

CONTRACTS USED FOR THE CHARTER OR LEASE OF PLEASURE VESSELS IN PLEASURE NAVIGATION: AN ITALIAN PERSPECTIVE

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The Italian Navigation Code has transposed the practices developed at international level, in particular in international contracts for the “locazione” and “noleggio” of ships, distinguishing between the ship lease, from the one side, and the charter, from the other. The latter, in particular, consists of voyage charter and time charter. However, the Italian discipline differs in several respects from the contract types developed at international level.

As for pleasure vessels, a specific regime lacked until the Law of 11 February 1971, No 50. The great development of this sector (which was previously considered limited to the use of pleasure vessels only for personal purposes), in particular of the entrepreneurial use of these vessels, furthered the draft and enactment, in 2005, of the Pleasure Navigation Code (Law of 18 July 2005, No 171), providing for a more comprehensive regime, however still not covering all the issues and aspects of pleasure navigation.

The Code provides for a special regime of the contracts for the lease and charter of pleasure vessels: this article provides a review of the regime of these contracts provided by the Italian Pleasure Navigation Code, with regard also to its relationship with the Navigation Code and the Civil Code. The Code’s provisions are also examined with reference to standard contracts developed at the international level.

Keywords: *charter parties; cruises; demise charter; Italian Navigation Code; Italian Pleasure Navigation Code; pleasure vessels; pleasure navigation; time charter; voyage charter.*

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1. WHAT'S IN A NAME? A METHODOLOGICAL PREMISE

Before getting to the heart of the matter dealt with by this article, some brief explanations on the legal terms used herein could be useful, since the Italian legal framework of “*noleggio*”, and “*locazione*” of ships actually does not entirely and always correspond to the content of charterparties developed at the international level: contract forms drafted by shipping companies, freight forwarders or their associations need to be carefully examined in order to identify the parties’ obligations and therefore apply the proper regime, i.e. that of the ship lease, hire or carriage.

This is particularly true with regard to “*noleggio*”, that is usually translated as “charter”, but whose content – according to the Italian Navigation Code – does not always and completely match that of the voyage or time charters widely used in the international shipping sector, which can be concluded for different purposes, from ship-hiring to carriage.¹ Another translation could also be the more general term “hire”, but still, it would miss the point and would not be proper in this context. Moreover, “*locazione*” can be translated both as “lease” or “charter”.² The solution to this issue is also affected by not always consistent and clear terms of some forms drafted by the pleasure navigation sector.³

In this article, in general, the word “charter” refers to “*noleggio*” and “lease” to “*locazione*”.

2. THE CONTRACTS FOR THE LEASE AND CHARTER OF SHIPS IN THE ITALIAN NAVIGATION CODE

At the end of the 1930s and the beginning of the 1940s, while drafting the Italian Navigation Code⁴, the Committee chaired by Prof. Antonio Scialoja based the development of the category of the so-called contracts for the use of a ship on the contracts actually developed in the shipping sector, as systematized by a renowned Italian scholar⁵ in those years.⁶

¹ A. Dani, *Charterparties*, A. Antonini (ed.), *Trattato breve di diritto marittimo*, Il vol., Giuffrè Editore, Milan, 2008, *passim* at pp. 103 ff.; A. Lefebvre D’Ovidio, G. Pescatore, L. Tullio, *Manuale di Diritto della Navigazione*, XIV edn., Giuffrè Editore, Milan, 2016, pp. 435-438.

² This is the case, for example, of the bareboat or demise charter. See also, M. Deiana, *Il noleggio delle unità da diporto*, *Dir. Mar.*, 2007, p. 119.

³ Deiana, *supra* note 2, p. 120.

⁴ The Code was enacted in 1942 by the Royal Decree No 327.

⁵ F.M. Dominedò, *Il sistema dei contratti di utilizzazione della nave*, Giuffrè Editore, Milan, 1937.

⁶ Lefebvre D’Ovidio – Pescatore – Tullio, *supra* note 1, pp. 24-25, 417-422, 435-438.

The Committee's works resulted in the identification of three main contracts for the use of a ship: the lease, the charter of a ship and the carriage. While the former implies the transfer of the ship's possession to the lessee, who becomes the disponent owner (as in the bareboat charter or charter by demise), in the two latter contracts, the vessel is the means for the shipowner or carrier to perform the contract. As a consequence, considering the contract structures developed since Roman Law, while ship lease is the case of *locatio rei*, ship charter and contract of carriage fit into *locatio operis*, because their very object is not the vessel *per se*, but the services rendered by its use.⁷

As for the former contract, the Italian Navigation Code does not expressly distinguish between bareboat charter and ship lease, with a master and crew (where the lessee becomes the disponent owner and, as such, succeeds in the seafarers' engagement contracts – hence not a time charter); however the latter case is not very common in practice, with the exception of pleasure navigation.⁸ The contract must be concluded in writing, but only for purposes of evidence and not for its validity.⁹ The lessor's main obligations are to deliver the vessel, with its appurtenances and the documents necessary for its use, seaworthy and in good condition, proper for the use provided for in the contract, within the deadline and at the place set by the parties.¹⁰ It is up to the lessor to maintain the vessel at efficient level, fit for the use agreed upon by the parties and to bear the expenses for repairing the ship due to force majeure or normal wear and tear throughout the contract period. However, these obligations can be superseded by the contract terms, such as those of the Barecon 2001, which is an international form of ship (finance or operating) lease: its second part, in particular, is used for the operating lease and, according to the contract's purpose, provides that the ship's maintenance is up to the lessee.¹¹ The lessor is liable towards the lessee for any damages caused by the ship's unseaworthiness, except in the case of latent defects not discoverable by due diligence.¹²

⁷ Lefebvre D'Ovidio – Pescatore – Tullio, *supra* note 1, pp. 417-422; M.M. Comenale Pinto, E.G. Rosafio, *Evoluzione della disciplina sul diporto e contratti*, M.M. Comenale Pinto, E.G. Rosafio (eds.), *Il diporto come fenomeno diffuso. Problemi e prospettive del Diritto della navigazione*, Aracne, Rome, 2015, pp. 450 f.

⁸ Lefebvre D'Ovidio – Pescatore – Tullio, *supra* note 1, p. 424; F. Pellegrino, *Charter di unità da diporto*, A. Antonini (ed.), *Trattato breve di diritto marittimo*, *supra* note 1, IV vol., Giuffrè Editore, Milan, 2013, p. 129.

