

# **CHARTERER'S LIABILITY INSURANCE**

A TYPE OF P&I INSURANCE

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Semester of submission: Spring 2007

Deadline for submission: September 1, 2007

Date of submission: 28 August 2007

Number of words: 15810

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# 1 Introduction

## 1.1 What is charterer's liability insurance?

The "charterer's liability insurance" is a type of marine insurance. According to English Marine Insurance Act 1906, s. 1, "A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure".

Most ships are chartered either on a time charter or voyage charter contract. In both cases the charterer assumes liabilities towards the shipowner because of damage caused to the ship in the course of cargo-handling or because of damage resulting from an unsafe port or berth. And also, the charterer becomes liable similarly to the shipowner, with P&I liability to cargo, pollution claims and etc. All charterers require cover for both damage to hull and other P&I liabilities. The so-called "charterer's liability insurance" provides coverage for such risks.

While it is quite easy to understand the charterer's liability for damage to hull according to the charter parties, one may have some difficulty to grasp what P&I liability is. "P&I" stands for "Protection and Indemnity" which is a type of insurance in respect of third party liabilities and expenses arising from owning ships or operating ships as principals.<sup>1</sup> The risks typically covered by P&I insurer (so-called P&I Association or P&I Clubs)<sup>2</sup> are described in more detail under Insurance Cover,<sup>3</sup> like liabilities in respect of crew, liabilities in respect of passengers, collision with other ships, pollution and salvage etc.

## 1.2 Charter parties suitable to charterer's liability insurance

The situation today is that a considerable number of vessels are engaged under charterparties and a lot of members of the international P&I clubs are charterers.

There are three main types of charter parties.

First of all, it is bareboat charter (demise charter). In this type of charterparty, the charterer takes over the unmanned ship from the owner and thus controls its operations and commercial activities. Here we can call the charterer "the owner pro tempore"<sup>4</sup> so we do not discuss it in this paper.

The voyage charter is probably the most popular one in today's ship-chartering market and the voyage charterer can be the assured of charterer's liability insurance. Under this charter party, the shipowner or his agent undertakes to convey certain cargo from the port of loading to the port of discharge (or ports of discharge). It should be noted here that the captain and crew are subordinate to the owner, and therefore the charter has no authority to command the ship. We can see that the voyage charter is similar to a "contract of affreightment"<sup>5</sup> for the contemplated

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<sup>1</sup> UK club home page, [www.ukpandi.com](http://www.ukpandi.com)

<sup>2</sup> Page 532 Scandinavian Maritime Law, 2<sup>nd</sup> ed. – Thor Falkanger, Hans Jacob Bull, Lasse Brautaset

<sup>3</sup> UK club home page, [www.ukpandi.com](http://www.ukpandi.com)

<sup>4</sup> Page 435 Scandinavian Maritime Law, 2<sup>nd</sup> ed. – Thor Falkanger, Hans Jacob Bull, Lasse Brautaset

<sup>5</sup> See page 4 Charterer's Liability Insurance - Schwampe

voyage. In this connection, the voyage charter includes two basic parties. One party undertakes to carry some goods from port of loading to port of discharge by ship in return for remuneration, the sum of which should be decided according to quantity of goods carried. The other party undertakes to deliver the goods to the ship and pay the agreed sum of fee, namely “freight”.<sup>6</sup>

Time charterer is the other type of assured for our topic. In time charter, the vessel’s capacity is chartered out for a certain period to a time charterer. The vessel should according to the charter party carry out voyages commanded by the charterer. The charterer has to pay the expenses for each voyage and to pay hire to the owner according to the length of time-period during which the vessel is under the charterer’s control.<sup>7</sup>

To sum up, the charters suitable to our topic are voyage charter and time charter parties which both have been performed for a long period of time based on the framework of charter contracts (charter parties).

### 1.3 Why did I choose this topic?

I choose charterer’s liability insurance as the topic mostly because of the fast development of chartering ships in the market and the large number of disputes arising thereof. According to China Sea-Transport Market Research Report 2006-2007, 80% ships serving the Chinese transport-market is chartered. During my research, I found that there might be disputes arising out of the charter party, most of which is in relation to the damage to ships and general average after the casualties. The disputes become a major problem facing the charterer if he does not have a charterer’s liability insurance policy or he did not rightly enter such a policy. Moreover, the disputes may hinder the development of shipping market.

In international P&I associations like Sculd and Gard, quite a number of vessels are entered on the basis of charterer’s entry.

To better understand this particular type of insurance and to discover certain practical problems about it, I will discuss sub-topics in the following chapters: Legal Sources (chapter 2), Charterer’s Risks (chapter 3), Overview of Charterer’s Liability Insurance Policy (chapter 4), Liability Cover (chapter 5), General Average Cover (chapter 6), Legal Expenses Cover (chapter 7) and Exclusions and Limitations of Coverage (chapter 8). For this mission, this thesis will adopt the comparative method by comparing the legislation and P&I Association rules of China, Norway and England, and by referring to different charter parties, different charterer’s liability insurance policies and several cases.

## 2 Legal Sources

### 2.1 Statutes

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<sup>6</sup> Page 345 Scandinavian Maritime Law, 2<sup>nd</sup> ed. – Thor Falkanger, Hans Jacob Bull, Lasse Brautaset

<sup>7</sup> Page 393 Scandinavian Maritime Law, 2<sup>nd</sup> ed. – Thor Falkanger, Hans Jacob Bull, Lasse Brautaset

### 2.1.1 China

The legal sources for charterer's liability insurance hierarchically come from mandatory laws such as Chinese Maritime Code (CMC), Contract Law of China, Civil Law Principle of China, and one non-mandatory regulation: Chinese Maritime Arbitration Commission Rule (CMACR).

The first resource I would explain is Chinese Maritime Code. Chapter 12 (from article 216 to article 256) which is entitled as "marine insurance" contains most of the rules in relation to Charterer's Liability Insurance.

If CMC does not have provisions applicable to certain issues, we should look at Contract Law of China, since "insurance" can be regarded as a special type of contract. Furthermore, if there is even in Contract Law of China no rule that can be used, Civil Law Principle of China kicks in.

Chinese Maritime Arbitration Commission Rule (CMACR) is not mandatory and is applicable whenever it has been chosen as governing law of the contract by the parties.

### 2.1.2 Norway and England

In Norway, the statute to deal with charterer's liability can be found in Norwegian Maritime Code (NMC, mandatory). Insurance Contract Act of 1989 (ICA) is not to be used in this thesis, because it is primarily non-mandatory<sup>8</sup> in relation to marine insurance.

In England Charterer's liability insurance should be ruled by Marine Insurance Act 1906 (MIA, mandatory) which specifies perils insured, insurable interest, insurable value and mutual insurance etc.

## 2.2 Contractual sources

### 2.2.1 P&I rules

The most important and biggest Chinese P&I association is China Shipowners Mutual Assurance Association, namely China P&I Club or "CPI". Therefore I will refer to CPI rules when I deal with issues in relation to charterer's liability insurance in China.

In Norway, the specific regulations about charterer's liability insurance can be found in Gard rules and Skuld rules. It states in Gard rule 3 that "application for a ship may be made by any owner, operator, charterer (including a bareboat or demise charterer) or other insurer of that ship, and the entry shall be on the basis of either an owner's entry or a charterer's entry", which confirms the application of this club's

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<sup>8</sup> Page 477 Scandinavian Maritime Law, 2<sup>nd</sup> ed. – Thor Falkanger, Hans Jacob Bull, Lasse Brautaset; ICA § 1-3 second paragraph letters (c) and (e).

rules when a charter entered the club. Similarly in Skuld, a charterer can be a member in the association if his ship becomes an entered vessel and the association shall issue a certificate of entry according to 1.1.3 of Skuld rules.

In England, the P&I rules I should firstly refer to is West of England P&I Association. It specifies the cover of charterer's liability insurance in detail in Rule 3 (B). And also I will use Lloyd's rules as supplement. Then I will make reference to London Steam-Ship Owner's Mutual Insurance Association Ltd. F.D. & D. rules in relation to legal expenses covered by charterer's liability policy.

Lloyd polices and Zurich Australian Insurance Limited policy for charterer's liability insurance may frequently be referred to when discussing the policy clauses.

### 2.2.2 Charter parties

The charter party forms are quite uniformed in the maritime transport field. The voyage charter I will refer to in the following chapters are Gencon 1976, Gencon 1994, Tankervoy 87 and SHELLVOY 5, and Baltime 1939, Produce 1946 (NYPE 46) and NYPE 93 are to be used for reference as to the time charter.

## 3 Charterer's Risks

Charterers may face risks from the "safe-port/berth clause" in the charter contract, damage to the vessel during loading and discharge, damage caused by the cargo, General Average and salvage liability and legal expenses etc.

### 3.1 Risk from "safe-port clause"

Some charter party, so-called "port charter" or "berth charter"<sup>9</sup>, typically permits the charterer to order the chartered vessel to a particular port or berth for loading or discharging. However, most charter parties also normally state in their clauses "the vessel should always enter, lie, and depart safely afloat" at port/berth. The charterer who nominates a port is to carry warranty that the chartered ship should call to port or berth without being subject to the risk of physical damage, unless this is modified by wording due to any other reasons or causes. If the vessel is damaged by some unsafe situation which the owner should not have reasonably known about, the charterer can be held liable for the loss of harm.

In China, the Chinese Maritime Code gives very clear description about the liability. It reads in article 134 (time charter) Chapter 6 as follows:

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<sup>9</sup> See page 361 Scandinavian Maritime Law, 2<sup>nd</sup> ed. – Thor Falkanger, Hans Jacob Bull, Lasse Brautaset

“The charterer shall guarantee that the ship shall be employed in the agreed maritime transport between the safe ports or places within the trading area agreed upon.

If the charterer acts against the provisions of the preceding paragraph, the shipowner is entitled to cancel the charter and claim any losses resulting therefrom.”

The first paragraph describes the charterer’s duty to run the ship to a safe port or place (berth), in order not to make the ship damaged. The rule codifies the so-called “safe port clause”, so that each party of the charter must obey it no matter if this is included in the charter contract. The second paragraph established a basic principle that the charterer are determined to be liability for the damage of the ship if it has been ordered to a unsafe port and the loss was incurred therein. It is a typical “strict liability” established for charterer in that the act of being employed in a unsafe port can be regarded the only precondition of bearing the liability if there is cause-effect relationship between the act and the damage, without consideration of other contributing factor such as bad weather, contingency, and Force Majeure etc.

