

Codification of Nautical Contracts: Experience of the Republic of Croatia

Vesna Skorupan Wolff

The Adriatic Institute of the Croatian Academy of Sciences and Arts : Director

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1. Introduction

The Republic of Croatia is a European country located in the Mediterranean along the eastern coast of the Adriatic Sea. The total length of the Croatian coast is 6,278 kilometres, including the coastline, stretching to about 1244 islands, islets, reefs and cliffs. Croatia has a long maritime tradition in educating seafarers who have always been appreciated worldwide, and used to be famous for its shipbuilding tradition, as well as for its important maritime fleet. Today, an important segment of its maritime orientation is nautical tourism, which is a well-

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- (1) According to the data of European Maritime Safety Agency (EMSA) Croatia is among four EU members with highest number of masters and officers. European Maritime Safety Agency, Seafarers' Statistic in the EU, Statistical review (2019 data from the STCW-IS as provided by 31 December 2020), <http://emsa.europa.eu/newsroom/latest-news/item/4601-copy-seafarer-statistics-in-the-eu-statistical-review-2019-data-stcw-is.html>, (accessed 22 December 2021).
- (2) The highest reaches were achieved by Croatian shipbuilding in the 1970s and 1980s when Croatian shipyards built large and technically complex passenger and cargo ships, as well as modern warships and especially submarines, which placed Croatian shipbuilding

developed and important sector of national economy. In addition, Croatia is a very popular destination for nautical tourism. There are 206 nautical tourism ports in Croatia, with about 18,942 berths for pleasure craft. In 2021, there were over 210,000 vessels in transit in these ports, and the total income realised in nautical tourism ports amounted to about €126 million, of which around 71% came from renting out berths.⁽³⁾ About 60,000 foreign yachts and boats visit Croatia every year, with more than 300,000 tourists who are active in sailing.⁽⁴⁾ In the national development strategy of the Republic of Croatia by 2030, there is a plan to develop nautical tourism, through the development of new marinas and mega marinas for large yachts, while considering the spatial planning capacities of possible locations for marinas.⁽⁵⁾

Nautical tourism as a very complex economic activity should be supported by adequate legal framework. The legal framework for the regulation of nautical tourism includes a number of legal areas and also a number of issues that need to be regulated. For example: granting concessions, property relations on maritime domain, classification and categorisation of nautical tourism ports, conditions for the business of renting berths for leisure craft, and other additional services or work in relation to it, safety of navigation, certification of the tourist nautical fleet, conditions for the activities of renting yachts and boats (charter), environmental

among several of the most technologically developed in the world, Batinić, S.; Belamarić, I., History of Shipbuilding on the Eastern Adriatic Coast, *Croatian Technical Encyclopedia*, Miroslav Krleža Lexicographic Institute, Zagreb, 2019, <https://tehnika.lzmk.hr/brodogradnja/> (accessed 22 December 2021). According to Lloyd's Register of Shipping data for 1986, Croatian shipbuilding was ranked third in the world, while in the largest trade fleet it entered among about thirty countries in the world, Nakićenović, J., Maritime Market in the function of global economic developments, Shippers and shipbuilding in front of the same goal, *Naše more*, No. 3-4, 1987, pp. 99-102.

- (3) Croatian Bureau of Statistics, Nautical Tourism – Capacity Turnover of Ports 2021, no. TUR-2021-2-1, 29 April 2022.
- (4) Government of the Republic of Croatia, Strategy of Maritime Development and Integral Maritime Policy of the Republic of Croatia for the period from 2014 to 2020, https://mmpi.gov.hr/UserDocsImages/arhiva/POMORSKA%20STARTEGIJA%20VRH%202207201%20web%2026-7_14.pdf (accessed 22 December 2021).
- (5) *Official Gazette*, nos. 13/2021.

standards for protecting the sea from pollution, waste management, contractual liability, non-contractual liability, etc.⁽⁶⁾

In this paper we deal with civil legislative issues, by legislative regulation of pleasure navigation berthing contract. In Croatian law there are two types of nautical contracts: pleasure navigation berthing contract and yacht and boat charter contract. A berthing contract is the most common contract concluded in nautical tourism and has the largest share in the distribution of total revenue from nautical tourism, approximately 80% of revenues are revenues from the payment of berths.⁽⁷⁾ Yacht and boat charter contract has special importance for Croatian maritime law because Croatia is the world's leading destination in terms of nautical charter fleet size and number of yacht and boat charter bookings. In nautical charter, Croatia is the world leader and has as much as 40 percent of the world's charter fleet. Nautical charter in Croatia is used by half a million guests a year, and the charter fleet consists of 4378 yachts and boats.⁽⁸⁾

After many years of applying these contracts in practice *as sui generis contracts*, they are codified in 2019, and represent the youngest and latest types of contracts in Croatian maritime law.⁽⁹⁾ Considering that in most maritime countries, nautical contracts were not specially regulated by any source of legislation

(6) Some of the topics are covered in monographs: 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 broj 47, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2019. and 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.

(7) Strategy of maritime development and integral maritime policy of the Republic of Croatia for the period 2014-2020 Microsoft Word - MARITIME STARTEGIA TOP 2207201 web 26-7_14.doc (gov.hr) (accessed 31 January 2022).

(8) Bohutinski, J., Croatia has the largest charter fleet in the world, Večernji list, 20 August 2019. <https://www.vecernji.hr/biznis/hrvatska-ima-najvecu-carter-flotu-na-svijetu-cak-4378-jahti-i-brodica-za-iznajmljivanje-1339568> - www.vecernji.hr (accessed 28 January 2022).