⁹ Art. 377.2 Italian Navigation Code.

¹⁰ Art.s 379 and 380 Italian Navigation Code.

¹¹ Cl. 10(a). Lefebvre D'Ovidio – Pescatore – Tullio, *supra* note 1, p. 427; C. De Marzi, *Leasing di nave*, A. Antonini (ed.), *Trattato breve di diritto marittimo*, II vol., Giuffrè Editore, Milan, 2008, pp. 34 ff.

¹² Art. 380 Italian Navigation Code.

The lessee has to take delivery of the vessel, use it according to the agreed purposes exercising due diligence and pay the hire.

As mentioned above, the framework for ship charters in the Italian Navigation Code was drafted upon the voyage and time charters used in the shipping sector: Article 384 of the Code distinguishes between voyage charter and time charter, too. By concluding this contract, the shipowner agrees to perform all the voyages provided for in the contract or those demanded by the charterer during the period of the time charter, in compliance with the agreed purposes of the contract, upon the payment of the hire.

However, as explained above and evidenced by the prevailing opinion among Italian scholars, the contract type named voyage or time charter in the Italian Navigation Code does not always correspond to the charter parties developed and employed by the shipping sector. For the purpose of applying the correct regime to each contract, it is necessary to carefully examine the contract's content, in particular in order to ascertain its main purpose, i.e. whether it is aimed at carrying goods, since the latter also implies the shipowner's obligation to transport and care for the cargo.¹³ Whereas, the aim of the charter party is different from the carriage of goods, the contract should be governed by the provisions of the Italian Navigation Code on *noleggio* or by the regime for service contracts ("*appalto*") prescribed by the Italian Civil Code.¹⁴

3. THE EVOLUTION OF THE ITALIAN REGIME OF PLEASURE NAVIGATION

Pleasure navigation was not expressly dealt with by the Italian Navigation Code, with the exception of few provisions,¹⁵ nor was there a comprehensive

¹³ Among the main works by Italian scholars, see, for example, A. Antonini, *Il noleggio*, A. Antonini (ed.), *Trattato*, *supra* note 1, pp. 50 ff.; Dani, *supra* note 1, pp. 103 ff.; F. Berlingieri, *Il noleggio*, *Dir. mar.*, 1983, pp. 113 ff.; S. Ferrarini, *Note sulla classificazione dei contratti di utilizzazione della nave*, *Riv. Dir. Nav.*, 1962, I, p. 189; Lefebvre D'Ovidio – Pescatore – Tullio, *supra* note 1, pp. 437–438; Pellegrino, *supra* note 8, p. 138; G. Righetti, *Trattato di diritto marittimo*, II, Giuffrè Editore, Milan, 1990, pp. 472 ff.; E. Spasiano, *Contratto di noleggio*, Giuffrè Editore, Milan, 1986, pp. 57 and 179; L. Tullio, *Contratto di noleggio*, Giuffrè Editore, Milan, 2008, pp. 340 ff.

¹⁴ According to some renowned scholars (F. Berlingieri, *Noleggio a tempo e noleggio a viaggio*, G. Visintini (dir.) *Trattato della responsabilità contrattuale*, II, *I singoli contratti. Applicazioni pratiche e disciplina specifica*, CEDAM, Padua, 2009, p. 1036; Comenale Pinto – Rosafio, *supra* note 7, p. 453), actually none of the charter forms developed at least for cargo shipments corresponds to the voyage charter described by the Navigation Code.

¹⁵ Art.s 213–218 Italian Navigation Code, which were revoked by the Pleasure Navigation Code. M.M. Comenale Pinto, E.G. Rosafio, *Il diporto come fenomeno diffuso: problemi e prospettive del Diritto della Navigazione*, M.M. Comenale Pinto, E.G. Rosafio (eds.), *supra* note 7, p. XIII.

regime until the 2005 Italian Pleasure Navigation Code. The first law specifically dealing with this sector was the Law of 11 February 1971, No 50. However, according to Art. 1.2 of the Law No 50/1971, pleasure navigation could consist only in navigation for sporting and recreational purposes: commercial and lucrative purposes were therefore excluded.¹⁶ The first time when the use of pleasure craft¹⁷ under lease contracts or charter agreements was expressly admitted – but as an exception to the regime set by the Law No 50/1971 – was by Art. 15 of the Law No 171 of 5 May 1989 (and then by the legislative decree of 21 October 1996, No 535, as modified by the Law No 647 of 23 December 1996). The implementing Ministerial decree No 731 of 21 September 1994 established the duty for pleasure craft lessors and charterees to enrol in a specific register kept at the Harbour Master's offices.

Due to further development of pleasure navigation sector in Italy, the Law of 8 February 2003, No 172 provided for an improved regime, under which the employment of pleasure vessels under lease contracts or charter agreements and for teaching activities or diving was explicitly allowed, but still the purpose of pleasure navigation had to be recreational or sporting without any lucrative aim.

Few years later, the Italian Pleasure Navigation Code was enacted by the Legislative Decree No 171, of 18 July 2005,¹⁸ which was subsequently modified by the Law No 106/2011¹⁹. According to Art. 1.2, pleasure navigation includes both “navigation performed for sporting or recreational purposes and without lucrative aims” and that “exercised for commercial purposes”;²⁰ under lease or charter contracts or

¹⁶ The ontological requirement for a vessel to be subject to specific rules herein described is not its structure or other substantial features, but its designation for sporting or recreational activities. Deiana, *supra* note 2, p. 117; Pellegrino, *supra* note 8, p. 123.

¹⁷ For the nomenclature of pleasure craft, see M. Musi, *The Nomenclature and Legal Classification of Pleasure Crafts*, in F. Berlingieri – M. Musi (eds.), *Maritime, Port and Transport Law: Current Scenarios and Emerging Issues, Il Diritto Marittimo – Quaderni 4*, Bonomo Editore, Bologna 2017, pp. 373-392.

¹⁸ The Code came into force on 15 September 2005.