### 3.2 Liability for damage to the ship during loading and discharging

In loading, the charterer is generally responsible for delivery of the cargo alongside the ship, and then the staff of the shipowner takes over. In discharging, the charterer is supposed to deal with the goods with the help of captain and crew. During delivery, the charterer may incur liabilities by his or his agents’ activities (for instance, the stevedore’s work). The liability could be from damage to onboard loading device, damage to the deck by dropping cargo from the tackle, or to the hull by knocking. According to the laws of different countries, the liability will be apportioned differently.

### 3.3 Liability for damage caused by the cargo

If the charterer brings illegal or dangerous cargo on board the ship, it may cause losses to the ship owner. Therefore, the ship owner would hold the charterer liable.

The main rule about time charter is in Chinese Maritime Code article 135 “the charterer shall guarantee that the ship shall be employed to carry the lawful merchandise agreed...to carry live animals or dangerous goods, a prior consent of the shipowner is required”. For voyage charter, it is said in article 100 CMC that: “the charterer shall provide the agreed goods, but he may replace the goods with the consent of the shipowner. However, if the goods replaced are detrimental to the interests of the shipowner, the shipowner shall be entitled to reject such goods and cancel the charter. Where the shipowner has suffered losses as a result of the failure of the charterer in providing the agreed goods, the charterer shall be liable for compensation”. The two rules seem quite similar in the requirement for lawful, agreed

and safe goods and they are not difficult to understand. The difference is article 135 is enforceable only when there is no agreed clause in the contract can be used according to article 127 CMC, while article 100 is mandatory.

### 3.4 Obligation to pay general average contributions

The charterer may often be subject to liability to pay General Average cost due to the bunkers taken on board and to freight to be collected. Internationalized charter parties always have General Average clauses for charterers. One may see such descriptions in clause 25 NYPE 93 (time charter), clause 12 Gencon 1994 (voyage charter) and clause 36 Shellvoy 5 (voyage charter especially for tanker).

The generally used regulation is York-Antwerp Rules 2004. Many countries like Norway<sup>10</sup> have accepted the rule as part of the statute, but some countries like China use their own rules unless otherwise agreed<sup>11</sup>.

### 3.5 Legal expenses

Once the charterer is claimed against for damages because of the aforesaid risks, he may in defense actions suffer legal expenses like cost of legal proceedings, hire of lawyers and experts, and expenses of collecting evidence etc.

## 4 Overview of Charterer's Liability Insurance Policy

Normally, charterer's liability insurance includes contents like: introduction of the policy, risks covered, principal risks excluded, limit of liability, premium, claim settling, period, proposer's (the charterer's) details, chartered ships details, charterer party contracts, choice of law details and duty of disclosure. Coverage is an issue which can be divided into three parts: "(1) the loss is the consequence of an insured risk or risks, (2) there is a sufficient nexus between the insured risk and the loss which has occurred, and (3) recovery is not subject to exclusion"<sup>12</sup>. Since it is very important to establish the scope of cover when the parties conclude an insurance contract, the main parts to be discussed in the following chapters are coverage of the policy: liability cover, general average cover and legal expenses cover.

In each following chapter, this mission should be accomplished firstly by a

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<sup>10</sup> § 461 Norwegian Maritime Code says: unless otherwise agreed, allowance in general average of damages, losses and expenses and the apportionment thereof shall be governed by the York-Antwerp Rules 1994. If the York-Antwerp rules 1994 are amended, the King can decide that the amended rules shall apply. The rules shall be published by the King in their English wording and in a Norwegian Translation.

<sup>11</sup> According to article 203 Chapter 10 Chinese Maritime Code

<sup>12</sup> See page 257 Marine Insurance: Law and Practice- F.D. ROSE

discussion of the P&I rules and policy clauses to define the cover, after which the relevant charter contract clause should be explained since the charterer's liability insurance policy always demand a full text charter contract to be attached as a part of the policy. Then I will discuss the underlining liability incurred by charterer to explain the cover furthermore, possibly making reference to the statutes of China, Norway and England. In the meanwhile, I will touch on the exclusions of the coverage.

## 5 Liability Cover

In the sub-chapters, I will respectively start with some common issues of the covers for charterer's liability from safe-port clause (5.1), liability for damage from loading and discharging (5.2) and liability for damage caused by cargo (5.3). Then I will go to charter parties and some statutes.

### 5.1 Cover for liability from the "safe-port clause"

#### 5.1.1 Interpretation of this cover

Among the aforesaid covered risks, liability for damage to the chartered vessel which has entered the clubs ranks as the first rate importance to the policy. Normally the P&I rules and charterer's P&I policies only have imprecise formulation<sup>13</sup> like "material damage to the chartered vessels for which the assured is responsible" as insured. The detailed description about the cover would be decided in a separate agreement attached to the policy, such as the cover for liability from the "safe-port clause".

As already described in Chapter 3, the charterer may incur liability from a so-called "safe-port warranty" incorporated in the charter party. To avoid a situation of paying the damages to the shipowner, the charter would conclude with his liability insurer a clause in the policy to cover the damages claimed by the ship owner for damage to the ship because of the charterer's ordering the ship to an unsafe port.

Policies describe the cover for this risk in different ways. As a rule, they are described in that the liability of the charterer for damage to the ship is said to be insured.<sup>14</sup> For example, rule 3 (B) (2) West of London P&I Association states that "liability as charterer to pay freight, charter hire, demurrage or damages to the owner or disponent

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<sup>13</sup> See page 25 Charterer's Liability Insurance - Schwampe

<sup>14</sup> See page 25 Charterer's Liability Insurance - Schwampe

owner of the insured vessel as a result of loss of or damage to the vessel for which the Member is responsible, but to the extent (and no more) that cover would otherwise be excluded by virtue of Rule 16(i) to (ix) and Proviso (a)(i) to Rule 2, Section 10". And also, Zurich Australian Insurance Limited describe in its charterer's liability policy that "for vessels not entered in a P & I club for charterers' risks these liabilities may include damage to the chartered vessel". These two examples are both too vague for deciding the cover for safe-port warranty. In practice, the policies require the charterer to attach a full copy of the charter contract to the policy, for instance, by wording "type of charter party wording (including riders thereto) and please attach a full copy is stated in the policy"<sup>15</sup>. By this way, the charter party with "safe-port clause" becomes one part of the insurance policy and the cover for damage to the vessel from "safe-port warranty" is consequently decided.

Since the charter parties should be normally attached to the insurance policy, we look at the charter parties with "safe-port clause" as below.

The time charter NYPE 93 states in clause 12 that "the vessel shall be loaded and discharged in any safe dock or at any safe berth or safe place that charterers or their agents may direct, provided the vessel can safely enter, lie and depart always afloat at any time of tide." Another time charter BALTIME 1939 describes in Clause 2 "vessel to be employed in lawful trades for the carriage of lawful merchandise only between good and safe ports or places where she can safely lie always afloat..." Further more, in clause 15- Excluded Ports, it says "the vessel not to be ordered to nor bound to enter: a) any place where fever or epidemics are prevalent or to which the master, officers and crew by law are not bound to follow the vessel". If the parties entered into these time charter parties, the "safe-port clause" is extremely important, because this type of charter typically grants the charterer with the authority to decide the destination port during the time chartered. In case of the vessel calling at an unsafe port with the effect of suffering damage, the shipowner can, therefore under the charter party and relevant laws hold the charterer liable. The charterer's liability insurance may also kick in at this stage and compensate the loss covered.

The voyage charter party Gencon charter 1994 provided a room for the parties to describe exact characters of the loading and discharging ports (Part I box 10 and 11), with the second paragraph of clause 1 laying out that "the vessel shall as soon as her prior commitments have been completed, proceed to the loading port(s) or place(s) stated in Box 10 or so near thereto as she may safely get and lie safely always afloat,... or so near thereto as she may safely get and lie always afloat, and there deliver the cargo". The voyage charterer is also only allowed to order the ship to safe ports so that the ship is prevented from suffering damage at an unsafe port. The legal consequence of a breach of warranty is the claim for compensation from the ship owner. The charter can also claim for cover against his P&I insurer.

### 5.1.2 Legal basis of liability of the charterer in relation to safe-port clause

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<sup>15</sup> Charterer's Liability Policy of Zurich Australian Insurance Limited

The scope of the cover in charterer's liability insurance is affected by the scope of liability suffered by the charterer. The scope of liability of the charterer is regulated by the statutes of different countries. Therefore, I will briefly discuss the problem from the practical view in the following sub-paragraphs to make sure what liability the charterer should bear respectively according to legal systems of China, Norway and England in case of violating safe-port clause.

#### 5.1.2.1 Chinese law

The liability for the charter in relation to "safe-port clause" is established in Chinese Maritime Code. In article 101 chapter 4, it describes in relation to voyage charter that "where the charterer did not instruct in time as to the chosen ports of discharge, as agreed in the charter, and the shipowner suffered losses thereby, the charterer shall be liable for compensation". It looks quite vague, because the expression only specifies the liability of the charterer when he does not timely nominate the safe port from the chosen ports according to the charterer. Positively, we can also comprehend this as a situation where the charter did not order the ship to a safe one, so that the captain wrongly chose a unsafe one, and the losses suffered as a result of which should be carried by the charterer according to the common principle of diligent/industrious performance of contract.

As for time charter, the Maritime Code gives very clear description about the liability in article 134 Chapter 6<sup>16</sup>, which has been present in 3.1.

What if the parties agree that the charterer should not be held liable if the vessel was ordered into an unsafe port and suffered damage from the un-safety, possibly considering the Hull underwriter offers to undertake the recovery of the loss? Since no case law and legal literature can be fell back on, let us look at another basic code, the Contract Law of China, to solve this problem. Article 52 (5) Contract Law decides: A contract shall be null and void if it is violating the compulsory provisions of the laws and administrative regulations. The Maritime Code is one of the basic laws of P.R. China, so any contract of its terms which go against it should be unlawful in the territory of China. Then the answer to our question should be that such an exemption clause is void.

#### 5.1.2.2 Norway

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<sup>16</sup> "The charterer shall guarantee that the ship shall be employed in the agreed maritime transport between the safe ports or places within the trading area agreed upon. If the charterer acts against the provisions of the preceding paragraph, the shipowner is entitled to cancel the charter and claim any losses resulting therefrom."

