

PLEASURE NAVIGATION BERTHING CONTRACTS UNDER CROATIAN LAW¹

Associate Professor
ADRIANA VINCENCA PADOVAN, PhD*
VESNA SKORUPAN WOLFF, PhD**

UDK 347.799.6:347.4
627.097:339.18
DOI 10.21857/yl4okfld59
Original scientific paper
Received: 15/3/2021
Accepted for print: 28/4/2021

The paper analyses the new legislative solution regulating berthing contracts as a new nominate contract under Croatian law. The authors examine the relevant new provisions of the Maritime Code which were introduced by the Act on Amendments to the Maritime Code of 2019. The paper deals with the definition of the contract, its basic features, essential elements, the obligations and liabilities of the contracting parties, and other salient features of berthing contracts. It also explains the background of the legislative proposal to introduce special provisions on berthing contracts into the Maritime Code and elaborates on the preparatory work preceding the proposal. The authors support the new legislative solution as an important step forward towards higher legal certainty in the field of nautical tourism, which is considered to be of strategic economic interest to the Republic of Croatia.

Key words: *berthing contract; pleasure navigation; marina; nautical tourism port; berth provider; berth user; berthing; mooring; yacht; boat; pleasure craft; Croatian Maritime Code.*

* Adriana Vincenca Padovan, PhD, Associate Professor; Senior Research Associate, Adriatic Institute of the Croatian Academy of Sciences and Arts, Augusta Šenoje 4, 10000 Zagreb, Croatia, e-mail: avpadovan@hazu.hr.

** Vesna Skorupan Wolff, PhD, Scientific Advisor with Tenure, Adriatic Institute of the Croatian Academy of Sciences and Arts, Augusta Šenoje 4, 10000 Zagreb, Croatia, e-mail: vesnas@hazu.hr.

¹ **Acknowledgements:** This paper has resulted from the research project of the Adriatic Institute of the Croatian Academy of Sciences and Arts, funded by the Croatian Science Foundation, entitled *Developing a Modern Legal and Insurance Regime for Croatian Marinas – Enhancing Competitiveness, Safety, Security and Marine Environmental Standards* (DELICROMAR, UIP-2013-11-3061, project period: 1 March 2016 – 28 February 2019, principal researcher: A. V. Padovan). More information is available from www.delicromar.hazu.hr.

1. INTRODUCTION

There has been an intensive development of nautical tourism in Croatia over the past thirty years. Today, there are 167 nautical tourism ports in Croatia, with about 18,179 berths for pleasure craft. In 2019, there were over 204,000 vessels in transit in these ports, and the total income realised in nautical tourism ports amounted to about €122 million, of which around 71% came from renting out berths.² Furthermore, there is a considerable berthing capacity for pleasure craft in ports open to public traffic and also in sports ports, and the number of these berths has been continuously rising.³ Consequently, the provision of nautical services, and in particular the business of renting berths for pleasure craft, has become an important economic activity. In fact, nautical tourism has become of strategic interest and certainly requires a solid and adequate legal framework to ensure its further sustainable development.

In this context, berthing contracts have been identified as an important legal basis for the successful business of renting berths in Croatian ports. As in most other maritime countries, prior to the last revision of the Maritime Code of 2019,⁴ berthing contracts in Croatia were not specially regulated by any source of legislation and therefore belonged to the group of innominate contracts. However, in practice they have been the most frequently concluded contracts in the field of nautical tourism. The research conducted as part of the DELICROMAR⁵ project

² Croatian Bureau of Statistics, *Nautical Tourism – Capacity and Turnover of Ports 2019*, First Release no. 4.3.4, 15 May 2020.

³ According to Croatian law, in particular the Maritime Domain and Seaports Act (*Official Gazette*, 158/2003, 100/2004, 141/2006, 38/2009, 123/2011, 56/2016, hereinafter: MDSPA) and subsidiary legislation, berths for pleasure craft can be established in county and local ports open to public traffic, nautical tourism ports and sports ports. However, unlike nautical tourism ports that are operated commercially, sports ports are given under concession to non-profit sport clubs, and berths therein are designated for pleasure craft owned or used for non-commercial purposes by the members of the club. It is estimated that in Croatia there are about 9,000 pleasure craft berths in sports ports (see Luković, T. et al., *Nautički turizam Hrvatske*, Redak, Split, 2015, p. 167), about 2,000 pleasure craft berths in county and local ports (see Perko, N., *Valorization of the Maritime Traffic Vessel Impact to the Capacity of the Sea Ports*, Doctoral Thesis, Faculty of Transport and Traffic Sciences, University of Zagreb, Zagreb, 2017, p. 24, available from <https://repozitorij.fpz.unizg.hr/en/islandora/object/fpz%3A820>, accessed 18 December 2018) and about 18,200 berths in nautical tourism ports (see Croatian Bureau of Statistics, 2020, *op. cit.*) However, it should be noted that these assessments vary considerably, due to the large number of administratively unregulated and unclassified berths.

⁴ The Act on Amendments to the Maritime Code, *Official Gazette*, no. 17/2019.

⁵ The research covered 37 marinas run by 12 marina operators in Croatia, the Association of Croatian Marinas of the Croatian Chamber of Economy, the Ministry of the Sea, Tran-

has shown that berthing contracts in Croatia have not reached such a level of standardisation as to be considered a typical contract. Furthermore, the research has shown that in practice written berthing contract forms and the general terms and conditions of the various marina operators and other port operators providing berthing and mooring services frequently suffer from a lack of clarity and precision, resulting in non-uniform interpretation and judicial practice. On the other hand, most Croatian port operators, as providers of berthing and mooring services, apply very similar rules of practice, implementing three to four essentially equal berthing contract models. The fact that practical implementation of berthing contracts is comparable and actually very similar in Croatian ports provides a solid basis for formal standardisation of private regulation, particularly in terms of port operator general terms and conditions and berthing contract models. Moreover, the research results led to the conclusion that legislative regulation of this frequently concluded contract that is vital for all pleasure craft berthing service providers is both possible and desirable as a major step towards legal certainty in the field.⁶ Finally, the legislator adopted *de lege ferenda* proposals created within the DELICROMAR project and introduced special legislative provisions regulating berthing contracts as nominate contracts. The new legislative provisions were included in the latest revision of the Maritime Code of 2019.

The main contents of any berthing contract include the service provider's obligation to provide a safe berth for a particular vessel during a defined period of time in consideration of a certain fee. Additionally, the service provider may un-

sport and Infrastructure, and the Ministry of Tourism. The research was based on an analysis of marina operator general terms and conditions and berthing contract forms, followed by interviews with marina management, combined with a written questionnaire. It also covered all relevant sources of legislation and case law. In addition, the research included a comparative analysis of the relevant legal sources and business practices in Slovenia, Montenegro, Malta, Italy, Spain and the United States.

⁶ For a more detailed discussion, see Padovan, A. V., *Marina Operator's Liability Arising from Berthing Contracts and Insurance Matters*, *Comparative Maritime Law*, vol. 52, no. 167, 2013, pp. 1-35; Skorupan Wolff, V.; Padovan, A. V., *Are there any Elements of the Contract of Custody in the Marina Operators' Contracts of Berth?*, in Ćorić, D.; Radionov, N.; Ćar, A. (Eds.), *Conference Book of Proceedings of the 2nd International Conference on Transport and Insurance Law, INTRANSLAW Zagreb 2017*, Faculty of Law, University of Zagreb, Zagreb, 2017, pp. 313-353; Padovan, A. V.; Skorupan Wolff, V., *The Effect of the Craft's Sinking on the Contractual Relationship of the Parties to the Contract of Berth and Deposit of a Pleasurecraft*, *Conference Book of Proceedings of the 2nd Adriatic Maritime Law Conference, 2nd AMLC 2017, Comparative Maritime Law*, vol. 57 (2018), no. 172, pp. 149-175; Skorupan Wolff, V.; Padovan, A. V., *Ugovor o vezu de lege ferenda*, in Barbić, J. (Ed.), *Pravni okvir za luke nautičkog turizma (The Legal Framework for the Nautical Tourism Ports)*, Nakladnički niz Modernizacija prava, knjiga br. 42, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2018, pp. 41-93.

dertake to supervise the berthed vessel or to perform certain additional services or work in relation to it. The contract itself is the main legal source relevant for the interpretation of the legal relationship between the service provider and the berth user. However, if there is a dispute and the contract itself or the applicable general terms and conditions of the berth provider are not sufficiently clear, the competent court will construe the contract in accordance with the applicable legislative provisions. Prior to the new legislative solution adopted within the framework of the Maritime Code as amended in 2019, the courts had to construe the contract in accordance with the general rules and principles of contract law contained in the Civil Obligations Act.⁷ Since prior to 2019 a berthing contract was an innominate contract, the courts would, where necessary, look into the special provisions of the Civil Obligations Act that specifically regulate certain types of nominate contracts which by their nature most closely corresponded to the contract in dispute. Usually, the subsidiary application of the legislative provisions on rental contracts, service contracts (*locatio conductio operis*), mandates and deposits (bailments, custody) used to come into play, but also other nominate contracts could have been relevant in a particular instance.⁸

