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MARINA OPERATOR'S OBLIGATIONS FROM THE CONTRACT OF BERTH ACORDING TO THE BUSINESS PRACTICES OF CROATIAN MARINAS

Vesna Skorupan Wolff¹, Ranka Petrinović², Nikola Mandić²

(¹ Adriatic Institute, Croatian Academy of Science and Arts, Šenoina 4, Zagreb, Croatia)

(² University of Split, Faculty of Maritime Studies, Split, Croatia)

(E-mail: vesnas@hazu.hr)

ABSTRACT

Contract of berth is the contract that is not regulated by any special laws, meaning that its essential components, including the contractual obligations of the parties are not specifically prescribed. The practice of using general terms and conditions of marinas is adopted when concluding a contract and determining the scope and content of the parties' obligations. The paper considers the obligations of marinas as a contractual party that provides specialized and complex services of berthing. The provisions of general conditions of marina business practices are analysed and interpreted in terms of obligations regarding the provision of technically acceptable and safe berth in the marina, control and custody of the vessels at berth. The paper explains the meaning and scope of specific contractual obligations and emphasises the impact of contract commitments on the subject of contractual liability and definition of the legal nature of a particular contract. For a better understanding of marina obligations, the paper compares them with the corresponding obligations of the berth user. The developed market of nautical tourism requires a balanced protection of economic and legal interests of marinas and berth users as its participants, which is reflected through the right balance of their contractual obligations. Bearing in mind contemporary conditions governing the nautical tourism and trends of its growth, the paper presents the thesis on the need for standardization of the provisions on the obligations of parties in specific general conditions of marinas in order to classify them into categories based on scope and content of services that marinas provide.

KEY WORDS

nautical tourism, berth contract, marina obligations, business practices of Croatian marinas

1. INTRODUCTION

Contract of berth is the type of contract that is not described in the law, which means that the obligations of the parties are not defined and prescribed. Therefore, the exact content of the rights and obligations of the parties shall be determined by analysing the content of the contract of berth and general terms and conditions of marinas as providers of berth services. General terms and conditions of local marinas in relation to

the obligations of the parties are not standardized and consistent, so the berth contract has not yet become a typical innominate contract.¹ All that has

¹ See Goldstein Alexander: *Commercial contract law - international and comparative*, Zagreb, 1991, p. 13; Padovan Adriana Vincenca: Responsibility of nautical port in the berth contracts and insurance, *Comparative Maritime Law*, vol. 52 (2013), No. 167, p. 1 to 35

been said complicates the legislative framework that leads to the application of contractual relationship of the parties to the berth contract.² The specific regulation of the obligations of the marina is of the utmost importance because it has a direct impact on contractual liability. The fact that some marina general terms and conditions do not contain specific provisions on obligations, but they are to be understood from the provisions on the liability of the marina proves how important provisions on the obligations and liabilities are, and how they make an almost indivisible whole. Interpretation of the provisions on obligations of the parties to the berth contract is in itself a complex issue. The obligations of the parties should be viewed as a set of interdependent obligations that make up the whole. Their stipulation in the contract requires compliance with other contractual provisions and numerous principles of the law of obligations.

All this leads to the fact that berth users when choosing a marina appreciate diversity offered by marinas and take into account the provisions in general terms and conditions on the obligations of the marina. The spectrum of marina obligations under the contract of berth varies primarily depending on the type of berth provided by the marina. Consequently a transit berth includes much narrower scope of obligations of the marina, which apart from providing technically and nautically sound and safe berths, supplying the electricity, water, etc. and maintaining security in the port has no other obligations. The service of transit berth use is provided on the basis of an informal contract that is considered concluded from the moment when the vessel lands in the marina and makes fast to its berth, thereby accepting the general terms and conditions of the marina.

