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**BẢO HIỂM ĐỒNG DANH VÀ QUYỀN THẾ QUYỀN TRONG HỢP ĐỒNG THUÊ TÀU:
PHÂN TÍCH ÁN LỆ THE OCEAN VICTORY VÀ NHỮNG HÀM Ý TỪ BARECON 2017**

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Tóm tắt

Nghiên cứu phân tích các vấn đề pháp lý xoay quanh cơ chế phân bổ rủi ro trong hợp đồng hàng hải, thông qua án lệ The Ocean Victory. Bằng phương pháp nghiên cứu án lệ, bài viết làm rõ cách Tòa án Tối cao Vương quốc Anh giải quyết mối quan hệ giữa nghĩa vụ bảo đảm cảng an toàn của bên thuê tàu và quyền thế quyền của người bảo hiểm trong bối cảnh bảo hiểm đồng danh. Tòa án xác định cảng vẫn được coi là an toàn do sự cố xuất phát từ hiện tượng thời tiết bất thường, qua đó loại trừ trách nhiệm của bên thuê tàu. Đồng thời, bảo hiểm đồng danh theo BARECON 89 được xem là cơ chế phân bổ rủi ro khép kín, ngăn cản người bảo hiểm thực hiện quyền thế quyền đối với các bên cùng được bảo hiểm. Từ đó, bài viết phân tích sự điều chỉnh trong BARECON 2017, tập trung vào bảo lưu quyền thế quyền như một nguyên tắc mặc định, thiết lập nghĩa vụ bảo đảm khả năng đi biển ở mức tuyệt đối, đồng thời thu hẹp phạm vi can thiệp của tòa án vào việc xác định cơ chế phân bổ rủi ro theo hợp đồng. Từ đó, nghiên cứu đưa ra các khuyến nghị cho các chủ thể tại Việt Nam nhằm hoàn thiện thiết kế hợp đồng và tăng cường quản trị rủi ro theo chuẩn mực quốc tế.

Từ khóa: Bảo hiểm đồng danh, BARECON 2017, phân bổ rủi ro, The Ocean Victory, thế quyền

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CO-INSURANCE AND THE RIGHT OF SUBROGATION IN CHARTERPARTY AGREEMENTS: THE OCEAN VICTORY CASE AND THE IMPLICATIONS OF BARECON 2017

Abstract

This report examines the sophistication regarding legal issues arising from the risk allocation mechanism in maritime contracts, characterized by a deep dive into the case of *The Ocean Victory*. Using a case study approach, the research explores how the UK Supreme Court addressed the tension between safe port warranties and an insurer's right to subrogation in the context of joint insurance. With reference to the findings, the UK Supreme Court determined that the port was safe due to the "abnormal occurrence" of the weather, granting the charterers free from liability. Furthermore, joint insurance in the BARECON 89 form functions as a "complete code", extinguishing the insurer's subrogation rights against co-insured parties. Building on this reasoning, the research evaluates transitions to BARECON 2017, focusing on the preservation of subrogation rights as a default, the introduction of absolute seaworthiness obligations, and the reduction of judicial intervention in contractual interpretation. From these insights, the paper provides strategic recommendations for Vietnamese stakeholders to improve contract design and risk management, highlighting the role of cross-industry working groups in aligning domestic practices with global standards.

Keywords: Joint insurance, BARECON 2017, risk allocation, subrogation, *The Ocean Victory*

1. Introduction

Although growing at a lower rate because of a prior contraction (UNCTAD, 2024), global maritime trade still remains the backbone of international cargo transportation, building a foundation to facilitate the expansion of the global marine insurance market, with a projected CAGR of 3.0% during 2025-2033 (IMARC Group, 2024). Though marine insurance acts as a great tool for cargo owners and shipowners to hedge risks, regular legal disputes often arise from the complex nature of insurance, often concerning: war risks, constructive total loss and policy exclusions in the primary case of *Delos Shipholding v. Allianz* (2024) and insurer liability in the case featuring *ARGOS PEREIRA ESPAÑA SL v ATHENIAN MARINE LTD* (2021).

