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

ADRIANA VINCENCA PADOVAN* – IVA TUHTAN GRGIĆ**

Abstract

The paper has been inspired by the recent practice of the commercial courts in Croatia regarding the arrest of yachts for the purpose of securing and eventually enforcing the marina operator's claim for the outstanding berthing fees. The authors seek to answer the question whether the marina operator's claim is protected by a maritime privilege according to the Croatian Maritime Code by analysing the relevant provisions of the Code regulating maritime privileges and arrest of vessels. In particular, the authors examine whether the marina operator's berthing fee might be regarded as a type of a port due or charge, and in respect thereof they compare the relevant provisions of the Maritime Domain and Seaports Act and the Maritime Code. In order to examine the correct interpretation of the relevant legislative provisions, the authors look into their background and development, in particular considering the fact that the provisions on maritime privileges and the arrest of vessels in the Croatian Maritime Code are inspired by the provisions of the International Convention on Maritime Liens and Mortgages of 1993 and the Arrest Convention of 1952. Through a critical analysis of the relevant court practice and the applicable law, the authors seek to make *de lege ferenda* proposals reflecting the interest of protecting the marina operator's position as a claimant and considering Croatia's strategic orientation towards nautical tourism.[1]

Summary: 1. Introduction. – 2. Is the Marina Operator's Claim for a Berthing Fee Protected by a Maritime Privilege? – 2.1. Judicial Practice. – 2.1.1. M/y *Saray*. – 2.1.2. M/y *Topsy*. – 2.1.3. M/B *Galeb*. – 2.1.4. M/y *Valery*. – 2.1.5. M/y *Just for Fun*. – 2.2. The Meaning of the Term 'Port Charges' in the Sense of Art. 241.1.4 of the CMC. – 2.2.1. Port Charges in the CMC. – 2.2.2. Port Charges in the MDSPA. – 2.2.3. Historical Background of the Notion 'Port Charges'. – 2.2.3.1. 'Port Charges' as a Maritime Privilege. – 2.2.3.2. 'Port Charges' in the

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Legislation Regulating Seaports. – 2.2.3.2.1. The Period from 1961 to 1995. – 2.2.3.2.2. The Period from 1995 up to Date. – 2.2.4. Applicability of the MDSPA Definition of Port Charges in the Context of Maritime Privileges. – 2.2.5. Some Additional Perplexities Regarding the Applicability of Maritime Privileges on Pleasure Craft. – 3. Is the Marina Operator's Claim for a Berthing Fee a Maritime Claim? – 3.1. Judicial Practice. – 3.2. Positive Law. – 3.3.1. Arrest of a Yacht under Croatian Law. – 3.3.1.1. When the CMC Applies. – 3.3.1.2. When the 1952 Convention Applies. – 3.3.2. Arrest of a Boat under Croatian Law. – 4. Comparative Law Solutions. – 5. Conclusions.

1. *Introduction*

The paper has been inspired by the recent decisions of the Commercial Court in Split as the first instance court and the High Commercial Court of the Republic of Croatia as the appeals court[2] in a case concerning the arrest of the yacht *Saray* for the purpose of securing and eventually enforcing the marina operator's claim for the outstanding berthing fees. In its judicial decision High Commercial Court deflected from the practice previously established by the commercial courts, which recognised the marina operators' claims for the outstanding berthing fees as port charges and therefore privileged maritime claims. It is very unfortunate that both courts missed the opportunity to elaborate more thoroughly and legalistically their positions to the benefit of legal certainty of all stakeholders involved.

The core problem is the issue of the legal nature of the marina operator's claim for a berthing fee. Therefore, in this paper the authors seek to answer two main questions. First, is the marina operator's claim for a berthing fee a privileged maritime claim, i.e. a claim protected by a maritime lien, and secondly, is such claim a maritime claim, i.e. a claim in respect of which the vessel may be arrested[3] by the order of a commercial court for the purpose of securing the claim. The latter issue is relevant because arrest is an important procedural tool for exercising a maritime privilege.

In order to answer the first question the authors examine the possibility of subsumption of the berthing fee under the term *port charges* in the sense of the provision of art. 241 of the Croatian Maritime Code[4] (further the CMC).[5]

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[2] The decision of the High Commercial Court of the Republic of Croatia, Pž-263/15-3, 26th January 2015, overruling the decision of the Commercial Court in Split, R1-123/14, 5th November 2014.

[3] In this paper, the term arrest refers to the detention of a ship by judicial process to secure a maritime claim, i.e. to the conservative, temporary arrest of a vessel by the order of a commercial court on the basis of the CMC provisions on ship arrest or the International Convention Relating to the Arrest of Sea-Going Ships, Brussels, 1952 (further 1952 Arrest Convention). Generally, on the arrest of vessels in the context of Croatian maritime law see J. MARIN, *Privremene mjere zaustavljanja broda*, University in Zagreb, Faculty of Law, Zagreb, 2003.

[4] The Maritime Code, Official Gazette of the Republic of Croatia, no. 181/2004, 76/2007, 146/2008, 61/2011, 56/2013, 26/2015.

[5] On maritime liens or privileges in the context of Croatian maritime law see J. MARIN, *Privilegiji na brodu – sigurnost i neizvijesnost u isto vrijeme*, in *Liber amicorum Nikola Gavella, gra ansko pravo u razvoju*, Zagreb, 2007, p. 369-409. Generally, on maritime liens in comparative law see W. TETLEY, *Maritime Liens and Claims*, Blais, Montreal, 1989.

Since the provisions of the CMC do not contain the definition of the port charges, in addition to the analysis thereof, a comparison of the relevant terms is made between the CMC and the Maritime Domain and Seaports Act[6] of 2003 (further MDSPA), which explicitly regulates port charges and other port revenues. In particular, we try to determine whether the marina operator's berthing fee can be regarded as a port charge or a port due (or none of those) in the context of the relevant provisions of the MDSPA.

Furthermore, by looking into the history and origins of the relevant provisions of the CMC and the MDSPA, which seem to be causing inconsistency in Croatian judicial practice when marina operator's claim for berthing fee is at stake, we attempt to construe their correct interpretation, their true meaning and aim in this specific context. Therefore, consideration must be made to the fact that the relevant provisions of the CMC relating to maritime privileges and arrest of ships were inspired by the 1993 Convention on Maritime Liens and Mortgages[7] and the 1952 Arrest Convention respectively.

After the above-mentioned analysis, we evaluate the applicability of the MDSPA's definitions of port charges in the interpretation of the meaning and the scope of port charges in the sense of the provision of art. 241.1.4 of the CMC.

The paper further analyses the previous practice of the Croatian courts relating to the marina operator's claim for berthing fees and its legal nature in the context of Croatian maritime law, particularly examining the critical points of inconsistency in its interpretation as the maritime claim.

Finally, some comparative law solutions to the problem are presented, and certain conclusions are drawn in respect of the question whether there is a need for a revision of the relevant law in Croatia.

2. *Is the Marina Operator's Claim for a Berthing Fee Protected by a Maritime Privilege?*

2.1. *Judicial Practice*

To discuss the question whether marina operator's claim for a berthing fee is protected by a maritime privilege, we will first look into the relevant judicial practice of the commercial courts in Croatia.

2.1.1. *M/y Saray*

In the case of the motor yacht *Saray* (Croatian flag), the Commercial Court in Split, as the first instance court, ordered the arrest of the yacht for the purpose of securing the plaintiff marina operator's claim for the outstanding berthing fees on the

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[6] The Maritime Domain and Seaports Act, Official Gazette of the Republic of Croatia, no. 158/2003,100/2004, 141/2006, 38/2009,123/2011,56/2016.

[7] International Convention on Maritime Liens and Mortgages, Geneva, 1993 (further 1993 Convention). It is to be noted that the Republic of Croatia has not ratified the Convention and is therefore not bound by it.

basis that the claim was protected by a maritime privilege under the CMC, art. 241.1.4 for port charges.[8]

Deciding on the appeal against the 1st instance court's arrest order, the High Commercial Court of the Republic of Croatia dismissed the arrest on the basis that the marina operator's claim for the outstanding berthing fee does not fall under the CMC, art. 241.1.4, i.e. it does not qualify as a claim for port charges protected by a maritime privilege.[9]

In this particular case, the marina operator provided services of berth to the m/y *Saray* in the nautical tourism port of Dubrovnik. During the berthing contract the yacht was under lease, so the lessee was personally liable for the berthing fee, whilst the owner of the yacht was the leasing company. The marina operator's claim amounted to approximately 52,000 EUR of the outstanding berthing fees for a period of 2 years.

The claimant applied for the arrest of the m/y *Saray* to the Commercial Court in Split to secure its claim, arguing that berthing fees are port charges by their nature, and protected by a maritime privilege under art. 241.1.4 of the CMC. The claimant argued that the provisions on maritime privileges also apply when the vessel is used and held by a person other than the owner of the vessel. The application for the arrest was therefore submitted against two defendants – the registered owner (the leasing company), and the lessee as the economic user of the vessel, on the basis that they were jointly and severally liable for the privileged claim at stake.

The Commercial Court in Split found that the decisive issue regarding this application was the question whether the berthing fee claimed by the marina operator qualified as a maritime privilege under art. 241.1.4 of the CMC. The court's reasoning was that "the claim for port charges for the use of berth is secured by a maritime privilege."[10] The court explained that berthing fee can be treated as a port charge, as that fee is "included in the calculation of the concession fee owed by the concessionaires of the nautical tourism ports, arising from the services provided to the users of berths".[11] Although port charges, as well as concession fees, are regulated under the MDSPA, the court did not rely on the provisions of that act in this reasoning. Moreover, the court engaged into an autonomous analysis of the institute of concession fees. Unfortunately, besides the cited parts of the reasoning, the court did not explain its position regarding the recognition of the privileged status of the respective marina operator's claim any further. While its reasoning may not be necessarily or entirely flaw, it is certainly not legally grounded in the provisions of the applicable law.

The High Commercial Court, deciding on the appeal against the ruling of the

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[8] Ruling of the Commercial Court in Split, R1-123/14, 5th November 2014.

[9] Ruling of the High Commercial Court of the Republic of Croatia, Pž-263/15-3, 26th January 2015.

[10] Ruling of the Commercial Court in Split, R1-123/14, *op. cit.*, p. 5.

[11] *Ibid*.

Commercial Court in Split, dismissed the arrest as unfounded, based on the position that a claim for a berthing fee in a nautical tourism port is not a privileged claim. Considering the question whether marina operator's berthing fee represents a port charge, the court of appeal refers to art. 62.1 of the MDSPA providing that in the seaports open to public traffic, the port tariffs consisting of port dues and port charges apply.[12] The Court further refers to the legal provisions prescribing the categories of port dues and their definitions, the definition of the term "port charges", as well as the definitions of the terms "seaport open for public traffic" and "special purpose port". With no additional explanation, the appeals court concludes that the marina operator's "berthing fee cannot be categorised as a port charge within the meaning of the cited legal provisions"[13] and that it therefore does not represent a privileged claim. The appeals court thereby neither states nor takes any position on the question of which of the port claims qualify as privileged maritime claims – whether these would be port dues (revenues of the port authority), port charges (owed to the concessionaires for the provision of the port services) or port tariffs (including both port charges and port dues). It thus misses the opportunity to explicitly define the scope of the port charges in the sense of the provision of art. 241.1.1 of the CMC.

