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12. – 13. listopada 2017., Zagreb, Hrvatska

TRANSPORT LAW TOWARDS THE FUTURE

October 12 – 13 2017, Zagreb, Croatia

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Croatian Transport Law Association

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Faculty of Law – University of Zagreb
Zagreb, 2017

Poštovani čitatelji,
Dragi sudionici konferencije INTRANSLAW 2017,

Posebno nam je zadovoljstvo da se nakon samo dvije godine od održavanja prve INTRANSLAW konferencije održava druga po redu Međunarodna konferencija transportnog prava i prava osiguranja – INTRANSLAW Zagreb 2017. Time smo ispunili očekivanja i uspjeli u naumu da INTRANSLAW postane znanstveni i stručni forum koji će okupljati zainteresirane sudionike ove opsežne i dinamične industrije i omogućiti im kvalitetnu razmjenu znanja, iskustva i informacija. Organizator ovogodišnje konferencije (Hrvatsko društvo za transportno pravo) i su-organizatori (Pravni fakultet Sveučilišta u Zagrebu, Hrvatska akademija znanosti i umjetnosti – Jadranski zavod, i *Institut du Droit International des Transports – IDIT*) okupili su velik broj izlagatelja, stranih i domaćih stručnjaka i znanstvenika, čiji je profesionalni interes vezan uz transportno pravo i pravo osiguranja.

U Zborniku što je pred Vama objavljeni su pisani radovi koji obuhvaćaju različite teme objedinjene u zajednički naziv Konferencije Transportno pravo ususret budućnosti. Svih 25 znanstvenih i stručnih radova prošli su postupak dvostruke anonimne međunarodne recenzije i vjerujemo da će Vam obrađene teme biti zanimljive i poticajne. Isto tako, vjerujemo da će i druge, usmeno prezentirane teme iz bogatog programa Konferencije potaknuti Vaš interes.

Zahvaljujemo se autorima koji su pripremili pisane radove objavljene u ovom Zborniku INTRANSLAW 2017 koji će ostati vrijedan trag naše Konferencije.

Također zahvaljujemo svim financijskim partnerima koji su svojim doprinosom pomogli organizaciji i održavanju druge po redu Međunarodne konferencije INTRANSLAW 2017, kao i objavljivanju ovoga Zbornika.

Znanstveni odbor
INTRANSLAW 2017

Dear readers,

Dear participants of INTRANSLAW 2017,

It is with particular pleasure that we welcome you to our second International Conference of Transport and Insurance Law – INTRANSLAW Zagreb 2017 – only two years after the first one. Being able to follow up on the extremely successful maiden Conference only two years later proves that we have met our expectations and attained the goal of making INTRANSLAW a scientific and professional forum which will keep bringing together all interested stakeholders in this comprehensive and dynamic industry, and continue to be the place of exchange of knowledge, experience and information. The organiser of this year's Conference (Croatian Transport Law Association) and the co-organisers (Faculty of Law of the University of Zagreb, Croatian Academy of Sciences and Arts – Adriatic Institute, and *Institut du Droit International des Transports – IDIT*) have gathered a great number of presenters, foreign and domestic experts and scientists, whose professional interests relate to transport and insurance law.

The Proceedings before you are a collection of written papers that cover a range of topics brought together under the title of the Conference: Transport law towards the future. All 25 scientific and professional papers have undergone an international double-blind review and we strongly believe that you will find the topics they deal with interesting and inspiring. We also believe that you will find the other, orally presented topics from the rich Conference programme equally informative and engaging.

We would like to thank the authors who have prepared the papers published in these Proceedings of INTRANSLAW 2017, which will remain a valuable keepsake of our Conference.

We would also like to thank all our sponsors, whose contributions have been invaluable in the organisation of this second International Conference INTRANSLAW 2017 and in publishing these Proceedings.

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I.

LOGISTIKA, KOPNENI TRANSPORT I DIGITALIZACIJA U TRANSPORTU

LOGISTICS, LAND TRANSPORT AND DIGITALISATION IN TRANSPORT

THE MANAGEMENT AND ORGANISATION OF CROSS-BORDER TRANSPORTATION SERVICES THROUGH THE EUROPEAN GROUPING OF TERRITORIAL COOPERATION (EGTC): FROM THEORY TO PRACTICE

Dr. Simone Carrea *, Ph.D.

Pregledni znanstveni rad / Review paper
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SUMMARY

Regulation EC 1082/2006 introduced the possibility for States, regional and local authorities to establish a European Grouping of Territorial Cooperation (EGTC), an entity provided with legal personality and legal capacity, whose objective is to facilitate and promote territorial cooperation between its members with the aim of strengthening economic, social and territorial cohesion.

The breadth of the tasks which can be entrusted to EGTCs, the openness of membership also to private law undertakings (recently introduced by regulation EU 1302/2013, which amended regulation EC 1082/2006) and the enhanced possibility of receiving support from both European and national funds make the new legal instrument especially appealing for the establishment of cooperation schemes in the area of transportation.

Indeed, several EGTCs have already been (or are about to be) set up with a view to organising and improving transportation across the territory of the partners involved.

In the light of the above, the present paper aims at assessing the relevance of the EGTC for the management and organisation of cross-border transportation as well as for the governance of transport infrastructures both in the territory of the European Union and of potentially interested third States. In this view, the purpose of the present analysis is two-fold in so far as it consists of (a) a theoretical legal analysis of the main features of the new instrument which make it particularly suitable for the management and organisation of cross-border transportation, as well as (b) a detailed case study of the above mentioned recently established EGTC Interregional Alliance for the Rhine-Alpine Corridor.

As far as the first part is concerned, the paper will focus on the exam of the provisions of regulation EC 1082/2006 which appear to be most significant for the purpose of organising and managing cross-border transportation services, such as (i) the (recent) openness of membership of EGTCs also to private undertakings entrusted with operation of services of general economic interest (art. 3, par. 1, e, introduced by regulation EC 1302/2013), which renders the instrument at issue particularly suitable for the establishment of public-private partnerships in the area of transportation; (ii) the possible accession of members from third countries or overseas countries or territories (art. 3a), which widens the territorial scope of the cooperation that can be established through the instrument at issue;

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(iii) the opportunity to finance EGTCs' activities by means of the EU and/or national funds; (iv) the comprehensiveness of the tasks which can be entrusted to EGTCs, which only have to fall within the competence of its members under their national law; (v) the possibility to assign to EGTCs the management of transport infrastructures, including the competence to define the terms and conditions of its use as well as the tariffs and fees to be paid by the users (art. 7, par. 4); (vi) the power of EGTCs to award public contracts under EU directive 2014/24/EU (art. 39), which enhances the capacity of the new legal instrument of efficiently organising transportation services in a cross-border area, e.g. by acquiring interoperable devices compatible with the (potentially) different legal standards in force in the territories of the States involved in the cooperation.

On the basis of such theoretical and preliminary introduction, the second part of the paper then focuses on the case study of the EGTC Interregional Alliance for the Rhine-Alpine Corridor EGTC, which has been established in order to facilitate and promote the territorial cooperation among its members and to jointly strengthen and coordinate the territorial and integrated development of the multimodal Rhine-Alpine Corridor (between Rotterdam and Genoa) both from the regional and local perspective.

In conclusion, the combination of the two sections above described shows, both from a legal and practical point of view, that the EGTC is a particularly suitable legal instrument for the management and improvement of cross-border transportation services, not only because of its versatility (as far as both its potential tasks and territorial scope are concerned) but also because of its capacity of involving all of the different actors (both public and private) concerned by the management of the interested cross-border area.

Key words: *international cooperation – EGTC – financing – management of cross-border infrastructures – public-private partnership.*

1. Introduction

Management and administration of border territories has always posed significant challenges – both at a practical level and from a legal perspective – with relevant impact upon the living conditions of the interested communities. As a matter of fact, borders are artificial lines (often drawn with no regard to the natural features of territories) dividing spaces otherwise contiguous at the geographical level and close from a social, economic, historic and cultural point of view[1].

[1] Perkmann, M., Sum, N. (2002), Globalization, regionalization and cross-border regions: scales, discourses and governance, Perkmann, M., Sum, N. (Eds.), *Globalization, regionalization and cross-border regions* (pp. 3-21), Basingstoke, Palgrave Macmillan, p. 7 observe that «borders areas are perceived as socially constructed spaces, mediating and negotiating the existence of linear demarcations between territorial units (e.g. Paasi 1996). In other words, they are conceived as spatially extended frontiers, i.e. 'zones of varying widths, in which people have recognisable configurations of relationships with other people inside that zone, on both sides of the borderline but within the cultural landscape of the borderlands' (Donnan and Vislon 1994:8). Such an understanding has also been adopted in anthropologically inflected studies (Blake 1994; Cole and Wolf 1974; Girot 1994). These often use ethnographic methods to examine how borders are involved in shaping the self-understanding of social groups». GEPE – Group of European Political Studies, *The European Grouping of Territorial Cooperation*, CdR 117/2007, retrieved 7.4.2017 from http://cor.europa.eu/en/documentation/studies/Pages/studies.aspx, p. 16 highlights that «the development of cross-border cooperation in Europe is justified by two factors which are linked to the relative importance of borders on the continent. Firstly, more than anywhere else, Europe bears the "scars of history", i.e. its borders» and «secondly, the importance and permeability of European borders are evolving. The key focus of the European integration process has been to significantly reduce the relevance of national borders for European economic players, in order to create a large market in which national borders no longer stand in the way of the free movement of workers, goods, services and capital».

The negative impact of borders can be appreciated in the perspective of both (*a*) the individual citizens, who are hindered in their freedom of movement, and (*b*) the authorities entrusted, within the different legal systems, with the management of border areas, which find in the frontiers an obstacle to the effective administration of their territories. In other words, border areas belonging to different States, despite being homogeneous from the socio-economic and geographical point of view, end up being administered by different authorities, each one of them within the scope of its competences and, in many cases, in the absence of any effective mechanism for reciprocal coordination.

In the European continent, the relevance of borders (and, more specifically, their impact upon people's lives) has been gradually and significantly reduced thanks to the introduction of the freedoms of movement of persons, goods and services. Nonetheless, also in the EU the situation of border areas appears to be still far away from reaching a satisfying arrangement as far as their management and administration by different national authorities are concerned, with significant and persistent consequences for the lives of the inhabitant communities.

Indeed, the effective exercise of the aforementioned freedoms of movement can be severely affected by the quality of the services provided within the cross-border territory. Moving more closely towards the object of the present paper, the relation between the exercise of the freedoms of movement and the organisation of efficient cross-border transportation services is, for instance, particularly evident.

As a consequence of the above described situation, the need has arisen to introduce mechanisms of cooperation capable of mitigating (if not completely overcoming) the obstacles posed by national borders to the efficient management of the territories they cross. To this end, several European States where such need was perceived as particularly urgent, introduced in their systems specific legal instruments aimed at enabling local authorities to cooperate with the corresponding authorities at the other side of the border.

Similar developments have been witnessed, again in the European continent, at international law level, and more specifically within the framework of the Council of Europe, with the adoption of the 1980 Madrid Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (and its additional Protocols)[2].

Finally, also the European Union took an interest in regulating transfrontier cooperation, in which it saw an important tool for the achievement of the objectives of social, economic and territorial cohesion established by art. 174 of TFEU. As will be highlighted more extensively under § 6 the interest of the EU for transfrontier cooperation initially took the form of financial support for programmes and initiatives having a transfrontier relevance. Afterwards, howev-

[2] European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities signed in Madrid on 21st May 1980 and entered into force on 22nd December 1981. On transfrontier cooperation see *ex plurimis*, Vellano, M. (2014), *La cooperazione regionale nell'Unione europea*, Torino, Giappichelli; Comte, H., Levrat, N. (Eds.) (2006) *Aux coutures de l'Europe. Défis et enjeux juridiques de la coopération transfrontalière*, Paris, L'Harmattan; Labayle, H. (Ed.) (2006), *Vers un droit commun de la coopération transfrontalière?*, Bruxelles, Bruylant; Frigo, M. (2005), Dalla Convenzione di Madrid all'Euroregione: prove di integrazione transfrontaliera, *Diritto dell'Unione europea*, pp. 697-618; Lejeune, Y. (Ed.) (2005), *Le droit des relations transfrontalières entre autorités régionales ou locales relevant d'Etats distincts, Les expériences franco-belge et franco- espagnole*, Bruxelles, Bruylant; Levrat, N. (1994), *Le droit applicable aux accords de coopération transfrontalière entre collectivités publique infra-étatiques*, Paris, PUF; Beyerlin U. (1988), *Rechtsprobleme der lokalen grenzüberschreitenden Zusammenarbeit*, Berlin, Springer-Verlag; Condorelli, L., Salerno, F. (1986), Le relazioni transfrontaliere tra comunità locali in Europa nel diritto internazionale ed europeo, *Rivista trimestrale di diritto pubblico*, pp. 381-423; Dupuy, P.M. (1977), La coopération régionale transfrontalière et le droit international, *Annuaire français de droit international*, Vo. 23 (1), pp. 837-860.

er, the need arose to introduce a specific legal instrument at EU law level – provided with legal personality and legal capacity – in order to ensure a more effective and organised management of EU funds as well as to enable the realisation of more structured forms of cooperation.

To this purpose, regulation EC 1082/2006[3] introduced the possibility for States, regional and local authorities as well as public undertakings to establish a European Grouping of Territorial Cooperation (EGTC), an entity provided with legal personality and legal capacity, whose objective is to facilitate and promote territorial cooperation between its members with the aim of strengthening economic, social and territorial cohesion.

The breadth of the tasks which can be attributed to EGTCs, the openness of membership also to private law undertakings entrusted with operation of services of general economic interest (recently introduced by regulation EU 1302/2013[4], which amended regulation EC 1082/2006) and the enhanced possibility of receiving support from both European and national funds make the new legal instrument especially appealing for the establishment of cooperation schemes in the area of transportation.

Indeed, several EGTCs have already been (or are about to be) set up with a view to organising and improving transportation across the territory of the partners involved[5]. In this regard reference can be made, for instance, to (*a*) the EGTC Central European Transport Corridor (CETC), which has been established for the purpose of facilitating and promoting transport accessibility along the length of the North-South axis of multimodal transport from the Baltic to the Adriatic Seas and possibly along the potential branch of the corridor towards the Black Sea[6]; (*b*) the EGTC Interregional Alliance for the Rhine-Alpine Corridor, established with a view to improving transportation services along the Rhine-Alpine Corridor, between Rotterdam and Genoa[7]; (*c*) the project of EGTC Inforailmed which aims at improving railway transportation services in the cross-border area covering the territory of the Italian region Liguria, the French region Provence-Alpes-Côte d'Azur and the Principality of Monaco, where national borders cannot presently be crossed without intermediate reloading because of lack of coordination and lack of interoperability of railways on the different sides of the borders[8]; (*d*) the EGTC Tritia Ltd., established by regional authorities belonging to Poland, Czech Republic

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3 Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European Grouping of Territorial Cooperation (EGTC), in OJ L 210 of 31.7.2006.

4 Regulation (EU) No 1302/2013 of the European Parliament and of the Council of 17 December 2013 amending Regulation (EC) No 1082/2006 on a European Grouping of Territorial Cooperation (EGTC) as regards the clarification, simplification and improvement of the establishment and functioning of such groupings, in OJ L 342 of 20.12.2013.

5 More information on existing EGTCs can be found on the so called EGTC platform at the link https://portal.cor.europa.eu/egtc/Pages/welcome.aspx, which has been established with a view to facilitating the exchange of experiences on the ground, promoting the EGTC as a tool for territorial cohesion as well as giving visibility to EGTC projects, while also supporting the consultative works of the Committee of the Regions in cross-border issues.

6 More information on the EGTC CETC can be found on the website of the EGTC platform at the link https://portal.cor.europa.eu/egtc/CoRActivities/Pages/Central-European-Transport-Corridor-Limited-Liability-European-Grouping-of-Territorial-Cooperation.aspx.

7 More information on the EGTC Interregional Alliance for the Rhine-Alpine Corridor can be found on the website of the EGTC platform at the link https://portal.cor.europa.eu/egtc/CoRActivities/Pages/Rhine-Alpine.aspx.

8 For a more detailed analysis of the Inforailmed project, see Carrea, S. (2015), La cooperazione transfrontaliera in ambito ferroviario e il miglioramento dei collegamenti sull'asse Nizza-Monaco-Ventimiglia-Imperia: il progetto INFORAILMED, *Nuova Giurisprudenza Ligure*, pp. 47-56.

and Slovak Republic with the objective of maximising the use of the geographical position of the partner regions for their economic development by appropriate development of cross-border transport infrastructure[9].

In the light of the above, the present paper aims at assessing the relevance of the EGTC for the management and organisation of cross-border transportation as well as for the governance of transport infrastructures both in the territory of the European Union and of potentially interested third States. In this view, the purpose of the present analysis is two-fold in so far as it consists, on the one hand, of a theoretical legal analysis devoted to a general description of the EGTC (§ 2) as well as to the identification of the main features of the new instrument which make it particularly suitable for the management and organisation of cross-border transportation, such as the effectiveness of the legal framework established by regulation EC 1082/2006 (§ 3), the remarkable openness of membership of the EGTC (§ 4), the territorial scope of the cooperation that can be established through the new instrument (§ 5), the opportunities for financing (§ 6), the comprehensiveness of the tasks and activities EGTCs can be entrusted with (§ 7), including the power to award public contracts (§ 8).

The second part will, on the other hand, provide a detailed case study of the above mentioned recently established EGTC Interregional Alliance for the Rhine-Alpine Corridor, with a view to assessing, also from a practical point of view, the suitability of the new instrument for the management and improvement of cross-border transportation services.

Part I – EGTC: a theoretical legal analysis

2. The European Grouping of Territorial Cooperation (EGTC): a general introduction

The European Grouping of Territorial Cooperation (EGTC) has been introduced with Regulation (EC) No. 1082/2006 of the European Parliament and of the Council of 5 July 2006 (hereinafter also regulation 1082), adopted in the context of the specific actions provided for under art. 175, par. 3, of the TFEU (*ex* art. 159 of the TEC) for the promotion of economic, social and territorial cohesion[10].

Through the introduction of such instrument the European Union has enabled Member States, regional and local authorities as well as, more in general, public undertakings (the complete list of potential members is provided by art. 3)[11] to create cooperative groups provided

[9] More information on the EGTC Tritia Ltd can be found on the website of the EGTC platform at the link https://portal.cor.europa.eu/egtc/CoRActivities/Pages/Tritia.aspx.

[10] On the matter of territorial cooperation within the EU and, more specifically, on the European Grouping of Territorial Cooperation (EGTC), see *ex plurimis* Carrea, S. (2017), *Coordinamento e integrazione tra ordinamenti: il caso del GECT. Diritto internazionale e diritto dell'Unione europea*, Torino, Giappichelli; Martínez, A.A. (2014), Towards a New Generation of European Groupings of Territorial Cooperation, *European Structural & Investment Funds Journal*, Vol 2 (2), pp. 89-101; Vellano, M. (2014), *La cooperazione regionale nell'Unione europea*, Torino, Giappichelli, pp. 153-176; Pechstein, M., Deja, M. (2011), Was ist und wie funktioniert ein EVTZ?, *Europarecht*, Vol. 46 (3), pp. 357-382; Cocucci, V. (2008), Nuove forme di cooperazione territoriale transfrontaliera: il Gruppo europeo di cooperazione territoriale, *Rivista italiana di diritto pubblico comunitario*, pp. 891-926; Pertile, M. (2005), Il GECT: verso un organismo di diritto comunitario per la cooperazione transfrontaliera?, *Diritto del commercio internazionale*, pp. 117-150.

[11] According to art. 3 of regulation 1082/2006, as amended by regulation 1302/2013, «the following entities may become members of an EGTC: (a) Member States or authorities at national level; (b) regional authorities; (c) local authorities; (d) public undertakings within the meaning of point (b) of Article 2(1) of Directive 2004/17/

with legal personality and legal capacity, with a view to facilitating and promoting territorial cooperation between its members.

The legal framework established by regulation 1082 is quite complex and, for the purpose of the present general introduction, can be briefly described as follows.

According to art. 4 of regulation 1082, an EGTC can be established by its potential members only with the previous approval of the competent authorities of the Member States involved. At the end of the authorisation procedure, the new entity acquires legal personality and legal capacity upon completion of the publication and registration formalities prescribed by art. 5.

As far as the applicable law is concerned, according to art. 2 of regulation 1082, EGTCs are governed not only by the regulation itself, but also by the convention signed by its members according to art. 8, as well as – in the case of matters not, or only partly, covered by regulation 1082 – by the national law of the Member State where the EGTC has its registered office.

From the organisation point of view, the minimum *apparatus* of an EGTC comprehends a general assembly of its members as well as a director entrusted with powers of representation, although the members are allowed to adopt more complex organisational schemes by adding in the statutes «additional organs with clearly defined powers» (art. 10, par. 2).

The tasks of the EGTC are defined by the convention approved by its members at the moment of the incorporation (art. 7, par. 1) and are generally confined to the facilitation and promotion of territorial cooperation with a view to strengthening Union economic, social and territorial cohesion as well as overcoming internal market barriers. According to art. 7, par. 3, of the regulation the tasks of EGTCs primarily regard (but are not confined to) the implementation of cooperation programmes or operations supported by the European Union through the European Regional Development Fund, the European Social Fund and the Cohesion Fund. Nonetheless EGTCs are also entitled to carry out specific actions of territorial cooperation between its members without financial support from the Union. Art. 7, par. 4, however, prohibits EGTCs from exercising powers conferred by public law or duties whose object is to safeguard the general interests of the State or of other public authorities, such as police and regulatory powers, justice and foreign policy. After the entry into force of regulation 1302/2013 of the European Parliament and of the Council of 17 December 2013, amending regulation 1082/2006, a very limited regulatory power is now allowed with regard to the definition of terms and conditions for the use of an infrastructure managed by the EGTC or for the provision of a general economic interest service, including the tariffs and fees to be paid by the users.

Regulation 1082 also deals with (*i*) the organisation of controls over the management of public funds by EGTCs (art. 6); (*ii*) the law applicable to budget and accounts of EGTCs (art. 11); (*iii*) the liability of EGTCs towards third parties as well as liquidation and insolvency (art. 13); (*iv*) the legal remedies aimed at preserving the consistency of EGTCs (and their activities) with the provisions of regulation 1082 (art. 14) as well as with Member States' provisions on public policy, public security, public health and public morality (art. 13); and finally (*v*) the rules of jurisdiction applicable to controversies involving EGTCs (art. 15).

In order to provide a general description of the legal framework concerning the EGTC, a brief reference has finally to be made to the existing relations between regulation 1082 and the

EC of the European Parliament and of the Council or bodies governed by public law within the meaning of the second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council; (e) undertakings entrusted with operations of services of general economic interest in compliance with applicable Union and national law; (f) national, regional or local authorities, or bodies or undertakings, equivalent to those referred to under points (d) and (e), from third countries, subject to the conditions laid down in Article 3a. Associations consisting of bodies belonging to one or more of these categories may also be members».

international legal instruments dealing with transfrontier cooperation and, more specifically, with the Madrid Outline Convention of 1980 on Transfrontier Co-operation between Territorial Communities or Authorities (and its additional Protocols) adopted within the Council of Europe[12]. Such relation is specifically addressed by recital 5 of regulation 1082, according to which «the Council of Europe *acquis* provides different opportunities and frameworks within which regional and local authorities can cooperate across borders» and regulation 1082 «is not intended to circumvent those frameworks or provide a set of specific common rules which would uniformly govern all such arrangements throughout the Community». In other words, with the adoption of regulation 1082 the European institutions have not intended to replace the existing international treaties dealing with transfrontier cooperation, but rather to introduce a new flexible instrument that potential members are allowed (but not obliged) to employ for the establishment of their cooperation[13].

3. The effectiveness of the legal framework

The first advantage of the EGTC is represented, from a legal point of view, by the significant degree of effectiveness of the normative framework under which the new entity has been introduced, a characteristic which played a key role for the success the instrument at issue has so far achieved[14].

Such enhanced degree of effectiveness stems, first of all, from the type of legislative act chosen by the EU institutions for the introduction of the EGTC. Indeed, as is well known, according to art. 288 of the TFEU, EU regulations are binding in their entirety and directly applicable in all Member States. As a consequence, Member States – which are traditionally very jealous of their treaty-making power and, more in general, of any initiative involving contact with foreign authorities – could limit the application of the new instrument only to a very limited extent (and within the narrow limitations that the regulation placed on the exercise of their discretion)[15].

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[12] Protocol No 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Co-operation Groupings (ECGs), signed in Utrecht on 16th November 2009 and entered into force on 1st March 2013. For an analysis of the analogies and the differences between the EGTC and the Euroregional Cooperation Grouping (ECG), see Engl, A. (2007), *Future Perspectives on Territorial Cooperation in Europe: The EC Regulation on a European Grouping of Territorial Cooperation and the Planned Council of Europe Third Protocol to the Madrid Outline Convention concerning Euroregional Cooperation Groupings*, *EDAP Papers, 03/2007,* retrieved 7.4.2017 from http://aei.pitt.edu/8901.

[13] Recital n. 15 of regulation 1082/2006 states that recourse to an EGTC is optional and art. 1 of the same regulation provides that «a European Grouping of Territorial Cooperation (…) may be established on Community territory».

[14] Pucher, J., Hauder, N. (2016), *EGTC Monitoring Report 2015 Implementing the new territorial cooperation programmes*, retrieved 7.4.2017 from http://cor.europa.eu/en/documentation/studies/Documents/EGTC-MR-2015.pdf p. 1 highlights that «by the end of 2015, 60 EGTCs were established in total, which include more than 800 national local and regional authorities from 20 different Member States and from Ukraine. (…) Another 14 Groupings are currently in the pipeline, one of them including non-EU countries: the EGTC EUCOR – The European Campus, with participation of Switzerland».

[15] Several provisions of regulation 1082 entitles Member States to exercise their discretion in limiting the scope of the cooperation initiatives which can be carried out by means of the establishment of an EGTC. In this regard, reference might be made, for instance, to art. 7, par. 3, of the regulation, according to which «Member States may limit the tasks that EGTCs may carry out without financial support from the Union. However, without prejudice to Article 13, Member States shall not exclude tasks concerning the investment priorities referred to in Article 7 of Regulation (EU) No 1299/2013 of the European Parliament and of the Council».

This is a very remarkable feature of the legal framework at issue, considering that – at the international law level – the margin of discretion withheld by national States in the implementation of treaties on transfrontier co-operation, such as the already mentioned Madrid Outline Convention (and its additional protocols), severely affected the efficacy of such instruments[16].

On the contrary, the entities listed by art. 3 of regulation 1082 as potential members of an EGTC are endowed with an actual right to cooperate with each other through the establishment of an EGTC, at the one condition that the cooperative initiative be consistent with the legal framework provided by the regulation itself. In this regard, it is particularly remarkable that potential members are even entitled to judicially enforce such right of theirs, by challenging before a court of law the refusal opposed by the competent national authorities with regard to the establishment of an EGTC[17].

As far as effectiveness of the legal framework is concerned, it also has to be mentioned, for the sake of completeness, that not all of the provisions of regulation 1082 – despite the nature of such legislative act – are provided with direct effect, but entail the legislative intervention of Member States. One might think, for instance, to art. 4, par. 4, of regulation 1082, which require Member States to designate the competent authorities to receive the notifications and the documents in the context of the authorisation procedure[18].

At this purpose, it has to be emphasised, however, that according to art. 4, par. 3, of the TEU, Member States are under a general obligation to «ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union» and such obligation is specifically reiterated in the very regulation 1082, whose art. 16, par. 1, provides that «Member States shall adopt provisions to ensure the effective application of this Regulation, including with regard to the determination of the competent authorities responsible for the approval procedure, in accordance with their legal and administrative arrangements».

As a consequence, despite the lack of direct effect of several provisions of regulation 1082, the effectiveness of the regulation, ensured, at national level, through the adoption of the nec-

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16 The margin of discretion retained by the States with regard to the application of the Madrid Outline Convention was significantly larger. In this regard, reference might be made to the possibility – recognised to the contracting States by the Convention – to identify, by means of national provisions, the authorities capable of entering into cooperation agreements according to the convention. As a matter of fact, art. 2 of the Convention established that «for the purpose of this Convention, the expression "territorial communities or authorities" shall mean communities, authorities or bodies exercising local and regional functions and regarded as such under the domestic law of each State. However, each Contracting Party may, at the time of signing this Convention or by subsequent notification to the Secretary General of the Council of Europe, name the communities, authorities or bodies, subjects and forms to which it intends to confine the scope of the Convention or which it intends to exclude from its scope».

17 On the one hand, art. 4, par. 3, of regulation 1082, concerning the procedure for the establishment of an EGTC, provides that «in the event of non-approval, the Member State shall state its reasons for withholding approval and shall, where appropriate, suggest the necessary amendments to the convention». On the other hand, art. 15, par. 2, on the matter of jurisdiction, establishes that «the competent courts for the resolution of disputes under Article 4(3) (…) shall be the courts of the Member State whose decision is challenged».

18 The peculiarity of several provisions of regulation 1082 (which do not have direct effect despite being included within a legal instrument provided with direct applicability) have sometimes induced national courts to misinterpret the legal nature of the regulation. In 2007, for instance, Italian Consiglio di Stato, held that «the real nature of the provisions of regulation 1082 is not the one of EU regulations, since they do not seem to have direct and immediate effect within the national legal systems of different Member States» (see Opinion n. 3665/2007 of 9 October 2007, retrieved 7.4.2017 from www.giustizia-amministrativa.it).

essary implementation measures[19], together with the relative rapidity of the authorisation procedure (six months, delayable only in case of a request for additional information according to art. 4, par. 3), made the EGTC a very suitable instrument for the establishment of transfrontier cooperation schemes.

4. The openness of membership

The second very interesting feature of the instrument under consideration – which appears to be of specific relevance for the transport sector – is represented by the significant openness of its potential membership. The list of potential members of EGTCs is provided, as mentioned earlier, by art. 3 of regulation 1082 and includes – after the entry into force of amending regulation 1302/2013 – (*a*) Member States or authorities at national level; (*b*) regional authorities; (*c*) local authorities; (*d*) public undertakings or bodies governed by public law; (*e*) undertakings (public or private) entrusted with operations of services of general economic interest; (*f*) national, regional or local authorities or bodies or undertakings equivalent to those under points d) and e) from third countries; as well as (*g*) associations consisting of bodies belonging to one or more of the aforementioned categories.

As the brief nature of the present introduction prevents from dwelling upon every single item of the list provided by art. 3, it suffices to highlight that the inclusiveness of such list is crucial for the suitability of the EGTC for the establishment of cooperation schemes in the area of transportation, as it can be shown through the following examples.

First of all, the remarkable comprehensiveness of potential membership of EGTCs allows the instrument at issue to fit the constitutional framework of the States involved in the cooperation, by making it possible to include in the planned cooperation initiative every authority (national, regional and local) and/or private undertaking which, according to national law, is entrusted with competences in the area of transportation. This seems to be particularly important as, in most States, competences concerning transport-related issues are frequently allocated across several institutional levels which need to be involved in order for the cooperation to be effective.

Such observation is clearly confirmed, for instance, by the already mentioned project of EGTC Inforailmed, where the openness of membership to States and national authorities[20] (and not only to regional and local actors) made it possible to involve in the programmed initiative both the Italian Region Liguria and the Italian State (whose participation was deemed necessary in the light of competence fragmentation in the area of transportation under Italian law).

The case of the EGTC project Inforailmed further shows the importance of potential involvement of third States[21], as any cooperation initiative aimed at improving cross-border

[19] More specific details about the measures adopted by Member States for the implementation of regulation 1082 in their legal systems might be found on the EGTC platform at the link https://portal.cor.europa.eu/egtc/about/Pages/national-dispositions.aspx.

[20] The possible involvement of States as members of the EGTC is a quite unusual feature of the legal framework at issue, considering that – in the area of transfrontier cooperation – States have usually played the role of *regulators* rather than *participants*. On the relevance of States' participation in the EGTC (with specific reference to the implication of such participation in terms of governance), see Nadalutti, E. (2013), Does the 'European Grouping of Territorial Co-operation' Promote Multi-level Governance within the European Union?, *Journal of Common Market Studies*, Vol. 51 (4), pp. 756-771, at p. 764.

[21] The accession of members from third countries was only mentioned in the original version of regulation 1082, whose recital 16 affirmed that «the third subparagraph of Article 159 of the Treaty does not allow the inclusion

transportation services between Italy and France and, more specifically, between the Italian Region Liguria and the French Region Provence-Alpes-Côte d'Azur necessarily entails the participation of the Principality of Monaco and, due to the particular conformation of the territory concerned, would not be possible without it.

In the same line, openness of membership to public or private undertakings according to letter d) and e) of the above considered list seems to be particularly relevant in the area of transportation, where the operation of services of general interest and the management of infrastructure in many cases are not withheld by national or local authorities, but frequently entrusted to public or private undertakings.

5. The territorial scope of the cooperation

The potentialities of the EGTC in the area of transportation can also be appreciated from the perspective of the territorial scope of the cooperation which can be established through the instrument at issue.

In the previous paragraph, the importance of the potential involvement of third States was already emphasised, whose territorial location might be strategic for the accomplishment of cooperation objectives. In this very regard, a further example might be gathered from the case of the EGTC Rhine-Alpine Corridor where it is easy to appreciate the geographical relevance of Swiss authorities for the promotion of the multimodal Rhine-Alpine Corridor linking Rotterdam and Genoa[22]. At this purpose, it may also be noted that the potential involvement of third States allows the territorial scope of the cooperation made possible by regulation 1082 to be largely independent from the territorial extension of the European Union. In other words, in order for the territory of a third State to be included in a cooperation scheme established under regulation 1082, it is not necessary that such State accedes to the European Union as a consequence of an enlargement of its territory[23].

As far as the territorial scope is regarded, a second remarkable feature of the EGTC concerns the size of the area potentially interested by the cooperation. As a matter of fact, according to art. 1, par. 2, of regulation 1082, the objective of an EGTC is to facilitate and promote territorial cooperation, including cross-border, transnational and interregional cooperation. The notions of cross-border, transnational and interregional cooperation stem from the terminology employed by the EU in the context of the Interreg programmes[24] and include a great

of entities from third countries in legislation based on that provision. The adoption of a Community measure allowing the creation of an EGTC should not, however, exclude the possibility of entities from third countries participating in an EGTC formed in accordance with this Regulation where the legislation of a third country or agreements between Member States and third countries so allow». After the amendments brought by regulation 1302/2013, regulation 1082/2006 now has a specific provision (art. 3a) devoted to accession of members from third countries or overseas countries or territories (OCTs). On the issue see Pucher, J. (2015), *The participation of entities of outside the EU in the European Groupings for Territorial Cooperation*, 2015, retrieved 7.4.2017 from http://cor.europa.eu/en/documentation/studies/Documents/EGTCs-Particip-Outside.pdf.

[22] In this regard, art. 7 of the convention of the Rhine-Alpine Corridor EGTC clearly provides that «entities from third countries, in particular Switzerland, may become a member in accordance with the rules of Articles 3a, 4 of Regulation (EC) No 1082/2006 as amended by Regulation (EU) No 1302/2013».

[23] In this regard, it has nonetheless to be mentioned that membership of a certain State to the European Union is not completely irrelevant, as accession of members from third countries is subject to the stricter requirements provided by art. 3a of regulation 1082.

[24] The notion of *cross-border* cooperation includes cooperation between NUTS III regions from at least two different Member States lying directly on the borders or adjacent to them and is employed by the different versions

variety of geographical relations among the potential partners of the cooperation: from (*i*) cooperation involving regions from at least two different Member States lying directly on the borders or adjacent to them (cross-border), to (*ii*) cooperation involving regions from several Member States forming bigger areas (transnational), up to (*iii*) areas covering the territory of the whole European Union (interregional).

Also the broadness of the territorial scope of the cooperation has proved decisive for the success of the EGTC in the area of transportation, as, in the practice, the interest has arisen to establish both (*a*) EGTCs focused on a circumscribed area, such as *e.g.* the project of Inforailmed EGTC, dealing with the improvement of railway transportation services between the Italian Region Liguria and the French Region Provence-Alpes-Côte d'Azur; and (*b*) EGTCs with a broader area of intervention such as the already mentioned Rhine-Alpine Corridor EGTC whose territory covers the whole corridor linking the cities of Rotterdam and Genoa and the EGTC Central European Transport Corridor (CETC) aimed at facilitating and promoting transport accessibility along the length of the North-South axis of multimodal transport from the Baltic to the Adriatic Seas and possibly along the potential branch of the corridor towards the Black Sea.

6. The opportunity of financing

A further noteworthy feature of the instrument at issue lies in the fact that it was specifically designed to receive and manage (not only) EU (but also national) funds. As a matter of fact, in this very regard, art. 7, par. 3, provides that «primarily, the tasks of an EGTC may concern the implementation of cooperation programmes, or parts thereof, or the implementation of operations supported by the Union through the European Regional Development Fund, the European Social Fund and/or the Cohesion Fund».

In order to fully appreciate the connection of the EGTC with the financing of cooperation – which goes to the very origin of the legal framework under consideration – a short historical excursus is in order.

Indeed, for a very long time, the European Union did not take any particular interest in regulating transfrontier cooperation, so much so that references to it in the Treaties are still quite rare[25].

Nonetheless, the relation between the achievement of the objectives of the (at the time) European Community and the development of border regions was already acknowledged in the '70s when it was considered with regret that «the internal border regions are hardly able to fulfil their bridging function between the Member States»[26].

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of the Interreg programme: Interreg (OJ C 215 of 30.8.1990, p. 4), Interreg II A (OJ C 180 of 1.7.1994, p. 60) and Interreg III A (OJ C 143 of 23.5.2000, p. 6). *Transnational cooperation* – introduced with the programme Interreg II C (OJ C 200 of 10.7.1996, p. 23) and continued under Interreg III B (OJ C 143 of 23.5.2000, p. 9) – involves regions from several countries of the EU forming bigger areas identified by the Commission for the achievement of the objectives of the project. Finally, *interregional cooperation* – introduced with Interreg III C (OJ C 143 of 23.5.2000, p. 10; Communication from the Commission to the Member States of 7 May 2001 – "Interregional cooperation" – Strand C of the Interreg III Community initiative – Commission communication C(2001) 1188 final in OJ C 141 of 15.5.2001) works at paneuropean level, covering all EU Member States.

[25] The expression «cross-border cooperation» is mentioned only once in the entire Treaty on the Functioning of the European Union by art. 307, par. 1, according to which «the Committee of the Regions shall be consulted by the European Parliament, by the Council or by the Commission where the Treaties so provide and in all other cases, in particular those which concern cross-border cooperation, in which one of these institutions considers it appropriate».

[26] Resolution on the motion for a resolution on the Community's regional policy as regards the regions at the Community's internal frontiers (18 November 1976) in *Official Journal* C 293 of 13.12.1976, p. 37 and ff.

In this view, art. 5 of regulation (EEC) 724/75 of the Council of 18 March 1975 establishing a European Regional Development Fund provided that the European Commission, in the deciding about the Fund's assistance, would have to assess the transfrontier implications of the investment.

The interest of the European Community toward border regions intensified – after the introduction in the Treaty of a Title devoted to economic and social cohesion (art. 130A-130E of TEC) – with the creation of the Interreg programme[27], specifically devoted to financially sustaining border areas in overcoming their development issues.

Art. 3 of TEU now provides that the Union «shall promote economic, social and territorial cohesion, and solidarity among Member States»[28], while the TFEU has a Title XVIII devoted to social, economic and territorial cohesion, whose very first provision, art. 174, establishes that «in order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion» and, in particular, «the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions»[29].

According to art. 175 of TFEU pursuance of the above mentioned objectives is supported by the European Union not only through the Structural Funds (European Agricultural Guidance and Guarantee Fund, Guidance Section; European Social Fund; European Regional Development Fund) (par. 1), but also by means of «specific actions» which might «prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies» and may be adopted «by the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions» (par. 3)[30].

For the purpose of the present analysis, it is noteworthy that since the first edition of the Interreg programme much importance has been paid to the establishment of special entities entrusted with the management of the cooperation programme, not only with a view to a more effective implementation of the programme itself, but also for a better administration of funding.

As a matter of fact, among the objectives of the first Interreg programme was already listed the creation of administrative structures devoted to sustaining and promoting cooperation, while the Communication from the Commission to the Member States on Interreg III mentioned among the «provisions for implementing the programme» also «the designation

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27 See above footnote 24.

28 According to art. 4, par. 2, c), TFEU, the matter of economic, social and territorial cohesion falls within the shared competence between the Union and the Member States.

29 Art. 174, par. 3, TFEU provides that «among the regions concerned, particular attention shall be paid to rural areas, areas affected by industrial transition, and regions which suffer from sever and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, cross-border and mountain regions».

30 The following provisions of Title XVIII of the TFEU are devoted to the regulation of European funds. Art. 176 TFEU provides that «the European Regional Development Fund is intended to help to redress the main regional imbalances in the Union through participation in the development and structural adjustment of regions whose development is lagging behind and in the conversion of declining industrial regions». Art. 177 TFEU deals with the legislative procedure applicable for the definition of the tasks, priority objectives and organisation of the Structural Funds (par. 1) as well as with the establishment of the Cohesion Fund (par. 2). Art. 178 TFEU finally concerns the legislative procedure applicable for the adoption of implementing regulations relating to the European Regional Development Fund (par. 1), the European Agricultural Guidance and Guarantee Fund as well as the European Social Fund (par. 2).

by the competent authorities participating in the programme of the common structures for cooperation established on the basis of specific agreements taking into account national legislation» (par. 25)[31].

Nonetheless – as EU law (at the time EC law) did not provide any legal framework for the establishment of an entity devoted to the management of the cooperation programme – recourse had to be made to (*a*) the legal framework provided in the context of the Council of Europe[32] or (*b*) legal entities introduced at EU law level for different purposes, such as the European Economic Interest Grouping (EEIG) brought by regulation 2137/1985.

Both alternatives, however, proved themselves to be far from adequate. On the one hand, the legal framework introduced within the Council of Europe posed too many legal issues to allow an effective management of cooperation[33]. On the other hand, the strictly economic nature of the EEIG and its activities was (and is) not always consistent with the management of transfrontier cooperation (which in many cases do not have an economic object). Not to mention the fact that the EEIG is not always provided with legal personality, depending on the discretion of Member States according to art. 1, par. 3, of regulation 2137/1985.

It is in this very context that the need was acknowledged to introduce at EU law level a legal framework enabling the establishment of entities provided with legal personality and entrusted with the management of transfrontier cooperation programmes funded by the European Union. The EGTC was then introduced on the basis of art. 175 TFEU (at the time art. 159 of TEC) which allows the European Parliament and the Council to adopt the «specific actions» which might «prove necessary outside the Funds» in order to strengthen economic, social and territorial cohesion[34].

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[31] Communication from the Commission to the Member States of 2 September 2004 laying down guidelines for a Community initiative concerning trans-European cooperation intended to encourage harmonious and balanced development of the European territory**,** in *Official Journal* C 226 of 10.9.2004, p. 2.

[32] On this issue, Casteigts, M. (2005), Cadre juridique et enjeux politiques du financement de la coopération transfrontalière en Europe, Lejeune, Y. (Ed.) *Le droit des relations transfrontalières entre autorités régionales ou locales relevant d'Etats distincts, Les expériences franco-belge et franco- espagnole* (pp. 165-182), Bruxelles, Bruylant, p. 165, highlighs that «le dispositif de soutien et d'accompagnement de la coopération transfrontière in Europe est marqué par une situation paradoxale qui affecte sa cohérence: ses instruements financiers sont mis en place par l'Union européenne au titre de l'initiative INTERREG mais son cadre juridique est fixé par la Convention-cadre de Madrid, négociée sous l'égide du Conseil de l'Europe et complétée par des accords bilatéraux». Levrat, N. (2006), La coopération territoriale: adaptation de la coopération transfrontalière aux nouveaux territoires du prokect européen, *Revue des affaires européennes*, pp. 495-509, at p. 504 writes about a «division horizontale du travail au niveau européen, entre un Conseil de l'Europe au sein duquel est élaboré le cadre juridique de la coopération transfrontalière, et la Communauté européenne qui, par le biais du Fonds européen de développement regional (FEDER), soutient financièrement les projets aux frontières entre Etats membres de l'UE» and identifies the main drawbacks of such *division du travail* on the one hand in the uncertainty of the regulatory framework laid down by the instruments adopted within the Council of Europe and, on the other hand, in the lack of uniform application of such instruments (due to the limited number of ratifications as well as to the numerous reservations and declarations entered by States).

[33] See GEPE – Group of European Political Studies, *The European Grouping of Territorial Cooperation*, CdR 117/2007, retrieved 7.4.2017 from http://cor.europa.eu/en/documentation/studies/Pages/studies.aspx, p. 41.

[34] In this perspective, it is possible to understand the reasons why regulation 1082 makes express reference in its recitals to the inadequacy of the legal instruments previously employed for the development of transfrontier cooperation initiatives and presents itself as an alternative to the instruments adopted within the Council of Europe, thus definitively overcoming the "functional specialisation" previously established between EU law and the legal framework of the Council of Europe. In this regard, recital 5 of regulation 1082 affirms that «the Council of Europe *acquis* provides different opportunities and frameworks within which regional and local authorities can cooperate across borders. This instrument is not intended to circumvent those frameworks or

In the light of the above it can be explained why the connection of the EGTC with the issue of funding goes to the very root of the legal framework under consideration.

Furthermore, also at a practical level, the close relation between the new instrument and the EU funds is clearly witnessed by the fact that many of the EGTCs which have been so far established, on the one hand, formalise and "institutionalise" cooperation schemes previously started on the basis of EU funds and, on the other hand, have the express objective to direct funds for the activities of its members.

This is the case, for instance, of the EGTC Rhine-Alpine Corridor, which, according to the Preamble of its Convention, aims to «continue the strategic initiative of the INTERREG Project CODE 24 for the securing of a long-term partnership and cooperation beyond the limited INTERREG project period» and, at the same time, has the objective of directing further «funds to corridor related activities and projects». The same is also true in the case of Inforailmed, where the preliminary study for the establishment of an EGTC entrusted with the organisation and management of railway transportation was financed thanks to the Alcotra programme, funded by the European Regional Development Fund (ERDF) under the European Territorial Cooperation objective in Italy and France.

7. The comprehensiveness of the potential tasks of EGTCs

As the tasks of EGTCs have already been generally outlined in the first paragraph, the present analysis will now focus upon some features of EGTCs' potential tasks which appear to be of specific relevance for the establishment of cooperation initiatives in the area of transportation.

In this regard, it is first of all noteworthy to underline the considerable flexibility of the tasks that can be entrusted to EGTCs, which might range from (*a*) the more general, such as, for instance, lobbying activities in the interest of the partners, promotion of the territories involved, planning of development strategies for transportation in the considered area, *etc.* to (*b*) the more specific, such as the organisation of transportation services in a precise area, directing of funds to transport related activities and projects in the territory of the partners, *etc*.

Art. 7, par. 1, of regulation 1082 only provides, in this regard, that «an EGTC shall carry out the tasks given to it by its members in accordance with this Regulation» and, according to par. 2, such tasks – falling within the competence of every member – have to meet the objective of «facilitation and promotion of territorial cooperation» (with or without the financial support from the Union).

In the practice, the comprehensiveness of the potential tasks of EGTCs has been widely taken advantage of by authorities and undertakings interested in establishing cooperation schemes dealing with transport-related issues.

As a matter of fact, some of the existing EGTCs have been entrusted with objectives having a general character and this is the case, for instance, of the already mentioned EGTC Central European Transport Corridor, whose aim is to (*i*) facilitate and promote the improvement of transport accessibility along the length of the North-South axis of multimodal transport from the Baltic to the Adriatic Seas and possibly along the potential branch of the corridor towards the Black Sea; (*ii*) support the development of the economies of the regions involved as well as

provide a set of specific common rules which would uniformly govern all such arrangements throughout the Community».

the improvement of the living conditions of their inhabitants; (*iii*) enhance the compatibility of the transport infrastructure among the regions involved; (*iv*) support the development of intermodal transport connections and spread environmentally friendly solutions.

Other EGTCs are, instead, devoted to the realisation of more specific objectives, such as, in the case of the project of EGTC Inforailmed, the improvement of railway transportation services between the Italian Region Liguria, the Principality of Monaco and the French Region Provence-Alpes-Côte d'Azur.

A combination of general and specific objectives is also feasible within the same EGTC, as in the case of the Rhine-Alpine Corridor EGTC which will be extensively analysed in the second part of the present paper. Indeed, such EGTC is entrusted with very general objectives, such as «combining and focusing the joint interests of its members towards national, European and infrastructure institution» by organising and implementing «joint lobbying activities for the development of the Corridor» (see art. 4.2.a of the Convention) as well as with very specific tasks, such as «directing funds to corridor related activities and projects» (see art. 4.2.c of the Convention) and «taking charge of the Corridor Information System, developed within the project CODE 24» (an interactive Web GIS-based instrument for information exchange whose purpose is to offer strategic information about the Rhine-Alpine Corridor's development) (see art. 4.2.d of the Convention).

As far as potential tasks are concerned, a second very interesting feature of the legal framework at issue for the purpose of establishing cooperation initiatives in the area of transportation is represented by the possibility to entrust an EGTC with the management of a transport infrastructure or with the organisation of transportation services across the transfrontier area involved. Indeed, not only do these kinds of tasks fall within the objective of promoting and sustaining territorial cooperation (and are therefore perfectly admissible according to art. 7), but the ability of EGTCs to perform them has been significantly enhanced by the amendment brought by regulation 1302/2013 with regard to the potential exercise of regulatory powers by EGTCs.

As a matter of fact, according to art. 4 of regulation 1082 «the tasks given to an EGTC by its members shall not concern the exercise of powers conferred by public law or of duties whose object is to safeguard the general interests of the State or of other public authorities». Nonetheless, regulation 1302/2013 added the provision according to which «in compliance with applicable Union and national law, the assembly of an EGTC (…) may define the terms and conditions of the use of an item of infrastructure the EGTC is managing or the terms and conditions subject to which a service of general economic interest is provided, including the tariffs and fees to be paid by the users».

Accordingly, an EGTC entrusted with the management of a crossborder transport facility (or a cross-border transportation service) connecting the territories of the partners involved in the cooperation could also be entitled by its members to exercise a regulatory function with regard to the condition of use of the infrastructure (or of the service) and the tariffs to be paid by their users.

8. The power to award public contracts

A further remarkable feature of the EGTC is represented by its ability to enter into binding contracts for the purchase of goods or services from third parties, so that the function of the EGTC is not confined to the organisation and coordination of programmes and projects taking

place in the territory interested by the cooperation, but the EGTC itself is actually able to implement cooperation activities also at an operational level.

From a legal point of view, such ability depends, first of all, on the attribution to the EGTC of legal personality and legal capacity according to art. 2, under which «an EGTC shall have legal personality» (par. 2) and «in each Member State the most extensive legal capacity accorded to legal persons under Member States' national law».

For the effective exercise of their legal capacity it is then crucial that EGTCs can rely on resources of their own coming from financial contributions of their members according to the agreement reached among them in the convention and in the statutes (art. 9, par. 2, lett. f) and/or from funds of the European Union. In this regard, art. 7, par. 3, of regulation 1082 is very clear in establishing that «an EGTC may carry out specific actions of territorial cooperation between its members (…) with or without financial support from the Union».

Moreover, not only can EGTCs enter into binding contracts with third parties, but they can also award public contracts according to Directive 2014/24/EU on public procurement, whose art. 39, par. 4, allows «several contracting authorities from different Member States» to «jointly award a public contract». Par. 5 of the same provision even allows contracting authorities having set up a joint entity such an EGTC to agree on the applicable national procurement rules of one of the Member States involved in the cooperation, namely the «national provisions of the Member State where the joint entity has its registered office» or «the national provisions of the Member State where the joint entity is carrying out its activities».

In order to fully appreciate the relevance of the ability of EGTCs to award public contracts for the establishment of cooperation initiatives dealing with transport-related issues it is useful to make again reference to the project of EGTC Inforailmed, aimed – as mentioned above – at improving railway transportation services within the cross-border territory comprehending the Italian region Liguria, the French region Provence-Alpes-Côte d'Azur and the Principality of Monaco[35].

In this instance, the partners of the cooperation had to deal with a major technical hurdle represented by the different operational and technical standards applicable in the States involved in the cooperation, which caused lack of interoperability of machines and the need of intermediate reloading at the border.

As a matter of fact, on the one hand, railway transportation has been the object of extensive harmonisation at EU law level. In this regard, reference has to be made to directive 2004/49/EC on railway safety, directive 2008/57/EC, so called railway interoperability directive, directive 2007/59/EC on the certification of train drivers operating locomotives and trains on the railway system in the Community.

As highlighted by the study conducted by the partners of the initiative, however, the recent technological evolutions (more specifically in the area of safety systems) gradually favoured the introduction – within the limits allowed by the harmonisation brought by the aforementioned directives – of safety and automation systems specific to each State. Such technological improvements – while enhancing automation and safety – further hindered interoperability of machines and caused the need for intermediate reloading.

It is in this very context that it is possible to appreciate the advantage of having a legal entity, such as the EGTC, provided with legal capacity and personality as well as with the power

[35] For a more detailed analysis see Carrea S. (2015), La cooperazione transfrontaliera in ambito ferroviario e il miglioramento dei collegamenti sull'asse Nizza-Monaco-Ventimiglia-Imperia: il progetto INFORAILMED, *Nuova Giurisprudenza Ligure*, pp. 47-56.

to award public contracts. Indeed, according to the Inforailmed Project, the EGTC that will be established is supposed to (*a*) purchase interoperable machines capable of providing cross-border transportation services in the transfrontier area without the need for intermediate re-loading at the border, as well as to (*b*) award the management of the transportation service by entering into contract with the train operator.

Part II – The Interregional Alliance for the Rhine-Alpine Corridor EGTC: a case study

9. The Rhine-Alpine Corridor

The so called Rhine-Alpine Corridor, as shown in **Figure 1**, comprehends a vast land area (long about 1.300 km) connecting the North Sea ports of Rotterdam and Antwerp to the Mediterranean basin in Genoa, via Switzerland and some of the major economic centres in the Rhein-Ruhr, the Rhein-Main-Neckar, Northern Italy regions such as, in particular, the agglomeration of Milan.

About 70 millions inhabitants are living in the territory of the corridor (which hosts the most densely populated urban regions in Europe) and about 50% of the north-south rail freight (about 700 million tons a year) is yearly operated along this corridor[36]. Because of such features, the corridor «can be seen as a prime example of a present-day European corridor, in which the diverging interests of transport, economic and spatial development are present at different spatial scales»[37].

Rhine-Alpine Corridor is part of the Trans-European Transport Network (TEN-T), which comprises roads, railway lines, inland waterways, inland and maritime ports, airports and railroad terminals throughout the 28 Member States[38].

The corridor was initially the object of a TEN-T priority project (PP)[39], namely PP24, relating to freight and passenger transport on the railway axis Lyon/Genoa-Basel-Duisburg-Rot-

[36] See *Region Frankfurt/Rhein-Main im Herzen des Korridors Rotterdam-Genua*, 2015, Frankfurt, brochure drafted in the context of the CODE 24 project and available on the website of the EGTC Rhine-Alpine Corridor, retrieved 7.4.2017 from the link http://egtc-rhine-alpine.eu/it/download/region-frankfurtrhein-main-im-herzen-des-korridors-rotterdam-genua/.

[37] Witte, P.A. (2014), *The Corridor Chronicles: integrated perspectives on European transport corridor development*, Delft, Eburon Academic Publishers, p. 30.

[38] The trans-European networks (TENs) have existed since 1993 and they now find their legal basis in art. 170 – 172 of Title XVI of the Treaty on the Functioning of the European Union. TENs do not only deal with transport but also with energy and telecommunication and the fundamental purpose of this EU policy is to interconnect national infrastructure networks and ensure their interoperability. At EU law level the main instruments employed under such policy are (*a*) Union Guidelines establishing objectives, priorities and outlines of measures for the development of networks and (*b*) EU funds supporting projects of common interest. As far as transport is concerned, the first guidelines were adopted by the European Parliament and the Council in 1996 (Decision No 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans-European transport network in *Official Journal* L 228 of 9.9.1996 p. 1 ff.) and the first regulation on funding was adopted by the Council in 1995 (Council Regulation (EC) No 2236/95 of 18 September 1995 laying down general rules for the granting of Community financial aid in the field of trans-European networks, in *Official Journal* L 228 of 23.9.1995, p. 1 ff.). Detailed maps of the Trans-European Transport Network can be found on the website of the European Commission at the link https://ec.europa.eu/transport/themes/infrastructure/ten-t-guidelines/maps_en.

[39] A full list of TEN-T priority projects can be found at the link https://ec.europa.eu/transport/themes/infrastructure/ten-t-policy/priority-projects_en.

terdam/Antwerpen and this is the reason why Rhine-Alpine Corridor is today also commonly known as Corridor 24 (see below § 10).

As the policy focus moved away from a disconnected set of projects to a more integrated approach, priority projects became part of the so called core network corridors, whose aim is to remove bottlenecks, build missing cross-border connections and promote modal integration and interoperability, as well as to integrate rail freight corridors, promote clean fuel and other innovative transport solutions, advance telematics applications for efficient infrastructure use, integrate urban areas into the TEN-T, enhance safety[40]. Since the beginning of 2014, Rhine-Alpine Corridor is among the nine core network corridors.

Given the above, the following paragraphs will be devoted, first of all, to the description of Project CODE 24 in which the origins of the EGTC Rhine-Alpine Corridor are to be found (§ 10) and then to the analysis of the main features of the above mentioned EGTC, with specific regard to its territory and members (§ 11), its objectives and tasks (§ 12) and the projects currently implemented by it.

Figure 1 – Territory of the Rhine-Alpine Corridor*

*This is an authorised reproduction of the map published on the website of the EGTC Rhine-Alpine Corridor.

[40] See Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU in *Official Journal* L 348 of 20.12.2013, p. 1 ff., especially art. 42-48; Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010 in *Official Journal* L 348 of 20.12.2013 p. 129 ff.; Communication from the Commission – *Building the Transport Core Network: Core Network Corridors and Connecting Europe Facility* COM (2013) 940 final of 7.1.2014. A map of the TEN-T Core Network Corridors can be found at the link http://ec.europa.eu/transport/infrastructure/tentec/tentec-portal/site/maps_upload/SchematicA0_EUcorridor_map.pdf.

10. The Project CODE24

The project *Corridor 24 Development Rotterdam-Genoa: Joint regional development for the north south corridor* – also referred to as CODE24 was approved under the Strategic Initiatives Framework of the INTERREG IVB NWE programme of the EU and financed 50% by EU funds[41].

Different types of stakeholders have been involved in the project as partners, such as port authorities (Port of Rotterdam, Port of Mannheim, Port of Strasbourg and Port of Genoa), regional and local public authorities (Rhein-Neckar, Ruhr, Karlsruhe, Frankfurt/Rhein-Main, Mannheim and Lahr), universities (Duisburg-Essen, Zürich, Kehl and Utrecht) as well as private entities (Uniontrasporti, SiTI, TransCare and PTV).

CODE24 project's objective was to promote the improvement and the development of the corridor through a transnational strategy capable of enhancing transport capacity and economic performance without negatively impacting the environment and the inhabitant population. To this end – and more specifically, in order to address the conflicts of capacity, sustainability and quality of life along the densely populated corridor – an integrated planning of landscape, settlement and transport development has been deemed to be necessary, with the involvement of all the stakeholders concerned.

The project consisted of four different Work Packages (and nineteen corresponding Actions) including (*1*) *Spatial and Infrastructural Development*; (2) *Environmental Aspects and Noise Reductions*; (*3*) *Increasing Regional Economic Benefits*; (*4*) *Communication, Acceptance and Interregional Cooperation*.

As it is not possible to dwell upon the outputs of every single action pursued under the project, it is interesting to mention that, among the key results achieved, are (*a*) the development of the Corridor Info System CIS, an interactive Web GIS-based instrument for information exchange about the corridor and its dynamics, with a view to enhancing the effectiveness of planning; (*b*) the creation of R&SET Tool (Railway and SET-tlement Development Dynamic Visualisation Tool), a model of the Rhine-Alpine Corridor aimed at simulating the effects of important planning decisions; (*c*) management of ecological compensation measures aimed at counter-balancing the environmental impact of larger infrastructure projects in densely populated areas; (*d*) development of measures aimed at reducing noise in order to foster public acceptance of measures for a capacity increase on the corridor[42]; (*e*) an analysis on how to connect the terminal ports (Genoa and Rotterdam) to the Hinterland; (*f*) an analysis on costs and other effects of bottlenecks to the regions along the corridor; (*g*) the development of an Online Rail

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[41] For a more detailed analysis of the CODE 24 project see Scholl, B. (2016), Spatial Planning and Development in a European and Macro-regional Context, Drewello H., Scholl, B. (Eds.), *Integrated Spatial and Transport Infrastructure Development*. *The Case of the European North-South Corridor Rotterdam-Genoa* (pp. 11-47), Cham, Springer, p. 11 ff. For a general overview of the CODE 24 project see also *CODE24 – Corridor 24 Development Rotterdam – Genoa – One Corridor – One Strategy! Towards an enduring interregional alliance for the integrated and balanced development of the Rhine-Alpine Corridor*, 2014, available on the website of the EGTC Rhine-Alpine Corridor retrieved 7.4.2017 from the link http://egtc-rhine-alpine.eu/download/strategy-paper-en/ and *CODE24 – Corridor 24 Development Rotterdam – Genoa – Key Results*, 2014, available on the website of the EGTC Rhine-Alpine Corridor retrieved 7-4-2017 from the link http://egtc-rhine-alpine.eu/download/code24-key-results/.

[42] See on this issue Wilske, S. (2016), Noise Reduction in the Railway Corridor Rotterdam-Genoa: Observations within the Project CODE24, Drewello H., Scholl, B. (Eds.), *Integrated Spatial and Transport Infrastructure Development*. *The Case of the European North-South Corridor Rotterdam-Genoa* (pp. 263-272), Cham, Springer, p. 263 ff.; Peinemann, C. (2016), Management of Ecological Compensation Measures, Drewello H., Scholl, B. (Eds.), *Integrated Spatial and Transport Infrastructure Development*. *The Case of the European North-South Corridor Rotterdam-Genoa* (pp. 273-290), Cham, Springer, p. 273 ff.

Freight Exchange (ORFE), a platform which allows the exchange of information about available loading and shipping capacities between rail operators, forwarders and shippers by use of the internet.

Partners of the CODE24 Project were also aware that the development of the major European axis represented by the Rhine-Alpine Corridor is a permanent task which cannot be fully and effectively performed within the lifetime of a single project. This is the reason why, among the actions of CODE24 project, there was also an analysis of feasibility of a European Grouping of Territorial Cooperation, which it was deemed to be the most appropriate framework for continuing the cooperation initiated under the CODE24 project, with a view to securing a long-term partnership and cooperation beyond the limited INTERREG project period.

11. The Interregional Alliance for the Rhine-Alpine Corridor EGTC: territory and members

Interregional Alliance for the Rhine-Alpine Corridor EGTC (in the following also referred to as Rhine-Alpine Corridor EGTC)[43] was therefore established in 2015 with a view to continuing «the strategic initiative of the INTERREG Project CODE 24 for the securing of a long-term partnership and cooperation beyond the limited INTERREG project period» as well as in order to «facilitate transnational cooperation between the partners along the axis and to manage the complex challenges of this corridor development» (Preamble of the Convention signed in Mannheim on the 24th April 2015)[44].

According to art. 3 of the Convention, the area of intervention of the EGTC is represented by the whole multimodal Rhine-Alpine Corridor, a vast area (as highlighted above under § 9) whose inclusion in the cooperation initiative under exam has been made possible thanks to the broad territorial scope allowed by regulation 1082, as described under § 5.

Founding members of the EGTC, according to art. 6 of the Convention, were not only public regional and local authorities (such as Province Gelderland, Regionalverband FrankfurtRheinMain, Verband Region Rhein-Neckar, Stadt Mannheim, Regionalverband Mittlerer Oberrhein, Stadt Karlsruhe, Stadt Lahr, Regionalverband Südlicher Oberrhein) but also private entities such as Duisburger Hafen AG (the holding and management company of the Port of Duisburg, the largest inland port in the world) and TechnologieRegion Karlsruhe Gbr (a partnership established according to German law between eleven cities and towns, four administrative districts and a regional association with the aim to strengthen Karlsruhe as an economic area).

Accession of further potential members from EU States is expressly allowed according to art. 6, par. 2, and the EGTC was subsequently joined by three Port Authorities, namely Port of Rotterdam, Port of Strasbourg and Port of Antwerp; several regional and local public authorities (Regione Piemonte, Regione Liguria, Regione Lombardia, Provincie Zuid-Holland, Stadt Mainz, Stadt Mannheim); as well as Uniontrasporti, a consortium company registered under Italian law with a view to promoting the development of transport, logistic and infrastructure.

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[43] See also the analysis conducted by Sallbach, J. (2016), European Grouping of Territorial Cooperation: Giving a Voice to Local and Regional Government in European Infrastructure Development, Drewello H., Scholl, B. (Eds.), *Integrated Spatial and Transport Infrastructure Development*. *The Case of the European North-South Corridor Rotterdam-Genoa* (pp. 319-328), Cham, Springer, p. 319 ff.

[44] The full text of the convention can be found on the website of the EGTC Rhine-Alpine Corridor at the link http://egtc-rhine-alpine.eu/organisation/convention/.

Accession of potential members from third countries is also provided for under art. 7 and, in this regard, particular attention is understandably paid to Switzerland, whose territory is crossed by the Rhine-Alpine Corridor and therefore represents a key area for the accomplishment of the development strategies implemented by the EGTC. Thanks to such provision, Kanton Basel-Stadt was able to recently join the EGTC.

The above description of the Rhine-Alpine Corridor EGTC demonstrates the flexibility as well as the potentialities of the EGTC for the purpose of establishing cooperation initiatives in the area of transportation. As a matter of fact, on the one hand, the breadth of the territorial scope makes it possible to provide the new entity with a vast area of intervention, even potentially including areas belonging to third countries, thanks to the clarification brought by regulation 1302/2013, amending regulation 1082/2006. On the other hand, the openness of membership which has been extensively described under § 4 makes it possible to involve in the cooperation initiative not only public authorities but also a remarkable variety of entities (public and private), representing the interests of the different stakeholders concerned.

This appears to be particularly important since – as was reiterated in several strategic documents drafted in the context of the CODE 24 project – the success of the initiatives pursued through the cooperation greatly depends on the integrated planning and management of several actions affecting a significant variety of subjects.

In this light, *CODE24 – Corridor 24 Development Rotterdam – Genoa – Key Results*[45], for instance, first observes that «the acceptance of infrastructure development in all regions is only possible when the development for goods transport doesn't create any disadvantages for regional passenger transport. As passenger transport in itself forms the foundation for spatial development strategies in all regions, the security and stimulation of this kind of transport needs to have priority». In this perspective «planning has to be carried out collaboratively by all stakeholders involved: responsible authorities (national / regional / local), transport sector and the users» and «for the international processing of activities in these spaces, as well as the implementation of the corresponding tasks, the relevant platforms for cooperation need to be created».

12. The Interregional Alliance for the Rhine-Alpine Corridor EGTC and its objectives and tasks

The objectives and tasks of the Rhine-Alpine Corridor EGTC are also noteworthy and deserve analytical consideration with a view to fully appreciating the potentialities of the EGTC. As a matter of fact – as the following analysis will show – thanks to a thorough drafting of the convention, potential members of the EGTC can shape the cooperative entity in a way as to serve a great variety of interests of the partners with specific reference to transport related issues.

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[45] Already quoted under footnote 40. The importance of stakeholders' involvement in decision relating transport infrastructure development is also emphasised by Drewello, H. (2016), The Consideration of Local Preferences in Transport Infrastructure Development: Lessons from the Economics of Federalism, Drewello H., Scholl, B. (Eds.), *Integrated Spatial and Transport Infrastructure Development*. *The Case of the European North-South Corridor Rotterdam-Genoa* (pp. 291-304), Cham, Springer, p. 291 ff. according to whom «a strong involvement of local players in the planning of infrastructure for European transport projects should become one of the most important objectives of the EGTC».

Art. 4, par. 1, of the convention of the Rhine-Alpine Corridor EGTC provides that «the main objective of the EGTC is to facilitate and promote the territorial cooperation among its members and to jointly strengthen and coordinate the territorial and integrated development of the multimodal Rhine-Alpine Corridor from the regional and local perspective». To this end, according to par. 2 of art. 4 of the Convention, the EGTC is entrusted with five specific categories of tasks, which, at different levels, are functional to the achievement of the main objective laid down by par. 1.

The first objective consists of «combining and focusing the joint interests of its members towards national, European and infrastructure institutions», by means of the «organisation and implementation of joint lobbying activities for the development of the Rhine-Alpine Corridor from a bottom-up perspective» as well as through the «representation of the EGTC members in the EU Rhine-Alpine Corridor Forum[46]».

The second objective established under art. 4, par. 2-b), is represented by the «evolution of the joint development strategy for the multimodal Rhine-Alpine Corridor» through the «coordination of regional development in the Rhine-Alpine Corridor, taking into account local and regional perspectives» as well as through the «consideration of transport infrastructure projects and land use conflicts along the Rhine-Alpine Corridor».

The third objective (art. 4, par. 2-c) regards direction of funds to corridor related activities and project, not only by providing «information to EGTC members about funding opportunities for corridor related projects» but also by directly applying «for EU-funded new projects» and ensuring «joint management of EU funds».

The fourth objective laid down by art. 4, par. 2-d) is represented by the provision of a «central platform for mutual information, exchange of experience and encounter», whose purpose should be to organise «meetings of members», ensure «information transfer», take charge of the «Corridor Information System, developed within the project CODE24» as well as maintain «the website www.code-24.eu developed within the project CODE24».

The fifth and final objective established by art. 4, par. 2-e) concerns the improvement of «the visibility and promotion of the corridor» by means of the «organisation of corridor events (congresses, workshops etc.); elaboration and distribution of publications (newsletters, leaflets, brochures); taking over and maintaining the Mobile Exhibition developed within the project CODE24».

The comprehensiveness of the objectives entrusted to the EGTC – together with their variety – allow the new entity to take care of different issues of the transfrontier area covered by the Rhine-Alpine Corridor, ranging from the more general tasks (such as political lobbying and strategic planning) to the more specific activities, such as the day to day management of the Corridor Information System developed within the project CODE24.

Moreover, through the establishment of the EGTC all of these activities can be efficiently performed through a single multifunctional entity, so that their management can also be better coordinated. By way of example, as far as spatial planning is concerned, the EGTC, by acting at the different levels provided for under the convention, might be able to (*a*) promote the

[46] The Corridor Forum was established on the basis of art. 46 of regulation 1315/2013 according to which «for each core network corridor, the relevant European Coordinator shall be assisted in the performance of his/her tasks concerning the work plan and its implementation by a secretariat and by a consultative forum (the Corridor Forum). In agreement with the Member States concerned, the Corridor Forum shall be established and chaired by the European Coordinator. The Member States concerned shall agree on the membership of the Corridor Forum for their part of the core network corridor».

evolution of a joint strategy shared by its members, upon consideration of the various interests represented within the EGTC; (*b*) contribute to provide the funds for the implementation of the strategy; (*c*) take the necessary actions for its execution; as well as (*d*) deal with the public relations and image building issues with a view to securing a successful external presentation of the initiative and fostering better public acceptance.

As can be gathered from the consideration of the aforementioned objectives and tasks (and as will be confirmed by the analysis of the projects currently implemented by the EGTC), the potentialities of the instrument at issue as well as its flexibility can be further appreciated in the light of the fact that the EGTC can be made functional to the establishment of a "multi-speed" cooperation among its partners.

As a matter of fact, the tasks established under art. 4 of the convention of the Rhine-Alpine Corridor are not exclusively focused upon projects and activities that the EGTC is supposed to directly perform and implement, but are more generally devoted to the promotion of the territorial cooperation among the partners as well as to the strengthening of the territorial and integrated development of the corridor (*e.g.* art. 4.2.b regarding «evolution of the joint development strategy for the multimodal Rhine-Alpine Corridor»; art. 4.2.c concerning direction of funds to corridor related activities and projects and not only to projects implemented by the EGTC).

As a consequence, according to the "multi-speed" approach mentioned above, the EGTC is allowed to promote and sustain (*i*) activities directly performed by the EGTC itself; (*ii*) projects in which both the EGTC and its members (or part of them) participate; (*iii*) activities implemented only by the members of the EGTC (or by a part of them).

Finally, the analysis of the objectives entrusted to the Rhine-Alpine Corridor EGTC also clearly confirms the strong connection – which has already been highlighted *supra sub* § 6 – between the instrument at issue and EU funds (as well as funds in general). As a matter of fact, not only the Rhine-Alpine Corridor EGTC has its origin in a project funded by the EU (project CODE24) but it also has among its fundamental objective to continue the cooperation started under the aforementioned project (including the management of very specific activities and programmes such as the Corridor Info System). Moreover, almost in a "circular" way, the Rhine-Alpine Corridor has the further objective of directing funds (especially EU funds) towards the cooperation initiatives of the partners.

13. Projects currently implemented by the EGTC

A final word has to be dedicated to the projects currently implemented by the EGTC Rhine-Alpine Corridor, namely (*a*) ERFLS – European Rail Freight Line System and (*b*) RAISE-IT Rhine-Alpine Integrated and Seamless Travel Chain.

ERFLS – European Rail Freight Line System is a project co-financed by the European Union under the Connecting Europe Facility[47] aimed at improving the accessibility of rail transport and the integration of rail transport in innovative multi-modal transport chains through the optimisation of both regional and intercontinental freight traffic flows.

In line with the mentioned "multi-speed" approach, the project counts among its partners several (but not all) members of the Rhine-Alpine Corridor EGTC (Provincie Gelderland, Stadt Lahr and Uniontrasporti), the University of Duisburg-Essen and SiTI – Higher Institute on

[47] More details on this project can be found on the website of the EGTC Rhine-Alpine Corridor at the link http://egtc-rhine-alpine.eu/it/portfolio-item/erfls/.

Territorial Systems for Innovation, a non-profit association set up in 2002 in order to carry out research and training oriented towards innovation and socio-economic growth, with specific reference to the areas of logistics and transport, environmental heritage and urban redevelopment, environmental protection.

The problems that the ERFLS project plans to address are the absence of frequent line services between rail terminals, the lack in infrastructure of intermodal terminals, the absence of efficient and reliable intermodal connections to inland waterways and highways for goods traffic. In order to solve such problems the ERFLS aims at connecting the different regions along the Rhine-Alpine Corridor with regular rail freight line services in combined traffic through a system of "smart hubs" for freight transport comparable to the intercity services for passengers.

In order to make ERFLS system operational, the Action will first focus on several implementation studies concerning infrastructure, terminal needs, interconnections, telematics and socio-economic impact analysis, with a view to providing a better understanding of the obstacles and investigating how "smart hub" terminals should be best organised, built and connected along the corridor.

RAISE-IT Rhine-Alpine Integrated and Seamless Travel Chain[48] is also financed by the EU under the Connecting Europe Facility and has among its partners (*i*) the EGTC Rhine-Alpine Corridor (which also acts as coordinator of the project); (*ii*) five members of the EGTC (Verband Region Rhein-Neckar, Regionalverband FrankfurtRheinMain, Uniontrasporti, Provincie Gelderland, Regionalverband Mittlerer Oberrhein); (*iii*) SiTI – Higher Institute on Territorial Systems for Innovation; (*iv*) ILS – Institut für Landes und Stadtentwicklungsforschung gGmbH; (*v*) Comune di Genova (Genoa Municipality); and (*vi*) IIC Istituto Internazionale delle Comunicazioni (International Institute of Communications).

RAISE-IT explores high speed rail integration and travel time savings through a multiscale accessibility approach and aims to cater for transport demand exchanging with the corridor at key TEN-T nodes, in the areas around the nodes and across the nodes. In this perspective, work on urban node accessibility aims at optimising access and travel time within a node by considering infrastructure and operational aspects such as configuration, way finding, integrated ticketing and facilities for transferring passengers. Action on seamless connection to and from nodes will study good integration of greater node areas with services on the corridor by working on transfers between local, regional, long distance and high speed services at nodes. Finally, the studies will also include the International Integrated Timed Transfer (IITT) concept to ensure better connection of the regions and their nodes along the Corridor.

14. Concluding remarks

In conclusion, the combination of the two sections above shows, both from a legal and practical point of view, that the EGTC is a particularly suitable legal instrument for the management and improvement of cross-border transport services, not only because of its versatility (as far as both its potential tasks and territorial scope are concerned) but also because of its capacity of involving all of the different actors (both public and private) concerned by the management of the interested cross-border area.

[48] More details on this project can be found on the website of the EGTC Rhine-Alpine Corridor at the link http://egtc-rhine-alpine.eu/it/portfolio-item/raise-it/.

As far as transport issues are concerned, the most remarkable advantages highlighted above are, first of all, the openness of membership, which makes it possible to involve in the EGTC all of the subjects (not only national, regional and local authorities but also private undertakings) entrusted with competences or tasks in the matter at issue. As clearly shown by the experience of the EGTC Rhine-Alpine Corridor, this is very important not only in the light of the fragmentation of competences which characterise in many legal systems the matter of transportation, but also with a view to involving in the EGTC the stakeholders concerned by the cooperation programme pursued by the new entity (thus improving also public acceptance of initiatives having a significant impact upon the communities living in the territory interested by the cooperation).

Secondly, the versatility of the objectives and tasks which can be entrusted to the EGTC does not only allow the Grouping to perform different kinds of activities, but – perhaps even more importantly – makes it possible to coordinate actions taken at various (but interconnected) levels. This kind of integrated approach to transfrontier cooperation appears to be particularly appropriate to deal with transport related issues, considering that, for instance, organisation of freight transport has to be coordinated with the organisation of passenger transport as well as with spatial planning. In this view, it might actually be said that the EGTC provides a form of "integrated cooperation at the service of integrated logistics".

Thirdly, the comprehensiveness of the territorial scope of the cooperation which can be established according to regulation 1082/2006 is also crucial for the successful organisation of cooperation schemes in the matter of transport, where – more than in other areas (one might think, *e.g.*, to culture, tourism, *etc.*) – every initiative has necessarily to fit the territorial context in order to prove effective, so that, in this perspective, the possibility to involve, wherever necessary, also the territory of third States is particularly important (as shown, at a practical level, by the experience of the project Inforailmed).

Finally, legal personality and capacity are decisive features of the legal instrument at issue which – together with the power to award public contracts and the availability of funding and resources – entitle EGTCs to act on behalf of their members, so that the function of EGTCs is not limited to planning and coordination, but it can also extend to the actual carrying out, at an operational level, of the devised cooperation initiatives among their members.

It remains to be seen (and only practice will be able to show) whether – beside the aforementioned advantages – the recourse to EGTCs for the purpose of cooperation in the area of transport will also have positive side-effects on the development of the legal framework governing transport. Indeed, the establishment of an EGTC offers to (national, regional and local) authorities entrusted with regulatory competences in the matter of transport a very important opportunity to engage in trans-frontier cooperation, thus acquiring direct perception, also at an operational level, of the challenges posed by the difficult coordination of several different national legal standards; those very challenges that the aforementioned authorities might be able to solve in the exercise of their normative powers.

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VERTIKALNA INTEGRACIJA U ŽELJEZNICI: *PRO ET CONTRA*

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SAŽETAK

Položaj i budućnost željeznice kao ekonomične i ekološki poželjne grane prometa razmjerno je izazovna s obzirom na izloženost konkurentnim oblicima prijevoza ljudi i roba, osobito korisnicima prilagodljivom cestovnom prometu. Tržište Europske unije prigoda je povijesnim željezničkim tvrtkama tradicionalno usmjerenima na promet unutar jedne države da ambicioznije planiraju i rade na konkurentnosti svoje željezničke mreže i željezničkog prijevoza u kontekstu rastućih europskih i međunarodnih robnih smjerova. Modernizacija i informatizacija željezničke infrastrukture te liberalizacija željezničkog prometa presudni su faktori za uspješnije pozicioniranje željeznice na glavnim prometnim koridorima te njezino restrukturiranje iz samodostatnog sustava desetljećima oslonjenog na financijsku potporu države u isplativu i korisnicima nezaobilaznu mrežnu djelatnost, kao što to jesu, primjerice, energija i elektroničke komunikacije. U mrežnim djelatnostima razvili su se različiti modeli organizacijskog odvajanja povijesnih monopola na poslovanje povezano s izgradnjom, održavanjem i upravljanjem mrežom i poslovanje povezano s opskrbom i naplatom, odnosno pružanjem usluga korisnicima. Svrha je bila završiti s praksom netransparentnog alociranja troškova usluga unutar vertikalno integriranih poduzetnika, a osobito kumuliranja troškova na uslugama i poslovima koji nisu izloženi konkurenciji ili ih država subvencionira. Prvi korak bilo je računovodstveno odvajanje usluga, a zavisno od mrežne djelatnosti i razvoja tržišnih odnosa uspostavljeni su i drugi modeli funkcionalnog i pravnog odvajanja poslova na vertikalnoj i/ili horizontalnoj osnovi, odnosno veleprodajnoj i/ili maloprodajnoj razini. Liberalizacija je potaknula stručnu raspravu i istraživanja o optimalnoj industrijskoj organizaciji prirodnih monopola na slobodnom tržištu te je došla do različitih zaključaka, što oslikava i različitu praksu organiziranja ovih poduzetnika od države do države. Rast sektora željeznice zavisi od mnogo okolnosti, među kojima su adekvatnost prometne politike i sektorske regulacije, iskorištenost međunarodnih prometnih koridora, kvaliteta infrastrukture i voznog parka, konkurentnost prijevoznika, zadovoljstvo korisnika, pa je u tom pogledu strukturni položaj upravitelja željezničke infrastrukture jedno od pitanja čiji je odabir važan, ali ne i odlučujući, kako to pokazuju iskustva država članica Europske unije. Odabir će zavisiti od zatečenih sektorskih karakteristika željeznice određene države, pa ni među državama EU-a nema ujednačenih svima prihvatljivih rješenja, što upućuje na prevladavajuću političku volju da se očuva autonomija odabira industrijske organizacije i nakon donošenja IV. željezničkog paketa EU-a u 2016. Odabrani model industrijskog organiziranja u tržišnoj ekonomiji moguće je preispitivati i eventualno mijenjati, ali uputno nakon javne, pozorne i sustavne analize koristi i rizika koji mogu proizići za odgovarajuću mrežnu djelatnost.

Ključne riječi: *željeznica, tržišno natjecanja, vertikalna integracija*

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1. Stanje i perspektive željezničkog sektora

Gotovo svaki razgovor o željezničkom prometu kao važnoj društveno-gospodarskoj djelatnosti zemalja Europske unije dotakne se njegove razmjerno nedovoljne granske (modalne) zastupljenosti i diskutabilne ekonomske učinkovitosti u posljednjih nekoliko desetljeća. Stoga se u fokusu sektora željeznice nalaze teme financijske stabilnosti, održivosti investicija, produktivnosti zaposlenih i slično[1]. Željeznički promet u Hrvatskoj uglavnom ne pobuđuje priželjkivani interes korisnika u putničkom ni u teretnom segmentu, često je financijski zavisan od javnih izvora financiranja i razmjerno polako razvija svoju međunarodnu prometnu atraktivnost uspostavom transeuropskih koridora[2]. Jedan objektivni dio razloga stagnacije sektora u posljednjim desetljećima jest pristupačnost novih prometnih sredstava dostupnih široj populaciji za privatne i za gospodarske svrhe, dovoljno je samo spomenuti ekspanziju cestovnoga teretnog i putničkog prometa (autobusi, kamioni, osobna vozila) ili gustoga zračnog i plovnog prometa uza željeznicu. Navedeno je potaknulo postavljanje političkog cilja preusmjeravanja 50 % postojećega putničkog i teretnog prometa na srednjoj udaljenosti s ceste na željeznicu[3]. Drugi subjektivni dio razloga počiva u općoj prometnoj politici nositelja državnih vlasti, raspoloživosti financijskih sredstava, stanju željezničke infrastrukture i učinkovitosti željezničkih prijevoznika. Ukratko, može se ustvrditi da željeznički sektor tradicionalno obilježava nedovoljna ekonomska učinkovitost i posljedično s višemodalnoga prometnog aspekta njegova nedostatna konkurentnost. Javna prometna politika planira se i definira u dokumentima prometne strategije za duže razdoblje. Unutar Europske unije Hrvatska ima izniman geoprometni položaj, pa može kombinirati i integrirati razvoj svih grana prijevoza s ciljem smanjenja troškova prijevoza, privlačenja novog tereta na dostupnim transeuropskim koridorima uz odgovarajuću zaštitu okoliša i sigurnost prijevoza. Posebno je perspektivan projekt intermodalni prijevoz od luke Rijeka prema kontinentu, koristeći se pritom budućom elektrificiranom nizinskom prugom punog profila prema Zagrebu i potencijalno unutarnjim plovnim putovima Save i Dunava prema Rajni, tj. koridorima Vb, X i VII. U hrvatskim strateškim dokumentima konstatira se zatečeno stanje prometa te izlažu ciljevi i sredstva kako ih ostvariti u željenim rokovima. Upotrebljava se metodološki pristup procjene snaga, slabosti, prilika i prijetnji (*SWOT*) u korelaciji različitih prometnih grana i geografskih područja u međunarodnom prometnom kontekstu[4]. Navode se kao mogućnosti u željezničkom sektoru, uz ostalo: porast mobilnosti stanovništva i uvođenje integriranoga javnog prijevoza putnika; visoka gustoća mreže željezničkih pruga; dostupnost fondova EU-a; tranzitni položaj Hrvatske prema sjevernoj i srednjoj Europi za protok tereta iz Azije te razvoj infrastruktura za intermodalni prijevoz tereta. Kao snaga navodi se: geostrateški položaj Hrvatske na križanju prometnih putova; lučka infrastruktura koja odgovara potrebama međunarodnog prometa i dr. Kao slabost navodi se: neodgovarajuće stanje prometne infrastrukture, zastarjela željeznička oprema i operativna struktura; nepostojanje integrirane prometne mreže; zemljopisna konfiguracija i nedovoljno prometno planiranje i dr. Kao prijetnja navode se: inozemni konkurenti; globalna ekonomska kriza i dr. Kao ciljevi navode se u bitnome: unapređenje prometne povezanosti i pristupačnosti u teretnom i putničkom prometu unutar i izvan Hrvatske te unapređenje prometnog

[1] Executive Rail Radar, The European rail industry, Roland Berger, 2013.

[2] Uredba (EU) 1315/2013 Europskog parlamenta i Vijeća od 11. prosinca 2013. o smjernicama Unije za razvoj transeuropske prometne mreže i stavljanju izvan snage Odluke br. 661/2010/EU, (OJ L/348, 20. 12. 2013. Str. 1).

[3] Eurostat regional yearbook 2012: Transport. Str. 150.

[4] Strategija prometnog razvoja Republike Hrvatske za razdoblje od 2014. do 2030. godine, Vlada Republike Hrvatske, Zagreb, listopad 2014.

sustava u smislu operativnosti i organizacije, zbog omogućavanja opstojnosti samog sustava, pri čemu je naglasak na financijskoj održivosti prometnog sustava[5]. Upravo taj posljednji cilj otvara pitanje načina dosezanja financijske održivosti sektora željeznice, što je predmet istraživanja tijekom više desetljeća[6]. Pritom su dopušteni oni oblici intervencije javnih vlasti, primjerice državnim potporama, koji su usklađeni s obzirom na liberalizaciju tržišta željezničkog prijevoza.[7] Ako postoji nereguliran sustav državnih potpora za poduzetnike u željeznici, osobito povijesne prijevoznike, tada ta društva nemaju poticaja na interne analize učinkovitosti poslovanja, smanjenje svojih troškova, zbrinjavanje viška zaposlenika, širenje poslovanja tuzemno i inozemno traženjem klijenata, kao ni razvoj novih poslovnih modela itd. Drugim riječima, *status quo* im je odgovarajući.

U tom pogledu indikativan je sljedeći navod koji se odnosi na svojedoban položaj željeznice u Italiji: "... neučinkovitost je FS-a (tal. *Ferrovie dello Stato*), čini se, posljedica odveć tolerantnoga državnog financiranja. U takvu slučaju FS nema važnijeg poticaja da na optimalan način organizira i upravlja internim resursima da bi smanjio troškove pružanja usluga uz postizanje odgovarajuće kvalitete usluga. Takva situacija pogoduje i razmjerno nezainteresiranom odnosu FS-a prema svojim dobavljačima. U Italiji je zastupljena raspodjela monopolističke rente između različitih subjekata kao što su menadžeri, zaposlenici, dobavljači te krajnji korisnici koji stoje u poslovnom lancu te čiji su pojedinačni interesi najveća zapreka ikakvim strukturnim reformama usmjerenim na uvođenje konkurencije i poboljšanje ekonomske učinkovitosti." S obzirom na vlasničke odnose primjetna je razlika u položaju željezničkog poduzetnika nad kojim nema važnijega proračunskog pritiska (eng. *soft budget constraint*) u odnosu na željezničkog poduzetnika konkurenta koji je suočen sa znatnim proračunskim ograničenjima (eng. *hard budget constraint*). U prvoj su skupini uvijek poduzetnici u vlasništvu države. Država pred vlastite poduzetnike može staviti prioritete koji nisu usmjereni na poslovni rast, konkurentnost i modernizaciju, nego primjerice na komforna socijalna prava i čuvanje postojećih radnih mjesta. Menadžment takva trgovačkoga društva tada nije samostalan u određivanju poslovne politike koja vodi ekonomski održivom i tržišnom poslovanju sukladnom prevladavajućim prijevozničkim trendovima i pravu Europske unije. U takvim uvjetima željeznički subjekt ima izgovor zašto ne može poslovati u konkurentnim tržišnim uvjetima bez potpore vlasnika države[8]. Povijesno, u većini zemalja EU-a prihodi od željezničkih usluga i željezničkog prijevoza nisu bili dostatni za pokrivanje ni polovice troškova, npr. u Francuskoj i Španjolskoj, a u Italiji nisu pokrivali ni trećinu ukupnih troškova, pa je ukupan dug u željeznici u Italiji u jednom trenutku iznosio gotovo 5 % državnog BDP-a[9]. Nužna je reforma željezničkog sektora da bi se veći dio troškova podmirivao komercijalno s tržišta uz manje oslanjanje na ograničena javna državna sredstva. Neovisne međunarodne analize pokazuju da bi u Hrvatskoj glavni cilj države trebao biti razvoj financijski opstojnoga željezničkog sektora temeljen na transparentnoj javnoj financijskoj potpori i sukladan s tržišnom potražnjom za željezničkim uslugama, prometnoj politici EU-a i opreznoj fiskalnoj politici uz poštovanje načela razmjernosti vrijednost za novac (eng. *value for money principle*)[10].

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5 Ibid. Str. 52.

6 Kopicki, R.; Thompson L. S. 1995. Best Methods of Railway Restructuring and Privatization, World Bank; Rail Restructuring in Europe. European Conference of Ministers of Transport. OECD. 1998.; Dyrhauge, H. 2013. EU Railway Policy-Making on Track? Palgrave Macmillian.

7 Communication from the Commission – Community guidelines on State aid for railway undertakings, OJ C 184, 22. 7. 2008. Str.13.

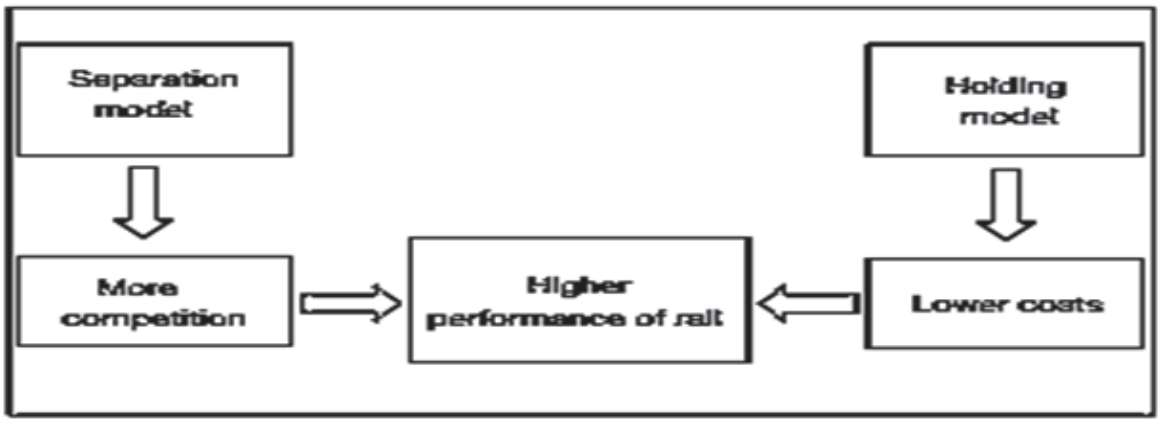
8 Railways: Structure, Regulation and Competition Policy. OECD. 1998. Str. 248.

9 Ibid.

10 World Bank, Croatia railway policy note, Report No.78689-HR, 2013. Str. 7.

Strukturne promjene zavise i od modela konkurencije i regulacije na tržištu. U bitnome razlikuje se konkurencija na tržištu između vertikalno integriranih željezničkih društava (eng. *source/destination competition in the market*) od konkurencije na tržištu između željezničkih prijevoznika na temelju prava pristupa (eng. *access competition in the market*) te konkurencije za tržište između putničkih željezničkih prijevoznika (eng. *competition for the market*). Prvi oblik konkurencije pretpostavlja postojanje konkurentnih željezničkih pravaca, tj. infrastrukturnu zamjenjivost između istih polazišnih i odredišnih odredišta. Takav je model zastupljen u Sjevernoj Americi. Drugi model uobičajen je u Europskoj uniji i zahtijeva liberalizaciju korištenja infrastrukturom kao načinom razvoja tržišta teretnoga željezničkog prometa. Treći je model također zastupljen u EU-u kao oblik uspostave konkurencije u putničkom prometu. Izvjesno, prvi model zahtijeva manje *ex ante* regulatorne intervencije za razliku od modela gdje postoji samo jedna nezamjenjiva željeznička infrastruktura. Kada ne postoje paralelne zamjenjive željezničke infrastrukture, postavlja se kao prvo pitanje je li povijesna vertikalna integracija željezničkih prijevoznika i upravitelja željezničke infrastrukture, kao uslužno-distributivno povezanih etapa u željeznici, poteškoća prijevoznicima konkurentima u osvajanju tržišnog udjela, u smislu moguće diskriminacije, odnosno nejednakog postupanja upravitelja infrastrukture prema njima, tj. trećima? S time je povezano drugo pitanje, kakav učinak ima vertikalno odvajanje na iskorištenost pružnih kapaciteta, kvalitetu i sigurnost infrastrukture te na ekonomiju razmjera, odnosno sinergije povijesno povezanih željezničkih društava? Odgovorima na ta pitanja zemlje članice definiraju politiku željezničkog prometa.

Slika 1.: Opći model rasprave o vertikalnoj strukturi upravljanja u željeznici[11]



Izvor: Intereconomics, 2012.

Na razini EU-a smatra se da upravo zajedničko tržište prijevozničkih usluga jačanjem prekograničnoga koridorskog prometa i konkurencije može dati doprinos strukturnim reformama u zemljama članicama i revitalizaciji željezničkog prometa u odnosu na konkurentne grane prijevoza, napose cestovni transport. Pravno-regulatorna harmonizacija preko nekoliko sukcesivnih željezničkih paketa EU-a od 2001. i tehničko-tehnološka standardizacija željezničkoga prometnog sustava, tj. interoperabilnost, daju svoj doprinos u tom pogledu. Povezana tema sveprisutna je digitalizacija prometnih usluga (eng. *digital economy*) s prigodama za smanjenja transakcijskih troškova koje nudi te prigodama veće koordinacije višemodalnoga teretnog i integriranog putničkog prometa, ali i sasvim novih na internetskim aplikacijama zasnovanih

[11] Laabsch, C.; Sanner, H. 2012/2. The impact of vertical separation on the success of the railways. European railway policy. Intereconomics. Str. 122.

modela prijevoza kao što je Uber ili različitih oblika samoorganiziranog prijevoza građana, tzv. ekonomije dijeljenja (eng. *sharing economy*)[12].

2. Prigode za Hrvatsku

Prije razmatranja vertikalne integracije u sektoru željeznice korisno je razmotriti zaključke analize sektora željezničkih usluga u Hrvatskoj koje je provela Svjetska banka. Sumarno je zaključeno sljedeće u pogledu trgovačkih društava nastalih nakon napuštanja modela holdinga Hrvatskih željeznica krajem 2012. i osnivanja samostalnih triju tvrtki: HŽ Infrastruktura (HZI), HŽ Putnički promet (HZP) i HŽ Cargo (HZC). Za HZI se ističe da ima prigodu koristiti se u većoj mjeri sredstvima fondova EU-a umjesto državnog proračuna te da dugoročna održivost poslovanja zavisi od restrukturiranja i povećanja produktivnosti kombinacijom rasta prometa, povećanjem iskorištenosti pruga te prilagođavanjem broja zaposlenih i veličine infrastrukture stvarnim potrebama. Za HZP navodi se da dugo vremena poslovanje zasniva na niskim pristojbama za korištenje infrastrukturom, troškovima vuče vlakova koje nije u cijelosti samostalno snosio te znatnom priljevu sredstava od države za obavljanje usluga javnog prijevoza putnika. Za HZC ističe se primjetna nespremnost za poslovanje u konkurentnom okruženju, zastarjelost suprastrukture (voznog parka) uz nemogućnost pravodobne obnove vlastitim financijskim sredstvima. Zapaža se niska produktivnost zaposlenih, nedovoljna iskorištenost prijevozničkih kapaciteta te rizik istiskivanja njegovih cijena, s jedne strane od cestovnih teretnih prijevoznika, a s druge od novih konkurenata u prijevozu tereta željeznicom. Smatra se da treba poraditi na međunarodnoj konkurentnosti tranzitnih pravaca kroz Hrvatsku modernizacijom vitalnih prometnih trasa i usklađivanjem pristojbi za korištenje infrastrukturom sa susjednim zemljama radi regionalne prometne atraktivnosti pojedinih koridora[13]. Uloga države, smatra se, trebala bi omogućiti profesionalno upravljanje društvima HŽ-a, tj. racionalno korištenje resursima, informatizaciju i optimiziranje upravljanja željezničkom mrežom i prijevozom na transparentnim i tržišnim osnovama. Glede željezničke mreže to treba značiti veća ulaganja u one dijelove koji su isplativi elektrifikacijom, građenjem dvaju kolosijeka te remontom u cilju dizanja prosječnih brzina vlakova. Glede prijevoza putnika održavanjem onih trasa koje su isplative uz osmišljavanje racionalnih modela integriranog prijevoza na regionalnoj razini. Glede teretnog prijevoza sugerira se sklapanje međunarodnih partnerstava radi povećanja teretnog prometa i očuvanja tržišnog udjela i konkurentnosti na X. i V. b) koridoru. Neovisne analize upozoravaju na korist od uvođenja drugačije poslovne kulture u Hrvatske željeznice, a predlaže se početi od redefiniranja uloge Vlade s obzirom na njezinu višestruku ulogu u željeznici. Valja tako razlučiti ulogu države kao donositelja politike, regulatora odnosa i vlasnika društava te korisnika željezničkih usluga od upravljačke uloge u željezničkim društvima. To znači s jedne strane transparentno odvojiti ulogu vlasnika od uloge korporativnog menadžera u željezničkim društvima, a s druge strane jasno odvojiti stratešku političku ulogu države od sektorske regulatorne funkcije u željeznici. Na taj način država može ostvariti dvostruki cilj, zaštititi javni interes i istodobno interes potencijalnih privatnih investitora koji ulaze na tržište. Odnosi između države i željezničkoga društva koje održava željezničku infrastrukturu i/ili prevozi putnike u javnom prometu trebaju se zasnivati na višegodišnjim ugovorima s unaprijed definiranim mjerljivim kriterijima uspješnosti kao preduvjeta držav-

[12] Cave, M.; Crozet, Y. 2016. Passenger mobility in digital society: New challenges for competition, transport policies and regulation. Centre on Regulation in Europe. Brussels. Str. 7.

[13] Op. cit. 10 (World Bank), str. ix.

nog financiranja (eng. *performance based contracting*)[14]. Povezana su pitanja određivanje cijene pristupa željezničkoj infrastrukturi (eng. *track access charges*) gdje niža cijena znači općenito veću konkurentnost željeznice u odnosu na druge oblike prijevoza ili konkurentne željezničke koridore, ali vjerojatno i veća financijska izdvajanja države operatoru infrastrukture za njegovo redovito poslovanje koje uključuje osobito gradnju i održavanje infrastrukture. Viša cijena može u određenoj mjeri smanjiti javna financijska davanja operatoru infrastrukture, ali povećati operativne troškove prijevoznicima. Povezani je proces restrukturiranje željezničkih društava s ciljem povećanja produktivnosti zaposlenih u željeznici, tehnološkom obnovom, iskorištenosti voznog parka, a osobito teretnih vagona te ukupnog rasta intenziteta željezničkog prometa. Konkretno, procesi restrukturiranja trebali bi ostvariti zadane ciljeve za HŽ Cargo: povećanje naturalne i financijske produktivnosti te uštede na troškovima rada; za HŽ putnički: razvijanje javnoga integriranog prijevoza, primjena nove tehnologije u poslovanju, podizanje kvalitete i konkurentske pozicije prijevozne usluge, povećanje prihoda i smanjenje troškova; za HŽ infrastrukturu: povećanje brzine na TEN-T koridorima i na regionalnim prugama te uštede na troškovima rada[15]. Ulaganja u modernizaciju infrastrukture i jesu koncentrirana na međunarodne željezničke prometne pravce[16]. Poboljšanju internoga poslovnog upravljanja povijesnih željezničkih društava te odgovarajućim uštedama trebale bi pridonijeti i mjere kao što je uvođenje certifikata sustava upravljanja kvalitetom ISO 9001, što je i provedeno pri upravitelju infrastrukture za poslove upravljanja željezničkom infrastrukturom, organiziranja i reguliranja željezničkog prijevoza, održavanje infrastrukture te upravljanje sigurnošću željezničkog prometa[17].

3. Neovisnost osnovnih funkcija upravitelja infrastrukture i vertikalna integracija

U Hrvatskoj željezničkom infrastrukturom upravlja upravitelj infrastrukture (dalje: Upravitelj) koji je sukladno Zakonu o željeznici (dalje: ZŽ), pravna osoba odgovorna za građenje, upravljanje, obnovu i njezino održavanje, uključujući i organiziranje i reguliranje prometa[18]. Željeznička infrastruktura javno je dobro u općoj uporabi u vlasništvu Republike Hrvatske kojim se mogu koristiti svi zainteresirani željeznički prijevoznici uz jednake uvjete, na način propisan Zakonom o željeznici i drugim propisima. Željezničku infrastrukturu u fizičkom smislu čine zemljište, željeznička pruga, signalno-sigurnosni i elektronički komunikacijski uređaji, prometna rasvjeta, namjenske zgrade i putovi te brojni drugi dijelovi i elementi[19]. Planovi građenja nove te obnove i održavanja postojeće željezničke infrastrukture uređuju se petogodišnjim Nacionalnim programom željezničke infrastrukture koji donosi Vlada Republike Hrvatske u skladu s ciljevima i smjernicama strategije kojom se uređuje prometni razvitak Republike Hrvatske. Nacionalnim programom određuju se ciljevi u građenju, obnovi i održavanju željezničke infrastrukture te izvori potrebnih financijskih sredstava, a na temelju njega ministarstva odgovorna za financije i željeznički promet donose odgovarajući srednjoročni

[14] Op. cit. 10 (World Bank), str. 61.

[15] Prezentacija programa restrukturiranja HŽ infrastruktura d.o.o., HŽ putnički d.o.o. i HŽ Cargo d.o.o., http://www.mppi.hr/default.aspx?id=9146, 21. 11. 2016.

[16] Godišnje izvješće o radu, Hrvatska regulatorna agencija za mrežne djelatnosti, 2014. Str. 73.

[17] Kaužljar, D. 2015. Uspostava i poboljšanje sustava upravljanja kvalitetom u cilju učinkovitog restrukturiranja HŽ infrastrukture d.o.o. *Željeznice 21*, god. 14, br. 3/15. Str. 69.

[18] Zakon o željeznici, članak 4., NN 94/13.

[19] Pravilnik o željezničkoj infrastrukturi, NN 127/05.

plan građenja, obnove i održavanja željezničke infrastrukture. Upravitelj donosi srednjoročni i godišnji plan građenja, obnove i održavanja[20]. Građenje, modernizacija, obnova i održavanje željezničke infrastrukture u interesu je Republike Hrvatske[21]. Upravljanje željezničkom infrastrukturom djelatnost je od javnog interesa. Obavlja je Upravitelj s kojim vlasnik infrastrukture sklapa ugovor na razdoblje od barem pet godina. Ugovorom se osobito uređuje izgradnja nove željezničke infrastrukture te modernizacija, obnova i održavanje postojeće željezničke infrastrukture. Ugovorom se utvrđuju i iznosi potrebnih financijskih sredstava za realizaciju navedenog te pokazatelji kvalitete pružanja željezničkih usluga osobito elementima kao što su: infrastrukturna brzina i pouzdanost pruga; kapacitet mreže; opseg aktivnosti mjeren vlak kilometrima; sigurnost i zaštita okoliša. Prije potpisivanja ugovora o upravljanju željezničkom infrastrukturom zainteresirane strane, tj. podnositelji zahtjeva za dodjelu infrastrukturnoga kapaciteta imaju pravo biti upoznati sa sadržajem ugovora i iznijeti stajališta na njega. Regulatorno tijelo, sukladno Zakonu, također daje neobvezujuće mišljenje o sadržaju ugovora[22]. Financiranje željezničke infrastrukture ostvaruje se naplatom korištenja infrastrukturom, iz državnog proračuna, proračuna jedinica lokalne i područne samouprave i dr. Pritom je od značenja da se sredstva javnih vlasti koje Upravitelj na taj način ostvaruje vode izdvojeno u poslovnim knjigama (odvojeno računovodstvo) da se ne bi mogla upotrebljavati za financiranje željezničkog prijevoza ako prijevoznik i upravitelj nisu pravno odvojena društva (eng. *cross-subsidisation*). Ovisno o tome jesu li upravitelj željezničke infrastrukture i željeznički prijevoznik povezana društva ili ne, provodi se postupak davanja prethodne suglasnosti na imenovanje i razrješenje članova upravljačkog tijela upravitelja infrastrukture i vladajućega društva. Zakon o željeznici propisuje neovisnost Upravitelja te detaljno razrađuje koji slučajevi članstva u upravljačkim tijelima povezanih društava upravitelja infrastrukture i željezničkih prijevoznika nisu dopušteni[23]. Dodatno, ako su Upravitelj i željeznički prijevoznik povezana društva, Upravitelj u području obavljanja svojih osnovnih funkcija treba imati vlastito osoblje i vlastite prostorije, a pristup njegovu informatičkom sustavu treba biti zaštićen da bi očuvao neovisnost svojih osnovnih funkcija. Te su funkcije sljedeće: dodjela trasa vlakova, uključujući i određivanje i ocjenu raspoloživosti infrastrukturnih kapaciteta te određivanje visine infrastrukturnih naknada, uključujući i naplatu tih naknada. Kada Upravitelj po svom pravnom obliku, organizaciji ili odlučivanju nije neovisan o bilo kojem željezničkom prijevozniku, određivanje visine infrastrukturne naknade i dodjelu infrastrukturnoga kapaciteta obavlja posebno tijelo koje treba biti neovisno o željezničkim prijevoznicima[24].

Neovisnost osnovnih funkcija Upravitelja potrebna je željezničkim prijevoznicima radi realizacije pravednog i nediskriminirajućeg pristupa željezničkoj infrastrukturi te uz transparentne unaprijed objavljene uvjete. Nakon pribavljanja dozvole za obavljanje usluga u željezničkom prijevozu, potvrde o sigurnosti te sklapanja ugovora o pristupu s Upraviteljem, željeznički prijevoznici imaju pravo pristupa željezničkoj infrastrukturi, što im omogućava korištenje željezničkim uslugama. Željezničke su usluge: minimalni pristupni paket[25]; pristup

[20] ZŽ, članak 8.

[21] ZŽ, članak 9.

[22] ZŽ, članak 18.

[23] ZŽ, članak 16.

[24] ZŽ, članak 17.

[25] ZŽ, članak 24. Minimalni pristupni paket obuhvaća: obradu zahtjeva za infrastrukturnim kapacitetom; pravo korištenja dodijeljenim infrastrukturnim kapacitetom; korištenje infrastrukturom, uključujući skretnice i čvorišta; upravljanje prometom vlakova; korištenje opremom za opskrbu električnom energijom potrebnom za vuču vlaka i dr.

uslužnim objektima i uslugama koje se pružaju u tim objektima te pristup prugom do tih objekata[26]; dodatne usluge[27] i prateće usluge[28]. Kako bi se neovisnost Upravitelja i pripadajuća prava željezničkih prijevoznika ostvarila, obveza je Upravitelja da za svaku godinu objavi izvješće o mreži u kojem su sadržani: podaci o željezničkoj infrastrukturi i uvjetima pristupa; načinu izračuna cijena usluga; kriterijima za dodjelu infrastrukturnoga kapaciteta; informacije o načinu i postupcima rješavanja prigovora; informacije o uvjetima pristupa uslužnim objektima i drugo. Podudarna izvješća o mreži dužni su objaviti operatori uslužnih objekata morskih i riječnih luka te operatori robnih terminala. Neovisno o tome što je riječ o zakonskoj obvezi korist od objave izvješća o mreži nemjerljiva je za razvoj prometa jer čini dostupnijim ključne podatke za korištenje željezničkom infrastrukturom i pratećim uslužnim objektima, tj. sredstvima rada. Poslovna prilika za konkurente u željezničkom prijevozu temelji se upravo na transparentnosti uvjeta pristupa željezničkoj mreži i uslužnim objektima i nediskriminaciji u realizaciji prava na pristup. U drugim mrežnim djelatnostima objavljuju se također podudarni dokumenti uglavnom pod nazivom standardna ponuda[29]. Direktiva 2012/34/EU postavlja kao temeljno načelo prava EU-a u željezničkom sektoru distinkciju između usluga prijevoza i usluga upravljanja infrastrukturom, pa je nužno odvojeno upravljanje tim djelatnostima i vođenje odvojenog računovodstva[30]. Praksa u bitnome razlikuje, sa stajališta cilja realizacije otvorenog pristupa mreži (eng. *open access*) za prijevoznike, dva opća modela. Prvi model odvaja prijevozničke i upravljačke djelatnosti u posebna društva (eng. *structural separation*), a drugi model zadržava ove djelatnosti unutar jednoga integriranog društva (eng. *holding*). Između tih dominantnih modela postoje različite varijacije i rješenja po zemljama članicama EU-a. Jedna skupina zemalja EU-a opredijelila se za prvi model, tj. pravno i strukturno odvajanje Upravitelja od željezničkih prijevoznika. Druga skupina zemalja opredijelila se za pravno odvajanje Upravitelja, ali unutar holdinga. Između ova dva temeljna modela postoje različite varijacije ovisno o stupnju samostalnosti upravitelja infrastrukture u holdingu u odnosu na obavljanje njegovih temeljnih funkcija[31]. Neovisno o odabranom modelu potpuna vertikalna integracija prijevoznika i upravitelja infrastrukture u jednom društvu, bez računovodstvenog odvajanja, odnosno bez odgovarajućeg jamstva sprječavanja prilijevanja sredstava namijenjenih za obavljanje javnih usluga i gradnje i održavanja infrastrukture na komercijalne prijevozničke usluge zabranjena je pravom EU-a[32]. Takva integracija najmanje je transparentna i pogodna za razvoj konkurentskih odnosa na liberaliziranom tržištu. Ipak, praktična je za koordinirano upravljanje, gradnju i održavanje željezničke infrastrukture, što je javni interes propisan zakonom[33]. Ta mrežna infrastruktura s obzirom na veliku nacionalnu geografsku rasprostranjenost iziskuje

[26] Uslužni su objekti: putnički kolodvori i pripadajuće zgrade i oprema; robni terminali; ranžirni kolodvori i objekti za manevriranje; garažni kolosijeci; objekti za održavanje; morske i riječne luke povezane na željezničku mrežu; objekti za opskrbu gorivom i dr.

[27] Električna energija za vuču vlaka; predgrijavanje i prethlađivanje; posebni ugovori za prijevoz opasnih tvari i dr.

[28] Pristup elektroničkoj komunikacijskoj mreži; tehnički pregled željezničkih vozila; usluga prodaje karata na putničkim kolodvorima.

[29] Primjerice u elektroničkim komunikacijama: https://www.hrvatskitelekom.hr/poslovni/veleprodaja/fiksni-operatori/regulativa

[30] DIREKTIVA 2012/34/EU EUROPSKOG PARLAMENTA I VIJEĆA od 21. studenoga 2012. o uspostavi jedinstvenoga Europskog željezničkog prostora (OJ L 343/32) od 14. 12. 2012., str. 136, preambula točka 6.

[31] Impact assessment, European Commission, SWD (2013) 12 final. Str. 13.

[32] Op. cit. 30, članak 6.

[33] Članak 15. ZŽ-a.

znatna financijska sredstva za održavanje i nadogradnju. Tržišni prihodi Upravitelja redovito nisu dostatni za tu svrhu pa je neizostavna politička odluka o financijskoj uključenosti javne vlasti, odnosno države i/ili dostupnih fondova EU-a. Temeljne funkcije Upravitelja načelno se razvrstavaju u četiri skupine: razvoj infrastrukture (planiranje i gradnja nove željezničke mreže); održavanje i obnova infrastrukture; određivanje cijene pristupa željezničkoj mreži; te dodjela infrastrukturnog kapaciteta i upravljanje prometom. Među ovima, ističu se dvije funkcije koje se stoga nazivaju – osnovnim funkcijama (eng. *essentail functions*). To su određivanje cijene pristupa željezničkoj mreži i dodjela infrastrukturnoga kapaciteta, kako je prethodno navedeno.

Interakcija među osnovnim i ostalim funkcijama Upravitelja, ovisno o tome je li Upravitelj njihov nositelj ili koje drugo tijelo, može dovesti do različitih posljedica. Na primjer, ako tijelo odgovorno za određivanje pristojbe ne upravlja održavanjem i investicijama u infrastrukturu, moguće je da pristojbe neće biti dostatne za povrat tih troškova, što može dovesti do nedovoljnog ulaganja u infrastrukturu te narušavanja tehničkih uvjeta nužnih za brz prijevoz. Visina pristojbi, s druge strane, važna je za privlačenje željezničkih prijevoznika i dovoljnu iskorištenost infrastrukture, pa je zamjetna međuovisnost pristojbi za korištenje, troškova održavanja i novih investicija. Funkcija dodjele željezničkih kapaciteta, tj. trasa, ako nije povezana s funkcijom određivanja pristojbi za korištenje infrastrukturom, može dovesti do nekoordiniranih financijskih učinaka, tj. nedovoljne ili eventualno prekomjerne iskorištenosti infrastrukture. Planiranje održavanja trasa predodređuje stvarnu iskoristivost trasa, tj. brzinu prijevoza i atraktivnost željezničkog prijevoza u odnosu na druge grane prijevoza. Jednako, poslovi održavanja željezničke infrastrukture i njezine daljnje izgradnje trebaju biti koordinirani da bi ograničena financijska sredstva za tu namjenu bila iskorištena uz istodobno što manji utjecaj na mrežnu propusnost i nesmetano korištenje trasama[34]. Iz svega navedenog može se zaključiti da se objedinjenjem svih ili većega broja navedenih funkcija pri Upravitelju, premda to nije pravna obveza u smislu prava EU-a, smanjuje trošak koordinacije tih funkcija, povećava optimizacija općeg sustava upravljanja i ukupna konkurentnost željeznice kao prometnog sredstva. Treba istaknuti da 4. željeznički paket EU-a izdvaja upravljanje infrastrukturom *(eng. infrastructure governance*), uz unapređenje interoperabilnosti i sigurnosti te otvaranje domaćega putničkog prijevoza, kao bitan cilj razvoja i oporavka sektora željeznica EU-a (eng. *Single European Rail Area, SERA*). Primjetna je određena politička podijeljenost dionika u pogledu opredijeljenosti za model tzv. odvojenoga ili integriranoga infrastrukturnog upravitelja. Općenito, za prvu su opciju u EU-u neovisni upravitelji infrastrukture, novi konkurenti na tržištu prijevoza te organizacije špeditera i prijevoznika, često državni resori prometa, regulatorna tijela i tijela za zaštitu tržišnog natjecanja. Drugoj su opciji skloni prijevoznici i upravitelji infrastruktura organizirani u holding-strukture, novi konkurenti prijevoznici ako su povezana društva bivših prijevoznika monopolista te sindikati. U bitnome zagovornici druge opcije slažu se sa zagovornicima prve opcije o nužnosti izbjegavanja potencijalnih sukoba interesa, diskriminatornih postupaka i transparentnih financijskih odnosa Upravitelja. Ipak, drže da strukturno odvajanje Upravitelja od prijevoznika u holdingu nije nužno[35]. Također, pojedini dionici, npr. udruge za putnički prijevoz, polazeći od vlastitog položaja na tržištu, zagovaraju razdvojenost Upravitelja kao preduvjet njegove neovisne investicijske politike u željezničku mrežu. Teretni prijevoznici zagovaraju odvajanje kao učinkovit način izgradnje jedinstvenoga željezničkog područja EU-a (*SERA*). Upravitelji, ako su razdvojeni, zainteresirani su za šire

[34] Op. cit. 31 (*Impact assessment*), str. 20.

[35] Op. cit. 31 (*Impact assessment*), str. 81.

ovlasti osim osnovnih funkcija dodjele kapaciteta i određivanja pristojbi. Sindikati vide opasnost u odvajanju Upravitelja radi potencijalnog smanjenja mobilnosti radnika između društava holdinga i ukupnoga gubitka radnih mjesta.

Očekivane prednosti i nedostaci strukturno razdvojenog upravitelja infrastrukture u odnosu na model holdinga mogu se općenito sumirati na sljedeći način.

I. Model odvojenog upravitelja infrastrukture

a) Očekivane prednosti
   - nema diskriminacije u pristupu infrastrukturi i nema sukoba interesa
   - jasnija podjela uloga između dionika u željezničkom sektoru
   - koristi od specijalizacije dionika
   - potpuna financijska transparentnost
   - harmonizacija na razini država članica EU-a i doprinos prekograničnoj suradnji Upravitelja
   - daje sigurnost novim prijevoznicima konkurentima i potiče nova ulaganja

b) Potencijalni nedostaci (rizici)
   - odvajanje Upravitelja od potreba tržišta
   - zloporaba vladajućeg položaja
   - fragmentacija i neusklađenost sustava manjom sinergijom i gubitkom u komunikaciji
   - manja učinkovitost i dodatni transakcijski troškovi

II. Model holdinga

a) Očekivane prednosti
   - jednostavnija koordinacija između Upravitelja i povijesnih željezničkih prijevoznika
   - manji transakcijski troškovi između Upravitelja i povijesnih željezničkih prijevoznika
   - jednostavnije pružanje prijevozničkih usluga unutar sustava javnih usluga (PSO)
   - jednostavnije ulaganje u vozni park za povijesne prijevoznike

b) Potencijalni nedostaci (rizici)
   - nedostatak transparentnosti u financijskim smjerovima i odlučivanju
   - rizik ustrajne diskriminacije
   - nužna intenzivnija aktivnost regulatora
   - nedostatak interesa za suradnjom

Između dva dominantna modela postoje različite inačice prema stupnju odvojenosti upravitelja infrastrukture, što je bilo i predmetom analize prema država članicama EU-a za potrebe Europskog parlamenta kako je niže prikazano[36].

[36] The impact of separation between infrastructure management and transport operations on the EU railway sector, DG for internal policies, European Parliament, 2011. Str. 28.

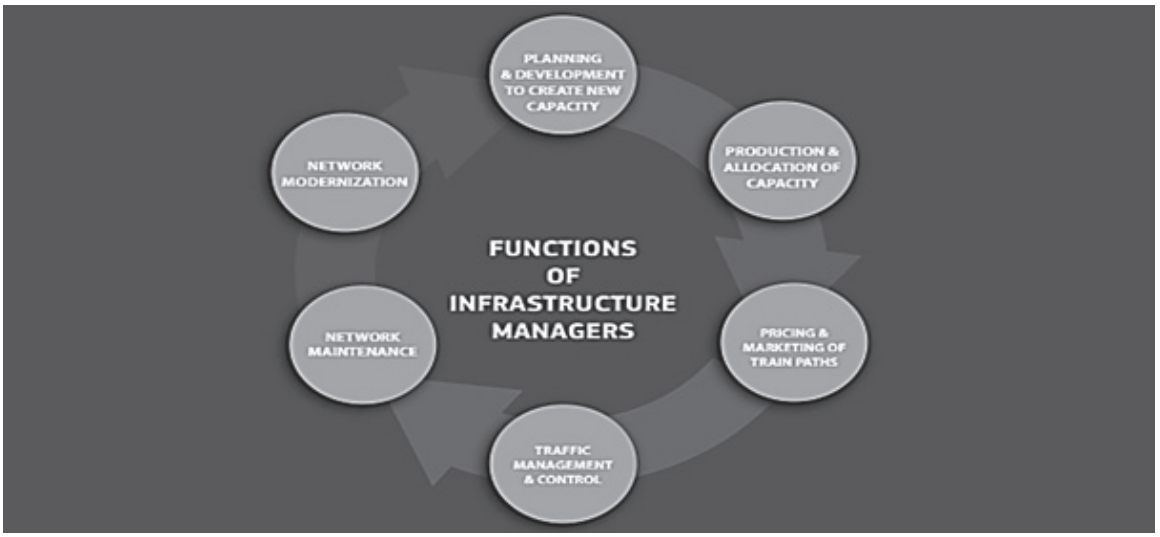
Slika 2.: Pregled država članica prema odabranom modelu vertikalne strukture u željeznici

CATEGORY	MEMBER STATE
Full separation	Great Britain, Finland, Denmark, Netherlands, Norway, Spain, Sweden, Portugal, Slovakia, Lithuania, Romania, Czech Republic, Greece
Partial separation	Estonia, France, Hungary, Slovenia, Luxembourg, Latvia
Partial integration	Austria, Belgium, Germany, Italy, Poland
Full integration	Ireland, Northern Ireland

Izvor: European Parliament, 2011.

Neovisno o odabranome modelu upravljanja željezničkom mrežom, funkcije upravitelja trebale bi biti načelno podudarne radi povećanja produktivnosti sektora željeznice[37].

Slika 3.: Funkcije upravitelja željezničke infrastrukture



Izvor: European Commission, 2013.

Izvan Europske unije provedena su također pojedina istraživanja kojima je cilj bio razmotriti odnos veličine tržišta u željeznici i oportunosti vertikalne integracije, odnosno odvajanja upravitelja infrastrukture sa strane troškova. U bitnome, zaključak je da odgovor na to pitanje zavisi uz ostalo i od iskorištenosti željezničke mreže u smislu intenziteta prometa. Što je veći promet na željezničkoj mreži, čine se manji razlozi za vertikalno odvajanje upravitelja infrastrukture. Naprotiv, što je manji promet, to su veće potencijalne koristi od vertikalnog odvajanja upravitelja. Tim više i stupanj razvijenosti tržišta može biti faktor razmatanja tog složenog

[37] The performing rail infrastrutructure manager, European Commission, 2013. Str. 6.

pitanja organiziranja željezničkog tržišta u pojedinoj zemlji[38]. Također, pojedina istraživanja pokazuju da opredjeljenje za vertikalno odvajanje donosi bolje rezultate ako je popraćeno prethodnim ili istodobnim horizontalnim odvajanjem između teretnog i putničkog prometa, što rezultira pretpostavkama za veću produktivnost[39]. Pitanje podizanja produktivnost sektora željeznice te povezano pitanje organizacije upravljanja željezničkom infrastrukturom prepoznato je globalno, pa su u Australiji provedena istraživanja u tom pogledu, a zaključci u bitnome upućuju na sljedeće[40].

- Gdje postoji dostatna intermodalna konkurencija i prostor za intramodalnu konkurenciju, vertikalno odvajanje može biti prikladno. Jednak je slučaj kada postoji znatna tržišna snaga pojedinog prijevoznika intramodalno.
- Gdje postoji intermodalna konkurencija uz nedovoljnu intramodalnu konkurenciju, vertikalno odvajanje upravitelja infrastrukture ne mora biti prikladno rješenje, s obzirom na to da troškovi odvajanja mogu biti veći od očekivane tržišne koristi.

U Europskoj uniji ogledni primjer političke dileme organiziranja upravljanja infrastrukturom može biti Francuska. Primjer Francuske zanimljiv je jer pokazuje poteškoću političke odluke izabrati prvi ili drugi model ili neku varijaciju prikladnu nacionalnim specifičnostima. Francuska je provela reformu 1997. te je do tada povijesno jedinstveno društvo SNCF (fran. *Société nationale des chemins de fer*) razdvojila na dva samostalna trgovačka društva, jedno za djelatnost upravljanja infrastrukturom RFF-a (fran. *Réseau ferré de France*), a drugo za djelatnost prijevoza (SNCF). RFF je imao u vlasništvu željezničku infrastrukturu kojom je i upravljao. Planirao je njezin razvoj te određivao cijenu pristupa, tj. korištenja za treće. Ipak, održavanje infrastrukture ugovorno je prenio na SNCF. Dio tadašnje reforme bila je i decentralizacija regionalnog i lokalnog putničkog prometa na tijela područne i lokalne vlasti koja su određivala opseg obavljanja javne usluge prijevoza putnika te su od središnje države primala financijska sredstva u tu svrhu. Nakon osamnaest godina, 2015. odlučila je provesti novu reformu željezničkog sustava na način da vrati do tada samostalno društvo RFF pod okrilje novoga holding-društva SNCF koje se sastoji od SNCF-a *Réseau* za upravljanje infrastrukturom i SNCF-a *Mobilites* za prijevoz putnika i tereta. *Ratio* željezničke reforme 1997. bio je veća transparentnost u financiranju održavanja i izgradnje željezničke mreže, razduživanje željezničkih prijevoznika te priprema za liberalizaciju tržišta prijevoza tereta i poslije putnika. U praksi se pokazalo da u odnosima između RFF-a i SNCF-a ima sporova ne samo imovinske naravi nego i regulatorne naravi u smislu visine naknade koju je SNCF dužan plaćati za korištenje infrastrukturom RFF-u. S druge strane, RFF bio je dužan plaćati SNCF-u delegirane mu poslove održavanja infrastrukture, što je dodatno usložilo financijske odnose i dovelo u pitanje ukupnu transparentnost. U praksi su dugovi prijevoznika prebačeni na upravitelja infrastrukture, a nedostatak suradnje kulminirao je 2014. narudžbom dijela voznog parka koji po dimenzijama nije tehnički odgovarao željezničkim kolodvorima, pa je to bio uvod u povratak s modela strukturne razdvojenosti u inačicu modela vertikalne integracije. Prigodom te posljednje reforme francusko tijelo za zaštitu tržišnog natjecanja očitovalo se francuskoj Vladi

[38] Matsushima, N.; Mizutani, F. 2011. Market size and vertical structure in the railway industry, Discussion paper n. 820, The Institute of Social and Economic Researche, Osaka University. Str. 14.

[39] Sanchez, P. C. et al. 2008. Vertical and horizontal separation in the European railway sector: Effects on productivty, working paper 12, BBVA Foundation. Str. 27.

[40] Owens, H. 2004. Rail reform strategies: The Australian experience. *Governance, regulation, privatization in the Asia-Pacific region*, vol. 12. Univeryity of Chicago Press. Str. 300.

u dvanaest preporuka kojima je cilj bio popratiti planirani povratak u vertikalnu integraciju i očekivanu poslovno-upravljačku sinergiju, međutim uz odgovarajuća jamstva da to neće utjecati na tržišno natjecanje, tj. neovisnost upravljanja željezničkom infrastrukturom koja je pretpostavka jednakopravnog pristupa svih prijevoznika. Neke su od preporuka tijela za zaštitu tržišnog natjecanja: organiziranje tzv. jedinstvenoga upravnog mjesta (eng. *one-stop-shop)* za upravljanje željezničkim kapacitetom, dodjelom trasa te pružanjem ostalih željezničkih usluga za putnički i teretni promet; jače ovlasti sektorskog regulatornog tijela ARAFER (fran. *Autorité de régulation des activités ferroviaires et routières*) prigodom imenovanja članova i predsjednika uprave upravitelja infrastrukture (fran. SNCF *Reseau*); zabrana personalne povezanosti uprava upravitelja infrastrukture i uprava prijevoznika (SNCF *Réseau i* SNCF *Mobilites*), a navedeno se u širem smislu odnosi i na zabranu transfera ključnih kadrova unutar skupine te zabranu dijeljenja uredskih prostora; jasno pravno razgraničenje ovlasti krovnoga društva unutar skupine SNCF u odnosu na SNCF *Réseau* glede sprečavanja njegova utjecaja na operativne poslove, s obzirom na to da su članovi uprave SNCF-a ujedno predsjednici uprava SNCF-a *Reseau i* SNCF-a *Mobilites*; te neke druge preporuke usmjerene na jačanje neovisnosti regulatornog tijela *ARAFER*[41]. Na složenost uređenja odnosa u sektoru željeznice u Francuskoj i poduzete reforme u posljednjih dvadesetak godina ilustrativno upućuju i pojedini akademski stavovi (Jean-Jacques Laffont): „SNCF je vrlo težak slučaj pa su se i najuporniji zagovornici poduzetnika javnog sektora razuvjerili. Naime, rasipnost u SNCF-u dostiže nevjerojatne razine, pa su zaposlenici doslovno prisvojili kompaniju. Ne otvarajući pitanje privatizacije, mislim da treba naglasiti važnost odvojenosti RFF-a od prijevozništva i uvesti konkurenciju, decentralizaciju i regionalnu usporedbu"[42].

4. Teorija i praksa ograničavanja tržišnog natjecanja u željeznici

Nova direktiva 4. željezničkog paketa od 2016. o otvaranju tržišta za usluge domaćega željezničkog prijevoza putnika i upravljanja željezničkom infrastrukturom razrađuje temeljna pravila glede vertikalno integriranih poduzetnika[43]. Vertikalno integrirani poduzetnik jest: (a) upravitelj infrastrukture pod kontrolom poduzetnika koji istodobno kontrolira jednog ili više željezničkih prijevoznika koji pružaju usluge željezničkog prijevoza na mreži upravitelja infrastrukture; (b) upravitelj infrastrukture pod kontrolom jednog ili više željezničkih prijevoznika koji pružaju usluge željezničkog prijevoza na mreži upravitelja infrastrukture; ili (c) jedan ili više željezničkih prijevoznika koji pružaju usluge željezničkog prijevoza na mreži upravitelja infrastrukture pod kontrolom upravitelja infrastrukture. To ujedno podrazumijeva poduzetnika koji se sastoji od zasebnih odjela, uključujući upravitelja infrastrukture i jednog ili nekoliko odjela koji pružaju usluge prijevoza, no nemaju zasebnu pravnu osobnost[44]. Da bi se utvrdilo bi li poduzetnika trebalo smatrati vertikalno integriranim, primjenjuje se pojam kontrole u smislu Uredbe Vijeća (EZ) br. 139/2004. Kada su upravitelj infrastrukture i željeznički prijevoznik potpuno neovisni jedan o drugome, no oba su pod izravnom kontrolom

[41] The Autorite de la concurrence publishes the opinion it provided to the French government concerning a bill on railway reform, http://www.autoritedelaconcurrence.fr, 2013.

[42] Laffont, J. J. 1999. Intervju, l'Expansion, br. 603, http://lexpansion.lexpress.fr/actualite-economique/la-france-ne-dereglemente-qu-en-trainant-les-pieds_1413348.html

[43] Direktiva (EU) 2016/2370 Europskog parlamenta i Vijeća od 14. prosinca 2016. o izmjeni Direktive 2012/34/EU u pogledu otvaranja tržišta za usluge domaćega željezničkog prijevoza putnika i upravljanja željezničkom infrastrukturom, OJ L 352, od 23. 12. 2016. Str. 1.

[44] Ibid., članak 1, točka 2. (c).

države koja ne uključuje nikakav posrednički subjekt, trebalo bi ih smatrati zasebnima[45]. Vladino ministarstvo koje provodi kontrolu i nad željezničkim prijevoznikom i nad upraviteljem infrastrukture ne bi trebalo smatrati posredničkim subjektom. Za neovisnost upravitelja infrastrukture, u bitnome, države članice trebaju osigurati sljedeće[46].

- Nijedan od pravnih subjekata unutar vertikalno integriranog poduzetnika nema odlučujući utjecaj na odluke upravitelja infrastrukture u pogledu njegovih osnovnih funkcija.
- Da je upravitelj infrastrukture organiziran kao subjekt koji je pravno odvojen od bilo kojega željezničkog prijevoznika te da je u vertikalno integriranim poduzetnicima odvojen od bilo kojega drugoga pravnog subjekta unutar poduzetnika.
- Članovi upravljačkog odbora upravitelja infrastrukture i osobe zadužene za odlučivanje o osnovnim funkcijama ne primaju nikakvu naknadu utemeljenu na postignutim rezultatima od bilo kojih drugih pravnih subjekata unutar vertikalno integriranog poduzetnika niti primaju bilo kakve bonuse koji su ponajprije povezani s financijskim rezultatima određenih željezničkih prijevoznika. To ne isključuje mogućnost poticaja u pogledu sveukupne izvedbe željezničkog sustava.
- Ako se različiti subjekti unutar vertikalno integriranog poduzetnika koriste zajedničkim informacijskim sustavima, pristup osjetljivim informacijama u vezi s osnovnim funkcijama ima samo ovlašteno osoblje upravitelja infrastrukture. Osjetljive informacije ne smiju se prosljeđivati drugim subjektima unutar vertikalno integriranog poduzetnika.
- Iste osobe ne mogu biti zaposlene ili imenovane:
  - ◊ kao članovi upravljačkog odbora upravitelja infrastrukture i kao članovi upravljačkog odbora željezničkog prijevoznika
  - ◊ kao osobe zadužene za odlučivanje o osnovnim funkcijama i kao članovi upravljačkog odbora željezničkog prijevoznika
  - ◊ ako postoji nadzorni odbor, kao članovi nadzornog odbora upravitelja infrastrukture i kao članovi nadzornog odbora željezničkog prijevoznika
  - ◊ kao članovi nadzornog odbora poduzetnika koji je dio vertikalno integriranog poduzetnika i koje kontrolira željezničkog prijevoznika i upravitelja infrastrukture te kao članovi upravljačkog odbora tog upravitelja infrastrukture.

Uz navedeno, potrebno je osigurati neovisnost upravitelja infrastrukture osobito u odnosu na obavljanje osnovnih funkcija te u odnosu na poslove upravljanja prometom i planiranje održavanja infrastrukture[47].

A) Teoretska polazišta

U nastavku kraći pregled tipičnih oblika potencijalnog narušavanja tržišnog natjecanja upravitelja infrastrukture[48]:

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[45] Ibid., alineja 6. i Uredba Vijeća (EU) 139/2004 od 20. siječnja 2004. o kontroli koncentracija između poduzetnika OJ L 24/1, 29. 1. 2004. Str. 1.

[46] Op. cit. 43., članak 1., točka 4.

[47] Op. cit. 43., članak 7a i 7b.

[48] Weidmann, U.; Nash, A. 2008. Open access to railway networks: Hidden discrimination potential in an integrated railway organisation, CRNI Conference. Brussels.

i. Razvoj željezničke mreže

Planiranje i razvoj mreže određuje mrežnu topologiju, kapacitete mreže i položaj uslužnih objekata poput ranžirnih kolodvora, garažnih kolosijeka, različitih objekata održavanja i dr. UI kroz tu funkciju može pogodovati prijevozničkim potrebama povijesnog prijevoznika i dugoročno mu omogućiti prednost pred konkurentima. To može biti slučaj kada se vrijeme realizacije investicije ili održavanja infrastrukture namješta prema potrebama povijesnog prijevoznika. Kako bi se smanjio rizik za diskriminaciju prigodom planiranja i razvoja mreže, nužna je mogućnost svih zainteresiranih prijevoznika, odnosno podnositelja zahtjeva za dodjelu infrastrukturnoga kapaciteta da mogu sudjelovati u tom procesu. Prijedlog izmjena i dopuna Zakona o željeznici, članka 8., ide u tom smjeru kada propisuje: „Upravitelj infrastrukture dužan je, najkasnije 30 dana prije donošenja poslovnog plana, osigurati da podnositelji zahtjeva i nakon upita i potencijalni podnositelji zahtjeva imaju pristup potrebnim podacima i da mogu izraziti svoja mišljenja o poslovnom planu u odnosu na uvjete pristupa i korištenja kao i na izvedbu, raspoloživost i razvoj željezničke infrastrukture.[49]" Takva je formulacija u skladu s pravom EU-a.[50] Željeznički mrežni kapaciteti upotrebljavaju se u dvije osnovne svrhe, jedna je provoz vlakova, a druga je održavanje infrastrukture. U pogledu potonjeg, cilj je upravitelja infrastrukture smanjiti troškove održavanja i broj provoza u tu svrhu. Stoga mu je u pravilu jeftinije zatvoriti na određeno dionicu pruge na kojoj se radi održavanje te preusmjeriti promet, od rada noću i svakodnevnog otvaranja i zatvaranja dionice radi ograničenog propuštanja vlakova. Plan održavanja infrastrukture potreban je za izradu reda vožnje, odnosno dodjelu raspoloživih infrastrukturnih kapaciteta prijevoznicima. On se oslanja na pravovremen i realan plan potreba prijevoznika za korištenje infrastrukturom koji služi za izradu voznog reda. Naime, događa se da prijevoznici, osobito povijesni, prekomjerno dimenzioniraju svoje prijevozničke potrebe (eng. *overbooking*) radi dostupnosti rezervnih trasa za svoje potrebe, odnosno radi sprečavanja konkurenata u pristupu upravo prekomjerno rezerviranim trasama zbog tržišne utakmice[51].

ii. Upravljanje željezničkih kapacitetima

Dodjela infrastrukturnoga kapaciteta potencijalno omogućava diskriminaciju prijevoznika. Kapacitet u tehničkom smislu zavisi od više faktora: broja vlakova koji prometuju, tehničke homogenosti vlakova, stabilnosti voznog reda te prosječne brzine na određenoj trasi. Što je veća tehnička homogenost vlakova i prosječna brzina, to može prometovati veći broj vlakova uz bolju iskoristivost voznog reda. Također, ukupan broj vlakova koji vozi na određenoj trasi može zavisiti od rizika koji je prihvatljiv upravitelju infrastrukture. Tako, primjerice, Upravitelj može biti sklon prihvatiti zahtjev za *ad hoc* trasom povijesnog prijevoznika, a isti zahtjev konkurentnog prijevoznika odbiti. Također, dodjela trasa može nositi prikrivenu diskriminaciju jer su pojedine trase vremenski bolje usklađene sa susjednim trasama na povezanim dijelovima željezničke mreže, pa je moguće ostvariti vremenske uštede i ukupno bolju uslugu komitentu. Upravitelj može u takvim slučajevima dodijeliti kvalitetnije trase povijesnom prijevozniku na štetu konkurentnim prijevoznicima.

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[49] Konačni prijedlog Zakona o izmjenama i dopunama Zakona o željeznici, Ministarstvo mora, prometa i infrastrukture, lipanj 2017. https://vlada.gov.hr/UserDocsImages//Sjednice/2017/.

[50] Op. cit. 30., članak 8.

[51] Amaral, M.; Thiebaud, J.-C. 2014. Vertical Separation in Rail Transport: How Prices Influence Coordination? Network Industries Quarterly, Num. 16/2. Str. 15.

iii. Rabatna politika

Uvjeti pristupa željezničkoj infrastrukturi mogu potencijalno pružiti priliku za diskriminaciju pojedinih prijevoznika. Može biti riječ o količinskim popustima, gdje je jedinična cijena manja za veći broj zakupljenih trasa (eng. *slots*). Količinski popusti imaju opravdanje u ekonomiji obujma iako mogu prouzročiti poteškoće novim prijevoznicima koji imaju manji broj vožnji od povijesnog prijevoznika pa ne mogu ostvariti količinske popuste. Također, za pojedine atraktivne trase mogu biti određeni zahtjevni tehnički uvjeti kao npr. kratko vrijeme provoza, što zahtijeva skupe suvremene električne lokomotive koje mali prijevoznici možda nemaju. Upravitelj sukladno Zakonu može odobriti popust u iznosu koji odgovara stvarnoj uštedi u administrativnim troškovima. Popust može biti i vremenski ograničen ili se odnositi samo na određeni dio željezničke infrastrukture. Formalno-pravno sustavi popusta koje odredi Upravitelj primjenjuju se na nediskriminirajući način na sve željezničke prijevoznike[52]. Ipak, zadaća je prava konkurencije i regulacije razmotriti sve stvarne učinke koje oni proizvode na tržištu.

iv. Tehničko-tehnološka obnova

Mogućnost za diskriminaciju postoji u slučaju određivanja i migracije na nove tehničke standarde vezane za sigurnost prometa, električno napajanje, visinu perona i dr. Premda je Europska unija razvila standarde za tehničke specifikacije i interoperabilnost *(eng. Technical Specifications for Interoperability*, *TSI*), provedba na regionalnoj i lokalnoj razini pojedinih država članica može potrajati. Prilagodba suvremenim elektroničkim sustavima zahtijeva sredstva i transparentan plan i rokove prelaska na prometne i sigurnosne sustave kao što su *GSM-R* i *ETCS* (eng. *European Train Control System*), odnosno *ERTMS* (eng. *European Rail traffic Management System*). Poteškoća za konkurenciju može nastati ako Upravitelj odluči pojedini segment željezničke mreže brzo migrirati na novu tehnologiju, a povijesni je prijevoznik povlaštenom informacijom već ekipirao vozni park potrebnom tehnologijom.

v. Upravljanje prometnim informacijama i diskriminacija

Kada upravitelj infrastrukture upravlja slučajevima zakašnjenja vlakova i održavanja voznog reda, odlučuje radi smanjenja povezanih zakašnjenja kojim će vlakovima dati prednost. Premda se Upravitelj rukovodi određenim pravilima za takve slučajeve, postoji i diskrecija u njegovu odlučivanju koja ne bi smjela rezultirati diskriminacijom prijevoznika konkurenata u odnosu na povijesnog prijevoznika. Također, napredni sustavi željezničke infrastrukture automatski dojavljuju tehničko stanje pojedinih dijelova voznog parka, primjerice temperature kočnica i sl. Upravitelj tada treba odlučiti u kojem trenutku isključiti iz prometa takav vlak. Ako ga isključi odmah, tj. što je prije moguće, to može povlačiti veće troškove nego ako se vlak zaustavi kasnije na njemu odgovarajućem mjestu za popravke i održavanje. Takva je odluka upravitelja diskrecijska u smislu da je spreman prihvatiti veći ili manji rizik koji proizlazi iz vremena prometovanja neispravna vlaka na infrastrukturi. Transparentnost pružanja brojnih željezničkih usluga čini se od presudne važnosti za prijevoznike konkurente. Upravljanje sustavom prometnih informacija upravitelja infrastrukture može postati prednost za povijesne prijevoznike kada pripada istom holdingu ili im na drugi način dostavlja povjerljive informacije o trasama, vrsti vlakova i drugim poslovnim obilježjima ostalih prijevoznika konkurenata. Isto se odnosi na raspolaganje povijesnim prometnim podacima i statistikama bitnim za pripremu poslovnih modela prijevoznika. Zaštita poslovnih podataka pri upravitelju infrastrukture pretpostavka je tržišne ravnopravnosti prijevoznika.

[52] ZŽ, članak 35.

vi. Stručni kadrovi

Nedostupnost prijevoznicima konkurentima kvalificiranog osoblja za upravljanje ili manevriranje vlakovima, rukovanje uslužnim objektima i slično može se pokazati zaprekom u pružanju prijevozničkih usluga, pa pojedini autori pristup ključnim kadrovima i zanimanjima u prvoj fazi liberalizacije vide kao prirodni monopol kojim upravljaju povijesni prijevoznici i upravitelj infrastrukture[53]. Ipak, u praksi je slučaj da novi prijevoznici relativno jednostavno preuzimaju perspektivne stručne kadrove povijesnim prijevoznicima, pa i javnim tijelima temeljem komparativno boljih materijalnih uvjeta koje im mogu ponuditi. Liberalizacija tržišta željezničkog prijevoza općenito znači i otvaranje tržišta rada i potražnje za stručnjake specijaliste, što čini prigodu kvalificiranim kadrovima, no istodobno i prijetnju niže kvalificiranim kadrovima za ostanak bez posla uslijed procesa restrukturiranja povijesnih prijevoznika.

vii. Portfelj željezničkih i prijevozničkih usluga

Dugogodišnje poslovanje povijesnih prijevoznika omogućilo im je da su u nekim slučajevima postali upravitelji uslužnih objekata i davatelji usluga u tim objektima, primjerice garažiranje lokomotiva ili pranje i čišćenje željezničkih teretnih vagona. Češće je povijesni teretni prijevoznik pružatelj usluge u uslužnom objektu kojim upravlja upravitelj infrastrukture i neka luka. To će biti slučaj s uslugom manevriranja, isprobavanja kočenja, tehničkog pregleda vagona, opskrbom goriva i nekim drugim uslugama[54]. Ako su upravitelj uslužnog objekta i pružatelj usluge različite pravne osobe, dužni su donijeti i objaviti zajedničko izvješće o mreži[55]. Izvješće o mreži operatora uslužnog objekta treba sadržavati, uz ostalo, podatke o kolosijecima dostupnim željezničkim prijevoznicima i uvjete pristupa, informacije o uvjetima pristupa uslužnim objektima i uslugama u tim uslužnim objektima te njihovoj cijeni te druge podatke koji korištenje uslužnim objektom čine transparentnim[56].

B) Praktična iskustva

Stvarna neovisnost funkcije upravljanja infrastrukturom smanjuje rizik narušavanja tržišnog natjecanja da upravitelj infrastrukture potencijalno svojim postupcima diskriminira željezničke prijevoznike. Zabilježeni su u EU-u slučajevi diskriminacije na osnovi sustava pristojbi za korištenje željezničkom infrastrukturom, dodjele trasa ili upravljanja sustavom informiranja. Među zemljama EU-a zabilježeni su brojni slučajevi postupanja Upravitelja koji su doveli do nejednakosti željezničkih prijevoznika na liberaliziranom tržištu. U Njemačkoj je Upravitelj u sastavu holdinga *Deutsche Bahn* (dalje: DB) 1998. uveo sustav pristojbi za pristup željezničkoj infrastrukturi koji je u primjeni povećao troškove konkurentima prijevoznika u sastavu DB-a za 25 – 40 %, pa su tijela za zaštitu tržišnog natjecanja i sektorski regulator intervenirali u svrhu uklanjanja spornih količinskih popusta. Količinski popusti bili su sporni i u slučaju opskrbe električnom energijom od društva DB *Energie* člana holdinga DB-a, s obzirom na to da je pravo na najveći popust mogao u praksi jedino ostvariti DB, a ostali prijevoznici plaćali su 15 – 20 % veću cijenu u prosjeku. U Austriji je zabilježeno da je Upravitelj, koji je dio holdinga *Oesterreich Bundesbahn* (dalje: OBB), selektivno podigao pristojbe 60 – 70 % za korištenje željezničkim kolodvorima na određenim trasama, što je konkurentu OBB-a u putničkom prijevozu bitno poskupilo poslovanje. Uz navedeno, došlo je do jednokratnog povećanja pristojbe za pristup željezničkoj infrastrukturi za gotovo 15 %, dok je porast prijašnjih godina bio u prosjeku 2,5 %,

[53] Op. cit. 49. (Weidmann). Str. 20.

[54] Izvješće o mreži 2016., prilog 5.1.i 5.2.

[55] ZŽ, članak 30.

[56] ZŽ, članak 29.

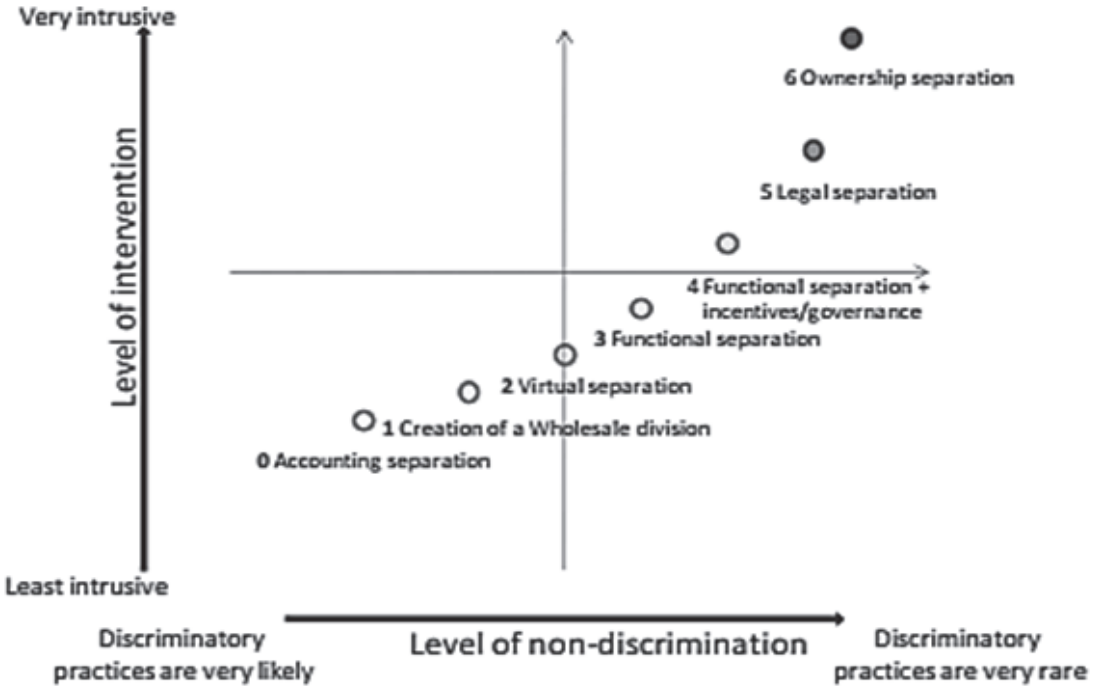
pa je to imalo i kumulativni učinak povećanja troška za konkurente austrijskom povijesnom prijevozniku OBB-u. U Italiji je zabilježen slučaj trogodišnjeg otezanja bivšeg monopolista *Ferrovie dello Stato* (dalje: FS) u davanju pristupa konkurentu na vrlo profitabilnoj željezničkoj trasi između Milana i Torina. FS je kao opravdanje naveo provedbu postupka ocjene utjecaja na ekonomsku ravnotežu obavljanja usluge javnog prijevoza putnika. Rješavajući navedeni slučaj u povodu zahtjeva konkurenta *Arenaways*, talijansko tijelo za zaštitu tržišnog natjecanja zaključilo je da je riječ o složenoj i unaprijed isplaniranoj strategiji FS-a za sprečavanje konkurenta u pružanju putničkog prijevoza. Bivšem talijanskom monopolistu određena je novčana kazna od 300 tisuća eura, što se ne čini mnogo s obzirom na razdoblje trajanja zloporabe vladajućeg položaja, a osobito što je imalo za posljedicu da je u međuvremenu konkurent *Arenaways* otišao u stečaj. Također su u Italiji zabilježene pritužbe na neočekivane promjene Izvješća o mreži Upravitelja, skraćivanje rokova prijevoznicima za dostavu potvrda o sigurnosti i podnošenje zahtjeva za trase prouzročilo je kašnjenje u početku njihova rada. Propisivanje dodatnih obveza, npr. posjedovanja rezervne lokomotive i dizalica za slučaj nezgode bitno poskupljuje poslovanje manjih prijevoznika na tržištu. Zabilježene su u Italiji i druge otegotne okolnosti za početak željezničkog prijevoza, npr. višegodišnje čekanje na ocjenu suglasnosti vozila s nacionalnim tehničkim pravilima, čak 45 mjeseci uz prateće visoke troškove. Nadalje, subjektivna i diskrecijska dodjela pogodnijih trasa za međunarodni putnički promet utječe na konkurentnost željezničkog prijevoznika i atraktivnost ponude za putnike. Nakon povlačenja talijanskog povijesnog prijevoznika *Trenitalia* s tog tržišta, *joint venture* koji su sastavili DB i OBB i talijanski prijevoznik nije uspio dobiti napuštene trase *Trenitalije*, što je neovisno o razlozima talijanskog Upravitelja, pripisano potencijalnoj diskriminaciji koja je rezultat vertikalne integracije upravitelja infrastrukture i prijevoznika. Ostali slučajevi u Njemačkoj i Austriji koji su otežavali novim prijevoznicima pristup željezničkoj mreži odnosili su se na sklapanje nepovoljnih okvirnih ugovora o pristupu, nedovoljnih informacija o kapacitetima infrastrukture, uvjetima pristupu uslužnim objektima, tehničkim karakteristikama trasa, planovima i točnim terminima zatvaranja infrastrukture radi održavanja i sl. Simptomatično je zapažanje njemačkoga vladina savjetodavnog tijela *Monopolkommission* iz 2011. da unatoč određenim poboljšanjima koje je proveo upravitelj infrastrukture integriran u holding DB-a, Upravitelj ne uzima dovoljno u obzir interese konkurenata povijesnog prijevoznika DB-a kada planira radove, nego daje prednost interesima prijevoznicima holdinga kojem pripada[57]. Poseban slučaj u Austriji bio je pravo pristupa konkurenata u realnom vremenu podacima Upravitelja o polascima povijesnog prijevoznika (OBB) radi obavještavanja putnika u slučaju kašnjenja ili otkaza putovanja na poveznim linijama. Upravitelj, član holdinga OBB-a, odbio je davanje takvih podataka premda je njima raspolagao u stvarnom vremenu za područje cijele zemlje.

Prethodni slučajevi opisuju poteškoće s kojima se suočavaju novi željeznički prijevoznici u realizaciji prava na otvoreni pristup mrežnoj infrastrukturi željeznice (eng. *open access*). U bitnome, otvoren pristup moguće je osigurati na dva načina. Jedan je odvajanje funkcije upravljanja infrastrukturnim kapacitetima od funkcije upravljanja prijevozničkim kapacitetima u zasebna pravna društva. Drugi je očuvanje obiju funkcija u istom vertikalno integriranom društvu uz provedbu mjera koje jamče nesmetano realiziranje otvorenog pristupa. Uvjeti koji pogoduju eventualnoj diskriminaciji novih prijevoznika vezani su ponajprije uz kontradiktoran položaj integriranog upravitelja infrastrukture člana holdinga odnosno koncerna, kada rješava u povodu zahtjeva konkurentnih prijevoznika. Radnje Upravitelja kojima se diskriminira konkurent mogu sigurno donijeti izravne konsolidirane financijske koristi holding-

[57] Op. cit. 31. (*Impact assessment*). Str. 89.

društvu. Klasični oblici diskriminacije odnose se na različito postupanje Upravitelja u istim situacijama prema prijevozniku koji jest član holdinga i onome koji nije. S obzirom na to da je uslužno distributivni lanac u željezničkom sektoru složen, potencijalna diskriminacija u pravilu se događa prigodom etapa: planiranja i razvoja mreže; utvrđivanja uvjeta pristupa mreži postupka dodjele kapaciteta, tj. trasa; tehničkih unapređenja i migracija; upravljanja vlakovima; upravljanja informacijama te formalnim uvjetima željezničkog osoblja. U Europskoj uniji na zahtjev Europske komisije vođeni su postupci pred Europskim sudom u vezi s obvezama koje proizlaze iz direktive 91/440/EU u vezi s neovisnošću upravitelja infrastrukture od željezničkih prijevoznika. U dva je slučaja Europski sud ustvrdio da zemlje članice Španjolska i Mađarska nisu na odgovarajući način provele navedenu direktivu[58]. Europska je komisija u predmetu vođenom protiv Mađarske navela da željeznički prijevoznik ne može odlučivati o dodjeli željezničkih trasa (eng. *path allocation*) jer je to osnovna funkcija za očuvanje jednakih i nediskriminirajućih uvjeta za pristup željezničkoj infrastrukturi i pripadajućim željezničkim uslugama opisanima u aneksu II Direktive 2012/34/EU[59]. Osnovna je funkcija i određivanje visine infrastrukturnih naknada *(eng. infrastructure charges determination*). Ipak, ono što je Sud presudio jest da naplata tih naknada (eng. *invoice charging*) kao i poslovi upravljanja prometom (eng. *traffic management*) nisu nužno inherentni navedenim osnovnim funkcijama upravitelja infrastrukture[60]. Podudarno iskustvima iz drugih mrežnih djelatnosti, može se primijetiti da su u odsutnosti vertikalne integracije načelno i manji rizici razmjene povjerljivih informacija, odnosno veća jamstva neovisnosti Upravitelja od povijesnih prijevoznika. U tom pogledu najdostupnija su iskustva iz sektora elektroničkih komunikacija.

Slika 4.: Model odvajanja u vertikalnoj integraciji[61]



Izvor: BEREC, 2010.

[58] Predmeti C 473/10 (Commission v. Hungary) i C 483/10 (Commission v. Spain).

[59] Op. cit. 30.

[60] Commission v. Hungary, judgment of the Court of 28. 2. 2013., C-473/10, točka 62 i dalje i točka 78 i dalje.

[61] BEREC Guidance on functional separation under Articles 13a and 13b of the revised Access Directive and national experiences, BoR (10) 44 Rev1. Str. 7.

5. Modeli upravljanja i razvoj prometa

Posljednjih dvadesetak godina u Europskoj uniji raspravlja se o tome treba li provesti vertikalno odvajanje funkcije upravitelja željezničke infrastrukture od funkcije željezničkog prijevoznika. Osim vertikalnog odvajanja moguće je provesti horizontalno odvajanje, a to znači razdvajanje teretnog prijevoza od putničkog prijevoza, što su također povijesno povezane funkcije istoga pravnog entiteta, tj. željezničkog prijevoznika. Vertikalno odvajanje često se šire zagovara u mrežnim djelatnostima s ciljem uklanjanja potencijalne diskriminacije u pristupu novih prijevoznika, konkurenata, željezničkoj infrastrukturi koja je prirodni monopol. Temeljna svrha trebala bi dakle biti poticanje intramodalnoga tržišnog natjecanja u željezničkom prijevozu (*intra-rail*). Osim toga, ciljevi su u željeznici širi i obuhvaćaju revitalizaciju ukupnoga željezničkog prijevoza i njegov veći udio u odnosu na druge grane prijevoza. Ipak, željeni rast željezničkog tržišta ovisan je u najvećoj mjeri o financijskim ulaganjima u modernizaciju željezničke infrastrukture i njezinu daljnju izgradnju te o osuvremenjenom voznom parku. Povijesno su državna sredstva zemalja članica bila osnovni izvor financiranja, rjeđe to su bile luke i proizvodni sektor gradnjom industrijskih kolosijeka. Danas su dostupna sredstva iz fondova Europske unije. Pritom je željeznica oduvijek imala naglašenu društveno-gospodarsku svrhu, ali realno i socijalnu kao način zapošljavanja brojnih radnika. Sigurno je da od same političke odluke vertikalnog odvajanja u pojedinoj državi članici nije realno očekivati rješavanje svakoga otvorenog pitanja u željeznici. Stoga taj regulatorni instrument nije panaceja. Moguće je zapitati se koji je njegov očekivani doprinos oporavku željezničkog sektora uza sve ostale relevantne čimbenike od kojih oporavak zavisi.

Pojedina istraživanja koja su vođena u tom pogledu kao zaključak navode da nije moguće na nedvojben način utvrditi korelaciju između vertikalnog odvajanja u željeznici i gospodarskog oporavka te djelatnosti. Dosta toga zavisi od svake pojedine države i načina na koji upravlja sustavom željeznice. Otvoreno je pitanje potiče li tržišno natjecanje te ako da, vodi li to rastu željezničkog prometa i njegova intermodalnog udjela u ukupnom prijevozu. Razinu tržišnog natjecanja moguće je promatrati na više načina. Prvi je jednostavna usporedba broja dodijeljenih dozvola za željeznički prijevoz između država članica, pa je zabilježeno da u prosjeku države s vertikalnim odvajanjem imaju manje izdanih dozvola prijevoznicima od država s vertikalnom integracijom koje imaju više izdanih dozvola. Ipak broj izdanih dozvola ne odražava rad prijevoznika, pa je samo sporedni tržišni pokazatelj. Drugi je udio novih prijevoznika konkurenata mjeren *Herfindahl-Hirschmanovim* indeksom, pa je zabilježena nešto veća razina konkurencije u zemljama s vertikalnim odvajanjem od onih zemalja s vertikalnom integracijom. Treći je indeks rasta željezničkoga teretnog prometa promatran u tonskim kilometrima u zemljama sa znatnim teretnim prijevozom. Zabilježen je u desetogodišnjem razdoblju (1998. – 2008.) rast od 40 % u Njemačkoj, Austriji i Velikoj Britaniji, dok je u Francuskoj zabilježen pad od 25 %. U prve dvije navedene zemlje na snazi je vertikalna integracija, a u potonje dvije zemlje tada je u primjeni bilo vertikalno odvajanje. Iz navedenog nije moguće zaključiti je li vertikalna integracija ili vertikalno odvajanje u kakvoj korelaciji s rastom ili padom prometa. Vezan podatak na navedeno porast je modalnoga teretnog prometa u Njemačkoj, Austriji i Velikoj Britaniji od 3 do 6 % i pad od 6 % u Francuskoj. Navedeno potvrđuje prethodni nalaz da teretni promet i modalni udio željeznice u ukupnom prometu nisu jasno korelirani s okolnošću je li u kojoj zemlji na snazi vertikalno odvajanje ili vertikalna integracija. Podudarne zaključke moguće je izvući i za putnički željeznički promet koji je u promatranom razdoblju porastao 40 % u Velikoj Britaniji, a rastao je također u Francuskoj, Španjolskoj i Nizozemskoj, kao i u Njemačkoj i Italiji, premda potonje dvije zemlje imaju model vertikalne integracije u odnosu

na prve četiri zemlje koje imaju model vertikalnog odvajanja. Prokompetitivna sektorska regulacija i osnivanje neovisnih regulatora osim postojanja vertikalnog odvajanja može biti faktor rasta željezničkog tržišta i pojave novih prijevoznika te osigurati njihov ravnopravni položaj u pristupu željezničkoj infrastrukturi. Procjena je da je u Velikoj Britaniji, Njemačkoj, Švedskoj i Nizozemskoj upravo regulacija usmjerena na nediskriminaciju omogućila tržišni udio od više od 20 % konkurentima uz ukupan rast teretnog prometa. Suprotno, Francuska je među zemljama koje su kasno osnovale neovisnog regulatora te je ostvarila pad teretnog prometa od više od 20 % u promatranom razdoblju 1998. – 2008. Zaključak je da nije moguće činjenicu postojanja vertikalne integracije i vertikalnog odvajanja pripisati kao glavni ili isključivi razlog ekonomskih pokazatelja željezničkog prijevoza[62].

Slika 5.: Koncept konkurencije i gospodarskog rasta[63]

Izvor: OECD, 2016.

Među novim državama članicama koje su pristupile EU-u simptomatičan je primjer Rumunjske koja se odlučila za vertikalno odvajanje 1998., podjelu povijesnog monopola na pet društava te je uvedeno tržišno natjecanje u teretnom željezničkom prometu. Konkurencija je jačala brže nego u zemljama kao što su Velika Britanije ili Njemačka, pa je od 2000. kada je poslovao samo povijesni teretni prijevoznik *Marfa* do 2015. broj konkurenata porastao na 24, a tržišni udio *Marfa* u tom se vremenu smanjio sa 100 % na svega 35 %. U tom vremenu bio je i pokušaj privatizacije *Marfa*. Razlozi slabog tržišnog položaja rumunjskoga povijesnog prijevoznika pripisuju se njegovoj dugogodišnjoj financijskoj opterećenosti križnim subvencioniranjem povijesnoga putničkoga željezničkog prijevoznika, a u odsutnosti financijski dosljedne i racionalne politike kojom Rumunjska subvencionira javni prijevoz putnika. Pojava novih prijevoznika na nedovoljno održavanoj željezničkoj infrastrukturi nije u tom vremenu donijela veće količine prevezene robe, nego se količina smanjila sa 70 milijuna tona na 50 milijuna tona od 2005. do 2014. Ni pojava ozbiljne konkurencije kao ni vertikalno odvajanje željeznice u Rumunjskoj nisu donijeli oporavak sektoru. Glavni razlog takvu razvoju događaja jest du-

[62] Drew, J.; Nash, C. A. 2011. *Vertical separation of railway infrastructure – does it always make sense*? Institute for Transport Studies, Univerity of Leeds, Working paper 594. Str. 8.

[63] OECD Competition Assessment Review: Romania, OECD, 2016, Paris. Str. 30.

gotrajno nedovoljno ulaganje u željezničku infrastrukturu i razmjerno visoke naknade prijevoznicima za pristup infrastrukturi. To je učinilo rumunjsku željeznicu malo atraktivnom za međunarodni i tranzitni prijevoz te posljedično manjeg rada željezničkih prijevoznika. Dostatna i kontinuirana financijska ulaganja u željezničku infrastrukturu čine se ključnim faktorom o kojem treba voditi računa pri revitalizaciji željezničkog sektora[64]. Mrežna infrastruktura, neovisno o mrežnoj djelatnosti o kojoj je riječ, ako se u nju nedovoljno ulaže osobito u dužem razdoblju bilo od privatnih vlasnika ili javne vlasti, otežano može biti generatorom gospodarskog rasta, pa su ulaganja uvjet održive konkurentnosti.

Zaključak

Bit funkcije tržišnih regulatora u odnosu na mrežne industrije, koje su prošle put od državnog monopola do slobodnog tržišta, može se slobodnim riječima opisati kao potraga za ekonomskom učinkovitošću. Naime, u vrijeme *de jure* ili *de facto* monopola u djelatnostima s naglašenom ekonomijom obujma i/ili opsega monopolisti mogu nametnuti veće cijene potrošačima ili im isporučivati usluge umanjene kvalitete. Uloga je tržišnih regulatora to spriječiti ili dovođenjem novih poduzetnika, tj. tržišnog natjecanja ili ekonomskom regulatornom intervencijom na bilateralnoj razini s poduzetnikom monopolistom, odnosno poduzetnikom u vladajućem položaju. Kada je tržište željeznice liberalizirano, sukladno pravu Europske unije, na zemljama je članicama da se opredijele između dvaju dominantnih modela upravljanja željezničkom mrežom, jedan zasnovan na tzv. holding-modelu, a drugi na modelu vertikalnog odvajanja upravitelja infrastrukture od prijevoznika. Nijedan od modela nije uputno prihvatiti ili odbaciti *a priori*, nego razmotriti željezničku prometnu strategiju, intermodalni konkurentni položaj željezničke mreže i ekonomske ciljeve u pojedinoj zemlji. Vertikalno odvajanje može utjecati na upravitelja infrastrukture da ne zlorabi svoj položaj na štetu prijevoznika konkurenata, a može biti i poticaj na smanjenje troškova upravitelja infrastrukture i povijesnih željezničkih prijevoznika koji specijalizirano rade svoj segment željezničkog poslovanja. Procjena je da se kod integriranih željezničkih sustava znatno teže racionalno upravlja troškovima i sprečava vertikalno ili horizontalno prebacivanje neučinkovitosti s povijesnih prijevoznika na upravitelja infrastrukture ili prijevoznika međusobno. U tom slučaju nužna je jača regulatorna intervencija i nadzor da bi se ostvarila društvena korist u smislu manjih državnih potpora, racionalnijeg odnosa države prema ovoj prometnoj grani te proveli programi restrukturiranja povijesnih željezničkih prijevoznika. Polazeći od izvrsnoga koridorskoga tranzitnog položaja Republike Hrvatske, političkog opredjeljenja za jačanje konkurentnog položaja željeznice kao prometne grane, zatim opredjeljenje zakonodavca za napuštanje modela holdinga i prihvaćanje modela vertikalno odvojenog upravitelja infrastrukture te polazeći od aktualnih rezultata rasta udjela novih teretnih prijevoznika na liberaliziranom tržištu, postojeće zakonsko rješenje u Hrvatskoj odražava se kao razuman izbor industrijskog organiziranja u toj mrežnoj djelatnosti.

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[64] Ibid. 136–140.

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SUMMARY

Although it is not an infringement of competition law, vertical integration may be conducive to abuse of market power. The recent Directive EU 2016/2370 lays out the general approach to the notion of company control within the meaning of competition law and the notion of vertically integrated undertaking with regard to the railways free market. Thereby legal grounds for avoidance of discriminatory practices or other types of distortion of competition are strengthened. Member States are free to choose between different organisational models, ranging from full structural separation to vertical integration, subject to appropriate safeguards to ensure the impartiality of the infrastructure manager as regards the essential functions, traffic management and maintenance planning. Decision-making by infrastructure managers with respect to train path allocation and to infrastructure charging are essential functions that are vital for ensuring equitable and non-discriminatory access to rail infrastructure. Functions of traffic management and maintenance planning are to be exercised in an impartial manner as well. The paper considers the pros and cons of different industrial organization models following an overview of EU market liberalisation experience.

Key words: *Railways, Competition, Vertical integration*

LIBERALIZACIJA ŽELJEZNIČKOG TERETNOG PRIJEVOZA U REPUBLICI HRVATSKOJ

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SAŽETAK

Korak prema liberalizaciji željezničkog tržišta i stvaranju jedinstvenog europskog željezničkog prijevoznog tržišta započet je donošenjem željezničkih direktiva početkom 90-ih godina. Prve zakonodavne mjere išle su u smjeru računovodstvenog razdvajanja djelatnosti upravljanja željezničkom infrastrukturom od djelatnosti prijevoza te sprečavanja prelijevanja državnih potpora iz jedne djelatnosti u drugu. Sljedećim zakonodavnim paketom omogućen je bio pristup pojedinim teretnim željezničkim prijevoznicima iz država članica na TEN-T mrežu, a daljnji korak predviđen tim zakonodavnim paketom bio je slobodan pristup mreži za obavljanje željezničkog teretnog prijevoza (domaći i međunarodni prijevoz). Drugim željezničkim paketom iz 2004. godine otvara se tržište prijevoza tereta na čitavoj željezničkoj mreži Europske Unije. Istovremeno u Republici Hrvatskoj je bio na snazi Zakon o hrvatskim željeznicama (NN br. 53/94, 139/97 i 162/98), kojim je djelatnost javnog prijevoza putnika i stvari u unutrašnjem i međunarodnom prometu željezničkim prijevoznim sredstvima, kao i izgradnja, modernizacija i održavanje željezničke infrastrukture te modernizacija i održavanje željezničkih vozila, kao djelatnost od posebnog društvenog interesa, bila povjerena javnom poduzeću HŽ - Hrvatske željeznice, iz čega je razvidno kako predmetnu djelatnost u tom razdoblju nije mogao obavljati niti jedan drugi prijevoznik, osim ovog javnog poduzeća.

Izmjenama Zakona o željeznici (NN br. 123/03, 30/04, 153/05, 79/07, 120/08 i 75/09; dalje: ZOŽ) bilo je propisano kako će se od dana pristupanja RH u punopravno članstvo Europske Unije priznavati dozvole izdane željezničkim prijevoznicima od mjerodavnih tijela drugih država članica Europske Unije, a koja okolnost se ostvarila 1. srpnja 2013. godine što se može uzeti kao datum pravne liberalizacije tržišta željezničkog teretnog prijevoza u Republici Hrvatskoj. Izmjenom željezničkog zakonodavstva i Zakonom o željeznici (NN br. 94/13, 148/13) iz sredine 2013. godine tržište teretnog željezničkog prijevoza u potpunosti je liberalizirano, a u pravni poredak Republike Hrvatske prenijeta je tzv. Recast Direktiva. Stvarna ili praktična liberalizacija u Republici Hrvatskoj nastupila je u ožujku 2014. godine kada je prvi novi željeznički teretni prijevoznik ispunio sve pretpostavke za obavljanje

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djelatnosti željezničkog teretnog prijevoza. Prva konkurencija povijesnom teretnom željezničkom prijevozniku zapravo se pojavila s ostvarivanjem prijevoznih rezultata novih teretnih prijevoznika krajem 2015. godine. Mogućnost korištenja željezničke infrastrukture za sve željezničke teretne prijevoznike i pojava novih prijevoznika pred upravitelja infrastrukture postavlja određene zahtjeve za pružanjem usluga. Uz osnovnu uslugu korištenja pruga i kolosijeka, za vožnju vlaka ključna uloga stavljena je i pred upravitelje uslužnih objekata i pružatelje usluga u uslužnim objektima. Definiranje željezničkih usluga i metodologija izračuna naknada ključan su čimbenik transparentnosti tržišta koje treba biti usmjereno prema potrebama prijevoznika. U vrijeme integriranih željezničkih tvrtki segmentacija usluga nije bila potrebna, a potreba za definiranjem željezničkih usluga pojavila se prilikom razdvajanja željezničkog prijevoza od upravljanja željezničkom infrastrukturom. U Republici Hrvatskoj Zakonom o željeznici (NN br. 94/13, 148/13) tržište željezničkih usluga u bitnome čine usluge i subjekti na tržištu. Tako definirano tržište na kojem djeluje upravitelj infrastrukture i operatori uslužnih objekata, koji pružaju željezničke usluge, a koje su podijeljene prema potrebi korištenja u različite skupine i to: minimalni pristupni paket, pristup uslužnim objektima i uslugama koje se pružaju u tim objektima, uključujući pristup prugom do uslužnih objekata, dodatne i prateće usluge. Željeznička infrastruktura definirana je Zakonom o željeznici kao javno dobro u općoj upotrebi koje pod jednakim i transparentnim uvjetima treba biti dostupno svim željezničkim prijevoznicima. Liberalizacijom željezničkog tržišta pokušava se podići kvaliteta pružanja željezničkih usluga korisnicima željezničkog prijevoza, ali i smanjiti troškove održavanja željezničke infrastrukture i upravljanja prometom za iznos naknade koja se naplati od prijevoznika. Razvoj tržišta se očituje u povećanju broja korisnika, ali i broja pružatelja usluga, te količina korištenih usluga što će u završnom dijelu rada biti obrađeno kroz pokazatelje stanja na tržištu.

***Ključne riječi**: željeznica, liberalizacija, teretni prijevoz, željezničke usluge, regulator*

I. Preduvjeti liberalizacije

Liberalizacija je zapravo povlačenje države iz pružanja određenih javnih usluga, privatizacija pružatelja usluga i stvaranje preduvjeta za pojavu konkurencije na tradicionalno monopolističkim tržištima. Otvaranje željezničkoga prijevoznog tržišta, odnosno liberalizacija pristupa željezničkoj infrastrukturi bila je moguća tek nakon donošenja pravnog okvira kojim su stvorene pretpostavke za slobodan pristup na željezničku infrastrukturu. U tom je procesu također bilo potrebno i razdvojiti i definirati djelatnost upravljanja infrastrukturom i djelatnost prijevoza, kao i posebne uvjete za obavljanje prijevoza, ali i pružanje različitih usluga koji omogućavaju obavljanje željezničkog prijevoza. Ostvarenjem prethodno navedenih preduvjeta bila je moguća tranzicija ovog monopolistički ustrojenog tržišta prema tržištu na kojem postoji konkurencija među pružateljima usluga. Međutim, zbog visokih troškova održavanja i ulaganja u infrastrukturu upravljanje infrastrukturom smatra se prirodnim monopolom i kao takav nastavlja egzistirati i u novim okolnostima. Dosljedna primjena zakonodavstva svoje bi posljedice trebala imati u vidu povećanja broja subjekata na tržištu, povećanja upotrebljavanja infrastrukture i svih usluga te povećanja obujma prijevoza.

II. Formalna liberalizacija željezničkoga teretnog prijevoza

Početkom 90-ih godina donesene su u Europskoj zajednici prve direktive koje su bile korak prema liberalizaciji željezničkog tržišta i stvaranju jedinstvenoga europskoga željezničkoga prijevoznog tržišta, i to:

- Direktiva 91/440/EEZ o razvoju željeznica Zajednice[1]

[1] Council Directive 91/440/EEC of 29 July 1991 on the development of the Community´s railways, [1991] OJ L 237. Str. 25.

- Direktiva 95/18/EZ o licenciranju željezničkih prijevoznika[2]
- Direktiva 95/19/EZ o raspodjeli kapaciteta željezničke infrastrukture i naplati pristojbi[3].

Direktiva 91/440/EEZ smatra se prekretnicom, a za cilj je imala računovodstvenim razdvajanjem odvojiti djelatnost upravljanja infrastrukturom od djelatnosti prijevoza te omogućiti da se potpore za jednu vrstu djelatnosti ne prelijevaju u drugu[4]. Direktiva je pokazala oprez kad su u pitanju obveze koje se nameću državama jer je model potpunog razdvajanja upravitelja infrastrukture od željezničkog prijevoznika predviđen kao jedna od mogućnosti, ali ne i obveza, te je i dalje bilo moguće postojanje povezanoga društva koje će računovodstveno biti odvojeno[5].

U pogledu otvaranja tržišta, Direktivom 91/440/EEZ tržište je otvoreno samo u segmentu kombiniranoga teretnog prijevoza, dok je međunarodni teretni prijevoz bio moguć samo za međunarodne grupacije (članovi kojih su bili prijevoznici iz zemalja kroz koje se prijevoz i odvijao).[6] Model funkcioniranja međunarodnoga željezničkog prometa nastavio je time funkcionirati kroz međunarodne grupacije koje su bile promjena u odnosu na prisilnu suradnju nacionalnih željezničkih prijevoznika u obavljanju međunarodnog prijevoza putnika i robe. Naime, funkcioniranje željeznica ustrojenih kao nacionalni monopoli značilo je mogućnost arbitrarnog odbijanja susjednoga željezničkog društva, pa je svako rješenje u smjeru ukidanja takve prakse bilo dobrodošlo, a međunarodne su grupacije bile prvi korak u liberalizaciji željezničkoga teretnog prijevoza[7] zbog mogućnosti slobodnoga biranja članova grupacije.

Direktiva 95/18/EZ imala je za cilj osigurati jedinstvene i nediskriminatorne uvjete pristupa željezničkom tržištu svim željezničkim prijevoznicima i grupacijama u onom dijelu u kojem je pristup bio liberaliziran (kombinirani prijevoz, međunarodni teretni prijevoz).

Sljedeći korak bio je usvajanje tzv. željezničkih paketa, odnosno istodobno donošenje ili mijenjanje većega broja direktiva i uredbi, a prvi je paket donesen početkom 2000-ih.

Prvi željeznički paket:[8]

- Direktiva 2001/12/EZ o izmjeni Direktive 91/440/EEZ o razvoju željeznica Zajednice[9]
- Direktiva 2001/13/EZ o izmjeni Direktive 95/18/EZ o licenciranju željezničkih prijevoznika[10]
- Direktiva 2001/14/EZ o raspodjeli kapaciteta željezničke infrastrukture, nametanju pristojbi za korištenje željezničke infrastrukture te potvrdama o sigurnosti[11]

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2 Council Directive 95/18/EC of 19 June 1995 on the licencing of railway undertakings, [1995] OJ L 143. Str. 70.

3 Council Directive 95/19/EC of 19 June 1995 on the allocation of railway infrastructure capacity and charging of infrastructure fees, [1995] OJ L 143. Str. 75.

4 Engl. *cross subsidization*

5 Detaljnije vidi Radionov, N. *et al.* 2011. Europsko prometno pravo. Pravni fakultet Sveučilišta u Zagrebu. Str. 62.

6 Ako se prijevoz odvijao kroz zemlju članicu čije željezničko društvo nije bilo član grupacije, postojalo je samo pravo tranzita.

7 Radionov, N. *et al*. op. cit. (bilj. 5.). Str. 74.

8 U praksi su ove direktive bile druga generacija direktiva donesenih početkom 90-ih.

9 Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community´s railways, [2001] OJ L 75. Str. 1.

10 Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licencing of railway undertakings, [2001] OJ L 75. Str. 26.

11 Directive 2001/14/EC of the European parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, [2001] OJ L 75. Str. 29.

- Direktiva 2001/16/EZ o interoperabilnosti transeuropskoga konvencionalnoga željezničkog sustava[12].

Direktiva 2001/12/EZ također je pokazala oprezan pristup u vezi s liberalizacijom jer je omogućila pristup pojedinim teretnim željezničkim prijevoznicima iz država članica na TEN-T mrežu[13], tj. jedan važni dio željezničke infrastrukture, a rok za njezinu implementaciju u nacionalna zakonodavstva bio je 15. ožujka 2003. godine. Direktiva je predvidjela i daljnji korak do pune liberalizacije – slobodan pristup cijeloj željezničkoj mreži EU-a svim željezničkim prijevoznicima u teretnom prijevozu (domaćem i međunarodnom) nakon 15. ožujka 2008. godine.

Osim navedenog, Direktivom 2001/12/EZ bilo je propisano kako se sredstva plaćena za aktivnosti u vezi s pružanjem usluga prijevoza putnika kao doznake za javnu uslugu moraju iskazati odvojeno na odgovarajućim računima i ne smiju se prenijeti na aktivnosti u vezi s pružanjem drugih usluga prijevoza ili kojega drugog poslovanja. Time su dopuštene potpore javnoj usluzi putničkog prijevoza, a zabranjene one u teretnom prijevozu.

Direktiva 2001/13/EZ i Direktiva 2001/14/EZ izjednačile su uvjete za željezničke prijevoznike u domaćem i međunarodnom prijevozu za pristupanje tržištu i za pružanje usluga željezničkog prijevoza kad su u pitanju dozvole (rok za transpoziciju direktiva bio je 15. ožujka 2003.) i to je bila najvažnija novina koju su ove direktive donijele. Osim navedenog, Direktiva 2001/14/EZ prvi je put propisala i pravila o dodjeli infrastrukturnoga kapaciteta i pristojbama za njegovu upotrebu, što se svakako može smatrati važnim u odnosu na prijašnja zakonodavna rješenja.

Premda su 2003. godine stvoreni dobri temelji jedinstvenog tržišta željezničkih usluga, ostala su još neriješena pitanja liberalizacije putničkog prijevoza u svim njegovim segmentima, kao i kabotažnoga teretnog prijevoza. Naime, kabotaža je usluga povremenog prijevoza između dva mjesta u jednoj državi od stranog prijevoznika, dok se pod pojmom nacionalnog prijevoza smatra održavanje redovite linije između dvaju mjesta u istoj državi od domaćeg ili stranog prijevoznika[14].

Drugim željezničkim paketom[15] iz 2004. godine dovršen je rad na otvaranju tržišta željezničkog prijevoza tereta na čitavoj mreži Europske unije (dalje: EU), a navedeni paket čine sljedeći propisi:

- Direktiva 2004/49/EZ o sigurnosti željeznica Zajednice, izmjeni Direktive 95/18/EZ o licenciranju željezničkih prijevoznika i Direktive 2001/14/EZ o raspodjeli kapaciteta željezničke infrastrukture, nametanju pristojbi za korištenje željezničke infrastrukture te potvrdama o sigurnosti (Direktiva o sigurnosti)[16]

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[12] Directive 2001/16/EC of the European Parliament and of the Council of 19 march 2001 on the interoperability of the trans-european conventional rail system, [2001] OJ L 110. Str. 1.

[13] Jedinstvena transeuropska prometna mreža (*Trans-European Network – Transport, TEN-T*). Cilj stvaranja ovakve mreže jest uklanjanje uskih grla na europskim prometnim pravcima, poboljšanje infrastrukture i povezivanje različitih vrsta prijevoza u multimodalni promet diljem EU-a, a pravo pristupa za međunarodni teretni prijevoz izjednačeno s kombiniranim prijevozom. Više vidi na http://ec.europa.eu/transport/infrastructure/tentec/tentec-portal/site/en/abouttent.htm.

[14] Radionov, N. *et al.* op. cit. (bilj. 5). Str. 79.

[15] Tzv. treći infrastrukturni paket

[16] Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (Railway Safety Directive), [2004] OJ L 164. Str. 44.

- Direktiva 2004/50/EZ o izmjeni Direktive 96/48/EZ o interoperabilnosti transeuropskog sustava velikih brzina i Direktive 2001/16/EZ o interoperabilnosti transeuropskoga konvencionalnoga željezničkog sustava[17]
- Direktiva 2004/51/EZ o izmjeni Direktive 91/440/EEC o razvoju željeznica Zajednice[18]
- Uredba 881/2004/EZ o osnivanju Europske željezničke agencije (ERA)[19].

Tim je zakonodavnim paketom dovršen rad na otvaranju tržišta i nekim tehničkim pitanjima organizacije željezničkog tržišta. Direktivom 2004/51/EZ kao rok potpune liberalizacije međunarodnoga teretnog prijevoza bio je predviđen 1. siječnja 2006., a za domaći prijevoz i kabotažu 1. siječnja 2007. godine, što je značilo završetak procesa otvaranja tržišta prijevoza tereta željeznicom na čitavoj mreži EU-a.

Treći željeznički paket čine:

- Direktiva 2007/58/EZ o izmjeni Direktive 91/440/EEZ o razvoju željeznica Zajednice i Direktive 2001/14/EZ o raspodjeli kapaciteta željezničke infrastrukture, nametanju pristojbi za korištenje željezničke infrastrukture te potvrdama o sigurnosti (Direktiva o liberalizaciji međunarodnoga putničkog prometa)[20]
- Direktiva 2007/59/EZ o izdavanju potvrda strojovođama koji upravljaju lokomotivama i vlakovima u željezničkom sustavu Zajednice[21]
- Uredba 1370/2007/EZ o javnim uslugama prijevoza putnika željeznicom i cestom i prestanku važenja Uredbi 1191/69 i 1107/70[22]
- Uredba 1371/2007/EZ o pravima i obvezama putnika[23]
- Uredba 1372/2007/EZ o izmjeni Uredbe 577/98 o provedbi ankete o radnoj snazi na uzorku u Zajednici[24].

U bitnom su trećim zakonodavnim željezničkim paketom koji je za cilj imao revitalizaciju željeznice omogućeni uvjeti za liberalizaciju međunarodnoga putničkog prijevoza, uz mogućnost kabotaže od 1. siječnja 2010. godine, i to pojedinačnim željezničkim prijevoznicima unu-

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17 Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 96/48/EC on the interoperability of the trans-European high-speed rail system and Directive 2001/16/EC of the European Parliament and of the Council on the interoperability of the trans-European conventional rail system [2004] OJ L 164. Str. 114.

18 Directive 2004/51/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 91/440/EEC on the development of the Community's railways, [2004] OJ L 164. Str. 164.

19 29. travnja 2004. godine osnovana je Europska agencija za željeznice sa sjedištem u Lilleu i Valenciennesu (Francuska). Glavna je zadaća Agencije uskladiti, registrirati i nadzirati tehničke specifikacije interoperabilnosti cjelokupnoga europskoga željezničkog sustava te odrediti zajedničke sigurnosne ciljeve za europske pruge.

20 Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure, [2007] OJ L 315. Str. 44.

21 Directive 2007/59/EC of the European Parliament and of the Council of 23 October 2007 on the certification of train drivers operating locomotives and trains on the railway system in the Community, [2007] OJ L 315. Str. 51.

22 Vidi supra, str. 7., bilj. 5

23 Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L 315. Str. 14.

24 Regulation (EC) No 1372/2007 of the European Parliament and of the Council of 23 October 2007 amending Council Regulation (EC) No 577/98 on the organisation of a labour force sample survey in the Community, [2007] OJ L 315. Str. 42.

tar EU-a (neovisno o tome hoće li putnici prelaziti sve granice), uz mogućnost ograničavanja prava pristupa[25] zbog ugrožavanja ekonomske ravnoteže ugovora o obavljanju javne usluge[26], o čemu odluku donosi regulatorno tijelo.

„Tehnički paket":

- Direktiva 2008/110/EZ o izmjeni Direktive 2004/49/EZ o sigurnosti željeznica Zajednice
- Direktiva 2008/57/EZ o interoperabilnosti željezničkog sustava unutar Zajednice
- Uredba 1335/2008 o izmjeni Uredbe 881/2004/EZ o osnivanju Europske željezničke agencije (ERA).

Revizija direktiva prvoga željezničkog paketa iz 2001.

- Direktiva 2012/34/EU o uspostavi jedinstvenoga Europskoga željezničkog prostora (Recast)[27].

Četvrti željeznički paket, čija je najvažnija izmjena otvaranje tržišta za usluge domaćega željezničkog prijevoza putnika, čine izmjene i dopune sljedećih uredbi i direktiva, pri čemu se razlikuju dva osnovna dijela ovoga zakonodavnog paketa:

1) tehnički dio (engl. *technical pillar*)

- Uredba (EU) 2016/796 Europskog parlamenta i Vijeća od 11. svibnja 2016. o Agenciji Europske unije za željeznice i stavljanju izvan snage Uredbe (EZ) br. 881/2004[28]
- Direktiva (EU) 2016/797 Europskog parlamenta i Vijeća od 11. svibnja 2016. o interoperabilnosti željezničkog sustava u Europskoj uniji (preinaka)[29]
- Direktiva (EU) 2016/798 Europskog parlamenta i Vijeća od 11. svibnja 2016. o sigurnosti željeznica (preinaka)[30].

2) politički/tržišni dio (engl. *market pillar*)

- Uredba (EU) 2016/2338 Europskog parlamenta i Vijeća od 14. prosinca 2016. o izmjeni Uredbe (EZ) br. 1370/2007 u pogledu otvaranja tržišta za usluge domaćega željezničkog prijevoza putnika[31]
- Direktiva (EU) 2016/2370 Europskog parlamenta i Vijeća od 14. prosinca 2016. o izmjeni Direktive 2012/34/EU u pogledu otvaranja tržišta za usluge domaćega željezničkog prijevoza putnika i upravljanja željezničkom infrastrukturom[32]

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[25] Članak 1. stavak 8. i Recital 12. Direktive 2007/58/EZ

[26] Engl. *Public Service Contract – PSC*

[27] Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast), OJ L 343, 14. 12. 2012. 32–77.

[28] Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004, OJ L138. 26. 5. 2016. 1–43.

[29] Directive (EU) 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system within the European Union (recast), OJ L 138, 26. 5. 2016. 44–101.

[30] Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety (recast), OJ L 138, 26. 5. 2016. 102–149.

[31] Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail, OJ L 354, 23. 12. 2016. 22–31.

[32] Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure, OJ L 352, 23. 12. 2016. 1–17.

- Uredba (EU) 2016/2337 Europskog parlamenta i Vijeća od 14. prosinca 2016. o stavljanju izvan snage Uredbe Vijeća (EEZ) br. 1192/69 o zajedničkim pravilima normalizacije računa željezničkih prijevoznika.[33]

Istodobno je u Republici Hrvatskoj (dalje: RH), koja u vrijeme donošenja prvih „željezničkih direktiva" nije bila članica EU-a, ali je 2001. godine potpisala Sporazum o stabilizaciji i pridruživanju, do 1. siječnja 2006. godine bio na snazi Zakon o hrvatskim željeznicama (NN br. 53/94, 139/97 i 162/98), kojim je djelatnost javnog prijevoza putnika i stvari u unutrašnjem i međunarodnom prometu željezničkim prijevoznim sredstvima, kao i izgradnja, modernizacija i održavanje željezničke infrastrukture te modernizacija i održavanje željezničkih vozila, kao djelatnost od posebnoga društvenog interesa, bila povjerena javnom poduzeću HŽ – Hrvatske željeznice, iz čega je razvidno da predmetnu djelatnost u tom razdoblju nije mogao obavljati nijedan drugi prijevoznik osim toga javnog poduzeća.

Zakonom o željeznici (NN br. 123/03, 30/04, 153/05, 79/07, 120/08 i 75/09; dalje: ZOŽ) iz 2003. godine, čija je primjena nastupila 1. siječnja 2006. godine, dana je mogućnost za obavljanje međunarodnoga željezničkoga teretnog prijevoza međunarodnoj grupaciji, čime se tržište željezničkoga teretnog prijevoza u RH liberaliziralo u jednom segmentu.

ZOŽ-om je bilo propisano da je željeznički prijevoznik svaka domaća i inozemna pravna osoba koja ima dozvolu za obavljanje usluga javnog prijevoza u željezničkom prijevozu i rješenje o sigurnosti koje je izdalo mjerodavno tijelo te su bili propisani uvjeti za dobivanje dozvole (jedan od uvjeta bio je da je sjedište pravne osobe na teritoriju RH), kao i uvjeti sigurnosti koje mora ispunjavati prijevoznik zbog sigurnog odvijanja prometa na pojedinoj željezničkoj pruzi ili željezničkoj mreži.

Poslije su donošenjem Zakona o Agenciji za sigurnost željezničkog prometa (NN br. 120/08) ti uvjeti propisani predmetnim Zakonom, a oni propisani ZOŽ-om zbog navedenog su stavljeni izvan snage. Uvjetom da sjedište tvrtke treba biti na teritoriju RH ograničavala se mogućnost potpune liberalizacije teretnoga željezničkoga prijevoznog tržišta, zbog čega je i dalje u navedenom razdoblju na prijevoznom tržištu egzistirao samo povijesni prijevoznik.

Izmjenama ZOŽ-a iz 2003. godine u 2009. godini, a koje su stupile na snagu 8. srpnja 2009. godine, bilo je propisano kako će se od dana pristupanja RH u punopravno članstvo EU-a priznavati dozvole koje su željezničkim prijevoznicima izdala mjerodavna tijela drugih država članica EU-a, a to se ostvarilo tek 1. srpnja 2013. godine. Međutim, u srpnju 2013. godine donesen je nov ZOŽ (NN br. 94/13) koji je stupio na snagu 23. srpnja 2013. godine, a kojim je tržište teretnoga željezničkog prijevoza u cijelosti liberalizirano.

Potpuna liberalizacija nastupila je na način da je omogućeno pravo pristupa željezničkoj infrastrukturi[34] za obavljanje svih vrsta usluga željezničkog prijevoza tereta, a koje uključuje i slobodan pristup infrastrukturi koja povezuje morske luke i luke unutarnjih voda te druge uslužne objekte[35] na infrastrukturi.

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[33] Regulation (EU) 2016/2337 of the European Parliament and of the Council of 14 December 2016 repealing Regulation (EEC) No 1192/69 of the Council on common rules for the normalisation of the accounts of railway undertakings, OJ L 352, 23. 12. 2016. 20–21.

[34] Željeznički prijevoznik, uz pravedne nediskriminirajuće i transparentne uvjete, ima pravo pristupa željezničkoj infrastrukturi za obavljanje svih vrsta usluga željezničkog prijevoza tereta. Pravo pristupa uključuje i pristup infrastrukturi koja povezuje morske i luke unutarnjih voda i ostale uslužne objekte iz članka 24. stavka 3. ovoga Zakona sa željezničkom infrastrukturom i pravo pristupa industrijskim kolosijecima koji služe ili mogu služiti za potrebe više krajnjih korisnika (Zakon o željeznici, članak 23., stavak 1, NN br. 94/13).

[35] Uslužni su objekti: putnički kolodvori, kolodvorske zgrade i ostali objekti, uključujući displeje za prikaz informacija o vlakovima i odgovarajući prostor za uslugu prodaje karata; robni terminali; ranžirni kolodvori i objekti

Pravo pristupa odnosi se i na slobodan pristup industrijskim kolosijecima[36] koji služe ili bi mogli služiti za više krajnjih korisnika, čime se proširuje tržište željezničkih usluga i na privatne vlasnike željezničke infrastrukture. Također, operatori uslužnih objekata luka i robnih terminala po obvezama se izjednačavaju s upraviteljem infrastrukture, čime se cjelokupno tržište željezničkih usluga ujednačava jer uvjeti nediskriminacije i transparentnosti vrijede na cijeloj mreži bez obzira na status osobe koja upravlja nekim njezinim dijelom.

Slijedom navedenog, željeznički prijevoznik koji ima dozvolu za obavljanje željezničkog prijevoza i potvrdu o sigurnosti može obavljati usluge prijevoza na željezničkoj infrastrukturi uz uvjet da je s upraviteljem infrastrukture sklopio ugovor o pristupu željezničkoj infrastrukturi. Za svaki vozni red sklapa se novi Ugovor o pristupu sukladno odredbama ZOŽ-a i konkretnog Izvješća o mreži (za određeni vozni red).

III. Stvarna liberalizacija željezničkoga teretnog prijevoza

Stvarna liberalizacija željezničkoga teretnog prijevoza u RH nastupila je u trenutku kada je jedan od novih željezničkih prijevoznika ispunio sve pretpostavke za obavljanje djelatnosti željezničkoga teretnog prijevoza, što se dogodilo u ožujku 2014. godine. Tada je tvrtka ADRIA TRANSPORT d.o.o. (sada PPD Transport d.o.o.) iz Zagreba ishodila i dio B-certifikata o sigurnosti[37], dok je dozvolu za obavljanje usluga javnog prijevoza u željezničkom prijevozu[38] ishodila još 1. srpnja 2013. godine, a dio A-potvrde o sigurnosti[39] u prosincu iste godine. Navedeno je značilo da se povijesnom željezničkom teretnom prijevozniku pojavila prva konkurencija na željezničkom teretnom prijevoznom tržištu, odnosno da predmetnu uslugu na tržištu više nije nudio samo jedan prijevoznik. Međutim, istodobno nije nastupila i praktična liberalizacija jer je uz ispunjenje administrativnih uvjeta za obavljanje djelatnosti teretnog prijevoza bilo potrebno početi i ostvarivati prve prijevozne rezultate. Prvi važniji prijevozni rezultati novih teretnih prijevoznika bilježe se tek krajem 2015. i početkom 2016. godine[40].

Ulaskom RH u EU omogućen je slobodan pristup svim željezničkim prijevoznicima EU-a na željezničku infrastrukturu RH za obavljanje usluga željezničkog prijevoza tereta. Pristup na željezničku infrastrukturu i korištenje željezničkim uslugama potpuno je otvoreno za nove teretne željezničke prijevoznike, bilo da su prijevoznici registrirani na teritoriju RH ili da dolaze iz zemalja članica EU-a. Ako se teretni prijevoznik registrira na teritoriju RH, treba od Ministarstva mora, prometa i infrastrukture (dalje: MMPI) ishoditi dozvolu za obavljanje usluga željezničkog prijevoza, koja vrijedi za cijelo područje EU-a. Da bi prijevoznik dobio dozvolu,

za formiranje vlakova, uključujući objekte za manevriranje; garažni kolosijeci; objekti za održavanje, osim objekata za redovito održavanje posebno namijenjenih za vlakove velikih brzina ili druge vrste željezničkih vozila koja zahtijevaju posebne objekte; ostali tehnički objekti, uključujući objekte za čišćenje i pranje; morske i luke unutarnjih voda koje su povezane sa željezničkom mrežom; pomoćni objekti i objekti za opskrbu gorivom i opskrba gorivom u tim objektima, za što se naknade prikazuju zasebno na računima (Zakon o željeznici, članak 24., stavak 3, NN br. 94/13).

[36] Vlasnik industrijskoga kolosijeka dužan je omogućiti pristup svom kolosijeku ako je to potrebno za ostvarenje pristupa uz jednake, transparentne i nediskriminirajuće uvjete uslužnim objektima nužnim za obavljanje usluga prijevoza i u slučaju kada industrijski kolosijeci služe ili bi mogli služiti za potrebe više od jednoga krajnjega korisnika (Zakon o željeznici, članak 27. NN br. 94/13).

[37] https://eradis.era.europa.eu/safety_docs/scert/search_results.aspx; stranica posjećena 20. listopada 2016.

[38] https://eradis.era.europa.eu/safety_docs/licences/view.aspx?id=2503; stranica posjećena 20. listopada 2016.

[39] https://eradis.era.europa.eu/safety_docs/scert/search_results.aspx; stranica posjećena 20. listopada 2016.

[40] U poglavlju V. popis je aktivnih prijevoznika

mora ispunjavati uvjete koji su propisani u članku 52. stavku 3. ZOŽ-a[41], a koji su detaljnije razrađeni Pravilnikom o uvjetima izdavanja dozvole za obavljanje usluga željezničkog prijevoza (NN br. 114/15). Dozvola vrijedi sve dok željeznički prijevoznik ispunjava uvjete za njezino izdavanje, a MMPI radi provjeru ispunjavanja uvjeta za izdavanje dozvola najmanje svakih pet godina.

Uz dozvolu prijevoznik mora imati i Potvrdu o sigurnosti koju u RH izdaje Agencija za sigurnost željezničkog prometa (dalje: ASZ) u skladu s odredbama Zakona o sigurnosti i interoperabilnosti željezničkog sustava[42] (NN br. 82/13 , 18/15 i 110/15). Potvrda o sigurnosti može vrijediti za cijelu ili samo za dijelove željezničke mreže u RH, a sadržava: opći dio (Dio A) – potvrdu o prihvaćanju sustava upravljanja sigurnošću željezničkog prijevoznika u skladu sa Zakonom o sigurnosti i interoperabilnosti željezničkog sustava i poseban dio (Dio B) – potvrdu o prihvaćanju pravila željezničkog prijevoznika, kojima se udovoljava posebnim zahtjevima RH, nužnima za obavljanje usluge prijevoza na siguran način na mreži za koju se izdaje potvrda o sigurnosti.

Željezničkom prijevozniku koji u RH prvi put započinje obavljati djelatnost željezničkog prijevoza ASZ izdaje opći i posebni dio (Dio A i Dio B) potvrde o sigurnosti. Opći dio (Dio A) potvrde o sigurnosti vrijedi za prostor cijelog EU-a za istovrsne usluge željezničkog prijevoza, a Dio B vrijedi samo za državu koja je izdala Dio B. Željezničkom prijevozniku, koji ima valjanu potvrdu o sigurnosti (Dio A) izdanu u državi članici EU-a, a namjerava obavljati usluge željezničkog prijevoza na području RH, ASZ izdaje poseban dio (Dio B) potvrde o sigurnosti. Za Dio B potvrde o sigurnosti željeznički prijevoznik mora ispunjavati uvjete propisane člankom 28. Zakona o sigurnosti i interoperabilnosti željezničkog sustava[43].

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[41] „(3) Za dobivanje dozvole iz stavka 1. ovoga članka pravna osoba mora ispunjavati sljedeće uvjete:
- da ima sjedište na teritoriju Republike Hrvatske
- da je registrirana za obavljanje djelatnosti željezničkog prijevoza (s vučom ili bez vuče vlakova ili samo za vuču vlakova) za usluge za koje traži dozvolu
- da nije pokrenut ili nije u tijeku stečajni postupak
- da član njezine uprave nije pravomoćno osuđen bezuvjetno na kaznu zatvora u trajanju jedne ili više godina za kazneno djelo u gospodarskom poslovanju, kazneno djelo protiv opće sigurnosti ljudi i imovine i sigurnosti prometa, povrede prava na rad i drugih prava iz rada, izbjegavanje carinskog nadzora i neplaćanje carine i drugih davanja koja se plaćaju u carinskom postupku u slučaju prijevoznika koji traži dozvolu za međunarodni prijevoz tereta koja podliježu carinskim postupcima
- da je financijski sposobna, što znači da svoje sadašnje i buduće obveze može uz normalne uvjete poslovanja ispuniti u razdoblju od 12 mjeseci
- da u radnom odnosu ima takvu organizacijsku strukturu koja može osigurati visok stupanj sigurnosti prijevoza i nadziranje aktivnosti prijevoza za koje se izdaje dozvola
- da je osigurana kod osiguravajućega društva te sposobna namiriti moguću odštetu na temelju odgovornosti nastale u obavljanju svoje djelatnosti te da može pružiti jamstva za pokriće štete u slučaju nesreće u odnosu na putnike, prtljagu, teret, poštu i treće osobe u skladu s domaćim i međunarodnim propisima."

[42] Čl. 27.–29. Zakona o sigurnosti i interoperabilnosti željezničkog sustava

[43] Čl. 28. st. 2. „Za izdavanje posebnog dijela (Dio B) potvrde o sigurnosti željeznički prijevoznik mora dostaviti:
a) dokumentaciju o primjenjivim TSI-jima ili njihovim dijelovima, o nacionalnim sigurnosnim pravilima i drugim pravilima koja se odnose na rad željezničkog prijevoznika, na radnike i na vozila te o načinu na koji sustav upravljanja sigurnošću osigurava usklađenost s navedenim pravilima
b) dokumentaciju o različitim kategorijama radnika ili vanjskih pružatelja usluga, uključujući dokaz da udovoljavaju zahtjevima iz TSI-ja ili iz nacionalnih pravila i da imaju propisana ovlaštenja
c) dokumentaciju o različitim tipovima vozila koja se koriste za obavljanje djelatnosti prijevoza, uključujući dokaz o udovoljavanju zahtjevima iz TSI-ja ili iz nacionalnih pravila te propisana odobrenja."

Željeznički prijevoznik pravo pristupa na infrastrukturu ostvaruje tek kada posjeduje važeću Dozvolu za obavljanje usluga željezničkog prijevoza i Potvrdu o sigurnosti te kada s upraviteljem infrastrukture sklopi ugovor o pristupu na željezničku infrastrukturu. Ulazak prvoga željezničkog prijevoznika iz države članice EU-a na tržište teretnoga željezničkog prijevoza RH (a da prijevoznik nije registriran u RH, odnosno nema Dozvolu za obavljanje usluga javnog prijevoza u željezničkom prijevozu izdanu u RH) dogodio se polovicom 2014. godine kada je prijevoznik Rail Cargo Carrier Kft. ishodio Dio B potvrde o sigurnosti (koji vrijedi od 6. lipnja 2014. godine)[44].

IV. Željezničke usluge

Liberalizaciju željezničkog sektora, između ostalog, karakterizira razdvajanje funkcije upravljanja željezničkom infrastrukturom od željezničkog prijevoza. U RH to je značilo da su 2005. Zakonom o podjeli trgovačkog društva HŽ – Hrvatske željeznice d.o.o. (NN br. 153/05) osnovana četiri društva s ograničenom odgovornošću za poslovna područja:

1. upravljanja, održavanja i izgradnju željezničke infrastrukture
2. prijevoz putnika
3. prijevoz tereta
4. vuču vlakova.

Temeljem navedenog Zakona Vlada Republike Hrvatske donijela je 6. srpnja 2006. Odluku o podjeli trgovačkog društva HŽ – Hrvatske željeznice d.o.o.[45], a zatim i Odluku o osnivanju trgovačkih društava: HŽ Infrastruktura d.o.o., HŽ Putnički prijevoz d.o.o., HŽ Cargo d.o.o.[46] i HŽ Vuča vlakova d.o.o. te Odluku o osnivanju krovnoga društva HŽ Hrvatske željeznice holding d.o.o.[47]

Zakonom o dopuni Zakona o podjeli trgovačkoga društva HŽ – Hrvatske željeznice d.o.o. (NN br. 57/12) stvorene su pretpostavke za donošenje Odluke o davanju prethodne suglasnosti za provedbu statusne promjene društva HŽ Vuča vlakova d.o.o.[48] u rujnu 2012. godine i Odluke o pripajanju društva HŽ Hrvatske željeznice holding d.o.o. društvu HŽ Infrastruktura d.o.o.[49] u listopadu 2012. Navedenim je prestalo postojati povezano društvo, koje je prema zakonodavstvu EU-a i dalje dopušteno te je prestalo postojati i društvo za vuču vlakova, a nastavila su egzistirati tri odvojena trgovačka društva.

Razdvajanjem cjelovite željezničke tvrtke koja je objedinjavala sve usluge, od upravljanja infrastrukturom do prijevoza, stvorile su se nove okolnosti, koje su se očitovale ponajprije u segmentaciji i diobi poslova koji su se do trenutka razdvajanja obavljali zajedno (na primjer izrada voznog reda i upravljanje prometom). Prijevoznicima je bilo potrebno omogućiti korištenje željezničkom infrastrukturom, a zadaća upravitelja infrastrukture bila je upravljanje infrastrukturom, pružanje ravnopravnog pristupa i naplata korištenja njome.

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44 https://eradis.era.europa.eu/safety_docs/scert/search_results.aspx; stranica posjećena 22. listopada 2016.

45 http://www.mppi.hr/default.aspx?id=2367; stranica posjećena 1. ožujka 2017.

46 https://vlada.gov.hr/UserDocsImages//Sjednice/Arhiva//177-8a.pdf; stranica posjećena 1. ožujka 2017.

47 https://vlada.gov.hr/UserDocsImages//Sjednice/Arhiva//177-8b.pdf; stranica posjećena 1. ožujka 2017.

48 https://vlada.gov.hr/UserDocsImages//Sjednice/Arhiva//67951.%20-%2010.pdf; stranica posjećena 1. ožujka 2017.

49 https://vlada.gov.hr/UserDocsImages//Sjednice/Arhiva//56.%20-%2012a.pdf; stranica posjećena 1. ožujka 2017.

Osim pristupa na infrastrukturu kao osnovne usluge upravitelj infrastrukture pruža i dodatne usluge važne za obavljanje usluge prijevoza te vodi računa o sigurnosti tijekom prijevoza.

Željezničke usluge mogu pružati i prijevoznici, ali samo manji dio njih to i čini, i to povijesni željeznički prijevoznici. Poslovni procesi koji su se u integriranim tvrtkama obavljali kao cjelina podijeljeni su između upravitelja infrastrukture i prijevoznika, što je dovelo do novog načina rada i novih organizacijskih shema. Novi prijevoznici, s manjim brojem zaposlenih, koncentriraju se na pružanje usluge prijevoza, a od povijesnih društava (upravitelja infrastrukture i povijesnih prijevoznika) koriste se uslugama koje sami ne mogu obaviti, dok su povijesni prijevoznici zadržali iste iz prijašnjih struktura.

Željeznička infrastruktura u vlasništvu RH javno je dobro u općoj upotrebi[50] s naglaskom na tome da se njome svi zainteresirani jednakopravno i nediskriminirajuće koriste. Kako bi se mogla iskazati cijena za korištenje javnim dobrom, bilo je potrebno definirati model naplaćivanja naknada i jedinicu korištenja temeljem koje će se predmetna naknada obračunavati. Navedeni model treba omogućiti da se dio troškova (samo oni izravni) održavanja željezničke infrastrukture prebaci na korisnika, odnosno željezničke prijevoznike. Svi zainteresirani prijevoznici unaprijed su upoznati s cijenom pristupa na željezničku infrastrukturu, što svakako pridonosi transparentnosti korištenja infrastrukturom.

Da bi obavljali uslugu prijevoza, prijevoznicima je potrebno omogućiti nesmetano korištenje željezničkom infrastrukturom, što je upravitelj infrastrukture omogućio uslugom minimalnoga pristupnog paketa. To je usluga koju upravitelj infrastrukture mora omogućiti podnositelju zahtjeva za infrastrukturnim kapacitetom[51] da bi on mogao prometovati od polazišnoga do odredišnoga službenog mjesta. Minimalnim pristupnim paketom omogućeno je prometovanje vlakova kojim upravitelj infrastrukture osigurava dostupnost korištenja tračnicama, izrađuje vozni red i upravlja prometom vlakova.

Međutim, razvojem tržišta, koji se ogleda u većem broju novih teretnih prijevoznika, raste važnost nediskriminatornog pružanja usluga koje su nužne za vožnju vlaka jer novi prijevoznici nemaju mogućnost sve te radnje obaviti samostalno. Naime, prijevoz je moguć tek nakon što se odrade sve predradnje potrebne za pripremu vagona za prijevoz i sastavljanjem vlaka. Nakon obavljena prijevoza vlak je potrebno ponovno završnim operacijama rastaviti. Zbog potrebe za definiranjem dodatnih usluga koje se trebaju pružati prijevoznicima, odnosno podnositeljima zahtjeva za infrastrukturnim kapacitetom razvija se i tržište željezničkih usluga, što je vidljivo u Izvješću o mreži[52].

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[50] Javna dobra u općoj uporabi stvari u vlasništvu su RH ili drugih javnopravnih tijela koja su namijenjena za uporabu svima. Na javna se dobra u općoj uporabi na odgovarajući način primjenjuju pravila koja vrijede za opća dobra jer su i jedna i druga dobra, tj. opća dobra i javna dobra u općoj uporabi, namijenjeni cjelokupnoj društvenoj zajednici (*l'utilisation commune du domaine public*). Uporaba je takvih dobara neosobna i anonimna. Za opću uporabu nije potreban poseban akt javne vlasti kojim bi se takva uporaba dopustila. Dakle, za opću upotrebu bilo općeg dobra bilo javnog dobra u općoj uporabi nije potreban ni unilateralan ni kontraktualan akt javne vlasti. Takve su stvari izvan pravnog prometa (*res extra commercium*).; Aviani, Damir. 2009. Zasebno korištenje opće-uporabljivih dobra u Hrvatskoj: dometi i ograničenja. *Zbornik radova Pravnog fakulteta u Splitu* god. 46, broj 1 (91).

[51] Prema Zakonu o željeznici (NN br. 94/13 i 148/13) podnositelj je zahtjeva za dodjelu infrastrukturnoga kapaciteta željeznički prijevoznik ili međunarodna grupacija ili druga fizička ili pravna osoba, kao što su nadležna tijela propisana Uredbom (EZ) br. 1370/2007 i svim njezinim naknadnim izmjenama i dopunama te brodari, špediteri i operatori kombiniranog prijevoza, koji imaju interes za obavljanje javne usluge ili poslovni interes za dodjelu infrastrukturnog kapaciteta.

[52] HŽ Infrastruktura d.o.o. na temelju je Zakona o željeznici dužna donijeti i objaviti Izvješće o mreži. Izvješće o

Prvo Izvješće o mreži u RH objavljeno je 2009. godine, a izrađeno je prema strukturi Izvješća o mreži koja je usvojena u okviru međunarodne organizacije RailNetEurope (RNE)[53]. Izvješće o mreži izrađuje se za svaku godinu u skladu s navedenom strukturom RNE-a, čime je omogućena ujednačenost informacija izvješća o mreži koje sastavljaju različiti upravitelji infrastrukture. Izvješće sadržava prikaz infrastrukture koja je na raspolaganju željezničkim prijevoznicima, informacije o uvjetima za pristup željezničkoj infrastrukturi i raspodjelu kapaciteta te principe određivanja naknada za korištenje infrastrukturom. Sukladno opisanim uvjetima, prijevoznici podnose upravitelju infrastrukture zahtjev za dodjelu kapaciteta temeljem kojih se izrađuje vozni red za sljedeće razdoblje. Željeznički prijevoznici i upravitelj infrastrukture zatim sklapaju ugovor o pristupu kojim se određuje dodijeljeni kapacitet, visina naknade za korištenje željezničkom infrastrukturom te ostala pitanja u vezi sa sigurnosti prijevoza i zaštitom okoliša.

Tržište željezničkih usluga u RH tržište je na kojem upravitelj infrastrukture HŽI i operatori uslužnih objekata (morske luke i luke unutarnjih voda, robni terminali, ranžirni kolodvori, objekti za održavanje, putnički kolodvori itd.) pružaju željezničke usluge iz članka 24. ZOŽ-a.

Prema članku 24. ZOŽ-a željezničke su usluge:

1. minimalni pristupni paket
2. pristup uslužnim objektima i uslugama koje se pružaju u tim objektima, uključujući pristup prugom do uslužnih objekata
3. dodatne usluge
4. prateće usluge.

Također, svaka od navedenih željezničkih usluga definirana je Direktivom 2012/34/EU Europskog parlamenta i Vijeća od 21. studenoga 2012. o uspostavi jedinstvenoga Europskoga željezničkog prostora[54] (dalje: Direktiva 2012/34/EU) koja je implementirana u hrvatsko zakonodavstvo te su aktualnim ZOŽ-om definirane sve usluge koje se u prethodnim zakonima nisu definirale, što je dovodilo do pravne nesigurnosti u pružanju određenih usluga. Prema ZOŽ-u usluge su definirane na sljedeći način.

Minimalni pristupni paket sastoji se od:

- obrade zahtjeva za infrastrukturnim kapacitetom
- prava korištenja dodijeljenim infrastrukturnim kapacitetom
- korištenja infrastrukturom, uključujući skretnice i čvorišta
- upravljanja prometom vlakova, uključujući signalizaciju, regulaciju, prijam i otpremu vlakova te sporazumijevanje i pružanje informacija o kretanju vlakova
- korištenja opremom za opskrbu električnom energijom potrebnom za vuču vlaka, gdje je na raspolaganju
- svih ostalih informacija potrebnih za realizaciju ili obavljanje usluge za koju je kapacitet dodijeljen.

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mreži služi ponajprije kao izvor informacija za podnositelje zahtjeva. HŽ Infrastruktura d.o.o. vezana je podacima iz Izvješća o mreži u kojem su opća pravila, rokovi, postupci i kriteriji za određivanje naknada i dodjelu kapaciteta, uključujući sve druge informacije koje su potrebne da bi se omogućilo podnošenje zahtjeva za infrastrukturnim kapacitetom. Razdoblje do kojeg vrijedi Izvješće o mreži povezano je s godišnjim voznim redom.

[53] RailNetEurope (RNE) je organizacija europskih upravitelja infrastrukture i tijela za dodjelu kapaciteta, osnovana u siječnju 2004. u cilju uspostave zajedničke organizacije da bi se olakšalo međunarodno poslovanje.

[54] Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast), OJ L 343, 14. 12. 2012. Str. 32– 77.

Uslužni su objekti:

- putnički kolodvori, kolodvorske zgrade i ostali objekti, uključujući displeje za prikaz informacija o vlakovima i odgovarajući prostor za uslugu prodaje karata
- robni terminali
- ranžirni kolodvori i objekti za formiranje vlakova, uključujući objekte za manevriranje
- garažni kolosijeci
- objekti za održavanje, osim objekata za redovito održavanje posebno namijenjenih za vlakove velikih brzina ili druge vrste željezničkih vozila koja zahtijevaju posebne objekte
- ostali tehnički objekti, uključujući objekte za čišćenje i pranje
- morske i luke unutarnjih voda koje su povezane sa željezničkom mrežom
- pomoćni objekti
- objekti za opskrbu gorivom i opskrba gorivom u tim objektima, za što se naknade prikazuju zasebno na računima.

Dodatne su usluge:

- električna energija potrebna za vuču vlakova (za koju se naknade na računima iskazuju zasebno od naknada za korištenje opreme za opskrbu električnom energijom)
- predgrijavanje i prethlađivanje putničkih vlakova
- posebni ugovori za:

1. nadzor pri prijevozu opasnih tvari
2. pomoć pri vožnji vlakova s izvanrednim pošiljkama.

Prateće su usluge:

- pristup telekomunikacijskoj mreži
- pružanje dodatnih informacija
- tehnički pregled željezničkih vozila
- usluga prodaje karata na putničkim kolodvorima
- usluge redovitog održavanja koje se pružaju u objektima za održavanje posebno namijenjenima za vlakove velikih brzina ili za druge vrste željezničkih vozila koja zahtijevaju posebne objekte.

Uslužni objekti, kao što su kolodvori, robni terminali, luke, važan su segment funkcioniranja tržišta koji služe i za objedinjavanje prijevozne ponude. Prethodno navedeni uslužni objekti podnositeljima zahtjeva za infrastrukturnim kapacitetom dostupni na tržištu željezničkih usluga, a većinom istih u RH upravlja upravitelj infrastrukture HŽI, koji je ujedno i najveći pružatelj željezničkih usluga u uslužnim objektima.

Željeznička infrastruktura u RH povezana je s četirima lukama unutarnjih voda, a to su: Osijek, Vukovar, Slavonski Brod i Sisak, a morske luke povezane sa željezničkom infrastrukturom jesu: Rijeka, Zadar, Šibenik, Split i Ploče. Navedene su luke ZOŽ-om definirane kao uslužni objekti kojima je dana obveza pružanja pristupa željezničkim kolosijecima unutar luke i pristup svim uslugama povezanim sa željezničkim prijevozom tereta te propisana obveza izrade izvješća o mreži operatora uslužnog objekta. Navedenim obvezama luke su, s pravom jer je riječ o važnim, možda i najvažnijim uslužnim objektima u željezničkom prijevoznom procesu, uz upravitelja infrastrukture, svrstane u posebnu kategoriju uslužnih objekata. Pri-

stup lučkim kapacitetima ključan je za nove željezničke prijevoznike jer u RH povijesni teretni željeznički prijevoznik obavlja uslugu manevriranja u svim lukama. Naime, luke i lučke uprave kao upravitelji uslužnim objektima nisu primarno orijentirani na željeznički prijevoz, nego na lučke djelatnosti. Osim luka važan segment željezničkog prijevoznog tržišta čine robni terminali, koji su u smislu ZOŽ-a u istome statusu kao i luke.

Hrvatska regulatorna agencija za mrežne djelatnosti (dalje: HAKOM) kao regulatorno tijelo za tržište željezničkih usluga provela je analizu uslužnih objekata na predmetnom tržištu i u skladu s definicijom robnog terminala iz ZOŽ-a utvrdila sljedeće robne terminale koji su povezani sa željezničkom infrastrukturom u RH: Kontejnerski terminal Vrapče, Robni terminali Zagreb-Jankomir, Robni terminali Zagreb-Žitnjak, Robni terminal INTEREUROPA, Robni terminal MURASPID i Robni terminal Jadranska vrata.[55]

V. Prikaz teretnih prijevoznika na tržištu RH i uloga HAKOM-a na tržištu željezničkih usluga

Pokraj povijesnoga teretnoga željezničkog prijevoznika, HŽ Carga d.o.o., Zagreb, u 2016. godini poslovalo je pet teretnih željezničkih prijevoznika, od kojih su tri registrirana u RH, a ostali „novi željeznički teretni prijevoznici" imaju dozvolu koju su izdala nadležna tijela u nekoj od država članica EU-a.

„Novi" teretni željeznički prijevoznici koji su poslovali u RH u 2016. godini jesu:

- PPD TRANSPORT d.o.o., Zagreb
- Rail Cargo Carier Croatia d.o.o. (RCC Croatia), Zagreb
- Train Hungary Magánvasú Ipari, Kereskedelmi és Szolgátató Korlátolt Felelősségű Társaság (THM) – Podružnica Zagreb, Zagreb
- SŽ TOVORNI PROMET d.o.o. (SŽT), Ljubljana
- Rail & Sea d.o.o., Zagreb.

Učinkovito upravljanje i nediskriminirajuće korištenje željezničkom infrastrukturom podrazumijevaju uspostavu regulatornog tijela koje će nadzirati primjenu zakonodavstva i djelovati kao žalbeno tijelo. Regulatorno tijelo u RH jest HAKOM. HAKOM je samostalno tijelo koje je u organizacijskom, funkcionalnom, hijerarhijskom smislu i u odnosu na donošenje odluka pravno odvojeno i neovisno o bilo kojem drugom javnom ili privatnom tijelu.

Uloga je HAKOM-a promicati tržišno natjecanje na tržištu željezničkih usluga, i to sprječavanjem narušavanja ili ograničavanja tržišnog natjecanja, osobito u smislu prethodne (*ex ante*) regulacije tržišta željezničkih usluga, uklanjanjem zapreka pristupu i funkcioniranju tržišta te poticanjem učinkovite uporabe željezničke infrastrukture. HAKOM promiče interese korisnika željezničkih usluga osiguravanjem pristupa željezničkim uslugama svim podnositeljima zahtjeva, osiguravanjem transparentnog postupanja upravitelja infrastrukture, operatora uslužnog objekta i željezničkog prijevoznika.

Osim navedenog HAKOM osigurava pravnu zaštitu podnositelja zahtjeva u odnosu na upravitelja infrastrukture i operatora uslužnog objekta jednostavnim i pristupačnim postupkom rješavanja sporova, što znači da HAKOM u zakonskom roku rješava sporove između podnositelja zahtjeva i pružatelja jedne od željezničkih usluga. Suradnja i razmjena informacija s regulatornim tijelima drugih država članica i Europskom komisijom pridonosi uspostav-

[55] https://www.hakom.hr/default.aspx?id=7075; stranica posjećena 12. veljače 2017.

ljanju najbolje regulatorne prakse i omogućava razvoj jedinstvenoga europskog tržišta željezničkih usluga.

U provođenju postupaka iz nadležnosti regulacije tržišta željezničkih usluga HAKOM ima pravo zatražiti podatke od upravitelja infrastrukture, podnositelja zahtjeva i bilo koje uključene treće strane. Informacije koje se moraju dostaviti HAKOM-u uključuju sve podatke koje HAKOM zatraži u okviru svoje funkcije žalbenog tijela i svoje funkcije nadziranja tržišnog natjecanja na tržištu željezničkih usluga. Navedeno uključuje i podatke koji su potrebni za statističke svrhe i za potrebe praćenja tržišta.

