

INSURANCE OF RISKS UNDER THE BAREBOAT CHARTER CONTRACT

Marija Pijaca, Ph. D. *
Božena Bulum, Ph. D. **

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The bareboat charter contract may appear to be a simple contractual relation: the owner gives to the charterer a vessel for the performance of a sea-going activity, and charterer pays hire to the owner. However, this contractual relation is very complex and the complexity of this contract can be seen in the complex system of legal relations of the parties that arises from the provision of vessel for use. Based on the complexities of mutual rights and obligations of the parties to a bareboat charter contract, an issue of insurance also arises in a very complex form. The hull and machinery insurance and liability insurance are intertwined and therefore there is a very real possibility that some interests might be missed and left uninsured. Therefore, it is necessary to establish with certainty who is obliged to take out hull and machinery and liability insurance and to establish all other aspects of insurance specific for this type of vessel employment. The aim of this paper is to ascertain the characteristics of bareboat charter contract insurance, especially hull and machinery and liability insurance, and, also, to analyse the manner in which the issue of bareboat charter contract insurance is standardized by the provisions of the BIMCO Standard Bareboat Charter, code name BARECON 2001. This standard contractual form is most often used in the practice of bareboat charter contracting and therefore it is deemed necessary to establish whether or not its provisions provide broad enough coverage of bareboat charter contract insurance. By analysing the insurance provisions of the standard contractual

* Marija Pijaca, Ph. D., Postdoctoral Researcher, Maritime Department, University of Zadar, Mihovila Pavlinovića 1, Zadar; mpijaca@unizd.hr

** Božena Bulum, Ph. D., Senior Research Assistant, Adriatic Institute, Croatian Academy of Sciences and Arts, Augusta Šenoa 4, Zagreb; bbulum@hazu.hr

form BARECON 2001, the authors provide a conclusion as to whether or not the specified provisions meet the interests of the parties to a bareboat charter.

Keywords: bareboat charter, hull and machinery insurance, liability insurance, insurance provisions of the BARECON 2001

1. INTRODUCTION

Legal issues of insurance, mainly of hull and machinery insurance and liability insurance for the duration of the bareboat charter, should not be left to chance. Hence it is necessary that the parties know that these insurance issues should be clearly resolved in the bareboat charter contract. Starting from the fact that in modern business practice of bareboat charter standard contract forms are used, the question arises in which way the issue of insurance is dealt with in the content of the standard forms. Take for example the content of the Standard Bareboat Charter, code name BARECON 2001¹, the last bareboat charter form by the international maritime association Baltic and International Maritime Council (BIMCO)², which is most often used in the contracting of bareboat charters.³ BARECON 2001 contains many provisions, two of which are dedicated to insurance: Article 13, entitled *Insurance and repairs*, and 14, *Insurance, repairs and classification*.

In this paper we will determine the main features of a bareboat charter contract and explain the insurance interests of the contracting parties during a bareboat charter. Afterwards, we will point out the main characteristics of hull and machinery and liability insurance. Also, we will analyse in their entirety the insurance provisions of the BARECON 2001 form and establish whether they satisfy the parties' interests. To conclude, we will state our view as to whether it is necessary to amend the insurance provisions of the form for the purpose of better protection of the contracting parties.

¹ BARECON 2001 is available in its entirety on BIMCO web site: https://www.bimco.org/~media/Chartering/Document_Samples/Sundry_Other_Forms/Sample_Copy_BARECON_2001.ashx (11 February 2016).

² For details about BIMCO visit www.bimco.org; also *BIMCO Centenary*, Baltic and International Maritime Council, Copenhagen, 2005; Bekiashev, K. A.; Serebriakov, V., *International Maritime Organizations: Essays on Structure and Activities*, Martinus Nijhoff Publishers, Hague-Boston-London, 1981, p. 3.

³ Davis, M., *Bareboat Charters*, 2nd ed., LLP, London-Singapore, 2005, p. 20.

2. MAIN FEATURES OF THE BAREBOAT CHARTER

The bareboat charter contract is completely different from other contracts for the employment of sea going vessels.⁴ This type of contract differs from a group of contracts for the employment of sea-going vessels in a few criteria, such as the aim of the conclusion of the bareboat charter.

The bareboat charter may appear to be a simple contractual relation: the owner gives to the charterer a vessel for the performance of a sea-going activity, and the charterer pays hire to the owner in consideration of the performance of that activity. However, this contractual relation is far from simple. That this is a very complex contract can be seen in a complex system of parties' relations stemming out of the provision of vessel for use. Two important facts should be pointed out here. Firstly, by the conclusion of the contract the owner gives the vessel for use to the charterer, i.e. delivers the vessel into possession, so the charterer can use it as agreed. Secondly, the property transfers from the owner to the charterer whereby the charterer becomes the ship operator, or as it is called in legal literature, he becomes the "maritime owner"⁵, i.e. "owner *pro hac vice*".⁶ It is necessary to emphasize that it is the transfer of the right of possession and the function of the operator from one contracting party to the other which forms the essence of this complex legal matter, thus increasing the importance of the bareboat charter contract as the operator is considered a complex function in maritime law.

⁴ For example, refer to the classification of contracts based on the employment of sea-going vessels as per Croatian Maritime Code (Official Gazette of the Republic of Croatia Narodne novine, nos. 181/04, 76/07, 146/08, 61/11, 56/13, 26/15) as per Article 442-443; for more detail refer to Pavić, D., *Pomorsko imovinsko pravo*, Književni krug, Split, 2006, p. 87; for an example of systematization of contracts on the employment of sea-going vessels shown through some comparative rights examples refer to Grabovac, I., *Sistematika ugovora o iskorištavanju brodova – usporedna analiza*, *Suvremeni promet*, vol. 12, no. 2-3, 1990, pp. 43 – 45; also see Tetley, W., *International Maritime and Admiralty Law*, International Shipping Publication, Québec, 2002, pp. 124 – 128.

