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QUADERNI

THE SHIP: AN EXAMPLE OF LEGAL PLURI-QUALIFICATION

Massimiliano Musi (Editor)

BONOMO EDITORE

IL DIRITTO MARITTIMO – QUADERNI

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IL DIRITTO MARITTIMO – QUADERNI

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The Ship: an Example of Legal Pluri-Qualification

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ordini@bonomoeditore.com
www.bonomoeditore.com

Stampato presso: Bonomo Editore

Impaginazione copertina: angelo@chieco.biz

Edizione: novembre 2016

INDEX

The Repercussions of the Legal Definitions of Ship, Yacht and Boat in The Croatian Maritime Code on the Court Competence *Ratione Materiae* in Disputes Arising from Berthing Contracts*

Abstract

The Croatian Maritime Code contains legal definitions of the terms *ship*; *yacht;* and *boat*. The main distinctions amongst the said terms are drawn in relation to the use and technical features of the respective types of vessels or craft. Whether a craft is legally a ship, a yacht or a boat will affect the application of the provisions of the Maritime Code and the court competence *ratione materiae*. In Croatia, commercial courts are competent to hear the cases governed by maritime law; all cases arising in relation to ships and yachts; as well as those arising in relation to navigation. The prevailing case law in Croatia is that marina operators' berthing contracts for yachts fall under the competence of commercial courts. However, the question in practice arises when a berthing contract is for a boat, since cases relating to boats generally fall under the competence of general civil courts, unless maritime law applies or the case is related to navigation. The authors critically examine the examples of the relevant court practice pointing at the lack of uniformity of the court practice in respect of *ratione materiae* competence. Certain *de lege ferenda* considerations are submitted with a view of improving the legal certainty and uniform application of the law relating to marina operators' berthing contracts, bearing in mind that Croatia has a strategic orientation towards the development of nautical tourism [(1)].

* This article has been submitted to double blind peer review.

(1) This paper is a result of the authors' joint preliminary research under the research project of the Adriatic Institute of the Croatian Academy of Sciences and Arts, funded by the Croatian Science Foundation, titled *Developing a Modern Legal and Insurance Regime for Croatian Marinas – Enhancing Competitiveness, Safety, Security and Marine Environmental Standards* (DELICROMAR, UIP-11-2013 no. 3061, project period: 1st March 2016 – 28th February 2019). More information about the project is available at www.delicromar.hazu.hr.

navigation. – 4. Critical review of Croatian judicial practice dealing with the conflict of Jurisdiction *ratione materiae* over disputes arising from marina operators' berthing contracts. – 4.1. Dispute relating to a yacht is a maritime dispute. – 4.2. Is a dispute arising from a berthing contract related to navigation (maritime dispute)? – 5. Concluding remarks. – Bibliography.

1. *Introduction*

The paper has been inspired by the frequent conflict of competence *ratione materiae* between Croatian courts of general jurisdiction in civil law cases, i.e. the municipal (first instance) and county (second instance) courts on the one hand and specialised commercial courts [2] on the other hand in respect of the cases arising from marina operators' berthing contracts [3]. The issue creates a considerable lack of legal certainty, prolongs the time of litigation in the course of arriving to the final judicial decision on the merits, generates unnecessary financial burden on the parties involved, and eventually leads to an overall inconsistency of judicial practice regarding the interpretation of berthing contracts. This is due to the difference in approach and the level of understanding of the maritime background surrounding the respective subject matter. These unwanted trends negatively affect the whole marina operators' business in the country where there is a declaratory strategic interest [4] in developing nautical tourism as one of the main branches of the local tourism and an important part of the national economy in general.

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[2] There are seven first instance commercial courts established in the cities of Bjelovar, Osijek, Rijeka, Split, Varaždin, Zagreb and Zadar. However, according to Art. 8 of the Courts (Areas and Seats) Act, Official Gazette no. 128/2014, only the commercial courts in Osijek, Rijeka, Split and Zagreb are competent to adjudicate maritime disputes. The only commercial court of appeal is the High Commercial Court of the Republic of Croatia.

[3] For the purpose of this article, marina operator's berthing contract means any contract between the marina operator and the vessel owner, under which the marina operator provides a safe berth in the marina, including, or not, services of guarding, maintaining, servicing, or storaging the vessel on land (dry berth), or similar services, against a corresponding fee owed by the vessel owner. These are innominate contracts under Croatian law, and in practice their contents are similar, but may vary in many aspects. For a more detailed discussion on marina operator's berthing contracts under Croatian law, see A.V. PADOVAN, *Marina operator's liability arising from berthing contracts and insurance matters*, in *Poredbeno pomorsko pravo = Comparative Maritime Law*, 2013, Vol. 52 no. 167, pp. 1-35.

[4] *Nautical Tourism Development Strategy of the Republic of Croatia 2009 – 2019*, Ministry of the Sea, Transport and Infrastructure & Ministry of Tourism, Zagreb, December 2008.

Therefore, the authors seek to identify the main reasons for this frequent conflict of competence between courts of general jurisdiction and commercial courts, by analysing relevant legal provisions, in particular those of the Croatian Maritime Code [5] (hereinafter: CMC) and the Croatian Civil Procedure Act [6] (hereinafter: CPA); and by studying the corresponding domestic judicial practice. The analysis has been undertaken with a view of clarifying the rules on the correct choice of the court competent to hear the cases arising from marina operators' berthing contracts under positive law, but also with the aim of discussing the most preferable approach to the matter in dispute, and subsequently assessing the need for adding any amendments to the existing rules.

It is hereby noted that in the course of this research, the authors have not identified any sources in the domestic legal literature dealing specifically with the respective topic. However, several legal writers and commentators have dealt generally with the competence *ratione materiae* of domestic commercial courts (*Zuglia* and *Triva* [7], *Dika* [8], *Eraković* [9], *Brežanski* [10], *Grbin* [11], etc.) and more specifically with such competence related to maritime cases (*Pallua* [12], *Jakaša* [13], *Šuc* [14], *Stanković* [15]) [16]. Generally, there is a lack of legal doctrine dealing with

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

[6] Civil Procedure, Official Gazette of the Republic of Croatia, no. 53/1991, 91/1992, 58/1993, 112/99, 88/2001, 117/2003, 88/2005, 02/2007, 84/2008, 123/2008, 57/2011, 148/2011, 25/2013, 89/2014.

[7] S. ZUGLIA, S. TRIVA, *Komentar Zakona o parničnom postupku*, Vol. II, Zagreb, 1957, as cited from E. PALLUA, B. JAKAŠA, *Pomorski sporovi u jugoslavenskom pravu*, in *Collected Papers of Zagreb Law Faculty*, 1960, vol. X, no. 3-4, pp. 258-268.

[8] M. DIKA, *Stvarna nadležnost trgovačkih sudova u parničnom i izvršnom postupku*, in *Pravo u gospodarstvu*, 1994, vol. 33, no. 7-8, pp. 542-553.

[9] A. ERAKOVIĆ, *Stvarna nadležnost trgovačkih sudova*, in *Pravo i porezi: časopis za pravnu i ekonomsku teoriju i praksu*, 1997, vol. 6, no. 6, pp. 27-33.

[10] J. BREŽANSKI, *Rješavanje sukoba nadležnosti u praksi Vrhovnog suda Hrvatske*, in *Naša zakonitost*, 1989, vol. 43, no. 9-10, pp. 1219-1226.

[11] I. GRBIN, *Zakon o parničnom postupku*, Organizator, Zagreb, 2012.

