

**Charterers' P & I Insurance:
The Risks, the Exposures and the Products Available**

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In considering P& I issues, we often move directly to the numerous and varied risks borne by shipowners and operators in connection with maritime adventures. Claimants generally focus on the shipowner's coverage and ability to pay claims, but not a great deal of focus historically seems to have been placed on charterers' P & I coverage with respect to their own contemporaneous exposures. This paper looks at the risks different types of charterers face, highlighting a wide array of exposures, and then considers the type of insurance products available for charterers depending on the nature of their businesses.

I. Charterers' Risks

A charterer's exposure to liability may arise by virtue of its status as a bareboat charterer, time charterer or voyage charterer. We focus here on time and voyage charterers, as bareboat charterers maintain a unique status vis-à-vis the owners. Time and voyage charterers, however, interact with all parties to the marine adventure, and thus maintain the risk of liability exposure to owners/bareboat charterers, cargo interests and third parties, as well as expense for their own account, in variety of ways. They are not necessarily professional vessel operators, but may well be commodity traders moving their products around the world, or shippers for their own accounts. Their exposures include:

- Hull damage which may occur in any variety of ways but most often occurs in the event of a grounding by way of a breach of safe port warranty. Likewise, claims may involve payment for wreck removal;

- Loss of or damage to the vessel by virtue of negligent cargo handling;
 - Personal injuries to stevedores or other third parties on board, and for potentially indemnifying the owner for its own liability toward stevedores and others;
 - Bunker quality claims which may have a direct impact on risk to the vessel, with the potential for vessel damage, cleaning and bunker removal/disposal costs;
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- Pollution. The charterer may be held liable both under Federal and State laws in the United States for a cargo or bunker spill;
 - Liability to cargo owners either by way of loss of or damage to cargo. (Remember: most liner service carriers subject to COGSA are also vessel charterers);
 - Fines and related imposts due to customs violations or improperly documented or non-manifested cargo;
 - Salvage and General Average Liability. Charterers generally will be responsible for contribution in General Average with respect to bunkers on board and pending freight;
 - Exposures via operation/exercise of charter party provisions (eg., cancellation of voyage, detention and related issues);
 - Defense and other legal costs arising out of bill of lading and charter party disputes.

II. Examples of Charterers' Unexpected Exposure to Liability Which Require Competent Insurance to Allay

- In a case from the 1990s, the barge charterer purchased #2 fuel oil from Citgo in New Jersey. During loading aboard the Tank Barge CIBRO SAVANNAH, an explosion occurred due to the combined negligence of the barge operator and the terminal, who obviously were exposed to liability for a resulting spill into the Arthur Kill. However, under New Jersey law, as interpreted in State D.E.P. v. Arlington Warehouse, 203 N.J. Super. 9 (App. Div. 1985), anyone who is in any way responsible for a polluting

substance is strictly liable to the State for pollution remediation. That included the barge charterer who, although he never handled or moved the cargo, was subject to liability by virtue of title. The case ultimately was resolved but not without the expenditure of substantial defense costs. In the Matter of Montauk Oil Transportation Corp. as Owner of the Barge Cibro Savannah, 859 F.Supp. 669 (S.D.N.Y. 1994).

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- In American Steamship Owners Mutual Protection and Indemnity Association Inc. v. Lafarge North America, 2008 WL 4449353 (2008), the member was enrolled in the Club as an owner who also occasionally chartered barges. It was in fact, the user of the Barge ING 4727 which found its way from the member's terminal in New Orleans across the levee and into the Ninth Ward during Hurricane Katrina. Substantial damages were claimed against the member who sought cover from the Club on the basis that its entry as an owner provided for automatic extension of coverage to chartered barges in which the insured acquired an insurable interest.

The Club resisted based in part on the premise that the Barge was not scheduled with the Club, nor was it "chartered." As it developed, the trade in which the member operated also included the use of river barges, obtained from fleets operated by various owners in the Mississippi River, under "transportation agreements" by which it was not permitted to be considered a charterer or lessee of the vessel. ING 4727 was just such a barge. This case went to judgment, and the Court found in favor of the Club, saying the member was not a charterer, but was rather a bailee and terminal operator in connection with the Barge's breakaway from the terminal where it was moored when the storm arrived. The member thus was exposed to substantial uninsured liability because it had

not arranged for a special P&I coverage in the circumstances in which it operated and was forced to rely on its marine general liability policy, which had relatively low limits.

- In a very recent English case, the question of a charterer's exposure to liability for breach of a safe port warranty was brought to vivid focus in Gard Marine & Energy Ltd. v. China National Chartering Co. Ltd. (The "Ocean Victory") [2015] EWCA Civ. 15, reversing Gard Marine Energy Ltd. v. China National Chartering Co. Ltd. (The "Ocean Victory") [2013] EWHC 2199 (Comm). That case involved a bareboat charterer, time charterer and a sub-time charterer. The sub-time charter was a trip time charter, so not that different from a voyage charter in terms of liability exposure. Each charter had a safe port warranty, and the last charterer in the chain wound up being held liable in the High Court for \$137.7 million in damages to the vessel for breach of its safe port warranty, indemnifying the charterers above and the owner's hull insurer, when the vessel grounded upon leaving a port in Japan in somewhat freakish weather, which the charterer argued was not characteristic of the port.