(9) Legislative provisions regulating berthing contracts and yacht and boat charter 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. The Maritime Code, *Official Gazette*, nos. 181/2004, 76/2007, 146/2008, 61/2011, 56/2013, 26/2015.

and therefore belonged to the group of innominate contracts, while nautics is a branch of the maritime law still undergoing a process of development, in the whole world, we believe that Croatian experience can be interesting to other countries.⁽¹⁰⁾ The aim of the paper is to present this segment of modern Croatian maritime legislation. We will present the experience of the Republic of Croatia in the process of codification of pleasure navigation berthing contract. The author will explain the background of the legislative proposal to introduce special provisions on berthing contracts into the Maritime Code, elaborates on the preparatory work preceding the proposal and highlight the effects that will be achieved by their codification. The new legislative solutions regulating berthing contract under Croatian law (Croatian Maritime Code) will be analysed in the paper.

2. Historical review of nautical contracts and preparatory work on their codification in Croatian law

The beginnings of sailing for pleasure and sport with boats and yachts (yachting) are considered regattas along Dutch canals back in the 16th century. Significant development of yachting began in the 17th and 18th century in Great Britain. The first sporting club Royal Cork Yacht Club was founded in 1720 in Ireland, and there the term yacht is used for the first time. However, it can be said that nautical tourism began to develop in the 19th century, and more intensive construction of specialized ports for the yachts and boats intended for sports and leisure began in the 20th century. In 1928, the Association of Motor

(10) For example, the Italian authors consider that the lack of legal regulation of the berthing contract in practice leads to a significant contractual imbalance in the position of the contracting parties and just from that where the interest of the legal doctrine for analysing in theory and in the judicial practice of the liability of the contracting parties and other salient features of berthing contracts. Russica, S., *Alcune riflessioni in tema di responsabilità del gestore del porto turistico quale parte del contratto di ormeggio*, 22. 10. 2009. <http://www.altalex.com/index.php?idnot=47813> (website visited on 12.1. 2022).

and Ship Constructors in New York mentioned for the first time the name “marina”, which became internationally recognized as the name for specialized ports intended for nautical tourism purposes. In the Mediterranean, nautical tourism and its resources, which are marinas and nautical - tourist fleets began to develop rapidly in the 1950s, first in France and followed by Spain, Italy and Greece.⁽¹¹⁾

Marina Punat on the island of Krk was the first marina on the Croatian part of the Adriatic, and it started operating in 1964.⁽¹²⁾ The port capacities needed for the development of nautical tourism are gradually evolving, and in the early 1980s, ten marinas operated along the Croatian coast with approximately 2000 berths in the sea.⁽¹³⁾ The more intensive development of nautical tourism in Croatia began in the 1980s and is associated with the development of ACY (Adriatic Club Yugoslavia), founded on July 1, 1983, as a company whose main business goal is a comprehensive program of capacity development and accompanying offer of nautical tourism services on the eastern Adriatic coast.⁽¹⁴⁾ Over the last twenty years, the number of nautical tourism ports in the Croatian part of the Adriatic has increased intensively.⁽¹⁵⁾

Regarding the content of the berthing contract and the issue of interpretation of contractual liability under the berthing contract, it should be emphasized that in the Republic of Croatia business practices have changed over time, primarily under the influence of changing the technical characteristics of yachts and boats and the capacity of nautical tourism ports. At the beginning of the

(11) Nautical tourism, *Croatian Technical Encyclopedia*, Miroslav Krleža Lexicographic Institute, Zagreb, 2019, <https://tehnika.lzmk.hr/nauticki-turizam/> (accessed on 27 January 2022).

(12) Žic - Dunižarić, D., *Marina Punat group, first 50 years*, Punat, 2014, p. 12.

(13) Nautical tourism, *Croatian Technical Encyclopedia*, Miroslav Krleža Lexicographic Institute, Zagreb, 2019, <https://tehnika.lzmk.hr/nauticki-turizam/> (accessed on 27 January 2022).

(14) The first phase of ACY's development involved the establishment of 16 marinas, all completed by 1991. In 1991, ACY changed its name to Adriatic Yacht Club, and in 1994 the company was registered under the name Adriatic Croatia International Club (ACI). Today, ACI operates 22 marinas <http://www.aci-marinas.com> (accessed 30 December 2021).

(15) See the text next to note 3.

development of nautical tourism (50 years ago), the marinas had relatively small accommodation capacities (about 50 yachts and boats were received on the berth). The vessels were of simpler technical features, there was no expensive and sophisticated equipment and devices. As result, the probability of damage was smaller, and marinas include certain obligations that by its content represent the elements of the contract of custody.⁽¹⁶⁾ On the 5th of October 1965, the first berthing contract containing explicit elements of care and custody of the vessel was signed at Punat marina on the island of Krk.⁽¹⁷⁾

In last two decades there is a multiple increase in the number of berths and vessels. Today larger Croatian marinas have got about 500 berths for pleasure craft, and the largest ones over 1000 berths. In addition, the technical characteristics, the size and value of the vessel have changed. 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. 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.⁽¹⁸⁾

It should also be considered that the liberalization of the insurance market and the emerging of increasing competition among insurers engaged in insuring the liability of marinas, diversify insurance conditions with a tendency to reduce the price of insurance and consequently narrow the scope of coverage. All these

(16) 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. 335.