However, the appeals court explains that the first instance court erroneously treats the berthing fee of a special purpose port (nautical tourism port) earned on the basis of a contract as a port charge earned by a seaport open to public traffic and levied on the basis of law (public authorities).[14] It may therefore be assumed that, in the opinion of the appeals court, the privileged port charges are those claimed by the seaports open for public traffic and earned on the basis of the law, i.e. of the public authorities.

Finally, the appeals court held that the arrest was unfounded also due to the fact that in the concrete case, the marina operator's claim arose from a contractual relationship – a berthing contract – and that it can only be enforced against the other contractual party. In the opinion of the appeals court, that is to say, the claim could not be enforced and the yacht arrested against the leasing company as the registered owner of the yacht, since the berthing contract was concluded with the lessee. It is a pity that both courts scarcely explained their positions regarding the nature of the

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[12] It should be clarified that the relevant terms used in the MDSPA are "lucke naknade" and "lucke pristojbe". The term "lucke naknade" refers to various fees of commercial nature charged by port concessionaries offering various port services, such as tug services, water, fuel and electricity supply, garbage disposal, use of the port cranes, storage, etc. For the purposes of this article, the authors translate the term "lucke naknade" as "port charges". On the other hand, the term "lucke pristojbe", which the authors translate as "port dues", refer to the fees earned by the port authorities on the basis of the law, reflecting the public nature of the activities of the seaports open to public traffic (berthing fees, dues levied for the use of the harbour shore, etc.). The term used in the CMC is "lucke naknade".

[13] Ruling of the High Commercial Court of the Republic of Croatia, Pž-263/15-3, *op. cit.,* fn. 9, p. 5.

[14] *Ibid*.

marina operator's claim for a berthing fee. The aim of this paper is to contribute to the discussion on the question of whether these fees should be regarded as privileged claims or not. We shall therefore try to confront the arguments in favour of these two opposite positions, with the view of proposing the most favourable solution to the problem of legal uncertainty regarding the specific interpretation of art. 241.1.4 of the CMC, prescribing that "port charges" are a privileged claim under maritime law.

2.1.2. *M/y Topsy*

In an older case, the Commercial Court in Rijeka ordered the arrest of the German flag motor yacht *Topsy* for the purpose of securing the marina operator's claim for the outstanding yearly berthing fee. The arrest was ordered on the basis of the CMC provisions on conservative arrest (art. 951.1), and the Enforcement Act (now art. 344).[15]

Deciding on the appeal, the High Commercial Court upheld the 1st-instance court's arrest order.[16] 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. 953.2 of the CMC, arrest can be ordered for the purpose of securing a maritime privilege."[17]

However, it remains unclear whether in this particular case, the court held that the marina's claim for a berthing fee was protected by a privilege, since the court did not base its decision on the CMC, art. 241.1.4, prescribing a privilege for port charges. From the quoted court's reasoning, it may be assumed that the court treated the marina's claim for a berthing fee as a maritime claim for which arrest can be ordered, without taking a position in respect of the question whether the same claim is also protected by a privilege. Furthermore, it seems the court takes for granted that a marina operator can have a privileged claim for port charges, yet it remains unanswered which charges in particular should be considered as port charges in case of a marina (nautical tourism port, special purpose port), and especially whether a claim for a berthing fee qualifies as such port charge. In respect thereof, it seems contradictory that the same court made the following statement as a part of its reasoning: "it is unclear why the defendant mentions port charges whereas the receipts show that the claim is for the yearly berthing fee and the yearly due."[18] Does this mean that, according to this court, the yearly berthing fee is not to be considered a port charge after all?

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[15] Ruling of the Commercial Court in Rijeka, R1-102/2006-2, 5th June 2006.

[16] Ruling of the High Commercial Court of the Republic of Croatia, Pž-5043/06-3, 27th September 2006.

[17] *Ibid*, p. 3.

[18] *Ibid*.

2.1.3. *M/b Galeb*

The judgement of the High Commercial Court in the case of a marina operator's claim for berthing and other fees arising from the contract of deposit and maintenance of the motor boat *Galeb*[19] does not directly deal with the question of the existence of a maritime privilege for port charges. However, there is 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 relevant for our discussion:

> "Most of the activities run in the special purpose ports according to their contents and concrete elements correspond to the activities in the seaports open for public traffic. The Seaports Act[20] […] 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. 29.3), 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 seaport open for public traffic to pay charges for the services provided, the charges shall likewise be paid to the commercial companies (concessionaires) for the services provided in the special purpose ports, in particular for the port services, including berth."

In our opinion, the court correctly emphasised the similarity of the activities of the special purpose (nautical tourism) ports and the seaports open to public traffic in providing services of nautical berth and the use of the shore. Since there is no explicit specific regulation relating to the special purpose ports, it is legitimate that the court endeavours to fill that legal lacuna by applying the method of analogy, i.e. by interpreting the relevant provisions relating to seaports open to public traffic as general rules that may *mutatis mutandis* be applied to the nautical tourism ports as the special purpose ports. All the more so, taking into account the fact that seaports open to public traffic often provide berthing services for yachts. On the line of this reasoning, we submit that there should be no discrimination between the seaports open to public traffic and the special purpose ports in their right to claim charges for the use of the shore and nautical berths, including the protection of those claims by a maritime privilege. Therefore, when interpreting the provision of the art. 241.1.4 of the CMC, the courts could, and should, refer to the principle of fairness.

2.1.4. *M/y Valery*

An interesting case entails insolvency proceedings against the owner of the m/y *Valery*.[21] Amongst other creditors claiming in the insolvency, there was the operator

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[19] Judgement of the High Commercial Court of the Republic of Croatia, Pž 8130/03-3, 22nd November 2006.

[20] The Court refers to the Seaports Act (Official Gazette of the Republic of Croatia, no. 108/1995, 6/1996, 97/2000), which was in force at the relevant time and that preceded the MDSPA.

[21] Ruling of the Commercial Court in Zagreb, St-1098/11-85, 8th February 2016.

of the marina in which the yacht was berthed. The marina operator's claim was for the outstanding berthing fees. The court treated the marina operator's claim as a claim protected by a statutory right of pledge – a maritime privilege over the yacht in respect of which the berthing service was provided. The court thereby relied on the CMC, art. 241.1.4, prescribing a maritime privilege for the outstanding port charges. The court also held that the marina operator had a statutory right of retention of the yacht on the basis of the general civil law rules on retention (Obligations Act,[22] art. 72-75). Consequently, the marina operator was given a higher priority ranking compared to certain other creditors in the same proceedings.

2.1.5. *M/y Just For Fun*

In the case of m/y *Just For Fun*, a Croatian marina operator claimed a yearly fee for the nautical berth of the respective German flag yacht against the registered owner of the yacht, which was a German company. The Commercial Court in Split as the competent first instance court, deciding on the merits of the case, held that the claim was founded and adjudicated in favour of the claimant relying on the CMC, art. 241.1.4. Namely, the court held that the marina operator's berthing fee was a port charge in the sense of the said CMC provision and that the claim therefore qualified as a maritime privilege for which the registered owner of the yacht, in respect of which the service of berth was provided, was liable.[23] Prior to the respective litigation, the Commercial Court in Split had ordered the arrest of the m/y *Just For Fun* on the same grounds that the marina operator's claim for a berthing fee qualified as the maritime privilege for port charges under the CMC, art. 241.1.4, and that therefore the yacht, in respect of which the nautical berth was provided, could be arrested to secure the marina operator's claim.[24]

An appeal was filed against the judgement on the merits, and the High Commercial Court of the Republic of Croatia reversed the first instance court's decision.[25] In essence, the appeals court held that in deed, the yacht was berthed in the marina (the nautical tourism port) during the critical period and that the marina operator had a valid claim for a yearly berthing fee in respect of that yacht. However, the court held that the claim in dispute could not be made against the registered owner, because the contract of berth for this yacht was concluded with a different legal person domiciled in Croatia, and not with the German registered owner of the yacht. According to the judgement of the High Commercial Court, the marina operator's berthing fee is not a port charge and does not represent the maritime

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[22] Official Gazette of the Republic of Croatia, no. 35/2005, 41/2008, 125/2011, 78/2015.

[23] Judgement of the Commercial Court in Split, 8P-948/10, 20th September 2012.

[24] Ruling of the Commercial Court in Split, R1-71/10, 16th April 2010. It is noted that, following the arrest, the court accepted the defendant registered owner's cash deposit and released the yacht.

[25] Ruling of the High Commercial Court of the Republic of Croatia, Pž-8720/2012-6, 25th May 2016.

privilege prescribed by the CMC, art. 241.1.4; there is therefore no legal basis for such claim against the registered owner of the yacht, who is not a party to the contract of berth. The court held that the registered owner was not the proper party to be sued. The relevant part of the court's reasoning reads as follows:

> "This court does not accept the assessment of the first instance court that a berthing fee arising from the contract of berth represents a port charge, the consequence of which is that, contrary to the determination of the first instance court, it cannot be categorised as a maritime privilege in the sense of the CMC, art. 241.1.4.
>
> According to art. 63 of the Maritime Domain and Seaports Act […], port charges are to be paid by the users of the seaports for the services received in the seaports open to public traffic. A port open for public traffic is a seaport, which, under the same conditions, can be used by any natural and legal person in accordance with its purpose and within the limits of its capacities (MDSPA, art. 2.1.2).
>
> A special purpose port is a seaport used for special purposes or commercial uses by legal or natural persons (nautical tourism port, industrial port, shipyard's port, fisheries port etc.) or by a public authority (military port – MDSPA, art. 2.1.3).
>
> In the sense of the cited provisions, a fee for berth in a special purpose port (nautical port) payable on the basis of a contract cannot qualify as a port charge payable in the seaport open to public traffic on the basis of the law. Therefore, the appellant's statement that the plaintiff's claim does not represent a maritime privilege and that the plaintiff is not allowed to pose that claim against the defendant [appellant] relying on the circumstance that the defendant is the registered owner of the yacht *Just For Fun* is well founded."

This is currently the most recent decision of the High Commercial Court on this matter, and it reinstates the position of that court reflected in the case of the arrest of m/y *Saray*.

2.2. *The Meaning of the Term 'Port Charges' in the Sense of Art. 241.1.4 of the CMC*

The inconsistent court practice indicates that the meaning of the term "port charges" in the sense of the CMC, art. 241.1.4, is dubious and disputable when berthing fees of marina operators are at stake. The question we therefore try to answer is how to correctly interpret the term "port charges" in the context of the CMC provisions on maritime privileges when the claim is of the concessionaire of the nautical tourism port as a special purpose port? What are the real contents and the aim of the respective legal provision (the lawmaker's true intention)?

In an effort to define the term "port charges" for the purposes of the correct interpretation of the relevant provision of the CMC, art. 241.1.4, we will compare the relevant terminology of the CMC and the MDSPA, and look into the history of the term "port charges" and the related similar terms in the context of the national maritime legislation, taking into consideration the legal nature and aim of the concept

of maritime privileges and the history of the international codification of certain rules on maritime liens or privileges. It is submitted that a strictly literal interpretation limited to the exact wording in this case is not sufficient to determine the true meaning of the relevant provision of the CMC, art. 241.1.4.