Historically, the charterer is not subject to strict liability as a general rule in Norway in case of violating safe-port clause. With time going, the situation changed. Norwegian Maritime Code (NMC) 1994 imposes stringent liability in § 328 second paragraph for voyage charter and in § 385 second paragraph, where it reads as follows:

“If the voyage charterer has ordered the ship to an unsafe port, the voyage charterer shall be liable for any damage caused to the ship thereby, unless the damage is not caused by the personal fault or neglect of the voyage charterer or that of anyone for whom the voyage charterer is responsible.”

In general, the charterer will try to avoid his liability when the damage to the ship happens. He therefore bears the burden of proving that the owner has known well enough the port is unsafe when the charterer’s nominated the port or when the port turns to be unsafe. This practice is followed from the legislative history of Norwegian Maritime Code upon chartering. According to § 322 which lays out the rules for “Freedom of Contract”, the charter contracts can have clauses different from regulations of Chapter 14, if the parties agree on them. As a result, the shipowner and the charterer can avoid the rule of “safe-port clause” by wording in the charter party. This is different from China.

#### 5.1.2.3 England

In England the charterer is also not subject to strict guarantee liability. The disputes about violation of the clause should be solved mainly in accordance with the charter contract, which is quite different from that of China and Norway. The conditions for such a claim is breaching the charter party and a causal relationship between the damage and breaching of the contract.<sup>17</sup> Limitations can be made due to remoteness of damage, either in the shape of the interruption of the causal process by a newly occurring cause – known as “novus actus interveniens” – or by the fact that the damage incurred is not sufficiently close to a breach of contract.<sup>18</sup>

#### 5.1.3 Situation of “non-safety” in the port

After a description of the statutes that ban charterers’ ordering the vessel to the un-safety port, one may still be not sure what “non-safety” is. The causes of the “non-safety” can be rough weather conditions, political risks, lack of required services, and unexpected emergencies etc. I will discuss first two main causes as follows:

##### 5.1.3.1 Rough weather conditions

The harsh weathers can affect the safety of a port. Typhoon/hurricane is kind of strange Tropical Cyclone that cause un-safety to all ships. In the recent years, the number and seriousness of typhoon are growing significantly. In 2005, the Atlantic typhoon destructively hit most places of U.S. and Mexico, which were Katrina, Rita

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<sup>17</sup> See page 28 Charterer’s Liability Insurance - Schwampe

<sup>18</sup> See page 28 Charterer’s Liability Insurance – Schwampe; McGregor, para.178; Cheshire/Fifoot, p.537

and Wilma. Wherever they went by, the ports and the ships in them would suffer great damage from influence of the gale. Therefore it is not safe to call at ports of the aforesaid region during June to December when the typhoon is extremely active. Another one to be considered is the effects of ice which would be serious in some northern ports. The damage may be caused to the hull and machinery due to collision with ice block or being confined by the ice sheet. Further more, strong sand-storms, heavy snow, acid rain and etc may also cause ship damage.

Therefore, some universalized charter parties have clauses to ban calling to a port with rough weather conditions. In clause 17 Gencon 1976, it states two situations about ice clause. Firstly, it is in port of loading.<sup>19</sup> Secondly, it is the port of discharge.<sup>20</sup> If, under this ice clause, the vessel has been harmed by the ice due to the negligence of a voyage charterer, for example, he did not inform the captain about the situation as he should have and the owner held him liable, then the charter might fall back on his charterer's liability insurance provided that this situation was not excluded from the coverage of the policy.

As for time charter, NYPE 93 states in clause 33 that the vessel shall not be required to enter or remain in any icebound port or area, nor any port or area where lights or lightships haven or are about to be with drawn by reason of ice, nor where there is risk that in the ordinary course of things the vessel will not be able on account of ice to safely enter and remain in the port or area or to get out after having completed loading or discharging. One of the differences between this and that of Gencon 1976 is that there is no exception of spring in this one, so that the charterer may suffer less liability than under Gencon. NYPE 93 charterer's liability insurer will not cover liability of the charterer because of ice that causes to the ship in spring.

The causation issues between the weather and safety is clear, considering the common sense and legal practice. The weather sometimes can be predicable but sometimes it cannot. If the bad weather suddenly comes and it is deemed to be totally unforeseeable, is the port to be considered safe or not? The answer should be "yes", because it will be decided by most of the national courts that such disaster belongs to "force majeure" which is commonly listed as a reason for exemption from liability both for tort and contract. What if there is casualty by a combination of unforeseen weather influence and predictability of the un-safety of the port? The common solution is the charterer is liable for his part of the loss according to the influence of his nomination upon the occurrence. Therefore, the loss can also be partly recovered by liability insurance in accordance with the portion of the liability imposed on the

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<sup>19</sup> (a) In the event of the loading port being inaccessible by reason of ice when vessel is ready to proceed from her last port or at any time during the voyage or on vessel's arrival or in case frost sets in after vessel's arrival, the captain for fear of being frozen in is at liberty to leave without cargo, and this charter shall be null and void. (b) if during loading the captain, for fear of vessel being frozen in, deems it advisable to leave, he has liberty to do so with what cargo he has on board and to proceed to any other port or ports with option of completing cargo for owner's benefit for any port or ports including port of discharge... (c) in case of more than one loading port, and if one of more of the ports are closed by ice, the captain or owners to be at liberty either to load the part cargo at the open port and fill up elsewhere for their own account... (d) this ice clause is not applicable in the spring.

<sup>20</sup> (a) Should ice, except in the spring, prevent vessel from reaching port of discharge receivers shall have the option of keeping vessel waiting until the re-opening of navigation and pay in demurrage, or of ordering the vessel to a safe and immediately accessible port where she can safely discharge without risk of detention by ice... (b) if during discharge the captain for fear of vessel being frozen in deems it advisable to leave, he has liberty to do so with what cargo he has on board and to proceed to the nearest accessible port where she can safely discharge.

charterer.

If the safe port turns to be unsafe when the ship is mooring in the port, the charterer normally bears the duty to order the ship out of it, if the captain or the shipowner does not know the fact. If the ship owner or his representative has the knowledge and try to run the ship out of there, but it is impossible to leave just because of crowding or the changing of weather too fast, the ship owner should be subject to the risk.<sup>21</sup>

Undoubtedly, the shipowner and his captain should know the weather with the assistance of modern technology so that the general view is the charterer can expect the master to have the usual ability to rightly assess the weather situation. If the captain does not figure out correctly, the shipowner cannot refer to “safe-port clause”, unless the charterer has better knowledge with better high-tech weather-prediction devices. Therefore, when deciding whether to compensate the liability, the charterer’s liability insurer should also take into consideration who has better knowledge about the situation.

#### 5.1.3.2 Political risks

The ship may also be under risks in a port for political incidents. They are war and strikes risks, like terrorism, political motive and malicious acts, detention etc. The method of such action may include normal weapons, helicopter or even nuclear, radioactive contamination, chemical, biological, bio-chemical and electromagnetic weapons. This may mean normal war situations in the port where the ship is destructed or damaged by actions of war, and also it maybe a situation in which the port is to be regarded as unsafe for the chartered ship because the war actions have already happened repeatedly in a recent period over there. A more sophisticated case is that after the ship had called at the port where the war broke out and where no war and war-like action has ever happened before. The question whether it should be regarded as an un-safe port should be dealt with according to the extent to which the charterer can anticipate the war actions at time when he ordered the vessel to the port. The ability of the charterer to anticipate should be valued by the discretion of the shipowner, the insurer if the charterer has liability insurance and the judge if there are disputes in the evaluation.

In England, the issue of “political risks” in relation to safe-port clause is described more clearly in the charter parties and charterer’s liability insurance policies. One can find this in (g) (6) (B) rule 3(specially for charterer’s liability) West of London P&I Association that the insurance covers “loss, damage or expense caused by a terrorist or any person acting from a political motive” and “in the event of an entered vessel sailing for, deviating towards, or being within the Territorial Waters of any countries or places described in the Excluded Areas as the Association may from time to time notify (including any port area that at the date of this notice constitutes part of such a country or place howsoever it may hereafter be described), additional premium shall be paid at the discretion of the Club’s Managers”. From wording thereof we can get the view that the liability of charterer who ordered the vessel to a port with “political risks” is to be covered in this

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<sup>21</sup> See page 33-34 Charterer’s Liability Insurance - Schwampe

Association only if certain procedure is carried out like notice to the Association in advance and payment of addition premium by the charterer.

The bellow is an English case as for capture-like situation “Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia)”<sup>22</sup>:

A chartered their vessel to Ron a time-charter in the Baltime form dated November 12, 1979, for 18 months, two months more or less at the charterer's option. cl.2 provided that the vessel was to be "employed . . . only between good and safe ports and places." cl.21 (A) provided that the vessel "unless the consent of the owners be first obtained [was] not to be ordered nor continue to any place . . . which will bring her within a zone which is dangerous as a result of any war." cl.21 (B) provided that "should the vessel approach . . . such zone . . . the owners [were] to be entitled to insure the vessel . . . the charterers to make a refund to owners of the premium on demand . . . line to be paid for all time lost including any lost owing to the action of the crew in refusing to be exposed to such risks." In March 1980 the charterers ordered the vessel to load a cargo in Cuba for carriage to Basra in Iraq; she sailed with this cargo on May 28, 1980. The vessel completed discharge on September 22, 1980, but was not able to sail because of the hostilities which had by then broken out between Iraq and Iran. The umpire found, inter alia, the following facts: border clashes between the two countries first occurred in June 1980 principally north-east of Baghdad; by mid-September the conflict had spread south; by September 20, 1980, it was clear that the Shatt-al-Aral waterway might be a casus belli, there were clashes along it on September 21, 1980, on September 22, 1980 both countries stated they were at war with each other; between September 26, 1980, and October 3, 1980, activity in the immediate vicinity of the vessel slackened; on October 1, 1980, most of the crew were repatriated leaving a skeleton crew abroad; thereafter the vessel remained trapped in the waterway. The owners appealed against the umpire's award.

Judge, Robert Goff, J., held, that (1) cl.21 of the charterparty did not exclude frustration; (2) the charterparty was frustrated on October 4, 1980; (3) the frustration was self-induced by reason of the charterer's breach of the safe-port provision in cl.2 of the charterparty; (4) the charterers were therefore liable for the additional war-risk premiums and hire claimed by owners.

