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INDEMNITY CLAUSE IN STANDARD BAREBOAT CHARTER BARECON 2001

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ABSTRACT

The aim of the paper is to analyse the Indemnity Clause contained in the standard BIMCO bareboat charter form with the code name BARECON 2001 as the most frequently used contract form in a bareboat charter. Due to the complexity of this issue, a special emphasis is placed on the analysis of BARECON 2001 provisions regarding the Indemnity Clause (clause 17). This paper includes provisions for the indemnification in case of any loss of the chartered Vessel. The prescribed clauses are also compared with the clauses contained in the BARECON 89 standard form which was preceded by the BARECON 2001 and with the options prescribed by the Croatian Maritime Code. The differences in the contents of the indicated sources are emphasised. The analysis refers to other provisions of the standard form primarily those relating to the insurance of the ship. It covers the provision of the origin of the contract in case of any loss of a chartered Vessel as a result from not acting according to the clauses of the agreement. Conclusively, the detailed analysis of the Indemnity Clause in BARECON 2001 points out the relevant questions influencing the content of the rights and liabilities of the parties. The Indemnity Clause in this standard agreement form also underlines the importance of interpretation in which parties participate in the risks. Furthermore, the importance of applying this clause is in order to avoid the unwanted disputes between the parties, as is outlined in the represented terms of the contract.

KEY WORDS

Indemnity Clause, BARECON 2001, Loss of chartered Vessel

1. INTRODUCTION

A Bareboat charter contract represents a complex system of rights and obligations of the contracting parties. The contract establishes the right of Charterer to the use of the Vessel,¹ also his obligation is to act in a way that would protect the Vessel from misuse and damage. The Owner transfers the possession and control of the Vessel to the bareboat Charterer. In relation to the Vessel, the Owner is actually in the "background"

(HILL 1995:185), in other words, the Owner does not take over the obligation for performance or success of the navigational ventures (SKORUPAN WOLFF 2008:578). Considering the many rights and obligations of the contracting parties, and the essential fact of transferring the possession of the Vessel to the Charterer, a question is raised, how should they share the risks that arise from signing this contractual agreement? The Charterer will seek to engage the Vessel in the most profitable manner and the Vessel becomes exposed to certain factors that may result in losses or damages incurred by the Owner. In such cases the

¹ By the use of the Vessel, the right to economic exploitation is understood, and the obtained benefits. See PAVIĆ 2006:288.

Indemnity Clause will have an important role in managing the risks associated with the bareboat charter. In discussing this clause, the importance of insurance in the maritime industry becomes evident.

The contracting parties use a contract form, which is prepared in advance, meaning a simple, fast, and above all legally secure, contractual arrangements.² Most parties use forms approved by the *Baltic and International Maritime Conference* (hereinafter: BIMCO).³ First BIMCO standard forms of bareboat charter agreement, codenamed Barecon A and Barecon B,⁴ quickly gained worldwide recognition and became very popular. These standard forms however were replaced with a new standard form called *The Baltic and International Maritime- Council (BIMCO) Standard Bareboat Charter*, Code Name: Barecon 89.⁵ Finally, *BIMCO Standard Bareboat Charter*, Code Name: Barecon 2001⁶ has replaced Barecon 89 as the industries standard form for a bareboat charter. Since its adoption onwards Barecon 2001 has been used for the vast majority of operating bareboat charters.⁷ The content of Barecon 2001 clause is particularly interesting because, as we noted, the bareboat charter is a complex contractual relation. Out of all the clauses of the contract, in this paper we set aside the Indemnity Clause, which is in our opinion very

specific and important in negotiating the bareboat charter.

Briefly presenting the structure of the Barecon 2001 we have aimed to determine the location of Indemnity Clauses within the provisions of the same standard form. We have analysed the provisions of the Indemnity Clause particularly trying to determine the obligation under the indemnity by the Charterer to the Owner and vice versa. The analysed provisions have been compared with the solutions contained in Barecon 89 which enabled us to make and present herein our estimation of the content of the Barecon 2001 Indemnity Clause. Finally, we have looked at the Croatian Maritime Code⁸, especially the part regarding the bareboat charter and have determined which part of our legislature covers this issue about the designated conditions.