To answer the question of which specific claims are to be treated as port charges under art. 241.1.4 of the CMC, it is necessary to determine the intention of the lawmaker. Upon regulating this maritime law matter, the lawmaker had to assess, in accordance with the State's legal and political interests, the special relevance of particular types of claims, in order to bestow upon them the status of privileged claims.[26] It is therefore necessary to engage into the application of other methods of interpretation, including the historical method and finally decisive method of teleological interpretation in the light of the purpose that the disputable provision aims to achieve.[27]

2.2.1. *Port Charges in the CMC*

The CMC recognizes the legal concept of maritime privileges. The relevant provisions are contained in Articles 241–252 of the CMC.

In the context of this paper, it is important to note that the CMC provisions regulating maritime privileges on ships apply (*inter alia*) to yachts and boats as well (CMC, art. 252).

The status of privileged maritime claims is bestowed exclusively upon the claims expressly listed in the CMC, art. 241.1.[28] In particular, subparagraph 4 of the cited provision gives to port charges the status of a privileged claim. The CMC does not specify which claims in particular qualify as port charges, i.e. it does not further define the term "port charges".

The term is, however, mentioned in a different context under the CMC, art. 582, prescribing that in case of a time charter of a whole vessel, the charterer is obliged, *inter alia*, to pay for all the port and navigational charges. It is submitted that

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[26] J. Marin, *Posebno stvarnopravno ure enje za brodove i plovila unutarnje plovidbe*, in N. Gavella (edited by), *Stvarno pravo – posebna pravna ure enja*, Vol. 3, Narodne novine, Zagreb, 2011, p. 618.

[27] N. Visković, *Teorija države i prava*, Birotehnika, Zagreb, 2006., p. 248-249, as cited in V. Tomljenović, *Tumacenje kolizijskih pravila me unarodnih konvencija – primjer tumacenja kolizijskih odredbi Haaške konvencije u prometnim nezgodama*, in *Collected Papers of Zagreb Law Faculty*, 2012, Vol. 62, no. 1-2, p. 101-152.

[28] An exhaustive list of maritime privileges on a vessel is prescribed by art. 241.1 of the CMC, and it contains:

the claims for crew wages, repatriation costs, social insurance contributions;
the loss of life or personal injury claims;
the claim for the ship salvage award;
the claims for port charges, costs of navigating through canals, and other waterways, and the costs of pilotage;
the tort claims for physical loss or damage (excluding cargo, containers and passengers' effects carried on the vessel).

it logically follows from the cited provision that the term port charges, as used in this context, includes all kinds of port dues and charges.[29]

Furthermore, the CMC defines a port as a seaport, i.e. as a maritime space including the land directly connected to the sea, with built and undeveloped shores, breakwaters, devices, installations and other facilities intended for landing, anchoring and the protection of ships, yachts and boats, embarkation and disembarkation of passengers, loading and unloading of cargo, storing and cargo handling […] and other commercial activities economically, traffic-wise or technologically related thereto".[30] It follows that under the CMC, the term port is meant to include all kinds of seaports, both those open to public traffic and special purpose ports.

In addition, the example of the CMC rules on ships' waste receipt, handling and disposal in the ports shows that (port) charges for such port services and activities may be claimed by the port authorities of the ports open to public traffic, as well as by the concessionaries of the special purpose ports.[31]

Finally, considering the contents of the CMC, arts. 56–60, on seaports and their legal obligations to maintain the order, navigational safety, security and environmental protection standards, it is submitted that, generally, the term "port charges", as used in the CMC, should be interpreted widely to include all kinds of port dues and charges. Moreover, if we remain in the context of the CMC, the authors' opinion is that such port charges and dues may equally be claimed by seaports open to public traffic and by special purpose ports, without discrimination.

2.2.2. Port Charges in the MDSPA

Lex specialis regulating the matter of seaports is the MDSPA. Since the term "port charges" is to be found in the provisions of the MDSPA, arts. 62 and 63, we thought it was necessary to study its provisions and examine its applicability for the interpretation of art. 241.1.4 of the CMC. The MDSPA prescribes that port tariffs payable in the seaports open to public traffic consist of port dues and port charges. Port dues are revenue of the port authorities, whilst port charges are revenue of the concessionaries. To better understand the relevance of this categorisation, it is

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[29] In shipping, it is usual that "the time charterer undertakes the commercial employment of the vessel, while the ownership and the commercial operation (i.e., operational management) of the vessel remain with the shipowner. This means that master and crew are appointed by the shipowner who is responsible for all costs appertaining to the running and manning of the vessel plus the capital cost. The charterer determines the trading voyages of the ship and he nominates the ports […]. The charterer pays for all voyage expenses (port charges, canal dues, pilotage, light dues, ballast) and cargo handling costs (stevedoring, dunnage, cleaning of the holds, loading and discharging costs). Most of all, the charterer is responsible for arranging and paying for bunkers […]" The quote is cited from E. PLOMARITOU, *A Review of Shipowner's & Charterer's Obligations in Various Types of Charter* in *Journal of Shipping and Ocean Engineering,* 2014, no. 4, p. 307-321.

[30] The CMC, art. 5.1.45. Equal definition is prescribed by the MDSPA, art. 2.1. Whilst the MDSPA provides further classification of seaports and defines the seaports open to public traffic and special purpose ports, the CMC does not contain such specific definitions.

[31] Arg. The CMC, arts. 56.b, 56.c.

important to point out that in the ports open for public traffic, port management is separated from its commercial exploitation.[32] The ports are managed by the port authorities, whilst the concessionaries commercially exploit the ports on the basis of the concessions granted by the port authorities. Depending on the size and importance of the port, the port authorities are established by various state authorities. The revenues of the port authorities, which, besides port dues, include concession fees earned from the port and commercial services concessions, are used for financing the construction and maintenance of the port superstructure and infrastructure, the port equipment used for the protection of marine environment from ship source pollution, the maintenance of the water depth in the port and on port anchorage, and the port authority's administrative costs (the MDSPA, art. 61.2). It follows that port dues are public levies, i.e. financial levies paid by the users of the port area.[33] The law distinguishes between three categories of port dues – port dues for the use of the port shores, demurrage fees, and berthing fees (the MDSPA, art. 62.2).

Unlike port dues, which are public taxes, port charges are fees payable by the users of the ports for the services received in the ports open to public traffic. The amounts of port charges for each and every type of service are determined by the concessionary, who also has a legal obligation to publish the respective port charges pricelist (the MDSPA, art. 63.3). The charges are for the activities and services that users may use, but do not have to.[34] If a user needs any of the port services, he will contract that service with the authorised concessionary, and on the basis thereof pay the port charges for the respective port service. It means that a claim for port charges is a claim arising from a contract.

Therefore, the position of the High Commercial Court, as expressed in the reasoning of the decisions in the cases of m/y *Saray* and m/y *Just For Fun*, that "port charges are collected in the seaports open to public traffic on the basis of law (public authority)", is not in accordance with the provisions of the MDSPA which the court refers to and quotes in its decisions. To the contrary, port charges in the seaports open to public traffic are charged on the basis of a contract. It is true that the concessionaries are not entirely autonomous in determining the amounts of these

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[32] See D. Pavić, *Sustav upravljanja hrvatskim morskim lukama za javni promet* in *Zbornik radova Pravni problemi instituta pomorskog dobra u Republici Hrvatskoj s posebnim osvrtom na luke otvorene za javni promet*, Udruga pravnika u gospodarstvu, Split, 1998, p. 44.

[33] The General Tax Act (Official Gazette of the Republic of Croatia, no. 147/2008, 18/2011, 78/2012, 136/2012, 73/2013, 26/2015, 44/2016) defines dues as financial provisions payable for a specific performance or for the use of a certain public good (art. 2.5). It should be emphasised that the same Act provides that public provisions are all those provisions that are prescribed and/or charged and/or controlled in accordance with special regulation in the competence of tax authorities (art. 2.2); this is not the case with the port authorities as non-profit legal persons.

[34] Port charges are, for example, charged for mooring and unmooring of the vessels, water and electricity supply, waste disposal, use of technical devices, handling of luggage or cargo, etc. See the example of the Port Tariff of the Port Authority Dubrovnik http://www.portdubrovnik.hr/assets/TARIFA_2015_2.pdf (website accessed 17thMarch 2017).

port charges, i.e. their pricelists, since the port authorities have the competence and legal obligation to determine the maximum amounts of these charges. However, in our opinion, this does not mean that port charges are earned *ex lege*.

The question that arises is whether the position of the High Commercial Court, as expressed in the respective decisions, means that in the court's opinion, the term port charges used in the CMC to determine a type of a maritime privilege corresponds to the term port dues as used in the MDSPA? Namely, only port dues are earned *ex lege,* i.e. collected on the basis of law (public authority), according to the MDSPA. The equation of the term port charges in the sense of the art. 241.1.4 of the CMC and the term port dues as used in the MDSPA is not legally grounded. It should be pointed out that, strictly speaking, the wording of the CMC, art. 241.1.4, does not imply that port charges should have a public character, or that they should arise *ex lege*. On the other hand, the question could be raised whether it means that, in the opinion of the High Commercial Court, port charges as defined by the MDSPA are earned and charged on the basis of a public authority? It is submitted that the position of the court does not seem correct in any case.

Finally, in case of the strictly literal interpretation of the MDSPA, arts. 62 and 63, and their application to the art. 241.1.4 of the CMC, it would be impossible to recognize the status of a privileged claim for port dues. This conclusion would be absolutely unacceptable.

2.2.3. Historical Background of the Notion 'Port Charges'

The discussion on the legal nature of port charges should also take into account the historical background of the notion 'port charges' and the lawmaker's inconsistency in the use of this term within the special acts regulating seaports. At the same time, the status of a privileged claim has continuously been recognised in favour of port charges, by the CMC and all the preceding acts regulating maritime privileges.[35]

2.2.3.1. 'Port Charges' as a Maritime Privilege

In the Kingdom of Yugoslavia, the matter was regulated by the Regulation with the Force of Law on Property Rights in Ships and on Maritime Privileges of 1939. In respect of maritime privileges, the Regulation relied on the solutions adopted by the 1926 Convention.[36] Other relevant legislation were the three regulations of 1940: the Regulation on the Registration of Property Rights in Ships and on the Respective

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[35] See B. JAKAŠA, *Udžbenik plovidbenog prava*, Narodne novine, Zagreb, 1979, p. 11. See also J. BRSTILO, *Pomorski privilegiji* in *Pomorski zbornik* Vol. 38 (2000), No. 1, p. 223-242.

See art. 261.1.1 of the Maritime and Inland Navigation Act, Official Gazette of the SFR Yugoslavia, no. 22/1977, 13/1982, 30/1985, 80/1989, 29/1990, 53/1991, 26/1993, 17/1994, 29/1994, 19/1998 (further: MINA); then art. 250.1.1 of the CMC 1994; finally, art. 241.1.4 of the current CMC.

[36] International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages, Brussels, 1926 (further: 1926 Convention).

