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**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**

INTRODUCTION

- Frequent conflict of competence *ratione materiae* between the courts of general civil jurisdiction and commercial courts
- Legal uncertainty, lack of uniformity of judicial practice, prolonged average time of proceedings, financial burden...
- Negative effect on the marina operator's business
- Strategic interest in further development of nautical tourism
- Goal: to identify the reasons for the frequent conflict, clarify the relevant rules of positive law, make *de lege ferenda* proposals for improvement
- Subject matter of analysis: positive law provisions, judicial practice, (lacking) legal doctrine

LEGAL DEFINITIONS OF SHIP, YACHT AND BOAT

Croatian Maritime Code

- **Vessel** (*Cro. plovni objekt*): maritime object intended for navigation at sea. It may be a **ship**, warship, submarine, **yacht** or **boat** (CMC, Art. 5, para.1, subpara. 2 and 3)
- **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)
- **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)
- **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.



LEGAL DEFINITIONS OF SHIP, YACHT AND BOAT

Ship

- i. $L > 12\text{m}$ and $\text{GRT} > 15\text{t}$, or
- ii. $\text{CC} > 12$ passengers

Recreational boat

- i. $2,5\text{m} < L \leq 12\text{m}$ and $\text{CC} \leq 12$ passengers, or
- ii. $L < 2,5\text{ m}$ and $\text{EP} > 5\text{ Kw}$ and $\text{CC} \leq 2$ passengers
- GRT is not determinative

Non-recreational boat

(transport, works, professional fishing, public service etc.)

- i. $L > 2,5\text{m}$ and $\text{CC} \leq 12$ passengers
 - if $L > 12\text{m}$, then $\text{GRT} \leq 15\text{t}$ and $\text{CC} \leq 12$ passengers, or
- ii. $L < 2,5\text{ m}$ and $\text{EP} > 5\text{ Kw}$

Yacht

(always recreational)

- i. $L > 12\text{m}$ and $\text{CC} \leq 12$ passengers
 - GRT is not determinative

LEGAL DEFINITIONS OF SHIP, YACHT AND BOAT

SCOPE OF APPLICATION OF THE CMC:

- 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).
 - provisions applying to ships shall only apply to other types of maritime objects, other than yachts, if such scope of application is expressly prescribed by the Code (CMC, Art. 2, para. 2).
 - Therefore: CMC shall apply to boats only when it is so explicitly prescribed by the Code
- *CMC does not apply to boat ownership, and to enforcement and securities on boats*
- Effect on the qualification of maritime disputes as disputes governed by maritime law (CPA)

Do the marina operator's berthing contracts fall under the commercial courts' jurisdiction over maritime cases?

*General remarks on jurisdiction *ratione materiae* over maritime disputes:*

- Traditionally, most of the maritime cases fall under the jurisdiction of commercial courts.
- specific, profound knowledge and understanding of maritime law
- Peculiar legal concepts departing from general civil and commercial law
- Experience in adjudicating maritime disputes
- High values, parties professionals
- International unification of maritime law, uniform application of conventions
- Relatively rare maritime disputes
- Reasons of economy
- Specialised forum desired

Do the marina operator's berthing contracts fall under the commercial courts' jurisdiction over maritime cases?

CPA, Art. 34.b, para. 1, subpara 6:

- **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)**
- three criteria defining the meaning of *maritime dispute* :
 - the dispute relates to a **ship**, or
 - the dispute relates to **navigation** (maritime or inland), or
 - the dispute is subject to **maritime law**.
- The list is exhaustive, but the criteria are not cumulative.

Do the marina operator's berthing contracts fall under the commercial courts' jurisdiction over maritime cases?

1. Disputes relating to ships

- ship in this context - widely interpreted to encompass all types of vessels that can qualify as ships and as yachts under CMC
- follows from the legal definition of yacht (CMC, Art. 5, para 1, subpara 21) the provision of CMC, Art. 2, para. 1, prescribing the application of the provisions of CMC relating to ships equally to yachts
- boats do not qualify as ships or yachts under CMC, and do not fall within the meaning of ship as envisaged by the CPA
- Original intention of lawmaker (boats are small craft commercially irrelevant – today the picture has changed)
- What is the difference between sailboat of 39 feet and of 40 feet, if both are used for private purposes?

Do the marina operator's berthing contracts fall under the commercial courts' jurisdiction over maritime cases?

Proposal to amend CMC, Art. 2, as follows:

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

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."

Do the marina operator's berthing contracts fall under the commercial courts' jurisdiction over maritime cases?