The charterer in this case violated safe-port warranty and suffered liability from “political risk” in the port. According to (g) (6) (B) rule 3 West of London P&I Association, the charterer’s liability insurer should covered the loss of damage to the chartered vessel, if the shipowner claim against the charterer for compensation.

Differently, Gard rule 58 denies this coverage. It describes in the first paragraph that the association shall not cover under a P&I entry liabilities, losses, costs or expenses when the loss or damage, injury, illness or death or other accident in respect of which such liabilities arise or such losses, costs or expenses are incurred by (a) war and war-like events. And in case of any dispute as to whether or not an act constitutes a war, the association shall in its absolute discretion determine that dispute and this decision shall be final. (b) capture, seizure, arrest, restraint or detainment etc (in the relevant literature, “seizure” is defined sometimes as a loss with consideration of the purpose of the action, length of the time and the

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<sup>22</sup> 1980 WL 148757 (QBD (Comm Ct)), [1981] 2 Lloyd's Rep. 613, [1981] Com. L.R. 243

possibility of return) (c) mines, torpedoes, bombs, rockets etc. Therefore there would be no coverage for charterer's liability incurred from "political risks" according to "safe port clause" in this association.

To sum up, political risk as a type of P&I- covered risk can be treated by different ways. In England some procedure should be done like notice to the association and additional premium, and in Norway it normally cannot be effected.

#### 5.1.3.3 The time of "non-safety"

After discussion the causes of unsafety of a port, we move to another important factor that may affect the scope of cover of charterer's liability insurance: when can a port be considered as unsafe or when does the P&I insurer begin to cover the charterer's liability from "safe-port clause"? From the purpose of the "safe-port clause", we can derive that the charter should warrant choosing a proper port during a proper period of time to keep the ship in safety. If the charter broke the warranty and ordered the vessel to an unsafe port, there would be three points we can choose for the beginning of "unsafe", namely: when the charter ordered the ship to the port, when the ship arrived the port and when the ship is mooring in the port.

There would be no doubt for the charterer to be liable, if he nominate the port when it is unsafe. The problematic is what if the port was safe when he nominated it but became unsafe when the ship arrived.

Article 134 Chinese Maritime Code establishes: "the charterer shall guarantee that the ship shall be employed in the agreed maritime transport between the safe ports or places within the trading area agreed upon". From the wording, it shows that the work for the charterer to do is to make the ship in a safe condition when it is used, but not just to make sure the destination port is safe at the time of warranty without considering the situation afterwards. And also it has been established as a basic principle that "the parties of the contract shall perform their obligations thoroughly according to the terms of the contract; the parties shall abide by the principle of good faith and perform the obligations of notice, assistance and maintaining confidentiality, etc. based on the character and purpose of the contract or the transaction practices" according to article 60 Contract Law of China. The first sentence means that the parties of the contract should always keep the goal of the contract in mind, and do anything he could to achieve it. For the charterer, he must try to avoid the ship calling to an unsafe port at any time in order that the charter party will not be frustrated. The second sentence contains a series of principles, good faith, timely notice, assistance and confidentiality. Then the charterer shall notice the captain or the shipowner what he knows about the port when the situation changes. In a nutshell, the charterer should still bear the liability if the safe port changed to be unsafe after his nomination in accordance with Chinese law. This is the understanding of timing for "safe-port clause" in China: the time of unsafe can be "from the point the charter nominates the port to the point the ship leaves the port". If the charterer deviates the principle established in the aforesaid clauses and runs the ship to a port that becomes unsafe after the nomination, the P&I insurer should accordingly cover the charterer's liability incurred during the whole period from the point they conclude the aimed port

to the point the vessel leaves the port, according to the aforesaid laws.

The main rule in Norway is §328<sup>23</sup> and § 385<sup>24</sup> NMC, where the adverse burden of proof is set for the charterer that he or his representatives must prove they are not negligent for the damage to the chartered ship, otherwise the charterer is liable for the damage from the unsafe port. What we have here is the charterer must be negligent if he has already foreseen or should have foreseen the port is unsafe and still he insisted on running to ship to there according to the tort law principle. Then our answer is if the port becomes unsafe between the point of time of nomination and the time of arrival, with the knowledge of this the charterer is liable for the damage because of the nomination.

This idea is also some times accepted in U.K. The reason is that, “although the warranty is initiated at the moment of nomination, it is nevertheless effective at the time of use. A violation of the warranty can therefore exist if the port becomes unsafe at any time between nomination and use. Only when there are ‘abnormal occurrences’ is the charterer free of liability.”<sup>25</sup> Furthermore, “the crucial time for determining whether a port is safe is the time it is named by the charterer; the safe port warranty is inapplicable if it becomes unsafe after the arrival of the vessel; if, however, the port becomes unsafe after its nomination, it is the responsibility of the charterer to substitute another port if that is reasonable under the circumstances.”<sup>26</sup> But, some courts<sup>27</sup> of England still reject the view following the considerations that the charterer’s duty is only to determine a prospective safety port, and if the port turns to be unsafe after the ship arrives, the captain have the right to leave or ask the charterer to nominate another port. Therefore the charterer should be liable only when the hazard of the port can be foreseeable at the time of nomination. Otherwise, the owner should bear the loss.

When the unsafe situation occurred after nomination and the charterer was held liable for losses incurred by the shipowner, the P&I insurer of England should hereby cover the charterer’s liability according to different arbitration award and judgments of the national courts. As already mentioned the charterer’s liability policy always should have an attachment of charter contract. Then the charter contract should be regarded as a part of the insurance contract. As a result, we may have two sets of governing law: the law governing the charter contract and the law governing the insurance contract. The law governing the charter contract decides whether or to what

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<sup>23</sup> Second paragraph says “if the charter has ordered the ship to an unsafe port, the voyage charterer shall be liable for any damage caused to the ship thereby, unless the damage is not caused by the personal fault or neglect of the voyage charterer or that of anyone for whom the voyage charterer is responsible.”

<sup>24</sup> Second paragraph says “if the damage arises because the time charterer has ordered the ship to an unsafe port, the time charterer shall be liable unless the damage is not caused by the personal fault or neglect of the time charterer or that of anyone for whom the time charterer is responsible.”

<sup>25</sup> See page 38 Charterer’s liability insurance-Schwampe

<sup>26</sup> Major Charter Party Issues and Problems - Chapter 11, Charter Parties, Admiralty & Mar. Law § 11-10 (4th ed.) - Thomas J. Schoenbaum [FNa0], Pocket Part by Thomas J. Schoenbaum and Jessica L. McClellan [FNa1]

<sup>27</sup> See the *Evia* (No. 2) [1982] 2 Lloyd’s Rep. 307; and likewise *Uni- Ocean Lines Pte. Ltd. v. C-Trde S.A. (The Lucille)* [1983] 1 Lloyd’s Rep. 387

extent the charter should be liable for the damage to the ship. Then we can decide the scope of the coverage of the P&I insurance according to the liability of the charter (only as a fact), the insurance contract and the law governing the insurance contract. At this stage, one may ask: what if the governing law of the charter contract is conflicting with the governing law of the insurance contract? The answer should depend on whether the dispute is filed to the arbitration or to a national court. If the case is to be decided by an arbitration tribunal, the tribunal will refer to the arbitration law of the place of arbitration to decide which law should prevail. If the case is to be handled by a national court, the collegiate bench is to use private international law of the venue to decide which law is overriding. Therefore, the scope of the charterer's liability insurance coverage may be affected by the governing law of the charter contract, the governing law of the insurance contract, the arbitration law of the place of arbitration and the private international law of the venue.

#### 5.1.4 Conclusion

When the charter parties have already given the name of the port, there would be no charterer's liability in relation to "safe-port clause". It is the owner's duty to determine whether the port is safe enough for the chartered ship to enter, float and depart. If it is a "port charter", safe-port clause rule applies. The scope of liability of the charterer depends on which law is governing the contract. If it is Chinese law, the charter bears strict liability with some exceptions like force majeure. When it comes to Norwegian law, the solution is depending on §328 and § 385 NMC together with some supplementary case law and legal literature and explanation. The English law is quite complicated as to the question, so we should take into consideration the specific circumstance of the case and case law. Typical, the charterer's home country legal system, the port legal system and charter-party's governing law affect the charterer's liability most. The charterer's liability insurers therefore have to cover the liabilities suffered by the charterer differently.

The insurer's liability is greatly influenced by the question of which law applies in the charter contract, because the P&I insurer's liability here can be traced back to charterer's liability incurred according to the "safe-port clause" of charter party, possibly with exceptions and limitations. And also the insurance contract itself is governed by certain laws which affect the court decision. Some of charter-contract's governing law should be decided by the negotiations of the parties like "Gencon 1994"<sup>28</sup>. If the parties chose English law and arbitration in London, their disputes arising from "safe-port clause" should be decided according to contract law and tort

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<sup>28</sup> In clause 19, it says: the sub-paragraph (a) (b) (c) are alternatives:

(a) this charter party shall be governed by and construed in accordance with English law and any dispute arising out of this charter party shall be referred to arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force...

(b) this charter party shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and should any dispute arise out of this charter party, the matter in dispute shall be refer to three persons at New York... the proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators...

(c) any dispute arising out of this charter party shall be referred to arbitration at the place indicated in Box 25, subject to the procedures applicable there. The laws of the place indicated in Box 25 shall govern this charter party.

law of England. The arbitration tribunal may possibly taken into consideration some typical English rules such as “consideration”<sup>29</sup>. Therefore, the charterer will bear liability of damage to the vessel in English law. When he claim against his P&I insurer for coverage, the insurer should make reference to the governing law of the insurance contract about whether the charterer’s liability is decided lawfully and reasonably. If the governing law of the insurance is also English, there would no doubt that the charter’s liability from “safe-port clause” should be covered. If the governing law of the insurance is Chinese law, the English arbitration award maybe discarded possibly because the arbitration tribunal used some case law to decide the dispute but the case law is not accepted in China. In this consideration, it is best that the charter party and the insurance contract have the same governing law.

## 5.2 Cover for liability during loading and discharging

Like the cover for liability from the “safe-port clause”, the cover for liability during loading and discharging should also be clearly described in the policy. As already described in Chapter 3, the charterer may incur liability from handling the cargo in the port of loading and port of discharge. Since the liability covered by the charterer’s P&I insurer can be traced back to charter contracts, we firstly look at two internationalized charter parties, Gencon 1994 and NYPE 93 as below.