[12] E. PALLUA, *Nekoliko napomena o odredbama Zakona o parničnom postupku u pomorskom sporovima*, in *Naša Zakonitost*, 1958, no. 4, pp. 135-142.

[13] E. PALLUA, B. JAKAŠA, *op. cit.*

[14] A. ŠUC, *Neka pitanja u vezi stvarne nadležnosti u pomorskim sporovima*, in *Naša Zakonitost*, 1955, pp. 261-266.

[15] G. STANKOVIĆ, *Neka pitanja stvarne nadležnosti sudova u pomorskim stvarima*, in *Journal of Maritime & Transportation Sciences*, 1996, vol. 34, no. 1, pp. 213-229.

[16] The reference is made both to the recent literature and to the literature dating back to the period when Croatia had formed a part of the Socialist Federal Republic of Yugoslavia. The legislative approach to the subject-matter jurisdiction of commercial courts over maritime cases

marina operators' activity, berthing contracts, their professional liability and other legal aspects of their business. Therefore, our research is predominantly based on the applicable legislation and the relevant judicial practice.

The legal definitions of the terms *ship*, *yacht* and *boat* are contained in the CMC. Some additional definitions relating to the specific types of yachts and boats are found in the Ordinance on Boats and Yachts [17] (in further text: OBY). The main distinctions amongst various types of vessels are drawn in relation to their use and technical features. Whether a vessel is legally a ship, a yacht or a boat will affect the application of the provisions of the CMC and of maritime law in general, as well as the subject matter jurisdiction of the courts [18]. In Croatia, commercial courts are competent to hear cases governed by maritime law; all cases arising in relation to ships and yachts; as well as all cases arising in relation to navigation. Therefore, in a case arising from a berthing contract for a yacht in a marina, the competent court is commercial court, and this has been confirmed by the prevailing case law in Croatia. However, the question in practice arises when berthing contract is for a boat, since cases relating to boats generally fall under the competence of regular courts, i.e. the courts of general civil jurisdiction, unless maritime law applies or the case is related to navigation. The marina operators' berthing contracts are not specifically regulated by the CMC

has not substantially changed between that period and today's modern Croatian legal system; therefore, some of the arguments delivered by the cited authors are still relevant and taken into consideration for the purposes of this research.

[17] Ordinance on Boats and Yachts, Official Gazette of the Republic of Croatia, no. 27/2005, 57/2006, 80/2007, 3/2008, 18/2009, 56/2010, 97/2012, 137/2013, 18/2016.

[18] It is noted that the CMC, together with the corresponding bylaws, comprehensively regulates most of the domestic maritime law matters. The other national maritime law legislation includes, in particular, the Maritime Domain and Seaports Act (Official Gazette of the Republic of Croatia, no. 158/2003, 100/2004, 141/2006, 38/2009, 123/2011, 56/2016) with the corresponding bylaws. Finally, the body of maritime law includes a number of international maritime law conventions that Croatia is party to. In respect of the inland ports and navigation, the relevant law is contained in the Inland Ports and Navigation Act (Official Gazette of the Republic of Croatia, no. 109/2007, 132/2007, 51/2013, 152/2014). This act functions as *lex specialis* in relation to the CMC that remains *lex generalis* in the respective area. It may be stated that inland navigation falls under the more general term of maritime law, and is subject to a similar legal regime as marine navigation. In this context, it is important to note that the Inland Ports and Navigation Act also contains certain definitions of vessel, ship of inland navigation, navigational craft, etc., which although being similar to the CMC definitions, do not entirely correspond thereto. This paper deals specifically with marinas as nautical seaports and their berths for boats and yachts of marine navigation, and not with inland navigation and ports as regulated by the IPNA.

or any other maritime law legislation, but they are as innominate contracts governed by general contract law, i.e. they are subject to the Civil Obligations Act [19] as *lex generalis*. Consequently, the main question to be answered by this paper is whether the legal relationships governed by marina operators' berthing contracts can be qualified by their relation to navigation, i.e. whether disputes arising therefrom are related to navigation as envisaged by the legal provision defining the subject-matter jurisdiction over maritime disputes. If the answer to this question is affirmative, then the correct forum to hear such cases is commercial court. If the answer is to the contrary, the competent court *ratione materiae* is the court of general civil jurisdiction.

The authors critically examine examples of the relevant court practice, pointing at the lack of its uniformity regarding subject-matter jurisdiction over disputes arising from marina operators' berthing contracts, especially when they relate to the berthing of boats. Finally, the authors make certain *de lege ferenda* proposals with a view of improving the legal certainty and uniform application of the law relating to marina operators' berthing contracts, bearing in mind that Croatia has a strategic orientation towards the development of nautical tourism.

2. *Legal definitions of ship, yacht and boat and the corresponding scope of application of the Croatian Maritime Code*

The term *ship* is directly or indirectly subject to practically all norms of maritime law. The legal term of ship is probably the most commonly used term in maritime legislation, it is defined by the majority of the international maritime law conventions unifying certain areas of maritime law at the international level. The definitions vary from one international legal instrument to another, and when all the various national law solutions are added thereto, we arrive to a wide spectrum of meanings and legal definitions of that term. The complexity of the task of defining various legal terms of vessels and of the classification of those objects is clearly evidenced in the current efforts of the *Comité Maritime International* (CMI) and its International Working Group on Vessel Nomenclature (in further text: IWG) [20]. The IWG explores, inter alia, whether there exists any national judicial practice in various countries relating to the legal classification of

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

[20] See the CMI International Working Group on Vessel Nomenclature on http://www.comitemaritime.org/Ship-Nomenclature/0,27154,115432,00.html (23 June 2016).

ships, vessels and other maritime objects and whether there are cases of diverse interpretation of the definitions of vessel, ship or similar, or of incoherent or contradictory definitions in the legislation that affect the court practice. In our opinion, there are no such inconsistencies or contradictory definitions under Croatian maritime law of the various types of vessels negatively affecting the relevant judicial practice. The problem, however, seems to arise in the interpretation of the terms "maritime case", "case related to navigation", "case subject to maritime law", which are determinative of the court competence *ratione materiae*. This frequently leads to the conflict of jurisdiction between the commercial and regular courts and the inconsistency of the respective judicial practice [21].

Legal definitions of the terms *ship*, *yacht* and *boat* are contained in Art. 5 of the CMC. All three types of maritime objects fall under the more general term of *vessel* (*Cro. plovni objekt*), which is defined as maritime object intended for navigation at sea. It is further stipulated that a vessel may be a ship, warship, submarine, yacht or boat (CMC, Art. 5, para.1, subpara. 2 and 3) [22].

Ship (*Cro. brod*) is a vessel whose overall length exceeds 12 m and whose gross tonnage is over 15 tons, or a vessel authorised to carry more than 12 passengers. A ship can be a passenger ship, cargo ship, technical vessel, fishing vessel, public (state) ship and scientific research ship (CMC, Art. 5, para. 1, subpara. 4) [23].

Yacht (*Cro. jahta*) is a vessel for sports and leisure, regardless of whether it is used for private purposes or commercially, intended for a longer stay at sea, whose overall length exceeds 12 m and which, in addition to the crew, is authorised to carry no more than 12 passengers (CMC, Art. 5, para. 1, subpara. 20). A *foreign yacht* is a vessel for sports and leisure sailing under a foreign flag and considered a yacht under the laws of the country of its nationality (CMC, Art. 5, para. 1, subpara. 21).