(17) Žic - Dunižarić, D., *Marina Punat grupa, prvih 50 godina*, op. cit., str. 26.

(18) See V. Skorupan Wolff, A. V. Padovan, 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., p. 43; Padovan, A. V.; Skorupan Wolff, V., Pleasure Navigation Berthing Contracts Under Croatian Law, *Poredbeno pomorsko pravo - Comparative Maritime Law* vol. 60 (2021), 175, p. 40.

facts influenced the forming of business policy of Croatian marinas.⁽¹⁹⁾

According to the current business practice and offer, most Croatian marinas do not take responsibility for the custody of vessels. Today in the business practice of Croatian marinas, the most commonly used models of the contract of berth are: model - berth rent/lease and model -berth rent/lease + supervision of the berthed vessel.⁽²⁰⁾

Prior to the last revision of the Maritime Code of 2019, berthing contracts in Croatia were not specially regulated by any source of legislation and therefore belonged to the group of innominate contracts.⁽²¹⁾

Since prior to 2019 the courts would, where necessary, look into the special provisions of the Civil Obligations Act⁽²²⁾ 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 contract (*location 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.⁽²³⁾

The research conducted as part of DELICROMAR⁽²⁴⁾ project has shown that in practice written berthing contract forms and the general terms and conditions

(19) Skorupan Wolff, V.; Padovan, A. V., Are there any Elements of the Contract of Custody in the Marina Operators' Contracts of Berth?, op. cit. p. 335.

(20) See *supra*, para 3.1.

(21) Amendments to the Maritime Code Bill, *Official Gazette* no. 17/2019.

(22) *Official Gazette*, nos. 33/2005, 41/2008, 125/2011, 75/2015.

(23) 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; Padovan, A. V.; Skorupan Wolff, V., Pleasure Navigation Berthing Contracts Under Croatian Law... op. cit. p. 39, 40.

(24) Research project titled *Developing a Modern Legal and Insurance Regime for Croatian Marinas - Enhancing Competitiveness, Safety, Security and Marine Environmental Standards* (DELICROMAR), more information about project is available at www.Delicromar.hrzu.hr. 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, Transport 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

of the various marina operators and other port operators providing berthing and mooring services are not uniform and standardized, and that the central problem of this matter is the lack of clarity and precision in the wordings and their frequent ambiguity. Subsequently, the relevant judicial practice is unconsolidated,⁽²⁵⁾ which altogether leads to legal uncertainty.

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. 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.⁽²⁶⁾ Furthermore, it was assessed that legislative regulation of this type of contract would be justified and beneficial in terms of legal certainty.

The questions that arise in connection therewith require the prior understanding and knowledge of the marina operators' economic role and the features of their entire professional activity. On the other hand, the fact that the financial values of the vessels berth in the marinas are relatively high, logically reflects on the contractual expectations of the vessel owners and operators calling for a suitable legal protection of their material interests. Legal certainty is therefore, as in any other business, a decisive factor for both contractual parties relying on the predictability of their mutual legal expectations. A developed nautical tourism market requires a balanced protection of interests of the stakeholders, in this context those are the marina operators and the owners or

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 Montenegro, Slovenia, Italy, Malta, Spain and the United States.

(25) Skorupan Wolff, V.; Padovan, A. V., Are there any Elements of the Contract of Custody in the Marina Operators' Contracts of Berth?... op. cit. p.352.

(26) Padovan, A. V.; Skorupan Wolff, V., Pleasure Navigation Berthing Contracts Under Croatian Law... op. cit. p. 63, 40.

operators of the vessels.⁽²⁷⁾

The idea of introducing berthing contracts as a new nominate contract in Croatian law was widely supported by the profession and the legislator. A proposal of new legislative provisions on berthing contracts was drafted based on DELICROMAR project research results to reflect and duly respect existing business practices. Final draft of the Amendments to the Maritime Code adopted by the Parliament in February 2019.

3. Pleasure Navigation Berthing Contracts

3.1. Essential elements of a berthing contract and the scope of application of the legislative provisions

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 (Maritime Code, Art. 673 j), para. 1).

Main purpose of berthing contracts is providing berth (space, infrastructure and equipment) for the safe accommodation of a vessel. Under Croatian law, by its nature any berthing contract is primarily contracts for the use of a safe berth (*locatio conductio rei*). In addition, the parties may agree to include other complementary marina services, such as supervision of the vessel on berth in the case of long term berthing contracts or other boat care services. In that sense, berthing contracts are mixed purpose contracts predominantly consisting of the elements of lease (berth rental) and of the elements of the contract for work and services. A berthing contract is regulated as a consensual, informal contract and according to its legal characteristics it is a double-bound, onerous and causal

(27) Skorupan Wolff, V.; Padovan, A. V., Are there any Elements of the Contract of Custody in the Marina Operators' Contracts of Berth?... op. cit. p. 352.

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

contract.

The essential elements of berthing contract are:

- Please for a safe berth (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),
- Vessel (yacht or boat) for which a berth is allocated,
- Supervision (only if expressly contracted),
- Additional works and services (only if expressly contracted),
- Berthing fee.

It is important to emphasise that 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 berth but any berth of the berthing service provider which is adequate and safe for the particular vessel.⁽²⁹⁾

The Maritime Code, Art. 673 j) para 2 stipulates a permissive provision regarding the movement of a yacht or boat from one berth to another. The berth 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 means the berth user does not have the exclusive right to use the berth designated in the contract. This legal solution implements current business and judicial practice. High Commercial Court of the Republic of Croatia, Pž-8130/03, 22 November 2016 pointed out that 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.

