

MARINA OPERATOR BERTHING CONTRACTS FROM A COMPARATIVE LAW PERSPECTIVE^{*,**}

Adriana Vincenca Padovan

Ph. D., Assistant Professor, Research Associate
Adriatic Institute of the Croatian Academy of Sciences and Arts, Zagreb (Croatia)

María Victoria Petit Lavall

Ph. D., Full Professor of Commercial Law, Director of the Institute for Transport Law,
Jaume I University, Castellón (Spain)

Daniele Casciano

LL. M. Ph. D., Lawyer in Trieste
Adjunct Professor of Insurance Law and Transport Law at the University of Udine (Italy)

ABSTRACT

This paper deals with the concept of marina operator berthing contracts from the comparative perspectives of Spanish, Italian, Croatian and US law. The focus is on the legal nature of the contracts and on the marina operator's liability arising from them. The authors analyse the relevant legal framework, private regulation, judicial practice and legal doctrine, and discuss the salient features of the contracts and the most prominent issues arising in relation to their practical application. A comparative law analysis shows the similarity of the questions raised in the judicial practice and legal doctrine in all four observed jurisdictions. The discussion revolves around the central problem of determining the legal nature of this innominate atypical contract. The positions are divided into two main lines of argument: one treats the contract primarily as a contract for the use of a safe berth (locatio conductio rei), while the other is based on the concept that the contract contains vital elements of a contract of deposit (depositum), whereby the vessel is entrusted to the marina for safe-keeping.

Keywords: marina operator, berthing contract, liability.

* Fecha de recepción del trabajo: 19/02/2019. Fecha de aceptación del trabajo: 20/05/2019.

** 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» (ref. DELICROMAR, UIP-2013-11-3061; principal researcher: A. V. PADOVAN; see www.delicromar.hazu.hr) and the research project financed by the Spanish Ministry of Economy and Competitiveness and the European Regional Development Fund (ERDF), entitled «Transport as a Motor of Socio-Economic Development: Protection of the Weak Contracting Party and Progress as regards Transport Sector Regulation» (ref. DER2015-65424-C4-3-P MINECO/FEDER; principal researcher: M.^a V. PETIT LAVALL).

SUMMARY: I. INTRODUCTION.—II. MARINA OPERATOR BERTHING CONTRACTS UNDER SPANISH LAW: 1. General Considerations. 2. The Legal Nature of Berthing Contracts under Spanish Law. 3. Contracting Parties: 3.1. The Marina Operator. 3.2. The Berth User. 4. Subject Matter of the Contract. 5. The Rights, Obligations and Liabilities of the Parties: 5.1. Marina Operators. 5.2. Berth Users.—III. MARINA OPERATOR BERTHING CONTRACTS UNDER ITALIAN LAW: 1. General Considerations. 2. The Legal Nature of Berthing Contracts under Italian Law. 3. The Rights, Obligations and Liabilities of the Parties: 3.1. Marina Operators. 3.2. Berth Users.—IV. MARINA OPERATOR BERTHING CONTRACTS UNDER CROATIAN LAW: 1. General Considerations. 2. The Legal Nature of a Berthing Contract under Croatian Law. 3. The Rights, Obligations and Liabilities of the Parties: 3.1. Marina Operators. 3.2. Berth Users. 4. De Lege Ferenda Proposals.—V. AN OVERVIEW OF MARINA OPERATOR LIABILITY FOR DAMAGE TO VESSELS AT BERTH UNDER THE LAW OF THE UNITED STATES: 1. General Considerations. 2. Wharfinger Liability. 3. Bailment vs. Berth (Slip) Rental. 4. Marina Operator Liability under Bailment Law. 5. Exculpatory Clauses.—VI. CONCLUSION.

I. INTRODUCTION

The tradition, culture and widespread diffusion of nautical tourism and pleasure navigation in Europe deserve the particular attention of policymakers and legislators at the national and regional levels but also at the level of the EU. This phenomenon is an important factor in terms of lifestyle and quality of life for a large number of EU citizens¹. In addition, the economic sector of nautical tourism has been recognised as one that can provide economic opportunities for coastal communities and that has good potential for further growth, generating a significant number of jobs and revenue². In this context, the marina industry has an important role. The legal regime of nautical tourism, in particular the marina business, should ensure legal certainty for all stakeholders and strike a fair balance between the interests of all parties involved. From the private law perspective, berthing contracts are probably amongst the most important topics of interest in this sphere.

This paper presents a comparative legal analysis of marina operator berthing contracts in the legal systems of three European Mediterranean countries with a strong tradition and culture of pleasure navigation and a developed nautical tourism sector: Spain, Italy and Croatia. In addition, a short overview of marina operator liability related to berthing contracts under the law of the United States of America is presented in the last part of the paper. Spain, Italy and Croatia belong to the circle of civil law countries with very similar systems of contract and tort law. Furthermore, the three jurisdictions in question apply a similar public maritime domain legal regime to determine the legal status of coastal zone areas and sea ports, which consequently affects the legal position of port operators, and particularly marina operators. On the other hand, it seemed in-

¹ About 48 million, *i. e.* one in ten, EU citizens participate regularly in water sports. 36 million participate regularly in boating activities, keeping about 6 million boats in European waters. Cited from EU COMMISSION, *Commission Staff Working Document on Nautical Tourism*, SWD (2017) 126 final, 30 March 2017, available from https://ec.europa.eu/maritimeaffairs/sites/maritimeaffairs/files/swd-2017-126_en.pdf (retrieved on 17 December 2018).

² *Ibid.* See also EU COMMISSION, *Assessment of the Impact of Business Development Improvements around Nautical Tourism*, Final Report, written by ICF in association with Deloitte, Marine South East, Sea Teach and IEEP, November 2016.

teresting and useful to draw a comparison with the legal concept of a marina operator berthing contract as shaped in the common law system of a nation with one of the largest and oldest traditions of pleasure navigation. Therefore, the legal concepts of a berthing contract, berth lease or rental and deposit shaped in the three European legal jurisdictions observed are compared with the concepts of boat storage and slip rental agreements, bailment law and wharfinger's liability established under US law. In this way, the authors wish to contribute to the global understanding and exchange of knowledge and experience of this interesting and complex legal topic, which so far has attracted very little attention in international legal literature. In fact, this paper presents a unique example of a comparative legal analysis of marina operator berthing contracts and the liability arising from them.

II. MARINA OPERATOR BERTHING CONTRACTS UNDER SPANISH LAW*

1. General Considerations

Berthing contracts are directly linked to sports or recreational navigation. This type of navigation constitutes a special part of maritime law, as it lacks the professionalism and profit-making aspect that otherwise characterises this sector of the legal system³. This is clear from the definition of sports or recreational navigation contained in Article 252(2), Paragraph 3 of the amended State Ports and Merchant Navy Act (*Ley de Puertos del Estado y de la Marina Mercante*), approved by Royal Legislative Decree 2/2011 of 5 September (SPMNA), according to which «recreational or sports navigation» is a type of navigation «the exclusive object of which is recreation, the practice of sports for non-profit-making purposes, or non-professional fishing, performed by the vessel owner or by other persons entitled to carry it out, through charter, contract of passage, assignment or by any other title, provided that in these cases the vessel or craft is not used by more than 12 people, excluding its crew».

It should be noted that even today Spain lacks a systematic body of rules governing pleasure navigation. Despite its undoubted economic importance and the recent significant modification of Spanish maritime law by Act No. 14/2014 of 24 July on Maritime Navigation (MNA)⁴ and by the SPMNA, both acts contain only references to it. Spanish legal scholars have not shown much interest in this

* M.^a Victoria PETIT LAVALL, Ph. D., Full Professor of Commercial Law, Director of the Institute for Transport Law, Jaume I University, Castellón (Spain).

³ I. ARROYO MARTÍNEZ, *Curso de Derecho Marítimo*, 3rd ed., Cizur Menor, Civitas-Thomson Reuters, 2015, p. 881; for a detailed account of the situation in Italy, see A. ANTONINI, «La legislazione sulla navigazione da diporto», in COMENALE PINTO and ROSAFIO (eds.), *Il diporto come fenomeno diffuso. Problemi e prospettive del diritto della navigazione*, Rome, Aracne, 2015, pp. 19 et seq.

⁴ Most of its content applies to vessels and pleasure craft, and for the first time the craft charter party is regulated.

field, either⁵. Perhaps this is due to the fact that the legal regime applicable to this sector is a multidisciplinary one, mostly consisting of administrative law rules. The relevant legislation is usually passed at the national or internal level of each state and is not uniform⁶. This is particularly evident in Spain, where legislative power is divided between the state and seventeen autonomous communities, *i. e.* regional bodies with a high, albeit asymmetrical, degree of self-government. In fact, Article 148(1)(6) of the Spanish Constitution empowers the latter to assume powers in the field of marinas, and all autonomous communities on the coast have done so in their respective statutes of autonomy, promulgating acts on ports and marinas⁷.

2. The Legal Nature of Berthing Contracts under Spanish Law

Based on the dictionary entry of the Spanish Royal Academy, «mooring» or «berthing» can be defined as fastening a ship in a port or at an anchorage by attaching it by cable, chain or rope to the shore or by using an anchor. Although mooring in itself is no novelty and despite the large number of berths existing in Spain, these contracts still lack regulation. It is, therefore, an atypical contract. Only Title VI of the SPMNA and the various regional acts on ports deal with mooring and unmooring services, referring to them as a public service provided in ports and marinas, which is, however, different from a berthing contract⁸. In fact, this is a technical-nautical port service [art. 108(2)(a)(3) SPMNA], and in this sense the SPMNA describes a mooring service as a service «the object of which is to collect the moorings of a ship, carry and fix them to the elements arranged in the docks or berths for this purpose in the berthing sector designated by the port authority, in order to conveniently facilitate docking, unmooring and undocking operations, following the instructions of the master of the ship» [art. 128(1)]. On the other hand, an unmooring service is «one whose object is to release the moor-

⁵ Very few authors and studies have analysed aspects of sports navigation, as pointed out by D. RODRÍGUEZ RUIZ DE VILLA, «El contrato de amarre en Puerto Deportivo», *UNED. Boletín de la Facultad de Derecho*, No. 25, 2004, p. 116.

⁶ See F. LORENZON and R. COLES, *The Law of Yachts and Yachting*, London and New York, Maritime and Transport Law Library, 2012, p. 223.

⁷ Act No. 5/1998 of 17 April on the Ports of Catalonia (*BOE* No. 127, 28 May 1998); Act No. 14/2003 of 8 April on the Ports of the Canary Islands (*BOE* No. 134, 5 June 2003); Act No. 10/2005 of 21 June on the Ports of the Balearic Islands (*BOE* No. 179, 28 June 2005) and Act No. 6/2014 of 18 July amending Act No. 10/2005 of 21 June on the Ports of the Balearic Islands (*BOE* No. 202, 20 August 2014); the Act of Cantabria No. 5/2004 of 16 November on the Ports of Cantabria (*BOE* No. 298, 11 December 2004); Act No. 21/2007 of 18 December on the Legal and Economic Regime of the Ports of Andalusia (*BOE* No. 45, 21 February 2008); Act No. 6/2017 of 12 December on the Ports of Galicia (*BOE* No. 36, 9 February 2018); Act No. 2/2014 of 13 June on the Ports of the Generalitat Valenciana (*BOE* No. 165, 8 July 2014); Act No. 3/1996 of 16 May on the Ports of the Autonomous Community of the Region of Murcia (*BOE* No. 238, 2 October 1996) and Act No. 3/2017 of 14 February amending Act No. 3/1996 of 16 May on the Ports of the Autonomous Community of the Region of Murcia (*BOE* No. 57, 8 March 2017); Act No. 2/2018 of 28 June on the Ports and Maritime Transport of the Basque Country (*BOE* No. 187, 3 August 2018).

⁸ U. LA TORRE, «Ormeggio di nave», in L. TULLIO *et al.* (eds.), *Studi in onore di Gustavo Romanelli*, Milano, A. Giuffrè, 1997, pp. 726 et seq.; A. CLARONI, *Il contratto di ormeggio nella portualità turistica*, Bologna, Bonomo editrice, 2003, p. 62.

ing lines of a ship from the fastening elements to which it is moored, following the sequence and instructions of the master and without affecting the mooring conditions of adjacent ships» [art. 128(2)].

Given the absence of the legal concept of a berthing contract, a definition has been drawn up by Italian authors after an analysis of contracts used in practice. Indeed, Spain stands out for its limited treatment of berthing contracts in legal literature, since contributions are limited to reproducing the correct opinions of the Italian authors who have studied the area⁹. Thus, a berthing contract has been defined as one by which an operator-concessionaire of a marina grants a berth user the right to occupy with a ship or vessel a body or sheet of water (called a berth, mooring or anchorage) for a certain period of time and to enjoy the use of adjacent structures (docks, berths, jetties) and equipment (buoys, chains, bollards, etc.), as well as the services inherent in their use and the needs of the ship (assistance in mooring and unmooring operations, meteorological services, water supply services, electricity, etc.), in exchange for the payment of compensation (known as a berthing fee)¹⁰.

With regard to the characteristics of a berthing contract, authors unanimously affirm, following the situation in practice, that it is a bilateral, onerous and consensual contract, with a freedom of form¹¹. That is, the contract is concluded with the consent of the parties and does not require a written form *ad substantiam*. However, it should be noted that it is normally concluded in writing¹² through pre-formulated standard contracts¹³ with consumers, which is the status berth users now have in line with Article 3 of Royal Legislative Decree 1/2007 of 16 November approving the amended General Protection of Consumers and Users Act and other complementary laws. Consequently, its clauses may be declared abusive and thus null and void¹⁴. In any case (as will

⁹ There is only one note on the Supreme Court Decision of 20 February 1999, written by C. SALINAS ADELANTADO, «Contrato de amarre», *RGD*, No. 668, May 2000, p. 6221, and two articles: D. RODRÍGUEZ RUIZ DE VILLA, «El contrato de amarre en Puerto Deportivo», *op. cit.*, pp. 115 et seq. and M.^a V. PETIT LAVALL, «Régimen jurídico del contrato de amarre» in GARCÍA-PITA, QUINTÁNS and DÍAZ DE LA ROSA (eds.), *El Derecho marítimo de los nuevos tiempos*, Civitas, 2018, pp. 689-712.

¹⁰ A. ANTONINI, «Contratto di ormeggio», *Trasporti*, nos. 48-49, 1989, p. 202; M. M. COMENALE PINTO, «In torno alla natura e al contenuto del contratto di ormeggio», *Diritto dei Trasporti*, 2000, pp. 890-891; L. VERDE, «Il contratto di ormeggio tra diritto pubblico e privato», in *Dai tipi legali ai modelli sociali nella contrattualistica della navigazione, dei trasporti e del turismo, Atti del Convegno di Modena*, 31 March and 1 April 1995, Milano, 1996, p. 549; L. VALLE, «Il contratto di ormeggio», in F. GALGANO (ed.), *I contratti del commercio, dell'industria e del mercato finanziario*, t. II, Torino, UTET, 1995, p. 1815; A. CLARONI, *Il contratto di ormeggio nella portualità turistica*, *op. cit.*, p. 62; M. BADAGLIACCA, «Il contratto di ormeggio», in COMENALE PINTO and ROSAFIO (eds.), *Il diporto come fenomeno diffuso. Problemi e prospettive del diritto della navigazione*, Rome, Aracne, 2015, pp. 204-205. In Spain, D. RODRÍGUEZ RUIZ DE VILLA, «El contrato de amarre en Puerto Deportivo», *op. cit.*, p. 119.

¹¹ A. CLARONI, *Il contratto di ormeggio nella portualità turistica*, *op. cit.*, p. 62.

¹² On berthing contracts concluded verbally, see the Judgment of the Court of Appeal of Cantabria (Section 1) of 19 July 2000 (AC 2000, 3765).

¹³ M. BADAGLIACCA, «Il contratto di ormeggio», *op. cit.*, p. 205; D. RODRÍGUEZ RUIZ DE VILLA, «El contrato de amarre en Puerto Deportivo», *op. cit.*, p. 131.

¹⁴ D. RODRÍGUEZ RUIZ DE VILLA, «El contrato de amarre en Puerto Deportivo», *op. cit.*, p. 131; Judgment of the Court of Appeal of Cadiz (Section 6, Ceuta) of 27 March 2012 (JUR 2013, 89492).

be seen below), the content of a berthing contract has a noticeably regulatory character, since it is necessarily determined by and integrated in various marina operating and policing regulations of a public law nature, and by the conditions of the concession¹⁵.

The fact that a berthing contract is an atypical contract makes it necessary to specify its legal nature in order to determine the applicable regulations and thus the content or legal regime thereof. This issue is not without difficulty, and there is still no unanimous position either in case law or in legal scholarship. This is recognised in the Judgment of the Court of Appeal of Granada (Section 3) of 13 September 1999¹⁶, which expressly states that there is no unanimous opinion on the nature of such a contract but, surprisingly, does not further address the question.

The determination of the legal nature of a berthing contract requires, in the first place, establishing whether the relationship between the marina operator and the user is of a public nature or, on the contrary, a private one. This will depend on the way in which the operation and management of a marina whose ownership is public (in the autonomous communities) is articulated. Nonetheless, as will be analysed, both legal scholars and Spanish tribunals have declared that if the management is indirect, the contract is a private mixed-cause or complex one¹⁷. Indeed, an analysis of the obligations that in practice the marina operator assumes with respect to the berth user has led authors to consider that a berthing contract has the character of a lease contract, a service contract, a deposit contract, a supply contract¹⁸, a contract for the parking of vehicles¹⁹, a garage rental agreement or even a camping contract²⁰. Thus, it has been said that the legal nature of a berthing contract depends on the obligations contractually assumed by the marina operator, which are not always identical but which have a common core. That is, a berthing contract has a minimum essential content, which is to

¹⁵ M. ZAMBONINO PULITO, *Puertos y costas: régimen de los puertos deportivos*, Valencia, Tirant lo Blanch, 1997, pp. 310-312; *id.*, «El nuevo marco de los Puertos deportivos: el régimen de las concesiones», *Revista Andaluza de Administración Pública*, 2010, No. 77, p. 93.

¹⁶ AC 1999, 2054.

¹⁷ U. LA TORRE, «Ormeggio di nave», *op. cit.*, p. 737. The Judgment of the Court of Appeal of Alicante (Section 5) of 20 June 2001 (JUR 2001, 238537) qualifies it as an atypical and complex contract.

¹⁸ See, among others, A. ANTONINI, «Contratto di ormeggio», *op. cit.*, p. 203; U. LA TORRE, «Ormeggio di nave», *op. cit.*, pp. 734 et seq.; L. VERDE, «Il contratto di ormeggio tra diritto pubblico e privato», *op. cit.*, pp. 556 et seq.; L. VALLE, «Il contratto di ormeggio», *op. cit.*, pp. 1823, 1826-1827; A. CLARONI, *Il contratto di ormeggio nella portualità turistica*, *op. cit.*, pp. 76 et seq.; M. BADAGLIACCA, «Il contratto di ormeggio», *op. cit.*, pp. 199 et seq.

¹⁹ M. M. COMENALE PINTO, «In torno alla natura e al contenuto del contratto di ormeggio», *op. cit.*, p. 899; C. SALINAS ADELANTADO, «Contrato de amarre», *op. cit.*, p. 6221; D. RODRIGUEZ RUIZ DE VILLA, «El contrato de amarre en Puerto Deportivo», *op. cit.*, pp. 125 et seq. In case law, among others, see Judgment of the Court of Appeal of Alicante (Section 7) of 22 June 2000 (JUR 2000, 270072); Judgment of the Court of First Instance No. 17 of Valencia of 28 February 2003 (JUR 2003, 2146639); Judgment of the Court of Appeal of the Balearic Islands (Section 3) of 23 June 2004 (JUR 2004, 192343); Judgment of the Court of Appeal of Barcelona (Section 13) of 6 July 2004 (JUR 2004, 293692); Judgment of the Court of Appeal of Alicante (Section 6) of 19 April 2011 (JUR 2011, 270005).

²⁰ M. M. COMENALE PINTO, «In torno alla natura e al contenuto del contratto di ormeggio», *op. cit.*, p. 899.

place the berth and the use and enjoyment of the marina infrastructure (docks, berths, jetties) at the disposal of the berth user. However, other obligations, such as the provision of certain services and/or the custody of the vessel or the goods contained therein, can be added to this minimum content²¹.

3. Contracting Parties

3.1. The Marina Operator

Marinas are public domain goods owned by an autonomous community, built on a public maritime-terrestrial domain assigned to the autonomous communities by the state administration (Art. 5 SPMNA and Art. 49 of Act No. 22/1988 of 28 July on the Coasts)²². However, autonomous communities can manage them directly (in a centralised or decentralised manner) or indirectly. «Indirect management» means that a third party is empowered by contract to construct and operate or only to operate a marina, assuming the economic risk derived from such exploitation. In this way, ownership and management are separated by privatising the latter²³ based on a concession, which is the formula used in practice. In fact, most Spanish marinas are operated, *i. e.* providing their services to pleasure craft under a concession contract, by private legal entities, usually associations (nautical clubs) or commercial companies (Inc. and Ltd.)²⁴.

Consequently, there is a link of a public nature between an autonomous administration and a marina operator (administrative concession), and a link of a private nature between a marina concessionaire and the user of marina infrastructure, by which the concessionaire-operator of the marina provides the latter with the use and enjoyment of the part of the property which is the subject matter of the concession (the marina), as well as with the services that are available to him²⁵. Even though some authors have considered this legal relationship to be

²¹ For Italy, see Decision of the Supreme Court of 13 February 2013; M. BADAGLIACCA, «Il contratto di ormeggio», *op. cit.*, p. 207 (no. 18).

²² M. ZAMBONINO PULITO, *Puertos y costas: régimen de los puertos deportivos*, *op. cit.*, pp. 93 et seq. and 116 et seq.; *id.*, «El nuevo marco de los Puertos deportivos: el régimen de las concesiones», *op. cit.*, pp. 50 et seq.; I. ARROYO MARTÍNEZ, *Compendio de Derecho marítimo* (Ley 14/2014, de navegación marítima), 6th ed., Madrid, Tecnos, 2017, p. 394; J. L. PULIDO BEGINES, *Instituciones de Derecho de la navegación marítima*, Madrid, Tecnos, 2009, p. 701.