2. NOTES ABOUT THE STRUCTURE OF BARECON 2001

The Barecon 2001 follows the traditional box layout pattern used by BIMCO. The Barecon 2001, Part I, consists of boxes used for inserting the contract's key variable information pertaining to Parts II, III, IV and V.

The most extensive part of the standard form represents Part II which contains 31 clauses.⁹

Parts III, IV and V are optional parts to be applied as appropriate to the nature of the specific agreement and cover new-building Vessels, hire-purchase agreements and Vessels registered in a bareboat charter registry (*Explanatory notes for Barecon 2001*).

² The practice of contracting regularly uses the possibility that some of the existing provisions of the form, delete or supplement the original text with the new provisions (Rider clauses) and prominent freedom of contracting parties. For more, see *Ibid* p. 114.

³ More about BIMCO available at: <https://www.bimco.org/>

⁴ Following standard forms which were published in 1974 Barecon A is composed for bareboat chartering of commissioned vessels, with or without an existing mortgage, and Barecon B is composed especially for the use in case of newbuilding vessels financed by a mortgage. See TETLEY, 2002:161.

⁵ Available at:

https://www.bimco.org/-/media/Chartering/Document_Samples/Withdrawn/Sample_Copy_BARECON_89.ashx

⁶ Available at:

https://www.bimco.org/-/media/Chartering/Document_Samples/Sundry_Other_Forms/Sample_Copy_BARECON_2001.ashx

⁷ Besides the mentioned standard forms, in practice some oil companies have used their own forms, e.g. Esso, BP and Shell. Shell especially uses *Shelldemis* - Time charter by demise. More available in ADEMUNI-ODEKE 1998:86 to 88. About differences between bareboat and demise charter also see PAVIĆ 2006:288.

⁸ Narodne novine, no. 181/04, 76/07, 146/08, 61/11 and 56/13.

⁹ Following titles are discussed: *Definitions, Charter Period, Delivery, Time for Delivery, Cancelling, 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, Assignment, Sub-Charter and Sale, Contracts of Carriage, Bank Guarantee, Requisition/Acquisition, War, Commission, Termination, Repossession, Dispute Resolution and Notice.*

3. INDEMNITY CLAUSE IN BARECON 2001

Standard form of Barecon 2001 contains several new clauses when comparing the content of Barecon 89. One of them is titled *Indemnity*.¹⁰ This clause is under number 17, lines 560 to 586. It is divided into two sub-clauses: sub-clause (a) provides an indemnity by the Charterer to the Owner, and sub-clause (b) provides an indemnity by the Owner to the Charterer.

The precise operation of an indemnity depends fundamentally on how it is drafted and to which extent drafting properly reflects the intention of the parties. In this sense the Barecon 2001 is an example of a contractual form that helps the contracting parties to avoid possible contractual disputes. It also helps in avoiding expenses especially after the interpretation of the clause content has been formulated in such a way to protect both parties in case of any loss, damage or expense incurred by the non-defaulting party. What is important to emphasise is that the prescribed Indemnity Clause is only as good as the financial strength of the parties providing the indemnities. The Owner will be keen to ensure that the Charterer is financially sound and/or that the Charterer provides security (DAVIS 2005:98). Such security is in the form of a bank guarantee or a performance bond. Obligation prescribed by clause 24 in Barecon 2001, titled *Bank Guarantee*, whereby the bareboat Charterer, before delivery of the Vessel, submits a first class bank guarantee or bond in the sum as indicated in Box 27.¹¹ The purpose of submitting a first class bank guarantee or bond is to guarantee a complete performance of their obligations under bareboat charter.

3.1. Indemnity by the Charterer to the Owner

In Barecon 2001 provisions on indemnity by the Charterer to the Owner are prescribed by sub-clause 17(a), lines 561 to 564. It anticipates the Charterer's obligation to indemnify the Owner

against any loss, damage or expense incurred by the Owner arising out of or in relation to the operation of the Vessel by the Charterer. Sub-clause covers indemnity for any loss, damage or expense made by the Charterer, therefore the provision very broadly provides a general indemnity. Furthermore, such formulations contribute to the protection of the Owner. It is important to point out that these are occurrences or activities for which indemnities are sought and drafted with phrases arising out of or in relation to the operation of the Vessel. When the Charterer is responsible for the loss, the question arises how will the damages be assessed. The answer to this question involves the application of the principles relating to remoteness of the damage. For them Barecon 2001 does not provide a solution, but it is left to the parties themselves to resolve the issue. In the absence of a common negotiated settlement, the role of arbitration will be of great importance.¹²

