

# Marina Operator Liability Insurance in Croatian and Slovenian Law and Practice

Adriana Vincenca Padovan<sup>a</sup>, Margita Selan Voglar<sup>b</sup>

The paper deals with marina operator liability insurance (hereinafter: MOLI) in the context of Croatian and Slovenian insurance law and business practice. The authors analyse, discuss and compare the salient features of MOLI contracts, their standard terms and conditions, scope of coverage and exclusions in Croatian and Slovenian law. The paper describes the relevant business practice in the two Adriatic countries. The analysis is based on the comparative study of the relevant national legislation and private regulation, as well as on the data and documentation gathered by field research, consisting of written questionnaires and live interviews with the representatives of insurance companies and marina operators. Our thesis is that the legal framework in the two observed jurisdictions, as well as the insurers' private regulation in Croatia and Slovenia are very similar. The aim is to establish the common features of

MOLI contracts and of the related practices of marina operators and their insurers in the respective countries and explain the background that has led to the formation of a MOLI product specific for the eastern Adriatic marina industry. Suggestions are given for the improvement of the relevant business practices and administrative requirements regarding the minimum insurance standards imposed on marina operators by the concessioning process

## 1. INTRODUCTION

Marina operator liability insurance (hereinafter: MOLI) is a special type of liability insurance protecting marina operators from civil liability incurred in relation to and as a consequence of performance of their core business activities. In the manner and to the extent agreed by the insurance contract, the insurer undertakes to indemnify the insured marina operator for any sums the insured becomes liable to pay to an injured party as a consequence of damage or loss caused in the course of performance of marina operator's business activities. In particular, marina operators may be liable to their clients for damage caused by a breach of a contractual obligation (contractual liability). The most frequent example of marina operators' contractual liability is liability for damage to vessels whilst berthed or during lifting and launching operations or in the course of repair, servicing or maintenance work performed by the marina operator. Marina operators may likewise be liable in tort for personal injury to third parties or for causing damage to or loss of a third party's property (third party liability, tortious liability). For example, a third party visitor could suffer an injury at the marina premises; a vessel berthed in a marina could get loose, float out of the marina and collide with another vessel outside the marina or hit a fixed or floating object; a fire or an explosion in the marina could spread out injuring persons and causing damage to property outside

### KEY WORDS

- ~ Marina operator
- ~ Liability insurance
- ~ Berthing contract
- ~ Nautical tourism port

a. Adriatic Institute of the Croatian Academy of Sciences and Arts

e-mail: [avpadovan@hazu.hr](mailto:avpadovan@hazu.hr)

b. Director of Transport Insurances, Zavarovalnica Triglav d. d. Ljubljana, Slovenia

e-mail: [margita.selan-voglar@triglav.si](mailto:margita.selan-voglar@triglav.si)

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the marina etc. Finally, a marina operator may become liable for damage caused by pollution originating from the marina operator's business activities. Due to the high business liability risks, a valid insurance policy with an adequate scope of coverage is a *conditio sine qua non* for a prudent marina operator to run business and function on the market uninterruptedly.

For the purpose of this paper, a marina can be defined as a harbour designated for vessels used for leisure, serving for the provision of berths and other accompanying services to yachts and other pleasure craft, their owners, users and crew. It is the most complex type of nautical tourism port. Other nautical tourism ports are usually smaller, simpler, providing only the basic berthing service (e.g. mooring or berthing facility, anchorage) or accommodation or storage of vessels on land.

In Croatia and Slovenia, marinas, as special purpose seaports, are subject to the legal regimen of public maritime domain and operated by commercial companies (cessionaires) based on concessions awarded by the competent public authorities. As port operators, they are responsible for the safety of navigation and order in the port, operation and maintenance of port infrastructure, facilities and equipment, for which purpose they hold certain delegated public powers.<sup>1</sup>

The capacities of marinas on the eastern Adriatic coast range from 70 to 1,500 berths. The difference in capacity obviously influences their exposure to liability risks. Apart from marinas, there are a number of small ports operated by sport yachting clubs as non-profit associations in Croatia and Slovenia. Although their management, purpose and set-up are different than in commercial marinas, the basic service provided to club members with respect to berthed pleasure craft is essentially the same as the marina operator's core business of providing berths. Insurers normally provide the same type of coverage (MOLI) to marinas and other nautical tourism ports, as well as to non-commercial ports designated for sport purposes, albeit the respective insurance policies are always tailor made to suit the specific needs of each client. The latter is reflected in the respective limits of liability, scope of coverage, exclusion clauses and optional insurance packages.

In the following chapters we will analyse, discuss and compare the main characteristics of MOLI contracts in Croatian

and Slovenian law. We will also look into the relevant business practices of local marina operators and insurers in the two Adriatic countries. The analysis should prove the similarity of the legal framework in the two observed jurisdictions, as well as in the relevant private regulation of the market stakeholders. The aim is to establish the common features of MOLI contracts and the related practices of marina operators and their insurers in these countries and to explain the background that has led to the creation of a MOLI product specific to the eastern Adriatic marina industry.

## 2. RESEARCH METHODS

The analysis is based on the data and documentation collected by means of a written questionnaire circulated amongst Croatian and Slovenian insurance companies. Furthermore, the relevant information was gathered through interviews with professionals from insurance companies and insurance brokers. The research encompassed the leading insurance companies involved in the MOLI business in both countries, insuring over 80 % of all marina operators in Slovenia and Croatia. The analysis also included information collected by means of a written questionnaire for marina operators, combined with field research consisting of interviews with marina operators' management staff in Croatia and Slovenia<sup>2</sup>, which covered 37 marinas (over 60 %) in Croatia<sup>3</sup> and 1 major marina (out of 3) in Sloveni<sup>4</sup>. Finally, interviews were held with the responsible staff of the Croatian Ministry of Maritime Affairs responsible for the administrative management of Croatian maritime domain and seaports.

So far the topic of research has not been discussed in Slovenian legal literature, whilst in Croatia, it was previously touched upon by only two papers dealing with MOLI in the context of the Croatian legal framework.<sup>5</sup> Similarly, very few

1. For a more detailed analysis of the legal status of marinas under Croatian law see Iva Tuhtan Grgić, *The Legal Regime of Nautical Tourism Ports in Croatia*, Stefano Zunarelli, Massimiliano Musi (eds.), *Current Issues in Maritime and Transport Law, Il Diritto Marittimo - Quaderni 2*, Bonomo Editore, Bologna, 2016, pp. 273-297. For Slovenian law perspective see Patrick Vlačić et al., *Pomorsko pravo (Maritime Law)*, Book 2, *Uradni list Republike Slovenije*, 2008, Ljubljana, pp. 147-166. The main source of legislation regulating ports in Croatia is *Maritime Domain and Seaports Act*, *Official Gazette of the Republic of Croatia* no. 158/2003, 100/2004, 141/2006, 38/2009, 123/2011, 56/2016 (hereinafter: MDSPA); in Slovenia the ports are regulated under *Slovenian Maritime Code*, *Uradni list Official Gazette of the Republic of Slovenia*, no. 26/20011, 21/2002, 2/2004, 98/2005, 49/2006, 88/2010, 59/2011, 33/2016, 41/2017, 21/2018, 31/2018 (hereinafter: SMC).