² The berth contract is primarily subject to the application of the Law on Obligations (Official Gazette No. 35/05, 41/08,125/11) that as a positive regulation governs the mandatory and contractual relations, provisions of the Maritime Domain and Seaports Act (Official Gazette No. 158/03, 100/04, 141/06, 38/09); Maritime Code (Official Gazette No. 17/94, 43/96, 181/2004, 76/07, 146/08, 61/11, 56/13, 26/15); Law on the Provision of Services in Tourism (Official Gazette No. 68/07, 88/10), the Consumer Protection Act (Official Gazette No. 79/07, 125/07, 79/09, 89/09, 133/09, 78/12, 56/13), and acts and the rules adopted on the basis of these laws.

On the other hand, a permanent berth is characterized by numerous more demanding obligations of marinas and it presents longer and more involved relationship of the parties in the area of defining the obligations and their fulfilment. In the permanent berth contract marinas often take on the obligation of providing the berth accommodation and the obligation of the vessels custody. The marina general terms and conditions rarely govern the service of custody of the vessel at berth. In addition to these features of permanent berth contracts, it should also be mentioned that in practice it is always made in writing for a period of time longer than a month, and as a rule, in practice the contract is usually concluded for an annual or semi-annual period of time. Also, an important feature of the contract of the permanent marina berth in which marinas undertake custody, or storing of vessels, is that they become a direct owner of the vessel at berth. The paper deals with the contractual arrangement of marina obligations under the berth contract according to standard business practices of 11 concessionaires of 32 Croatian marinas.³ The research focuses on the analysis of obligations related to nautical elements of the berth contract, as well as its part pertaining to safeguarding vessels at berth. In particular, it deals with the obligation of storing, although this obligation is not a common commitment to business practices of Croatian marinas and it is rarely governed by the general terms and conditions of Croatian marinas. Despite this, the obligation of vessels custody needs to be analyzed and considered by the researchers.⁴

³ The following documents were analyzed: General conditions on berth usage of Adriatic Croatia International Club Plc.; General terms and conditions of Trogir marina; General terms and conditions of Kaštela marina; General terms and conditions for berth accommodation in Agana marina; General terms and conditions of the Punat marina; General terms and conditions of Borik marina; General terms and conditions for vessels in nautical tourism of Lav marina; General terms and conditions for the boat in Zadar Color marina; General terms and conditions of Baotić marina; Agreement on the use of berth of Dalmacija marina; Agreement on the use of dry berth of Nauta Lamjana.

⁴ The study of the legal framework which should apply to the contractual relationship represents a scientifically relevant topic that will be discussed in a separate article.

The goal of the research is to identify and classify marina obligations and to give a concise explanation for each obligation stating its content and the function it has in achieving the purpose of the berth contract. A special emphasis in the research is given not only to the description of the obligations but also to the definition of the effect of the meaning and scope that certain obligations have on the contractual liability of marinas. Consequently, there is consideration of consequences of failure to meet any obligations and commitments. The interpretation of obligations is followed by the substantive law to be applied in the event of a dispute between the parties of the berth contract. There is a mention of all other important issues that directly affect the scope and content of each obligation, primarily on the legal issues that arise in this matter and are related to the contractual liability for damage.

2. PROVIDING PLACE FOR BERTH

The main obligation of any berth contract includes the commitment of the nautical tourism port to allow the berth user who is also the owner of a particular vessel, to use the safe berth for the vessel's accommodation for a specific period of time. Therefore, the obligation of providing the berth for use is the most important and recognizable obligation, as a basic *differentia specifica* of this legal transaction. The provision of the berth used for vessels accommodation is an essential component of all types of berth contracts including those which are concluded only for the rent of the berthing space, as well as those whose contracts apart from space renting, also include control and custody of the vessel at berth.

Provision of berth usually means that the nautical tourism ports allocate specific part of their waters, facilities and infrastructure and the corresponding port equipment to the berth users. When a sea berth is in question, it particularly refers to the part of the sea surface, pier for the access to the vessel, the anchor block and chain, with electricity and running water and the like.⁵

Although the berth space is usually designated in the contract, the user of the berth does not have

the exclusive right to the use of specific berth. Thus, the general terms and conditions of business transactions provide that marinas are authorized to move each vessel to another appropriate berth according to its needs. To move the vessel, the marina does not need the berth user's approval, but the general conditions provide for a special obligation of marinas to inform the user about the performed berth transfer.