Boat (*Cro. brodica*) is a vessel which is not a ship or a yacht, and whose length exceeds 2,5 m or the total power of its propulsion engines is over 5 kW. The term boat does not include (CMC, Art. 5, para. 1, subpara. 15):

- vessels belonging to another maritime craft, such as lifeboats or tenders
- vessels intended exclusively for competitions
- canoes, kayaks, gondolas and pedal boats
- windsurfing boats and surfboards.

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[21] Further discussion and analysis of the matter is delivered in the following chapters.

[22] Accent added by the authors.

[23] Term *ship* does not apply to *warship* which is defined separately under CMC, Art. 5, para. 1, subpara. 6 and 7.

According to the respective legislative nomenclature, whilst the use of the vessel is determinative of the status of yacht, it is not the case with the term boat. That is to say, boats can be used for various purposes, including sports and leisure, transport of cargo or passengers, for works, supply, fishing, public service etc., whereas yachts are always pleasure craft.

The focus of interest here is on marina operators' berthing contracts. Therefore, logically, the emphasis is on boats and yachts, and specifically on such types of vessels that are used for sports and leisure, since almost as a rule those are the exact types of vessels berthed in marinas [24]. However, both boat and yacht are defined in relation to the term ship and cannot be regarded outside that context.

Further worth noting are some definitions contained in the OBY that categorise boats and yachts into several subtypes relevant in the context of this research [25]. However, one should keep in mind that, although the provisions of the OBY have been harmonised with the CMC on the basis of which the OBY was promulgated, the below cited definitions of various types of boats and yachts are worded to reflect the meaning of the relevant terms in the specific context. That is the context of a special bylaw regulating the conditions for navigation, placing on the market and/or the use of recreational craft, limits of navigation, conditions for and inspection of the construction of boats and yachts, registration and deletion of the boats from the boat ledgers [26], determination of the boat registration marks and boat names [27], seaworthiness of boats and yachts, boat documentation [28], boat and yacht crew, qualifications and certification of the boat and yacht masters, certification of the training schools and the control over the implementation of the Ordinance.

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[24] Although it is possible to have a situation where a ship or a boat used for non-recreational purposes is berthed in a marina, marinas as nautical tourism ports are in practice intended for yachts and recreational boats. Therefore, the focus of our discussion is on the types of vessels that present the great majority of the vessels on berth in marinas.

[25] The OBY is a bylaw promulgated on the basis of the CMC, Art. 1021, para. 3. It has been harmonised with the 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 of the European Parliament and of the Council of 16 June 1994 on the approximation of the laws, regulations and administrative provisions of the Member States relating to recreational craft.

[26] The corresponding rules on registration applying to yachts are to be found in the CMC, as the same rules in this respect apply to ships and yachts.

[27] *Ibidem.*

[28] *Ibidem.*

- *Boat for personal use* is a boat for sports and recreation that is not in commercial use (OBY, Art. 3, para. 1, subpara. 1).
- *Boat for commercial use* is a boat for transport of passengers and/or cargo for remuneration, a recreational charter boat, professional fishing boat, a boat used for extraction of gravel or stone and for other commercial activity (OBY, Art. 3, para. 1, subpara. 2) [29].
- *Yacht for commercial use* is a yacht used for charter with or without crew (OBY, Art. 3, para. 1, subpara. 5).
- *Yacht for personal use* is a yacht that is not in commercial use (OBY, Art. 3, para. 1, subpara. 6).
- *Recreational craft* is any watercraft of any type, intended for sports and leisure purposes of hull length from 2,5 m to 24 m [...], regardless of the means of propulsion [...] (OBY, Art. 3, para. 1, subpara. 7) [30].
- *Speedboat* is a boat or a yacht that with the power of its mechanical propulsion engine skims on the sea surface (OBY, Art. 3, para. 1, subpara. 8).
- *Personal watercraft* (jet ski, or similar) is a boat of less than 4 m in hull length which uses a propulsion engine having a water jet pump as its primary source of propulsion and designed to be operated by a person or persons sitting, standing or kneeling on, rather than within the confines of a hull (OBY, Art. 3, para. 1, subpara. 9).

Considering the above cited definitions, a simplified scheme can be used for a better understanding as follows [31]:

Ship

i. L > 12m and GRT > 15t, or
ii. CC > 12 passengers

[29] Relevant in the context of this paper is the term *boat for commercial use* when it relates to a recreational charter boat.

[30] The term *recreational craft* is entirely relevant in the context of this paper. It determines the scope of application of certain provisions of the OBY regarding the subject matter of regulation. When interpreted in connection with the relevant nomenclature of the CMC, it encompasses both yachts and boats, whereas all *recreational craft* of hull length up to 12 m falls under the CMC definition of *boat*, and all *recreational craft* of hull length over 12 m (and up to 24 m) falls under the CMC definition of *yacht*.

[31] L stands for length, GRT stands for gross tonnage, CC stands for carrying capacity, EP stands for engine power.

Recreational boat [32]

i. 2,5m < L ≤ 12m and CC ≤ 12 passengers, or
ii. L < 2,5 m and EP > 5 Kw and CC ≤ 2 passengers
- GRT is not determinative [33]

Non-recreational boat (transport, works, professional fishing, public service etc.)

i. L > 2,5m and CC ≤ 12 passengers
- if L > 12m, then GRT ≤ 15t and CC ≤ 12 passengers, or
ii. L < 2,5 m and EP > 5 Kw

Yacht (always recreational)

i. L > 12m and CC ≤ 12 passengers
- GRT is not determinative

Now that we have analysed relevant legal definitions, it is important to point out that the scope of application of various provisions of the CMC is determined in relation to the respective types of vessels as defined therein. This will consequently be important for the establishment of the subject-matter jurisdiction of commercial courts or the courts of general civil jurisdiction respectively, due to the determinative criterion of the application of maritime law to the case in dispute, which places such case, as a maritime case, under the competence of commercial courts.

The CMC prescribes that its provisions applying to ships shall equally apply to yachts, unless otherwise stipulated by the same Code regarding the scope of application of a specific section (CMC, Art. 2, para. 1).

On the other hand, the provisions of the CMC applying to ships shall only apply to other types of maritime objects, differing from yachts, if such scope of application is expressly prescribed by the Code (CMC, Art. 2, para. 2). Therefore, since the term boat falls neither under the term of ship nor under the term of yacht, the CMC shall apply to boats only when it is so explicitly prescribed thus

[32] It can be concluded that a boat intended for sports and leisure is a vessel whose length is maximum 12 m, as if the length of such vessel exceeds 12 m it falls under the definition of yacht, provided that it is authorised to carry no more than 12 passengers, in addition to the crew. If any such vessel is authorised to carry more than 12 passengers, then it falls under the definition of ship.

[33] The GRT is only determinative of the vessel's status when the vessel's length exceeds 12 m, as such vessel whose GRT is over 15t qualifies as a ship. However, if a recreational vessel exceeds 12 m in length, it automatically qualifies as a yacht, and in that case the GRT is not determinative of its status.

by the Code. For example, the provisions of the CMC expressly applicable on boats are those on the safety of navigation and protection against pollution from maritime objects, provisions on seaworthiness of yachts and boats, on their tonnage-measurement, on the documentation and certification of boats and yachts, on inspection control, on boat registration, on ship hypotheques and privileges, on the shipowner's limitation of liability, on shipbuilding and shiprepair contracts, on contracts for commercial exploitation of ships (carriage of goods and passengers, charterparties, etc.), on marine insurance contracts, on the collision of ships, salvage, general average if expressly agreed between the parties to the maritime adventure, on the shipowner's extracontractual liability for damage to persons, property and marine environment, on wreck removal and recovery. On the other hand, the CMC shall in particular not apply to boat ownership, nor to enforcement and securities on boats.