2. Six leading insurance companies based in Croatia and one based in Slovenia providing MOLI coverage for the majority of Croatian and Slovenian marinas participated in the questionnaire and interviews.

3. According to Croatian Bureau of Statistics, *Nautical Tourism - Capacity and Turnover of Ports, 2017, First Release* no. 4.3.4, 27 March 2018, there are 140 nautical tourism ports in Croatia, i.e. 57 marinas, 13 land marinas and 70 other nautical tourism ports (anchorage, mooring or berthing facilities, boat storages, uncategorised nautical tourism ports). The numbers do not include sport ports and the areas of ports open to public traffic designated for nautical tourism berths. In this context, it is important to distinguish communal berth areas of the public ports designated for smaller vessels and pleasure craft. This paper focuses on liability insurance of proper marinas, although, the same insurance product is frequently adjusted and used for the sport ports and less complex types of nautical tourism ports.

4. Slovenia has 43 km of coast and three marinas with a total of 1,800 berths for pleasure craft and more than 1,700 berths in communal ports.

5. Adriana Vincenca Padovan, *Marina Operator's Liability from the Contract of Berth and Insurance Matters*, *Poredbeno pomorsko pravo = Comparative Maritime Law*, Vol. 52(2013), no. 167, pp. 1-35; Adriana Vincenca Padovan, *Osiguranje odgovornosti luke nautičkog turizma (Marina Operator Liability Insurance)*, *Svijet osiguranja*, no. 7/2013, pp. 40-42.

sources dealing specifically with this subject are available in comparative legal literature.<sup>6</sup>

### 3. RESULTS AND DISCUSSION

#### 3.1. The Legal Framework

The research has shown that the legal framework for MOLI is very similar in Croatia and Slovenia. The similarity stems from their common legal history and tradition. Following the breakup of the Socialist Federal Republic of Yugoslavia in 1991, Slovenia and Croatia incorporated the former Yugoslav Civil Obligations Act of 1978 and the Marine and Inland Navigation Act of 1977 into their legal systems, and have afterwards developed their modern national civil and maritime law legislation based on those legal sources. Nowadays, both in Croatia and Slovenia, MOLI as a special type of liability insurance contract is subject to the general insurance contract law, i.e. governed by the civil obligations codes of these countries.<sup>7</sup> Both civil obligations codes contain special provisions regulating insurance contracts,<sup>8</sup> whereas the provisions setting out the general rules of contract law apply in accordance with the principle of subsidiarity of *lex generalis*.<sup>9</sup>

The Croatian and Slovenian civil obligations codes contain an article expressly excluding the application of the special provisions regulating insurance contracts to the contracts of marine and transport insurance (CCOA, Art. 923; SCOC, Art. 923). Marine insurance contracts are regulated by the maritime codes of these countries.<sup>10</sup> Both maritime codes similarly prescribe the types of insurance contracts that are subject to the legislative provisions governing marine insurance contracts. The list typically encompasses insurance of vessels, including vessels under construction, and related interests, shipowners' liability insurance and insurance of cargo in transport. The legislative provisions regulating marine insurance contracts also apply to ship repairers' liability insurance and to other insurance contracts concluded under the terms and conditions typical for marine insurance (CMC, Art. 684; SMC, Art. 680). Whilst the special

provisions on insurance contracts prescribed by Croatian and Slovenian civil obligation codes are expressly excluded in respect of marine insurance contracts, the general rules of contract law contained in Croatian and Slovenian civil obligations codes are relevant for the interpretation of marine insurance contracts under the principle of subsidiary application of the law governing general matters (*lex generalis*).<sup>11</sup>

MOLI, as well as the insurance of port operators' liability in general, do not fall under the scope of application of the maritime law rules on marine insurance contracts, but are rather subject to the rules of general insurance law. However, MOLI standard terms and conditions of Croatian and Slovenian insurers commonly allow for an extension of coverage of marina operators' liability arising from their business activity of ship repair and ship maintenance work. Namely, many marina operators provide ship repair and maintenance services for vessels berthed in their marinas, and when they do perform such business activity they need to have their liability arising in connection therewith insured. This is sometimes done within the framework of the same MOLI contract. Since under Croatian and Slovenian law ship repairer's liability insurance is regulated by the maritime law rules on marine insurance contracts (CMC, Art. 684.1.3; SMC, Art. 680.2), the part of MOLI coverage relating to liability arising from the performance of ship repair and maintenance services will exceptionally be subject to the legislative provisions governing marine insurance contracts. In particular, the provisions of maritime law regulating marine liability insurance will be relevant (CMC, Art. 743; SMC, Art. 739).

Unlike the mandatory nature of the majority of legal provisions governing general insurance contracts, the provisions of maritime law regulating marine insurance contracts are predominantly dispositive.<sup>12</sup> Therefore, particular contractual provisions prevail over the dispositive legislative provisions on marine insurance. An important difference between a general liability insurance contract and a marine liability insurance contract under Croatian and Slovenian laws relates to the concept of direct action of an injured third party against the liability insurer. In both countries direct action is envisaged as an independent right of an injured third party by the mandatory rules of general insurance law applying to liability insurance contracts

6. See e.g. James N. Hurley, *Maritime Law and Practice*, 5th edition, *The Florida Bar*, 2017, Chapter 17. *Marina Liability*, § 17.22 - § 17.27 *Insurance for Marinas*.

7. See *Croatian Civil Obligations Act*, Official Gazette no. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018 (hereinafter: CCOA) and *Slovenian Civil Obligations Code*, *Uradni list*, no. 83/2001, 28/2006, 40/2007, 97/2007, 64/2016 (hereinafter: SCOC).

8. See CCOA, Arts. 921 - 989; SCOC, Arts. 921 - 989.

9. For Croatian law see Drago Pavić, *Ugovorno pravo osiguranja (The Law of Insurance Contracts)*, Tectus, 2009, Zagreb, pp. 86 - 88; for Slovenian law see Marko Pavliha, *Zavarovalno pravo (Insurance Law)*, *Gospodarski vestnik*, 2000, Ljubljana, pp. 154 - 161.

10. See *Croatian Maritime Code Official Gazette* no. 181/2004, 76/2007, 146/2008, 61/2011, 56/2013, 26/2015 (hereinafter: CMC), Arts. 684 - 747.d; SMC, Arts. 680 - 743.

11. For Croatian law position regarding the relationship of the CMC provisions on marine insurance contracts and the CCOA see Pavić, *Ugovorno pravo osiguranja*, op. cit., pp. 89 - 91; for Slovenian position regarding the same matter see Patrick Vlačić et al., *Pomorsko pravo (Maritime Law)*, Book 1, *Uradni list Republike Slovenije*, 2008, Ljubljana, pp. 401 - 405 and *Pomorski zakonik (PZ) z uvodnimi pojasnili prof. dr. Marka Ilešiča in prof. dr. Marka Pavlihe in stvarnim kazalom (Maritime Code with the Introductory Explanations by Prof. Marko Pavliha and Prof. Marko Ilešič, Uradni list Republike Slovenije*, 2001, Ljubljana, pp. 48 - 51.

12. Pavić, *Ugovorno pravo osiguranja*, op. cit., pp. 88 - 89, 92; similarly Ilešič, Pavliha, *Pomorski zakonik (PZ) z uvodnimi pojasnili...*, op. cit., pp. 48 - 49.