²³ For more detail, see M. ZAMBONINO PULITO, *Puertos y costas: régimen de los puertos deportivos*, *op. cit.*, pp. 252 et seq.; *id.*, «El nuevo marco de los Puertos deportivos: el régimen de las concesiones», *op. cit.*, pp. 59 et seq. See also J. L. PULIDO BEGINES, *Instituciones de Derecho de la navegación marítima*, *op. cit.*, p. 702.

²⁴ The types of management of marinas in Spain are: state port authority (4.7%); autonomous community (18.5%); local government (0.8%); nautical club (43.7%); commercial company (31.7%). See «Amarres y puertos deportivos» at <http://www.nauticalegal.com/en/articulos/ports-and-moorings-in-spain/60-amarres-y-puertos-deportivos>.

²⁵ If the marina is managed directly by the administration, there is only a single link between the marina and the berth user, which is a berthing contract of a public nature, as the assignment of the mooring takes place by virtue of an administrative authorisation (Arts. 63 and 64, Act No. 10/2005 of 21 June on

of a juridical-administrative nature²⁶, a berthing contract between a concessionaire (marina operator) and a berth user should be considered to be of a private nature, following the prevailing position in legal literature²⁷. This clearly derives from the different regional port acts that are subject to the regulatory power of the autonomous communities.

This is also the position adopted by the Spanish courts: Supreme Court (Civil Section), 20 February 1999²⁸; Court of Appeal of the Balearic Islands (Section 4), 19 July 2000²⁹; Court of Appeal of Tarragona (Section 1), 13 February 2002³⁰; Court of Appeal of Barcelona (Section 13), 6 July 2004³¹; Court of Appeal of A Coruña (Section 5), 19 July 2006³²; Court of Appeal of Valencia (Section 7), 4 April 2007³³; Court of Appeal of Murcia (Section 1), 28 May 2009³⁴; Court of Appeal of Murcia (Section 1), 24 September 2009³⁵, and others.

A berthing contract between a concessionaire-marina operator and a user is thus different from the relationship between the administration and a concessionaire. Indeed, on the one hand, marinas, as public spaces, are operated by means of an administrative concession in accordance with public law and not civil or commercial law. In particular, the operating and policing regulations of each marina regulate the use or possession of berths. On the other hand, the legal relationship between a berth user and a port operator is a berthing contract, whose regulation and scope is fully within the sphere of private law [Judgment of the Court of Appeal of Alicante (Section 7) of 22 June 2000]³⁶.

However, it cannot be ignored that the content of a berthing contract is directly conditioned by marina operating and policing regulations of an administrative nature, by the content of the concession contract, by the autonomous administrative legislation on marinas and, additionally, by state law³⁷.

the Ports of the Balearic Islands). See M. ZAMBONINO PULITO, «El nuevo marco de los Puertos deportivos: el régimen de las concesiones», *op. cit.*, p. 92.

²⁶ See in this sense M. ZAMBONINO PULITO, *Puertos y costas: régimen de los puertos deportivos*, *op. cit.*, pp. 311 and 320, although she changes her position in «El nuevo marco de los Puertos deportivos: el régimen de las concesiones», *op. cit.*, pp. 92-93.

²⁷ A. ANTONINI, «Contratto di ormeggio», *op. cit.*, p. 203; M. M. COMENALE PINTO, «In torno alla natura e al contenuto del contratto di ormeggio», *op. cit.*, p. 896; U. LA TORRE, «Ormeggio di nave», *op. cit.*, p. 736; L. VERDE, «Il contratto di ormeggio tra diritto pubblico e privato», *op. cit.*, pp. 543-544, 550 et seq.; L. VALLE, «Il contratto di ormeggio», *op. cit.*, p. 1823; D. RODRÍGUEZ RUIZ DE VILLA, «El contrato de amarre en Puerto Deportivo», *op. cit.*, p. 129.

²⁸ RJ 1999, 1056.

²⁹ JUR 2000, 296599.

³⁰ JUR 2002, 101510.

³¹ *Op. cit.*, *supra*, footnote 20.

³² JUR 2007, 324156.

³³ AC 2007, 1185.

³⁴ JUR 2009, 339482.

³⁵ JUR 2009, 460971.

³⁶ *Op. cit.*, footnote 20.

³⁷ L. VALLE, «Il contratto di ormeggio tra diritto pubblico e privato», *op. cit.*, pp. 544, 548, 550 and 551; M. ZAMBONINO PULITO, «El nuevo marco de los Puertos deportivos: el régimen de las concesiones», *op. cit.*, p. 93.

3.2. *The Berth User*

A berthing contract is concluded between the marina operator, the holder of an administrative concession, and a user, who is usually known as the berth user. This can be a natural person or a legal entity that, as has been seen, has the status of a consumer. In any case, the user is not required to be the owner of the vessel or craft³⁸, as a berthing contract is totally independent of vessel ownership. This clearly derives from the marina operating and policing regulations. However, it is usually required to notify the marina operator of any change in ownership of a vessel.

Likewise, the berth user can be a member or associate of the marina operator or a third party. Usually, when the marina concessionaire is a commercial company or an association (yacht club), the user is required to meet the condition of being a shareholder, member or associate to conclude a berthing contract. Therefore, the acquisition of shares, social participation or admission to an association with the consequent payment of a fee are a necessary but not sufficient requirement for the acquisition of the right to use a berth. Therefore, a partnership or association agreement and a berthing contract are linked³⁹.

4. Subject Matter of the Contract

The subject matter of a berthing contract, as derived from its concept, is the right of the berth user to preferentially use a berth or mooring in a marina for a vessel or craft⁴⁰.

The vessel⁴¹ or craft⁴² must be intended for recreational or sports purposes. The definition of a recreational craft is contained in Article 4(2) of Royal Decree No. 98/2016 of 11 March, which regulates the safety, technical and commercialisation requirements of personal watercraft and sports boats and their components⁴³. However, this decree does not offer a definition of recreational vessels. This is contained in Royal Decree No. 875/2014 of 10 October, which regulates nautical qualifications for operating pleasure craft (Art. 3). In these

³⁸ D. RODRÍGUEZ RUIZ DE VILLA, «El contrato de amarre en Puerto Deportivo», *op. cit.*, p. 131.

³⁹ A. ANTONINI, «Contratto di ormeggio», *op. cit.*, p. 203; L. VALLE, «Il contratto di ormeggio», *op. cit.*, pp. 1828 and 1831; A. CLARONI, *Il contratto di ormeggio nella portualità turistica*, *op. cit.*, p. 116.

⁴⁰ A. ANTONINI, «Contratto di ormeggio», *op. cit.*, p. 203; A. CLARONI, *Il contratto di ormeggio nella portualità turistica*, *op. cit.*, p. 62.

⁴¹ Defined by Article 56 MNA as «all vehicles with a structure and capacity to navigate the sea and to transport people or property, with a running deck of a length equal to or greater than twenty-four metres».

⁴² Defined by Article 57 MNA as «a vehicle that lacks a running deck or the length of which is less than twenty-four metres, provided that, in both cases, it is not qualified as a minor unit according to its characteristics of propulsion or use».

⁴³ This transposes Directive 2013/53/EU of the European Parliament and of the Council of 20 November 2013 on recreational craft and personal watercraft and repealing Directive 94/25/EC (OJ No. 354, of 28 December 2013).

Acts, it is inherent in the definition of a vessel or craft as a recreational or sports vehicle that its intended use is recreational sailing, sport or non-professional fishing, and its means of propulsion (motor, sailing, rowing or pedal) is completely irrelevant. In this sense, it has to be understood that a jet ski is a sports or recreational vessel. At present, this clearly derives from Royal Decree No. 98/2016 of 11 March, which means that the doubts that existed when the previous Royal Decree No. 2127/2004 of October 29 was in force (repealed by Royal Decree No. 98/2016), which defined it as «floating equipment» and not a craft, have been removed. Indeed, Article 4(3) of Royal Decree No. 98/2016 of 11 March expressly includes jet skis within the category of pleasure craft. Royal Decree No. 607/1999 of 16 April, which approves the regulation of compulsory civil liability insurance for recreational or sports craft, contains a similar provision.

5. The Rights, Obligations and Liabilities of the Parties

5.1. Marina Operators

A berthing contract has a minimum essential content which consists of the obligation assumed by the marina operator to make available to the berth user a berthing place and to guarantee to him its peaceful enjoyment, to provide certain services and, as will be seen, to safeguard the vessel or craft, its belongings and other assets contained therein.

Indeed, the main obligation of the marina operator is to make available to the user, for a certain period of time and at a set price, a berth comprising a sheet of water appropriate to the characteristics of the vessel or craft, and a mooring, as well as all the elements necessary for the vessel or craft's stationing (buoys, chains, bollards, etc.), and to guarantee the peaceful enjoyment of the asset⁴⁴ during the contract period.

Thus, this type of contract has been assimilated into a lease contract (Article 1543 of the Civil Code) (Judgment of the Court of Appeal of A Coruña (Section 5) of 19 July 2006)⁴⁵. However, strictly speaking, a berthing contract is not a lease, since such a contract cannot be concluded for a public domain property and because the use and enjoyment of the mooring is not full, but partial or limited, when applied to such a property⁴⁶. For this reason, most marina operating and policing regulations, as well as berthing contracts themselves, usually refer to it as a contract for the assignment of the use of a berth, in accordance with Act No. 9/2017 of 5 November on Public Sector Contracts and with the various regional acts. However, it must be taken into account, in line with Article 1555

⁴⁴ A. CLARONI, *Il contratto di ormeggio nella portualità turistica*, op. cit., p. 63; M. BADAGLIACCA, «Il contratto di ormeggio», op. cit., p. 205.

⁴⁵ *Op. cit.*

⁴⁶ See U. LA TORRE, «Ormeggio di nave», op. cit., p. 735; A. CLARONI, *Il contratto di ormeggio nella portualità turistica*, op. cit., pp. 97-98.

of the Civil Code (CC), that under a lease contract the enjoyment of an asset by the lessee is not absolute but according to the agreed use and, in the absence of an agreement, the use that derives from the nature of the leased asset⁴⁷. This is also the case here. The use and enjoyment of a berth is subject to the limitations inherent in the nature of the asset, *i. e.* the requirements imposed by the applicable regulations due to the fact that marinas are located in the public domain, and also by the content of the concession contract.

It should be noted that various autonomous acts prohibit the constitution of the right to exclusive use over any water surface inside marinas and, especially, the right to exclusive use of berths. As a result, marina operating and policing regulations provide that the right to use and enjoy a berth is not exclusive but preferential, and they oblige users to notify the marina management on vacating their berth (usually for a period exceeding 72 hours). As a consequence, the manager can assign the mooring during the time the user does not occupy it to so-called «passers-by».

In this sense, the Judgment of the Court of Appeal of Granada (Section 3) of 13 September 1999⁴⁸ states that:

«While there is no unanimous opinion on the nature of berthing rights [...], it cannot be denied that, in any case, the Administration can and must demand from the *concessionaire* the fulfilment of the exploitation objectives in accordance with the general interest. Therefore, in no case may the possession held over a berth be of an absolute, exclusive and unlimited nature»⁴⁹.

The marina operator is also obliged to provide the berth user with certain services aimed at ensuring the full use and functionality of the marina and the berthing place⁵⁰. Port services are detailed in the legislation and are provided either by the administration or concessionaire. The different marina policing and operating regulations contain detailed lists of the various services. In this sense, berthing contracts also have the legal nature of a service contract or even a supply contract (*e. g.* water and electricity)⁵¹.

The main controversy that remains unresolved is determining whether the obligation of care and custody of a berthed vessel or craft and its component parts, belongings and other property contained therein on the part of the marina operator is inherent in the content of a berthing contract⁵². Most marina operating and policing regulations, as well as berthing contracts themselves, seem to exclude such an obligation, thus exempting the marina operator from liability for

⁴⁷ U. LA TORRE, «Ormeggio di nave», *op. cit.*, pp. 735-736.

⁴⁸ *Op. cit.*, *supra*, footnote 17.

⁴⁹ In similar terms, see the Judgment of the Court of Appeal of Murcia (Section 1) of 28 May 2009, *op. cit.*

⁵⁰ A. CLARONI, *Il contratto di ormeggio nella portualità turistica*, *op. cit.*, p. 95.

⁵¹ A. ANTONINI, «Contratto di ormeggio», *op. cit.*, p. 203; L. VERDE, «Il contratto di ormeggio tra diritto pubblico e privato», *op. cit.*, p. 559.

⁵² See M. M. COMENALE PINTO, «In torno alla natura e al contenuto del contratto di ormeggio», *op. cit.*, p. 899; D. RODRÍGUEZ RUIZ DE VILLA, «El contrato de amarre en Puerto Deportivo», *op. cit.*, p. 123.

any damage, theft or burglary of vessels berthed in areas within port facilities or occurring to their occupants and their accessories and belongings. It is thus up to the owner to adopt the necessary security measures to avoid such incidents. On the other hand, other regulations hold the marina operator responsible for damage resulting «from causes that are attributable to it», *i. e.* that are its own fault. To be released from liability, the marina operator then has to prove not only that the damage to the vessel was caused by a fortuitous event or *force majeure* but also that it had cared for the asset with due diligence (Judgment of the Court of Appeal of Castellón (Section 3) of 11 January 2013)⁵³, that is to say, with the proper care of an organised port operator. The degree of due diligence cannot be altered in order to exclude only gross negligence⁵⁴. The Civil Chamber of the Supreme Court (Section 1), in its Judgment of 6 May 2015, on the occasion of a fire on a vessel causing damage to third parties, affirmed that the «duty of the lessor to keep the lessees in the peaceful enjoyment of the leased object does not imply the obligation to compensate for damage caused by third parties to the lessee when the lessor is not at fault».

However, it should be noted that in most marina operating and policing regulations, on the one hand, marina operators assume no liability whatsoever for any damage caused to vessels but on the other undertake to provide security and safety services, since these are imposed on them by the different autonomous regulations. That is to say, security and safety are port services, the provision of which is assigned to the marina operator and for which in many cases the user even pays. In short, if the security of the marina and therefore of the berthed vessel and its belongings constitutes an *ex-lege* obligation of the marina operator, this must necessarily give rise to the obligation of the latter to safeguard the asset (the berthed vessel).

This is the position held by the majority of courts when they declare that the duty of care contained in marina operating and policing regulations, which impose on the marina operator a special duty of surveillance to ensure the sound condition and safety of vessels, also entails a duty of diligent care and custody of the vessel. As a consequence, a marina operator is liable for damage caused in the case of non-compliance (Judgments of the Court of Appeal of the Balearic Islands (Section 4) of 15 May 2000⁵⁵; Court of Appeal of Barcelona (Section 13) of 6 July 2004⁵⁶; Court of Appeal of the Balearic Islands (Section 3) of 23 June 2004⁵⁷; Court of Appeal of Girona of 17 November 1994⁵⁸; Court of Appeal of Barcelona (Section 11) of 2 May 2006)⁵⁹. In this sense, the Judgment of the

⁵³ JUR 2013, 152760. This is what happens in the United Kingdom. See F. LORENZON and R. COLES, *The Law of Yachts and Yachting*, *op. cit.*, pp. 224-225. In the same sense, see V. CARBONE, «Contratto di ormeggio», *Corriere Giuridico*, No. 7, 2004, p. 874.

⁵⁴ Judgment of the Court of Appeal of Cadiz (Section 6, Ceuta) 27 March 2012, *op. cit.*

⁵⁵ AC 2000, 229.

⁵⁶ *Op. cit.*, *supra*, footnote 21.

⁵⁷ *Op. cit.*, *supra*, footnote 21.

⁵⁸ AC 1994, 2260.

⁵⁹ JUR 2006, 253851.

Court of Appeal of Alicante (Section 5) of 20 June 2001 correctly states that a berthing contract integrates features of a lease contract and a deposit contract in such a way that the obligations that stem from these contracts can be perfectly applied to a berthing contract when the marina regulations include a surveillance service for moored vessels⁶⁰.

In short, it follows from the preceding arguments that although the marina operator's obligation to make available to the berth user a berthing place and to ensure its peaceful enjoyment is inherent in any berthing contract, the care and custody of the craft or vessel is not an obligation that is always present in a contract. On the contrary, it will depend on the content of the marina operating and policing regulations and the concession contract integrated with the content of the berthing contract, *i. e.* the agreement of the parties, in accordance with Article 1089 of the Civil Code⁶¹.

Thus, if a marina operator assumes the duty to provide such surveillance and security services, it also assumes an obligation of care and custody of the vessel. Consequently, the clause in a berthing contract that excludes liability for damages, deterioration or theft of the moored vessel is an unfair term and therefore null and void in accordance with the Consumer Act, since—as seen above—the user must be considered a consumer⁶².

However, even in those cases where the marina operating and policing regulations or the terms of the concession do not establish the provision of a surveillance and security service by a marina operator, it must be understood that the marina operator has a duty of care and custody towards the vessel. That is to say, the obligation of care and custody is inherent in every berthing contract. Indeed, it should not be forgotten that whoever enters into a berthing contract in a marina does not do so simply to obtain the right to enjoy a sheet of water and a mooring place but to obtain all the services provided by the marina, including security, *i. e.* the care and custody of the vessel⁶³. This is the position maintained in the Judgment of the Court of First Instance No. 17 of Valencia of 28 February 2003⁶⁴. In this sense, whoever contracts a berth in a marina expects to receive in exchange for the fee he pays a surveillance and security service that is fundamental to ensuring the sound condition and conservation of his vessel⁶⁵. For this reason, it has been affirmed that the inclusion of clauses in a contract that intend

⁶⁰ *Op. cit.*, *supra*, footnote 18.

⁶¹ This position is also followed by the Italian courts. See M. BADAGLIACCA, «Il contratto di ormeggio», *op. cit.*, pp. 206-209.

⁶² Judgment of the Court of Appeal of Seville (Section 2) of 10 March 2000 (AC 2000, 1682); Judgment of the Court of Appeal of Cadiz (Section 6, Ceuta) of 27 March 2012, *op. cit.* See also M. M. COMENALE PINTO, «In torno alla natura e al contenuto del contratto di ormeggio», *op. cit.*, pp. 901-902; D. RODRÍGUEZ RUIZ DE VILLA, «El contrato de amarre en Puerto Deportivo», *op. cit.*, p. 131.

⁶³ A. ANTONINI, «Contratto di ormeggio», p. 205; M. M. COMENALE PINTO, «In torno alla natura e al contenuto del contratto di ormeggio», *op. cit.*, pp. 900-901; D. RODRÍGUEZ RUIZ DE VILLA, «El contrato de amarre en Puerto Deportivo», *op. cit.*, pp. 134-135.

⁶⁴ *Op. cit.*, *supra*, footnote 20.

⁶⁵ L. VERDE, «Il contratto di ormeggio tra diritto pubblico e privato», *op. cit.*, p. 563.

to liberate the marina operator from liability for any damage caused to vessels is by itself proof that such a duty of care and custody exists, since otherwise they would not have been included⁶⁶.

From this perspective, a berthing contract is more equivalent to a garage contract, which is also atypical under Spanish law, rather than the vehicle parking contract⁶⁷ regulated in Act No. 40/2002 of 14 November, since the legal regime of this latter contract is intended for short or specific periods of stay for vehicles, and the user is charged according to the length of stay (Arts. 3 and 4). On the contrary, a garage contract embraces far longer periods (months or even years) and the parking space is leased for a comprehensive fee that does not take into account the specific parking time. In any case, in both contracts, the owners or concessionaires of such parking services assume (whenever they operate on a professional or corporate basis, *i. e.* for profit) a duty of care and custody⁶⁸. This was declared, *inter alia*, by the Judgment of the Court of Appeal of Valencia (Section 6) of 30 December 2010⁶⁹. However, opinions on this issue are still divided⁷⁰.

5.2. Berth Users

The main obligation of the berth user is the payment of a fee. The payment can be global, at the beginning of the contract, or regular (semi-annual/annual), as established in the berthing contract and marina operating and policing regulations. It usually consists of a berthing rate (for the assignment of the right of use), which is based on the length and width of the berthing place; a maintenance fee, which includes the operating, maintenance and conservation costs of the berth; a common services rate, which aims to defray conservation and administration expenses, and the general expenses of the facilities, elements and common services of the marina; a services rate, which applies to the services requested by users; a minimum consumption of electricity and water, the amount of which is updated annually based on the consumption during the previous year; and by the taxes that apply to sports and recreational vessels (Arts. 223 et seq. SPMNA). However, although the taxable person for sports and recreational vessels is the vessel owner, the taxes are normally paid by the marina operators (concessionaires) as part of their status as substitutes for the taxpayer.

When the management of a marina is exercised by an association or nautical club, it is necessary to be a member of the club in order to be a berth user, irre-

⁶⁶ M. M. COMENALE PINTO, «In torno alla natura e al contenuto del contratto di ormeggio», *op. cit.*, p. 901.

⁶⁷ A. ANTONINI, «Contratto di ormeggio», *op. cit.*, p. 205; L. VERDE, «Il contratto di ormeggio tra diritto pubblico e privato», *op. cit.*, pp. 560-561; M. BADAGLIACCA, «Il contratto di ormeggio», *op. cit.*, pp. 209 et seq.

⁶⁸ Judgement of the Supreme Court (Civil Chamber) of 22 October 1996 (RJ 1996, 723); Judgement of the Court of Appeal of Valencia (Section 7) of 11 April 2000 (AC 2000, 1197); Judgement of the Court of Appeal of Barcelona (Section 13) of 23 October 2002 (JUR 2003, 192083).

⁶⁹ JUR 2010, 15036.

⁷⁰ M.^a V. PETIT LAVALL, «Régimen jurídico del contrato de amarre», *op. cit.*, pp. 705-707.

spective of who the owner of the vessel is. In this sense, the articles of association of nautical clubs envisage, among the obligations of the partners, a contribution to support the economic burdens of the club through ordinary or extraordinary contributions, which are established either by the articles themselves or validly agreed upon by the organs of representation or government (the assembly or board of directors), specifically for the use of the facilities or services of the marina (common services tariff). Usually the quota assigned to each partner depends on the berth length in metres.

