# Subordinate Application of the General Rules and Provisions of Mandatory Law to Nautical Berth Contracts in the Maritime Code

Miho Baće[1], Nikola Mandić[2]

The authors of this paper focus on the nautical berth contract prescribed by the Maritime Code (hereinafter: MC).[1] Despite the extensive regulatory coverage of all economic and legal circumstances that may arise during the term of the nautical berth contract, there are practical, contractual, and consequently legal gaps that may occur when deciding on the rights and interests of the parties. It is important to note that the context of rights and obligations under the nautical berth contract is completely different from a nautical berth contract where the supervision of the vessel is agreed upon. Contracts covered by this research are contracts concluded under Article 673. j, paragraph 1, and Article 673.l of the MC, which regulate the obligation of the service provider to make available a berth at sea or on land to the user, to accommodate a specific yacht or boat together with persons staying on such vessel. The aim of this paper is to point out that, in cases of contractual gaps or uncertainties, the provisions of general rules of mandatory and contractual law can be applied in a subordinate manner.Thus, the paper analyses the application of the rules of the Civil Obligations Act (hereinafter: COA)[2] to nautical berth contracts and other matters beyond the contracts regulated by the MC. Although the MC does not envisage the subordinate application of certain COA rules, their application arises from the traditional general and special legal regulation of contractual and non-contractual liability for damages, which is often the most common contentious relationship in nautical operations. Therefore, various COA rules can be applied when deciding on the rights and obligations arising from nautical transactions. Primarily, these are general mandatory law rules applicable to contractual and non-contractual relations and the general rules governing contractual relationships. In addition to these rules, which are the focus of this paper, other general non-contractual rules and the rules concerning specific contracts may also be the subject of further research and study.

**KEYWORDS**
~ Nautical berth contract
~ Nautical berth contract with vessel supervision
~ Provisions of the general rules of mandatory and contractual law

[1] University of Dubrovnik, Maritime Department, Dubrovnik, Croatia
[2] University of Split, Faculty of Maritime Studies, Split, Croatia
e-mail: miho.bace2@gmail.com
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[1] Maritime Code, Official Gazette No. 181/04, 76/07, 146/08, 61/11, 56/13, 26/15, 17/19.
[2] Civil Obligations Act, Official Gazette, No. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22.

## 1. INTRODUCTION

The nautical berth contract in Croatian law is a specific and legally regulated contract, i.e. a contract specified by law. It is a formal, bilateral, consensual, and payable contract. The legal norms prescribed by the provisions of the Maritime Code which regulate the nautical berth contract, regulate all the elements or features of the contract as a contract regulated by law. These provisions contained in the Maritime Code are generally to be regarded as dispositive legal norms unless a different conclusion arises from the interpretation of a particular norm.

The authors from Croatian legal theory, who emphasize that the nautical berth contract became a designated contract in Croatian law with the entry into force of the new Maritime Code in 2019[3], highlight the importance of regulating this contract in Croatian legislation. They point out that such regulation will provide legal certainty and ensure judicial consistency in assessing contractual rights and obligations.

Please note that the research focused on the so-called "basic" nautical berth contract, which includes the obligation of the service provider to assign and maintain an unsupervised berth. This focus was mainly chosen because this contract constitutes the majority of nautical berth contracts, while the elements of supervision make contracts distinct, i.e., their *differenta specifica* differ, and therefore the rights and obligations of the contracting parties differ as well.

The provisions of other named, or legally regulated, types of contracts cannot generally be fully applied to the nautical berth contract as a special type regulated by law. However, certain provisions of other types of designated contracts may be applied by analogy[4] to the contractual relationships arising from the nautical berth contract in specific cases, “under certain conditions where the protective purpose of a particular legal provision implies that it can be applied to a specific issue”.[5] Which provisions and which types of contracts designated by law can be subsidiarily applied to the contract depends on the particular form of the nautical berth contract and the context in which it was concluded. Therefore, there is no comprehensive answer to the question which contract named in the COA should be applied subsidiarily to all types of nautical berth contracts governed by the Maritime Code.

## 2. THE LEGAL NATURE OF NAUTICAL BERTH CONTRACTS AND ELEMENTS OF OTHER CONTRACTS CONTAINED IN NAUTICAL BERTH CONTRACTS

Although there were some doubts in domestic legal literature regarding the relationship between the nautical berth contract and the contract for storage before nautical berth contracts were regulated, such connections were already rejected then[6]. Thus, the provision of Art. 673 j of the Maritime Code, which stipulates the rights and obligations of parties to the nautical berth contract, differentiates between “basic” nautical berth contracts and storage contracts.[7] However, the application of the Obligations Act, where not otherwise determined by the provisions of the Maritime Code as a special law, has been omitted from the text, leading to criticism that the Maritime Code has failed to regulate the subordinate application of the provisions of the special part of the Obligations Act to the nautical berth contract. Even if the set of actions and procedures of the parties to the nautical berth contract is classified as a nautical berth transaction, which includes negotiations on other life and business activities and the like outside the framework of the nautical berth contract, it cannot be unambiguously connected with any special part of the Obligations Act.