⁵ Brajković, V., *Problem brodara i njegove odgovornosti de iure condendo*, in: *Ugovori o iskorištavanju brodova na moru: Zbornik rasprava*, Jugoslavenska akademija znanosti i umjetnosti, Zagreb, 1951, p. 60.

⁶ Tetley, W., under note n. 4, p. 125 quoted *Leary vs. United States*, 81 U.S. (14 Wall) 607 (1872), *Reed vs. The Yaka* 373 U.S. 410, 1963. AMC 1373, *Matute vs. Lloyd Bermuda Lines Ltd.*, 931 F. 2d 231, 1991. AMC 1830 (3 Cir. 1991.) [author's remark]; also see Keenan, R. T., *Charter Parties and Bills of Lading*, *Marguette Law Review*, vol. 42, no. 3, 1959, p. 347.

The BARECON 2001 form, which we used as the example of a bareboat charter contract contains in its entirety the stated main features of the contractual relations of a bareboat charter. The form contains many provisions which are used for the regulation of the parties' rights and obligations. We can single out the most important features: charter period, delivery, time of delivery, cancelling clause, trading restrictions, surveys on delivery and redelivery, inspection, inventories, oil and stores, maintenance and operation, hire, mortgage, insurance and repairs, insurance, repairs and classification, redelivery, non-lien, indemnity, lien, salvage, wreck removal, general average, contract of carriage, bank guarantee, assignment, sub-charter and sale, requisition/acquisition, war, commission payment to the ship broker, termination, repossession, dispute resolution, notices and some optional provisions (provisions applicable to newbuilding vessels only, hire/purchase agreement provisions applicable to vessels registered in a bareboat charter register). Also, some "usual" provisions concerning the legal relations of the parties, such as vessel delivery, the owner's responsibility for not making the vessel seaworthy, vessel redelivery, responsibility of the charterer for the vessel's condition at redelivery, and payment of hire are significantly better regulated by the BARECON 2001 form than the legal regulations concerning bareboat charters which dedicate only a small number of provisions, mainly dispositive, to these legal matters.⁷

Regardless of the broad content of the provisions of the BARECON 2001 form, some legal matters concerning liability remain unknown. This specifically refers to the owner's and/or charterer's liability that might occur for the duration of a bareboat charter contract, and which refers to the liability for damage caused by a bareboat charter towards third parties (swimmers and other persons at sea), or the environment (in case of a tanker bareboat charter, or bunker oil pollution). However, there are also other important issues which require clarification.

3. INTERESTS OF CONTRACTING PARTIES IN INSURANCE

Taking into consideration the basic characteristics of the bareboat charter it is clear that the proprietary and legal relations are not an exclusive criterion

⁷ See for example Croatian Maritime Code and provisions entitled Bareboat charter - *Zakup*, Articles 658-672 or Italian Maritime Code (*Codice della navigazione*) and provisions entitled *Locazione di nave*, Articles 376-383.

for establishing the existence of interest in hull and machinery insurance.⁸ Alongside the owner, the charterer also has a legal interest in hull and machinery insurance in the duration of the bareboat charter contract. A charterer can also suffer damage arising from the loss of or damage to the vessel, his interest in hull and machinery insurance is justified.⁹ The basis of the charterer's interest is his obligation to maintain the vessel during the bareboat charter contract and return it in the same condition in which it was received after the expiration of the contract.¹⁰

In addition to hull and machinery insurance, during a bareboat charter contract both the owner and the charterer have an interest in obtaining insurance against liability (contractual and third party liability). Contractual liability generally occurs by failure to fulfill contractual obligations, whereas third party liability occurs by a damaging activity. For example, in a bareboat charter contract the owner's contractual liability can refer to his liability for the vessel's navigational incapacity, while the contractual liability of the charterer may concern returning the vessel to the owner in the condition received for the charter, taking into account regular wear and tear of the vessel. Third party liability refers to the liability stemming from collisions, impacts, marine pollution and the like. In this case, the aggrieved party is the third party.¹¹ A special form of liability is the charterer's obligation to the crew, i.e. his liability in the capacity of the operator for certain costs (for example, liability for damage occurred due to a physical injury or death of a crew member, liability for

⁸ Pavić, D., *Pomorsko osiguranje pravo i praksa*, Književni krug Split, Split, 2012, p. 331; also see Winfield Stretch, G., *Chartering of Ships, Charter parties and Bills of Lading, Notes, References, Forms*, Bierne Associates Inc., New York, 1953, pp. 224 – 225.

⁹ It is necessary to add that a subcharterer, a contracting party of the vessel subcharter concluded with a charterer, can also have a legal interest in hull and machinery insurance, as can a mortgagee. A bank can also have a special interest in the hull and machinery insurance. For this reason, in practice the insured person and hull and machinery insurer usually undertake, by virtue of a special legal procedure, that the insurance premium for the loss or damage of a vessel under mortgage shall be paid to the mortgagee. For details Pavić, D., *Ugovorno pravo osiguranja, komentar zakonskih odredaba*, Tectus, Zagreb, 2009, p. 551.

¹⁰ These charterer's responsibilities, pursuant to the BARECON 2001 form, stem from the provision of Article 10 *Maintenance and Operation* and Article 15 *Redelivery*. A similar provision is included in the Croatian Maritime Code, whose Article 661, paragraph 2 provides the following: "A charterer shall maintain the vessel for the duration of the contract and, after its expiration, return the vessel in the same condition and place as he received it."

¹¹ Pavić, D., *op. cit.* (fn. 8), p. 419.

damage caused to items intended for personal use by a crew member, liability towards a crew member during medical treatment, the obligation to cover the costs of a return trip for crew members (repatriation), obligation to compensate for crew members' salaries in the event of a shipwreck).

