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STANDARD BERTHING CONTRACT MODELS FOR CROATIAN MARINAS AS A WAY FORWARD

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INTRODUCTION



➤ Research under the DELICROMAR project has shown:

- Croatian marina operator berthing contracts have not reached such level of similarity to be recognized as standard contracts
- Theory and practice agree that standardisation of the general terms and conditions of marina operator berthing contracts in Croatia is possible and desirable (legal certainty)

➤ Important result of DELICROMAR project:

- Proposed standard marina operator general terms and conditions (GTC) of berthing contracts and
- Proposed standard berthing contract models



➤ STANDARD GENERAL TERMS AND CONDITIONS

- I. GTC regulating permanent berth (annual berth) for all except chartering companies
- II. GTC regulating permanent berth (annual berth) for chartering companies
- III. GTC for transit berth

➤ STANDARD BERTHING CONTRACT MODELS

- I. Berth rental or dry berth rental
- II. Berth rental or dry berth rental and supervision of the vessel on berth
- III. Berth rental or dry berth rental and supervision of the vessel on berth + additional services and works
- IV. Berth rental or dry berth rental + additional services and works

CONTRACT FORM – GENERAL PROVISIONS



- All contract models contain general provisions – information on marina, user, vessel, berth, contract period, berth price,
- GTC follow the contract provisions – the first group of GTC clauses defines these essential elements of berthing contract,
- Special clause regarding *the user of berth*: „In case the user of berth is not the registered owner of the Vessel, it is presumed that the user of berth acts in his own name and for the account of the registered owner of the vessel and of the hypothecary creditor and that they are jointly and severally liable for the obligations under the berth contract.“

CONTRACT FORM – CONTRACTED SERVICES



- In this part the 4 berth contract models vary relating to the package of the contracted services
- Description of the respective services serves as guideline for drafting the exact wording of the respective clauses.
- Additional services listed in the contract models are exemplary: bilge water control, draining rainwater, battery charging, cleaning, hull washing, covering the vessel with tarpaulin, travel lift operations, etc.
- Each marina defines a list of services it offers – the essential element of the contract is only the provision of a safe berthing place, other services are optional
- It is recommended that each marina precisely defines the services it offers and clearly determines what exactly would pose a breach of its contractual obligation – marina operator's contractual liability

MARINA OPERATOR'S OBLIGATIONS – PROVIDING AND MAINTAINING A SAFE BERTH

- Providing a safe berth
- Maintaining berth in a safe and sound condition
- Maintenance of the port, its infrastructure, buildings and premises, safety and order in the port, supply of electricity and fresh water, etc.



MARINA OPERATOR'S OBLIGATIONS – SUPERVISION OF THE VESSEL ON BERTH



- External inspection of the vessel from the pier, checking the condition of the vessel and its equipment (control of the water-line, fenders, berthing ropes, etc.) – by marina mariners, according to the marina operator's internal protocols,
- Security supervision of the vessel aimed at prevention of criminal offences and trespasses against the property and persons in the marina – can be entrusted to professional security guards,
- GTC wording allows for the application of various new technologies in the process of vessel supervision, each marina should accommodate the description of the contractual service to its protocols and technical and human resources.

MARINA OPERATOR'S OBLIGATIONS – SUPERVISION OF THE VESSEL ON BERTH

- GTC precisely treat the transfer of risk from the user of berth to the marina operator and vice versa in terms of vessel supervision by defining when the marina operator's obligation to supervise the vessel commences and when it ends – 3 options provided, marina can choose the one that best corresponds to its practice.
- GTC provide that the obligation to supervise the vessel on berth does not qualify as bailment/deposit/custody of the vessel and that it does not presume transfer of possession over the vessel – exclusion of the rules on the contract of deposit – wrong connotations about marina berthing contract eliminated.



MARINA OPERATOR'S OBLIGATIONS – ADDITIONAL SERVICES



- Marina operator's obligations and liability should be assessed according to the legal nature of the particular additional service – adequate application of the legal provisions on particular nominate contracts – e.g. battery charging, cleaning, washing, etc. are subject to the legal provisions on service contracts (*locatio conductio operis*).
- Recommendation – vessel maintenance, servicing, and similar shiprepair services and works should be contracted separately – special contract – subject to the provisions of the Maritime Code regulating the contract of ship repair.