Analysing sub-clause 17(a) in BARECON 2001, logical Charterer's liability is to indemnify the Owner in case of loss, damage or expense, when taking into account the specifics arising by signing the bareboat charter. In the first place we think of transferring the possession of the Vessel and the acquisition of property to the Charterer. The Charterer, considering his place in a contractual relationship, must commit to pay the costs incurred by the Owner as a consequence of not respecting the provisions of the contractual terms. The liability for loss or damage to the chartered Vessel can range from relatively small claims for routine damage, to the total loss of the Vessel. In order to mitigate the uncertainty in this legal field, in particular the uncertainty of occurrences regarding cases for any loss of the Vessel, Barecon 2001 in Clause 13, titled *Insurance and liability*, lays down the obligation of the Charterer. In detail, sub-clause 13(a), lines 358 to 360 provide that the Charterer, at his own expense, keeps the Vessel insured throughout the Charter Period primarily against hull and machinery, war or

¹⁰ Indemnity Clause contained in Barecon 2001 consolidates into a single clause the indemnity provisions previously found in *Non – lien and Indemnity* and *Bills of Lading* of Barecon 89. It extends the scope of these previous provisions from Barecon 89.

¹¹ See clause 24, lines 643 to 644 in Barecon 2001.

¹² Barecon 2001 contains a provision titled *Dispute Resolution*, it extensively regulates the manner of resolving disputes and determines the jurisdiction of the arbitral tribunal in the case a settlement was not negotiated. See clause 30 in Barecon 2001.

Protection and Indemnity risks.¹³ These risks and liabilities are large enough that insurance protection is definitely necessary.

The provision of sub-clause 17(a), lines 561 to 564, is just one provision of the Indemnity Clause that should be read in conjunction with other provisions of the contractual form in order to be aware of the consequences that the described events will have on the contractual relationship for bareboat charter. Analysing other provisions of Barecon 2001, we see that in the event of a breach of contract, it would affect the indemnity by terminating the bareboat charter. Thus, in case of total loss of the Vessel, sub-clause 28(c), lines 826 to 828, provide that the bareboat charter will be deemed to be terminated if the Vessel becomes a total loss or is declared as a constructive or compromised or arranged total loss. The provision of sub-clause 28(c) of the indicated lines represents an extraordinary termination of the bareboat charter. Therefore, the Charterer will be charged for the Owner's loss, and the bareboat charter agreement will not be valid anymore. It should be noted that the provision states that the Vessel is not deemed lost until she becomes an actual total loss or an agreement has been reached in respect of her loss with her underwriters. If the underwriters fail to comply with the agreement regarding the Vessels total loss, the matter is then to be determined by a competent tribunal (*Explanatory notes for Barecon 2001*).

Furthermore, sub-clause 17(a), lines 564 to 566, stipulate the Charterers obligation to indemnify the Owner against any lien of whatsoever nature arising out of an event occurring during the Charter Period. This provision is pulled from Barecon 89, where its content almost entirely corresponds to clause 15, lines 387 to 388. Specifically, in Barecon 89, clause 15, includes only indemnity of the Owner when it comes to any lien arising upon the Vessel, but not in the case of compensation for any loss, damage or expense. Compensation for the Owner is stipulated by the introduction of a new form of contract. Indicated provisions do not require either breach or fault on the part of the Charterer to be operative. That means that the Charterer will not extend to any loss, damage or expense incurred as a result of the negligence by the Owner (DAVIS 2005:98 quoted

¹³ See the entire contents of clause 13 in Barecon 2001.

according to *Smith v. South Wales Switchgear Co Ltd* [1978] 1 WLR 165).