Spanish courts, in almost all proceedings against berth users for the payment of maintenance and support fees for marinas, consider that the berth user's obligations are similar in this respect to those of the co-owners in a condominium. Consequently, they apply by analogy either the provisions on joint-ownership contained in the Civil Code (Arts. 392 et seq.)⁷¹ or Act No. 49/1960 of 21 July on Condominiums. Indeed, the berth user is obliged in the same way that the owner of a flat or an office that is part of a community of owners is obliged to pay the fees for the common expenses of the property although he does not use the flat or the office of which he is the owner (Judgments of the Court of Appeal of Valencia (Section 7) of 4 April 2007⁷²; Court of Appeal of Alicante (Section 9) of 21 November 2013)⁷³.

In accordance with Article 1556 of the Civil Code, if the berth user fails to comply with the payment obligation, the marina operator is entitled to request contract enforcement and compensation for damages, thus maintaining the validity of the contract, or to terminate the contract with consequent compensation for damages. This is also the solution envisaged by the different marina operating and policing regulations. On occasions, a mere delay entails an increase or surcharge on the amount of the unpaid rates or fees, *i. e.* compensation for damages, or empowers the marina operator to deny the provision of new services. The marina operating and policing regulations and berthing contract usually establish the procedure to follow. Some regulations empower the marina operator to retain the vessel for as long as the berth user does not comply with his payment obligation, as in a deposit contract (Art. 1780 CC), and to remove the vessel from the mooring place and to dry-dock or immobilise it. The expenses arising from this, including towage, ramps, transport, extraction, stay and withdrawal, are borne by the user.

The user also assumes the obligation to use the mooring post and marina infrastructure with due diligence and in accordance with the agreed use, which is an obligation that typically arises from a lease contract (and, as such, derives from Art. 1555(2) CC). In this regard, the marina operating and policing regulations and berthing contracts contain detailed provisions on obligations with respect to the use, conservation and cleaning of mooring points, sheets of water,

⁷¹ Judgment of the Court of Appeal of Cantabria (Section 2) of 1 February 2005 (JUR 2005, 118771); Judgment of the Court of Appeal of Valencia (Section 7) of 22 June 2006 (JUR 2006, 270339).

⁷² *Op. cit.*, *supra*, footnote 34.

⁷³ JUR 2013, 23131.

and other marina facilities. This obligation of diligent use and conservation is expressly extended to the vessel itself, which must be maintained in perfect condition so that it does not constitute a threat to the safety of other vessels and the marina itself⁷⁴. The different marina operating and policing regulations exhaustively list the activities and materials that are prohibited on vessels, and the user is obliged to allow inspections and access by the marina manager to the mooring post to monitor the status of the facilities and services.

The berth user is also required to take out civil liability insurance for the vessel. Indeed, marina operating and policing regulations require the user to take out an insurance policy for his vessel that covers civil liability for damages caused to the facilities of the marina, as well as to employees and third parties. This is the compulsory insurance of extra-contractual civil liability regulated by Royal Decree No. 607/1999 of 16 April, which approves the Regulation on mandatory liability insurance for recreational or sports vessels, and Act No. 50/1980 of 8 October on Insurance Contracts (Art. 406 MNA and Sole Additional Provision (b) of Royal Decree No. 607/1999).

III. MARINA OPERATOR BERTHING CONTRACTS UNDER ITALIAN LAW*

1. General Considerations

In Italy, as in many other countries, pleasure navigation has in the last few decades become an increasingly widespread phenomenon with a positive economic impact, particularly in terms of the nautical market and tourism in general.

The development of the nautical sector as a result of the large-scale growth of pleasure navigation in recent years has benefited both the pleasure craft industry (shipbuilding, refitting, chartering, etc.) and the management of infrastructure devoted to the reception of yachts. This latter has led to the creation and adaptation of installations intended to offer repairs, hospitality and protection to pleasure craft, such as marinas, tourist landing places, and mooring points⁷⁵.

⁷⁴ M. BADAGLIACCA, «Il contratto di ormeggio», *op. cit.*, p. 205.

* Avv. Daniele CASCIANO, LL. M., Ph. D., lawyer in Trieste (Italy); Adjunct Professor of Insurance Law and Transport Law at the University of Udine.

⁷⁵ A. CORRADO, «Il contratto di ormeggio», in F. MORANDI (ed.), *I contratti del trasporto*, Bologna, 2013, p. 947. According to the provisions of the Decree of the President of the Republic No. 509 of 2 December 1997, the different types of infrastructure designed for the reception of pleasure craft are as follows: *porto turistico* (tourist port), which is a complex of movable and immovable structures realised through works on land and at sea designed to serve pleasure navigation and yachtsmen, including through complementary services; *approdo turistico* (tourist landing place), which is the part of a port intended to serve pleasure navigation and yachtsmen, and which includes the provision of complementary services; *punto di ormeggio* (berthing point), which is a maritime state-owned area or water sheet equipped with structures that do not involve equipment which is difficult to remove, and which is designed for the mooring, hauling, launching and storing of small boats and pleasure craft.

At the same time, the growth of recreational boating and the development of related economic activities have brought about the gradual sedimentation of new contractual practices and models designed to meet the needs of the market.

The Italian national lawmaker has tried to provide a legal framework for this phenomenon, aimed at governing the subject matter of recreational boating in fairly broad and extensive terms through the progressive adoption, over the years, of special legislation that has eventually been systematised into a single text of law, *i. e.* the so-called Pleasure Navigation Code⁷⁶.

However, as often happens in economic sectors characterised by a marked dynamism, this legislative intervention was not comprehensive in nature. In particular, on the one hand, the Pleasure Navigation Code established a contractual regime for recreational boating through a series of provisions that are largely non-compulsory⁷⁷, while on the other it has omitted *tout court* to regulate certain aspects, entirely devolving their treatment to the discretion of the parties.

In this context, the fast growth of pleasure navigation led to the creation by the market of new types of contract that were, and in certain cases still are, neither regulated nor envisaged by the law. Amongst such contracts a special significance is held by berthing contracts (*contratti di ormeggio*), *i. e.* contracts between the marina operator and the owner of the pleasure craft regulating the use of a specific berthing space located within a tourist port or tourist landing place, in the vast majority of cases along with a number of other services provided by the marina to the pleasure craft itself⁷⁸.

Under Italian law, a berthing contract is an innominate contract, *i. e.* a contract that lacks specific regulation. Namely, such contracts are not governed by either the Civil Code, Navigation Code, or even the more recent Pleasure Navigation Code. It is therefore a contract that is legally atypical, even though it is socially typical as a result of its widespread diffusion and the standardisation of its terms within the general contractual clauses adopted by marinas⁷⁹.

⁷⁶ Legislative Decree No. 171 of 18 July 2005, as amended by Legislative Decree No. 229 of 3 November 2017. As has been correctly noted in A. ANTONINI, *Corso di diritto dei trasporti*, 3rd ed., Milano, 2015, p. 30, although commonly called the Pleasure Navigation Code, the text does not have the nature of a proper code but rather that of a consolidated law, being a mere *lex specialis* complementary to the Navigation Code. Before the adoption of the Pleasure Navigation Code, the previous regulation of the area was provided by Law No. 51 of 6 March 1976; Law No. 193 of 26 April 1986; Law Decree No. 378 of 16 June 1994; Law No. 172 of 8 July 2005.

⁷⁷ The non-mandatory nature of this regulation can be viewed as a positive factor, and actually constitutes the most appropriate way to deal, in legislative terms, with a fast-developing economic sector such as pleasure navigation in order not to hamper its natural evolution and growth.

⁷⁸ A. V. PADOVAN, M.^a V. PETIT LAVALL, A. MERIALDI and F. CERASUOLO, «Security and Enforcement of Marina Operator's Claims: Croatian, Italian and Spanish Law Perspectives», in *J. Mar. L. & Com* 49 (2018), pp. 543 et seq.

⁷⁹ A. ANTONINI, «Il contratto di ormeggio», in *Resp. civ. prev.*, 1999, pp. 1228 et seq., at p. 1235; C. TOSORATTI, «Il contratto di ormeggio e la responsabilità del titolare del porto turistico per eventi esterni», in *Dir. traspr.* 2005, pp. 256 et seq., at p. 261.

Practice has outlined the principal characteristics of the *contratto di ormeggio*. As mentioned above, in terms of its basic content, a berthing contract provides for the availability, usually within a marina, of a specific berthing space to a user, where he can keep his pleasure craft for an agreed period of time.

Frequently, however, the contract also envisages a wide number of other services that the marina operator offers to the user in addition to the rental of the berthing space, such as docking and mooring, power supply, garbage disposal, etc. Among these services, particular importance is attached to the obligation of custody of the craft on the part of the marina operator, especially whenever the contract is a long-term berthing contract in which the owner does not remain on board the craft itself for most of its time in berth.

As will be discussed below, these services combine to determine, together with the rental of the berthing space (which constitutes the minimum feature of the contract), the *causa* of the agreement itself (*i. e.* the particular economic function of the contract, in consideration of which the parties undertake their respective obligations).

Based on observations of the content of the contractual forms usually adopted in the market, a legal definition of berthing contracts has been proposed aimed at synthesising the most common and relevant features of them. A berthing contract has thus been described as a «contract whereby a party (an association or a company), the concessionaire of a publicly-owned area that includes a body of water, constitutes in favour of another party (a member of the association, a partner of the company or a third party), in consideration of the payment of a certain fee, the right to remain with a pleasure craft on a specific part of a body of water (a so-called berthing space), as well as to use the infrastructure (quays, rest area, beach) and equipment (bitts, rings, catenaries) located there, and, as the case might be, in consideration of an additional fee, to receive certain related ancillary services (assistance for docking and berthing, haulage, garbage disposal, weather forecasts, energy and water supply, a telephone connection)»⁸⁰.

2. The Legal Nature of Berthing Contracts under Italian Law

One of the most significant issues concerning berthing contracts, on which both Italian scholars and court decisions have focused their attention, is certainly that of its legal qualification.

The lack of statutory regulation is the source of the legal quandaries regarding the definition of the juridical nature of such contracts that have concerned commentators, practitioners and Italian case law in recent decades. Namely, in the absence of an express legislative regime, a need has been perceived to try and define the legal nature of berthing contracts in order to identify within the

⁸⁰ A. ANTONINI, «Dal contratto di ormeggio al contratto di locazione di posto barca», in *Dir. trasp.* 2009, pp. 109 et seq., at p. 109.

framework of the existing legal types of contract a more appropriate form of regulation for them. Indeed, as will be discussed more thoroughly below, the legal qualification of a *contratto di ormeggio* has significant implications regarding the legal regime that applies to it, especially with respect to issues concerning the extent of the parties' respective obligations and the liability of marina operators for any damage to the craft and the goods placed on board the same during the period of its stay.

In this regard, the first aspect that ought to be outlined is that a *contratto di ormeggio* should not be confused with a *servizio di ormeggio* (berthing service), which constitutes (along with pilotage, towing and mooring) one of the so-called *servizi tecnico-nautici* (technical-nautical services) carried out by professional providers under the supervision of the competent maritime authority exercising policing, safety and security powers in national ports. Article 116, Paragraph 1, item 4 of the Navigation Code identifies line handlers as the persons engaged in such services, whereas Article 208 et seq. of the Maritime Navigation Regulation describes the way in which these services are delivered⁸¹.

Another issue that has been addressed is whether a berthing contract constitutes a private or public contract. A doubt might be raised due to the nature of the body of water on which the berth is located, which is generally (but not always) a publicly-owned asset let by the state or other competent public authority to the marina operator by means of a maritime concession. Given the specific nature of the subject matter to which the contract refers, an older pronouncement of the Court of Cassation qualified a berthing contract as a public contract, namely a sub-concession⁸². However, other than this isolated decision, the contract has generally been considered to be a private contract, and therefore entirely subject to the rules of law contained in the Civil Code⁸³.

As far as the content of a *contratto di ormeggio* is concerned, the case law has identified the existence of two types of such a contract:

- i) The so-called *ormeggio-locazione* (berth-lease), in which the marina operator provides the owner of a pleasure craft (the user) with an available body of water for berthing (berthing space).
- ii) The so-called *ormeggio-deposito* (berth-deposit), in which the marina operator also undertakes the custody of the pleasure craft.

⁸¹ The services can be made compulsory by the maritime authority, depending on the location and the structures employed; the line handlers moor the ships arriving in the port, watch and supervise the berth during the stay of the ship in the port, and unmoor the ship when it leaves; see A. GAGGIA, «Il contratto di ormeggio», in A. ANTONINI (ed.), *Trattato breve di diritto marittimo*, vol. 4, Milano, 2013, pp. 173 et seq., and C. TOSORATTI, «Il contratto di ormeggio e la responsabilità...», *op. cit.*, at p. 257. More broadly, on the subject of the *servizio di ormeggio*, see U. LA TORRE, «Ormeggio di nave», *op. cit.*, pp. 723 et seq.; E. SANTORO, «I servizi e le operazioni portuali», in A. ANTONINI (ed.), *Trattato breve di diritto marittimo*, vol. 1, Milano, 2007, pp. 241 et seq.

⁸² Court of Cassation, 28 April 1989, No. 2015, in *Giust. civ.* 1990, I, pp. 2407 et seq.

⁸³ Court of Cassation, 18 July 2013, No. 17643 in *Mass. Giur. it.* 2013; see also L. FABIANI, *Gli aspetti turistici nella problematica giuridica*, Milano, 1972, p. 72, which, although qualifying the contract as a sub-concession, concludes that it is private in nature.

The first type of berthing contract (*ormeggio-locazione*), according to the decisions of the courts that have dealt with this issue, is characterised by the fact that the sole obligation borne by the marina operator is that of making available the port infrastructure to the user through the assignment of a specific portion of a body of water in which to berth the pleasure craft. Such provision of part of the water sheet is effectively a mere rental of the berthing space, *i. e.* a *locatio rei*, as no tender of services or obligation of custody of the craft (*locatio operis*) is involved in the contract.

The second type of contract also encompasses the provision of a specific berthing space by the marina to the user for the agreed period of time. However, along with this obligation, another specific duty is borne by the marina operator, which is the custody of the pleasure craft. Only if such an obligation of custody is expressly or implicitly envisaged in the agreement does the berthing contract fall under the second type of contract mentioned above, which is usually qualified as a contract of deposit for the pleasure craft⁸⁴.

Although Italian courts have identified the two possible abovementioned subtypes of berthing contract, depending on the presence or lack of the element of custody within the provisions of the agreement, the Court of Cassation, when it scrutinises the actual content of the contracts involved in the cases before it, has always considered the obligation of custody (if not explicitly laid down) as implied in the contracts, and has therefore invariably construed them to be the same as berth-deposits rather than berth-leases⁸⁵.

On the other hand, scholars and academic commentators have expressed doubts about the possibility of subsuming the *contratto di ormeggio* under lease contracts⁸⁶. In this regard, it has been pointed out that what differentiates a berthing contract from a lease agreement is the fact that in practice the subject matter of the berthing contract is never the simple availability of the water space, as through the berthing contract, the marina operator undertakes to provide the user with a series of articulated services. These are never limited to the minimum essential content of the rental of the berthing space but require the delivery of numerous services aimed at ensuring, from a technical point of view, the usability and functionality of the marina infrastructure, as well as the provision of other services organised for tourism purposes, which is nowadays essential on the nautical market⁸⁷.

⁸⁴ *Ex multis*, Court of Cassation, 21 October 1994, No. 8657, in *Dir. trasp.* 1995, pp. 801 et seq.; Court of Cassation, 2 August 2000, No. 10118, in *Dir. mar.* 2001, pp. 1431 et seq.

⁸⁵ Court of Cassation, 22 October 1970, No. 2094 in *Dir. mar.* 1971, pp. 530 et seq.; Court of Cassation, 21 October 1994, No. 8657, in *Dir. trasp.* 1995, pp. 801 et seq.; Court of Cassation (Joined Chambers), 3 April 2007, No. 8224, in *Foro it.* 2007, vol. 130 (11), pp. 3117 et seq.; on merit court decisions, see the Court of Appeal of Naples, 24 January 2008, in *Guida al diritto* 2008, pp. 1698 et seq.

⁸⁶ On the possibility of construing a berthing contract as a lease contract, see G. BALESTRA, «Il carattere di atipicità del contratto esclude la responsabilità per eventuali furti», in *Guida al diritto* 1995, vol. 6, pp. 37 et seq.

⁸⁷ A. CORRADO, «Il contratto di ormeggio», *op. cit.*, at p. 951; see also L. VERDE, «Sulla responsabilità dell'ormeggiatore per custodia dell'imbarcazione da diporto», in *Dir. mar.* 1996, pp. 703 et seq.,

The opinion that the *contratto di ormeggio* should be categorised as a deposit contract has obtained more support among commentators, as its obligation related to the custody of pleasure craft is constantly provided for either explicitly or implicitly in the contract forms used in practice⁸⁸.

As opposed to this more traditional distinction, a further theory has been developed by scholars, according to which, given the complexity and variety of the obligations and services borne by marina operators under the contract, a *contratto di ormeggio* cannot be reduced to either a berth-lease or berth-deposit but has to qualify as an atypical contract with a *causa mista*, due to the coexistence of diverse obligations and services that share equal relevance in characterising such a contract⁸⁹. As has been pointed out, this approach has the merit of taking into account the actual needs that the berthing contract is required to satisfy, which go beyond the sole provision of the water space (*i. e.* the rental of the berthing space) and the custody of the craft (*i. e.* its deposit), and also involve the supply by the marina operator of a unitary complex of services (none of which is more relevant *per se* than the others, as all of them, being mutually linked and aiming at satisfying the exigencies of the user, combine to define the subject matter of the contract)⁹⁰.

This latter position has also been embraced by a Court of Appeal decision which highlighted that «the socio-economic evolution of pleasure boating has meant that [...] constant rules have come to be established which govern the relationship between the entity (company or association) that is the holder of the state concession that has as its subject matter a sheet of water and the area adjacent to it (a tourist port or tourist landing places) and the owners of recreational craft that use a berth within the same. This evolution has given rise —with the force of the living law— to a categorisation of the contents of the rules governing the contractual relationship for the use of a berth [...], by virtue of which it can be said that a berthing contract, even if it does not fit

at p. 709. The possibility of qualifying a berthing contract as a lease contract has also been criticised in terms of the particular nature of the goods that constitute the subject matter of the contract itself, *i. e.* a body of water, which is often (if not always) public property, and as such subject to the terms and conditions of the concession granted by the state to the marina operator, which is the concessionaire of the same; it has been argued that this circumstance would prevent the user from exercising the right of use in a berthing space in such a way that he would enjoy the same content, nature and extent of rights as are typically afforded to the lessee under a contract of lease; see R. TRANQUILLI LEALI, *Porti turistici*, Milano, 1996, pp. 249 et seq.

⁸⁸ C. ANGELONE, «Lineamenti di gestione dei porti turistici», in *Porti mare territorio*, 1988, pp. 202 et seq.; M. GRIGOLI, «Sulla qualificazione del contratto di ormeggio», in *Giust. civ.* 1994, vol. I, pp. 3062 et seq.; L. VERDE, «Sulla responsabilità dell'ormeggiatore...», *op. cit.*; A. BOTTI, «Natura giuridica del contratto di ormeggio e responsabilità del fornitore del servizio», in *Nuova giur. civ. comm.* 2005, pp. 926 et seq.; G. MAGLIOCCO NICASTRO, «In merito al contratto di ormeggio», in *Dir. trasp.* 2005, pp. 553 et seq., at p. 561; M. CAMPALLA, «Il contratto di ormeggio nella portualità turistica», in F. MORANDI (ed.), *I contratti del turismo, dello sport e della cultura*, Torino, 2010, pp. 229 et seq.; A. CORRADO, «Il contratto di ormeggio», *op. cit.*, at p. 949.

⁸⁹ A. ANTONINI, «Il contratto di ormeggio», *op. cit.*, pp. 1239 et seq.; see also U. LA TORRE, «Ormeggio di nave», *op. cit.*

⁹⁰ A. CORRADO, «Il contratto di ormeggio», *op. cit.*, at p. 950.

any abstract legal model, has now assumed its own legal individuality resulting in a convergence into its regulation of rules of law which derive from different legal types»⁹¹.

More recently, the Court of Cassation has evolved its traditional view based on the rigid distinction between *ormeggio-locazione* and *ormeggio-deposito*. This has allowed it to be recognised that in a berthing contract, whichever sub-type is considered, there «subsists a recurrent essential minimal structure resulting from the provision and use of the port facilities and the related assignment to the user of a delimited and protected water space; the content of the contract may, however, also extend to other services, such as the custody of the craft and/or goods contained therein, in which case it is up to the party who asserts a certain right or the liability of the other contractual party regarding the specific subject matter of the contract to provide the relevant proof»⁹².

Although outlining a common minimum structure for a berthing contract (given by the provision of the berthing space), the Court of Cassation has not, however, come to state that this socially typical contract type is characterised by a legal individuality and unity that overcomes the traditional distinction between *ormeggio-locazione* and *ormeggio-deposito*. The consequence of such an approach is therefore that, from a practical and applicative point of view, the reference to lease and deposit agreements remains relevant in identifying the legal regime applicable to the *contratto di ormeggio*.

In this context, a possible solution in order to overcome the uncertainties related to such a construction and two-fold legal qualification of the contract has been proposed by an academic commentator who has suggested the adoption by marina operators of a new type of contract in which, on one hand, any clause containing an explicit or implicit reference to the element of custody of the craft is avoided and, on the other, the provision of custody itself is expressly envisaged as a merely optional service. Under this type of agreement, the obligation of custody is ordinarily excluded from the scope of the contract itself but may nonetheless be included by virtue of the mutual express consent of the parties in consideration of the payment of an additional fee. In particular, it has been argued that the adoption of this contract form would be consistent and coherent with the legal difference drawn, on the basis of the traditional court opinion, between *ormeggio-locazione* and *ormeggio-deposito* (or more precisely between

⁹¹ Court of Appeal of Trieste, 28 July 1999, in *Dir. trasp.* 2000, pp. 885 et seq., with the case note of M. COMENALE PINTO, «Intorno alla natura e al contenuto del contratto di ormeggio», *op. cit.*, pp. 889 et seq.