Taking into consideration that the average value of the vessels in permanent berths in Croatian marinas amounts to about €165,000, although the value frequently reaches over €1,000,000, the claims in question tend to be very high.⁹ Disputes are usually complicated, especially in terms of evidence proceedings, and they tend to be lengthy and costly. Unclear and imprecise contract forms and marina operator general terms and conditions resulting in non-uniform judicial practice additionally complicate the situation. On the other hand, the business practice in terms of the content and description of berthing services used in pleasure navigation has been sufficiently harmonised. Therefore, it seemed sensible to introduce a set of new legislative provisions regulating berthing contracts, harmonising the theoretical concepts and practical solutions, and establishing a coherent system of predominantly dispositive legal norms. The new legislative text should serve as a minimum legal standard and as a guideline for further harmonisation and standardisation of private regulation, i.e. berthing contract standard forms and general terms and conditions used in practice.

⁷ *Official Gazette*, nos. 33/2005, 41/2008, 125/2011, 75/2015.

⁸ Padovan, A. V., *Marina Operator's Liability Arising from Berthing Contracts...*, *op. cit.*, pp. 16-21; Skorupan Wolff, V.; Padovan, A. V., *Ugovor o vezu de lege ferenda...*, *op. cit.*, p. 42.

⁹ 95% of the pleasure craft permanently berthed in Croatian marinas are below 20 m in length, but the remaining 5% of vessels are larger yachts that sometimes reach values of up to €20 million. See Skorupan Wolff, V.; Padovan, A. V., *Ugovor o vezu de lege ferenda...*, *op. cit.*, p. 43.

The idea of introducing berthing contracts as a new nominate contract in Croatian law was widely supported by the profession and the legislator. Therefore, a proposal of new legislative provisions on berthing contracts was submitted to the Expert Committee of the Ministry of the Sea, Transport and Infrastructure for the revision of the Maritime Code¹⁰ in November 2011. It was drafted based on the DELICROMAR project research results to reflect and duly respect existing business practices. The proposal was included in the final draft of the Act on Amendments to the Maritime Code (P.Z.E. No. 421) submitted to Parliament in August 2018 and finally adopted by the Parliament in February 2019. In the following text, we will present and analyse the new legislative provisions regulating berthing contracts.

2. A DEFINITION OF BERTHING CONTRACTS AND THE SCOPE OF APPLICATION OF THE NEW LEGISLATIVE PROVISIONS

The new legislative provisions regulating berthing contracts are contained in the Maritime Code, Part VII – Contracts, under new Heading II A) - Yacht and Boat Charter Contracts and Pleasure Navigation Berthing Contracts (Arts. 673 j) *et seq.*). A berthing contract is defined as a contract in which a berthing service provider undertakes to provide a place for the safe berthing of a particular yacht or boat in the sea or on land, and in return the berth user undertakes to pay a berthing fee. The new legislative provisions are designed and adapted for berthing contracts commonly concluded in the course of pleasure navigation. In other words, they apply to pleasure craft berths, whilst berthing contracts for merchant ships, fishing vessels, inland navigation vessels and all other types of vessel remain innominate contracts under Croatian law. However, it should be noted that the new provisions on pleasure navigation berthing contracts are also relevant to other categories of berth, as their subsidiary application by way of analogy is possible due to the fact that the new legislative provisions most closely correspond to the respective innominate contracts, i.e. contracts relating to all other categories of berth.¹¹

¹⁰ The Maritime Code, *Official Gazette*, nos. 181/2004, 76/2007, 146/2008, 61/2011, 56/2013, 26/2015.

¹¹ On the interpretation and construction of contracts by the analogous application of legislative provisions, see Slakoper, Z.; Gorenc, V., *Obvezno pravo: Opći dio – sklapanje, promjena i prestanak ugovora (The Law of Obligations: General Part – Contract Conclusion, Alteration and Termination)*, Novi informator, Zagreb, 2009, p. 111.

Whilst the essential obligation of the berthing service provider is to assign a place for a safe berth for a particular vessel, the contract may include certain additional obligations on the part of the berthing service provider, including in particular the supervision of the vessel and or additional work or services in relation to the berthed vessel. The additional obligations of the berthing service provider are not presumed and must be expressly stated and defined in the contract.

The relevant business practice differentiates between a permanent berth and a transit berth. A transit berth is used in the course of navigation as a temporary berth for the purpose of taking on supplies, carrying out small repairs, changing the nautical tourists on board, sleeping over, sheltering from bad weather, etc. It presupposes a short-term contractual relationship which can last several hours, a day, or a few days or weeks.¹² On the other hand, a permanent berth presupposes a long-term contractual relationship and its purpose is *inter alia* vessel lay-up outside the navigation season. In local business practice, a permanent berth is usually based on an annual contract with the possibility of automatic extension or renewal. The new legislative provisions on berthing contracts apply to both categories of berth. The distinction between permanent and transit berths is not firmly defined. It is broadly determined as arising from the parties' intentions and the nature of the contract (Maritime Code, Art. 673 k), para. 1).

A berthing contract is regulated as a consensual and informal contract, which means that it is concluded when the parties have agreed upon the essential terms of the contract, and therefore no special form is required for the contract to be effected. In practice, a permanent berthing contract is commonly concluded in written form, but *de lege lata* the written form is not compulsory (Maritime Code, Art. 673 k), para. 3). On the other hand, a transit berthing contract is considered to have been concluded when the vessel gets into the berth, unless the berthing service provider objects to this (Maritime Code, Art. 673 k), para. 2).

Furthermore, the new legislative provisions apply to sea berths as well as to dry berths. In this sense, it is irrelevant whether the dry berth is located in a port, on the maritime domain or inland, as long as it is technically equipped to allow for the stay and accommodation of persons on board, and as long as it is concerned with navigation. In other words, its aim must be connected with maintaining the vessel's main and real purpose of being used for navigation. Thus, it is logical that the berth user's obligation is to maintain the vessel in a seaworthy condition throughout the contract period. On the other hand, vessel storage or deposit in hangars or similar fenced and locked facilities, where no stay or ac-

¹² Padovan, A. V.; Skorupan Wolff, V., *The Effect of the Craft's Sinking...*, *op. cit.*, p. 158.

commodation of persons on board is possible and no preparation of the vessel for navigation can be performed, does not fall within the scope of application of the new legislative provisions. In the absence of clear and precise contractual provisions, the latter arrangements remain subject to the existing provisions of the Civil Obligations Act regulating deposit contracts.¹³

3. CONTRACTING PARTIES

a) The Berthing Service Provider

The legal term “berthing service provider” encompasses any person, legal or natural, whose business activity is to provide berthing services for pleasure navigation. The new legislative provisions do not define a list of stakeholders that provide such services, such as marina operators, public port operators, concessionaires in public ports, sport clubs operating sports ports, and anchorage, mooring area and similar berthing or mooring facility operators. The respective list of possible entities and enterprises as well as their legal nomenclature depend on the legislative regulation of ports and the maritime domain, in particular the MDSPA and subsidiary legislation. Therefore, the drafters did not wish to burden the text of the Act on Amendments to the Maritime Code with provisions that would be dependent upon other maritime legislation which is currently also under revision, and potentially subject to many further and frequent amendments in future. Instead, the term “berthing service provider” is introduced as a widely defined legal term encompassing all stakeholders providing berthing services for pleasure navigation. The new legislative provisions also treat the problem of illegal berths, i.e. berths that have been illegally built, established or offered on the market against the rules of the MDSPA, the Tourism Services Act (TSA),¹⁴ or subsidiary legislation, or in breach of the relevant concession contract for commercial use of the maritime domain. Berthing contracts involving such illegal berths would be valid but voidable. It is prescribed that if a berthing service provider exploits a berth which is subject to a berthing contract but without any legal basis to perform such a business activity in accordance with the laws regulating seaports, the maritime domain and the provision of services in nautical tourism, the berthing service provider shall be strictly liable to the berth user for any damage or loss occurring in relation to the contract (Maritime Code, Art. 673 lj), para. 2 – 4). Besides the prescribed civil law sanction of strict liability, such berthing service providers shall also be subject to the administrative and

¹³ Skorupan Wolff, V.; Padovan, A. V., *Ugovor o vezu de lege ferenda...*, op. cit., p. 49.