MARINA OPERATOR'S LIABILITY – IN GENERAL

- GTC contain special clauses on contractual liability for:
 - deficiencies of berth,
 - vessel supervision
 - additional services.

- Different rules on liability for consumer contracts and non-consumer contracts
 - **Non-consumer contracts** – marina is liable if it is proven that the damage is a consequence of a wilful misconduct or gross negligence of the marina operator or its employees,
 - **Consumer contracts** – marina is liable for negligence (mandatory rules forbid the exclusion of liability for negligence).



MARINA OPERATOR'S LIABILITY FOR BERTH DEFICIENCIES

- If damage/loss arose from the collapse or breaking of moorings, chains, anchor block, pier, or other berthing equipment or infrastructure
- Consumer and non-consumer contracts – marina operator's culpability and liability for damage/loss is presumed.
- If damage/ loss arose from other deficiencies of berth (e.g. access to the berth, fire-fighting system, distance between the vessels on berth, arrangement of berths, electrical pedestals, etc.):
- **Consumer contracts** – marina operator's culpability is presumed
- **Non-consumer contracts** – burden of proof is on the user – he/she must prove that 1. damage arose in the marina, 2. casual link between loss/damage and deficiency o berth, 3. marina's gross negligence or wilful misconduct



MARINA OPERATOR'S LIABILITY FOR BREACH OF VESSEL SUPERVISION



➤ Consumer contracts – user must prove:

- 1. that damage arose whilst the vessel was under the marina's supervision,
- 2. casual link between the loss/damage and a default in supervision.

➤ Non-consumer contracts – user must prove:

- 1. that loss/damage arose whilst the vessel was under the marina's supervision,
- 2. casual link between loss/damage and a default in supervision and
- 3. that the default in supervision amounts to gross negligence or wilful misconduct on the part of the marina.

LIABILITY FOR ADDITIONAL SERVICES

➤ Consumer contract – the user must prove:

- 1. that loss/damage arose in connection with the performance of additional services
- 2. casual link between the loss/damage and the act or default in performing additional service

➤ Non-consumer contract – the user must prove:

- 1. that damage arose in connection with the performance of additional services,
- 2. casual link between the loss/damage and the act or default in performing additional service
- 3. that loss/damage is a consequence of marina's wilful misconduct or gross negligence.



MARINA'S EXONERATION



➤ Marina will be exonerated:

- by relying on one (or more) of the exonerating reasons expressly provided in the exoneration clauses (exhaustive list)
 - when marina proves one of the exonerating reasons the burden of proof is transferred to the user who may establish that loss/damage is a consequence of marina's culpability (the level of proven culpability must be in accordance with the GTC provisions regulating the marina operator's liability - depends on the type of marina service and on the type of contract – consumer or non-consumer)
- marina may still exonerate itself by proving that it acted with due diligence

LIMITATION OF MARINA OPERATOR'S LIABILITY

- GTC provide for a limitation of liability up to an amount defined by berthing contract applying per occurrence and per claimant,
- Limitation of liability may be applied only in non-consumer contracts (due to mandatory legal rules of the Obligations Act)



USER'S OBLIGATIONS

USE OF BERTH ACCORDING TO THE CONTRACT AND ITS PURPOSE

- Due respect of all positive rules and regulations on the safety of navigation, environmental protection, maintenance of port order, etc.
- moor the vessel safely and in proper manner
- when entering and leaving the port obey the marina's instructions (if given) – but liability for navigational fault is always on the user of berth (maritime law)

MAINTENANCE OF THE VESSEL AND ITS EQUIPMENT

- to maintain the vessel and its equipment in a seaworthy condition,
- to equip the vessel with appropriate berthing ropes, fenders, tarpaulin, firefighting equipment etc.
- continuous obligation
- breach of this obligation is material to the contract