⁹² Court of Cassation, 1 June 2004, No. 10484, in *Dir. trasp.* 2005, at pp. 249 et seq., with the case note of C. TOSORATTI, «Il contratto di ormeggio e la responsabilità...», *op. cit.*, at pp. 256 et seq.; on the same court's decision, see also the comments of G. GENOVESI, «Contratto di ormeggio e responsabilità dell'ormeggiatore», in *Corriere giuridico* 2005, vol. 2, pp. 240 et seq. For similar propositions, see also *ex multis* Court of Cassation, 13 February 2013, No. 3554, in *Guida al diritto* 2013, vol. 17, pp. 70 et seq.; Court of Chiavari, 24 March 2009, in *Dir. mar.* 2010, pp. 661 et seq.; Court of Trieste, 15 February 2011, in *Dir. mar.* 2013, pp. 473 et seq., with the case note of F. CAGURRA, «Rischio assicurabile nel contratto di ormeggio», *ibid.*

berthing contracts in which the obligation of the marina operator consists of the mere rental of the berthing space and berthing contracts involving an obligation of custody of the craft), and at the same time would allow the adequate reconciliation of the interest of the user in taking advantage of the berth and the ancillary services provided by the marina operator (regardless of the surveillance or custody of the pleasure craft) with that of the marina operator to have its obligations governed by the more favourable regime of *ormeggio-locazione* (instead of that of *ormeggio-deposito*) so as not to be held accountable for damage deriving from omitted or insufficient custody⁹³.

3. The Rights, Obligations and Liabilities of the Parties

The structure of a berthing contract as a mixture of obligations of different kinds poses a number of problems concerning the definition of the rights, obligations and related liabilities of the parties to the contract.

As observed above, a berthing contract is concluded between, on the one hand, the body, company or non-profit association holding the state concession for the water sheet and the bordering shore area (*porto turistico* or *approdo turistico*) and, on the other, the owner (or the charterer, as the case may be) of the pleasure craft that uses the mooring place within the same.

The contract is executed as a consequence of the meeting of the wills of the parties, *i. e.* by virtue of the acceptance by the marina operator of the contractual proposal of the intended user, in accordance with the consensual principle established by Article 1376 of the Civil Code.

The form of the contract is free, which means the contract may be concluded in writing upon the signing of a specific form (usually based on the standard terms and conditions of the marina operator), or orally. In most cases, the rights and obligations of the parties are included as part of the regulations of the tourist port or yacht club approved by the maritime authorities. Apart from clauses (discussed below) regarding exclusions or limitations of the marina operator's liability and, more generally, so-called vexatious clauses, these standard terms and conditions are deemed to be enforceable, provided that they were actually known to the user, or should have been known to him as part of ordinary diligence, at the time of the conclusion of the contract⁹⁴.

It is therefore from an analysis of such standard terms and conditions, as usually drafted in the contract forms adopted in the course of trade, that the respective content of the parties' rights, obligations and liabilities are identified.

⁹³ A. ANTONINI, «Dal contratto di ormeggio al contratto di locazione di posto barca», *op. cit.*

⁹⁴ Article 1341, Paragraph 1 of the Civil Code.

3.1. Marina Operators

As far as the position of marina operators is concerned, the structure of their obligations can be summarised as follows⁹⁵:

i) As seen above, the main and minimum feature common to any berthing contract is the letting of a specific berthing place by the marina operator to the user, who is normally allowed to use such a berthing space only with a specific craft.

ii) It may be argued that, even if not explicitly envisaged in the contract, a number of implied duties are borne by the marina operator as the lessor of the berthing space, namely those of warranting that the berth is in a good state of repair, maintaining it in a suitable condition for the use agreed, and ensuring the peaceful enjoyment of the same by the user throughout the duration of the contract⁹⁶.

iii) The provision to the user and maintenance of the facilities and equipment needed for the berthing of the craft (quays, piers, jetties, bits, mooring ropes, etc.) and for the people embarked on it (various sorts of infrastructure).

iv) The performance of services aimed at preserving the condition of the docking and mooring, along with the safety and security of the same, such as surveillance and maintenance if necessary.

v) The supply of water and electricity, as well as the provision of telephone or Wi-Fi connections, etc.

Within the marina area, other services may also be provided to the user, such as the sale of food and beverages, the supply of fuel, the sale of clothing and equipment, etc. These services, however, fall outside the scope of a berthing contract and are subject to the conclusion of independent and distinct contracts between the user and other providers. The marina operator may also, directly and on its own, procure the distribution of these services, although it may be argued that such an occurrence does not change the nature of the specific contract executed between the user and the provider, which still remains separate from the berthing contract, as the location of the craft in the tourist port constitutes only the occasion for the user to access such services⁹⁷.

The most delicate aspect related to the recognition of the obligations borne by the marina operator under a berthing contract concerns the problem of identify-

⁹⁵ A. ANTONINI, «Il contratto di ormeggio», *op. cit.*, at p. 1238; A. GAGGIA, «Il contratto di ormeggio», *op. cit.*, at p. 180.

⁹⁶ Such implied duties are a consequence of the application to the berthing contract of the provisions contained in Article 1578 of the Civil Code concerning leasing contracts. For the application of this principle, see *obiter* Court of Cassation, 1 June 2004, No. 10484, mentioned above in footnote 93, according to which, even if a berthing contract provides only for the lease of the infrastructure needed in order to allow mooring for protection from winds and gales, with the exclusion of any obligation of custody, the marina operator will still be held liable for any damage occurring to the craft in the event that such damage is caused by the deficiency and failure of the aforementioned infrastructure (in this particular case, the craft was a total loss as a result of a violent storm during which the breakwater collapsed).

⁹⁷ A. GAGGIA, «Il contratto di ormeggio», *op. cit.*, at p. 182.

ing a duty of custody in respect of the craft, its equipment, and also the user's personal belongings located on board. The ascertainment of this duty is hampered by the fact that an obligation of custody is usually not expressly envisaged as such in the contract. It is, however, argued that the existence of this contractual duty can be concluded from a series of collateral provisions of the agreement such as:

- i) The obligations of surveillance and maintenance of the infrastructure that may be envisaged as falling upon the marina operator.
- ii) The possibility of the marina operator issuing orders to the craft owners aimed at guaranteeing and enforcing the safety of the berths, and even providing for this directly in the case of inactivity on the part of the users.
- iii) The specific insurance cover held by the marina operator for theft, damage and the loss of craft during the absence of owners.
- iv) Arguing *a contrariis*, the existence of clauses intended to exclude the liability of the marina operator in the event of damage caused by the unfitness of the mooring (if attributable to the user), exceptional adverse weather conditions or by third parties; the theft of the craft and the goods placed on board; damage caused to third parties resulting from the use of the berth⁹⁸.

In particular, the case law has emphasised the relevance of the provision of a surveillance service for the marina infrastructure as a factor that can lead to establishing, by means of interpretation, the existence of a broader duty of the concessionaire to guard and exercise custody over craft berthed in a tourist port⁹⁹.

The ascertainment of a contractual duty of custody over craft significantly affects the extent of the liability regime of the marina operator.

Within the framework of the prevailing case law, which, as discussed in the previous section, outlines the existence of two sub-types of berthing contract (*i. e.* berth-lease and berth-deposit), if an obligation of custody cannot be inferred from the provisions of the agreement so that its typical subject matter consists essentially of the rental of a water space for mooring, the marina operator, having to be con-

⁹⁸ See A. ANTONINI, «Il contratto di ormeggio», *op. cit.*, at p. 1240, according to whom «excluding the operator from being held accountable for damage caused by a mooring deficiency or by adverse weather conditions means exempting the same from liability for the conduct or fault of the user (who is obliged to carry out the mooring in a proper manner) as well as force majeure, and therefore implies or presupposes the affirmation of the operator's responsibility for other damage, if imputable to its fault, according to the common principles of contractual liability. Likewise, excluding the operator's liability for damage to items and personal belongings located on board the craft presupposes the entrustment of the same to its custody, as otherwise the clause would not have any *raison d'être* [...] the aforementioned provisions show, by way of interpretation, that the common will of the contracting parties [...] has the sense of always including the obligation of custody among the obligations borne by the marina operator». See also, C. TOSORATTI, «Il contratto di ormeggio fra interessi private e interessi pubblici», in *Dir. trasp.* 2006, pp. 260 et seq., at p. 268.

⁹⁹ *Ex multis*, Cass. civ. 1 June 2004, No. 10484, *op. cit.*, which also considers other concurring contractual and practical elements characterising berthing operations when ascertaining an obligation of custody, such as: the fact that the subject matter of the contract is a small coastal craft; the absence of a stable crew on board the craft, especially in the case of berthing that takes place during the winter season; the conduct of the legal representative and personnel of the marina in the event of danger or an accident to the craft, and specifically their attempt to intervene in order to avoid the occurrence of any damage to the same; etc.

sidered a mere lessor of the berthing space, would not be liable for any damage to the pleasure craft, as it has not undertaken any obligation *ex recepto*¹⁰⁰.

On the contrary, whenever (in accordance with what has commonly been found in cases brought before the scrutiny of the courts) it is ascertained that, in addition to the obligation to make a water space available, the contract also envisages an additional duty of custody of the craft, the operator of the tourist port will be accountable for any damages occurring to the pleasure craft guarded in it.

This liability regime is governed by the deposit contract rule referred to in Article 1768 of the Civil Code, as well as the rules laid down in Article 1177, which have a general scope of application with respect to all the obligations of custody that are ancillary and functionally required by the law for the fulfilment of the main performance of the contractual obligations.

Both the former and the latter provisions require that the conduct of the party obliged to take custody conforms to the standard of diligence of the *bonus pater familias* (*bonus pater familias*, i. e. a prudent and reasonable man)¹⁰¹ set out in the general rule of Article 1176 of the Civil Code concerning the performance of contractual obligations¹⁰².

In this respect, it should however be noted that in an important decision on berthing contracts the Court of Cassation stated the principle that if the marina operator, obliged *ex recepto* in its performance of the contract, becomes aware (or should have been aware) that the satisfaction of the user's interest requires an additional effort compared to that ordinarily demanded of a reasonable man, it is obliged to take all necessary measures to prevent a harmful event in accordance with the higher standard of the qualified professional diligence required by its activity¹⁰³.

In the same decision, the Court of Cassation also clarified that the provision of Article 1768 of the Civil Code does not exhaust the scope of liability of the depositary, since, in order to be exempted from responsibility, it is not sufficient for it to give proof of having exercised the required diligence, since—as it is for the promisor in any other contract—the depositary is also compelled, according to Article 1218 of the Civil Code, to demonstrate that the non-fulfilment of the obligation is due to a cause not attributable to him¹⁰⁴. This principle, stated with respect to a contract of deposit, should be extended, according to the Court of

¹⁰⁰ A. CORRADO, «Il contratto di ormeggio», *op. cit.*, at p. 952.

¹⁰¹ Court of Cassation, 10 December 1996, No. 10986, in *Giur. it.* 1997, vol. I(1), pp. 1504 et seq.

¹⁰² Article 1768 of the Civil Code stipulates that the depositary should use in exercising custody the diligence of the *bonus pater familias*; similarly, Article 1176 of the Civil Code also stipulates that, in fulfilling his obligation, the promisor must exercise the diligence of the *bonus pater familias*, specifying in Paragraph 2 that if the obligation is inherent in the conducting of a professional activity, the diligence must be evaluated with regard to the nature of the performed activity itself.

¹⁰³ See Court of Cassation, 1 June 2004, No. 10484, *op. cit.*

¹⁰⁴ Article 1218 of the Civil Code establishes the general rule on contractual liability under Italian private law, stipulating that a: «Debtor who does not duly perform his obligation is obliged to pay damages, unless he proves that the non-performance or delay was determined by the impossibility of his performance deriving from a cause not attributable to him».

Cassation, to any custody obligation, and therefore also to the obligation of custody of a craft undertaken by a marina operator.

However, as has also been clarified by the Supreme Court in the same judgement, this does not mean that the external factor causing the non-fulfilment of the obligation must necessarily have the character of an unforeseeable circumstance (*caso fortuito*) or force majeure (*forza maggiore*), which would imply a *presumption of liability*, whereas the provision of Article 1218 of the Civil Code introduces only a *presumption of fault*, by placing on the debtor the onus of proving that the breach of his contractual obligation was determined by an impossibility not attributable to him (*i. e.* proof that the breach was not his fault). Translating this concept into the specificity of a berthing contract, it is argued that the proof required of a marina operator in order to displace its liability is met if it is demonstrated that it has adopted all the precautions that the circumstances suggested, according to the criterion of ordinary diligence, in order to avoid the loss of or damage to the goods in its custody. Only if the marina operator realises (or should have realised at the time of the performance of the obligation of custody) that the interest of the user cannot be satisfied without the production of a greater effort than that which the diligence of a prudent and reasonable person ordinarily involves, it shall be required to produce such an effort in order to avoid the damage. Failing to do so would imply that the marina operator acted with wilful misconduct, if not fraud, even if it guarded the goods in its custody with the diligence of the *buon padre di famiglia*¹⁰⁵.

From such principles, it also follows that whenever the cause of the damage remains unknown or, as the case may be, the marina operator is not able to identify and prove the same, it cannot be exempted from liability.

To briefly sum up the above observations concerning the liability regime related to the obligation of custody, it may be concluded that in the case of damage to a craft, under Italian law, the marina operator has the burden of proving that it has used, during the performance of the contract, the degree of diligence required in relation to the professional nature of the activity exercised, pursuant to Articles 1768 and 1176 of the Civil Code, in addition to the onus of identifying the specific event that has caused the damage itself, and demonstrating that the same is not attributable to its conduct, in accordance with Article 1218 of the Civil Code¹⁰⁶.

Any clause contained in the contract intended to exclude or limit the liability of the marina operator is subject to the general constraints regarding the validity or enforceability of such kinds of clauses set out in Articles 1229, 1341 and 1342 of the Civil Code, as well the specific provisions of Article 33 et seq. of the consumer protection legislation laid down by Legislative Decree No. 206/2005 (the so-called Consumer Code).

¹⁰⁵ Court of Cassation, 1 June 2004, No. 10484, *op. cit.*

¹⁰⁶ A. CORRADO, «Il contratto di ormeggio», *op. cit.*, at p. 952. In case law, see Court of Cassation, 12 June 1995, No. 6592, in *Mass Giur. it.* 1995; Court of Cassation, 8 August 1997, No. 7363, in *Mass. Giur. it.* 1997; Court of Cassation, 1 June 2004, No. 10484, *cit.*

In particular, based on Article 1229 of the Civil Code, any clause providing for an exclusion or limitation of liability in case of fraud or the gross negligence of the debtor has to be considered null and void. If a clause aimed at excluding or limiting responsibility is envisaged in the standard terms and conditions of the marina operator, it constitutes a vexatious clause whose enforceability is subject to specific approval in writing by the user, as provided for by Articles 1341 and 1342 of the Civil Code. The clause is, in any event, considered to be vexatious and therefore null and void if it is set out within a contract between a professional operator (as the marina operator frequently is) and a consumer, and—regardless of the good faith of the professional operator— determines a significant imbalance in the rights and obligations deriving from the contract for the consumer, as per Article 33, Paragraph 1 of the Consumer Code, or has the content and scope of the types of contractual provisions expressly listed in Paragraph 2 of the same article.

A specific problem concerns the extent of the exclusion or limitation of liability clauses in the case of theft or fire often envisaged in the standard terms and condition of marinas. In this regard, it is necessary to identify the actual content of such clauses. If the clause deals with damage suffered by the craft to its essential structure and/or its accessories and equipment, the regulation of the same will be that outlined above, with the consequent application of the provisions set out in Articles 1341 and 1342 of the Civil Code and Article 33 et seq. of the Consumer Code whenever the contract is entered into between a professional operator and a consumer.

A different approach has been adopted for the hypothesis of contractual clauses that exclude the liability of the marina operator in the event of loss of or damage to the user's personal belongings and to other goods located on board the craft that are structurally and functionally independent of the same.

Two different solutions have been proposed by scholars with respect to this issue. According to the first opinion, these contractual provisions do not impinge on the liability regime of the marina operator regarding breaches of the obligation of custody of the craft, having rather the scope and effect of circumscribing and defining the subject matter of the contract. As such, they do not have the nature of an exclusion of liability clause and are therefore fully valid and enforceable, as they do not fall under the field of application of either the general provisions laid down by the Civil Code in Articles 1229, 1341 and 1342, or the *lex specialis* of the Consumer Code¹⁰⁷. According to another interpretation, these provisions should instead be considered as proper exclusion of liability clauses and therefore subject to the aforesaid legal constraints, since the obligation of custody of the craft also naturally includes and extends to all of its content¹⁰⁸.

¹⁰⁷ D. RICCIO, «Ormeggio, ormeggio di fatto e sub-ormeggio», in *Nautes*, 2009, vol. 2, pp. 83 et seq., at p. 94.

¹⁰⁸ See A. GAGGIA, «Il contratto di ormeggio», *op. cit.*, at p. 186, footnote 12, which draws a comparison with the stated principles on the basis of the issue of safe deposit box contracts as ruled upon by the Court of Cassation, according to which a bank, when it undertakes the obligation to provide suitable

3.2. Berth Users

The principal obligation borne by the berth user is to pay the agreed contract fee. The fee may be established as a daily rate (for short-term berthing contracts) or a lump sum for a certain period of time (usually only for long-term berthing contracts, *e. g.* annual or semi-annual agreements).

Should the user not fulfil his obligation to pay the fee, the marina operator may avail itself of the remedies that the law recognises in order to secure and enforce its rights against the debtor (right of retention under Articles 2756 and 2761, Paragraph 3 of the Civil Code; *sequestro conservativo* based on Articles 2905 of the Civil Code, 671 et seq. of the Civil Procedure Code, and Article 682 et seq. of the Navigation Code; arrest of ship under the 1952 Arrest Convention)¹⁰⁹.

The user cannot sublet the berth, or assign the contract or concede the use of the berth to third parties at any title or for whatever reason, not even for only temporary hospitality.

Under Italian law, every master of a ship, and therefore by extension also the skipper of a pleasure craft, has a duty to take care of its seaworthiness. According to the court's decision, «the office of the harbourmaster oversees the anchorages and moorings but does not have the duty to continuously supervise the safety of the same; this responsibility falls prevalently upon the master of the vessel, who must deal with and be concerned with the safety of the ship, while the master and the shipowner are liable for any damage caused as a consequence of negligence in the observation of the abovementioned obligation»¹¹⁰. Moreover, Article 68 of the Maritime Navigation Regulation (entitled «Reinforcement of moorings») stipulates that «ships and floats, in the event of bad weather, need to reinforce their moorings and adopt all needed precautions; they are also obliged to adopt the measures that the harbourmaster intends to impose, it being in the power of the latter to act at their expense in the case of their non-compliance».

Berthing contracts invariably contain provisions with a similar content, stating that the user must take due care of the craft's maintenance for the entire dura-

premises for the allocation of the safe box, to guard such premises and guarantee the integrity of the box, at the same time undertakes the obligation of custody and guarantee of the goods and belongings contained within the box. Based on this reasoning, the Court of Cassation has therefore decided, in a number of judgments, that the contractual clauses limiting the compensation for damages owed by the bank to the client up to a determined sum or value (also those doing so indirectly by prohibiting the client from depositing goods of a value above a certain amount in the safe box) are to be considered null and void pursuant to Article 1229 of the Civil Code, or vexatious according to Article 1341, Paragraph 2 of the Civil Code; in this sense, see Court of Cassation, 24 January 1997, No. 750, in *Danno e resp.* 1997, pp. 461 et seq.; Court of Cassation, 4 April 2001, No. 4946, in *Danno e resp.* 2001, pp. 915 et seq.; Court of Cassation, 29 July 2004, No. 14462, in *Foro it.* 2005, vol. 1, pp. 1446 et seq.; Court of Cassation, 30 September 2009, No. 20948 in *Giust. civ. mass.* 2009, vol. 9, p. 1382.

¹⁰⁹ See A. V. PADOVAN, M.^a V. PETIT LAVALL, A. MERIALDI and F. CERASUOLO, «Security and Enforcement of Marina Operator's Claims...», *op. cit.*, pp. 543 et seq.

¹¹⁰ Court of Appeal of Genoa, 5 May 1950, in *Dir. mar.* 1952, p. 25; in this sense, see G. BOGLIONE, «Note minime in tema di responsabilità del gestore di approdo di imbarcazioni da diporto», in *Diritto e fiscalità dell'assicurazione* 2012, vol. 2, pp. 376 et seq.

tion of the berth, in particular ensuring that it is properly equipped with adequate mooring ropes and fenders.

It is argued that the extent of such an obligation is closely related to the obligation placed upon the marina operator to watch and supervise the berth and, in turn, to exercise custody over the craft.

If, under a particular contract, the marina operator does not undertake any obligation as to surveillance and custody of the craft, then it is consequential that such a burden weighs in the first place, and even exclusively, on the user, according to the legal provisions referred to above. This has implications not only in respect of damage to the user's own craft but also with regard to damage caused to other yachts or to the port infrastructure¹¹¹.

On the contrary, if the marina operator undertakes the obligation to supervise the craft for the duration of the berthing contact in the absence of the owner or skipper of the craft, the duty of the user tends to be narrower. This does not mean that such an obligation of custody of the marina operator excludes *per se* the duty of the user towards the safety of the craft and mooring and, in turn, a responsibility towards the same. It is thus argued that if damage to the craft is caused by breaches of both the above mentioned duties borne respectively by the marina operator and the user, or such breaches have worsened the consequences of the damage itself, this may lead to the ascertainment of the fault of the user under Article 1227 of the Civil Code and, in turn, to a proportional reduction of the compensation due to him from the marina operator¹¹². In the case of damage to third parties, the marina operator and the user might be held jointly and severally liable for the same, so that if the marina operator has paid compensation, the inobservance of the obligation borne by the user to arrange a safe mooring for the craft within the port may give the marina operator the right of recourse against him.

Connected to such an obligation on the part of the user, there is the further provision, usually contained in the marina's standard terms and conditions, for the user to have adequate insurance cover for civil liability, fire, and damage to other ships, and persons employed or carried on board the craft, as well as to the marina infrastructure, facilities and equipment, which might be caused by the craft itself, by its crew or by persons in charge of its custody and use.