¹⁹ In December 2017, following the Law of 7 October 2015, No 167, which enabled the Italian Government to further the reform of the Pleasure Navigation Code, a new reform of the Italian Pleasure Navigation Code was approved by the Italian Council of Ministers, but few of its provisions deal with the contracts examined in this paper. In particular, reference to the lessee in the finance lease is added next to the shipowner in the provisions concerning the latter's duties and liabilities, where appropriate, the activity of shipbrokers in the sector is expressly introduced, and new commercial activities are added: the use of pleasure vessels for assistance to mooring and for assistance and towage. The reform needs to be implemented before entering into force.

²⁰ See also Art.s 2.3 and 3 of the Law No 5 of 11 January 2016, implementing the EU Dir. 2013/53.

for professional pleasure navigation schools or diving. For the Italian Pleasure Navigation Code to apply, sporting or recreational activities have to be pursued as the ship's final designation, i.e. pursued by the final users of the pleasure craft.²¹ Therefore, carriage contracts are excluded from the Italian Pleasure Navigation Code and, as a consequence, are governed by the Italian Navigation Code.²² Moreover, voyage charters are considered to fall outside the scope of the Code, too, as will be explained in the following paragraph.

With regard to the actual purpose of a recreational vessel, the Italian law still forbids, in general, the mixed (both personal and commercial) use, with the exception of the occasional charter of pleasure craft not specifically intended for commercial purposes, which may last no more than forty-two days²³. Before the explicit provision for such a case was enacted, a renowned author admitted the lawful possibility of an occasional use of a pleasure craft or – *vice versa* – a commercial ship for a purpose different from the one to which it is normally designated, and according to which the regime should be identified.²⁴

As for the regime of the contracts dealt with in this article, it is useful to consider also the relationship between the Italian Pleasure Navigation Code and the Italian Navigation Code, which is defined by Art. 1.3 of the former as one of speciality,²⁵ but not autonomy²⁶, where – as a consequence – regulations and usages pertaining to pleasure navigation prevail over the Italian Navigation Code's provisions and its implementing rules, which apply in the absence of any sectoral rule.²⁷ Art. 1, para. 3, of the Law No 50/1971 already provided that

²¹ Deiana, *supra* note 2, p. 118 f.; Lefebvre D'Ovidio – Pescatore – Tullio, *supra* note 1, p. 243; F. Pellegrino, *L'utilizzazione a fini commerciali delle unità da diporto*, A. Antonini (ed.), *Trattato*, *supra* note 8, p. 109.

²² Pellegrino, *supra* note 21, p. 113; Comenale Pinto, Rosafio, *supra* note 15, p. XV.

²³ Art. 49-bis Italian Pleasure Navigation Code, added by the Law No 27 of 24 March 2012. On this topic, S. Vernizzi, *L'impiego promiscuo delle unità da diporto*, M.M. Comenale Pinto, E.G. Rosafio (eds.), *Il diporto come fenomeno diffuso*, *supra* note 7, pp. 511-521.

²⁴ Deiana, *supra* note 2, p. 118.

²⁵ Lefebvre D'Ovidio – Pescatore – Tullio, *supra* note 1, pp. 240 f.

²⁶ Comenale Pinto, Rosafio, *Evoluzione della disciplina sul diporto e contratti*, and G. Vermiglio, *Il diporto tra decodificazione e ricodificazione*, M.M. Comenale Pinto, E.G. Rosafio (eds.), *Il diporto come fenomeno diffuso*, *supra* note 7, pp. 436 f. and pp. 47-72.

²⁷ A. Antonini, *L'autonomia del diritto della navigazione, il ruolo del diritto comune e la posizione sistematica della legislazione sulla navigazione da diporto*, *Dir. trasp.*, 2014, p. 482 ff.; L. Tullio, *Diritto della navigazione*, M. Deiana (ed.), *Diritto della Navigazione*, N. Irti (found.) *Dizionari del Diritto Privato*, Giuffrè Editore, Milan, 2010, pp. 155; M.M. Comenale Pinto, *La locazione delle unità da diporto*, *Dir. Mar.*, 2007, pp. 103 ff.; A. Masutti, *Il nuovo codice della nautica da diporto*, *Dir. mar.*, 2006, p. 737; Pellegrino, *supra* note 21, p. 122.

the Italian Navigation Code and the other maritime law provisions applied also to pleasure navigation in aspects not dealt with by the Law No 50/1971 itself, which, in Art. 46, listed the provisions of the Navigation Code that did not apply to pleasure navigation.²⁸ Therefore, the change brought by the Pleasure Navigation Code resulted in further specialization of the sectoral regime, providing for a derogation from the general hierarchy of sources: the Navigation Code applies only in the absence of regulations and usages pertaining to pleasure navigation.²⁹ However, no complete autonomy of the Pleasure Navigation Code and the related provisions was introduced.³⁰

The solution adopted by the 2005 Code was criticized by some scholars, because it reintroduced the relationship of speciality between the two Codes already revoked by Art. 1 of Law No 172, of 8 July 2003, whose Art. 6 enabled the Italian Government to draft and issue the Pleasure Navigation Code.³¹ The main change was the co-ordination and harmonization of the several rules on pleasure navigation in one single Code, pursuant to Art. 6, second para of the Law No 172/2003.³²

²⁸ Art.s 274, 275, 276 and 277 of the Navigation Code for ships (i.e. the provisions concerning the disponent owner's liability regime) and Art.s 232-375 for the other vessels.

²⁹ Similarly to what is provided by Art. 1 of the Navigation Code as for the relationship with the Civil Code.

³⁰ On the contrary, Navigation Law is a branch of law autonomous from Civil Law, based on a technical phenomenon (the waterborne or airborne navigation by the use of a vessel or an aircraft) that is specific and proper of that branch. This is a reason why pleasure navigation cannot be considered an autonomous branch, being based on the same technical phenomenon. A. Xerri, *Il codice della nautica da diporto tra diritto special e diritto comune*, M.M. Comenale Pinto, E.G. Rosafio (eds.), *Il diporto come fenomeno diffuso*, supra note 7, pp. 2 ff; E. Spasiano, *Sistema unitario e tendenze separatiste nel diritto della navigazione*, *Il Foro Italiano*, Vol. 73, 1950, IV, pp. 153-158. Moreover, according to Xerri, p. 16, since the Pleasure Navigation Code is not exhaustive, it could not entail an autonomous branch.