VI. Pokazatelji korištenja infrastrukture / uslužnih objekata

HAKOM kontinuirano nadzire pružatelje usluga na tržištu željezničkih usluga, i to u odnosu na njihovu obvezu objavljivanja potrebnih informacija o željezničkim uslugama koje pružaju. Povijesni željeznički prijevoznici, kao pružatelji željezničkih usluga, objavili su na inicijativu HAKOM-a na svojim internetskim stranicama potrebne informacije i time učinili važan korak u jačanju transparentnosti na tržištu željezničkih usluga.

Sukladno Zakonu o elektroničkim komunikacijama,[56] HAKOM tromjesečno objavljuje statističke i druge pokazatelje tržišta željezničkih usluga, koje prikuplja od svih željezničkih prijevoznika i upravitelja infrastrukture.

Ova nadležnost HAKOM-a omogućava uvid u stanje na tržištu željezničkih usluga, korištenje infrastrukturom, rad prijevoznika i upravitelja infrastrukture. U nastavku su prikazani podaci o ključnim pokazateljima za 2016. godinu.

Jedan od ključnih pokazatelja korištenja željezničkim uslugama korištenje je željezničkom infrastrukturom od željezničkih prijevoznika, odnosno korištenje željezničkim uslugama koje pruža upravitelj infrastrukture na javnoj infrastrukturi, što je prikazano u Tablici 1.

Tablica 1. Korištenje željezničkim uslugama u RH koje pruža HŽ Infrastruktura d.o.o.

Korištenje željezničkim uslugama	2014.	2015.	2016.
Minimalni pristupni paket			
Ostvareni vlkm	20.320.062,00	20.378.684,00	20.798.904,00
Korištenje uslužnim objektima			
Broj korištenja uslugama u uslužnim objektima	7.238.516,00	12.773.660,00	15.285.034,00

Izvor: HAKOM

Broj ostvarenih putničkih i teretnih vlak kilometara[57] (dalje: vlkm) u 2016. pokazuje porast u odnosu na prijašnje godine, a povećano je i korištenje željezničkim uslugama. Od ukupna broja ostvarenih vlkm u 2016. godini 74 % ostvario je putnički prijevoznik, a 26 % teretni prijevoznici, što je povećanje u odnosu na prijašnje godine kada je taj postotak iznosio 76 % putnički prijevoznik, a 24 % teretni prijevoznik.

[56] Članak 14. Zakona o elektroničkim komunikacijama (NN br. 73/08, 90/11, 133/12, 80/13 i 71/14)

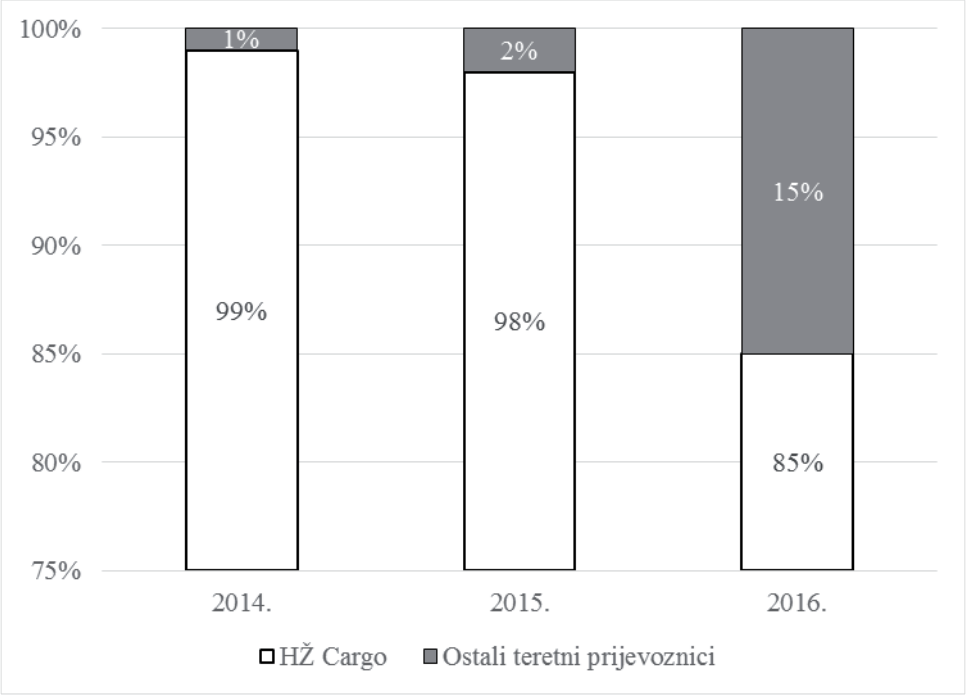
[57] Vlak kilometar (vlkm) mjerna je jedinica koja izražava kretanje jednog vlaka na udaljenosti od jednoga kilometra.

Zbog znatnijega rada novih željezničkih prijevoznika tijekom 2016. godine vidljivi su prvi rezultati liberalizacije željezničkog tržišta, što je nakon dugogodišnjeg stagniranja pozitivan pokazatelj oporavka željezničkoga prijevoznog tržišta. Pozitivni pomaci liberalizacije tržišta željezničkih usluga vidljivi su u svim pogledima teretnoga željezničkog prijevoza.

Novi prijevoznici u 2016. godini bilježe znatan udio na tržištu po količini prevezene robe i ostvarenim tonskim kilometrima[58], što je prikazano Grafikonom 1. i 2.

Iz Grafikona 1. vidljivo je da je tek u 2016. godini udio u prevezenoj robi novih teretnih prijevoznika znatniji i iznosi 15 %, što je pokazatelj razvoja tržišta i konkurentnosti na željezničkom teretnom prijevoznom tržištu. Ujedno je to i pokazatelj koliko je vremena potrebno da bi novi teretni željeznički prijevoznik ostvario zapaženiji rezultat poslovanja.

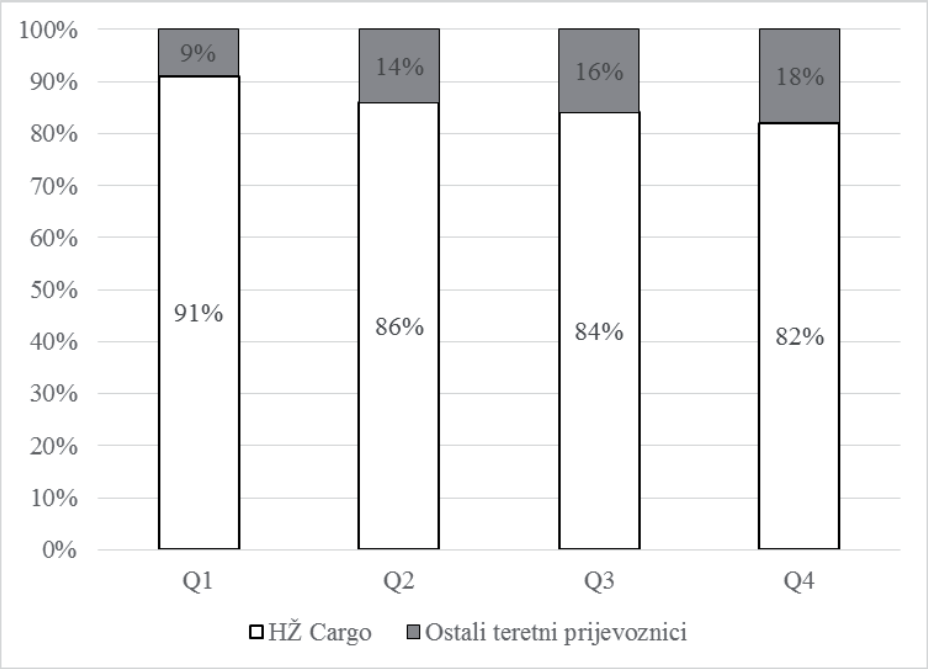
Grafikon 1.: Prikaz stanja na tržištu po prevezenoj robi



Izvor: HAKOM

[58] Tonski kilometar (tkm) mjerna je jedinica koja izražava prijevoz jedne tone robe na udaljenosti od jednoga kilometra

Grafikon 1a: Prikaz stanja po tromjesečjima na tržištu po prevezenoj robi

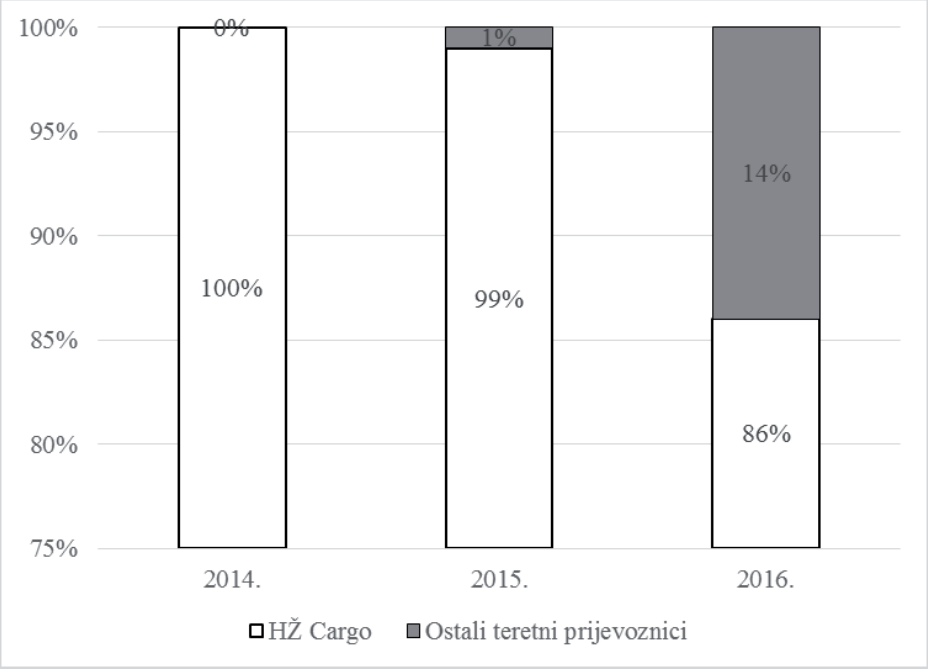


Izvor: HAKOM

Usporedbom istih pokazatelja tijekom 2016. godine vidljivo je da udio novih teretnih prijevoznika bilježi važan pomak, i to s 9 % početkom godine na 18 % u posljednjem tromjesečju, što je osim pokazatelja količine prevezene robe dobar pokazatelj povoljnih prijevoznih uvjeta i dobre organizacije novih teretnih prijevoznika u prijevoznom tržištu.

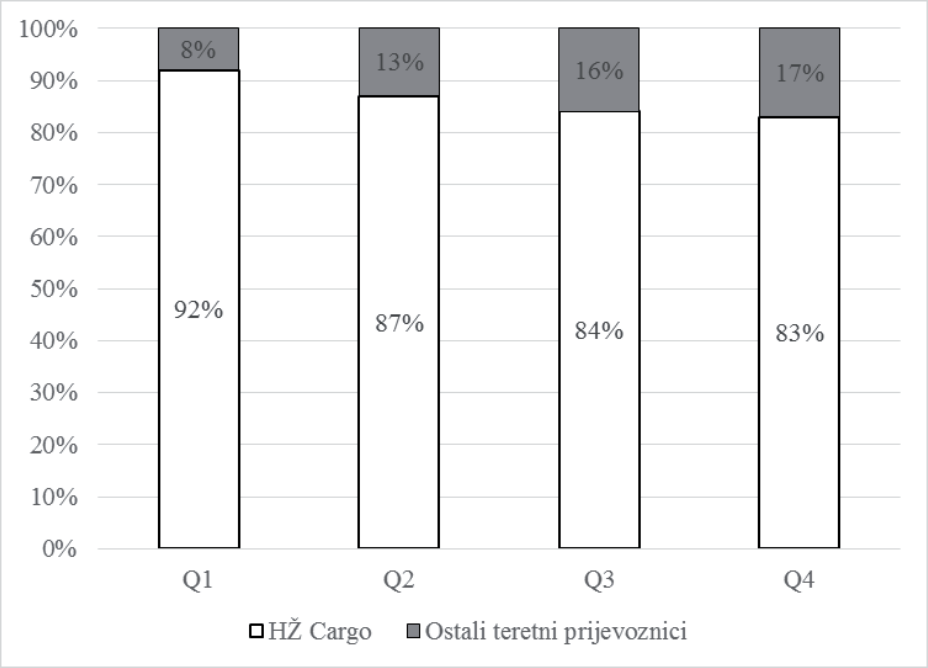
Realni pokazatelji rada prijevoznika u željezničkom teretnom prijevozu mogu se usporediti ostvarenim netotonskim ili tonskim kilometrima, što je prikazano Grafikonom 2.

Grafikon 2.: Prikaz stanja na tržištu po ostvarenim tkm



Izvor: HAKOM

Grafikon 2a: Prikaz stanja po tromjesečjima na tržištu po ostvarenim tkm



Izvor: HAKOM

Podaci prikazani gornjim grafikonima pokazuju pojačanu aktivnost novih teretnih željezničkih prijevoznika na tržištu RH. Iz slika je vidljivo da su novi teretni prijevoznici donijeli promjene na tržištu željezničkih usluga na način da je povijesni prijevoznik smanjio svoj udio na tržištu.

Ključne riječi: željeznica, liberalizacija, teretni prijevoz, željezničke usluge, regulator

VII. Zaključak

Ulaskom RH u zajedničku europsku obitelj prihvaćena su pravila i zajednički ciljevi Unije, pa tako i stvaranje zajedničkoga europskoga željezničkog tržišta. Zbog navedenog liberalizacija tržišta željezničkih usluga postala je obvezom, a od prvih zakondavnih koraka u smjeru liberalizacije monopolističkoga željezničkog tržišta prošlo je gotovo 30 godina. Za RH, kao jednu od najmlađih članica EU-a, može se reći da je postupak liberalizacije željezničkoga teretnog prijevoza bio postupan te da je trebalo nekoliko godina da se formalna liberalizacija tržišta provede i u praksi. Navedeno nije, međutim, specifičnost RH jer su takvu tranziciju prolazile i druge države članice.

Odvajanjem djelatnosti prijevoza od djelatnosti upravljanja željezničkom infrastrukturom stvoreni su preduvjeti da se željeznički teretni prijevoznici koriste željezničkom infrastrukturom, pa tako danas u RH imamo potpuno odvojena povijesna trgovačka društva, koja su u ne tako davnoj prošlosti bila jedno javno trgovačko društvo.

Ustrojavanjem regulatornog tijela i tijela za sigurnost ispunjeni su uvjeti pravne zaštite korisnika željezničkih usluga i kontrole sigurnosti željezničkog sektora, prijevoznih sredstava i infrastrukture. Razvidno je da je od vremena stvaranja administrativnih pretpostavki za pristup željezničkoj infrastrukturi i praktičnog korištenja njome bilo potrebno prevladati ba-

rijere ulaska i probijanja na tržište, koje je stotinama godina bilo zatvoreno i organizirano kao poseban sustav internih pravila u kojem su organizacija prometa i prijevoz zapravo bili jedna djelatnost.

Pojavom novih teretnih željezničkih prijevoznika stvaraju se nove okolnosti na tržištu jer za pružanje usluge prijevoza tereta sada međusobno konkurira šest teretnih željezničkih prijevoznika. Perspektiva daljnjeg razvoja tržišta ogleda se u korištenju željezničkim teretnim koridorima, od kojih ogranak tzv. 6. koridora (mediteranskog) prolazi kroz RH (Rijeka – Zagreb – Budimpešta), razvoju potencijala morskih luka i poboljšanju stanja željezničke infrastrukture, za čiju su svrhu namijenjena znatna sredstva EU-a.

SUMMARY

Step toward freight transport liberalization and making of single European railway market was done back in the 1990´ when first railway Directives were adopted. First legislative measures were made in order to manage accounting separation of infrastructure management and transport operations.

Following package of directives enabled access to single freight railway undertakings on TEN-T networkand next step envisaged with the same package was free access in order to operate freight transport (domestic and international).

By second railway package in 2004 whole freight transport market of EU had been opened.

At the same time in Republic of Croatia was in force Act on Croatian Railways (OJ No 53/94, 139/97 and 162/98) in which the activity of public transport of passengers and goods in domestic and international railway transport, as well as the construction, modernization and maintenance of railway infrastructure and the modernization and maintenance of railway vehicles as an activity of public interest was entrusted to a public company HZ - Croatian railways, which shows that the activity in this period, could not be performed by any other railway undertaking , apart from this public company.

By amendments on Railway Act (OJ No 123/03, 30/04, 153/05, 79/07, 120/08 i 75/09) was envisaged that from the date of accession of Republic of Croatia to the European Union licenses issued to railway undertakings by the competent authorities of other member states of the European Union will be recognized, which circumstance was fulfilled on 1 July 2013 and this can be taken as the date of the rule of liberalization of the rail freight transport in the Republic of Croatia.

Amendments of railway legislature and Railway Act (OJ No 94/13, 148/13) from the middle of 2013 freight transport market was copletely liberalized and Recast Directive was implemented. Real or practical leberalization happened in March 2014 the first new rail freight undertaking has fulfilled all the conditions for carrying out activities of rail freight transport.

The first competition to incumbent freight rail undertaking actually appeared when new entrants achievied first transport results at the end of 2015. The possibility of using rail infrastructure for all rail freight undertakings and the emergence of new undertakings sets certain requirements in providing services from infrastructure manager. In addition to the basic service using lines and tracks for train, key role was placed and for service facilities managers and service providers in service facilities.

Definition of railway services and methodology for calculating the charges are a key factor for market transparency which should be directed to the needs of railway undertakings. At the time of the integrated railway companies segmentation service was not needed, and the need to define rail services appeared during the separation of rail transport from the management of railway infrastructure.

In Croatia, the Railway Act (OJ No 94/13, 148/13) that defined railway transport market essentially consists of services and entities in the market. Thus defined the market on which it operates the infrastructure manager and operators of service facilities, which supply railway services and those services are divided as appropriate use in different groups: minimum access package, access to service facilities and to the services provided in these facilities, including track access to service facilities, additional and ancillary services.

Railway infrastructure is defined by the Railway Act as a public good in general use, which under equal and transparent conditions should be available to all railway undertakings. The liberalization of the railway market tends to raise the quality of rail services for the railway transport users, and in the same time reduce the maintenance costs of railway infrastructure and traffic management for the amount of compensation which is collected from the railway undertakings. Market development is reflected in the increasing number of service users, but also in the number of service providers, and the amount of services used, which will be presented through indicators of the market in the final part of this paper.

Key words: *railways, liberalisation, freight transport, railways services, regulatory authority*

THE CYBER FUTURE OF MARINE RISK AND INSURANCE

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ABSTRACT

The purpose of this presentation is to cast at glance and to contribute to the evaluation of the concept and recent development related to cyber marine risks and insurance. Nowadays, cyber threats and attacks are becoming more common, sophisticated and detrimental. Currently, every new ship built has a software to run its engines, which is almost always updated remotely. Furthermore, all passenger vessels and cargo vessels if engaged in international trade are required by the International Maritime Organization (IMO) to be fitted with an Automatic Identification System (AIS). To date there is no global regulation in the maritime sector governing cyber security at present, but it is on the way. By the end of 2018, vessels trading in US waters could be subject to new cyber security regulations currently being developed by the US Coast Guard. Finally, the article deals with the lack of objective data allowing for the correct calculation of risks and exposure to losses creating difficulties to insurers in an average changing and developing landscape.

Key words: *Cyber risks, cyber-attacks, cyber insurance, autonomous ships, IMO, Nist-800, malicious hackers, malicious jamming*

The Cyber future of Marine Risk and Insurance Safety of international shipping vessels is critical to the global economy given that, approximatively 90% of traded goods are transported by international shipping industry with approximatively 50,000 merchant ships registered World-wide. The downward trend in shipping losses is encouraging, however, more challenges lie ahead. In an increasingly connected world, cyber enablement opens huge opportunities for owners and operators to improve performance and efficiency, but also brings increased risks to security. Cyber risks are already present in marine shipping and transportation with navigation having become ever more reliant on electronic navigation tools and interconnectivity. Presently, it is possible to notice over-reliance on technology (ex. navigation), training of crews not uniform in all countries and minimum manning levels on board, all elements which in an even more advanced IT environment will make, for instance, hackers' lives easier when attempting to compromise a vessel. Furthermore, hackers want to create highly visible inci-

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dents that embarrass or harm companies. In this regard, an increasing number of malicious jamming of GPS signals in some Seas has been reported. Such are called spoofing attacks, i.e. a type of cyber-attack which could lead a vessel off course and result in a grounding, collision or similar serious marine incident. The navigation system is just one element of an integrated, complex information process which can also be directly accessed. Navigation system network include integrated navigation, radar, speed log, sonar, autopilots, voyage data recorder, weather information receivers, positioning devices (satellite navigation). The firewalls on-board ships are often not able to provide adequate protection given that vulnerability is due to the necessity of the different systems to communicate with each other. In fact, with so many different suppliers of the different components of the systems (ex. radars, GPS, AIS, etc.) open communication is necessary for their joint operating. The flexibility inherent to the systems' components allowing for their communication with components from other manufacturers leaves obvious security gaps which are the targets of hackers. Many categories of wrongdoers may be interested in such assets. The consequences of such acts may give rise to theft of data or cargo, extortion, property damage coupled with bodily injury and at times even loss of life, not excluding catastrophes, even environmental ones (ex. the grounding of an LNG carrier).

These developments have also affected ports. In 2012, over 120 ships, including major Asian Coast Guard vessels experience malicious jamming of GPS signals. In 2013, in the Port of Antwerp, a drug smuggling organization hacked the tracking system of goods. In 2014, in a primary US Port, all cranes were simultaneously shut down during loading / unloading operations by an unidentified intruder in their IT systems. Inadequate cyber protection is a relatively new threat compared with traditional perils. However, cyber risk is regarded by many as the major issue for the shipping industry going forward, particularly given that it is not inconceivable that an attack could ultimately result in the loss of vessels. In 2012, the European Network and Information Security Agency issued an Analysis of Cyber Security Aspects In The Maritime Sector, emphasizing that the awareness on cyber security needs and challenges in the maritime sector is currently low to non-existent.[1]

Technology's advancements are leading the way to a future in which ships will be unmanned. In 2015, a Finnish ship designer presented an unmanned and zero-impact cruise ship capable of transporting hundreds of passengers. Many other prototypes of drone cargo carriers have also seen their debut in the recent past. In one of their most popular systems configurations, drone ships are governed by a so-called Integrated Bridge System (IBS) having direct control over an Engine Automation System (EAS), an Autonomous Ship Controller (ASC) and an Advanced Sensor Module (ASM). The EAS controls the AEMC or Autonomous Engine Monitoring and Control, the ASM instead communicates with the dedicated LOS communicators (AIS, VDES, GMDSS). The drone ship's systems as described above, are interfaced via a Communications Controller to the SCC or Shore Control Centre which encompasses Shore Engine Control, Remote Fine Navigation and Shore Bridge Controls. The SCC and IBS then communicate with other ships and shore systems.3 The implications of the cyber risks involved in the control and navigation of unmanned drone ships is evident and would not require lengthy argumentation.[2] There is no global regulation in the maritime sector governing cyber security at present, but it is on the way. By the end of 2018, vessels trading in US waters could

[1] ENISA (2011), Analysis of cyber security aspects in the Maritime sector, retrieved on 10/11/2016 from file:///C:/Users/STEG/Downloads/2011_ENISA_Analysis_of_cyber_security_aspects_in_the_maritime_sector_1%200.pdf

[2] DGON ISIS, (2014), Conducting look-out on an unmanned vessel: Introduction to the advanced sensor module, retrieved from 4/9/2014, 5/9/2017 Presentation Hamburg, Germany

be subject to new cyber security regulations currently being developed by the US Coast Guard. The framework is likely to be called NIST -800 a set of computer security policies, procedures and guidelines. The Maritime law organization (IMO) in their Interim guidelines on maritime cyber risk management acknowledged the dangers posed by cyber-risks to the maritime industry and asked "Stakeholders should take the necessary steps to safeguard shipping from current and emerging threats and vulnerabilities related to digitization, integration and automation of processes and systems in shipping".[3] With the aforementioned document, the IMO has therefore attempted to provide interim guidelines on maritime cyber-risk management and to safeguard shipping from threats and vulnerabilities related to: digitation, integration, automation of processes. Very interestingly, in terms of risk management processes, the IMO distinguishes between information technology systems focusing on data as information and operational technology systems using such data to control or monitor physical processes. The risks mostly arise from the exchange of information and communication protocols between these systems which, together, are critical to shipping security, especially in a World which will soon see the dawning of fully automated and unmanned vessels. Threats are identified by the IMO as intentional or unintentional, i.e. as malicious hacking or as unintentional consequences of normally legitimate actions (ex. software maintenance). The IMO accepts that rapidly changing technologies and threats make it difficult to address these risks only through technical standards. Cyber risk management means the process of identifying, analyzing, assessing, and communicating a cyber-related risk and accepting, avoiding, transferring, or mitigating it to an acceptable level, considering costs and benefits of actions taken to stakeholders. The goal of maritime cyber risk management is to support safe and secure shipping, which is operationally resilient to cyber risks. Furthermore, the IMO believes that effective cyber risk management should start at the senior management level. Effective marine cyber-risk management leads to the issue of cyber-risk transfer in an insurance environment in which typically, marine insurance policies exclude IT-related liability and losses resulting from computer and network security failure. Stand-alone cyber insurance may integrate such coverage for data theft, incident response, network business interruption and cyber extortion, excluding in most cases property damage and bodily harm. This leaves the marine industry with a clear cyber-risk gap. In fact, cyber risk policies tend to include as standard wording or by specific endorsement coverage for privacy and data breach i.e. the unauthorized disclosure of personally identifiable information (including liability claims, defense in response to regulatory action, first-party response costs, forensic IT costs involved in investigating security breaches leading to disclosure), for business interruption i.e. the coverage triggered by certain intangible or non-physical business interruption events, such as hacking of IT systems and the negligent acts of staff causing software/hardware failure. This coverage also includes the reimbursement of costs for the reconstitution of data and the replacement or repair of software in case of hacking incidents. Policies also cover costs of ransom demands relating to cyber-extortion, multimedia coverage in relation to defamation, intellectual property infringement and invasion of privacy. However, cyber insurance in most cases does not provide coverage for bodily injury and property damage and, in some instances also excluding loss of use, in case of a hacking event. The Standard Lloyd's Clause CL380 (2003) in fact removes from covers the use of IT systems as means of inflicting harm. It has been applied in various forms by most P&I Clubs. Other gaps or limitations of coverage relating to cyber-risk may be found in insurances covering shore-

[3] IMO, INTERIM GUIDELINES ON MARITIME CYBER RISK MANAGEMENT MSC.1/Circ.1526 1/7/2016, retrieved 6/11/2016 from https://www.marad.dot.gov/wp-content/uploads/pdf/MSC.1-Circ.1526-Interim-Guidelines- On-Maritime-Cyber-Risk-Management-.pdf

based facilities such as ports, terminals, and shipyards. Such exclusions are, for instance, Terrorism Form T3 LMA3030 Exclusion 9, excluding cyberattacks motivated by terrorism (in a similar fashion to CL380). The same applies to non-marine property although to a lesser extent as the standard Electronic Data Exclusion (NMA2914) which is typically found in non-marine property and business interruption policies does not contain as many exclusions as CL380. Negotiations with insurers to remove these exclusions have been unsuccessful because the removal of these clauses, which are features of most treaty contracts, could leave them exposed to substantial "net" losses.[4] It remains that potential marine cyber risks affect primary property damage (hull, cargo, yachts, dealerships), third-party property damage and bodily injury (marine liabilities), errors and omissions, etc. The insurance industry has thus far been able to resist changes in their offering of insurance coverage to the marine industry. Although they may already have borne at times the costs relating to cyber risks due to inability to discern with exactness the proximate causes of losses, they have not been able to sustain the industry's drive towards a future of unmanned drone ships, entirely controlled by IT systems both on- ship and on-shore. IT-related losses due to malicious or negligently caused cyber events may become catastrophic, depending on size of ships (increasingly large), types of cargo transported (ex. dangerous cargo, liquid gas, etc.) and due to the concentration of traffic to a few densely utilized deep-water ports due to the developments in shipping and vessel size. In a fast-changing World and in an ever-evolving IT or cyber landscape, proper risk management will not be able to sustain the brunt of an increasingly risky environment and the insurance industry will have to stand up to the challenge that the safety of 90% of World trade requires. According to recent reports, Underwriters at Lloyd's recognize the threat to the maritime sector posed by cyber-attacks and issue warnings relating to the safety issues posed by GPS systems which could lead to the effective change in a ship's direction due to hackers. Also, they mention how Somali pirates accessed a shipping firm's cyber systems to identify ships passing through the Gulf of Aden and the worth of their cargo. Underwriters also recognize cases in which ports have experienced denial of service attacks with hackers accessing online systems to alter manifests of cargo, create forged documentation or fictitious goods in order to steal goods from ports and smuggle them. It is not only Lloyd's who are concerned about the impact of cyber-crime on the maritime sector. Swiss Re have publicly stated on several occasions that mariners should be more concerned about cyber threats emphasizing how, although the impact of such risks may not be currently present in the estimates on potential exposure to the hull and cargo sector, this does not mean that such risks are inexistent.[5] In spite of this flurry of warnings and cries for caution, to date, the only insurance instrument that is commonly available providing coverage for cyber threat are all-risk policies that do not exclude cyber liability. In fact, most hull and machinery policies contain the exclusion. Therefore, although the insurance sector recognizes the danger, they are not yet willing to develop a general solution. This is not to say that claims are not made in relation to cyber losses. According to the 2016 Cyber Security Survey launched by HIS Markit and Bimco submitted to three hundred Ship Owners, Port Authorities, Ship Managers, Trade Organizations, Marine Survey Providers, Equipment Providers and Shipyards, sixty-five confirmed ha-

[4] Betterley, Richard S., (2016) CYBER/PRIVACY INSURANCE MARKET SURVEY—A Tough Market for Larger Insureds, but Smaller Insureds Finding Eager Insurers, retrieved 2/5/2017 from www. https://www.irmi.com/online/betterley-report-free/cyber-privacy-media-liability-summary.pdf

[5] Guy, Jon; IUMI 2016: IUMI president warns insurers of accumulations risk HIS Fairplay 23/09/2016, retrieved 16/05/2017 from http://fairplay.ihs.com/safety-regulation/article/4275531/iumi-2016-iumi-president-warns- insurance-sector-under-threat-from-accumulations

ving been victims of cyber-attacks. The rest either denied any incident or did not respond (another sixty-five). More importantly, only 11% of the attacks were notified to insurers and only 3% of the claims were considered as covered by insurers. None of the claims were settled via hull and machinery coverage. The Survey is also interesting in order to understand which risks the Maritime Sector considers as clear and present danger. The findings indicate that the attacks involved malware (77%), phishing (57%), spear phishing (23%), application attacks (9%), brute force (13%), denial of service (18%), network of protocol attack (14%), man in the middle (4%), theft of credentials (25%), known vulnerability (7%), other elements (9%). The attacks resulted in: loss of corporate data (48%), financial loss (21%), detriment to on-shore IT system functionality (67%), detriment to functionality of ship-borne systems (4%). The first two types of losses are not dissimilar to those of other economic sectors such as the financial arena, whilst prejudice to on-shore IT systems and on-board systems are peculiarities of the marine sector and which could potentially constitute enormous risks. The future of marine insurance is played in relation to the incidents affecting on-shore IT functionality and ship-borne systems, given that such control physical activities and assets and will increasingly do so with the advent of the "Internet of things". Very interestingly, the survey went on to identify which on-board systems are considered as being more vulnerable and such were found to be the ECDIS (51%), VDR (15%), IBS (12%), Positioning Systems (52%), BNWAS (12%), GMDSS (24%), Cargo Control Systems (36%), Engine Controls and Monitoring Systems (40%), other systems (10%). The defenses against these immense potential threats are rather traditional in their nature. They are firewalls, intrusion detection / prevention systems, physical segregation of networks or network nodes, review of logs, best practice protocols and assistance by cyber security experts. Certainly, this range of weaponry cannot be considered as infallible and, as a result, risk transfer remains a certain necessity. The vulnerability of the Maritime Sector to cyber-attacks is ranked very highly amongst industries. In fact, the transportation industry was fifth, in a list of most targeted industries in 2015 (healthcare being first).[6] In a situation in which cyber-risks could emerge from a multitude of factors, it is not only insurers who are at difficulty in finding a general solution. In fact, there are several definitions of cyber-security which may be found in literature. One is by ABS, it refers to " … the activity or process, ability or capability, or state whereby information and communication systems and the information contained therein are protected from and/or defended against damage, unauthorized use or modification or exploitation.". The North of England P&I Association considers cyber security as "… the body of technologies, processes and practices designed to protect networks, computers, programs and data from attack, damage or unauthorized access." As previously mentioned, the IMO Maritime Safety Committee (96th Session) referred to cyber security as to "… the range of information technology processes intended to protect data being transmitted over the Internet, and to combat the threat of the installation of malware programs." BIMCO's definition which was then by DNV GL in their recommended practice refers to "…practices, tools and concepts that protect the operational technology (OT) against the unintended consequences of a cyber incident and information and communications systems and the information contained therein from damage, unauthorized use or modification, or exploitation and/or, against interception of information when communicating and using the internet." [7] In addition to the utilization of a variety of definitions, there is another

[6] IBM X-Force® Research 2016 Cyber Security Intelligence Index, retrieved 29/04/2017 from https://www.ibm.com/security/data-breach/threat-intelligence-index.html

[7] Vleeschhouwer, Sanne (2017) Safety of data - The risks of cyber security in the maritime sector, pp. 4 – 22, Netherlands, Maritime Technology, S. de Vleeschhouwer, at p. 5

issue which has been raised by many experts in relation to on-shore IT functionality and ship-borne systems. In fact, although many studies, guidelines and recommendations have been issued on the subject of cybersecurity, the regulatory environment is still at the embryonal stage. This is a very serious delay which needs to be eliminated as soon as possible given that maritime systems are essential to the safety of navigation and, if compromised, the ship itself becomes a hazard, especially in busy waterways, in the proximity of ports or cities and depending on the cargo that is being transported. An example would be an instance of GPS spoofing in the Port of Rotterdam, the consequences of which, if not eliminated or immediately corrected, could be incalculable. Yet, the focus of current regulations remains on physical security. Only recently have the International Safety Management Code (ISM) and the International Ship and Port Facility Security Code (ISPS) code started to explicitly consider the management of information system security on board ships.

Table 1 - Regulations

Measure	Reference
Do an assessment of the ship's information security systems (ISS including Information technology (IT) and operational technology (OT))	ISPS Code - B8.3
Apply the physical protection measures for the ship's information systems (priority is given to the restricted areas of the ship)	ISPS Code - A9.4.2
Draft a company information systems policy for the ship	ISM Code – Chapter 1
Train the crew on the ship's information systems	ISM Code - Chapter 6
Apply best practices in management of information systems on board the ship	ISM Code - Chapter 7
Apply checking on interchanges by the information systems on board the ship	ISM Code - Chapter 7
Implement an operational continuity plan for after an incident	ISM Code - Chapter 8
Manage the ship's information systems incidents.	ISM Code - Chapter 9
Implement checking of activity of the ship's information systems.	ISM Code - Chapter 12

The present scenario therefore is challenging for the Marine Insurance Sector as it involves a rapidly developing IT sector offering new solutions, amongst which is the introduction in the near future of vessels without crew entirely relying on IT for navigation at all times; a rapidly developing cyber-criminality utilizing continuously improved and devastating IT

means against all economic sectors; a particular vulnerability of marine sector operations to cyber- criminality with the potential of catastrophic losses beyond imagination (including unprecedented environmental damage).

At this time the growing set of sectorial recommendations, studies and guidelines still have not given rise to a comprehensive regulatory system which may be used as objective reference by underwriters in devising new insurance products particularly fitted to tackle these new risks. A rather incomplete and limited history of losses, according to common view, indicate only that we are only at the beginning of marine cybercrime, being the worst still to come. So far, in view of this uncertainty and the inability to objectivize and calculate risk and exposure to losses, insurers have shielded themselves behind Cyber Attack Exclusion Clause (CL 380) 10/11/2003. This clause excludes any loss, damage or liability caused either directly or indirectly by the use of a computer and its associated systems and software as a means of inflicting harm. This is true for most policies issued to provide coverage to ships, shipyards and cargo-handling facilities. There is then a grey area which pertains to whether software and computer systems may be considered as tangible property under standard marine insurance policies, however, the coverage gap is evident and is even more so today when many insurers and reinsurers have started to explicitly exclude the consequences of cyberattacks from their policies.[8] It remains that there is an underlying issue to which solutions have not yet been devised. It is impossible to apply to cyber risks traditional methods of risk assessment and actuaries are facing unprecedented difficulties. Furthermore, actuaries are facing difficulties in considering traditional cyber insurance. When actuaries price cyber insurance they still need the same more complex than in other cases. Whilst still utilizing an underwriting tool, an individual risk-pricing tool and a catastrophe-aggregation model as in pricing other catastrophe-related products, certain aspects of these tools are significantly different from the past. Data is the lifeblood of an actuary's work, however, when it comes to cyber products, data becomes very limited for several reasons. Firstly, it is necessary for them to define the cyber peril and what types of attacks are possible. Risks could lie anywhere between smaller attacks on individuals involving brute force attempts to steal credentials and conduct identity theft to state-sponsored attacks. Malware may be used on commonly-used software packages or hardware at a massive scale. Other times, infrastructures or processes taken down using denial of service or there may be a breach of a popular database or platform that affects many entities simultaneously. Many of the variations in this hypothetical list have never taken place and may even never take place at all. In respect of those that have actually happened, information pertaining to the breach (attack specifics used or the actual financial impact of the attack) is difficult to obtain.[9] Furthermore several third-party data sources are currently available to actuaries, but they tend to concentrate primarily on data or attack types that are most accessible, focusing on data breach and privacy violation claims, i.e. small subsets of what is actually needed to acceptably price the products. The data is not available also due to the fact that the regulation relating to the reporting of the different types of attack is not precise, homogenous and varies greatly. Even within the data breach family it is possible to note lack of standardization with respect to reporting and the criteria utilized to determine whether a report is at all necessary (ex. data encryption, number of people affected, type of data that was stolen, etc.), In some cases external research may assist in determining aggregate losses, however, it remains

[8] Marsh & McLennan Companies, Annual Report, Making a difference in 2014, retrieved on 6/2/2017 from http://MC%202014%20Annual%20Report%20v3%20(1).pdf

[9] Pyle, Joshua; Actuaries Beware: Pricing Cyber Risk Is a Different Ballgame InsuranceThoughtLeadership.com, retrieved 16/05/2017 from http://insurancethoughtleadership.com/actuaries-beware-cyber-is-treacherous

that there is little incentive for the victim of the breach to provide more information than the minimum required. Thus, putting a price tag on data at this level becomes arduous. If there is true for traditional cyber risks that afflict financial and commercial companies, difficulties are multiplied when the IT systems that are being affected do not only govern commercial information and financials within a company but also the navigation of cargo ships with 90% of the World's merchandise on board, including massive quantities of polluting and dangerous cargo. It is worth to mention that insurers are struggling to quantify the potential impact of cyber breaches on their clients and develop the necessary insurance products to protect shipping and marine companies. Simultaneously, money lenders are considering the huge risks in their portfolios when involving maritime traffic and its evolution. Whilst BIMCO expects to see an increase of cyber clauses in shipping contracts which might increase the demand for cyber insurance policies, a question remains due to the evident gap between technology and regulation: who is accountable for what? Where best practices are shared on the technical aspects of cyber incidents, it could be sensible to share information on the distribution of responsibility as well. Maritime insurance companies could play an important role in this[10] Clearly, establishing rules for liability on which insurance products may be created is a difficult task as the advancements in the IT sector are outpacing regulators insurers and actuaries who cannot make rules, create insurance products and price them on the basis of unpredictable future developments rather than past loss history.

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[10] Vleeschhouwer, Sanne (2017) Safety of data - The risks of cyber security in the maritime sector, pp. 4 – 22, Netherlands, Maritime Technology, S. de Vleeschhouwer, at p. 6

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O PRAVNIM PRISTUPIMA ZA UVOĐENJE ELEKTRONIČKE TERETNICE U HRVATSKO PRAVO

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SAŽETAK

Analiza odredaba hrvatskog Pomorskog zakonika upućuje na zaključak da u kontekstu hrvatskog pomorskog prava de lege lata *ne postoji mogućnost izdavanja elektroničkih teretnica. Teretnica kao prenosiv vrijednosni papir i dalje ostaje neraskidivo povezana s tradicionalnom papirnatom ispravom.*

U radu se analizira pozitivnopravno uređenje teretnice u Hrvatskoj, i to u sklopu odredaba Pomorskog zakonika te općih odredaba Zakona o obveznim odnosima o vrijednosnim papirima. Izlažu se argumenti iz kojih proizlazi da hrvatsko pravo ne poznaje institut elektroničke teretnice te se utvrđuje ostavlja li hrvatsko pravo de lege lata *mogućnost izdavanja elektroničkih teretnica u okviru ugovorne autonomije te pod kojim pretpostavkama. Pored toga analizira se pravno uređenje elektroničke teretnice u poredbenim pravnim sustavima, osobito u pravu SAD-a i Južne Koreje te se upućuje na različite zakonodavne pristupe za uvođenje elektroničke teretnice. Raspravlja se o mogućim modelima uvođenja elektroničkih teretnica u hrvatsko pravo de lege ferenda, i to na općoj i posebnoj razini. U tom smislu razmatra se mogućnost redefiniranja pojma teretnice i vrijednosnog papira te uvođenja tehnološki neutralne terminologije i uvođenje u hrvatsko pravo elektroničkih ekvivalenata za vrijednosni papir i teretnicu u smislu postojeće odredbe čl. 1135., st. 2. Zakona o obveznim odnosima. Raspravlja se i o nužnim zakonodavnim intervencijama u tom smislu. Konačno, nastoji se procijeniti koji je pravni pristup za uvođenje elektroničke teretnice u hrvatsko pravo najprimjereniji uzimajući u obzir osobitosti hrvatskog prava i pravne tradicije.*

Cilj je rada teorijski raspraviti mogućnosti modernizacije hrvatskog pomorskog prava u kontekstu progresivnog tehnološkog napretka i zakonodavnih kretanja u poredbenim pravnim sustavima te dati konkretne prijedloge za pravno uređenje elektroničke teretnice u okviru hrvatskog prava de lege ferenda.

***Ključne riječi*:** *elektroničke prijevozne isprave, teretnica, elektronička teretnica, vrijednosni papir, Pomorski zakonik, modernizacija hrvatskog pomorskog prava*

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1. Uvod

Teretnica je temeljna prijevozna isprava kod ugovora o prijevozu robe morem.[1] U pravnoj teoriji teretnica se najčešće definira svojim trima temeljnim funkcijama: (1.) teretnica je potvrda da je roba ukrcana na brod, odnosno da je primljena za ukrcaj te potvrda o tzv. elementima tereta, (2.) teretnica je pisani dokaz da je sklopljen ugovor o prijevozu te o njegovu sadržaju i, naposljetku, (3.) teretnica je vrijednosni papir (*document of title*).[2] Upravo ta posljednja karakteristika, svojstvo vrijednosnog papira,[3] čini teretnicu specifičnom prijevoznom ispravom koja se u praksi pokazuje najpoželjnijom kad postoji potreba za disponiranjem robom u prijevozu te kad se naplata vrši dokumentarnim akreditivom.[4] S druge strane, obveza prijevoznika da na odredištu isporuči robu isključivo osobi koja se može formalno legitimirati kao zakoniti imatelj teretnice,[5] predstavlja njezin najveći praktični nedostatak. S obzirom na to da teretnica nerijetko stiže u odredišnu luku tek nakon tereta, slijedom čega teret nije moguće isporučiti, a da se pritom ne povrijedi ugovor o prijevozu, u praksi dolazi do niza negativnih posljedica kao što su kvar robe, potreba za skladištenjem i sl.[6]

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1 Za teretnicu u okviru domaće pravne književnosti v. Grabovac, I. 2005. *Suvremeno hrvatsko pomorsko pravo i Pomorski zakonik*. Književni krug. Split. str. 89-101; Ivković, Đ. 2005. *Pomorski zakonik 2004.* Dio VII. Glava II. (čl. 442.-597., čl. 648.-672.) s komentarom i bilješkama, sudskim odlukama i literaturom. Priručnik, 2. izd. Piran. http://www.dpps-mlas.si/ivkovic/Pomorski%20Zakonik.pdf (preuzeto 15. ožujka 2017.) str. 72-95; Jakaša, B. 1983. Sistem plovidbenog prava Jugoslavije. Treća knjiga. Ugovori o iskorištavanju brodova. 2. svezak. *Prijevoz stvari: odgovornost brodara, odgovornost naručitelja, prijevozne isprave, vozarina*. Zrinski. Čakovec. str. 157-266; Pavić, D. 2006. *Pomorsko imovinsko pravo*. Književni krug. Split. str. 183-203; Rastovčan, P. 1951. Teretnica. *Ugovori o iskorišćivanju brodova na moru: zbornik rasprava*. JAZU. Zagreb. str. 105-148. Za stranu pravnu književnost v. Bennett, W. P. 1914. *The History and Present Position of the Bill of Lading as a Document of Title to Goods*. Cambridge University Press. Cambridge; Dalhuisen, J. H. 2013. Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law. Vol. 2: *Contract and Movable Property Law*. 5 ed. Oxford and Portland. Hart Publishing. str. 551-568; Kozolchyk, B. 1992. Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective. *Journal of Maritime Law and Commerce*. vol. 23 (1). str. 161-245; Murray, C.; Holloway, D.; Timson-Hunt, D. 2007. *Schmitthoff's Export Trade: the Law and Practice of International Trade*. 11. ed. Sweet & Maxwell. London. str. 299-330; Pejović, Č. 2004. Documents of title in carriage of goods by sea under English law: Legal nature and possible future directions. *Poredbeno pomorsko pravo*. vol. 43 (158). str. 43-83; Schmitz, T. 2011. The bill of lading as a document of title. *Journal of International Trade Law and Policy*. vol. 10 (3). str. 255-280; United Nations. 1971. *Bills of Lading - Report of the secretariat of UNCTAD*, New York. http://unctad.org/en/PublicationsLibrary/c4isl6rev1_en.pdf (preuzeto 15. ožujka 2017.)

2 Tako, primjerice, u: Dalhuisen, J. H. 2013. *op. cit.* u bilj. 1. str. 552; Goldby, M. 2013. *Electronic Documents in Maritime Trade*. Oxford University Press Oxford. str. 88; Grabovac, I. 2005. *op. cit*. u bilj. 1. str. 89; Murray, C. *et. al.* 2007. *op. cit.* u bilj. 1. str. 300; Jakaša, B. 1983. *op. cit.* u bilj. 1. str. 158; Pavić, D. 2006. *op. cit.* u bilj. 1. str. 185; Schmitz, T. 2011. *op. cit.* u bilj. 1. str. 258; United Nations. 1971. *op. cit.* u bilj. 1. str. 5.

3 Ipak, potrebno je napomenuti da teretnica u poredbenom pravu nema uvijek i bezuvjetno značenje vrijednosnog papira. Tako, primjerice, britanski *Carriage of Goods by Sea Act 1992* (dalje: COGSA'92) pod teretnicom smatra isključivo isprave po naredbi i na donositelja, čime se teretnicama na ime (*straight bill of lading*) izričito odriče svojstvo vrijednosnog papira (*document of title*). V. u tom smislu Schmitz, T. 2011. *op. cit.* u bilj. 1. str. 265. *Vice versa*, u hrvatskom pravu svojstvo vrijednosnog papira imaju i papiri na ime (tzv. rekta papiri), pa tako i teretnica na ime. V. u Rastovčan, P.; Luger-Katušić, R. 1985. *Vrijednosni papiri – Mjenica i ček*. 5. izd. Informator. Zagreb. str. 5.

4 Pamel, P. G.; Wilkins R. C. 2011. *Bills of Lading vs Sea Waybills, and The Himalaya Clause*, http://www.cmla.org/papers/006B%20Pamel_Bills%20of%20Lading_Paper_ENG.pdf (preuzeto 16. ožujka 2017.) str. 2.

5 V. u tom smislu čl. 528. i čl. 530. Pomorskog zakonika (dalje: PZ). Za poredbeno pravo v., primjerice, čl. 521 njemačkog *Handelsgesetzbuch* (dalje: HGB), čl. 252. španjolskog *Ley de Navegación Marítima* (dalje: LNM), § 7-403. američkog *Uniform Commercial Code* (dalje: UCC) i sl.

6 Za tzv. krizu teretnice v. Šafranko, Z. 2016. *Pravni aspekti elektroničkih prenosivih zapisa u trgovačkim transakcijama*. Doktorski rad. Pravni fakultet Sveučilišta u Zagrebu. Zagreb. str. 69 *et seq.*

Kao jedan od mogućih odgovora na izložen nedostatak teretnice 80-ih godina prošloga stoljeća javlja se prvo inicijativa uklanjanja papirnatih teretnica iz faktične cirkulacije njihovim deponiranjem kod banke u sklopu *SeaDocs* sustava.[7] Potom, 1990. godine, CMI izdaje Pravila za elektroničke teretnice (dalje: CMI pravila) kao autonoman izvor prava koji u potpunosti napušta tradicionalnu papirnatu teretnicu i uvodi njezin funkcionalni ekvivalent – elektroničku teretnicu.[8] Petnaestak godina kasnije elektronička je teretnica zaživjela i u praksi. Danas se o elektroničkoj teretnici govori ponajprije u kontekstu sustava koji se temelje na autonomnom pravu i multilateralnim ugovornim platformama od kojih su najistaknutiji sustavi *Bolero*, *ESS-Data Bridge* i *e-Title*.[9] Iako je ovdje riječ o zatvorenim sustavima koji omogućuju prijenos teretnica samo među subjektima unutar sustava, izgleda da oni, unatoč tom nedostatku, ipak udovoljavaju potrebama suvremene prakse.

Međutim, pojam elektroničke teretnice posljednjih je godina sve više zastupljen i u nacionalnim zakonodavstvima.[10] Određene su države, poput Južne Koreje, problematiku elektroničkih teretnica uredile iznimno opsežno te stvorile pravni okvir koji omogućava praktičnu primjenu elektroničkih teretnica.[11] Njemačko je zakonodavstvo, primjerice, zasad samo predvidjelo načelnu mogućnost izdavanja elektroničkih teretnica, no još nisu doneseni podzakonski propisi potrebni za primjenu elektroničkih teretnica u praksi.[12] Hrvatska pak pripada krugu onih država u čijoj pozitivnopravnoj terminologiji uopće nije zastupljen pojam elektroničke teretnice.[13]

U radu se analizira pozitivnopravno uređenje teretnice u Hrvatskoj, i to u sklopu odredaba PZ-a te općih odredaba Zakona o obveznim odnosima (dalje: ZOO) o vrijednosnim papirima. Nastoji se utvrditi ostavlja li hrvatsko pravo *de lege lata* mogućnost izdavanja elektroničkih teretnica u okviru ugovorne autonomije te pod kojim pretpostavkama. Pored toga, analizira

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7 Za *SeaDocs* sustav v. Ćesić, Z. 2000. CMI pravila za elektroničke teretnice i problemi u praktičnoj primjeni. *Pomorski zbornik*. vol. 38 (1). str. 116; Dubovec, M. 2006. The problems and possibilities for using electronic bills of ladings as collateral. *Arizona Journal of International and Comparative Law*. vol. 23 (2). str. 449; Kozolchyk, B. 1992. *op. cit.* u bilj. 1. str. 227; Lisičar, H. 2011. Pojam i regulacija elektroničke teretnice i sustava elektroničke razmjene podataka. *Pravo u gospodarstvu*. vol. 50 (5). str. 1131.

8 Za CMI Pravila v. Ćesić, Z. 2000. *op. cit.* u bilj. 7. str. 109; Dubovec, M. 2006. *op. cit.* u bilj. 7. str. 451; Goldby, M. 2013. *op. cit.* u bilj. 2. str. 149; Lisičar, H. 2011. *op. cit.* u bilj. 7. str. 1125.

9 Šafranko, Z. 2016. *op. cit.* u bilj. 6. str. 105 *et seq*.

10 Tako je, primjerice, revizijom HGB-a iz 2013. godine uveden pravni institut elektroničke teretnice (*elektronisches Konnossement*) u njemačko pravo iako podzakonski akti koji bi trebali detaljno uređivati procedure u vezi s izdavanjem, prezentacijom, vraćanjem i prijenosom elektroničkih teretnica još nisu doneseni. Revizijom LNM-a iz 2014. godine omogućeno je izdavanje elektroničke teretnice u sklopu španjolskog prava.

11 Južnokorejski *Commercial Act* (dalje: CA) iz 2007. predviđa izdavanje elektroničke teretnice sustavom registara dok sva pitanja u vezi s registrom i agencijom koja vodi registar te pitanja u vezi s izdavanjem, prijenosom, zamjenom elektroničke teretnice te s isporukom robe na temelju elektroničke teretnice detaljno uređuje *Presidential Decree No 24415, March 23, 2013 – Regulation on Implementation of the Provisions of the Commercial Act Regarding Electronic Bills of Lading* (dalje: PD 24415/2013).

12 Čl. 516., st. 2. i st. 3. HGB-a.

13 S obzirom na to da naše pozitivno pravo ne poznaje pojam elektroničke teretnice, elektroničkom teretnicom u sklopu hrvatskog prava ne bavi se sustavno ni domaća pravna književnost. U pojedinim se radovima domaćih pravnih autora tek načelno postavlja problematika elektroničkih teretnica u sklopu hrvatskog prava, osobito odredaba PZ-a. U tom smislu v. Ćesić, Z. 2000. *op. cit.* u bilj. 7. str 124; Ćesić, Z. 2001. Elektronički potpis i njegova primjena u sustavu elektroničkih teretnica. *Hrvatska pravna revija*. vol. 1 (8). str. 43; Grabovac, I. 2001. Aktualna problematika elektroničkih teretnica. *Pravo i porezi*. vol. 10 (2). str. 14; Oršulić, I.; Bulum, B. 2011. Neki problemi vezani uz uređenje elektroničkih prijevoznih isprava i poticanje elektroničke trgovine u Roterdamskim pravilima. *Poredbeno pomorsko pravo*. vol. 50 (1). str. 187.

se pravno uređenje elektroničke teretnice u poredbenim pravnim sustavima, osobito u pravu SAD-a i Južne Koreje kojima se nastoji uputiti na različite zakonodavne pristupe za uvođenje elektroničke teretnice. Raspravlja se o mogućim modelima uvođenja elektroničkih teretnica u hrvatsko pravo *de lege ferenda*, i to na općoj i posebnoj razini. U tom smislu razmatra se mogućnost redefiniranja pojma teretnice i vrijednosnog papira te uvođenja tehnološki neutralne terminologije. Raspravlja se i o nužnim zakonodavnim intervencijama. Konačno, nastoji se dati ocjena koji je pravni pristup za uvođenje elektroničke teretnice u hrvatsko pravo najprimjereniji uzimajući u obzir osobitosti hrvatskog prava i pravne tradicije.

Cilj je rada teorijski raspraviti mogućnosti modernizacije hrvatskog pomorskog prava u kontekstu progresivnog tehnološkog napretka i zakonodavnih kretanja u poredbenim pravnim sustavima te dati konkretne prijedloge za pravno uređenje elektroničke teretnice u okviru hrvatskog prava *de lege ferenda*.

2. Pravno uređenje teretnice u hrvatskom pravu *de lege lata*

Teretnica se u pravilu koristi kod prijevoza robe morem i unutarnjim vodama dok se u kopnenom i zračnom prijevozu u pravilu koristi teretni list. Kad je riječ o prijevozu robe unutarnjim vodama, Hrvatska nema vlastitih pravila o teretnici. Zakon o plovidbi i lukama unutarnjih voda (dalje: ZPLUV) određuje da će se na ugovore o domaćem prijevozu *mutatis mutandis* primjenjivati odredbe Budimpeštanske konvencije o ugovoru o prijevozu robe unutarnjim plovnim putevima iz 2000. (dalje: CMNI) uključujući i odredbe koje se bave pitanjima teretnice.[14] Jasno, navedena će se pravila primjenjivati i kod prijevoza robe unutarnjim vodama s međunarodnim obilježjem.[15]

Kad je riječ o prijevozu robe morem, pravila o teretnici sadržana su u PZ-u. Osim toga, na teretnicu se supsidijarno primjenjuju opća pravila ZOO-a o vrijednosnim papirima te odredbe Zakona o mjenici (dalje: ZM) glede oblika i učinaka indosamenta.[16] Međutim, potrebno je uzeti u obzir da je Hrvatska članica Međunarodne konvencije za izjednačenje nekih pravila o teretnici iz 1924., Protokola o izmjeni Međunarodne konvencije za izjednačenje nekih pravila o teretnici iz 1968. te Protokola o izmjenama Međunarodne konvencije za izjednačenje nekih pravila o teretnici iz 1924. kako je izmijenjena protokolom iz 1968., od 1979. (dalje: Haško-visbijska pravila). Prema tome, odredbe PZ-a, pa i one o teretnici primjenjivati će se izravno samo u slučajevima koji nisu pokriveni Haško-visbyjskim pravilima.[17] To će prije svega biti situacije u kojima se ne radi o međunarodnom prijevozu, već je riječ prijevozu koji se odvija između dviju domaćih luka.[18] Ne ulazeći ovdje dublje u problematiku mjerodavnog prava za

[14] Čl. 181. ZPLUV-a. Za teretnicu v. od čl. 11. do čl. 13. CMNI-a.

[15] Za polje primjene v. čl. 2. CMNI-a.

[16] Čl. 502. st. 2. PZ-a.

[17] Prema čl. 10. Haško-visbijskih pravila ona se primjenjuju kad je izdana teretnica za prijevoz robe između luka dviju različitih država, i to kad je: a) teretnica izdana u državi ugovornici ili b) prijevoz započeo u luci države ugovornice ili c) teretnicom predviđeno da se ugovor ravna po Haško-visbijskim pravilima ili pravu države koje upućuje na njihovu primjenu, i to neovisno o državnoj pripadnosti broda, prijevoznika, krcatelja, primaoca ili bilo koje druge zainteresirane osobe. U određenim slučajevima moguće je da dođe i do primjene Međunarodne konvencije za izjednačenje nekih pravila o teretnici iz 1924., bez Protokola iz 1968. i 1979. (dalje: Haška pravila). O toj mogućnosti detaljnije u Marin, J. 2007. Međunarodne konvencije i protokoli kao izvor hrvatskog pomorskog prava. *Poredbeno pomorsko pravo*. vol. 46 (161). str. 102.

[18] V. u Ivković, Đ. 2005. *Haška - Visby pravila iz 1924., 1968. i 1979. u odnosu na Pomorski zakonik iz 2004.* Piran. http://www.dpps-mlas.si/ivkovic/HV-pravila.pdf (preuzeto 15. ožujka 2017.) str. 1-3.

prijevoze robe morem, u nastavku se raspravlja o teretnici u kontekstu odredaba PZ-a i ZOO-a kao pravnih izvora koji su u isključivoj domeni hrvatskog zakonodavca.

2.1. Pojmovno određenje teretnice

PZ ne sadržava izričitu definiciju teretnice.[19] Ipak, odredbe PZ-a o teretnici u svojoj ukupnosti jasno upućuju na to da je teretnica: (1.) prijevozna isprava,[20] (2.) dokaz da je sklopljen ugovor o prijevozu te o njegovu sadržaju,[21] (3.) dokaz o ukrcaju robe, odnosno preuzimanju robe za ukrcaj te o elementima robe[22] i (4.) vrijednosni papir.[23] Dakle, teretnica u smislu PZ-a ima sve one karakteristike koje se općenito u pravnoj teoriji pripisuju teretnici te koje eksplicite proizlaze iz definicije teretnice sadržane u Hamburškim pravilima.[24]

2.1.1. Teretnica kao prijevozna isprava

PZ teretnicu prvenstveno određuje kao prijevoznu ispravu koja se u pravilu izdaje nakon završetka ukrcaja robe.[25] Uz teretnicu PZ predviđa i mogućnost izdavanja teretnog lista, elektroničke izmjene podataka ili pak *druge isprave o prijevozu*. Valja napomenuti da izdavanje teretnice, kao ni drugih prijevoznih isprava, nije nužan uvjet valjanosti ugovora o prijevozu.[26] Teretnicu, odnosno neku drugu prijevoznu ispravu, prijevoznik je dužan izdati isključivo onda kada to zahtijeva krcatelj.[27] Ugovorna odredba kojom bi se odricalo krcatelju pravo zahtijevanja izdavanja prijevozne isprave bila bi ništetna.[28]

Iz izloženog pravnog konteksta moguće je zaključiti: (1.) da se pojam prijevozne isprave odnosi kako na tradicionalne (papirnate) isprave tako i na elektroničke zapise koji ostvaruju funkcije papirnatih isprava te (2.) da krcatelj ima pravo izbora hoće li uopće zahtijevati prijevoznu ispravu i, podredno, koju prijevoznu ispravu.

Pomorski zakonik, kad govori o teretnici i teretnom listu, nesumnjivo ima u vidu isključivo tradicionalne (papirnate) isprave. Pojmovi teretnica i teretni list, dakle, ne uključuju elektroničke zapise koji bi u funkcionalnom i supstancijalnom smislu u potpunosti odgovarali opisu teretnice, odnosno teretnog lista. Tomu u prilog govori i činjenica da PZ navedenim papirnatim prijevoznim ispravama izričito suprotstavlja elektroničku prijevoznu ispravu, tzv. elektroničku izmjenu podataka koja je u svojoj suštini funkcionalni ekvivalent za teretni list.[29]

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[19] Definicija teretnice sadržana je, primjerice, u Konvenciji UN-a o prijevozu robe morem iz 1978. (dalje: Hamburška pravila). Prema čl. 1.. t. 7. Hamburških pravila, teretnica je isprava koja dokazuje ugovor o prijevozu robe morem i preuzimanje ili ukrcavanje robe od prijevoznika i kojom se prijevoznik obvezuje isporučiti robu uz predaju isprave. Odredba u ispravi da se roba isporučuje na zahtjev imenovane osobe ili po naredbi ili donosiocu, stvara takvu obvezu.

[20] Čl. 496. PZ-a.

[21] *Arg. ex* čl. 496., čl. 505., st. 2. i čl. 512. PZ-a.

[22] *Arg. ex* čl. 497., čl. 498., čl. 505., st. 1., t. 6-8., čl. 508., čl. 509. i čl. 511 PZ-a.

[23] V. čl. 501., čl. 502., čl. 505., st. 1., čl. 507., čl. 528. i čl. 530. PZ-a. *Cf.* s čl. 1135-1137., 1140-1142. ZOO-a.

[24] V. *supra* bilj. 2. i bilj. 19.

[25] Prijevozna je isprava isprava kojom prijevoznik potvrđuje da je robu primio na prijevoz i na temelju koje se reguliraju odnosi stranaka iz prijevoznog posla. Tako u Jakaša, B. 1983. *op. cit.* u bilj. 1. str. 155.

[26] Tako Ivković, Đ. 2005. *op. cit.* u bilj. 1. str. 72.

[27] Čl. 496. PZ-a.

[28] Čl. 500. PZ-a. U tom smislu i Ivković, Đ. 2005. *op. cit.* u bilj. 1. str. 75; Jakaša, B. 1983. *op. cit.* u bilj. 1. str. 156.

[29] Za elektroničku izmjenu podataka v. i *infra ad* 2.2.

Pojam prijevozne isprave PZ ne iscrpljuje nabrajanjem papirnate teretnice i teretnog lista te elektroničke izmjene podataka. Osim tih pobrojanih isprava, krcatelj je ovlašten zahtijevati, a prijevoznik dužan izdati i neke druge prijevozne isprave. Pritom bi, uzme li se u obzir da opći pojam prijevozne isprave obuhvaća i papirnate i elektroničke isprave, *argumentum a maiori ad minus*, trebalo bi razmotriti da i pojam drugih prijevoznih isprava obuhvaća i papirnate i elektroničke prijevozne isprave. Nejasno, međutim, ostaje koje bi to prijevozne isprave ulazile u kategoriju drugih prijevoznih isprava u smislu PZ-a. Pojam drugih prijevoznih isprava zasigurno ne obuhvaća tzv. prijevozne isprave *primljeno za ukrcaj* s obzirom na to da se navedene isprave izdaju isključivo prije ukrcavanja dok predmetna odredba govori o izdavanju prijevoznih isprava poslije završetka ukrcavanja.[30] Pojam prijevozne isprave u prijevozu robe morem uvriježeno obuhvaća teretnice, pomorske teretne listove te, eventualno, teretnice na ime (*straight bill of lading*) koje u određenim pravnim sustavima tvore zasebnu kategoriju,[31] kao i elektroničke ekvivalente za navedene isprave.[32] Uz navedene, prijevoznim ispravama općenito treba još smatrati i tzv. prenosive i neprenosive transportne isprave (*negotiable/non-negotiable transport dokument*) u smislu Konvencije UN-a o ugovorima o prijevozu robe u cijelosti ili djelomično morem iz 2009. (dalje: Roterdamska pravila).[33]

Uzimajući sve to obzir, moglo bi se zaključiti da PZ ostavljanjem otvorene kategorije prijevoznih isprava sintagmom *ili drugu ispravu o prijevozu*, nastoji ostati primjenjiv te aktualan i u kontekstu razvoja novih praksi, odnosno uvođenja u praksu nekih novih prijevoznih isprava.[34] To, nadalje, dovodi do zaključka da PZ pod pojmom *druge isprave o prijevozu* potencijalno prikriva mogućnost izdavanja i elektroničkih teretnica.[35] U svakom slučaju, i teretnica i, eventualno, elektronička teretnica u smislu PZ-a predstavljaju isprave kojima se potvrđuje primitak robe za prijevoz i kojima se uređuju pravni odnosi stranaka iz prijevoza.

2.1.2. Teretnica kao dokaz ugovora o prijevozu

Teretnica je pisani dokaz da je sklopljen ugovor o prijevozu te dokaz o njegovu sadržaju. Ona nije pisana isprava ugovora o prijevozu, no kako su ugovori o prijevozu robe morem u pravilu neformalni ugovori, teretnica se u praksi može pojaviti kao jedina pisana isprava koja iscrpno uređuje međusobna prava i obveze ugovornih strana. U praksi se teretnica izdaje

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[30] Čl. 497. PZ-a.

[31] Za teretnicu na ime (*straight bill of lading*) u kontekstu engleskog i američkog prava v. Pejović, Č. 2004. *op. cit.* u bilj. 1. str. 60. *et seq.*

[32] Časnička se potvrda ne smatra prijevoznom ispravom. *Ibid.* str. 64; Jakaša, B. 1983. *op. cit.* u bilj. 1. str. 155. U Hamburškim pravilima pojam *other transport documents* iz čl. 18. odnosi se u pravilu na neprenosive teretne listove. V. komentar u United Nations. 1994. *United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules)* http://www.uncitral.org/pdf/english/texts/transport/hamburg/hamburg_rules_e.pdf (preuzeto 3. travnja 2017.) str. 28. Za pojam *any other similar document* u smislu čl. 1 (b) Haško-visbijskih pravila v. u Ivković, Đ. 2005. op. cit. u bilj. 18. str. 5; Pejović, Č. 2004. *op. cit.* u bilj. 1. str. 62.

[33] V. čl., 1. t. 14-16. Roterdamskih pravila. Potrebno je napomenuti da iako Roterdamska pravila napuštaju ustaljene termine kao što su teretnica i teretni list, uvođenjem novih termina nije uvedeno ništa novo u supstancijalnom smislu. V. u tom smislu Sturley, M. F. *et al.* 2010. *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*. Sweet & Maxwell. London. str. 204; Reynolds, F. 2010. The Carriage of Goods by Sea Under the Rotterdam Rules. *Lloyd's List Law*. Ur. Thomas, R. London. str. 276.

[34] Pomorski zakonik iz 1994. predviđao je, primjerice, izdavanje isključivo teretnice iako je pomorski teretni list već tada bio u širokoj upotrebi i u prijevozu robe morem.

[35] O mogućnosti izdavanja elektroničkih teretnica u kontekstu aktualnih odredaba PZ-a v. *infra ad 2.3.*

kao formular koji se sastoji od dvaju dijelova.[36] U pravilu se na prednjoj strani teretnice upisuju bitni sastojci teretnice dok se na poleđinu teretnice upisuju različite klauzule kojima se razrađuju prava i obveze prijevoznika i krcatelja ili pak su tamo već unaprijed otisnuti opći uvjeti prijevoznika.[37] Temeljna je svrha tih klauzula da se trećeg, zakonitog imatelja teretnice koji nije izvorna stranka ugovora o prijevozu, upozna s njegovim pravima i obvezama zato što nije sudjelovao pri sklapanju ugovora o prijevozu pa ga takav ugovor ne obvezuje.[38]

2.1.3. Teretnica kao dokaz o preuzimanju, ukrcaju te o elementima robe

Teretnica je, nadalje, pisana potvrda prijevoznika o tome da je roba ukrcana, odnosno primljena za ukrcaj na brod. Navedena se funkcija teretnice neposredno povezuje s pravilima o dokaznoj snazi teretnice i odgovornosti prijevoznika za gubitak ili oštećenje robe. S obzirom na vrijeme izdavanja teretnice, razlikuju se tzv. teretnice *ukrcano* (*on board B/L*) i teretnice *primljeno za ukrcaj* (*received for shipment B/L*).[39] Samo teretnica *ukrcano* potvrđuje da je roba uistinu ukrcana na brod dok teretnica *primljeno za ukrcaj* potvrđuje samo da je prijevoznik preuzeo robu radi prijevoza.[40] Na razliku između tih dviju vrsta teretnica jasno upućuju i međunarodne konvencije i poredbena nacionalna prava.[41]

Osim toga, teretnica je i dokaz o tzv. elementima tereta, odnosno količini i stanju tereta prilikom preuzimanja.[42] Elemente tereta u teretnicu unosi zapovjednik broda na temelju pisanih podataka koje je dobio od krcatelja.[43] Pokaže li se opravdana sumnja da podatci što ih je naveo krcatelj o vrsti tereta, oznakama koje se na njemu nalaze, količini tereta prema broju komada, težini, obujmu ili drugoj jedinici mjere nisu točni ili pak potpuni, ili ako nema razumne mogućnosti da se točnost tih podataka provjeri pri ukrcavanju ili su oznake na teretu nedovoljno trajne, prijevoznik može u teretnicu, prije njezina potpisivanja, unijeti primjedbe s obrazloženjem (tzv. marginalne klauzule).[44] Svrha unošenja marginalnih klauzula u teretnicu nije u tome da se prijevoznika oslobodi odgovornosti, odnosno da se njegova odgovornost

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[36] Pavić, D. 2006., *op. cit.* u bilj. 1. str. 117.

[37] Bitni sastojci teretnice navedeni su u čl. 505., st. 1. i čl. 507. PZ-a. Nedostatak kojeg od bitnih sastojaka teretnice ne čini teretnicu potpuno ništetnom. Tako Rastovčan, P. 1951. *op. cit.* u bilj. 1. str 112. Određeni bi nedostatci teretnici mogli uskratiti svojstvo vrijednosnog papira u smislu čl. 1136., st. 3. ZOO-a, no samim tim teretnica ne bi izgubila određene dokazne funkcije. U tom smislu i Jakaša, B. 1983. *op. cit.* u bilj. 1. str. 180. Prema čl. 505., st. 2. PZ-a, teretnica može sadržavati i druge podatke te uvjete prijevoza, što je u praksi redovito i slučaj. Za fakultativne klauzule v. Jakaša, B. 1983. *op. cit.* u bilj. 1. str. 182 *et seq.*

[38] Tako Pavić, D. 2006. *op. cit.* u bilj. 1. str. 119. U tom smislu v. čl. 512. PZ-a prema kojem ovlaštenog imatelja teretnice koji nije naručitelj ni krcatelj obvezuju samo oni pisani uvjeti ugovora o prijevozu i opći uvjeti prijevoznika na koje se teretnica izričito poziva. Usmeni uvjeti ugovora koji nisu uneseni u teretnicu ne obvezuju ga, pa i kad se teretnica izričito poziva na te uvjete.

[39] Pavić, D. 2006. *op. cit.* u bilj. 1. str. 189.

[40] U praksi se teretnica „primljeno za ukrcaj" uglavnom koristi kad roba stigne u polazišnu luku prije broda. Teretnica „primljeno za ukrcaj" u neku je ruku privremena teretnica koja se, pošto teret bude ukrcan na brod, može zamijeniti teretnicom „ukrcano" ili dopuniti klauzulama koje joj daju pravni značaj teretnice „ukrcano". V. čl. 497., st. 2. i čl. 498. st. 1 PZ-a.

[41] V. primjerice čl. 3., st. 7. Haško-visbijskih pravila; čl. 15., st. 2. Hamburških pravila te čl. 497. PZ-a i § 514. HGB-a.

[42] Pavić, D. 2006. *op. cit.* u bilj. 1. str. 194. Prema čl. 505. PZ-a elementi tereta su: (1.) količina tereta prema broju komada, težini, obujmu ili drugoj jedinici mjere, prema vrsti tereta, (2.) vrsta tereta i oznake koje se na njemu nalaze, (3.) stanje tereta ili omota prema vanjskom izgledu.

[43] Čl. 508. PZ-a.

[44] Čl. 509. PZ-a.

umanji, već je u tome da se teret dokaza o tome što je i u kojoj količini prijevoznik primio na prijevoz prebaci s prijevoznika na korisnika prijevoza.[45] Teretnica koja ne sadržava marginalne klauzule - tzv. čista teretnica (*clean bill of lading*) predstavlja: (1.) oborivu presumpciju da je prijevoznik zaprimio teret kako je on naznačen u teretnici prema krcatelju te (2.) neoborivu presumpciju da je prijevoznik zaprimio teret kako je on naznačen u teretnici prema trećim osobama koje su stekle teretnicu u dobroj vjeri.[46] Kad su u teretnicu unesene marginalne klauzule (*claused bill of lading*), situacija je praktički obrnuta – tad postoji oboriva presumpcija da je prijevoznik od krcatelja preuzeo teret onako kako ga je predao primatelju.[47]

2.1.4. Teretnica kao vrijednosni papir

Funkcije teretnice o kojima je dosad bilo riječi, moguće je postići i neprenosivim teretnim listom.[48] Ipak, za razliku od neprenosivog teretnog lista, teretnica u pravilu ima svojstvo vrijednosnog papira (*document of title*).[49] Iako PZ ne određuje eksplicite teretnicu kao vrijednosni papir, na taj zaključak *prima facie* navode odredbe PZ-a o naznaci ovlaštenika, prijenosu teretnice te predaji tereta.[50] Ipak, činjenica da po PZ-u teretnica može glasiti na ime, po naredbi ili na donosioca, da se prenosi cesijom, indosamentom ili faktičkom predajom te da pravo zahtijevati predaju robe pripada ovlaštenom imatelju teretnice, samo po sebi ne kvalificira teretnicu kao vrijednosni papir.

Za kvalifikaciju određene isprave kao vrijednosnog papira u hrvatskom će pravu odlučujuće biti odredbe ZOO-a, odnosno usklađenost konkretne isprave s općim pojmom vrijednosnog papira te pretpostavkama povezanim s oblikom i bitnim sastavnicama vrijednosnog papira. Prema ZOO-u vrijednosni je papir isprava kojom se njezin izdavatelj obvezuje ispuniti obvezu upisanu u toj ispravi njezinu zakonitom imatelju.[51] Teretnicu je u smislu odredaba PZ-a moguće bez većih napora podvesti pod pojam vrijednosnog papira u smislu ZOO-a. Ona je (papirnata) isprava kojom se njezin izdavatelj, odnosno prijevoznik obvezuje ispuniti u njoj upisanu obvezu, tj. predati teret njezinu ovlaštenom imatelju.[52]

Uz to, ZOO propisuje i bitne sastojke, odnosno minimalan sadržaj potreban da bi se određena isprava kvalificirala kao vrijednosni papir. U tom smislu vrijednosni papir mora sadr-

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45 Pavić, D. 2006. *op. cit.* u bilj. 1. str. 196. Riječ je o oborivoj pravnoj presumpciji – zakoniti imatelj teretnice može dokazivati što je prijevoznik primio na prijevoz te u kojoj količini i u kakvu stanju.

46 Prema čl. 511., st. 1. PZ-a, kad prijevoznik nije unio u teretnicu primjedbe u skladu s čl. 509. PZ-a, smatra se za odnose između njega i trećeg zakonitog i savjesnog imatelja teretnice da je prijevoznik preuzeo teret onako kako je naznačen u teretnici.

47 Čl. 511., st. 2. PZ-a.

48 V. čl. 514. PZ-a.

49 U domaćoj pravnoj književnosti nema dvojbe oko klasifikacije teretnice kao vrijednosnog papira. V., primjerice, Grabovac, I. 2005. *op. cit.* u bilj. 1. str. 89; Ivković, Đ. 2005. *op. cit.* u bilj. 1. str. 72; Jakaša, B. 1983. *op. cit.* u bilj. 1. str. 159; Pavić, D. 2006. *op. cit.* u bilj. 1. str. 185; Slakoper, Z. 2005. *Komentar Zakona o obveznim odnosima.* Ur. Gorenc, V. RRIF. Zagreb. str. 1776.

50 V. *supra* bilj. 23.

51 V. čl. 1135., st. 1. ZOO-a. Valja imati na umu da kad ZOO u citiranoj odredbi govori o ispravi, pod tim isključivo podrazumijeva pisanu, odnosno papirnatu ispravu. *Arg. ex* čl. 1135., st. 2. i st. 3. ZOO-a.

52 Samo pravo na predaju tereta u odredišnoj luci ne nastaje izdavanjem teretnice, već sklapanjem ugovora o prijevozu stvari pa će u slučajevima da nije izdana teretnica, prijevoznik biti obvezan isporučiti robu ugovorom određenom primatelju. Međutim, kad je izdana teretnica, zahtjev na isporuku robe pripada isključivo zakonitom imatelju teretnice.

žavati: (1.) naznaku vrste vrijednosnog papira, (2.) tvrtku, tj. naziv i sjedište, odnosno ime i prebivalište izdavatelja vrijednosnog papira, (3.) tvrtku, tj. naziv ili ime osobe na koju, odnosno po čijoj naredbi vrijednosni papir glasi ili naznaku da papir glasi na donositelja, (4.) točno naznačenu obvezu izdavatelja koja proizlazi iz vrijednosnog papira, (5.) mjesto i nadnevak izdavanja vrijednosnog papira, a kod onih koji se izdaju u seriji i njihov serijski broj i (6.) potpis izdavatelja vrijednosnog papira, odnosno faksimil potpisa izdavatelja vrijednosnih papira koji se izdaju u seriji.[53] Posebnim zakonom za pojedine vrijednosne papire mogu biti određeni i drugi bitni sastojci.[54]

Da bi se određena isprava smatrala teretnicom u smislu PZ-a, treba sadržavati: (1.) tvrtku, odnosno naziv i sjedište, odnosno ime i prebivalište prijevoznika koji izdaje teretnicu, (2.) ime, odnosno druge podatke o identitetu broda, (3.) tvrtku, odnosno naziv i sjedište, odnosno ime i prebivalište krcatelja, (4.) tvrtku, odnosno naziv i sjedište, odnosno ime i prebivalište primatelja ili oznaku „po naredbi" ili „na donosioca", (5.) luku odredišta ili vrijeme kad će se, odnosno mjesto gdje će se takva luka odrediti, (6.) količinu tereta prema broju komada, težini, obujmu ili drugoj jedinici mjere s obzirom na vrstu tereta, (7.) vrstu tereta i oznake koje se na njemu nalaze, (8.) stanje tereta ili omota prema vanjskom izgledu, (9.) odredbe o vozarini, (10.) mjesto i dan ukrcaja tereta i izdavanja teretnice i (11.) vlastoručni potpis prijevoznika ili njegova punomoćnika.[55]

Usporede li se bitni sastojci teretnice prema PZ-u s onima vrijednosnog papira prema ZOO-u, moguće je zaključiti da teretnica i u sadržajnom pogledu načelno odgovara vrijednosnom papiru.[56] Međutim, PZ u odredbi čl. 505. ne navodi eksplicite da teretnica mora sadržavati i naznaku „teretnica" u smislu odredbe čl. 1136., st. 1., t. 1. ZOO-a.[57] Ako se pritom uzme u obzir da je ZOO glede bitnih sastojaka vrijednosnog papira krajnje restriktivan te da svaki nedostatak u tom pogledu sankcionira odricanjem svojstva vrijednosnog papira konkretnoj ispravi,[58] moguće je zaključiti kako se teretnicu ne treba beziznimno smatrati vrijednosnim papirom. Iako je ovdje ponajprije riječ o hipotetskom slučaju, jer će u praksi teretnica redovito sadržavati naznaku „teretnica", trebalo bi uzeti da je ispravno tumačenje prema kojem opće odredbe ZOO-a o vrijednosnim papirima nadopunjuju posebne odredbe PZ-a o teretnici.[59] U tom smislu, isprava koja ne bi sadržavala naznaku „teretnica", ne samo da se ne bi mogla smatrati vrijednosnim papirom nego se ne bi mogla smatrati ni teretnicom.

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[53] Čl. 1136., st. 1. ZOO-a.

[54] Čl. 1136., st. 2. ZOO-a.

[55] Čl. 505., st. 1. i čl. 507. PZ-a.

[56] Za naznaku izdavatelja *cf.* čl. 505., st. 1., t. 1. PZ-a i čl. 1136., st. 1., t. 2. ZOO-a; za naznaku vjerovnika *cf.* čl. 505., st. 1., t. 4. PZ-a i čl. 1136., st. 1., t. 3. ZOO-a; za naznaku obveze *cf.* čl. 505., st. 1., t. 6-8. PZ-a i čl. 1136., st. 1., t. 4. ZOO-a, za naznaku mjesta i datuma izdavanja *cf.* čl. 505., st. 1., t. 10. PZ-a i čl. 1136., st. 1., t. 5. ZOO-a; za potpis izdavatelja *cf.* čl. 507. i čl. 1136., st. 1., t. 6. ZOO-a.

[57] Po tom pitanju, teretnica je svakako jedinstvena među ispravama koje pretendiraju da budu vrijednosni papiri. Gotovo za sve ostale vrijednosne papire u hrvatskom pravu posebni propisi eksplicite zahtijevaju naznaku vrste vrijednosnog papira. V., primjerice, čl. 1., t. 1. i čl. 109., t. 1. ZM-a za trasiranu i vlastitu mjenicu; čl. 1., t. 1. Zakona o čeku za ček; čl. 170., st. 1., t. 1. Zakona o trgovačkim društvima za dionicu; čl. 11., st. 3. Zakona o uskladištenju i skladišnici za žitarice i industrijsko bilje za skladišnicu. I teretnica izdana u prijevozu robe unutarnjim vodama treba sadržavati naznaku teretnica. V. čl. 11., st. 5. CMNI-a.

[58] Čl. 1136., st. 3. ZOO-a.

[59] Tako Ivković, Đ. 2005.*op. cit.* u bilj. 1. str. 83.; Jakaša, B. 1983. *op. cit.* u bilj. 1. str. 177.

2.2. Posebno o obliku teretnice

Nedvojbeno je da PZ kad uređuje teretnicu, ima u vidu isključivo tradicionalnu papirnatu ispravu. Ipak, ne ulazeći ovdje u problematiku opravdanosti suprotstavljanja tradicionalnog pisanog oblika tzv. elektroničkom obliku, odnosno tradicionalne pisane isprave elektroničkom zapisu,[60] navođenje elektroničke razmjene podataka u kontekstu prijevoznih isprava[61] te elektroničkog zapisa u kontekstu jednog od mogućih oblika vrijednosnog papira[62] svakako aktualizira i pitanje elektroničkih teretnica u kontekstu hrvatskog pozitivnog prava.

U tom smislu prvenstveno je potrebno razriješiti dvojbu može li se tzv. elektronička izmjena podataka koju PZ navodi u kontekstu prijevoznih isprava, tretirati kao funkcionalni ekvivalent za teretnicu, odnosno kao elektronička teretnica. Odgovor na ovo pitanje valjalo bi potražiti u odredbama kojima se uređuju formalnopravne i materijalnopravne pretpostavke za teretnicu, kao i u posebnim odredbama o pravnom značaju elektroničke izmjene podataka.

PZ, kad je riječ o teretnici, beziznimno inzistira na vlastoručnom potpisu prijevoznika, odnosno njegova punomoćnika, što po prirodi stvari pretpostavlja i papirnatu ispravu.[63] *Vice versa*, kad je riječ o pomorskom teretnom listu, PZ izričito navodi da potpisi (krcatelja i prijevoznika) mogu biti tiskani, zamijenjeni pečatom, faksimilom ili pak elektroničkom izmjenom podataka.[64] Osim toga, PZ izričito navodi da se njegove odredbe o teretnom listu *mutatis mutandis* primjenjuju na situacije kad se prijevoz robe obavlja uz izmjenu elektroničkih podataka.[65] Prema tome, moguće je zaključiti da elektronička izmjena podataka u smislu PZ-a ima isključivo značaj funkcionalnog ekvivalenta za pomorski teretni list.[66] To, naposljetku, i ne čudi jer elektronički teretni listovi danas ne predstavljaju rijetkost u drugim prometnim granama.[67]

Bez obzira na značenje elektroničke izmjene podataka u smislu PZ-a, inzistiranje na vlastoručnom potpisu teretnice samo po sebi ne bi trebalo dovesti do zaključka kako je izdavanje elektroničke teretnice nedopušteno. Hrvatsko pravo, naime, poznaje institut naprednog elektroničkog potpisa koji ima jednaku pravnu snagu te zamjenjuje vlastoručni potpis.[68] Pridoda li se tomu institut elektroničke isprave koja ima istu pravnu snagu kao i isprava na papiru (ako

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60 Više o tome u Šafranko, Z. 2016. *op. cit*. u bilj. 16. str. 53 *et seq*.

61 Čl. 496. PZ-a.

62 Čl. 1135., st. 2. ZOO-a.

63 V. čl. 507. PZ-a. Tako i Grabovac, I. 2001. *op. cit.* u bilj. 13. str. 14. Autor, međutim, navodi kako je u određenim poredbenim pravnim sustavima dopuštena uporaba pečata, faksimila itd. U tom smislu v., primjerice, čl. 516., st. 1. HGB-a koji dopušta tiskanu ili ispisanu repliku vlastoručnog potpisa na teretnici. U tom smislu i čl. 14., st. 3. Hamburških pravila.

64 Čl. 513., st. 4. PZ-a.

65 V. čl. 519., st. 1. PZ.

66 Tako i Oršulić, I.; Bulum, B. 2011. *op. cit.* u bilj. 13. str. 188. Takva bi elektronička izmjena podataka u smislu PZ-a predstavljala: (1.) predmnjevu o sklopljenom ugovoru o prijevozu, (2.) između krcatelja i prijevoznika - predmnjevu do protudokaza o primitku stvari kao što je u elektroničkoj razmjeni podataka navedeno te (3.) između prijevoznika i primatelja dokaz o primitku stvari kao što je u elektroničkoj razmjeni podataka navedeno. *Arg. ex* čl. 514., st. 1- 3. PZ-a.

67 Više o tome u Kumpan, A.; Marin, J. 2009. Teretni list u kopnenom, pomorskom i zračnom prijevozu. *Poredbeno pomorsko pravo*. vol. 48 (163). str. 76 *et seq*.

68 Čl. 5. Zakona o elektroničkom potpisu (dalje: ZEP). O ovoj problematici i u: Oršulić, I.; Bulum, B. 2011. *op. cit.* u bilj. 13. str. 188-189. Autorice ističu kako rješenja ZEP-a o pravnoj snazi naprednog elektroničkog potpisa u kombinaciji s odredbom čl. 1135., st. 3. ZOO-a pridonose pravnoj nesigurnosti u pogledu mogućnosti izdavanja elektroničkih teretnica. Navedeno je stajalište potrebno uzeti s oprezom jer iz cijelog tog konteksta nije moguće isključiti odredbu čl. 1135., st. 2. ZOO-a.

se njezina uporaba i promet provode u skladu s odredbama Zakona o elektroničkoj ispravi; dalje: ZEI), moglo bi se *prima facie* zaključiti da ne postoji pravna zapreka izdavanju elektroničkih teretnica. Ipak, tomu nije tako, i to zbog pravnih i tehničkih razloga.

Zapreku s pravnog aspekta predstavlja odredba ZOO-a prema kojoj vrijednosni papir može imati oblik elektroničkog zapisa kad je to određeno zakonom.[69] Navedenom je odredbom ZOO postavio pravnu osnovu za izdavanje i promet elektroničkim ekvivalentima za pojedine vrste vrijednosnih papira, ali ujedno i uvjetovao tu mogućnost postojanjem zakonske odredbe koja eksplicite predviđa određenu vrstu vrijednosnog papira u obliku elektroničkog zapisa.[70] Izgleda da je ZOO, prepuštajući pravno uređenje elektroničkih ekvivalenata za vrijednosne papire „određenim zakonima", prije svega imao na umu zakone koji uređuju posebne vrste vrijednosnih papira kao što su, primjerice, ZM za mjenicu ili PZ za teretnicu.[71]

S tehničkog aspekta, valja napomenuti da elektronička isprava i napredni elektronički potpis zajedno ne čine dostatan funkcionalan ekvivalent za sve funkcije vrijednosnog papira, odnosno teretnice u tradicionalnom papirnatom obliku. Elektroničkom ispravom u smislu ZEI-a omogućen je funkcionalan ekvivalent za pisani oblik i izvornik isprave[72] dok je naprednim elektroničkim potpisom u smislu ZEP-a omogućena autentikacija izdavatelja koja se inače postiže vlastoručnim potpisom. Navedeno u tehničkom smislu zadovoljava dokazne funkcije teretnice, međutim, sve funkcije teretnice kao vrijednosnog papira nije moguće ostvariti isključivo konceptom elektroničke isprave i naprednog elektroničkog potpisa. Jedna od temeljnih karakteristika vrijednosnog papira, na kojoj počiva i sam koncept vrijednosnog papira, činjenica je da vrijednosni papir kao materijalni (opipljiv) dio prirode može biti predmet posjeda. Upravo posjedom isprave ostvaruju se publicitetne i akvizitivne funkcije vrijednosnog papira.[73] ZEI i ZEP ne raspolažu odredbama koje rješavaju pitanja identifikacije imatelja isprave te mogućnosti prijenosa isprave pa, u skladu s tim, i ne omogućuju u potpunosti funkcionalan ekvivalent za teretnicu, odnosno vrijednosne papire uopće.

2.3. Trenutačan stav Pomorskog zakonika prema elektroničkoj teretnici

Iz prethodnog izlaganja moguće je zaključiti kako hrvatsko pravo u ovom trenutku ne predviđa elektroničku teretnicu. U konstelaciji važećih propisa trebalo bi izrijekom predvidjeti mogućnost izdavanja elektroničkih teretnica. Samo u tom slučaju elektronička bi teretnica mogla imati jednake pravne učinke kao i tradicionalna papirnata teretnica koju uređuje PZ.

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[69] Čl. 1135., st. 2. ZOO-a.

[70] Sam ZOO ne razrađuje ovu mogućnost u detalje, već rješava samo dva temeljna pitanja. Prvo, odredbe ZOO-a koje se odnose na vrijednosne papire izdane u obliku pisane isprave primjenjuju se *mutatis mutandis* i na vrijednosne papire u obliku elektroničkog zapisa, ako posebnim propisom nije drukčije određeno. V. čl. 1135., st. 3. ZOO-a. Navedena se odredba prvenstveno odnosi na supstancijalna pravila poput pravnih učinaka i sl. Drugo, glede bitnih sastojaka vrijednosnog papira, ZOO ostaje dosljedan i kad je riječ o vrijednosnim papirima u obliku elektroničkog zapisa. Elektronički zapis koji ne sadržava sve bitne sastojke koje ZOO propisuje za vrijednosni papir, neće imati pravne učinke vrijednosnog papira. V. čl. 1136., st. 3. ZOO-a.

[71] Ta je mogućnost zasad korištena u pogledu tzv. prenosivih vrijednosnih papira u smislu čl. 3. Zakona o tržištu kapitala (dalje: ZTK), primjerice, dionica i obveznica. V. čl. 490., st. 1. ZTK-a.

[72] *Arg. ex* čl. 6 ZEI-a.

[73] Publicitetna funkcija posjeda u konceptu vrijednosnog papira sastoji se u tome da se posjednik isprave smatra zakonitim imateljem inkorporiranog prava dok se akvizitivna sastoji u tome da se pravo stječe stjecanjem isprave u posjed. V. o tome u Šafranko, Z. 2016. *op. cit*. u bilj. 16. str. 190 *et seq*. U pravu SAD-a koncept kontrole usvojen je kao funkcionalan ekvivalent za posjed. O tome v. *infra ad* 3.2.

Naposljetku, i poredbeni pravni sustavi u pravilu eksplicite određuju mogućnost izdavanja elektroničkih teretnica.[74]

Međutim, to što PZ, odnosno neki drugi propis hrvatskoga prava izričito ne propisuju mogućnost izdavanja elektroničke teretnice, ne znači samo po sebi da se time brani njezino izdavanje. Naime, PZ dopušta izdavanje elektroničkih teretnica u domeni ugovorne autonomije, međutim, u tom pogledu ostaju određene dvojbe glede pravnih učinaka takvih elektroničkih isprava.

S obzirom na to da PZ ne uvjetuje valjanost ugovora o prijevozu, izdavanjem teretnice, odnosno prijevozne isprave uopće,[75] nema smetnje da ugovorne strane ugovora o prijevozu, u okviru svoje autonomije, predvide izdavanje elektroničke teretnice, dogovore postupke u vezi s elektroničkom teretnicom te preuzmu određene obveze u vezi s elektroničkom teretnicom. Štoviše, nema smetnje da se ugovori primjena nekog postojećeg sustava, primjerice CMI pravila, *Bolero* ili *ESS-Databridge* sustava. Međutim, u takvim bi slučajevima trebalo voditi računa o djelovanju ugovora te granicama ugovorne autonomije.

Budući da je opće pravno načelo da ugovor stvara prava i obveze za ugovorne stranke,[76] valja uzeti da će ugovorna utanačenja u vezi s elektroničkom teretnicom vrijediti samo između izvornih ugovornih strana dok prema trećim osobama (potencijalnim stjecateljima elektroničkih teretnica) utanačenja u vezi s elektroničkom teretnicom, a samim tim i njezini pravni učinci, vrijede isključivo ako one prihvate takva utanačenja. Dakle, prema trećim osobama elektronička teretnica ne bi proizvodila pravne učinke *ipso iure*, čime se i temeljna svrha teretnice – neometano cirkuliranje u prometu – dovodi u pitanje.[77]

Drugi problem predstavljaju granice ugovorne autonomije – Ustav RH, prisilni propisi i moral društva.[78] U tom smislu, valja odmah napomenuti da su pravila ZOO-a o obliku vrijednosnog papira prisilne naravi, što u krajnjoj konzekvenci znači da se elektronička teretnica izdana u domeni ugovorne autonomije ne bi trebala smatrati vrijednosnim papirom.[79] Ugovorne strane bi eventualno mogle replicirati određene učinke vrijednosnih papira, primjerice, dužnost legitimacije prijenosom elektroničke teretnice pri preuzimanju tereta. S druge strane, s obzirom na to da se takva teretnica ne bi smatrala vrijednosnim papirom, dvojbeno je bi li se mogla na njezin prijenos primijeniti pravila o indosamentu ili pak isključivo o građanskopravnoj cesiji. Naposljetku, upitna bi bila i primjena pravila o dokaznoj snazi teretnice na elektroničku teretnicu izdanu u domeni ugovorne autonomije.

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[74] V. primjerice čl. 862., st. 1. CA; čl., 516 st. 2. HGB-a; čl. 263., st. 1. LNM-a; čl. 1., st. 5. COGSA'92. U svim navedenim slučajevima, izuzev u slučaju španjolskog LNM-a, predviđa se donošenje propisa kojima će se pitanja elektroničkih teretnica detaljno urediti.

[75] *Arg. ex* čl. 496. PZ-a.

[76] Čl. 336. ZOO-a.

[77] Suvremeni sustavi za elektroničke teretnice ovaj problem rješavaju multilateralnim ugovornim platformama kojima su potencijalni korisnici dužni pristupiti. U slučaju Bolero sustava to je *Bolero Rulebook*, u slučaju ESS-Databridge sustava to je *ESS-Databrige Services and Users Agreement* (DSUA), a u slučaju e-Title sustava to je *Electronic Title User Agreement*. Navedeni pravni okviri na temelju ugovorne autonomije izjednačavaju pravne učinke elektroničkih ekvivalenta koje predviđaju s pravnim učincima tradicionalne teretnice. Riječ je, naravno, o zatvorenim sustavima, a elektroničke teretnice izdane u sklopu tih sustava imaju pravne učinke samo prema osobama koje su pristupile sustavu.

[78] Čl. 2. ZOO-a.

[79] S obzirom na to da ZOO u odredbi čl. 1135., st. 2. eksplicite govori da vrijednosni papir može imati oblik elektroničkog zapisa samo kad je to predviđeno zakonom, valjalo bi uzeti da pitanje oblika vrijednosnog papira nikako nije u domeni ugovorne autonomije.

Moguće je, prema tome, zaključiti, da trenutačan sklop relevantnih propisa hrvatskog prava nije blagonaklon izdavanju elektroničke teretnice u okviru ugovorne autonomije. Iako PZ ne priječi takvo što, tako izdana elektronička teretnica iz formalnih se razloga ne može smatrati vrijednosnim papirom, pa ni teretnicom, što ostavlja čitav niz dvojbi, posebice glede modusa prijenosa prava te dokazne snage. U takvu pravnom okruženju pragmatično je držati se prijevoznih isprava koje PZ eksplicite uređuje.

3. Poredbenopravni osvrt na uređenje elektroničkih teretnica u pojedinim nacionalnim zakonodavstvima

Za razliku od hrvatskog prava koje ne predviđa elektroničku teretnicu, određena poredbena prava predviđaju izdavanje elektroničke teretnice. Dakako, rješenja poredbenih prava, u vezi s uvođenjem elektroničkih teretnica različita su.

Revizijom HGB-a iz 2013. uvedena je osnova za izdavanje elektroničkih ekvivalenata za teretnice u kontekstu njemačkog prava. HGB, međutim, ne uređuje detaljno problematiku elektroničkih teretnica (*elektronisches Konnossement*), nego samo u najosnovnijim crtama. Elektronički zapis koji ima jednake značajke kao teretnica smatrat će se ekvivalentom za teretnicu pod pretpostavkom da je moguće osigurati integritet elektroničkog zapisa te da ga je moguće autenticirati.[80] Detaljnu razradu problematike u vezi s izdavanjem, prezentacijom, vraćanjem i prijenosom elektroničkih teretnica te naknadnim izmjenama sadržaja elektroničkih teretnica HGB ostavlja podzakonskim propisima – uredbama koje je ovlašteno donijeti Ministarstvo pravosuđa nakon konzultacija s Ministarstvom unutarnjih poslova.[81] Predviđene uredbe još nisu donesene.

Gotovo identična situacija postoji i u britanskom pravu. Tamo je donošenjem britanskog *Communications Act* iz 2003. godine COGSA'92 doživjela manju reviziju usmjerenu na mogućnost izdavanja elektroničkih transportnih isprava, među ostalim, i teretnice. Tako revidirana COGSA'92 predviđa mogućnost donošenja uredaba za njezinu primjenu u slučajevima kad se elektronička komunikacijska mreža ili druga informacijska tehnologija primjenjuje radi izdavanja, indosiranja ili kojih drugih transakcija i dispozicija u vezi s transportnim dokumentima koji su njome obuhvaćeni.[82] I ovdje valja istaknuti da navedene uredbe do danas nisu donesene.[83]

Mogućnost izdavanja elektroničkih teretnica u Španjolskoj uvedena je revizijom LNM-a iz 2014. Pristup kakav je usvojio španjolski zakonodavac specifičan je s obzirom na to da je gotovo cjelokupni sustav elektroničkih teretnica zasnovan na pisanom ugovoru o izdavanju elektroničke teretnice koji krcatelj i prijevoznik moraju sklopiti prije početka krcanja.[84] Ugovor o izdavanju elektroničke teretnice, među ostalim, mora sadržavati: (1.) utanačenja kojima se određuje sustav za izdavanje i cirkulaciju elektroničke teretnice, (2.) odredbe o garanciji sigurnosti medija i metodi za postizanje neizmjenjivosti, odnosno integritetu sadržaja, (3.) odredbe o metodama koje će se primijeniti za identifikaciju imatelja elektroničke teretnice,

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80 Čl. 516., st. 2. HGB-a.

81 Čl. 516., st. 3. HGB-a.

82 Čl. 1., st. 5. COGSA'92.

83 Više o tome u Goldby, M. 2011. *Reforming the law to facilitate the use of electronic bills of lading in the United Kingdom*. http://www.uncitral.org/pdf/english/colloquia/EC/Legislating_to_facilitate_the_use_of_electronic_transferable_records_-_a_case_study_.pdf (preuzeto 15. ožujka 2017.) str. 3. *et seq*.

84 Čl. 262., st. 1. LNM-a.

(4.) utanačenja o metodama koje će se primijeniti za bilježenje isporuke robe te (5.) odredbe o dokazivanju prestanka valjanosti i gubitku pravnih učinaka elektroničke teretnice.[85] LNM elektroničkoj teretnici daje isti pravni učinak te za nju vrijedi isti pravni režim kao i za tradicionalnu teretnicu.[86]

Određena prava, poput južnokorejskog, u potpunosti su izgradila i uredila sustave elektroničkih teretnica koji funkcioniraju u praktičnoj primjeni. Tamo je prisutan sličan pristup kao i u njemačkom i britanskom pravu. Međutim, Južna Koreja donijela je propise kojima je problematika elektroničkih teretnica detaljno uređena i ne ostavlja mnogo dvojbi.

S druge strane, pravo SAD-a uređuje elektroničku teretnicu neizravno, višim rodnim pojmovima – *transferable records* i *documents of title*. Ondje su pitanja elektroničke teretnice riješena na najopćenitijoj razini, a detalji su prepušteni domeni autonomnog prava.

S obzirom na to da pravna uređenja elektroničkih teretnica u Južnoj Koreji i SAD-u predstavljaju cjelovita pravna rješenja, potpuno različita glede pravnog pristupa, u nastavku se o njima zasebno raspravlja.

3.1. Pravno uređenje elektroničke teretnice u južnokorejskom pravu

Mogućnost izdavanja elektroničke teretnice kao ekvivalenta za tradicionalnu teretnicu uvedena je revizijom korejskog CA-a iz 2007.[87] CA propisuje samo temeljna pitanja u vezi s mogućnošću izdavanja elektroničke teretnice dok cjelokupnu problematiku elektroničke teretnice detaljno uređuje PD 24415/2013.[88] CA se jasno opredjeljuje za tehnologiju koju će koristiti u vezi s elektroničkim teretnicama – elektronička se teretnica izdaje upisom u posebno predviđen registar koji vodi registarska agencija.[89] Registar u tom sustavu ima izuzetno bitnu ulogu jer se njime postižu publicitetna i akvizitivna funkcija koje se inače postižu posjedom papirnate isprave.[90] Registrom upravlja tzv. Registarska agencija na temelju koncesije Ministarstva pravosuđa.[91] Od 2008. godine poslove registarske agencije, u skladu s odredbama CA-a i PD 24415/2013, obavlja *Korea Trade Net* (KTNET).[92]

Prema CA-u, prijevoznik izdaje teretnicu na zahtjev krcatelja nakon primitka robe radi prijevoza.[93] Umjesto izdavanja tradicionalne teretnice prijevoznik može izdati elektroničku teretnicu ako je s tim suglasan krcatelj. U tom slučaju elektronička teretnica ima jednake pravne učinke kao i tradicionalna teretnica.[94] Elektronička teretnica mora sadržavati sve sastojke

[85] Čl. 262., st. 2. LNM-a.

[86] Čl. 264., LNM-a.

[87] Goldby, M. 2013. *op. cit.* u bilj. 2. str. 294.

[88] PD 24415/2013 razrađuje problematiku registarske agencije te pitanja izdavanja elektroničkih teretnica kod pojedinačnih ugovora o prijevozu i *charter* ugovora, prijenosa prava iz elektroničkih teretnica, procedure predaje robe na temelju elektroničke teretnice i zamjene elektroničke teretnice za tradicionalnu papirnatu teretnicu.

[89] Čl. 862., st. 1. CA.

[90] Na tehnologiji elektroničkog registra počiva, među ostalim, i *Bolero* sustav. Više o tome u Šafranko, Z. 2016. *op. cit.* u bilj. 6. str. 197.

[91] PD 24415/2013 detaljno uređuje statutarne, tehničke, financijske i ostale uvjete koje mora zadovoljiti registarska agencija da bi dobila ovlast za poslove registra, procedure za dobivanje odobrenja za rad od Ministarstva pravosuđa te nadzor nad radom registarske agencije i oduzimanje odobrenja za rad. V. čl. 3-5. i 14- 15. PD 24415/2013.

[92] Tako Goldby, M. 2013. *op. cit.* u bilj. 2. str. 294.

[93] Čl. 852., st. 1. CA-a.

[94] Čl. 862., st. 1. CA-a.

kao i tradicionalna papirnata teretnica.[95] Pravni učinci elektroničke teretnice nastaju kad ju prijevoznik elektronički potpiše i prenese na krcatelja.[96] Elektronička teretnica izdaje se tako da prijevoznik registarskoj agenciji pošalje zahtjev za izdavanje i registraciju u obliku elektroničkog dokumenta koji sadržava bitne sastojke elektroničke teretnice, mjesto primitka ili mjesto predaje robe te certificiran digitalni potpis. Uz navedeni dokument prijevoznik je dužan registarskoj agenciji poslati i elektronički dokument iz kojeg proizlazi suglasnost krcatelja s izdavanjem elektroničke teretnice, a prema potrebi može poslati i svoje standardne opće uvjete koji se odnose na prijevoz. Nakon zaprimanja takva zahtjeva prijevoznika registarska će agencija unijeti podatke u registar i krcatelju poslati elektroničku teretnicu u obliku elektroničkog dokumenta.[97]

Zakoniti imatelj elektroničke teretnice može disponirati elektroničkom teretnicom, a samim tim i zahtjevom za isporuku robe. I prijenos elektroničke teretnice obavlja se posredstvom registarske agencije. Dakle, za prijenos elektroničke teretnice potrebno je sastaviti zahtjev za prijenos u obliku elektroničkog dokumenta[98] te ga s elektroničkom teretnicom uputiti registarskoj agenciji. Nakon primitka zahtjeva za prijenos registarska će agencija unijeti podatke o prijenosu u registar, poslati elektroničku teretnicu stjecatelju te će o tome obavijestiti prenositelja.[99] Prijenos elektroničke teretnice na opisan način proizvodi jednake pravne učinke kao i prijenos papirnate teretnice indosamentom, a stjecatelj elektroničke teretnice stječe jednaka prava kakva bi stekao i indosatar glede papirnate teretnice.[100]

I isporuka robe na temelju elektroničke teretnice slična je propisanim procedurama izdavanja, odnosno prijenosa elektroničkih teretnica. Zakoniti imatelj elektroničke teretnice koji zahtijeva isporuku robe dužan je pripremiti elektronički dokument kojim zahtijeva isporuku pa ga zajedno s elektroničkom teretnicom poslati registarskoj agenciji koja će upisati da elektronička teretnica više nije prenosiva i zahtjev proslijediti prijevozniku. Nakon primitka zahtjeva prijevoznik utvrđuje je li podnositelj zahtjeva za isporuku zakoniti imatelj elektroničke teretnice te isporučuje robu o čemu obavještava registarsku agenciju. Nakon primitka obavijesti o isporuci robe od prijevoznika registarska agencija unosi zaključni upis, koji je pravno izjednačen s faktičnom predajom papirnate teretnice prijevozniku, te o tome obavještava prijevoznika.[101]

Osim detaljno razrađenih procedura u vezi s izdavanjem i prijenosom elektroničkih teretnica te postavljanjem zahtjeva za isporuku robe na temelju elektroničke teretnice, PD 24415/2013 uređuje i proceduru povezanu s izmjenom informacija u elektroničkoj teretnici te mogućnost zamjene elektroničke teretnice za tradicionalnu papirnatu teretnicu.[102]

Pravni okvir za elektroničke teretnice u Južnoj Koreji cjelovit je i funkcionira u praksi. Jasno je usvojen konkretan tehnološki sustav koji uključuje treću nezavisnu stranu - registarsku agenciju kao posrednika među svim subjektima koji sudjeluju u transakcijama u vezi s elektro-

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95 V. čl. 853., st. 1. u vezi s čl. 862., st. 2. CA-a.

96 V. čl. 862., st. 2. CA-a.

97 V. čl. 6. PD 24415/2013.

98 Taj elektronički dokument mora sadržavati podatke o elektroničkoj teretnici, podatke o stjecatelju i certificiran digitalni potpis zakonitog imatelja elektroničke teretnice.

99 V. čl. 8., st. 1. do st. 4. PD 24415/2013.

100 V. čl. 862., st. 4. CA-a.

101 V. čl. 10. i čl. 11. PD 24415/2013.

102 V. čl. 9. i čl. 12. PD 24415/2013.

ničkom teretnicom. U cijelom sustavu iznimno važnu ulogu ima i certificiran digitalni potpis koji služi kao funkcionalan ekvivalent za potpis izdavatelja, odnosno indosanta.

3.2. *Transferable records* i *documents of title* u pravu SAD-a

Američko pravo elektroničku teretnicu ne uređuje izravno kao što je to slučaj u južnokorejskom pravu, već to čini posredno, višim rodnim pojmovima – *transferable records* (prenosiv zapis) i *documents of title*.[103]

Institut prenosivog zapisa u američko pravo uvodi *Uniform Electronic Transactions Act* (dalje: UETA) iz 1999. Prenosiv zapis elektronički je zapis koji ima učinke vlastite mjenice (*note*) iz § 3. UCC-a, odnosno tradicijskog papira (*document of title*) iz § 7. UCC-a u pisanom obliku ako se izdavatelj elektroničkog zapisa s tim izričito suglasio.[104] Navedenim je generičkim pojmom u pravo SAD-a uveden elektronički ekvivalent za teretnice, skladišnice i vlastite mjenice. UETA ne uređuje detaljno problematiku elektroničkih zapisa kao što to, primjerice, čine CA i PD 24415/2013 glede elektroničke teretnice u južnokorejskom pravu. Ona se svodi na pravno izjednačavanje elektroničkih zapisa s njihovim papirnatim ekvivalentima, i to izjednačavanjem prava i obveza te općenito pravnog položaja izdavatelja i imatelja.[105]

Temeljni koncept na kojem počiva prenosiv zapis koncept je kontrole kojim se postiže funkcionalan ekvivalent za posjed. Osobu koja ima kontrolu nad prenosivim zapisom valjalo bi u tom smislu smatrati zakonitim imateljem.[106] UETA ne govori kako se kontrola ostvaruje. Ona je u tom pogledu tehnološki neutralna pa omogućuje primjenu različitih tehnologija, među ostalim, i trenutačno u praksi dominantnu tehnologiju registara.[107] Ipak, UETA postavlja tzv. standard pouzdanosti kojem tehnologija za uspostavu kontrole mora udovoljiti kako bi prenosiv zapis mogao proizvoditi pravne učinke jednake teretnici, skladišnici ili vlastitoj mjenici. Prema tome, sustav za ostvarivanje kontrole smatra se pouzdanim ako omogućava da se prenosiv zapis stvori, pohrani i prenese tako da: (1.) postoji jedan mjerodavni primjerak vrijednosnog papira u elektroničkom obliku koji je jedinstven, odrediv i nepromjenjiv, osim u slučajevima pod točkama 4., 5. i 6., (2.) da taj mjerodavni primjerak identificira osobu koja ima kontrolu kao (a) osoba kojoj je vrijednosni papir u elektroničkom obliku izdan, odnosno (b) ako taj mjerodavni primjerak pokazuje da je bilo prijenosa, posljednja osoba na koju je vrijednosni papir u elektroničkom obliku prenesen, (3.) da taj mjerodavni primjerak priopćava i održava osoba koja ostvaruje kontrolu ili njezin skrbnik, (4.) primjerci ili izmjene koje dodaju ili mijenjaju identificiranog imatelja mjerodavnog primjerka mogu biti sačinjeni jedino uz privolu osobe koja ostvaruje kontrolu, (5.) svaka preslika mjerodavnog primjerka mora biti na

[103] V., primjerice, *Federal Bill of Lading Act u 49 U.S. Code Chapter 801 Bills of Lading* koji ni u kojem pogledu ne ulazi u problematiku elektroničkih teretnica.

[104] V. § 16 (a) UETA.

[105] V. § 16 (d), (e) i (f) UETA.

[106] *Arg. ex* § 16 (b) UETA. U smislu § 1-201 (20) UCC imateljem (*holder*) smatra se: (a) osoba u čijem je posjedu *negotiable instrument* plativ donositelju ili naznačenoj osobi, (b) osoba u čijem je posjedu *negotiable document of title* ako se u njemu naznačena roba treba isporučiti donositelju ili po naredbi, (c) osoba koja ima kontrolu nad *negotiable electronic document of title.*

[107] U pravnoj se literaturi u tom smislu navode dva temeljna sustava – sustav digitalnog objekta (*token system*) i sustav registara (*registry system*). V. Boss, A. 2011. Becoming Operational: Electronic Registries and Transfer Of Right. *United Nations, Modern Law for Global Commerce: Proceedings of the Congress of the United Nations Commission on International Trade Law held on the Occasion of the Fortieth Session of the Commission Vienna*. 9-12 July 2007. New York. str. 306; Goldby, M. 2013. *op. cit.* u bilj. 2. str. 136.

očigledan način raspoznatljiva kao primjerak koji nije izvornik, (6.) svaka promjena mjerodavnog primjerka mora biti jasno raspoznatljiva kao autorizirana ili neautorizirana.[108]

Uvođenjem pravnog instituta prenosivog zapisa javila se i potreba za usklađenjem i modernizacijom određenih odredaba § 7. UCC-a. [109] S obzirom na to da je § 7. UCC-a izvorno pisan uzimajući u obzir teretnice i skladišnice u obliku (papirnate) pisane isprave, kako bi se osigurao adekvatan pravni okvir za razvoj elektroničkih teretnica i skladišnica te postojeća pravna rješenja uskladila sa zahtjevima suvremene trgovačke prakse, 2003. godine revidiran je § 7. UCC-a *Documents of title*.[110] Valja istaknuti da revidiran § 7. UCC-a ne govori izravno o elektroničkoj teretnici ili elektroničkoj skladišnici, već to čini višim rodnim pojmom - *documents of title* – koji, među ostalim, obuhvaća i teretnicu i skladišnicu, a može biti u elektroničkom obliku ili u obliku papirnate isprave.

Jedna od važnijih izmjena odnosi se na definiciju pojma *document of title*. Revizijom je *document of title* definiran kao zapis koji se u redovnoj poslovnoj praksi ili financiranju tretira kao adekvatan dokaz da je osoba koja je u posjedu tog zapisa ili nad njime ima kontrolu, ovlaštena primiti, kontrolirati, držati i raspolagati zapisom i robom na koju se zapis odnosi.[111] Revidiran pojam *document of title* polazi od termina „zapis" koji je neutralan u odnosu na medij. Zapis (*record*) pritom je definiran kao informacija upisana na materijalnom, elektroničkom ili drugom mediju i naknadno dostupna u razumljivom, odnosno perceptibilnom obliku.[112] *Documents of title*, koji je utemeljen na medijski neutralnom pojmu zapisa kao polaznoj točki, obuhvaća teretnice i skladišnice u elektroničkom obliku te u obliku papirnate isprave.[113]

I revidiran § 7. UCC-a usvaja koncept kontrole kao funkcionalnog ekvivalenta za posjed te ju uređuje na identičan način kao što to čini i UETA.[114] Osim određenja kontrole i postavljanja općih kriterija kojima mora udovoljiti sustav za ostvarivanje kontrole koji će se koristiti u praksi, UCC uređuje još dva pitanja koja nisu obuhvaćena UETA-om – mogućnost zamjene medija[115] i posebne odredbe za stjecanje elektroničkih vrijednosnih papira u dobroj vjeri (*due negotiation*).[116]

Američko pravo, kao i južnokorejsko, postavlja adekvatan pravni okvir koji omogućuje funkcioniranje elektroničkih teretnica u praksi. Ipak, pristup je potpuno drugačiji. Pritom je manje bitno što američko pravo ne uređuje elektroničku teretnicu izravno, već posredno, višim rodnim pojmovima. Temeljna je razlika u tome što američko pravo počiva na načelu tehnološke neutralnosti. Ono postavlja kontrolu kao funkcionalan ekvivalent za posjed, no ni u kojem pogledu ne ulazi u pitanje konkretne tehnologije kojom će se kontrola u praksi ostvariti. To *de facto* znači da su sve postojeće tehnologije, ali i one koje bi se tek mogle razviti, primje-

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[108] V. § 16 (c) UETA.

[109] Goldby, M. 2013. *op. cit.* u bilj. 2. str. 147.

[110] Kershen, D. L. 2003. Article 7: Documents of title – 2003 Developments. *Business Lawyer*. vol. 59 (4). str. 1629.

[111] *Ibid.* str. 1630.

[112] V. § 1-201 (31) i § 7-102 (10) UCC-a. Navedenom definicijom UCC neizravno usvaja načelo nediskriminacije medija i u prvi plan stavlja samu informaciju. Glede medija, bilo da je riječ o tradicionalnoj papirnatoj ispravi, elektroničkom zapisu ili kakvu drugom mediju, jedino je odlučno da može zadržati integritet informacije, odnosno da je takav da informaciju može naknadno reproducirati u obliku koji je razumljiv, odnosno kojim je moguće spoznati informaciju.

[113] Kershen, D. L. 2003. *op. cit.* u bilj. 110. str. 1630.

[114] *Cf.* § 7-106 UCC i 16 (b) i (c) UETA.

[115] V. § 7-105 UCC. Navedena odredba uređuje procedure za zamjenu elektroničkog *documents of title* u papirnati i *vice versa*.

[116] V. § 7-501 (b) UCC.

njive ako udovoljavaju minimalnim kriterijima, odnosno propisanom standardu pouzdanosti. Takva otvorenost i prilagodljivost američkog prava novim tehnologijama svakako predstavlja prednost, međutim, kad se postavi pitanje pravne sigurnosti prednost bi ipak trebalo dati južnokorejskom pristupu koji se decidirano opredijelio za jednu konkretnu tehnologiju koja je pravno uređena u detalje.

4. O uvođenju elektroničke teretnice u hrvatsko pravo *de lege ferenda*

Poredbeni prikaz južnokorejskog i američkog pravnog uređenja elektroničke teretnice navodi na zaključak da su moguća barem dva različita pristupa koja bi mogla poslužiti kao uzor za uvođenje elektroničke teretnice u hrvatsko pravo *de lege ferenda*. Uzme li se pritom u obzir specifičnost hrvatskog prava koje pitanje teretnice uređuje na posebnoj razini odredbama PZ-a te na općoj razini odredbama ZOO-a o vrijednosnim papirima, mogućnosti uvođenja elektroničke teretnice u hrvatsko pravo praktički se udvostručuju.

Pri uvođenju elektroničke teretnice u hrvatsko pravo trebalo bi prije svega voditi računa o postojećem pravnom okviru te nastojati da se, uvođenjem novog pravnog instituta, taj pravni okvir ne remeti u većoj mjeri. U tom smislu svakako treba uzeti u obzir odredbe ZOO-a o izdavanju vrijednosnih papira u obliku elektroničkih zapisa, kao i postojeća praktična iskustva s nematerijaliziranim dionicama i obveznicama. Uz to, potrebno je voditi računa o tome da se: (1.) pojam elektroničke teretnice na adekvatan način uvede u hrvatsko pravo te da mu se dodijele pravni učinci kakve ima i tradicionalna teretnica, (2.) na odgovarajući način uredi pitanje funkcionalnog ekvivalenta za pisani oblik, izvornost i jedinstvenost poruke, vlastoručni potpis i posjed, (3.) uzmu u obzir općeusvojena načela koja vrijede u svim poredbenim pravima, a osobito ona koja se odnose na stranačku autonomiju.

4.1. Tehnološki neutralna terminologija ili elektronički ekvivalent

4.1.1. O redefiniranju pojmova vrijednosni papir i teretnica

Jedno od mogućih rješenja za uvođenje elektroničke teretnice u hrvatsko pravo sastoji se u redefiniciji pozitivnopravnog pojma vrijednosnog papira u tehnološki neutralnom smislu te uvođenju tehnološki neutralnog jezika primjenjivog i na materijalno (papirnato) i na elektroničko okruženje. Navedeni pristup, među ostalim, podrazumijeva konceptualnu izmjenu pojma vrijednosnog papira kako je to učinjeno glede pojma *document of title* u kontekstu UCC-a.[117] U tom smislu, umjesto definiranja vrijednosnog papira kao isprave i omogućavanja izdavanja vrijednosnog papira u obliku elektroničkog zapisa trebalo bi vrijednosni papir definirati kao zapis uz dodatno određenje pojma zapis.[118] Ne ulazeći ovdje dublje u raspravu o mogućim implikacijama takva pristupa, valja istaknuti da bi intervencije u odredbe ZOO-a u tom slučaju

[117] V. *supra ad* 3.2.

[118] U tom smislu sadašnji čl. 1135. ZOO-a mogao bi *de lege ferenda* glasiti: „(1.) Vrijednosni je papir zapis kojim se njegov izdavatelj obvezuje ispuniti obvezu iz tog zapisa njegovu zakonitom imatelju. (2.) Zapisom u smislu stavka 1. ovog članka smatra se izjava volje izdavatelja upisana na materijalnom mediju (papiru) ili elektroničkom (ili drugom) mediju tako da je trajno dostupna u razumljivu obliku." Takav je pristup donekle primijenjen u pravu SAD-a, doduše ne konkretno glede vrijednosnih papira. UETA i UCC definiraju pojam zapis kao neutralan pojam stavljajući u prvi plan ne sam medij, već temeljne karakteristike zapisa. U biti, riječ je o informaciji pohranjenoj na određenom mediju (papirnatom ili elektroničkom) koji omogućuje trajan, sukcesivan pristup informaciji u obliku koji je čitljiv, razumljiv ili općenito perceptibilan čovjeku. U tom smislu *cf.* § 1-201 (30) UCC i § 2 (13) UETA.

bile opsežne te da bi sve odredbe o vrijednosnim papirima trebalo uskladiti s tehnološki neutralnim pojmom vrijednosnog papira.[119] Takvim bi se zahvatom, međutim, u hrvatsko pravo uvele ne samo elektroničke teretnice nego i sve ostale vrste vrijednosnih papira u elektroničkom obliku.

Na jednak način moguće je redefinirati i sam pojam teretnice u okviru PZ-a. Već je navedeno da PZ ne sadrži izričitu definiciju teretnice,[120] no za potrebe ilustracije kako bi tehnološki neutralna definicija teretnice glasila, moguće je poslužiti se definicijom sadržanom u Hamburškim pravilima. Tako bi se teretnica mogla definirati kao zapis koji dokazuje ugovor o prijevozu robe morem i prijevoznikovo preuzimanje ili ukrcavanje robe i kojim se prijevoznik obvezuje isporučiti robu imatelju tog zapisa.

U navedenim slučajevima, dakle, ako bi se interveniralo u pojmove vrijednosnog papira ili teretnice tako da ih se odredi kao tehnološki neutralne pojmove, ne bi bilo potrebno donositi posebne odredbe kojima se izjednačuju pravni učinci elektroničke forme s pisanom jer bi pravni učinci koji se odnose na teretnicu vrijedili i za elektroničku i za papirnatu teretnicu.

4.1.2. O uvođenju elektroničkih ekvivalenata za vrijednosne papire i teretnice

Drugi pristup temelji se na čl. 1135., st. 2. ZOO-a, dakle na donošenju novih posebnih zakona ili reviziji postojećih kojima bi se omogućilo izdavanje vrijednosnih papira općenito ili pak pojedinih vrsta vrijednosnih papira, konkretno, teretnice u obliku elektroničkih zapisa.

Ako bi se išlo tomu da se u hrvatsko pravo uvede elektronički ekvivalent za vrijednosne papire općenito, kao višeg generičkog pojma koji obuhvaća teretnice, skladišnice, mjenice i sl., valjalo bi se svakako ugledati na američka rješenja u pogledu pravnog instituta prenosivog zapisa.[121] U tom je smislu moguće donijeti poseban zakon kojim će se uvesti i urediti pravni institut elektroničkog vrijednosnog zapisa kao elektroničkog ekvivalenta za vrijednosne papire općenito. Ovdje valja napomenuti da je u sklopu UNCITRAL-a 13. srpnja 2017. usvojen Model zakon o elektroničkim prenosivim zapisima čija je svrha pravno omogućiti primjenu elektroničkih prenosivih zapisa kao funkcionalnih ekvivalenata za teretnice, skladišnice te vlastite i trasirane mjenice.[122] U tom pogledu, ako bi hrvatski zakonodavac krenuo putem uvođenja elektroničkog ekvivalenta za vrijednosne papire uopće, zakonodavni bi uzor prvenstveno trebalo potražiti u Model zakonu koji, s jedne strane, sadrži suvremena rješenja, a s druge, predstavlja instrument unifikacije prava.

Druga je mogućnost revizijom PZ-a unijeti u njega odredbu kojom se predviđa izdavanje elektroničkih teretnica kao ekvivalenata za papirnate teretnice. Takav je pristup prisutan u južnokorejskom, njemačkom, britanskom i španjolskom pravu.[123] Osim toga, taj je pristup u potpunosti usklađen s odredbama 1135., st. 2. ZOO-a. U tom bi slučaju PZ predstavljao poseban zakon koji uređuje teretnice u obliku elektroničkog zapisa pa bi se takva elektronička teretnica, među ostalim, smatrala vrijednosnim papirom.

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[119] Detaljnije u Šafranko, Z. 2016. *op. cit.* u bilj. 6. str. 243.

[120] V. *supra ad* 2.1.

[121] V. § 16 UETA.

[122] V. objavu za medije dostupnu na: http://www.unis.unvienna.org/unis/en/pressrels/2017/unisl251.html, na dan 22. srpnja 2017. Za UNCITRAL-ov Model zakon o elektroničkim prenosivim zapisima detaljno u Šafranko, Z. 2016. *op. cit.* u bilj. 6. V. i pripremne dokumente IV. radne skupine (Elektronička trgovina) dostupne na: http://www.uncitral.org/uncitral/en/commission/working_groups/4Electronic_Commerce.html, na dan 19. travnja 2017.

[123] V. čl. 862., st. 1. CA-a, čl. 516., st. 2. HGB-a, čl. 1., st. 5. COGSA'92, čl. 262., st. 1 LNM-a.

U navedenim slučajevima uvođenja elektroničkih ekvivalenata bilo za vrijednosni papir općenito ili isključivo za teretnicu u okviru PZ-a, izrijekom je potrebno elektroničkom ekvivalentu dodijeliti pravne učinke papirnatog vrijednosnog papira, odnosno teretnice.[124] To je potrebno jer se u tom slučaju pravni učinci teretnice neće neposredno odnositi na elektroničku teretnicu, i to zato što elektronička teretnica nije obuhvaćena pojmom teretnice, već predstavlja repliku teretnice u elektroničkom okruženju.[125]

4.2. Pitanje tehnološke opredijeljenosti

Drugo pitanje o kojem bi se trebalo voditi računa stav je koji će mjerodavan propis zauzeti prema tehnologiji. Jasno je da elektronička teretnica može zaživjeti u praksi isključivo uporabom određene tehnologije. Naposljetku, i tradicionalna se teretnica u praktičnom životu ostvaruje tehnologijom pisane riječi na papiru. Poredbenopravni sustavi i u tom pogledu nude dva različita rješenja.

Tehnološki neutralan pristup ostavlja mogućnost izbora među različitim tehnologijama kojima je moguće ostvariti funkcionalan ekvivalent. Takav se pristup ne opredjeljuje za konkretnu tehnologiju, nego propisuje minimalne kriterije kojima određena tehnologija treba udovoljiti – tzv. standard pouzdanosti - da bi pravni učinci elektroničkih prenosivih zapisa bili izjednačeni s pravnim učincima vrijednosnih papira u smislu pisanih isprava. Tehnološki neutralan pristup usvojen je u pravu SAD-a, konkretno odredbama UETA-e i UCC-a, španjolskom LNM-u te Roterdamskim pravilima. Ovdje valja pridodati i odredbu čl. 1135., st. 2. hrvatskog ZOO-a kojom se načelno dopušta izdavanje vrijednosnih papira u obliku elektroničkog zapisa, no detaljnije uređenje, među ostalim, i pitanje tehnologije prepušta se posebnim propisima.[126] Prednost ovog pristupa sastoji se u prilagodljivosti prava tehnološkom razvoju i novim poslovnim praksama.

Tehnološki određen pristup izričito se opredjeljuje za konkretnu tehnologiju kojom će se ostvariti funkcionalan ekvivalent. U takvim slučajevima pravni su izvori uglavnom eksplicite opredijeljeni za sustav elektroničkih registara. Tako se, primjerice, južnokorejski CA i PD 24415/2013 izričito opredjeljuju za sustav registara i primjenu certificiranih digitalnih potpisa. Ovakvo vezanje zakonom za određenu tehnologiju stvara nefleksibilan sustav koji neizravno priječi razvoj i praktičnu primjenu novih tehnologija. Ipak, određenost tehnologije omogućava detaljno pravno uređenje svih procedura pa u tom smislu ostaje manje prostora za pravnu neizvjesnost.

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[124] Tu je riječ o jednom od temeljnih načela prava elektroničke trgovine – načelu nediskriminacije medija. Navedenim se načelom nastoji postići da se elektronička teretnica ne diskriminira u odnosu na tradicionalnu papirnatu teretnicu, odnosno da joj se ne odriču pravni učinci isključivo zato što je izdana u elektroničkom obliku. Dikcija ovog načela u poredbenom pravu različita je, no svrha je uvijek elektroničkoj teretnici priznati sve pravne učinke koje ima i papirnata teretnica. V. u tom smislu čl. 862., st. 1. CA-a i čl. 264. LNM-a.

[125] *Cf. supra ad* 4.1.1. kad se temeljni pojmovi redefiniraju korištenjem tehnološki neutralne terminologije.

[126] Prema čl. 1135., st. 2. ZOO-a, vrijednosni papir može imati oblik elektroničkog zapisa određenog zakonom. ZOO, prema tome, iako načelno predviđa mogućnost izdavanja pojedinih vrsta vrijednosnih papira u obliku elektroničkog zapisa, uopće ne ulazi u problematiku konkretnih tehnologija, već to pitanje ostavlja uređenju posebnim zakonom. U kontekstu takva pristupa ZTK se u čl. 488., st. 1. izričito opredijelio za sustav registara – tzv. središnji depozitorij kad je riječ o nematerijaliziranim vrijednosnim papirima.

4.3. Ugovorna autonomija

Treća okolnost koju bi trebalo imati u vidu pri uvođenju elektroničke teretnice u hrvatsko pravo značenje je ugovorne autonomije u kontekstu izdavanja elektroničkih teretnica. U tom su pogledu poredbena prava istovjetna. Kao opće načelo prihvaćen je stav da se elektronička teretnica može izdati umjesto tradicionalne isključivo onda kad se tako sporazumiju prijevoznik i krcatelj.[127] To donekle odstupa od temeljnog pravila koje vrijedi za klasičnu teretnicu prema kojem za prijevoznika postoji obveza izdavanja teretnice ako je krcatelj zahtijeva.

Autonomija pri izboru medija proteže se i na kasnije imatelje teretnice, odnosno elektroničke teretnice, dakle, treće osobe koje inicijalno nisu imale utjecaj na izbor elektroničke, odnosno tradicionalne teretnice. To se omogućuje davanjem imatelju teretnice prava da od prijevoznika naknadno zahtijeva zamjenu medija, odnosno zamjenu elektroničke teretnice za papirnatu i *vice versa*.[128]

Dakle, Hrvatska bi se, ako i kad će uvoditi elektroničku teretnicu, svakako trebala voditi ovim dvama pravilima glede inicijalnog i naknadnog izbora medija s obzirom na to da je riječ o općeusvojenim standardima u poredbenom i međunarodnom pravu.

5. Zaključak

Republika Hrvatska trenutno ne poznaje institut elektroničke teretnice, a dvojbeno je može li se uopće i predvidjeti izdavanje elektroničkog ekvivalenta za teretnicu u okviru ugovorne autonomije. Odgovor na to postoji li trenutačno potreba za pravnim uređenjem elektroničke teretnice valja potražiti u praksi. Pritom nije bez značenja činjenica da će se odredbe PZ-a općenito, a samim tim i one o teretnici, primjenjivati uglavnom u domaćem prijevozu. Ipak, to ne bi smjelo obeshrabriti zakonodavca da modernizira pomorsko pravo i uvede institut elektroničke teretnice. Taj je trend posljednjih godina vidljiv u sve više poredbenih prava. Naposljetku, činjenica da PZ uređuje tradicionalnu (papirnatu) teretnicu, dovoljan je argument za uvođenje elektroničke teretnice u hrvatsko pravo.

Poredbena prava nude različita rješenja koja je moguće uzeti kao model za uvođenje elektroničke teretnice u hrvatsko pravo. Međutim, pri izboru tih rješenja treba prije svega imati u vidu već postojeću pravnu infrastrukturu u Hrvatskoj, prvenstveno odredbu čl. 1135., st. 2. ZOO-a, te činjenicu da na temelju navedene odredbe hrvatsko pravo *de lege lata* uređuje tzv. nematerijalizirane vrijednosne papire (dionice i obveznice) čija primjena u praksi funkcionira bez poteškoća.

U tom kontekstu, kao najprihvatljivije rješenje za uvođenje elektroničke teretnice u hrvatsko pravo nameće se uvođenje elektroničkog ekvivalenta za teretnicu (elektroničke teretnice) odredbama PZ-a. Dakle, trebalo bi se prikloniti pristupu koji je zastupljen u južnokorejskom, njemačkom, britanskom i španjolskom pravu. Takvo je rješenje kompatibilno s postojećim pravnim sustavom u Hrvatskoj.

Glede tehnološke opredijeljenosti, odnosno izbora tehnologija za funkcioniranje elektroničke teretnice u praksi, trebalo bi se voditi računa o tome da se odredbama PZ-a nikako ne bi smjelo opredijeliti za konkretnu tehnologiju kao što to čini južnokorejski CA u pogledu tehnologije registara. PZ bi eventualno trebao sadržavati opći standard pouzdanosti, i to po uzoru na Roterdamska pravila ili Model zakon o elektroničkim prenosivim zapisima. Detaljnije

[127] U tom smislu v., primjerice, čl. 262., st. 1. LNM-a, 862. st. 1. CA-a, čl. 8. (a) Roterdamskih pravila.

[128] *Cf.* čl. 263. i čl. 265. LNM-a, čl. 12. PD 24415/2013, § 7-105 UCC i čl. 10. Roterdamskih pravila.

odredbe o tehnologiji, koje bi omogućile i praktičnu primjenu elektroničke teretnice, trebalo bi prepustiti uređenju podzakonskim aktima s obzirom na to da su procedure u vezi s njihovim donošenjem i izmjenama mnogo jednostavnije, što ih u krajnjem slučaju čini mnogo prilagodljivijima najsuvremenijem tehnološkom razvoju.

Summa summarum, elektroničku teretnicu u hrvatsko pravo trebalo bi uvesti u dva koraka. Prvo, pri sljedećoj reviziji PZ-a trebalo bi predvidjeti mogućnost izdavanja elektroničke teretnice te njezine pravne učinke i dokaznu snagu izjednačiti s onima koje ima tradicionalna (papirnata teretnica) pod uvjetom: (1.) da sadrži sve bitne sastojke teretnice i (2.) da je primijenjena pouzdana metoda koja omogućuje identifikaciju određenog elektroničkog zapisa koji čini elektroničku teretnicu, očuvanje cjelovitosti informacije sadržane u elektroničkom zapisu te da je nad tim elektroničkim zapisom moguće uspostaviti kontrolu. Drugo, kad se u praksi pokaže potreba za elektroničkom teretnicom, trebalo bi donijeti podzakonski akt koji detaljno uređuje procedure u vezi s izdavanjem i prijenosom elektroničke teretnice, preuzimanjem robe, zamjenom medija i sl.

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SUMMARY

The analysis of the provisions of Croatian Maritime Code suggests that current Croatian maritime law doesn't regulate the possibility of issuing electronic bills of lading. In that sense, it seems that the bill of lading as a negotiable document of title remains inseparably tied to the traditional paper-based document.

The paper analyzes the current regulatory framework for the bills of lading in Croatia, provided by the Maritime Code and the Obligations Act. The arguments confirming the thesis that Croatian law does not provide the institute of electronic bill of lading are offered and explained. It is further discussed whether the Croatian law allows the possibility of issuing electronic bills of lading under the principle of freedom of contract. Additionally, the paper analyzes the legal solutions regarding electronic bills of lading in comparative law, particularly in the United States and South Korea. In that context, the various legislative approaches are discussed. Furthermore, possible models of introduction of electronic bill of lading into the Croatian law are discussed. In this regard, consideration is given to the possibility of redefining the terms of document of title and bill of lading through introduction of the technologically neutral terminology. On the other hand, the introduction of the electronic equivalents for document of title and bill of lading in compliance with the existing provision of Article 1135, paragraph 2 of the Obligations Act is considered. Paper also discusses the necessary legislative interventions in the case of both approaches. Finally, the assessment of the most appropriate legal approach for the introduction of electronic bill of lading into Croatian law is given.

The aim of the paper is to discuss the possibilities of modernizing Croatian maritime law in the context of progressive technology development and the latest legislative developments in the comparative legal systems with an aim to give concrete legislative proposals regarding the introduction of electronic bills of lading to Croatian law de lege ferenda.

Key words: *electronic transport documents, bill of lading, electronic bill of lading, documents of title, Maritime Code, modernization of the Croatian maritime law*

II.

NOVI PROBLEMI I IZAZOVI U POMORSKOM PRIJEVOZU I POMORSKOM OSIGURANJU

NEW ISSUES AND CHALLENGES IN MARITIME TRANSPORT AND INSURANCE

FREIGHT INSURANCE IN CHARTER PARTIES – SOLUTIONS PROVIDED BY NATIONAL LEGISLATION AND INSTITUTE CLAUSES

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SUMMARY

Various interests of ship operators and charterers can be a subject of insurance in the transport of cargo by sea. In charter parties, as a type of contract on transport of goods by sea, a ship operator which is an exponent of maritime venture, in addition to many rights and obligations also has a justified material and legal interest in hull and machinery insurance and liability insurance. In addition to hull and machinery insurance and liability insurance the ship operator also has a material interest in freight insurance. The importance of this type of insurance is especially due to the role of the freight, given the fact that the freight is the main economic purpose of charter parties, i.e. the economic price for the exploitation of a ship. Freight insurance is one of the forms of marine insurance in which the subject is the insurance of freight exposed to risks from usual marine risks as well as to possible war risks and other risks. During the charter period, the ship operator can be prevented in executing their contractual obligation of transport of cargo and collection of freight for a variety of reasons, and therefore the ship operators have an interest in freight insurance with regard to such risks. Ship operators also have insurable interest when they have well-founded expectations for income from future ship operation. For example, when entering into time charter, there is a possibility that the ship operator will suffer a loss of hire, determined per unit of time, because the ship was out of operation for a certain period of time due to a need to effect repairs of suffered damage; therefore, interest of the ship operator from charter party in freight insurance is logical. By taking this fact into account, the primary goal of this paper is the study and the analysis of all relevant legal issues regarding the freight insurance in charter parties within the Croatian legal framework, other national legislations and provisions of the freight insurance institute clauses. Therefore, the paper primarily determines the basic characteristics of charter parties and the term freight itself. Furthermore, it determines the concept of freight insurance and explains the purpose of economic interests for the freight insurance of all charter party beneficiaries. The basic methods of interest insurance regarding freight are presented – the freight insurance being part of the hull and machinery insurance or a separate freight insurance. A detailed analysis of the Croatian Maritime Code provisions regarding freight insurance is carried out, as well as the analysis and comparison with the provisions of other legal systems (the English Marine Insurance Act, 1906; the Australian Marine Insurance Act, 1909; the Norwegian Insurance Contracts Act, 1986) and separate institute cargo clauses against maritime perils, war risks and strike risks. The analysis of the institute freight clauses includes the Disbursement Warranty, which governs the possibility of additional insurances such as the freight insurance in institute hull

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clauses. The paper reviews the loss of hire insurance, that is characteristics of charter hire insurance in time charters. The conclusion summarizes the most important freight insurance provisions of the Maritime Code, other legal systems' provisions and institute freight clauses in the standardization of these types of charter party insurances. The quality of freight insurance standardization in terms of legal provisions and institute clauses is also explained.

Key words: *freight, insurance, the Maritime Code, the freight insurance regulations in other legal systems, the English Marine Insurance Act, the Australian Marine Insurance Act, the Norwegian Insurance Contracts Act, Institute Time Clauses – Freight, Institute Voyage Clauses – Freight, Institute War and Strikes Clauses – Freight*

Introduction

The subject matter of insurance in the contracts for carriage of goods by sea may be different interests of ship operators[1] and charterers, such as material goods (ship, cargo), persons, legal relations (claims, debits, disbursements, costs, liability, and loss of profit). In charter parties, which are contracts for carriage of goods by sea, the ship operator which performs the carriage of goods has, apart from responsibilities and obligations, materially and legally justified interest for hull and machinery insurance[2] and liability insurance[3]. In addition to these two insurances, the ship operator has an ownership interest to insure other vessels' interests, one of them being the freight insurance.

Although numerous papers on maritime law indicate the existence of a scientific interest in certain aspects of marine insurance, it is clear from previous surveys that the topic of the freight insurance in charter parties has not been sufficiently represented. Therefore, we aim to research thoroughly all the relevant legal issues of the freight insurance in the contract concerned by linking its legislative and autonomous legal sources in one place.

The primary goal of this paper is the research and analysis of all relevant legal issues regarding the freight insurance in specified contracts, within the national legislation, foreign legislations and provisions of the institute freight clauses. Therefore, the paper primarily de-

[1] The paper uses the term ship operator, which is commonly used in commerce, as opposed to the term carrier, which is used in the Croatian Maritime Code (*Official Gazette of the Republic of Croatia*, issues no. 181/04, 76/07, 146/08, 61/11, 56/13, 26/15), and the terms owner or ship owner, which are standardly used in charter party documents (visit www.bimco.com for document samples) (signed in 2 April 2017).
Broadly speaking, the ship operator undertakes a maritime venture (see Article 5, paragraph 32 of the Maritime Code), while the carrier is just a party to the contract for carriage of goods by sea (see Article 5, paragraph 40 of the Maritime Code). By concluding the contract of carriage of goods by sea, the ship operator becomes a carrier. The carrier may be the owner of the ship and in that sense is referred to as a ship owner.

[2] In hull and machinery insurance the subject of insurance is a vessel or some other waterborne craft. Generally, the ship operator has a justified legal interest to insure the hull and machinery. The hull and machinery insurance has been established by determining specific conditions for the insurance of vessels. The most prominent standard conditions are 1983 and 1995 Institute Clauses Hulls (Voyage and Time), the latest one being 2003 International Hull Clauses. For more details on hull and machinery insurance see Pavić, D. (2005), Međunarodne klauzule za osiguranje brodova (2003.), *Naše more*, Dubrovnik, 52 (3-4), pp. 173-181; Ivković, Đ. (1971), *Pomorsko osiguranje (kasko)*, 2nd part, Piran-Portorož, Višja pomorska škola.

[3] In Protection and Indemnity Insurance the subject of the insurance is the ship operator's liability to third parties for damage. Thus the insurerer protects its interests wherein the damage would have to be indemnified. There are three possible types of liabilities: contractual liability, third party liability and liability in respect to crew members. On liability insurances see Medić, M. (2010), Osiguranje odgovornosti brodara putem P&I klubova, *Praktični menadžment*, Zagreb, 1(1), pp. 62-68; Güres, Ő. (2016), *Marine Insurance Law*, 2nd ed, London, Taylor & Francis Ltd.; Hodges, S. (1999), *Cases and Materials on Marine Insurance Law*, London, Taylor & Francis Ltd.

termines the fundamental features of the charter parties, the main rights and obligations of the parties involved – the ship operator and the charterer, and it also defines the term freight and explains the ways of charging.

In addition, the concept of freight insurance is defined and the economic interest for its insurance explained. The basic methods of securing interests regarding the freight are specified as well – the freight is insured within the hull and machinery insurance or the cargo insurance, or by signing a separate, i.e. autonomous contract on the freight insurance. The paper analyses in detail the freight insurance provisions regarding the Maritime Code and specifically addresses the loss of hire due to the total loss of cargo and determines the indemnity rate. The provisions of some other legal systems**,** English *Marine Insurance Act*, *1906*; the Australian *Marine Insurance Act*, *1909* and the Norwegian *Insurance Contracts Act*, *1986*, are also analysed, as well as institute freight clauses against maritime perils, institute war and strike clauses and the *Disbursement Warranty Clause* in institute hull clauses. The paper deals with the loss of hire insurance, i.e. the characteristics of the hire insurance in time charter parties. The conclusion refers to the most important freight insurance provisions of the Maritime Code, provisions of the legal systems compared, and institute freight clauses in the standardization of the freight insurance in charter parties. The quality of the freight insurance standardization in terms of legislation and institute clauses is also explained.

1. The main characteristics of charter parties

For the purpose of further study it will be helpful to determine the main characteristics of charter parties and their locus in contracts of employment of sea going vessels; to define the term, rights and obligations of contract parties, placing emphasis on liability with regards to the payment of freight charges, i.e. a right to claim.

Maritime law practice has created numerous types of contracts for all sorts and means of economic exploitation of merchant ships, which are commonly known as *contracts of employment of sea going vessels*. In addition to highlighting the legal and economic importance of these contracts, as well as the complexity of legal regulations regarding the subject matter,[4] it is common practice that introductory remarks deal with the topic of classification of contracts of employment of sea going vessels.[5] For example, the Maritime Code differentiates between two basic groups of contracts for the employment of sea going vessels (see Article 442 of the Maritime Code). In some of these contracts the subject is thetype of shipping service, such as: carriage of goods by sea, carriage of passengers by sea, towing, etc. The main purpose of such classification of contracts for the employment of sea going vessels is "to establish the essential type of contract which regulates the carriage of goods by sea"[6]. It is this contract that the Maritime Code pays special attention to, and it divides all contracts of carriage of goods by sea into: a) charter parties, that is voyage charters and time charters, and b) contracts of carriage (Article 448 of the Maritime Code).[7] Hence, we can determine the existence of different forms of con-

[4] See Jakaša, B. (1980), *Sistem plovidbenog prava Jugoslavije, Ugovori o iskorištavanju brodova*, book 3, vol. 1, Zagreb, Informator, p. 1.

[5] Ivošević, B. V. (1984), *Brodarski ugovor na vrijeme za cijeli brod (time charter)*, Kotor, Institut za pomorstvo i turizam, p. 8; Chorley, R. S. T. – Giles, O. Ch. (1965), *Shipping Law*, 5th ed, London, LLP, p. 92.

[6] Jakaša, B., *op. cit.* (fn. 4), p. 13.

[7] Similar division of carriage of goods by sea is present in other legal systems as well. For example, foreign legislation distinguishes three types of charter parties (voyage, time and bareboat/demise charter) and the bill of

tracts of carriage of goods by sea, where charter parties represent just one form of contractual relations and can be observed independently of other contracts of carriage of goods by sea.

When it comes to determining the term of charter parties, it should be emphasized that this is a contract by which the ship operator assumes responsibility for carriage of goods and agrees to lease a whole vessel or part of it.[8] Therefore, charter parties are associated with the requirement of finding and hiring a vessel for the carriage of goods by sea.[9] Such contracts require from the charterer to pay freight charges to the ship operator for the carriage of goods or use of a vessel for the carriage of goods.

2. Liability for payment of freight charges/the right of freight charging

The charterer is primarily liable for the payment of freight. The freight, as a part of the contract of carriage of goods by sea, is the amount of money paid by the charterer to the ship operator for the carriage of goods, or for used vessel space. The liability of freight payment is present in all forms of contract of carriage of goods by sea, depending on the type of contract. In maritime practice there is a variety of different freight categories. The freight stipulated in the voyage charter party is known as the *voyage charter freight*, the one in the time charter party as *time charter hire* or the *hire freight,* whereas the freight in the bill of lading contract is known as the *Bill of Lading Freight*.[10] Charter parties use different terms for charges which are the liability of the charterer. In Croatian language, the term freight comprises all its forms, i.e. it is not limited only to the liability of the charterer which is stipulated in the voyage charter.

Apart from being the main charterer's obligation, the freight is also the basic right of the ship operator. The freight covers all the expenses of the ship operator during the carriage of goods (bunkering costs, laytime, crew costs, etc.)[11]. In other words, the ship operator will try to bear the expenses of the operation of the vessel and, at the same time, make profit that will depend on numerous factors. Rate agreement and freight rates in international trade are primarily affected by the situation in the shipping market.

It is necessary to emphasize the various models of freight calculation, since the freight can be calculated per unit of cargo, per unit of time (time freight) and as a lump-sum (lump-sum freight). When the cargo determines the amount of freight payable, the quantity can be measured in several ways: by weight, volume of cargo, or by number of packages. If the type of cargo is not specified or if it is cargo with different volume in relation to weight and vice versa, the freight is calculated as „weight or measurement in owner's option". It is also possible that no cargo is loaded or it isn't loaded as per contract, and if there is no termination of charter, the freight is paid for the pre-agreed quantity commitment under a service contract. The amount of cargo which is not supplied is considered dead freight.[12] The situation with time freight is different because the freight is calculated regardless of quality, quantity or the cargo volume. The period of vessel employment is the crucial condition for calculating the freight in time

lading contract. For further details see Tetley, W. (2002), *International Maritime and Admiralty Law*, Québec, International Shipping Publication, pp. 123-128.

8 Pavić, D. (2006), *Pomorsko imovinsko pravo*, Split, Književni krug, p. 101.

9 Ivošević, B. V., *op. cit*., (fn 5), p. 11.

10 Pavić, D. (2012), *Pomorsko osiguranje, pravo i praksa*, Split, Književni krug, p. 413.

11 *Ibidem*, p. 413; Pavić, D. (2009), *Ugovorno pravo osiguranja*, *Komentar zakonskih odredaba*, Zagreb, Tectus, p. 608.

12 Grabovac, I. (2003), *Plovidbeno pravo Republike Hrvatske*, Split, Književni krug, p. 288; also, Kragić, P. (1992), *Ugovori o prijevozu tankerima*, Zadar, Grafoservis, p. 17.

charters, whereas it is very rare in voyage charters.[13] Finally, lump sum freight is calculated per cargo space and it is not tied directly to the quantity of cargo actually carried. It is a sum agreed to be paid for the use of the whole vessel, or part of a vessel, for one or more voyages, and it is payable no matter if the cargo is loaded or cargo space used. This type of freight calculation is applied when the charterer does not know what type of cargo or the exact quantity of cargo will be loaded at the moment of signing the agreement.[14]

Furthermore, formulas for calculating and determining the freight are different as well. As a case in point, one of them is defined as: freight payable "ship or cargo lost or not lost", which means that the freight must be paid even if the cargo does not reach the destination or cannot be delivered to the consignee. Another type of freight is the distance freight where freight is payable in proportion to the distance covered. This may occur in the event of a shipwreck or other marine incidents, seizure of the ship, detention of ship or cargo in a port as a result of acts of war, in case of international war crimes at sea (e.g. piracy), negligence, mutiny or riot.[15] Unlike distance freight, calculated in proportion to the distance covered, the Croatian Maritime Code defines the freight according to the distance covered effectively (Article 587 of the Maritime Code) and states that the ship operator is entitled to the freight although the voyage has been partially performed.

According to numerous legal systems, pro rate „distance freight" is payable according to the mileage actually covered on the voyage, and some legal systems allow the full freight to the ship operator even if the voyage is only partially performed. In some cases it can be appreciated that the freight will be lost if the vessel is lost, although it is possible that the ship operator delivers cargo in another ship, thus earning the freight.[16]

It has been useful reviewing some general characteristics of the payment obligation, i.e. the right of charging freight in charter parties in order to discuss the question of the freight insurance more easily. Henceforward, the freight at risk as the subject of the insurance in charter parties will be discussed as the centrepiece of this paper.

3. Freight as the insured subject

The freight insurance, along with the hull and machinery insurance and cargo insurance, is considered to be a distinguishable feature of the marine insurances[17]. However, it is also considered to be "a difficult subject"[18]. The possible reasons for the complexity of the subject matter lie in the fact that the interests of the parties are frequently mutually related (ship operator, charterer, and possibly other transport beneficiaries – shipper, cargo owner).[19] Therefore, it is necessary to explain the interests of the parties for freight insurance, to provide the definition of the term *freight insurance* and emphasize some particularities in the description of the freight in the insurance policy.

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[13] Štambuk, D. (2005), Specifičnosti osiguranja vozarine pod pomorskom policom, *Svijet osiguranja*, Zagreb, VIII (5), p. 46.

[14] Grabovac, I., *op. cit.* (fn 12), p. 289; also see Stopford, M. (2003), *Maritime Economics*, 2nd ed, London and New York, Routledge Taylor & Francis Group, pp.101-102.

[15] Štambuk, D., *op. cit.* (fn 13), p. 46.

[16] Kenneth Goodacre, J. (1996), *Marine Insurance Claims*, 3rd ed, London, Witherby & Co. Ltd., p. 550.

[17] Pavić, D., *op. cit.* (fn 10), p. 407.

[18] Kenneth Goodacre, J., *op. cit.* (fn 16), p. 549.

[19] *Ibidem*, p. 549.

3.1. The definition of the freight insurance and its characteristics in the insurance policy

Freight Insurance is a contract of insurance whereby one party of the contract insures the interest towards the freight.[20] The subject of insurance is the freight, subject to usual perils of the sea, war and strike risks.[21] To avoid possible coverage misunderstandings, the insurance policy must describe the freight in details. It is necessary to emphasize again the existence of different freight categories in the maritime practice, which were discussed earlier in the paper and which can lead to misinterpretation of the definition of the insurance subject – the freight. Therefore, clear definitions are the priority in the arrangement of this type of insurance, although precision in meaning is not new to the practice of arranging insurance contracts, since it is also required in the description of the insurance subject, such as vessel, goods, etc.[22]

Also, describing the subject of the insurance, i.e. the freight, it is necessary to state which charter party insurance it relates to, whether it is time charter or voyage charter, whether it is the freight earned for already loaded cargo or for the cargo that yet has to be loaded, as well as other details important for determining the characteristics of the freight.[23]

Furthermore, the freight, as any other subject of insurance, may be insured for the whole voyage or part of it, or for the period of time along with the right to claim the insurance premium. The practice of the insurance companies demonstrates that it is possible to allocate part of the freight at risk within the individual journey.[24]

It is of utmost importance to describe in detail the subject of the insurance in the policy because clear definition of the insurance subject means clear and unambiguous policy. Therefore, due attention should be given to the subject matter of freight insurance.

3.2. Insurable interests in freight insurance

The interest in freight insurance arrangement may lie either with the ship operator or any other transport beneficiary (charterer, shipper, the cargo owner). There is an insurable interest in freight with both parties; the one representing the vessel and the one representing goods.

The ship operator has interest in freight insurance in cases when, according to the contract of carriage of goods by sea, the freight may be paid in part or in whole on delivery of the cargo, i.e. at destination. However, the ship operator may, for various reasons, be prevented to deliver goods in accordance with the agreement and, nevertheless, collect the freight. Regarding this risk, the ship operator has an insurable interest in the freight, the same as in case of the anticipated freight when earnings are expected from the future vessel employment. On the other hand, under the contract of carriage of goods by sea, both the shipper and the cargo owner have insurable interest in freight, especially in the advance freight when there is no reimbursement if the vessel or any cargo is damaged or lost. The same contract parties have insurable interest in freight in situations when the goods do not reach the destination or are

[20] Pavić, D., *op. cit*. (fn 10), p. 407; Pavić, D., *op. cit*. (fn 11), p. 608; Pavić D. (1994), *Pomorsko osiguranje*, Book 2, Zagreb, Croatia osiguranje, p. 397.

[21] Simović, A. I. (editor) (1990), *Pomorski leksikon*, see: „Osiguranje vozarine", Zagreb, JLZ „Miroslav Krleža", p. 558.

[22] For details on vessel design and goods description in marine insurance policy, see Pavić, D., fn 10, pp. 337 (vessel) and 278-279 (goods).

[23] Štambuk, D., *op. cit*. (fn 13), p. 47.

[24] *Ibidem*, p. 47.

not placed at disposal to the consignee. In such cases the freight insurance is regularly a part of the cargo insurance.[25] Thus, there is no insurable interest in freight where the cargo has not been loaded and there is no contract for its carriage. However, if the contract for the freight to be insured exists, there can be an insurable interest in the full amount of freight that can be earned under the contract even if none of the cargo has been loaded at the time of the loss.[26] There is undoubtedly an insurable interest in freight, so this type of insurance agreement can be concluded as the separate contract on freight insurance or as a part of the hull and machinery insurance – either by costs insurance in the amount of agreed vessel value or as a part of the cargo insurance.[27] If there is a hull and machinery insurance or a cargo insurance and the freight is insured as a separate contract, such a contract represents a separate legal document, i.e. it is independent of the other two insurances. Separate institute clauses, known as the *Institute Freight Clauses*, are applied to such a type of freight insurance and shall be handled accordingly if it is agreed so.

In any case, by entering into freight contract as a separate cover, the ship operator has a double coverage: a) freight risk insurance at the risk of the ship operator and b) additional cover due to actual or constructive total loss.[28]

4. Freight insurance under the Croatian Maritime Code

The provisions on the freight insurance are stipulated in the Part VII, Chapter IV of the Maritime Code under the heading *Contract of Marine Insurance*. The implementation, i.e. the full effect of the Maritime Code, is under the assumption that the provisions of the insurance contract are in accordance with the Croatian legislation. There are few provisions regarding the freight insurance under the heading *Freight Insurance* (Articles 739-742), noting that provisions in this part are namely based on *ius dispositivum* and are subject to modification by consent or agreement.

As stated in Chapter IV, Article 684, *Contract of Marine Insurance*, *General Provisions*, the provisions relating to the freight insurance which are not regulated under the heading *Freight Insurance* will be regulated by the provisions on cargo insurance and the hull and machinery insurance. Article 742 also refers to freight insurance, stating that, unless otherwise provided by law, the freight insurance of the particular goods shall be regulated by the cargo insurance regulations, whereas other freight insurances shall be regulated by the hull and machinery insurance.

Considering the fact that the Maritime Code uses the term freight for both contracts of carriage and charter parties (time or voyage), the first part of this provision refers to the freight insurance in contracts of carriage, while the second part refers to "other freight insurances", that is to charter party freight insurance.[29]

Analysing the Maritime Code provisions, it is important to determine the content of Article 739, which provides the definition of the term freight as the subject of insurance. The article states that "unless otherwise provided, the freight insurance shall cover the gross income from freight". According to this, "the gross freight" is the object of the insurance if it is

[25] Pavić, Drago, *op. cit.* (fn 20), p. 398.

[26] Rose, E. D. (2012), *Marine Insurance: Law and Practice*, 2nd ed, London, Informa, p. 42

[27] Pavić, Drago, *op. cit.* (fn 20), p. 398.

[28] *Ibidem*, p. 398; Štambuk, D., *op. cit.* (fn 13), p. 47.

[29] Pavić, D., *op. cit.* (fn 11), pp. 613-614.

not agreed otherwise. The term gross freight, as defined in the professional literature, denotes fully paid freight to which the ship operator is entitled.[30]

The further content of these regulations standardizes other important legal issues of freight insurance as follows: defining the measure of indemnity in case of freight loss caused by the total loss of cargo (Article 740) and defining the indemnity clause (Article 741). The legal aspects of these articles are discussed further in the text.

4.1. Determining indemnity in cases of freight loss due to the total loss of cargo

Article 740 of the Maritime Code states the following: "In case of total loss of freight resulting from the total loss of cargo for which the freight has been or is due to be paid, the indemnity for the loss of cargo shall be paid in accordance with Article 709, Paragraph 2 of this Code, but the rights of the assured on goods shall not be transferred to the freight insurer". This provision regulates the right to indemnity in cases of the freight loss resulting from the total loss of cargo, for which the freight has been or is due to be paid, but the cargo and the freight are not insured by the same insurer. In such cases, the indemnity for the actual total loss will be determined in accordance with Article 709, Paragraph 2 of the Maritime Code. In other word, in case of actual total loss, the loss will be indemnified in the amount of the actual value, or if the value is determined by the policy, in the amount agreed, but not exceeding the insured value. It also means that the amount of freight recoverable according to the freight insurance policy will be the amount of gross value of freight and shall not exceed the value actually insured.[31]

The provisions of Article 740 of the Maritime Code apply only to the assured's rights to goods which are subrogated to the insurer of the goods and not to the insurer of the freight.

It may be concluded that this provision does not affect the rights of the assured to the third parties liable for the loss for which compensation has been paid. According to Article 723 of the Maritime Code on subrogation, the rights of the assured to the third parties are transferred both to the insurer of the goods and the insurer of the freight in proportion to the compensation sum for actual total loss and loss of freight.[32]

4.2. The indemnity clause

According to Article 741 of the Maritime Code, "where the freight which has been or is due to be paid for particular goods is insured, the indemnity for loss caused by perils insured against shall be ascertained, if it cannot be done otherwise, in the same proportion as the indemnity for the loss sustained by the goods to which the freight relates". This provision refers to the method of determining the indemnity under the freight insurance, which has been paid or is due to be paid for particular goods. Thereat, it is important whether the freight is insured individually, i.e. by a separate contract or it is insured under the cargo insurance policy. In the first case, the indemnity due to loss of freight is determined regardless of the potential cargo loss. However, if it cannot be done so, it will be determined "in the same proportion as the indemnity for the loss sustained by the goods to which the freight relates". In the second case, if the freight is insured under the cargo insurance policy, the provisions under the heading

[30] *Ibidem*, p. 610.

[31] *Ibidem*, p. 612.

[32] *Ibidem*, p. 613; Pavić, D., *op. cit*. (fn 10), p. 413.

Goods insurance, Articles 731-738, of the Maritime Code will be applied. In other words, the indemnity will be determined in the same proportion as the indemnity for the loss sustained by the goods to which the freight has been or is due to be paid.[33]

5. Comparative law – the freight insurance in different legal systems

Given the importance of the English Maritime or Admiralty Law in the field of the maritime insurance, the presentation of different legal solutions must include regulations, especially those regarding the freight insurance, under *Marine Insurance Act* of 1906[34], which is the English legal framework of the marine insurance.

English judiciary defined the term *freight in an insurance policy* in the case of *Flint vs. Fleming* as early as 1830, when it defined the freight as „interest, income, indemnity from the ship employment". According to the judiciary viewpoint in this particular case, it is irrelevant whether the ship operator[35] derives profit from the employment of his ship by renting out cargo space to one or more charterers and for different cargo quantities, or by selling his own goods to a buyer at the destination who pays the full price of goods with the cargo carriage added value. The important outcome of the English judiciary is as follows: the ship operator's vessel must be ready for the carriage of cargo, there must be a cargo to be carried by sea, and the ship operator is not entitled to the freight until the vessel is ready for the carriage of the cargo.[36]

On the other hand, the English legislation defines the term freight in terms of insurance policy relations. According to *Rules for Construction of Policy* as an integral part of the *Marine Insurance Act*, the freight is „the profit derivable by ship owner from the employment of his ship to carry his own goods or movables as well as freight payable by a third party, but does not include passage money" (Rule 16, Chapter I, *Rules for Construction of Policy*). The term „freight payable by a third party" implies that this part of the definition is intentionally worded in general terms in order to embrace all the various types of freight known in the law of carriage of goods by sea. Also, the use of the word „includes" implies that the definition is not exhaustive. Though incomplete, it is nevertheless comprehensive, covering any benefit derived from the employment of his ship by the ship operator.[37]

According to this judicial definition in English law, the freight may be divided into two categories: the freight earned from carriage of goods and the freight earned from the hire of the ship. It is important to point out that no distinction is made in the *Marine Insurance Act* of the different types of freight, i.e. they are all referred to generally as freight.[38]

The *Marine Insurance Act* includes few provisions that contain the term freight, and there is no particular chapter that deals with freight insurance issues. One of such rare provisions is the one that deals with procedures in the case of the advance freight, Article 12 of the *Marine Insurance Act*. Thus, „the person advancing the freight has an insurable interest, in so far as

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33 *Ibidem*, p. 414.

34 For more details on *Marine Insurance Act* (the circumstances of coming into force, etc.) see Rhidian Thomas, D. (editor) (2006), *Marine Insurance: The Law in Transition*, London, Informa, pp. 193-209. *Marine Insurance Act* is available at http://www.legislation.gov.uk/ukpga/Edw7/6/41/part3 (1 April 2017).

35 See fn 1, *supra*.

36 Štambuk, D., *op. cit*. (fn 13), pp. 45-46.

37 Hodges, S. (1996), *Law of Marine Insurance*, London, Cavendish Publishing Limited, p. 28

38 *Ibidem*, p. 28.

such freight is not repayable in case of loss". The professional literature provides an explanation that it is „a specific illustration of the general rule that the person who bears the risk of the loss of freight may insure it".[39] If advance freight is not repayable in the event of loss of cargo, the cargo owner may insure the sum at risk. Conversely, if the advance freight is repayable in the event of loss of cargo, the ship operator may insure the sum at risk. A distinction has to be drawn between the advance freight, which is generally not repayable unless the contract provides the contrary, and some other form of repayable advance to the ship operator.[40]

According to Article 16 of the *Marine Insurance Act*, "in insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance". According to the professional literature, the most recent cases hold that the standard London market wordings, which speak of the provisions of indemnity, are inconsistent with the basic rule in Article 16. In the vast majority of cases the principle will be that the assured's loss is measured by the difference in the value of the subject matter immediately before and immediately after the loss.[41]

Although it is relatively simple to comprehend that the prepaid freight is usually merged with the cargo valuation, it is not so easy to assess where liability arises with some types of freight paid in advance. Where the manner of payment is not clearly expressed the test is whether there was an intention to insure such payment, in which case it can be deemed to be advance freight. Perhaps the most difficult aspect of the prepaid freight for the practitioner to grasp is in cases where only part of the freight is paid in advance, so that a proportion remains at the risk of the ship operator.[42]

In addition to solutions on freight insurance in English legislation, we would like to illustrate marine insurance in the legal systems of some other countries as well.

In Australia, the Act regulating marine insurance is the Australian *Marine Insurance Act* of 1909.[43] It is often emphasized that its content is very similar to that of the English *Marine Insurance Act*.[44] Indeed, a large number of provisions are virtually identical. For example, the term freight defined in Part I, Article 3, under *Preliminary*, states that „freight includes the profit derivable by a ship owner from the employment of his or her ship to carry his or her own goods or movables, as well as freight payable by a third party, but does not include passage money". The same provision is found in the English *Marine Insurance Act* (see *supra*). Article 9 of the Australian *Marine Insurance Act*, *Marine adventure and maritime perils defined* states as follows: „subject to the provisions of the Act, every lawful marine adventure may be the subject of a contract of marine insurance". Paragraph 2 of the same Article states: " in particular there is a marine adventure where: the earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils". The provision mentions the freight as well, along with other subjects.

The Australian *Marine Insurance Act* discusses the advance freight as a separate provision

39 Merkin, R. (2014), *Marine Insurance Legislation*, 5th ed, Oxon/ New York, Informa law from Routledge, pp. 14-15.

40 *Ibidem*, pp. 14-15.

41 *Ibidem*, pp. 14-17.

42 Kenneth Goodacre, J. (1996), *Marine Insurance Claims*, 3rd ed, London, Witherby & Co. Ltd., p. 573.

43 Australian *Marine Insurance Act* is available at: https://www.legislation.gov.au/Details/C2008C00419 (logged in on 8 April 2017).

44 Noussia, K. (2007), *The Principle of Indemnnity in Marine Insurance Contracts*, Springer Science & Business Media, p. 21.

according to which „the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss" (Article 18). According to the Australian legislation, in insurance on freight, whether paid in advance or otherwise, the insurable value is „the gross amount of the freight at the risk of the assured, plus the charges of insurance" (Article 22). A separate provision covers the abandoning of ship, according to which, upon the abandonment of a ship, „the insurer thereof is entitled to any freight in course of being earned", and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss (Article 69 of the Australian *Marine Insurance Act*). Furthermore, where there is a partial loss of freight, subject to any express provision in the policy, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy (Article 76 of the Australian *Marine Insurance Act*). This is also the last provision on freight insurance in the Australian *Marine Insurance Act*.

There is also the example of the Norwegian legislation, which regulates the marine insurance by the *Insurance Contract Act* of 1986,[45] with which all insurance contracts comply. For marine insurance, there is a contractual freedom, limited only by general contractual principles against illegal and unfair contracts. Also, the conditions for marine insurance have been incorporated into an extensive private codification known as the *Norwegian Marine Insurance Plan*.[46] This Plan regulates all the practical questions concerning marine insurance.[47] However, when reviewing its content and the content of the Norwegian *Insurance Contract Act*, separate provisions regarding individual freight insurance couldn't be found. Thereby it can be concluded that the Norwegian legislator has left that question to be dealt with by contracting parties.

6. The freight insurance institute clauses

The practice of freight insurance, as well as hull and machinery insurance and cargo insurance support the use of a set of the institute clauses published by *Institute of London Underwriters (ILU)*.[48] In general, the institute clauses, including those regarding the freight insurance, are used in international marine insurances. The most important freight clauses are those from 1983, although some of them have been revised since then.

The institute freight clauses regarding freight insurance contain the provision on application of English law and practice in contracts. The provision states: „This insurance is subject to English law and practice". In such cases there are no challenges in the interpretation of institute clauses texts since they are interpreted in the same way as in English judicial, arbitrary and business practice.

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[45] *Insurance Contract Act* is available at: http://www.austlii.edu.au/au/legis/cth/consol_act/ica1984220/ (signed in on 7 April 2017).

[46] *Norwegian Marine Insurance Plan* is available at: http://www.nordicplan.org/Documents/Archive/Plan-2010/Norwegian%20Plan%20of%201996,%20Version%202010%20-%20English.pdf (signed in on 7 April 2017).

[47] Noussia, K., *op. cit.* (fn 44), p. 11.

[48] *Institute of London Underwriters* (ILU) was set up in 1884 as the trade association of British marine insurers. In 1999 it merged with the LIMRA association and changed the name into *International Underwriting Association* (IUA). For more on the association visit: https://www.iua.co.uk/ (signed in on 4 April 2017.).

It has already been stated that freight can be insured as a part of the hull and machinery insurance, cargo insurance, or independently. In the first case, the provision *Disbursements Warranty Clause* in the *Institute Time Clauses – Hulls* and the *Institute Voyage Clauses – Hulls* (*Institute Time Clauses - Hulls, 1983*, *Institute Time Clauses – Hulls, 1995*, *Institute Voyage Clauses – Hulls*, *1983* and *Institute Voyage Clauses – Hulls*, *1995*) allows the possibility of determining terms and conditions for additional insurances. The same provision, inter alia, may cover freight insurance as well. Hence, in the context of the institute clauses and freight insurance, apart from the content of the institute additional perils clauses, we must also analyse the content of provisions relating to the institute hull clauses. In the second case, if the freight is insured in the separate insurance which is legally independent of the hull and machinery insurance, then such an insurance requires special institute clauses - *Institute Freight Clauses*.

It is important to emphasize the existence of particular institute freight clauses: those against maritime perils, war risks and strike risks. The former are framed in particular *Institute Time Clauses – Freight* (*Institute Time Clauses – Freight*, *1983* and *Institute Time Clauses – Freight, 1995*) and into *Institute Voyage Clauses – Freight* (*Institute Voyage Clauses – Freight, 1983* and *Institute Voyage Clauses – Freight*, *1995*). Their application depends on whether the freight is insured for a period of time or for a voyage. The latter are framed in particular War and Strike Clauses: *Institute War and Strikes Clauses – Freight – Time*, *1983* and *Institute War and Strikes Clauses – Freight – Time*, *1995*, and those for voyage into *Institute War and Strikes Clauses, Freight – Voyage*, *1983* and *Institute War and Strikes Clauses, Freight – Voyage*, *1995*. Again, their application depends on whether the freight is insured for a period of time or for a particular voyage.

Hereafter, the paper will determine the content of each of the institute clauses that explain the key risks and damages covered by these institute clauses. The first to be discussed are provisions regarding the possibilities of the additional insurances, including the freight insurance, under the hull and machinery insurance. It will be followed by the analysis of the institute freight clauses against maritime perils, war risks and strike risks.

6.1. *Institute Time Clauses – Hulls*

The following will discuss only the content of the *Institute Time Clauses – Hulls* regarding the models of contracting the additional insurances. It is the common practice to agree on additional insurance under the hull and machinery insurance, that is, to cover other interests such as freight. But, such insurances are limited since the interests of the assured are allowed to be covered only to a certain sum. If there were no such restrictions to the additional insurances there would be a possibility for the assured to insure the vessel to the sum lower than the actual value of the vessel and effect the additional policy only in case of the total loss of the vessel. Thus, the assured would pay a lower insurance premium since the insurance premiums in the case of total loss are considerably lower. Therefore, the *Disbursements Warranty Clause* was introduced into the *Institute Time Clauses– Hulls*. This way the additional insurances, the freight insurance and the premium insurance being one of them, are limited only to the extent of 25% of the insured value of the vessel. Under the *Disbursements Warranty Clause* it is not mandatory for the assured to provide proof of actual operational expenses since the amount to which these disbursements are insured may cover the freight as well.[49]

[49] Štambuk, D., *op. cit.* (fn 13), p. 48.

6.2. Institute freight clauses against maritime risks

6.2.1. Institute Time Clauses – Freight

The *Institute Time Clauses – Freight* contain a number of clauses which are identical or slightly modified in respect to the *Institute Time Clauses – Hulls.* When comparing the *Institute Time Clauses – Freight* and the *Institute Time Clauses – Hulls,* it is clear that the following clauses are identical: *Breach of Warranty* (Article 4), *Termination* (Article 5), *Assignment* (Article 6), *Returns for lay-up and Cancellation* (Article 16), *War/Strikes/Malicious Nuclear Exclusions* (Articles 17/20), while the following are slightly different in their content: *Navigation* (Article 1), *Continuation* (Article 3), *Perils* (Article 7), *Pollution hazard* (Article 8) and *Sister-ship* (Article 10).

For example, the *Perils Clause* in the *Institute Time Clauses – Freight*, the clause which covers risks against loss, is by its content barely different from the same clause in the *Institute Time Clauses – Hulls*. Notably, the *Perils Clause* in *Institute Time Clauses – Freight* states that the insurance covers loss of the subject-matter insured, caused by „perils of the seas, rivers, lakes or other navigable waters, fire, explosion, violent theft by persons from outside the vessel, jettison, piracy, breakdown of or accident to nuclear installations or reactors, contact with aircraft or similar objects, or objects falling therefrom, land conveyance, dock or harbour equipment or installation, earthquake volcanic eruption or lightning" (Article 7, *Institute Time Clauses – Freight*). Furthermore, the insurance covers loss of or damage to the subject-matter insured, caused by „accidents in loading, discharging or shifting cargo or fuel, bursting of boilers breakage of shafts or any latent defect in the machinery or hull, negligence of the Master, Officers, Crew or Pilots, negligence of repairers or charterers provided such repairers or charterers are not an Assured hereunder, barratry of Master, Officers or Crew" (Article 7, *Institute Time Clauses – Freight*) provided such loss or damage has not resulted from want of due diligence by the assured, the ship owner, the ship operator or managers.

While the *Institute Time Clauses – Hulls,* in the *Perils Clause* use the expression „loss or damage", the *Institute Time Clauses – Freight* in the same clause refer to it as „loss". This is the basic, rather inconsiderable difference between these two sets of clauses. The difference in wording is quite logical since we cannot talk about the damage of freight, only about its loss.

Furthermore, the *Institute Time Clauses – Freight* include the insurance cover against the following types of loss: 1) actual total loss or constructive total loss, 2) partial loss subject to franchise, 3) general average, salvage and salvage charges, 4) collision liability.

1) An actual total loss of freight frequently follows upon an actual total loss of ship or cargo, and an actual total loss of freight can also occur when the vessel is so damaged that it becomes impossible to forward the cargo she has on board in order to earn that freight. If, however, it is simply unlikely that cargo can be forwarded, this will give rise to a claim for a constructive total loss of freight, as will a situation where the cost of forwarding the cargo would exceed the amount of the freight to be earned.[50]

According to Article 13 of the *Institute Time Clauses – Freight*, the amount recoverable under the insurance for claim for total loss of freight shall not exceed the gross freight actually lost. However, where insurances on freight, other than this insurance, are current at the time of loss, all such insurances will be taken into consideration in calculating the liability under the insurance, and the amount recoverable will not exceed the rateable proportion of the gross freight lost, (Article 13, *Institute Time Clauses – Freight*). On the other hand, in the event of

[50] Kenneth Goodacre, J., *op. cit.* (fn 42), pp. 979-980.

the total loss of the vessel, actual or constructive, under the Article 15 *Total loss Clause*, „the amount insured shall be paid in full, whether the vessel be fully or partly loaded or in ballast, chartered or unchartered".

Also, according to the provision of Article 15, paragraph 15.2, *Institute Time Clauses – Freight*, „in ascertaining whether the vessel is a constructive total loss, the insured value in the insurances on hull and machinery shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account". These terms are identical to those of the valuation clause in hull policies, and it is obviously desirable that the same standard of proof of a constructive total loss should be applicable in both cases.

Article 15, paragraph 15.3, *Institute Time Clauses – Freight*, deals with the situation when one claim, despite complying with the terms of contract to be considered as a constructive total loss, is settled as a partial loss. In such a case there is no payment obligation from paragraph 15.1, *Institute Time Clauses – Freight*, which brings up the question of the purpose of this provision. The professional literature provides the following explanation: "the assured may choose to claim for a partial loss although the requirements for a constructive total loss are met in terms of the vessel's market value growth"[51]. This provision resulted as an attempt to avoid the situation such as in *Petros M. Nomikos v. Robertson* case. The vessel Petrakis Nomikos was insured at 28.000 £, and damage repair costs due to explosion and fire on board were estimated at 37.000 £. Meanwhile, the market value of the ship was growing and it was estimated that the value of the ship after the repairs would be 45.000 £. In this case, the assured did not claim for a constructive total loss, although they could have done so. Instead, they chose to claim for a partial loss. Then, they claimed on their policy covering the chartered freight for a total loss. Since the vessel had been a constructive total loss they managed to recover the loss of freight as well.[52]

In the context of actual total loss of freight it is important to add that Article 15, *Institute Time Clauses – Freight*, states only the actual and constructive total loss of vessel, while the claim for a constructive total loss under the *Institute Time Clauses – Hulls* remains open and imposes the rights of the assured. Numerous sources suggest that, in such a situation, it would be appropriate for the insurer to indemnify the assured to the same value as the one paid from the hull and machinery insurance policy.[53]

2) The *Institute Time Clauses – Freight* include partial loss subject to franchise being written in the policy. The franchise applies only to partial loss caused by the perils insured against and does not apply to partial loss of the freight if the cause of loss is fire, stranding, grounding or collision with another vessel (Article 12, *Institute Time Clauses – Freight*). According to the article, this insurance does not cover partial loss other than general average loss under 3% unless caused by fire, sinking, standing or collision with another vessel. It practically means that the franchise will apply mostly in losses due to heavy weather.[54]

3) Under certain conditions in general average and salvage, the freight may be liable to contribute to itself. It is a generally accepted principle that the freight is liable to contribute in general average and salvage in its net amount. However, if, in general average, the freight is

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[51] Štambuk, D., *op. cit.* (fn 13), p. 49.

[52] Kenneth Goodacre, J., *op.* cit. (fn 42), p. 982 quote from *Petros M. Nomikos v. Robertson* 59 Lloyd's law Report 182; (C.A.) 61 Lloyd's law Report 105 105; (H.L.) 64 Lloyd's law Report 45; [1939] A.C. 371; [1939] N.N. 192; 55 T.L.R. 779; 108 L.J. (K.B.) 433; 160 L.T. 542; 44 Com. Cas 303; [1939] 2 All e.r. 723.

[53] Pavić, D., *op. cit.* (fn 20), p. 403.

[54] Pavić, D., *op. cit.* (fn 20), p. 406.

lost due to jettison of cargo, it is considered to be a part of salvage value in the adjustment of general average.[55]

4) When it comes to collision liability, according to the *Freight Collision Clause*, the insurance covers the amount of the freight taken into account in calculating the measure of the liability of the assured. The basic principle of this cover is that no claim shall attach to this insurance which attaches to any other insurance covering collision liabilities (Article 9, *Institute Time Clauses – Freight*). Also, one should bear in mind that 3/4ths Collision Liability is covered by the *Institute Time Clauses – Hulls* to the sum insured in the policy. This means that the *Freight Collision Clause* will come into effect only if the insured sum in the hull and machinery insurance is not enough to settle the collision liabilities.[56]

At the end of the review of the *Institute Time Clauses – Freight* provisions, we will determine the content of the *Time Penalty Clause*, Article 14. Since the freight as an insured subject Time Charter does not cover the loss of hire calculated per unit of used cargo**,** the question of terms and conditions in case of loss of hire on a daily basis is brought up. The previously mentioned terms and conditions of the freight insurance specifically exclude the cover of loss due to loss of time, i.e. off-hire period, regardless of whether the loss is caused by insured risks or not (Article 14, *Institute Time Clauses – Freight*). Because of this clause, *Institute Time Clauses – Freight* are not appropriate for loss of hire insurance under time charter during the period when the vessel is off-hire.

6.2.2*. Institute Voyage Clauses – Freight*

The Institute Voyage Clauses – Freight are only slightly different from the *Institute Time Clauses – Freight*. The only difference is that the *Institute Voyage Clauses – Freight* do not contain clauses regarding "time". These are the following: *Continuation* (Article 3), *Breach of Warranty* (Article 4), *Termination* (Article 5) and *Returns for lay-up and Cancellation* (Article 16). Also, the provision *Breach of Warranty* is replaced by the *Change of Voyage Clause* (Article 3), while all the other provisions of the *Institute Voyage Clauses – Freight* are identical to those of the *Institute Time Clauses – Freight.* Since some articles were removed, the headings of provisions and the numbers of articles do not coincide in these two institute clauses.

Everything stated in the following text regarding the types loss insured in *Institute Time Clauses – Freight* is applicable in the *Institute Voyage Clauses – Freight* as well.

6.2.3. *Institute War and Strikes Clauses – Freight*

A glance at the standard marine clauses covering freight will show that they contain the same paramount exclusions as the institute time and voyage clauses - hulls. Likewise, the *Institute War and Strikes Clauses – Freight* very closely follow their counterparts covering hulls.[57] The differences are only in the subject of the insurance, whereby instead of the hulls, the subject to insurance is freight. The change of the subject of the insurance in comparison to institute clauses - hulls required the appropriate changes in the clauses text.

As it has already been pointed out, there are the *Institute War and Strikes Clauses – Freight – Time* and the *Institute War and Strikes Clauses – Freight – Voyage*. When analysing these clauses,

[55] Pavić, D., *op. cit.* (fn 10), p. 416; Pavić, D., *op. cit.* (fn 20), p. 404.

[56] *Ibidem*, p. 416.

[57] Kenneth Goodacre, J., *op. cit.* (fn 42), p. 1205.

it is evident that they are almost identical in their content. The difference is in the terms and conditions of the insurance, i.e. whether it is on time or on voyage. Also, each set of clauses contains individually named perils concepts, under the heading Perils. In the *Perils Clause*, Article 1, this insurance, except for those excluded, covers loss, total or partial, caused by: war, civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power, capture, seizure, arrest, restraint, or detainment, and the consequences thereof or any attempt thereat, derelict mines, torpedoes, bombs, or other derelict weapons of war". In addition, the *Perils Clause* states that the insurance covers, as the specific insured risk, „loss, total or partial, arising from loss of or damage to the vessel caused by: strikers, locked – out workmen, or persons taking part in labour disturbances, riots or civil commotions, any terrorist or any person acting malicious or from a political motive, confiscation or expropriation" (Article 1, *Institute War and Strikes Clauses – Freight*).[58] The meaning of most terms from the Perils Clause has been determined by English judiciary practice, which gives us the possibility to name some of the "representative" legal cases to interpret risks listed in this clause.

The problem arises from the differences in Croatian terminology, which does not have synonyms for „capture" and „seizure" in terms of insured risks, or for „arrest", „restraint", „detainment", etc., which are precisely interpreted in the context of the insurance contract.

The *Institute War and Strikes Clauses – Freight* contain the provision *Incorporation*, Article 2, which regulates clauses to be incorporated into the *Institute Freight Clauses*, and Article 3, *Detainment* , which regulates the issue of risk of the vessel confiscation.

The *Institute War and Strikes Clauses – Freight,* contain the clause *Exclusion*, Article 4, which excludes specified risks from insurance. These are the outbreak of war (whether there is declaration of war or not) between superpowers, requisition and pre-emption, capture, seizure, arrest, etc. The nuclear risks are explicitly excluded from the insurance. There is the usual exclusion of collision liability, exclusion of expenses arising from delay except for such expenses as would be recoverable in principle in English law and practice under the York Antwerp Rules (Y/A Rules)[59] (Article. 4, *Institute War and Strikes Clauses – Freight*) and solutions provided in case of a double insurance.

Finally, the *Termination Clause* in *Institute War and Strikes Clauses – Freight* provide that the insurance may be cancelled by either the underwriter or the assured giving 7 days' notice. The underwriters agree, however, to reinstate this insurance subject to agreement between underwriters and assured prior to the expiry of such notice of cancellation as to new rate of premium and/or conditions and/or warranties. Whether or not such notice of cancellation has been given, the insurance shall terminate automatically. The insurance will be terminated in case of hostile detonation, the outbreak of war between superpowers (United Kingdom, United States of America, France, Russia, The People's Republic of China) and in the event of the vessel being requisitioned, either for title or use (Article 5, *Institute War and Strikes Clauses – Freight*).

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[58] Rose, F. D., *op. cit*. (fn 26), pp. 831-840.

[59] York Antwerp Rules (Y/A Rules) are set of international rules on general average. Their application rests on the principle of reciprocity referring to all the beneficiary parties. In practice, the rules are incorporated by reference into most bills of lading and contacts for carriage of goods by sea. The rules, which are under supervision of the *Comité Maritime International* – CMI, have been amended several times, most recently in May 2016. Further readings: Hudson, G. (1996), *The York-Antwerp Rules*, 2nd ed, London, LLP; Cornah, R. (2004), The road to Vancouver – the development of the York-Antwerp Rules, *The Journal od International Maritime Law*, 2.

7. Conclusion

This paper has demonstrated the most important legal issues regarding the freight insurance within the national legislations (Croatian and some other national legislations – English, Australian and Norwegian) and institute freight clauses. Legal literature reviewed for the purpose of this paper indicates that the freight insurance, along with the hull and machinery and the cargo insurances is a distinguishing feature of marine insurance. Freight insurance is one type of marine insurances in which the subject to the insurance is the freight insured against maritime perils, war risks and strike risks. This insurance is of great importance since the freight represents the basic profitable interest in the carriage of goods by sea, i.e. the market price for the employment of the vessel. Both parties of the charter party have an insurable interest in the freight insurance.

The Maritime Code provisions regulate two aspects of the freight insurance: indemnity in case of the freight loss due to the total loss of cargo and models of determining the indemnity policy clause unless otherwise determined. In case of the total loss of freight resulting from the total loss of goods for which the freight has been or is due to be paid, the indemnity for the loss shall be paid, in accordance with the general legal provisions on actual total loss.

According to the Maritime Code, where the freight which has been or is due to be paid for particular goods is insured, the indemnity for loss caused by perils the goods are insured against shall be ascertained in the same proportion as the indemnity for the loss sustained by the goods to which the freight relates (if it cannot be done otherwise). Since these provisions of the Maritime Code are subject to modification by the consent or agreement of the contract parties, it is considered that the Maritime Code provisions on freight insurance are relatively well settled.

On the other hand, other legal systems' acts, English *Marine Insurance Act* and Australian *Marine Insurance Act*, contain few provisions on the freight insurance and are very similar in their content. Both acts describe freight in details, primarily in terms of the insurance policy. In addition, the freight insurance provides the possibility of the advance freight. Also, in insurance on freight, whether paid in advance or otherwise, the insurance value is defined as the gross amount of the freight at the risk of the assured, plus the charges of insurance. These marine insurance acts include a specific provision; the measure of indemnity. The Australian *Marine Insurance Act* stipulates the following: subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy.

The Norwegian *Insurance Contract Act* does not contain any specific provisions which regulate the freight insurance within the same act.

Taking into account the practice of marine insurance in the international relations, it has been necessary to analyse the content of the institute clauses. The separate freight insurance required the analysis of the several sets of the institute clauses. They are classified according to the risks covered by the terms of the insurance (the Institute Freight Clauses against maritime risks, war risks and strike risks, time or voyage). The most detailed are those which define insurance coverage against different types of loss: constructive total loss, partial loss subject to franchise, general average, salvage charges and collision liability. The analysis of the content of these clauses has shown that insurance coverage is possible for both, the constructive total

loss and partial loss of freight. Thus, the freight can be protected against loss, regardless of the loss of or the damage to the vessel.

Detailed provisions of the institute clauses on the freight insurance leave no ambiguities and are therefore considered to be a crucial element in protecting the beneficiaries of the charter parties.

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NEKI ASPEKTI POMORSKE ARBITRAŽE U HRVATSKOM, ENGLESKOM I NJEMAČKOM PRAVU

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SAŽETAK

Cilj je rada prikazati te analizirati određene organizacijsko-kompetencijsko-funkcionalne aspekte pomorske arbitraže u hrvatskom, engleskom te njemačkom pravu uzimajući u obzir i podatke o organiziranim i provedenim pomorskim arbitražama pri Stalnom arbitražnom sudištu Hrvatske gospodarske komore (dalje: SAS-HGK) u čijoj se organizaciji bilježe (doduše, još uvijek skromno) pojedine pomorske arbitraže.

Raspravi o pomorskoj arbitraži u hrvatskom pravu prethodit će analiza o organizacijsko-kompetencijsko-funkcionalnim aspektima pomorske arbitraže u engleskom te njemačkom pravu, posebice uzimajući u obzir pomorske arbitraže pri Londonskom udruženju pomorskih arbitara (dalje: LMAA) te Njemačkom udruženju pomorske arbitraže (dalje: GMAA). Izbor tih dvaju poredbenopravnih sustava uvjetovan je okolnošću što u njihovu okviru djeluju navedeni europski pomorskoarbitražni centri, ali i okolnošću što pomorske arbitraže pri LMAA-u prednjače u odnosu na ostale pomorskoarbitražne centre. Izbor njemačkog poredbenopravnog sustava uvjetovan je i povijesnim razlozima, odnosno snažnim utjecajem njemačkog prava i doktrine na hrvatsko pravo te doktrinu procesnog prava.

Razmatranje organizacijsko-kompetencijsko-funkcionalnih aspekata pomorske arbitraže u engleskom i njemačkom pravu slijedit će sustav koji su utvrdile autorice. Najprije će se raspraviti o pojmu te specifičnostima pomorske arbitraže u izabranim sustavima, kao i o izvorima arbitražnog prava. Potom će se razmotriti kakav utjecaj ugovaranje pomorske arbitraže ima na nadležnost državnog suda u razmatranim sustavima.

U radu će se prikazati osnovne karakteristike pojedinih arbitražnih centara (LMAA, GMAA). Nakon prikaza pojedinih arbitražnih centara u poredbenopravnim sustavima analizirat će se osnovni instituti arbitražnog postupka u pomorskim sporovima pri izabranim centrima, i to: arbitražni sporazum, arbitražni sud (konstituiranje, sastav, prava i dužnosti arbitara), načela arbitražnog postupka, pokretanje arbitražnog postupka, posebni (ubrzani, pisani, sumarni) arbitražni postupci (s obzirom na vrijednost predmeta spora), dokazni postupak, troškovi arbitražnog postupka, pravorijeka, pravnih sredstava protiv pravorijeka te ovrhe (domaćeg) pravorijeka.

U zaključnom dijelu rada pokušat će se naznačiti tendencije konvergencije te divergencije poredbenopravnih sustava uključenih u analizu. Na temelju provedene poredbenopravne analize, kao i analize povijesnih izvora hrvatske pomorske arbitraže te (oskudne) prakse, pokušat će se naznačiti

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projekcije de lege ferenda u cilju poticanja razvoja prakse pomorske arbitraže u Hrvatskoj. Posebno će se razmotriti organizacijski aspekt, potreba uspostavljanja posebnog pomorskoarbitražnog centra SAS-HGK-a čije bi sjedište bilo izvan Zagreba, na jednoj od (po)morskih destinacija.

Ključne riječi: *pomorski sporovi, arbitraža, Stalno arbitražno sudište pri Hrvatskoj gospodarskoj komori, Londonsko udruženje pomorskih arbitara, Njemačko udruženje pomorske arbitraže, Zakon o arbitraži, postupak, hrvatsko pravo, englesko pravo, njemačko pravo*

1. Uvod

Pomorska arbitraža određuje se u literaturi kao oblik općetrgovačke arbitraže, odnosno arbitraža koja je usko povezana s općetrgovačkom arbitražom. Pomorskom arbitražom rješavaju se trgovački sporovi koji uključuju brod.[1] Odlika je sporova koji se rješavaju pomorskoarbitražnim forumom da se u njima puno češće javljaju kompleksna činjenična negoli pravna pitanja. Posljedično, pomorski arbitri ne moraju nužno biti pravnici te će većinom biti riječ o tzv. poslovnim ljudima, stručnjacima iz određenog pomorskopravnog, odnosno općetrgovačkog područja.[2]

Cilj je rada prikazati i analizirati određene organizacijsko-kompetencijsko-funkcionalne aspekte pomorske arbitraže u hrvatskom, engleskom te njemačkom pravu uzimajući u obzir i podatke o organiziranim i provedenim pomorskim arbitražama pri Stalnom arbitražnom sudištu Hrvatske gospodarske komore (dalje: SAS-HGK) u čijoj se organizaciji bilježe (doduše, još uvijek skromno) pojedine pomorske arbitraže. Analizi uređenja pomorske arbitraže u hrvatskom pravu prethodit će analiza i rasprava o organizacijsko-kompetencijsko-funkcionalnim aspektima pomorske arbitraže u engleskom te njemačkom pravu, posebice uzimajući u obzir pomorske arbitraže pri Londonskom udruženju pomorskih arbitara (dalje: LMAA) te Njemačkom udruženju pomorske arbitraže (dalje: GMAA). Izbor tih dvaju poredbenopravnih sustava uvjetovan je okolnošću što u njihovu okviru djeluju navedeni europski pomorskoarbitražni centri, ali i okolnošću što pomorske arbitraže pri LMAA-u prednjače u odnosu na ostale pomorskoarbitražne centre.[3] Izbor njemačkog poredbenopravnog sustava uvjetovan je i povijesnim razlozima, odnosno snažnim utjecajem njemačkog prava i doktrine na hrvatsko pravo te doktrinu procesnog prava.

Razmatranje organizacijsko-kompetencijsko-funkcionalnih aspekata pomorske arbitraže u engleskom i njemačkom pravu slijedit će sustav koji su utvrdile autorice. Najprije će se raspraviti o pojmu i specifičnostima pomorske arbitraže u izabranim sustavima, kao i o izvorima arbitražnog prava. Potom će se razmotriti kakav utjecaj ugovaranje pomorske arbitraže ima

[1] Usp. Mintas Hodak, Lj. 1985. *Arbitar u pomorskoj arbitraži.* Magistarski rad. Pravni fakultet u Zagrebu. Zagreb. str. 5; Marrella, F. 2005. Unity and Diversity in International Arbitration: The Case of Maritime Arbitration. *American University International Law Review*. 20 (5). str. 1059; Ambrose, C.; Maxwell, K.; Parry, A. 2009. *London Maritime Arbitration*. 3. izd. Informa. London. str. 1; Kapov, T. 2012. Pomorska arbitraža pri Londonskom udruženju pomorskih arbitara. *Pravo u gospodarstvu* 51 (2). str. 1092-1093, s bibliografskim uputama.

[2] V. Marrella, F. 2005. *op. cit.* u bilj. 1. str. 1087; Kapov, T. 2012. *op. cit.* u bilj. 1. str. 1094, s bibliografskim uputama.

[3] U literaturi se ističe da članovi LMAA-a godišnje prime oko 3000 imenovanja te donesu više od 400 pravorijeka. Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 2.; v. i Aston, C. *A look at the London Arbitration Scene*. http://www.lmaa.london/uploads/documents/LSLC %20talk.pdf. str. 2 (preuzeto 23. travnja 2017. s: www.lmaa.london); v. i Tassios, P. N. 2004. Choosing the Appropriate Venue: Maritime Arbitration in London or New York? *Journal of International Arbitration* 21 (4). str. 355. Iznesena je i brojka da LMAA pomorske arbitraže obuhvaćaju oko 75 % (i više) svih pomorskih arbitraža. Harris, B. 2011. London Maritime Arbitration. Chartered Institute of Arbitrators 77. http://www.lmaa.london/uploads/documents/London %20Maritime %20Arbitration %20by %20B %20Harris.pdf. str. 123-124 (preuzeto 23. travnja 2017. s: www.lmaa.london).

na nadležnost državnog suda u razmatranim sustavima. U radu će se prikazati osnovne karakteristike pojedinih arbitražnih centara (SAS-HGK-a, LMAA-a, GMAA-a). Nakon prikaza pojedinih arbitražnih centara u poredbenopravnim sustavima analizirat će se osnovni instituti arbitražnog postupka u pomorskim sporovima pri izabranim centrima, i to: arbitražni sporazum, arbitražni sud (konstituiranje, sastav, prava i dužnosti arbitara), načela arbitražnog postupka, pokretanje arbitražnog postupka, posebni (ubrzani, pisani, sumarni) arbitražni postupci (s obzirom na vrijednost predmeta spora), dokazni postupak, troškovi arbitražnog postupka, pravorijeka, pravnih sredstava protiv pravorijeka te ovrhe (domaćeg) pravorijeka.

U zaključnom dijelu rada pokušat će se naznačiti tendencije konvergencije te divergencije poredbenopravnih sustava uključenih u analizu. Na temelju provedene poredbenopravne analize, kao i analize povijesnih izvora hrvatske pomorske arbitraže te (oskudne) prakse, pokušat će se naznačiti projekcije *de lege ferenda* u cilju poticanja razvoja prakse pomorske arbitraže u Hrvatskoj.

2. Pomorska arbitraža u engleskom pravu

2.1. Određenje pojma i izvora pomorske arbitraže

Izvor engleskog arbitražnog prava u engleskom je Zakonu o arbitraži (*Arbitration Act*) iz 1996. godine.[4] Ukratko, donošenju EZA-a prethodilo je tzv. *Mustill* izvješće iz 1989. godine koje je izradio *Departmental Advisory Committee on Arbitration Law* pod vodstvom *Lord Justice Mustilla*, posebice u odnosu na prihvaćanje UNCITRAL-ova modela zakona o međunarodnoj trgovačkoj arbitraži.[5] Primjena EZA-a općenito je ocijenjena iznimno uspješnom u praksi, neovisno o komentarima da je postalo gotovo nemoguće dobiti dopuštenje za podnošenje žalbe (*appeal on point of law*[6]).[7]

Jedan od ciljeva donošenja EZA-a bio je osiguranje Londona kao svjetskog arbitražnog centra.[8] U okviru engleskog sustava djeluje i LMAA te je, promatrajući pomorske arbitraže, LMAA zasigurno centar svjetske pomorskoarbitražne scene. Arbitraža pri LMAA-u primjer je *ad hoc* pomorske arbitraže i upravo se ta njezina odlika u literaturi ističe kao prednost.[9]

LMAA je izradio svoja Pravila o arbitraži (*The LMAA Terms 2012*[10]). Arbitražni postupci pri LMAA-u provode se u prvom redu prema uglavcima arbitražnog sporazuma. Pritom stranke mogu ugovoriti primjenu Pravila LMAA-a izravno, ali i neizravno – ako su stranke izabrale arbitra pojedinca ili arbitre koji su punopravni članovi LMAA-a ili pak ako su arbitar pojedinac ili arbitri imenovani na temelju Pravila LMAA-a (osim ako su se stranke drugačije sporazumjele, čl. 5. Pravila LMAA-a).[11]

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4 Engleski Zakon o arbitraži iz 1996. (dalje: EZA), dostupan na: http://www.legislation.gov.uk/ukpga/1996/23/contents. PDF verzija dostupna na: http://www.legislation.gov.uk/ukpga/1996/23/data.pdf (preuzeto 14. travnja 2017. s: www.legislation.gov.uk.).

5 V. Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 20; Roth, M.; Brinkmann, T. 1998. *The English Arbitration Act 1996. – A Comparative Assessment*. Croatian Arbitration Yearbook 5. str. 51-54.

6 O pravnim sredstvima protiv pravorijeka u engleskom pravu v. *infra ad* 2.2.9.

7 Za rezultate istraživanja v. u Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 19.

8 *Ibid.*, str. 22.

9 V. *Ibid.* str. 2; Kapov, *op. cit.* u bilj. 1. str. 1095-1096, s bibliografskim uputama.

10 PDF verzija Pravila LMAA-a dostupna na: http://www.lmaa.london/uploads/documents/2012Terms.pdf (preuzeto 14. travnja 2017. s: www.lmaa.london; dalje: Pravila LMAA-a).

11 Usp. Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 4-5.

2.2. Londonsko udruženje pomorskih arbitara (LMAA)

2.2.1. Općenito o LMAA-u

Londonsko udruženje pomorskih arbitara (*London Maritime Arbitrators Association* - LMAA) profesionalno je udruženje pomorskih arbitara sa sjedištem u Londonu osnovano 1960. godine. Ono ima temelje u organiziranoj grupi brokera Baltičke burze (*Baltic Exchange*) koji su djelovali kao pomorski arbitri.[12] Svrha LMAA-a kao pomorskoarbitražnog centra nije administriranje arbitražnog postupka. Ono je prepušteno individualnom arbitražnom sudu. Administrativne su funkcije tog centra, naime, sporedne.[13]

LMAA djeluje na ujednačavanju standarda te postupovnih pravila pomorske arbitraže.[14] U tom kontekstu treba istaknuti Pravila LMAA-a. Pravila LMAA-a prvi su put donesena 1984. godine, a zbog svoje se jasnoće, prikladnosti i fleksibilnosti često ugovaraju i za one pomorske arbitraže u kojima ne arbitriraju članovi LMAA-a.[15] Uz Pravila LMAA-a kojima je propisan redovan tijek arbitražnog postupka, postoje i Pravila LMAA-a u sporovima male vrijednosti (*The Small Claims Procedure*) iz 2012. godine.[16] Osim toga, u ožujku 2009. godine donesena su i Pravila LMAA-a u sporovima srednje vrijednosti (*The Intermediate Claims Procedure*) koji zaslužuju potpuniji postupak u odnosu na sporove male vrijednosti, ali ne i redovan postupak uzimajući u obzir načelo proporcionalnosti.[17] Trenutno su na snazi Pravila LMAA-a u sporovima srednje vrijednosti iz 2012. godine.[18] [19]

LMAA-om upravlja Odbor (*The LMAA Committe*) kojem predsjeda predsjednik (*The LMAA President*) i kojeg biraju punopravni članovi.[20] Članovi Udruženja dijele se na punopravne članov (*Full Members*) i članove potpore (*Supporting Members*). Punopravni članovi čine skupinu od trideset i sedam osoba[21] koje su općenito spremne arbitrirati u pomorskim arbitražama bilo koje vrste i trajanja. Među njima u pravilu dominiraju osobe s pravnim znanjem, ali ima i

[12] *Ibid.*, str. 2.; Harris, B., (2011.), *op. cit.* u bilj. 3, str. 118; Kapov, T., (2012.), *op. cit.* u bilj. 1, str. 1096, s bibliografskim uputama.

[13] Mali je broj pomorskih arbitraža u kojima će predsjednik LMAA-a vršiti funkciju ovlaštenika za imenovanje (koju bi mogao imati prema Pravilima LMAA-a). Harris, B. 2011. *op. cit.* u bilj. 3. str. 121.

[14] Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 2.

[15] *Ibid.* str. 3.

[16] The Small Claims Procedure iz 2012. http://www.lmaa.london/terms2012.aspx (preuzeto 18. travnja 2017. s: www.lmaa.london; dalje: Pravila LMAA-a u sporovima male vrijednosti).

[17] Commentary on the LMAA Intermediate Claims Procedure 2012. http://www.lmaa.london/uploads/documents/2012ICPCommentary.pdf. str. 1 (preuzeto 22. travnja 2017. s: www.lmaa.london); Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 8, 191.

[18] The Intermediate Claims Procedure iz 2012. http://www.lmaa.london/terms2012.aspx (preuzeto 18. travnja 2017. s: www.lmaa.london; dalje: Pravila LMAA-a u sporovima srednje vrijednosti).

[19] Godine 1996. prihvaćena su i tzv. FALCA pravila (*Fast and Low Cost Arbitration*) kako bi osiguralo brz i troškovno isplativiji arbitražni postupak za sporove srednje vrijednosti (do 250,000 $). Međutim, FALCA pravila pokazala su se relativno nepopularnim u odnosu na Pravila LMAA-a u sporovima male vrijednosti te je ocijenjeno da će vjerojatno to biti i dalje slučaj uzimajući u obzir Pravila LMAA-a u sporovima srednje vrijednosti (koja su prvi put prihvaćena 2009. godine). Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 7-8. Za LMAA FALCA arbitražnu klauzulu v. http://www.lmaa.london/lmaa-falca-clause.aspx (preuzeto 22. travnja 2017. s: www.lmaa.london); v. Commentary on the LMAA FALCA Rules. http://www.lmaa.london/terms-commentary-on-the-falca-rules.aspx (preuzeto 22. travnja 2017. s: www.lmaa.london).

[20] Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 2.

[21] Za listu punopravnih članova v. http://www.lmaa.london/membership-browse.aspx?mtype=1 (preuzeto 18. travnja 2017. s: www.lmaa.london).

onih s tehničkim i trgovačkim vještinama. Većini je punopravnih članova funkcija pomorskog arbitra glavno zanimanje.[22] Članovi potpore čine veću skupinu, oko 750 osoba,[23] a u literaturi se ističe da je riječ o osobama, većinom sudionicima pomorske trgovine, odvjetnicima i osobama iz P&I klubova (osiguravajućih društava) koje su zainteresirane za rad društva te podupiru njegove aktivnosti.[24] Članovi potpore u pravilu ne arbitriraju, već predstavljaju korisnike LMAA-a. Važne promjene u praksi, kao promjene u Pravilima LMAA-a, naime, bit će usvojene tek nakon konzultacija s Odborom za povezivanje članova potpore (*The Supporting Members Liaison Committee*).[25]

2.2.2. Arbitražni sporazum

Na arbitražni sporazum kojim stranke ugovaraju pomorsku arbitražu pri LMAA-u primjenjuje se englesko arbitražno pravo, osim ako stranke nisu ugovorile primjenu drugog prava (čl. 6. (a) Pravila LMAA-a). I u slučaju sporazuma o primjeni drugog prava primjenjivat će se prisilni propisi engleskog arbitražnog prava (Dodatak 1. EZA-a)[26] poput odredaba o dužnosti arbitražnog suda da postupa pravedno (*fairly*) i nepristrano (*impartially*) te da postupak provodi bez nepotrebnih odlaganja i troškova (čl. 33., st. 1. EZA-a). Prema Pravilima LMAA-a mjesto je arbitraže u Engleskoj (osim ako se stranke nisu drugačije sporazumjele); (čl. 6. (b) Pravila LMAA-a).

Kao i u hrvatskom pravu arbitraža se može ugovoriti u samostalnom ugovoru ili pak uvrštavanjem arbitražne klauzule u glavni ugovor. Pomorska arbitraža u engleskom pravu može se ugovoriti izrijekom, što je često i slučaj, uvrštavanjem arbitražne klauzule u brodarski ugovor, ugovor o kupoprodaji ili teretnicu. Međutim, to se može učiniti i prešutno – tako da stranke pristupe arbitraži te se upuste u arbitražni postupak (čl. 5., st. 5. EZA-a).[27] I u tom slučaju, međutim, smatrat će se da su stranke ugovorile arbitražu u pisanom obliku: razmjenom podnesaka u arbitražnom postupku u kojem se jedna stranka poziva na arbitražni sporazum, a druga to ne osporava (*arg. ex* čl. 5., st. 5. EZA-a).[28] Značenje je „sporazuma u pisanom obliku", dakle, relativno široko. Tomu treba pridodati i okolnost da arbitražni sporazumi u usmenom obliku imaju učinke u engleskom *common law* sustavu, ali ne uživaju statutarnu zaštitu (čl. 81., st. 1. (b) EZA-a).[29]

U vezi s ugovaranjem arbitražnog rješavanja pomorskih sporova otvara se pitanje trećih, poput imatelja teretnice. U slučaju teretnice stajalište je engleske prakse da se (ipak) u teretnici potrebno izrijekom pozvati na arbitražnu klauzulu iz brodarskog ugovora (v. čl. 6., st. 2. EZA-a).[30]

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[22] Usp. Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 2; Kapov, T. 2012. *op. cit.* u bilj. 1. str. 1096.

[23] Za listu članova potpore v. http://www.lmaa.london/membership-browse.aspx?mtype=2 (preuzeto 18. travnja 2017. s: www.lmaa.london).

[24] Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 3; usp. Kapov, T. 2012. *op. cit.* u bilj. 1. str. 1096.

[25] Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 3; v. Kapov, T. 2012. *op. cit.* u bilj. 1. str. 1096.

[26] V. Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 65-66.

[27] V. *Ibid.* str. 44.

[28] V. *Ibid.* str. 49.

[29] *Ibid.* str. 48.

[30] Za razvoj prakse engleskih sudova te različita stajališta v. *Ibid.* str. 51-54. Usp. i Kapov, T. 2012. *op. cit.* u bilj. 1. str. 1102.

Za ugovaranje LMAA-a arbitraže te pravila LMAA-a stranke mogu koristiti tzv. BIMCO/LMAA arbitražnu klauzulu koja sadrži uglavke o mjestu arbitraže, mjerodavnom pravu i pravilima prema kojima će se voditi postupak te o broju i načinu izbora, odnosno imenovanja arbitara.[31]

Okolnost da su stranke ugovorile arbitražno rješavanje pomorskih sporova pri LMAA-u dovodi do prekida sudskog postupka (*stay of legal proceedings*) u povodu prigovora stranke u slučaju da je jedna od stranaka ipak pokrenula sudski postupak protiv druge u stvarima za koje je ugovorena arbitraža (v. čl. 9. EZA-a). Uz to, englesko pravo propisuje i mogućnost da sud odredi nalog (tzv. *anti-suit injunctions*) kojim se stranci zabranjuje pokretanje ili nastavak sudskog postupka u drugoj državi (v. čl. 44., st. 2. (e) EZA-a).[32] Iako je na određivanje takvih mjera pod određenim pretpostavkama ovlašten i arbitražni sud (v. čl. 39, čl. 48., st. 5. EZA-a), činjenica je da će u praksi u pravilu to činiti državni sudovi jer imaju na raspolaganju efikasna sredstva da to i postignu.[33] U sporovima s prekograničnim elementom, međutim, praksa Europskog suda priječi engleske sudove u određivanju takvih naloga u odnosu na sudske postupke u drugim državama članicama EU-a.[34] S druge strane, ističe se da ta mogućnost i dalje postoji u odnosu na druge države izvan EU-a.[35]

2.2.3. Arbitražni sud

O sporazumu stranaka ovisi broj arbitara koji će činiti arbitražni sud. Ako se stranke nisu sporazumjele u pogledu broja arbitara, a prema arbitražnom sporazumu moraju se primjenjivati Pravila LMAA-a, tada će sud biti sastavljen od triju arbitara (čl. 8. (a) Pravila LMAA-a).

Arbitra pojedinca sporazumno će izabrati stranke (čl. 16., st. 3. EZA-a). U slučaju arbitražnog vijeća svaka stranka izabire po jednog arbitra, a tako izabrani arbitar imenuje trećeg (čl. 8. (b), čl. 9. Pravila LMAA-a). Treći arbitar imat će funkciju predsjednika arbitražnog vijeća (*chairman*), osim ako se stranke nisu drugačije sporazumjele (čl. 8. (b. iii.) Pravila LMAA-a). Naime, stranke se mogu sporazumjeti o imenovanju dvaju arbitra te nadarbitru (*umpire*) (čl. 9. (a. i b.) Pravila LMAA-a). Dok je predsjednik arbitražnog vijeća prvi među jednakima,[36] na-

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[31] Riječ je o arbitražnoj klauzuli koju je preporučilo Baltičko i međunarodno pomorsko vijeće (*Baltic and International Maritime Council*), a čiji je sadržaj dostupan na: http://www.lmaa.london/terms-incorporation-clause.aspx (preuzeto 14. travnja 2017. s: www.lmaa.london); v. Commentary on the LMAA Intermediate Claims Procedure 2012. *op. cit.* u bilj. 17. str. 1; v. i Marrella, F. 2005. *op. cit.* u bilj. 1. str. 1077-1078.

[32] O tzv. *anti-suit injunctions* i praksi engleskog suda v. Fisher, G. 2010. Anti-suit Injunctions to Restrain Foreign Proceedings in Breach of an Arbitration Agreement. *Bond Law Review* (22) 1. str. 1-25.

[33] Usp. Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 106-107.

[34] U predmetu *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc.* (Europski sud: C-185/07 od 10. veljače 2009.) Sud je zauzeo stajalište prema kojem je određivanje naloga od suda jedne države članice EU-a kojim se osobi zabranjuje pokretanje ili nastavak sudskog postupka u drugoj državi članici jer bi to bilo u suprotnosti s arbitražnim sporazumom „nespojivo s Uredbom Vijeća (EZ-a) br. 44/2001 od 22. prosinca 2000. o nadležnosti, priznanju i izvršenju sudskih odluka u građanskim i trgovačkim stvarima." Naime, takav je nalog „u suprotnosti s međusobnim povjerenjem država članica u odnosu na njihove pravne sustave i tijela pravosuđa i na kojem počiva sustav nadležnosti Uredbe br. 44/2001" jer sprečava sud druge države članice u ostvarivanju ovlasti koje su mu tom Uredbom dodijeljene, dakle, u odlučivanju o primjenjivosti Uredbe na temelju njezinih odredaba o materijalnom polju primjene (t. 30. Odluke, C-185/07 od 10. veljače 2009.).

[35] Usp. Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 105, 111-114.

[36] Mišljenje predsjednika vijeća, međutim, imat će prednost u slučaju kad nije postignuta jednoglasnost, odnosno većina u vijeću (v. čl. 8. (b. v. i vi.) Pravila LMAA-a).

darbitar sudjeluje u postupku kao promatrač – ako se stranke nisu drugačije sporazumjele – te u slučaju neslaganja ostalih arbitara samostalno donosi odluku (čl. 9. (c. i e.) Pravila LMAA-a; čl. 21. EZA-a). U tom će slučaju ostali arbitri u pravilu prestati djelovati u arbitraži kad se predmet uputi nadarbitru.[37]

O sporazumu stranaka ovisi koje će se kvalitete zahtijevati od arbitara. Često se one i određuju u arbitražnim sporazumima. U praksi, u pomorskim arbitražama u načelu arbitriraju stručnjaci s profesionalnim iskustvom u trgovini brodovima ili pravnici koji se bave trgovačkim pravom.[38]

2.2.4. Načela arbitražnog postupka

Načela arbitražnog postupka ocrtavaju se već u odredbama Pravila LMAA-a o svrsi arbitražnog postupka. Svrha je arbitraže, u skladu s Pravilima LMAA-a, pravedno rješenje pomorskog i drugog spora pred nepristranim sudom bez nepotrebna odugovlačenja ili troškova. Osim toga, arbitri su dužni cijelo vrijeme postupati pravedno i nepristrano među strankama (čl. 3. Pravila LMAA-a).

Dužnost arbitara da vode postupak bez odugovlačenja te dodatnih troškova očituje se i u odredbama Pravila LMAA-a o dokaznom postupku, posebice u odredbama o izvođenju dokaza vještačenjem.[39] Činjenica je, naime, da u pomorskim sporovima, odnosno općenito u trgovačkim sporovima, nalazi i mišljenja vještaka znaju biti dosta dugi i skupi. Prema Pravilima LMAA-a sud je ovlašten odrediti da se neće izvoditi dokaz vještačenjem ili da će se taj dokaz izvoditi samo poslije dopuštenja suda ili pak može ograničiti broj vještaka koje može predložiti pojedina stranka, kao i duljinu nalaza i mišljenja vještaka (čl. 14. (a) Pravila LMAA-a).

Uz to, Pravila LMAA-a propisuju mogućnost paralelnog (istovremenog) vođenja arbitražnih postupaka te usmenih rasprava u slučaju kad se u dvjema arbitražama ili više njih jave zajednička činjenična ili pravna pitanja. U takvim slučajevima – ako to odrede arbitražni sudovi – oni mogu u interesu pravednosti, ekonomičnosti i ubrzanja postupka odrediti i da se dokumenti koje je stranka podnijela u jednom arbitražnom postupku učine dostupnim strankama u drugom arbitražnom postupku, naravno, pod uvjetima koje odredi sud te da se rezultati izvođenja dokaza u jednom arbitražnom postupku prihvate u drugom postupku omogućavajući svim strankama razumnu mogućnost da se o njemu očituju i pod drugim uvjetima koje sud može odrediti (čl. 14. (b) Pravila LMAA-a).

U cilju efikasnosti postupka Pravilima LMAA-a propisana je mogućnost rekonstrukcije arbitražnog suda (Dodatak IV. Pravila LMAA-a: *The fourth schedule, Reconstitution of the Tribunal*) u slučaju da zbog obveza arbitara nije moguće odrediti prihvatljiv datum održavanja usmenog ročišta, a rano održavanje ročišta bitno je za arbitražni postupak u tijeku (čl. 19. Pravila LMAA-a).

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[37] V. čl. 3. Pravila LMAA-a. Usp. Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 142.

[38] Usp. Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 152.

[39] Iako prema Pravilima LMAA-a arbitri imaju na raspolaganju sredstva u pogledu učinkovitog vođenja arbitražnog postupka, postoje autori koji ističu da su arbitri pasivni, odnosno da bi trebali preuzeti vođenje postupka, biti aktivniji te koristiti ta sredstva. Evans, D. 2004. *LMAA arbitrations: observations of a user*. http://www.lmaa.london/uploads/documents/C50ObservationsofaUser.pdf. str. 6 (preuzeto 23. travnja 2017. s: www.lmaa.london. Usp. Tassios, P. N.) *op. cit.* u bilj. 3. str. 357.

2.2.5. Tijek arbitražnog postupka

Tijek arbitražnog postupka u prvom će redu ovisiti o sporazumu stranaka, odnosno provodit će se prema Pravilima LMAA-a čiju su primjenu stranke izravno ili neizravno odredile u arbitražnom sporazumu (čl. 5., čl. 12. Pravila LMAA-a). Redovan tijek postupka opisan je u Dodatku II. Pravila LMAA-a (*The second schedule: Arbitration procedure*). Stranke, odnosno sud (u slučaju izostanka sporazuma stranaka) ovlašteni su odlučiti hoće li se održati usmena rasprava tijekom postupka ili će se voditi pisana, tzv. dokumentarna arbitraža te će se pravorijek donijeti na temelju pisanih podnesaka i dokaza koje su stranke podnijele arbitražnom sudu (čl. 12. (b) Pravila LMAA-a).[40] Prema podatcima iznesenim u literaturi, 80 % svih pomorskih arbitraža pri LMAA-u provodi se kao dokumentarna arbitraža.[41]

Ako to zahtijevaju okolnosti arbitraže, a posebice u slučaju složenijih sporova, Pravila LMAA-a propisuju mogućnost održavanja pripremnih sastanaka (*preliminary meetings*) da bi se sudu i strankama omogućilo pregledavanje tijeka dosadašnjeg postupka, postizanje sporazuma o daljnjem tijeku postupka te (u slučaju ako sporazum izostane) kako bi se sudu omogućilo da odredi upute koje smatra prikladnim (čl. 15. Pravila LMAA-a).

Kao što je već navedeno, redovan tijek arbitražnog postupka pri LMAA-u opisan je u Dodatku II. Pravila LMAA-a. Redovan postupak započinje podnošenjem tužbe koja se (uobičajeno) podnosi 28 dana nakon imenovanja arbitra pojedinca, odnosno kad se arbitražni sud sastoji od više arbitara, nakon imenovanja drugog arbitra (čl. 3. Dodatka II. Pravila LMAA-a). S obzirom na formu, tužba može biti neformalna (poput pisma) ili oblikovana formalnije, ali mora jasno, točno i potpuno prikazati poziciju stranaka u odnosu na sporna pitanja te biti popraćena pisanim dokazima relevantnim za rješenje spora. Uz to, paragrafi u tužbi moraju biti numerirani (čl. 1. Dodatka II. Pravila LMAA-a). Ako stranka ne priloži sve pisane dokaze, takvo se postupanje može odraziti na odluku o konačnom snošenju troškova arbitražnog postupka (čl. 2. Dodatka II. Pravila LMAA-a). Osim u iznimnim slučajevima, tuženik je dužan podnijeti odgovor na tužbu te (eventualno) protutužbu u roku od 28 dana od dana primitka tužbe (čl. 4. Dodatka II. Pravila LMAA-a). Nadalje, tužitelj je dužan podnijeti svoj podnesak na odgovor na tužbu u roku od 14 dana od dana njegova primitka, odnosno u roku od 28 dana u slučaju da je tuženik podnio i protutužbu. U slučaju podnošenje protutužbe, tuženik će biti pozvan na podnošenje još jednog podneska na tužiteljev odgovor na protutužbu, i to u roku od 14 dana od dana primitka odgovora na protutužbu (čl. 5. Dodatka II. Pravila LMAA-a). Pritom se neće prihvatiti neobrazložene tvrdnje u obrani, kao ni naknadni podnesci. Ako je podnesak odbijen, treba dati obrazloženje (čl. 6. Dodatka II. Pravila LMAA-a).

Nakon što stranke izmijene inicijalne podneske, one se mogu sporazumjeti (ili pak arbitražni sud može odrediti provedbu dokumentarne arbitraže); (čl. 11. Dodatka II. Pravila LMAA-a). Arbitražni sud donijet će u tom slučaju pravorijek, osim ako stranke u roku od sedam dana od dana obavijesti suda o namjeri donošenja pravorijeka ne zatraže dopuštenje za podnošenje dodatnih podnesaka i dokaza (čl. 13. (c) Pravila LMAA-a).

Ako se stranke ne sporazume oko provedbe dokumentarne arbitraže, morat će u roku od 14 dana od dostave posljednjeg podneska ispuniti upitnik s podatcima o vrsti spora, vrijednosti predmeta spora (uključujući i protutužbeni zahtjev), načelnim spornim pitanjima među strankama, potrebi podnošenja dodatnih podnesaka, potrebi održavanja pripremnih sastana-

[40] Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 186.

[41] Dawood, A. 2016. Arbitration in Maritime Disputes. *Journal of Shipping and Ocean Engineering* 6. str. 208; Harris, B. 2011. *op. cit.* u bilj. 3. str. 122; Kapov, T. 2012. *op. cit.* u bilj. 1. str. 1114, s bibliografskim uputama.

ka i rasprave, dokaznim prijedlozima (te potrebi usmene rasprave), očekivanim troškovima (i troškovima postupka koji su nastali do popunjavanja upitnika) te očekivanoj duljini trajanja usmene rasprave/postupka koji je sastavni dio Dodatka III. Pravila LMAA-a (*The third schedule: Questionnaire*). Treba napomenuti da se razmatra i pitanje jesu li stranke razmatrale mogućnost medijacije kao prikladnog foruma za rješavanje njihova spora (t. 18. Dodatka III. Pravila LMAA-a).[42] Na temelju ispunjena upitnika sud će odlučiti hoće li arbitražni postupak provesti (ipak) kao dokumentarnu arbitražu ili će zakazati usmenu raspravu (čl. 11. Dodatka II. Pravila LMAA-a).