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

(29) Padovan, A. V.; Skorupan Wolff, V., *Pleasure Navigation Berthing Contracts Under Croatian Law...* op. cit. p. 45.

into the allocated berth (Maritime Code, Art. 673 o) and 673 v) para. 2).

The supervision of a yacht or boat and other additional work and services are not an essential element of a berthing contract, so the obligation to supervise a yacht or boat or obligation to perform certain work and services in respect of the vessel exists only if it is expressly stated in the contract (Maritime Code, Art. 673 j) para. ⁽³⁰⁾3).

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. ⁽³¹⁾

Legislative provision of Maritime Code applies to: a) permanent berth, b) transit berth, c) sea berth and d) dry 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 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

(30) See *infra*, para. 3.3.3. and para 3.3.4.

(31) On the interpretation and construction of contracts by the analogous application of legislative provisions, see Z. Slakoper, V. Gorenc, *Obvezno pravo: Opći dio - sklapanje, promjena i prestanak ugovora (The Law of Obligations: General Part - Contract Conclusion, Alteration and Termination)*, Zagreb, 2009, Novi informator, p. 111; Padovan, A. V.; Skorupan Wolff, V., *Pleasure Navigation Berthing Contracts Under Croatian Law...* op. cit. p. 41.

possibility of automatic extension or renewal. In practice, a permanent berthing contract is commonly concluded in written form, but the written form is not compulsory (Maritime Code, Art. 673 k), para. 3).

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.⁽³²⁾ Transit berth includes much narrower scope of obligations of the marina, which apart from providing technically and nautically sound and safe berth, supplying the electricity, water, etc. and maintaining security in the port. 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).

It should be stressed that legislative provision of Maritime Code applies to sea berths as well as to dry berths. On the other hand, vessel storage or deposit in hangars or similar fenced and locked facilities, where no stay or accommodation 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.⁽³³⁾

In the business practice of the Croatian marinas, the commonly used models of

(32) Padovan, A. V.; Skorupan Wolff, V., *Pleasure Navigation Berthing Contracts Under Croatian Law...* op. cit. p. 42.

(33) A. V. Padovan, V. Skorupan Wolff, *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, p. 158; Padovan, A. V.; Skorupan Wolff, V., *Pleasure Navigation Berthing Contracts Under Croatian Law...* op. cit. p. 42.

(34) V. Skorupan Wolff, A. V. Padovan, *Berth Contract de Lege Ferenda...*, op. cit., p. 49; Padovan, A. V.; Skorupan Wolff, V., *Pleasure Navigation Berthing Contracts Under Croatian Law...* op. cit. p. 43.

the contract of berth are:

- Model I – berth rent/lease
- Model II – berth rent/lease + supervision
- Model III – berth rent/lease + supervision + additional works and services
- Model IV – berth rent/lease + additional works and services

3.2. Contracting Parties

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 Maritime Domain and Seaports Act, hereinafter MDSPA and subsidiary legislation.⁽³⁶⁾

The berth user is the person who concludes a berthing contract with the berthing service provider. In permanent berthing contracts, the berth user is normally the register 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.

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

(35) *Official Gazette*, 158/2003, 100/2004, 141/2006, 38/2009, 123/2011, 56/2016.

(36) Padovan, A. V.; Skorupan Wolff, V., *Pleasure Navigation Berthing Contracts Under Croatian Law...* op. cit. p. 43; For more detailed discussion, see Skorupan Wolff, V., A. V. Padovan, *Berth Contract de Lege ferenda*, op. cit., p. 41-93.

(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.⁽³⁷⁾

3.3. The Berthing Service Provider's Obligations and Liability

3.3.1. Provision and Maintenance of the Berth

Providing a berth is the most important and recognizable obligation of the berthing service provider, as a basic *differentia specifica* of this contract. It is present in all models of the berthing contracts.⁽³⁸⁾

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.⁽³⁹⁾ Maritime Code, Art. 673 l) stipulates that a berth must be safe and sound. Also a berth must be adequate for the individual vessel assigned thereto with

(37) V. Skorupan Wolff, A. V. Padovan, Berth Contract *de Lege Ferenda*..., op. cit., pp. 56-57; Padovan, A. V.; Skorupan Wolff, V., Pleasure Navigation Berthing Contracts Under Croatian Law... op. cit. p. 45. 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 D. Ćorić, 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.

(38) See *supra* para. 3.1.

(39) Padovan, A. V.; Skorupan Wolff, V., Pleasure Navigation Berthing Contracts Under Croatian Law... op. cit. p. 47.

respect to the type, size and other technical characteristic of the vessel.

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.⁽⁴⁰⁾

This is a continuing obligation of berthing service provider which means that berthing service provider is not only required to provide the berth that is safe and sound but this obligation also implies that a berth must be regularly checked and maintained in this condition throughout the contract (Maritime Code, Art. 673 l).

Although the berth space is usually designated in the contract, but the user of the berth does not have the exclusive right to use of specific berth. The berthing service provider is authorized to move each vessel to another appropriate berth according to its needs. To move the vessel, the berthing service provider does not need the berth user's approval (Maritime Code, Art. 673 j).⁽⁴¹⁾

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).⁽⁴²⁾

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 and Tourism Services Act (TSA) 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

(40) Padovan, A. V.; Skorupan Wolff, V., *Pleasure Navigation Berthing Contracts Under Croatian Law...* op. cit. p. 47.