Procedure, the Regulation on the Organisation of the Ship Registry and on the Respective Procedure, and the Regulation on the Enforcement of and Security for Claims and on Temporary Injunctions. After the Second World War, SFR Yugoslavia inherited the legislation of the Kingdom of Yugoslavia, and the matter of maritime privileges remained regulated by the same rules until 1977, when the Maritime and Inland Navigation Act[37] was adopted. The solutions of the 1926 Convention were followed similarly as in the previous legislation.[38] As regards port charges, MINA, art. 261.1.1 provides for a maritime privilege over a vessel in respect of the following claims:

> "Judicial costs incurred in the common interest of the creditors in the proceedings of enforcement or securing of claims in order to preserve the vessel or to procure its forced sale, as well as the cost of watching and preservation from the time of the entry of the vessel into the last port; port awards[39] and charges for the safety of navigation service; pilotage dues, claims on the basis of the social security contributions; claims of the maritime administration authorities for the ordered and executed raising or removal of wreck."

The corresponding provision of the 1926 Convention relied upon by the lawmaker contains somewhat different wording when port dues and charges are at stake, as it refers to "tonnage dues, light or harbour dues, and other public taxes and charges of the same character".[40] It follows from the express wording of the 1926 Convention that maritime privilege is provided in respect of those port claims that have a character of public taxes and charges. On the other hand, the text of the domestic law does not contain such express qualification of the corresponding term of "port awards", allowing therefore for a more flexible interpretation.

MINA was inherited by the Republic of Croatia and remained in force until 1994, when the first Croatian Maritime Code was adopted. Maritime privileges were regulated by art. 250 of the CMC 1994, still relying on the solutions of the 1926 Convention.[41] Finally, the current CMC regulates maritime privileges in art. 241, adopting the solutions of the 1993 Convention. The CMC version of 2004 in the part relating to maritime privileges was inspired by the 1993 Convention, whose provisions on maritime liens are thereby in an indirect manner implemented into Croatian maritime law, although Croatia has neither ratified nor acceded to the 1993 Convention. Therefore, if the Croatian lawmaker's intention was to implement the solutions of the 1993 Convention in respect of maritime privileges, it might be argued that for the purposes of the correct interpretation of the relevant CMC, art. 241.1.4,

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[37] Official Gazette of the SFR Yugoslavia, no. 22/1977, 13/1982, 30/1985, 80/1989, 29/1990, 53/1991, 26/1993, 17/1994, 29/1994, 19/1998 (further MINA).

[38] B. Jakaša, *op. cit.*, p. 107-108.

[39] The term in Croatian was "lucke nagrade". Emphasis added by the authors.

[40] 1926 Convention, art. 2.1.

[41] In respect of maritime privileges for port charges see art. 250.1.1 of the 1994 CMC, whose wording is almost the same as the corresponding provision of the previously cited MINA, except that it refers to the "port charges" instead of "port awards".

relating to maritime privilege in favour of port charges, one should look into the background of the corresponding provision of the 1993 Convention (art.4.1.d), which reads as follows:

"Each of the following claims against the owner, demise charterer, manager or operator of the vessel shall be secured by a maritime lien on the vessel:

[…]

(d) Claims for port, canal, and other waterway dues and pilotage dues;"

Port dues are not further defined by the Convention; therefore, in order to interpret the meaning of that term, we looked into the preparatory work leading to the adoption of the 1993 Convention, and we found that under the cited provision, the drafters' intention was to protect by a maritime lien the harbour authorities' claims for harbour dues, as well as tonnage and light dues, canal, and other waterway dues and pilotage dues as public taxes and charges of the same character.[42] Therefore, in our opinion, there is a strong argument in favour of the position that the Croatian lawmaker, by choosing to rely on the solutions of the 1993 Convention, prescribed

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[42] Following the decision of IMO and UNCTAD to place in their work programme the revision of the 1926 and 1967 Brussels Conventions on Maritime Liens and Mortgages and of the 1952 Brussels Convention on Arrest of Ships, the CMI appointed two International Sub-Committees to offer co-operation. The drafts of the two conventions on maritime liens and mortgages and on ship arrest were fist prepared within the CMI. Further work of UNCTAD and IMO leading to the adoption of the 1993 Convention on Maritime Liens and Mortgages was based on the work of the CMI. The CMI documentation shows that the 1993 Convention essentially represents a revision of the 1967 Convention on Maritime Liens and Mortgages. The aim of the 1967 Convention, which never came into force, was to achieve a greater protection of mortgages and greater international uniformity, which meant that compared to the 1926 Convention, the number of claims protected by maritime liens enjoying priority over mortgages had to be reduced. The drafters had in mind that long-term financing, which was becoming more and more international and at the critical time less available, was essential for the development of merchant marine. Some of the considerations made by IMO and UNCTAD in the preparatory work were to encourage ship financing by affording appropriate protection to persons providing finance, to encourage the provision of services to ships, and to minimize the potential encumbrances to the operation of the ship. In the reform process, only minor changes to the 1967 Convention were made. In respect of port dues and other similar claims, the text of the 1967 Convention, art. 4 (ii), was retained, but that group of claims was given a lower priority. The drafters assessed that this lien affected the security of the holder of a mortgage or hypothec, and it did not seem to substantially contribute to the safe and efficient operation of the ship "no more than it would a lien securing any type of service required for the operation of a ship. It was felt, however, that since the sums involved should not be great, it may be advisable to leave this lien undisturbed, for its deletion might adversely affect ratification of the convention, but that there was no justification for its high ranking and thus it was moved to the bottom of the list." See CMI 1985 Lisboa I, Documents, MLM – 1926/1967-66/II – 1985; MLM – 1926/1967-66ter/II – 1985. Looking deeper into the history of the relevant provision on port, canal and similar dues, particularly in the preparatory work of the CMI for the 1967 Convention, which was used as the basis for the 1993 Convention, we found that one of the drafters' preliminary qualifications was that "the pre-mortgage liens may be divided into three categories, one of which were "the costs of wreck removal and harbour and canal dues to *public authorities*, all of which enjoy a high priority in a number of national legislations;". See CMI 1964 New York, Documents, Maritime Liens and Mortgages, HYPO – 12/5-64. The public nature of the port, canal and similar dues to be protected by a maritime lien does not seem to have been disputable at any point of the preparatory work leading to the adoption of the 1967 Convention, and likewise of the 1993 Convention.

a maritime lien under the CMC, art. 241.1.4, to protect the claim for port charges as a port authorities' claim of public law character.

2.2.3.2. 'Port Charges' in the Legislation Regulating Seaports

2.2.3.2.1. The Period from 1961 to 1995

The analysis of the history of the relevant legislative provisions regulating seaports shows that the Exploitation of Ports and Docks Act[43] of 1961 categorised the revenues of the ports open to public traffic into tariffs for services and port charges. Port charges included the fees for the use of the port shores, demurrage fees and berthing fees (EPDA, arts. 9, 18 and 19). The amounts of port tariffs and charges were determined by the workers' organisation and the municipal assembly that exploited the port and had the obligation, *inter alia*, to cater for the construction and development of the port, maintenance in the state required by the public traffic and safety of vessels. The Act, however, did not prescribe which revenue was to cover the respective expenses, whether the income coming from port charges or the one coming from delivering services. However, considering further subdivision of port charges and their distinction from port tariffs, it may be concluded that at the time of the application of the EPDA, the term "port charges" had the meaning equal to the current definition of the term "port dues"; i.e., at the time of the EPDA, port charges were public taxes charged for the use of the ports. On the other hand, the term "port dues" as defined in the EPDA corresponds to the term "port charges" as defined in the MDSPA.

The Maritime and Inland Water Domain, Ports and Docks Act[44] of 1974 provided that the port operator's income consisted of port and dock charges (under the common term of port charges), of the income coming from its own business activity and otherwise (MIWDPDA, art. 47.1). The categories of port charges were further exhaustively listed to include: the fee for the use of the port, demurrage fee, berthing fee for fishing boats and other types of boats. Therefore, the term "port charges" as used in the MIWPDA and the EPDA corresponds to the term "port dues" as defined by the currently relevant MDSPA. Unlike the EPDA, the MIWPDA provides that port charges may be used exclusively for the purpose of the construction and development of the port infrastructure, and for the maintenance and repairs of small ports, which clearly reflected their public character. It is important to point out that port charges, according to the MIWPDA, were regulated as a source of income not only of the seaports open for public traffic, but also of the special ports, i.e. of the special purpose ports, as we refer to them today according to the relevant positive legislation.

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[43] Official Gazette of the FNR Yugoslavia, no. 24/1961, Official Gazette of the SFR Yugoslavia, no. 10/1965, 23/1967, 2/1968 (the consolidated text) (further: EPDA).

[44] Official Gazette of the Socialist Republic of Croatia, no. 19/1974, 24/1974, 39/1974, 39/1975, 17/1977, 18/1981, 31/1986, 47/1989, Official Gazette of the Republic of Croatia, no. 26/1993, 17/1994, 29/1994, 107/1995, 108/1995, 142/1998 (further MIWPDA).

2.2.3.2.2. *The Period from 1995 up to Date*

The change in the respective terminology arose upon the adoption of the Seaports Act[45] of 1995. The SPA does not use the term "port charges". It differentiates between the term "charges" (payable for the services received) and "port dues" (income of the port authority). Port activities in the seaports open to public traffic are performed by the commercial companies on the basis of concessions and for the services performed they charge various fees referred to as "charges" (not "port charges", just "charges"), the amounts of which have to be determined in accordance with the tariffs prescribed by the port authority. Strictly formal and literal interpretation of this norm would mean that no other claim could qualify as a port charge. It is submitted that this conclusion is unacceptable.

According to the SPA, there were still essentially two types of income for the ports – one of public character, paid by the users of the port for the mere use of the port area, and the other of commercial (private law) character paid for the services received. However, terminology is opposite to that used by the preceding legislation. What was previously called port charge has now become port due, whilst port dues have become charges. In our opinion, the lawmaker did not take into account that this change in terminology would cause such important legal effects, for instance the loss of the status of a privileged claim for the public dues or the establishment of that status in favour of the fees charged for the port services.

The SPA was replaced by the MDSPA in 2003, which in the part relevant for this paper does not substantially differ from the preceding Act. There is a difference in terminology in respect of the concessionary's income in the ports open to public traffic, which was referred to as "charges" in the SPA, whilst the MDSPA refers to it as "port charges".

