01- 02 October, 2008

DORCHESTER HOTEL, LONDON

ITIC forum 2008

The Club is pleased to announce that it will be hosting the third ITIC Forum on 1st and 2nd October 2008.

This event will explore topics of mutual interest, provide training and give you the opportunity to network with other members and other industry professionals, both in your field of business and in related areas. Speakers at the last Forum included Ugo Salerno, Chairman of RINA, John Noble of BMT and John Welham, Senior Partner of Simpson Spence & Young. Members will be asked to provide input to the next Forum at our dedicated website **www.itic-forum.com**

The event will be held at the Dorchester Hotel in London, with a cocktail party at the Roof Gardens in Kensington. We will be sending out further information shortly and look forward to seeing as many Members as possible at the event.

For further information about the Forum and to apply online, visit www.itic-forum.com

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ITIC
THE PROFESSIONAL INSURER

INTERMEDIARY

2007 EDITION

Maritime competition law, new challenges for pool managers

In this edition:

Welcome from **Harry Gilbert**

Chairman of ITIC

In this, my third year as chairman of your Club, it gives me great pleasure to introduce this edition of the Intermediary to you. Once again, under the stewardship of the Managers at Thomas Miller, the Club has had a very successful year which culminated in your Board of Directors agreeing to grant, for the twelfth consecutive year a continuity credit of up to 30% of expiring premium.

The last six months has seen the Club introduce a new product for you, the Members: Directors' and Officers' insurance. Details of this offering, and the types of claims it covers can be read within this edition of the Intermediary.

This month, the Board of Directors of the Club is meeting in Copenhagen with a further meeting in Oslo. A large proportion of the Club's pool manager members are based in Scandinavia and, accordingly, the leading article in this edition concentrates on the challenge of maritime competition law for pool managers. However, as always, the Intermediary also includes a wide number of articles dealing with areas of interest for most, if not all, of our members.

In addition, as you will note from publicity within the magazine, the Club will hold the third ITIC Forum on 1st and 2nd October 2008 at the Dorchester Hotel in London. This provides you with the direct opportunity to question the Managers and to hear key figures from the industry speak on areas of interest to all of us. The last two events, held in 2000 and 2004, were great successes and I would recommend that as many of you as possible attend the next Forum.

Finally, I extend my thanks to you for your continued support of the Club.

September 2007

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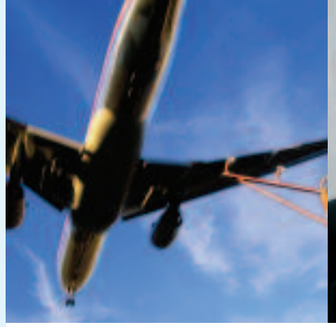

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Maritime competition law, new challenges for pool managers

Peter Appel and Bitten Thorgaard Sørensen of
Gorrissen Federspiel Kierkegaard, Copenhagen

1. INTRODUCTION

Due to the recent competition law reforms, the shipping industry is today faced with the obligation of complying with European Community competition rules, namely, Article 81 of the EC Treaty containing a prohibition against anti-competitive agreements, and Article 82 of the EC Treaty containing a prohibition against abuse of a dominant position.

Competition rules are relevant for pool managers and other participants of a tramp pool given that the pool arrangements imply (horizontal) cooperation between the pool members. Furthermore, for the pool managers, it is important to note that competition assessments will have to be conducted by the pool managers themselves and their advisers. Companies can no longer rely on an "ex-ante" clearance by the European Commission.

This is due to the 2004 abolition of the system of notification and approval by the European Commission. Competition concerns may be raised towards a pool (or its members) individually or towards its relations with other pools. This article provides a brief introduction to the legal framework relevant to pool managers.

2. LEGAL FRAMEWORK

The Community competition rules were applicable to tramp shipping even before the recent amendments, however they were not enforceable by the European Commission at that time because they were excluded from the applicable procedural rules. This situation changed in 2006 when the Council adopted the European Commission's proposal to include tramp-vessel services and cabotage under the procedural rules.

Under this new regime, tramp pools risk falling into investigations and sanctions by the European Commission and national competition authorities. Thus, the European Commission has all of its normal enforcement powers and may investigate and impose fines on shipowners and/or pool managers.

3. INDIVIDUAL POOLS

The relevant market

For a competition assessment the markets in which the pool operates must be defined. How the market is defined (from a competition law point of view) is crucial to determine the pool's market power and its competitors. Thus, pool managers should be familiar with competition law market definitions.

Anticompetitive agreements

Under Article 81 of the EC Treaty conduct such as price fixing, output limitation, and sharing of markets is considered anti-competitive. Agreements between competitors involving price fixing will always be presumed anticompetitive and be subject to a competition assessment irrespective of the parties' market power.

Pools are less likely to be considered anti-competitive if: i) pool members are not actual or potential competitors; ii) they are competitors but do not have any other means of providing the service object of the agreement; iii) the pool does not influence competition because they are of minor importance (for this criterion to apply, the pool cannot have provisions regarding joint price fixing and joint marketing) and/or do not have an appreciable effect on trade between Member States.

Pools do not have as their object to restrict competition, however, even so, pools could nevertheless be seen to generate anti-competitive effects. Thus, the effects of the pool will be analyzed in its economic context taking into account the nature of the agreement and the parties' combined market power, together with structural factors of the relevant market. Such considerations include the possibility of affecting neighbouring markets; inclusion of clauses prohibiting members from being active in the same market outside the pool; exchange of commercially sensitive information; stability of market shares over time; structural links between pools; market entry barriers; and market transparency.

Even if a pool raises competition concerns, the question is nevertheless whether it has an appreciable effect on competition and if so whether it has positive effects on the market despite the apparent reduction in competition (e.g. benefits consumers). The European Commission has suggested that while horizontal cooperation may produce anticompetitive effects in the market, in many cases cooperation may lead to substantial pro-competitive benefits. Given the fact that pools have different characteristics a case by case analysis will be required.

Thus, in the event a pool is found to fall within the scope of Article 81(1) of the EC Treaty it could still benefit from an individual exemption (under Article 81(3) of the EC Treaty) provided certain conditions are met, which ultimately translate in the agreement producing benefits that outweigh its anti-competitive effects.

Abuse of a dominant position

A company will be regarded as having a dominant position if it is economically strong enough to act independently on the market, i.e. independently of its competitors, suppliers, and customers. Numerous factors are used to determine whether a company has a dominant position. However, market share is often the most important.

The term abuse has been given a wide interpretation by the Commission and includes inter alia excessive pricing, predatory pricing, price discrimination, fidelity rebates, refusal to supply and abuse in the form of bundling/tying.

4. COOPERATION BETWEEN POOLS, INFORMATION EXCHANGES

Cooperation between different pools will almost always raise competition concerns. In this respect, the exchange of information between competing pools can constitute an infringement of competition rules.