¹⁴ *Official Gazette*, no. 130/2017.

criminal law sanctions already prescribed by the MDSPA, TSA and Criminal Code.^{15,16} Furthermore, the legislative provisions regulating berthing contracts stipulate that in the abovementioned case the berth user shall also be entitled to rescind the contract (Maritime Code, Art. 673 lj), para. 5). It should be noted that according to the existing general rules of contract law, the berth user is also entitled to set the contract aside as voidable based on fraudulent deception (Civil Obligations Act, Art. 284) or a mistake as to the subject matter contained in the contract (Civil Obligations Act, Art. 280).

b) The Berth User

In permanent berthing contracts, the berth user is normally the owner, lessee, bareboat charterer or manager of the berthed vessel. On the other hand, in transit berthing contracts, the berth user can also be the charterer of the berthed vessel.

A special problem arising in practice relating to permanent berthing contracts is a change of ownership or possession of the vessel during the contract period. Since a contract is binding only upon the contracting parties, a change of ownership or possession of the vessel does not automatically lead to a change of the user of the berth. The original berth user should thus continue to be bound by the contract until its expiry, cancellation, termination or assignment. However, due to the nature of berthing contracts, which presupposes a close relationship between the contracting parties and a factual and legal link between the berth user and the vessel which is subject to the berthing contract, the identity of the berth user is of crucial importance to the berthing service provider. This especially follows from the fact that some of the berth user's main obligations are to keep the vessel in a safe and sound seaworthy condition and to effect and maintain adequate insurance cover for the vessel, including hull and machinery and third-party liability insurance. Furthermore, the berth user's identity and ownership of the vessel is also crucial, as the vessel represents a type of security for the berthing service provider's claims under the berthing contract.

It is therefore recommended that the parties precisely regulate the consequences of a change of ownership or possession of the vessel in a permanent berthing contract. In the absence of an express contractual provision concerning this issue, the general rule on the assignment of contracts applies (Civil Obliga-

¹⁵ *Official Gazette*, nos. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017.

¹⁶ E.g. sanctions for illegal use of the maritime domain are prescribed in Articles 112 and 114 of the MDSPA. The Criminal Code prescribes a criminal sanction for illegal construction on the maritime domain in Article 212.

tions Act, Art. 127). Consequently, the berth user may assign the contract to the new owner of the vessel, subject to the berthing service provider's approval of such assignment. In practice, however, the berthing service provider's general terms and conditions usually expressly stipulate that the berthing contract cannot be assigned to a third party, and that in the case of a change of ownership or possession of the vessel, the berthing service provider is entitled to unilaterally cancel the contract.

As far as transit berths are concerned, a possible question relates to the identity of the berth user in the case of a chartered vessel. Usually, in pleasure navigation transit berthing contracts, the person acting on behalf of the vessel (yacht or pleasure craft) is the skipper. The identity of the berth user in the case of a chartered vessel then depends on the nature of the charter-party agreement, in particular on whether the vessel is chartered with or without a crew. If the vessel is chartered without a crew, the skipper acts on behalf of the charterer, and therefore the transit berthing contract will bind the charterer, whereas if the vessel is chartered with a crew, the contract will bind the owner, lessee or the bareboat charterer of the vessel that has chartered the vessel with the crew.¹⁷

4. ESSENTIAL ELEMENTS OF A BERTHING CONTRACT

a) The Berth

The main element of any berthing contract is the obligation to provide a place for a safe berth for the accommodation of a particular vessel and persons on board the vessel over a limited period of time. It follows that the main purpose of a berthing contract is always the use of a berth, which means that by its nature any berthing contract is a contract for use – *locatio conductio rei*.¹⁸ Although the allocation of a berth is an essential element of a berthing contract, and in practice the contract will normally define the exact position of the allocated berth, the subject matter of the contract is not necessarily the exact individual

¹⁷ Skorupan Wolff, V.; Padovan, A. V., *Ugovor o vezu de lege ferenda...*, *op. cit.*, pp. 56-57. For a more detailed discussion and analysis of the civil liability of the owner, bareboat charterer, lessee or charterer of pleasure craft under Croatian law, see Čorić, D., *Application of Non-Contractual Liability of Shipowner and Ship Operator Prescribed by the Maritime Code on Yachts and Boats*, *Conference Book of Proceedings of the 2nd Adriatic Maritime Law Conference, 2nd AMLC 2017, Comparative Maritime Law*, vol. 57 (2018), no. 172, pp. 131-147.

¹⁸ For a more detailed discussion and analysis of the nature of berthing contracts, see Skorupan Wolff, V.; Padovan, A. V., *Are there any Elements of the Contract of Custody...*, *op. cit.*, pp. 326-330.

berth but any berth of the berthing service provider which is adequate and safe for the particular vessel.¹⁹

Therefore, according to Article 673 j), para. 2 of the Maritime Code, a berthing service provider is entitled to reassign the vessel unilaterally to any other adequate berth at any point in time without asking for the berth user's approval and regardless of the reasons for the reassignment. This will allow the berthing service provider to dispose freely of their berthing capacity. The motive for the reassignment could be commercial or driven by safety reasons.

b) The Vessel

Another essential element of a berthing contract is the vessel (yacht, boat or pleasure craft) for which a berth is allocated. The vessel must be defined by the contract, and the allocated berth must be adequate for that vessel and its technical features (Maritime Code, Art. 673 j), para. 1). Consequently, the berth user is not allowed to place any other vessel into the allocated berth (Maritime Code, Art. 673 o) and 673 v), para. 2).

However, a specific situation arises when a berthing service provider contracts a number of berths for the same berth user, typically a chartering company. It is possible that such a contract would allow the chartering company to use an entire pier for all the vessels of its charter fleet as long as it duly respected the port rules and safety regulations and other technical requirements related to the arrangement of the berths and their equipment. The reality is that the chartering company is likely to occasionally move its vessels amongst the berths, despite the fact that the contract nominally assigns particular vessels to individual berths.

In any case, the legislative solution reflects the prevailing business practice whereby the vessel is defined by the contract and the berth user may not use the allocated berth for any other vessel, whilst the berthing service provider is entitled to reassign the vessel to any other adequate berth. It should be pointed out that the respective provisions are of a dispositive nature and the parties are free to contractually regulate the matter in a different manner.

¹⁹ Judicial practice has confirmed the position that by concluding a berthing contract the berth user does not acquire the right to use an individually determined berth but acquires the right to be assigned an adequate berth during the time the vessel is in the nautical tourism port. See High Commercial Court, Pž-8130/03, 22 November 2016.

c) The Berthing Fee

A berthing contract is a contract against payment (Maritime Code, Art. 673 j), para 1). Therefore, the berth user's obligation to pay a berthing fee is their main obligation, and the berthing fee is an essential element of a berthing contract. In practice, the berthing fee, as the main source of income for berthing service providers, is always defined by the contract. Usually, the berthing service providers publish price lists for their services that constitute an integral part of all their berthing contracts. Moreover, Art. 6 of the TSA prescribes that all providers of tourism services must duly publish the standard terms and conditions and prices for all their services. This *inter alia* applies to berthing and related services as a type of nautical tourism service.

5. THE BERTHING SERVICE PROVIDER'S RIGHTS, OBLIGATIONS AND LIABILITY

a) Provision and Maintenance of the Berth

Providing a berth is the main obligation of the berthing service provider, and it is central to the entire legal relationship between them and the berth user. Essentially, the obligation presumes the provision of a part of the sea or land area and the infrastructure, facilities and equipment needed for the safe berthing of a vessel. In particular, a sea berth in a marina normally presumes a berthing place in the sea with adequate access to the vessel from the shore, and a mooring block with mooring lines and chains or other technical solutions for safe berthing. In addition, marina berths usually include the necessary land equipment, infrastructure and facilities to supply berthed vessels with electricity and fresh water. The Maritime Code, Art. 673 l), stipulates that a berth must be safe and sound. The applicable law and rules of practice are relevant in determining whether these conditions have been fulfilled. In the case of a dispute, the technical evidence determines the safety and soundness of an individual berth. It is a matter of fact that must be established in each individual case. Besides having adequately built and equipped infrastructure, mooring systems and facilities, a berth must be adequate for the individual vessel assigned thereto, especially regarding its type, building material, dimensions and other technical and maritime features. Furthermore, it should offer reasonably adequate protection against hydro-meteorological influences.

The berthing service provider's obligation to provide a safe and sound berth is continuous, which means that a berth must be regularly checked and maintained in this condition throughout the contract.