2.2.6. Troškovi arbitražnog postupka

Nakon što je izradio pravorijek, arbitražni će sud obavijestiti stranke o iznosu naknada i troškova suda te da će se pravorijek dostaviti, odnosno biti dostupan strankama nakon plaćanja cijelog iznosa naknada i troškova. Arbitražni sud ima pravo, među ostalim, odbiti dostavu pravorijeka strankama do plaćanja cijelog iznosa odmjerenih troškova (čl. 23. Pravila LMAA-a).

Troškovi arbitražnog postupka pri LMAA-u uključuju nagradu i troškove arbitara (v. Dodatak I. o naknadama arbitražnog suda: *Tribunal's fees*)[43] te troškove stranaka tijekom postupka, posebice one koji se odnose na predlaganje i izvođenje dokaza. Budući da je arbitraža pred LMAA-om *ad hoc* arbitraža, tu se ne pojavljuju troškovi arbitražne institucije povezani s organiziranjem arbitražnog postupka (v. čl. 59. EZA-a).[44]

Ako se stranke ne sporazume oko načina pokrivanja troškova arbitraže, a što je moguće tek nakon nastanka spora (v. čl. 16. i čl. 17. Pravila LMAA-a; čl. 60. EZA-a), o troškovima odlučuje arbitražni sud (čl. 23. Pravila LMAA-a).

Načelo kojim će se voditi arbitražni sud prilikom odlučivanja o naknadi troškova arbitražnog postupka načelo je *causae* (*costs should follow the event*), ali je ovlašten od njega i odstupiti, odnosno korigirati ga ako se ono u konkretnom slučaju pokaže nepravednim (čl. 61., st. 2. EZA-a).[45]

2.2.7. Pravorijek

Vrijeme potrebno za izradu pravorijeka ovisi o okolnostima slučaja. U pravilu se pravorijek mora donijeti u roku ne duljem od šest tjedana od okončanja postupka.[46] U mnogim slučajevima, posebice ako je riječ o hitnim slučajevima, vrijeme za donošenje pravorijeka treba biti

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[42] Treba spomenuti LMAA/Baltic Exchange pravila o medijaciji iz 2009. http://www.lmaa.london/uploads/documents/MEDIATION %20TERMS %20(2009).pdf (preuzeto 23. travnja 2017. s: www.lmaa.london). U praksi, međutim, pomorski arbitri u načelu nisu toliko aktivni kao suci u upućivanju stranaka u medijaciju. O razlozima v. više u: Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 38.

[43] Pravila LMAA-a određuju samo naknadu za imenovanje arbitara (250 £) te naknadu za rezervaciju termina (*booking fees*), i to1000 £ po danu za rasprave koje traju do 10 dana. Za iznos naknada arbitraže pri LMAA-u v. http://www.lmaa.london/notes-on-fees.aspx (preuzeto 18. travnja 2017. s: www.lmaa.london). Stoga, iznos nagrade i troškova arbitara ovisi o sporazumu stranaka ili pak ih određuje arbitražni sud. Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 301.

[44] V. Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 322.

[45] Usp. *Ibid.* str. 327-328.

[46] Rok od šest tjedana u literaturi se ocjenjuje kao smjernica te se ističe da je za donošenje nekih pravorijeka potrebno puno više vremena. *Ibid.* str. 277.

supstancijalno kraće. Ako to zatraže stranke, arbitražni sud, prema Pravilima LMAA-a, treba pri zaključenju usmene rasprave, odnosno kod dokumentarnih arbitraža nakon primitka posljednjeg podneska odrediti rok u kojem će donijeti pravorijek (čl. 20. Pravila LMAA-a).

Ako se stranke nisu drugačije sporazumjele, pravorijek se donosi u pisanom obliku i potpisuju ga svi arbitri koji su sudjelovali u njegovu donošenju (čl. 52., st. 1.-3. EZA-a). Pravorijek mora biti i obrazložen, osim ako nije donesen na temelju nagodbe stranaka ili ako se stranke nisu odrekle obrazloženja (čl. 52., st. 4. EZA-a). Prema Pravilima LMAA-a obrazloženje pravorijeka nije potrebno ako su se stranke tako sporazumjele ili se izrijekom odrekle obrazloženja, a u tom će se slučaju smatrati da su odustale i od (eventualnog) pobijanja pravorijeka žalbom (*appeal on point of law*) pred državnim sudom (čl. 22. (a. i b.) Pravila LMAA-a; čl. 69., st. 1. EZA-a). Prema Pravilima LMAA i u takvu će slučaju arbitražni sud izraditi sažeto obrazloženje pravorijeka, ali to obrazloženje neće se moći upotrijebiti u postupcima povezanim s pravorijekom, osim ako arbitražni sud ne odredi drugačije (tzv. privilegirano obrazloženje; *privileged reasons*; čl. 22. (c. i d.) Pravila LMAA-a).

Pravila LMAA sadrže i odredbe kojima se propisuje ovlast arbitražnog suda na ispravke donesenog pravorijeka, kao i na tumačenja određenog dijela pravorijeka (čl. 25. Pravila LMAA-a).

Kako pravorijek tako je i arbitražni postupak pri LMAA-u povjerljiv. Prema Pravilima LMAA-a, međutim, ako arbitražni sud smatra da pravorijek zaslužuje objavu te o tome obavijesti stranke, objava pravorijeka bit će moguća samo ako stranke tomu ne prigovore, ali će se i onda zaštititi identitet stranaka, njihovih pravnih i drugih zastupnika te arbitražnog suda (čl. 26. Pravila LMAA-a).

2.2.8. Posebni (ubrzani, pisani, sumarni) arbitražni postupci

Za sporove male i srednje vrijednosti postoje posebna pravila LMAA-a te se stranke mogu sporazumjeti da će se ona primjenjivati u takvim postupcima. Ako pritom stranke odrede novčani iznos do kojeg, odnosno od kojeg će se određeni spor smatrati sporom male, odnosno srednje vrijednosti, tada se smatra da taj iznos ne uključuje i kamate i troškove (osim ako se stranke nisu drugačije sporazumjele); (čl. 1. (a) Pravila LMAA-a u sporovima male vrijednosti; čl. 1. (a) Pravila LMAA-a u sporovima srednje vrijednosti). Pravila LMAA-a u sporovima male, odnosno srednje vrijednosti primjenjuju se, dakle, ako su se tako stranke sporazumjele; obično arbitražna klauzula u brodarskom ugovoru može odrediti da se ta pravila automatski primjenjuju na sporove manje od određenog iznosa, odnosno do njega.[47]

Pravila u sporovima male vrijednosti oblikovana su da pruže brži i jeftiniji način postupanja u takvim sporovima.[48] Pritom se ističe da ta pravila nisu prikladna u složenijim sporovima ili ako je potrebno ispitati vještaka. Ta pravila, međutim, mogu biti prikladna i za sporove veće vrijednosti koja uključuju samo jedno sporno pitanje ako nije potrebno usmeno saslušanje.[49]

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[47] Usp. *Ibid.* str. 6.

[48] U literaturi se sugeriralo da su Pravila LMAA-a u sporovima male vrijednosti prikladna ako vrijednost predmeta spora tužbe te protutužbe ne prelazi iznos od 50 000 $ ne uzimajući u obzir kamate i troškove. Pritom je istaknuto da će taj iznos najvjerojatnije porasti na 100 000 $ (što je i bio slučaj jer Pravila LMAA-a u sporovima srednje vrijednosti iz 2012. predviđaju iznos od 100 000 $, a iznad tog će se iznosa spor smatrati sporom srednje vrijednosti). Treba napomenuti da je knjiga iz 2009. godine te je pisana prema Pravilima LMAA-a u sporovima male vrijednosti iz 2006. V. *Ibid*. str. 6; v. i *Commentary on the LMAA Small Claims Procedure.* 2012. http://www.lmaa.london/uploads/documents/2012SCPCommentary.pdf. str. 1 (preuzeto 22. travnja 2017. s: www.lmaa.london).

[49] Usp. Ambrose, C.; Maxwell, K.: Parry, A. 2009. *op. cit.* u bilj. 1. str. 6.

Bitna su obilježja LMAA pomorske arbitraže u sporovima male vrijednosti: arbitrirat će sudac pojedinac (čl. 2. Pravila LMAA-a u sporovima male vrijednosti), sudac pojedinac ima pravo na fiksni iznos naknade troškova (čl. 3. Pravila LMAA-a u sporovima male vrijednosti),[50] vodit će se sumarna, u pravilu dokumentarna arbitraža (čl. 5. Pravila LMAA-a u sporovima male vrijednosti), pravorijek će se objaviti u roku od mjesec dana od dana primitka svih relevantnih podnesaka i dokaza, odnosno zaključenja rasprave (čl. 7. Pravila LMAA-a u sporovima male vrijednosti), stranke nemaju pravo na žalbu protiv takva pravorijeka (čl. 4. Pravila LMAA-a u sporovima male vrijednosti) te on neće sadržavati obrazloženje.[51] Naknada troškova u takvim pomorskim arbitražama može iznositi maksimalno 4 000 £, odnosno 4 500 £ ako vrijednost predmeta spora protutužbe prelazi vrijednost tužbe.[52]

Ako se stranke nisu sporazumjele o novčanom iznosu od kojeg, odnosno do kojeg će neki spor smatrati sporom srednje vrijednosti, prema Pravilima LMAA-a u sporovima srednje vrijednosti iz 2012. takvim će se sporovima smatrati sporovi koji prelaze 100 000 $. Pritom je gornja granica postavljena na 400 000 $ (čl. 1. (a) Pravila LMAA-a u sporovima srednje vrijednosti). U sporovima srednje vrijednosti arbitrira tročlano arbitražno vijeće ako se stranke drugačije ne sporazumiju (čl. 2. i 3. Pravila LMAA-a u sporovima srednje vrijednosti). Stranke su dužne postupati prema određenim vremenskim tablicama u pogledu podnošenja podnesaka te pisanih dokaza (čl. 6. Pravila LMAA-a u sporovima male vrijednosti) dok se usmena rasprava održava samo iznimno, a i onda je u pravilu ograničena na najviše pet sati[53] (čl. 10. Pravila LMAA-a u sporovima srednje vrijednosti). Dokazni je postupak sažet, izvođenje dokaza saslušanjem vještaka moguće je samo ako to dopusti arbitražni sud (čl. 7., čl. 8. i čl. 9. Pravila LMAA-a u sporovima srednje vrijednosti). Sud treba donijeti pravorijek u roku od šest tjedana od dana primitka posljednjeg podneska (čl. 13. (a) Pravila LMAA-a u sporovima srednje vrijednosti). Žalba protiv takva pravorijeka dopuštena je samo iznimno (čl. 14. Pravila LMAA-a u sporovima srednje vrijednosti[54]). Naknada troškova postupka ograničena je – može iznositi maksimalno 30 % vrijednosti tužbenog odnosno, protutužbenog zahtjeva, a ako je održana usmena rasprava, 50 % vrijednosti tužbenog zahtjeva (čl. 15. (b) Pravila LMAA-a u sporovima srednje vrijednosti). Također, i troškovi i naknade arbitražnog suda ograničeni su (čl. 17. (b) Pravila LMAA-a u sporovima srednje vrijednosti). Troškovi arbitražnog suda (bez naknada za imenovanje arbitara[55]) u slučaju arbitra pojedinca ne mogu prelaziti jednu trećinu, odnosno u slučaju vijeća od dvaju ili triju arbitara, dvije trećine ukupnih troškova postupka (čl. 17. (b) Pravila LMAA-a u sporovima srednje vrijednosti).

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[50] Od 1. lipnja 2012. godine naknada troškova arbitru pojedincu u sporovima male vrijednosti iznosi 3 000 £, uz dodatnu naknadu od 2 000 £ ako vrijednost predmeta spora protutužbe prelazi vrijednost tužbe. V. http://www.lmaa.london/notes-on-fees.aspx (preuzeto 18. travnja 2017. s: www.lmaa.london).

[51] Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 190.

[52] Primjenjuje se od 1. lipnja 2012. godine. Za iznose naknade troškova postupka u sporovima male vrijednosti v. http://www.lmaa.london/notes-on-fees.aspx (preuzeto 18. travnja 2017. s: www.lmaa.london).

[53] *Commentary on the LMAA Intermediate Claims Procedure*. *op. cit.* u bilj. 17. str. 2.

[54] Smatrat će se da su se stranke suglasile da se pravo na žalbu (*right of appeal*) ograniči samo na slučajeve kad pravorijek otvara pitanja od općeg interesa ili je on važan za trgovinu ili granu industrije u pitanju, kao i da se stranka može obratiti sudu samo ako arbitražni sud potvrdi da je to pitanje važno za trgovinu, odnosno granu industrije u pitanju (čl. 14. Pravila LMAA-a u sporovima srednje vrijednosti). V. *Commentary on the LMAA Intermediate Claims Procedure*. *op. cit.* u bilj. 17. str. 2-3; Ambrose, C.; Maxwell, K.; Parry, A. 2009. *op. cit.* u bilj. 1. str. 9, 191.

[55] Od 1. lipnja 2012. godine naknada za imenovanje arbitra iznosi 250 £. V. http://www.lmaa.london/notes-on-fees.aspx (preuzeto 18. travnja 2017. s: www.lmaa.london).

2.2.9. Pravna sredstava protiv pravorijeka

Odlika je engleskog arbitražnog prava da njime nije uređena tužba za poništaj arbitražnog pravorijeka (poput one u hrvatskom pravu), već mogućnost osporavanja pravorijeka (*challenging the award*) ako stranka smatra da arbitražni sud nije bio nadležan za odlučivanje (čl. 67. EZA-a) ili da je tijekom arbitraže došlo do bitnih procesnih povreda koje su uzrokovale ili će uzrokovati tešku povredu prava stranaka (čl. 68. EZA-a). Uz to, žalba zbog pogrešne primjene materijalnog prava (*appeal on point of law*) dopuštena je samo ako se druga strana tomu ne usprotivi ili ako ju dopusti državni sud, a što će biti slučaj ako je odluka arbitražnog suda o pojedinom pravnom pitanju očito pogrešna ili pak je posrijedi pitanje od javnog interesa, a odluka je arbitražnog suda o tom pitanju dvojbena (čl. 69. EZA-a).

2.2.10. Ovrha (domaćeg) pravorijeka

Ovrha pravorijeka LMAA arbitraže u Ujedinjenom Kraljevstvu (izuzev Škotske) provest će se prema odredbama EZA-a o ovrsi domaćih pravorijeka (čl. 66. EZA-a). Prije izvršenja pravorijeka bit će potrebno provesti odgovarajući postupak u kojem će državni sud priznati pravorijek. Riječ je o skraćenom postupku ovrhe u kojem stranka uz zahtjev za ovrhu mora podnijeti ovjerenu ili drugu dokaznu ispravu koja se odnosi na arbitražni sporazum i pravorijek. Postupak se provodi samo na temelju isprava.[56] Puno će suđenje (*full trial*), međutim, biti potrebno u slučaju ako se suprotna strana protivi ovrsi pravorijeka zbog razloga koji otvaraju pojedina činjenična (i pravna) pitanja, a koja zahtijevaju puno ispitivanje (*full investigation*).[57]

Ako, dakle, nije moguć sumaran postupak, u skladu s čl. 66. EZA-a, postoji alternativni put, i to instrument *common law* sustava (v. čl. 81. EZA-a), [58] tužba zbog kršenja pravorijeka (*action on the award*) koja se podnosi protiv dužnika zbog kršenja obveze poštovanja pravorijeka.[59]

3. POMORSKA ARBITRAŽA U NJEMAČKOM PRAVU

3.1. Određenje pojma te izvora pomorske arbitraže

Arbitraža, osobito trgovačka arbitraža, u Njemačkoj se koristila kao način rješavanja sporova od početka 19. stoljeća. Tako je već Zakonik o građanskom parničnom postupku od 13. siječnja 1877.[60] sadržavao detaljna pravila o arbitraži. U međunarodnim je trgovačkim centrima poput Hamburga trgovačka arbitraža imala vrlo važnu ulogu i prije stupanja na snagu Zakonika.[61] Godine 1998. provedena je reforma njemačkog arbitražnog prava prema pravilima UNCITRAL-ova modela zakona o međunarodnoj trgovačkoj arbitraži i tada se nastojala zadržati jasna i pregledna struktura uzora.[62] Osnovni je izvor

[56] V. Ambrose, C.; Maxwell, K.: Parry, A. 2009. *op. cit.* u bilj. 1, str. 379-381.

[57] V. *Ibid.* str. 381.

[58] *Ibid.* str. 382.

[59] *Ibid.* 383.

[60] Zivilprozessordnung v 13. 1. 1877. (RGBl S 83).

[61] Trappe, J. 2013. *Arbitration in Germany – some aspects and comparison of law.* Zeitschrift für Schiedsverfahren 3/2013. str. 167.

[62] V. Rieckhoff, J. J. 2006. *Deutsche Seeschiedsgerichtsbarkeit unter der GMAA Schiedsordnung in vergleichender Betrachtung englischer Seeschiedsgerichtsbarkeit unter der LMAA Reglement*. Univ. Dissertation. Hamburg. str. 16. PDF ver-

arbitražnog prava u Njemačkoj 10. knjiga Zakonika o građanskom parničnom postupku (§§ 1025.-1066).[63]

GMAA je višestruko mijenjao svoja pravila o arbitraži (*GMAA Schiedsgerichtsordnung)*,[64] a posljednja je aktualna verzija od 13. siječnja 2017.[65] Ako su stranke ugovorile da će se njihovi sporovi rješavati primjenom Pravila GMAA-a, primijenit će se ona pravila koja su bila na snazi u vrijeme pokretanja arbitražnog postupka. Stranke pritom Pravila GMAA-a mogu u pojedinom slučaju mijenjati ili dopuniti. Ako je arbitar već imenovan, izmjene i dopune dopuštene su samo uz njegov pristanak (§ 1., br. 1. i 2. Pravila GMAA-a).

3.2. Njemačko udruženje pomorske arbitraže (GMAA)

3.2.1. Općenito o GMAA-u

GMAA su 1983. osnovali brodari i odvjetnici iz Hamburga i Bremena specijalizirani za područje pomorskog prava s ciljem da se u sporovima proizišlim iz pomorske plovidbe omogući jeftinija i djelotvornija alternativa u odnosu na strane arbitražne sudove. Od početka je bio prihvaćen pomalo „staromodan princip" imenovanja arbitražnog suda od svega dvaju arbitra što je namjerno ili slučajno pogodilo pravi duh nadolazećeg vremena u kojem su troškovi postupka bili često izvan kontrole.[66] Formulacija *pomorska arbitraža* na engleskom jeziku (*Maritime Arbitration*) bila je nužna da bi se pojmovno razlikovala od njemačkog arbitražnog suda u Hamburgu (*Deutsche Schiedsgericht in Hamburg*) osnovanog 1913. godine. Za razliku od tog suda, GMAA ne nudi institucionalnu arbitražu, nego pravila za *ad hoc* arbitražu, dakle, u pojedinom slučaju prema volji stranaka ustanovljen arbitražni sud. Ovaj se postupak nužno ne vodi na engleskom jeziku i nije ograničen samo na postupke u svezi s plovidbom brodom, nego se odnosi na sve sporove do kojih može doći između poduzetnika različitih struka. Primjenjuje se u svim ugovorima koji su, u najširem smislu te riječi, povezani „s vodom" u svezi s transportom, iznajmljivanjem broda, spašavanjem i tegljenjem, izgradnjom broda i investiranjem u pomorsku gradnju, termoelektrane na vjetar itd.[67] Na temelju podataka prikupljenih analizom upitnika provedenih u svrhu komparativne analize arbitražnih sustava LMAA-a i GMAA-a kako bi se utvrdila razina zadovoljstva korisnika u Sjevernoj Njemačkoj,[68] utvrđeno

zija dostupna na: https://www.gesetze-im-internet.de/bundesrecht/zpo/gesamt.pdf (preuzeto 2. svibnja 2017. s: gmma.de).

63 Zivilprozessordnung idF v 5. 12. 2005 (BGBl. I S. 3202; 2006 I S. 431: 2007 I S. 1781), zulezt geändert durch Art. 7 G. v. 28. 4. 2017. (BGBl I S. 969), u daljnjem tekstu: ZPO. PDF verzija dostupna na: https://www.gesetze-im-internet.de/bundesrecht/zpo/gesamt.pdf (preuzeto 10. svibnja 2017. s: www.gesetze-im-internet.de).

64 Pravila GMAA od 1. 1. 1999. do 31. 12. 2001.; od 1. 1. 2002. do 31. 12. 2006., od 1. 1. 2007. do 31. 12. 2011., od 1. 1. 2013. do 12. 1. 2017. https://gmaa.de/de/gmaa-intern/bibliothek/archiv (preuzeto 20. travnja 2017. s: gmaa.de).

65 PDF verzija Pravila GMAA-a dostupna na: https://gmaa.de/images/GMAA_Schiedsgerichtsordnung_2017.pdf (preuzeto 20. travnja 2017. s: gmaa.de; dalje: Pravila GMAA).

66 Strube, F. 2003. *German Maritime Arbitration Association – arbitration and/or mediation?* BIMCO Review 2003. str. 180, PDF verzija dostupna na: https://gmaa.de/images/gmaa/pdf/artikel/StrubeBimco.pdf (preuzeto 11. svibnja 2017. s: gmma.de).

67 Zillmer, M. 2011. *Anstehende Änderungen der GMAA Schiedsgerichtsordnung*. Mittelungsblatt DAV Internationler Rechtsverkehr 2/11. str. 57, PDF verzija dostupna na: https://gmaa.de/images/gmaa/pdf/artikel/20120220143828531.pdf (preuzeto 11. svibnja 2017. s: gmma.de).

68 Rezultati istraživanja objavljeni su u veljači 2007. godine. Upitnik se sastojao od 18 pitanja upućenih na adresu 116 ispitanika. Opširnije v. Harke, W. 2007. A Comparative Study on the Arbitration Systems of the London Maritime Arbitrators Association (LMAA) and the German Maritime Arbitration Association (GMAA) in Hamburg/Bremen – with special focus on the level of satisfaction of the Northern German users of the system. Scholl

je da arbitražu najčešće ugovaraju stranke ugovora o iznajmljivanju broda, izgradnji broda, kupoprodaji, naknadi za spašavanje te ugovora o pomorskom osiguranju, ugovora o uslugama i sl.

Pravila GMAA-a, za razliku od Pravila LMAA-a, ne sadrže posebna pravila za sporove manje ili srednje vrijednosti. Međutim, vrijednost predmeta spora ključan je kriterij određivanja iznosa naknade i troškova suda pri čemu je određena najmanja (10.000,00 €) i najveća (50.000.000,00 €) vrijednost predmeta spora (§ 3., br. 2. i 3. Pravila GMAA-a za naknadu troškova arbitražnog suda, *GMAA-Regeln für die Vergütung des Schiedsgerirchts*).[69]

U skladu sa Statutom GMAA-a[70], cilj je udruženja potaknuti pomorsku arbitražu u njemačkim lučkim gradovima i učiniti te gradove značajnim mjestima međunarodne pomorske arbitraže, ojačati ugled njemačke pomorske arbitraže u međunarodnim okvirima te pružiti potporu osobama djelatnim u njemačkoj pomorskoj arbitraži izmjenom iskustava i uspostavom studijskih programa o pravnim i praktičnim pitanjima značajnim za pomorsku arbitražu (§ 1. Statuta GMAA-a). Članom GMMA-a može postati svaka fizička osoba koja je pravnim ili praktičnim djelovanjem u plovidbi brodom ili u pomorskom transportu povezana s njemačkom pomorskom arbitražom. O primanju u udruženje odlučuje uprava, a članstvo prestaje smrću, istupanjem ili isključenjem (§ 3. Statuta GMAA-a). Tijela su udruženja uprava i skupština članova (§ 5. Statuta GMAA-a).

Zanimljivo je da je GMAA 2010. godine osnovao GMAA 40 kao forum mladih odvjetnika, nautičara ili drugih osoba povezanih s pomorskom djelatnošću, mlađih od 40 godina. Cilj ovog foruma izmjena je praktičnih iskustava i uspostava poslovne mreže radi razvoja novih perspektiva u pomorskoj arbitraži.[71]

3.2.2. Arbitražni sporazum

Ako stranke nisu odredile koje će se pravo primijeniti u arbitražnom postupku, primjenjuje se njemačko pravo. Ovo se pravilo odnosi i na arbitražni sporazum (§ 12., br. 1. Pravila GMAA-a), stoga će se valjanost arbitražnog sporazuma prosuđivati prema njemačkom pravu. Isto tako, kad stranke nisu odredile mjesto arbitraže, arbitražni će sud kao mjesto arbitraže odrediti Hamburg ili Bremen (§ 8., br. 1. Pravila GMAA-a).

Prema § 1029. ZPO-a arbitražni sporazum definira se kao sporazum stranaka prema kojem se svi ili pojedini sporovi koji su u svezi s određenim pravnim odnosom nastali na ugovorni ili izvanugovorni način ili će tek nastati, podvrgavaju odluci arbitražnog suda. Arbitražni sporazum može biti zaključen u formi samostalnog ugovora (*Schiedsabrede*, arbitražni sporazum) ili klauzule u ugovoru (*Schiedsklausel*, arbitražna klauzula). U doktrini njemačkog procesnog prava pravna je priroda arbitražnog ugovora sporna,[72] iako pojedini autori drže da način prosu-

of Law. University of Northumbria at Newcastle, L.L.M. PDF verzija dostupna na https://gmaa.de/images/gmaa/pdf/artikel/20120220143828531.pdf (preuzeto 11. svibnja 2017. s: gmma.de).

[69] GMAA-Regeln für die Vergütung des Schiedsgerirchts. https://gmaa.de/de/schiedsverfahren/kosten-des-schiedsgerichts/gebuehrenordnung (preuzeto 12. svibnja 2017. s: gmaa.de).

[70] GMAA Satzüng od 18. 11. 2015. https://gmaa.de/de/gmaa-intern/satzung (preuzeto 12. svibnja 2017. s: gmaa.de; dalje: Statut GMAA).

[71] Opširnije v. o GMAA 40. https://gmaa.de/de/gmaa-intern/gmaa40 (preuzeto 12. svibnja 2017. s: gmaa.de).

[72] Za razliku od starije literature koja je smatrala da je arbitražni sporazum materijalnopravni ugovor, ne uzimajući u obzir da su glavni učinci tog ugovora procesnopravne prirode, danas je u njemačkoj procesnoj doktrini prevladavajući stav da je riječ o procesnopravnom ugovoru kojim se spor između stranaka prenosi u nadležnost arbitražnog suda. V. Saenger, I. 2017. Zivilprozessordnung: ZPO. Kommentar. Baden-Baden. Nomos, ZPO § 1029. Rn. 1.

đivanja ovog pitanja nema gotovo nikakve praktične posljedice.[73] Ipak, ako se prihvati stav da je arbitražni sporazum procesni ugovor, njegovo će se zaključenje, sadržaj i opseg prosuđivati prema pravilima procesnog prava. Arbitražni ugovor i glavni ugovor trebaju se razmatrati strogo odvojeno, čak i onda kad je arbitražni ugovor zaključen u obliku arbitražne klauzule. Smatra se da nevaljanost glavnog ugovora ne dovodi nužno do nevaljanosti arbitražnog ugovora, čime se naglašava samostalnost arbitražnog ugovora.[74]

Arbitražni sporazum mora biti sadržan ili u ispravi koju su stranke potpisale ili je sklopljen između stranaka razmjenom pisama, telefaksa, telegrama ili pak drugih oblika komuniciranja koji omogućavaju dokaz o tome da je ugovor sklopljen (§ 1031., st. 1. ZPO-a). Međutim, čl. 6. t. 9. Zakona kojim je provedena reforma pomorskog trgovačkog prava[75] ukinuo je § 1031., st. 4. ZPO-a. Ova je zakonska intervencija imala kao posljedicu novu odredbu § 522., st. 1. t. 2. Trgovačkog zakonika[76] prema kojoj sporazumi na koje se upućuje u teretnici (inkorporacijske klauzule) nisu više sastavni dio (sadržaj) teretnice. Zbog toga arbitražni sporazumi moraju biti izrijekom prihvaćeni u teretnici. Za sve teretnice do 24. ožujka 2013. na snazi ostaje prvobitno uređenje koje je omogućavalo da se dokazivanje arbitražnog sporazuma provede upućivanjem na ugovor o najmu broda.[77] Ako zahtjevi forme iz § 1031., st. 1. ZPO-a nisu ispunjeni, arbitražni sporazum nije valjan. Međutim, ako bi se protivna strana upustila u raspravljanje o glavnoj stvari, arbitražni će ugovor konvalidirati (§ 1031., st. 6. ZPO-a). Ako je arbitražni sporazum nevaljan, upuštanje u raspravljanje o glavnoj stvari može dovesti do zaključenja valjanog arbitražnog sporazuma pod uvjetom da su stranke znale ili su računale da je prvobitno zaključen sporazum moguće bio nevaljan.[78]

GMAA upućuje na standardnu, kombiniranu (medijacijsko-arbitražnu), skraćenu i opširniju arbitražnu klauzulu.[79] Tako skraćena arbitražna klauzula sadrži samo uputu *GMAA abitrage* dok opširnija verzija, osim upućivanja na Pravila GMAA-a, sadrži i pravila za izbor arbitra, mjesto arbitraže i pravo koje će se primijeniti.

Osnovne su procesnopravne posljedice zaključenog arbitražnog sporazuma što stranka ima mogućnost istaknuti prigovor nenadležnosti suda redovne sudbenosti i pozvati se na odgovarajuće kompetencije arbitražnog suda za odlučivanje u sporu. Zbog toga, ako bi tužba bila podnesena sudu u stvari koja je predmet arbitražnog ugovora, sud će tužbu odbaciti kao nedopuštenu, osim ako bi tuženik prije početka usmene rasprave o glavnoj stvari prigovorio i ako bi sud utvrdio da je arbitražni sporazum nevaljan, da je prestao važiti ili da se ne može ispuniti (§ 1032., st. 1. ZPO-a). S druge strane, arbitražni je sud ovlašten odlučiti o tome je li arbitražni sporazum valjan, je li arbitražni sud ustanovljen u skladu s propisima te je li nadležan za donošenje odluke u sporu. Kad bi jedna od stranaka prigovorila nadležnosti arbitražnog suda, arbitražni sud može, ako se smatra nadležnim, o tome odlučiti međuodlukom. Arbitražni postupak može se nastaviti, čak i ako je međuodluku pobio sud redovne sudbenosti (§ 10., br. 1. Pravila GMAA-a).

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[73] V. Rieckhoff, J. J. 2006. *op. cit*. u bilj. 62. str. 41.

[74] Saenger, I. 2017. *op. cit*. u bilj. 72. ZPO § 1029. Rn. 3.

[75] Gesetzes zur Reform des Seehandelsrechts v 24. 4. 2013. (BGBl. I S. 831).

[76] Handelsgesetzbuch in der im Bundesgesetzblatt Teil III. Gliederungsnummer 4100-1, veröffentlichten bereinigten Fassung, das durch Artikel 5 des Gesetzes vom 13. April 2017 (BGBl. I S. 866) geändert worden ist. PDF verzija dostupna na: https://www.gesetze-im-internet.de/bundesrecht/hgb/gesamt.pdf (preuzeto 12. svibnja 2017. s: www.gesetze-im-internet.de).

[77] Saenger, I. 2017. *op. cit*. u bilj. 72. ZPO § 1031. Rn. 8.

[78] Rosenberg, L.; Schwab, K. H.; Gottwald, P. 2010. Zivilprozessrecht. München. C.H. Beck. str. 1031.

[79] Dostupno na: https://gmaa.de/de/schiedsverfahren/vertragsklauseln (preuzeto 12. svibnja 2017. s: gmaa.de).

Materijalne posljedice manifestiraju se u zasnivanju posebnog odnosa dužnosti između procesnih stranaka i u glavnom ugovoru samostalnih stvarnopravnih učinaka. Tako se stranke međusobno obvezuju da će učiniti sve što je nužno za provedbu arbitražnog postupka (*Förderungspflicht*, dužnost poticanja) i propustiti sve što bi bilo protivno cilju koji se u postupku želi ostvariti (*Loyalitätspflicht*, dužnost lojalnog postupanja). Dužnost lojalnog postupanja obuhvaća osobito dužnost plaćanja predujma i prikupljanja procesnog materijala.[80]

3.2.3. Arbitražni sud

Arbitražni sud čine dva arbitra, osim ako se stranke nisu sporazumjele da će biti sastavljen od triju arbitara ili jednog arbitra (§ 3. Pravila GMAA-a). Stranke su u izboru arbitara potpuno slobodne, osim ako se u arbitražnom sporazumu nisu sporazumjele o posebnim kvalifikacijama arbitra. Osobe koje su u istom postupku sudjelovale kao izmiritelji i sl. ne mogu biti imenovane za arbitra[81] (§ 2. br., 1. i 2. Pravila GMAA-a). Izabrani arbitar ne mora biti član GMAA, a arbitra može predložiti i predsjednik uprave GMAA-a na zahtjev jedne od stranaka (§ 2., br. 3. Pravila GMAA-a). Što se kvalifikacija koje arbitar u postupku pomorske arbitraže treba imati, nužno je istaći da arbitri ne moraju biti i nužnu nisu samo pravne struke. Tako se među članovima GMAA-a, odnosno arbitrima, osim odvjetnika nalaze i kapetani broda, poduzetnici iz domene financija, osiguranja, pomorske plovidbe, inženjeri strojarstva, brodogradnje, vještaci raznih struka i sl.[82]

Ako arbitražni sud čine dva arbitra, svaka stranka će izabrati po jednog arbitra. Međutim ako se oba arbitra ne mogu suglasiti o tome kakvu će odluku donijeti, izabrat će trećeg arbitra kao predsjedavajućeg (§ 4., br. 1. Pravila GMAA-a). Međutim, s povećanjem broja arbitara koji u arbitražnom postupku sudjeluju povećava se i iznos nagrade koja se za arbitra isplaćuje prema Pravilima GMAA-a za naknadu troškova arbitražnog suda.[83]

U slučaju da arbitražni sud čine tri arbitra, svaka straka izabire po jednog arbitra, a izabrani arbitri bez odgađanja imenuju trećeg arbitra kao predsjedavajućeg (§ 4., br. 2. Pravila GMAA-a). Ipak, ako se izabrani arbitri ne bi mogli suglasiti oko izbora trećeg arbitra (predsjedavajućeg), imenovat će ga predsjednik uprave GMAA-a ili njegov zamjenik na zahtjev jedne stranke. Isto pravilo se primjenjuje i kada su stranke ugovorile da će odluku u sporu donijeti jedan arbitar, a ne mogu se suglasiti o osobi arbitra (§ 4., br. 4. Pravila GMAA-a).

Pravila GMAA-a uređuju i slučaj kad se stranka ne izjasni o drugom arbitru ili izboru jednog arbitra pismom, faksom ili e-poštom u roku od dva tjedna od dana kad joj je dostavljen poziv. I u tom će slučaju arbitre na prijedlog jedne stranke imenovati predsjednik uprave ili njegov zamjenik. Ovo pravilo vrijedi i za imenovanje zamjenskog arbitra *(Ersatzschiedsrichter*) (§ 4., br. 3. Pravila GMAA-a) čija je zadaća obavljanje dužnosti arbitra kojem je dužnost prestala.

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[80] Saenger, I. 2017. *op. cit*. u bilj. 72. ZPO § 1029.

[81] Kritički o tome v. Trappe, J. 2012. Richter/Schiedsrichter als Schlichter? Zeitschrift für Schiedsverfahren 2/2012. str. 83. Tako Trappe kritizira Pravila GMAA-a kojima je isključena mogućnost da osoba koja je u istom postupku sudjelovala kao izmiritelj bude imenovana kao arbitar (§ 2., st. 3.) jer ista pravila omogućavaju da arbitar potiče stranke na zaključenje nagodbe i zaključi nagodbu (§ 13).

[82] Dostupno na: https://gmaa.de/de/mitglieder-der-gmaa/catalog?format=html&reset=false&ordering=&orderby=&task=&search=schiedsrichter&searchfield=schiedsrichter&limit=500 (preuzeto 12. svibnja 2017. s: gmaa.de).

[83] Prema § 1., br. 1. Pravila GMAA-a za naknadu troškova arbitražnog suda svakom arbitru pripada odgovarajući iznos nagrade. Primjerice, ako je vrijednost predmeta spora 10.000,00 €, svakom arbitru pripada iznos od 1.500,00 €. Ako su dva arbitra, to je 3.000,00 €. Međutim, tri arbitra u tom bi slučaju znatno poskupjela iznos nagrade na 4.500,00 €, što je gotovo polovina iznosa koji se treba ostvariti.

Posebna pravila primjenjuju se kad je na strani tužitelja ili tuženika više osoba (§ 4. a Pravila GMAA-a) ili kad je riječ o sporovima između društva i njegovih tijela i/ili članova društva, kao i o sporovima između članova društva, tijela i/ili članova tijela (§ 4. (b) Pravila GMAA-a). Tako u slučaju da se na strani tužitelja nalazi više osoba, one će zajednički imenovati jednog arbitra, a ako je tužba podnesena protiv više tuženika, trebali bi pismom, faksom ili e-poštom u roku od četiri tjedna od dana kad su zaprimili poziv zajednički imenovati jednog arbitra. Ako se tuženici ne usuglase o osobi arbitra, predsjednik uprave GMAA-a ili njegov zamjenik imenovat će dva arbitra. Na taj će se način arbitar kojeg je imenovao tužitelj zamijeniti arbitrom kojeg je imenovao predsjednik uprave GMAA-a ili njegov zamjenik (§ 4. (a), br. 1. i 2. Pravila GMAA-a). Kad je riječ o sporovima između društva i njegovih tijela i/ili članova društva, kao i sporovima između članova društva, tijela i/ili članova tijela, arbitražni će se sud ustanoviti tako da predsjednik uprave GMAA-a ili njegov zamjenik na zahtjev tužitelja imenuju dva arbitra (§ 4. (b), br. 1. Pravila GMAA-a).

Imenovanje arbitra ili predsjedavajućeg proizvodi učinke od trenutka prihvaćanja dužnosti arbitra i obavještavanja stranke o tome da je imenovan (§ 4., br. 5. Pravila GMAA-a).

Pravila GMAA-a propisuju posebna pravila o izuzeću arbitra koja kao polazište za izuzeće arbitra navode sve slučajeve u kojima se i sudac suda redovne sudbenosti može isključiti na temelju zakona (§ 6., br. 1. t. a), kao i ostale okolnosti koje, ako postoje, dovode u sumnju njegovu nepristranost ili neovisnost (§ 6., br. 1. t. b). Osim toga, arbitar se može isključiti i ako ne ispunjava pretpostavke koje su stranke u sporazumu odredile ili ako je ispunjenje svojih dužnosti neprimjereno odugovlačio (§ 6., br. 1. t. (c) i (d) Pravila GMAA-a), što predstavlja jedan od elemenata osiguranja načela donošenja pravorijeka u primjerenom roku, odnosno poštovanja načela ekonomičnosti.

U usporedbi s pravilima njemačkog parničnog procesnog prava koja propisuju da će o zahtjevu za izuzeće, u slučaju da arbitar čije se izuzeće zahtijeva ne odstupi ili druga stranka ne prihvati zahtjev za izuzeće, odlučiti arbitražni sud (§ 1037., st. 2. reč. 2. ZPO-a), Pravila GMAA-a propisuju da će u takvu slučaju, bez provedbe pretpostupka (u koji je uključen arbitražni sud), o zahtjevu odmah odlučiti državni sud (§ 6., br. 4). Smatra se da je takav prijenos, neovisno o tome što se u doktrini dijelom osporava kao nedopušten, ipak moguć i dopušten.[84] Čini se da sudska praksa nije sklona široko tumačiti okolnosti zbog kojih postoji sumnja u neovisnost i nepristranost arbitra.[85]

3.2.4. Načela arbitražnog postupka

Iako Pravila GMAA-a u posebnoj odredbi uređuju načela arbitražnog postupka (§ 10. Pravila GMAA-a), smjernice za postupanje u postupcima pomorske arbitraže proizlaze i iz brojnih drugih odredbi. Tako je svaki arbitar koji prema Pravilima GMAA-a provodi postupak, u ispunjavanju svojih dužnosti obvezan postupati nepristrano vodeći računa o povjerljivosti postupka. Osim toga, arbitar treba poticati brzo rješavanje spora u okviru zahtjeva stranaka te u primjerenom roku postupak završiti (§ 5., br. 1. i 2. Pravila GMAA-a). Obveza poštovanja

[84] Viši zemaljski sud u Hamburgu iznio je shvaćanje da stranke mogu odluku arbitražnog suda o izuzeću arbitra neposredno prenijeti na državni sud (OLG Hamburg, 28. 8. 2012. - 6 SchH 2/12). V. Kröll, S. 2013. Die schiedsrechtliche Rechtsprechung 2012. Zeitschrift für Schiedsverfahren 4/2013. str. 192.

[85] Tako nije prihvaćen zahtjev za izuzeće osobe koja je bila predsjedavajući arbitar zbog njegovih odnosa s punomoćnikom jedne od stranaka u postupku. Naime, iako ga je taj odvjetnički ured u više navrata imenovao kao vještaka, kao međunarodno priznati stručnjak nije bio ekonomski ovisan o odvjetničkom uredu koji ga je u ranijim postupcima angažirao (OLG Frankfurt, 13. 2. 2012. – 26 SchH 15/11). *Ibid.* str. 192 i 193.

zahtjeva brzine odlučivanja i ekonomičnosti proizlazi i iz već istaknutog pravila o izuzeću arbitra koji neprimjereno odugovlači ispunjenje svoje dužnosti (§ 6., br. 1. t. (d) Pravila GMAA-a). Novina u odnosu na ranije uređenje Pravila GMAA-a određivanje je jezika na kojem će se postupak voditi.[86]

Arbitražni sud dužan je strankama u svakom stadiju postupka omogućiti saslušanje (§ 10., br. 3., reč. 2. Pravila GMAA-a). Kako bi kompetentno i brzo donio odluku o sporu, arbitražnom sudu stoje na raspolaganju različite mjere usmjerene na poticanje stranaka na postavljanje činjenično potkrijepljenih zahtjeva, postavljanje primjerenih rokova za izjašnjavanje stranaka, osiguranje dokaza i sl. (§ 10., br. 4. t. (a), (d) i br. 8. Pravila GMAA-a).

Analiza Pravila GMAA-a u navedenom kontekstu upućuje na zaključak da u primjeni pravila na strani sudionika arbitražnog postupka dominiraju načelo dispozicije i raspravno načelo te da strankama mora biti omogućeno saslušanje. U skladu s tim, stranke bi bile dužne pridržavati se nacrta i redoslijeda određenog u svrhu njihovih izjašnjavanja o pojedinim spornim točkama, kao i rokova za poduzimanje pojedinih radnji koje je odredio arbitražni sud vodeći računa o složenosti svakog pojedinog postupka. Arbitražni bi sud trebao nastojati sa strankama uspostavi adekvatnu komunikaciju, svojevrsnu poticateljsku i korektivnu ulogu kako bi u provedbi postupka i pri donošenju odluke o sporu brzo i kompetentno odlučio. Ipak, u skladu s Pravilima GMAA-a, arbitražni sud ne bi imao sve ovlasti kao i državni sud pa tako ne bi bio ovlašten odlučiti o privremenim mjerama u svezi s predmetom spora (§ 10., br. 8. Pravila GMAA-a).

3.2.5. Tijek arbitražnog postupka

Arbitražni postupak počinje kad tuženik zaprimi poziv od tužitelja da pismom, faksom ili e-poštom odredi arbitra. Taj zahtjev mora sadržavati stranke, njihove adrese i naznaku predmeta spora (§ 9., br. 1. Pravila GMAA-a). Međutim, ako je riječ o sporovima između društva i njegovih tijela i/ili članova društva kao i sporova između članova društva, tijela i/ili članova tijela (§ 4. (b) Pravila GMAA-a) ili pak drugim sporovima u kojima će, ako su to stranke ugovorile, na zahtjev tužitelja predsjednik uprave GMAA-a ili njegov zamjenik imenovati dva arbitra (§ 4. (c) Pravila GMAA-a), arbitražni postupak počinje kada predsjednik uprave GMAA-a zaprimi zahtjev da pismom, faksom ili e-poštom imenuje dva arbitra, osim ako u arbitražnom sporazumu nije drugačije određeno (§ 9., br. 2. Pravila GMAA-a).

Osim općih načela kojima se određuje način postupanja arbitražnog suda i stranaka u postupku,[87] Pravila GMAA-a ne sadrže, poput Pravila LMAA-a, detaljan broj podnesaka koji se u postupku mogu podnijeti i rokove u kojima je te radnje potrebno poduzeti. Međutim, s obzirom na to da Pravila GMAA-a upućuju na to da će se, u slučaju da stranke izrijekom nisu drugačije odredile, u postupku primjenjivati Knjiga 10. njemačkog ZPO-a; § 1046., st. 1. ZPO-a propisuje da će se tužba i odgovor na tužbu podnositi u rokovima koje su odredile stranke ili arbitražni sud, s tim da se svaka stranka treba izjasniti o zahtjevu protivnika i da stranke trebaju svojim zahtjevima priložiti isprave ili naznačiti druga dokazna sredstva kojima potkrepljuju svoje navode. Pritom, ako stranke nisu drugačije odredile, svaka stranka tijekom postupka može svoje podneske nadopunjavati i mijenjati, osim ako arbitražni sud to ne dopu-

[86] Prema § 10., br. 2. Pravila GMAA-a postupak će se provoditi na engleskom ili njemačkom jeziku. Ako stranke nisu odredile jezik na kojem će se postupak provoditi, odluku o tome donijet će arbitražni sud. Drugi jezici mogu se u postupku koristiti samo ako o tome postoji suglasnost arbitražnog suda i stranaka.

[87] V. *supra ad* 3.2.4.

sti zbog zakašnjenja koje nije dovoljno ispričano (§ 1046., st. 2. ZPO-a). U tom smislu i Pravila GMAA-a propisuju da će zakašnjeli zahtjev arbitražni sud odbaciti ako bi njegovo uzimanje u obzir utjecalo na odugovlačenje u donošenju odluke o sporu, a stranka koja je zakasnila nije učinila vjerojatnim da je bez svoje krivnje bila spriječena poštovati rok (§ 10., br. 4. t. (g) Pravila GMAA-a).

Stranke međusobno šalju sve podneske uključujući tužbu i odgovor na tužbu te ostale izjave kojima prilažu isprave, a po jedan primjerak šalje se i svakom arbitru. Međusobna komunikacija može se odvijati i u elektroničkom obliku (§ 10., br. 6. Pravila GMAA-a).

Arbitražni sud provodi usmeni raspravu, osim ako se stranke toga nisu suglasno odrekle. O svakom ročištu za usmenu raspravu jedan od arbitara treba sastaviti zapisnik koji će se naknadno poslati strankama. Zapisnici koji se sastavljaju tijekom izvođenja dokaza diktirat će se u prisutnosti stranaka (§ 11., br. 1. i 2. Pravila GMAA-a). Pozivi stankama upućivat će se uz potvrdu o primitku, osim ako se stranke nisu drugačije dogovorile (§ 11., br. 3. Pravila GMAA-a).

3.2.6. Troškovi arbitražnog postupka

Osnovni su pravni izvori za donošenje odluke o troškovima u njemačkoj pomorskoj arbitraži Pravila GMAA-a o naknadi troškova arbitražnog postupka, odredba Pravila GMAA-a kojom se uređuju troškovi arbitražnog postupka (§ 7.) i odredba ZPO-a o odluci o troškovima (§ 1057.).

Arbitražni sud ima pravo zahtijevati naknadnu troškova (eventualno porez na promet) za koje stranke odgovaraju kao solidarni dužnici (§ 7. br., 1. Pravila GMAA-a). Stoga, nakon pokretanja postupka arbitražni sud zahtijeva od stranaka da predujme iznos predvidivih troškova i izdataka. Umjesto predujma arbitražni sud može zatražiti osiguranje troškova ako se svi arbitri s tim suglase. Arbitražni će sud odrediti da svaka stranka položi iznos predujma, odnosno osiguranja troškova u jednakim dijelovima, s tim da nastavak daljnjeg postupka može ovisiti o tome jesu li stranke položile iznos predujma ili osiguranja troškova (§ 7., br. 2. Pravila GMAA-a). To se pravilo primjenjuje i na daljnje troškove koji u postupku mogu nastati, osobito troškove izvođenja dokaza u okviru kojih će arbitražni sud zatražiti da ona stranka na čijoj je strani teret dokazivanja predujmi iznos potreban za izvođenje potrebnog dokaza ili pak iznos troškova osiguranja. Ako stranka ne položi iznos predujma ili osiguranja, arbitražni sud taj dokaz neće izvesti i postupak će se odmah nastaviti (§ 7., br. 3. Pravila GMAA-a).

O tome hoće li i koliko tužitelj ili tuženik svojem protivniku na njegov zahtjev zbog troškova postupka predujmiti iznos osiguranja (jer postoji opasnost da se troškovi, u slučaju da on uspije u parnici, neće moći naknaditi) odlučuje arbitražni sud prema slobodnoj ocjeni. Ako jedna od stranaka u roku koji je određen i koji se može produljiti ne dokaže da je predujmila iznos osiguranja, sud će na zahtjev druge stranke donijeti odluku kojom se utvrđuje da je tužba ili odgovor na tužbu povučen ako se dokaz o tome da je iznos osiguranja položen ne bude podnio do donošenja odluke suda o tome da je došlo do povlačenja tužbe ili protutužbe (§ 7., br. 4. Pravila GMAA-a).

S obzirom na to da svaku stranku u arbitražnom postupku može zastupati punomoćnik, (§ 10., br. 7. Pravila GMAA-a), u naknadi troškova punomoćnika primjenjivat će se odvjetnička tarifa određena Zakonom o naknadi troškova odvjetnika [88] (§ 7, br. 5 Pravila GMAA-a).

[88] Rechtsanwaltsvergütungsgesetz v. 5. 5. 2004. (BGBl. I S. 718, 788) zulezt geändert durch Art. 6 Absatz 24 des Gesetzes vom 13. April 2017 (BGBl. I S. 872).

Svakom arbitru za njegov rad pripada odgovarajuća naknada, određena Pravilima GMAA-a za naknadu troškova arbitražnog postupka (§ 1., br. 1 u svezi s § 3.). Zanimljivo je istaknuti kako se u slučaju da u arbitražnom postupku sudjeluje više od dviju stranaka, iznos naknade arbitru uvećava za 20 % za svaku daljnju stranku, s tim da ne može iznositi više od 50 % ukupnog iznosa naknade (§ 3., br. 4. Pravila GMAA-a o naknadi troškova arbitražnog postupka).

3.2.7. Pravorijek

Prema § 11., br. 4. Pravila GMAA-a arbitražni postupak može se okončati zaključkom arbitražnog suda kad tužitelj tužbu nije supstancirao u roku koji su stranke ugovorile ili u roku koji je na zahtjev tuženika odredio arbitražni sud (a), ako je tužba povučena, osim ako se tuženik tome ne usprotivi i sud prizna tuženiku pravni interes da se o toj pravnoj stvari donese konačan pravorijek (b), ako stranke ugovore okončanje postupka (c), ako stranke unatoč poticajima arbitražnog suda ne žele dalje nastaviti arbitražni postupak (d) ili pak je nastavak arbitražnog postupka iz nekog drugog razloga postao nemoguć (e). Iako će se arbitražni postupci koji su okončani nagodbom u pravilu okončati donošenjem zaključka, sud može na zahtjev stranaka donijeti pravorijek na temelju nagodbe (§ 13., br. 2. Pravila GMAA-a).

Osnovno je pravilo u donošenju pravorijeka da arbitražni sud odlučuje većinom glasova (§ 14., br. 1. Pravila GMAA-a), kao i da je arbitražni sud pri donošenju pravorijeka vezan zahtjevima stranaka (§ 14., br. 3. Pravila GMAA-a) čime se potvrđuje još jedan aspekt načela dispozicije tipičnog za parnični postupak, postupak u kojem se u pravilu ostvaruju privatnopravni interesi stranaka i određuju granice postupanja arbitražnog suda. Za razliku od Pravila LMAA-a, Pravila GMAA-a ne propisuju nikakve rokove za donošenje pravorijeka,[89] što nije neobično s obzirom na to da nisu propisani rokovi ni za poduzimanje drugih procesnih radnji u arbitražnom postupku. Ipak, arbitražni sud ovlašten je potaknuti stranke da iznesu činjenice na kojima temelje svoje zahtjeve, zatim posebno provesti strukturiranje redoslijeda kojim će se stranke izjašnjavati o spornim pitanjima te, eventualno, odrediti iskaze stranaka u formi elektroničkih podataka u PDF obliku ili odgovarajućih tablica (§ 11., br. 4. t. (f) Pravila GMAA-a). Iako se na taj način može doprinijeti brzini odlučivanja, strukturiranje, bez određivanja vremenskog okvira u kojem se pojedine radnje suda ili stranaka moraju izvršiti, ne mora nužno biti učinkovito.

Pravorijek se donosi u pisanom obliku, mora biti obrazložen te mora sadržavati određene podatke (§ 14., br. 3. i 4. Pravila GMAA-a). [90] Jedan od bitnih sastojaka pravorijeka potpis je arbitara. Međutim, ako arbitražni sud čini više od dvaju sudaca i ako izostane potpis jednog od arbitara koji je sudjelovao u glasovanju, dostatan je potpis preostalih arbitara. Arbitar/arbitri koji su potpisali pravorijek trebaju na pravorijeku naznačiti da je potpis jednog od arbitara izostao, odnosno da se neće moći pribaviti (§ 14., br. 4. t. (i) Pravila GMAA-a). Na zahtjev

[89] Vrijeme kao pokazatelj djelotvornosti u primjeni Pravila LMAA-a i Pravila GMAA-a upućuje na postojanje izvjesnih razlika. Tako je 36 % ispitanika izjavilo da je za rješenje njihova spora u arbitražnom postupku bilo potrebno između dviju i pet godina, a za oko 32 % ispitanika između jedne i dviju godina. Zaključno, 43 % ispitanika, od kojih je većina primjenjivala Pravila LMAA-a, u upitniku je odgovorilo da je za donošenje odluke u njihovu sporu bilo potrebno više od dviju godina. Za razliku od toga, prema izjavama većina ispitanika koji su primjenjivali Pravila GMAA-a, vrijeme potrebno za donošenje odluke u sporu nije iznosilo više od dviju godina. Harke, W. 2007. *op. cit.* u bilj. 68. str. 32-33.

[90] Među podatcima koje pravorijek mora sadržavati ime su i prezime stranaka u arbitražnom postupku, njihove adrese i, eventualno, punomoćnike, ime i prezime arbitara koji su pravorijek donijeli, datum donošenja pravorijeka, izreku, činjenično stanje, razloge za donošenje odluke (obrazloženje), kao i odluku koja će stranka naknaditi troškove arbitražnog postupka prema § 7., br. 4.

jedne od stranaka arbitražni sud ovlašten je donijeti dopunsku odluku bez održavanja usmene rasprave, a kojom će odlučiti o visini troškova postupka koje stranke moraju naknaditi (§ 10., br. 5. Pravila GMAA-a). Konačno, arbitražni sud ovlašten je objaviti pravorijek u kojem će se navesti samo ime broda, ali bez ostalih individualiziranih podataka, osobito imena stranaka, svjedoka i vještaka (osim ako jedna stranka ne prigovori tome) u roku od mjesec dana od dana donošenja pravorijeka (§ 14., br. 6. Pravila GMAA-a).

3.2.8. Posebni (ubrzani, pisani, sumarni) arbitražni postupci

GMAA ne određuje nikakva posebna pravila o ubrzanim arbitražnim postupcima ili postupcima manje ili srednje vrijednosti. Na osnovi komparativnog istraživanja kojim je provedena usporedba primjene Pravila LMAA-a i Pravila GMAA-a, a s obzirom na kriterij vrijednosti predmeta spora, utvrđeno je da je najveći broj postupaka u kojima je vrijednost predmeta spora iznosila do 250.000,00 $. (62 %).[91]

Određene razlike u proceduralnom smislu prema Pravilima GMAA-a ipak postoje kad je riječ o sporovima u kojima je na strani tužitelja ili tuženika veći broj osoba (§ 4. (a) Pravila GMAA-a) ili kad je riječ o sporovima između društva i njegovih tijela i/ili članova društva, kao i sporovima između članova društva, tijela i/ili članova tijela (§ 4. (b) Pravila GMAA-a) te ostalim neutralnim imenovanjima arbitara (§ 4. (c) Pravila GMAA-a). U skladu s tim, posebnosti se odnose na postupak imenovanja arbitra, kao i određenje momenta od kojeg se u tim postupcima prosuđuje da je arbitražni postupak započeo (§ 9., br. 2. Pravila GMAA-a). Međutim, kako se primjenom tih pravila samo dijelom utječe na sastav arbitražnog suda, ali ne i na radnje koje će se u postupku poduzimati i rokove, ne bilježi se nikakav značajniji utjecaj na djelotvornost tih postupaka.

3.2.9. Pravna sredstava protiv pravorijeka

Pravila GMAA-a ne uređuju pravna sredstva protiv pravorijeka. Međutim, kako se ona pozivaju na primjenu njemačkog procesnog prava, ako stranke izrijekom nisu ugovorile primjenu nekog drugog procesnog prava, primjenjuju se pravila o pobijanju arbitražnog pravorijeka (§ 1059. ZPO-a).

3.2.10. Ovrha (domaćeg) pravorijeka

Pravorijek ima snagu pravomoćne sudske presude (§ 1055. ZPO-a). Da bi se provela ovrha domaćeg pravorijeka, potrebno je prethodno podnijeti zahtjev za izdavanje potvrde o ovršnosti (*Vollstreckbarerklärung*) kojem se prilaže pravorijek u izvorniku ili ovjerenom prijepisu (§ 1064. ZPO-a). Zahtjev se podnosi višem zemaljskom sudu koji je naznačen u arbitražnom sporazumu, a ako takvo određenje nedostaje, višem zemaljskom sudu na čijem se području provodi arbitražni postupak (§ 1062., st. 1., t. 4. ZPO-a). U pomorskim arbitražama koje se provode primjenom Pravila GMAA-a, to će u pravilu biti viši zemaljski sudovi u Hamburgu i Bremenu. Zahtjev za izdavanje potvrde o ovršnosti odbit će se ako postoji jedan od razloga za poništaj arbitražnog pravorijeka prema § 1059. ZPO-a, st. 2. (§ 1060., st. 2. ZPO-a).

[91] Harke, W. 2007. *op. cit.* u bilj. 68. str. 28.

4. Pomorska arbitraža u hrvatskom pravu

4.1. Određenje pojma i izvora pomorske arbitraže

Organiziranje pomorske arbitraže specijalnim pomorskoarbitražnim centrom postojalo je u Hrvatskoj u vrijeme djelovanja Pomorskoarbitražnog centra pri Trgovinskoj komori FNRJ-a sa sjedištem na Sušaku koji je bio organiziran Pravilnikom od 25. 12. 1946. godine.[92] Međutim, on je ukinut novelom Zakona o privrednim sporovima od 9. 7. 1955.[93] kojom je određena nadležnost Vanjskotrgovinske arbitraže pri Trgovinskoj komori FNRJ-a u Beogradu za, među ostalim, „rješavanje pomorskih sporova između domaćih privrednih poduzeća, ustanova i organizacija s inozemnim fizičkim i pravnim osobama ako su stranke pismeno ugovorile njezinu nadležnost".[94] Literatura tog vremena iznosi da su „motivi suprotni interesima slobodnog razvitka arbitražnog sudovanja doveli u svoje vrijeme do ukidanja posebne pomorske institucionalne arbitraže u Rijeci."[95] Osim toga, ističe se da je pomorskoarbitražni centar u Rijeci do tog vremena stekao i određenu međunarodnu prepoznatljivost koja se očitovala u okolnosti da je arbitražna klauzula kojom se ugovarala pomorska arbitraža u Rijeci unesena u teretnice Jugolinije.[96]

Funkciju pomorskoarbitražnog centra sa sjedištem na Sušaku preuzela je, dakle, Vanjskotrgovinska arbitraža pri Trgovinskoj komori FNRJ-a u Beogradu, pri čemu se u literaturi iznosilo da učinci njezina rada na području pomorske arbitraže nisu bili onakvi kakvi su mogli biti da je (i dalje) djelovala pomorska arbitraža i pomorskoarbitražni centar sa sjedištem u Rijeci.[97]

Danas postoji mogućnost ugovaranja institucionalne pomorske arbitraže putem SAS-HGK-a. Pritom se na institucionalnu arbitražu pri SAS-HGK-u, uz Zakon o arbitraži,[98] primjenjuju i Zagrebačka pravila.[99]

4.2. Praksa Stalno arbitražnog sudišta Hrvatske gospodarske komore (SAS-HGK)

SAS-HGK bilježi u novije vrijeme oskudan broj predmeta pomorske arbitraže; od 2009. do 2017. godine svega tri predmeta koji se odnose na povrede ugovora o gradnji, odnosno remontu broda (Tablica 1.). Pritom treba napomenuti da SAS-HGK nema posebna pravila i listu arbitara za pomorske arbitraže.

Prema vrsti predmeta, ako se promatra zasad oskudna praksa domaće arbitraže, u pravilu je riječ o isplatama po ugovoru o gradnji, odnosno remontu broda te naknadama štete zbog povrede tih ugovora. Ako se promotri novije razdoblje, može se konstatirati da pretežu sporovi s međunarodnim obilježjem (Tablica 1.). Pritom treba spomenuti da je u jednom od predmeta bila ugovorena i arbitraža u Londonu, međutim, naknadno su se stranke sporazumjele da će sporove rješavati pred SAS-HGK-om primjenom Zagrebačkih pravila. Može

[92] Pravilnik o Pomorskoj arbitraži pri Trgovinskoj komori FNRJ-a (SL FNRJ, 26/1947). V. Zuglia, S. 1956. Sudovi i ostali organi građanskog pravosuđa. Školska knjiga. Zagreb. str. 159.

[93] Zakon o izmjeni i dopuni Zakona o privrednim sudovima (SL FNRJ, 32/1955).

[94] Zuglia, S. 1956. *op. cit.* u bilj. 92. str. 162-163.

[95] Triva, S.1970. Stanje i razvitak izabranih sudova (arbitraža). Zagreb (rukopis). str. 60.

[96] *Ibid.* str. 60.

[97] *Ibid.* str. 61.

[98] Zakon o arbitraži Republike Hrvatske (NN, 88/2001; dalje: ZA).

[99] Pravilnik o arbitraži pri Stalnom arbitražnom sudištu Hrvatske gospodarske komore (NN 129/2015; dalje: Zagrebačka pravila).

se pretpostaviti da su jedan od razloga kojim su se stranke vodile bili troškovi arbitražnog postupka u Londonu.

U odnosu na sastav arbitražnog suda u pomorskim arbitražama pri SAS-HGK-u zamjetna je tendencija javljanja mješovitih arbitražnih vijeća, sastavljenih i od drugih profesija (poput inženjera brodogradnje, brodostrojarstva te pomorskog prometa). U svim predmetima, osim u jednom koji se odnosi na izdavanje platnog naloga, arbitražni je sud bio sastavljen od triju arbitara (Tablica 1.).

U samo jednom od sporova s međunarodnim obilježjem ugovorena je primjena stranog prava. Također, svi su se arbitražni postupci vodili na hrvatskom jeziku (Tablica 1.).

Tablica 1. Pomorske arbitraže pri SAS-HGK-u (Izvor: podatci dobiveni od SAS-HGK-a)

broj predmeta	**predmet spora**	**datum odluke**	**spor s međunarodnim obilježjem ili bez njega**	**stranke**	**sastav arbitražnog suda**	**mjerodavno materijalno pravo**	**jezik**
IS-P-2/1983.	radi izmjene odredbe ugovora o cijeni brodskog dizelskog motora	zaključak o obustavi postupka (tužba povučena) od 18. 1. 1984.	bez međunarodnog obilježja	domaće osobe	vijeće (3)		hrv.
IS-P-3/1986.	radi predaje novosagrađenog broda; radi isplate cijene; alternativno radi razvrgnuća ugovora o gradnji broda	(meritorna) odluka od 15. 12. 1986.	bez međunarodnog obilježja	domaće osobe	vijeće (3)	domaće pravo	hrv.
IS-P-1/1987.	radi isplate po ugovoru o gradnji jednog motornog broda	platni nalog od 16. 2. 1987; zaključak o ukidanju platnog naloga te obustavi postupka od 27. 12. 1988. (odricanje od tužbenog zahtjeva)	bez međunarodnog obilježja	domaće osobe	arbitar pojedinac		hrv.
IS-P-2002./11.	radi isplate po ugovoru o remontu broda	pravorijek od 7. 4. 2003.	s međuna-rodnim obilježjem	domaća i strana osoba	vijeće (3)	domaće pravo	hrv.

broj predmeta	predmet spora	datum odluke	spor s međunarodnim obilježjem ili bez njega	stranke	sastav arbitražnog suda	mjerodavno materijalno pravo	jezik
AS-P-2009./1.	radi naknade štete (uslijed jednostranog raskida ugovora o izgradnji trupa broda zbog kašnjenja tuženika)	pravorijek od 5. 3. 2014.	bez međunarodnog obilježja	domaće osobe	vijeće (3): sudjelovanje drugih struka (dipl. ing.)	domaće pravo	hrv.
AS-P-2014./1.	radi isplate po ugovoru o remontu broda	pravorijek od 23. 3. 2015.	s međunarodnim obilježjem; prvotno ugovorena strana arbitraža	domaća i strana osoba	vijeće (3): sudjelovanje drugih struka (dipl. ing.)	strano pravo	hrv.
AS-P-2015./2.	radi isplate naknade štete (uslijed havarije motora novoizgrađenog broda po ugovoru o gradnji broda)	pravorijek od 15. 7. 2016.; izdvojeno mišljenje	s međunarodnim obilježjem	domaća i strana osoba	vijeće (3)	domaće pravo	hrv.

5. ZAKLJUČAK

Na temelju provedene poredbenopravne analize pravila pomorske arbitraže LMAA-a i GMAA-a utvrđuju se određene sličnosti koje obilježavaju pomorsku arbitražu kao takvu. Naime, u obama komparativnim sustavima riječ je o neinstitucionaliziranoj *ad hoc* arbitraži za koju je tipično postojanje posebnih specijaliziranih pravila kojima se uređuju osnove arbitražnog postupanja. Zajednička obilježja obaju sustava relativno su široka nadležnost u rješavanju pomorskih stvari kao i potreba za rješavanjem složenih činjeničnopravnih pitanja zbog kojih u sastavu arbitražnog suda često sudjeluju osobe koje nisu pravnici – inženjeri brodogradnje i strojarstva, poduzetnici, brodari i sl.

Istovremeno, oba sustava obilježavaju i određene razlike koje su odraz odabranih rješenja, ali i tradicijske pripadnosti Pravila LMAA-a *common law* i Pravila GMAA-a kontinentalnom pravnom sustavu. Naime, Pravila GMAA-a, koja su donesena u svrhu jačanja domaće njemačke pomorske arbitraže i jakih pomorskih centara kao što su Hamburg i Bremen, nadležnost za postupanje u pomorskim stvarima odredila su vrlo široko – za sve sporove u kojima je ugovorena nadležnost *ad hoc* GMAA arbitražnog suda. Afirmaciji Londonske pomorske arbitraže pridonio je položaj Londona, ali i tradicija brodogradnje, općenito trgovine. Općenito govoreći, promatrajući englesko pravo i praksu, ima veliku pomorsku zajednicu, ali i stručnjake.

Kao prednost londonske pomorske arbitraže ističe se okolnost da ona nije institucionalna arbitraža. Administriranje konkretnog arbitražnog postupka preuzima individualni arbitražni sud. Međutim, prisutne su ideje/tendencije o potrebi institucionalizacije i te arbitraže kako bi bolje odgovorila potrebama industrije.[100]

[100] Evans, D., *op. cit.* u bilj. 39, str. 3-5.

Iako je sastav arbitražnog suda primarno određen dispozicijom stranaka, razlike koje postoje prema Pravilima LMAA-a i Pravilima GMAA-a kratko se mogu skicirati tako da će se u primjeni Londonskih pravila u pravilu ugovarati nadležnost arbitražnog suda koji čine tri arbitra (čl. 8. (a) Pravila LMAA-a), odnosno jednog arbitra pojedinca u sporovima male vrijednosti (čl. 2. LMAA Pravila u sporovima male vrijednosti). Nasuprot tomu, Pravila GMAA-a, ako stranke nisu drugačije ugovorile, određuju sastav arbitražnog suda od dvaju arbitara (§ 3. Pravila GMAA-a).

Pravila LMAA-a i Pravila GMAA-a razlikuju se i u pogledu tijeka arbitražnog postupka. U londonskoj pomorskoj arbitraži prevladavaju tzv. dokumentarne arbitraže, što je ne samo brže nego i jeftinije u odnosu na mogućnost održavanja usmene rasprave. Naravno da je zakazivanje usmene rasprave skupo ako se u obzir uzmu troškovi svjedoka, vještaka, stranaka, arbitara. Unatoč tomu, ima autora koji ističu da su visoki troškovi Londonske pomorske arbitraže glavni argument protiv pomorskih arbitraža pri LMAA-u.[101] Osim toga, u posebnom je dodatku Pravilima LMAA-a propisan vremenski tijek arbitražnog postupka u okviru kojeg su propisani rokovi za poduzimanje pojedinih radnji (Dodatak II. Pravila LMAA-a). Za razliku od toga, Pravila GMAA-a tek okvirno određuju strukturu arbitražnog postupka propisujući načela koja će se u postupku primjenjivati (§ 10. Pravila GMAA-a) te u pravilu predviđaju održavanje usmene rasprave (§ 11., br. 1. Pravila GMAA-a), bez vremenskog plana i rokova određenih za poduzimanje radnji u postupku.

Rezultati upitnika iz 2007. kao osnovne prednosti arbitraže pri LMAA-u ističu prihvatljivost (29,73 %) i iskustvo (16,22 %), a kao nedostatke vremensku nedjelotvornost (37,50 %) i troškove arbitražnog postupka (32,50 %). Suprotno tomu, kao prednosti pomorske arbitraže pri GMAA-u ističu se troškovi postupka (35,29 %) i duljina trajanja (29, 41 %), pri čemu su glavni nedostatci prihvatljivost (42,86 %) i dominantna pozicija odvjetnika u postupku (23,81 %). Očito je da se nedostatci jedne pomorske arbitraže prepoznaju kao prednosti druge te u tom smislu one mogu biti međusobno konkurentne.[102]

Kakvu poruku ova poredbenopravna analiza upućuje arbitraži u Hrvatskoj? Prije svega, sam povijesnopravni razvoj pomorske arbitraže u Hrvatskoj, koji je započeo 1946. osnivanjem pomorskoarbitražnog centra sa sjedištem na Sušaku, dakle, četrnaest godina prije osnivanja arbitražnog pomorskog centra u Londonu (1960.), mogao je, da nije bilo prekida kontinuiteta u njegovu razvoju do kojeg je došlo već 1955. prijenosom nadležnosti za odlučivanje u pomorskim stvarima Vanjskotrgovinskoj arbitraži pri Trgovinskoj komori FRNJ-a u Beogradu, razviti arbitražno rješavanje pomorskih sporova kao šire prihvaćenu metodu pravne zaštite. Međutim, kako prekidom razvojnog kontinuiteta do toga nije došlo, a s obzirom na to da se ne bilježi ni veći broj pomorskih sporova u kojima je sudjelovao SAS-HGK, ostaje i nadalje dvojbeno je li zapravo prijenosom nadležnosti za rješavanje pomorskih stvari u Beograd došlo do prekida koji rješavanje pomorskih stvari više neće vratiti pred domaću pomorsku arbitražu ili pak vrijedi iznova osnovati pomorskoarbitražni centar radi rješavanja pomorskih sporova. U posljednje vrijeme sve je glasnija inicijativa za osnivanje pomorskog arbitražnog centra sa sjedištem u jednom od gradova na jadranskoj obali koji se planira osnovati kao arbitražno sudište u sklopu SAS-HGK-a, dakle, kao institucionalna, a ne *ad hoc* arbitraža s ciljem promocije rješavanja pomorskih sporova u arbitražnom postupku pri arbitražnom sudu čije je mjesto u Republici Hrvatskoj. Jačanje domaće pomorske arbitraže trebalo bi doprinijeti i promociji arbitražnog rješavanja sporova u Hrvatskoj uopće.

[101] U literaturi se ističe da su troškovi pomorske arbitraže u Njemačkoj tri puta niži od arbitraže u Londonu. V. Tassios, P. N., (2004), *op. cit.* u bilj. 3, str. 358.

[102] Harke, W. 2007. *op. cit.* u bilj. 68. str. 40-41.

U skladu s tim, trebalo bi razmisliti bi li trebalo donijeti posebna pravila kojima bi se pomorski sporovi rješavali brzo i kvalitetno te kakve bi komparativne uzore trebali slijediti. Ako se prihvati stav da bi posebna pravila bila potrebna, svakako valja preporučiti da se, neovisno o tome što su Pravila LMAA-a nastala pod utjecajem *common law* sustava, prihvate rješenja koja predviđaju dokumentarnu arbitražu i sudjelovanje arbitra pojedinca u postupcima male vrijednosti čime bi se mogli polučiti dobri rezultati, moglo bi se doprinijeti djelotvornosti arbitražnog postupka i time pozitivno promotivno djelovati *pro futuro.* Uvažavajući njemačka iskustva u odnosu na sastav arbitražnog suda od dvaju arbitara i potrebu da se angažiranjem manjeg broja arbitara ostvaruju uštede u arbitražnom postupku, hrvatska arbitražna praksa nema iskustva s imenovanjem arbitražnog suda koji čine dva arbitra pa bi zbog toga ipak trebalo optirati za sastav suda od triju ili jednog arbitra, ovisno o tome kolika je vrijednost predmeta spora.

Zaključno, s obzirom na to da se čini kako su nastojanja za osnivanjem pomorskog arbitražnog centra pri SAS-HGK-u dosegla svoj vrhunac te da postoji potreba za djelotvornim rješavanjem pomorskih sporova alternativnim oblicima pružanja pravne zaštite pred domaćom arbitražom, nadamo se da ćemo uskoro nastaviti s prekinutim kontinuitetom rješavanja pomorskih sporova u pomorskom arbitražnom centru osnovanom u jednom od obalnih gradova Republike Hrvatske.

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Zakon o arbitraži Republike Hrvatske (NN, 88/2001)

Zakon o izmjeni i dopuni Zakona o privrednim sudovima (SL FNRJ, 32/1955)

Zakonik o građanskom parničnom postupku od 13. siječnja 1877. (Zivilprozessordnung v 13.1.1877. (RGBl S 83))

Zakonik o građanskom parničnom postupku (Zivilprozessordnung idF v 5. 12. 2005 (BGBl. I S. 3202; 2006 I S. 431: 2007 I S. 1781), zulezt geändert durch Art. 7 G. v. 28. 4. 2017. (BGBl I S. 969)). https://www.gesetze-im-internet.de/bundesrecht/zpo/gesamt.pdf (preuzeto 10. svibnja 2017. s: www.gesetze-im-internet.de)

SUMMARY

SOME ASPECTS OF MARITIME ARBITRATION IN CROATIAN, ENGLISH AND GERMAN LAW

This paper portrays an analyses of some organisational-competence-functional aspect of the maritime arbitration in Croatian, English and German law, considering the data of the organised and conducted maritime arbitrations at the Permanent Arbitration Court at the Croatian Chamber of Economy (hereinafter PAC-CCE) in which organisation are recorded (though still modest) certain maritime arbitrations.

The analysis of the maritime arbitration in Croatian law will be preceded by an analysis and discussion of the organisational-competence-functional aspects of the maritime arbitration in English and German law, in particular considering the maritime arbitrations at the London Maritime Arbitrators Association (hereinafter LMAA) and the German Maritime Arbitration Association (hereinafter GMAA). The choice of these two comparative systems is determined by the fact that in the context of these systems operate supra mentioned European maritime arbitration centers, and by the fact that maritime arbitrations at the LMAA lead in relation to other maritime arbitration centers. Also, the choice of the German comparative system is determined by the historical reasons, this means the strong influence of German law and the doctrine on Croatian law and the doctrine of procedural law.

The review of the organisational-competence-functional aspects of the maritime arbitration in English and German law follows the system established by the authors. First, the concept and specificities of maritime arbitration in the compared systems, as well as the sources of arbitration law will be discussed. Then the impact of the maritime arbitration clauses on the court jurisdiction in the compared systems will be analysed.

This paper considers the basic characteristics of the compared arbitration centers (LMAA, GMAA). After the comparative review of the arbitration centers, an analysis of the basic institute of the arbitration proceedings in the maritime disputes of the compared centers will be provided, namely: arbitration agreements, arbitral tribunal (appointment, number of arbitrators to be appointed, rights and duties of arbitrators), principles of arbitration proceedings, arbitration procedure, special (accelerated, written, summarised) arbitration proceedings (in relation to the value of dispute), evidentiary proceedings, costs of the arbitration proceedings, arbitration awards, remedies against the award, and enforcement of (domestic) awards.

In the final part of the paper an indication of the tendencies of convergence and divergence regarding the comparative systems included into the analysis will be given. Considering the comparative analysis, as well as analysis of the historical sources of the Croatian maritime arbitration and (still modest) practice, some projections de lege ferenda will be indicated in order to encourage development of the practice of the maritime arbitration in Croatia. It will particularly be considered the organisational aspect, the need to establish a specific maritime arbitration center of the PAC-CCE whose seat will be outside of Zagreb, on one of the maritime destinations.

Key words: *maritime disputes, arbitration, Permanent Arbitration Court at the Croatian Chamber of Economy, London Maritime Arbitrators Association, German Maritime Arbitration Association, Arbitration Act, procedure, Croatian law, English law, German law*

THE MAIN LEGAL ISSUES IN THE SHIPMENT & TRANSPORT OF DANGEROUS GOODS BY SEA UNDER INTERNATIONAL SEA CARRIAGE CONVENTIONS

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SUMMARY

Sea-traffic has been grown considerably and more goods, which are considered to be dangerous, are frequently being transported. This rise can be attributed to the development of new technologies, which enable the production of more goods of dangerous nature as well as to the emergence of containerisation as a predominant transport method. The multiplicity of dangerous goods and the multifarious dangers they may present – primarily to the sea-carrier - has been highlighted as the main reason for which the regulation of their carriage under the International Sea Carriage Conventions has been made. However, what is deemed as a dangerous cargo (or at least what cannot be seen as a dangerous one) is not clearly defined. As a result, the shipper is very easily exposed to expensive damage claims. Therefore, this paper is aimed at examining the relevant legal issues regarding the carriage of dangerous goods by sea. Based on both the International Sea Carriage Conventions and the English case law, this study starts by trying to define the concept of dangerous goods. A special attention is given to the meaning of dangerous goods because of the ambiguity regarding its legal term. The study mainly focuses on the duties of the main parties involved in the transport of dangerous goods by sea; meaning the shipper and the carrier. Afterwards, their liability regime is broadly examined.

***Key words**: Dangerous Cargo, Sea-Transport, Duties & Responsibilities, Shipper's Liability, Hague/Hague-Visby Rules, Hamburg Rules, Rotterdam Rules.*

1. Introduction

The shipment of dangerous goods is a common practice in international maritime trade. It is estimated that more than 50% of containerized cargo transported by sea today can be considered as dangerous, hazardous or harmful to the environment[1]. Despite the fact that most dangerous goods are accepted for shipment either pursuant to terms specifically negotiated

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[1] Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 39.

between the parties to contracts of carriage or in compliance with express terms contained in standard contracts, including a proper declaration, the sad truth is that there are times when sea-carriers are transporting a dangerous cargo without their knowledge. Unfortunately, there have been a number of cases in which crews and their ships have been suffered harm from explosions or fires caused by dangerous goods because shippers wrongly declared them. It also happens that they get incorrectly or incompletely named, as different companies, countries and trades may use different names for specific dangerous cargoes[2].

The risks involved for a sea-carrier in not knowing the dangerous nature of some or all of the cargo may range from designing an inaccurate stowage plan to being unable to take preventive measures to guard against the danger in the cargo manifesting itself. Dangerous goods have been involved in some of the worst maritime disasters, while incidents involving dangerous goods occur frequently. To name a few, "Maersk Seoul" (2015) and "Maersk Londrina" (2015) provide sad examples in recent years of self- exploding cargoes in containers causing catastrophic fires on board of container vessels. Of course, similar safety concerns also exist for those suffering from carriage even if completely unconnected with it. Especially nowadays, due to the development of new technologies, some dangerous goods could be seen as instruments used for terrorist attacks. Consequently, the dangers inherent in the carriage of such goods have grown with the passage of time, as their misfortune does not only affect the parties involved in the maritime transport but also the society as whole.

However, what is "dangerous" is not clearly defined. The applicable legal framework, which covers both the area of public and private law, does not give any definition of dangerous goods. Neither the SOLAS Convention nor the Hague/Hague-Visby Rules or Hamburg Rules solve any problem of definition. They either refer to relevant codes, such as the IMDG[3] one, or give only some examples of dangerous cargo, such as "*inflammable, explosive and any other dangerous goods*". A definition of the concept of "dangerous goods" is indeed implicitly provided by the Rotterdam Rules, but this Convention lacks of current applicability. In addition, charter parties and bills of lading contain clauses concerning dangerous cargo, but none of them is explicit in defining exactly what is meant by "dangerous".

Due to the lack of an explicit definition regarding the concept of dangerous goods, the shipper is very easily exposed to unknown risks. The International Sea Carriage Conventions have consistently made a distinction between "dangerous" and "ordinary" cargo[4]. It is a branch of private law, which inevitable places additional responsibilities on the shoulders of shippers[5]. Especially under the Hague/Hague -Visby Rules, which are the most popular currently applicable Sea Carriage Convention, shippers are liable even if they have no knowledge of the dangerous nature of the goods or even if they had no means of ascertaining its dangerous nature. It is not necessary to establish negligence on the part of the shipper, as the mere shipment of such goods without giving notice of its dangerous nature establishes shipper's

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2 Karampetsou, A.K., (2016), *"Container Information & Privacy Concerns: Opening the "Pandora's" Box? Legal Challenges of a Business-to-Customs Information Sharing with regard to Containerized Cargo"*, Current Issues in Maritime & Transport Law, pp.253-272, Bologna, Bonomo, at p. 259.

3 International Maritime Dangerous Goods Code.

4 Thomas R, (2015), *"Special Liability Regimes under the International Conventions for the Carriage of Goods by Sea – Dangerous Cargo and Deck Cargo"*, Dutch Journal of Commercial Law 2010-5, Transport Law Section ("Nederlands Tijdschrift voor Handelsrecht 2010-5, Vervoerrecht Sectie), pp. 197-202, at p.198.

5 Thomas R, (2015), *"Special Liability Regimes under the International Conventions for the Carriage of Goods by Sea – Dangerous Cargo and Deck Cargo"*, Dutch Journal of Commercial Law 2010-5, Transport Law Section ("Nederlands Tijdschrift voor Handelsrecht 2010-5, Vervoerrecht Sectie), pp. 197-202, at p.198.

liability[6]. The avoidance of this strict liability regime[7] is mentioned as one of the reasons for which dangerous goods tend to be mis-declared by shippers.

Of course, there are other reasons for which shippers might resort to hiding the dangerous nature of the goods. They might do so in order to avoid paying the extra rate for the shipment of dangerous goods or avoid any kind of possible delays that might occur in case the sea-carrier refuses to take over the carriage of container due to unambiguity regarding the safety of its cargo or due to the limitations regarding the quantity of the dangerous cargo that shippers are allowed to carry on board of the container vessel[8].

This article aims to highlight the main legal issues, relating to the dangerous goods by sea, which are mentioned in both the International Sea Carriage Conventions and English law. Therefore, other Conventions, statutes or regulations than those listed above – either from the public law or private law sphere - are outside the scope of this article. The paper is structured as follows. First, I give an overview of the characteristics of dangerous goods, by discussing the definition of their concept according to case law. Then, I refer to the duties and responsibilities of the main parties involved in the transport of dangerous goods by sea; meaning the shipper and the carrier. Their legal relationship and their liability regime are presented in afterwards. Finally, conclusions are drawn in the last section.

2. The Concept of Dangerous Cargo

Dangerous goods as a legal category makes sense due to the fact that the rules attached to them are different from those governing cargo, which for convenience may be described as an ordinary one[9]. Based on the concept of "dangerous" goods, the Sea Carriage Conventions contain specific rules, in which a special treatment is identified for them. Special provisions in relation to the carriage of dangerous goods have been consistently made, mostly because of the multifarious dangers they may present as well as the potential additional risks that may involve for sea-carriers. Nevertheless, when cargo is to be considered as dangerous remains still a crucial and ongoing research question. Determining the meaning of "dangerous" or at least of what cannot be seen as "dangerous" plays a pivotal role when allocating liability. Thus, this section aims to figure out what dangerous cargo means.

As it was stated above, on one hand, the applicable Sea Carriage Conventions neither give a definition of what is meant by the word "dangerous" nor provide any "*numerous clausus*" of cargoes[10], which may be considered as "dangerous, hazardous or harmful". More precisely,

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6 Tetley, W., (2008), *"Marine Cargo Claims"*, Canada, Yvon Blais, p. 1851; Crowley, M.E, (2005), *"The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem"*, USA, Tulane Law Review, Vol.79, p. 1461.

7 With regard to the dangerous goods, see art. IV (6) of the Hague/Hague-Visby Rules & art. 13 of the Hamburg Rules. For English case law, see also the "Athanasia Comninos Case".

8 Karampetsou, A.K., (2016), *"Container Information & Privacy Concerns: Opening the "Pandora's" Box? Legal Challenges of a Business-to-Customs Information Sharing with regard to Containerized Cargo"*, Current Issues in Maritime & Transport Law, pp.253-272, Bologna, Bonomo, at p. 260.

9 Thomas R, (2015), *"Special Liability Regimes under the International Conventions for the Carriage of Goods by Sea – Dangerous Cargo and Deck Cargo"*, Dutch Journal of Commercial Law 2010-5, Transport Law Section ("Nederlands Tijdschrift voor Handelsrecht 2010-5, Vervoerrecht Sectie), pp. 197-202, at p.198.

10 Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 39.

the Hague/Hague-Visby Rules do not refer to any related instrument to help resolve any uncertainty regarding dangerous good's definition. Art. IV.6 of the Hague/Hague-Visby Rules[11] is only limited to provide some examples of cargo, whose nature or character is considered to be "dangerous", such as "*inflammable*" and "*explosive*". Similarly, art. 13 of the Hamburg Rules[12] refers to the special rules applicable on dangerous goods. Compared with Hague/Hague-Visby Rules, the Hamburg Rules are more detailed because they make three useful technical changes regarding dangerous cargo, which are further discussed in the following sections. Apart from this, art. 13 of the Hamburg Rules confirms in different language the meaning of art. IV.6 of the Hague/Hague-Visby Rules.

On the other hand, charter parties or bill of lading standard forms contain dangerous goods clauses, but none of them explicitly defines what is meant by dangerous. It is therefore necessary to look on how the national Courts tried to interpret this imprecise legal term. The Courts look at many different factors in order to establish whether the goods in the particular case, which is brought before them, are deemed as dangerous. For the purposes of this article, I focus on the English case law, by analysing some of its landmark cases.

English Courts generally focus on the *situation*, in which the damage occurred and not on the *nature of a substance* carried on board of the ship[13]. They seem to be more concerned with the legal term *"dangerous situation"* rather than *"dangerous nature"*. An evaluation of the event causing the damage is precisely being made, as the word "dangerous" covers all the features of the goods, which may lead to the maritime disaster. Thus, in order to determine whether the goods are dangerous, the context is of paramount importance. It could be supported that under special circumstances, almost any product can be deemed as dangerous. Based on this, it is difficult to talk about an exhaustive list of specific situations that could be seemed dangerous. Nevertheless, some factors-indicators are deduced from English case law.

In the "*Athanasia Comninos*"[14] case, for example, the element of the carrier's knowledge to the meaning of dangerous goods was relevant for determining whether the goods were indeed dangerous. Safety is therefore dependent on the actual knowledge from the part of the carrier

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[11] *"Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any".*

[12] *"(1) The shipper must mark or label in a suitable manner dangerous goods as dangerous. (2) Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, the shipper must inform him of the dangerous character of the goods, and if necessary, of the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character: (a) the shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment of such goods, and (b) the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.*
(3) The provisions of par.2 of this article may not be invoked by any person if during the carriage he has taken the goods in his charge with knowledge of their dangerous character. (4) If, in cases where the provisions of par.2, subpar (b), of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of article 5".

[13] Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 61.

[14] *The Athanasia Comninos*, (1990), 1 Lloyd's Rep. 277, 282.

regarding the nature and the character of the goods, the care with which he carries them in the light of that knowledge as well as the precautions taken , if need be. The Court said that if the carrier had the necessary knowledge, skill and equipment, the particular –in this case- hazards would have been avoided. In the "*Fiona*" case[15], the Court was concerned on whether the particular cargo had different characteristics than usual. According to its decision, the Court held that the fuel-oil cargo had dangerous characteristics, which were completely different from those commonly associated with fuel-oil cargoes.

In a case proceeding the application of Hague/ Hague-Visby Rules, the concept of dangerous goods was also dependent on the legality of them. To be more specific, in the "*Mitchell Cotts vs. Steel*"[16] case, the goods were considered as dangerous because they made the ship subject to legal or political risks by causing delay and detention. The Court extended the meaning of dangerous goods, as the legal term did not only cover the goods, which are physically dangerous. However, after the application of Hague/Hague-Visby Rules, the House of Lords, in the "*Giannis NK*"[17] case, declined to express a view on whether the goods are dangerous if they may be subject to cause delay or detention of the ship and cargo through the application of some local law. In this case though, the House of Lords established a very interesting precedent regarding the interpretation of the art.IV.6 of the Hague/Hague-Visby Rules, which is worth mentioning. The House of Lords ruled that the words "*dangerous*" were to given a broad meaning and were not only restricted to "*inflammable or explosive*" nature of cargo. Especially regarding to the word "dangerous nature" mentioned in this specific provision, the Court held that it would be wrong to apply the "*euisdem generis*" rule[18]. Moreover, the House of Lords clarified that within the context of the Hague/Hague-Visby Rules, the words "dangerous" refer to physically dangerous goods. In the *"Giannis NK"* case, the groundnut cargo was dangerous within the meaning of this rule since, although not liable to cause physical damage to the vessel, it was liable to give rise to the loss of other cargoes shipped in the same vessel, by dumping them at sea. The more recent decision of "*Darya Radhe*"[19] case also confirmed this reasoning, by pointing out that the term "dangerous" in the context of Hague/Hague – Visby Rules is limited to physical damage to the ship or other cargo.

Nevertheless, it has been argued that the concept of dangerous goods is implicitly defined by the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which is commonly and widely known as the Rotterdam Rules. This International Sea Carriage Convention lacks of current applicability, but it is worth referring to it mostly because of its unique provision regarding the goods of dangerous nature. Indeed, art. 32[20] of the Rotterdam Rules provides special rules for dangerous goods. Even though an

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15 *Mediterranean Freight Services Ltd. v. BP Oil International Ltd. ("The Fiona")*, (1993), 1 Lloyd's Rep. 257, 258.

16 *Mitchell Cotts vs. Steel*, (1916), 2 K.B. 610.

17 *Giannis N.K.*, (1994), 2 Lloyd's Rep. 171, 179.

18 The so-called "*eiusdem generis*" rule lies down that where a list of specific items is followed by general words, such as "any other cause", the general words should be interpreted as being restricted to things of the same kind as the specific examples.

19 *Darya Radhe*, (2009), 2 Lloyd's Rep. 175.

20 *"When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment: (a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform and (b) The shipper shall mark or label dangerous goods n accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure."*

explicit definition of the concept of "dangerous goods" is not given by the Rotterdam Rules, this provision expressly states that it is applicable only *"when goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment"*. Therefore, for goods to be regulated under this article, they must be *"by their nature or character"* dangerous. It seems that UNCITRAL[21] included the *"nature or character"* qualification in order to avoid all the broad interpretations previously given by some Courts[22] regarding the concept of "dangerous goods" under the Hague/Hague-Visby Rules[23]. Based on this qualification, ordinarily harmless goods are not by *"their nature or character"* dangerous, despite the fact that they may provoke harm under certain circumstances[24].

In addition, it is of paramount importance to note that art. 32 of the Rotterdam Rules covers goods that are dangerous to "persons", "property", or the "environment"[25]. In comparison with the Hague/Hague Visby Rules, where the concept of dangerous goods is defined by reference to the ship or cargo, the Rotterdam Rules extend the concept by including danger to both persons and the environment as well. Of course, it has been argued that the concept of dangerous goods has already been extended to include danger to life, since the adoption of the Hamburg Rules[26]. However, the Hamburg Rules were not an overwhelming success, as they did not manage to reach the same amount of popularity as the Hague/Hague-Visby Rules. Furthermore, apart from some modifications, the Hamburg Rules follow the basic pattern of the Hague/Hague-Visby Rules with regard to the provision referring to dangerous goods. Based on these reasons, I thought that it would be more appropriate to highlight - in this paragraph - the difference between the Rotterdam Rules and the Hague/Hague-Visby Rules. Thus, in contrast with the Hague/Hague-Visby Rules, goods may be "dangerous" for the purposes of art.32 of Rotterdam Rules, even though they do not harm the carrier (or the ship or any other cargo shipped on board of the vessel)[27].

The abovementioned examination of both the International Sea Carriage Conventions and the English Case Law shows that the concept of dangerous cargo is unclear, controversial and vague[28]. During their sea-transportation, goods can provoke multiple kinds of damage in

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21 United Nations Commission on International Trade Law.

22 See e.g. the *Giannis N.K.,* (1994), 2 Lloyd's Rep. 171, 179.

23 Fujita T, (2011), *"Shipper's Obligations & Liabilities under the Rotterdam Rules"*, The Rotterdam Rules, pp.1-30, Abu Dhabi, at p. 23; Sturley M.F., Fujita T & Van der Ziel G, (2010), *"The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea"*, UK, Sweet & Maxwell, pp. 177-201.

24 Fujita T, (2011), *"Shipper's Obligations & Liabilities under the Rotterdam Rules"*, The Rotterdam Rules, pp.1-30, Abu Dhabi, at p. 23; Sturley M.F., Fujita T & Van der Ziel G, (2010), *"The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea"*, UK, Sweet & Maxwell, pp. 177-201.

25 Fujita T, (2011), *"Shipper's Obligations & Liabilities under the Rotterdam Rules"*, The Rotterdam Rules, pp.1-30, Abu Dhabi, at p. 23; Sturley M.F., Fujita T & Van der Ziel G, (2010), *"The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea"*, UK, Sweet & Maxwell, pp. 177-201.

26 Thomas R, (2015), *"Special Liability Regimes under the International Conventions for the Carriage of Goods by Sea – Dangerous Cargo and Deck Cargo"*, Dutch Journal of Commercial Law 2010-5, Transport Law Section ("Nederlands Tijdschrift voor Handelsrecht 2010-5, Vervoerrecht Sectie), pp. 197-202, at p.199.

27 Fujita T, (2011), *"Shipper's Obligations & Liabilities under the Rotterdam Rules"*, The Rotterdam Rules, pp.1-30, Abu Dhabi, at p. 23; Sturley M.F., Fujita T & Van der Ziel G, (2010), *"The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea"*, UK, Sweet & Maxwell, pp. 177-201.

28 In particular, since the absence of definition results in legal uncertainty, a question has been raised on whether there is a need for special micro-liability regime regarding the dangerous cargo. Please see Thomas R, (2015), *"Special Liability Regimes under the International Conventions for the Carriage of Goods by Sea – Dangerous Cargo and Deck Cargo"*, Dutch Journal of Commercial Law 2010-5, Transport Law Section ("Nederlands Tijdschrift voor Handelsrecht 2010-5, Vervoerrecht Sectie), pp. 197-202, at p.202.

different situations. Goods may present multifarious dangers to property or/and to persons, or/and the environment. They may physically damage the ship or other goods on board or may provoke non-physical damage, such as delay or detention and other costs. From the sea-carrier's perspective, the goods are considered to be dangerous when they pose unforeseeable hazards to the ship or cargo. From the English Case Law, it follows that the definition of what is dangerous or at least of what cannot be seen as dangerous is subject to an evaluation of the particular case, which is brought before the Courts. English Courts look at a variety of different factors and they examine carefully the occurred incident and the specific causes that led to it. In any of these situations, the incurred damage can be quite substantial and the ensuing legal issues highly complex.

3. The Duties of the Main Parties Involved

The transportation of dangerous goods is by nature multi-tasking, mostly due to the multifarious potential dangers they may present during the different stages involved in the entire transport chain. Each party of this chain has certain responsibilities, which all aim to ensure the safe movement of the dangerous cargo and each is governed by comprehensive rules. Under the International Sea Carriage Conventions, there are three key parties, whose duties are either partly or fully regulated by them: the shipper, who initiates or consigns the transport of dangerous goods, the sea-carrier, and the consignee, the person to whom the goods are delivered. For the purposes of this article, the current research is limited to highlight the main duties, which are imposed to the first two parties involved in the transportation of the dangerous goods –meaning the shipper and the sea-carrier – according to the three International Sea Carriage Conventions. Of course, it is worth mentioning that besides duties, both contractual parties have certain rights as well. Due to the fact that the rights are intricately linked with liability, they are analysed in the next section. Thus, this section is limited to examine both the shipper's and the sea-carrier's obligation in relation to the dangerous goods under the Hague/Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules.

A. Duties of the Shipper

In general, the applicable Sea Carriage Conventions did not pay much attention to the shipper's obligations or liabilities. Indeed, the Hague/Hague-Visby Rules include only very few rules on shipper's duties and liabilities because their main purpose was to establish the mandatory minimum standards of sea-carrier's liability in the context of contracts of carriage on the carrier's standard terms. Consequently, the Hague/Hague-

Visby Rules include only the shipper's guarantee of the accuracy of the information it supplies concerning the goods (art. III.5), the shipper's exoneration for loss or damage resulting from any cause that was without the shipper's fault (art. IV.3) and the shipper's liability for dangerous goods (art. IV.6)[29]. The Hamburg Rules have an independent chapter on the liability of the shipper but it contains only two articles: one addressing the basis of the liability of the shipper (art.12) and one providing special rules for dangerous cargo (art.13)[30]. Nevertheless, the

[29] Fujita T, (2011), *"Shipper's Obligations & Liabilities under the Rotterdam Rules"*, The Rotterdam Rules, pp.1-30, Abu Dhabi, at p. 2; Sturley M.F., Fujita T & Van der Ziel G, (2010), *"The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea"*, UK, Sweet & Maxwell, pp. 177-201.

[30] Fujita T, (2011), *"Shipper's Obligations & Liabilities under the Rotterdam Rules"*, The Rotterdam Rules, pp.1-30, Abu Dhabi, at p. 3; Sturley M.F., Fujita T & Van der Ziel G, (2010), *"The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea"*, UK, Sweet & Maxwell, pp. 177-201.

fact that both the Hague/Hague-Visby Rules contain limited provisions concerning the shipper's duties does not mean that the shipper has no other duties. Duties also arise from general law, statutes or are naturally implicit in the contract[31].

In contrast to both the Hague/Hague-Visby Rules, chapter 7 of the Rotterdam Rules, which consists of eight articles, provides more detailed rules on the shipper's obligations and liabilities. Articles 27-29 of the Rotterdam Rules specify the general obligations of the shipper. The article 30 of the same rules provide the basis of the shipper's liability, while the articles 31 and 32 address the specific obligations of the shipper. In particular, article 31 contain special rules for dangerous cargo.

As it can be seen, all the Sea Carriage Conventions contain one provision, which explicitly provides special rules for dangerous cargo. On one hand, these special rules refer to the extra obligations that are imposed on the shoulders of the shipper when he consigns to the transport of cargo whose nature or character is dangerous. On the other hand, these rules trigger the more onerous strict liability, which is attributed to the shipper in case he breaches any of these extra obligations. Hereby, I present and analyse three main obligations of the shipper in relation to the transport of dangerous goods: the obligation to mark and label the dangerous goods, the obligation to disclose the dangerous nature or character of the goods and the obligation to pack sufficiently the dangerous cargo.

I. The Obligation to Mark & Label Dangerous Goods

In practice, the person who provides all the details that are written on the bill of lading is the shipper. According to the bill of lading terms, the shipper is usually required to describe the cargo in an accurate way and guarantee the accuracy of such a description[32]. Especially with regard to the dangerous cargo, this obligation requires the shipper to mark and label them in such a way, so as the substances can be readily identifiable during the transport. The purpose of this obligation is to inform all the cargo related parties–including the carrier-about the contents of the packages in order to allow them to take care the goods without jeopardizing the maritime safety and security. In that respect, it can be said that the obligation of marking and labelling any dangerous cargo serves the same objective as the documentation .

The obligation of the shipper to mark and label any dangerous characteristics of the goods can also be found in the Hague/Hague-Visby Rules. In addition to art. IV.6[33], this obligation of the shipper can be deduced from art.III.3 in combination with art.III.5. According to art.III.3 (a) of the Hague/Hague-Visby Rules, the shipper is required to mark the goods and indicate *"the leading marks necessary for the identification of the goods"* in case the shipper wants the carrier to issue a bill of lading. Such a bill of lading shall be *prima facie* evidence of the shipment in condition of the indicated quantity of goods, which is identified by the leading marks[34]. In

[31] Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 90.

[32] Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 96.

[33] See above in n.18 .

[34] See art. III.4 of the Hague/Hague-Visby Rules; Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 96.

addition, according to the art.III.5 of the same rules, the shipper *"shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars".* This rule also confirms the obligation of the shipper to mark and describe the goods in an accurate way, as in case where the shipper is not compliant to this obligation, a strict liability is imposed on the shoulders of him. This provision is similar to that of art.17[35] of the Hamburg Rules, except that the *"nature"* of the goods is also guaranteed in the Hamburg Rules. The shipper, thus, is under a statutory duty to mark dangerous goods and normally, the certain way under which he has to do so is generally contained in the bills of lading[36].

The obligation to mark and label the dangerous goods is explicitly referred to both the Hamburg and Rotterdam Rules. The only difference is that art.32 (b)[37] of the Rotterdam Rules requires the marking and labelling of the dangerous goods to be *"in accordance with the law, regulations or other requirements of public authorities that apply during the intended carriage"*, while art.13[38] of the Hamburg Rules refers to this obligation in a more general way. According to both provisions, the shipper must properly mark or label dangerous goods and any lack of actual knowledge from his side regarding either the dangerous nature of the goods or the legal requirements for their marking and labelling is considered to be irrelevant. This duty of the shipper to properly mark and label the dangerous nature of the goods is part of his duty to give notice of the dangerous goods[39].

II. The Obligation to Disclose the Dangerous Nature or Character of the Goods

When looking at the implications of the carriage of dangerous goods, one of the most important factors to be considered is the quality of the information provided about the cargo. It is essential for all the parties involved in the intended carriage to have accurate and reliable information regarding the nature and the properties of the cargoes they are about to carry. This is not only related to cargo protection but also to the safety of human lives and the security of other properties (apart from the cargo) as well as the protection of the marine environment. Carriers often receive pre-stowed, pre-locked and pre-sealed containers in large numbers and shortly before shipment and it would be very costly, time-consuming and inefficient to open each and every container in order to establish what is inside[40]. It is therefore impossible to

[35] *"The shipper is deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper must indemnify the carrier against the loss resulting from inaccuracies in such particular".*

[36] Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 97.

[37] See above n. 28.

[38] See above n.19.

[39] Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 98.

[40] Karampetsou, A.K., (2016), *"Container Information & Privacy Concerns: Opening the "Pandora's" Box? Legal Challenges of a Business-to-Customs Information Sharing with regard to Containerized Cargo"*, Current Issues in Maritime & Transport Law, pp.253-272, Bologna, Bonomo, at p. 254; Levinson, M., (2010) *"The World the Box Made. In the Box: How the Shipping Container Made the World Smaller and the World Economy Bigger"*, USA, Princeton University Press.

expect from the carriers to inspect the contents of all these containers, whereas the need for quick on and off loading as well as for security reasons make this demand unrealistic. A sea-carrier and his crew rely on what is "said to contain" according to the information supplied by the shipper. If the shipper does not make an accurate and reliable declaration of what has been loaded on board, the sea-carrier will not be able to take the appropriate precautions. The consequences are obvious: a ship at sea cannot throw or drop out a burning container, which is stowed deep down. All the other cargoes, which are stowed nearby can also catch a fire and, if they happen to be undeclared dangerous cargo, the consequences can be severe for all the parties involved in the carriage and for the society as a whole. Therefore, data accuracy and reliability about the cargo is of paramount importance, as decision-making on partial or in full unreliable and inaccurate information is inherently dangerous.

According to art. IV.6 [41]of the Hague/Hague-Visby Rules, it can be deduced that the shipper guarantees that no goods of *"inflammable, explosive or dangerous nature"* shall be shipped without given notice. Thus, the shipper must inform the carrier of the dangerous nature or character of the goods. In addition, this provision requires the consent of the carrier and this consent could only be given upon knowledge communicated by the shipper[42]. Therefore, the duty to disclose the dangerous nature or character of the goods is implied in the liability. On the other hand, both the Hamburg and Rotterdam Rules expressly refer to the obligation of the shipper to inform the carrier of the dangerous nature or character of the goods. Although this obligation is identical between art. 13(2)[43] of the Hamburg Rules and art. 32(a)[44]of the Rotterdam Rules, minor differences exist. While art. 13 (2) of the Hamburg Rules require the shipper to inform the carrier *"if necessary, of the precautions to be taken"*, the Rotterdam Rules do not. The art.29 of the Rotterdam Rules might require the shipper to inform the carrier of necessary precautions, however the breach of such obligation would not trigger strict liability. Under art. 13 (2) of the Rotterdam Rules, the shipper has an obligation to *"inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party"*. Nevertheless, even information after delivery could reduce the shipper's liability to the extent that it contributed to the prevention of losses.

However, what is the nature of this necessary information that should be given to the carrier with regard to the dangerous character of the goods? The guiding principle is that the information to be given by the shipper should be such that an ordinarily competent and experienced carrier will be able to appreciate the nature of the risks involved in the carriage and to guard against them[45]. Moreover, the information should be sufficient to show the dangers of the goods. When is the provided information, though, considered to be sufficient? It has been supported that this is a question of fact and therefore it is subject to judicial interpretation[46].

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41 See above in n.18.

42 Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 100.

43 See above in n.19.

44 See above in n.28.

45 Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 100.

46 Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 102.

In this respect, the Courts have to decide in the light of the surrounding circumstances of the case, which is brought before them.

III. The obligation to pack sufficiently the dangerous cargo

Packing is the most important aspect of handling of goods and it is usually performed by the shipper himself or by a third-party acting on behalf of the shipper. It is generally believed that if the packing is suitable, the risk of a serious accident occurring is extremely low. The packing of goods plays a pivotal role in protecting other cargo, the ship as well as those who are on board. Especially, in case of dangerous cargoes, where their transport is associated with special risks, due to the property of the transported substances, packing emphasizes two main purposes: protection and handling. Dangerous cargoes require a higher degree of care and they are carried in packaged form for facilitation of their storage and transport, as well as better identification and safe recovery in case of incidents.

According to the Hague/Hague –Visby Rules, the only provision which refers to the packing of goods, is that of art. IV.2(n)[47]. This article contain one of the major defenses available to sea-carriers, as it relieves the sea-carrier from liability arising or resulting from insufficiency of packing. Therefore, there is no explicit provision imposing a duty on the shipper to pack sufficiently. However, in practice, goods are packed by shippers, unless otherwise agreed by parties in the contract of carriage. The duty of the shipper to pack properly is a natural part of his duties and the specific requirements regarding packing can be found as part of the statutory or contractual obligations of the shipper[48]. A more explicit provision regarding this issue can be found in Rotterdam Rules. Sufficiency of packing is referred among the general obligations that the shipper has to the sea-carrier and therefore it is also applicable in case of dangerous goods[49].

B. Duties of the Sea-Carrier

As it has been mentioned above, the main purpose of the Sea Carriage Conventions is to establish the minimum standards of sea-carrier's liability in the context of contracts of carriage on the carrier's standard terms. Consequently, the Sea Carriage Conventions regulate primarily the sea-carrier's duties and liability. In particular to the carriage of dangerous goods, the above-mentioned special rules remain silent to the carrier's duties. However, the fact that art. IV.6 of the Hague/Hague-Visby Rules, art. 13 of the Hamburg Rules and art 32 of the Rotterdam Rules did not express anything with regard to the carrier's duties in relation to the dangerous goods, does not mean that the sea-carrier has no duties. Duties can arise from other provisions of these rules. Hereby, I present and examine briefly two examples of the obliga-

[47] *"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from insufficiency of packing".*

[48] Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 92-93.

[49] *"Article 27 (1) Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property. (2) The shipper shall properly and carefully perform any obligation assumed under an agreement made pursuant to article 13, paragraph 2. (3) When a container is packed or a vehicle is loaded by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container or vehicle and in such a way that they will not cause harm to persons or property."*

tions that a sea-carrier has in general and can also be imposed in particular for the transport of dangerous goods as well.

I. The Duty of Care to the Goods

Art. III (2) of the Hague/Hague-Visby Rules regulates the obligation of the sea-carrier to *"properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried"*. The carrier, through his master, is obliged to be careful and skilful in protecting each part of the cargo. All reasonable precautions ought to be taken in order to prevent the goods from being damaged, destroyed or lost. Like the duty of seaworthiness, the duty of care for the cargo is non-delegable and the carrier is responsible for any acts or omissions of his agents. However, in contrast to the duty of seaworthiness, which applies before and at the commencement of the voyage[50], the duty of care for the cargo is continuous and applies during the voyage as well. Therefore, if the carrier agrees to carry dangerous cargo, he has a duty to exercise a high degree of care to these cargoes[51]. A high standard of care is enunciated by the word *"properly"*[52].

This obligation of the carrier is also contained in art. 13 of the Rotterdam Rules with similar wording. Under the Rotterdam Rules, the obligation of the carrier *"to properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods"* is also continuous and applies during the voyage as well. Nevertheless, in contrast to both the Hague/Hague-Visby Rules and the Rotterdam Rules, there is no reference of this obligation in the Hamburg Rules. With regard to the last ones, it has been deemed sufficient to provide in article 5(1) that the carrier is liable *"unless he proves that he and his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences"*.

II. The Duty to Properly Stow the Goods

The carrier's duty to properly and carefully stow the cargo is part of the abovementioned duty of care to the goods. This obligation refers to the placing of the goods in a ship's spot and in the absence of an express contract or custom, it is performed by the carrier through his master. Questions of stowage are therefore under the absolute control of the master of the vessel and as such he has the final say as to how stowage is to be effected. This is so not only because of the carrier's obligation to care for the cargo but also due to the carrier's responsibility for the stability of the vessel and the safety of the ship and crew[53].

In particular, an improper or poor stowage of the dangerous cargo can cause detrimental risks on the maritime safety and security, and even result in lives being put at risk and prop-

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50 See art. III (1) of the Hague/Hague-Visby Rules.

51 Stevens, F., (2014), "Liability for Defective Containers: Charting a Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers", Soyer B., Tettenborn, A., "Carriage of Goods by Sea-, Land and Air-Unimodal and Multimodal Transport in the 21st Century", UK, Informa Law; Girvin, S., (2011), *"Carriage of Goods by Sea"*, USA, Oxford University Press, p.429-433;Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 123.

52 Tetley, W., (2008), *"Marine Cargo Claims"*, Canada, Yvon Blais, p. 185.

53 Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 94.

erty being destroyed or lost[54]. It is therefore of paramount importance for the carrier to stow especially the dangerous cargo in accordance with all applicable regulations and take all the necessary measures for it, such as, for example, to maintain certain distances between incompatible goods or to require the presence of one or more decks between them or to have certain chemical properties all grouped together[55]. Moreover, an accurate stowage plan, which also includes a proper dangerous goods plan, plays a pivotal role to the protection of dangerous goods from external causes, such as from adverse weather conditions or from the impact of a collision.

However, even though the responsibility for proper stowage remains in all circumstances with the carrier, this obligation is not absolute[56]. It is true that the carrier is expected to be an expert with respect to ordinary cargo and should stow it properly without having to receive special instructions. Nevertheless, he cannot be expected to be an expert with regard to the cargo, which requires special care[57]. It is the shipper's responsibility thus, to give the carrier all the instructions for cargo requiring special care. Otherwise, the carrier cannot be able to comply with his obligation to properly stow the dangerous goods on board. Consequently, the obligation of the carrier to exercise due diligence with regard to the cargo as well as to properly stow the goods on board of the vessel is dependent on the information supplied by the shipper. In relation to the dangerous cargo in particular, it can be assumed that if the shipper does not perform his two special obligations that were presented in the previous sub-section, meaning the obligation to mark, label and disclose the dangerous nature or character of the goods, he is not able to execute properly neither his duty of care nor his duty to carefully stow the goods on board.

4. Liabilities & Rights of the Main Parties Involved

Goods can cause various damages in different situations. In particular, the carriage of dangerous goods by sea inherently poses substantial risks of damage or loss, both to the vessel and to other cargoes. For example, dangerous goods can cause a fire or an explosion, destroy the cargo holds or the hull or provoke the consolidation of the liquids in the cargo holds . Moreover, the sea-carrier may incur extra expenses, such as cargo unloading and reloading or additional bunker expenses because of the damage to the ship, since he may have to deviate

[54] Karampetsou, A.K., (2016), *"Container Information & Privacy Concerns: Opening the "Pandora's" Box? Legal Challenges of a Business-to-Customs Information Sharing with regard to Containerized Cargo"*, Current Issues in Maritime & Transport Law, pp.253-272, Bologna, Bonomo, at p. 260; Kofopoulos, I., (2014) "Inaccurately Declared Container Weights: The Danger to Life, the International Trade and the Carriage of Goods by Sea", in European Transport Law Journal, p.279.

[55] Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 95; See also IMDG Code.

[56] Stevens, F., (2014), "Liability for Defective Containers: Charting a Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers", Soyer B., Tettenborn, A., "Carriage of Goods by Sea-, Land and Air-Unimodal and Multimodal Transport in the 21st Century", UK, Informa Law; Girvin, S., (2011), *"Carriage of Goods by Sea"*, USA, Oxford University Press, p.429-433;Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 123.

[57] Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 124.

from the agreed route[58]. The ship may be detained or quarantined, so the sea-carrier may suffer economic losses due to the delay to reach the port of destination on the agreed time. The vessel may also need to be cleaned[59]. Last but not least, dangerous cargo may damage other cargo on board, injure the master or the crew, while their dumping at sea may have a detrimental impact on the marine life and environment.

The carriage of dangerous goods raises first of all the question of how such kind of risks may be distributed between the two main parties involved, meaning the shipper and the sea-carrier. Although the International Sea Carriage Conventions contain special provisions in relation to the liability arising from the transport of dangerous goods, the approach varies. The rights and liabilities of the shipper and carrier vary and mostly greatly depend on whether the carrier knew or should have known the dangerous nature or character of the cargo. Thus, a brief examination of the different approaches relating to the rights and liabilities of both the shipper and carrier is being made, by analysing step by step each International Sea Carriage Convention.

A. Shipper's Liability for Dangerous Goods

The allocation of liability between shippers and carriers in relation to the transport of dangerous goods is the subject-matter of the above-mentioned special rules contained in the three Sea Carriage Conventions. These special rules regulate mostly the shipper's liability to the ship and the sea-carrier. Of course, it is worth mentioning that when a damage occurs, the liability from the part of the shipper may arise not only towards the carrier but also to third parties, such as seamen, stevedores and owners of other cargoes. Nevertheless, this liability is in tort, and as a result, it does not fall under a contract of carriage. There is a possibility though that if the carrier is deemed to be liable to third parties due to the shipment of dangerous goods, he can recover the amount of liability in a recourse action against the shipper[60]. Therefore, claims for third parties might fall indirectly under the contract of carriage and/or the applicable Sea Carriage Conventions. However, for the purposes of this article, the research is limited only to the shipper's liability towards the sea- carrier and thus, the liability to the third parties is outside of its scope.

I. Liability under the Hague/Hague-Visby Rules

As it was previously mentioned, the Hague/Hague-Visby Rules contain very few rules on the shipper's obligations and liabilities. In general, the liability of the shipper is fault-based, as according to the art.IV.3 of the Hague/Hague-Visby Rules, "*the shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or servants*". However, this general principle is not

[58] Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 137.

[59] Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 137.

[60] Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 137.

applicable in case of dangerous goods due to the existence of both art. III.5 and art.IV.6, which contain special rules regarding them.

In contrast to the general principle of fault-based liability, art.IV.6 of the Hague/Hague-Visby Rules –at least as interpreted in English case law[61]- imposes a strict liability on the shoulders of the shipper in relation to the shipment of dangerous goods irrespective of fault or neglect on their part[62]. Under this circumstances, the risk is borne wholly by the shipper, even in case he had no means of knowing or discovering the potential dangerous nature of the goods shipped, and the liability to indemnify the sea-carrier is strict[63]. Consequently, for triggering the application of the special rule, which is set out in art.IV.6 of the Hague/Hague-Visby Rules, there is no requirement that the shipper or his agent should have the relevant knowledge, either actual or constructive, of the nature or character of the goods. The liability of the shipper, thus, is not dependent on whether he himself knew or should have known the dangerous nature of the relevant cargo, as even in case he had no means of asserting the dangerous nature of the goods, he is liable for the consequences of shipping those goods[64].

Of course, the above-mentioned issue can easily be understood in case where the carrier was not aware of the dangerous nature of the goods and therefore he did not consent for their shipment on board of his vessel. Therefore, a strict liability is imposed on the shoulders of the shipper in two situations: (1) in a situation in which neither the shipper not the carrier knew the dangerous nature of the goods and the necessary measures to be taken[65], and (2) in a situation in which the shipper was aware of the dangerous nature of the goods and/or the necessary measures to be taken in order to avoid a possible damage, and he did not–either intentionally or recklessly-disclose this information to the carrier. However, what happens in case where the carrier knew the dangerous nature or character of the goods and/or the necessary precautions to be taken? Does the sea-carrier's knowledge constitute a substantial basis for not triggering the application of the strict liability set out in art.IV.6 of the Hague/Hague-Visby Rules? In other words, is it enough to say that where the sea-carrier has been given notice of the dangerous nature of the cargo and/or its handling conditions, the shipper's strict liability should be discharged?

In such a case, it is generally accepted that when the carrier consents to carry such cargo, he agrees to carry such risk as well as the extra charges for the carriage of dangerous cargo[66]. However, the knowledge of the sea-carrier is dependent on whether the shipper had sup-

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61 See e.g. *Giannis N.K.,* (1994), 2 Lloyd's Rep. 171, 179.

62 Thomas R, (2015), *"Special Liability Regimes under the International Conventions for the Carriage of Goods by Sea – Dangerous Cargo and Deck Cargo"*, Dutch Journal of Commercial Law 2010-5, Transport Law Section ("Nederlands Tijdschrift voor Handelsrecht 2010-5, Vervoerrecht Sectie), pp. 197-202, at p.198.

63 Thomas R, (2015), *"Special Liability Regimes under the International Conventions for the Carriage of Goods by Sea – Dangerous Cargo and Deck Cargo"*, Dutch Journal of Commercial Law 2010-5, Transport Law Section ("Nederlands Tijdschrift voor Handelsrecht 2010-5, Vervoerrecht Sectie), pp. 197-202, at p.198. See also e.g. *Giannis N.K.,* (1994), 2 Lloyd's Rep. 171, 179.

64 Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 144.

65 Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 159.

66 Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 159.

plied him with sufficient, reliable and accurate information regarding the dangerous nature of goods as well as the measures to be taken. If the provided information is insufficient or found to be unreliable or inaccurate, it cannot be said that the carrier accepted the cargo with that knowledge[67]. Last but not least, it is worth mentioning that even in case of full knowledge, meaning a case where the dangerous cargo is accepted based on accurate, reliable and sufficient information, the acceptance of dangerous cargo by the sea-carrier is not enough to fully exonerate the shipper from his liability[68]. The shipper will still be liable to the extent of his fault or negligence.

II. Liability under the Hamburg Rules

In relation to the dangerous goods, the Hamburg Rules follow the basic pattern of the Hague/Hague-Visby Rules. Nevertheless, some necessary modifications have been made. As it has been analysed before, the concept of dangerous is extended to include danger to life and an explicit obligation is imposed on shippers to properly mark and label dangerous goods. This duty exists alongside the duty to inform the sea-carrier of the dangerous nature of the goods shipped, and if necessary, of the precautions to be taken[69]. Both duties are contained in art.13 of the Hamburg Rules.

According to art. 13(2) of the same rules, if the shipper breaches his obligation to disclose the dangerous nature or character of the goods and the sea-carrier does not otherwise have knowledge of it, the shipper becomes liable to the contractual or actual carrier for losses or damages resulting from this breach. This phrase implies that in case the sea-carrier has other means of asserting the dangerous nature, the shipper may not be liable, at least in a strict way. In addition, in case where the carrier accepts the dangerous goods for shipment with full knowledge of their dangerous character, and despite the full awareness of the necessary measures to be taken from the part of the carrier, an actual danger is manifested, which can be attributed to the sea-carrier's fault, the carrier will not be protected by art.13 from liability[70]. The latter case is regulated under paragraph 4 of article 13 of the Hamburg Rules. However, based on what it was analysed above, this might not be the case if the Hague/Hague-Visby Rules are applicable.

III. Liability under the Rotterdam Rules

As far as the special obligations of the shipper in relation to the dangerous goods are concerned, the Rotterdam Rules contain similar provisions with those referred to the Hamburg

[67] Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 159.

[68] Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 160.

[69] Thomas R, (2015), *"Special Liability Regimes under the International Conventions for the Carriage of Goods by Sea – Dangerous Cargo and Deck Cargo"*, Dutch Journal of Commercial Law 2010-5, Transport Law Section ("Nederlands Tijdschrift voor Handelsrecht 2010-5, Vervoerrecht Sectie), pp. 197-202, at p.199.

[70] Thomas R, (2015), *"Special Liability Regimes under the International Conventions for the Carriage of Goods by Sea – Dangerous Cargo and Deck Cargo"*, Dutch Journal of Commercial Law 2010-5, Transport Law Section ("Nederlands Tijdschrift voor Handelsrecht 2010-5, Vervoerrecht Sectie), pp. 197-202, at p.199.

ones. The only difference is that the Rotterdam Rules extend the concept of dangerous goods in order to include danger to the environment as well. With regard to the shipper's liability, article 32(a) of the Rotterdam Rules implies that the shipper can only be liable for loss or damage resulting from a breach of the obligation to disclose where the carrier does not have knowledge of the dangerous nature or character of the goods.

This provision is remarkable for two reasons. First of all, this provision establishes a link of causation between the breach of obligation to disclose the dangerous nature or character of the goods and the damage or loss occurred[71]. In simple words, in order to hold the shipper liable, the occurred damage or loss should be a result of the breach of shipper's special obligation to disclose the dangerous nature or character of the goods shipped. The wording is slightly different than that used in both the Hague/Hague-Visby Rules and Hamburg Rules, which instead provide that the shipper is liable for the loss resulting from the shipment. In particular, art. IV.6 of the Hague/Hague-Visby Rules provide that the shipper is liable *"for all damages and expenses directly or indirectly arising out of or resulting from such shipment"*, while art. 13 (2) (a) of the Hamburg Rules mentions that the shipper is liable *"for the loss resulting from the shipment of such goods"*. It is therefore necessary to examine whether, for instance, an explosion of the goods would have been avoided, if the shipper had complied with his obligation to disclose. In case of an affirmative answer, the necessary causation exists and the shipper is liable. In cases of joint causation, in which the loss or damage occurred as a result of both the shipper's breach of special obligation to disclose under art.13 and another event, it has been claimed that the shipper is liable only to the extent that his breach caused the loss or damage[72]. Secondly, this provision implies that if the carrier does have such knowledge at the time he accepts the goods, there is no exposure to liability under art. 32(a) of the Rotterdam Rules[73]. In this circumstance, the core liability regime of the Rotterdam Rules applies[74].

However, what is not clearly said under the art.32 of the Rotterdam Rules is the precise circumstances under which the shipper's special obligation to disclose takes place. The duty applies *"before the goods are delivered"* and relates to goods which *"are or reasonable appear to be likely to become a danger"*. In addition, it has been supported that the shipper's obligation to disclose under art.32 of the Rotterdam Rules is strict. If this interpretation is correct, the liability of shippers has been significantly changes, at least under English Law[75]. In other words, if the goods shipped are not dangerous per se at the time of shipment and there is no reasonable reason for believing –at the time of shipment, that the goods will be a danger during the transport, then a duty of disclose of the part of the shipper does not arise. In such a case, it follows that if the

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71 Fujita T, (2011), *"Shipper's Obligations & Liabilities under the Rotterdam Rules"*, The Rotterdam Rules, pp.1-30, Abu Dhabi, at p. 26; Sturley M.F., Fujita T & Van der Ziel G, (2010), *"The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea"*, UK, Sweet & Maxwell, pp. 177-201.

72 Fujita T, (2011), *"Shipper's Obligations & Liabilities under the Rotterdam Rules"*, The Rotterdam Rules, pp.1-30, Abu Dhabi, at p. 26; Sturley M.F., Fujita T & Van der Ziel G, (2010), *"The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea"*, UK, Sweet & Maxwell, pp. 177-201.

73 Thomas R, (2015), *"Special Liability Regimes under the International Conventions for the Carriage of Goods by Sea – Dangerous Cargo and Deck Cargo"*, Dutch Journal of Commercial Law 2010-5, Transport Law Section ("Nederlands Tijdschrift voor Handelsrecht 2010-5, Vervoerrecht Sectie), pp. 197-202, at p.199.

74 Thomas R, (2015), *"Special Liability Regimes under the International Conventions for the Carriage of Goods by Sea – Dangerous Cargo and Deck Cargo"*, Dutch Journal of Commercial Law 2010-5, Transport Law Section ("Nederlands Tijdschrift voor Handelsrecht 2010-5, Vervoerrecht Sectie), pp. 197-202, at p.199.

75 Thomas R, (2015), *"Special Liability Regimes under the International Conventions for the Carriage of Goods by Sea – Dangerous Cargo and Deck Cargo"*, Dutch Journal of Commercial Law 2010-5, Transport Law Section ("Nederlands Tijdschrift voor Handelsrecht 2010-5, Vervoerrecht Sectie), pp. 197-202, at p.199.

cargo becomes dangerous in the course of its transit, the shipper will not bear responsibility for any resulting loss[76]. The risk under the Rotterdam Rules is allocated, thus, to carriers. This is a significant change compared with the Hague/Hague-Visby Rules, under which the risk is borne by the shipper.

B. Sea- Carrier's Liability & Rights for Dangerous Goods

As it was previously analysed, the allocation of liability between shippers and carriers in relation to the transport of dangerous goods is the subject-matter of art. IV (6) of the Hague/Hague-Visby Rules, art. 13 of the Hamburg Rules and art. 32 of the Rotterdam Rules. These special rules present mostly the circumstances under which the shipper can be held liable to the sea-carrier. Therefore, in relation to the transport of dangerous goods, the sea-carrier can be held liable only in cases where he is in breach of one of his obligations, which are contained in other provisions of the Sea Carriage Conventions. The breach of his duty of care to the goods or his duty to properly stow the goods on board can be illustrated as an indicative example. However, in addition to shipper's liability, these special provisions regulate the rights that a sea-carrier has in case a carriage of dangerous goods takes place. Similar provisions with regard to the sea-carrier's right for compensation from the shipper can be found in all the three Sea Carriage Conventions. In general, the carrier's right for compensation from the shipper differ according to whether the shipment of dangerous goods was performed with or without consent and knowledge of the dangerous nature or character of the goods[77]. Of course, the following account is based on the assumption that the sea-carrier has not materially broken his obligations under art. III of the Hague/Hague-Visby and art. 13 and 14 of the Rotterdam Rules[78].

In particular, according to art. IV (6) of the Hague/Hague-Visby Rules, the carrier has the right to *"land, destroy, render the goods innocuous without paying any compensation"*, regardless of the fact whether he has consented to the carriage of the goods with knowledge of their nature or character. More specifically, where knowing consent is absent, the carrier *"may at any time before discharge"* take all the above-mentioned actions and also claim an indemnity *"for all damages and expenses"* incurred. In such a case, the carrier does not need to demonstrate that the goods have become a danger to the ship and cargo. It has been supported that the main reasoning behind it, is that the carrier is not required to run a risk he has never consented for[79]. On the other hand, where knowing consent has been given, the carrier may take all the above-mentioned steps only if an actual danger to ship or cargo arises[80]. In such a case, the carrier

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[76] Thomas R, (2015), *"Special Liability Regimes under the International Conventions for the Carriage of Goods by Sea – Dangerous Cargo and Deck Cargo"*, Dutch Journal of Commercial Law 2010-5, Transport Law Section ("Nederlands Tijdschrift voor Handelsrecht 2010-5, Vervoerrecht Sectie), pp. 197-202, at p.199.

[77] Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 184.

[78] As it was mentioned above, the Hamburg Rules does not contain specific provision for regulating the duty of care and seaworthiness.

[79] Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 186.

[80] Thomas R, (2015), *"Special Liability Regimes under the International Conventions for the Carriage of Goods by Sea – Dangerous Cargo and Deck Cargo"*, Dutch Journal of Commercial Law 2010-5, Transport Law Section ("Nederlands Tijdschrift voor Handelsrecht 2010-5, Vervoerrecht Sectie), pp. 197-202, at p.198.

does not bear any liability for his actions. It has been supported that the right of these actions, which is given to the sea-carrier presumably arises out of the proper exercise of his duty of care[81]. Of course, the position of the carrier in respect of these rights may be undermined in case the incurred damage was partially caused by a breach of duty on the part of the carrier (for example either breach of duty of care or breach of seaworthiness duty), which can be established by the shipper[82].

A similar regulation is also contained in the Hamburg Rules. According to art. 13 of the Hamburg Rules, if the shipper breaches the obligation to disclose and the carrier does not otherwise have knowledge of their dangerous nature, the shipper is liable to the carrier for losses resulting from the shipment of dangerous goods and the carrier has the right to dispose of or render innocuous the goods without paying compensation. On the other hand, where the carrier agrees to take over the goods with knowledge of their dangerous nature, he still has the right to dispose of or render the goods innocuous *"as the circumstances may require"*, but only in case where the goods become an actual danger.

Last but not least, the Rotterdam Rules also regulate the carrier's right to unload, destroy or render goods harmless. However, unlike the Hague-Hague/Visby Rules and Hamburg Rules, this right is not regulated in the special provision of art.13 of the Rotterdam Rules but in art. 15. Therefore, according to art. 15 of the Rotterdam Rules, the carrier *"may take such other measures as are reasonable, including unloading, destroying or rendering goods harmless, if the goods are, or reasonably appear likely to become during the carrier's responsibility, an actual danger to persons, property or the environment"*.

5. Conclusion

To conclude, dangerous cargo is identified for special treatment in all the International Carriage Sea Conventions due to the potential multifarious and additional risks that they may involve for sea-carriers. Article IV.6 of the Hague/Hague-Visby Rules, art. 13 of the Hamburg Rules and art. 32 of the Rotterdam Rules not only regulate the special obligations of the shipper in relation to the transport of dangerous goods but also impose a more onerous liability regime on the shoulders of the shipper. According to these provisions, the shipper is strictly liable for dangerous goods carried without consent from the part of the carrier and he is liable for any damages and expenses arising from this. Of course, it is worth mentioning that the Rotterdam Rules provide a more favourable liability regime for the shipper, due to the particular provision of art. 32 of the same rules. On the other hand, it is more difficult for the shipper to be fully exonerated from liability under the Hague/Hague-Visby Rules. Thus, the Hague/Hague-Visby Rules seems to be more carrier-friendly.

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[81] Thomas R, (2015), *"Special Liability Regimes under the International Conventions for the Carriage of Goods by Sea – Dangerous Cargo and Deck Cargo"*, Dutch Journal of Commercial Law 2010-5, Transport Law Section ("Nederlands Tijdschrift voor Handelsrecht 2010-5, Vervoerrecht Sectie), pp. 197-202, at p.198.

[82] Thomas R, (2015), *"Special Liability Regimes under the International Conventions for the Carriage of Goods by Sea – Dangerous Cargo and Deck Cargo"*, Dutch Journal of Commercial Law 2010-5, Transport Law Section ("Nederlands Tijdschrift voor Handelsrecht 2010-5, Vervoerrecht Sectie), pp. 197-202, at p.198; Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 192-193.

It has been supported that the strict liability of the shipper for shipment of dangerous goods, whose dangers are unknown to the carrier is necessary for safety reasons[83]. However, how does strict liability address safety? It has been claimed that if the shipper knows that he will be strictly liable for the dangerous cargo, he will exercise a high degree of care[84]. Furthermore, the shipper is in much better position than the carrier to conduct tests and ascertain the true character of the shipped goods, especially if the goods are likely to be packed in sealed boxes. It is extremely inefficient and time-consuming to expect from a sea-carrier to open each and every stuffed container to see what is inside them before departure or test each cargo in order to find out their properties. Moreover, even in case where a sea-carrier opens randomly a container, how would he be expected to know whether a substance is dangerous?

It is true that there are indeed some obvious examples of what could be immediately considered as dangerous, such as inflammable goods, explosives, petroleum products and chemicals. Nevertheless, some cargo that appears to be safe can also become dangerous. On the other hand, what is dangerous in one context may not be in another one. Presumably, that was the reason why an exact definition of the concept of the dangerous goods was not achieved. Maybe, it is not even appropriate to give such a definition because of the extremely rapid changes in the technical developments, which enable the production of more articles of dangerous nature or character. The only thing that we can have a say with certainty is that without a reliable communicated knowledge in relation to the cargo carried on board of a vessel, the maritime safety and security can be put at risk. It is of vital importance for a carrier to be able to trust that the shipper is not going to load dangerous cargo without informing timely as well as in an accurate and sufficient way the carrier. At least, when the carrier has been given notice, he can make the decision of whether or not to take the risk.

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[83] Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 288.

[84] Guner – Ozbek, M.D., (2008), *"The Carriage of Dangerous Goods by Sea"*, Hamburg Studies on Maritime Affairs (PhD Thesis at the International Max Planch Research School for Maritime Affairs at the University of Hamburg), Vol.12, Springer, p. 288.

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III.

FINANCIRANJE BRODOVA I ZRAKOPLOVA, BRODOGRADNJA, OSIGURANJE POTRAŽIVANJA I OVRHA U TRANSPORTU

FINANCING OF SHIPS AND AIRCRAFT, SHIPBUILDING, ENFORCEMENT OF CLAIMS IN TRANSPORT

DOES THE SHIPPING INDUSTRY NEED A SHIPPING PROTOCOL TO THE CAPE TOWN CONVENTION? *KEY ISSUES MARITIME LAW-RELATED*[1]

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"The Bank advances to one or more owning companies a large sum of money. It of course requires security. It will take a mortgage on the ship for that security. It may take other mortgages on other ships for the same security. If the ship, as often happens, is about to be time chartered, the bank will take an assignment of the time charter in order that the bank as assignee can benefit from the time charter in order to reduce the mortgage debt. In addition, it will take an assignment of insurance policies and P&I club cover in order that in the event of total or partial loss of the ship the bank as the lender nay be suitable secured. […] The effect of this is to ensure that the lending bank is completely secured against the insolvency of the borrower who intends that the bank shall obtain complete priority over the claims of other creditors against the borrower"

Roskill L.J.,
The Panglobal Friendship [1978] Lloyd"s Rep 368, p. 371

ABSTRACT

The background of any ship finance transaction is that a bank(s) or some other lender(s) advance(s) money to a shipowner(s) to assist his/them to build a new ship(s); buy a second-hand ship(s); convert, repair or alter a ship(s); or refinance existing company indebtedness secured on a ship(s). The lender must be secured and looks, for his principal security (although not the only one), to the ship itself. This paper is intended to highlight the particular factors that make ship finance different from other

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types of lending (especially from other movable assets) and, particularly, the possible necessity to look for new uniform alternatives, especially in the light of the limited success of the International Convention on Maritime Liens and Mortgages (hereinafter MLM 1993) and the scant likelihood of many further accessions.

The UNIDROIT Convention on International interests in mobile equipment, signed on 16 November 2001 in Cape Town (commonly known as Cape Town Convention – hereinafter CTC), along with the Protocols about particular assets encumbered with consensual security interests (airframes, aircraft engines and helicopters; railway rolling stock; and space assets, so far), has revealed as one of most successful international instrument in the international scene of the uniform private law. The difficulties that such a topic involves (not only those arising from the elaboration of an international text but also specifically the ones relating to the attempt to unify principles between very different legal systems in the topic of security interest and property law) have been overcome by the wide consensus that the Convention is obtaining. Currently, it counts with more than 73 Contracting States; a considerable part of them are developing countries (evident sign of the sensibility that this text has shown to certain jurisdictions).

Given this huge success (especially the one shown by the Aircraft Protocol, even though the same fortune is foreseen for the rest), a scholar of Maritime Law cannot stop asking himself the following questions: Would a shipping Protocol be a good idea? Does the shipping industry need a maritime protocol to the Cape Town Convention? Despite the particularities of the sector (see one ship's companies, flags of convenience or open registers, Bareboat or demise charter and the registration of the vessel in other national Registry for the duration of a bareboat contract, among others), the huge value of the asset (ship), the constant need of financing for its acquisition or construction, the international mobility of the ships or the necessary protection of the secured creditor, do not differ excessively from the reasons why its adoption for the aircraft sector has been a solid success.

At the beginning of its elaboration, the drafters of the Cape Town Convention wondered if the ship would be a susceptible asset from being associated with the Convention. The answer of the shipping-related International Institutions (IMO, CMI and UNCTAD) was categorical: No, thank you. The arguments for such rejection were short: [a] it was feared lest the inclusion of registered ships in an international Convention of a general nature might prove to be source of conflict with the newly drafted International Convention on Maritime Liens and Mortgages (adopted by the 1993 Geneva Conference) and cause confusion and uncertainty (an answer of certain strength); [b] the preparation of international rules governing ships and shipping was described as an issue that was traditionally the preserve of specific international organisations with full participation of shipping circles. To sum up, quoting Professor Roy Goode, ships were excluded because of a perception (probably a misconception) that these were already catered for by existing Conventions, though in respect of consensual security interests all of these were confined to rules of recognition and none of them has been very successful.

More than 20 years later, and especially before the low acceptance that the MLM1993 has had (with only 18 Contracting States), maybe now it is time to ask ourselves the same question: Is a Shipping Protocol possible? Is it a good idea?

The purpose of this paper has the following objectives [a] to examine the main problems, both legal and practical that this new instrument would face in the field of Maritime Law, (e.g. particularities of the shipping industry and its financial counterpart –the financial institutions-, relationship and conflicts with other Conventions, international maritime liens v. non-consensual rights or interests); [b] to analyse the problems that it would have to overcome in the field of consensual security interests (especially those concerning the creation, validity, priority rules, recognition and enforcement, all of these issues of a marked domestic legal nature); [c] if the dual structure model (Convention & Protocol) and the flexibility of the text (reservations and declarations) will solve the main problems that the financial industry is facing.

It will be interesting to make a quick review of the intent of the Convention and the proposed solutions for the aircraft sector, establishing primacy with regards to matters within its scope relating to the creation, enforcement, perfection and priority of security interests in aircraft (establishing a new international framework –functional approach to the security interests through the recognition of an generic International Interest-, providing for the creation of an International Registry (IR

hereinafter) or the regulation of default remedies, among others), to finally conclude, as far as possible, if the Convention on International interests in mobile equipment (along with a possible maritime Protocol) is the ideal mechanism to regulate the main problems that ballast the Conventions on Maritime Liens and Mortgages (both 1926 - hereinafter MLM 1926- and 1993).

As succinctly highlighted by Professor Roy Goode, the questions to be asked when considering the drafting of a new Protocol are: Can the shipping industry be persuaded to see the prospect of shipping and shipping finance securing benefits from the Convention, with a shipping protocol, similar to those by the other sectors mentioned? And, is the project likely to receive a substantial measure of support not only from industry but also from governments and other interested sectors?

Key words: *security interest, Cape Town Convention, Shipping Protocol, ship finance, mortgages and hypothèques, secured creditors, maritime liens, non-consensual rights or interests*[3].

1. Introduction

The Cape Town Convention is a uniform law instrument initiated by the International Institute for the Unification of Private Law (UNIDROIT). It is one of the most recent texts but has become one of the most successful in the field of private law. The original idea was to draft a general Convention on security interests in mobile equipment, broadly covering every kind of high-value mobile assets. Nevertheless, this approach was abandoned in 1997[4], and the "umbrella" structure of the Base Convention and three Protocols was adopted instead[5].

The final text has five main goals including, in the words of one of the most important drafters, Prof. Roy Goode[6]: (a) **legal-related**: (1) the creation of an international interest which will be recognised in all Contracting States (instead of the current dispersion between different legal systems and types of instruments[7]); (2) providing the creditor with a range of basic default remedies (absent from current international instruments[8]); (3) the creation an electronic international register of interests to give notice (ensuring the recognition worldwide of the

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[3] For convenience, in this article, we use the following terms and list of abbreviations:
CTC – *Cape Town Convention*
IR – *International Registry*
ISI – *International security interest*
MLM 1926 - *The 1926 Convention on Maritime Liens and Mortgages*
MLM 1993 - *The 1993 Convention on Maritime Liens and Mortgages*
N-CRoI – *Non-consensual right or interest*

[4] KOZUKA, S., "About This Book: Why National Implementation of the Cape Town Convention Matters", In KOZUKA, S. (Ed.), *Implementing the Cape Town Convention and the Domestic Laws on Secured Transactions*, Springer, 2016, p. 1.

[5] The CTC system and the first Protocol on Matters Specific to Aircraft Equipment were adopted at the Diplomatic Conference in Cape Town in 2001. The second Protocol on Matters Specific to Railway Rolling Stock was adopted in 2007 at the Diplomatic Conference hosted by the Grand Duchy of Luxembourg. The third Protocol on Matters Specific to Space Assets, which applies the rules of the Cape Town Convention with necessary adaptations to the space business, was adopted in Berlin in 2012 and is known as the Space Protocol. Since 2014, a fourth Protocol on mining, agricultural and construction equipment (MAC Protocol) has been discussed by the MAC Study Group. It has also been argued that a Protocol on ship might be worth considering.

[6] *See* GOODE, R., "The Cape Town Convention on International Interests in Mobile Equipment: a Driving Force for International Asset-Based Financing", *Uniform Law Review*, vol. 7, 1, 2002, p. 4.

[7] *See infra* apts. 3.1-3.2 and apt. 4.3.b.

[8] As we study later, neither the MLM 1926 nor the MLM 1993, regulate a well-organized set of remedies in case of default. *See infra* apt. 3.6 and apt. 4.3.e.

security interest[9]), and preserve priority against unregistered interests[10]; (b) **finance-related**: (4) to ensure through the relevant Protocol that the particular needs of the industry sector concerned are met; and (5) to give intending creditors greater confidence in the decision to grant credit, enhance the credit rating of equipment receivables and reduce borrowing costs to the advantage of all interested parties.

The instrument has proven to be an enormous success[11]. Its ambition is a response to a real and pressing need to fill the gaps which existed in regards to certain types of assets (namely, aircraft equipment and, to a lesser extent, railway rolling stock and space assets). The CTC appears to have been the best way to address those issues. The question is, therefore, whether or not comparable gaps exist in regards to ships and whether or not a shipping Protocol is an adequate solution. The preliminary answer is that there are many gaps, or at least, inconsistencies in the rules relating to the way in which security interests operate regarding ships or another kind of maritime mobile equipment. Although this would suggest that this is a field ripe for further and new harmonization attempts, as we will point out in the next pages, there are significant issues facing a hypothetical shipping protocol to the CTC in the realm of Maritime law and several problems with regard to ships' security interests (maritime mortgages[12] and liens) that need an in-depth study. The real challenge in answering this need to address the gap, however, is a problem of pragmatism, rather than a problem of theory[13].

Among the issues and questions that need solutions, we may include:

(a) Whether or not comparable gaps exist with regard to ships (as is usually stated for the aviation industry).

(b) Whether current cross-border ship finance practices are satisfactory and, if not (the question must be answered by shipping financial institutions, shipowners, maritime lawyers, etc.), whether the international harmonization of those practices through the CTC system provides a better working solution (the question must be answered by aviation financial institutions, airlines companies, aviation lawyers, etc.).

(c) Whether CTC may do for ship finance, what it has done for aviation finance. In other words, would credit be enhanced by application of CTC to ships? and would borrowing costs be lowered by application of CTC to ships and the financing opportunities increased?

(d) Whether ship finance has a problem in need of a CTC solution or is CTC a solution in search of a ship finance problem?

The answers to all of the above depend on whom you ask: academics see crossover benefits for ship finance; aviation finance operators are satisfied with CTC system (specially with the Aircraft Protocol), but shipping lawyers and international maritime Organizations are generally sceptical or opposed thereto because most of them prefer the *status quo.* Supporters of the

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9 *See infra* apt. 3.5 and apt. 4.3.d.

10 *See infra* apt. 3.4 and apt. 4.3.f.

11 As of July 2017, the Convention has 73 Contracting States, and the Aircraft Protocol has 63 States Parties. *See* http://www.unidroit.org/status-2001capetown.

12 The ship mortgage has a double legal nature: (i) as a contract and (ii) as a property right that direct and immediately holds the vessel on which it is created a collateral for securing a previous obligation. In this paper we will focus on the study of the mortgage as a property right, given the scope of the CTC, leaving its characterization as a contract for a subsequent study, although we will turn to some of its elements when it shall be necessary.

13 POWER, V., "Commentary on 'Assessing the legal and economic case for a shipping protocol to the Cape Town Convention'", *Cape Town Convention Journal*, 5:1, p. 104.

status quo in the maritime world argue that there is no comparable need in the area of maritime matters and, in particular, taking security over ships. They argue, not without reasons, that the solvency of the shipping companies and the offen state support allow them to come to finance. In addition, they mantain that the issues are different, that the history is more complex, that the tapestry of existing laws (both at national and international) are more involved and, that it is not possible to simply graft the CTC onto the pre-existing maritime fabric[14]. However, such a instrument could facilitate access to the market for smaller shipping companies, increasing competition, which could also come from emerging countries, *priori*, with lower financial capacity. In addition, it would make it possible to extrapolate the benefits of the Convention to other domestic operations, not just merchant ships, but recreational ships, yachts, fishing boats, etc.

The maintenance of the *status quo* would suppose: Growth in size and sophistication of open registries: Top 10 registries now account for more than 80% of total DWT of world fleet; established and widely known ship registration and mortgage registration regimes; and properly recorded ship mortgages will be generally enforceable in most important countries worldwide (*see*, for exceptions, Brazilian case –apt. 3.5-); and keeping the unregistered and non-consensual maritime liens against ships, governed by the law of the forum and based on local interests and preferences. The consequence would be that the international harmonization of maritime liens will remain unlikely. As we will see, past efforts were barely successful, e.g. MLM 1993.

However, if we look today at the world of international trade and finance we can identify a number of characteristics affecting ships and shipping[15]: (1) the universal use of containers (specially the cost of those fleets of containers, their value and fast deterioration or loss); (2) the huge growth in multimodal transport operations, and thus the need, as regards secured financing, for a legal regime which covers the principal types of transport equipment used; (3) the variety and sophistication of modern financing tools, so that we have not only mortgages and charges but also the use of conditional sales, finance leases and subleases, often of considerable complexity[16]; (4) the vast sums involved in building contracts and equipping modern container-ships or bulk cargo ships[17] (the average cost for large container-ships build in recent years is US$150 millions); and (5) the concern of many developing countries that, because of

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14 *Ibid.*

15 GOODE, R., "Battening down your security interests: how the shipping industry can benefit from the UNIDROIT Convention on International Interests in Mobile Equipment", *LMCLQ*, 2000.

16 Among the diversity of forms in order to finance a ship in maritime sector that may be guaranteed by means of the constitution of a ship mortgage or *hypothèque*, the following should be highlighted: (1) ship mortgage during its build phase (mortgage for construction), where the mortgagor is the shipyard requesting credit as collateral of the reimbursement that must be delivered to the principal against the advances agreed under the construction contract, according to the milestones achieved in the execution of the project; (2) ship mortgage after delivery (mortgage for acquisition), where the owner-debtor creates a mortgage right over the ship for satisfying or guarantee the credit granted to the bank in order to finance all of the payments advanced and made during the construction phase; (3) ship mortgage in the context of construction and acquisition under the tax lease operation. Putting aside their own exceptions of a financial nature (early amortization and accelerated of asset) by these techniques or negotiable schemes, we are, properly speaking, before a financial leasing agreement (not under a mortgage itself) in which the ownership of the ship is not acquired directly by the owner but by the structuring bank, who is going to mortgage the vessel in its capacity as no-debtor- mortgagee guaranteeing the credits of the shipowner's financing banks, which is sparsely who operates the ship.

17 In terms of vessel types, bulk carriers account for 42.8% of dwt, followed by oil tankers (28.7%), container ships (13.2%), other types (11.3%) and general cargo ships (4%). *See UNCTAD maritime statistics on the world shipping fleet 2017.*

a lack of a legal infrastructure supportive of security and quasi-security interests (conditional sale, leases, and the like), are unable to obtain the finance necessary to construct their fleets of ships (only one country from Latin America –Brazil- is among the top 35 ship owning countries and none from Africa).

So, what are the current needs for an international legal regime for ship finance? These were very clearly identified by the CMI in the early stages of its work for the revision of the 1967 Convention on Maritime Liens and Mortgages, and have been summarized by Prof. Francesco Berlingieri in the following terms[18]: The primary purpose of a Convention should be that of improving the security level of mortgages and *hypothèques*[19]. In particular, it was agreed that:

(a) long-term financing is essential for the development of shipping fleet;

(b) the more readily available and less expensive security is the vessel itself;

(c) the need for uniform rules is increasing, for ship financing is becoming more and more international;

(d) the essential features of a satisfactory security are: (i) the possibility of enforcement wherever the vessel may be found, and to this effect the security must be recognized in as many countries as possible through an international Convention; (ii) the possibility of sale of the vessel at the market price, and to this effect it is necessary to offer the prospective buyer a valid title wherever the ship may go after the forced sale; (iii) the possibility of recovering the outstanding portion of the loan from the proceeds of the forced sale, and to this effect the claim of the lender must be granted the highest possible priority.

2. What type of problems should be facing the shipping Protocol in the field of maritime law?

Ship finance is international, not only because most ships move all over the world, but also because the financing of large ocean-going ships is required by large cargo-carriers companies and undertaken by most important banks around the globe. For example, a not uncommon case may involve a Japanese bank, acting through its New York office, lending –in US dollars- to a Greek-controlled owning company (usually by means of a mortgage with a Singapore arbitration clause) and securing itself on a Liberian-registered ship, insured by a London-based P&I Club.

The particularities of the maritime sector (*see infra* one ship's companies practice, the widespread use of flags of convenience, open registers and secondary registers, bareboat or demise charters and the temporary flagging-out during those contracts, among others); the huge value of the asset (e.g. large cargo-ships, offshore platforms, etc., which is adequate to serve as collateral against the credit that finances the acquisition or building project); the constant need of financing for its acquisition or construction; and the international mobility of the ships or the necessary protection of the secured creditor, are all important factors to consider in order to draft a further feasibility study on the preparation of a new Protocol to the Cape Town Convention covering ships and maritime equipment requirements.

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[18] BERLINGIERI, F., "The 1993 Convention on Maritime Liens and Mortgages", *LMCLQ*, 1995, p. 57 ss.

[19] A hypothecation under civil law gives the holder of the security the same rights as the statutory English mortgagee, which become exercisable when a default event occurs, but exclude the power of the mortgagee to sell the ship otherwise than by a court sale.

These are, in fact, the kind of elements that led to the adoption of the CTC system in other fields, which clearly show the sense and legitimacy of the possibilities addressed in this article, as well as in some other previous works: to extend such a system to the shipping world. Nonetheless, how would the adoption of the shipping Protocol interact with the existing maritime issues as mentioned above?

2.1. One ship's companies and the designed structure for that purpose.

In order to protect their assets, shipowners or shipowning groups quite frequently follow the well-known practice to create a separate company for each of the ships beneficially owned by the same person or entity. Occasionally, this will be dictated by the requirements of the flag -sometimes, as in Cyprus or in Liberia, among others, it is necessary to set up a locally registered firm to own the ship, e.g., a Cyprus ship must be owned by a Cypriot or a Cypriot company[20]-. If a Greek shipowner wishes, for administrative, labour or commercial advantages, to flag his ship with a Cyprus' flag, the ship will need to be owned by a Cypriot company. Other reasons for such a practice relate, however, to the usual business and liability risks involved in the ownership of a fleet of several vessels in a single company –e.g., the feasible arrest of vessels, other than the offending vessel, under the legal framework set by the international vessel arrest conventions[21].

The first solution is to register each ship in a particular owner's fleet in the name of a different company where each company is a subsidiary of the parent company or owned by the individual shipowner. Certainly, in English law, the separate legal personality is sufficient to prevent a ship owned by one of those one-ship companies being arrested for claims against other ships belonging to the same group. This was tested in the English legal system when the English Court of Appeal gave judgment in the case of the 'EVPO AGNIC'[22] (1988), summarising his position as follows: *The truth of the matter, as I see it, is that Section 21 [of the Supreme Court Act 1981] does not go, and is not intended to go, nearly far enough to give the plaintiffs a right of arresting a ship which is not the 'particular ship' or a sister ship, but the ship of a sister company of the owners of the 'particular ship'*[23].

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[20] In Cyprus, more than half the shares in the ship must be owned by a Cypriot national (or by citizens of Member States of the EU), by a company established and having its registered office in Cyprus or (with specific authorization) by a company registered outside of Cyprus but controlled by Cypriots. In addition, applications for registration of ships must be made through Cypriot lawyers. In Liberia, the ownerships requirements are: the ship must be owned by a Liberian citizen or national Liberian corporations, partnerships or undertakings registered in Liberia as Foreign Maritime Entities. However, in other legal systems, e.g. Panama or Norway, amongst others, a ship need not be owned by a Panamanian corporation or individual although a legal or authorised representative in Panama or in Norway must be appointed for the purposes of accepting service of legal process and must entrust either the technical or commercial management functions to a manager.

[21] The International Convention relating to the Arrest of Seagoing 1952 (and International Convention on the Arrest of Ships 1999) provide, *see* art. 3, that "a claimant may arrest either the particular ship in respect of which the maritime claim arose or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship". The English law on what has come known commonly as 'sister ship arrest' is found in Sec. 21 of the Supreme Court Act 1981. Under those provisions, the claimant is not restricted to arresting the ship against which his claim arose, but may also arrest any other ship in the same beneficial ownership when the action was brought. Most other maritime jurisdictions have similar provisions.

[22] [1988] 2 Lloyd's Rep. 411.

[23] The Tribunal drew an important distinction as well between the beneficial ownership of the ship and the beneficial ownership of the shares in the owning company, holding that the ship (owned by a traditional one-ship company) was both legally and beneficially owned by that company and that: *"(…) any division between legal*

The use of one-ship companies has two important implications for lenders. Firstly, as a clear advantage, it makes the ship encumbered by a mortgage immune to arrest for claims against other ships in the owner's fleet (though if the lender has secured itself by mortgages on all the ships in the fleet this advantage apparently disappears[24]). No lender wishes the earning capacity of a mortgaged ship to be adversely affected as a result of a claim totally unrelated to that ship. Secondly, the lender will be lending to a borrower with no assets of any consequence other than the ship. Apart from this asset (and its insurances and earnings), the borrower may be unable to offer any other property to the bank by way of security or as a source of income for debt repayment and service.

This way of proceeding makes the enforceability of the mortgage of crucial importance. The lender must look elsewhere for additional security, often by way of a collateral from the parent of the one-ship company, perhaps backed by security over its assets (among others assignment of earnings, requisition compensation and assignment of charter fees; assignment of insurances; mortgage or charge of shares; assignment of shipbuilding contract; assignment of refund guarantee). An alternative approach, sometimes used for large corporate groups, is for the lender to lend to the parent and take collaterals from each subsidiary. Those securities being backed by mortgages over the owning companies. Where one-ship companies are used, shipping finance is considered as asset finance in the narrowest sense of the term because if the ship, for whatever reason, disappears, is made liable or is foreclosed for the company's debts or liabilities, the lender will, for all practical purposes, have no recourse to the borrower and it will be left to look to his secondary lines of security.

The implications of this widespread practice should be necessary and carefully considered in the near future in order to analyse the effects on the shipping Protocol, given the fact that in the aeronautical sector this method is absent, the drafters of the CTC had not to deal with it. Especially, the question to consider is whether the advantages of the CTC system would be neutralised by this practice in the common use of the one-ship companies.

2.2. Bareboat or Demise charter registry (and temporary change of flag)

Under a demise or bareboat charter, the charterer leases the ship (for a set period of time or a trip) and consequently obtains full control over the management and navigation of the vessel. Under this kind of contract, the shipowner may turn over to the charterer with or without a master and crew. If the ship's crew (master included) remain under the agreement, then they operate the vessel for the charterer and its agents as a provision of such agreement (in other words, the crew is considered as charterer's employees and not of the owner). For those reasons, bareboat or demise charter in most states allow the registration of a ship in the particular national register to be temporarily suspended and being registered in the name of the charterer on an alternative register for the duration of the contract, during which time it may fly the flag of the charterer's chosen register[25].

and equitable interests occurs in relation to the registered owner itself, which is almost always a juridical person. The legal property in its shares may well be held by A and the equitable property by B, but this does not affect the ownership of the ship or of the shares in that ship. They are the legal and equitable property of the Company". [1988] 2 Lloyd's Rep. 411.

[24] HARWOOD, S., *Shipping finance*, 3rd ed, Euromoney Books, 2006, p. 12. But, although the lender has secured itself by mortgages on all the ships in their own fleet (in different companies) the risks of defeating its right in each of the ships would also be divided between them.

[25] Under Montego Bay Convention on the Law of the Sea, "every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the

Although the particular conditions in which different countries permit bareboat charter registration out from, or in to, their ship registers go over the purpose of this paper, some relevant features are worth listing:

- The owner's title remains registered in the underlying or primary register (the register where the ship was registered before the charter).

- The vessel will fly the flag of the country of the second register for the duration of the bareboat charter (usually subject to periodic renewal of the temporary registration during the life of the contract). In other words, its registration not being terminated but merely suspended.

- Similarly, mortgages will remain registered on the primary register, and this temporary change of flag will not affect security interests recorded in the primary register[26]. Mortgagees' consent will usually be required for any bareboat charter registration. Nevertheless, there is frequently no procedure for the mortgage to be registered on the secondary register –as the ship will be flying the flag of the country of the secondary register, third parties will be unaware of the country of the primary register. This lack of transparency may create concern for lenders, even though their security rights should not be adversely affected[27].

Reasons mentioned by charterers in order to require the vessel to be temporarily registered on the register of their choice are varied: (a) where specific cargoes or geographical trades are limited to ship flying certain flags (that kind of agreement, known as "trading limits", is found in several charterparties); (b) in leasing transactions where the lessee/charterer will not want the choice of the vessel's flag to be determined by any mandatory requirements of the lessor's country of incorporation[28]; and (c) where the country of the charterer's chosen register does not have a system of mortgage registration considered adequate by international banks, then, financing through bareboat charter registration may resolve this issue. That is, lending to a one-ship company in an acceptable jurisdiction (for the financing bank perspective) and then permitting bareboat charter registration by the ultimate shipowner, as bareboat charterer, in a less acceptable jurisdiction.

2.3. Open registers and the widespread flagging out phenomenon

Of the three categories of assets (immovable, tangible movables and intangibles), ships fall into the category of movable goods (like aircrafts or cars). Immovable property is subject to some form of registration system, but movables are not. Ships, however, are an exception to this general rule. Publicity is crucial in trade of assets, and this is carried out through inscription on the Register. The reasons are, mainly, the following: (a) ships travel, for a large part of their life, around the world, outside the jurisdiction of any particular country; (b) ships are uniquely identifiable high-valuable assets, and lenders will normally want to take security

nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship". Nationality of ships is the connecting element in order to establish (and submit) the legal system applicable, not only to ships but their encumbrances as well (*see* also art. 10.2 Spanish Civil Code).

[26] Under at. 16(b) MLM 1993, "the law of the State of registration shall be determinative for the purpose of recognition of registered mortgages, *hypotheques* and charges". In other words, temporary change of flag (by charter agreement) shall not affect the law applicable to the mortgages and other encumbrances registered, that shall continue to be that of the registration the ship had on constituting the mortgage and other encumbrances (*see* art. 96 Spanish MNA).

[27] HARWOOD, S., *Shipping finance*, cit., p. 10.

[28] *Ibid.*, p. 11.

over them; (c) countries may wish to restrict, for economic and political reasons, certain types of trade to their own flag. By those grounds, countries have sought to retain and control their own fleet; so, a ship owned by a national of a country was registered in the Register of that country and crewed by nationals, hold to the jurisdiction of the authorities of that country.

By January 2016, the world merchant fleet was comprised of 90,917 vessels, with a combined deadweight tonnage (DWT) of 1.18 billion tons. The top 5 ship-owning economies in terms of DWT were (in order): Greece, Japan, China, Germany and Singapore (together they have a market share of 50% of DWT in 2017). However, a very different picture emerges if the DWT is allocated by reference to the flag state, demonstrating the extent to which the world fleet is now dominated by open registers (in order): Panama, Liberia, Marshall Islands, Hong Kong, Singapore, Malta, Greece, China, Bahamas and Cyprus.

The most common reasons argued by shipowners for selecting the registry include: (a) the ability to reduce crew costs by employing international or offshore-based crew on lower pay levels and social security contributions (especially on stipulations over the nationality of the officers and crew employed, though master and the first officer must normally satisfy certain technical standards[29]); (b) the avoidance or reduction of tax in the country in which the shipowner is based, or the ship is used; (c) reduced level of regulatory control (especially in terms of environmental restrictions); access to shipping finance facilities is not available to the shipowner's home jurisdiction; or to shelter the ownership of maritime assets in a more stable jurisdiction.

In order to register the ship, shipowners have three options in matters of the choice of flag: (a) the national flag of the beneficial owner (primary register); (b) choose an "offshore" register, combining some of the advantages of an open register with those proper of a register in an established shipping nation[30]; or (c) choose an open register (called also *flag of convenience*) [31]. Anyone can register its ship in one of these registers, as long as the ship satisfies the register's requirements (age or technical standards, amongst others[32]). In the traditional

[29] Crews from developing countries have become, to a large extent, the standard. Many shipowners affirm, not without some justification, that without the opportunity to employ cheap crew they would have been forced out of business long ago. Their arguments have not found much favour with the International Transport Workers' Federation (ITF), which has waged a long and vigorous campaign to protect these seamen from exploitation. One result of the campaign has been the designation by the ITF of certain registers – principally the open registers – with the supposedly pejorative term 'flag of convenience'. Any ship registered under a FoC is liable to be subject to action such as blacking by members of ITF-affiliated unions unless it can produce a certificate that it has satisfied the ITF that its crew's conditions of employment meet certain minimum standards. *See* in detail *Ibid.*, p. 12. Regarding the nationality of the crew, in the Special Registry of Ships of the Canary Island, Master and First Officer will be from EU Member State, except those serving in Government ships engaged in non-commercial voyages and the rest of the enrolled crew, at least 50%, from EU Member State.

[30] For example, the British Red Ensign Group of registers (REG), the Norwegian International Ship Register (NIS), the Danish International Ship Register (DIS), the Luxembourg International Ship Register (CAM), the Madeira Register (MAR) or the Special Register of Ships in the Canary Islands (REBECA).

[31] There are several factors influencing choice of flag when considering open or offshore registers: Reputation (including Paris and Tokyo MOU Listing and United States Coast Guard Qualship 21 White List status); the stability of legal system in which the register is placed; acceptability of chosen flag by lenders; ease of access to and efficiency of registry and maritime administration; availability of lawyers and company administrators within the jurisdiction; age, size, condition and type of vessel; availability of naval and consular support; cost of registration, survey and annual fees; and fiscal advantages (such as Tonnage Tax available to owners in the United Kingdom, Spain and some other jurisdictions).

[32] Owners (and their lenders) will therefore avoid Registers who fail to monitor these international standards to an acceptable level and it have neither the resources nor the technical expertise under their control to meet their obligations under the ISM Code.

national registers, on the other hand, strict requirements for officers and crews, either as to nationality or as to pay rates, are frequently imposed.

Starting with the last one, the *Flag of convenience* (or the closely related term "open registry") is a business practice whereby the ship is registered in a country other than that of the ship's owners, and the ship flies that country's civil ensign. The use of Flags of convenience (FoC) dates back to the 17th -19th centuries when English merchants or fishermen sometimes used Spanish, French or Norwegian flags to circumvent monopoly or other trading restrictions imposed by foreign governments. However, during the first half of the 20th century the practice grew significantly: Firstly, with the use of Panamanian-flagged tonnage by Spanish shipowners during the Spanish Civil War and by US shipowners wishing to avoid the US Neutrality Act prior to the entry of the United States into Second World War; secondly, during the alcohol prohibition years in United States and Canada, where shipowners increased the use of Panama and Honduras-flagged vessels by to avoid US Prohibition laws; and thirdly, with the establishment in 1948 of the Liberian offshore register administered in the United States, underpinned by the Liberian Maritime Law and Liberian Corporation Law based on US legislation. After these important precedents, several countries began to open up their ship's registers to all newcomers (these were the so-called *PanLibHon* registers –Panama, Liberia and Honduras-), even without any economic or legal relationship with the ship. Panama and Liberia have had sufficient success to make them, by gross registered tonnage, the world's two largest fleets. More recently, other flags have joined the "exclusive club", including Cyprus, Malta, Bahamas or Marshall Islands[33]. Those registers are known as open registers or flags of convenience (although the terms are used, in some contexts, indistinctively, the ideological and legal nuances are different).

Some national registers have fought back with the introduction of tonnage tax schemes providing strong incentives for owners to enter (usually in the known as second or offshore registers). The offshore or second registers are established in regions with a specific and differentiated taxation regime, in a colony or in a dependency of a particular country (e.g., Marshall Islands, Canary Islands[34], etc.), with the aim to attract the registration of ship's fleet from that country which might otherwise go to an open register. In many cases, these dependencies are well established as centres for offshore finance, and the use of their ship registers has followed almost accidentally. Their general approach is to allow owners to fly the flag of the home country while imposing less strict requirements for ownerships and crewing than the national register. There may also be tax incentives in operating in a tax haven jurisdiction with low, or no, company tax and, very possibly, no obligation to deduct personal income tax, national insurance or social security contributions at source from officers' and crews' wages[35]. In addition,

[33] In 2014, in terms of deadweight tonnage, Panama and Liberia remained at the top of the global ranking. The top 10 nations (Panama, Liberia, Marshall Islands, Hong Kong, Singapore, Malta, Greece, China, Bahamas and Cyprus) held 77% of total deadweight tonnage.

[34] In the Special Registry of Ships of the Canary Islands –Spain- (REBECA), there are some standard requisites for registration, not only regarding the Shipping Company (effectively having the control center of shipping operations based in the Canaries or in the case of mainland Spain or abroad, having a permanent establishment or legal representation in the Canaries; to be the owners or financial lessees of the ships whose registration is requested; or to have possession of these under a bareboat charter agreement or any other title involving control of the nautical and commercial management of the ship) but also in regard to ships (amongst others, merchant ships fit for navigation for mercantile purposes, excluding fishing, with a minimum measurement of 100 GT).

[35] Many of the offshore registers are also classified as flags of convenience by the International Transport Workers' Federation, either for complete fleets or on a vessel-by-vessel basis depending on the nationality of the vessel's ultimate owner. Statistics reveal the rise of the open registers. See note 27, *supra*.

this system allows shipping companies to choose between paying Company Tax on a fixed sum per registered tonnage or paying according to obtained profit (*tonnage tax*).

In many countries, having in mind that publicity is crucial in the trade of assets and this is carried out through inscription on the Register, it has been drawn a dual registration system where national ships were registered (Primary Register): Register of Moveable Assets (private nature) which shall be coordinated with the Register of Ships and Shipping Companies (administrative or public nature). Both have a different function assigned. The Register of Moveable Assets shall have the legal effects inherent to material publicity of the ownership and encumbrances (mortgages, *hypothèques* or other charges), vis-à-vis the typically administrative scope of the Register of Ships and Shipping Companies, that will grant the right to fly the national flag.

What is, nevertheless, the true significance of the flag of a ship for a lender? The basic answer is that the law of the flag will invariably govern the mortgage/ *hypothèques* which will be a fundamental part of the lender's security. So, he will also always be concerned with ensuring that the ship satisfies the register's requirements of the flag state. If it does not, the registration will be liable to be voided and with it may go the lender's mortgage. Another important factor, for a lender, will be the extent of any regulatory conditions with which the owner will need to comply because of having its ship registered on the flag in question[36].

However, the policy adopted by lenders differs from one to another. Some will have no concern about the flag flown by the ship, given that their security by way of registered mortgage is adequate. Others will turn down without question, ships not registered in certain registers without a proven track record of security enforcement by mortgagees. Nevertheless, lenders should look rather further than these positions: (a) a lender should consider whether the vessel's Flag State will impose and enforce mandatory safety and technical standards; (b) it will be looking to the ship's earnings capacity as the primary source of the debt service; (c) it will be not too keen to have the ship delayed or detained because of failure to meet acceptable technical standards; and (d) it will also need to consider the way in which the legal system of the Flag State deals with maritime liens: in some countries, a wide range of unregistered claims against the ship will take priority to the rights of a mortgagee on a judicial sale. Lastly, (e) the political stability of the Flag State may be an important issue to consider.

2.4. International/national maritime liens

The basic purpose of the maritime lien (also called *non-consensual rights/interests* in the wording of the CTC) is to provide security for a claim while permitting the ship to proceed on her way in order to earn the freight or hire necessary to pay off the claim[37]. The simplest way of understanding the nature of a maritime lien is by examining its functions and features. These are:

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[36] See apt. 2.1, *supra*.

[37] The justification of this type of privilege is discussed by the academy: (i) some authors, clear majority, consider that this support is to compensate some creditors against the right to limit their liability favored to shipping companies; (ii) others, on the contrary, attribute these privileges to strengthening the naval heritage; (iii) and others, for practical reasons, in the remoteness or geographical distance of the inland heritage of a foreign shipowner (*see* some Spanish authors as ALONSO LEDESMA, C., *Los privilegios marítimos*, Civitas, Madrid, 1995, pp. 244-262; GABALDÓN GARCÍA; RUIZ SOROA, *Manual de Derecho de la Navegación Marítima*, 3 Ed., Marcial Pons, Madrid, 2006, p. 307.GABALDON GARCÍA).

[a] maritime lien is a nonpossessory security created by operation of law[38];

[b] maritime liens are secret; they do not require recordation by registration for their validity (as opposed to maritime mortgages/*hypothèques*);

[c] maritime liens, in *common law* structure, are based on the fiction of a "personified" vessel and under the personification doctrine, whereby the vessel is conceived of as a person responsible for the claim against it[39];

[d] in a fictional sense, maritime lien goes with the ship everywhere, even in the hands of a purchaser for value without notice, travels with the vessel surviving its conventional sale (although not its judicial sale);

[e] if a lien is a charge on property for the payment of a debt, maritime lien is a special property right over a vessel given to a creditor by statute as security for a debt or claim arising from some service rendered to the ship to facilitate her use in navigation or from an injury caused by in navigable waters[40]. This right gives the lienor's claim priority in ranking over most other claims, notably ship mortgages, breaking thus the principle *par conditio creditorum*;

[f] maritime liens are temporary, and they extinguish over time (one year for uniform liens -art. 4 MLM 1993- and six months for national liens -art. 6 MLM 1993-).

The uniform texts have traditionally recognised two different kinds of maritime liens on the basis of their origin: when referring to ***international or uniform maritime liens***, we want to point out those that are explicitly endowed by international conventions (especially art. 2 MLM 1926 and art. 4 and 7 MLM 1993). Among those are:

(a) Claims for wages and other sums due to the master, officers and other members of the vessel's crew in respect of their employment, including costs of repatriation and social contributions payable on their behalf (although these maritime liens adversely affect the secured creditors, due to its priority, they contribute to the safe and efficient operation of the ship).

(b) Claims in respect of loss of life or personal injury occurring in direct connection with the operation of the ship. These liens should not affect the right of the holder of a mortgage if the instrument whereby the security is effected provides, as is usually the case, that the owner ensures its asset on the basis of the ordinary terms of a hull and machinery policy, also covering its liability against third parties.

(c) Remuneration for assistance and salvage. This lien, like the previous one, should not affect mortgagees if there is an adequate forecast in the contracted insurance. In addition, the salvage is a clear advantage for secured creditors, since they will see, thanks to the salvage operation, how their collateral survives. Their priority ahead of the rest is an incentive to the salvor to carry out dangerous tasks as they often are the ones of the rescue.

(d) Debts due in respect of claims for port, canal and other waterway and pilotage dues. Those affect the security of the mortgagee and, contrary to the lien for wages or salvage operations, it does not seem to contribute substantially to the safe and efficient operation of the ship.

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[38] They are automatic, without requiring any additional declaration of will or consent, although the cause of it is in a contract or by civil liability). In this sense, the maritime lien is a very different right from the *common law* possessory lien (e.g. of the shipbuilder and ship repairer) which are purely a right of retention of another's property until a debt relating to that property retained is paid (rights that are lost if the creditor loses possession of the related property.

[39] A ship is held liable for its torts and contractual obligations undertaken on its behalf to facilitate the success of its mission. An action based on a maritime lien may only be brought *in rem* against the vessel itself.

[40] FORCE, R., *Admiralty and Maritime Law*, Federal Judicial Center, 2004, p..

(e) Claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the ship.

(f) Right of retention in respect of a vessel in possession of either: a shipbuilder, to secure claims for the building of the vessel; or a ship-repairer, to secure claims for repair, including reconstruction of the vessel, effected during such possession. As mentioned before, these types are purely rights of retention (*possessory lien*) until a debt relating to the ship retained is paid (those rights are lost if the creditor loses possession of the property in question)[41]. These rights are not privileged liens in *strictu sensu*, but rights with preference in their collection in case of forced sale of the vessel[42].

By contrast, when referring to ***national maritime liens***, art. 6 MLM 1993 stipulates that each Contracting State may, under its law, grant other maritime liens on a vessel to secure claims, against the owner, demise charterer, manager or operator of the vessel. These shall rank after the international maritime liens -set out in art. 4- and also after registered mortgages, *hypothèques* or charges -which comply with the provisions of art. 1-[43]. The authorisation to create new maritime liens and their recognition was subordinated to the same requirements for the uniform or international ones[44].

The direct consequence of the existence and recognition of these domestic maritime credits will be that their holders may request, as well as the international creditors, the execution of the credit and all related procedural measures. However, unlike international liens, the State of the forum where the claim is being lodged -being Contracting State or not-, will not recognise the privileged claims under the domestic law of another Contracting State, unless the private international law rules subject the solution of the dispute (and the rights of third party creditors) to such legislation. Similarly, there is no provision in the MLM 1993 regarding the applicable law for determining the validity and priority of these national liens.

> Let us suppose that a Spanish judge must be aware of the arrest of a Tunisian-flagged ship (both Spain and Tunisia are Contracting States to the MLM 1993) and that the proceeds from the judicial sale are distributing among the creditors. The judge must look at the Tunisian law -by express reference to art. 10.2 Spanish Civil Code to the law of flag for the

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41 It should be noted that, under MLM 1993, there are no privileged credits for supplies [by the contrary, they are included in MLM 1926 (art. 9)]. Neither Spanish Maritime Navigation Act makes an express declaration (unless a general declaration in art. 124), as currently happen in the US under the 46 USC§31301, by classifying the credits for necessary supplies (repairs, supplies, towage, bunkering, etc.) as privileged. The Arrest Convention of 1999 does mention the liens for supplies or services rendered to the vessel for its operation, management, conservation or maintenance (art. 1.1), although these will not be interpreted as creating a maritime privilege (art. 9).

42 Art. 12.4 MLM 1993. In case of forced sale of ship secured with ship mortgage: first of all, will be satisfied the credits of preferred collection (art. 12.2 y .3 MLM 1993); secondly, with the proceeds of the sale, will be satisfied the privileged maritime liens of art. 4 MLM 1993; thirdly, the credits of shipbuilders and repairers (art. 12.4 MLM 1993); and lastly, secured mortgage creditors.

43 It was not clear, instead, during the *Travaux Preparatories* of the International Convention, whether by this provision grant Contracting States permission to create other maritime liens or, by contrary, only possessory liens.

44 Those are: [a] the debtor must be the owner, tenant or manager of the ship (in case the debt was contracted by the charterer, there is no privilege); [b] the lien is attached to a particular ship and follow it wherever goes and from owner to owner; [c] the lien is subject to the rules of assignment and subrogation of art. 10 MLM 1993; and [d] the lien be subject to extinction both by lapse of time (six months instead of one year) and the judicial sale. In a case of a sale to a bona fide purchaser, national maritime liens are extinguished after a period of 60 days from the date of registration of the sale. The voluntary sale is not cause of extinction of Convention maritime liens.

> determination of the validity and priority of all rights over the ship- and examine, under the aforementioned law, whether that Contracting State has recognized national privileges of art. 6 MLM 1993 under the requirements already mentioned. If so, and once satisfied the privileged liens intended in art. 4 and mortgages/*hypothèques* (with the conditions set out in art. 1), he/she must meet the national liens in accordance with the priority order established in the domestic legislation of the ship's flag (Tunisian law). Under English law (and let us assume for these purposes that the UK was a contracting state to the MLM 1993), the priority in the distribution of the sale, as in our legal system, is, firstly, to the privileged international creditors and mortgagee holders. Nevertheless, if there were a remnant, this would be for the privileged credits accepted by English law, if they comply with the requirements of art. 6 of the MLM 1993. Since under this legal system, and in the absence of rules on recognition of maritime privileges, the *lex fori* (conflict of law rule under the English legal system[45]) will be the law applicable to the validity and priority of the national privileges, it would not be possible -as it is under Spanish law- to apply the Tunisian law.

It is necessary to emphasise, for the purposes of this work, the existence of maritime credits that are not parallel in air law (so the CTC system was not able to deal with them): salvage, wreck removal or contracts concluded by the master (pilotage, trailer, handling, etc.). Unlike the MLM Conventions, the CTC system does not intend to regulate maritime privileges uniformly. The provisions referred to in arts. 39/40 permit the Contracting States, exclusively using the declaration procedure and in the terms provided for therein, alter the basic and essential rule that underlies the system under which a registered security prevails over an unregistered one. Despite these two important provisions, the shipping Protocol, as we will mention afterwards[46], would have to address, not only with the priority ranking of these privileges but with the recognition and enforcement in foreign Contracting States jurisdictions, if they do not state similar declarations. This could be the most important barrier to the success of the future shipping Protocol.

2.5. Uniform attempts and possible conflicts

At the beginning of its elaboration, the drafters of the Cape Town Convention wondered if the ship (or even offshore platforms and other maritime equipment) would be a susceptible asset of being addressed under the Instrument. The negative answer of the shipping-related International Organizations (IMO, CMI and UNCTAD) was based, mainly, on the fear lest the inclusion of registered ships' mortgages in an international Convention of a general nature might prove to be cause of conflict with the newly drafted International Convention on Maritime Liens and Mortgages, and source confusion and uncertainty. In other words, ships were excluded because of a perception (probably a misconception) that these were already catered for by existing Conventions, though in respect of consensual security interests all of these were confined to rules of recognition and none of them has been very successful[47] (see *infra*).

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[45] Under the English jurisdiction, the recognition of foreign maritime liens is a matter of procedure and then governed by the *lex fori*, which is the domestic law of the country where legal proceedings are taken. On the other hand, matters of substance are governed by the law to which the court is directed by its choice of law rule. The principle that the priorities between claimants are governed by the *lex fori* was established by the Privy Council in *The Halcyon Isle* [1981] AC 221 (PC), p 230, but it is not a universal. By contrast, *The Ioannis Daskalelis* [1974] 1 Lloyd's Rep 174, that is consistent with private international law rules. *See* MANDARAKA-SHEPPARD, A., *Modern Maritime Law*, vol. Vol. II, 3rd, Routledge, 2013 chpt. 6.

[46] *See* Apt. 4.3.d.

[47] GOODE, R., "Battening down your security...", cit.

The purpose of listing these international instruments should be two-fold: On the one hand, to emphasise the absence of uniform rules regarding substantive law governing security rights on the international scenario. This lack represents one of the serious problems for the international financing sector, especially in developing countries, which will limit access to international credit. On the other hand, it shows how a future shipping Protocol could offer legal mechanisms that regulate many of the substantive aspects absent in the current uniform instruments -creation of international interests, validity and recognition, remedies, International Registry and their advantages, etc.-.

a. International Convention on Maritime Liens and Mortgages, 1926, 1967 and 1993

While the MLM 1926 [for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages] attracted 28 States Parties in total[48], it generally failed to gain support among the most important shipping nations worldwide (*common-law* legal systems included). The 1967 Brussels Convention [for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages] was ratified only by three States and never entered into force since it did not meet the required number of five Contracting States. The drafting and adoption of the 1993 Geneva Convention [on Maritime Liens and Mortgages] was motivated by what was widely regarded as a failure by the 1926 and 1967 Conventions to attract widespread support, but in the end, the 1993 Geneva Convention was even less successful with only 18 State Parties[49].

These Conventions mostly regulate the same aspects (apt. A), and some elements are exclusively covered by one or another international text (apt. B). However, none of the said instruments harmonizes substantive rules governing mortgages and other security interests over ships (apt. C).

(A) Issues covered by both Conventions

[A] Recognition and enforcement of mortgages, *hypothèques* and charges. In this regard, art. 1 MLM 1993 provides that "Mortgages, *hypothèques* and registrable charges of the same nature (…) shall be recognized and enforceable in States Parties" (and they have been effected and registered in accordance with the law of the State in which the ship is registered). Recognition is one of the few aspects of substantive law dealt within the Convention. For that reason, art. 2, refers to the domestic legislation of the ship's flag for its treatment (while the enforcement of the security, which is a procedural aspect, refers to the *lex fori* of the Court).

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[48] The following States are Parties to the MLM 1926 Convention: Algeria, Argentina, Belgium, Brazil, Cuba, Denmark, Estonia, Finland, France, Haiti, Hungary, Iran, Italy, Lebanon, Luxembourg, Madagascar, Monaco, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, Syria, Turkey, Uruguay, Zaire. Denmark, Finland, Norway and Sweden have declared their denunciation of the 1926 Convention. Source: http://www.comitemaritime. org/Uploads/pdf/CMI-SRMC.pdf.

[49] The following States are Parties to the MLM 1993 Convention: Albania, Benin, Congo, Ecuador, Estonia, Lithuania, Monaco, Nigeria, Peru, Russian Federation, Serbia, Spain, St. Kitts and Nevis, St. Vincent and the Grenadines, Syria, Tunisia, Ukraine, Vanuatu. *See* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-4&chapter=11&clang=_en. There are no "financier" States (UK and Nordics) pary of the Convention, "register or flag" countries (Panama, Liberia or Marshall Islands), "shipbuilder" countries (Republic of Korea, China and Japan -constructed 91.8% of world tonnage-) and, except Peru, there is no American States and only 3 European members. Of course, no *common law* countries either.

Quite differently, MLM 1926 will only apply to ships registered in a Contracting State (art. 14). Any mortgagee may bring an action for the enforcement of its claim only before the courts of a Contracting State. That is, it may request the seizure of the vessel when it is under the jurisdiction of the court (an action that will be governed by the procedural law of the *lex fori*). To summarise, the MLM 1993 has considerably extended its scope of application.

[B] List, with some differences, of international maritime liens (art. 4 MLM 1993);

[C] Grant of other maritime liens (national) over a ship (art. 6 MLM 1993):

[D] Priority of maritime liens: Due to the conventional treatment of both mortgage and liens, the ranking - internal and external - requires certain clarifications that must be stated. Different possible *vis-a-vis* combinations must be contemplated: [1] Priority between competing mortgages; [2] Priority among international liens granting different types of credits; [3] Priority among international liens granting the same type of credit; [4] Priority between liens and secured mortgages; [5] Priority between international liens, secured mortgages and national liens; [6] Priority between international liens, secured mortgages and rights of retention; [7] Priority between international liens, secured mortgages and public authority credits by sunken vessel removal[50]. The priority between national liens must be resolved by the domestic law of the Contracting State that grant their recognition.

[E] Maritime liens follow the vessel, notwithstanding any change of ownership or of registration or of flag (art. 8 MLM 1993);

[F] Extinction of maritime liens by lapse of time (art. 9 MLM 1993).

(B) <u>Particular issues</u> (exclusively covered by one or another international Convention)

[A] Accessories of the vessel (art. 4 MLM 1926);

[B] The registration of the security interest (art. 1 MLM 1993);

[C] Change of ownership or registration (art. 3 MLM 1993);

[D] Rights of retention/possessory-liens for shipbuilders and ship repairers (arts. 7 and 12.4 MLM 1993);

[E] Assignment and subrogation (art. 10 MLM 1993);

[G] Notice and effects of forced sale (arts. 11 and 12 MLM 1993);

[H] Temporary change of flag (art. 16 MLM 1993).

(C) <u>Issues not covered by any of the Conventions in force</u>

[A] Creation of the security interest (whether in the form of mortgage/*hypothèques* or as conditional sale, lease, etc.) and detailed procedure for its registration;

[B] Contractual remedies other than the forced sale of the ship (such as private sale, the possibility of leasing the vessel or receive the incomes generated by the secured ship coming from its management and operation);

[C] Matters relating to the procedure of enforcement (all of them shall be regulated by the law of the State where enforcement takes place).

[D] Seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument

[50] The [2-5] and [7] are resolved by art. 5 and 6 MLM 1993, and the [6] is in art. 12.4.

The creation of an international and uniform security interest independently the national legal form (functional approach); the procedure for its registration, such national and international scope; and the recognition of a set of remedies in case of default are all very important aspects of a proper regulation over security interest over maritime assets in a transnational context. As we will see forwards, apt. [A] and [B] are both issues covered by the CTC system.

b. International Convention on the Arrest of Ships, 1952 and 1999; Draft International Convention on Foreign Judicial Sales of Ships and their Recognition

As to the specific issue of the arrest of ships, two international instruments have been adopted: Brussels Convention relating to the Arrest of Seagoing Ships of 1952, with over 60 Contracting States[51] and the Geneva Convention on the Arrest of Ships of 1999, which entered into force in 2011, which has only 10 States Party[52]. Both Conventions are concerned exclusively with the issue of the arrest of ships, determining the types of maritime claims on the basis of which a ship may be arrested (art. 1.1) and describing further conditions for the exercise of the right of arrest against a ship, such as whether and when the demise charterer or the person who owned the ship was, at the time when the maritime claim arose, liable for the underlying claim, or whether and when the right of arrest can be exercised on the basis of a maritime lien or a consensual security (mortgage, *hypothèque* or a charge of the same nature on the ship) securing the maritime claim (art. 3). Both Conventions expressly provide that the right of arrest under the provisions of the Conventions shall not be construed as creating a maritime lien (art. 9).

The CMI is currently working on a projected International Instrument for the Recognition of Judicial Sales of Ships. It provides, amongst other matters, that a judicial sale -carried out in accordance with the provisions of the proposed instrument- has the effect of extinguishing all rights and interests in the ship that existed prior to the sale and must be recognised in the Contracting States as having the effect of transferring title to the ship to the purchaser and extinguishing all consensual and non-consensual security rights in the ship unless assumed by the purchaser[53].

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[51] Among these States are: Belgium, Denmark, Egypt, Finland, France, Germany, Greece, Italy, the Netherlands, Nigeria, Norway, Portugal, Russia, Spain, Sweden, United Kingdom. For a complete list *see* http://www.comitemaritime.org/Uploads/pdf/CMI-SRMC.pdf.

[52] Albania, Algeria, Benin, Bulgaria, Ecuador, Estonia, Latvia, Liberia, Spain and Syria. *See* http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-8&chapter=12&lang=en.

[53] It should be noted that the question of judicial sale is also addressed by MLM 1993 (art. 12). So, why a new international instrument regarding regulated issues? (rethorical question that does not expect an answer). The arguments advanced as justifying an additional Convention are: MLM 1993 cover judicial sale only as a type of enforcement of rights under proprietary security rights in ships, whereas the proposed instrument would be broader in scope; it is submitted that even at the risk of overlap with the MLM 1993, an additional, standalone instrument on judicial sale would be opportune; the limited success of the MLM 1993 Convention and the scant likelihood of many further accessions argue in favour of an international instrument on judicial sales that avoids the internationally disputed issues of maritime liens which, as experience shows, has proved something of an obstacle to broad support. The solution, however, seems to come from broader interpretations would be from the standpoint of international legal harmonisation and efficiency of cross-border transactions. *See* UNIDROIT, *Possible preparation of other Protocols to the Cape Town Convention*, 2013, p. 21.

2.6. Current situation of the shipping market

The current situation of the maritime market is defined, not by legal problems, but by economic ones. Two are, among other matters, the most significant in terms of topicality. The *Hanjin* bankruptcy, so much read in the specialised newspapers and websites in past months, is instructive. Hanjin's fleet of ships represented 3.2% of world container capacity (remember that the 95% of the world's manufactured goods is transported on container-ships). Last year, *The Wall Street Journal*[54] –and many others mass media- reported that around the world, 73 Hanjin ships -carrying US$14 billion of cargo- were reportedly seized or denied access to ports, as the seventh-largest cargo carrier on the world drowned under $5.5 billion in debt, due to legal uncertainties as to who would pay for docking, unloading, and storage fees, and, more important, for fear of ship arrests due the creditors' claims.

On the other hand, we could mention the current crisis in the international maritime transport industry. Furthermore, it is fair to say that the shipping sector is always in the middle of some crisis[55]. Crises in terms of shipping finance are nothing new[56].

The role of the current crisis in the maritime industry, the international financial problems of insolvency of largest cargo carrier on the planet and in the more and more globalised world we live in, where the carriage of goods by sea is continuously increasing, could be treated as a stimulus for adopting a new shipping protocol in the CTC system.

3. What type of problems would be overcome by applying the convention in the field of ships' security interests (mortgages and maritime liens)?

3.1. Application of the flag's law as governing law for security interests over ships

Recognition of contractual security rights on movable property created under a foreign law is one of the most complex issues in private international law. Although the traditional rule is that this type of right or interest is subject the *lex situs*, given the particularities of ships (as well as aircraft), which, by their nature and operation, remain in different places (ports or airports) very short periods of time (due to its constant mobility during their transport services), the use of the *lex situs* is not satisfactory as a conflict of laws rule. Therefore, there are good reasons, as the doctrine has repeatedly shown[57], to exempt such a rule and apply, in the maritime field, the law of the flag for the creation and effectiveness of ship security interests [see art. 10.2 Spanish Civil Code, art. 6 Italian *Codice della Navigazione*, sec. 46 USC 31301 (6)(b) or *The Angel Bell*[58] in the British legal system).

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54 WSJ, 9 September 2016.

55 For the analyze the root causes, to assess the attributable effects on the industry ' s performance since the mid-1970s, their status in the early 1990s, and projecting expected trends during the remainder of the current decade, *see* PETERS, H.J., *The Maritime Transport Crisis*, World Bank Discussion Papers, v. 220, 1993.

56 "Noah probably had difficulty in raising the finance to build the Ark because no one believed there would be a flood and everyone wondered how a bank 'under water' would have been able to ensure payment when the courts were also 'under water'". *See* POWER, V., "Commentary on 'Assessing...", cit.

57 TETTENBORN, A., "Maritime securities and the conflict of laws - some problems?", *LMCLQ*, vol. 4, 1980, p. 407.

58 In *The Angel Bell* [1979] 2 Lloyd's Rep. 491, unlike the decision in *The Colorado* [1923] P. 102 (most relevant cases in this matter), the Judge held a different approach. A Panamanian-registered ship was mortgaged by her Panamanian owners to an English bank (the mortgagors agreed to insure the vessel and assign the policies to the mortgagee). Unfortunately, the mortgage was not registered within six months in Panama, as a result of which by Panamanian law the mortgage was divested of any interest in the vessel. Subsequently the Angel Bell (the

However, not all jurisdictions recognise a security interest -in the form of a ship mortgage- constituted and registered under foreign law. The reasons for this lack of recourse to the flag-of-ship law are mainly due to the protection policies of national liens in order to protect national (or non-privileged) creditors *vis-à-vis* secured creditors by foreign mortgages. This lack of recognition will oblige the secured creditor to choose carefully (and thus reflect in the security agreement with the debtor-ship) the ports in which the vessel is moored (whether it operates in regular line or *tramp* traffic under charter contracts). In order to anticipate possible actions that national creditors may bring before the courts of the countries where the port is located.

3.2. Different types of consensual security rights under national law

The law of consensual security rights over ships has traditionally been characterised by the diversity both of types used in international market practice. Their legal effects are the fundamental reason for this range of possibilities. Originally, prior to the British Merchant Shipping Act 1854, the ship mortgage was understood as involving a transfer of ownership to the secured creditor, subject to a re-transfer upon satisfaction of the secured obligation. Thus, traditionally, in common law, the chattel mortgage was regarded as a property transfer by way of security, whereby legal ownership was transferred to the mortgagee and, upon payment of the loan amount with interest, was retransferred to the mortgagor[59]. Even when the ship mortgage was regarded as a mere transfer of security to the secured creditor (as opposed to ownership), the requirement that the mortgage had to be registered in the shipping register was upheld.

Civil law systems, however, were originally hostile to the use of non-possessory consensual security interests in relation to ships. The principle of possession was regarded as central to the pledge over movables, and hypothecation was restricted to immovable[60], subject to some form of registration system. Ships, nevertheless, are an exception to this general rule. Only after the intervention by the legislator to change this situation, the hypothecation over ships was introduced in various civil law jurisdictions[61].

Recourse to English mortgages has been commonplace among the maritime financial industry, due to the holder of a ship mortgage traditionally having a stronger position in relation to the enforcement of its rights. The reasons have been mainly related to the execution

vessel) sank and her owners went into liquidation and the mortgagees claimed the benefit of the insurance. Donaldson, J., held, admittedly as a result of the somewhat doubtful argument that a ship is in law a floating piece of territory of her State of registration, that the validity of the mortgage of the Angel Bell was governed by Panamanian law, being the law of the place of registry. Hence the bank was not a legal mortgagee of the ship, and therefore could not claim the policy monies as such. Nevertheless, that while the bank's claim to be a *legal mortgagee* failed because of Panamanian law, nevertheless, by virtue of the vessel owner's agreement to create a mortgage in proper form, the bank remained an *equitable mortgagee* of the ship (by virtue of English law –*lex situs*-), before deciding the case on the basis that, by virtue of an agreement by the mortgagor to assign the benefit of the insurance, the bank could claim the monies as equitable assignee. As a conclusion, under English law, (a) the validity of a mortgage upon a vessel depends on the law where it has been registered (which will generally coincide with the flag) and, (b) that even if the mortgage is null and void by the *lex causae* or the law of flag, *lex situs* can be, in short, applied.

59 MANDARAKA-SHEPPARD, A., *Modern Maritime Law*, cit., vol. Vol. II, apt. 6.1.

60 As we pointed out previously the reasons are the following: (a) ships travel, for a large part of their life, around the world, outside the jurisdiction of any particular country (normally in open waters); (b) ships are high-valuable assets and lenders will normally want to take security over them; (c) countries may wish to restrict, for economic and political reasons, certain types of trade to their own flag.

61 UNIDROIT, *Possible preparation of...*, cit., p. 10.

of the interest in the event of default by the debtor: (a) the secured creditor may exercise the right of possession over the ship; (b) exercise the right of control; (c) enjoy the earnings; (d) and the satisfaction of the secured claim out of the proceeds of an out-of-court sale of the ship. On the other hand, the continental or civil *hypothèques* only allows the creditor to exercise its right through judicial enforcement, typically by way of a judicial sale (unless the parties have contractually provided for a power of sale for the creditor, which has been reported as being common in the market practice).

However, practice also discloses that financial creditors have often shown a greater interest in the judicial sale of the vessel, since it may be sold to the buyer free of all encumbrances (especially maritime liens) without the need for the seller/creditor -who executes the sale- gives the buyer any other warranties against possible liabilities to the debtor who, in the event of possible suspicions, claims the seller/creditor *vis-à-vis* because the vessel was not sold at the best possible sales price[62].

Along with the mortgage/hypothecation, other legal instruments exist with an enormous importance as a financing tool that allows acquiring a ship with certain security rights for the creditor/s. First, this is the case of leasing contracts (*bareboat* or *demise charter*), whereby the owner/lessor of the ship charters or leases, in return for an annual hire, the vessel for a period during which the latter gets possession of the ship, assumes her operational and functional control, contracting of the crew, maintenance, insurance and other necessary operational aspects. This typology of contract allows shipping companies to acquire high-value-goods through the payment of a monthly or annual fee, with the possibility of financing (instead of a single disbursement) through future operational revenue flows (through sub-charters, transport services, etc.) generated by themselves, with the advantage that their liquidity is not affected nor a high financial burden of short term[63]. This provides the entity financing the acquisition of a ship with security, so far as title thereupon is instrumentally and temporarily held to secure repayment of the sums advanced for that purpose[64]. The financial leasing provides the owner with a solid collateral because the ownership of the vessel operates, throughout the contract as security right that the user will pay the agreed instalments. However, this protection is not complete, as the right of the lessor yields to the appearance of privileged maritime creditors, bringing cause of the debts of the lessee.

On the other hand, this is the case also for the sale of the vessel with title reservation. However, given its lack of practical use in the maritime industry, we will not dwell on its study.

3.3. Perfection of the security interests: different requirements under national law

Most legal systems require, in order to achieve the effectiveness of security interests as against third parties, the publicity by means of registration (e.g. in the national Register of

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62 *Ibid.*, p. 11.

63 In general, there are three reasons, amongst others, for the under-utilization of the financial leasing of ships: Ignorance by users of the advantages that this instrument entails; the lack of understanding by the financial sector of the complexities characteristic of the shipping industry and the lack of standardization of the vessels as the object of the business. This situation contrasts with the air sector, with few prototypes of commercial aircraft and high standardization, which makes leasing the world's first aircraft financing system. This is, probably, one of reasons for the huge success of the CTC and the Aircraft Protocol.

64 However, not all leasing contracts over a ship will be considered as security interests. Only when the contract covers the whole of the ship's operational life will be considered as such. In case of not doing so, we will be dealing with a mere operating lease contract. BEALE, H.; BRIDGE, M.; L. GULLIFER, L., *The Law of Security and Title-Based Financing*, Second Edition, Oxford University Press, Oxford, 2012 para. 18.37.

Movable Property), given the absence of transfer of possession, as a requisite for its perfection, thus granting the creditor a full and effective security over the vessel[65]. Requirement that is not necessary, as we saw -art. 122.2 Spanish Maritime Navigation Act-, for maritime privileges (given its secret nature)[66].

The formal requirements that must be fulfilled for the effective registration of a proprietary security interest over a ship vary according to the jurisdiction concerned[67]. Some of them require a public deed of the contract (art. 128 MNA), others, however, insist on the use of standardised forms[68]. In addition, different legal systems allow the application for registration to be made in different places, especially regarding the possibility of registration outside the flag territory. While some other jurisdictions permit applications for registration in a foreign consulate of the flag (*see* in Spanish, arts. 154, 155 and 160 Regulations of the 1956 Register of Companies), others restrict such possibilities to certain consulates in the most important port cities[69].

3.4. Determination of priority on the basis of registration and governing law

a. Internal priority (*inter-mortgages*)

There are two main issues that a secured creditor should take into consideration when it comes to the position and strength of its right: (a) different priority rules for consensual securities over ships in different legislations and (b) the lack of international harmony in determining the law applicable to the priority between them. Rules of priority depending on national legislation: It is a relatively common appreciation that registration publicity systems in the field of security rights in movable assets not only offer secured creditors a general method for achieving third-party effectiveness of security rights in all types of movable asset, but also contributes as well to the efficient and fair ordering of priority by establishing an objectively verifiable temporal reference for applying priority rules based on the time of registration among competing securities[70].

However, the set of rules governing priority between security rights in movable asset varies considerably from one legal system to another.

[A] Specific details of the rules of priority relating to ship's consensual securities vary according to the different legal systems. Some systems, according to the principle *prior in tempore prior in iure*, provide priority to rights registered first on those registered subsequently[71], while

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65 *Vid*. sch. 1, para. 7 de la *Merchant Shipping Act* 1995; 46 USC Sec. 31321(a)(1). In the Spanish legal system, *see* art. 128 Maritime Navigation Act.

66 English law also allows equitable mortgages over ships without a registration requirement under the Merchant Shipping Act 1995, but due to their low priority status their value as a security right is limited. For smaller ships, there is often an exemption from the requirement of registration of the ship and of any security rights created over it. *See* BEALE, H. ET AL, *The Law of Security and Title-Based Financing*, cit. para. 14.34.

67 For an exhaustive analysis of different jurisdictions, *see* HARWOOD, S., *Shipping finance*, cit., pp. 125-225.

68 *Vid*. *Merchant Shipping Act* 1995, sch. 1, para. 7(2).

69 UNIDROIT, *Possible preparation of...*, cit., p. 12.

70 *See* UNCITRAL Legislative Guide on Secured Transactions, p. 149.

71 *See* art. 137.2 MNA: " In order to determine preference between two or more inscriptions on a same date related to a same ship, the time of the respective titles being lodged at the Registry shall be taken into account"; *Merchant Shipping Act* 1995, such. 1, para. 8(1): "Where two or more mortgages are registered in respect of the same ship or share, the priority of the mortgagees between themselves shall, subject to sub-paragraph (2) below, be determined by the order in which the mortgages were registered".

others, in the same rank, place those who have registered on the same date[72]. Another issue, also in terms of registration, is the permissibility of some legal systems forms of provisional or advance registration intended to ensure that the priority of a proprietary security is not overridden in the period before registration is effective, but the details of such forms of provisional or advance registration vary[73] (there is, nonetheless, no harmony as to the duration of the period during which a priority position can be obtained with such registration).

[B] Some legal systems provide that, regardless of the order of registration in the registry, consensual securities acquired by a secured creditor that knew or should know the existence of prior security rights cannot take precedence over those[74].

[C] Other systems have legislated granting priority to the registered securities in their own national Registry over foreign security rights, regardless of the order of registration, which is generally treated less favourably than their domestic security rights[75]. This procedure has been developed in two different ways: either by not recognising validly constituted securities abroad (for example, as we have seen, if there is no reciprocity[76]) or by assigning a non-priority status (or lower priority), not only over national security rights but also in non-privileged liens[77].

b. External priority as between maritime liens and contractual security rights (*mortgages v. liens*)

As we have already mentioned, along with the contractual security interests, exist the maritime liens as well (with a privileged nature), whose impact on the secured creditor's position by secured mortgage is considerable. Unlike the internal priority rules seen for competing security rights, rules between mortgages and maritime liens are not based on temporary registration criteria; rather, the mere existence of maritime liens and their privileged status entail their superiority over the mortgagee's rights. Once more, the priority between mortgages and maritime liens is a matter that is dealt with differently in different legal systems, especially in recognition of what types of credits should prevail over contractual security rights on ships. The Spanish MNA prioritises, according to the Convention's criteria, maritime credits over mortgages and other registered charges or encumbrances, irrespective of the date of their registration, and no other claim shall take priority over such maritime liens or over such mortgages[78].

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[72] *See* Norwegian Maritime Code 1994, Sec. 23: Acquisitions of rights entered in the journal at the same time have equal rank. Notwithstanding Sec. 23, and under Sec. 24, an older right ranks prior to a newer right if the latter is voluntarily acquired and the acquiring party knew or ought to have known about the earlier right at the time when his or her right was entered in the journal.

[73] *See* Merchant Shipping (Registration of Ships) Regulations 1993, Reg. 59(1)/(6).

[74] Amongst others, *see* Norwegian Maritime Code 1994, Sec. 24(1).

[75] BOGER, O., "The case for a new Protocol to the Cape Town Convention covering security over ships", *Cape Town Convention Journal*, vol. Vol. 5, No. 1, 2016, p. 83.

[76] *See* Brazilian Case, apt. 3.5.

[77] Art. 143 Spanish MNA regulates the recognition and enforcement by the Spanish Courts of the mortgages and in rem encumbrances constituted on foreign ships under the fulfilment of some requisites. However, due to the referral to the provisions of the International Convention on Maritime Liens and Mortgages (1993), the situation described will not be applicable in Spain on the basis of art. 2 MLM 1993. By contrary, 46 USC Sec. 31326 (b)(2), subordinating the mortgages whose has not been guaranteed (under chapter 537) for a foreign vessel to a maritime lien for necessaries provided in the United States.

[78] *See* arts. 3 and 5 MLM 1926 and 1993, respectively. Except in the event of the forced sale of a stranded or sunken vessel following its removal by a public authority in the interest of safe navigation or the protection of the ma-

This is undoubtedly one of the most controversial issues in previous attempts to harmonise the security rights over ships since political interests between "financial" and "supplier" countries have their deepest roots here. The former, because they will grant a higher priority rank to mortgages, thus preventing any lien-holder from invoking priority. They allege that the mortgage is in the very origin of the ship, without which the owner could not have faced her purchase. The latter, on the one hand, in order to favour their interests, will grant higher priority to the credits of repairers, crew, suppliers, bunkering, salvage, removal, etc. to ensure they are not unprotected against the potential insolvency of the debtor. An international instrument must also balance the internal priority between maritime creditors themselves, prioritising those credits necessary for the subsistence of the ship and the maritime adventure over those that are not (*the adventure must go on*).

c. Governing law for issues of priority between contractual security interests over ships

The ranking order of competing security interests is one of the most important aspects of any legal system on consensual security rights. The reliability of the position conferred on a secured creditor by the production of a security interest could be compromised by any uncertainty as to the determination of the legal regime under which its position over the rest should be decided.

Despite this importance, there is no unanimity between legal systems with regard to the law applicable to the privileged maritime liens and their priority status. Some legal systems apply the same conflict of law rule used to determine the status of the security interest over the vessel according to the law of the flag[79]. Other jurisdictions, on the other hand, insist on the procedural nature regarding the determination of the priority in the process of performance of the interests, applying then the *lex fori*, avoiding the commitment with foreign laws of the flag of the ship[80]. The International Instruments have tried to give a uniform response, but the insufficient acceptance of them has prevented the desired effect. Art. 2 MLM 1993 expressly

rine environment, the costs of such removal shall be paid out of the proceeds of the sale, before all other claims secured by a maritime lien on the vessel (art. 12.3/4 MLM 1993).

79 *See* art. 10.2 Spanish Civil Code: " Vessels, aircraft and railway transport vehicles, and all rights created thereon, shall be subject to the law of their flag, matriculation or registration"; art. 96.4 Spanish MNA: "[…] law applicable to the mortgages and other encumbrances registered, that shall continue to be that of the registration the ship had on constituting the mortgage and other charges and encumbrances; *Codice della Navigazione italiano,* art. 6 [*la proprietà, gli altri diritti reali e i diritti di garanzia sulle navi (...), nonché le forme di pubblicità degli atti di costituzione, trasmissione Ed estinzione di tali diritti, sono regolati dalla legge nazionale della nave*]; *1994 Norwegian Maritime Code*, Sec. 75(2), under the sec. "choice of law": "[…] determined according to the laws of the State where the ship is registered". Because of the United States' civilian maritime law heritage, maritime liens in the United States have long been regarded as substantive rights, rather than as procedural remedies referred to in jurisdiction statutes, as they are in the United Kingdom and most British Commonwealth countries. *See* TETLEY, W., "The General Maritime Law - The Lex Maritima", *Syracuse J. Int'l. L. & Comm. 105*, vol. 20, 1994. Also BOGER, O., "The case for a new Protocol to the Cape Town Convention covering security over ships", cit., p. 84; UNIDROIT, *Possible preparation of...*, cit.

80 *See* New Zeeland S*hip Registration Act 1992*, Sec. 70: "Where a question arises in New Zealand as to the priority of instruments creating securities or charges in respect of a ship registered under the law of a foreign country, instruments creating securities or charges in respect of the ship and duly registered in respect of the ship under that law shall (a) have the same effect as a mortgage registered in respect of a ship under this Act; and (b) be accorded the priority that they would have been accorded if they had been registered under this Act"; and the case *The Colorado* [1923] P 102 (CA). See also BOGER, O., "The case for a new Protocol to the Cape Town Convention covering security over ships", cit., p. 84; UNIDROIT, *Possible preparation of...*, cit.

provides that "the ranking of registered mortgages (*hypothèques* or charges) as between themselves and, without prejudice to the provisions of this Convention, their effect in regard to third parties shall be determined by the law of the State of registration"[81].

Given the domestic nature of such privileged credits (although they have been considered by the international conventions), and in light of the differences between the national legal systems concerning the circumstances in which maritime liens arise and their priority over consensual security interests, the rules of private international law may be highly relevant in practice. However, the conflict of law rules applied vary considerably. There are, at least, three approaches regarding the law applicable to the privileged maritime liens and their priority status[82].

(A) In some legal systems, the law of the forum shall be the rule that governs the existence, validity and priority of maritime liens, regardless of the relationship of the credit with the forum[83]. The reason is that the maritime lines have an eminently procedural nature and, therefore, must be governed by the law of the forum that knows the claim.

(B) On the other hand, in other jurisdictions, maritime liens are considered a matter of substantive law, and they are governed by the *lex causae* of the underlying claim (*the proper law of the necessaries contract*)[84]. Under this approach, neither the location of the ship nor the choice of forum affects the applicable law that determines the existence of a maritime lien.

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[81] However, without prejudice to the provisions of this Convention, all matters relating to the procedure of enforcement shall be regulated by the law of the State where enforcement takes place (art. 2 MLM 1993).

[82] UNIDROIT, *Possible preparation of...*, cit., p. 15.

[83] In the British case law, *see* leading case *Bankers Trust International Ltd v Todd Shipyards Corp (The Halcyon Isle)* [1981] AC 221 (PC) (and, in similar terms, the Australian case law in *Morlines Maritime Agency Ltd v the Proceeds of Sale of the Ship Skulptor Vuchetich* [1997] FCA 1627). A claim for a repair of an English flagged vessel in a United States port. The arrest is in Singapore (which applies mainly British law) and the Singapore Court of Appeal held that since the credit is not recognized among the British list of liens (although if it is recognized in the United States, where it originated), this should not be considered as privileged and therefore cannot take priority over the mortgage. Lord Diplock stated "[…] rights that are procedural or remedial only, and accordingly the question whether a particular class of claim gives rise to a maritime lien or not [is] one to be determined by English law as the *lex fori*". Under the Australian case law, *see Morlines Maritime Agency Ltd v the Proceeds of Sale of the Ship Skulptor Vuchetich* [1997] FCA 1627. However, more recent opinions has held that the existence, scope and applicability of maritime liens is a matter of substantive law, so it must be applied the *lex causae*. *Vid*. *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; (2000) 203 CLR 503, and recently *The Ship Sam Hawk* [2015] FCA 1005, avoiding that those aspects of a maritime lien depends on the legal system where the ship is occasionally located, which places these countries among the so-called "*arrest and enforcement-frinedly jurisdictions*" (especially for credits not recognized by international conventions or foreign laws - typical bunkering credits recognized in the United States). *See* as well, TETLEY, W., "Maritime liens in the conflict of laws", in *J.A.R. Nafziger & Symeon C. Symeonides (Eds.), Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren*, Transnational Publishers Inc., New York, 2002, p. 449.

[84] In US case law, *see Dresdner Bank AG v MV Olympia Voyager* 463 F3d 1210 (11th Cir 2006), where the Court wonder what is the applicable law to a maritime claim (supply of food in a US port to a passenger cruise with Greek flag) and whether the claimant was a necessary supplier as privileged 46 USC§31301 (*repairs, supplies, towage*, etc.). The court held that according to Restatement (Second) of Conflicts of Law, §§ 6 and 188, should be the one that has "most significant relationship with the transaction at issue*" (lex causae*): US law, granting the claimant priority according its national law over the secured mortgagee [46 USC §31326(b)(2) *-for a foreign vessel (…) the preferred mortgage is subordinate to a maritime lien for necessaries provided in the United States-*]. In similar terms, in Candian case law, *see Todd Shipyards Corp. and Altema Compania Maritima SA (The Ioannis Daskalelis)* [1974] SCR 1248; Australian case law, *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; (2000) 203 CLR 503 and *The Ship Sam Hawk* [2015] FCA 1005.

(C) A third solution contemplates the application of the law of the flag (instead of *lex fori* or *lex causae*) [85]. The advantage of this latter solution offers a precise and predictable test for determining the applicable law (unlike the changing law of the jurisdiction or *lex causae*, the ship's flag is expected to remain the same). However, because the widespread use of flags of convenience by which shipowners choose to register a vessel under the laws of a State without substantial links with the ship or her ownership, there will be not many connections between the law of flag and the circumstances giving rise to the claim for a maritime lien.

3.5. Recognition and enforcement of security interests over ships

One of the main concerns -although not the only one- of secured creditors when purchasing a ship in a cross-border transaction is whether such security may be expected to be recognised before the Courts of another State and under any foreign law, which might particularly become relevant if the ship is arrested in another jurisdiction and the proceeding of enforcement is brought before the Courts of that jurisdiction. The application of the *lex situs* has been replaced, in almost all legal systems, by an application of law of the flag[86], not only to the acceptance and perfection of the security rights over ships but also their recognition and effectiveness *vis-à-vis* third party's foreign security rights, thereby providing market operators with certainty regarding the law applicable to the priority of a security right in respect of vessels in a cross-border context. The consequence is that secured creditors can rely on the recognition of their proprietary security even before foreign courts as long as the requirements for the valid creation and third party effectiveness of the security under the law of the flag are fulfilled[87].

The uniform rules in this regard, their limited adoption aside, treat the matter in a non-uniform approach. The MLM 1926, in its art. 1 states that "mortgages, hypothecations, and other similar charges upon vessels, duly effected in accordance with the law of the Contracting State to which the vessel belongs, and registered in a public register either at the port of the vessel's registry or at a central office, shall be regarded as valid and respected in all the other Contracting countries". The recognition of mortgages will only be possible if (a) the security has been duly created and registered in a State party and (b) the enforcement is intended to be in a State that is also a Contracting party. By contrary, MLM 1993, noticing the limited scope of the referred disposition, extended the range of the recognition of mortgages/ *hypothèques* that can be registered in the Contracting States (under particular conditions listing by art. 1 MLM). The requirement that the security right must be created in a State Party disappear, but the conditions for their international recognition (which focus on the requisites for their creation in accordance with the national law of the flag) are further detailed. So that the law of the flag is a competent rule in respect of consensual security rights over ships.

Traditionally, and so it is in MLM 1926, it was left to the national legislation where the mortgage was constituted the criteria of its validity. However, under the influence of the Scandinavian States[88], it was decided to include in the most recent Convention (inherited from

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[85] *Codice della Navigazione italiano,* art. 6: "La proprietà, gli altri diritti reali e i diritti di garanzia sulle navi e sugli aeromobili, nonché le forme di pubblicità degli atti di costituzione, trasmissione Ed estinzione di tali diritti, sono regolati dalla legge nazionale della nave o dell'aeromobile".

[86] Qualified by the US Supreme Court as "[…] the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag". *See Lauritzen v. Larsen* 345 U.S. 571 (1953).

[87] BOGER, O., "The case for a new Protocol...", cit., p. 80.

[88] WOOD, P., *Comparative Law of Security and Title Finance*, 2nd Ed., Sweet & Maxwell, 2007, p. 280.

MLM 1967) some conditions relating to the creation of the security necessary for its international recognition by the Contracting States[89]: (a) such mortgages/*hypothèques* and charges have been effected and registered in accordance with the law of the State in which the asset (ship) is registered; (b) the register and any instruments required to be deposited are open to public inspection; and (c) either the register or any instruments specifies at least the name and address of the person in whose favor the mortgage/*hypothèques* or charge has been effected or that it has been issued to bearer, the maximum amount secured and the date and other particulars which, according to the law of the State of registration/perfection, determine the ranking in relation to other registered mortgages, *hypothèques* and charges.

The improvement, for the secured creditors, that MLM 1993 brought with it, is undoubted. Any secured creditor would be able to have his mortgage recognised - and therefore also its priority in the case of arrest over national claims of any national and non-secured creditor- in any Contracting State. This will be irrespective of the flag flown by the ship and whether that is a contracting State's flag, allowing the use of flags of convenience (which often require the registration of the mortgage where the ship is registered). In addition, art. 2 MLM 1993 refers to the law of the flag in order to regulate the priority and effectiveness of these consensual securities (not the enforcement that will be determined by the *lex fori*).

However, there are a number of jurisdictions (minority positions) where the rule of law of the flag cannot unreservedly rely upon the recognition of foreign ship mortgages and hypothecations. This situation is, in fact, worrying, because the secured creditors cannot anticipate, when the security is created (unless explicit agreements relating to trading limits in some charter parties) if the ship, in the course of its operation, will dock in ports in which the legislation does not apply the law of the flag regarding the recognition of the consensual security interests and the ship is there arrested[90]. However, as some authors have noticed[91], some of these legal systems have in fact now reformed their law so as to now expressly to provide for the recognition of foreign ship mortgages/*hypothèques* where the requirements for the valid creation and effectiveness of these rights under the law of the flag are fulfilled[92].

In *The Betty Ott* (1992)[93], the New Zealand Court of Appeal had to decide the priority conflict in respect of a ship's registered mortgage in Australia and a later New Zealand security interest registered under the provisions of the law of New Zealand. Under New Zealand's legislation, the Court (after examining the leading precedents in *The Colorado* and *The Halcyon Isle*) held that priority between the competing security rights was to be determined under New Zealand legislation (*lex fori*.)

Under this premise, the mortgage registered under the provisions of Australian law could not be recognised as equivalent to that registered in the New Zealand Registry (and thus not of a type recognised under New Zealand law). So that the security registered in New Zealand, despite being later in time, was afforded priority over the Australian security which was considered as unregistered. Criticism of the decision was not long in coming. The reasons, the

89 Similar terms in art. 143 Spanish MNA.

90 Thailand, Turkey, Venezuela or South Africa. *See* WOOD, P., *Comparative Law of Security and Title Finance*, cit., pp. 279-280.

91 BOGER, O., "The case for a new Protocol...", cit., p. 80.

92 In Argentina (Ley no. 20.094/1974 de *Régimen de navegación,* art. 600) or Brazil, for example, foreign ship mortgages that fulfil the requirements for the valid creation and registration under the foreign law of the flag are recognized exclusively under reciprocity, requiring the secured creditor to study which legal system has such reciprocity, introducing uncertainty for the secured creditors.

93 [1992] 1 NZLR 655.

obvious ones: the application of this rule would potentially deprive holders of registered ship mortgages of their security under all jurisdictions except for the State of registration[94]. This could discourage secured creditors by mortgage from taking action *in rem*, where there is a competing security, in a jurisdiction other than that of the State in which the asset is registered, while encouraging domestic creditors to claim, despite being entitled to a later security, with priority over mortgages[95].

A more recent example is the litigation in Brazil concerning recognition and execution of a ship mortgage over the floating production storage and offloading unit ship (FPSO) "OSX-3". The Dutch company (debtor) OSX 3 Leasing is the owner of the ship FPSO (floating production storage and offloading movable platform), which is registered in Liberia. The mortgage, as security for the US$500 million bond issued by OSX 3 Leasing in Norway over the ship, is issued in favour of Nordic Trustee ASA (on behalf of bondholders) and governed by Liberian law (registered in the Liberian ships' register). The mortgagee -Nordic Trustee (Norwegian)- registered the security with the Registry of Titles and Documents in Brazil, but the mortgage could not be registered with the Port Authority (as the owner was not Brazilian) or the Maritime Tribunal (as the FPSO was not Brazilian flagged). Brazilian creditor Banco BTG S/A (holder of an unsecured credit) asserted a claim of almost US$28 million against OSX 3 Leasing (debtor) and applied to the lower court for an attachment of the ship in order to enforce the debt. Nordic Trustee applied to that court for the dismissal of unsecured creditor's attachment asserting the priority of its mortgage. In June 2015, the lower court made a declaration that Banco BTG's attachment had priority. Nordic Trustee appealed. The Court dismissed the appeal.

Banco BTG claimed that the ship mortgage was not valid in Brazil arguing the following reasons: (1) Liberia is a FoC chosen for tax reasons and thus there is no a geniuine link between the vessel and the flag state (in words of the claimant this should be considered an illegal voluntary evasion of Brazilian law); (2) Liberia is not a Contracting State of MLM 1926 (which makes foreign mortgages valid in another country); and (3) ship mortgage is not registered –for its validity- with the Brazilian Maritime Tribunal.

The secured creditor claimed the application of the debtor's domicile law (as the CTC does –art. 3-), provided Dutch law recognises the validity and effectiveness of mortgages executed under Liberian law. However, the Court held that the owner, in fact, despite being domiciled in Netherlands, belongs to a Brazilian Group of companies, with no other movable or fixed assets in that country, so Dutch law would not be applicable here. Brazilian law requires that all mortgages of Brazilian ships shall be registered in the Maritime Court, which is extremely difficult for foreign flagged vessels. Notwithstanding this difficulty of registration of the mortgage, concludes the Court, this does not mean an automatic recognition of the security interest on a vessel with a foreign flag.

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94 BOGER, O., "The Case for a New Protocol to the...", cit., p. 79; MYBURGH, P., "Recognition & Priority of Foreign Ship Mortgages: The Betty Ott", LMCLQ, 1992, p. 160.

95 *The situation in New Zealand has since been remedied because of the enactment of Sec. 70 of the Ship Registration Act 1992, where expressly recognize the priority of* "foreign instruments creating securities or charges in respect of a ship registered under the law of a foreign country, instruments creating securities or charges in respect of the ship and duly registered in respect of the ship under that law shall have the same effect as a mortgage registered in respect of a ship under this Act; and be accorded the priority that they would have been accorded if they had been registered under this Act". Following the New Zealand High Court decision in the case *KeyBank National Association v. The Ship Blaze* [2007] 2 NZLR 271, rights over ships of less than 24 meters length, in relation to which there is no registration requirement under the Ship Registration Act 1992 it has also been confirmed –and then recognised-, even if they are incorporated under foreign law. *See* William Tetley, Maritime Liens, Mortgages and Conflict of Laws, in: University of San Francisco Maritime Law Journal 6 (1993), 1, at 40.

Nordic Trustee responded that: (1) the Maritime Tribunal does not register mortgages of foreign vessels (only Brazilian ones); (2) ship mortgage is governed by the law of the flag, and it is an international custom that a court should recognize valid and enforceable a Liberian ship mortgage in the country where the vessel is located; (3) the fact that Liberia is a FoC does not its fraudulent nature (and UNCLOS' requirements for a genuine link exist); (4) Brazil is Contracting State to the MLM 1926 and to the 1928 Bustamante Code (both grant effects to foreign ship mortgages in Brazil), so, the principle behind them should apply regardless of Liberia being a signatory; and (5) the vessel is a moveable asset only temporarily stationed in Brazil so, if one were not to apply the law of the flag directly, under Brazilian conflict-of-laws rules, the law of the domicile of a moveable asset's owner should apply (Dutch law in this case), and such law also recognizes the mortgage as valid.

Additionally, after the decision, Nordic Trustee filed a motion for clarifications arguing (1) the vessel is located in the Exclusive Economic Zone, which is an area of limited sovereign rights, that this is a further argument towards the application of the law of the flag; and (2) the lack of a specific international instruments is actually evidence that countries generally recognize an international customary law on the matter. By contrary, BTG responded that (1) the EEZ argument is new and barred for procedural reasons; and (2) there was no proper evidence of international customary law in the case files.

The Court of Appeals held that the Liberian mortgage would only be recognised if it is registered in Brazil or in another country with which Brazil has a Convention specifically recognising its security interests (and accordingly would not be valid under Brazilian law). There is no international link between Liberia and Brazil in this regard. Arguments: (1) the facts that Liberia is a FoC and that it is impossible to register the mortgage with the Maritime Tribunal should be irrelevant to determine the validity of the foreign mortgage; (2) the law of the flag is not applicable to this case because (i) this is only valid between Contracting States of the Convention[96] on Private International Law, the Bustamante Code (Liberia is not part of this Treaty), which specifically give effect to flag-state mortgages, or the MLM 1926[97]; and (ii) it is only applicable to ships, not to offloading platforms, even floating ones. It is arguable that the ship in question –although designated to operate as an offloading platform for a period of 20 years- must be treated as a fixed platform, and then, no movable asset); (3) an international customary law recognizing foreign ship mortgages was not duly evidenced.

