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ARE THERE ANY ELEMENTS OF THE CONTRACT OF CUSTODY IN THE MARINA OPERATORS' CONTRACT OF BERTH?

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Developing a Modern Legal and Insurance Regime for Croatian Marinas - Enhancing Competitiveness, Safety, Security and Marine Environmental Standards



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INTRODUCTION

- Field research was made in 32 Croatian marinas, which included data collection through questionnaires and personal interviews;
 - General terms and conditions and standard contract terms applied by 38 marinas, dry marinas and boat storages have been analysed;
 - Court practice has been studied in disputes arising from the contracts of berth.
- There is a diametrically opposite approach by the courts, on one hand and the marinas, on the other, related to the responsibility for the care and custody of the vessel on berth.



INTRODUCTION

➤ The aim of the research is to establish:

1. Are there any elements of care and custody of the vessel on berth in the contracts of berth applicable in the business practice of Croatian marinas?
2. If the custody of the vessel is engaged, what are the characteristics and special features of the custody of the vessel?
3. When and to what extent should the general provisions of the Croatian Obligations Act relating to the contract of custody apply to the contract of berth in a marina?



CHARACTERISTICS OF THE CONTRACT OF BERTH

- Atypical, innominate, informal contract, marina operators' general terms and conditions are not uniform and standardised, and the central problem of this matter is the lack of precision in the language and its frequent ambiguity.
- The Contract of berth does not have a continuous and stable business and court practice.
 - At the beginning of the development of nautical tourism (30 years ago), the marinas had relatively smaller accommodation capacities, the vessels were of simpler technical features, there was no expensive and sophisticated equipment, the probability of damage was smaller, marinas took over the obligation to have custody of the vessel on berth,
 - According to the current business practice and offer, most Croatian marinas do not take responsibility for the vessel's custody, but they function on the basis of the contract of berth rental and control of the vessel on berth. There is a multiple increase in the number of berths and vessels (today larger marinas receive more than 500 vessels and the largest ones over 1000), the technical characteristics, the size and value of the vessel have changed, because of the scope and nature of custody of a vessel, it is not economically justified for a marina to take responsibility for the custody.

MODELS OF THE CONTRACT OF BERTH IN THE BUSINESS PRACTICE OF CROATIAN MARINAS

- I. Berth rental or dry berth rental
- II. Berth rental or dry berth rental and control of the vessel on berth
 - A) Berth rental and control of the vessel on berth without implicit elements of custody
 - B) Berth rental and control of the vessel on berth with implicit elements of custody
- III. Berth rental, care and custody of the vessel
 - A) Berth rental and control of the vessel with the option of contracting boat care package of services including explicit elements of care and custody
 - B) Storage of the vessel in dry marinas, boat storages or halls, including explicit elements of care and custody of the vessel

ARE THERE ANY ELEMENTS OF CUSTODY OF THE VESSEL ON BERTH IN THE CONTRACTS OF BERTH APPLIED IN THE BUSINESS PRACTICE OF CROATIAN MARINAS?

- Elements of custody are present only in one of three models of the contract of berth, and that one is applied in only few marinas. It is more frequently present in the operation of dry marinas, boat storages and custody of the vessels in the indoor spaces (premises).

Reasons:

- different technological process of the service of vessel's custody whether at sea or on land (open air) than in the indoor space, complex tasks, much larger volume of work, different risk and liability allocation,
- The usual practice is that many yacht owners themselves arrange custody, care and maintenance of the vessel with special natural or legal persons, so-called "boat care" contracts and there is also employment of permanent crew on vessels of a greater value. Such arrangements are separate from marina services and the contract of berth between the user of berth and the marina.

IF THE CUSTODY OF THE VESSEL ON BERTH IS AGREED, WHICH ARE THE CHARACTERISTICS OF THE CUSTODY OF THE VESSEL ON BERTH?

- In the legal theory and court practice there is a questionable and insufficiently elaborated standpoint regarding the features of the custody of the vessel on berth.



IF THE CUSTODY OF THE VESSEL ON BERTH IS AGREED, WHICH ARE THE CHARACTERISTICS OF THE CUSTODY OF THE VESSEL ON BERTH?

➤ An example from the court practice of the Commercial Court in Rijeka P-2590/1994, of 28th of February 2007.

- ❖ The Court held that the marina, according to the contract of berth, was obliged to take all the actions necessary that the vessel as an object under custody be redelivered to the owner in the state in which it was given into the custody of the marina.
- ❖ According to the Court's reasoning, the marina was obliged to carry out the conservation of the engine, the removal of the battery from the vessel and its storage in a dry indoor space, with occasional recharging, as part of the fulfilment of the obligation to take care and custody of the vessel. All the aforementioned actions had to be undertaken without the instructions and written orders of the owner of the vessel because those are considered the basic activities of the marina, and furthermore, the standard of care of a good entrepreneur is required in the performance of the custody.
- ❖ The Court applied the provisions of the Croatian Obligations Act regulating the contract of custody.