It is expressly prescribed that a berthing service provider must act with due care, and the standard of care applied must be the degree of prudence and caution required of a reasonably cautious professional (Maritime Code, Art. 673 l)).²⁰

In practice, it is recommended that berthing service providers rely on the formal protocols of check-ups and the maintenance of berths, relevant infrastructure, equipment and facilities for the purpose of supervising their safety and soundness, and have an adequate number of well-trained and qualified staff to carry them out. Combined with clear and precise standard berth contract clauses and general terms and conditions, such formalised protocols contribute to a clearer description of the berthing service provider's obligations and a higher standard of legal certainty.²¹

b) Liability for Material Defects

It is stipulated that material defects exist when a berth is not safe for its intended use or if it becomes unsafe during the contract period (Maritime Code, Art. 673 m)). In either of these events, a berth user is entitled to terminate the contract and claim damages, unless the berthing service provider removes the defects or assigns the vessel to another adequate safe berth. Therefore, a berth user's primary right is to request the removal of defects or the reassignment of the vessel to another adequate berth, and their secondary right is to terminate the contract and claim damages. In practice, this means that to terminate the contract a berth user would first have to allow for an additional reasonable deadline for the berth service provider to remove the defects or to reassign the vessel to another adequate berth. Exceptionally, the berth user would be allowed to terminate the contract instantly if the berthing service provider expressly refused

²⁰ Under Croatian law, the due care of a reasonably cautious professional is the highest standard of care. It goes beyond the standard of care of a *bonus pater familias* and of a reasonably cautious entrepreneur. For a more detailed explanation of the standard of care under Croatian law, see Gorenc, V. *et al.*, *Komentar Zakona o obveznim odnosima (A Commentary on the Civil Obligations Act)*, Narodne novine, Zagreb, 2014, pp. 22-23.

²¹ It is worth noting that within the DELICROMAR project a set of recommended berthing contract standard clauses and models for marina operators was drafted and published in Barbić, J.; Padovan, A. V.; Skorupan Wolff, V. (Eds.), *Novi pravni režim za marine (The New Legal Regime for Marinas)*, Nakladnički niz *Modernizacija prava*, knjiga br. 47, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2019, pp. 319-409. See also: Skorupan Wolff, V.; Padovan, A. V., *Standardizirani modeli ugovora o vezu za hrvatske marine kao korak naprijed*, in Barbić, J., Padovan, A. V., Skorupan Wolff, V. (Eds.), *Novi pravni režim za marine*, *op. cit.*, pp. 127-195.

to perform as requested or if it became evident that the berthing service provider would not perform their duty to remove the defects or to reassign the vessel to another adequate berth. Furthermore, a berth user may terminate the contract instantly if the main cause of the contract cannot be realised due to the berthing service provider's default.²²

Subsidiary to the relevant provisions of the Maritime Code on the berthing service provider's liability for the material defects of a berth (Art. 673 m)), the provisions of the Civil Obligations Act on the liability of a seller for material defects apply (Arts. 400 – 422) in accordance with the general rule of contract law contained in Article 357 of the Civil Obligations Act regulating the effects of bilateral contracts, in particular the liability for material defects in performance.

According to the general rules of contract law, the effect of termination of the berthing contract in this case would be the same as the termination of a bilateral contract due to non-performance. Both parties would be freed from their contractual obligations, whilst the party that had already performed under the contract would be entitled to restitution and to claim compensation for any benefits that the other party had realised based on what had been performed under the contract.²³ Since this is a case of termination due to non-performance on the part of the berthing service provider, the berth user would also have a right to claim damages for breach of contract in accordance with Articles 342 – 349 of the Civil Obligations Act and also by way of analogous application of the provisions contained in Articles 1045 *et seq.* of the same Act, which generally regulate third-party liability for damages. Finally, in the case of material defects of an illegal berth, as explained above in 3.a), the berthing service provider would be subject to a strict liability regime based on causality.

The new provisions stipulate that a berthing service provider may exclude or limit liability for material defects unless they are a consequence of their wilful misconduct or gross negligence (Art. 673 m), para. 2), which is in accordance with the mandatory provision of the Civil Obligations Act forbidding contractual exclusion or limitation of liability for wilful misconduct and gross negligence (Art. 345, para. 1). Furthermore, in accordance with Article 408, para. 2 of the Civil Obligations Act, which would apply in a subsidiary manner to the newly proposed provisions of the Maritime Code on berthing contracts, a contractual exclusion or limitation of liability for material defects would be null and void if the defect was known to the berthing service provider and they did not inform

²² This is in accordance with Articles 357, para. 3 and 412 of the Civil Obligations Act.

²³ See the commentary for Article 419 of the Civil Obligations Act in Gorenc, V. *et al.*, *op. cit.*, pp. 719.

the berth user about it, or if such a contractual clause was imposed on the berth user as a consequence of the berthing service provider's monopolistic position or if the contract in question was a consumer contract.

c) Urgent Unforeseeable Interventions in Respect of the Vessel

Under normal circumstances, the condition of the berthed vessel and moorings is such that no additional significant interventions are necessary to maintain safety. Depending on the type of berthing service provider, the scope and quality of service, and the price of the berthing contract, the berthing service provider may carry out periodic check-ups of the berthed vessel for the purpose of supervision of the vessel, including the state of the fenders and moorings. In addition, a berthing service provider may undertake to adjust the fenders, moorings and other berthing equipment occasionally, depending on the hydro meteorological conditions. The said services are typical of permanent berths in marinas, which are the most complex type of nautical tourist port, whilst they are normally not provided under transit berthing contracts and are unlikely to be offered in ports open to public traffic.

However, the described ordinary situation should be distinguished from one where certain extraordinary circumstances require urgent intervention to protect the vessel, people, environment, and other vessels in the port, or the port infrastructure, facilities or equipment from immediate danger. In such cases, the berthing service provider should undertake reasonable measures to protect the safety of the vessel and other interests involved from the extraordinary danger. Such situations require urgent intervention to prevent or minimise damage, and there is no time for the berthing service provider to contact the berth user for instructions regarding the vessel. It should be pointed out that certain obligations and powers to act in the public interest in order to preserve safety at sea and protect the marine environment are bestowed upon berthing service providers by law and, where applicable, by the concession agreements giving the commercial operators the authority to operate a port or port area, mooring area, anchorage, etc. Therefore, to clarify the contractual position of a berthing service provider in the case of an emergency, it is prescribed that a berthing service provider is entitled to intervene in respect of a berthed vessel without the prior approval of the berth user, regardless of the cause giving rise to the extraordinary dangerous circumstances (Maritime Code, Art. 673 nj)). These interventions are defined as being necessary to prevent or minimise damage and to protect the vessel from damage or loss, to maintain its stability and floatability, eliminate danger to the life and health of people, protect the environment, other vessels, port equip-

ment and infrastructure, and also include interventions ordered by the competent public authorities. It should be stressed that urgent interventions are not regulated as the berthing service provider's contractual obligation but as their right under the contract. The respective provisions do not specifically deal with liability for the costs of these interventions. Therefore, according to the general provisions of the Civil Obligations Act, the party bearing the risk or liability for the occurrence of the circumstances giving rise to the necessary intervention shall bear the costs of the intervention. It is recommended to regulate the coverage of the cost of these interventions in more detail in the contract.²⁴

d) The Supervision of the Berthed Vessel

As already mentioned, the supervision of the berthed vessel is not foreseen as an essential element of a berthing contract. Therefore, if the parties agree to include this as an obligation on the part of the berthing service provider, it must be expressly stated in the contract (Maritime Code, Art. 673 j), para. 3). Research shows that the most frequent model of a permanent berthing contract used by marina operators in Croatia is one that includes the berthing service provider's obligation to supervise the berthed vessel.²⁵

Therefore, the new dispositive provisions of the Maritime Code regulating berthing contracts provide for special rules on vessel supervision as a possible additional obligation of a berthing service provider. The relevant legal provisions reflect the existing well-established business practice in Croatia, which is also very similar to the relevant practice in certain other countries included in the research.²⁶

It is prescribed that if vessel supervision is expressly contracted, the berthing service provider is obliged to check the condition of the vessel and its equipment periodically in a customary manner, in other words by means of an ordinary external inspection from the pier (Maritime Code, Art. 673 n), para. 1). If, however, it is expressly agreed, the vessel supervision may include an occasional internal visual inspection of the vessel.

The customary external inspection of the vessel from the pier in practice presumes that trained dock staff periodically inspect the berthed vessel according

²⁴ For a more detailed discussion on the berthing service provider's right to intervene in the case of an emergency, see Skorupan Wolff, V.; Padovan, A. V., *Ugovor o vezu de lege ferenda...*, *op. cit.*, pp. 64-69.

²⁵ See Skorupan Wolff, V.; Padovan, A. V., *Are there any Elements of the Contract of Custody...*, *op. cit.*, pp. 319-321.