The charterer has a special interest in liability insurance, which is usually concluded by a ship operator, since as we emphasized earlier, the main effect achieved by the conclusion of a bareboat charter contract is the transfer of the capacity of the ship operator from the owner to a charterer. The owner, on the other hand, also has an interest in liability insurance. Pursuant to the solutions proposed by some conventions' (see *infra*), the owner can also be the bearer of liability for damage caused by the vessel. In these cases, the compulsory conventional solutions impose on the "registered owner" or "owner" compulsory insurance or other financial security (such as a guarantee of a bank or similar institution).

With regard to the foregoing, the parties' interests in insurance in general for the duration of the contract are mutually intertwined. Hence, it is possible that some insurance interests remain uninsured. Therefore it is necessary to establish with certainty whose responsibility it is to insure the hull and machinery and to insure oneself against all liabilities with the purpose of protecting the interests of both parties to the bareboat charter contract.

4. INSURANCE OF THE HULL AND MACHINERY AND INSURANCE AGAINST LIABILITY DURING THE TERM OF A BAREBOAT CHARTER CONTRACT

From the standpoint of the protection of interests of the parties to a bareboat charter contract, the two most important types of insurance are hull and machinery insurance and liability insurance. The first type of insurance tries to prevent the loss of or damage to the vessel, whereas the other type of insurance tries to protect the interests of the owner and the charterer when, due to possible liability, they are obliged to compensate for damage. Within the context of liability insurance it is important to determine the provisions of compulsory insurance stipulated by international maritime conventions. The provisions concerning compulsory insurance are especially important from the position of a bareboat charter contract since the owner has to be aware of these obligations regardless of giving the vessel to the charterer for use.

An analysis of legal matters regarding insurance during the term of a bareboat charter contract must be approached starting with a presentation of the

most important elements of hull and machinery and liability insurance, as well as compulsory insurance pursuant to international maritime conventions. Within the framework of the general features of hull and machinery and liability insurance we will single out some specific elements of the said types of insurance during the term of a bareboat charter contract.

4.1. Hull and machinery insurance

As regards hull and machinery insurance it is necessary to indicate in more detail the elements of a vessel that are covered by the insurance. With regard to the significant role of English maritime insurance in the world, in hull and machinery insurance the insurable value is the value, as stipulated by the Marine Insurance Act of 1906, at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages, and other disbursements (if any) (Article 16 of the Marine Insurance Act).¹²

Insurance for a hull and machinery carrying out international transport is mainly designed pursuant to institutional clauses of London-based insurers. Hence, English marine insurance is important for hull and machinery insurance because, among other things, these clauses explicitly envisage the application of English law.

The standard English insurance conditions used are: Institute Hull Clauses (1983 and 1995) and International Hull Clauses (2003). These represent a collection of clauses which regulate the most important issues of the contractual relationship of marine insurance.¹³ There are a couple of institutional clauses which differ only in their scope of coverage (insurance for so-called full coverage, limited coverage and insurance against a complete loss "only"). Institute Time Clause – Hulls and Institute Voyage Clause – Hulls offer the widest coverage. These clauses form the basic conditions for marine risks in hull and machinery insurance. According to the Institute Time Clause – Hulls, full insurance coverage includes those risks which are included in the *Perils Clause* and the *Pollution Hazard Clause*.¹⁴ Since the Institute Time/Voyage Clause –

¹² Available in its entirety on web site: <http://www.legislation.gov.uk/ukpga/Edw7/6/41/part/3> (12 February 2016).

¹³ Pavić, D., *op. cit.* (fn. 8), p. 351.

¹⁴ *Perils Clause* divides the insured risks into two groups. The first group includes loss or damage to the insured hull and machinery due to:

- danger at sea (danger at sea, for example, impact, impact with floating or submerged items, sinking, capsizing, stranding, impact with the sea ground, storm),
- fire, explosion,

Hulls does not cover war risks and strike risks, the Institute War and Strikes Clauses, Hulls – Time and Institute War and Strikes Clauses, Hulls – Voyage¹⁵ include complete insurance against such risks.

With hull and machinery insurance it is necessary to emphasize that the hull and machinery should be insured to the amount which corresponds to the real vessel value and which should be entered in the insurance policy. The issue of determining the actual value of a vessel is rather complicated¹⁶ so that the actual value of the vessel which brings profit is determined only when the costs of equipping the vessel and the consideration which can be earned by

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- violent theft committed by persons outside the insured vessel,
 - jettison,
 - piracy,
 - breakage or accident of nuclear installations or reactors ,
 - contact with airplane or other air crafts, or items which fall from them, with a land vehicle, a dock, harbour equipment and installations,
 - earthquakes, volcano eruptions or thunder strikes.

The second group includes loss or damage to the insured hull and machinery due to:

- accidents during loading, unloading and movement of cargo or fuel ,
- boiler burs, shaft breakage or other hidden faults in the machinery or hull of a vessel,
- negligence of the master, officer, crew or pilot,
- negligence of repairers or charterer under the condition that those persons have the capacity of insured persons as per the contract.

The main difference between these two groups is that the risk coverage of the second group is conditioned by the fact that the damage did not occur as a consequence of *due diligence* on behalf of the insured person.

Polluttion Hazard Clause broadens the insurance in order for it to include the loss or damage to the vessel if they are caused by a failure of a state administrative body in the prevention of occurrence or reduction of the risk when the pollution risk is an immediate consequence of vessel damage for which insurer is liable to cover pursuant to the hull and machinery insurance policy. This coverage is conditioned by the fact that the damage did not occur as a consequence of due dilligence. *Ibid.*, pp. 352 – 353; also Pavić, D., *Međunarodne klauzule za osiguranje brodova (2003.)*, Naše more, vol. 52, 2005, pp. 175 – 176; about *Perils Clause* also see Davison, R.; Snelson, A., *The Law of Towage*, Lloyd's of London press Ltd, London-New York-Hamburg-Hong Kong, 1990, pp. 110 – 111.