Furthermore, the two other factors of joint insurance and subrogation also constitute common subjects of disputes, with the specific case of *The Ocean Victory* highlighting the sophisticated dynamic of these two aspects. The case emerged from the total loss of a Capesize carrier at the Port of Kashima due to a rare meteorological phenomenon, and sparked conflicts between the insurer's right to subrogation and the "joint insurance" provisions under the BARECON 89 form which extinguished liability between the co-insured parties.

The report aims to analyze the incident, arguments of parties involved and the Court's ruling, to subsequently delve into the case's substantial impact and draw lessons for specific stakeholders in Vietnam.

2. Theoretical framework

2.1. Marine insurance and marine insurance contract

2.1.1. Marine insurance

Marine insurance functions as a risk-allocation mechanism through which financial losses arising from fortuitous maritime events are transferred from the insured to the insurer in exchange for premiums (Bennett, 2018; Hodges, 2017).

Internationally, marine insurance is commonly divided into three principal categories: hull insurance, cargo insurance, and marine liability insurance (Pavliha, 2016). Among these, hull insurance plays a central role in protecting the vessel's economic value against perils of the sea such as sinking, collision, fire, and explosion (Soyer, B., & Tettenborn, 2020). This approach is reflected in Vietnamese law, where the 2015 Vietnam Maritime Code recognizes marine insurance as coverage for risks arising from maritime voyages and combined sea transport operations.

2.1.2. Marine insurance contracts

Pursuant to Article 303 of the 2015 Vietnam Maritime Code, a marine insurance contract is an agreement whereby the insured pays a premium and the insurer undertakes, in writing, to indemnify covered maritime losses in accordance with the agreed terms.

By its legal nature, a marine insurance contract is a contract of indemnity, under which the insurer is liable only for the actual loss suffered, so as to restore the insured's financial position and not to confer profit. Coverage is limited to fortuitous losses, while inevitable losses or losses intentionally caused by the insured are excluded.

Marine insurance contracts are further governed by the principle of utmost good faith, requiring full disclosure of all material facts relating to the risk, and by the requirement of insurable interest, whereby the insured must possess a legitimate financial interest in the subject matter both at contract formation and at the time of loss. Vietnamese law also recognises subrogation: upon payment of indemnity, the insurer may assume the insured's legal position to pursue recovery from any liable third party within the amount paid (Article 326, 2015 Vietnam Maritime Code).

2.2. Hull insurance

2.2.1. Definition and concept

Hull insurance is a primary branch of marine insurance designed to protect shipowners or parties with an insurable interest against physical loss or damage to the vessel's hull, machinery,

and equipment arising from maritime operations. In practice, hull insurance occupies a central position within the marine insurance system, as the vessel represents a high-value asset and serves as the fundamental platform for all commercial maritime activities.

2.2.2. Subject matter and scope of coverage

Hull insurance primarily covers the vessel's hull, machinery, and integral equipment, and is confined to physical loss of or damage to the ship. It does not extend to freight, operating expenses, or other economic interests, which must be insured under separate marine insurance policies.

The scope of insured risks is commonly defined by the Institute Time Clauses – Hulls (ITCH), covering perils of the sea, fire, explosion, grounding, collision, missing vessels, barratry, piracy, and similar maritime hazards (Institute Time Clauses – Hulls 1/10/83, cl.6; ITCH 1/11/95, cl.6).

Hull insurance typically excludes losses caused by unseaworthiness, willful misconduct or gross negligence of the insured, and extraordinary risks such as war, strikes, and nuclear hazards, unless expressly covered by additional clauses or endorsements (ITCH 1995, cl.26–27; Hodges & Hill, *Principles of Maritime Law*).

2.2.3. Total loss and partial loss

In hull insurance, losses are categorized into Actual Total Loss (ATL) and Constructive Total Loss (CTL). An actual total loss occurs when the vessel is completely destroyed or irretrievably lost. A constructive total loss exists when the costs of salvage and repair equal or exceed the vessel's value after repair, allowing the insured to declare notice of abandonment of the vessel and claim indemnity for a total loss (Marine Insurance Act 1906, ss.57–60).