²⁶ See *supra*, n. 5.

to pre-established protocols by checking the vessel's condition, equipment, and stern lines externally from the pier. Certain berthing service providers, however, carry out periodic internal check-ups of the vessel, which presumes that dock staff periodically, according to pre-established protocols, board the vessel, enter the cabin, visually survey the interior and check the bilge water. The practice of vessel supervision also differs regarding the delivery of the vessel keys, certificates, and inventory lists. Some berthing service providers contractually regulate their delivery and some do not take delivery of these items at all.

As regards the moment when the obligation to supervise a vessel begins and ends, or when it is suspended, it should be kept in mind that throughout the normal implementation of a berthing contract, the berth user may board and use the vessel, sail it and return it to its berth as they wish. This necessarily impacts upon the berthing service provider's obligation to supervise the vessel if this has been agreed. The obligation to supervise the vessel exists, provided that the following conditions have been fulfilled cumulatively (Maritime Code, Art. 673 n):

- the obligation to supervise the vessel is expressly contracted;
- the vessel is berthed; and
- the berth user, or any other person authorised by the berth user, is not on board the vessel.

Therefore, it is prescribed that the obligation to supervise the vessel is suspended when the berth user, or any other person authorised by the berth user boards the vessel (Maritime Code, Art. 673 n), para. 3). The judicial practice in this regard is yet to interpret when in particular it is presumed that the berth user has boarded or disembarked from the vessel and consequently when the obligation to supervise the vessel has been suspended. However, contracting parties are free to regulate the duration of the berthing service provider's obligation to supervise the vessel by fixing its commencement, suspension or end to a specific moment, e.g. the delivery and return of the vessel keys or certificates, checking in and out at the reception desk, digital registration with a key card upon entrance and exit, etc.

It is recommended to contractually regulate in detail the content and scope of the obligation to supervise the vessel, as well as the legal effects of delivery of the vessel keys, certificates and vessel inventory list, in particular the exact time when the obligation to supervise the vessel commences and when it ends or is suspended.²⁷

²⁷ For a more detailed discussion on the obligation to supervise the berthed vessel according to the new legislative solution, see Skorupan Wolff, V.; Padovan, A. V., *Ugovor o vezu de lege ferenda...*, *op. cit.*, pp. 74-78.

e) Other Additional Work and Services

The legislative provisions regulating berthing contracts allow the contracting parties to include additional berthing service provider obligations to perform certain work and services in respect of the vessel along with the main obligation to provide a safe berth. This has to be done by means of an express contractual provision. For example, additional work and services may include vessel deposit services, maintenance, winterising, servicing, travel-lifting, and similar. In particular, a deposit service may include airing the interior, cleaning, emptying rainwater, pumping out bilge water, covering the vessel with a tarpaulin, periodic starting-up of the vessel engines, charging the batteries, etc. Maintenance usually includes work and services related to regular maintenance of the vessel hull, machinery and equipment necessary for keeping the vessel in a seaworthy condition. Deposit of the vessel is a specific obligation that involves the obligation to supervise a berthed vessel but is obviously much more complex. It is, therefore, important to distinguish the gradation between supervision and deposit.²⁸

Research shows that in the business practice of Croatian marinas there are two permanent berthing contract models including a deposit obligation towards the vessel along with the main obligation to provide a safe berth:

²⁸ In practice and in the legal literature, there has been a lot of discussion on the nature of berthing contracts. For a more detailed comparative analysis and further references, see Padovan, A. V.; Petit Lavall, M. V.; Casciano, D., *Marina Operator Berthing Contracts from a Comparative Law Perspective*, *Revista de Derecho del Transporte*, 23 (2019), pp. 39-97. The main question is whether the contract is primarily a rental contract or a contract of deposit. Croatian judicial practice has frequently taken the position that a berthing contract presumes the marina operator's obligation to safeguard the vessel as a depository and to restore it to the berth user as the depositor on their demand. See e.g. Supreme Court: Rev-756/11, 30 October 2013; Rev-2454/95, 6 May 1999; Rev 2333/2010, 14 May 2013. On the other hand, practitioners and academics have argued that a berthing contract is primarily a contract for use (lat. *locatio conductio rei*), i.e. it is similar to a rental contract, and additional services can be included therein under express contractual provisions. *Inter alia*, a marina operator may undertake to safeguard the vessel, which presumably means that the marina operator is in the legal position of a depository. However, in practice there has been a lot of misunderstanding regarding the meaning and content of the obligation to safeguard the vessel in the context of berthing contracts. Through research, we have clarified that in the case of permanent berthing contracts, along with berthing rental, most marinas contract vessel supervision that is far less complex than safeguarding or safekeeping as contemplated in contracts of deposit, and which does not presume the transfer of possession. For a thorough analysis and discussion of the issue, see Skorupan Wolff, V.; Padovan, A. V., *Are there any Elements of Custody...*, *op. cit.*

- i. berthing rental plus vessel supervision with an option of contracting a service package including explicit elements of deposit;
- ii. berthing contracts and boat storage contracts containing explicit elements of deposit.

In the first model, it is specified that the marina offers the possibility to a permanent berth user of opting for an additional service package that in terms of its contents amounts to the deposit of the vessel. If the berth user chooses this option, all three services are provided under the same berthing contract: berth rental, vessel supervision and deposit. The second model is rarely applied in Croatian marinas and is more frequent in the case of dry berths or boat storage on land.²⁹ An analysis of the business practice of berthing service providers shows that vessel deposit and maintenance services are almost always contracted separately and not as part of a berthing contract. In some Croatian marinas, it is possible to contract so-called boat-care services with specialised service providers offering such services commercially within the marina. More frequently, however, vessel owners engage persons of their own choice to safeguard and take care of the vessel during their absence.³⁰ In particular, in the case of large yachts and pleasure craft with complex machinery, equipment, and electronic and hydraulic systems, a permanent crew is frequently engaged to take care of the vessel on a continuous basis.

Some marina operators offer directly or through their sub-contractors vessel repair and maintenance, winterising, recommissioning, cleaning and similar services under separate special contracts that are by their nature most similar to a vessel repair contract specially regulated under the Maritime Code (Arts. 430 – 440).

f) Right of Retention and Maritime Lien

One of the important legislative solutions included in the Act on Amendments to the Maritime Code of 2019 is the introduction of the *ex lege* right of retention in favour of the berthing service provider. *De lege lata*, the berthing service provider is entitled to retain the vessel and all its appurtenances in order to secure their claims arising from or in relation to the berthing contract (Maritime Code, Art. 673 s)). The claims that can be secured by exercising the right of retention include:

²⁹ Skorupan Wolff, V.; Padovan, A. V., Ugovor o vezu *de lege ferenda...*, *op. cit.*, p. 79.

³⁰ Skorupan Wolff, V.; Padovan, A. V., Are there any Elements of Custody..., *op. cit.*, p. 319.

- i. unpaid berthing fees;
- ii. all other claims arising from berthing contracts, such as claims for damages and expenses incurred by the berth user, including *inter alia* the costs of urgent interventions; and
- iii. claims in relation to the vessel being kept and retained in berth after termination, cancellation or expiry of the berthing contract.

The right of retention may be exercised until the full settlement of all claims in respect of which retention is allowed. The right is exercised by retaining the vessel in its current berth or by moving the vessel to another safe berth in the sea or on land.

Although the right of retention exists under the general rules of the Civil Obligations Act, its application for the purpose of security for the claims of marina operators and other berth service providers has so far been disputable.³¹

In this context, it is important to note that according to the general rules, berthing service providers may exercise the right of retention over a berthed vessel only if it is owned by the berth user against whom the claim has arisen, and provided that the berthing service provider is in possession of the vessel.³² Since berthing contracts in practice are rarely contracts of deposit, and more frequently are berth rental contracts with additional services, including in particular the service of vessel supervision, the berthing service provider normally does not take possession of the vessel in such contracts. Therefore, it is recommended to contractually regulate the possibility of the berthing service provider entering into possession of the vessel under certain conditions, for the purpose of exercising the right of retention.

Furthermore, the amendments to the Maritime Code of 2019 include *inter alia* a revision of Article 912 on the ranking of claims against the proceeds of a judicial sale of a vessel in enforcement proceedings. It is prescribed that all creditors secured by the rights of retention prescribed by the Maritime Code

³¹ For a more detailed discussion, see Skorupan Wolff, V.; Padovan, A. V., *Ugovor o vezu de lege ferenda...*, *op. cit.*, pp. 81-83. See also Padovan, A. V.; Petit Lavall, M. V.; Merialdi, A.; Cerasuolo, F., *Security and Enforcement of Marina Operator's Claims: Croatian, Italian and Spanish Law Perspectives*, *Journal of Maritime Law and Commerce*, vol. 49 (2018), Issue 4, pp. 523-532.