Due to the variety of different forms in which nautical berth contracts appear as business transactions in the economic sense, it would be entirely wrong to assume that every contract concluded between a service provider and a berth user is also a nautical berth contract as a unique type of contract. Separating the provisions of Article 673(j) of the Maritime Code regulating the basic nautical berth contract from the provisions of Article 673(n) regulating the rights and obligations

[3] Padovan, A., V., Skorupan Wolff, V., Ugovori o vezu u rekreacijskoj plovidbi po hrvatskom pravu, Comparative Maritime Law, Vol. 60, No. 175, 2021, p. 37

[4] Tot, I., Zakonom uređeni tip ugovora, mješoviti ugovori i ugovori sui generis, Liber amicorum Aldo Radolović, Faculty of Law in Rijeka, Rijeka, 2018, p. 60

[5] Ibid.

[6] Skorupan Wolff, V.; Padovan, A., V., Postoje li elementi ostave u ugovorima o vezu u lukama nautičkog turizma?, D. Ćorić; N. Radionov; A. Čar (ed.), Proceedings of the 2nd International Conference on Transport Law and Insurance Law, INTRANSLAW Zagreb 2017, Faculty of Law, University of Zagreb, Zagreb, 2017; Baće, M., Priroda ugovora o godišnjem vezu u marinama, Pravo u gospodarstvu, No. 3., Zagreb, 2018.

[7] Baće, M. Poredbena analiza pravnog uređenja ugovora o nautičkom vezu iz Pomorskog zakonika i ugovora o ostavi iz Civil Obligations Act, Proceedings of the Faculty of Law in Split, Vol. 61, No. 2, 2024, p. 311.

of the service provider and the berth user, emphasizing the obligation of the service provider stipulated in paragraph 1, Article 673(j), and including additional services by the service provider in paragraph 3 of the same Article, made possible the conclusion of the nautical berth contract in a different substantive form. This prevents the automatic classification of all such contracts as nautical berth contracts.

Taking into account the mandatory legal consequences of the assumption that some contracts under the name of nautical berth contract in the business practice of Croatian marinas have different characteristics, it should be concluded that the same mandatory law provisions cannot be applied in the same way to all contracts with the characteristics of a nautical berth contract[8].

The legal nature of the nautical berth contract in the Croatian legal and economic environment is still ambiguous. In Croatian judicial practice, the prevailing view, even after the adoption of the provisions on nautical berth in the Maritime Code, is that it is an atypical contract of storage, while there are no examples of judicial practice that consider it a *sui generis* contract.[9] In Croatian legal theory, influenced by judicial practice, there has been debate regarding the legal nature of nautical berth contracts, given their similarities with contracts for storage which are regulated by another law.

With the adoption of provisions on the nautical berth contract in the Maritime Code, which in its basic form clearly and unequivocally includes elements of a usage agreement ("granting of the berths to the user"), in our opinion, two different approaches to the nautical berth contract have emerged. The first is that the nautical berth contract is a *sui generis* contract and the second that it is an atypical lease or rental contract. Adopting the perspective that it is an atypical lease and rental contract has the consequence that, while acknowledging the specific nature of this characteristic relationship in the maritime business between the parties to the nautical berth contract, the norms of the legal model for the lease and rental contract can be applied subordinately to the nautical berth contract while respecting the real legal characteristics of the institute of maritime property as the place where the nautical berth contract is executed. Additionally, in this case, the elements of lease and rental from the COA cannot be applied as a "reverse filter" when checking the provisions of the nautical berth contract, or evaluating the validity of certain parts of the general Terms and Conditions of business. On the other hand, the point of view that the nautical berth contract is a *sui generis* contract would acknowledge the freedom of contracting to the greatest extent possible, providing that the provisions of the MC "cover" all legal situations that may arise during contract execution, which is not the case here. In that case, the provisions of other types of contracts regulated by law could not fully apply to the nautical berth contract. Instead, certain statutory provisions could be applied by analogy, but only if their application to a specific contract is justified by the purpose of such legal norms.

In Croatian law, a nautical berth contract is a designated contract, i.e. a new type of contract regulated by law, though the provisions of the Maritime Code do not identify a distinctive content that would differentiate it from other types of contracts[10]. However, its key components can be clearly identified. The basic nautical berth contract in Croatian law is a contract in which a service provider undertakes to assign the berth, while a berth user, in turn, undertakes to pay the service provider a fee for the berth.

In the statutory model of the basic nautical berth contract, the key elements characteristic of lease and rental contracts are identified, as these contracts share the same conceptual legal and economic purpose, which is a temporary contract of use.