3. *Commercial Courts' jurisdiction over maritime cases under the Croatian Civil Procedure Act*

3.1. *General remarks on jurisdiction* ratione materiae *over maritime cases*

Traditionally, most of the maritime cases fall under the jurisdiction of commercial courts. There are several reasons in favour of such distribution of the court competence *ratione materiae*. Adjudicating maritime disputes requires a specific, profound knowledge of maritime law, whilst there are not many specialised experts in the field, especially amongst the judges. Therefore, it is necessary to entrust the complex and specific maritime law cases to the courts that possess adequate specialised knowledge, the true understanding of the respective legal concepts, of the trends in international maritime law codification and judicial practice, and who are familiar with and experienced in adjudicating this sort of disputes. Furthermore, considering the public importance of maritime cases, frequently high values at stake, the fact that the parties are mostly professionals responsible to conduct their business with a higher level of professional diligence, it is only adequate to concentrate the adjudication of maritime disputes to the specialised fora. Finally, maritime law with its peculiar legal concepts, conditioned by historical, traditional and ambient factors, substantially departs from classic principles of civil and commercial law. Its unification at the international level through numerous maritime conventions has been largely influenced by the

general principles and specific solutions originating from the common law systems [34]. Such situation is strongly reflected in our national law, as Croatia has adopted a whole range of international standards and principles contained in the international maritime law conventions. The CMC adopts many modern solutions of international maritime law that have developed over decades, and many of which originate from the common law, which is so extraneous to our classic civil law system and judiciary. For all those reasons, it is strongly desirable that the courts competent to hear maritime cases have a certain level of expert knowledge of maritime law and true understanding of its developments [35].

The described position has been widely acknowledged, which is evidenced by the fact that, in most countries, the jurisdiction over maritime cases is regulated by special legislation separately from the general civil jurisdiction. In the common law countries, in particular, it has historically and traditionally been entrusted to the highly specialised admiralty courts [36]. The aim of such legislation is that this jurisdiction be bestowed on a relatively small number of courts, where specialised judges are professionally trained in maritime law. The justification for such approach is to be found in the fact that maritime law, as superstructure to the economic relationships of maritime trade, globally shows the tendency of the establishment and development of mutually similar or same legal concepts. The tendency culminates in the unification of maritime law through international conventions and is not limited to the formal unification achieved through the adoption of internationally binding legal instruments. Moreover, it is extended to their uniform implementation and application. To achieve such uniformity, it is essential to confer the maritime jurisdiction to a smaller number of competent courts [37]. Furthermore, maritime cases, compared to all other disputes in a state, are relatively rare. That said, combined with the fact that maritime law substantially differs from the general principles of the civil law, leads to the conclusion that a state, for reasons of economy, should attempt to spare the entire staff of judges of professional training in maritime law, and to provide such professional specialisation only for those judges, who will more frequently be in the position to adjudicate maritime disputes [38].

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[34] G. STANKOVIĆ, *op. cit.*, p. 227.

[35] *Ibidem.*

[36] On admiralty jurisdiction see G. GILMORE, C.L. BLACK, *The Law of Admiralty*, New York, 1975, pp. 1-53; N. MEESON, J.A. KIMBELL, *Admiralty Jurisdiction and Practice, 4th Edition*, London, 2011, pp. 25-85.

[37] E. PALLUA, B. JAKAŠA, *op. cit.*, p. 258. Similarly, G. GILMORE, C.L. BLACK, *op. cit.*, p. 32.

[38] E. PALLUA, B. JAKAŠA, *op. cit.*, p. 258.

In Croatia, relevant provisions of the CPA greatly fulfil the expressed requirement for specialised courts, conferring the majority of maritime disputes to commercial courts. However, some cases in connection with shipping and navigation sometimes escape the jurisdiction of commercial courts [39]. For example, upon deciding on the conflict of jurisdiction, the Supreme Court subjected the following disputes to the jurisdiction of municipal courts: a dispute arising from a claim for damage to the boat (Supreme Court, R. 144/81, 10 June 1981), a dispute arising from the sale of a boat (Supreme Court, R. 118/83, 12 May 1983), a dispute arising from a contract for the repair of a boat (Supreme Court, R. 27/81, 25 March 1981), in a case arising from passengers' claim for damage on the basis of a contract for carriage by sea [40] (Supreme Court, R. 138/81, 16 June 1981), a dispute involving floating facilities, (Supreme Court, II. Rev. 61/82, 16 June 1982), a dispute arising from a claim for master's wages (Supreme Court, R. 264/84, 3 April 1985), a dispute relating to the parts of a former ship (Supreme Court, R. 368/85, 19 November 1985) [41].

The subject-matter jurisdiction or competence *ratione materiae* of the commercial courts over maritime cases is defined by Art. 34.b, para. 1, subpara 6 of the CPA, providing that commercial courts as courts of first instance are competent to adjudicate the disputes relating to ships and maritime and inland navigation and disputes to which navigation law applies (maritime disputes [42]). It follows that there are three components, or three criteria defining the meaning of the term *maritime dispute* for the purpose of the establishment of commercial courts' jurisdiction *ratione materiae*:

i. the dispute relates to a ship, or

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[39] G. STANKOVIĆ, *op. cit.*, p. 242.

[40] Disputes relating to the carriage of passengers and their luggage by sea had for many years been excluded from the jurisdiction of commercial courts, although they are clearly maritime cases, governed by maritime law. There was an explicit exclusion of this sort of dispute in the provision of Art. 34.b, para. 1, subpara. 6. of the CPA to that extent, as well as in the corresponding provisions of the acts preceding the CPA, dating all the way back to the 1950s. This exclusion was finally deleted by the amendments to the CPA in 2013 (The Act to Amend the Civil Procedure Act, Official Gazette of the Republic of Croatia, no. 25/2013). According to the positive law, disputes arising from the carriage of passengers and their luggage by sea, as maritime disputes, fall within the maritime jurisdiction, like all other cases governed by maritime law.

[41] J. BREŽANSKI, *op. cit.*

[42] The original wording in Croatian is "*plovidbeni sporovi*", which literally translates into "*navigation disputes*". However, it is submitted that maritime law, as a general term, traditionally encompasses both sea and inland navigation and transport, and it therefore seems that "*maritime dispute*" is a more adequate translation, especially for the purpose of this paper that deals with the berthing of boats and yachts as maritime objects. See the authors' comment in fn. no. 18.

ii. the dispute relates to navigation (maritime or inland), or
iii. the dispute is subject to maritime law.

The list is exhaustive, but the criteria are not cumulative. Namely, it suffices that only one of the criteria is fulfilled for the dispute to qualify as maritime dispute within the meaning of the said provision defining the commercial courts' competence *ratione materiae* [43].