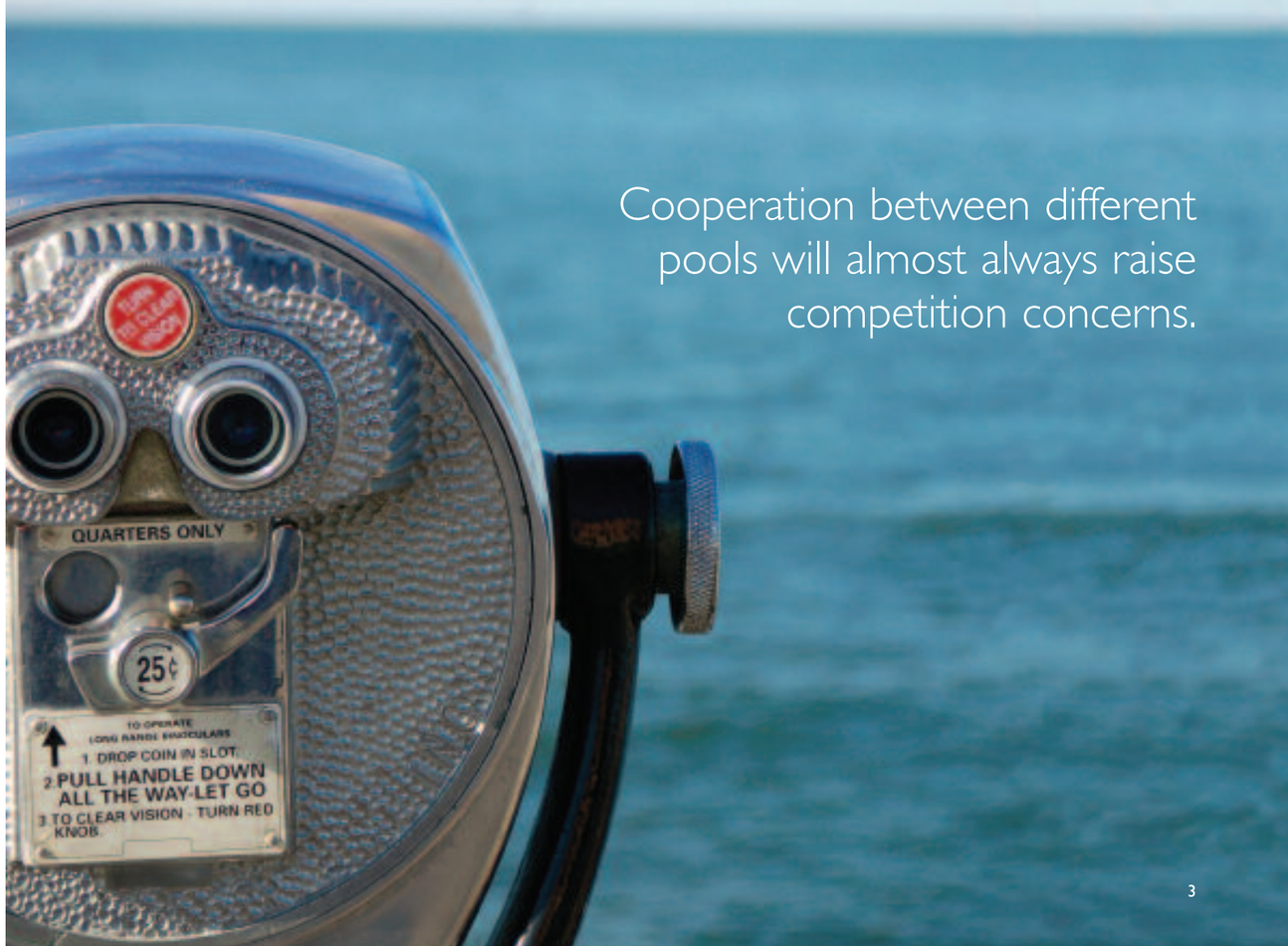
Here, a distinction should be made between cases where it forms part of a broader infringement; or a separate infringement under Article 81(1).

It is difficult to establish general rules to distinguish between information exchanges that are neutral or even pro-competitive from those that are restrictive of competition. The European Commission has adopted a case by case approach. However, the nature of the information, frequency with which it is disseminated, and the persons to whom it is disclosed, are elements which will be taken into consideration by competition authorities. Pools are less likely to raise concerns if they only provide aggregated, historical, publicly available and general data to all market participants, while individual data is only accessible to the owner of such data.

Accordingly, pool managers should be careful not to exchange sensitive commercial information with managers of competing pools. This may lead competition authorities to believe that there is "collusion" or "coordinated behaviour" between competitors. This is especially relevant when pools have the same owners, members or managers. There must be a clear separation in administration and a system built to prevent the spill-over of information from one pool to the other (e.g. "Chinese walls"). The main purpose should be to guarantee the independence of different pools.

5. FUTURE GUIDELINES

The Commission will soon issue draft guidelines that will help clarify the application of competition rules to tramp shipping and maritime transport in general. For further information on applicable laws and future guidelines, please refer to the Commission's website at http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/



Cooperation between different pools will almost always raise competition concerns.

Copyright issues

The work of many of ITIC's members, particularly those involved in design, such as naval architects, involves intellectual property rights and obligations. Members cannot deliberately infringe the copyright, patent or design rights of others but if they do so inadvertently while performing their insured services they would be covered by ITIC. The following scenarios are examples of claims that the Club has dealt with:

1.

The member was a marine software provider to the shipmanagement industry. It formed a joint venture with another company to sell individually developed software to companies in the marine sector. The arrangement came to an end in 2003. Subsequently, the member developed and marketed its own fleet maintenance software package, which was sold as a "software suite" to the shipping industry.

In March 2005, lawyers appointed by the former joint venture partner wrote to the member alleging that programming lines used within the new product infringed the ex-partner's copyright material. The ex-partner issued a writ demanding an injunction preventing the member from selling further copies of their new product and giving up all existing copies of the new product and written material relating to it. In addition the ex-partner claimed damages, interest and costs. The member instructed lawyers to defend their interests.

The dispute involved a highly technical comparison of the underlying programming code. It was agreed that it would be appropriate for the matter to be referred to a recognised expert in the field. The expert produced a report stating that, in its opinion, the member's product had infringed the ex-partner's copyright by using some lines of computer code from the ex-partner's software from the time of their cooperation.

Although the expert's report was not binding it was clearly likely to be accepted by the court. The copyright infringement was inadvertent but it was likely that the member would have a legal liability.

In the circumstances the lawyers negotiated a settlement. This involved the payment of USD 250,000 in damages. In addition the Member was responsible for legal fees, including those of the expert, and the claim therefore amounted to USD 305,000, which was paid by ITIC.

2.

A surveying company recruited a senior staff member from a rival who brought a major client to his new firm. The surveyor used an existing reporting format. Shortly after the surveyor started his new job his employers received a threat of an injunction and a claim for damages from the rival firm. The rival firm alleged that they had developed the reporting format and owned the copyright. The surveyor was advised that there was an argument that the client, and not the rival firm, owned the copyright. The surveyors did not wish to become involved in a protracted legal dispute. They therefore designed a new reporting format to match the client's requirements and gave a formal undertaking not to use the previous format. A small contribution to the rival's legal costs was made by way of settlement.

"The member felt that it was totally unreasonable that the lawyers, who presumably were invoicing huge legal fees, were not prepared to pay for a few copies of a reference work."

3.

Many firms of shipbrokers publish reference works for sale to their clients and others. One shipbroker member recently received a letter from lawyers representing one of their clients. The letter stated that the client was involved in arbitration and part of their argument before the arbitration panel referred to the contents of the shipbroker's reference book. They had been very surprised to receive a request from the opponents that they photocopied the entire reference work (at least 850 pages). The request was not simply for a single copy for the opponents but also one for each of the three man arbitration panel. The lawyers noted however that at the beginning of the reference work there was a notice forbidding its photocopying. In the circumstances they stated that they would like permission to make the photocopies.

They also pointed out that their opponents had alleged that under copyright legislation it was not a breach of copyright if the materials copied were for the purposes of legal proceedings. The member felt that it was totally unreasonable that the lawyers, who presumably were invoicing huge legal fees, were not prepared to pay for a few copies of a reference work.

ITIC drafted a letter that was placed before the arbitration panel objecting to the wholesale photocopying of the reference work and asking for the identity of the opponent's lawyers to be provided.

Ultimately the opponent's lawyers decided that it would be better to purchase copies rather than persist in the demand for photocopies.