After the expiry of the contract duration, the user must give back the berth free of any goods or persons to the marina operator. This provision bears a particular significance whenever the contract is not subject to tacit renewal. The contractual forms usually envisage a provision which clarifies that the contract ceases at the end of its duration and its renewal is to be expressly negotiated

¹¹¹ Court of Grosseto, 12 June 2004, in *Dir. trasp.* 2006, pp. 259 et seq., with the case note of C. TORRATI, «Il contratto di ormeggio fra interessi private e interessi pubblici», *op. cit.*

¹¹² Article 1227 of the Italian Civil Code stipulates that: «1. If the fault of the creditor has contributed to the damage, the compensation is reduced according to the severity of the fault and the extent of the consequences that derive from it. 2. Compensation is not due for damages that the creditor could have avoided by using ordinary diligence».

between the parties. As a result, in the case that no agreement is reached in this regard, the presence of the craft in the berthing space after the expiry of the contract period is deemed to be unlawful, and therefore the user is held to be automatically in default of his obligation.

Considering that the marina operator has the possession of the body of water by reason of a state concession, it is also often clarified in the contract that if the concession expires or is revoked for whatever reason before the natural expiry of the berthing contract, such a circumstance will imply the automatic termination of the contract, without any obligation on the part of the marina operator to refund, even partially, the fee to the user or to pay to him any other compensation.

IV. MARINA OPERATOR BERTHING CONTRACTS UNDER CROATIAN LAW*

1. General Considerations

Under Croatian law, a marina is a type of special purpose port designated exclusively for nautical tourism. As sea ports, they are subject to the legal regime of the public maritime domain, whereby the construction, development and/or operation of a marina is given under concession by the competent public authorities to a concessionaire (a commercial company). The concessionaire is thereby entitled to exploit the port commercially within the limits of the concession contract and the relevant administrative law¹¹⁵. A marina concessionaire is a legal entity responsible for operating the port, and as such holds certain public competencies and obligations¹¹⁴. It follows that there is a dual function of a marina concessionaire. One is commercial, driven by the requirements of the specific nautical tourism market and the operator's profit-making motivation. The other function relates to the concessionaire's responsibility for safety of navigation, environmental protection, waste management and the maintenance of port order, which are purely administrative law duties delegated from the state to the concessionaire. The described duality of functions is of primary importance in understanding the legal nature of marina operator berthing contracts.

The primary business activity of marina operators is the provision of berths for vessels used in nautical tourism (pleasure craft). This service normally includes

* Adriana VINCENCA PADOVAN, Ph. D., Assistant Professor, Research Associate, Adriatic Institute of the Croatian Academy of Sciences and Arts, Zagreb (Croatia).

¹¹⁵ The main source of legislation regulating the administrative law regime of the public maritime domain and sea ports is the Maritime Domain and Sea Ports Act, *Official Gazette* Nos. 158/2003, 100/2004, 141/2006, 38/2009, 123/2011, 56/2016 (MDSPA). For a more detailed analysis of the legal status and regime of marinas under Croatian law, see I. TUHTAN GRGIĆ, «The Legal Regime of Nautical Tourism Ports in Croatia», in ZUNARELLI and MUSI (eds.), *Current Issues in Maritime and Transport Law*, Il Diritto Marittimo - Quaderni 2, Bologna, Bonomo Editore, 2016, pp. 273-297.

¹¹⁴ R. PETRINOVIĆ and N. MANDIĆ, «Public Competencies of the Concessionaire of the Port of Nautical Tourism», in BARBIĆ (ed.), *The Legal Framework for the Nautical Tourism Ports*, Book Series Modernisation of Law, Book 42, Zagreb, Croatian Academy of Sciences and Arts, 2018, pp. 125-135.

supplying vessels with electricity and fresh water, and waste reception services, as well as providing communal bathrooms, toilets, showers and laundry rooms, and other marina premises intended for communal use by vessel owners, crews and guests. Furthermore, this service frequently includes a certain degree of supervision of the berthed vessels, in particular in the case of long-term (usually annual) berths. Marinas may provide additional services, such as vessel maintenance, repairs, overhauling, winterising, preparations for navigation, lifting and launching, dry-berthing, cleaning, boat-care, yacht agency services, grocery and chandlery supplies, and catering, including bars and restaurants, etc. Sometimes, these additional services are provided by independent service providers based in a marina. In Croatia, about 70% of total marina operator income comes from the provision of berths¹¹⁵, which highlights the importance of berthing contracts as the most frequently concluded contracts in nautical tourism and as the basis on which the various marina business models are built.

Similar to marinas but on a lower scale of complexity and quality of service, berths for pleasure craft are provided in so-called sport ports, which are special purpose ports operated by non-profit sport clubs that act as concessionaires. Berths are provided to the members of the club that operates the port (MDSPA, Art. 81). In addition, there are certain types of nautical tourism port such as anchorages and mooring areas that are much simpler than marinas in terms of construction, infrastructure, equipment and service range, but which are also operated commercially¹¹⁶. Finally, berths for pleasure craft are also provided in the ports open to public transport operated by the port authorities¹¹⁷. There is a difference between the so-called nautical berths provided in the special areas of the public ports designated for nautical tourism and communal berths traditionally designated for the local population. The nautical berths in public ports are provided on a commercial basis and are originally intended for short-term berthing (seasonal and transit berths), whilst communal berths are provided as permanent berths for the local population¹¹⁸. However, in practice, the competent port authorities manipulate pleasure craft berthing capacities and the distribution of the respective revenues in a manner not originally conceived by the legislator, which is questionable in the context of fair market competition between marinas on the one hand and public ports on the other¹¹⁹. In any case, the legal relationships

¹¹⁵ Croatian Bureau of Statistics, *Nautical Tourism - Capacity and Turnover of Ports 2017*, First Release No. 4.3.4, 27 March 2018.

¹¹⁶ Ordinance on the Classification and Categorisation of Nautical Tourism Ports, Official Gazette No. 72/2008.

¹¹⁷ Ordinance on the Criteria for Determining the Uses of the Port Areas in a Port Open to Public Transport of Regional or Local Relevance, on the Method of Payment of Berthing Fees, on Determining their Maximum Amounts, the Use of Funds, and on the Allocation of Revenues, Official Gazette Nos. 94/2007, 79/2008, 114/2012, 47/2013.

¹¹⁸ *Ibid.*; see also Provision of Services in Tourism Act, Official Gazette No. 130/2017 (PSTA), Arts. 84 and 86.

¹¹⁹ B. BULUM, «De Lege Lata Legal Regulation of the Provision of Nautical Tourism Services in Croatian Ports and de Lege Ferenda Proposals», a lecture delivered at the academic conference: *The New Legal Regime for Marinas*, 22-23 November 2018, Zagreb, Croatian Academy of Sciences and

arising with regard to individual berths in sport and public ports are also governed by berthing contracts. However, these berthing contracts are much simpler, as they entail a considerably smaller range of services and obligations undertaken by the berth provider, which also assumes less liability than under commercial marina operator berthing contracts.

This chapter focuses primarily on berthing contracts typical for Croatian marina operators, but due to their inherent similarities and common basic elements, the analysis and conclusions can be applied *mutatis mutandis* to the berthing contracts of other nautical tourism, sport and public ports. The analysis is based on the information and documentation gathered through a research project undertaken on 37 Croatian marinas operated by 12 different concessionaires¹²⁰, 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 included the analysis of the marina operators' general terms and conditions and berthing contract forms, followed by interviews with marina management, combined with a written questionnaire for marina operators. It also covered all relevant sources of Croatian legislation and case law. The subject had not been discussed previously in Croatian legal literature, but the current research project has resulted in a number of published papers dealing *inter alia* with berthing contracts¹²¹.

Arts, <http://delicromar.hazu.hr/files/file/pdf/CONFERENCE-MATERIALS/09-Bulum.pdf> (retrieved 15 December 2018).

¹²⁰ The total number of Croatian marinas is 57 (in addition, there are around 100 sport ports, 13 dry berth marinas, and around 70 other berthing facilities: anchorages, mooring areas, boat storages and similar). See T. LUKOVIĆ *et al.*, *Nautički turizam Hrvatske*, Split, Redak, 2015, pp. 167; see also Croatian Bureau of Statistics, 2017, *op. cit.*

¹²¹ See A. V. PADOVAN, «Marina Operator's Liability Arising from Berthing Contracts and Insurance Matters», *Comparative Maritime Law*, 52 (2015) 167, pp. 1-35; V. SKORUPAN WOLFF y A. V. PADOVAN, «Are there any Elements of the Contract of Custody in the Marina Operators' Contracts of Berth?», in ČORIĆ, RADIONOV and ČAR (ed.), *Conference Book of Proceedings of the 2nd International Conference on Transport and Insurance Law, INTRANSLAW Zagreb 2017*, Faculty of Law, Zagreb, University of Zagreb, 2017, pp. 313-353; A. V. PADOVAN and 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», *Comparative Maritime Law*, 57 (2018) 172, pp. 149-175; V. SKORUPAN WOLFF and A. V. PADOVAN, «Berth Contract de Lege Ferenda» in BARBIĆ (ed.), *The Legal Framework for the Nautical Tourism Ports*, Book Series Modernisation of Law, Book 42, Croatian Academy of Sciences and Arts (Zagreb), 2018, pp. 41-93; V. SKORUPAN WOLFF, R. PETRINOVIĆ and N. MANDIĆ, «Marina Operator's Obligations from the Contract of Berth according to the Business Practices of Croatian Marinas». in VIDAN *et al.* (eds.), *Book of Proceedings, 7th International Maritime Science Conference, IMSC 2017*, Faculty of Maritime Studies, University of Split, Split, 2017, pp. 104-111; V. SKORUPAN WOLFF and A. V. PADOVAN, «Obligations of the User of Berth Arising from the Berth Contract According to the Business Practices of Croatian Marinas», in AMIŽIĆ JELOVČIĆ *et al.* (eds.), *Book of Proceedings, 2nd International Scientific Conference on Maritime Law - Modern Challenges of Marine Navigation, ISCML Split 2018*, Split, Faculty of Law, University of Split, 2018, pp. 333-379; PIJACA, M., «Legal Relationship between Marina Operator and Charter Company Arising from the Contract of Berth - Analysis of Croatian and Comparative Commercial Practice», *Comparative Maritime Law*, 57 (2018) 172, pp. 253-284; M. PIJACA and A. V. PADOVAN, «A Review of Contractual Practices between Marina Operators and Yacht Chartering Companies in Croatia», *JIML*, 24 (2018) 4, pp. 317-325; J. PAVLIČEK, A. V. PADOVAN and M. PIJACA, «Criminological and Legal Aspects of Croatian Ports and Marinas Security», in MEŠKO *et al.* (eds.), *Book of Proceedings, Twelfth Biennial International Conference Criminal Justice and Security in Central and Eastern Europe:*

2. The Legal Nature of a Berthing Contract under Croatian Law

Like in the other jurisdictions observed in this paper, berthing contracts under Croatian law are innominate contracts because they are not subject to any special legislative regulation. Their contents and variations have developed and crystallised in marina operators' business practice¹²². In the absence of any special legislative provisions on berthing contracts, the most important sources for their interpretation and analysis are marina operators' private regulation and commercial practice, including in particular their:

- a) General terms and conditions and standard berthing contract forms.
- b) Marina regulations on port order.

Whilst marina operators' general terms and conditions regulate the private rights and obligations of the berthing contract parties, marina regulations on port order reflect the public law function of marina operators¹²³. According to the MDSPA, every marina concessionaire is obliged to issue and publish marina regulations on port order and is responsible for their implementation. A breach of marina regulations is a maritime offence punishable by law. The competent authority for sanctioning maritime offences is the harbourmaster's office¹²⁴.

An analysis of the general terms and conditions and standard berthing contract forms of Croatian marina operators shows that their contents vary and that they are frequently imprecise and not sufficiently clear¹²⁵. It follows that berthing contracts have not reached a necessary degree of standardisation and therefore belong to a group of atypical contracts. To construe the contents of a particular berthing contract, one must resort to the general rules of the law of obligations and contract law contained in the Civil Obligations Act¹²⁶ (COA), and to the analogous application of special provisions of the COA regulating certain types of contract that a particular berthing contract is most similar to. Finally, in the case that a berthing contract is a consumer contract, it must be construed in accordance with the Consumer Protection Act¹²⁷ (CPA), which prescribes certain limitations on freedom of contract, especially regarding contractual exclusions and limitations of marina operator liability.

According to the general principles of contract law, contractual provisions should be interpreted according to their wording by respecting the contractual

From Common Sense to Evidence-based Policy-making, University of Maribor Press (Maribor), 2018, pp. 469-484.

¹²² A. V. PADOVAN «Marina Operator's Liability...», *op. cit.*, pp. 6-8; V. SKORUPAN WOLFF and A. V. PADOVAN, «Are there any Elements of Custody...», *op. cit.*, p. 314.

¹²³ R. PETRINOVIĆ, N. MANDIĆ and B. MILOŠEVIĆ PUJO, «Safety of Navigation Standards in the Ports of Nautical Tourism (Marinas) with a Special Focus on the Maintenance of the Port Order», *Comparative Maritime Law*, vol. 57 (2018) 172, pp. 177-204.

¹²⁴ R. PETRINOVIĆ and N. MANDIĆ, «Public Competencies of the Concessionaire...», *op. cit.*, pp. 125 et seq.

¹²⁵ V. SKORUPAN WOLFF and A. V. PADOVAN «Are there any Elements of Custody...», *op. cit.*, p. 314.

¹²⁶ *Official Gazette* Nos. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018.

¹²⁷ *Official Gazette* Nos. 41/2014, 110/2015.

freedom of the parties. Only in the case that a contractual provision is disputable, or in the absence of a clear contractual stipulation on a particular matter, should the answers be found by applying the principles of contract interpretation by reference to the applicable contract law¹²⁸.

No special form is required for berthing contracts under Croatian law. Consequently, a berthing contract comes into force when the parties reach an agreement on the essential elements of the contract. In practice, a berthing contract is usually concluded by a berth user adhering to a marina operator's standard berthing contract. Therefore, the principle of interpreting unclear provisions in favour of the party adhering to the contract applies (COA, Art. 320)¹²⁹. In theory and practice, certain rules and methods of contract interpretation have been established. The doctrine accepts that any means and methods are allowed if they can be used *bona fide* in interpreting a contract. All these methods should be combined in order to reach the main goal of contract interpretation, which is to establish the true will of the parties with the aim of keeping the contract in force, if possible, according to the *pacta sunt servanda* principle¹³⁰.

Based on an analysis of Croatian marina operators' general terms and conditions and their business practices, a berthing contract can generally be defined as a bilaterally binding contract whereby a marina operator undertakes to provide a safe berth for a certain vessel for a specific period, and possibly provide other related or additional services to the berth user, in consideration of a certain fee. Therefore, the basic minimum elements of any marina operator berthing contract are the following¹³¹:

- The berth, *i. e.* a designated place for a safe berth in a marina, including the necessary berthing equipment and port infrastructure.
- The vessel, *i. e.* a specific vessel to be placed in the berth.
- The contract period.
- The berthing fee.

It follows that every berthing contract is a contract for the use (*locatio conductio rei*) of a safe berth. However, there are two features specific to this type of contract. First, a berth user does not acquire the exclusive right to use a specifically designated place for berthing his or her vessel but the right to have a safe berth always ensured in the marina during the contract period¹³². In other words, although marina operators usually designate specific berths for their berth users, they keep a discretionary right to reallocate vessels to other adequate safe

¹²⁸ A. V. PADOVAN and V. SKORUPAN WOLFF, «The Effect of the Craft's Sinking...», *op. cit.*, p. 159.

¹²⁹ In general, on the interpretation of contracts under Croatian law, see V. GORENC *et al.*, *Komentar Zakona o obveznim odnosima* (Commentary on the Civil Obligations Act), Zagreb, Narodne novine, 2014, pp. 506-513.

¹³⁰ V. GORENC, *ibid.*, p. 509.

¹³¹ A. V. PADOVAN, «Marina Operator's Liability...», *op. cit.*, p. 9; A. V. PADOVAN and V. SKORUPAN WOLFF, «The Effect of the Craft's Sinking...», *op. cit.*, p. 159.

¹³² This has been confirmed by the courts. See High Commercial Court, Pž-8130/03 of 22 November 2016.

berths within the marina, whether for reasons of safety or for purely commercial reasons. Furthermore, marina operators are free to temporarily assign another vessel to a berth otherwise occupied under a permanent berth contract during the time that the original vessel is not in the port. Marina operator general terms and conditions commonly prescribe that a berth user is obliged to report any absence from the port lasting longer than seven days, whilst during that time the marina operator can assign the same berth as a transit berth to other vessels, which does not affect the original berthing fee. Second, a berth user is not allowed to use the allocated berth for any other vessel, nor can he or she assign the berth to a third party. Exceptionally, when a berth user is a chartering company and a number of berths in the same marina are designated for the vessels of its charter fleet, the chartering company is free to move the vessels of its fleet amongst the allocated berths, provided that the berths are adequate for the individual vessels in terms of dimensions and technical requirements. In any case, only the marina operator is authorised to manage and commercially exploit the berthing capacities of the marina¹³³.

A berthing contract can be a commercial or a consumer contract. When a berth user acts as a trader and enters into a contract in the course of its business activity, we are dealing with a commercial contract. Typical examples of commercial berthing contracts are contracts between marina operators and chartering companies¹³⁴. If, on the other hand, the berth user is a natural person who concludes a berthing contract for a vessel used for private purposes, we are dealing with a consumer contract. It is important to draw this distinction because consumer contracts are subject to certain special mandatory consumer protection rules, whilst commercial contracts are characterised by more contractual freedom.

Practice differentiates between a permanent berth and a daily or transit berth. A permanent berth presupposes a longer-term contractual relationship. It is usually concluded for a period of one year (annual berth) or six months (seasonal berth), and is commonly followed by the signing of a written contract. It usually entails certain other formalities such as handing over the vessel's documentation and in some marinas the vessel keys. Permanent berthing contracts sometimes provide for additional services in respect of the vessel, such as maintenance, de-commissioning and winter lay-up services, as well as subsequent recommissioning and preparation for navigation services. Permanent berths may include lifting and launching services and placing the vessel in a winter dry berth. It is common under a permanent berth contract for the marina operator to assume a certain level of supervision over the berthed vessel. On the other hand, transit berths are short-term temporary berths used in the course of navigation for the purpose of supply, sleep-over, change of guests on a charter vessel, finding shelter from bad weather, etc. They are usually entirely informal. Marina operator general terms

¹³³ V. SKORUPAN WOLFF and A. V. PADOVAN, «Berth Contract de Lege Ferenda», *op. cit.*, pp. 59-60.

¹³⁴ See M. PIJACA and A. V. PADOVAN, «A Review of Contractual Practices between Marina Operators and Yacht Chartering Companies in Croatia», *JIML*, vol. 24 (2018) 4, pp. 317-325.

and conditions frequently stipulate that a transit or daily berthing contract is considered concluded when a vessel moors in the marina, which means that a berth user by mooring a vessel in a particular marina automatically adheres to the marina operator's general terms and conditions. Transit berths are naturally always sea berths. Under a transit berth contract, a marina operator usually provides only a safe berthing place for the vessel, including fresh water and electricity supply for the vessel, the possibility for the crew, passengers and guests of the vessel to use communal bathrooms, showers, laundry rooms and other marina premises for communal use, but no additional services in respect of the vessel.

Therefore, in our opinion, it can be concluded that according to the common practice of Croatian marina operators, transit berthing contracts are typically contracts for the use (*locatio conductio rei*) of a safe berth, whilst permanent berthing contracts are of a more complex nature and may contain elements of other types of contract. In particular, they may contain elements of work and service contracts (*locatio conductio operis*), mandates, and deposit (*depositum*), storage, and ship repair contracts, etc., which needs to be established in each individual case by a true interpretation of the contract in question. In case of dispute, the court should establish the legal qualification of the particular contract elements, determine whether it is possible to subsume the contract according to its contents under a regulated type of contract, and consequently reach for the analogous application of the respective legislative provisions¹³⁵. In doing so, the court should establish the true intentions of the parties and the *causa* of the contract by looking into both the explicit and implicit elements of the contract. This is necessary even when the parties expressly exclude the application of the COA provisions on certain types of contract (*e. g.* deposit) or when a contract remains silent on the issue of care, custody and control of the vessel. It is a well-established court practice that to ascertain the legal nature and correct type of a contract, the court must examine its contents, the parties' intention, and the manner in which the parties perform their obligations. The title that the parties gave to the contract is not relevant to its interpretation¹³⁶.

The predominant position of Croatian courts is that by its nature a berthing contract is a contract of deposit, whereby the vessel is placed in the care, custody and control of the marina operator, who is presumed liable for any damage to or loss of the vessel that occurs during the period of deposit, unless it proves that as a depositary it exercised due care in protecting the vessel from possible adverse influences, accidents, incidents or malicious acts of third parties¹³⁷. The standard of care usually applied by the courts is that of a reasonable businessman, which is a higher degree of due care than that of a *bonus pater familias*. Marina operator berthing contracts have been interpreted as deposit contracts in a number of court decisions, including for example: Rijeka Commercial Court, decision No. P-2590/1994

¹³⁵ Z. SLAKOPER and V. GORENC, *Obvezno pravo: opći dio* (Obligations Law: General Part), Zagreb, Novi informator, 2009, p. 111.

¹³⁶ Supreme Court, Rev. 30/02 of 6 March 2002.