3.2. *Disputes relating to ships*

In respect of the first criterion defining maritime disputes as those related to ships, it has been established that the meaning of ship in this context should be widely interpreted to encompass all types of vessels that qualify as ships under the CMC [44]. Furthermore, it should include all vessels qualifying as yachts under the CMC. The conclusion follows from the legal definition of yacht (CMC, Art. 5, para 1, subpara 21) and from the provision of the CMC, Art. 2, para. 1, prescribing the application of the provisions of the CMC relating to ships equally to yachts [45]. Boats, however, do not qualify as ships or yachts under the CMC, and do not fall within the meaning of ship as envisaged by the CPA, Art. 34.b, para. 1, subpara. 6. As explicitly defined by the CMC, boat is neither a ship, nor a yacht, and it truly was the original intention of the lawmaker to exclude boats from the jurisdiction of commercial courts unless the dispute is related to navigation or if maritime law applies. As stated in the legal doctrine of the early sixties, "Considering the problem from a practical point of view, we must exclude boats from the application of this provision. Boats are small vessels that commercially have very little importance, and their activity cannot in any way be compared to the marine navigation activity of ships. There is no reason for these

[43] Similarly, E. PALLUA, *op. cit.*; E. PALLUA, B. JAKAŠA, *op. cit.*; A. ŠUC, *op. cit.*; G. STANKOVIĆ, *op. cit.*

[44] Similarly, G. STANKOVIĆ, *op. cit.* For the legal definitions of *ship* and *yacht* see *supra.* Term ship as used in the relevant provision of the CPA also encompasses all types of vessels qualifying as ships of inland navigation according to the IPNA; however, this issue is not relevant in the context of this paper. See fn. 18.

[45] MINA (1977), the Yugoslav Act on Navigation, preceding the CMC, defined the yacht somewhat differently: "yacht is a ship for non-commercial purposes, used for leisure, sport and recreation." Due to the commercialisation of yachts and boats in nautical tourism, the CMC amended the definition to allow the commercial use of yachts (charter). However, the point to emphasise here is that previously, yacht was explicitly defined as a type of ship.

disputes to be adjudicated by the courts competent to hear maritime cases [...]" [46].

Today, however, the picture has substantially changed. There is a whole range of technically highly sophisticated boats used for sports and navigation of up to 12 meters in length [47], be it sailboats or powerboats, the values of which frequently exceed 100,000 USD [48]. Furthermore, the last two decades have been marked with a vast expansion of nautical tourism in Croatia, especially the one involving boat and yacht charter [49]. Boats for sports and leisure of up to 12 m in length used commercially for charter earn between 1,000 to 3,000 EUR per week in average, depending on the season and the boat type [50]. Nowadays, there are over 100 ports of nautical tourism in Croatia, with more than 17,000 nautical berths, earning more than 95,000,000 EUR per year. The number of boats and yachts in transit in Croatian nautical ports in 2014 exceeded 180,000 [51]. In addition, there is a certain capacity of nautical berths outside marinas, in numerous communal ports along the coast.

It is submitted that it can no longer be unconditionally claimed that boats are small vessels with very little commercial importance, and that there is no reason for these disputes to be adjudicated by the courts competent to hear maritime cases. In fact, the amount of maritime traffic produced by boats and yachts on the one hand, and the level of commercial and legal activity related to those types of vessels on the other, justifies in our opinion the idea of conferring the subject-matter jurisdiction over disputes related to boats to the same specialised courts as over those related to yachts, i.e. to commercial courts.

It seems absurd that a difference of one foot in length, e.g. from a sailboat of 39 to a sailboat of 40 feet, should result in altering jurisdiction *ratione materiae* from the court of general civil jurisdiction to commercial court, provided all other circumstances of the case are unaltered. For example, we might have two

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[46] E. PALLUA, B. JAKAŠA, *op. cit.*

[47] See the analysis of the legal definition of boat *supra.*

[48] Information retrieved from the shipbroking Internet portals.

[49] The beginnings of the development of nautical tourism in Croatia date back to the 1980s and are linked to the development of the Adriatic Club Yugoslavia (ACY), established in 1983, as a state-owned company operating a chain of marinas in the Adriatic. The first phase of the development of ACY encompassed the establishment of 16 brand new ports of nautical tourism which were all finalised by 1986. In 1991, ACY changed its name to Adriatic Yacht Club. Today ACY operates 22 marinas. Source: http://www.aci-marinas.com/ (23 June 2016).

[50] Information retrieved from the Internet advertisement of various charter companies in Croatia.

[51] Croatian Bureau of Statistics, *Nautical Tourism: Capacity and Turnover of Ports, 2014*, year: LI, Zagreb, 25 March 2015, no. 4.3.4.

disputes arising in relation to two similar sailboats, one of 39 and the other of 40 feet, both used for private purposes and owned by natural persons, both placed on dry berth in the same marina under the same terms of contract. The owner of the 39-foot boat would have to sue the marina operator for damage to the vessel before a municipal court, because the boat is below 12 m in length and does not qualify as a yacht under the CMC, and therefore does not fall within the meaning of the term *ship* under the CPA, Art. 34.b, para. 1, subpara. 6. On the other hand, the equal claim of the owner of the 40-foot sailboat would be subject to the jurisdiction of commercial court, because his vessel exceeds 12 m in length, and therefore qualifies as a yacht under the CMC and falls within the meaning of *ship* as prescribed by the relevant provision of the CPA [52]. Yet, both cases are marked with all the specificities incumbent upon navigation craft, the manner in which it is maintained and serviced. Both cases involve the same service provider, who should apply the same level of professional diligence, regardless of the fact that some of those vessels are commercially exploited by charter agencies or companies, whilst others are owned by individuals and used for private purposes. There is no difference in that respect, regarding the merits of the case.

If anything, for the sake of the legal certainty and uniformity of court practice in this field, it is hereby recommended to consider possible *de lege ferenda* interventions, with a view of placing boats in the same category as yachts for the purposes of defining jurisdiction *ratione materiae* over maritime cases.

It is submitted that a possible solution might be to amend the CPA, Art. 34.b, para. 1, subpara 6 to provide that commercial courts as courts of first instance are competent to adjudicate the disputes relating to *vessels* [53] and maritime and inland navigation and disputes to which navigation law applies (maritime disputes). The authors are advocating this amendment of the CPA as it would directly and clearly, beyond any doubt, subject the disputes involving all types of vessels, including in particular ships, yachts and boats, as well as all other types of vessels intended for navigation, to the jurisdiction of the specialised commercial courts. In a situation where there is a substantial decrease in the number of

[52] In the described set of circumstances, according to the prevailing judicial practice (see *infra*) the other two criteria qualifying the cases as maritime disputes under the CPA are not fulfilled either. Furthermore, there is no other basis for commercial courts' jurisdiction since these two disputes arise from consumer contracts.

[53] Currently the term used is "*ships*". Should the term used be "vessels" (*Cro. plovni objekti*), it would undoubtedly encompass boats, as well as all other types of vessels as defined by the CMC (*see supra*).

traditional commercial maritime disputes, and an increase in the number of disputes relating to nautical navigation, acknowledging the particularities of all disputes with a maritime background, we are of the opinion that this amendment is desirable. It would contribute to legal certainty and uniformity of the relevant judicial practice, eliminating any doubt regarding the interpretation of the relevant provision of the CPA. It is submitted, however, that the proposed amendment would also mean that all disputes relating to the ownership of boats, including contracts of sale and purchase, leasing contracts, or similar, would fall under the jurisdiction of commercial courts, even if those were consumer contracts. On the other hand, disputes relating to enforcement and securities over boats would in principle remain in the competence of courts of general civil jurisdiction as under the CMC, Art. 841, paras 3 and 6, boats are excluded from the special maritime law provisions on enforcement and security and are subject to the Enforcement Act [54] as *lex generalis*, according to which courts of general civil jurisdiction are competent to rule on enforcement and security matters (arg. Enforcement Act, Art. 37).