(41) See par. 3.1.

(42) 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 V. Gorenc *et al.*, *Komentar Zakona o obveznim odnosima (A Commentary on the Civil Obligations Act)*, Narodne novine, Zagreb, 2014, pp. 22-23.

(43) *Official Gazette*, no. 130/2017.

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). 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⁽⁴⁴⁾).

3.3.2. Liability for Material Defects

Maritime Code, Art. 673 m) stipulated that material defects exist when a berth: a) is not safe for its intended use or b) if it becomes unsafe during the contract period.

The berthing service provider shall be liable if one of these taxonomically stated material defects is met but only if: a) does not removes the defects or b) does not move the yacht or boat to another adequate safe berth. A berth user's primarily has the right to request the removal of defects or the reassignment location of a yacht or boat to another adequate berth. A berth user's secondary right is to terminate the contract and claim damages.

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

(44) Padovan, A. V.; Skorupan Wolff, V., *Pleasure Navigation Berthing Contracts Under Croatian Law...* op. cit. p. 43.

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 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.⁽⁴⁵⁾

3.3.3. The Supervision of the Berthed Vessel

It should be emphasized that research conducted as part of the DELICROMAR⁽⁴⁶⁾ project has shown that the most frequent model of a permanent berthing contract used by marina operators in Croatia is one that include the berthing service provider's obligation to supervise the berthed vessel. For this reason, the new provision the Maritime Code regulating berthing contracts provide for special rules on vessel supervision as a possible additional obligation of a berthing service provider.

As previously pointed out, the supervision of a yacht or boat is not an essential element of a berthing contract, so the obligation to supervise a yacht or boat exists only if it is expressly stated in the contract (Maritime Code, Art. 673 j) para. 3).

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,

(45) Padovan, A. V.; Skorupan Wolff, V., *Pleasure Navigation Berthing Contracts Under Croatian Law...* op. cit. p. 49.

(46) See *supra* n. 24.

it is expressly agreed, the vessel supervision may include an occasional internal visual inspection of the vessel.⁽⁴⁷⁾

The obligation to supervise the vessel exists, provided that the following conditions have been fulfilled cumulatively (Maritime Code, Art. 673 n):

- a) the obligation to supervise the vessel is expressly contracted,
- b) the vessel is berthed, and
- c) 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).

It is important to point out that supervision of the vessel at berth, if expressly contracted does not imply bailment (no transfer of possession) over the vessel.

3.3.4. Other Additional Work and Services

As previously pointed out 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. It is specific to the berth contract that additional services and works in the contract must be explicitly contracted. For example, additional work and services may include launching/lifting, cleaning, washing, winterising, airing the interior, control of bilge water, emptying rainwater, pumping out bilge water, covering the vessel with a tarpaulin, periodic starting-up of the vessel engines, charging the batteries, vessel deposit services, maintenance, servicing, travel-lifting, and similar.

Maintenance usually includes work and services related to regular maintenance of the vessel hull, machinery and equipment necessary for keeping the vessel in

(47) Padovan, A. V.; Skorupan Wolff, V., *Pleasure Navigation Berthing Contracts Under Croatian Law...* op. cit. p. 51.

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.⁽⁴⁸⁾ In practice and in the legal literature, there has been a lot of discussion on the nature of berthing contracts. 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.⁽⁴⁹⁾ 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.⁽⁵⁰⁾

Exceptionally, the marina operator may have to take the vessel into its custody

(48) For a more detailed comparative analysis and further references, see A. V. Padovan, M. V. Petit Lavall, D. Casciano: Marina Operator Berthing Contracts from a Comparative Law Perspective, *Revista de Derecho del Transporte*, 23 (2019), pp. 39-97; Padovan, A. V.; Skorupan Wolff, V., Pleasure Navigation Berthing Contracts Under Croatian Law... op. cit. p. 53.

(49) See e.g. Supreme Court: Rev- 756/11, 30 October 2013; Rev-2454/95, 6 May 1999; Rev 2333/2010, 14 May 2013.

(50) For a thorough analysis and discussion of the issue, see V. Skorupan Wolff, A. V. Padovan, Are there any Elements of Custody..., op. cit.; Padovan, A. V.; Skorupan Wolff, V., Pleasure Navigation Berthing Contracts Under Croatian Law... op. cit. p. 53.

while performing its obligation to provide certain additionally contracted work or service in relation to the berthed vessel. In such cases, the marina operator will be in a position of a custodian of the vessel, but only during the performance of that additionally stipulated work or service (e.g. during lifting or launching, servicing of the engines, cleaning, airing or other additionally stipulated works or services in respect of the berthed vessel). Thus, any potential elements of the contract of deposit in the context of the berthing contract are only exceptional and should be interpreted within the limits of the respective elements of the contract for works and services.⁽⁵¹⁾

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. 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 subcontractors 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).⁽⁵²⁾

(51) V. Skorupan Wolff, A. V. Padovan, Why the legal provisions on warehousing contracts should not be applied to berthing contracts?, Amžić Jelovčić, P., et. al. (ur.), *Modern Challenges of Marine Navigation, Conference Book of Proceedings of 2nd International Scientific Conference on Maritime Law (ISCML Split 2018)*, Faculty of Law University of Split, Croatia, Split, 2018, pp. 263-294.

(52) V. Skorupan Wolff, A. V. Padovan, Are there any Elements of Custody..., op. cit., p. 319; Padovan, A. V.; Skorupan Wolff, V., Pleasure Navigation Berthing Contracts Under Croatian Law... op. cit. p. 54.