By prescribing such business conditions marina is able to manage its berth accommodation facilities independently. The reason for moving the vessel may be of a commercial nature, however, in some cases moving the vessel may be caused by marina's performance of public duties as a concessionaire responsible for the port's safety, or having to conduct salvage operations in the port.⁶ This can be reflected to the question of liability for damage caused to the vessel during the moving operations.

2.1. Operation, safety and maintenance of berths provided for use and proper maintenance of marina infrastructure

According to analyzed terms and conditions of Croatian marina practices, one of the most important obligations of marinas is to provide the berth in sound condition, safe in technical and nautical terms and appropriate for a specific vessel with respect to the type, size and other technical characteristics of the vessel. This is a continuing obligation of marinas, which means that marinas are not only required to provide the berth that is technically and nautically safe, but this obligation also implies that for the entire duration of the contract, marina regularly checks and maintains its safety and operation. Apart from the proper operation of the berth, the marina is obliged to continuously maintain, clean and keep the port in good condition, as well as its infrastructure, buildings, installations and other port facilities. Providing a proper and safe berth and maintaining it for the duration of the contract is an obligation that must be fulfilled by marinas that observe

⁵ PADOVAN, op. cit.

⁶ A salvage operations will be considered if the marina in this particular case takes specific activities that require exceptional skills and efforts which go beyond the usual and regular activities of the marina in the performance of their professional duties and activities in the berth contract, which are aimed at assisting the vessel and property in distress.

sound business practices and rules of professional conduct. Very often, in descriptions of this obligation in general terms and conditions of our nautical tourism ports, it is stated that this obligation includes the duty of the marina to employ a sufficient number of qualified employees trained for the work related to maintenance, supervision and care of technical and nautical safety of berths.

Detailed description of this particular obligation is necessary because the berth's operation and safety is an essential component of any berth contract. Therefore, Croatian marinas pertain to fair business practice of considering the berth's sound operation in the technical and nautical sense an essential obligation of the nautical tourism port. This commitment contributes to a fair distribution of risks between the parties involved in a legal transaction, as a counterpart to this obligation, the berth users has to fit the vessels with appropriate quality mooring lines and fenders and to provide for their maintenance. In this context, it is important to emphasize that general terms and conditions provide that the nautical tourism port shall replace the mooring ropes and fenders of the vessel at berth at the expense of its user if they are not of adequate quality, or are in poor condition, or missing, and if the user does not take care of it himself after being advised to do so. This is done primarily with intention of keeping order and safety in the port.

3. VESSEL CONTROL

The special feature of the transit berth is that general terms and conditions expressly exclude the commitment to control the vessel at berth. As a rule, general terms and conditions state that the vessel during its full use of service of the transit berth is controlled by the user of the transit berth and that it is in no time, nor in any sense or part under the control of the marina. This arrangement is directly reflected to the issue of contractual liabilities of the marina. Namely, in this case, the marina is responsible solely and exclusively for technical and nautical safety and security of the berth and its equipment, and it does not assume any liability for the vessel.

By contrast, one of essential features of a permanent berth according to the common practice

of Croatian marinas is that the subject of berth contracts, apart from providing berth accommodation, is also the obligation of controlling (supervising) the vessels at berth.

The obligation to control the vessel according to the usual terms and conditions of our marinas comprises the control of the condition of the vessel and the berth. The marina performs this obligation by observing previously agreed protocols of periodical external examination of the condition of the vessel, its equipment and mooring gear. The control implies that the port of nautical tourism holds the keys and documents of the vessel.

The obligation of controlling with occasional external inspection of the vessel also includes the obligation to inform and alarm the user on adverse changes in the condition of the vessel and its equipment or regarding unauthorized boarding of the vessel, its unauthorized use or departure.

The obligation of the owner or user is to take care that the vessel is in good condition, primarily taking care of ropes and tarpaulin.