Alternatively, considering the fact that due to the reasons of political nature it would most likely be complicated to amend the CPA, whilst a well-argued proposal to amend the CMC would more probably be accepted by the decision-makers, the authors propose to amend the definition of the term boat under the CMC, Art. 5, para. 1, subpara. 15, as follows:

"*Boat is a vessel ~~which is not a ship or a yacht, and~~ whose length exceeds 2,5 m or the total power of its propulsion engines is over 5 kW, whose gross tonnage is less than 15 t, and which is authorised to carry no more than 12 passengers. A boat intended for sports and leisure shall not exceed 12 m in length. The term boat does not include*

- *vessels belonging to another maritime craft, such as lifeboats or tenders*
- *vessels intended exclusively for competitions*
- *canoes, kayaks, gondolas and pedal boats*

windsurfing boats and surfboards".

The proposed amendment removes the express qualification that the boat is not a ship, whilst logically refers to the same group of vessels as the current CMC definition.

Along with the proposed amendment of the legal definition of the term boat, the CMC, Art. 2 should be amended as follows:

"*1. The provisions of this Code applying to ships shall equally apply to yachts and boats, unless otherwise stipulated by the Code.*

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

2. The provisions of this Code applying to ships shall apply to other types of maritime objects, other than yachts and boats, if such application is expressly prescribed by the Code" [55].

Consequently, further interventions could be made if necessary to exclude the application of certain provisions of the CMC on boats, where it has originally not been envisaged that they should apply to boats (e.g. the provisions on ownership or on registration). Following this approach, boats would have to be equally treated as yachts for the purposes of establishing the jurisdiction of commercial courts over maritime cases, whilst the scope of application of the CMC would effectively remain the same. We are of the opinion that the proposed amendment of the legal definition of the term boat combined with the amendment of the CMC, Art. 2, defining the scope of application of the CMC, would remove the reasons for discrimination between boats and yachts in the context of the interpretation of the CPA, Art. 34.b, para. 6, allowing that the term ship in the context of the relevant CPA provision be interpreted to include ships, yachts and boats. Concurrently, the proposed amendments of the CMC would effectively reinstate that which is currently prescribed, however, using a different legislative drafting technique.

The question of subjecting the so-called small pleasure-craft to the jurisdiction of the courts specialised in maritime disputes is not straightforward, in deed. There are arguments for and against the inclusion. The matter has also been recognized as controversial in comparative law and discussed in the foreign legal doctrine reaching some similar solutions, but still different in certain aspects [56]. However, it is submitted that the distribution of court jurisdiction *ratione materiae* over maritime cases is primarily a question of the national policy relating to the organisation of the domestic judicial system, which depends on a variety of factors specifically relevant in the local context. Therefore, as much as it can be interesting and useful to compare various comparative solutions to this problem, we have not gone deeper into that analysis for the purposes of this article, possibly saving that subject for a future article. Our proposals *de lege ferenda* are hereby submitted on the basis of considerations made by taking into account the factors and criteria deemed relevant within the domestic context as discussed above.

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[55] The proposed amendments *de lege ferenda* are marked as underlined text.

[56] P. STOLZ, *Pleasure Boating and Admiralty: Erie at Sea*, in *California Law Review*, Vol. 51, no. 4 (1963), pp. 661-719; Note, *Admiralty Jurisdiction over Pleasure Craft Torts*, in *Maryland. Law Review*, Vol. 36, no. 1 (1976), pp. 212-232; K. DEPOY, *Pleasure Boat Torts in Admiralty Jurisdiction: Satisfying The Maritime Nexus Standard*, in *Washington and Lee Law Review*, Vol. 34, no. 1 (1977), pp. 121-140; N. MEESON, J.A. KIMBELL, *op. cit.*

Finally, we would like to conclude this chapter with a quote:

"It is quite apparent that the influence of admiralty law on pleasure-boating has provided a source of confusion. The confusion results from the fact that pleasure boats are within admiralty jurisdiction and subject to the same rules of the road and the same substantive principles as commercial vessels. Since pleasure boats do operate on navigable waters, it is proper that they should be subject to the jurisdiction of a court which theoretically has a considerable amount of expertise in dealing with problems which arise on those waters" [57].

3.3. *Disputes governed by maritime law*

The term *maritime law* is commonly understood to encompass all that is contained in the CMC and in all other legislation dealing with maritime and inland navigation, including that relating to ports, such as the Maritime Domain and Seaports Act (in further text: MDSA) with its bylaws, as well as all international maritime conventions [58].

There are disputes to which maritime law does not apply, but which are related to ships or navigation and therefore qualify as maritime disputes, although subject to general civil law. For example, the sale and purchase or financial leasing of a ship or a yacht is governed by general contract law, but these disputes are still considered maritime disputes, and as such fall under the jurisdiction of commercial courts. Similarly, a claim for damage caused to a ship or a yacht by a land vehicle, crane or similar object is not governed by any special rules of maritime law, but by general tort law. Nevertheless, it is considered a maritime dispute subject to the jurisdiction of commercial courts.

As regards marina operators' berthing contracts, there are no maritime law rules applying thereto. As already mentioned, these are innominate contracts governed by general contract law, in particular by the Civil Obligations Act [59]. The contents of these contracts and the scope of marina operator's services provided thereunder vary from a simple marina operator's obligation to provide for a safe nautical berth to a whole range of services such as safeguarding, maintenance of and care for the vessel, engine servicing, lifting the vessel from the water and putting it on a dry berth, etc. If such contract relates to a yacht, any

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[57] Note, *Pleasure-Boating and the Admiralty Jurisdiction*, in *Stanford Law Review*, Vol. 10, no. 4, (1958), pp. 724-745.

[58] G. STANKOVIĆ, *op. cit.*, p. 216.

[59] See *supra*.

dispute arising therefrom would be considered a maritime dispute on the basis of the first criterion determining maritime disputes as disputes relating to ships. If, however, such contract is for a boat, the only way for such a case to qualify as a maritime dispute is to interpret it as one relating to navigation.

3.4. *Disputes relating to navigation*

The term *navigation* is legally defined neither in the CMC nor in the CPA. Therefore, it is subject to judicial interpretation. Literally, navigation means an act of movement of a vessel over an area of water. Strictly literal interpretation limited to the exact wording is not sufficient to determine the true meaning of the relevant CPA, Art. 34.b, para. 1, subpara. 6. It is necessary to engage into the application of other methods of interpretation, in particular the finally decisive method of teleological interpretation in the light of the purpose that this provision aims to achieve [60]. In that sense, the term navigation should not be strictly limited to nautical activities; but it should rather be interpreted widely to encompass the vessel's commercial activities, such as loading and unloading of cargo, boarding and disembarking of passengers, fuel charging, etc. [61].

Frequent conflict of jurisdiction *ratione materiae* between courts of general civil jurisdiction and commercial courts over maritime disputes proves that the judicial interpretation of the respective CPA provision in practice is problematic. In fact, it is submitted that most diversity in interpretation arises precisely in relation to the meaning of the term navigation in the context of the CPA, Art. 34.b, para. 1, subpara. 6.

In our opinion, berthing, anchoring, mooring, and similar activities are related to navigation, and should therefore fall under this part of the respective provision. A dispute arising in respect of an incident related to those activities should undoubtedly be considered a maritime dispute [62]. Moreover, it is sub-

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[60] N. VISKOVIĆ, *Teorija države i prava*, Zagreb, 2006., pp. 248-249, as cited in V. TOMLJENOVIĆ, *Tumačenje kolizijskih pravila međunarodnih konvencija – primjer tumačenja kolizijskih odredbi Haaške konvencije u prometnim nezgodama*, in *Collected Papers of Zagreb Law Faculty*, 2012, Vol. 62, no. 1-2, pp. 101-152.

[61] G. STANKOVIĆ, *op. cit.*, p. 215.