(CCOA, Art. 965; SCOC, Art. 965),<sup>13</sup> whilst under maritime law rules direct action is allowed only in the context of compulsory marine insurance (CMC, Art. 743; SMC, Art. 739.2).<sup>14</sup>

In both countries MOLI is voluntary, i.e. it is not prescribed by law as compulsory insurance and is, therefore, as a rule, subject to the freedom of contract. By its nature, it is always a commercial contract, since marina operators effect this insurance in the course of and in connection with their business. The aim is to protect the marina operators from potential liabilities arising from the performance of their business activities. The parties are in principle free to define the scope of coverage, insurance limits, deductibles, exclusions and other terms and conditions of insurance depending on their commercial needs and expectations. In practice, coverage is tailored to account for marina operators' exposure to liability risks and financial capacity. The freedom of contract is partly limited by the mandatory rules of general insurance law, and individual marina concession agreements. Namely, when awarding concessions for the development and operation of marinas, the competent public authorities usually include provisions in the concession contract obliging the marina operator to effect business liability insurance which should meet certain requirements as defined therein. These concession contract stipulations define the subject matter of insurance as contractual and tortious liability arising from the marina operator's business activities and sometimes set the minimum limit of insurance per event.<sup>15</sup>

From the aspect of business organisation, although MOLI is regulated by general insurance law, in the practice of Croatian and Slovenian insurance companies it is handled as a part of

marine, aviation and transport insurance business, i.e. it is usually written by the underwriters specialised in marine, transport and aviation insurance.<sup>16</sup>

Croatian and Slovenian marina operators have so far always insured their liability with local insurers who drew up their own general terms and conditions. A comparative analysis of the standard insurance clauses for MOLI in Croatia and Slovenia shows that they are very similar. The similarity is a result of the specific common historical circumstances related to the development of the marina industry and MOLI business on the eastern Adriatic coast. The intensive development of marina business and the accompanying MOLI practice in this region is closely related to the development of the Adriatic Club Yugoslavia (ACY) established in 1983, operating the largest chain of marinas in the Adriatic. By 1986 ACY built sixteen brand new marinas along the Croatian Adriatic coast and another two by 1990. In 1994 the company was restructured into a joint-stock company and registered as Adriatic Croatia International Club d.d. (ACI). Nowadays, it operates twenty-two marinas along the eastern Adriatic coast.<sup>17</sup> On the other hand, the dominant player of the Croatian insurance market of the time was Croatia Insurance Company, a social enterprise that practically held most of the marine insurance portfolio in the former Yugoslavia, including the MOLI business emerging in the 1960s and intensively developing in the 1980s along with the formation of ACI. During this period, a mutual adjustment and standardisation of the general terms and conditions of marina operators and insurers took place, owing to the joint efforts of professionals representing the stakeholders<sup>18</sup> of the contemporary common Yugoslav market. In effect, smaller market players adopted ACI standard terms of berthing contracts and Croatia Insurance MOLI standard terms and conditions. In the late 1990s, with the liberalisation of the Croatian and Slovenian markets, a number of insurance companies emerged and new marinas were constructed.<sup>19</sup> Simultaneously, Croatia saw a sudden development of the yacht chartering market. There

13. For a more detailed discussion on direct action under Croatian law, see e.g. Pavić, *Ugovorno pravo osiguranja*, op. cit., 326-334; Drago Pavić, *Pomorsko osiguranje: pravo i praksa (Marine Insurance: Law and Practice)*, Književni krug Split, 2012, Split, pp. 429 – 440; and under Slovenian law see e.g. Jernej Veberič, *Pogodba o zavarovanju odgovornosti (Liability Insurance Contract)*, *Pravni ljetopis*, 2008, no. 1, pp 169-179.

14. See Pavić, *Ugovorno pravo osiguranja*, op. cit., pp. 621-625; Pavić, *Pomorsko osiguranje*, op. cit., pp. 425 – 429; Vlačić et al., *Book 1*, op.cit., pp. 402. Both states prescribe compulsory marine liability insurance for damage caused by motor yachts and boats. Furthermore, both states are parties to the following conventions prescribing compulsory shipowner's liability insurance and direct action: *Convention on Civil Liability for Oil Pollution Damage*, London, 1992, *International Convention on Civil Liability for Bunker Oil Pollution Damage*, London, 2001 and *Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea*, 2002. Croatia is also a party to *Nairobi International Convention on the Removal of Wrecks*, 2007 prescribing compulsory insurance for the costs of wreck removal. See <http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx> (accessed on 2 January 2019). In addition, direct action in Croatia is prescribed for the seafarers' claims (CMC, Art. 743.2).

15. See e.g. *Decision on the concession for the operation of Marina Portorož*, *Uradni list* no. 28/2016, 15 April 2016, Art. 31 stipulates that marina operators must insure their business liability for damage caused to marina users, third parties or to the concession awarding authority up to a minimum insurance limit of 500.000 EUR per event.

16. The group includes liability insurance for shipowners, ship repairers, marine agents, freight forwarders, air carriers, airport operators, road carriers. It is interesting to note that liability insurance policies for airport operators, freight forwarders, road carriers and marine agents are also subject to the rules of the civil obligation codes of Croatia and Slovenia governing insurance contracts. See Pavić, *Pomorsko osiguranje*, op. cit., pp. 52 – 53, 474 – 475; Katarina Sunara, *Osiguranje djelatnosti sudionika zračnog prometa (Business Liability Insurance in Air Transport)*, workshop materials, *Croatian Transport Law Association*, Zagreb, 16 March 2017, <http://hdtf.eu/wp-content/uploads/2018/01/Sunara-OSIGURANJE-ODGOVORNOSTI-ZRA%C4%8CNIH-LUKA.pptx> (accessed on 30 November 2018).

17. For more information see *Mladen Gerovac, Postanak (Formation), Adriatic Croatia International Club d.d., Opatija*, 2016.

18. Maja Bosnić Tabain, *Marina Operator Liability Insurance in Croatian Judicial Practice (invited lecture)*, *Conference Book of Abstracts: The New Legal Regime for Marinas*, 22 – 23 November 2018, *Croatian Academy of Sciences and Arts*, Zagreb, p. 43.

19. *Ibid.*

was also a substantial increase in the number of pleasure craft used for private purposes. The value of pleasure craft increased and the related technologies and materials became more sophisticated.<sup>20</sup> Marina operators' general terms and conditions of berthing contracts were adjusted to the new market circumstances with the trend of reduction of the scope of marina operators' liability. Consequently, MOLI practice diversified. Some insurers followed the trend of reduction of the scope of marina operators' liability by reducing the scope of coverage and introducing more exclusion clauses in their standard MOLI terms and conditions. However, the original core structure and the main content of those insurance terms and conditions applied by Slovenian and Croatian insurers still remains recognizable. It can therefore be concluded that the MOLI standard terms and conditions originally created and predominantly applied in Croatia and Slovenia influenced the marina operators' general terms and conditions of berthing contracts used at the time. Furthermore, although there were no official common MOLI standard terms and conditions for Croatian and Slovenian markets, local insurers on those markets can be concluded to have followed the common practice and developed their own mutually very similar MOLI terms and conditions. Finally, the MOLI terms and conditions available on the Croatian and Slovenian markets today still resemble their early versions in terms of structure and main content, especially with respect to the definition of the scope of coverage and standard exclusions. They were not strongly influenced by MOLI clauses used on the international insurance markets because local marina operators have traditionally always insured their liability with the local insurers on their own MOLI terms and conditions.