If it is agreed only to control the vessel at berth, the port of nautical tourism shall not be obliged to remove the tarpaulin, open the vessel, ventilate it, or undertake any work or repairs on the vessel.

An important feature of the obligation to control is a periodic external inspection of the vessel that involves informing and advising the user on any damaging changes.⁷

However, it should be noted that the obligation of controlling the vessel includes taking the usual prudent measures to protect the vessel from extraordinary external threat, such as adverse weather conditions, fire and the like. The marina commits to undertake these activities within the obligations of controlling vessels at berth, particularly in the framework of its activities and obligations of maintaining order in the port and proper technical, safety and other standards.⁸

Therefore, in the case of visible flooding and / or fire, the marina is obliged to intervene and take action in order to salvage the vessels and the marine property.⁹

⁷ PADOVAN, *op. cit.*

⁸ PADOVAN, *op. cit.*

⁹ Read more on the obligation of marinas to take reasonable measures necessary to preserve the vessels and equipment i.e., measures aimed at averting the danger more in *infra t. 5*

General Terms and Conditions provide that the marina as part of its obligations set out in the terms and conditions, shall be liable for damage caused to the vessel and equipment for which there is a signed contract on the use of permanent berth, provided that the damage occurred while the marina had control over the vessel only if the damage was the result of the failure of due diligence on the part of the marina.

4. CUSTODY OF THE VESSEL

The obligation of vessels custody is very rare in business practices and in general conditions of Croatian marinas. Analyses of general business conditions of Croatian marinas governing permanent berths show that almost all marinas expressly exclude obligation of permanent custody of vessels at permanent berth. This is usually emphasized in general terms by a specific provision which stipulates that the agreement does not apply to the provisions of The Law of Obligations Act (ZOO) on the contracts on custody or by explicitly pointing out that the marina is not liable for the vessel's custody.

Thus, when it comes to the sea berth, the custody of vessels is not a typical activity of Croatian marinas. It is a business policy of marinas not agreeing to the vessels custody, but to work exclusively on the basis of berth rental, or the berth rental and control of vessels at berth. Although the subject of berth contracts with elements of custody requires to be analysed separately, at this point it should be stated that when it comes to the obligations of the contract of berth, the questions of whether the custody is agreed and if so, what the obligation scope and the extent of vessels custody is, and what it covers fall among the most contentious issues.

The problem of non-unitary judicial practice in such matters is emphasized in the context of this problem. Due to the nature of the object of custody, which is the vessel at berth, the custody involves various activities. First of all, it should be noted that the scope of the obligation of vessels custody comprises those obligations that the parties have agreed to and which are described in general terms and conditions of the marina. The specific obligations relating to the custody of vessels mentioned in terms and conditions of

Croatian marinas are: to be in their custody 24 hours a day, so as to supervise the ropes provided by the owner for vessels mooring to the jetty / pontoon; conduct discharge of water from vessels by operating bilge pumps, checking whether the pumps are connected to the power supply, checking the plugs that allow the water flow from the vessel; ventilation of the vessel's interior; covering the vessel with tarpaulin supplied by the owner and in accordance with his orders and the like. Therefore, terms and conditions include the obligations that are specific to the nature of having the vessel's custody at berth, and that are reasonable and customary in fulfilling this service provided by the marina.

The scope of obligation of the vessels custody includes holding of documents and keys. However, this is not a typical obligation exclusive to the custody, but it is included in the contract of controlling the vessel at berth. The holding of vessels' documents is an obligation also in transit berth and their delivery serves the sole purpose of exercising the right of the vessel's retention in order to settle the claims of the marina if necessary.¹⁰

The retention of documents and keys in the case of permanent berth contract with the elements of controlling or custody also has two other important functions. Handing over the keys and documentation represents handing over the possession of the vessel for the purpose of its control or custody, which means fulfilling the contractual obligations, but also enables the marina to have access to the vessel in order to fulfil its obligations as concessionaire that takes care of the safety of the port.