In addition, the provision of sub-clause 17(a), lines 566 to 568 in Barecon 2001, includes indemnity by the Charterer in case that the Vessel should be arrested or otherwise detained by reason of claims or liens arising out of her operation hereunder by the Charterer. In case of occurrence of such events, according to sub-clause 17(a), lines 568 to 571, the obligation of the Charterer is to take all reasonable steps, at his own expense, to secure that within a reasonable time the Vessel is released, including the provision of bail. This clause is necessary in order for the Charterer to take all reasonable steps when it comes to a Vessel that was arrested or otherwise detained by reason of claims or liens arising out of her operation by the Charterer. Also, this provision could be interpreted in a way that arrest and detainment which occurred after the expiration of the contract is a result of claims or liens during the Chartered Period. We consider that the provision should be interpreted in such a way that the Charterer in each of these cases takes all necessary measures to release the Vessel even though the Vessel was arrested or detained upon the expiration of the contractual relationship. Although, the Owner may argue that it does not seem fair for his Vessel to be arrested or detained after the bareboat charter is terminated, however, by applying the Indemnity Clause contained in a standard form contract the Owner will not be left without compensation.¹⁴

Additionally, sub-clause 17(a), lines 572 to 576, in Barecon 2001, provide that, without prejudice the Charterer agrees to indemnify the Owner against all consequences or liabilities arising from the Master, officers or agents signing Bills of Lading or other documents. Talking about the Bill of Lading, it has long been recognised that in the case of bareboat charter, the Bill of Lading binds the Charterer and not the Owner. The Owner of a bareboat chartered Vessel will not be liable either in the contract or damaged for the consequences of the signing of the Bill of Lading by the Master, and such indemnity is likely to be of little practical effect (DAVIS 2005:98). In the provisions of the

¹⁴ The Owner has the same obligation similar to the one of the Charterer. The obligation is prescribed by sub-clause 17(b), line 577 to 581 in Barecon 2001. More *infra* section 3.2.

sub-clause other documents that are signed are also discussed, and the Charterer has to take the consequence or obligation to indemnify the Owner. Other documents may include delivery orders or sea waybills or the documents arising from contracts of carriage which the Charterer concluded on the basis of the bareboat charter.¹⁵

As previously stated, the provision of sub-clause 17(a), lines 572 to 576 in Barecon 2001, were previously contained in the provisions of clause 21 titled *Bills of Lading*.¹⁶

3.2. Indemnity by the Owner to the Charterer

When signing a bareboat charter contract it is important to take care of the issue regarding the indemnity by the Owner to the Charterer. In that sense clause 17, that we have emphasized, also contains sub-clause 17(b) dealing with the issue of indemnity by the Owner. The sub-clause 17(b), lines 577 to 581, provide that in case if a Vessel was arrested or otherwise detained by reason of claims against the Owner, the Owner shall take all reasonable steps to secure that the Vessel is released, including the provision of bail. Accordingly, this provision incorporates reciprocal indemnities for the Owner to indemnify the Charterer against the consequences of arrest prescribed by sub-clause 17(a), lines 566 to 571 in Barecon 2001.¹⁷

Further, sub-clause 17(b), lines 582 to 586 in Barecon 2001, prescribe that the Owner shall indemnify the Charterer against any loss, damage or expense incurred by the Charterer, including hire paid under the bareboat charter, as a direct consequence of such arrest or detention. The quoted provision particularly emphasises the obligation of the Owner to indemnify the Charterer's hire paid for the Charter Period, in case of the described circumstances. The rest of the liabilities for the Owner are defined very broadly, providing an indemnity to protect the Charterer against any loss, damage, or expense arising out of arrest or detention for which the Owner is responsible.

¹⁵ Barecon 2001 contains a provision titled *Contracts of Carriage*. For details, see clause 23 in Barecon 2001.

¹⁶ Compare clause 21, lines 427 to 429 in Barecon 89.

¹⁷ See *supra* section 3.1.

Unlike Barecon 2001, the previous standard form did not contain provisions for indemnity by the Owner, but only indemnity by the Charterer to the Owner. In this sense, there is no doubt that Barecon 2001 means a shift in the regulation of this matter between the contracting parties.

4. INDEMNITY PROVISIONS IN BAREBOAT CHARTER OF THE CROATIAN MARITIME CODE

The seventh section of the Croatian Maritime Code contains provisions regarding contractual maritime law. The most extensive part of this section is chapter II which includes provisions regarding the sea going vessels employment contracts.

The provisions for Bareboat Charter are regulated by a few articles, from article 658 to 672. Application of the provisions contained in the Maritime Code is valid only when the contracting parties determine the relevant Croatian law.