For voyage charerers, it states in (c) clause 5 Gencon Charter 1994: “the charterer shall be responsible for damage (beyond ordinary wear and tear) to any part of the vessel caused by stevedores”. The second paragraph imposed responsibility of notice to the charterer on the shipowner and his agents. As for time charterers, we have NYPE 93 which describes the same liability in clause 35 first paragraph that: “notwithstanding anything contained herein to the contrary, the charters shall pay for any and all damage to the vessel caused by stevedores provided the master has notified the charterers and/or their agents in writing as soon as practical but not later than 48 hours after any damage is discovered.” The only difference between the aforesaid charter contracts is the NYPE 93 imposed duty of notice within 48 hours on the shipowner about the damage. It increased risks of the shipowner and consequently decreased the possibility of bearing liability for the charterer so that the charterer’s P&I insurer will provide no cover for the damage if the charterer did not receive notice from the shipowner/master within 48 hours.

Then we look into a charter party especially for tanker trade, where the loading and discharging operations are a co-operative effort between the ship and shore installations.<sup>30</sup> SHELLVOY 5 (voyage charterparty) clause 7 describes as below:

“The cargo shall be loaded into the vessel at the expense of charterers and, up to the vessel’s permanent hose connections, at charterers’ risk. The cargo shall be discharged from the vessel at the expense of owners and up to the vessel’s permanent hose connections at owner’s risk. Owners

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<sup>29</sup> [http://en.wikipedia.org/wiki/Consideration\\_under\\_English\\_law](http://en.wikipedia.org/wiki/Consideration_under_English_law)

Consideration under English law is anything of value (an item or service), which each party to a legally-binding contract must agree to exchange if the contract is to be valid. If only one party offers consideration then the agreement is not contract.

<sup>30</sup> See page 367 Scandinavian Maritime Law, 2<sup>nd</sup> ed. – Thor Falkanger, Hans Jacob Bull, Lasse Brautaset

shall unless otherwise notified by charterers or their agents, supply at owners's expense all hands, equipment and facilities required on board for mooring and connecting and disconnecting hoses for loading and discharging.”

In the course of loading, the charterer may incur liabilities for damage to ship if the oil exploded or spilled out on deck. It should be noted that this type of damage unlike Gencon 1994 and NYPE 93 is generally not caused by stevedores but some installations on board. As for charterer's P&I insurer, he still should cover the liability to compensate the damage to the ship.

To avoid a situation of paying the damages to the shipowner, the charterer would conclude with his insurer a clause in the policy to cover the damages claimed by the ship owner for damage to the ship because of the stevedores' actions or some special installations. Such covered liabilities shall also conform to the national statute because if there are disputes between the charterer and his insurer on the liability of the charterer against the shipowner, they may file the case to the national courts and put the judgment to enforcement.

Maritime code of China states in article 142 that: “when the charterer redelivers the ship to the shipowner, the ship shall be in the same good order and condition as it was at the time of delivery, fair wear and tear excepted” which set up a strict liability for the charterer to guarantee the ship to be as good as at the commencement of the voyage. Therefore damage to the ship during the loading and discharge is reasonably to be born by the charterer, excepting the cases of force majeure, shipowner's intentional act and his gross negligence as basic civil principles. Therefore, CPI covers this liability of charterer.

### 5.3 Cover for liability of damage caused by the cargo

There would be many possibilities that the cargo carried on board by the charterer will harm the chartered ship so that the charterer will be held liable by the ship owner. Therefore the charterer needs to enter into liability insurance with his P&I insurer.

There are exhaustive descriptions about charterer's liability in rule 3 (B) West of London P&I association as I previously referred to, while the No. 5 is specifically for liabilities incurred from cargo:

“5. Both the Member (charterer) and the Co-Assured shall be covered in the capacity of cargo owner in respect of:

- a. the liabilities, losses, costs and expenses set out in Rule 2, Section 11<sup>31</sup> and the Member shall further be covered against such liabilities, losses, costs and expenses where they arise out of an incident occurring at a time when the Co-Assured:
- b. owned all or part of the cargo being carried on the insured vessel; and
- c. was wholly owned or controlled by, or was in the same ownership or control as, the Member; and where the liabilities, losses, costs and expenses in such circumstances arise by virtue of the relationship between the Member and the Co-Assured.”

The cover above is for charterer’s pollution liability in case of the charter solely as cargo owner or as part owner.

To further examine the cover we should look at the charter parties where there would be detailed clauses about charterer’s liability incurred from the cargo.

Clause 2 Baltim 1939 reads, “Vessel to be employed in lawful trades for the carriage of lawful merchandise only between good and safe ports or places where she can safely lie always afloat within the limits stated in Box 17. No live stock nor injurious, inflammable or dangerous goods (such as acids, explosive, calcium, carbide, ferro silicon, naphtha, motor spirit, tar, or any of their products ) to be shipped”.

In the lines 24-25 NYPE 1946, there is such description: “... carrying lawful merchandise, including petroleum and its products, in proper containers, excluding BLANK to be filled in with some excepted cargo (vessel is not to be employed in the carriage of carriage of live stock, but Charterers are to have the privilege of shipping a small number on deck at their risks)”.

As for voyage charterer warranty, some special charter contracts have special demand for the nature of cargo, like Tankvovoy 87 which says in clause (C) that “cargo not to be loaded at a temperature exceeding: BLANK to be filled °C or °F”.

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<sup>31</sup>**Pollution liability:** Subject to the provisions of Rule 15 the liabilities, loss, damage, costs and expenses set out in paragraphs (A) to (E) below when and to the extent that they arise out of or are incurred in consequence of the discharge or escape from the insured vessel of oil or any hazardous substance, or the threat of such discharge or escape:

- A. Liability for loss, damage, contamination, costs and expenses.
- B. Any loss, damage or expense which the Member incurs, or for which he is liable, as a party to any agreement in respect of pollution approved by the Committee, including the costs and expenses incurred by the Member in performing his obligations under such agreements.
- C. The costs of any measures reasonably taken for the purpose of avoiding or minimising pollution or any resulting loss or damage together with any liability for loss of or damage to property caused by measures so taken.
- D. The costs of any measures reasonably taken to prevent an imminent danger of the discharge or escape from the insured vessel of oil or any hazardous substance.
- E. The costs or liabilities incurred as a result of compliance with any order or direction given by any government or authority for the purpose of preventing or reducing pollution or the risk of pollution, provided always that such costs or liabilities are not recoverable under the Hull Policies of the insured vessel.

Provided that ...

Then we examine the statutes about this type of liability.

In China, the main rule about time charter is in Maritime Code article 135 “the charterer shall guarantee that the ship shall be employed to carry the lawful merchandise agreed...to carry live animals or dangerous goods, a prior consent of the shipowner is required”. For voyage charter, it is said in article 100 CMC that: “the charterer shall provide the agreed goods, but he may replace the goods with the consent of the shipowner. However, if the goods replaced are detrimental to the interests of the shipowner, the shipowner shall be entitled to reject such goods and cancel the charter. Where the shipowner has suffered losses as a result of the failure of the charterer in providing the agreed goods, the charterer shall be liable for compensation”. The two rules seem quite similar in the requirement for lawful, agreed and safe goods and they are not difficult to understand. The difference is article 135 is enforceable only when there is no agreed clause in the contract can be used according to article 127 CMC, while article 100 is mandatory.

In Norway, the voyage charterer is liable for the damage to the ship and he should compensate the shipowner if he negligently lets the goods harm the ship, according to § 357 NMC. Time charterer’s liability is stated in § 385, where the time charterer has to pay damages for damage to the ship on the basis of fault. The two have the same subject conditions of negligence (not just confined to gross negligence or on purpose), which is more advantageous than the Chinese regulations which are ruling the case in question on basis of strict liability principle. Therefore the Norwegian P&I insurer should cover less liability than that of Chinese.

In England it is enjoined on the charterer to load no dangerous goods onto the ship, even if this is not expressly determined in the charter contract, even if this is not expressly determined in the charter contract<sup>32</sup> according to 4 (6) Carriage of Goods by Sea Act (COGSA)<sup>33</sup>. If the goods are loaded onto the ship in breach of the charter contract, for instance, because these goods or all dangerous goods are excluded<sup>34</sup>, the knowledge of the captain does not exempt the charterer from the liability because the captain lacks the authority to make an amendment to the contract<sup>35</sup>. If the goods designated in the contract are loaded and the ship is damaged by these goods the charterer is not liable.<sup>36</sup> Therefore, the P&I insurer should have to cover the charterer’s liability of dangerous goods on basis of breaching both statute and charter contract.

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<sup>32</sup> See page 74 Charterer’s liability insurance-Schwampe; Ministry of Food b. Lamport & Holt [1952] 2 Lloyd’s Rep. 371; The Athanasia Comminos, quoted in Wilford, p. 95; Pierce v. Winsor, 19 F.Cas: 646; American & Cuban Steamship Line Inc. v. Beer Sondheimer & Co. Inc. (The Santa Clara), 281 F. 725; Luckenbach Steamship Co. Inc. v. Coast Manufacturing & Supply Co., 185 F. Supp. 910.

<sup>33</sup> See page 75 Charterer’s liability insurance-Schwampe

<sup>34</sup> See page 75 Charterer’s liability insurance-Schwampe; Cf. e.g. Transport Lines Inc. v. Refineria Panama S.A., N.Y. award (S.M.A. No. 1381) Fairplay 28.8.80, p.23.

<sup>35</sup> See page 75 Charterer’s liability insurance-Schwampe; Steven & Co. v. Bromley & Son (1919) 88 L.J.K.B. 1147; Chandris v. Isbrandtsen-Moller Co. Inc. (1950) 83 Ll.L.Rep. 385; Carver, para. 665; Scrutton, p. 101.

<sup>36</sup> See page 75 Charterer’s liability insurance-Schwampe; S.S. Sebastian v. Sociedad Altos Hornos de Vizcaya (1920) 89 L.J.K.B.385; Scrutton, p. 101

## 6 General Average Cover

The rules on General Average have their basis in the fact that, during a voyage, the ship, cargo and freight form part of a common venture.<sup>37</sup> “There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure” according to YAR Rule A. For the requirements to be fulfilled, the bellow<sup>38</sup> is to be met:

“Firstly, the property must first all be in danger.