³¹ On the alleged autonomy of the pleasure navigation law with regard to the "general" navigation law, cf. M. Grigoli, *La disciplina del diporto e turismo nautico*, Cacucci, Bari, 2005, pp. 223 ff.; R. Abbate, *Alcune osservazioni sulla legge 8 luglio 2003, n. 172 "Disposizioni per il riordino della nautica da diporto e del turismo nautico"*, *Dir. Mar.*, 2004, p. 1134. According to A. Antonini, supra note 27, p. 487, the Pleasure Navigation Code is not in a relationship of "sub-speciality" with the Civil Code. Cf. also A. Antonini, *La legislazione sulla navigazione da diporto nel sistema del Diritto della navigazione*, M.M. Comenale Pinto, E.G. Rosafio (eds.), *Il diporto come fenomeno diffuso*, supra note 7, pp. 19-45.

³² S. Zunarelli, M.M. Comenale Pinto, *Manuale di Diritto della navigazione e dei trasporti*, III Edn., Wolters Kluwer – CEDAM, Padua, 2016, p. 98; E. Romagnoli, *La disciplina del diporto nel Codice della nautica*, *Trasporti*, No 107, 2009, pp. 62, 64 f.

4. THE CONTRACTS FOR THE LEASE AND CHARTER OF SHIPS IN THE ITALIAN PLEASURE NAVIGATION CODE

The regime of the lease and charter of pleasure craft in several aspects corresponds to that established by the Italian Navigation Code. One of the main differences is the requirement of a written form for validity purposes³³ and of providing the insurance coverage of civil liability towards third parties and, in respect of the charter contract, also liability insurance in favour of the charterer and the passengers for damages suffered in occasion or by virtue of the contract.³⁴ Thus, the Italian Pleasure Navigation Code prescribes stricter requirements for the contracts of lease and charter of pleasure vessels than those provided by the Italian Navigation Code.³⁵

However, the most relevant difference concerns the charter of pleasure craft, whose definition differs from the contract governed by the Italian Navigation Code. Under Art. 47 of the Italian Pleasure Navigation Code, the charter of pleasure vessels can only be time charter, where the pleasure vessel is made available to the charterer for recreational purposes at sea or on inland waters of his choice, stationed³⁶ or in navigation, according to the contract's requirements, for a limited period of time, and in exchange of a charter hire.³⁷

This contract does not qualify as a lease contract, because the same article specifies that the vessel's possession remains with the shipowner, i.e. the charterer, and the crew is under the shipowner's employment. Another element that enables to identify the contract's nature is the so-called employment clause, which is a typical clause of time charters³⁸ and therefore cannot be found in the lease contract, as well as in the contract of carriage and voyage charter. The clause provides that the master is under the charterer's orders and directions

³³ Art. 42.3 Italian Pleasure Navigation Code.

³⁴ Art. 45 Italian Pleasure Navigation Code.

³⁵ The main reason being tax purposes (M.M. Comenale Pinto, *La locazione delle unità da diporto*, Dir. Mar., 2007, p. 108). See also Deiana, *supra* note 2, p. 120.

³⁶ This is in case, for example, of the use of vessels for partying or temporarily serving as hotels (Deiana, *supra* note 2, p. 120). According to some Italian scholars (Lefebvre D'Ovidio – Pescatore – Tullio, *supra* note 1, p. 244; Pellegrino, *supra* note 8, p. 136), where the Italian Pleasure Navigation Code enables the charter of a stationed pleasure craft, it refers always to vessels falling within its scope, i.e. designated to navigation and only temporarily stationed, therefore excluding ships permanently stationed, for example as restaurants or hotels.

³⁷ Pellegrino, *supra* note 8, p. 125.

³⁸ Tullio, *supra* note 13, pp. 69 f.

in respect of the pleasure vessel's employment. The degree of the charterer's powers depends on the actual type and content of the charter agreement.³⁹

Therefore, as mentioned above, voyage charter of pleasure craft does not fall within the scope of the Italian Pleasure Navigation Code.⁴⁰ Moreover, it is discussed among renowned Italian scholars whether the charter of pleasure craft can be considered a contract different from the ship charter governed by the Italian Navigation Code. The authors who affirmatively answer this question highlight the absence from the former of the performance of one or more voyages as the contract's main purpose and the different obligation of the charterer consisting only in making the pleasure craft available for the charterer: this concept highlights the vessel's static role for satisfying pleasure navigation purposes (its tourist/recreational designation, instead of its dynamic role under the Italian Navigation Code, i.e. the navigation), falling outside the ship charter as governed by the Italian Navigation Code.⁴¹ The most relevant consequence these scholars infer from these considerations is that the Italian Navigation Code cannot directly govern pleasure craft charters (in aspects not regulated by the Italian Pleasure Navigation Code or the applicable regulations and usages), but only through the principle of analogy (*analogia legis*).⁴²

Under the Italian Pleasure Navigation Code, the charterer bears the costs for bunkering, water and engine oils during the charter, because the former's main purpose is not the performance of one or more voyages.⁴³

³⁹ See the contracts examined in para. 5, where it is evidenced that in some forms there is no employment clause or the charterer's rights in this regard are very limited (see Benelli, *Le crociere con unità da diporto*, M.M. Comenale Pinto, E.G. Rosafio (eds.), *Il diporto come fenomeno diffuso*, *supra* note 7, p. 534).

⁴⁰ Deiana, *supra* note 2, p. 121; Lefebvre D'Ovidio – Pescatore – Tullio, *supra* note 1, p. 244.

⁴¹ Deiana, *supra* note 2, p. 122; Lefebvre D'Ovidio – Pescatore – Tullio, *supra* note 1, pp. 245 and 434; Pellegrino, *supra* note 21, p. 114 and 116; Pellegrino, *supra* note 8, pp. 133 ff. The opposite opinion is expressed, for example, by Antonini A., *Riflessioni sulla navigazione da diporto*, *Dir. mar.*, 2005, p. 666.

⁴² L. Tullio, *Il noleggio nel codice della nautica da diporto*, M.M. Comenale Pinto, E.G. Rosafio (eds.), *Il diporto come fenomeno diffuso*, *supra* note 7, p. 508. Analogy in Italian law is one of the methods for interpreting the existing law and identifying the regime of a specific case, under Art. 12.2 of the so-called *Preleggi*, i.e. the general provisions preliminary to the Italian Civil Code. In particular, provided that a legal system does not allow any gap, where there are no specific provisions governing a case, the provisions governing similar cases or analogous subjects are considered and applied (the so-called *analogia legis*) or, in the absence thereof, the general principles of that legal system (the so-called *analogia iuris*) are applied. See L. Gianformaggio, *Analogia, Digesto Discipline Privatistiche, Diritto Civile*, UTET, Turin, 1987. On this principle, also Tullio, *supra* note 27, p. 153.