¹⁵ Insurance against war risks is divided into regular war insurance during the use of a vessel (for one year) and additional insurance for entry into so-called war zones where war risks are large and imminent. Ivošević, B. V., *Brodarski ugovor na vrijeme za cijeli brod (time charter)*, Institut za pomorstvo i turizam, Kotor, 1984, p. 76.

¹⁶ For details Pavić, D., *op. cit.* (fn. 8), pp. 338 – 343.

employing the vessel (freight, i.e. hire) is taken into consideration. Without insuring the costs and consideration, in case of a complete vessel loss, the insurance beneficiary would not receive full indemnification for the damage suffered. The owner and/or the charterer as insurance beneficiaries might suffer various types of damage in case the insured value of the vessel was not properly determined. If the charterer is an insurance beneficiary and the insured value of the vessel was less than the value used for the calculation of contributions in general average, then in the case of application of English law, this contribution is compensated from the insurance only proportionally to the relation between the insured value and this other value.¹⁷

Taking into consideration the corresponding assignment of rights and obligations to the contracting parties, in addition to hull and machinery insurance for marine risks and war and strike risks, other vessel-related interests can also be insured. Primarily, the owner can insure the hire, while the charterer can insure other expenses and costs that he incurred during the vessel exploitation. The insurance of these charterer's interests which fall into the category of additional interests can be envisaged by the bareboat charter contract because the aim of this contract is to regulate the parties' relations for the purpose of vessel employment.

When it comes to hull and machinery insurance, the question arises as to which of the contracting parties is obliged to bear insurance costs. We believe that the contracting parties have to resolve these issues through the bareboat charter contract. The duration of the contract might have a decisive role in the regulation of the issue of insurance costs.

4.2. Liability insurance

The legal basis of liability insurance is based on the fact that liability might stem from vessel employment. A liability insurance contract can be concluded by every person who can be the holder of the liability for damage. A bareboat charter is a type of contract in which there is a wider circle of persons on the side of the vessel who can be holders of liability stemming from vessel use.

Liability insurance is usually taken out at Protecting and Indemnity Associations (P&I clubs) which are characterized by their specific operation system.¹⁸

¹⁷ Web site under note n. 12 (14 February 2016).

¹⁸ P&I clubs are insurance organizations which operate under the principle of mutual insurance for risk insurance which cannot be insured with insurers that operate

The rules of a P&I club determine the types of damage and costs covered by the insurance and circumstances which have to be met for the insurance beneficiary to have the right to indemnification. The most important types of liability insurance which P&I clubs exclusively provide to their members are the following: insurance against boat collision damage (one fourth or three fourths¹⁹), damage to fixed or floating objects, responsibility for cargo, objects boarded on the insured hull and machinery, physical injuries, illness and death of a crew member and other persons, such as passengers, obligations towards personal belongings of a crew member, obligations towards the vessel's diversion, insurance of professional rescuers, rescue of persons, general average contribution, liability in relation to a wreck of the insured ship, responsibility

under the premium insurance principle. One of the main differences between mutual and premium insurance is that for mutual insurance one pays a call and not a fixed premium. Membership in a P&I club is gained in relation to a specific vessel, and a member is insured against liabilities and costs which stem from the interests that he has in relation to the subscribed vessel. A Certificate of Entry is issued for every subscribed vessel. At the conclusion of a contract an advance call is paid, and the final call for each business year depends on the ratio between the paid amounts and damage paid for every single member and the club in its entirety. If the fund formed from advanced calls is not sufficient, then a supplementary call is calculated for members. Traditionally, a P&I club operates with the aim of indemnifying the insured person and pays damages from the insurance policy to the insured person under the condition that the insured person himself has indeed paid the indemnification amount to a third person on the grounds of liability covered by the insurance policy. This stems from the so-called *pay to be paid* rule which is considered one of the key conditions of all P&I coverage. The importance of a P&I club is not reflected only in the fact that, through its network of expert associates, it offers to its members coverage against their liabilities but also because it offers an effective legal and technical support in defending against unjust and disproportionate indemnification requests in all larger world ports. Pursuant to Vincenca Padovan, A., *Uloga pomorskog osiguranja u zaštiti morskog okoliša od onečišćenja s brodova*, Hrvatska akademija znanosti i umjetnosti, Jadranski zavod, Zagreb, 2012, p. 86; Zelenika, R.; Knapić, I.; Likić, R., *Upravljanje rizicima u klupskom osiguranju*, Naše more, vol. 54, n. 1-2, 2007, p. 51; Medić, M., *Osiguranje odgovornosti brodarara putem P&I klubova*, Praktični menadžment, vol. 1, no. 1, 2010, p. 63; Hodges, S., *Cases and Materials on Marine Insurance Law*, Cavendish Publishing Limited, London, 1999, pp. 535, 541 – 547; Hazelwood, J. S.; Semark, D., *P&I Clubs, Law and Practice*, 4th ed, Informa, London, 2010, chapter 1; Gurses, O., *Marine Insurance Law*, 1st ed, Taylor & Francis Ltd., London, 2015; also websites of UK P&I Club, <http://www.ukpandi.com/about-the-club/> (19 February 2016).