### 3.2. Scope of Coverage

MOLI is a special type of insurance of liability arising from a specific type of business. In Croatia and Slovenia, this insurance is commonly provided as a separate insurance product and combined with other insurance policies covering marina operator's general liability, employer's liability, shipowner's liability (for vessels owned or used by the marina in the course of its business activities), property insurance of docks, piers, pontoons, port infrastructures, installations, equipment and buildings. This paper deals only with the MOLI contracts typical for the Croatian and Slovenian markets.

As stated in the introduction, MOLI covers liability stemming from the marina operator's business of providing berths, related and additional services to vessels, owners, crews and nautical tourists. The insurance covers marina operator's

contractual liability, i.e. liability towards the customers and users of marina services. Furthermore, it covers marina operator's tortious liability, i.e. liability to third parties for damage to their property and bodily injury caused by the performance of marina operator's activities. The marina operator's liability may result from a negligent act or omission of marina staff (employees), management or marina operator's subcontractors.

The insurance further covers the costs of legal proceedings and other reasonable costs incurred in the ascertainment of liability of the insured marina operator. The costs of measures taken at the request of or in agreement with the insurer, for the purpose of legal defence against unfounded or excessive third party claims are also recoverable under the insurance contract (CCOA, Art. 964; SCOC, Art. 964). Some insurers undertake to cover these costs together with the main claim up to the limit of insurance, whilst others cover them in addition to the insurance limit up to a certain maximum amount defined under the policy. If not expressly stipulated in the policy, the legislative rule providing that the insurer covers these costs up to the limit of insurance (CCOA, Art. 964.2; SCOC, Art. 964.2) applies. Furthermore, the insured marina operator is obligated to take all prescribed, agreed and reasonable measures to prevent or minimize loss, damage or cost giving rise to its liability covered by insurance. The insurer covers the costs of such measures, as well as any loss or damage suffered by the insured marina operator due to such measures. These costs and losses are recoverable under insurance even if the attempts were unsuccessful, provided that the measures were reasonable or compulsory by law or undertaken at the request or with the approval of the insurer. The law prescribes that these costs and losses are recoverable under insurance even if they exceed the limit of insurance together with indemnity. If, however, the insured marina operator fails to meet this obligation for no justified reason, the insurer's liability is reduced in proportion to the increase in the marina operator's liability covered by insurance resulting from this breach (CCOA, Art. 950; SCOC, Art. 950).

A major part of marina operators' liability risks is related to the potential damage to, or loss of a vessel at berth. Marina operators' liability for this type of damage or loss is defined by the relevant berthing contracts. One of the most discussed matters in theory and practice is the legal nature of this type of contract and the extent of a marina operator's liability thereunder. So far in Croatia and Slovenia the berthing contract has not been regulated as a special type of contract, in other words, it is an innominate contract. Furthermore, research has shown that in Croatia and Slovenia marina operator's general terms and conditions of berthing contracts have not reached the level of standardisation required for them to be considered a typical

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20. *Ibid.*

contract. Frequently imprecise and incomplete berthing contractual terms and conditions have led to legal disputes resulting in rather inconsistent court practice and a discrepancy between the concept of a marina operator's liability as perceived by the industry on one hand, and by the courts on the other hand. The main point of contention is whether the contract should be interpreted as a contract of deposit of the vessel or a berth rental contract. The predominant position in judicial practice is that by its nature a berthing contract is a contract of deposit, whereby the vessel is in the care, custody and control of the marina operator who is presumed to be liable for damage to or loss of the vessel during the period of deposit, unless he proves that as a bailee he exercised due care (professional care) in protecting the vessel from possible accidents, incidents or malicious acts of third parties.

The Croatian legal doctrine differentiates between two main groups of berthing contracts: a) contracts for use of a safe berth (berth rental contracts) and b) contracts for use of a safe berth with additional marina services. The additional services can, inter alia, include care, custody and control services. Research has shown that the so called transit or daily berths are commonly regulated by contracts for use of a safe berth. It is submitted that not all marina operators' permanent berth contracts include the marina's obligation to safeguard the vessel, i.e. the obligation of custody in the sense of the legislative provisions of the contract

of deposit.<sup>22</sup> The fact that a vessel is berthed in a marina and that the marina accepted the vessel's documentation and keys, is not enough to establish that the contract is a contract of deposit. In other words, the issue whether the vessel was delivered into the possession of the marina, as a bailee, needs to be established in each individual case by a true interpretation of the contract in question. Research has shown that the majority of marina operators in Croatia apply a model of annual rental of a safe berth, including a certain level of control of the berthed vessel, without taking the vessel into possession.<sup>23</sup>

The Croatian legal doctrine differentiates between two main groups of berthing contracts: a) contracts for use of a safe berth (berth rental contracts) and b) contracts for use of a safe berth with additional marina services. The additional services can, inter alia, include care, custody and control services.<sup>24</sup> Research has shown that the so called transit or daily berths are commonly regulated by contracts for use of a safe berth. It is submitted that not all marina operators' permanent berth contracts include the marina's obligation to safeguard the vessel, i.e. the obligation of custody in the sense of the legislative provisions of the contract of deposit.<sup>25</sup> The fact that a vessel is berthed in a marina and that the marina accepted the vessel's documentation and keys, is not enough to establish that the contract is a contract of deposit. In other words, the issue whether the vessel was delivered into the possession of the marina, as a bailee, needs to be established in each individual case by a true interpretation of the contract

21. *Berthing contracts under Croatian law have so far been discussed in the following literature: Padovan, Marina Operator's Liability...*, op.cit.; Vesna Skorupan Wolff, Ranka Petrinović, Nikola Mandić, *Marina Operator's Obligations from the Contract of Berth According to the Business Practices of Croatian Marinas*, Pero Vidan et al. (ed.), *IMSC 2017 Book of Proceedings, Faculty of Maritime Studies, Split, 2017*, pp. 104-111; Vesna Skorupan Wolff, Adriana Vincenca Padovan, *Are there any Elements of the Contract of Custody in the Marina Operators' Contracts of Berth?*, Dora Čorić, Nikoleta Radionov, Aleksandra Čar (ed.), *Conference Book of Proceedings of the 2nd International Conference on Transport and Insurance Law, INTRANSLAW Zagreb 2017, Faculty of Law, University of Zagreb, Zagreb, 2017*, pp. 313-353; Marija Pijaca, *Legal Relationship between Marina Operator and Charter Company Arising from the Contract of Berth – Analysis of Croatian and Comparative Commercial Practice*, *Poredbeno pomorsko pravo = Comparative Maritime Law*, Vol. 57 (2018), no. 172, pp. 253-284; Adriana Vincenca Padovan, Vesna Skorupan Wolff, *The Effect of the Craft's Sinking on the Contractual Relationship of the Parties to the Contract of Berth and Custody of a Pleasurecraft*, *Poredbeno pomorsko pravo = Comparative Maritime Law*, Vol. 57 (2018), no. 172, pp. 149-175; Vesna Skorupan Wolff, Adriana Vincenca Padovan, *Berth Contract De Lege Ferenda*, Jakša Barbić (ed.), *The Legal Framework for the Nautical Tourism Ports, Book Series Modernisation of Law, Book 42, Croatian Academy of Sciences and Arts, Zagreb, 2018*, pp. 41-93; Vesna Skorupan Wolff, Adriana Vincenca Padovan, *Obligations of the User of Berth Arising from the Berth Contract According to the Business Practices of Croatian Marinas*, Petra Amžić Jelovčić et al. (ed.), *Book of Proceedings, 2nd International Scientific Conference on Maritime Law - Modern Challenges of Marine Navigation, ISCML Split 2018*, pp. 333-379; Miho Baće, *Priroda ugovora o godišnjem vezu u marinama (The Nature of the Annual Berthing Contracts in Marinas)*, *Pravo u gospodarstvu: časopis za gospodarsko-pravnu teoriju i praksu - A Journal for Business Law Theory and Practice*, Vol. 57 (2018) no. 3; pp. 497-519.