Analysing the same provisions of the Maritime Code, we see that the legislator does not actively interfere in the relationship between the contracting parties. It is primarily left for themselves to resolve the issue. Lacking relevant provisions in this case, one should reach not only for the sources of maritime law, but also for the sources of civil law.

Within these provisions, we can single out a provision relating to the responsibilities of the Charterer, which is related to the issue of indemnity. In accordance with Article 661, Paragraph 4, of the Maritime Code, the Charterer will not bear the loss of the Vessel due to force majeure. What the Charterer must prove in this case is that the force majeure is the immediate cause for the loss of the Vessel. It is interesting how Barecon 2001 in its provisions does not mention this case regarding Charterer's rights.

5. CONCLUSIONS

Indemnity Clause in Barecon 2001 is designed to help and assist the contracting parties and to avoid contractual or any potential disputes. It is therefore formulated in a way to protect both parties. This type of protection is a process which

has developed over time. We have seen it while comparing solutions on compensation for the contracting parties which is contained in Barecon 89. Although they are similar in their content, some differences between these provisions do exist. Indemnity Clause in Barecon 2001 consolidates indemnity provisions which are mentioned before in clauses dealing with *Non-lien and Indemnity* and with *Bills of Lading* of Barecon 89 into one single clause. Analysing the Indemnity Clause, we have concluded that there are two levels of compensation. The same provisions should be monitored without neglecting the content of other provisions of Barecon 2001.

In a closer study of the first sub-clause, general information regarding the indemnity on terms is provided where the Charterer must indemnify the Owner against any loss, damage or expense. Meaning, the Owner of the Vessel has the right to be indemnified against any loss, damage or expense in any case which the Charterer caused by any event that might have occurred during the Charter Period. Also, the Charterer shall indemnify the Owner against any lien of whatsoever nature arising out of an event which occurred during the Charter Period. The indemnity defined in the indicated provisions of Barecon 2001 concurs with the overall scheme of bareboat charters. In case that the Vessel is arrested or otherwise detained because of claim reasons that were caused by the Charterer, the Charterer is obliged to take all reasonable steps to make sure that the Vessel is released, including the provision of bail. The Owner should be indemnified from all possible consequences or liabilities arising from the Master, officers or agents signing the Bills of Lading.

The second sub-clause, describes the indemnity given by the Owner to the Charterer. The Owner must take all possible steps to release the Vessel from the arrest in case that the Vessel is arrested because of a claim against the Owner. In a situation when the Vessel is detained by any reason including claims against the Owner, the Owner must act in a reasonable way and consider to take all steps to release the Vessel, especially taking into consideration the inclusion of the provision of bail. In such cases, the Charterer should be indemnified by the Owner against any loss, damage or expense. This sub-clause ensures or defines that the Owner is obliged to ensure that

the Charterer is financially sound, and that the Charterer will provide any kind of security in a financial way (e.g. a bank guarantee) for safe performance of their obligations for bareboat charter.

What we can safely conclude is that the provisions of the Indemnity Clause, contained in Barecon 2001 represent a clearer and stricter regime of compensation issues and regulations of the contracting parties in relation to the forms that preceded it. Although there are a few provisions of this legal problem, we think that some changes in the contents should be made. There is no doubt that Barecon 2001 means a realised shift of negotiating a compensation with the bareboat charter.

Considering possible future changes, the form should point out the amount of compensation as a suitable resolution, all for the purpose of better relations with the Bareboat Charter parties. Barecon 2001 contains no provision but just refers to the final part of the form which contains provisions regarding the settlement of disputes between the parties. When adopting a new form of contract, one should consider changing the contract with the provisions relating to the Vessel's arrest or detainment. It is necessary to determine whether the actions are related to the Charterer and if the Vessel's arrest or detainment is within the Charter Period or after the Charter Period has ended. There is no doubt that this is a reviewer's oversight.

Although the indemnification provision was not contained within the *Bareboat Charter* in our Maritime Code, it seems that it is not even necessary. The bareboat charter contract is the most important source of law for contractual relationships. The Maritime Code leaves the parties themselves to arrange all relevant issues relating to contracting. Only in the absence of indemnification provisions in the contract will other provisions of Maritime Code be applied, as well as the sources of civil law.

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