3.4. Berth User Obligations and Liability

3.4.1. Using the Berth in Accordance with the Contract and its Purpose

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 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.⁽⁵⁴⁾ A special provision forbids a berth user to assign the berth to a third party (Maritime Code, Art. 673 o) para. 2). This is mandatory rule. Mandatory rules regulating the regime of the public maritime domain. Maritime Domain and Seaports Act, Articles 2, 6, 7, 16 prescribing mandatory requirements for the commercial exploitation of the maritime domain. In addition, the Tourism services Act, Articles 84-89⁽⁵⁵⁾ prescribing mandatory requirements for the providers of nautical tourism services.

The Maritime Code 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.⁽⁵⁶⁾

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

(53) Padovan, A. V.; Skorupan Wolff, V., *Pleasure Navigation Berthing Contracts Under Croatian Law...* op. cit. p. 54.

(54) Padovan, A. V.; Skorupan Wolff, V., *Pleasure Navigation Berthing Contracts Under Croatian Law...* op. cit. p. 56, 57.

(55) Official Gazette no. 130/2017

(56) For an explanation of the legal standards of due care under Croatian law, see V. Gorenc *et al.*, op. cit. p. 23; Padovan, A. V.; Skorupan Wolff, V., *Pleasure Navigation Berthing Contracts Under Croatian Law...* op. cit. p. 56.

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 (Maritime Code, Article 673 o) para 3).

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. A berthing service provider also has a right to claim damages for breach of contract (Maritime Code, Art. 673 o) para. 4).

3.4.2. Maintenance of the Vessel and its Equipment

A berth user is obliged to maintenance of the vessel and to equip the vessel with adequate berthing lines and fenders and other berthing equipment and continuously to take care of the vessel's technical soundness and its maintenance.

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.⁽⁵⁷⁾ On the other hand, as explained above berthing service provider's obligations are: provide a place for a safe berth, maintain the berth and the mooring equipment in a safe and technically sound condition, and maintain the port its infrastructure and suprastructure in good order and sound condition, maintain safety and security in the port.

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

(57) V. Skorupan Wolff, A. V. Padovan, Berth Contract *de Lege Ferenda*, op. cit., p. 72; Padovan, A. V.; Skorupan Wolff, V., Pleasure Navigation Berthing Contracts Under Croatian Law... op. cit. p. 58.

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⁽⁵⁸⁾).

3.4.3. Payment of Berthing Fees

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 Tourism Services Act prescribes that all providers of tourism services must duly publish the standard terms and conditions and prices for all their services. 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).

Also 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

(58) For the detailed discussion on the issue of the obligations of the user of berth see Skorupan Wolff, V., Padovan A.V., *Obligation of the User of Berth Arising from the Contract of Berth According to the Business Practises of Croatian Marinas*, Amižić Jelovčić, P., et al. (ur.), *Modern Challenges of Marine Navigation, Conference Book of Proceedings of 2nd International Scientific Conference on Maritime Law (ISCML Split 2018)*, Faculty of Law University of Split, Croatia, Split, 2018, pp. 263-294.

(Maritime Code, Art. 673 r) para. 3). In any case, a berth user who defaults owes all the default interest pursuant to Article 29.1 of the Civil Obligations Act.⁽⁵⁹⁾

3.5. Other relevant solutions regulating berthing contracts

One of the important legislative solutions included in the Amendments to the Maritime Code of 2019 is the introduction of the *ex lege* right of retention in favour of the berthing service provider. 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:

- a. unpaid berthing fees,
- b. 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
- c. 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.⁽⁶⁰⁾

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.⁽⁶¹⁾

As already mentioned, the berthing service provider normally does not

(59) V. Skorupan Wolff, A. V. Padovan, Berth Contract *de Lege Ferenda*, op. cit., p. 74; Padovan, A. V., Skorupan Wolff, V., Pleasure Navigation Berthing Contracts Under Croatian Law... op. cit. p. 60.

(60) Padovan, A. V.; Skorupan Wolff, V., Pleasure Navigation Berthing Contracts Under Croatian Law... op. cit. p. 55.

take possession of the vessel. No transfer of possession over the vessel, even if supervision is expressly contracted (regular visual check up from the pier, CCTV). Additional works and services may imply bailment but only to the extent necessary for the performance of the additional service and during such performance (e.g. launching/lifting, cleaning, winterizing etc.).

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⁽⁶²⁾.

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 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⁽⁶³⁾.

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

(61) See I. Crnić, *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 S. Petrić, *Institut prava retencije u hrvatskom i usporednom pravu (The Legal Concept of the Right of Retention in Croatian and Comparative Law)*, Split, Faculty of Law, University of Split, 2004; Padovan, A. V.; Skorupan Wolff, V., *Pleasure Navigation Berthing Contracts Under Croatian Law...* op. cit. p. 55.

(62) Padovan, A. V.; Skorupan Wolff, V., *Pleasure Navigation Berthing Contracts Under Croatian Law...* op. cit. p. 55.

(63) Padovan, A. V.; Skorupan Wolff, V., *Pleasure Navigation Berthing Contracts Under Croatian Law...* op. cit. p. 56.

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.⁽⁶⁴⁾

Prior to the amendments to the Maritime Code of 2019 it was disputable 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, if a vessel remains berthed 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.⁽⁶⁵⁾ 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).