IF THE CUSTODY OF THE VESSEL ON BERTH IS AGREED, WHICH ARE THE CHARACTERISTICS OF THE CUSTODY OF THE VESSEL ON BERTH?



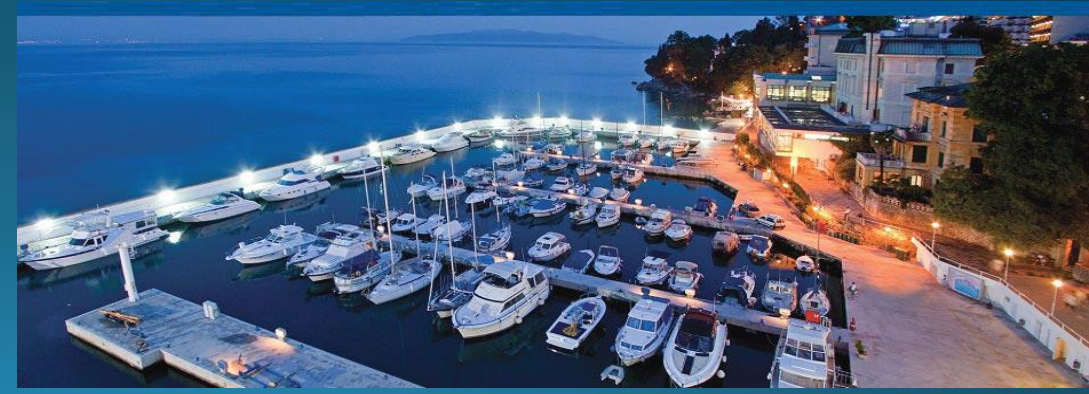
➤ Comment and critique:

- ❖ Maintenance and servicing of the vessels and engines are not the basic business activities of the marina, but exclusively additional services that can be offered and provided along with the basic service of renting berths for the accommodation of vessels. In many marinas these services are not even offered by the marina operator; the fact is also reflected in the Ordinance on Classification and Categorization of Nautical Tourism Ports prescribing the minimum conditions to be met by the ports of nautical tourism.
- ❖ This example shows that domestic courts do not recognize the fact that there is a whole spectrum of various services provided by marina operators.
- ❖ Custody is neither basic nor typical activity of the marina and is not a usual ingredient of the contract of berth. The essential element of any contract of berth is purely the obligation to provide a place for (nautically safe) berth.

IF THE CUSTODY OF THE VESSEL ON BERTH IS AGREED, WHICH ARE THE CHARACTERISTICS OF THE CUSTODY OF THE VESSEL ON BERTH?

➤ There are a number of features of a contract of berth reflected in the contents and scope of the obligation of custody of the vessel, which are specific in comparison to the general contract of custody.

- According to the concept and purpose of the contract of berth, the task of the marina is to provide a technically and nautically safe berth; the corresponding obligation of the owner of the vessel is to keep and maintain the vessel in a seaworthy condition during the entire contract, to take care of the marine ropes, battles, fairleads, fenders, proper operation of the equipment etc;



IF THE CUSTODY OF THE VESSEL ON BERTH IS AGREED, WHICH ARE THE CHARACTERISTICS OF THE CUSTODY OF THE VESSEL ON BERTH?

- During the contract of berth including custody, the owner maintains the right to use the vessel (sail or stay on it) at any time of his choice;
- Marina operator cannot have exclusive control over the vessel on berth because of the principle of the open access to the maritime domain, including users of other vessels in the marina, or other services offered within the marina, or third persons;
- Specificities of the vessel as an object of custody and the place where the custody is normally performed (exposure to humidity, salt, wind, freezing, impact on machinery, equipment, batteries, vessel's electronics, complexity of the vessel and its equipment);



IF THE CUSTODY OF THE VESSEL ON BERTH IS AGREED, WHICH ARE THE CHARACTERISTICS OF THE CUSTODY OF THE VESSEL ON BERTH?

- Delivery of a vessel into the custody is not fixed to a single moment of fulfillment of a one-time contractual obligation, as is the case with the classical contract of custody - in practice there is no formal redelivery and no survey of the state of the vessel at each unmooring and mooring;
- The place for berth is designated but the owner of the vessel does not have the exclusive right to use a specific berth, the marina operator may designate another adequate berth unilaterally at any time and may move the vessel to another berth independently from the owner. The court practice confirmed the view that by signing a contract of the use of berth, the user does not acquire the right to use a particular berth, but the right to a safe berth within the marina (Commercial court PŽ-8130/03 of 22nd of November 2016).

TO WHAT EXTENT SHOULD THE PROVISIONS OF THE CROATIAN OBLIGATIONS ACT RELATING TO THE CONTRACT OF CUSTODY APPLY TO THE CONTRACT OF BERTH?

