

# The Charterer

FEBRUARY 2002



## Stability and Service Key to Success

By Christopher Else

“The operating environment for charterers is increasingly hostile. Legislation is constantly being introduced placing a greater burden on the charterers doorstep. Witness the EU response to the sinking of the tanker *Erika*”.

If this sentence sounds familiar it is because it featured in an article in the Lloyd’s List P&I supplement entitled *Aegean Sea was a wake-up call for charterers*.

No apologies are offered for the repetition since charterers have become increasingly anxious about the way liabilities are being heaped upon them and once imposed those liabilities are not going to go away. The number of high profile cases where charterers are condemned to pay crippling amounts are becoming almost an everyday occurrence. Dry cargo operators may feel they are immune to such events but of particular concern are cases where a dry cargo vessel is lost and the owner becomes insolvent or disappears leaving the charterer as the only solvent party to the venture to pick up the bill. Gone are the days when charterers’ P&I cover was almost an afterthought, simple and relatively inexpensive.



Christopher Else

With the increase in liabilities the need for special skills in the handling of claims against charterers are in great demand and the experienced team built up in the Club is of special value in advising on how to defeat and mitigate claims.

This is why charterers have been examining their P&I insurance arrangements more closely and are choosing the Charterers Club. It is the oldest operation of its kind working independently of the owners’ P&I clubs and is the leading facility dedicated to the interests of charterers. This independence obviates any possible conflict of interest which could arise if covered by a conventional club whose *raison d’etre* is to protect shipowners interests.

The decreased capacity in the market caused by recent events has inevitably pushed up rates throughout the insurance industry and P&I clubs are seeking increases on their basic rates of around thirty percent; a trend which is almost certainly set to continue. But because of prudent and selective underwriting during the soft market cycle The Charterers Club has been able to create the conditions to offer a competitive and stable alternative to the International Group. This has resulted in an unprecedented number of enquiries and the amount of business already bound to date exceeds last year’s figure by two million dollars.

The Charterers Club’s continued aim is to remain the pre-eminent provider of tailor-made cover and service to charterers at a competitive price.■

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# Chartered Claims for Trading Losses

By Paul Dickie and Zoe Osborne

A question of fundamental importance to a charterer is whether he can recover from a shipowner all his losses arising from the owner's failure to perform the charter. Such losses may include market losses if, for example, cargo cannot be delivered by a particular time and a distress sale fails to compensate a charterer who either trades in the goods or is liable to the buyer or seller of the goods.

Damages arising under charter party contracts are generally subject to the same rules as for any other contract. The aim of damages for breach of contract is to put the claimant into the position he would have been in if the contract had been performed. This aim is subject to certain restrictions – the most important being that damages cannot be recovered for loss that is too remote and where the damage was not reasonably within contemplation of the parties at the time the contract was concluded.

In *British Columbia Saw Mill Co v Nettleship* (1868) L.R. 3 C.P. 499, the shipowner contracted to carry several cases of machinery by sea. The machinery was to be erected as a sawmill. On the arrival of the ship, it was found that one of the cases was missing. This resulted in the trader having to replace the missing part. The part took a year to be replaced. The trader's claim for a year's loss of profit was disallowed on the basis that although the defendant knew what the cases contained, the defendant did not know that the mill could not be erected without the missing part or that the part would take a year to replace. Indeed, the judgments indicate a very strict approach in favour of the carrier by suggesting that even if the shipowners

had been fully aware of the contents and the replacement procedure, they still would not have been liable.

Several cases have supported the view expressed in *Nettleship*. Asquith L.J., in delivering his judgement in *Victoria Laundry v Newman* [1949] 2 K.B. 528 CA, said that the courts are not readily prepared to imply liability for loss against a carrier of goods, as opposed to a seller of goods.

The rationale is as follows:



Paul Dickie

“It must be remembered when dealing with the case of a carrier of goods by land, sea or air, he is not carrying on the same trade as the consignor of goods and his knowledge of the practices and exigencies of the other's trade may be limited and less than between buyer and seller of goods who probably know far more about one another's business”. Lord Upton in *Czarnikow v Koufos* [1969] 1 AC 350.

In *Montevideo Gas Co v Clan Line* [1921] 37 T.L.R. 866 C.A, the plaintiff successfully claimed something akin to profits. The defendants contracted with the plaintiffs to carry and deliver a quantity of gas coal which they knew the plaintiffs urgently required. They wrongly delivered a smaller quantity of steam coal which the plaintiffs used. There was no market in which they could buy coal gas. The plaintiffs successfully claimed that they had lost in the manufacture of gas by the use of the inferior steam coal and also by the short delivery.

Whilst the modern view of the court remains that a carrier is less likely to be held liable for such losses, it does not mean that damages can never be recovered. Indeed, Robert Goff J. in *The Pegase* [1981] 1 Lloyd's Rep said:

“there appears to be no rule of policy excluding, or restricting, the recovery of such damages; everything depends on the circumstances of the case.”