⁴³ Art. 49 Italian Pleasure Navigation Code.

It is also useful to underline that the Italian Pleasure Navigation Code provides for demurrage for delay in redelivery of the vessel at the end of the lease period, as it is usually provided by the standard forms.⁴⁴

As for the difference between charters and carriage contracts, in the latter the shipowner's main obligation (of result) is to carry the passengers from the place of departure to the place of destination agreed upon by the parties or specified by the other party and prevails over other obligations. On the contrary, in the former the shipowner's main obligation is of means and consists in making the vessel available to the charterer and having it employed (navigating) under the latter's instructions.⁴⁵ Even if the locations where the pleasure vessel is going to move and stop are listed in the charter agreement, the shipowner's obligation does not consist in transferring the charterer and – as the case may be – his guests or passengers to those locations, but the vessel.⁴⁶

5. PLEASURE CRAFT CHARTERS FOR CRUISE PURPOSES AND CHARTER OF PLEASURE CRAFT WITH A SKIPPER

Considering the several forms drafted by business organizations or associations in the sector, what firstly emerges is the great variety of their content, as already expressed in the previous paragraphs, so that only their in-depth exam enables to identify their nature and thus their regime (as pleasure craft lease or charter or contract of carriage or package travel contract) for the aspects not dealt with by the parties to the contract.⁴⁷ Some relevant examples concern passenger cruises with pleasure craft, which often include board and lodging services, similarly to “traditional” cruise services and, in any case, travel packages, within which cruise services fall according to the case law and to Art. 34 of the Italian Tourism Code (Decree Law No 79 of 23 May 2011, as subsequently modified) and which in Italy are governed by the latter and by Dir. 2015/2302/EU.⁴⁸

Four main categories can be identified: the crewed pleasure craft charter for cruise purposes, the cruise-charter according to an itinerary established in

⁴⁴ Comenale Pinto, Rosafio, *supra* note 7, p. 476.

⁴⁵ Antonini, *supra* note 31, p. 39.

⁴⁶ Tullio, *supra* note 43, p. 509.

⁴⁷ Comenale Pinto, Rosafio, *supra* note 7, pp. 436 f. and 477 ff.

⁴⁸ Benelli, *supra* note 40, p. 524 ff.; Comenale Pinto, Rosafio, *supra* note 15, p. XV; Id., *supra* note 7, pp. 444 f.; F. Morandi, *Natura e disciplina del contratto di crociera turistica*, A. Antonini (ed.), *Trattato breve di diritto marittimo*, Vol. IV, *Navigazione da diporto e viaggio organizzato. Disposizioni processuali*, Giuffrè Editore, Milan, 2013, pp. 25 ff.

advance by the shipowner, the cabin charter and the time-charter agreement for commercial vessel in tourist use.⁴⁹ The main problem entailed there is the identification of the contract type governing each case, from the contract of carriage, through charter, to the cruise contract, which consists in a travel package involving mainly carriage and board and lodging services, along with other services, typically meant to satisfy recreational aims.

Another issue, which is a consequence of the former, is whether the use of a pleasure vessel for commercial purposes other than its lease or charter is lawful. It is possible to identify two main streams among Italian scholars: according to some authors⁵⁰ in these cases, the shipowner will be fined under Art. 55 of the Pleasure Navigation Code because of abusive exercise of an activity different from that the vessel is designated to and, where the shipowner actually undertook also the carriage of passengers, the applicable regime is that provided by the Navigation Code. Other authors,⁵¹ on the contrary, follow a stricter interpretation of Art. 1.2 of the Pleasure Navigation Code; the shipowner/charteree of a pleasure vessel cannot undertake the obligation to transfer passengers and the related obligation to protect them until destination,⁵² which is proper of a carrier. According to the different contract types, the regime applicable to the relationship with the persons on board other than the charterer, i.e. the regime of the contract of carriage or tort liability, which, following Art. 40 of the Pleasure Navigation Code, is governed by Art. 2054 of the Civil Code.⁵³

In the case of crewed-pleasure craft charter for cruise purposes, the vessel is chartered with the crew by a single charterer; the shipowner undertakes to organize the cruise for an agreed period of time according to a program set in advance by the charterer or however, according to the latter's requests: therefore in this case the charterer's rights under the employment clause reach their maximum level. Other services offered by the shipowner, such as food and beverages, are included.

⁴⁹ For their deeper analysis, see Benelli, *supra* note 40, pp. 523-548.

⁵⁰ Comenale Pinto, Rosafio, *supra* note 7, p. 477; Benelli, *supra* note 40, pp. 538 f.

⁵¹ Tullio, *supra* note 43, pp. 504 and 509.

⁵² In other words to adopt all the measures necessary to prevent the death or injuries to a passenger. On this topic, A. Romagnoli, S. Zunarelli, *Contratto di trasporto marittimo di persone*, P. Schlesinger (dir.), *Trattato di diritto civile e commerciale*, Giuffrè Editore, Milan, 2012; S. Pollastrelli, *Il contratto di trasporto marittimo di persone*, Giuffrè Editore, Milan, 2008; G. Mastrandrea, *L'obbligo di protezione nel trasporto aereo di persone*, CEDAM, Padua, 1994.

⁵³ Comenale Pinto, Rosafio, *supra* note 7, p. 478.

In the second case, the itinerary is chosen by the shipowner, whose main obligation consists in a complex of carriage, board and lodging services and other services: this case is considered more similar to a voyage charter, where however, the carriage elements (along with the other services) prevail over the typical elements of a charter agreement,⁵⁴ because the charterer's right of deciding on the vessel's employment are very limited. This case can be considered a travel package including carriage services: as a consequence, some scholars suggest to conclude a cruise contract, instead of a charter.⁵⁵

As for the cabin charter, the shipowner offers cruise packages with itineraries established in advance and the single charterer obtains the availability of a cabin together with rooms and services in common with the other charterers: therefore there is no room for any employment clause, too. Therefore, this case can be better considered a cruise contract.

