



THE CHARTERERS  
P&I CLUB

# THE CHARTERER

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## Stability is The Key To Success

It is pleasing to note that the progress referred to in the previous issue of *The Charterer* has continued to gather pace. There has been a marked increase in the number of clients over the past twelve months and the Club is now insuring the interests of some 6,000 vessels annually.

The Club remains the largest dedicated underwriter serving the specialist insurance needs of Charterers. Michael Else and Company has an evergreen management contract with the capital provider, Limit at Lloyd's, which offers our clients first class security and stability. Limit is one of the largest operations at Lloyd's and is an excellent capital partner. In these turbulent times counterparty risk is a critical factor. The Club's S&P rating of A+ and its track record in this specialised sector provide our chartering clients with true peace of mind.

For many years there were underwriters who took the view that Charterers Liability was a very low risk. How wrong they were and what a price some of them have paid. The simple truth is that Charterers come in all shapes, sizes and colours of the rainbow and, like a fingerprint, each one is unique. This individuality makes it a challenging, but rewarding, class of business to underwrite. The differ-

ence in risk between two chartering operations can be extreme and it is the job of skilled underwriters to accurately assess this exposure and price it accordingly.

Thankfully non-specialist underwriters have finally woken up to the fact that the "one size fits all" approach is hopelessly inadequate. This, coupled with the general perception that the entire class is a soft risk, had led many underwriters to generate significant losses. Unfortunately, but somewhat predictably, the reaction is often to discontinue writing the class, whilst those that remain are analysing their mistakes and becoming far more selective and forensic in their approach to underwriting.

Throughout this period the Charterers P&I Club has been consistent in its approach and has used its expertise and specialisation within the sector to ensure positive results and to provide its clients with stability of cover and pricing.

Recent years have seen an increasing spotlight on the Charterer as a responsible party within the transport chain. New rider clauses have been drafted that shift more and more responsibility onto the charterer, a good example being the BIMCO stowaway clause. In certain trades, completely new charterparties have been drafted that place much greater responsibility onto the charterer. The Bovertime Charterparty recognises the fact that liner operators chartering in tonnage will still be regarded by their customers as the carrier. The provisions of Bovertime are onerous as far as the Charterer is concerned; however, Bovertime is a logical and balanced contract that more truly reflects the commercial reality.

The dynamics of the changing nature of charterers risk are recognised by the Club. In order to keep pace with developments we represent the interest of Charterers on BIMCO documentary committees. Furthermore, we are constantly fine tuning our cover and operational practices to cater for the ever changing needs of our clients.

Governments are increasingly focusing on the role that Charterers can play in restricting the supply of sub-standard ship-

ping. It has been a long held view that Charterers withholding custom from sub-standard ships can have a dramatic effect. Nowhere is this more evident than in the overall success of the individual vessel vetting programmes implemented by many tanker charterers post "E Exxon Valdez". Some maritime jurisdictions are starting to take this argument one stage further and investigating the possibility of holding the Charterer responsible for chartering sub-standard or unsafe ships. As if all this was not enough there have been two recent landmark decisions that may effectively prohibit a Charterer from exercising the same rights to limitation of liability as the vessel owner, a sobering thought.

Across the P&I Industry rates are set to rise significantly and many commentators consider that rates in this sector will remain firm until at least the end of 2005. In such an environment a specialist such as the Charterers P&I Club can be a real safe haven.



"The Club now insures  
6,000 vessels annually"

CHRISTOPHER ELSE  
MICHAEL ELSE & COMPANY

# Identity of Carrier Clause

**Where there is a conflict between what appears on the face of a Bill of Lading and any clauses on the reverse, who is the carrier?**

## Overriding Principals in relation to Identity of Carrier

- It is a matter of construction of the Bill of Lading rather than the Charterparty which will determine identity of carrier (although the terms of the relevant Charterparty may assist this determination)
- The Master of a vessel will generally be the servant and/or agent of the Owner and therefore have either actual or ostensible authority to bind the Owner. This being the case the signature of a Master on a Bill will normally indicate that the contract contained in the Bill is a contract with the Owner. This general principle will be overridden in circumstances where the Bill makes it clear that notwithstanding the signature of the Master the document is not to be considered as a contract with the Owner, or where some intervening Act removes the actual and/or ostensible authority of the Master.

There are five main areas to consider in any particular matter:

### 1. SIGNATURE BY THE MASTER

The Master will have the right to bind the shipowner so that his signature on a Bill of Lading renders it an Owners Bill (Sandemann -v- Scurr (1866) LR 2 QB 86). In that case the Master's signature bound the Owner even though the Bill had been prepared by Charterers agents, signed in their office, and as between Owner and Charterer it could have been argued that the Master had authority to sign the Bill "on behalf of the Charterer only".

Accordingly, even where a Charterparty provides that the Master will sign as agent for the Charterers this will not necessarily protect the Owner against an innocent shipper without notice. Such a provision will not negate the Master's apparent authority to bind the Owner by signing on their behalf.