In the case of partial loss, the insurer is obligated to indemnify the reasonable costs of repairing or replacing damaged parts, based on the principle of indemnity and within the limits of the sum insured. This distinction is critical in cases involving severe maritime casualties, where extensive structural damage and the disproportionate cost of recovery and repair may justify treating the vessel as a constructive total loss.

2.3. Safe port warranty

In charterparty agreements, particularly time and voyage charters, the safe port warranty is generally construed as an absolute obligation on the charterer. The charterer warrants that the nominated port is safe at the time of nomination, in the sense that the vessel can reach, use, and depart from it without exposure to dangers not avoidable by good navigation and seamanship, absent an abnormal occurrence. This definition originates from *The Eastern City* and remains the leading authority on safe port clauses (The Shipowners' Club, *Safe Ports*).

An abnormal occurrence denotes a rare and extraordinary event that is not inherent in the

normal characteristics of the port. Where loss results from such an event, the charterer is not in breach, as the risk cannot be treated as a characteristic attribute of the port or reasonably foreseeable (Law and Justice Review, Safe Port and Abnormal Occurrence).

Although Vietnamese law does not expressly define the safe port warranty, Articles 13 and 14 of the 2015 Vietnam Maritime Code embody the same concept by requiring vessels to be directed to safe and accessible berths. In particular, Article 13(2) obliges the carrier to place the vessel at a charterer-designated berth that is safe for arrival, remaining, and departure.

Accordingly, charterparties allocate port-safety risk to the charterer at the time of nomination (subject to abnormal occurrences), while the owner retains the right to refuse unsafe orders, a position consistently supported in international practice (The Shipowners' Club, Safe Ports).

2.4. Subrogation, joint insurance and limitation of liability in marine insurance

Subrogation is a core principle of indemnity insurance, under which the insurer, after indemnifying the insured, is entitled to assume the insured's legal position to recover from a liable third party within the amount paid, thereby preventing double recovery (Bennett, *The Law of Marine Insurance*, Oxford University Press).

Vietnamese law adopts this principle in Article 54 of the 2022 Law on Insurance Business. In marine insurance, subrogation commonly arises where vessel loss or damage results from a charterer's breach of contract or negligence, allowing the insurer to pursue the responsible party in the shipowner's name.

Maritime practice also employs joint insurance, whereby two or more parties are insured under the same policy in respect of the same subject matter and risk. In charterparty relationships, both owners and charterers often have insurable interests in the vessel, and joint insurance serves as a commercial mechanism to allocate risk to insurers and reduce inter-party disputes (Clarke, 2016; Bennett, 2006; BIMCO, 2017).

Joint insurance does not, however, automatically exclude subrogation. Subrogation is barred only where the parties' contractual intention clearly shows that insurance proceeds are to be the sole remedy between them; otherwise, underlying contractual liabilities may persist (Clarke et al., *The Law of Insurance Contracts*, Informa Law).

This dependence on wording is reflected in standard forms. BARECON 89 Clause 12 requires joint insurance but does not expressly exclude recovery or subrogation, whereas Clause 13 expressly bars owners and insurers from pursuing subrogated claims against the demise charterer for insured hull losses. BARECON 2017 likewise contains an express exclusion of such claims (BIMCO, BARECON 2017 Explanatory Notes).

Separate from insurance, limitation of liability allows a person liable for maritime claims

to cap financial exposure by reference to the vessel's tonnage under the LLMC 1976. Any subrogated claim remains subject to the same limitation rights available to the original defendant (Baatz et al., 2014). Accordingly, charterparty disputes involving marine insurance typically require a sequential analysis: (i) whether a breach exists; (ii) whether joint insurance affects recoverability; and (iii) whether limitation of liability applies.

3. Analysis of the incident

3.1. Incident overview

3.1.1. Related parties and contractual structure

The dispute arose from the total loss of the bulk carrier Ocean Victory at Kashima Port, Japan, in October 2006. The incident involved multiple contractual and insurance relationships:

- **The Claimant (Insurer):** Gard Marine & Energy Ltd ("Gard") was one of the vessel's hull insurers. After paying out the claim for the total loss of the vessel, Gard attempted to recover its losses from the time charterers through subrogation.
- **The Insureds (The "Co-Assureds"):** This joint insurance arrangement derived from Clause 12 of the Barecon 89 demise charter, which clearly stated that the hull policy be taken out "in the joint names of the Owners and the Charterers as their interests may appear". Consequently, the Supreme Court referred to the registered owners (Ocean Victory Maritime) and the demise charterers (Ocean Line Holdings) as "co-insureds" or "joint assureds".
- **The Defendants / Third Parties (Not insured under this policy)**
 - The time charterers: China National Chartering Co Ltd ("Sinochart").
 - The sub-time charterers: Daiichi Chuo Kisen Kaisha ("Daiichi").