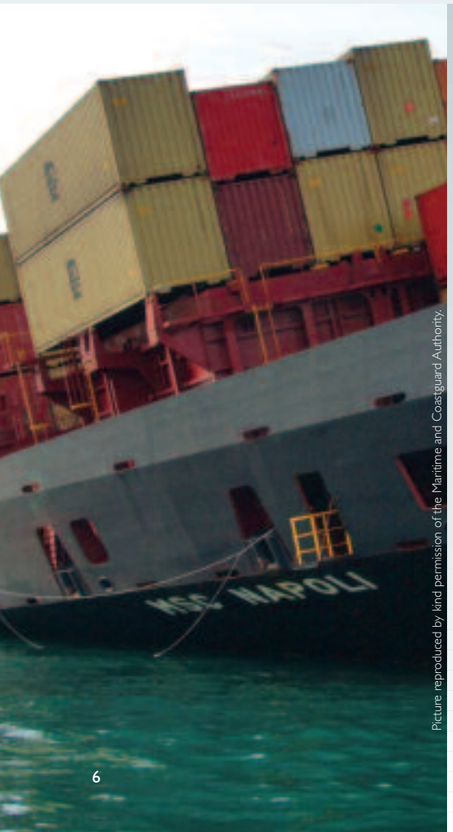
Additional insurances

Cash in transit and money insurance

Ship owners often require their agents to deliver large amounts of cash to ships in port. The risks are obvious. A ship agent will need insurance to cover cash when it is in his care temporarily, whether kept in a strong room at his office or in a safe at home. ITIC provides a product offering this combination of insurances which can be offered either on a single occurrence or annual basis.

Debt collection

Over the past fifteen years, ITIC has recovered USD 80m in unpaid commission, disbursement accounts and other debts for our members. The managers employ an experienced debt collector, Paul Monteith, whose record in ship arrest is probably second only to that of the ITF, the Seafarers Union. The insurance pays for the legal costs of pursuing your claim. Tact is vital in order to preserve commercial relationships and often a polite reminder is all that is needed to secure payment. However, if proceedings are necessary, our specialist team will use whatever legal means necessary to try to recover the monies owed to you.



Picture reproduced by kind permission of the Maritime and Coastguard Authority.

Loss of commission cover

One of the additional insurances that ITIC offers to shipbrokers and ship managers is loss of commission insurance when they are not paid commission or fee income arising out of a marine peril, such as the loss of the MSC NAPOLI, pictured here. The broker who fixed the vessel for a period charter lost its right to commission when the ship was declared a constructive total loss. The broker insured that risk with ITIC and the Club paid USD 500,000 to the broker which was the equivalent of the balance of the commission earned over the duration of the charterparty. The broker was therefore paid all the lost commission upfront.

We offer two levels of cover, the simpler being loss of commission insurance resulting from the actual or constructive total loss of a vessel and the more comprehensive cover which includes loss of commission due to a wide range of marine perils, such as heavy weather, fire, piracy, collision, engine breakdown and negligence of master or crew. Cover is offered either on an individual declaration of a charter, sale or purchase, or management contract or annually for all fixtures or management contracts concluded throughout the year. In the latter case, there is no need to make any further individual declarations as they are automatically covered.

As the broker of the MSC NAPOLI found out, loss of commission insurance can be considered to be an essential cover, similar to business interruption and loss of profits insurances which routinely cover any other business. The loss caused by, for example, the sinking of a vessel on a long term time-charter could seriously disrupt a broker's income.

If you do not have these additional insurances, and would like to receive a quotation, please contact your insurance broker or your ITIC underwriter.

Reasonable endeavours

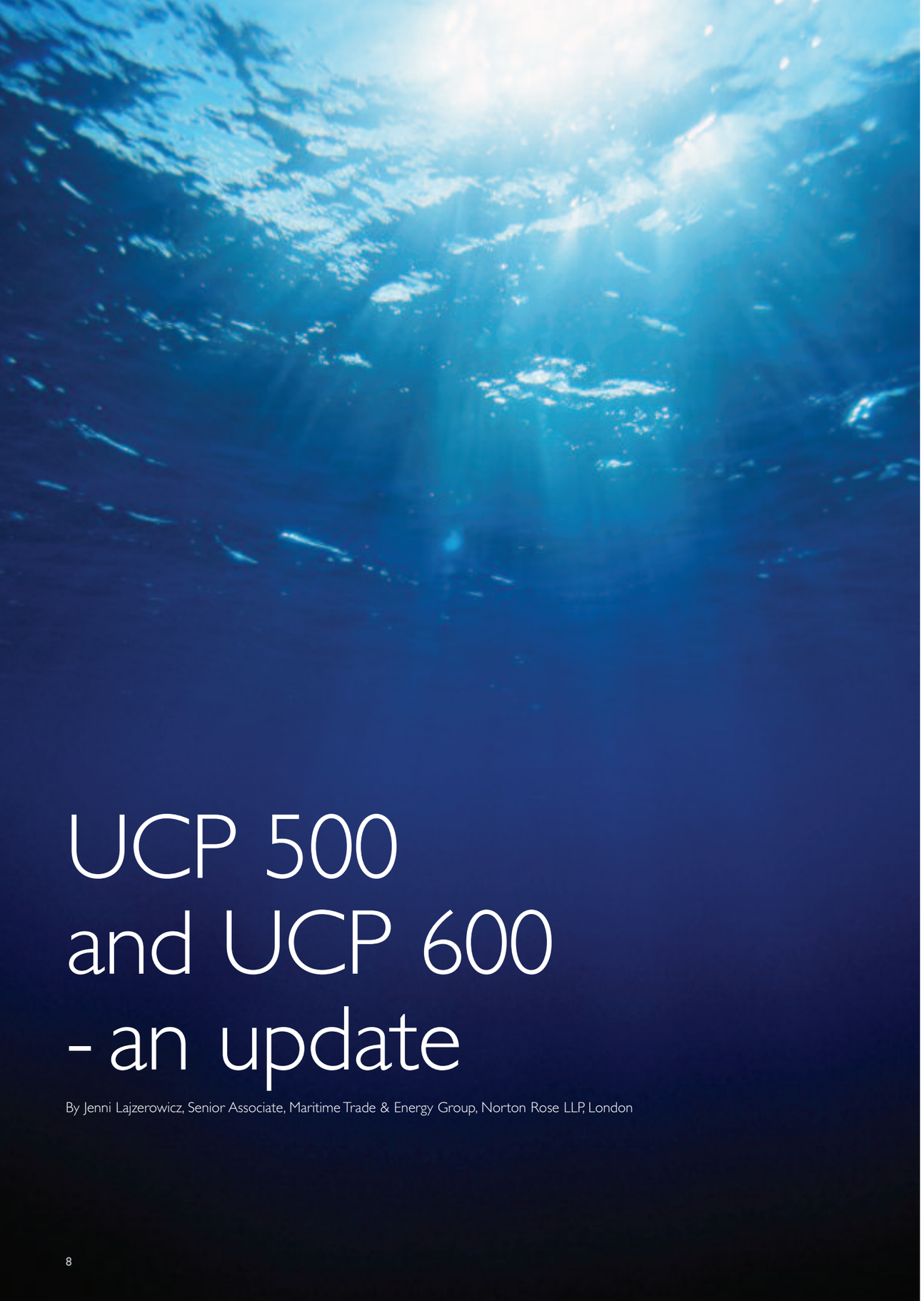
The Club is often asked to distinguish the difference between reasonable endeavours and best endeavours.

Where a clause in a contract exists that requires a company to use reasonable endeavours to obtain a third party's consent and that contract contains specific steps that have to be taken as part of the exercise of those reasonable endeavours, the company is obliged to take those steps even if they are detrimental to its own commercial interests.