¹⁹ In more detail Petrinović, R., "Collision Liability Clause" u *institutskim klauzulama za osiguranje brodova*, Zbornik radova Pravnog fakulteta u Splitu, vol. 38, no. 4, 2001, pp. 491-506.

for towing, coverage of consequences of oil pollution damage or damage from other dangerous substances released from the vessel, liability for legal expenses and other various costs.²⁰

The P&I club rules stipulate that a member vessel has to have a class awarded by a classification club and has to maintain that class for the duration of the insurance. Members have to strictly fulfill the legal requirements of the state flag in relation to use, construction, adaptation, vessel condition, navigational ability and equipment. A member vessel has to have all prescribed certificates in relation to safety of management and protection thus contributing to a higher vessel safety level. Every failure results in the loss of the right to indemnification.²¹ It is important to add that a standard bareboat charter contract BARECON 2001 contains a box in which the data on the classification system, the date of the last vessel inspection on behalf of the classification company, the number of months of validity of class certificates, which are also important for the purpose of hull and machinery insurance, are entered.²²

Furthermore, as regards the parties' liability, it is necessary to refer to some international maritime conventions which envisage compulsory insurance or the provision of another type of financial security (such as a guarantee from a bank or similar institution). Namely, although the general right of marine insurance is based on the consent of the parties, there are certain exceptions to that principle prescribed by compulsory convention solutions. A request for compulsory insurance or another type of financial security is a concept of the international maritime conventions from the domain of sea environment protection and transport of passengers. Compulsory insurance or financial security is prescribed by the following maritime conventions: International Convention on Civil Liability for Oil Pollution Damage, 1969²³, amended in 1992²⁴ (CLC Convention); International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and

²⁰ If the damage is observed pursuant to types, the highest incidence of damage is that to the cargo; See Hazelwood, J. S., *P&I Clubs, Law and Practice*, 3rd ed, LLP, London-Hong Kong, 2000.

²¹ Pavić, D., *op. cit.* (fn. 9), p 619.

²² Refer to BARECON 2001, Part I, box 10, 11 and 12.

²³ The Convention was adopted on a Diplomatic Conference in Brussels on 29 November 1969 and became effective on 19 June 1975.

²⁴ The Protocol was adopted on a Diplomatic Conference in Cape Town on 7 November 1992 and became effective on 30 May 1996.

Noxious Substances by Sea, 1996 (HNS Convention);²⁵ International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunker Convention);²⁶ Wreck Removal Convention, 2007 (WRC Convention)²⁷ and Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 2002 (Athens Convention of 2002).²⁸

Within the context of the provisions on compulsory insurance it is necessary to point out that the owner of the vessel registered in a contracting state and carrying more than 2,000 tons of oil in bulk as cargo is required to maintain insurance or other financial security (Article 7 of the CLC Convention).²⁹

Also, the owner of a vessel having a gross tonnage greater than 1,000 registered in a state party to the Bunker Convention is required to maintain insur-

²⁵ HNS Convention was adopted on a Diplomatic Conference in London on 3 May 1996; The Convention has never entered in force.

²⁶ The Bunker Convention was adopted on a Diplomatic Conference in London on 23 March 2001 and became effective on 21 November 2008.

²⁷ WRC Convention was adopted on a Diplomatic Conference in Nairobi on 18 May 2007 and became effective on 14 April 2015.

²⁸ The revised part of the Athens Convention of 1974 (adopted on 13 December 1974 and became effective on 29 April 1987), together with the final provisions of the Protocol of 2002 (adopted on 1 November 2002 and became effective on 23 April 2014) constitutes a revised text of a new convention entitled: *Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 2002*.

²⁹ The provisions of the CLC Convention direct the liability for sea pollution by oil carried in bulk as cargo strictly towards the owner (Article 3, paragraph 1 of the CLC Convention). Emphasizing the channeling of the responsibility onto the owner, the CLC Convention states the group of persons against which an indemnification request cannot be submitted. One of the taxatively stated persons against whom an indemnification request cannot be submitted is the bareboat charterer (Article 3, paragraph 4 of the CLC Convention). Along with a bareboat charterer, the CLC Convention as per Article 3, paragraph 4 defines other persons against whom an indemnification request cannot be filed, whether based on convention or not; those are: a) the servants or agents of the owner or the members of the crew; b) the pilot or any other person who, without being a member of the crew, performs services for the vessel; c) any charterer (howsoever described, including a bareboat charterer), manager or operator of the vessel; d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority; e) any person taking preventive measures; f) all servants or agents of persons mentioned under items (c), (d) and (e). For other provisions of the CLC Convention refer to: Ćorić, D., *Onečišćenja mora s brodova, međunarodna i nacionalna pravna regulacija*, Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2009, pp. 129 – 150; also Berlingieri, F., *International Maritime Conventions: Volume 3, Protection of the Maritime Environment*, Informa Law, Routledge, Arbingdon, 2015, pp. 156 – 188.

ance or other financial security to cover the liability of the owner for pollution damage by bunker oil (Article 7 of the Bunker Convention).³⁰

Pursuant to the provisions of the WRC convention, the owner of a vessel of a gross tonnage of 300 gross tons and above and flying the flag of a state party is required to maintain insurance or other financial security to cover the liability for the costs of locating, marking and removing a wreck (Article 12 of the WRC Convention).³¹

The HNS Convention envisages the same obligation which makes the owner obliged to maintain insurance or other financial security in the sums fixed by applying the limits of liability to cover liability for damage under the Convention (Article 12 of the HNS Convention). In case of a vessel for the carriage of hazardous and noxious substances by sea, the owner is responsible for taking out insurance against liability for damage in relation to the carriage.³²

Finally, pursuant to the provisions of the Athens Convention of 2002, when passengers are carried on board a vessel registered in a state party that is licensed to carry more than 12 passengers, any carrier who actually performs the whole or a part of the carriage must maintain insurance or other financial security to cover liability under the Convention in respect of the death or personal injury to passengers (Article 5 of the Athens Convention of 2002). Every actual carrier is obliged to have compulsory insurance, which is required solely for the case of death and personal injury of a passenger, and not baggage loss.³³

³⁰ The provisions of the Bunker Convention direct the liability to the *ship owner*. The term *ship owner*, pursuant to the introductory explanation of the terms of the Bunker Convention, implies the registered owner, bareboat charterer, manager and operator of the vessel. Pursuant to the provisions of the Bunker Convention, the *ship owner* at the time of an incident is liable for pollution damage caused by bunker oil (Article 3, paragraph 1 of the Bunker Convention). For other provisions of the Bunker Convention refer to: Ćorić, D., *op. cit.* (fn. 29), pp. 155 – 161; Berlingieri, F., *op. cit.* (fn. 29), pp. 189 – 207.