2.2.4. *Applicability of the MDSPA Definition of Port Charges in the Context of Maritime Privileges*

In the *Saray* case, the High Commercial Court strongly relies on the argument that, on the basis of the MDSPA, art. 63.1, berthing fee in a special purpose port is not a port charge in the sense of the CMC, art. 241.1.1, because the law prescribes that port charges are charged in the seaports open to public traffic for the port services provided, whilst there is no such legislative provision in respect of the special purpose ports. It is hereby submitted that income of the special purpose ports, including nautical tourism ports, is not regulated at all. Generally, matters related to the special purpose ports are substantially under-regulated. There are only three articles of the MDSPA (arts. 80 – 82) that apply to special purpose ports, and they relate solely to their establishment and to concessions, including an express provision that in respect of the matters not specifically regulated, the rules on concessions on

[45] Official Gazette of the Republic of Croatia, no. 108/1995, 6/1996, 137/1999, 97/2000, 158/2003 (further SPA).

the maritime domain apply *mutatis mutandis*. The application *mutatis mutandis* of the rules on seaports open to public traffic is not expressly prescribed. Such application would not even be possible, because, unlike in the case of the ports open to public traffic, the management function is not separated from the commercial exploitation of the special purpose ports. It follows that discussion on the legal nature of port charges should be correlated to the system of the port management. It seems that the first instance court's argument in the *Saray* case, stating that port charges are "included in the calculation of the concession fee paid by the concessionaries of the special purpose ports within the services provided to the users of berths",[46] although insufficiently clarified, actually is on that line. Unlike in the ports open to public traffic, in the special purpose ports, there is no port authority responsible for the public law aspects of the port management. In the legal doctrine, it has been argued that such ports are directly managed by the state.[47] We can only partly agree with this position. It should be emphasised that concessionary of the special purpose port has certain responsibilities of public law nature that in the ports open to public traffic are held by the port authorities. The SPA introduced and later in the MDSPA kept the categorisation of seaports into the ports open to public traffic and special purpose ports. The novelty introduced by the SPA and taken over by the MDSPA are port authorities, non-profit legal persons established in the ports open to public traffic for the purpose of management, construction, development and the use of the ports (SPA, art. 30). Port authorities' activities include a wide spectrum of responsibilities of public interest, such as securing continuous and undisturbed port traffic, safety of navigation, providing services of public interest including those that are not of commercial interest to other commercial subjects. All revenues of the port authorities earned from various sources, including port dues, are intended exclusively for the construction development and maintenance of the port infrastructure and superstructure, port equipment for the protection of marine environment from ship source pollution, maintenance of the sea depth in the port and on port anchorage, and the port authority's administration (SPA, art. 45 – 46). Commercial subjects performing port activities and services have no responsibilities of public nature. On the other hand, in case of special purpose ports, there are no port authorities. The activities and responsibilities placed in the competence of port authorities of the ports open to public traffic remain greatly in the hands of the concessionaries of the special purpose ports (including marinas and other nautical tourism ports). Concessionaries are obliged to maintain order in the special purpose ports similarly as are port authorities in the ports open to public traffic. They are obliged to equip

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[46] Ruling of the Commercial Court in Split, RI-123/2014, *op. cit.*, p. 5.

[47] See D. Bolanča, *Pravni status morskih luka kao pomorskog dobra u Republici Hrvatskoj*, Split, 2003, p. 101; M. Meštrović, *Uporedni prikaz sustava upravljanja lukama otvorenim za javni promet i lukama posebne namjene u hrvatskom zakonodavstvu*, in *Zbornik radova Pravni problemi instituta pomorskog dobra u Republici Hrvatskoj s posebnim osvrtom na luke otvorene za javni promet*, Udruga pravnika u gospodarstvu, Split, 1998, p. 57.

the special purpose ports in accordance with special regulations. They are further liable for sea pollution and the accumulation of waste in the port, and are obliged to clean the port when necessary, as well as designate the area for handling dangerous substances. They must procure certificates attesting the maximum allowed number of vessels and capacities of the sport shores (SPA, art. 50-53). The law does not prescribe which revenues of the concessionary may or must be used to finance the said activities of public interest. It is only important that these activities are actually performed primarily in the interest of safety and pollution prevention and removal.

Returning to the argument of the first instance court in the *Saray* case that port charges are "included in the calculation of the concession fees paid by the concessionaries of the special purpose ports, within the services they provide to the users of berths", it seems that the court wanted to emphasise that in special purpose ports, no public taxes are charged and the sole public charge is the concession fee covering the concessionary's use of the port area and all users of the concessionary's services. Economically, this may be correct, but legally, the concessionary pays the concession fee on the basis of the concession and the concession contract. He may not pass his obligations to the final users of the port, but may calculate service prices to include the part relating to the concession fee.

On a similar line of argument, we would like to re-emphasise the reasoning of the High Commercial Court in the *Galeb* case as cited *supra*. In this case, the court elaborated in more detail how "[m]ost of the activities run in the special purpose ports according to their contents and concrete elements correspond to the activities in the seaports open for public traffic." It further argued that there are no explicit legislative provisions "on the obligation of the user of the special purpose port to pay charges", and it therefore pointed at "the legal provisions explicitly regulating the obligations of the user of the special purpose port regarding the mode of use of the port […], according to which there is a corresponding right to claim charges for the use of the shore. Through the application by analogy of the [legislative] provisions […] regulating the obligation of the user of the seaport open for public traffic to pay charges for the services provided, [the court held that] the charges shall likewise be paid to the commercial companies (concessionaires) for the services provided in the special purpose ports, in particular for the port services, including berth."

It is submitted that the provisions of arts. 62 and 63 of MDSPA are not applicable *mutatis mutandis* to special purpose ports, due to differences in management systems. However, taking into account similarities in duties prescribed for port authorities and concessionaires in the special purpose ports, we are of the opinion that there should be no discrimination between the seaports open to public traffic and the special purpose ports in their right to claim charges for the use of shore and the use of nautical berths, including the protection of those claims by maritime privilege. This means that the definition of port charges contained in the MDSPA should not be applied in the interpretation of art. 241.1.4 of the CMC.

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To conclude on this point, it should be stressed that on the one hand, the term "port charges" in the context of the CMC provision on maritime privileges, has had a continuous history ever since 1936, whereas until 2004, it had reflected the solutions of the 1926 Convention and afterwards of the 1993 Convention. On the other hand, however, the same or similar terms in the legislation regulating seaports were used inconsistently with different meanings. The current meaning of the term "port charges" in the context of the seaports' legislation arrives from the MDSPA of 2003. Therefore, it is submitted that it would not be correct to interpret the term "port charges" as used in the CMC by strictly relying on the meaning of the same term as prescribed by the MDSPA.

It is argued that a strictly formal and literal interpretation of the term "port charges" and of the single legislative norm that regulates them, without taking into account the relevant legal context, and the aim and history of that norm, may lead us to an incorrect and unjust result that does not fulfil the purpose of the norm originally intended by the lawmaker.

Positive law, as presented, leaves a lot of room for various interpretations of the matter, resulting, naturally, in legal uncertainty. Literal interpretation of the relevant legislative provisions, as the High Commercial Court has done in the SARAY and JUST FOR FUN cases, places the concessionary of the special purpose port into a considerably worse position than the concessionaries in the ports open to public traffic. This is, unlike the concessionary in the port open to public traffic, due to the fact that the special purpose port concessionary's claim for the fees for services provided is not protected by a maritime privilege, and it is hence questionable whether this claim could be enforced through the arrest of the vessel in respect of which berthing service was provided.

Considering all stated above, and having in mind the importance of the nautical tourism for the Croatian economy, we feel that certain interventions in the positive law are necessary to eliminate the existing legal uncertainty. We will, therefore, at the end of this paper make certain *de lege ferenda* proposals, which we deem appropriate in the present context. However, in order to arrive to such proposals, some specificities of the application of the concept of maritime privileges on pleasure boats and yachts should be taken into account.

2.2.5. *Some Additional Perplexities Regarding the Applicability of Maritime Privileges on Pleasure Craft*

Maritime privileges are an ancient concept of maritime law designed originally for trading ships, adapted to the requirements of commercial shipping and navigation. It is, therefore, sometimes difficult, although possible, to apply the concept as such in the context of yachting and marinas. The differences are particularly reflected in the enforcement of maritime privileges on yachts and boats, as we will discuss in the following chapters.

Finally, if there is a question whether to recognize a maritime privilege in respect of the marina operators' claims for berthing fees arising from berthing contracts, the

lawmaker should assess whether there is special economic or social interest for protecting such claims by a privilege? It is submitted that, considering the importance of nautical tourism and marinas in Croatia, the strategic orientation of the country towards further development of this branch of economy and the fact that berthing fees are the main source of income for the domestic marina operators, there is a strong argument in favour of such maritime privilege or at least in favour of categorising such claims as maritime claims on the basis of which arrest can be made, which is discussed below.

Hypothetically, if we assume that under Croatian law, there is a maritime privilege in favour of the marina operator's claim arising from a berthing contract, there are two particular questions that have to be taken into account:

When does Croatian law apply in respect of maritime privileges?

The identity of the debtors personally liable for the claim secured by a maritime privilege is expressly envisaged by the law (i.e. by the CMC, art. 241.1).

As regards the applicable law, the CMC prescribes that the law of the state whose nationality the vessel has governs real rights on a vessel. Under Croatian law, maritime privileges are considered real rights, i.e. they are subject to substantive law by their legal nature. For this reason, according to the CMC, the question of whether there is a privilege on a vessel has to be assessed in accordance with the law of the vessel's flag state (arg. the CMC, art. 969.1).[48] It means that, if the CMC prescribed a maritime privilege in favour of a marina operator's claim arising from a berthing contract, this would apply to yachts and boats registered in Croatia. On the other hand, the existence of such maritime privilege on a foreign flag yacht or boat in a Croatian court would have to be assessed in accordance with the law of the respective foreign flag state. Furthermore, the ranking of the existing maritime privileges amongst themselves (the CMC, art. 914 in relation to the CMC, art. 245)[49] and in relation to other claims (the CMC, art. 912)[50] in a procedure in front of a Croatian court should be governed by the provisions of the CMC on security and enforcement procedures, i.e. by Croatian procedural law as *lex fori*, regardless of the flag of the vessel.[51] Considering the general lack of legal uniformity in respect of maritime liens in comparative law, the existence of a maritime privilege on a foreign vessel and potentially of its ranking in relation to other secured claims remains hardly predictable in each individual case.[52]

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[48] Similarly, J. MARIN, *Privilegiji na brodu…*, *op. cit.*, p. 403.

[49] According to the CMC, art. 245, the claims secured by maritime privileges rank according to the order of priority that corresponds to the order in which those claims are listed under the CMC, art. 241. Exceptionally, the maritime privileges securing the claims for the salvage awards have priority over all other maritime privileges on a vessel that accrued prior to salvage operations.

[50] According to the CMC, art. 912, the ranking of the claims is the following: 1. The claims of the Republic of Croatia for the costs of the removal of substandard ships and wrecks; 2. The claims secured by maritime privileges; 3. The ship repairer's and the shipbuilder's claim secured by the right of retention; 4. The claims of the hypothecary creditors; 5. Other claims.

[51] J. MARIN, *Privilegiji na brodu…*, *op. cit.*, p. 403.

[52] For a discussion on the conflict of law intricacies related to maritime liens (privileges) see W. TETLEY, *Maritime Liens in the Conflict of Laws, Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren*, Transnational Publishers Inc., Ardsley, N.Y. 2002.