The only exception is where it can be shown that the shipper actually knew that the Master had no authority to bind the Owner, or where there is a specific incor-

poration in the Bill of Lading of the Charterparty provision which makes it clear that the Master is signing on Charterers behalf. Such an incorporation would have to be explicit. For example the standard clause 8 of an NYPE Charterparty will not be sufficient, although such a clause will have the effect that time Charterers are given actual authority to issue and sign Bills of Lading on behalf of the Owner .

### 2. SIGNATURE BY OTHERS

The Bill may be signed by the Charterer or agent of the Charterer, normally "on behalf of the Master", "on behalf of the Charterer" or "on behalf of the Carrier".

Does signature by the Charterer bind the Owner? Only where it can be established that the Charterer or agent had authority to sign on behalf of the Master will the Bill of Lading be an "Owners Bill".

The REWIA [1991] 2 Lloyds Rep 325 and subsequent decisions showed a preference by the Courts to find that a Bill of Lading was an Owners Bill unless there was wording which made it clear that the Bill should be a

Charterparty  
Identity of Carrier  
and Demise Clauses  
may be of no  
legal effect

Charterers Bill.

Essentially, ambiguities were often resolved in favour of the Charterer so that the party bound by the Bill of Lading contract will be the Owner. In The REWIA this was the case even though the Bill was issued on a sub-charterers form which carried the name and identity of their agents as part of the printed form. However the House of Lords decision in The STARSIN [2003] UK HL 12 places doubt as to whether this is still the position.

Charterers authority is not derived from apparent authority (as may be the case for the Master) but rather from actual authority often found in the provisions of the Bill of Lading or in the underlying Charterparty.

### 3. TERMS OF THE BILL OF LADING

Previously even when the identity of the carrier seemed clear from the face of the Bill of Lading could be rebutted by a contrary provision such as an "Identity of Carrier Clause".

# uses and Bills of Lading

Identity of Carrier and Demise Clauses have been upheld even where the Bill of Lading was on Charterers form and signed by Charterers agent.

In the INES [1995] 2 Lloyd's Report 144, a signature which would, in the absence of contra-indications have given the Bill of Lading the character of a Charterers Bill was displaced by the fact that the Bill contained a Demise Clause. Similarly in the FLECHA [1999] 1 Lloyds Report 612, Bills of Lading signed by agents of the Charterer "as agents for the Charterer as carrier" and other words to the same effect were overridden by an Identity of Carrier and Demise Clause which indicated that the shipowner was the carrier.

This has now all changed due to the decision of the House of Lords in the STARSIN, which overruled the previous Court of Appeal decision and further stated that the decision reached in the FLECHA was wrong. A Bill of Lading on a form, signed by Port Agents as Agents of Charterers, was held to be a Charterer's Bill notwithstanding the presence of both an Identity of Carrier Clause and a Demise Clause which pointed to the Owner as Carrier.

The decision has been welcomed by those who criticised the earlier Court of Appeal decision as being contrary to commercial reality. The House of Lords have accordingly made a ruling which supports the overall intention of UCP 500 that those who are involved in commercial transactions should be allowed to rely upon clear indications on the face of documentation.

Interestingly, shortly before the Court of Appeal decision in the STARSIN High Court held in the HECTOR that a Bill of Lading which on its face seemed to identify the sub-charterer as carrier and which had been signed by an agent of the sub-charterer on behalf of the Master was a Charterer's Bill.

The Court of Appeal distinguished this decision (Rix LJ dissenting - he had been the High Court Judge in the HECTOR). The House of Lords ruling therefore breathes new life into the HECTOR.

The decision brings England and Wales in line with the Courts in other European jurisdictions and the US who

generally look more broadly at the face of the Bill of Lading and do not as enthusiastically uphold Identity of Carrier/Demise Clauses.

## 4. THE TERMS OF THE CHARTERPARTY

The question of whether a Bill of Lading is an Owners or Charterers Bill is determined by construction of the Bill rather than construction of the Charterparty.

However, there may be occasions where Charterparty terms will be relevant especially where there is a specific incorporation of a particular term within the Bill of Lading. Similarly standard form provisions such as those of Clause 8 of a NYPE Form Charterparty have been

considered when identifying the carrier for the purposes of Bill of Lading Contracts. The rationale behind this being that the terms of the Charterparty may be the sole source of actual authority.

## 5. EXTRANEOUS CIRCUMSTANCES

The Court may also look beyond the immediate contracts to establish the commercial reality of the situation, for example, the Charterers conduct. Where a

well known liner service chartered in tonnage to supplement its own fleet so that its regular customers did not realise there was any difference between particular ships that now utilised Bills of Lading issued on the usual liner form, it was held that the Bills were Charterers Bills of Lading (Patterson Zochonis -v- Elder Dempster [1922] 12 Lloyd's Reports 69).

Finally, the Courts will consider extraneous matters for the purpose of determining authority (both actual and ostensible). Such authority can be overridden where there has been some act in detriment of that authority, for example, a Charterer will not have actual authority to issue a fraudulent Bill of Lading (e.g. backdating a bill).



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