The Judge in a recent case in England said that reasonable endeavours is a less stringent obligation than best endeavours. Generally, reasonable endeavours will not require a party to do anything contrary to its own commercial interest but may involve that party following a reasonable course of action in order to attempt to bring about the desired result. Best endeavours would generally involve a party following every reasonable course of action to bring about the desired result, short of sacrificing its own commercial interest. Both are to be distinguished from an absolute (i.e. unqualified) obligation to bring about a specific result.

If you are a party bearing the burden of an obligation under a contract, you should always try to negotiate the use of reasonable endeavours to fulfil such an obligation. If, on the other hand, you are the party with the benefit of that obligation, you should try to obtain from the other party a duty to use best endeavours. If, however, the other party will not accept best endeavours, the next best option would be to ask the party to use reasonable endeavours and then list a number of precise steps that would constitute examples of steps that need to be taken in order to satisfy the test results of reasonable endeavours.

The Club would like to thank Craig Neame of Holman Fenwick & Willan in London for bringing this to the Club's attention.



UCP 500 and UCP 600 - an update

By Jenni Lajzerowicz, Senior Associate, Maritime Trade & Energy Group, Norton Rose LLP, London

The Uniform Customs and Practice for Documentary Credits ("UCP") is a standard set of rules which may be incorporated into documentary letters of credit to govern their operation and payment. The rules have been produced and updated a number of times by the International Chamber of Commerce ("ICC") since they were first promulgated in 1933. The subject is particularly relevant at the moment since the ICC issued their remodelled set of rules – the UCP 600 – on 25 October 2006 and these new rules have been available for incorporation into credits since 1 July 2007. As such, they are not yet fully established, very much under scrutiny and open to critical comment.

This article will consider briefly the factors that instigated the revision and the background to the reworking of the UCP 500, the UCP 600's predecessor. It will also provide highlights of the more crucial changes and some of the more important ones will be considered in overview below.

It is worth making a few general comments by way of introduction. Looking at the UCP 600, one can find both cosmetic changes to structure of the rules and deeper changes that go to the heart of the role that documentary credits play in international commerce. When considering the various changes, it is important to remember that documentary credits are frequently the payment mechanism of choice when conducting cross-border business. The nature of credits makes them ideal for parties based in different jurisdictions performing contracts in still different countries to where they themselves are based. In many cases, the parties will not have had prior dealings with each other. With the use of documentary credits, commodity traders, those involved in the shipping industry or in any kind of international agency or business can ensure that the payment aspect of their contract runs smoothly provided of course that the correct documents are presented to trigger payment. Reliability in such a payment mechanism is paramount. In considering the revisions to the UCP, it is essential to appreciate the balance which needs to be struck between "strict compliance" on the one hand and the commercial reality of providing a workable, international commercial payment mechanism on the other. Compliance needs to be strict but conversely the credit cannot be subject to such literal or technical scrutiny that it fails as a reliable payment mechanism.

BACKGROUND

The process of revision started in May 2003. The Banking Commission of the ICC established two working groups to undertake this substantial task: a Drafting Group and a Consulting Group. These groups consulted, in turn, with forty five ICC National Committees globally. Given the importance of standardisation of banking procedure internationally, it was crucial to obtain input from the market which included contributions on banking and letter of credit practices across industries and across jurisdictions. The review process itself was thorough to say the least. It took three years whilst an exhaustive process was undertaken. Almost 600 opinions issued by the Banking Commission, numerous DOCDEX decisions and legal authority, as well as over 5,000 comments from more than 40 ICC national committees worldwide were reviewed with active input from not only bankers and lawyers, but also from key industry sectors including traders, insurers, carriers and various others.

THE CHANGES: CLARITY AND CONSISTENCY IN APPLICATION

A major theme in the revision was to ensure clarity and consistency in approach. This was achieved by means of changes to the overall structure of the rules and more fundamental changes in content of certain key rules. UCP 600 both clarifies how certain pre-existing rules should be interpreted and also adds new conditions and parameters for documentary credit practice. ICC Position Papers and a number of the ICC Banking Decisions will no longer be used to interpret the rules. The restructuring condenses the provisions from 49 to 39 articles and streamlines the procedure and should, in theory at least, leave less room for inconsistent application. It is clear that the rules have been carefully considered both individually and as a whole. There are a number of provisions or amendments to provisions which should aid clear interpretation and consistent application:

- Fuller definitions are provided, including full definitions of "advising" and "confirming" banks, "issuing bank" and also the concept of "honour" vis-à-vis payment (i.e. "honour" means to pay immediately or, alternatively, to pay at maturity having either incurred a deferred payment undertaking or accepted a "draft"/bill of exchange).

- The term "negotiation", which was previously unclear, has now been defined properly. It means the purchase of drafts or documents under a complying presentation by advancing or agreeing to advance funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank. This appears to apply to silent confirmations as well.

- Defining "honour" and "negotiation" should create an improvement in practice since these terms have been the subject of disputes in the past.

- A "banking day" is defined and can be distinguished from a business day since the drafters wanted to exclude days on which a bank would be open for business but not for checking documents presented under credits. Unfortunately, the wording arguably does not achieve this aim since it provides that a "banking day means a day on which a bank is regularly open at the place at which an act subject to these rules is to be performed".

- An entirely new section containing interpretations aims to ensure clarity and consistency in application of the rules.

- Some of the interpretations are not new. For instance, the requirement to disregard terms such as "prompt", "immediately" and "as soon as possible" appear under UCP 500 but only towards the end of the rules, like an afterthought. The new interpretations section in UCP 600 is given prominence as the third article under the rules. Here a note of caution is given in relation to calculating time in the context of a shipment period. In particular, the new rules provide that calculation of the number of days "from" a certain date in the context of a shipment period must include the date mentioned. This is not the way most people would approach such a calculation.

- Further quite simple changes provide clarity and remove previous problem areas. For instance, the phrases "without delay" and "reasonable time … which must not exceed seven banking days", being the period in which banks previous had to accept or reject documents under UCP 500, have now been replaced with a defined period of five days without any qualification.

- Similarly, banks cannot now impose a time limit for rejection of amendments to the credit. This effectively puts a halt on some banks' previous practice under the UCP 500 of setting down a time limit within which an amendment had to be accepted or rejected and, if the deadline was not complied with by the due date, the amendment would, somewhat unfairly, be deemed accepted.

STANDARD FOR EXAMINATION OF DOCUMENTS

The conflict between the doctrine of strict compliance in documentary credit practice and the need to ensure commercial workability was raised in the introduction to this article. One of factors driving the need for revision of the UCP was the high level of rejections of documents on first presentation. Indeed, the introduction to UCP 600 specifically refers to concerns that documentary credits will be undermined as international payment mechanisms if certain issues are left unaddressed. A major concern was banks being able to continue rejecting documents on purely technical grounds when, in fact, there is no real or actual discrepancy.

One key change under UCP 600 which goes to the root of the problem is the fact that documents presented under a credit are now not required to be an exact replica or mirror image of each other. Rather, the data in documents must not be inconsistent or, as set out in Article 14, must "not conflict" with other data. This alters the previous requirement under the UCP 500 that such data had to be consistent. This is sensible in that data in two documents which is not "consistent" might at the same time not actually conflict. It is a matter of degree, and by changing the requirement to a lack of conflict, the drafters have lowered the threshold slightly.

Typographical errors have in the past been a sticky area when it comes to technical as opposed to real discrepancies. There are numerous examples of typographical errors in documents causing problems and particularly common are typing errors in addresses. In this situation, the document checker might not be aware whether he is considering two entirely different addresses or whether the discrepancy is merely a typographical error. Under UCP 600, with the exception of addresses in transport documents, the addresses of the beneficiary and the applicant need not be identical provided that they are in the same country as the addresses provided in the credit. Moreover, contact details such as telex, telephone, fax and the like will be disregarded. This change will go some way towards ensuring that documents presented under a credit cannot be rejected on purely technical grounds. In the same vein, Article 14 requires that non-documentary conditions are disregarded. A non-documentary condition would be a condition in the credit which does not stipulate a corresponding document to indicate compliance with the condition. For instance, a credit may specify that goods are carried on a first class vessel but not require a class certificate to be tendered establishing the vessel's classification. Similarly, the credit may state that the goods be of a certain origin but not call for presentation of a certificate of origin for those goods.