¹³⁷ J. PAVLIČEK, A. V. PADOVAN y M. PIJACA, «Criminological and Legal Aspects...», *op. cit.*, p. 479.

of 28 February 2007¹³⁸; Rijeka Commercial Court, decision No. 9-P-4327/11-72 of 13 September 2012¹³⁹; High Commercial Court, decision No. 3667/02-3 of 18 January 2006¹⁴⁰; Supreme Court, decision No. 756/11-2 of 30 October 2013¹⁴¹; Supreme Court, decision No. Rev. 2333/2010 of 14 May 2013¹⁴²; Rijeka County Court, decision No. Gž-932/2013-2 of 4 October 2016¹⁴³. In all of these examples, the berthing contracts stated that they were for the use of a safe berth and for the safekeeping of a vessel in a marina, and defined the manner of delivery of the vessel into the custody of the marina operator (*e. g.* upon handing over of the vessel certificates, keys, or sometimes even mutually signed inventory lists and vessel survey reports). However, the contracts did not define the obligation of safekeeping a vessel in more detail. Therefore, the courts qualified the berthing contracts as contracts of deposit. To construe the contents of the unclear or missing contractual provisions,

¹³⁸ The court stated that a marina operator as a depositary of a vessel is obliged to undertake all reasonable and necessary measures to preserve the vessel and to return it to the deponent in the same condition that the vessel was in when it was delivered to the marina for safekeeping. This obligation has to be performed with the standard of care expected from a reasonable businessman, and in this case it meant that the marina operator had to undertake the conservation of the engines, the removal of the batteries and their storage in a dry and closed space, the occasional charging and discharging of the batteries, regular starting of the bilge pumps, and draining of the rainwater from the vessel. Although none of these services were defined in the contract and the berth user did not specifically order them, the court held that they were the primary obligation of the marina operator as the depositary of the vessel that was entrusted to its custody.

¹³⁹ The court held that a marina operator was liable as a depositary for the loss of a yacht berthed in a marina that is caused by the theft of the yacht.

¹⁴⁰ A marina operator was legally qualified as a depositary for a vessel entrusted to its custody. However, in this particular case involving the burglary of a vessel, the court held that there was no marina operator liability for the stolen vessel's equipment kept inside the vessel, because the vessel inventory list had not been duly formulated, signed and handed over to the marina operator. Therefore, the court held that the stolen vessel equipment was not the subject matter of a deposit in this case. The deposit of a vessel does not entail a deposit of equipment and other things kept inside the vessel that do not form a part and parcel of the vessel if they are not listed on the inventory list that must be handed over to the marina operator in accordance with the contractual stipulations.

¹⁴¹ A marina operator was held liable as a depositary for allowing a third party to remove a vessel from the marina without having informed the berth user and obtaining his or her approval to do so, although the party that took possession of the vessel in the marina was the vessel owner. However, the vessel owner was not a party to the berthing contract, and the marina operator as a depositary was therefore liable for a breach of contract for having delivered to a third party a vessel that had been entrusted to it for safekeeping.

¹⁴² A marina operator was held liable as a depositary for damage caused by the sinking of a vessel in its berth, as based on the berthing contract it was obliged to safeguard the vessel with the due care of a reasonable businessman, supervise the safety of the berth, drain the rainwater, air the inside of the vessel, cover the vessel with a tarpaulin, and return the vessel in the same condition that it was in upon its delivery to the marina. The court held that the sinking was caused by the marina operator's failure to keep the bilge pumps functional, the batteries charged and sound, and to drain the rainwater, as these measures were necessary for the safekeeping of the vessel in its sea berth. The court did not find any contributory fault on the part of the berth user, although in this case the vessel was simply left by the berth user in the marina with no maintenance and no specific instructions to the marina operator after an automatic berthing contract renewal, with no berthing fees having been paid for renewal.

¹⁴³ The marina operator was liable as a depositary for damage to a vessel caused by fire because it did not act as a prudent (reasonable) businessman, *i. e.* it did not act with due care in safekeeping the vessel. The firefighting equipment in the marina was insufficient and the fire was noticed too late. The court held that the organisation of fire protection and the procedures in case of a fire were below the level of due care expected from a reasonable businessman as prescribed by the COA provisions on contracts of deposit.

they applied by analogy the provisions of the COA regulating contracts of deposit (COA, Arts. 725-736). Consequently, the prevailing position of the courts is that a marina operator, as a depositary of a vessel, is obliged to undertake all reasonable and necessary measures to preserve the vessel and to return it to the deponent in the same condition that the vessel was in when it was delivered to the marina for safekeeping, because that is the main purpose, *i. e.* the *causa*, of any contract of deposit.

Having thoroughly analysed the practice of Croatian marina operators and their usual manner of performing their obligations under permanent (annual) berthing contracts, we have established that in reality the examples of true deposits of vessels in marinas are very rare. The problem of the discrepancy between court practice and the marina operators' perception of their own obligations and liability arises from the imprecise, unclear and frequently contradictory general terms and conditions of berthing contracts and from the inconsistent and inadequate terminology used in them. Therefore, standard berthing contracts do not really reflect the true content of the services (obligations) actually performed by marina operators in practice¹⁴⁴.

First of all, it is submitted that the safekeeping of a vessel in a berth in a marina cannot be fully identified with a contract of deposit as regulated by the COA because of the specific circumstances in which the contract is performed. Namely, a vessel in a berth is exposed to various hydro-meteorological influences and the perils of the sea. A marina, as a sea port, is under the legal regime of the public maritime domain, and therefore all Croatian marinas are in principle open to public access. A marina operator never has exclusive control over a vessel in a berth, because the berth user and the persons that they authorise are free to board the vessel, use it, sail out with it, return to the port, and moor again any time they wish. The rules of practice and the common standards applied in Croatia, but also in other countries covered by our field research, including Malta, Italy, Slovenia and Montenegro, are such that even in some large marinas with more than 700 berths there are usually around five to ten marina mariners in a day shift and two mariners or guards in a night shift.

Therefore, it seems to us that for a marina operator it is practically impossible to perform the duties of a depositary as envisaged under the strict provisions of the COA regulating the depositary's liability for damage. Namely, in order to fulfil the obligation of returning the vessel to the berth user in the same condition as it was upon the delivery of the vessel into its custody, a marina operator would have to perform a whole range of services for the maintenance and preservation of the vessel in its berth, such as airing the inside of the vessel, conservation and periodical starting of the engines, removal of the batteries and their regular charging and discharging, regular checking of the bilge and starting of the bilge pumps, draining the rainwater, cleaning and washing of the vessel, covering the

¹⁴⁴ See V. SKORUPAN WOLFF and A. V. PADOVAN, «Are there any elements of the contract of custody...», *op. cit.*, pp. 317 et seq.

vessel with a tarpaulin, servicing the engines, and electric and hydraulic installations, preparing the vessel for the winter season, applying anti-fouling and anti-corrosive coating, etc.¹⁴⁵. In the absence of these various preventive and regular maintenance services, a vessel's condition in the normal circumstances of being placed in a sea berth or open-air dry berth in a marina would considerably deteriorate. However, according to the prevailing position reflected in the majority of the marina operators' general terms and conditions, the maintenance of the vessel is primarily within the sphere of the berth user's responsibility. A berth user is liable for the maintenance of the vessel in a seaworthy condition throughout the berthing contract period. Many marinas are able to provide the maintenance services, but this is usually performed upon a berth user's express orders as additional work or services in consideration of a special fee. On the other hand, it happens rather frequently, especially when larger and more expensive yachts are involved, that the owners engage specialised providers of boat-care services or employ full-time skippers or crews responsible for vessel maintenance. There are also examples of marinas that categorically do not provide any boat-care services but maintain business cooperation agreements with specialised boat-care service providers who perform these services independently.

Furthermore, it has been established that marina operators when admitting vessels to annual berths in reality do not take possession of the vessels. As a rule, the majority of marina operators do not allow their dock staff to board the vessels, except in two situations. One is in the case of a specific instruction by the berth user, which is treated as a separate contract for work and services. The other is the rare situation of an emergency. In this case, the intervention of the marina staff may involve boarding and/or taking possession of the vessel for the purpose of preventing or minimising potential damage or loss. Such intervention is primarily justified by the marina operator's public duties and competencies in maintaining the safety of navigation and port order. It is also regarded as an exceptional measure in the performance of the marina operator's contractual obligations to provide a safe berth and supervise the vessel.

Research shows that most marina operators perform a certain level of supervision of vessels in berths in the case of permanent berthing contracts. In our opinion, the supervision of a berthed vessel, as customarily performed by marina operators, is different from the safekeeping obligation as traditionally perceived under contracts of deposit. Namely, as already explained, the supervision of a vessel and berth is in principle performed without the marina operator taking possession of the vessel. It customarily consists of periodic patrols by the marina dock staff (marina mariners) of all berths and of an external survey of berths and vessels from the pier, whereby certain indicators are checked by the marina

¹⁴⁵ By reference to the Ordinance on the Classification and Categorisation of Nautical Tourism Ports, it is evident that these services are in addition to the primary service of providing a safe berth. According to the minimum technical requirements prescribed by the Ordinance, it is not even compulsory for a marina to provide these services. Depending on its business orientation and categorisation, a marina may decide to limit its supply to the basic service of providing a safe berth.

mariners according to internal marina protocols, check lists and procedures, and possibly with the help of certain technological support (sensors, IT support, etc.) Most marinas implement a certain level of security protection (24/7 CCTV systems, professional night guards, entry and exit controls and recording systems, keys for dock gates, etc.)¹⁴⁶ However, it should be emphasised that in practice marina security protection systems are not directed to individual vessels but to the marina as a whole, its infrastructure, premises, facilities and equipment, whilst they necessarily contribute to the prevention of potential criminal acts or offences endangering the property and persons in the marina.

In our opinion, the presence of marina mariners and of security systems is not in itself sufficient to qualify a berthing contract as a contract of deposit. The content of the supervision services is considerably narrower in its scope and purpose compared to a depositary's obligations¹⁴⁷.

The actual scope of the obligation to supervise a vessel is limited by the fact that, in principle, there is no possession of the vessel by the marina operator. The fact that some berthing contracts prescribe the handing over of keys, vessel certificates, inventory lists and vessel survey reports in this sense seems contradictory. Further analysis of this issue shows that frequently the main purpose of these provisions is not to regulate the transfer of possession but to ensure a potential future retention of the vessel as a security for the marina operator's outstanding claims¹⁴⁸. Furthermore, the handing over of the vessel keys is frequently considered an additional service for customers for practical reasons, *e. g.* so that the authorised service providers can access the vessel to perform work and services when the berth user so orders. The practice of formulating and signing vessel inventory lists and condition survey reports is being abandoned in a number of marinas. However, if this type of clause is inserted in a berthing contract, although the marina operator does not wish to take possession of the vessel, it is recommended to define the purpose and effect of such a clause and to exclude the transfer of possession in order to avoid any legal uncertainty. The transfer of possession certainly takes place in the case of ship repair, lifting and launching, transport by land and maintenance services, but only for the purpose and during the performance of those services which are usually specifically ordered by the berth user and subject to a separate contract.

The purpose of supervision is to check whether the vessel is correctly moored and equipped with adequate berthing lines and fenders, as well as to detect any potential adverse changes to the vessel, and to inform the berth user about them, whilst further action is within the sphere of the berth user's risk and responsibility.

¹⁴⁶ For more about the legal aspects of marina security, see J. PAVLIČEK, A. V. PADOVAN and M. PIJACA, «Criminological and Legal Aspects...», *op. cit.*, pp. 478-480.

¹⁴⁷ V. SKORUPAN WOLFF and A. V. PADOVAN, «Are there any elements of the contract of custody...», *op. cit.*, pp. 320-321, 334-342.

¹⁴⁸ For a detailed analysis and discussion of the issue of the marina operator's right of retention under Croatian law, see A. V. PADOVAN, M.^a V. PETIT LAVALL, A. MERIALDI and F. CERASUOLO, «Security and Enforcement of Marina Operator's Claims...», *op. cit.*, pp. 523-532.

ity. Only in the case of an emergency caused by immediate danger will the marina operator intervene unilaterally to avert potential damage or loss. Unless the cause that gave rise to the emergency was in the sphere of the marina operator's liability, the intervention is usually performed by marina mariners at the berth user's risk and expense. Finally, a specific service typical for annual berthing contracts in the majority of Croatian marinas is that the marina mariners occasionally adjust the fenders, moorings and other berthing equipment, depending on the hydro-meteorological conditions. They are also authorised to replace inadequate or insufficient berthing lines or fenders on behalf of and at the expense of the berth user.

We can conclude that the described practice of performing supervision of berthed vessels in marinas may appear as an aspect of safekeeping, but it is substantially narrower in scope and has a considerably more limited purpose than safekeeping as assumed under a contract of deposit. A depositary safeguards the item entrusted to it in controlled circumstances and usually in a space where the subject matter of the deposit can be protected from various external influences. A classic deposit presupposes the depositary's possession of the deposited item throughout the duration of the contract. Dry berthing and boat storage are therefore closer to the concept of deposit. It is submitted that the analogous application of the COA provisions on contracts of deposit is indeed justifiable in the case of dry berthing and boat storage, subject to the general principle of freedom of contract and subsidiary application of the dispositive legislative rules. In other words, the COA provisions on contracts of deposit are dispositive and should only apply to the extent that they are not displaced by overriding contractual stipulations. Finally, in our opinion the usual marina operator berthing contracts, especially those regulating sea berths, are contracts *sui generis* that cannot be identified with a single nominate contract. The component of supervision of a berthed vessel should not be considered as safekeeping under a classic contract of deposit but rather as a part of a specific service particular to the marina industry. Therefore, the correct approach in the interpretation of berthing contracts comes from an understanding of the usual basic distribution of risk between a marina operator and a berth user. On one hand, a marina operator's responsibility is to provide up-to-standard port infrastructure, mooring systems and equipment supervised and managed by able, qualified, trained and well-organised marina staff. On the other hand, a berth user's responsibility is to keep the vessel in a sound seaworthy condition and use the allocated berth and other marina premises in accordance with their purpose and the requirements of safety and order in the port.

3. The Rights, Obligations and Liabilities of the Parties

3.1. Marina Operators

The field research undertaken in Croatian marinas shows that there are three main models of berthing contract applied in practice. A marina operator's liability depends on the model of the contract in question.

For the purpose of this paper, the first model is referred to as a berth rental. It is the basic model that is present in all types of berthing contracts of Croatian marinas. The usual content of the basic marina operator's obligation to provide a safe berth is to designate a location for a vessel to be safely moored, which presupposes that the marina infrastructure and berthing equipment¹⁴⁹ are technically adequate, well maintained, sound and functional, that there is adequate access to the location of the berth, so that the vessel can safely sail in, moor, unmoor and sail out, and also that the vessel can be safely disembarked from and boarded by the skipper, crew, guests, passengers and other persons authorised to board the vessel. Furthermore, a safe berth presupposes reasonable protection from the hydro-meteorological influences that vessels are exposed to during their stay in a marina. The designated berth must be adequate for the specific vessel, its dimensions, type and other technical characteristics. Usually, this service includes supplying the vessel with electricity and fresh water. This model is typical for transit berths¹⁵⁰. There is one Croatian marina operator that nominally applies this model to permanent berths. However, field research shows that in fact this operator also performs supervision of the vessels in permanent berths in a customary manner but does not wish to define it expressly as a contractual obligation¹⁵¹.

The second model is referred to as a berth rental including supervision of the berthed vessel. Besides the obligation to provide a safe berth, this model includes the marina operator's obligation to supervise the berthed vessel and to inform the berth user of any adverse changes in the vessel's condition. The service customarily consists of the marina master and mariners observing the berthing and mooring lines, fenders and the outer condition of the vessel by way of regular periodical rounds and external surveys of berths and vessels from the pier. The visual supervision by the marina staff is usually combined with CCTV monitoring and specially designed IT system support. As a rule, marina mariners do not board vessels, although there are several marinas where marina mariners occasionally board vessels and check the bilge. In case they notice any adverse changes on a vessel or its equipment, they contact the berth user and proceed according to his or her instructions for the purpose of repair or prevention of damage. The additional work is done at the berth user's risk and expense and is based on a separate contract, *i. e.* outside the berthing contract. In the case of emergency (*e. g.* the waterline is too high and there is a danger of sinking), the marina operator, as a concessionaire responsible for safety and order in the port, is authorised to undertake reasonable measures to prevent or mitigate the potential damage without the prior instructions of the berth user. This is the most frequently applied model for permanent (annual) berths in Croatian marinas¹⁵².

¹⁴⁹ In particular, this refers to mooring lines, chains and blocks, jetties, quays, pontoons, piers, docks, signalling lights, buoys, dock fenders, breakwaters, gangways, mooring cleats, electricity distribution and water supply pedestals and other installations, firefighting equipment, etc.

¹⁵⁰ A. V. PADOVAN and V. SKORUPAN WOLFF, «The Effects of the Craft's Sinking...», *op. cit.*, p. 160; V. SKORUPAN WOLFF and A. V. PADOVAN, «Are there any Elements of Custody...», *op. cit.*, p. 318.

¹⁵¹ V. SKORUPAN WOLFF and A. V. PADOVAN, *ibid.*, p. 319.

¹⁵² *Ibid.*, pp. 319-321.

The third model of berthing contracts consists of berth rental and supervision but includes certain additional boat-care services that can be identified with the safekeeping of the vessel, containing express or implied elements of a contract of deposit. The additional services may include cleaning, airing, covering the vessel with a tarpaulin, winterising, occasional starting of the engines and bilge pumps, removing and charging of the batteries, etc.¹⁵³.

A marina operator may undertake to perform other additional services and work, including the repair and maintenance of the vessel and its engines or equipment, for the purpose of keeping the vessel in a seaworthy condition. However, in the practice of Croatian marinas, vessel maintenance and repair work and services are usually arranged under a special contract parallel to a berthing contract¹⁵⁴.

The third berthing contract model is very rare in the actual practice of Croatian marinas. Some marinas have introduced such optional service packages in addition to regular permanent berthing contracts, but in fact they have not attracted a lot of interest amongst their customers. In some marinas, it is possible to contract so-called boat-care services offered by independent service providers. Vessel owners frequently engage professional skippers, boat-care service providers or yacht managers of their own choice to cater for the vessels in their absence¹⁵⁵.

Based on a berthing contract, a marina operator may become liable towards a berth user for damage to or loss of the vessel berthed in the marina. When ascertaining a marina operator's contractual liability, it is necessary to analyse the applicable berthing contract terms and conditions. Since a berthing contract is not specially regulated, it should be interpreted within the legal framework of the COA and, in the case it is a consumer contract, in accordance with the CPA¹⁵⁶. Croatian law prescribes a regime of presumed liability based on fault. Under the general rules of obligations law, if a berth user as a claimant demonstrates a causal link between the damage and an act or omission of the marina operator or its staff, the marina operator is presumed liable for the damage unless it proves that there was no fault for the damage on its part. There is fault if the damage is caused wilfully or negligently. There is a legal presumption of *culpa levis* (COA, Arts. 349, 1045 and 1049)¹⁵⁷.

As a concessionaire of a port and a commercial company providing berthing services and accompanying nautical tourism services, a marina operator must act with due care, *i. e.* as a prudent businessman, in performing its contractual obligations. A marina operator must comply with the prescribed standards, as

¹⁵³ *Ibid.*, pp. 321-323.

¹⁵⁴ A. V. PADOVAN and V. SKORUPAN WOLFF, «The Effects of the Craft's Sinking...», *op. cit.*, p. 162.

¹⁵⁵ *Ibid.*

¹⁵⁶ A. V. PADOVAN, «Marina Operator's Liability...», *op. cit.*, pp. 5-6.

¹⁵⁷ Generally, on the right to claim damages for a breach of a contractual obligation, and on the analogous application of the COA provisions regulating extra-contractual liability for damage to contractual liability, see V. GORENC *et al.*, *Komentar Zakona o obveznim odnosima*, *op. cit.*, pp. 547-562, and on the regime of presumed liability based on tort law, *ibid.*, pp. 1697-1714.

well as with the rules of practice. The prescribed standards include the relevant standards regarding construction, hydro-construction, environmental protection, safety, firefighting, waste management, the minimum requirements for the operation of sea ports (MDSPA, Maritime Code¹⁵⁸ and subsidiary legislation), the minimum standards for the providers of services in nautical tourism (PSTA and subsidiary legislation), etc. For example, the Ordinance on the Conditions and Methods for the Maintenance of Order in Ports and Other Parts of the Internal Waters and the Territorial Sea of the Republic of Croatia¹⁵⁹ prescribes that a marina concessionaire is obliged to regulate port areas *inter alia* according to their uses, as well as reporting procedures, entry into and exit from the port, mooring, sailing within the port, and control of these operations, etc. If in a particular case it can be established that an accident or incident in the port resulting in damage to a berthed vessel arose from a lack of due care (of a prudent businessman) in regulating and controlling port operations or implementing port order, the marina operator's liability for such damage would be successfully ascertained.

As the case may be, the COA provisions on strict liability for damage caused by a dangerous object or a dangerous activity may apply (COA, Art. 1045.3, Art. 1063 et seq.). According to these rules, exoneration is possible only if the marina operator proves that the damage resulted from force majeure, an act of the injured party (berth user) or of a third party, if such an act was unpredictable and inevitable, or if it was impossible to prevent its adverse consequences. For these provisions to apply, the claimant must demonstrate that the object or activity that caused the damage is dangerous, and this is assessed by the court on a case-by-case basis¹⁶⁰. For example, an electric pedestal, a port crane or a travel lift could be assessed as a dangerous object, and welding might be considered as a dangerous activity, but this has to be determined depending on the facts of a particular case^{161,162}.

The main obligation of a marina operator under a berthing contract is to provide a safe berth for a specific vessel, and it is therefore liable for damage caused by a breach of this obligation. A marina operator's liability for damage to a vessel will be ascertained if it is established that the damage resulted from an act or omission of the marina operator (or its staff) in performing the obligation

¹⁵⁸ Maritime Code, Official Gazette Nos. 181/2004, 76/2007, 146/2008, 61/2011, 56/2013, 26/2015.

¹⁵⁹ Official Gazette Nos. 90/2005, 10/2008, 155/2008, 127/2010, 80/2012, 56/2013, 7/2017.

¹⁶⁰ H. KAČER, A. RADOLOVIĆ and Z. SLAKOPER, *Zakon o obveznim odnosima s komentarom* (The Civil Obligations Act and Commentary), Zagreb, Poslovni zbornik, 2006, pp. 928-929.

¹⁶¹ A. V. PADOVAN «Marina Operator's Liability...», *op. cit.*, p. 7.