22. *See similar discussion in Italian and Spanish legal literature: Daniel Rodríguez Ruiz de Villa, El contrato de amarre en puerto deportivo, UNED. Boletín de la Facultad de Derecho*, no. 25, 2004, 115-152; Maria Victoria Petit Lavall, *Régimen jurídico del contrato de amarre*, José Luis García-Pita et al. (ed.) *El Derecho marítimo de los nuevos tiempos*, Civitas, 2018, pp. 689-712; Umberto La Torre, *Ormeggio di Nave, Studi in onore di Gustavo Romanelli, Giuffrè, Milan, 1997*, pp. 726 et seq.; Alessio Claroni, *Il contratto di ormeggio nella portualità turistica*, Bonomo editrice, Bologna, 2003; Alfredo Antonini, *Il contratto di ormeggio, Diritto Marittimo*, 1999, p. 1067 et seq.; Alfredo Antonini, *Dal contratto di ormeggio al contratto di locazione di posto barca, Diritto dei Trasporti*, 2009, p. 109 et seq.; Marco Badagliacca, *Il contratto di ormeggio*, Michele M. Comenale Pinto, Elisabetta G. Rosafo (ed.), *Il diporto come fenomeno diffuso. Problemi e prospettive del diritto della navigazione*, Aracne, Rome, 2015, pp. 199-215.

23. Josip Pavliček, Adriana Vincenca Padovan, Marija Pijaca, *Criminological and Legal Aspects of Croatian Ports and Marinas Security*, Gorazd Meško et al. (ed.), *Book of Proceedings, Twelfth Biennial International Conference Criminal Justice and Security in Central and Eastern Europe: From Common Sense to Evidence-based Policy-making*, Ljubljana, 25-27 September 2018, University of Maribor Press, Maribor, 2018, p.479. In the following decisions of Croatian courts marina operator berthing contracts were interpreted as deposit contracts: *Commercial Court in Rijeka, decision no. P-2590/1994 of 28 Feb. 2007; Commercial Court in Rijeka, decision no. 9-P-4327/11-72 of 13 Sept. 2012; High Commercial Court, decision no. 3667/02-3 of 18 Jan. 2006; Supreme Court, decision no. 756/11-2 of 30 Oct. 2013; Supreme Court Rev. 2333/2010 of 14 May 2013; Commercial Court in Zagreb, decision no. 42. P-915/2014 of 10 Jan. 2019.*

24. Skorupan Wolff, Padovan, *Berth Contract de Lege Ferenda*, op. cit., pp. 46-49; Padovan, Skorupan Wolff, *The effect of the Craft's Sinking...*, op.cit., pp.

25. See CCOA, Arts. 725 – 743 and SCOC, Arts. 729 – 746 on the contract of deposit.

in question.<sup>26</sup> Research has shown that the majority of marina operators in Croatia apply a model of annual rental of a safe berth, including a certain level of control of the berthed vessel, without taking the vessel into possession.<sup>27</sup>

Slovenian marinas also use two types of berthing contracts. One type is the contract of accommodation and deposit of a vessel in a marina and the other is the contract of accommodation of a vessel in a marina. The difference is primarily in that the contracts of accommodation of vessels expressly state that they are not to be considered deposit contracts and that the SCOC provisions governing deposit contracts do not apply to them. Still, the majority of provisions in both types of berthing contract are almost identical.

According to the standard clauses of Slovenian marina operator berthing contracts, a marina undertakes to allocate a place for a safe berth and accommodation of a vessel and its crew and allow the use of port infrastructure, facilities and equipment. Berthing contracts with the elements of deposit stipulate that a marina operator's liability for deposit commences when the owner or user of the vessel hands over the vessel keys and certificates at the marina reception. The obligation ends when the owner or user of the vessel takes over the vessel keys and certificates at the reception desk. During the period of deposit a marina is liable for the care, custody and control of the vessel and this obligation must be fulfilled with professional care.

It is peculiar that berthing contracts expressly excluding the application of the rules of deposit state that upon handing over the vessel keys and certificates the marina enters into possession of the vessel. This provision is in contradiction with the express exclusion of the rules of deposit, since it clearly defines the moment of vessel bailment commencement. Effectively it follows that a marina operator's liability under this type of contract is the same as under the contracts of accommodation and deposit of a vessel in a marina.

The above described legal uncertainty regarding the nature of a berthing contract is reflected in the results of the written questionnaire for insurers. For example, one of the questions posed to the insurers was whether in their opinion under annual berthing contracts marina operators assume liability for deposit, or just berth rental, or for berth rental combined with supervision of the vessels at berth. Two out of seven insurers replied that this depended on the standard berthing contract of a particular marina operator and that their coverage corresponds to the marina operator's liability assumed under that contract. Any liability assumed beyond the standard berthing contract submitted to the insurer upon the negotiation of the insurance

policy will not be covered unless prior approval is obtained from the insurer. The other five insurers stated that in their opinion marina operator annual berthing contracts are contracts of care, custody and control of the vessel. Concerning the standard transit berth contracts, four insurers consider them contracts for use of a safe berth (berth rental). One insurer stated that they consider them berth rental contracts combined with the marina operator's obligation to supervise the vessel at berth. One insurer stated that transit berth general terms and conditions varied between marina operators and that they relied on the standard contract declared to them by the insured marina operator. One insurer stated that in their opinion transit berth contracts are also contracts of care, custody and control of a vessel, just like the annual ones. Some insurers stated that they do not differentiate between the obligations of safeguarding and supervising the vessel, in other words, if a marina operator assumes the obligation to supervise the vessel at berth, in their opinion, it qualifies as a contract of care, custody and control of a vessel (deposit). They hold that a marina operator is obliged to organize: technical and personal protection of the marina premises, piers and berths; regular rounds of all berths by the marina mariners and guards; operational and functional CCTV system 24/7; maintenance of the marina premises, piers, moorings, infrastructure, buildings, facilities and equipment in a safe and sound condition; berthing assistance; prevention of accidents, incidents or malicious third party acts in the marina etc.