Finally, in the cruise voyage agreement for commercial vessel in tourist use⁵⁶, the charterer obtains the availability of a pleasure vessel designated to commercial use (i.e. charter) for a cruise in favour of the charterer's clients. The shipowner delivers the ship at an agreed port on the agreed day and time, with the documents necessary for the carriage of passengers on-board. This contract is indeed a ship charter, where the charterer has the right to decide on the vessel's employment, but differs from the first one herein examined, because the charterer does not obtain the availability of the whole vessel, but only of room on board for hosting the passengers. The charterer is considered the contracting carrier, whereas it is discussed among the scholars whether the shipowner can be considered an actual carrier, with the application also to the latter of the regime of carriage⁵⁷ or can be considered liable only according to Art. 2054 of the Civil Code.⁵⁸

Another issue concerns the nature of charter of pleasure vessels with a skipper, i.e. a professional conductor of the vessel other than a ship master:⁵⁹

⁵⁴ Benelli, *supra* note 40, pp. 538 f.

⁵⁵ Benelli, *supra* note 40, pp. 538 f.

⁵⁶ E.g., the ISYBA-YCRUISE standard form. On this topic, see also Comenale Pinto, Rosafio, *supra* note 7, pp. 479 f.

⁵⁷ *Ibidem*; G. Romanelli, *Profilo del noleggio*, Giuffrè Editore, Milan, 1979, pp. 69 ff.

⁵⁸ Tullio, *supra* note 43, pp. 509 f.

⁵⁹ It is discussed whether the so-called skipper could be considered to have the same powers of the ship master (App. Florence, 21 February 1992, *Dir. trasp.*, 1993, p. 105, with comment of L. Masala, *Brevi considerazioni sulla figura dello skipper*; *contra* Cass., 12 February – 5 July 1993, No 1959 and D. Gaeta, *Nozione, compiti e responsabilità dello skipper*, *Dir. trasp.*, 1993, p. 331; L. Masala, *Lo skipper*, M.M. Comenale Pinto, E.G. Rosafio (eds.), *supra* note 7, p. 552).

several forms qualify themselves as pleasure craft leases. However, where the control over the vessel does not pass onto the lessee, the contract should be considered a pleasure craft charter.⁶⁰ Even where the passengers co-operate in manoeuvring the vessel, pursuant to Art. 36 of the Italian Pleasure Navigation Code,⁶¹ the skipper has the responsibility for the navigation and manoeuvring, including control over the persons on-board.⁶²

6. THE FINANCE LEASE OF PLEASURE CRAFT

The finance lease of pleasure craft has become more and more common during the years and is particularly important for the development of the shipbuilding sector in case of new vessels.⁶³ It is usually concluded under a trilateral operation involving the lessee, the shipyard and the leasing company, through two contracts, which are different but linked, i.e. the finance lease between the lessee and the leasing company and the ship building or sale contract between the latter and the shipyard or supplier.⁶⁴ This contract is expressly dealt with by the Italian Pleasure Navigation Code, articles 16, 40, 49-*bis* and 53.

Under the contract, the lessee acquires the availability of the vessel, which is purchased by the leasing company, that remains the ship-owner until the payment of the final monthly instalment.

⁶⁰ A. Antonini, *Profili privatistici della navigazione da diporto*, L. Tullio, M. Deiana (eds.), *Il cinquantenario del codice della navigazione*, I.S.D.I.T., Cagliari, 1998, p. 129; Zunarelli, Comenale Pinto, *supra* note 32, p. 218. For the case law, see App. Milan, 2 June 2000; Trib. Sassari, Sect. Alghero, 27 April 2010, No 79, in *Riv. Dir. Nav.*, 2011, p. 913; Trib. Genoa, 12 October 2009, in *Dir. Mar.*, 2011, p. 574.

⁶¹ According to the second paragraph of the article, in case of pleasure ships deck and engineer officers must be enrolled in the register of seafarers, whereas for the other pleasure craft it is sufficient that the deck officer be at least sixteen years old and the engineer eighteen years old (first para of the same article).

⁶² L. Masala, *Lo skipper*, *supra* note 60, pp. 553, 557 f.; U. La Torre, “*Ospite*” e membro di equipaggio: una singolare commistione, U. La Torre, G. Moschella, F. Pellegrino, M.P. Rizzo, G. Vermiglio (eds.), *Studi in memoria di Elio Fanara*, II, Milan, 2008, p. 139.

⁶³ In particular thanks to the rules lowering the tax disadvantages of this tool (A. Claroni, *Il leasing di unità da diporto*, F. Morandi (ed.), *I contratti del trasporto*, II vol., *Nautica da diporto, trasporto terrestre e ferroviario*, Zanichelli, Bologna, 2013, pp. 903 f.). See also De Marzi, *supra* note 11, pp. 24 and 28.

⁶⁴ A. Claroni, M. Badagliacca, N. Romana, A. Corrado, S. Rossi, *Il diporto nautico: regole di sicurezza e responsabilità*, I S. – *La responsabilità civile, i contratti di utilizzazione di unità da diporto e il contratto di locazione finanziaria di unità da diporto nel settore sportivo e turistico*, F. Morandi – U. Izzo (eds.), *L'acqua. Mare, laghi e fiumi*, Giappichelli, Turin, 2015, pp. 180 f.; Comenale Pinto, Rosafio, *supra* note 7, pp. 474; L. Carcano, *Challenges for the Italian Boating Industry*, EGEA, Milan, 2010.

The lessee however becomes the pleasure craft's disponent owner and is liable for any damage caused by it or its use and for the obligations entered into because of the use of the vessel. As usual in finance lease contracts, at the end of the contract, the lessee can choose to purchase the pleasure craft at the price agreed in advance by the parties or extend the contract's duration. The lessee is liable towards the lessor for the correct payment of the monthly instalments within the deadlines set by the contract.