[62] In favour of such submission, we refer to a decision of the Supreme Court of Croatia, Gž-524/1978, 9 January 1979, according to which a dispute relating to the fee owed for the use of a berth in a port is considered a maritime dispute subject to the jurisdiction of commercial court, as cited in J. BREŽANSKI, *op. cit.*

mitted that the interpretation should be even wider to include the legal relationship underlying the actual berthing of the vessel. Therefore, a contract for berth in a marina as such should be interpreted as one that is in relation to navigation [63]. Consequently, any dispute arising from a berthing contract with a marina operator should be considered maritime dispute and therefore subject to the jurisdiction of commercial court, regardless of the consumer or commercial nature of the contract.

We recognize that there is certain controversy regarding the qualification of a dry berth in this context. In our opinion, for the sake of legal certainty and uniformity of judicial practice, all berthing contracts with marina operators should be considered maritime disputes subject to the jurisdiction of commercial courts. We see no reason why various services provided by marina operators to vessel owners on the basis of various types of berthing contracts should be treated differently, depending strictly on the locality where these services take place. In fact, there are situations where under the same berthing contract, a vessel is kept on berth in the water part of the year, and then lifted and put on a dry berth for the winter in the same marina. It would be illogical to subject the disputes arising from such contracts to various courts, depending on whether the damage to the vessel, for example, was caused during the time when it was in the water or on dry berth, or during the lifting or launching operation conducted by the marina operator. It is submitted that both dry berths and nautical berths are aimed at boats and yachts in the course of their normal use as navigational craft. As services, they are regularly provided by marina operators to the vessel owners at their own choice, and they sometimes come in package. A winter berth in the water and a dry berth have equal or at least very similar purpose, although the service is practically and technically different. Finally, there seems to be no real justification, for the purposes of defining jurisdiction *ratione materiae*, to discriminate between the marina operator's claim for the outstanding berthing fee when such claim arises from a contract for nautical berth or dry berth. Furthermore, should the dispute arise from a contract for dry berth of a yacht, the case would qualify as a maritime dispute, on the basis that it relates to a yacht, and as discussed above, there seems to be no justification for discriminating boats used for leisure and sports from yachts that are used for the same purpose and maintained, berthed and serviced in equal or very similar manner. For all

[63] In favour of such submission, we refer to a decision of the High Commercial Court of the Republic of Croatia, Pž-8130/03-3, 22nd November 2006. In the reasoning of the decision the court elaborates that a dispute related to the marina operator's claim for a fee under the berthing contract is a maritime dispute by its contents (see *infra*).

these reasons, we advocate a broad interpretation of the term navigation in the context of the relevant CPA provision, allowing for all marina operator's berthing contracts to fall under the jurisdiction of commercial courts.

4. *Critical review of Croatian judicial practice dealing with the conflict of jurisdiction* ratione materiae *over disputes arising from marina operators' berthing contracts*

4.1. *Dispute relating to a yacht is a maritime dispute*

In the example of an older judicial decision, the court took the stand that the classification of ships and yachts to certain subtypes, in particular according to their uses, is not decisive for the choice of the competent court *ratione materiae* [64]. The case involved a yacht used for sports and leisure. The conflict of jurisdiction arose between a municipal court and a commercial court. The latter established the lack of jurisdiction *ratione materiae* and passed the case to the municipal court leading to the negative conflict of jurisdiction. The Supreme Court, relying on the provisions of the Marine and Inland Navigation Act [65], held that a yacht used for sports and leisure is considered a ship. Consequently, on the basis of Art. 36, para. 1, subpara. c) of the Regular Courts Act [66], the competent court *ratione materiae* in a case related to such a type of ship is the commercial court. The Supreme Court emphasised that the law governing the subject matter jurisdiction of commercial courts does not differentiate ships by their uses, but simply provides that the competent court to hear the cases related to ships is commercial court. Since a yacht used for leisure falls under the term of ship, cases related to yachts fall under the subject-matter jurisdiction of commercial courts.

Similarly, in a more recent case, the position was confirmed by the decision of the Supreme Court of the Republic of Croatia deciding on the conflict of jurisdiction between a municipal and a commercial court [67]. The court held that

[64] The Supreme Court of Croatia, Gr-415/1990, 26 December 1990.

[65] Official Gazette of the SFR Yugoslavia, no. 22/1977. The act preceded the Maritime Code of the Republic of Croatia of 1994 that has finally been superseded by the CMC.

[66] Official Gazette, no. 5/1977, 27/1988. The act was later superseded by the Courts Act (Official Gazette of the Republic of Croatia, no. 150/2005, 16/2007, 113/2008, 153/2009, 116/2010, 122/2010, 27/2011, 57/2011, 130/2011, 28/2013) that was in force from 29 December 2013 until 14 March 2013; then by the currently applicable Courts Act (Official Gazette of the Republic of Croatia, no. 28/2013, 33/2015, 82/2015). In particular, the relevant provision on the subject-matter jurisdiction of commercial courts over maritime cases has now been superseded by the corresponding provision of the CPA, Art. 34.b, para. 1, subpara. 6.

[67] The Supreme Court of the Republic of Croatia, Revt 90/2006, 5 September 2007.

the case arising from the plaintiff's claim for damage to his yacht caused by the defendant upon putting the yacht to the sea is subject to the jurisdiction of commercial courts on the basis of the CPA, Art. 34.b, para. 1, subpara. 6. In its explanation, the Court emphasised that, within the meaning of the relevant provisions of the CMC, the yacht is considered a ship, and that consequently the competent court *ratione materiae* is the commercial court of first instance.

Along the same line of reasoning, the Supreme Court ruled on the conflict of subject matter jurisdiction in a case arising from a contract of sale and purchase of a pleasure powerboat of 8 m in length. The court held that the dispute was not a maritime dispute, because the vessel did not qualify as a ship under the CMC, but as a boat, and that therefore, the competent court to adjudicate the case was the municipal court [68].

Another conflict of jurisdiction arose between a municipal and a first-instance commercial court in a case involving a yacht damaged whilst on dry berth in a marina. The municipal court proclaimed the lack of jurisdiction *ratione materiae*, holding that the dispute arose in respect of damage to a yacht, and therefore it fell within the meaning of a maritime dispute as prescribed by the CPA [69]. Although the claimant yacht owner was a natural person, the court competent to decide on the conflict of jurisdiction upheld the municipal court's first-instance ruling and assigned the case to the commercial court of first instance [70], which finally delivered a judgement on the merits [71].

Similar decisions on the conflict of subject-matter jurisdiction over maritime cases are those establishing the jurisdiction of municipal courts in a dispute relating to a claim for damage to a boat (Supreme Court, R. 144/81, 10 June 1981), a dispute relating to the sale of a rowing boat, (Supreme Court, R. 118/83, 12 May 1983), a dispute arising from a contract of repair of a boat (Supreme Court, R. 27/81, 25 March 1981) [72].

It seems to be well-established in the judicial practice of the domestic courts that disputes relating to yachts are considered maritime disputes, because yachts are considered to qualify as ships in the context of the currently relevant CPA, Art. 34.b, para. 1, subpara. 6. In our opinion, the prevailing judicial practice in this particular respect is in line with the relevant legislation. It follows that marina operators' berthing contracts relating to yachts should, without any doubt, be considered maritime disputes. However, as already discussed and for

[68] The Supreme Court of the Republic of Croatia, Gr 146/1998-2, 1 October 1998.
[69] The Municipal court in Zagreb, Pn-4833/07, 2 November 2010.
[70] The County court in Zagreb, Gžn-296/11-3, 15 February 2011.
[71] The Commercial court in Rijeka, P-3326/11-106, 3 March 2016.
[72] G. STANKOVIĆ, *op. cit.*, p. 243.

all the reasons stated above, we advocate the amendments of the CMC in order to place boats and yachts in the same category relevant for determining the subject matter jurisdiction over maritime disputes relating to pleasure craft.