The aim of these changes is to reduce the number of rejections of documents tendered under documentary credits. It is still early days but the outlook is favourable in that it is easier for a document to be compliant under UCP 600 and there is less room for rejecting documents presented under a credit on purely technical grounds. If this is wrong and the figure of 70% of documents rejected on first presentation is not reduced, there are likely to be further changes by the ICC.

GLENCORE INTERNATIONAL V BANK OF CHINA, KREDIETBANK NV V MIDLAND BANK & CREDIT INDUSTRIEL ET COMMERCIAL V CHINA MERCHANT BANK

What constitutes an original document has also provided fodder for disputes in the past, as is illustrated by the cases of Glencore International v Bank of China, Kredietbank NV v Midland Bank and Credit Industriel et Commercial v China Merchant Bank. The question is whether new article 17 under UCP ***Glencore*** and ***Kredietbank*** cases and as accepted by the Judge in the ***China Merchants Bank*** case?

UCP 500 provided that, unless the credit stated otherwise, banks should accept as "original" all documents which were produced by automated or computerised means and were marked "original" and, where necessary, signed. This meant that any document which was in fact original but not stamped as such could be rejected as not being compliant. Consequently, a Policy Statement was issued by the ICC stating that documents would be presumed originals unless they were "obviously copies"; not a very helpful guide. Now, under UCP 600, a new article re-states the position and incorporates the Policy Statement into the rules themselves. This also reflects current legal authority. However, the article goes further to state that not only is a document to be treated as original if it is stamped or marked as such, but it must also be treated as original if it appears to have an original signature, mark, stamp or label of the document issuer, if it appears to be produced on original stationery, or if it appears to be written, typed, perforated, or stamped by the issuer's hand (unless the document makes clear that it is merely a copy). The drafters' intentions may have been sound but this sounds like a recipe for trouble.

BANCO SANTANDER

The ***Banco Santander v Bayfern*** case, infamous and controversial in the banking community, concerned a dispute between an issuing bank and a confirming bank over a deferred payment credit. The Court of Appeal in England held that a bank entering into a deferred payment arrangement without express authority from the issuing bank to pay earlier than the credit's maturity date bore the risk of fraud uncovered between the time that it effected (early) payment and the maturity date to the tune of US$18.5 million. Certainly, the decision discouraged some banks from discounting payments before the maturity date. UCP 600's articles 7(c) and 8(c) attempt to resolve the problem posed by the ***Banco Santander*** case. The effect of these new provisions is that nomination of a bank to prepay or purchase an accepted draft or a deferred payment undertaking simultaneously gives the nominated bank authorisation to act. Consequently, the nominated bank will be entitled to reimbursement by the issuing bank even if there is intervening fraud. Thus the risk of such intervening fraud will fall on the applicant and they need to be aware of this. In practice, this may also mean that issuing banks are unwilling to issue deferred payment credits using nominated banks because they themselves will be equally exposed to a loss which might not be recoverable from the applicant.

CONCLUSION

In conclusion, UCP 600 provides a neater, more comprehensive and more streamlined version of the rules than its predecessor. Various revisions are aimed squarely at improving certainty, clarity and predictability and, in most cases, they ought to achieve this. Notably, the UCP 600 is not intended to be a bank's document. The aim has been to balance interests rather than produce a document which favours bankers versus applicant and beneficiary. That said, realistically, one would be advised to view the UCP 600 as a bank's document and tread with caution. Overall, a number of improvements under UCP 600 can be welcomed and there ought to be improvements in practice. However, some of the old problems of UCP 500 may well not have been resolved. Moreover, it must be appreciated that this set of rules is not intended to be a stand alone document. National law in the applicable jurisdiction, the law chosen to govern the credit and local banking practice will inevitably affect uniformity of interpretation or application of the rules. In terms of examination of documents, the various ways in which UCP 600 waters down the requirement for consistency between documents will be helpful in reducing the number of rejections of documents on first presentation and rejection of documents on purely technical grounds. Finally, there is the question of whether the right balance has been struck between strict compliance on the one hand and commercial reality on the other. It is early days for the UCP 600. Whether UCP 600 will succeed where UCP 500 fell short remains to be seen. These rules came into effect less than two months ago and time is needed for the market to get used to applying them, interpreting them, and working with them.

Professional Indemnity Insurance and the Hydrographer

Over the course of the last few years the trend has been for former governmental hydrographic organisations to become privately owned companies, joining the existing privately owned companies in the oil & gas and ports & harbours sectors. As this process continues it will become increasingly likely that third parties and contractual partners will attempt to hold such hydrographic service providers liable for losses they may have suffered whilst relying on the service provided.

The world is becoming ever more litigious and ITIC has seen an ever-increasing volume of professional indemnity claims made against its members, which include maritime professionals such as marine surveyors, naval architects, class societies and a number of hydrographers, over the corresponding period.

WHAT IS A PROFESSIONAL INDEMNITY CLAIM?

It is a claim against the provider of a professional service by someone to whom that provider owes a duty of care, either contractually or by the tort of negligence, and who has relied on the advice provided and has suffered a loss because of that reliance. As charts are now generally available to many members of the public, particularly following the introduction of the Electronic Navigational Chart and the increase of new companies which market and distribute hydrographic information, the potential number of people that rely on the information provided by the hydrographer, and therefore to whom the hydrographer owes a duty of care, will have significantly increased.

If a contract exists between a provider of a service and the consumer of that service, there will be a contractual duty of care. If the service is not correctly performed, this is known as a 'breach of contract' and the party who has suffered the breach will be able to issue a claim against the party in breach. However, if there is no contract (which in the majority of hydrographic charting cases there will not be) you can still owe a duty of care to another party. In the case of Donoghue v Stevenson [1932] Lord Aitken described what a duty of care is and to whom it is owed:

"*The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, 'who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably forsee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.*"

Therefore, the hydrographer will owe a duty of care to any person or company that could reasonably be expected to rely on their service i.e. any ship owner or operator.

ITIC is aware of two claims brought against hydrographic charting service providers, each with a different result. First, the good news: in an unreported first instance case in the United States it was held that the then US Hydrographic Office was not negligent in causing the passenger liner, Queen Elizabeth 2, to ground between Nantucket and Martha's Vineyard after Cunard Line claimed that a reef had been negligently charted. Firstly, the Court held that the error on the chart was not as a result of any negligence by the US Hydrographic Office since the survey was conducted in accordance with 'state-of-the-art' techniques at the time the survey was conducted in 1939. It also held that there was no pressing need for NOAA to perform a new survey. Secondly, it was also held that the vessel did not actually rely on the defective chart when fixing its course. Therefore, even if the chart was defective, it did not cause the loss. The US Court of Appeal confirmed the second point, but the first was not mentioned in the judgement.

More worrying is the Swedish Supreme Court decision in the 'TSESIS'. In this case a Russian tanker struck a rock, which was incorrectly marked on the chart. The Supreme Court held that the Swedish Hydrographic Office was liable for the consequences. This included the damage to the ship. Even worse, the Court also held that as the chart was defective, this was a defence for the owner to any claim for the cleanup costs of the spillage and any pollution claims.

WHAT CAN HYDROGRAPHERS DO TO LIMIT THEIR POTENTIAL EXPOSURE TO LIABILITIES (AND SUBSTANTIAL LEGAL FEES)?