The charterer's liability ultimately was reversed by the Court of Appeal who gave a clarifying interpretation with respect to the type of risk that could be called an "abnormal occurrence" and of wind and wave that would not be considered a characteristic of the port. However, the case is illustrative of the potential for enormous liability that might befall a charterer in an otherwise simple transaction.

- Loukas I, S.M.A. No. 4124 (2011), presents an interesting FD&D twist. The vessel was under an ExxonMobilVoy charter on a voyage from 1-2 safe ports South Korea to 1-3 safe ports Chile, carrying a cargo of fuel oil. The vessel had lost one of its two anchors while berthing to discharge the prior cargo in Korea, which was not disclosed to the

charterer. The missing anchor was of no moment until the vessel arrived to discharge in Chile, where the ports, exposed to windward seas, all require the use of both anchors during berthing. After the vessel was required to undergo repairs to install a replacement anchor before discharging the cargo, the owner claimed against the charterer for demurrage and detention, on the grounds that the charterer had failed to nominate a safe berth. The charterer defended on the grounds that the owner had breached the seaworthiness warranty. Although the case was not notable for its coverage issues, it eventually turned out that the same IG club was obligated to indemnify both the owner and the charterer for all legal costs associated with the arbitration. (The sole arbitrator found for the charterer).

- In Continental Grain Co. v. Fireman's Fund Ins. Co., 1997 WL 86392 (S.D.N.Y. 1997) the voyage sub-charterer submitted a claim under its charterer's legal liability policy covering "the legal and/or contractual liability of the Assured as Charterer (other than Bareboat Charterer) in respect of the vessel insured hereunder for any loss, damage and/or expense, including but not limited to demurrage and/or any other consequential loss or damage, resulting from any accident in which said vessel may be involved". The cargo was loaded before vermin was discovered, upon which the Master refused to issue clean bills of lading. The cargo was then unloaded for segregation and cleaning, which resulted in delays and ultimately the cancellation of the charter. The sub-voyage charterer sought to recover its legal expenses in defending the claims of its disponent owner. The court ultimately denied coverage on the grounds that the loading of the infested cargo and subsequent refusal of the Master to issue a clean bill of lading was not an accident within the meaning of the liability coverage. One has to ask whether the

same outcome would have been reached if the voyage charterer had been claiming under P&I cover rather than even its own manuscript CLL policy.

- In a current case that will have no reported name or citation, an owner and disponent owner seek to hold a voyage charterer liable for cleaning costs, delay and vessel repair costs due to the degradation of a cargo of styrene monomer which polymerized en route to the discharge port. This obviously could expose the voyage charterer to liability well in excess of value of the cargo.

III. Charterers' P&I Insurance Available Today

First, it should be noted that many charterers have marine general liability coverage which is often relatively limited in the amount of insurance available, as well as being limited as to scope of coverage available to an organization in the position of a charterer, particularly a voyage charterer, who may be least likely to consider its own P&I risk.

It is believed that until recent years the main P&I cover available to charterers was by way of "charterers' liability" insurance through the commercial market, as P& I Clubs rarely offered charterer-only coverage. Such insurance rarely included Freight, Demurrage and Defense (FD&D) and other specialized coverages that may be necessary to charterers.

However, that market has changed substantially in the last fifteen years. Currently, there are many products available to the charterer to cover its P&I and defense cost risks. In addition to market insurance, also available to charterers is always P&I Club membership, as all of the Clubs now offer P&I coverage at various levels, primarily on a fixed premium basis. In addition, there are many non-International Group organizations that cater to the specific needs of charterers, including RaetsMarine (the Raets Club), Charterers P&I Club and others who

generally offer P&I limits of \$500 million or more. These organizations are backed by major re-insurers such as Munich Re, Lloyd's and Amlin.

All of the Club and specialized facilities offer charterers FD&D cover, which still is not always available in the commercial market.

The question charterers need to ask is what type of product they should be working with given the type of trade in which they engage. However, it is generally said that the Clubs (including those who cater to charterers) provide a level of service and advice that market insurance does not always offer.

Finally, the charterers' specialists, such as Raets, differentiate themselves from the International Group (IG) market by contrasting the IG focus on owners with their own focus on charterers while providing Club-level services. They also stress that their coverage is more comprehensive than charterers' P&I coverage through the IG Clubs, where coverage usually is governed by Club rules which may exclude numerous liabilities that can be obtained only at additional cost (eg., hull damage, deviation, some transshipments and carriage at terms broader than Hague/Visby).

IV. Conclusion

The key factor is that, depending on the nature of one's chartering operations (whether many vessels are chartered and sub-chartered; whether many shipments are made on chartered vessels or whether the charterers are engaged in liner services), it is important to know which product is best for your line of business but most of all to be sure that all of your risks are covered by the selected facility.

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