Secondly, the danger must be a common danger for the ship and cargo.

Thirdly, there must be an intentional, extraordinary sacrifice or expenditure.

Lastly, the action taken must have been reasonable.”

### 6.1 P&I coverage for General Average

In China, General Average cost of the charterer can be covered by China Shipowners Mutual Assurance Association (CPI). According to section 17 Rule 5, the cost of G/A bellow is covered:

“The proportion of General Average expenditure, special charges or salvage which a Member (charterer) is or would be entitled to claim from cargo or from some other party to the marine adventure and which is not legally recoverable by reason only of a breach of the contract of carriage.

Provided always that:

Proviso (a), (b) and (c) of Section 15 (CARGO LIABILITY) of this Rule shall apply to any claim under this Section.”

If a charter ordered the ship to non-safe port banned by the charter party, he may probably incur liability to pay losses from General Average. Then he has the right to claim against his P&I insurer to cover this liability.

In Gard rule 41 a, it describes that “the association shall cover the proportion of general average, special charges or salvage...where contributing cargo or any other contributing asset belongs to the member, the member shall be entitled to recover from the association as if that...” If the charterer has become a member of the club, the unpaid freight and value of bunkers taken onboard the vessel should be regarded as the aforesaid “any other contributing asset belonged to the member”<sup>39</sup> and thereby be covered by charterer’s entry policy.

The most comprehensive description can be found in West of London P&I rules 3 B 3, that members should be covered in respect of liability as charterer to contribute to general average, special charges or salvage in respect of freight and any property, other than cargo, carried on board the insured vessel and owned or leased by the Member. Special charges and salvage can be regarded as the method employed for “common benefit” of the ship and its cargo, and the expenses thereof imposed on the charterer should rank as an allowance for G/A, so that such expenses are supposed to

<sup>37</sup> See page 465, *Scandinavian Maritime Law*, 2<sup>nd</sup> ed. – Thor Falkanger, Hans Jacob Bull, Lasse Brautaset

<sup>38</sup> See page 467, *Scandinavian Maritime Law*, 2<sup>nd</sup> ed. – Thor Falkanger, Hans Jacob Bull, Lasse Brautaset

<sup>39</sup> One can deduce from the wording of “...allowances in general average for the shipowner for crew wages, bunkers, and port charges during the repairs...” referred to in page 212, *Gard Hand Book on P&I Insurance*

be categorized as G/A contribution covered by the charterer's liability insurance.

Most charterer's liability insurance policy accepts General Average contribution liability like West of London P& Association, but some associations refuse it with exceptions like the wording of charterer's liability policy of Zurich Australian Insurance Limited:

"Principal risks excluded: Liability, costs or expenses for general average contributions or salvage charges (other than for charterers' freight at risk)."

Some English Policies include such clause as:

"No coverage is afforded here in for any liability for contributions in General average, Salvage or Salvage charges, other than liability for contributions in respect of charterer's freight at risk, or contributions which are attributable to the chartered vessel and which arise directly because of loss or damage to the chartered vessel following upon an accident for which the charterer is legally liable and which is covered under this insurance."

Under this clause the P&I insurer covers charterer's liability of contributions for the freight and the bunker fuel ("attributable to chartered vessel")<sup>40</sup>. The scope of cover is however limited in a particular way: there is only obligation to pay when the obligation to pay contributions results directly from damage to the ship or from the loss of the ship.<sup>41</sup> The requirement of causation laid down here has the effect that the obligation to pay contributions is not covered if it does not result from damage to the ship.<sup>42</sup> While the underlining philosophy is not important for the charterer, a connection between liability cover and contribution cover is consequently made.<sup>43</sup>

In a nut shell, there are different clauses in the various policies as to G/A, so that it is up to the charterer to consider if it is suitable for him and to decide if he should apply an entry into the club.

## 6.2 Charterer's liability to pay General Average costs in the charter contract

Internationalized charter parties always have very exhaustive General Average clauses in relation to charterers, which are described in the follow paragraphs.

In clause 25 NYPE 93, it is decided that General average shall be adjusted according to York-Antwerp Rules 1974, as amended in 1990 or any subsequent modification thereof, and the charterer shall procure that all bills of lading issued during the currency of the charter party will contain a provision to the effect that

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<sup>40</sup> See page 97 Charterer's liability insurance-Schwampe

<sup>41</sup> See page 97 Charterer's liability insurance-Schwampe; According to the Y-A Rules and English law there is also a general average situation when only the cargo is saved (unlik Art. 703 HGB) Schaps/Abraham, Art. 703, para. 7.

<sup>42</sup> See page 97 Charterer's liability insurance-Schwampe

<sup>43</sup> See page 97 Charterer's liability insurance-Schwampe

general average shall be adjusted according to York-Antwerp Rules 1974, as amended in 1990, or any subsequent modification thereof and will include the “New Jason Clause”<sup>44</sup> as per clause 31.

As to voyage charter, Gencon 1994 also included York-Antwerp rules 1994 supplemented by the so-called “New Jason Clause”.

To sum up, the aforesaid charter parties have uniformed and detailed information about charter’s liability relevant to General Average contribution.

### 6.3 Legal basis of liability to pay General Average

#### 6.3.1 China

York-Antwerp Rules is not accepted in China, so that the general average action is determined by Chinese Maritime Code Chapter 10 if there are no rules otherwise agreed in the contract according to article 203 CMC. Article 199 (3) states: “the contributory value of freight shall be calculated on the basis of the amount of freight at the risk of the carrier (charterer) and which the carrier (charterer) is entitled to collect at the end of the voyage, less any expense incurred for the prosecution of the voyage after the general average, in order to earn the freight, plus the amount of general average sacrifice”. Further more the charterer has the proprietorship of bunker fuel according to the chapter 9 (contract of sales and purchase) Contract Law of China. Article 133 states that the proprietorship of the good transfers to the buyer at the time of delivery. If the charterer bought the bunkers and put them on the vessel which is considered under the charterer’s possession temporarily, he has the ownership of the bunkers. Therefore the charterer will suffer the liability of contribution of G/A for the value of freight and bunker, which can be covered by the liability insurance of CPI.

#### 6.3.2 Norway

According to § 461 Norwegian Maritime Code, York-Antwerp Rules 1994 should be used to govern General Average act, if no otherwise rules have been agreed. Y-A Rule XV and Rule XVII (a) (ii) implies that the freight is generally regarded as individual interest to contribution<sup>45</sup>, except it is prepaid. On the other hand, it is described in § 260 and § 344 NMC that the freight should not be paid if the cargo suffered a loss, and if this is the case, there would be no liability of the charterer to pay General Average for value of freight.<sup>46</sup> What we concern here is the charter’s

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<sup>44</sup> “In the event of accident, danger, damage or disaster before or after the commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequences of which, the carrier (may be charterers) is not responsible, by statute, contract, or otherwise, the goods shippers, consignees, or owners of the goods shall contribute with the carrier (may be charterers) in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods... ”

<sup>45</sup> See page 470, *Scandinavian Maritime Law*, 2<sup>nd</sup> ed. – Thor Falkanger, Hans Jacob Bull, Lasse Brautaset

<sup>46</sup> See page 470, *Scandinavian Maritime Law*, 2<sup>nd</sup> ed. – Thor Falkanger, Hans Jacob Bull, Lasse Brautaset

liability to pay G/A contribution if the freight (at risk) is to be paid when the goods is delivered to the consignee. This liability should reasonably be insured against by his liability insurance.

Another contributing value is that of bunkers stored on the vessel which is generally regarded as cargo on board according to Rule York-Antwerp Rules IX which is:

“Cargo, ship’s materials and stores, or any of them, necessarily used for fuel for the common safety at a time of peril shall be allowed as general average, but when such an allowance is made for the cost of ship’s materials and stores the general average shall be credited with the estimated cost of the fuel which would otherwise have been consumed in prosecuting the intended voyage.”

Time charter charterer normally bears the expense of bunkers (stores for fuel) for the contemplated voyage, so that it is possible that he bears the liability of paying contribution for the saved bunkers and so does his liability insurer. The prerequisite is the value of the bunkers should be deducted by the reasonably estimated cost of the fuel that would have been consumed if the casualty had not happened.

## **7 Legal Expenses Cover**

There are two types of charterer’s liability insurance as for legal expenses. The first one is Protection and Indemnity insurance (P&I) and the other is Freight, Demurrage and Defense Insurance (F.D. & D.). I will give a discussion of them respectively in the following sub-chapters (7.1 & 7.2).

### **7.1 P&I insurance**

P&I club will normally cover this expense either by wording of explicit rules or specific contracts with negotiations.

As for the rules of CPI, paragraph 2 section 23 says “legal costs and expenses relating to any liability or expenditure against which the Member is wholly, or by reason of a deductible, partly insured by the Association. Furthermore, legal costs and expenses relating to any liability or expenditure against which the Member is wholly, or by reason of a deductible, partly insured by the Association.”

According to (1) (B) Rule 3(Cover for Charterers) West of London P&I Association, “Liability as charterer to indemnify the owner or disponent owner of the insured vessel in respect of the risks set out in Rule 2”. Then we go to Rule 2, which describes the covered legal costs as:

“(A) Extraordinary costs and expenses (other than those set out in paragraph (B) of this Section) reasonably incurred on or after the occurrence of any casualty, event or matter liable to give rise to a claim upon the Association and incurred solely for the purpose of avoiding or minimising (as required by Rule 23) any liability or expenditure against which the Member is

wholly or, by reason of a deductible or otherwise, partly insured by the Association.

(B) Legal costs and expenses relating to any liability or expenditure against which the Member is wholly, or, by reason of a deductible or otherwise, partly insured by the Association.”

In Norwegian P&I associations, the legal costs are also covered if the “members” are charterers. Gard rule 44 states that: “the association shall cover legal costs and expenses relating to any liability, loss, cost or expense which, in the opinion of the association, is (or, apart from any applicable deductible, would be) likely to result in a claim on the association, but only to the extent that such legal costs and expenses have been incurred with the agreement of the association.”

Skuld also laid out its cover legal and associated costs in 25.1 “the standard insurance shall cover legal and associated costs reasonably incurred, in agreement with the association, in relation to claims for which the member is covered under the rules”.