In addition, the Court found that, because the FPSO (floating production storage) was to operate in Brazil for 20 years, it should not be treated as movable and the *lex situs* where the ship is located should apply, even the FPSO had entered in Brazil under a temporary-impor-

[96] The Court's decision was based on whether a security right that has been registered under a foreign law should be recognised in Brazil, and if it is necessary for that foreign State to be a Contracting State to a Convention of which both states are parties. The Court argued that recognition of registration under the laws of another state implies a certain level of acceptance of foreign sovereignty, which can only be done by a treaty or convention that provides for this possibility (a situation which does not occur in the case). What motivated the Court to defend this argument was not the fact that it is not possible to recognise a foreign mortgage in Brazil, but only the fact that the creditors could have conditioned the loan to the inscription of the encumbered asset and its mortgage to a jurisdiction of a state which is a signatory to conventions that establish mutual recognition of foreign mortgages.

[97] MLM 1926 recognizes, as we have mentioned before, the effect of that kind of securities only when the ship is registered in a Contracting State to the Convention (as opposed to MLM 1993, signed by Brazil but did not ratify, which recognizes mortgages, under particular conditions, even if registered in a country which is not a contracting state [art. 13(1)]. As Liberia is not a Contracting party of the MLM 1926 Convention, the Court can not recognize the mortgage, prioritizing unsecured creditor.

tation customs status. Although the unsecured creditor -Banco BTG- argued that the whole project had been orchestrated to flag the ship in Liberia, in order to reduce taxes, salaries, etc. (all the *benefits* of flags of convenience) and develop their activity in Brazil, without having to submit to Brazilian law, the Court excluded this point from its analysis.

There are, however, several remaining questions from the Court: (a) if registration in the Maritime Tribunal is extremely difficult for foreign companies, how can it be a requirement for the validity of the foreign mortgage?; (b) considering a floating platform as a fixed asset requires more technical and legal arguments; (c) the contempt for the flags for being from Open Registries is something subjective and an evidence of lack of technical reasoning.

The commercial consequences involved are, amongst others, the following: (a) there are many ships (under the form of floating platforms) that are operating under the same conditions stated in this case; (b) although the case related to an FPSO and the Brazilian law position in relation to internationally-trading cargo vessels (or floating platforms) appears to be somewhat more positive, the case reinforces that Brazil is not, in any event, a favorable jurisdiction for mortgage enforcement generally; (c) could exist a possible flight out situation to more favorable or friendly jurisdictions.

Although the existence of other solutions (re-flagging the ship in more favourable or friendly jurisdiction for creditors -Panama would be a good destination-; search legal formulas to inscribe the mortgage in the Brazilian Maritime Tribunal; register the ship under flag other than a FoC; or the ratification the MLM 1993 by Brazil, etc.), attention might focus on whether the Cape Town Convention should be extended to ships and that solution would be appropriate. This OSX-3 decision is comparable to the *Blue Sky One* case, in which English courts applied the *lex situs* to aircraft mortgages, and which sparked the Protocol to the CTC regarding Aircraft Equipment. A similar protocol creating international interests on ships and offshore assets could be an interesting development from the decision. While Brazil is party to the CTC (and the Aircraft Protocol), two previous caveats are needed: a new shipping Protocol would be a long process; and, CTC relates to mobile equipment, so it would be necessary to address the issue –which has arisen in the Brazilian litigation– that some maritime assets in the offshore oil and gas industries might not invariably be regarded as "mobile".

3.6. Current set of remedies in case of default

The *common law mortgagee* has traditionally had a stronger position in the use of his or her contractual remedies. In case of default in payment, the mortgagee may take possession and exercise control over the asset (1) for enjoying its profits (although also being liable for the expenses incurred by such control) and satisfy its secured claim with the proceeds exercising his/her power of sale (2) by having the ship arrested and sold by the court[98]. On the contrary, the holder of a ship hypothecation on the vessel (under a civil or continental law system), only can traditionally exercise its rights through judicial enforcement, typically by way of a judicial sale of the vessel[99]. These differences, however, can be overcome by agreement if the parties stipulate - provided that it had been agreed in the deed of constitution of the mortgage, and

[98] *See* Australian *Personal Property Securities Act* 2009 - Sect 128, para. 2: A secured party may dispose of collateral under this section: (a) by private or public sale (including auction or closed tender); *MSA 1995, Sched. 1, Sec. 9. Registered mortgagee's power of sale*: "every registered mortgagee shall have power, if the mortgage money or any part of it is due, to sell the ship or share in respect of which he is registered, and to give effectual receipts for the purchase money".

[99] Art. 480 and subs. Spanish MNA 2014.

only in the case of non-payment of capital or the interest- an extrajudicial power of sale in favour of the mortgagee [*see* art. 129(b) Spanish Hypothecation Act and, by remission, art. 144 LNM], which has been reported as being common in the market practice [100].

The right to take possession: The statute does not expressly confer to the mortgagee a right to take possession (there is no express reference in Sched 1 to the MSA 1995 that the mortgagee has such power), but such right is conferred by *common law* independently of express provisions in the contract: the mortgagee can enter into possession when there is default in payment of capital or interest or a threat to his security[101].

The mortgagee may recover his debt, either by instituting an action *in rem* under s.21 of the UK Supreme Court Act 1981 or by taking actual or constructive possession of the vessel. He may take actual possession by putting his own representative on board the vessel, and constructive possession by simply giving notice to the mortgagor and all interested parties, such as insurers, charterers and bill of lading holders. When he takes possession, he must take sufficient steps to indicate his intention to enter into possession, which must be clear and unambiguous to the interested parties.

When the mortgagee takes possession of the vessel, he becomes responsible for the mortgagor's contractual obligations under pre-existing binding contracts. Thus, he will be liable to pay the expenses, but he will also enjoy the benefits of such contracts. Once he has taken possession of the vessel, he is entitled to the freight which is being earned[102].

Power of Sale: Whether or not the mortgagee takes possession of the ship, he/she can exercise this statutory power (art. 9 of Sched 1, MSA 1995) by having the ship arrested and sold by the court. The main duty of the mortgagee to the mortgagor during the exercise of his power of sale is to act in good faith when he deals with the asset of the mortgaged property. Therefore, he/she does not have a duty to achieve the best price for sale, but he should use his best endeavours to obtain the market price. If he does not seek to obtain the market price, the remedy for the mortgagor may be to obtain an injunction from the court to prevent the sale at a low value[103]. Once the debt is satisfied with the amount obtained from the sale, the surplus must be delivered to the remaining mortgage creditors and the debtor.

The effect of sale by the mortgagee is that the purchaser of the ship will obtain good title. However, a private sale will have the effect of extinguishing only such encumbrances on the ship that arose after the mortgage but does not extinguish maritime liens created at any time. This operation would make it difficult for the mortgagee to find a buyer willing to take such risk, or at the very least would certainly lower the price of the ship. For that reason, the mortgagee frequently seeks the assistance of the Court in arresting the ship, so that the sale can be made by a court order, the effect of which is to extinguish all encumbrances registered, except those the buyer may have subrogated itself in with the consent of the creditors, as well as all the liens and charges of any kind that may befall the ship shall be without effect and, where appropriate, their cancellation shall be ordered[104].

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[100] BOGER, O., "The case for a new Protocol...", cit., p. 88.

[101] The power can be implied from the statute (Sched 1 to the MSA 1995). *See* MANDARAKA-SHEPPARD, A., *Modern Maritime Law*, cit., vol. Vol. II para 9.1.

[102] *Ibid.* para 9.3.1.

[103] *Ibid.* para 9.4.4.

[104] Art. 484 Spanish MNA 2014. However, holders of privileged maritime credits may appear and allege the relevant third party claim with a superior right in the manner and to the ends foreseen in the Civil Procedure Act (art. 483 Spanish MNA 2014).

4. Could the shipping sector benefit from the application of the Cape Town Convention system to security rights in ships? Conditions and advantages.

4.1. Main inconveniences preventing its consideration in origin have disappeared

In the early stages of the drafting process, the drafters of the Cape Town Convention wondered whether ships (along with offshore platforms) would be assets likely to be covered by it. The answer from the main International Maritime Organizations (IMO[105], UNCTAD[106] and CMI[107]) was resounding: *No, thank you*. The arguments alleged against the inclusion of a shipping protocol were mainly the following[108]:

(a) the fact that international maritime law is a distinctive *corpus juris* which had long been established and that the International Convention on Maritime Liens and Mortgages of 1993 had recently been adopted only two years earlier. It was feared that the inclusion of ships registered in an international convention of a general nature such as the CTC proposed might be a source of conflict with the NLM 1993 and it could lead to confusion and uncertainty;

(b) this is a subject whose regulation at the international level has traditionally been centralized under the competence and within the scope of activities of the International Maritime Organization (along with the participation of the shipping industry).

At present, one could argue -with or without reason- some more objections, in line with those that the States have already expressed in order not to ratify the CTC system: the designed system is considerably influenced by art. 9 UCC, establishing a flexible system of security interests that opportunistically favors secured creditors (especially international investors and banks). In addition, in other legal systems, which have not ratified the CTC, debtors may obtain a higher degree of protection than that provided for in the uniform text (e.g. at the enforcement stage).

All these reasons notwithstanding, what seems clear is that the previous Conventions on ship mortgages, *hypothèques* and maritime liens were really ambitious in this regard, as they tried to harmonise a subject susceptible of disparities by different States: the maritime liens (so-called non-consensual rights in the CTC language). This desire to regulate such a sensitive issue has been at the same time the greatest obstacle to their wide acceptance. Few countries have ratified the MLM 1993 so far[109], which shows a preference for most States to simply keep the legal framework of security interests relating to seagoing vessels under their legislative control.

However, the CTC system allows the Contracting States to limit the scope of their dispositions only to consensual security rights on ships although it is possible its extension through the set of declarations provided. A new shipping Protocol could also cover new ships and maritime equipment, especially container fleets or in relation to containers used in a non-ship-

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105 Letter sent on July 10th 1996 by Mr. O'Neil, *Secretary-General* of the IMO.

106 Letter sent on July 4th 1996 by Mr. Ricupero, *Secretary-General* of the UNCTAD.

107 In 1992, Prof. BERLINGIERI anticipated that the reasons for the need for a Convention on the subject would be difficult to understand. *See* CMI Newsletter 1992-2.

108 *See* UNIDROIT, *Study group for the preparation of uniform rules on international interests in mobile equipment*, 1996.

109 *See* apt. "a. International Convention on Maritime Liens and Mortgages, 1926, 1967 and 1993".

ping environment[110], which would enable industry (both maritime and financial) to finance elements hitherto lacking a uniform and international regulation, as requested by economic operators.

Very recently some shipping associations have expressed their interest in a possible new protocol on ships. For example, the African Shipowners Association has stated that a new instrument would allow African shipowners to access to foreign capital and reduce the costs of secured transactions[111] (especially with economic incentives, similar to those proposed by Aeronautic Industry, which this new protocol could bring)[112].

The CMI itself, in response to interest by certain maritime and financial sectors, has recently become involved in this issue. It established in 2014 a Working Group on *Ship Financing Security Practices*[113] under the leadership of Ann Fenech who is a renowned and very experienced Maltese shipping lawyer. During the last 42nd International Conference of the CMI in New York on 4 May 2016, she described this concern by some in the sector and recalled that the inclusion in the CTC of ships was very vigorously questioned at the time by the International Maritime Organisation (IMO) as well as the United Nations Conference on Trade and Development (UNCTAD). The reasons alleged against the inclusion of a shipping protocol were the following: the fact that international maritime law is a distinctive corpus juris which had long been established; the 1993 MLM had been adopted, and that furthermore any international development related to shipping had to include the industry and recognised bodies which had long been an intrinsic part of the development of International law related to and effecting shipping[114].

4.2. The work is already done: 73 Contracting States of the CTC

One of the most important aspects, and perhaps frequently forgotten, is that much of the work is already done. The CTC has more than 70 ratifications (and the Aircraft Protocol around 63), many of them belonging to Countries with huge international, political and economic weight, being already part of their internal legal systems. These States have already taken over and internalized the proposals and basis of the CTC system relating to security interests or rights over movable assets, their remedies and the International Registry accession. The only step that would remain would be the elaboration of the new Shipping Protocol, which could be adapted to the specific needs of maritime practice (and which we have already noticed).

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110 UNIDROIT, *Possible preparation of...*, cit., p. 24.

111 UNIDROIT, *Secured transactions: Preparation of Protocols to the Cape Town Convention – Ships and maritime transport equipment*, 2016, p. 2.

112 The fact that the developing countries are interested in this future regulation allows imagining a future more enlightening to the proposal, since the investors will see the possibility of satisfying their credits via the CTC system (in particular with the system of proposed remedies), since the debtor, when concluding the financial contract, is situated in a Contracting State (art. 3 CTC), consequently, the nationality of the creditor or the ship's flag it is no longer important.

113 *See* http://www.comitemaritime.org/Ship-Financing-Security-Practices/0,27150,115032,00.html.

114 *See* Ann Fenech, "An Introduction to the CMI IWG on Ship Finance Security Practices". See page 1 of her remarks which are published at: http://static1.squarespace.com/static/566212aae4b0d8f0948180ce/t/ 57331cc5a3360c5f776ea041/1462967494090/Session%B16%B1-%B1Anne%B1Fenech%B1Introduction.pdf

4.3. The Cape Town Convention's structure

a. The new scheme of the CTC: What does it address and what does it not?

The international security interest regulated in art. 7 CTC (*hereinafter* ISI), the publicity of international interests in mobile equipment (art. 16), the asset-based structure or *folio* real system (art. 22) and the searchable/accessible format (art. 22 CTC) are all admirable from the perspective of the shipping sector. System which give clarity on priorities (art. 29 CTC) would seem custom made for the shipping industry.

The CTC differs, in some important respects, from the current maritime Conventions on ship mortgages and liens:

1. The Cape Town Convention has not the aim to be (as the maritime ones partly do) a conflict-of-law Conventions, but an instrument which provides mainly a set of uniform substantive-law rules governing ISI in mobile equipment.

2. The Convention is not confined to a single category of movable asset but covers aircraft, aircraft engines, helicopters, railway rolling stock, space property and, in the future, farming, agricultural and mining machinery. In addition, other types of assets, uniquely identifiable objects, may be added if this is found appropriate (e.g., ships, container fleet or mobile offshore platforms). For the incorporation of each distinct category it will be supplemented by a Protocol.

3. The wide scope of "international security interest" covers not only the right of a security holder under a security contract but also the interest vested in a person who is the conditional seller under a title reservation agreement or a lessor under a leasing contract.

4. CTC applies, unlike the MLM 1993 Convention which links their application with the law of the flag, when the debtor is situated in a Contracting State (it is irrelevant, in fact, for the purposes of applying the Cape Town Convention, where the creditor is located, even if is in a non-Contracting State, or the nationality or the situation of the secured asset)[115].

5. The Convention provides its own set of remedies or default remedies (without parallel in the maritime Conventions), including provisions for interim judicial relief, provisions for assignment or subrogation, and recognition of the secured party's rights in case of insolvency.

6. The Convention includes two articles enabling the States to make declarations related to non-consensual rights and interests (or liens). This is particularly important for the future of the shipping Protocol because those kinds of rights are of capital relevance in the maritime Conventions.

7. The Convention provides for the creation of an International Register to receive registrations of ISI, the key to priority and the sole method to give international efficacy to the ISI.

The Convention proposal is to replace at international level the multiplicity of national laws governing security and related interest created under national law and to provide a single regime of rights and duties and a single system of protection and priorities, coupled with recognition of rights in bankruptcy. This does not mean that national interests will disappear; on the contrary, most national interests in mobile equipment will be, simultaneously, international interests[116] and then, susceptible of registration in the International Registry (under

[115] The Aircraft Protocol allows, regarding the sphere of application, an alternative requirement: if the aircraft is registered in an aircraft register of a Contracting State which is the State of registry. Could be necessary a further study whether this requirement could be translated to the Shipping Protocol.

[116] GOODE, R., "Battening down your security...", cit., p. 168; RODRIGUEZ DE LAS HERAS BALLEL, T., *Las garantías mobiliarias sobre equipo aeronáutico en el comercio internacional*, Marcial Pons, Madrid, 2012, pp. 78-79.

fulfillment of the CTC requirements) entitling the creditor both sets of remedies (national and uniform). Their *status* as national interests will continue to be governed by national law, but a national interest not registered as an international interest in the IR will be subordinate over a registered international interest (except for the declarations of arts. 39 and 40 CTC).

Premises for its application: (a) The Convention is designed for equipment/object which is mobile, in the sense that it regularly moves from one country-to-country, jurisdiction-to-jurisdiction, in regular course of business, crossing national boundaries or, in the case of space property, is outside terrestrial jurisdiction altogether; (b) The CTC deal with high-value equipment entered into by sophisticated enterprises well versed in the art of negotiation and possessing the necessary economic muscle to do so (for example, aircraft and space property) or of particular economic significance in cross-border transactions. In other words, due to the fact that the IR is asset-based, not debtor-based, the Convention is confined to equipment that is uniquely identifiable.

b. Two-instrument structure: A Convention and a set of Protocols

The CTC system responds, on the one hand, to the need to overcome the inadequate rules on conflict-of-law based on *res sitae* for movable property, achieving an acceptable level of substantive unification between the different legal systems, resolving legal issues caused by their mobility, i.e., conflicting rules relating to the recognition, securing and enforcement of rights in the assets as they travel across jurisdictions (*legal reasons*). In maritime regulation, the existence of international conventions supplements this lack in a theoretical way, however, the absence of success of these texts, in practice, makes the domestic conflict-of-law rules frequently used. On the other hand, the system searches and promotes the facilitate acquisition, financing and leasing of mobile assets, reducing borrowing costs (by means of economic incentives) and providing predictability to market participants in asset-based transactions by creating uniform set of rules relating to creation, perfection and priority of interests that will be universally recognized and protected. In addition, the CTC wants to promote the financing of debtors in developing countries by improving the confidence of the financiers (*economic reasons*). However, one of the major criticisms of the CTC system is that it strengthens considerably the position of the secured creditor *vis-à-vis* unsecured creditors, especially lienholders, depriving them of their traditional remedies for the protection of their claims.

The Cape Town system is based, from the beginning of the drafting process when it soon became clear that there was overwhelming support, on an original and pragmatic multi-divisional structure[117] for the production of a consolidated Text which would integrate the provisions of the Convention (that would not be equipment-specific and a separate) and -initially open- set of "Equipment" Protocols covered by the System, each of which deal with matters specific to different categories of assets – aircraft equipment (Aircraft Protocol), railway rolling stock (Rail Protocol), space assets (Space Protocol) and, in case of adoption, agricultural, construction and mining equipment (MAC Protocol). This innovative structure operates together in brilliant coordination, wisely combining equipment-specific provisions with general rules, and allowing greater flexibility in adapting the System to the different Mobile Equipment that will fit into the uniform text (both existing as developed in the future).

[117] GOODE, R., "The Cape Town Convention on International Interests in Mobile Equipment", cit., p. 5; RODRIGUEZ DE LAS HERAS BALLEL, T., "The accession by Spain to the Cape Town Convention: a first assessment", *Unif. L. Rev.*, 2014, p. 3.

This dual structure would allow, without major opposition, the elaboration of a shipping protocol on ships, offshore platforms or other types of mobile equipment of maritime nature (e.g., container units or fleets). The main basis is already included in the Convention, as currently happen with other assets, and the characteristics, regarding the specific asset, will be regulated by the Protocol. The interested Contracting States will only have to ratify the Protocol.

c. Scope of application

c.1. International security interest: material scope

Among the diversity of forms in order to finance a ship in maritime sector that may be guaranteed by means of the constitution of a ship mortgage or *hypothèque*, the following should be highlighted:

- Ship mortgage during its building phase (mortgage for construction), where the mortgagor is the shipyard requesting credit in different ways, typically from a bank or other credit institution. The vessel in construction is used as collateral for securing the (mortgagor) shipyard's obligations. These obligations may relate to the reimbursement of amounts received (and interest) under a loan agreement, or to reimbursement obligations arising out of refund guarantees issued by the bank (with the owner in the shipbuilding contract as the beneficiary –the refund guaranties would in such a case guarantee the shipyard's restitution obligations, and possibly other payment duties, in case of termination of the shipbuilding contract by the owner).

- Ship mortgage after delivery (mortgage for acquisition), where the owner-debtor creates a mortgage over the ship for securing the credit granted by the bank in order to finance all or part of the payments advanced and made during the construction phase, or due upon or after delivery.

- Ship mortgage in the context of construction and acquisition under the tax lease operation.

All of these are forms likely shall fall within the scope of the CTC under the umbrella of the international interest. The ISI designed by the CTC qualifies it as (A) an autonomous concept, independent of any legal form that adopts a negotiation scheme of security rights; (B) functional, since it unites and provides and equivalent treatment to several different legal transactions; and (C) to that extent allows simplification of the existing dual scheme of securities over ships in common law and civil law (*mortgages* and *hypothèques*), as well as leasing, sale and retention of title, etc.

The term used by the CTC for the creation and consolidation of a new, uniform and simplified system on security rights on mobile equipment is, as we have mentioned previously, the ISI. This term, however, does not have correspondence with anyone used in the different legal systems worldwide. It could be said that it is a category -in Aristotelian logic- in which the different concepts or notions of each system will be included: *hypothèques*, mortgages (statutory or equitable), charges, leasing contracts, conditional sales, etc.

The CTC defines in art. 2 the *International Security Interest* as an interest, constituted under the formal requirements of art. 7[118], in a uniquely identifiable object of a category of such ob-

[118] The agreement creating or providing for the interest must: (a) be in writing; (b) relate to an object of which the chargor, conditional seller or lessor has power to dispose; (c) enable the object to be identified in conformity

jects listed in paragraph 3 (airframes, aircraft engines[119] and helicopters; railway rolling stock; and space assets[120]) and designated in the Protocol. The CTC, providing the extension, allows the possibility to assess the feasibility of extending the application of this Convention, through one or more Protocols, to objects of any category of high-value mobile equipment, other than a category, each member of which is uniquely identifiable (although the text does not affirm so, it would seem that the object, as a whole, is also identifiable [121]), and associated rights relating to such objects (art. 51 CTC).

For the recognition and enforceability of the ISI, given the list of different types of security interest that the Convention regulates, this must be (art. 2.2): [a] granted by the chargor (generally a bank or a financial institution) under a security agreement (as determined by national law). *Hypothèques*, mortgages or consensual charges should be here categorized; [b] vested in a person who is the conditional seller under a title reservation agreement; or [c] vested in a person who is the lessor under a leasing agreement. The applicable national law will determine whether an interest falls within one of these categories.

The effectiveness of the ISI *vis-à-vis* third-party creditors is one of the issues, along with the priority, which is more concerned with ship mortgagees. An adequate regulation of this element will be fundamental to envisage the future of a possible shipping protocol. We must distinguish between internal priority (competitive security interests) and external priority (between consensual security interest and non-consensual rights).

On the basis that clarity was preferable to sophistication, the Convention provides a remarkably succinct set of priority rules over competing rights within a single art. 29, leaving the external priority rules for arts. 39 and 40)[122]. The primary rule is that a registered interest has priority over any other interest subsequently registered (*prior in tempore, prior in iure)* and over any unregistered interest or right. The priority over an unregistered interest applies even if the registered interest was acquired or registered with actual knowledge of it and extends to

with the Protocol; (d) in the case of a security agreement, enable the secured obligations to be determined but without the need to state a sum or maximum sum secured; (e) allow determining the secured obligations (although it is not necessary that it determines or can determine a quantity or a guaranteed maximum quantity). It should be noted that the MLM 1993 on maritime mortgages and liens requires, for a valid and enforceable mortgage, the necessary mention in the documentation required, among other elements, of the quantity or a guaranteed maximum quantity, if that is a requirement of the law of the State of registration or if that amount is specified in the instrument creating the mortgage [art. 1 (c) MLM 1993]. Registration of the ISI is not a condition in the creation of a security, merely a requirement if it is to be protected against third-party claims. It is envisaged that in the great majority of cases a security agreement made in conformity with national law will simultaneously meet the Convention requirements for an international interest. *See* GOODE, R., "Battening down your security...", cit., p. 171.

[119] This may get in conflict with the general principles of many countries because, in the case of Spain, property rights affect on objects not on the parts of those objects.

[120] Par. 5, art. 2 extends the scope of the ISI to proceeds of those objects. In maritime terms, due to its traditional incorporation into the material scope of the mortgages, see 134.2 Spanish MNA, will be the compensations for material damage caused to the ship and not repaired due to collision or other accidents, as well as the contribution to the general average and that of the insurance, both for not repaired damage suffered by the ship, as well as its total loss (art. 134).

[121] Unlike the aeronautical sector, in maritime, the security interests generally cover the entire ship, not differentiating, generally, between engines, hull, machinery, etc.

[122] Art. 50 CTC allows to extend the rules of priority hold in art. 29 to internal transactions (...) such national interest has been registered in the International Registry, the priority of the holder of that interest under Article 29 shall not be affected by the fact that such interest has become vested in another person by assignment or subrogation under the applicable law.

proceeds (art. 29.6). The second rule is that the outright buyer of an object acquires its interest subject to an interest registered at the time of its acquisition of that interest but free from an unregistered interest even if it has actual knowledge of such an interest. Given the Convention does not apply to outright sales, the primary rule cannot fairly be applied to an outright buyer, so that he has no ability to protect himself by registration[123]. By contrary, the conditional buyer or lessee acquires its interest over that object subject to an interest registered prior to the registration of the international interest held by its conditional seller or lessor but free from an interest not so registered at that time even if it has actual knowledge of that interest. However, parties may vary these priority rules by agreement.

c.2. Geographical scope (arts. 3 and 4 CTC):

CTC applies when, at the time of the of the agreement creating or providing for the international interest, the debtor is situated in a Contracting State (it is irrelevant, for the purposes of applying the Convention, where the creditor is located, even in a non-Contracting State, or the nationality or the situation of the secured asset). In accordance to the Convention, the debtor will be deemed located in the State: (a) under the law of which it is incorporated or formed; (b) where it has its registered office or statutory seat; (c) where it has its centre of administration; or (d) where it has its place of business[124].

The transposition of this requirement for the application in the maritime field would mean that, for an effective harmonization of the Convention, flags used as "flags of convenience" or open registers (which together account for more than 70% of the world flagship fleet, and which for registration of a vessel usually require that her owner - debtor in the form of *one ship's company* - be domiciled and constituted under a corporate structure of the country) should be the Contracting States of the CTC. This is the case of Panama -which would also have to ratify the shipping protocol[125] - but not from Liberia, which is not currently part of the CTC. All security interests on ships registered in Liberia (and if the Liberian law required, as it seems to be the case, that the owner was a Liberian entity[126]), would not be covered by the CTC since the debtor-owner would not be located (under any of the modalities of art. 4 CTC) in a Contracting State.

The Aircraft Protocol adds a further –and alternative- requirement, not necessarily transferable to a possible Shipping Protocol: the Convention shall also apply in relation to a helicopter, or to an airframe pertaining to an aircraft, registered in an aircraft register of a Contracting State which is the State of registry, and where such registration is made pursuant to an

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123 GOODE, R., "Battening down your security...", cit., p. 171.

124 If the debtor has more than one place of business, will be its principal place of business or, if it has no place of business, its habitual residence (art. 3.2 CTC).

125 For example, in Panama, the Merchant Shipping Act 2008 allows any person, natural or corporation, without special requirement of nationality or domicile, to register one or more ships under their property complying with the requirements and formalities established for that purpose (art. 3).

126 The Liberian Maritime Act (art. 51) allows the registration of the following vessels: over 20 tons or more, owned by a citizen or national of Liberia and exclusively engaged in maritime traffic between the ports of Liberia or between these and other West African nations; Vessels of more than 500 tonnes engaged in foreign trade and owned by a citizen or national of Liberia; Or any yacht or other vessel exclusively used for recreation, 24 meters or more, owned by a citizen or national of Liberia. However, the requirement of ownership may be waived for vessels of more than 500 tonnes engaged in foreign trade, where, among others, the owner or bareboat charterer is registered in the Republic of Liberia as a foreign maritime entity and maintains at all times an operating company in that country (article 51.5).

agreement for registration of the aircraft it is deemed to have been effected at the time of the agreement (art. IV). The application of this second requirement in the maritime sector would be a step backwards to the scope of MLM 1926, which required that the security interest on the vessel "duly effected in accordance with the law of the Contracting State to which the vessel belongs" be considered valid in all Contracting States. In this sense, the scope of MLM 1993 seems more in line with the international instrument.

The future protocol should continue to maintain the geographical scope of application to the domicile of the debtor, but being aware that the shipping finance structure frequently uses the *flags of convenience* and *one-ship companies* resources, which entails that these are incorporated under the legislation of a limited number of States under open registries, but adding, moreover, and independently of the above requirement, that international safeguards established in a Member State on ships (and registered in the International Register) will be recognized and enforceable in any of the contracting States regardless of the flag of the vessel (similarly to MLM 1993, whose regulation, at this point, is adequate and ensures uniformity).

d. Non-consensual rights and interests: the case of maritime liens

The last part of the Convention, before the jurisdiction and final provision chapters, deals with non-consensual rights and interests subject to declaration by Contracting States. These are typically of two kinds: non-consensual rights or interests[127] (N-CRoI) having priority (over ISI) without registration[128] (art. 39) and registrable non-consensual rights or interests[129] (art. 40). These rights or interests remind us of the already explained *liens* or privileged maritime credits. But, unlike in the maritime context, where the recognition and priority of these are determined by the International Convention (*see* arts. 2 and 4 of the 1926 and 1993 MLM respectively), in the CTC system Contracting States may declare the list of N-CRoI (provided by national law) for which they request priority over ISI[130]. In short, we are faced with a type of national security rights or interests, similar to the ones set by MLM 1993 (art. 6), but with a higher degree of priority (the N-CRoI, under express declaration, will be ranked prior to the mortgages, unlike the priority of the domestic liens of art. 6 MLM 1993, whose priority rank is very reduced).

This disposition is one of the most controversial points in relation to any future incorporation of a shipping protocol to the CTC system. The reason is that maritime liens take priority -by its mere existence- over the mortgage (under the premise of its uniform character), whereas in the CTC there are no privileged credits of such nature (recognized by all participants). Instead of that, each Contracting State will be in disposition –under declaration deposited with the Depositary of the Protocol- to grant priority to rights or interests over ISI. These declara-

[127] Art. 1(c): "non-consensual right or interest" means a right or interest conferred under the law of a Contracting State which has made a declaration under Article 39 to secure the performance of an obligation, including an obligation to a State, State entity or an intergovernmental or private organization".

[128] Art. 1(mm): "unregistered interest" means a consensual interest or non-consensual right or interest (other than an interest to which Article 39 applies) which has not been registered, whether or not it is registrable under this Convention".

[129] Art. 1(dd): "registrable non-consensual right or interest" means a non-consensual right or interest registrable pursuant to a declaration deposited under Article 40".

[130] In order to accomplish with priority system, the CTC does not permit the Contracting States to create a new right or interest or a new priority but merely permits them to choose whether to declare that a category of non-consensual security rights that have already priority over consensual interest.

tions are an attempt on the uniformity of the maritime liens, since each Contracting State may recognize one or the other independently. In addition, it will be necessary to study to what extent these national rights or interests will be recognized by the courts of the Contracting States when they must grant priority between non-registered credits of a foreign Contracting State and those of the Contracting State of the forum.

The consequence is the absence of a uniform recognition of *maritime liens* –and their priority character-, which would be detrimental to developing Contracting States (or suppliers Contracting States), assuming their national credits (in form of declared N-CRoI) will be ranked subsequent to mortgages (in form of previously registered ISI) under the priority rules of art. 29.1 CTC (*prior in tempore, prior in iure*). The future protocol will have to deal with those issues, setting a priority non-contractual rights or interests over the ISI (e.g. mortgages) even without an express declaration from the Contracting States (in form, for example, of *supra and uniform N-CRoI*).

Issues of priorities are considered, under the conflict-of-law rules of some countries, matters of substantive law to be governed by the *law of the flag* or alternatively the law of the current situation of the vessel at a particular time (*lex situs*), while in others they are regarded as procedural and are to be determined by the *lex fori*[131]. On the basis of the CTC system, the distinction between substantive and procedural law regarding the maritime liens (and their priority rules) has disappeared. The Convention gathers all kind of security interests (national and international, contractual and non-contractual, registrable and non- registrable ones[132]) under the umbrella of substantive law, and then, under the CTC applicability.

Prof. GOODE has pointed out attention should not be placed on maritime or statutory liens and their priorities among themselves or in relation to ship mortgages, but rather on consensual security and quasi-security instruments, namely mortgage and charge, sale under retention of title and lease, all of them important tools for facilitating the acquisition and use of ships[133]. However, we predict that this will be the greatest source of conflict between the drafters of the possible shipping Protocol, given the regulatory differences between the existing regulation and that proposed by the CTC.

d.1. Rights or interests having priority without registration

For the application of the following priority rules, several premises are necessary:

1. non-contractual rights or interests do not arise from an agreement between the parties, a requirement for the creation of ISI .
2. their recognition requires an express declaration by Contracting State
3. they arise (and have priority) without registration

A Contracting State may at any time, in a declaration deposited with the Depositary of the Protocol, declare those categories of unregistered N-CRoI (other than a registrable right or interest to which art. 40 applies):

a. which under that State's law have priority over an interest in an object equivalent to that of the holder of a registered international interest. In these kind of interests or

[131] GOODE, R., "Battening down your security...", cit., pp. 167, 172.

[132] When arts. 39 and 40 apply and only regarding the State that has reported an express declaration (not for CTS system in general).

[133] *Vid*. *Ibid*., p. 162.

rights, in order to rank the categories and in absence of registration, a N-CRoI has priority over any other interest or right subsequently created (surely it is useful to mention here that maritime liens arise with the obligation-credit-claim they guarantee);

b. which shall have priority over a registered international interest, whether in or outside insolvency proceedings. This priority over ISI will only happen if and only if the right or interest is a category covered by a declaration deposited prior to the registration of the international interest[134].

c. In other words, the CTC enables a Contracting State to list categories of N-CRoI which are to be treated under the Convention as if they were ISI.

This scheme allows Contracting States to give priority to certain non-consensual rights or interests *vis-à-vis* international and registered security interests. Many authors have criticized this position, considering that it intensifies the complexity of the text, reduces its harmonizing effect and places holders of ISI with a serious burden of uncertainty. This declaration makes it possible to attract all conflicts between registered mortgages (as ISI) created before the entry into force of the Protocol and the rights or interest (covered by a declaration giving priority over an international interest registered prior to the ratification).

The recognition of these "*national* and non-contractual rights or interests" (e.g. maritime liens), ranked priority over ISI (e.g. ship mortgages) allows us to affirm, with the previously expressed difficulties on the enforcing in the different Contracting States, a certain possibility for international organizations to accept the possibility of studying a new shipping Protocol in the CTC system. Among others, the following rights would be covered by this priority:

(a) Claims for wages and other sums due to the master, officers and other members of the vessel's crew in respect of their employment, including costs of repatriation and social contributions payable on their behalf (art. 4 MLM 1993).

(b) Claims in respect of loss of life or personal injury occurring in direct connection with the operation of the ship (art. 4 MLM 1993).

(c) Remuneration for assistance and salvage (art. 4 MLM 1993).

(d) Maritime lien in respect of claims for port, canal and other waterway dues and pilotage dues (art. 4 MLM 1993).

(e) Rights of retention in respect of a vessel in the possession of either a shipbuilder, to secure claims for the building of the vessel; or a shiprepairer, to secure claims for repair, including reconstruction of the vessel, effected during such possession (art. 7 MLM 1993).

Furthermore, the declaration would not have to specify individual categories, nor would it have to be confined to existing categories. It would be sufficient if it stated that all non-consensual rights or interest currently enjoying, or to enjoy in the future, priority over an interest equivalent to that held by the holder of the international interest would have priority over that security interest even if registered.

Examples of categories of N-CRoI declared and deposited by the Contracting States are:

- liens in favour of airlines employees for unpaid wages arising since the time of a declared default under a contract to finance or lease the subject object;

[134] Nevertheless, a Contracting State may, at the time of ratification to the Protocol, declare that a right or interest of a category covered by a declaration shall have priority over an international interest registered prior to the date of such ratification of the Protocol (art. 39.4 CTC).

- liens in favour of any authority or State entity relating to unpaid taxes or other charges since the time of a declared default under a contract to finance or lease the subject object;
- liens in favor of repairers of an aircraft object in their possession to the extent of service or services performed on and value added to that aircraft object;
- claims for bankruptcy expenses and community debts;
- claims for remuneration for salvage or rescue of a civil aircraft;
- claims for necessary expenses incurred for the custody and maintenance thereof of the civil aircraft, etc.

d.2. Registrable non-consensual rights or interests

The CTC provides for a Contracting State to declare a list of categories of N-CRoI which shall be registrable under this Convention as regards any category of object as if the right or interest were an ISI. Those non-contractual rights or interests subject to registration differ from the previous category because their priority depends on the definitive registration in the IR.

Although in the previous case the priority is recognized to these N-CRoI without registration, in this case, the priority is linked to its registration in the IR, accessing the register without being, in fact, ISI.

By virtue of art. 40 CTC, Contracting States may, at any time, declare a list of certain N-CRoI, constituted in accordance with their national applicable law (usually conferred by statute), that may be registered in the IR and shall be regulated and ranked accordingly as ISI, notwithstanding their non-contractual nature. This includes the determination of the priority status according to the order of registration (*see* Art. 29). Such a declaration may be modified from time to time.

The effect of this provision is that a non-consensual interest thus covered can no longer be treated as enjoying generally lower priority ranking than consensual proprietary security interests in the same asset, even if this would be the position if the conflict-of-laws provisions of the forum and the applicable legal regime for the determination of the priority status of this type of N-CRoI were applied. In the absence of registration, the non-contractual right or interest does not rank the priority conferred by the Convention.

Examples of categories of registrable N-CRoI declared and deposited by the Contracting States:

- rights of a person obtaining a court order permitting attachment of an aircraft object in a full satisfaction of a legal judgment[135];
- liens or other rights of a State entity relating to taxes or other unpaid charges (conferred by statute)[136];
- liens in favour of workers for unpaid wages arising prior to the time of a declared default under a contract to finance or lease the subject object[137] (conferred by statute)

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[135] Declarations lodged by the kingdom of Spain under the cape town convention at the time of the deposit of its instrument of accession. *See* http://www.unidroit.org/status-2001capetown?id=1960.

[136] *Ibid*.

[137] Declarations lodged by the kingdom of Oman under the cape town convention at the time of the deposit of its instrument of accession. *See* http://www.unidroit.org/141-instruments/security-interests/cape-town-convention-mobile-equipment-2001/depositary/declarations-by-article/1666-article-40-declarations-deposees-en-vertu-

d.3. A brief conclusion regarding N-CRoI

To sum up, arts. 39 and 40 CTC would safeguard, among other things, the traditional priority of maritime liens (one of the most important obstacle for the future study on the opportunity of drafting a shipping protocol evidenced by academic, maritime lawyers, operators and international maritime organizations, generally skeptical or opposed because most of them prefer the *status quo*). But, the main problem is whether those domestic non-consensual rights or interests, registered (art. 40) or not (art. 39) are going to be recognized by third Contracting States. If those are as well declared by that State, probably does, but if not, what is the solution?[138] (especially if the N-CRoI arise at the expense of a national creditor).

The priority status of this N-CRoI is determined on the basis of the provisions of the Convention but following the position of the Contracting State expressed in its declaration. In other words, a rule under which the determination of the priority status of the N-CRoI are to be determined under the rules of the same law that governs its creation[139].

As the preliminary study drafted by UNIDORIT in 2013 anticipated[140] as a possible solution, art. 39 could be made subject to a rule in the additional shipping Protocol, according to which the non-consensual interests covered in the declaration –regarding the priority of those non-consensual interests or rights- of the Contracting State (or even list a minimum of worldwide-accepted categories of maritime liens) only if, according to the conflict-of-laws rules of the forum, the issue of the priority status of N-CRoI are to be governed by the laws of the Contracting State concerned or under any other legal regime under which an equivalent priority position is awarded to these N-CRoI.

Let's see some cases:

> **Case 1:** The unregistered right is similar to the credit for wages due to the captain/crew, where the ship flies a north American flag and the Court who knows the case is British. At present, the court would apply the *lex fori* (given the procedural nature of the dispute under British law) and would grant a *lien* to the claimant, as that non-contractual right is recognized in British law.
>
> If the MLM 1993 were the applicable law, the result would be similar.
>
> In case of CTC, if the Contracting State where the ISI was registered and the State where the unregistered right is going to be executed, make a declaration of this type of N-CRoI giving them priority (and this recognition was made prior to the perfection of the ship mortgage), the *lien* should be recognized first and foremost over other ISI that may exist over the ship (mortgage). *The result would be similar to both the application of national law and MLM 1993.*

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de-la-convention-du-cap-relative-aux-garanties-internationales-portant-sur-des-materiels-d-equipement-mobiles.

138 The common position would be that the recognition by another Contracting State is reached based on domestic conflict-of-laws rules and is not, therefore, automatic. This would be a serious legal problem.

139 This provision does not harmonize the conditions for the creation of the non-consensual rights or interests covered in the declared list; and such a right will only arise if the conflict-of-law rules of the *forum* determine the law of the Contracting State concerned as the regime governing the issue of the creation of non-consensual security rights. Under several legal systems which refer the issues of creation and priority of non-consensual security over ships to the same applicable law (the law of the flag or the law of the forum), other jurisdictions apply different conflict-of-laws rules to these matters (for instance, the legal regime governing the secured claim is applicable also to the creation of the non-consensual security, while the priority status of the latter is determined under the law of the forum). *See* UNIDROIT, *Possible preparation of...*, cit., p. 26.

140 *Ibid.*, pp. 26-27.

C**ase 2:** The unregistered right is similar to the credits for wages by social insurance contributions, and the ship flies Italian flag and the Court is British. At present, the court would apply *lex fori* (given the procedural nature of the dispute under British law), but it would not grant lien to the claimant, since that unregistered right is not recognized under British law (although under Italian law is).

If this situation were under the MLM 1993 (assuming that the court is located in a Contracting State, for example, Spain), the result would be different, since the MLM recognizes the credits by unpaid social insurance contributions (art. 4.1). The result should be the recognition of the *lien*, as an unregistered right, with priority over mortgages.

In case of CTC, If the Contracting State where the mortgage was registered and the State where the lien is going to be executed, make a declaration recognition this type of N-CRoI and ranking them with priority (and this recognition was made before the perfection of the ship mortgage), the lien should be recognized as preferred over other ISI that may exist over the ship (mortgage). The result would be similar to the application of MLM 1993.

Case 3: The unregistered right is similar to claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel, for example, during the loading operation and the Court that knows the case is in the U.S. At present, the court would apply Canadian law, as the *lex causae* (conflict of law rule in the United States). The result should be the recognition of the *lien*, as an unregistered right, if the Canadian maritime law recognizes it as such (regardless of the flag of the vessel).

If this situation were under the MLM 1993, the result would be similar, since the Convention recognizes claims in respect of loss of life or personal injury in direct connection with the operation of the vessel (where this situation could be located).

In case of CTC, if the Contracting State where the mortgage was registered and the State where the lien is going to be executed, make a declaration recognition this type of non-contractual rights as a priority giving them priority (and this recognition was made prior to the perfection of the maritime mortgage), the *lien* should be recognized as a priority over other ISI that may exist over the ship (mortgage). *The result would be similar to both the application of national law and MLM 1993*.

Case 4: The unregistered right is similar to claims or credits *for necessaries* (e.g. bunkering), the ship flies U.S. flag and the dispute will be held under a Canadian Court. Under the current applicable law, the court would apply U.S. law, because it is the law of the flag (which is the conflict of law rule in Canada, under the consideration of *liens* as a substantive matter), and it should recognize the priority of lien over the mortgage.

If this situation were applied under a Contracting State Court of the MLM 1993, the result must be different, since the Convention -unlike the MLM 1926- does not recognize credits by bunkering, so, being then considered like national *liens* (art. 6), should not have priority over the mortgage.

CTC: if the Contracting State where the mortgage was registered and the State where the lien is going to be executed, make a declaration recognition this type of non-contractual rights as a priority giving them priority (and this recognition was made prior to the perfection of the maritime mortgage), that credit (lien *for necessaries*) should be recognized as a priority over other ISI that may exist over the ship (mortgage). *The result would be similar to the application of US national law (and not the application of MLM 1993)*.

e. Harmonized set of remedies

A distinction is traditionally made between the remedies available under a mortgage over a ship and under the civil *hypothecation*[141] (however, there are some evidences suggesting that several national regimes are committed to overcoming this discrepancy). On the contrary, the Cape Town Convention makes no distinction between the remedies available to a secured creditor holding an international interest (other than that of a retention of title seller or lessor). This reflects a modern functional approach to proprietary security[142].

The element that will put the CTC system of remedies in operation is the default (*in the event of default...*), which is defined by the Convention, where the debtor and the creditor have not so agreed, as a situation "*which substantially deprives the creditor of what it is entitled to expect under the agreement*". The debtor and the creditor may at any time agree in writing as to the events that constitute a default or otherwise give rise to the rights and remedies specified in arts. 8 to 10 and 13.

Given the diversity of security interests regulated by the uniform text, the Convention will structure remedies according the breach of the different financial contracts:

- Remedies of chargee (art. 8) shall be (a) take possession or control of any object charged to it; (b) sell or grant a lease of any such object; (c) collect or receive any income or profits arising from the management or use of any such object.

- Remedies of conditional seller or lessor (art. 10): terminate the agreement and take possession or control of any object to which the agreement relates, or (b) apply for a court order authorising or directing either of these acts.

Any additional remedies permitted by the applicable law, including any remedies agreed upon by the parties, may be exercised by the secured creditor/seller/lessor where they are not inconsistent with the mandatory provisions of the Convention (art. 12).

By contrary, the current international maritime instruments, as we mentioned in apt. 3.6, do not regulate in detail a set of remedies in case of default (other than the arrest of the ship or the judicial sale), neither for the creditor or chargee (in general terms) nor for the conditional seller or lessor (although MLM 1193 implicitly refers the matter to the law of the *enforcement* State –in case of forced sale-). So, the remedies of the national legal systems are, in fact, the solution adopted by creditors in case of breach of the contract.

f. International registry

One of the most characteristic features of the CTC system is that it provides for a, amongst other rights, registered international interest and registrable non-consensual rights and interests, a single International Register[143] (art. 16)[144]. The designed system, applicable to the regis-

[141] *See* apt. 3.6.

[142] However, as the UNIDROIT Study evidences, it would be appropriate ask to maritime market their preferences to uphold the traditional distinctions as concerns consensual security rights over ships or whether there is sufficient demand for some rationalisation of the available remedies that would justify undertaking an effort towards law reform in this respect. *See* UNIDROIT, *Possible preparation of...*, cit., p. 28.

[143] For a comprehensive study of the International Register, functions and responsibilities, Supervisory Authority or national access points that each Contracting State may set, *see* RODRIGUEZ DE LAS HERAS BALLEL, T., *Las garantías mobiliarias...*, cit., pp. 157-112.

[144] The International Registry only deals with the security interests covered by the Convention, while the determination of a law of registration under a national flag would still be relevant for, amongst others, labour, environmental and safety regulations.

tration of ship mortgages and *hypothèques*, which differ in numerous national registers, would be replaced by the registration of the international interest in a single international register.

This would be greatly beneficial, an important advantage as compared to the conflicts of- laws approach of the 1926 and 1993 Conventions, to the process of obtaining proprietary security over ships in a cross-border context[145]: secured creditors wishing to take security over a ship under a foreign flag would no longer face the additional cost and effort of ascertaining and complying with procedural requirements for the registration of ship mortgages or *hypothèques* under a foreign law, depending on the relevant State of registration.

A single International Register set up under the CTC system would also make searches for existing security interests easier (arts. 18.1 and 22 CTC); improving access to the register (art. 26), simplifying the cancellation of the security interest once been discharged (art. 25); the publicity function of registered security interests is greatly enhanced compared to that of registers operated by traditional methods and on a purely national level. A unified register for ISI would also be of great advantage in situations of a demise or bareboat charter where the ship may, under the laws of some jurisdictions, be temporarily registered in a secondary register under another flag chosen by the charterer. Under the current system, interests registered in the original register would not be visible for third parties through a search of the secondary register[146]. With a unified register, both inscriptions for international interests (conditional sales or leases) over a ship will be at the same place.

However, although this is correct as a matter of law, the shipping Protocol will have to face with the jealousy of the States who guard their role in registration proceedings. Although this assignment of the sovereignty has already happened (Aircraft Equipment Protocol), many Contracting States and International Organizations will be wondering if this they will be willing to concede, much more to an IR under the shipping Protocol[147].

5. Conclusions

The law of security interests over ships (under the legal form of common law mortgages or civil *hypothèques*) is characterized by strong divergences between the various legal systems –especially for creation, third-party enforcement, priority and conflict of laws rules-, as well as by a high degree of uncertainty for market participants (mainly secured creditors, due to the lack of knowledge of the governing law in the event of litigation). This diversity of national legal regimes is compounded by the lack of success of the International Conventions on mortgages and *hypothèques* (MLM 1926, 1967 and 1993 - the sum of the three, regarding Contracting States, does not reach half of the States that have ratified the Cape Town Convention).

This places secured creditors at the risk of losing their secured position, in particular by failing to have their security interest recognized against a vessel in the courts of a foreign State, for an inadvertent failure to comply with the procedures for registration under a foreign registration law or the unforeseen application of rules on the order of priority under the law of the forum (*see supra* Brazilian case as a modern example). These risks will reduce the accessibility

145 BOGER, O., "The case for a new Protocol...", cit., pp. 94-95.

146 *See* para 2.2.

147 As some author has synthetized, "the competitiveness and jostling between registries and jurisdictions as well as the occasional desire for opaqueness which characterizes some in the maritime sector means that the brilliance of a solution may not necessarily appeal to those who do not want such a solution". *See* POWER, V., "Commentary on 'Assessing...", cit., p. 106.

to financing in an international context and will increase its cost, which, at the end, is clearly unfavourable for the future debtor. A Shipping Protocol of the CTC would be mainly beneficial for secured creditors and non-maritime creditors as well, who would see how their positions in the creditors ranking in case of insolvency rise up given that there are no international maritime privileges such as those recognized by the MLM Convention (art. 2 MLM 1926 and art. 4 MLM 1993). Therefore, the lienholders will be injured parties by the Protocol.

The drafting process of a new Protocol to the Cape Town Convention covering ships (or even offshore platforms or container fleets) could be a treasured contribution to the law of maritime security rights, specially:

(1) the unification of the various security interests or rights existing under a single and functional approach, (registered) ISI, accepted throughout the Contracting States, would eliminate the perceived risk (specially the non-recognition of the registered ship mortgage by the Courts of the foreign State which the claim is filed) under the argument that the security interest is recorded not in the State of the forum, but under the law of the flag;

(2) harmonization of the registration requirements for consensual collateral over ships by introducing a unified and efficient electronic registration system in an IR (where the viability has already been demonstrated in practice for security rights in aircraft), eliminating the various procedures for the creation or perfection of mortgages/*hypothèques* currently required by different legal systems.

(3) unification of the rules on priority between mortgage on ships, thus reinforcing the certainty of international foreign trade transactions and the risks arising from the diversity of legal regimes according to the State of the forum;

(4) establishment of a harmonized set of remedies available in case of default instead of the traditional distinction between common law and civil law remedies;

The solutions proposed by the detractors to the drafting process of the shipping Protocol are based on the reform of national laws (incorporating some of the solutions proposed by the CTC system) and the higher acceptance of the existing international instruments, which seems unlikely in these days (have already lapsed more than 25 year since the last of the conventions in force). However, both measures could not afford some of the advantages mentioned: the creation of an ISI and the unification of the registration system.

The elaboration of a shipping Protocol should, nevertheless, deal very carefully with the great obstacle that the CTC has for its opponents in the maritime circles: the limited treatment of maritime liens. The lack of concern of the drafters of the Convention for these non-consensual rights, due to the smallest importance they have in the aeronautical field, constitutes an imbalance with the importance that these have in maritime industry, both for maritime service providers (bunkering, repairers, pilotage, tug services, etc.), and, especially for Contracting States which will see how the list of internationally recognized privileges (art. 4 MLM 1993) are reduced to two single provisions (arts. 39/40 CTC). Additionally, they also require an express declaration in this respect and whose recognition by foreign Contracting States is doubtful if they do not have a statement on the same non-consensual right or interest[148].

[148] If Spain would ratify the future Shipping Protocol and a creditor claims for the arrest of the ship before a Spanish Court (enforcing a maritime lien), this will have to study what is the applicable law to the claim: If the applicable law, applying the conflict-of-law rules, is the Spanish one, it will only give priority (o enforce first) those maritime liens that have recognised by an express declaration under art. 39/40 provisions (the Court will have to apply the CTC, in force in Spain, if the formal and geographical requirements are fulfilled). If the applicable law, according to the conflict-of -law rules (art. 10 of the Spanish Civil Code redirects to the law of the flag) is the law of a Contracting State that has made a declaration of maritime liens, then the Court must prioritize

Strengthening the position of security interests on ships would be of great importance for the financing of the maritime industry, as it has been for aeronautics. Its involvement in the future drafting process of the Protocol, its demands, as well as its specialized knowledge of the market, would be essential for the success of a harmonized solution. There would be interesting to see the following steps of the CMI, especially in waiting for the outcome of the reception and study of the questionnaire sent to the various National Maritime Law Associations. The degree of participation, their responses and comments will be a first preview of the feasibility of the project. The conclusion of the gathered information by that process would not only be rich in terms of the detail but essential to the 'next steps' to be taken.

In conclusion, there is an *opportunity* [(1) difficulties in harmonizing appropriate solutions to the recognition of mortgage guarantees on ships in the courts of a foreign State; (2) or for an inadvertent breach of registration procedures under a foreign registration law; (3) the unforeseen application of rules of order of priority under the law of the forum; Together with the lack of recognition of international conventions on the subject] and there is a *possibility* (the Cape Town Convention has proved its success in a similar sector - aeronautics and railways - among lawyers, academics, sector operators and financiers). It is now necessary to determine whether there is the political determination (governments, industry and interested circles) necessary to carry it out. Should UNIDROIT and the CMI continue their work on this project. If they do, the shipping Protocol could become, by their importance, another successful addition to the Cape Town Convention system.

The limited success of the MLM 1926/1993 and the scant likelihood of further accessions, added to the fact that much of the work is already done (the CTC system as a whole has been assumed by more than 73 Contracting States), argue in favor of a new international instrument on Security Interests over ships. We must wait, however, to see what happens to the MAC Protocol. Its future may well condition the final fate of a feasible Maritime Protocol.

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them over another kind of encumbrances. Only if the Contracting State has made a declaration either under art 39 or under art 40 including the lien claimed by the unregister creditor, then the Court will grant it, even if that lien is not in the declaration list of Spanish N-CRoI. Otherwise, the lienholder will see his claim subordinated.

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SHIPBUILDING CONTRACT – A VERSATILE LEGAL FRAMEWORK: GUARANTEE PERIOD CLAUSE IN A CIVIL LAW SYSTEM

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SUMMARY

The paper examines the issue of guarantee period regularly present in the standard shipbuilding contract forms, as opposed to the general damage compensation claim available through the Croatian legislation (civil law tradition). The shipbuilding process contains a transition from a full to limited, and finally no liability on the side of shipbuilder. In general, during the shipbuilding phase, the shipbuilder retains full responsibility and liability, additionally reinforced by a constant supervision on the side of buyer and classification society. Prior to the vessel delivery, it is necessary to undergo various testing procedures, that are finalized with the final sea trail(s) and class assignment. Successful trails and class assignment, followed by the vessel delivery, usually mark the fulfillment of main shipbuilder's contractual obligations. In practice, after that moment, a significant portion of responsibility and liability for damage is transferred to the buyer, with the shipbuilder significantly limiting the exposure to liability with the guarantee period mechanism. The guarantee period clause usually sets a one year time bar, and with the expiration of one year, the question is posed on whether the buyer is capable to claim additional (or other) damage compensation.

The guarantee period sets different obligations for both sides to a contract. The buyer, in general, is under an obligation to exercise due care and attention with regard the vessel's maintenance and expected utilization (as anticipated in the contract). The shipbuilder, in general, during the one year time-frame assumes further responsibility to, if properly notified (up to 30 days from damage) provide replacement for damaged parts of equipment and other parts (allowing for a new guarantee period for the replaced parts, up to 18 months from delivery as a time cap), and perform repairs or reimburse the costs of such repairs (in agreement with the buyer). The shipbuilder is, depending on the guarantee period clause wording, not liable for: delay, defects not specified in the guarantee period clause, direct, indirect or consequential damage, and, expenses or loss (including, ie: loss of time, loss of profit, loss of earnings, demurrage costs, port costs). With the expiration of one year time bar, it is no longer possible to, in accordance with a contract containing a guarantee period clause, enforce further liability compensation. In addition, the guarantee period clause usually contains specific wording that places the guarantee period mechanism in lieu of any conditions implied by law, statutory obligations or customary obligations. Should the shipbuilder receive any guarantees from

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various contractors involved in the shipbuilding process, such guarantees are assigned to the buyer after the guarantee period has expired.

To test the possible application of general damage compensation with the noted guarantee period clause, a hypothetical scenario will be analyzed. The shipbuilding phase has been successfully completed, achieved in auspices of constant supervision by all involved parties, successful individual testing, successful sea trial and class assignment. The shipbuilder has delivered the vessel, the buyer has made the payment, and the vessel has engaged in the anticipated commercial activity. Following several months of uninterrupted operation, the vessel has experienced serious equipment failure (ie, engine or auxiliary engine failure) due to a faulty component. The engine/auxiliary engine has been provided by a producer nominated by the buyer in the Maker's List, whereas the faulty component (the part that has caused damage to the engine/auxiliary engine) has been provided by a third-party producer (not nominated by the buyer on the Maker's List) to the engine/auxiliary engine producer. The Maker's List is an annex to the shipbuilding contract, and the shipbuilder is under an obligation to procure specified materials and equipment from the nominated producers and providers. The master of vessel has directed the vessel to a near-by port for repairs, and the buyer (shipowner) has suffered various costs and damage, including: towage costs, repair costs, loss of time, loss of earning and other associated costs (including the crew costs, fuel costs, supplies costs, etc.). As the incident has occurred during the guarantee period, the buyer has immediately notified the shipbuilder, who, in turn, dispatched the replacement parts and agreed to compensate certain costs. As the sum of compensated costs does not cover all costs, the buyer now considers pursing full damage compensation from the shipbuilder.

The Croatian Maritime Code (MC) contains special provisions on the shipbuilding contract (a rare example of shipbuilding contracts being specifically regulated as a sui generis contract). In accordance with Art. 430 MC, the shipbuilder in under a general obligation to construct the vessel, and the buyer is under a general obligation to make the payment. Art. 433 MC sets the strict liability standard of performance on the side of shipbuilder (strict liability principle), requiring the shipbuilding to be done in accordance with the contract and professional standards. The constructed vessel, therefore, must conform to all requirements necessary for seaworthiness and class assignment. An exception to the strict liability standard (Art. 435 MC) is, however, available if materials and equipment have been ordered from producers or providers nominated by the buyer. In the case of defects on the noted materials or equipment, the shipbuilder's responsibility is presumed (presumed fault principle), unless the shipbuilder can prove that the defects could not have been avoided by utilizing the due care (professional diligence in accordance with lex generalis, the Croatian Obligations Act (OA, Art. 10)). In accordance with Art. 438 MC, all visible (material) defects must be reported prior to vessel delivery, with the shipbuilder retaining liability for such defects. In case of hidden defects (Art. 439 MC), the shipbuilder's liability is time-barred to one year from the delivery (Art. 411 MC).

The pending questions, among others, include the following two issues: (a) with regard the materials and equipment (including the vital components) utilized by the producers nominated by the buyer in the Maker's List, are the third-party producers of such materials and equipment directly responsible to the buyer, producer nominated in the Maker's List, and/or shipbuilder?; and, (b) is the shipbuilder responsible for the nominated (Maker's List) producer's choice of materials and equipment provider (including the vital components) in terms of the quality requirements? To answer these and associated issues, the pending analysis will make a thorough (and, where appropriate, comparative) analysis of the relevant primary (MC) and secondary (OA) legislation and case practice, with a particular focus on the general legal framework (as regulated by OA) of contract of sale and purchase, contract of work and product liability, and their possible applicability in the default hypothetical scenario. In addition, the pending analysis will assess other possible issues, based on the default hypothetical scenario, that might arise when utilizing standard shipbuilding contract forms based on English and Welsh law and standard English and Welsh case practice, in the civil law tradition, such as is the case of Croatian statutory framework and available case practice.

Key words: *Shipbuilding Contract, Guarantee Period Clause, Standard Terms and Conditions, Shipbuilder's Responsibility and Liability*

1. Introduction

The Croatian shipyards often utilize variations of commonly used standard shipbuilding contract forms, especially if the ordering party is a foreign buyer. Such forms are often drafted in line with the common law systems' established practice. Problems may arise when a contract form, based on the common law system's preferences, mandates a civil law system jurisdiction and domestic law as applicable law. The issue is especially highlighted when an exemption or limitation clause, such as is the guarantee period clause, is contrasted with general damage compensation opportunities on the side of injured party (ie, buyer in the shipbuilding contract) as established through relevant statutory regulation. The paper aims to analyze such possible discrepancy, and place forward opinions with regard the overall effects of general liability norms on the application of standard shipbuilding contract clauses in the civil law setting.

To that purpose, a hypothetical scenario will serve as a method of analysis. Following a successful vessel construction, with no remarks on the side of supervisors and ordering party (ie, buyer, classification societies, etc.) as to the final testing of various equipment and machinery, sea trials and class assignment, the vessel is delivered to the buyer and begins serving its commercial purpose. At a certain stage in its early operation, within the first few months of its maiden voyage, the vessel experiences serious machinery failure, caused by malfunctioning parts that are a part of a more complex machinery item (ie, engine). The machinery item has been produced by a sub-contractor (third-party producer) nominated by the buyer in the Maker's List. The malfunctioning parts (that were inserted in the machinery item by the machinery producer) have, in turn, been produced by another third party who served as a sub-contractor to the machinery producer, and who was directly chosen by the machinery producer (and was not nominated in the Maker's List). The machinery failure caused immediate costs such as: repair costs, port facility utilization costs, towage costs, extra fuel costs, extra supplies costs, loss of time, loss of earnings, loss of market, etc. The shipbuilder's response was triggered through the guarantee period clause, with the shipbuilder accepting the repairs to be made in a near-by port (as to the vessel's location at the time of defect, making it impractical for a long towage to the shipyard of origin), covering the repair costs, and sending the necessary replacement parts (obtained in the market after the defect notification). The shipbuilder declined to cover other costs, arguing that the same are excluded through the application of guarantee period clause.

The pending questions, to be analyzed in the context of Croatian regulatory framework – with a special emphasis on general liability rules in connection to the sale and purchase contract, contract of work and product liability rules – as a representative civil law system, highlight the following initial issues. First, with regard the materials and equipment utilized by the producers nominated by the buyer (Maker's List): are the third-party producers of such materials and equipment directly responsible to the buyer, and/or producer nominated in the Maker's List, and, and/or shipbuilder? Second, is the shipbuilder responsible for the nominated producer's choice of materials and equipment provider in terms of the quality requirements? To understand the rationale behind the possible issues and discrepancies that might arise by contrasting the private-law derived contractual clauses with a statutory regime in the civil law tradition, it is necessary to examine the nature of shipbuilding contracts in the context of codified shipbuilding contract norms.

2. Rationale behind Shipbuilding Contract Codification

The nature of shipbuilding contract is usually comprised of various standpoints and characteristics, either pertaining to a close link with a particular type of a more general category of contracts (ie, contract of sale, construction contract, contract of work, etc.), or a mixed, hybrid variant. Even if a shipbuilding contract is presented as a *sui generis* contract, codified by national regulation, rarely will such a codification provide all necessary specifications sufficient to mark a clear separation of the said contract from other similar contracts, and, potentially applicable norms regulating other, similar contracts. Such is the case with the Croatian Maritime Code (MC),[1] that codifies the shipbuilding contract (already present in the Yugoslav codification) as will be analyzed in further text.

The general recommendations with regard the codification of Yugoslav Maritime Code envisaged the incorporation of shipbuilding contract into the maritime code with hopes of negating the consequences of amphibious nature of shipbuilding contracts in general, torn between the maritime law norms and general civil law regulation.[2] Such view was enforced by legal considerations pertaining to significant differences between a shipbuilding contract on one side, and a standard contract of work and contract of sale on the other. Given the fact that a vessel under construction already incorporates certain elements of a sea-faring vessel (including the ship registry for vessels under construction, mortgages on vessels under construction and specific marine insurance for vessels under construction), the prevailing opinion adhered to the incorporation of a specific body of law on shipbuilding contracts, seeing no major objections to such legal novelty.

Similar regulation at the time has been present in the Italian 1942 Maritime Code[3] (Art. 232 to 245, contratto d' appalto as a *sui generis* contract[4]) and in the French 1967 Law on seafaring vessels' status[5] (Art. 5 to 9, not a *sui generis* contract, but falling under the application of *vente a` livrer* general contract – sale and delivery), and served as a general inspiration as well as confirmation with regard the intention of incorporating the shipbuilding norms into the new maritime code. It is relevant to mention that the German doctrinal approach at the time viewed the shipbuilding contract as the so-called *Werklieferungsvertag* (West Germany, BGB classification, subject to HGH specification on trade purchases – a mix of contract of work and contract of sale where the main shipbuilder's obligation is not only focused on vessel delivery but also on the transfer of ownership on utilized materials and equipment to the buyer) or *Werkvertrag* (East Germany, contract of work). With regard the common law systems, the 1893 Sale of Goods Act in England served as the principle source of shipbuilding contract qualification (contract of sale, more specifically, related to "future goods" provisions), and a similar qualification was present in the United States through the application of 1962 Uniform Commercial Code.[6] It also has to be mentioned that, depending on different aspects of shi-

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1 Pomorski zakonik, Narodne novine (NN) 181/2004., 76/2007., 146/2008., 61/2011., 56/2013., 26/2015.

2 For more, see: Magazinović, H. (1968), *Odgovornost brodograditelja za kvalitet broda*, Split, Pravni fakulet Sveučilišta u Splitu, p. 5 *et seq*.

3 *Codice della navigazione 1942*. For a translation to English, and associated commentary, see: Manca, P. (1969), *The Italian Code of Navigation: Translation and Commentary*, Milano, Dott. A. Giuffrè Editore.

4 For a thorough analysis of the concept of vessel and the concept of shipbuilding contract in Italian law and doctrine, see: Kompanjet, Z. (1969), *Stvarnopravni aspekt broda u gradnji*, Beograd, Institut za uporedno pravo, p. 9 *et seq*.

5 *Loi No 67-5, du 3 janvier 1967, portant statut des navires et autres bastiments de mer*.

6 For more national law comparison, especially with regard the Greek law that, together with the Italian Mariti-

pbuilding process, certain activities where recognized by the case practice as predominantly a contract of work activities (ie, engine implementation).[7]

One of the main issues that needed to be considered prior to the shipbuilding contract codification was the question on whether a shipbuilding contract fits better within the concept of contract of sale or contract of work, or whether it is a mixed, *sui generis* type of contract. The choice obviously presupposes a potential applicability of relevant regulation, either on the side of general property regulation or general contract performance regulation. The latter is especially complicated given the practical nature of shipbuilding, where different production and associated aspects significantly influence the shipbuilding activity. For example, who provides for the blueprints (design) and technical specifications, who provides the materials, who owns materials and equipment during the shipbuilding process, who chooses various materials and equipment providers and sub-contractors, etc. In Roman Law, the afore mentioned elements made a significant impact on whether the contract (especially with regard the building of ships) was to be understood as *emptio venditio rei speratae* or *locatio conduction operis*. In ancient times,[8] due to the fact that the materials where supplied by the client, the nature of shipbuilding was usually associated with the contract of work qualification. It is important to note that the mentioned qualification with regard the supply of materials in modern legal systems no longer represents the key element with regard the contract qualification.

In accordance with the legal reasoning at that time when the shipbuilding contract codification has been considered, and based on older legislation,[9] in case that the shipyard is responsible for all aspects of shipbuilding process, especially with regard the necessary materials and equipment, and provided that the shipbuilding contract does not stipulate differently, the shipbuilding contract is to be considered as a contract of sale and purchase, where a vessel of certain specifications corresponds to the sale of future things (*emptio venditio rei speratae*). With the emergence of special registries for vessels under construction, this opinion is only reinforced. In other cases, where the buyer takes part in the shipbuilding process, either through instructions, main project preparation (including design), specifications, materials' and equipment' supply or other aspects, the shipbuilding contract places more focus on actual conduct on the side of shipbuilder, thus brining this type of shipbuilding contracts into the realm of contract of work (*locatio conduction operis*). Whereas the first category is based on the transfer of right (transfer of ownership over the constructed vessel) and specific result (particular type of vessel) as its primary purpose, the other is based on a specific conduct (professional shipbuilding skill and knowledge in accordance with professional standards and contract specifications) and a specific result (particular type of vessel). The matter is further complicated by the fact that, in accordance with the Croatian law (namely, Art. 214 MC) and other similar systems, the right of ownership is, among other things, transferred exclusively through the appropriate deletions and entries in ship registries, that must follow (and are usually performed simultaneously with) the vessel delivery.

In older practice,[10] the relevant norms with regard the contract of purchase and sale were usually applied in cases when shipyards built vessels in stockpiles or when the ordering party

me Code, served as a primary source of shipbuilding contract codification, see: Hlača, V. (1995), Unifikacija prava pomorske brodogradnje, *Uporedbno pomorsko pravo*, v. 37., (1.-4.), pp. 269-282, p. 271 *et seq*.

7 See: Magazinović, *op.cit.*, p. 30.

8 Magazinović, *id.*, p. 17.

9 See: Brajković, V. (1965), Neka uvodna pitanja o ugovorima o gradnji brodova, *Savjetovanje o pravnim problemima ugovora o građenju i popravku brodova*, 2.-4. VI, Referati I, Rijeka, p. III *et seq*.

10 See: Magazinović, H. (1979), *Ugovor o gradnji broda*, Split, Pravni fakultet Sveučilišta u Splitu, p. 12-14.

canceled the contract at the stage when the vessel is almost constructed. In other cases, where the ordering party took part in the shipbuilding process, the contract of work framework was to be applied, drawing certain similarities with the construction contracts.[11]

In current practice, depending on the jurisdiction, the shipbuilding contracts are usually not codified, but rather fall either into one of, or represent a mixture of the two following categories: contract of sale, and, contract for work and materials.[12] Older case practice in the United Kingdom usually pointed to the application of contract of sale framework, as visible in the *McDougall v. Aeromarine of Emsworth Ltd*.[13] Recent case practice, however, such as is the example of *Stocznia Gdanska SA v Latvian Shipping Co*[14] and *Hyundai v Papadopoulos*[15] reflects the continuous ambiguity of shipbuilding contracts (being reviewed under the auspice of a mixed, hybrid concept, based, usually, on the contract of sale and contract of construction), depending on the facts of each individual case.[16]

3. Croatian Statutory Framework

MC contains special provisions on the shipbuilding contract (Part VII, Head I, Art. 430-441), this being a rare (but not entirely uncommon, as noted earlier) example of shipbuilding contract being specifically regulated as a *sui generi*s contract. It has to be stressed, however, that even if the shipbuilding contract is a nominated contract, such qualification does not automatically exclude the application of other *lex specials* and *lex generalis* norms, depending on the level of detailed regulation available through the MC shipbuilding related norms (as analyzed in the further text).

Art. 430/1 MC stipulates the main responsibilities of contracting parties. Shipbuilder is under an obligation to construct a vessel in accordance with the project (design) and technical documentation, within the agreed deadline. The ordering party is under an obligation to pay the stipulated price. Given the fact that, in practice, the Croatian shipyards utilize standard contract forms, the ordering party corresponds to the "Buyer" in line with the wording of English and Welsh law and practice, as well as other jurisdictions that have produced standard shipbuilding contract forms. MC stipulates, as noted earlier, that in case when something is not regulated by MC, the norms of *lex generalis* will be applicable. In the context of current examination, the relevant act is the Croatian Obligations Act (OA).[17] MC remains to act as *lex*

[11] See, however, the analysis in: Tasić, Z. (2001), Ugovori o gradnji broda i hrvatska pravila o mjerodavnom prvu i sukobu zakona, *PPP*, god. 40 (2001), 155, pp. 143-152, p. 145 *et seq.*, where the author warns that the principles arising out of standard construction contracts are not applicable in the shipbuilding contracts' context.

[12] For more basic information and basic comparison between several jurisdictions, see: Clarke, M.A. (1972), *Shipbuilding Contracts: A Comparative Analysis of Contracts in the Major Maritime Jurisdictions*, London, Lloyd's of London Press Ltd, 7th edition, p. 13-16.

[13] McDougall v. Aeromarine of Emsworth Ltd [1958] 2 Lloyd's Rep. 345.

[14] Stocznia Gdanska SA v Latvian Shipping Co [1998] 1 Lloyd's Rep 609. For more information, see: Lorenzon, F., Campàs Velasco, A. (2014), Chapter 2: Shipbuilding, Sale, Finance and Registration, Yvonne Bart (ed.), *Maritime Law*, London, informa law from Routledge, 3rd edition, p. 68-69.

[15] Hyundai Shipbuilding & Heavy Industries v Papadopoulos [1980] 2 Lloyd's Rep 1, 5 (HL).

[16] For more information and analysis, see: Mandaraka-Sheppard, A. (2012), Chapter 3: Shipbuilding Contracts and Termination Issues, Attard, D.J. (gen ed.), *The IMLI Manual on International Maritime Law, Volume II, Shipping Law*, Oxford, Oxford University Press, p. 43. See especially: Curtis, S. (2012), *The Law of Shipbuilding Contracts*, London, informa, 4th edition, p. 1-4.

[17] Zakon o obveznim odnosima, NN 35/2005., 41/2008., 125/2011., 78/2015.

specials – the principle legal source with regard the shipbuilding disputes – as was confirmed by the Croatian courts.[18]

3.1. Strict Liability Principle

In accordance with MC, the shipbuilder is responsible in line with the strict liability (objective responsibility) principle. Art. 430/1 MC, as noted earlier, stipulates that the shipbuilder is under a general obligation to construct the vessel as dictated by the shipbuilding contract and professional standards, and the buyer is under a general obligation to make the payment. The constructed vessel must conform to all requirements necessary for seaworthiness and class assignment (Art. 433 MC). Similarly, standard shipbuilding contract forms stipulate the shipbuilder's obligation to construct a vessel that will fit all requirements to be assigned a specific class. Failure to meet the specific criteria with regard the class corresponds to the failure to fulfill the basic shipbuilder's obligation. The class assignment (in cooperation with one or more classification societies involved during the shipbuilding phase), testing phases and sea trail phase(s) are regularly stipulated through a contract. The class assignment is usually accompanied by various certificates that a vessel under construct must conform to in order to reach or adhere to a specific class assignment. The choice of classification societies and the choice of shipyard – what corresponds to the requirements issued by various regulatory bodies in the jurisdiction where the shipyard is located – presumes an additional set of shipbuilding rules, norms, expectations and other requirements that must be fulfilled by the shipbuilder. The buyer, classification society and other vested interests are entitled to supervise the entirety of shipbuilding process (as regulated both through the contractual stipulations as well as statutory norms, as is the example of Art. 434 MC). The contractual stipulations often allow additional rights to the supervisors, allowing, among other relevant things, the sea trials participation, where the mutual agreement over the sea trials' results often represents a crucial moment as to the recognition of vessel's construction in accordance with the contract and standard practice (no negative remarks as to the quality and functionality of the vessel).

The class assignment is the final confirmation that the shipbuilder has fulfilled the principle obligation. This corresponds to the buyer's obligation to accept the delivery of vessel. In practice, such delivery is performed even in the case of minor notes and recommendations issued by relevant bodies and entities (ie, classification society, buyer) as to the additional work that needs to be performed by the shipbuilder, provided that the noted defects do not impair the commercial value and usability of vessel. Such practice is often regulated by standard shipbuilding contract forms, and such work will often be performed under the auspices of guarantee period (as analyzed in the further text).

A failure to meet these requirements equals the responsibility on the side of shipbuilder. MC allows for a limited number of exemptions with regard the shipbuilder's responsibility (Art. 436 MC): a) if defects are a result of specific requirements or demands on the side of buyer, provided that the shipbuilder has warned the buyer about possible negative outcomes, if such negative outcomes could have been detected by utilizing due diligence on the side of shipbuilder; b) if materials, that are provided by the buyer, are, upon inspection, found to be defective, and the buyer is notified by the shipbuilder, and if the buyer nevertheless insists that such materials are to be utilized; and, c) if the shipbuilder is not the project (design) ma-

[18] See, for example, the decision: Pž 4798/02-4, Visoki trgovački sud Republike Hrvatske (High Commercial Court of the Republic of Croatia), 9.8.2005.

nager, the shipbuilder is responsible for defects resulting from project only if such defects in project could have been detected by utilizing due diligence; the shipbuilder will not, however, be liable in such case if the buyer has insisted that the project is to be followed despite the detected deficiencies.

3.2. Presumed Fault Principle

An exception to the strict liability standard is available (Art. 435 MC) in case where the materials and equipment have been ordered from producers or procurers nominated by the buyer (ie, through the Maker's List). In the case of defects on the noted materials or equipment, the shipbuilder's responsibility is presumed (presumed fault principle), unless the shipbuilder can prove that the defects could not have been avoided by utilizing the due care (professional diligence in accordance with *lex generalis*, Art. 10 OA).

Irrespective of whether the basic principle of responsibility and liability is based on the subjective (fault principle) or objective (strict liability) principle, the shipbuilder's conduct is reviewed during the whole shipbuilding process. The latter is also relevant with regard the materials and equipment procured by the buyer (or through the producers or procurers nominated by the buyer), with the shipbuilder being under the obligation to test and/or examine all materials and equipment so procured in order to determine whether the materials and equipment are fit for further utilization during the shipbuilding process.

3.3. Visible and Hidden Defects

Once the class has been assigned and the vessel deliver, in principle, the shipbuilder has meet all obligations and shipbuilder's responsibility ends (condition requirement). The statutory exception is available through the responsibility for hidden defects, whereas the contractual exception – with the exception of minor additional works that do not impair the delivery (as mentioned above) – is made available through the guarantee period mechanism (warranty requirement). The establish case practice recognizes such eventualities, readily accepting the mutual understanding of contracting parties that such defects will be annulled by the shipbuilder during the guarantee period, as is visible in the case example *J. Samuel White & Co. Ltd v. Coombes, Marshall & Co. Ltd*.[19]

In accordance with Art. 438 MC, all visible (material) defects must be reported prior to vessel delivery, with the shipbuilder retaining liability for such defects even if the buyer (or other supervising bodies) has failed to report such defects.[20] In accordance with the same provision, the buyer reserves the right of general damage compensation irrespective of the right to cancel the contract (or demand lower price), or shipbuilder's actions with regard repairs and defects' annulment.[21]

Final sea trails followed by signatures of all involved parties (clean certificate principle, with no special remarks) serve as a legal presumption that the vessel is constructed in accor-

[19] J. Samuel White & Co. Ltd v. Coombes, Marshall & Co. Ltd (1922) (1922) 13 Ll.L.Rep. 199.

[20] For example: Revt 14/2009-2, Vrhovni sud Republike Hrvatske (Supreme Court of the Republic of Croatia), 21.11.2011.

[21] For a more detailed analysis of several standard shipbuilding contract forms as well as a comparative analysis of national law, see: Clark, *op.cit.*, Chapter 9. For a wider overview, see: Anderson, R. C., Taylor, J., Pett, C., Shish, J. (1955), A Collection of Shipbuilding Contracts, *The Mariner's Mirror*, 41:1, p. 47-52.

dance with all relevant expectations,[22] thus concluding the scope of application of the examined legal regime available through Art. 438 MC.[23] This corresponds to the *res perit domino* principle, whereby the risk is transferred from the shipbuilder to the buyer at the time of vessel delivery.

In case of hidden defects as per Art. 439 MC, the shipbuilder's liability is time-barred to one year from the delivery (Art. 411 MC). The time-bar corresponds to the typical length of a guarantee period clause in standard shipbuilding contract forms, and the Croatian case practice[24] readily accepts the recognition of hidden defects and the associated time-bar. The general Croatian case practice defines hidden defects a such defects that are impossible to be detected during a regular inspection. Instead, it is necessary to utilize a specialist inspection which often includes extraordinary and specialized services.[25] The usual example is the taking apart of an engine in order to inspect its functioning, and during the inspection, realizing that an engine part is defective. In the shipbuilding context, the regular inspections adhere to the shipbuilding phase regular testing and sea trails, whereas the specialist inspection refers to the defects discovered after the vessel has been put into commercial use, and has experienced certain malfunctions.

The application of Art. 438 and Art. 439 MC does not rely on the distinction between the subjective and objective responsibility principles. Therefore, it is necessary to review the statutory norms in line with what the standard shipbuilding contract clauses provide. The typical guarantee period clause relies on strict liability, with a limited scope of application and a wide scope of exemptions from liability, as analyzed in further text.

4. Guarantee Period Clause

The shipbuilding process contains a transition from a full to limited, and finally no liability on the side of shipbuilder. In general, during the shipbuilding phase, as examined above, the shipbuilder retains full responsibility and liability, additionally reinforced by a constant supervision on the side of buyer and classification society. Prior to the vessel delivery, it is necessary to undergo various testing procedures that are finalized with the final sea trail(s) and class assignment. In practice, successful trails and class assignment usually mark the fulfillment of main shipbuilder's contractual obligations, and are followed by the vessel delivery and appropriate ship registry deletions and entries (as mentioned earlier). Following the vessel delivery, a significant portion of responsibility and liability for damage is transferred to the buyer, with the shipbuilder significantly limiting its exposure to liability through the guarantee period mechanism. Precisely due to same reason, and in order to enhance the principle of equivalence between contracting parties, courts readily accept guarantee period claims (warranties in the context of English and Welsh law and practice), as is visible in the recent cases pertaining the warranties' compensation such as is the *Austen v Pearl Motor Yachts Ltd*[26]

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[22] Established as practice in 1962. See: Viši privredni sud NR Hrvatske, Prvostepena presuda od 20.XII 1962., available in: Prikaz sudske prakse, *Uporedno pomorsko pravo i pomorska kupoprodaja*, 5(1963), 17, p. 39-41.

[23] Compare: Triva, S. i dr. (1981), *Zakon o pomorskoj i unutrašnjoj plovidbi s napomenama i komentarskim bilješkama*, Zagreb, Narodne novine, p. 169.

[24] For example, see: Pž 4798/02-4, *op.cit*.

[25] For example, see: Rev 448/2004-2, Vrhovni sud Republike Hrvatske (Supreme Court of the Republic of Croatia), 16.11.2005.

[26] Austen v Pearl Motor Yachts Ltd [2014] EWHC 3544.

and *China Shipbuilding Corporation v Nippon Yusen*.[27] It is useful to remind that such practice usually takes into consideration the older practice's reasoning, as is the example of *Ackerman v Protim*,[28] where the *contra proferentem* principle was utilized in deciding the issue of possible contributory negligence on the side of buyer (ie, owner). Standard shipbuilding contract forms usually contain warranties in the form of a guarantee period.[29]

As noted above, the guarantee period is based on the principle of equivalency between contracting parties. The shipbuilder retains a duty to remove all hidden defects or compensate costs related to the hidden defects' manifestation. Such responsibility is limited in duration as to enhance the legal certainty on behalf of the shipbuilder, and limited in scope (as detailed below). On the side of the buyer, the buyers's position is enhanced through the stipulation of shipbuilder's strict liability (objective responsibility in the civil law systems), whereby the fault on side of shipbuilder (especially relevant in the civil law systems with regard the subjective responsibility) is irrelevant as to the establishment of shipbuilder's responsibility. The guarantee period system is, to a certain extent, codified in certain jurisdiction (such as is the Croatian legal system), and regularly present in standard shipbuilding contract forms. Its purpose, benefits for both contractual parties and equivalency rationale have been confirmed in case practice, as is the case with, for example, the *BHP Petroleum Ltd v. British Steel*.[30] Due to the complexity of modern shipbuilding, it is often the case that vessel's parts (various pieces of or parts of equipment and machinery) face various kinds of operational difficulties or malfunctions upon utilization, even with the best of care engaged on the side of shipbuilder and (buyer's, owner's (if sold by the buyer) or charterer's) crew. The guarantee mechanism recognizes this fact as a standard business model, and shipyards, as a matter of practice, offer additional services following the delivery of vessel in recognition of such occurrences, especially with regard the right to make the necessary repairs themselves (if possible). This is confirmed by standard case practice such as is the example of *Pearce & High Ltd v. Baxter*.[31] Whereas the buyer benefits by this model by means of not having to rely on third-party contractors to conduct the necessary repairs and replacements, the shipbuilder enjoys legal certainty both with regard the time span of this additional warranty obligation, as well as by the scope of the responsibility and liability exposure. Without such mechanism, the shipping industry would face unforeseeable compensation claims that would seriously hamper its longevity.

4.1. Main Obligations

The guarantee period clause usually sets a one-year time-bar, and with the expiration of one year, the question is posed on whether the buyer is capable to claim for additional or other damage compensation. The said clause sets different obligations for all sides to a contract, and usually, by wording, is placed in lieu of any guarantee and conditions imposed or

[27] China Shipbuilding Corporation v Nippon Yusen Kabukishi Kaisha and another [2000] 1 Lloyd's Rep. 367.

[28] Ackerman v. Protim Services Ltd [1988] 2 E.G.L.R. 259, C.A.

[29] For more general information, including the analysis of typical standard shipbuilding contract forms (namely, 1974 SAJ Standard Shipbuilding Contract, 1978 AWES Standard Shipbuilding Contract, 1980 MARAD (US Maritime Administration) Form, 2000 (NSC) Standard Form Norwegian Shipbuilding Contract, 2008 BIMCO Newbuildcon, and, 2012 CMAC Standard Newbuilding Contract), see: Tettenborn, A. (2015), Chapter 1. Contracting by Numbers: The Different Characteristics of the Main Shipbuilding Contracts, Soyer, B., Tettenborn, A., *Ship Building, Sale and Finance*, London, Taylor and Francis Group.

[30] BHP Petroleum Ltd v. British Steel plc [2000] 2 Lloyd's Rep. 277.

[31] Pearce & High Ltd v. Baxter [1999] B.L.R. 101.

implied by statutory or customary framework. The buyer, in general, is under an obligation to exercise due care and attention with regard the vessel's maintenance and expected utilization (as anticipated in the contract), an obligation that also extends to the vessel's machinery and equipment. Failure to adhere to this obligation enables the shipbuilder's right to deny the guarantee, as established by relevant case practice, such as is the *Ackerman v. Protim Services Ltd*.[32]

The shipbuilder, in general, during the one year time-bar (12 months) following the delivery and acceptance of constructed vessel, assumes further responsibility to, if properly notified (up to 30 days from defect being detected[33]), provide replacement for damaged parts of equipment and other parts (allowing for a new guarantee period for the replaced parts, up to 18 months from delivery as a time cap), and/or perform repairs or reimburse the costs of such repairs (in agreement with the buyer). More precisely, the shipbuilder assumes responsibility for such defects in ships' hull, engine and equipment, that render the contractually agreed vessel's performance capabilities insufficient. The measure of damage is, therefore, associated with the costs of replacement parts or repair costs, as confirmed by standard case practice, such as is the *East Ham Corporation v. Bernard Sunley & Sons Ltd*.[34] This, in accordance with the established English and Welsh case practice, includes the defects resulting from poor design, provided that the defects were not identified prior to the class assignment and delivery, as confirmed in *Aktiebolaget Gotaverken v. Westminster Corporation of Monrovia*.[35] If, however, defects are discovered after the expiration of guarantee period, the case practice, as established with, for example, the *Eagle Line Inc. v. Namura Shipyard*,[36] denies buyer's right to seek repairs or compensation. Similarly, as confirmed in the same case, if the buyer fails to adhere to the previously mentioned 30 days notice requirement on defect notification, the result will likely be the same.

Formally, the shipbuilder is not automatically responsible – the buyer must allow the shipbuilder access to and/or information with regard the cause and nature of defects in order for the shipbuilder to determine whether the defects fall under the shipbuilder's scope of responsibility.[37] This usually refers to the shipbuilder's right to personally inspect the detected defects. If this option is not practical, the buyer assumes responsibility to deliver to the shipbuilder an independent report with regard the defective materials or equipment, usually prepared by a classification society. This includes the shipbuilder's right to inspect the defective materials and equipment at its premises or most suitable premises at a later stage.

4.2. Scope of Application

Usually, the standard contract forms contain very specific and limited compensation rights on the side of buyer, although the wording in different forms may vary significantly.

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[32] Ackerman v. Protim Services Ltd, *op.cit*. For more, see: Curtis, *op.cit.*, p. 186 *et seq*.

[33] See: Neon Shipping Inc. v. Foreign Economic 7 Technical Corporation Co. of China and another [2016] EWHC 399 (Comm), where the court examined the application of the 1979 Sale of Goods Act with regard the time-bar, in the context of guarantee period clause.

[34] East Ham Corporation v. Bernard Sunley & Sons Ltd [1966] A.C. 406.

[35] Aktiebolaget Gotaverken v. Westminster Corporation of Monrovia (1971) [1971] 2 Lloyd's Rep. 505.

[36] Eagle Line Inc. v. Namura Shipyard Co. Ltd (The ''Elf'') (1985) Commercial Court, 25 March 1985, (1985) 145 LMLN 4. Similarly, see: BHP Petroleum Ltd v. British Steel plc, *op.cit.*, and China Shipbuilding Corporation v Nippon Yusen, *op.cit*.

[37] In case of fraud or intentional wrongdoing, such clauses will be invalid. For more, see: Curtis, *op.cit.*, p. 183 *et seq*.

Whereas the shipbuilder will usually acknowledge the costs of repair of previously noted defective materials and equipment (provided that such costs are "reasonable costs" – the case practice varies from the actual market value costs as paid in the place or repair (potentially understood as a "direct" loss[38]), to the value of costs that would be paid at the shipbuilder's premise[39]), the shipbuilder will not assume liability for compensation of associated costs, namely, towage costs, port costs and similar. In addition, the guarantee period clauses usually exclude the application of loss due to delay, direct or indirect (this varies between different standard shipbuilding contract forms, both in form and scope) consequential loss, such as: loss of time, loss of freight, loss of profits (earnings), demurrage costs, port costs and similar costs, expenses and loss.[40] Absence of clear wording, however, may lead to additional responsibility on the side of shipbuilder, as established by case practice (for example, see: *Gordon Allison & Co. v. Wallsend Slipway & Engineering Co. Ltd*[41]).[42] The guarantee period clause is often be followed by a special protocol, detailing the procedure with regard the claims falling under the scope of guarantee.

The guarantee period clauses often contain wording with regard the guarantee period expiration, that points to the practical effects whereby the shipbuilder's responsibility equals the unenforceable liability, and that the buyer's options are *de facto* limited to direct contacts with the producers of faulty materials and equipment. Some guarantee period clauses utilize the word "shall" when stating the noted buyer's option, thus further enhancing the limited validity of the guarantee period. Similarly, some guarantee period clauses utilize an even more precise wording with regard the effect of guarantee period, such as are the "absolutely unenforceable" or "forever at an end" phrases.

The guarantee period clause is a standard clause, and as such is recognized by the Croatian regulatory framework as well (in the context of hidden defects, as examined earlier). Unlike the contractual clauses that precisely define what is considered as shipbuilder's guarantee after the vessel delivery, the statutory framework offers no specific definitions or specification. This can be seen as a problematic feature, especially taking into consideration the potentially overwhelming risk on the side of shipyards should they be exposed to various layers of liability, especially given the plethora of damage that can arise due to hidden defects in vessel's hull and engine. At the same time, the principle of equivalency requires some burden of risk to be inherently anchored in the shipbuilder's position, even if for a limited amount of time.

At the same time, and especially having in mind that the domestic shipbuilding industry relies on both domestic and foreign orders, and taking into consideration that even the domestic orders are very often based on standard shipbuilding contract forms that resemble most

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38 See: Curits, *op.cit.*, p. 185, with regard the relevant case practice.

39 See, for example: Samuel White & Co. Ltd v. Coombes, *op.cit*.

40 For a more detailed analysis of several standard shipbuilding contract forms, see: Clark, *op.cit.*, at 114 *et seq*. In addition, for a detailed analysis of guarantee period clauses' wording through the examples of standard shipbuilding contract forms, see: Tettenborn, *op.cit.*, at 1.2.5. See especially: Curits, *op.cit.*, at 172 et seq. Note the London arbitration case detailed by Curtis where the tribunal awarded additional damages, Curtis, *id.*, p. 180. In connection to the previous point, Curtis also refers to practice where the costs of repairs were too high to be reasonably acceptable, or no repairs were made at all, thus transferring the claim's focus on the loss of market value (Ruxley Electronics and Construction Ltd v. Forsyth [1995] 3 W.L.R. 118, H.L., Sealace Shipping Co Ltd v. Oceanvoice Ltd [1991] 1 Lloyd's Rep. 120, and, Southampton Container Terminals Ltd v. Schiffahrisgesellsch ''Hansa Australia'' GmbH & Co. [2001] EWCA Civ 717). For more, see: Curtis, *ibid*.

41 Gordon Allison & Co. v. Wallsend Slipway & Engineering Co. Ltd (1927) (1927) 27 Ll.L.Rep. 285, C.A.

42 For more, see: Curtis, *op.cit.*, p. 182 *et seq*.

frequently used ones in general, it is necessary to strike balance between the statutory requirements and practical needs. The latter is of a particular importance if ones seeks remedies outside of the MC framework, and in the realm of general compensation regulation (ie, OA), what potentially might turn the whole guarantee period concept on its head. The noted issue will be analyzed in further text, taking into consideration the specific shipbuilding contractual arrangement that arises from the utilization of the so-called Maker's List, that is analyzed next.

5. Maker's List

The shipbuilder is under an obligation to procure materials and equipment[43] from producers or procurers nominated in the Maker's List.[44] The nominated producers and procurers may be deciding by both contracting parties in conjunction, or they may be chosen exclusively by one party (most often, by the buyer). In case that the shipbuilder and buyer have contracted the construction of several vessels (in line), the Maker' List may, if so agreed by the parties, be relevant for all vessels, based on the "as built" principle, with the reference to the first constructed vessel. If a particular material or equipment is not listed as a category in the Maker's List, the shipbuilder is, in principle, free to make a choice with regard the type of material or equipment, producer of material or equipment, or procurer of material or equipment. Such materials and equipment must, however, conform to the contractual specifications as with regard the quality and technical conformity. In case of several vessels being built in line, such materials and equipment must conform to the quality and technical conformity as was the case with previously built vessels. Often, the Maker's List contains a choice between several materials' or equipment's producers or procurers. In such case, the shipbuilder is free to choose the producers or procurer, but remains responsible with regard the conformity of materials and equipment so chosen with the contract specifications and plans, as well as technical conformity. Another usual contractual clause enables the shipbuilder to substitute the producers or procurers on Maker's List with other producers or procurers in case the nominated producers or procurers are not able to provide the shipyard with the required materials and equipment in time necessary to meet the contractual deadlines with regard the vessel construction. Very often, the nominated producers and procurers rely on a third layer of producers and procurers, thus significantly widening the number of persons involved in a single shipbuilding process. The latter option is also relevant with regard the responsibility and liability issues, as will be discussed in further text.

[43] Usually, such a document contains references to the following materials and equipment: steering gear, anchoring winches, mooring winches, paint, cargo deck crane, fixed pitch propellers, auxiliary diesel generators, exhaust gas boilers, auxiliary steam boilers, FO/LO separators, centrifugal pumps, generators, switchboards, distribution board, group starter panels, emergency switchboards, monitoring mechanisms, alarm mechanisms, control mechanisms, integral navigation and radio communications, GMDSS and SATCOM equipment, ME/AW booster modules, compressors, fresh water generators, emergency generator engines, heat exchangers, hatch covers, ballast valves, stern tube sealings, bilge water separators, and other.

[44] For a more thorough analysis of sub-contractors and the effect of sub-contracting with regard the rights and obligation of shipbuilding contracting parties, particularly through the examples of standard shipbuilding contract forms, see: Tettenborn, *op.cit.*, p. 1.2.1.

6. Statutory Provisions vs. Contractual Remedies

6.1. Defective Product

In accordance with Art. 1074 OA, a product can also be a part of other movable or immovable thing, whereas the producer (Art. 1076 OA) can also produce a product that is a part of another product. If one is to construe a constructed vessel as a product, it is necessary to distinguish between different individual products that are a part of a vessel. Thus, the potential liability for defective products must correlate with individual producers of faulty or defective products (parts of vessel).

Art. 1075 OA further defines a defective product as a product that fails to provide its core functions at the time when the product has been placed on the market. Art. 1079 OA disables all contractual limitations or exclusions with regard the producer's liability for defective products. In the context of shipbuilding, the vessel, if seen as a product or an aggregate of products, is placed on the market at the time of class assignment and the follow-up vessel delivery. All visible defects are determined up to that point, and the shipbuilder cannot limit or exclude damage compensation liability for failing to fulfill the primary obligation for visible defect up to the vessel delivery.[45] Any follow-up defects do not fall under the scope of Art. 1075 OA.

Art. 1078 OA allows the producer to be exempted from liability if the producer can show that, based on the relevant facts, it is likely that the product was not defective nor were the causes of later defect present at the time when the product was placed at the market. In the context of present examination, such facts are established through numerous testing and sea trails during the shipbuilding process, up to the final class assignment and issuance of all relevant certificates. Additionally, the same norm stipulates that the producer is not responsible for faulty or defective products due to actions of third parties that could not have been foreseen or prevented. In the context of shipbuilding process, this refers to third-party producers and procurers of materials and equipment utilized for shipbuilding. If that was not the case, having in mind the time-bar limitation of three (subjective deadline) and ten (objective deadline) years in line with Art. 1080 OA, the shipyard's exposure to legal uncertainty (due to absence of guarantee period clause security) would prompt an unstable future for domestic (and any other) shipbuilding industry.

However, Art. 1073, para 2 OA significantly limits the application of product liability norms to such material damage that is a result of, in the context of current examination, damage to injured's property different from the defective product, if such property has been primarily used for personal use.

It is noteworthy to mention that, in the comparative practice – namely, the English and Welsh law – although the common contractual practice, as noted by Curtis,[46] excludes the guarantee period warranty with regard the sub-contractors nominated by the buyer, the 1999 Contracts (Rights of Third Parties) Act, if English law is nominated as valid law, complicates the warranty arrangement, requiring clear wording in the guarantee period clause with regard this specific exemption on the side of shipbuilder. The matter is further complicated by practice where buyer sells or charters the vessel within the first year following the delivery, especially if such contracts include the assignment clause. Many standard shipbuilding contract

[45] For a detailed analysis with regard the English and Welsh law, especially with regard the 1977 Unfair Contract Terms Act and the test of reasonableness, see: Curtis, *op.cit.*, p. 188 *et seq*.

[46] Curtis, *op.cit.*, p. 177 and 180 *et seq*.

forms, and guarantee period clauses therein, expressly exclude such possibilities, requiring special consent on the side of shipbuilder, as confirmed in the *Linden Gardens Trust Ltd v. Lenesta Sludge Disposals Ltd and Others*.[47]

6.2. Contract of Purchase and Sale

In accordance with Art. 400 OA, the seller is responsible for all defects present at the moment of risk transfer from the seller to the buyer. In the shipbuilding context, this corresponds to the Art. 438 MC as examined before. In addition, Art. 400 OA states that the seller is also responsible for all defects detected at a later stage (hidden defects), provided that the cause for such defects has existed at the risk transfer moment, allowing for a legal presumption (unless proven otherwise) that this is the case for all defects detected up to 6 months from the moment of risk transfer. In the shipbuilding context, this corresponds to the Art. 439 MC as analyzed earlier. With regard the hidden defects, Art. 404 OA further stipulates the time-bar of two years for general contracts, and 6 months for commercial contracts, and the possibility to negotiate for shorter or longer deadlines, with the notable exception available in Art. 407 OA whereby the seller will not be able to avail the statutory time-bar if the seller knew or should have known that the defects are present.

What is of a particular interest is a specific buyer's right, regulated in Art. 410/2 OA, that allows the buyer to claim damage compensation in accordance with the general liability compensation rules, including the damage compensation with regard damage to the buyer's other goods that have suffered damage due to the noted defects. In accordance with Art. 345 OA, the injuring party – in accordance with the general liability compensation rule – is under a general obligation to compensate the injured party for all damage suffered, including the costs of repair and loss of profits. This, in the shipbuilding context, if applicable, would potentially allow a circumnavigation of the guarantee period mechanism altogether.

In order to successfully claim general liability compensation, the injured party must establish (prove the existence of) the following elements: relevant parties (injured party, injuring party), damage suffered, conduct or omission that has caused the damage, causal link, and, illegality of the conduct or omission on the side of injuring party. In case of the application of subjective responsibility principle, it is additionally necessary to prove the fault on the side of injuring party.

In the shipbuilding context, even if one was to accept the application of general contract of purchase and sale norms to the shipbuilding contract (something that is very dubious, especially given the fact that the practice recognizes a separate activity of vessel purchase and sale – that, unlike the shipbuilding, has much more similarities with the general contract of purchase and sale), it becomes obvious that the buyer would have to prove all the above noted elements – including the fault element, having in mind that the issue under examination involved the presence of hidden defects that are, in the shipbuilding context, regulated with Art. 439 MC. Given the fact that, with regard the hypothetical scenario, the shipbuilder has met all requirements as proscribed with the previously analyzed Art. 433 MC and Art. 435 MC (including no remarks as to the supervision and sea trials, as well as successful class assignment), it is submitted that it would not be possible to prove all the above enumerated elements.

[47] Linden Gardens Trust Ltd v. Lenesta Sludge Disposals Ltd and Others (1994) [1994] 1 A.C. 85, H.L.

6.3. Contract of Work

In Croatian case Pž 8125/04-3,[48] the High Commercial Court of the Republic of Croatia stated that the shipbuilding contract shares many similarities and same basic principles with the contract of work. This is, among other things, visible in the shipbuilder's right of retention (right of possession on the constructed vessel until contractually agreed price has been paid, as per Art. 437 MC). The same right is available to the performing party under the general provisions regulating the contract of work (Art. 617 OA).

Art. 601 OA dictates that the performing party is responsible for all persons acting under the instructions of performing party, as if the work so done has been done by the performing party. As examined earlier, MC regulates the same issue differently if the buyer has nominated producers or procurers of materials and equipment (Art. 435). In this case, the shipbuilder is responsible (presumed fault principle) unless able to prove that such defects could not have been foreseen by utilizing due care.

In case of doubt whether a contract falls under the contract of work or contract of purchase and sale, in accordance with Art. 591 OA, if the performing party utilizes its own materials to produce a movable object, the contract of purchase and sale framework applies. If, however, the ordering party supplies its own material, the contract of work framework applies. In the contexts of current examination, the latter option can be interpreted as including the nominated producers and procurers. In addition, Art. 591 OA stipulates that a contract will be considered a contract of work if the contracting parties placed a considerable value on performing parties' skill and knowledge in performance.

Finally, Art. 604 OA stipulates that the producer, following the inspection and acceptance of performed work, is no longer liable for any defects that could have been discovered by an ordinary survey. Unlike as is the case with the general contract of purchase or sale rules, the norms regulating the product liability contain no mention of general liability compensation rights. In the shipbuilding context, Art. 604 OA corresponds to the 438 MC.

7. Conclusion

The above examination has reviewed the potentially applicable *lex generalis* legislation in the context of hypothetical scenario as detailed in the introductory part. In the opinion of the author, and especially having in mind that the Croatian law does not acknowledge the precedent case practice system, the absence of clear contractual wording may bring about differing and potentially unwanted dispute mechanism interpretations. This is particularly relevant as to the application of contractual mechanisms – such as is the guarantee period clause – that exclude or limit the potential liability of contracting parties, and that may, potentially, be challenged by various statutory norms. The latter is further enhanced by the amphibious nature of shipbuilding contract, interpretation of which may be heavily influenced by the facts of each case, resulting in the possible secondary application of *lex generalis* norms that the parties have not properly considered at the time when the contract has been drafted. However, even if the Croatian law is chosen as the applicable law to a shipbuilding contract that is based on a common law system's standard shipbuilding contract form, both the *lex specials* and *lex generali*s regulation conform to the basic premises and principles present in the shipbuilding

[48] Pž 8125/04-3, Visoki trgovački sud Republike Hrvatske (High Commercial Court of the Republic of Croatia), 11.7.2007.

context, and with careful contractual consideration of several particularities, should not pose any obstacles to the "business as usual" performance.

A summary reminder of the previously noted conclusions points to the following: in case that the shipbuilder's responsibility is analyzed through the application of general norms with regard the contract of sale contract and damage compensation, the buyer is required to prove the existence of all general elements necessary to find the shipbuilder responsible and liable for damage if the liability principle is based on the strict liability standard (parties, damage, conduct or omission creating damage, causal link, illegality of conduct or omission creating damage). In case that the liability principle is based on the fault liability standard, the buyer will additionally have to prove the existence of fault on the side of the shipbuilder. Having in mind the hypothetical scenario, and due to the fact that the classification society's certificate clause is considered final and binding, the obvious lacking element is the causal link. The certificate clause confirms that the shipbuilder has acted with due diligence (as a professional shipbuilder is required to), and has undergone all possible measures to test all materials and equipment, as was additionally confirmed during the supervision and (individual) testing, as well as during the Sea Trail(s). Due to the fact that the shipbuilder has acted in accordance with all requirements regulated through Art. 433 and Art. 435 MC, no responsibility and liability can be assigned.

With regard the product liability norms, the application of tort liability is severely limited having in mind Art. 1073, para 2 OA, whereby the additional damage on other property is reserved for property primarily used for personal use. Irrespective of the noted limitation, the above noted certificates point to the fact that, having in mind the hypothetical scenario, the shipbuilder has made available a product to the market (delivery of vessel) with no visible defects. Any potential product liability claims are, therefore, limited to the tort relationship between the buyer and the producer(s) of faulty materials and equipment, who were not under the direct control of the shipbuilder (and who were assigned by the buyer).

Similarly, when considering the possible application of contract of work norms, the hypothetical scenario includes the Maker's List in accordance to which it was the buyer who has nominated the faulty materials and equipment producer(s). Again, the noted certificates and delivery mark a point after which the contractor (no matter whether there were any actual sub-contractors under the direct control of the contract) no longer stands liable for any defects that could be detected through an ordinary survey (in the context of current examination, the performed supervision, testing and Sea Trail(s)).

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THE LIABILITY OF "MAKERS" – AN OVERVIEW FROM AN ITALIAN LAW PERSPECTIVE

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ABSTRACT

This paper addresses the role played in the industry by a particular category of suppliers of components for ships, which shall be identified under the word "makers". The essay draws attention to some critical aspects of the relationship between makers and shipowners, and examines the structure of the makers' potential liabilities.

Key words: *Maker, information asymmetry, technical recommendation, shipbuilding contract, supply, product liability, guarantee, exclusions of liability, service letter, tort.*

1. The role of the "maker" in the industry

Makers are suppliers of goods and services, the activity of which is denoted by a high degree of technical competence. In fact, the progress of technology and science has led to the individuation of peculiar figures of suppliers for highly specialized products and services.

Typically, from when a vessel is built, it is within her shipowner's interest to ensure that certain components of the vessel are provided by selected makers, as this will set the quality of the component and consequently of the vessel. For this purpose, a "*makers' list*" is normally attached to shipbuilding contracts[1] and throughout the operation of the vessel the owner tends

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[1] See in this respect Curtis, S. (2012), *The law of Shipbuilding Contracts*, London, LLP, p. 30. In particular, the author reports about the common contractual practice and states that "*normal shipbuilding practice is […] to require that, at least in relation to substantial elements of construction and outfitting, the builder may delegate the contract works only with the buyer's prior approval in writing, the same not to be "unreasonably" withheld. In order to minimise the potential for delay in obtaining such consent, the contract or specifications will often incorporate a list of subcontractors and suppliers, usually known as the "Makers' List", which have been pre-approved by the buyer. This will frequently include a number of different subcontractors or suppliers for the same item, in which event the builder will usually be entitled to make the final selection […]*". The importance of such a practice is also stressed by the Author who states, at p. 29, that "*while the buyer will not be concerned with minor items of subcontracted work or supply, the right to approve major subcontractors and suppliers represents an important tool in ensuring full compliance with the quality standards stipulated in the contract*".

to establish a direct relationship with such makers so as to ensure the correct maintenance of the components.

This has led to a twofold phenomenon:

(a) the enhanced and specialized knowledge of makers has turned into a form of asymmetry of information vis-à-vis the end users of the component, i.e. the shipowners[2]; and

(b) the relationship between shipowners and makers is characterized by technological dependence in respect of the maintenance of the relevant components, as these cannot be properly maintained by the appointed shipyard, but will often have to be put to the attention of the surveyors of the maker itself[3].

But most importantly, the role of the maker has become a crucial factor in the determination of the standards of diligence of shipowners in the maintenance of vessels. The role played by makers in the industry, indeed, has an impact on numerous areas of maritime law which involve the assessment of shipowners' diligence in the maintenance of the vessels.

Shipowners could incur (amongst others) the following consequences if, by failing to follow the makers' recommendations, they are negligent in maintaining the vessel in the proper condition.

(a) The vessel could become unseaworthy for the purpose of the carriage of goods by sea, according to international law conventions[4] and national legislations, including the Italian Code of Navigation[5].

(b) Failure to comply with the makers' recommendation could cause the shipowner to breach the obligations arising under charterparties as to the due diligence to be had in the maintenance of the vessel[6].

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2 Depending on the resources available to the shipowner, some technical matters are normally dealt with directly by the ship operator himself. However, certain components require specialized personnel, which shipowners will struggle to find amongst independent surveyors, eventually being forced to resort to the specialists which are set upand provided by the makers themselves.

3 Apart from the complexity of the technical issues concerning certain components, it should be added that technological dependence is also induced by the fact that some of the information regarding the component are covered by industrial patent and it is therefore only available to the producer himself.

4 The reference is – in first place – to Article 3.1(a) of the Brussels Convention (Hague Rules) of 25 August 1924, unamended, in this respect, by the 1968 ad 1979 Protocols (Hague-Visby Rules). Similarly, Article 14(a) of the Rotterdam Convention (Rotterdam Rules) of 11 December 2008 sets forth the duty of the shipowner to make the ship seaworthy . Eventually, the role of makers in determining the shipowners' standards of diligence is relevant also under the reasonableness test set to exculpate the carrier under the Hamburg Convention (Hamburg Rules) of 31 March 1978.

5 Article 421 of the Italian Code of Navigation contains a provision originally inspired by Article 3.1(a) of the Hague Rules, which sets forth the shipowner's obligation to use due diligence to make the ship seaworthy before the beginning of the voyage.

6 Typically, under time charters, provisions are made establishing the shipowner's duty of maintenance of the vessel, throughout the charter period. Examples of such provisions are clause 1 of the 1946 NYPE, clause 6 of the 1993 NYPE, clause 3 of the Baltime and clause 3 of the Shelltime 4. Although in some circumstances that obligation has been held to be an absolute one, the duty to maintain the vessel is commonly a due diligence obligation, i.e. a duty to exercise reasonable diligence (see, in this respect, Coghlin, T. (2014), *Time Charters*, London, LLP, para. 11.5 et seq.), and it is submitted that makers can play a crucial role in determining the shipowner's level of diligence. The same is also true in respect of the charterer's obligation to make the vessel seaworthy upon entering service (see Coghlin, T. (2014), *Time Charters*, London, LLP, para. 8.1 et seq.) or, in case of voyage charterparties, at the beginning of the voyage (see Cooke, J. (2014), *Voyage Charters*, London, LLP, para. 11.17.

(c) Most importantly, the makers' recommendations have become an important element to be taken into consideration by the vessels classification societies in determining the conditions necessary for the vessel to be in a class[7].

(d) Apart from the above, failure to comply with the makers' technical standards could have repercussions on the commercial employment of vessels, as it could jeopardize their vetting approvals[8].

(e) Moreover, makers' recommendations are typically matters to be taken into consideration in terms of the ISM Code and shipowners could easily fall short of its obligations under the Code if such recommendations are overlooked[9].

(f) Finally, in extreme circumstances, failure to comply with the technical requirements, established by makers, could even result in criminal liability[10].

2. Liability of the maker

Moving now to the potential types of liability which can be imputed to the maker, a distinction is drawn between the liability which may be incurred by the maker in the aftermath of the acquisition of a unit, and the liability which may arise subsequently and irrespective of the moment of her acquisition.

2.1. Liability profiles of makers when a unit is acquired

Of course, a unit can be either acquired as a newbuilding or purchased as a second-hand vessel. Accordingly, property in the vessel will be acquired from the shipyard, which built the ship, or from her previous owner.

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7 Classification societies have always had a role in establishing maintenance duties and, consequently, the shipowners' level of diligence in operating the vessel. The development of an independent relationship between shipowners and makers raises interesting issues of interplay between the role of the classification society and that of the maker. Particularly, the classification society's rules may have to be considered together with the technical documentation provided by the makers, when the vessel's condition is to be verified and certified.

8 Especially for oil and product tankers (but not limitedly to that type of vessels), the role of vetting is nowadays central in the maintenance of the vessel's condition. The growing importance of vetting systems implies constant scrutiny of the ship by charterers and it requires procedures to be in place in respect of both maintenance and repair. The shipowners' relationship with the makers is again very important also in this context. In fact, amongst the information which vetting companies will want to examine there will be technical data made available by the makers, as well as documentation evidencing the processes in place for the maintenance and repair of the individual component.

9 It is an express objective of the ISM Code to provide an international standard for the safe management and operation of ships and for pollution prevention by setting a framework for the proper development, implementation and assessment of safety and pollution prevention management in accordance with good practice. Within the IMO Code scheme, the shipowners' relationships with certain makers of crucial components, such as for instance turbocharges, will require procedures to be established and documented so as to develop practices that minimize accidents by improving maintenance.

10 Criminal liability connected to the maintenance of the vessel will depend on the relevant jurisdiction. Yet, generally speaking, it cannot be excluded that a shipowner's failure in following the makers' recommendations for the maintenance of certain crucial components of the ship may lead to criminal liability of the shipowner. Under Italian law, the Code of Navigation establishes that the conduct of the shipowner and of the master, who allow a vessel to sail notwithstanding her unseaworthy conditions could constitute a crime punishable by imprisonment (see article 1215 of the Code).

In both the above cases, any latent defect of the vessel's components will be regulated by the contractual regime, provided for under the relevant shipbuilding contract[11] or sale and purchase agreement[12].

Makers commonly supply their components during the construction of the vessel pursuant to supply contracts concluded with the yards. Their liability for such components is thus regulated by the terms and conditions agreed therein and, particularly, by the contractual guarantee granted thereunder.

It is, however, common practice that the makers' guarantees are made assignable, so that the shipyard that first contracted the installation of the relevant component can assign the rights under the guarantee to the shipowner so that the guarantee can then circulate if the vessel is sold[13].

The makers' liabilities will, therefore, in the first place, be regulated under the guarantee regime for the duration of time set forth in the guarantee itself (normally one year running from the delivery of the component to the shipyard).

2.2. Liability profiles of makers subsequently to the acquisition of the unit

Following the installation on board, the role played by the maker becomes crucial in the maintenance of the relevant component and the twofold phenomenon mentioned at the beginning of this paper establishes a continuous relationship between the shipowner and the maker.

Particularly, makers provide a rather wide-ranging set of services, which normally include:

(a) ordinary and extraordinary maintenance of the components;

(b) supply of spare parts; and

(c) a broad flow of informative materials as to the correct use and maintenance of the relevant components.

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[11] Notably, the builder's warranty of quality is coupled, under most widespread largescale shipbuilding contracts, with a rather articulated set of provisions intended to exclude the liability of the shipbuilder in respect of whatever responsibility falls short of the warranty regime. In the words of Curtis, S. (2012), *The law of shipbuilding contracts*, London, LLP, p. 172, under shipbuilding contracts "*it is usually agreed that the builder's warranty is to operate to the exclusion of any other contractual or statutory warranties regarding the vessel's condition or performance*". Such a contractual practice was also made subject of judicial consideration in The "Seta Maru" [2000] 1 Lloyd's Rep. 367, where Thomas J. defined – at p. 372 – the contractual guarantee under the shipbuilding contract in discussion as a "*comprehensive provision forming part of what was in my view a complete code for dealing with defects discovered after delivery of the vessel*".

[12] Under the 2012 Norwegian Saleform the seller's liability in respect of the condition of the vessel upon delivery is regulated in clause 11, for a commentary of which see Goldrein, I. (2012), *Ship Sale and Purchase*, London, LLP, para. 5.44 et seq. It is worth mentioning that, although highly criticized, the judgment of Flaux J. in The "Union Power" [2013] 1 Lloyd's Rep. 509 is authority for implying into the contract, when not expressly contracted out, the satisfactory quality guarantee of law set under section 14(2) of the Sale of Goods Act 1979.

[13] This practice is reported by Curtis, S. (2012), *The law of shipbuilding contracts*, London, LLP, p. 30, where the author reports that "*where the builder employs a subcontractor to undertake parts of the construction or outfitting of the vessel, the builder naturally remains liable in full for the performance of the works he has delegated. It may, however, sometimes be agreed between the buyer and the builder that, in respect of the post-delivery period, the builder will, instead of providing his own warranty, either assign to the buyer the benefit of any guarantees provided to him by the subcontractor or procure that these are issued to the buyer directly*".

2.2.1. Product liability

The first question to be addressed in determining the types of liability to which a maker may be exposed is one of whether any liability can be ascribed to the maker for the mere failure of the component, subsequently to the expiry of the guarantee period. In other words: is the maker subject to any form of product liability?

The answer to this question is negative. Under Italian law, the doctrine of product liability is expressly established by statute, particularly by the legislative decree n. 206 of 6th September 2005, also known as the "Consumers' Code".

The rules on product liability are contained in Articles 114 to 127 thereof, and they apparently do not expressly limit the right to sue to consumers alone. However, reliance on this piece of legislation is, in most instances, prevented by the fact that the losses claimable for product liability are limited to death, personal injury and damage to property, but only if intended for private use (Article 123, let. b)[14].

2.2.2. Maintenance and supply

As mentioned above at paragraph 19(a), the complexity of the components supplied by makers often renders it necessary for the makers themselves to be involved in the maintenance of the supplied components.

Such maintenance can either be ordinary, carried out throughout the components' life, or extra-ordinary, when the components require repairs in consequence of particular events.

In all such cases, if any damage is caused by the maker, this would give the shipowner the right to claim compensation of losses under contract. Any liability would be regulated under the terms and conditions of the supply contract, which – in most cases – would be agreed in writing.

Indeed, makers normally operate under standard general terms and conditions, which include provisions as to the applicable law, as well as jurisdiction or arbitration. But most importantly, the standard contracts drafted by the makers will normally include clauses providing for limitations and exclusions of liability.

Issues may, thus, arise as to the validity of such provisions exculpating the maker under the contract and any such provision would have to be scrutinized pursuant to the law made applicable to the contract.

2.2.3. Service letters and other informative materials

Interestingly enough, however, most of the technical information provided by markers is not provided to shipowners within the framework of a contractual agreement. In fact, makers commonly issue informative materials, which are distributed to the users of the components.

[14] Particularly, the Code normally finds application only to cases involving consumers, producers/professionals and products, each of which is defined in the opening provisions of the Code. However, the section dedicated to product liability covers Articles 114 to 127 and contains specific definitions of producer and product, which do not seem to exclude, at least in principle, the application of the liability rules under the Code to business-to-business relationships. Yet, Article 123.1 sets out the only losses that can be claimed from the producer under Article 114 and these are limited to death, personal injury and damage to property of private use. This last limitation obviously renders the liability scheme hardly applicable to claims which may be addressed against makers.

The content of such materials has become a crucial element in the maintenance of the relevant components. This typically includes suggestions as to how best to use and maintain the components; however, they can also convey information as to possible issues arising with the components and solutions to such issues are often proposed.

In certain cases, makers go so far as to suggest the implementation of measures, which imply an investment on behalf of the shipowner, thereby assuming a position where technical aspects can overlap with commercial considerations.

Any informative material provided by the maker can give ground for liability in tort against the shipowner if, by relying on the contents of such material, the shipowner acts in such a way as to cause the relevant component to become damaged or to cause other losses.

Such a claim would not be subject to limitations or exclusions of liability and the applicable law, as well as the jurisdiction, would have to be established on a case-by-case basis.

Particularly, as far as applicable law is concerned, consideration should be had to Regulation EU 864/2007 ("on the law applicable to non-contractual obligations", also known as the Rome II Regulation), in application of which the law applicable to the maker's liability in tort for wrongful information provided would be the law of the country in which the damage occurred.

Further, as to jurisdiction, the claim would have to be brought before the court competent pursuant to Regulation EU n. 1215/2012 ("on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters", also known as Bruxelles Regulation recast) i.e. the "courts for the place where the harmful event occurred".

The content of the technical information provided by the maker is, obviously, crucial and it would have to undergo a thorough scrutiny, in order to establish whether the measures suggested by the information materials were in fact mistaken and whether, by following them, the shipowner actually suffered a loss, which would have to be directly linked to the maker's negligence.

If the above can be evidenced, then a liability in tort, on behalf of the maker can be established.

3. Conclusions

In conclusiion, it should be noted that the rising importance of makers in the shipping industry is not (yet) counterbalanced by a system capable of sufficiently regulating their liability towards shipowners.

A few guidelines may, thus, be drawn hereunder, so as to possibly assist shipowners in the daily management of their relationship with makers.

(A) The core of the post-delivery regime of makers' liability, although for the limited scope of its duration, is the wording of the guarantee contained in the supply contract, where limitations and exclusions of liabilities will also be provided for. It is, therefore, important that shipowners obtain from shipyards and/or sellers the relevant assignments.

This will also be true in respect of components installed on board subsequently to the building of the vessel, if an *ad hoc* contractual guarantee is provided.

(B) Once the guarantees have expired, the owners will conclude with the makers individual contracts for the supply of spare parts and for surveys of a technical

nature. Both these services will be agreed on contractual terms, which the makers will try to set unilaterally. Although there may be limited space for negotiations, owners may be able to contract special conditions.

(C) Regarding the informative material provided by makers, its importance in the maintenance of components cannot be underestimated, and the shipowners will be required – to some extent – to use due diligence in maintaining the vessels' components, as suggested by the makers.

Any evaluation of such informative material should, however, be made subject to internal considerations of technical reasonableness, and should be counterbalanced by the following factors:

(i) on the one hand, the makers' potential effect on shipowners' liability is not mirrored by an adequate system of liability of the makers for the correctness of the information they provide; and

(ii) on the other hand, the reliability of the information provided by makers does not originate from independent bodies and it may be contaminated by a concurrent economical interest of the makers themselves in the investments, which the shipowner would have to make, in order to comply with technical requests.

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SECURING THE FINANCING AND LEASE OF AIRCRAFT IN CROATIA IN THE LIGHT OF THE CAPE TOWN CONVENTION

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SUMMARY

Adoption of the Cape Town Convention on International Interests in Mobile Equipment in 2001, together with the Aircraft Protocol, created a new international framework for financing and leasing of aircraft. This complex international instrument that introduces a novel approach to establishing and registering international interests in aircraft objects has now been offered to countries that need to recognize it and embrace it. Although aviation industry is global in so many ways, national practices and laws regulating proprietary and obligation rights in this area (and their conflict of law rules) are still diverse, which poses costs and legal insecurity for aircraft owners and financiers all over the world.

Regardless of reticent importance of Croatian aviation sector in global terms, and having a rather modest number of aviation transactions in Croatia, regulatory framework and local practices of purchase and lease, as well as financing and collateralisation are constantly developing. Due to the distinctly international character of aircraft industry, legal structures of aircraft finance and aircraft lease used in Croatia, are very similar to ones used in rest of the world. However, Croatian legal framework, especially in relation to rights in rem and creation of securities has its own peculiarities that rest on the "old" system of Geneva Convention.

Although Croatia has not yet ratified the Cape Town Convention, growth of the importance of this instrument for international aircraft (and aviation) industry, together with its solutions which are becoming globally accepted, accounts for a need to settle the scene in Croatian legal system as well.

Having in mind the complexity of the Cape Town Convention and its economic and legal implicacies, this paper aims to detangle existing legal and practical issues related to securing aircraft finance and lease in Croatia, as well as to give a precise analysis of its legal regulation.Therefore, in our paper we will give an overview of typical manners of securing claims, such as hypothecation (mortgage), assignment of claims from the lease agreement and pledge over movables (in case when only parts of the aircraft and not the entire aircraft, are pledged) in Croatian legal system, followed by an analysis of the most important principles and newly introduced instruments of the Cape Town Convention in relation to it. In this context, this paper aims at clearing out issues of legal nature, especially in cases when holders of proprietary rights on aircraft and aircraft parts are not the same persons, and tackle potential obstacles for implementation of Cape Town Convention in Croatia.

Key words: *Cape Town Convention on International Interests in Mobile Equipment, proprietary rights on aircraft, securing aircraft financing, aircraft lease, securing claims*

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1. Introduction

Aircraft are long-life assets that everybody likes, and we do not mean only people around the world, but also investment banks, commercial banks, insurance companies, and big corporations. Aircraft are extremely expensive and therefore only those with a good financial background can afford them. However, those who need them the most for their business – airlines – have very limited financial sources to spend on new aircraft. Therefore, airlines depend on others who have money and can secure their financing to help them grow their fleet. Still, the ones who pay these huge sums of money are very sensitive about it, because aircraft are the epitome of mobility, moving all the time and passing through many jurisdictions, which often makes it difficult to ensure the rights of financiers and their enforceability. This situation naturally produces extra risks for them and therefore needs to be approached seriously and regulated internationally.

The aircraft finance practice that has been developing for the past seventy years started to change globally with the signing of the Cape Town Convention and the Aircraft Protocol to it in 2001.[1] This complex international instrument that introduces a novel approach to securing the financing of aircraft has, after being ratified by some major aviation forces, become a subject of interest for both practitioners and scholars worldwide. A completely new scheme for establishing and registering international interests in aircraft objects has been offered to countries whose task now is to recognize and embrace it.

Regardless of the reticent importance of the Croatian aviation sector in global terms, and considering that there is a rather modest number of aviation transactions in Croatia, the regulatory framework and local practices of purchase and lease, as well as financing and collateralisation, are constantly developing. Due to the distinctly international character of the aircraft industry, the legal structures of aircraft finance and lease used in Croatia are very similar to ones used in the rest of the world. However, the Croatian legal framework, especially in relation to rights *in rem* and the creation of securities has its own peculiarities that rest on the "old" system of the Geneva Convention.

This paper aims to detangle existing legal and practical issues connected to securing aircraft finance and lease in Croatia, as well as to give a precise analysis of its legal regulation. Therefore, in this paper we will give an overview of the typical manners of securing claims in the aviation sector in Croatia, and analyse them in the light of the new international legal framework that is evolving with the ever growing acceptance of the Cape Town Convention.

2. Croatian Regulatory Framework

In the Croatian legal system, an aircraft is considered movable property and all basic principles of Croatian law regulating ownership and rights *in rem* over movable property also apply to aircraft.[2] Similarly, the obligations relating to aircraft are based on the basic principles

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[1] Convention on International Interests in Mobile Equipment, Cape Town, 16.11.2001., entered into force 01.03.2006. Protocol to the Convention on International Interests in Moblie Equipment on Matters Specific to Aircraft Equipment, Cape Town, 16.11.2001., entered into force 01.03.2006.

[2] The main source of law is the Act on Ownership and Other Rights *in rem* (Zakon o vlasništvu i drugim stvarnim pravima, Narodne novine br. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14).

of Croatian civil obligations law, including the basic rules of contract law regulating terms of sale and purchase agreement, lease agreement, etc.[3]

Due to the specific nature of aircraft as an object of rights *in rem* and obligations, a special law has been adopted in Croatia in addition to the general rules: Act on Obligations and Proprietary Relations in Air Traffic[4]. It comprises, among others, specific provisions on acquiring ownership and pledge (hypothecation) over aircraft, provisions governing the lease of aircraft, as well as enforcement proceedings and proceedings for the creation of security over aircraft.

Although an aircraft is defined as movable property, unlike in the case of standard movable property, aircraft and rights *in rem* over aircraft are registered in a special register, i.e. the Croatian Registry of Civil Aircraft (Croatian Registry). The Croatian Registry is maintained by the Croatian aviation authority - Croatian Civil Aviation Agency (CAA). Such treatment of movable property is, as in the case of ships, closer to the treatment of real estate, for which rights *in rem* are also registered with the Land Registry.[5] Lease of aircraft is also supervised by the CAA and in a certain way registered with the Croatian Registry as will be explained *infra* (section .). The main sources of law regulating the Croatian Registry are the Air Traffic Act[6] and the Ordinance on the Content and Manner of Keeping the Croatian Registry of Civil Aircraft[7] (Ordinance on Croatian Registry), which we will address in more detail in the next section.

The Croatian Registry first includes the data relating to aircraft: full identification details, owner of the aircraft, operator of the aircraft (if different from the owner) and liens on the aircraft (if any). With the moment of registration with the Croatian Registry, the aircraft acquires Croatian nationality.[8] While aircraft leases as such are not registered with the Registry, the lease agreement is delivered to the Croatian Registry as evidence of the operator's leasehold title to the aircraft.

Under the provisions of Croatian law, the law of the country of the aircraft registry applies to ownership and other rights *in rem* over the aircraft, which makes Croatian legal norms applicable not only in domestic transactions, but also in international transactions, in cases where the aircraft registered in the Croatian Registry, or its parts, constitute security interests.

2.1. Acquiring Ownership over Aircraft

Ownership of an aircraft is acquired by the registration of ownership with the Croatian Registry, when ownership is acquired by virtue of an agreement between the former owner and the new owner.[9] Similarly, rights *in rem* over the aircraft created on a voluntary basis are created also by registration with the Croatian Registry. It follows that the registration of ownership and rights *in rem* with the Croatian Registry is the necessary prerequisite for their creation and transfer of ownership by way of a legal transaction.

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3 The main source of law is the Civil Obligations Act (Zakon o obveznim odnosima, Narodne novine br. 35/05, 41/08, 125/11, 78/2015).

4 Zakon o obveznim i stvarnopravnim odnosima u zračnom prometu, Narodne novine br. 132/98, 63/08, 134/09, 94/13.

5 Baretić, M., Posebno stvarnopravno uređenje za zrakoplove, Godišnjak 7, Aktualnosti hrvatskog zakonodavstva i pravne prakse, Zagreb, 2000, p. 358.

6 Zakon o zračnom prometu, Narodne novine br. 69/09, 84/11, 54/13, 127/13, 92/14.

7 Pravilnik o sadržaju i načinu vođenja Hrvatskog registra civilnih zrakoplova, Narodne novine br. 137/12.

8 Art. 135 of the Act on Obligations and Proprietary Relations in Air Traffic.

9 Art. 132 of the Act on Obligations and Proprietary Relations in Air Traffic.

There are a number of formal requirements under Croatian law which an agreement on the transfer of ownership must fulfil. The Act on Obligations and Proprietary Relations in Air Traffic requires that this agreement is entered into in writing,[10] while the Ordinance on the Croatian Registry further requires that the legal basis for the change in ownership (e.g. sale and purchase) must be visible from the document which serves as the basis for the transfer of ownership.[11] Such document must conatin a clear identification of the previous and the new owner, where the new owner must obtain the Croatian personal identification number (OIB), issued by the Tax Administration of the Ministry of Finance prior to applying for registration of ownership. It must also contain a correct and full description of the aircraft and an explicit statement of the seller whereby he gives his consent to the registration of the new owner *(clausula intabulandi*).[12] The document must contain the place and date of signing, and the original or a certified copy thereof must be delivered to the Croatian Registry, with the seller's signature duly certified.[13] The same requirements apply to documents under which the ownership of real estate is transferred on a voluntary basis.[14]

In practice, various types of international documents which are commonly used in sale and purchase of aircraft as documents transferring ownership from the owner to the acquirer, such as bills of sale, can easily be adjusted in their wording to fulfil the criteria of Croatian law. Also, some formal requirements explicitly do not apply to new aircraft acquired from the manufacturer.[15] Foreign legal documents are generally accepted, provided certain requirements are met, such as reciprocity and required certification and legalisation of the documents depending on the country in question. By this practice the Croatian Registry has adapted to the international aviation practices and various legal systems, aiming at facilitating simpler registration procedures.

While the application for the transfer of ownership could be filed by the registered owner or the operator of the aircraft with the consent of the registered owner, it is usually filed by the acquirer of the aircraft on a prescribed registration form, with the transfer document and other required documents enclosed.

2.2. Lease of Aircraft

A lease agreement under the Act on Obligation and Proprietary Rights in Air Traffic is defined as an agreement under which the lessor undertakes to deliver to the lessee a certain aircraft for his use and the lessee undertakes to pay the rent.[16] In terms of formal requirements, it is required that the lease agreement is concluded in writing.[17] Croatian laws do not define any types of leases commonly used in international aviation practice, but these are defined in EU law with direct application in the Croatian legal system.

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10 Art. 130(1) of the Act on Obligations and Proprietary Relations in Air Traffic.

11 Art. 13(2) of the Ordinance on Croatian Registry.

12 Art. 14(1)b) of the Ordinance on Croatian Registry.

13 Art. 13(13) of the Ordinance on Croatian Registry.

14 See Art. 119 and 120 of the Law on Ownership and Other Rights In Rem and Art. 43-55 of the Law on Land Registry (Zakon o zemljišnim knjigama, Narodne novine br. 91/96, 68/98, 137/99, 114/01, 100/04, 107/07, 152/08, 126/10, 55/13 and 60/13).

15 See for instance Art. 13(14) of the Ordinance on Croatian Registry.

16 Art. 95(1) of the Act on Obligations and Proprietary Relations in Air Traffic.

17 Art. 95(2) of the Act on Obligations and Proprietary Relations in Air Traffic.

A dry lease agreement, defined in Regulation (EC) 1008/2008[18] as an agreement between undertakings pursuant to which the aircraft is operated under the air operator certificate (AOC) of the lessee,[19] has become increasingly utilised in Croatia only in the last decade. Before this, it was commonplace for operators of aircraft to also be their owners. The major Croatian national air carrier *Croatia Airlines* is engaged both as the operator and the lessee in a number of dry lease arrangements with various international aircraft leasing companies.[20]

On the other hand, a wet lease agreement is defined as an agreement between air carriers pursuant to which the aircraft is operated under the AOC of the lessor.[21] Croatian air carriers also engage in wet leasing of aircraft, both on the lessor and the lessee side. Among them are Croatia Airlines[22] and a privately owned air carrier *Trade Air* as major players[23]. This shift marked a crucial contribution to the development of the legal practice related to the local aircraft lease regime, although these lease arrangements, whenever they include a foreign element (i.e. a foreign air carrier or leasing undertaking), are regularly not governed by Croatian law and do not fall within the jurisdiction of Croatian courts.

Lease of an aircraft begins at the moment of the conclusion of the lease agreement. Pursuant to Regulation (EU) No 965/2012, a lease agreement must be delivered to and approved by the competent authority of each Member State from the perspective of organisation requirements of air operations.[24] The competent Croatian authority for the approval of leases is the CAA.

The Ordinance on the Croatian Registry provides for the registration of leases as interests in aircraft.[25] From our professional experience, it is the practice of the Croatian Registry that the lease agreements are only delivered to the Croatian Registry and kept with other registration documents of the aircraft in question as evidence of the aircraft operator's legal basis to operate the aircraft. The registration of the lease is not visible in the extract from the Croatian Registry, but only the operator as lessee is shown. There is no special register for leases or aircraft leases in Croatia.

Neither the Act on Obligation and Proprietary Rights in Air Traffic, nor the Ordinance on the Croatian Registry distinguish between a dry lease and a wet lease, but in practice only dry leases of aircraft with Croatian nationality are delivered to the Croatian Registry and serve as the basis for registration of the aircraft operator. Wet leases are not delivered to and registered

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18 Definitions of dry lease, damp lease and wet lease are given in Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast), [2008] OJ L 293, p. 3.

19 Art. 2 (24) of the Regulation 1008/2008.

20 The list of aircraft owners and lessors is available online in the Croatian Registry at http://www.ccaa.hr/download/documents/read/popis-registraranih-zrakoplova_706 (Sept. 10, 2017).

21 Art. 2 (25) Regulation 1008/2008. Another term commonly used for a wet lease, which describes the economics of the wet lease well is "ACMI" lease, meaning a wet lease pursuant to which the lessee receives the aircraft, crew, maintenance and insurance (acronym ACMI). As a wet lease in particular can take many forms, it is common also to speak about various types of wet leases, such as a damp lease, which is a wet-lease that includes a cockpit crew but not cabin attendants.

22 News on Croatia Airlines' latest wet leases can be found at http://www.exyuaviation.com/2017/04/croatia-airlines-takes-first-crj-1000.html (Sept. 10, 2017).

23 For more on Trade Air see their web page http://www.trade-air.com/CharterFlights

24 Subpart ARO.OPS.110 of Commission Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, [2012] OJ L 296, p. 1.

25 Art. 18(3) of the Ordinance on the Croatian Registry.

with the Croatian Registry because the lessor is the air carrier who remains to be the aircraft operator, and the aircraft remains on his AOC.

2.3. Third Party Rights *In Rem*

According to our professional experience at the time of writing, Croatian air carriers acquire newly manufactured aircraft or used aircraft (on the secondary market) using loans granted by credit institutions or, to some extent, through equity financing. Several larger banks operating in Croatia are experienced in financing the purchase of various types of aircraft and are willing to grant credit facilities for this purpose. If an air carrier does not wish to become the owner of the aircraft, but obtains the aircraft pursuant to a long-term dry lease, the lessor will be the one providing the financing for the purchase of the aircraft.

Both in the cases of purchase or lease of aircraft, the key concerns are making the right choice of security for the creditor's claims, and understanding their creation, implementation and possible enforcement. The most obvious and common security interest for a credit institution which grants a loan facility for the purchase of an aircraft is a pledge over that aircraft or its parts, which will be analysed in this chapter.

2.3.1. Hypothecation Over Aircraft

In Croatia, a voluntary pledge over aircraft is called "hypothecation" and it may be created by way of entering into a security agreement between the owner of the aircraft as the security debtor and the secured creditor. In Croatian market practice it is common to conclude such a security agreement in the form of a directly enforceable court or notary deed, which follows certain formalities. Most importantly, the content of the agreement has to be notarised by a notary public or verified by the court, and the agreement must include a specific wording, a so called "enforcement clause", which effectuates direct enforceability under Croatian law.[26] Hypothecation is created only upon its registration with the Croatian Registry, effective from the moment of submission of the application for registration.[27] By registration with the Croatian Registry the hypothecation obtains the publicity effect in relation to third parties and reserves its priority order in the Croatian Registry.

As a result, if the security debtor defaults in performing his obligations, a secured creditor may initiate enforcement proceedings to collect his claims by having the aircraft sold in a public auction or otherwise. In case of the debtor's default, the hypothecation does not grant the right to the secured creditor to automatically become the owner of the aircraft or to sell it on the market freely. In accordance with the Croatian Enforcement Act, enforcement proceedings in Croatia are always court administered and the principle of the preservation of value of the security interest and the protection of debtor's and third-party rights are embedded in the rules of the proceedings.[28]

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[26] Requirements for such a security agreement are set out in Chapter 29 of the Enforcement Act (Ovršni zakon, Narodne novine, br 112/2012, 25/2013, 93/2014, 55/2016).

[27] Art. 139 and 146(1) of the Act on Obligations and Proprietary Relations in Air Traffic.

[28] Pursuant to Art. 175 of the Act on Obligations and Proprietary Relations in Air Traffic, provisions of the Maritime Code regarding security and enforcement proceedings over ships apply to security and enforcement proceedings over aircraft.

2.3.2. Pledge Over Aircraft Parts

It is rather common for the engines of a particular aircraft, being the most valuable part of the aircraft, to be owned by a different undertaking than the undertaking owning the airframe. It is equally common that the engine installed in one aircraft upon delivery is occasionally or regularly removed from that aircraft and installed and used in another aircraft.

The Croatian Registry does not contain a special section for registering aircraft engines or other parts of aircraft, which means that a third party cannot obtain any information about the owner of a particular engine (if different than the aircraft owner), or third-party rights over the engine. Potential legal difficulties arising from the fact that the engine is a separable part of an aircraft, and as such may be an object of separate third-party rights, are not resolved in Croatian aviation legislation. The Act on Obligations and Proprietary Rights in Air Traffic defines the term "aircraft" and the term "part or appliance" to describe the parts and appliances of an aircraft in the broadest possible manner, including parts of the aircraft structure, the engine or the propeller.[29]

Nevertheless, under Croatian national law a voluntary pledge over an engine may be created by way of concluding a security agreement between the owner of the engine (as the security debtor) and the secured creditor, provided that the parties agree that the engine should be treated as a distinct object of rights, separate from the aircraft.[30] Such a security agreement over the engine as movable property would most likely be concluded in the form of a directly enforceable court or notary deed. Provided that the agreement follows specific formalities[31], the security can be registered with the Croatian Registry of Court and Notary Public Security Interests over Movables and Rights (FINA Registry) and thus obtain publicity of a pledge towards third parties.[32] Perfection of such security occurs by registration with the FINA Registry.[33]

Similarly as in case of hypothecation over aircraft, if an engine is pledged in the described manner, the pledge over the engine will be perfected upon the registration of the pledge with the FINA Registry, effective from the moment of submitting the application for registration with the FINA Registry. If the security debtor defaults on his obligations, the secured creditor

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[29] Art. 2(1), items 7 and 94. Part or appliance means any instrument, equipment, mechanism, part, device, tool, computer program or supplement, including communication equipment, which is used or is intended to be used when operating or controlling aircraft in flight, and is installed in or affixed to the aircraft. It also includes parts of the aircraft structure, engine or propeller or equipment, which is used to guide the aircraft from the ground. Aircraft means any device, which keeps itself in the atmosphere due to an air reaction, except for the reaction of air in relation to Earth surface.

[30] It should be noted that Art.II(1) of the Geneva Convention prescribes that "[A]ll recordings relating to a given aircraft must appear in the same record". In our view, recording relating to the engine as a separate object of rights does not relate to the given aircraft within the meaning of Geneva Convention. See Convention on the International Recognition of Rights in Aircraft, signed in Geneva, 19 June 1948, entered into force 17 September 1953.

[31] Same as in the case of hypotecation over aircraft. See text *supra*, at p. 6.

[32] The FINA Registry is established and regulated by the Act on the Registry of Court and Notary Public Security Interests in Movables and Rights (Zakon o Upisniku sudskih i javnobilježničkih osiguranja tražbina vjerovnika na pokretnim stvarima i pravima, Narodne novine br. 121/05). The FINA Registry serves as a public registry of rights (interests) and court ordered measures in connection with movables and rights which are not registered in any other public registry. Consequently, interests in aircraft are not registered in the FINA Registry because they are registered with the Croatian Registry, but interests in engines and other aircraft parts could, in our opinion, be registered with the FINA Registry.

[33] Rights over aircraft parts are a complex legal issue in many EU member states, which goes beyond the scope of this paper. It deserves a separate analysis and discussion on potential solutions *de lege ferenda*.

may again initiate direct enforcement proceedings for the purpose of collecting his claims by way of having the engines sold in a public sale by the court.[34]

2.3.3. Other Security Interests

There are several other security interests which creditors may acquire in aircraft or in relation to the aircraft.

Pre-emption rights and similar rights over aircraft are also envisaged as obligation rights which can encumber an aircraft and be registered with the Croatian Registry[35], but are not much used in practice in Croatia.

If an aircraft engine or another part is the object of a security interest, the secured creditor can contract a fiduciary transfer of ownership of the engine or part instead of a pledge. A fiduciary transfer of ownership is another type of third party right *in rem* more similar to the concept of mortgage but less common in Croatian legal practice. Fiduciary transfers of ownership over aircraft are not envisaged in Croatian aviation law, but they are envisaged as a possibility in the Ordinance on the Croatian Registry in connection with ownership of aircraft.[36] The creation of such a security interest is possible given the general rule that all proprietary rights in aircraft which are not regulated in the Act on Obligations and Proprietary Rights in Air Traffic are governed by the general rules of the Croatian law on rights *in rem*.[37]

If a dry lease agreement is concluded, the financing party which financed the purchase of the aircraft can also arrange with the lessor a security assignment of rights arising from the lease agreement. If Croatian law is applicable to the lease agreement and the security assignment, there are no constraints on the form of such assignment. The Croatian law does not require the debtor's (in this particular case, lessee's) consent to the assignment (but only that the debtor - lessee) be notified about the assignment (unless such consent would be required under the agreement between the lessor and the lessee).[38] The lessee who obtains aircraft insurance in his own name and for his own account would commonly also assign his claims in connection with the insurance proceeds arising from the insurances covering the aircraft during the lease term to the lessor. If the owner is also the operator of the aircraft, the assignment of insurance proceeds would commonly be contracted in favour of the financing party. As in the case of lease assignment, if Croatian law is applicable to the insurance assignment, there are no constraints as to the form of such assignment. The Croatian law does not require the debtor's consent for the assignment, but the debtor has to be notified of the assignment.

If governed by Croatian law, both security assignments could be signed in the form of a Croatian notary deed and registered in the FINA Registry, thus creating the publicity effect for the security interest and enabling direct enforcement before the Croatian courts.

3. International and Comparative Law

The Convention on International Interests in Mobile Equipment, popularly called the Cape Town Convention (Convention or CTC), together with the protocols that govern the

34 See Art. 136 and Art. 305 of the Enforcement Act.

35 Art. 18(3) of the Ordinance on the Croatian Registry.

36 Art. 22(3) of the Ordinance on the Croatian Registry.

37 Art. 129(2) of the Act on Obligations and Proprietary Rights in Air Traffic.

38 Art. 82 of the Civil Obligations Act.

rules for securing the financing of equipment in specific sectors,[39] is one of the most complex commercial international treaties. The only protocol of relevance to this paper is the Protocol in Matters Specific to Aircraft Equipment (Aircraft Protocol). In that sense, when we mention the CTC we are referring to both the Convention and the Aircraft Protocol, read as one instrument, unless otherwise specifically stated.[40]

After the airline industry completely switched from state ownership (and government protectionism) to private capital (and competition rules), financial institutions were faced with an increased credit risk, which raised the cost of borrowing and financing aircraft equipment, especially for operators from developing countries. In those circumstances, followed by problems stemming from the inconsistent national law concerning rights *in rem* over aircraft and an inadequate international system (as found in the Geneva Convention), an instrument such as the CTC has been recognized as much needed by everyone: banks and other financial institutions, leasing companies, and aircraft manufacturers.[41] Before turning to the essential provisions of the CTC and discussing what changes it brought, we must take a look at the system governing rights *in rem* and third person's rights in aircraft before 2001.

3.1. The Geneva Convention and the CTC

Over the years, financing institutions, airplane owners and air carriers have dealt with many practical problems which the Geneva Convention and different national legal systems had been causing. In this chapter we will address certain problems of the still existing system governing the recognition of third persons' rights in aircraft, based on the Geneva Convention.[42] Beside the general problem that in the first 50 years of its existence the Geneva Convention did not become a globally accepted instrument,[43] the system created by this treaty showed numerous disadvantages. In the context of rights *in rem* in aircraft which the Geneva Convention regulates, one of the most important ones – mortgage – perfectly depicts the status of international securities laws. Because of different national regimes that did not adapt to new principles suggested by the Geneva Convention, mortgage was left regulated by (generally) three different regimes: (a) one provided by the Geneva Convention, recognized by its state parties, (b) the second, provided by the national laws of the countries that recognize the institute of mortgage, but are not parties to the Geneva Convention (*e.g.* UK, Canada, Australia), and (c) the third, provided by countries which treat mortgage as impossible (and therefore do

[39] The other two protocols regulate rail and space mobile equipment, and neither of them has entered into force: the Luxembourg Protocol To The Convention On International Interests In Mobile Equipment On Matters Specific To Railway Rolling Stock (Luxembourg, 23 February 2007); Protocol To The Convention On International Interests In Mobile Equipment On Matters Specific To Space Assets (Berlin, 9 March 2012).

[40] This is explicitly recognized in Art. 6(1) of the Convention. It is quite unusual that the Convention does not take effect with respect to aircraft equipment until the Aircraft Protocol has taken effect. Furthermore, in the event of conflict between those two instruments, the text of the Protocol will prevail. See Art. 6(2) of the Convention.

[41] At the request by Unidroit, the Aviation Working Group was formed in 1994 as a forum which will contribute to the development of policies and regulations that facilitate aviation financing. AWG took off with only Airbus and Boeing on board, only to includes all airplane and aircraft equipment manufacturers nowadays (Bombardier, Embraer, ATP). For a history of AWG see: http://www.awg.aero/inside/history/ (June 10, 2017).

[42] Convention on the International Recognition of Rights in Aircraft, signed in Geneva, 19 June 1948, entered into force 17 September 1953.

[43] Interestingly enough, since the late 1990s, while the CTC was in the making, the Geneva Convention got more than 30 new parties. Today, the Geneva Convnention counts 89 state parties. See https://www.icao.int/secretariat/legal/List%20of%20Parties/Geneva_EN.pdf (June 7, 2017).

not recognize it all, which makes that security interest unenforceable), like Belgium and Austria.[44] This fact alone has led to multiple problems for mortgagees, especially in cases of foreign airline bankruptcy, when the mortgagor was from a state that does not recognize mortgage as such, or from another state that was not party to the Geneva Convention.[45] According to the Geneva Convention, its rules apply only if the mortgage is recorded in a contracting state and the aircraft is arrested in the (same or any other) contracting state.[46]

It is beyond the scope of this paper to delve into the details proving the inadequacy of the Geneva Convention in the aviation market today. However, we must point out to the most important problem the Geneva Convention had produced. To be more specific, the Geneva Convention had, in order to solve the problem of applicable law to security interests, set out that both "the country where the aircraft is registered" and "the country where the owner or financier is enforcing its rights" must be parties to the Convention if the creditor wants to enjoy any benefits. This approach appeared very risky for many creditors (i.e. states of their establishment), which therefore asked for a more favourable and transparent system.[47]

Today, the Geneva Convention has 89 State Parties – Croatia being one of them. The Croatian system of registration of rights in aircraft (rights *in rem* and obligations), as described *supra* in section 2.1, as well as their enforcement over aircraft, is regulated in line with the Geneva Convention. However, the Geneva Convention is slowly becoming replaced worldwide by the CTC.[48] Nevertheless, in the cases where it is not possible to apply CTC provisions or if the case concerns securities on aircraft equipment that are out of the CTC's scope of application (*e.g.* for internal transactions), the Geneva Convention will continue to apply (among its state parties or when the conditions are met). Taking into account that the CTC contains a big list of opt-out declarations, which state parties can use even in relation to some core principles of the CTC, this is likely to happen.[49]

3.2. Key features of the CTC

Aircraft finance lawyers point out two most important things that changed with the CTC. First, the CTC brought predictability in recognizing and enforcing security rights, which further led to a better position of financiers; and second, it provided a common set of rules governing security interests, which led to greater legal certainty.[50] Achieving these goals was not

[44] Crans, B. J.H., Selected pitfalls and booby-traps in aircraft finance, in Crans, B.J.H., Aircraft Finance, Kluwer Law International, 1996, p.1.

[45] For examples see Crans, ibid., at p. 2.

[46] See Art. II (2) of the Geneva Convention.

[47] See Downs, N., Taking flight from Cape Town: Increasing Access to Aircraft Financing, University of Pennsylvania Journal of International Law, vol. 35 (2014), p. 870.

[48] In a strictly formal sense, the Aircraft Protocol regulates the relationship between the CTC and the Geneva Convention. Art. XXIII reads as follows: „The Convention shall, for a Contracting State that is a party to the *Convention on the International Recognition of Rights in Aircraft*, signed at Geneva on 19 June 1948, supersede that Convention as it relates to aircraft, as defined in this Protocol, and to aircraft objects. However, with respect to rights or interests not covered or affected by the present Convention, the Geneva Convention shall not be superseded."

[49] Therefore, some authors have questioned the CTC, arguing that this system creates ambiguity and problems in its application. See Mauri, G., The Cape Town Convention on Interests in Mobile Equipment as Applied to Aircraft: Are Lenders Better Off Under the Geneva Convention?, European Review of Private Law., vol. 13 (2005), p. 645 and further. We are addressing this issue *infra* (section 3.2.).

[50] Personal notes of author, from LL.M.course in International Aircraft Financing Law, DePaul University, Febru-

an easy task for the authors of the CTC. In this chapter we will analyse the most important principles and instruments of the CTC, and try to show how it managed to achieve success in a relatively short term.

The CTC applies to international interests in aircraft objects. In the Convention, aircraft objects are defined as aircraft frames, aircraft engines, and helicopters.[51] There are three categories of interests that fall within the scope of the CTC, and those are: (1) security interests, granted by a chargor under the security agreement, (2) interests vested in the conditional seller under a title reservation agreement, and (3) the lessor's interests, granted under a leasing agreement.[52] A common characteristic of those interests under the CTC is the possibility to make them „international". Interests that do not fall within the scope of Art. 2 (2) of the Convention, are not covered by the CTC and therefore remain governed by national law rules (or the Geneva Convention, as explained above). If an interest satisfies all the criteria to be qualified as international under the CTC, it will be recognized by all state parties to the Convention.

Having an international interest in terms of the CTC means that its holder (*i.e.* holder of a security interest, conditional seller or lessor) can enjoy benefits given by the Convention that will help him enforce his rights. Among those benefits are the following:

(1) Basic default remedies, found in Art. 10 of the Convention and Art. IX of the Aircraft Protocol;

(2) Insolvency-related remedies,[53] found in Art. XI of the Aircraft Protocol; and

(3) Interim protective relief under applicable national law, as prescribed under Art. XI (5) of the Aircraft Protocol, under the condition that a State Party makes a declaration pursuant to Art. XXX (5).

In order to qualify as an international interest, certain conditions need to be fulfilled. Art. 7 of the Convention stipulates that an interest is constituted as an international interest when the following four criteria are met: the agreement creating or providing for the interest is in writing;[54] the agreement relates to an object of which the chargor, conditional seller or lessor has the power to dispose; the agreement enables the object to be identified in conformity with the Protocol;[55] and in the case of a security agreement, it enables the secured obligations to be determined (without the need to state a sum or maximum sum secured).[56]

In order to have the CTC applied to an (international) transaction, the debtor must be situated[57] in a Contracting State at the time of the conclusion of the agreement that creates or

ary 2014, lecture given by Gerber, D.N., shareholder at Vedder Price P.C. and Vice-Chair of the Legal Advisory Panel for the Aviation Working Group.

51 See Art. II of the Aircraft Protocol.

52 Art. 2 (2) of the Convention.

53 Although the question of insolvency and insolvency-related remedies has caught a lot of attention of both states adhering to the CTC and academics and practitioners, its special nature and complexity go far beyond the scope of this paper, which is why we will not be dealing with it. For further reading on the topic, see: Wool, J; Littlejones, A. Cape Town Treaty in the European context: The case for Alternative A, Art. XI of the Aircraft Protocol, Airfinance Annual; Van Zwieten, K., The insolvency provisions of the Cape Town Convention and Protocols: historical and economic perspectives, Cape Town Convention Journal, vol 1 (2012), p. 53.

54 Also includes electronic records. See Chapter-by-Chapter Technical Summary of the Cape Town Convention & Aircraft Protocol, prepared by the AWG (Annex IV), p. 2.

55 Aircraft objects are defined as aircraft frames, aircraft engines, and helicopters. Those objects must meet certain minimum size thresholds. See Art. I (2b), I (2d) and I (2l) of Aircraft Protocol.

56 See comparison of the requirements concerning security interests in Croatia, *infra* (section 4.2.).

57 Under Art. 4, the debtor is considered to be situated in a Contracting State in case of any of the following: a)

provides for the international interest.[58] However, the location of the creditor is irrelevant. It is important to stress that the applicable national law is of outmost importance here. As the Convention stipulates: *The applicable law determines whether an interest to which paragraph 2 applies falls within subparagraph (a), (b) or (c) of that paragraph*.[59] Therefore, once it is determined that an interest does fall within one of those three categories, its characterization will be determined by applicable (national) law.

In this short overview of the key principles of the CTC, we must also point out certain special characteristics of the CTC. The first of them is the use of declarations in the Convention (Art. 54-58 of the Convention and Art. XXX and related Articles of the Aircraft Protocol). Due to the fact that the parties to the CTC have the possibility (and sometimes even an obligation)[60] to make over 20 declarations of various kinds to the CTC,[61] we could say that Convention has a high degree of possible customization, which also complicates its interpretation and application. By making each declaration, States are practically clarifying the meaning of a certain provision (on which they put a declaration) in their legal framework, even in cases where they decide not to apply a certain provision.[62] Therefore, it is very important for financiers to have this in mind when they deal with airlines and potential buyers/lessees from certain countries.[63] The idea behind reaching global acceptance of the CTC is to preserve party autonomy, which is an important incentive not only for the state parties but also for possible future parties to the Convention. Namely, these possibilities can also enable creditors to mitigate their risks and offer more capital in the market. Therefore, the CTC allows for so many declarations to be made by state parties,[64] giving them a possibility to derogate from most of its provisions.

In the end, it is important to stress that numerous aspects of an aircraft finance transaction to which the CTC applies will continue to be governed by national law, because the Convention expressly leaves various matters to the "applicable law" meaning "the domestic rules of the law applicable by virtue of the rules of private internal law of the forum State",[65]

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under the law of which it is incorporated or formed; (b) where it has its registered office or statutory seat; (c) where it has its centre of administration; or (d) where it has its place of business. The place of the signing of the document or the place of aircraft registration are not relevant for this determination.

58 See Art. 3 of the Convention.

59 Art. 2 (4) of the Convention.

60 There is only one case of mandatory declaration in the CTC, which, if not made at the time of ratification, will prevent the CTC from taking effect in that State Party.

61 It is possible to recognize three groups of those declarations: (a) opt-in clauses, (b) opt-out clauses, and (c) mandatory declarations. The most important ones are those related to default remedies and insolvency.

62 We must point out Art. 54(2) of the Convention, which requires States to specify whether remedies will be available via self-help, or only through leave of the court *("A Contracting State shall, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare whether or not any remedy available to the creditor under any provision of this Convention which is not there expressed to require application to the court may be exercised only with leave of the court.").* For some scholars this is an "undoubtedly controversial" declaration, which is "probably the most creditor-friendly provision in the entire CTC". See Havel, B.F., INTRODUCTION TO THE CAPE TOWN CONVENTION AND THE AIRCRAFT PROTOCOL, Teacher's Manual Version, 2012, p. 46.

63 AWG has issued a detailed summary with information on national implementation of the CTC, listing all important declarations and providing additional comments on each state parties' legal position towards the CTC. A summary is available on the AWG web site: Cape Town Convention on International Interests in Mobile Equipment and its Aircraft Protocol, Summary of National Implementation, February 2015.

64 Nevertheless, Art. 56 of the Convention prohibits States from making any reservations or declarations outside the specified provisions.

65 See Art. 5 of the Convention.

such as the nature of agreements, governing law of the agreement, procedural law, additional remedies, or safety regulations.[66] Like the approach taken towards making declarations, this proves again that the CTC, although aiming at universal applicability, respects the important differences within its (prospective) state parties and their regulation in certain matters. This flexibility might be what the (future) success of the CTC might rest with.

3.3. CTC International Registry

In close connection with the concept of international interest is another key feature of the CTC, namely the International Registry (Registry). It must be emphasized that registration of an interest is not a prerequisite for the interest to qualify as international under the CTC.[67] The Registry provides protection to recognized international interests, and similarly to many national aircraft registries, preserves priority against later registrations ("first to file" rule). It means that once an interest is registered in the Registry, the holder of that interest has priority over all subsequently registered and unregistered interests.[68]

The Registry is established and operated by Aviareto, a joint venture of SITA SC and the Irish Government, which was awarded a contract with the International Civil Aviation Authority (ICAO) in accordance with Art. XVII of the Aircraft Protocol.[69] At the same time, ICAO is designated as the Supervisory Authority for oversight and regulation of the Registry.[70]

Registry is fully electronic and easily accessible on-line twenty-four hours a day, which makes it extremely convenient to use, both for those who want to register their interests and those who are only interested in finding information regarding certain aircraft objects.[71] The Registry has a few significant characteristics, one of them being special treatment of engines which are considered as separate property (apart from airframes), to which the CTC applies. This feature stems from the definition of an aircraft object under the CTC and enables the holder of the interest to separately register against them. According to the drafters of the Convention, this will support advanced engine financing and use, since they are often separately financed and hired out on a short term basis (where strong property rights are particularly important).[72]

Although the International Registry is envisaged as a one-dimensional registry that offers a wide, international base of information on security interests on certain aircraft objects, it is

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66 See Art. 12, 16, 36, 38 of the Convention, as well as Art. VIII (2), IX (5), XI, XIII (3) and XVI (2) of the Protocol.

67 See requirements *supra* (section 3.3).

68 Art. 42 (1) Priority of competing interests, says: *A registered interest has priority over any other interest subsequently registered and over an unregistered interest.* And it continues in par. 2 *The priority of the first-mentioned interest under the preceding paragraph applies:(a) even if the first-mentioned interest was acquired or registered with actual knowledge of the other interest; and (b) even as regards value given by the holder of the first-mentioned interest with such knowledge.*

69 See https://www.aviareto.aero/about-us/ (June 20, 2017)

70 Resolution No 2 adopted by the Cape Town Diplomatic Conference on 16 November 2001, based on Art. XVII of the Aircraft Protocol.

71 Art. VII of the Aircraft Protocol prescribes that for the purposes of constituting an international interest under the CTC, an aircraft object needs to be described containing the manufacturer's serial number, the name of the manufacturer and its model. Those are the exact derails according to which the International Regustry is organized. See https://www.internationalregistry.aero/ir-web/search/registration?execution=e1s1 (last accessed June 20, 2017).

72 AWG in response to Rachel Onikosi, Deputy Head, Legislative and International Policy Unit, Department for Business, Innovation & Skills in a Call for Evidence – Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment, August 16, 2010, at p. 4-5.

possible under Art. XIX of the Aircraft Protocol that a Contracting State designate one or more entities in its territory as the entry point (or points) through which the information required for registration[73] will be transmitted to the Registry. A number of Contracting States have used this possibility and designated an exclusive entry point for accessing the international registry for the purpose of harmonizing national registration systems with the international registry.[74]

3.4. CTC and Member States Experience

Although it has been more than 10 years since the CTC entered into force, from the standpoint of the European Union (EU) and Croatia as its Member State, it is still waiting for its glorious days to come. The European Union has recognized the importance of the CTC for its Member States and it acceded to the Convention and the Aircraft Protocol in 2009.[75] Practitioners were expecting that this would give Member States the much needed motivation and support to do the same. However, since 2009, not many EU countries have ratified the Convention and the Aircraft Protocol, those being: Denmark, Gibraltar, Latvia, Malta, Spain, Sweden and the United Kingdom (Luxembourg and Ireland signed it earlier, in 2008 and 2009, respectively).[76] Nevertheless, we expect more Member States to join the CTC in the coming years.[77]

Under the CTC, the EU has the right to accede to the Convention and make declarations, like any other state, whereby it is to be treated as a contracting state, with its rights and obligations, under the condition that it has competence over matters that are governed by the CTC.[78] The fact that the EU and the Member States have shared competences in questions governed by the CTC and the fact that the EU was the first to ratify the CTC (with the exception of Luxembourg who ratified it in 2008), has led to, to say tthe least, an interesting situation. More specifically, while ratifying the CTC, the EU made some declarations in which it specified that it had competences in respect of those provisions regarding jurisdiction,[79]

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[73] Other than the registration of a notice of a national interest or a right or interest under Art. 40, in either case arising under the laws of another State. As prescribed in Art. XIX of Aircraft Protocol.

[74] See the case of the United States where a party must first register the aircraft object with the Federal Aviation Administration (FAA) in order to receive a transaction code, which it can then use to register the aircraft object with the international registry. See Havel, *supra* note 62, at p. 10. Also, Spain has designated the Registro de Bienes Muebles, in practice the Registro Provincial de Bienes Muebles de Madrid (RBM), as its national entry point, which caused the confusion caused by the interaction between the RBM, the Aircraft Registry – the Registro de Matriculas de Aeronaves (RMA) – and the International Registry. For more see Gray, K, CTC in Europe: Assessment of Ratifications to Date and Implications of Brexit on the Ratification by the UK, Cape Town Convention Journal, 2016, Vol. 5, No. 1, at p. 2, http://dx.doi.org/10.1080/2049761X.2016.1252136 at 12-13.

[75] See Council Decision 2009/370/EC of 6 April 2009 on the accession of the European Community to the Convention on international interests in mobile equipment and its Protocol on matters specific to aircraft equipment, adopted jointly in Cape Town on 16 November 2001, [2009] OJ L 121, p. 3.

[76] Status of CTC and Protocol on June, 7th 2017 (www.unidroit.org/status-2001capetown-aircraft).

[77] A number of other larger countries with impotance for aircraft finance and leasing, such as Australia, Egypt and Vietnam, also acceded to the CTC in the past few years.

[78] Art. 48 (1) of the CTC reads as follows: „A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that that Organisation has competence over matters governed by this Convention. (…)"

[79] Subject to REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial

choice of law,[80] and insolvency.[81,82] Following this decision, and in accordance with the EU principle of subsidiarity, the Member States are left unable to make declarations in respect of those matters. Furthermore, it also means that any subsequent ratification of the CTC by a Member State would not extend to these matters.[83] The EU itself has stressed the importance of application of those provisions of the CTC that fall within the *exclusive* (emphasis added) competence of the Community.[84]

Each Member State that has ratified the CTC has its own story, and there is no doubt that the position of the EU and its Member States towards the CTC differs. At the time of ratification, some of the Member States made certain declarations under the Protocol while others did not.[85] Some Member States, like Denmark,[86] have had a rather positive experience so far, while others, like Spain, experienced certain problems in the interpretation and application of CTC provisions at an early stage, but have managed to clear out the situation.[87]

Therefore, when addressing the issue of EU-wide acceptance of CTC, we must have in mind the broad perspective, which can be described by the fact that, beside the U.S. aviation market, the EU aviation market is still a very important one. In terms of financing, this is a market that is dominated by one of the biggest aircraft manufacturers (Airbus), which accounts for a few dozen airlines, some of which being the leading ones in the world, a few big leasing companies (especially in Ireland), and some global financiers in the aircraft industry, such as the German DVB Bank. Therefore, it is in the interest of all Member States to embrace a new legal framework which should bring economic benefits to the entire air transport industry.

The fact that ever more countries are gradually acceding to the CTC opens the questions of potential ratification and implementation of the CTC in Croatia, replacing the Geneva Convention and the nationally created model of acquiring security interests in aircraft, which is currently in force.

4. Potential Obstacles for the Implementation of the CTC in Croatia

While the European Union joined the CTC as a Regional Economic Integration Organization, the Republic of Croatia did not sign or ratify the Convention or the Aircraft Protocol, as

matters, [2012] OJ L 351, p. 1.

80 Subject to Council Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), [2008] OJ L 177, p. 6.

81 Subject to Council Regulation (EC) No 1346/ 2000 of 29 May 2000 on insolvency proceedings (the Insolvency Regulation), [2000] OJ L 160, p. 1.

82 Declarations lodged by the EU under the CTC at the time of the deposit of its instrument of accession, at http://www.unidroit.org/status-2001capetown?id=1658 and http://www.unidroit.org/status-2001capetown-aircraft?id=1573 (last accessed June 20, 2017).

83 There is one exception to this concerning Denmark. Denmark has negotiated an exemption from EU competence on the relevant subject areas as set out in the 'Protocol on the position of Denmark', which is annexed to the Treaty on European Union (the TEU). It follows that EU Declarations do not apply to Denmark, and the basis for Denmark's ratification of the Convention is, therefore, the same as for non-Member States. See Gray, *supra* note 74, at 2.

84 Recitals 2-3 in the preamble to Council Decision 2009/370/EC.

85 See Gray for a detailed analysis across EU Member States, s*upra note* 74, at p. 5-14.

86 We wish to express our gratitude to Morten L. Hans Jakobsen, Partner at Gorrissen Federspiel Advokatpartnerselskab, and Katrine Stellini, Assistant Attorney, who shared their experience and knowledge on this topic, and especially for giving us insight into the recent Danish experience with the ratification of the CTC.

87 Gray, *supra note* 74.

a majority of other EU Member States. Apart from certain matters where the EU has competence, in all subjects of the CTC where Croatia as a Member State has exclusive competence, the CTC has no legal relevance or impact on the Croatian legal system.

According to the conflict of laws provisions in the Croatian Law on Obligations and Proprietary Relations in Air Traffic relating to ownership and other rights *in rem* over the aircraft, the law of the aircraft's state of registration applies.[88] Under Croatian law, voluntary hypothecations over aircraft can only be created by registration in the Croatian Registry. Other pledges over aircraft can either be created by a court decision or by the operation of the Croatian law. As a consequence, all proprietary interests over aircraft with Croatian nationality, created by registration with the International Registry, would not be considered validly created under Croatian law.

In reviewing the text of the CTC, we identified several provisions which are substantially different from the solutions employed in Croatian aviation law and might represent an obstacle in implementing the CTC in the Croatian legal system. The CTC is a complex legal document and there are certainly other points which could be raised on the implementation of the CTC in Croatian law. In this chapter only a number of provisions concerning the establishment of security interests and remedies on the disposal of persons in which security interests are vested will be analysed. We will concentrate specifically on aircraft as objects of security interest, but obstacles to implementation of the CTC could also be viewed from the perspective of other mobile equipment the CTC deals with.

4.1. Airframe and Aircraft Engine as Singular Objects of International Interests

International interests are granted in airframes, aircraft engines and helicopters. The CTC defines the term "aircraft" as defined for the purposes of the Chicago Convention, which either refers to airframes with aircraft engines installed thereon or helicopters.[89] However, international security interests are created, registered and enforced in airframe and aircraft engines as separate objects even if they initially belonged to the same aircraft.[90] This separation is logical, because aircraft engines are highly valuable objects which are often separately bought, maintained, pledged or leased and are from time to time installed on different aircraft.[91]

Conversely, the Croatian aviation regulation recognises only aircraft as a main object of proprietary and obligation rights, with the aircraft engine defined as an aircraft part. Separate proprietary and obligation rights can be constituted in aircraft engines under the general principles of the Croatian law on rights *in rem* and the law of civil obligations. However, aviation law does not deal with this specific issue and some doubt always remains whether the secured creditor could potentially lose his interest in an engine if the engine is separated from or attached to an aircraft, depending on the case at hand.[92]

Since the CTC recognizes the creation of two separate international interests – one in the airframe and another in the engine – the application of the CTC would help resolve practical issues regularly encountered in the course of the creation of security interests over aircraft and

88 Art. 181 of the Law on Obligations and Proprietary Relations in Air Traffic.

89 Art. I(2)(a) of the Aircraft Protocol.

90 Art. I(2)(c) and II(1) of the Aircraft Protocol.

91 See also Practitioners' Guide to the Cape Town Convention and The Aircraft Protocol of the Legal Advisory Panel of the Aviation Working Group, September 2015, p. 10.

92 See more insight into this topic *supra* (section 2.3.2.).

its parts in Croatia. Implementation of the CTC would thus most likely require certain amendments to the Croatian aviation laws so that they may explicitly recognize the airframe and aircraft engines as separate objects of rights, and provide for the possibility of registering them.

4.2. International Interest Under a Security Agreement

Three types of international interests in airframe and aircraft engines recognised by the CTC are intentionally defined broadly so as to cover any possible financing, collateralisation and interest mechanisms used in a variety of national legal systems.[93] International interests should not be interpreted in accordance with any local law, even in case of legal disputes over an international interest, but their meaning should be determined by the CTC's own definitions and autonomous rules of interpretation.[94] However, in order to determine whether the rules of the CTC could be introduced in the Croatian (or any other) national legal system (with more or fewer obstacles), it is helpful to compare the international interests from the CTC to various national interests which resemble or fall within the scope of definition of international interests regulated in the CTC.

The Croatian hypothecation over aircraft and the Croatian pledge over the aircraft engine (or other aircraft parts), which were analysed in chapter 2 of this paper, could be compared with international interest granted by the chargor under a security agreement. If Croatia accesses to the CTC, this type of international interest could replace the Croatian hypothecation or pledge.

However, certain requirements for the security agreement and rights granted to the chargee as the secured creditor are very different from the rules and principles found in Croatian security and enforcement law and generally the security and enforcement law of European countries belonging to the continental civil law systems. The CTC requires that the security agreement enables the secured obligations to be determined, but without the need to state a sum or maximum sum secured.[95] Under the general rule of the Croatian Enforcement Act, the secured claim should be determined or be able to be determined. The latter requirement is fulfilled if the framework amount of the future claim which is being secured is indicated and if the creditor or a third party is subsequently entitled to determine the amount of claim up to that framework amount and its maturity date.[96] It arises from this definition that a framework sum or the maximum sum secured must be determined in the security agreement. In practice, the parties will usually determine the maximum sum of the main claim, up to which the secured creditor will be entitled to subsequently determine the exact amount of claim. If the CTC is to be implemented, its rule on determining secured obligations would be directly contrary to Croatian security law. Therefore, either the Enforcement Act would need to be amended to comply with the solution used in the CTC, or, more likely, the rule on secured claims from the Enforcement Act would remain, and the special rule under the CTC would apply only to security interests in aircraft and other mobile equipment within the scope of the CTC.

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[93] Ibid., at p. 12.

[94] This view is shared by the Aviation Working Group, see ibid. AWG also asserts that an international interest comes into existence when the conditions from the CTC are met, even if these conditions would not be sufficient to create a lease, a security interest, a conditional sale or a sale under otherwise applicable national law end even if the international interest is of a kind not known under such national law.

[95] Art. 7 of the Convention.

[96] Art. 311 of the Enforcement Act.

An international interest is established by the conclusion of the agreement and registration in the International Registry is not a prerequisite for its creation. The registration under the CTC is used to create the publicity effect in relation to third parties and to establishe priority in case of multiple interests.[97] On the contrary, under Croatian national law, registration with the Croatian Registry is the prerequisite for the creation of hypothecation as a security interest and the focal point of any financing transaction. If Croatia ratifies the CTC, it will need to recognize the creation of an international interest by entry into agreement only in accordance with the rules of the CTC.

Probably the most important obstacle for the adoption of the CTC in Croatian legislation is the provision of Art. 8 on non-judicial remedies of the chargee in the event of default as provided in Art. 11 of the Convention. Under the CTC, the chargee may exercise any or all of the following remedies: 1) take possession or control of any object charged to it, 2) sell or grant a lease of any such object, 3) collect or receive any income of profits arising from the management or use of any such object, 4) procure the de-registration of the aircraft and 5) procure the export and physical transfer of the aircraft object from the territory in which it is situated.[98] The chargee may exercise these remedies without interference of the court or any other agent. The chargee may alternatively apply for a court order authorising or directing any of the said remedies.[99] Furthermore, at any time after default, the chargee and all interested persons may agree, or the court may order (on the application of the charge), that ownership of (or any other interest of the chargor in) the airframe or the aircraft engine covered by the security interest vest in the chargee in or towards satisfaction of the secured obligations.[100]

These solutions envisaged in the CTC do not correspond to the logic of Croatian enforcement law, nor of Croatian aviation law, which in matters of security and enforcement refers to the provisions of maritime law.[101] Under the mentioned legal sources the chargee is entitled to take possession of an aircraft and sell an aircraft or part of an aircraft in a public action, all in court administered proceedings. A secured creditor's use of non-judicial remedies to sell, de-register and export or consensually acquire ownership of the aircraft without interference of the court or another public authority, is not in conformity with Croatian laws regulating enforcement over real estate and movable assets and their principles of protection of the debtor's and third party rights.[102] Although it is difficult to imagine that Croatia would be ready to implement and enforce in the courts rules which are substantially different, an exception has already been made in regard to ships, for which the Croatian Maritime Code envisages an out-of-court sale.[103] Therefore, a similar exception could possibly also be applied to aircraft.

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97 See Practitioners' Guide 2015, *supra* note 91, at p. 16.

98 Art. 8(1) of the Convention, Art. IX(1) of the Aircraft Protocol.

99 Art. 8(2) of the Convention.

100 Art. 9(1) and (2) of the Convention.

101 Art. 175 of the Act on Obligations and Proprietary Rights in Air Traffic

102 In some older versions of the Enforcement Act it was possible for the fiduciary owner of an asset as the secured creditor to become the owner of the asset in case of default without court administration and without selling the asset in a public auction.

103 Art. 219 of the Maritime Code (Pomorski zakonik, Narodne novine br. 181/2004, 76/2007, 146/2008, 61/2011, 56/2013, 26/2015). Interestingly, Art. 175 of the Act on Obligations and Proprietary Rights in Air Traffic does not refer to the Maritime Code currently in force in Croatia, but to the provisions of the old Maritime Code (Pomorski zakonik, Narodne novine br. 17/1994, 74/1994, 43/1996, 158/2003), which did not provide for out-of-court sale of ship.

Remedies including economic usage of aircraft objects, such as a lease of such object, collection or receipt of income or profits arising from the management or use of aircraft objects, is not completely unknown in Croatia, although it has, to our knowledge, not been enforced in practice and is envisaged within a single provision of the Act on Obligations and Proprietary Rights in Air Traffic. Under this provision (Art. 148(2)) the hypothecation agreement can contain a provision that empowers the hypothecation creditor, , if the debt is not settled, to settle his outstanding mature claim by economically using the aircraft. This right can be registered with the Croatian Registry as a charge on the debtor's aircraft and constitutes a special manner of settlement that could be described as non-judicial.[104]

The CTC however provides for the possibility of any contracting state to declare whether or not any remedy available to the creditor under any provision of the CTC, which does not have to require an application to the court, might be exercised only with leave of the court.[105] If Croatia would make this declaration, the remedies would still be significantly broader than the remedies permitted under Croatian enforcement law. The largest obstacle, which excludes the non-participation of the court, could be overcome by a declaration.

4.3. International Interest Under a Title Reservation Agreement

A title reservation agreement under the CTC means an agreement for the sale of an object on the condition that ownership does not pass to the buyer until the condition or conditions stated in the agreement are fulfilled.[106] The ownership reservation agreement is regulated in the Croatian contract law in form of a sale and purchase with ownership reservation[107]. While the ownership of mobile assets is normally transferred from the seller to the buyer by the delivery of the asset into the buyer's possession, if the seller and the buyer have contracted a reservation of the right of ownership, the seller can reserve ownership after the mobile asset has been delivered to the buyer, until the buyer pays the purchase price. According to the explicit provision of the Civil Obligations Act, in the case of mobile assets for which public registers are kept, the sale and purchase with ownership reservation as described is not possible unless envisaged in the laws and regulations on such public registers.[108]

The Ordinance on the Croatian Registry indeed comprises one provision on fiduciary transfer of ownership, defined as ownership limited by term or condition, after the expiry or fulfilment of which the ownership is transferred to the acquirer.[109] This right can be registered with the Croatian Registry in favor of the acquirer, not in the form of an interest encumbering the aircraft, but rather as registration of ownership of the aircraft including a note on the term or condition which must be fulfilled in order for the conditional ownership to become full, unconditional ownership. Such registration of conditional ownership[110] has the effect of a pre-registration of ownership, which becomes regular registration of ownership after the term has lapsed or the condition has been fulfilled.[111]

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[104] See also Baretić, *supra* note 5, at p. 368.

[105] Art. 54(2) of the Convention.

[106] Art. 1(1)(ll) of the Convention.

[107] Art. 462 of the Civil Obligations Act.

[108] Art. 462(4) of the Civil Obligations Act.

[109] Art. 22 of the Ordinance on Croatian Registry.

[110] In Croatian „potonje vlasništvo" as per Art. 22. of the Ordinance on the Croatian Registry.

[111] In Croatian „predbilježba", type of registration envisaged for cases when full registration of certain right *in rem* is subject to the fulfilment of certain condition(s).

While the ownership reservation is permitted in Croatian air traffic law and could be registered as conditional ownership with the Croatian Registry due to the explicit provision of the Ordinance, to the best of our knowledge it has not yet been used in the practice of the Croatian Registry. Introduction of title reservation agreements as international interests under the CTC and remedies available to the conditional seller in the event of default under a title reservation agreement would thus be a novelty for legal practitioners and courts alike.

4.4. International Interest Under a Lease Agreement

Registration of a leasing agreement in an international register would not be a complete novelty if the CTC were ratified, given that aircraft lease agreements are currently delivered to the Croatian Registry and operators of aircraft are registered on those grounds.

The CTC provides for special remedies available to the lessor in the event of default under a leasing agreement. The lessor may terminate the agreement and take possession or control of airframe or aircraft engine to which the agreement relates, or apply for a court order authorising or directing either of these acts.[112] These remedies of the lessor do not substantially differ from the remedies available to the lessor under a lease agreement under Croatian law. The exception is that CTC grants the lessor a right to take possession or control of the security object without the court participation, which would not be possible in Croatia.

Nevertheless, a contracting state can again make a declaration that any remedy available to the creditor under any provision of the CTC, which does not require application to the court, may be exercised only with leave of the court. It is likely that Croatia would make use of this declaration for leasing agreements as well.

5. Conclusion

Asset-based financing principles that have been embraced in the CTC provisions are a key feature that leads to more transparency in the industry, which should, in theory, make aircraft financing much easier to secure.

Judging by the experiences of other countries, especially EU Member States, which are already applying the CTC, transitional issues can be expected to occur and continue occurring for a certain transitional period of time after the accession to the CTC. Those issues may appear in Croatia as well, especially in case of already created national interests, novation of national interests into international interests, or perhaps agreements concluded under the old Geneva regime, but which are to be registered only once the CTC is adopted and enters into force. However, these potential issues should not discourage the legislator to ratify the CTC and make any necessary amendments to the national law, as they are common whenever larger legal shifts are implemented and can be resolved in practice. As always, thorough and precise transitional provisions in the adoption of the CTC would be essential so that difficulties in its implementation could be avoided.

Having described some of the potential obstacles for the implementation of the CTC into Croatian aviation law and its legal system in general, it should be stressed that experiences in enforcement over aircraft for the settlement of creditor's monetary claims and enforcement of repossession of aircraft in Croatia are scarce to none. Even if such proceedings are initiated, it is in our opinion likely that they would be settled amicably, due to all difficulties which

[112] Art. 10 of the Convention.

aircraft as an object of security interests and enforcement presents. Hence, there is not much practical experience with enforcement and repossession under the current registration system and the same would probably apply to the CTC system if it were to be implemented in Croatia. It is possible that the CTC registration system may function for a long time without really being tested in practice, in particular in smaller jurisdictions with few aircraft transactions and subsequent legal proceedings. Nevertheless, once Croatia decides to accede to CTC, much effort should be made to ensure proper guidance to courts which bear a great responsibility of applying its provisions.

Although there have not been many cases of default under the CTC, which makes it hard to predict the financial benefits of implementation of CTC at this point, some analyses show that ratification of the CTC will bring financial benefits both to creditors and borrowers.[113] Adherence to the CTC will enable airlines located in the ratifying States to reduce costs and provide them with additional sources of financing. They can become eligible for decreased fees from export credit agencies in various aircraft manufacturing States such as the United States,[114] the EU, Japan, Brazil, and Canada. Under the OECD Aircraft Sector Understanding (ASU 2011), discounted rates are permitted for States that have ratified the CTC and adopted a specified set of declarations.[115] Such direct benefits, paired with the benefits that CTC offers to manufacturers and financial institutions, entail important indirect benefits, including job creation and benefits to passengers.[116]

But more than these numbers, it is important to note that the mission of people behind the CTC (namely AWG) is to make CTC globally accepted and help countries promote business and better relationships with foreign export credit agencies.[117] In the light of this, we hope that countries worldwide, including Croatia, will recognize the benefits that the CTC system offers and will thus give their support to make the aviation market and air transport industry a better place for all stakeholders.

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[113] See Downs, *supra* note 47, at p. 881.

[114] In 2003 the U.S. Export-Import Bank announced that it would offer a one-third reduction of its exposure fee for foreign buyers of U.S. commercial aircraft who were subject to the CTC. For more details see Downs, *supra* note 47, at p. 877-878.

[115] More on ASU 2011 and understanding financing of aircraft sector see GERBER, D.N., The 2011 Aircraft Sector – Understanding: Calming turbulent skies, *The Air & Space Lawyer*, Volume 24, Number 1, 2011.

[116] See AWG in reponse to Rachel Onikosi, *supra* note 72.

[117] Also see Downs, *supra* note 47, at p. 880.

IV.

PRAVNA PITANJA VEZANA UZ LUKE NAUTIČKOG TURIZMA

LEGAL ISSUES REGARDING NAUTICAL TOURISM

IZGRADNJA GRAĐEVINA I DRUGIH OBJEKATA INFRASTRUKTURE U LUKAMA NAUTIČKOG TURIZMA

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SAŽETAK

Izgradnju građevina i drugih objekata infrastrukture na pomorskom dobru, s obzirom na njegovu pravnu prirodu kao općega dobra, moguće je ostvariti samo režimom koncesije. Zakon o gradnji, osim ugovora o koncesiji, ne predviđa drugi modus dokazivanja pravnog interesa za izdavanje građevinske dozvole za nekretninu na kojoj nije moguće stjecanje stvarnih prava. Stoga potencijalni investitor pravni interes dokazuje ugovorom o koncesiji za gospodarsko korištenje pomorskim dobrom ili ugovorom o koncesiji za posebnu uporabu pomorskoga dobra. Koncesija se zakonom izrijekom određuje kao pravo koje se stječe ugovorom, a sam sadržaj tog instituta, iz perspektive luka nautičkog turizma, predviđa korištenje pomorskim dobrom s korištenjem postojećim ili izgradnjom novih infrastrukturnih i suprastrukturnih objekata. Zakon o prostornom uređenju pod pojmom infrastrukture podrazumijeva komunalne, prometne, energetske, vodne, pomorske, komunikacijske, elektroničke komunikacijske i druge građevine namijenjene gospodarenju drugim vrstama stvorenih i prirodnih dobara. Luke nautičkog turizma, iako u svojoj osnovi egzistiraju u simbiozi s pojedinom mikrolokacijom, po normativnom određenju u građevinskom i funkcionalnom pogledu čine cjelinu, što znači da se s građevinskoga gledišta imaju promatrati kao jedinstvena građevina. Pitanje izgradnje pojedinih građevina i objekata infrastrukture unutar koncesijskog obuhvata luke nautičkog turizma javlja se u pravilu u slučaju izgradnje nove luke nautičkog turizma ili u slučaju cjelovite rekonstrukcije luke nautičkog turizma kao potrebe koja se javlja za trajanja koncesije uslijed dotrajalosti postojeće suprastrukture i infrastrukture, odnosno potrebe za povećanjem postojećih kapaciteta. Na pitanje opravdanosti takve investicije odgovor mora dati studija gospodarske opravdanosti, čiji sadržaj, opet, ovisi o vrsti zahvata. Neovisno je li riječ o izgradnji nove ili rekonstrukciji postojeće luke nautičkog turizma, koncesionaru najčešće predstoji dugotrajni postupak ishođenja dozvola da bi se moglo pristupiti građenju. Posebno mjesto u dokumentaciji koja se ima pribaviti prije pristupanja građenju svakako pripada pisanoj suglasnosti davatelja koncesije. Uzevši u obzir zakonodavne promjene u području regulacije gradnje u posljednjih nekoliko godina, postavlja se pitanje hoće li biti dostatno zatražiti tu suglasnost već temeljem idejnog projekta kao podloge za izdavanje lokacijske dozvole ili pak glavnog projekta kao podloge za dobivanje građevinske dozvole. Pri razmatranju pitanja izgradnje građevina i drugih objekata infrastrukture u lukama nautičkog turizma, pozornost treba posvetiti i činjenici da je izgradnja pojedinih građevina i objekata infrastrukture, a posebice vodovodne, kanalizacijske i energetske mreže, zakonom izrijekom navedena

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kao jedna od vrsta posebne upotrebe pomorskoga dobra, za koju se dodjeljuje koncesija, u postupku koji se razlikuje od postupka koji se vodi za koncesiju za gospodarsko korištenje pomorskim dobrom. Stoga se postavlja pitanje je li koncesionar luke nautičkog turizma ovlašten izvoditi radove koji spadaju u izgradnju građevina i objekata infrastrukture, i to vodovodne, kanalizacijske i energetske mreže i pod kojim uvjetima. S obzirom na postojeće uređenje koncesijskog odnosa u Zakonu o koncesijama, Zakonu o pomorskom dobru i morskim lukama te podzakonskim propisima, promišljaju se mogući modeli kojima bi se u izgradnju građevina i objekata vodovodne, kanalizacijske i energetske mreže mogle uključiti treće osobe izvan koncesijskog odnosa. Razmatra se model promjene granica koncesije kao varijante za omogućavanje davanja koncesije za posebnu uporabu pomorskoga dobra trećim osobama u cilju zadovoljenja potrebnih infrastrukturnih uvjeta. Posebno se analizira moguća primjena modela potkoncesije kao jednog od normativnih rješenja prijenosa izvođenja određenih prava i obveza koja pripadaju koncesionaru iz koncesije na treću osobu te se razrađuje bitan sadržaj takva ugovora uslijed nedostatka detaljnijeg uređenja navedenog instituta.

Ključne riječi: *građevine, objekti infrastrukture, pomorsko dobro, luka nautičkog turizma, koncesija, potkoncesija*

1. Uvod

U javnosti je sveprisutan naglasak na potrebu povećanja broja nautičkih vezova na Jadranu radi postizanja odgovarajuće razine ponude uslijed rastućeg interesa domaćih i stranih nautičara. Nautički vez nije samo puko mjesto za privez plovila, kako se to nerijetko prikazuje, nego egzistira kao sastavni dio ponude unutar određene luke s cjelokupnom infrastrukturom i suprastrukturom. A tu infrastrukturu i suprastrukturu potrebno je prethodno izgraditi. Kada se govori o izgradnji[1] objekata u lukama nautičkog turizma, odnosno na pomorskom dobru, prvo je potrebno osvrnuti se na pravnu prirodu pomorskoga dobra. Riječ je o općem dobru, čiji su pravni status i zaštita regulirani već u Ustavu Republike Hrvatske. Tako su čl. 52. Ustava Republike Hrvatske[2] more, morska obala i otoci proglašeni kao dobra od interesa za Republiku Hrvatsku i imaju njezinu osobitu zaštitu.[3] Zakon o pomorskom dobru i morskim lukama (dalje: ZPDML),[4] naravno, slijedi[5] takvo određenje te definira pomorsko dobro kao opće dobro od interesa za Republiku Hrvatsku, koje ima njezinu osobitu zaštitu, a upotrebljava se pod uvjetima i na način propisan istim zakonom. Stoga pomorsko dobro nije u vlasničkom režimu, što znači da se njime može svatko koristiti tako da takvu uporabu ne priječi drugome i da ta uporaba ne šteti ni na koji način samom pomorskom dobru.[6] Sukladno zakonskoj definiciji, pomorsko dobro čine unutarnje morske vode i teritorijalno more, njihovo dno i podzemlje te dio kopna koji je po svojoj prirodi namijenjen općoj upotrebi ili je proglašen takvim, kao i sve

[1] Sukladno čl. 3. st. 1. t. 3. Zakona o gradnji (NN 153/13, 20/17) pojam gradnja obuhvaća projektiranje i građenje građevina te stručni nadzor građenja. Pod pojmom izgradnja autor se za potrebe ovog članka referira na pojam građenje, koje je čl. 3. st. 1. t. 4. navedenog zakona definirano kao izvedba građevinskih i drugih radova (pripremni, zemljani, konstruktorski, instalaterski, završni te ugradnja građevnih proizvoda, opreme ili postrojenja) kojima se gradi nova građevina, rekonstruira, održava ili uklanja postojeća građevina.

[2] NN 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

[3] Zakonom se određuje način na koji dobra od interesa za Republiku Hrvatsku mogu upotrebljavati i iskorištavati ovlaštenici prava na njima i vlasnici te naknada za ograničenja kojima su podvrgnuti, čl. 52. st. 2. Ustava Republike Hrvatske.

[4] NN 158/03, 100/04, 141/06, 38/09, 123/11, 56/16.

[5] Čl. 3. ZPDML-a.

[6] Tako Seršić, V. 2012. Upravljanje pomorskim dobrom de lege ferenda. *Aktualnosti hrvatskog zakonodavstva i pravne prakse, Godišnjak 19*. Str. 488.

što je s tim dijelom kopna trajno spojeno na površini ili ispod nje. Navedenim dijelom kopna smatra se: morska obala, luke, nasipi, sprudovi, hridi, grebeni, plaže, ušća rijeka koje se izlijevaju u more, kanali spojeni s morem te u moru i morskom podzemlju živa i neživa prirodna bogatstva.

Pomorskim dobrom u svrhu zaštite njegove prirodne te društvene vrijednosti[7] upravlja Republika Hrvatska neposredno ili preko jedinica područne (regionalne) samouprave, odnosno jedinica lokalne samouprave. ZPDML definira navedeno upravljanje kao održavanje, unapređenje, brigu o zaštiti pomorskog dobra u općoj upotrebi te posebnu upotrebu ili gospodarsko korištenje pomorskim dobrom na temelju koncesije ili koncesijskog odobrenja.[8] Nastavno na navedeno, ZPDML razlikuje redovno i izvanredno upravljanje pomorskim dobrom. Redovno upravljanje obavlja se sukladno godišnjem planu te obuhvaća brigu o zaštiti i održavanju pomorskog dobra u općoj upotrebi. Izvanredno upravljanje obuhvaća sanaciju pomorskoga dobra izvan luka nastalu uslijed izvanrednih događaja i izrada prijedloga granice pomorskoga dobra i njezina provedba.[9] Dakle, pomorsko dobro može biti u režimu opće uporabe, u kojoj je situaciji ono dostupno svima pod jednakim uvjetima[10] ili u režimu koncesije, u kojem se slučaju druge osobe mogu djelomično ili potpuno isključiti od upotrebe ili korištenja.[11]

ZPDML nije iskoristio mogućnosti koje je svojim općim odredbama otvorio Zakon o vlasništvu i drugim stvarnim pravima[12] glede pravnog razdvajanja zgrada i drugih građevina izgrađenih na općem dobru na temelju koncesije, kojim iznimkom ove građevine mogu predstavljati posebnu nekretninu dok koncesija traje.[13] Tako je ZPDML-om određeno da se građevine i drugi objekti na pomorskom dobru koji su trajno povezani s pomorskim dobrom smatraju pripadnošću[14] pomorskoga dobra. [15] Naime, sukladno načelu *superficies solo cedit*, odnosno načelu jedinstvenosti nekretnine, građevine slijede pravnu sudbinu zemljišta. Slijedom navedenog načela, trajna zgrada pravno je sastavni dio zemljišta.[16]

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[7] U zakonu je pomorsko dobro izdvojeno kao posebna društvena vrijednost. Tako Hlača, V.; Nakić., J. 2010. *Zaštita pomorskog dobra u Republici Hrvatskoj*, PPP god. 49, br. 164. Str. 496.

[8] O dijelu pomorskoga dobra u općoj upotrebi koje se nalazi na njezinu području vodi brigu o zaštiti i održava jedinica lokalne samouprave, čl. 10. ZPDML-a.

[9] O redovnom upravljanju pomorskim dobrom vode brigu jedinice lokalne samouprave, a o izvanrednom upravljanju jedinice područje (regionalne) samouprave, čl. 11. ZPDML-a.

[10] Opća upotreba pomorskog dobra podrazumijeva da svatko ima pravo služiti se pomorskim dobrom sukladno njegovoj prirodi i namjeni, čl. 6. st. 3. ZPDML-a.

[11] Čl. 9. ZPDML-a.

[12] NN 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14.

[13] Čl. 3. st. 4. te čl. 9. st. 4. Zakona o vlasništvu i drugim stvarnim pravima. Pojedini autori upozoravaju da je nejasno zašto ZPDML nije prihvatio opći princip mogućnosti stjecanja vlasništva i stjecanja stvarnih prava na izgrađenom objektu dok koncesija traje jer se na navedeni način ne bi umanjila zaštita pomorskog dobra, a s druge strane postojao bi jedinstven princip pravnog statusa izgrađenih objekata na osnovu koncesije. Tako Jug, J. u: Gavella, N.; Josipović T.; Gliha, I.; Belaj, V.; Stipković, Z. 2007. *Stvarno pravo,* II. izmijenjeno i dopunjeno izdanje, svezak 1. Zagreb. Str. 273.

[14] Općenito, pravne su pretpostavke za pripadnost da sporedna stvar (pripadak) služi glavnoj stvari, s glavnom je stvari u takvu prostornom odnosu da može služiti za određenu namjenu i po općem shvaćanju (u pravnom prometu) može biti pripatkom. Tako Simonetti, P. 2009. Nekretnine kao objekti prava vlasništva i prava građenja. *Zbornik Pravnog fakulteta Sveučilišta u Rijeci,* v. 30, br. 1. Str. 39.

[15] Čl. 5. ZPDML-a.

[16] Iako se za trajnu građevinu i zemljište uobičajeno rabi naziv nekretnina, valja istaknuti da su nekretnine i privremene zgrade, koje pravno nisu sastavni dio zemljišta, ali su mehanički tako vezane za zemljište da se mogu premještati bez oštećenja njihove strukture samo uz nerazmjerne troškove ili se uopće ne mogu premjestiti. Tako Simonetti, P., *op. cit.* u bilj. 14. Str. 38.

Zakon o gradnji, kao temeljni akt koji se primjenjuje na gradnju građevina na pomorskom dobru, u čl. 109. osim ugovora o koncesiji ne predviđa drugi modus dokazivanja pravnog interesa[17] za izdavanje građevinske dozvole za nekretninu na kojoj nije moguće stjecanje stvarnih prava.[18] Štoviše, čak ni ZPDML, osim sanacije pomorskoga dobra izvan luka nastale uslijed izvanrednih događaja, u kontekstu poduzimanja konkretnih zahvata na pomorskom dobru ne predviđa druga ovlaštenja za ovlaštenike prava upravljanja na pomorskom dobru.

Slijedom navedenog, izgradnja infrastrukture i suprastrukture na pomorskom dobru, a posebice u lukama nautičkog turizma, vezana je isključivo za prethodni nastanak koncesijskog odnosa.

Stoga potencijalni investitor pravni interes za izgradnju građevina na pomorskom dobru može dokazati ili ugovorom o koncesiji za gospodarsko korištenje pomorskim dobrom ili ugovorom o koncesiji za posebnu uporabu pomorskoga dobra.

2. Pojam i sadržaj koncesije

Koncesija kao institut kojim se regulira pitanje korištenja pomorskim dobrom od određenoga pravnog subjekta upotrebljava se već godinama, samo s vremenom mijenja svoju narav ovisno o političkom i gospodarskom okruženju.[19] U pozitivnom zakonodavstvu, točnije Za-

[17] Čl. 109. Zakona o gradnji propisuje kako se dokazom pravnog interesa za izdavanje građevinske dozvole smatra: 1. izvadak iz zemljišne knjige iz kojeg je vidljivo da je investitor vlasnik ili nositelj prava građenja na građevnoj čestici ili građevini na kojoj se namjerava graditi, 2. predugovor, ugovor ili ugovor sklopljen pod uvjetom, na temelju kojeg je investitor stekao ili će steći pravo vlasništva ili pravo građenja, 3. odluka nadležne vlasti na temelju koje je investitor stekao pravo vlasništva ili pravo građenja, 4. ugovor o ortaštvu sklopljen s vlasnikom nekretnine čiji je cilj zajedničko građenje, 5. pisana suglasnost vlasnika zemljišta, odnosno vlasnika postojeće građevine, 6. pisana suglasnost fiducijarnog vlasnika dana dotadašnjem vlasniku nekretnine koji je investitor. Dokazom pravnog interesa za izdavanje građevinske dozvole u pogledu obuhvata zahvata u prostoru smatra se: 1. izvadak, ugovor, odluka ili suglasnost glede dokaza pravnog interesa, 2. izvadak iz zemljišne knjige iz kojeg je vidljivo da je investitor nositelj prava služnosti, 3. predugovor, ugovor ili ugovor sklopljen pod uvjetom na temelju kojeg je investitor stekao ili će steći pravo služnosti, zakupa ili korištenja, 4. odluka nadležne državne vlasti na temelju koje je investitor stekao pravo služnosti. Dokazom pravnog interesa za izdavanje građevinske dozvole u pogledu nekretnine na kojoj stjecanje stvarnih prava nije moguće ili se prema posebnom zakonu pravo građenja stječe koncesijom smatra se ugovor o koncesiji kojim se stječe pravo građenja.

[18] Koje bi onda bile mogućnosti odnosno pravne osnove za izgradnju nekretnine na pomorskom dobru koje nije dodijeljeno u koncesiju? Pojedini autori upućuju na to da je osnovni sustav rješavanja takve situacije izuzimanje spornog područja iz pomorskog dobra s obzirom na to da zakonski propisi kao takvi ne omogućuju ishođenje dozvole za ikakve radove za koje se kao pravne osnove ne priloži ugovor o koncesiji. Tako Kundih (Kundih, B. 2000. Pomorsko dobro i granice pomorskog dobra. Edicija Božičević. Zagreb. Str. 28) upućuje na izneseno mišljenje redaktora Zakona o građenju, koji je bio na snazi u periodu od 1992. do 1995. godine, prema kojem u slučajevima kada jedinica lokalne samouprave na temelju prostornih planova želi raditi nešto na pomorskom dobru s time da to dobro i nakon gradnje ostaje u općoj upotrebi, kao primjerice šetnicu, mišljenja su da se treba postupiti po čl. 50. st. 4. Pomorskog zakona i taj dio izuzeti iz pomorskoga dobra. U protivnom zahtjevu potrebno je priložiti ugovor o koncesiji. Kundih smatra da je izneseno mišljenje u suprotnosti s *ratiom* samog zakona jer se ne smije dopustiti mogućnost da se dio kopna u općoj uporabi isključi iz pojasa pomorskoga dobra širine manje od šest metara, a najmanje zbog izdavanja građevinske dozvole. Vojković (Vojković, G. 2003. Pomorsko dobro i koncesije. Str. 90) pak smatra da bi rješenje trebalo potražiti u uvođenju termina oplemenjivanja pomorskoga dobra sukladno kojem će se i dalje moći služiti općoj uporabi, a na koji način bi se naglasila specifičnost ovog oblika gradnje.

[19] Što se tiče normativnog značenja pojma koncesije, njega daje zakonodavac tako da pravni pojam definira u normativnom aktu. Što će se u nekoj državi smatrati koncesijom, propisuje zakonodavac pravnim propisima. Tako Staničić, F.; Bogović, M. 2017. Koncesije na pomorskom dobru – odnos Zakona o koncesijama i Zakona o pomorskom dobru i morskim lukama. *Pravni vjesnik, god. 33, br. 1.* Str.78.

konu o koncesijama (dalje: ZK)[20] kao krovnom zakonu, koncesija se izrijekom određuje kao pravo koje se stječe ugovorom, a prema vrsti razlikuju se koncesija za gospodarsko korištenje općim ili drugim dobrom, koncesija za radove te koncesija usluge.[21] Tako se ugovor o koncesiji za gospodarsko korištenje općim ili drugim dobrom određuje kao upravni ugovor, u pisanom obliku, čiji je predmet gospodarsko korištenje općim ili drugim dobrom za koje je zakonom određeno da je dobro od interesa za Republiku Hrvatsku, a koje ne označuje izvođenje radova, odnosno pružanje i upravljanje uslugama definiranih navedenim zakonom. Ugovor o koncesiji za radove jest upravni ugovor, u pisanom obliku, kojim se ostvaruje financijski interes, a posredstvom kojega davatelj koncesija ili više njih povjerava izvođenje radova jednomu gospodarskom subjektu ili više njih čija se naknada sastoji isključivo od prava na iskorištavanje radova koji su predmet ugovora ili od tog prava i plaćanja. Ugovor o koncesiji za usluge jest upravni ugovor, u pisanom obliku, kojim se ostvaruje financijski interes, a posredstvom kojega davatelj koncesija ili više njih povjerava pružanje i upravljanje uslugama koje nisu izvođenje radova, kako ih definira ugovor o koncesiji za radove, jednomu gospodarskom subjektu ili više njih čija se naknada sastoji isključivo od prava na iskorištavanje usluga koje su predmet ugovora ili od tog prava i plaćanja.[22] Predmet koncesije mogu biti različita područja i različite djelatnosti te se ona tako može dati i na pomorskom dobru, za luke, u području energetike, za komunalne djelatnosti i dr.[23]

Sukladno ZPDML-u[24], koji kao *lex specialis* regulira isključivo pitanje koncesija na pomorskom dobru, koncesija je pravo kojim se dio pomorskoga dobra djelomično ili potpuno isključuje iz opće upotrebe i daje na posebnu upotrebu ili gospodarsko korištenje fizičkim i pravnim osobama, sukladno prostornim planovima. Opseg i uvjeti posebne upotrebe ili gospodarskoga korištenja uređuju se odlukom i ugovorom o koncesiji.[25] Razlika u normativnoj regulaciji koncesije prema ZPDML-u i ZK-u,[26] koja se posebice ogleda u vezi s definicijom koncesije, proizlazi iz usklađenja ZK-a s europskom pravnom stečevinom.[27] Naime, valja uzeti u obzir da

[20] NN 69/17.

[21] Čl.1. st. 2. i 3. ZK.

[22] Čl. 3. ZK.

[23] Uz navedene ZK u čl. 7. kao moguće predmete koncesije navodi da se koncesija osobito može dati: za eksploataciju mineralnih sirovina, za korištenje vodama, za pravo lova na državnim lovištima i uzgajalištima divljači, u području zaštite prirode, za obavljanje djelatnosti linijskog i obalnog pomorskog i riječnog prijevoza, za građenje i upravljanje autocestom i pojedinim cestovnim objektima na državnoj cesti (most, tunel i drugi), za pružanje usluga javnog prijevoza, za zračne luke, u području sporta, na kulturnim dobrima, u području željeznica, u području žičara, za djelatnosti gospodarenja otpadom, u području turizma, u području zdravstva, za pružanje medijskih usluga televizije i radija, za slobodne zone, za uzgoj riba i drugih morskih organizama te u području veterinarskoga javnog zdravstva.

[24] Čl. 2. st. 1. t. 5. ZPDML-a.

[25] Odluka o koncesiji sadržava područje pomorskoga dobra koje se daje na upotrebu ili gospodarsko korištenje, način, uvjete i vrijeme upotrebe ili gospodarskoga korištenja pomorskim dobrom, stupanj isključenosti opće upotrebe, naknadu koja se plaća za koncesiju, ovlaštenja davatelja koncesije, popis objekata podgradnje i nadgradnje koji se nalaze na pomorskom dobru i daju se u koncesiju, prava i obveze ovlaštenika koncesije, uključujući i obvezu održavanja i zaštite pomorskog dobra te zaštite prirode ako se pomorsko dobro nalazi na zaštićenom dijelu prirode. Ugovorom o koncesiji u skladu s odlukom o koncesiji uređuje se bliža namjena za koju se daje koncesija, uvjeti koje u tijeku koncesije mora zadovoljavati ovlaštenik koncesije, visina i način plaćanja naknade za koncesiju, jamstva ovlaštenika koncesije, druga prava i obveze davatelja i ovlaštenika koncesije, čl. 24. i 25. ZPDML-a.

[26] Više o neusklađenosti uređenja koncesija sukladno ZK-u i ZPDML-u, vidi Staničić, F.; Bogović, M., *op. cit.* u bilj. 19. 73–103.

[27] Tako Vojković (Vojković, G. 2014. Novi pravni okvir koncesija u Republici Hrvatskoj. *Zbornik radova Pravnog fakulteta u Splitu, god. 51, br. 1.* Str. 148) upozorava da je Europska unija razvila model primjeren modernom

ZPDML još sadržava određenje koncesije iz 2003. godine, dok izloženo ugovorno određenje koncesije uz određene modifikacije u ZK-u postoji još od 2012. godine.[28]

Kao pravo koje svoju pravnu snagu crpi iz ugovora koncesija predviđa da se predmetnim ugovorom određuju prava i obveze davatelja koncesije i koncesionara na temelju prethodno donesene odluke o davanju koncesije, a u skladu sa zakonskim i podzakonskim aktima. Na pitanja iz ugovora o koncesiji koja nisu uređena ZK-om primjenjuju se odgovarajuće odredbe općeg zakona kojima se uređuju porezi te zakona kojima se uređuju opći upravni postupak i obvezni odnosi.[29] Što to točno znači za pravni položaj koncesionara? Naime, prethodni ZK iz 2012. godine normirao je ugovor o koncesiji kao ugovor koji nema upravnu narav [30] iako je bio bitno determiniran odlukom o koncesiji. No opet, ni u pravnoj praksi nije se moglo oteti dojmu o njegovoj mješovitoj pravnoj prirodi. Obveznopravnom dijelu na koji upućuje norma, a opet upravnoj naravi, koju u okvirima koncesije odlikuje dominantnost ovlasti javnopravnih tijela koje su povezane sa svrhom koja se tim ugovorima želi postići.[31] Sadašnjim uređenjem, nastavno na iznesenu mješovitu pravnu prirodu, obje ugovorne strane podvrgnute su strožim zahtjevima načela jednakosti postupanja i transparentnosti. Ta pravna priroda ugovora o koncesiji posebice dolazi do izražaja u vezi s mogućim izmjenama ugovora. Tako, ZK propisuje mogućnost izmjene ugovora o koncesiji bez pokretanja novog postupka davanja koncesije samo: kada Hrvatski sabor utvrdi da je ugrožena nacionalna sigurnost i obrana države, okoliš ili ljudsko zdravlje, ako to zahtijeva interes Republike Hrvatske utvrđen u Hrvatskome saboru, te kada je to propisano posebnim zakonom. Navedene izmjene ugovora o koncesiji ne smiju mijenjati vrstu i/ili predmet ugovora o koncesiji. O izmjeni ugovora o koncesiji sklapa se dodatak ugovoru o koncesiji, kojem prethodi odluka o izmjeni odluke davanja koncesije.[32]

2.1. Koncesija za posebnu uporabu pomorskoga dobra

Za razliku od ZK-a koji ne poznaje pojam posebne uporabe, ZPDML definira navedeno kao modus korištenja pomorskim dobrom, koji ne bi bio ni opća uporaba ni gospodarsko korištenje.[33]

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vremenu, kada države više ne mogu biti nositeljice kapitalnih ulaganja, sukladan načelima zajedničkog tržišta: načelom tržišnog natjecanja, načelom jednakog tretmana, načelom zabrane diskriminacije, načelom uzajamnog priznavanja te načelom razmjernosti i načelom transparentnosti, a nova regulacija odraz je bliskog povezivanja tri do sada prilično udaljena pravna okvira sustava: koncesija, javne nabave i javno-privatnog partnerstva.

[28] Nastavno na izmjene uvedene ZK-om iz 2008. koje su također bile odraz prilagodbe europskom pravu.

[29] Čl. 56. ZK-a.

[30] Navedeno se posebice ogledalo oko pitanja pravnih lijekova, više vidi, Vojković, G., *op. cit.* u bilj. 27. Str. 144.

[31] Upravni ugovor može se odrediti kao pravni posao što ga država ili drugo javnopravno tijelo sklapa s trećim osobama, fizičkim ili pravnim, koji je usmjeren na postizanje određena cilja za koji postoji širi društveni interes, i to pod uvjetima koji su predviđeni posebnim pravilima. Ljubanović, B. 2010. Upravni ugovori i upravno sudovanje. *Zbornik radova Pravnog fakulteta u Splitu, god 47., br. 1.* Str. 39.

[32] Čl. 39. i 40. ZK-om predviđeno je pokretanje novog postupka davanja koncesije i sklapanje novog ugovora o koncesiji u slučaju bitnih izmjena ugovora. Smatra se da je riječ o bitnoj izmjeni ugovora kada je, u pravilu, ispunjen jedan od sljedećih uvjeta: izmjena uvodi uvjete koji bi, da su bili dio postupka davanja koncesije, učinili mogućim odabir nekoga drugog ponuditelja umjesto onog koji je odabran kao najpovoljniji ili bi učinili mogućim sklapanje ugovora o koncesiji s drugim ponuditeljem; izmjena utječe na ekonomsku ravnotežu koncesije u korist koncesionara; izmjena znatno proširuje opseg djelatnosti koncesije u cilju uključivanja robe, radova ili usluga koji nisu bili uključeni u ugovor o koncesiji; mijenja se koncesionar.

[33] Čl. 6. ZPDML-a.

Tako se posebnom upotrebom pomorskoga dobra smatra: gradnja na pomorskom dobru građevina za potrebe vjerskih zajednica, za obavljanje djelatnosti na području kulture, socijalne skrbi, odgoja i obrazovanja, znanosti, informiranja, športa, zdravstva, humanitarnih djelatnosti i druge djelatnosti koja se ne obavlja radi stjecanja dobiti te gradnja na pomorskom dobru građevina i drugih objekata infrastrukture (ceste, pruge, vodovodna, kanalizacijska, energetska, telefonska mreža i sl.), građevine i drugi objekti za potrebe obrane, unutarnjih poslova, regulaciju rijeka i drugih sličnih infrastrukturnih objekata.[34] Koncesija za posebnu upotrebu pomorskoga dobra daje se na zahtjev.[35] Odluku o koncesiji za posebnu upotrebu, na rok do 99 godina, za objekte državnog značaja donosi Vlada Republike Hrvatske, odluku o koncesiji za posebnu upotrebu za objekte županijskog značaja, na rok do 20 godina, donosi županijska skupština, a za objekte lokalnog značaja, na rok do 20 godina, odluku donosi općinsko ili gradsko vijeće.[36] Za koncesiju na pomorskom dobru plaća se godišnja naknada koja se određuje odlukom o koncesiji. Pritom valja naglasiti da se naknada za koncesije dane radi posebne upotrebe pomorskoga dobra u pravilu određuje u simboličnom iznosu.[37] Iznimka je propisana za koncesije gradnje infrastrukture (vodovodna, kanalizacijska, energetska i telefonska) u čijem se slučaju naknada utvrđuje kao za gospodarsku upotrebu pomorskoga dobra.[38]

2.2. Koncesija za gospodarsko korištenje pomorskim dobrom

Gospodarsko korištenje pomorskim dobrom korištenje je pomorskim dobrom za obavljanje gospodarskih djelatnosti, s korištenjem ili bez korištenja postojećim građevinama i drugim objektima na pomorskom dobru te s gradnjom ili bez gradnje novih građevina i drugih objekata na pomorskom dobru.[39] Kao moguće načine gospodarskoga korištenja pomorskim dobrom Uredba o postupku davanja koncesije na pomorskom dobru razlikuje koncesije na pomorskom dobru koje bi činile turističko-ugostiteljska djelatnost, plaže, marikultura i uzgoj mlađi te ostale gospodarske djelatnosti (ronilački centri, jedriličarski centri, akvagan, *zip-line*, ski-lift, arheološki park, podmorski park i dr.) te koncesije luka posebne namjene koje bi činile luke nautičkog turizma, industrijske luke, brodogradilišne luke, sportske luke i ribarske luke. [40]

Koncesija za gospodarsko korištenje pomorskim dobom daje se na temelju provedenoga javnog prikupljanja ponuda na rok od pet do 99 godina ovisno o vrstama građevina koje su

[34] Čl. 19. st. 1. ZPDML-a.

[35] Čl. 19. st. 2. ZPDML-a.

[36] Čl. 24. st. 1. Uredbe o postupku davanja koncesije na pomorskom dobru (NN 23/04, 101/04, 39/06, 63/08, 125/10, 102/11, 83/12, 10/17).

[37] U praksi se događa i da, uzevši u obzir značenje zahvata koji bi se izvršio na pomorskom dobru nakon davanja koncesije, davatelj koncesije oslobodi plaćanja naknade koncesionara, vidi Odluku Gradskog vijeća Grada Omiša od 22. 9. 2016., Klasa: 361-02/15-01/36, Urbroj: 2155-01/01-16-32, dostupno na: http://www.omis.hr/Gradska-uprava/Gradskovije%C4%87e/tabid/69/Default.aspx (datum pristupa 29. 7. 2017. godine). Ovdje valja i posebno istaknuti da pri određivanju naknade nije moguće primijeniti odredbe Zakona o uređivanju imovinskopravnih odnosa u svrhu izgradnje infrastrukturnih građevina (NN 80/11), koji se učestalo rabi za rješavanje imovinskopravnih odnosa na nekretninama koje su u vlasničkopravnom režimu.

[38] Čl. 28. st. 1. i 3. ZPDML-a. Tako se primjerice u Odluci Županijske skupštine Primorsko-goranske županije o davanju koncesije za posebnu upotrebu pomorskoga dobra KD Vodovodu i kanalizaciji d.o.o. za rekonstrukciju crpne stanice CS Kostabela na dijelu pripadajućih cjevovoda – I faza, Grad Rijeka, od 18. 12. 2104. godine, objavljenu u SL PGŽ, broj 39/2014, u čl. 4. određuje da je koncesionar dužan plaćati godišnju naknadu za koncesiju, koja se sastoji od dva dijela: stalni dio naknade za koncesiju iznosi 355,00 kuna te promjenjivi dio naknade iznosi 1 % od prihoda od ubrane naknade na dijelu pripadajućeg cjevovoda.

[39] Čl. 6. ZPDML-a.

[40] Čl. 16. Uredbe o postupku davanja koncesije na pomorskom dobru.

uključene u koncesiju.[41] Tako koncesiju za gospodarsko korištenje pomorskim dobrom te za korištenje ili gradnju građevina od važnosti za županiju daje županijska skupština na rok do najviše 20 godina, koncesiju za gospodarsko korištenje pomorskim dobrom koja obuhvaća korištenje ili gradnju građevina od važnosti za Republiku Hrvatsku daje Vlada Republike Hrvatske na rok do 50 godina, a koncesiju koja obuhvaća gradnju novih građevina od važnosti za Republiku Hrvatsku koja zahtijeva velika ulaganja te se ukupni gospodarski učinci ne mogu ostvariti u roku od 50 godina Vlada Republike Hrvatske daje na rok od više od 50 godina uza suglasnost Hrvatskoga sabora. Pritom valja naglasiti da su građevine od važnosti za Republiku Hrvatsku određene propisima iz područja prostornog uređenja, a građevinama od važnosti za županiju smatraju se sve ostale građevine. Prigodom određivanja roka za koncesiju uzima se u obzir namjena, opseg i visina potrebnih ulaganja te ukupni gospodarski učinci koji se postižu koncesijom.[42] Naknada za koncesiju za gospodarsko korištenje pomorskim dobrom sastoji se od stalnog i promjenjivog dijela, a visina se određuje polazeći od gospodarske opravdanosti, odnosno profitabilnosti gospodarskoga korištenja pomorskim dobrom koja se dokazuje studijom gospodarske opravdanosti, procijenjenom stupnju ugroženosti prirode, ljudskog okoliša i zdravlja ljudi te zaštite interesa i sigurnosti Republike Hrvatske.[43]

3. Luka nautičkog turizma

3.1. Općenito o lukama i lučkom području

Sukladno ZPDML-u, luka označava morsku luku, tj. morski i s morem neposredno povezani kopneni prostor s izgrađenim i neizgrađenim obalama, lukobranima, uređajima, postrojenjima i drugim objektima namijenjenima za pristajanje, sidrenje i zaštitu brodova, jahti i brodica, ukrcaj i iskrcaj putnika i robe, uskladištenje i drugo manipuliranje robom, proizvodnju, oplemenjivanje i doradu robe te ostale gospodarske djelatnosti koje su s tim djelatnostima u međusobnoj ekonomskoj, prometnoj ili tehnološkoj svezi.[44] Lučko područje luke jest područje morske luke koje obuhvaća jedan ili više morskih i kopnenih prostora (lučki bazen), koje se upotrebljava za obavljanje lučkih djelatnosti, a kojim upravlja lučka uprava, odnosno ovlaštenik koncesije, a granica lučkog područja granica je pomorskoga dobra.[45]

Prema namjeni kojoj služe, luke se dijele na luke otvorene za javni promet i luke za posebne namjene.[46] Luka otvorena za javni promet jest morska luka koju pod jednakim uvjetima može upotrebljavati svaka fizička i pravna osoba sukladno njezinoj namjeni i u granicama raspoloživih kapaciteta. Luka posebne namjene jest morska luka koja je u posebnoj upotrebi ili gospodarskom korištenju pravnih ili fizičkih osoba (luka nautičkog turizma, industrijska luka,

41 Čl. 17. st. 1. ZPDML-a.

42 Iznimno, ako je određen projekt u interesu Republike Hrvatske ili ako to ocijeni opravdanim, Vlada Republike Hrvatske uvijek može odlučiti o raspisivanju javnog prikupljanja ponuda i davanju koncesije na pomorskom dobru. U slučaju promjene namjene prostora koje je obuhvaćeno koncesijom, promjenom dokumenata prostornog uređenja, ovlaštenik koncesije može zatražiti promjenu namjene koncesije u kojem slučaju davatelj koncesije može odlučiti o izmjeni odluke o koncesiji te utvrditi nove uvjete, opseg i obuhvat korištenja pomorskim dobrom, čl. 20. ZPDML-a.

43 Čl. 28. st. 2. ZPDML-a.

44 Čl. 2. st. 1. t. 1.ZPDML-a.

45 Čl. 2. st. 1. t. 4. ZPDML-a.

46 Čl. 40. ZPDML-a.

brodogradilišna luka, sportske, ribarske i druge luke slične namjene) ili državnog tijela (vojna luka).[47] Luke posebne namjene prema veličini i značaju za Republiku Hrvatsku razvrstavaju se u dva razreda: luke od značaja za Republiku Hrvatsku i luke od županijskog značaja. Luke posebne namjene u pravilu se određuju odlukom o davanju koncesije, a samo trajanje koncesije uvjetovano je njihovim razvrstajem u jedan od navedenih razreda. Tako koncesiju za luku posebne namjene[48] za luke od županijskog značaja daje županijska skupština na rok do 20 godina, za luke od značaja za Republiku Hrvatsku Vlada Republike Hrvatske na rok do 50 godina, za luke od značaja za Republiku Hrvatsku Vlada Republike Hrvatske na rok više od 50 godina uza suglasnost Hrvatskoga sabora. [49] Navedeno je u korelaciji s odredbama ZPDML-a, kojim se određuju rokovi i davatelj koncesije.

3.2. Pravni status luka nautičkog turizma

Kada je riječ o lukama nautičkog turizma, pravni okvir za dodjelu koncesije, a poslije i poslovanje luka nautičkog turizma čine: ZK, Zakon o javnoj nabavi,[50] ZPDML, Zakon o pružanju usluga u turizmu,[51] Pravilnik o razvrstavanju i kategorizaciji luka nautičkog turizma[52], Pravilnik o uvjetima i načinu održavanja reda u lukama i na ostalim dijelovima unutarnjih morskih voda i teritorijalnog mora Republike Hrvatske,[53] Uredba o postupku davanja koncesije na pomorskom dobru, Uredba o razvrstaju luka otvorenih za javni promet i luka posebne namjene te Uredba o uvjetima kojima moraju udovoljavati luke[54]. Navedenim propisima, a ovisno o području koje reguliraju, primjećuje se različito definiranje luka nautičkog turizma. Za potrebe određivanja i uopće shvaćanja biti luke nautičkog turizma možda je najpogodnija definicija pružena u Uredbi o razvrstaju luka otvorenih za javni promet i luka posebne namjene gdje se luka nautičkog turizma definira kao luka koja služi za prihvat i smještaj plovila te je opremljena za pružanje usluga korisnicima i plovilima. U poslovnom, građevinskom i funkcionalnom pogledu čini jedinstvenu cjelinu. Vrste luka nautičkog turizma prema vrsti objekata i usluga određene su Pravilnikom o razvrstavanju i kategorizaciji luka nautičkog turizma koji tako razlikuje: sidrište, odlagalište plovnih objekata, suhu marinu i marinu. Istim pravilnikom definirano je da se u luci nautičkog turizma pružaju turističke usluge u nautičkom turizmu te druge usluge u funkciji turističke potrošnje (trgovačke, ugostiteljske i dr.) koje mogu pružati i druge pravne i fizičke osobe.[55]

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47 Čl. 2. st. 1. t. 3. ZPDML-a. Napominje se da se u čl. 10. Uredbe o razvrstaju luka otvorenih za javni promet i luka posebne namjene (NN 110/04, 82/07) kao vrsta luka posebne namjene navodi i luka u sustavu koji pojam podrazumijeva zbir najmanje pet luka iste vrste i kategorije koje djeluju na području najmanje pet županija pod istim standardima poslovanja.