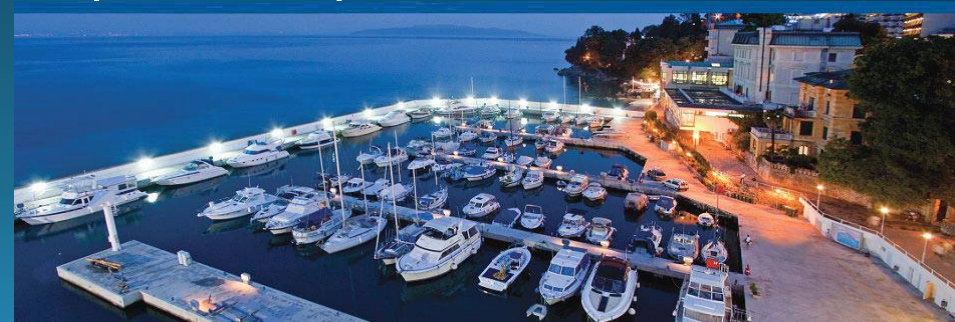
USER'S OBLIGATIONS – PERFORMING SERVICE WORKS IN THE MARINA

- For performing service works, shiprepair, vessel maintenance and similar works in the marina (by third parties) the user:

Option 1 – must use exclusively the services of those providers who have a business cooperation agreement with the marina

Option 2 – may use third party provider services under special conditions:

- Where and when?
- When can marina refuse to give a third party service provider access to the marina premises?



USER'S OBLIGATIONS



➤ DOCUMENTATION

User is obliged to deliver the relevant documentation and keep it updated throughout the contract:

- Vessel certificates,
- Documents identifying the registered owner and proving the right to possession of the vessel; documents proving that the user is empowered to act for the account of the registered owner and hypothecary creditor; powers of attorney for third persons entitled to board the vessel; etc.
- Valid insurance policies and certificates for the vessel.

➤ VESSEL INSURANCE

- Hull and machinery,
- Compulsory insurance of liability
- Voluntary insurance of third party liability at least up to 1.000.000 EUR per occurrence

USER'S OBLIGATIONS

BERTHING FEE

- Amounts, due dates, manner of payment etc. should be defined by each marina in the berthing contract form
- GTC do not contain special provisions, the issue is left to each marina to regulate as practice varies considerably.

OTHER OBLIGATIONS OF THE USER

- Especially important: the user must ensure that crew and other persons empowered to board the vessel respect the GTC, berth contract, rules on port order and other marina rules.



USER'S LIABILITY



- Responsible for his/her own act and default as well as for those of his crew and other persons empowered to board the vessel, including third party service providers.
- Obligated to fully compensate for damage/loss resulting from the breach of contractual obligations:
 - Damage to property belonging to the marina or third parties,
 - Death, injury, health impairment of marina staff or third parties,
 - Environmental pollution.

EMERGENCY INTERVENTION



- Marina is entitled to undertake emergency intervention in respect of the vessel without prior approval of the user – not an obligation, but a right, it arises from the public law competencies and powers of the marina operator as a concessionaire of the port to cater for the safety and order in the port.

RIGHT OF RETENTION

- Marina has a right to retain the vessel in the port until the full settlement of all outstanding claims against the user:
 - berthing fee;
 - other claims arising from the berthing contract;
 - claims in relation to the vessel remaining in the port.
- Marina's right to enter into possession of the vessel for the purpose of entertaining the right of retention (otherwise there is no possession by marina under berthing contract, even if the vessel supervision is contracted).



TERMINATION AND CANCELLATION



- GTC provide a list of material breaches of the contract that allow a unilateral termination of the contract.
- Cancellation is allowed to both parties without stating a reason, but subject to a notice period and to a penalty – the clause has a nature of a guideline
- GTC regulate
 - the user's obligation to remove the vessel from the marina
 - the application of daily berth price for the period when the vessel remains in the port,
 - risk of loss/damage to the vessel is entirely on the user

CONCLUSION

➤ The effect of the standardised GTC and berth contract models:

- Clarity and uniform interpretation of the contract,
- Simpler procedure of contract conclusion,
- Contribution to the quality of service in terms of legal certainty,
- Solution to the problems identified in practice – imprecise and frequently badly structured GTCs of individual marina operators, lacking provisions on important issues, in particular regarding the marina operator's obligations and liability
- Well-balanced rights and obligations of the contract parties, adjusted to the current business practice and mandatory legal norms.

➤ GTC and berth contract models:

- adjusted to the newly proposed provisions of the Maritime Code on berthing contracts
- fairly reflect the features and specificities of berthing contracts that have been developed in the practice of Croatian marinas,
- Standardisation of GTC and berthing contract models + special law provisions on berthing contracts present a big step forward in favour of legal certainty regarding liability arising from berthing contracts, predictability of legal protection and unification of judicial practice.