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IS THE MARINA OPERATOR'S BERTHING FEE A PRIVILEGED CLAIM UNDER THE CROATIAN MARITIME CODE?

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INTRODUCTION

- Inspiration: recent practice of the commercial courts in Croatia
- Analysis of the relevant provisions of the Croatian Maritime Code (CMC)
- Comparison of the relevant terms in the Maritime Domain and Seaports Act – can the marina operator's berthing fee be regarded as a port charge or a port due, or…?
- Origins of the relevant provisions of the CMC (Conventions of 1993 and 1952)
- Comparative law – exemplary solutions
- Is there a need for the revision of the relevant law in Croatia?

MAIN QUESTIONS:

1. Is the marina operator's claim for a berthing fee protected by a maritime lien/privilege?

2. Can a yacht be arrested for the purpose of securing the marina operator's claim for the berthing fee?

1. Is there a privilege?

Case law:

- M/Y SARAY (Croatian flag)
  - Ruling of the Commercial Court in Split R1-123/14, 11/5/2014: arrest order; marina's privileged claim for the outstanding berthing fees under CMC, art. 241. para. 1. subpara. 4. (port charges)
  - Ruling of the High Commercial Court's Pž-263/15-3, 01/26/2015: arrest dismissed, marina's claim for the outstanding berthing fee does not fall under CMC, art. 241. para. 1. subpara. 4. (port charges)

1. Is there a privilege?

Case law (continued):

- M/Y TOPSY (German flag)
  - Ruling of the Commercial Court in Rijeka R1-102/2006-2, 6/5/2006: arrest order; securing the marina's claim for the outstanding yearly berthing fee; on the basis of the CMC provisions on conservative arrest (art. 951. para 1) and the Enforcement Act (now art. 344)
  - Ruling of the High Commercial Court Pž-5043/06-3, 9/27/2006: 1st instance ruling upheld; it is unclear whether the court held that the marina's claim was protected by a privilege in this case; there is an interesting part of the court's reasoning reflecting the general position of the court that the marina's claim for „port charges" is protected by a maritime privilege:

    „...the fact that there is a privilege in respect of the outstanding port charges in favour of the marina in which the yacht is berthed merely corroborates the claimant's request for security, since according to art. 953. para 2. of the CMC, arrest can be ordered for the purpose of securing a maritime privilege."

1. Is there a privilege?

Case law (continued):

- M/B GALEB (Croatian flag, German owner)
  - Judgement of the High Commercial Court Pž 8130/03-3, 11/22/2006: marina operator's claim for berthing and other fees arising from the Contract of deposit and maintenance of the boat
  - A part of the court's reasoning reflecting the general position of the court regarding the public element of the marina operator's professional activity:

    „Most of the activities run in the special purpose ports according to their contents and concrete elements correspond to the activities in the harbours open for public traffic. The Seaports Act […] does not contain an explicit provision on the obligation of the user of the special purpose port to pay charges. […] This court points at the legal provisions explicitly regulating the obligations of the user of the special purpose port regarding the mode of use of the port (The Seaports Act, Art. 29. para. 3.), according to which there is a corresponding right to claim charges for the use of the shore. Through application by analogy of the provisions of Art. 20. of the Seaports Act regulating the obligation of the user of the harbour open for public traffic to pay charges for the services provided, the charges shall likewise be paid to the commercial copanies (concessionaries) for the services provided in the special purpose ports, in particular for the port services, including berth."

1. Is there a privilege?

- CMC recognizes maritime privileges – arts. 241-252
- List of privileges on a vessel – art. 241 (similar to art. 4.1. of the 1993 Convention on Maritime Liens and Mortgages)
    1. Crew wages, repatriation costs, social insurance contributions;
    2. Loss of life or personal injury claims;
    3. Ship salvage award;
    4. Claims for **port charges**, costs of navigating through canals, and other waterways, costs of pilotage;
    5. Tort claims for physical loss or damage (excl. cargo, containers and passengers' effects carried on the vessel).
- The meaning of the term „port charges"?

1. Is there a privilege?

- Maritime Domain and Seaports Act (MDSA) – art. 62, 63
- Harbours open for public traffic
- Port tariffs:
  - port dues (fees for the use of the port area and infrastructure, e.g. berthing fees, (de)murrage, etc.)
  - port charges (for services, e.g. waste disposal, electricity or water supply, freight forwarding, etc.)
- port administration / commercial exploitation of the port
- port authority's revenues (port dues, concession revenues) – allocation (public interest)
- concessionary's revenues (port charges: arising from services – commercial contracts)
- Is there a maritime privilege for port dues?
- Can a marina operator earn port charges or port dues?
- Does the term „port charges" in CMC correspond to the term „port charges" in MDSA?
- Berthing fee in the port open for public traffic vs. berthing fee in a marina – is it fair to discriminate?