## 3. THE APPLICATION OF THE GENERAL RULES OF MANDATORY LAW TO NAUTICAL BERTH CONTRACTS

### 3.1. The application of the general principles of mandatory law

Croatian business and legal practice, both before and after the standardization of nautical berth contracts in the Maritime Code, has generally adopted the contractual concept of nautical berths. Due to the inevitability of applying the provisions of the COA subordinately to the nautical berth contract and the general Terms and Conditions of nautical tourism

[8] On the term "type of contract": Honsell, H. and Mayer-Maly, T., Rechtswissenschaft – Eine Einführung in das Recht und seine Grundlagen, Springer-Verlag, Berlin – Heidelberg, 2015, p. 128. – 129.
[9] High Commercial Court of the Republic of Croatia, 47 Pž-4747/2019-3 of February 11, 2022; Supreme Court of the Republic of Croatia, Rev – 877/1991-2 of September 18, 1991; High Commercial Court of the Republic of Croatia, 43 Pž-676/2018-2 of March 24, 2022; High Commercial Court of the Republic of Croatia, 35 Pž-3255/2019-3 of May 11, 2022.
[10] In the case of some other contracts prescribed by Croatian legislation, for example leasing contracts based on the Leasing Act, the form and content of the contract are prescribed in detail; Leasing Act, Official Gazette, no. 141/2013, Art. 52.

port contracts, regardless of the level and intensity of the legal regulation arising from the MC, in mandatory law, the general legal framework holds a significant position as a subsidiary source of law.[11]

Although the MC did not explicitly prescribe the subordinate application of the rules of mandatory law from the COA to the legal affair of contracting a nautical berth, COA rules apply to the rights and obligations stemming from nautical berth contracts at different levels, namely: 1. general rules from the general part of the COA apply to all mandatory relationships (Art. 1 to 246 of the COA) regardless of their legal basis or origin, i.e. regardless of whether they are contractual or non-contractual in nature; for example, the principles of mandatory law, types of obligations of contracting parties, default interest, statute of limitations, 2. the general rules of contracting (Art. 247 - 375 of the COA), for example, the validity and invalidity of a contract is governed by special rules of the Maritime Code, which take precedence over the general rules of contracting from the COA, 3. the general rules of non-contractual law, above all the responsibility of the port of nautical tourism for damage based on presumed fault, which includes liability to third parties for damage to their property, for damage resulting from death, injury or harm to the health of third parties, and for pollution,[12] and in some cases 4. rules on certain related contracts, primarily lease contracts, rental contracts and contracts for storage.

All the listed categories can be disputed from the perspective of standardization in a narrow interpretation, as they do not arise from the explicit provisions of the MC that would indicate the application of the rules from some of the categories. However, under a broader interpretation, they should not be problematic, as their application follows from the nature of the matter (for example, from the subordinate application of the general rules on liability for damage, and other specific conditions for liability). Furthermore, the application of the fourth category, i.e. special rules for individual contracts in the light of the provisions of the MC, is particularly important for the nautical berth contract with supervision. Namely, as previously mentioned, by standardizing the nautical berth contract, the MC covered the entire scope of rights and obligations of the nautical berth contract without supervision. However, if supervision is contracted in the nautical berth contract, this type of contract is "brought closer" to one of the designated contracts from the COA, primarily contracts for storage.

The sheer scope of the topic prevents the presentation of all general rules of mandatory law in the context of nautical contracting, but allows for only some examples of the general principles of mandatory and contractual law. By providing an insight into the principles and rules, an attempt was made to give a cross-section of the general part of the COA, along with the relevant examples from judicial practice which abounds with the instances of the application of the general rules of mandatory law in decisions pertaining to the rights and interests arising from nautical berth contracts. The examples from judicial practice are important because they show the continuity of application of the principles of mandatory and contractual law from the time when the nautical berth contract was not standardized.

### 3.2. The principle of dispositivity

The principles of mandatory law apply to the contracting of nautical berths to the same extent as in other typical mandatory legal relationships. The norming of nautical berth contracts in MC regulated this matter without the tendency to protect or favour any of the contracting parties, as the circumstances of nautical transactions, and therefore of nautical berth contracts, are such that the parties are equal. This is true even though, in practice, the berth user may accept or reject the marina's pre-established business conditions.

The framework provided by the nautical legislation presents the relationship between the berth user and the marina as a typical contractual relationship in civil law, which is largely subject to the principle of the freedom of contract. The rules on berth contracts in the MC provide only frameworks without limiting the principle of dispositivity.[13] In practice, the freedom of contracting in nautical business is quite limited by Terms and Conditions, i.e. by predetermined contractual clauses that the berth user can either fully accept or reject. However, freedom of contracting in nautical practice exists as a general principle, allowing for various contractual provisions, primarily the additional contracting of yacht or boat supervision at berth.

[11] On the secondary application of the general principles of mandatory law to nautical berth contracts even before the adoption of provisions in the MC: Skorupan Wolff, V.; Padovan, A., V., Postoje li elementi ostave u ugovorima o vezu u lukama nautičkog turizma?, D. Ćorić; N. Radionov; A. Čar (ed.), Proceedings of the 2nd International Conference on Transport Law and Insurance Law, INTRANSLAW Zagreb 2017, Faculty of Law, University of Zagreb, Zagreb, 2017, p. 332-334.

