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**THE EFFECT OF THE CRAFT'S SINKING
ON THE CONTRACTUAL RELATIONSHIP OF THE PARTIES
TO THE CONTRACT OF BERTH AND CUSTODY
OF A PLEASURECRAFT**

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Thank you for the attention...

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INTRODUCTION

- 121 nautical ports: 57 marinas, 38 Anchorages, 10 M
- 2012-2016: 24 + 1 cases of sinking in NPs (x5 elsewhere)
- Cca 17.350 berths: 95% up to 20m length
- Average value on berth: cca 165.000 EUR

- Destiny of the contract of berth?
 - Contract nature, parties, applicable law...?
 - MO'a GTC
 - Cause of sinking – fault, latent defect/unseaworthiness, Act of God?
 - Extent of damage
 - Consequences upon the contract?



CASE 1 (VSRH Rev 2333/2010-3)

1. Contract of berth 25 Aug. 2001 – 1 year, automatic renewal unless written notice of cancellation given 30 days prior to expiry
2. Contract for the use of berth + custody of the vessel (due diligence = reasonable professional care, control over the safe berth, pumping out of the rain water, ventilating the interior, setting the tarpaulin, upon the expiry of the contract return the vessel to the owner in the state that it was received.
3. Upon the receipt of the vessel into the custody of the marina: written acceptance protocol, list of inventory, state of the vessel – forming part of the contract
4. The receipt into the custody – upon the delivery of the vessel's documentation, keys and the signature of the acceptance protocol
5. Marina shall indemnify the owner for any damage to the vessel/equipment/inventory caused with the fault of the marina or arising from the breach of the contract – period of liability: receipt - redelivery
6. 25 Aug. 2002 vessel still on berth; 16/17 Nov. 2002, sinking on berth; 22 Nov. 2002 lifted and placed in dry berth, unprotected
7. Value: 270.000 EUR

Case 1 (ctd.):

- Cause of sinking: flooding by heavy rain, 4 automatic bilge pumps failure, flat battery, the vessel disconnected from the power pedestal on the pier;
- Contract – elements of (berth) rental + elements of custody
- Plaintiff's claim partly accepted by the courts - 195.000 EUR for damage to the vessel + the cost of the lifting
- The remaining value (wreck?): 75.000 EUR
- Courts held: contract was renewed in Aug. 2002, (keys not left at the marina, no notice of cancellation) / contract terminated automatically upon the sinking / marina's counterclaim for the costs of dryberth rejected (no contract) / marina liable for the sinking: they did not take due care by not charging the battery, which caused the bilge pumps failure, and sinking due to flooding by heavy rain
- Damaged vessel – the same ownership, no abandonment
- Marina's counterclaim for dryberth costs? – demurrage? storage? – returned to the first instance court for the repeated proceedings.



Case2 (VSRH II Rev 24/1997-2)

- contract of berth
- Yacht sank on berth 19. Nov. 1992
- Cause: water penetration through the main vent (ware&tare, inefficient sealing), breakage of water filter and – cca 69 hours to sink
- 3 days before sinking the marina's staff was on board for service maintenance
- No evidence of the causal link between the works of service maintenance or the acts of the marina's staff and the sinking
- MO's GTC – marina is not liable for damage caused by latent defect in the vessel
- The staff did not know and ought not have known of the problem with the vent (due care)
- Subrogated claim of hull insurer rejected



Contract of berth - features

- Parties – MO & Owner/Lessee/Charter Agency
- Form – transit: informal / long term: formal
- Innominate, atypical
- MO's GTC
- Applicable law



Contract of berth - models

- Berth/mooring rental - always
- Berth/mooring Rental + Control (from the pier) – frequently in longer term berth contracts
- Care and Custody – rarely; „boat care package“ available as an additional service
- Repairs, maintenance works, lifting and launching, servicing, cleaning, etc. – on mandate (separate contract)

CAUSE OF SINKING:

- MO's liability: deficiencies of the mooring system and equipment; act or default of the MO's staff (contractual liability: surveillance from the pier; default in custody, maintenance, repair or similar if contracted... statutory obligations of the concessionary of the port) – the principle of presumed liability based on fault; standard of due diligence (reasonably careful businessman/professional)
- Owner's liability: due care in the maintenance and keeping of the vessel in a seaworthy condition; marine ropes, battles, fairleads etc;
- Owner's risk: latent defect, act or default of his men, accidental loss or damage, act or default of his men; force majeure;

Extent of damage:

- Possible damages in case of sinking:
 - TLO + WR / large PA + SL
 - TPL claims and pollution?
 - Loss of earnings?
 - Damage to marina infrastructure or equipment?

- Potential exclusions and limitations in the GTCs



Destiny of the contract?

- Automatic termination?
- Cancellation?
- Rescission?
- Continuation?
- Novation (animus novandi)?



DESTINY OF THE CONTRACT

- A. TLO – contract is terminated automatically, faulty party liable in damages; restoration to status quo; presumed fault of the MO – burden of proof.
- B. PA – the parties continue to be bound by the contract; the innocent party's right to cancel the contract; the faulty party liable in damages; restoration to status quo; presumed fault of the MO – burden of proof.
- MO's fault + Owner's contribution to the damage – MO liable, but liability reduced (%)
- Cause is at the risk of the owner? – in case of PA – *rebus sic stantibus*?
- duty of both parties to mitigate the loss / creditor's delay?
- Parties' autonomy

Conclusions

- The effect of the craft's sinking on the contract of berth depends on:
- The dominant cause of sinking – fault of MO or of Owner or accidental
- The extent of damage
- The specific terms of the contract
 - Exclusions and limitations of liability
 - Model of Berth contract
 - Cancellation policy
 - Applicable law