48 Osim vojnih luka, koje su drugačije normirane.

49 Čl. 80. ZPDML-a.

50 NN 120/16.

51 NN 68/07, 88/10, 30/14, 89/14, 152/14.

52 NN 72/2008.

53 NN 90/05.

54 NN 110/04.

55 Čl. 2. st. 2. Pravilnika o razvrstavanju i kategorizaciji luka nautičkog turizma.

4. Izgradnja građevina i drugih objekata infrastrukture u lukama nautičkog turizma

Kako je već navedeno, ZK koji je na snazi izrijekom definira koncesiju kao pravo koje se stječe ugovorom, a sam sadržaj tog instituta, iako je različito definiran ZK-om i ZPDML-om, s gledišta luka nautičkog turizma predviđa korištenje pomorskim dobrom s korištenjem postojećim ili izgradnjom novih infrastrukturnih i suprastrukturnih objekata. Kad se govori o građevinama i drugim objektima infrastrukture u kontekstu luka nautičkog turizma, valja prvo razmotriti što pojam infrastrukture zapravo znači u modernom poimanju. Tako se upozorava da infrastruktura[56] može obuhvatiti sve sustave unutar jedne funkcionalne cjeline koji komplementarnim djelovanjem omogućavaju njezin nesmetani rad, koji je pak obično usmjeren za neku drugu svrhu. Zakon o prostornom uređenju[57] pod pojmom infrastrukture podrazumijeva[58] komunalne, prometne, energetske, vodne, pomorske, komunikacijske, elektroničke komunikacijske i druge građevine namijenjene gospodarenju s drugim vrstama stvorenih i prirodnih dobara. Osnovna infrastruktura prometna je površina preko koje se osigurava pristup do građevne čestice, odnosno zgrade, javno parkiralište, građevine za odvodnju otpadnih voda i niskonaponska elektroenergetska mreža. Komunalna su infrastruktura građevine namijenjene opskrbi pitkom vodom, odvodnji i pročišćavanju otpadnih voda, održavanju čistoće naselja, skupljanju i obradi komunalnog otpada te ulična rasvjeta, tržnice na malo, groblja, krematoriji i površine javne namjene u naselju. Zakon o gradnji prati zakonski izričaj propisa o prostornom uređenju, pa samim time ne sadržava posebno određenje pojma infrastrukture.

ZPDML određuje da su infrastruktura, odnosno lučka podgradnja, operativne obale i druge lučke zemljišne površine, lukobrani i drugi objekti infrastrukture (npr. lučke cestovne i željezničke prometnice, vodovodna, kanalizacijska, energetska, telefonska mreža, objekti za sigurnost plovidbe u luci i sl.), a suprastruktura, odnosno lučka nadgradnja, građevine izgrađene na lučkom području (upravne zgrade, skladišta, silosi, rezervoari i sl.).[59] Takvo vertikalno prostorno odjeljivanje koje se upotrebljava pri određivanju pojma infrastrukture i suprastrukture prema ZPDML-u pokazuje se neprimjenjivim u naravi, a samim time i neusklađenim s propisima o prostornom uređenju i gradnji.

Iz perspektive luke nautičkog turizma može se govoriti o građevinama i drugim objektima koji su izgrađeni za potrebe energetske, kanalizacijske, vodovodne, informatičke i druge mreže. Pritom se posebno napominje da iako luke nautičkog turizma u svojoj osnovi egzistiraju u simbiozi s pojedinom mikrolokacijom, po normativnom određenju u građevinskom i funkcionalnom pogledu čine cjelinu, što znači da se iz građevinske perspektive imaju promatrati kao jedinstvena građevina.[60] Također, valja napomenuti da pri izgradnji potrebne infra-

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[56] Kod razmatranja pojma infrastrukture u domaćoj i stranoj praksi nalazi se na niz sličnih definicija. Tako se infrastruktura definira kao ekonomska i organizacijska podloga proizvodnih djelatnosti (npr. prometna mreža, vodovod i sl.), tako Hrvatski leksikon, dostupno na http://www.hrleksikon.info/definicija/infrastruktura.html, (datum pristupa 29. 7. 2017.) odnosno kao *the basic systems and services, such as transport and power supplies, that a country or organization uses in order to work effectively,* Cambridge Dictionary, http://dictionary.cambridge.org/dictionary/english/infrastructure (datum pristupa 29. 7. 2017.).

[57] NN 153/13, 65/17.

[58] Čl. 3. st. 1. Zakona o prostornom uređenju.

[59] Čl. 2 .st. 1. t. 7. i 8. ZPDML-a.

[60] Sukladno čl. 3.st. 1. t. 5. Zakona o gradnji građevina građenjem je nastao i s tlom povezan sklop, izveden od svrhovito povezanih građevnih proizvoda s instalacijama ili bez instalacija, sklop s ugrađenim postrojenjem, samostalno postrojenje povezano s tlom ili sklop nastao građenjem.

strukture veliku pozornost treba posvetiti i izgradnji potrebne infrastrukture izvan koncesijskog obuhvata, koja tu luku nautičkog turizma dovodi u vezu sa širim lokalitetom, što često prouzročuje prebacivanje financijskog opterećenja na koncesionara zbog nedostatka potrebnih financijskih sredstava u proračunu lokalne ili regionalne samouprave.

Općenito, pitanje izgradnje pojedinih građevina i objekata infrastrukture unutar koncesijskog obuhvata luke nautičkog turizma javlja se u pravilu u dva slučaja. Prvi je slučaj izgradnja nove luke nautičkog turizma kao obveza koja za koncesionara proizlazi nakon sklapanja ugovora o koncesiji.[61] Riječ je, zapravo, o osnovnoj obvezi ispunjenjem koje se u velikom dijelu realizira svrha dodjele koncesije od davatelja koncesije te koja samim time omogućuje postojanje zakonom definiranoga koncesijskog odnosa. Puna konzumacija ugovora o koncesiji postiže se tek nakon realizacije te izgradnje i poslovanja luke nautičkog turizma. Drugi je slučaj u pravilu cjelovita rekonstrukcija[62] luke nautičkog turizma kao potreba koja se javlja za trajanja koncesije uslijed dotrajalosti postojeće[63] suprastrukture i infrastrukture, odnosno potrebe za povećanjem postojećih infrastrukturnih kapaciteta uslijed praćenja trendova razvitka nautičkog turizma i promjena koje se javljaju na nautičkom tržištu. Naime, ekspanzija luka nautičkog turizma te povećanje veličine plovila uključuje i nove trendove pri izgradnji objekata infrastrukture i suprastrukture u lukama nautičkog turizma. Također, sve i da je riječ o dostatnoj suprastrukturi, postavljanje nove infrastrukturne mreže često uvjetuje prethodno izmještanje, odnosno uklanjanje objekata koji čine suprastrukturu.

Kako je već navedeno, lokacija zahvata određena je prostornim planom. Opseg ulaganja definiran je studijom gospodarske opravdanosti. Za razliku od studije opravdanosti davanja koncesije koja je detaljno uređena ZK-om[64] sadržaj studije gospodarske opravdanosti uređuje Uredba o postupku davanja koncesije na pomorskom dobru na način da pokazuje da se navedena studija izrađuje prema sadržaju i u formi iz dokumentacije za javno prikupljanje ponu-

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[61] Vidi kao primjer, točku III. Odluke o koncesiji na pomorskom dobru u svrhu izgradnje i gospodarskog korištenja luke posebne namjene – luke nautičkog turizma Marina Kaštela, Klasa: 934-01/12-01/04, Urbroj: 50301-05/20-13-5, od 7. 11. 2013. objavljena u NN 136/13 , kojom je određena obveza ovlaštenika koncesije da u roku od 2 (dvije) godine od dana sklapanja ugovora o koncesiji preda davatelju koncesije pravomoćnu građevinsku dozvolu te u daljnjem roku od 2 (dvije) godine dovrši izgradnju i preda davatelju koncesije pravomoćnu uporabnu dozvolu.

[62] Čl. 3. st. 1. t. 19. Zakona o gradnji rekonstrukcija građevine definirana je kao izvedba građevinskih i drugih radova na postojećoj građevini kojima se utječe na ispunjavanje temeljnih zahtjeva za tu građevinu ili kojima se mijenja usklađenost te građevine s lokacijskim uvjetima u skladu s kojima je izgrađena (dogradivanje, nadogradivanje, uklanjanje vanjskoga dijela građevine, izvođenje radova radi promjene namjene građevine ili tehnološkog procesa i sl.), odnosno izvedba građevinskih i drugih radova na ruševini postojeće građevine. Lokacijski su uvjeti kvantitativni i kvalitativni uvjeti i mjere za provedbu zahvata u prostoru koji se na temelju prostornog plana i posebnih propisa određuju lokacijskom dozvolom ili građevinskom dozvolom, čl. 3. st. 1. t. 16. Zakona o prostornom uređenju.

[63] Sukladno čl. 3. st. 1. t. 14. Zakona o gradnji, postojeća je građevina građevina izgrađena na temelju građevinske dozvole ili drugoga odgovarajućeg akta i svaka druga građevina koja je prema ovom ili posebnom zakonu s njom izjednačena. Svakako je ovdje nužno istaknuti da na pomorskom dobru nije moguća primjena odredaba Zakona o postupanju s nezakonito izgrađenim zgradama (NN 86/12, 143/13, 65/17) kojim se utvrđuju uvjeti uključivanja u pravni sustav nezakonito izgrađenih zgrada.

[64] Studiju opravdanosti davanja koncesije izrađuje davatelj koncesije, a sastoji se osobito od operativnog sažetka, općeg dijela, tehničke, financijske, ekonomske i pravne analize, po potrebi analize utjecaja na okoliš odnosno prirodu, kulturna dobra i zdravlje te pripadajućih priloga, zaključka i preporuka, čl. 13. ZK-a. Kod koncesije za javne usluge procijenjene vrijednosti manje od 2.000.000 EUR, u kunskoj protuvrijednosti, bez PDV-a i koncesije za gospodarsko korištenje općim ili drugim dobrom davatelj koncesije može umjesto studije opravdanosti davanja koncesije izraditi analizu davanja koncesije, čl. 12. ZK-a.

da.[65] Valja napomenuti da navedeni sadržaj i forma variraju od slučaja do slučaja.[66] Svakako bi minimalni sadržaj studije gospodarske opravdanosti trebala biti analiza tržišta, manje ili više detaljan opseg predviđene investicije, ekonomsko-financijska analiza te zaključna ocjena studije koja bi trebala ustvrditi isplativost investicije u zadanom koncesijskom razdoblju. Tako u slučaju dodjele koncesije i izgradnje nove luke nautičkog turizma ponuđeni iznos ukupnoga investicijskog ulaganja, sadržan u studiji s ponuđenim iznosom stalnog i promjenjivog dijela koncesijske naknade čini kriterije prema kojima se obavlja ocjenjivanje ponuda za koncesiju.[67] U slučaju rekonstrukcije luke nautičkog turizma studija gospodarske opravdanosti s potrebnim sadržajem bit će osnovni dokument temeljem kojeg će koncesionar procjenjivati postoji li poslovni interes za ulazak u investiciju ili ne. Stoga će se prije preuzimanja poslovnog rizika[68] izraditi studija gospodarske opravdanosti koja će uz već navedeno sadržavati i učinak investicije na postojeće poslovanje luke nautičkog turizma. Laički rečeno, komparirat će se postojeće poslovanje s poslovanjem nastavno na moguću investiciju da bi se procijenila oportunost projekta za poslovanje konkretne luke nautičkog turizma.[69]

Neovisno o kojoj je od navedenih situacija riječ, s pravne i građevinske strane one u većini slučajeva znače početak dugotrajnog postupka ishođenja dozvola[70] da bi se moglo pristupiti izgradnji.

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[65] Ukupna vrijednost investicije koja se planira studijom gospodarske opravdanosti smatra se ulaganjem u osnovna sredstva, čl. 18. st. 2. t. 3. Uredbe o postupku davanja koncesije na pomorskom dobru.

[66] Tako je, primjerice, sukladno dokumentaciji za javno prikupljanje ponuda za davanje koncesije na pomorskom dobru u svrhu izgradnje i gospodarske uporabe luke posebne namjene – luke nautičkog turizma u uvali Luke, na dijelu K. O. Tisno, za koju je Vlada Republike Hrvatske dana 11. 3. 2013. donijela obavijest o namjeri davanja koncesije, određeno da studija gospodarske opravdanosti kao obvezan prilog ponude za dodjelu koncesije obavezno sadržava sljedeće elemente: postojeće stanje lokacije za koju se traži koncesija; plan investicija detaljno razrađen za cjelokupno trajanje koncesije; iznos planirane investicije u zaštitu okoliša; iznos planirane ukupne investicije; izvore financiranja investicija (vlastiti izvori, krediti); procjenu rentabilnosti projekta (prihodi – rashodi); izjavu ponuditelja o tehničkoj i kadrovskoj opremljenosti i organizacijskim sposobnostima za ostvarenje koncesije; jamstvo poslovne banke za ozbiljnost ponude u visini 1 % od ponuđene vrijednosti investicije s rokom do planiranog roka zaključenja ugovora o koncesiji, a najduže dvije godine; pismo namjere poslovne banke da će izdati jamstvo za dobro ispunjenje obveza iz ugovora o koncesiji koji će se sklopiti s odabranim ponuditeljem u visini 5,0 % ponuđene vrijednosti investicije s rokom šest mjeseci dužim od planiranog roka završetka investicijskog ciklusa, dostupno na http://www.mppi.hr/UserDocsImages/Obavijest%20konc-LPN-LNT%20k.o.%20Tisno.pdf i http://www.mppi.hr/UserDocsImages/STUDIJA%20GOSPODARSKE%20OPRAVDANOSTI%20TISNO%2029-7_13.pdf (datum pristupa 29. 7. 2017.).

[67] Čl. 21. Uredbe o postupku davanja koncesije na pomorskom dobru.

[68] Europski sud u svojim je kasnijim odlukama utvrdio da je temeljno obilježje ugovora o koncesiji rizik koji preuzima koncesionar, a koji je svojstven eksploataciji radova i usluga. Tako Bulum, B.; Batur, T.; Oršulić, I. 2012. Financiranje morskih luka u svjetlu donošenja direktive Europske unije o dodjeljivanju ugovora o koncesiji. PPP, god. 51, br. 166. Str. 159.

[69] Razdoblje na koje se zaključuje ugovor o koncesiji uvjetovano je, između ostalog, i razdobljem u kojem je razumno očekivati da će doći do amortizacije stvarne vrijednosti ulaganja koncesionara te povrata uložena kapitala. Slijedom navedenog, u čl. 29. ZPDML-a, kojim se regulira mogućnost opoziva koncesije, kada to zahtijeva interes Republike Hrvatske, definirano je i da ako ovlaštenik koncesije na osnovi koncesije izgradi građevinu na pomorskom dobru, ima u cijelosti pravo na naknadu troškova za takvu građevinu koja je pripadnost pomorskoga dobra u razmjeru prema vremenu za koje je prikraćen u korištenju koncesijom. Naravno, ta naknada ne može premašiti vrijednost građevine u trenutku opoziva, umanjena za iznos ostvarene amortizacije. Iz navedenoga zakonskog uređenja slijedi da osim kapitalnih investicija koje se izvode sukladno studiji gospodarske opravdanosti na početku koncesijskog razdoblja, zakonodavac ne predviđa nikakve druge investicije koje bi mogao izvršiti koncesionar za trajanja koncesijskog razdoblja. Takvo rješenje nije životno ni primjenjivo u praksi. Tako Ljubetić, S. 2016. Pomorsko dobro – aktualnosti te položaj koncesionara. *Pravo u gospodarstvu, 2, br. 55.* Str. 222.

[70] Navedeno uz iznimku čl. 128. Zakona o gradnji, koji regulira izvođenje jednostavnih i drugih građevina i određenih radova bez građevinske dozvole.

4.1. Postupak ishođenja dozvola za poduzimanje zahvata u lukama nautičkog turizma

Sa stajališta koncesijskog odnosa prvi i osnovni uvjet prije ikakve aktivnosti koncesionara za početak izgradnje jest traženje suglasnosti davatelja koncesije. Naime, uz to što se čl. 30. ZPDML-a kao jedan od razloga za oduzimanje koncesije navodi slučaj u kojem ovlaštenik koncesije ne izgradi u određenom roku građevine ili druge objekte za koje mu je dana koncesija, tako je kao razlog za oduzimanje koncesije naveden i slučaj u kome ovlaštenik koncesije bez odobrenja učini na pomorskom dobru označenom u koncesiji radnje koje nisu predviđene u koncesiji ili su u suprotnosti s odobrenim projektom. Navedena obveza koncesionara još se jedanput stipulira i kao posebna obveza koncesionara u odluci[71] i u ugovoru o koncesiji. Postavlja se pitanje u kojoj je fazi, odnosno s kojom razinom projekta potrebno zatražiti tu suglasnost davatelja koncesije. Zakon o prostornom uređenju i Zakon o gradnji pojmovno vezuju koncesiju uz pojam dokaza pravnog interesa za poduzimanje zahvata u prostoru.[72] Naime, svaki zahvat u prostoru[73] provodi se u skladu s prostornim planom, odnosno u skladu s aktom za provedbu prostornog plana i posebnim propisima ako ovim Zakonom nije propisano drukčije. Prostorni se planovi provode[74] izdavanjem lokacijske dozvole, dozvole za promjenu namjene i uporabu građevine, rješenja o utvrđivanju građevne čestice, potvrde parcelacijskog elaborata (u daljnjem tekstu: akti za provedbu prostornih planova) te građevinske dozvole na temelju posebnog zakona.[75]

Zakonodavne promjene u području regulacije gradnje u 2013. godini, kojima se predviđa obveza pribave lokacijske dozvole samo u zakonu taksativno navedenim slučajevima, koji uključuju etapnu ili faznu gradnju[76] i neriješene imovinskopravne odnose,[77] bile su usmjerene

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71 Kao primjer, vidi točku III. Odluke o koncesiji na pomorskom dobru u svrhu izgradnje i gospodarskog korištenja luke posebne namjene – luke nautičkog turizma Marina Kaštela, Klasa: 934-01/12-01/04, Urbroj: 50301-05/20-13-5, od 7. 11. 2013. objavljena u NN 136/13, kojom je određena obveza ovlaštenika koncesije da za svaku daljnju gradnju ili rekonstrukciju na koncesioniranom pomorskom dobru zatraži suglasnost davatelja koncesije te ishodi lokacijsku i građevinsku dozvolu.

72 Tako čl. 150. Zakona o prostornom uređenju i čl. 109. Zakona o gradnji.

73 Zahvat u prostoru svako je građenje građevine, rekonstrukcija postojeće građevine i svako drugo privremeno ili trajno djelovanje ljudi u prostoru kojim se uređuje ili mijenja stanje u prostoru, čl. 3. st. 1. t. 41. Zakona o prostornom uređenju.

74 Akte za provedbu prostornih planova izdaje Ministarstvo graditeljstva i prostornog uređenja te upravno tijelo, čl. 115. Zakona o prostornom uređenju.

75 Čl. 114. Zakona o prostornom uređenju.

76 Sukladno čl. 3. Zakona o prostornom uređenju, etapno je građenje građenje pojedinih građevina od kojih se sastoji složena građevina određenih lokacijskom dozvolom, a za koje se građevine izdaju posebne građevinske dozvole, dok je fazno građenje građenje građevine po njezinim dijelovima određenim lokacijskom dozvolom, a za koje se dijelove izdaju posebne građevinske dozvole.

77 Tako je čl. 125. Zakona o prostornom uređenju određeno da se lokacijska dozvola izdaje za: eksploatacijsko polje, osim za eksploatacijsko polje ugljikovodika ili geotermalne vode za energetske svrhe, građenje rudarskih objekata i postrojenja koji su u funkciji izvođenja rudarskih radova, skladištenje ugljikovodika i trajno zbrinjavanje plinova u geološkim strukturama; rudarske objekte i postrojenja za eksploataciju ugljikovodika ili geotermalne vode za energetske svrhe u skladu s prostornim planom na eksploatacijskom polju određenom na temelju posebnog zakona kojim se uređuje istraživanje i eksploatacija ugljikovodika; određivanje novih vojnih lokacija i vojnih građevina; zahvate u prostoru koji se prema posebnim propisima kojima se uređuje gradnja ne smatraju građenjem; etapno i/ili fazno građenje građevine; građenje na zemljištu, odnosno građevini za koje investitor nije riješio imovinskopravne odnose ili za koje je potrebno provesti postupak izvlaštenja; građenje građevina ako to stranka zatraži.

na smanjenje broja slučajeva u kojima je investitor dužan prvotno zatražiti lokacijsku dozvolu umjesto da je moguće izravno pokrenuti postupak za izdavanje građevinske dozvole.[78]

Sadržaj idejnog projekta, kao podloge za ishođenje lokacijske dozvole, definiran je čl. 128. Zakona o prostornom uređenju kao skup međusobno usklađenih nacrta i dokumenata struka koje, ovisno o vrsti zahvata u prostoru, sudjeluju u projektiranju, kojima se daju osnovna oblikovno-funkcionalna i tehnička rješenja zahvata u prostoru, odnosno idejno-tehničko rješenje, prikazuje smještaj jedne ili više građevina na građevnoj čestici i/ili unutar obuhvata zahvata u prostoru, određuju osnovna polazišta važna za osiguravanje postizanja temeljnih zahtjeva za građevinu i drugih zahtjeva za građevinu.[79] Idejni projekt zajedno s drugom zakonom propisanom dokumentacijom[80] podloga je ishođenju lokacijske dozvole za zakonom navedene slučajeve. U vezi s preostalom zakonskom dokumentacijom koja se mora priložiti za potrebe ishođenja lokacijske dozvole nužno je izdvojiti posebne uvjete koji se moraju zadovoljiti, a koje izdaju javnopravna tijela sukladno posebnim zakonima. Tako se, primjerice, sukladno čl. 161. Zakona o vodama[81] posebnim uvjetima priključenja određuju tehnički zahtjevi kojima mora udovoljiti građevina da bi njezini interni vodovi bili priključeni na komunalne vodne građevine[82] sukladno općim i tehničkim uvjetima isporuke vodnih usluga, a izdaje ih javni isporučitelj vodne usluge.[83] Na temelju relevantnih odredaba Zakona o energiji[84] (iz čl. 41. i dr.), Zakona o tržištu električne energije[85] te Općih uvjeta za korištenje mrežom i opskrbu električnom ener-

[78] Također, zakonom je uvedeno razlikovanje zgrada prema novom kriteriju tako da se čl. 4. Zakona o gradnji, umjesto dosadašnjeg razlikovanja građevina s obzirom na površinu, građevine i radovi na građevinama s obzirom na zahtjevnost gradnje razvrstavaju u tri kategorije, od zahtjevnijih prema manje zahtjevnima, kako slijedi: 1. skupina – građevine koje se planiraju Državnim planom prostornog razvoja, 2. skupina – ostale građevine, osim građevina 1. i 3. skupine, 3. skupina – građevine koje se sukladno čl. 128. Zakona o gradnji mogu graditi bez građevinske dozvole.

[79] Idejni projekt mora na neposredan i odgovarajući način sadržavati sve podatke potrebne za izdavanje lokacijske dozvole (lokacijske uvjete) te mora biti izrađen na način iz kojeg je vidljivo da su projektirana idejno-tehničko rješenja u skladu s propisima i aktima u skladu s kojima se izdaje lokacijska dozvola i posebnim propisima kojima se uređuje zaštita okoliša i prirode, čl. 128. st. 2. Zakona o prostornom uređenju. Sadržaj idejnog projekta detaljnije je razrađen Pravilnikom o obveznom sadržaju idejnog projekta (NN 55/14, 41/15, 67/16, 23/17).

[80] Postupak izdavanja lokacijske dozvole pokreće se na zahtjev zainteresirane stranke, koja zahtjevu prilaže: tri primjerka idejnog projekta, izjavu projektanta da je idejni projekt izrađen u skladu s prostornim planom, posebne uvjete i/ili dokaz da je podnio zahtjev za utvrđivanje posebnih uvjeta ako oni nisu utvrđeni u zakonom propisanom roku, rješenje o prihvatljivosti zahvata za okoliš ako je riječ o zahvatu u prostoru za koji se prema posebnim propisima provodi postupak procjene utjecaja zahvata na okoliš i/ili ocjene prihvatljivosti zahvata za ekološku mrežu i potvrdu o nostrifikaciji idejnog projekta ako je projekt izrađen prema stranim propisima, čl. 127. Zakona o prostornom uređenju.

[81] NN 153/09, 63/11, 130/11, 56/13, 14/14.

[82] Pojam komunalne vodne građevine obuhvaća građevine za javnu vodoopskrbu – akumulacije, vodozahvati (zdenci, kaptaže i druge zahvatne građevine na vodnim tijelima), uređaji za kondicioniranje vode, vodospreme, crpne stanice, glavni dovodni cjevovodi i vodoopskrbna mreža te građevine za javnu odvodnju – kanali za prikupljanje i odvodnju otpadnih voda, mješoviti kanali za odvodnju otpadnih i oborinskih voda, kolektori, crpne stanice, uređaji za pročišćavanje otpadnih voda, uređaji za obradu mulja nastalog u postupku pročišćavanja otpadnih voda, lagune, ispusti u prijemnik i druge građevine pripadajuće ovim građevinama, uključujući sekundarnu mrežu, čl. 22. Zakona o vodama.

[83] Javni isporučitelj vodnih usluga javne vodoopskrbe ili javne odvodnje trgovačko je društvo u kojem sve udjele, odnosno dionice u temeljnom kapitalu imaju jedinice lokalne samouprave ili trgovačka društva u kojima sve udjele, odnosno dionice u temeljnom kapitalu izravno imaju jedinice lokalne samouprave, odnosno ustanova kojoj je osnivač jedinica lokalne samouprave, čl. 202. Zakona o vodama.

[84] NN 120/12, 14/14, 102/15.

[85] NN 22/13,102/15.

gijom[86] (NN 85/2015) koncesionar podnosi zahtjev za izdavanje prethodne elektroenergetske suglasnosti u svrhu spoznaje mogućnosti priključenja, određivanja tehničkih, ekonomskih i ostalih uvjeta priključenja građevine na mrežu i izgradnje građevine te uvjeta korištenja mrežom.[87]

U drugim slučajevima, odnosno u slučaju kada je zahvat definiran prostornim planom[88], odmah se pristupa izradi glavnog projekta. Sadržaj glavnog projekta definiran je čl. 68. Zakona o gradnji kao skup međusobno usklađenih projekata kojima se daje tehničko rješenje građevine i dokazuje ispunjavanje temeljnih zahtjeva za građevinu te drugih propisanih i određenih zahtjeva i uvjeta.[89] Nakon izrade glavnog projekta,[90] a ovisno o vrsti zahvata, koncesionar uvijek mora, uz izjavu projektanta da je projekt izrađen u skladu s prostornim planovima, od javnopravnih tijela[91] pribaviti potvrde da je glavni projekt izrađen u skladu s posebnim propisima, odnosno posebnim uvjetima. Navedeno u slučaju izravnog pristupanja izradi glavnog projekta znači da će već pri pristupanju izradi projekta koncesionar zatražiti izdavanje posebnih uvjeta, a nakon izrade potvrdu da je projekt izrađen u skladu s posebnim uvjetima. Usporedno s traženjem navedenih potvrda koncesionar se u pravilu obraća davatelju koncesije sa zahtjevom za davanje suglasnosti za poduzimanje zahvata u prostoru. Naime, sada koncesionar ima u svojim rukama projekt dovoljne razrađenosti koji je osnova za izdavanje akta na osnovi kojeg se može pristupiti gradnji te on pruža odgovarajuću osnovu davatelju koncesije da utvrdi hoće li za isti projekt dati suglasnost ili ne. Navedeno vrijedi neovisno o tome je li riječ o izgradnji nove luke nautičkog turizma ili rekonstrukciji postojeće.

Zaključno valja istaknuti da sami zakonski propisi određuju da su svi zahvati koji se tiču izgradnje nove luke nautičkog turizma već definirani prostornim planom, dok će pribavi lokacijske dozvole pribjeći kod nužne faznosti izgradnje uslijed neriješenih imovinskopravnih odnosa[92] koji nerijetko dolaze do vidjela kod rekonstrukcije postojećih luka nautičkog turizma za koje je koncesija dodijeljena prije 2003. godine, odnosno prije stupanja na snagu ZPDML-a i uvođenja obvezatnosti prethodnog upisa pomorskoga dobra na području koje se daje u koncesiju. Naime, neovisno o datumu dodjele koncesije Ministarstvo graditeljstva i prostornog uređenja u svrhu izdavanja dozvola zahtijeva da bude obavljen upis pomorskoga dobra na

[86] NN 85/15.

[87] Vidi obrazac zahtjeva dostupan na http://www.hep.hr/ods/UserDocsImages/dokumenti/Obrasci/Zahtjev_za_izdavanje_prethodne_elektroenergetske_suglasnosti.pdf (datum pristupa 29. 7. 2017.)

[88] Odluka o koncesiji koja se donosi prema posebnom propisu, koja obuhvaća provedbu zahvata u prostoru, može se donijeti ako je taj zahvat planiran prostornim planom, a što tijelo koje priprema dodjelu koncesije utvrđuje uvidom u lokacijsku informaciju ili na drugi način propisan posebnim propisom, čl. 124. Zakona o prostornom uređenju.

[89] Glavni projekt ovisno o vrsti građevine, odnosno radova sadržava: arhitektonski projekt, građevinski projekt, elektrotehnički projekt, strojarski projekt. Izradi glavnog projekta odnosno pojedinih projekata koje sadržava, ovisno o vrsti građevine odnosno radova, ako je to propisano posebnim zakonom ili ako je potrebno, prethodi izrada: krajobraznog elaborata, geomehaničkog elaborata, prometnog elaborata, elaborata tehničko-tehnološkog rješenja, elaborata zaštite od požara, elaborata zaštite na radu, elaborata zaštite od buke, konzervatorskog elaborata, drugoga potrebnog elaborata, čl. 69. Zakona o gradnji.

[90] Glavni projekt mora izraditi ovlaštena osoba, vidi čl. 51. i dr. Zakona o gradnji.

[91] Javnopravna su tijela tijela državne uprave, druga državna tijela, upravni odjeli, odnosno službe velikih gradova, Grada Zagreba i županija nadležni za obavljanje poslova iz određenih upravnih područja te pravne osobe koje imaju javne ovlasti, određeni posebnim zakonima, koji utvrđivanjem posebnih uvjeta, odnosno potvrđivanjem projekta na način propisan Zakonom o gradnji sudjeluju u gradnji građevina, čl. 3. st. 1. t. 7. Zakona o gradnji.

[92] Neriješeni imovinskopravni odnosi uopće ne utječu na izdavanje lokacijske dozvole. Navedeno je jasno izraženo i u odluci USRH, Us-575/1996. od 18. srpnja 1996. g., Izbor odluka 2-1997.

cijelom obuhvatu u svrhu formiranja građevinske čestice. Navedeno je, zapravo, striktno udovoljavanje zakonskom određenju građevne čestice kao u načelu jedne katastarske čestice čiji je oblik, smještaj u prostoru i veličina u skladu s prostornim planom te koja ima pristup na prometnu površinu sukladan prostornom planu.[93] Stoga se u slučaju nesređenih imovinskopravnih odnosa, ako je moguće, pribjegava faznosti izgradnje te se dobivanjem lokacijske dozvole, koja uključuje nekoliko građevnih čestica u luci nautičkog turizma, pristupa ishodovanju dvije ili više građevinskih dozvola.

4.2. Posebno o izgradnji građevina i drugih objekata energetske, vodovodne i kanalizacijske mreže u lukama nautičkog turizma

Kada se razmatra pitanje pravnog interesa te dokumentacije kojom se dokazuje, valja imati na umu, kada je riječ o izgradnji pojedinih građevina i objekata infrastrukture, a posebice vodovodne, kanalizacijske i energetske mreže, da je takva izgradnja zakonom izrijekom navedena kao jedna od vrsta posebne uporabe pomorskoga dobra za koju se dodjeljuje koncesija u postupku koji se razlikuje od postupka koji se vodi za koncesiju za gospodarsko korištenje pomorskim dobrom. Naime, ZPDML-om se posebna upotreba pomorskoga dobra definira kao svaka ona upotreba koja nije opća upotreba ni gospodarsko korištenje pomorskim dobrom. Je li, stoga, koncesionar luke nautičkog turizma ovlašten izvoditi radove koji spadaju u izgradnju građevina i objekata infrastrukture, i to vodovodne, kanalizacijske i energetske mreže i pod kojim uvjetima? Da bi se moglo odgovoriti na navedeno, potrebno je prvo razmotriti što se zapravo događa u praksi. Iako se po zakonskom određenju luke nautičkog turizma tretiraju kao izdvojena građevinska cjelina unutar određene lokacije, upravo kada se razmatra izgradnja građevina i objekata vodovodne, kanalizacijske i energetske mreže, istu izgradnju nije moguće izdvojiti iz same lokacije s obzirom na to da se njome često postiže ne samo zadovoljenje potrebnih infrastrukturnih kapaciteta luke nautičkog turizma, nego se njome postiže kompenzacija nedostatnih infrastrukturnih uvjeta za lokaciju u cjelini. Naime, često je postizanje odgovarajućih infrastrukturnih uvjeta luke nautičkog turizma prethodno uvjetovano makroaspektom te iste lokacije, odnosno razvijenošću šireg područja u kojem egzistira pojedina luka nautičkog turizma. Prije poduzimanja zahvata koncesionar je kao investitor dužan pribaviti sve potvrde da su pri pojedinim radnjama uključenima u zahvat poštovane odredbe posebnih zakona koji reguliraju pojedinu djelatnost, pa tako Zakona o vodama, Zakona o energiji i drugih relevantnih propisa. Navedeni su upravo oni posebni uvjeti za ispunjenje kojih koncesionar dobiva potvrdu javnopravnih tijela. A ne može ih ispuniti na drugi način nego da upravo sam bude investitor u odnosu na izgradnju potrebnih građevina i drugih objekata infrastrukture. Dakle, koncesionar je ovlašten izvoditi predmetne radove uz uvjet da prethodno zadovolji uvjete koje za pojedinu djelatnost definiraju posebni propisi.

S obzirom na postojeće uređenje koncesijskog odnosa u ZK-u, ZPDML-u i podzakonskim propisima, postavlja se pitanje o mogućim modelima kroz koje bi se u izgradnju građevina i objekata vodovodne, kanalizacijske i energetske mreže mogle uključiti treće osobe izvan koncesijskog odnosa. Mogućnosti koje bi se primijenile, naravno, ovise i o intenciji u vezi s budućom uporabom davatelja koncesije i koncesionara glede građevine ili drugog objekta infrastrukture o kojem je riječ.

[93] Čl. 3. st. 1. t. 4. Zakona o prostornom uređenju.

4.2.1. Izmjena prostornih planova[94]

Prostornim planovima propisuju se uvjeti provedbe zahvata u prostoru, odnosno uvjeti za građenje građevina i provedbu drugih zahvata u prostoru na određenoj razini i/ili lokaciji u skladu s kojima se izdaje akt za provedbu prostornog plana. Ti uvjeti propisuju se odredbama za provedbu prostornog plana i/ili njegovim grafičkim dijelom.[95] Prostorni su planovi: Državni plan prostornog razvoja,[96] prostorni planovi područja posebnih obilježja, urbanistički plan uređenja državnog značaja,[97] prostorni plan županije,[98] Prostorni plan Grada Zagreba, urbanistički plan uređenja županijskog značaja,[99] prostorni plan uređenja grada, odnosno općine,[100]

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94 Postupak izmjene prostornih planova uređen je odredbama čl. 113. Zakona o prostornom uređenju.

95 Čl. 53. Zakona o prostornom uređenju.

96 Državni plan prostornog razvoja određuje: 1. osobito vrijedno zemljište namijenjeno poljoprivredi, 2. zemljište namijenjeno šumi i šumsko zemljište državnog značaja, 3. koridore infrastrukture državnog značaja, 4. zone namijenjene istraživanju i eksploataciji mineralnih sirovina, 5. područja posebne namjene, 6. granice područja za koje se donosi prostorni plan područja posebnih obilježja čija je obveza donošenja propisana tim planom, 7. izdvojena građevinska područja izvan naselja za gospodarsku i javnu namjenu državnog značaja, 8. površine drugih namjena državnog značaja određene uredbom iz članka 56. Zakona o prostornom uređenju, čl. 67. Zakona o prostornom uređenju.

97 Urbanistički plan uređenja državnog značaja donosi se obvezno za područje određeno Državnim planom prostornog razvoja te propisuje uvjete provedbe svih zahvata u prostoru unutar svog obuhvata i uvjete provedbe infrastrukture izvan područja za koje se donosi urbanistički plan uređenja za potrebe tog područja, čl. 70. Zakona o prostornom uređenju.

98 Prostorni plan županije određuje: 1. vrijedno obradivo poljoprivredno zemljište, 2. koridore infrastrukture županijskog značaja, 3. izdvojena građevinska područja izvan naselja za gospodarsku namjenu županijskog značaja, 4. površine drugih namjena županijskog značaja određene uredbom iz čl. 56. st. 2. Zakona o prostornom uređenju. Prostorni plan županije propisuje: 1. uvjete provedbe zahvata u prostoru za javne, društvene i druge građevine područnog (regionalnog) značaja, 2. uvjete provedbe zahvata u prostoru područnog (regionalnog) značaja koji se prema posebnim propisima koji uređuju gradnju ne smatraju građenjem, 3. smjernice za izradu urbanističkih planova uređenja na izdvojenim građevinskim područjima izvan naselja za gospodarsku i javnu namjenu područnog (regionalnog) značaja, čl.72. Zakona o prostornom uređenju.

99 Urbanistički plan uređenja županijskog značaja donosi se obvezno za područje određeno Prostornim planom županije te propisuje uvjete provedbe svih zahvata u prostoru unutar svog obuhvata i uvjete provedbe infrastrukture izvan područja za koje se donosi urbanistički plan uređenja za potrebe tog područja, čl. 74. Zakona o prostornom uređenju.

100 Prostorni plan uređenja grada, odnosno općine određuje: 1. građevinsko područje naselja, izdvojeno građevinsko područje izvan naselja i izdvojeni dio građevinskog područja naselja, 2. neizgrađeni dio građevinskog područja naselja, izdvojenog građevinskog područja izvan naselja i izdvojenog dijela građevinskog područja naselja, za koje se ne donosi generalni urbanistički plan te neuređeni dio tih područja, 3. dio građevinskog područja naselja, izdvojenog građevinskog područja izvan naselja i izdvojenog dijela građevinskog područja naselja, za koje se ne donosi generalni urbanistički plan, planiran za urbanu preobrazbu i urbanu sanaciju, 4. obuhvat generalnoga urbanističkog plana, 5. obuhvat urbanističkih planova uređenja koji se donose u građevinskom području naselja i izdvojenom građevinskom području izvan naselja koje određuje grad, odnosno općina, a za koje se prema Zakonu o prostornom uređenju ne donosi generalni urbanistički plan, 6. koridore infrastrukture značajne za grad, odnosno općinu. Prostorni plan uređenja grada, odnosno općine propisuje: 1. uvjete provedbe svih zahvata u prostoru izvan građevinskog područja, osim zahvata državnog i županijskog značaja, 2. uvjete provedbe svih zahvata u prostoru u dijelu građevinskog područja naselja i dijelu izdvojenog građevinskog područja izvan naselja koje određuje grad, odnosno općina, a za koje se prema ovom Zakonu ne donosi generalni urbanistički plan ili urbanistički plan uređenja te u izdvojenom dijelu građevinskog područja naselja, 3. smjernice za izradu urbanističkih planova uređenja koji se prema ovom Zakonu donose u građevinskom području naselja i izdvojenom građevinskom području izvan naselja, a za koje se ne donosi generalni urbanistički plan. čl. 76. Zakona o prostornom uređenju.

generalni urbanistički plan[101] i urbanistički plan uređenja[102]. Načelo vertikalne integracije zahtijeva usklađenost prostornog plana užeg područja s prostornim planom šireg područja, a u slučaju neusklađenosti primjenjuje se prostorni plan šireg područja.[103] Ipak, u praksi, nerijetko se može svjedočiti kako prostorni planovi, nadležnost za izradu i donošenje kojih je u rukama lokalnih i županijskih (regionalnih) jedinica, nisu u korelaciji s poslovnim interesom koncesionara kojem je dodijeljena koncesija na određenom području, a posebice kada je riječ o koncesijama od državnog značenja.

Iz perspektive luka nautičkog turizma, što se prostorni plan odnosi na uže područje, znači da je koncesijsko područje razrađenije. Tako urbanistički plan uređenja najdetaljnije propisuje uvjete za provođenje zahvata u prostoru koji se odnosi na pojedinu luku nautičkog turizma, a što je prethodno zakonodavnim izmjenama iz 2013. godine činio nekadašnji detaljni plan uređenja, koji se donosio za dio naselja te koji se sada u smislu odredaba Zakona o prostornom uređenju smatra urbanističkim planom uređenja.[104] Naime, njime se propisuju granice pomorskoga dobra kao i djelatnosti koje se mogu obavljati na konkretnom području. Da bi došlo do izmjene granica koncesije, prvotno bi trebalo pristupiti izmjeni urbanističkog plana uređenja u svrhu izmjene koncesijskog obuhvata luke nautičkog turizma. Potom bi se nakon izmjene granice koncesije drugom pravnom subjektu mogla dodijeliti koncesija za posebnu uporabu pomorskog dobra. Zašto bi takva mogućnost bila oportuna za koncesionara? Zato što bi se teret investicije koja se koncesionaru često ne može pokazati kao profitabilna prebacila na pravni subjekt ovlašten za obavljanje te djelatnosti, koji nužno ne obavlja tu djelatnost u svrhu stjecanja profita,[105] a opet postiglo bi se zadovoljenje nužnih infrastrukturnih uvjeta.

4.2.2. Potkoncesija

Sukladno čl. 35. ZPDML-a koncesija se može prenijeti u cijelosti ili dati dijelom u potkoncesiju u istom opsegu i pod istim uvjetima pod kojima je i dana, uza suglasnost davatelja koncesije. Uredba o postupku davanja koncesije na pomorskom dobru, podloga za čije je donošenje bio ZPDML propisuje da se koncesija može dati dijelom u potkoncesiju u istom

[101] Generalni urbanistički plan donosi se obvezno za građevinsko područje naselja i izdvojeno građevinsko područje izvan naselja središnjeg naselja velikoga grada. Generalni urbanistički plan određuje: 1. neizgrađeni dio građevinskog područja naselja i izdvojenoga građevinskog područja izvan naselja za koje se donosi generalni urbanistički plan te neuređeni dio tih područja, 2. dio građevinskog područja naselja i izdvojenog građevinskog područja izvan naselja, planiran za urbanu preobrazbu i urbanu sanaciju, 3. obuhvat urbanističkih planova uređenja koji se prema ovom Zakonu donose za građevinsko područje naselja i izdvojeno građevinsko područje izvan naselja koje određuje grad, odnosno općina. Generalni urbanistički plan propisuje: 1. uvjete provedbe svih zahvata u prostoru unutar dijela svog obuhvata za koji se ne donosi urbanistički plan uređenja, 2. smjernice za izradu urbanističkih planova uređenja čiji je obuhvat određen generalnim urbanističkim planom, čl.77. i 78. Zakona o prostornom uređenju.

[102] Urbanistički plan uređenja propisuje uvjete provedbe svih zahvata u prostoru unutar svog obuhvata te u navedenu svrhu obvezno sadržava: 1. detaljnu podjelu područja na posebne prostorne cjeline s obzirom na njihovu namjenu, 2. prikaz građevnih čestica namijenjenih za građenje, odnosno uređenje površina javne namjene, 3. druge detaljne uvjete korištenja i uređenja prostora te građenja građevina, čl. 80. Zakona o prostornom uređenju.

[103] Čl. 12. Zakona o prostornom uređenju.

[104] Vidi čl. 200. Zakona o prostornom uređenju. Tako primjerice, DPU zone Monte Mulini, dostupno na http://istra-istria.hr/fileadmin/dokumenti/prostorni_plan/Ostali/Rovinj_DPU_Monte_Mulini_04_07_tekst.pdf (datum pristupa: 29. 7. 2017.).

[105] Tako je čl. 5. Zakona o vodama izrijekom navedeno da voda nije komercijalni proizvod te je s obzirom na status općeg dobra podređena posebnim pravilima.

opsegu i pod istim uvjetima pod kojima je i dana, uza suglasnost davatelja koncesije. U svrhu realizacije navedenog ovlaštenik koncesije podnosi davatelju koncesije pisani obrazloženi prijedlog za davanje dijela koncesije u potkoncesiju pravnoj osobi ili fizičkoj osobi registriranoj za obavljanje obrta, ako iz organizacijsko-tehnoloških, financijskih ili drugih opravdanih razloga više nije u mogućnosti u cijelosti koristiti koncesiju i izvršavati obveze i prava iz ugovora o koncesiji, odnosno ako smatra da bi obavljanje djelatnosti za koju je dobio koncesiju bilo učinkovitije davanjem dijela u potkoncesiju. Davatelj koncesije dužan je u roku od 30 dana od dana zaprimanja prijedloga dati ili odbiti suglasnost.[106] Tek kada ovlaštenik koncesije dobije suglasnost na namjeravano sklapanje ugovora o potkoncesiji, pristupa sklapanju ugovora s budućim potkoncesionarom.

Pojedini autori upozoravaju na to da je, s obzirom na to da zakonski propisi ne predviđaju nikakvih ograničenja, potkoncesiju moguće zasnovati na bilo kojem dijelu koncesije, u vezi s djelatnostima radi kojih je dodijeljena i u vezi s dijelom koncesioniranog područja.[107] Iz sadržaja citirane odredbe proizlazi da se potkoncesija može dati ne samo za glavne i sporedne djelatnosti koncesije nego i za druge djelatnosti koje bi se mogle obavljati na koncesioniranom području. ZK regulira ugovor o potkoncesiji paralelno s pravnim odnosom imenovanim kao podugovor. Tako[108] za vrijeme trajanja ugovora o koncesiji, u roku u kojem traje koncesija, koncesionar može s trećim osobama sklopiti podugovor i/ili ugovor o potkoncesiji radi izvođenja određenih radova ili pružanja pojedinih usluga iz ugovora o koncesiji u manjem opsegu te obavljanja sporednih djelatnosti. Ugovor o potkoncesiji sklapa se kada iz objektivnih opravdanih razloga nije moguće sklopiti podugovor, odnosno kada je pravni status nekretnine koja je predmet koncesije takav da nije sposobna biti objektom prava vlasništva i drugih stvarnih prava. ZK, u skladu s već istaknutim prilagođavanjem pravu EU-a u kontekstu koncesija, propisuje i da mogućnost sklapanja i opseg podugovora i ugovora o potkoncesiji davatelj koncesije predviđa u studiji opravdanosti davanja koncesije, dokumentaciji za nadmetanje, obavijesti o namjeri davanja koncesije te u ugovoru o koncesiji u okviru koje se može dati[109] te da se podugovor i ugovor o potkoncesiji ne može sklopiti s ciljem neopravdana izbjegavanja izvršenja ugovornih obveza koncesionara i s ciljem i svrhom davanja koncesije određenih ugovorom o koncesiji. Naravno, prethodno sklapanju ugovora o potkoncesiji, kao i za moguću kasniju izmjenu tog ugovora, koncesionar je dužan zatražiti pisanu suglasnost davatelja koncesije.[110] Ugovorom o potkoncesiji potkoncesionar ima pravo na ostvarivanje prihoda od djelatnosti koja je predmet ugovora, a prihod od naknade iz ugovora o potkoncesiji čini prihod koncesionara, te se zbraja u ukupan prihod na koji se obračunava naknada za koncesiju. Naknada za ugovor o potkoncesiji mora biti razmjerna vrijednosti ugovora o potkoncesiji.[111]

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[106] Sukladno čl. 6. Uredbe o postupku davanja koncesije na pomorskom dobru.

[107] Tako Bolanča, D. 2009. Koncesije na pomorskom dobru – novine u hrvatskom zakonodavstvu. *Zbornik radova Pravnog fakulteta u Splitu, god. 46, br. 1.* Str. 80.

[108] Sukladno čl. 68. ZK-a.

[109] Davatelj koncesije može u dokumentaciji za nadmetanje zahtijevati od ponuditelja dostavu podataka o budućem podugovaratelju ili potkoncesionaru, čl. 68. st. 3. ZK-a. Takav preduvjet za sklapanje ugovora o potkoncesiji faktično je moguće primijeniti samo na koncesijske odnose nastale nakon stupanja na snagu te zakonske odredbe.

[110] Čl. 69. st. 1. i 2. ZK-a. Kao primjer davanja suglasnosti koncesionaru na sklapanje ugovora o potkoncesiji, vidi http://www2.pgz.hr/pozivi_skupstina/13-17/skupstina36/TOCKA11.pdf http://www2.pgz.hr/pozivi_skupstina/13-17/skupstina36/TOCKA12.pdf (datum pristupa 29. 7. 2017.)

[111] Čl. 69. st. 4. i 5. ZK-a.

Također, ZK upućuje na to da se ugovorom o potkoncesiji na odgovarajući način primjenjuju odredbe posebnih zakona.[112]

Iz svega navedenog proizlazi da je ugovor o potkoncesiji moguće sklopiti za obavljanje glavnih djelatnosti koncesije kao i sporednih djelatnosti. Nadalje, potkoncesija podrazumijeva dva pravna odnosa. Prvi odnos postoji između davatelja koncesije i ovlaštenika koncesije, a drugi između ovlaštenika koncesije i potkoncesionara.[113] Stoga proizlazi da davatelj koncesije i potkoncesionar nisu u neposrednom pravnom odnosu, odnosno da potkoncesionar uopće nije ovlašten pravno nastupati prema davatelju koncesije. Štoviše, sukladno ZK-u sudjelovanje potkoncesionara ne utječe na odgovornost koncesionara za provedbu ugovora o koncesiji.[114]

Je li model potkoncesije, kao jedno od normativnih rješenja prijenosa izvedbe određenih prava i obveza koji pripadaju koncesionaru iz koncesije na treću osobu, moguće primijeniti i za slučaj kada je potrebno izgraditi građevine i druge objekte energetske, vodovodne ili kanalizacijske mreže? Kada se uzmu u obzir odredbe ZPDML-a, kojima se određuje naknada za posebnu uporabu za potrebe energetske, vodovodne i kanalizacijske mreže, razvidno je da se ona određuje u fiksnom i u promjenjivom dijelu. Promjenjivi dio sugerira da je ipak riječ o djelatnostima koje ostvaruju ne samo općedruštvenu nego i gospodarsku svrhu. Nadalje, s obzirom na to da je riječ o djelatnostima koje se nužno obavljaju u sklopu dane koncesije, odnosno bez njih obavljanje glavne djelatnosti koncesije ne bi ni bilo moguće, proizlazi da je upravo riječ o djelatnostima koje bi mogle biti obuhvaćene potkoncesijskim odnosom.

Što bi sklapanje takva ugovora značilo za koncesionara? Prvo, svakako smanjenje iznosa potrebne investicije s obzirom na to da se više ne bi pojavljivao kao investitor. Drugo, izgradnju i obavljanje djelatnosti preuzeo bi pravni subjekt kojem je upravo ta djelatnost osnovna djelatnost i u odnosu na koju raspolaže potrebnim stručnim kadrom.

S obzirom na nedostatak zakonske norme koja bi detaljnije uređivala pitanje ugovora o potkoncesiji, svakako u odnosu na sve navedeno valja promisliti i o sadržaju takva ugovora. Naime, nedostatak zakonskog, a potom i ugovornog uređenja prouzročio bi pravnu nesigurnost za obje ugovorne strane, koja bi posljedično onemogućila uredno poslovanje na koncesijskom području. Usporedbe radi, koncesijski odnos mnogo je više normiran od potkoncesijskog, a opet, pojedini autori upozoravaju na to da su najčešći razlozi koncesijskih sporova upravo tumačenje pojedinih odredbi ugovora o koncesiji ili izvršavanje ugovorom preuzetih obveza.[115] Što bi se tek dogodilo s nedovoljno ugovorno uređenim potkoncesijskim odnosom čije se sadržajno uređenje po pravnoj prirodi naslanja na koncesijski odnos? Zbog navedenog, sadržaj takva ugovora prije sklapanja valja detaljno promisliti. Uvodne odredbe ugovora, kojima se stipulira pobuda sklapanja, trebale bi sadržavati kratak opis pravnog statusa koncesionara kao ovlaštenika koncesije za gospodarsko korištenje pomorskim dobrom u definiranoj luci nautičkog turizma te naznaku predmeta poslovanja kao i kratak opis djelatnosti potkoncesionara. Pobuda za sklapanje ugovora definirala bi se kao spoznaja, odnosno utvrđenje koncesionara da bi obavljanje djelatnosti za koju je dobio koncesiju bilo učinkovitije davanjem dijela u potkoncesiju na način da se osigura opskrba električnom energijom, odnosno vodovodna ili kanalizacijska mreža društvom ovlaštenim za obavljanje predmetne djelatnosti. Nastavno,

[112] Čl. 68. st. 6. ZK-a.

[113] Tako Bolanča, D., *op. cit.* u bilj. 107. Str. 80.

[114] Čl. 69. st. 9. ZK-a.

[115] Tako Đerđa, D. 2016. *Pravna zaštita u postupcima dodjele koncesija prema hrvatskom i europskom općem koncesijskom pravu,* izlaganje sa Stručnog savjetovanja o pomorskom dobru. Građenje, upravno sudska praksa i pravna zaštita na pomorskom dobru. Rijeka, 21. 5. 2016.

definirao bi se predmet ugovora kao potkoncesije u svrhu obavljanja djelatnosti glede energentske, vodovodne ili kanalizacijske mreže koja uključuje pravo na izgradnju i održavanje građevine i drugog objekta infrastrukture na pomorskom dobru. Također, u ugovoru bi bilo poželjno stipulirati da je koncesionar, prethodno sklapanju ugovora pribavio suglasnost za sklapanje ugovora o potkoncesiji od davatelja koncesije, koju prilaže ugovoru te čini njegov sastavni dio.[116] Opisno i površinom utvrdilo bi se pomorsko dobro koje se daje u potkoncesiju. Postavlja se pitanje na koji će se način odrediti naknada za potkoncesiju u slučaju kada dio infrastrukture prolazi ispod površine zemljišta, na koji način koncesionar nije uskraćen u upotrebi cijelog područja na kojem se nalazi infrastruktura, nego samo nadzemnoga dijela? Naime, čak i ako infrastruktura u jednom dijelu ne ometa obavljanje djelatnosti koncesionara, opet navedeni dio mora biti obuhvaćen ugovorom o potkoncesiji jer potkoncesionar mora za navedeno pribaviti potrebne dozvole. U svakom slučaju, površinu koja se daje u potkoncesiju potrebno je odrediti u cijelosti i prikazati na nacrtima koji čine sastavni dio ugovora. S obzirom na to da nakon potpisa ugovora potkoncesionar stupa u posjed dijela koncesijskoga područja danog u potkoncesiju, svakako bi, uz konstataciju navedenoga, bilo uputno unijeti odredbu sukladno kojoj bi se taj prostor prihvatio u zatečenom stanju. Nastavno na navedeno, za vrijeme trajanja potkoncesije ovlaštenik koncesije dužan je osigurati potkoncesionaru nesmetano korištenje dijelom koncesijskog područja danog u potkoncesiju.

Rok potkoncesije s jedne strane ograničen je rokom na koji je dana koncesija, kao rezultat obligatorne zakonske norme, a s druge strane mora u sebi sadržavati kalkulaciju povrata investicije u odnosu na potkoncesionara. Kada je riječ o djelatnostima koje se tiču energetske, vodovodne i kanalizacijske mreže, upitno je što se ima smatrati odgovarajućim povratom investicije. Svakako u obzir valja uzeti i obvezu navedenih pružatelja usluga da osiguraju potrebne infrastrukturne uvjete za mikro- i makrolokaciju. Ipak je riječ o djelatnostima od posebna društvenog interesa. Pokazuje se da je čak i niska profitabilnost koja bi rezultirala pozitivnim novčanim tijekom pri kraju potkoncesijskog razdoblja svakako prihvatljiva za budućeg potkoncesionara.

S obzirom na svrhu sklapanja, ugovor mora sadržavati i odredbu u kojoj se izrijekom daje ovlaštenje potkoncesionaru za ishođenje potrebnih dozvola za izgradnju građevina i drugih objekata pred nadležnim tijelima, temeljem kojeg ovlaštenja bi se i predmetni ugovor mogao smatrati dokazom pravnog interesa sukladno čl. 109. Zakona o gradnji. Ovdje se postavlja jedno pitanje vezano za pitanje suglasnosti davatelja koncesije za radnje koje se poduzimaju na koncesijskom području. Svakako valja istaknuti da je i dalje suglasnost davatelja koncesije nužan dokument za ishođenje građevinske dozvole, no riječ je o dokumentu koji je već prethodno ishodio koncesionar. Sukladno maksimi *nemo plus iuris ad alium transferre potest quam ipse habet*[117], koncesionar ne bio smio pristupiti sklapanju predmetnog ugovora o potkoncesiji, a kamoli dobiti suglasnost za isti ugovor, ako nije prethodno ishodio suglasnost davatelja koncesije za namjeravani zahvat.

Ugovor između ovlaštenika koncesije i potkoncesionara sklapa se u istom opsegu i pod istim uvjetima pod kojima je koncesija dana. Podrazumijeva li navedeno da se mora odrediti i naknada koja proporcionalno odgovara koncesijskoj naknadi?[118] Praksa pokazuje različite modele naplaćivanja naknade. Naime, kada bi se reklo da bi s jedne strane najsigurnija praksa bila

[116] Stoga bi nacrt predmetnog ugovora prije sklapanja trebalo poslati na suglasnost davatelju koncesije. Ne bi bilo naodmet da se uz nacrt ugovora dostavi i dopis kojim budući potkoncesionar potvrđuje svoju namjeru.

[117] Nitko ne može na drugoga prenijeti više prava nego što sam ima.

[118] Kako to određuje ZK u čl. 43. st. 9.

određivanje iste naknade kao što je ima koncesionar, u proporcionalnom dijelu, s druge strane navedeno bi značilo da bi potkoncesionar mogao ostvarivati veći prihod, koji potom nije isplaćivan davatelju koncesije naknadom pa bi se koncesionar mogao suočiti sa situacijom u kojoj bi bio terećen za plaćanje manje naknade od potrebne. U drugom slučaju, kada bi naknada bila veća od one proporcionalne naknadi koncesionara, teretilo bi ga se da neovlašteno zarađuje potkoncesijom. U svakom slučaju, fiksni dio naknade određivao bi se po zauzetoj površini, odnosno volumenu, uključivo i podzemnim koridorima. U odnosu na promjenjivi dio dolazi u pitanje navedena dilema o tome treba li se uračunati prihod koncesionara ili prihod potkoncesionara. Uzevši u obzir postojeće zakonske odredbe kao i slučajeve iz prakse, proizlazi da bi se u konkretnom slučaju promjenjivi dio određivao ovisno o prihodu koji ostvari potkoncesionar, sukladno modelima koji postoje za obračun naknade za koncesiju za posebnu uporabu.[119] Dinamiku plaćanja trebalo bi povezati s dinamikom ugovora o koncesiji te rokovima za plaćanje stalnog i promjenjivog dijela naknade.[120] Također, valjalo bi i predvidjeti instrumente osiguranja plaćanja naknade za potkoncesiju, primjerice zadužnicu, da bi se koreliralo s obvezom koju koncesionar ima prema davatelju koncesije.[121] Uz prava i obveze koje se odnose na predmet ugovora i naknadu, svakako bi trebalo predvidjeti sljedeće pravo potkoncesionara da bez ikakvih daljnjih suglasnosti koncesionara u upisniku koncesija, kada se steknu uvjeti, upiše potkoncesije u svoju korist.[122] Nadalje, potrebno bi bilo stipulirati sljedeće obveze potkoncesionara: da će se koristiti dijelom pomorskoga dobra koji mu je dan u potkoncesiju u skladu sa zakonima i propisima Republike Hrvatske koji su na snazi, da će izgraditi građevinu i/ili drugi objekt infrastrukture u ugovorenom roku, da će pozornošću dobroga gospodarstvenika obavljati djelatnost na dijelu koncesijskog područja danog u potkoncesiju, da je dužan na dijelu koncesijskog područja koje mu je dano u potkoncesiju poduzeti sve mjere sigurnosti, zaštite na radu i zaštite okoliša, kao i da je dužan o svom trošku osigurati dio pomorskoga dobra koji mu je dan u potkoncesiju na način da ugovori osiguranje odgovornosti iz djelatnosti te druga potrebna osiguranja. Općenito, a nastavno na uređenje koncesijskog odnosa,[123] moglo bi se ugovoriti da potkoncesija prestaje: istekom vremena za koji je dana, prestankom odnosno smrću potkoncesionara odnosno koncesionara te svakako prestankom koncesije iz zakonom ili ugovorom propisanih razloga. Svakako bi trebalo ugovorom izrijekom navesti da koncesionar ima pravo na jednostran raskid ugovora o potkoncesiji u slučaju da potkoncesionar ne poštuje odredbe propisa kojima se uređuje održavanje pomorskoga dobra i luke ili uvjete potkoncesije određene ugovorom, ako ne koristi potkoncesiju ili je koristi za svrhe za koje nije dana, ako bez odobrenja koncesionara učini na pomorskom dobru označenom u potkoncesiji radnje koje nisu predmetom potkoncesije ili su u suprotnosti s odobrenom potkoncesijom, ako neuredno plaća potkoncesijsku naknadu. Prestankom potkoncesije prestaju prava potkoncesionara te je potkoncesionar dužan vratiti koncesionaru dio koncesijskog područja danog u potkoncesiju, kao i svu dokumentaciju koja se odnosi na izgradnju građevina i objekata za koje je dana pot-

[119] Tako se u Odluci o davanju koncesije za posebnu upotrebu pomorskoga dobra trgovačkom društvu HEP ODS d.o.o. za izgradnju i održavanje 20 kV kabelskog priključka TS 20/0,4 kV MEL, Grad Rab, navodi da s obzirom na to da Uredbom nisu propisane početne cijene za trase kabelskih priključaka, vode se dosadašnjom praksom davanja koncesije za kabelske priključke po godišnjoj cijeni za trasu kabelskog priključka u iznosu od 5kn/m2 za stalni dio, a za promjenjivi dio 1 % od prihoda ostvarenog od ukupne godišnje ubrane naknade od korisnika kabelskog priključka, dostupno na http://www2.pgz.hr/pozivi_skupstina/13-17/skupstina30/TOCKA11.pdf (datum pristupa 29. 7. 2017.).

[120] Korisno je da se predvide i prava koncesionara u slučaju neplaćanja koncesije u definiranim rokovima.

[121] Vidi čl. 55. ZK-a.

[122] Navedeno pod uvjetom da je koncesija doista i upisana, odnosno da postoje sređeni imovinskopravni odnosi.

[123] Čl. 31. i dr. ZPDML-a.

koncesija. Bi li potkoncesionar imao pravo na povrat obavljenih ulaganja u slučaju prijevremenog prestanka potkoncesije bez njegove krivnje? Primjenom instituta stjecanja bez osnove, svakako. Uzevši u obzir pravila koja vrijede za koncesiju[124], imao bi pravo na naknadu koja ne bi premašivala vrijednost ulaganja u građevinu u trenutku prestanka potkoncesije, umanjenu za iznos ostvarene amortizacije. No dokazivanje pravne osnove i visine bilo bi nesporno lakše kada bi se navedeno utvrdilo u ugovoru o potkoncesiji. Završne odredbe sadržavale bi utanačenja glede načina rješavanja sporova, načina izmjene predmetnog ugovora te druga utanačenja koja se tiču forme i valjanosti ugovora.

5. Zaključak

Izgradnja građevina i objekata infrastrukture jedna je od temeljnih okosnica zahvata izgradnje nove ili rekonstrukcije postojeće luke nautičkog turizma. U sklopu poduzimanja predmetnog zahvata koncesionar je kao investitor ovlašten poduzeti sve radnje uključene u zahvat, pa tako i izgradnju građevina i objekata infrastrukture, ako su pri navedenome poštovane relevantne odredbe sektorskih propisa u zakonom propisanom postupku, kao i pribavljena suglasnost davatelja koncesije temeljem izrađenoga glavnog projekta. Traženje suglasnosti davatelja koncesije temeljem idejnog projekta pokazuje se suvišnim s obzirom na to da navedeni projekt ne pruža dovoljnu razinu razrađenosti zahvata da bi se poslije mogla preskočiti stepenica traženja te iste suglasnosti temeljem glavnog projekta.

U okviru zahvata izgradnje ili rekonstrukcije luke nautičkog turizma postoji mogućnost prepuštanja izgradnje građevina i objekata infrastrukture trećim osobama, bilo na način da se prostornim planovima ta izgradnja, zapravo, izuzme iz zahvata i postane predmetom zasebne koncesije ili da se teret izgradnje te kasnije obavljanje djelatnosti prebaci na treće osobe ugovorom o potkoncesiji. Ugovor o potkoncesiji, kao rezultat često neusklađenih odredaba ZPDML-a i pratećih propisa te ZK-a, nije odgovarajuće normiran da bi njegovo uređenje moglo udovoljiti osnovnim potrebama pravne sigurnosti budućih ugovornih strana. Ostavlja se ugovornim stranama teret promišljanja odgovarajućega ugovornog uređenja u cilju izbjegavanja sporova oko budućega potkoncesijskog odnosa. Stoga se pokazuje nužnim prvo usuglasiti zakonske odredbe kojima se uređuje predmetno područje, a potom propisati minimum sadržaja potkoncesijskog odnosa, dok bi se u odnosu na preostali sadržaj uputilo na odgovarajuću primjenu odredaba kojima se uređuje koncesijski odnos.

[124] Čl. 29. st. 2. ZPDML-a.

SUMMARY

CONSTRUCTION OF BUILDINGS AND OTHER INFRASTRUCTURE OBJECTS IN THE PORTS OF NAUTICAL TOURISM

The construction of buildings and other infrastructure objects on the maritime domain, given its legal nature as a common good, can only be achieved through the concession regime. The Building Act, apart from the concession contract, does not foresee any other way of proving the legal interest for issuance of a building permit for real estate for which property rights cannot be acquired. Therefore, a potential investor proves the legal interest with a concession contract for the economic exploitation of a maritime domain or a concession contract for the special use of maritime domain. Concession is explicitly stipulated by law as a contractual right, and the very content of that institute, from the nautical tourism point of view, stands for the use of maritime domain, with or without using existing buildings and other structures and with or without constructing new buildings and other structures on the maritime domain. In the Physical Planning Act the term infrastructure includes municipal, transport, energy, water, maritime, communication, electronic communication and other buildings intended for managing other types of manufactured and natural goods. Ports of nautical tourism, though in their essence exist in symbiosis with individual micro location, by a normative definition, in the constructional and functional view, represent a unified complex, which means that from the construction aspect they have to be seen as a unique structure. The question of the construction of buildings and other objects within the concession scope of a nautical tourism port usually comes up in the case of the construction of a new port or in the event of a complete reconstruction of the port as a necessity trough the duration of the concession, due to the detrition of superstructure and infrastructure or the need to increase existing capacity. Cost-effectiveness of such an investment, must be given in a feasibility study, whose content depends on the scope of the project. Regardless of whether there is a new port of nautical tourism being built or the existing one is being reconstructed, it is most likely to take some time for the concessionaire to get a permit to commence construction. Within the documentation that has to be included when applying for issuance of the building permit, special importance must be given to the written consent for construction made by the concession grantor. Taking into account the legislative changes in the field of construction regulation over the past few years, the question arises as to whether it will be sufficient to request such consent with a conceptual design as the basis for issuing a location permit or the main design as a basis for obtaining a construction permit. When considering the issue of construction of buildings and other infrastructure objects in the ports of nautical tourism, attention should also be paid to the fact that the construction of certain buildings and infrastructure objects, in particular the water supply, sewage and energy networks, is explicitly stated as category of special use of maritime domain, the concession for which is granted in a procedure that is different from the procedure for concession for the economic exploitation of the maritime domain. Therefore, the question arises whether the concessionaire of a nautical tourism port is authorized to carry out works involving the construction of buildings and infrastructure objects, such as water supply, sewage and energy networks and under what conditions. Considering the existing arrangement of concession relations in the Concessions Act, the Maritime Domain and Seaports Act and subordinate legislation, a number of possible models will be considered through which third parties outside the concession contract could be involved in the construction of buildings and infrastructure objects as water supply, sewage and energy networks. One of the possibilities that is considered in order to meet the required infrastructure conditions, is changing the concession boundaries to enable the granting of a concession for the special use of maritime domain to third parties. In particular, the possible application of the sub-concession model is analyzed, as one of the normative solutions to transfer certain rights and obligations from the concession contract, belonging to the concessionaire, to a third party, and the essential content of such contract is thoroughly considered due to the lack of detailed legal regulation of the said institute.

Key words: *buildings, infrastructure objects, maritime domain, port of nautical tourism, concession, sub-concession,*

POSTOJE LI ELEMENTI OSTAVE U UGOVORIMA O VEZU U LUKAMA NAUTIČKOG TURIZMA[1]

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SAŽETAK

Ugovori o pružanju usluga luka nautičkog turizma, poglavito ugovori o iznajmljivanju vezova, a zatim i oni o prihvatu i čuvanju plovnih objekata te njihovu uređenju, pripremanju, održavanju, servisiranju i popravljanju nisu pravno regulirani posebnim zakonskim odredbama. To su atipični inominatni ugovori nastali u poslovnoj praksi luka nautičkog turizma. Pri sklapanju ugovora i određivanja opsega i sadržaja obveza te ugovorne odgovornosti stranaka primjenjuje se praksa korištenja općih uvjeta ugovora luka nautičkog turizma. Iz preliminarne analize primjećuje se da su opći uvjeti poslovanja luka nautičkog turizma neujednačeni i nestandardizirani, a središnji je problem ove materije njihova nepreciznost i nedorečenost. Posljedica ovog nedostatka postojećeg autonomnog prava neujednačena je sudska praksa, što sve zajedno dovodi do pravne nesigurnosti. Pritom valja naglasiti da domaći sudovi ne prepoznaju činjenicu postojanja čitavog spektra različitih usluga koje luke nautičkog turizma pružaju u okviru svojih ugovora o vezu. Naime, u praksi oni mogu varirati od jednostavnog ustupanja mjesta za vez do vrlo složenih kombinacija usluga koje uz to uključuju, primjerice, čuvanje, održavanje, popravak plovila i sl. Uz to, složen je i zakonodavni okvir koji se primjenjuje na ove ugovore, a čine ga opće odredbe obveznog i ugovornog prava iz ZOO-a te posebne zakonske odredbe o onim tipovima ugovora čije elemente ugovor o vezu ili njegovi sastojci sadrže, primjerice, odredbe ZOO-a o ugovorima o ostavi, najmu, djelu, nalogu te odredbe o potrošačkim ugovorima. U odnosu na održavanje i popravak plovila mogu doći do primjene i odredbe PZ-a koje kao specijalni propis uređuju taj segment ugovora. Relevantan može biti i Zakon o zaštiti potrošača. U okviru kompleksne materije ugovora o vezu kao jedno od iznimno važnih pitanja u praksi pojavljuje se pitanje postoji li i u kojim slučajevima odgovornost luke nautičkog turizma korisniku

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veza za čuvanje plovila na vezu. Odgovor na to pitanje zadire prvenstveno u raspravu o sadržaju konkretnog ugovora o stalnom vezu te analizu autonomnih izvora prava koji se na taj ugovor o vezu primjenjuju. Predmet rada analiza je ugovora o vezu koji se primjenjuju u poslovnoj praksi naših marina, usmjerena na pitanje postoje li elementi čuvanja plovila na vezu te ako postoje, koji je stvaran opseg takve obveze marine i u kojoj mjeri se ona može tumačiti primjenom odredbi o ugovoru o ostavi iz ZOO-a. Razvijeno tržište nautičkog turizma zahtijeva uravnoteženu zaštitu interesa stranaka koje u njemu sudjeluju. Takvi izazovi posebno dolaze do izražaja upravo u segmentu građanskopravne odgovornosti za štetu iz ugovora o vezu. Smatramo da bi unapređivanje pravnog okvira za ugovore o vezu, pa tako i ugovore o vezu s elementima ostave, trebalo ići u smjeru tipiziranja općih uvjeta poslovanja i izrade modela standardnih općih uvjeta poslovanja hrvatskih marina. Ovaj rad treba poslužiti kao znanstvena podloga za izradu takvih općih uvjeta ugovora o vezu.

Ključne riječi: *ugovor o vezu, opći uvjeti poslovanja marina, luka nautičkog turizma, odgovornost marine, ostava, čuvanje, plovilo, jahta, brodica*

1. Uvodna razmatranja

Pravna pitanja glede ugovora o vezu, kao što su njegova pravna priroda, sadržaj, bitni sastojci, prava i obveze ugovornih stranaka, a posebno ugovorna odgovornost iz tog pravnog posla, postala su zbog intenzivnog razvoja nautičkog turizma i težnje Republike Hrvatske da i dalje razvija nautički turizam iznimno važna pitanja hrvatskog prava.

Ugovori o pružanju usluga luka nautičkog turizma, poglavito ugovori o iznajmljivanju vezova, a zatim i oni o nadziranju i čuvanju plovnih objekata te njihovu uređenju, pripremanju za nautičku sezonu, održavanju i servisiranju nisu pravno regulirani posebnim zakonskim odredbama. To su atipični inominatni ugovori nastali u poslovnoj praksi luka nautičkog turizma.[2] Riječ je o ugovorima koje priprema i predlaže jedna ugovorna strana, a uvijek je to pružatelj usluge veza, znači, luka nautičkog turizma, odnosno marina[3]. Pri sklapanju ugovora i određivanju opsega i sadržaja obveza te ugovorne odgovornosti stranaka primjenjuje se praksa korištenja općih uvjeta marina.[4] U poslovnoj praksi hrvatskih marina ugovori o vezu nisu se ustalili u svom sadržaju. U praksi se iza naziva „ugovor o vezu" često kriju pravni poslovi koji imaju vrlo različit sadržaj, pravnu prirodu, opseg ugovornih obveza stranaka, a time i ugovornu odgovornost koja proizlazi iz tih ugovora. Rezultati naše dosadašnje analize na projektu DELICROMAR[5] pokazuju da su opći uvjeti poslovanja marina neujednačeni i nestandardizirani, a središnji problem ove materije njihova je nepreciznost i nedorečenost.

Nadalje, u praksi se uočava dijametralno suprotan pristup s jedne strane sudova, a s druge strane marina o pitanju odgovornosti marina za čuvanje plovila na vezu. Sudovi nerijetko zaključuju da je marina odgovorna za štetu zbog gubitka ili oštećenja plovila jer nije postupala s pažnjom dobrog gospodarstvenika u ispunjavanju obveze čuvanja plovila te na ugovorni odnos stranaka iz ugovora o vezu primjenjuju odredbe Zakona o obveznim odnosima[6] o ugovoru

[2] Padovan, A. V. 2013. Odgovornost luke nautičkog turizma iz ugovora o vezu i osiguranje. *Poredbeno pomorsko pravo - Comparative Maritime Law*. god. 52. br. 167. str. 6-8.

[3] Marina je najprepoznatljiviji i najkompleksniji oblik luke nautičkog turizma kao luke posebne namjene. U daljnjem ćemo tekstu radi jednostavnosti koristiti pojam marina premda se naša razmatranja na odgovarajući način odnose i na ostale vrste luka nautičkog turizma.

[4] U praksi se rabe izrazi *opći uvjeti* ili *opći uvjeti poslovanja* i sl. iako je riječ o pojmovima koji imaju isto značenje. Radi ujednačenosti terminologije u ovom radu rabimo izraz *opći uvjeti ugovora* koji koristi i ZOO.

[5] Vidjeti bilješku 1.

[6] Narodne novine broj 35/05, 41/08, 125/11 i 78/15; u nastavku ZOO.

o ostavi. Istodobno, obveza čuvanja plovila prisutna je iznimno rijetko u poslovnoj praksi i općim uvjetima ugovora hrvatskih luka nautičkog turizma. Analiza općih uvjeta ugovora marina kojima se uređuje stalni vez, pokazuje da marine veoma rijetko nude uslugu čuvanja plovila na vezu, štoviše, u pravilu se ograđuju od preuzimanja te obveze i u svojim općim uvjetima ugovora isključuju obvezu čuvanja i odgovornost za čuvanje plovila na vezu. Znači, čuvanje plovila na vezu nije tipična djelatnost hrvatskih marina. Riječ je o poslovnoj odluci marina da ne ugovaraju čuvanje plovila, već da rade po modelu tzv. najma veza ili najma veza i nadziranja ili pak nadgledanja plovila na vezu. Zbog toga treba naglasiti da domaći sudovi ne prepoznaju činjenicu postojanja čitavog spektra različitih usluga koje marine pružaju u okviru svojih ugovora o vezu. Naime, u praksi usluge mogu varirati od jednostavnog ustupanja mjesta za vez do vrlo složenih kombinacija usluga koje uz najam mjesta za vez mogu uključivati nadziranje, čuvanje, održavanje, servisiranje, popravak plovila i sl.

Ugovor o vezu neimenovan je, atipičan, neformalni ugovor pa je zbog toga složen i zakonodavni okvir koji se primjenjuje na ove ugovore, a čine ga opće odredbe obveznog i ugovornog prava iz ZOO-a te posebne zakonske odredbe o onim tipovima ugovora čije elemente ugovor o vezu ili njegovi sastojci sadrže, primjerice, odredbe ZOO-a o ugovorima o ostavi, najmu, djelu, nalogu te odredbe o potrošačkim ugovorima. U odnosu na održavanje i popravak plovila mogu doći do primjene i odredbe Pomorskog zakonika[7] koji kao specijalni propis uređuje taj segment ugovora. Relevantan može biti i Zakon o zaštiti potrošača.[8] Međutim, s obzirom na opisanu strukturu pravnih izvora, čini se da je u praksi najspornije pitanje u kojim slučajevima se na ugovor o vezu primjenjuju odredbe ZOO-a o ostavi te koje specijalne odredbe ZOO-a o ugovoru o ostavi mogu doći u obzir. U praksi, stranke mogu u ugovoru o vezu ugovoriti primjenu odredbi ZOO-a o ugovoru o ostavi, izričito isključiti njihovu primjenu, a moguće je i da se u ugovoru ne spominje primjena zakonskih odredbi o ostavi, ali se ugovaraju obveze koje po svom sadržaju predstavljaju elemente ugovora o ostavi. Zbog toga je važno sagledati i razmotriti pravne posljedice koje nastupaju stranačkim disponiranjem o tom pitanju te što u ugovoru znači šutnja o tome.[9]

Razvijeno tržište nautičkog turizma zahtijeva uravnoteženu zaštitu interesa stranaka koje u njemu sudjeluju (luka nautičkog turizma i korisnika veza). Takvi izazovi posebno dolaze do izražaja upravo u segmentu građanskopravne odgovornosti za štetu iz ugovora o vezu. Ako se uzme da ugovor o vezu sadrži elemente čuvanja plovila, razina odgovornosti marine za štete na plovilu znatno je viša nego u slučaju ako je ugovoreno samo ustupanje mjesta za vez koje podrazumijeva poglavito samo odgovornost za ispravnost i prikladnost veza koji se ustupa na uporabu. Pitanja koja se pojavljuju u impostaciji ovog ugovora zadiru u pitanje uloge, poslovanja i obilježja cjelokupne djelatnosti marina. S druge strane, ako imamo elemente čuvanja kod ugovora o vezu, onda je vrijednost imovine koju korisnik veza povjerava na čuvanje marini također značajna pa zaštita korisnika veza kod ugovora o vezu s elementima čuvanja plovila ima i za ovu ugovornu stranu posebnu dimenziju. Za obje ugovorne strane odlučna je pravna sigurnost i predvidivost pravne zaštite koju mogu očekivati ako dođe do spora iz ugovora o vezu.

Divergentan pristup ovom problemu, točnije nejedinstveno tumačenje samog koncepta i *causae* ugovora o vezu, značajno utječe na pravnu sigurnost. Nejedinstvena sudska praksa i pogrešno kanaliziranje odgovornosti marine kao ostavoprimca u slučajevima kad čuvanje

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[7] Narodne novine broj 181/04, 76/07, 146/08, 61/11, 56/13 i 26/15.

[8] Narodne novine broj 41/14 i 110/15.

[9] V. o tome i Padovan, op. cit. bilješka 2., str. 1-35.

plovila nije ugovoreno i kad se ono ne predviđa kao ugovorna obveza prema općim uvjetima ugovora luke nautičkog turizama i konkretnom ugovoru o vezu, može imati značajne posljedice na poslovanje marina i daljnji razvoj nautičkog turizma. Riječ je o vrlo ozbiljnom problemu u praksi jer sporovi iz ugovora o vezu mogu biti sporovi iznimno visoke vrijednosti. Zbog toga je nužno razumijevanje šireg konteksta poslovanja marina i ugovora o vezu.

Nužno je istaknuti da domaće pravne književnosti o ovoj temi nema, izuzev dvaju radova, autora Padovan[10] i Skorupan Wolff, Petrinović, Mandić,[11] koji spominju problem čuvanja plovila na vezu i upozoravaju na potrebu njegova daljnjeg razmatranja. To znači da ne postoji sustavan i detaljan doktrinarni osvrt na pitanje u kojim se slučajevima na ugovor o vezu mogu primijeniti odredbe ZOO-a o ostavi, drugim riječima, postoje li u okviru ugovora o vezu elementi ugovora o ostavi i, ako postoje, u kojim je to slučajevima.

Predmet rada analiza je ugovora o vezu koji se primjenjuju u poslovnoj praksi naših marina, usmjerena na pitanje postoje li elementi čuvanja plovila na vezu te, ako postoje, koji je stvaran opseg takve obveze marine i u kojoj se mjeri ona može tumačiti primjenom odredbi o ugovoru o ostavi iz ZOO-a. Građa za istraživanje su opći uvjeti ugovora koji se primjenjuju u 38 hrvatskih marina te suhih marina i odlagališta plovnih objekata, odnosno hala/zatvorenih prostora za smještaj plovila[12] te rezultati terenskog istraživanja poslovne prakse marina intervjuima i upitnicima provedenim u 32 hrvatske marine.[13][14] Uz autonomno pravo i zakonski okvir koji se primjenjuje na ovaj tip ugovora, analizira se sudska praksa u sporovima u kojima su sudovi odlučivali o ugovornoj odgovornosti luka nautičkog turizma za štetu iz ugovora o vezu. [15] Služimo se poredbenopravnom metodom i uspoređujemo bitne sastojke i sadržaj ugovora o vezu s ugovorom o ostavi iz ZOO-a. Dakle, cilj nam je odgovoriti na pitanje ima li ugovor o vezu elemente ugovora o ostavi te, ako ima, u kojim je to slučajevima i mogu li doći do primjene odredbe ZOO-a o ostavi na ugovorni odnos stranaka iz ugovora o vezu.

Osnovne su teze ovog rada:

1. Kvalifikacija pravne prirode konkretnog ugovora o vezu te odabir materijalnog prava

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[10] Padovan, op. cit., bilješka 2.

[11] Skorupan Wolff, V.; Petrinović, R.; Mandić, N. 2017. Berthing contract obligations according to the business practice of Croatian marinas. *Book of Proceedings 7th International Maritime Science Conference*. April 20th – 21th. Solin. str. 104-111.

[12] Analizirani su: Opći uvjeti poslovanja Marine *Punat*, Opći uvjeti poslovanja Marine *Servisni centar Trogir*, Opći uvjeti poslovanja Marine *Kaštela*, Opći uvjeti poslovanja za smještaj plovila u luci nautičkog turizma *Lav*, Opći uvjeti poslovanja za smještaj plovila u Marini *Zadar color*; Opći uvjeti poslovanja Marine *Baotić* (Nautički centar *Trogir*), Opći uvjeti za korištenje veza u *Adriatic Croatia International Clubu* d. d., Ugovor o korištenju veza Marine *Dalmacija*, Ugovor o korištenju veza Marine *Borik*, Ugovor o korištenju veza Marine *Mandalina*, Opći uvjeti korištenja veza za smještaj povila u Marini *Agana*, Ugovor o korištenju veza u Laguni *Poreč*, Ugovor o korištenju veza u Marini *Solaris*, Ugovor o vezu s *Tehnomontom* d. d., Ugovor o korištenju suhog veza s *Nauta Lamjanom*, Ugovor o korištenju veza na suhom s *Marservisom*, Ugovor o korištenju suhog veza s Nautičkim centrom *Liburnija*, Ugovor o čuvanju i održavanju plovila *Navitech yacht service*.

[13] *Punat*, Servisni centar *Trogir* (SCT), Kaštela, Tribunj, Solaris, Nautički centar *Trogir* (*Baotić*), 21 marina *ACI* d. d., *Dalmacija, Mandalina, Borik, Tankercomerc Zadar*, Marina *Veruda*.

[14] Napominjemo da smo u okviru dosadašnjih aktivnosti na projektu DELICROMAR istraživali i uvjete triju slovenskih i dviju crnogorskih marina te proveli terenska istraživanja u jednoj slovenskoj i četirima crnogorskim marinama. Također smo razmatrali dostupnu pravnu literaturu koja se bavi istim ili srodnim pitanjima u okviru talijanskog, kanadskog i američkog prava. Međutim, komparativnopravna analiza koju ovdje ne iznosimo bit će predmetom posebnog znanstvenog rada.

[15] Vidjeti bilješku 13.

koji na ugovor treba primijeniti mora proizlaziti iz njegova precizno i točno utvrđena sadržaja, istražene i analizirane *causae* pravnog posla koju stranke žele postići sklapanjem ugovora, kao i iz točno interpretiranih općih uvjeta ugovora koji se na taj ugovor primjenjuju.

2. Primjena odredbi ZOO-a o ugovoru o ostavi na ugovor o vezu moguća je samo u ograničenu dosegu, s obzirom na mali broj elemenata čuvanja u ugovorima o vezu prema praksi domaćih marina.

2. Pregled aktualne poslovne prakse u pogledu elemenata čuvanja u ugovorima o vezu

Istražili smo poslovnu praksu hrvatskih marina koja se odnosi na pitanja kojim se aktivnostima koncesionari bave u okviru ugovora o vezu, odnosno kakvoj su odgovornosti iz poslovne djelatnosti izloženi. Obavili smo terenska istraživanja u hrvatskim marinama[16] tako da smo pisanim upitnicima prikupili podatke o poslovnoj praksi i relevantnim pravnim pitanjima, odnosno intervjuirajući odgovorne djelatnike i predstavnike marina. Proučili smo i opće uvjete ugovora i/ili ugovore o vezu koji se primjenjuju u hrvatskim marinama, a da bismo stekli što bolji uvid u sve aktivnosti i djelatnosti koje se obavljaju, a povezane su s čuvanjem i/ili nadziranjem plovila, proučavali smo i ugovore koji se primjenjuju u suhim marinama, odlagalištima plovnih objekata i ugovore o čuvanju plovila u halama – zatvorenim prostorima.[17] Posebnu pažnju usmjerili smo na pitanje pružaju li koncesionari kod stalnog veza uslugu čuvanja plovila ili nadzora plovila ili samo ustupanje veza na uporabu (davanje u najam) ili, možda, sve zajedno.[18] Utvrdili smo koje su uobičajene obveze marine i praktične mjere koje marina treba ispunjavati u okviru usluge: a) sigurnog nautičkog veza kad nije ugovoreno čuvanje ili nadzor, b) nadzora nad plovilom na vezu, ako je nadzor ugovoren i c) čuvanja, ako je čuvanje ugovoreno te u čemu se sastoji njihova obveza čuvanja i koji je opseg njihove odgovornosti u okviru te obveze. Proučavali smo i specifična pitanja kao što je pitanje ugovaraju li stranke predaju ključeva plovila, pravo ulaska u zaključane kabinske prostorije plovila i sastavljaju li inventarne liste opreme plovila te, ako ugovaraju, koja je funkcija spomenutih aktivnosti. Drugim riječima, nastojali smo ispitati znači li ugovaranje spomenutih aktivnosti i implicitno ugovaranje čuvanja plovila ili pak je riječ o aktivnostima koje nisu tipične samo za čuvanje i nisu prisutne samo kod čuvanja plovila, već se ugovaraju i kod nadziranja plovila na vezu. Opisanim metodama utvrđeno je da se u poslovnoj praksi hrvatskih marina mogu razlučiti tri osnovna modela ugovora o vezu:[19]

I. ugovori o najmu veza u moru ili na kopnu
II. ugovori o najmu veza u moru ili na kopnu i nadziranju plovila
   A) ugovori o najmu veza u moru ili na kopnu i nadziranju plovila u kojima nema ni implicitnih elemenata čuvanja
B) ugovori o najmu veza u moru ili na kopnu i nadziranju plovila uz prisutne sadržaje

[16] Vidjeti bilješku 13.

[17] Vidjeti bilješku 12.

[18] Najam veza, nadzor i čuvanje termini su koje uvodimo za potrebe teoretske analize, a koje podrobnije definiramo dalje u tekstu, no oni u praksi nisu ujednačeni te ne možemo govoriti o njihovu uobičajenom značenju.

[19] Klasifikacija i nazivi modela ugovora koriste se u svrhu znanstvene analize i teorijske sistematizacije ugovora pa ti nazivi u potpunosti ne odgovaraju nazivima ugovora koje bi imali u praktičnoj primjeni i poslovnoj praksi imajući pritom u vidu da terminologija koja se javlja u praksi nije ujednačena. V. također bilj. 18.

koji mogu imati implicitne elemente čuvanja[20]

III. ugovori o najmu veza u moru ili na kopnu i čuvanju plovila

A) ugovori o najmu veza u moru ili na kopnu i nadziranju plovila, uz opciju ugovaranja tzv. paket-usluge koja obuhvaća eksplicitne elemente čuvanja plovila

B) ugovori o vezu u moru ili na kopnu te ugovori o smještaju plovila u suhim marinama, odlagalištima plovnih objekata, halama – zatvorenim prostorima koji sadrže eksplicitne elemente čuvanja.

Za model I. ugovora o vezu karakterističan je najuži opseg obveza marine. Marina isključivo preuzima obvezu da će korisniku veza ustupiti na uporabu siguran vez za smještaj plovila tijekom određenog vremenskog razdoblja. Ovaj model ugovora karakterističan je za tranzitne vezove te ugovore o ustupanju mjesta za vez čarterskim kompanijama[21], ali ustupanje mjesta za vez ujedno je i osnovni sadržaj svih modela ugovora o vezu, što znači i onih kojima se ugovara samo najam mjesta za vez, kao i onih kojima se uz najam mjesta za vez ugovara i nadziranje ili čuvanje plovila na vezu. Specifičnost je ugovora o najmu veza da marine isključuju preuzimanje obveze nadziranja plovila na vezu. Za sve vrijeme korištenja usluge najma veza plovila se nalaze pod nadzorom korisnika veza te ni u kojem trenutku, smislu ni dijelu ne prelaze pod nadzor marine. To utanačenje izravno se reflektira na pitanje ugovorne odgovornosti marine. Naime, marina u ovim slučajevima odgovara jedino i isključivo za tehničku i nautičku ispravnost i sigurnost veza i njegove opreme te ne preuzima odgovornost za plovilo.

Modelu I. i svim ostalim modelima ugovora o vezu zajedničko je da marina s korisnikom ugovara ustupanje mjesta na vez jer je upravo to osnovna *causa* i gospodarska svrha svakog ugovora o vezu. To je bitan sastojak svakog ugovora o vezu, njegov osnovni sadržaj i najprepoznatljivija *differentia specifica* ugovora o vezu u odnosu na sve druge poslove obveznog i trgovačkog prava.

Ustupanje mjesta za vez uobičajeno se svodi na to da luka nautičkog turizma ustupi određeni dio svog akvatorija, određene objekte i infrastrukturu te odgovarajuću lučku opremu na uporabu korisniku veza za smještaj određenog plovila. Kad je riječ o vezu u moru, to se odnosi poglavito na dio morske površine, gata za pristup plovilu, sidreni blok i lanac ili na drugi način tehnički izveden *muring*, priključak za električnu energiju i tekuću vodu i sl.[22] Ako je u pitanju suhi vez, ustupanje mjesta za vez zapravo se sastoji od ustupanja dijela površine zemlje na kopnu koji može biti na pomorskom dobru na prostoru na kojem je luka nautičkog turizma koncesionar ili pak na mjestu fizički izmještenom i udaljenom od luke nautičkog turizma.

Za najam je karakteristično da vez koji se daje na uporabu bude ispravan i siguran u tehničkom i nautičkom smislu te odgovarajući za određeno plovilo s obzirom na vrstu, dimenzije i druge tehničke osobine plovila. Uz ispravnost veza, marina je dužna održavati uredno i u dobrom stanju marinu, svu njezinu infrastrukturu, građevinske objekte, postrojenja i drugu lučku opremu. Riječ je o kontinuiranim obvezama marine, a to znači da marina nije obvezna samo predati na uporabu tehnički i nautički siguran vez, kao i svu infrastrukturu i lučku opremu, već ova obveza podrazumijeva i da za čitavo vrijeme trajanja ugovora marina redovito

[20] Zbog jednostavnijeg sistematiziranja i izlaganja materije te elaboriranja problema ovaj model ugovora nazivamo „(…) uz prisutne implicitne elemente čuvanja“ iako u ekspertizi dokazujemo da ugovaranje tako nazvanih „implicitnih elemenata čuvanja“ u ovom modelu ugovora nema značenje, ulogu i funkciju čuvanja, već isključivo nadziranja plovila na vezu.

[21] U okviru projekta DELICORMAR (vidjeti bilješku 1.) u posebnom će znanstvenom radu biti obrađene posebnosti ugovora o vezu u kojima je ugovorna strana čarterska kompanija.

[22] Padovan, op. cit. bilješka 2.

provjerava i održava njihovu sigurnost i ispravnost.[23]

Kad je riječ o ugovorima o stalnom vezu, onda rezultati našeg istraživanja pokazuju da ugovorom preuzeta obveza marine nije samo ustupanje mjesta za vez, tj. davanje na uporabu veza nego marina preuzima i obvezu nadziranja plovila na vezu. Znači, većina hrvatskih marina radi po modelu II. ugovora o vezu.

U istraživanju smo naišli na primjere koji pokazuju da su u praksi ponekad prisutne neujednačene interpretacije poslova i aktivnosti koje marine obavljaju u okviru pružanja svojih usluga, a poglavito je riječ o neusklađenoj terminologiji. Jedan je koncesionar u odgovoru na upitnik decidirano istaknuo da pruža samo uslugu ustupanja mjesta za vez, a ne vrši nadzor ni čuvanje. Rezultati intervjua s istim koncesionarom pokazuju da su u njegovu poslovanju prisutni bitni elementi nadziranja plovila, kao što su videonadzor gatova i plovila, redovite ophodnje mornarskog osoblja marine, promatranje i praćenje stanja plovila i stanja priveza s gata i sl. U slučaju nepovoljnih promjena marina kontaktira korisnika veza, odnosno vlasnika plovila radi dobivanja naloga za otklanjanje uzroka nepovoljnih promjena na plovilu, a u hitnim slučajevima radi sigurnosti u luci intervenira samoinicijativno kako bi spriječila nastanak veće štete. Stoga, smatramo da se i u tim marinama primjenjuje model II. ugovora o vezu premda je koncesionar u upitniku konstatirao da ne ugovara uslugu nadzora nad plovilom, znači, marine zapravo, uz ustupanje mjesta za vez, pružaju i uslugu nadzora. Ta skupina marina karakteristična je po tome što se korisniku veza omogućuje da s posebnom pravnom osobom koja posluje u marini, sklopi tzv. paket-uslugu *boat care* koja uključuje nadziranje plovila na vezu. Riječ je o posebnom ugovoru o djelu koji korisnik sklapa s posebnom pravnom osobom, znači, riječ je o paralelnom ugovoru o nadzoru i brizi o plovilu. U praksi je često prisutno i zapošljavanje stalne posade na skupljim, tehnički složenijim i većim jahtama koje u tom slučaju preuzimaju ulogu čuvanja plovila na vezu, a marina je odgovorna isključivo za ustupanje odgovarajućeg mjesta za vez i nadzor plovila s gata.

Za poslovnu praksu marina koje primjenjuju model II. ugovora o vezu karakteristično je da uz najam veza u moru ili na kopnu u okviru svoje ugovorene obveze iz ugovora o stalnom vezu vrše i nadziranje plovila na vezu. Važno je reći da je ovo u praksi najčešći model ugovora o vezu jer gotovo sve hrvatske marine rade po modelu najma veza i nadzora plovila na vezu. Ugovori o vezu pojedinih marina koje primjenjuju ovaj model ugovora o vezu razlikuju se u načinu i sadržaju ispunjavanja obveze nadziranja plovila na vezu. Zbog toga smo ovom teorijskom modelu ugovora dodijelili dva podmodela koji se razlikuju u modalitetima ispunjavanja obveze nadziranja.

Model II. A) uključuje isključivo vanjski pregled plovila s gata. Ovu obvezu marina ispunjava tako da povremeno, prema unaprijed utvrđenim protokolima, uobičajenim vanjskim pregledom s gata tijekom obilaska marine provjerava stanje plovila i njegove opreme te konopa za privez i bokobrana. Zapisi o izvršenom nadzoru osoblja marine pohranjuju se u elektroničkom obliku te se periodično dostavljaju korisnicima veza. Kao i kod modela I. ugovorom se jasno razgraničava obveza marine da se brine o ispravnosti sustava *muringa* i lučke infrastrukture dok je isključiva odgovornost korisnika veza da se brine o ispravnosti svoga plovila, njegovu održavanju u plovidbenu stanju, ispravnosti i primjerenu broju i rasporedu bokobrana te o dobru stanju konopa za privez, bitvi i druge brodske opreme za privez. Marina ne preuzima ključeve ni dokumentaciju plovila, ne sastavlja se inventarna lista. Unutar našeg uzorka identificirali smo četiri hrvatske marine koje posluju po ovom podmodelu. Riječ je o marinama s velikim brojem vezova.

[23] Opširnije: Skorupan Wolff, Petrinović, Mandić, op. cit. bilješka 11.

S druge strane, marine koje primjenjuju model II. B) ugovaraju nešto širi sadržaj obveza marine i korisnika veza. Riječ je o tome da marina preuzima ključeve plovila i dokumentaciju koja omogućuje isplovljavanje, a u većini marina koje posluju po ovom modelu, stranke sastavljaju i listu inventara koja je sastavni dio ugovora o vezu. U pravilu, sadržaj usluge obuhvaća sve što je predviđeno po modelu II. B), uz dodatnu mogućnost ulaska osoblja marine u zaključane kabinske prostore u slučaju izravne ugroženosti i opasnosti ili sumnje da je došlo do nepovoljnih promjena u stanju plovila (primjerice, promjena na vodenoj liniji, naginjanje plovila, paljenje alarma u plovilu itd). Utvrdili smo da sve nabrojene aktivnosti imaju ulogu i funkciju nadziranja plovila, točnije, da stranke ovim aktivnostima daju bitno drugačiji pravni učinak od onog koje kod modela III. ugovora o vezu, koji uključuje elemente čuvanja, ima predaja ključeva i pravo ulaženja u zaključane kabinske prostore. Prema ovom modelu II. B) ugovora o vezu predaja ključeva plovila ima nekoliko funkcija. Ključevi se deponiraju kod marine da bi ih po potrebi mogla preuzeti osoba koju vlasnik ovlasti, najčešće je riječ o serviserima ili osobama koje obavljaju popravke ili održavanje plovila te njegovu pripremu za sezonu, a može se raditi o fizičkim osobama ili posebnim pravnim osobama koje su povezane s marinom kao trgovačkim društvom ili pravnim osobama koje nisu povezane s marinom kao trgovačkim društvom. Marina za vrijeme trajanja ugovora *ne* koristi ključeve i *ne* ulazi u zaključane kabinske prostore plovila, osim ako ne dođe do nepovoljnih promjena u stanju plovila i/ili opasnosti pa je nužna hitna intervencija. Čin predaje ključeva ima funkciju predaje plovila pod nadzor marine, a ključevi imaju funkciju ostvarivanja prava retencije nad plovilom radi osiguranja naplate potraživanja marine.

Također, uočeno je da neke od marina koje primjenjuju ovaj model ugovora o vezu (II. B), uslugu nadziranja plovila na vezu opisuju u nešto širem opsegu od prethodno izložene prakse. Naime, osim vanjskog vizualnog pregleda plovila s gata te pregleda bokobrana, priveznih konopa i *muringa*, ove marine u sklopu nadzora plovila vrše i povremeni unutarnji vizualni pregled te kontrolu kaljuže broda (primjerice, jednom mjesečno u dugotrajnijem odsustvu vlasnika). U slučaju da pri nadzoru primijeti kakav kvar ili nedostatak (kao i kod modela II. A) marina će kontaktirati vlasnika radi eventualnog primanja naloga za određene dodatne radove ili mjere uklanjanja nedostatka ili popravljanja kvara, no to će se obavljati prema posebnom nalogu, tj. posebnom ugovoru. Iz toga proizlazi da je predaja ključeva u funkciji nadziranja unutrašnjosti plovila na vezu. U ovom je slučaju riječ o nekolicini marina koje posluju sa stalnim klijentima, pretežno fizičkim osobama po principu stalnog veza, uz relativno malu ponudu tranzitnih vezova u sezoni. Dakle, ove marine najčešće imaju dugogodišnje klijente (korisnike vezova) kojima nude uslugu nadziranja plovila u nešto širem opsegu. Međutim, treba smatrati nespornim da su u ovom slučaju korištenje ključeva i ulaženje u zaključane prostore plovila po svom učinku te opsegu i dosegu obveza i prava u funkciji nadzora, a ne čuvanja. To potvrđuje sam koncept poslovne prakse ove skupine marina. One u svojoj ponudi imaju opisan model ugovora koji uključuje ustupanje mjesta za vez i nadzor plovila te korisnicima vezova, uz standardni ugovor o vezu, nude i ugovaranje posebne paket-usluge koja obuhvaća i čuvanje plovila. U slučaju ugovaranja paket-usluge, marina pruža istovremeno najam, nadzor i čuvanje plovila na vezu, znači u tom slučaju riječ je o drugačijem, posebnom modelu ugovora, opisanom pod III. A). Prije analize modela III. A) treba istaknuti sljedeće. Razlike u sadržaju obveze nadziranja (uporaba ključeva, ulaženje u zaključane prostore plovila) te u praksi nešto drugačiji način ispunjavanja ove obveze (samo vanjski pregled ili vanjski i unutarnji pregled plovila) pokazuje složenost i slojevitost ove obveze. To također znači i da je uvijek odlučna pravna kvalifikacija konkretnih aktivnosti i prepoznavanje cilja koji stranke žele postići ugovaranjem određenih aktivnosti, odnosno obveza. Ugovaranje tih aktivnosti i

obveza samo po sebi, neovisno od ispitanog konteksta cjelokupnog ugovora i njegova cilja, ne implicira ugovaranje čuvanja plovila. U pogledu primjene materijalnog prava, svi modeli ugovora o vezu kojima se ugovara nadziranje, ali ne i čuvanje, a to su modeli II. A) i II. B), kongruentni su te između njih nema bitnih razlika. Međutim, kad se odlučuje o ugovornoj odgovornosti, treba respektirati nešto širi opseg, točnije, način i sadržaj ispunjavanja obveze nadziranja kod modela II. B) u odnosu na model II. A). Naime, marini će se moći staviti na teret ako nije ispunjavala obvezu nadziranja u opsegu i sadržaju te onako kako je to ugovoreno određenim ugovorom o vezu.

Rezultati našeg istraživanja poslovne prakse hrvatskih marina pokazuju da ugovaranje čuvanja ima svoju *differentiu specificu* u odnosu na nadzor, a to znači da treba poštovati gradaciju obveza te modele ugovora međusobno razlikovati. Ovu tezu potkrepljuje činjenica da u poslovnoj praksi hrvatskih marina postoje posebni modeli ugovora o vezu koji konzumiraju čuvanje, modeli III. A) i III. B). Stoga treba jasno istaknuti da se obveze marine u odnosu na čuvanje i nadzor bitno razlikuju te da je riječ o odvojenim i samostalnim obvezama u odnosu na plovilo. Obveza čuvanja zapravo podrazumijeva i nadzor te se oni nužno stapaju u jedinstvenu cjelinu u onim ugovorima u kojima marina preuzima nadzor i čuvanje plovila na vezu.

Čuvanje se razlikuje od nadzora po tome što marina ima kompleksnije i po svom sadržaju složenije obveze u odnosu na plovilo. Nadziranje plovila na vezu iscrpljuje se u vanjskom, rjeđe u unutarnjem vizualnom pregledu plovila, a čuvanje uključuje i niz aktivnih radnji. Ulaženje u zaključane prostore preduvjet je da se šire i složenije aktivnosti u vezi s plovilom mogu ispunjavati, stoga je predaja ključeva u funkciji poduzimanja radnji usmjerenih na čuvanje. Sadržaj obveze čuvanja prema uobičajenoj poslovnoj praksi marina koje primjenjuju model III. obuhvaća provjetravanje plovila, punjenje baterija, pražnjenje oborinskih voda, pokrivanje plovila ceradom i sl.

Model ugovora o vezu III. A) u praksi se zasad gotovo uopće ne primjenjuje jer za njega nema dovoljno interesa korisnika veza i potražnje na tržištu. Stoga, marine koje u ponudi imaju taj model ugovora o vezu, u praksi češće rade po modelu II. B), znači, ugovaraju najam veza i nadzor plovila na vezu, a po potrebi daju poseban nalog za određene dodatne mjere i usluge koji se onda smatra i posebnim ugovorom. Inače, za model III. A) karakteristično je da marina nudi mogućnost da korisnik veza, uz ugovor o vezu po modelu II. B) (ustupanje mjesta za vez i nadzor), ugovori dodatna paket-usluga koja po svom sadržaju predstavlja eksplicitno ugovaranje čuvanja plovila. U tom slučaju, sve tri usluge pružaju se zajedno kao kombinacija usluga (davanje veza u najam, nadzor i čuvanje), sve u sklopu modela III. A). Čuvanje plovila ugovara se u okviru paket-usluge provjetravanja plovila, kontrole unutrašnjosti i fotografiranja plovila te punjenja baterija, a obavlja ju osoblje marine. Međutim, kao što je istaknuto, taj model ugovora nije zaživio u poslovnoj praksi.

Kad je riječ o stalnom vezu u moru, model III. B) primjenjuje se u samo nekoliko hrvatskih marina, a nešto je češći kad se ugovara čuvanje u suhim marinama, odlagalištima plovnih objekata te čuvanje u halama – zatvorenim prostorima.

Ugovori jedne od marina koja primjenjuje ovaj model ugovora o vezu propisuju da će marina plovilo čuvati pozornošću urednog i savjesnog gospodarstvenika. Nadalje, decidirano se navodi da je marina dužna korisniku veza nadoknaditi štetu nastalu na plovilu i na njegovoj uredno prijavljenoj opremi za vrijeme čuvanja plovila, a za koju bi bila odgovorna u skladu sa zakonskim propisima. Ovakva stilizacija ugovornih odredbi u potpunosti je analogna zakonskoj odredbi koja uređuje odgovornost ostavoprimca prema ugovoru o ostavi.[24] Stoga se

[24] Arg. iz čl. 727. ZOO-a.

može smatrati da na takav ugovor o vezu treba primijeniti odredbe ZOO-a o ostavi u odnosu na pitanja pozornosti čuvanja i odgovornosti marine. To znači da se od marine zahtijeva ona pozornost koja se pri čuvanju stvari može zahtijevati od svakog dobrog gospodarstvenika *in abrstracto*. Bitna je posljedica koju proizvodi ovakvo ugovorno utanačenje da će marina, nastupajući kao ostavoprimac, biti dužna poduzimati sve radnje koje su potrebne da se čuvana stvar vrati ostavodavcu u stanju u kojem je primljena. Trebalo bi se upitati do koje je mjere ovakva analogija ugovora o vezu s elementima čuvanja i ugovora o ostavi moguća s obzirom na složenost plovila kao objekta ostave te specifičnosti mjesta i načina čuvanja plovila u moru ili na kopnu.[25]

Ovako stroge kondicije koje propisuju ugovori o vezu s elementima čuvanja, a prema kojima je ostavoprimac obvezan poduzimati sve radnje potrebne da se čuvana stvar vrati ostavodavcu u stanju u kojem je primljena, treba staviti u kontekst ugovora o vezu. Naime, važno je kako stranke ugovorom raspodijele rizike, obveze i odgovornosti.

U ovom modelu ugovora precizno se utvrđuje trenutak prelaska rizika za čuvanje plovila s vlasnika na marinu i obrnuto. Ugovorom o vezu propisuje se da su stranke dužne zapisnički utvrditi predaju ključeva plovila na recepciji marine, kao i predaju dokumentacije plovila koja omogućuje isplovljavanje. Isto tako, kad korisnik veza preuzme dokumentaciju koja omogućuje isplovljavanje i ključeve plovila, smatra se da je plovilo preuzeto, a od tog trenutka marina se oslobađa odgovornosti za plovilo, neovisno o tome je li plovilo na vezu ili u plovidbi.

Trebalo bi skrenuti pažnju na to da ugovori nekih marina koje primjenjuju ovaj model ugovora nisu precizni, dovoljno razrađeni i ni dobro strukturirani. Primjerice, jedna od marina u ugovoru o vezu decidirano navodi da: „čuva plovilo i vrši nadzor nad konopima za privez" te da se marina „obvezuje nadoknaditi vlasniku štetu nastalu na plovilu i njegovoj uredno prijavljenoj opremi za vrijeme čuvanja plovila, za koje bi štete marina prema zakonskim propisima o obligacijama bila odgovorna." Ovakve ugovorne odredbe čine se na prvi pogled vrlo jasnim i vode prema zaključku da po ovom ugovoru marina odgovara kao čuvar, točnije ostavoprimac jer u ugovoru piše da marina za čuvanje odgovara prema zakonskim propisima prema kojim bi bila odgovorna za čuvanje, a čuvanje uređuju odredbe ZOO-a o ostavi. Međutim, tumačenje ostalih odredbi ugovora pokazuje da je niz drugih prava i obveza ove marine, propisanih istim ugovorom, tipičan za nadziranje, a ne za čuvanje plovila. Primjerice, u istom ugovoru o vezu navodi se da marina ima pravo ući u plovilo ako sumnja da je na plovilu nastala šteta. Ovo je odredba tipična za nadziranje plovila na vezu, a ne za čuvanje jer kod čuvanja se ugovara pravo marine da redovito ulazi u plovilo i na njemu obavlja određene aktivne radnje, primjerice, punjenje baterija, provjetravanje, izbacivanje oborinskih voda i sl. Nadalje, u ovom ugovoru ne postoji ni jedna odredba koja bi opisivala sadržaj obveze čuvanja, dakle, barem primjerice i okvirno navodila koje aktivne radnje marina treba poduzimati u ispunjavanju obveze čuvanja. Osim tih, očigledno proturječnih ugovornih utanačenja, u našem terenskom istraživanju utvrđeno je kako su percepcije ove marine da ona čuva plovilo na vezu. Na temelju toga čini se da ovaj ugovor treba klasificirati kao ugovor kojim se izravno ugovara čuvanje. Međutim, ako bi došlo do sudskog spora u vezi s ugovornom odgovornošću, čini se da ne bi bilo potpuno nedvojbeno kojem modelu ugovora pripada ovaj ugovor i koje materijalno pravo treba primijeniti. To bi trebalo utvrditi ispitivanjem kako su stranke ispunjavale ugovor i koje je aktivne radnje marina poduzimala u odnosu na plovilo.

Iako je područje našeg interesa na projektu DELICROMAR,[26] pa tako i u ovom radu, proučavanje poslovne prakse i modela ugovora koji se primjenjuju u marinama, treba reći da je u

[25] Opširnije *infra*.

[26] Opširnije *infra*.

poslovnoj praksi čuvanje puno tipičnije za suhe marine te odlagališta plovnih objekata, kako onih koji se nalaze na lučkim područjima, tj. na pomorskom dobru, tako i na odlagalištima i u halama – zatvorenim prostorima koji nisu na pomorskom dobru. Ovdje ne ulazimo u složena pitanja upravnopravne prirode i koncesija na pomorskom dobru, već samo želimo skrenuti pozornost na neujednačenu terminologiju te na to da se i na suhe marine i odlagališta plovnih objekata primjenjuje Pravilnik o razvrstavanju i kategorizaciji luka nautičkog turizma[27] iako neke od njih uopće nisu luke jer se ne nalaze na pomorskom dobru. Osim što je mjesto na kojem se plovilo odlaže i čuva nerijetko prostorno udaljeno od marine i ne nalazi se na pomorskom dobru, čuvanje plovila u takvu slučaju vrši pravna ili fizička osoba koja nije koncesionar luke, već djelatnost obavlja na svojoj privatnoj čestici zemljišta na kojoj drži poslovni prostor, primjerice, halu ili ograđen prostor za čuvanje plovila na otvorenom.

Uspoređujući djelatnosti marina, rezultati našeg istraživanja pokazuju da se čuvanje znatno češće ugovara kad je plovilo smješteno na kopnu nego u moru, i to iz faktičnih i opravdanih razloga. Izostaju maritimni rizici i obilježja specifična za ustupanje mjesta za vez u moru, njegovo održavanje u sigurnom i ispravnom stanju. Prvenstveno je riječ o raspodjeli rizika i odgovornosti i obujmu poslova koje marina treba poduzimati. Plovilo koje se čuva na suhom statičan je objekt, a uvjeti u kojima se nudi čuvanje po prirodi su stvari drugačiji, često je riječ o prostoru koji je ograđen i pod videonadzorom. Primjerice, neki od pružatelja usluga čuvanja plovila na suhom čije smo ugovore analizirali, nude uslugu zimovanja za brodice i jahte. Zimovnik je smješten u industrijskoj zoni udaljenoj nekoliko kilometara od luke, na raspolaganju je otvoren asfaltirani prostor te prostor u halama. Neki od pružatelja usluge čuvanja plovila navode da se obvezuju čuvati plovilo u svom poslovnom prostoru. Prostor je ograđen i pod videonadzorom, a cijela industrijska zona u okviru koje se obavlja djelatnost čuvanja ima vlastitu čuvarsku službu. Transfer plovila iz luke do zimovnika u aranžmanu je čuvara. Smještaj je na unificiranim ležaljkama ili na prikolici vlasnika, u ponudi postoji i konzervacija plovila i motora te čišćenje i pranje, kao i punjenje baterija. Vlasnik plovila koji plovilo ostavlja na zimovanju u pravilu nema nikakvih doticaja s plovilom; ne dolazi na plovilo, ne boravi na njemu.

Može se rezimirati da su elementi čuvanja prisutni isključivo u jednom od opisanih triju modela ugovora o vezu, a to je ujedno model koji primjenjuje svega nekoliko marina te je češće prisutan u poslovanju suhih marina, odlagališta plovnih objekata i čuvanju plovila u halama – zatvorenim prostorima. Zaključili smo da većina hrvatskih marina radi po principu najma veza ili najma veza i nadzora plovila na vezu, a to su ovdje izloženi modeli I. i II ugovora o vezu. Znači, rezultati naše analize upućuju na zaključak da su u domaćoj praksi najčešće primjenjivani modeli ugovora o vezu oni modeli ugovora koji ne predviđaju obvezu čuvanja, odnosno da uobičajene obveze marine, koje se odnose na plovilo na vezu, nemaju odliku čuvanja u smislu kako je to predviđeno tradicionalnim ugovorom o ostavi.[28]

3. Pojam ugovora o vezu i ugovora o ostavi - usporedba

Ugovor o vezu inominatni je ugovor, njegov naziv i sadržaj nisu se ustalili u poslovnoj praksi. U praksi se susreću različiti nazivi za ovaj ugovor, primjerice, *ugovor o vezu*, *ugovor o korištenju veza*, *ugovor o najmu veza*, *ugovor o usluzi veza*, *ugovor o smještaju plovila* i sl. Uobičajena praksa razlikuje stalni vez od dnevnog ili tranzitnog veza pa se susreću nazivi *ugovor o stal-*

[27] Narodne novine broj 72/2008, u nastavku PLNT.

[28] O obilježjima i usporedbi ugovora o vezu i ugovora o ostavi opširnije *infra*.

nom vezu, *ugovor o godišnjem vezu*, *ugovor o tranzitnom vezu*, *ugovor o dnevnom vezu*. Kad je riječ o ugovoru o dnevnom vezu, uvijek je riječ o vezu u moru. Ugovor o stalnom vezu može biti vez u moru ili vez na kopnu, tzv. suhi vez, ili pak ugovor prema kojem je dio godine plovilo smješteno na vez u moru, a dio godine na suhi vez.

U ovom radu zbog jasnoće u izražavanju i ujednačenosti terminologije koristimo pojam *ugovor o vezu*. Smjer razvoja pravnog okvira za ovaj tip ugovora trebao bi ići prema standardizaciji njegova naziva. Pitanje naziva ugovora izravno je povezano s njegovim sadržajem pa je korisno i važno da i sam naziv ocrtava i govori o sadržaju ugovora te da se iz njega jasno vide i prepoznaju bitna obilježja te opseg i sadržaj pravnih poslova koji se ugovaraju njegovim sklapanjem. Danas to nije slučaj jer se u praksi iza naziva *ugovor o vezu* često kriju pravni poslovi koji imaju vrlo različit sadržaj, pravnu prirodu, opseg ugovornih obveza stranaka, a time i ugovornu odgovornost koja proizlazi iz tih ugovora. Ugovor o dnevnom vezu predstavlja ugovor kojim se, u pravilu, samo ustupa mjesto za vez. Ugovor o stalnom vezu uvijek uključuje najam mjesta za vez, a osim toga najčešće uključuje i nadziranje stanja priveza i stanja plovila. Osim ustupanja mjesta za vez i nadziranja stanja priveza i plovila, ugovor o stalnom vezu može sadržavati i obveze čuvanja, održavanja, servisiranja i popravka plovila i sl.

Zalažemo se za standardizaciju nazivlja te smatramo kako je poželjno da opći uvjeti ugovora predviđaju nomenklaturu naziva ugovora o vezu prema njihovim modelima iza kojih treba stajati jedinstven, prepoznatljiv sadržaj usluga za svaki pojedini model ugovora o vezu kako smo razjasnili u prethodnom poglavlju.

Ugovor o ostavi imenovani je ugovor koji je kodificiran još u OGZ-u. Tada je imao naziv ostavna pogodba ili depozitni ugovor. Paragraf 957. OGZ-a definirao je ostavnu pogodbu: „ako tko uzme tuđu stvar pod svoju skrb, nastaje ostavna pogodba." Pozitivni popis (čl. 725. ZOO-a) sadrži sljedeću definiciju ugovora o ostavi: „ugovorom o ostavi obvezuje se ostavoprimac da primi stvar od ostavodavca, da ju čuva i da ju vrati kad je ovaj bude zatražio." Neki autori ovakvu zakonsku definiciju kritiziraju i smatraju nepotpunom jer se ovim ugovorom ne obvezuje samo ostavoprimac već se i ostavodavac obvezuje predati stvar ostavoprimcu.[29] Ističe se i da ovakvom formulacijom pojma ugovora o ostavi zakonodavac nije sasvim otklonio eventualne dvojbe je li riječ o realnom ugovoru za čiju bi valjanost, osim postignute suglasnosti volja ugovornih stanaka, bila potrebna i predaja predmeta ugovora.[30] Ugovor o ostavi u hrvatskom pravu je konsenzualni ugovor.[31] Za ugovor o ostavi važno je da objekt ostave mogu biti samo pokretne stvari i da ostavoprimac (depozitar) stvar može čuvati besplatno ili uz naknadu te da je stvar dužan vratiti nakon određenog vremena ili na zahtjev ostavodavca (deponenta).

4. Bitni sastojci i sadržaj ugovora o vezu i ugovora o ostavi - usporedba

Budući da sadržaj ugovora o vezu nije zakonom propisan ni u pogledu bitnih ni uzgrednih sastojaka, sadržaj konkretnog ugovora o vezu ovisi o ugovornoj autonomiji stranaka. Primjenom osnovnih načela propisanih općim dijelom ZOO-a (čl. 1.-15.) sudionici u prometu, znači koncesionar marine i korisnici veza, slobodno uređuju obvezne odnose, a ne mogu ih

[29] Gorenc, V.; Belanić, L.; Momčinović, H.; Perkušić, A.; Pešutić, A.; Slakoper, Z.; Vukelić, M.; Vukmir, B. 2014. *Komentar zakona o obveznim odnosima*. Narodne novine. Zagreb. str. 1117-1118.

[30] Gorenc, V.; Kačer, H.; Momčinović, H.;, Slakoper, Z.; Vukmir, B.; Belanić, L. 2012. *Obvezno pravo. Posebni dio I. Pojedini ugovori.* Novi informator. Zagreb. str. 364.

[31] Opširnije *infra*.

uređivati suprotno Ustavu Republike Hrvatske, prisilnim propisima i društvenom moralu.[32] Također, marine i korisnici veza dužni su poštovati i druga osnovna načela utvrđena općim odredbama ZOO-a, kao što su ravnopravnost sudionika u obveznom odnosu, načelo savjesnosti i poštenja, dužnost suradnje, zabrana zlouporabe prava, načelo jednake vrijednosti činidbi, zabrana prouzročenja štete, dužnosti ispunjenja obveze, ponašanje u ispunjavanju obveze i ostvarivanju prava.[33] Ako korisnik veza nastupa u svojstvu potrošača, onda ugovor o vezu treba tumačiti i u skladu sa Zakonom o zaštiti potrošača.

Za utvrđivanje sadržaja i sastojaka pojedinog ugovora o vezu treba proučiti i protumačiti:

- sve njegove pojedinačne odredbe i njihov međusobni odnos te ugovor kao cjelinu tumačiti u skladu s pravilima o tumačenju ugovora iz ZOO-a[34]
- opće uvjete ugovora luke nautičkog turizma, koja je ugovorna strana u tom ugovoru, i koji su sastavni dio ugovora o vezu.

Rezultati našeg istraživanja poslovne prakse marina, koji uključuju proučavanje općih uvjeta ugovora i terensko istraživanje intervjuima i upitnicima, pokazuju da ugovori koje sklapaju luke nautičkog turizma s vlasnicima plovila mogu uključiti sljedeće poslove:

a) najam veza
b) nadzor stanja priveza i nadzor stanja plovila na vezu uobičajenim vanjskim pregledom
c) čuvanje plovila na vezu 24 sata dnevno (čuvanje ključeva, ulazak na plovilo, provjetravanje unutrašnjosti plovila, izbacivanje oborinskih voda, pokrivanje plovila pokrivačem – ceradom i sl.)
d) održavanje plovila (poduzimanje aktivnih radnji u vezi s održavanjem plovila u ispravnom stanju, pokretanje motora, ispitivanje akumulatora, sprečavanje smrzavanja i sl.)
e) servisiranje i/ili popravak i sl.

Marine u pravilu nude najam veza i nadzor plovila na vezu. Manji broj marina nudi najam veza i čuvanje plovila na vezu. Ostali poslovi ugovaraju se u pravilu posebnim ugovorima, i to rjeđe s marinama, a češće s posebnim pravnim osobama koje su povezane s marinom kao trgovačkim društvom ili pak s posebnim pravnim osobama koje nisu povezane s marinom kao trgovačkim društvom.

Ako je uz najam veza ugovoreno i čuvanje plovila, onda su bitni sastojci takva ugovora o vezu s elementima čuvanja plovila:

- mjesto za vez ili smještaj plovila u luci nautičkog turizma
- plovilo koje je predmet ugovora o vezu s elementima čuvanja, tj. objekt čuvanja[35]

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[32] Čl. 2. ZOO-a.

[33] Čl. 3–10. ZOO-a.

[34] Čl. 319-320. ZOO-a.

[35] Predmet je ugovora plovilo u odnosu na koje je sklopljen ugovor o vezu s elementom čuvanja. U ugovoru se plovilo individualizira tako da se navode njegove tehničke karakteristike, registarska oznaka, naziv plovila te podatci o zastavi. U pravilu se plovilo u ugovoru o vezu opisuje sljedećim podatcima: ime i oznaka plovila, tip plovila, luka upisa, zastava, dužina preko svega, širina, gaz, težina, trup, godina gradnje, tip motora, snaga motora, broj motora. U podatke koji opisuju plovilo ulazi i podatak o njegovoj vrijednosti. U nedostatku posebnih ugovornih odredbi o tome što sve predstavlja objekt čuvanja prema konkretnom ugovoru, treba smatrati da plovilo podrazumijeva trup i stroj, ali i sve sastavne dijelove kao i pripadke plovila. Uobičajeno je da opći uvjeti ugovora sadrže odredbu prema kojoj su stranke dužne prilikom predaje plovila luci nautičkog turizma na čuvanje sastaviti popis inventara plovila koji čini sastavni dio ugovora o vezu i za koji inventar luka nautičkog turizma preuzima odgovornost. U nedostatku takve inventarne liste, u sudskoj i poslovnoj praksi smatra

- vrijeme trajanja uporabe veza i čuvanja plovila na vezu
- naknada za vez i čuvanje.

Bitni su sastojci ugovora o ostavi:

- objekt ostave koji uvijek mora biti pokretna stvar
- vrijeme trajanja ostave i
- naknada, samo ako je riječ o naplatnoj ostavi.

Ovi ugovori ne podudaraju se u svim bitnim sastojcima. Naime, bitan je sastojak i najvažnija *differentia specifica* ugovora o vezu s elementima za čuvanje ili bez njih ustupanje mjesta za vez ili davanje na uporabu mjesta za smještaj plovila. Za razliku od toga, ugovor o ostavi nema elemenata uporabne pogodbe pa njegov bitan sastojak nije ustupanje mjesta za čuvanje objekta ostave.[36] Ako uslugu čuvanja plovila na vezu pruža posebna pravna ili fizička osoba koja nije povezana s trgovačkim društvom koncesionara marine, tada vlasnik plovila s tom osobom ne ugovara najam mjesta za vez, nego isključivo čuvanje plovila na vezu pa takav ugovor može imati bitne sastojke ugovora o ostavi. U poslovnoj praksi hrvatskih marina primjenjuje se model ugovora o vezu prema kojem marina s korisnikom veza ugovara isključivo ustupanje mjesta za vez, a u marinama postoje posebne pravne osobe koje nisu povezane s marinom kao trgovačkim društvom, a koje nude posebnu paket-uslugu *boat care*. Ta paket-usluga obuhvaća obvezu nadziranja plovila na vezu. Dakle, marina pruža uslugu ustupanja mjesta za vez, a posebna pravna osoba uslugu nadziranja plovila na vezu. Ugovor o vezu s marinom nema elemenata čuvanja plovila dok ugovor o usluzi *boat care* s posebnom pravnom osobom sadrži elemente čuvanja.

5. Pravna priroda ugovora o vezu i ugovora o ostavi - usporedba

Kao što je istaknuto, ustupanje mjesta za vez plovila u luci nautičkog turizma osnovni je sadržaj svakog ugovora o vezu. Dakkle, svrha sklapanja svih vrsta ugovora o vezu uvijek je uporaba mjesta za vez pa je po svojoj pravnoj prirodi svaki ugovor o vezu uporabna ili najamna pogodba – *locatio conductio rei*. Ugovor o vezu ubraja se u skupinu ugovora o privremenoj uporabi dobara.[37]

Teorija i praksa smatraju da je riječ o *ugovoru o najmu* ako je riječ samo o uporabi stvari, a ako je uključeno i iskorištavanje, o *ugovoru o zakupu*. Zbog toga pojam uporabe treba tumačiti tako da *ne* podrazumijeva i mogućnost iskorištavanja, odnosno pribiranja plodova zakupljenog predmeta.[38]

Smatramo da je doktrinarno najtočnije i najbliže te najdosljednije teorijskim podjelama ugovor o vezu smatrati ugovorom o uporabi, dakle, ugovorom o najmu, a ne ugovorom o ko-

se da luka nautičkog turizma nije preuzela odgovornost za opremu i druge stvari koje se nalaze na plovilu kao inventar (pripadci), već samo za trup i sastavne dijelove plovila. VTS, Pž-3667/02, od 18. 1. 2006. istaknuo je stajalište da ako ugovor sadrži samo odredbu o ostavi plovila, nije moguće ugovor tako široko tumačiti da on obuhvaća kao predmet ugovora i zalihe hrane i pića te opremu koja nije ugrađena u samo plovilo, bez obzira na to što oprema, eventualno, predstavlja standardnu opremu takve vrste plovila. Opširnije vidjeti i rad Padovan, op. cit., str. 15.

[36] O ostalim specifičnostima te kongruentnostima, sličnostima i razlikama opširnije *infra*.

[37] Ovoj grupi pripadaju i ugovor o posudbi, ugovor o zakupu, ugovor o zajmu, ugovor o kreditu i ugovor o licenciji.

[38] Gorenc i drugi. Obvezno pravo. Posebni dio I. op. Cit., bilješka 60., str. 155.

rištenju, znači, ugovorom o zakupu. Naime, marina ustupa vez na uporabu određenoj osobi za određeno plovilo, a ne ustupa ga za iskorištavanje, to jest pribiranje plodova veza. Osoba kojoj je ustupljen vez na uporabu nema pravo ustupiti vez na uporabu trećoj osobi uz naknadu, a ni besplatno. Posebna je situacija kad su mjesta za vez ugovorom ustupljena, primjerice, čarterskoj tvrtki kojoj je iznajmljivane plovila poslovna djelatnost. Tada bi se, eventualno, moglo smatrati da takvo društvo iskorištava vez stječući dobit, tj. uživajući plodove. Međutim, smatramo da takvo tumačenje nije ispravno. U opisanoj situaciji čarterska tvrtka stječe dobit, tj. uživa plodove iznajmljivanja ili davanja u zakup plovila, a ne raspolaganja vezovima. Mjesta za vez takvoj su pravnoj osobi nužna za obavljanje djelatnosti iznajmljivanja plovila, ali ona joj nisu ustupljena na korištenje, već samo na uporabu. Pravna osoba koja obavlja čarterske djelatnosti nema pravo raspolagati vezovima u neku drugu svrhu, osim za smještaj isključivo onih plovila kojima obavlja čarterske djelatnosti.[39]

U domaćoj literaturi izraženo je stajalište da najmoprimac može biti samo fizička osoba jer se ugovorom o najmu stvar predaje na uporabu, a što ne obuhvaća crpljenje plodova.[40] Drugim riječima, najmoprimac može biti samo osoba koja nije trgovac jer trgovac ne bi samo rabio predmet najma nego i pribirao njegove plodove pa bi to bio zakup, a ne o najam.[41] Ovakvo shvaćanje aludira na tezu da pravna osoba uvijek ulazi u ugovorni odnos kojem je svrha korištenje, točnije, gospodarsko iskorištavanje stvari i crpljenje plodova. Iz toga proizlazi da pravne osobe ne mogu biti stranke ugovora o najmu plovila, ugovoru o najmu stana, ugovora o najmu veza i sl., već samo o njihovu zakupu. To se može učiniti točnim kad je riječ o situaciji da pravna osoba nastupa i radi u okviru obavljanja poslovne djelatnosti. Sve pravne osobe koje obavljaju čartersku djelatnost nužno za obavljanje te djelatnosti moraju imati vezove, ali ne smiju poslovati tim vezovima, tj. njima prihodovati i eksploatirati ih. Međutim, ako se povuče analogija s poslovnim prostorima koji se uvijek zakupljuju, onda bi se moglo braniti stajalište da čarterske tvrtke zakupljuju vez jer on postaje sredstvo koje omogućuje vršenje njihove poslovne djelatnosti. S druge strane, ne postoje zakonske, praktične i teoretske zapreke da se pravna osoba pojavi u ulozi najmoprimca ako stvar uzme u uporabu bez crpljenja plodova, dakle u negospodarske svrhe. Ipak, toga u praksi nema, točnije pravne osobe u praksi nikad ne sklapaju ugovor o najmu, već ugovor o zakupu koji zbog povoljnijeg poreznog opterećenja pravne osobe ugovorni odnos prikazuje kao trošak poslovanja. Dakle, riječ je isključivo o pitanju poreznog tretmana i porezne politike. Takva situacija reflektira se na pravno nedosljedno i deformirano poimanje ugovora o najmu i ugovora o zakupu, pa tako i kad je riječ o ugovorima o najmu ili o zakupu plovila te ugovoru o najmu veza. Znači, treba razumjeti da u praksi, zbog opisanih razloga koji se odnose isključivo na pitanje porezne politike, pravne osobe nastupaju kao zakupoprimatelji, a ne kao najmoprimci. U ovom radu svuda govorimo o ugovorima o najmu veza iako, kao što je opisano, u praksi to može biti ugovor o vezu koji po svom sadržaju sliči na ugovor o zakupu jer pretpostavlja gospodarsko korištenje ako takav ugovor o vezu s marinom sklapa pravna osoba, osobito kad je to čarterska kompanija. Stoga se za potrebe ovog rada i teoretske analize opredjeljujemo za stav da ugovor o vezu, kao ugovor *sui generis*, sadrži elemente ugovora o najmu mjesta za vez, bilo da je riječ o korisniku koji je fizička osoba,

[39] Padovan, A. V. 2013. Odgovornost luke nautičkog turizma iz ugovora o vezu i osiguranje. *Poredbeno pomorsko pravo - Comparative Maritime Law*. god. 52. br. 167. str. 1-35.

[40] Perkušić, A. 1998. Ugovor o najmu stana, povijesni pregled, de lege lata, de lege ferenda. *Hrvatsko sudstvo*. vol. 2. br. 8. str. 7-19.

[41] Tako Gorenc i drugi. *Komentar Zakona o obveznim odnosima*…,op. cit., str. 910.

tj. potrošačkom ugovoru ili pak je riječ o pravnoj osobi, pa i čarterskoj kompaniji, odnosno trgovačkom ugovoru.

Osim toga, treba naglasiti da postoji shvaćanje Ministarstva nadležnog za poslove pomorstva[42] da se na pomorskom dobru ne mogu sklapati ugovori o zakupu jer pomorsko dobro nije u sustavu vlasništva, a smije se gospodarski iskorištavati isključivo u skladu sa Zakonom o pomorskom dobru i morskim lukama[43], tj. na temelju koncesije (ZPDML, čl. 16.), podkoncesije (ZPDML, čl. 35.), koncesijskog odobrenja (čl. 38) ili pak na temelju članka 26. ZPDML-a po kojem ovlaštenik koncesije, koji je dobio koncesiju za gospodarsko korištenje pomorskog dobra, može sporedne djelatnosti manjeg opsega iz područja usluga dati na obavljanje pravnim i fizičkim osobama uz suglasnost davatelja koncesije, a s ciljem boljeg iskorištavanja pomorskog dobra. Prema takvu tumačenju, pomorsko dobro ili bilo koji njegov dio, uključujući infrastrukturu i suprastrukturu, koncepcijski ne može biti predmet zakupa. Smatramo da se takvo shvaćanje treba propitati i detaljnije razmotriti, no to može biti predmet posebnog znanstvenog rada.

Kao što je opisano, smatramo da su svi ugovori o vezu uporabne ili najamne pogodbe (*locatio conductio rei*). Budući da ugovorom preuzete obveze utječu na određivanje pravne prirode konkretnog ugovora, svaka daljnja sistematizacija i razvrstavanje ugovora o vezu, pa tako i ona prema pravnoj prirodi ugovora, ima u podlozi njihovo razlikovanje prema sadržaju i opsegu drugih obveza marine, dakle, onih obveza koje marina preuzima uz obveze ustupanja mjesta za vez. Kad je riječ o ugovoru o stalnom vezu, stranke, osim ustupanja mjesta za vez, u pravilu ugovaraju i elemente ugovora o djelu sadržane u obvezi luke nautičkog turizama da nadzire stanje plovila. Za razliku od toga, čuvanje plovila na vezu nije tipična djelatnost hrvatskih marina, međutim, ako stranke ugovora o vezu ugovore čuvanje plovila na vezu, tada, kao i u slučaju ugovaranja nadzora plovila na vezu, ugovor o vezu poprima elemente ugovora o pribavljanju faktičnog rada - *locatio operis*, a ugovor o čuvanju plovila na vezu ima elemente ugovora o ostavi. Korisnik veza s lukom nautičkog turizma može sklopiti i ugovor o održavanju, popravku ili servisiranju plovila, njegovu vađenju iz mora, premještanju plovila na suhi vez, porinuću plovila u more i sl.

U slučaju postojanja ugovora o vezu i ugovora o čuvanju[44], otvara se složeno pitanje međusobne povezanosti pravnih poslova. Ugovor o najmu mjesta za vez i ugovor o čuvanju, iako povezani životnom, odnosno gospodarskom svrhom, mogu biti pravno odvojeni, a mogu biti i fuzionirani u jednom ugovoru i povezani u jednu poslovnu cjelinu. Drugim riječima, doktrinarno gledano, kod ugovora o vezu i ugovora o čuvanju može, a i ne mora biti riječ o zajednici međusobno zavisnih ugovora u kojoj postoji pravna povezanost tih dvaju postojećih ugovora u vezi s njihovim međusobnim postankom, djelovanjem, primjenom i prestankom. Naime, teoretski i praktično moguće su dvije situacije:

A) korisnik veza može ugovoriti najam veza s marinom, a čuvanje plovila na vezu s posebnom (drugom) pravnom ili fizičkom osobom koja nije povezana s marinom kao trgovačkim društvom[45]

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[42] Izvor: rezultati terenskog istraživanja osobnim intervjuima i upitnicima, opširnije *infra*.

[43] Narodne novine 158/2003, 100/2004, 141/2006, 38/2009, 123/2011, 56/2016, dalje u tekstu: ZPDML.

[44] To se može odnositi i na održavanje, popravak, servisiranje i sl.

[45] Vidi *supra*, t. 2. Pregled aktualne poslovne prakse u pogledu elemenata čuvanja u ugovorima o vezu. Primjer ovakve situacije u praksi ugovaranje je usluge nadzora ili čuvanja plovila koje obavlja posebna pravna ili fizička osoba različita od marine, primjerice, stalno zaposleni profesionalni skiper ili trgovačko društvo koje pruža takve usluge za plovila.

B) korisnik veza može s lukom nautičkog turizma ugovoriti najam veza i čuvanje plovila na vezu. Ovdje pripada i slučaj ako se čuvanje plovila ugovara s pravnom osobom povezanom s marinom kao trgovačkim društvom.[46]

Riječ je o ugovorima koji s obzirom na njihovu sadržajnu samostalnost mogu egzistirati odvojeno, međutim, stranke ih mogu vezati u jednu jedinstvenu poslovnu cjelinu. Važno je da ispunjavanje obveze čuvanja plovila na vezu iz sklopljenog ugovora o čuvanju uvijek podrazumijeva poduzimanje pravnog posla najma mjesta za vez s marinom.

Kod ugovora o vezu s elementima čuvanja plovila na vezu koji sklapaju marina i korisnik veza (situacija opisana pod točkom B), nastat će zajednica ugovora koji su međusobno povezani svojim postankom, ispunjavanjem i prestankom. U pogledu obveza luke nautičkog turizma kao ugovorne strane koja pruža uslugu najma veza i čuvanja plovila, dolazi do izvjesne kompenzacije obveza unutar pojedinog ugovora. Riječ je, primjerice, o obvezi nadzora stanja plovila koju gotovo uvijek uključuje i ugovor o uporabi stalnog veza, dakle, ugovor o vezu i ugovor o čuvanju plovila na vezu. Naime, čuvanje plovila na vezu sigurno uključuje i njegovo nadziranje te uz to i druge složenije obveze kao što su pregledavanje unutrašnjosti plovila, provjetravanje, pokrivanje ceradom, izbacivanje oborinskih voda i sl.[47] U ovom slučaju ugovor o najmu mjesta za vez i ugovor o čuvanju neće imati sadržajnu samostalnost, već se mogu smatrati posebnim tipom neimenovanog ugovora, a to je *ugovor o vezu s elementima čuvanja*. U slučaju ugovora o vezu s elementima čuvanja, smještaj plovila na vez, odnosno najam mjesta za vez, zapravo predstavlja način, odnosno oblik čuvanja plovila. Dakle, ustupanje mjesta za vez u funkciji je čuvanja plovila. Isto vrijedi i u slučaju ako uslugu čuvanja plovila na vezu pruža pravna osoba povezana s marinom kao trgovačkim društvom.

Drugačiji je slučaj opisan pod točkom A). U odnosu na plovilo na vezu može se sklopiti ugovor o najmu mjesta za vez s marinom i ugovor o čuvanju s drugom pravnom ili fizičkom osobom koja nije povezana s marinom kao trgovačkim društvom. Riječ je o paritetnim ugovorima koji sadržajno nisu ovisni jer unutar svakog pojedinog ugovora ostaju odvojene i odijeljene obveze stranaka. Međutim, smještaj plovila na vez može predstavljati ugovoreno mjesto i način čuvanja. Tada ugovor o čuvanju plovila na vezu ne može postojati bez ugovora o vezu jer je čuvanje plovila uvjetovano njegovim smještajem na vez. Čuvanje je povezano i međuovisno sa smještajem plovila na vez jer ako prestane namjeravani gospodarski cilj smještaja plovila na vez ili čim prestane, prestaje i ugovor o čuvanju plovila na vezu.[48]

Važno je da se na ugovor o vezu ne primjenjuju odredbe ugovora o čuvanju pa se, na temelju toga, u slučaju neurednog ispunjenja ugovora o vezu u marini, ne mogu suprotstaviti prigovori iz odvojeno ugovorenog čuvanja plovila s drugom osobom. Isto vrijedi i u odnosu na neuredno ispunjenje ugovora o čuvanju plovila. Ako je riječ o slučaju da ugovor o čuvanju

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[46] Vidi *supra*, t. 2. Pregled aktualne poslovne prakse u pogledu elemenata čuvanja u ugovorima o vezu. U poslovnoj praksi hrvatskih marina prisutan je model ugovora o vezu za koji je karakteristično da marina s korisnikom veza ugovara ustupanje mjesta za vez i nadziranje plovila na vezu, a istodobno korisniku veza nudi mogućnost da uz spomenute dvije usluge ugovori dodatnu tzv. paket-uslugu koja po svom sadržaju predstavlja eksplicitno ugovaranje čuvanja plovila. U tom slučaju, sve tri usluge pružaju se zajedno kao kombinacija usluga (davanje veza u najam, nadzor i čuvanje). Čuvanje plovila ugovara se u okviru paket-usluge provjetravanja plovila, kontrole unutrašnjosti i fotografiranja plovila te punjenja baterija, a obavlja ju osoblje marine.

[47] Opširnije o obvezi čuvanja *infra*.

[48] Primjerice, u poslovnoj praksi hrvatskih marina jedan od koncesionara nudi mogućnost ugovaranja posebne paket-usluge, tzv. *boat care*. Kao što je opisano, karakteristično je za poslovnu praksu tog koncesionara da marina pruža isključivo uslugu iznajmljivanja veza, a posebna pravna osoba pruža paralelni ugovor o nadziranju plovila na vezu.

vrši pravna ili fizička osoba različita od marine kao stranke iz ugovora o vezu, posebnu pažnju treba pokloniti tumačenju ugovornih odnosa u slučaju situacije da se plovilo nađe u opasnosti ili da nastanu nepovoljne promjene u stanju plovila i opreme. Tada je potrebno obavijestiti vlasnike ili poduzeti razumne i nužne mjera da se plovilo zaštiti. Oprezno treba tumačiti koje su zadaće marine, a koje posebne pravne osobe koja odgovara za čuvanje plovila na vezu.

6. Stranke ugovora o vezu i ugovora o ostavi - usporedba

Stranke su ugovora o vezu marina i korisnik veza,[49] a ugovora o ostavi ostavoprimac i ostavodavac. Budući da se ovim ugovorima ne prenosi pravo vlasništva, korisnik veza kod ugovora o vezu te ostavodavac kod ugovora o ostavi mogu biti i osobe koje nisu vlasnik stvari (plovila). Dakle, ugovor o vezu i ugovor o ostavi može valjano sklopiti i nevlasnik, ali ga sklapa u svoje ime. U takvu je slučaju ostavoprimac ostavodavcu dužan vratiti stvar predanu u ostavu.

Čl. 762., st. 1. ZOO-a propisuje iznimku od obveze ostavoprimca da vrati stvar osobi s kojom je sklopio ugovor. Riječ je o situaciji kad je stvar ukradena. Ako ostvoprimac dozna da je stvar ukradena, ne smije stvar vratiti ostavodavcu sve dok se pouzdano ne utvrdi komu stvar treba predati. Također, dužnost je luke nautičkog turizama zadržati ključeve i isprave plovila ako dozna da je plovilo ukradeno te obavijestiti nadležna tijela o sumnji na kazneno djelo.

O obvezi marine da vrati plovilo osobi s kojom je sklopila ugovor o vezu očitovao se VSRH[50] u sporu u kojem je odlučivao o ugovornoj odgovornosti iz ugovora o vezu s elementima ostave. Tužitelj je s marinom kao tuženikom sklopio ugovor o vezu koji ima elemente ugovora o ostavi. Marina, kao ostavoprimac, obvezala se uz naknadu čuvati plovilo i vratiti ga tužitelju kad ovaj zatraži, a u skladu s odredbom čl. 712. ZOO-a, Narodne novine br. 53/91, 73/91, 3/94, 7/96 i 112/99. U postupku je utvrđeno da je plovilo preuzela treća osoba koja je predočila dokumentaciju iz koje proizlazi da je ona vlasnik plovila, a marina prije predaje plovila trećoj osobi o tome nije obavijestila tužitelja. S obzirom na to da su tužitelj i tuženik imali valjani ugovor o ostavi te da tuženik nije poštovao odredbe ugovora, već je stvar koja mu je povjerena na čuvanje dao trećoj osobi bez znanja i bez naloga ostavoprimca, a plovilo je nestalo u nepoznatom smjeru pa tuženik više ne može vratiti plovilo koje je primio na čuvanje, sud je zaključio da su se ispunili svi uvjeti za naknadu štete u vidu novčane protuvrijednosti plovila. Sud se pozvao na odredbu čl. 718., st. 1. ZOO-a kojom je propisano da je ostavoprimac dužan vratiti stvar čim ju ostavodavac zahtijeva, i to sa svim plodovima i drugim koristima od stvari. Iz spomenute odredbe proizlazi da je tuženik bio dužan vratiti plovilo ostavodavcu, a ne osobi koja se predstavila kao vlasnik stvari, stoga je sud usvojio tužbeni zahtjev tužitelja u cijelosti. Posebno treba naglasiti da ako je ugovorom o vezu stvarno i nesporno ugovoreno čuvanje, tada bi se mogle analogno primijeniti spomenute odredbe ZOO-a o ugovoru o ostavi. Međutim, i na ovom mjestu treba naglasiti da se u aktualnoj poslovnoj praksi hrvatskih marina čuvanje plovila iznimno rijetko ugovara. Dakle, poslovna se praksa promijenila pa prezentno i marina, koja je bila stranka u prikazanom sudskom sporu, radi po modelu najma veza i nadziranja plovila na vezu, što znači da se prema njezinim općim uvjetima ugovora više ne ugovara čuvanje plovila na vezu.

[49] U skladu s pravnom prirodom ugovora o vezu kao uporabnom pogodbom, pravilnije bi bilo govoriti o uporabitelju veza, međutim, u praksi se ustalio izraz korisnik veza pa se i u ovom radu rabi taj termin.

[50] Rev-756/11 od 30. listopada 2013.

Može se problematizirati pitanje u kojim slučajevima postoji odgovornost marine za nemogućnost ispunjavanja ugovorne obveze vraćanja (predaje) plovila koje je primila na vez. U pravilu, marine prema svim modelima ugovora u općim uvjetima ugovora propisuju ugovorno isključenje odgovornosti za slučaj oštećenja ili uništenja plovila zbog krivnje treće osobe. To znači da se krađa plovila na vezu smatra krivnjom treće osobe za koju marina ne odgovara. Naravno, na stranke ugovora o vezu primjenjuje se pravilo da se odgovornost marine za namjeru ili krajnju nepažnju ne može unaprijed ugovorom isključiti ni ograničiti.[51] Osim toga, spomenuto isključenje nije apsolutno isključenje jer je marina prema ugovoru o vezu dužna nadzirati sigurnost marine u okviru svojih funkcija kao koncesionara. Marine u pravilu imaju videonadzor, čuvarsku službu, redovite ophodnje mornara, dužne su u razumnom roku obavijestiti policiju i vlasnika u slučaju nestanka plovila i sl. Dakle, ako je marina krađu mogla spriječiti, postupajući kao dobar gospodarstvenik, bit će odgovorna za nestanak plovila s veza, osim ako ne dokaže da je sve svoje ugovorne obveze koje se odnose na ustupanje sigurnog i ispravnog mjesta za vez i nadziranje plovila uredno ispunjavala s pažnjom dobrog gospodarstvenika.

Posebno treba naglasiti da svi modeli ugovora o vezu predviđaju pravo retencije u korist marine za nepodmirene tražbine korisnika veza. Takva ugovorna odredba treba imati prednost u odnosu na zakonsku odredbu iz ugovora o ostavi koja može doći do primjene samo ako su stranke doista ugovorile čuvanje plovila, a prema kojoj se tumači da ostavoprimac nema pravo retencije stvari predane u ostavu jer je stvar dužan vratiti ostavodavcu na njegov poziv. U pogledu prava zadržavanja stvari predane u ostavu, sudska se praksa izjasnila da ako je riječ o ugovoru o ostavi, ostavoprimac nema pravo zadržavanja jer je obveza ostavoprimca na osnovi čl. 712., st. 1. ZOO/91 (sad čl. 725., st. 1. ZOO-a)[52] da stvar koju primi od ostavodavca čuva i da ju vrati kad to on bude zahtijevao.[53] ZOO-om je propisano da vjerovnik nema pravo zadržavanja kad dužnik zahtijeva da mu se vrati stvar koja je izišla iz njegova posjeda protiv njegove volje (čl. 73., st. 1. ZOO-a).[54] Ugovorna odredba kojom se uređuje pitanje prava retencije drugačije od dispozitivne odredbe ugovora o ostavi, treba imati prednost primjene. Naravno, kao što je istaknuto, taj problem aktualan je samo u slučaju onih ugovora o vezu kojima je ugovoreno čuvanje i u odnosu na koje mogu doći do primjene odredbe ZOO-a o ostavi, a u većini slučajeva ugovora o vezu čuvanje se ne ugovara pa to pitanje nije za takve ugovore relevantno.

S obzirom na to da se u svim modelima ugovora o vezu koji se primjenjuju u aktualnoj poslovnoj praksi hrvatskih marina predviđa pravo zadržavanja u korist marine, važno je napomenuti da marina ima pravo zadržati plovilo samo ako je ono u vlasništvu korisnika veza prema kojem ima dospjelu tražbinu. Naime, bitna su obilježja instituta zadržavanja prema hrvatskom obveznom pravu da objekt prava zadržavanja može biti pokretna ili nepokretna stvar u dužnikovu vlasništvu, pod pretpostavkom da vjerovnik ima dospjelu tražbinu prema tom dužniku i da je dužnik svojom voljom predao tu stvar u posjed vjerovniku.[55] To znači da marina neće moći ostvariti pravo retencije ako je riječ o tražbinama iz ugovora o vezu koji je sklopila s nevlasnikom plovila, dakle osobom koja plovilo ima u najmu, zakupu ili ga drži po nekoj drugoj osnovi, ali nije njegov vlasnik.

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[51] Arg. iz čl. 345., st. 1. ZOO-a.

[52] Napomena autora.

[53] VSRH, Rev-2454/95 od 6. 5. 1999.

[54] Pravo retencije bit će posebno obrađeno u okviru projekta DELICORMAR, vidjeti bilješku 1.

[55] Opširnije Crnić, I. 2010. *Zakon o obveznim odnosima – napomene, komentari, sudska praksa i abecedno kazalo pojmova*. Četvrto, bitno izmijenjeno i dopunjeno izdanje. Organizator. Zagreb. str. 175.

Ako korisnik veza koji je sklopio ugovor o vezu s marinom ili ostavodavac odredi osobu kojoj treba vratiti stvar, primjerice, vlasniku ili drugoj ovlaštenoj osobi, ostavoprimac ili marina dužni su toj osobi vratiti stvar.

Kod ugovora o ostavi moguće je da treća osoba tuži ostavoprimca na predaju stvari. O tome će biti riječ kad ostavodavac nije ujedno i vlasnik stvari pa se javi treća osoba koja, kao vlasnik stvari, tužbom od ostavoprimca zahtijeva predaju stvari (redovito vlasnička tužba), ostavoprimac je, kao tuženi u sporu, obvezan sudu priopćiti osobu od koje je primio stvar, a istodobno obavijestiti ostavodavca o podignutoj tužbi[56] kako bi se ovaj mogao umiješati u parnicu i obraniti, eventualno, svoje pravo. Ne obavijesti li ostavoprimac ostavodavca o podignutoj tužbi, odgovara ostavodavcu za svu štetu koju ovaj pretrpi zbog propuštanja izvješćivanja.[57] U praksi je moguće da nevlasnik plovila, odnosno najmoprimac ili zakupoprimac plovila u svoje ime i za svoj račun sklapa s marinom ugovor o čuvanju plovila pa da treća osoba, koja je vlasnik plovila, tuži marinu na predaju plovila. Primjerice, o tome će biti riječ ako ugovor o vezu sklapa čarterska agencija koja je nevlasnik (drži plovilo u zakupu), a vlasnik plovila javlja se tužbom.

Ostavoprimac ne mora znati tko je vlasnik stvari koja se daje u ostavu. To proizlazi iz činjenice da se ugovorom o ostavi ne prenosi vlasništvo stvari, nego se stvar daje na čuvanje. U odnosu na ugovor o vezu poslovna praksa nešto je drugačija, marina ugovor o vezu sklapa s vlasnikom ili korisnikom plovila, u obama slučajevima može biti riječ o pravnoj ili fizičkoj osobi, međutim u ugovoru o vezu uvijek se evidentira tko je vlasnik plovila te podatci o plovilu, a plovidbena dozvola predaje se na uvid ili pak marine često uvjetuju da se za trajanja ugovora o stalnom vezu ostavi kod marine plovidbena dozvola.

7. Pravni izvori za ugovore o vezu

Kad je riječ o neimenovanom ugovoru, u praksi se otvara pitanje koji zakonski okvir treba primijeniti na tumačenje ugovornih utanačenja stranaka i odlučivanje o sporu glede ugovorne odgovornosti. Pomorski plovidbeni poslovi i ugovori uređeni PZ-om stvoreni su i adaptirani za pravno uređenje djelatnosti povezanih s brodovima, plovidbom i prijevozima. Pravna priroda poslova, aktivnosti i usluga koje marine nude, nema sličnosti s tim ugovorima, zbog toga se ugovor o vezu ne uklapa u tezaurus ugovora uređenih PZ-om, čak ni u pogledu supsidijarne primjene njegovih odredbi na ovaj ugovor.[58]

Za ugovor o vezu nisu propisana posebna pravila, kao što je to učinjeno za imenovane ugovore, već se na njih primjenjuju autonomni izvori prava nastali u poslovnoj praksi marina, opća zakonska načela o obveznim odnosima propisana ZOO-om, opće odredbe o ugovornim obveznim odnosima predviđene ZOO-om i pravna pravila propisana za srodne ugovore, a treba uvažavati i pravnu i poslovnu praksu koja se izgradila za takve ugovore.

S obzirom na takvu strukturu pravnih izvora, ako dođe do spora između stranaka, pravni okvir koji se primjenjuje čine:

1. opći uvjeti ugovora luka nautičkog turizma kao autonomni izvori prava
2. zakonodavni okvir:

a. ZOO – opći dio kojim se uređuju osnove obveznih odnosa (čl. 1.-246. ZOO-a)
b. ZOO – opće odredbe o ugovornim obveznim odnosima (čl. 247.-375. ZOO-a)

[56] Čl. 726., st. 2. ZOO-a.

[57] Čl. 348. ZOO-a.

[58] Iznimka može biti jedino primjena odredbi o gradnji broda na eventualne aktivnosti popravka broda.

c. ZOO – odredbe o pojedinim srodnim ugovorima (ugovor o najmu, ugovor o djelu, ugovor o ostavi, ugovor o nalogu)
d. Zakon o zaštiti potrošača
e. PZ.

Iako su marine i plovni objekti koji se u nautičkom turizmu koriste za gospodarstvo vrlo važni, ugovorni odnosi stranaka iz ugovora o vezu nisu sustavno uređeni autonomnim izvorima prava. U poslovnoj praksi marina razvili su se i formalizirali opći uvjeti ugovora.[59] Sadržaj općih uvjeta ugovora konkurentskih marina sličan je, međutim, nije standardiziran ni ustaljen, pa se u slučaju ugovora o vezu može govoriti o atipičnim inominatnim ugovorima.[60]

Valja naglasiti kako je nužno da sudovi i stranke ugovora pravilno tumače svaki pojedini ugovor o vezu i opće uvjete ugovora koji su njegov sastavni dio te da razumiju koncepciju i *causu* ugovora o vezu. Specifičnost ugovora o vezu nije čuvanje plovila na vezu, već prvenstveno ustupanje mjesta za vez i nadzor nad stanjem priveza i plovila. Drugim riječima, ugovaranje čuvanja plovila na vezu iznimka je i susreće se samo u poslovnoj praksi manjih hrvatskih marina te suhih marina i odlagališta plovnih objekata[61]. Stoga je nužno da u praksi ne dolazi do ishitrene i neutemeljene primjene odredbi ZOO-a o ostavi na ugovor o vezu. Kvalifikacija pravne prirode konkretnog ugovora o vezu kao ugovora o ostavi, odnosno kao ugovora s elementima čuvanja, mora proizlaziti iz njegova precizno i točno utvrđena sadržaja, kao i iz točno utvrđene prave volje ugovornih strana te iz pravilna tumačenja općih uvjeta ugovora koji se primjenjuju na taj ugovor. Dakle, u pogledu supsidijarne primjene dispozitivnih odredbi ZOO-a koje se odnose na druge srodne ugovorne odnose obveznog prava, valja istaknuti da prvenstveno treba vidjeti kako su opći uvjeti i ugovor uredili to pitanje.

U odnosu na zakonski okvir koji regulira ugovor o ostavi, luke nautičkog turizma, kao sastavljači općih uvjeta ugovora, pristupaju na više načina:

a) U općim uvjetima ugovora izrijekom se isključuje primjena odredbi ZOO-a o ugovoru o ostavi tako da se navodi posebna odredba u kojoj se propisuje da se na ugovor ne primjenjuju odredbe ZOO-a o ugovoru o ostavi ili se decidirano ističe da marina ne odgovara za čuvanje plovila na vezu. Ako se u sklopu ugovora o vezu marina *ne* obveže na čuvanje plovila na vezu, onda nema mjesta podrednoj primjeni zakonskih odredbi o ostavi, već se na sva pitanja koja nisu posebno uređena ugovorom, odnosno općim uvjetima ugovora luke nautičkog turizma, treba podredno primijeniti opće odredbe obveznog prava uključujući osobito opće odredbe o ugovorima te o odgovornosti za štetu.[62]

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[59] Opći uvjeti ugovora su ugovorne odredbe sastavljene za veći broj ugovora koje jedna ugovorna strana (sastavljač) prije ili u trenutku sklapanja ugovora predlaže drugoj ugovornoj strani, bilo da su sadržani u formularnom (tipskom) ugovoru, bilo da se na njih ugovor poziva (čl. 295. st. 1. ZOO-a).

[60] Tako Padovan, op. cit., bilj. 39.

[61] Opširnije *supra*, t.2. Pregled aktualne poslovne prakse u pogledu elemenata čuvanja u ugovorima o vezu.

[62] U poslovnoj praksi hrvatskih marina izrijekom se isključuje primjena odredbi ZOO-a o ugovoru o ostavi u onim modelima ugovora koji nemaju elemente čuvanja, dakle, riječ je u stvari o deklaratornom isključivanju jer odredbe ZOO-a o ostavi ne bi ni došle do primjene u odnosu na te modele ugovora o vezu. Inače, ako je diskutabilno jesu li stranke ugovorile nadziranje ili čuvanje plovila, treba utvrditi pravu volju stranaka i cilj koji žele postići sklapanjem ugovora. Znači, u svakom konkretnom slučaju, točnije u svakom ugovoru o vezu u kojem su ugovorene obveze i aktivnosti s implicitnim elementima čuvanja, treba pomno protumačiti koja je namjera stranaka i *causa* ugovora. To je nužno bez obzira na to jesu li stranke izričito ugovorom isključile čuvanje ili ostavu po ZOO-u ili „šute" o pitanju ugovaraju li čuvanje. VSRH ima ustaljenu sudsku praksu u pogledu pitanja koje su činjenice relevantne za tumačenje pravne prirode i tipa ugovora. Za tumačenje ugovora bitno je: a) sadržaj ugo-

b) Općim uvjetima ugovora propisuje se da luka nautičkog turizma odgovara za čuvanje u mjeri u kojoj je prema zakonskim propisima odgovorna. Za ovakvu stilizaciju može se reći da predviđa primjenu odredbi ZOO-a o ugovoru o ostavi jer je propis koji uređuje čuvanje upravo ZOO, i to u dijelu u kojem sadrži posebne odredbe o ugovoru o ostavi (čl. 725.-743.).[63]

c) Opći uvjeti ugovora ne spominju pitanje primjene dispozitivnih odredbi ZOO-a o ugovoru o ostavi. Ako stranke ugovorom o vezu s elementima ostave nisu isključile primjenu odredbe ZOO-a o ostavi, na ugovor će se osim općih uvjeta ugovora, primjenjivati i odredbe ZOO-a o ostavi, i to u odnosu na ona pitanja koja stranke nisu ugovorom uredile drugačije od dispozitivnih zakonskih odredbi o ugovoru o ostavi.[64]

d) Ako je riječ o formulaciji ugovora koja ne otklanja eventualne dvojbe radi li se o ugovoru na koji treba primijeniti odredbe ZOO-a o ostavi, treba primijeniti pravila o tumačenju ugovora iz čl. 319.-320. ZOO-a.

U odnosu na ugovor o vezu s elementima čuvanja ili bez njih, mogu se primijeniti i odredbe ZOO-a o ugovoru o najmu (čl. 550.-578.) budući da jer luka nautičkog turizma na temelju ugovora o vezu daje određeni vez na uporabu vlasniku, odnosno korisniku plovila, a ovaj se zauzvrat obvezuje plaćati ugovorenu naknadu (najamninu) pa možemo govoriti da ugovor o vezu u tom smislu ima elemente ugovora o najmu.[65]

8. Čuvanje – opće napomene

Obveza čuvanja stvari temeljna je obveza ostavoprimca i dominira ugovorom o ostavi jer se njezinim ispunjenjem ostvaruje i gospodarski cilj (*causa*) ovog ugovora.[66] Štoviše, u sudskoj se praksi ističe stajalište da ugovor o ostavi nije ni nastao kad obveza čuvanja nije preuzeta.[67] Čuvanje tuđe stvari javlja se i kod drugih ugovora (primjerice, zakupa, najma, posudbe i sl.), ali kod njih ono nije glavna svrha ugovora zbog koje je ugovor sklopljen, nego odgovornost postoji i za neispunjenje te „sporedne obveze".[68] Takvo stajalište zastupljeno je i u sudskoj praksi.[69]

Ugovor o ostavi ima dugu tradiciju i izgrađenu stabilnu poslovnu i sudsku praksu. Za razliku od toga, ugovor o vezu nema kontinuiranu i stabilnu poslovnu i sudsku praksu. Praksa čuvanja plovila na vezu vjerojatno datira iz vremena kad je nautički turizam bio u začetku, a marine su preuzimale punu skrb o plovilima vezanim u njihovim lukama. Naime, u početku razvoja nautičkog turizma marine su u usporedbi s današnjim imale znatno manje i ograniče-

vora, b) volja stranaka, c) kako stranke u naravi ispunjavaju ugovor, a pritom nije odlučujuće kako su stranke nazvale svoj ugovor. Takvo pravno stajalište sud je izrekao u predmetu VSRH, Revt -30/02 od 6. 3. 2002.

63 Ovakve ugovorne odredbe prisutne su u onim modelima ugovora o vezu u moru ili na kopnu te ugovorima o smještaju plovila u suhim marinama, odlagalištima plovnih objekata, halama – zatvorenim prostorima koji sadrže eksplicitne elemente čuvanja.

64 Opširnije Padovan, op. cit.

65 Ibid.

66 Gorenc i drugi. *Komentar Zakona o obveznim odnosima*…, op. cit. str. 1121.

67 Odluka Vs, Rev-1422/82 od 19. listopada 1982. Slakoper SP, odluka br. 1078.

68 Crnić, op. cit., bilješka 55., str. 907.

69 PVSRH je odlučio da je vlasnik mehaničarske radionice obvezan čuvati automobil koji mu je predan na popravak pa odgovara za štetu koja je zbog njegova propusta u čuvanju prouzročena oduzimanjem vozila (Rev 959/84 od 4. 9. 1984., citirano prema Crnić, op. cit. u bilj. 55., str. 908.).

nije kapacitete jer se na vez primalo oko 50 plovila, a plovila su bila jednostavnijih tehničkih karakteristika te na njima nije bilo skupe i sofisticirane opreme i uređaja kao što je to danas. Zbog toga je vjerojatnost nastanka štetnih događaja kao što su, primjerice, požari bila manja. Uz to, sporova i štetnih događaja koji bi po visini iznosa naknade štete predstavljali veći problem za marine i osiguravatelje nije bilo. U posljednjim dvama desetljećima došlo je do značajnog proširivanja kapaciteta luka nautičkog turizma koje je uvjetovalo značajno povećanje obujma posla u lukama nautičkog turizma i višestruko povećanje broja vezova i broja plovila na vezu. Danas veće hrvatske luke nautičkog turizma primaju oko 500 plovila na vez, a one najveće i oko 1000 plovila. Osim toga, kao posljedica razvoja brodskih tehnologija bitno su se izmijenile karakteristike plovila i složenost njihove opreme te njihova veličina i vrijednost.[70] Liberalizacijom tržišta osiguranja i pojavom sve veće konkurencije među osigurateljima koji se bave osiguranjem odgovornosti marina, diversificiraju se uvjeti osiguranja s tendencijom sniženja cijene osiguranja i posljedičnim sužavanjem opsega pokrića. Sve te činjenice utjecale su na formiranje poslovne politike marina. Prema aktualnoj praksi i ponudi, veće hrvatske marine ne preuzimaju punu odgovornost za plovila na vezu u smislu odgovornosti za njihovo čuvanje, već rade po modelu najma veza ili najma veza i nadziranja plovila na vezu. Naime, ako marina odgovara po pravilima ZOO-a kao ostavoprimac, snosi punu odgovornost za plovilo na vezu tako da je dužna poduzeti sve radnje kako bi se čuvana stvar vratila ostavodavcu u stanju u kojem je primljena. U tom smislu elemente ostave češće susrećemo u praksi suhih marina, odlagališta plovnih objekata i pružatelja usluga čuvanja plovila u halama, zatvorenim ili ograđenim prostorima u kojima je po prirodi stvari drugačiji tehnološki proces usluge. Čuvanje plovila u moru iziskuje znatno veći obujam posla, drugačiju raspodjelu rizika i odgovornosti. Čuvanje plovila u moru iznimno je kompleksno, pristup trećih osoba slobodan je jer su marine na pomorskom dobru. Ako pak je riječ o većem broju plovila u marini, nužno je zapošljavanje brojnijeg osoblja koje će se o njima brinuti. Plovila na vezu u moru i suhom vezu na otvorenom izložena su hidrometeorološkim prilikama soli, vlazi, koroziji i drugim vanjskim utjecajima koji djeluju na strojeve, baterije, uređaje, cerade i drugu opremu plovila. Čuvanju je imanentno održavanje plovila u ispravnom stanju u smislu punjenja baterija, pražnjenja oborinskih voda, pokrivanja i slično. Tu je i pitanje vrlo praktične prirode – kako dokazati da se plovilo predaje u stanju u kojem je primljeno? Osim što bi se moralo precizno utvrditi koje su promjene na plovilu nastale kao posljedica redovitog trošenja, trebalo bi se utvrditi stanje plovila u trenutku primopredaje, koje su promjene, točnije, oštećenja nastala za vrijeme dok je vlasnik koristio plovilo, na njemu boravio, njime plovio i sl. U slučaju spora oko tih činjenica trebalo bi provesti i vještačenje spomenutih okolnosti. Otvara se pitanje gospodarskih interesa, naime, riječ je o omjeru očekivanja vlasnika i opsega poslova te cijene koju marina dobiva; često marini nije gospodarski opravdano preuzimati odgovornost za čuvanje plovila. Treba spomenuti i čestu praksu mnogih vlasnika jahti da sami, u privatnom aranžmanu, ugovaraju čuvanje, brigu i održavanje plovila s posebnim fizičkim ili pravnim osobama. Riječ je o tzv. ugovorima *boat care*, a prisutno je i zapošljavanje stalne posade na plovilima veće vrijednosti. Takvi aranžmani nemaju veze s uslugama marine i ugovorom o vezu koji korisnik veza sklapa s marinom. Kad se razmatra pitanje čuvanja, općenito treba započeti od temeljne i osnovne raspodjele obveza stranaka. Vlasnik plovila dužan je brinuti se o održavanju plovila u dobrom stanju, njegovoj ispravnosti uključujući brodske konope, bokobrane i opremu

[70] Prosječna je vrijednost plovila na stalnom vezu od 50 tisuća do 20 milijuna eura, a procijenjena najveća ukupna vrijednost svih plovila na vezu u jednom trenutku za marinu od 440 vezova iznosi 1 milijardu eura. Izvor: Upitnik za koncesionare luka nautičkog turizma proveden u okviru znanstveno-istraživačkog projekta DELICROMAR, opširnije *supra*, bilješka 1.

za privez. Vlasnik u pravilu ugovara kasko osiguranje svog plovila (što marine i uvjetuju za plovila koja primaju na stalni vez), a marina odgovara za svoju struku, tj. za ispravnost, primjerenost, dostupnost i održavanje sigurnog nautičkog veza, opreme, građevina, uređaja i infrastrukture u luci. Marina nije jamac da će plovilo biti neoštećeno i vraćeno u istom stanju u kojem je prihvaćeno na vez. Čuvanje nije standardna obveza i kad je riječ o nautičkom vezu, ona je atipična za hrvatske marine.

Ipak, valja istaknuti da usluga marine ima dodanu vrijednost u odnosu na vezove u lukama otvorenim za javni promet, a to su kontinuirana briga o vezovima, stalan nadzor vezova u tehničkom i sigurnosnom smislu, obavještavanje vlasnika o stanju veza i stanju plovila koje se može ustanoviti vanjskim pregledom plovila, intervencije u interesu sigurnosti u okviru marine (rizik od potonuća pojedinog plovila ili od požara, izvanrednih vremenskih prilika te preventivne i interventne mjere koje marine poduzimaju u takvim situacijama, primjerice, plovilo koje tone marina će izvaditi na suhi vez, po potrebi pojačavati vez dodatnom užadi, staviti dodatne bokobrane, tegliti brod koji je u marini ili na ulazu u marinu ostao bez pogona, intervenirati radnim brodicama da spriječi pomorsku nezgodu; protupožarna oprema i sustavi te interni protokoli i procedure u marinama na veoma su visokoj razini itd.). Nadalje, u marini su dostupne usluge održavanja, servisiranja, popravka plovila i brodskih strojeva, zamjene privezne opreme, cerade i sl., ali obično na temelju dodatnog radnog naloga, tj. posebnog ugovora koji je po svojoj prirodi srodan ugovoru o nalogu, ugovor o djelu, ugovor o popravku broda. Posebno, ako je riječ o ugovoru o popravku i obavlja ga marina, tada je u njemu implicirana obveza čuvanja te ju treba tumačiti u okviru odgovarajućeg ugovora o popravku.

Dakle, u nas praksa ugovaranja čuvanja plovila na vezu nema kontinuitet ni dugu tradiciju, a prema postojećoj poslovnoj praksi čuvanje plovila na vezu nije tipična djelatnost hrvatskih marina.

Postoji niz specifičnosti čuvanja plovila na vezu. One proizlaze iz pomorskih rizika kojima su plovila na vezu izložena i specifičnosti samog plovila kao predmeta čuvanja. U pravnoj teoriji i sudskoj praksi diskutabilno je, nedovoljno razrađeno i neustaljeno stajalište glede specifičnosti čuvanja plovila na vezu, opsega obveze čuvanja plovila, pitanja do koje se mjere provodi čuvanje i što ono obuhvaća. Zbog toga je sadržaj i domašaj obveze čuvanja plovila jedno od najkontroverznijih i najsloženijih pitanja u vezi s pravnim poslom koji ima obilježja ugovora o vezu s elementima čuvanja. Radi boljeg razumijevanja posebnosti ugovora o vezu i dominantnih razloga za često neopravdano imputiranje pravila o ostavi kod ove vrste ugovora u domaćoj praksi, analizira se sadržaj pojedinih specifičnih obaveza marine koje eksplicitno ili implicitno znače čuvanje, a koje treba razlikovati od onih za koje smatramo da se u sudskoj praksi pogrešno kvalificiraju kao čuvanje.

8.1. Čuvanje – sadržaj obveze

Usluga čuvanja plovila na vezu složena je i visoko specijalizirana. Zbog naravi objekta čuvanja, a to je plovilo na vezu, čuvanje uključuje niz različitih aktivnih radnji. Ponajprije treba naglasiti da u opseg obveze čuvanja plovila ulaze one obveze koje su stranke ugovorile i koje se opisuju u ugovoru i/ili općim uvjetima ugovora. Dakle, pri tumačenju konkretnog pravnog odnosa uvijek treba dati prednost ugovornim odredbama stranaka kojima one određuju i ugovaraju konkretne radnje i postupke te aktivnosti koje je marina obvezna poduzimati u ispunjenju svojih obveza iz ugovora o vezu, a tako i, eventualno, ugovorene obveze čuvanja. Specifične su obveze koje se odnose na čuvanje plovila, a spominju se u općim uvjetima ugovora marina koje pružaju uslugu čuvanja: čuvati plovilo u luci nautičkog turizma tako da

se vrši nadzor nad konopima koje daje vlasnik za privez plovila na gat/ponton, i to 24 sata dnevno; vršiti izbacivanje oborinskih voda s plovila; provjetravati unutrašnjost plovila; pokrivati plovilo pokrivačem (ceradom) vlasnika. U tom kontekstu treba imati na umu da postoje standardizirani protokoli obilaska i nadziranja plovila te poduzimanja drugih radnji koje čine sadržaj obveze čuvanja. Priroda posla čuvanja plovila na vezu u moru u pravilu ne uključuje paljenje motora ni vožnju plovila radi provjeravanja ispravnosti motora, popravak plovila i razne vrste radova na plovilu jer to pripada poslovima održavanja plovila i/ili popravka plovila te znači dodatne i posebne usluge izvan ugovora o vezu. U opseg obveze čuvanja ulazi i čuvanje dokumentacije i ključeva. Međutim, to nije tipična obveza prisutna samo kod čuvanja plovila, već se ugovara i kod nadziranja plovila na vezu, a čuvanje dokumentacije postoji ponekad kao obveza i kod tranzitnog veza. Kod tranzitnog veza predaja dokumentacije ima isključivo svrhu ostvarivanja prava retencije plovila radi namirenja tražbine luke nautičkog turizma.[71] Čuvanje dokumentacije i ključeva kod ugovora o stalnom vezu s elementima nadziranja ili čuvanja uz to ima još dvije važne funkcije. Predaja ključeva i dokumentacije predstavlja predaju posjeda plovila u svrhu nadziranja ili čuvanja plovila, dakle, ispunjavanja ugovorne obveze,[72] a također omogućuje marini da u slučaju potrebe intervenira na plovilu postupajući u ispunjavanju svojih obveza kao koncesionar koji se brine o sigurnosti u luci.[73] Pritom treba istaknuti da su i marine koje ne preuzimaju obvezu čuvanja plovila kao koncesionari dužni brinuti se o redu u luci i spriječiti nastanak štete na plovilima primjenom dužne pažnje i na primjeren način. Međutim, upravo način, a time i efikasnost zaštite plovila na vezu od nastupanja štetnih posljedica do kojih može doći zbog nepovoljnih promjena u stanju plovila na vezu, razlikuje se ovisno o tome što čini sadržaj ugovorom preuzetih obveza marine. Marine koje ne preuzimaju ključeve plovila i koje ne nude čuvanje plovila na vezu imaju zasigurno niži stupanj nadzora nad stanjem plovila te ograničenu mogućnost intervencije na plovilu u slučaju opasnosti. Njihovo osoblje ne ulazi na plovilo, već isključivo vanjskom inspekcijom opaža postoje li nepovoljne promjene u njegovu stanju, primjerice, puni li se plovilo vodom. U slučaju potrebe za premještanjem plovila, njegovim vađenjem iz mora i sl. njihove su manevarske mogućnosti ograničene, a plovilo u pravilu samo mogu tegliti do drugog veza ili pak mjesta gdje će se izvaditi iz mora. S druge strane, luke nautičkog turizma koje preuzimaju ugovornu odgovornost za čuvanje plovila imaju znatno zahtjevnije obveze i dužne su plovilo čuvati s pažnjom dobrog gospodarstvenika te poduzimati razumne mjere da se plovilo zaštiti od vanjskih opasnosti. Međutim, važno je naglasiti da su marine prema svim modelima ugovora o vezu dužne poduzimati razumne mjere da se plovilo zaštiti od vanjskih opasnosti. Stoga su i one marine koje ne ugovaraju preuzimanje ključeva plovila, ulaženje u zaključane kabinske prostore i sl., dužne intervenirati ako dođe do nepovoljnih promjena u stanju plovila ili je ono u opasnosti, a priroda promjena ili opasnosti zahtijeva urgentno postupanje. Rezultati proučene poslovne prakse domaćih marina pokazuju da urgentni sigurnosni razlozi mogu utjecati na to da osoblje marine uđe u kabinske prostore iako to nije standardna obveza marine prema ugovoru i općim uvjetima ugovora, pa čak i uporabom sile (bez ključeva), sve u slučaju ako marina procijeni da je šteta na obijenim vratima manja od moguće štete koja bi nastala ako se ne uđe ili ako se čeka da se dođe do ključeva plovila.

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[71] Riječ je o tražbinama s osnove pružene usluge veza, zatim mjera poduzetih na trošak korisnika veza i tražbine s osnove naknade štete.

[72] O kondicijama koje predstavljaju predaju plovila na čuvanje opširnije *infra*.

[73] Skorupan Wolff; Petrinović; Mandić, op. cit. bilj.

8.2. Pozornost čuvanja

Prema tumačenjima pravne teorije, svrha je ugovora o ostavi poduzimati sve potrebne radnje da se čuvana stvar vrati ostavodavcu u stanju u kojem je primljena.[74] Općenito se smatra da je ostavoprimac u pogledu radnji koje ulaze u kompleks čuvanja relativno samostalan. U načelu sam odlučuje gdje će i kako čuvati stvari predane na čuvanje te što i kako treba raditi jer snosi i odgovornost za čuvanje.[75]

Glede pozornosti koju ostavoprimac mora pokloniti čuvanju stvari, zakonodavac čini razliku ovisno o tome čuva li ostavoprimac stvar uz naknadu ili bez nje. Pri naplatnoj ostavi ostavoprimac je dužan čuvati stvar kao dobar gospodarstvenik, odnosno dobar domaćin. To znači da se od ostavoprimca zahtijeva ona pozornost koja se pri čuvanju stvari može zahtijevati od svakog dobrog gospodarstvenika *in abstracto* (vidjeti čl. 10., st. 1 ZOO-a).[76]

Ako se na ugovor o vezu primjenjuju odredbe ZOO-a o ugovoru o ostavi, tj. ako su u njemu sadržani elementi čuvanja, tada je marina dužna čuvati plovilo s pažnjom dobrog gospodarstvenika.[77] Uz to, marina je dužna plovilo čuvati s povećanom pažnjom dobrog stručnjaka.[78] Ovakav stupanj pažnje traži se zato što marina profesionalno i uz naknadu obavlja usluge iz ugovora o vezu koji uključuje i obvezu čuvanja, a podrazumijeva poduzimanje razumnih i uobičajenih mjera u okviru svoje djelatnosti da bi se plovilo zaštitilo od vanjskih opasnosti, tj. opasnosti koje ne potječu od nekog nedostatka u samom plovilu ili njegovoj opremi.[79] O tumačenju standarda čuvanja plovila na vezu s pažnjom dobrog gospodarstvenika sud se izjasnio u više predmeta u kojim je odlučivao o ugovornoj odgovornosti luka nautičkog turizma.

Trgovački sud u Rijeci[80] usvojio je tužbeni zahtjev i obvezao marinu (tuženika) na naknadu štete tužitelju u sporu u kojem je odlučivao o ugovornoj odgovornosti marine za štetu na plovilu. Ugovor iz kojeg je nastao spor sklopili su vlasnik plovila (tužitelj) i marina (tuženik), a predmet ugovora bilo je preuzimanje na čuvanje i održavanje plovila te izvršavanje radova na plovilu prema pisanoj narudžbi naručitelja (tužitelja). Tužitelj je tvrdio da marina nije ispunila ugovornu obvezu čuvanja plovila te da odgovara za naknadu štete zbog uništenja plovila. Sud je ocijenio da je tuženik, u skladu s ugovornom obvezom čuvanja plovila, bio dužan poduzeti sve radnje potrebne da se čuvana stvar vrati tužitelju u stanju u kojem je bila predana na čuvanje, a što je i osnovna svrha čuvanja. To znači da je bio dužan izvršiti konzervaciju motora, skinuti s broda akumulatore i čuvati ih na suhom i u zatvorenom prostoru s povremenim punjenjem i pražnjenjem, koristiti kaljužnu pumpu, odvrnuti čep za otjecanje vode i dr. Tuženi je istaknuo da je tužitelj pridonio nastanku štete, odnosno da je riječ o podijeljenoj odgovornosti za štetu jer je tužitelj bio dužan predati pisanu narudžbu svih usluga koje je želio da se izvrše na brodu, a koje proizlaze iz djelatnosti marine. Sud nije prihvatio takav stav marine kao tuženika. Zaključak je suda da je tuženik, u skladu s ugovorenom obvezom čuvanja broda, sve spomenute radnje trebao poduzimati bez upute tužitelja jer je riječ o osnovnim djelatnostima tuženika pa se, štoviše, zahtijeva standard čuvanja stvari kao u dobrog gospodarstvenika. Pisanu narudžbu za usluge čuvanja broda na koju se poziva tuženik tužitelj, prema mišljenju

[74] Gorenc i dr. *Komentar zakona o obveznim odnosima*…, op. cit., str. 1121.

[75] Klarić, P.; Vedriš, M. 2014. *Građansko pravo.* Narodne novine. Zagreb. str. 546.

[76] Gorenc i dr. *Komentar zakona o obveznim odnosima*…, op. cit., str. 1121.

[77] Čl. 727., st. 1. ZOO-a.

[78] Arg. iz čl. 4. st. 1. Zakona o pružanju usluga u turizmu, Narodne novine br. 68/07, 88/10.

[79] Padovan, op. cit.

[80] TS u Rijeci, P-2590/1994, od 28. 2. 2007.

suda, nije trebao predati tuženiku niti se ona odnosi na čuvanje broda, već se odnosi na slučaj narudžbe eventualno nekih drugih, dodatnih, posebnih usluga koje proizlaze iz djelatnosti tuženika. Ova se odluka može kritizirati u dijelu u kojem sud zaključuje da je marina niz radnji, kao što su konzervacija motora, skidanje s broda akumulatora i čuvanje na suhom, njihovo povremeno punjenje i pražnjenje i druge opisane radnje, trebala izvršavati bez upute tužitelja jer je riječ o osnovnim djelatnostima tuženika. Treba istaknuti da se spomenute djelatnosti ne mogu smatrati osnovnim djelatnostima marine, već isključivo dodatnim uslugama uz osnovnu uslugu iznajmljivanja veza i smještaja plovnih objekata. Štoviše, u marinama se uopće ne moraju pružati usluge održavanja i servisiranja plovnih objekata jer to nije predviđeno Pravilnikom o razvrstavanju i kategorizaciji luka nautičkog turizma[81] u dijelu u kojem se govori o minimalnim uvjetima koje moraju zadovoljavati luke nautičkog turizma.

Vrhovni sud Republike Hrvatske[82] odlučivao je u sporu nastalom iz ugovora o vezu i ugovora o čuvanju plovila u kojem je vlasnik plovila (tužitelj) potraživao naknadu štete zbog oštećenja plovila do kojeg je došlo zbog potonuća plovila na vezu u marini tuženika, a marina kao tuženik protutužbom je potraživala plaćanje naknade za pruženu uslugu suhog veza na koji je plovilo bilo smješteno nakon što je izvađeno iz mora. Sud je utvrdio da je sklopljeni ugovor sadržavao elemente ugovora o najmu veza i ugovora o ostavi, ugovori su se izvršavali sve do trenutka kad je brod potonuo na vezu. Uzrok potonuća broda prodor je mora u njega, a do čega je došlo zato što brodske pumpe (četiri kaljužne pumpe), koje se automatski uključuju kad se u brodu pojavi određena količina vode, u kritičnoj prigodi nisu radile. To se dogodilo zato što su se brodski akumulatori ispraznili jer brod nije bio priključen na izvor struje na gatu. Sud je istaknuo stajalište da je tuženi bio u obvezi čuvanja broda (do njegova potonuća) pa snosi posljedice koje zbog nepoštovanja te obveze iz takva ugovornog odnosa proizlaze. Sud smatra da je priključenje tuženikova broda na izvor električne energije na gatu bio dio ugovorne obveze tuženika pa je tuženik odgovoran za nastao štetni događaj koji je upravo posljedica nepostupanja tuženika u skladu s preuzetom ugovornom obvezom. Prema mišljenju suda, tuženik je za vrijeme nevremena, koje je nužno imalo za posljedicu prodor mora, odnosno kišnice u brod, propustio kontrolirati je li brod priključen na dotok električne energije (čime se omogućava rad brodskih pumpi za crpljenje vode iz unutrašnjosti broda) pa se nameće zaključak kako tuženik nije čuvao tužiteljev brod s pažnjom dobrog gospodarstvenika, a na što se obvezao odredbom ugovora sklopljenog u smislu odredbe čl. 714. ZOO-a i zbog toga odgovara tužitelju za nastalu štetu.[83] Treba napomenuti da kaljužne pumpe na plovilu moraju raditi neovisno o tome je li plovilo priključeno na izvor električne energije na gatu. Napon u baterijama (njihovo punjenje) može se održavati na više načina, a da se pritom ne ugrožava sigurnost i izaziva opasnost od požara. Moguća je demontaža i punjenje baterija ili pak priključivanje broda na izvor električne energije na gatu pod nadzorom vlasnika, njegova opunomoćenika ili se to može posebno ugovoriti s marinom ili serviserom. Svakako treba naglasiti da briga oko napona u baterijama te njihovo održavanje u radnom stanju predstavlja vrlo specifične aktivnosti koje bi bilo potrebno precizno urediti u onim modelima ugovora koji sadrže eksplicitne elemente čuvanja.

U postupku u kojem je predmet spora zahtjev korisnika veza (tužitelja) za naknadu štete koju je tužitelj pretrpio zbog požara na njegovu brodu nastalom dok je brod bio na vezu u

[81] Narodne novine broj 72/2008, u nastavku PLNT.

[82] VSRH Rev 2333/2010, 14. svibnja 2013.

[83] O odluci suda o protutužbenom zahtjevu radi naknade za čuvanje plovila na suhom vezu nakon što je izvađeno iz mora, a koji je u postupku postavila marina kao protutužitelj protiv vlasnika plovila, te o problemu mijenjanja mjesta i načina čuvanja opširnije *infra*.

lučici tuženika, sud je odbio tužbeni zahtjev za naknadu štete.[84] Tužitelj u tužbi tvrdi da je tuženik propustio pravovremeno uočiti požar koji je nastao na tužiteljevu brodu i nije poduzeo odgovarajuće mjere radi gašenja požara, tj. da nije na valjan način vršio svoju dužnost čuvanja lučice, odnosno imovine tužitelja. Nadalje, tužitelj smatra da bi u slučaju pravovremena uočavanja požara i poduzimanja odgovarajućih mjera požar bio ugašen te da bi na brodu nastala samo neznatna šteta. Sud je utvrdio da su stranke bile u ugovornom odnosu koji je sadržavao i elemente ugovora o ostavi uz naknadu. Međutim, sud je zaključio da nisu ispunjene pretpostavke za nastanak tuženikove odštetne odgovornosti. Tuženik u sporu nije dokazao da je zbog propusta tuženika u konkretnom slučaju došlo do uništenja tužiteljeva broda. Od tuženikova čuvara nije se moglo očekivati da bude neprekidno uz tužiteljev brod, a da je i primijetio izbijanje požara na tužiteljevu brodu, zbog brzine širenja požara, materijala od kojeg je sačinjen brod i ugrađena gorivog materijala u njemu te vjetra ne bi uspio ugasiti požar. Stoga je sud zaključio da to što tuženikov radnik (čuvar) nije pravovremeno uočio požar na tužiteljevu brodu nije u adekvatnoj uzročnoj vezi s uništenjem tužiteljeva broda u požaru. Sud smatra da u tuženikovu postupanju nije bilo propusta koji bi bili u uzročno- posljedičnoj vezi s nastalom štetom, pa je odbio tužbeni zahtjev. Sud je istaknuo da se prema odredbi 154., st. 1. ZOO-a krivnja štetnika za nastanak štete pretpostavlja, ali u ovom je slučaju utvrđeno da na strani tuženika nije bilo krivnje za nastanak tužiteljeve štete jer bi do nje došlo i u slučaju da je tuženikov radnik (čuvar) ranije uočio požar na tužiteljevu brodu.

Kao što je razvidno iz prikazanih sudskih odluka, u slučaju spora predmet sudskog tumačenja može biti što u konkretnom slučaju čuvanje plovila znači, koje su aktivne radnje luke nautičkog turizma uključene u izvršavanje obveze čuvanja, koji je standard pažnje potreban i sl. Odgovor na to pitanje daju pravila struke i priroda posla čuvanja plovila na vezu te, kao što je istaknuto, ponajprije ugovorne odredbe stranaka o tom pitanju. Znači, ako takvih odredbi nema u ugovoru, onda se ocjenjuje što iz prirode i svrhe konkretnog posla proizlazi. Treba imati na umu da izuzetno strog zahtjev ZOO-a iz ugovora o ostavi o poduzimanju svih radnji potrebnih da se čuvana stvar vrati u stanju u kojem je primljena, treba vrlo pažljivo i oprezno tumačiti ako se na ugovor o vezu s elementima čuvanja primjenjuju odredbe ZOO-a o ostavi.

8.3. Čuvanje - značaj i domašaj

Treba odgovoriti na pitanje u kojoj je mjeri moguće luci nautičkog turizma kao čuvaru plovila ispuniti imperativ karakterističan za ugovor o ostavi, a to je da se predmet ostave vrati u stanju u kojem je primljen. Ugovor o vezu s elementima čuvanja ima niz specifičnosti, a iz njih proizlaze i različitosti ovog ugovora u odnosu na ugovor o ostavi. Te specifičnosti se bitno odražavaju na ispunjavanje obveze čuvanja plovila u luci nautičkog turizma te značaj i domašaj obveze čuvanja u odnosu na čuvanje iz ugovora o ostavi. Istaknut ćemo najvažnije.

a) Ugovaranje čuvanja plovila na vezu ne isključuje pravo korisnika veza da iskorištava plovilo za vrijeme trajanja ugovora o vezu i čuvanju.

Korisnik veza za vrijeme trajanja ugovora o vezu s elementima čuvanja može dolaziti na plovilo, boraviti na plovilu, njime poduzimati plovidbeni pothvat te vraćati plovilo na vez i ponovno ga predavati na čuvanje luci nautičkog turizma. Takva praksa bitno odstupa od prakse iz ugovora o ostavi i razlikuje se od nje jer nije riječ o klasičnom deponiranju stvari tako da se ona, kao kod tipičnog ugovora o ostavi, predaje ostavoprimcu i time ostavlja na čuvanje

[84] VSRH, Rev-20/2008. od 2. 7. 2008.

te preuzima u ugovoreno vrijeme ili na zahtjev ostavodavca, a čime završava primjena ugovora. Uz to, ostavodavac iz ugovora o ostavi za vrijeme trajanja ugovora u pravilu ne iskorištava stvar niti joj fizički pristupa, drugim riječima, predaje predmet ostave ostavoprimcu u neposredan posjed i s njim nema doticaj do trenutka preuzimanja predmeta ostave, a stvar je najčešće u zaštićenu prostoru ili pod ključem ostavoprimca. Ako bi se ugovoru o vezu s elementima čuvanja oduzelo pravo korisnika veza da iskorištava plovilo za vrijeme trajanja ugovora, takav ugovor o čuvanju polovila izgubio bi elemente specifične za nautički turizam čija je osnovna funkcija plovidba i razonoda. Jedna je od specifičnosti ugovora o vezu s elementima čuvanja da marina nije čitavo vrijeme trajanja ugovora o vezu u neposrednom posjedu plovila kao objekta čuvanja, a za vrijeme korištenja plovila može doći do promjena na plovilu kao objektu čuvanja. Naime, zbog iskorištavanja plovila može doći do kvara na uređajima (električnim, hidrauličkim, mehaničkim i dr.), popuštanja čvrstoće opreme za prirez na plovilu, oštećenja oplate trupa plovila, primjerice, ogrebotina i sl. Te posebnosti imaju za posljedicu da za vrijeme dok je korisnik veza na plovilu, luka nautičkog turizma nije odgovorna za čuvanje plovila. Takva praksa obrazlaže se činjenicom da je vlasnik plovila tada u neposrednom posjedu svog plovila, on ga iskorištava i dužan je preuzeti punu skrb o njegovoj sigurnosti i čuvanju. Primjerice, u sporu koji je riješen nagodbom, pojavilo se pitanje odgovornosti za štetu na plovilu do koje je došlo tijekom kuhanja na plovilu kad je plamen zahvatio zavjesu. Stranke su sporazumno riješile spor i zaključile da u tom slučaju nema odgovornosti marine za čuvanje plovila na vezu jer je na plovilu bio vlasnik plovila te je on odgovoran za njegovo čuvanje i sigurnost. Znači, imanentno je ugovoru o vezu s elementima čuvanja da se ispunjava bitno drugačije nego ugovor o ostavi. To je posljedica svrhe koja se ugovorom želi postići, a ona se razlikuje od svrhe čuvanja stvari kod ugovora o ostavi.

b) Marina ne može imati isključivu kontrolu nad plovilima na vezu jer u luku slobodno mogu ulaziti zainteresirani posjetitelji, korisnici drugih plovila, korisnici ugostiteljskih i drugih uslužnih djelatnosti marine i sl.

Marine su na pomorskom dobru, a u svim lukama nautičkog turizma otvoren je pristup. Dakle, marine ne provjeravaju identitet osoba koje ulaze u njihov prostor. Stoga marina ne može imati apsolutnu i isključivu kontrolu nad plovilom na vezu koje čuva. Marine ne nude čuvanje plovila u garažiranom prostoru koji je pod ključem. Iako je moguće da se vez nalazi na gatu pod ključem, i u tim okolnostima ostaje prostor za pristup plovilima morskim putem, pa i ta činjenica pokazuje da marine ne mogu apsolutno onemogućiti pristup plovilima i osobama koje nisu njihovi vlasnici ili korisnici. Zbog toga je bitno ograničena i onemogućena kontrola ulaska na plovila osoba koje nisu vlasnici ili korisnici plovila. Čuvanje u klasičnom smislu značenja te riječi trebalo bi uključivati zabranu ulaska na plovilo osoba koje nisu vlasnici plovila ili nemaju punomoć vlasnika u pisanom obliku. Takve stroge kondicije nastoje se u praksi ispunjavati tako što luke nautičkog turizma koje nude čuvanje, općim uvjetima ugovora propisuju obvezu korisnika veza da prijavi svaki dolazak i odlazak s plovila te da na recepciji preda ključeve plovila i plovidbenu dozvolu, a od trećih osoba koje traže pristup na plovilo marina će zahtijevati odgovarajuću punomoć ili sličan pravni temelj.[85]

c) Specifičnosti plovila kao predmeta ostave

Zbog prirode predmeta ostave treba uzeti u obzir da luka nautičkog turizma ne može spriječiti promjene na plovilu ako se uzme u obzir zamor materijala i činjenica da su uređaji i

[85] O posljedicama propuštanja korisnika veza da vrati ključeve i dokumentaciju plovila nakon završene plovidbe te vraćanja plovila na vez i čuvanje u luku nautičkog turizma opširnije *infra*. Predaja plovila na čuvanje.

oprema (elektronika, mehanika, hidraulika) izloženi stalnoj vlazi, soli, koroziji i uvjetima koji vladaju na moru. Primjerice, činjenica da je motor radio pri predaji plovila na čuvanje nakon završetka nautičke sezone, ne znači da će raditi i na početku nove sezone jer su se u međuvremenu mogle dogoditi promjene zbog vlage, soli, smrzavanja i sl. na koje marina u pravilu ne može utjecati. Stoga treba precizno utvrditi opseg i doseg svih obveza koje čine sadržaj obveze čuvanja u konkretnom ugovoru. Primjerice, ako je prema sporazumu stranaka čuvanje trebalo uključiti i konzervaciju motora te njegove posebne uvjete čuvanja, onda je vjerojatno kao posebna svrha ugovora određeno da motor ostane u ispravnom stanju, tj. očuvan i zaštićen. Zbog svega toga treba respektirati promjene nastale zbog redovita trošenja i posebnih uvjeta boravka i čuvanja plovila na vezu od onih koje su nastale kao posljedica neispunjavanja obveza marine iz ugovora o vezu s elementima čuvanja.

d) Obveze su vlasnika održavanje u ispravnom stanju plovila i opreme te njihovo čuvanje za vrijeme trajanja ugovora o vezu

Sadržaj obveze i svrha ugovora o ostavi čuvanje je stvari te je ostavoprimac obvezan poduzeti sve radnje potrebne da se čuvana stvar vrati ostavodavcu u stanju u kojem je primljena.[86] Kad je u pitanju čuvanje plovila na vezu, već koncepcijski i suštinski ta obveza nije u potpunosti analogna zato što je, prema ugovoru o vezu, za vrijeme trajanja ugovora zadaća vlasnika čuvanje plovila na vezu, njegovo održavanje u ispravnu stanju, skrb o stanju konopa i bokobrana, o ispravnosti opreme i sl. U slučaju propusta dužne pažnje, luka nautičkog turizma ovlaštena je na trošak korisnika veza obaviti mjere i radnje u okviru svojih ovlaštenja u svrhu očuvanja imovine i sprečavanja nastanka štete i u tom slučaju nastupa u ime i za račun korisnika veza.

Zbog opisanih su razloga značenje i domašaj obveze čuvanja plovila na vezu kompliciranipa su u određenim segmentima neusporedivi s klasičnim čuvanjem deponirane stvari prema ugovoru o ostavi.

8.4. Predaja stvari/plovila na čuvanje

Ugovori o vezu s elementima čuvanja neizostavno sadrže odredbe o predaji plovila na čuvanje. O predaji plovila govori se obično u općim odredbama ugovora na mjestu na kojem se govori o sklapanju ugovora i zasnivanju obveza ili pak u dijelu ugovora u kojem se stipuliraju obveze stranaka. Za razliku od toga, u zakonskim odredbama koje uređuju ugovor o ostavi, ne govori se o obvezi ostavodavca da preda predmet ostave na čuvanje. Domaći autori smatraju da obveze ostavodavca na predaju stvari po naravi stvari ne treba ni biti.[87] Neki autori objašnjavaju to navodom da je za pojam ostave bitno istaknuti obvezu ostavoprimca da primi i čuva stvar ostavodavca, a ne predaju same stvari jer ona nema značenje za nastanak ugovora.[88] Nije se teško složiti s tvrdnjom da predaja stvari kod ostave kao konsenzualnog ugovora nije akt sklapanja, ali ostaje nejasno kako će se stvar naći kod ostavoprimca ako nema ostavodavčeve obveze da ju preda ostavoprimcu. Zbog toga neki autori smatraju da ako je ostava nastala već samim sporazumom strana, a to je bit njegove konsenzualne naravi, predaja stvari ostavoprimcu može uslijediti jedino kao ispunjenje ostavodavčeve obveze na predaju stvari

[86] Gorenc i dr. *Obvezno pravo*…, op. cit., str. 367.

[87] Klarić; Vedriš, op. cit., str. 544.

[88] Perović, S. *Komentar Zakona o obligacionim odnosima*. Knjiga druga. Redakcija Perović, S.; Stojanović, D. 1980. Beograd. str. 495. Citirano prema Klarić; Vedriš. *Građansko pravo*, op. cit., str. 544.

(osim ako se stvar već ne nalazi kod ostavoprimca po nekoj drugoj osnovi). Upravo je zato za konsenzualni karakter ostave bitno apostrofirati obvezu ostavodavca na predaju stvari, a ne samo obvezu ostavoprimca da ju čuva. Uostalom, to neminovno proizlazi iz činjenice da je stvar koju treba čuvati bitan sastojak ostave, što se smatra nespornim.[89] O samom primanju stvari na čuvanje, osim u definiciji ugovora o ostavi (čl. 752. st., 1. ZOO-a), nema posebnih odredaba. S obzirom na konsenzualne značajke ovog ugovora, prva je obveza ostavoprimca preuzeti stvar. Ispunjenje obveze prethodni je akt u cilju ostvarenja čuvanja stvari zbog koje je ugovor o ostavi sklopljen.[90]

U autonomnim izvorima prava koji uređuju ugovor o vezu s elementima čuvanja obveza *predaja* plovila smatra se toliko važnom da se njezino neispunjenje smatra nemarnošću vlasnika, odnosno korisnika plovila te dovodi do izostanka ugovorne odgovornosti marine. Činjenično je pitanje što se smatra *predajom* plovila na čuvanje. Međutim, u ugovorima o vezu s elementima čuvanja i to pitanje stranke precizno ugovaraju. Prema analiziranim općim uvjetima ugovora, plovilo se smatra predanim na čuvanje kad je dovedeno na vez i kad su predani dokumenti plovila (plovidbena dozvola, odnosno odgovarajuća isprava koja omogućuje isplovljenje), ključevi plovila i liste inventara. Treba imati u vidu da sličnosti ovog modela ugovora o vezu, znači modela koji sadrži eksplicitne sadržaje čuvanja prema modelu ugovora o vezu kojim se ugovara najam mjesta za vez i nadziranje plovila na vezu, a prema kojem se također ugovara predaja ključeva plovila i plovidbene dozvole u praksi, ne smiju dovesti do njihova poistovjećivanja. Naime, ta sličnost ne znači njihovu kongruentnost, to su različiti modeli ugovora, a funkcija predaje ključeva kod jednog je u funkciji predaje plovila na čuvanje, a kod drugog predaje plovila pod nadzor. Ostali elementi ugovora upućuju na njihovu različitost i bitno različit sadržaj ispunjavanja obveze nadziranja plovila na vezu od obveze čuvanja plovila na vezu.

O posljedicama neispunjenja *predaje* plovila kao ugovorne obveze korisnika veza VSRH decidirano se očitovao.[91] U sporu u kojem je korisnik veza potraživao naknadu štete od marine zbog toga što je njegova jahta na vezu (nestala) ukradena, sud je odbio tužbeni zahtjev i odlučio da nema osnove za odgovornost marine. Sud je u odluci jasno obrazložio i protumačio kakvo značenje na ugovorni odnos stranaka ima tužiteljevo propuštanje ispunjenja obveze predaje plovila na čuvanje. Istaknuo je da je obveza vlasnika plovila iz ugovora o vezu s elementima ostave predati brod na čuvanje, a brod se smatra predanim predajom navigacijske dozvole i ključeva broda koji ostaju na recepciji za vrijeme čuvanja. Tužitelj nije predao navigacijsku dozvolu na recepciji kad je posljednji put odlazio iz marine i ostavljao brod, a uz to, jedan primjerak ključeva ostavio je na brodu. Prema shvaćanju suda iz takva činjeničnog stanja proizlazi pravna ocjena da tom prilikom brod tužitelja nije ni bio predan na čuvanje u marini, stoga nema obveze tuženika na naknadu štete tužitelju. Sud je zaključio da je tuženik obvezan naknaditi štetu tužitelju za vrijeme čuvanja broda, ali tek kad vlasnik preda brod na čuvanje, s tim da se brod smatra predanim na čuvanje predajom navigacijske dozvole i ključeva broda što u konkretnom slučaju nije ostvareno.

Razlike između ugovora o vezu s elementima čuvanja i ugovora o ostavi dolaze do izražaja i u pogledu predaje plovila na čuvanje. Prisutno je nekoliko posebnosti. Najvažnija je da predaja plovila na čuvanje kod ugovora o vezu s elementima čuvanja nije fiksirana samo na trenutak ispunjenja jednokratne ugovorne obveze kao što je to slučaj kod klasičnog ugovora o

[89] Tako i Klarić; Vedriš, op. cit., str. 544.

[90] Gorenc i dr. *Komentar Zakona o obveznim odnosima*…, op. cit.

[91] VSRH, Rev-244/2013 od 17. 4. 2013.

ostavi. Korisnik veza za vrijeme trajanja ugovora o vezu s elementima čuvanja može dolaziti na plovilo, na njemu boraviti, njime ploviti i vraćati ga ponovno na vez i čuvanje. U praksi, kad je ugovoreno čuvanje, marina i korisnik veza ugovaraju obvezu korisnika veza da obavijesti marinu o svom dolasku i odlasku s plovila. Međutim, kod svakog takva dolaska i odlaska s plovila za vrijeme trajanja ugovora izostaje element primopredaje i zapisničkog konstatiranja stanja plovila i opreme. Naime, u praksi je teško provedivo i potpuno nepraktično i neekonomično da stranke ugovora o vezu s elementima čuvanja svaki put kad vlasnik dođe s plovilom u marinu, odnosno kad napušta plovilo i ostavlja ga na čuvanje, vrše primopredaju plovila na čuvanje u punom značenju i dosegu te ugovorne obveze misleći pritom na sastavljanje inventarnih listi, pregled te zapisničko utvrđivanje i opisivanje stanja plovila i opreme.

U pogledu vraćanja plovila, a ta je obveza podudarna kod ugovora o ostavi (čl. 731. ZOO-a), treba istaknuti da su marina, odnosno ostavoprimac iz ugovora o ostavi dužni vratiti plovilo (stvar) u stanju u kojem je primljeno uzimajući u obzir redovitu amortizaciju, odnosno gubitak vrijednosti po prirodi stvari. Dakle, trebalo bi u slučaju neslaganja stranaka o činjenici postoji li i u kojoj mjeri pogoršanje stanja plovila, utvrditi i respektirati elemente redovitog trošenja plovila kao predmeta čuvanja te posebne okolnosti koje se tiču uvjeta čuvanja plovila u moru koje je izloženo eroziji, koroziji vlazi, soli i sl.

8.5. Mjesto i način čuvanja plovila s posebnim osvrtom na pravo luke nautičkog turizma da mijenja mjesto i način čuvanja

Ugovorima o vezu s elementima čuvanja plovila ugovara se mjesto čuvanja plovila tako da se u ugovoru odredi da je to, primjerice, vez na suhom ili vez u moru te se ugovori broj veza, gata/pontona i slično na kojem će plovilo biti privezano. Također, stranke u pravilu u ugovoru o vezu s elementima čuvanja plovila opisuju i način čuvanja pa se, primjerice, navodi da se marina obvezuje vršiti nadzor nad konopima koje daje vlasnik za privez plovila za gat/ponton i to 24 sata, izbacivati vodu iz plovila, provjetravati unutrašnjost plovila, pokrivati plovilo pokrivačem (ceradom) i sl. Specifičnost je ugovora o vezu u tome što iako je mjesto za vez designirano, unajmitelju veza ne omogućuje se ekskluzivno pravo na uporabu konkretnog veza. Općim uvjetima poslovanja predviđa se da je marina ovlaštena svako plovilo prema potrebama marine premještati i na druge odgovarajuće vezove.

Sudska praksa potvrdila je stajalište da sklapanjem ugovora o uporabi veza korisnik veza ne stječe pravo na uporabu određenog veza, nego pravo da mu marina (tužitelj) osigura vez za vrijeme dok se nalazi u luci nautičkog turizma (kod tužitelja).[92]

Za premještanje plovila marini nije potrebno odobrenje korisnika veza, ali se općim uvjetima u pravilu predviđa posebna obveza marine da korisnika veza obavijesti o obavljenom premještanju. Razlog za premještanje plovila može biti komercijalne prirode, međutim, do premještanja plovila u praksi može doći radi izvršavanja javnih ovlasti luke nautičkog turizma kao koncesionara koji je dužan brinuti se o sigurnosti u luci, a u obzir može doći i postupanje marine kao spašavatelja.[93] To se može reflektirati na pitanje odgovornosti za štetu nastalu na plovilu tijekom njegova premještanja, ali i za eventualnu štetu glede, primjerice, činjenice da vez na koji je plovilo premješteno u tehničkom i nautičkom smislu nije bio odgovarajući za

[92] VTS, Pž-8130/03 od 22. 11. 2016.

[93] Riječ će biti o spašavanju ako luka nautičkog turizma u konkretnom slučaju poduzima posebne aktivnosti koje iziskuju iznimne vještine i napore, a koje nadilaze uobičajene i redovite aktivnosti luke nautičkog turizma u obavljanju njezine profesionalne dužnosti i djelatnosti iz ugovora o vezu te koje su usmjerene na pomoć plovilu i imovini u opasnosti.

određeno plovilo. Propisivanjem takvih uvjeta poslovanja luci nautičkog turizma omogućeno je da upravlja svojim smještajnim kapacitetima za vez potpuno suvereno.[94]

U slučaju spora iz ugovora o vezu i čuvanju plovila relevantne su ugovorne odredbe stranaka koje se odnose na mjesto i način čuvanja, ponajprije je važno utvrditi sadrže li ugovor i/ili opći uvjeti ugovora odredbe prema kojima je luka nautičkog turizma ovlaštena premještati plovilo bez odobrenja korisnika veza. Treba skrenuti pažnju na to da ako je mjesto za vez designirano te način čuvanja također ugovorom propisan, a ugovor ne sadrži permisivnu odredbu za premještanje plovila na vezu bez traženja pristanka korisnika veza, na ugovor se mogu primijeniti odredbe ZOO-a o ostavi koje su stroge u pitanju odgovornosti za štetu ako ostavoprimac mijenja mjesto i način čuvanja stvari.

Iz toga proizlazi da ako o pitanju mjesta i načina čuvanja postoje ugovorna utanačenja kojima se ugovaraju mjesto i način čuvanja te opisuje u kojim je slučajevima ostavoprimac ovlašten premjestiti stvar, slijedeći načelo *pacta sunt servanda*, ostavoprimac *ne može* promijeniti ugovoreno mjesto ni način čuvanja niti pak može premjestiti stvar, osim u ugovorom utvrđenim slučajevima. Dakle, u odnosu na mjesto čuvanja, njegovo mijenjanje i premještanje, ostavoprimac ne smije postupiti drugačije od ugovorenog. Međutim, u pogledu ugovorenog mjesta i načina čuvanja stvari, zakon pravi iznimku od načela *pacta sunt servanda*. Ako su ugovoreni mjesto i način čuvanja te, eventualno, u ugovoru definirani razlozi zbog kojih ostavoprimac može premještati stvar s ugovorenog mjesta na drugo mjesto, ostavoprimac ih može promijeniti *samo* ako to zahtijevaju promijenjene okolnosti.[95] Mijenja li ostavoprimac ugovoreno mjesto i način čuvanja, a da se okolnosti čuvanja nisu promijenile, odgovara i za slučajnu propast ili slučajno oštećenje stvari.[96] Znači, odgovara po objektivnom kriteriju (uzročnosti). Takav zaključak proizlazi iz zakonskih odredbi koje govore o čuvanju stvari, a kojima se uređuju obveze ostavoprimca (čl. 727.-731. ZOO-a). Za ovu povredu ugovorne obveze odgovara se po općim pravilima o ispunjenju obveze i popravljanju štete nastale povredom ugovora (čl. 342. ZOO-a).[97] Činjenično je pitanje u svakom konkretnom slučaju je li došlo do promijenjenih okolnosti i kad promijenjene okolnosti zahtijevaju promjenu mjesta i načina čuvanja stvari. Primjena odredbe čl. 727., st. 2. ZOO-a nije povezana s pitanjem krivnje i odgovornosti za nastanak promijenjenih okolnosti. Može biti riječ o krivnji ostavoprimca, treće osobe ili ostavodavca, višoj sili i slučaju, a to će pitanje biti odlučno za ugovornu odgovornost. Važno je naglasiti da zakon ublažava ovako strogu odgovornost i predviđa isključenje od odgovornosti ostavoprimca. Kad ostavoprimac suprotno ugovoru mijenja mjesto i način čuvanja, ne odgovara za slučajnu propast ili oštećenje stvari, ako bi do njih došlo, i da je postupao u skladu s ugovorom.[98] U tom slučaju vrijedi pravilo da štetu snosi vlasnik stvari, a kod ugovora o ostavi to je redovito ostavodavac.[99] Osim u opisanom slučaju, ZOO odstupa od načela odgovornosti ostavoprimca prema kriteriju presumirane krivnje u još dvama slučajevima.[100] Ostavoprimac odgovara prema načelima objektivne odgovornosti (po kriteriju uzročnosti) i kad bez pristanka ostavodavca ili bez nužde, suprotno ugovoru, rabi stvar ili kad stvar preda na čuvanje

[94] Rezultati terenskih istraživanja pokazuju da su u praksi najčešći razlozi za premještanje komercijalne prirode (marina slobodno raspolaže vezovima s obzirom na trenutnu potražnju tranzitnih i stalnih vezova), a premještanje se najčešće vrši tegljenjem. U pravilu, osoblje marine ne ukrcava se na plovilo i ne pali motore.

[95] Arg. iz čl. 727., st. 2. ZOO-a.

[96] Čl. 727., st. 2. ZOO-a.

[97] Tako Gorenc i dr. *Komentar zakona o obveznim odnosima…*, op.cit., str. 1122.

[98] Čl. 730. ZOO-a.

[99] Gorenc i dr. *Komentar zakona o obveznim odnosima…*, op.cit., str. 1125.

[100] O temelju odgovornosti marine kao ostavoprimca opširnije *infra*.

drugoj osobi (podostava ili subdepozit).[101] Međutim, i u ovim dvama slučajevima zakonom je isključena odgovornost ostavoprimca za slučajnu propast ili oštećenje do kojih bi došlo i da se postupalo u skladu s ugovorom.[102]

U prethodno izloženoj presudi, VSRH[103] je odlučivao u sporu glede naknade štete iz ugovora o vezu i čuvanju plovila u kojem se, prema našoj ocjeni, kao središnje pitanje pojavilo upravo pitanje kakvo značenje i pravne reperkusije na ugovorni odnos ima mijenjanje mjesta i načina čuvanja plovila. Sud je zaključio da je plovilo na vezu potonulo jer marina nije čuvala plovilo tužitelja s pažnjom dobrog gospodarstvenika, a na što se obvezala odredbom ugovora sklopljenog u smislu odredbe čl. 714. ZOO-a zbog čega odgovara tužitelju za štetu. U ovom sporu korisnik veza potražuje naknadu štete od marine, a marina protutužbom potražuje naknadu za čuvanje plovila na suhom vezu nakon što je izvađeno iz mora. Naime, nekoliko dana nakon što je plovilo potonulo, vlasnik (tužitelj) izvadio ga je iz mora i smjestio na suhi vez kod tuženika. Tužitelju je dosuđena naknada štete u visini vrijednosti plovila s opremom i pogonskim motorima prije nezgode te naknada za troškove vađenja potonulog plovila, a nižestupanjski sudovi (Općinski sud u Zadru i Županijski sud u Zadru) odbili su protutužbeni zahtjev tuženika kao protutužitelja (marine), koji se odnosi na plaćanje naknade za čuvanje plovila na suhom vezu, s obrazloženjem da je potonućem tužiteljeva broda došlo do prestanka važenja ugovora o najmu veza i čuvanju plovila, a među strankama nije sklopljen (novi) ugovor o najmu suhog veza ili garaže. VSRH smatra da je ocjena nižestupanjskih sudova kako je ugovor o najmu veza i čuvanju plovila prestao potonućem broda pravilna, zbog čega nema osnova za potraživanje naknade od tužitelja za usluge ugovorene tim ugovorom. Međutim, VSRH smatra da se pravna ocjena nižestupanjskih sudova o neosnovanosti protutužbenog zahtjeva tuženika ne može prihvatiti kao pravilna, makar s osnove ležarine. Istaknuo je da je zbog pogrešnog pravnog pristupa nižestupanjskih sudova glede protutužbenog zahtjeva činjenično stanje u tom dijelu ostalo nepotpuno utvrđeno pa je u tom dijelu ukinuo obje nižestupanjske presude i predmet vratio provostupanjskom sudu na ponovno odlučivanje. U nastavljenom postupku prvostupanjski sud treba ocijeniti značaj i narav pravnog odnosa smještaja plovila kod tuženika na suhi vez te potom ponovno odlučiti o protutužbenom zahtjevu.

Smatramo da u opisanom slučaju nema osnove za zaključak da je ugovor o vezu prestao zbog potonuća plovila na vezu. U ovom slučaju bilo je nužno promijeniti mjesto i način čuvanja plovila, a promjenu ugovorenog mjesta i načina čuvanja plovila zahtijevale su promijenjene okolnosti. Naime, plovilo je potonulo pa se njegovo čuvanje više nije moglo ispunjavati držanjem plovila na vezu u moru, već je jedini učinkovit način čuvanja bilo njegovo premještanje na suhi vez. Iz činjenica koje su nam dostupne, a do kojih dolazimo analizom revizijske odluke, vidljivo je da je marina nastavila čuvanje plovila na suhom vezu nakon što je vlasnik plovila izvadio potonulo plovilo. Tu činjenicu marina ne osporava, štoviše, u postupku protutužbom potražuje naknadu za čuvanje plovila na suhom vezu. Budući da nakon vađenja plovila iz mora novi ugovor o vezu i čuvanju plovila na suhom vezu nije sklopljen, a očito je da su stranke nastavile izvršavati ugovor o čuvanju plovila jer je tužitelj ostavio plovilo na suhom vezu u marini, a marina protutužbom potražuje naknadu za njegovo čuvanje, smatramo da nema osnove za zaključak da je ugovor o vezu i čuvanju plovila prestao. Znači, na temelju takva činjeničnog stanja trebalo bi smatrati da je ugovor o vezu i čuvanju plovila na snazi te da su mjesto i način njegova čuvanja promijenjeni zbog nesporno promijenjenih okolnosti koje

[101] Čl. 728. i čl. 729. ZOO-a.

[102] Čl. 730. ZOO-a.

[103] VSRH, Rev 2333/2010 od 14. svibnja 2013.

su zahtijevale promjenu mjesta i načina čuvanja. U prilog takvu zaključka govori i činjenica da nijedna stranka u postupku nije raskinula ugovor o najmu i čuvanju plovila, a zbog same činjenice potonuća plovila ne može se smatrati da je ugovor prestao.[104] Cilj prethodno obrazložene norme čl. 727., st. 2. ZOO-a, koja daje zakonsko ovlaštenje ostavoprimcu da može premjestiti stvar, upravo je u tome da se promijene mjesto i način čuvanja prije nego što nastupe oštećenje ili propast predmeta ostave zbog promijenjenih okolnosti. U konkretnom slučaju, marina je trebala reagirati premještanjem plovila na vrijeme, dakle prije njegova potonuća. Očito je da to nije učinjeno, a marina je nakon obavješćivanja vlasnika plovila o potonuću plovila na vezu s njim ostala u ugovornom odnosu. Iz držanja stranaka proizlazi kako je bila njihova volja da se njihov ugovorni odnos čuvanja plovila nastavi ispunjavati i nakon vađenja plovila i njegova premještanja na suhi vez.

9. Zaključak

U okviru kompleksne materije ugovora o vezu kao jednom od iznimno važnih pitanja, u praksi se pojavljuje pitanje postoji li i u kojim slučajevima odgovornost luke nautičkog turizma korisniku veza za čuvanje plovila na vezu. Odgovor na to pitanje zadire prvenstveno u raspravu o sadržaju konkretnog ugovora o vezu te analizu autonomnih izvora prava koji se na taj ugovor primjenjuju, ali i u njegovu pravnu prirodu. U pogledu pravnih izvora koji uređuju ovaj pravni posao, važno je istaknuti da ugovori o pružanju usluga luka nautičkog turizma, poglavito ugovori o iznajmljivanju vezova, a zatim i oni o nadzoru i čuvanju plovnih objekata te njihovu uređenju, pripremanju, održavanju, servisiranju i sl., nisu pravno regulirani posebnim zakonskim odredbama. Riječ je o atipičnim inominatnim ugovorima. Zbog toga je složen i zakonodavni okvir koji se primjenjuje na ove ugovore.

U svim slučajevima u kojima se postavlja pitanje ugovorne odgovornosti luke nautičkog turizma iz ugovora o vezu, treba imati na umu da je ustupanje mjesta za vez bitan sadržaj ovog ugovora, odnosno njegova osnovna *differentia specifica*. Ocjene i zaključak o tome koje su, eventualno, druge obveze luke nautičkog turizma u pogledu plovila na vezu, primjerice, nadziranje stanja plovila, čuvanje, održavanje i sl. trebaju se iznimno pažljivo donositi, i to tumačenjem i promatranjem isključivo konteksta konkretnog ugovora o vezu i općih uvjeta ugovora luke nautičkog turizma koja je stranka u tom ugovoru o vezu. Drugim riječima, odgovornost za čuvanje plovila na vezu nikako se ne može presumirati kao sadržaj svakog ugovora o vezu niti se svaki ugovor o vezu može tumačiti tao da je čuvanje plovila na vezu njegov sastojak. Drugačija praksa može biti pogrešna i štetna ako kvalifikacija pravne prirode konkretnog ugovora o vezu kao ugovora o ostavi ne proizlazi iz njegova precizno i točno utvrđenog sadržaja, kao i iz točno utvrđene prave volje ugovornih stranaka.

S tumačenjem svakog pojedinog ugovora o vezu izravno je povezano i pravilno tumačenje autonomnih izvora prava, u ovom slučaju općih uvjeta ugovora luka nautičkog turizma. Njihovo tumačenje pokazuje da je u poslovnoj praksi hrvatskih marina čuvanje plovila na vezu rijetko, tj. uređuje se općim uvjetima ugovora nekoliko manjih marina dok većina marina isključuje obvezu čuvanja plovila na vezu. Nešto češće se takva obveza ugovara u suhim marinama i odlagalištima plovnih objekata.

[104] U okviru istraživanja na projektu DELICROMAR *supra* bilješka 1., autori ovog rada proučavaju i pravne učinke potonuća plovila na vezu na ugovorne odnose stranaka. Rezultati istraživanja bit će objavljeni u posebnom radu koji je u izradi.

Rezultati analize pokazuju da su opći uvjeti poslovanja luka nautičkog turizma neujednačeni i nestandardizirani, a središnji problem ove materije njihova je nepreciznost i nedorečenost. Posljedica ovog ozbiljnog nedostatka postojećeg autonomnog prava neujednačena je sudska praksa, što sve zajedno dovodi do pravne nesigurnosti.

Analogija ugovora o vezu s elementima čuvanja prema ugovoru o ostavi moguća je u vrlo ograničenu segmentu. Ugovor o vezu s elementima čuvanja često se na razini pojedinačnih rješenja razlikuje od ugovornog uređenja ugovora o ostavi iz ZOO-a. Položaj luke nautičkog turizma i korisnika veza kao stranaka iz ugovora o vezu s elementima čuvanja ne može se u potpunosti poistovjetiti s položajem ostavoprimca i ostavodavca iz ugovora o ostavi. Odnos obiju ugovornih strana iz ugovora o vezu s elementima čuvanja prema plovilu kao objektu čuvanja te njihove obveze u odnosu na plovilo kao objekt čuvanja imaju toliko specifičnosti da se mogu pronaći samo vrlo ograničene sličnosti s obvezama ostavodavca i ostavoprimca u odnosu na objekt ugovora o ostavi. Prvenstveno je riječ o puno aktivnijoj ulozi korisnika veza u odnosu na ostavodavca iz ugovora o ostavi u pogledu obveza prema plovilu kao objektu čuvanja. Različitost dvaju ugovora može se najbolje shvatiti u onim segmentima ugovornog odnosa koji se tiču: a) preuzimanja plovila na čuvanje, b) posebnosti (svojstva) plovila kao predmeta čuvanja, c) načina, sadržaja, dosega i značenja čuvanja koji su uvjetovani specifičnostima i svrhom posla čuvanja plovila na vezu, d) obveza stranaka u odnosu na plovilo na vezu.