¹⁶² In a recent decision regarding damage to a vessel caused by a fire in a marina, the court held that a dangerous object is any object carrying a higher risk of causing damage in the circumstances of a particular case, whereby the risk exists regardless of adequate precautionary measures because the object is not fully under the control of its holder. In the opinion of the court, although a vessel on its own does not present a dangerous object, in the circumstances of this particular case, a vessel placed on a dry dock qualified as a dangerous object *inter alia* due to the usual technical arrangement of dry docks, whereby vessels are placed on three-metre-high boat cradles, occasionally connected to electricity, with bunkers filled with fuel and gas cylinders on board, and with the distances between the dry docks being rather small so that fire can spread quickly, etc. Rijeka Commercial Court, 8 P-2575/14-115 of 7 December 2018.

to provide a safe berth. For example, causes such as technical deficiencies in the berth system, port infrastructure, equipment, devices and installations will fall within the sphere of the marina operator's liability¹⁶³.

If under a berthing contract the marina operator provides maintenance, repairs or similar services, it is liable for bad workmanship. If these services are provided by independent subcontractors, the marina operator may be held liable for its choice (*culpa in eligendo*).

In particular, when damage is caused by an act or omission of marina staff, the expected marina operator performance has to be determined in accordance with the relevant berthing contract. For example, in the case of a berthing contract containing berth rental and vessel supervision, the marina operator would be liable if damage resulted from the fact that rounds were performed irregularly or incompletely, or not all risk indicators were checked in the usual external surveys of vessels and berths, which led to marina staff not noticing an adverse change to the vessel. However, if the damage was caused by bad maintenance or a defect in the vessel, and the marina operator was not engaged to perform boat-care services, there would be no liability on the part of the marina operator¹⁶⁴.

The marina operator may exonerate itself from liability if it proves that it acted with due diligence or that there is no causal link between an act of the marina staff and the damage or if the damage resulted from a cause which is not within the sphere of its liability, such as force majeure, or the fault of the berth user or a third party (COA, Arts. 342.5 and 343). Finally, it may rely on the express exclusions and limitations of liability as stipulated in the contract, subject to the general principles of good faith, social morality and mandatory law (COA, Arts. 2, 4 and 296). *Inter alia*, according to the mandatory rules of the COA, it is not allowed to exclude or limit liability for wilful misconduct and gross negligence (COA, Art. 345). Furthermore, under a consumer contract, a marina operator may not exclude or limit liability for deficiencies in the berth (COA, Art. 408.2 in connection with Art. 357.3).

The following are examples of some standard contractual exclusions of marina operator liability:

- Force majeure.
- Ordinary wear and tear of the vessel, its parts or equipment.
- Damage occurring whilst the vessel is under the berth user's control.
- Damage caused by the berth user, crew or another person authorised by the berth user.
- Bad maintenance, an unseaworthy condition or a latent defect in the vessel, its parts or its equipment¹⁶⁵.

¹⁶³ A. V. PADOVAN and V. SKORUPAN WOLFF, «The Effects of the Craft's Sinking...», *op. cit.*, pp. 163-164.

¹⁶⁴ *Ibid.*, p. 164.

¹⁶⁵ Supreme Court, II Rev. 24/1997-2 of 17 May 2001: the court held that the defendant marina operator was not liable. It was able to rely on a contractual exclusion of liability, as the cause of sinking was a latent defect in the vessel (a defective seal) to which the defendant was not privy.

- Inadequate or insufficient berthing lines or fenders.
- A fire or explosion starting on board the vessel.
- Malicious acts of third parties, etc.

Some of these exclusions apply *ex lege* (e. g. force majeure, damage caused by the fault of the injured party), whilst others are there to reallocate the burden of proof, *i. e.* to ease the legal position of marina operators whose liability is otherwise presumed by law. The latter are more likely to be within the sphere of the berth user's responsibility. By relying on one of them, a marina operator shifts the burden of proof to the berth user, who needs to demonstrate that the damage did not result from the cause envisaged by the exclusion but from a negligent act or omission on the part of the marina operator. The validity of these clauses is subject to the rules on unfair contract terms (COA, Art. 296; CPA, Arts. 49-56)¹⁶⁶.

3.2. Berth Users

Besides the main contractual obligation of paying the berthing fee, a berth user is responsible for the maintenance of the vessel in a seaworthy condition throughout the duration of the contract. This obligation has to be performed with due care, *i. e.* in accordance with the standard of a *bonus pater familias*. The vessel and its equipment must be kept in a technically sound condition, and it has to comply with all prescribed safety standards and be certified accordingly. The berthing lines, fenders and other berthing equipment belonging to the vessel must be adequate and in a good condition. Furthermore, the berth user is responsible for the acts and omissions of his or her crew, guests, workmen and all other persons authorised to use, board or access the vessel. The risks of a latent defect in the vessel and accidental damage lie with the berth user¹⁶⁷. A berth user is also obliged to declare all information about the vessel relevant to its stay in the port and potential work carried out on it, and to provide the vessel's documentation regarding ownership, title of possession, insurance, compliance with technical standards (vessel certificates), powers of attorney, etc.

When damage results from a combination of causes, whereby some of them are in the sphere of the marina operator's liability and some in the sphere of the berth user's liability, the general rules on contributory negligence apply (Arts. 347 and 1092)¹⁶⁸.

4. De Lege Ferenda Proposals

At the time of writing this article, the final draft of the Amendments to the Maritime Code Bill was submitted to the Parliament (PZE No. 421, December

¹⁶⁶ *Ibid.*, p. 166.

¹⁶⁷ *Ibid.*, pp. 166-167.

¹⁶⁸ *Ibid.*, p. 167.

2018), containing a set of predominantly dispositive legislative provisions regulating berthing contracts as a new type of nominate contract in Croatian law. The proposal basically treats the contract as a contract for the use of a safe berth, with the possibility of expressly extending a berth provider's obligations to include additional services in respect of the vessel¹⁶⁹. It sets the standard of care of a berth provider to a higher degree than that of a reasonable businessman by prescribing that a berth provider must act with professional diligence in providing a safe berth and performing other obligations assumed under a berthing contract¹⁷⁰.

V. AN OVERVIEW OF MARINA OPERATOR LIABILITY FOR DAMAGE TO VESSELS AT BERTH UNDER THE LAW OF THE UNITED STATES*

1. General Considerations

In the United States, marinas are generally operated pursuant to a franchise granted by a public authority (federal, state or municipal), either commercially in the form of private ownership, by a non-profit association (*e. g.* a yacht club), or by a public corporation¹⁷¹.

In the context of marina operator liability under US law, a marina generally falls under the definition of a wharfinger¹⁷², and as such it owes a duty to exercise reasonable diligence in providing a safe berth and avoiding damage to vessels¹⁷³.

The relevant case law and doctrine typically differentiate between berth (slip) rental or lease and marina storage agreements, but there is a wide variety of modification to such contracts¹⁷⁴.

¹⁶⁹ A. V. PADOVAN, M.^a V. PETIT LAVALL, A. MERIALDI and F. CERASUOLO, «Security and Enforcement of Marina Operator's Claims...», *op. cit.*, p. 530. For a detailed analysis of the legislative proposal, see V. SKORUPAN WOLFF and A. V. PADOVAN, «Berth Contract de Lege Ferenda», *op. cit.*, pp. 41-93.

¹⁷⁰ For a thorough analysis, see V. SKORUPAN WOLFF and A. V. PADOVAN, «Berth Contract de Lege Ferenda», *op. cit.*; A. V. PADOVAN and V. SKORUPAN WOLFF, «Pleasure Navigation Berthing Contracts under Croatian Law de Lege Ferenda», paper accepted for publication in CELLE (ed.), *Diritto Marittimo Quaderni*, 6, Bologna, Bonomo Editore, expected time of publication: July 2019.

* Adriana Vincenca PADOVAN, Ph. D., Assistant Professor, Research Associate, Adriatic Institute of the Croatian Academy of Sciences and Arts, Zagreb (Croatia).

¹⁷¹ J. C. KOSTER, *Benedict on Admiralty*, vol. 8, Mathew Bender & Company Inc., a member of the LexisNexis Group, 2017, chap. XIX Marinas, § 19.01. For a review of the legal regime of waterfront land, construction and use of wharves, piers and docks, and riparian and coastal rights under common law and under extensive federal, state and municipal regulations, see *ibid.*, § 19.02.

¹⁷² J. N. HURLEY, *Maritime Law and Practice*, 5th Edition, Florida Bar, 2017, chap. 17 Marina Liability, § 17.7.

¹⁷³ *Trade Banner Line, Inc. v. Caribbean Steamship Co.*, S. A., 521 F.2d 229 (5th Cir. 1975), cited in HURLEY, *ibid.*

¹⁷⁴ J. C. KOSTER, *Benedict on Admiralty*, *op. cit.*, § 19.06. See also J. R. HARRIS, «Sources of Marina Liability for Storage and Repairs Ashore and the Effectiveness of Red Letter Clauses», *J. Mar. L. & Com.*, 37 (2006) 545, pp. 547-548. For a distinction between rental and storage services versus repairs, see *Pillgrem v. Cliff Richardson Boats, Ltd.* [1977] 1 Lloyd's Rep. 297, cited in KOSTER, *ibid.*, § 19.04. Slip rental agreements do not necessarily create a bailment relationship, *In re Wechsler*, 121 F. Supp. 2d 404,

Most marina berthing contracts are governed by general maritime law and fall within the federal admiralty court's jurisdiction¹⁷⁵. This particularly applies to sea berth rental and wet storage agreements, and vessel repair, maintenance and supply, since «storing and maintaining a vessel at a marina on a navigable waterway is substantially related to maritime activity», as the US Supreme Court stated in *Sisson v. Ruby*¹⁷⁶. Marina dry storage agreements are also governed by maritime law and fall within admiralty jurisdiction, as long as they have a «maritime flavour» according to *American Eastern Development Corp. v. Everglades Marina Inc*¹⁷⁷. However, matters arising from dry storage may be governed by state law and fall under the jurisdiction of state courts, in particular where such storage is not related to a «traditional maritime activity», *e. g.* in the case of vessels removed from navigation, new vessels not engaged in navigation, or regarding ships' stores, etc.^{178,179}.

2. Wharfinger Liability

The common law rules on wharfinger liability date back to the nineteenth century¹⁸⁰. In *Smith v. Burnett* 173 U.S. 430 (1899), the US Supreme Court established the duty of a wharfinger to provide a safe berth and the corresponding duty of a vessel tying up to the wharf, according to which a wharfinger does not guarantee the safety of vessels coming to his wharves but «is bound to exercise reasonable diligence in ascertaining the condition of the berths thereat, and if there is any dangerous obstruction to remove it, or to give due notice of its existence to vessels about to use the berths. At the same time the master is bound

2001 AMC 312, cited in HARRIS, *ibid.*, p. 548. When only docking space is provided and the marina exercises no control over the vessel, a bailment relationship does not exist. *Royal Ins. Co. v. Marine Indus., Inc.*, 611 NE 2d 716, 717, 1994 AMC 103, 104-05 (Mass. App. Ct. 1993), cited in G. H. UZZELLE, III, «Liability of Wharfingers, Fleeters, and Bailees», 70 *Tul. L. Rev.* 647, p. 661.

¹⁷⁵ J. N. HURLEY, *Maritime Law and Practice*, *op. cit.*, § 17.2.

¹⁷⁶ 497 U.S. 358, 367, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990), cited in HURLEY, *ibid.*

¹⁷⁷ 608 F.2d 123, 125, 1980 AMC 2011, 2012 (5th Cir. 1979), cited in D. MINICHELLO, «Marina Liability for Damage to Yachts in Storage», *Recreational Craft-Jurisdiction, Claims and Coverage* (1990), Admiralty and Maritime Law Committee of the Tort and Insurance Practice Section, American Bar Association, pp. 87-121, at p. 93. In *Medema v. Gombo's Marina Corp.*, 97 FRD 14 (N.D. Ill. 1982), the court held that a seasonal dry storage contract was subject to maritime law and admiralty jurisdiction because the vessel was not withdrawn from navigation, cited in J. C. KOSTER, *Benedict on Admiralty*, *op. cit.*, § 19.04.

¹⁷⁸ J. N. HURLEY, *Maritime Law and Practice*, *op. cit.*, § 17.3. In *La Vida Marine Ctr. v. Zellers*, 2006 U.S. Dist. LEXIS 48777, 47 V.I. 747 (2006), the court held that an action for long-term dry storage costs did not fall within admiralty jurisdiction, cited in J. C. KOSTER, *Benedict on Admiralty*, *op. cit.*, § 19.04.

¹⁷⁹ For a detailed account of the choice of law governing marina operator berthing contracts and admiralty jurisdiction in the USA, see J. C. KOSTER, *Benedict on Admiralty*, *op. cit.*, § 19.04, § 19.06; J. N. HURLEY, *Maritime Law and Practice*, *op. cit.*, § 17.2, § 17.3; D. MINICHELLO, «Marina Liability for Damage...», *op. cit.*, pp. 89-100; J. R. HARRIS, «Sources of Marina Liability...», *op. cit.*, pp. 546-551. In general on admiralty jurisdiction and procedure in the USA, see R. FORCE, *Admiralty and Maritime Law*, 2nd Edition, Federal Judicial Center, Washington D. C., 2013, pp. 1-41.

¹⁸⁰ G. H. UZZELLE, III, «Liability of Wharfingers...», *op. cit.*, p. 648.

to use ordinary care, and cannot carelessly run into danger»¹⁸¹. In *Trade Banner Line, Inc. v. Caribbean Steamship Co. S.A.*¹⁸², the court concluded that the mooring of a vessel is strictly the responsibility of the vessel not the wharfinger, and stated that «it is well settled that a wharfinger is not the guarantor of the safety of a ship coming to his wharf»¹⁸³.

The wharfinger's duty is «to ascertain the condition of the berth, and to make it safe or warn the ship of any hidden hazard or deficiency known to the wharfinger or which, in the exercise of reasonable care and inspection, should be known to him and not reasonably known to the shipowner»¹⁸⁴.

In *General Motors Corp. v. Pennsylvania Railroad Co.*¹⁸⁵, the court held that whether or not a wharfinger's duty of care to a vessel exists requires a case-by-case analysis of the relationship of the parties. In this case, a lighter containing a cargo sank while tied to a pier. The vessel was secured by the tug lighter's master, but no one had been notified of its arrival and it was noticed only later by the wharfinger's stevedore agent. The court found that the wharfinger was not under a duty to maintain a continual watch over any vessel at its pier and that according to the facts of this case the vessel had not been delivered to the wharfinger, and so the wharfinger was not a bailee. However, the court concluded that the wharfinger had a duty to provide a safe berth to vessels tying to the pier, but the burden of proving that the berth was not safe rested with the plaintiff. Since there was no evidence as to the cause of the sinking, the plaintiff's claim against the wharfinger was unsuccessful¹⁸⁶.

On the other hand, when a wharfinger is the bailee of a vessel, he bears the burden of proving the cause of loss¹⁸⁷. Where no benefit of bailment presumption is available, a vessel owner must establish negligence or a breach of contract¹⁸⁸. In other words, there are three possible causes of action of a vessel owner (or a subrogated hull insurer) against a marina under US law: a claim in tort (for negligence), contract and bailment¹⁸⁹. The choice of the available causes of action to be utilised will depend on the factual circumstances, availability of evidence, prescription periods, choice of applicable law and jurisdiction, or similar considerations¹⁹⁰. In particular, it should be kept in mind that if a claim is in tort, there

¹⁸¹ *Ibid.* See also *United States v. Mowbray's Floating Equipment Exchange*, 601 F.2d 645 (2d Cir. 1979), cited in J. C. KOSTER, *Benedict on Admiralty*, *op. cit.*, § 19.02.

¹⁸² 521 F.2d 229, 230, 1975 AMC 2515, 2516 (5th Cir. 1975), cited in G. H. UZZELLE, III, «Liability of Wharfingers...», *op. cit.*, pp. 649-650.

¹⁸³ G. H. UZZELLE, III, «Liability of Wharfingers...», *op. cit.*, p. 650.

¹⁸⁴ J. N. HURLEY, *Maritime Law and Practice*, *op. cit.*, § 17.7.

¹⁸⁵ 357 F. Supp. 646, 1973 AMC 1506 (S.D.N.Y. 1973), affirmed, 506 F.2d 1395 (2d Cir. 1974), cited in UZZELLE, *ibid.*

¹⁸⁶ G. H. UZZELLE, III, «Liability of Wharfingers...», *op. cit.*, pp. 650-651.

¹⁸⁷ *C. F. Harms Co. v. Erie Railroad* 167 F.2d 562, 563 (2d Cir. 1948), cited in G. H. UZZELLE, III, «Liability of Wharfingers...», *op. cit.*, p. 651.

¹⁸⁸ *Goudy & Stevens, Inc. v. Cable Marine, Inc.*, 924 F.2d 16 (1st Cir. 1991), cited in J. C. KOSTER, *Benedict on Admiralty*, *op. cit.*, § 19.05.

¹⁸⁹ D. MINICHELLO, «Marina Liability for Damage...», *op. cit.*, p. 90.

¹⁹⁰ J. C. KOSTER, *Benedict on Admiralty*, *op. cit.*, § 19.05.

is no independent basis for admiralty jurisdiction if damage was caused to the vessel in dry storage¹⁹¹ because of the strictly land-based nature of the tort and there being no connection to navigable waters¹⁹². On the other hand, if the claim for the same damage is in contract or bailment, there is an independent basis for the federal court's admiralty jurisdiction¹⁹³.

Generally, a marina operator is liable for any failure to perform its contractual obligations¹⁹⁴. The services it provides must be carried out in a workmanlike manner¹⁹⁵, and it is bound to furnish a safe berth as established by the relevant maritime law¹⁹⁶.

In providing a safe berth and in performing other contractual obligations, a marina is held to a standard of due (reasonable) care, which is measured, in part, by (1) the customs and practices of other marinas in the area, (2) the foreseeability of the harm, (3) the value of the property damaged as measured against the cost or difficulty of protective action, and (4) the general relationship between the contract parties¹⁹⁷. For example, it is held that a marina must make a reasonably diligent effort to ensure that moorings are fit and safe for their intended use¹⁹⁸, and that reasonable diligence requires a mooring and buoy to be pulled from the water and inspected at least every two years¹⁹⁹. The berth user has a right to rely upon the marina operator's designation and implied representation that the berth is suitable for the vessel, and if the berth fails under normal weather conditions, there is a presumption of the marina operator's negligence²⁰⁰. The marina operator may free itself from liability by proving the exercise of due care²⁰¹.

¹⁹¹ J. R. HARRIS, «Sources of Marina Liability...», *op. cit.*, p. 549.

¹⁹² D. MINICHELLO, «Marina Liability for Damage...», *op. cit.*, pp. 91-92, referring to *Fireman's Fund American Insurance Company v. Boston Harbor Marina Inc.* 406 F. 2d 917 (1st Cir. 1969).

¹⁹³ See *supra*, footnote 180.

¹⁹⁴ J. C. KOSTER, *Benedict on Admiralty*, *op. cit.*, § 19.06.

¹⁹⁵ In *Selame Assocs. v. Holiday Inns, Inc.*, 451 F. Supp. 412 (D. Mass. 1978), a wharfinger agreed to provide wharfage and storage to a ferryboat, and was bound to do so with due care; in other words it warranted a workmanlike performance. Therefore, the wharfinger became liable for lack of a proper camel or breast lines when the ferryboat sunk. Cited in J. C. KOSTER, *Benedict on Admiralty*, *op. cit.*, § 19.04. The warranty of workmanlike performance is a promise that the work or service will be performed in a workmanlike manner, *i. e.* by using the standard of skill and knowledge reasonably expected in the particular trade or business. It can be compared to the standard of a reasonable businessman applied in civil law jurisdictions.

¹⁹⁶ J. C. KOSTER, *Benedict on Admiralty*, *op. cit.*, § 19.06.

¹⁹⁷ *Ibid.*, § 19.05. For a thorough analysis of the relevant case law where the courts considered these factors in determining the reasonableness of care used by a marina, see D. MINICHELLO, «Marina Liability for Damage...», *op. cit.*, pp. 101-107.

¹⁹⁸ *Doubleday v. Corinthian Yacht Club*, 1979 AMC 2578 (D. Md. 1973), cited in KOSTER, *ibid.*

¹⁹⁹ *Hardesty v. Larchmont Yacht Club*, 1983 AMC 1059 (SDNY 1982), cited in KOSTER, *ibid.* In this particular case, a yacht broke free due to the unfit condition of the mooring. The court found that the marina operator's inspection and repair procedures were faulty and inadequate, *i. e.* not up to the standard of reasonable diligence expected from a marina under the circumstances. See D. MINICHELLO, «Marina Liability for Damage...», *op. cit.*, p. 93.

²⁰⁰ *Ibid.* at 1063-1064, cited in KOSTER, *ibid.*

²⁰¹ *Harris v. Traini*, 759 N.E.2d 215 (Ind. Ct. App. 2001); *Rogers v. Yachts America*, 1983 AMC 417 (D. Md. 1982), cited in KOSTER, *ibid.*

3. Bailment vs. Berth (Slip) Rental

In the practice of American marina operators, there are two main types of marina berthing contract, the so-called slip rental contract and the so-called winter storage contract²⁰². However, many variations of such contracts are available, depending on the specific requirements of marina operators and vessel owners (berth users)²⁰³. The differences are usually best reflected in the various limitation of liability clauses²⁰⁴.

A distinction should be drawn between a mere lease or rental of a berth as opposed to a vessel bailment²⁰⁵. A berth lease or rental is an agreement to pay a fee for the opportunity for a vessel to occupy an assigned slip while a bailment requires exclusive possession or control of the vessel by the marina^{206,207}. In this sense, typical marina winter storage contracts are bailment contracts. Likewise, vessel maintenance and repair contracts also presuppose a bailment relationship.

In particular, the courts have held that there is no bailment where a fee is involved but constitutes only a charge for the privilege of mooring or of renting space²⁰⁸. Slip rental agreements do not create bailment, and there is no presumption of marina operator negligence for loss of vessels in fire where owners, their brokers and insurers have right of access to vessels, and marina employees can board vessels only for limited purposes²⁰⁹. Furthermore, if the vessel owner pays only for the use of an assigned slip and the marina holds no keys and merely provides slip space on premises, there is no bailment, only a slip rental²¹⁰. Similarly, in a case where a monthly charge was only for the privilege of mooring, and the vessel owner kept the keys and came and went as he pleased, the court held there was no liability of the marina when the vessel went missing²¹¹. In *Rogers v. Yachts America*, the court held that the marina was not liable for damage to the plaintiff's vessel because the monthly charge for a dry berth was merely for the privilege of renting space, and the evidence showed that there was an unwritten rule that the boat owners were responsible for visiting their

²⁰² J. C. KOSTER, *Benedict on Admiralty*, *op. cit.*, § 19.06.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ J. R. HARRIS, «Sources of Marina Liability...», *op. cit.*, p. 548.