[12] "As a rule, the port of nautical is considered liable for damage to third parties that arises in connection with its activities, unless it proves that it did not cause the damage, i.e., that it acted with due diligence." Padovan, A. V., Odgovornost luke nautičkog turizma iz ugovora o vezu i osiguranje, Comparative maritime law, vol. 52, no. 167, 2013, p. 6.

[13] Ljubenko, M., Građanskopravna odgovornost luke nautičkog turizma, doctoral thesis, Faculty of Law, University of Zagreb, 2024, p. 129.

Nautical transactions in Croatia presuppose the existence of general conditions as annexes to the nautical berth contract, as well as various marine ordinances as general acts that are not specifically defined by nautical legislation. This makes the principle of dispositivity a potential principle in the nautical berth contracting, although negotiating opportunities are limited in practice.[14]

### 3.3. The principle of equality

The principle of equality in binding legal relations means that the parties to such legal relations are in a synchronized relationship so that neither party is subordinate to the other party.[15] In this regard, legally defined relationships in the nautical business should be no exception from the principles of equality, which, based on the nautical berth contract, nonetheless represent a form of subordination of the berth user to the marina due to the general Terms and Conditions, i.e. the terms of use of the berths.[16] However, this subordinate relationship between the marina and the berth user is not uniform across all marinas, but rather depends on the business policies of individual marinas, whose general Terms and Conditions or berth usage terms may define mutual rights and obligations of the parties to a greater or lesser extent. Subordination in terms of accepting the provisions of the Terms and Conditions represents an exception from the principle of equality as stipulated by the general rules of mandatory law.[17]

### 3.4. The principle of good faith and fairness

The principle of good faith and fairness in nautical berth contracts is linked to the principle of prohibiting the abuse of rights. These principles are applied in nautical transactions just as in all contractual relationships, due to the inherent connection between the prohibition of the abuse of rights and the application of good faith and fairness.[18] Recent Croatian judicial practice provides examples where courts have ruled on the abuse of rights in nautical berth contracts, referring to the general principles of mandatory law. For example, "The obligations of the fourth defendant and the berth user are the same regardless of whether they pertain to a sea berth or a dry berth. The berth contract is linked to a storage contract, and the appropriate provisions prescribed by the general provisions of mandatory law apply.[19] The principle of prohibiting the abuse of rights was also relevant in a case where the court concluded that the berth contract was not concluded by implicit actions, and that there was no extra-contractual liability for damages. Specifically, "From the time when the plaintiff was obliged to retrieve the boat from the defendant's possession, the risk for the accidental loss of the boat passed to the plaintiff, so there are no grounds for extra-contractual liability on the part of the defendant for the damage incurred.[20]" The principle of good faith and fairness is not explicitly mentioned in contracts and regulations in connection with order in ports of nautical tourism as a general rule of conduct for participants in the port's life, including in the legal regulation of their rights and obligations. This makes sense, given that the principle of good faith and fairness applies to all contractual relationships, regardless of whether the parties invoke it in their contracts.

### 3.5. The principle of equal value of actions

The principle of equal value of actions is inherent in the contractual nature of nautical berth contracts, as these are always contracts for payment. The main obligation of the service provider in offering a berth, whether at sea or on land, is to

[14] On various models of nautical berth contracts and the service user's right to specific terms in contracting: Skorupan Wolff V.; Padovan, A. V., Standardizirani modeli ugovora o vezu za hrvatske marine kao korak naprijed, in: Barbić, J.; Padovan, A. V.; Skorupan Wolff, V. (ed.), New legal regime for marines: conference held on November 22 and 23, 2018 in the Academy Palace in Zagreb, Croatian Academy of Sciences and Arts, Zagreb, 2019, p. 127-195.

[15] Court practice from the "Franak" case indicated the guidelines for a new and different judicial questioning of unfair contractual provisions. The High Commercial Court of the Republic of Croatia Pž-6632/17 of June 14, 2018.

[16] On the subordination of leasing users by the same author: Vidić, M., Baće, M., Posebnosti ugovaranja leasinga plovila u pravnom prometu u Republici Hrvatskoj.; Comparative Maritime Law, vol. 62, no. 177, 2023, p. 209-248.

[17] It is important to note that the Commercial Court in Rijeka, in its Decision P-2590/14 of April 19, 2019, took the position that the berth contract in this particular case constitutes a consumer contract, as it was concluded between the plaintiff, a physical person acting outside their business, trade, craft, or professional activity, and the defendant (marina) as a trader, within the meaning of Article 3 of the Consumer Protection Act (COA). Therefore, the terms of that contract should be interpreted in favour of the plaintiff as the consumer, and in the case of unfavourable contractual provisions, more favourable statutory provisions should be applied. This is especially so given that the plaintiff did not participate in drafting the General Terms and Conditions of the marina, which form an integral part of the dry berth contract.