In respect of the identity of the debtors personally liable for the claims secured by maritime privileges, the CMC prescribes that – to be secured by a maritime privilege – the claim ought to be against the owner,[53] bareboat charterer or operator[54] of the ship (the CMC, art. 241.1).[55] Only then does the privilege attach to the vessel, remaining in force for a maximum period of one year (the CMC, art. 246.1.2), regardless of the possible change of ownership, registry or flag (the CMC, art. 243). It is also prescribed that the rules on maritime privileges apply even when the vessel is exploited by a person other than the owner, unless the owner is deprived of the vessel in an illegal manner and the privileged creditor is privy thereof (the CMC, art. 248). In the context of marinas and yachting, there is a potential lack of clarity of this concept. The term "ship operator" (*Cro.* "*brodar*") is used generally in the context of shipping, whilst it is not common in the context of yachting. In addition, the CMC defines the term "yacht holder" (*Cro. "korisnik jahte"*) as "the natural or legal person who on the basis of the bareboat charter agreement or leasing contract exploits the yacht, whereas it is presumed until proven contrary that the yacht holder is the person registered in the yacht registry as the owner of the yacht." (the CMC, art. 5.1.32.a). It seems that this term should have been included in the circle of debtors personally liable for the claim secured by a maritime privilege under the CMC, art. 241.1. However, the term yacht holder is used in the CMC only for the purposes of the yacht registration procedure and in the provisions on maritime offences, and is not mentioned in any other provisions of private shipping law nature. The general rule is that the CMC provisions relating to ships apply equally to yachts, unless expressly provided otherwise (the CMC, art. 2.1). Therefore, it is submitted that the provisions relating to "ship operator" should by analogy apply to yachts. This, *inter alia*, means that a "yacht holder" is to be considered "operator" for the purposes of applying the provision of the CMC, art. 241.1 in case of a privilege on a yacht, i.e. the yacht holder belongs to the circle of debtors personally liable for the claim secured by a maritime privilege. A similar situation arises in respect of maritime privileges on boats financed by leasing arrangements. It is prescribed that the CMC provisions apply to boats only when it is expressly provided so (arg. the CMC, art. 2.2). The CMC does not provide for a special definition of a "boat holder" comparable to that of the "yacht holder", but according to the Regulation on boats and yachts, the boat owner includes the registered owner and the lessee of the boat. In our opinion, since it is expressly prescribed that the provisions on maritime privileges apply to boats as to ships and yachts, the circle of personally liable debtors defined by

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[53] The owner of the ship under the CMC is actually the registered owner.

[54] Croatian term used in the provision is "brodar", which is one of the central concepts of Croatian shipping law. The term is defined under the CMC, art. 5.1.32 as "the natural or legal person who, as the possessor of the ship, is the holder of the maritime adventure, whereas it is presumed, until proven contrary, that the operator is the person registered in the ship registry as the owner of the ship."

[55] In respect of the claims for crew wages, the circle of personally liable debtors additionally includes the employer, whilst in respect of the claims for death and personal injury the circle includes the employer (crew claims) and the ship manager.

art. 241.1 of the CMC should in case of a maritime privilege on a leased boat include the lessee. Still, for the purpose of complete clarity, it would *de lege ferenda* be useful to expressly include the boat and yacht holder in the circle of personally liable debtors defined by art. 241.1 of the CMC.

3. *Is the Marina Operator's Claim for a Berthing Fee a Maritime Claim?*

The question we try to answer is whether a yacht or a boat can be arrested for the purpose of securing the marina operator's claim for a berthing fee, or, in other words, whether the marina operator's claim for the outstanding berthing fee presents a maritime claim in the sense of the CMC provisions on security for and enforcement of maritime claims, or of the 1952 Arrest Convention, which Croatia is a party to.

This question is important in this context, because the most attractive procedural tool for exercising a maritime privilege is the arrest of the vessel in respect of which there is a maritime privilege. The provisional remedy of the arrest of a vessel assures privileged maritime creditors an effective means of enforcement of their claims.[56]

3.1. *Judicial Practice*

Relevant references in Croatian judicial practice are the Rulings of the High Commercial Court in the cases regarding the arrest of m/y *Saray*[57], m/y *Topsy*[58], and m/y *Crisandra*.[59]

In the earlier cases of m/y *Topsy* and m/y *Crisandra*, the High Commercial Court held that 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). The position of the Court reflected in these rulings is that the conditions to be fulfilled for allowing arrest are:

The claim is from the list of maritime claims prescribed by the CMC, art. 953.1, or by the 1952 Arrest Convention, art. 1, respectively;

The claimant ought to 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,[60] art. 344);

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[56] J. M. Kriz, *Ship Mortgages, Maritime Liens and their Enforcement: the Brussels Conventions of 1926 and 1952* in *Duke Law Journal*, Vol. 1963, p. 671-695, p. 672.

[57] See *supra*, 2.1.1.

[58] See *supra*, 2.1.2.

[59] Ruling of the High Commercial Court of the Republic of Croatia, Pž-6486/06-3, 17th January 2007. In this case, the first instance court refused the claimant's application for arrest on the ground that the marina operator's claim for a berthing fee arising from a berthing contract is not a maritime claim, whilst the High Commercial Court repealed that decision and returned the matter to the 1st instance court for a retrial.

[60] Enforcement Act, Official Gazette of the Republic of Croatia, no. 112/2012, 25/2013, 93/2014, 55/2016.

Periculum in mora is presumed (*presumptio iuris* and *de iure*) in case where the claim is to be enforced abroad (Enforcement Act, art. 344.3), whereas such presumption is fulfilled when the vessel to be arrested flies a foreign flag and this cannot be challenged.

In the case of m/y *Crisandra*, the Court held that the marina operator's claim fell under CMC, art. 953.1.11 – "disbursements incurred by the master, shipper, charterer, or agent on behalf of the ship, her owner or the operator, in connection with the ship". The Court explained that the claim arose on the basis of a berthing contract, and that such contract gives rise to certain expenses "on account of the ship, i.e. in connection with the ship in respect of which the contract was concluded, and precisely because of that feature, the claim qualifies as a maritime claim".[61]

It is submitted that the cited Court's reasoning is not correct. The maritime claim prescribed under the CMC, art. 953.1.11 refers to the expenditures incurred by a master, shipper, contracting party, or agent. Therefore, in order to qualify as a maritime claim under the respective CMC provision, it must be a claim of one of the persons envisaged by the provision.[62] It is not sufficient that the expenditure is in respect of a ship or in connection with the ship. To qualify as a maritime claim, the disbursement ought to be:

– On behalf of the ship or her owner or operator, in connection with the ship;
– And made (and therefore claimed) by the master, shipper, charterer, or an agent.

Marina operator's claim arises from a berthing contract, whereby the marina operator as the contracting party acts in its own name, not (as agent) on behalf of the ship or her owner or operator, and its claim is not for disbursements, but for the service of berth provided to the ship. Therefore, marina operator's claim does not qualify as a maritime claim envisaged under the CMC, art. 953.1.

Considering that the respective CMC provision is derived from the 1952 Arrest Convention, art. 1.1.n – "Master's disbursements, including disbursements made by shippers, charterers or agent on behalf of a ship or her owner", and that Croatia is a party to the said Convention, our argumentation is further supported by the interpretation of the respective provision adopted in the prevailing legal doctrine and court practice of state parties to the Convention.[63]

In the case of m/y *Topsy* registered in Germany, the court applied the 1952 Arrest Convention and confirmed the 1st instance court's arrest order, on the ground that the marina operator's claim fell under art. 1.1.d) of the Convention – "agreement relating to the use or hire of any ship whether by charter party or otherwise", and was therefore a maritime claim in respect of which arrest can be made.

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[61] High Commercial Court, Pž-6486/06-3, *op. cit.*

[62] Similarly, Đ. Ivković, *Me unarodna konvencija za izjednacenje nekih pravila o privremenom zaustavljanju pomorskih brodova, 1952, Prirucnik*, Piran, 2005, p. 95-96.

[63] See F. Berlingieri, *Berlingieri on Arrest of Ships: a Commentary on the 1952 and 1999 Arrest Conventions*, 5th Edition, Informa, London, 2011, p. 117-120; see also N. Meeson, J. Kimbell, *Admiralty Jurisdiction and Practice*, 4th Edition, Informa, London, 2011, §2.127-2.135.

It is submitted that in this case the Court incorrectly interpreted the provisions of the 1952 Arrest Convention. Marina operator's claim for a berthing fee does not fall under art. 1.1.d) of the Convention. It is widely accepted that the wording "agreement relating to the use or hire of any ship whether by charter party or otherwise" is meant to cover any agreement relating to the use or hire of a ship, the purpose of which is not the carriage of goods, for any agreement relating to the carriage of goods is covered by the subsequent sub-paragraph (e). Such agreements would include bareboat charter agreements, salvage contracts, towing contracts, ship management contracts, etc.[64] It certainly does not relate to marina operators' berthing contracts, as they are not in any way contracts for the use or hire of a ship.

Finally, in the case of the arrest of m/y *Saray*, the main issue was not whether the marina operator's claim was a maritime claim. The point of dispute was whether the claim was a maritime privilege. The first instance court allowed the arrest on the ground that the claim was a maritime privilege, and that the arrest could therefore be made under the CMC, art. 953.2. However, the same court reasoned that the claim was also a maritime claim envisaged under the CMC, art. 953.1.11,[65] allowing for the arrest. The High Commercial Court dismissed the arrest mainly on the ground that the claim was not a maritime privilege, without any reference whatsoever as to the question whether the claim was a maritime claim under the CMC, art. 953.1.

3.2. *Positive Law*

3.3.1. *Arrest of a Yacht under Croatian Law*

In respect of the arrest of yachts, the relevant law is:

The 1952 Arrest Convention[66];

The CMC, arts. 841 et seq. on Enforcement and Security over Ship and Cargo, in particular arts. 951-964 on temporary arrest of ships as *lex specialis*[67], and relevant provisions of the Enforcement Act as *lex generalis.*[68]

Under the CMC, art. 953, temporary arrest of the ship may be ordered only for the claims listed under the CMC, art. 953.1 as **maritime claims,** and **for the enforcement of a maritime privilege** or hypotheque, or a charge similar to hypotheque (the CMC, art. 953.2).

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[64] For a detailed interpretation see F. BERLINGIERI, *op. cit.*, p. 75-79.

[65] Similarly, the High Commercial Court held in the *Crisandra* case, as described and criticised above.

[66] Croatia is a party to the 1952 Convention. The Convention applies to ships that are subject to registration. See F. BERLINGIERI, *op. cit.*, p. 449-456. Under Croatian maritime law, yachts are subject to registration in the national registry, and they are in most aspects regarded and treated as ships. Yacht is defined under the CMC, art. 5.1.20 as a vessel for sports and leisure, regardless of whether it is used for private purposes or commercially, intended for a longer stay at sea, whose overall length exceeds 12 m and which, in addition to the crew, is authorised to carry no more than 12 passengers. A *foreign yacht* is a vessel for sports and leisure sailing under a foreign flag and considered a yacht under the laws of the country of its nationality (the CMC, art. 5.1.21).

[67] Arg. the CMC, art. 2.1 and art. 841.3.

[68] Arg. the CMC, art. 841.5.

The list of maritime claims is exhaustive, and it mainly corresponds with the one envisaged by the 1952 Arrest Convention, art. 1.1, with certain extensions. The list includes all claims arising from: damage caused by collision of the ship that is subject to the arrest, or damage otherwise caused by that ship; death or personal injury caused by the ship or arising in connection with the operation of the ship, salvage, contracts for the exploitation of the ship, general average, supply of the ship necessary for her maintenance and operation, shipbuilding, reconstruction, repair, equipment or docking of the ship; employment rights of the crew; disbursements of the master, shipper, charterer or agent on behalf of the ship, her owner or the operator, in connection with the ship; brokerage provisions and agency fees owed in connection with the ship (the CMC, art. 953.1).