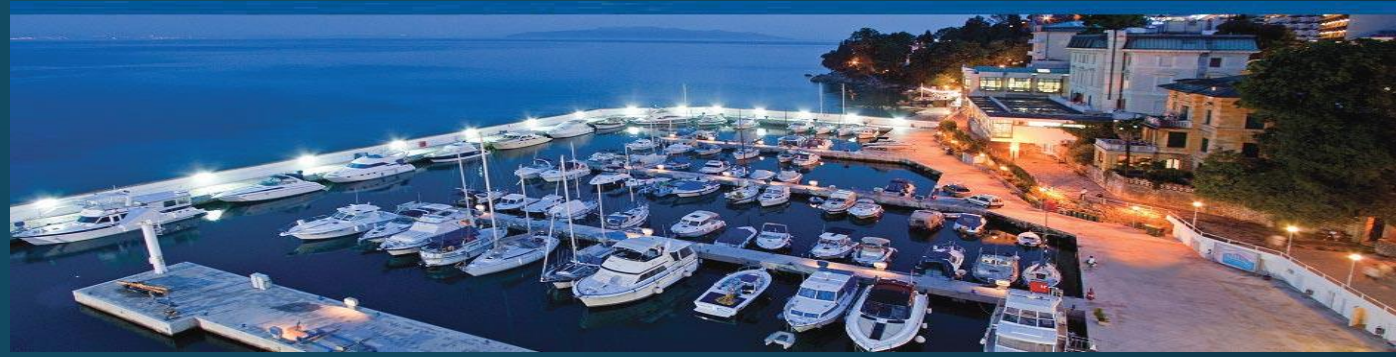
- Specific qualification of the contract of berth is not the custody of the vessel on berth but primarily providing a place for berth and control of the condition of berths and vessels. It is therefore important to consider that there should be no compulsory and unfounded application of the provisions of the Obligations Act regulating the contract of custody to the contract of berth.



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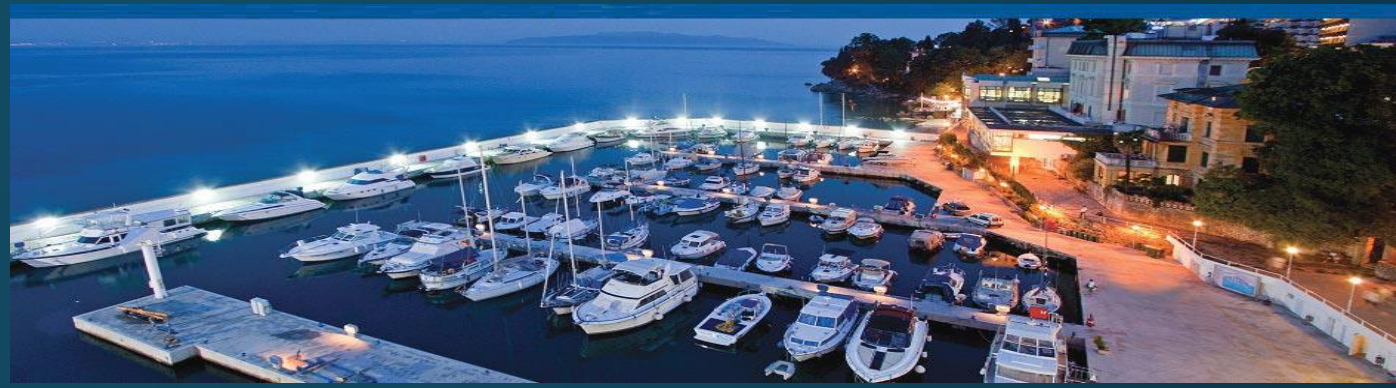
- If custody is expressly contracted, the analogy of the contract of berth containing the elements of custody and the general contract of custody is possible in a very limited segment. The contractual arrangement of the contract of berth is largely different from the contractual arrangement of the contract of custody regulated by the Croatian Obligations Act, not only on the level of individual solutions but also on the concept of their construction.
- If the application of the Croatian Obligations Act regulating custody is made on the contract of berth containing the elements of custody, its interpretation should be adjusted to the purpose, aim and particularities of the contract of berth containing the elements of custody of the vessel on berth.

CONCLUSION



- In the business practice of the Croatian marinas, the most commonly used models of the contract of berth are a) berth rental and b) berth rental including control of the vessel on berth. The usual marina operator's obligation relating to the vessel is not the custody in the sense that it is provided by the traditional contract of care and custody.
- If the contract of berth explicitly includes the obligation of custody, then there are numerous specific qualities in relation to the contract of berth, so if the provisions of the Croatian Obligations Act regulating the contract of custody applies, their interpretation needs to be adapted to the purpose, aim and particularities of the contract of berth including the elements of custody of the vessel on berth.

CONCLUSION



- An important problem in practice are imprecise and insufficiently elaborated marina operators' general terms and conditions. We believe that the improvement of the legal framework for the contracts of berth should go in the direction of standardizing the general terms of business and the development of a model of standard general operational conditions of Croatian nautical ports, in which the obligations and contractual responsibility will be adjusted to the particularities of the contract of berth and especially those elements arising from the particularities of maritime risks to which the vessel on berth is exposed to, the characteristics of the vessel and the purpose of the contract of berth.