Stoga, ako na ugovor o vezu s elementima čuvanja plovila na vezu dođu do primjene odredbe ZOO-a o ostavi, njihovo tumačenje i primjenu treba prilagoditi svrsi, cilju i posebnostima ugovora o vezu s elementima čuvanja plovila na vezu.

Poželjno je da stranke, što u praksi redovito i čine, svoje obveze i ugovornu odgovornost iz ugovora o vezu s elementima čuvanja prilagode specifičnostima ugovora o vezu s elementima čuvanja, i to onim elementima koji proizlaze iz posebnosti pomorskih rizika kojima je plovilo na vezu izloženo, svojstvima plovila kao objekta čuvanja te svrsi ugovora o vezu s elementima čuvanja.

Specifičnosti koje se ugovaraju:

a) Određuje se vez za plovilo brojem i lokacijom veza, a luka nautičkog turizma ovlaštena je prema potrebama plovilo premještati na druge odgovarajuće vezove za što nije potrebno odobrenje korisnika veza.
b) Korisnik veza obvezuje se za vrijeme boravka u luci nautičkog turizma čuvati i održavati plovilo i opremu plovila postupajući s primjerenom pažnjom. Nadalje, dužan je opremiti plovilo kvalitetnim i odgovarajućim konopima za privez i bokobranima za sve vrijeme boravka plovila u luci nautičkog turizma.
c) Za vrijeme trajanja ugovora o vezu vlasnik može dolaziti na plovilo te njime ploviti i vraćati se na vez, a dužan je luci nautičkog turizma najaviti svako isplovljavanje iz luke nautičkog turizma te predati isprave plovila i ključeve svaki put kad plovilo ostavlja u luci nautičkog turizma.

Sve istaknute karakteristike ugovora o vezu jasno pokazuju da se njihovo ugovorno uređenje u velikoj mjeri razlikuje od ugovornog uređenja ugovora o ostavi propisanog ZOO-om, i to ne samo na razini pojedinačnih rješenja već i u koncepciji na kojoj njihovo uređenje počiva. Tu činjenicu poslovna praksa i sudovi trebaju respektirati kad odlučuju o ugovornoj odgovornosti.

Problem u praksi neprecizni su i nedovoljno razrađeni opći uvjeti ugovora pa smatramo potrebnim i korisnim da luke nautičkog turizma svoje opće uvjete ugovora urede na prikladniji način. Taj imperativ nužan je s aspekta osiguranja urednog funkcioniranja pravnog pro-

meta u nautičkom turizmu. Potrebno je u poslovnoj praksi uskladiti prava, ekonomske interese i poslovanje luka nautičkog turizma s ekonomskim interesima i pravima korisnika usluga veze u slučaju gubitka ili oštećenja plovila na vezu.

Smatramo da bi unapređivanje pravnog okvira za ugovore o vezu, pa tako i ugovore o vezu s elementima čuvanja, trebalo ići u smjeru tipiziranja općih uvjeta poslovanja i izrade modela standardnih općih uvjeta poslovanja hrvatskih luka nautičkog turizma. Ovaj rad treba poslužiti kao znanstvena podloga za izradu općih uvjeta ugovora koji sadrže bitne sastojke ugovora o ustupanju mjesta na vez i čuvanju plovila. Svrha standardizacije općih uvjeta poslovanja postizanje je pravne sigurnosti i predvidivosti sudske i poslovne prakse, pojednostavljenje i ubrzavanje pravnog prometa, povećanje učinkovitosti ugovaranja, standardizacija rizika u svim istovrsnim poslovima. Time će se lukama nautičkog turizma omogućiti učinkovitiji nadzor nad sustavom vlastitog poslovanja koje zbog porasta nautičkog turizma podrazumijeva i veću frekventnost sklapanja velikog broja istovrsnih ugovora s različitim kontrahentima. Ekspanzija nautičkog turizma zahtijeva složenu organizaciju, dobro pravno strukturirane i razrađene opće uvjete poslovanja te rutinirane postupke pri njihovu sklapanju i ispunjavanju s ciljem ostvarivanja jednoobraznosti u istovrsnim poslovima.

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3. Opći uvjeti poslovanja Marine *Kaštela*.
4. Opći uvjeti poslovanja za smještaj plovila u luci nautičkog turizma *Lav*.
5. Opći uvjeti poslovanja za smještaj plovila u Marini *Zadar color*.
6. Opći uvjeti poslovanja Marine *Baotić* (Nautički centar *Trogir*).
7. Opći uvjeti za korištenje veza u *Adriatic Croatia International Clubu* d. d. Opatija.
8. Ugovor o korištenju veza Marine *Dalmacija.*
9. Ugovor o korištenju veza Marine *Borik*.
10. Ugovor o korištenju veza Marine *Mandalina.*
11. Opći uvjeti korištenja veza za smještaj povila u Marini *Agana*.
12. Ugovor o korištenju veza u Laguni *Poreč*.
13. Ugovor o korištenju veza u Marini *Solaris*.
14. Ugovor o vezu s *Tehnomontom* d. d. Pula.
15. Ugovor o korištenju suhog veza s *Nauta Lamjanom*.
16. Ugovor o korištenju veza na suhom s *Marservisom*.
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ARE THERE ANY ELEMENTS OF THE CONTRACT OF CUSTODY IN THE MARINA OPERATORS' CONTRACTS OF BERTH?

SUMMARY

The contracts of marina operators' services, mainly the contracts of berth, but also those including the care, custody and control of pleasure craft, their maintenance and repair, are not regulated by any special legal provisions. These are atypical innominate contracts created through the marina operators' business practice. The respective contract terms are usually prepared and proposed by the provider of the service of berth, i.e. the marina operator. The practice of concluding the contract and defining its scope and contents relies on the use of the marina operators' general terms of business. The title "contract of berth" frequently entails various contents, legal nature, scope of the parties' obligations, extent of contractual liabilities. The preliminary analysis shows that the marina operators' general terms and conditions are not uniform and standardised, and that the central problem of this matter is the lack of precision in the wordings and their frequent ambiguity. Subsequently, the relevant judicial practice is unconsolidated, which altogether leads to legal uncertainty. It is noted that the domestic courts do not seem to recognize the fact that the marina operators provide various ranges of services under their contracts of berth. Namely, these contracts can vary from the simple providing of the nautical berth to a complex combination of services that besides the berth itself include e.g. the care and custody of the vessel, its maintenance, repair, or similar. In addition, the legal framework applicable to these contracts is rather complex, as it includes the general provisions of the law of obligations and contracts, as well as the special provisions regulating those types of contracts whose elements may be contained in the respective contracts of berth, such as the provisions of the Obligations Act regulating the contracts of custody, rent, mandate, consumer contracts. As regards the maintenance and repair of the vessel, the provisions of the Croatian Maritime Code would be relevant, as lex specialis applicable to the respective segment of the contract. The Consumers' Protection Act should also be kept in mind. One of the most important issues that arises in practice is whether the marina operator is liable as a custodian for the vessel on berth, and if so in which particular cases. The answer to that question requires a discussion on the contents of the contract of berth. The focus is on the so called permanent berth, as opposed to the transit berth. The main subject of analysis are the marina operators' general terms of business. The question that must be answered is when and to what extent should the provisions of the Croatian Obligations Act relating to the contract of custody apply to the contract of berth in a marina. In practice, the parties may agree to apply the provisions on custody, expressly exclude the application of such provisions, or the contract may not even mention the custody, whilst at the same time include certain obligations that by its content represent the elements of the contract of custody. The authors analyse the legal consequences of the respective contractual dispositions. A developed nautical tourism market requires a balanced protection of interests of the stakeholders, in this context those are the marina operators and the owners or operators of the vessels. Such challenge is particularly reflected in the segment of the civil liability for damage under the contract of berth including the elements of custody of the vessel. In such contracts the extent of the marina operator's liability for damage to the vessel on berth is much higher than in the case when the contract is merely for providing a nautical berth. Namely, the marina operator, under the contract of berth that contains the elements of custody, in addition to the liability for the suitability and propriety of the nautical berth itself, undertakes to take care of the vessel. The questions that arise in connection therewith require the prior understanding and knowledge of the marina operators' economic role and the features of their entire professional activity. On the other hand, the fact that the financial values of the vessels berthed in the marinas are relatively high, logically reflects on the contractual expectations of the vessel owners and operators calling for a suitable legal protection of their material interests. Legal certainty is therefore, as in any other business, a decisive factor for both contractual parties relying on the predictability of their mutual legal expectations. The authors thoroughly analyse the contracts of berth as used in the practice of the Croatian marina operators, focusing on the question whether such contracts contain the elements of the contract of care and custody and on the legal repercussions thereof. The main theses of this paper is that the qualification of the legal nature of the contract of berth and the choice of the relevant substantive law to be applied to the contract is closely

linked with the precisely and exactly determined contents and cause of the contract, which necessarily entails a correct interpretation of the marina operator's general terms and conditions on the basis of which the contract was concluded. It is submitted that the improvement of the legal framework applying to the marina operators' contracts of berth, including in particular those with the elements of custody, should be directed towards the standardisation of the marina operators' general terms of business and the creation of the set of models of the standard general terms of business for the Croatian nautical ports. This paper should serve as a basis for the creation of such general terms of contract containing the basic elements of the contract of berth.

***Key words**: contract of berth, marina operators' general terms and conditions, nautical tourism port, marina operators' liability, custody, yacht, boat, pleasurecraft*

ZABRANJENI SPORAZUMI KONKURENATA O CIJENAMA I NJIHOVE SPECIFIČNOSTI U SLUČAJU MARINA U REPUBLICI HRVATSKOJ

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Pregledni znanstveni rad / Review paper
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SAŽETAK

U radu se analizira rješenje Agencije za zaštitu tržišnog natjecanja u predmetu Agencija protiv Hrvatske gospodarske komore i devet članova Udruženja nautičkog turizma (dalje: predmet Marine) kojim je utvrđeno postojanje zabranjenog sporazuma poduzetnika glede budućih cijena vezova u marinama na području Republike Hrvatske (dalje: Hrvatska, RH) te odluke Visokog upravnog suda RH i Agencije za zaštitu tržišnog natjecanja koje su uslijedile poslije toga. Nakon uvodnog dijela i definiranja instituta zabranjenih sporazuma konkurenata razmatraju se sporna pitanja činjenične i pravne prirode koja su se javila u predmetu Marine, kao što su postojanje kartelnog sporazuma između marina, utvrđivanje mjerodavnog tržišta, pružanje usluga veza za nautička plovila u lukama otvorenim za javni promet i sportskim lukama, uloga Udruženja luka nautičkog turizma (marina) itd. Analiziraju se i relevantne odluke Suda Europske unije i Općeg suda Europske unije koje je Agencija za zaštitu tržišnog natjecanja koristila kao interpretativni instrument u tumačenju hrvatskih propisa prava tržišnog natjecanja te ranije donesene odluke Agencije za zaštitu tržišnog natjecanja o horizontalnim sporazumima poduzetnika o cijenama. Krajnji je cilj ovog rada osigurati kritičku ocjenu odluka Agencije za zaštitu tržišnog natjecanja i Visokog upravnog suda RH donesenih u predmetu Marine te hrvatskih propisa primijenjenih u tim odlukama.

Ključne riječi: *pravo tržišnog natjecanja, horizontalni sporazumi o cijenama, luke nautičkog turizma, ugovor o vezu, mjerodavno tržište u proizvodnom smislu, mjerodavno tržište u zemljopisnom smislu*

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1. Uvod[1]

Poduzetnička sloboda, sloboda ugovaranja i autonomija volje vrijednosti su koje se štite u gotovo svim modernim pravnim sustavima.[2] Pravilima tržišnog natjecanja dolazi do miješanja u privatnopravne odnose između poduzetnika kako bi se spriječile zlouporabe poduzetničkih i tržišnih sloboda, ali samo u unaprijed propisanim slučajevima i u onoj mjeri koja je nužna kako bi se spriječilo i sankcioniralo nedopušteno ponašanje poduzetnika. Krajnji je cilj prava tržišnog natjecanja unapređenje blagostanja potrošača[3] koje se ostvaruje tako što se njegovim pravilima nastoji očuvati konkurentnost tržišta koja poduzetnike potiče da svoje poslovanje što više unapređuju u odnosu na svoje konkurente uvođenjem novih proizvoda i razvojem novih proizvodnih tehnologija, čime se postiže veći stupanj gospodarske učinkovitosti koja se očituje u smanjenju cijena proizvoda i usluga, povećanju njihove kvalitete, redistribuciji gospodarskih izvora i bogatstava, ostvarivanju veće razine zaposlenosti i sl. i tako doprinosi blagostanju društva kao cjeline.[4] Iz toga proizlazi kako pravo tržišnog natjecanja ima obilježja javnog prava. [5] U ekonomskoj teoriji, na kojoj je suvremeno tržišno natjecanje utemeljeno, opisani su određeni postupci poduzetnika koji mogu ugroziti slobodno tržišno natjecanje. To su osobito sporazumijevanje među poduzetnicima, samostalno poduzeti postupci poduzetnika koji imaju snažan položaj na tržištu i koncentracije poduzetnika kojima se stvara ili jača već postojeći snažan položaj na tržištu. U skladu s tim, takvi postupci poduzetnika predstavljaju tri ključna materijalnopravna instituta prava tržišnog natjecanja. [6]

Sustavan razvoj prava tržišnog natjecanja u Republici Hrvatskoj započeo je donošenjem Zakona o zaštiti tržišnog natjecanja 1995. godine (dalje: ZZTN)[7] kojim je osnovana Agencija za zaštitu tržišnog natjecanja (dalje: Agencija) te su uređeni temeljni instituti te grane prava. Određeni nedostatci tog zakona te potreba prilagodbe hrvatskog zakonodavstva propisima

[1] Ovaj je članak rezultat autorova istraživanja u okviru znanstvenoistraživačkog projekta Jadranskog zavoda Hrvatske akademije znanosti i umjetnosti, koji je financirala Hrvatska zaklada za znanost, pod naslovom Razvoj suvremenog pravnog i osigurateljnog režima za hrvatske marine – unapređenje konkurentnosti, sigurnosti, sigurnosne zaštite i zaštite morskog okoliša (DELICROMAR, UIP-11-2013 br. 3061, razdoblje projekta: od 1. ožujka 2016. do 28. veljače 2019.). Više podataka o projektu dostupno je na internetskim stranicama www.delicromar.hazu.hr

[2] V. Butorac Malnar, V.; Pecotić Kaufman, J.; Petrović, S. 2013. *Pravo tržišnog natjecanja*. Pravni fakultet Sveučilišta u Zagrebu. Zagreb. str. 12.

[3] Bishop i Walker navode kako je „glavni cilj prava tržišnog natjecanja promocija učinkovitog tržišnog natjecanja, ali isključivo zbog koristi koju donosi europskim potrošačima." Bishop, S.; Walker, M. 2002. *The Economics of EC Competition Law: Concepts, Application and Measurement*. Sweet and Maxwell. London. str. 3. Opširnije o blagostanju potrošača: Poščić, A. 2008. Blagostanje potrošača - krajnji cilj europskog prava tržišnog natjecanja. *Socijalna prava kao temeljna ljudska prava.* Zbornik radova. Ur. Bodiroga Vukobrat, N.; Barić, S. Pravni fakultet u Rijeci. Rijeka. str. 205-225.

[4] Opširnije: Šoljan, V. 2004. *Vladajući položaj na tržištu i njegova zlouporaba u pravu tržišnog natjecanja Europske zajednice*. Ibis grafika. str. 106.

[5] „S druge strane pravo tržišnog natjecanja ima i svoje privatnopravne aspekte jer je riječ o obliku intervencije države isključivo u privatnopravne odnose… Stoga to pravo treba svrstati u posebnu granu prava koja nadilazi tradicionalnu podjelu prava na privatno i javno, ali koje je u najužoj vezi s trgovačkim pravom jer ono neposredno utječe na okvire u kojima se može razvijati sadržaj ugovornih odnosa subjekata trgovačkog prava." *Ibid.* str. 6 i 107.

[6] Slobodno tržišno natjecanje može biti narušeno i intervencijom države na tržištu koja može uključivati državne potpore i restriktivnu politiku obavljanja određenih djelatnosti. Butorac Malnar, V.; Pecotić Kaufman, J.; Petrović, S. *Pravo tržišnog natjecanja*, *o. c.* u bilješci 2., str. 9.

[7] Zakon o zaštiti tržišnog natjecanja, Narodne novine (dalje: NN) 48/95, 52/97 i 89/98.

Europske zajednice prouzročili su donošenje novog ZZTN-a iz 2003. godine.[8] Iako je Zakon iz 2003. godine mnogo preciznije uređivao pojedine institute prava tržišnog natjecanja, imao je određene nedostatke. To je, u prvom redu, sustav kažnjavanja poduzetnika prema kojem Agencija nije imala mogućnost izricanja kazni poduzetnicima kao ni mogućnost blažeg postupanja prema poduzetnicima koji ju izvijeste o postojanju kartela. To su bili temeljni razlozi za donošenje novog ZZTN-a iz 2009. godine.[9] Taj zakon donosi značajnu novinu, a to je da Agencija izriče poduzetnicima kaznu, čime je ukinuta nadležnost prekršajnih sudova za izricanje kazni na temelju odluka Agencije. Osim toga, na temelju tog Zakona doneseni su podzakonski akti koji propisuju kriterije za oslobađanje od kazne, odnosno umanjenje kazne poduzetnicima koji daju Agenciji značajne informacije o postojanju kartela. Stupanjem Hrvatske u punopravno članstvo Europske unije (dalje: Unija, EU) bile su potrebne izmjene ZZTN-a kako bi Hrvatska ispunila svoje obveze kao država članica. [10]

U ovom radu u fokusu naše analize nalaze se horizontalni sporazumi poduzetnika o cijenama, regulirani člankom 101., stavkom 1. UFEU-a, čije se pravno uređenje u Uniji i Hrvatskoj razmatra u prvom dijelu rada. Kako bi se mogao primijeniti članak 101., stavak 1. UFEU-a potrebno je utvrditi ispunjenje preduvjeta za njegovu primjenu, odnosno da postoje poduzetnik, sporazum, cilj ili učinak sporazuma kojim se nastoji ograničiti tržišno natjecanje te znatan utjecaj tog sporazuma na trgovinu među državama članica Unije.[11] Sadržaj tih pojmova nije određen u UFEU-u, već je njegovo tumačenje sadržano u odlukama europskih sudova i Komisije. Osim toga, kako hrvatski propisi o zaštiti tržišnog natjecanja ne uključuju detaljne odredbe o razmjeni informacija i sporazumijevanju konkurenata, hrvatsko tijelo nadležno za zaštitu tržišnog natjecanja u takvim slučajevima koristi pravnu stečevinu EU-a kao interpretativni instrument za primjenu hrvatskih propisa o zaštiti tržišnog natjecanja.[12] Odluke sudova EU-a i Europske komisije osobito su važan instrument za prevladavanje pravnih praznina te dvojbi u tumačenju hrvatskih propisa prava tržišnog natjecanja. Stoga ćemo u okviru ovog rada razmatrati pravnu praksu sudova EU-a i Komisije kojom je određen sadržaj temeljnih pojmova koji se koriste u definiranju zabranjenih sporazuma: poduzetnika, sporazuma, odluke udruženja poduzetnika i usklađenog djelovanja. Posebno će se naglasiti odluke na koje se hrvatska Agencija pozivala odlučujući u predmetu *Marine*. U drugom dijelu rada analizira se rješenje hrvatskog tijela nadležnog za zaštitu tržišnog natjecanja kojim je utvrđeno postojanje zabranjenog sporazuma poduzetnika glede budućih cijena vezova u marinama na području RH te odluke Visokog upravnog suda RH i Agencije koje su uslijedile nakon toga. Razmatraju se sporna pitanja koja su se javila u tom predmetu, a koja u velikoj mjeri proizlaze iz specifične pravne regulacije lučkog sektora uključujući i luke nautičkog turizma (dalje: LNT) u RH, ali i njegove podreguliranosti. Dodatni problem predstavlja i činjenica što se razvoj prava tržišnog natjecanja u RH bilježi tek posljednja dva desetljeća (posebice, od početka rada Agencije 1997. godine), zbog čega je još uvijek zamjetan nedostatak društvene svijesti o pravilima tržišnog natjecanja i njihovu značaju za gospodarski razvoj i prosperitet čitavog društva.

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8 Zakon o zaštiti tržišnog natjecanja, NN 122/03.

9 Zakon o zaštiti tržišnog natjecanja, NN 79/09.

10 V. Zakon o izmjenama i dopunama Zakona o zaštiti tržišnog natjecanja, NN 80/13.

11 Jones, A.; Sufrin, B. 2004. *EC Competition Law*. Oxford University Press. Oxford. str. 102.; Poščić, A. 2011. Zabranjeni sporazumi u europskom pravu tržišnog natjecanja. *Zbornik Pravnog fakulteta u Rijeci* 32 (1). str. 322.

12 Člankom 74. ZZTN-a propisano je kako se u primjeni ZZTN-a, a osobito u slučajevima postojanja pravnih praznina ili dvojbi pri tumačenju propisa, u skladu s člankom 1. Ugovora o pristupanju Republike Hrvatske Europskoj uniji (NN – Međunarodni ugovori broj 2/12 i 9/13), primjenjuju na odgovarajući način kriteriji koji proizlaze iz primjene pravila o tržišnom natjecanju u Europskoj uniji.

2. Pravno uređenje zabranjenih sporazuma u propisima tržišnog natjecanja unije i Republike Hrvatske

Člankom 101. UFEU-a zabranjuju se svi sporazumi,[13] odluke i usklađeno djelovanje[14] poduzetnika[15] koji imaju koluzivni karakter,[16] ograničavaju tržišno natjecanje i utječu na trgovinu među državama članicama Unije. U stavku 1. članka 101. UFEU-a, primjerice, su navedeni određeni oblici ponašanja koji mogu ograničiti tržišno natjecanje dok je stavkom 2. propisana ništavost zabranjenog sporazuma. Kad je riječ o ništavosti kao pravnoj posljedici zabranjenog sporazuma, treba istaknuti kako ona zahvaća samo one klauzule ugovora koje su zabranjene na temelju članka 101., stavka 1. UFEU-a, a cijeli ugovor samo u slučaju kad se sporne klauzule od njega ne mogu odvojiti. O tome kakve su posljedice ništavosti za druge dijelove ugovora ne odlučuje se na temelju prava Unije, već o tome odlučuje nacionalni sud na temelju nacionalnog prava.[17] Stavkom 3. članka 101. predviđeni su uvjeti za pojedinačno ili skupno izuzeće sporazuma.

U RH zabranjeni sporazumi regulirani su člankom 8. ZZTN-a. Taj se članak sadržajno u velikoj mjeri podudara s člankom 101. UFEU-a. Razlikuju se u tome što je članak 8. ZZTN-a opširniji (ima pet stavaka) jer sadržava i određena objašnjenja pojmova (koje su sudovi EU-a i Komisija utvrdili primjenjujući članak 101. UFEU-a) koja povećavaju preciznost i jasnoću

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[13] Iz sudske prakse Suda EU-a proizlazi kako je za nastanak sporazuma dovoljno da su poduzetnici očitovali „zajedničku volju ponašati se na tržištu na određen način." Oblik očitovanja volje nije bitan dokle god ono „vjerno odražava namjeru stranaka." Tako široko tumačenje pojma sporazuma usvojili su Europska komisija i sudovi EU-a kako bi se njime obuhvatili svi oblici dogovaranja poduzetnika o budućem ponašanju na tržištu. Prema sudskoj praksi Suda EU-a, sporazumom će se smatrati pisani i usmeni sporazumi, potpisani ili nepotpisani sporazumi, opći uvjeti poslovanja, protokol iz kojeg je vidljiva suglasnost stranaka glede njihova budućeg ponašanja, akt o osnivanju udruženja poduzetnika, džentlmenski sporazum, nagodba parničnih stranaka. V. Van Der Woude, M.; Jones, C. 2017. *EU Competition Law Handbook*. Sweet and Maxwell. str. 51 i 52; Butorac Malnar, V.; Pecotić Kaufman, J.; Petrović, S. *Pravo tržišnog natjecanja*, *o. c.* u bilješci 2., str. 111.

[14] Koncept usklađena djelovanja Sud EU-a prvi je put uveo u presudi u predmetu *Dyestuffs* kao „oblik usklađivanja poduzetnika kojim oni rizik konkuriranja svjesno zamjenjuju praktičnom suradnjom, a ne dolazi do sklapanja sporazuma." Dakle, u slučaju usklađena ponašanja poduzetnika nije riječ o dogovoru među konkurentima koji ima sve potrebne elemente ugovora, već je riječ o kontaktu među konkurentime s ciljem utjecanja na ponašanje stvarnog ili postojećeg konkurenta, odnosno odavanja konkurentu svojeg budućeg ponašanja ili razmišljanja o eventualnom ponašanju, u cilju otklanjanja rizika u poslovanju svakog od tih poduzetnika. Predmet C-48/*96 Imperial Chemical Industries Ltd*. protiv Komisije. (1972.) ECR- 619, (*predmet Dyestuffs*), par. 64 i 65; Odudu, O. 2006. *The Boundaries of EC Competition Law, the Scope of Article 81*, Oxford University Press. Oxford. str. 72.

[15] Iz sudske prakse Suda EU-a proizlazi da se pri donošenju ocjene o tome je li riječ o poduzetniku kao subjektu prava tržišnog natjecanja, primjenjuje tzv. funkcionalni pristup. U skladu s tim, svaki subjekt koji se bavi gospodarskom djelatnošću, bez obzira na njegov pravni status i način financiranja, smatra se poduzetnikom. Ovdje je vrlo važno istaknuti kako je s obzirom na primjenu funkcionalnog pristupa u tumačenju pojma poduzetnika, moguće da određeno javno tijelo u jednoj situaciji djeluje kao poduzetnik u smislu prava tržišnog natjecanja zbog toga što obavlja određenu gospodarsku djelatnost dok u drugoj situaciji može izvršavati svoje javne ovlasti te se neće smatrati poduzetnikom. Dakle, za ocjenu je li riječ o poduzetniku u smislu prava tržišnog natjecanja, presudna je funkcija koju neki subjekt obavlja u konkretnom slučaju. V. predmet C-343/95 *Cali e Figli v. SEPG* (1997.) ECR I-1547, par. 23. V. Bulum, B. 2009. Zajednička europska lučka politika -prošlost i recentne mjere u njezinu uspostavljanju. *Zbornik radova pravnog fakulteta u Splitu* 46 (2). str. 345.

[16] Sud EU-a je u presudi *Komisija protiv Anic Partecipazioni* naveo kako se članak 101. UFEU-a primjenjuje na sve oblike koluzije među poduzetnicimaa bez obzira na njihov oblik. U tom je kontekstu potrebno razlikovati neovisno ponašanje poduzetnika koje je dopušteno, od koluzivnog koje je zabranjeno bez obzira na oblik u kojem se javlja. Vidjeti predmet C-49/92 *Komisija protiv Anic Partecipazioni SpA*. (1999.) ECR I-4125, par. 108.

[17] Predmet C-319/82 *Societe de Vente de Ciments et Betons de l´Est v Kerpen & Kerpen*. (1983.) ECR-4173, par. 11-12.

njegovih odredbi, stoga ih smatramo vrlo korisnima, posebice ako se uzme u obzir relativno kratka primjena pravila tržišnog natjecanja u našem pravnom sustavu.

3. Primjena članka 101., stavka 1. UFEU-a na kartele

U teoriji prava tržišnog natjecanja razlikuju se različiti oblici suradnje poduzetnika kad je riječ o odlučivanju o cijenama, količinama te podjeli tržišta i kupaca koji se mogu kretati od tzv. izričite koluzije kad dolazi do izravne komunikacije među konkurentima do tzv. prešutne koluzije kad do usklađenog ponašanja dolazi bez njihova kontakta.[18] Izričit dogovor konkurenata kojim se oni dogovaraju o cijenama, količini proizvodnje, rabatima, izboru kupaca ili područja, uvjetima koje će postaviti u postupcima javne nabave, kojim dijele profit, razmjenjuju komercijalno osjetljive informacije itd., naziva se kartel. Riječ je o horizontalnim sporazumima, odnosno sporazumima koje sklapaju poduzetnici na istom stupnju ekonomskog procesa.[19] Iz prakse Suda EU-a i Komisije proizlazi da takvi sporazumi predstavljaju ograničenje tržišnog natjecanja po cilju, stoga nije potrebno utvrđivati njihove antikompetitivne učinke. Dovoljno je dokazati da je takav sporazum sklopljen i on će se smatrati zabranjenim, bez obzira na to jesu li njegovi učinci na tržištu doista i nastali. Kako su karteli u velikom broju slučajeva tajni i neformalni, njihovo postojanje često je vrlo teško dokazati.[20] Najveću dokaznu snagu imaju izravni dokazi kao što su tekst pisanog sporazuma između konkurenata ili pisani tragovi o njihovoj komunikaciji (pisma, mailovi i sl.).[21] Vrlo često tijela nadležna za zaštitu tržišnog natjecanja ne raspolažu izravnim dokazima, već je analizom tržišta utvrđeno koordinirano ponašanje konkurenata. U slučaju da ta tijela imaju barem posredne dokaze (indicije)[22] o izravnom ili neizravnom kontaktu poduzetnika radi razmjene strateških informacija, tada su u mogućnosti utvrditi postojanje sporazuma ili usklađenog djelovanja poduzetnika, ovisno o tome je li njihov dogovor formaliziran ili ne. Radi lakšeg dokazivanja kartela, Europska je komisija u svojoj

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[18] Opširnije o kartelima v. Pecotić Kaufman, J. 2008. Horizontalni sporazumi o cijenama u pravu tržišnog natjecanja. Doktorska disertacija. Pravni fakultet Sveučilišta u Zagrebu. str. 41 i dalje.

[19] Horizontalni sporazumi obuhvaćaju međusobne ugovore među strankama koje djeluju na istoj razini proizvodnje ili distribucije. Stranke su najčešće međusobni konkurenti. Najčešće su to razni oblici zajedničkog pothvata, ugovora o licenciji ili pak drugi oblici suradnje. Poščić, A. *Zabranjeni sporazumi u europskom pravu tržišnog natjecanja, o.c.* u bilješci 11., str. 334.

[20] U hrvatskoj teoriji prava tržišnog natjecanja upozoravalo se na mali broj kartelnih predmeta o kojima je hrvatska Agencija odlučivala u svom dosadašnjem radu, a što upućuje na postojanje poteškoća u njihovu otkrivanju. V. Pecotić Kaufman, J. 2011. Kartelni sporazumi i usklađeno djelovanje: kada je paralelno ponašanje poduzetnika nezakonito. *Pravo tržišnog natjecanja - Novine u hrvatskom i europskom zakonodavstvu i praksi.* Zbornik radova. Ur. Pecotić Kaufman, J. Ekonomski fakultet. Zagreb. str. 35; Poščić, A. *Zabranjeni sporazumi u europskom pravu tržišnog natjecanja, o.c.* u bilješci 11., str. 321.

[21] Kao što su „… stvaran, pisani sporazum koji dokazuje postojanje zabranjenog sporazuma, njegov sadržaj te identificira poduzetnike koji u njemu sudjeluju ili dokument koji na njega ukazuje, usmene ili pisane izjave sudionika kartela." V. *Godišnje izvješće o radu Agencije za 2012. godinu*. www. aztn.hr/uploads/documents/tn/godisnja_izvjesca/godisnje_izvjesce_AZTN_za_2012.pdf (preuzeto 21. travnja 2017.) str. 26.

[22] Neizravni su dokazi, primjerice, „(…) dokazi međusobne komunikacije koji dokazuju da su se poduzetnici sastajali ili međusobno komunicirali, ali ne opisuju sadržaj njihove komunikacije (primjerice, zapisi telefonskih razgovora među konkurentima, njihovo sudjelovanje i međusobni kontakti na raznim seminarima ili konferencijama te na drugim sastancima i slično), ekonomski dokazi – podatci o tržištu, uvjetima i kretanjima na tržištu, tržišnim udjelima, proizvodima te svi dokazi koji uključuju paralelno postupanje konkurenata na tržištu, nisu i ne mogu biti dostatni bez dodatnih dokaza, tzv. plus faktora (*plus factors*) koji ih potkrepljuju, a na temelju kojih bi se s nedvojbenom sigurnošću moglo utvrditi da je riječ o zabranjenom sporazumu - kartelu." *Ibid.*

praksi odlučivanja razvila doktrinu zajedničke klasifikacije[23] prema kojoj nije potrebno precizno definirati o kojem je između tih dvaju instituta riječ jer oba predstavljaju povredu članka 101., stavka 1. UFEU-a. U slučajevima kad tijelo nadležno za tržišno natjecanja ne raspolaže dokazima o kontaktu konkurenata, nego je utvrđeno samo njihovo koordinirano ponašanje[24] na tržištu, takvo ponašanje poduzetnika (tzv. prešutno usklađivanje) vrlo je teško podvesti pod definiciju zabranjenog sporazuma kojim se krši članak 101. UFEU-a jer se može raditi o legitimnom činu poduzetnika koji predstavlja „inteligentno prilagođavanje ponašanju konkurenata." Kako bi regulirao korištenje instituta usklađenog djelovanja na oligopolnim tržištima[25] na kojima poduzetnici, zbog karakteristika tog tržišta, ne mogu postupati potpuno neovisno, već se moraju prilagođavati ponašanju konkurenata, Sud EU-a u predmetu *Suiker Unie* naveo je kako je poduzetnicima dopušteno „inteligentno prilagođavanje trenutnom i očekivanom ponašanju konkurenata." Ipak, takvo prilagođavanje ne smije uključivati njihov „izravni ili neizravni kontakt."[26] Do prešutnog usklađivanja može doći samo na oligopolnim tržištima, na kojima djeluje mali broj poduzetnika zbog čega je njihovo usklađivanje moguće provesti bez mnogo napora i kontakata između poduzetnika (tzv. oligopolno usklađivanje).[27] Za razliku od toga, karteli se mogu javiti i na tržištima koja nisu oligopolna. Na takvim je tržištima zbog velikog broja konkurenata neophodno sklapanje formalnog sporazuma radi usklađivanja njihove poslovne politike. Kako bi izbjegli sklapanje formalnog sporazuma, poduzetnici na takvim tržištima vrlo često koriste gospodarska udruženja[28] koji im služe kao mjesta za dogovaranje

[23] Sud EU-a podupro je stajalište Komisije zaključivši kako sporazumi i usklađeno djelovanje poduzetnika obuhvaćaju oblike koluzije koji su iste prirode, a razlikuju se jedino po svom intenzitetu i oblicima u kojima se očituju te se međusobno ne isključuju. V. predmet C-49/92 *Komisija protiv Anic Partecipazioni SpA*. (1999.) ECR I-4125, par. 131.

[24] Prva odluka u kojoj je Agencija za zaštitu tržišnog natjecanja raspravljala o koordiniranom ponašanju poduzetnika glede cijena odluka je *Kartel autobusnih prijevoznika*. U ovom predmetu nije postojao pisani sporazum o ujednačenim cijenama. Agencija je odluku temeljila na dokazima o koordiniranom ponašanju poduzetnika na tržištu, dokazima o telefonskim kontaktima radi dogovora o cijenama, dopisima, ali i izjavama pojedinih poduzetnika o dogovoru o cijenama autobusnih karata (Autobusni promet d. d. Varaždin i dr., klasa UP/I-030-02/2006- 01/39, odluka od 24. 9. 2007., NN br. 115/07).

[25] Oligopol je struktura tržišta koju obilježava mali broj prodavatelja od kojih ni jedan ne može samostalno utjecati na tržišnu cijenu. Zbog malog broja prodavatelja i većeg utjecaja promjena cijena jednog oligopolista na promjene udjela na tržištu drugih oligopolista ključno je obilježje oligopolista svijest svakog od oligopolista o strateškom postupanju drugih. V. Šoljan, V. *Vladajući položaj na tržištu i njegova zlouporaba u pravu tržišnog natjecanja Europske zajednice*, *o. c.* u bilješci 4., str. 117.

[26] U ovom predmetu utvrđene su četiri situacije u kojima su poduzetnici uskladili svoje ponašanje kako bi zaštitili tržište šećera u Italiji, Nizozemskoj, kao i u zapadnim i sjevernim dijelovima Njemačke. Spojeni predmeti 40-48, 50, 54-56, 111, 113,114/73, *Coöperative Veraniging Suker Unie UA i dr. protiv Komisije* (1975.) ECR 1663, par. 173 i 174.

[27] Sudska je praksa također dala odgovor na pitanje kad koordinirano ponašanje ne predstavlja povredu članka 101. UFEU-a, odnosno usklađeno djelovanje, već je riječ o tzv. oligopolnoj međuovisnosti. Presudom u predmetu *Wood Pulp II* Sud EU-a zauzeo je stav da koordinirano ponašanje poduzetnika ne može biti dokaz o njihovu usklađenom djelovanju, osim ako ono nije „jedino vjerojatno objašnjenje takva ponašanja." Predmet C-89, 104, 116, 117, 125-129/85 *A. Ahlström Osakeyhtiö i dr. protiv Komisije* (predmet *Wood Pulp II*), (1993.) ECRI-1307.

[28] Pojam odluka udruženja poduzetnika u pravu tržišnog natjecanja tumači se vrlo široko tako da one ne podrazumijevaju samo sporazume članova udruženja nego i preporuke koje ono izdaje. Iako se postavljalo pitanje opravdanosti postojanja instituta odluke udruženja poduzetnika, s obzirom na to da se jednako ponašanje može podvesti pod primjenu instituta usklađena djelovanja, smatra se kako on ima svoje opravdanje zbog toga što omogućuje kažnjavanje samog udruženja. Osim toga, u određenim slučajevima može biti jednostavnije utvrditi da odluka udruženja ugrožava tržišno natjecanje, nego utvrditi postojanje zabranjenog sporazuma. Odluka Komisije u predmetu AROW/BNIC, SL (182) L379/1; Freeman, P.; Whish, R. 1991. *Butterworths Competition Law*. London: Butterworths, par. 131-140.

zajedničkog ponašanja na tržištu. Međutim, karteli su ipak puno češći na oligopolnim tržištima na kojima je zbog malog broja poduzetnika njihovo sporazumijevanje mnogo lakše provesti, a postignuti sporazumi u pravilu su dugotrajniji nego na tržištima koja nisu oligopolna.[29]

4. Predmet AZTN protiv Hrvatske gospodarske komore i devet članova udruženja nautičkog turizma

4.1. Činjenično stanje

U prosincu 2013. godine Agencija je pokrenula postupak protiv Hrvatske gospodarske komore (dalje: HGK) i devet poduzetnika članova Udruženja nautičkog turizma (marina)[30] radi utvrđivanja narušavanja tržišnog natjecanja sklapanjem zabranjenog sporazuma o cijenama vezova u LNT-u u Hrvatskoj.

Agencija je u provedenom postupku utvrdila kako su navedene marine na sjednici Vijeća Udruženja nautičkog turizma (marina) pri Hrvatskoj gospodarskoj komori (dalje: Udruženje), održanoj 25. listopada 2012. godine u marini Kornat u Biogradu na Moru, međusobno razmjenjivale informacije o budućim cijenama svojih usluga, konkretno cijenama vezova, čime su sklopile zabranjen sporazum kojem je cilj sprečavanje, ograničavanje ili narušavanje tržišnog natjecanja u smislu članka 8. ZZTN-a.

Uvidom u presliku zapisnika sa sporne sjednice Agencija je utvrdila sljedeće: „Nazočni su također najavili da za sljedeću godinu njihove marine neće podizati cijene usluga (vezova), a oni koji će i podizati cijene, ići će s minimalnim poskupljenjem (za postotak inflacije u RH)." Agencija je smatrala kako navedeni zapisnik nedvojbeno upućuje na činjenicu da su članovi Udruženja koji su prisustvovali ranije spomenutoj sjednici, međusobno razmjenjivali informacije o budućim cijenama svojih usluga. Međutim, sve stranke negirale su da se na sjednici uopće razgovaralo o cijenama najma vezova, odnosno da je to bila tema navedene sjednice. Predsjednik Udruženja i tadašnji predsjednik uprave ACI-ja u svom je iskazu naveo kako je spornu izjavu dao u vrijeme kad je sjednica već bila završena.[31] Nekoliko stranaka u svojim je očitovanjima isticalo kako je sporna rečenica rezultat neiskustva osobe koja je tom prilikom vodila zapisnik, a koja nije poslovni tajnik Udruženja. Također, gotovo sve su stranke tvrdile kako izjavu u trenutku kad je izrečena nisu čule.[32] Uz to, sve su stranke navele da u pravilu dobivaju zapisnike sa sjednica Udruženja, i to elektroničkom poštom, ali iz njihovih očitovanja proizlazi kako sporni zapisnik sa sjednice od 25. listopada 2012. ni jedna stranka nije dobila ili ne zna je li ga dobila.[33] Na temelju navedenog, a da nije provela druge dokaze (osim saslušanja stranaka), na tu je okolnost Agencija zaključila kako su „sva očitovanja stranaka u pogledu

[29] Carlton, Dennis W.; Perloff, Jeffery M. 2005. *Modren industrial organization*. Boston. str. 122.; Pecotić Kaufman, J. *Horizontalni sporazumi o cijenama u pravu tržišnog natjecanja, o. c.* u bilješci 18., str. 42.

[30] Poduzetnika *Adriatic Croatia International Club* d. d., *Tehnomont* d. d., Marina *Šibenik* d. o. o., *Ilirija* d. d., Marina *Hramina* d. o. o., *Brodogradilište i marina* d. o. o., Marina *Punat* d. o. o., Marina *Dalmacija* d. o. o. te Marina *Borik* d. o. o. V. rješenje AZTN-a protiv Hrvatske gospodarske komore i devet članova Udruženja nautičkog turizma (marina), predmet *Marine*, Klasa: UP/034-03/2013-01/047, od 17. ožujka 2015. godine, objavljeno u Narodnim novinama br. 58/215.

[31] Međutim, to nije u suglasju sa zapisnikom jer je izjava unesena u zapisnik u okviru prve točke dnevnog reda.

[32] Izuzev zastupnik Tehnomonta koji je u svom iskazu naveo kako je čuo spornu izjavu.

[33] Jedino iz očitovanja zastupnika Marine *Dalmacija* i Marine *Borik* proizlazi kako su one zaprimile sporan zapisnik, ali ga nisu pročitale.

zapisnika sa sjednice Udruženja od 25. listopada 2012. usmjerena isključivo na izbjegavanje vlastite odgovornosti za sudjelovanje u zabranjenom sporazumu."[34]

U skladu s pravnom stečevinom EU-a, u slučaju kad se poduzetnik koji sudjeluje na sastanku na kojem se razmjenjuju konkurentski osjetljive informacije[35] javno ne ogradi od onog o čemu se raspravlja na tom sastanku i odmah ne napusti sastanak, dovodi druge sudionike sastanka u uvjerenje da se slaže sa zaključcima i da će postupiti u skladu s njima. Činjenica da pojedini poduzetnik nije postupio u skladu s dogovorom sa sastanka ne isključuje njegovu odgovornost za sudjelovanje u kartelu, već se navedeno može uzeti u obzir samo kod utvrđivanja težine narušavanja tržišnog natjecanja, odnosno kod utvrđivanja visine kazne. [36] Stoga se u takvim situacijama smatra da su svi sudionici sastanka sudjelovali u kršenju propisa o zaštiti tržišnog natjecanja.[37] Iz toga proizlazi da se poduzetnik koji elektroničkom poštom dobije od konkurenta poruku kojom se otkriva njegova buduća poslovna politika glede cijena, kako bi se oslobodio od odgovornosti za sudjelovanje u kartelu, mora izričito ograditi od takve informacije ili pak o tome obavijestiti tijelo nadležno za tržišno natjecanje.[38] Također, iz prakse Suda EU-a proizlazi kako je i samo jedan sastanak između konkurenata dovoljan za usklađenje njihova ponašanja na tržištu ako je riječ o usklađivanju ponašanja koje se odnosi samo na jedan parametar tržišnog natjecanja, odnosno kako nije bitan broj održanih sastanaka, već je bitno je li održan sastanak omogućio njegovim sudionicima da uzmu u obzir razmijenjene informacije u svrhu određivanja svog ponašanja na tržištu.[39] Kako ni jedan od devet članova udruženja, kao ni HGK, nisu ispunili preduvjete potrebne za oslobođenje od odgovornosti za sudjelovanje u kartelu, Agencija je utvrdila postojanje zabranjenog sporazuma u smislu članka 8. ZZTN-a. Agencija smatra kako su razmjenom informacija o cijenama najma vezova u idućoj godini, čak i bez postojanja izričitog međusobnog dogovora o cijenama, sudionici sporazuma unaprijed otklonili neizvjesnost o budućoj poslovnoj politici, što je dovelo do njihova usklađenog ponašanja. Takva razmjena informacija između konkurenata koja obuhvaća pojedinačne podatke o budućim cijenama, predstavlja teško (*hard-core*) ograničenje tržišnog natjecanja. U svojoj se odluci Agencija pozvala i na Smjernice o horizontalnim sporazumima. [40] U skladu s točkom 74. Smjernica o horizontalnim sporazumima, razmjena informacija između konkurenata koja obuhvaća pojedinačne podatke o predviđenim budućim cijenama ili količinama,

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[34] V. odluku Agencije od 17. ožujka 2015. u predmetu *Marine*, str. 36.

[35] U pogledu postojanja uzročne veze između usklađenog djelovanja i postupanja na tržištu poduzetnika koji usklađeno djeluju, Sud EU-a zauzeo je stav kako se pretpostavlja, ako se ne dokaže suprotno, da poduzetnici koji su sudjelovali u razmjeni informacija i koji su ostali aktivni na tržištu uzimaju u obzir podatke razmijenjene sa svojim konkurentima u svrhu određivanja njihova ponašanja na tom tržištu. Predmet C-199/92 *Hüls AG protiv Komisije (predmet Polypropylene*), ECLI:EU:C:1990:385, par. 158-167.

[36] Agencija se pozvala na odluku u predmetu C-204, 205, 211, 213, 217 i 219/00 *Aalborg Portland AS protiv Komisije*. (2004.) ECR I-123, par. 81-86.

[37] Predmet *Thyssen Stahl protiv Komisije* (1999.) ECR II-347.

[38] Opširnije: Pecotić Kaufman, J. *Kartelni sporazumi i usklađeno djelovanje: kada je paralelno ponašanje poduzetnika nezakonito, o.c.* u bilješci 20., str. 34.

[39] U predmetu *Marine* Agencija se pozvala na praksu Suda EU-a, a s obzirom na to da se u konkretnom slučaju radilo o razmjeni informacija u vezi sa sljedećom sezonom (koja traje godinu dana; kod nekih poduzetnika sezona se poklapa s početkom i krajem kalendarske godine dok kod nekih sezona traje od travnja jedne godine do kraja ožujka iduće godine) te da stranke donose cjenike svojih usluga jednom godišnje, proizlazi kako je jedan sastanak bio dovoljan za usklađivanje njihova ponašanja. C-8/08 *T-Mobile Netherlands BV and Others protiv Raad van bestuur van der Nederlandse Mededingingsautoriteit,* ECLI:EU:C:2009:110, par. 60-62.

[40] Priopćenje Europske komisije - Smjernice o primjeni članka 101. UFEU-a na horizontalne sporazume o suradnji (OJ C 11, 14. 01. 2011, p.1-72, dalje: Smjernice o horizontalnim sporazumima).

treba se smatrati ograničenjem tržišnog natjecanja po cilju.[41] Na temelju točke 20. Smjernica, kad se utvrdi da sporazum ima cilj sprečavanje, ograničavanje ili narušavanje tržišnog natjecanja, nema potrebe uzimati u obzir i njegove konkretne učinke. To znači da su takvi sporazumi zabranjeni *per se* bez obzira na to jesu li nastupili njihovi stvarni učinci na tržišno natjecanje ili nisu. U tom smislu, Agencija nije uvažila prigovore stranaka koje su smatrale da je u konkretnom predmetu trebala uzeti u obzir karakteristike tržišta na koje se odnosi predmetna razmjena informacija te karakteristike razmijenjenih informacija. Ona ističe kako se karakteristike tržišta i razmijenjenih informacija analiziraju u slučajevima kad razmjena informacija nije zabranjena po cilju pa je potrebno dokazati antikompetitivne posljedice takve razmjene.

U skladu sa svim tim sudionicima zabranjenog sporazuma Agencija je izrekla upravnokaznene mjere u ukupnom iznosu od 2.363.000,00 kuna.

Protiv navedenog rješenja Agencije osam stranaka podnijelo je upravne tužbe. Presudom Visokog upravnog suda RH (dalje: Sud) usvojeni su tužbeni zahtjevi te je poništeno rješenje Agencije i predmet vraćen na ponovni postupak.

Iako je Sud izvedeni zaključak Agencije da je izjava tadašnjeg predsjednika Udruženja i predsjednika uprave ACI-ja dana u okviru rasprave o prvoj točki dnevnog reda u vezi s osvrtom na turističku sezonu u marinama te da ju treba tumačiti kao namijenjenu svim članovima udruženja prihvatio kao logičan, poklonio je vjeru svjedocima koji su gotovo suglasno izjavili kako tu izjavu nisu čuli. Stoga se Sudu „postavilo pitanje ima li izjava predsjednika Udruženja značenje razmjene informacija s ciljem ograničenja tržišnog natjecanja ili pak je riječ o jednostranoj izjavi poduzetnika."[42] Tužitelji osporavaju toj izjavi značaj razmjene informacija s obrazloženjem da taj pojam uključuje određenu interakciju sudionika, odnosno reciprocitet u ponašanju.[43] U skladu s praksom Suda EU-a, reciprocitet u ponašanju ne znači samo otvorenu komunikaciju, izričit pristanak, nego i prešutni pristanak, odnosno suglasnost, s tim što se zahtijeva jasan dokaz o prešutnoj suglasnosti.[44] Odnosno, ako je riječ o jednostranoj izjavi poduzetnika, adresati se moraju jasno ograditi čim se za to steknu uvjeti kako se njihovo ponašanje ne bi tretiralo kao prešutna suglasnost."[45]

Sud smatra kako se na temelju utvrđenog činjeničnog stanja u upravnom postupku pred Agencijom ne može nedvojbeno zaključiti da su „svi sudionici spornog sastanka bili upoznati sa spornom informacijom - izjavom tako da su imali mogućnost reagirati i ograditi se od nje."[46]

Osobito spornom Sud ocjenjuje činjenicu dostave zapisnika sa sjednice članovima Udruženja, odnosno marinama te drži kako je Agencija trebala provesti odgovarajuće dokaze o elek-

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[41] U skladu s točkom 21. Smjernica, ograničenja tržišnog natjecanja prema cilju ona su ograničenja koja već po samoj svojoj prirodi imaju mogućnost ograničavanja tržišnog natjecanja, a u skladu s točkom 22. Smjernica, sadržaj konkretnog sporazuma i njegovi objektivni ciljevi relevantni su pri ocjeni ima li taj sporazum cilj ograničiti tržišno natjecanje. Prema točki 23. Smjernica, u slučaju horizontalnog sporazuma, o kakvu je sporazumu u konkretnom slučaju riječ, ograničenja tržišnog natjecanja prema cilju uključuju dogovaranje cijena ili drugih trgovinskih uvjeta, ograničavanje proizvodnje i podjelu tržišta itd.

[42] Presuda Visokog upravnog suda RH, Usll-39/15-10 od 17. 3. 2016. www.aztn.hr/ea/wp-content/uploads/2016/05/UP-I-034-032013-01047-1.pdf (preuzeto 2. svibnja 2017.) str. 13.

[43] To je slučaj kad jedan konkurent „otkrije svoje buduće namjere ili ponašanje na tržištu drugom na njegovo traženje" ili ako drugi „u najmanju ruku prihvati" takvo otkrivanje namjera ili ponašanja. Predmet T-25/*95 Cimenteries* CBR i dr. protiv Komisije (2000.) ECR II-491, par. 1849.

[44] Predmet C-48/*96 Imperial Chemical Industries Ltd*. protiv Komisije (1972.) ECR-619, (*predmet Dyestuffs*), par. 64 i 65.

[45] Presuda Visokog upravnog suda RH, Usll-39/15-10 od 17. 3. 2016., str. 13.

[46] *Ibid*.

tronskoj dostavi zapisnika sa sporne sjednice Vijeća Udruženja marina (koje je ona propustila provesti), čime bi u potpunosti bili otklonjeni prigovori tužitelja koji se odnose na dostavu zapisnika, tj. da dostava zapisnika nije izvršena. Osim toga, Sud smatra da je u odnosu na navode stranaka kako su imali formirane cjenike prije sporne sjednice Vijeća Udruženja, činjenično stanje ostalo nedovoljno utvrđeno. U prilog tomu Sud navodi primjer Marine Harmina koja je u spis dostavila dokaze da je donijela odluku o cijenama za 2013. godinu te predala cjenike na tiskanje znatno prije dana održavanja sjednice Vijeća Udruženja od 25. listopada 2012. godine.

Sud zaključuje kako je osporavano rješenje zasnovano na nedovoljno utvrđenom činjeničnom stanju te je u ponovljenom postupku naložio otklanjanje propusta na koje je upozoreno pridržavajući se pravnih stajališta Suda izraženih u presudi.

U ponovljenom postupku, uvažavajući stajalište Suda kako u ovom predmetu nije riječ o međusobnoj razmjeni informacija, već je riječ o njihovu jednostranom iznošenju, tj. jednostranom postupanju poduzetnika s ciljem utvrđivanja predstavlja li takvo jednostrano iznošenje strateških informacija zabranjeni sporazum, Agencija je razmatrala prirodu tih informacija i način njihova iznošenja.

Kad je riječ o prirodi iznesenih informacija, Agencija smatra kako je riječ o jednokratnoj izjavi kojom se najavljuje zadržavanje postojećih cijena ili, eventualno, njihovo minimalno povećanje. Jednako tako, uvažavajući stav Suda da je predsjednik Udruženja, ujedno i predsjednik uprave njegova najjačeg člana, spornu izjavu dao zaposleniku HGK-a koji je sastavljao zapisnik, a koju gotovo nitko od ostalih sudionika sastanka nije čuo, te se[47] iz teksta zapisnika ne može se zaključiti čija je to izjava bila, Agencija smatra da je u konkretnom slučaju riječ o postupanju koje se ne bi moglo okarakterizirati kao razmjena konkurentski osjetljivih informacija, pa čak ni kao njihovo jednostrano iznošenje. Ona drži „bespredmetnim utvrđivanje činjenice jesu li članovi Udruženja primili sporni zapisnik."[48] Uz to, jedini način nedvojbenog utvrđivanja da su stranke elektronskim putem primile sporni zapisnik, provođenje je nenajavljene pretrage poslovnih prostorija stranaka, odnosno njihovih računala. Kako je „od sporne sjednice prošlo više od četiriju godina, a stranke ne samo da imaju saznanja da se protiv njih vodi postupak pred Agencijom nego točno znaju koji bi ih dokumenti mogli teretiti, provođenje nenajavljene pretrage u konkretnom slučaju ne bi bilo svrhovito jer je izvjesno da se na taj način ne bi mogli prikupiti novi dokazi."[49] Budući da je Agencija iscrpila sve mogućnosti za utvrđivanje činjenica u ovom postupku te bi daljnje postupanje bilo protivno načelima učinkovitosti i ekonomičnosti postupanja, ona je donijela rješenje o obustavi postupka.

Naše je mišljenje kako je Agencija u ovom predmetu, provodeći upravni postupak u predmetu „Marine", napravila propust tako što nije u potpunosti utvrdila činjenicu dostave zapisnika sa sporne sjednice Vijeća Udruženja nautičkog turizma (marina) održane pri HGK-u strankama u postupku. Činjenica dostave zapisnika ključna je za donošenje ocjene o tome jesu li sve stranke bile upoznate s informacijom o budućoj politici glede cijena tako da su imale mogućnost reagirati i ograditi se od te informacije što je, prema sudskoj praksi Suda EU-a, potrebno kako bi se oslobodile optužbi za sudjelovanje u kartelu.[50] Suprotno stajalištu Agencije, smatramo kako bi u slučaju da se nedvojbeno utvrdilo da su stranke primile sporni zapisnik,

[47] Zbog čega ona i ne bi imala neki značaj, posebice ne onako kako je to naveo Sud da je riječ o izjavi najjačeg člana Udruženja marina, a koja bi zbog toga imala poseban utjecaj na ponašanje ostalih članova. Vidi odluku Agencije u ponovljenom postupku, Klasa: UPI/I 034-03/13-01/047 Urbroj: 580-09/74-2017-225 od 16. 2. 2017., str. 12.

[48] *Ibid.*

[49] *Ibid.*

[50] Predmet C- 204, 205, 211, 213, 217 i 219/00 *Aalborg Portland AS protiv Komisije* (2004.) ECR I-123, par. 81-86.

to bilo dovoljno za utvrđenje postojanja zabranjenog sporazuma u smislu članka 8. ZZTN-a. Iako se iz teksta zapisnika ne može iščitati tko je dao spornu izjavu glede buduće politike cijena najma vezova u marinama na obalnom području RH[51] na sjednici Vijeća Udruženja marina pri HGK-u, smatramo kako bi u slučaju da su s njom bili upoznati,[52] ostali poduzetnici bili dužni ograditi se od te izjave bez obzira na to što im možda nije bilo poznato tko je spornu izjavu dao ili što se njome najavljuje zadržavanje postojećih cijena ili pak, eventualno, njihovo minimalno povećanje. U protivnom, mogli bi se teretiti za sudjelovanje u kartelu. To proizlazi i iz točke 62. Smjernica o horizontalnim sporazumima gdje se navodi kako situacija kad samo jedan poduzetnik otkriva strateške informacije svojim konkurentima koji ih prihvaćaju, isto tako može predstavljati usklađeno djelovanje te da nije važno daje li jedan poduzetnik jednostrano svojim konkurentima informacije o svojem budućem ponašanju na tržištu ili pak svi poduzetnici obavijeste jedni druge o svojim namjerama. Iz odredbi Smjernica proizlazi kako se u svakom slučaju za poduzetnika koji od svog konkurenta primi strateške informacije pretpostavlja da ih je prihvatio i njima prilagodio svoje ponašanje, osim ako se jasno ne očituje da ne želi primati takve podatke.

4.2. Mjerodavno tržište u predmetu *Marine*

Odredbom članka 7. ZZTN-a mjerodavno tržište definirano je kao tržište određene robe i/ili usluga koje su predmet obavljanja djelatnosti poduzetnika na određenom zemljopisnom području. Mjerodavno tržište, u skladu s odredbom članka 4. Uredbe o načinu utvrđivanja mjerodavnog tržišta,[53] utvrđuje se tako da se utvrdi njegova proizvodna dimenzija (mjerodavno tržište u proizvodnom smislu) i zemljopisna dimenzija (mjerodavno tržište u zemljopisnom smislu).[54]

U predmetu *Marine* Agencija je analizirala stanje na tržištu usluga najma veza u marinama zato što su postojale indicije da su se na sjednici Udruženja od 25. listopada 2012. među članovima Udruženja razmjenjivale informacije o budućim cijenama vezova u marinama na području RH te s obzirom na činjenicu da članovi Udruženja, prisutni na navedenoj sjednici Udruženja, obavljaju djelatnost pružanja usluga veza u marinama na cijelom obalnom području RH.

Pravilnikom o razvrstavanju i kategorizaciji luka nautičkog turizma iz 2008. godine [55] propisuju se vrste, minimalni uvjeti, kategorije i način kategorizacije LNT-a te se navodi kako se LNT razvrstavaju u sljedeće kategorije: sidrište, odlagalište plovnih objekata, suha marina i marina.[56]

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[51] Štoviše, iz zapisnika proizlazi kako je to zajednički stav svih konkurenata prisutnih na sjednici: *Nazočni su također najavili da za sljedeću godinu njihove marine neće podizati cijene usluga (vezova), a oni koji će i podizati cijene, ići će s minimalnim poskupljenjem (za postotak inflacije u RH)*. V. odluku Agencije od 17. ožujka 2015. u predmetu *Marine*, str. 3.

[52] Odnosno, da postoje dokazi o elektronskoj dostavi zapisnika strankama.

[53] Uredba o načinu utvrđivanja mjerodavnog tržišta (NN 9/11; dalje: Uredba o mjerodavnom tržištu).

[54] Na temelju članka 5. Uredbe o mjerodavnom tržištu, mjerodavno tržište u proizvodnom smislu obuhvaća sve proizvode za koje potrošači smatraju da su međusobno zamjenjivi s obzirom na njihove bitne značajke, cijenu ili način uporabe, odnosno navike potrošača. Prema članku 6. Uredbe o mjerodavnom tržištu, mjerodavno tržište u zemljopisnom smislu obuhvaća zemljopisno područje na kojem poduzetnici sudjeluju u ponudi ili nabavi proizvoda.

[55] Pravilnik o razvrstavanju i kategorizaciji luka nautičkog turizma (NN 72/08; dalje: PLNT iz 2008.).

[56] U skladu s PLNT-om, sidrište se definira kao dio morskog ili vodenog prostora, pogodnog za sidrenje plovnih objekata, opremljenog napravama za sigurno sidrenje. Odlagalište plovnih objekata dio je kopna ograđen i ure-

Marina se u skladu s PLNT-om smatra dijelom vodenog prostora i obale, posebno izgrađen i uređen za pružanje usluga veza, smještaja turista u plovnim objektima te ostalih usluga u nautičkom turizmu. U marini se pružaju usluge pića, napitaka i prehrane u skladu s tim Pravilnikom (članak 10. PLNT-a).

Člankom 29. PLNT-a iz 2008. godine propisano je da pravne i fizičke osobe koje na dan stupanja PLNT-a imaju rješenje za LNT izdano u skladu s ranije donesenim PLNT-om,[57] nemaju obvezu usklađivanja s PLNT-om iz 2008., ali mogu podnijeti zahtjev za kategorizaciju i razvrstavanje prema PLNT-u iz 2008. godine. Iz toga proizlazi kako su na snagu stupila nova pravila o razvrstavanju i kategorizaciji LNT-a, ali nema obveze usklađivanja s tim pravilima. U praksi to znači da su neke LNT kategorizirane prema starom PLNT-u iz 1999. godine, a neke prema novom PLNT-u iz 2008.godine. Takva situacija nije zadovoljavajuća i ne pridonosi uređenosti sektora nautičkog turizma. Smatramo kako je nužno provođenje kategorizacije svih LNT-a prema jedinstvenim pravilima kako bi se izbjegla neujednačenost u terminologiji koja može imati dalekosežne posljedice.[58] Neujednačenost u terminologiji osobito je izražena kad je riječ o definiciji privezišta. PLNT-om iz 2008. kao vrsta LNT-a brisano je privezište,[59] a uvedeno odlagalište plovnih objekata koje se s obzirom na vrste usluga koje se u njemu pružaju bitno razlikuje od odlagališta. Privezište je brisano i iz Uredbe o razvrstaju luka otvorenih za javni promet i luka posebne namjene (dalje: UOR).[60] S druge strane, Zakon o pomorskom dobru i morskim lukama (dalje: ZPDML)[61] u članku 74., stavku 3. navodi privezišta kao dijelove lučkog područja luke otvorene za javni promet od županijskog i lokalnog značaja.[62]

Dakle, prema važećim pravilima privezište više nije ni LNT ni područje za privremeni privez plovnih objekata izvan lučkog područja, već je ono sad dio lučkog područja luke otvorene za javni promet od županijskog i lokalnog značaja. [63]

đen za pružanje usluga odlaganja plovnih objekata na suhom te pružanje usluga transporta, spuštanja u vodu i dizanja iz vode plovnog objekta. Suha marina dio je kopna ograđen i uređen za pružanje usluga skladištenja plovnih objekata na suhom te pružanje usluga transporta, spuštanja u vodu i dizanja iz vode plovnog objekta. Temeljna je razlika između odlagališta plovnih objekata i suhe marine u širini usluga koje one pružaju. Dok u suhoj marini mogu boraviti turisti i mogu se obavljati priprema plovnog objekta za plovidbu te pružati usluge pića i prehrane, u odlagalištu to nije moguće.

57 Pravilnik o razvrstavanju i kategorizaciji luka nautičkog turizma (NN 142/99, 47/00, 121/00, 45/01, 108/01 i 106/04; dalje: PLNT iz 1999.).

58 Primjerice, na prikupljanje statističkih podataka i mjerenje različitih ekonomskih pokazatelja u vezi s poslovanjem LNT-a. V. Luković, T. 2015. *Nautički turizam Hrvatske*. Redak. Split. str. 164.

59 Privezište je definirano kao dio vodenog prostora i dio obale, uređen za pristajanje plovnih objekata i opremljen priveznim sustavom. Ako mogućnosti vodenog prostora privezišta to dopuštaju, u dijelu vodenog prostora privezišta može se označiti i mjesto gdje je dopušteno sidrenje plovnih objekata. Članak 6. PLNT-a iz 1999.; Luković, T. 2015. *Nautički turizam Hrvatske*, *o.c.* u bilješci 58., str. 163.

60 Člankom 2., stavkom 2. te Uredbe privezište je bilo definirano kao dio obale izgrađen za privremeni privez plovnih objekata izvan lučkog područja, s najviše 10 vezova. V. UOR (NN 110/2004 i 82/2007).

61 NN 158/2003, 100/2004, 141/2006, 39/2009, 123/2011 i 56/2016.

62 Lučko područje luka otvorenih za javni promet županijskog i lokalnog značaja obuhvaća područje namijenjeno za obavljanje linijskog pomorskog prometa, komunalni vez koji obuhvaća vez plovnog objekta čiji vlasnik ima prebivalište na području jedinice lokalne samouprave ili plovni objekt pretežito boravi na tom području i upisan je u upisnik brodova nadležne lučke kapetanije ili očevidnik brodica nadležne lučke kapetanije ili ispostave, nautički vez za nautička plovila, ribarski vez i privezišta. Članak 74., stavak 3. ZPDML-a.

63 Nova definicija privezišta sadržana je u Praviliku o kriterijima za određivanje namjene pojedinog dijela luke otvorene za javni promet županijskog i lokalnog značaja, načinu plaćanja veza, uvjetima korištenja te određivanja maksimalne visine naknade i raspodjele prihoda donesenom na temelju ZPDML-a, a prema kojem je privezište definirano kao izdvojeno lučko područje koje je opremljeno za sigurno vezanje plovila (NN 94/07, 78/08, 114/2012 i 47/2013).

U svojoj odluci Agencija je navela kako iz definicija u PLNT-u iz 2008. proizlazi kako svi članovi Udruženja prisutni na sjednici Vijeća Udruženja od 25. listopada 2012. osim ostalih djelatnosti, pružaju usluge najma veza u marinama. Agencija, tumačeći PLNT iz 2008., zaključuje da jedino u marinama postoji mogućnost pružanja usluge veza plovila,[64] stoga je mjerodavno tržište u proizvodnom smislu odredila kao tržište pružanja usluga najma veza u marinama. Međutim, nije uzela u obzir činjenicu da se usluge najma veza nautičkih plovila, osim u marinama, u RH pružaju i u lukama otvorenim za javni promet i sportskim lukama.[65] Osim usluga najma veza, marine pružaju i dodatne usluge pretežno turističke prirode namijenjene odmoru i rekreaciji.[66] S druge strane, usluge najma veza za nautička plovila u lukama otvorenim za javni promet i sportskim lukama nude se po znatno povoljnijim cijenama nego u marinama pa se postavlja pitanje smatraju li potrošači (nautičari) usluge najma veza u marinama i iste usluge u lukama otvorenim za javni promet i sportskim lukama zamjenjivima. Kako u posljednje vrijeme u Hrvatskoj postoji velik interes nautičara za uslugama najma veza plovnih objekata u lukama otvorenim za javni promet i sportskim lukama, prvenstveno zbog njihove pristupačne cijene, držimo kako usluge veza plovnih objekata u marinama i ostalim lukama u kojima se one pružaju u RH, njihovi potrošači (nautičari) smatraju u velikoj mjeri zamjenjivima. Postojale bi stoga osnove za tvrdnju kako u predmetu *Marine* mjerodavno tržište proizvoda obuhvaća i usluge najma veza za nautička plovila u lukama otvorenim za javni promet i sportskim lukama. U tom bi slučaju stranke u postupku imale znatno manje tržišne udjele te, posljedično, i manju tržišnu snagu od one koja proizlazi iz Agencijine analize mjerodavnog tržišta i tržišne snage poduzetnika u predmetu *Marine*.

Uzevši u obzir da je u ovom predmetu riječ o horizontalnom sporazumu koji sadrži ograničenja koja se smatraju teškim ograničenjima tržišnog natjecanja, precizno utvrđivanje mjerodavnog tržišta i tržišne snage poduzetnika nije od odlučujuće važnosti jer tržišni udjeli poduzetnika ne utječu na činjenicu je li u konkretnom slučaju došlo do povrede odredbi ZZTN-a. Međutim, Agencija je unatoč tomu na temelju dostupnih i prikupljenih podataka analizirala stanje na mjerodavnom tržištu i tržišnu snagu stranaka u postupku za 2012. i 2013. godinu.[67] Podatke Državnog zavoda za statistiku (dalje: DZS)[68] o ukupno ostvarenim prihodima LNT-a promatrala je u odnosu na ostvarene prihode članova Udruženja prisutnih na sjednici od 25. listopada 2012. te je utvrđeno kako je u 2012. godini devet poduzetnika Udruženja ostvarilo

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64 Misli se na nautička plovila.

65 Iako je predstavnik Marine *Harmina* na to upozorio u svom iskazu. „U RH se posljednjih godina pojavio alternativni način bavljenja nautičkim turizmom u vidu komunalnih vezova narušavajući time sva pravila tržišnog natjecanja." V. predmet *Marine*, str. 47.

66 **Usluge su u nautičkom turizmu: iznajmljivanje veza u LNT-u za smještaj plovnih objekata i turista - nautičara koji borave na njima, usluge** upravljanja plovnim objektom turista nautičara, prihvat, čuvanje i održavanje plovnih objekata na vezu u moru i suhom vezu, opskrbe nautičara (vodom, gorivom itd.), davanje različitih informacija nautičarima (vremenska prognoza, nautički vodič i sl.), druge usluge za potrebe nautičkog turizma. V. Zakon o pružanju usluga u turizmu, članak **45.** (NN 68/2007, 88/2010, 30/2014, 89/2014, 152/2014).

67 Agencija je tijekom postupka od stranaka zatražila podatke o broju vezova, prihode od najma vezova, cjenike najma vezova za 2011., 2012. i 2013. godinu, podatke o iskorištenosti vezova u marinama za 2011., 2012. i 2013. godinu u postotnom iznosu te očitovanje o točnom datumu objave cjenika usluga u marinama za navedene godine koje su stranke i dostavile.

68 Agencija ističe kako je definicija mjerodavnog tržišta u skladu s terminologijom korištenom u dokumentu pod nazivom *Priopćenje o kapacitetima i poslovanju luka nautičkog turizma za 2012*. objavljenom na službenim stranicama DZS-a gdje se, među ostalim, uvodno navode ostvareni prihodi svih marina od obavljanja djelatnosti iznajmljivanja vezova u RH. V. *Priopćenje o kapacitetima i poslovanju luka nautičkog turizma za 2012*. http://www.dzs.hr (preuzeto 2. svibnja 2017.)

preko 60 % (63,41 %), a u 2013. oko 60 % (59,76 %) ukupnih prihoda svih LNT-a od djelatnosti iznajmljivanja vezova.

Glede prigovora stranaka u vezi s određivanjem mjerodavnog tržišta u proizvodnom smislu, a s obzirom na raznolikost plovnih objekata kojima pružaju usluge veza i drugih sadržaja koje određene marine pružaju,[69] Sud je podupro stajalište Agencije kako oni nisu od utjecaja na odluku o utvrđivanju mjerodavnog tržišta. Sud nije uzeo u obzir ni činjenicu da se usluge najma veza za nautička plovila, osim u marinama, u RH pružaju i u lukama otvorenim za javni promet i sportskim lukama. Naime, sud smatra kako je Agencija postupila ispravno kad je prilikom utvrđivanja kriterija za određivanje mjerodavnog tržišta uzela cijene dnevne i godišnje usluge veza brodica od 10, 12 i 14 metara kao zajedničke svim marinama jer su na taj način vrednovani podatci o uslugama koje pružaju sve marine. Također, Sud je naveo kako nisu od utjecaja navodi pojedinih stranaka da nije riječ o uslugama najma veza, već je riječ o vezu kao ostavi[70] jer je u svakom slučaju riječ o usluzi koju stranke pružaju i za koju se plaća određena naknada. Dakle, riječ je o obavljanju gospodarske djelatnosti marina, pa je ispunjen preduvjet za primjenu članka 8. ZZTN-a o zabranjenim sporazumima.

4.2.1. Pružanje usluga najma veza za nautička plovila u lukama otvorenim za javni promet u RH

Izmjenama i dopunama ZPDML-a došlo je do vrlo značajnih izmjena kad je riječ o sastavnim dijelovima lučkog područja luka županijskog i lokalnog značaja otvorenih za javni promet. Tako je članku 74. dodan stavak 3. po kojem lučko područje luka otvorenih za javni promet županijskog i lokalnog značaja obuhvaća: područje namijenjeno za obavljanje linijskog pomorskog prometa, komunalni vez,[71]nautički vez za nautička plovila, ribarski vez i privezišta.

Ovim člankom ZPDML-a legalizirana je već postojeća praksa poslovanja luka otvorenih za javni promet županijskog i lokalnog značaja u RH u kojima su se pružale usluge linijskog, ribarskog, ali i komunalnog te, posljednjih godina, i nautičkog veza. Na osnovi ZPDML-a donesen je i Pravilnik o kriterijima za određivanje namjene pojedinog dijela luke otvorene za javni promet županijskog i lokalnog značaja, načinu plaćanja veza, uvjetima korištenja te određivanju maksimalne visine naknade i raspodjele prihoda (dalje: PNL).[72]

Člankom 3. PNL-a predviđena je podjela lučkog područja luke otvorene za javni promet županijskog i lokalnog značaja te njenih sidrišta i privezišta na operativni dio luke,[73] komunalni dio luke i, ukoliko ima potrebe, prostora na nautički dio luke.

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[69] U nekim se marinama pruža više vrsta usluga veza: godišnji vez, kombinirani vez, dnevni vez izvan vrhunca sezone i dnevni vez u vrhuncu sezone, i to posebno za više različitih dužina brodova. V. odluku Agencije od 17. ožujka 2015. u predmetu *Marine*, str. 36.

[70] Usluge veza i smještaja za plovila LNT-a, u pravilu na temelju ugovora koji se u praksi nazivaju ugovorima o vezu ili ugovorima o korištenju veza, najmu veza, usluzi veza i sl. Kod takvih ugovora riječ je o uporabi veza, a ne o njegovu korištenju jer LNT ne ustupa pravo na puno uživanje (uključujući crpljenje plodova) svog akvatorija ili njegova dijela, već samo njegovu uporabu određenom subjektu za određeno plovilo. Dakle, ta osoba nema pravo ustupiti vez na uporabu trećoj osobi. Iz toga proizlazi kako su ti ugovori po svojoj pravnoj prirodi najbliži ugovoru o najmu. V. Padovan, A. 2013. Odgovornost luke nautičkog turizma iz ugovora o vezu i osiguranje. *Poredbeno pomorsko pravo* 52 (1). str. 7.

[71] Obuhvaća vez plovnog objekta čiji vlasnik ima prebivalište na području jedinice lokalne samouprave ili plovni objekt pretežito boravi na tom području i upisan je u upisnik brodova nadležne lučke kapetanije ili pak je upisan u očevidnik brodica nadležne lučke kapetanije ili ispostave.

[72] Vidi *supra*, bilješka 63.

[73] Namijenjen je za privez plovila u javnom pomorskom prometu, plovila za povremeni prijevoz putnika, teretnih plovila i ostalih plovnih objekata i ribarskih plovila kad obavljaju djelatnost ukrcaja i iskrcaja.

PNL predviđa mogućnost da se u komunalnom dijelu luke za korištenje veza[74] sklapa ugovor o stalnom vezu s vlasnicima, i to sljedećim redom prvenstva (članak 5.):

1. vlasnici plovnih objekata koji imaju prebivalište ili sjedište na području jedinice lokalne samouprave i plovilo je upisano na području nadležne lučke kapetanije ili ispostave nadležne za tu luku, u svrhu obavljanja gospodarske djelatnosti, posebice za ribarstvo ili prijevoz putnika, 2. vlasnici plovnih objekata koji imaju prebivalište na području jedinice lokalne samouprave i koje je upisano na području nadležne lučke kapetanije ili ispostave nadležne za tu luku, u svrhu sporta i razonode, 3. vlasnici plovnih objekata čije plovilo pretežito boravi na tom području i upisano je na području nadležne lučke kapetanije ili ispostave.

Dakle, PNL-om je predviđena mogućnost veza za lokalno stanovništvo plovilima za sport i razonodu i izvan sportskih luka te veza plovila za gospodarsku namjenu koja u sportskim lukama ne bi smjela boraviti na vezu.

Kad je riječ o nautičkom dijelu luke PNL-a (članak 8.), određeno je kako će lučka uprava odrediti vrijeme zadržavanja plovila u nautičkom dijelu luke vodeći računa o intenzitetu prometa u pojedinoj luci. Također, člankom 2. PNL-a definiran je dnevni ili tranzitni vez kao vez u nautičkom dijelu luke. PNL predviđa i mogućnost zimovanja plovila u lukama županijskog i lokalnog značaja otvorenim za javni promet, a u tom slučaju njihovi vlasnici ili korisnici moraju imati ugovor o stalnom vezu ili sidrištu za zimovanje s nadležnom lučkom upravom (članak 9. PNL-a). Iščitavajući odredbe PNL-a, iako to njime nije potpuno jasno regulirano, ipak se stječe dojam kako je nautički dio luka županijskog i lokalnog značaja otvorenih za javni promet predviđen za kraće zadržavanje plovila (na dnevnom ili tranzitnom vezu), prvenstveno u ljetnim mjesecima kad su kapaciteti LNT-a popunjeni. Međutim, u praksi se događa nešto sasvim drugo. Nautička plovila borave u lukama otvorenim za javni promet, i to ne samo onim županijskog i lokalnog značaja nego i u lukama od osobitog (međunarodnog) gospodarskog interesa za RH na temelju ugovora o stalnom vezu te tu i prezimljavaju. Posebno zabrinjava činjenica što se lokalno stanovništvo u mnogim lukama od županijskog i lokalnog značaja žali na nejasan i netransparentan sustav dodjeljivanja komunalnih vezova od nadležnih lučkih uprava.[75]

Osim toga, kod svih ovlaštenika koncesija u marinama u RH koje smo intervjuirali[76] vrlo je izraženo nezadovoljstvo sadašnjim stanjem prema kojem luke otvorene za javni promet i sportske luke konkuriraju marinama u pružanju usluga najma vezova za nautička plovila. Smatramo kako nepostojanje propisa koji bi precizno regulirali tu vrstu djelatnosti luka otvorenih za javni promet i sportskih luka omogućuje da te luke budu u znatno povoljnijem konkurentskom položaju u odnosu na LNT.[77] Povoljniji konkurentski položaj luka otvorenih

[74] Smatramo kako bi ovdje prikladniji termin bio „upotreba veza" jer riječ je o vezu namijenjenom za potrebe lokalnog stanovništva koji se osigurava po znatno pristupačnijim cijenama od nautičkog veza zbog čega ne bi trebalo postojati pravo ustupanja tog veza na uporabu trećima. U praksi se ipak događa da se komunalni vezovi uz naknadu ustupaju (često strancima, nautičarima) čime se zloupotrebljava pravo na komunalni vez.

[75] U tim pritužbama često se navodi kako su u nekim lukama i strani državljani korisnici cjenovno znatno povoljnijih komunalnih vezova dok u isto vrijeme mještani nemaju na njih pravo. Takve pritužbe trebalo bi istražiti odgovarajućim kontrolama jer upozoravaju na moguće zlouporabe kojima se iskrivljuje svrha postojanja komunalnih vezova kao vezova koji se daju na upotrebu lokalnom stanovništvu.

[76] U okviru projekta DELICROMAR obavljeni su intervjui s ovlaštenicima koncesija u marinama *ACI*, *Dogus grupe*, *Kaštela*, *Punat*, *Servisni centar*, Marini *Trogir*, *Zadar* i Marini *Baotić*. Također, ovlaštene osobe u tim marinama popunile su upitnik koji sadržava niz pitanja u vezi s poslovanjem marina. Podatci prikupljeni na taj način koristit će se isključivo u znanstvene svrhe.

[77] Ovlaštenici koncesija u marinama ističu kako im luke otvorene za javni promet i sportske luke „nelojalno konkuriraju", odnosno kako je tu riječ o „nepoštenom tržišnom natjecanju". Pravila o nepoštenom tržišnom natje-

za javni promet djelomično proizlazi i iz toga što se te luke, osim naplaćivanjem lučki pristojbi i koncesija za pružanje lučkih usluga, financiraju i sredstvima osnivača njihovih lučkih uprava (u slučaju luka od osobitog, međunarodnog, gospodarskog interesa za RH to je država, a kod luka županijskog i lokalnog značaja županija), dakle, javnim sredstvima, iz čega proizlazi kako ta sredstva predstavljaju državnu potporu. Mada je člankom 61. ZPDML-a predviđeno kako se sredstvima iz proračuna osnivača lučke uprave[78] može isključivo financirati gradnja i održavanje lučke podgradnje (infrastrukture), čime je ZPDML usklađen s pravilima Unije o dodjeli državnih potpora morskim lukama prema kojima se investicije u lučku infrastrukturu nisu smatrale državnim potporama ako je pristup toj infrastrukturi dopušten svim njezinim korisnicima pod jednakim uvjetima (kriterij selektivnosti infrastrukture).[79] Iz novije sudske prakse Suda EU-a u predmetu C-288/11 *Leipzig-Halle* proizlazi kako je „buduća upotreba infrastrukture, mogućnost njezina gospodarskog iskorištavanja ta koja određuje ulazi li financiranje te infrastrukture u opseg primjene pravila tržišnog natjecanja Europske unije."[80] U skladu sa sudskom praksom sudova Unije, Europska je komisija napustila kriterij selektivnosti infrastrukture prema kojem se investicije u lučku infrastrukturu nisu smatrale državnim potporama ako je pristup toj infrastrukturi dopušten svim njezinim korisnicima pod jednakim uvjetima kao temeljni kriterij za određivane predstavlja li financiranje određene infrastrukture državnu potporu. Zbog toga je Komisija u nizu predmeta zauzela stajalište kako je izgradnja i iskorištavanje određenih dijelova lučke infrastrukture gospodarska djelatnost zato što se ta infrastruktura može gospodarski iskorištavati, čime je lučkoj upravi omogućena gospodarska prednost te financiranje konkretne infrastrukture može uključivati državnu potporu.[81] Dakle, za postojanje državne potpore presudan je komercijalni karakter infrastrukture, odnosno mogućnost njezina gospodarskog iskorištavanja. Iz toga proizlazi kako bi bilo koji oblik javnog financiranja infrastrukture luka otvorenih za javni promet, koja služi za pružanje usluga veza za nautička plovila u tim lukama, imao karakter državne potpore jer je nedvojbeno riječ o in-

canju u RH uređena su Zakonom o trgovini (NN 87/2008, 96/2008, 116/2008, 76/2009, 114/211, 68/2013, 30/2014) te podrazumijevaju radnje trgovca kojima se radi tržišnog natjecanja povređuju dobri trgovački običaji. Nepoštenim tržišnim natjecanjem osobito se smatra reklamiranje, oglašavanje ili ponuda robe i usluga navođenjem podataka kojima se iskorištava ugled drugog trgovca, njegovih proizvoda i usluga, davanje podataka o drugom trgovcu ako ti podatci štete ili mogu nanijeti štetu ugledu i poslovanju drugog trgovca i sl. (čl. 65. Zakona o trgovini). Nelojalna konkurencija ima privatnopravni značaj pa se postupak protiv subjekta koji djeluje nedopušteno pokreće na zahtjev onog čije je pravo povrijeđeno. Stoga u predmetu *Marine* nije riječ o nelojalnoj konkurenciji ili nepoštenom tržišnom natjecanju, već je riječ je o povoljnijem konkurentskom položaju luka otvorenih za javni promet i sportskih luka koji je rezultat podreguliranosti tog segmenta njihove djelatnosti.

78 Prema sudskoj praksi Suda EU-a, kadgod neki subjekt obavlja gospodarsku djelatnost, treba se smatrati poduzetnikom za potrebe prava tržišnog natjecanja EU-a bez obzira na njegov pravni status i način financiranja. U skladu s tim, i lučke se uprave mogu smatrati poduzetnicima u onom dijelu u kojem obavljaju gospodarske djelatnosti, kao što je to kod pružanja usluga veza nautičkih plovila. Spojeni predmeti C-180/98 i C-184/98 *Pavlov i dr.* (2000.) ECR I-6451, par. 75.

79 Opširnije v. Bulum, B. 2009. Primjena pravila o državnim potporama Europske zajednice u segmentu morskih luka. *Poredbeno pomorsko pravo* 48 (1). str. 147.

80 Predmet C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle protiv Komisije.* EU:C:212:821, par. 42.

81 Commission decision of 15. December 2009. in case SA. C 39/2009 (ex N 385/2009) – Latvia - *Public financing of a port infrastructure in Ventspils Port,* OJ C 62, 13.03.2010, p. 7.; Commission Decision of 15. June 2011. in State aid case no. 44/2010 *Public financing of port infrastructure in Krievu Sala,* OJ C 215 of 21. 7. 2011, p. 1; Commission Decision of 22. February 2012. on State aid case no. SA.30742 (N/2010) – Lithuania *Construction of infrastructure for the passenger and cargo ferries terminal in Klaipeda*, OJ C 121 of 26. 4. 2012., p. 1, Commission Decision of 2. July 2013. in State Aid case no. SA.35418 (2012/N) – Greece – *Extension of Piraeus Port*, OJ C 256 of 5. 9.2013., p. 2, Commission Decision of 18. September 2013. in State Aid case no. SA.36953 (2013/N) – Spain – *Port Authority of Bahía de Cádiz*, OJ C 335 of 16. 11. 2013, p.1.

frastrukturi koja ima komercijalni karakter, odnosno postoji mogućnost njezina gospodarskog iskorištavanja.

Osim toga, luke otvorene za javni promet i sportske luke vrlo često ne ispunjavaju minimalne tehničke uvjete za pružanje usluga najma veza za smještaj plovnih objekata i turista - nautičara koji borave na njima jer to i nije njihova primarna namjena, što može predstavljati opasnost za sigurnost plovidbe u tim lukama i osobe koje borave na plovnim objektima.[82]

Naše je mišljenje kako bi država, prvenstveno ministarstvo nadležno za pomorstvo,[83] trebalo donijeti preciznija i jasnija pravila kojima bi se reguliralo korištenje dijela kapaciteta luka otvorenih za javni promet za nautičke vezove**. Kao prvo, pružanje usluga veza za nautička plovila trebalo bi dopustiti samo onim lukama koje ispunjavaju za to predviđene minimalne tehničke uvjete, a koji bi trebali odgovarati standardima propisanim za luke nautičkog turizma. Drugo, treba odrediti maksimalan broj nautičkih vezova u odnosu** na kapacitet cijele luke otvorene za javni promet kako bi se spriječila prenamjena većeg dijela luke u prostor za nautičke vezove. Treće, taj segment njihove djelatnosti **(uključujući i pojedine vrste infrastrukturnih objekata koji su u funkciji pružanja usluga u nautičkom turizmu) ne bi trebao biti financiran javnim sredstvima. U protivnom, radilo bi se o državnim potporama. I četvrto, ali ne i najmanje važno, u tim lukama treba predvidjeti dostatan broj komunalnih vezova koji će zadovoljiti potrebe lokalnog stanovništva. Iako postojeći sustav omogućuje zlouporabe tog prava na vez** po povoljnim cijenama za lokalno stanovništvo, to nikako ne bi trebao biti razlog za njegovo potpuno ukidanje.[84] Svjedočimo kako velik broj ljudi u priobalnim dijelovima RH ima u vlasništvu plovni objekt (najčešće brodicu), što životu u tim područjima daje dodatnu kvalitetu. Na nekim je otocima to nužnost jer je pristup pojedinim dijelovima otoka moguć samo s morske strane (primjerice, poljoprivrednim zemljištima koja otočani obrađuju). Također, treba imati na umu da je tradicijsko ribarstvo u teškim razdobljima ratova i gospodarskih kriza omogućilo egzistenciju tog dijela hrvatskog stanovništva zbog čega je potrebno osigurati preduvjete za njegovo očuvanje. Komercijalna cijena veza za mnoge bi stanovnike priobalnih dijelova RH bila previsoka te bi djelovala destimulirajuće na njihovu odluku o držanju brodice. S druge strane, kad je riječ o plovnim objektima namijenjenim obavljanju gospodarske djelatnosti ribarstva ili prijevoza putnika (kojima je PNL-om dano prvenstvo kod ostvarivanja prava na komunalni vez), držimo kako bi se za takva plovila trebala plaćati komercijalna cijena veza neovisno o prebivalištu ili sjedištu njihova vlasnika i tome gdje je ono upisano.[85]

4.2.2. Pružanje usluga najma veza za nautička plovila u sportskim lukama u RH

Sportske luke definirane su kao luke posebne namjene koje služe za vez brodica upisanih u hrvatski očevidnik brodica s namjenom sporta i razonode, a koje su u vlasništvu članova

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[82] Minimalni uvjeti koje svi LNT-i moraju ispunjavati propisani su člancima 11. - 20. PLNT-a.

[83] Trebalo bi uključiti i ministarstvo nadležno za turizam zbog toga što se u LNT-u, osim lučkih, pružaju i turističke usluge.

[84] Potrebno je provođenje strožih kontrola rada lučkih uprava koje dodjeljuju komunalne vezove kojima bi se utvrdilo pridržavaju li se propisanih uvjeta i postupaka za njihovu dodjelu, ali i obvezatnih periodičkih kontrola nadležnih tijela kojima bi se, na licu mjesta, utvrdilo upotrebljava li komunalni vez njegov ovlaštenik ili je on ustupljen nekom drugom. U posljednjem bi se slučaju pravo na komunalni vez trebalo oduzeti.

[85] Ne nalazimo opravdanje za tako nisku cijenu lučkih pristojbi za plovila gospodarske namjene prema važećem PNL-u. Naime, Prilogom 3. tog Pravilnika propisana je maksimalna visina lučkih pristojbi za brod/brodicu preko svega maksimalno 200, 00 kuna godišnje u prvoj zoni. Štoviše, plovila namijenjena za gospodarski ribolov i prijevoz putnika plaćaju maksimalno 50 % te naknade.

udruge (sportske) ili same udruge koja ima koncesiju za luku.[86] ZPDML-om (članak 81. stavak 2.) propisano je kako se koncesija za sportsku luku može dodijeliti samo udruzi za obavljanje sportske djelatnosti, odnosno sportskoj udruzi.[87] Zakonom o udrugama (dalje: ZOU, čl. 9.) propisano je da se udruga ne osniva sa svrhom stjecanja dobiti (za svoje članove ili treće), ali može obavljati gospodarsku djelatnost, u skladu sa zakonom i njezinim statutom. Ako obavljanjem gospodarskih djelatnosti udruga ipak ostvari dobit, ona se može koristiti samo za ostvarivanje ciljeva i obavljanje djelatnosti određenih statutom udruge, u skladu sa zakonom (članak 30., stavak 2. ZOU-a). Odredbe iz čl. 9. ZOU-a koje udrugama dopuštaju (pod određenim uvjetima) stjecanje dobiti, u suprotnosti su sa ZPDML-om kojim je to sportskim udrugama, koje su ovlaštenici koncesija u sportskim lukama, izričito zabranjeno.[88] O tom nesuglasju između općeg i posebnog propisa piše i Pandžić,[89] čije mišljenje dijelimo, koji smatra da bi se primjenom načela *lex specialis derogat legi generali* u slučaju sportskih luka trebala smatrati relevantnom zabrana stjecanja dobiti za sportske udruge kao ovlaštenike koncesija u sportskim lukama u skladu sa ZPDML-om.

Za razliku od LNT-a kojima se dodjeljuje koncesija za gospodarsko korištenje pomorskog dobra, sportskoj udruzi daje se koncesija za posebnu upotrebu pomorskog dobra.[90] Najvažnija razlika između gospodarskog korištenja i posebne upotrebe pomorskog dobra određena je ZPDML-om (čl. 17., st. 1. i 2.) po kojem se koncesija za gospodarsko korištenje pomorskog dobra daje na temelju provedenoga javnog prikupljanja ponuda (koje uključuje natjecanje svih zainteresiranih poduzetnika), a koncesija za posebnu upotrebu pomorskog dobra daje se na zahtjev (bez mogućnosti natjecanja). Iz toga proizlazi kako je posebna upotreba pomorskog dobra izuzeta od primjene načela tržišne utakmice koji vladaju kod njegova gospodarskog korištenja gdje se svi zainteresirani imaju pravo natjecati. Osim toga, ZPDML-om (čl. 28.) propisano je kako se naknada za koncesije dane radi posebne upotrebe pomorskog dobra određuje u simboličnom iznosu.[91] Dakle, koncesije za sportske luke dodjeljuju se sportskim udrugama uz minimalnu koncesijsku naknadu, bez provođenja javnog prikupljanja ponuda kako bi se potaknulo obavljanje njihove djelatnosti koja ima općedruštvenu korist. Na taj način država se odriče prihoda koji bi se mogao ostvariti dodjelom koncesija za gospodarsko korištenje tih dijelova pomorskog dobra (primjerice, za izgradnju LNT-a), a koji, s obzirom na njihov broj i kapacitet, nije zanemariv.[92] Međutim, praksa poslovanja sportskih luka sve manje opravdava takve ustupke zbog toga što se kapaciteti sportskih luka u sve većoj mjeri koriste u gospodarske svrhe. Naime, u sportskim se lukama redovito mogu zateći na vezu (i to ne samo dnevnom

[86] V. UOR (članak 10., stavak 1., točka 4.).

[87] Zakon o udrugama (NN 74/2014) uređuje osnivanje, pravni položaj, djelovanje, registraciju, financiranje, imovinu, odgovornost, statusne promjene, nadzor i prestanak postojanja svih udruga, pa tako i onih sportskih.

[88] Sportska luka može se koristiti samo za članove udruge te u obavljanju djelatnosti ne može stjecati dobit (članak 81., stavak 3. ZPDML-a).

[89] Vidi poseban rad o toj temi. Panžić, T. 2010. Sportske luke u zakonodavstvu Republike Hrvatske. *Zbornik radova Pravnog fakulteta u Splitu*. god. 47 (3). str. 647-675.

[90] ZPDML (čl. 19., st. 1.) pod posebnom upotrebom pomorskog dobra smatra i gradnju na pomorskom dobru građevina za potrebe vjerskih zajednica, za obavljanje djelatnosti na području kulture, socijalne skrbi, odgoja i obrazovanja, znanosti, informiranja, sporta, zdravstva, humanitarnih djelatnosti i drugih djelatnosti koje se ne obavljaju radi stjecanja dobiti.

[91] Osim za koncesije gradnje infrastrukture (vodovodna, kanalizacijska, energetska i telefonska) za koje se naknada utvrđuje kao za gospodarsku upotrebu pomorskog dobra, a što je u potpunosti opravdano s obzirom na profite koji se mogu ostvariti posebnom upotrebom te infrastrukture.

[92] Procjenjuje se da u Hrvatskoj ima nešto više od 100 sportskih društava s više od 9000 vezova. V. Luković, T. *Nautički turizam Hrvatske, o. c.* u bilješci 58., str. 167.

ili tranzitnom nego i godišnjem) plovila gospodarske namjene i ona koja su vlasništvu osoba (pravnih i fizičkih) koje nisu članovi udruge koja je ovlaštenik koncesije. Iako vlasnici takvih plovila plaćaju tzv. komercijalnu cijenu veza koja je višestruko veća od onih za tzv. obične članove, a sve se opravdava potrebom prikupljanja novca za potrebe sportskog društva i ulaganja u infrastrukturu, riječ je o protuzakonitoj djelatnosti.[93] Zbog toga se hrvatska pravna doktrina već dulje vrijeme zalaže za donošenje pravnih pravila kojima bi se precizno reguliralo poslovanje sportskih luka zato što njihova sadašnja podreguliranost omogućuje zlouporabu tih vrijednih resursa. Ističu se dvije moguće opcije, a to su ili donošenje novih propisa kojima bi se omogućila djelomična komercijalizacija sportskih luka ili pak dosljedna primjena postojećih propisa koji priječe njihovu komercijalizaciju.[94]

4.3. Provođenje nenajavljenih pretraga u praksi hrvatskog tijela nadležnog za tržišno natjecanje

Kao što je već istaknuto, karteli su u velikom broju slučajeva tajni i neformalni pa je njihovo postojanje često vrlo teško dokazati. ZZTN-om predviđeno je više dokaznih sredstava za otkrivanje kartelnih sporazuma, a među najučinkovitijim[95] je *ovlaštenje Agencije za provođenje nenajavljenih pretraga poslovnih i drugih prostorija poduzetnika, zemljišta i prijevoznih sredstava, pečaćenje i privremeno oduzimanje predmeta i uvid u poslovne knjige i drugu dokumentaciju* (dalje: nenajavljene pretrage). [96] Osim toga, važan oblik suradnje s Europskom komisijom, koji je stupanjem Hrvatske u članstvo EU-a povjeren Agenciji, sudjelovanje je i asistencija u provedbi nenajavljenih pretraga koje provodi Europska komisija na teritorijima zemalja članica EU-a, a u sklopu istraga kartela koji imaju nadnacionalni karakter.[97]

U današnje se vrijeme podatci sve više pohranjuju u digitalnom obliku, a komunikacija među poduzetnicima najčešće se odvija elektronički zbog čega su pretrage prvenstveno usmjerene na računala, poslužitelje i ostale elektroničke uređaje. Kako bi pretrage bile što učinkovitije te omogućile prikupljanje odgovarajućih dokaza o postojanju kartela, Agenciji je, uz osposobljavanje njezinih zaposlenika za takve vrste pretraga, potrebna i oprema za digital-

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93 V. Panžić, T. *Sportske luke u zakonodavstvu Republike Hrvatske*, *o. c.* u bilješci 89., str. 662. Autor upozorava na brojne nepravilnosti u poslovanju sportskih luka u RH koje uključuju boravak plovila u vlasništvu čarter kompanija na vezu u sportskim lukama te „trgovanje vezovima" u tim lukama.

94 *Ibid.*

95 Pokajnički program ili program zviždača (*leniency programme*) pokazao se kao najučinkovitije sredstvo u otkrivanju kartela. On uključuje oslobođenje od plaćanja upravno-kaznene mjere pokajniku (sudioniku zabranjenog sporazuma koji Agenciji prvi otkrije kartel i omogući joj pokretanje postupka ili, ako je Agencija već pokrenula postupak, koji joj prvi dostavi relevantne dokaze o postojanju kartela), ali i umanjenje iznosa upravno-kaznene mjere i ostalim poduzetnicima, pokajnicima, ovisno o redu obraćanja Agenciji i dostavi dodatnih valjanih dokaza koji su od odlučujućeg značaja za okončanje postupka utvrđivanja kartela. Iako ih je Agencija ovlaštena provoditi još od studenoga 2010., prvi zahtjev za primjenom pokajničkog programa zaprimljen je tek u 2015. godini. Agencija vjeruje da je taj iskorak posljedica značajnih iznosa upravno-kaznenih mjera koje je izrekla tijekom 2014. i 2015. godine i da je visina sankcija u izravnoj vezi s odvraćajućim učinkom od kršenja propisa tržišnog natjecanja. Primjena pokajničkih programa zasigurno će i ubuduće povećati učinkovitost i brzinu rada Agencije u kartelnim postupcima. V. *Godišnje izviješće o radu Agencije za 2015. godinu*. www. aztn.hr/ea/wp-content/uploads/2015/05/GI-AZTN-2015.pdf (preuzeto 21. travnja 2017.) str. 34.

96 Vidi članke od 42. do 46. ZZTN-a.

97 Agencija će pružiti potrebnu pomoć Europskoj komisiji u pripremi i provedbi nenajavljene pretrage na području RH. Ona može ovlastiti osobe iz nadležnog tijela za zaštitu tržišnog natjecanja druge države članice Europske unije za sudjelovanje u provedbi nenajavljene pretrage na području RH ili ju može provesti u ime i za račun tog tijela. Članak 42., stavak 3. ZZTN-a.

nu forenziku[98] kojom se na licu mjesta mogu pretražiti, pronaći i pohraniti digitalni dokazi. [99] Osim toga, važna je i mogućnost istovremenog provođenja nenajavljenih pretraga poslovnih prostorija svih ili barem većine potencijalnih sudionika kartela. Istovremene nenajavljene pretrage više poduzetnika na određenom tržištu uobičajen su način provođenja pretraga jer je tako vjerojatnost pronalaženja dokaza najveća, a umanjuje se mogućnost bilo kojem sudioniku kartela da ih sakrije ili pak uništi.

Iako je mogućnost provođenja nenajavljenih pretraga uvedena još ZZTN-om iz 2003. godine, Agencija je sve do 2014. godine[100] imala ograničena iskustva u primjeni tih ovlaštenja, prvenstveno zbog toga što nije bila dovoljno tehnički opremljena, tj. nije raspolagala adekvatnom opremom i programima za digitalnu forenziku. Tu je ovlast Agencija intenzivirala u 2015. godini kad je provela dvije nenajavljene pretrage na tržištu medicinskih i nemedicinskih plinova te na tržištu kućnih telefonskih centrala.[101]

Nenajavljene pretrage posljednjih su godina postale jedan od ključnih alata u otkrivanju kartela, kako u postupcima koje provodi Europske komisija tako i u postupcima pred nacionalnim tijelima za zaštitu tržišnog natjecanja. Smatramo kako je njihovo neprovođenje imalo odlučujući na ishod postupka u predmetu *Marine*.

4.4. Uloga Udruženja nautičkog turizma u predmetu *Marine*

Budući da se sporni sastanak poduzetnika u predmetu *Marine* održao u okviru strukovnog udruženja HGK-a, a prisustvovali su mu i predstavnici tog udruženja, Agencija je postupak vodila i protiv HGK-a. HGK samostalna je stručnoposlovna organizacija koja promiče, zastupa i usklađuje zajedničke interese svojih članica pred državnim i drugim tijelima u Hrvatskoj i inozemstvu. Članice su Hrvatske gospodarske komore sve pravne osobe koje obavljaju gospodarsku djelatnost sa sjedištem na području RH, osim pravnih osoba koje obavljaju obrt. U Komoru se mogu učlaniti fizičke i pravne osobe koje obavljaju obrt. [102]

Na temelju članka 37. Statuta oblici organiziranja i rada u HGK-u zasnivaju se na prostornom i strukovnom povezivanju članica. Članice HGK-a prostorno se povezuju u županijskim regionalnim komorama, a strukovno u udruženja i zajednice. Člankom 47. Statuta propisano je kako udruženje s više od 20 članica ima vijeće udruženja. [103]

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98 Znanost prikupljanja, obrade i prezentiranja digitalnih podataka s ciljem provođenja sustavne provjere kako bi se otkrilo što se na računalu dogodilo i tko je za to odgovoran.

99 Statistika pokazuje da se 70 posto elektroničkih dokumenata nikad ne ispisuje. Istodobno, tvrdi disk od 80 GB (trenutno najmanji) može sadržavati 18.181.820 stranica podataka. Za analizu i obradu tih podataka nužna su znanja i alati iz digitalne forenzike, odnosno posebni hardverski i softverski alati. V. *Godišnje izviješće o radu Agencije za 2013. godinu*. www. aztn.hr/uploads/documents/tn/godisnja_izvjesca/godisnje_izvjesce_AZTN_za_2013.pdf (preuzeto 21. travnja 2017.) str. 52.

100 U toj je proračunskoj godini Ministarstvo financija odobrilo novčana sredstava za nabavku opreme za digitalnu forenziku koja je Agenciji osigurala nužnu tehničku opremljenost za provođenje nenajavljenih pretraga. V. *Godišnje izvješće o radu Agencije za 2014. godinu*. www.aztn.hr/ea/wp-content/uploads/2015/05/GI-AZTN-2014.pdf (preuzeto 21. travnja 2017.) str. 38.

101 Prva se odvijala na trima lokacijama (u trima različitim županijama) dok je druga obuhvatila četiri poduzetnika na području Grada Zagreba i Zagrebačke županije. V. *Godišnje izvješće o radu Agencije za 2015. godinu*. www. aztn.hr/ea/wp-content/uploads/2015/05/GI-AZTN-2015.pdf (preuzeto 21. travnja 2017.) str. 34.

102 Zakon o Hrvatskoj gospodarskoj komori (NN, broj 66/91 i 73/91; dalje Zakon o HGK-u) i Statut Hrvatske gospodarske komore (NN, broj 11/94 – pročišćeni tekst, 108/95, 19/96, 64/01, 142/11 i 9/14; dalje: Statut).

103 Na temelju članka 44. Statuta strukovno udruženje oblik je strukovnog povezivanja i organiziranja članica HGK-a na razini RH radi unapređivanja rada i poslovanja članica Komore koje obavljaju određenu djelatnost,

U pravu tržišnog natjecanja udruženjem poduzetnika smatra se i tijelo osnovano na temelju zakona koje obavlja određene javne funkcije ako zastupa gospodarske interese svojih članova.[104] Stoga HGK treba smatrati udruženjem poduzetnika iako obavlja određene javne funkcije.[105]

Udruženje nautičkog turizma (marine) organizirano je i djeluje pri HGK-u, Županijskoj komori u Rijeci, a u svom radu i aktivnostima okuplja 50 marina (od navedenih 21 marina nalazi se u sustavu ACI-ja) s čitavog područja hrvatskog Jadrana. Aktivnosti Udruženja odvijaju se radom Udruženja i njegova Vijeća kao izvršnog tijela. Vijeće Udruženja se, među ostalim, ističe aktivnostima povezanim s promocijom hrvatskih marina na svim emitivnim tržištima Europe, prati aktualnu problematiku u poslovanju marina i zalaže se za njezino što brže i kvalitetnije rješavanje.[106]

ZZTN iz 2003. nije sadržavao pravni temelj za utvrđivanje odgovornosti udruženja poduzetnika. To je zasigurno doprinijelo činjenici da su u velikom broju kartelnih predmeta u postizanje dogovora o cijenama i njegovo provođenje, osim konkurenata, bila uključena i udruženja poduzetnika,[107] uključujući i HGK.[108] To je izmijenjeno u ZZTN-u iz 2009. tako što je definicija poduzetnika usklađena s pravnom stečevinom Unije te iz nje proizlazi kako se poduzetnicima mogu smatrati i udruženja.[109]Agencija je razmatrala položaj HGK-a s obzirom na značajke obavljanja djelatnosti te pravne osobe na tržištu, pri čemu je uzela u obzir i članak 8., stavak 1. ZZTN-a u kojem se kao zabranjeni sporazumi, među ostalim, navode i odluke udruženja poduzetnika. S obzirom na to da Udruženje predstavlja jedan od oblika strukovnog povezivanja i organiziranja članica HGK-a, konkretno poduzetnika koji obavljaju djelatnost marina i sudjeluju u prometu roba, nedvojbeno je da se odredbe ZZTN-a u konkretnom slučaju primjenjuju i na HGK. U upravnom je postupku pred Agencijom HGK navela kako u dnevnom redu sjednice Vijeća Udruženja nautičkog turizma (marina) održane 25. listopada 2012. nije kao posebna točka bila predviđena rasprava o cijenama vezova članova Udruženja, dakle, nije utvrđeno da bi HGK uvrštavanjem takve točke na dnevni red poticala raspravu o

a člankom 45. Statuta propisano je kako je svaka članica Komore članica jednog matičnog udruženja, a zavisno o svom interesu, može sudjelovati u radu drugih udruženja.

104 Hrvatska Agencija u predmetu *EPH/NCL Media Grupa* navela je kako je legitimno pravo udruženja poduzetnika zaštititi interese svojih članova, ali samo ako time ne krše propise uključujući one kojima se štiti tržišno natjecanje. Predmet *EPH/NCL Media Grupa* (*Europapress Holding* d. o. o. i *NCL Media Grupa* d. o. o., klasa UP/I 030-02/2010-01/027, odluka od 16. prosinca, NN, br. 20/2011); Pecotić Kaufman, J. *Kartelni sporazumi i usklađeno djelovanje: kada je paralelno ponašanje poduzetnika nezakonito, o.c.* u bilješci 20., str. 39.

105 Činjenica što je članstvo u HGK-a obvezatno za sve gospodarske subjekte koji obavljaju gospodarsku djelatnost sa sjedištem na području RH nije od utjecaja. V. i predmet C 35/96, *Komisija protiv Italije*, (1998.) ECR I-3851, par. 40.

106 V. odluku Agencije od 17. ožujka 2015. u predmetu *Marine*, str. 4.

107 Primjerice, predmetu *Razminirači* to je bila Hrvatska udruga poslodavaca, (predmet Hrvatski centar za razminiranje protiv *AKD - Mungos* d .o .o. i dr., klasa UP/I/030-02/2004-01/95, odluka od 4. 10. 2005., NN br. 119/05), a u predmetu *Splitske autoškole* Hrvatska zajednica autoškola - regionalni odbor Split (predmet *Biserka -ST* d. o. o., Autoškola *Centar* d. o. o. i dr., klasa UP/I-030-02/99-01/134, odluka od 19. 2. 2001., NN br. 18/01).

108 V. predmet *Kartel autobusnih prijevoznika* u kojem je stručna služba Sektora za promet i veze HGK-a čak izradila izračun „minimalne cijene", što je dokaz aktivnog sudjelovanja udruženja u dogovoru konkurenata. V. *supra*, bilješka 24.

109 Člankom 3. ZZTN-a propisano je kako se poduzetnikom smatraju trgovačka društva, trgovci pojedinci, obrtnici i druge pravne i fizičke osobe koje, obavljajući gospodarsku djelatnost, sudjeluju u proizvodnji i/ili prometu robe, odnosno pružanju usluga, državna tijela i jedinice lokalne i područne (regionalne) samouprave, kad izravno ili neizravno djeluju na tržištu, kao i sve druge pravne ili fizičke osobe (udruge, sportske organizacije, ustanove, vlasnici autorskih i sličnih prava i ostali) koje djeluju na tržištu.

cijenama. HGK se pozvala i na raniju praksu Agencije u predmetima *AZTN protiv Obrtničke komore Osječko-baranjske županije, Udruženja obrtnika Osijek, Sekcije pekara i sedamnaest poduzetnika - pekara* (predmet *Kartel pekara*) u kojima je utvrđeno da je navedeno udruženje bilo inicijator sastanka na kojem se dogovarala cijena kruha te imalo presudnu ulogu u postizanju sporazuma, a Agencija je ipak izrekla simboličnu upravno-kaznenu mjeru tom udruženju.[110]

HGK se pozvala i na odluku Agencije kojom je izrečena simbolična upravno-kaznena mjera društvu ortodonata.[111] U svojoj odluci u predmetu *Marine* Agencija je utvrdila postojanje odgovornost HGK-a za moguće sklapanje zabranjenog sporazuma. HGK, kao tijelo osnovano na temelju posebnog zakona, ima „posebnu zadaću i odgovornost osiguranja poštovanja zakonskih propisa njegovih članova, posebice jer sjednicama Udruženja uvijek prisustvuju djelatnici HGK-a koji bi trebali spriječiti bilo kakav oblik narušavanja tržišnog natjecanja koje se odvija na tim sjednicama, odnosno upozoriti članice da određeno ponašanje može dovesti do kršenja propisa o zaštiti tržišnog natjecanja."[112] Olakotnom okolnošću Agencija je ocijenila činjenicu što nije utvrđena bilo kakva dodatna aktivnost HGK-a koja bi išla u smjeru razmjene osjetljivih informacija ili pak postizanja dogovora među njenim članicama, a koji bi mogao predstavljati zabranjen sporazum u smislu odredbi ZZTN-a. Zbog toga je Agencija HGK-a izreka simboličnu upravno-kaznenu mjeru. Iznenađuje nas, a istodobno i zabrinjava činjenica što iz spisa predmeta i iskaza djelatnika HGK-a koji je sastavljao sporni zapisnik sa sjednice Udruženja nautičkog turizma u predmetu *Marine*, proizlazi kako ni on sam nije bio svjestan toga da izjava kojom se najavljuje buduće povećanje cijena usluga veza u marinama predstavlja osobito teško kršenje propisa o tržišnom natjecanju, stoga nije ni mogao upozoriti poduzetnike na njezinu nezakonitost, a što ukazuje na nedovoljnu educiranost djelatnika HGK-a o pravilima tržišnog natjecanja.[113]

5. Zaključak

Kad je riječ pravnim pravilima kojima se uređuju karteli, kao najteži oblici kršenja prava tržišnog natjecanja za koje je dokazano da nanose najveću štetu potrošačima i gospodarstvu u cjelini, pravo RH u potpunosti je usklađeno s pravnom stečevinom EU-a. Međutim, kad je riječ o njihovu otkrivanju i sankcioniranju, hrvatska teorija prava tržišnog natjecanja jedinstvena je

[110] Simbolična upravno-kaznena mjera izrečena je Udruženju, premda je ono bilo inicijator ovog dogovora, jer je procijenjeno da bi izricanje upravno-kaznene mjere u postotku koji predstavlja zbroj ukupnih prihoda članova udruženja predstavljalo previsoku kaznu koja ne bi bila razmjerna težini i značaju povrede. Agencija je smatrala da će izrečena simbolična upravno-kaznena mjera u visini od 50.000 kuna postići cilj primjerenog kažnjavanja Udruženja, odvraćanja pekara, ali i svih drugih poduzetnika od budućih postupanja kojima se narušava tržišno natjecanje. Rješenje Agencije, klasa: UP/I 030-02/11-01/039 od 26. srpnja 2012. (NN broj 102/2012).

[111] Agencija za zaštitu tržišnog natjecanja tom je u postupku utvrdila da minimalni cjenik ortodontskih usluga, javno objavljen na mrežnim stranicama Hrvatskog društva ortodonata (dalje: HDO), sadrži popis ortodontskih usluga i njihove minimalne cijene, što predstavlja zabranjeni sporazum. Agencija je uvažila činjenicu da je važećim propisom utvrđivanje minimalnih cijena na tržištu dentalnih (i ortodontskih) usluga još uvijek dopušteno iako je za njihovo utvrđivanje ovlaštena Hrvatska komora dentalne medicine koja nije iskoristila tu svoju ovlast. Činjenica da Komora nije zasebnim cjenikom utvrdila najniže cijene ortodontskih usluga ni izravno ni neizravno ne daje ovlast HDO-u da to učini. HDO je vrednovanje ortodontskih usluga trebao riješiti na bilo koji drugi zakonom dopušten način. Zbog toga je Agencija HDO-u izrekla simboličnu upravno-kaznenu mjeru. Predmet AZTN protiv Hrvatskog društva ortodonata, klasa: UP/I 034-03/13-01/034, od 12. lipnja 2014., Narodne novine br. 81/14 .

[112] V. odluku Agencije od 17. ožujka 2015. u predmetu *Marine*, str. 52.

[113] Vjerujemo kako je riječ o izdvojenom slučaju i da je odluka Agencije u predmetu *Marine* bila dovoljno upozorenje te da se u međuvremenu poradilo na edukaciji zaposlenika HGK-a o pravilima tržišnog natjecanja.

u stajalištu da bi broj kartelnih predmeta o kojima je hrvatsko tijelo nadležno za zaštitu tržišnog natjecanja u svom dosadašnjem radu odlučivalo, trebao biti znatno veći.[114] Iz toga proizlazi da pravila tržišnog natjecanja nisu u dovoljnoj mjeri zaživjela u praksi. U tom kontekstu treba uzeti u obzir određene okolnosti povezane s primjenom pravila tržišnog natjecanja u RH. Sustavan razvoj prava tržišnog natjecanja u RH započeo je 1995. godine donošenjem ZZTN-a dok je Agencija, kao tijelo nadležno za zaštitu tržišnog natjecanja u RH, započela s radom 1997. godine. Nadalje, treba napomenuti kako je tek ZZTN-om iz 2009. godine Agenciji dano ovlaštenje za izricanje kazni poduzetnicima čime je ukinuta nadležnost prekršajnih sudova za izricanje kazni na temelju odluka Agencije. Također, na temelju ZZTN-a iz 2009. doneseni su kriteriji za oslobađanje od kazne, odnosno umanjenje kazne poduzetnicima koji daju bitne informacije o postojanju kartela (tzv. pokajnički program ili program zviždača), a prvi zahtjev za primjenu pokajničkog programa zaprimljen je tek 2015. godine. Iako je mogućnost provođenja nenajavljenih pretraga poslovnih i drugih prostorija poduzetnika uvedena još ZZTN-om iz 2003. godine, Agencija je sve do 2014. godine imala ograničena iskustva u primjeni tih ovlaštenja, prvenstveno zato što zbog recesijskih ograničenja povezanih s proračunskim financiranjem Agencije nije bila dovoljno tehnički opremljena za provođenje te vrste pretraga, tj. nije raspolagala adekvatnom opremom za digitalnu forenziku. U poredbenoj praksi država EU-a program zviždača pokazao se kao najučinkovitije sredstvo u otkrivanju kartela, a provođenje nenajavljenih pretraga, uz korištenje opreme i programa za digitalnu forenziku u vremenu kad se podatci sve više pohranjuju u digitalnom obliku, neizbježno je. Agencija stoga niz godina nije mogla biti u dovoljnoj mjeri učinkovita u otkrivanju i sankcioniranju kartela jer nije imala potrebna ovlaštenja i opremu. Osim toga, kako u našem pravnom sustavu ne postoji duga tradicija primjene prava tržišnog natjecanja, potrebno je određeno vrijeme da bi se poduzetnici (i cijela društvena zajednica) upoznali s njegovim pravilima i načelima. Taj proces još uvijek traje. Da stranke (uključujući i djelatnike HGK) nedovoljno poznaju pravila i načela prava tržišnog natjecanja, pokazalo se i u predmetu *Marine*, a to upućuje da je i dalje potreban kontinuiran rad Agencije i drugih nadležnih tijela, ali i pravne znanosti na promicanju prava i politike tržišnog natjecanja u RH. Kad je riječ o odlukama Agencije i Visokog upravnog suda RH u predmetu *Marine*, smatramo kako su ta tijela pravilno primijenila materijalno pravo kad je riječ o relevantnim izvorima domaćeg prava tržišnog natjecanja i pravne stečevine EU-a. Međutim, mislimo kako materijalno pravo nije pravilno primijenjeno pri definiranju mjerodavnog tržišta u proizvodnom smislu. Iako su stranke na glavnoj raspravi u postupku pred Agencijom upozorile na praksu bavljenja nautičkim turizmom luka otvorenih za javni promet i, slijedom toga, na moguće kršenje pravila o tržišnom natjecanju, ni Agencija ni Visoki upravni sud RH u svojim se odlukama nisu osvrnuli na te navode te se nisu upuštali u analizu mjerodavnih propisa pomorskog prava, ZPDML-a i njegovih podzakonskih akata[115] koji reguliraju namjenu pojedinih luka. Također, nisu se uzele u obzir ni općepoznate činjenice u vezi s praksom poslovanja luka otvorenih za javni promet i sportskih luka u RH koje se posljednjih godina u sve većoj mjeri bave nautičkim turizmom. Ipak, uzevši u obzir da je u ovom predmetu bila riječ o mogućem sklapanju horizontalnog sporazuma o cijenama s ograničenjima koja se smatraju teškim ograničenjima tržišnog natjecanja, zbog čega se takvi sporazumi smatraju zabranjenim *per se* bez obzira na to jesu li njihovi učinci na tržištu doista i nastali, precizno utvrđivanje mjerodavnog tržišta i tržišne snage poduzetnika nije bilo od odlučne važnosti jer tržišni udjeli poduzetnika ne utječu na činjenicu je li u konkretnom slučaju došlo do povrede odredbi ZZTN-a. Zbog toga smatramo da definicija mjerodavnog tržišta u ovom predmetu

[114] V. *supra*, bilješka 20.

[115] V. *supra*, 4.2.1.

nije utjecala na ishod postupka. Za razliku od toga, a na što je upozorio i Visoki upravni sud RH, Agencija nije u potpunosti utvrdila činjenično stanje, odnosno nije u potpunosti rasvijetlila činjenicu dostave zapisnika sa sporne sjednice Vijeća Udruženja nautičkog turizma (marina) strankama u postupku. Nedvojbeno utvrđivanje činjenice dostave zapisnika strankama bilo je ključno za donošenje ocjene o tome jesu li sve stranke bile upoznate s informacijom o budućoj politici glede cijena tako da su imale mogućnost reagirati i ograditi se od te informacije, a što je, prema sudskoj praksi Suda EU-a, potrebno kako bi se oslobodile optužbi za sudjelovanje u kartelu. Upravo je to, što je činjenica dostave zapisnika strankama u postupku ostala neutvrđena, odlučujuće utjecalo na ishod postupka u predmetu *Marine*.

SUMMARY

PROHIBITED AGREEMENTS OF COMPETITORS ON PRICES AND THEIR PARTICULARITIES IN MARINAS CASE IN THE REPUBLIC OF CROATIA

In this paper we analyse the decision of the Croatian Competition Agency in case Croatian Competition Agency against Croatian Chamber of Economy and nine undertakings members of the Croatian Association of Nautical Tourism (case "Marinas") in which the existence of a prohibited agreement of undertakings on the future prices of berthing services in marinas on the territory of the Republic of Croatia is determined, as well as the judgement of the High Administrative Court of the Republic of Croatia and of the Croatian Competition Agency which were brought after that. After introductory part and definition of prohibited agreements of competitors, many disputable issues, factual and legal, which appeared in that case, are being examined, such as existence of cartel agreement between marinas, determination of the relevant market, providing of berthing services for nautical vessels in ports open to public traffic and sports ports, role of the Croatian Association of Nautical Tourism etc. Relevant judgements of the Court of Justice of the European Union and General Court of the European Union which Croatian Competition Agency used as an interpretative instrument for the application of the Croatian competition rules are analysed, as well as previously issued decisions of the Croatian Competition Agency on horizontal agreements on prices. The overriding goal of the present paper is to provide a critical evaluation of the decisions of the Croatian Competition Agency and High Administrative Court of the Republic of Croatia brought in "Marinas" case and Croatian rules applied in that case.

Key words: *competition law, horizontal agreements on prices, nautical tourism ports, berth contract, relevant product market, relevant geographic market*

PRIVREMENA MJERA ZAUSTAVLJANJA JAHTE PRED HRVATSKIM SUDOM RADI OSIGURANJA TRAŽBINE KONCESIONARA MARINE

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SAŽETAK

U ovom se radu autorica bavi pravnom problematikom povezanom s privremenom mjerom zaustavljanja jahte pred hrvatskim sudovima u svrhu osiguranja potraživanja koncesionara marine, kao što su tražbina naknade za vez, tražbine s osnova opskrbe jahte električnom energijom, vodom, gorivom, rukovanja otpadom, popravka ili održavanja jahte te drugih sličnih usluga koje koncesionar luke nautičkog turizma pruža vlasnicima i korisnicima jahti na vezu u luci nautičkog turizma. Autorica proučava praksu domaćih trgovačkih sudova nadležnih za određivanje privremene mjere zaustavljanja jahte te analizira relevantno pozitivno pravo koje uređuje pitanja ovrhe i osiguranja na brodu, a koje se odnosi i na privremeno zaustavljanje jahte radi osiguranja pomorskih tražbina, posebno u svjetlu problematike osiguranja i u konačnici namirenja tražbina koncesionara luke nautičkog turizma. Osobit interes usmjeren je na pitanje mogu li se tražbine koncesionara luke nautičkog turizma smatrati pomorskim tražbinama u smislu odredaba hrvatskoga Pomorskog zakonika, odnosno Međunarodne konvencije za izjednačenje nekih pravila o privremenom zaustavljanju brodova iz 1952. s obzirom na to da je Hrvatska stranka te konvencije. Nadalje, pozornost se posvećuje i pitanju jesu li pojedine tražbine koncesionara luke nautičkog turizma zaštićene pomorskim privilegijem sukladno odredbama Pomorskog zakonika, a s obzirom na to da se po domaćem pravu privremena mjera zaustavljanja jahte može odrediti i ako je tražbina čija se naplata želi osigurati pomorski privilegij. Kritičkom analizom relevantne sudske prakse i mjerodavnog prava autorica nastoji pružiti primjerene prijedloge de lege ferenda *koji odražavaju interes da se zaštiti položaj koncesionara luke nautičkog turizma kao vjerovnika, a s obzirom na stratešku orijentaciju Hrvatske prema daljnjem razvoju nautičkog turizma.*[1]

Ključne riječi: *privremena mjera, zaustavljanje jahte, marina, luka nautičkog turizma, osiguranje tražbina, pomorska tražbina, naknada za vez, popravak jahte, održavanje jahte*

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[1] Rad je rezultat istraživanja u okviru znanstvenoistraživačkog projekta Jadranskog zavoda Hrvatske akademije znanosti i umjetnosti pod nazivom *Razvoj suvremenog pravnog i osiguratelјnog režima za hrvatske marine – unapređenje konkurentnosti, sigurnosti, sigurnosne zaštite i zaštite morskog okoliša (DELICROMAR)*, br. UIP-11-2013-3061, koji financira Hrvatska zaklada za znanost, www.delicromar.hazu.hr.

1. Uvod

Predmet je istraživanja pravna problematika povezana s privremenom mjerom zaustavljanja jahte pred hrvatskim sudom u svrhu osiguranja potraživanja koncesionara marine.[2] Riječ je o tražbinama kao što su naknada za vez, tražbine s osnova opskrbe plovila[3] električnom energijom, vodom, gorivom, rukovanja otpadom, popravka ili održavanja plovila te drugih sličnih usluga koje koncesionar marine pruža vlasnicima i korisnicima plovila na vezu u marini. Treba imati u vidu da upravo te vrste usluga čine i osnovni prihod marine, te je učinkovita naplata tih vrsta tražbina bitan uvjet opstanka marine.[4] K tomu, velik broj plovila koja se nalaze na vezu u domaćim marinama vije strane zastave,[5] u vlasništvu je stranih državljana te su i ugovori o vezu, održavanju ili čuvanju tih plovila sklopljeni sa stranim državljanima, što dodatno otežava naplatu dospjelih potraživanja s obzirom na to da će strani korisnici usluga i vlasnici plovila na vezu koji ne ispunjavaju svoje obveze iz ugovora s marinom često biti teško dostupni marini i domaćem pravosuđu.[6] U takvim situacijama plovilo je najčešće i jedina imovina iz koje marina može naplatiti svoja potraživanja[7]. Stoga je očit interes vjerovnika za ishođenjem privremene mjere radi osiguranja naplate dospjele tražbine nadležnim sudom upravo na samom plovilu. Pritom treba paziti da su ovrha i osiguranje na brodovima i jahtama u nas uređeni posebnim zakonskim odredbama Pomorskog zakonika[8] (u nastavku: PZ), uz supsidijarnu primjenu Ovršnog zakona[9] kao općeg pravnog propisa.

Iz istraživanja provedenih upitnicima i intervjuima s predstavnicima koncesionara 30 hrvatskih marina zaključujemo da se većina marina u svakodnevnom poslovanju povremeno susreće s problemom naplate dospjelih tražbina s osnova pruženih usluga veza i dodatnih usluga za plovila. Kad je riječ o većim nenaplaćenim iznosima novčanih tražbina, poglavito

[2] U radu se koristimo terminom marina, a misli se na najrazvijeniji i najkompleksniji oblik luke nautičkog turizma, kao luke posebne namjene, kako je definirana Zakonom o pomorskom dobru i morskim lukama, Narodne novine br. 158/2003, 100/2004, 141/2006, 38/2009, 123/2011, 56/2016 (u nastavku: ZPDML). Termin marina u domaćem je zakonodavstvu definiran Pravilnikom o razvrstavanju i kategorizaciji luka nautičkog turizma, Narodne novine br. 72/2008, kao dio vodenog prostora i obale posebno izgrađen i uređen za pružanje usluga veza, smještaja turista u plovnim objektima te ostalih usluga sukladno ovom Pravilniku. Specifično je da je citirani Pravilnik usvojen kao podzakonski akt na temelju Zakona o pružanju usluga u turizmu, Narodne novine br. 68/2007, 88/2010, 30/2014, 89/2014, 152/2014 (u nastavku: ZPUT) čija je implementacija u nadležnosti Ministarstva turizma, dok je pravni status luka nautičkog turizma i pomorskog dobra na kojem djeluju temeljem koncesije primarno uređen ZPDML-om čija je implementacija u nadležnosti Ministarstva mora, prometa i infrastrukture.

[3] Radi jednostavnosti koristimo se pojmom plovilo premda on ne odgovara relevantnoj zakonskoj terminologiji. Na vezu u marinama pretežno se nalaze jahte i brodice za sport i razonodu, pri čemu su pojmovi jahta, strana jahta i brodica definirani u čl. 5. st. 1. t. 15), 20) i 21) Pomorskog zakonika, a za potrebe ovog članka pod jedinstvenim pojmom plovila podrazumijevamo brodice i jahte koje čine većinu plovnih objekata smještenih u marinama.

[4] Majstorović, D. 2009. Ovršno pravo – prodaja (napuštenih) plovila. *XXIV. Savjetovanje – Aktualnosti hrvatskog zakonodavstva i pravne prakse*, Godišnjak 16. Hrvatsko društvo za građanskopravne znanosti i praksu. Zagreb. 841–853.

[5] Prema podacima Državnog zavoda za statistiku u 2015. godini na stalnom je vezu u domaćim lukama nautičkog turizma bilo 56 %, a na tranzitnom vezu 53 % plovila pod stranim zastavama, najviše iz Italije, Njemačke, Austrije i Slovenije. Vidi Priopćenje Državnog zavoda za statistiku: „Nautički turizam – Kapaciteti i poslovanje luka nautičkog turizma u 2015.“, br. 4.3.4., Zagreb, 25. 3. 2015.

[6] *Ibid*.

[7] *Ibid*.

[8] Narodne novine br. 181/2004, 76/2007, 146/2008, 61/2011, 56/2013, 26/2015.

[9] Ovršni zakon, 112/2012, 25/2013, 93/2014, 55/2016.

s osnova stalnog veza, održavanja, popravka ili opskrbe plovila, u praksi domaćih marina u vezi s tim nailazimo na primjere pokušaja naplate dospjelih tražbina s pomoću marinina instituta retencije plovila, ovrhe i prisilne prodaje, ali i privremene mjere zaustavljanja jahte, osobito kad je riječ o jahtama pod stranim zastavama za koje postoji opasnost da će se prodati ili napustiti marinu i naše teritorijalno more te trajno onemogućiti naplatu dospjelih potraživanja. U ovom radu bavimo se poglavito problematikom privremene mjere zaustavljanja jahte, dok su neki od ostalih načina osiguranja i prisilne naplate tražbina koncesionara marine prema korisnicima vezova i drugih usluga marine predmet posebnog istraživanja.

U radu će se analizirati relevantno domaće pozitivno pravo, posebno odredbe Pomorskog zakonika koje se odnose na ovrhu i osiguranje na brodu, a primjenjuju se i na jahte, kao i Međunarodna konvencija za izjednačenje nekih pravila o privremenom zaustavljanju brodova, Bruxelles, 1952. (u nastavku: Konvencija iz 1952.) kojoj je Hrvatska stranka te njihova specifična primjena na privremenu mjeru zaustavljanja jahte radi osiguranja tražbina koncesionara marine. U cilju vjerne interpretacije relevantnih zakonskih i konvencijskih odredaba u radu se pruža kraći osvrt i na njihovu povijesnu pozadinu i razvoj. Obradit će se i kritički analizirati relevantna sudska praksa domaćih sudova. Pritom se nastoji odgovoriti na pitanje mogu li se tražbine koncesionara marine smatrati pomorskim tražbinama u smislu odredaba hrvatskoga Pomorskog zakonika, odnosno Konvencije iz 1952., te jesu li pojedine tražbine koncesionara luke nautičkog turizma zaštićene pomorskim privilegijem sukladno odredbama Pomorskog zakonika, a s obzirom na to da se po domaćem pravu privremena mjera zaustavljanja jahte može odrediti i ako je tražbina pomorski privilegij.

Nadalje, potrebno je osvrnuti se i na povezanu problematiku mjerodavnog prava i nadležnosti, što dodatno komplicira pokušaj davanja konkretnih odgovora i pojašnjenja pitanja razmatranih u ovom radu. S tim u vezi potrebno je analizirati opseg primjene Konvencije o zaustavljanju brodova iz 1952., odnosno relevantnih odredaba Pomorskog zakonika kad su u pitanju pravni odnosi s međunarodnim elementom.

U radu se prikazuju i pojedina rješenja iz komparativnog prava te rješenja iz Međunarodne konvencije o zaustavljanju brodova iz 1999.

Napokon, razmatraju se mogući prijedlozi *de lege ferenda* koji odražavaju interes da se zaštiti položaj koncesionara marine kao vjerovnika, a s obzirom na stratešku orijentaciju Hrvatske prema daljnjem razvoju nautičkog turizma.

Predmet ovog istraživanja postaje sve važniji u svjetlu usmjeravanja Hrvatske prema daljnjem razvoju nautičkog turizma i planiranju povećanja kapaciteta nautičkih vezova. Položaj koncesionara marine u današnje vrijeme dobiva opće gospodarsko značenje te zaslužuje posebnu pozornost s raznih aspekata. Ovaj rad usmjeren je na jedan vrlo uzak, ali praktično veoma važan vid toga položaja. On želi istražiti i razjasniti pravne probleme s kojima se koncesionari marina susreću u situacijama kada radi osiguranja i u konačnici namirenja svojih tražbina pokušaju zaustaviti plovilo u odnosu na koje je usluga pružena. Riječ je o praktično najatraktivnijem i potencijalno najučinkovitijem načinu ostvarenja njihovih potraživanja. S tim u vezi zabrinjavajuće je uvidjeti koliki su razmjeri pravne nesigurnosti koja okružuje promatranu tematiku, pa se ovim radom želi pridonijeti postizanju veće pravne sigurnosti, a osobito usuglašavanju domaće sudske prakse.

2. Primjena odredaba pomorskog zakonika o privremenoj mjeri zaustavljanja broda

Odredbama Dijela devetog PZ-a (čl. 841. *et seq*) uređuje se ovrha i osiguranje na brodu i brodskom teretu, a propisano je da u ovom dijelu PZ-a izraz *brod* obuhvaća te se na odgovarajući način primjenjuje i na ostale pomorske objekte osim brodica.[10] Dakle, odredbe PZ-a o ovrsi i osiguranju na brodu na odgovarajući se način primjenjuju i na ovrhu i osiguranje na jahti, dok se ovrha i osiguranje na brodici provodi prema Ovršnom zakonu.[11] Nadalje, kad je riječ o privremenoj mjeri osiguranja na brodu ili jahti, predviđena je odgovarajuća supsidijarna primjena odredaba PZ-a o ovrsi na brodu,[12] a općenito u odnosu na ovrhu i osiguranje na brodu supsidijarno će se na odgovarajući način primjenjivati odredbe Ovršnog zakona i opća prava osiguranja.[13] Ovrhu i osiguranje na brodu i jahti određuju i provode trgovački sudovi nadležni za pomorske sporove,[14] dok su za ovrhu i osiguranje na brodici u pravilu stvarno nadležni općinski sudovi. [15]

Dakle, važno je razlikovati zakonske pojmove jahte i brodice s obzirom na to da će o tome u koju od navedenih dviju kategorije potpada plovilo u odnosu na koje se predlaže privremena mjera ovisiti stvarna nadležnost suda te primjena odgovarajućega pravnog uređenja – pomorskog za jahte, odnosno općega ovršnog za brodice.[16]

Zaustavljanje, kao jedna od privremenih mjera radi osiguranja novčanih tražbina[17], uređeno je PZ-om, i to poglavito odredbama članaka 952.–964. Nadalje, pitanje pretpostavki za određivanje privremene mjere radi osiguranja novčane tražbine uređeno je Ovršnim zakonom, i to čl. 344. [18]

Sukladno tome, da bi sud mogao odrediti privremenu mjeru zaustavljanja jahte, koja se provodi na temelju zabrane odlaska jahte iz luke[19], u našem slučaju marine, trebaju se ispuniti sljedeće pretpostavke.

a) Tražbina čije se osiguranje traži mora biti pomorska tražbina, tj. mora se moći podvesti pod jednu od taksativno navedenih pomorskih tražbina iz čl. 953. st. 1. ili mora biti riječ o realizaciji pomorskog privilegija, hipoteke na brodu/jahti ili hipoteci slična založnog prava (čl. 953. st. 2. PZ-a).

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[10] PZ, čl. 841. st. 1. i 3.

[11] PZ, čl. 841. st. 3.

[12] PZ, čl. 841. st. 4.

[13] PZ, čl. 841. st. 5.

[14] PZ, čl. 841. st. 6.

[15] Vidi VSRH, Rješenje broj: Gr1 336/07-2 od 25. rujna 2007., citirano prema Skorupan Wolff, V. 2009. Odluke domaćih sudova: Stvarna nadležnost u postupku ovrhe na brodici upisanoj u upisnik brodova, prikaz presude. *Poredbeno pomorsko pravo,* god. 48, 163. 212–214.

[16] U kontekstu nautičkog turizma i djelatnosti marina promatramo prije svega brodice za sport i razonodu i jahte, pri čemu PZ, čl. 5. t. 15. brodicu definira kao plovni objekt namijenjen za plovidbu morem koji nije brod ili jahta, čija je duljina veća od 2,5 metara ili ukupne snage porivnih strojeva veće od 5 kW. Jahta je definirana kao plovni objekt za sport i razonodu, neovisno o tome upotrebljava li se za osobne potrebe ili za gospodarsku djelatnost, a čija je duljina veća od 12 metara i koji je namijenjen za dulji boravak na moru te koji je uz posadu ovlašten prevoziti ne više od 12 putnika (PZ, čl. 5. st. 1. t. 20.). Strana je jahta plovni objekt za sport i razonodu koji ima stranu državnu pripadnost i koji se takvim smatra prema propisima države čiju državnu pripadnost ima (PZ, čl. 5. st. 1. t. 21.)

[17] Može se odrediti prije pokretanja ili tijekom parničnog, ovršnog ili upravnog postupka (PZ, čl. 951.).

[18] Marin, J. 2003. *Privremene mjere zaustavljanja broda*. Pravni fakultet Sveučilišta u Zagrebu. Str. 6.

[19] PZ, čl. 952.

b) Predlagatelj osiguranja treba učiniti vjerojatnim postojanje pomorske tražbine i opasnost da će bez takve mjere protivnik osiguranja spriječiti ili znatno otežati naplatu tražbine time što će svoju imovinu otuđiti, prikriti ili na drugi način njome raspolagati (OZ, čl. 344. st. 1.).

c) Predloženom privremenom mjerom postiže se svrha osiguranja.[20]

Takva se opasnost predmnijeva (*presumptio iuris et de iure*) ako bi se tražbina imala ostvariti u inozemstvu (OZ, čl. 344. st. 3.), a u domaćoj sudskoj praksi ta se neoboriva zakonska predmnjeva redovito primjenjuje kada se u hrvatskoj luci želi zaustaviti brod ili jahta strane zastave ili kada je vlasnik broda strana ili fizička osoba.[21] Predlagatelj osiguranja ne mora dokazivati opasnost sprečavanja ili otežavanja naplate tražbine protivnika osiguranja ako se učini vjerojatnim da bi predloženom mjerom protivnik osiguranja pretrpio samo neznatnu štetu (OZ, čl. 344. st. 3).

Dakle, da bi se mogla odrediti privremena mjera zaustavljanja jahte, prije svega novčana tražbina marine čije se osiguranje traži, mora biti pomorska tražbina (PZ, čl. 953. st. 1.) ili pomorski privilegij (PZ, čl. 953. st. 2.). Propisano je da se privremeno zaustavljanje može odrediti samo za (pomorske) tražbine koje proizlaze iz:

„1) štete prouzročene sudarom broda čije se zaustavljanje traži ili štete prouzročene tim brodom na koji drugi način,

2) smrti ili tjelesne ozljede prouzročene brodom čije se zaustavljanje traži ili koje su nastale u svezi s iskorištavanjem toga broda,

3) spašavanja,

4) ugovora o iskorištavanju broda čije se zaustavljanje traži,

5) zajedničke havarije,

6) tegljenja,

7) peljarenja,

8) opskrbe broda čije se zaustavljanje traži radi njegova održavanja ili iskorištavanja,

9) gradnje, preinake, popravka, opreme ili dokovanja broda čije se zaustavljanje traži,

10) prava posade po osnovi rada,

11) izdataka koje učini zapovjednik, krcatelj, naručitelj ili agent za račun broda, odnosno vlasnika broda ili brodara, a u svezi s brodom,

12) posredničkih provizija ili agencijskih nagrada koje se duguju u svezi s brodom.“[22]

Privremeno zaustavljanje broda može se odrediti i radi ostvarenja pomorskog privilegija ili hipoteke na brodu ili hipoteci slična sredstva osiguranja.[23]

Tipične su tražbine marine one koje proizlaze iz njezine osnovne djelatnosti pružanja usluga veza i smještaja plovila te popratnih ili dodatnih usluga kao što su podizanje na suhi vez ili u dok te spuštanje plovila u more, održavanje, servisiranje, popravljanje,

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[20] Marin tumači kako se konzervacijska svrha privremenog zaustavljanja „sastoji u osiguranju budućeg ostvarenja tražbine predlagatelja osiguranja.“ To znači, ako se privremenom mjerom zaustavljanja takva svrha ne može postići jer je, primjerice, tražbina predlagatelja osiguranja već dovoljno osigurana, takvo zaustavljanje nije dopušteno zbog nedostatka pravnog interesa. Vidi MARIN, *op. cit.* Str. 12.

[21] MARIN, *op. cit.* Str. 11.

[22] PZ, čl. 953. st. 1.

[23] PZ, čl. 953. st.2.

opremanje ili opskrba plovila i sl.[24] Navedene tražbine ujedno su i glavni prihod marina u Hrvatskoj.

2.1. Popravak i opremanje jahte, troškovi dokovanja

Tražbine poput naknade za popravak i opremanje jahte te s tim povezane troškove podizanja iz mora u suhi dok, dane u doku te ponovnog spuštanja u more i sl. mogu se podvesti pod PZ, čl. 953. st. 1. t. 9. Takvo tumačenje odgovara i široko prihvaćenom tumačenju odgovarajuće odredbe Konvencije iz 1952., čl. 1. st. 1. t. l).[25] Tako bismo pod to mogli podvesti, primjerice, popravak trupa, jedara, motora, generatora, nautičkih instrumenata ili druge brodske opreme, uređaja ili dijelova, naravno, uz pretpostavku da se marina javlja kao ugovorni pružatelj tih usluga te da za te usluge ispostavlja račun. Popravak ne uključuje redovito servisiranje i radove na jahti potrebne za njezino redovito održavanje. O pravnoj prirodi tražbina koje proizlaze iz potonjih usluga raspravljamo u nastavku.

2.2. Opskrba električnom energijom, vodom, gorivom, materijalom i proizvodima, redovito servisiranje i održavanje jahte

Nadalje, smatramo da naknade za servisiranje i održavanje jahte u marini treba podvesti pod PZ, čl. 953. st. 1. t. 8., tj. tražbine koje proizlaze iz opskrbe broda radi njegova održavanja ili iskorištavanja. U prilog tome ističemo argument da je citirana odredba PZ-a inspirirana odgovarajućom odredbom Konvencije iz 1952., čl. 1. st. 1. t. k)[26] uz jedno malo, ali znakovito odstupanje. Naime, dok Konvencija spominje dobavu proizvoda i materijala za brod u svrhu njegova iskorištavanja ili održavanja, tekst PZ-a govori samo o opskrbi radi održavanja ili iskorištavanja. Stoga bi se tekst PZ-a mogao tumačiti šire od teksta odgovarajuće odredbe Konvencije u smislu da bi odredba PZ-a mogla obuhvatiti i usluge pružene u svrhu redovitog održavanja i iskorištavanja (redovito servisiranje i održavanje brodskog motora, akumulatora i ostalih uređaja, uključujući usluge povremenog pokretanja motora, ispitivanja baterija, sprečavanja smrzavanja i sl., zatim postavljanje i skidanje cerade, prozračivanje unutrašnjosti plovila, čišćenje, redovito bojenje i premazivanje, uskladištenje nekih predmeta i dijelova opreme izvan broda, itd.), a ne samo opskrbu proizvodima i materijalima (nabava brodskih dijelova i dijelova motora, opskrba gorivom, mazivom, vodom i električnom energijom i sl.). Nadalje, u prilog takvu tumačenju navodimo primjer iz domaće sudske prakse, a riječ je o odluci Privrednog suda Hrvatske kojom je određena privremena mjera zaustavljanja pojedinih brodova radi osiguranja novčanih tražbina predlagatelja privremene mjere s osnova pruženih usluga nužnih za redovito održavanje brodova, upravo na temelju odnosne zakonske odredbe koja kao pomorsku tražbinu predviđa opskrbu broda radi njegova održavanja ili iskorištavanja.[27]

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[24] Iz provedenih istraživanja proizlazi da se najčešće kao pružatelji dodatnih usluga servisiranja, održavanja i popravaka plovila ili opskrbe gorivom u marini javljaju posebne pravne ili fizičke osobe različite od koncesionara marine, a koje s koncesionarom mogu ili ne moraju biti povezane. Mnogi koncesionari marina imaju praksu ugovaranja takvih dodatnih usluga za korisnike vezova, koje provode pojedini kooperanti koncesionara. Da bi koncesionar marine bio vjerovnik takve pomorske tražbine, treba imati ugovor, narudžbenicu ili radni nalog te izdati račun, što znači da treba biti i registriran za takvu vrstu djelatnosti. Vidi Ivković, Đ. 2007. *Pomorski privilegiji na brodu – Priručnik.* Piran. Str. 116.

[25] Vidi Berlingieri, F. 2011. *Berlingieri on Arrest of Ships*, 5th Edition. Informa. London. Str. 106 i dalje.

[26] U izvornom engleskom tekstu ova točka glasi: "goods or materials wherever supplied to a ship for her operation or maintenance".

[27] II Pž-1257/90-2, 29. 5. 1990. Zaustavljanje je određeno temeljem čl. 877. st. 3. t. 7. tada važećeg Zakona o pomor-

Opisanim bismo tumačenjem obuhvatili i uslugu veza za jahtu u marini s obzirom na to da je takva usluga nužna za redovito održavanje i uporabu, odnosno iskorištavanje jahte.

Suprotno tomu, Ivković navodi da bi se odredba o „opskrbi" broda mogla primijeniti na marinu samo kad je riječ doista o *opskrbi*, misleći pritom na dijelove broda ili stroja, hranu, gorivo, mazivo, boje, konope i sl. Po njegovu mišljenju, to bi dolazilo u obzir samo ako je marina registrirana za takvu djelatnost i ako se bavi prodajom tih artikala, ako ima narudžbenicu za isporuku i ako je izdala račun za isporučene artikle.[28]

Zaključno, smatramo da usluga veza kao i popratne usluge radi redovita iskorištavanja i održavanja brodova i jahti po svojoj prirodi uistinu imaju karakter pomorskih tražbina te bi radi uklanjanja svake sumnje bilo poželjno *de lege ferenda* dopuniti odredbu PZ-a, čl. 953. st. 1. t. 8. tako da izričito uključuje i usluge radi održavanja i iskorištavanja broda.

2.3. Naknada za vez u marini

U praksi je najspornije pitanje pravne prirode naknade za vez u marini u ovom kontekstu, a riječ je o glavnom prihodu marine koji proizlazi iz njezine osnovne djelatnosti, pa je upravo ona u središtu naše pozornosti. Primjerice, *Ivković* navodi: „Čini se da položaj marina nije raščišćen u pogledu primjene i/ili prava kako kod privremenih mjera tako i privilegija. Treba poći od toga da su pomorske tražbine i privilegiji stvoreni i adaptirani, uglavnom za aktivnosti, i to za brod, plovidbu, prijevoz itd. Marine imaju uglavnom uslužni karakter, djelomično i trgovački itd., ali je jasno da se marine mogu pojavljivati kao vjerovnici pomorske tražbine, a i privilegija. Pitanje je samo koje postojeće tražbine i privilegiji mogu doći u pitanje i na kojem se pravnom poslu pojavljuju. Može se čak postaviti i pitanje kamo bi spadale marine po Pomorskom zakoniku?"[29] Posebno kad je riječ o naknadi za vez, *Ivković* smatra da ona po pravnoj prirodi nije pomorska tražbina i da se stoga po toj osnovi ne može odrediti privremena mjera zaustavljanja jahte po našem pravu premda je svjestan činjenice da su sudovi izdavali privremene mjere za neke od navedenih slučajeva koji, po njegovu, mišljenju nisu ni pomorska tražbina ni privilegij.[30] Kako smo već pojasnili u prethodnom poglavlju[31], skloniji smo prikloniti se stavu da je vez u marini takva usluga koja je nužna za redovito i uobičajeno iskorištavanje, odnosno uporabu jahte i da bi se kao takva mogla podvesti pod pomorsku tražbinu predviđenu u PZ-u, čl. 953. st. 1. t. 8. U prilog tome navodimo *Berlingierijevu* argumentaciju koji navodi da usluge koje su nužne za redovito održavanje i iskorištavanje broda uključuju, između ostalog, vez, protupožarnu zaštitu, nadzor klasifikacijskog društva i sl. [32]

skoj i unutrašnjoj plovidbi, Službeni list SFRJ 22-294/1977 (u nastavku: ZPUP), a odredba je identična danas važećem čl. 953. st. 1. t. 8. PZ-a. Privremena mjera zaustavljanja brodova i čuvanja dopuštena je predlagatelju osiguranja Sportskom društvu P. iz Splita jer je vjerovnik učinio vjerojatnom opasnost namirenja i postojanja svoje pomorske tražbine s naslova pomorskih plovidbenih usluga pruženih tim brodovima na temelju s dužnikom sklopljenih ugovora o poslovnoj suradnji. Sud je ocijenio da razne usluge i troškovi radi održavanja brodova po svojoj pravnoj naravi predstavljaju pomorsku tražbinu iz čl. 877. st. 3. t. 7. ZPUP-a. Vidi Vujović, V. 1990. Zaustavljanje broda koji ne pripada dužniku pomorskih tražbina, prikaz presude. Privredni sud Hrvatske. Presuda br. II Pž-1257/90-2 od 29. 5. 1990. *Uporedno pomorsko pravo*, v. 32, (3 – 4). 301–302.

[28] Vidi Ivković, Đ. 2007. Pomorski privilegiji na brodu. Priručnik. Piran. Str. 116.

[29] IVKOVIĆ, *Pomorski privilegiji…*, *op. cit.* Str. 116.

[30] *Ibid*. Str. 118–119.

[31] Vidi *supra* t. 2.2. Opskrba električnom energijom, vodom, gorivom, materijalom i proizvodima, redovito servisiranje i održavanje jahte.

[32] BERLINGIERI, *op. cit.* Str. 105. (Naglasak dodala autorica.) *Berlingieri* ovdje uspoređuje odredbu Konvencije iz 1952., čl. 1. st. 1. t. k) koja se odnosi samo na opskrbu proizvodima i materijalom te odgovarajuću odredbu čl. 1.

U stručnim je krugovima poznato da su u prošlosti, osobito kad su u pitanju bile strane jahte, domaći sudovi u prvom stupnju često određivali privremene mjere zaustavljanja jahti radi osiguranja novčanih tražbina marina, uključujući i tražbine s osnova naknade za vez koje mogu dosezati relativno visoke iznose.[33] U praksi bi se problem ubrzo nakon zaustavljanja riješio sporazumno te se pravna narav naknade za vez u marini kao pomorske tražbine, odnosno kao pomorskog privilegija uglavnom nije dodatno preispitivala.[34]

Od nama dostupne starije sudske prakse istaknuli bismo primjer odluke Visokoga trgovačkog suda (u nastavku: VTS) nakon žalbe u vezi s privremenom mjerom zaustavljanja jahte „Crisandra" u marini F.[35] Žalbeni sud zauzeo je stav da je prvostupanjski sud pogrešno ocijenio tražbinu marine (predlagatelja osiguranja) s osnova ugovora o najmu veza kada je zaključio da to nije pomorska tražbina, zbog čijeg bi se osiguranja mogla odrediti privremena mjera. Po mišljenju žalbenog suda, u konkretnom slučaju riječ je o tražbini koja proizlazi iz izdataka učinjenih za račun broda, a u vezi s brodom iz čl. 953. st. 1. t. 11. PZ-a jer je ugovor o najmu veza pravna osnova iz koje proizlazi predlagateljeva tražbina, a sklapanjem tog ugovora nastaju izdaci za račun broda, odnosno u vezi s brodom na koji se taj ugovor odnosi te upravo to svojstvo čini tražbinu pomorskom.[36]

Smatramo, međutim, da kvalifikacija tražbine marine s osnova ugovora o najmu veza kao pomorske tražbine iz PZ-a, čl. 953. st. 1. t. 11. (izdaci koje učini zapovjednik, krcatelj, naručitelj ili agent za račun broda, odnosno vlasnika broda ili brodara, a u svezi s brodom) nije točna. Naime, da bi se tražbina za izdatke mogla kvalificirati kao pomorska tražbina iz citirane odredbe PZ-a, mora biti riječ o tražbini jedne od osoba predviđenih samim tekstom odredbe.[37] Nije dovoljno da izdatak bude u vezi s brodom ili da se odnosi na brod. Potrebno je da izdatak u vezi s brodom i) bude učinjen za račun broda ili njegova vlasnika ili brodara te ii) da ga učine zapovjednik, krcatelj, naručitelj ili agent. Dakle, mora biti riječ o tražbini zapovjednika, krcatelja, naručitelja ili agenta koji se kao vjerovnici mogu javiti u svojstvu predlagatelja privremene mjere zaustavljanja broda, odnosno jahte.[38] Kako tražbina marine proizlazi iz ugovora o vezu,

st. 1. t. l) Konvencije o zaustavljanju brodova iz 1999. koja u izvornom tekstu glasi "goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance". *Berlingieri* tumači da dodatak riječi „services rendered" znatno proširuje opseg ove odredbe koja sada uz opskrbu raznim materijalom i proizvodima obuhvaća usluge poput sljedećih: „mooring, fireguard, surveys by classification societies and other surveyors, etc." (Naglasak dodala autorica.)

33 Primjerice, iz cjenika domaćih marina proizlazi da cijena godišnjeg veza u marini za jahtu duljine oko 20 m može iznositi oko 100.000 kn.

34 Informacije prikupljene upitnicima za marine i intervjuima s predstavnicima koncesionara marina, odvjetnika specijaliziranih u području pomorskog prava i sudaca koji sude u pomorskim sporovima.

35 VTS XL VII Pž-6486/06-3, 17. 1. 2007. Riječ je o ukidnom rješenju VTS-a kojim se predmet vraća Trgovačkom sudu u Splitu na ponovni postupak, a prvostupanjskim rješenjem odbijen je prijedlog marine za osiguranje određivanjem privremene mjere zaustavljanja m/y „Crisandra".

36 *Ibidem*.

37 Slično i Ivković, Đ. 2005. *Međunarodna konvencija za izjednačenje nekih pravila o privremenom zaustavljanju pomorskih brodova, 1952. Priručnik*. Piran. 95–96.

38 Izneseno tumačenje odgovara prevladavajućem tumačenju odnosne odredbe Konvencije 1952. (čl. 1. st. 1. t. n) u međunarodnoj sudskoj praksi i pravnoj doktrini država stranaka Konvencije. Vidi BERLINGIERI, *op. cit.* Str. 117–120; vidi također Meeson, N.; Kimbell, J. 2011. *Admiralty Jurisdiction and Practice*, 4th Edition. Informa. London. Budući da je citirana odredba PZ-a prenesena iz odgovarajuće odredbe Konvencije 1952. te da je Hrvatska ujedno i stranka te konvencije, opravdano je predmetnu odredbu PZ-a (čl. 953. st. 1. t. 11.) tumačiti na jednak način kao i odgovarajuću odredbu Konvencije 1952. (čl. 1. st. 1. t. n), a pritom je poželjno primijeniti prevladavajuće tumačenje međunarodne sudske prakse i doktrine, što je opravdano interesom uniformne implementacije međunarodne pomorske konvencije.

pri čemu marina nastupa u svoje ime i za svoj račun, a ne kao zastupnik (ili agent) broda, njegova vlasnika ili brodara te nije riječ o tražbini s osnova izdataka, nego s osnova pruženih usluga, tražbina marine iz ugovora o vezu nikako se ne može podvesti pod citiranu odredbu PZ-a, čl. 953. st. 1. t. 11.[39]

2.4. Tražbina marine kao pomorski privilegij

Posebno je pitanje je li tražbina marine zaštićena pomorskim privilegijem kao zakonskim založnim pravom na jahti u odnosu na koju je tražbina nastala, a sukladno PZ-u, čl. 241.[40] Ako se konkretna tražbina marine može smatrati pomorskim privilegijem, za realizaciju takva privilegija može se odrediti privremena mjera zaustavljanja jahte. Sukladno PZ-u, čl. 252. odredbe PZ-a o založnim pravima primjenjuju se i na brodice i jahte. Marini će biti u interesu osloniti se na zaštitu pomorskog privilegija, ponajviše što u pravilu privilegij prati jahtu i kod promjene vlasništva ili upisa jahte (PZ, čl. 243.)[41], što nije slučaj s ostalim neprivilegiranim pomorskim tražbinama.[42] Nadalje, velika je prednost i ta što se vjerovnici čije su tražbine osigurane pomorskim privilegijem iz diobne mase namiruju prije svih ostalih vjerovnika, pa čak i onih čije su tražbine zaštićene pravom retencije kao i hipotekarnih vjerovnika.[43]

Međutim, usporedimo li popis pomorskih privilegija u čl. 241. PZ-a i pojedine tipične vrste tražbina marine koje proistječu iz njezine djelatnosti, proizlazi da bi jedina dodirna točka mogla biti u PZ-u, čl. 241. st. 1. t. 4. koji kao privilegiranu tražbinu predviđa tražbinu za lučke naknade.[44]

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[39] Padovan, A. V.; Tuhtan Grgić, I. *Is the Marina Operator's Berthing Fee a Privileged Claim under the Croatian Maritime Code?*, *Il Diritto Marittimo*, 2017/II. 366–399.

[40] PZ, čl. 241. propisuje: „(1) Svaka od sljedećih tražbina prema vlasniku, zakupcu ili brodaru broda, a tražbine iz stavka 1. točke 1) ovoga članka i prema poslodavcu te tražbine iz stavka 1. točke 2) ovog članka i prema poslovođi broda i poslodavcu osigurana je pomorskim privilegijem koji postoji na onom brodu u odnosu na koji je nastala:

1) tražbine za plaće i druge iznose koji se duguju zapovjedniku broda, časnicima i drugim članovima posade u svezi s njihovim zaposlenjem na brodu, uključujući troškove povratnog putovanja i doprinose za socijalno osiguranje koji se plaćaju u njihovo ime
2) tražbine za smrt ili tjelesne ozljede koje su se dogodile na kopnu ili moru u neposrednoj vezi s iskorištavanjem broda
3) tražbine s naslova nagrade za spašavanje broda
4) tražbine za lučke naknade, troškove plovidbe kanalima i drugim plovnim putovima te troškove peljarenja
5) tražbine po osnovi izvanugovorne odgovornosti za materijalne gubitke ili oštećenja prouzročena uporabom broda, izuzev gubitka ili oštećenja tereta, kontejnera i putničkih stvari koje se prevoze brodom.

(2) Pomorski privilegij u korist glavnice postoji i za kamate.
(3) Pomorski privilegij prostire se i na pripadak broda."

[41] Međutim, treba imati na umu da privilegij prestaje protekom jedne godine, sukladno PZ-u, čl. 246. st. 1. t. 2.

[42] Opširnije o pomorskim privilegijima u našem pravu vidi u Marin, J. 2007. Privilegiji na brodu – sigurnost i neizvjesnost u isto vrijeme. *Liber amicorum Nikola Gavella, građansko pravo u razvoju*. Zagreb. 369–409. O pomorskim privilegijima u poredbenom pravu vidi Tetley, W. 1989. *Maritime Liens and Claims*. Blais. Montreal.

[43] Po redu prednosti jedino je Republika Hrvatska ispred privilegiranih vjerovnika, i to za tražbine s osnova troškova uklanjanja podrtine ili broda koji je opasnost za okoliš ili sigurnost plovidbe. Vidi PZ, čl. 912.

[44] U iznimnom slučaju moguće je zamisliti da marina stekne privilegij s naslova nagrade za spašavanje jahte. Tako i IVKOVIĆ, *Pomorski privilegiji…*, *op. cit*. Str. 117. Primjerice, takav bi slučaj bio da se jahta u marini nađe u opasnosti koju nije skrivila marina te da marina poduzme kakve izvanredne mjere nadilazeći napore i radnje koje bi se po redovitu tijeku stvari očekivale od marine u takvim okolnostima u okviru izvršavanja njezinih zakonskih dužnosti koncesionara luke posebne namjene i ugovornih obveza prema korisnicima vezova. U opisanom

U starijoj sudskoj praksi, čini se, prevladavao je stav da se tražbine marine mogu smatrati lučkim naknadama i stoga se mogu podvesti pod navedeni pomorski privilegij. Primjerice, u obrazloženju presude VTS-a kojom se potvrđuje presuda Trgovačkog suda u Rijeci u pravnoj stvari marine TMV (radi naplate godišnje naknade za vez), a protiv vlasnika brodice „Galeb" i korisnika veza iz ugovora o čuvanju i održavanju te brodice stoji: „Po svojim sadržajnim i pojavnim elementima, većina djelatnosti koje se u lukama za posebne namjene obavljaju, istovjetne su lučkim djelatnostima u lukama otvorenima za javni promet. [Zakon o morskim lukama], za razliku od ranijih propisa […] ne sadrži izričitu odredbu o obvezi plaćanja naknada korisnika luka za posebne namjene. U takvom plovidbenom sporu, prazninu u propisima prvostupanjski sud ispravno je popunio primjenom općih odredaba obveznog prava i tumačenjem Ugovora među strankama. Ovaj sud upućuje i na propis kojim je izričito regulirana obveza korisnika luke za posebne namjene o načinu korištenja luke (članak 29. stavak 3. ZML-a), temeljem kojeg postoji istodobno i ovlaštenje na naplatu naknade za upotrebu obale. Analognom primjenom odredbe članka 20. ZML-a, kojom je regulirana obveza korisnika luke otvorene za javni promet na plaćanje naknade za pružene usluge, naknada se plaća i trgovačkim društvima (ovlaštenicima) za pružene usluge u luci posebne namjene, koje se odnose na lučke djelatnosti, među kojima i za privez."[45]

Nadalje, u obrazloženju rješenja VTS-a, kojim se potvrđuje rješenje Trgovačkog suda u Rijeci o privremenoj mjeri zaustavljanja jedrilice „Topsy" i zabrane isplovljenja iz marine V.,[46] a radi osiguranja za naknadu plaćanja godišnjeg veza, sud navodi: „… činjenica da postoji privilegij marine u kojoj se jedrilica nalazi glede neplaćenih iznosa lučkih naknada samo potkrjepljuje osnovanost prijedloga predlagatelja osiguranja jer se prema odredbi članka 953. stavak 2. PZ-a radi ostvarenja pomorskog privilegija može odrediti privremeno zaustavljanje broda." Međutim, u sljedećem tekstu obrazloženja sud navodi da je „nejasno zbog čega protivnik osiguranja spominje lučke naknade kad je iz računa vidljivo da je riječ o naknadi za godišnji vez u moru i godišnjoj pristojbi." Dakle, ostaje pomalo nejasno smatra li sud naknadu za vez u marini privilegiranom tražbinom, tim više što privremena mjera nije određena radi realizacije privilegija po PZ-u, čl. 953. st. 2., nego radi osiguranja neprivilegirane pomorske tražbine. Dakle, proizlazi da je naknada za vez po ocjeni sudova u ovom predmetu pomorska tražbina za koju se može odrediti privremena mjera zaustavljanja jahte, pri čemu se nije ocjenjivalo je li ujedno ta tražbina marine i pomorski privilegij. Nadalje, čini se da je žalbeni sud podrazumijevao da marina može načelno steći pomorski privilegij radi osiguranja nenaplaćenih lučkih naknada, ali ipak ostaje nejasno koje bi se to konkretne vrste naknada mogle smatrati lučkim naknadama za potrebe primjene čl. 241. st. 1. t. 4. Zaključujemo da sud nije naknadu za vez u marini cijenio kao lučku naknadu ni kao pomorski privilegij, nego kao neprivilegiranu pomorsku tražbinu. Ipak, iz prije iznesenog argumenta VTS-a proizlazi da, po mišljenju suda, marina načelno može steći pomorski privilegij za lučke naknade.

Zanimljiva je odluka Trgovačkog suda u Zagrebu u stečajnom postupku nad trgovačkim društvom vlasnikom jahte „Valery".[47] Jedan od vjerovnika u stečajnom postupku bio je koncesionar marine F. u kojoj je jahta bila vezana. Sud je marini priznao zakonsko založno pravo (pomorski privilegij) sukladno odredbi PZ-a, čl. 241. st. 1. t. 4. na ime nepodmirene lučke

slučaju mogla bi se marina *ex lege* smatrati spašavateljem u smislu odredaba PZ-a, čl. 760. i dalje ili Konvencije o spašavanju, London, 1989. te steći pravo na nagradu za spašavanje jahte.

45 VTS XLVII Pž-8130/03-3, 22. 11. 2006.

46 VTS XLIII Pž-5043/06-3, 27. 9. 2006.

47 TS Zagreb, 3 St-1098/11-85, 8. 2. 2016.

naknade, i to na jahti „Valery" u odnosu na koju je bila pružena usluga veza u marini. Sud je također marini priznao zakonsko pravo retencije jahte temeljem općih obveznopravnih odredaba o retenciji (Zakon o obveznim odnosima[48], čl. 72.–75.). Sukladno tome, marina je imala viši red prvenstva prigodom namirenja iz stečajne mase u odnosu na druge vjerovnike u istom postupku.[49]

Novija sudska praksa kreće se u smjeru nepovoljnijem za marine kao vjerovnike s obzirom na to da se ustalio stav VTS-a da marinine tražbine iz ugovora o vezu nisu lučke naknade i stoga nisu zaštićene pomorskim privilegijem iz PZ-a, čl. 241. st. 1. t. 4. Čini se da je u tom pogledu presudna bila odluka VTS-a povezana s privremenim zaustavljanjem jahte „Saray" radi osiguranja novčane tražbine s osnova naknade za stalni vez u marini.[50] Navedenim rješenjem preinačuje se rješenje prvostupanjskog suda i odbija prijedlog privremene mjere zaustavljanja jahte „Saray" za osiguranje novčane tražbine koncesionara marine s osnova naknade za stalni vez u marini A. m. D. Prvostupanjski je sud smatrao da tražbina predlagatelja osiguranja proizlazi iz pružanja usluga jahti čije se zaustavljanje traži pa da je riječ o pomorskoj tražbini temeljem koje se sukladno čl. 953. st. 1. t. 11. i 953. st. 2. može odrediti privremena mjera zaustavljanja jahte.[51] Prvostupanjskim je rješenjem sud prihvatio prijedlog privremene mjere osiguranja ocijenivši tražbinu marine s osnova naknade za vez kao tražbinu koja se može svrstati među lučke naknade temeljem PZ-a, čl. 241. st. 1. t. 4. „jer je naknada za vez uključena u obračun koncesijske naknade koju plaćaju korisnici luke specijalne namjene, u okviru usluga koje pružaju korisnicima veza." Sukladno tomu, prvostupanjski sud odredio je privremenu mjeru zaustavljanja jahte u vidu zabrane isplovljenja iz marine, temeljem PZ-a, čl. 951. st. 2. Protivnici osiguranja bili su *leasing*-društvo kao vlasnik jahte i primatelj *leasinga* kao korisnik jahte. Stav je žalbenog suda u ovom postupku da se naknada za vez na temelju ugovora o korištenju veza ne može svrstati u pomorske privilegije iz PZ-a, čl. 241. st. 1. t. 4. jer se ne može podvesti pod lučke naknade u smislu odredaba čl. 62. i 63. Zakona o pomorskom dobru i morskim lukama.[52] Po mišljenju VTS-a, naknade za vez u luci posebne namjene (nautičkoj luci) koje se naplaćuju temeljem ugovora ne mogu se svrstati među lučke naknade koje se naplaćuju u lukama otvorenima za javni promet temeljem zakona (javne ovlasti). Nadalje, žalbeni sud ocijenio je da je prijedlog za osiguranje neosnovan u odnosu na *leasing*-društvo zato što *leasing* s predlagateljem osiguranja (marinom) nije u ugovornom odnosu iz ugovora o upotrebi veza, pa odatle nema ni njegovih obveza iz tog ugovora, a obveze iz ovog ugovora isključivo su obveze protivnika osiguranja.

Citirano smo rješenje VTS-a temeljito analizirali i komentirali u kontekstu posebnog rada u kojem smo se bavili ispitivanjem je li naknada za korištenje vezom u marini privilegirana tražbina po hrvatskom Pomorskom zakoniku.[53] U okviru toga rada detaljno smo izučili povijest i razvoj relevantnih odredaba ZPDML-a (čl. 62. i 63.) i PZ-a (čl. 241. st. 1. t. 4.) s ciljem njihove vjerne interpretacije. Ukratko, u tom smo radu zaključili da nije opravdano tumačiti značenje pojma „lučke naknade" iz PZ-a, čl. 241. st. 1. t. 4 prema definiciji pojma „lučke naknade" iz ZPDML-a. Naime, isti jezični pojam „lučke naknade" paralelno se upotrebljava u kontekstu PZ-a, odnosno zakonskih propisa koji su mu prethodili te u sklopu ZPDML-a,

[48] Narodne novine br. 35/2005, 41/2008, 125/2011, 78/2015 (u nastavku: ZOO).

[49] PADOVAN, TUHTAN GRGIĆ, *op. cit.*

[50] VTS, 32. Pž-263/15-3, 26. 1. 2015.

[51] TS Split, 9.R1-123/2014, 5. 11. 2014.

[52] Narodne novine br. 158/03, 141/06, 38/09 (u nastavku: ZPDML).

[53] Vidi PADOVAN, TUHTAN GRGIĆ, *op. cit.*

odnosno prethodnih zakona koji su uređivali materiju morskih luka, pri čemu nosi različito pravno značenje u ta dva paralelna sustava. Pravni pojam „lučke naknade" paralelno se razvija u okviru ovih dvaju sustava bez međuovisnosti. Štoviše, u okviru sustava propisa o morskim lukama nekoliko je puta taj pojam u pravnom smislu mijenjao značenje[54], dok je u okviru PZ-a tijekom svoga povijesnog razvoja ostao uglavnom konstantan.[55] Pojam lučkih naknada u važećem ZPDML-u odnosi se na naknade koje plaćaju korisnici luke za dobivene usluge u lukama otvorenima za javni promet (ZPDML, čl. 63.). Dakle, VTS pogrešno zaključuje da su lučke naknade koje se plaćaju u lukama otvorenim za javni promet javna davanja koja se naplaćuju temeljem zakona (javne ovlasti). Riječ je o tražbinama lučkih koncesionara s osnova pruženih usluga u lukama otvorenim za javni promet (privez, odvez, ukrcaj, iskrcaj, čišćenje, odvoz brodskog otpada, skladištenje, špedicija itd.), a ne o javnim davanjima. Stoga bi strogim jezičnim tumačenjem značilo da i lučke naknade u PZ-u, čl. 241. st. 1. t. 4. imaju isto značenje, što bi bilo očito pogrešno i protivno cilju te odredbe o pomorskom privilegiju, koja u svakom slučaju treba obuhvatiti lučke pristojbe za uporabu obale, pristojbe za vez i brodske ležarine. Po ZPDML-u za uporabu obale, pristojbe za vez i brodske ležarine ne plaćaju se lučke naknade, nego lučke pristojbe. Lučke pristojbe, za razliku od lučkih naknada, imaju karakter javnih davanja koja se naplaćuju temeljem zakona (javnih ovlasti) te su prihod lučkih uprava. Dakle, svakako je pogrešno tumačiti pojam lučkih naknada iz PZ-a strogo jezičnom metodom, tj. sukladno definiciji lučkih naknada iz ZPDML-a. Nadalje, i marine su luke, tj. luke posebne namjene (nautičke luke), samo što njima, za razliku od luka otvorenih za javni promet, upravljaju koncesionari kao privatni gospodarski subjekti pa njihove tražbine nemaju karakter javnih davanja. Međutim, i koncesionari marina imaju slične zakonske dužnosti i obveze u pogledu upravljanja lukom, kao pomorskim dobrom (općim dobrom od interesa za Republiku Hrvatsku), održavanja reda u luci, sigurnosti plovidbe i zaštite okoliša, što uključuje i održavanje lučkih obala i infrastrukture, pružanje sigurnog priveza i sl.[56] Strogo jezično tumačenje kakvo je primijenio VTS u odluci o privremenom zaustavljanju jahte „Saray" kosi se s načelom pravednosti i jednakosti pred zakonom jer marine stavlja u znatno nepovoljniji pravni položaj u odnosu na luke otvorene za javni promet, pogotovo ako uzmemo u obzir da se posljednjih godina i javne luke naveliko bave ponudom nautičkih vezova od koje ostvaruju velike prihode. Dosljednom primjenom zauzetog stava VTS-a u predmetu „Saray", koncesionari u javnim lukama bili bi zaštićeni pomorskim privilegijem za lučke naknade, dok marina za istu vrstu usluge nije zaštićena takvim zakonskim založnim pravom. Smatramo da između luka otvorenih za javni promet i marina ne bi smjelo biti diskriminacije u pogledu njihova

[54] Terminologija o lučkim naknadama, pristojbama, tarifama i sl. mijenjala se u raznim tekstovima zakona o lukama kroz povijest, pa je i termin "lučke naknade" mijenjao značenje u okviru toga zakonodavstva.

[55] Općenito, odredbe PZ-a o pomorskim privilegijima od 2004. godine do danas oslanjaju se na Međunarodnu konvenciju o pomorskim privilegijima i hipotekama iz 1993. Sve do 2004. odredbe PZ-a i prethodnih domaćih propisa o pomorskim privilegijima oslanjale su se na Konvenciju o ujednačavanju nekih pravila o pomorskim privilegijima i hipotekama iz 1926. U kontekstu obiju citiranih konvencija privilegij za lučke tražbine odnosi se na naknade koje se naplaćuju temeljem javnih ovlasti (lučke pristojbe ili lučke takse). To proizlazi iz samog teksta Konvencije iz 1926., odnosno iz pripremnih radova Konvencije iz 1993. Vidi opširnije o tome PADOVAN, TUHTAN GRGIĆ, *op. cit.* Međutim, pojam lučkih naknada kao pomorskog privilegija u PZ-u, odnosno starog termina "lučkih nagrada" iz jugoslavenskoga pomorskog zakonodavstva, čini se širi i fleksibilniji za tumačenje jer nikad tijekom svoga povijesnog razvoja nije sadržavao izričitu kvalifikaciju javnih davanja i naknada istoga karaktera, kao što je to predviđala Konvencija iz 1926. Hrvatska nije stranka ni jedne od konvencija o privilegijima i hipotekama te su domaći sudovi slobodni tumačiti relevantnu odredbu PZ-a kao dio isključivo nacionalnoga pomorskog prava.

[56] Slažemo se potpuno s argumentacijom VTS-a iz obrazloženja presude u predmetu koji se odnosio na brodicu „Galeb", VTS Pž-8130/03-3, *op. cit.*

prava na naknadu za korištenje luke i nautičkih vezova, uključujući i zaštitu tih tražbina pomorskim privilegijem.[57]

Nakon odluke VTS-a o privremenoj mjeri zaustavljanja m/y „Saray" uslijedila je još jedna odluka toga suda sa sličnim ishodom, i to u pravnoj stvari koncesionara marine F. radi isplate cjelogodišnje naknade za stalni vez jahte „Just for fun" njemačke zastave,[58] a protiv upisanog vlasnika jahte, inače njemačkoga trgovačkog društva. Trgovački je sud u Splitu, odlučujući o meritumu, u prvom stupnju prihvatio tužbeni zahtjev kao osnovan i presudio u korist tužitelja, zauzevši pravni stav da je riječ o tražbini koncesionara marine zaštićenoj pomorskim privilegijem iz PZ-a, čl. 241. st. 1. t. 4. te da stoga za tu tražbinu odgovara upisani vlasnik jahte u odnosu na koju je pružena usluga veza, tj. u odnosu na koju je tražbina nastala.[59] Prije te presude prvostupanjski je sud odredio i privremenu mjeru zaustavljanja jahte „Just for fun" temeljem PZ-a, 953. st. 2. i PZ-a, 241. st. 1. t. 4., ocijenivši tražbinu predlagatelja osiguranja kao lučku naknadu zaštićenu pomorskim privilegijem za koju se može odrediti privremena mjera zaustavljanja jahte u odnosu na koju je tražbina nastala.[60] Odmah nakon zaustavljanja sud je prihvatio gotovinski depozit protivnika osiguranja (upisanog vlasnika jahte) te oslobodio jahtu. Odlučujući o žalbi, VTS je preinačio prvostupanjsku presudu držeći da tražbina koncesionara marine nije lučka naknada koja je zaštićena pomorskim privilegijem iz čl. 241. st. 1. t. 4. te da stoga za tu tražbinu ne odgovara upisani vlasnik (tuženik), nego osoba s kojom je koncesionar marine imao sklopljen ugovor o vezu predmetne jahte, a to je bilo jedno hrvatsko trgovačko društvo. Stoga tužbeni zahtjev nije osnovan protiv upisanoga vlasnika koji nije ugovorna strana iz ugovora o vezu te je po ocjeni VTS-a u ovom predmetu riječ o promašenoj pasivnoj legitimaciji. U obrazloženju te presude sud se služi jednakim argumentima kao i u prije izloženom rješenju o žalbi protiv privremene mjere zaustavljanja jahte „Saray".[61]

U rješenju o namirenju ovrhom na brodici „Comet" Općinski je sud u Dubrovniku u vezi s tražbinom koncesionara marine za nenaplaćeni iznos naknade za stalni vez ocijenio da se tražbina tog vjerovnika ne smatra pomorskim privilegijem kao zakonskim založnim pravom iz PZ-a, čl. 241. st. 1. t. 4. jer vjerovnik ne predstavlja luku otvorenu za javni promet te naknada koja se za nju plaća nije lučka naknada. Stoga je po mišljenju ovog suda marina trebala ishoditi rješenje javnog bilježnika kojim se određuje ovrha općenito na imovini ovršenika pa temeljem toga rješenja ishoditi zabilježbu na brodici u Registru brodica da bi stekla pravo na namirenje u postupku ovrhe na brodici po redoslijedu upisa sukladno pravilima ovršnog prava.[62]

Kad je u pitanju postojanje pomorskog privilegija, *Ivković* smatra da prema pozitivnom pravu ne postoji pomorski privilegij koji bi se mogao primijeniti na marinu. Po njegovu mišljenju, odredba PZ-a, 241. st. 1. t. 4. (lučke naknade, kanali, peljarenje) ne bi se mogla primijeniti na tražbine s osnova ugovora o vezu i ostalih usluga koje marina pruža u vezi s jahtama i brodicama. Smatra da naknada za vez nije zaštićena pomorskim privilegijem te navodi da je to za marinu vrlo opasno jer bez privilegija potraživanje marine ne prelazi na novog vlasnika. Opasnost je najveća kod stranih zastava jer promjena vlasništva kod takvih plovila nije odmah poznata marini.[63]

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57 PADOVAN, TUHTAN GRGIĆ, *op. cit.*

58 VTS, 72 Pž-8720/2012-6, 25. 5. 2016.

59 TS Split, 8P-948/10, 20. 9. 2012.

60 TS Split, R1-71/10, 16. 4. 2010.

61 Opširnije vidi PADOVAN, TUHTAN GRGIĆ, *op. cit.*

62 OS Dubrovnik, Posl. br. 17. Ovr. 227/2015, 17. 2. 2017.

63 IVKOVIĆ, Pomorski privilegiji…, *op. cit.* Str. 118.

Skloniji smo prikloniti se stavu da postojeću odredbu PZ-a o privilegiju za lučke naknade treba tumačiti na način da obuhvati i lučke naknade za pružene usluge, kao i lučke pristojbe s karakterom javnih davanja te da u tom pogledu nije opravdano diskriminirati koncesionare u javnim lukama i one u lukama posebne namjene, uključujući i marine. Stoga smo mišljenja da novija sudska praksa nije korektna te da sukladno čl. 241. st. 1. t. 4. PZ-a treba priznati pomorski privilegij koncesionaru marine za nenaplaćene lučke naknade, tj. naknade s osnova ugovora o vezu.

Ipak, moramo konstatirati da u pogledu postojanja pomorskog privilegija u korist marine radi osiguranja njezinih novčanih tražbina s osnova naknada za korištenje veza i sličnih tražbina postoji visok stupanj pravne nesigurnosti s obzirom na to da postojeći tekst zakona ostavlja prostor za različita, pa i suprotna tumačenja. Prevladavajućom novijom sudskom praksom koncesionare u lukama nautičkog turizma stavlja se u znatno nepovoljniji položaj od koncesionara u lukama otvorenima za javni promet, što je nepoželjan i nepravedan rezultat, koji nije u skladu s općim pravnim načelima, pa ni ciljem koji se konkretnim zakonskim odredbama o pomorskim privilegijima treba postići. S obzirom na važnost nautičkog turizma za domaće gospodarstvo smatramo da je potrebno poduzeti određene izmjene u postojećim propisima da bi se razjasnilo to sporno pitanje, uklonili uzroci pravne nesigurnosti i postigla optimalna ravnoteža privatnih i općih interesa.[64]

3. Odgovarajuća primjena međunarodne konvencije o zaustavljanju brodova iz 1952.

Materija privremene mjere zaustavljanja broda kad je riječ o predmetu s međunarodnim elementom uređena je Konvencijom iz 1952. kojoj je Hrvatska stranka. Nesporno je da se Konvencija primjenjuje na jahte, a smatramo da bi se načelno trebala primjenjivati i na brodice kao plovne objekte podložne sustavu upisa koji stoga imaju državnu pripadnost.[65] Naime, pojam broda iz Konvencije iz 1952. treba tumačiti široko jer Konvencija iz 1952. načelno ne predviđa ograničenja u primjeni s obzirom na veličinu, tehničke osobine, vrstu pogona, fizičko stanje ili namjenu broda. Jedini je uvjet za primjenu Konvencije da je plovni objekt podložan upisu, tj. da ima državnu pripadnost, što se očituje u tome da vije zastavu države u kojoj je upisan.[66] Ovdje citiramo *Berlingierija* koji pojašnjava: „When no restriction is specifically provided or arises out of the scope of the convention, the use of the ship cannot be relevant. This is clearly so for the Arrest Convention, since most of the maritime claims enumerated in article 1(1) can arise whatever the use of the ship, including pleasure."[67] Ipak, u domaćoj je praksi sporno treba li na brodice primijeniti Konvenciju 1952., ponajviše iz razloga što u definiciji brodice iz čl. 5. PZ-a izričito stoji da brodica nije ni *brod* ni *jahta*, pa je upitno može li se Konvencija o zaustavljanju *brodova* primijeniti na tako definirane brodice po domaćem pravu.[68] *De lege lata*, smatramo da se na strane brodice pod zastavom država članica Konvencije 1952. trebaju pri-

[64] PADOVAN, TUHTAN GRGIĆ, *op. cit.*

[65] Po PZ-u, čl. 186. hrvatsku državnu pripadnost brodica stječe upisom u odgovarajući očevidnik brodica kod nadležne lučke kapetanije. Po čl. 188. i 190. moguće je iznimno upis brodice provesti i u hrvatskom upisniku brodova. Po domaćem pravu brodice hrvatske državne pripadnosti dužne su vijati hrvatsku zastavu kad plove izvan teritorijalnog mora. Vidi Milošević Pujo, B.; Petrinović, R. 2008. *Pomorsko pravo za brodice i jahte.* Pomorski fakultet Sveučilišta u Splitu. Split. Str. 92.

[66] Tako BERLINGIERI, *op. cit.* Str. 449–456.

[67] *Ibid*, str. 454.

[68] Vidi Ivković, Đ. 2006. Privremene mjere na brodu – Priručnik. Piran. 133–136.

mijeniti odredbe Konvencije te da bi za njihovo zaustavljanje takvom privremenom mjerom bio stvarno nadležan trgovački sud koji sudi u pomorskim sporovima[69], dok bi brodice pod domaćom zastavom trebale ostati u režimu općega ovršnog prava i nadležnosti općinskog suda.[70] *De lege ferenda*, zbog veće pravne sigurnosti i ujednačene sudske prakse u istovrsnim sporovima i predmetima, smatramo da bi trebalo sve brodice, domaće i strane, podvrgnuti jednakom pomorskopravnom režimu privremenih mjera osiguranja i nadležnosti trgovačkih sudova, kao što to vrijedi za jahte.[71]

Kada jahta (ili strana brodica) vije zastavu države članice Konvencije 1952., privremena se mjera zaustavljanja hrvatskog suda mora odrediti prema odredbama Konvencije (arg. Konvencija 1952., čl. 8.). To vrijedi i za jahte pod hrvatskom zastavom ako predlagatelj osiguranja ima redovito boravište ili glavno poslovno sjedište u inozemstvu (arg. Konvencija 1952., čl. 8. st. 4.).[72] Dakle, kada su ispunjene pretpostavke za primjenu Konvencije 1952. iz čl. 8., mogućnost određivanja privremene mjere zaustavljanja plovila ograničena je samo i isključivo na pomorske tražbine predviđene u čl. 1. st. 1. Konvencije (arg. čl. 2.), a to su tražbine koje proizlaze iz jedne ili više sljedećih osnova:[73]

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[69] Konvencija 1952. ne regulira pitanje stvarne nadležnosti te se ona ima tumačiti sukladno normama prava države suda. Posebna odredba čl. 841. t. 6. PZ-a predviđa da ovrhu i osiguranje na brodu i brodskom teretu određuju trgovački sudovi nadležni za pomorske sporove, no ta se odredba ne primjenjuje na brodice, nego samo na brodove i analogno na jahte i druge pomorske objekte osim brodica (arg. PZ, čl. 841. st. 3.). Smatramo da stvarna nadležnost trgovačkog suda za određivanje mjere osiguranja na brodici temeljem Konvencije 1952. u opisanom slučaju proizlazi iz Zakona o sudovima, Narodne novine br. 28/2013, 33/2015, 82/2015, 82/2016 (u nastavku: ZS), čl. 21. t. 7. po kojemu su trgovački sudovi stvarno nadležni određivati mjere osiguranja u postupcima i u povodu postupaka u kojima su inače nadležni. Kako Zakon o parničnom postupku, Narodne novine br. 53/1991, 91/1992, 58/1993, 112/1999, 88/2001, 117/2003, 88/2005, 02/2007, 84/2008, 123/2008, 57/2011, 148/2011, 25/2013, 89/2014 (u nastavku ZPP) u čl. 34.b. t. 6. propisuje da su trgovački sudovi stvarno nadležni u parnici odlučivati u plovidbenim sporovima (sporovi koji se odnose na brodove i plovidbu te sporovi na koje se primjenjuje plovidbeno pravo), onda se i mjera osiguranja na brodici, kad je riječ o tražbini marine, određuje u postupku ili u povodu postupka (koji se već vodi ili se tek treba pokrenuti) u kojem je nadležan trgovački sud jer je riječ o plovidbenom sporu. U prilog tom zaključku ističemo odluku Vrhovnog suda RH, VSRH Gr1 30/2015-2 od 9. travnja 2015. primjenom analogije. U ovom postupku Vrhovni je sud odlučio o sukobu nadležnosti općinskog i trgovačkog suda u pogledu određivanja privremene mjere osiguranja nenovčane tražbine u vezi s kojom je predlagatelj osiguranja trebao pokrenuti parnični postupak u kojem je prema odredbi čl. 34.b t. 1. ZPP nadležan bio trgovački sud. VSRH odlučio je da je trgovački sud u smislu odredbe čl. 21. t. 7. ZS nadležan i u ovome izvanparničnom postupku odrediti privremenu mjeru osiguranja nenovčane tražbine koja je predmet toga parničnog postupka. VSRH obrazlaže da "između predložene privremene mjere i pokrenutog sudskog postupka, odnosno postupka koji će se pokrenuti (parničnog ili nekoga drugog) mora postojati povezanost u smislu da se njome osigurava tražbina o kojoj će se odlučivati ili se odlučuje u tom postupku ili o kojoj je u postupku odlučivano." Dakle, analogijom jednako vrijedi i kod primjene čl. 21. t. 7. ZS u vezi s čl. 34.b t. 6. ZPP. Nadalje, o tome da se sporovi u vezi s ugovorom o vezu u marini i pratećih usluga koje se odnose na brodice i jahte na vezu u marini trebaju smatrati plovidbenim sporovima za koje su stvarno nadležni trgovački sudovi u smislu čl. 34.b t. 6. ZPP, opširnu raspravu vidi u Padovan, A. V.; Skorupan Wolff, V. 2016. The Repercussions of the legal definitions of ship, yacht and boat in the Croatian Maritime Code on the Court Competence Ratione Materiae in Disputes Arising from Berthing Contracts. U: Musi, M. (ed.), *The Ship: An Example of Legal Pluri-Qualification, Il Diritto Marittimo - Quaderni 3*. Bonomo Editore. Bologna. 249–277.

[70] Vidi opširnije PADOVAN, TUHTAN GRGIĆ, *op. cit.*

[71] Svjesni smo da se može istaknuti niz argumenata i protiv takva stajališta, primjerice, gospodarska opravdanost posebna režima privremenih mjera osiguranja za trgovačke brodove, široka primjena brodica za privatne, tj. negospodarske namjene, nedostatak opravdanosti primjene posebnoga privilegiranog režima za vjerovnike pomorskih tražbina u odnosu na druge vjerovnike kad je riječ o brodicama koje se upotrebljavaju u negospodarske namjene i sl.

[72] MARIN, *Privremene mjere…, op. cit*. Str. 24.

[73] Prijevod preuzet iz MARIN, *Privremene mjere…, op. cit*. Str. 205–206.

a) šteta koju prouzroči brod sudarom ili kojim drugim načinom
b) gubitka ljudskih života ili tjelesnih ozljeda koje prouzroči brod ili nastalih u vezi s iskorištavanjem broda
c) pružanjem pomoći i spašavanja
d) ugovora o iskorištavanju ili zakupa broda, bilo brodarskim ugovorom ili na neki drugi način
e) ugovora o prijevozu robe brodom, na osnovi brodarskog ugovora, teretnice ili na neki drugi način
f) gubitka ili oštećenja robe i prtljage koji se prevoze brodom
g) zajedničke havarije
h) pomorskog zajma
i) tegljenja
j) pilotaže
k) dobave brodu proizvoda ili materijala, gdje god ona bila obavljena, u svrhu iskorištavanja ili održavanja broda
l) gradnje, popravka ili opremanja broda ili naknade za dokovanje
m) plaće zapovjednika broda, časnika ili posade
n) izdataka zapovjednika broda i izdataka krcatelja, naručitelja prijevoza u brodarskom ugovoru ili agenata za račun broda ili njegova vlasnika
o) sporova o vlasništvu broda
p) sporova o suvlasništvu, posjedu, iskorištavanju ili o pravima na plodove iskorištavanja broda u suvlasništvu
q) pomorskih hipoteka i *mortgagea*.

U nastavku razmatramo pojedine tipične tražbine marine i mogućnost njihova podvođenja pod pomorske tražbine predviđene Konvencijom 1952.

3.1. Popravak i opremanje jahte, troškovi dokovanja

Primjenjuje se Konvencija 1952., čl. 1. st. 1. t. l). Ta odredba slična je onoj iz PZ-a, čl. 953. st. 1. t. 9. PZ-a te se u našem kontekstu tumači na jednak način i sve što smo naveli u vezi s privremenom mjerom radi osiguranja ove vrste tražbina marine po PZ-u vrijedi jednako i kad se treba primijeniti Konvenciju 1952.[74] Dakle, zaključak je da se za eventualne tražbine marine s osnova pruženih usluga popravka i opremanja plovila te troškova dokovanja može odrediti privremena mjera osiguranja zaustavljanjem plovila po Konvenciji 1952.

Ovdje vrijedi napomenuti da se naknade za dokovanje, da bi se mogle podvesti pod citiranu odredbu Konvencije, ne moraju nužno vezivati uz popravak, gradnju ili opremanje. Ta pomorska tražbina prema *Berlingieriju* obuhvaća i lučke pristojbe i takse te slična javna davanja u plovidbi kanalima i drugim plovnim putovima.[75]

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[74] Vidi *supra*, t. 2. 1.

[75] BERLINGIERI, *op. cit*. Str. 171. Lučke pristojbe i takse kao tražbine lučkih uprava i sličnih organizacija s javnim ovlastima mogle bi dati temelj i za detenciju broda od tijela koje nije sud (u upravnopravnom postupku), no takva detencija nije predmet Konvencije 1952. (arg. čl. 2) i dopuštena je u raznim slučajevima po propisima nacionalnog prava. Vidi BERLINGIERI, *op. cit.* 181–197.

3.2. Opskrba električnom energijom, vodom, gorivom, materijalom i proizvodima, redovito servisiranje i održavanje jahte

Kad je riječ o opskrbi broda, odnosno u našem kontekstu jahte električnom energijom, vodom, gorivom, materijalom i proizvodima potrebnima za redovito iskorištavanje, odnosno uporabu i održavanje jahte, takve tražbine marine mogu se podvesti pod čl. 1. st. 1. t. k) Konvencije 1952. Međutim, s obzirom na to da se u tekstu Konvencije upotrebljava konstrukcija „goods or materials… supplied", pod tu se odredbu Konvencije ne mogu svrstati tražbine s osnova usluga pruženih za redovito održavanje i uporabu jahte. Kako smo prije pojasnili, smatramo da za razliku od Konvencije čl. 953. st. 1. t. 8. PZ-a ostavlja prostor za šire tumačenje tako da obuhvati i usluge radi održavanja i iskorištavanja jahte. Upravo u kategoriju usluga radi redovita održavanja i uporabe ili iskorištavanja jahte moglo bi se svrstati tipične tražbine marine, poput one za naknadu za vez i slične usluge.[76]

3.3. Naknada za vez u marini

Pridržavajući se službena prijevoda Konvencije 1952., čini se da se tražbinu marine s osnove naknade za vez može podvesti pod čl. 1. st. 1. t. l) koja u službenom prijevodu glasi: „izgradnja, opremanje i popravak broda, odnosno lučki troškovi i dažbine",[77] a takve primjere nalazimo i u domaćoj sudskoj praksi.

S druge strane, takvo bi se tumačenje moglo kritizirati pozivom na izvorni tekst Konvencije 1952. i na relevantnu pomorskopravnu doktrinu. Naime, pomorska tražbina iz čl. 1. st. 1. t. l) Konvencije 1952., koja u izvornom engleskom tekstu glasi „construction, repair or equipment of any ship or dock charges and dues" prema *Berlingieriju* obuhvaća i lučke pristojbe te slična javna davanja u plovidbi kanalima i drugim plovnim putovima.[78] Naknada s osnove ugovora o vezu u marini teško bi se mogla podvesti pod takvo tumačenje konkretne konvencijske odredbe s obzirom na to da je ovdje riječ o tražbinama lučkih uprava i sličnih tijela ili organizacija s javnim ovlastima.[79]

Dakle, izuzev odredbe čl. 1. st. 1. t. l) Konvencije 1952., za koju smatramo da je diskutabilna, tražbine s osnova naknade za pružene usluge veza u marini ne bi se mogle podvesti ni pod jednu od preostalih pomorskih tražbina predviđenih Konvencijom 1952. Podsjećamo, jahta koja vije zastavu države članice Konvencije ne bi se mogla zaustaviti privremenom mjerom

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[76] Vidi *supra*, t. 2. 2.

[77] Uredba o ratifikaciji Međunarodne konvencije o privremenom zadržavanju pomorskih brodova, Sl. list SFRJ, Međunarodni ugovori, br. 12/1967.

[78] U izvornom engleskom tekstu ova odredba glasi: „construction, repair or equipment of any ship or dock charges and dues". Sukladno *Berlingierijevoj* interpretaciji: „[dock charges and dues] may be considered equivalent to the port dues mentioned in article 4 (1)(d) of the 1993 Convention on Maritime Liens and Mortgages." BERLINGIERI, *op. cit*. Str. 171. Citirana odredba Konvencije iz 1993. u engleskom izvorniku glasi „claims for port, canal, and other waterway dues". Iz pripremnih radova koji su prethodili Konvenciji o pomorskim privilegijima i hipotekama iz 1993. razvidno je da je cilj ove odredbe bio zaštititi tražbine lučkih uprava i nadležnih tijela i organizacija s javnim ovlastima - „… as public taxes and charges of the same character." Povijest i razvoj relevantnih odredaba Konvencije iz 1993. proučili smo i izložili u prijašnjem pisanom radu, vidi PADOVAN, TUHTAN GRGIĆ, *op. cit.,* osobito t. 2.2.3.1.

[79] Lučke pristojbe i takse kao tražbine lučkih uprava i sličnih organizacija s javnim ovlastima mogle bi dati temelj i za detenciju broda od tijela koje nije sud (u upravnopravnom postupku), no takva detencija nije predmet Konvencije 1952. (arg. čl. 2) i dopuštena je u raznim slučajevima po propisima nacionalnog prava. Vidi BERLINGIERI, *op. cit*. Str. 181–197.

nadležnog suda u Hrvatskoj ako se njezina tražbina ne može podvesti pod neku od pomorskih tražbina predviđenih u čl. 1. Konvencije 1952.[80]

Konvencija iz 1952. ne predviđa mogućnost privremene mjere zaustavljanja broda radi tražbina osiguranih privilegijem koji je priznat prema pravu države u kojoj je zaustavljanje predloženo. Stoga, kad jahta vije zastavu države članice Konvencije 1952., čak i ako bi se po našem pravu naknada za vez smatrala osiguranom pomorskim privilegijem, to ne bi omogućilo privremenu mjeru zaustavljanja jahte od našeg suda temeljem privilegija. Trebalo bi upirati na neku od pomorskih tražbina iz čl. 1. Konvencije 1952.

U primjerima iz sudske prakse nalazimo rješenje o privremenoj mjeri zaustavljanja jahte „Topsy" radi osiguranja novčane tražbine marine s osnove pružene usluge godišnjeg veza i to po čl. 1. st. 1. t. d) Konvencije 1952.[81] Smatramo da se naknada za vez u marini ne može podvesti pod ovu odredbu Konvencije koja u izvornom engleskom tekstu glasi: „agreement relating to the use or hire of any ship whether by charterparty or otherwise". Naime, široko je prihvaćeno tumačenje te odredbe u međunarodnoj sudskoj praksi i implementaciji Konvencije 1952. da je riječ o tražbinama iz ugovora o iskorištavanju ili zakupu broda, bilo da je riječ o brodarskom ili nekom drugom ugovoru, ali kojima nije svrha prijevoz robe jer su ti ugovori predviđeni u čl. 1. st. 1. t. e. Ovdje bi se, primjerice, moglo uvrstiti tražbine iz ugovora o najmu ili čarteru jahte ili brodice. Tražbina iz ugovora o vezu ni u kojem se slučaju ne može uvrstiti u tu kategoriju pomorske tražbine.

Naknada za vez ne bi se mogla podvesti ni pod čl. 1. st. 1. t. n) Konvencije 1952. (izdaci zapovjednika broda i izdaci krcatelja, naručitelja prijevoza u brodarskom ugovoru ili agenata za račun broda ili njegova vlasnika). Naime, da bi se tražbina za izdatke mogla kvalificirati kao pomorska tražbina iz citirane odredbe Konvencije, mora biti riječ o tražbini jedne od osoba predviđenih samim tekstom odredbe.[82]

Dok postojeće uređenje ne ide u prilog koncesionarima luka nautičkog turizma, čini se da se mnogo povoljnije rješenje može naći u Konvenciji o privremenom zaustavljanju brodova iz 1999. o čemu nešto više izlažemo u sljedećim poglavljima.

3.4. Strana jahta pod zastavom države koja nije članica Konvencije 1952.

Kad je riječ o stranoj jahti koja nije članica Konvencije 1952., a predlaže se privremena mjera zaustavljanja od hrvatskog suda, Konvencija će se načelno primijeniti. Međutim, takva jahta može se zaustaviti privremenom mjerom na temelju koje od pomorskih tražbina iz čl. 1. Konvencije, ali i na temelju bilo koje druge tražbine za koju PZ dopušta privremenu mjeru zaustavljanja (arg. Konvencija 1952., čl. 8. st. 2.). PZ propisuje da se povlastica ograničenja broja tražbina za koje se može odrediti privremena mjera na pomorske tražbine predviđene u čl. 953. st. 1. i 2. PZ-a odnosi na strane brodove samo kada postoji recipročnost između države zastave i Hrvatske. To zapravo znači da je za strane jahte pod zastavama država koje nisu članice Konvencije 1952. moguće odrediti privremenu mjeru za bilo koju pomorsku tražbinu iz čl. 953. st. 1. PZ-a te za ostvarenje privilegija, hipoteke, *mortgagea* ili sličnoga stvarnopravnog tereta

[80] Ivković smatra da se tražbina s osnove naknade za vez ne može svrstati ni u jednu od pomorskih tražbina predviđenih Konvencijom 1952. Vidi IVKOVIĆ, Pomorski privilegiji… 117–118.

[81] VTS RH, Pž 5043/06-3 od 27. 9. 2006. kojim se potvrđuje rješenje Trgovačkog suda u Rijeci br. III R1-102/2006-2 od 05.06.2006.

[82] Tako i BERLINGIERI, *op. cit*. 117–120. Vidi *supra* komentar odluke VTS Pž-6486/06-3, 17. 1. 2007. i osobito fn. br. 41.

(PZ, čl. 953. st. 2.). Povrh toga, u slučaju da država zastave ne primjenjuje pravila o zaustavljanju brodova slična onima iz Konvencije 1952. ograničavajući mogućnost privremene mjere zaustavljanja samo za određen krug pomorskih tražbina, takva bi jahta mogla biti zaustavljena privremenom mjerom domaćeg suda za bilo koju tražbinu koja se može osigurati ili ovršiti po pravilima općega ovršnog prava, pa tako i za tražbinu marine s osnove ugovora o vezu. Sva ostala pravila Konvencije 1952. primijenila bi se u takvu slučaju na privremenu mjeru zaustavljanja strane jahte, osim čl. 1. Konvencije.

4. Identitet dužnika – napomene

4.1. Privremena mjera radi realizacije pomorskog privilegija

Treba voditi računa o tome da tražbina, da bi bila osigurana pomorskim privilegijem, mora biti tražbina protiv *vlasnika, zakupca* ili *brodara*[83] broda. Dakle, vlasnik (upisani), zakupac ili brodar trebaju biti osobno odgovorni za tražbinu da bi na brodu u odnosu na koji je tražbina nastala nastao pomorski privilegij. Takav će privilegij postojati na brodu, najduže godinu dana od nastanka tražbine (arg. PZ. čl. 246. st. 1. t. 2.), neovisno o naknadnoj promjeni vlasništva, upisa ili zastave (PZ. čl. 243.). Privilegij na brodu postoji na onom brodu u vezi s kojim je tražbina nastala. Ne opterećuje ostale brodove istoga vlasnika.[84] Pravila o privilegijima primjenjuju se i kad brod iskorištava osoba koja nije vlasnik broda, osim ako je brod vlasniku oduzet nedopuštenom radnjom, a vjerovnik koji ima privilegij za tražbinu nije savjestan (PZ. čl. 248.).

U kontekstu tražbina marine i problematike iskorištavanja ili uporabe jahti i brodica za sport i razonodu potencijalno može doći do nejasnoća u pogledu koncepta brodara, zakupca i naručitelja iz brodarskog ugovora koji se uz vlasnika mogu javiti kao osobni dužnici. Naime, plovila koja se upotrebljavaju u nautičkom turizmu najčešće su u privatnom vlasništvu za nekomercijalnu namjenu ili u *leasingu*, a mnoga se upotrebljavaju za čarter, tj. iznajmljivanje s posadom ili bez posade. Te je pravne odnose katkad teško tumačiti u kontekstu pravnih instituta općega pomorskog prava, osobito instituta brodara te dispozitivnih zakonskih odredbi o ugovorima o iskorištavanju brodova. Primjerice, moglo bi biti sporno koja se od fizičkih ili pravnih osoba koje upotrebljavaju jahtu ima smatrati brodarom (vlasnik, korisnik *leasinga*, čarter-kompanija kao zakupoprimac i sl.), odnosno može li se najmoprimac iz uobičajenog ugovora o najmu jahte (tzv. čarteru) s posadom ili bez nje izjednačiti u pravnom statusu s naručiteljem iz brodarskog ugovora po PZ-u u kontekstu odgovornosti za pomorske tražbine i privremenih mjera radi osiguranja tih tražbina.[85] Dodatno može zbuniti i definicija „korisnika jahte" iz PZ-a, čl. 5. st. 1 t. 32.a. sukladno kojoj je korisnik jahte „fizička ili pravna osoba koja temeljem ugovora o zakupu ili ugovora o *leasingu* jahte nju iskorištava, s tim što se pretpostavlja, dok se ne dokaže suprotno, da je korisnik jahte osoba koja je u upisniku jahti upisana kao vlasnik jahte". Čini se da je i pojam korisnika jahte trebalo uključiti u krug osobnih dužnika tražbine osigurane pomorskim privilegijem. Međutim, pojam korisnika jahte upotrebljava se u zakonskom tekstu samo za potrebe postupka upisa jahte i u odredbama o pomorskim prekršajima te se uopće ne spominje u kontekstu imovinskopravnih odredaba PZ-a. Opće je

[83] PZ, čl. 5. st. 1. t. 32) brodar jest fizička ili pravna osoba koja je kao posjednik broda nositelj plovidbenog pothvata, s tim što se pretpostavlja, dok se ne dokaže protivno, da je brodar osoba koja je u upisnik brodova upisana kao vlasnik broda.

[84] MARIN, *Privilegiji na brodu…*, *op. cit.*

[85] Opširnije o ugovorima o najmu brodica i jahti vidi Petrinović, R.; Perkušić, A.; Mandić, N. 2008. Ugovor o najmu jahte i brodice. *Zbornik radova Pravnog fakulteta u Splitu*, god. 45, 4. 863–884.

pravilo da se odredbe PZ-a koje se odnose na brodove primjenjuju i na jahte, osim ako izričito nije drugačije propisano (PZ, čl. 2. st. 1.). Zbog svega navedenog smatramo da pojam brodara treba analogno primjenjivati i na jahte. To znači da je „korisnik jahte" ujedno i brodar u smislu primjene čl. 241. st. 1., tj. da i korisnik jahte pripada krugu osobnih dužnika tražbine osigurane pomorskim privilegijem. Slično će biti i s privilegijima na brodicama koje su financirane *leasingom*. Odredbe PZ-a se primjenjuju na brodice samo kad je to izričito predviđeno (PZ, čl. 2. st. 2.). U PZ-u ne postoji definicija korisnika brodice koja bi bila slična definiciji korisnika jahte. Međutim, Pravilnik o brodicama i jahtama predviđa da pojam vlasnika brodice uključuje upisanog vlasnika i korisnika *leasinga*. Kako je izričito propisano da se odredbe o privilegijima primjenjuju i na brodice jednako kao na brodove i jahte, logično je da krug osobnih dužnika tražbine osigurane pomorskim privilegijem treba uključivati i korisnika *leasinga* kad je riječ o brodici u *leasingu*. Ipak, zbog preciznosti predlaže se *de lege ferenda* izričito dodati korisnika brodice i korisnika jahte u krug osobnih dužnika tražbine osigurane pomorskim privilegijem u čl. 241. st. 1.

4.2. Privremena mjera radi osiguranja pomorske tražbine

Po hrvatskom pravu i ustaljenoj sudskoj praksi, kod privremene mjere radi osiguranja pomorske tražbine koja nije osigurana pomorskim privilegijem ili drugim sličnim stvarnim pravom, protivnik osiguranja mora biti vlasnik jahte čije se zaustavljanje traži, što se u praksi i doktrini tumači kao upisani vlasnik. U suprotnom se ne bi mogla ostvarivati osnovna konzervacijska svrha privremene mjere zaustavljanja jahte jer se u budućem ovršnom postupku ne bi mogla ostvariti prodaja te jahte, odnosno namirenje te tražbine iz postignute prodajne cijene.[86] Ovrha je po našem pravu moguća samo na imovini koja je u vlasništvu dužnika. Za utvrđivanje uvjeta vlasništva relevantan je trenutak podnošenja prijedloga za osiguranje. Međutim, radi osiguranja pomorske tražbine koja nije osigurana pomorskim privilegijem ili drugim stvarnim pravom može se zaustaviti i druga jahta u vlasništvu istoga osobnog dužnika (tzv. „sister ship arrest"). Pod osobnim dužnikom smatra se osoba koja odgovara za tražbinu radi koje se traži zaustavljanje jahte, a u vrijeme nastanka tražbine bila je u svojstvu vlasnika, zakupnika ili korisnika jahte u *leasingu* u svezi s čime je nastala tražbina (arg. PZ, čl. 954. st. 2.)[87]. Dakle, marina može radi ostvarenja svoje pomorske tražbine koja nije osigurana privilegijem tražiti zaustavljanje bilo koje jahte koja je u vrijeme podnošenja prijedloga za osiguranje u vlasništvu takva dužnika marine.[88]

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[86] MARIN, *Privremene mjere…*, *op. cit.* Str. 148.

[87] Čl. 954. st. 2. u krug osobnih dužnika svrstava izričito brodara, zakupnika i naručitelja. O problemu tumačenja pravnih instituta brodara, zakupnika i naručitelja u kontekstu nautičkog turizma i uporabe i iskorištavanja jahti i brodica za rekreaciju vidi *supra* t. 4. 1. U praksi krug osobnih dužnika marine obuhvaćat će potencijalno upisanog vlasnika, korisnika *leasinga* i zakupnika (primjerice čarter-kompaniju), a svi oni mogli bi biti u pravnom statusu brodara. Pitanje je u kojim bismo situacijama mogli imati naručitelja iz brodarskog ugovora u kontekstu uporabe i iskorištavanja jahti i bi li se tada primjerice najmoprimac iz uobičajenog ugovora o najmu brodice ili jahte imao smatrati naručiteljem u smislu ove odredbe PZ-a. Ako bi takav najmoprimac ušao u krug potencijalnih osobnih dužnika iz čl. 954. st. 2. i hipotetski ako bi on imao u svom privatnom vlasništvu brod ili jahtu, tada bi marina mogla predložiti tzv. „sister ship arrest". No ovo nam se čini kao pitanje za posebnu akademsku raspravu.

[88] Arg. PZ, čl. 954; Konvencija 1952., čl. 3. st. 4. Vidi opširno o tome MARIN, *Privremene mjere…*, *op. cit*. 139–155.

5. Problematika privremene mjere radi osiguranja tražbine kad je riječ o brodici

Kao što smo već naveli, privremena mjera osiguranja na brodici ne može se odrediti zaustavljanjem brodice po PZ-u čl. 951.–964. s obzirom na to da se te odredbe PZ-a ne primjenjuju na brodice hrvatske državne pripadnosti (arg. PZ, čl. 2. st. 2. u vezi s čl. 951, i dalje). To znači da je privremena mjera osiguranja na brodici predmet općega ovršnog prava, tj. da se na nju primjenjuje OZ, a nadležan je općinski sud.

Nadalje, pitanje primjene Konvencije 1952. jest sporno, kako smo već prije analizirali.[89] Konvencija 1952. primjenjuje se na sve plovne objekte koji viju zastave država članica, pa bi ju trebalo primjenjivati i na brodice koje viju zastavu države članice. Smatramo da bi najkorektnije rješenje bilo da se na domaće brodice primjenjuju relevantne odredbe PZ-a, a na brodice pod zastavama država članica Konvencije 1952. odredbe te konvencije. Na strane brodice koje ne viju zastave država članica Konvencije 1952. najvjerojatnije će se u praksi primijeniti Ovršni zakon. Pritom treba paziti kako strani plovni objekt kvalificirati brodicom za potrebe točna odabira mjerodavnog propisa s obzirom na to da je u različitim državama terminologija za rekreacijska plovila veoma raznolika. Problem se dodatno komplicira definicijom strane jahte iz PZ-a, čl. 5. st. 1. t. 21.

Zbog različitoga pravnog režima privremenih mjera za brodice i jahte u domaćem pravu u konačnici je presudna duljina plovnog objekta i njegova državna pripadnost, pa će za rekreacijska plovila do 12 m (brodice) registrirane u Hrvatskoj mjerodavno biti opće ovršno pravo uz nadležnost općinskog suda, za takva plovila pod zastavama država članica Konvencije 1952. smatramo da je najtočnije primijeniti Konvenciju uz nadležnost trgovačkog suda,[90] a za rekreacijska plovila duža od 12 m (jahte) primjenjivat će se odredbe PZ-a o ovrsi i osiguranju na brodu, odnosno odredbe Konvencije 1952., ovisno o zastavi jahte, uz nadležnost trgovačkih sudova koji sude u plovidbenim sporovima.

Nadalje, treba imati na umu da se pravila o pomorskim privilegijima iz PZ-a primjenjuju i na brodice, jednako kao na jahte i brodove (PZ, čl. 252). No takav se privilegij neće moći realizirati primjenom odredaba PZ-a o privremenoj mjeri zaustavljanja brodice, nego samo u skladu s općim Ovršnim zakonom i pod nadležnošću općinskog suda. Zatim će se otvoriti i pitanje prednosti kod namirenja, pri čemu se neće moći primijeniti čl. 912. PZ-a kojim je propisan red prednosti kod namirenja ovrhom na brodu. Po ovom članku PZ-a vjerovnici čije su tražbine osigurane pomorskim privilegijem rangirani su iznad svih drugih vjerovnika, pa čak i hipotekarnih, osim kad je vjerovnik Republika Hrvatska za tražbine s osnova uklanjanja podrtine ili broda koji je opasnost za okoliš ili sigurnost plovidbe. Kod ovrhe na brodici neće se primijeniti ova odredba PZ-a, nego će sukladno općem Ovršnom zakonu, vjerovnici zaštićeni pomorskim privilegijem kao zakonskim založnim pravom biti u istom redu namirenja s ostalim založnim vjerovnicima.[91] Kao što smo već prije naveli, *de lege ferenda*, radi veće pravne sigurnosti i ujednačene sudske prakse u istovrsnim sporovima i predmetima, smatramo da bi trebalo sve brodice, domaće i strane, podvrgnuti jednakom pomorskopravnom režimu privremenih mjera osiguranja i nadležnosti trgovačkih sudova, kao što to vrijedi za jahte, čime bi se postigla jednaka primjena pravila o privilegijima kao i o privremenoj mjeri zaustavljanja radi

[89] Vidi *supra*, t. 3.

[90] *Ibid*. Vidi osobito bilj. 69.

[91] O problematici ovrhe na brodicama s aspekta namirenja tražbina koncesionara marine vidi MAJSTOROVIĆ, *op. cit*.

osiguranja pomorske tražbine na sve brodice i jahte, no to je pitanje za opširniju akademsku raspravu koja nadilazi okvire ovoga rada.[92]

6. Problem mjerodavnog prava i nadležnosti – napomene

Za odlučivanje o prijedlogu za osiguranje zaustavljanjem jahte mjesno je nadležan sud na čijem se području jahta nalazi u vrijeme podnošenja prijedloga za određivanje privremene mjere (PZ, čl. 849. st. 2.). Što se tiče pravila postupka, primjenjuje se pravo države suda, dakle hrvatsko pravo, a uz postupovne odredbe PZ-a i OZ-a tu je još i Zakon o parničnom postupku.

Odredbe PZ-a o privremenoj mjeri zaustavljanja broda primijenit će se kad jahta u odnosu na koju se predlaže osiguranje vije hrvatsku zastavu i predlagatelj osiguranja ima redovito boravište ili glavno poslovno sjedište u Hrvatskoj. U svim ostalim situacijama treba primijeniti Konvenciju iz 1952. (arg. Konvencija 1952., čl. 8. st. 4.).

Posebna je situacija kada strana jahta vije zastavu države koja nije članica Konvencije 1952. Tada se Konvencija načelno primjenjuje, uz iznimku da se takva jahta može privremeno zaustaviti radi osiguranja svih pomorskih tražbina iz čl. 1. st. 1. Konvencije, ali i bilo koje druge tražbine za koju je privremena mjera zaustavljanja dopuštena po PZ-u (arg. Konvencija 1952. čl. 8. st. 2.), dakle i za svaku tražbinu osiguranu pomorskim privilegijem (PZ, čl. 953. st. 2.). Nadalje, povlastica ograničenja broja tražbina za koje se može odrediti privremena mjera osiguranja na one iz PZ-a, čl. 953. st. 1. i st. 2. vrijedi uz uvjet recipročnosti između Republike Hrvatske i države zastave jahte (PZ, čl. 953. st. 3.). To znači da bi za jahtu pod zastavom države koja nije članica Konvencije 1952. i koja ne propisuje pravila o privremenoj mjeri zaustavljanja jahte slična onima iz Konvencije 1952., u Hrvatskoj bilo moguće ishoditi privremenu mjeru osiguranja i za sve ostale vrste tražbina za koje je moguće ishoditi privremenu mjeru sukladno pravilima Ovršnog zakona.

Postojanje pomorskog privilegija ocjenjuje se sukladno PZ-u (čl. 241.) samo ako je riječ o jahti pod hrvatskom zastavom. Naime, u čl. 969. PZ-a propisano je da se prema pravu države čiju državnu pripadnost brod ima ocjenjuju stvarna prava na brodu, a pomorski je privilegij stvarno pravo na brodu, odnosno jahti i brodici.[93] To znači da se postojanje pomorskog privilegija za tražbine marine kad je u pitanju strana jahta mora ocjenjivati prema pravu države čiju zastavu ta jahta vije, što je ozbiljan element pravne nesigurnosti za vjerovnika.[94]

7. Primjeri komparativnopravnih rješenja

U Kanadi marina ima zakonsko pravo *in rem*[95] sukladno čl. 22.2.m. Zakona o Federalnim sudovima za tražbine s osnova pruženih usluga za održavanje broda, tj. jahte.[96] Vez, tj. usluga veza takva je usluga koja je potrebna za redovito održavanje jahte. Međutim, ovo zakonsko pravo *in rem* za razliku od pomorskog privilegija, točnije *maritime liena* koji postoji u *common lawu*, vjerovniku (marini) ne pruža pravo prednosti prigodom namirenja u odnosu na ostale

92 Vidi *supra*, t. 3.

93 MARIN, *Privilegiji na brodu…*, *op. cit.* Str. 403.

94 Opširnije o problemu mjerodavnog prava kod pomorskih privilegija vidi MARIN, *Privilegiji na brodu…* 397–405.

95 Izvorno: *statory right in rem,* procesni institut koji omogućuje pokretanje sudskog postupka "na stvari", u ovom slučaju na jahti.

96 Caldwell, B. M. *Marina Operator's Liens*, http://www.admiraltylaw.com/fisheries/Papers/Marina%20Operators%20lien%20pdf.pdf (17. 5. 2016.).

vjerovnike, ali omogućava vjerovniku da ishodi tzv. *arrest* jahte, tj. privremenu mjeru zaustavljanja jahte u vidu zabrane isplovljenja preko nadležnog suda, pa bi se mogla usporediti s institutom pomorske tražbine kakvu poznaje naše pravo. Prema *Caldwellu*, marina bi potencijalno mogla imati i zakonsko pravo *in rem*, po čl. 22.2.s. istog zakona, za troškove doka (eng. *dock charges*), u kojem bi slučaju takvo pravo preživjelo i promjenu vlasništva jahte (slično pomorskom privilegiju). Međutim, kako kaže Caldwell, za ovu odredbu zakona nema dostupne sudske prakse, pa je upitno njezino tumačenje. Vjerojatnije je da bi kanadski sud ograničio ovo pravo *in rem* samo na dokove kojima upravljaju tijela s javnim ovlastima s obzirom na to da je ova odredba proizišla iz Konvencije o privilegijima i hipotekama iz 1926. koja predviđa takav privilegij u korist lučkih vlasti.[97] Napominjemo da Kanada nije stranka nijedne konvencije o zaustavljanju brodova.[98]

U pravu SAD-a osoba koja pruža usluge i opskrbljuje jahtu za potrebe njezina održavanja i normalne uporabe, a po nalogu vlasnika ili osobe koju vlasnik za to ovlasti, ima pomorski privilegij (*maritime lien,* i to tzv. *necessaries lien*) na jahti i može pokrenuti postupak *in rem* pred nadležnim sudom radi ostvarivanja tog privilegija. Za upravitelja luke u kojoj se pružaju takve usluge, a to može biti i (pravna ili fizička) osoba koja upravlja marinom, vrijedi zakonska presumpcija da radi po nalogu odnosno ovlaštenju vlasnika jahte u pogledu pružanja usluga i opskrbe radi održavanja jahte. Po američkom je pravu tzv. *necessaries lien* vrlo visoko rangiran u odnosu na druge tražbine.[99] Napominjemo da SAD nije stranka nijedne konvencije o zaustavljanju brodova.[100]

Slovenija je stranka Konvencije 1952. Konvencija se u Sloveniji primjenjuje na brodove pod zastavama država članica koji se žele zaustaviti privremenom mjerom u slovenskoj luci. U slučajevima kada se ne primjenjuje Konvencija, primjenjivo je slovensko nacionalno pravo, tj. Pomorski zakonik (u nastavku SPZ). Slično kao i u nas, privremena mjera zaustavljanja broda u Sloveniji uređena je SPZ-om kao posebnim zakonom te Zakonom o ovrsi i osiguranju kao općim zakonom. SPZ načelno usvaja pravila Konvencije iz 1952., ali uz produžen popis pomorskih tražbina temeljen na Konvenciji 1999.[101]

SPZ, čl. 841. st. 7. kao jednu od pomorskih tražbina predviđa tražbinu s osnova opskrbljivanja broda radi njegova uzdržavanja i iskorištavanja. S obzirom na to da je riječ o prenesenoj odredbi iz Konvencije 1999. moglo bi se argumentirati da su ovdje uključene i tražbine s osnova pruženih usluga za održavanje i iskorištavanje broda premda nema takve izričite specifikacije u samome zakonskom tekstu.[102] Po našem mišljenju, tražbine bi se s osnova usluge veza mogle podvesti pod tu odredbu. Međutim, SPZ u čl. 838. propisuje da ukoliko plovni objekt nije brod po SPZ-u, tj. plovni objekt duljine 24 m ili više, utoliko se privremena mjera osiguranja ima odrediti prema pravilima općeg Zakona o ovrsi i osiguranju.[103] Opisano tumačenje očituje se u odluci slovenskog suda prema kojoj se privremena mjera zaustavljanja jahte koja se nalazi u marini ima odrediti na način da jahta mora ostati vezana u marini, no kako jahta

[97] *Ibid*.

[98] PADOVAN, TUHTAN GRGIĆ, *op. cit.*

[99] Vidi 2012 US Code §§ 31341 – 31343, http://law.justia.com/codes/us/2012/title-46/subtitle-iii/chapter-313/subchapter-iii/section-31341 (17. 5. 2017.). Vidi također R. HAMANN, B. D. E. CANTER, *Legal Aspects of Recreational Marina Operations in Florida*, Florida Sea Grant College, Report No. 46, August 1982. 69–74.

[100] PADOVAN, TUHTAN GRGIĆ, *op. cit.*

[101] Pavliha, M.; Grbec, M. 2001. *Maritime Law, Jurisprudence and the Implementation of International Conventions into the Legal System of the Republic of Slovenia.* Il Diritto Marittimo. 1207–1217.

[102] Tako BERLINGIERI, *op. cit.* Str. 106.