3.1.2. The casualty at Kashima port

In September 2006, the sub-charterer, Daiichi, assigned the vessel to discharge 170,000 tons of iron ore at Kashima, Japan. The ship arrived in Kashima on October 20, 2006, and proceeded to the loading port. To reach the port, it had to pass through the Kashima Fairway. On October 24, 2006, the ship was trapped there due to the simultaneous occurrence of two adverse weather conditions, including long waves, which rendered it unsafe to remain at the berth and severe gales preventing safe departure.

In attempting to leave the port, the vessel lost control in the fairway, collided with the southern breakwater, dragged her anchors, and grounded. Consequently, the ship's structure was damaged and the vessel broke in two, resulting in a constructive total loss. The wreck removal operation was lengthy and costly.

Subsequently, Gard Marine & Energy Ltd ("Gard"), one of the hull insurance companies,

took the right from the shipowner and demise charterers to claim damages against the time charterers for breach of the undertaking to trade only between safe ports.

3.1.3. Insurance and subrogation claim.

The central controversy arose from Gard's attempt to exercise subrogation rights in the name of the owners against the Time Charterers and further down the charter chain, in circumstances where the demise charterer was a co-insured under the same policy. This required the Court to determine if an insurer could exercise rights of subrogation in the name of one co-insured against another co-insured.

3.2. Legal issues in dispute

The parties agreed upon three primary legal issues for determination by the Supreme Court:

- Was there a breach of the safe port undertaking? In particular: (1) Was the port unsafe within the meaning of the safe port undertaking, so that the charterers were in breach; or (2) Did the casualty result from an “abnormal occurrence”, so that there was no breach?
- If there was a breach, do the joint insurance provisions in Clause 12 of the Barecon 89 form preclude rights of subrogation of hull insurers and right of owners to recover insured losses from the demise charterer for breach of the safe port undertaking?
- If there was a breach, is Daiichi entitled to limit its liability for Gard's losses as against Sinochart (and Sinochart in turn against Gard) pursuant to section 185 and Schedule 7, Article 2(1) of the Merchant Shipping Act 1995?

3.3. Proceedings and judicial reasoning

3.3.1. Proceedings before the High Court

The claimant's arguments

In the High Court, the claimant argued that Kashima was prospectively unsafe due to inherent and characteristic risks. Specifically, long waves at the Raw Materials Quay forced the vessel to leave the berth, while severe northerly gales made the fairway dangerous for navigation. This risk was exacerbated by the port's lack of a system to manage vessel departures in adverse weather, including procedures to ensure departures “in good time” or to prevent ships from sailing in unsafe conditions. Moreover, the counsel argued that the port failed to conduct risk assessments to determine the limiting conditions for ships anchored (Gard Marine & Energy Ltd v China National Chartering Co Ltd & Ors [2013] EWHC 2199 (Comm), para. 93). Applying the classic definition of a safe port from *The Eastern City* [1958] 2 Lloyd's Rep 127 “must be able to reach, use, and return from it without being exposed to danger that cannot be avoided by good navigation and seamanship”, Gard submitted that the resulting danger could

not be avoided by good navigation and seamanship, particularly given the inadequacy of the port's warning and departure systems. ([2013] EWHC 2199 (Comm), paras 102-103).

Concerning the subrogation, Gard argued that Clause 12 of the BARECON charter contained no express exclusion of recovery or subrogation, contrasted with Clause 13 ([2013] EWHC 2199 (Comm), para. 181). The omission of similar wording in Clause 12 indicated that the parties did not intend to exclude liability or subrogation. Second, Gard further argued that there was an undoubted safe port warranty, breach of which gave rise to liability in damages, and that construing Clause 12 as barring recovery would render the safe port warranty in Additional Clause 29 commercially ineffective, particularly in cases of total loss. Third, they analyzed that insurance discharged the demise charterer's liability but did not extinguish it; accordingly, Gard was entitled to pursue the claim by way of subrogation to the owners' rights. ([2013] EWHC 2199 (Comm), para. 183).