³² See Crnić, I., *Zakon o obveznim odnosima – napomene, komentari, sudska praksa i abecedno kazalo pojmova (The Civil Obligations Act – Remarks, Comments, Judicial Practice and Index of Terms)*, Organizator, Zagreb, 2010, p. 175. For a detailed study of the legal concept of retention under Croatian law and in comparative law, see Petrić, S., *Institut prava retencije u hrvatskom i usporednom pravu (The Legal Concept of the Right of Retention in Croatian and Comparative Law)*, Faculty of Law, University of Split, Split, 2004.

rank higher than hypothecary creditors. Consequently, this includes berthing service providers in respect of their claims arising from or in relation to berthing contracts. Previously, this category of creditors included only ship repairers and shipbuilders, as they were the only creditors secured by the *ex lege* right of retention under the Maritime Code.

In the case that the berth user is not the owner of the vessel, it is now possible to arrest the vessel in respect of which the claim has arisen based on a maritime lien according to Article 953, para. 2 of the Maritime Code. Namely, the amended Article 241, para. 1 of the Maritime Code on maritime liens expressly provides for a maritime lien securing all claims arising from port fees and dues, including all port fees charged in special purpose ports such as nautical tourism ports.³³

6. BERTH USER OBLIGATIONS AND LIABILITY

a) Using the Berth in Accordance with the Contract and its Purpose

The berth user is obliged to use the berth in accordance with the contract and its purpose (Maritime Code, Art. 673 o)). This is an implementation of the general principle of contract law, i.e. *pacta sunt servanda*. A berthing contract always regulates the purpose of the berth and the way in which the berth must be used. Therefore, a berth user must respect these contractual terms and conditions. For example, if according to a berthing contract the berth is intended for private use, the berth user must not use the berth for commercial purposes. In particular, it

³³ In domestic judicial practice, prior to the amendments to the Maritime Code of 2019, it was disputable whether marina operator berthing fees were protected by a maritime lien and whether marina operator claims for berthing fees were considered maritime claims for which a vessel arrest could be ordered. In its most recent decisions, the High Commercial Court took the position that, unlike public port operator claims for various port charges and dues, marina operator claims for berthing fees were not protected by a maritime lien. See e.g. High Commercial Court of the Republic of Croatia: Pž-263/15-3, 26 January 2015. This position has been heavily criticised by maritime lawyers and academics in Croatia mostly because it discriminates between public and private port operators without a justified reason. For a detailed discussion on the issue of the arrest of pleasure craft for the purpose of securing claims for berthing fees, and on the question of whether such claims are privileged claims under the Maritime Code, see Padovan, A. V.; Tuhtan Grgić, I., *Is the Marina Operator's Berthing Fee a Privileged Claim under the Croatian Maritime Code?*, *Il Diritto Marittimo*, CXIX (2017), II, pp 366-399; Padovan, A. V., *Arrest of a Yacht in a Croatian Court for the Purpose of Securing a Marina Operator's Claim*, Ćorić, D.; Radionov, N.; Čar, A. (Eds.), *Conference Book of Proceedings of the 2nd International Conference on Transport and Insurance Law, INTRANSLAW Zagreb 2017*, Faculty of Law, University of Zagreb, Zagreb, 2017, pp. 379-406; Padovan, A. V.; Petit Lavall, M. V.; Merialdi, A.; Cerasuolo, F., *op. cit.*, pp. 532-543.

would be a breach of the contract to use the berth for the accommodation of a vessel engaged in chartering. Furthermore, it would be a breach to place another vessel in the berth instead of the one for which the berth was allocated.

A special provision forbids a berth user to assign the berth to a third party (Maritime Code, Art. 673 o), para. 2). Unlike most of the provisions regulating berthing contracts, this is a mandatory rule as it complies with mandatory administrative rules regulating the regime of the public maritime domain³⁴ and the provision of nautical tourism services.³⁵

It is further stipulated that a berth user is under a duty to act with due care when performing the contract (Maritime Code, Art. 673 o), para. 1). The standard of care to be applied corresponds to the legal standard of *bonus pater familias* in the case of berths for private use or otherwise the legal standard of a reasonable businessperson.³⁶

As regards a berth user's contractual liability for breach of contractual obligations, the general rules of contract law contained in Articles 342 – 349 of the Civil Obligations Act apply accordingly, and the rules of the same Act on third-party liability apply *mutatis mutandis*. A berth user is liable for damage caused by breaching the contract, in particular if the berth has been used in a manner or for a purpose contrary to the contract. In this respect, a berth user is responsible for their personal acts or omissions as well as for those of their agents, employees, independent sub-contractors and persons who they have authorised to use the vessel.

In practice, it is usually sufficient that a berthing service provider warns the berth user about a breach and requests them to stop it, after which the parties continue performing the contract in their common interest of maintaining the contract. Therefore, it is stipulated that only a repeated breach after the berthing service provider's warning may entitle the berthing service provider to terminate the contract unilaterally (Maritime Code, Art. 673 o), para. 4). A berthing service provider also has a right to claim damages for breach of contract. It is prescribed that in the case of a breach, the berthing service provider must first give a warning to be able to terminate the contract in order to ensure that there is some clear evidence of breach. The berthing service provider is bound to express

³⁴ E.g. Articles 2, 6, 7, 16 of the MDSPA, prescribing mandatory requirements for the commercial exploitation of the maritime domain.

³⁵ Articles 84 – 89 of the TSA, prescribing mandatory requirements for the providers of nautical tourism services.

³⁶ For an explanation of the legal standards of due care under Croatian law, see Gorenc, V. *et. al., op. cit.* p. 23.

a complaint against the breach and record it. Only thereafter can they execute the right to terminate the contract, provided that the berth user has continued with the respective breach. According to the general rules of the Civil Obligations Act, the contract is terminated when the berth user receives the notice of termination.³⁷

b) Maintenance of the Vessel and its Equipment

The berth user's duty to maintain the vessel and its equipment is emphasised as being particularly important, especially due to the common erroneous assumption found in practice that a berthing contract is necessarily a contract of deposit and custody of the berthed vessel. Therefore, it is important to point out that a salient feature of a berthing contract is that it is the continuous duty of the berth user and not of the berthing service provider to maintain and keep the vessel and all its equipment in a sound and seaworthy condition. This is in line with one of the important principles of maritime law, according to which the shipowner's duty to maintain the vessel in a seaworthy condition is non-delegable, in the sense that the shipowner always remains fully responsible for the vessel's seaworthiness.³⁸

On the other hand, in a contract of deposit, it is the depositary's primary and main obligation to safeguard and safely keep the deposited object, and this obligation reflects the main purpose of the contract (lat. *causa*).³⁹ Safekeeping or safeguarding of another's property is an obligation also found in other contracts such as lease, rental, loan, repair contracts, etc. However, in these contracts, the obligation of safekeeping or safeguarding is a collateral obligation and does not represent the main purpose for which the contract is concluded.⁴⁰

In particular, a berth user is obliged to equip the vessel with adequate berthing lines and fenders and other berthing equipment, to prepare the vessel for lay-up during the winter season (conserving the engines, covering the vessel with tarpaulin, etc.) and continuously to take care of the vessel's technical soundness and its maintenance. This includes *inter alia* complying with the regular technical check-ups necessary for the vessel's certification, and ensuring that the crew on board the vessel is qualified, adequately trained and licensed. It also includes the duty to have up-to-date compulsory insurance for the vessel.

³⁷ *Ibid*, p. 892.

³⁸ Skorupan Wolff, V.; Padovan, A. V., *Ugovor o vezu de lege ferenda...*, *op. cit.*, p. 72.

³⁹ Gorenc, V. *et. al.*, *op. cit.*, p. 1121. See also Supreme Court, Rev-1422/82, 19 October 1982.

⁴⁰ See Crnić, I., *op. cit.*, pp. 907-908.

As already mentioned, the obligation to maintain the vessel in a seaworthy condition is a continuous duty. The standard of care expected from the berth user is the one of a *bonus pater familias*, or of a reasonably careful businessperson where applicable, e.g. if the berth user is a chartering company or yacht manager, etc. (Maritime Code, Art. 673 p)).

It is prescribed that a breach of this contractual obligation entitles the berthing service provider to terminate the contract unilaterally. Naturally, it may also give rise to a claim for damages against the berth user (Maritime Code, Art. 673 p), para. 2).