The marina is obliged to render the service of vessel's custody observing sound business practices. A considerable level of attention is required because the marina is obliged to provide the service of custody professionally for an agreed fee. Taking reasonable and customary measures is also included in the activities of protecting the vessel against external dangers, i.e., risks that do not originate from a defect in the vessel or its

¹⁰ It is about the claims related to services of providing the berth, the measures taken at the expense of the berth user, and claims arising from damages.

equipment.¹¹ The nature of the service of vessels custody at berth does not generally include the test navigation in order to verify the operation of the engine, repair and various other interventions pertaining to the maintenance of the vessel, which would involve additional and special services apart from the services in the berth contract with elements of vessels custody. Of course, theoretically it is possible that parties include all services in one contract, i.e., a berth, custody and maintenance of vessels etc., even if this rarely happens in practice. It is important to point out that the obligation of vessels custody corresponds to the obligation of the berth user to keep and maintain the vessel and equipment of the vessel acting with appropriate care for the whole duration of the contract.

In case of failure of due diligence, the marina is authorized at the expense of berth user to take measures and actions within its powers in order to safeguard the assets and prevent losses. In terms of fulfilment of the contract and contractual liability in the event of a dispute between the parties, it should be clearly distinguished what obligations of the parties are covered by the contract of berth, and whether the custody of the vessel is included in the contract, and that liability, namely, the work that the marina has undertaken under a special authorization outside the berth contract with elements of custody or acting in emergencies without the owners' orders but at their expense.¹²

If the parties of the berth contract with elements of custody do not exclude the application of provisions of The Law of Obligations Act (ZOO) on custody, the contract will in addition to general business conditions, be the subject of application of the provisions of The Law of Obligations Act (ZOO) on custody in relation to the issues that the parties did not settle in the contract other than dispositive legal provisions on the contract and custody.¹³

¹¹ PADOVAN, op. cit.

¹² more *infra t. 5.* on taking reasonable steps necessary to preserve the vessels and equipment and to prevent the danger if the berth user does not take the necessary measures after having been informed and warned by the marina, more *infra t. 5.*

¹³ More PADOVAN, op. cit.

5. NOTIFICATION OF CHANGES ON THE VESSEL AND TAKING REASONABLE MEASURES NECESSARY TO PRESERVE THE VESSELS AND EQUIPMENT AND TO PREVENT DANGER

The contract parties are subject to the application of general principles of The Law of Obligations Act (ZOO), and one of the fundamental principles is that the participants shall co-operate for a full and proper fulfilment of obligations and exercise of rights in those obligations (The Law of Obligations Act – ZOO, Art. 5). The duty of cooperation is primarily related to the duty of notification and informing the counterparties of the facts that have impact on their contractual relationship, particularly about all the changes and hazards.

General terms and conditions applicable to the obligations of the parties in the contract on permanent berth provide that marina shall inform the berth user if they notice any changes in the vessel, equipment or mooring ropes. The purpose of prescribing this obligation is to enable the owner to determine specific measures for the preservation of objects and prevention of harmful consequences. By meeting these obligations, marinas transfer the liability to the berth user for the consequences that may arise if the vessel is in danger. In that case the logical sequence of events is that the owner of the vessel then takes, or more precisely, orders appropriate additional measures to preserve the vessel and equipment from damage, or to remove the risk that the vessel or equipment pose to other vessels or property within the marina. In fact, the owner of the vessel who is usually dislocated will make these arrangements through additional contracts with the marina or the third party.

This will require a new authorization with specific and new obligations beyond the obligations covered by the conclusion of the berth contract. The new contractual relations between the marina and the owner of the vessel are subject to the provisions of this new agreement, and additionally the provisions of The Law of Obligations Act (ZOO) in the agreement on order, or contract on provision of services, or provision of MA for vessel repair and the like.¹⁴