3.3.1.1. *When the CMC applies*

The exclusive application of the CMC provisions on arrest is possible only when there is no international element, i.e. when the vessel that is subject to arrest under the jurisdiction of a Croatian court flies Croatian flag, and the claimant has his habitual residence or principal place of business in Croatia (arg. 1952 Arrest Convention, art. 8.4). In such a case, the arrest would be possible if the marina operator's claim were to be recognized as maritime privilege under Croatian law,[69] which seems to be dubious in practice.[70] In that case, the claim would rank prior to other claims that are not secured by a maritime privilege, including those secured by a hypotheque, mortgage or a similar charge (arg. the CMC, art. 912). Alternatively, it might be argued that a contract of berth of a yacht in a marina is a contract for service necessary for the normal operation and maintenance of the yacht, and that the claims of the marina operator arising from such contract should therefore be regarded as maritime claims falling under the CMC, art. 953.1.8 – "supply for the maintenance and operation of the ship". It seems to us that such interpretation would be possible because the terms (supply for) "materials and goods" are omitted from the provision of the CMC, art. 953.1.8, which otherwise derives from the 1952 Convention, art. 1.1.k). The omission allows for a wider interpretation that may include supply for services, and not only materials and goods. The argumentation is supported by a decision of the Commercial Court of the SR Croatia, as the appeals court, ordering arrest of certain ships for the purpose of securing the plaintiff's claims arising from the supply of services necessary for the maintenance of the ships. The court held that these claims were considered maritime claims under MINA, art. 877.3.7 – supply for the maintenance or operation of the ship.[71] In favour of the argument that service of berth in a marina should be considered service for the

[69] Arrest under the CMC, art. 953.2.

[70] See judicial practice *supra*, 2.1.

[71] Judgement of the Commercial Court of Croatia, II Pž-1257/90-2, 29th May 1990. The cited provision of MINA, that as the main legislative source of Yugoslav maritime law preceded the CMC, is equal to the current CMC, art. 953.1.8.

maintenance and operation of a yacht, we refer to Berlingieri's interpretation of the words "services rendered" in the provision of the 1999 Arrest Convention, art. 1.1.l) compared to the corresponding provision of the 1952 Convention, art. 1.1.k) referring to the supply of "goods and materials" only. He states that "the addition of the words '[…] services rendered' to the words 'goods or materials' considerably expands the scope of this sub-paragraph so as to include not only all kinds of supplies but, also services […] such as mooring, fireguard, surveys by classification societies and other surveyors, etc."[72]

3.3.1.2. *When the 1952 Convention Applies*

Yacht's Flag is of a State Party to the 1952 Convention

When a yacht flies the flag of a state party to the 1952 Convention, the court should apply the provisions of the Convention (arg. 1952 Arrest Convention, art. 8.1). The possibility of arrest in that case is limited only to the maritime claims envisaged by the 1952 Arrest Convention, art. 1.1. It is submitted that the fees owed for the mooring of the yacht on the basis of the contract for services of mooring or berth are not envisaged therein, as art. 1.1.k) mentions only the supply of goods and materials, and not of services.[73] Furthermore, the 1952 Arrest Convention, unlike the 1999 Arrest Convention,[74] does not include port charges and dues in its list of maritime claims.[75] Therefore, it is impossible to place the marina operator's claim for a berthing fee under any of the types of maritime claims envisaged by the 1952 Convention. It means that the arrest of a yacht flying the flag of any of the state parties to the 1952 Convention in a Croatian court to secure the marina operator's claim for a berthing fee arising from the contract of berth should not be allowed. Moreover, since the 1952 Convention does not expressly envisage a possibility of arrest for a claim protected by a maritime lien or privilege (as a general qualification of a claim), it would not be possible to arrest a yacht for the purpose of potential enforcement of such claim, even if it were acknowledged as maritime lien or maritime privilege under the law of the yacht's flag state.[76]

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[72] F. BERLINGIERI, *op. cit.*, p.105. Emphasis added by the authors. *Ivković* argues to the contrary, see Đ. IVKOVIĆ, *Pomorski privilegiji na brodu – Prirucnik*, Piran, 2007, p.116.

[73] See F. BERLINGIERI, *op. cit.*, p. 51-139, in particular p. 99-111. See also fn. 69.

[74] See International Convention on the Arrest of Ships, Geneva, 1999, art. 1.1.n).

[75] *Berlingieri* comments that dock charges and dues mentioned in art. 1.1.l) "may be considered equivalent to the port dues mentioned in article 4(1)(d) of the 1993 Convention on Maritime Liens and Mortgages". See F. BERLINGIERI, *op. cit.*, p. 171. Port charges and dues as claims by the public authorities (port authorities) may form the basis for the detention of the ship by order of an authority other than a judicial authority. Such detention is not subject to the 1952 Arrest Convention (arg. art. 2) and is permitted by various national laws in a number of cases, including the failure to pay port dues. See F. BERLINGIERI, *op. cit.*, p. 181-197.

[76] Neither does the 1999 Arrest Convention provide for such possibility. However, the enlarged list of maritime claims under the 1999 Arrest Convention effectively covers all claims protected by maritime privileges under Croatian law.

Yacht's Flag is not of a State Party to the 1952 Arrest Convention

In case of arrest where the yacht's flag is not of a state party to the 1952 Convention, the Convention applies in principle, with the exception that such ship may be arrested in respect of any of the maritime claims enumerated in article 1 of the Convention, or of any other claim for which the CMC permits arrest (arg. 1952 Arrest Convention, art. 8.2). Furthermore, the CMC provides that the benefit of limitation of the possibility of arrest to the maritime claims listed in art. 953.1 and 953.2 applies to foreign ships only when there is reciprocity between the Republic of Croatia and the ship's flag state. This effectively means that for the ships flying the flags of non-parties to the 1952 Convention, arrest is possible for any maritime claim listed under the CMC, art. 953.1, and for the enforcement of a maritime privilege, hypotheque, mortgage or a similar charge on the vessel (the CMC, art. 953.2).[77] Additionally, provided that the ship's flag state does not implement any rules on ship arrest similar to the 1952 Convention limiting the possibility of arrest to certain maritime claims, such ship could be arrested in Croatia for any other type of claim, for which provisional measure of security may be obtained according to the Enforcement Act as *lex generalis*. Therefore, if the marina operator's claim for a berthing fee were recognized as maritime privilege under the law of the yacht's flag state, arrest would be possible in Croatia. Even if the marina operator's claim for a berthing fee was not a maritime privilege under the law of the flag state, the arrest would be possible in Croatia, provided there is no reciprocity between the flag state and the Republic of Croatia in respect of the limitation of arrest to certain maritime claims. It is submitted that the rules of the 1952 Convention, except art. 1.1, would still apply to such arrest.[78] However, in the absence of maritime privilege, the marina operator would not enjoy any benefit of priority in relation to other claimants.

3.3.2. *Arrest of a Boat under Croatian Law*

The arrest of a boat under Croatian law is specific due to the fact that the CMC provisions on temporary arrest of ships contained in arts. 951-964 do not apply to boats registered in Croatia[79] (arg. the CMC, art. 2.2 in connection with art. 951, *et seq*.). This means that provisional measures of security over boats registered in Croatia are subject to the Enforcement Act and in the competence of the courts of general jurisdiction. On the other hand, the arrest of yachts is always a matter of maritime law (the CMC or the 1952 Arrest Convention), as discussed above, and in the competence of commercial courts specialised in maritime disputes.

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[77] Whether there is a maritime privilege will be assessed in accordance with the law of the flag state (arg. the CMC, art. 969.2), see *supra*, 2.2.5.

[78] See J. MARIN, *Privremene mjere zaustavljanja…*, *op. cit.*, p. 23.

[79] Boats in Croatia are subject to special rules of registration in the books of records kept by the harbour masters' offices. Once registered, they receive Croatian nationality and are obliged to fly Croatian flag when sailing outside Croatian territorial sea. B. MILOŠEVIĆ PUJO, R. PETRINOVIĆ, *Pomorsko pravo za brodice i jahte*, Faculty of Maritime Studies – University of Split, Split, 2008, p. 92.

Furthermore, due to the definition of the boat contained in the CMC, art. 5.1.15,[80] it is unclear in practice whether the 1952 Arrest Convention should apply to the arrest of boats in Croatia.[81] It may be argued that the 1952 Arrest Convention, which applies to seagoing ships, does not apply to boats, since the term boat is expressly defined not to be a ship or a yacht. On the other hand, as *Berlingieri* explains, "it is accepted that any type of craft is included in the notion of ship for the purposes of the Arrest Convention", but "there is […] an overriding condition for its application: the registration of the ship in a national register which enables such ship to fly the flag of the State in which such register is situated."[82] It therefore seems to us that there is no obstacle for the application of the 1952 Convention on the arrest of foreign boats flying the flags of state parties to the 1952 Convention. In that case, the arrest procedure would be in the competence of commercial courts specialised in maritime disputes. Nevertheless, the issue has not been settled in the domestic judicial practice or legal literature.[83]

Finally, foreign boats registered in non-parties to the 1952 Convention would most likely be subject to the Enforcement Act and in the competence of the courts of general jurisdiction, similarly as boats registered in Croatia.

In practice, this means that the arrest of an 11-meter-long pleasure boat registered in Croatia or in a non-party to the 1952 Arrest Convention falls under the competence of different courts and would be governed by entirely different rules, including those relating to the types of claims for which arrest can be obtained, than the arrest of an 11-meter-long pleasure boat registered in a state party to the 1952 Convention or a 12-meter-long yacht.[84] In the context thereof, the answer to the question whether a marina operator's claim for a berthing fee is a maritime claim is ambiguous, as it depends on the flag and the length of the pleasure craft, in respect of which the provisional measure is being obtained.[85]

The issue becomes more complex when one takes into account that under Croatian law, the rules on maritime privileges apply to boats, equally as to ships and yachts (arg. the CMC, art. 252). It follows that when there is a maritime privilege on a boat, yet the boat is excluded from the application of the CMC rules on arrest and

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[80] According to the CMC, boat (Cro. *brodica*) is defined as "a vessel which is not a ship or a yacht, and whose length exceeds 2,5 m or the total power of its propulsion engines is over 5 kW. The term boat does not include: vessels belonging to another maritime craft, such as lifeboats or tenders, vessels intended exclusively for competitions, canoes, kayaks, gondolas and pedal boats, windsurfing boats and surfboards" (emphasis added by the authors).

[81] See Đ. Ivković, *Privremene mjere na brodu – Prirucnik*, Piran, 2006. p. 133-136.

[82] F. Berlingieri, *op. cit.*, p. 452.

[83] Đ. Ivković, *Privremene mjere na brodu…*, *op. cit.*, p. 133-136.

[84] Compare the CMC definitions of the terms boat (art. 5.1.15 as cited in fn 80) and yacht (art. 5.1.20 as cited in fn 66).

[85] The complexity of the problem is actually even higher since the CMC, art. 5.1.21 prescribes that a foreign vessel will be a yacht if it is considered a yacht under the law of the state of its nationality.

the 1952 Arrest Convention, such privilege would have to be realised in the proceedings governed by the Enforcement Act as *lex generalis,* and under the competence of the court of general jurisdiction.[86]

The described situation leaves a lot of room for various interpretations and calls for improvement *de lege ferenda* in the interest of legal certainty and uniform application of law in favour of all the parties involved. In our opinion, a matter for consideration would be to subject the arrest of all boats to procedural rules of maritime law and to the competence of specialised commercial courts as is the case with yachts, particularly paying due regard to the fact that Croatia is bound by the 1952 Arrest Convention applying to all types of vessels, regardless of their technical features or their intended use, provided they are subject to registration in the national registries.