[18] It is important to mention Council Directive 93/13/EEC on unfair terms in consumer contracts, which in Article 3(1) defines when a contractual term is considered unfair. An unfair term is a contractual term that has not been individually negotiated and, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations arising from the contract to the detriment of the consumer.

[19] High Commercial Court of the Republic of Croatia, 47 Pž-4747/2019-3 of February 11, 2022.

[20] Supreme Court of the Republic of Croatia, Rev – 877/1991-2 of September 18, 1991.

make the berth available to the user for the placement of a specific yacht or boat and the accommodation of people on board[21]. The user's main obligation, in return, is to pay the fee for the berth.[22] However, regarding the question of whether this principle has practical value in contracting nautical berths, it should be noted that in the general regime of civil law, a violation of the principle of equal value and interdependence of actions is not sanctioned. Instead of sanctions, the law establishes that in certain contractual relationships, a breach of this principle entails specific legal consequences.[23] Thus, in judicial practice payment for berthing, or the equal counter-performance of the berth user, creates a contractual relationship without the necessity of a formal contract.[24] Life or legal circumstances under which the principle of equal value is violated, such as responsibility for material defects, exist in modern nautical contracting [25]. In particular, situations where institutes related to the principle of equal value, such as excessive damage, might suggest a disproportion between the value provided by the service provider and the fee paid by the berth user. However, these principles do not apply to nautical contracting and the potential conclusion of the nautical berth contract is left to the discretion of the parties involved. Thus, the institutes of civil law do not apply in this context[26].

### 3.6. The principle of the duty to meet obligations and the principle of prohibition on causing damage

In court practice, courts have made decisions referring to the COA provisions on storage.[27] This has placed the service provider in a position where, given the circumstances of contract performance in an environment that is highly sensitive to weather conditions, a vessel berthed in a nautical tourism port can easily violate the principle of prohibition on causing damage and the principle of the duty of the service provider to cooperate.[28] The principle of the duty to meet the obligation, that is, the principle that contracts should be performed by service providers, certainly leaves no room for free interpretation by the courts, especially considering the clear legal distinction between the nautical berth contract[29] and the nautical berth contract with supervision[30].

The need for a critical perspective on older judicial practices and the necessity for broader professional discussion is highlighted by Padovan, who states that "in domestic legal doctrine, we do not find discussions on this issue, although it is evident from the few court practices and from the analysis of the general terms of business in domestic nautical tourism ports that the understanding of the basis, scope, and extent of this type of liability has neither been established nor uniform." This free interpretation in any case implies that COA provisions on storage can not be applied. The principle of the duty to meet the obligation, along with the associated principle of liability for damage, thus applies to nautical berth contracts. At first glance, this is legally inevitable and self-evident, as without these principles, no legal relationship, including a berth contract, would make sense. However, this needs to be emphasized both for the sake of rules and exceptions.

The provisions of the Maritime Code on liability for damage, primarily of the service provider, have essentially regulated nautical business practices, thereby preventing the extensive application of this principle by the legislator. Namely, the legal definition in the Maritime Code presupposes that any damage occurring on a yacht or boat must be proven, as the

[21] Baće, M. Poredbena analiza pravnog uređenja ugovora o nautičkom vezu iz Pomorskog zakonika i ugovora o ostavi iz Civil Obligations Act, Proceedings of the Faculty of Law in Split, vol. 61, no. 2, 2024, p. 305.
[22] Ibid., p. 310.
[23] Petrić, S., O nepravičnim klauzulama općih uvjeta ugovora u pravu Europske unije, Proceedings of the Faculty of Law in Split, vol. 39, no. 1-2, 2002,
[24] "Considering that the will to enter into a contract can be expressed by words, common signs or other behaviour from which it can be concluded with certainty that such will exists, its content and the identity of the person giving the statement (Article 249, paragraph 1 of the Civil Obligations Act – "Official Gazette" No. 35/05, 41/08, 125/11 and 78/15; hereinafter: COA), based on the conducted evidentiary procedure, the first-instance court correctly concluded that the parties, although they did not sign it, entered into a dry berth contract, as the defendant paid the plaintiff's invoice for the berth of the boat NU, registration number B3, for the period from June 28 to November 13, 2013." High Commercial Court of the Republic of Croatia, 43 Pž-676/2018-2 from March 24, 2022.
[25] "A nautical tourism port is, by law, liable for material defects of the berth provided for use (arg. Civil Obligations Act, Art. 557), and this liability can be excluded or limited by contract within the framework of mandatory regulations." Padovan, A. V. Odgovornost luke nautičkog turizma iz ugovora o vezu i osiguranje, Comparative Maritime Law, vol. 52, no. 167, 2013, p. 14.
[26] It is important to highlight that this principle limits the previous principle of dispositivity. In this sense, the objectively essential components of the berth contract - i.e., the minimum obligations of the contracting parties necessary for a contract to qualify as a berth contract under the Maritime Code - are the provision and maintenance of a safe berth. However, the subjectively essential components, such as vessel supervision at the berth and additional services and works, must be explicitly agreed upon, as their content and scope are not implied. Therefore, the issue of potential nullity will generally pertain to the objectively essential components of the contract, which cannot be dispositively regulated, limited, or excluded.
[27] High Commercial Court of the Republic of Croatia, Pž-3691/02-3 of January 18, 2006.
[28] Supreme Court of the Republic of Croatia, Rev-877/1991 of September 18, 1991, High Commercial Court of the Republic of Croatia, 47 Pž-4747/2019-3 of February 11, 2022.
[29] MC, Art. 673j.
[30] MC, Art. 673n.