The defendant's arguments

The Charterers argued that the port was in fact safe, as the vessel could have remained safely alongside the berth at the material time (Parton, 2014). Moreover, they argued that the legal standard for a safe port is "reasonable safety" rather than absolute protection from every possible hazard. In other words, the port was not unsafe because its systems failed to guard against every conceivable hazard, but only to take reasonable precautions ([2013] EWHC 2199 (Comm), paras 94-95). Furthermore, the defendant stressed that the combination of long waves and gale-force northerly winds was characterised as an abnormal and highly remote occurrence, rather than a characteristic risk of the port. No vessel had ever previously been trapped by this specific combination in the port's history ([2013] EWHC 2199 (Comm), para. 125). On this basis, it was unreasonable to criticise the port for failing to implement systems to address what they described as a "non-risk". Second, they contended that the casualty was caused by the master's negligent decision to leave the port and his navigation through the Kashima Fairway, which constituted the real and effective cause of the loss (Parton, 2014).

In opposition, the Defendants contended that Clause 12 constituted a "complete code" for the treatment of insured losses, under which the parties intended to look exclusively to the insurance fund for recovery ([2013] EWHC 2199 (Comm), para. 182). Second, they relied on the co-assured principle, arguing that an insurer cannot exercise subrogation rights against one co-insured in the name of another. Allowing such a claim would undermine the commercial purpose of joint insurance. Third, it would be "odd and uncommercial", contrary to *The Evia* (No. 2), for a charterer to pay insurance premiums for the joint benefit of both parties and yet remain exposed to claims by the owners' insurers for the very loss insured against ([2013] EWHC 2199 (Comm), para. 196).

High Court's reasoning and decision

Mr. Justice Teare ruled in favor of the Claimants (Gard), finding that the port of Kashima was prospectively unsafe for a vessel like the Ocean Victory and that this unsafety was the effective cause of the ship's loss. He rejected the argument that a port only needs to be "reasonably safe," stating that the warranty is for safety itself. The concurrence of "long waves" at the berth and northerly gales in the fairway was a prevailing characteristic of Kashima. Despite the rare combination, it was foreseeable and flowed from the port's attributes; therefore, it was not an "abnormal occurrence". The Court also found that the Master was not negligent in leaving the berth, as he acted on advice from the Charterers' local representative. Any shortcomings in navigation arose from the inherent dangers of the port and did not break the chain of causation. Accordingly, the unsafety of the port remained the real and effective cause of the loss, and the Charterers were in breach of the safe port warranty. Regarding joint insurance, the Court ruled that having joint insurance did not prevent the shipowner from claiming compensation from the charterer. The parties' proactive removal of Clause 13 demonstrated an intention to retain the right to claim compensation under Clause 12 ([2013] EWHC 2199 (Comm)).

3.3.2. Proceedings before the Court of Appeal

The claimant's arguments

Before the Court of Appeal, Gard maintained that the combination remained a characteristic risk of the port because each element was foreseeable from the port's history. An occurrence was not abnormal just because it was out of the ordinary when viewed against the entire history of the port (*Gard Marine & Energy Ltd v China National Chartering Co Ltd (Rev 1)* [2015] EWCA Civ 16, [2015] para. 45). Regarding subrogation, the Claimants persisted in arguing that the choice of clause 12 instead of clause 13 indicates an intention to preserve rights of recovery against the demise charterers for insured losses ([2015] EWCA Civ 16, para. 73). Therefore, after compensation and transfer of rights, Gard still has the right to claim from the time charterers based on the breach of the safe port guarantee.

The defendant's arguments

On appeal, the Respondents maintained these arguments and added that a holistic assessment was required rather than a separate evaluation of elements. The combination of the two weather events had apparently never occurred over 35 years and across 5,316 Capesize visits, which reinforced the conclusion that the combination was abnormal ([2015] EWCA Civ 16, paras 19, 44). Regarding insurance, they argued that Clause 12 reflected a mutual intention not to pursue claims for insured losses, even in cases of contractual breach, and that joint insurance was intended to replace litigation ([2015] EWCA Civ 16, para. 72).