4. *Comparative Law Solutions*

In **Canada**, marina has a statutory right *in rem* under section 22(2)(m) of the Federal Courts Act[87] for the supply of "services wherever supplied […] for the maintenance of the ship". Moorage (or berth) is such service, but statutory right *in rem* does not give any priority greater than that of a general unsecured creditor. It is interesting to note that "a marina may also have a statutory right *in rem* under section 22(2)(s) of the Federal Courts Act for 'dock charges'. If so, this particular claim survives a change in ownership. Unfortunately, this section does not appear to have received any judicial interpretation. However, since this section appears to have been added as a result of the 1926 Maritime Liens and Mortgages Convention, it is likely that the term 'dock charges' will be restricted to docks operated by public authorities, as is the case in the 1926 Convention."[88] It is noted that Canada is not a party to any of the Arrest Conventions.

In the **USA**, according to the 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 (i.e. potentially also the marina operator) is listed as a person presumed to have authority to procure necessaries for a vessel.

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[86] See the example of the Ruling of the Commercial Court in Zagreb in the case of M/Y VALERY, *supra,* 2.1.4.

[87] http://laws-lois.justice.gc.ca/eng/acts/f-7/fulltext.html (website accessed on the 2nd November 2016).

[88] B. M. CALDWELL, *Marina Operator's Liens*, http://www.admiraltylaw.com/fisheries/Papers/Marina%20Operators%20lien%20pdf.pdf (website accessed on the 2nd November 2016).

Under the US law, "necessaries lien" ranks very high in relation to other claims.[89] It is noted that the USA is not a party to any of the Arrest Conventions.

In **Italy**, which is a party to the 1952 Arrest Convention, marina has the right of retention of a yacht on berth, under the general civil law rules on retention provided by the Italian *Codice Civile*.[90]

Slovenia is a party to the 1952 Convention. Thus, the Convention applies whenever the ship to be arrested is flying the flag of a contracting state. On the other hand, if the Convention is not applicable, the provisions of the Slovenian Maritime Code are relevant. Similar to Croatia, the arrest of ships (as a "temporary injunction") in Slovenia is regulated by *the Maritime Code* as *lex specialis* and *the Enforcement and Security Act* as *lex generalis*. Slovene Maritime Code in principle adopts the provisions of the 1952 Convention. However, the enlarged list of maritime claims is based on the 1999 Arrest Convention.[91] Article 841(7) of Slovene Maritime Code provides that the claims arising from the supply of a ship for the maintenance and use of the ship are maritime claims. It is argued that "although there is no specification of the subject matter of the supply, it is thought that, on the background of the provision in the Convention, it is reasonable to include in this maritime claim any kind of supplies, including the supply of services."[92] In our opinion, it follows that on the basis of the cited provision, the claim for the fees for mooring services would qualify as a maritime claim. However, according to Slovene Maritime Code (art. 838), if the vessel subject to arrest does not qualify as a ship (a seaworthy vessel, which is 24 metres long or more[93]), the temporary measure of "arrest" shall be issued in accordance with general law, i.e. the law governing the general enforcement and security proceedings.[94] This effectively means that all pleasure craft that is less than 24 meters long, i.e. does not qualify as a ship, will be excluded from the application of maritime law. Consequently, marina operator might succeed with a temporary measure on such vessel to secure its claim for berthing fees on the basis of the Enforcement and Security Act, but would not enjoy any priority in relation to other non-secured creditors.[95]

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[89] http://law.justia.com/codes/us/2012/title-46/subtitle-iii/chapter-313/subchapter-iii/section-31341 (website accessed on the 2nd of November 2016). See also R. HAMANN, B. D. E. CANTER, *Legal Aspects of Recreational Marina Operations in Florida*, Florida Sea Grant College, Report No. 46, August 1982, p. 69-74.

[90] See Cessazione. Trib. Napoli 30 ottobre 2000, *Dir. Mar.*, I/2001.

[91] M. PAVLIHA, M. GRBEC, *Maritime Law, Jurisprudence and the Implementation of International Conventions into the Legal System of the Republic of Slovenia*, in this *Review 2001*, p. 1207-1217.

[92] F. BERLINGIERI, *op. cit.*, p. 106.

[93] Slovene Maritime Code, art. 3.1.3. There is no special definition of yacht, whilst boat is defined in art. 3.1.15 as a vessel less than 24 metres long.

[94] M. PAVLIHA, M. GRBEC, *op. cit.*, p. 1211.

[95] The position is reflected in a decision of the Slovene Court of Appeal, 1997, Cpg – 791/96: "A temporary injunction - arrest of a ship (yacht), which is situated in a marina, shall be effected in a manner that the arrested ship remains berthed within the waters of the marina. A yacht is not a sea-going ship and shall therefore be arrested on the basis of general law." Cited from M. PAVLIHA, M. GRBEC, *op. cit.*, p.1209.

It is interesting to note that the **1999 Arrest Convention**, compared to the 1952 Arrest Convention, provides a wider list of maritime claims, which *inter alia* includes:

Goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance (art. 1.1.l)).

It is submitted that the maritime claim envisaged by the cited provision would also include the marina operator's claim for the berthing fees, i.e. the fees owed for the berthing (or mooring) service provided to the vessel, since such service is intended for the normal operation and management of the vessel.[96]

5. *Conclusions*

Under Croatian positive law, it is dubious whether the maritime privilege for the port charges prescribed by the CMC applies to the marina operator's claim for berthing fees arising from the contract of berth in the marina. Interpretation of the notion 'port charges' and its scope within the context of the CMC leads to the conclusion that port charges and dues may be claimed equally, as privileged claims, regardless of the kind of seaport. On the other hand, the meaning of the term "port charges" used by the CMC does not correspond with the same term used by the MDSPA. The term "port charges" in the context of the CMC provision on maritime privileges has had a continuous history ever since 1936, whereas until 2004, it reflected the solutions of the 1926 Convention, and thereafter of the 1993 Convention. On the other hand, the same or similar terms in the legislation regulating seaports have been used inconsistently with different meanings. The current meaning of the term "port charges" in the context of the seaports' legislation arrives from the MDSPA of 2003. Therefore, it is submitted that it would not be correct to interpret the term "port charges" as used in the CMC by strictly relying on the meaning of the same term as prescribed by the MDSPA. A strictly formal and literal interpretation of the term "port charges", without taking into account the relevant legal context, and the aim and history of that norm, may lead us to an incorrect and unjust result that does not fulfil the purpose of the norm originally intended by the lawmaker. Positive law leaves a lot of room for various interpretations of the matter, resulting, naturally, in legal uncertainty. Literal interpretation of the relevant legislative provisions, as the High Commercial Court has done in the *Saray* and *Just For Fun* cases, places the concessionary of the special purpose port into a considerably worse position than the concessionaries in the ports open to public traffic. We are of the opinion that there should be no discrimination between the seaports open to public traffic and the special purpose ports in their right to claim charges for the use of shore and the use of nautical berths, including the protection of those claims by a maritime privilege.

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[96] See F. BERLINGIERI, *op. cit.*, p. 105.

Having analysed the question whether the marina operator's claim for berthing fees is a maritime claim for which arrest can be obtained under the rules of maritime law, we can conclude that under the 1952 Arrest Convention, which Croatia is bound by, it is not the case. This means that the arrest of yachts flying the flags of the state parties to this Convention should not be allowed in Croatia. However, when there is no international element (Croatian flag yacht arrested by a person domiciled in Croatia) or when the yacht flies the flag of a non-contracting state, the arrest can be obtained to secure one of the maritime claims envisaged by the CMC or to enforce a maritime privilege. In the case of the marina operator's claim for a berthing fee, the latter possibility is dubious for the reasons stated above, and particularly due to the fact that the existence of a maritime privilege should be assessed in accordance with the law of the vessel's flag. Regarding the possibility of arrest for the purpose of securing one of the maritime claims prescribed by the CMC, we are of the opinion that the marina operator's claim for a berthing fee could be interpreted as a maritime claim arising from the supply (of service) for the operation and maintenance of the ship (arg. the CMC, art. 953.1.8). The situation is unclear in the case of arrest of pleasure boats. Due to the definitions of the term boat, and the scope of application of the CMC, the CMC rules on the arrest of ships do not apply to boats. Therefore, the provisional security measures over Croatian flag boats and those flying the flags of the non-contracting states are governed by the Enforcement Act as *lex generalis* and subject to the competence of the courts of general jurisdiction. However, it is questionable whether the 1952 Convention should apply to boats flying the flags of the state parties. If it were so, there would be no possibility to arrest a boat flying the flag of a contracting state in Croatia for the purpose of securing the marina operator's claim for a berthing fee. Alternatively, the claim might be protected by the right of retention under the general rules on retention (Obligations Act, art. 72 et seq.), and possibly by the subsidiary application of the rules on deposit or storage, e.g. in respect of a dry berth.

In any case, we are of the opinion that there is need for improvement, since positive law is unclear and uncertain, and it is not adequate in respect of the marina operator's claim for a berthing fee. This is reflected in the inconsistency of the relevant judicial practice. Croatian High Commercial Court seems to acknowledge the marina operator's claim for a berthing fee as a maritime claim (allowing the possibility of the arrest under the rules of maritime law), but the correctness of this practice is questionable. The court practice is particularly inconsistent regarding the question whether the marina operator's claim for berthing fee is a privileged claim, i.e. whether a claim for a berthing fee may be regarded as a claim for port charges.

The prevailing position in the professional circles seems to be that the marina operator's claim should be protected. We feel that certain interventions in positive law are necessary to eliminate the existing legal uncertainty.

If there is a question whether to recognize a maritime privilege in respect of the marina operators' claims for berthing fees arising from berthing contracts, the lawmaker should assess whether there is special economic or social interest for

protecting such claims by a privilege. It is submitted that, considering the importance of nautical tourism and marinas in Croatia, the strategic orientation of the country towards further development of this branch of economy and the fact that berthing fees are the main source of income for the domestic marina operators, there is a strong argument in favour of such maritime privilege. We would therefore propose that *de lege ferenda* there should be a maritime privilege in favour of the marina operator as the provider of the berthing service, which is necessary for the normal maintenance and operation of the pleasure craft. Such maritime privilege with a high priority ranking should be specifically envisaged under the CMC. An example of comparative law to follow would be the solution found in the US law treating this type of service as "necessaries" and providing for a maritime lien in respect thereof. However, it should be kept in mind that such intervention *de lege ferenda* would effectively tackle only Croatian flag vessels.

As for the problems regarding the arrest and the qualification of the marina operator's claim as a maritime claim, it is submitted that the most favourable solution would be to denounce the 1952 Arrest Convention, and consequently to adhere to the 1999 Arrest Convention and amend the CMC to implement the same rules. There are a number of other reasons in favour of this approach, but this is a matter for a separate discussion that goes beyond the scope of this article. In this specific context, it is submitted that by applying the enlarged list of maritime claims as envisaged by the 1999 Convention, the marina operator's claim for berthing fees would be recognized as a maritime claim (supply of services for the maintenance and operation of the ship, 1999 Arrest Convention, art. 1.1.l)). Therefore, the arrest would be allowed to secure such claim according to the rules of maritime law and under the jurisdiction of commercial courts specialised in maritime disputes. This would eventually lead to the uniformity of judicial practice and greatly contribute to legal certainty, which is a prerequisite for further economic progress.

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