

Insurance Clauses and Subrogation of the Insurer in the New 'Barecon 2017' Standard Agreement



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I. Introduction

Bareboat charter party:

- a) One person –the owner–;
- b) transfers to another – the bareboat or demise charterer–;
- c) possession of a vessel;
- d) for a certain period of time;
- e) in exchange for a price.



I. Introduction



- Lease of movable assets.
- Conveyance of possession.
- The charterer acquires the use and enjoyment of the vessel.

I. Introduction



No uniform international regulation of the bareboat charterer.

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II. The BARECON

- Use of internationally accepted forms.
- The most well-known: BARECON Standard Agreement.
- Adopted for the first time in 1974 and modified in 1989, 2001 and 2017.

II. The BARECON

17. Insurance

(a) General

(i) The value of the Vessel for hull and machinery (including increased value) and war risks insurance is the sum stated in Box 23, or such other sum as the parties may from time to time agree in writing. The party insuring the Vessel shall do so on such terms and conditions and with such insurers as the other party shall approve in writing, which approval shall not be unreasonably withheld, and shall name the other party as co-assured.

(ii) Notwithstanding that the parties are co-assured, these insurance provisions shall neither exclude nor discharge liability between the Owners and the Charterers under this Charter Party, but are intended to secure payment of the loss insurance proceeds as a first resort to make good the Owners' loss. If such payment is made to the Owners it shall be treated as satisfaction (but not exclusion or discharge) of the Charterers' liability towards the Owners. For the avoidance of doubt, such payment is no bar to a claim by the Owners and/or their insurers against the Charterers to seek indemnity by way of subrogation.

(iii) Nothing herein shall prejudice any rights of recovery of the Owners or the Charterers (or their insurers) against third parties.

III. Insurance Clauses



- ✧ Hull and Machinery Insurance (H&M).
- ✧ Protection and Indemnity Insurance (P&I).

1. The obligation to insure

Who has to insure the ship?

- a) The charterer is responsible for contracting both H&M and P&I.
- b) The charterer shall provide for P&I; the owner, assumer de obligation to contract H&M.



1. The obligation to insure

What option should the parties chose?

Criterion linked to the obligation of maintenance.

Criterion linked to the insurable interest.

Criterion linked to the duration of the contract.



1. The obligation to insure

The breach of the obligation to insure will give the other party the right to:

1. Terminate the contract.
2. Claim for damages.



2. The subrogation of the insurer

Clause 17 (b) (ii) BARECON 2017:

“Such insurances shall be arranged by the Charterers to protect the interests of the Owners and the Charterers (...).”

2. The subrogation of the insurer



Can the owner be subrogated in the owner's rights and claims against the co-insured charterer?

2. The subrogation of the insurer



Gard Marine and Energy Ltd & Anor v China National Chartering Company Ltd & Anor [2017] UKSC 35

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2. The subrogation of the insurer



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2. The subrogation of the insurer

Theory of the construction of the main contract:

- Analyze the provisions made by the parties in the main contract:
 - If liability is excluded: subrogation is not possible.
 - If liability is not excluded: subrogation is possible.

2. The subrogation of the insurer

The majority of the UKSC held that the insurer cannot be subrogated into the owner's rights and claim against the co-insured charterer.



2. The subrogation of the insurer

Lord Clarke

- Exclusion of liability must be expressly excluded in the contract.
- The absence of such exclusion implies that the intention of the parties was that the charterer could be held liable to the owner.

Lord Sumption

- The express inclusion of a safe port clause implies that liability must also be expressly excluded.
- In the absence of the aforementioned waiver, the lack of standing of the insurer is due to the fact that as both parties appear as co-insured, the payment of compensation by the insurer satisfies the charterer's liability.

3. The subrogation of the insurer in the BARECON 2017

Clause 17 (a) (ii)
BARECON:

“Notwithstanding that the parties are co-assured, these insurance provisions shall neither exclude nor discharge liability between the Owners and the Charterers (...)”.



3. The subrogation of the insurer in the BARECON 2017

- “For the avoidance of doubt, such payment is no bar to a claim by the Owners and/or their insurers against the Charterers to seek indemnity by way of subrogation”.
- “Nothing herein shall prejudice any rights of recovery of the Owners or the Charterers (or the insurers) against third parties”.

3. The subrogation of the insurer in the BARECON 2017

BUT this does not seem to solve the problem of subrogation:

- Circuity of action.
- Implicit term theory in the insurance contract.



3. The subrogation of the insurer in the BARECON 2017

- In the case of the subsequent charterers and sub-charterers the solution is different.
- They are not insured in the hull insurance.



IV. Conclusions

- Obligation to take out the insurances.
- The subrogation of the insurer against the co-insured charterer.
- The subrogation of the insurer against the sub-charterers.



**MANY THANKS FOR
YOUR ATTENTION**



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