As for the limit of liability, the policy of Zurich Australian Insurance Limited states under the section “Limit of Liability” in its introduction part that “this should be sufficient to cover the full value of the chartered vessel plus potentially heavy legal fees and costs”. We can deduce from the wording that the heavy legal fees and costs incurred by the charterer are covered under this policy. As for the limitation of this cover, the parties of this policy have to fill out the sum expressly in a blank after the phrase “policy limit required in respect of any one loss or series of losses arising out of one accident or event” in the policy part.

Then we have a look at what expenses the charter would bear in different countries. This issue may affect the scope of cover in the insurance policy, so that the insurer would take the relevant laws into consideration when deciding the insurance.

### 7.1.1 China

In China, expense of legal activities is to be compensated in litigation and arbitration according to some procedure laws China Maritime Arbitration Commission Rule (CMACR). The below is a case about ship “SHOUANHAI” damage:

On 31 September 1989, SHOUANHAI reached her loading port. On the same day she began loading, after which she suffered damage on her way to leave in THIMBLE SHOAL CHESA PEAKE BAY BRIDGE, because her hull collided with a big discarded anchor about 19 000 tons lying on the bottom of the port. On 2 July 1990, the shipowner claimed to China Maritime Arbitration Committee against the time charterer for damages and relevant expenses. The arbitral tribunal at last concluded in its award that the charterer had to pay the reasonable expenses of the repair, investigation and legal expense including the hire of lawyers.

Article 58 China Maritime Arbitration Commission Rule (CMACR) says: “the arbitration tribunal has the power to decide in the arbitral award that the losing party shall pay the

winning party as compensation a proportion of the expenses reasonably incurred by the winning party in dealing with the case. The amount of such compensation shall not in any case exceed 10% of the total amount awarded to the winning party.” The arbitral award was without doubt.

Therefore the charterer’s liability to pay legal expenses such as arbitration fee and lawyer’s hire can be covered by the liability insurance in China.

### 7.1.2 Norway

Norwegian P&I clubs provide general rules for compensation of associated legal expenses of charterer’s liability covered.

In Gard rule 44, it is said that “the association shall cover legal costs and expenses relating to any liability, loss, cost or expense which, in the opinion of the association, is (or, apart from any applicable deductible, would be) likely to result in a claim on the association, but only to the extent that such legal costs and expenses have been incurred with the agreement of the association.” Similarly, Skuld in rule 25.1 says that the standard insurance shall cover legal and associated costs reasonably incurred, in agreement with the association, in relation to claims for which the member is covered under the rule.

In practice, the “legal costs and expenses” can be the cost of inspection of relevant authorities, litigation, arbitration, and possibly lawyers. As for charterer’s liability policy, the club will normally cover certain legal costs according to the specific feature of the ship entered, the time, voyage and the other things in the charter party.

### 7.1.3 England

English charterer’s liability insurance usually provides cover of legal expenses or costs and the following clause is probably the most frequent<sup>47</sup>:

“costs incurred by the Assured shall be payable by underwriters only if Underwriters hereon give written consent to the incurring of such costs in respect of any particular claim, suit or proceeding and if such costs are not covered by underlying insurance and then only in proportion between the amount (excluding costs) paid by the assured (or by the underlying insurers) and the amount (excluding costs) paid by the underwriters hereon. (the word “costs” shall be understood to mean investigation, adjustment and legal fees and expenses excluding, however, all expenses for salaried employees and retained counsel and all office expenses of the assured.)”

The initial requirement is consequently that the club has agreed to cover the expense; then the cost cannot be covered by other insurances. Furthermore, the limitation should be calculated by proportion.

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<sup>47</sup> See page 101 Charterer’s liability insurance-Schwampe

## 7.2 Freight, Demurrage and Defense Insurance (F.D. & D.)

F.D. & D. is a separate type of liability insurance practiced either in normal P&I clubs or in independent F.D. & D. clubs like Steamship Mutual Underwriting Association (Bermuda) Ltd., where charterer's costs are covered for litigations from charter contracts (V) and in particular those due to the preparation of defective bunker (VI) and lack of care in loading and unloading and unloading the ship.<sup>48</sup>

### 7.2.1 China

In China, this insurance is incorporated in CPI, where it states in rule 7 that this Association insures its Members for such reasonable legal and defense costs and expenditures as arising from the claims, disputes and legal proceedings in connection with the following matters and events as numbered 1 to 10 inclusive herebelow:

“1. Freight, dead freight, demurrage or damages for the detention of any Member's ship or dispatch money, passage money and hire or any other matter arising out of a charter party, Bill of Lading or other contract of affreightment or the carriage of goods in or the trading of the insured vessel generally;

2. Damages for detention of any entered ship in any collision action;

3. Salvage, General Average contributions and charges (except where the insured vessel is a professional salvage ship/tug or other craft specially designed, converted, or maintained for use in salvage operations and the claim arises as a result of or during any salvage operations or attempted salvage operations by such kinds of vessels or crafts; but the Managers (or Directors) in its absolute discretion may allow claims of this type to be covered);

4. A policy of insurance, other than with this Association;

5. Damages sustained by the insured vessel;

6. Interference, neglect, default or any other cause involving detention of or loss to a Member's ship by any Department of State, or public body, or other person or persons whatsoever either at home or abroad;

7. Any contract for the building, purchase, sale, conversion or repair of the insured vessel (including any guarantee in connection with such contract) only if the contract was made at the beginning of or during the period of insurance or the Managers agree in writing that claims, disputes or proceedings arising from the particular contract will be covered;

8. Any Mortgage of the insured vessel or contract of such mortgage;

9. Any other contract in relation to the insured vessel, except where the disputes arise under a management contract, unless the Directors determines otherwise;

10. Any other matter which the Directors determines falls within the scope of this Rule.”

While this provision covers legal costs incurred from extensive liabilities of the charterer, there are still exceptions and limitations listed in this provision's Appendix such as no. 2. “Limitation: cover under this Rule is limited to USS 1 million per dispute” and no. 3. “Deductibles: Cover under this Rule is always subject to a deductible amounting to USS 5,000,00 per dispute”.

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<sup>48</sup> See page 101 Charterer's liability insurance-Schwampe

### 7.2.2 Norway

It seems that the expression “F.D. & D.” is not used in Norwegian Associations. Both Gard and Skuld use in their rules “DEFENCE COVER” for this insurance.

In Gard rule 65 it describes that the association shall cover legal and other costs necessarily incurred in establishing or resisting claims concerning the following:

- (a) Contracts of affreightment, charterparties, bills of lading or other contracts of carriage;
- (b) Loading, lighting, stowing, trimming or discharge of cargo;
- (c) Passengers and passenger monies;
- (d) Loss of or damage to the ship or general average;
- (e) Delay of the ship
- (f) Property damage, personal injury or loss of life;
- (g) Repairs or deliveries to the ship;
- (h) Salvage or towage unless the ship is respectively a salvage vessel or tug;
- (i) Agents or brokers;
- (j) Insurance contracts pertaining to the ship
- (k) Customs, harbor or other public or quasi-public authorities, but not taxes or dues payable

in countries:

- i where the ship is registered, or
- ii where the member is resident, or
- iii where the member has a permanent place of business.

No. (c) seems to have little connection with charterer’s liability and No. (e) is generally banned by normal P&I charterer’s liability insurance.

Then we move on to Skuld. It describes in rule 27.1 that “the association shall cover the member’s ‘reasonable’ costs for ‘necessary’ legal assistance in relation to disputes which are ‘directly connected with the operation of the entered vessel’ and ...”

The words “reasonable” and “necessary” is general expressions, so that it needs special explanation in the specific policy. In practice, “reasonable cost” can be understood as “normal/market expense”<sup>49</sup> at the place of litigation or arbitration. “Necessary legal assistance” means “litigation/arbitration fee, hire of lawyers and investigation cost”<sup>50</sup>. “Directly connected with the operation of the entered vessel” can be comprehended as liabilities incurred from actions like pure commercial activities cannot be covered.

### 7.2.3 England

The London Steam-Ship owner’s Mutual Insurance Association Ltd. has its F.D. & D. cover in rule 9.1 class 8 that “subject to any special terms which may be agreed in writing and to the provisions of Rules 22 and 23, an Assured is insured in respect of

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<sup>49</sup> It should not exceed 10% of the total amount awarded to the winning party according to Article 58 China Maritime Arbitration Commission Rule (CMACR)

<sup>50</sup> Legal Expenses To Be Covered by Insurance Company - Xinhua Net - [http://news.xinhuanet.com/auto/2007-01/31/content\\_5676234.htm](http://news.xinhuanet.com/auto/2007-01/31/content_5676234.htm)

each Ship entered by him in this Class for legal costs, charges or disbursements incurred in relation to the claims or matters set out in Rules 9.2.1 - 9.2.16". Among these rules, the below are quite relevant to charterer's liability:

(9.2.3) Breach of any charter party, bill of lading or other contract;

(9.2.4) Detention from any cause by any department of state, or public or local body or authority or other person or persons in authority; and if in such cases an entered Ship be, by order of the Committee, allowed to remain under detention for the purpose of testing the legality of such detention, the Assured shall be indemnified for his actual loss, by payment of such sum as the Committee in its sole discretion shall consider fair and reasonable, to the extent that such loss shall not be otherwise recovered;

(9.2.5) Supply of inferior or wrongly described bunkers, equipment or other necessities, or negligent repair or alteration;

(9.2.6) Improper loading, lightering, stowage, trimming or discharge of cargo;

As for (9.2.3), the charterer may sufferer liability for breaching contractual terms of charter party. In (9.2.4), the liability arises in failing to re-deliver the vessel. By virtue of (9.2.5) and (9.2.6), the charterer may be claimed against for damage to the vessel. And also the cover is to be limited by rule 10.1-10.4 as below:

10.1 The cover afforded by this Class is limited except as to the indemnity provided by Rule 9.2.4 to the payment of legal costs, charges and disbursements incidental to or in anticipation of legal or other proceedings.

10.2 While an Assured has complete freedom to litigate or arbitrate disputes involving his vessels entered in the Association it is a condition precedent to his right to recover, in whole or in part, out of the funds of this Class that at all times the Association shall have sole discretion as to the sub-chapters<sup>51</sup>.

10.3 The Committee may in its sole discretion determine for each Policy Year the figures above and/or below which claims will be reimbursed in full; but otherwise, unless the Association agrees in writing to provide full cover without deductibles as a term of entry, deductibles shall apply to each claim and there shall be no recovery in respect of 25% of all legal costs, charges and disbursements.