[103] PAVLIHA, GRBEC, *op. cit*. Str. 1211.

nije pomorski brod, primjenjuju se opća pravila o osiguranju tražbina.[104] Dakle, marina bi mogla uspjeti s privremenom mjerom zaustavljanja jahte radi osiguranja nenaplaćenih naknada za vez temeljem Zakona o ovrsi i osiguranju, ali pritom ne bi imala prednost kod namirenja u odnosu na ostale neosigurane vjerovnike.[105]

Konvencija o zaustavljanju brodova iz 1999. predviđa širi krug pomorskih tražbina od Konvencije 1952., a uključuje, *inter alia*, u čl. 1. st. 1. t. l) tražbine s osnova opskrbe robom, materijalima, zalihama, gorivom, opremom (uključujući kontejnere) ili usluga izvršenih radi iskorištavanja, menadžmenta, čuvanja ili održavanja broda.[106] Po našem mišljenju, pod tu bi se pomorsku tražbinu mogla podvesti naknada za vez u marini s obzirom na to da je riječ o usluzi koja je uobičajena i potrebna za normalno i redovito upravljanje i uporabu jahte.[107]

8. Zaključak

U domaćem pravu i sudskoj praksi koji su na snazi nije razjašnjeno može li koncesionar marine ishoditi privremenu mjeru zaustavljanja jahte radi osiguranja tražbina s osnova usluga koje je marina pružila u odnosu na tu jahtu u okviru svoje redovite poslovne djelatnosti. Također je sporno je li naknada za vez u marini pomorski privilegij. Sudska se praksa koleba, a pravna literatura koja bi se bavila ovom temom kroz prizmu marina i rekreativne nautike u nas je gotovo nepostojeća.

Kako se na ovrhu i osiguranje jahte primjenjuju odredbe PZ-a o ovrsi i osiguranju na brodu, odnosno Konvencije 1952. kojoj je Hrvatska stranka, ključno je ocijeniti je li tražbina marine čije se osiguranje traži pomorska tražbina po tim propisima.

Ustanovili smo da bi se prema pozitivnom pravu usluge poput popravka i opreme jahte te s tim povezani troškovi dokovanja, podizanja i spuštanja u more i sl., ako ih obavlja marina, mogli smatrati takvim pomorskim tražbinama i po PZ-u (čl. 953. st. 1.) i po Konvenciji 1952. (čl. 1. st. 1.). Također, smatramo da bi se i troškovi opskrbe jahte vodom, električnom energijom, gorivom, zalihama, materijalima i proizvodima za potrebe njezina redovita održavanja i uporabe mogli smatrati pomorskom tražbinom marine po PZ-u i po Konvenciji 1952. Za takve bi tražbine marina mogla ishoditi privremenu mjeru zaustavljanja jahte uz uvjet da je jahta koja se zaustavlja u trenutku podnošenja prijedloga za osiguranje u vlasništvu osobnoga dužnika marine. Mogla bi se zaustaviti bilo koja jahta koja je u vlasništvu osobnoga dužnika po pravilima zaustavljanja tzv. *sister shipa*. Ove tražbine, međutim, nisu osigurane pomorskim privilegijem.

Ostaje sporno mogu li se tražbine s osnova usluga za potrebe redovita održavanja i uporabe ili iskorištavanja jahte (npr. stalni vez, bojenje, premazivanje, redovito servisiranje, održavanje trupa, opreme, strojeva i uređaja, sprečavanje zamrzavanja, prihvat i rukovanje brodskim otpadom, podizanje i spuštanje u more radi redovita održavanja ili sezonski i sl.) smatrati pomorskim tražbinama, odnosno jesu li osigurane pomorskim privilegijem, a posebno kad je riječ o naknadi s osnova ugovora o vezu koja joj nosi najveći prihod u ukupnom poslovanju.

U vezi s pitanjem postojanja pomorske tražbine za ovu vrstu usluga u domaćoj sudskoj praksi, osobito prvostupanjskih sudova, prevladava načelno pozitivno stajalište. Međutim, praksa se koleba oko pitanja podvođenja ovih tražbina pod točnu vrstu pomorskih tražbina iz

[104] *Ibid*. Str. 1209.

[105] PADOVAN, TUHTAN GRGIĆ, *op. cit*.

[106] Prijevod prema MARIN, *Privremene mjere…*, *op. cit.* Str. 216.

[107] Arg. BERLINGIERI, *op. cit.* Str. 25

PZ-a. Smatramo da je najispravnije podvesti ove tražbine pod PZ, čl. 953. st. 1. t. 9., odnosno pod čl. 1. st. 1. t. l) Konvencije 1952. premda za oba pristupa ima dosta protuargumenata te bi svakako trebalo razmisliti da se *de lege ferenda* krug pomorskih tražbina u PZ-u proširi sukladno Konvenciji 1999., pa čak i da se u perspektivi ozbiljno razmišlja o pristupanju toj konvenciji koja je po mnogočemu napredak u odnosu na Konvenciju 1952.

Što se tiče pomorskog privilegija za lučke naknade i njegove primjenjivosti na naknadu za vez u marini, smatramo da se novonastala praksa VTS-a može ozbiljno kritizirati. Osobito smatramo da je pogrešno tumačenje pojma lučkih naknada iz čl. 241. PZ-a sukladno definiciji tog pojma u ZPDML-u. Takvo tumačenje ima nelogičan i nepravedan rezultat koji zasigurno nije u skladu s ciljem odnosnih zakonskih odredaba i namjerom zakonodavca. Ono neopravdano dovodi koncesionare u lukama nautičkog turizma u znatno nepovoljniji položaj u odnosu na koncesionare u lukama otvorenim za javni promet. Stoga smatramo da bi pojam lučkih naknada u PZ-u trebalo tumačiti tako da obuhvati i lučke pristojbe i naknade za lučke usluge, pri čemu se ne bi smjelo diskriminirati koncesionare luka posebne namjene i koncesionare luka otvorenih za javni promet u njihovu pravu da ostvare svoja dospjela novčana potraživanja, uključujući i pravo na pomorski privilegij.

Na koncu, s obzirom na visok stupanj pravne nesigurnosti s jedne te veliko gospodarsko značenje djelatnosti marina u našoj zemlji s druge strane, smatramo da je opravdano zaštititi položaj marine kao vjerovnika, osobito imajući u vidu da je većina jahti u hrvatskim marinama pod stranim zastavama te da je mogućnost naplate činjenicom teže dostupnosti dužnika hrvatskom pravosuđu znatno otežana. Stoga predlažemo da se *de lege ferenda* odredba PZ-a o pomorskim privilegijima dopuni na način da se na jasan i nedvosmislen način tražbine s osnova usluga pruženih radi redovita održavanja i uporabe broda zaštite pomorskim privilegijem.

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ARREST OF A YACHT IN A CROATIAN COURT FOR THE PURPOSE OF SECURING A MARINA OPERATOR'S CLAIM

SUMMARY

The paper deals with the legal complexities related to the possibilities of arrest of yachts in Croatian courts for the purpose of securing the marina operators' claims, such as the claims for the outstanding berthing fees, supplies (electricity, water, fuel), waste disposal, repairs, maintenance and similar marina operator's services supplied to the owners and operators of yachts berthed in the marinas and other nautical tourism ports. The author examines the practice of the commercial courts in Croatia regarding the arrest of yachts and analyses the relevant positive law governing the matters related to the interim measures on yachts and ships for the purpose of securing and eventually enforcing the marina operators' claims. In particular, the author seeks to answer the question whether the marina operators' claims can be treated as maritime claims under the Croatian Maritime Code and/or the International Convention Relating to the Arrest of Sea-Going Ships of 1952 which Croatia is a party to. Furthermore, certain relevance is given to the possibility of subsuming the marina operators' claims under the provisions of the Croatian Maritime Code relating to maritime privileges, as the national law allows the arrest based on a claim protected by a maritime privilege. Through critical analysis of the relevant court practice and the applicable law, the author seeks to make certain de lege ferenda proposals reflecting the interest of protecting the marina operator's position as a claimant and considering Croatia's strategic orientation towards nautical tourism.

***Key words*:** *arrest, yacht, marina operator, maritime claim, maritime lien, berthing fee, yacht repair, yacht maintenance*

V.

BUDUĆNOST TRANSPORTNOG PRAVA U PRIJEVOZU PUTNIKA

FUTURE OF PASSANGERS' TRANSPORT LAW

SCOTS COURTS ON BUDGET AIRLINE PRACTICES: JURISDICTION, CARE AND COMPENSATION

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SUMMARY

Budget airline practices – a 'price' passengers have to pay and at what cost? What services can a passenger expect from an airline, despite contracting on restrictive contract terms? This paper discusses a number of budget airline practices, the ensuing legal issues and related arguments of jurisdiction as received in the Scottish courts. Two key Scots cases are analysed considering the following topics: separation of flights at booking stage, the airline's lack of assistance to passengers at the airport regarding check-in and proceeding through security, restrictive contract clauses used by airlines designed to curtail the passengers' rights, and lack of sufficient aircraft on stand-by to be called upon to minimise disruptions for passengers in case of previous extraordinary circumstances. It will be seen that the combination of the international and European legislative frameworks provide passengers with a helpful safety net, which is effectively enforced in the Scots courts.

1. Introduction

1.1. The cases in overview

This paper illustrates the legal issues arising from specific budget airline practises through analysis of two key cases which had received detailed consideration in the Scots courts, with relevant excursions to English and EU case-law where appropriate. The first case, *Caldwell v EasyJet Airline Co Ltd*[1], concerned the interaction and application of the Montreal Convention for International Carriage by Air 1999[2] and the EC Regulation 261/2004 on compensation and

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1 2015 S.L.T. (Sh Ct) 223; 2015 G.W.D. 34-546

2 Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, 2242 U.N.T.S. 350 (hereinafter Montreal Convention).

assistance for denied boarding or cancellation of flights[3]. It gave rise to a number of significant issues:

- Which courts had jurisdiction, where a number of "separate" flights were sold in order to enable travellers to reach their destination. Could the airline treat every flight as a separate contract with separate jurisdictional consequences?
- How did the Montreal Convention and the EC Passenger Rights Regulation interact?
- Were standard contract terms, which obliged passengers to present themselves on time at the departure gate, valid, even in situations where there was little or no assistance available to passengers at the airport to timely allow them to check-in or drop-off their baggage and clear security, customs and passport control to reach the gate in time? Did the passengers have a claim for damages for breach of contract? Or alternatively, could this lack of assistance be classed as denied boarding under the EC Regulation, thus giving rights of compensation and reimbursement?

The second case of *Dunbar v EasyJet Airline Co Ltd*[4] concerned passenger rights under the EC Regulation in case of perpetual flight delays of the aircraft leading up to the flight concerned.

- Could the airline rely on the defence of extraordinary circumstances where the flight of the aircraft that had been affected by adverse weather and respective air traffic restrictions had been scheduled to depart some 8 hours prior to the flight concerned? Or was the chain of causation too weak since the airline had known for a significant amount of time of the delay and the resulting back-log that was building up for the plane's schedule?
- Ought the airline to have responded to ensure minimal impact? The CJEU only recently decided in the context of bird strikes that it mattered what action an airline took and whether such action could be classified as reasonable measures to avoid the delays or cancellations.[5]

After introductory remarks on the legal framework and application of the relevant regimes, where a few case anomalies by English courts are worth noting, the two Scots cases are discussed, setting out the facts, the legal background and the reasoning of the court in each of these cases. The paper will also consider and suggest likely approaches of the Scots courts on related matters which, this time, had not stood for decision.

1.2. Legal Framework

International air travel has long been regulated by international conventions and has also been subject to further regulation within the European Union. In the United Kingdom, and thus the laws of England & Wales, Scotland and Northern Ireland, the regimes providing for liability of the carrier to a passenger for death or personal injury and for loss of or damage to

[3] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L46, 17.2.2004, p 1) (hereafter EC Passenger Rights Regulation).

[4] Paisley Sheriff Court, judgment of 30th October 2015, 2015 G.W.D. 36-570.

[5] See Case C-315/15 *Marcela Pešková and Jiří Peška v Travel Service A.S.*, judgment of 4 May 2017, EU:C:2017:342.

luggage are those of the Warsaw[6] and Montreal[7] Conventions.[8] Where there is overlap between convention regimes the Montreal Convention takes priority and is therefore the convention discussed in this paper.[9] Furthermore, the liability regime of the Montreal Convention is applicable, in any event, in case of carriage of passengers and their luggage by Community Air carriers.[10]

In addition, EC Regulation 261/2004[11] provides a duty for qualifying carriers to compensate and assist passengers in case of denied boarding, cancellation or long delay of their flight. And last, but not least, EC Regulation 1107/2006[12] provides a duty to give assistance to disabled persons and to compensate for loss of or damage to wheelchairs or other mobility equipment. However, the latter Regulation, does not establish rights for individuals to claim for damages against air carriers outside the Warsaw or Montreal Convention regime.[13] The discussion in the following, centring on claims by passengers against airlines, will therefore focus on the Montreal Convention and the EC Passenger Rights Regulation.

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6 The Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw in 1929, with subsequent amendments. The Warsaw Convention of 1929 was substantially amended by the Hague Protocol of 1955, in a version generally referred to as the Warsaw-Hague Convention. In 1975 the Montreal Additional Protocols Nos 1–4 (MP1–4) were introduced to allow for various amendments to the Warsaw regime. Protocol No.3 never came into force; Protocols Nos 1 and 2 brought in the concept of Special Drawing Rights to calculate the limits of liability for the Warsaw and Warsaw-Hague Conventions respectively; No.2 being mostly superseded by the subsequent coming into force of Protocol No.4 which, in addition, includes further alterations to Warsaw-Hague (the so amended regime thus being known as "Warsaw-Hague-MP4" Convention). Since the contracting States to the Warsaw Convention have not all ratified the same or all subsequent amendments, a number of convention regimes exist and must be applied depending on the common ratification denominator between the States of departure and destination (see art.1 of the various conventions on their range of application).

7 The Convention for the Unification of Certain Rules for International Carriage by Air done at Montreal on May 28, 1999.

8 See the UK's implementing legislation in form of the Carriage by Air Act 1961 (implementing the amended Warsaw-Hague (Sch.1), Warsaw-Hague-MP4 (Sch.1A) and Montreal Conventions (Sch.1B)), the Carriage by Air (Supplementary Provisions) Act 1962 implementing the Guadalajara Convention (Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air performed by a Person other than the Contracting Carrier, signed in Guadalajara on September 18, 1961); and the Carriage by Air Acts (Application of Provisions) Order 2004 (incorporating the 1929 Warsaw and Warsaw-MP1 Conventions together with the Guadalajara Convention and also providing for the application of a modified version of the Montreal Convention as a matter of domestic law to non-convention carriage).

9 See Art.55 Montreal Convention.

10 See 3(1) of EC Regulation 2027/97 of October 9, 1997 on air carrier liability in respect of the carriage of passengers and their baggage by air, as amended by EC Regulation No 889/2002, as embedded in the laws of the UK and given priority by s.1(2) of the Carriage by Air Act 1961 and s.3(2) of the Carriage by Air Acts (Application of Provisions) Order 2004.

11 EC Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights (hereafter also EC Passenger Rights Regulation), embedded into the laws in the UK by the Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005 (SI 2005/975), designating the Civil Aviation Authority as enforcement body.

12 EC Regulation 1107/2006 concerning rights of disabled persons and persons with reduced mobility when travelling by air, as embedded in the laws of the UK by the Civil Aviation (Access to Air Travel for Disabled Persons and Persons of Reduced Mobility) Regulations 2014 (SI 2014/2833), providing offences and fines for failure to comply with the EC Regulations and designating the Civil Aviation authority as enforcement body.

13 *Hook v British Airways Plc* [2014] UKSC 15; [2014] A.C. 1347; [2014] 2 All E.R. 461; [2014] 2 Lloyd's Rep. 207.

1.3. Application of the regimes

In order for any such regime to be applicable, the matter must fall within its scope.

1.3.1. Montreal Convention

The Montreal Convention applies only to "international carriage",[14] which is defined as "any carriage in which, according to the agreement between the parties, the place of departure and the place of destination . . . are situated either within the territories of two State Parties or within the territory of a single State Party, if there is an agreed stopping place within the territory of another state,[15] even if that state is not a State Party".[16] And while carriage between two points within the territory of a single State Party without an agreed stopping place in another state is not international carriage, in the UK an amended version of the Montreal Convention applies as a matter of domestic law to non-convention carriage.[17] Where a state is not party to the Montreal Convention it is necessary to see whether it is party to any of the versions of the Warsaw Convention, which may then apply instead.

Where carriage is international, convention carriage will be fulfilled on many if not most occasions; in contrast, the EC Passenger Rights Regulation has a more restrictive scope.

1.3.2. Application of EC Regulation 261/2004

According to Article 3 (1) of the Passenger Rights Regulation, the Regulation applies: (a) to passengers departing from an airport located in the territory of a Member State to which the Treaty applies; or (b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, but in the latter case only if the operating air carrier of the flight concerned is a Community carrier. That outward bound and return journeys have to be treated separately with respect to the application of the Regulation according to Article 3(1)(a) was confirmed by the CJEU in C-173/07 *Emirates Airlines Direktion für Deutschland v Schenkel*[18]. It had to be accepted that, unless the carrier was a Community carrier, where there were delays on both journeys, the one leaving from a Member State of the EU was compensable and the return leg departing from a Non-Member State was not.

However, this was taken yet a step further, in the English High Court in *Sanghvi v Cathay Pacific Airways*[19] where Article 3(1)(a) was interpreted as also requiring that the act of denied boarding itself occurred in a Member State, i.e. with respect to a flight leaving from a Member State. Therefore, even though in this case the overall journey was from London to Sydney, and

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[14] Although it applies in amended form in the UK as a matter domestic law to non-convention carriage.

[15] Art.1 Montreal Convention. However, the Conventions as implemented in the UK by the 1961 Act do not apply where the places of departure and destination and any agreed stopping places are all within the territory of a single foreign state: *Holmes v Bangladesh Biman Corp* [1989] A.C. 1112.

[16] Art.1 Montreal Convention; an up-to-date list of Convention Parties can be found on the Treaty collection website of the International Civil Aviation Authority ("ICAO") at *http://www.icao.int/* [accessed June 5, 2017] ("About ICAO" tab, under heading "Services" select "Treaty Collection"). ICAO is depository for several of the air Treaties and is notified of any changes by other depositories.

[17] See s.4 and Sched 1 of Carriage by Air Acts (Application of Provisions) Order 2004.

[18] *C-173/07 Emirates Airlines Direktion für Deutschland v Schenkel* [2008] E.C.R. I-5237; [2009] 1 Lloyd's Rep. 1.

[19] [2011] EWHC 1684 (Ch); [2012] 1 Lloyd's Rep. 46.

the flight from London arrived late into Hong Kong with the result that the connecting flight to Sydney was missed, the judge, decided that boarding was denied in Hong Kong, a third state, and therefore the Regulation did not apply.[20] It is submitted that this extension of what was claimed to be the CJEU's interpretation is not one envisaged by the CJEU in *Schenkel*. It is therefore welcome that the very same issue is due to be heard by the Court of Appeal in July 2017 in an appeal against a decision by the County Court at Liverpool in *Gahan v Emirates*,[21] one of a number of examples where the lower courts felt obliged to follow this High Court ruling as binding precedent.[22]

The reasoning of the High Court in *Sanghvi*, it is submitted, can no longer stand in the light of the decision of the CJEU about 2 years later in *C-11/11 Air France SA v Folkerts*[23] where it was held that the EC Regulation applied to a case of delayed flights from Bremen in Germany to Asuncion in Paraguay with connecting flights first in Paris/France and further in Sao Paulo/Brazil, which were both missed. In order to calculate the delay, the court decided, one had to take note of the time of arrival at the final place of destination, irrespective of whether this was within or outside of an EU Member States, as long as the place of original departure of the journey was within the EU.

The CJEU specifically set out that the compensation was not conditional upon there having been a delay at departure; what mattered for consumer protection purposes was the inconvenience and irreversible loss of time caused showing in the time of arrival.[24]

The focus is thus firmly on the overall flight and the consequences as a whole. Indeed the Regulation defines the concept of "final destination" as "the destination set out in the ticket presented at check-in counter, or in the case of directly connecting flights, the destination of the last flight". The same, it is submitted, must apply to denied boarding and the delays in arrival time thus encountered, regardless of where the connection was missed.

Such issues did however not arise in *Caldwell* or *Dunbar*, as the flights concerned were firmly situated in EU Member States.

2. Budget Airline Practices under Review

2.1. *Caldwell v EasyJet* - Separation of flights and lack of assistance for timely boarding

The budget airline tactics of separation of flights with its potential impact on jurisdiction and questions of denied boarding due to lack of assistance for check-in and clearing security in the context of restrictive contract terms came before the Edinburgh Sheriff Court in *Caldwell v EasyJet*[25] under both the Montreal Convention and the EC Passenger Rights Regulation.

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20 See paras [4]-[24] of the judgment by Mrs Proudman J.

21 *Thea Gahan v Emirates* Claim No. B3FY3R03, County Court at Liverpool, District Judge Benson, 9 May 2016.

22 For a short discussion of some of these cases see Walker M., "A view from above", 166 (2016) NLJ 7721 p.14f.

23 *C-11/11 Air France SA v Folkerts* EU:C:2013:106; [2013] 2 C.M.L.R. 44.

24 See *C-11/11 Air France SA v Folkerts* EU:C:2013:106; [2013] 2 C.M.L.R. 44 at [37 – 40, 47].

25 2015 S.L.T. (Sh Ct) 223; 2015 G.W.D. 34-546.

2.1.1. The facts

The journey

Niall Caldwell and his wife Aileen McLuckie, both domiciled in Edinburgh, went on holiday to Sicily and had booked flights via an agent with EasyJet, from Edinburgh to London Gatwick and London Gatwick to Catania, Sicily. It was on their return journey that they encountered problems. With boarding passes already in hand, they presented themselves 2 hours before the departure time at the EasyJet check-in desk to drop off their baggage. However the queue was substantial, containing passengers to four different flight destinations. The queue moved so slowly that Mr Caldwell after 30 minutes went up to the desk to ask EasyJet to prioritise the passengers on the next flights; this was rejected. After another 30 minutes he and his wife had dropped off their baggage only to find yet another long and slow moving queue at security, where equally no system of prioritisation was in operation. Mr Caldwell's requests, first to EasyJet and then to security staff to prioritise them were denied. EasyJet staff told him that EasyJet had no control over the security queue and airport security staff's answer was that only EasyJet could require such prioritisation and had not done so.

After clearing security and passport control and running to the gate the pursuers arrived at the gate at the scheduled departure time only to be told that the plane had left and their luggage had been off-loaded. They were not offered any assistance and told that if they wanted to fly on other EasyJet flights they would have to pay full fare and that the next ones scheduled were in two and three days' time. Lucky for them, the pursuers were able to find an alternative and bought two tickets to London from British Airways (BA) for the same day. However, this cost them more than double the price of the flights they had just missed. BA staff guaranteed that they would manage to get to the gate on time, even though there was only one hour left to departure. Indeed a BA representative escorted them through security and ensured their timely arrival at the gate. Once the pursuers arrived at London Gatwick they managed to pick up their initial itinerary and board the EasyJet flight to Edinburgh.

The complaints and action

Back home, the pursuers complained and asked EasyJet to refund their costs for the extra BA flights. EasyJet denied liability and told the pursuers that it had been their responsibility to reach the departure gate in time for their flight as indicated in the terms and conditions. Yet EasyJet confirmed that out of the 180 passengers booked on the EasyJet flight from Catania to London on the particular day only 168 had actually flown.

The pursuers brought action against EasyJet at Edinburgh Sheriff court for damages for breach of contract under the Montreal Convention and for compensation and reimbursement due to denied boarding according to the EC Passenger Rights Regulation. The defender rejected the claims, challenged jurisdiction under the Montreal Convention, claimed exclusivity of the Montreal Convention and, alternatively, that the concept of "denied boarding" was restricted to the practice of overbooking flights.

2.1.2. The decision and reasoning

Jurisdiction

According to the rules of jurisdiction under domestic law, the contract between the parties being a consumer contract, the courts of the place where the consumer was domiciled would normally have jurisdiction.[26] However, the contract with EasyJet was for flights only and transport contracts were governed by the exception referring to the Montreal Convention for a claim for damages arising out of the contract of carriage.[27] Whether jurisdiction under the Montreal Convention was fulfilled in favour of the Edinburgh Sheriff court was disputed by the defendant, however the defendant had not raised any issue on the matter of jurisdiction over the claims under the EC Passenger Rights Regulation.

Article 33 of the Montreal Convention established jurisdiction before the courts in the territory of the state where the carrier had its domicile or principal place of business or where it had its place of business through which the contract had been made, or at the place of destination. While, EasyJet had its domicile and principal place of business in Luton, England and while the contract had been made via an agent also situated in England, the place of destination, it was held, was Edinburgh and thus the Edinburgh Sheriff court had jurisdiction. EasyJet's submission had been that there were four separate and distinct, independent and unconnected contracts between the parties, one for each flight with individual costs attached, to ensure that flights did not become dependent on each other and to allow maximum flexibility to the passengers; and thus, that the relevant contract in dispute was the flight Catania to London with the consequence that the place of destination was London. This however was rejected by Sheriff T Welsh QC, who instead found that "the flights sold and the contract concluded involved a return trip, beginning and ending at the passengers' home city of Edinburgh." Furthermore, "[t]here was a single check in in advance of departure and boarding passes were issued by the carrier for all directly connecting flights." Irrespective of EasyJet's arguments proffered, the Sheriff held that the flights were realistically connected and the return flight from Catania was to Edinburgh albeit via London. Place of destination was therefore Edinburgh.

This conclusion, the Sheriff argued, was also supported by the Australian case *Gulf Air Co GSC v Fattouh*[28] and a United States case, *Butz v British Airways.*[29] *Fattouh* concerned a round trip from Beirut to Sydney, Australia and back to Beirut and the court in New South Wales, Australia had held that the place of destination was Beirut which was also the place of departure. In the latter US case, there had been a round trip from London to New York with tickets purchased in London. The US District Judge had declined jurisdiction[30] and had rejected the argument that the place of destination of the outward leg was New York. He had found that the opposite view submitted that each place where a particular flight terminated was relevant would lead to the conclusion that each flight had a different place of destination, resulting in

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[26] See r.3(1) of Sch.8 of the Civil Jurisdiction and Judgments Act 1982 (CJJA 1982).

[27] But see r.3(2) of Sch.8 CJJA 1982. Exclusivity of the convention for jurisdiction, cause of action and as sole remedy for a passenger who claims against a carrier for loss, injury and damage sustained in the course of, or arising out of, international carriage by air was also confirmed by Lord Hope of Craighead, in his speech in *Abnett v British Airways Plc* [1997] A.C. 430; 1997 S.C. (H.L.) 26; 1997 S.L.T. 492.

[28] [2008] NSWCA 225

[29] 421 F Supp 127(E.D. Pa. 1976).

[30] Based on jurisdiction provisions of the Warsaw Convention on the International Carriages by Air, 1929, the predecessor to the Montreal Convention, which are near identical to those of the Montreal Convention.

different places of jurisdiction for each segment of the entire journey; this would be against the aim of the convention of uniformity with respect to a single ticket.

Relationship of Montreal Convention and EC Passenger Rights Regulation

The tension between the Montreal Convention and the EC Regulation had already been subject to considerable litigation, in national courts and by the CJEU. Whether a matter fell within the scope of the Montreal Convention or concerned an aspect of the Community legal order was to be determined in accordance with the principles laid down by relevant decisions of the CJEU. Drawing on the analysis in *Dawson v Thomson Airways Ltd*[31] the Sheriff found that with respect to the claim for compensation and reimbursement due to denied boarding, as distinct from a claim for damages, the case-law of the CJEU clearly established the EC Regulation as an independent and separate compensatory regime that dealt with claims arising at an earlier stage than those under the Montreal Convention. As the CJEU had decided, the EC Regulation aimed at compensating the damage constituted by the inconvenience that delay and cancellation of flights caused. This was also true, as in this case, for the inconvenience caused due to denied boarding; insofar the principles laid down by CJEU case-law with regard to the EC Regulation had to be applied.

This result was also in line with decisions taken by taken by Sheriff Principal Lockhart in *Vergara v Ryanair Ltd*,[32] and Sheriff Principal Scott in *Weir v Ryanair*,[33] that claims for compensation under the EC Regulation were not covered by a clause in the general terms and conditions of Ryanair subjecting claims for damages to a 2-year time bar. Compensation claims were to be assessed under the EC Regulation whereas damages claims were regulated by the Montreal Convention.

Claim for damages for breach of contract

This claim was governed by the Montreal Convention. While the pursuers undoubtedly incurred extra costs purchasing the BA tickets the claim for damages in the Edinburgh Sheriff Court failed on two grounds: Firstly, the pursuers had difficulty in attaching liability to the defender for breach of contract and, secondly, they failed to demonstrate that it was the defender's breach that caused their damage. The pursuers had accepted clauses in the standard terms and conditions putting the onus on them to reach the departure gate in time for the flight. The clauses also stipulated that failure to do so, allowed the carrier to refuse to carry the passenger, and that the passenger had forfeited the seat and any right to compensation, subject to international and domestic passenger rights regulations to the contrary.[34] According to the

[31] [2014] EWCA Civ 845; [2015] 1 W.L.R. 883; [2014] 4 All E.R. 832, a case dealing with flight cancellation, where the Court of Appeal decided that it was bound by case-law of the CJEU, that an obligation to pay compensation under the Regulation lay outside the scope of the Montreal Convention ; in so doing the Court of Appeal in *Dawson* referred to case-law of the CJEU such as C-344/04 *R. (on the application of International Air Transport Association (IATA)) v Department of Transport* [2006] E.C.R. I-403; [2006] 2 C.M.L.R. 20; Case C-402/07 *Sturgeon v Condor Flugdienst GmbH* [2010] 2 All E.R. (Comm) 983; [2010] 1 Lloyd's Rep. 522; *C-581/10 Nelson v Deutsche Lufthansa AG* [2013] 1 All E.R. (Comm) 385; [2013] 1 Lloyd's Rep. 49; and C-139/11 *Cuadrench Moré v Koninklijke Luchtvaart Maatschappij NV* [2013] 2 All E.R. (Comm) 1152; [2013] 1 Lloyd's Rep. 341.

[32] 2014 S.L.T. (Sh Ct) 119.

[33] Glasgow Sheriff court, 22 January 2014, unreported.

[34] Cl. 12.2.1 of the conditions of the contract between the parties provides, "You must arrive at the airport sufficiently in advance of the scheduled Flight departure time to permit completion of Government formalities

Sheriff, the pursuers thus had taken the entire responsibility for clearing security, customs and passport control and could not attribute the delays encountered there to the defender. The vital link in the chain of causation was therefore fatally absent.

Claims for compensation and reimbursement under the EC Regulation

The EC Passenger Rights Regulation, however, allowed claims for compensation and reimbursement in case of denied boarding.[35] The Sheriff decided that the case at hand was indeed one of denied boarding as per the principles applied by the CJEU. According to CJEU[36] the Regulation definition of denied boarding[37] was not linked or limited to cases of overbooking, as it had been in EC Regulation 295/91. The latter was now superseded by EC Regulation 261/2004. Indeed the legislative history and the Recitals of the current EC Regulation clearly showed that a broad interpretation of the rights granted to passengers by the EC Regulation was required and that the concept of denied boarding also included other grounds, such as operational reasons.[38] In C-321/11 *Rodriguez Cachafeiro v Iberia* the passengers were through no fault of their own denied boarding because the carrier had wrongly assumed they would miss a connecting transatlantic flight and resold their seats. In C-22/11 *Finnair v Lassooy* a strike had affected earlier flights and the carrier decided to "bump" Mr Lassooy to a later flight in order to give priority to passengers from the affected flights. In both cases the CJEU found that these were cases of denied boarding which were not justified by reasonable grounds.[39]

According to the Sheriff, the present case also fell within this concept. The defender's view that this was simply a case of passengers being late for boarding could not be accepted. In agreement with the views presented by Advocate General Bot in *Finnair*,[40] denied boarding was to include cases where carriers for operational reasons wrongly denied boarding to passengers in contravention of the Regulation. Passengers "bumped" to another flight, as in *Finnair*, or in other circumstances as here, would otherwise be left abandoned to their fate

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and security procedures. Government formalities and security procedures may vary at different airports and for particular Flights. It is Your responsibility to ensure that You comply with these formalities and procedures, details of which will be available at the time Your booking is made."

Cl. 12.4.1 states: "Please note: You must present Yourself at the boarding gate no later than 30 minutes prior to scheduled time of departure or You may not be accepted for travel, and will forfeit Your seat even if [special add-ons were purchased]…."

Cl. 12.4.3 reads: "If You present Yourself at the boarding gate outside the time restrictions outlined in this Article 12 (Online Check-in and Airport Procedures), or You are improperly documented and not ready to travel, We may refuse to carry You and You will forfeit Your seat and any right to compensation, subject to any passenger rights pursuant to any international or domestic laws or regulations to the contrary."

35 Art 4.3 EC Reg. 261/2004 referring to rights of compensation according to Art.7 and to reimbursement of rerouting according to Art 8 of the same Regulation.

36 In C-22/11 *Finnair Oyj v Lassooy*, [2013] 1 C.M.L.R. 18 and C-321/11 *Rodriguez Cachafeiro v Iberia, Lineas Aereas de Espana SA*, [2013] 1 C.M.L.R. 19 with reference inter alia to Case *C-344/04 R. (on the application of International Air Transport Association (IATA)) v Department of Transport* [2006] ECR I-403, [2006] 2 C.M.L.R. 20 at [69] and Case *C-549/07 Wallentin-Hermann v Alitalia - Linee Aeree Italiane SpA* [2008] ECR I-11061, [2009] 2 C.M.L.R. 9 [18].

37 See Art 2(j) EC Reg 261/2004 which states: "'denied boarding' means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2),

except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation."

38 See C-22/11 *Finnair v Lassooy*, [20 - 26] and C-321/11 *Rodriguez Cachafeiro v Iberia* [20 -27].

39 See Art 2(j) EC Reg 261/2004.

40 At [AG46- AG48] and also [AG39] and [AG55].

without the payment of compensation for the damage caused, but also, and above all, without assistance, to provide for the immediate needs, on the spot, of the passengers. The division of responsibilities between the parties to an air passenger transport contract under the EC Regulation was as set out in the words of AG Bot in *Finnair*: "55. It is indeed true that the airport strike cannot be attributed to Finnair. However, as is apparent from the travaux préparatoires for the adoption of Regulation No 261/2004, the system of compensation and assistance for air passengers established by the EU legislature is designed, above all, to protect those passengers. Thus, that legislature adopted a simple solution according to which all the obligations relating to that scheme are the responsibility of the carrier operating the flight. It is a solution which is practical since the operating carrier has personnel and agents in the airports to help passengers. It is a system which is direct and simple, and therefore easily understood by passengers."

The AG's analysis had been accepted by the CJEU in its *Finnair* decision without any objections. Thus, the answer to the question who, within the framework of the Regulation, was responsible for the mismanagement of the queue at the EasyJet check-in desk that morning and the consequences of the bottleneck causing passengers' delay in passing through security, customs and passport checks, was EasyJet. Thus, a passenger who presented him/herself for check-in on time for a confirmed reserved seat and who was not at fault was entitled to compensation if the carrier failed to take reasonable steps to ensure passage through its own bag drop and airport security queues. A similar approach had also been taken by a German decision of the Amtsgericht Erding,[41] where passengers arrived on time for check-in for a reserved flight but due to insufficient check-in staff could not check-in on time to board the flight.

Further, the EC Regulation rights were of mandatory nature and could not be contracted out of; the standard term clauses agreed between the parties could therefore not impinge on them.[42] The pursuers thus were entitled to compensation[43] and to reimbursement[44] of the flights to which boarding had been denied. A choice of reimbursement or re-routing had never been offered to the pursuers. A sum of overall £1,042.90[45] was awarded.

2.2. *Dunbar v EasyJet* - Delay claims and extraordinary circumstances the impact of which was unavoidable

The question of avoidability of knock-on effects of extraordinary circumstances was the topic of the Scots case in *Dunbar v EasyJet Airline Co Ltd*[46].

2.2.1. Facts

The pursuer's flight from Glasgow to Malaga was delayed for more than 6 hours. Instead of leaving Glasgow airport at 15:55h with scheduled arrival at Malaga airport at 19:10h, the plane departed only at 22:26h arriving into Malaga the next morning at 01:12h. The aircraft

41 Fist Instance Court for Small Claims; AG Erding, 05.07.2006, Az.4 C 309/06.

42 See Art 15 EC Reg. 261/2004.

43 In accordance to Art 7.1(b) of EC Reg. 261/2004 to €400 each, determined based on the distance of the flight, which, on 14th September 2014, would have amounted to £634.92.

44 According to Art 8 of EC Reg. 261/2004, of the costs for their failed flights for a sum of £407.98.

45 Based on the addition of the sums of £634.92 for compensation and £407.98 for reimbursement as set out in the footnotes immediately above.

46 Paisley Sheriff Court, judgment of 30th October 2015, 2015 G.W.D. 36-570.

had initially been delayed by air traffic management due to adverse weather at Gatwick airport some 3 flights and 8 hours earlier before the scheduled departure of the pursuer. It had been delayed ever since in all of its flights that day and up to and including the pursuer's flight, which finally took off 15 hours after the delays had first manifested.

The pursuer raised a claim, in the value of Euro 400, for long delay under Articles 6(1)(b) with 7(1)(b) of the EU Passenger Rights Regulation in the Paisley Sheriff Court. The value of the compensation sought was not in dispute, but the defender rejected the claim aiming to avail itself of the defence set out in Recitals 14 and 15 of the Regulation. It argued that the delay was caused by extraordinary circumstances which it had not been able to avoid, irrespective of taking reasonable measures. The pursuer disagreed that the delay on her flight was unavoidable.

2.2.2. The decision and reasoning

The Sheriff agreed with the authority in C-549/07 *Wallentin-Hermann v Allitalia-Linee Aeree Italienne SpA*[47] and *Jet2.com Ltd v Huzar*[48] and Recital 15 of the EU Regulation that it was not for a court to look behind air traffic management decisions ordering delay. However, the question here was not that of the impact of the decision by air traffic control on the initial flight but whether all reasonable measures had indeed been taken to avoid delays for the later flights. While the Sheriff did not accept the broad general stance that knock-on effects from incidences in earlier flights could not provide an extraordinary circumstance defence, as suggested by the pursuer with reference to an unreported case of a Cheshire County Court decision in England of September 2013,[49] he did not agree that EasyJet had shown that it had taken all reasonable measures to avoid the delay impacting on the pursuer. According to the Sheriff, there had to come a time when the extraordinary circumstances ceased to exist. At the very least, the longer the timeframe between the circumstances causing the original delay coming to an end and the continuation of delays, the weaker the extraordinary circumstances exception had to be.[50]

EasyJet had argued that it had had 5 aircraft in reserve that day, available to draw on, these had all been busy on other flights. The pursuer had countered that 5 aircraft was insufficient as only constituting less than 2% of the EasyJet fleet. In any event, it transpired, that 3 of these aircraft covered for flight delays due to the original aircraft having encountered "unexpected flight safety shortcomings"[51], rather than dealing with issues arising from other unforeseen circumstances, such as the one involving the aircraft in question. No other aircraft were made available and nothing else had been done to alleviate the impact of the initial delay of the aircraft even though plenty of time had passed; this was found not to be good enough for the defence to be available.[52]

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47 [2008] E.C.R. I-11061; [2009] 1 Lloyd's Rep. 406.

48 [2014] EWCA Civ 791; [2014] 4 All E.R. 581; [2014] 2 Lloyd's Rep. 368 (technical problems are not extraordinary circumstances – even if not foreseeable, as these were inherent in the normal exercise of a carrier's activity).

49 *Jager v EasyJet*, Macclesfield County Court, 16th September 2013, unreported.

50 See *Dunbar v EasyJet Airline Co Ltd,* 2015 G.W.D. 36-570, at paras [21 – 24].

51 According to EasyJet's claims.

52 *Dunbar v EasyJet Airline Co Ltd,* 2015 G.W.D. 36-570, at paras [26 – 28].

3. Conclusion and Comment

While matters, such as the interaction of the EC Regulation with the Montreal Convention and the broad interpretation of the concept of denied boarding had already been clarified by the CJEU, the binding relevance of these decisions in Scotland and in the UK as a whole had been clearly set out in *Caldwell*. Additionally and more importantly, the decisions provide much welcome clarification on a number of issues: on jurisdiction in budget airline cases, the levels of passenger assistance required by airlines at airports, as well as on the limited availability of the extraordinary circumstances defence, depending on whether appropriate action to minimise the impact of flight delays or cancellations had been taken.

3.1. Jurisdiction

3.1.1. Montreal Convention

With *Caldwell* it is now decided that under the Montreal Convention the operational decision of budget airlines of selling and pricing flights separately, while they are in practice connecting, does not cut through to determining jurisdiction separately. Instead the focus for founding jurisdiction is on the overall destination of the round trip or journey. While there already was case-law on jurisdiction to the effect of focusing on the place of final destination and thus the place of departure for true round trips,[53] the application of this understanding to flights sold "separately" by the same airline, although they are connecting, is herewith clarified.

To hold otherwise, and to segment the travel would be against the spirit of the Montreal Convention and lead to unreasonable results, as otherwise transfer in any airport could found jurisdiction. The inappropriateness of such approach becomes even more obvious where the cause resulting in damages pervades more than one flight.

3.1.2. EC Passenger Rights Regulation

However, what had not been argued in Caldwell and thus had not been explicitly decided was the jurisdiction of the Sheriff Court under the EC Passenger Rights Regulation. How would jurisdiction have been decided for such claims? These claims fall outside the jurisdictional rules of the Montreal Convention[54] and are thus either determined by the EU Judgments Regulation[55] together with the intra-UK allocation of jurisdiction via Schedule 4 of the Civil Jurisdiction and Judgments Act 1982, or the domestic rules of jurisdiction of the Scottish courts in Schedule 8 of the 1982 Act, both implementing schemes similar to that under the EU Regu-

[53] As, for example, the US and Australian decisions cited in the case; Shawcross and Beaumont: Air Law, VII Carriage by Air, paras 440 -441 and also German case-law, see Schmidt, Herber, Münchener Kommentar zum Handelsgesetzbuch, Band 7, §§ 407 - 619 Transportrecht (3nd edn, Verlag C H Beck, 2014), MÜ, Art. 33, para.25.

[54] See C-139/11 *Cuadrench Moré v Koninklijke Luchtvaart Maatschappij NV* [2013] 2 All E.R. (Comm) 1152; [2013] 1 Lloyd's Rep. 341 and *Dawson v Thomson Airways Ltd* [2014] EWCA Civ 845; [2015] 1 W.L.R. 883; [2014] 4 All E.R. 832; both decisions stating that limitation of claims under the EC Regulation was outside the scope of the Montreal Convention.

[55] EU Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ L351, 20.12.2012, p1), which has replaced Council Regulation (EC) No 44/2001) for cases instituted from 10th January 2015.

lation. Since the consumer contract domicile rules of do not apply to transport contracts[56] and EasyJet, the defender, was domiciled in England, could Edinburgh have been a place where the services under the contract were or should have been provided[57]?

The CJEU had decided the place of performance for carriage of passengers by air in C-204/08 *Rehder v Air Baltic Corp*[58]. It explained that where there were several places at which services were provided in different member states, it was necessary to identify the place with the closest linking factor between the contract in question and the court having jurisdiction, in particular the place where, pursuant to that contract, the main provision of services was to be carried out. It then looked at the places where air passenger services were provided and explained that this was a multifaceted contract where the carrier had to fulfil duties at the place of departure, throughout the carriage and at the place of arrival. These duties were indivisible and none of them more important than others; thus, a claimant should have the choice to sue before the courts of the place of departure or the place of arrival. However, interim places where the aircraft may stop over did not have a sufficient link to the essential nature of the services resulting from the air passenger contract[59].

It is submitted that, if this was applied to cases such as here of connecting flights where the first one was cancelled or boarding denied, the places of departure and arrival under the contract ought to be interpreted as the ones of the overall connecting flights' starting and destination points. These places of departure and destination ought to be determinative instead of those of a single flight, which by itself would have no use to the passenger to taking him or her to the intended (final) destination as envisaged by the overall contract and which, as a place of transfer, similar to a stopover place, would be entirely accidental depending on the route that was chosen, without providing any further key connection. It is thus submitted that such a transfer place would be subsidiary compared to the places of overall departure and arrival. This is further supported by the EC Passenger Rights Regulation defining final destination under the contract of carriage as destination on the ticket presented at the check-in counter or, in case of directly connecting flights, the destination of the last flight.[60]

The solution therefore, it is submitted, would have been the same in *Caldwell* if jurisdiction had been disputed and the EU jurisdiction rules or the domestic rules had been applied to the claim under the EU Passenger Rights Regulation. Such a result would equally further the aim of the EC Regulation to provide passengers with effective consumer protection[61] that is, that jurisdiction connects to a place that is meaningful to the passenger and not simply a useful place of transfer from the point of view of the airline only. However, it might be worth seeking a definite answer to this question via a preliminary ruling from the CJEU in an appropriate

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56 See Art 17(3) of the EU Judgments Regulation No 1215/2012; for intra-UK jurisdiction allocation r.7(2), Sched.4, CJJA 1982 and for jurisdiction of the Scottish courts r.3(2), Sched.8, CJJA 1982.

57 As per Art 7(1)(b) EU Reg 1215/2012 or the former Art 5(1)(b) EU Reg 44/2001; for intra UK allocation by virtue of r.3(a), Sched 4, CJJA 1982 or for rules of jurisdiction in Scotland by virtue of r.2(b), Sched.8, CJJA 1982. For the latter two regimes it is submitted that case-law of the CJEU is persuasive authority since their jurisdictional rules have specifically been designed to work in parallel with the Judgments Regulation.

58 [2009] E.C.R. I-6073; [2009] I.L.Pr. 44.

59 See *Rehder, ibid,* at [38 – 42].

60 Art 2(h) EC Reg 261/2004.

61 See Recitals 1-4 of REg 261/2004 and C-344/04 *R. (on the application of International Air Transport Association (IATA)) v Department of Transport* [2006] E.C.R. I-403; [2006] 2 C.M.L.R. 20 at [46]; Case C-402/07 *Sturgeon v Condor Flugdienst GmbH* [2010] 2 All E.R. (Comm) 983; [2010] 1 Lloyd's Rep. 522 at [44 & 63]; *C-581/10 Nelson v Deutsche Lufthansa AG* [2013] 1 All E.R. (Comm) 385; [2013] 1 Lloyd's Rep. 49 at [72 & 81].

case in the future.

3.2. Denied boarding - assistance required

It is now clearly pronounced that assistance at airports to ensure passengers can proceed timely through check-in and security is required by airlines, whether budget or not, and irrespective of the use of standard terms designed to burden the passenger with taking responsibility for arriving at the gate in time. While such clauses might impact on a damages claim, the airline employing such terms cannot avoid its duties under the EC Passenger Rights Regulation. The decision therefore constitutes an important step to ensuring a high level of passenger protection as envisaged by the EC Regulation.

3.3. Standard Contract Terms

The Unfair Contract Terms Act (UCTA) 1977 and, for consumer contracts, the Consumer Rights Act (CRA) 2015, apply to contracts of carriage by air,[62] and standard terms can be tested against these Acts insofar as they go beyond a mere repetition of what is provided by the conventions.[63]

In *Caldwell*, the Sheriff found that EasyJet's standard contract terms put the onus on reaching the departure gate in time on the passenger, so that there was no claim for breach of contract. Whether these terms and conditions are fair and enforceable, considering the imbalance of power and also the passengers' limited ability to impact the procedures and the support available at airports, may be worth testing in appropriate cases in the courts. According to section 62(1) of the Consumer Rights Act 2015[64] a term that is unfair is not binding on the consumer and it is unfair, where contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.[65] It is submitted that this is the case and that it may be worth pleading this matter before the courts, even more so now that the 2015 Consumer Rights Act is in force.

In any event, the EC Passenger Rights Regulation clarifies that its provisions are mandatory and cannot be derogated from[66], thus avoiding the need for a similar discussion concerning restrictive contract terms; the latter cannot impinge on the Regulation's compensation and reimbursement rights.

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62 Unfair Contract Terms Act 1977 s.15(2)(c), with ss 16(4), 17(3); for consumer contracts entered into as of 1st October 2016 the Consumer Rights Act 2015 ("the 2015 Act"), s.57 (Services) and Part 2 (Unfair Terms) applies (see The Consumer Rights Act 2015 (Commencement No. 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (SI.2015/1630)). See also s.2(3) of the 2015 Act for the definition of consumer as an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.

63 See Unfair Contract Terms Act 1977 s.29 and for consumer contracts governed by the Consumer Rights Act 2015, see s 73 of the 2015 Act.

64 And for persons other than consumers, see s.24 for Scotland and s.11 for England & Wales under the Unfair Contract Terms Act 1977 and Sched.2.

65 S.62(4) CRA 2015. In deciding whether a term is fair the judge should (a) take into account the nature of the subject matter of the contract, and (b) refer to all the circumstances existing when the term was agreed and to all of the other terms of the contract (s.62(5) CRA 2015; and see s 63 and Sched.2 CRA 2015, providing the judge with an indicative and non-exhaustive list of terms deemed unfair).

66 Art 15 Regulation 261/2004.

3.4. Extraordinary Circumstances Defence and Knock-on Effects

While Scots courts are willing to consider extraordinary occurrences of an earlier flight where these are impacting on later ones, the airline will have to make out a strong case of having taken all reasonable measures, before it can claim exemption from having to pay compensation.

Insofar, no guidance can be derived from the CJEU decision in C-22/11 *Finnair v Lassooy*,[67] which denied an airline to rely on extraordinary circumstances and thus the benefit of a possible defence due to a knock-on effect. Compared to perpetual flight delay cases, *Finnair* was based on very different circumstances: A strike at the airport had caused significant disruption and while its occurrence had provided a defence to the passengers so impacted on, this was no longer valid as against passengers on later flights from the same airport, such as the claimant in *Finnair*, who had been denied boarding on "their" flight as a result of the airline's decision to work through the back-log of passengers by prioritising those passengers whose flights had been directly affected by the strike.

Of interest, however, may be the recent decision of the CJEU in Case C-315/15 *Pešková and Peška v Travel Service*[68] where the court confirmed that the delay of an aircraft in its subsequent flight, as knock-on effect of an extraordinary circumstance, here a collision of the aircraft with a bird, did not give rise to claims of compensation, insofar as the delay was due to the plane undergoing necessary[69] safety checks. Yet, the proviso remained, that all reasonable measures to avoid the occurrence of the extraordinary circumstance and the delay resulting from it, had been taken.

Therefore, the closer in time the more likely that the courts will accept that the delay was caused by the extraordinary circumstance rather than an unwillingness to provide necessary resources to avoid delay for passengers down the line on subsequent flights.

3.5. Final Remark

All in all the cases have shown that Scottish courts apply the relevant international and European instruments in favour of the passenger's interests of assistance, support and timely execution of the agreed carriage, lest compensation is due and enforceable in courts accessible to the passenger.

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[67] C-22/11 *Finnair Oyj v Lassooy* [2013] 1 C.M.L.R. 18.

[68] Case C-315/15 *Marcela Pešková and Jiří Peška v Travel Service A.S.*, judgment of 4 May 2017, EU:C:2017:342.

[69] However this was only the case where such safety checks were required and not where additional safety checks were carried out after the aircraft was cleared by an authorised expert, due to the service preferences by the owner of the aircraft; see paras [32 - 37] and point 2 of the court's ruling.

FIERCE OR UNFAIR COMPETITION IN THE ROAD PASSENGER TRANSPORT SECTOR? *

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SUMMARY

I. Introduction: the current state of the question.—II. Legal regime for the carriage of passengers by road in Spain: 1. Classification of transport services. 2. Subjects involved in the supply of transport services. 3. Requirements for the exercise of the activity: A. As a carrier. B. As an intermediary.—III. The possible qualification of digital platforms as subjects in the field of transport: 1. The platform BlaBlaCar. 2. The platform UberPop. 3. The platforms UberBlack, UberX and Cabify.—IV. By way of conclusion: the desirability of regulating the activity by liberalizing the sector.

Key words: *carriage of passengers by road, shared economy, unfair competition*

I. INTRODUCTION: THE CURRENT STATE OF THE QUESTION

In recent years, new Internet service providers that specialise in carriage of passengers[1] by road[2] have emerged in many countries, including Spain, in particular, the well-known platforms *BlaBlaCar* (French), *Uber* (North American)[3] or the Spanish undertakings *Cabify* and *Amovens*. Their activity consists of intermediating between users that are in need of transport

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1 However, there are similar initiatives in the cargo sector: *Uship* (*https://www.uship.com/es/*); *wtransnet* (*http://www.wtransnet.com/es/*); *Transportemos* (*https://gust.com/companies/transportemos_1*); *UberCargo* or *UberFreight* (*https://www.engadget.com/2017/05/18/uber-is-ready-to-help-truck-drivers-find-cargo/*).

2 Nonetheless, this practice is currently being extended to transport by other modes, such as air (by helicopter): *UberCopter* (*https://wwwhatsnew.com/2016/06/15/asi-es-ubercopter-el-servicio-de-uber-con-helicopteros/*).

3 Similar to *Uber* is the US-based platform *Lyft*: *https://www.lyft.com/*.

and drivers who perform the transport with their own vehicles[4]. Thus, practically anyone who owns a vehicle and aims to participate can operate through such platforms[5].

The professional transport sector has reacted critically to these new competitors that combine technology and transportation, especially because their price is usually lower than the one charged for "official" transport (taxis, car rental with drivers, line buses, etc.).

The arguments used against these new service providers and their activity are diverse, but they are essentially grounded on the repression of unfair competition and, in particular, on an alleged breach of legal rules, as envisaged by Article 15 of Act No 3/1991, of 10 January, on Unfair Competition (UCA). Indeed, these new transport service providers and (some of the) drivers pretend not to be subject to the strict legal controls of access to the profession and the performance of transport services that currently govern the market; and (some of the) drivers do not pay taxes professional transport is charged with (underground economy). The service providers, on their part, object by stressing that such platforms are a manifestation of the so-called on-line collaborative or sharing economy —i.e., an information society service— or even that they respect current regulations.

The matter is in the courts. The Commercial Court Number 2 of Madrid ordered on 9 December 2014[6] the closure of the services provided by *UberPop*, precisely on grounds of unfair competition, a decision that has been confirmed on appeal in 2015. On the contrary, the solution adopted by the same Commercial Court Number 2 of Madrid in its judgment No 30/2017, of 2 February[7], is different with respect to *BlaBlaCar*. In the latter decision, the Judge considers that *BlaBlaCar* does not infringe the Spanish legislation on transport and, therefore, its conduct cannot be described as unfair. Likewise, the Commercial Court No 12 of Madrid dismissed in 2015 the petition for interim measures requested by the Taxi Federation of Madrid against *Cabify* as it considered that the urgency of this measure was disproportionate[8]; and the judgment on the merits dismissed the claim against the platform, based on an alleged unfair behaviour (breach of legal rules)[9].

Recently, the Order of the Supreme Court (Contentious-Administrative Chamber, Section 1) of 13 March 2017[10], has admitted an appeal for revision filed by the Catalonian regional government (*Generalitat de Catalunya*) against the judgments of the Contentious-Administrative Courts No 15 and 17 of Barcelona, of 18 July[11] and 5 October 2016[12], which annulled a sanction imposed on *Uber* by the Department of Territory and Sustainability of Catalonia. The Supreme Court considers that the issue "presents 'cassational interest' for the formation of jurisdictional doctrine to determine the regulatory framework applicable to intermediation activities between users and service providers through platforms or digital applications and the possibility, if

4 *Social Car*, on the contrary, is a platform dedicated to vehicle rental services without driver. See *https://www.socialcar.com/*.

5 VELASCO SAN PEDRO, L., "El consumo colaborativo en el transporte de personas", *Diario La Ley*, on-line document, 9 September 2015.

6 JUR 2014, 286106.

7 AC 2017, 207.

8 According to the decision (*non vidimus*), the petitioner had in fact tolerated the platform, since it had been functioning in Spain for four years. For further information on this issue see *http://www.expansion.com/economia-digital/companias/2015/11/26/565714c2e2704eb57c8b45c7.html*.

9 Commercial Court No. 12 of Madrid, Judgment No 159/2017, of 13 June (JUR 2017, 163178).

10 JUR 2017, 68419.

11 Roj: SJCA 1565/2016.

12 Roj: SJCA 1739/2016.

appropriate, to submit these activities to the specific regime of administrative intervention in the transport sector, for which it will be necessary to interpret […] Act No 16/1987, of 30 July, on the Administrative Organisation of Land Transport; as well as the corresponding provisions of Act No 34/2002, of 11 July, on Services of the Information Society, Directive 2000/31/EC, of 8 June, on Electronic Commerce, and Directive 2006/123/EC, of 12 December 2001, on Services in the Internal Market".

In any case, the destiny of such platforms is also in the hands of the European Union, as the Commercial Court No 3 of Barcelona decided, on 7 August 2015, to suspend the proceedings and file a request for a preliminary ruling at the Luxembourg Court. Although no decision has yet been reached, the opinion of the Advocate General in case C-434/15 (*Asociación Profesional Elite Taxi v. Uber Systems Spain, SL*)[13] has recently been published, stating that "Uber's activity must be viewed as a whole encompassing both the service of connecting passengers and drivers with one another by means of the smartphone application and the supply of transport itself, which constitutes, from an economic perspective, the main component. This activity cannot therefore be split into two, for the purpose of classifying a part of the service as an information society service. Consequently, the service must be classified as a 'service in the field of transport'", so that Uber can be obliged to obtain the licences and authorizations required by national law.

It therefore appears that different solutions will be adopted in respect of each of the different transport service platforms. In fact, although all of them have a common denominator, the online intermediation between drivers and users, their business model or way of operating is different. While the drivers offering their services through *BlaBlaCar* or *Amovens* are individuals who offer available seats in their vehicles for a pre-established journey in exchange for sharing the costs of the transfer, *UberPop* also works with non-professional drivers, but they seek a profit. *Cabify* (or *UberX/Black*) drivers, on their part, are professionals who have previously obtained the mandatory authorization or transport licence (known as *VTC* licences).

However, it cannot be denied that this new business model increases competition in the transport sector and is therefore advantageous for consumers, who benefit of a greater availability of vehicles, shorter waiting times, lower prices, better quality and innovation[14]. Nonetheless, it is highly debatable that we are —at least in all cases— facing a genuine hypothesis of collaborative economy that fits into the scheme of a service of the information society, the provision whereof has been liberalized. In fact, the services that are provided through the intermediation of the platform are occasional transport services of passengers by road, which, at present, form part of a regulated sector in Spain.

The regulatory framework of the transport sector in Spain is far from being appropriate to this new panorama, as will be explained hereunder. Naturally, in 1987, when the Administrative Organisation of Land Transport Act was passed, the legislator did not foresee the emergence of this new form of intermediation with respect to transport services, but he still does not envisage their regulation. The activity of the different operators (*BlaBlaCar*, *Uber*, *Cabify* or *Amovens*) will therefore be analysed in order to determine whether it is included in the current legislation regulating passenger transport by road or if, on the contrary, it constitutes an activity situated outside the regulatory framework, since the answer to this question is crucial for the application of unfair competition law.

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[13] ECLI:EU:C:2017:364.

[14] VELASCO SAN PEDRO, L., "El consumo colaborativo en el transporte de personas", cit.

II. LEGAL REGIME FOR THE CARRIAGE OF PASSENGERS BY ROAD IN SPAIN

1. Classification of transport services

Passenger transport by road in Spain is regulated in Act No 16/1987, of 30 July, on the Administrative Organisation of Land Transport (AOLTA)[15], further developed by the Regulation implementing the Administrative Organisation of Land Transport Act, approved by Royal Decree 1211/90, of 28 September (AOLTR)[16]. However, many of the provisions of the Regulation have not yet been adapted to the amendments of the Act made in 2013, but they remain in force provided that they are not incompatible with the provisions of the Act.

The AOLTA classifies passenger transports by road, depending on the nature of the activity —and not the ownership of the undertaking—, into public and private transport services [Art. 62 (1) AOLTA][17].

Thus, *public transport services* are those carried out on behalf of a third party for reward [Art. 62 (2) AOLTA]. Public transport, on its part, is subdivided, depending on the periodicity of the provision of the services, in regular services, which are carried out at specified intervals along specified routes; and occasional services, which are not subject to pre-established itineraries or schedules (Art. 64 AOLTA).

Furthermore, depending on their use, the Act also distinguishes between public transport of general use, which may be accessed by any interested party (Art. 67 AOLTA), and public transport of special use, in all other cases (Art. 67 AOLTA)[18]. Be that as it may, occasional public passenger transport services are privately owned and do not represent a public service provided by the State[19].

On the contrary, *private transport services* are those carried out on the vehicle holder's own account, either to satisfy particular needs, or as a complement to other main activities, carried out by companies or establishments that belong to the same undertaking and that are directly linked to the proper development of such activities [Art. 62 (3) AOLTA]. In this sense, private transport services are subdivided into individual private transport services and complementary private transport services. *Individual private transport services* are those carried out on the vehicle holder's own account to satisfy the personal or domestic transportation needs of the vehicle holder and his or her relatives. Such transport services are necessarily free of charge, although the holder may receive allowances and travel expenses without the transportation losing the consideration of a private transport service (Art. 101 AOLTA). On the other hand, *complementary private transports* are those carried out by companies or other entities whose object is not the transportation of passengers or goods, but for whom transport is a necessary or suitable complement for the proper development of their main activity (Arts. 62, 101 and 102 AOLTA). In any case, complementary private passenger transports are those whose object

[15] For the last time modified by Act 9/2013, of 4 July, amending Act No 16/1987 of 30 July, on the Administrative Organisation of Land Transport, and Act No 21/2003, of 7 July 2003 on air safety (*B.O.E.* No 160, of 5 July 2013).

[16] *B.O.E.* No 241, of 8 October 1990. Last modified by Royal Decree 1057/2015, of 20 November (*B.O.E.* No 279, of 21 November 2015).

[17] CANO CAMPOS, T., "El transporte urbano por carretera", P. Menéndez (ed.), *Régimen jurídico del Transporte Terrestre: Carreteras y ferrocarril*, t. I, Aranzadi, Cizur Menor, 2014, p. 779.

[18] That is, intended exclusively to serve a specific group of users (eg. school, workers, military).

[19] GARRIDO, J. Mª, "Derecho de la competencia y transporte terrestre", P. Menéndez (ed.), *Régimen jurídico del Transporte Terrestre…*, t. I, cit., p. 627.

is the transfer of workers to the undertaking's establishments [Art. 102 (2) OLTA].

According to the above classification of passenger transport services, it seems, in principle, that *Uber* and *Cabify* should be included in the category of public transport services, since they are carried out on behalf of a third person, the passenger, for reward [Art. 62 (2) OLTA]. Since they are open to any interested party and are not carried out at specified intervals along specified routes, they are also occasional services [Art. 64 AOLTA] of general use [Art. 67 AOLTA].

On the contrary, the subsumption of *BlaBlaCar* (or *Amovens*) under this category presents greater doubts, for —as shall be seen later in the text— it seems that the transport is not carried out, as required by Article 101 (1) (a) of the AOLTA, for reward, that is, in exchange for a "direct or indirect monetary remuneration", and only travel expenses are shared. In fact, the absence of economic compensation makes it difficult to consider the services rendered as public transport services.

2. Subjects involved in the supply of transport services

There are different subjects that, according to the AOLTA and AOLTR, can perform occasional public passenger transport services, and the conditions required in each of the categories are different. In detail, the Act distinguishes between 1) contractual carriers; and 2) intermediaries in the hiring of transport services. It should be noted that intermediation activities in the field of passenger transport are not regulated in the AOLTA. As a matter of fact, according to the Explanatory Memorandum of Act N0 9/2013, the last amendment of the AOLTA aimed at reducing operational barriers by "fully liberalizing intermediation activities in the hiring of passenger transport services, without prejudice to the regulation of travel agencies in the tourism sector". As a consequence, only the AOLTR refers to such activities, reserving the performance of intermediation services to travel agencies (Art. 165.1 AOLTR), which must hire the corresponding occasional transport in their own name, both with the carriers and the users [Art. 165 (2) AOLTR].

Be that as it may, in spite of the declaration of principles in the Explanatory Memorandum of Act No 9/2013, the participation in the performance of occasional public passenger transport services, either as a carrier or as an intermediary (travel agency), pursuant to Article 42 AOLTA (and Arts. 41 and 109 AOLTR), still seems to require the possession of the corresponding administrative authorization issued by the competent body of the General Administration of the Spanish State or, as the case may be, by that of the Autonomous Region in which the authorization is domiciled. This administrative authorization has, in accordance with the AOLTA, a regulated nature, and it can only be denied when the previously established requirements are not met [Arts. 48 (1) and 91 AOLTA).

The requirements that are to be fulfilled in order to obtain the mandatory authorization for the exercise of transport activities, both as a carrier and as an intermediary, are regulated in detail in Articles 43 *et seq.* AOLTA, developed by Articles 42 *et seq.* AOLTR. In this regard, the Act requires the subjects which are regulated in the Act itself —thus excluding travel agencies, which are not subject to regulation by the Spanish State but by the Autonomous Regions— to be registered in the so-called *Register of Companies and Transport Activities* (Art. 53 AOLTA).

Pursuant to the AOLTA, the granting of the authorization to perform activities in the *public transport* sector is conditioned, among other requirements (good repute; financial capacity or solvency; professional competence, that is, to count on at least one natural person who performs the functions of a transport manager), to the existence of a "business organization" [Art.

54 (1), para. 1 AOLTA], that includes owning 1) an establishment, which in turn implies to dispose of vehicles owned by the undertaking or leased thereby; 2) a physical location where the main documents of the company are kept (including those with data on driving and rest times of the drivers), so that they are available for inspection purposes; and 3) administrative and technical equipment, as well as appropriate facilities in the establishment where the company carries out its activity, according to what is determined by regulation. However, the performance of intermediation activities does not require a proper business organization [Art. 54 (1), para. 2 AOLTA).

On the contrary, the performance of *individual private transport services* does not require administrative authorization [Art. 103 (2) (b) AOLTA][20].

3. Requirements for the exercise of the activity

A. As a carrier

Spanish legislation contains a detailed regulation of the requirements that are necessary to perform occasional public passenger transport services by road *as a carrier*, depending on the type of vehicle used and the service provided. Thus, occasional public passenger transport services can be provided by bus or in passenger cars (Art. 110 AOLTR). At the same time, transport services in passenger cars are divided into the rental of vehicles with driver (known as *VTC* licences) [Art. 99 (4) AOLTA and Arts. 180 to 182 AOLTR) and public transport in passenger cars, that is, urban or interurban taxis (Art. 123 AOLTR). The main difference in state legislation between the rental of vehicles with driver and taxi services is that vehicles covered by a mere authorization for rental are only allowed to circulate if it can be proved that they are doing so to perform a previously hired service. To this end, the documentation proving such previous hiring, that has to be filled in previous to the performance of the service, has to be carried on board the vehicle. Consequently, holders of such licences cannot drive along public roads or remain parked in search of customers or encouraging the capture of passengers who had not previously contracted the service [Art. 182 (1) AOLTR][21].

Although the fulfilment of the requirements indicated above should lead to the granting of the mandatory administrative authorization, it should be noted that the AOLTA empowers regional and/or local administrations to establish quantitative limitations to the granting of new authorizations to passenger cars (both for carrying out interurban transport and for the renting of vehicles with drivers), as well as to determine the territorial scope, that is, the origin, destination or itinerary of such services [Arts. 48 (2) and 91 AOLTR]. On the contrary, there are no quantitative limits on the granting of authorizations to carry out nationwide occasional public passenger transport services by bus (Art. 114 AOLTR)[22]. Among the conditions for the granting of authorizations to provide transport services by bus, it is required that the undertaking owns, at all times, at least five buses.

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[20] However, authorization is required, as a general rule, for complementary private transport [Art. 103 (1) AOLTA and Art. 158 AOLTR].

[21] In fact, the alleged violation of Article 182 (1) AOLTR by *Cabify* was analyzed in the abovementioned Judgment of the Commercial Court No. 12 of Madrid of 13 June 2017.

[22] Licences to perform occasional transport services by bus enable the undertaking to supply services throughout the Spanish territory, without any limitation by reason of the origin or the destination of the service (Art. 91 AOLTA). Their legal regime is developed by a Ministerial Order of 23 July 1997 (*B.O.E.* No 182, of 31 July 1997), as amended by Order FOM/2183/2008, of 23 July (*B.O.E.* No 179, of 25 July 2008).

After the 2013 amendment, Article 99 (4) AOLTA defines the rental of vehicles with driver as a specific modality of passenger transport by car, so that it remains subject to the provisions relating to the supply of transport services and not to those that envisage mere auxiliary or complementary activities. The rental of vehicles with driver is regulated in Articles 180 to 182 AOLTR[23], the provisions of which are developed by Order FOM/36/2008, of 9 January[24], as amended by Order FOM/2799/2015, of 18 December[25].

In order to obtain the mandatory licence, which is documented by the issuance of a VTC type card (Art. 15 Order FOM/36/2008), the applicant has to comply, pursuant to Article 181 AOLTR, with the requirements envisaged by Article 43 (1) AOLTA and dispose, at any time, of a fleet of at least seven (owned or leased) vehicles assigned to this activity[26].

Furthermore, Article 181 (3) AOLTR (developed by Art. 14 of the Order FOM/36/2008), in accordance with Article 48 (2) AOLTA, empowers the Spanish Autonomous Regions to establish quantitative limitations to the granting of new authorizations with the purpose of maintaining an adequate ratio between taxi and VTC licences. Pursuant to this provision, it shall be understood that the ratio is inadequate and, consequently, the granting of new VTC licences will be denied, "when the relation between the number of existing licences in the territory of the Autonomous Region in which such licence is to be domiciled and that of taxi licences in that same territory is greater than one VTC licence for every thirty taxi licences". However, those Autonomous Regions that have assumed competences in respect of licences for the rental of vehicles with driver are allowed to modify this rule of proportionality (1 to 30), provided that the one established by the Autonomous Region is less restrictive (for example, 1 to 20).

The distribution of competences between the State and the Autonomous Regions in transport matters is established in Articles 148 (1) and 149 (1) (21) of the Spanish Constitution, pursuant to which the Autonomous Regions have competence over transport operations which are carried out entirely on their territory, while the competence lies with the State when the transport operation is performed on the territory of two or more Regions. In this respect, the Autonomous Regions have not only assumed competences in transport matters, they also exercise the competences that have been delegated to them by the State, pursuant to the Organic Act No 5/1987, of 30 July, *on the delegation of competences of the State to the Autonomous Regions in relation to the carriage by road and by cable*. In particular, they are also empowered to grant authorizations for the performance of occasional public passenger transport services the scope of which exceeds the territory of the Autonomous Region (Art. 5). Finally, the municipalities do also have competence in matters of urban collective transport [Art. 25 (2) (g) of Act No 7/1985, *on the bases of the legal regime applicable to municipalities*], the scope of which is usually contained in legislative acts of the Autonomous Regions[27].

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[23] The current wording stems from Royal Decree 1057/2015, of 20 November (*B.O.E.* No 279, of 21 November 2015).

[24] *B.O.E.* No 19, of 22 January 2008.

[25] *B.O.E.* No 307, of 24 December 2015.

[26] It should be noted that the minimum fleet requirement was introduced in Article 181 (1) AOLTR by Royal Decree 1057/2015. In this respect, the transitional provision of Royal Decree 1057/2015 empowers holders of rental of vehicles with driver licences that are in force at the time of entry into force of the regulation and who do not own the minimum number of vehicles envisaged in Article 181 (2) AOLTR (i.e., seven vehicles) to continue the exercise of their activity as long as they remain the holders of said licences.

[27] See CANO CAMPOS, T., "El transporte urbano por carretera", cit., pp. 766 *et seq.*; LÓPEZ QUIROGA, J., "Transporte de viajeros por carretera", F. Martínez Sanz (ed.), *Manual de Derecho del Transporte*, Marcial Pons, Madrid, 2010, p. 427.

For example, Act No 6/2001, of 1 April, of the Valencian Regional Government, *on mobility in the Valencian Autonomous Region*[28], envisages both taxi services and the rental of vehicles with driver. While the provision of taxi services in passenger cars is carried out in accordance with the provisions of the Act itself[29], the rental of vehicles with drivers is subject to State law [Arts. 21 and 41 (2)]

An analysis of the regulations at the infra-State level would exceed the limited scope of the present study, but there are two features that are common to all the different regional and local regulations of taxi services[30]. On the one hand, the access to the market is restricted, since there is a limitation of the number of taxi licences that may be granted (depending on the population); on the other hand, there is no freedom to determine the transport charges, because they are subject to tariffs previously established by the administration of the Autonomous Region[31].

B. As an intermediary

In addition to the provision of occasional public passenger transport services by road *as a carrier*, the AOLTA and its Regulation do also regulate the intermediation in the hiring of transport services. However, Articles 119 *et seq.* AOLTA only contain the regime applicable to the intermediation in the transport of goods by road. In particular, they define the different types of intermediaries (transport agencies, freight forwarders, warehousing and distribution undertakings, logistic operators and other intermediaries), who have to obtain previously an authorization as "transport operators" [Article 119 (1) AOLTA].

On the contrary, Article 22 (2), para. 3 AOLTA refers the regulation of intermediation activities in the transport of passengers by road to the legislation on tourism, providing that "the intervention of travel agencies and other intermediaries in the hiring of any kind of passenger transport shall be governed by the specific legislation on tourism". In similar terms, Article 165 AOLTR reserves the provision of intermediation services in the transport of passengers to travel agencies. Consequently, the different regional regulations on tourism have to be taken into account, since pursuant to Article 148 (1) (18) of the Constitution the Autonomous Regions can assume competences with respect to the promotion and the management of tourism on their territory (and they have all done so).

Be that as it may, and despite the alleged liberalization of intermediation activities in the passenger transport sector in 2013, the Administrative Organisation of Land Transport Act seems to require to be in possession of a licence to intermediate in the field of passenger transport. Such obligation derives from Article 42 AOLTA, which extensively refers to the provision of public passenger transport services and thus applies to both carriers and intermediaries; it also derives from Article 54 AOLTA, which excludes those undertakings who perform pure intermediation activities in the hiring of transport services of both cargo and passengers only

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[28] *D.O.G.V*. No 6495, of 5 April 2011.

[29] Article 44 of the Act entrusts the regional government with the exercise of administrative powers, the regulation thereof, as well as the determination of the maximum number of VTC licences, except in municipalities with more than 20,000 inhabtitants that are not integrated in joint provision areas, where such competences correspond to the municipal government.

[30] For a detailed analysis see BOTELLA CARRETERO, J., "El servicio de auto-taxis y los recientes desarrollos normativos de ámbito autonómico: análisis, crítica y perspectivas", P. Menéndez (ed.), *Régimen jurídico del Transporte Terrestre: Carreteras y ferrocarril*, t. I, Aranzadi, Cizur Menor, 2014, pp. 405 *et seq*.

[31] CANO CAMPOS, T., "El transporte urbano por carretera", cit., pp. 825 to 827. See also Art. 55 of Act No 6/2011, of 1 April, *on mobility in the Valencian Autonomous Region*.

from the obligation to dispose of a "business organisation"; and it also derives, albeit implicitly, from Article 99 (1) AOLTA, pursuant to which the licence for the provision of public passenger transport services empowers the licenced undertaking to both carry out this type of transport with its own means and to intermediate in the hiring of such services[32]. Likewise, the possession of an administrative authorization is required also by the Regulation developing the Act [Arts. 166 and 181 (1) AOLTR][33].

In the Valencian Autonomous Region, Article 11 of Act No 3/1998, of 21 May, *on Tourism in the Valencian Autonomous Region*[34], merely establishes that travel agencies, which must hold the corresponding licence, are natural or legal persons engaged in the provision of intermediation services and/or the organization of tourist services. Such services are regulated in Decree 20/1997, of 11 February, of the Valencian Regional Government, which approves the Travel Agency Regulation of the Valencian Autonomous Region, as amended by Decree 63/2010, of 16 April. Pursuant to Article 1 of Annex I of the Decree, the organization and sale of package tours can only be carried out by travel agencies, without prejudice to the fact that they can also intermediate in the sale of tickets or the reservation of seats in any means of transport[35].

III. THE POSSIBLE QUALIFICATION OF DIGITAL PLATFORMS AS SUBJECTS IN THE FIELD OF TRANSPORT

1. The platform *BlaBlaCar*

The virtual platform *BlaBlaCar*, of French origin, aims to put drivers in contact with potential travelling companions who share the same destination. The driver, whose vehicle has free seats, announces the trip and the characteristics thereof on the platform, together with the "price" per occupant, the possible stops, the approximate time of departure and arrival, the route and even some of his or her preferences (music, characteristics of the fellow travellers, admission of pets, if smoking is allowed, etc.). It thus constitutes an alternative to public passenger transport, mainly to regular transport by bus or even by rail.

The main characteristic of the service is the shared use of vehicles by means of an online application that facilitates the contact between drivers and passengers to perform together a specific itinerary, which is determined by the driver and not by the passenger. In return, the driver obtains reimbursement for part of the costs of the trip. Therefore, it is not surprising that the initiative has been classified as a sort of "hitchhiking 2.0"[36], although in purity hitchhiking is completely free of charge.

Online platforms such as *BlaBlaCar* provide services related to the transmission and the exchange of information with respect to the sharing of expenses related to transportation by

[32] See GÓRRIZ LÓPEZ, C., "Uber. Transporte de pasajeros y competencia desleal", *Revista de Derecho del Transport*, No 16, 2015, p. 87.

[33] However, according to the judgments of the Contentious-Administrative Courts Nos 15 and 17 of Barcelona, of 18 July and 5 October 2016, the activity of intermediation in the hiring of passenger transport services is not envisaged by these provisions (which seems to be in line with the abovementioned Explanatory Memorandum of Act No 9/2013, according to which the intermediation in the hiring of such services has been completely liberalized). For further information, see the criticial position of GÓRRIZ LÓPEZ, C., "Generalitat vs Uber", *http://blogs.uab.cat/dretmercantil/2017/04/12/generalitat-vs-uber/* (12 abril 2017).

[34] *B.O.E*. No 149, of 23 June 1998.

[35] *D.O.G.V*. No 6249, of 20 april 2010.

[36] Conclusions of the Advocate General in case C-434/15, note 14, cit.

road. They thus allow drivers who have empty seats in their vehicle on a specified trip to find fellow travellers and, consequently, to reduce the money spent on the trip, since they share the expenses with the passengers they carry. Sometimes, such expenses include a percentage of the depreciation and general expenses of the vehicle, such as insurance costs, but as a matter of principle the driver does not aim to obtain a profit. In fact, *BlaBlaCar* establishes an indicative price of 0.06 € / km or, in any case, never more than 0.09 € / km, which is lower than the allowance per kilometre established by public administrations in Spain. According to the information provided by *BlaBlaCar* itself, the average cost of travelling in a private vehicle is 0.332 € / km, so that the drivers do not even receive an equivalent amount and cover the total costs when they carry four passengers[37].

The platform, in addition to intermediating in the contact between driver and passengers, selects the users and establishes rules for the drivers, the format in which the trip is to be made, the price to be paid, collects the transport charges in advance and transfers them afterwards to the driver, and obtains a remuneration or margin for the provision of such services[38].

However, it has to be determined whether the activity carried out by *BlaBlaCar* constitutes a transport service subject to the provisions contained in the AOLTA and the regulations developing such provisions, which oblige to obtain a licence and subject such activities to administrative control; or whether, on the contrary, the activity remains outside the provisions regulating the transport sector and should be considered a service of the information society.

In this regard, the only available decision that refers to this issue in Spain is the aforementioned judgment of the Commercial Court No 2 of Madrid of 2 February 2017, that considers the services provided by the drivers in the framework of the *BlaBlaCar* platform to be individual private transport services, so that no administrative authorization is required [Art. 103 (2) (b) AOLTA]. The judge holds that the platform does not offer public passenger transport, since there is no economic reward. The services offered are rather to be qualified as individual private transport services, envisaged by Article 101 (1) (a) AOLTA, since they are not provided for reward ("in exchange for direct or indirect monetary remuneration"). They only aim at sharing travel expenses and are designed to meet the needs of "relatives" of the owner of the vehicle, as defined in Article 156 (1) AOLTR. In this sense, it is said, the users of the platform fall within the scope of social relationships that are equivalent to friendship and of the concept of "relatives" contained in the provision.

Indeed, pursuant to Article 156 (1) AOLTR, individual private transport services are those that serve the personal needs of the vehicle owner and those of his relatives. In this regard, the term "relatives" refers to "family members or other persons who live with the vehicle owner or maintain with him a personal or professional relationship of a domestic nature", as well as to "social relationships of friendship or equivalent".

Doubtlessly, when the legislator enacted the Regulation in 1990 and included a reference to "social relationships of friendship or equivalent", what he had in mind was the transportation of colleagues —not friends— who work together or share hobbies or sports, or that of neighbours (even the transportation of the driver's children's fellow students to school or to the location where common activities take place). But he did certainly not have in mind such a broad concept of friendship that includes any user of an online platform, that is, perfect strangers. It is however notorious that, in the pre-internet era, shared trips have been organised in

37 Judgment of the Commercial Court No 2 of Madrid of 2 February 2017.

38 Judgment of the Commercial Court No 2 of Madrid of 2 February 2017.

a "handcraft" way, by way of announcements on university bulletin boards, in supermarkets, bars — or even, more recently, on the internet. In all of these cases, it has been considered that, just like in hitchhiking, the driver performs an individual private transport[39]. This seems to be also the conclusion reached by the Commercial Court, although in its judgment it does not distinguish between the platform and the drivers. It can indeed not be ignored that *BlaBlaCar* is not the carrier, but that this condition is met by each of the drivers associated with the platform, so that the private nature of the transport has to be attributed to all of them and not to the platform. In this sense, according to the judgment, "the agreement of two people to take a trip together perfectly fits into the concept of a relationship equivalent to friendship" [40]. It is a sort of "'community' integrated by those who install the […] app on their smartphone, which shows the private nature of the transport, since it is necessary to join the group to benefit from the service either as a driver or as a passenger" [41].

However, even admitting that the activity of the drivers fits into the concept of individual private transport, the question to be answered is not whether *BlaBlaCar* provides public or private transport services, since it is not a carrier. On the contrary, what is relevant is to determine whether the activity developed by *BlaBlaCar* consists of providing intermediation services in the transport sector —with the consequence that it could be subject to the sector-specific regulations, however defective and unrelated to reality such regulations may be— or whether it constitutes a business model of the so-called sharing economy.

With respect to *BlaBlaCar*, it can be said that it represents a clear example of such a business model of the collaborative economy, defined as an "economic system based on sharing assets or services, for free or for a fee, directly from individuals", using online platforms[42]. In fact, such a model, called *carpooling* or *car sharing*, consists of the connection or intermediation through the internet between drivers owning private vehicles who wish to share free seats on trip, on the one hand, and users, on the other. This is the point of view expressed in the Opinion of the European Economic and Social Committee on "Sharing economy and self-regulation" [43]. It should not be forgotten, however, that undertakings pertaining to the "sharing economy" are entering markets that have hitherto been served by traditional service providers, such as the intermediation in the transport sector[44]. And, undoubtedly, they are also subject to the legal order applicable to the activity developed by them, so that —in absence of a specific regulation— they have to abide by the requirements on market entry and functioning of transport intermediaries. In short, to the extent that this type of activity competes in the market with other undertakings pursuing the same aims and activities, fair competition has to

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39 VELASCO SAN PEDRO, L., "El consumo colaborativo en el transporte de personas", cit.

40 In this sense GÓRRIZ, C., "Conclusiones del AG Szpunar sobre el caso Uber", 28 mayo 2017, *http://blogs.uab.cat/dretmercantil/2017/05/28/conclusiones-del-ag-szpunar-sobre-el-caso-uber/*. For a different opinion see CASCALES MORENO, F., "Comentario sucinto de la Sentencia de 2 de febrero de 2017, del Juzgado de lo Mercantil Número 2 de Madrid (procedimiento ordinario 343/2.015), sobre la actividad de BLABLACAR", *La Ley*, No 2373, 2017.

41 The quote is taken from the allegations made by *Uber* and contained in the judgment of the Milan Tribunal, Special section on business, of 25 May 2015, *Il Diritto industriale* 3/2015, pp. 245 *et seq.* See also MANZINI, P., «Uber: tra concorrenza e regolazione del mercato», *Diritto dei Trasporti*, No 1/2017, p. 85.

42 Opinion of the European Economic and Social Committee on "Sharing economy and self-regulation" (*O.J.* C 303, of 19 August 2016).

43 *Ibidem.*

44 Communication from the Commission "A European agenda for the collaborative economy", 2 June 2016, COM (2016) 356 *final*.

be guaranteed[45]. It is, therefore, a classic transport service envisaged by the legislation in force, regardless of whether it is part or not of a "collaborative economy" [46].

BlaBlaCar does indeed act as an intermediary between drivers and passengers. It does not limit its activity to establishing contact between individuals who want to travel together and share certain expenses related to the trip. It rather controls the registration of users, to check whether his or her data are correct, and the profile of the drivers and the opinions of users, it receives the agreed fee and, after 10 days, it issues a ticket and makes a money transfer to the beneficiary. In exchange for the service it provides, *BlaBlaCar* charges a commission. It thus offers services that go beyond a service of the information society. It does not merely recommend prices, but imposes a maximum reward (0.09 € / km[47]) and gives instructions on the provision of the underlying transport service, including the obligation to provide the service to the driver, as well as the perception of compensation by the driver through the platform if the user cancels a trip with short notice[48]. In short, it exerts a decisive influence on the conditions in which the service is provided[49].

The fact that the transport sector is still a regulated sector is not trivial, but aims at protecting traffic safety. As acknowledged by the European Commission itself[50], the emergence of a collaborative economy and the entry into the market of new business models contribute significantly to fight unemployment and to enhance competitiveness and economic growth. However, it cannot be overlooked that, in some cases, the platforms may be subject to regulatory requirements due to certain objectives of public interest (such as public safety in the transport sector). Indeed, anyone who owns a vehicle and wants to share a trip can freely access the *BlaBlaCar* platform, virtually without any control of the characteristics of the vehicle or the driver, let alone a monitoring of the legal limits as regards driving and rest times that may apply [Art. 95 (2) AOLTA]. Act No 34/2002, of 11 July, *on Services of the Information Society and Electronic Commerce*, itself expressly provides that, where a given service of the information society attempts or is likely to attempt against public safety, the bodies charged with the protection thereof may take the necessary measures to interrupt the provision of such services [Art. 8 (1) (a), in relation to Art. 3 (4) (a) (i) of the Electronic Commerce Directive[51]]. Similarly, the so-called Bolkestein Directive[52] excludes transport services from its scope of application

45 See the Opinion of the European Economic and Social Committee on "Sharing economy and self-regulation", cit., para. 8.2.4.d).

46 Conclusions of the Advocate General in case C-434/15, cit., para. 42.

47 Judgment of the Commercial Court No 2 of Madrid of 2 February 2017.

48 These are elements that, according to the European Commission, serve to assess whether a platform offers underlying services in addition to services of the information society. See its Communication on "A European agenda for the collaborative economy", cit.

49 The importance of the intermediation activity carried out by *BlaBlaCar* is underscored by the fact that *Amovens*, a competing platform that develops a similar activity (although it also engages in car rental between private individuals), has filed a suit against the former for alleged unfair competition (breach of secrecy). According to the plaintiff, *BlaBlaCar* accesses its website through a computer robot with the aim of learning, not only the exchange of data, but also the number of seats offered on the different itineraries of shared trips in Spain (*http://www.20minutos.es/noticia/3063092/0/amovens-demanda-blablacar-espionaje-informatico-competencia-desleal/#xtor=AD-15&xts=467263*).

50 Communication on "A European agenda for the collaborative economy", cit.

51 Directive 2000/31/CE of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (*O.J.* L 178, of 17 July 2000).

52 Directive 2006/123/CE of the European Parliament and of the Council of 12 December 2006 on services in the internal market (*O.J.* L 376, of 27 December 2006).

[Art. 2 (2) (d)] and expressly establishes that such services include urban transport and taxis (recital 21); and the exclusion of transport activities from the freedom to provide services is justified precisely because the administrative regulation thereof is aimed at ensuring the safety in the provision of transport services[53].

Certainly, the Administrative Organisation of Land Transport Act seems still to require —as has been explained— to be in possession of the relevant administrative authorization to provide intermediation services in the field of passenger transport, subject to the compliance with a series of conditions (such as good repute, professional competence and financial capacity) aimed at ensuring safety. As a consequence, *BlaBlaCar*, as an intermediary, should not be allowed to evade them. However, by expressly excluding private transport from the scope of application of the Act, it does not seem that an authorization to intermediate in the hiring of such services should be demanded. Hence, it all depends on the qualification of the activity carried out by the drivers associated to the platform and, ultimately, whether it is intended to meet the needs of the vehicle owner's friends and "close relatives" [Art. 156 (1) AOLTR][54]. This clearly demonstrates the necessity to modify the current regulatory framework, which does not envisage, either expressly or implicitly, the type of activity developed by *BlaBlaCar*, nor is it designed to cover the services provided by the drivers. It is debatable, however, that the need to amend the legislation in force can justify such a broad interpretation of the provisions in force in order to adapt them to the "social reality of the time in which they are to be applied" [Art. 3 (1) of the Spanish Civil Code] since, being rules of public law, their interpretation would have to be strict.

BlaBlaCar is thus not a simple mediator dedicated to facilitating the contact between individuals, one who provides the private transport service and another who benefits thereof. It intermediates in the transport sector rather than providing an information society service. If this were the case and the services supplied by the drivers were to be classified as public (and not private) transport (since they carry perfect strangers), the activity performed by the platform would probably have to be considered as contrary to the rules governing the transport sector and, therefore, as an act of unfair competition [specifically, a breach of legal provisions destined to regulate competitive activity, pursuant to Art. 15 (2) of the 1991 Unfair Competition Act[55]], unless it is in possession of the relevant authorization[56]. The controversy is thus served and the decision of a possible appeal against the judgment of the Commercial Court No 2 of Madrid of 2 February 2017 should be awaited.

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53 Pursuant to ALFARO, J., «La cuestión prejudicial sobre Uber», *Almacén de Derecho*, 20 June 2015, *http://almacendederecho.org/la-cuestion-prejudicial-sobre-uber/*, "competition between carriers is limited to ensure, on the one hand, that there will not be a 'race to the bottom' as regards quality —which is what can be observed in developing countries, with a multiplication of transport accidents, overemployment, etc.— and, on the other hand, to ensure a fair level of monopoly rents in favour of the operators that are already present in the market so as to reduce their incentives to lower the quality of their services".

54 According to LEIÑENA MENDIZÁBAL, E., «Los nuevos sistemas de utilización compartida de vehículos de transporte (*carpooling* y *car sharing*): entre la economía colaborativa y la competencia desleal», *Revista de Derecho Mercantil*, No 296, 2015, p. 300, the services offered by the drivers are invidual private transport services. ARMENGOL I GASULL, O. / OLMOS CASTRO, N., «El impacto de la economía colaborativa en el transporte interurbano: un análisis jurídico del *ride sharing*», J.J. Montero Pascual (ed.), *La regulación de la economía colaborativa*, Tirant lo Blanch, Valencia, 2016, pp. 347 *et seq.*, further advocate, precisely, for a corrective interpretation of Art. 156 (1) AOLTR in the light of current social reality.

55 This is the opinion of CASCALES MORENO, F., "Comentario sucinto de la Sentencia de 2 de febrero de 2017, del Juzgado de lo Mercantil Número 2 de Madrid…", cit.

56 *Cabify*, for example, does hold a travel agency licence.

2. The platform *UberPop*

Uber is an electronic platform that, through an intelligent device (phone, tablet) on which the application has been installed, allows requesting an urban transport service in the cities in which it operates. The application recognizes the location of the user or the exact point of departure through a map service and searches available drivers that are near the user. Once the driver accepts the service, the application informs the user and shows him the driver's profile, the registration number and the vehicle class, as well as an estimate of the price to be paid for the journey to the destination previously introduced by the user. Once the service has finished, the payment is made through the user's credit card, the data of which has to be provided when registering with the application. The said application does also dispose of an evaluation function, whereby the drivers can evaluate the passengers and vice versa, and a scoring below a certain threshold may involve expulsion from the platform[57].

The *UberPop* platform, like *BlaBlaCar*, does not provide transport services with professional carriers, but employs private drivers who do not hold the mandatory licence or administrative authorization. However, unlike *BlaBlaCar*, drivers associated with *UberPop* do not make the journey in their own interest, sharing expenses with the users or "guests". The driver rather provides the transport service at the request of the user, makes his vehicle and his activity available to the latter in order to pick him up at the address chosen by the customer ("get to the rider") and takes him or her to the indicated destination. The drivers do not offer their journeys through the platform in an isolated or sporadic way, but on a continuous basis, so that there is a more intense connection between both. Furthermore, the driver and the customer lack the possibility to negotiate the price of the service, which is fixed by *UberPop* based on the supply and demand existing at any time (a so-called "surge pricing" system), and drivers are paid a reward that widely exceeds the mere reimbursement of the expenses incurred[58].

Thus *UberPop* became an alternative to occasional public passenger transport, that is, to the traditional taxi service and the rental of vehicles with driver, a regulated sector that openly opposed the legality of the service. In fact, there have even been violent demonstrations and judicial proceedings all over Europe. For the time being, only the United Kingdom and Estonia have adopted provisions to legalise its services[59].

A number of requests for preliminary rulings have also been filed. The Brussels *Rechtbank van koophandel* (Belgium) raised, on 5 October 2015, the question as to whether the concept of "taxi service" also applies to unpaid private transport operators engaged in *ridesharing* (shared transport) who accept transport requests made available to them through a computer application owned by Uber BV and others established in a different Member State, that is, whether their activity is contrary to regulations such as those laid down in the Ordinance of the Brussels-Capital Region of 27 April 1995, *on taxi services and car rental with drivers*[60].

With another request for a preliminary ruling, filed on 7 August 2015[61], the Commercial Court No 3 of Barcelona asked whether the activity of intermediation between the holder of a

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57 For a description of the functioning of *Uber* see the Conclusions of the Advocate General in case C-434/15, cit.

58 The description of the functioning of the *UberPop* platform has been extracted from the judgments of the Milan Tribunal, Special section on business, of 25 May and 9 July 2015, *Il Corriere Giuridico*, 3/2016, pp. 361 to 363.

59 Opinion of the European Economic and Social Committee on the "Sharing economy and self-regulation", cit., para. 5.2.2.

60 *Uber Belgium BVBA v Taxi Radio Bruxellois NV*, case C-526/15, *O.J.* C 429, of 21 December 2015.

61 *Asociación Profesional Elite Taxi v Uber Systems Spain, S.L.*, case C-434/15, *O.J.* C 363, of 3 November 2015.

vehicle and the person who needs transport in a city, where *Uber* provides the computerized means to facilitate the connection for reward (it charges a 20 % of the transport price) [62], has to be considered an activity in the field of transport, thus belonging to a regulated sector in Spain, or an electronic intermediation service, that is, a service that belongs to the information society and is governed by the principle of freedom to provide services.

As of today, the Court's preliminary rulings are still pending, although the conclusions of Advocate General Szpunar, which do not bind the Tribunal, have already been published, expressing an opinion we share. He states that the activity developed by *UberPop*, which enables to find a driver through a smartphone application and connect him to a potential passenger to carry out an urban transport service at his or her request, is a mixed service, one part of which is provided electronically and the other is not.

However, "where the provider of the service supplied by electronic means is also the provider of the service not supplied by such means or where he exercises decisive influence over the conditions under which the latter service is provided, so that the two services form an inseparable whole, […] it is necessary to identify the main component of the supply envisaged, that is to say, the component which gives it meaning in economic terms", since the qualification as an information society service implies that this main element is supplied by electronic means.

As a result, *UberPop*'s activity cannot be classified as an "information society service", in accordance with Directive 2000/31, since the electronic component is neither the principal factor —as passenger transport is more relevant—, nor is it autonomous or economically independent thereof. *UberPop* is not, therefore, a mere intermediary between drivers and users, but a true organizer and operator of urban transport services[63]. The transport service constitutes the main service and the one that confers economic sense to the platform, so that the "connection" phase has a mere preparatory character, in order to allow the supply of the transport service in the best conditions[64].

As a matter of fact, the drivers that circulate under the umbrella of the *UberPop* platform do not exercise any other economic activity (as is the case with *BlaBlaCar*). In addition, *Uber* controls the relevant economic factors of the supplied urban transport service: (i) it establishes the requisites for the access of the drivers to the activity and the conditions for the supply of the services; (ii) it economically rewards the drivers, who carry out a significant number of journeys, and indicates the locations and times at which they can count on an important number of customers or advantageous fares (allowing *Uber* to adapt its offer to the fluctuations of the demand without exercising formal control over the drivers); (iii) it controls —albeit indirectly— the quality of the driver's performance; and (iv) it determines the price of the service[65]. In short, *UberPop*'s activity rather consists of the organization and management of a complete urban transport system on request, so the service offered by the platform should be

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62 *http://www.elperiodico.com/es/motor/noticias/actualidad/uber-mas-barato-eficaz-que-taxi-3369805*.

63 Conclusions of the Advocate General in case C-434/15, cit., para. 61.

64 Conclusions of the Advocate General in case C-434/15, cit., para. 64.

65 *Uber* charges 1.20 euros for every kilometre and an additional 0.10 € for every minute the costumer is in the car, as well as a minimum fee of 5 €. *Cabify*, for its part, only charges an amount per kilometre (1.65 € for the first 20 kilometres and 1.10 € for the rest), regardless of the travel time, so that the traffic volume does not influence the final price. In return, it establishes a higher minimum amount (6 €). See *https://www.xataka.com/aplicaciones/uber-cabify-o-taxi-con-esta-calculadora-podras-saber-que-te-interesa-mas* and *https://cincodias.elpais.com/cincodias/2016/03/30/lifestyle/1459324276_862096.html*.

classified as a "service in the field of transport" and, therefore, subject to the conditions and requirements demanded for the exercise of this activity[66].

On 4 July 2017, a second opinion of Advocate General Szpunar was delivered, at the request for a preliminary ruling by the *Tribunal correctionnel* (*tribunal de grande instance*, *huitième chambre*) in Lille in the context of a criminal procedure (case C-320/16, *Uber France SAS*)[67]. The question posed to the Court once again refers to whether the *UberPop* service offered by *Uber* can be described as a service of the information society. In his conclusions, the Advocate General refers to his previous opinion in the *Professional Elite Taxi Association* case.

This has in fact and for the moment been the solution delivered by comparative jurisprudence, and the operation of the *UberPop* platform has been banned almost throughout the European Union[68], since the activity developed by *UberPop* is considered to be a non-regular passenger transport and not an information society service. Consequently, both *Uber*'s actions and those of the drivers constitute a case of unfair competition for breach of legal rules, because neither the platform nor the carriers dispose of the necessary administrative authorizations in accordance with the domestic legislation of each State. This has been the case in Italy (judgments of the Milan Tribunal, Special section on business, of 25 May[69] and 9 July 2015); in Germany, where the judgment of the Regional Tribunal of Frankfurt of 8 March 2015[70] prohibited the service in the whole territory of Germany; in Belgium, where *Uber* has been sanctioned, or in the Netherlands, by virtue of a judgment of a Hague Tribunal of 9 December 2014. More striking has been the solution in France, where the so-called Thévenoud Act, which entered into force on 1 January 2015, expressly prohibits and punishes the supply of passenger transport services by persons who do not possess the mandatory licence[71].

More doubts arise with respect to the qualification of *UberPop* as a carrier or as an intermediary in the hiring of passenger transport services. Although initially it was understood that *UberPop* was an intermediary[72], since it supplies the transport service through independent

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66 This conclusion is shared by ALFARO, J., "La cuestión prejudicial sobre Uber", cit.; and LEIÑENA MENDIZÁBAL, E., "Los nuevos sistemas de utilización compartida de vehículos…", cit., p. 328, in whose opinion *Uber* is a transport undertaking.

67 The *tribunal correctionnel* requested the Court of Justice to answer a question as to whether a certain provision of Act No 2014-1104, of 1 October 2014, on taxis and transport vehicles with driver, constitutes a new technical regulation that is not implicit and that relates to one or more information society services within the meaning of Directive 98/34, as amended, such that, pursuant to Art. 8 of the Directive, it had to be notified to the European Commission; or whether it falls within the scope of Directive 2006/123, Article 2 (2) (d) of which exludes transport (ECLI:EU:C:2017:511).

68 Opinion of the European Economic and Social Committee on "Sharing economy and self-regulation", cit., para. 5.2.2.

69 For a commentary thereof see GIOVE, L. / COMELLI, A., *Il Diritto industriale*, No 3/2015, pp. 245 *et seq.*

70 Judgment of the *Landgericht* Frankfurt of 18 March 2015, Az. 3-08 O 136/14.

71 Loi nº 2014-1104, du 1er octobre 2014, *relative aux taxis et aux voitures de transport avec chauffeur*. On the contrary, the Act does permit the so-called *covoiturage* (car sharing), which is carried out on a non-profit basis (with the exception of a participation in the travel expenses), that is, the activity carried out through the *BlaBlaCar* platform (Art. L3132-1 of the *Code des transports*, introduced by Loi nº 2015-992, du 17 août 2015). See also SERAFINI, S., "La concorrenza sleale per violazione della normativa pubblicistica del trasporto urbano non di linea: il caso Uber", *Il Corriere Giuridico*, No 3/2016, p. 369 (note 3).

72 VELASCO SAN PEDRO, L., "El consumo colaborativo en el transporte de personas", cit.; GÓRRIZ LÓPEZ, C., "Uber. Transporte de pasajeros y competencia desleal", cit., p. 86; DOMÉNECH PASCUAL, G., "El impacto de la economía colaborativa sobre la regulación del taxi", M.V. Petit and A. Puetz (eds.), *La eficiencia del transporte como objetivo de la actuación de los poderes públicos: liberalización y responsabilidad*, Marcial Pons, Madrid, 2015, p. 58.

or autonomous drivers (according to the opinion delivered by the undertaking), the now predominant idea seems to consider the platform to be a carrier itself, that is, a transport undertaking, while the drivers are dependent pay-roll workers. This is the opinion of the London Employment Tribunal in a judgment of 28 October 2016[73], the arguments of which are shared by authors in the field of labour law[74], inasmuch as there are classic signs of a labour relationship based on dependency, as well as new ones that arise form recent forms of market activity, that is, the supply of services through virtual platforms. Both the drivers and the services performed by them are under the control, the management and the organization of *UberPop*. The latter selects the drivers and vehicles (in fact, it even owns a "Driver's Manual"), it designates those who are going to supply the service, it sets the price and charges it to the user, and finally transfers it to the driver, after deducting a commission. The relationship between *Uber* and the drivers is of an exclusive nature, because the drivers lack any opportunity of professional development by obtaining their own clientele. In short, the contracts of carriage between the drivers and the users are celebrated through *Uber*, the clients a *Uber*'s clients, the know-how and the trademark belong to *Uber* and *Uber* even offers economic incentives. The fact that the driver provides the vehicle is not an obstacle to such qualification, because its cost is not important enough to assert that the worker is assuming the risks of the business, that is, the inversion in technology and the development of the virtual platform[75].

It should not be discarded that, under Spanish law, the drivers might also be considered as "economically dependent self-employed workers" (*trabajadores autónomos económicamente dependientes – TRADE*)[76], as envisaged by Act No 20/2007, of 11 July, *on the Statute of the Self-Employed Worker*. Its Article 11 (1) defines them as workers "who carry out a profit-oriented economic or professional activity on a regular, personal and direct basis, predominantly for one and the same legal or natural person, the client, on whom they depend economically for receiving at least a 75 per cent of their income" from the latter. However, even economically dependent self-employed workers have to act outside the sphere of management and organization of another person [Art. 1 (1)], a requirement that currently seems not to be met by *Uber* drivers.

However, this does not mean that *Uber* drivers must necessarily be pay-roll workers or *TRADE*: *Uber* can doubtlessly supply its services using self-employed workers or professionals[77], and this seems to be the organizational structure of *Cabify* and *UberX/UberBlack* (see below). Although this aspect has not been analysed by the aforementioned judgment of the Commercial Court No 12 of Madrid, it appears from the decision that the contracts that link the platform with the drivers are not labour contracts, but contracts of or for services.

Be that as it may, regardless of the consideration of the platform as a carrier or an intermediary in the hiring of transport services, the provision of transportation services by private drivers who are obliged to comply with the relevant regulations (e.g., in relation to the

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[73] Judgment of the Employment Tribunal, London Central, of 28 October 2016, case 2202551/2015, *Y Aslam, J Farrar & Others v Uber*.

[74] TODOLÍ SIGNES, A., "Comentario a la Sentencia que declara la laboralidad de los conductores de Uber en UK", 2 November 2016, *https://adriantodoli.com/2016/11/02/comentario-a-la-sentencia-que-declara-la-laboralidad-de-los-conductores-de-uber-en-uk/*.

[75] Vid. TODOLÍ SIGNES, A., "El impacto de la "Uber Economy" en las relaciones laborales: los efectos de las plataformes virtuales en el contrato de Trabajo", *IUSLabor*, No 3/2015, pp. 1 *et seq.*

[76] This seems to be the opinion of ALFARO, J., "La cuestión prejudicial sobre Uber", cit.

[77] Conclusions of the Advocate General in case C-434/15, cit., para. 54.

compulsory insurance of civil liability) and have not previously obtained a licence for the rental of vehicles with driver has to be considered, in our opinion, to be unfair. This is so not only because it implies the breach of a rule that has as its object the regulation of competitive activity [Art. 15 (2) UCA], but also because it allows to offer prices that are lower than those of competing service providers (taxi drivers), precisely because the infringement of the obligations imposed on professional carriers[78] permits them to obtain a significant competitive advantage [Art. 15 (1) UCA]. Faced with such evidence, the recourse to drivers who do hold a rental of vehicles with driver licence is the only way to avoid not only private law sanctions for anticompetitive behaviour, but also an administrative sanction based on the regulation on land transport and tourism.

3. The platforms *UberBlack*, *UberX* and *Cabify*

Faced with the prohibition to provide the *UberPop* service in most European Member States, it is not surprising that *Uber* has designed and commercialized two new applications (*UberBlack* and *UberX*) which, unlike *BlaBlaCar* and *UberPop*, supply transportation services with professional drivers, do not offer shared car services and pay the drivers a reward that goes far beyond the mere reimbursement of the expenses incurred. Very similar is the functioning of *Cabify*. By employing professional drivers, a violation of the obligation of the latter (who actually supply the service to the customer) to obtain the corresponding rental of vehicles with driver licence can be discarded.

However, the activity of *Uber* and *Cabify* has not escaped criticism from the taxi industry. In fact, after liberalizing the rental of vehicles with driver sector in 2009[79] by amending the Administrative Organisation of Land Transport Regulation, the protests headed by taxi drivers led to a new reform of the Regulation, which resulted in the aforementioned quota system (one VTC licence for every thirty taxi licences, unless the corresponding Autonomous Region establishes a lower ratio). Even so, the matter is far from being settled. Indeed, while the taxi sector denounces the breach of the quotas, the Spanish National Market and Competition Commission has challenged both the AOLTR and Order FOM/36/2008 before the contentious-administrative jurisdiction, applying for the elimination of the existing restrictions to the free provision of the service[80]. Apart from this, taxi licence holders are already complaining about a reduction of the value of such licences, which are freely transmissible and, as such,

[78] Among the costs not incurred by drivers that operate within the framework of the system devised by *Uber*, the aforementioned order of the Milan Tribunal of 25 May 2015 mentions the following: those related to the acquisition of a vehicle exclusively dedicated to public transport; the installation of expensive measuring devices (taximeters); the contracting of professional insurance, usually more expensive than private insurance; the costs derived from the association with other drivers in order to gain clientele (e.g., radiotaxi); and those resulting from the duty to supply the service within the predetermined shift, even at times when the demand is low. See also SURDI, D., "Concorrenza sleale e nuove forme di trasporto condiviso: il Tribunale di Milano inibisce 'uber pop'", *Giureta*, vol. XIII, 2015, pp. 387 y ss.

[79] See Art. 21 of Act No 25/2009, of 22 December, *on the reform of different Acts to adapt them to the Act on free access to service activities and their exercise* (*B.O.E.* No 308, of 23 December 2009). The Act completes the incorporation into national law of Directive 2006/123/CE of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

[80] By virtue of an order of 4 July 2016, the National Tribunal (*Audiencia Nacional*) declared itself competent to hear the challenge of Order FOM/36/2008 and referred the alleged illegality of the provisions contained in the AOLTR to the Supreme Court (*non vidimus*). See the references on this issue in the judgment of the Commercial Court No 12 of Madrid in the *Cabify* case.

subject to the law of supply and demand, so that a complete liberalization of the sector would result in an equally complete devaluation of the licences[81].

As has already been pointed out, *Cabify* eluded a conviction for unfair competition in the recent judgment of the Commercial Court No 12 of Madrid No 159/2017, of 13 June. However, it is also true that, on that occasion, the plaintiff only alleged the infringement by the drivers of the obligations imposed by the rules on rental of vehicles with driver licences (mainly the prohibition of picking up customers who had not previously claimed the service, an infringement which could not be proved), rather than an violation committed by the platform itself. In this sense, the Court points out that "no liability can be attributed to the functioning of the application managed by the plaintiff [*sic*] on the grounds that the drivers holding such [VTC] licences may infringe the administrative rules invoked, in the same way as no liability could be attributed to the platform for the commission of any other administrative infringements, such as those in the field of traffic or road safety".

Thus, the question as to whether the behaviour of *Cabify* (or that of *UberBlack* or *UberX*) is in itself unfair, has not been answered, since civil courts are bound by the specific claims of the parties. In the light of Advocate General Szpunar's opinion, however, it cannot be ruled out that the activity of such platforms should be considered, not a service of the information society, but rather a service in the field of transport, so that both the drivers and the platform should obtain the mandatory administrative authorizations required by the legislation, either to provide transport services or to intermediate in their hiring[82]. All this apart from the fact that, obviously, the drivers as (effective) carriers must abide by the requirements established in Articles 180 to 182 AOLTR (after their modification by Royal Decree 1057/2015), developed by Order FOM/36/2008, as amended by Order FOM/2799/2015, on the rental of vehicles with driver (VTC licences). Therefore, they have to comply with all the conditions stipulated in Article 43 (1) AOLTA and dispose at all times (from 2015 on) of at least seven vehicles dedicated to this activity, either as their owner or as a lessee. If these requirements were not met, the behaviour of the platform or of its drivers would have to be considered as unfair (Art. 15 UCA).

IV. BY WAY OF CONCLUSION: THE DESIRABILITY OF REGULATING THE ACTIVITY BY LIBERALIZING THE SECTOR

The National Markets and Competition Commission has positioned itself in favour of the liberalization of the sector. However, its report on new models for the supply of services and the collaborative economy, published on 11 March 2016 and submitted to public consideration, has been heavily criticised by the regulated sectors, so no progress has been made on this issue. On the contrary, Article 99 (4) AOLTA is still in force and qualifies the rental of vehicles with driver as a mode of passenger transport, the exercise of which is conditional on obtaining the corresponding authorization, pursuant to Articles 42 and 43 (1) AOLTA and their regulatory development. The regulation thereof is currently contained in the AOLTR and in Order

[81] Even so, it does not seem possible to consider the liberalization as an "expropriation" of taxi drivers, so that no compensation would be due (nor, probably, convenient). In this sense, DOMÉNECH PASCUAL, G., "La regulación de la economía colaborativa en el sector del taxi y los VTC", J.J. Montero Pascual (ed.), *La regulación de la economía colaborativa*, cit., pp. 388 *et seq.*; GÓRRIZ LÓPEZ, C., "Reflexiones sobre Uber a propósito de la decisión de la Court of Appeals for the Seventh Circuit", *Revista de Derecho del Transporte*, No 19, 2017, pp. 236 *et seq.*

[82] As has been said, *Cabify* at least declares to hold a travel agency licence.

FOM/36/2008, as amended by Order FOM/2799/2015. Similarly, the taxi continues to be regulated in Articles 123 *et seq.* AOLTR and in different regulations of the Autonomous Regions. But most of these rules envisage the exercise of the activity of carrier, and not the intermediation in the hiring of passenger transport.

It is unquestionable that the legislation in force is manifestly inadequate and completely alien to the reality of the sector. Until now, other modes of transport that have traditionally been regulated, such as air or rail transport, have opened up or are opening up to free competition through a complex liberalization process initiated by the European legislator in different phases, thus allowing the entrance of new participants alongside with the traditional ones. The beneficial effects for consumers derived from the entry in the market of low-cost airlines are well known. However, as regards some segments of the passenger transport by road sector (urban transport and taxis), the procedure is completely different. The sector is heavily regulated and has in fact been excluded from the scope of Directive 2006/123/EC on the free provision of services for safety reasons. In spite of this, a new category of intermediaries has stepped into the market. Thanks to innovation and new technologies, such intermediaries have entered or pretend to enter a traditional and highly regulated market without the legislation being modified.

It is thus of the utmost importance to modify without delay the current legislation of the transport sector, introducing a regulation of this new typology of technological transport services that combines the introduction of more competition with the preservation of public safety. The world of transport is changing and these changes have to be reflected in a new regulatory framework, preferably at a European level, that provides legal certainty, conjugating the requirements of traditional transport services with the entry of these new competitors. However, it also seems obvious that the regulation cannot be the same for genuinely collaborative initiatives (such as car sharing via platforms like *BlaBlaCar*) and others in which transport services are offered for reward. In the latter case, administrative intervention is desirable to ensure passengers' safety, since the transportation is carried out in the context of a professional activity.

MODELS OF REGULATION FOR TRANSPORT SERVICES IN THE EUROPEAN LIBERALIZED MARKET: LOCAL PUBLIC TRANSPORT IN ITALY

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SUMMARY

Public transport is a fundamental factor in the service market, characterized by a structural imbalance due to misalignment between satisfying the requirements of supply (accessibility and pricing) and the cost of activities. They are services mainly directed to satisfy the mobility needs of citizens and (general) objectives of territorial cohesion; thus, they must also be provided when supply conditions generate significant diseconomies.

For this reason, historically, in all European countries, there has been a pervasive intervention of public authorities in this economic sector, culminating in a public monopolistic management of the services or in endemic financial support of business activities subject to public service obligations.

The European liberalization of transport services, which since the end of the last century has involved all transportation modes of goods and passengers, has led to general changes in public intervention models that are evident in the area of national network services (railways), and in regional and local transport; in these areas, however, the application of competitive policies without first "creating" market dynamics, ensuring fair access to (and use of) infrastructure and basic amenities to production, is not possible.

In Italy, a comprehensive reform of local public services took place with Legislative Decree No. 422, 19 November 1997, implementing law 1997, n. 59, as amended several times.

The paper deals with this new legislative asset of the local transport services market in Italy, with special reference to application issues which have emerged in the twenty years of its adoption, primarily in the implementation of the fundamental principles of the reform: the gradual opening of the sector to competition through divestment of direct management and the start of tender procedures for the award of services; the separation between the exercise of administrative functions, which is the task of the public sector, and the operating service, which is entrusted to market operators.

Particular attention is paid to the role played in the process of liberalization and regulation by those called to exercise independent administrative functions (such as the newly instituted National Authority for Regulation of Transport - ART), and the analysis of efficiency data, considering new regulations regarding the legal relationship between administration and managers (public service contract), also in the light of elements of conflict between the public sector, the operator and the users, which have emerged in numerous court rulings.

Key words: *passenger mobility; Italian local transport services; public service contract; public service obligation; general interest services.*

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1. Preliminary remarks

Public transport is a fundamental segment of the service market, characterized by a structural imbalance due to misalignment between satisfying the requirements of supply (accessibility and pricing) and the cost of activities. These are services which are mainly directed at satisfying the mobility needs of citizens and (general) objectives of territorial cohesion; thus, they must also be provided when supply conditions generate significant diseconomies. For this reason, historically there has been pervasive intervention of public authorities in this economic sector in all European countries[1].

Transport is a strategic sector of the European economy, subject to a specific common policy whose basic rules are now contained in Title VI of the Treaty on the Functioning of the European Union (TFEU); harmonization of market conditions in the transport field is essential for the development of trade relations between Member States in the most relevant sectors of production and trade, and also for the implementation of various activities of common interest.

The European liberalization of transport services, which since the end of the last century has involved all transportation modes of goods and passengers, has led to general changes in public intervention models that are evident in the area of national network services (railways), and in regional and local transport; in these areas, however, the application of competitive policies without first "creating" market dynamics, ensuring fair access to (and use of) infrastructure and basic amenities to production, is not possible.

It is important to underline that European public transport policy aims to provide, above all, safe, efficient and high-performance passenger transport, even if it means sacrificing the competitive market in favour of a "regulated" competition.

The opportunity to introduce a special policy in the transport sector, able to direct market initiatives towards general interest objectives (such as rights of mobility in anti-economic areas as well, sustainable development, and so on) has been evident since the conclusion of the European Treaty; it is not incidental that only the Title on transport policy contains an article including the term "public service" (common in the legal systems of the Member States), and that still today legislation on transport defines and regulates categories like "public service obligation", "public service contracts", "in-house operations" (of jurisprudential origin).

The aim of this paper is to examine the regulatory framework on public transport services in the European Union, as a chosen research field for the experimentation of public intervention tools, able to balance the freedom of market initiatives with the result of general and social development; the paper then focuses on Italian legislation in regional and local transport services, where, frequently, marginality conditions of demand require the support of a politically responsible authority to increase the market supply, both qualitatively and quantitatively.

2. Legal regime of public transport services in Europe

The European legal basis for public support interventions in the road, rail and waterways transport market is Art. 93 TFEU[2], which authorizes such aids «if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service».

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[1] For the current situation in Europe see *Study on economic and financial effects of the implementation of Regulation 1370/2007 on public passenger transport services - Final Report* – European Commission, Brussels February 2016.

[2] According to Art. 93, «Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service».

It is a special rule that foresees a "sui generis" derogation of competition rules for the land transport sector; the application rules of Art. 93 TFEU are included in Regulation 1370/2007 on public passenger transport services by rail and by road[3], examined below.

Outside the scope of this provision, activities conducted for collective or social purposes are called by the European legislator "services of general economic interest" by Art. 106(2) of the TFUE[4], to emphasize their inborn commercial consistency; when these services have to meet, at the same time, objectives of general interest, public intervention is necessary to direct private suppliers toward common interest results, as elaborated in the concept of "public service requirements"[5].

In addition, the notion of "public service obligation" is introduced by secondary legislation in the field of transport[6]; it identifies an obligation that the company, if it were considering its economic interest, would not take on or would not take on to the same extent and under the same conditions, without public intervention with financial support.

From a legal point of view, a "public service obligation" consists of a binding commitment, imposed on or agreed with an operator, to include special requirements in the offer of transport services, which are estimated by the competent public administration as enough to satisfy the mobility needs of citizens. In this case, the obligation of providing transport under conditions that can limit the commercial viability of the services may justify, in return, financial support to the operator pursuant to art. 93 TFEU.

Art.106.2, TFEU[7] also submits undertakings entrusted with the operation of services of general economic interest to Treaty provisions, and the rules on competition in particular,[8] but allows the exclusion of these rules if they prevent the achievement of results of general

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3 See Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos. 1191/69 and 1107/70.

4 Under Article 106 (2) of the Treaty on the Functioning of the European Union (TFEU), companies that provide services that are of general economic interest are subject to the rules of the Treaties, in particular the rules governing competition. Article 14 of TFEU and Protocol No. 26 on services of general interest annexed to TFEU set out the general principles of how Member States define and provide services of general economic interest.

5 Maritime and air transport services affected by public interest requirements are subject to Article 106 (2) of the Treaty, in accordance with the implementation rules introduced by Regulation (EC) No. 1008/2008 on common rules for the operation of air services in the Community and in Regulation (EEC) No. 3577/92, which applies the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) which fall beyond the scope of this paper. For comment see *ex multis*, Sauter, W. (2015), *Public Service in EU Law*, Cambridge, Cambridge University Press, specially at p. 40 ff.; Gardella, A. (2014), *Commento dell'art. 106 del TFUE*, on Tizzano A. (Ed.) *Trattati dell'Unione europea*, Milano, Giuffrè, p. 1117 ff.; Sorace, D. (2014), *Diritto delle amministrazioni pubbliche,* Bologna, Il Mulino, p. 162 ff.; Id., (2010), *I servizi «pubblici» economici nell'ordinamento nazionale ed europeo, alla fine del primo decennio del XXI secolo*, on *Diritto amministrativo,* p. 1 ff.; Bertonazzi, L. Villata, R. (2007), *Servizi di interesse economico generale,*on Chiti M., Greco S. (Ed.) *Trattato di diritto amministrativo europeo*, IV, 2 ed., Milano, Giuffrè, p. 1791 ff.; De Falco, V. (2003), *Il servizio pubblico tra ordinamento comunitario e diritti interni*, Padova, Cedam, p. 159 ff.

6 Regulation (EEC) No. 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, Art. 2.

7 According to Art. 106, «Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union».

8 Italian Constitutional Court 26 January 2011, n. 24, *iusexplorer* data bank.

interest, up to also permitting access restrictions to the market, or recognition of special or exclusive rights of production.

Therefore, it can be said that the competitive market is the regular model of production for transport of general economic interest as well; however, this model is susceptible to special regulation if the market is unable to meet the essential mobility needs of the collective.

An exemption is legitimate if three conditions are met[9]: the service must be defined by the competent national authority as a service of general economic interest; the company must be explicitly entrusted with its production; the application of competition rules must obstruct the performance of the particular tasks assigned to the undertaking[10]. However, the exemption must not affect the development of trade to an extent which is contrary to the interests of the community[11]. In accordance with these principles, the EU has developed secondary legislation to harmonize the procedures and conditions that Member States must apply in the execution of public service obligations.

The first regulation concerning undertakings entrusted with services of general economic interest is the aforementioned Reg. (EEC) No. 1191/69, on action by Member States concerning obligations inherent in the concept of a public service in transport by rail, road and inland waterways.

The main aim of this regulation is a general suppression of public service obligations, which were quite common in the transport market at the national level; Member States are required to eliminate these obligations at the request of the operator; the maintenance of existing obligations, or a new imposition, are allowed in exceptional cases where it is necessary to ensure adequate services. Nevertheless, in the latter case, Member States must recognize an adequate compensation, in accordance with the general criteria fixed by the regulation, to remove the competitive disadvantage caused to the operator due to extra costs related to the imposition of the obligation.

A «public service obligation»[12] consists of the obligation to operate, to carry, and the tariff obligation: the "obligation to operate" means «any obligation imposed upon a transport undertaking to take, in respect of any route or installations which it is authorised to work by licence or equivalent authorisation, all necessary measures to ensure the provision of a transport service satisfying fixed standards of continuity, regularity and capacity. It also includes any obligation to operate additional services and any obligation to maintain routes, equipment - in so far as this is surplus to the requirements of the network as a whole - and installations in good condition after services have been withdrawn»; the "obligation to carry" refers to «any obligation imposed upon transport undertakings to accept and carry passengers or goods at specified rates and subject to specified conditions»; the tariff obligation consists of a requirement for special tariffs, under the control of the authorities, that operators are obliged to practise for all or part of the users.

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9 CJEC 24 July 2003, case C-280/00 *Altmark Trans GmbH*, on *Servizi pubblici e appalti* (2004), p. 105.
Trib. EC, 26 June 2008, n. 442, on *Foro amministrativo* (2008), 6, p. 1674; European Commission, Decision 20 December 2011 on the application of Art. 106, § 2, TFEU on state aids as public service obligations compensation (on OJEC 11 January 2012).

10 CJEEC, 21 September 1999, No. 67, *Albany International,* on *Foro italiano* (1999), IV, 489; CJEEC 27 April 1994, *Comune di Almelo* in *iusexplorer* data bank.

11 EEC Trib., V, 26 June 2008, n. 442, § 144, in *Foro amministrativo del Consiglio di Stato* (2008), 6, p. 1674; CJEC, 24 July 2003, n. 280, *Altmark Trans*, on *Servizi pubblici e appalti,* (2004), p. 105, point 81.

12 Art. 2 § 3, EEC Reg. No. 1191/69.

With its revision of EEC Reg. No 1191/1969, the European legislator introduced the "public service contract" as a tool for intervention in the transport market to set up agreements with operators regarding public service obligations. This instrument was considered less invasive than the imposition of an obligation by the competent authority, but equally efficient in binding operators in the achievement of adequate service provision to the community.

Council Regulation 1191/69 (EEC), as amended in 1991, was repealed by the current Reg. (EC) No. 1370/2007 of the European Parliament and of the Council of 23 October 2007, on public passenger transport services by rail and by road, in force since December 2009[13].

Public transport services are defined as «[...] services of general economic interest provided to the public without discrimination and on an ongoing basis» (Art. 2 § 1, lett. A), submitting them to the principle sanctioned by Art. 106 TFEU.

Member States may extend the scope to services by inland waterway and national sea water, respecting the provisions of Reg. (EEC) No. 3577/92[14], while the transport of goods is not included in any case; thus, in this field, public contributions are governed by the Treaty rules relating to aids in transport (Art. 93 TFEU).

Basically, this Regulation introduces an organic system of passenger transport management and simultaneously leaves open the option for national authorities to decide on instruments to be adopted in the different modal fields and also in regional contexts: it is important to underline that the regulatory act is not directly binding on regional and local transport services. Nevertheless, competent authorities at a local level can apply the provisions concerning the direct award cases (Art. 5), provided these provisions are «not contrary to the industry internal rules»[15].

Art. 3 § 1, identifies the «service contract» as the instrument through which an authority confers an exclusive right to an operator[16] (on a line, or network, or on a given area), or a compensation in the discharge of public service obligations.

Public service contract means «one or more legally binding acts confirming the agreement between a competent authority and a public service operator to entrust to that public service operator the management and operation of public passenger transport services subject to public service obligations; depending on the law of the Member State, the contract may also consist of a decision adopted by the competent authority:

– taking the form of an individual legislative or regulatory act, or

– containing conditions under which the competent authority itself provides the services or entrusts the provision of such services to an internal operator» (Art. 2, § 1, let. *i*).

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[13] But Art. 8, § 2 introduces a long transition period (deadline, December 3, 2019).

[14] EEC Reg. No. 3577/92 of the Council, 7 December 1992, applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage). See Communication of European Commission on the interpretation of EEC Reg. n. 3577/92, Brussels, 22 April 2014, COM (2014) 232 def., § 8.

[15] The doctrine speaks about a "second-rate (European) legislation" which is recessive compared to national laws with different content: Busti, S. Santuari, A. (2009), *Il trasporto pubblico locale (tpl) tra regolazione e mercato*, on *Diritto dei trasporti*, p. 375 ff., at p. 380.

[16] According to Art. 2, § 1, *d*), of EC Reg. No. 1370/2007, "public service operator" means any public or private undertaking or group of such undertakings which operates public passenger transport services or any public body which provides public passenger transport services.

The definition leads to very different legal forms[17]. This formula is, in fact, merely a recognition of different instruments, formally included in a single category, without any substantive consistency, namely: a) the bilateral act (contract) that formalizes the agreement between a competent authority and an undertaking, entrusting the operator with public service obligations in exchange for remuneration; b) the unilateral decision, of a legislative or regulatory nature, by which the authority self-determines, at an organizational level, provision of the service via an internal operator (in-house)[18] or in a self-handling manner.

In my opinion, the rule must be interpreted in the sense that the competent authorities can decide, according to national legislation, if and when it is better to provide public transport services through an internal structure (for example an *in-house* management), or choose a model of outsourcing, making use of market experience. In the former case, the authority can fix the service requirements on a "unilateral basis", because management decisions mature within the corporate majority (which is public); in the latter case, the public party must "stipulate" a contract (art. 1 § 1)[19].

In addition, Reg. (EC) No. 1370/2007 extends organizational solutions to public transport by road and rail that are fully in line with free market principles, already tested in shipping[20] and air lines[21]: in accordance with Art. 2, § 1, let. l), the authorities that have the purpose to introduce fair tariff charges on specific lines may adopt a "general regulation", i.e., a general provision concerning public service requirements applying to all transport companies operating in a given area, in a market context (without special or exclusive rights). The provision of the services remains a free choice on the part of the companies; however, those who intend to operate in the given area must comply with regulations on tariffs applicable to users, and also to specific categories of users. All carriers will have access to eventual compensation foreseen, with a general scope, for all operators active in the area[22].

At the same time, the aim of ensuring transport of adequate level to all, in any economic condition[23], has led European institutions to contemplate a wider possibility of direct administrative intervention, compared to what was permitted by Reg. (EEC) No. 1191/69, as amended by Reg. (EEC) No. 1893/91.

As the EU legislator recognizes, many passenger services cannot be operated on a commercial basis; hence the choice open to the public authorities is to decide whether to provide services in a "self-handling" manner, or through an "in-house" body, or whether to entrust its provision to a third entity (outsourcing)[24].

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17 Communication of the European Commission on the interpretation of EC Reg. No. 1370/2007 Brussels, 29 March 2014, C 92/1.

18 See *infra*, § 5.

19 ECJC, II, 19 April 2007, n. 295, *ASEMFO*, on *Urbanistica e appalti* (2007), p. 1479.

20 Art. 4, EEC Reg. No. 3577/92.

21 Art. 16, EC Reg (CE) No. 1008/2008.

22 The introduction of general rules does not exclude that the administration can intervene in the same market segment by imposing additional obligations to certain operators on an individual basis through a public service contract.

23 See the Green Paper of the European Commission on Services of General Interest in Europe, 21 May 2003, COM (2003) 270 def.; White Paper of European Commission on Services of General Interest, of 12 May 2004, COM (2004) 374 def.; Protocol on Services of general economic interest (No. 26) attached to the Lisbon Treaty.

24 White Paper on Services of General Interest cit.

Art. 5 § 1 foresees that contracts for the supply of passenger services by bus or tram «are awarded in accordance with public procurement directives, if they do not take the form of a service "concession" » as defined in the directives just referred to.

Otherwise, if the contract for the supply of services does not regard transportation by bus or tram, or, while being inherent in these transport modes, assumes the character of a "concession" (within the meaning of European law on public procurement), the provisions of paragraphs 2 to 6 of Art. 5 Reg. (EC) No. 1370/2007, must be applied; those rules go beyond a competitive selection of the service suppliers and allow direct management by the competent public authority.

It seems appropriate to point out, then, when a public service contract can be classified as a "concession" or a "contract" within the meaning of EU legislation on public procurement.

The notion of "service concession" is found in the latest package of directives on public procurement[25] and, in detail, in Art. 5, § 1, let. *b*) of EU Directive 2013/23, of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, which qualify "service concession" as a «contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services [...] to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment».

In short, if the operator receives the fare paid by users, or receives the recognition of an "exclusive right" as compensation for the discharge of a public service obligation, the agreement refers to the category of concessions of European law on public procurement[26]; on the contrary, it will be considered as a proper public procurement.

The characteristic of the concession contract lies, therefore, in the transfer from the public authority to the manager of an operational risk of economic nature, which exposes him to fluctuations in demand; if the contract assumes the characteristics of a concession, Art. 5 § 2, Reg. (EC) No. 1370/2007 enables the competent local authorities (also in team) to self-produce the service or assign it directly to an internal operator, that is a legally distinct entity over which the competent local authority (or in the case of a group of authorities at least one of them), exercises control similar to that exercised over its own departments (in-house providing)[27].

As clarified by the European Court of Justice, the "in-house body" must be provided with a legal personality separate from the responsible authority, but placed in the management framework of this authority, the same way as its internal structures[28]. The operator is required to carry out the essential part of its activities with the administration or administrations that control it[29]: the expression "in-house" identifies an inter-departmental delegation phenom-

25 EU Dir. 2014/24 of European Parliament and of the Council, on public procurement; EU Dir. 2014/25 of the European Parliament and of the Council on procurement procedures of entities operating in the water, energy, transport and postal services; EU Dir. 2014/23 on the attribution of concession contracts.

26 ECJC, 6 April 2006 n. 410, *Anav*, on *Foro amministrativo del Consiglio di Stato*, (2006) 4, p. 1109.

27 Art. 5 § 2, letter. a) indicates criteria aimed at verifying the existence of the "similar control" requirement, such as the level of representation of the authority in the administrative, management and supervisory bodies, the relevant statutory provisions, ownership, the influence and control exercised over strategic decisions and specific management decisions.

28 See *ex multis*, ECJC, 13 November 2008, n. 324, *Coditel*, on *Foro amministrativo del Consiglio di Stato*, (2008) p. 2889.

29 As explained by EUJC, IV, 27 October 2016, No. 292, H.R. v. S.A., on *Foro amministrativo del Consiglio di Stato* (2016), p. 2298, according to Art. 4, par. 7, Reg. No. 1370/2007, the contracting authority may determine the extent of 70% share of the direct supply by the operator which is responsible for the management and the pro-

enon of tasks within the administration itself, as such opposite to the decision of outsourcing or contracting out the services. As for the ownership structure, Reg. (EC) No. 1370/2007 has a less rigorous approach than the one supported by the Court of Justice, which requires total public contribution to the operator's in-house capital[30]. Letter *a*) of Art. 5, § 2, of the Reg. under analysis, foresees that total ownership of shares by the public authority is not a mandatory requirement for establishing control within the meaning of this paragraph, provided there is a dominant public influence.

If the authority intends to find a third operator, external to the administration, it is obliged to award the public service according to the results of a fair, competitive procedure, conducted also in a negotiated way, but respectful of the principles of transparency and non-discrimination (Art. 5, § 3); this duty is excluded in cases of service contracts "below threshold"[31] or in the case of emergency allocation[32] and for rail transport contracts (Art. 5, § 6).

3. Evolution of regulation of local public transport in Italy.

According to former Italian legislation, the operation of regional and municipal transport, limited to bus and tram services[33], is reserved to public special companies (municipality)[34] or is assigned to private companies chosen by the administration, which are granted exclusive or special rights for a specific line or in a determined area[35].

The 1981 general law on Local Public Transport[36], partially still in force, introduces an organic legislation on the planning, management and financing of services operated by municipal companies and concessionaires, providing them with a grant which was formally related to standard costs of performance, but which was effectively quantified to consent a balanced budget.

The implementation of a competitive market, from the early 1990s, in all modes of transport at European level[37], has led to a general revision of the limits and modalities of pub-

vision of a public service transport of passengers by bus. See also ECJC, 10 September 2009, No. 573, *Sea s.r.l.*, on *Guida al Diritto*, (2009), 46, p. 80. As they are hypotheses with exceptional character, according to the indications contained in the cons. n. 17 of EC Reg. No. 1370/2007, the conditions for the use of an "in house" providing system must be interpreted strictly according to ECJC, April 6, 2006, *Anav*, on *Foro amministrativo del Consiglio di Stato* (2006), p. 1109, and in compliance with the proportionality principle, according to ECJC of 13 October 2005, *Parking Brixen*, n. 458, in *iusexplorer* data bank.

30 ECJC, 13 November 2008, n. 324, *Coditel*, on *Foro amministrativo del Consiglio di Stato*, (2008), p. 2899.

31 Art. 5 § 4, EC Reg No. 1370/2007.

32 The local competent authority may take emergency measures made necessary as a result of the cut-off situations, of actual or imminent verification, through the direct awarding of the contract, or the imposition of obligations, or even foresee a voluntary extension of an expiring contract for a period not exceeding two years.

33 Before the current legislation, introduced by Legislative Decree No. 422/1997, air and maritime transport (excluding regional connections with the smaller islands) were considered services of national interest.

34 Royal Decree Law, 9 May 1912, No. 1447 on trams; Royal Decree Law, 14 July 1937, No. 1728 on trolley-bus; Law 28 September 1939, No 1822 on road services.

35 For a historical profile of the Italian legislation on local public transport services, see Carnevale Venchi, R. (1992), *Trasporti pubblici,* on *Enciclopedia del Diritto,* XLIV, Milano, Giuffrè, p. 1065 ff., at p. 1082; Alberti, G. (1989) *I trasporti pubblici locali (pianificazione e modelli di gestione),* Milano, Giuffrè, p. 11 ff.; Busti, S. (2011), *Profilo storico della disciplina del trasporto pubblico locale,* on *Diritto dei trasporti,* p. 461 ff.

36 Law 10 April 1981, n. 151, in G.U. 24 April 1981, n. 113, «*legge quadro per l'ordinamento, la ristrutturazione ed il potenziamento dei trasporti pubblici locali. Istituzione di un Fondo nazionale per il ripiano dei disavanzi di esercizio e per gli investimenti nel settore*».

37 See the above-mentioned Reg. (EEC) 3577/92 on maritime cabotage; Reg. (EEC) 2408, 2409 and 2410 of 1992, today replaced by Reg. (EC) 1008/2008 on air transport services; for a progressive liberalisation of passenger

lic intervention, albeit not directly of regional and urban services[38]. According to European principles, public intervention must be confined to situations of "market failure" and assume a substitute and residual role; in any case, appropriate tools ensuring transparency and certainty of the relationship - including financial - between public administration and enterprises must be adopted[39].

The reform of Italian national legislation on local public transport, operated by Legislative Decree No. 422 of 19 November 1997 ("decreto Burlando")[40], represents the first concrete attempt to include elements of competitiveness and productive efficiency in a monopolistic administered market, introducing a system of competitive tendering in all modes of transport. This anticipated many of the key features of Regulation 1370/2007, including the treatment of, and compensation for, public service obligations, and the awarding and duration of public service contracts. In addition, this legislation makes competitive tendering the sole award procedure.

The decree applies to all transport that operates in a certain geographic area, defining local public transport on a systemic basis, such as the set of land, sea, lagoon, lake, river and airborne mobility systems operating in a continuous or periodical manner, with routes, schedules, frequencies and pre-defined tariffs, with general access, within an area of, normally, regional or infra-regional dimension [41]. The regional administration assumes the regulatory function for the implementation of the principles contained in the reform at regional level, and manages rail, maritime and aviation services, while the remaining competences are delegated to municipal authorities [42].

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road transport see the "Road Package" adopted in October 2009, including EU Reg. Nos. 1071/2009, 1072/2009 and 1073/2009 common to international and cabotage road haulage services. For a progressive liberalisation of passenger rail transport, see Dir. (EEC) 91/440 on European Railways; the "First Railway Package" of 2001 (Dir. 2001/12/EC; 2001/13/EC; 2001/14/EC) the "Second Railway Package" of 2004 (Dir. 2004/49/EC; 2004/50/EC; 2004/51/EC, Regulation (EC) 881/2004 on European Railway Agency) and the "Third Railway Package" of 2007 (Directive 2007/58/EC allowed free access to the international market of passenger transport; Regulation (EC) 1371/2007 on passengers' basic rights). In literature see, *ex multis*, Cantarini, M. (2008), *I servizi marittimi*, on Zunarelli, S. (Ed) *Il diritto del mercato del trasporto* Milano, Giuffrè, p. 41 ff.; Bocchese , D. (2011), *Servizi marittimi,* on Tullio, L. Deiana, M. (Ed.), *Codice dei trasporti,* Milano, Giuffrè, p. 3 ff., on maritime services regulation; Sia, A. M. L., (2011) *La disciplina dei servizi aerei,* on Tullio, L. Deiana, M. (Ed.) *Codice dei trasporti,* Milano, Giuffrè, p. 57 ff., on air services regulation; Marino, A. (2011), *I servizi di trasporto di persone su strada*, on Tullio, L. Deiana, M. (Ed.) *Codice dei trasporti,* Milano, Giuffrè, p. 129 ss., on road services; Ingratoci, C. (2011), *Accesso all'infrastruttura ferroviaria e oneri di servizio pubblico*, on Tullio, L. Deiana, M. (Ed.) *Codice dei trasporti,* Milano, Giuffrè, p. 325 ff., on rail services, also for further bibliographical references.

38 Art. 1, § 1, (EEC) Reg. n. 1191/69; Art. 1 § 2 (EC) Reg. 1370/2007.

39 See, *ex multis*, Ingratoci, C. (2011), *Accesso,* p. 406 ff.; Zunarelli, S. (2010), *Il nuovo regime dei servizi di trasporto pubblico locale*, on *Diritto marittimo,* II, p. 1215 ff.; Busti, S. Santuari, A. (2009), *Il trasporto pubblico locale*, p. 375 ff.; Claroni, A. (2008), *La regolamentazione del trasporto pubblico locale in Italia*, on Zunarelli S. (Ed.), *Il diritto del mercato del trasporto,* Padova, Cedam, p. 141 ff.; Maresca, F. (2008), *Servizi di trasporto*, on Sandulli, M.A. - De Nictolis, R.- Garofoli, G. (Ed.) *Trattato sui contratti pubblici*, V, *I settori speciali. L'esecuzione*, Milano, Giuffrè, p. 3201 ff.; Galletta, D.U. Giavazzi, M. (2007), *Trasporti terrestri*, p. 2173 ff.; Fulciniti, F. (2004) *Spunti critici per uno studio del trasporto pubblico locale nell'attuale assetto istituzionale e organizzativo,* on *Diritto dei trasporti,* p. 711 ff.; Brancasi A. (Ed.), (2003), *Liberalizzazione del trasporto terrestre e servizi pubblici economici,* Bologna, Zanichelli; Ingratoci, C. (2001), *Trasporti e contratti di servizio,* Roma, Aracne, p. 343 ff.; Rangone, N. (2000), *I trasporti pubblici di linea*, on Cassese S. (Ed.) *Trattato di diritto amministrativo*, II, 2 ed., Milano, Giuffrè, p. 1697 ff.

40 O.J. 10 December 1997, n. 287.

41 Art. 1.2, Legislative Decree No. 422/1997.

42 Arts. 5, 7, 8, 9, 10, Legislative Decree No. 422/97. On Constitutional division of competence for transport in Italy see Italian Constitutional Court, 13 January 2014, n. 2, in *Foro amministrativo* (2014), 9, p. 2212; Italian Constitutional Court 14 November 2013, n. 273 in *iusexplorer* data bank; Italian Constitutional Court, 23 July 2013, n. 230,

The decree requires a complete separation between the exercise of powers on planning of networks and lines of public concern (which includes the functions of direction and control), and operational management, entrusted to enterprises in a competitive environment. Thus, the progressive privatization of municipal companies[43], the use of tender procedures for the periodic selection of management enterprises[44] and the use of public service contracts as a tool for direction of operative management to public service objectives[45] are foreseen.

The contract - which includes public service requirements fixed by competent authorities - binds operators to offer the transport services in conformity with public service obligation for the benefit of users; in return, the operator is entitled to a fixed remuneration, which is compared to the standard costs of the activity and definitively quantified in the tender of the bidder to whom the service has been awarded. The economic risk of the activity is borne by the operator; however, management independence is guaranteed by the stability and predictability of the terms and conditions of the contract with the public administration, according to the "contractual/private" model.

4. Limits of public intervention: notion of minimum services

Decree No. 422 refers to certain provisions of Reg. (EEC) No. 1191/69, as amended by Reg. (EEC) No. 1893/91, which are in force in domestic legislation by virtue of their inclusion in national legislation, despite the repeal of the regulation in European laws. We are referring to the notion of "public service obligation" and the procedures for defining "sufficient services", a concept that has been transposed into the category of "minimum services" in national legislation, i.e. those services which are essential to satisfy the needs of citizens' mobility which, for this reason, must be guaranteed by the competent authority[46].

Minimum services «*qualitativamente e quantitativamente sufficienti a soddisfare la domanda di mobilità dei cittadini*»[47], are defined through an elaborate programming activity, involving regions for "regional transport plans" and local authorities for the drafting of "basin plans"[48]; the latter identify the optimum territorial area to implement an integrated, coordinated public transport system in relation to mobility needs; they represent the area under tender.

Therefore, the "minimum service" marks the essential level of performance, determined on the basis of an assessment of existing and potential mobility in a given field (school, work, access to administrative, social, health and cultural services); a specific range of services at a regional level is offered, including all modes and types of transport (scheduled and non-

in *Giurisprudenza costituzionale*, (2013), 4, p. 3404; Italian Constitutional Court 11 April 2011, n. 123, in *Giurisprudenza costituzionale* (2011), 2, p. 1686.

43 Art. 18.3, Legislative Decree No. 422/97. On this matter, Ministero delle Infrastrutture e dei Trasporti, *Conto nazionale delle infrastrutture e dei trasporti 2012-2013,* Roma, 2014, 223 ss.

44 Art. 18.2, Legislative Decree No. 422/97.

45 The extension of the transitional period and the legislative changes that occurred during this period led to the failure to impose public tenders: at the expiration of the transitional period (31 December 2008), Art. 61 of Law 99/2009 foresaw that the competent authorities could award public service contracts using the provisions of Art. 5, §§ 2, 4, 5 and 6, and Art. 8, § 2, of the aforementioned Reg. (CE) n. 1370/2007.

46 Art. 3, § 1, (EEC) Reg. No. 1191/69; Art. 16.2, let. *a*) and *b*) Legislative Decree No. 422/97.

47 Qualitatively and quantitatively sufficient to meet the demand for mobility of citizens: Art. 16, Legislative Decree No. 422/97.

48 Art. 3, Law No. 151/81.

scheduled) available to optimize efficiency, effectiveness and cost-effectiveness, taking into account related financial burdens and negative externalities (security, environment). In the presence of more than one solution capable of providing such services under similar conditions, the competent authority must select the one that entails the lowest costs for the community, in accordance with the criterion of strict proportionality and in coherence with the residual public intervention principle, inferred by Art. 106 TFEU[49].

On this essential level of performance, municipalities may, after agreement with the Region (for network compatibility), foresee additional transport services in the budget[50].

The implementation experience of the reform has demonstrated the extreme complexity of this planning function, as the assessment of the adequacy of the transport offer supposes an analysis of demand needs (mobility) which can lead to uneven solutions in the absence of benchmarks; wide qualitative differences in the performance of services have led to situations of disparity between territories and citizens at the national level, infringing the constitutional principles of equality and uniformity of the essential levels of performance.

Thus, the aim to define uniform criteria for determining the minimum quality standard of transport services, at a national level, requires the intervention of a qualified, independent national body: this is the new National Authority for the Regulation of the Transport sector(ART)[51], established by National Decree 6 December 2011 n. 211.

5. Opening to market competition and procedure of assigning management

Art. 18.2 of Legislative Decree No. 422/97 foresees that local authorities are obliged to apply tender procedures for the selection of the operator, in accordance with national and European legislation on public procurements[52]. The award procedure is usually also prescribed in regional legislations that, on the basis of the overarching legislative framework, rule the governance of the local transport sector.

The aforementioned Art. 18.2 rule is a general limit to the application of direct award procedures foreseen by (EC) Reg. No. 1370/2007.

However, subsequent law No. 99/2009, Art. 61, laying down additional provisions on local public transport, removes this constraint, allowing regional and local authorities to make use of the provisions referred to in paragraphs 2, 4, 5 and 6, Art. 5 of Reg. (CE) n. 1370/2007.

Therefore, local authorities may now "self-produce" the service or decide for a direct award procedure to an in-house operator; in any event, without a public procurement procedure, they may entrust those services which do not exceed certain thresholds of economic importance, or those required to deal with emergency situations, rail services included (Article 5 § 6 Reg. No. 1370/2007), with the exception of tram services and metropolitan railways.

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[49] See Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, O.J. C8, 11 January 2012, p. 4-14.

[50] Art. 16.3, Legislative Decree No. 422/97.

[51] Art. 37 of Legislative Decree 6 December 2011, n. 201, converted with modification by Law 22 December 2011, n. 214; Art. 37, Legislative Decree 24 January 2012, No. 1, converted with modification by Law 24 March 2012 n. 27. See also art. 1, para 609 of Law 23 December 2014, n. 190.

[52] Art. 114 ss. of Legislative Decree 18 April 2016, No. 50, Implementation of Directives 2014/23/ EU, 2014/24/EU and 2014/25/EU in OJ No. 91 of 19 April 2016.

However, the normal method to award a service remains competitive tendering, since the choice of a different form must be adequately motivated by the authority, which must publish a report on its website in which it justifies the reasons of its choice and shows fulfilment of the conditions set out in European legislation for the selected procedure[53].

The tender is awarded on the basis of the best economic conditions and performance, regarding plans for development and upgrading of networks and installations, sustainable environmental policies, measures contrasting evasion and support for activities in favour of users with reduced mobility. ART defines the criteria of thelevel of essential equipment, ensuring that the availability of networks, installations and other equipment does not constitute a discriminatory element restricting access to the market for new competitors.

Thus, tendering entities are required to make "essential" public facilities available, which the successful bidder is obliged to adopt and maintain; the "essential" equipment is distinguished from "indispensable" equipment on the basis of the requirement of "sharing" or not[54].

In the case of equipment owned by third parties, availability is provided by the tendering entity through specific clauses of public service contracts, requiring the outgoing operator to sell the essential facility and the incoming to acquire availability, paying a pre-determined rate (or price).

Under Art. 61 of law No. 99/2009, the authorities responsible for the awarding of contracts may also apply the procedures introduced by § 2, Art. 5 of reg. (CE) n. 1370 of 2007.

Probably, in the light of the systemic notion of local transport services, the rule does not limit the scope of the provision, which in European legislation refers only to road and rail services; therefore, we believe that, under national law, in-house management could be used for maritime lines of regional interest, for reasons of territorial continuity[55].

According to a constitutionally-oriented reading of the aforementioned provisions, the application of European rules on in-house providing procedures does not exclude assessment (by the competent ART) of choices made by the local authority: the Italian Constitutional Court sanctioned the legitimacy of national rules that exclude (or severely limit) the in-house model, both in relation to EU law and in relation to the competences of the Region in the transport sector[56].

The contents of "analogous control", as a proper element of the in-house model, have been strongly debated in doctrine and jurisprudence.

A legal definition has been introduced by the recent single text on publicly owned companies[57], identifying a condition in which the administration exercises a decisive influence on the company, both on strategic objectives and on significant decisions, through a different legal body too, which is controlled by the administration in the same way.

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53 Art. 7, § 1, (EC) Reg. No. 1370/2007; Art. 34.20, Legislative Decree No. 179 of 18 October 2012, converted with modification by law 17 December 2012, No. 221 as emended by Art.1.609 of Law No. 190/2014. See also Art. 5, Legislative Decree 19 August 2016, No. 175, Single Text on public companies in O.J. No. 210 of 8 September 2016.

54 See ART Resolution No. 49/2015.

55 Art. 4 and 16, Legislative Decree No. 175/2016.

56 Constitutional Court 20 November 2009, 307 on *Urbanistica e appalti*, (2010), p. 4412 ff.

57 National Decree N. 175/2016 "Testo unico in materia di società a partecipazione pubblica" in force from 23 September 2016.

Due to its characteristics, the "in-house" company has been considered as a modern revalidation of the "municipal company", usually entrusted with local public transport services in Italy[58], or a species of public (economic) body[59].

6. Public intervention tools: public service contract

Under Art. 18.1, of Legislative Decree No. 422/97, the exercise of local and regional public transport services, carried out by any means and entrusted in any form, is ruled by service contracts of a duration not exceeding nine years[60]. Contracts for the operation of public rail transport last no less than six years, renewable for another six.

According to the definition of public service obligation, as per Art. 17 of Legislative Decree No. 422/97[61], an authority must include the conditions of the supply, which it intends to provide to users, in the contract (in terms of quantity and quality of the lines, accessibility levels and tariffs); the authority must also quantify additional costs associated with public service requirements. Such costs are considered in defining the remuneration foreseen in the contract that the public party must pay to the private party for the offer of transport (under the conditions specified in the contract)[62].

Thus, the contract must indicate the characteristics of the services offered, the operating schedule, minimum quality standards, age of means, maintenance, comfort and cleaning of vehicles, regularity of the line, tariff structure adopted, annual updating of criteria for the fees, and modalities for modifying the agreement following its conclusion, and in particular, iz must take account of unforeseeable changes[63]; the guarantees that must be provided by the transport company and the sanctions in case of non-compliance with the contractual regulation must also be specified.

The contract governs, inter alia, the division of revenues from ticket sales. Revenues may be either retained by the service provider, released to the competent authority or redistributed between the parties. Based on these provision, we can distinguish:

a) the "gross cost" contract, in which the authority receives the tariff revenues and pays the agreed sum to the operators, calculated on the basis of single operating costs. The operator is incentivized to reduce its management costs, while the commercial risk inherent in the economic operation is entirely the onus of the authority;

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58 Greco, G. (2005), *Imprese pubbliche, organismi di diritto pubblico, affidamenti «in house»: ampliamento o limitazione della concorrenza*, in *Rivista italiana di diritto pubblico comunitario*, p. 61 ff., at 72; Ursi, R. (2005), *La società per la gestione dei servizi pubblici locali a rilevanza economica tra outsourcing e in house providing*, in *Diritto amministrativo,* p. 179 ff., at 196.

59 Goisis, F. (2008), *Nuovi sviluppi comunitari e nazionali in tema di* in house providing *e suoi confini,* in *Diritto amministrativo,* p. 558; ECJC, 10 April 2008, C-323/07, point 20, www.europa.eu.

60 As an exception to this general rule, a municipality can directly perform services, which are characterized by a modest size and a general lack of entrepreneurial connotations, through its offices: State Council, V, 6 February 2008, n. 340, on *Foro amministrativo del Consiglio di Stato,* (2008), p. 262.

61 Art. 17, Legislative Decree No. 422/97.

62 Art. 19, Legislative Decree No. 422/97.

63 The rule is intended to preserve the economic and financial equilibrium of the contract according to the division of risks, operational and commercial, agreed by the parties to the award procedures.

b) the "net cost" contract, in which the tariff revenues are retained by the operator and included among the incoming items at the time of the definition of the retribution. The latter is calculated on the difference between standard costs and foreseen revenues, on the basis of the service tariffs fixed by the local authority. Therefore, management risks (demand risk) and provision of service are the onus of the operator.

As said, this distinction is fundamental for the application of European public tender law. Considering that, under Art. 17, Legislative Decree No. 422/97, the compensation included in the contract for the operator must take account of the tariffs which are received by the operator, it can be concluded that public service contracts take on the structure of net cost contract in Italian national law[64].

The evaluation of production of service costs is relevant in determining the maximum amount to insert in the tender[65]. It is of fundamental importance also in the context of in-house management[66]: indeed, both national and EU legislation require that remuneration does not go beyond what is necessary to cover the net costs arising from the fulfilment of public service obligations (taking into account revenue generated and a reasonable profit)[67]. From these provisions, a more general principle of efficiency of management can be inferred, which should be applied in quantifying compensation in the case of a contract directly entrusted to in-house suppliers[68]: in this case, the efficiency of management can be stimulated by pricing systems (and penalties) directly effecting the managers and employees of the suppliers.

The same methodology can be used to demonstrate the economic convenience of direct management carried out by the competent local authority, compared to contracting out the tender[69].

Service contracts must be characterized by financial certainty and budgetary coverage. Contracts which do not guarantee compensation for services with available resources, the net of revenue tariffs, are considered invalid (Article 19, paragraph 1).

The certainty of the remuneration is a central factor in the new model of public service financing: under service contracts, the operator assumes the obligation of offering transport services (to the users) with certain characteristics in exchange for a payment that the operator considers appropriate on the basis of its business plan[70]; following the stipulation, modifications to it are only permitted in the event of unforeseen changes or in the case of alteration in the tariff structure adopted by the public body; the latter may be subject to annual

64 State Council, VI, 23 September 2008, 4591, in *Foro amministrativo del Consiglio di Stato*, (2008), 9, p. 2505.

65 Art. 23.12 *undecies*, Legislative Decree No. 95/2012.

66 According to the above-mentioned *Altmark* judgment, where the undertaking to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and reasonable profit for discharging the obligations.

67 Art. 4, para 1, letter b), reg. (CE) n. 1370/2007

68 See Communication of the European Commission on EC Reg. No. 1370/2007 cit., § 2.4.2.

69 Art. 1.609, Law No. 190/2014, and Art. 34.20, Legislative Decree 18 October 2012, No. 179, converted with modification by Law 17 December 2012, No. 221.

70 EC Tribunal, 16 March 2004, cit.

review on the basis of the terms specified in the contract (with an increase not exceeding the rate of planned inflation, with the same supply of transport)[71].

Relationship certainty with the authority significantly affects the operator's financial situation and hence its necessity for long-term investments in local transport infrastructures and equipment. The application of private law rules in the performance of the contract provides greater stability by limiting the possibility that the public party affects the relationship in an authoritative way, except in the cases of exceptional change in the public interest, inserted in the contract (definition of minimum service)[72].

Hence, beyond organizational decisions (programming and financing), which precede the conclusion of the contract, the authority is on an equal footing with the operator, and any changes that require the parties to renegotiate the essential terms of the relationship necessitate a new award tender[73].

Thus, the examined discipline leads us to believe that the public service contract, whose legal status is still debated, both in doctrine and jurisprudence[74], is an act which is subject to private law rules[75].

7. User protection in public service contracts

The new transport public services regime also affects the discipline of transport contracts with users, regarding the fulfilment of quality requirements by the supplier.

ART is competent to harmonize the levels of performance to be provided on a national level, by fixing the "minimum quality conditions for national and local transport services with public service obligations" and "minimum content of the specific rights, even of a remedial nature, which users may require against the operators of transport services"[76] .

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71 Failure would result in a breach of competition rules, since the consideration sought by the tenderer is decisive for the award of the contract.

72 In the event of substantial changes, Art. 43 of Directive 23/2014/EU, on the award of concession contracts, requires the re-awarding of the contract.

73 ECJC, C- 91/08 *Wall AG*, point 37.

74 On the qualification of public service contract as a concession see Galletta, D.U. Giavazzi, M. (2007), *Trasporti terrestri*, p. 2173 ff., at 2230; Scotti, E. (2003), *Il pubblico servizio tra tradizione nazionale e prospettive europee*, Bologna, Cedam, p. 340 ff.; Raimondi, S. (1999), *Accordi di programma, contratti ed obblighi di servizio pubblico: il d.lgs. 422/97,* on Fanara E. (Ed.), *Riforma del trasporto pubblico locale e sviluppo del turismo in Sicilia,* Messina, CUST, p. 55 ff. In jurisprudence State Council, V, 27 March 2013, No. 1755. As a public-law contract, see G.E. Berlingerio, (2003) *Studi sul pubblico servizio,* Milano, Giuffrè, p. 160 ff.; Romano Tassone, A. (1998), *Il contratto di servizio,* on *Diritto dei trasporti,* p. 613 ff., at 619; Supreme Cassation Court, 17 May 2013 n. 12111 in *iusexplorer* data bank.

75 Art. 1, para 1-*bis*, of Law 241/90, according to which in the adoption of acts of a non-authoritative nature, public administration acts in accordance with the rules of private law, unless the law provides otherwise. See Sorace, D. (2014), *Diritto delle amministrazioni pubbliche. Una introduzione*, Bologna, p. 162 ss.; Ingratoci, C. (2001), *Trasporti*, p. 551 ff.; Pericu, S. (2001), *Impresa ed obblighi di servizio pubblico*, Milano, Giuffrè, p. 452; State Council, V, 25 June 2002 n. 3455, on *Foro amministrativo del Consiglio di Stato,* (2002), p. 1470; Supreme Cassation Court, 6 September 2013, No. 20567, on *iusexplorer* data bank; Supreme Cassation Court 11 January 2011 n. 397, on *iusexplorer* data bank.

76 ART evaluates claims and reports submitted to the service providers in respect of the quality and tariff levels, facilitating the establishment of direct and not expensive procedures for conciliation and resolution of disputes between traders and users (Art. 37, para 3, lett. *g* and *h,* Legislative Decree 6 December 2011, No. 201).

Quality performance profiles are also indicated in the "Services Charter" or "Charter of Mobility"[77], that the operator is requested to assume[78] as a private-law self-regulation tool, able to ensure pre-emptive protection of users' rights[79].

In the case of direct management of the service by a public authority, the Charter assumes the value of a management directive; where the service is entrusted to a private company, the Charter integrates the content of a public service contract[80].

The adoption of this document, indeed, is requested in the call for tenders with the aim to transfer the requirements of the obligation assumed by the operator to administration of the transport contract with the users: thus, in addition to the private law protection, the user will be able to request the authority's intervention to inhibit any behaviour on the part of the operator in violation of the obligations assumed through the public service contract [81].

We could say the Services Charter acquires the function of a minimum level list of services to be provided by the carrier[82], allowing the public service requirements to move from the relationship between authorities and supplier to the relationship between the latter and the user [83].

Regulations governing the management of services (also issued by administrative regulatory bodies) [84] may be considered as supplementary clauses of the transport contract *ex* Art. 1339 c.c. (Italian Civil Code) [85]; while if the quality levels are assumed by the operator on a voluntary basis, the Charter constitutes a promise to the public *ex* Art. 1989 CC.[86].

Any failure to meet the performance levels expressed by specific standards could be sanctioned with a lump-sum penalty[87], to which liability arising from general service organization failures is added, also justifying action for the protection of collective or widespread interests[88].

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77 On Service Charters see: Fantigrossi, U. (2010), *Il servizio pubblico ferroviario e la tutela degli utenti*, on *Amministrare*, 1, p. 139 ff.; Boesso, G. Monteduro, F. (2008), *La qualità delle carte dei servizi: un'analisi empirica nelle aziende di tpl,* on *Azienda pubblica*, 1, p. 99 ff.; Ieva, L. (2002), *Tutela dell'utente e qualità del servizio pubblico – Dall'organizzazione alla «Carta dei servizi»,* Milano, Ipsoa, p. 109; Id. (2001), *Il principio della qualità del servizio pubblico e la «carta dei servizi»*, in *Foro amministrativo,* p. 231; Malfatti, V. (1999), *Carte dei servizi e procedure di gara nel trasporto pubblico locale*, in *Diritto dei trasporti*, p. 817 ff.; Marconi, P. (1998), *La carta dei servizi pubblici e la Citizen's charter. La normativa sulla carta dei servizi*, in *Rivista italiana di diritto pubblico comunitario*, 1, p. 197 ff.

78 Legislative Decree 30 July 1999, No. 286 reorganizing and enhancing the monitoring and evaluation mechanisms of the costs and results of the activities carried out by public administrations.

79 Mastrandrea, G. (2008), *Le carte dei servizi ferroviari e la qualità della prestazione,* in La Torre, U., Moschella, G., Pellegrino, F., Rizzo ,M.P., Vermiglio, G., (Ed.) *Studi per Fanara,* II, Milano, Giuffrè, p. 197 ff., at 211.

80 Mastrandrea, G. (2008), *Le carte,* p. 207

81 Napolitano, G. (2001), *Servizi pubblici e rapporti d'utenza,* Padova, Cedam, p. 335.

82 Mastrandrea, G. (2004), *Il trasporto ferroviario*, in Riguzzi, M., Antonini, A. (Ed.) *Trasporti e turismo*, Milano, Giuffrè, p.405.

83 Napolitano, G. *Servizi pubblici,* p. 514 ff. For recognition of rights to compensate damages, including non-pecuniary damage, suffered by railway passengers for delays in transport, and in the light of the obligations assumed by the transport company with a public service contract, cf. Justice of the Peace, Piacenza, December 30, 2008, in *Il Giudice di pace*, (2009), 3, p. 238 ff.; Justice of the Peace, Cassino, 28 February 2001 No. 108, in *iusexplorer* data bank; Tribunal of Firenze, III, 26 March 2007, in *La responsabilità civile*, (2008), 10, 827 ff. See also Supreme Court of Cassation, III, 8 May 2015, No. 9312, in *iusexplorer* data bank.

84 Supreme Court of Cassation 21 May 2013, No. 12318 in *Giustizia civile* (2013), 10, I, p. 1996.

85 Mancini, L. (2002), *I contratti di utenza pubblica*, in *Diritto amministrativo,* p. 133 ff.

86 Calabrò, M. (2014), *Carta dei servizi, rapporto di utenza e qualità della vita*, in *Diritto amministrativo*, 1, p. 373 f.

87 Doctrine has identified the features of the administrative sanction (Mastrandrea, G. (2008), *Le carte,* p. 209; Ieva, L. (2002), *Tutela dell'utente*, p. 138), or of penalty clause (Napolitano, G. (1996), *Gli indennizzi automatici agli utenti dei servizi pubblici,* on *Danno e responsabilità*, p. 15 ff.).

88 Administrative Regional Tribunal of Puglia, Lecce, III, 23 March 2009, No. 493, in *Utet giuridica* data bank.

8. Conclusion: the importance of an independent Regulator to guide the planning, financing and management of services

The examined reform of local public transport in Italy has, to date, been partially implemented; in the face of a general privatization of public management companies, services granted by public tender are still very limited and, in any case, are often managed by the same companies emerging from the transformation of previously public companies.

The point is that opening to the transport services market requires measures to "create" competitive dynamics and ensure fair access to and use of infrastructure and essential facilities, such as a "competitive" regulation[89]. At the same time, a more competitive, efficient management of local public transport services involves a harmonized level of performances, not only to ensure the constitutional right of equality between citizens, but also for effective equality of access conditions to the market by companies. This is a question of "finalistic regulation".

Both forms of regulatory function, the former and the latter, cannot be carried out by regional authorities assigned to plan and finance local public transport. As clarified, according to national legislation on public service transport, local authorities are requested to define the essential mobility needs of citizens, planning the program of services, which becomes the "core" content of the public service contract; they are requested to decide on models of governance and management of the transport services; the local authorities define the system of financing of local public transport services as well as public requirements and obligations.

Hence, these authorities intervene in the contract in representing a part of the transport market, i.e. the users, and thus they are "in the market".

On the contrary, the role of the new regulatory body, ART, significantly differs from the administrative functions of programming, directing and control of local transport, which are the mandate of regional and municipal authorities. An institution of an independent authority, working outside of the market, is the fundamental key to success in the new model of regulation, which suffered a functional imbalance until the establishment of ART.

ART meets the essential regulatory framework for effective promotion of competitiveness and efficiency in the local transport market, also taking into account aspects that impose a uniform standard at the national level[90].

In particular, we refer to the conditions of participation of operators in the tender procedures, the criteria for determining contract remuneration, the setting up of models of reference for tender and service contracts, to guarantee equal opportunities in the availability of the facilities which are essential to operating services.

The essential role of ART is also to make the criteria for granting financial subsidies to operators more compatible with market rules, on a national level.

Mechanisms to financing services can be profoundly different.At the moment, the most widely used model is "cross-financing" subsidisation, where "minimum services" (as per Art. 14 of Legislative Decree No. 422/1997) are fed by the income of remunerative services.

This is a mechanism that broadens the gap between the market system and free competition and adversely affects the efficiency of the management, but is nevertheless recognized in European legislation.

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89 Napolitano, G. (2005), *Regole e mercato nei servizi pubblici*, Bologna, Il Mulino, p. 91. Rangone, N. (2006), *Regolazione*, in Cassese S. (Ed.) *Dizionario di diritto pubblico*, V, Milano, Giuffrè, p. 5057 ff., at 5058.

90 On the minimum level of services performance see National Authority of Transport (ART), Resolution No. 48 of 30 March 2017, on www.art.it

The Interpretative Communication on Regulation (EC) No. 1370/07[91], point 2.2.5, refers to "Network effects" of the local transport financing system, making clear the importance of "cross-subsidisation" between cost-covering services and non-cost-covering services.

In detail, the geographical scope of public service contracts enables competent authorities to optimise the economics of public transport services operated under their responsibility including, where appropriate, «local, regional and sub-national network effects».

Another common form is direct financing through compensation for the extra costs incurred by a company for public service obligations, including a reasonable profit. The mechanism, as mentioned, positively affects the operator's efficiency only if it is included in a public service contract as a fixed remuneration.

Other less frequently used, but probably more suitable, mechanisms for defining a competitive and efficient context for management include: i) oriented purposes fee; (ii) tax on "market access", or similar burdens imposed on operators engaged in the transport sector (or in complementary services) under market conditions; they are specially provided for transferring positive financial effects from commercial services to those provided under public requirements, without restricting competition in the exercise of lines characterized by an adequate level of supply without public support.

We are speaking about road pricing, for access to urban centres, both in the form of congestion charges and pollution charges.

As an example of a special contribution, the onus of market operators, in the interest of public service providers, has already been introduced in Italian legislation by Art. 12, paragraph 12 of Legislative Decree 15 July 2015, No. 112, which establishes a surcharge in the access fee at railway infrastructure for companies providing national medium-long and long-distance passenger transport services in potential competition with those covered by public service contracts.

In addition to general rules (supported by cross-subsidization systems between market services and services characterized by public services obligation) reference is made to models of direct redemption of tariffs towards the users or even the model of payment of compensation by market operators who intend to operate lines in competition with a public service supplier.

This funding mechanism, which is in force in the aviation sector, ensures the highest level of "neutrality" in relation to market dynamics.

Therefore, it would be desirable to increase direct funding to users for meeting minimum performance targets set at s national level by the ART, supporting public service obligations through the participation of all market companies in the financing of lines provided by public service operators.

[91] See European Commission, Communication on interpretative guidelines concerning Regulation (EC) No. 1370/2007 on public passenger transport services by rail and by road 2014/C 92-01, of 29 Mach 2014.

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DEVELOPING LIABILITY ISSUES IN INTERNATIONAL AIR TRANSPORTATION

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SUMMARY

Air travel is the safest method of travel. Nevertheless, despite the fact that there are very few accidents, they do happen. Consequently, this area of air law involves loads of complexities, especially taking into account that the terms "accident" and "injury" have no clearly defined legal meanings.

In the last decade, despite the adoption of new standards, European legislation on air carriers' liability seems to be behind the needs of both passengers and air carriers alike. Undoubtedly, there are huge potential exposures for airlines arising not only from a possible individual crash accident, but also from liability extended through the controversial Regulation (EC) 261/2004. The impressive number of passenger complaints filed for delays and cancellations and the conflicts in these matters, best illustrate the need for evolution in this field of air law.

Although the Regulation (EC) 261/2004 was one of the most successful areas of EU action in the field of consumer protection and has contributed to the regulation of the internal market for aviation services, it has been severely criticized by the aviation industry: the obligations originally mentioned in its provisions, and in particular those subsequently extended by the EU Court of Justice, imposed serious financial burdens on air carriers, and still pose a challenging legal issue in the relationship between EU law and international standards, in particular the Montreal Convention, and its exclusive liability regulation.

By pointing out relevant issues and challenging learning points deriving from several recent cases, the author discusses the legal status of airline liability, touching upon the concept of an "accident" and an "injury", while drawing connections between EU and international law. The paper also aims at answering whether consumers in the EU have been given a fair level of protection, or are they "overprotected", as some airlines often argue.

Given the fact that it is possible to identify several other concerning areas of possible future airline liability, which could potentially lead to claims involving new high costs (e.g. damages caused by air pollutants in air conditioning systems, exposure to harmful radiation), the air carriers can certainly expect turbulent weather in the future.

Key words: *airline liability, passenger rights, Montreal Convention, Regulation (EC) 261/2004, accident, injury.*

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I. INTRODUCTION

International air transportation is becoming increasingly important in our globalized times. In less than a hundred years, air travel has gone from non-existent to transporting more than 3.5 billion people in 2016.[1] That is almost half of the world's population. Air travel has hence become truly integral part of our lives.

Safety is surely the most crucial issue in the air transportation. Its complexity encompasses all fields of the industry and affects every single individual involved. Air travel is still the safest method of travel - despite the fact that you are travelling 11.000 meters high up in the air, at a speed of over 800 kms per hour, there are very few accidents. According to the *International Air Transport Association* (IATA) in 2016, there was only one commercial jet accident per 2.56 million flights[2], and a study conducted by the *US National Safety Council*[3] showed that flying is 22 times safer than travelling by car.

Nevertheless, accidents do happen and they are usually result of an undesirable chain of events.[4] Beside accidents, air passengers are sometimes also victims of malpractices. As such, they are entitled to a fair treatment and a proper compensation. On the other hand, the airlines themselves can also be subject to financial abuse from the injured passengers.

Hence, aiming at striking a balance between the often-colliding interests of consumer protection on one side, and the economic aspects of airline business on the other, this paper proposes answering whether consumers, and especially those in the European Union are given a fair level of protection, or are they already "*over-protected*", as some airlines argue these days. Furthermore, an attempt is made in answering whether amendments to certain pieces of EU legislation are needed.

Surely, the liability area of air law involves loads of complexities, especially taking into account that the terms "*accident*" and "*injury*" have no clearly defined legal meaning and that, in the last decade, despite the adoption of new standards, European legislation on air carriers' liability seems to be behind the needs of both passengers and air carriers.

Undoubtedly, there are huge potential exposures for airlines arising not only from a possible individual *crash* accident, but also from liability extended through the controversial Regulation (EC) 261/2004. The impressive number of passenger complaints filed for delays and cancellations and the conflicts in addressing those, best illustrate the need for a change and evolution in this field.

By pointing out relevant issues and learning points derived from recent case law, the legal status of airline liability shall be explained and the concept of "*accident*" and "*injury*" will be touched upon, while drawing connections between EU and international law. A special emphasis on the EU law is made throughout the article, as in the framework of the common EU transport policy, it is of vital importance that a proper level of compensation for passengers involved in air accidents and other incidents is ensured. Nevertheless, for better understanding

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1 *IATA Annual Review 2016*, p. 55, retrieved 01/03/2017 from: http://www.iata.org/publications/Documents/iata-annual-review-2016.pdf

2 *IATA Airline Safety Performance 2016*, retrieved 19/04/2017 from: http://www.iata.org/pressroom/pr/Pages/2017-03-10-01.aspx

3 *Flight fear? Air travel is less dangerous than car and road travel, statistics show.* Retrieved 19/04/2017 from: http://www.news.com.au/travel/travel-advice/overcome-your-fear-of-flying/news-story/d79e47f541ea51b6f0c46

4 The worst single loss in terms of the number of casualties was the 1985 Japanese Airlines B747, causing 505 passenger and 15 crew fatalities; the worst incident was the Pan American/KLM collision at Tenerife (two B747s) in 1977 resulting in 560 passenger and 23 crew fatalities. The cost of both incidents exceed 2 billion USD.

of the current developing liability issues in the international air transportation, several recent cases that involved a major Middle-Eastern carrier shall be pointed out and used.

The paper is divided into three main parts. Introductory chapters explain the legislative background of airline liability and give an overview of the basic provisions of the current liability regime, which was specifically incorporated into the EU law. Additionally, in this part, the merits and shortcomings are addressed, as well as the concept of "*accident*" and "*injury*".

Part two takes a closer look at the much-disputed Regulation (EC) 261/2004. This part examines the problems caused by the inconsistent application of the Regulation and ways of getting around it. At that point, the paper tries to answer whether the Regulation achieved its objective and whether it contributes to the effective operation of the internal market for aviation by ensuring appropriate protection for air travellers, while minimizing distortion of competition. The perceived inconsistencies and gaps shall be addressed.

In part three, other areas of liability concern, which could potentially lead to higher costs of future claims, will be identified. The brief emphasis shall be put on legal liability issues and possible claims deriving from pollutants in the aircraft air conditioning units and the radiation exposure at high altitudes.

II. THE AIR CARRIERS' CONTRACTUAL LIABILITY

Those of us who fly a lot are probably familiar with the announcement towards the end of (most) flights asking us to be careful when opening the overhead storage bins as items may fall out. Whenever I hear that announcement, visions of giant bags or several bottles of duty free liquor cascading onto someone's head appear before me. However, the reality is, bizarre accidents on flights do happen every day: it might be a simple case of tripping on the stairs while boarding a flight; colliding with a trolley in the aisle of an aircraft or a bag falling onto someone's head; while air crashes being the least common ones.

If you have been unlucky enough to experience an accident of such type, you were probably left wondering: "Who was at fault? Whom to blame? Who is liable?" Unfortunately, the answer is not as straightforward as we would like to think.

To reduce confusion, the Montreal Convention[5] was introduced by the UN's *International Civil Aviation Organization* (ICAO) in 1999 with the purpose of re-establishing uniformity and consistency in the rules relating to the international carriage of passengers, baggage and cargo, so that passenger rights are largely consistent.

Most of ICAO member states have so far adopted the Convention's provisions into their own laws. Furthermore, the European Union has, for example, also specifically incorporated them into Regulation (EC) 889/2002[6].

a. Scope of Liability

When it comes to *accidents*, Article 17 of the Montreal Convention states: "*The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.*"

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[5] *Convention for the Unification of Certain Rules for International Carriage by Air*, Montreal, 1999, ICAO doc 4698.

[6] *Regulation (EC) 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) 2027/97 on air carrier liability in the event of accidents*, Official Journal of the European Communities, L 140/4, May 30, 2002.

Seems straightforward enough? Well, establishing that *an accident* is in fact, *legally* an "*accident*", can still be very tricky. There have been many cases, in several different jurisdictions around the world, which have tried to constitute what is and what is not an "*accident"* under aviation law.

In that sense, a passenger aboard an Emirates flight bound for Dubai recently failed in her claim for damages against the airline for a back injury she allegedly sustained while aboard the aircraft. The passenger argued that she injured her back when attempting to avoid hot tea that had been spilled on her serving tray by a flight attendant.

The crucial question is: can one bring a claim against an airline for a hot tea injury suffered while aboard their aircraft. In the following lines, the law applicable to airline injuries shall be examined first; answering when a passenger is likely to be successful in a claim. Finally, conclusion why the passenger in the above-mentioned case failed in her claim is made.

b. Defining "Accidents" in the Air; Rules Concerning Liability

As the term "*accident*" has no clearly defined legal meaning, this further complicates the whole liability issue. Therefore, it is unclear can the carrier become liable for all passenger damages caused by any unusual or unexpected event, as long as they are external to the passenger, e.g. passenger-to-passenger assault or terrorist act.

Surely, the operation of an aircraft should be read to reflect not only the mechanical (technical) operation of the aircraft, but also services provided by the carrier. The carrier can therefore become liable for passenger-to-passenger assaults caused by e.g. over-serving of alcohol on a flight.

c. Liability Limits for the Carriage of Passengers by Air

Liability for the carriage of passengers by air can be strict or based on fault of the airline. Under strict liability, no negligence of the airline needs to be proven, whereas with fault-based liability, an airline will only be found liable if some form of negligence is established. Furthermore, liability can be limited with a cap on the potential level of compensation, or unlimited, in which case there is no theoretical cap on the amount of damages for which defendants are potentially liable[7].

Since 1934, the liability regime governing international air carriers' responsibility for injuries sustained by its passengers has been based upon carriers' presumptive liability rather than strictly upon fault. Beginning with the adoption of the Warsaw Convention[8], through its amendments that followed through the years, and culminating with the ratification of the Montreal Convention[9] of 1999, air passengers were normally not required to establish fault in order to recover claims for bodily injuries sustained during international flights.

Although it would seem that a non-fault based regime would, at first sight, easily facilitate the necessary proof required of any injured passenger, several unique issues have presented themselves, which have made recovery of claims by injured passengers against a presumptively liable carrier less than certain.

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[7] Compensation would in practice be limited to the value of an airline's insurance policy combined with its total liquidated assets.

[8] *Convention for the Unification of Certain Rules Relating to International Transportation by Air,* Warsaw, 1929.

[9] *Convention for the Unification of Certain Rules for International Carriage by Air,* Montreal, 1999.

Historically, under the Warsaw system, a passenger who sustained *injury* during an international flight had to fulfil two preconditions for recovery against the presumptively liable carrier: first, the injury must had been a result of an accident, which occurred during the transportation, by air. Second, the injury, which was sustained, must had been a bodily injury.[10]

Generally, whether the incident occurred during the transportation by air was normally a fairly uncomplex fact to establish. Under the provisions of the Warsaw Convention, the period comprising the transportation by air during which the accident must occur, begins with the embarkation, continues during the period the passenger is actually on board the aircraft, and ends with disembarkation.

Thus, if an incident, qualifying as an accident, occurred within that time, and resulted in a bodily injury, the passenger had right to recover damages against the carrier. What was not as easily definable, however, was primarily, whether the incident occurring was *an accident*; and, second, if it had produced a *bodily injury* recognizable under the Convention.

Surely, the Warsaw Convention had as its goal the creation of a liability regime applicable to international air transportation, nevertheless, being written in 1929, it was more concerned with protecting newly developing air carriers and fostering young airline industry, than providing full recovery to injured passengers.

On November 4, 2003, a new era in international air transportation law began with entering into force of the 1999 Montreal Convention. The Montreal Convention was intended to replace the Warsaw Convention, which, together with several protocols and agreements, had governed the liability rules applicable to the international air transport for more than 70 years.

The Warsaw liability limits had been inadequate and the Montreal Convention ensured a much more humane treatment of international airline accidents' victims. It introduced a modern, uniform legal framework that governed airlines' liability in the event of damage caused to passengers, baggage or goods during international journeys. The most important contribution was surely the principle of air carriers' unlimited civil liability in the event of bodily injury; that splits into two tiers:

- a first tier of strict carrier liability for damages of up to 113 000 SDRs[11];

- in excess of that amount, a second tier of liability based on the presumed fault of the carrier, which the carrier may avoid only by proving that it was not at fault (the burden of proof is on the carrier).

Nevertheless, unless it can be proven that both an accident and a bodily injury have resulted from an international flight, the plaintiff may not recover damages.

III. THE TURBULENT CASE LAW

An Emirates Airline Boeing 777 performing flight EK 521 from Thiruvananthapuram (India) to Dubai (United Arab Emirates) with 275 people on board was on its final approach to

[10] Warsaw Convention, Art. 17; *Air France v. Saks*, 470 U.S. 392; 105 S.Ct. 1338 (1985).

[11] Special Drawing Rights, as defined by the International Monetary Fund. One of the key features of the Montreal Convention is that airlines now accept strict liability for accidents up to a certain limited amount, where an accident is proven. This limit currently equates to about 144,000 EUR. The effect of this policy is that where a passenger's claim exceeds the SDR limit, an airline can use the defence that the accident was not due to their negligence or can attribute the accident to the negligence of a third party. Previously, airlines could have also argue that all necessary measures had been taken to avoid the accident, but the Montreal Convention removed this defence for claims up to the SDR limit. European Regulation (EC) 889/2002 has followed suit. The result is that most smaller claims are now settled out of court.

Dubai on August 3, 2016 when it attempted to go around from low height. The aircraft, however, did not climb, but after retracting the gear touched down on the runway and bursted into flames. Passengers evacuated safely - all 275 people on board were able to escape from the burning aircraft, but a firefighter died tackling the fire.

Following the incident, the airline offered 7.000 USD to all affected passengers for loss of luggage, inconvenience and "emotional trauma" of evacuating the aircraft. At first, this amount might not look unreasonable. However, although assuming that Emirates passengers will be justly compensated, especially knowing the publicity around this operational incident, in case of negligence or incompetence of the airline stuff, the proposed amounts could easily change.

It might be a slightly different story for severe turbulence though, especially where the result is just a hot tea spilled over a passenger's lap. Nevertheless, if such a spill can be attributed to turbulence, the carelessness of the cabin crew or even another passenger, the airline may well be liable. However, if the spill cannot be explained by any factor "*external to the passenger*" such as turbulence, or has entirely been caused by the passenger himself or herself, it is unlikely the airline could be blamed.

Furthermore, mental injury arising from airline accidents is not covered, although there had been significant efforts made to have the Montreal Convention amended to include reference to "*mental*", and not just "*bodily*" injury. The controversy arises because currently a passenger who, for example, has suffered a light scratch to the head during the emergency evacuation in the previously mentioned incident can claim against the airline for bodily injury, while a passenger suffering severe *Post Traumatic Stress Disorder*, following the same incident, but without bodily injury, will not be entitled to a claim at all.

a. A historical perspective of air carriers' liability for injuries on international flights and liability rules applicable to international air transportation as developed by the courts

As previously argued, the particular wording of Article 17 has given rise to a great deal of litigation and case law worldwide and much of this case law is focused on the definition of "*accident*" and what is meant by "*bodily injury*". There may be many occurrences or events on board aircraft that are not an "*accident*" for the purposes of the Montreal Convention. Countless articles appeared in different jurisdictions, dealing with the air carriers' liability for injuries on international flights. In the following lines, difficulties that have been encountered by passengers and carriers in establishing the existence or absence of a recognizable *accident* and *bodily injury* shall be examined.

In the United States in the case of *Air France vs Saks*[12], the US Supreme Court denied recovery of damages to a passenger who suffered deafness because of aircraft depressurization, which was a perfectly normal consequence of the normal operation of an aircraft in its landing phase. The Court found that the passenger's injury to the inner ear was caused by the passenger's own inner ear and sinus problems specific to her own body, rather than by anything "unusual or unexpected" about the operation of the flight. The US Supreme Court concluded that an accident under Article 17 arises only if the passenger's injury is caused by an unexpected or unusual event or happening which is external to the passenger.

[12] *Air France v. Saks*, 470 U.S. 392 (1985), US Supreme Court; retrieved 20/04/2017 from URL: https://supreme.justia.com/cases/federal/us/470/392/

In *Kyrs vs Lufthansa*[13], a passenger suffered a heart attack on a transatlantic flight from Miami to Frankfurt and started proceedings against Lufthansa for aggravating the damage to the passenger's heart by not landing the aircraft before the scheduled destination, so that the passenger could immediately go to hospital. The US Court of Appeal concluded that the injury was not caused by an unusual or unexpected event or happening that is external to the Plaintiff, and so did not constitute an accident within the meaning of the (Warsaw) Convention.

In *Singh vs Caribbean Airlines Limited*[14], it was held that as long as the crew did not depart from the airline's policies and procedures in responding to a medically ill passenger, there was no accident.

Nevertheless, there are cases where there can be recovery under Article 17. In *Olympic Airways vs Hussain*[15], the US Supreme Court again considered the definition of "*accident*" from *Air France vs Saks*, which was that liability arises only if the passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. In the particular case, the passenger had died on board the flight because he was allergic to cigarette smoke. His wife had asked the flight attendant to move him to a seat further away from the cigarette smoke and the flight attendant had falsely informed her that there were no vacant seats. The Court held that the flight attendant's failure to offer assistance constituted an accident.

As one can see from above, the concepts of "*accident*", "*bodily injury*" and the wording of Article 17 do give rise to a great deal of case law in different jurisdictions.

b. Blood Money vs. Acts of God

In the Islamic nations, such as the United Arab Emirates[16], the matter can possibly get even more complicated with the issues of the local Sharia law, as the plaintiffs can claim also for "*Diya"* (blood money) against the airline for liability under Article 17 of the Montreal Convention.

Under Sharia law, the amount of compensation that may be granted to the heirs in the event of wrongful death is called Diya. If a wrongful death is proven, a fixed sum of money may be awarded without proving any damage, which may have been suffered by the heirs.

In another recent case, plaintiffs (family of a deceased passenger) claimed for compensation of material, moral, physiological damages and Diya against a major UAE airline.

Factually, the passenger was taken ill on board a flight bound for the UAE. An hour passed from the time of the start of the symptoms to the passenger's eventual death by heart attack. During this time, two on-board doctors attended to the passenger, and medical care was administered, which included the use of a defibrillator. The incident took place over the sea.

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13 *United States Court of Appeals, Leonard Krys, Rebeca Krys, Plaintiffs-Appellees, v. LUFTHANSA GERMAN AIRLINES*, Defendant-Appellant, No. 96-4430, retrieved 20/04/2017 from URL: http://caselaw.findlaw.com/us-11th-circuit/1005408.html

14 United States Court of Appeals, *Soorajnine Singh, Cyndiana Singh, Plaintiffs–Appellants, v. CARIBBEAN AIRLINES LIMITED*, Defendant–Appellee, No. 14–14661, retrieved 20/04/2017 from URL: http://caselaw.findlaw.com/us-11th-circuit/1711344.html

15 OLYMPIC AIRWAYS V. HUSAIN (02-1348) 540 U.S. 644 (2004) 316 F.3d 829, affirmed. Retrieved 20/04/2017 from URL: https://www.law.cornell.edu/supct/html/02-1348.ZD.html

16 The legal system in Dubai is a combination of Sharia, civil and criminal laws, while in other emirates only Sharia is implemented.

The airline was eventually not found responsible for the death, which was caused by a heart attack internal to the passenger. An emergency landing would have been difficult given that the aircraft was above the sea and the incident from start to finish lasted approximately one hour, which was not sufficient for an emergency landing. The crew were not advised by *Medlink*[17] to make an emergency landing, and the defendant provided the deceased with all medical care required to deal with a heart attack. The Court found that there could be no liability on the part of the airline for *an act of God*.

c. What is the Future for Hot Tea Spill Lawsuits against Airlines?

Coming back to our *spilled-tea-incident*. The particular flight was an international flight bound for Dubai and the Montreal Convention was applicable.[18]

The passenger's version of the tea incident was that she was seated in the aisle seat, when the flight attendant offered her a cup of tea. The flight attendant was distracted as she was putting down the serving tray with the cup of hot tea on it and the hot tea spilt on to the passenger's body. She claimed that in order to avoid being burnt, she had turned, which caused a sharp pain in her lower back.

The airline's version of the incident was contained in their standard in-flight incident report, the so-called "*KIS Report*", which was completed in-flight by the flight supervisor who spoke with the passenger while she was lying down on the floor near the First Class section. It stated: "*Description: Miss D. spilt tea on her leg when the cup slide off the tray table. Action: Crew rendered first aid, cooling burn and applying burn cream. PJs given from First Class as loose fitting and to give time to dry trousers. Customer satisfied with treatment received.*"

The passenger's travel insurance covered the cost of the medical procedure, treatment and hospitalization at her destination for her back injury. Her claim was for damages of almost 800.000 USD for continuing treatment on her return home, wage loss, home assistance and other general damages. She made no claim for treatment of burns on her body.

As previously argued, the Montreal Convention is "passenger friendly" because it requires international airlines to assume liability for passenger injuries, unlike in domestic flights where a passenger usually needs to prove that the airline was negligent.

In the particular case, the airline did not dispute that the hot drink spill was *an accident*. The contentious issue was whether it caused the back injury to the plaintiff.

The plaintiff (the passenger) has failed to prove causation, namely that she sustained that injury or even aggravated an already existing injury during the particular flight and eventually failed because her evidence was unreliable and unsatisfactory in many respects. For example, she changed the description of how she fell, she did not complain about her back injury during the flight, she waited 4 days before seeking medical treatment, and none of the medical practitioners who treated her referred to the tea incident in their notes.

The defendant (the airline) relied on the in-flight incident report only. It did not call the flight attendant to give evidence. The court admitted the in-flight incident report into evidence as a contemporaneous record.

The alleged back injury in this particular case was unusual for a hot drink spill as in almost all lawsuits for hot tea or coffee spills, the injuries are burns.

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[17] The methodology by which Emirates crew contact medical professionals on the ground for medical advice. Used by several large airlines.

[18] *Dibbs v. Emirates* (2016), NSWSC 1332, September 11, 2016.

The slide of the tea off the tray table and its fall onto the plaintiff's lap were events "external" to the plaintiff. Moreover, those events were unusual and unexpected. Although it may be common for an airline seat to shake when its occupant moves around, it is not common for beverages placed on the tray behind that seat to fall onto another passenger. It is the failure of the tray table to hold beverages securely despite passenger movement in the seat in front that is unexpected. Therefore, the spill was *an accident*. Whether the plaintiff contributed to the injury (i.e. spilled the tea on to herself) is an Article 21 defence that the airline can use. Therefore, in the right circumstances, air passengers could succeed in hot tea or coffee spill injury claims.

IV. AIR CARRIERS' SPECIFIC LIABILITY FRAMEWORK IN THE EU

Within the framework of the common EU transport policy, a proper level of compensation for passengers involved in air accidents is of vital importance. In the past years, the EU has promulgated several "consumer protection" regulations that address a variety of airline passenger issues, including flight delays, cancellations and denied boarding. Nevertheless, despite the adoption of new standards, European legislation on air carriers' liability seems to be behind the needs of both passengers and airlines. Of course, each case needs to be examined on its own circumstances and merits, but the impressive number of passenger complaints filed for delays and cancellations and the conflicts in those matters best expresses the need for evolution in this field of air law.

The most controversial Regulation's purpose was to compensate passengers suffering the inconvenience of being delayed or refused boarding through mandatory payment and provision of certain services. More precisely, the Regulation (EC) 261/2004 requires airlines to grant financial compensation to passengers in the event of denied boarding or flight delay or cancellation, assist them in changing their travel plans by giving them a choice between rescheduling of the ticket or a refund, and to pay for their food and accommodation, while waiting.

However desirable the Regulation might look, it raised several serious legal questions regarding the relation with the previously mentioned international conventions that address carrier liability for passenger injuries, including delay in air carriage.

Specifically, under the Montreal Convention, air carrier liability for loss caused by delay is excluded where the carrier can show that it took all reasonable measures to avoid the losses or that it was impossible to take such measures. Nevertheless, under European Union Regulation 261/2004 compensation is to be paid for short-notice flight cancellations, unless the carrier proves that "*the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken*".

The two regimes clash because flight cancellation can be seen as the ultimate form of delay. The European Court of Justice (ECJ), while acknowledging the supremacy of the Montreal regime, has held that in the case of flight cancellation for technical reasons, the carrier is liable for EU compensation unless the problem that leads to the cancellation stems from events which "are not inherent in the normal exercise of the activity of the air carrier concerned" as well as beyond its actual control.

In the following lines, we shall look at the relationship between the EU law and international norms, in order to explain the compliance with established rules of international law.

a. The Prevailing Concept of Exclusivity?

Regional arrangements, such as the EU ones can affect the objective of global uniformity of international conventions.[19] - As already previously argued, the Conventions for the Unification of Certain Rules Relating to International Carriage by Air (the Warsaw Convention of 1929 and the Montreal Convention of 1999) directly address the issue of air carrier compensation to passengers for damages suffered because of "delay" and explicitly provide that the remedies provided thereunder are exclusive. Admittedly, neither the Warsaw, nor the Montreal Convention explicitly mention the term "cancellation" or "denied boarding", though one could possibly include them within the concept of "delay" addressed in Articles 20 and 19 of the Warsaw and the Montreal Conventions, respectively.

Under the Montreal Convention, passengers can recover *actual damages* up to 4.150 SDRs for personal delay and 1.000 SDRs for baggage delay[20], or more if it is proven that the carrier engaged in wilful misconduct ("done with intent to cause damage, or recklessly and with knowledge that damage would probably result")[21]. For delay of cargo, one can recover actual damages up to 17 SDRs per kilogram, but not more, as the ceiling for cargo is unbreakable.[22]

The very fundamental purpose of international transportation conventions is surely the uniformisation of international law within their respective field of application. This is also true with respect to the Warsaw and the Montreal Conventions for the Unification of Certain Rules Relating to International Carriage by Air. In order to fulfil this purpose, the Convention is ought to be exclusive in matters covered by it. State parties to such Convention are bound by international law to respect this feature of the Convention in order to facilitate its principal purpose.

The Warsaw and the Montreal Conventions impose liability on the carriers to compensate all real consequential losses up to a defined amount. On the other hand, the EU Regulation 261/2004 compensates inconvenience shared by all passengers rather than the individual losses subject to claim under the Conventions. The passenger who is provided with care under the Regulation retains all rights to claim for other consequential losses resulting from the delay under the applicable international regime.

The Regulation (EC) 261/2004 stipulates fixed compensatory amounts. These are not in any way correlated to actual loss and are owed irrespectively of whether the passenger suffered any loss because of the cancellation. Therefore, the European Union insists that whereas the Warsaw and the Montreal Conventions seek to provide damages, the Regulation (EC) 261/2004 focuses on compensating inconvenience and imposing sanctions upon airlines that cancel flights, especially cancellations based on commercial considerations. The passenger retains the right to sue under the Warsaw or the Montreal Convention up to the limits on liability defined for other consequential damages flowing from his delay due to cancellation.

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[19] Diederiks-Verschoor, I.H.Ph. (2012), *An Introduction to Air Law*, The Hague, Wolters Kluwer Law & Business, p. 251.

[20] Montreal Convention, Articles 22(1) and (2).

[21] Montreal Convention, Article 22(5).

[22] Montreal Convention, Article 22(3).

b. Montreal vs. Brussels

The Contract of Carriage by Air has traditionally been the subject of international law[23], falling under a regime of the Warsaw and the revised Montreal Convention, to which all EU Member States are signatories. The EU itself acceded to the Convention by Council Decision, and with the substantive provisions of the Convention being incorporated into the EU's legal order.

Surely, (EC) 261/2004 was controversial from the very beginning. Pursuing the aim of guaranteeing a high level of protection for air passengers (consumers), it came under a vigorous fire from the European airlines, particularly the *low cost* ones.[24] They accused the Regulation of imposing additional obligations upon them[25] and of putting them at a comparative disadvantage in the market in relation to carriers coming from outside of the EU.

Nevertheless, the European institutions concluded that there was no conflict between the Regulation (EC) 261/2004 and the Montreal Convention, since they established two separate compensation systems pursuing different objectives. They were hence complementary and not in conflict. Furthermore, given that the "damage" constituted by the inconvenience caused by delay is almost identical for all passengers on the same flight, they can receive the same form of standardized compensation. As a result, such "damage" is not covered by the Montreal Convention, which only concerns claims for damages assessed on individual basis.

V. ONGOING 261 CONTROVERSIES

Regulation (EC) 261/2004 establishes common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. It is directly applicable across the entire EU; it is not to be transposed by the Member States and thus it ought to be the same in all Member States.

Over the years, different analyses of the Regulation have ranged from praise for providing a high degree of protection for passengers, to warnings of multiple failures, in practice leading to significant problems in the implementation of passenger rights.

a. Liability Exoneration and Enforcement Controversies

The Regulation is at almost every point of comparison more favourable to the passenger/consumer than the Montreal Convention. Furthermore, the scope of application of the Regulation's provisions is broad. Nearly all passengers departing from or to the territory of an EU Member State can invoke its protection.[26] Nevertheless, whilst its scope of application is broader than that of the Montreal Convention (which was *prima facie* inapplicable in the case of purely domestic flights), it is not unlimited. The Regulation's regime is mandatory and cannot be excluded, limited or waived.

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[23] See: McClean, D. (2017), *Carriage by Air*, Chitty on Contract, Volume II – Specific Contracts, London, Sweet & Maxwell.

[24] Arnold, K. (2007), *Application of Regulation (EC) No 261*, Journal Article published in *Air and Space Law*, 32(2), p. 93.

[25] Schladebach, M. (2006), *Europäisches Luftverkehrsrecht: Entwicklungsstand und Perspektiven*, Journal Article published in *Europarecht*, p. 789.

[26] Regulation (EC) 261/2004, Art. 3.

An operating air carrier is not obliged to pay the compensation in accordance with the Regulation, if it can prove that the cancellation was caused by extraordinary circumstances, which could not have been avoided even if all reasonable measures had been taken.

The European Commission has noted that in practice, the experience has shown that, in most cases, airlines invoke these extraordinary circumstances when facing a cancellation. However, such practice should not be abused.[27]

Certainly, the biggest controversy arose in the context of financial compensation to passengers whose flights had been delayed, but not cancelled, following the ECJ's judgement in the *Stugeron* case. The Court interpreted the Regulation in line with its consumer-protective purpose and therefore extended the right to financial compensation to passengers affected by a delay only.

Furthermore, in terms of institutional structure, it is not acceptable that certain Member States have entrusted the enforcement of the Regulation (EC) 261/2004 to their national civil aviation authorities and the others to ministries of transport or some even to their consumer or trade inspectorates.

Regulation's provisions on enforcement of its rules, just like its substantive provisions, have given rise to a number of further legal questions. There is much ambiguity, lack of clarity and uncertainty about the actual powers that have been entrusted to *National Enforcement Bodies* (NEB), which are responsible for ensuring the respect of passengers' rights (they may decide on enforcement actions based on individual complaints). Also, it is unclear whether individual instances of non-compliance or only systematic and serious non-compliance should attract a fine. We can argue that the role of NEBs should hence be more precisely defined and, in any case, NEBs should be taking a more proactive approach in investigating and enforcing customer rights.

b. The Boom of Specialised 261 Claims Agencies

It can be noted that specialized claims agencies have also decided to step into what they consider a new and lucrative market, thus offering management services of compensation claims. Most of such agencies are advertising their services on the Internet and are soliciting clients to bring compensation claims against airlines.

Incorrect practices by some claims agencies triggered the publication of an *Information Notice*[28] by the European Commission to the attention of air passengers on March 9, 2017, through which the Commission formally reminded claim agencies specializing in Regulation (EC) 261/2004 of their duties and invited Member States to ensure their full compliance with relevant EU rules.

The Notice focused on four key, general legal obligations that claim agencies should strictly observe, subject to adjustments in accordance with each EU Member State's national law.

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[27] See: Communication from the Commission to the European Parliament and the Council pursuant to Article 17 of Regulation (EC) No 261/2004 on the operation and the results of this Regulation establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delays of flights, COM/2007/0168 final (5.2).

[28] *Information notice on relevant EU consumer protection, marketing and data protection law applicable to claim agencies' activities in relation to Regulation 261/2004 on air passenger rights*, retrieved 19/04/2017 from URL: https://ec.europa.eu/transport/sites/transport/files/2017-03-09-information-note-air-passenger-rights-on-claim-agencies_en.pdf

1. In that sense, the claims agencies should provide clear information in relation to the price of their services. No uncertainty should be created in the calculation of the total fees in the eyes of passengers.
2. The Commission underlined that, where a passenger decides to be represented in court by another person or entity, in line with applicable national legislation, claim agencies must be able to provide a signed power of attorney with a copy of ID or passport of the passenger.
3. The third key legal principle the Commission considered necessary to remind to claim agencies, is that persistent unsolicited telemarketing is prohibited under the Unfair Commercial Practices Directive.
4. Finally, the notice stressed that any transfer to claim agencies of passengers' personal data by a third party to the contract of carriage (for example, ticket vendors and travel agents) must be expressly permitted by the passenger, and that processing of such information is in any case submitted to EU data protection rules.

Whilst the first, third and fourth abovementioned rules are usually not raised in disputes between air carriers and passengers under Regulation (EC) 261/2004, the second, relating to the power of attorney of claim agencies, is particularly interesting. - The scenario consists of a passenger liaising with a claim agency through its website and the latter bringing the case before the court through the services of a lawyer. As far as we are aware, the bar associations have still not been taking any actions against this unfair competition, although by providing legal advices, the claim agencies' activity is in breach of the practice of law, when they offer such legal advising services to the public.

Furthermore, airlines sometimes encounter identical claims, for the same passenger, emanating from three or four different claim agencies. Aside from increasing the administrative burden on airlines, data systems hence have to be implemented by airlines to minimize the risk of duplicate payments.

c. Croatian 261 Perspective

In certain EU Member States, airlines systematically deny compensations, knowing that the risk of their exposure to claims before the courts is remarkably small.

On the contrary, in Croatia, the situation is very different. The implementation and application of Regulation (EC) 261/2004 has not triggered a substantial number of cases, nor intensive public or academic debate. Based on the analysis of the statistical data provided by the Croatian national carrier, it can be stated that the enforcement of the Regulation in Croatia is generally in accordance with the EU Law and the case law of the CJEU. Furthermore, only a very limited number of cases has been brought before the NEB.

The Croatian positive legislation stipulates that the affected passenger must first submit a written complaint, with relevant supporting documents, to the airline itself. The airline must confirm the receipt of the passenger's complaint in writing, and must reply to the complaint within 15 days. The reply must include a reasoned opinion and suggestion about how the complaint might be settled. If the airline does not agree with the complaint, it must provide justification for its refusal of the whole or part of the claim. If agreement cannot be reached between passenger and the airline, or if the airline refuses to reply within the timeframe provided by the law, the passenger submits the complaint to the *Croatian Civil Aviation Authority* and, as the final resort, the affected air passenger has a choice to submit a complaint to the court.

Besides having only one strong national airline and a rather small market "creating" only a limited number of cases, I assume that the length of the judicial proceedings, their cost and the uncertainty of the results might also deter passengers in Croatia from seeking judicial enforcement of their rights. This might also be attributed to sometimes-problematic application and lack of knowledge of the EU law by the Croatian courts and attorneys. Hence, the author has not identified any cases or decisions concerning Regulation (EC) 261/2004 claims made before the Croatian courts.

It is surely puzzling to note that Croatian air passengers submit so few complaints, and that the case law is non-existent, with very little attention given to the issue in public. Despite this, it can generally be believed that the existing legal framework and institutional capacities in Croatia are used effectively to protect air passenger rights.

V. FUTURE AIRLINE LIABILITY CHALLENGES

a. Contaminated or Polluted Air in the Aircraft Cabin

Airline crewmembers have tough jobs. They have to maintain aircraft's safety while dealing with often-difficult passengers, all with smiles on their faces. Furthermore, flight attendants and pilots also face cosmic radiation and contaminated air in their daily work, and legal actions have already been announced in some jurisdictions because of the allegedly contaminated air inside plane cabins that made some flight attendants seriously ill.[29]

What is being criticized? - At the altitude at which commercial jet aircraft fly, the air pressure does not allow humans to breathe independently. To overcome this, hot compressed air is drawn from the plane's engines and, once cooled, it is directed into the cabin to supply breathable air. This does not pose a health risk in itself, but it is believed that potential faults in the engine seals can lead to heated engine oil, hydraulic fluids and harmful chemicals called organophosphates, used to lubricate the engine's metal parts, contaminating the air. It is claimed that this can cause negative health consequences. These health effects are known as "*aero toxic syndrome*", but there is still no scientific evidence that shows that this condition really exists or positive evidence of a link between exposure to contaminants in cabin air and possible long-term health effects, although such link cannot be excluded.

Hence, the possibility of long-term health effects from repeated exposure to fume events is an area that needs more research. Nevertheless, this is an area of possible future liability that could potentially involve significant costs for airlines.

b. Cosmic Radiation

Beside contaminated air, flight attendants and pilots also face cosmic radiation. It cannot be seen or felt, but at any given moment, tens of thousands of highly charged particles are soaring through space and slamming into Earth from all directions.

[29] Figures from the UK Civil Aviation Authority show that since 2010 they have received more than 1,300 reports of smoke or fumes inside a large passenger aircraft operated by a British airline. See URL last visited 19/04/2017 at: http://www.bbc.com/news/health-32786537

These particles, sometimes called cosmic rays[30] or cosmic ionizing radiation[31], originate from the farthest reaches of the Milky Way. They are bits and pieces of atomic cores shot to nearly light-speed by black holes and exploding stars, and they smash into anything and everything in their way. With that incredible speed and energy, it is no surprise that cosmic rays can easily penetrate human flesh and, in the process, pose risks to human health. Their damage to tissues and DNA have been linked to cancer and reproductive problems, for example.

Those who spend a lot of time high up in the atmosphere, e.g. - flight or cabin crews, face much higher exposure to cosmic radiation. On the contrary, closer to the ground you are, less exposure you will get. For this reason, the *Centre for Disease Control and Prevention* (CDC)[32] classified airline crew members as radiation workers in the USA. In fact, their *National Council on Radiation Protection and Measurements* reported[33] that aircrews have, on average, the highest yearly dose of radiation out of all radiation-exposed workers in the USA.

Airlines are aware of the risk, and to minimize exposures, they limit crewmembers working on flights that are very long or that fly over the poles, which are associated with higher exposures. Pregnant crewmembers are also particularly at risk and should not be flying.

V. CONCLUDING REMARKS

The aviation industry has evolved from a means of transportation into a vehicle of life in general. In view of this pivotal role, ensuring aviation safety should always be paramount. Nevertheless, accidents have occasionally always been happening and the need for adequate compensation in the event of accidents and the consequent harm to passengers and their luggage – while also preventing excessive or spurious claims against airlines – has led to the development of an international regime regulating the air carriers' liability. Nevertheless, airlines seem to be losing gamble. They suffer big losses and face future liabilities.

As previously explained, passenger delays are currently regulated by two influential international and regional legal regimes: *The Convention for the Unification of Certain Rules for International Carriage by Air*, signed in Montreal on May 28, 1999 and the (EC) Regulation 261/2004 of the European Parliament and of the Council. The intention of the Montreal Convention was to create a harmonized, uniform, reliable regime. Even though the European Union and its Member States are signatories to the Montreal Convention, the European Union introduced the EC Regulation to further protect passengers from the negative effects of denied boarding, cancellation and delay. Furthermore, since the introduction of the new regime the Court of Justice of the European Union has given a number of controversial judgments concerning the liability provisions of the EC Regulation and all resulting with certain ambiguity as two conflicting regimes now govern the airline liability.

The Regulation has, on one hand, certainly been one of the most successful areas of EU law in the field of consumer protection, contributing to the creation of the internal market in aviation services.[34] On the other, however, the Regulation has received heavy criticism from

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[30] See URL last visited 10/04/2017: http://www.srl.caltech.edu/personnel/dick/cos_encyc.html

[31] See URL last visited 10/04/2017: http://chemed.chem.purdue.edu/genchem/topicreview/bp/ch23/radiation.php

[32] See URL last visited 10/04/2017: https://www.cdc.gov/niosh/topics/aircrew/cosmicionizingradiation.html

[33] See URL last visited 10/04/2017: https://www.ncrponline.org/PDFs/2012/DAS_DDM2_Athens_4-2012.pdf

[34] Prassal, J. (2015), *Liberalisation, Information and Transparency: Three Tales of Consumer Protection in EU Aviation Law*, Journal Article published in *European Review of Contract Law*, (11), p. 281.

the aviation industry – the obligations as laid down in its provisions, and especially as later expanded upon by the ECJ, are said to impose serious financial burdens on air carriers, and pose challenging questions as regards the relationship between EU law and international norms, notably the Montreal Convention which is to regulate exclusively all liability arising from the contract of carriage by air.

Preserving uniformity in liability is extremely important for air carriers and passengers. As the Montreal Convention expressly states that the remedies it provides are exclusive and directly addresses the issue of airline liability to passengers for damages suffered because of delay, it could be argued that the establishment of a conflicting EU Regulation raises cause for concern. Hence, amendments to it, if not a repeal of it, will have to be made in the near future.

The proposed reform of the Regulation is viewed critically by airlines and passengers alike. The airlines are hoping that their financial obligations will be limited, while passengers are hoping that their rights to assistance and compensation will be strengthened. It is to be hoped that the new Regulation will bring more clarity and better enforcement mechanisms.

Although the fatality rate of commercial aviation has fallen considerably in the past few years, and aviation has become safer, it cannot be argued that many airlines are suffering financially and that the liability regimes pose further financial burden on them. As there are huge potential exposures arising from an actual accident, and areas for future liability concerns can be identified, the future of the industry certainly looks turbulent.

RIGHTS OF PERSONS WITH DISABILITIES AND REDUCED MOBILITY IN THE EU AND CROATIAN TRANSPORT LAW

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SUMMARY

Passengers are, over the past ten years, placed at the heart of the European transport policy. In order to ensure the comparable opportunities to travel to all citizens, special attention was devoted to passengers with disabilities and with reduced mobility. The purpose of this research is to make an analysis and comparison of the legal sources relevant to each branch of transport and to examine the extent of the achievement of their rights to free movement, freedom of choice and non-discrimination, as well as the right to obtain free of charge assistance and information with adequate visual and audible system. The emphasis is put on the EU regulations due to their direct application not only on the carriage of passengers between Member States but also on the domestic carriage. A comparative review of applicable provisions in all modes of transport showed that there is the common core of rights (in different shades) guaranteed to passengers with reduced mobility. Whilst some differences are linked to the specificities of the different transport sectors, there are some rules whose appliance in all modes of transport could enhance the quality of protection of passengers with disabilities and reduced mobility. In concluding remarks guidelines for possible improvements are offered.

Key words: *persons with reduced mobility, persons with disabilities, passengers rights, right to assistance, accompanying person, mobility equipment, carrier*

1. Introduction

Over the last decade the EU adopted a number of regulations and directives aimed at enhancing passengers' rights in all modes of transport. Thereby a 'separate and specialised subspecies of transport law, as well as consumer law' was created.[1] The aim of placing users at the heart of transport policy, outlined in the 2001 White paper on the European transport

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1 Marin, J., Function of the insurance related to protection of passengers' rights and of carriers' professional interest, Zbornik radova: Dani hrvatskog osiguranja 2014, p. 43.

policy,[2] was attained. Within the realm of passengers rights special attention was given to the world's largest minority group – people with disabilities.[3, 4]

In order to provide passengers with disabilities and reduced mobility travel opportunities comparable to those of other citizens, European legislator prescribed for them a comprehensive set of rights, aligned with the Art. 26 of the Charter of fundamental rights of the European Union.[5] According to the latter the EU recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the file of the community. Improvement of the quality of transport for elderly people, passengers with reduced mobility and for disabled passengers is also in the Commission's vision of future transport stated in the 2011 White paper.[6] Moreover, by the establishment of an appropriate legal framework for passengers with disabilities, the European Union fulfils the requirements of the UN Convention on the Rights of Persons with Disabilities (the UN Convention).[7] Even though the UN Convention is widely accepted, none of the international instruments regulating passengers' rights contains provisions regarding rights of passengers with disabilities and reduced mobility.[8]

The rights of disabled passengers and passengers with reduced mobility in the EU are contained in several regulations. The first and the only one exclusively devoted to these passengers, was the Regulation (EC) No 1107/2006 from 2006 regulating the rights of disabled persons and persons with reduced mobility in air transport.[9] Modelled after this

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2 White paper: European transport policy for 2010: time to decide, Commission of the European Communities, Brussels, 12.9.2001, COM(2001) 370 final, pp. 82-83.

3 One in six people (around 80 million people) in the EU has a disability that ranges from mild to severe. See: European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, European Commission, Brussels, 15.11.2010, COM(2010) 636 final, p. 3. According to the Croatian Institute of Public Health Report 11,9% of the population of the Republic of Croatia have some type of disability. See: Report on persons with disability in the Republic of Croatia for the year 2016, April, 2016. The number of persons suffering from reduced mobility is even greater, since it encompasses all persons with reduced mobility regardless of its cause and duration (details infra: 2.).

4 The Treaty on Functioning of the European Union requires the Union to combat the discrimination based on disability and, in the Art. 19, gives it the power to adopt legislation to address such discrimination.

5 OJ, C 83/02, 30.3.2010. The Charter became legally binding with the entry into force of the Treaty of Lisbon, on 1 December 2009.

6 White paper: Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system, European Commission, Brussels, 28.3.2011, COM(2011) 144 final, p. 24.

7 The UN Convention was adopted on 13 December 2006 and entered into force on 3 May 2008. The UN Convention has been ratified by 176 countries, including Republic of Croatia, and EU. See Official Gazette of the Republic of Croatia – International Contracts, no. 6/07. For the EU the UN Convention entered into force on 22 January 2011. See: Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC), OJ L 23/35. It is the first human rights convention to which the EU has become a party, and its provisions falling within the EU competence are binding on the EU institutions and oblige Member States.

8 It is interesting to note that first measures to facilitate air travel to elderly and disabled passengers were adopted by the International Civil Aviation Organization in 1968, recommending rendering assistance to invalid passengers in making direct transfer from one aircraft to another. More on the historical background of regulatory provisions: ABEYRATNE, Ruwantissa, The Rights of Disabled Airline Passenger: A New Approach, Zeischrift für Luft-und Weltraumrecht, 2/2011., p. 179-185.

9 Regulation (EC) No 1107/2006 of the European Parliament and the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (the Air Regulation), OJ L 204, 26.7.2006. Regarding the rights in the event of cancellation or delay in departure see: Regulation (EC) No

Regulation,[10] in the following five years, special chapters in all regulations governing passengers' rights were adopted.

In the Republic of Croatia the responsibility to devote special care to the protection of persons with disabilities and their inclusion in social life at the national level is prescribed in the Art. 58/2 of the Constitution of the Republic of Croatia.[11] However, provisions on persons with disabilities and reduced mobility and their rights as passengers are in Croatian legislation rare and sporadic. Significant progress of their rights occurred with the accession of the Republic of Croatia to the EU since all regulations became directly applicable in Croatia, not only on the carriage of passengers between Member States but also on the domestic carriage.

2. Legal framework

The UN Convention provides the normative framework for numerous measures which all parties to the Convention should introduce in order to grant human rights of persons with disabilities. Accessibility to transport, imposed by the Art. 9 of the UN Convention, is only one among numerous aims to be fulfilled in order to enable persons with disabilities to live independently, participate fully in all aspects of life and exercise their right to free movement.

In order to prevent discrimination of disabled persons and to ensure them necessary protection and assistance when travelling, in addition to the protection guaranteed to all passengers as the weaker party to the transport contract, the EU legislator adopted a whole legislative framework consisting of the following regulations:

- Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, (the Air Regulation) and Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 on air carrier liability in the event of accident,[12] (the Montreal Regulation)

- Regulation (EC) No 1371/2007of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations,[13] (the Rail Regulation),

- Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway,[14] (the Sea Regulation) and Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents,[15] (the Athens Regulation),

261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, OJ L 46, 17.2.2004.

[10] A model accepted in the Air Regulation is, in comparison to US regulation, in the legal literature recognised as a 'model of brevity and concision'. O'KEEFE, Constance, Air travel for the Disabled: Isn't it Time for a Harmonized Approach?, Air & Space Law, vol. XXXI/6, November 2006, p. 410

[11] Official Gazette of the Republic of Croatia, no. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014.

[12] OJ L 140, 30.5.2002.

[13] OJ L 315, 3.12.2007. See Chapter V, Art.19-25 (Disabled Persons and Persons with Reduced Mobility).

[14] OJ L 334, 17.12.2010. See Chapter II, Art. 7-15 (Rights of Disabled Persons and Persons with Reduced Mobility).

[15] OJ L 131, 28.5.2009.

- Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004,[16] (the Bus Regulation).

The aim of above regulations is to achieve a consistent legal framework in the interests of all passengers travelling in all modes of transport and to ensure that all passengers are entitled to enjoy the same level of the quality and safety wherever they travel within the EU. The EU protection rules basically cover passenger services within the Community or performed by Community carrier but, due to the numerous exceptions from the above rule, especially in the Sea and the Bus Regulations, special attention should be paid to their scope of application.[17] Even though the regulations are directly applicable in the Member States,[18] the wanted effect of harmonisation of passengers' law, and thereby of unification of rights of passengers with disability and reduced mobility, is additionally reduced by the possibility to exempt the application of certain provisions of regulations on domestic transport.[19]

In all cases of carriage of passengers falling out of the scope of the application of EU regulations, passengers with disability or reduced mobility are, under the Croatian law, not adequately ensured.

3. Definition of the phrase 'disabled person' and 'person with reduced mobility'[20]

Definition of the persons with disabilities, according to the Art. 1 of the UN Convention, includes those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

The EU went a step further, expanding the circle of addressees to "disabled person" and "person with reduced mobility (PMR)." Definitions of those terms have the same wording

16 OJ L 55, 28.2.2011. See Chapter III, Art. 9-19 (Rights of Disabled Persons and Persons with Reduced Mobility).

17 Art. 2 of the Bus Regulation, Art. 2 of the Rail Regulation, Art. 2 of the Sea Regulation, Art. 1 of the Air Regulation.

18 In spite of their direct applicability the application of the Sea Regulation is prescribed by the art. 606 of the Maritime Code (Official Gazette of the Republic of Croatia, no 181/04, 76/07, 146/08, 61/11, 56/13, 26/15); the application of the Rail Regulation is prescribed by the Art. 62 of the Law on railways (Official Gazette of the Republic of Croatia, no. 94/2013 and 148/2013); in the Art. 1.a Law on obligations and proprietary rights in air traffic (Official Gazette of the Republic of Croatia, no. 132/1998, 63/2008, 134/2009, 94/2013) its compliance with the Air Regulation is affirmed.

19 The only exemption still in force for the Republic of Croatia is the one regarding the provisions of the Rail Regulation. The first 5 years period of exemption lasted for Croatia shorter - from the date of Croatia's accession to EU, which took place on July 1st 2013, until the December of the 2014. (Art. 65/10 of the Law on railways). In the 2014 exemption was renewed until the December 3rd of the 2019, by the Ministry's Decision on Suspension of the Application of the Provisions of the Regulation (EC) No. 1371/2007 of the European Parliament and of the Council of 23 October 2007 on Rail Passengers' Rights and Obligations, Official Gazette of the Republic of Croatia, no. 120/2014.

The exemption period for certain provisions of the Bus Regulation lasted until the 1. March 2017. (Art. 6 of the Law on the implementation of the Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004, Official Gazette of the Republic of Croatia, no. 127/2013).

20 On different definitions of terms 'disability', 'impairment' and 'handicap' see: ABEYRATNE, R., op. cit., p. 177-179.

in all EU passenger rights rules.[21] It means any person who is disabled or whose mobility is reduced because of any physical disability (sensory or locomotory, permanent or temporary), intellectual impairment, age or any other cause of disability, and whose situation needs special attention and adaptation to the person's needs of the services made available to all passengers. The phrases 'disabled persons' and 'persons with reduced mobility' are used in its broadest sense in order to accommodate the needs of wide spectrum of disabilities, and such approach is to be welcomed. The most significant widening of the meaning is deriving from the embracement of the reduced mobility regardless of its cause and duration. Thus, the pregnant passenger, obese passenger or old passenger whose condition clearly reduces its mobility will enjoy all the rights available to the PRMs.[22] Since special treatment for disabled or reduced mobility persons, prescribed by EU regulations, covers not only the journey itself but much longer period of time, starting from the seat reservation until the travel finalisation and in case of lost or damaged assistive devices even longer, each request for assistance should be appraised individually, taking into account not only the person's condition (grade of reduced mobility) but also some other circumstances that could be relevant, such as the size of the port, station or airport, time between flights etc.

The broadness of the PRM definition opens at the same time the possibility of its abuse since carriers are not allowed to ask for documentation on passengers reduced mobility as a prerequisite for selling ticket, permitting carriage or securing requested assistance.[23]

4. EU passenger rights rules - rights of persons with disabilities and/or reduced mobility

4.1. Right to transport

One of the objectives of the EU passenger rights rules (in air, rail, waterborne and road transport) is to allow disabled persons and persons with reduced mobility, whether caused by disability, age or any other reason, equal access to travel as other citizens. To reach this objective, it is important that discrimination towards persons with disabilities and reduced mobility in all modes of transport is strictly prohibited. All passengers should be guaranteed equal opportunities for travel across transport modes. It means that disability or reduced mobility cannot be used to justify the refusal to provide a reservation or of embarkation for persons with disabilities or reduced mobility.[24] In addition, reservation and tickets shall be offered to disabled passenger or passenger with reduced mobility at no additional cost.

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[21] Art. 3/15 of the Rail Regulation, Art. 3/j of the Bus Regulation, Art. 3/a of the Sea Regulation, Art. 2/a of the Air Regulation.

[22] Unaccompanied minors are not covered by Regulation 1107/2006. Interpretative Guidelines on the application of Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (Interpretative Guidelines - Air), European Commission, Brussels, 11.6.2012., SWD(2012) 171 final, p. 3.

[23] Similar: Interpretative Guidelines – Air, p. 4.; Zunarelli, Stefano, Il Regolamento (UE) N. 1177/2010 sui diritti dei passegeri che viaggiano per mare: obblighi di vettori e di operatori dei terminali e problemi applicativi, Il diritto marittimo, 2012, 3, p. 782.

[24] It does not, for example, prohibit the carrier to refuse the carriage of the passenger who is fully mobile but has a health condition that may require medical attention that will be unavailable during voyage.

4.1.1. Exceptions of right to transport

Regarding the flights to which the Air Regulation applies reduced mobility cannot be the ground for the refusal to accept a reservation for a flight nor for the embarkation of a disabled person or a person with reduced mobility.[25] The rule set by the Art. 3 of the Regulation applies to air carriers, its agents and tour operator and is obligatory with the exception of two situations set forth in the following article. The refusal to make a reservation or to embark the person with disability may be justified in order to comply with applicable safety requirements established either by the law or by the authority that issued the air operator certificate to the air carrier, for example ability to comply with evacuation plan, ability to use safety equipment such as emergency oxygen masks or life jackets. Second reason justifying the refusal is the physical impossibility of embarkation because of the size of the aircraft or its doors. Special safety rules, as well as the restrictions, applied to carriage of PRMs differ depending on the size and construction of the aircraft. Information on this special conditions, with reference to the relevant legislation, shall be made publicly available in alternative formats accessible to disabled persons, in order to enable PRM to make an informed decision on adequacy of that flight.

Similar provisions form a part of passenger rights rules also in waterborne and land transport. The Rail Regulation places obligation on railway undertakings and station managers to establish non-discriminatory access rules for transport of disabled person or person with reduced mobility.[26] Railway undertaking, ticket vendor or tour operator cannot refuse to accept a reservation from, or issue a ticket to, a disabled person or a person with reduced mobility, or impose accompanying persons unless this is necessary to comply with non-discriminatory access rules.[27]

The regulations concerning the rights of passengers when travelling by sea, inland waterway and bus also aim to provide that the disabled passengers or passengers with reduced mobility are entitled to make a booking for, buy a ticket for, and travel by ship or by bus on the same basis as other passengers.[28] There are only two circumstances in which carriers, travel agents and tour operators in the sea or bus carriage may refuse to accept reservation from or to issue ticket or to embark disabled person or person with reduced mobility – where carrying those persons would conflict with safety requirements as established by international, EU or national law or in order to meet safety requirements established by competent authorities or when design of the passenger ship or vehicle or port infrastructure, bus terminals makes impossible to take on board disabled persons or PRMs in a safe and operationally feasible manner.[29] In this context it is very important that safety regulation and non-discriminatory access rules are fairly used to justify refusal of embarkation of persons with disabilities or reduced mobility.