service provider is not liable *ex lege* if they have a valid legal basis for conducting their activities. All other common circumstances related to damage or harmful event on the part of the service provider or the berth user must be proven. The legislator has thus directly prevented the application of the norm that would otherwise allow the service provider to be automatically liable for damage to a boat or yacht.

In the context of a nautical berth contract, the principle of *pacta sunt servanda* (agreements must be honoured), as well as the principles of meeting obligations and prohibiting damage, establish their scope in each specific case. Therefore, the person applying a norm must take into account what constitutes a rule and what constitutes an exception in each case. Unlike these general rules of civil law applicable to specific contracts that could be subordinately applied to a nautical berth contract, it should be noted that this legal framework is legally defined by the essential obligations of both parties. Given this legal definition, compensation for costs incurred by the injured party is not implied; instead, damage must be established, making the subordinate application of these principles the necessary and only possible course of action.[31]

### 3.7. Application of the general principles of mandatory law to mandatory relationships arising outside the nautical berth contract

The fundamental principle of contract law is the principle of the binding force of the contract, that is, the principle that contracts should be honoured, which stipulates that, regardless of any changes that may occur between contract conclusion and cessation, contractual obligations must be met in full. If, especially in the case of long-term contracts, such as nautical berth contracts, parties were allowed to invoke new and changed circumstances at any moment - circumstances that hinder or significantly complicate the fulfilment of their obligations, or cause the contract to no longer meet their expectations at the time of its conclusion - contractual discipline would be seriously undermined. The consequences for legal transactions, especially commercial ones, would be extremely unfavourable given that the basic minimum trust in the contract and its binding force would disappear. Therefore, parties involved in a contractual relationship that spans a certain period, during which significant changes to their legal positions and economic interests may arise, are required to carefully consider the possibility of such changes and bear the risk of their potential occurrence, as is expected in business transactions.[32]

A nautical berth contract is therefore a contract the circumstances of whose performance sometimes result in situations where the service provider and the berth user exceptionally perform urgent unforeseen actions in connection with a yacht or boat.

In addition to the subordinate application of the general principles of mandatory law to nautical berth contracts, there is also the subordinate application of the general rules of mandatory law that apply to all mandatory legal relationships, regardless of whether they arise from a contract or another legal basis.[33] In this context, the general principles of mandatory law also apply to such non-contractual relations, given that certain actions and reactions of parties to the nautical berth contract are sometimes necessary to prevent or reduce damage to a yacht or boat, i.e. port equipment and infrastructure, or protect human life and health and the environment. The MC left the application of certain rules it failed to regulate to contracting parties and law enforcers. Among these are the rules on different types of financial obligations, such as late payment or default interest.

The MC does not regulate the statute of limitations for nautical berth contracts, because the statute of limitations is an institute that in practice in most cases is related only to the statute of limitations for the payment of the berth fee. In this regard, the provisions of the COA apply,[34] along with the general 5-year statute of limitations.[35]

[31] In the context of the principle of the prohibition on causing damage, it is important to point out judicial practice which is of the opinion that a vessel at berth is not a dangerous object. High Commercial Court of the Republic of Croatia, Pž-6142/19 of October 12, 2021; High Commercial Court of the Republic of Croatia, Pž-6141/19 of November 30, 2021.
[32] Petrić, S., Izmjena ili raskid ugovora zbog promijenjenih okolnosti prema novom Civil Obligations Act, Proceedings of the Faculty of Law in Rijeka. vol. 28., no. 1., 2007, p. 1-2.
[33] Ljubenko, M., Građanskopravna odgovornost luke nautičkog turizma, doctoral thesis, Faculty of Law, University of Zagreb, 2024, p. 55.
[34] Art. 51, 62, 214 - 246 of CPA
[35] Art. 225. CPA.

## 4. APPLICATION OF THE GENERAL RULES OF CONTRACT LAW TO NAUTICAL BERTH CONTRACTS

### 4.1. Nullity and voidability

The provisions of the Maritime Code do not explicitly contain rules on the nullity and voidability of nautical berth contracts. In this regard, the legislator regulated the relationship between the service provider and the berth user in such a way that contract conclusion and liability for its performance are made mandatory for the service provider, regardless of other circumstances that affect the legality of the service provider's nautical business activities.