The general terms and conditions of the berthing contracts of Croatian marina operators usually contain a clause enabling the berthing service provider to replace missing, damaged or otherwise inadequate berthing lines or fenders without the prior notice or approval of the berth user and at the berth user's expense. The purpose of such clauses is to keep the contract in force and ensure safety and order in the port.⁴¹

Finally, as discussed above, a berthing service provider also has the right to intervene in the case of an emergency by undertaking extraordinary reasonable measures in respect of a berthed vessel for the purpose of safety or preventing or minimising potential damage to the vessel, other vessels in the port, people, the environment, port infrastructure, etc.⁴²

c) Payment of Berthing Fees

A berthing fee is an essential element of a berthing contract, and its main economic purpose. Therefore, it is important that the berth user pays the fee in a timely manner and as determined by the contract. It is prescribed that in the absence of a contractual provision, the berth user shall pay the berthing fee in a manner that is customary in the place where the berth is located (Maritime Code, Art. 673 r), para. 1).

Payment of the berthing fee is the berth user's main obligation under a berthing contract, and therefore it is prescribed that a berthing service provider may cancel the contract without respecting any period of notice if the berth user defaults on payment of two consecutive instalments or of a substantial part of the berthing fee (Maritime Code, Art. 673 r), para. 2). If, however, the berth user settles the debt prior to receiving the notice of cancellation, the berthing contract shall remain in force (Maritime Code, Art. 673 r),

⁴¹ Skorupan Wolff, V.; Padovan, A. V., *Ugovor o vezu de lege ferenda...*, *op. cit.*, p. 73.

⁴² See *supra*, para. 5.c.

para. 3). In any case, a berth user who defaults owes all the default interest pursuant to Article 29, para. 1 of the Civil Obligations Act.⁴³

7. DURATION OF A BERTHING CONTRACT

a) Tacit Renewal of a Berthing Contract

A berthing contract is always concluded for a defined period and expires with the lapsing of the contract period. If a vessel remains berthed after the expiry of the contract, and there are no contractual provisions or relevant clauses in the berthing service provider's general terms and conditions on this matter, the question arises as to what would be the legal nature of the relationship between the berthing service provider and the owner of the vessel after the expiry of the contract. Without a specific legislative solution, various legal concepts of the general law on civil obligations would come into play, including the rules on quasi-contracts and tort law principles. Therefore, it was considered important to regulate this situation, which is likely to happen in practice, especially in relation to permanent berthing contracts. It is now expressly prescribed that in the case of a vessel remaining berthed or if the berth user continues to use the berth after the expiry of the contract, the contract shall be tacitly renewed for the same duration and under the valid terms and conditions of the berthing service provider, unless the berthing service provider objects thereto (Maritime Code, Art. 673 t)).

This legislative presumption contributes to legal certainty, and it logically follows from the principle that a berthing contract is an informal, consensual type of contract. The bilateral continuation of performance after the contract has expired can be interpreted as an implicit sign of consent by both parties to be bound by the same contract under the same terms and conditions. However, contract renewal does not take place if the berthing service provider objects to it by clearly expressing the position that they do not wish to continue to be bound by the contract.

The new provisions on berthing contract renewal ensure more certainty regarding the berthing service provider's claims for berthing fees. On the other hand, the provisions also provide legal certainty in favour of the berth user, since in the absence of the berthing service provider's objection, the berth user will be able to rely on the contract and the berthing service provider's duty to perform their contractual obligations. However, it should be noted that the re-

⁴³ Skorupan Wolff, V.; Padovan, A. V., *Ugovor o vezu de lege ferenda...*, *op. cit.*, p. 74.

spective legal provisions are of a dispositive nature, which means that the parties are free to contract differently, and in particular berthing service providers are free to regulate this issue differently under the general terms and conditions of their berthing contracts.

Furthermore, to prevent potentially unfair contract terms on tacit contract renewal, a suggestion *de lege ferenda* of the authors is to prescribe that when a berthing contract provides for tacit contract renewal, unless either of the parties gives timely and express notice to the contrary, the notice period should be reasonable and should not create an imbalance between the parties. In particular, the main berthing contract terms for the following contract period must be made known to the berth user prior to the expiry of the notice period. Finally, it is desirable to prescribe that a contractual provision on tacit renewal containing an unreasonable notice period, e.g. such that it expires prior to the berthing service provider publishing the service prices for the next contract period, shall be null and void.

b) Ending a Berthing Contract

According to the new provisions of the Maritime Code, a berthing contract ends: a) upon the expiry of the contract period, b) upon its cancellation, c) upon destruction of the vessel, or d) upon destruction of the respective berth, unless the berthing service provider reassigns the vessel to another adequate berth in the same area (Maritime Code, Art. 673 v)).

As for the expiry of the contract period, it is now prescribed that a berthing contract is a contract for a defined period, and upon its expiry the berth user must remove the vessel from the berth, i.e. they must free up the berth (Maritime Code, Art. 673 š)). In the business practice of Croatian marina operators, we have seen half-day or daily berths that can last up to several days (transit berths), half-year berths, winter berths and annual berths (permanent berths). Permanent berthing contracts are most frequently concluded for a period of one year, with the possibility of tacit renewal. There are examples of berth users renewing their berthing contracts in Croatian marinas continuously for many years, sometimes even up to 30 years. In practice, permanent berth contracts are always concluded for a defined period, and if the parties do not define the contract period, a logical conclusion should be that they have agreed on a transit berth of the shortest period available according to the berthing service provider's price lists and general terms and conditions.⁴⁴

⁴⁴ Skorupan Wolff, V.; Padovan, A. V., *Ugovor o vezu de lege ferenda...*, *op. cit.*, p. 87.

As for cancellation, it is prescribed that both parties may unilaterally cancel a permanent berthing contract subject to the cancellation notice period defined by the contract (Maritime Code, Art. 673 u)). No special form of notice is required by law. Cancellation takes effect upon the expiry of the notice period. The notice period runs from the moment when the counter party receives the cancellation notice. If the cancellation notice period is not defined by the contract or by the local customs of the trade, the period shall last 30 days (Maritime Code, Art. 673 u), para. 2). The general rules contained in Article 212 of the Civil Obligations Act apply, i.e. cancellation can be effected at any moment but not at an inopportune time. This means that the cancellation must not place the counterparty in a position in which they can suffer damage due to the fact that the obligation to perform has ceased. Upon cancellation, the parties are entitled to request from each other anything that has become due before the obligation ceased with the expiry of the cancellation notice period.⁴⁵ It is noted that a unilateral cancellation of a permanent berthing contract subject to a cancellation notice period should be distinguished from cancellation due to default in the payment of the berthing fee.⁴⁶

Finally, it is prescribed that a berthing contract ends upon the total destruction of the subject matter of the contract, i.e. the vessel or the respective berth, regardless of the cause of destruction (Maritime Code, Art. 673 v)). This, however, does not interfere with the right to claim damages from the contracting party liable for the destruction of the subject matter. The idea behind these provisions is that due to the destruction of the subject matter of the contract, it becomes impossible to perform the contractual obligations, and therefore the contract ends. Accordingly, the destruction of the berth is not in itself sufficient for the contract to end automatically. It must be combined with the fact that it is impossible for the berthing service provider to allocate another adequate berth for the accommodation of the respective vessel in the same berthing area. Only then does the berthing service provider's performance under the contract become impossible and the contract ends at that point by virtue of law.

8. CONCLUSION

With the intensive development of nautical tourism in Croatia and the strategic interest of the State in this branch of the economy, berthing contracts have become an important legal topic. On the other hand, there has been a lot of legal

⁴⁵ Gorenc, V. *et al.*, *op. cit.*, p. 320.

⁴⁶ See *supra*, para. 6. c).

uncertainty regarding the interpretation of the general terms and conditions of the berthing contracts of Croatian marina operators and other berthing service providers, which is reflected in non-uniform judicial practice, non-standardised specialist legal terminology, and unclear and imprecise contract clauses used in practice.

The research as part of the DELICROMAR project led to the conclusion that the standardisation of berthing contracts used in pleasure navigation was both possible and desirable, considering that there was a substantial level of similarity in business practice in providing berthing services. Furthermore, it was assessed that legislative regulation of this type of contract would be justified and beneficial in terms of legal certainty.

Therefore, the Ministry of the Sea, Transport and Infrastructure of the Republic of Croatia accepted the proposal and included the new provisions on berthing contracts in the draft Act on Amendments to the Maritime Code, which was submitted to Parliament in August 2018. These provisions were finally accepted by the legislator and they were incorporated in the revised Maritime Code by the adoption of the Act on Amendments to the Maritime Code of 2019. Consequently, berthing contracts in pleasure navigation became a new nominate contract in Croatian law. This definitely places berthing contracts in the domain of maritime law and sets a minimum legal standard in respect of the rights, obligations and liabilities of berthing service providers and berth users. It affirms the true nature of a berthing contract as a contract for the use of a safe berth, and not a contract of deposit of a berthed vessel with the berthing service provider as a depository. However, the new legislative provisions allow for the possibility of contracting additional services and work, including in particular vessel supervision but possibly also vessel safeguarding and safekeeping services provided by the berthing service provider. The new provisions were designed predominantly as dispositive law, allowing the contracting parties to freely regulate their relationships according to their needs and expectations. However, in the absence of clear and precise contractual stipulations, the new legislative provisions will ensure more certainty in the interpretation of the contractual relationship.