The lessor undertakes to make the vessel described in the contract available to the lessee: according to Italian case law, the link between the two contracts entails the lessee's right to suspend payments where the vessel has not been delivered.⁶⁵ Considering the main form used for this purpose, i.e. the Barecon 2001, the third part, provides that the vessel shall be constructed and built in accordance with the building contract, which is attached to the lease contract and with the annexed specifications and plans, countersigned as approved by the lessee.⁶⁶ As a consequence, the same form provides that no change to the specifications and plans shall be without the lessee's consent⁶⁷ and that the latter has the right to send its representatives to the builders' yard to inspect the vessel during the course of its construction, in order to ascertain and satisfy themselves that the construction is compliant with the agreed specifications and plans.⁶⁸

It is discussed in the Italian case law whether the clauses usually included in finance lease contracts of pleasure craft, providing for the lessee's obligation to pay the instalment/s even where the vessel has not been delivered, should be considered null and void.⁶⁹

Moreover, in case of breach of the supplier's duty to deliver the vessel within the deadline set in the shipbuilding or sale contract or in case of defects in the vessel, according to the Italian case law and scholars, the lessee has a direct action towards the shipyard/supplier, notwithstanding that the contract for the

⁶⁵ Cass., Joint Sessions, 5 October 2015, No 19785; Cass., 14 October 2011, No 21301; Cass., 5 September 2005, No 17767; Cass., 8 March 2005, No 5003; Cass., first October 2004, No 19657; Cass., 2 August 2004, No 14786; Cass., 30 June 1998, No 6412; Cass., del 21 June 1993, No 6862; A. Claroni, *supra* note 64, pp. 911 f.

⁶⁶ Cl. 1(a) and (b). De Marzi, *supra* note 11, p. 34.

⁶⁷ Cl. 1(b).

⁶⁸ Cl. 1(c).

⁶⁹ Cass., 23 May 2012, No 8101; Cass. 29 September 2007, No 20592; Cass. 2 November 1998, No 10926 considered those clauses null and void; Cass., Joint Sessions, 5 October 2015, No 19785; Cass., 14 October 2011, No 21301; Cass., 2 August 2004, No 14786; Cass., 30 June 1998, No 6412; Cass., del 21 June 1993, No 6862, for example, rule out any liability of the lessor in case of non-delivery of the vessel.

construction or purchase of the vessel was concluded between the lessor and the shipyard or the supplier and the lessee is not formally a party to that contract. The reason has been identified in the link between the two contracts, so that the supplier can be considered an auxiliary to the lessee (and not to the lessor) in enabling the former to obtain the availability of the vessel, so that the lessor acts – in a certain sense – as the lessee’s agent when concluding the contract with the supplier.⁷⁰ The other reasons are the lessee’s obligation of custody of the vessel and its liability for any damages caused by its navigation.⁷¹ In the absence of a comprehensive regime for the lease contract, the case law has thus supplemented the few specific rules with the general good faith principle in order to balance the positions of the parties to the two different, but linked, contracts.⁷²

However, the right of the lessee to terminate the shipbuilding/sale contract due to a default of the supplier has been ruled out in the absence of a contract clause providing for such right and, in the case of alleged non-delivery of the pleasure vessel, where the delivery report, stating that the delivery of the vessel occurred, was signed by the lessee.⁷³

In the case of the Barecon 2001, the form provides that the lessee undertakes to accept the vessel constructed and built in compliance with the building contract and, once the vessel is accepted, not to raise any claims against the leasing company in respect of its performance, specifications or defects.⁷⁴ However, the latter undertakes to compel the shipyard to repair, replace or remedy any defects or to recover from them any expenditure met by the lessee, provided that the repairs, replacements or defects appeared within twelve months from the date of delivery and that the leasing company has a valid claim against the builder under the guarantee clause of the building contract.

An express definition of the finance lease has been recently provided by the Law No 124, of 4 August 2017, the Italian yearly law on markets and competition.⁷⁵ Para 136 of Art. 1 describes the finance lease as a contract where a bank or

⁷⁰ A. Scarpa, *Leasing: che c’è di nuovo?*, *Immobili e proprietà*, No 10/2017, p. 577.

⁷¹ Cass., Joint Sessions, 5 October 2015, No 19785; App. Naples, 11 January 2017; Arb., 28 February 1990, in *Dir. mar.*, 2000, p. 224; Claroni, *supra* note 64, p. 913 f.

⁷² Scarpa, *supra* note 71, p. 578.

⁷³ See, recently, Trib. of Bologna, 19 January 2017.

⁷⁴ De Marzi, *supra* note 11, p. 36.

⁷⁵ The very first definition of finance lease was provided by Art. 17, second paragraph, of Law 2 May 1976, No 183, nowadays no longer in force: “*Per operazioni di locazione finanziaria si intendono le operazioni di locazione di beni mobili e immobili, acquistati o fatti costruire dal locatore, su scelta e indicazione del conduttore, che ne assume tutti i rischi, e con facoltà per quest’ultimo di divenire*

a finance company as lessor,⁷⁶ obliges itself to purchase certain goods or to have something built, according to what is indicated by the user, who undertakes all the related risks, including the loss of the subject matter of the lease. Furthermore, the lessor is obliged to make the subject matter of the lease available to the user for a certain period in consideration of the payment of an amount of money calculated on the basis of the purchase / construction price of goods and duration of the contract. At the end of the contract, the user has the right to purchase the ownership of the subject matter of the lease at a price set in advance, otherwise he must return the leased goods.⁷⁷ On the contrary, in the operating lease it is the supplier who leases the goods in consideration of the payment of monthly instalments that are not linked to the economic value of the subject matter of lease, but to the services it renders along with the maintenance and the lessor's assistance, including the lessee's option to purchase the leased goods.⁷⁸ Since the lease contract of pleasure craft is a special contract, although not specifically regulated by the Italian Pleasure Navigation Code, but widely employed also for pleasure vessels, as the practice and case law demonstrate, the new provisions should be deemed lawfully applicable also in the pleasure navigation sector. Paras 136-139 of Art. 1 of the Law No 124/2017, the Law on Markets and Competition, although not providing for a comprehensive unique regime, expressly regulate what qualifies for a serious breach of contract by the lessee and the consequences thereof, enabling the leasing company to terminate the contract in case of non-payment of at least four monthly instalments, whether or not consecutive, or an equivalent amount.

In fact, the main issue was to avoid an unlawful enrichment of the lessor, in a situation where the leasing company terminates the contract, withholds the instalments already paid by the lessee along with the vessel's ownership (even if the vessel's value is higher than the lessee's debt) and earns revenue from the

proprietario dei beni locati al termine della locazione, dietro versamento di un prezzo prestabilito ("The finance lease consists in the lease of movable goods or real estate, that the lessor purchased or had built, following the lessee's choice and request, who undertakes all the related risks, and with the latter's option to become the owner of the goods at the end of the lease by paying a price fixed in advance")

⁷⁶ Which has to be enrolled in the register provided by Art. 106 of Law No 385/1993.