MC positioned the nautical berth contract as a civil law or commercial contract that is legally valid and produces binding legal effects even when the service provider concludes a nautical berth contract without a valid legal basis. This primarily pertains to concession agreements, which grant the right to enter into a nautical berth contract. In this regard, it is evident that the legislator was guided by the general rules on nullity from the COA, considering that the position of the service provider is similar to that of the contracting party who was prohibited from entering into contracts under the general rules of contracting. Just as the COA does not envisage any sanctions for a party that concludes a contract despite being prohibited to do so, the MC does not stipulate that such contracts are null and void. On the contrary, it establishes the service provider's liability for any damage that may occur to the berth user or third parties in connection with the berth contract.

In Croatian legislation, providing berthing services on maritime property without a valid concession or other legal basis, or contrary to the concession decision or agreement, constitutes a misdemeanour for which fines are prescribed in keeping with applicable regulations on maritime property and seaports.[36] Furthermore, pursuant to Art. 212 of the Criminal Code, whoever, contrary to the regulations, constructs an object in an area declared by law or decision of a competent authority to be of special interest to the state, which maritime property is under the Constitution of the Republic of Croatia, will be sentenced to between six months and five years in prison. Therefore, the purpose of protecting the public interest is achieved through administrative and criminal regulations that prohibit the economic use of maritime property without valid legal grounds or contrary to concession decisions and agreements. This means that berth contract conclusion is prohibited to only one party, i.e. the service provider who acts contrary to the regulations on maritime property and seaports.[37]

Raising the issue of reciprocity in liability in the reverse scenario is reasonable. Namely, the legislator has not regulated the situation where a berth contract is concluded by a person – the berth user — who lacks legitimacy or mandate to enter into the contract. There are real-world situations that are rare in business practice and exceptional, where contracts are made with individuals who, pursuant to the Maritime Code, do not have the mandate to be berth users. In the light of the provisions of the MC, the service provider is not even in a position to unilaterally terminate the contract. On the other hand, in addition to compensation for damage that may arise from the berth contract, the service provider also has the right to unilaterally terminate the contract. We believe that, based on the principle of the equality of the parties, which is one of the most important principles of mandatory law, in such cases the application of norms must receive the same treatment as when the service provider lacks a valid legal basis. Here, the legislator has prioritized consumer protection over the principle of equality.[38] It is common for legislators not to enact laws that consider contracts which are prohibited from being concluded as void. As in other legal regulations, the purpose of the MC is to protect consumers from the unscrupulous practices of certain entities, and not to annul concluded contracts, which could result in legal uncertainty, especially given that such contracts are typically shorter-term contracts. The purpose of the ban is to impose a penalty, not to void contracts.[39]

We believe that the MC, as a regulation that specifically regulates nautical berth contracts, sanctions the activities of service providers in the sense of civil law, as it prevents them from avoiding liability for damage on the grounds of the lack of a legal basis for service provision.

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[36] Skorupan Wolff, V.; Padovan, A. V., Ugovor o vezu de lege ferenda, in Barbić, J. (Ed.), The Legal Framework for the Nautical Tourism Ports (The Legal Framework for the Nautical Tourism Ports), Publisher series Modernization of Law, book no. 42, Croatian Academy of Sciences and Arts, Zagreb, 2018, p. 52.

[37] Ibid.

[38] On the special aspect of consumer protection in nautical berth contracts: "ZIDMC2019 in the provision of Art. 673. m, paragraph 3, regulates the possibility to establish nullity in the following case, which expressly refers to consumer rights. It stipulates that a provision that would exclude or limit liability for material defects of the berth, taking advantage of a monopolistic position towards the consumer, would be null and void. In this respect, due to the specific geographic location of certain marinas in Croatia and the number of marinas, establishing when a particular marina has assumed a monopolistic position is challenging. We believe such situations will be exceptions, for example, if there is only one marina on a particular island." Ljubenko, M., Građanskopravna odgovornost luke nautičkog turizma, doctoral thesis, Faculty of Law, University of Zagreb, 2024.

[39] Gorenc, V. (ed.), Komentar Civil Obligations Act, Official Gazette, Zagreb, 2014, p. 519.

Furthermore, it is important to note that the MC contains provisions on the tacit renewal of berths. In doing so, it addresses the principle of contract law related to the formality of contracts.[40] This is relevant because, in contractual practice, the principle of formality is often linked to issues of nullity and voidability. Therefore, it stipulates that if after the expiry of the period specified in the contract, the berth user continues to use the berth, the contract is considered tacitly renewed. The legislator thereby regulated the frequent situation in the nautical business where a yacht or boat remains at berth even after contract expiry. This simultaneously affirmed the principle of the informality of berth contracts, and served as the basis for denying attempts to achieve a better procedural position of a party in court proceedings, which is evident from court practice.[41]

### 4.2. Changed circumstances

In determining the rights and obligations under berth contracts, older judicial practice was influenced by the limited number of contractual provisions and inconsistent court rulings, which prevented the full application of the institute of changed circumstances. Since, at the very beginning of the contractual relationship, it was not clearly established which circumstances constituted the regular fulfilment of obligations for both parties, it was difficult to determine which life or legal circumstance represented the regular performance of the nautical berth contract, and what constituted changed circumstances, or a deviation from one of the fundamental principles of contractual law - *pacta sunt servanda*.