1. Is there a privilege?

History of the term „port charges":

- In CMC (1994, 2004, 2013)
  - inherited from the ex Yugoslav Act on Sea and Inland Navigation, 1978. and the earlier legislation on property rights in vessels
  - Origins: until CMC 1994 the provisions on maritime privileges inspired by the 1926 Convention; since 2004 by the 1993 Convention
- In MDSA since 2003.
  - Prior to MDSA – various acts applying to ports and harbours, various terminology

How to correctly interpret the term „port charges" in the context of the CMC, i.e. the provisions on maritime privileges? What is the real contents and the aim of the respective legal provision (the lawmaker's intention)?

- Maritime privilege – legal nature; aim; history; 1926 and 1993 conventions

Specific aspects in the context of yachting and marinas:

- Privilege on a yacht or a boat? (CMC art. 252.)
- Marina berthing fee – berthing contract? Special economic or social interest for protecting the claim by a privilege?

2. Can there be arrest?

- How to exercise a privilege?
- Can a yacht be arrested for the purpose of securing the marina operator's claim for berthing fees?
- Privilege vs. maritime claim

2. Can there be arrest?

Case law:

- Rulings of the High Commercial court in the cases regarding the arrest of m/y SARAY and m/y TOPSY (cited *supra*), and
- Ruling of the High Commercial Court Pž-6486/06-3, 01/17/2007: arrest of m/y CRISANDRA (Italian flag):

Marina operator's claim for berthing fee is a „**maritime claim**" that can be secured by arresting the yacht in respect of which the claim arose (conservative arrest).

2. Can there be arrest?

Case law (continued):

- The conditions to be fulfilled for allowing arrest:
  - The claim is from the list of maritime claims, CMC art. 953. para. 1.
    - M/Y CRISANDRA – the court held that the marina's claim fell under CMC, art. 953. para 1. subpara. 11. *„expenses incurred by a master, shipper, contracting party, or agent on behalf of the ship, her owner or the operator, in connection with a ship"*
    - M/Y TOPSY - the court held that the marina's claim fell under Arrest Convention 1952, art. 1. para 1. subpara. d) *„agreement relating to the use or hire of any ship whether by charterparty or otherwise"*
  - The claimant must show the likelihood of the existence of the maritime claim for which the arrest is requested and of the *periculum in mora* i.e. the likelihood that in the absence of the conservative arrest the debtor would prevent or substantially frustrate the exercise of the claim for which the security is requested (Enforcement Act, Art. 344)

2. Can there be arrest?

- Arrest of a **yacht** under Croatian law:
  - Arrest Convention 1952
  - CMC, art. 2. para. 1., arts. 951-964 (temporary arrest), Enforcement Act (lex generalis)
  - CMC art. 953: The decision for temporary arrest of the ship may be ordered only for
    - the claims listed under CMC art. 953. para. 1. **maritime claims** (like in the Arrest Convention 1952) and
    - **for the enforcement of a maritime privilege** or hypotheque or a charge similar to hypotheque (CMC art. 953. para.2)
  - CMC arts. 951-964 apply when there is no international element (Croatian flag, Croatian claimant)
  - In any case, **there is no maritime claim for „port charges"** - arrest can be ordered for the port charges only under CMC art. 953. para.2 privilege (Croatian flag, Croatian claimant OR flag of a non-contracting state)
  - No possibility of arrest of a yacht flying the flag of a (C1952) contracting state to secure a claim for the „port charges"

2. Can there be arrest?

- Arrest of a **boat** under Croatian law:
  - Arrest Convention 1952 and CMC arts. 951-964 on temporary arrest do not apply
  - Application of Enforcement Act (lex generalis) and the competence of the civil courts
  - There is a privilege (CMC art. 252.) that cannot be exercised through arrest, but would be recognized under the general enforcement rules (Enforcement Act)

Comparative law solutions?

- Canada:
  - marina has a statutory right in rem under section 22(2)(m) of the *Federal Court Act* for the supply of "services wherever supplied . . . for the maintenance of the ship" – moorage is such service
  - statutory right *in rem* does not give any priority greater than that of a general unsecured creditor.
- Italy:
  - Cessazione. Trib. Napoli 30 ottobre 2000, DIR.MAR., I/2001 – marina has a possessory lien under the Civil Code
- USA: 2012 US Code §§ 31341 - 31343
  - a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner—

    (1) has a maritime lien on the vessel;

    (2) may bring a civil action in rem to enforce the lien; and

    (3) is not required to allege or prove in the action that credit was given to the vessel.
  - a manager at the port of supply (marina operator) is listed as a person presumed to have authority to procure necessaries for a vessel.