²⁰⁶ *Ibid.*

²⁰⁷ See *Fletcher v. Port Marine Center, Inc.*, 1990 AMC 2877 (D. Mass. 1990) and *Snyder v. Four Winds Sailboat Centre, Ltd.*, 701 F.2d 251, 1983 AMC 1510 (2nd Cir. 1983), cited in HARRIS, *ibid.*

²⁰⁸ *In re Wechsler*, 121 F. Supp. 2d 404, 2001 AMC 312 (D. Del. 2000), cited in J. C. KOSTER, *Benedict on Admiralty*, *op. cit.*, § 19.07.

²⁰⁹ *In re Wechsler*, 121 F. Supp. 2d 404 (D. Del. 2000), cited in W. R. HABEEB, «Liability of Operator of Marina Boatyard for Loss of or Injury to Pleasure Boat Left for Storage or Repair» (annotation), 44 ALR 3d 1332, *3.

²¹⁰ J. C. KOSTER, *Benedict on Admiralty*, *op. cit.*, § 19.07, referring to *Marino v. Gagliano*, 1966 AMC 2303, 50 Misc. 2d 499, 270 NYS 2d 934 (NY Sup. Ct. 1966).

²¹¹ *Blank v. Marine Basin Co., Inc.*, 178 A.D. 666, 165 NYS 883 (NY App. Div. 1917), cited in KOSTER, *ibid.*

boats periodically to maintain and inspect them²¹². In another case, the court stated that the marina was not legally in charge of the boat because it simply rented docking space, so the legal relationship was that of lessor and lessee, not of bailor and bailee²¹³. Furthermore, it has been held that liability cannot be imposed on the operator of a marine dock or basin, especially where the price of the rental arrangement is reduced specifically in view of a special hazard which has developed²¹⁴. A similar result was reached where a boat was moored in a marina despite the operator's refusal to receive it²¹⁵. Finally, in *Royal Ins. Co. v. Marine Indus., Inc.*²¹⁶, it was held that when only docking space was provided and the marina exercised no control over the vessel, a bailment relationship did not exist, even though the marina had the right to move the boat to another slip in emergency situations²¹⁷.

4. Marina Operator Liability under Bailment Law

Under US maritime law, a vessel storage contract and a vessel repair contract create a bailment under US admiralty law²¹⁸. In the context of marina berthing contracts, the elements of a bailment are²¹⁹:

- a) Delivery of a (vessel) by the bailor (vessel owner/berth user) to a bailee (marina).
- b) An express or implied contract for the mutual benefit of both parties (bailment for hire).
- c) Acceptance of the vessel by the marina, with the express or implied promise that it will be returned after the purpose of delivery has been fulfilled.
- d) Exclusive possession by the bailee.

To determine the contractual rights and obligations of the parties, if there is a written contract, the courts must first look at the written word of the contract²²⁰. However, a bailment may arise through custom and the absence of an express contract would be irrelevant where a lengthy history of a bailment relationship existed between the vessel owner and the marina operator²²¹.

²¹² *Rogers v. Yachts America* 1983 AMC 417 (Md. 1982), cited in KOSTER, *ibid.*

²¹³ *Security National Insurance Co. v. Sequoyah Marina*, 246 F.2d 830 (10th Cir. 1957), cited in KOSTER, *ibid.*

²¹⁴ *Richardson v Port Vincent Boat Works, Inc.* (1968, DC La) 284 F Supp 353, cited in W. R. HABEED, «Liability of Operator of Marina...», *op. cit.*, 44 ALR 3d 1332, *2b.

²¹⁵ *Sellick v Clipper Yacht Co.* (1967, CA9 Cal) 386 F2d 114, cited in HABEED, *ibid.*

²¹⁶ 611 NE 2d 716, 717, 1994 AMC 103, 104-05 (Mass. App. Ct. 1993), cited in G. H. UZZELLE, III, «Liability of Wharfingers...», *op. cit.*, p. 661.

²¹⁷ *Ibid.*

²¹⁸ J. N. HURLEY, *Maritime Law and Practice*, *op. cit.*, § 17.8.

²¹⁹ J. R. HARRIS, «Sources of Marina Liability...», *op. cit.*, p. 547.

²²⁰ K. S. BRAIS, «Florida Marina Storage Agreements at a Glance», Brais and Associates, P. A., https://www.braislaw.com/files/Florida_Marina_Storage_Agreements_Glance_Paper.pdf (retrieved on 10 January 2018).

²²¹ J. C. KOSTER, *Benedict on Admiralty*, *op. cit.*, § 19.07, referring to *Coryell v. Phipps*, 317 U.S. 406, 63 S. Ct. 291, 87 L. Ed. 363 (1943).

The US Supreme Court in *Commercial Molasses Corp. v. New York Tank Barge Corp.*²²² stated the basic law with respect to presumptions, inferences, and the burden of proof in cases involving bailments²²³, according to which the bailee's failure to redeliver the bailed item in good condition raises a presumption of negligence by the bailee²²⁴. The bailee bears the burden of overcoming that inference, because he is generally in a better position to examine the facts and ascertain the cause of the loss and to show that it did not involve the bailee's liability²²⁵.

However, for the presumption to exist, it must be proven that the item was not redelivered in good condition. The bailor must demonstrate the *prima facie* negligence of the bailee. The burden of proof then shifts to the bailee who must show that the loss occurred without his fault. It is sufficient for the bailee to show that he acted with due care²²⁶, and then the bailor is charged with the burden of showing the bailee's negligence. Finally, the presumption of negligence applies only if the evidence lies within the knowledge and control of the bailee, *i. e.* the presumption does not apply when neither party has knowledge of the ascertained cause of loss²²⁷.

As for the requirement of exclusive possession or control of the vessel by the bailee, it has been held that bailment does not arise unless delivery to the bailee is complete and the bailee has exclusive possession of the bailed property²²⁸. The presumption of the bailee's negligence can be undermined if his control over the property is not exclusive because the vessel owner and the wharfinger had equal access to the vessel and both frequently boarded the vessel and worked on it²²⁹. If the bailee is in a better position to explain what happened, a presumption of the bailee's negligence arises. However, if both parties have equal access and equal ability to explain what happened, then an inference of bailee negligence is barred

²²² 314 U.S. 104, 1941 AMC 1697 (1941), cited in G. H. UZZELLE, III, «Liability of Wharfingers...», *op. cit.*, p. 656.

²²³ *Ibid.*

²²⁴ J. R. HARRIS, «Sources of Marina Liability...», *op. cit.*, p. 548.

²²⁵ G. H. UZZELLE, III, «Liability of Wharfingers...», *op. cit.*, p. 657; J. C. KOSTER, *Benedict on Admiralty*, *op. cit.*, § 19.07.

²²⁶ *Leyendecker v. Cooper*, 1980 AMC 1061 (D.Md. 1979), cited in J. R. HARRIS, «Sources of Marina Liability...», *op. cit.*, p. 549.

²²⁷ J. R. HARRIS, «Sources of Marina Liability...», *op. cit.*, pp. 548-549, referring to *Matter of Flowers*, 526 F.2d 242 (8th Cir. 1975); *Buntin v. Fletchas*, 1958 AMC 2416, 257 F.2d 512 (5th Cir. 1958); *Fireman's Fund Am. Ins. Co. v. Captain Fowler's Marina, Inc.*, 343 F. Supp 347, 1972 AMC 765 (D.Mass. 1971); *Leyendecker v. Cooper*, 1980 AMC 1061 (D.Md. 1979). See also J. N. HURLEY, *Maritime Law and Practice*, *op. cit.*, § 17.8, quoting *In re Lady Jane, Inc.*, 818 F.Supp. at 1476-1477.

²²⁸ *Thyssen Steel Co. v. M/V Kavos Yerakas*, 50 F.3d 1349, 1995 AMC 2317 (5th Cir. 1995), cited in J. R. HARRIS, «Sources of Marina Liability...», *op. cit.*, p. 548.

²²⁹ G. H. UZZELLE, III, «Liability of Wharfingers...», *op. cit.*, pp. 659-660, referring to *United States v. Mowbray's Floating Equip. Exch., Inc.*, 601 F.2d 645, 647, 1979 AMC 1530, 1533 (2d Cir. 1979). See also J. C. KOSTER, *Benedict on Admiralty*, *op. cit.*, § 19.07, referring to *Royal Insurance v. Marina Industries*, 611 NE 2d 716 (Mass. App. Ct. 1995); *Certain Underwriters at Lloyds of London v. First Citizens Bank (ND Ind. 1994)*; *Reel Therapy Charters, Inc. v. Marina Mgmt.*, 2003 U.S. Dist. LEXIS 25155, 2004 AMC 378 (N.D. Fla. 2003).

by the bailor's control²⁵⁰. If the bailor or its agent or employee remained on the vessel or had access to it, the bailee's duties were limited²⁵¹.

Other courts have not applied the exclusive control requirement as strictly and have held that the bailor's mere access to the bailed property does not affect the presumption of the bailee's negligence if, in fact, the bailee's possession is exclusive at the time of the loss²⁵².

If there is bailment, the bailee (marina) has a duty to exercise reasonable care in the protection of bailed goods (the vessel)²⁵³. However, a higher standard of care applies when a marina is on notice of a threatening condition²⁵⁴. In such a case, additional precautions may be required from a marina, for example if a thief is known to be in the area²⁵⁵. The failure to redeliver the vessel in the same order and condition creates a *prima facie* case of liability against the bailee²⁵⁶.

A reasonable standard of care is described as that which is contemplated by the parties «or which can be impliedly expected by the given nature of their relationship and the scope and manner of the work to be performed»²⁵⁷.

For example, in a case involving a vessel that sank shortly after being launched by a marina operator, the court considered the contents of a marina operator's duty of reasonable care, in particular the duty to inspect a vessel when launching it in the absence of the owner. The court stated that «the marina's duty is only to launch the vessel safely into the water, securing it as necessary, and to perform a cursory inspection, that is a quick look and listen, to discern whether the vessel is safely riding in the water in a normal way. In the period shortly after the launch, marina employees must visually check the outside of the vessel and listen while near the vessel to determine if there are any sounds indicative of a problem. In the absence of an express agreement either permitting or prohibiting the marina from boarding the vessel, when the owner or its agent is not present during the

²⁵⁰ G. H. UZZELLE, III, «Liability of Wharfingers...», *op. cit.*, p. 660 referring to Goudy & Stevens, Inc. v. Cable Marine, Inc., 924 F.2d 16 (1st Cir. 1991).

²⁵¹ J. R. HARRIS, «Sources of Marina Liability...», *op. cit.*, p. 548, referring to TNT Marine Service, Inc. v. Weaver Shipyards & Dry Docks, Inc., 702 F.2d 585, 588 1984 AMC 1341 (5th Cir. 1983), cert. denied, 464 U.S. 847 (1983).

²⁵² Hicks v. Tolchester Marina, Inc., 1984 AMC 2027, 2029 (D. Md. 1983), cited in G. H. UZZELLE, III, «Liability of Wharfingers...», *op. cit.*, p. 660. See also J. C. KOSTER, *Benedict on Admiralty*, *op. cit.*, § 19.07 referring to Pan-American Petroleum Transportation Co. v. Robins Dry Dock & Repair Co., 281 F. 97 (2d Cir. 1922); Harrison Bros. Drydock v. J.R. Atkins, 193 F. Supp. 386 (S.D. Ala. 1961); Johnson's Branford Boat Yard v. The Yacht ALTAIR, 260 F. Supp. 841 (D. Conn. 1966); The English Whipple Sail-yard v. The Yawl ARDENT, 459 F. Supp. 866 (W.D. Pa. 1978); N.H. Ins. Co. v. Dagnone, 2006 U.S. Dist. LEXIS 49700 (DRI July 10, 2006).

²⁵³ J. R. HARRIS, «Sources of Marina Liability...», *op. cit.*, p. 548, referring to English Whipple Sail-yard, Ltd v. Yawl Ardent, 459 F. Supp. 866, 1980 AMC 1104 (WD Pa. 1978).

²⁵⁴ J. C. KOSTER, *Benedict on Admiralty*, *op. cit.*, § 19.07.

²⁵⁵ *Ibid.*, referring to Snyder v. Four Winds Sailboat Centre, 701 F.2d 251 (2d Cir. 1983). Cf. Leach v. Mountain Lake, 120 F.3d 871 (8th Cir. 1997).

²⁵⁶ G. H. UZZELLE, III, «Liability of Wharfingers...», *op. cit.*, p. 651, referring to Latin American Property & Casualty Ins. Co. v. Hi-Lift Marina, Inc., 677 F. Supp. 1156, 1159, 1989 AMC 757, 759 (SD Fla. 1988), vacated, 887 F.2d 1477, 1990 AMC 2004 (11th Cir. 1989).

²⁵⁷ D. MINICHELLO, «Marina Liability for Damage...», *op. cit.*, p. 101.

launch and marina employees know the vessel has undergone repairs, the marina's duty of reasonable care only requires that the marina board the vessel, under implied authority from the owner, for as short a time as possible to secure the vessel. A visual check of what is in plain view is reasonable. Only when this casual check reveals an open and obvious source of concern regarding the vessel's seaworthiness does the marina's duty require it to act to remedy the negligence of another person»²³⁸.

In another case, the cause of the sinking of a vessel while at berth in the defendant's boatyard was the failure of the vessel owner to properly winterise the boat when it was left in the custody of the defendant. The court held that the bailor could not take advantage of the presumption of the bailee's negligence. It was held that the boatyard as a bailee did not have the duty of interior inspection until there was some exterior indication of necessity, and that there was no duty to pump the vessel when necessary. The evidence did not show that by custom there existed an obligation on the boatyard to open the hatches and determine the quantity of water in the bilges when there was no exterior evidence of excessive water accumulation in the vessel. Furthermore, the evidence was not sufficient to demonstrate that there was a particular promise or agreement by the bailee to that extent²³⁹.

The US courts have assessed the reasonableness of care used by marina operators to protect and safeguard boats in a number of cases and by doing so they have considered various factors²⁴⁰. Inter alia, the courts have taken into account, on a case-by-case basis, the reasonableness of the various protective measures and devices applied in marinas, such as fences, gates and locks, lighting, security guards and watchmen, alarm systems, maintenance of protective devices, etc.²⁴¹.

Finally, one should bear in mind that the activities of marina operators are often subject to various statutory regulations on navigation, construction and development of waterfront structures, and environmental protection contained in federal, state and local legislation. A violation of a statutory standard of care amounts to negligence per se²⁴².

5. Exculpatory Clauses

The enforceability of exculpatory clauses in marina operator contracts is one of the most disputable issues in the context of marina operator liability²⁴³. Marina operators' berthing contracts, *i. e.* vessel storage and slip rental contracts, as

²³⁸ J. N. HURLEY, *Maritime Law and Practice*, *op. cit.*, § 17.7, quoting Reel Therapy Charters, Inc. v. Marina Management, Inc., 2003 WL 23514559, 2004 AMC 378 (ND Fla. 2003) at 8.

²³⁹ W. R. HABEED, «Liability of Operator of Marina...», *op. cit.*, 44 ALR 3d 1332*6.

²⁴⁰ See *supra* footnote 198 and the corresponding main text.

²⁴¹ See the relevant analysis in D. MINICHELLO, «Marina Liability for Damage...», *op. cit.*, pp. 108-112. See also J. C. KOSTER, *Benedict on Admiralty*, *op. cit.*, § 19.07.

²⁴² G. H. UZZELLE, III, «Liability of Wharfingers...», *op. cit.*, pp. 665-666.

²⁴³ J. N. HURLEY, *Maritime Law and Practice*, *op. cit.*, § 17.10.

well as their vessel repair contracts, usually contain such clauses purporting to exculpate marina operators from their own negligence, or to limit their liability for damage.

The issue of the degree of enforceability of such clauses has not been settled in US law. The positions of the courts differ from state to state. On the other hand, general maritime law has developed particular rules in this regard, starting with *Bisso v. Inland Waterways Corporation*²⁴⁴ and followed by a number of precedents²⁴⁵. However, the federal courts applying general maritime law are also divided on the issue and there is currently a split among the circuits, *i. e.* the US courts of appeal, regarding the enforceability of exoneration clauses in maritime contracts²⁴⁶.

Generally, clauses that completely waive liability for negligence on the part of the bailee are not favoured²⁴⁷. However, if exculpatory clauses are clear, specific and unequivocal they may be enforceable, subject to certain limited public policy considerations²⁴⁸. They have been upheld as not violative of public policy where the contract is between persons of equal bargaining power²⁴⁹. In any case, such clauses are always strictly construed by the courts against the drafter (marina operator)²⁵⁰.

In *Sander v. Alexander Richardson Invs.*²⁵¹, the court held that an exculpatory clause that absolves a marina from liability for its own negligence is enforceable as long as the parties' intent in this regard is clear and the clause is not the result of overreaching. However, the court pointed out that this holding is limited to clauses contained in slip rental agreements and chose expressly not to address the broader question of whether exculpatory clauses are valid in all maritime contracts save towage agreements²⁵².

The courts have held that exculpatory clauses going beyond ordinary negligence, *i. e.* excluding liability for gross negligence and wilful misconduct are unenforceable²⁵³.

²⁴⁴ 349 U.S. 85 (1955), cited in J. R. HARRIS, «Sources of Marina Liability...», *op. cit.*, p. 552. The case involved a negligent towage. The exculpatory clauses in the towage contract stated that the towing movement was the «sole risk» of the barge. The court held that the exculpatory clauses were invalid. *Harris* explains that in the wake of this precedent lies the split among the circuits as to whether exculpatory clauses relieving one party of liability are enforceable in admiralty. The question is whether this precedent creates the rule in admiralty or is limited to application to towage contracts.

²⁴⁵ For a detailed review of the relevant case law, see J. C. KOSTER, *Benedict on Admiralty, op. cit.*, § 19.07; J. R. HARRIS, «Sources of Marina Liability...», *op. cit.*, pp. 551-558; D. MINICHELLO, «Marina Liability for Damage...», *op. cit.*, pp. 112-121.

²⁴⁶ J. R. HARRIS, «Sources of Marina Liability...», *op. cit.*, p. 552.

²⁴⁷ J. C. KOSTER, *Benedict on Admiralty, op. cit.*, § 19.07. *E. g.* a court will invalidate an exculpatory clause if there is some monopolistic advantage to one of the contracting parties. See also D. MINICHELLO, «Marina Liability for Damage...», *op. cit.*, pp. 119-120.

²⁴⁸ J. C. KOSTER, *Benedict on Admiralty, op. cit.*, § 19.07.

²⁴⁹ *Ibid.*, referring to *Key Biscayne Divers, Inc. v. Marine Stadium Enterprises*, 490 So. 2d 137, 138 (Fla. Dist. Ct. App. 1986).

²⁵⁰ *Ibid.*, referring to *Rogers v. Yachts America*, 1983 AMC 417 (D. Md. 1982).

²⁵¹ 334 F.3d 712, 2003 AMC 1817 (8th Cir. Mo. 2003), cited from KOSTER, *ibid.*

²⁵² *Ibid.*

²⁵³ J. C. KOSTER, *Benedict on Admiralty, op. cit.*, § 19.07.

Some courts have held that certain marina storage agreements amount to warehousing under Article 7 of the Uniform Commercial Code²⁵⁴. Pursuant to this, an exculpatory clause altering the duty of care of a warehouseman applicable under § 7-204 of the Code is ineffective²⁵⁵.

VI. CONCLUSION

The authors have studied all the relevant sources of law, including in particular the sources of private regulation of marina operators (marina operator general terms and conditions, standard berthing contracts, marina regulations), case law, relevant national legislation, and the available legal literature. The results of the comparative legal analysis presented in this paper show a number of similarities in the legal concept of marina operator berthing contracts in Spanish, Italian, Croatian and US law.

In all four jurisdictions in question, berthing contracts are innominate contracts the contents of which have crystallised in the practice of marina operators and boat owners. However, Croatia will soon become an exception in this sense, since at the time of preparation of this paper the Amendments to the Croatian Maritime Code Bill reached its final stage, whereby the legislative regulation of berthing contracts will be introduced for the first time.

In all four of the jurisdictions observed in this paper, it is possible to draw a distinction between two sub-types of berthing contract: one that is based on the concept of berth lease or rental (*locatio conductio rei*) and another that is based on the concept of deposit or bailment.

The prevailing position of Spanish, Italian and Croatian law is that marina operator berthing contracts in principle contain certain vital elements of deposit. However, this issue has been further analysed and conclusions drawn, with the necessary considerations being made for the competing principles of freedom of contract and consumer protection.

As regards the minimum elements of a berthing contract, the inferences are similar in all four of the jurisdictions observed. The common conclusion is that every berthing contract is in essence a contract for the use of a berthing place, whilst there are additional elements of *locatio conductio operis* and deposit that are usually added. It follows that berthing contracts are complex contracts of a mixed legal nature.

Whilst it seems that the mainstream position in Spanish and Italian legal doctrine is generally to qualify all marina operator berthing contracts as special types of contract of deposit, Croatian legal doctrine tends to give more importance to the distinction between berth rental agreements and berthing contracts with ad-

²⁵⁴ *Ibid.*, referring to *Fireman's Fund American Insurance Company v. Captain Falvers Marina Inc.* 343 F. Supp. 347 (D. Mass. 1971).

²⁵⁵ J. C. KOSTER, *Benedict on Admiralty*, *op. cit.*, § 19.07.

ditional services. US law recognises the division between slip rental and marina storage agreements, and the courts seem to respect the choice of the parties to that extent. All four of the legal systems contain certain solutions protecting the weaker party from vexatious or unfair contract terms, which in the context of this topic is best reflected in the treatment of the exculpatory and limitation of liability clauses used in berthing contracts.