You will undoubtedly expect an article written by an insurance company to include a recommendation to insure with a reputable insurer and, of course, that is what we do recommend. However, although it is a useful and comforting safety net, insurance is only ever the first part of the answer because, even if you have professional indemnity insurance, you still have your professional reputation and your clients to maintain.

Secondly, then, you should devise a 'best working practice' guideline, which should be issued to, and followed by, all staff to minimise the chance of claims occurring in the first place.

Thirdly, if you are entering into a new contract, certain clauses should be either inserted at an early stage, or implemented into your existing standard trading terms and conditions.

For example:

- a clause excluding liability (an exclusion clause) - however, if this is not acceptable
- a clause limiting liability (a limitation clause) to a certain figure is quite usual - this can be a specified sum or a multiple (certainly no more than ten times and, usually, five) of your fee
- choice of jurisdiction and governing law may also help reduce or limit potential exposure - based on the decision in the TSESIS do not agree to Swedish law if you have the choice

Finally, if a new report is being prepared or a new chart is being drawn, it is good practice to insert an exclusion or limitation clause on the actual document.

This article has focused on the charting sector of the hydrographic profession although parallels can be draw within the other sectors. It would be impossible to detail each type of claim that you may be faced with during your professional life, or all of the risk avoidance strategies that may be available to help you, here. However, if you require more information or advice please do not hesitate to contact us at itic@thomasmiller.com

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A "Telex Release" is the industry term for the release of cargo at one port when the original bill of lading has been surrendered at another.

Telex release by e-mail – precautions and pitfalls

What is a "Release"?

A Telex release is the industry term for the release of cargo at one port when the original bill of lading has been surrendered at another. Although this is still referred to as a Telex release, today the release is almost always made by e-mail. Telex release is a normal practice in liner shipping. The shipper, or a forwarder, or an NVOCC may choose (for one reason or another) to surrender the bills of lading to the carrier's agent in a port other than the discharge port. The carrier's agent has a duty to collect the original bills of lading before releasing cargo and the bills of lading are normally surrendered to the discharge port agent, but it is not necessary for this to be the case. However, collection by another agent does need to be handled carefully.

How is "Telex Release" achieved?

The bills of lading are surrendered by the shipper or forwarder or NVOCC to an agent in a port other than the discharge port (the "Third Country Receiving Agent" - usually, but not always, the agent at the port of loading) with an instruction to release the cargo to the consignee or a named party. Once the original bills of lading are in the hands of the Third Country Receiving Agent he sends a "Telex release" to the discharge port agent (the "Releasing Agent"), confirming that the full set of original bills of lading have been surrendered to him and that the cargo can be released to either the consignee on the bill of lading or some other party authorised by the shipper or the consignee (depending on whether it is a non negotiable or negotiable bill of lading).

Problems which can result from "Telex Releases"

There are two main problems with Telex releases. The first is carelessness in the way that they are worded and dealt with. Considering the value of some of the cargoes which are released in this way, the release instructions which are sent between agents are often extremely casual. There have been several claims reported to ITIC where the Releasing Agent has taken an ambiguously worded message from a Third Country Receiving Agent to be a release, when it was not. In one typical case the Singapore shipper of a container of quartz clocks shipped to the UK had not been paid by the original consignee in the UK and had found another buyer in Durban. The shipper requested that the cargo be shipped from the UK to Durban. The line agreed to a change of destination (COD), on condition that the shipper paid additional freight and surrendered the original bills of lading issued in Singapore in exchange for new bills of lading showing the new destination. The Singapore agent sent an e-mail to the UK agent which said "Shipper has confirmed COD charges and bills are now surrendered. Please kindly go ahead, Thanks." One of the staff in the office of the UK agent took the "go ahead" to mean that the cargo could be released without collecting the original bills of lading to the original UK consignee, when "go ahead" actually meant that the cargo should be shipped to Durban. In this case the Singapore agent had not taken the trouble to make clear what he meant by "go ahead" and the UK agent, in receipt of an unclear message, had not clarified it. As a result, valuable cargo was misreleased and the Singapore shipper claimed his losses from the line, who claimed reimbursement from the agents.

The second problem with Telex Releases has resulted from e-mail fraud. In the ITIC GUIDELINES FOR THE RELEASE OF CARGO (available on the ITIC website) we recommend that agents check the authenticity of messages from other agents to release cargo. This recommendation was based on previous experience of forged faxes ordering Telex Release. ITIC has recently received several claims involving Telex release by faked e-mails. These are e-mails, received by discharge port agents which have been manipulated to appear as though they have originated from the load port agent, and authorise release of cargoes and confirm that freight has been received when it has not.

One forged e-mail confirmed that the original bills of lading had been collected at the load port for four containers of mobile phones, and another forged e-mail confirmed that the original bills of lading for a cargo of fruit and the freight had been collected. In both cases the fake e-mails were accepted by the discharge port agent at face value, and cargo was released. In the first case valuable cargo was misdelivered and in the second case a large amount of freight remained unpaid.

What should agents do when asked to perform a "Telex Release"?

The first thing any agent should do is to obtain written authority from the principal. Shipping lines often include Telex release procedures in their Agency Manuals, which set out standard procedures to be followed by the Third Country Receiving Agent and the Releasing Agent. These procedures must be followed strictly by both agents. If the principal does not have standard Telex release procedures, then, in every case, the Releasing Agent must obtain written authority from the principal before releasing cargo in this way.

Third Country Receiving Agents must:

- "Straight" (non negotiable) bs/l - obtain full set of three originals
  "To Order" (negotiable) bs/l - obtain full set of three originals, properly endorsed by "To Order" party;
- collect outstanding freight and charges to be collected at his port (as appropriate);
- obtain written instruction from shipper (or valid endorsee) that cargo can be released at Releasing Agent's port (to be specified) against surrender of bs/l to Third Country Receiving Agent. The shipper or endorsee should be asked to provide in writing details of consignee or other party to whom cargo should be released (full style, name, address, phone, fax, e-mail);
- send clear and unambiguous instruction to Releasing Agent including:
  a) confirmation that full set of three original bills of lading, properly endorsed (if appropriate) have been surrendered and that cargo can be released at Releasing Agent's port;
  b) confirmation that all charges (such as freight and other charges payable at load port) have been collected;
  c) full details of the cargo to be released (i.e. b/l number/date/place of issue, container number and cargo details);
  d) full name, style, address, telephone, fax and e-mail address of consignee, or valid endorsee, to whom cargo should be released;
- ask Releasing Agent to confirm once cargo has been released, at which time the bills of lading should be stamped "ACCOMPLISHED" and placed on the voyage file, which should be retained for the length of time the principal requires such documents to be retained.

Releasing Agent must:

- make sure that principal's authority to release against "Telex release" has been received. If the principal has other requirements (such as Letters of Guarantee from shippers/receivers or to be notified of all Telex releases) then these requirements must be followed;
- check wording of "Telex release" carefully. The Releasing Agent should double-check with the Third Country Receiving Agent if it does not clearly state the following:
  a) that original bills of lading have been collected and that cargo can be released; AND
  b) that freight and other charges payable at the load port have been collected, AND
  c) full details of the cargo, container number, name, address etc. of consignee or party to whom delivery should be given.

- FINALLY AND MOST IMPORTANTLY - Releasing Agents in receipt of Telex Releases MUST NOT ACCEPT THEM AT FACE VALUE.

In every case, the Releasing Agents should send an e-mail to the Third Country Receiving Agent (not by pressing the "Reply" button to respond to the purported Telex release but by finding, checking and using the genuine e-mail address of the Third Country Receiving Agent). The Telex release should be copied into the e-mail to the Third Country Receiving Agent, who should be asked to confirm that the message originated with him. Only then should the Releasing Agent release the cargo.