³¹ The WRC Convention in more detail: Rahan, D., *Međunarodna konvencija o uklanjanju podrtina*, 2007., Zbornik radova Pravnog fakulteta u Splitu, vol. 46, no. 2, 2009, pp. 391 – 406; Skorupan Wolff, V.; Petrinović, R., *Međunarodna konvencija o uklanjanju podrtina*, Poredbeno pomorsko pravo, vol. 47, no. 162, 2008, pp. 109 – 134; Griggs, P., *Draft Wreck Removal Convention*, CMI Yearbook 2005-2006, pp. 376 – 383.

³² For liability of the owner and other provisions of the HNS Convention refer to: Ćorić, D., *op. cit.* (fn. 29), pp. 150 – 155.

³³ For other provisions of the Athens Convention of 2002 refer to: Pospišil Miler, M., *Atenska konvencija o prijevozu putnika i njihove prtljage morem 2002*, Poredbeno pomorsko pravo, vol. 43, no. 158, 2004, pp. 227 – 262.

Each vessel that complies with a convention obligation concerning the implementation of insurance or financial security is required to carry on board a certificate of insurance or other financial security which confirms that the insurance or other financial security is in force pursuant to the provisions.³⁴

5. ADDITIONAL REMARKS ON THE INSURANCE PROVISIONS OF THE BARECON 2001 FORM

BARECON 2001 stipulates two insurance-related provisions: Article 13 *Insurance and Repairs* and Article 14 *Insurance, Repairs and Classification*. Provision 14 is optional and is applied solely if the parties have contracted its application, whereby provision of Article 13 is considered to be deleted from the standard form, i.e. invalid.

Pursuant to Article 13 of the BARECON 2001, during the charter period the vessel must be kept insured by the charterer at his expense against: “hull and machinery, war and Protection and Indemnity (P&I) risks (and any risks against which it is compulsory to insure for the operation of the vessel)”.³⁵ Article 13 provides that the charterer is obliged to insure against any other compulsory risks, including maintaining financial security. The form of insurance is subject to the owner’s written approval, which is not to be unreasonably withheld.

³⁴ Further significant contribution to the expansion of compulsory insurance is provided by Directive 2009/20/EU of the European Parliament and the Council of the European Union on the insurance of shipowners for maritime claims of 23 April 2009, which prescribes compulsory insurance of a shipowner for maritime claims as per International Convention on Limitation of Liability for Maritime Claims, 1976 (adopted on 19 November 1976 and entered in force on 1 December 1986) and the Protocol of 1996 (adopted on 2 May 1996 and entered in force on 13 May 2004). About International Convention on Limitation of Liability for Maritime Claims, 1976 and the Protocol of 1996 see: [http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Convention-on-Limitation-of-Liability-for-Maritime-Claims-\(LLMC\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Convention-on-Limitation-of-Liability-for-Maritime-Claims-(LLMC).aspx) (14 February 2016).

³⁵ The words “hull and machinery” have been inserted in Article 13 of the BARECON 2001 to replace the word “marine” in the equivalent provision of the previous BIMCO standard contract form on the bareboat charter code name BARECON 89 so as to restrict the scope of application and so as to exclude other insurances which may otherwise come within the definition of “marine” insurance. Davis, M. *op. cit.* (fn. 3), p. 77. For BARECON 89 see: https://www.bimco.org/~/_media/Chartering/Document_Samples/Withdrawn/Sample_Copy_BARECON_89.ashx (15 February 2016).

If the parties act pursuant to the provision of Article 14, hull and machinery insurance and war risk insurance is contracted at the owner's expense, whereas insurance against Protection and Indemnity (P&I) risks and compulsory insurance, including maintaining financial security, is contracted at the charterer's expense.

The acceptance of the provision of Article 13 means that in the case of occurrence of an insured risk, with the approval of the owner and the insurer, the charterer performs the repairs of the vessel damage covered by the insurance, reimbursement of all costs related to repairs, insured charges, expenses and insurer's obligations. The charterer is obliged to effect all insured repairs and to arrange for the payment and collection of all costs in connection with such repairs, as well as to arrange for all repairs not covered by the insurance or below the level of the deductible, or any possible franchise³⁶ (BARECON 2001, Part II, Article 13(a)).

If the contracting parties have an interest in additional insurance for the coverage of additional risks, for example contracting of insurance in case of a loss of time caused by time-consuming repairs of the vessels' hull³⁷, the coverage is limited for each contracting party to the amount stated in the contract. Pursuant to Article 13(b) of BARECON 2001 a contracting party is obliged to deliver the details of the additional insurance (copies of any cover notes or policies and written consent of the insurers) to the other party.

Article 13(c) of BARECON 2001 introduces a new requirement obliging the charterer to provide information and promptly execute such documents as may be required to enable the owner to comply with the insurance provisions of any financial instrument.³⁸

³⁶ *Franchise* is the amount or percentage stipulated by the insurance contract pursuant to which the insurance does not compensate for damage. The insurance beneficiary bears the cost of damage although it is usually covered by insurance. It can be stated as a sum of money or as a percentage of the insured amount. The main purpose of the application of the franchise is to stimulate an insurance beneficiary to undertake preventive measures against damage and to reduce the already occurred damage to avoid the cost of the procedure of establishment and liquidation of minor damage as well as to exclude all damage due to normal cargo or volume loss. Pavić, D., *op. cit.* (fn. 8), pp. 241 – 242.

³⁷ Pursuant to *Explanatory notes for BARECON 2001*, available on: https://www.bimco.org/Chartering/Documents/Bareboat_Chartering/BARECON2001/Explanatory_Notes_BARECON2001.aspx. (15 February 2016).