In both older and more recent judicial practice, no cases can be found where courts applied the general rules of mandatory law on changed circumstances to disputed relations arising from nautical berth contracts. The issue is not that the previous lack of legal regulation of berth contracts, or their subsequent regulation, prevented the application of general rules on changed circumstances. Rather, it is that the application of these general rules on changed circumstances necessarily contains a certain number of assumptions, the application of which reduces that institute to an exception.

The assumptions for the application of the institute of changed circumstances have undergone significant changes in the recent amendments to the Civil Obligations Act, as have the legal consequences arising from the fulfilment of the conditions regarding changed circumstances. Pursuant to the previous provisions of the Civil Obligations Act, a party affected by changed circumstances only had the right to request contract termination, whereas the new provisions allow the affected party to request both contract termination and amendment.

The basic assumptions for the application of the institute of changed circumstances are the occurrence of extraordinary circumstances after the conclusion of the contract, which could not have been reasonably foreseen at the time of contract conclusion, and due to which the fulfilment of obligations has become exceptionally difficult for one contracting party or would cause excessively large damage if fulfilled under such changed circumstances. However, a contracting party cannot invoke changed circumstances if at the time of contract conclusion it undertook to take those circumstances into account or could have avoided or overcome them, nor can it invoke them if the changed circumstances occurred after the contracting party was late.

## 5. CONCLUSION

The contracting of nautical berth is not a separate branch of law, and to a significant extent, does not deviate from the general legal regulations of mandatory and contractual law. There is a relatively large number of examples in the available older and more recent Croatian court practice in which courts applied the general rules of contract law to disputed relationships arising from nautical berth contracts. There are examples in domestic judicial practice of the application of the general principles of mandatory law to relationships relating to nautical berths, i.e. contractual and non-contractual relations between service providers and berth users, which are necessary not only for understanding the general principles of mandatory law in the context of rights and obligations arising from nautical berth contracts, but also for the application of rules on such general principles to traditional civil law relationships, as well as to relationships arising from commercial contracts.

[40] It is worth noting that in our opinion the berth user, by the very fact of continued use of the berth after contract expiry, is subject to the general principle of contract law affirmed by Article 252, paragraph 1 of the Civil Obligations Act, which states that a contract is concluded at the moment the offeror receives the statement of the offeree accepting the offer. Pursuant to Article 253, paragraph 1 of the Civil Obligations Act, an offer is a proposal for the conclusion of a contract made to a specific person, that contains all the essential elements of the contract.

[41] High Commercial Court of the Republic of Croatia, 43 Pž-676/2018-2 of March 24, 2022.

General rules on contract invalidity are also worth noting, as they are not explicitly mentioned anywhere in the MC because the legislator is deeply aware of the need to protect consumers, i.e. of the fact that the vast majority of nautical berth contracts are consumer contracts. Furthermore, the legislative regulation of the invalidity of nautical berth contracts could result in grave life and legal situations for berth users.

In the framework of the application of the general rules of mandatory law to the field of contract law, the institute of changed circumstances should be mentioned, which has not been applied in our judicial practice so far. In the context of the standardization of nautical berth contracts and potential disputes between the parties, it should be noted that in ordinary civil and commercial disputes this legal institute is applied restrictively, as it represents an exception to the principle of the duty to meet obligations. Therefore, more frequent application of the institute of changed circumstances cannot be expected even after the regulation of nautical berth contracts by the Maritime Code.

In the context of the subordinate application of the general rules of mandatory law to relations stemming from the nautical berth contract, an important place belongs to the provisions on liability for damage. Given that the MC has regulated liability for damage at a general level, it can be concluded that numerous rules of the COA are related to such provisions.

For all these institutes, the COA, judicial practice and legal literature that deals with these institutes are meritorious. When discussing the subordinate application of the general rules of mandatory law that apply to special contracts, one should be cautious and take the declarative stance that the rules on special contracts do not apply to nautical berth contracts. Such a position does not need to be strictly adhered to, especially bearing in mind that the application of special rules would result in decisions in favour of berth users, given that berth users do not have an opportunity to negotiate about the berth but can only accept the pre-existing Terms and Conditions of the service provider.

This limited and simple analysis reveals that the possibility or impossibility of applying COA rules on special contracts to relationships arising from nautical berth contracts shows that the legal regulation of certain contracts from the domains of civil or commercial law contains provisions and principles that protect one contracting party. In the context of relationships arising from nautical contracts, it cannot be argued that these rules are inappropriate, given that the berth user is in a significantly weaker negotiating position than the service provider.

Finally, it should be noted that the idea of the subordinate application of the provisions on certain designated contracts from the COA to nautical berth contracts needs to be developed further.

## CONFLICT OF INTEREST

The authors declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

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