Conclusion

Misrelease of valuable cargo is a major factor in claims by principals against their agents. Carelessness in dealing with Telex release has contributed to these losses, and agents are now faced with attempts to obtain delivery using forged e-mails. Fraud in shipping is endemic, cargoes are valuable, and it has never been easier to forge documents, electronic communications, bills of lading, etc. Carriers and their agents have to continuously be aware of this fact and to take whatever steps are necessary to avoid becoming unnecessarily involved in costly claims for damages which have resulted from a failure to be careful and vigilant.

Directors' & Officers' Insurance: claims examples

Directors' & Officers' insurance (D&O) is a personal insurance purchased by the employer for the benefit of its directors and officers. ITIC's D&O product protects both individual directors from claims against them in person and also the company that has to indemnify these senior staff. For a comprehensive understanding of the terms and scope of ITIC's D&O insurance, please read the simple three page insurance policy available from ITIC. However, the following claims examples are provided to illustrate how D&O insurance could benefit you as a member of ITIC.

CLAIMS FROM THIRD PARTIES

Commercial partners, customers or even members of the public might consider bringing a claim against an individual person rather than the company.

A marine and transport consultancy contracted to provide services to an oil major. It was later alleged that a director of the consultancy had breached the confidentiality provisions of the contract by passing over sensitive commercial information to a competitor. The consultancy services were terminated and a significant legal action commenced. This alleged not only breach of contract but also a "wrongful act" on the part of the responsible director of the consultancy, thereby resulting in financial loss for the oil major. The individual director denied that he had done anything wrong and asked his employer to indemnify him.

The employer approached D&O underwriters for support. Insurance coverage was provided on the basis that an allegation of a "wrongful act" had been made against an "insured person" (company director). The allegation of misconduct was not admitted, nor had it been proven in final adjudication. The company was obliged to indemnify the director until or unless his misconduct was established. D&O coverage was provided under the company reimbursement provision of the D&O policy. A firm of defence lawyers was agreed upon together with D&O underwriters. Although the oil major's claim was upheld in the first instance court, it was overturned on appeal and the director was cleared of the allegations made against him. However, the cost of defence was significant, in the region of USD 500,000.

CLAIMS FROM SHAREHOLDERS

D&O insurance responds to claims brought against individual directors and officers by shareholders of the company. Claims from shareholders often follow a poorer than expected financial performance of the company.

A ship management company, and all of its Board of Directors in person, received such a claim from its shareholders. This alleged that one or more directors were in breach of their duty to act in the best interests of the company when they failed to ensure that the company had a reasonably comprehensive liability insurance programme in place to protect its assets. The year before two incidents had occurred. An employee had been sadly killed in a car crash whilst on a business trip. Employment liability underwriters had declined to pay the family compensation based on a provision in the policy which required the company to declare certain information at renewal. Due to an oversight, they had failed to do so. Later that same year, fire damage to one of the company's offices had not been reimbursed due to the insolvency of the insurers.

Both claims had resulted in significant losses on the balance sheet of the ship management company. A sum close to USD 1 million had been paid in total.

The individual director on the Board responsible for "risk management" received a claim in person from the company shareholders. D&O underwriters agreed to consider the claim on the basis that the alleged "wrongful act" required a defence. Shortly before going to trial, the case was settled. D&O underwriters agreed that although the claim could be defended, there was a significant chance the shareholders would be successful in bringing their action. As a result, a settlement was negotiated for two thirds of the claimed amount.

CLAIMS FROM STAFF (EMPLOYMENT PRACTICE LIABILITY)

Personal claims against individual directors and officers can be brought by staff who may allege that they were discriminated against (age, gender, religion etc) or had their employment terminated unfairly.

A marine and transport services company made the difficult decision to reduce the numbers of its staff. Business volume had declined and this was the only way forward. Upon receiving notice from the company, several members of staff consulted an "employment practice lawyer", and they began a legal action against the company and the individual directors responsible for their dismissal.

At the same time, a different member of staff who had also been dismissed began a separate legal action. Her allegation was that one particular director had always discriminated against her on grounds of her being female and of a differing religious faith. She considered that this was why she had been made redundant.

D&O underwriters were approached and lawyers appointed to defend the allegations against the individual directors. An allocation of costs was agreed for the defence of the company (not itself insured under a D&O policy) and the defence costs for the "insured persons" i.e. directors. At the subsequent employment tribunal, the individual directors were cleared of any wrongdoing and the company reached a settlement with the former employees. D&O defence costs for the individual directors were significant.

CLAIMS FROM REGULATORY AUTHORITIES

Health and safety in the workplace, statutory accounting and tax provisions, compliance with governmental and regulatory authority requirements; in the modern business world, more and more professional corporate governance is expected of individual company directors. ITIC's D&O policy includes legal costs coverage to help respond to regulatory inquiry.

A company director received a letter from the governmental authority responsible for overseeing the annual registration of his company accounts. This suggested he had submitted incorrect information and a fine was likely. An inquiry began. With the agreement of D&O underwriters, assistance was provided by a firm of consultants to show that no such breach of regulations had occurred.

ASSOCIATED COMPANIES

A director of a marine services company was required by his employer to also sit on the Board of Directors of another company, to whom corporate services were provided. Another director was also asked to sit on the Board of the local Port Authority.

Rather than rely upon any other D&O policy, both directors agreed an "associated directorship" extension whereby their additional directorships were also insured under their own ITIC D&O insurance policy.

These examples are illustrations only. They do not substitute the provisions of the insurance policy, which will be interpreted on a case by case basis.

If you would like a quotation for ITIC's D&O insurance, please contact your insurance broker or your underwriter at ITIC.

Viking Leiv Eiriksson monument looking out towards Munkholmen Island fort in Trondheim Fjord, Norway.

Arrest of vessels in Norway

By Tor Aasberg, Partner, Advokatfirmaet Grette DA, Oslo, Norway

1. INTRODUCTION

According to the Norwegian Enforcement Code (NEC) and the Norwegian Maritime Code (NMC) a creditor with a maritime claim against a debtor may demand security by way of arrest of a vessel.

The essence of arrest under the NEC and NMC may be summarized as follows:

- The creditor demanding an arrest decree may be a natural person or a company or other legal entity.
- Similarly, the debtor may be anyone, however, with the exception of the state and the municipality; these bodies are given immunity.
- The claim must be a "maritime claim". Whether the claim is due or not is in principle irrelevant.
- The basic requirement for an arrest decree is that a so-called arrest ground exists. However, as regards vessels, an arrest decree may be given without an arrest ground provided that the creditor has an overdue claim in respect of the vessel.
- The creditor has to present sufficient evidence to demonstrate that the claim exists and that there are grounds for an arrest.
- The Court that hands down an arrest decree is the Court of Enforcement (CE). This is the ordinary court of first instance, applying special rules given in NEC.
- There are three possibilities for the CE: it may reject the application, decide the case after an oral hearing, or decide the case directly on the basis of the application in favour of the claimant, without the other party being heard.
- The actual implementation of an arrest shall make the decree effective as against the debtor as well as against third parties.
- The effects of an arrest may be summarized as follows: (1) the debtor is thereafter not entitled to dispose of the arrested vessel to the detriment of the creditor (2) the arrest does not prevent other creditors from enforcing their claims, (3) an arrest does not in itself create a right to have the object sold, and (4) venue is obtained for the underlying claim.
- The creditor may apply for an execution lien to require the vessel to be sold.
- An arrest decree may be subject to security posted by one of the parties, and to the instigation of suit regarding the claim for which arrest is sought.
- The unsuccessful creditor may become liable towards the debtor.