³⁸ Davis, M., *op. cit.* (fn. 3), p 79; also see web site under fn. 1.

BARECON 2001 differentiates between the insurance for the case of actual and constructive, compromised or agreed complete vessel loss (see BARECON 2001, Part II, Article 13(d)). Actual loss implies physical loss or damage to an insured vessel whereas constructive loss implies the loss of commercial use of the vessel. By encompassing various cases of vessel loss a completely new criterion for the determination of complete loss has been introduced. Namely, from the content of a standard contract form of the bareboat charter contract under the code name BARECON 89 the hull and machinery insurance covers only the physical loss and damage. With the BARECON 2001 form another compromised and agreed vessel loss has been added which can be interpreted within the scope of the agreed contract, compromise, acceptance or the settlement of the parties.³⁹

The charterer is obliged to notify the owner and the mortgagee (if any) of any occurrences which are likely to result in the vessel becoming a total loss (BARECON 2001, Part II, Article 13(d)). The owner is, on the other hand, obliged, upon the request of the charterer, to promptly execute such documents as may be required to enable the charterer to abandon the vessel to insurers and claim a constructive total loss (BARECON 2001, Part II, Article 13(e)).

Finally, it is necessary to determine the vessel's value for the purpose of insurance coverage. Pursuant to the BARECON 2001 form the value of the vessel is determined by the agreement of the contractual parties (*contract value*) which is entered in the first part of box 29 (BARECON 2001, Part II, Article 13(f)). If the amount determined by the contract does not correspond to the actual value of the vessel, i.e. if the amount is entered with an intent to commit fraud against the insurer, the value of the vessel which can be insured is taken.⁴⁰

On the other hand, in practice it can happen that the owner does not demand from the charterer to insure the hull and machinery, but in the delivery of the vessel also offers hull and machinery insurance. If the charterer accepts the offered insurance, the parties must accept the insurance provision pursuant to Article 14 of the form BARECON 2001. According to Article 14, the obligation of the hull and machinery and war risk insurance are contracted at the owner's cost whereas the insurance against Protection and Indemnity

³⁹ *Explanatory notes for BARECON 2001.*

⁴⁰ Davis, M., *op. cit.* (fn. 3), p. 80; also see web site under fn. 1.

(P&I) risks (and any risks against which it is compulsory to insure for the operation of the vessel) are contracted at the charterer's expense.

It is considered that the hull and machinery insurance by the owner is usually contracted in a charter for a definite period of time, which is usually a shorter period (from four to six months)⁴¹ so the provision has a special application to passenger vessels which are placed into bareboat charter for seasonal cruise or ferries hired for summer season.⁴² Usually the owner maintains the hull and machinery insurance at his own expense.⁴³

Pursuant to the stated provision of Article 14 of the BARECON 2001 form, the owner bears the expense of hull and machinery insurance against maritime and war risks, although the charterer must, with the approval of the owner or the insurer, perform all insured repairs and cover the costs of all such repairs. Provided that an invoice is submitted, the insurer must cover the costs of the charterer.

The owner and/or the insurer, in case of loss or damage to a vessel, machinery or devices, are not entitled to a compensation from a charterer as opposed to Article 13 which stipulates that the charterer is responsible for contracting and insurance payments for the Protection and Indemnity risks coverage and for the risks for which an insurance is compulsory, and which were approved by the owner. However, if the charterer by his action or negligence endangers the contracted insurance, he is liable to compensate for any losses to the owner and to indemnify him with regard to the claims and demands which would otherwise be covered by the insurance. The owner, under such circumstances, has the right to withdraw the vessel, which terminates the contract pursuant to the provision on the termination of the contract⁴⁴ (BARECON 2001, II Part, Article 14(c) and 14(d)).

⁴¹ Pursuant to *Explanatory notes for BARECON 2001*.

⁴² Davis, M., *op. cit.* (fn. 3), p. 82.

⁴³ Pursuant to *Explanatory notes for BARECON 2001*.

⁴⁴ When it is referred to the termination of the contract stipulated under the provision *Termination* from the BARECON 2001 form, the occurrence of certain circumstances is implied within the duration of the contract which lead to the termination of the contract against the contracting parties' will or which give the right to one or the other contracting party to request such termination. The provision on the termination of a contract stipulated under the BARECON 2001 contract implies the termination of the contract based on the charterer's default and the loss of the vessel. It also states other reasons for the termination of a contract such as liquidation, bankruptcy and other circumstances which are a consequence of a financial loss of the contracting party; see BARECON 2001, Part II, Article 28.

The charterer is responsible for other repairs and costs which are not covered by the insurance and/or are beyond the franchise level. The charterer must bear the costs of the time necessary for the repairs of a vessel and such time is included in the duration of the charter. This includes the time necessary for repairs caused by the latent defects of the vessel (BARECON 2001, II Part, Article 14(e) and 14(f)).

The remaining part of Article 14 *mutatis mutandis* contains identical provisions of Article 13 of the BARECON 2001 form: contracting of additional insurance; insurance in case of actual, constructive, compromised or agreed complete loss of a vessel and determination of a value of the vessel for the purpose of insurance.

Finally, in the whole concept of Article 14 it is implied that the owner maintains the class of a vessel until the date stated by the classification company as well as all other certificates for the duration of the charter. If the agreed charter is for a shorter period of time, for example four to six months, it is not appropriate that the charterer should be responsible for the renewal of the class of a vessel.⁴⁵ The possession of a class and prescribed certificates are conditions for the vessel's membership in the P&I Club as well as for hull and machinery insurance and liability insurance.