Arrest Convention 1999?

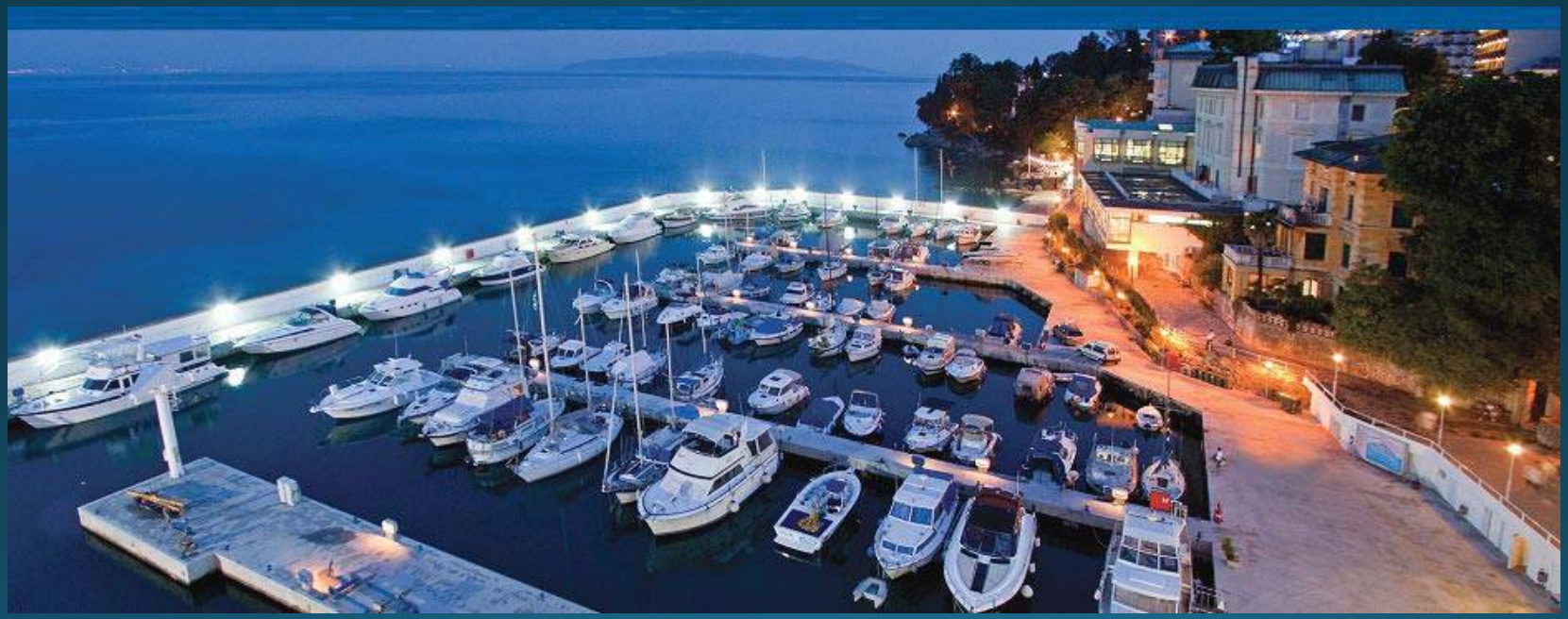
- The list of maritime claims includes:

  goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance (Art. 1. para. 1. subpara. (L))

CONCLUSIONS

- Positive law
  - Privilege for the port charges (CMC) – dubious interpretation
  - Maritime claim (CMC, Arrest Convention 1952) – no
  - Possibility of arrest? – only if it is recognized as a privilege, and then only if the yacht is not flying a flag of a state party to AC1952; application of the Enforcement Act (*lex generalis*)
  - Inadequate, unclear, uncertain – a need for improvements
  - General rules regarding the right of retention (Obligations Act, Art. 72 et seq.); possible subsidiary application of the rules on deposit or storage, e.g. in respect of a dry berth?
- Croatian High Commercial Court acknowledges the marina operator's claim for berthing fee as a maritime claim (allowing the possibility of the arrest) – the correctness is questionable;
- The court practice is inconsistent regarding the question whether the marina operator's claim for berthing fee is a privileged claim (port charges)
- The prevailing position in the professional circles seems to be that the marina operator's claim **should be protected**
- Economic importance of the marina operators' business (strategic)
- *De lege ferenda*? Pro „privilege" or pro „maritime claim"?

What do you think…?



Thank you for the attention…

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