In giving his judgment in *Montevideo*, Roche J. said that the defendants were

## No Substitute for Arresting Experience in Spain

**By Ignacio de Ros**

liable for the plaintiffs' loss as the defendants knew that the gas coal was urgently required, that gas coal was probably not easily obtainable, and that steam coal would not be an adequate substitute. Roche J. agreed with the contention of the plaintiffs that the contemplation of the parties is more rigidly applied to carriers than to sellers as 'a natural result of the fact that the carrier is supposed to know less about the commodity he carries and to undertake less responsibility in connection with it', but pointed out that:

“in truth distinctions between the liability of a carrier and a seller depend on matters of fact and not of law”.

The cases demonstrate that a charterer's ability to recover trading losses will depend on the particular circumstances. If the loss is sustained as a result of general market factors of which a shipowner may be expected to be aware, then these losses are more likely to be recoverable. If, on the other hand, the loss relates to a peculiarity of the charterer or, of his business, of which the ship owner is unaware, the claim for losses may be more difficult to pursue.

What can charterers practically do to protect themselves against having irrecoverable losses following a breach of charter? The answer is, if possible, to ask the owner to give specific warranties. For example regarding delivery times, whether of the vessel at the commencement of the charter or of the cargo itself, particularly if loss will be incurred if a delivery window is missed. Such warranties may of course have to be paid for in extra hire or freight. Charterers may in addition seek via brokers to emphasise to owners the importance of the vessel's performance to their own trade or market, and might also obtain via questionnaires from the owners (which might form part of the charter) written information as to the vessel's performance and trading history. This may assist later in evidencing that particular types of loss were indeed foreseeable by owners, making recovery more likely. ■

Each year, more than 75,000 vessels pass through the Gibraltar Straits. All have to give traffic control notice of their intention to enter or exit the Mediterranean. Many stop at Algeciras, Ceuta or other ports for bunkers. The combined effect of this volume of traffic, and the relative ease with which vessels can be arrested in Spain (a mere allegation of a maritime claim is sufficient), requires charterers and owners alike to be familiar with Spanish procedure, in order that they can minimise the effect of an arrest.

As far as charterers are concerned, the main risk is that a party alleging a claim can arrest the bunkers on board a vessel. The effect of this can be catastrophic. Charterers will have to continue paying hire, and may face cargo claims and/or an indemnity claim by owners.

The rules governing the arrest procedure in Spain have recently been overhauled. Under the old procedural law, parties seeking to oppose an arrest would face a wait of at least six weeks for a decision, as the whole procedure was carried out through written submissions. The new law, which came into force in January 2001, aims to reduce the length of this procedure to one month. However, owners and charterers will still incur substantial losses if a vessel is paralysed for that amount of time.

There are also new procedures for more urgent hearings, but it is still unlikely that either charterers or owners will be able to obtain a court order lifting an arrest within an acceptable time-frame, since urgent hearings may not always be available, if indeed at all.

To obtain an arrest order, it is necessary to post counter-security. It is, however, very rare indeed for damages for wrongful

arrest to be awarded. Even if they are awarded, they will most likely be limited to the loss of profits of the vessel in the five days following the arrest. This is on the grounds that the owners or charterers will have an obligation to mitigate their loss by posting security within this period.

Therefore, if bunkers on board a vessel are arrested, the safest option for charterers, even under the new procedural law, will be to post security, but to try to do this without prejudice to their ability to argue that the arrest was wrongful, if they think they might have grounds for such a claim.

A vessel may also be arrested in respect of claims that have nothing to do with the charterer. This is particularly the case in Spain because, in order to arrest an associated vessel, it is only necessary to show that the two owning companies are managed from the same premises. In such circumstances, charterers should be able to declare the vessel off-hire, but will still suffer loss of profits and may face cargo claims. They should therefore be ready to help owners provide security and/or dispute the arrest. The security required to lift the arrest is usually in the form of a bank guarantee, or a guarantee from an insurance company. A club letter of undertaking will need the acceptance of the arresting party.

If respondents to an arrest application wish to appear in court, they will have to arrange to provide a power of attorney to the lawyer who is going to represent them. Often, the master of the vessel will seek to appear to oppose the arrest proceedings.

The concept of the master being the *alter ego* of the shipowner is, however, unknown in the Spanish Commercial Code. Therefore, attempting to enter an appearance through the master is a waste of time and money.

While ship arrest procedures in Spain contain pitfalls for charterers, they also provide charterers with excellent opportunities to obtain security for any claims arising out of the charter when the vessel giving rise to the claim – or an associated vessel – calls at a port in Spain. Such vessels can be tracked relatively easily and an arrest order obtained.

A primary concern for applicants is the amount of counter-security they will have to put up in order to obtain an arrest order. While this should, in theory, be limited to losses in the five-day period following the arrest order, different courts can apply different criteria. Lawyers experienced in ship arrest can minimise the effects of these regional differences by relying on experience and using precedents in order to persuade judges to order a lower amount of counter-security than would normally be required.

In short, minimising the risk and maximising the opportunities of arrest in Spain depends on a thorough grounding in the procedure. While the new Civil Procedural Laws may introduce some changes, and may even produce some unpredictable results, experience of previous cases and knowledge of precedents is still likely to be of overriding importance in both obtaining and opposing arrest orders. ■

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## The Charterer Newsletter

The next issue will be distributed in September 2002. If you wish to contribute to the next edition then please contact the Managers, Michael Else and Company Limited at the following address:

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