

BARECON 2017: AN UPDATE TO BIMCO'S BARECON 2001

Introduction

In December 2017 BIMCO published BARECON 2017, a revision to BARECON 2001. The BARECON is widely used in the shipping industry and has now been updated to reflect legal and commercial developments.

BARECON 2017 is more streamlined and user-friendly than its predecessor with provisions removed which were no longer relevant and language consolidated to avoid repetition. Additional definitions have been inserted to bring clarity to expressions which were used but not defined in BARECON 2001. BARECON 2017 has also sought to address some key issues, particularly in light of recent English case law in relation to an insurer's right to claim against third parties.

We highlight some of the notable changes brought about by BARECON 2017 below:

Charter Period

The charterers' right to extend the charter period was previously (if such right was granted) included in the additional clauses agreed between the parties to the BARECON charterparty. This right has now been included in BARECON 2017 and grants the charterers the option to extend the charter period by reference to a pre-agreed duration and rate.

Delivery

The owners now have an absolute obligation to deliver a seaworthy vessel to the charterers, in contrast to the previous standard of "*due diligence*". The vessel will still need to be delivered with valid class certificates (for an agreed period of months) but trading certificates are no longer required on delivery, as such certificates (e.g. Certificates of Financial Responsibility) may not be transferable and will have to be obtained by the charterers.

The owners remain responsible for latent defects which appear within 12 months from delivery (or such other agreed period), however, "*Latent Defect*" is now defined to address any ambiguity as to its meaning.

Familiarisation and Underwater Inspection

The parties now have the option to place their representatives on board the vessel to familiarise themselves with the vessel, as well as the option to arrange for an underwater inspection as part of the vessel's inspection at delivery and redelivery respectively. However, no mechanism is provided for resolving a situation where damage is found during an underwater inspection. Accordingly, the resolution of such issues should be dealt with by additional language in the charterparty.

Maintenance and Operation

The parties now have the option to choose alternative methods of allocating costs for structural changes or new equipment required by class or compulsory legislation. The costs can either be (i) entirely for the charterers' account (which may be suitable if the charter period is the entire expected lifespan of the vessel); or (ii) apportioned in accordance with a new formula, calculated by reference to the total cost of the modifications, the expected life of the modification and of the vessel and the remaining charter period. This second option removes the uncertainty of the "*reasonable distribution*" method, used in BARECON 2001. These amendments are likely to have been made to deal with the upcoming regulatory requirement to install a ballast water management system.

Hire

The requirement to pay hire "*in respect of which time shall be of the essence*" has been deleted and replaced with an obligation to pay hire "*punctually*". This is to avoid any suggestion that delay could grant the owners an immediate right of termination. An automatic grace period of 3 days has also been included should the charterers fail to pay hire when due. If hire remains outstanding after the expiry of the grace period then the owners will have the right to terminate the agreement.

Insurance

The insurance provisions have been substantially amended to provide greater clarity as to the parties' responsibilities in respect of insuring the vessel. BARECON 2017 states that the vessel will either be insured by the charterers or the owners (this was also the position with its predecessor). However, a new clause provides for the other party to be named as co-assured, irrespective of who insures the vessel. This is, amongst other reasons, to address issues where claims are made against the owners which should have been made against the charterers who are operating the vessel.

The insurance provisions in BARECON 2017 have also been amended to address the concerns raised by the recent decision of the Supreme Court in the "*Ocean Victory*"¹. In this case the hull insurers paid the owners for the total loss of the ship, but were prevented from pursuing a subrogated claim against the third party time charterers who were operating the vessel, as a result of a co-assurance clause. The Supreme Court relied on the common law principle that co-assureds cannot claim against each other in respect of an insured loss, and therefore, there could be no claim that could be subrogated to the insurers. The Supreme Court regarded the co-insurance clause as an agreement between the parties that any loss or damage would be settled by the insurance, regardless of fault. Since the liability owed between the owners and the charterers was settled by the insurance recovery, the charterers (and thereby the insurers) could not pursue a claim against the time charterers, as the charterers had in effect not suffered any loss that could lead to a claim against the time charterers. Therefore, there was no liability which the insurers could pursue.

The revised insurance provisions of BARECON 2017 provide that the common law principle that co-assureds have no liability towards each other is not automatically applicable. There is express wording that payment of insurance proceeds is a "*first resort to make good the*

¹ *Gard Marine & Energy Limited v China National Chartering Company Limited and another* [2017] UKSC 35.

Owners' loss" and does not prevent the owners and/or their insurers from seeking an indemnity from the charterers by way of subrogation. In addition, wording has been included to enable the owners or the charterers (and their insurers) to pursue claims against third parties. Likewise, where the owners insure the vessel the charterers are now under an obligation to progress claims for recovery against third parties.

Anti-Corruption and Sanctions

A new anti-corruption clause based on BIMCO's Anti-Corruption Clause for Charter Parties has been included as well as a clause on sanctions based on BIMCO's Designated Entities Clause for Charter Parties. The consequence for breach of these provisions may entitle the non-defaulting party to terminate the charterparty.

Purchase Option

The hire/purchase mechanism which appeared in the optional Part IV of BARECON 2001 has been replaced with a purchase option. Under the old version, title would be simultaneously transferred to the charterers with payment of the final hire at the end of the charter period. However this did not accurately reflect industry practice where the vessel is normally sold for a pre-agreed figure, depending on when the purchase option is exercised. The new version reflects this arrangement.

A link to the judgement in "*Ocean Victory*" can be accessed below:

<https://www.supremecourt.uk/cases/uksc-2015-0036.html>

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