Considerable differences in the insurers' answers to the questionnaire are indicative of the level of legal uncertainty surrounding the concept of marina operators' liability and the scope of the accompanying insurance coverage. The ideal way of resolving this issue in our opinion is to devise standard general terms and conditions of berthing contracts and the corresponding standard insurance clauses to be adopted by marina operators and their insurers. Research has shown that, although there are discrepancies in the perception of legal concepts, the actual business practice, the concrete contents of marina services and the way they are performed are ultimately very similar. Therefore the standardisation of contractual terms and conditions is absolutely possible and desirable in the interest of legal certainty and all stakeholders in question.

The scope of marina operators' liability insurance coverage depends, inter alia, on the scope of services provided by a particular marina operator. This information is normally declared to the insurer when insurance is contracted and taken into account in the risk assessment process. The scope of coverage is then tailored to suit the needs of the particular client.

When underwriting MOLI, the insurer relies on the standard terms of berthing contracts and other types of contract commonly concluded by marina operators with their customers and partners in the course of business. The insurer examines marina rules and regulations, as well as other internal acts of

26. *Adriana Vincenca Padovan, Maria-Victoria Petit Lavall, Angelo Merialdi, Fabio Cerasuolo: Security and Enforcement of Marina Operator's Claims: Croatian, Italian and Spanish Law Perspectives, Journal of Maritime Law and Commerce, Vol. 49 (2018), no. 4, pp. 522-523.*

27. *Ibid, p. 522.*

the insured marina operator. Some marina operators provide a whole range of high quality services, whilst others limit their business to the basic service of providing a safe berth. The corresponding liability insurance thereby follows the underlying marina operator's business model. The standard contracts used by the insured marina operator must therefore be approved by the insurer and any liability assumed by the marina operator that goes beyond the standard contract terms is commonly excluded from insurance coverage, unless previously presented to the insurer and expressly approved.

Croatian and Slovenian insurers normally cover the following marina operators' activities: berth rental, custody of the vessel at berth, lifting and launching operations, open air dry berth, vessel storage in closed premises such as halls, hangars etc. Furthermore, most local insurers may include coverage for liability arising in the course of and in connection with vessel maintenance, laying-up, recommissioning or repair works and transport by land, provided that the marina operator undertakes to perform these services, either directly or through subcontractors. Additional coverage can be provided for food and beverage catering services, provision of recreational facilities and chandlery.

Any third party liability that is not in direct connection with a marina operator's business is not covered by MOLI, but can be insured under a different type of policy available on Croatian and Slovenian markets, covering general third party liability. This type of policy usually contains optional employer's liability coverage, i.e. liability of the marina operator as an employer for personal injury or property damage suffered by the employees in the course of or in connection with their work.

### 3.3. Standard exclusions

The usual exclusions from MOLI terms and conditions of Croatian and Slovenian insurers are as follows:

- claims arising from wilful misconduct and gross negligence of the insured marina operator, its employees, subcontractors and their employees
- claims that are not directly related to the marina operator's business activity
- contractual extension of the marina operator's liability beyond the standard terms and conditions approved by the insurer
- claims for non-performance of the insured's contractual obligations, consequential damage
- damage to property owned or leased by the insured or his subcontractors
- costs of repairing the insured's bad workmanship, material or design
- damage arising from bad maintenance, wear and tear, bad overall condition of the vessel, corrosion, breaking of mooring

lines belonging to the vessel

- damage arising from latent defects in the vessel's hull or machinery
- damage arising from defective electrical installation or piping system in the vessel
- damage caused by rodents or pests
- damage caused by water freezing in the engine or other parts of the vessel
- costs of painting the hull of an undamaged vessel
- damage arising from erroneous or unprofessional act or omission of the owner or crew of the vessel
- damage arising in connection with the breach of customs regulations, port regulations or other administrative regulations; breach of marina rules and regulations
- loss of or damage to artefacts, money or other valuables
- loss of or damage to cameras, TVs, mobile phones, PCs, binoculars, and similar objects, unless occurring because of sinking, explosion or fire on the vessel, provided that the insured is liable for the cause of damage
- loss of fenders, anchors, mooring lines belonging to the vessel or other equipment that can be removed from the vessel without using force
- loss of reputation, loss of goodwill, loss of business
- loss of earnings, loss of profits or similar economic loss
- fines and penalties
- contractual penalties, pre-liquidated damages or similar
- claims arising in connection with the insured's insolvency or business interruption
- war, insurrection, strike, labour disruption, sabotage, terrorist acts and similar events
- nuclear and radioactive contamination exclusions
- damage resulting from temperature, gas, steam, humidity, smoke and similar phenomena (emissions) if such influence has a slow damaging effect
- damage caused by asbestos

The following exclusions that can be found in MOLI terms and conditions of Croatian and Slovenian insurers' can usually be insured by expanding standard coverage:

- damage caused by shifting of the vessel within the marina
- product liability
- liability related to grocery and chandlery supply
- liability related to (food and drinks) catering
- liability related to vessel chartering or sales
- liability for the costs of wreck removal and recovery
- pollution liability

We noticed that many of these exceptions can also be found in the general terms and conditions of berthing contracts of Croatian and Slovenian marina operators. However, especially in Croatia, there is a variety of marina operators' general terms and conditions of berthing contracts, and when compared with the usual MOLI scope of coverage and exclusions, they are mostly not



“back-to-back”. This is cause of uncertainty for marina operators, since there are instances in which their potential liability will remain uninsured. This issue should be resolved by devising model berthing contracts and standard marina operator general terms and conditions combined with standard MOLI insurance clauses designed on a back-to-back basis.

### 3.4. Insurance Limits

In case of MOLI, the insurance limits currently available on the respective markets range from EUR 5,500 to EUR 7,900,000 per event in Croatia and from EUR 1,000,000 to EUR 4,000,000 in Slovenia. Most of the local insurers reinsure these risks on the international markets, depending on the insurance limit in question and in line with their internal reinsurance programmes. The extremely wide range of liability limits on the Croatian market proves there exist vast differences between the various kinds and sizes of nautical tourism ports and liability risks they are exposed to in the course of their business. This is because in Croatia, there are 83 other nautical tourism ports apart from 57 marinas, including anchorages, mooring areas, land marinas and uncategorised nautical tourism ports.<sup>28</sup> The research results are further affected by the data on the insurance of sport ports.

### 3.5. Risk Assessment

When assessing the risk upon contracting insurance for the first time with a marina operator, the insurers rely on the written questionnaires specifically created for this type of insurance. Most insurers also hire surveyors to inspect the marina facilities, including the marina premises, piers, pontoons and docks, marina cranes, travel-lifts and other equipment and devices, marina security system etc. Some of them also look into the marina operators’ documentation (licences, concession, public authorities’ inspection records, certification, internal protocols etc.). Inspections may be repeated every several years if required by insurance results. Some insurers further rely on information available on the internet or in the media. Good practice of risk assessment normally takes into account the following factors:

- marina's location and micro-location (hydro-meteorology, security, traffic)
- limited, partly limited or open access<sup>29</sup>
- organisation and number of marina masters and mariners and other marina staff
- scope of marina services and standard contracts used

- subcontractors (are they licenced service providers, do they hold business or product liability insurance policies, do they have good references?)
- firefighting system
- overall condition and maintenance of marina premises, infrastructure, equipment, devices and berthing facilities
- planned investments
- security service
- design, functionality and quality of CCTV system
- environmental standards and measures
- entry and exit control and recording system

When underwriting MOLI, the insurers first look into the scope of services performed by a particular marina operator directly or through subcontractors. In the latter case, the subcontractors should also be taken into consideration during the risk assessment process. Furthermore, the insurers should assess whether a marina meets the minimum standards for safe operation under the relevant laws and regulations with respect to construction and maintenance, sanitary standards, firefighting, first aid, safety at work, environmental protection, waste management and similar. They should also check the marina operator’s compliance with any specific standards prescribed by the concession contract, but this is not always the case. Namely, three out of seven interviewed insurance companies replied that they do not take concession documentation, licences and other documentation or certification required by law into consideration during risk assessment, and that it is presumed that the marina operator is in possession of the necessary documentation. However, in case of a claim, any missing certificates or licences should give rise to exclusion of insurance coverage. Furthermore, the insurers should take into consideration the security, safety and environmental protection systems and protocols implemented by marina operators in addition to the prescribed minimum standards, but in practice these considerations do not seem to substantially affect the insurance price on the markets in question. Namely, all seven interviewed insurance companies stated that they did not take into consideration classification or certification of marinas according to internationally recognized quality standards during risk assessment.