Maritime Code deal with situation 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

(64) Padovan, A. V.; Skorupan Wolff, V., Pleasure Navigation Berthing Contracts Under Croatian Law... op. cit. p. 56. 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 A. V. Padovan, I. Tuhtan Grgić, Is the Marina Operator's Berthing Fee a Privileged Claim under the Croatian Maritime Code?, *Il Diritto Marittimo*, CXIX (2017), II, pp 366-399; A. V. Padovan, Arrest of a Yacht in a Croatian Court for the Purpose of Securing a Marina Operator's Claim, D. Ćorić, N. Radionov, A. Čar (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; A. V. Padovan, M. V. Petit Lavall, A. Meriardi, F. Cerasuolo, op. cit., pp. 532-543.

(65) Padovan, A. V.; Skorupan Wolff, V., Pleasure Navigation Berthing Contracts Under Croatian Law... op. cit. p. 60.

involved from the extraordinary danger.⁽⁶⁶⁾ 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).

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.⁽⁶⁷⁾

4. Conclusion

The pleasure navigation berthing contracts are important maritime law matter in Croatia. It has been gaining importance in recent decades due to the intensive development of nautical tourism together with the aspirations of the Republic of Croatia to continue to develop nautical tourism.

Until 2019 a berthing contract was an innominate contract, so it was a very complex legal framework that came to be applied in case of disputes. A number of provisions of the Civil Obligations Act applied, the courts had to construe the contract in accordance with the general rules and principles of contract law contained in the Civil Obligations Act, as well as special provisions that specifically

(66) Padovan, A. V.; Skorupan Wolff, V., *Pleasure Navigation Berthing Contracts Under Croatian Law...* op. cit. p. 50.

(67) For a more detailed discussion on the berthing service provider's right to intervene in the case of an emergency, see V. Skorupan Wolff, A. V. Padovan, *Berth Contract de Lege Ferenda...*, op. cit., pp. 64-69; Padovan, A. V.; Skorupan Wolff, V., *Pleasure Navigation Berthing Contracts Under Croatian Law...* op. cit. p.51.

regulate certain types of nominate contracts which by their nature most closely corresponded to the contract in dispute. Usually, the courts used to, where necessary, look into the special provisions on rental contracts, service contracts (*locatio conductio operis*), mandates and deposits (bailments, custody), but also other nominate contracts could have been relevant in a particular instance.

Such a legal framework did not offer solid and adequate legal certainty and predictability of legal protection. In addition, case law was not uniform, and autonomous law was not standardized, thus contributing to legal uncertainty. All of that did not ensure further sustainable development of nautical tourism and legal certainty in the field of nautical tourism.

The research conducted as part of DELICROMAR project⁽⁶⁸⁾ led the conclusion that most Coratian port operators, as providers of berthing and mooring services, apply very similar rules of practice, implementing three or four essentially equal berthing contracts models. That fact provides a solid basis for formal standardisation, considering that there was a substantial level of similarity in business practice in providing berthing services. The new provisions on the berthing contract were finally accepted by the adoption of the Act on Amendments to the Maritime Code of 2019.

By adopting new legislation the following important effects have been achieved:

- A clear, precise and well-developed system of contractual liability has been created.
- The new legislative provisions on berthing contract successfully resolve the main legal issues arising in relation to pleasure navigation berthing contracts in practice: they provide a precise definition of the contract and determine its essential elements and the scope and contents of the parties' rights and obligations; sets a minimum legal standard in respect of the

(68) See *supra* n. 24.

rights, obligations and liabilities of berthing service providers and berth users; establish a clear regime of the contractual liability for damage.

- Business practice, together with all its specifics created and set in practice, is implemented in legal provisions, and they are in line with mandatory positive law. This has achieved the maintenance of continuity and stability of business practice. The relevant legal provisions reflect the existing well-established business practice in Croatia. This ensures the continuity and stability of business practices.
- 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 depositary. 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.
- Legal gaps in a number of specific legal issues related to the berthing contracts have been eliminated.
- A higher level of protection, security and order in ports is achieved. Significantly stricter contractual liability is foreseen for berthing service provider 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.
- Codification of contracts contributes to a uniform interpretation of contracts in practice. A higher degree of legal certainty is achieved for informally concluded contracts and contract whose content is unclear or disputable.
- Special legislative provisions for these contracts offer greater legal certainty and predictability of legal protection for nautical tourism ports and other nautical port service providers, charter companies, economic entities engaged in maintenance, repair and servicing of yachts and boats and for berth users.

- Adoption of new legislation is an important prerequisite for the successful development of nautical tourism ports and charter activities. They will contribute to the quality of service and also to a more efficient operation of berthing service provider and charter service providers. The attributes of codified contracts enable berthing service provider and charter service providers to monitor their operations more efficiently, and indirectly contribute to the quality of service and competitiveness of Croatian marinas and charter companies.

In honorem Caslav Pejovic

Professor Caslav Pejovic left a deep and indelible mark in maritime law science, therefore the Adriatic Institute of the Croatian Academy of Sciences and Arts (hereinafter Adriatic Institute) is particularly proud to have had the opportunity to cooperate with such a giant of the maritime law profession, a brilliant scientist, legal writer and great cosmopolitan.

