

A general framework of the berth contract in Italy

1. The berth contract (in Italian “*contratto di ormeggio*”) has no specific legal regulation under Italian law and it is therefore an atypical contract contemplated by article 1322 of the Italian Civil Code, under which the parties are always free to deviate from the typical contractual schemes, provided that the aims pursued by the parties appear lawful. According to Italian Courts such atypical contracts should be governed by the law provisions for the typical contract(s) to which the concerned atypical contract may be assimilated. In case of atypical contract presenting similarities with more than one typical contract, then the judge is entitled to apply the law provisions for the typical contract which appears more similar or even to combine law provisions of more than one typical contract in order to “tailor” a specific legal regime that better fits the concerned atypical contract. According to the prevailing trend of Italian Courts the typical contract scheme which appears more similar to the berth contract is that of the lease contract (in Italian “*contratto di locazione*”, as gover-

ned by articles 1571 and ff. of the Italian Civil Code). However, depending on the specific terms and conditions agreed by the parties, provisions of other typical contract(s) (such as the contract of sale or the contract of storage with custody) could be relevant and applicable by analogy.

2. Berth contracts may be structured in different ways. However, in general, it can be said that berth contracts always grant the user the right to use a certain berth for a certain time in exchange for a certain consideration. The right granted to the user is a mere right of use of the berth without any property right, regardless of the duration of the contract (that may be even of decades).

3. The berth contracts should be closely considered on a case-by-case basis. One of the potentially critical issue is the one of the liability (if any) of the Marina in relation of thefts/damages of the vessel moored at the berth. That requires a detailed analyses as to whether, under the terms and conditions of the berth contract, the Marina

undertakes a custody obligation and, if so, whether this is subject to valid limitation of liability or exoneration clauses.

4. Also the long-term duration of a berth contract may give rise to issues, in view of the fact that the user is usually required to pay in advance the full consideration for the entire agreed duration of the berth contract which, especially for large size berths located in modern marinas in renowned touristic areas, may be substantial.

5. One of the issues to be considered when the intended user is planning to sign a long-term berth contract in Italy is to check if the berth is registered with the Land Registry. If the berth is so registered, then the berth contract can be in turn registered and this makes the contract fully prevailing on any right that a third party might acquire from the Marina for the use on the same berth. Registration of the berth with the Land Registry (if any) may have however certain tax implications which should be assessed in advance with a tax advisor.

6. It is also important to consider the intended actual duration of the long-term berth contract. Most berth contracts are stipulated for a duration of more than 30 years. However, it is questionable if this term may be valid under article 1573 of the Italian Civil Code, whereby the duration of the corresponding typical contract of lease, to which the berth contract is usually assimilated, may not exceed 30 years. Under Italian law any contract of lease providing for a duration longer than 30 years would

be automatically reduced to 30 years by law. Having this in mind, it is advisable to agree either a duration not exceeding 30 years (with a corresponding reduction of the consideration to be paid by the user) or clauses providing for the reimbursement to the user of the consideration paid in excess of 30 years if the contract duration becomes limited to 30 years by effect of the above law provisions.

7. Other potentially critical issues are those related to the early termination of a long-term berth contract. It is to be considered that the Marina has no actual proprietary rights on the berth which is the subject of the berth contract. The Marina is always acting by virtue of a State concession whereby it is granted the use of the concerned harbour area, with the right to stipulate berth contracts. Therefore, any berth contract is always conditioned upon the terms and duration of the State concession (a contractual relationship governed by Public Law poses the State in a position of privilege over the Marina). For instance according to article 42 and article 47 of the Italian Code of Navigation the Public Authority can declare unilaterally the concession terminated in certain cases, some of which depending on a breach by the Marina of its obligations under the concession, but others may be depending exclusively on the discretion of the Public Authority: in all such cases according to the general principles of Contract Law the consideration paid in advance by the user to the Marina should be returned in proportion of the lost duration period and damages could be also claimed if the early termination were the result of a breach

of the marina. However, it appears that the majority of the berth contracts (usually drafted by the Marina on standard general terms and conditions) expressly exclude any right of reimbursement for the user in case of early termination as a result of early termination of the underlying State concession, no matter the reason why.

8. Furthermore, it is not rare that the a long-term berth contract concerns a Marina which is still under construction. In this case it is important to understand what representations are made by the marina during negotiations with the intended user as to the time of completion of the marina and its facilities as well as the respective standards. It is also important to keep in mind that substantial delay in completion of the works of construction may cause the revocation of the underlying State concession. In this respect the intended user should consider to insert in the berth contract the Marina's undertakings as to the time of completion of works and respective standards and make the terms of payment of the consideration (often to be paid in instalments in the very early stage of the berth contract duration) conditional upon the actual progress of the construction.

9. Also when the berth contract is stipulated for a short (monthly or yearly) duration, consideration is usually due in advance but on a monthly basis (or quarterly or semi-annually basis). Of course, in short-duration berth contracts the user accepts the risk of an increase of the consideration after the

expiration of the berth contract if the user wishes to stipulate a fresh short-duration berth contract.

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