In the opinion of the authors, the new legislative provisions on berthing contracts, as presented and analysed in this paper, successfully resolve the main legal issues arising in relation to berthing contracts in practice. In particular, they provide a precise definition of the contract and determine its essential elements and the scope and contents of the parties' rights and obligations. Furthermore, they establish a clear regime in terms of the berthing service provider's liability

for damage to or loss of a berthed vessel and for other potential contractual damage suffered by a berth user. Finally, they strive to establish a fair balance between the parties' rights and obligations, whereby the berthing service provider is mainly responsible for allocating and maintaining a safe berth for a particular vessel, whilst the berth user is responsible for paying a berthing fee and maintaining the vessel in a seaworthy condition.

BIBLIOGRAPHY

Books:

1. Crnić, I., *Zakon o obveznim odnosima – napomene, komentari, sudska praksa i abecedno kazalo pojmova (The Civil Obligations Act – Remarks, Comments, Judicial Practice and Index of Terms)*, Organizator, Zagreb, 2010.
2. Gorenc, V. et al., *Komentar Zakona o obveznim odnosima (A Commentary on the Civil Obligations Act)*, Narodne novine, Zagreb, 2014.
3. Luković, T. et al., *Nautički turizam Hrvatske (Nautical Tourism of Croatia)*, Redak, Split, 2015.
4. Petrić, S., *Institut prava retencije u hrvatskom i usporednom pravu (The Legal Concept of the Right of Retention in Croatian and Comparative Law)*, Faculty of Law, University of Split, Split, 2004.
5. Slakoper, Z.; Gorenc, V., *Obvezno pravo: Opći dio – sklapanje, promjena i prestanak ugovora (The Law of Obligations: General Part – Contract Conclusion, Alteration and Termination)*, Novi informator, Zagreb, 2009.
6. Barbić, J.; Padovan, A. V.; Skorupan Wolff, A. V. (Eds.), *Novi pravni režim za marine (The New Legal Regime for Marinas)*, Nakladnički niz *Modernizacija prava*, knjiga br. 47, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2019.

Articles:

1. Ćorić, D., Application of Non-Contractual Liability of Shipowner and Ship Operator Prescribed by the Maritime Code on Yachts and Boats, *Conference Book of Proceedings of the 2nd Adriatic Maritime Law Conference, 2nd AMLC 2017, Comparative Maritime Law*, vol. 57 (2018), no. 172, pp. 131-147.
2. Padovan, A. V., Marina Operator's Liability Arising from Berthing Contracts and Insurance Matters, *Comparative Maritime Law*, vol. 52, no. 167, 2013, pp. 1-35.
3. Padovan, A. V., Arrest of a Yacht in a Croatian Court for the Purpose of Securing a Marina Operator's Claim, Ćorić, D.; Radionov, N.; Čar, A. (Eds.), *Conference Book of Proceedings of the 2nd International Conference on Transport and Insurance Law, INTRANSLAW Zagreb 2017*, Faculty of Law, University of Zagreb, Zagreb, 2017, pp. 379-406.

4. Padovan, A. V.; Petit Lavall, M. V.; Meriardi, A.; Cerasuolo, F., Security and Enforcement of Marina Operator's Claims: Croatian, Italian and Spanish Law Perspectives, *Journal of Maritime Law and Commerce*, vol. 49 (2018), Issue 4, pp. 515-579.
5. Padovan, A. V.; Skorupan Wolff, V., The Effect of the Craft's Sinking on the Contractual Relationship of the Parties to the Contract of Berth and Deposit of a Pleasurecraft, *Conference Book of Proceedings of the 2nd Adriatic Maritime Law Conference, 2nd AMLC 2017, Comparative Maritime Law*, vol. 57 (2018), no. 172, pp. 149-175.
6. Padovan, A. V.; Tuhtan Grgić, I., Is the Marina Operator's Berthing Fee a Privileged Claim under the Croatian Maritime Code?, *Il Diritto Marittimo*, CXIX (2017), II, pp. 366-399.
7. Skorupan Wolff, V.; Padovan, A. V., Are there any Elements of the Contract of Custody in the Marina Operators' Contracts of Berth?, in Čorić, D., Radionov, N., Čar, A. (Eds.), *Conference Book of Proceedings of the 2nd International Conference on Transport and Insurance Law, INTRANSLAW Zagreb 2017*, Faculty of Law, University of Zagreb, Zagreb, 2017, pp. 313-353.
8. Skorupan Wolff, V.; Padovan, A. V., Ugovor o vezu *de lege ferenda*, in Barbić, J. (Ed.), *Pravni okvir za luke nautičkog turizma (The Legal Framework for the Nautical Tourism Ports)*, Nakladnički niz *Modernizacija prava*, knjiga br. 42, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2018, pp. 41-93.
9. Skorupan Wolff, V.; Padovan, A. V., Standardizirani modeli ugovora o vezu za hrvatske marine kao korak naprijed in Barbić, J.; Padovan, A. V.; Skorupan Wolff V. (Eds.), *Novi pravni režim za marine (The New Legal Regime for Marinas)*, Nakladnički niz *Modernizacija prava*, knjiga br. 47, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2019, pp. 127-195.
10. Padovan, A. V.; Petit Lavall, M. V.; Casciano, D., Marina Operator Berthing Contracts from a Comparative Law Perspective, *Revista de Derecho del Transporte*, 23 (2019), pp. 39-97.

Legislation:

1. The Maritime Domain and Seaports Act, *Official Gazette*, nos. 158/2003, 100/2004, 141/2006, 38/2009, 123/2011, 56/2016.
2. The Maritime Code, *Official Gazette*, nos. 181/2004, 76/2007, 146/2008, 61/2011, 56/2013, 26/2015, 17/2019.
3. The Act on Amendments to the Maritime Code, *Official Gazette* no. 17/2019.
4. The Civil Obligations Act, *Official Gazette*, nos. 33/2005, 41/2008, 125/2011, 75/2015.
5. The Tourism Services Act, *Official Gazette*, no. 130/2017.
6. The Criminal Code, *Official Gazette*, nos. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017.

Judicial Practice:

1. High Commercial Court, Pž-8130/03, 22 November 2016.
2. High Commercial Court, Pž-263/15-3, 26 January 2015.
3. Supreme Court, Rev- 756/11, 30 October 2013.
4. Supreme Court, Rev 2333/2010, 14 May 2013.
5. Supreme Court, Rev-2454/95, 6 May 1999.
6. Supreme Court, Rev-1422/82, 19 October 1982.

Other:

1. Croatian Bureau of Statistics, *Nautical Tourism – Capacity and Turnover of Ports 2019*, First Release no. 4.3.4, 15 May 2020.
2. N. Perko, *Valorization of the Maritime Traffic Vessel Impact to the Capacity of the Sea Ports*, Zagreb, 2017, Doctoral Thesis, Faculty of Transport and Traffic Sciences, University of Zagreb, available from <https://repozitorij.fpz.unizg.hr/en/islandora/object/fpz%3A820>, accessed 18 December 2018.

Sažetak:

UGOVORI O VEZU U REKREACIJSKOJ PLOVIDBI PO HRVATSKOM PRAVU

Članak analizira novo zakonsko rješenje koje uređuje ugovor o vezu kao novi nominatni ugovor hrvatskog prava. Autorice ispituju relevantne nove odredbe Pomorskog zakonika koje su uvedene Zakonom o izmjenama i dopunama Pomorskog zakonika iz 2019. godine. Rad se bavi definicijom ugovora, njegovim glavnim obilježjima, bitnim elementima, obvezama i odgovornostima ugovornih strana te ostalim važnim pravnim pitanjima vezanim uz ugovore o vezu. Nadalje, obrazlaže se pozadina zakonskog prijedloga uvođenja posebnih zakonskih odredbi o ugovoru o vezu u Pomorskom zakoniku te iznose pojedini detalji o pripremnim radovima koji su prethodili ovom novom zakonskom rješenju. Stav je autorica da novo zakonsko rješenje predstavlja važan korak prema većoj pravnoj sigurnosti u području nautičkog turizma koji je, kao gospodarska grana, od strateškog interesa za Republiku Hrvatsku.

Ključne riječi: ugovor o vezu; rekreacijska plovidba; marina; luka nautičkog turizma; marina; pružatelj usluge veza; korisnik veza; vez; muring; jahta; brodica; rekreacijsko plovilo; Pomorski zakonik.