Court of Appeal's reasoning and decision

The Court of Appeal unanimously overturned the High Court's decision, holding that the port of Kashima was prospectively safe and that an abnormal occurrence caused the casualty. The Court criticised Teare J's approach of considering each event separately and adopted a unitary approach, asking whether the simultaneous coincidence of the two critical features constituted an abnormal occurrence or a normal characteristic of the port. In this respect, the Court of Appeal criticised Teare J for neglecting significant factors such as the port's operational history, the frequency of the event, the degree of foreseeability, and the severity of the storm ([2015] EWCA Civ 16, paras 55-58). On the evidence, long waves occurred 2-3 times per year and were usually manageable, while northerly gales occurred infrequently and did not normally endanger berthed vessels. However, the combination was exceptionally rare, unprecedented in the port's operational history. The Court of Appeal found that the combination of these two features was an abnormal occurrence; therefore, there was no breach of the safe port obligation (Parton, 2015).

In addition, the Court concluded that even assuming a breach, the charterers would not be held legally liable as the shipowners had agreed to look to the insurance proceeds rather than the demise charterers for compensation. No legal obligation and recoverable loss remained capable of being passed down the contractual chain. This ruling recognized the complete "insurance-funded solution" for the insured losses under clause 12 ([2015] EWCA Civ 16, para. 89). Departing from the High Court's approach, the Court of Appeal held that the absence of Clause 13 did not imply that Clause 12 permitted litigation. The court viewed Clause 13 as a "reaffirmation" of the principle prohibiting subrogation in short-term contracts, which implicitly understood in long-term contracts. ([2015] EWCA Civ 16, para. 88).

3.3.3. Proceedings before the Supreme Court

The claimant's arguments

Gard argued that "abnormal occurrence" was not a "term of art" as viewed by the Court of Appeal, but merely a qualification to support the assessment of port safety. Specifically, an event is only "abnormal" if it does not result from the port's setup or characteristics. If a risk is foreseeable from the port's location and history, then it is characteristic, not abnormal (Gard Marine and Energy Ltd v China National Chartering Co Ltd & Anor [2017] UKSC 35, para. 14).

Regarding subrogation, Gard additionally argued that even if co-insurance prevented claims between owners and demise charterers, it should not bar claims against third-party time charterers, who were not parties to the joint insurance, and that excluding recovery would deprive the safe port warranty of meaningful commercial effect ([2017] UKSC 35, para. 99).

The third issue concerning the limit of liability under the 1976 LLMC was not thoroughly discussed until the Supreme Court. Article 1 of the Convention allows “shipowners”, including “shipowners, charterers, managers, operators”, and salvors, to limit their liability to a level based on the ship's tonnage. The aim is to protect against excessive claims with limited claims including “...loss or damage to property occurring on board or in direct connexion with the operation of the ship...” according to Article 2.1(a) ([2017] UKSC 35, para. 61). Gard countered the defendants’ application by contending that "property" in the Convention refers to third-party property or property on board not the vessel itself. Gard further argued that the ship could not simultaneously act as both the "perpetrator" causing the damage, which the object used to calculate the limit fund, and the "victim" receiving compensation ([2017] UKSC 35, para 80, 84).

The defendant’s arguments

The Charterers reinforced that an abnormal occurrence was one that was so rare and unexpected that a notional charterer would not have it in mind. They maintained that they only assume responsibility for risks that are sufficiently regular to be considered an attribute of the port. Furthermore, the Time Charterers emphasised that Clause 12 established a comprehensive and exclusive scheme for the allocation of risk, under which the parties were intended to look to insurance rather than fault-based claims. They further contended that, under the 1976 Convention, charterers were entitled to limit liability as “shipowners”, and that claims for loss of the vessel constituted claims for “loss or damage to property” within Article 2 ([2017] UKSC 35).