As for marina security standards, it is interesting to note that four out of seven interviewed insurance companies state that hiring professional private security guards is a condition for a valid insurance coverage. On the other hand, this requirement is not prescribed by law and the marina operator decides at his discretion whether to outsource this service or to set up and implement an in-house security system depending on its specific security risk assessment and plan of measures.<sup>30</sup>

28. Croatian Bureau of Statistics, 2017, *op. cit.*

29. It should be noted that none of Croatian and Slovenian marinas are fully closed to the public due to the specific legal regimen of public maritime domain.

30. For more information on marina security standards in the context of Croatian legal framework see Pavliček, Padovan, Pijaca, *op. cit.*, pp. 469-484.

If a marina operator provides ship repair, maintenance or similar services, risk assessment should take into account whether this sort of work is carried out only on site or at other locations as well, in which case insurers should also inspect such locations, equipment and devices used.

Information of particular relevance are the fire protection organisation in the marina, whether the marina has its own firefighting unit and what is the response time by the nearest firefighting brigade? Are the employees well trained in firefighting operations? Does the marina have adequate firefighting equipment and protocols in place, including regular control and maintenance of firefighting equipment? All this can be checked in the firefighting plan and protocols.

Finally, a thorough risk assessment should take into account the minimum requirements that marina operators apply towards the clients. These can be established by reviewing the marina operator's general terms and conditions of berthing contracts, marina regulations and the actual practice applied. In particular, it would be important to establish whether a marina operator is consistent in requiring that each vessel be fully covered by a standard hull and third-party liability insurance policy. The required scope of hull and liability insurance coverage should be at least similar to the one provided under Institute Yacht Clauses 1/1/85, with adequate insured values and liability limits. Research has shown that the risk assessment requirement is observed more thoroughly in Slovenia. It is recommended that this approach be more stringently applied in Croatia as it would contribute to optimum risk distribution between marina operators, their clients and respective insurers.

### 3.6. Claims

Research has shown that MOLI business on the eastern Adriatic coast gives positive results. The claims ratio for the observed period amounts to less than 40 % (Table 1). As stated above, the data was collected from six Croatian and one Slovenian leading insurance companies, holding more than 80 % of the MOLI portfolio in those two countries. As for the distribution of claims by direct cause of damage, research has shown that most claims arise from damage to the vessel at berth or its equipment (Table 2). The most frequent direct cause of damage is inclement weather, as 40 % of the declared total number of claims in the observed period was caused by bad weather conditions. Furthermore, nearly 10 % of all claims pertain to collisions or contacts of berthed vessels with fixed or floating objects. Nearly 6 % of claims relate to damage caused by vessel break-ins (Table 2).

In practice, disputes arise when damage occurs during inclement weather, because marina operators or their insurers attempt to rely on the *vis maior* defence. The MOLI terms and conditions typical for Croatian and Slovenian markets do not define an exact borderline, e.g. by reference to the Beaufort wind force scale, as to which weather conditions are to be considered *vis maior*. Therefore, in case of a dispute, the competent court will have to consider the relevant facts and circumstances of each particular case to determine if bad weather can qualify as *vis maior*, in which case the marina operator would be released from liability.

**Table 1.**

Marina operator liability insurance statistics 2013 – 2016.

Year	Gross written premium in EUR	Number of insurance contracts	Number of claims	Value of claims in EUR	Claims ratio
2013	1,045,301.09	147	138	240,094.88	0,2297
2014	892,283.41	153	121	807,316.95	0,9048
2015	975,044.00	144	105	116,583.76	0,1196
2016	1,104,814.54	158	165	414,826.30	0,3755
<b>TOTAL</b>	<b>4,017,443.04</b>	<b>602</b>	<b>529</b>	<b>1,578,821.89</b>	<b>0,3930</b>

When analysing and comparing MOLI business practice, looking into the specific claims handling procedures of Croatian and Slovenian insurers is interesting. When a claim pertains to the damage to or loss of a berthed vessel, the usual documentation required by the insurer includes:

- the relevant berthing contract / ship repair contract / vessel owner's work order
- the marina operator's general terms and conditions
- documentation proving the ownership of the damaged vessel

**Table 2.**

Distribution of claims by cause of damage 2013 – 2016.

	2013	2014	2015	2016	TOTAL	Proportion in the total number of claims
Collision, contact with fixed or floating objects	17	23	6	6	52	9,8 %
Sinking, capsizing	2	2	2	5	11	2,1 %
Flooding	0	0	0	0	0	-
Lifting / launching accidents	0	4	0	3	7	1,3 %
Stranding	0	0	0	0	0	-
Fire	0	1	0	5	6	1,1 %
Pollution	0	0	0	0	0	-
Personal injury	0	1	0	2	3	0,6 %
Theft of a vessel	0	0	0	0	0	-
Break-in	10	16	1	3	30	5,7 %
Inclement weather	34	36	54	88	212	40,1 %
Other (e.g. damage caused by contact with marina crane, damage to hull due to flooding of the tarpaulin, inadequate mooring, marina ship repairer's error, transport by land, ice, third party liability, etc.)	75	38	42	53	208	39,3 %

- the original claim of the vessel owner
- the insured's statement describing the incident/accident and his position regarding his liability
- the statement of the insured's staff directly familiar with the incident/accident giving the relevant details of the event
- a pro forma invoice or a survey report indicating the cost of repair
- a market price valuation (in case of total loss of the vessel)
- in case that damage or loss was caused by a criminal offence or a trespass, the insured is required to submit the official documentation of the competent public authorities (police, harbour master's office)
- official weather forecast for the critical period (damage caused by inclement weather)
- vessel inventory list (in case of damage to or loss of vessel's equipment) etc.

Pursuant to the usual MOLI clauses, it is the obligation of the insured to produce evidence proving the extent of the damage covered and ascertaining the insured's liability covered by insurance. Therefore, the insurer may require the insured to provide the necessary documentation or other evidence to establish the existence and extent of the insurer's obligation. The insured is obliged to cooperate with the insurer in the claims handling process, as well as in the legal defence against

unfounded, unreasonable or excessive third-party claims. He must also preserve all his rights of recourse against other persons responsible for the damage and assist the insurer in realizing the subrogated rights against such persons. Finally, the insured is not allowed to admit liability or negotiate a settlement without the insurer's approval. A breach of any of these duties by the insured may result in the insurer being partly or entirely released from liability under the insurance contract, i.e. to the extent that the insurer's legal position was prejudiced by the breach (CCOA, Art. 963; SCOC, Art. 963).