6. CONCLUSION

In this paper we have tried to identify the specific features which characterize insurance during the term of a bareboat charter contract, focusing mainly on hull and machinery and liability insurance. Any discussion of insurance in a bareboat charter contract is impossible to present without an overview of the main features of a bareboat charter contract. We re-emphasized that both parties have an interest in insuring the hull and machinery and liability during the term of a bareboat charter contract. In individual cases the owner can be held liable for damage caused by the vessel (for example CLC Convention explicitly directs the liability for sea pollution by oil carried as a bulk in cargo to the owner; the Bunker Convention directs the liability for sea pollution by bunker oil to both the owner and the charterer). Moreover, we have determined that the fact of letting the vessel be used does not relieve the owner of liability; hence the owner, together with the charterer, has an interest in taking out insurance against liability. Along with the general features of hull and machinery

⁴⁵ For more details refer to *Explanatory notes for BARECON 2001*.

and liability insurance (the common usage of institutional clauses - Institute Hull Clauses, International Hull Clauses, Institute War and Strikes Clauses; the role of the P&I Clubs), we stated some provisions of compulsory insurance which are stipulated by several international maritime conventions. Solutions proposed by some conventions':

- a vessel that carries more than 2,000 tons of oil in bulk as cargo must have compulsory insurance or other financial security (Article 7 of the CLC Convention);
- the owner of any vessel having a gross tonnage greater than 1,000 is obliged to maintain insurance or other financial security for the coverage of liability for damage due to sea pollution by bunker oil (Article 7 of the Bunker Convention);
- the owner of a vessel having a gross tonnage greater than 300 gross tons is obliged to maintain in force insurance or other financial security for the coverage of location costs, marking and removal of a wreck (Article 12 of the WRC Convention);
- a vessel that carries 12 or more passengers is obliged to have a certificate of compulsory insurance or financial security which proves that the carrier who performs actual transport has third party liability coverage (Article 5 of the Athens Convention 2002).

Although the HNS Convention has not entered into force on an international level, it is necessary to note that it also stipulates compulsory insurance. Pursuant to the HNS Convention, the owner is also obliged to conclude an insurance contract or some other financial security in case of sea pollution with hazardous and noxious substances (Article 12).

From the example of the provisions of the BARECON 2001 form we have determined that the expense of hull and machinery insurance can be borne by a charterer (Article 13) or the owner (Article 14) depending on which contractual provision of the form the parties have agreed upon. Acceptance of one provision deletes the other. Pursuant to the BIMCO explanatory notes concerning the provisions of BARECON 2001, the acceptance of the provision of Article 14, i.e. contracting of the owner's obligation to bear the insurance expense, is customary in bareboat charters for a shorter period of time. Having analysed the provisions of the BARECON 2001 form we have determined that the form envisages the obligation of taking out insurance against maritime and war risks, but also against any risks that the vessel is exposed to during its maritime endeavours. BARECON 2001 indicates the obligation of the charter-

er to bear the expense even when it comes to compulsory insurance, although the provisions do not directly specify the compulsory insurance. We believe that expanding these provisions with convention solutions on the compulsory insurance should be considered. In other words, we believe that it is desirable to have such convention solutions in mind when concluding of a bareboat charter contract.

We can conclude that the insurance provisions from the BARECON 2001 form are satisfying, with the said note to clearly state the obligations, primarily of compulsory insurance. Contracting parties have to have a good knowledge of compulsory insurance of the said maritime convention solutions. Additionally, these provisions refer the parties to their contracting positions for the duration of the bareboat charter.

Sažetak

Dr. sc. Marija Pijaca *
Dr. sc. Božena Bulum **

RIZICI OSIGURANJA KOD UGOVORA O ZAKUPU BRODA

Ugovor o zakupu broda može se činiti jednostavnim ugovornim odnosom: zakupodavatelj daje zakupoprimaltelju brod na uporabu radi obavljanja plovidbene djelatnosti, a zakupoprimaltelj plaća zakupodavatelju zakupninu. Međutim, riječ je o iznimno složenom ugovornom odnosu koji se ogleda u kompleksnom sustavu pravnih odnosa ugovornih stranaka koji proizlazi iz davanja broda na uporabu. U skladu s kompleksnošću međusobnih prava i obveza stranaka iz ugovora o zakupu broda u prilično složenom obliku javlja se i pitanje osiguranja. Interesi osiguranja broda i odgovornosti međusobno se prepleću pa je lako moguće da neki interes promakne i ostane neosiguran. Zato je potrebno sa sigurnošću utvrditi tko je dužan osigurati brod, osigurati se od odgovornosti te utvrditi ostale oblike osiguranja specifične za tu vrstu iskorištavanja broda. U ovom radu cilj je utvrditi obilježja osiguranja kod ugovora o zakupu broda te, također, analizirati način na koji je pitanje osiguranja zakupljenog broda normirano odredbama BIMCO-ova standardnog ugovornog obrasca o zakupu broda, kodnog naziva BARECON 2001. Isti ugovorni obrazac najčešće se koristi u praksi ugovaranja zakupa broda, pa se smatra potrebnim utvrditi predviđaju li odredbe standardnog ugovornog obrasca dovoljno široko pokriće osiguranja za trajanja ugovora o zakupu broda. Analizom i tumačenjem odredaba o osiguranju standardnog ugovornog obrasca BARECON 2001 autorice iznose zaključak zadovoljavaju li naznačene odredbe interese stranaka iz ugovora o zakupu broda.

Ključne riječi: ugovor o zakupu broda, osiguranje broda, osiguranje od odgovornosti, odredbe o osiguranju obrasca BARECON 2001

* Dr. sc. Marija Pijaca, poslijedoktorandica na Pomorskom odjelu Sveučilišta u Zadru, Mihovila Pavlinovića bb, Zadar; mpijaca@unizd.hr

** Dr. sc. Božena Bulum, viša znanstvena suradnica Jadranskog zavoda Hrvatske akademije znanosti i umjetnosti, Augusta Šenoa 4, Zagreb; bbulum@hazu.hr