2. Disputes governed by maritime law

- maritime law: all that is contained in the CMC and in all other legislation dealing with maritime and inland navigation, including that relating to ports, like Maritime Domain and Seaports Act (in further text: MDSA) with the bylaws, and all international maritime conventions
- disputes to which maritime law does not apply, but related to ships or navigation (maritime disputes), subject to general civil law, e.g., sale and purchase or financial leasing of a ship or a yacht governed by general contract law, a claim for damage caused to the vessel by a land vehicle, crane or similar object governed by general tort law
- marina operators' berthing contracts – no maritime law rules apply, innominate contracts governed by general contract law, the contents and the scope of marina operator's services vary (nautical berth, dry berth, safeguarding, maintenance, care, engine servicing, lifting and launching, etc.)
- If such contract relates to a yacht –maritime dispute as it relates to a yacht (ship)
- If such contract is for a boat, then the only way for such case to qualify as maritime dispute is to interpret it as one relating to navigation.

Do the marina operator's berthing contracts fall under the commercial courts' jurisdiction over maritime cases?

3. Disputes related to navigation

Navigation – not defined; subject to judicial interpretation; lack of uniformity of judicial interpretation; conflict of jurisdiction;

Literally, navigation means an act of movement of a vessel over an area of water

True meaning – teleological interpretation to encompass nautical activities + all commercial activities + underlying legal relationships

Berthing, anchoring, mooring – nautical activities – contract of berth?

Dry berth? Related to navigation? Dry berth i.r.o..a yacht? Dry berth i.r.o. boat?

It is submitted: all marina operator's berthing contracts should be subject to the same jurisdiction *ratione materiae* (commercial courts)

Review of the relevant judicial practice

- *Dispute relating to a yacht is a maritime dispute:*
 - SC Gr 415/1990, 26 Dec. 1990: The classification of ships and yachts to certain subtypes, in particular according to their uses, is not decisive of the choice of the competent court *ratione materiae* (yacht used for sports & leisure; conflict of jurisdiction between municipal and commercial court; SC relying on legal definition of yacht in MINA77 held that yacht is considered a ship and consequently the competent court is commercial court)
 - SC Revt 90/2006, 5 Sept. 2007: The court held that 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 CPA, Art. 34.b, para. 1, subpara. 6. The Court emphasised that, within the meaning of the relevant provisions of the CMC, yacht is considered a ship, and that consequently the competent court *ratione materiae* is the commercial court of first instance.

Review of the relevant judicial practice

Dispute relating to a yacht is a maritime dispute:

- SC Gr 146/1998-2, 1 Oct. 1998: 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
- County court in Zagreb, Gžn-296/11-3, 15 Feb. 2011: a case involving a yacht damaged whilst on dry berth in a marina; although the claimant yacht owner was a natural person, the county 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
- Similar decisions are those establishing jurisdiction of municipal courts in the dispute relating to a claim for damage to a boat (SC, R. 144/81, 10 June 1981), dispute relating to the sale of a rowing boat, (SC, R. 118/83, 12 May 1983), dispute arising from a contract of repair of a boat (SC, R. 27/81, 25 March 1981)

Review of the relevant judicial practice

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

- High Commercial Court, Pž 1739/05-3, 22 Sept. 2006: deciding on the conflict of jurisdiction *ratione materiae*, in a dispute relating to damage to 11,49 m long sailboat whilst on berth in a marina, the court held that there was no subject matter jurisdiction of commercial courts as prescribed by the CPA 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.

Review of the relevant judicial practice

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

- High Commercial Court, Pž 8130/03-3, 22 Nov. 2006: reasoning of the judgement on the merits, 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 (consumer contract):

"[...] 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. [...]"

Review of the relevant judicial practice

[...] 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 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.”

CONCLUSIONS

- the main reason for the frequent conflict of jurisdiction:
 - lack of uniform interpretation of the CPA, Art. 34.b, para. 1, subpara 6 combined with the relevant provisions of the CMC (the legal definitions of the terms vessel, ship, yacht and boat and the scope of application of the Code)
- CPA confers the jurisdiction over maritime disputes to the specialised commercial courts
- Maritime disputes are all those related to ships and navigation and those to which maritime law applies
- The prevailing judicial practice is that the term ship should include all types of ships and yachts, but not the boats

CONCLUSIONS

- Contract of berth is for a yacht - commercial courts' jurisdiction (maritime dispute)
- When the contract of berth is for a boat,
 - Is it governed by maritime law? No
 - Is related to navigation?
- „NAVIGATION“ should be understood widely: berthing of a vessel is related to navigation, and the contract of berth should therefore also be.
- Marina operator's berthing contracts - maritime in nature and subject to the jurisdiction of commercial courts
- proposal to amend the CMC, Art. 2 to place the boats and yachts in the same category regarding the scope of application of the Code.
- The intervention would result in the inclusion of all disputes relating to boats under the jurisdiction *ratione materiae* of commercial courts.
- In line with the policy of subjecting the disputes with maritime background to the competence of specialised courts, in favour of legal certainty and uniformity of judicial practice.

Thank you for the attention...

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