¹⁴ *Ibid.*

However, two other hypothetical situations are possible: 1) the owner has remained passive and did not take appropriate measures aimed at eliminating the danger to the vessel and equipment and therefore the danger that the vessel poses to other vessels or property within the marina and 2) there are circumstances in which it is necessary to urgently intervene and the marina has no time for informing and obtaining the authorization from the owner. It is logical that the marina being a direct holder of a vessel that is in danger and having the obligation of maintaining order and keeping safety in the port has, according to general terms and conditions, appropriate authority in dealing with vessels in these situations. Consequently, general business conditions of marina provide the authorization of marinas for taking reasonable measures necessary to preserve the vessels and equipment and to prevent the danger at the expense of the berth user. Herewith, it is necessary to distinguish between those measures which marinas are obliged to undertake at their own expense in order to maintain berth safety and operation. For example, if during the berth contract, an urgent intervention is required due to loosened anchor chain, the marina shall be liable and it shall be obliged to undertake necessary activities at its own expense. On the other hand, if there is a failure of the rope, its cost and responsibility lies with the owner because he is obliged to supply the vessel with quality ropes.

The Law of Obligations Act (ZOO) Art. 348 is about the liability for failure to inform the other side of the facts which influence their mutual relations. It is stipulated that the Contracting Party that is obliged to notify the other party of the facts that influence their relations is liable for the damage suffered by the other party if it was not notified in time.

In order for the obligor, in this case the marina, to be responsible for the failure of notification, the failure to inform the creditors of the facts that affect their relations must be causative to the damage.¹⁵

With the obligation to notify the other contractual party about the changes and dangers to the vessel, the marina is obliged to inform the competent

authorities about the damage to the vessel caused by other vessels and / or third parties. If it finds that the departure of the vessel has not been made in compliance with the berth user, the marina is obliged to inform the relevant national authorities immediately about the departure of the vessel and to cooperate in their further proceedings.

6. CONCLUSIONS

The provisions of general business conditions are generally structured according to the basic division of the contract on transit and permanent berths. Common to all berth contracts and their *differentia specifica* in relation to other duties of compulsory and commercial law is to provide the berth accommodation for vessels in the marina. As a rule, in the permanent berth contract, apart from the obligations to provide the berth, the marina obliges to undertake other services in relation to the vessel's berth. Therefore, both theoretical and practical aspects of any further systematization and classification of the contract of berth have an underlying differentiation based on the content and scope of other liabilities of the marina, meaning those obligations the marinas undertake apart from the obligation of providing the berth accommodation. Consequently, permanent berths can be classified according to the berth contracts with elements of control, berth contracts with elements of custody of vessels, berth contracts with elements of custody and maintenance of the vessels and the like. The marinas that have the capacity and concession license may offer repair services, maintaining of vessels and the like, and all this can be covered by a single berth contract. The complexity and importance of defining the obligations of the berth contract encompass the issue of the role, operations and characteristics of nautical tourism activities in general. It is primarily a business decision of marinas which obligations they undertake and regulate in their general conditions. In that view it is necessary to point out, that currently, according to business practices of Croatian marinas, general business terms and conditions rarely include the obligation of vessels custody at berth.

From a legal point of view, it is important to understand and acknowledge that it is necessary to accurately distinguish between the obligations

¹⁵ Crnić Ivica, Law of Obligations, notes, comments, jurisprudence and an alphabetical index of terms, Organizator, Zagreb, 2010, p. 578.

which the marina is obliged to carry out in the context of fulfilling the berth contract and of those commitments and obligations subsequently undertaken on the basis of a new mandate and a separate agreement with the owner of the vessel, as well as those obligations taken when it was necessary, and the owner has remained passive, or in an emergency situation when there is no time to obtain a mandate from the owner.

In this regard, it is important to distinguish and determine the boundaries within the groups of commitments, which can be particularly important in a dispute regarding the contract of berth when an issue arises about the obligation of the marina and what practical measures it was supposed to undertake in fulfilling the particular contract.

The developed market of nautical tourism requires a balanced protection of economic and legal interests of both marinas and berth users. This is among other things achieved by clear and precise definition of general conditions in terms of obligations of the parties. Bearing in mind the contemporary conditions governing the nautical tourism and trends of its growth, the paper puts forward the thesis of the need for standardization of the provisions on obligations of parties in specific general conditions of marinas in a way that they are categorised by the criteria of the scope and content of services that marinas provide.

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