Supreme Court’s reasoning and decision

The Supreme Court unanimously held that Kashima was prospectively safe and there was no breach of the safe port warranty. Endorsing the unitary approach, the Court clarified that theoretical foreseeability did not equate to a normal characteristic. Since this specific combination of events was unprecedented in the port’s 35-year history, it was "unexpected" and "out of the ordinary” ([2017] UKSC 35).

For subrogation issues, by a majority of 3:2, the Court held that Clause 12 of the Barecon 89 form precluded any claim by the owners against the demise charterers. Clause 12 created a comprehensive scheme whereby parties look exclusively to insurance proceeds for recovery, avoiding litigation between co-insureds. Even without the express language of Clause 13, there was an implied understanding that no liability existed between the parties for insured total losses. Gard’s subrogated claim was therefore barred. Lords Clarke and Sumption dissented, arguing that the safe port warranty remained an independent obligation and that insurance only "satisfied" the debt rather than erasing the liability ([2017] UKSC 35).

Unanimously, the Court ruled that time charterers could not limit liability for the total loss under the 1976 Convention. Affirming the CMA Djakarta, “property” in Article 2.1(a) means third-party property, not the ship whose tonnage sets the limitation fund. The “victim” ship cannot also be the “perpetrator” for limitation purposes ([2017] UKSC 35, para. 84).

4. Implications & Recommendations

4.1. Implications of the BARECON 2017 amendments

One of the most significant conceptual shifts in BARECON 2017 is the restructuring of the insurance regime through the express preservation of subrogation rights under Clause 17, unless the parties agree otherwise (Abreo, 2017). This departs from the assumption, reflected in *Ocean Victory*, that joint insurance implies a mutual exclusion of liability. Under BARECON 2017, immunity from subrogated claims arises only by express agreement, rejecting insurance as a default “sole remedy” and preserving the enforceability of core contractual obligations, including the safe port warranty and the obligation of due care. Also, by re-establishing a direct link between fault and liability, the regime enhances contractual discipline and limits moral hazard in long-term bareboat chartering.

BARECON 2017 further strengthens contractual certainty by elevating the owner’s obligation of seaworthiness at delivery from one of due diligence to an absolute obligation (Abreo, 2017). Liability attaches whenever the vessel is unseaworthy at delivery, including latent defects, irrespective of the owner’s efforts. This establishes a clear baseline for risk allocation at the commencement of the charter, firmly attributing losses arising from the vessel’s initial condition to the owner and reducing the scope for cross-blame in complex casualty scenarios.

The amendments also constrain the scope for judicial intervention in ex post risk allocation. In *Ocean Victory*, uncertainty surrounding the interface between insurance and liability prompted courts to infer commercial intention and reconfigure the parties’ contractual bargain. By contrast, BARECON 2017 allocates risk through explicit contractual mechanisms, confining the judicial role largely to enforcement rather than interpretation. This promotes legal certainty and reduces litigation risk in long-term bareboat charter contracts.

Finally, BARECON 2017 also reflects BIMCO’s broader effort to recalibrate market expectations following *Ocean Victory*. Issues previously left to judicial construction, most notably the relationship between insurance and contractual liability, are reframed as matters of contractual design and risk pricing. Therefore, BARECON 2017 reduces reliance on the uncertain evolution of case law and reinforces contractual standardisation as the primary mechanism for stability and predictability in modern maritime transactions.

4.2. Recommendations for Vietnam

4.2.1. For Vietnamese legal practitioners

Vietnamese legal practitioners and contract drafters should prioritise the standardisation and clarification of contractual language governing core risk-allocation mechanisms at the drafting stage. The Ocean Victory case shows that major disputes often arise not from the absence of obligations but from indeterminate evaluative clauses, particularly the safe port warranty and related notions such as “abnormal occurrence” and “reasonable foreseeability”, which force courts to reconstruct commercial intention ex post.

This lesson is especially relevant in Vietnam, where maritime contracts often adopt international standard forms such as BIMCO or GENCON, typically governed by English law, while disputes may still be resolved by Vietnamese courts or arbitral tribunals applying domestic law. In a civil law system where binding precedent plays a limited role, unclear contractual definitions can create interpretative uncertainty and potential divergence from the common-law doctrines underlying these forms.