The Adriatic Institute was founded in 1945. Its headquarters is in Zagreb, Republic of Croatia. The activities of the Adriatic Institute are focused on the scientific study of maritime law and international law of the sea, the implementation of European Union maritime law, the comparative study of national, European and international sources of maritime law and domestic, foreign and international court and arbitral decisions. It is one of the few institutes in Europe specializing in the aforementioned fields of law. Since 1958, the Adriatic Institute has edited *Poredbeno pomorsko pravo - Comparative Maritime Law*, a respectable legal journal which publishes academic articles in the fields of international law of the sea, maritime law, including shipping and transport law, marine and transport insurance law, maritime labour law, protection of the marine environment, maritime safety and security, and similar fields. Also, the journal publishes other materials, such as professional translations of the international legal instruments and documentation, book reviews, case law commentaries, reports from the relevant

meetings, conferences and similar events. It has an international editorial board and is referenced in relevant international bibliographic databases.

During his career as a scientist and university teacher, Professor Pejovic has continuously maintained cooperation with the Adriatic Institute. This cooperation began in 1983, while Professor Pejovic used the library of the Adriatic Institute, which was and remains the only specialized library in the field of maritime law and the law of the sea in the Republic of Croatia and the neighboring countries. The library's fund consists of three collections: monographs, periodical publications, and documentation. Library collects case law and numerous documents related to preparatory work on international conventions in the field of maritime law. That is when professor Pejovic commenced his cooperation with already established and experienced scientists of the Adriatic Institute, such as Emilio Pallua and Branko Kojic.

In the Adriatic Institute, Professor Pejovic got in touch with the greatest authority in Croatian maritime law science and the unsurpassed maritime law writer in Croatia, respected professor Branko Jakasa, who would later become his mentor. Professor Jakasa was the head of the Adriatic Institute and a professor at the Faculty of Law in Zagreb, where Professor Pejovic obtained his doctorate. Professor Pejovic always fondly remembers his teacher and mentor Professor Jakasa and points out that he was strongly influenced by his way of writing and analyzing legal issues.

The Adriatic Institute was then (and still strives to maintain that role today) the meeting-place of legal scientists who dealt with maritime law. For example, in the Adriatic institute, national legislation was created, accession to international conventions was considered, recent maritime law literature and unification trends in the world were discussed, etc.

The application of the comparative method in the study of transnational concepts of maritime law was especially encouraged. The Adriatic Institute strived to be a center of knowledge and a place of contact for scientists from the surrounding areas. At the same time, the Faculty of Law in Zagreb organized high-quality

postgraduate studies in commercial law led by excellent professors, such as academician Aleksander Goldstajn, academician Sinisa Triva, academician Jaksa Barbic, Professor Branko Jakasa, PhD, Professor Ljudevit Rosenberg, PhD, Professor Velimir Filipovic, PhD and others. Professor Professor Pejovic attended their lectures during his postgraduate studies.

Such exceptionally stimulating surroundings for the development of young scientists contributed to the fact that Professor Pejovic felt comfortable during his stay in Zagreb. Also, we believe that he absorbed a hint of motivation, ambition and ideas for dealing with maritime law in Zagreb and took it to the world.

During our last meeting at the Adriatic Institute, Professor Pejovic explained to us that it is possible for the people from small countries, such as Montenegro, to have successful careers abroad. There are several ingredients that are necessary to do that: high ambition, strong motivation, a lot of effort, and a little bit of luck. This is an important message for young scientists who are starting a scientific career.

The most important aspect of the collaboration between Professor Pejovic and the Adriatic Institute relates to his role as a member of the editorial board, author and reviewer of the journal *Poredbeno pomorsko pravo - Comparative Maritime Law*. This cooperation has been going on for over 30 years. His articles are always included in the journal with great excitement and with special joy because it is known that they will attract a wide range of readers in the maritime law profession. As an author professor Pejovic contributed always with up-to-date and high-quality articles. In this way, he contributed to the journal achieving an appropriate level of quality. It enabled our readers to become familiar with the interpretation of legal issues by an internationally renowned expert. His articles, due to their in-depth and critical analysis, are a role model for young scientists who are at the beginning of their affirmation. Knowledge is gained from these articles and inspiration is created for dealing with similar topics. In addition, we are sure that the papers of Professor Pejovic are of particular and lasting importance for maritime law science on a global level.

Professor Pejovic has always responded to the invitations of the editorial board to be a peer-reviewer of articles in our journal, thereby contributing to its quality. It is valuable for every author to receive constructive criticism, advice, or suggestions from such a prominent peer.

Reading the journal *Comparative Maritime Law* and occasionally reviewing articles, Professor Pejovic has been with us all these years and followed the development of law and practice in Croatia. Because of all this, the Adriatic Institute is extremely grateful to Professor Pejovic for always unselfishly devoting a part of his valuable time for cooperation with the journal *Comparative Maritime Law*.

During the breakup of the former Yugoslavia and the formation of the independent states of Croatia, Montenegro, Serbia, Bosnia and Herzegovina, Slovenia and Macedonia, we maintained a friendly and collegial relationship with Professor Pejovic. Our relationship was spared from ideological contamination and retained the dignity of pure legal science.

Our humble contribution to Professor Pejovic's *Liber amicorum* is just a small gesture of gratitude to Professor Pejovic for everything he has done for the Adriatic Institute and the journal *Comparative Maritime Law*.

All these years, it has been a special honor for us to cooperate with such a brilliant scientist whose contribution is of particular and lasting importance to the world's maritime law science and practice.

We hope that after his retirement, the cooperation of the Adriatic Institute with Professor Pejovic will further deepen and that he will continue to engage in science with the same zeal and intensity. In addition, we are sure that he will continue to be a role model for young scientists due to his work ethic, scientific enthusiasm, energy and engagement as a legal writer and expert.