4.1.2. Information regarding exemptions and refusals of carriage for disabled and reduced mobility passengers

In cases where an carrier or its agents, tour or ticket operator, as well as railway undertaking perceives the existence of the legitimate reasons for the refusal of the reservation or em-

[25] Art. 3 of the Air Regulation.

[26] Art. 19/1 of the Rail Regulation.

[27] Art. 19/2 of the Rail Regulation.

[28] Art. 7 of the Sea Regulation and Art. 9 of the Bus Regulation.

[29] Art. 8/1 of the Sea Regulation and Art. 10/1 of the Bus Regulation.

barkation of a disabled person or person with reduced mobility, it shall immediately inform the respective person, and on request it shall communicate those reasons in writing within five working days.[30] Refusals to sell the tickets or to provide carriage to disabled people or persons with reduced mobility must always be based on justified grounds in line with the non-discriminatory access rules. A claim for discrimination may follow if a carriage is refused to disabled passenger for any other reason than the exceptions set out in the relevant regulations. However, even in cases of legitimate derogations, the carrier, travel agent or tour operator shall make reasonable efforts in order to find and propose the adequate alternative means of transport that is operated by the carrier which may be acceptable to the passenger.[31]

4.2. Right to travel with an attendant or accompanying person

The air carrier, its agents and tour operator may, in order to meet applicable safety requirements established either by the law or by the authority that issued the air operator certificate to the air carrier, require from person with disability or reduced mobility to travel with an attendant capable of providing the needed assistance.[32] Namely, according to the Annex II of the Air Regulation, the only additional assistance that should be provided to the PRM by the cabin crew is assistance in moving to toilet facilities. The *ratio* of prescribing such narrow burden to cabin crew is directly connected to their primary responsibility – safety of all passengers on board.[33] By setting clear and precise rules on circumstances under which travel with an attendant is necessary air carrier and PRM should be able to easily determine the cases where attendant is required. As soon as an air carrier, its agents or tour operator finds out that, for safety reasons, an attendant is required he has to communicate it with the disabled person or person with reduced mobility.

Requiring from disabled person to travel with an attendant is in some situation necessary. However, the Regulation does not provide the rule on the fare for the required attendant. By the omission of such provision person with severe disability who has to travel with an attendant may be put in the economically disadvantaged position. The Commission services recommended that the seat should be offered for free or at a significantly discounted rate.[34, 35] It is recommended, *de lege ferenda*, to ensure those passengers right to free of charge attendant or, at least right to discounts for attendants' fare. In cases where PRM is assisted by accompanying person the air carrier will make all reasonable efforts to provide her a seat next to disabled person.[36]

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[30] Art. 4/4 of the Air Regulation, Art. 20 of the Rail Regulation, Art. 10 of the Bus Regulation, Art. 8/5 of the Sea Regulation, Art. 4/4 of the Air Regulation.

[31] See Art. 4/1/3 of the Air Regulation, Art. 10/2 of the Bus Regulation, Art. 8/2 of the Sea Regulation.

[32] Art. 4/2 of the Air Regulation.

[33] Interpretative Guidelines – Air, p. 5.

[34] Interpretative Guidelines – Air, p. 9. In the Annex 9 to the Convention on the International Civil Aviation it is prescribed, as Recommended Practice 8.40 that Contracting States should encourage aircraft operators to offer discounts for the carriage of the assistant.

[35] The 'one person-one fare' principle, introduced by the Canadian Transportation Agency at the beginning of the 2008, includes the right to free of charge attendant in cases where attendant is required under the terms of the carriers' tariff. See: LUONGO, E. Norberto, Persons with Disabilities and Their Right to Fly, Air and Space Law, 34, no. 3, (2009), p. 154. Furthermore, this principle applies to obese people needing additional adjacent seat. See: *Ibidem*., pp. 149-175.

[36] Annex II of the Air Regulation.

There are also circumstances in which the carrier, travel agent or tour operator in bus and waterborne transport, as well as railway undertaking in rail transport, may be within their rights to require that a disabled or reduced mobility passenger be accompanied by another person who is capable of providing the assistance required by the disabled or PMR passenger.[37] It should be noted that this requirement has to be based on one of the exemptions mentioned above. It follows that the accompanying person is required in order that the applicable safety law or safety requirements are met or to ensure that due to the design of the ship (vehicle) or port infrastructure (bus stops and terminals) the disable or reduced mobility passenger can still be carried in safe and operationally feasible manner.

Such an accompanying person in bus transport shall be carried free of charge and, where feasible, seated next to the disabled or reduced mobility passenger.[38] However, in the waterborne carriage, it shall be carried free of charge only as regard passenger service not cruise.[39] The Rail Regulation does not contain provision on free of charge transport for the imposed accompanying person.

4.3. Right to assistance

Right to assistance is very important issue because is crucial for the dignity of disabled or reduced mobility passengers to receive assistance that corresponds to their particular need. The carriers in all modes of transport, operators of the air, sea, bus terminals or ports of embarkation and disembarkation, as well as railway undertakings, are required to provide assistance to disabled or reduced mobility persons. Assistance should be provided free of charge.[40]

4.3.1. Assistance at stations, ports, terminals

Since managing bodies of airports, bus terminals, sea ports and railway stations have a central role in providing services through their ports, stations and terminals it was logical to make them responsible for ensuring the services of needed assistance to disabled passengers or PRMs. Managing body's obligations are precisely stated in the Annex I of the Air Regulation,[41] covering a wide range of services, including even some service assistance on

[37] Art. 19/1 of the Rail Regulation, Art. 8/4 of the Sea Regulation and Art. 10/4 of the Bus Regulation.

[38] Art. 10/4 of the Bus Regulation. The air and sea carrier will also make all reasonable efforts to give such person a seat next to the disabled or reduced mobility passenger (Annex II of the Air Regulation - Assistance by air carriers, Annex III/5 of the Sea Regulation – Assistance on board ships).

[39] Art. 8/4 of the Sea Regulation. *Passenger service* means a commercial passenger transport service by sea or inland waterways operated according to a published timetable (Art. 3/f) and *Cruise* means a transport service by sea or inland waterway, operated exclusively for the purpose of the pleasure or recreation, supplemented by accommodation and other facilities, exceeding two overnight stays on board (Art. 3/t).

[40] Art. 8/1 and Art. 10 of the Air Regulation, Art. 23/1 of the Rail Regulation, Art. 13 of the Bus Regulation and Art. 10 of the Sea Regulation.

[41] Annex I prescribes: Assistance and arrangements necessary to enable disabled persons and persons with reduced mobility to: — communicate their arrival at an airport and their request for assistance at the designated points inside and outside terminal buildings mentioned in Article 5, — move from a designated point to the check-in counter, — check-in and register baggage, — proceed from the check-in counter to the aircraft, with completion of emigration, customs and security procedures, — board the aircraft, with the provision of lifts, wheelchairs or other assistance needed, as appropriate, — proceed from the aircraft door to their seats, — store and retrieve baggage on the aircraft, — proceed from their seats to the aircraft door, — disembark from the aircraft, with the provision of lifts, wheelchairs or other assistance needed, as appropriate, — proceed from the aircraft to the baggage hall and retrieve baggage, with completion of immigration and customs procedures,

board (assistance to proceed from the aircraft door to the seats, to store and retrieve baggage on the aircraft and to proceed from their seats to the aircraft door). The similar obligations regarding the assistance are prescribed in the Bus Regulation and Sea Regulation.[42] It should be noted that pursuant to Art. 12 of the Bus Regulation assistance will be provided only at designated terminals.[43] At unstaffed stations or terminals there is no obligation to provide assistance, though the needs of disabled passenger should be taken into account. For example, railway undertakings and station managers shall ensure that easily accessible information is displayed regarding the nearest staffed station.[44]

4.3.2. Assistance on board

The sea and air carriers, as well as managing bodies of airports in some cases, shall provide disabled persons and PMRs assistance on board ships and aircrafts as well as during boarding and disembarking from ships or aircrafts. This, *inter alia,* includes assistance as a passenger may need in order to proceed to an appropriate seat or cabin on embarkation, to stow and retrieve any luggage, to proceed (if necessary) to any toilet facilities and proceed to the exit for disembarkation at the end of the voyage.[45] Carriers also have a duty to carry any medical or mobility equipment belonging to the passenger, subject to such equipment being permitted on board the ship, aircraft or vehicle. Railway undertakings shall also provide assistance on board train and during boarding and disembarking from train, including all reasonable efforts to offer assistance to disabled person or PMRs in order to allow that person to have access to the same services in the train as other passengers.[46] According to the Bus Regulation, assistance on board buses or during pauses in journey is provided only if there are personnel other than the driver on board.[47]

4.3.3. Conditions under which assistance is provided

The above mentioned obligations regarding the assistance are conditional upon receiving 48 hours (36 hours in bus transport) notice form passenger and the passenger arriving in

— proceed from the baggage hall to a designated point, — reach connecting flights when in transit, with assistance on the air and land sides and within and between terminals as needed, — move to the toilet facilities if required. Where a disabled person or person with reduced mobility is assisted by an accompanying person, this person must, if requested, be allowed to provide the necessary assistance in the airport and with embarking and disembarking. Ground handling of all necessary mobility equipment, including equipment such as electric wheelchairs subject to advance warning of 48 hours and to possible limitations of space on board the aircraft, and subject to the application of relevant legislation concerning dangerous goods. Temporary replacement of damaged or lost mobility equipment, albeit not necessarily on a like-for-like basis. Ground handling of recognised assistance dogs, when relevant. Communication of information needed to take flights in accessible formats.

42 Art. 13 of the Bus Regulation, as well as Annex I (Assistance provided to the disabled persons and persons with reduced mobility), Art. 10 of the Sea Regulation, as well as Annex II (Assistance in ports, including embarkation and disembarkation).

43 Member State shall designate bus and coach terminals and inform the Commission. The Commission shall make available a list of designated bus and coach terminals on the Internet.

44 Art. 22/3 of the Rail Regulation.

45 Annex III of the Sea Regulation (Assistance on board ships), Annex I of the Air Regulation (Assistance under the responsibility of the managing bodies of airports) and Annex II of the Air Regulation (Assistance by air carriers).

46 Art. 23 of the Rail Regulation.

47 Part (b) of Annex I of the Bus Regulation.

sufficient time.[48] This includes designating and signposting a place where disabled passenger or PMR can report on arrival or departure in the ports or terminals.[49] In the case when the required notice is not given the relevant assistance providers shall make all reasonable effort to provide assistance in such way that disabled person or person with reduced mobility may travel.[50] Where a disabled or reduced mobility passenger, when making the booking or buying the ticket had provided information about his or her specific requirements for accommodation, assistance or need to bring medical equipment and is nonetheless refused embarkation at the port or terminal, the respective carrier must either, at the discretion of the passenger, provide a full refund or re-routing. The right to the option of a return journey or re-routing shall be conditional upon all safety requirements being met.[51]

With the aim to meet their obligations regarding the assistance to disabled or reduced mobility passengers, the assistance providers across modes shall define and maintain assistance quality standards. In addition, they will establish disability-related training procedures and ensure that their personal or staff are adequately trained and instructed.[52]

4.3.4. Assistance dogs

According to the Art. 7/2 of the Air Regulation and Art. 11/5 of the Sea Regulation, right of the passenger to usage of a recognised assistance dog shall be accommodated in accordance with applicable national rules, where such rules exist. By omitting to prescribe the minimum standard regarding to assistance dogs and referring to 28 national laws (if there are ones), the EU has created a legal vacuum and thereby legal uncertainty. It is unclear whether national law will apply to airplanes flying under Croatian flag, or to flights staring from Croatian airport, or to Croatian passengers or to those who concluded the contract in Croatia.

Ground handling of recognised assistance dogs is within the responsibility of managing bodies of airport.[53] The Bus Regulation does not contain the explicit provision on right to use a recognised assistance dog, but it arises from the obligation of the bus terminals to provide assistance in carrying a recognised assistance dog on board prescribed in the Annex I. In the Rail Regulation and their Annexes assistance dogs are not even mentioned.

Croatian Parliament adopted the Law on movement of blind person with the help of guide

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48 Any time stipulated shall not be more than 60 minutes before the published departure time. If no time is stipulated, at least 30 minutes before the published departure time or the time at which all passenger are asked to check in (Art. 24/e of the Rail Regulation and Art. 14/b/II of the Bus Regulation). Regarding the flights on which Air Regulation applies, at the time stipulated by the air carrier (or its agent and tour operator) or if no time is stipulated, not later than two hours before the published departure time (Art. 7/4/b of the Air Regulation). When travelling by the sea way, at a time stipulated which shall not be more than 60 minutes before the published embarkation or if no time of embarkation is stipulated, no later than 60 minutes before the published time (Art. 11/1/b of the Sea Regulation).

49 Art. 5 of the Air Regulation, Art. 24/d of the Rail Regulation and Art. 12/3 of the Sea Regulation.

50 Art. 11/e of the Sea Regulation, Art. 7/3 of the Air Regulation, Art. 24/c of the Rail Regulation, Art. 14/4 of the Bus Regulation.

51 Art. 4/1/b of the Air Regulation, Art. 8/3 of the Sea Regulation, Art. 10/3 of the Bus Regulation.

52 Art. 13/14/ of the Sea Regulation, Art. 28 of the Rail Regulation, Art. 16 of the Bus Regulation, Art. 11 of the Air Regulation.

53 Annex I of the Air Regulation. Assistance with ground handling of recognised dogs in ports is the responsibility of terminal operators and carriers operating port terminals or passenger service with a total of more than 100 000 commercial passenger movements (Art. 13 of the Sea Regulation).

dog[54] in 1998, regulating the rights of blind individuals to use guide dog[55] to assist them with their mobility in all means of public transport,[56] including the right to remain within the all areas designated for passengers (Art. 4 of the Law on movement…). It is also prescribed that guide dogs accompanying blind persons should be carried free of charge, irrespective of the length and route of the journey. These provisions shall apply *mutatis mutandis* to the persons with disabilities in the wheelchair with recognised assistance dog (Art. 8/1 of the Law on movement). Apart from blind passengers and passengers in wheelchairs, the Law does not grant the right to assistance by recognised assistance dog to other passengers with reduced mobility.

4.4. Rights in the event of cancellation or delay

Passenger rights regulations set out a different measures ensuring equitable treatment and appropriate compensation of damage suffered by the passengers with disabilities or reduced mobility during their travel across transport modes. Regulation 261/2004[57] provides for a high level of protection for all passengers in the occasion of denied boarding, cancellation of flights or its long delays. Priority in gaining those rights should be given to persons with reduced mobility as well as persons or certified service dogs accompanying them and to unaccompanied children.[58] Pursuant to the Art. 11/2 and 9/3 of the mentioned Regulation such commitment is in particular prescribed relating to the right to care for passengers whose boarding was denied, or are awaiting an alternative or delayed in departure, i.e. the right to be offered by meals and refreshments, hotel accommodation, alternative transport arrangements, reimbursement schemes, re-routing options. Art 16. of the Sea Regulation also provides that in the event of the a cancellation or delay in departure of a ferry or a cruise,[59] reasonable efforts should be made by the carrier (or terminal operator) to inform those passengers concerned of the alternative connections in accessible formats. When a ferry service is over 90 minutes late in its departure, or is cancelled, passengers have a right to be re-routed or reimbursement the price of the ticket paid and, where relevant, a return service to the initial port of departure at the carrier's cost.[60] In the case of a cancellation or a delay periods, passenger must also be offered snacks, meals or refreshment free of charge in proportion to the delay suffered. Additionally, where delay or

[54] Zakon o kretanju slijepe osobe uz pomoć psa vodiča, Narodne novine (Official Gazette of the Republic of Croatia) no. 131/1998.

[55] For the purposes of the Law on movement 'blind person' is a person whose blindness is declared in accordance with special legislation and is trained for movement with guide dog (Art. 2/1/1 of the Law on movement). Croatian association for guide dog's training and mobility has a public authority to render a decision on right of the blind person to travel with guide dog and to issue the card proving that right (Art. 7/2 of the Law on movement). Foreign nationals are granted the same rights providing the respective documents in accordance with their national law (Art. 8/2 of the Law on movement).

[56] For the purposes of the Law on movement 'public transport' means the road, rail, maritime, air and urban transport (Art. 2/1/3 of the Law on movement).

[57] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, OJ L 46, 17.2.2004.

[58] Art. 11/1 of the Air Regulation 261/2004.

[59] Protection of the cruise passenger is set out in the EU Package Travel Directive 90/314/EEC. (Art. 21 of the Sea Regulation).

[60] It will not apply in the case of weather delays or other conditions which are outside of the carrier's control, such as natural disasters (Art. 20 of the Sea Regulation).

cancellation is significant enough to necessitate a stay of one or more nights, the carrier shall offer passenger adequate accommodation on board or shore-side, transport to and from port terminal and place of accommodation and snacks, meals or refreshments. Providing said assistance particular attention is to be paid to the needs of the disabled and reduced mobility passenger and accompanying persons in arranging and transporting to the shore accommodation. The rights in the case of interrupted travel are also provided to passengers affected by delay and cancellation under Bus and Rail Regulations. The passengers shall be informed as soon as possible and not later than 30 minutes after the scheduled time of departure. They should also be advised of the new estimated departure time and estimated arrival time as soon as information is available.[61] Where a carrier reasonable expects a regular service to be cancelled or delayed in departure for more than 120 minutes in bus service or 60 minutes in rail service, passengers shall have a right the continuation or re-routing or reimbursement of the ticket price.[62] In applying those rights carriers shall pay particular attention to the needs of disabled persons and persons with reduced mobility and any accompanying persons.

5. Information for passengers with disabilities and/or reduced mobility

With the aim to prevent the refusals and enable the passengers with disabilities and reduced mobility to get precise information on access conditions by carriers and managing bodies of ports and terminals, as well as on restrictions and safety rules applied by the carrier or its agents to the carriage of disabled passengers and passengers with reduced mobility, the legislator mandated the carriers or its agents to make respective policies publicly available.[63] The same obligation applies to restrictions on carriage of the mobility equipment. Regarding the information on accessibility of rail services and on the access condition of the rolling stock there is no obligation to make those information publicly available, but it shall be given to PRM upon request.[64] In relation to flights included in package travel, package holidays and package tours organised, sold or offered by the tour operators the obligation to make those restrictions and safety rules available is imposed on the tour operators.[65] It is also clarified that the information shall be publicly available in accessible formats and in at least the same languages as the information made to other passengers. Carriers, travel agents and tour operators in the land and sea transport also have a duty to provide clear information concerning the conditions of carriage and journeys information.[66] Complete information describing passengers' rights and obligations should also be communicated by transport operator throughout stages of journey. All relevant information should be available in appropriate and accessible formats for disabled and reduced mobility passengers. Accessible formats include, but not limited to, large print, Braille version, easy-to-read version, audio format, video format, electronic format etc. In addition, special attention should be given to the provision of information to disabled

61 Art. 20 of the Bus Regulation and Art. 18/1/5 of the Rail Regulation.

62 Art. 21 of the Bus Regulation. It should be stressed out that a hotel accommodation and transport arrangements between terminal and the place of accommodation shall not apply where the carrier proves that the cancellation or delay is caused by severe weather conditions or major natural disasters endangering the safe operation of bus services (Art. 23). Also, according to the Rail Regulation there are causes where the carrier shall be relieved of his liability in case of cancellation, delays or missed connections. (Art. 15 of the Rail Regulation).

63 Art. 4/3 of the Air Regulation, Art. 9/2 of the Sea Regulation, Art. 11/2 and 5 of the Bus Regulation.

64 Art. 20/1 of the Rail Regulation.

65 Art. 4/3 of the Air Regulation.

66 Art. 9/4 of the Sea Regulation, Art. 11/2 of the Bus Regulation, Art. 20 of the Rail Regulation.

persons or persons with reduced mobility concerning accessibility of transport services, or transport infrastructure i.e. condition of rolling stocks, ports and terminals and the facilities on board. *Inter alia*, railway undertakings and station managers should take into account the needs of the disabled persons and PRMs through compliance with the TSIs (Technical Specifications for Interoperability), so as to ensure, that all buildings and rolling stock are made accessible.[67]

6. Medical equipment and mobility equipment and assistive devices

6.1.1. Carriage of medical equipment and mobility equipment

Medical equipment, used for monitoring or treatment of medical condition, may be of life significance to its users. Mobility equipment and assistive devices are, on the other hand, to some PRMs of high importance for their mobility, their independence and daily functioning. It is apparent that carriage of medical or/and mobility equipment is a necessity when travelling to many PRMs. Hence, it is of utmost importance to ensure to PRMs the possibility to use their medical and mobility equipment, as much as possible, as well as to provide the service of their carriage free of charge. In order to meet those needs European legislator introduced set of rules regarding carriage of medical and mobility equipment. Notwithstanding the need for clarity and legal certainty regarding the exercising those rights, none of the regulations contains the definition of either.[68] Since none of these equipment is excluded from the definition of luggage it is to be concluded that it falls under it.

Even though the mobility equipment is considered as luggage its carriage should not be extra charged. In spite of the fact that the Bus and the Rail Regulation do not explicitly stipulate right to expenseless carriage, extra charging should not be exercised as discriminatory. The Air and the Sea Regulation, on the other hand, envisage that service of mobility equipment shall be rendered free of charge. However, the air carrier is obliged to transport up to two pieces of mobility equipment per PRM, including electric wheelchairs.[69] Furthermore, this limitation is, according to the Annex I of the Air Regulation, subject to advanced notification 48 hours before flight, possible limitation of space on board and the application of the relevant legislation concerning dangerous goods. Regarding the transportation of medical equipment the Regulation does not provide any limitation in terms of quantity, and the air carrier should give to PRM additional luggage allowance,[70] but it is subject to the same restraints as mobility equipment. Restrictions are also possible due to the size of aircraft. The Sea Regulation prescribes the duty of free carriage of mobility equipment necessary for the disabled person or person with reduced mobility, including electric wheelchairs. Absence of the definition of mobility equipment which has to be carried free of charge may result in diverse interpretations. Carriers' duty to transport necessary mobility equipment should not be interpreted narrowly encompassing only equipment necessary for the trip itself.

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67 Art. 21 of the Rail Regulation.

68 Possible definition is given by the Commission: Any equipment the purpose of which is to provide mobility to disabled persons and persons with reduced mobility or assist them in their mobility. Report from the Commission to the European Parliament and the Council on the functioning and effects of Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when traveling by air, European Commission, Brussels, 11.4.2011, COM(2011) 166 final, p. 20.

69 Annex II of the Air Regulation.

70 Interpretative Guidelines – Air, p. 6.

In all cases where PRM has special need regarding carriage of medical and mobility equipment, he shall notify the carrier of that need beforehand.[71]

6.1.2. Compensation for lost or damaged mobility equipment and assistive devices

Strengthening of the PRM's passengers' rights within the EU law is to be achieved by gradual introduction of another right - right to compensation in respect of mobility equipment or assistive devices damaged or lost during the transport. Its damaging or loss may cause serious inconveniences to PRMs, not only financial but (maybe even more) of practical nature. Hence, the objective of the provisions on compensation is to relief and facilitate such unenviable situation in two directions: primarily by eliminating financial limitations of compensation, and by imposing the obligation to undertake every effort to rapidly provide temporary replacement equipment.[72]

The need for introduction of provision on unlimited compensation is a consequence of designation of mobility equipment as luggage. In the case of absence of the provision on compensation, the standard of carriers' limited liability for damage or loss of luggage, generally accepted in all branches of transport law, applies. By introduction of this rule the carriers' liability for damage on mobility equipment continues to be governed by the liability regime applicable to luggage but, in case of its liability, the compensation for damage is not subject to limitations. The application of limits set for luggage is, until today, excluded for mobility equipment compensation in all modes of transport, but air.

The only regulation prohibiting any financial limits in respect of compensation for mobility equipment is the Rail Regulation.[73] According to other regulations prescribing the right to compensation, the compensation shall correspond to value of the equipment i.e. the cost of its replacement or, where applicable, to the costs of repairs.[74] It means that PRM will be able to recover only direct damage, whilst indirect damage loss such as expenses of temporary replacement for mobility equipment,[75] costs of additional care due to increased needs, compensation for financial loss due to incapacity to work until the repair of the damaged equipment are not encompassed by the compensation and non-material damage will not be compensated. Although the measure has indisputably improved the position of the PRM's, they still do not have right to 'full compensation' (apart in the rail transport).

The application of the provision on compensation for damaged mobility equipment is extended to port terminal operators[76] and to the bus terminal managing bodies'.[77] By widening the scope of this provision, the PRM's rights are actually being reduced, since, normally, the terminal operators' and terminal managing bodies' liability is, unlimited, and the full damage (material and non-material) could be recovered.

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71 Art. 11/2 of the Sea Regulation.

72 Art. 15/4 of the Sea Regulation, Art. 17/3 of the Bus Regulation, Annex I of the Air Regulation.

73 Art. 25 of the Rail Regulation.

74 Art. 15/2 of the Sea Regulation, Art. 4 of the Athens Regulation, Art. 17/2 of the Bus Regulation.

75 As showed above, some regulations prescribe the duty of carriers or/and managing bodies to provide service of temporary replacement, but only the Air Regulation prescribes that such service shall be free of charge.

76 Art. 15/1 of the Sea Regulation. In case of port terminal operators' liability, general liability regime prescribed in Croatian Civil Obligations Act (Official Gazette of the Republic of Croatia, no. 35/2005, 41/2008, 125/2011, 78/2015) shall be applied. The liability is based on proven fault (Art 1045).

77 Art. 17/1 of the Bus Regulation.

European standard of protection of PRMs' right to compensation for lost or damaged mobility equipment is not accepted by any international convention covering travel services nor by Croatian national law. Due to the direct applicability of the regulations to domestic carriage this standard is gradually becoming Croatian national standard, as well as the standard of all Member States. However, the scope of application of mentioned regulations is extended to domestic carriage of passengers in different manners, leaving to the Member States possibilities to grant exemptions for certain provisions, for different periods of time. Hence, the PRM's entitlement to unlimited compensation for damage on mobility equipment will depend on the scope of the application of the regulation concerned. Damages and losses on mobility equipment which occur during the transport outside the scope of application of regulations will be compensated according to the corresponding national or international law on liability for damage on luggage.

The broadest scope of application regarding the right to compensation has the Bus Regulation, since it was not allowed to Member States to exempt the provisions of the Art. 17/1 and 2 regulating carriers' and terminal managing bodies' liability for damage to mobility equipment and prescribing that the compensation has to be equal to the cost of replacement or repair of the lost or damaged equipment.[78] It means that PRM whose mobility equipment is damaged or lost will not be entitled to unlimited compensation only in cases where CVR Convention is applied.

Right to unlimited compensation for damaged or lost mobility equipment of rail passengers is prescribed in the Art. 25 of the Rail Regulation. Unfortunately, Croatia exercised the right to exempt this service from the application of the Regulation on domestic services, as well as on the cross border services with third countries until 2019.[79] Croatian Law on contracts of carriage in rail transport[80] does not contain rules concerning mobility equipment, and thus the provisions on the limited liability of the carrier for damaged or lost luggage shall apply. Limitation prescribed for hand luggage is 4.200 kuna per passenger,[81] and for registered luggage only 2 kuna per kilo.[82] Taking into account the fact that sophisticated and complex mobility equipment may weigh less than 10 kilos it is obvious that prescribed limitation is not only insufficient but also degrading.

There are two EU regulations containing provisions on compensation for mobility equipment damaged or lost during the sea transport. According to the Art. 4 of the Athens Regulation the liability of the carrier for damage or loss of mobility equipment occurred during the maritime carriage of passengers shall be governed by rules of Athens Convention 2002 on liability of the carrier for damage to cabin luggage. However, the compensation is not limited and it shall correspond to the replacement value of the equipment or the costs of repairs. In cases where the Athens Regulation is not applicable,[83] compensation in respect of mobility equipment shall be ruled pursuant to the Sea Regulation, requiring the compensation of direct damage.[84] However, it is to be stressed that, in contrast to other regulations, Art. 6 of the Sea

[78] See also: Art. 7/2/b of the Bus Regulation.

[79] For the exemptions see footnote 19.

[80] Law on contracts of carriage in rail transport, Official Gazette of the Republic of Croatia, no. 87/96.

[81] Art. 25 of the Law on contracts of carriage in rail transport. The value of 4.200 kuna corresponds to 560 Euro.

[82] Art. 22 and 64 of the Law on contracts of carriage in rail transport. The value of 2 kuna corresponds to 0,3 Euro.

[83] It is not applicable to domestic carriage of passengers by sea on board ships of Classes C and D under Art. 4 of Directive 98/18/EC.

[84] Art. 15 of the Sea Regulation. However, regarding the liability regime, the provisions on carrier liability for damage on luggage prescribed by Croatian Maritime Code will be applied.

Regulation does not allow contractual waiving or limitation of rights and obligations (in favour of both contractual parties).[85]

The Air Regulation also contains provision on compensation for lost or damaged wheelchairs, other mobility equipment and other assistive devices lost or damaged whilst being handled at the airport or transported on board aircraft, but it does not entail the carrier to compensate the damage unlimitedly. Namely, regarding the compensation for damaged mobility equipment it refers to international, Community and national law, leaving the question of limitations of liability to 28 national laws.[86] Since neither the Montreal Convention (MC) (nor the Warsaw Convention), neither the Montreal Regulation, nor the Croatian law contain special provisions on the compensation for mobility equipment, the wheelchairs and other mobility equipment is, according to Croatian law, to be treated as baggage.[87] Consequence of such designation of mobility equipment is a lack of adequate protection of PRMs' interests in cases of its loss or damage.[88]

Limits of compensation[89] prescribed by MC for lost, damaged or destroyed baggage are set to 1131 Special Drawing Rights for each passenger.[90] Value of lost or damaged mobility equipment, which is sometimes highly personalised, can easily exceed the limit of liability prescribed by MC. Having in mind that in the context of Art. 22/2 of the MC the term 'damage' must be interpreted as including both material and non-material damage[91] it is easily to conclude that the limits of compensation prescribed by the MC are, undoubtedly, inadequate regarding mobility equipment. It is clear that, in respect of compensation for mobility equipment damaged during the air transport, European legislator failed to provide adequate protection.

In all cases where limited liability of carrier is prescribed contracting parties may stipulate that the contract shall be subject to higher limits of liability or to no limits of liability, but, in a line with the principle of freedom to contract, it is also allowed to charge additional fee for such contractual obligation. According to MC, passengers may, in order to raise the limits of liability for lost or damaged baggage, at the time when the checked baggage was handed to the carrier, make a special declaration of interest in delivery at destination and pay supplementary sum if the case so requires.[92] It is clear that requiring additional payment for special

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85 Zunarelli, S., op. cit, p. 783.

86 Art. 12 of the Regulation 1107/2006.

87 According to MC the carrier is liable for damage sustained in case of destruction or loss, or of damage to checked baggage which occurs while those are in the charge of the carrier. His liability for checked baggage is strict. However, there are several possible exoneration provided by the Art. 17 and 20 of the MC; the carrier shall be wholly or partly exonerated from its liability to the extent that claimants' negligence or other wrongful act or omission caused or contributed to the damage. Carriers' liability for unchecked baggage, including personal items is based on proven fault of the carrier or its servants and agents (Art. 17/2 MC).

88 Even though the European Commission showed its awareness of the problem in 2008, the legal vacuum remained unresolved until today. See: Communication from the Commission: Communication on the scope of the liability of air carriers and airports in the event of destroyed, damaged or lost mobility equipment of passengers with reduced mobility when traveling by air, Commission of the European Communities, Brussels, 7.8.2008., COM(2008) 510 final.

89 According to the Art. 3 of the Montreal Regulation liability of Community air carrier in respect of passengers and their baggage shall be governed by all provisions of MC. The application those provisions of MC is extended to carriage by air within a single Member state (Art. 1 of the Montreal Regulation).

90 The value of 1 SDR is approximately 1,36 US $, and the limitation threshold is 1538 US $.

91 Case C-63/09, Axel Walz, ECLI:EU:C:2010:251, par. 39.

92 See: Art. 22/2 of the MC. The passenger has right to full compensation of damage only in cases where damage

declaration of interest for mobility equipment or raising the limitation threshold would place PRM at a financial disadvantage by comparison with other passengers.

Provisions of the MC cover air carrier liability for damage on luggage occurred on board the aircraft or during any period within which the baggage was in charge of the carrier (Art. 17/2 of the MC). In case of airport managing body liability, the full damage can be recovered in accordance with Croatian Civil Obligations Act.

To conclude, regarding the compensation for lost or damaged mobility equipment, the compensation should be full, or, at least equal to the cost of replacement or repair of the mobility equipment lost or damaged. The compensation should also be prompt and it should be additionally guaranteed by prescribing the obligation to carriers or/and terminal operators to provide temporary replacement in all modes of transport.

After the expiry of the period of postponed application of the Rail Regulation, the right to full compensation will be granted in Community regime and within the Member States in land transport. It is to be hoped that the European legislator will follow the path and will introduce the right to full compensation for damaged or lost mobility equipment for passengers travelling by air.

7. Right to effective enforcement of passenger rights

With the aim to ensure proper implementation of the EU passenger rights all Regulations contain provisions relating to the enforcement and complaint procedure. According to those provisions the Member States shall designate a body or bodies responsible for the enforcement of relevant Regulations and shall inform Commission of the body or bodies designated (National Enforcement Body – NEB).[93] By designating NEBs the States must take into account that bodies shall, in its organization, funding decision and legal structure, be independent of carriers, tour and terminal or port operators. The obligation of the NEBs is to publish a report of their activity, containing in particular description of actions and measures taken in order to implement the passenger rights law as well as statistics on complaints and penalties applied. In order to ensure an effective and coherent application of the passenger rights in all modes of transport, NEBs need to cooperate and mutually assist each other. Furthermore, passengers should have access to easy means of redress when a problem occurs. NEBs may handle complaints either in the first instance or in the second instance, in cases where passenger is not satisfied with the solution proposed by carrier or port and terminal operator.[94] The Regulations do not specify a procedure for handling complaints. The Member States have to ensure quick and efficient complaint procedure. Bearing in mind the needs of the disabled and reduced mobility passengers it is important to made handling procedures available in accessible formats. Finally, the certain degree of harmonization of the complaint regimes between transport modes is needed because different procedures can be very confusing for passengers, particularly for disabled ones.

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is a result of an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result (Art. 22/6 of the MC).

93 Art. 14 of the Air Regulation, Art. 30 of the Rail Regulation, Art. 28 of the Bus Regulation and Art. 25 of the Sea Regulation. In the Republic of Croatia NEBs are HAKOM, Croatian Regulatory Agency for Network Industries, Coastal Liner Services Agency, Croatian Civil Aviation Agency and Ministry of the Sea, Transport and Infrastructure.

94 Art. 15 of the Air Regulation and Art. 25/2/3 of the Sea Regulation, Art. 28 of the Bus Regulation.

8. Conclusion

The analysis of EU legislation demonstrates the EU commitment to inforce the rights guaranteed by the UN Convention on the Rights of Persons with Disabilities. The rationale behind all applicable regulations was to provide equal opportunities for travel across all modes of transport to all citizens. To that end, the EU legislator went beyond the obligations arising from the UN Convention, by extending the scope of application of the relevant acts to persons with reduced mobility, thus embracing all those 'whose situation needs special attention and adaptation to the person's needs of the services made available to other passengers.' Comparative analysis of respective regulations reviles a common core of rights: non-discriminatory treatment; right to assistance in ports and terminals, on board of ships, aircrafts, trains and buses; financial compensation in case of damage or loss of mobility equipment or assistive devices; and, finally, right to information about accessibility of transport services and infrastructure. These common rights may be restricted under specifically prescribed circumstances which should be interpreted very narrowly, so as to avoid abuse. As an example, safety rules may be used as a justification for refusing the person with disability access to travel. If such an exception is not narrowly interpreted it may become a vehicle for carriers to avoid their obligation to implement the rights of persons with disabilities.

The core rights are applicable to all modes of transport, however, some important discrepancies are present. While some of them may be attributed to distinctive nature of individual modes of transport, others do not have an objective justification. For instance, in sea and bus transport persons with disability and reduced mobility must travel accompanied by one or more other persons, who should travel free of charge. Such a measure, however, may not be found in air and rail services. The similar inconsistency between transport modes may be found in relation to the right to compensation in case of damage or loss of mobility equipment or assistive devices. While such right exist in sea, bus and rail transport it does not exist in the air transport. Not even the right to information is standardised across the modes. Because of these differences, unlike other passengers, persons with disabilities and reduced mobility are forced to choose between different modes of transport on the ground of the extent of realisation of their rights, instead of convenience. This fact indicates that the lack of harmonized rules between transport modes poses an important barrier and still prevents disabled passengers from benefiting the freedom of movement within the European Union. Despite of all the legislative efforts made so far, the aim to provide equal treatment to all has not been fully achieved. The analysis clearly demonstrates the inefficiency of the fragmented approach to traveling rights of persons with disabilities and reduced mobility. If these persons are truly to gain equal treatment, the adoption of a coherent and standardised rules across modes of transport is warranted. Because traveling is a global activity, such an effort should encompass international agreements as well. [95]

That being said, the existing rules did have a beneficial impact in Croatia as the rights of passengers with disabilities and reduced mobility significantly improved. However, as prof. Camarda so truly pointed out, each law, in order to achieve its aims and be fully applicable, should fit in the cultural and social context ready to accept the new duties, collective and individual, imposed by this new law.[96] This is reflected in the areas falling out of the scope of the

[95] O'KEEFE, op. cit., p. 421; ABEYRATNE, op. cit., p. 192; KONERT, Anna, EPHRAIMSON, Hans, Passengers with Reduced Mobility in the EU, Canada and the US, Air & Space Law, vol. XXXIII/3, June 2008, p. 241-243. LUONGO, op. cit., p. 174.

[96] CAMARADA, Guido, Il trasporto dei disabili. Profili giuridici pluriordinamentali, Giureta, Vol. IX, 2011, p. 202.

EU legislation in which rights of passengers with disability or reduced mobility are very few as Croatia failed to fulfil its obligations arising from the UN Convention in the area of transport. There are many challenges in front of the Croatian legislator who should not be passively awaiting the EU legislator to pave the way forward.

OPENNESS OF CROATIA'S REGULATORY FRAMEWORK TO INNOVATIONS IN PASSENGER ROAD TRANSPORT

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SUMMARY

The rise of the sharing economy concept influenced significantly a number of economic activities. This innovative approach had a particularly strong impact on the transport services market. Uber and similar urban mobility services have caused major changes and brought numerous benefits to consumers. At the same time, this innovative way of providing transport services raises many interesting legal issues. This paper provides insight into the legal aspects of innovative transport models at both the international and national level. It also gives an overview of Croatia's transport legislation and analyses the legal issues encountered by Uber following its entry onto the Croatian market in 2015. Finally, the paper presents proposals for de lege ferenda regulation of new innovative business models in the transport sector.

Key words: *sharing economy, transport, Uber, innovations, transportation network company*

1. Introduction

In recent years we have witnessed significant changes in certain economic sectors. Major technology development has rapidly enabled the rise of new business models which conquered the markets and disrupted long-standing business practices. These new business models are usually called the "sharing economy". This concept is not clearly defined and encompasses different businesses that do not share many common features. Sometimes it is defined as the (economic) model in which demand and supply are immediately in contact through an online platform such that the supply side directly provides services and/or products with the underlying aim of improving the use of assets and reducing transaction costs.[1]

There are several prominent examples of the sharing economy. For instance, Airbnb, described as a trusted community marketplace for people to list, discover, and book unique

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[1] Gori P., Parcu P. L., Stasi M. L., (2015) Smart Cities and Sharing Economy, Robert Schuman Centre for Advanced Studies, Florence School of Regulation, European University Institute p. 2.

accommodations around the world — online or from a mobile phone or tablet,[2] or many of the crowdfunding platforms, which enable individuals to financially support projects they consider important. Sharing economy models had a particularly strong impact on the transport services market. Projects such as Uber, BlaBlaCar and Lyft can be considered as the real spearheads of major market change. While innovative entrepreneurial ventures in the transport sector may vary considerably, with some directed toward resource sharing without intending to make a profit but instead only to share costs and others being extremely profit-oriented, all such business models can, in the authors' opinion, be subsumed under the abovementioned definition of the shared economy. It can be expected that such business models will in the near future become even more important and will consequently have an even greater impact on the market and consumers. For this reason it seems valuable to study the legal aspects of their business models. This paper focuses in particular on Uber because it started operating in Croatia in 2015, making it possible to analyse the legal issues that have emerged as a result of its entrance onto the market.

The paper outlines the main legal features of Uber and other similar innovative transportation models that are present in Croatia, analyses the legal issues that Uber encountered when entering the market and examines to what extent Croatia's legal framework in the transport sector is open to business innovations.

2. Uber and its legal challenges

The most well-known and globally spread example of the sharing economy, in particular in the transport sector, is Uber, which provides a smartphone application platform for matching consumers and drivers. It originated in the United States of America (USA) in 2009 and in less than a decade spread over 6 continents, 81 countries and 581 cities.[3] According to publicly available information, just in the 3rd quarter of 2016 Uber posted worldwide gross revenue of USD 5.4 billion.[4]

The layperson's general perception of Uber's business model is that it was well received in the USA but that it has raised many issues and gained little support in Europe. However, if we look more closely at the growth of and the story behind Uber we soon come to realize that this is not entirely true. Whereas Uber faced and is still facing many legal challenges in different US states, different European Union (EU) institutions have declared their support for collaborative business models such as Uber, with some Member States already working on reforming their national transport legislation in order to liberalise the sector and promote the sharing economy.[5]

Some of the legal challenges faced by Uber's business model in both the USA and EU Member States include regulatory, labour law and competition law challenges as well as unfair competition charges.

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2 About us, Airbnbn, retrieved 30/04/2017 from www.airbnb.com

3 Uber Cities, Uber, retrieved 27/04/2017 from uberestimator.com

4 Edwards, J, *Uber's leaked finances show the company might — just might — be able to turn a profit*, Business Insider, retrieved 27/04/2017from www.businessinsider.com

5 Commission staff, (2016), *European agenda for the collaborative economy - supporting analysis*, European Commission, Brussels, retrieved 27/04/2017 from ec.europa.eu

Regulatory challenges

Existing market operators, in particular the taxi industry, put up fierce opposition to Uber not only in Europe, including Croatia, but also in the USA where they adopted a similarly hostile attitude to Uber's innovative and, from their perspective, disruptive business model.

In 2013, after a number of cease and desist letters issued to e-hail service providers and retaliation proceedings from the taxi lobby,[6] the regulatory agency California Public Utilities Commission (CPUC) created a new category of service called "transportation network company" (TNC), making California the first jurisdiction to recognize Uber and similar urban mobility services.[7]

Today, Rasier-CA, LLC, a subsidiary of Uber Technologies, Inc., is classified by the CPUC as a TNC – a company providing prearranged transportation services for compensation using an online-enabled application or platform (such as smart phone apps) to connect drivers using their personal vehicles with passengers.[8] In California, a TNC needs to apply for a permit issued by the CPUC and satisfy insurance and other requirements.[9]

In the EU, it is still open to debate whether Uber should be qualified as a transport operator (subject to national regulation by each EU Member State) or a digital service (information society service)[10] provider. In this regard, the Court of Justice of the European Union is expected to issue a decision upon a Spanish court request for a preliminary ruling and provide answers to questions referred by the national court, including an answer to the question "*must the activity carried out for profit by the defendant, consisting of acting as an intermediary between the owner of a vehicle and a person who needs to make a journey within a city, by managing the IT resources — in the words of the defendant, 'intelligent telephone and technological platform' interface and software application — which enable them to connect with one another, be considered to be merely a transport service or must it be considered to be an electronic intermediary service or an information society service*".[11] Once this ruling is issued, it should also resolve debates pending before national courts in other EU jurisdictions and provide clear guidance on how EU law should be

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6 Yeung, Ken, *California Becomes First State To Regulate Ridesharing Services benefiting Uber, Lyft, Sidecar, and InstantCab*, TheNextWeb, retrieved 26/04/2017 from thenextweb.com

7 Yeung, Ken, *California Becomes First State To Regulate Ridesharing Services benefiting Uber, Lyft, Sidecar, and InstantCab*, TheNextWeb, retrieved 26/04/2017 from thenextweb.com

8 Transportation Network Companies, California Public Utilities Commission, retrieved 27/04/2017 from www.cpuc.ca.gov

9 Such as driver criminal background check, driver training program, zero-tolerance policy on drugs and alcohol, car inspection, etc. The California Public Utilities Commission, (2013), *CPUC Establishes Rules for Transportation Network Companies*, Press Release, 19 September 2013, retrieved 27/04/2017 from www.cpuc.ca.gov

[A]ll transportation must be prearranged through the use of an online-enabled application or platform, the use of top lights and/or taxi meters in all vehicles operated under such permit is prohibited, as well as street hailing of passengers. Carrier is authorized to facilitate rides between passengers and private drivers using their own personal vehicles and is not permitted to itself own vehicles used in its operation or own fleets of vehicles. The California Public Utilities Commission, (2017), *CLASS P TRANSPORTATION NETWORK COMPANY PERMIT*, San Francisco, retrieved 27/04/2017 from www.cpuc.ca.gov

10 Information society service is defined as any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of a service. Article 2(1)(a) of Directive 2000/31/EC (Directive on Electronic Commerce) with reference to Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC

11 Request for a preliminary ruling from the Juzgado Mercantil No 3 de Barcelona (Spain) lodged on 7 August 2015 – Asociación Profesional Élite Taxi v Uber Systems Spain, S.L. (Case C-434/15), Court of Justice, retrieved 27/04/2017 from curia.europa.eu

interpreted and applied to both the national judiciaries and the national regulators. In this respect, it is noteworthy to point to Advocate General Szpunar's Opinion, issued on 11 May 2017, according to which the service offered by Uber "*does not constitute an information society service*" but "*must be classified as a 'service in the field of transport'*".[12] The legal consequence of this qualification is, the Advocate General concludes[13], that Uber's activity is not governed by the principle of freedom to provide services, within the meaning of information society services, but is subject to national conditions under which carriers may operate transport services within each respective Member State.

Labour law challenges

Under Uber's business model its partner drivers are treated as independent contractors. This has raised labour-law challenges both in the USA and in some EU Member States. Namely, it has been argued that Uber in fact acts as the employer of drivers and should therefore give them basic employee rights under national labour legislation.

In 2015, Uber lost a case in California where it was found to be the employer due to the control exerted over the driver.[14] As a follow-up to class-action labour-related lawsuits in California and Massachusetts, in April 2016 Uber reached a settlement and agreed to pay USD 100 million and make policy concessions in exchange for keeping its drivers in those states classified as independent contractors instead of employees.[15]

In October 2016, the Central London Employment Tribunal ruled that Uber drivers are "workers" entitled to the minimum wage, paid holiday, sick leave and other normal worker entitlements, rather than self-employed.[16]

Competition law challenges

In the business model in which Uber acts as an independent software provider to independent contractors (Uber partner drivers) who act independently from Uber and from one another, there arose the question of cartel (prohibited agreements) in respect of fare determination as all independent entrepreneurs (Uber partner drivers) apply the same pricing mechanism determined by Uber algorithms.

The antitrust question arose in the USA in 2015 when Spencer Meyer (a former Uber driver) filed a suit in the U.S. District Court for the Southern District of New York against Travis Kalanick, the then chief executive officer of Uber Technologies Inc., alleging that the defendant had engaged in a price-fixing scheme with Uber drivers using Uber's pricing algorithms to fix ride prices in violation of the US antitrust legislation. Uber was later joined as a party to the case. The case is currently stayed pending the second instance decision on Uber's argument that the case should be decided by arbitration.[17]

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[12] Opinion of Advocate General Szpunar delivered on 11 May 2017, Asociación Profesional Élite Taxi v Uber Systems Spain, S.L. (Case C-434/15), Court of Justice, retrieved 30/08/2017 from curia.europa.eu

[13] It should be noted that the Advocate General's Opinion is not binding on the Court of Justice and that the Court has yet to deliver its judgment.

[14] *Barbara Berwick v. Uber Technologies, Inc. and Rasier CA-LLC*, Case No. 11-46739 EK, Labor Commissioner of the State of California, retrieved 27/04/2017 from www.scribd.com

[15] Isaac, M. and Scheber, N., *Uber Settles Cases With Concessions, but Drivers Stay Freelancers*, The New York Times, retrieved 27/04/2017 from www.nytimes.com

[16] Chakrabortty, A., *Uber ruling is a massive boost for a fairer jobs market*, The Guardian, retrieved 27/04/2017 from www.theguardian.com

[17] Geier, P., *Uber antitrust actions a tough nut for US plaintiffs to crack*, law.seattleu.edu, retrieved 24/04/2017 from law.seattleu.edu

Unfair competition charges

Uber has been widely accused of competing unfairly with taxi drivers on the grounds that it enters markets without complying with national and local regulations, which enables it to undercut prices.

In 2015, a Spanish court referred to the Court of Justice of the European Union for a preliminary ruling the following question, among others: "*If the service provided by UBER SYSTEMS SPAIN, S.L. were not to be considered to be a transport service and were therefore considered to fall within the cases covered by Directive 2006/123, the question arising is whether Article 15 of the Law on Unfair competition – concerning the infringement of rules governing competitive activity – is contrary to Directive 2006/123, specifically Article 9 on freedom of establishment and authorisation schemes, when the reference to national laws or legal provisions is made without taking into account the fact that the scheme for obtaining licences, authorisations and permits may not be in any way restrictive or disproportionate, that is, it may not unreasonably impede the principle of freedom of establishment.*"[18]

In the meantime, while the preliminary ruling of the Court of Justice upon the Spanish court request is pending,[19] unfair competition claims against Uber remain to be brought in different European jurisdictions. In April 2017, an Italian court upheld a complaint filed by the taxi unions against Uber on the grounds of unfair competition, finding that Uber is a transportation company, and banned the Uber application, its promotion and advertising on the Italian territory.[20] Most recently, Croatia has been added to the list of countries where Uber is challenged on the grounds of unfair competition.[21]

3. Croatian regulatory framework

3.1. Some remarks about Croatia's transport services market

The rules applicable to questions of transport service provision in Croatia are contained in the Road Transport Act (Official Gazette 82/13). This comprehensive legal source regulates all types of road transport in Croatia, with it being allowed to provide passenger transport only under the terms laid down by this Act. Consequently every entrepreneurial initiative has to comply with its provisions.

The said Act sets forth the conditions and models for transport service provision such that business activities focusing on transport service provision are legal only if they meet the criteria laid down by the said Act.

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[18] Request for a preliminary ruling from the Juzgado Mercantil No 3 de Barcelona (Spain) lodged on 7 August 2015 – Asociación Profesional Élite Taxi v Uber Systems Spain, S.L. (Case C-434/15), Court of Justice, retrieved 27/04/2017 from curia.europa.eu

[19] In his Opinion of 11 May 2017 Advocate General Szpunar did not deal with this question considering it obsolete due to his proposed answers to the first two questions of the Spanish court, namely, that Uber's service is not an information society service but a service in the field of transport. Opinion of Advocate General Szpunar delivered on 11 May 2017, Asociación Profesional Élite Taxi v Uber Systems Spain, S.L. (Case C-434/15), Court of Justice, retrieved 30/08/2017 from curia.europa.eu

[20] Agence France-Presse, *Italy court bans Uber over unfair competition for taxis*, The Guardian, retrieved 27/04/2017 from www.theguardian.com

[21] In February 2017, the Croatian Chamber of Trades and Crafts filed a suit against Uber Croatia d.o.o. asking the court to prohibit misleading and prohibited marketing of their services, claiming that Uber Croatia d.o.o. markets illegal passenger transportation by road vehicles, in fact taxi transportation, without licenses and permits thus encouraging unfair competition to legal taxi drivers. *Hrvatska obrtnička komora vs. Uber Croatia d.o.o.*, P-248/2017, Commercial Court in Zagreb (*Trgovački sud u Zagrebu*).

As will be shown below, the main problem of Croatia's regulatory framework in the field of transport is the legislator's relatively rigid approach to transport innovation. Namely, at the moment only those business activities in the transport sector that are expressly mentioned in the Act may be performed. Whenever the Act does not provide for a transport service, the regulatory authorities treat it as illegal. For that reason it is possible to say that in Croatia transport services are regulated as *numerus clausus* services, i.e., they are listed exhaustively by the Act, the consequence being that the entrepreneur has to adapt his/her business model to the models provided for by the Act.

It is not necessary to mention that this legislative model is almost completely closed for innovation and represents a strong administrative barrier to the development of new business models in the transport sector. At present the innovative entrepreneur in Croatia has only two options: he/she can try to subsume his/her innovation under some transport model already provided for or can try to initiate a wide public debate with the aim of bringing about legislative change. In either case the entrepreneur is in an unenviable position: if he/she has come up with a big innovation, he/she will very likely not be able to apply the existing rules to it. On the other hand, initiation of legislative changes is always a lengthy and uncertain process which abounds in obstacles and is followed by resistance from business competitors.

In addition to the aforementioned problem of there being an exhaustive list of transport services, which makes it difficult to implement innovations, Croatia's regulatory framework has one more characteristic which can be perceived as an administrative barrier to new entrants to the market. An entrepreneur interested in starting a business in the transport sector is faced with a series of challenging administrative proceedings which he/she must go through in order to obtain all the licences and permits prescribed by the Act as the prerequisites for providing passenger transport.

This situation has resulted in closed markets characterised by low levels of competition and few competitors that divided up the markets along municipal lines. This is especially visible in the taxi services market. Almost every town has its own taxi association and the municipal authorities use all available legal tools to protect the market position of their domestic taxi drivers, among other things, by actually making it impossible for entrepreneurs established or residing in other towns to start a business within their jurisdiction. The final result of this is very predictable: taxi prices are high and do not represent value for money.

3.2. Arrival of new entrants

The year 2015 brought the entrance onto Croatia's transport services market of several new players offering innovative and technologically superior solutions to customers. The biggest change for everyone was the arrival of Uber, an advanced international transport services model which is based on an innovative approach not only to customers but also to drivers. Uber provides everyone with the opportunity to start very easily a transport business as an Uber partner driver. As a result, the number of drivers using the Uber application increased, which in economic terms meant an increased supply on the transport market, which consequently led to lower transport prices. Having recognized the advantages of Uber, especially service availability and price acceptability, many customers turned their backs on conventional taxi transport and started using only Uber.

Very soon Uber was followed by a number of domestic competitors which in an attempt to reap the benefits of Uber's market penetration adopted the key features of Uber's business model.

It did not take long to see the reaction to this tectonic shift. After a brief period of initial confusion, the public authorities started inspections of Uber partner drivers and the other competitors which tried to implement various innovations in the day-to-day transport business. The authorities' repressive reaction was followed by a very strong response from old market competitors, especially taxi drivers, which gathered around their guilds. In most cases taxi drivers organised public demonstrations against Uber and the other new entrants, but a few of them were also involved in aggressive incidents and physical attacks on Uber drivers and their vehicles.

It is worth mentioning that the arrival of Uber was perceived by the general public as a huge change in favour of strengthening competition and the key factor in opening Croatia's urban mobility market. To the best of the authors' knowledge, the abovementioned competition law issues in respect of Uber's business model that are pending in the USA have not even been raised in Croatia. In this respect it is interesting to note the statement of the President of the Competition Council of the Croatian Competition Agency that Uber in Croatia is not violating competition law, either in terms of prohibited agreements or abuse of dominant position,[22] which clearly suggests that the Croatian Competition Agency does not consider Uber's business model problematic in terms of competition law. Of course, this statement only applies to matters of competition law and cannot be interpreted as general approval of Uber's business model.

The main regulatory issue which came to the fore with the arrival of new entrants onto the market concerned legal prerequisites that entrepreneurs have to fulfil in order to be allowed to provide passenger transport. As has already been said, Croatia's transport market is, due to a rigid regulatory framework, very much closed to new entrants. Before starting a business the entrepreneur is obliged to obtain different permits and licences and fulfil other legal requirements. Some of these permits are practically impossible to obtain because their issue is within the purview of local government units which in general favour existing market operators, specifically local taxi drivers.

Because their chances of obtaining the necessary taxi service permits were slim, Uber and the other entrepreneurs tried to find some other way of providing transport services. As has already been mentioned, under the Croatian law transport services are *numerus clausus* services, meaning that only such types of transport services as are expressly listed in the relevant Act may be provided. Consequently, the new entrants were forced to find a model which could be subsumed under one of the legally recognized transport types.

3.3. Legal provisions on passenger transport

As has already been said, the law applicable to Croatia's transport services sector is the Road Transport Act. The Ministry of the Sea, Transport and Infrastructure is responsible for supervising its implementation. Within the Ministry there is the Traffic Inspectorate charged with supervising transport service providers. Where irregularities are detected during inspections, inspectors are authorised to issue misdemeanour orders and impose administrative measures against transport companies deemed to have breached the law.

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[22] S. Abramov, *Mladen Cerovac, predsjednik Vijeća AZTN-a: 'Kratki lanac dostave hrane' ne bi kršio tržišno natjecanje* [*Mladen Cerovac, president of the Competition Council of the CCA: 'A short food supply chain' would not violate competition*], Lider, retreived 30/08/2017 from lider.media

The Road Transport Act defines public transport as transport available to all users under the same conditions.[23] Types of passenger transport include: public line transport, special line transport, shuttle transport, occasional transport, taxi transport and special purpose transport.[24] As has already been said, these types of transport form an exhaustive list of permitted forms of transport in Croatia and the prospective entrepreneur must choose among them. Any other form of transport would be considered by the Traffic Inspectorate as in breach of the law.

Public line transport services may be provided exclusively by bus on local, county and inter-county lines.[25] They have to be operated in accordance with the published timetable, with the transporter having to obtain a permit for the provision of inter-county or county public line transport from, respectively, the Ministry or county administrative body.[26]

Special line transport services are in general run by buses but can be provided exceptionally by personal vehicles (8+1) or special vehicles on the basis of a written agreement between the client and the transporter. The agreement must include a list of passengers and has to be deposited on board the vehicle for the entire length of the trip. Furthermore, it is forbidden to transport passengers whose names are not on the list which forms an integral part of the agreement.[27] The transporter is obliged to notify the Ministry or county authorities of the agreement within 8 days after its conclusion.[28] As in the case of public line transport, this type of transport is provided on the basis of the appropriate permit.[29]

Shuttle transport means transport of passengers along the route linking an airport and the city centre or a hotel. It can be provided by bus or personal vehicle (7+1 or 8+1). In order to be allowed to provide this type of transport the transporter does not need a permit but must instead conclude an agreement with the airport which he/she serves.[30]

Occasional transport may be provided by bus or personal vehicle (7+1 and 8+1). It must not contain elements of line transport and is intended as one-time transport only, that is, it does not serve the function of daily migration transport. The transporter is obliged to have a written transport agreement on board the vehicle for the entire length of the trip.[31] Since the provision of occasional transport is not subject to the permit requirement, occasional transport can be considered as a form of transport regulated less than line transport.

Taxi transport is defined as passenger transport provided by car if the passenger or group of passengers is collected at one location, transport is provided on the basis of a single order and is paid for by means of a single payment.[32] Unlike the above described types of transport, taxi transport is not regulated only at the national level but can be further regulated at the municipal level, with the rules and regulations thus adopted valid in the territory of each respective municipal unit.[33] Municipal units are entitled to require a special permit for operating taxi services. Where this is the case, the permit is issued by the competent authority of the

23 Article 4, point 15, of the Road Transport Act.

24 Article 32 of the Road Transport Act.

25 Article 33, paragraph 2, of the Road Transport Act.

26 Articles 34 and 36 of the Road Transport Act.

27 Article 53, paragraph 1, of the Road Transport Act.

28 Article 53, paragraph 2, of the Road Transport Act.

29 Article 53, paragraph 4, of the Road Transport Act.

30 Article 54 of the Road Transport Act.

31 Article 55 of the Road Transport Act.

32 Article 4, point 1, of the Road Transport Act.

33 Article 56, paragraph 1, of the Road Transport Act.

relevant local government unit.[34] Furthermore, local government units are authorised to lay down requirements for taxi vehicle appearance and equipment. The municipal units' most important power is the power to set taxi fares and lay down rules fixing the number of taxi drivers in each town.[35] The Act provides that the transporter can provide taxi services only on the territory of the municipal unit in which it is established or residing. An exemption to this provision is possible only if the local government unit opens up by a special regulation its taxi services market to transporters from other towns.[36] Taxi drivers are also required to pass an exam on the cultural sites, tourist attractions and other sites of interest located on the territory of the municipal unit in which they intend to provide their services. Examination methods are within the purview of the local government units.[37]

Special purpose transport is not regulated at all at the national level. It is defined as a permitted type of transport whose regulation is left entirely to the local government units. The Act only provides that the need for and manner of renting out private vehicles with a driver and providing special purpose transport by road train, horse-drawn carriage or any other road vehicle is to be regulated by the local government units.[38] This legal provision is unclear and raises several questions, the most important of which being: Is it allowed to rent out private vehicles with a driver or provide other forms of special purpose transport if the relevant local government unit has not adopted any applicable rules and regulations? If the answer to this question is affirmative, then this type of transport is completely unregulated. However, the answer to the above question probably depends on the personal beliefs of the person answering it, i.e., on whether he/she is devoted to the *laissez faire* doctrine or believes that all business activities, in order to be allowed, must be regulated in detail.

In addition to the other requirements, the entrepreneur intending to start a transport business is required to obtain a public transport licence. The Act differentiates between two types of licences. The first type, which can be dubbed a general licence, is issued for special line transport, occasional transport and shuttle transport. The second type is a taxi licence issued specifically for taxi transport.[39] Both types of licences are issued by county state administration offices.

The conditions to be fulfilled by applicants in order to obtain the licence include: 1) good reputation, 2) financial ability, 3) professional competence and 4) ownership of at least one vehicle which meets special legal requirements. These special requirements are set forth in the Regulation on the special conditions applicable to public road transport and own-account transport vehicles (Official Gazette 31/14). This Regulation lists the requirements for the provision of taxi transport, special line transport, occasional transport and shuttle transport. The Regulation makes no mention at all of special purpose transport. Consequently, we can conclude that being issued a licence is not a legal prerequisite for operating special purpose transport services.

The aforementioned legal provisions show that the business activity of passenger transport is heavily regulated and involves numerous administrative barriers to new entrepreneurs interested in starting a business in the transport sector. These barriers take the form of legal

[34] Article 56, paragraph 3, of the Road Transport Act.

[35] Article 56, paragraphs 5 and 6, of the Road Transport Act.

[36] Article 57 of the Road Transport Act.

[37] Article 59 of the Road Transport Act.

[38] Article 60 of the Road Transport Act.

[39] Article 14, paragraphs 1 and 2, of the Road Transport Act.

conditions for lawful transport provision. Table 1 provides an overview of these legal prerequisites:

Table 1: Legal prerequisites prescribed at the national level by transport type

(+) mandatory prerequisite (-) non-mandatory prerequisite

	Public line transport	Special line transport	Shuttle transport	Occasional transport	Taxi transport	Special purpose transport
licence	+	+	+	+	+	-
permit	+	+	-	-	+	-
agreement on board the vehicle	-	+	-	+	-	-
fixed number of drivers	-	-	-	-	+	-
fixed fares	-	-	-	-	+	-
specific exam for drivers	-	-	-	-	+	-
limited route	+	+	+	-	+	-
special conditions for vehicles	+	+	+	+	+	-

The above table reveals that taxi transport is convincingly the most regulated type of transport. The result is well-known: Croatia's taxi services market is closed and largely static. It is no wonder that the new entrants tried to find alternative models to penetrate the market. Uber has managed to find its way into the market for special purpose transport, which is not surprising given that special purpose transport is completely unregulated at the national level. As has already been said, it is left to the local government units to regulate all aspects of provision of special purpose transport. Considering that the local government units have not done that, Uber and the other new entrants considered it legitimate to take the position that everyone without any restriction is permitted to provide special purpose transport. Eventually Uber entered the market by taking advantage of the model based on rentals of private vehicles with drivers, which is a form of special purpose transport. Soon after entering the Croatian market, the Traffic Inspectorate started inspections of Uber partner drivers which came to highlight several issues.

3.4. Currently unresolved issues

The main question to which no unambiguous answer can be given is whether it is legally possible to provide special purpose transport if the relevant local government unit has not adopted any rules and regulations in that field. We have already said that the answer to this question depends on the personal beliefs of each individual. Indeed, this question is of a gen-

eral nature and it is possible to find arguments supporting answers both in the affirmative and in the negative. Special purpose transport is a category of transport provided for by law, so it is generally acceptable. Why would the entrepreneur be restricted in doing business just because the city failed to adopt a regulation on that matter? If the administrative authorities of a town believe that special purpose transport is not a good solution for their citizens, they have the power to stop that type of transport being provided simply by prohibiting it. On the other hand, grammatical interpretation of the Road Transport Act provides that "*the need for… special purpose transport… is to be regulated by the local government unit*." So it can be interpreted that if a local government unit has not adopted any rules or regulations in this respect, then there is obviously no need for special purpose transport within its territory. Supporters of grammatical interpretation consider that from the cited provision it follows that special purpose transport is permitted only if the local government decides so. However, the authors of this article hold that this is only one of the possible ways of interpreting the cited provision. If the legislator's intention was to limit the provision of special purpose transport only to those local government units which expressly allowed it, it would have expressly provided so in Article 60 of the Road Transport Act by adding a second paragraph. However, there is no such paragraph, only a provision open to legal interpretation which says that the need for and manner of renting out private vehicles with a driver and providing special purpose transport by road train, horse-drawn carriage or any other road vehicle are to be regulated by the local government unit. It is obvious that what is at issue here is the word *need* and its meaning. Specifically, what is the legal meaning of regulating a need and can a need be regulated at all or is its existence a matter of fact. Furthermore, if a transport need is not regulated at all, does that mean that type of transport is not allowed? The Road Transport Act uses the expression *to regulate* and not the expression *to allow* so we cannot unambiguously conclude that not regulating the need for and manner of renting out private vehicles with a driver means that type of transport is not allowed. These questions clearly show that the disputed provision of the Road Transport Act is unclear and should be amended and clarified in the future.

In any case, it will not be easy to decide this issue. A major consideration in taking that decision will certainly be the constitutional guarantee of freedom of entrepreneurship. Under the Croatian Constitution, free enterprise and free markets form the foundation of the economic system of the Republic of Croatia.[40] All legal issues must be interpreted in accordance with constitutional principles so this could be a strong argument in favour of the view that special purpose transport is legally acceptable even if not regulated at the municipal level.

Another important question concerns the need to obtain the public transport licence if the transporter intends to provide only special purpose transport. The general rule provides that a legal or natural person is allowed to perform the business activity of public transport only if it has obtained the appropriate licence.[41] The fact of the matter is that special purpose transport is not expressly mentioned in the exceptions to the general rule, which leads to the conclusion that the licence for that form of transport is mandatory. However, Article 60 of the Road Transport Act provides that special purpose transport is to be regulated by the local government units so the licence would be required only if a particular local government unit decided so for the territory within its jurisdiction. We should also bear in mind that the abovementioned Regulation on the special conditions applicable to public road transport and own-account transport vehicles contains no provision on special purpose transport. One of the

[40] Article 49 of the Constitution of the Republic of Croatia (Official Gazette 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14).

[41] Article 14 of the Road Transport Act.

prerequisites for issuing the licence is that the applicant is the owner of or has the right to use at least one registered vehicle for each type of transport. In order to fulfil that prerequisite the vehicle has to be equipped in accordance with the provisions of the abovementioned Regulation. Given that this Regulation is one of the basic legal acts regulating licence issue, it follows that for this type of transport (under the present legal regime) it is not even possible to obtain a licence because the legislator failed to regulate how the rental vehicle-cum-driver should be equipped so when issuing the licence, this specific circumstance cannot be checked.

Until Croatia's transport services legislation is amended, these and other issues will have to be resolved through misdemeanour and administrative court proceedings that are pending between Uber partner drivers and the Ministry of the Sea, Transport and Infrastructure. Bearing in mind the average length of court proceedings in Croatia, we cannot expect a final resolution of these issues by the Croatian judiciary any time soon.

4. *De lege ferenda*

The issue of how to regulate new innovative business models in the transport sector, such as Uber's, is still unresolved in most jurisdictions, including Croatia. Innovative models of service provision are based on simplicity, availability and accessibility to the broadest circle of users so any regulatory provision has a contracting effect. At the same time, the protection of the public interest necessarily entails a certain level of regulation guaranteeing the minimum standard of service quality and safety. Thus, the challenge faced by legislators consists in determining the ideal ratio between deregulation, which opens up space for innovative entrepreneurs, and regulatory limits necessary for protecting the public interest.

In several of its working papers European Union institutions presented views in support of the collaborative (sharing) economy and, more specifically, collaborative (sharing) business models in the transport sector.

Already in 2014, the Vice-President of the European Commission, Neelie Kroes, commenting on the decision of a Belgian court to ban Uber, said that "*This decision is not about protecting or helping passengers – it's about protecting a taxi cartel. (…) No-one is saying that Uber drivers should not pay taxes, follow rules, and protect consumers. But banning Uber does not give them the chance to do the right thing! If Brussels authorities have a problem with Uber they should find a way to help them comply with standards instead of banning them.*"[42]

On 6 May 2015, the European Commission published its communication to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions entitled: "A Digital Single Market Strategy for Europe" recognizing that the sharing economy offers opportunities for increased efficiency, growth and jobs, through improved consumer choice, and that Europe has a strong potential in the area of e-commerce but is held back by fragmented markets and regulatory questions.[43]

A briefing prepared for European Parliament members in October 2015 recognized that a major question in this regard is whether to regulate transportation network companies (TNCs), such as Uber, at the European level.[44]

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[42] Kroes, N., *Crazy court decision to ban Uber in Brussels*, European Commission, retrieved 27/04/2017 from ec.europa.eu

[43] European Commission, (2015), *A Digital Single Market Strategy for Europe*, European Commission, Brussels, retrieved 27/04/2017 from eur-lex.europa.eu

[44] Azevedo, F., and Maciejewski, M., *Social, Economic and Legal Consequences of Uber and Similar Transportation Network Companies (TNCs)*, European Parliament, retrieved 27/04/2017 from www.europarl.europa.eu/portal/en

In April 2016, an external analytical paper contracted by the European Commission, dealing with regulatory and economic aspects of the collaborative economy, recognized that "*Large collaborative platforms are mainly US-based enterprises (e.g. Airbnb, Uber). This observation suggests that European platforms face barriers to growth possibly created by the EU environment*" and that "*From a collaborative economy perspective, some parts of the existing EU framework might just need to be applied to the collaborative economy in a more appropriate way. An example for this is the Services Directive and its application to ridesharing services like Uber. As transport services, the Services Directive does not cover them. If they were instead classified as digital services, EU level jurisdiction would be warranted.*"[45]

In order to provide "*clarity on applicable EU rules and policy recommendations*" regarding the collaborative economy with a view to encouraging "*the development of new and innovative services, and the temporary use of assets, while ensuring adequate consumer and social protection*"[46], on 2 June 2016 the European Commission published its communication to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions entitled: "A European agenda for the collaborative economy".[47]

The European Commission's main conclusions, among others, were that:

- services providers should only be obliged to obtain business authorisations or licenses where strictly necessary to meet relevant public interest objectives, regulation should not favour one business model over another and absolute bans of an activity should only be a measure of last resort;
- platforms should not be subject to authorisations or licenses where they only match consumers and those offering products and services and it is to be established case-by-case whether their activities go beyond such intermediary activities and they also provide the actual service (e.g. transport or accommodation service);
- EU Member State are invited to review and where appropriate revise existing legislation according to the European Commission's guidance, whilst ensuring that social and consumer rights are respected.[48]

On 7 November 2016, the Committee on Transport and Tourism of the European Parliament published the "Report on new opportunities for small transport businesses, including collaborative business models" in which it:

- called on the Commission and the Member States to take appropriate action to combat anti-competitive practices by large integrated groups in order to tackle discrimination and market access restrictions, regardless of size or type of enterprise, especially regarding new business models;
- called for the review and harmonisation of the rules on access to regulated occupations and activities in Europe, so as to enable new operators and services linked to digital platforms and the collaborative economy to develop in a business-friendly environment, including greater transparency with regard to legislative changes, and to coexist with incumbent operators within an environment of healthy competition;

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[45] Cologne Institute for Economic Research, (2016), *Collaborative Business Models and Efficiency, Potential Efficiency Gains in the European Union*, Cologne, retrieved 27/04/2017 from ec.europa.eu

[46] Collaborative economy, European Commission, retrieved 27/04/2017 from ec.europa.eu

[47] European Commission, (2016), *A European agenda for the collaborative economy*, European Commission, Brussels, retrieved 27/04/2017 from ec.europa.eu

[48] Collaborative economy - factsheet, European Commission, retrieved 27/04/2017 from ec.europa.eu

- regretted that the Member States' response to the development of collaborative business models has so far been very fragmented and in some cases entirely inconsistent with the potential and benefits of the development of this sector, as well as contrary to consumer expectations, and considering that a coordinated overall European-level action, covering issues for a sustainable collaborative business model, is desirable.[49]

At the informal meeting of the Competitiveness Council (COMPET) held on 6 April 2017 in Malta, which brought together EU ministers responsible for competitiveness, it was concluded that "*Europe must be ready to look at the regulatory environment in order to boost and encourage new business models to allow these to develop rather than saying that these do not fit Europe's regulatory environment.*"[50]

Regardless of the widely proclaimed support for the collaborative economy business models, the EU has so far given little direct guidance on how this issue is to be legislatively resolved at the national level. No directive setting joint principles for Member States in regulating innovative business models in the transport sector is currently due and each EU Member State is still left to regulate these issues for itself with only general (insufficiently specific) guidance from the EU on best practices. Considering the recently issued opinion of Advocate General Szpunar (that Uber's service qualifies as a service in the field of transport and not as an information society service),[51] EU guidance will sooner come from the EU's judiciary than from its legislator since the judgment of the Court of Justice in Asociación Profesional Élite Taxi v Uber Systems Spain, S.L. is now due. Since the Advocate General's opinion is not binding on the court, it still remains to be seen whether the Court of Justice will agree with it..

Croatia's transport sector legislation is in need of significant corrections in order to enable smooth and unquestionable application of innovative business models in urban mobility in Croatia. The provisions of the Road Transport Act currently in force and their practical application in administrative and judicial proceedings aim at closing the market to new entrants, thus significantly impeding further competition. Ultimately, this affects most significantly consumers as the users of transport services. Croatia's road transport legislation should be brought into the 21st century and explicitly recognize innovative business models in urban mobility resulting from technological innovation and progress and should stop turning a blind eye to technological reality.

Accepting innovative business models based on the principles of the sharing (collaborative) economy (such as Uber)[52] does not mean that they have to be given the unfair advantage of under-regulation over traditional business models (such as taxi services). To the contrary, the legislator should provide for a clear and fair regulation of both innovative and traditional business models setting the minimum standards (in particular in terms of consumer protection and safety) which each model has to satisfy. The industry should not be entirely de-

[49] Committee on Transport and Tourism, (2016), *Report on new opportunities for small transport businesses, including collaborative business models*, European Parliament, retrieved 27/04/2017 from www.europarl.europa.eu/portal/en

[50] *Maltese Presidency determined to help start-ups deliver their full innovation and job creation potential*, retrieved 27/04/2017 from www.eu2017.mt/en/Pages/home.aspx

[51] Opinion of Advocate General Szpunar delivered on 11 May 2017, Asociación Profesional Élite Taxi v Uber Systems Spain, S.L. (Case C-434/15), Court of Justice, retrieved 30/08/2017 from curia.europa.eu

[52] While Advocate General Szpunar opined that Uber is not a ride-sharing platform, he noted that Uber is often considered as the undertaking in the collaborative economy. Opinion of Advocate General Szpunar delivered on 11 May 2017, Asociación Profesional Élite Taxi v Uber Systems Spain, S.L. (Case C-434/15), Court of Justice, retrieved 30/08/2017 from curia.europa.eu

regulated but regulated in a smart and clear manner. This would create a level playing field and equal opportunities for all business models to compete, which would ultimately result in consumers benefitting the most. Safety is an indispensable requirement in every transport activity, as is consumer protection in general. However, these should not be used as excuses for erecting administrative market access barriers and any regulation preventing or making it more difficult for innovative services to enter the market without any reasonable justification should be avoided.

A new road transport act is currently under preparation in Croatia, with the working group drafting the new act consisting of both existing market operators (taxi association) and new service providers (Uber). The media recently reported that the new act, to be adopted in autumn 2017, will partially liberalise the urban transport market by increasing the number of licenses and lowering administrative barriers while maintaining safety standards in an attempt to ensure both consumer safety and service price reductions.[53] However, there is still no official confirmation of any particulars of the new draft, including the possible timeframe for its presentation for public discussion or adoption by the Croatian Parliament, so it still remains to be seen how our legislator will resolve the urban transport dilemma.

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[53] J. Bohutinski, *Više dozvola i blaži uvjeti za dobivanje taksi licencije [More licenses and less strict requirements for obtaining taxi licenses]*, Večernji list, retrieved 30/08/2017 from vecernji.hr

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VI.

JEDINSTVENO TRŽIŠTE PRIJEVOZNIH USLUGA I PITANJA TRŽIŠNOG NATJECANJA

SINGLE MARKET IN TRANSPORT AND COMPETITION LAW ISSUES

ANTITRUST DAMAGES CLAIMS UNDER EU AND NATIONAL LAW: A TRANSPORTATION SECTOR FOCUS

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Pregledni znanstveni rad / Review paper
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SUMMARY

This short paper deals with some ongoing cases of antitrust damages claims related to the transportation sector. The paper also depicts the current legal landscape under EU law and under one of the jurisdictions well-known to the author (Spain). On balance, this paper considers some of the key questions that usually arise in relation to cartel damages claims.

Key words: *cartels, transportation sector, trucks, antitrust damages claims, Directive 104/2014.*

I. INTRODUCTION. PRECEDENTS OF CARTELS IN THE TRANSPORTATION SECTOR THAT RESULT IN CLAIMS FOR DAMAGES

Damages claims for breach of the European and national antitrust laws are undoubtedly one of the most exciting areas of business law. Indeed, this is a field which lies at the crossroads between enforcement of competition law (an area of which primarily focuses on the economic general interest) and satisfying the private interest of those companies that have been harmed by a cartel or by anticompetitive conduct more generally.

Although this may still be considered to be an emerging area, there are already quite a few cases in the transportation sector.

On this session, we'd like to cover the European law of antitrust damages and its application to some specific examples drawing from our law firm experience.

1. Cartel in the trucks sector

In July 2016, the European Commission (**EC**) fined five truck manufacturers due to a cartel, and punished them with the highest fine imposed on a cartel.[2]

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[1] Callol, Coca & Asociados, Madrid.

[2] Decision of the European Commission, of 19 July 2016, in case AT.39824, Trucks (OJ 2017/C 108/05).

In 2011, the EC confirmed unannounced inspections in the truck manufacturing sector: initial investigations were conducted against MAN, Volvo/Renault, Daimler, Iveco and DAF. MAN finally and voluntarily revealed the existence of a cartel to the EC. The cartel operated during 14 years (1997 through 2011).

The cartel coordinated:

(i) Prices at "gross list" level for medium and heavy trucks in the European Economic Area (**EEA**).[3]

(ii) Timing for the introduction of emission technologies for medium and heavy trucks to comply with the increasingly strict European emissions standards (from Euro III through to the currently applicable Euro VI).

(iii) The passing on to customers of the costs for the emissions technologies required to comply with the increasingly strict European emissions standards (from Euro III through to the currently applicable Euro VI).

Volvo/Renault, Daimler, Iveco, and DAF pleaded guilty, in order to reach a settlement with the EC. Such settlement contains a record fine of € 2.926 million.

"*The evidence shows that information on gross price increases, amongst others, all of the Addressees of November 2010 and of January 2011 had been collected from participants in the exchanges. The content of this list has been reproduced in a handwritten note by an employee of MAN who also received the gross increase in information about the other participants directly from Daimler. This information was provided when Daimler called MAN to find out details about MAN's next gross price increase.*"[4]

"*The evidence available shows that the conduct described above constituted an ongoing process and did not consist of isolated or sporadic occurrences. The contacts between the Addressees were of a continuous nature, with numerous regular contacts (face-to-face meetings, phone calls and email exchanges). The different elements of the infringement were in pursuit of a common anti-competitive object as described above, which remained the same throughout the entire period of the infringement. The existence of a single and continuous infringement is also supported by the fact that the anticompetitive conduct followed a similar pattern throughout the entire period of the infringement.*"[5]

2. Other cartels in the transport sector

In recent years, a number of cases have been initiated in which carriers or companies in the transport sector of passengers or all types of goods were finally punished.

2.1. European Union

In recent years, a number of cases have been investigated and decided in which carriers or companies in the transport sector of passengers or all types of goods were finally punished.

[3] The "gross list" price level relates to the factory price of trucks, as set by each manufacturer. Generally, these gross list prices are the basis for pricing in the trucks industry. The final price paid by buyers is then based on further adjustments, done at national and local level, to these gross list prices.

[4] EC Decision on Trucks, *op. cit*., paragraph 60.

[5] EC Decision on Trucks, *op. cit*., paragraph 73.

The most recent sanction in this sector, apart from truck cartel, commented, is the cartel in "blocktrain".

In July 2015, the EC imposed fines of € 49 million on Express Interfracht, part of the Austrian railway incumbent *Österreichische Bundesbahnen*, and Schenker, part of the German railway incumbent Deutsche Bahn, for operating a cartel in breach of EU antitrust rules in the market for so-called cargo "blocktrain" services. The three companies fixed prices and allocated customers for their "Balkantrain" and "Soptrain" services in Europe for nearly eight years (from July 2004 to June 2012).[6]

More specifically, in order to limit competition between them, the companies agreed on several restrictive practices:

- They agreed and allocated existing and new customers as well as setting up a customer allocation scheme including a 'notification system' for new customers;
- they exchanged confidential information on specific customer requests;
- they shared transport volumes contracted by downstream customers;
- they coordinated prices directly by providing each other with cover bids in respect of customers protected under their customer allocation scheme and coordinated sales prices offered to downstream customers.

2.2. Spain

In Spain, the National Markets and Competition Commission (**NMCC** or **Spanish Competition Authority**) has fined in recent years several anticompetitive agreements made by carriers. In 2015, the following cases were punished: the Balearic transport of passengers[7] and refrigerated transport[8].

In addition, this year the NMCC has punished two transport companies for price and commercial conditions fixing:

(i) In November 2016 the NMCC fined two security companies (Prosegur and Loomis) with € 46.4 million, and two of their managers with € 52,600 by market sharing and manipulation of funds during seven years.[9]

(ii) In September 2016, the NMCC fined fifteen international moving companies with € 4.09 million due to the infringement of Articles 1 of the Spanish Competition Act (**SCA** or **Competition Act**) and 101 TFEU consisting of a cartel for more than fifteen years. These companies signed an agreement to fix prices and other commercial conditions in concert, to share the market and to exchange commercially sensitive information.[10]

Foremost, the NMCC has imposed multimillion fines in connection with the Valencia and Barcelona harbors, a key infrastructure in the transportation sector.

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6 Decision of the European Commission, of 15 July 2015, in case AT.40098, Blocktrains (OJ 2015/C 351/06), pages 8-9.

7 NMCC Decision of 9 March 2017, case S/DC/0512/14, Transporte balear de viajeros.

8 NMCC Decision of 25 June 2015, case S/0454/12, Transporte frigorífico.

9 NMCC Decision of 10 November 2016, case S/DC/0555/15, Prosegur-Loomis.

10 NMCC Decision of 6 September 2016, case S/DC/0544/14, Mudanzas internacionales.

II. THE EU ANTITRUST DAMAGES DIRECTIVE

The questions below are addressed bearing in mind *(i)* EU Directive 104/2014 and *(ii)* the national experience.

1. EU Directive 104/2014.

On 26 November 2014, the European Parliament and the Council launched Directive 2014/104/UE on antitrust damages actions (**Directive 104/2014**).[11]

Directive 104/2014 makes it a lot easier for victims of antitrust violations to claim compensation. Amongst other things, it will give victims easier access to evidence they need to prove the damage suffered and more time to make their claims. Up until now it was difficult to exercise this right in practice for all but the biggest companies. By harmonising procedures all over Europe, litigation to recover losses will become a realistic option for smaller companies, SMEs and consumers.[12]

Directive 104/2014 is designed to achieve more effective enforcement of the EU antitrust rules overall: it fine-tunes the interplay between private damages claims and public enforcement, and preserves the attractiveness of tools used by European and national competition authorities, in particular leniency and settlement programmes.

Because Directive 104/2014 touches on issues of harmonisation in the internal market, Parliament and Council adopted it under the ordinary legislative procedure.

First, in the majority of cases where the Commission has established an infringement of EU competition rules, the majority of victims have remained uncompensated. Second, the vast majority of cases have been brought in only three countries: the UK, Germany and the Netherlands, which are the jurisdictions generally perceived as most attractive for a number of reasons. In around 20 Member States there are few or no follow-on actions regarding Commission infringement decisions. Third, the majority of cases are brought by big businesses that purchase directly from the infringers. Indirect purchasers, SMEs and consumers very rarely bring cases.

Directive 104/2014 will significantly improve the situation of underdeveloped and uneven private enforcement of the EU competition rules. It removes important obstacles to effective damages actions in Member States' national legislation. It also harmonizes national laws in the field of damages actions. This ensures that each country has at least the basic rules in place needed to exercise effectively the EU right to full compensation.

Main improvements include:

- National courts can order companies to disclose evidence when victims claim compensation. The courts will ensure that disclosure orders are proportionate and that confidential information is protected.[13] (Discovery, which is a largely unknown notion in some EU countries).

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[11] Directive 2014/104/EU of the European Parliament and of the Council, of 26 November 2014, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349/1).

[12] http://ec.europa.eu/competition/publications/cpb/2015/001_en.pdf

[13] Directive 104/2014, *op. cit.*, Article 5.

- A final decision of a national competition authority (**NCA**) finding an infringement will automatically constitute proof of that infringement before courts of the same Member State.[14]
- Once an infringement decision by a competition authority has become final, victims will have at least one year to claim damages.[15]
- If an infringement has caused price increases and these have been "passed on" along the distribution chain, those who suffered the harm in the end can claim compensation.[16]
- The Directive clarifies the relationship between court actions and consensual settlements between victims and infringing companies, which makes settlements easier. This makes it easier and cheaper to resolve disputes.[17]

2. Case study of national implementation of the Directive 104/2014 in Spain.

In February 2015, the Ministry of Justice published its proposal (**Proposal**) on the implementation in Spain of the Directive. Before initiating the parliamentary approval process, the Proposal should be formally submitted by the government. According to sources of the Ministry of Justice, the Proposal would be subject to public consultation, during which stakeholders could submit their views. The deadline for Member States to implement the Directive 104/2014 in their respective domestic legal systems expired on 27 December 2016. At this stage, it was not entirely clear whether or not that deadline will be met in Spain since, subsequent to the December 2015 parliamentary elections and until November 2016, there has been no stable coalition to form a new government.

On December, Margrethe Vestager (the European Commissioner for Competition) urged a "final push" in adopting damages-action law across EU. Member states had until 27 December 2016 to transpose a pan-European directive into their statute books. Sweden became the first country to implement Directive 104/2014.[18]

On 26 May 2017 the Spanish Government implemented the Directive 104/2014[19] by means of Royal Decree-Law 9/2017 (**RDL**).[20] A Royal Decree-law is an instrument used by the government to legislate on matters that require urgency, subject to subsequent validation by Parliament within 30 days. In this case, as stated in the preamble of the RDL, the urgency is due to the fact that, as stated above, the deadline for EU Member States to implement the Directive 104/2014 in their respective domestic legal systems expired on 27 December 2016. In this regard, the European Commission had already opened an infringement procedure against Spain in January. In addition, failure to implement a Directive may potentially trigger the State's liability *vis-à-vis* individuals under the *Francovich* case law. On 22 June 2017 the Parliament validated the RDL. However, the Parliament has also decided to use a mechanism (fast-track approval as bill) by which it is possible to propose amendments to the text.[21]

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14 *Ibid*, Article 9.

15 *Ibid*, Article 10.

16 *Ibid*, Article 14.

17 *Ibid*, Article 19.

18 http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=845352&siteid=190&rdir=1

19 Directive 2014/104, *op. cit*.

20 Spanish Royal-Decree Law 9/2017, of 26 May.

21 We note that the RDL also implemented several other Directives into Spain.

The Proposal was not finally submitted by the Spanish Government as a bill or proposed legislation, since the government has opted for using the instrument of the Royal Decree-Law on the aforementioned urgency grounds. It should be noted that the RDL is less ambitious than the Proposal, in particular concerning the rules on access to evidence.

The RDL amends (i) the SCA, regarding substantive issues; and (ii) the Civil Procedure Act,[22] concerning procedural issues such as access to evidence.

Regarding changes to the Competition Act, the RDL includes the content of the Directive and, notably, the RDL goes beyond the wording of the Directive in some instances.[23] We comment on some of this below with regard to the previous Proposal.

2.1. Rules on joint and several liability.

In line with the Directive 104/2014,[24] the RDL establishes the general rule of statutory joint and several liability of cartel members for damages caused as a result of anticompetitive conduct. That clashes with prior provisions on the matter under Spanish civil law.[25]

The general principle under Spanish law, with the exception set out below, is that joint and several liability cannot be presumed to exist and must be based either on statute or on express agreement between the parties.[26] There is prior to the RDL no legal provision in force in Spain, which provides that cartel members are joint and severally liable for damages caused by a cartel. Hence, the new provisions implies a substantial change by introducing an exception to the general rule.

2.2. Parental liability.

A relevant presumption foreseen in the RDL is the liability of parent companies for damage caused by their subsidiaries, except when the economic conduct of a company is not determined by its parent company.[27] Therefore, the refutable presumption generally applicable to liability stemming from administrative decisions will also be applied *ex lege* in damages cases.

Until now, the extension of the said presumption to extra-contractual damages claims was not foreseen in Spain. Under the general regime, only under extraordinary circumstances is it possible to pierce the corporate veil and find a parent company liable for the harm caused by a subsidiary. In particular, pursuant to the case law the concurrence of bad faith is required.[28]

On the other hand, it should be noted that the presumption in the context of administrative enforcement only applies when the controlling stake is 100%, or very close to that figure.[29] Therefore, in order to mirror the rationale of the presumption in place at administrative level a reference to such ownership percentage would be required.

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22 Law 1/2000, of 7 January, on Civil Procedure Act.

23 http://callolcoca.com/wp-content/uploads/2015/06/Competition-Alert-Damages-Implemen-Propv5.pdf

24 Directive 104/2014, op. cit., Article 11.

25 New Article 73 Competition Act.

26 Article 1137 of the Civil Code and Judgment of the Supreme Court of Spain of 24 May 2004, case number 413/2004.

27 New Article 71.2 Competition Act.

28 For instance, Judgment of the Supreme Court of Spain of 29 June 2006, case number 665/2006.

29 For instance see Judgment of the EU Court of Justice of 10 September 2009 in case C-97/08 P, *Akzo Nobel and Others v Commission*,.

2.3. Statute of limitations.

This is arguably one of the areas with highest potential for distortions in the common market stemming from diverging national laws regulating antitrust damages recovery. Spain is one of the countries where the limitation period under law prior to the RDL is nominally shortest, although as it will be seen, such nominally short duration is not at all a major hurdle for this type of claims, if handled properly.

Under prior law, the cartel damages claims' statute of limitations was one year only. However, the RDL sets the statute of limitations for antitrust damages claims at five years,[30] which is the minimum limitation period pursuant to the Directive 104/2014.[31] The five-year limitation period will constitute an exception to the general rule for non-contractual damages claims in Spain since, according to the Civil Code,[32] the limitation period non-contractual damages actions is one year.[33] When it comes to cartel damages claims, the Spanish Supreme Court has expressly stated that the civil rules on non-contractual liability apply in those cases.[34]

2.4. Binding character of domestic antitrust decisions.

The RDL establishes that *final* decisions of national competition authorities and courts (including not only Spanish, but also from the other Member States) establishing the existence of a competition law infringement will be considered binding on Spanish civil courts.[35]

This is a novelty in Spain, since there was no statutory provision equivalent to Article 16 of Regulation 1/2003,[36] which establishes that European Commission decisions are binding on national courts to ensure the uniform application of EU competition law.

Despite the absence of such kind of provision, the Spanish courts have expressly ruled on the issue. In its judgment issued on 9 January 2015,[37] the Spanish Supreme Court established that final judgments issued by contentious-administrative courts when reviewing a decision of the Spanish Competition Authority are binding on civil courts.

In the abovementioned case, which was part of the *football TV-rights war* saga, the Spanish Supreme Court analysed whether the civil courts were bound by the decision issued by the Competition Authority on 14 April 2010. In the said decision, the Authority had declared that the pooling agreements of football TV-rights granting long-term exclusivities to successive pay-TV operators were contrary to the anticompetitive agreements prohibition (one of the parties in the civil litigation claiming that the agreement was thus void). Firstly, the Spanish Supreme Court concluded that a decision issued by the Authority, in the absence of a provision equivalent to Article 16 Regulation 1/2003, is not binding upon civil courts hearing a case involving the application of competition rules. Second, the court ruled that final decisions is-

30 New Article 74 Competition Act.

31 Directive 104/2014, *op. cit*., Article 10.3.

32 Royal Decree of 24 July 1889, on Civil Code.

33 *Ibid*, Article 1968, second paragraph, in connection with Article 1902. In this regard, it should be noted that the application of the rules on contractual liability to antitrust damages cases has been discussed in the framework of the *Sugar Cartel*, cited, and ruled out at least concerning cartel damages cases.

34 Judgment of the Supreme Court of Spain of 8 June 2012, case number 2163/2009.

35 New Article 75 Competition Act.

36 Council Regulation (EC) No 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 001 of 04.01.2003).

37 Judgment of the Supreme Court of Spain of 9 January 2015, case number 220/2013.

sued by a court on review do bind civil courts when it comes to the facts of the case (no binding effect can exist, naturally, regarding issues such as causality and *quantum* of damage, which are typically to be decided by the competent civil court). Indeed, in one of its judgments in the *Sugar Cartel* case,[38] where the issue of the binding nature of administrative decisions was also discussed, the Spanish Supreme Court held that the judgments of the review courts are not binding upon civil courts concerning the existence of actual harm and the quantification of the damage, including the existence of passing-on. Thus, those are questions that are currently in the exclusive hands of the civil courts.

It should be noted that the *Sugar Cartel* cases were judged under the former 1989 Spanish Competition Act (superseded by the 2007 Competition Act, currently in force), which required a final administrative decision to enable civil litigation (that is the reason why the final civil judgments were issued by the Spanish Supreme Court fourteen years after the Spanish Competition Authority issued its decision in the *Sugar Cartel* case).

Until the 2007 Competition Act was in place it was possible to invoke Articles 101 and 102 TFEU (at the time Articles 81 and 82 EC Treaty) in a damages claim, but not the equivalent domestic rules, regarding which a final decision (*i.e.*, normally a Spanish Supreme Court judgment) was required prior to suing for damages, as discussed. Under current law, the final character is not a requirement to sue for damages in Spain currently on the basis of an infringement of domestic competition law.

The position generally makes it slightly more difficult for claimants to bring claims immediately after issuance of an antitrust decision, as only *final* decisions are binding on civil courts pursuant to the RDL. In practice, this means that claimants may have an incentive to seek a final antitrust decision (*i.e.,* a decision against no further appeal is possible, which often will mean a Spanish Supreme Court judgment) before embarking in antitrust damages litigation. At least, claimants would be well advised to undertake an in-depth analysis of the solidity of the administrative antitrust decision with a view to ascertaining the actual risk that such decision will be overturned by the administrative court on review (given that, should the antitrust decision be overturned, this may have fatal consequences for the damages claim).

The RDL seems to go beyond the minimum requirements in the Directive 104/2014 concerning decisions issued by authorities from Member States other than Spain. Whereas the Directive 104/2014[39] establishes that final decisions issued by other Member States authorities should serve as *prima facie* evidence of the existence of an infringement, the RDL appears to establish, as mentioned, the binding nature of such decisions on Spanish civil courts.

2.5. Procedural issues concerning access to evidence.

As it has been already pointed out, the RDL is rather ambitious. One of the legislative reforms awaited with most expectation is the overhauled set of rules on access to evidence which is proposed for insertion in the Civil Procedure Act. Such reform of the rules of evidence would go beyond antitrust damages claims, as it would be applicable to all kinds of civil litigation. Therefore, the RDL includes,[40] first, a set of provisions common to all types of civil

[38] Judgment of the Supreme Court of Spain of 7 November 2013, case number 2472/2011.

[39] Directive 104/2014, op. cit., Article 9.

[40] The RDL introduces a new Article 283 bis, ter and quater in the Civil Procedure Act. The RDL includes rules on disclosure of documents from counterparties and other third parties (even before proceedings are initiated); rules to be taken into account by the courts to assess the proportionality of disclosure petitions; rules on confi-

court proceedings, and second, a number of specific rules concerning antitrust damages and IP litigation.

Focusing on the new rules regulating access to means of evidence in antitrust damages specifically, these can be summarized as follows:

- Any claimant may submit a reasoned petition requesting the court to grant access to means of evidence (including documents, digital recordings, quantitative information, witnesses, expert reports, amongst others) in the hands of the defendant or third parties. The petition can be submitted before the proceedings are initiated or during proceedings.
- The claimant should properly justify in its petition (a) that the means of evidence to which access is requested are relevant to the case; and, (b) that it has no means to access the evidence in question other than by court intervention. If the petition is filed before proceedings are initiated, the claimant should also provide indication of the legal actions that will be filed.
- It is worth noting that, according to the RDL the court hearing the case may also grant the defendant access to means of evidence held by the claimant and/or third parties if so required by the defendant.
- According to the RDL, civil courts hearing on the petitions should rule on the requests to access evidence guided by the principle of proportionality, taking into account the legitimate interests of all the parties involved. Namely, courts should take into account the following considerations (a) that the petition is justified by facts and other evidence; (b) the scope and costs that the access to the evidence entail (particularly for third parties), avoiding indiscriminate searches of irrelevant information; and (c) whether or not the information requested is confidential.

Obviously, the above principles set out in the RDL are sometimes quite ambiguous and leave courts a wide margin of interpretation. A possible risk is that continental European courts generally and Spanish courts in particular may take a narrow view of these provisions curtailing in practice the production of evidence.

With regard to the documents related to antitrust investigations,[41] following the provisions included in the Directive 104/2014,[42] the RDL establishes the following rules:

- Courts may order the following documents to be disclosed, but only once a Competition Authority has concluded the investigation (by issuing a decision or by any other means): (a) documents prepared by natural or legal person specifically in relation to an antitrust investigation; (b) documents produced by a Competition Authority and addressed to the parties during the investigation; and (c) settlement applications submitted to the Authority but ultimately withdrawn.
- The RDL shields leniency statements and settlement submissions filed with the Competition Authority.

dentiality of documents; hearing of the parties from whom documents are requested; possible coercive measures; possibility of requesting additional measures; or the protection of protected documents (*i.e.* leniency statements and settlement submissions), amongst others.

41 New Article 283 quater c) of the Civil Procedure Act.

42 Directive 104/2014, *op. cit.*, Article 6.

Now, under the current version of the Civil Procedure Act it is also possible to obtain documents from third parties through pre-trial proceedings.[43] A potential claimant may ask the court to act to obtain information that is essential to safeguard the effectiveness of subsequent court proceedings. The issue is that the items regarding which it is possible to ask the court to act are limited to those provided in the Civil Procedure Act: information related to the capacity and standing of the parties, deeds of will in family law cases, insurance contracts, for instance. Therefore, the use of pre-trial proceedings is limited in the context of antitrust damages claims.

III. CASE STUDY: STRUCTURE OF A DAMAGES CLAIM. SOME PRACTICAL ISSUES.

1. Territorial and subject matter of jurisdiction.

Once it has been decided that Spanish courts have jurisdiction over a given damages claim, it is necessary to ascertain which courts within the Spanish system will provide the appropriate forum. In 2003, a reform of the law governing the judicial branch created the commercial courts of first instance.[44] Decisions on damages claims by the courts of first instance may be appealed before the appellate courts ("*Audiencias Provinciales*", which are the appellate courts in Spain). Ultimately, decisions may be reviewable on points of law before the Supreme Court, subject to the appropriate procedural conditions and limitations.

Commercial Courts are generally perceived to be not extremely fast -they are under an excessive workload- but technically reliable.

2. Joinder of claims

Spain does not have regulation on class actions. The only comparable institute is subjective joinder of claims. Subjective joinder of claims is likely to be challenged by defendant.

To play it safe, it should probably be limited to actions filed by plaintiffs of the same regional jurisdiction against the same manufacturer.

Germany and Holland recognize the possibility that a variety of claimants assign their claims to a special purpose corporation that then files suit in its own name and right.[45] Needless to say, said corporation pays for such assignment, on a success fee basis or on other grounds. This structure has not yet been employed in Spain.

3. Time bar

Prior to the RDL, the general rules establishes by the Spanish Civil Code establish that the limitation period for extra-contractual damages actions is one year.[46] Pursuant to the Civil Code, the one-year limitation period starts to run once the victim has knowledge of the harm suffered. However, as stated above, the RDL sets the statute of limitations for antitrust dam-

[43] Civil Procedure Act, *op. cit*., Articles 256-263.

[44] "*The International Handbook on Private Enforcement of Competition Law*" (2010). Edited by Albert A. Foer and Jonathan W. Cuneo.

[45] Dutch Civil Code, section 7, Article 414; and German Code of Civil Procedure, sections 59-62.

[46] Civil Code, *op. cit*., Article 1968, second paragraph, in connection with Article 1902.

ages claims at five years, in accordance with Directive 104/2014 (is the minimum limitation period pursuant to the Directive).

The short duration of the limitation period in Spain has been subject to some criticism. It has been argued that such a short limitation period might not be compatible with the principle of effectiveness of damages claims.

Having said that, the fact is that the one-year limitation period can be easily handled under Spanish civil law rules. In particular, pursuant to the Civil Code, the limitation period may be interrupted if the following situations occur: *(i)* the submission of a court claim; *(ii)* the filing of an extrajudicial claim; *(iii)* and any act of recognition by the cartel members of the damage produced. Given that an extrajudicial claim can interrupt the limitation period, in practice, a party willing to interrupt the limitation period of the action should just address an extrajudicial claim (*i.e.* a letter asking for the damages to be paid, that should be served using reliable means) to interrupt the statute of limitations. In that regard, in the landmark *Sugar Cartel* case,[47] the Spanish Supreme Court accepted the general principle already well-established under tort law that the limitation period was duly interrupted by extrajudicial claims submitted by the complainants.

In that regard, in the cited sugar cartel case,[48] the Spanish Supreme Court considered that the limitation period was duly interrupted by extrajudicial claims submitted by the complainants.

A crucial question is establishing the *dies a quo* of a damages action. Obviously, this issue has important practical implications and is often discussed in these types of claims. Pursuant to the Civil Code, the limitation period starts to run once *the victim has knowledge of the harm suffered*.[49] Article 10.2 of Directive 104/2014, which has been included in the RDL, takes in fact the same approach. Useful guidance on when a victim has actual knowledge of the harm suffered can be found in the case law.

According to the Spanish Supreme Court, the victim is considered to have had knowledge of the harm suffered (*dies a quo*) when the victim has certain and accurate knowledge of the dimension of the damage suffered, at least having the information required to carry out a valuation of the suffered damage.[50]

In the context of a claim for damages (follow-on) derived from a cartel, the limitation period may be considered to start to run on the date on which a Decision of the Competition Authority is published (or individually notified if applicable) determining the existence of the cartel, the participants, the duration and the relevant particulars about the cartel's effects, particularly when those elements were not known prior to the administrative Decision.[51] The Press Release alone does not trigger the statute of limitations.

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47 See Judgment of the Supreme Court of Spain of 8 June 2012, case number 2163/2009.

48 *Ibid*.

49 Civil Code, *op. cit*., Article 1968, second paragraph.

50 Judgments of the Supreme Court of Spain of 20 May 2009, case number 368/2009; of 19 May 2011, case number 336/2011; and of 28 June 2011, case number 599/2011.

51 One discussion in this regard is whether or not such findings by a Competition Authority decision would be binding on a civil court or not. Under the EU Damages Directive 2014/104 it appears that such binding character will be acquired only by 'final' decisions (*i.e*., decisions confirmed by a court of last resort). However, such 'final' character would in principle not be a requirement to sue for damages in Spain currently. In this regard, we note that the position in Spain has changed under the new Competition Act, Law 15/2007, of 4 July (in relation to the prior Competition Act). This is because under the prior legislation (Article 13.2 of Law 16/1989, of 17 July) there was a requirement that the available legal remedies and appeals before the administrative law courts be exhausted prior to initiating a claim for damages. This in practice meant that the one-year limitation started

Notwithstanding the foregoing, the *dies a quo* may start to count, depending on the facts, before an antitrust Decision is issued by the Competition Authority.[52] The key element to determine the *dies a quo* is clearly knowledge of the harm.

Although the most reasonable standpoint is that the *dies a quo* starts to run when the administrative Decision declaring the existence of a cartel,[53] such *dies a quo* could, arguably, be considered to take place (arguably and depending on the facts of the case at hand) at the time, or even before, an antitrust Decision by a Competition Authority is published. As mentioned, the key element to determine the *dies a quo* is clearly knowledge of the harm. In many instances it cannot be ruled out that a potential claimant has the required information to claim damages even before the administrative antitrust decision.

The Spanish Supreme Court has shed light regarding when a victim of an antitrust infringement can be considered to have knowledge of the harm suffered. Although the case refers to an abuse of dominance, some useful lessons can be drawn and applied to cartel damages litigation. In the particular instance, one of the main Spanish utilities, Iberdrola, was accused of having abused its dominant position for refusal to provide information required for an entrant, Centrica, to compete in the electricity supply market. Centrica filed a stand-alone damages action against Iberdrola before the civil courts. The *dies a quo* was disputed by Iberdrola, which put forward that Centrica's claim was time barred.

The Spanish Supreme Court had to decide on the point of when the *dies a quo* should be established. The Spanish Supreme Court was faced with two possible relevant dates as determinant of the *dies a quo*. On the one hand, Iberdrola claimed that the appropriate *dies a quo* was the date when Iberdrola formally notified Centrica that the relevant information to interconnect was available to Centrica in Iberdrola's premises (22 May 2008). On the other hand, Centrica maintained that the right *dies a quo* was the date when Centrica could in fact access the relevant information (2 June 2008). Centrica sent formal notice to interrupt the one-year limitation period for damages (described above) on 28 May 2009. The Spanish Supreme Court found that the one-year limitation had not lapsed when the formal notice was served on Iberdrola on 28 May 2009, because it was only when Centrica had effective access to the information made available by Iberdrola (*i.e.*, 2 June 2008), that Centrica had the possibility of assessing the actual extent of the damage it had suffered.[54]

The Spanish Supreme Court based its reasoning on the case law related to personal injury disputes where, only when the injured individual leaves medical treatment or receives the final assessment by the medic, can the injury be considered stabilized and the injury and sequels, as well as the concepts that must be compensated, can be clearly determined. The Spanish Supreme Court also referred to the Commission White Paper and the (at the time) draft EU Damages Directive and considers that the above-mentioned criterion on *dies a quo* is consistent with the EU legal standard.

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to count from the final Judgment of the Supreme Court (administrative law Section) confirming the antitrust decision. Such requirement was, however, eliminated under the current Competition Act.

52 See Judgment of the Supreme Court of Spain of 4 September 2013, case number 528/2013.

53 An antitrust Decision by the European Commission or a national Competition Authority should normally be expected to contain the information necessary to ascertain the damage, given that such a Decision normally makes reference to the elements of knowledge described above as determinant of the *dies a quo*. For instance, in a Judgment of 9 May 2014, appeal 24/2014, a First Instance Civil Court decided that the issuance of the relevant Decision by the Spanish Competition Authority declaring the existence of an anticompetitive agreement constituted the relevant *dies a quo* for the purposes of accounting the one-year limitation period for a damages claim.

54 Judgment of the Supreme Court 4 September 2013, num. 528/2013.

An interesting fact around the judgment of the Spanish Supreme Court is that the exclusionary conduct by Iberdrola was subject of separate administrative antitrust proceedings, which led to an antitrust decision issued by the Spanish Competition Authority on 2 April 2009 against Iberdrola.

The above suggests that, if the relevant data are available to a potential claimant already before an administrative antitrust decision has been issued, the claimant should not wait for such antitrust decision to be issued. On the contrary, such a victim should claim for damages before a decision is issued, at the risk of seeing his damages claim time-barred. In other words, if the relevant information to mount a damages claim is available, the safest approach is to file a sole-standing claim or, alternatively, serve a notice to interrupt the limitation period. It should be noted that, where a civil court hearing an antitrust damages case becomes aware that there is an ongoing investigation by a Competition Authority on the case, such court may interrupt the deadline to issue a judgment until the relevant Competition Authority issues a decision.[55] The court is entitled to suspend proceedings if it understands that the findings of the Competition Authority are necessary to decide on the damages case.

Another example involving the setting of the *dies a quo* is the Judgment of the Madrid Commercial Court of 9 May 2014 (case number 24/2014). There, the Court correctly applies the above stated statutory rule, according to which the time bar of an action for damages starts counting upon the claimant's actual knowledge of the harm. In the said judgment, the Court checked whether the claimant had actual knowledge of the harm even before or independently of the administrative decision declaring the existence of a cartel. The Court finally reached the conclusion that actual knowledge happened on the date of the administrative antitrust decision. In that particular case, the claimant was able to ascertain the actual reach of a boycott against it, which was discussed by the Competition Authority in the administrative decision.

Tort actions are subject to longer deadlines in Holland and in Germany, for instance.[56]

4. Existence of damage

Cartels and other anticompetitive practices are conceptually presumed to cause damage. Directive 104/2014 sets out such general presumption in connection with cartels.[57]

Returning to the EC Decision on Trucks, the damage equals the difference between the purchase price of the truck actually paid for and the purchase price the truck would have had in a healthy market wherein participants compete rather than cooperating in a cartel (hypothetical free market price), plus the legal interest thereof. The hypothetical free market price is in turn determined upon the production cost. In some Jurisdictions, production cost is considered to be commercially privileged information.

If such an allegation is asserted by defendant in Spain, the burden of proof will shift onto defendant, in as much plaintiff brings a credible damage expert assessment into the proceedings. The case will ultimately turn on the quality of plaintiff's expert witness. Lawyer's assistance in coordinating experts and plaintiffs will be of the essence. The EC fine may or may not establish damage calculation criteria. It is advisable that the appointed expert witness has

[55] Article 434 of Law 1/2000, of 7 January, on Civil Procedure.

[56] In Germany, the standard limitation period is three years, according to Section 195 of the German Civil Code. In Holland, the right of action (legal claim) of the injured person for the recovery of damages against the producer becomes prescribed on expiry of three years, according to Section 6, Article 191 of the Dutch Civil Code.

[57] Article 17.2 of Directive 104/2014.

access to a representative data base (critical mass) to the largest possible number of cases. This once again underscores the importance of subjective joinder of claims.

5. Joint and several liability

As stated above, in line with the Directive, the RDL introduces in the Competition Act the general rule of statutory joint and several liability of cartel members for damages caused as a result of anti-competitive conduct.

The general principle under Spanish law is that joint and several liability cannot be presumed to exist and must be based either on statute or on express agreement between the parties.[58] There was prior to the RDL no legal provision in force in Spain, which provides that cartelists are joint and severally liable for damages caused by a cartel. Hence, the new provision implies a radical departure with the hitherto applicable rules stemming from the Civil Code.

The general principle under the law prior to the RDL (which as discussed, will continue to be relevant for claims arisen of antitrust matters occurred prior to the RDL), therefore, is that cartel members are not to be held joint and severally liable for cartel damages. Indeed, in the sugar cartel case, the claimants submitted their claims individually against each cartel member (*i.e.*, Ebro Puleva S.A. and Acor, Sociedad Cooperativa General Agroportuaria).[59]

Notwithstanding the foregoing general principle (applied in the leading cartel case in Spain), there is also case law (in other areas of non-contractual liability distinct from cartel claims, but which general principles may potentially be extended to cartel damages claims depending on the circumstances) establishing that joint and several liability may be construed by the courts in extracontractual damages claims when the following requirements are met:[60]

(i) Participation of a plurality of entities in the generated damage.

(ii) It is not possible to individually determine the liability attributable to each entity.

Under the principles of construed joint and several liability, it cannot be ruled out that various cartelists may be held jointly and severally liable under current law depending on the actual circumstances of fact of such case, particularly where the damage caused may not be individually attributable or severable amongst the cartel members. Regarding cartel damages claims, the general position under tort law has been confirmed by lower courts: no joint and several liability was construed by the Spanish Supreme Court to have arisen in the *Sugar Cartel* case,[61] cited above, as in that case the complainants do not seem to even have sought application of any joint and several liability and distict legal actions were brought against the cartel members. The application of the exceptional rule has been accepted in the antitrust damages context at least in one lower court judgment we are aware of: a First Instance Court in Madrid declared the defendants in the case joint and severally liable for the damages stemming from an anticompetitive boycott, which was found to have harmed the claimant. Following the abovementioned rules, joint and several liability was construed on the grounds that (in the

[58] Article 1137 of the Civil Code and Judgment of the Supreme Court of Spain of 24 May 2004, case number 413/2004.

[59] Judgments of the Supreme Court of Spain of 8 June 2012, case number 2163/2009 and of 7 November 2013, case number 2472/2011.

[60] Judgment of the Supreme Court of Spain of 24 September 2003, case number 858/2003.

[61] Judgments of the Supreme Court of Spain of 8 June 2012, case number 2163/2009, and of 7 November 2013, case number 2472/2011, in the landmark *Sugar Cartel*, abovementioned.

case at hand) it was not possible to individually determine the portion of damage attributable to each of the defendants.[62]

Questions arise about the statute of limitations applicable to claims in joint and several liability scenarios. It should be noted that, in a situation of construed joint and several liability, the statutory limitation period has only effects regarding each defendant. The claim raised against one member of the cartel does as a general rule not interrupt the statute of limitations period *vis-à-vis* the remaining cartel members. The valid interruption of the statute of limitations against one defendant is only valid in connection with the claim against that defendant individually.[63] Thus, different limitation periods applicable to different cartelists would arise.

However, the above does not prevent courts from construing the presence of joint and several liability for cartel damages: a joint and several liability construction by a civil court may also affect cartel members regarding which claims are time barred for the harmed party, but against whom the cartel member(-s) from whom damages have already been recovered could still sue to recover the excess compensation paid by the latter.

By the same token, in the event of a subsequent action for recovery filed by the cartel member who pays the entire cost of damages against the remaining cartel members (in case of judicially construed joint and several liability), the latter cartel members whose proceedings are time barred could not invoke such time limitation.[64] The contribution claim against the other members has a limitation period of five years[65] and that apportionment of the damage in that circumstance is in equal parts (see below).

6. Interest

Three different categories of legal interest would apply under Spanish law:

(i) Ordinary interest[66]: full compensation requires that the damage caused (*damnum emergens* and *lucrum cessans*) is compounded with the legal interest rate in order to grant full compensation for the damage caused. This category of interest runs from the moment that harm has occurred until the date the court claim is brought.

(ii) Default interest: this is applicable to the *quantum* claimed (*i.e., damnum emergens* + *lucrum cessans* + ordinary interest) and its period runs from the day the court claim is filed up to the moment of the first instance judgment. The interest rate applicable to this category is *(i)* the interest rate agreed between the parties or, *(ii)* in the absence of agreement, the legal interest rate (see above).[67] The default interests must be explicitly requested in the claim.[68]

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62 Judgment of a First Instance Civil Court of 9 May 2014, *op. cit* (60).

63 Judgments of the Supreme Court of Spain of 16 January 2014, case number 761/2014; 14 March 2003, case number 223/2003 and 23 June 1993, case number 673/1993. It must be cautioned that there are also some precedents that consider that the general rule (lapse of the limitation period against one signifies lapse against all) would also apply in these cases. In principle, this is case law (Judgement of 3 December of 1998, case number 1121/1998) which has been superseded by later case law, and although it cannot be ruled out that an argument can be made with basis on this earlier case law, the most current case law we have examined would support the finding above that the limitation period is distinct for each cartel member.

64 Civil Code, *op. cit*., Article 1144 and 1145.

65 Civil Code, *op. cit*., Article 1964.

66 Civil Code, *op. cit*., Article 1101 to 1106.

67 Civil Code, *op. cit*., Article 110.

68 See Judgments of the Supreme Court of Spain of 8 June 2012, case number 2163/2009, and of 7 November 2013, case number 2472/2011.

(iii) Procedural interest: this refers to *(i)* the interest rate agreed between the parties or, *(ii)* in the absence of agreement, the legal interest rate increased by two percentage points. In 2016, for instance, the procedural interest would be 5.00%.[69] This third category of interest runs from the date of the first instance judgment until the date the debt is totally paid. The procedural interest is applied *ex officio* by the court.

V. POSSIBILITY OF CLAIMING DAMAGES AGAINST THE SPANISH STATE DUE TO THE DELAY IN IMPLEMENTING THE DIRECTIVE.

The Directive should have been implemented since the end of 2016, but implementation occurred on 26 May 2017. There was therefore a situation of coexistence of the Directive with the national law in force, which should have been repealed or amended, during five months, precisely at a moment where antitrust damages claims such as, in particular, those stemming from the *Trucks cartel* discussed above, could be initiated.

1. Direct effect of Directives.

Direct effect as cornerstone of EU law was shaped by the European Union Court of Justice (**CJEU**) in the *Van Gend en Loos* case, in 1963.[70] In this judgement, the CJEU says that European law not only creates obligations for EU countries, but also rights for individuals. The principle allows individuals to invoke European regulations before national courts, in cases where the European regulation is clear and precise, is in force and is capable of generating rights.

'Vertical' direct effect intervenes in relations between individuals and the State, meaning that individuals can rely on European law before the Member State. In the context of directives, on the one hand, directives whose transposition period is foregone can be invoked by individuals before public authorities.[71] On the other hand, directives cannot create obligations on individuals (it would be the national law that incorporates the directive which would generate those obligations). The directive obliges Member States to implement the directive within the prescribed period. If no (or defective) implementation happens in time, individuals cannot be obliged by the directive, which cannot create obligations for individuals by itself, nor be invoked against them, much less can obligations arise that can be invoked by individuals against other individuals.[72]

2. Principle of State liability.

Another principle on which EU law is based is the principle of State liability for breaches of EU law. The failure to implement a directive, the delay, or the incorrect or partial imple-

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[69] Civil Procedure Act, *op. cit.*, Article 576.

[70] Judgement of the EU Court of Justice of 5 February 1963, *Van Gend en Loos*, case C-26/62.

[71] European case law has set that the directive can be invoked before any authority (whatever its legal form), which has been mandated under a public act to carry out, under control, a public interest service which has powers in relation to the regulation applicable in relations between individuals. See Judgements of the EU Court of Justice of 26 February 1986, *Marshal*, case C-154/84; and of 12 July 1990, *Foster*, case C-188/89.

[72] See Judgements of the EU Court of Justice of 11 June 1987, *Pretore di Salò*, case C-14/86; and of 8 October 1987, *Kolpinghuis Nijmegen,* case C-80/86.

mentation of EU directives are breaches of EU law.[73] Directives must be incorporated to EU Member States' laws in the terms and time periods fixed therein.

The principle of State liability is applicable to Member States if the breach is attributable to the national Legislature and derives from a material or legislative activity in relation to EU law (*Factortame* and *Walter Tögel*[74]). In particular, in the *Francovich* Judgment,[75] the CJEU dealt with an unincorporated directive that benefits an individual. In that context, the CJEU relied on the principle of State liability for breach of EU law, and specified its suitability to the case in question: "*The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain reparation when their rights are infringed by a breach of Community law for which a Member State can be held responsible. Such a possibility of reparation by the Member State is particularly indispensable where the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law*".

On balance, the principle of State liability entails the possibility for individuals of the Member State who has failed to duly implement a directive to claim damages arising from non-compliance.

When claiming, individuals may apply to the national court to declare their right against the State. For this purpose, three requirements must be met:

(i) That the legal rule breached aims to confer rights on individuals, such as the Directive 104/2014, which gives individuals the right to claim damages suffered by anti-competitive practices. That is to say, the content of those rights can be identified on the basis of provisions of the Directive 104/2014.

(ii) That the violation is sufficiently characterized. It must be a manifest and serious failure to observe the limits imposed on the State's power of assessment by EU law. This is determined considering, for instance, the degree of clarity and precision of the breached rule, the extent of the margin of discretion conferred on the State, the intentional or involuntary nature of the infringement, the excusable or inexcusable nature of any error in law, and that the attitudes adopted by an EU Institution may have contributed to the omission, adoption or maintenance of national measures or practices contrary to EU law.[76]

(iii) That there is a direct causal relationship between the breach of the State's obligation and the damage suffered by the victims, *i.e.* because of the State has failed to comply with the obligation to implement the Directive 104/2014 within the set deadline. The Court must also take into account the situation of the injured party: the damage must be of special gravity to that party.

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[73] The CJEU has rejected allegations made by governments based on an internal problem to avoid complying with them; nor does it admit, as justification for non-compliance, the complexity of the legislative changes required for the incorporation.

[74] Judgments of the EU Court of Justice of 19 June 1990, *Factortame*, case C-213/89; and of 24 September 1998, *Walter Tögel*, case C-76/96.

[75] Judgment of the EU Court of Justice of 19 November 1991, *Andrea Francovich and Danila Bonifaci and others c. Italian Republic*, joined cases C-6/90 and C-9/90.

[76] This requirement is added to the requirements established in the *Factortame* Judgment by the *Francovich* Judgment.

It should not be forgotten that, although the right to compensation is based directly on EU law and the CJEU has established the relevant criteria of liability, it is the task of each Member State to determine the facts, to qualify the infringement and to give satisfaction to the individual.

National courts are competent to award damages against the State for failure to implement a directive appropriately. The Supreme Court in Spain has dealt with State liability matters for failure to appropriately implement a directive, in a matter related to conditional television signal.[77] In another case, the Spanish Supreme Court also partially upheld the appeal filled by Teknon Healthcare against the decision of the Council of Ministers of 13 December 2013 denying compensation, and declared the Spanish State's financial liability for non-compliance with EU law, by repeatedly applying national regulation contrary to an EU Directive.[78]

In view of the above, it is quite clear that the subject-matter of Directive 104/2014 is likely to meet the requirements leading to State liability, should an individual be harmed by the late implementation of the Directive in Spain. As indicated, such individual may not claim the provisions of the Directive 104/2014 against another individual prior to national implementation (no 'horizontal effects`of directives). However, it is quite possible that the first individual seeking to rely on the provisions of the Directive 104/2014 may end up claiming damages against the State.

CONCLUSIONS:

Antitrust damages claims are an extremely attractive area, both from the competition enforcement standpoint (as damages claims are the potentially most deterrent mechanisms against cartels), as from the standpoint of companies and private practitioners.

One focus case to conclude is the ongoing *Trucks cartel* damages case, cited at the beginning of this paper. The size of the companies and turnover involved in this matter, which involves the entire truck business throughout Europe for many years, as well as the record fines, have sparked a great deal of attention in Europe and beyond, raising enormous expectations in terms of money to be recovered from cartel members. In practice, however, such legal actions are likely to encounter considerable hurdles. The courts of some jurisdictions are far slower, have less resources, and are likely to take more time and face more difficulties than others. Some jurisdictions do not have suitable collective redress mechanisms in place, which will make the task of accommodating thousands of claimants difficult. Although not within the scope of this paper, the possibility of bringing multiple claims from various countries before a single jurisdiction exists in theory. Even then, lawsuits will be complicated by the fact that the applicable law will continue to be that of many countries (even if the competent court were only one), depending on the applicable laws of conflicts. Finally, cartel members have done a considerably good job of engaging multiple law firms to make sure a lot of the available qualified or specialist counsel is not available to act for claimants (which range from multinational transportation, logistics and companies in many sectors to individually or family owned businesses).

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[77] Judgment of the Supreme Court of Spain of 12 June 2003, case number 46/1999.

[78] Judgment of the Supreme Court of Spain of 6 May 2016, case number 199/2014. See also Judgments of the Supreme Court of Spain of 24 February 2016, case number 195/2015 (tax on sales to retailers of certain hydrocarbons); and of 7 March 2012, case number 203/2008 (incorrect transposition of a VAT Directive, preliminary ruling).

In view of the above, therefore, all we can conclude is that this is an area of ongoing development internationally and considerable challenges lie ahead. The European Commission Directive for harmonization of damages claims is a substantial effort which must generally be viewed as positive. However, careful monitoring of the actual implementation and application of the Directive at national level are of the essence. Otherwise, this is an area where Europe *à la carte* is indeed to become a worrisome reality.

THE SIXTH FREEDOM: FLYING UNDER THE REGULATORY RADAR?

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SUMMARY

For the last 70 years, the right to carry passengers or cargo on aircraft from one state to another has been regulated by air service agreements (hereinafter: ASAs) between two states. As the air transport progressed into big and powerful industry with considerable market share, the ASAs followed – from restrictive agreements limited strictly to transport between the signatory states, they developed into bilateral and multilateral agreements providing underlying traffic rights for the consummation of various commercial arrangements between air carriers. In the context of freedoms of the air, ASAs did not only allow third and fourth freedoms (the right to carry traffic from home state of the operator to another state, and vice versa) but started granting the fifth freedom as well (the right granted by one state to another state to carry traffic destined to or originating from a third state).

Freedoms beyond the fifth were almost never the subject of ASAs. In the world of state owned carriers and highly regulated airline activities, it was not very likely that any of them would be granted traffic rights between two foreign countries (foreign meaning that none is the home state of the carrier). Seventh, eighth and ninth freedoms (which include rights to carry passengers or cargo between two foreign countries without any link to the home state of the carrier, and the right to operate within a foreign country) were granted to foreign carriers extremely rarely and for justified reasons, e.g. tourism or sports events. As for the sixth freedom, which is usually defined as the right to carry traffic between two other states via home state of the carrier, there was rarely any need to regulate it, as will be explained later in the paper. Further development of air transport led to the emergence of interline and code share agreements, airline alliances and electronic ticketing. In terms of traffic rights, what was once a clear picture started to be a blurry one. With commercial and technical possibilities of providing services between two foreign countries, and with a deficient regulatory framework which was drafted decades ago, more and more carriers use this situation to effectively exercise more rights than originally planned by the regulators. This practice is also heavily supported by airports of the home state which enjoy increased passenger numbers and expansion of their business.

In this paper, I will examine the types of traffic rights granted by international agreements and their evolution as the airline business changes. Furthermore, I will analyze recent trends in airline practices and their consequences on the competition. Finally, I will give my reasons for believing

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that the sixth freedom is far more than a simple combination of third and forth freedoms and should therefore be an unavoidable part of any future air services agreement.

Key words: *air service agreements, competition, air transport, freedoms of the air, sixth freedom, liberalisation, traffic rights*

1. INTRODUCTION

From the moment commercial air transport began to develop towards a global economy, there were also freedoms of the air which regulated market access i.e. the right of an air carrier to provide air services to other countries.[1] Initially these freedoms of the air were defined by ASAs in a unified manner.[2] As the applicable legal framework for airlines began to change, freedoms of the air became the subject of various multilateral agreements or stopped being a subject all together – as a result of liberalisation and creation of a single market, as is the case in the European Union (hereinafter: the EU). Development of technology and new commercial practices in advertising or operating air services present a challenge to the old bilateral concept of granting the freedoms of the air between two countries. In this paper, I will give an overview on the development of freedoms of the air, with a special view of the sixth freedom and its diferrent interpretations across Europe: among authors, countries and even regulators.

2. THE RIGHT TO FLY – WHO HAS THE FINAL SAY?

Ever since the first known flight of an aircraft, a hot air balloon in the 18th century, there was also a tendency to regulate it.[3] Could an aircraft operator freely determine the final destination of the flight or should the flight be the subject of an authorisation? If yes, who should give such an authorisation? The state of the operator, the state of departure or the state of destination? Should the authorisation also be mandatory in case of overflights? Various questions which undoubtedly did not bother the operator of the first baloon flight, but they did nonetheless result in regulation that all flights should be authorised by the local police[4]. As aviation continued to evolve, it became more evident that a common understanding needs to be reached on underlying question: does a state have sovereignity of airspace over its territory? During the first international conference on air transport in Paris in 1910, these questions remained unanswered although proponents of the so-called "freedom theory" were outnumbered by supporters of the "sovereignity theory".[5] In the aftermath of the World War I, the sovereignity theory was finally accepted at a Paris conference in 1919 by the Convention

1 The term "air service" will be used in this paper as defined by Article 2 of Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293, 31 October 2008): "air service' means a flight or a series of flights carrying passengers, cargo and/or mail for remuneration and/or hire".

2 Both "freedoms of the air" and "traffic rights" will be used throughout this paper, as synonims. The terms "carrier", "operator" and "airline" will be used for undertakings which are licensed to carry passengers, baggage or cargo for renumeration or hire.

3 The first piece of national legislation was published in France and referred to balloons which were not allowed to fly without prior authorisation. For more on this see Diederiks-Verschoor, I., *An introduction to Air Law*, Kluwer Law International, Alphen aan den Rijn, 2012, p. 2.

4 Hobe, S., Von Ruckteschell, N., Heffernan, D., (2013) *Cologne Compendium on Air Law in Europe*, Koeln, Carl Heymanns Verlag KG, p. 131.

5 Diederiks-Verschoor, I., op.cit. (fn. 3), p. 3.

Relating to the Regulation of Aerial Navigation (hereinafter: the Paris Convention).[6] The Chicago Conference in 1944 introduced further legal changes when, as a result of war activities and growing American aviation industry, sovereignity over national airspace was not only confirmed but further enforced due to, primarily, strong British influence with an understandable military background.[7] Apart from defence and security reasons, the period between two World Wars showed the great potential of civil aviation with establishment of international air services, primarily operated by European and American airlines.[8] Therefore, Article 1 of what turned out to be the fundamental act of public air law, Convention on International Civil Aviation (hereinafter: the Chicago Convention), states that "the contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory".[9] The term "complete and exclusive sovereignity" is further elaborated in Article 6 which says that "no scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization". This special permission or authorisation was usually granted by a bilateral air services agreement which contained the designation clause specifying which airline is authorised to exercise the rights established by ASA. As seen from Article 6, in case of scheduled air services, even overflights are subjects of prior authorisation.

As for the non-scheduled services, Article 5 specifies that overflights are allowed without any prior authorisation. Reasons for such a diferrence in rights probably lies in the fact that non-scheduled services were scarce in post-war years. Furthermore, the same Article sets the right of the state of destination to impose certain requirements or limitations for aircraft performing a non-scheduled service if passengers or cargo or mail is being transported.[10] There is another distinguished difference when looking at the wording of Articles 5 and 6, respectively. While Article 6 refers to air services, Article 5 refers to aircraft (operating a particular service). Again, the reasoning behind this is probably the nature of scheduled air service, which has always been operation of series of flights by an airline which had been previously designated by the State. Aircraft was not the determining factor but the airline – which in the past usually operated with its own aircraft, this aircraft always belonging to the registry of the same State as the airline.[11] As for the non-scheduled services, Article 6 links the permission to the aircraft, also not without a reason: non-scheduled service does not entail designation of an airline. It is by its nature not regular and therefore could be operated, from time to time, by different operators. Therefore, the only determining factor can be the nationality of aircraft. If not for such

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6 *Ibid.*, p. 10, Convention relating to the Regulation of Aerial Navigation, 1919, Paris. http://www.spacelaw.olemiss.edu/library/aviation/IntAgr/multilateral/1919_Paris_conevention.pdf (15 June 2017)

7 *Ibid.*, p. 11.

8 Smith Jr., M.J., (2002), *The Airline Encyclopedia 1909–2000*, Lanham, Scarecrow Press, Inc.

9 Convention on International Civil Aviation, 1944, Chicago. https://www.icao.int/publications/Documents/7300_orig.pdf (15 June 2017)

10 Chicago Convention, Article 5.

11 Nationality of air carriers is determined by the state which issued the air operators certificate (AOC), as prescribed by Annex VI of the Chicago Convention: "an operator shall be in possession of an AOC issued by [State CAA] in order to engage in commercial air transport operation" and Commission Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations (OJ L 296, 25 October 2012). In the European Union, this safety document is followed by operating licence (OL), which proves that the carrier meets other requirements (financial, insurance, good repute etc.), as prescribed by Regulation (EC) No. 1008/2008 – see *supra*, fn. 1.

wording, non-scheduled services could have been operated by a foreign aircraft, which was clearly not the intention of signatories of the Chicago Convention. The argument which goes in favour of such interpretation is the regulation of cabotage, the right to operate air services within the territory of another country, as prescribed by Article 7 of the Chicago Convention. It gives the right to each state to refuse permission to the aircraft of other contracting States, but goes a lot more further with regards to exclusive cabotage rights: "each contracting State undertakes not to enter into any arrangements which specifically grant any such privilege to any other State or an airline of any other State, and not to obtain any such exclusive privilege from any other State".[12] As seen above, there is an understanding and a reason for such use of different terms (states, aircraft and airlines) depending on the type of service (scheduled and non-scheduled) when defining freedoms of the air i.e. defining the scope of complete and exclusive sovereignity. Such careful wording served to ensure that no foreign airline or aircraft could be granted exclusive cabotage rights. This kind of protectionism will continue to exist in aviation until 1997 and the liberalisation of traffic rights within the EU.[13]

Against this background, two additional agreements were signed along with the Chicago Convention: International Air Services Transit Agreement and International Air Transport Agreement. The purpose of both agreements was to allow for states to give each other permanent "prior authorization" as defined by Article 6.[14] International Air Services Transit Agreement grants the right of overflight and the right to make a technical landing to all the parties. So far, 131 states have ratified this agreement.[15] The other one, International Air Transport Agreement, failed to achieve the same goal with three more freedoms: third, fourth and fifth. Since 1944, only 11 states have ratified it.[16] The states were reluctant when it came to granting all these traffic rights to all the signatories. The regulation of freedoms of the air and mutual recognition of traffic rights was clearly going to be regulated between states on a bilateral level.

With this in mind and having the Chicago Convention as a mutual basis, freedoms of the air were granted through bilateral ASAs which were, very early on, modelled after the agreement between the United States and the United Kingdom.[17] This agreement became a standard for every ASA around the world. The main feature of the agreement was reciprocity; the parties would grant each other traffic rights, but in a very limited and defined manner: with specified routes, types of aircraft which are going to be used for these services, capacity (number of available seats) and frequencies (number of daily or weekly flights). Both sides either designated, or undertook to designate, the carrier which would be entitled to exercise traffic rights in a manner defined by the ASA. This carrier had to be owned by the designating State.[18] Granting of third and fourth freedoms was the rule, while allowing the fifth freedom was more an exception. When it was granted, it was necessary for such a freedom to be "secondary" –

[12] Chicago Convention, Article 7.

[13] See *infra*, p.9.

[14] See *supra*, p.3.

[15] Source: https://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx (11 September 2017)

[16] For more on freedoms of the air, see Table 1, p.7. For more on both agreements, see Diederiks-Verschoor, I., op.cit. (fn. 3), p. 53. and Radionov, N.; Ćapeta, T.; Marin, J.; Bulum, B.; Kumpan, A.; Popović, N.; Savić, I., *Europsko prometno pravo*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2011, p. 338-341.

[17] Also known as the Bermuda I Agreement. For more on this see Diederiks-Verschoor, I., op.cit. (fn. 3), p. 49.

[18] Savić, I., Kapetanović, A., (2011), *Reaching for the European Sky*, Poredbeno pomorsko pravo, Vol. 50, No 165, pp. 195 – 216.

ASAs were created to first and foremost reflect the market requirements of the two signatory states and not the requirements for traffic between either of them and third countries. More and more agreements recognised the need to put such principles in the agreement, clearly stating that capacity should primarily reflect the traffic demands of the two parties of agreement, which is the main purpose of ASA.[19] This approach is the reason why, with the evolution of aviation market, states felt the need to define freedoms of the air beyond the fifth – which will allow for possibilities of providing air services completely outside the state of the airline, i.e. fulfil the capacity demands between two foreign countries. The sixth freedom, however, was never touched upon in the "original" ASAs, probably because it was first considered as a pure combination of forth and third freedom.[20]

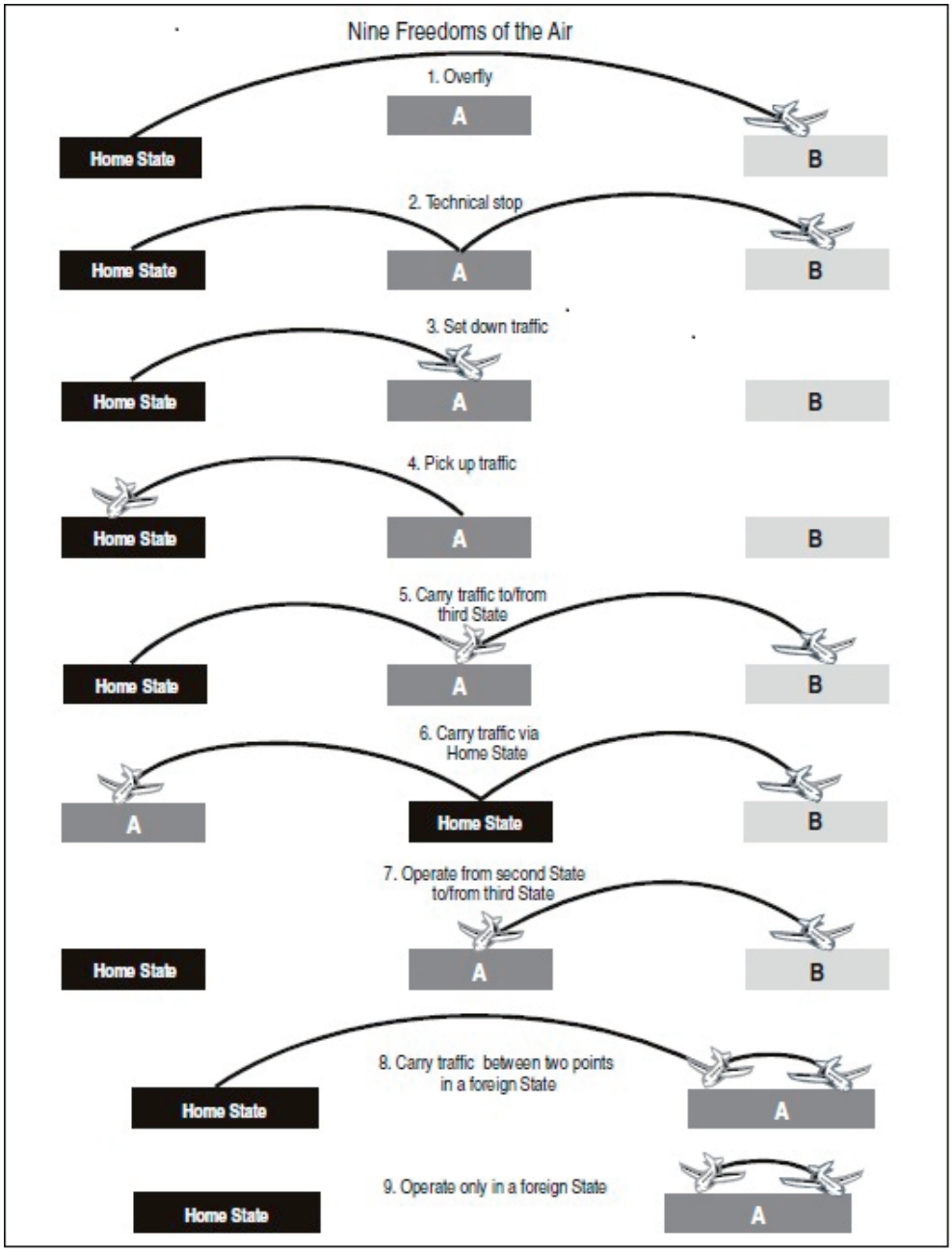
3. THE EMERGENCE OF OTHER FREEDOMS OF THE AIR

As elaborated in the previous chapter, only the first five freedoms were defined in 1944 when two agreements were drafted along with the Chicago Convention. In the after-war period there was hardly any need, or willingness, for the states to allow for cabotage rights or any other freedom other than those defined by the International Air Services Transit Agreement and International Air Transport Agreement. One has to bear in mind that for decades states refused to deregulate aviation market and instead subsidised their national carriers (so-called flag carriers) in order to effectively fullfill the demands of the market – to this end, numerous restrictions were imposed by air services agreements with other countries: from capacity limitations, to defined number of allowed weekly flights, determination of prices, designation of airlines which are authorised to exercise the rights established by these agreements, etc. As commercial air transport progressed and carriers developed their businesses on the wings of their fleets with evergrowing performances in terms of capacity, speed and range, it is not a surprise that eventually other freedoms needed to be recognised and, when needed, regulated among the states. The table below provides for a comprehensive definition of all freedoms of the air, as defined by the ICAO.[21]

[19] A good example of this kind of clause is the Article 11 of Consolidated Air Services Agreeement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland (the so-called Bermuda II Agreement, available at https://www.state.gov/e/eb/rls/othr/ata/u/uk/176322.htm (04 June 2017)

[20] It should be noted that even the authors who continued to view the sixth freedom as the third and forth being combined recognised that a carrier should only use it (carrying traffic between two other countries) „as far as necessary to make its service to/from its own country economically viable, but this only without affecting the sound operation of the local air services". Source: Van Brandenburg-Kulkarni, P., (2015), *'Sixth freedom' Revisited in the Twenty-First Century*, Air & Space Law 40 (1), p. 57.

[21] The Table is available at the ICAO website: https://www4.icao.int/newdataplus/ (4 June 2017)



Source: International Civil Aviation Organisation, (2012), Manual on the Regulation of International Air Transport (Doc 9626, Part 4), Montreal

The need to recognise the sixth freedom as a separate freedom clearly shows that it is not simply a combination of the third and forth freedoms. If we look at the definition of the fifth and sixth freedom, the only difference is in the sequence of the flights performed: in the case of fifth, home state of the carrier is the initial or final destination, whereas with the sixth freedom, the home state is the transfer point between two other states. Although the effect is the same (carrying some of the traffic between two foreign states), the sixth freedom can only be exercised, or abused for that matter, by the states which have a specific geographical position which allows them to be a transfer point, or a carrier with a network huge enough to substitute the lack of convenient geographic position. Good examples are Gulf carriers and, in Europe, Netherlands with its strong hub airport and a national carrier which has a number

of transit passengers in Amsterdam of almost 70%.[22] From a commercial point of view, the sixth freedom gives the carrier even more opportunities due to the advantages of the transfer taking place in its hub (e.g. available aircraft, acces to the rest of the carrier's network), not to mention the advantages for the state of the carrier, like the development of tourism, business advantages and higher employment rates.[23] Initially, the sixth freedom was not a big topic but later, with all the repercussions of deregulation and liberalisation, it became a subject of international disputes while regulators struggled to find a way to solve them.[24]

As a result of the Airline Deregulation Act of 1978 which opened the internal market of the United States and ceased the control of the government over air fares and available routes, both airlines and airports started to look for sustainable business models. It marked not only the beginning of the low cost carriers but also the start of the so-called Open Skies policy which allowed foreign airlines to operate to/from "underserved" airports in the United States.[25] Although Open Skies does not remove all restrictions to provision of air services, as its impressive name might suggest, it does in fact introduce more freedom between the states: the fifth and sixth freedoms are now also a rule, while the seventh freedom could also be granted for cargo flights.[26]

This change of approach in one of the two major aviation markets naturally had an impact on Europe and its market.[27]The nature of change in regulation of air transport in the EU, going from protectionism to open market, required a gradual approach in order to avoid big disruptions. Three legal packages were designed to ensure that the following changes take place, all in their due time: removal of route or capacity restrictions, introduction of multiple designations of air carriers, freedom of pricing, etc. As for the traffic rights, the so-called "second package" introduced unlimited third, forth and fifth freedoms of the air, while the sixth was not even mentioned.[28] From 1987 to 1992 all barriers to open aviation market within the Community were removed, except for cabotage which came into effect in 1997. By then, freedoms of the air became a thing of the past for the EU market. Division between scheduled and non-scheduled transport no longer existed. All EU carriers were allowed to fly anywhere within the EU and there was no need for ASAs between Member States. As for air services to

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22 Van Brandenburg-Kulkarni, P., op.cit. (fn. 18.), p. 59.

23 *Ibid.*

24 Hanlon, J.P., (2007), *Global Airlines: Competition in a Transnational Industry*, Burlington, Butterworth Heinemann, p. 132.

25 For more on the Open Skies Policy, see Diederiks-Verschoor, I., op.cit. (fn. 10), pp. 66-72.

26 *Ibid*., p.69.

27 This transition did not happen over night. Air transport was originally not regulated by provisions on transport (Title IV) of the Treaty establishing the European Economic Community (hereinafter: the Treaty of Rome) which, for the Member States at least, meant that the common market principles also did not apply. This interpretation proved to be a major issue in creation of the EU common transport policy, which was part of the Treaty of Rome. Only after it was referred to the European Court of Justice, it was finally settled that the general provisions of the Treaty of Rome also apply to air and sea transport, which opened the way to create the EU common aviation transport policy through new Community regulatory framework.

28 Council Regulation (EEC) No. 2342/90 of 24 July 1990 on fares for scheduled air services (OJ L 217/90); Council Regulation (EEC) No. 2343/90 of 24 July 1990 on access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States (OJ L 217/90); Council Regulation (EEC) No. 2344/90 of 24 July 1990 amending Regulation (EEC) No. 3976/87 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (OJ L 217/90).

and from the EU, EU carriers could operate those as well - if allowed by the applicable international agreement, which will be covered later in the paper.[29]

4. THE RACE BETWEEN THE MARKET AND THE REGULATOR

It is a common understanding in the aviation world that the industry tends to be two steps ahead of the regulator. From the first baloon operator, to the currently emerging drone industry, it has always been a challenge to absorb and regulate in a meaningful way everything that has been going on in the air transport. It is one thing to understand the freedoms of the air, but completely another to anticipate or grasp all the technological changes or emerging business models that have been introduced in aviation in the last 25 years. Some of them have made a huge impact on the way traffic rights are regulated and some of them are still flying under the regulatory radar. The above-mentioned deregulation in the United States, and the subsequent liberalisation in the EU, both led to some big changes in the aviation business.

4.1. Code-Sharing

Code-sharing is "a marketing arrangement in which an airline places its designator code on a flight operated by another airline, and sells tickets for that flight".[30] The obvious reason for such an arrangement between two airlines is the expansion of market beyond their own network. Naturally, this kind of cooperation couldn't be viable without the underlying traffic rights for the marketing carrier (carrier which issued the ticket but is not operating the flight). This is why bilateral agreements today tend to include provisions on code-share, requiring carriers which enter into code-share (as marketing or operating carriers) to obtain traffic rights as well. In the EU, code-share is allowed within internal market as well as with third country carriers, subject to reciprocity which is usually agreed on in the ASA. For example, Article 8(7) of the Euro-Mediterranean Aviation Agreement between the European Union and Israel allows for the airlines of both contracting parties to enter into code-share arrangements, provided that both operating and marketing carriers hold the appropriate traffic/route rights.[31]

4.2. Airline alliances

A step further than code-sharing, with regards to the level of cooperation and coordination of airlines' activities, is the formation of airline alliance. [32] Alliance tends to connect all member airlines in creating a common product which will be served throughout their respective markets and remain globally recognisable. Airlines usually streamline their activities and, although still competing against eachother, they cooperate via code-sharing, common lounges, terminals, ticketing system, etc. in order to reduce their individual risks and benefit from each other's network as much as possible. Code-share, of course, is one of the most important ways of achieveing this goal. Creation of alliance does have some competition risks, especially in airports where other airlines or alliances are not present or represent only a minor market

[29] See *infra*, p. 11.

[30] Definition available at the U.S. Department of Transportation website: https://www.transportation.gov/policy/aviation-policy/licensing/code-sharing (9 July 2017)

[31] Euro-Mediterranean Aviation Agreement between the European Union and its Member States, of the one part and the government of the State of Israel, of the other part, 2 August 2013, OJ L 208, pp. 3-68.

[32] Code-sharing is not linked exclusively to alliance partners, but it is one of their most predominant features.

share, but alliances in general are considered to be a good step in the direction of further development of the aviation market.

4.3. Interlining

Interline agreements between airlines have enabled passengers to purchase one ticket for flights of more than one airline. The development of technology has made possible for a carrier to sell a ticket for the flight of another or multiple carriers. This way the passenger can reach his/her final destination while taking several flights on only one ticket, issued by one carrier, without having to collect his/her baggage or check-in at every transfer point of the journey. The financial and technical details, as well as liability issues, are covered by the interline agreement drafted by International Air Transport Association (hereinafter: IATA). The IATA Multilateral Interline Traffic Agreements (hereinafter: MITA) is "an agreement whereby passengers and cargo use a standard traffic document (i.e. passenger ticket or air waybill) to travel on various modes of transport involved in a routing in order to reach a final destination."[33] By participating in MITA, airlines agree to the terms and conditions of passenger and baggage handling which also contributes to the quality of service of every airline involved.

5. THE CURRENT INTERNATIONAL LEGAL FRAMEWORK

Creating a common EU market provided a major boost to the EU carriers.[34] Commercial opportunities, as explained in the previous chapter, combined with new IT solutions, primarily in computer reservation and departure control systems, undoubtedly contributed as well.[35] However, for an aircraft to be profitable for an airline, it needs to do what it was created to do – fly far away. Aside from business class seats, the real "money-makers" in air transport are long-haul flights. If an airline doesn't have a fleet which can offer this kind of service, it can still sell tickets on such flights provided by others – thanks to interline or, even better, codeshare. As already mentioned, a large aircraft or a good commercial agreement with another airline are not enough – for provision of air services to third (non-EU) countries, there needs to be an underlying traffic right. Furthermore, old ASAs simply won't do anymore: firstly, they were negotiated on behalf of only one Member State and usually only one carrier. Due to strict prohibition of discrimination on the ground of nationality in the EU, this kind of arrangement was no longer possible - which has been confirmed by the European Court of Justice (hereinafter: CJ or the Court) in the famous "Open Skies judgements" wherein the Court declared that the *Open Skies* agreements between the US and eight EU Member States are contrary to

[33] Definition available at IATA's website: http://www.iata.org/whatwedo/workgroups/Pages/mita.aspx (12 September 2017)

[34] Between 1990 and 2013, the number of intra-EU15+2 (Norway and Iceland) flights increased by 80%, while the number of routes increased by 138% over the same period. Source: International Transport Forum Discussion Paper No. 2015-04, (2015), EU Air Transport Liberalisation Process, impacts and future considerations, available at: https://www.itf-oecd.org/sites/default/files/docs/dp201504.pdf (10 July 2017)

[35] Departure control system (DCS) allows coordination and streamlining of information coming from various computer reservation systems (CRS) to different sources (carriers, airports, other handlers of passengers, baggage and cargo): information required for check-in (e.g. visa requirements), issuing boarding cards, handling of baggage (e.g. load control information, transfer baggage), boarding (e.g. passengers requiring special assistance), passengers (e.g. transfers, frequent fliers, status of their journey i.e. if they have boarded the aircraft or not) etc.

the Community law due to their discriminatory and disruptive effect on the internal market.[36] The discriminatory part, as established by the Court, was the so-called "nationality clause": a requirement that a designated airline which is entitled to use traffic rights as negotiated by each agreement can only be a carrier owned or effectively controlled by the signatory Member State (or its nationals). The Court held that all Community carriers established in a particular Member State should have market access to third countries, as prescribed by the ASA between a third country and the Member State.[37] This requirement would be achieved by inserting the so-called "Community designation clause" in each ASA.

One of the consequences of the *Open Skies* judgments was the "horizontal mandate" given by the Council to the Commission to negotiate amendments (i.e. delete nationality clauses and insert the Community designation clause) of existing ASAs between the Member States and third countries.[38] It was not only the Commission who was given the authority to amend the agreements and bring them in line with EU law: Member States were allowed to do it as well, provided that they inform the Commission about their intentions to enter into such negotiations as well as their end result.[39] It was important not to reduce the number of designated carriers and, having in mind that there will be times when the interest of carriers will be greater then the scope of given traffic rights – to ensure a clear and transparent procedure for distribution of these rights among the carriers.[40] Again, the explicit mention of the sixth freedom was nowhere to be found during this process. However, the model of negotiating traffic rights is about to be changed forever, at least when it comes to EU.

5.1. Open Sky Agreement between the EU and the US

Apart from the revision of the existing ASAs, Commission was given the so-called "vertical mandate" for negotiating air transport agreement with the US: it was allowed to sign an agreement with one of EU's biggest trade partners, on an EU level. From US' point of view, this would mean the end of the more restrictive ASAs it had with some Member States, while for the EU this was the best way to ensure Community designation in the future agreeement. Not to mention the traffic rights, which had to be less restrictive than in previous ASAs in order to allow better market access for US and EU carriers and more routes within one service i.e. exercise of freedoms beyond the forth.

The Air Transport Agreement between the US and the EU was signed in 2007 and amended by Protocol in 2010.[41] With regards to the subject of this paper, this agreement represents

[36] Judgment of the Court of 5 November 2002, cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475-98, C-476-98 (Commission of the European Communities v United Kingdom, Kingdom of Denmark, Kingdom of Sweden, Republic of Finland, Kingdom of Belgium, Grand Duchy of Luxemburg, Republic of Austria and Federal Republic of Germany), [2002] European Court Reports 2002 I-09427.

[37] For more on the Open Skies judgements, see Savić, I., Kapetanović, A., op.cit. (fn. 16), pp. 197-198. and also Radionov, N. *et al*., op.cit. (fn. 14), p. 406-410.

[38] Some authors strongly disagreed saying that Member States have no legal obligation to designate a carrier from another Member State. For more on this see: Wassenbergh, H., (2003), *A Mandate to the European Commission to Negotiate Air Agreements with Non-EU States: Internatonal Law versus EU Law*, Air and Space Law, 28 (3), p.139.

[39] Regulation (EC) 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries, [2004], OJ L 157, 30.4.2004.

[40] *Ibid*., preamble.

[41] Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand (OJ L 134, 25 May 2007) and Protocol to amend the Air Transport Agreement between the European Community and its Member States, of the one part, and the United States of America, of the other part (OJ L 223, 25 August 2010).

a clear landmark: not only was the sixth freedom recognised and regulated, it was also regulated together with the fifth freedom. All the developments which took place in the civil aviation, which were presented throughout this paper, led to the awareness of the biggest players in the industry that it is time to put the sixth freedom on the regulatory radar. By explicitly recognizing this freedom of the air, both parties of the agreement wanted to make sure that what they allow each other, they can forbid to someone else. Under the Agreement (Article 3), EU airlines are free to carry traffic between the US and EU, and then on to third countries, whether they make stops in the EU (the sixth) or in the US (the fifth). The definition of sixth freedom as a combination of the third and fourth freedoms was understandable, although not true, during the decades in which passengers had to buy separate tickets and collect their baggage after each flight, not to mention a lot less knowledge or visibility of the passenger's final destination, if any.[42] Nowadays, a passenger doesn't have to have a paper ticket or collect his/her baggage at every stop, nor does he/she have to buy separate tickets for flights operated by different airlines. A service could be provided on a single contract of carriage consisting of two or more flights, i.e. legs of the journey. Finally, old theories that the sixth freedom is nothing more than a combination of the third and forth freedoms became part of the history – when a passenger holds an electronic ticket allowing him/her to take several flights on one contract of carriage, this is definitely to be considered one service: service of providing air transport from one country to the third, with just a quick stop in the home base of the carrier.

5.2. The European Common Aviation Area

The process of negotiating traffic rights with a strong trade partner such as US or Canada is very different than the same process between the EU and its neighbouring countries. When deciding on its future policy, the EU has taken several criteria into account: the tendency of a certain country, or region, to eventually join the EU, the safety level of aviation and the interests of an EU carrier in its potential market. Based on this, the EU created different policies for different countries or group of countries (e.g. the Western Balkans). Each policy needed a different kind of agreement which is why the EU now has agreements in place which vary from standard ASAs to the common aviation area agreements which have a much wider scope than just traffic rights. The one that is the most far-reaching, and relevant for this paper, is the European Common Aviation Area Agreement (hereinafter: the ECAA Agreement).[43] Originally signed between eight Western Balkans countries and the EU, Norway and Iceland, it was aiming to create a single aviation market for all potential EU Member States: the fulfillment of all requirements listed in the ECAA Agreement would bring the carriers of the Associated Parties a status of an EU carrier.[44] The road to this goal was divided into phases: each of them sets

[42] Before sofisticated departure control systems which can easily extract such data within seconds, numbers on point-to-point and transfer passengers were usually collected by airlines and airports which would then, along with immigration authorities, send those to the statistics office and tourism office – they usually consolidated the data and provided it to the ministry responsible for transport when an ASA was being negotiated or revised.

[43] Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the establishment of a European Common Aviation Area, 16 October 2006, OJ L 285, pp.1-46.

[44] "The term "Associated Party" means the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Montenegro, Romania, the Republic of Serbia, or any other State or entity that shall have become a party to this Agreement pursuant to Article 32." (Art. 2.1.(b) ECAA Agreement).

obligations (transposition of EU legislation), but also guarantees certain rights - traffic rights. Third and forth freedoms were unrestricted as soon as the agreement entered into force, and upon fulfillment of the first transitional period, the fifth freedom is granted. The sixth freedom, again, is not explicitly mentioned but the wording of articles which define the rights granted in the second transitional period could be interpreted in a way which would include the sixth freedom.[45] Nevertheless, it looks like such an interpretation was not the intention of the Commission when it drafted the agreement as this was amended in the newer versions of common aviation area agreements which now explicitily mention only the fifth freedom.[46]

Although both agreements were signed around the same time, the Commission obviously didn't expect the same challenges or did not see the same potential in ECAA carriers as it did with the US partners. In the meantime, some carriers belonging to ECAA Associated Parties secured major foreign investments and trasformed into strong regional players. Today, their network, combined with a hugely supportive hub, allows them to advertise and operate air services between EU Member States via their own non-EU hub – which is a textbook example of the sixth freedom and surely not something a non-EU carrier would be entitled to.

6. CONCLUSION

Freedom of the air, or the right to operate air services between states, is nothing less than a right to market access.[47] Based on its nature and definition, the sixth freedom is always going to be somewhat controversial: countries with strong hub airports or larger airlines are always going to claim that it is nothing more than a combination of the third and forth freedom, while other states (states of origin or destination of such services) will think of it as a separate freedom which should be separately granted – or at best, a version of the fifth freedom.[48]

The third and forth freedoms relate to traffic strictly between two countries. This is why their purpose, whether they are granted conservatively or in an unlimited manner, has always been to reflect demands of the markets of these two states, respectively. On the other hand, the fifth and sixth freedoms allow carriers to take into account the markets of third countries as well – but not as their primary goal. The main objective of the fifth and sixth freedoms is the provision of capacity for the markets of two signatory states (as with the third and forth), while also having the right to carry a marginal portion of traffic from or to a third destination. This is why in practice these kinds of air services were never disputed, as long as they remained a minor part of, or at least secondary to the carrier's traffic. If it weren't for this requirement, the fifth and sixth freedoms could easily develop into hidden seventh freedom: carriers would make a quick stop in their home state just to avoid their service being disputed and then continue to make profit from providing air services between two foreign countries.

Further evolution of airline business only contributed to this view: transfer flights are now regulary offered on a single ticket i.e. one contract of carriage which represents one air ser-

[45] What should be mentioned here is that, until recently, freedoms of the air were never written in a numerical form in international agreements (third, forth, fifth…).They were usually explained in words and the numerical system was created to facilitate all communication surrounding the agreements.

[46] Common Aviation Area Agreement between the European Union and its Member States and Georgia (OJ L 321, 20 November 2012)

[47] Authors who define the sixth freedom as combination of the third and forth strongly disagree with this. For example, see Wassenbergh, H., op.cit. (ftn. 36), p. 141.

[48] O'Connor, W.E., (2001), *An introduction to Airline Economics*, Westport, Praeger Publishers, p. 55.

vice.[49] It is a well-known fact that in air transport, a passenger is generally not entitled to skip a flight (to be a "no-show") and use the rest of the flights in the ticket or to add a flight to his ticket later on. This is why advertising of services to third destinations can only have one meaning when it comes to air transport: it is offered as one contract, with origin and destination which are not flexible or subject to change. In the world of "exclusive and complete sovereignty", as elaborated throughout this paper, these services shouldn't represent the majority of carrier's traffic on a certain route and they should always have an underlying traffic right. In time, what was once just a small portion of a carrier's traffic suddenly started to be the biggest source of income for some of them. Some EU Member States will ignore this practice for the sake of their economy (tourism, for example) by simply tolerating it or by allowing it formally, but not publicly (additional traffic rights are often granted by a Memorandum of Understanding or just an exchange of letters between two respective ministries). In a common market environment, this practice is still detrimental to all other EU carriers who are operating on the same routes.

While deregulation, liberalisation and common aviation areas are all welcome pratices in an attempt to have a sustainable and global industry, they should be achieved gradually and with the same rules applicable to all. The current system, where non-EU airlines can reap the benefits of regulatory convergence and obvious lack of clear interpretation of certain rights, while at the same time not be subjected to competition rules or requirement of traffic rights, will have a long and distortive effect on EU carriers – which was certainly not the idea of the common market, accompanying common aviation areas or other ASAs.

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[49] Single ticket, as opposed to separate tickets, does not include one flight number (each flight has its own number, primarily for air traffic control purposes), but it does include one reservation number or passenger name record (PNR): a six-digit code which makes the passenger easily traceable in different reservation or departure control systems. The advantages of one ticket are numerous: through check-in of passengers and baggage (to the final destination, if possible), better prices (tariffs), visibilty in the system in case of travel disruptions (delays, cancellations etc. where the carrier can rebook the passenger while still in air), and in some instances, smaller airport charges.

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CODE-SHARING AGREEMENTS AND COMPETITION PROTECTION IN THE EUROPEAN UNION

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SUMMARY

The reason for writing this paper is the recent announcement of the European Commission, published in a press release on the web pages of the European Commission, dated October 27th, 2016, in case AT.39860. In the so-called Statement of Objections the Commission determined that two airline companies – Brussels Airlines and TAP Air Portugal – breached the provisions of Article 101 of the Treaty on Functioning of the European Union by concluding a "code-sharing" agreement. At the same time, the European Commission announced the end of another investigation in case AT.39794, also concerning two airline companies which also concluded code-sharing agreements – Turkish Airlines and Lufthansa. Given the fact that the forms of cooperation in these two cases are seemingly identical, it is necessary to distinguish them and identify the criteria which would help undertakings involved in similar forms of cooperation to detect whether their arrangements could be contrary to competition rules. As explained further in the text, this proved a difficult task due to the scarcity of information released by the European Commission and available practice.

The authors of the paper primarily tried to identify certain key criteria for assessing anti-competitive effects of code-sharing agreements. The Commission's recent Statement of Objections has also raised certain questions – will the mentioned criteria be sufficiently clear and stable to become a direction for assessment of similar agreements in future, or will the practice in this sense change and will these criteria "withstand" the assessment of the Court of Justice of the European Union, in case the undertakings oppose the Statement of Objections and request the Court's intervention (provided that the European Commission assumes the same stance in its final decision).

Having in mind the relatively low number of decisions issued in the air transport sector relating to market competition (especially having in mind that the analysed decisions represent the first significant step towards an analysis of code-sharing agreements and their impact on the air transport sector), it is highly likely that the authorities tasked with the protection of market competition will intervene more and more often in that sector as well, and they will use more sophisticated methods of analysis.

Despite the mentioned, it remains unclear what exactly constitutes a breach of competition law in the case of code-sharing agreements, and the paper is aimed at identifying several key factors marked

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as the most important for competition law analysis related to code-sharing agreements. Therefore, due to the widespread use of code-sharing agreements, the authors recommend that clear criteria for the assessment of such agreements be set, and they tried to provide certain guidelines to undertakings, on the basis of the existing information, in order to reduce the risk of distortion of competition.

Key words: *code-sharing, horizontal agreements, airlines, competition law, market barriers, pricing, European Commission, European Union*

1. INTRODUCTION

On October 27th, 2016, the European Commission (hereinafter: the Commission) announced, through a press release,[1] that a so-called Statement of Objections was issued indicating that two airline companies – Brussels Airlines and TAP Air Portugal – breached the provisions of Article 101 of the Treaty on Functioning of the European Union[2] (hereinafter: TFEU) by concluding a code-sharing agreement. The Statement of Objections in question is a result of the long-lasting investigation in the case AT.39860[3] initiated by the *dawn raid* investigation carried out by the Commission on December 13th, 2011, in the business premises of Brussels Airlines and TAP Air Portugal in Belgium and Portugal.

Simultaneously with the announcement of the Statement of Objections determining the breach of the competition law, the Commission announced the completion of the investigation in case AT.39794[4] concerning two airline companies which also concluded a code-sharing agreement – Lufthansa and Turkish Airlines. In this case the Commission assessed that there were no elements indicating a breach of competition law and creation of a cartel between the undertakings.

Although the Commission indicated certain differences in the two mentioned cases, no clear criteria were set up for assessing the anti-competitive effects of such agreements. However, one must bear in mind that the Statement of Objections is just the preliminary view on the issue in matter and does not prejudice the outcome of the investigation.

Therefore, on the basis of information provided by the Commission in cases AT.39860 and AT.39794, this paper will focus on competition analysis of code-sharing agreements with a special view of parallel hub-to-hub code-sharing agreements.

2. CONCEPT OF CODE-SHARING IN THE AIRLINE INDUSTRY

2.1. Defining code-sharing

Code-sharing is a common concept of cooperation developed in the airline industry to achieve network extension and better connectivity.[5] The first example of a code-sharing agreement occurred in 1967 in the United States (hereinafter: US), when Allegheny Airlines (later

1 Brussels Airlines/TAP Air Portugal, COMP/39.860, Press release, [2016], IP/16/3563.

2 *Consolidated version of the Treaty on the Functioning of the European Union*, OJ C 326, 26.10.2012, p. 47–390.

3 *Brussels Airlines/TAP Air Portugal*, COMP/39.860, European Commission, retrieved 16/04/2017 from http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39860 (last accession: 12/08/2017).

4 *Lufthansa/Turkish Airlines*, COMP/39.794, European Commission, retrieved 16/04/2017 from http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39794 (last accession: 12/08/2017).

5 Steer Davies Gleave, (2007), *Competition impact of airline code-share agreements*, final report, European Commission, DG Competition, retrieved 10/04/2017 from http://ec.europa.eu/competition/sectors/transport/reports/airlinecodeshare.pdf, p. 28. (last accession: 12/08/2017).

on US Airways) partnered with Richard Henson's commuter airline.[6] However, it was not before mid-1980 that practice of that kind of cooperation become prevalent within the airline industry, following the US Congress deregulation of the domestic airline industry in 1978.[7],[8] In Europe, the practice of such cooperation agreements started after the third reform package in the airline industry in 1992 within the process of liberalization of the airline industry. [9]

In its basic form, code-sharing can be described as an agreement that allows for a flight operated by one carrier (which will offer the flight for sale under its own code or designator and associated flight number, such as 'XY1234'), also to be marketed by another carrier, under that other carrier's code and flight number (e.g. 'PQ5678'). Whereas the carrier operating the flight (in this case, the carrier with code 'XY') is known as the "operating carrier", the carrier marketing the flight under its own code (in this case 'PQ') is known as the "marketing carrier".[10,11] Consequently, "code" in "code-sharing" refers to a two-part code (in the previous example XY1234) used to identify commercial flights. The first part of the code refers to an International Civil Aviation Organization (hereinafter: ICAO) designation established to identify the airline company, while second part is the flight number assigned by the airlines to identify the flight's origin and destination.[12,13]

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6 Wang, J. (2010), Airline Code-Sharing: A Trap for Travelers?, *International Journal of Organizational Innovation*, Vol 3, (1), pp. 173-188, at p. 175.

7 United States, *The Airline Deregulation Act of 1978*, Pub.L. 95-504, retrieved 25/04/2017 from https://www.gpo.gov/fdsys/pkg/STATUTE-92/pdf/STATUTE-92-Pg1705.pdf (last accession: 12/08/2017).

8 Bear, D. (July 12, 2007), *Be conscious of code sharing*, Pittsburgh Post-Gazette, retrieved 25/04/2017 from http://www.post-gazette.com/life/david-bear/2007/07/12/Be-conscious-of-code-sharing/stories/200707120339.

9 The process of airline reform in the European Union began in 1987 with the first reform package essentially mandating that any licensed European carrier could fly on a scheduled service basis into any European market (*Council Decision 87/602/EEC on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States*, OJ L 374, 31.12.1987, p. 19–26). With the second reform package in 1990, the EU took the power to establish prices away from the countries whose cities represented the relevant market, instituting a double-disapproval pricing structure. That meant that a carrier could only be prohibited from offering fares in excess of a reference fare by five percent if both member states disapproved it (*Council Regulation (EEC) No 2342/90 of 24 July 1990 on fares for scheduled air services*, OJ L 217, 11.8.1990, p. 1–7). Also, capacity restrictions on intra-Community flights were lifted, meaning that any European airline could fly as many seats into any foreign European market as it deemed sensible (*Council Regulation (EEC) No 2343/90 of 24 July 1990 on access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States*, OJ L 217, 11.8.1990, p. 8–14). Finally, with the third reform package in 1992, by April 1, 1997, any Community carrier was allowed to offer service on any intra-Community route, allowing cabotage which was unthinkable before these reforms (*Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes*, OJ L 240, 24.8.1992, p. 8–14); Pinkham, R. (April 1, 1999), European Airline Deregulation: The Great Missed Opportunity?, *The SAIS Europe Journal*, retrieved 25/04/2017 from http://www.saisjournal.org/posts/european-airline-deregulation (last accession: 12/08/2017).

10 Steer Davies Gleave, (2007), *op. cit.* n. 5, p. 7.

11 Also, when there are more than two carriers in code-sharing arrangement of a certain flight, besides "operating carrier" and "marketing carrier" the third role of "ticketing carrier" should be distinguished. The ticketing carrier issues tickets to the passenger for a journey involving code-sharing. When there are only two parties involved in code-sharing, the marketing carrier and ticketing carrier will usually be the same. However, when there is a third carrier involved, in some cases, the carrier issuing the ticket may be neither the operating nor the marketing carrier. This can cause problems in revenue settlement if the operating carrier, which in general accepts the ticket coupon for carriage on the flights that it operates (or equivalent electronic ticketing procedure), has no interline relationship with the ticketing carrier; *Ibid.*, p. 8.

12 Hassin, O., Shy, O. (2004), Code-sharing Agreements and Interconnections in Markets for International Flights, *Review of International Economics*, Vol. 12, (3), 2004, pp. 337-352, at p. 338.

13 The term code-share (or codeshare, code-sharing, codesharing) was firstly coined in 1989 by Quantas Airways

As can be seen from the above, the development of code-sharing is closely connected to the introduction of Computerized Reservation Systems (hereinafter: CRS; now known as Global Distribution Systems - GDS) in the 1980s and 1990s. Namely, CRS was required to be neutral. It was governed by a set of display rules that were agreed within the industry and were endorsed by the authorities in both the US and the EU. One of the governing rules gave higher priority to online connections rather than to interline connections. In response to that rule, airlines started to adopt code-sharing agreements considering that, as far as the CRS was concerned, flights were treated as online connections and were given higher positions on screens. The higher a flight was displayed on a CRS screen, the more likely it was to be booked by a travel agent.[14,15]

Considering all the previously mentioned, code-sharing can be defined as a marketing arrangement among two or more airlines whereby one or more carriers (marketing carriers) adopt their designator codes to sell tickets on a flight which is operated by their partner carrier (operating carrier).[16]

2.2. Types of code-sharing

Code-sharing is considered to be one of ten types of cooperation in the airline industry. Recognised vertical and horizontal cooperation vary in their construction (from contractual to cross-investment) and level of commitment (from association to acquisition), and are set out below in order of increasing level of intimacy:[17]

1. interline agreements
2. franchising
3. block space agreements (wet lease)
4. code-sharing agreements
5. global alliances
6. cargo alliances
7. joint ventures
8. networks
9. stock investments
10. mergers
11.

and American Airlines (*Financial Review*, November 21, 1989); Weensven, J. (2016), *Air Transportation: A Management Perspective*, 6th ed, Cram101 Textbook Reviews, retrieved 19/04/2017 from https://books.google.hr/books?id=7sLiDw60omUC&pg=PT154&lpg=PT154&dq=code+sharing+Financial+Review,+November+21,+1989&source=bl&ots=hrN8fREpHc&sig=eAw20YVVvHonGNJTaENocWffWIM&hl=en&sa=X&ved=0ahUKEwjflJOGhL_TAhXDDMAKHXBnBoYQ6AEIKDAB#v=onepage&q=code%20sharing%20Financial%20Review%2C%20November%2021%2C%201989&f=false (last accession: 12/08/2017).

[14] According to one study, as often as 90 per cent of the time travel agents book flights on the first screen.; de Groot, J. E. C. (1994), Code-Sharing: United States' policies and lessons for Europe, *Air & Space Law*, Vol. IXX, (2), pp. 62-74, at p. 64.

[15] Steer Davies Gleave, (2007), *op. cit*. n. 5, p. 7.

[16] Oum, T.H., Park, J.H., and Zhang, A. (1996), The Effects of Airline Codesharing Agreements on Firm Conduct and International Air Fares, *Journal of Transport Economics and Policy*, Vol. 30, (29), pp. 187-202, at p. 188.

[17] Truxal, S. (2013), *Competition and Regulation in the Airline Industry: Puppets in chaos*, London, Routledge, p. 119-121.

Although each of the previously listed types of cooperative agreements may exist independently, in practice it is common to extract features of several in combination to produce a suitable agreement for a certain venture's objectives.[18]

Regarding code-sharing agreements, three main types can be recognised:

1. parallel code-sharing,
2. unilateral code-sharing,
3. behind and beyond code-sharing.

2.2.1. Parallel code-sharing

Parallel code-sharing refers to an agreement where two carriers both operate the same route and each gives its code to the other's operated flight. It is sometimes known as online code-sharing.[19] An example of this are flights between Paris and Milan, operated by Air France and Alitalia, which have each other's codes as well as their own.[20] The purpose of parallel code-sharing is for the airline to offer a higher flight frequency and is attractive for business travellers and passengers who have to connect to one or more flights, so they need additional flexibility. It can also have a strategic market power impact as it could prevent other entries on that market. That especially when slots (permission to take-off and landing) constraint is present. Consequently, among all the types of code-sharing it raises most antitrust concerns for competent regulators. Considering the revenue, it is set up through commission.[21,22]

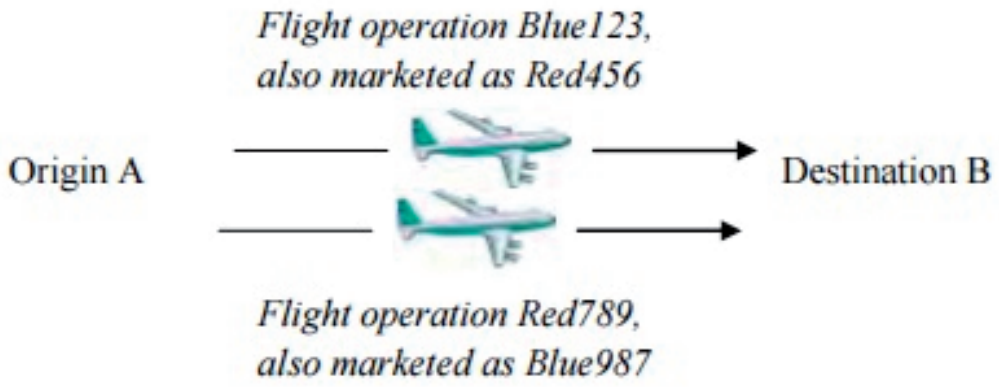

Illustration 1. Parallel code-sharing[23]

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[18] *Ibid.*

[19] Steer Davies Gleave, (2007), *op. cit.* n. 5, p. 8.

[20] Savaser, C. (November 26, 2013), Overall Analysis of Code-Share Agreements in Global Markets, *Martindale Legal Library*, retrieved 25/04/2017 from https://www.martindale.com/aviation-aerospace/article__2030652.htm

[21] Servin Almkvist, M. (2014), *Codeshare Agreement - A way to gain market power and raise airfares?: An investigation of the effect of codeshare agreement on the European airline market,* Södertörn University, Institution for Social Science, retrieved 19/04/2017 from http://www.diva-portal.org/smash/get/diva2:787832/FULLTEXT01.pdf, p. 8. (last accession: 12/08/2017).

[22] Research conducted by Steer Davies Gleave in 2007 for the European Commission has shown that 13 out of 14 involved carriers offer parallel code-sharing. Many of them had anti-trust immunity while some run as competing services. According to interviewed carriers, code-sharing arrangements provided better consumer choice in terms of timings and frequencies and no carrier could recall a frequency reduction as a result of code-sharing.; Steer Davies Gleave, (2007), *op. cit.* n. 5, p. 28.

[23] *Ibid.*, Appendix B.

2.2.2. Unilateral code-sharing

When an airline offers service to a destination without serving that particular route, this is by definition unilateral code-sharing.[24] Here a carrier puts its code on a flight that is operated by another carrier and not by itself, nor is it a connecting flight to one of its own flights. This kind of code-sharing arrangement is also known as network extension code-sharing.[25] For example, Delta puts its code on Paris-Boston, operated by Air France.[26] As in parallel code-sharing, revenue is also set up through commission. However, considering that the airline is actually not performing the flight, it is clear that revenues are not big for marketing carriers in this arrangement. Still, since costs are almost zero, it is still profitable to enter into such agreements.[27,28]

Illustration 2. Unilateral code-sharing[29]

2.2.3. Behind and beyond code-sharing

Behind and beyond code-sharing is when a carrier puts its own code on sectors operated by another carrier to provide connections with its own operated services.[30] It is the most common way of code-sharing which extends an airline's network by offering connecting flights from a destination that it serves.[31] Considering that connecting code-sharing generally require the marketing carrier to sell an interline journey (i.e. one involving travel on its own services and then on the partner carrier's services), it is sometimes known as interline code-sharing. An example of this sort of code-sharing is when British Airways sells a journey from London Heathrow to Chicago via Washington, with the US domestic sector operated by United Airlines.[32] Due to the existence of a code-sharing agreement, behind and beyond code-sharing arrangements can nevertheless be distinguished from a traditional interline journey, on which passengers simply take connecting flights designated only by the code of the operating carrier.

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24 Servin Almkvist, M. (2014), *op. cit.* n. 21, p. 8.

25 Steer Davies Gleave, (2007), *op. cit.* n. 5, p. 8.

26 Savaser, C. (November 26, 2013), *op. cit.* n. 20.

27 Servin Almkvist, M. (2014), *op. cit.* n. 21, p. 8.

28 According to research conducted by Steer Davies Gleave in 2007 for the European Commission, all of the interviewed carriers were involved in unilateral code-sharing, sometimes as the marketing carrier and sometimes as the operating carrier. This was all due to network extension strategy that sometimes encompassed other transport modes such as bus transportation; Steer Davies Gleave, (2007), *op. cit.* n. 5, p. 28.

29 Steer Davies Gleave, (2007), *op. cit.* n. 5, Appendix B.

30 *Ibid.* p. 8.

31 Servin Almkvist, M. (2014), *op. cit.* n. 21, p. 9.

32 Savaser, C. (November 26, 2013), *op. cit.* n. 20.

Unlike for the previous two, revenue is set up through various mechanisms for the division of revenues known as proration.[33,34]

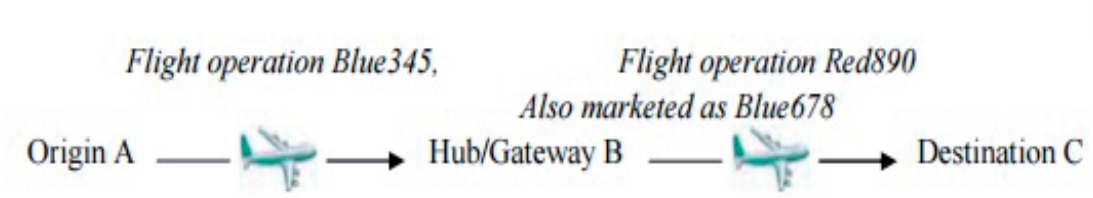

Illustration 3. Behind and beyond code-sharing[35]

2.3. Ways of airline traffic operating

As it can be seen from the above, there are different ways of operating airline traffic from origin to final destination. Therefore, it is important to tell apart situations when the passenger travels from origin to final destination directly or by transfer on two or more flights.

For the purpose of this article, in the broader sense the authors distinguish two ways of airline traffic operating – point-to-point journey and interline journey.

The point-to-point journey refers to nonstop traffic from origin to final destination, regardless of whether points are hub or non-hub. From the code-sharing aspect this would include parallel and unilateral code-sharing.

The interline journey is one where two or more flights are needed to travel from origin to final destination. Behind and beyond code-sharing would fall within this category.

2.4. Positive and negative aspects of code-sharing

Getting a better position in CRS was certainly a good reason for airlines to start practicing code-sharing. However, this original motivation for code-sharing has fallen considering that the importance of CRS as a direct selling channel has been gradually replaced with the development of internet services. But that did not persuade airlines to stop practicing code-sharing. On the contrary, code-sharing agreements are still being practiced and are widespread across the industry, due to several other aspects in which code-sharing agreements contribute to the airline industry for both airlines and customers.[36] Firstly, using code-sharing agreements airlines can provide a cost-efficient way for carriers to enter new markets, expand their systems and obtain additional flow traffic to support their operations by using existing facilities and scheduled operations.[37] Secondly, code-sharing agreements enhance presence in markets where a certain airline would have no profile. By code-sharing airlines can sell seats and market

[33] Steer Davies Gleave, (2007), *op. cit.* n. 5, p. 8.

[34] According to research conducted by Steer Davies Gleave in 2007 for the European Commission, all of the interviewed carriers were involved in behind and beyond code-sharing; *Ibid.* p. 28.

[35] *Ibid.* Appendix B.

[36] *Ibid.* p. 7.

[37] Statement of United States International Air Transportation Policy (May 3, 1995), Federal Register, Vol. 60, (85), pp. 21841-21845, p. 21842.

their services on routes they do not conduct or are weakly recognised.[38] Thirdly, they could give confidence to both customers and distribution channels that journeys involving the partner can be sold with the expectation of a good overall level of service considering suitability of the product. Also, the carrier issuing the travel documents retains responsibility in relation to the consumer for the entire journey.[39] Fourthly, it increases passengers' convenience by permitting single-carrier reservations and ticketing. It enables passengers to check-in only once, while their baggage is transferred all the way to the final destination despite the number of stops in-between, which usually shortens waits between connecting flights. All of that is covered by the phrase "seamless travel".[40]

However, despite the abovementioned positive aspects of code-sharing, there are some serious drawbacks, as well. Hence, listing a flight under the code and name of an airline carrier that does not actually perform the flight can be seen as inherently fraudulent and misleading for customers. One of the biggest problems is price deception where two code-sharing partners may list different prices for a flight that would turn up to be the same, which would not be immediately obvious to the average traveller. Therefore, due to incomplete information, a customer who purchased a ticket for a flight believed to be operated by the marketing operator will not have received the expected service. That is an issue in terms of available seats and more importantly safety concerns, as well as jurisdictional and liability confusion in case of a dispute.[41] Also, there is a question of air carrier liability of operating and marketing carriers. Not going into further details, there is bad airlines' common practice due to the fact that the operators often decline their joint and several liability.[42,43] There are also certain indications that smaller airlines involved in code-sharing agreements use airplanes that are more accident prone and engage younger, less experienced and trained pilots to operate flights, which may raise certain security issues.[44]

However, one of the most disputable consequences of code-sharing is its anti-competitive aspect. Namely, despite the apparent benefits that may arise from entering into code-sharing agreements, there is a risk of possible anti-competitive harm that might result from coordinated activities of competitors.[45] This is especially true for point-to-point routes where two carriers both operate the same route. Considering the importance of this subject and recent investigations of the Commission, the following sections will focus on the anti-competitive aspect of code-sharing.

3. COMPETITION LAW AND CODE-SHARING

Before going into further analysis of the competitive aspects of code-sharing, it would be appropriate to make a few general remarks about competition law.

38 Steer Davies Gleave, (2007), *op. cit.* n. 5, p. 9.

39 *Ibid.;* de Groot, J. E. C. (1994), *op. cit.* n. 14, p. 32.

40 de Groot, J. E. C. (1994), *op. cit.* n. 14, p. 32.

41 Wang, J. (2010), *op. cit.* n. 5, p. 181-182.

42 Ladra, J. (August 14, 2014), *How to Get Compensations from Codeshare Flight, ClaimAir*, retrieved 25/04/2017 from-https://www.claimair.com/blog/how-to-get-compensations-from-codeshare-flight/ (last accession: 12/08/2017).

43 Franklin, M. (1999), Code-Sharing and Passenger Liability, *Air & Space Law*, Vol. XXIV, (3), pp. 4-18, at p. 131-132.; Conti, C. (2001), Code-Sharing and Air Carrier Liability, Air & Space Law, Vol. XXVI, (1), pp. 4-18, at p. 6.

44 Wang, J. (2010), *op. cit.* n. 5, p. 184.

45 Harris, H. S., Kirban E. (1998), Antitrust Implications of International Code-sharing Alliances, *Air & Space Law*, Vol. XXIII., (4/5), pp. 166 – 176, at p. 169.

Competition law consists of rules intended to protect the process of competition in order to maximize consumer welfare.[46] Competition law can be understood as one of the pillars supporting the free market economy.[47] Due to the fact that older economic theories, which described markets as rational, efficient, self-correcting organisms, have largely been discredited,[48] predominantly due to the emergence of several economic crises,[49] there is a global consensus that state involvement is necessary to retain an undistorted market economy.

A paradoxical role of competition law, which is seen as a direct state intervention in the supposedly free behaviour of all market participants, is best summarized in the following quote:

It may seem ironic that competition laws seek to control and interfere with the freedom of conduct of firms in order to promote free competition. However, similar paradoxes face democratic governments in other spheres, such as the perennial question of how far the liberties of individuals should be constrained in order to uphold liberty itself.[50]

Generally, it could be considered that competition law is concerned with several practices which may be harmful for the competitive process – such as anti-competitive agreements (with restriction of competition as their object or effect, unless they are justified by prevailing positive effects), abusive behaviour (in which an undertaking with substantial market power behaves independently on the market to the detriment of other competitors and consumers), mergers (if a merger may have considerable effects on the competitive process) and public measures which may restrict competition.[51] In the analysis of such behaviours, two types of relationship are recognized – horizontal (i.e. between the competitors on the same level of the distribution chain) and vertical (i.e. between undertakings which are positioned on different levels of the distribution chain – such as between the producer of kitchen appliances and the distributor).

The development of competition law is often associated with the US Sherman Antitrust Act, passed by Congress in 1890, and its later amendment in the form of the Clayton Antitrust Act (1914) – the most widely accepted explanation of this legislative activity is that it was passed to combat the power of the *trust.*[52] It is also important to highlight that US terminology recognizes this particular set of rules as *antitrust law*, whereas in the EU the term *antitrust* denotes the areas of competition law other than merger control and state aid.[53] The emergence of modern European competition law is often associated with post-World War II Germany, were a set of rules concerning competition law was introduced immediately after the war as a part

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46 Whish R., Bailey D. (2015), *Competition Law*, Eighth Edition, Oxford, Oxford University Press, p. 1.

47 Jones A., Sufrin B. (2014), *EU Competition Law*, Fifth Edition, Oxford, Oxford University Press, p. 1 – 4.

48 For a detailed analysis of the economic theory that underpins the development of competition law see *ibid.*

49 Such as the Long Depression (1876 – 1893), Wall Street Crash (1929) and ensuing Great Depression (1929 – 1939), OPEC oil price shock (1973) and ensuing recession, and the most recent Late 2000s Financial Recession (2007), etc.

50 Jones A., Sufrin B. (2014), *op. cit.* n. 47, p. 3.

51 Whish R., Bailey D. (2015), *op. cit.* n. 46, p. 3.

52 Jones A., Sufrin B. (2014), *op. cit.* n. 47, p. 19; the authors of the article also provide reference to the common practice which consisted of stock-owners acquiring stocks of competing companies and transferring them to *trustees* and then indirectly exercising control over a competitor's activities, which lessened competition (hence the name *antitrust* law).

53 See, e.g. European Commission, Antitrust – Overview, retrieved 23/04/2017 from /ec.europa.eu/competition/antitrust/overview_en.html (last accession: 12/08/2017).

of restructuring the German economy.[54] The introduction of the *Gesetz gegen Wettbewerbsbeschränkung* in 1957 (entry into force in 1958)[55] was a result of previous Allies' policy of reducing the economic power of cartels in Germany, as the centralized industry and strong cartels were seen as one of the pillars of the Nazi-regime.[56] Rules regulating modern European competition law are enshrined in the TFEU and in supporting European legislative acts.

Code-sharing agreements fall into the category of horizontal agreements,[57] although, as is further elaborated, they may have an impact on other complementary markets. Due to their horizontal nature, they may be contrary to Article 101 of the TFEU that prohibits agreements and concerted practices which may affect trade and prevent or restrict competition.[58] Consequently, primary concern for any authority analysing a code-sharing agreement arises out of the fact that such agreements facilitate collusion, which may result in increasing the fares that the passengers are obliged to pay and decrease the provided capacity on a route.[59] However, some forms of cooperation in the airline industry, due to its specific nature, are actually allowed – in practice, an example of such practice may be passenger tariff conferences organised by the International Air Transport Association (IATA) for facilitation of interlining.[60] Previously, certain forms of potentially anti-competitive behaviours in airline industry were expressly excluded from control by the Block Exemption Regulation (BER).[61] This is not uncommon in the recent development of European competition law, as other industries have seen similar changes aimed at the unification of competition law.[62]

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54 Wigger, A. (2009), The External Dimension of EU Competition Policy: Exporting Europe's Core Business?, Orbie, J. (Ed.), *Europe's Global Role: External Policies of the European Union* (pp. 181 – 202), Farnham, Ashgate, p. 183.

55 German, Gesetz gegen Wettbewerbsbeschränkung in 1957, Bundesgesetzblatt, retrieved 23/04/2017 from https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl157s1081.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl157s1081.pdf%27%5D__1492967056607

56 This was determined in the Potsdam Agreement, Protocol of the Proceedings, (signed on August 1st, 1945), retrieved 20/04/2017 from http://www.nato.int/ebookshop/video/declassified/doc_files/Potsdam%20Agreement.pdf (last accession: 12/08/2017).

57 European Competition Authorities (2006), Code-sharing agreements in scheduled passenger air transport - The European Competition Authorities' Perspective, *European Competition Journal*, Vol. 2, (2), pp. 263 – 284, at p. 268.

58 Code-sharing agreements may always fall under the application of Art. 101 (if the agreement contains *hardcore restrictions* – such as price-fixing, output limitation, market division, etc.), they may never fall under it (in the case of code-sharing between non-competing undertakings or in the case when the undertaking cannot access the market a without code-sharing agreement), and there are cases when they may fall under the application of Art. 101, which requires extensive analysis; *Ibid.*, p. 271 – 274.

59 Steer Davies Gleave, (2007), *op. cit.* n. 5, p. 45

60 Beuve-Méry H., Struk M. (2007), *Commission brings air transport in line with other industries by phasing out the block exemptions that have existed in this sector since 1988*, Competition Policy Newsletter, European Commission, No. 3, p. 1, retrieved 31/04/2017 from: http://ec.europa.eu/competition/publications/cpn/2007_3_45.pdf (last accession: 12/08/2017).

61 *Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector*, OJ L 374, 31.12.1987, p. 9–11*; Council Regulation (EC) 487/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector*, OJ L 148, 11.6.2009, p. 1–4.

62 One such recent example is the expiration of the Block Exemption Regulation No 267/2010 for the insurance sector (Commission Regulation (EU) No 267/2010 of 24 March 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ L 83, 30.3.2010, p. 1–7). There is a trend to discontinue the use of Block Exemption Regulations and to further elaborate Commission-issued Guidelines, to offer some guidance in relation to competition law analysis. This could be a good approach to the code-sharing problem – guidelines may provide sufficient information on the treatment of such agreements.

It is clear that agreements such as code-sharing agreements may lead to potentially seriously harmful effects on competition – the most obvious being the reduction of competition between cooperating competitors.[63] Therefore, there is a significant danger of coordination between the competitors by adjusting pricing policy.[64] By establishing a level of cooperation, competitors may easily establish harmful horizontal cooperation. Price coordination may also have a certain form specific for this industry – when two airlines cooperate in the form of code-sharing, they may not engage in a *price battle* over the tickets they are selling for the seats on the operating carrier's aircraft. In order to promote better relations, it is more convenient to offer the same prices as the competitor for the seats on his aircraft, as this service may be returned by the operating carrier on another code-sharing line – this situation benefits both undertakings.[65] Apart from horizontal cooperation issues, there is a possibility of unilateral or collective action in the form of abuse of dominant position – since the competitors are in a position in which they seemingly divide the market between themselves, it allows them to abuse their dominant position by reducing the capacity and increasing prices – lack of direct competition between them increases their individual strength on a market.[66]

Reduction of competition may also be reinforced through further services offered to customers, such as combining *frequent flyer programmes* (for earning free miles or other benefits), lounge access or other benefits, which would discourage customers from using other airlines.

So far, there has been no extensive analysis of code-sharing agreements by the Commission.[67] The only two cases[68] which considered this problem were case COMP.D.2 37.444 - *SAS Maersk Air*[69] and case COMP.D.2 37.386 - *Sun-Air* versus *SAS* and *Maersk Air*.[70] The cases concerned notification of cooperation agreement between SAS and Maersk Air[71] and the subsequent complaint on the agreement filed by *Sun-Air*. It was evident that following the agreement *Maersk Air* stopped operating its Copenhagen-Stockholm route, while *SAS* stopped operating its Stockholm-Venice route and Frankfurt-Billund route. However, the Commission did not carry out extensive analysis of the code-sharing arrangements, since its focus was on market-sharing agreement.

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63 Harris, H. S.; Kirban E. (1998), *op. cit*, n. 45, p. 166.

64 One of the few arguments of the Commission visible from the *press release* is specifically that Brussels Airlines and TAP Air Portugal were aligning both their fare-structures and prices on the route, which was not the case in Lufthansa/Turkish Airlines; Slaughter and May Competition & Regulatory Newsletter (2016), *European Commission issues Statement of Objections to two airlines over codesharing agreement*, Issue 5, retrieved 30/04/2017 from: https://www.slaughterandmay.com/media/2536142/competition-and-regulatory-newsletter-26-oct-08-nov-2016.pdf (last accession: 12/08/2017).

65 Harris, H. S.; Kirban E. (1998), *op. cit*, n. 45, at p. 169.

66 This could be the case in, *e.g. unilateral* code-sharing, when an undertaking following such agreement decides to eliminate its lines on a specific *city-pair* market – by removing the most significant competitor, the remaining undertaking is now free to abuse its position (in the absence of other equally strong competitors).

67 Steer Davies Gleave, (2007), *op. cit.* n. 5, p. 21.

68 European Competition Authorities (2006), *op. cit.* n. 57, p. 268.

69 2001/716/EC: *Commission Decision of 18 July 2001 relating to proceedings pursuant to Article 81 of the EC Treaty and Article 53 of the Agreement on the European Economic Area (Case COMP.D.2 37.444 — SAS Maersk Air and Case COMP.D.2 37.386 — Sun-Air versus SAS and Maersk Air)*, OJ L 265, 5.10.2001, p. 15 – 41.

70 *Ibid.*

71 At that time, similar to the US system, the European Commission had the authority to exempt certain agreements.

4. CASE AT.39794 LUFTHANSA/TURKISH AIRLINES AND CASE AT.39860 BRUSSELS AIRLINES/TAP AIR PORTUGAL – LEGAL AND FACTUAL BACKGROUND

In 2011, following a *dawn raid* investigation, the Commission opened two separate own initiative antitrust investigations into code-sharing agreements in case AT.39794 Lufthansa/Turkish Airlines[72] and case AT.39860 Brussels Airlines/TAP Air Portugal.[73] In both cases the investigation was focused on parallel hub-to-hub code-sharing. Namely, Lufthansa and Turkish Airlines on Germany-Turkey routes and Brussels Airlines and TAP Air Portugal on the Belgium-Portugal routes had agreed to sell seats on each other's flights where both pairs of companies had already operated their own flights between their own hubs, and should be, in principle, competing with each other. Both agreements were to sell seats as long as there are seats available (so called *free-flow* arrangement – see *infra 5.2. Pricing strategies and capacity usage between code-sharing partners*).[74]

In the first case, the Commission observed routes Munich-Istanbul and Frankfurt-Istanbul where Lufthansa and Turkish Airlines were major operators and, in the other case, Brussels-Lisbon, where Brussels Airlines and TAP Air Portugal were the only operators. The Commission initiated the procedure with the assumption that, in comparison to unilateral code-sharing, the agreements at hand may lead to higher prices and less service quality for customers.[75]

Legal basis for deciding on the cases in matter was Article 101 TFEU. The Commission initiated proceedings within the meaning of Articles 11(6) and 16(1) of the Council Regulation (EC) No 1/2003[76] and Article 2(1) of the Commission Regulation No 773/2004.[77,78] According to the provisions of the Council Regulation (EC) No 1/2003 competition authorities in the Member States are relieved of their authority to apply Articles 101 and 102 TFEU to the practices concerned, and the national courts are refrained from giving decisions which could conflict with a decision contemplated by the Commission in proceedings it has initiated. Article 2(1) of Commission Regulation No 773/2004 regulates initiation of proceedings with a view to adopt a decision pursuant to Chapter III of Regulation (EC) No 1/2003 (*Commission decisions*).

Five years after the initiation of the procedures, the Commission issued a press release concerning the case AT.39860 Brussels Airlines/TAP Air Portugal through which it informed the public about sending the Statement of Objections to Brussels Airlines and TAP Portugal on code-sharing on the Brussels-Lisbon route.[79] The Statement of Objections contains only a preliminary view that code-sharing cooperation in the matter restricts competition between the

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72 Lufthansa/Turkish Airlines, COMP/39.794, European Commission, retrieved 16/04/2017 from http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39794 (last accession: 12/08/2017).

73 Brussels Airlines/TAP Air Portugal, COMP/39.860, European Commission, retrieved 16/04/2017 from http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39860 (last accession: 12/08/2017).

74 Lufthansa/Turkish Airlines, COMP/39.794, Press release, [2011], IP/11/147; Brussels Airlines/TAP Air Portugal, COMP/39.860, [2011], IP/11/147.

75 *Ibid.*

76 *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, OJ L 1, 4.1.2003, p. 1–25.

77 *Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty*, OJ L 123, 27.4.2004, p. 18–24.

78 Lufthansa/Turkish Airlines, COMP/39.794, Opening of Proceedings, [2011]; Brussels Airlines/TAP Air Portugal, COMP/39.860, Opening of Proceedings, [2011].

79 Brussels Airlines/TAP Air Portugal, COMP/39.860, Press release, [2016], IP/16/3563.

two airlines and represents a breach of the EU antitrust rules. Anti-competitive infringements were found in the following aspects:

1. discussing a capacity reduction (number of seats) and an alignment of their pricing policy on the route;
2. granting each other unlimited rights to sell seats on each other's flights on the route (where they had previously competed);
3. implementing these arrangements by actually reducing capacity, completely aligning their fare structures, as well as their ticket prices on the route.[80]

Furthermore, the Commission explained that combination of these practices breaches EU rules that prohibit anti-competitive agreements (Article 101 TFEU) and that its preliminary conclusion is that these practices eliminated competition on prices and capacity between the two airlines on the Brussels-Lisbon route and led to higher prices and less choice for customers. No further reasoning was made publicly available at this stage of the proceedings.[81]

However, it is important to note that the Statement of Objections is only a formal step in the Commission's investigations and does not prejudge the final outcome of the investigation.

Although no notices were publicly made available in relation to the case AT.39794 Lufthansa/Turkish Airlines, in the same press release on sending the Statement of Objections to Brussels Airlines and TAP Air Portugal, the Commission informed about closing the investigation in the case concerning the Lufthansa and Turkish Airlines code-sharing agreement. Namely, the Commission had found that Lufthansa and Turkish Airlines did not have full marketing rights to each other's seat inventory and that they applied differing pricing strategies. Also, the code-sharing accounted for only a marginal share of the parties' sales on the routes of concern, which was sufficient for the Commission to close its investigation.[82]

Therefore, having in mind that there is no reasoning publicly available for the Commissions' preliminary views given in case AT.39794 Lufthansa/Turkish Airlines and case AT.39860 Brussels Airlines/TAP Air Portugal, based on the existent case law and studies and relevant literature, in the following paragraphs competition analysis of code-sharing agreements will be given with a special emphasis on parallel hub-to-hub code-sharing.

5. COMPETITION LAW ANALYSIS OF PARALLEL HUB-TO-HUB CODE-SHARING

As is immediately obvious from the previous analysis of code-sharing agreements, there are significant positive, but also considerable negative effects on the competition associated with the agreements. Primarily, an important remark must be made in relation to competition law in airline industry – airline industry is characterized by oligopoly markets with often few undertakings holding significant market shares.[83] In such an environment, with obvious significantly high barriers to entry (see *infra 5.1. Relevant market and barriers to entry*), it may be concluded that competition can be easily distorted. However, due to the unclear approach of the Commission, it could be argued that the industry has been neglected from the competition law point of view. Anyone who wants to make a detailed analysis of the competition law is

[80] *Ibid.*

[81] *Ibid.*

[82] *Ibid.*

[83] Truxal, S. (2013), *op. cit.* n. 17, p. 8, 48 and 78; Hassin, O., Shy, O. (2004), *op. cit.* n 12, p. 337.

faced with a difficult task, since there are not many references for the analysis. There are only a few decisions related to the competition law in the air transport sector, with concise explanations (with the exception of merger analysis), and also there are no clear guidelines for the analysis of the industry and no concrete policy, leaving the undertakings "in the dark".[84] This is, perhaps, the reflection of earlier European (and American) policy of liberalization of the industry, which led to intentional overlooking of some potentially anti-competitive behaviours in order to motivate the undertakings to continue developing the market. In the global economic race, it is difficult to expect that governments will abide by the protection of competition law, since they are often in fact motivating its distortion.[85] However, such a lenient approach could also be explained by the fact that the airline industry involves significant investments that few are prepared to make and the industry equally brings huge benefits for the economy in general, so a degree of tolerance towards minor competition law breaches is permitted (this may be supported by the fact that previously Block Exemption Regulations exempted certain behaviours from the reach of competition law). However, such balancing remains very dangerous, since fines imposed by the Commission can be enormous[86] and it could even be argued that by investigating such widely-used agreements, the principle of legal certainty is stretched to the edge. Before going into analysis of the specific circumstances of the Commission cases AT.39860 and AT.39794, it is important to analyse a few important competition law aspects specific for the airline industry.

5.1. Relevant market and barriers to entry

First of all, in competition analysis, one of the most complicated points is definitely the market definition. Although this is often criticized[87] for not taking into account various factors, authorities usually analyse city-pair markets (the *point-of-origin/point-of-destination* approach or the *O&D* approach).[88] This approach consists of analysis of a single route between two cities. Also, various further factors must be taken into account – for example, serving of the morning

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84 Truxal, S. (2013), *op. cit.* n. 17, p. 2.

85 A perfect example of such a case is the case of the United Airlines/Lufthansa code alliance – prompted by the success of the Northwest/KLM alliance, exempted by the United States' Department of Transport antitrust immunity, during the negotiations between the German and US governments on the implementation of the "open skies" agreement which would remove certain barriers for the airlines operating between these two countries; Germany actually preconditioned its acquiescence to the agreement by the US government issuing guarantee that the Department of Transport would grant antitrust immunity to United Airlines/Lufthansa cooperation; Harris, H. S.; Kirban E. (1998), *op. cit*, n. 45, at p. 174.

86 The Commission, in its decision dated 9.11.2010 in case COMP/39258 – *Airfreight*, imposed fines for an air transport cartel (for airfreight services) in a total amount of EUR 799 million (involving 11 airline companies); Airfreight, COMP/39.258, European Commission, retrieved 20/04/2017 from http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39258; Airfreight, COMP/39.258, Provisional version of the decision, [2010], C(2010) 7694 final; Airfreight, COMP/39.258, Press Release, [2010], IP/17/661.

87 *Merger of International Consolidated Airlines Group – British Airways Plc.* and *British Midlands Limited*, COMP/M.6447, European Commission, retrieved 13/04/2017 from COMP/M.6447; *Merger of International Consolidated Airlines Group – British Airways Plc.* and *British Midlands Limited*, COMP/M.6447, Article 6(1)(b) with conditions & obligations, OJ C 161/2, 7.6.2012., p. 2.

88 This approach is suitable for depicting the impact of code-sharing – e.g. in the Delta and SwissAir example, both undertakings serviced the Zurich-Cincinnati route (city-pair market) – so their cooperation started as a *parallel* code-sharing. However, after a certain period, only one undertaking remained servicing the route – obviously undertakings allocated the market and are now free to charge supracompetitive prices and the cooperation turned into a *unilateral* code-sharing; Harris, H. S.; Kirban E. (1998), *op. cit*, n. 45, at p. 170.

and evening market,[89] serving of time-sensitive and non-time sensitive passengers,[90] existence of complementary markets such as speed-trains,[91] congestion of the airports (particularly in Europe where due to the value of slots, negative effects in competition law are regularly more apparent), services of chartered and scheduled flights, even factors which may seem completely insignificant such as allocated terminal space,[92] etc. *Point-to-point* routes are treated as separate markets as opposed to interline journey.[93] Finally, geographical characteristics should also be taken into an account – e.g. if the geographical circumstances are such that a single route is more preferable (for various geographic, meteorological, political or other factors), thus diminishing the importance or completely eliminating the significance of other routes, dominant position on such route could further reinforce the negative effects on the market.

One closely related concept that should be analysed is the concept of "barriers to entry" to the market. Barriers to entry may further restrict new entrants in specific markets. Analysis of entry barriers is an important step in every competition analysis.[94] The most significant barriers to entry are considered to be availability of slots[95] in the airport, frequent flyer programmes,[96] which may motivate customers to choose a specific brand, high-speed rail competition (but not on all markets), new route investment costs and routes connecting two hubs of competitors.[97] These barriers can all increase the risk of negative effects on markets where two strong competitors cooperate in the form of *parallel* code-sharing. For example, in the case of *parallel* code-sharing between TAP Portugal and Brussels Airlines on the Lisbon-Brussels market, it is evident that the route connects their hubs, thereby facilitating aircraft servicing and maintenance (under the presumption that such provisions also exist in their cooperation agreement).

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89 *Parallel* code-sharing would have a greater impact on the competition if one undertaking has a dominant position on the morning city-pair market due to good coverage of morning slots in the airports, whereas the other would have a good coverage of the evening city-pair market. See *Harris, Kirban,* p. 170.

90 This is especially important in *parallel* code-sharing, as it benefits time-sensitive passengers (often traveling for business purposes) since they get more flexibility. An example of analysis of this market can be found in Commission Decision No. COMP/M.5747, Iberia/British Airways dated 14 July 2010; Iberia/British Airways, COMP/M.5747, European Commission, OJ C 241, 08.09.2010, p. 1.

91 It is often a practice that airlines cooperate with other transport operators – their individual strength in the airline industry is thus capable of "*spilling over*" into the complementary market (the spill-over effect is common in competition law – e.g. the insurance industry in relation to insurers and car repairers – but it has not been thoroughly analysed in the context of *code-sharing)*; for a good analysis of the influence of code-sharing on complementary markets (with the examples of Deutsche Bahn and SNCF); see Truxal, S. (2013), *op. cit.* n. 17, p. 134 – 136.

92 One report shows that a significant economic impact arises from the fact that US carriers were allocated to spaces in older, less-desirable terminals in Narita Tokyo airport, whereas Japanese carriers were allocated to new terminals; see Harris, H. S.; Kirban E. (1998), *op. cit.*, n. 45, at p. 171.

93 This is especially problematic for Europe, as more traffic in Europe is *point-to-point*, so slots constraints are more severe and hubs represent more significant barriers to entry – see Steer Davies Gleave, (2007), *op. cit.* n. 5, p. 25 – 26.

94 Communication from the Commission – Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. Published in OJ C 45, 24.2.2009, p. 7–20.

95 Steer Davies Gleave, (2007), *op. cit.* n. 5, p. 64 – inefficient use of slots is currently one of the main preoccupations of the European Commission – for more information see:

European Commission, Air Slots, retrieved 26/04/2017 from https://ec.europa.eu/transport/modes/air/airports/slots_en (last accession: 12/08/2017).

96 Steer Davies Gleave, (2007), *op. cit.* n. 5, p. 65.

97 Kappes, J W. and Merkert, R. (2013), Barriers to entry into European aviation markets revisited; A review and analysis of managerial perception, *Transportation research part E: Logistics and transport Review*, Vol. 57, (C), pp. 58-69.

This may bring significant benefits for the undertakings and increase potential investments for new entrants that wish to successfully compete with them. In accordance with experience from similar analysed cases, slot congestion favours both airlines as well, as they naturally have better access to the slots in their hubs, so it creates another significant (perhaps even the most significant) barrier to entry for new competitors. By *parallel* code-sharing dominant undertakings practically double this effect and considerably limit the available slots for other undertakings. An exclusivity clause in such a *parallel* code-sharing agreement may also *de facto* represent another regulatory barrier to entry.[98]

5.2. Pricing strategies and capacity usage between code-sharing partners

One of the main antitrust concerns that the Commission has expressed in its Statement of Objections from 2016 was alignment of pricing policy between two airlines. Namely, the Commission's preliminary conclusion was that the practices of the two airlines that were investigated in case no. AT.39860 Brussels Airlines/TAP Air Portugal eliminated competition on prices that consequently led to higher prices for consumers.

Throughout the last decade, several studies have been conducted in the area of code-sharing that dealt with the issue of pricing in the airline industry. Although different methods had been used and different results were provided by different studies, the general attitude is that code-sharing in general has a beneficial impact on pricing in the sense of decreasing fares for consumers.[99]

However, that conclusion refers mostly to interline flights, where the journey includes two or more flights. Considering point-to-point flights, several studies had shown that code-sharing agreements may lead to higher fares and anti-competitive behaviour. Therefore, the Brueckner and Whalen study showed that hub-to-hub fares increased up to 5 percent as a result of code-sharing agreement with two airlines operating within the same alliance.[100,101] The Bilotkach study indicated that hub-to-hub non-stop flights with antitrust immunity lead to higher fares.[102] Armantier and Richard in their analysis of the Continental Airlines and Northwest Airlines code-sharing agreement, predicted a raise of fares up to more than 10 percent as a result of their arrangement.[103] The Servin Almkvist analysis showed that parallel and unilateral code-sharing agreements increased in all the five different models that were analysed.[104] The

[98] An exclusivity clause is usually not considered as a barrier to entry, but it may very well be one, as the new entrants into the market will be discriminated by the code-sharing partners. As has already been pointed out, some smaller airlines can enter new markets only through code-sharing, therefore, an exclusivity clause removes their only means of entry.

[99] Servin Almkvist, M. (2014), *op. cit.* n. 21, p. 3; Brueckner, J., K., (February, 2003), International Airfares in the Age of Alliances: The Effects of Codesharing and Antitrust Immunity, *The Review of Economics and Statistics*, Vol 85 (1), pp. 105-118, at pp. 105-106.

[100] Brueckner, J., Whalen, T., (2000), The Price Effects of International Airline Alliances, *The Journal of Law & Economics*, Vol. 43, (2), pp. 503-546, at p. 539.

[101] Brueckner, J., K. (February 2003), *op. cit.* n. 99, p. 106.

[102] Bilotkach, V. (May 2005), *Journal of Transport Economics and Policy*, Vol. 39 (2), pp. 167-189, at p. 183.

[103] Armantier, O., Richard, O., (2006), *Evidence on Pricing from the Continental Airlines and Northwest Airlines Code-Share Agreement*, Lee, D. (Ed.), Advances in Airline Economics, Competition Policy and Antitrust, pp. 91-108, Bingley, Emerald Group Publishing Limited, at p. 106., also available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=869242 (last accession: 12/08/2017).

[104] Servin Almkvist, M. (2014), *op. cit.* n. 21, p. 25-26.

Steer Davies Gleave study explains that this could be a consequence of collusion and/or of the displacement of point-to-point passengers by passengers making a connection flight.[105]

But not all researchers agree on that and some did not find evidence that code-sharing agreements on point-to-point routes have a negative impact on fares. In their study of hub-to-hub and hub-to-hub-to-non-hub flights, Hassin and Shy determined that some passengers become better off, and none are hurt with the implementation of code-sharing agreement.[106] Even some researchers whose result of study showed that fares increased as a result of hub-to-hub code-sharing arrangement have reservation towards their conclusion. For instance, Brueckner and Whalen state that their findings on increase of fares are not statistically significant.[107]

Therefore, when analysing the results of studies conducted on the impact of code-sharing agreements on pricing, one must have in mind the complexity of that area and number of variables that must be taken into consideration. Such variables are type and content of the code-sharing agreement, level of cooperation between airlines, arrangement on revenues between airlines, slots constraint, level of congestion at an airport, antitrust immunity, time of flights, duration of flights, exclusivity of flights, *etc*. Also, there is a possibility of illegal price-fixing conspiracy between airlines which should also be taken into consideration when analysing code-sharing impact on airline fares (although, price-fixing does not necessary include agreement between partner-competitors).[108]

Namely, most of the existent studies are focused only on partial aspects of pricing within code-sharing agreement and should be taken with certain caution before making firm conclusions on the impact of code-sharing agreements on pricings. Furthermore, it should also be noted that most of the studies are of an older date so there is an urgent need for comprehensive study on the effects of code-sharing agreements on airline fares before making any final conclusions.

Nevertheless, it should be noted that in the Commission investigation both cases at hand focused on parallel hub-to-hub code-sharing. As previously mentioned, this kind of code-sharing agreement falls within the category of code-sharing arrangements for which some studies have shown that they may have negative impact on fares and is the most questionable from the aspect of competition law. However, despite all reservations the Commission took in its preliminary remarks about parallel hub-to-hub code-sharing,[109] parallel with sending the Statement of Objections to Brussels Airlines and TAP Air Portugal, the Commission closed the investigation in the case of Lufthansa and Turkish Airlines. Therefore, not all parallel hub-to-hub code-sharing agreements automatically have a negative impact on pricing and are considered by default to be anti-competitive.

The primary difference, according to published reports, between the two investigated cases was that Lufthansa and Turkish Airlines did not have full marketing rights on each other's seat inventory and they applied different pricing strategies and code-sharing accounted for only a marginal share of the market.[110] If two undertakings, that already cooperate in some way, have the same pricing strategy – it is strong evidence that collusion between them took

[105] Steer Davies Gleave, (2007), *op. cit.* n. 5, p. 59.

[106] Hassin, O., Shy, O. (2004), *op. cit.* n. 12, p. 349.

[107] Brueckner, J., Whalen, T., (2000), *op. cit.* n. 100, p. 542.

[108] Harris, H. S.; Kirban E. (1998), *op. cit,* n. 45, at p. 169.

[109] Lufthansa/Turkish Airlines, COMP/39.794, Press release, [2011], IP/11/147; Brussels Airlines/TAP Air Portugal, COMP/39.860, [2011], IP/11/147.

[110] Brussels Airlines/TAP Air Portugal, COMP/39.860, Press release, [2016], IP/16/3563.

place. If it can be proven that two undertakings in fact aligned prices or pricing strategies, there has been a violation of competition law (as Article 101 TFEU expressly prohibits undertakings to: *directly or indirectly fix purchase or selling prices or any other trading conditions*). However, at this phase of the proceedings it is impossible to analyse how the Commission determined and compared pricing strategies of the two undertakings or whether it analysed the previously elaborated impact of pricing strategies on the market, without its concrete reasoning being publicly available. This aspect is very important, as the negative effects of collusion or abuse of dominant position in this case, where other factors already facilitate such behaviour (as is further elaborated), would be best verifiable through effects of applied pricing strategies.

Finally, the provision regulating the marketing carrier's access to the operating carrier's capacity needs analysis. Basically, two concepts of capacity assignment in code-sharing may be distinguished – *free-flow* (*free-sale*) arrangement and *block space* arrangement.[111] *Free-flow* arrangements give the marketing carrier access to all of the operating carrier's aircraft seats independently of the operating carrier.[112] Although at first one may assume that this arrangement is better as both carriers compete freely (determining prices independently for seats on an aircraft belonging to operating carrier), this arrangement regularly brings negative consequences for the competition, especially in *parallel* code-sharing. This is due to the above-described motivation of code-sharing partners to cooperate and not to compete in prices – the other competitor returns the favour on a different code-sharing route. Such an arrangement is especially detrimental in *parallel* code-sharing as the undertakings thus coordinate their pricing policy and this is probably what happened in the *Brussels Airlines/TAP Portugal* case, although due to the lack of any additional information, it is not possible to verify this. The other option – *block space* arrangement – consists of assigning a pre-determined number of seats on the aircraft for sale to the marketing carrier. There are also two sub-types of this arrangement – *hard block space* arrangement, in which the marketing carrier cannot return unsold seats back to the operating carrier and bears full financial risk, and *soft block space* arrangement, in which the marketing carrier is allowed to return some or all seats to the operating carrier.[113]

5.3. Overview of anticompetitive effects of parallel code-sharing

Parallel code-sharing arrangements are perhaps considered the most problematic of all code-sharing agreement subtypes. They can produce benefits for the customers, given that customers who require flexibility in the flight schedules (particularly time-sensitive passengers, who often travel on short-haul routes for business purposes) benefit from more choices in the available flights.[114] Also, the benefits may arise from increased frequency of flights (in the case, e.g. when code-sharing partners operate morning and evening flights, which provides further flexibility to passengers), and may provide better connections (as passengers can easily reach the connecting flight in the destination airport).[115] However, on the other hand, they may also produce harms for the competition if the cooperating undertakings have a strong market posi-

[111] This problem is related to one of the major issues of parallel code-sharing – how to share capacities, revenues, profits and costs between alliance partners; see Chen, C., Ren, Y. (2007)., Predictive Methods for Using Capacity Data to Estimate Market Shares and the Extent of Risk Pooling by Airline Alliance Partners under Parallel Codesharing, Airline Alliance Codesharing, *Transportation Journal*, pp 21-35, at p 23.

[112] European Competition Authorities (2006), *op. cit.* n. 57, p. 266.

[113] *Ibid.*; Steer Davies Gleave, (2007), *op. cit.* n. 5, p. 29.

[114] Such arrangements enable higher flights frequency as a whole; see Chen, C.; Ren, Y (2007), *op. cit.* n. 112, p 23.

[115] Steer Davies Gleave, (2007), *op. cit.* n. 5, p. 73.

tion – synergy of two such undertakings could *congest* the market leaving no or very little choices if the customer wishes to travel with a different carrier. This can also facilitate collusion as the undertaking can reduce capacity and/or charge supra-competition prices.[116] This effect could be further reinforced in case there are barriers to entry – one such significant barrier, which is often analysed, is the congestion of the airports in the city-pair markets. These slot-constraints are particularly serious in Europe, where several airports are already significantly congested and have no available slots.[117] If an undertaking is also using such a congested airport as a hub, it is in an even better position to foreclose the market for other competitors, as it has reduced costs of operating from such an airport, so the entry of a new undertaking onto the market may be considerably complicated and requires significant investments.

6. CONCLUSION

In line with the conclusion of the Commission in the previously analysed case AT.39860, *parallel*, *hub-to-hub*, *free-flow* code-sharing agreement, combined with barriers to entry, may produce significant negative effects for the analysed city-pair market. It is clear that some serious issues existed in the *Brussels Airlines/TAP Portugal* case, as all these described factors existed, making it probably the most detrimental code-sharing arrangement possible.

As stated earlier, it is important to take into account that this case is not, however, concluded. Issuing the Statement of Objections just represents a provisional Commission's stance towards the problem in question and may be reversed by well-placed arguments or evidence by the parties. Due to the indications and high probability of overwhelming evidence that could point to the violations of competition law, the Commission's final decision will probably remain the same. A possible scenario of the development of the investigation is that the parties will cooperate with the Commission. Such cooperation could include introduction of certain remedies with the purpose of elimination and reduction of violation. The most frequent remedy aimed at restoring competition, which may likely be introduced in the present case, is divestment of slots held by the parties in Brussels and Lisbon airports.[118] Having in mind the most problematic issues posed by parallel code-sharing, such a remedy may be the most effective mean for restoration of competition. Although this remedy is more suitable for merger cases, due to the nature of code-sharing cooperation, market competition should be strengthened by facilitating the access for other undertakings. Opening of the slots should create this desired effect, as new entrants may apply pressure on the code-sharing partners. Apart from this, other remedies, such as commitment to facilitate *intermodal* passengers tran-

[116] The European Commission is familiar with this problem, as is evident from the Study created for the European Commission – see *Ibid.* p. 45.

[117] London – Heathrow (analysis in *e.g.* COMP/M.6447 decision), Paris – Charles de Gaulle and Frankfurt Airport are often identified as airports with serious slot availability problems; see *Ibid.* p. 64.

[118] Such commitments are quite often – e.g. commitments of the parties related to the decision COMP 37749 *Austrian Airlines – SAS* for the Vienna-Stockholm and Vienna-Copenhagen routes (Austrian Airlines + SAS, COMP 37749, European Commission, retrieved 24/04/2017 from http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_37749; Austrian Airlines + SAS, COMP 37749, Proposed Commitments, [2005].); or decision COMP A/38477/D2 *SN Brussels Airlines – British Airways* (British Airways + SN Brussels Airlines, COMP A/38477/D2, European Commission, retrieved 28/04/2017 from http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_38477 (last accession: 12/08/2017); British Airways + SN Brussels Airlines, COMP A/38477/D2, Negative clearance decision (Reg 17/62), [2003]).

sport services,[119] entering into fare combinability agreements or special prorate agreements,[120] or opening of the *frequent flyer programs* for competitors,[121] are also quite frequent and standard in the airline industry. It is very likely and in line with previous practice that, after the implementation of such remedies, the Commission will abandon further proceedings.

It is however unclear why the Commission and other competition regulators hesitated for so long and failed to pursue the objective of regulating competition in the airline industry.[122] One of the factors that may contribute to the described time-lag may be the previous existence of the Block Exemption Regulations. Evidently, the Commission was warned about the possible problems caused by code-sharing agreements almost a decade ago.[123] However, given that the regulators have left the development of code-sharing agreements unchecked for too long, this slowly became the industry's standard.[124,125] Reversing this process could be very difficult and certainly requires sufficient guidelines as well as an adaptation period for all the undertakings.

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[119] See commitments of the parties related to the decision COMP 37749 *Austrian Airlines – SAS*; Austrian Airlines + SAS, COMP 37749, Proposed Commitments, [2005].

[120] Continental/United/Lufthansa/Air Canada, AT.39595, European Commission, retrieved 22/04/2017 from http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39595; Continental/United/Lufthansa/Air Canada, AT.39595, Commitments Decision, [2013].

[121] Commission decision No. 37730 – *Lufthansa – Austrian Airlines*; *2002/746/EC: Commission Decision of 5 July 2002 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/37.730 — AuA/LH)*, OJ L 265, 5.10.2001, p. 15–41.

[122] The European Commission was, undoubtedly, aware of the position of the undertakings in the case concerned, one study even concluded that *some smaller carriers are also placed towards the top, including TAP (...);* (Steer Davies Gleave, (2007), *op. cit.* n. 5, p. 37). Such special emphasis on TAP could have certainly drawn the Commission's attention to TAP (placed 9th in the code-sharing ranking out of 102 carriers) and Brussels Airlines (placed 19th out of 102).

[123] Steer Davies Gleave, (2007), *op. cit.* n. 5, p. 59: The study expressly stated that *Parallel code-share agreements are less likely to expand the range of journey opportunities available on an intra-European route (...). Therefore, code-share agreements are less likely to lead to higher demand or higher capacity on an intra-European route.(…) the evidence points to code-shares having the potential to result in disadvantages for customers, particularly where other constraints, such as airport slots, help them to act as barriers to entry.*

[124] Harris, H. S., Kirban E. (1998), *op. cit*, n. 45, at p. 175.

[125] Also, see Steer Davies Gleave, (2007), *op. cit.* n. 5, p. 33; the study shows that undertakings no longer consider code-sharing as a potential problem – this finding from a survey further reinforces the argument that there is a belief code-sharing is not regarded as a potential problem. Therefore, the decision analysed may come as a shock to the undertakings.

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