Accordingly, Vietnamese practitioners should shift legal risk management from ex post dispute resolution to ex ante contract design. This involves supplementing evaluative clauses with objective benchmarks or technical parameters, such as port infrastructure standards, meteorological thresholds, or navigational conditions relevant to Vietnamese ports. Practitioners should also clarify the interaction between insurance, subrogation rights, and contractual liability, expressly stating whether insurance functions as the exclusive remedy between the parties or whether underlying contractual liabilities remain enforceable, thereby avoiding conflicts with Vietnamese subrogation rules.

4.2.2. For Vietnamese enterprises

Vietnamese enterprises engaged in maritime transportation and logistics should adopt a more proactive approach to contractual risk allocation, particularly regarding joint insurance arrangements. The Ocean Victory litigation shows that joint insurance can significantly shape liability within a chartering chain, functioning either as a risk-pooling mechanism or as a limitation on inter-party claims, depending on the contractual wording.

From the perspective of Vietnamese law, this issue requires special attention because the legal framework only generally recognises subrogation rights. While Article 54 of the Law on Insurance Business 2022 (ThongTinChinhPhu, 2022) confirms the insurer’s right of subrogation after indemnification, neither this statute nor the Vietnam Maritime Code 2015 (LuatVietnam, 2017) provides detailed rules on the legal consequences of joint insurance arrangements comparable to those in international charterparty forms such as BARECON.

Consequently, when Vietnamese enterprises adopt international standard contracts, the

contractual allocation of liability may not fully align with Vietnam’s default subrogation regime. To mitigate this risk, charterparty agreements should explicitly clarify the relationship between insurance coverage and contractual liability, including whether insurers retain subrogation rights against charterers or other contracting parties. Clear drafting in this respect can reduce interpretative uncertainty and prevent disputes arising from inconsistencies between contractual practice and domestic legal principles.

4.2.3. For industry professionals

Industry professionals should integrate the lessons of *Ocean Victory* and BARECON 2017 into targeted training and professional development programmes, focusing on the interaction between contractual drafting, insurance arrangements, and liability allocation. Rather than treating these instruments as rigid templates, they should be framed as illustrations of evolving international best practice. This approach is particularly relevant in Vietnam, where contractual practice commonly reflects a hybrid of domestic mandatory rules and foreign standard forms (Hoàng, 2024). Also, collaborative initiatives involving maritime lawyers, insurers, and shipping companies could facilitate the development of best-practice guidelines for adapting international contract models to the Vietnamese legal environment, thereby reducing legal uncertainty and strengthening the resilience of Vietnam’s maritime commercial practice.

5. Conclusion

The *Ocean Victory* case constitutes an important milestone in the development of international maritime law, clarifying risk allocation in charterparties. The UK Supreme Court not only refined the scope of port safety obligations through its interpretation of “abnormal occurrence”, but also articulated a landmark precedent to joint insurance by treating it, under BARECON 89, as a “complete code”. This reflected a commercial preference for insurance proceeds as the primary mechanism for loss allocation, rather than prolonged litigation between jointly insured parties.

However, the case also exposed the limitations of a regime in which the boundary between insurance and contractual liability depended heavily on implied intention and judicial inference. The subsequent reforms embodied in BARECON 2017 mark a decisive shift towards explicit contractual design. By introducing express subrogation provisions and strengthening the seaworthiness regime, BARECON 2017 reduces ambiguity and enables parties to identify and manage liability *ex ante*. Clear contractual definition not only balances the interests of owners, charterers, and insurers, but also reduces the time and cost associated with post-casualty disputes.

In the Vietnamese context, the lessons of *Ocean Victory* underscore the need to enhance contractual management and risk assessment capabilities. While the Law on Insurance Business

2022 and the Vietnam Maritime Code 2015 continue to evolve, stakeholders should proactively standardise contractual language, specify technical parameters relating to port safety, and adapt international insurance mechanisms such as BIMCO forms with appropriate flexibility. Shifting the focus from litigation to rigorous contract design is essential not only for mitigating legal risk, but also for enabling Vietnamese enterprises to integrate sustainably into global logistics and shipping networks. Industry-specific training programmes and cross-sector working groups remain critical in aligning domestic practice with international maritime standards.

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