As explained above, there is a possibility of direct action of a third-party claimant against the insurer (CCOA, Art. 965; SCOC, Art. 965), unless the claim arose from damage to the vessel caused in the course of repair or servicing. In the latter case, the relevant rules on marine insurance contracts apply, according to which no direct action is allowed for this type of claim (CMC, Art. 743; SMC, Art. 739). In case of direct action, the insurer has at his disposal all defences that would have been available to the insured marina operator had the claim been filed against him. For example, in case of a claim for damage to a vessel at berth, the insurer may use the same defence the marina operator would have been entitled to, had it been sued. Furthermore, since this is a voluntary liability insurance, the insurer may also use the defences stemming from the insurance contract (CCOA, Art. 945).

For example, the insurer could defend itself by establishing that the damage resulted from gross negligence on the part of the marina operator, which is excluded from insurance coverage. However, when contesting a direct action, the insurer only has at his disposal the defences that were available to him before the insured event occurred (CCOA, Art. 945.3; SCOC, Art. 965.2).

In case of right to direct action, the injured third party's right to file a claim against the insurer is subject to a prescription period which expires simultaneously with the prescription period applying to the injured party's claim against the insured marina operator liable for damage (CCOA, Art. 234.5; SCOC, Art. 357.5). The applicable prescription period depends on the underlying indemnity claim against the insured marina operator. The general prescription period stipulated by law is five years. However, prescription period for tort-based claims is three years from the injured party becoming aware of the damage and the identity of the tortfeasor, but maximum five years from the occurrence of damage. The prescription period for a contractual claim for damages is the period stipulated by law for prescription of the breached obligation (CCOA, Art. 230; SCOC, Art. 352). Claims of the insured marina operator against the insurer arising from a MOLI contract are subject to a prescription period of three years from the moment the injured person files a court claim for indemnity against the insured marina operator, or from the moment the marina operator indemnifies the injured person. In effect, this means that the insurer's exposure to potential claims under a MOLI policy continues for a number of years after policy expiry. An incident occurring during the insurance period may result in a court claim five years later. If the insurer or the insured marina operator contest the claim, the court proceedings may last for a number of years until the final court decision is reached. Five out of seven interviewed insurers declared that they had unsettled MOLI policy claims pending in court. Most of them are direct action claims. There are some rare examples of unsettled MOLI claims that have been kept in the claims reserve funds for more than twenty years due to pending court proceedings. This is possible because standard MOLI policies of Croatian and Slovenian insurance companies are "loss occurring" and not "claims made" policies.<sup>31</sup> In fact, according to Croatian and

Slovenian mandatory rules of general insurance law, insurance clauses excluding the insurer's obligation to pay indemnity for the claims made after the expiry of the insured period have no legal effect.<sup>32</sup> The determining factor for the insurer's obligation to pay indemnity is that the loss or damage giving rise to a claim occur during the insurance period. The moment the claim is made is irrelevant as long as it is made within the prescription period. Under Croatian and Slovenian law the legislative rules on prescription are mandatory and cannot be altered contractually (CCOA, Art. 218; SCOC Art. 339).

#### 4. CONCLUSION

A valid MOLI policy with an adequate scope of coverage is a *conditio sine qua non* for a prudent marina operator. Croatian and Slovenian marina operators have so far always insured their liability with local insurers who have developed their own general terms and conditions. Standard MOLI insurance clauses in Croatia and Slovenia are very similar due to the common historical circumstances in which the marina industry and MOLI business developed on the eastern Adriatic coast. Croatian and Slovenian insurers' MOLI terms and conditions have influenced the marina operators' general terms and conditions of berthing contracts which is reflected especially in the liability exclusion clauses.

MOLI contracts in Croatia and Slovenia are subject to general insurance law, with the exception of shiprepairer's liability coverage extension which is governed by the maritime law rules on marine insurance contracts. However, from the aspect of business organisation, MOLI is handled as a part of the marine, aviation and transport insurance business.

MOLI is voluntary insurance in the sense that it is not prescribed as compulsory by law, but in practice, it is usually imposed on marina operators as a condition of the concession-awarding contract. Public authorities competent for the granting of nautical tourism port concessions are recommended to always include such stipulation in the concession contracts defining the minimum scope of coverage and insurance limits.

MOLI in Croatia and Slovenia covers marina operator contractual and tortious liability arising from the operator's core business activity. General third party liability and employer's liability are usually covered under a different insurance policy.

31. According to Dunham, claims-made policies are common in the professional liability context, and gained popularity in the 1970s when medical malpractice claims and larger damage awards became more common. Claims-made policies differ from traditional occurrence or accident policies in that coverage under a claims-made policy is triggered when the claim is made, and not when the bodily injury or property damage occurs. Furthermore, depending on the wording of the claims-made policy, there may not be coverage for events occurring prior to a certain date if the claim is made after the policy came into effect. However, depending on policy wording, there may still be coverage for claims made after the expiry of the policy period if the insured had obtained a so-called "discovery" or extended coverage. See Wolcott B. Dunham, Jr., *New Appleman New York Insurance Law, Second Edition, Vol. 1*, § 16.04, Matthew Bender & Company, Inc., a member of the LexisNexis Group, New York, 2017.

CCOA, Art. 922 in connection with Art. 964.1 and Art. 218; SCOC, Art. 922 in connection with Art. 964.1 and Art. 339. See Marijan Ćurković, *Claims made clause in liability insurance contracts*, *Hrvatska pravna revija* 11 (2011), no. 11, pp. 44-47; Drago Klobučar, *Claims made or Losses occurring, Osiguranje*, 34 (2003), no. 7-8, pp. 40-43. Vesna Markić, *Rizik i osigurani slučaj u osiguranju od odgovornosti*, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 16 (1995), no. 2, pp. 353-364; Adriana Vincenca Padovan, *Claims made clause in a shipbuilder's liability insurance contract under Croatian law*, Sanja Ćorić et al. (ur.), *Zbornik radova s međunarodne znanstveno-stručne konferencije Dani hrvatskog osiguranja 2014.*, Croatian Chamber of Commerce, Croatian Insurance Office, Zagreb, 2014, pp. 57-67.

The scope of contractual liability covered by MOLI is disputable. The issue is whether the marina operator undertakes to safeguard the vessel at berth, i.e. whether berthing contracts are contracts of deposit, or primarily contracts for use of a safe berth similar to berth rental. The problem could be overcome by developing and implementing standard general terms and conditions of berthing contracts and standard MOLI clauses.

In both countries in question direct action is allowed in case of voluntary liability insurance governed by general insurance law, which includes MOLI policies. Exceptionally a direct action is not allowed with respect to claims pertaining to damage to the vessel arising from ship repair or maintenance work.

As for risk assessment, local insurers are recommended to periodically inspect the marinas they insure. The inspections should include the checking of the necessary documentation (concession, technical safety, fire-protection etc.). Marina operators should require that all vessels berthed in their marinas are insured under the common hull and liability insurance policies and that all of their subcontractors hold adequate business, professional or product liability insurance policies.

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