10.4 The Association shall not be responsible for damages resulting from the arrest of any vessel, nor for the exercise of a lien on cargo, although such vessel may have been arrested or such lien may have been exercised upon the advice of the Association, its correspondents, lawyers or lawyers acting for the Assured.

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<sup>51</sup> **10.2.1** the claims in respect of which it may support an Assured;

**10.2.2** the conduct thereof (and the exercise of any right to recover costs therein);

**10.2.3** the extent of such support and conduct both in terms of progress through the appropriate legal or arbitral process and/or of the Assured's monetary recovery out of the funds of this Class;

**10.2.4** the discontinuance or settlement of claims or the discontinuance of support in connection with claims which it has previously agreed to support; and the Committee shall be entitled when exercising its sole discretion to take into account, inter alia, the merits of the claim or matter, the interests of the other Assureds of this Class, the amount of the costs and expenses incurred or expected to be incurred in respect of the claim and its effect on the financial position of this Class.

## 8 Exclusions and limitations of Coverage

### 8.1 China

Firstly, liability caused by willful conduct of the charterer is excluded from the cover. Article 242 CMC says: “the insurer shall not be liable for the loss caused by the intentional act of the insured”. According to this, if a charterer willfully took onboard some dangerous goods which harmed ship, he should lose the indemnity from the insurer against the liability. But how to decide whether he is on purpose or not, if the problem of the goods is not evident at the commencement of the voyage? What if there is a third factor? What if the shipowner contributes to the event? These questions depend to a large extent on the special conditions of charter party and the discretion of the judges.

Furthermore, the parties can decide exclusions and limitations of coverage in the liability policy according to the principle of “Party Autonomy” or “Freedom of Contract”.

On the other hand, a responsibility of “good faith” for the insurer is laid out in article 18 Insurance law of China (ILC): if there are any exclusions and limitations in the insurance contract, the insurer must expressly and positively show them to the assured, or otherwise the exclusions and limitations have no forcibility.

At this point, some would ask: what if there is inconsistency between the cover provided by the policy and the exclusions/limitations? Here is article 125 Contract Law of China that answers:

“With regard to disputes between the parties to a contract arising from the understanding of any clause of the contract, the true intention of such clause shall be determined according to the terms and expressions used in the contract, the contents of the relevant clauses of the contract, the purpose for concluding the contract, the transaction practices and the principle of good faith.

Where two or more languages are adopted in the text of a contract and it is agreed that both texts are equally authentic, it shall be presumed that the terms and expressions in various versions have the same meaning. In case that the terms and expressions in different versions are inconsistent, they shall be interpreted according to the purpose of the contract.”

Not like the English opinion giving a brief answer – “Exclusions Generally Prevail”<sup>52</sup>, the interpretation of such clauses is depending on the discretion of the judges in China.

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<sup>52</sup> See page 343 Marine Insurance: Law and Practice - F.D.ROSE; Handelsbanken Norwegian Branch of Svenska Handelsbanken AB (Publ) v Dandridge (The Aliza Glacial) [2002] EWCA Civ 577; [2002] 2 Lloyd’s Rep 421. See also ante, § 17.23

P&I exclusions/limitations can be found in CPI rule 8 “General Rules and conditions” (§1 - §13). Except for general rule for both owner entry and charterer entry, the below is specifically for charterers:

#### §9 B. Charterers

Where an entry of a ship in the Association is in the name of or on behalf of a charterer (other than a charterer by demise or bareboat charterer), unless otherwise agreed in writing between such charterer and the Managers, the liability of the Association in respect of any claims brought by such charterer relating to the entry of that ship in the Association shall be subject to the limitations as if he had been the registered owner of that ship and had sought and not been denied the right to limit.

#### §9 C. Oil pollution

Unless otherwise limited to a lesser sum, the Association's liability for any and all claims in respect of oil pollution shall be limited to such sum or sums as referred to in the Appendixes A of Rule 5. Unless the Directors otherwise decide, such limit shall apply in respect of any one entered ship each accident or occurrence and shall apply irrespective of whether the accident or occurrence involves the escape or threatened escape of oil from one or more than one ship and to all claims in respect of oil pollution brought by the Member of the entered ship whether under one Section or more than one Section of Rule 5, if the aggregate of such claims exceeds that limit, the liability of the Association for each claim shall be limited to such proportion of that limit as such claim bears to the aggregate of all such claims.

PROVIDED ALWAYS that:

(a)...

(b)...

(c) Unless otherwise determined by the Directors pursuant to Section 9(C) of Rule 8, in the event that more than one charterer other than a demise or bareboat charterer is insured in respect of the same ship by the Association or by any other insurer which participates in the Pooling Agreement and/or the Group Excess Reinsurance Policies, the aggregate recovery in respect of all claims brought by all such charterers in respect of oil pollution arising out of any one accident or occurrence shall not exceed the limit determined by the Directors pursuant to Section 9(C) of Rule 8 and the liability of the Association to each charterer insured by the Association shall be limited to such proportion of the limit as the maximum claim otherwise recoverable from the Association by each such charterer bears to the aggregate of all the said claims.

Normally, the charterer cannot get more coverage than shipowner, except otherwise agreed in accordance with §9 B. In aforesaid §9 C (c), it describes in detail about the situation of several charterers involved in the same Oil pollution claim. The solution is all the claims cannot exceed the limit of Section 9(C) of Rule 8 and each charterer's liability limitation should be determined by the proportion according to his individual sum against total sum of all the charterers.

## 8.2 Norway

Gard Rules Appendix II entitled by “Charterer’s limits” from 1 to 5 is a list of limitations for charterer’s liability in this association. Among the limits, rule 4 is regarding charterer’s oil-pollution liability limitations during salvage.

Since oil pollution liability is always channeled to the ship owner, one may ask: where did charterer’s pollution liability come from? To answer this question, we should look at Norwegian Maritime Code.

When the charterer’s oil pollution liability is concerned, we have to make reference to NMC chapter 10 to chapter 12. Section 193 establishes the mandatory rule of Channeling Liability where the claims for compensation for oil pollution damage can only be made against the shipowner, and there is no possibility of recourse action except that it is against any charterer ... Therefore the charterer is to bear pollution liability if the ship owner claims against him in recourse action.

The charter may perform a salvage action and incur pollution liability. If he claims against his P&I insurer for covering this liability, there would be limitations in rule 4 Gard Rules Appendix II as below:

(A) Where the ship provides salvage or other assistance to another ship following a casualty, a claim by the member in respect of oil pollution arising out of the salvage, the assistance or the casualty shall be aggregated with any claim or claims for liabilities, losses, costs or expenses incurred in respect of oil pollution by any other ship(s) similarly engaged in connection with the same casualty when such other ship(s) are either:

(i) Insured by the association in respect of oil pollution under charterer’s entries; or

(ii) Covered for those risks under charterer’s entries with any other association which participates in the Pooling Agreement.

In such circumstances the limit of liability of the association shall be such proportion of the sum set out in section (B) below as the claim by the member bears to the aggregate of all the said claims.

(B) Where a ship is separately insured under more than one charterer’s entries with the association or with the association and any other association (s) which participate (s) in the pooling agreement, the aggregate of all claims for oil pollution brought against the association and/or such other association(s) following a incident or occurrence shall be limited to USD 350 million. The liability of the association in respect of each such claim shall be limited to that proportion of USD 350 million that that claim bears to the aggregate of the claims against the association or the association and such other association(s), if any.

(A) is a rule about how to apportion the liability limitation (USD 350) in case of the chartered ship participate in a salvage action together with other ships and incurred liability for oil pollution. (B) is deciding how to apportion the limitation if

the chartered ship separately insured in several association.

### 8.3 England

§ 55 (2) (a) MIA describes that the insurer is liable for any loss attributable to negligence of the assured and his representative, willful conduct excluded. Willful conduct can lead to criminal punishment and can harm *Ordre public* so that it is banned from or kicked out of the cover of insurance. As a general rule of insurance, there would be no difference for property insurance and liability insurance for exclusion of willful conduct. § 55 (2) (b) MIA excludes the loss from delay and (c) ordinary wear and tear ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.

As for P&I rules, it lists in rule 3 A West of Landon P&I Association 2003 as below:

- (i) Ordinary loss in weight or volume or ordinary degradation or deterioration of such fuel oil, stores or supplies;
- (ii) Loss, damage or expense caused by inherent vice or nature of such fuel oil, stores or supplies;
- (iii) Loss, damage or expense caused by delay, even where such delay is caused by a risk insured by the Association;
- (iv) Loss, damage or expense caused by a terrorist or any person acting from a political motive.

(i) means that if the charter is claimed against for ordinary use of the fuel oil, stores or supplies, the association will not provide cover. (ii) excludes cover of loss from inherent nature of fuel oil, stores or supplies. (iii) excludes cover for any liability caused by delay. (iv) excludes cover for charterer's liability from political risks.

Some other English policies can be obtained without "coverage of war risk"<sup>53</sup> like the aforesaid (iv). This can be seen from the jacket policy, e.g. the J-form or the J (A)-Form of the Lloyd's Charterer's Liability Policy<sup>54</sup>:

"Notwithstanding anything to the contrary contained herein this Policy does not cover loss, damage or liability or indirectly occasioned by, happening through or in consequence of war, invasion, act of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation or nationalization or requisition or destruction of or damage to property by or under the order of any government or public or local authority."

The wording of the war and war-like actions should be interpreted according to

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<sup>53</sup> Some P&I association like CPI can cover charterer's liability caused by political/war risks, with special agreement.

<sup>54</sup> See page 115 Charterer's liability insurance-Schwampe

the agreements of parties and common legal literature. Furthermore, liabilities for the transportation of certain goods, and acceptance and satisfaction claims are often banned. Some limitations can sometimes also be covered by paying additional premium to the insurers.<sup>55</sup>

## **9 Closing Remarks and Summary**

The differences in relation to charterer's liability insurance such as the legal framework, the cover of risks insured and limitation of risk between countries can be found anywhere especially when you are trying to make them clear by comparing eastern laws like China with western systems like Norway and U.K. However the situation is changing with the globalization. To meet the needs of international trade development, China is planning to revise a series of laws including Chinese Maritime Code. To my own opinion, China should introduce more western methods of legislation like case law supplementing the statutes in order to improve the accuracy and justice of the court judgments. Hope the differences will be harmonized soon in the future!

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<sup>55</sup> See page 119 Charterer's liability insurance-Schwampe

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