⁷⁷ "Il contratto con il quale la banca o l'intermediario finanziario iscritto nell'albo di cui all'articolo 106 del testo unico di cui al decreto legislativo 1° settembre 1993, n. 385, si obbliga ad acquistare o a far costruire un bene su scelta e secondo le indicazioni dell'utilizzatore, che ne assume tutti i rischi, anche di perimento, e lo fa mettere a disposizione per un dato tempo verso un determinato corrispettivo che tiene conto del prezzo di acquisto o di costruzione e della durata del contratto. Alla scadenza del contratto l'utilizzatore ha diritto di acquistare la proprietà del bene ad un prezzo prestabilito ovvero, in caso di mancato esercizio del diritto, l'obbligo di restituirlo".

⁷⁸ Scarpa, *supra* note 71, p. 574; De Marzi, *supra* note 11, p. 30.

vessel's further employment.⁷⁹ With regard to the ship finance lease, in order to avoid these consequences, many forms provide that the leasing company must return to the lessee the difference between the purchase price and its debt.⁸⁰

In the absence of such provisions, the solution found by the main case law concerning the finance lease in general, was the analogical application of Art. 1526 of the Italian Civil Code on sale and purchase including a retention of title clause: the lessor is obliged to return the instalments already paid, but may obtain the compensation for the vessel's use by the lessor and its depreciation, together with the damages.⁸¹ This solution was criticized by some scholars, because the final purchase price of the leased goods is often lower than its actual value. Further issues have arisen from the interpretation of Art. 72 *quater* of Law No 267, of 16 March 1942, as subsequently modified (the Italian Law on Bankruptcy), which states the lessor's right to have the goods returned in case of the lessee's bankruptcy with the duty to pay the difference between the price obtained from its sale and the lessee's debt: the Supreme Court has ruled out its analogical application in cases where the contract is terminated because of the lessor's non-payment of instalments instead of its bankruptcy.⁸²

The 2017 Law on Markets and Competition has finally provided a solution for the above mentioned issues on the provisions applicable in case of termination of the lease contract for non-payment of several instalments by the lessor. According to Art. 1, paras 137-140, Law No 124/2017, where the leasing company terminates the contract, it also has the right to recover the vessel in order to sell or otherwise arrange for it. In such case the lessor must pay to the lessee the difference (if any) between that what has been obtained and the overdue instalments, future instalments, final purchase price (as the case may be), and the expenses of recovering the vessel. On the contrary, where the amount obtained, is lower than the lessee's debt, the latter is obliged to pay the leasing company the difference, and this applies also in the absence of any contract clause to that effect.

⁷⁹ Scarpa, *supra* note 71, p. 582 f.

⁸⁰ De Marzi, *supra* note 11, p. 27, footnote 6.

⁸¹ Cass., 10 September 2010, No 19287; Cass., 8 January 2010, No 73; Cass., 23 May 2008, No 13418; Cass. 28 August 2007, No 18195; Cass., 4 April 1997, No 6034.

⁸² Cass. 30 January 2017, No 2312; Cass. 28 September 2016, No 19198; Cass., 9 February 2016, No 2538; Cass., 29 April 2015, No 8687. *Contra*, V. Timpano, *Il contratto di leasing: vecchi contrasti interpretativi e nuove soluzioni normative, I contratti*, No 5/2017, p. 549.

7. CONCLUSIONS

The Italian Pleasure Navigation Code has indeed considerably improved the domestic regime of lease and charter of pleasure craft or vessels for recreational/sporting purposes, but there still is room for further improvements, as evidenced by many Italian scholars.

The examination of the actual forms and contracts typically used for the purposes of this sector, in fact, highlights the great variety of agreements, which sometimes do not entirely fall within the contracts described by the Italian Pleasure Navigation Code or whose clauses are somewhat inconsistent with the latter's provisions. On the other hand, it is also true that the regulation of relationships in the shipping sector has been traditionally provided by the customs of trade and contract models and forms, which could better serve the parties' needs and the constant evolution of markets. It is therefore very difficult for hard law to be so comprehensive as to cover the wide range of possible agreements concerning commercial uses of pleasure vessels for recreational/sporting purposes, since the issue also entails a broad range of services meant to fulfil the charterer/customer's needs.

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Sažetak:

UGOVORI O NAJMU ILI ZAKUPU PLOVILA ZA RAZONODU: TALIJANSKA PERSPEKTIVA

Talijanski Pomorski zakonik preuzima postojeću međunarodnu praksu, osobito u pogledu međunarodnih ugovora za iskorištavanje brodova, razlikujući ugovor o zakupu broda od brodarskih ugovora na vrijeme i na putovanje. Međutim, talijanska praksa razlikuje se u nekoliko aspekata u odnosu na tipove ugovora razvijene na međunarodnoj razini.

Do donošenja Zakona br. 50 od 11. veljače 1971. nije postojalo posebno pravno uređenje u pogledu plovila za razonodu. Snažan razvoj ove pomorske grane (koja se prethodno smatrala ograničenom na privatnu uporabu plovila za razonodu), te osobito iskorištavanje plovila za razonodu u komercijalne svrhe, potaknulo je izradu i donošenje 2005. godine Zakona o rekreacijskoj plovidbi (Zakon br. 171 od 18. srpnja 2005.) koji predviđa sveobuhvatniji režim, ali još uvijek u potpunosti ne obuhvaća sva pitanja i aspekte rekreacijske plovidbe.

Zakon predviđa poseban pravni okvir za ugovore o zakupu i najmu plovila za razonodu. Ovaj članak daje pregled uređenja ovih ugovora prema talijanskom Zakonu o rekreacijskoj plovidbi s osvrtom na Pomorski i Građanski zakonik. Zakonske odredbe se analiziraju s obzirom na standardne ugovore koji se primjenjuju na međunarodnoj razini.

Ključne riječi: brodarski ugovori; krstarenje; zakup broda; talijanski Pomorski zakonik; talijanski Zakon o rekreacijskoj plovidbi; plovila za razonodu.

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