4.2. *Is a dispute arising from a berthing contract related to navigation (maritime dispute)?*

In a ruling of the High Commercial Court as the court of appeal, deciding on the conflict of jurisdiction *ratione materiae* between a municipal and a commercial court of first instance, in a dispute relating to damage to a 11.49 m long sailboat whilst on berth in a marina, it was held that there was no subject-matter jurisdiction of commercial courts as prescribed by the CPA and the Courts Act over this kind of dispute; that the plaintiff was a natural person, not a trader or an entrepreneur, that the claim was based on the tortious liability of the marina operator for damage to a vessel that could not be considered a ship under the CMC as it was 11.49 m long, with GRT of less than 15t and not authorised to carry more than 12 passengers. The court did not find any elements for the application of maritime law, and held that the case was not related to navigation and that it therefore fell under the jurisdiction of the municipal court [73].

On the other hand, in a High Commercial Court's judgement on the merits, following the defendant boat owner's appeal, in a dispute arising from a marina operator's berthing contract including deposit and maintenance of a boat (not a yacht), where the marina operator claimed for the outstanding berthing and other fees owed by the boat owner who is a natural person, in the reasoning of the court it was stated:

"[...] claim for the fees for services of berthing of a boat in a marina, by its contents is a maritime dispute [...] [The Seaports Act] as *lex specialis*, categorises seaports according to their use as: seaports open for public traffic and special purpose ports [...] Nautical tourism port is a special purpose port [...] Most of the activities run in the special purpose ports according to their contents and concrete elements correspond to the activities in the seaports open for public traffic. The Seaports Act [...] does not contain an explicit provision on the obligation of the user of the special purpose port to pay charges. [...] In such maritime dispute the first instance court correctly filled the legal gap by the application of the general rules of the law of obligations and the construction of the

[73] The High Commercial Court of the Republic of Croatia, Pž 1739/05-3, 22nd September 2006.

contract between the parties to the dispute. [...] This court also points at the legal provisions explicitly regulating the obligations of the user of the special purpose port regarding the mode of use of the port (Seaports Act, Art. 29, para. 3.), according to which there is a corresponding right to claim charges for the use of the shore. Through application by analogy of the provisions of [...] Seaports Act regulating the obligation of the user of the seaports open for public traffic to pay charges for the services provided, the charges shall likewise be paid to the commercial companies (concessionaries) for the services rendered in the special purpose ports, in particular for the port services, including berth" (74).

The cited decision of the High Commercial Court is a decision on the merits. There was no conflict of jurisdiction in this case, although the dispute was in respect of a boat, not a yacht, and the contract was a consumer contract, not a commercial one (the claimant is a natural person, using the boat for private purposes). Still, the dispute was heard by the Commercial Court in Rijeka as the court of first instance, and then by the High Commercial Court as the court of appeal assuming the subject-matter jurisdiction over the dispute as a maritime dispute due to the fact that it was a case relating to navigation. We are of the opinion that the part of the court's reasoning, as quoted, qualifying the disputes arising from berthing contracts as maritime disputes, is an excellent argumentation in favour of the teleological interpretation of the term navigation. We choose to advocate such approach as the adequate interpretation of the relevant provision of the CPA, Art. 34.b, para. 1, subpara. 6 defining the subject matter jurisdiction over maritime disputes.

In favour of such submission, we also refer to a decision of the Supreme Court of Croatia, according to which a dispute relating to the fee owed for the use of a berth in a port is considered a maritime dispute subject to the jurisdiction of commercial courts (75).

5. *Concluding remarks*

It is submitted that the conflict of jurisdiction *ratione materiae* over cases relating to berthing contracts and marina operator's professional liability seems to appear frequently in the domestic judicial practice. Such situations prolong

(74) The High Commercial Court of the Republic of Croatia, Pž 8130/03-3, 22nd November 2006.

(75) The Supreme Court of Croatia, Gž-524/1978, 9th January 1979, as cited in J. BREŽANSKI, *op. cit.*

the average time of arriving to final judgements, which financially burdens the parties involved and creates legal uncertainty. Another problem is that in certain aspects of the matter, the judicial practice is not uniform. All that subsequently negatively affects the entire marina operators' business and creates lack of confidence in the judiciary. Considering the fact that Croatia has a strategic interest in a further development of nautical tourism as an important branch of the state's economy, it is important to clarify the reasons for the frequent conflict of jurisdiction over maritime cases with a view of rectifying such a trend. As analysed and discussed above, we may conclude that the main reason lies in the lack of a uniform interpretation of the CPA, Art. 34.b, para. 1, subpara 6 combined with the relevant provisions of the CMC, in particular legal definitions of the terms vessel; ship; yacht and boat (CMC, Art. 5), and the scope of application of the Code (CMC, Art. 2).

The CPA confers the jurisdiction over maritime disputes to specialised commercial courts. Maritime disputes for that purpose are all those related to ships and navigation, and those to which maritime law applies. The prevailing judicial practice is that the term ship in that context should be understood including all types of ships and yachts, not the boats, though. Therefore, whenever a contract of berth is for a yacht, any disputes arising in connection thereto shall fall under the commercial courts' jurisdiction as maritime disputes, regardless of personal criteria, that is to say even when the contract is consumer contract, and regardless of the locality, i.e. even when the vessel is kept on dry berth (on land).

The problem in interpretation arises when the contract of berth is for a boat. It then has to be examined whether such contract is governed by maritime law or related to navigation. Maritime law encompasses the CMC, the IPNA, the MDSA, and all other acts and bylaws related to navigation, as well as the applicable international maritime conventions. Berthing contracts are not regulated under maritime law. These are innominate contracts the contents of which vary in practice, and they are regulated under the general law of obligations.

Whether berthing contracts are related to navigation as envisaged by the CPA, Art. 34.b, para. 1, subpara 6 depends on the interpretation of the term navigation in that context. It is submitted that the term should be understood widely, applying the teleological method of interpretation, to include not only the nautical, but also commercial activities of the vessel; in particular the underlying legal relationships. In that sense, berthing of a vessel is certainly related to navigation, and the contract of berth should therefore also be regarded as such. Consequently, marina operator's berthing contracts should be considered mari-

time in nature, and any disputes arising therefrom should fall under the jurisdiction of commercial courts, regardless of the type of the vessel and the commercial or consumer nature of the contract.

Finally, in the interest of the legal certainty and uniformity of judicial practice, the authors propose to amend the CPA, Art. 34.b, para 6 to subject all disputes related to all types of vessels under the jurisdiction of commercial courts. Alternatively, for pragmatic reasons, the authors propose to amend the CMC, Art. 2 and the legal definition of the term boat under the CMC in order to place the boats and yachts in the same category regarding the scope of application of the CMC and to allow for a wider interpretation of the term ship in the context of the CPA, Art. 34.b, para 6, to include ships; yachts; and boats. Such intervention in the CPA or alternatively in the CMC would also result in the inclusion of all disputes relating to boats under the jurisdiction *ratione materiae* of commercial courts. This would be in line with the policy of subjecting the disputes with maritime background to the competence of specialised courts that have a certain level of expertise in adjudicating the complex and peculiar maritime cases.

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