2. MARITIME CLAIM

According to Section 14-2 of the NEC, the basis for the arrest has to be a monetary claim. This is, however, not sufficient as regards arrest of vessels. The Norwegian Maritime Code (NMC) contains supplementary regulations as regards arrest of vessels. According to NMC Section 92(1) an arrest can only be carried out to secure "[…] a maritime claim." The provision contains the following list of what type of claims constitute "maritime claim":

- damage caused by a vessel in a collision or otherwise,
- loss of life or personal injury caused by a vessel or occurring in connection with the operation of a vessel,
- salvage and the removal of wrecks,
- a charterparty or other agreement for the use or hire of a vessel,
- a charterparty or other agreement for the use or hire of a vessel,
- a charterparty or other agreement for the carriage of goods by a vessel,
- loss of or damage to goods, including luggage, carried by a vessel,
- general average,
- bottomry,
- towage,
- pilotage,

- goods or materials delivered anywhere to a vessel for use in its operation and maintenance
- the building, repair or fitting out of a vessel and costs and fees payable for docking,
- wages and other remuneration due to the master and other employees on board in respect of their service on the vessel,
- a master's disbursements, including disbursements by shippers, charterers or agents on behalf of the vessel or its owner,
- a dispute as to the ownership of the vessel,
- a dispute between co-owners of a vessel concerning its ownership, possession or use or the revenues from it, and
- any mortgage on or security in a vessel, except for a maritime lien.

3. ARREST GROUND

The basic requirement for an arrest decree is that grounds for arrest exist.

The grounds are defined in Section 14-2 (1):

> ***"Arrest of assets of economic value can be decreed when the behaviour of the debtor gives reason to fear that the enforcement of the claim otherwise will either be made impossible or made substantially more difficult, or has to take place outside the Kingdom."***

Normally, it would not be possible to obtain an arrest on grounds of the debtor's poor state of finances, or on grounds that the debtor is subject to massive influx of other creditors. Equally, a claim cannot be secured if the debtor's finances are deteriorating because of circumstances over which he has no control, such as force majeure or fire.

The "behaviour of the debtor" is the crucial element, also in respect of enforcement abroad. Behaviour under and after conclusion of contract would be relevant. Also consecutive circumstances may be relevant, e.g. transfer of assets etc. The first sentence of Section 14-2 of the NEC extends the opportunity to obtain an arrest for an " […] overdue claim in the vessel […]". In these situations it is not necessary to prove that there is a need for the claim to be secured. It is sufficient to demonstrate that, on the balance of probabilities, an overdue claim exists, which is secured by a maritime lien. The request in these cases can be directed to the owner of the vessel.

4. EVIDENCE TO MAKE PROBABLE THAT THE CLAIM EXISTS AND THAT THERE IS AN ARREST GROUND

The claimant has to present sufficient evidence to make probable that the claim exists and that there is an arrest ground. This requirement is explained in the travaux preparatoires in this way:

> ***"Making the claims probable refers both to its factual and legal basis. The judge must from an evaluation of the factual and legal aspects find it more probable that the claimant will succeed than not in a subsequent litigation. Of course, the judge will in some instances have to base his decision upon thinner evidentiary material than in ordinary litigation. Time pressure may in some instances make it difficult for the judge to go to the bottom of the legal issues. In principle, however, the situation is not different from the evaluation of the claim in an ordinary court litigation."***

It is then stated that these guidelines are applicable also to the evaluation of whether grounds for arrest exist.

The uncertainties connected with the procedure in arrest cases are to some extent balanced by the rules on posting security: The more uncertain the position of the creditor, the more likely it is that he will be required to put up security for the loss suffered by the other party if it is eventually established that the arrest was unwarranted.

Where there is "danger of delay" arrest may be granted. However, in these situations posting security is an absolute pre-requirement.

5. THE AUTHORITY TO GIVE AN ARREST DECREE, THE PROCEDURE AND THE COURT'S DECISION

The authority to give an arrest decree is the Court of Enforcement (CE). This is the ordinary court of first instance in Norway, applying special rules in the NEC.

The CE is competent in two instances:

- when the debtor has his home venue (e.g. main office) within the geographical district of the court. The nationality or domicile of the creditor is irrelevant, and so is the question of whether the claim is of a national character.
- The second instance of competency is where the debtor has assets of any type in the court's geographical district, or - as regards chattels - such assets belonging to the debtor can be expected to come hereto "in the near future" (e.g. with a consignment of goods).

The procedure before the CE is relatively simple. An arrest application is in most instances submitted in writing by a lawyer on behalf of the creditor. The application should include a specified maximum as regards the size of the claim.

The arrest application must, as a rule, be directed against a specific vessel, and there must be a maritime claim relating to the vessel in question. According to NMC Section 93(1) of the NMC arrest can only be effected against:

- the vessel to which the maritime claim relates, or
- if the owner of the vessel to which the maritime claim relates is personally liable for the claim: other vessels owned by that person at the time when the claim arose, or
- if someone other than the owner of the vessel to which the maritime claim relates is personally liable for the claim: other vessels owned by the person personally liable for the claim.

Vessels are regarded as having the same owner when the same person or persons own all parts or shares.

For claims regarding a dispute as to the ownership of a vessel or a dispute between co-owners of a vessel concerning its ownership, arrest may only be affected against the vessel to which the claim relates.

If a vessel has already been arrested in Norway or abroad, subsequent applications for arrest based on the same claim shall be refused. This applies correspondingly if an earlier application for arrest was denied or if an arrest was lifted because the debtor provided security for arrest. This regulation, however, do not apply if the creditor shows that the security provided in the earlier arrest case has lapsed with final effect or there are other good reasons for granting the later application for arrest.

The CE shall state the maximum amount to be secured in the vessel.

The ruling by the court on the merits of the application is not a formal judgment but takes the form of a decree, which is less formal than a judgment. The decree may be subject to an appeal to the Court of Appeal.

According to NMC Section 93(1) the CE must decide that the creditor must provide security for cost related to port fees incurring during the period of the court hearings, within a week. The security must be able to cover port fees for at least 14 days ahead. As security any deposits in a Norwegian bank or a guarantee from a Norwegian bank will be sufficient. In some cases the CE also accept a bank guarantee from a foreign bank or insurance company. When the case is settled and incurred port fees are paid, the security can be withdrawn.

The debtor can request the lifting of the arrest at any time, if new evidence is presented or new circumstances prove that the claim or the need to secure the claim is no longer is present. The same applies if the creditor is deliberately delaying the proceedings after the petition is delivered to the court or if legal enforcement is demanded.

The debtor may also request the withdrawal of the arrest by presenting sufficient security equivalent to the amount of the arrest.

If the court accepts security offered by the debtor, it may decide that the security shall apply to any judgment concerning the claim given by a competent court in Norway or abroad, irrespective of whether or not Norway has entered into any treaty with the State concerned relating to the recognition and enforcement of judgements.

6. THE ACTUAL IMPLEMENTATION OF AN ARREST

The actual implementation of an arrest has two components:

- deciding which object shall serve as security for the claim accepted by the CE.
- making the decree effective as against the debtor as well as against third parties.

A vessel arrested according to the second paragraph of Section 14-2 in the NEC must not leave its berth until a forced sale has been completed or the vessel commences operation under order of the court. If an arrested vessel is not in this country when the arrest is granted, then the defendant, as part of the decision, shall be ordered to bring the vessel to a designated place. After its arrival, the vessel is prohibited to leave its berth.

This arrest must be brought to the attention of the vessel's master.

7. EFFECTS OF AN ARREST UNDER NORWEGIAN LAW

The effects of an arrest may be summarized as follows:

- the debtor is thereafter not entitled to dispose of the arrest object to the detriment of the creditor.
- the arrest does not prevent other creditors from enforcing their claims.
- arrest does not create a right to have the object sold.
- venue is obtained for the underlying claim.

An arrest decree may be subject to security posted by one of the parties, and to the instigation of suit regarding the claim for which arrest is sought.

The unsuccessful creditor may become liable towards the debtor. NEC Section 3-5 stipulates that when an arrest is

> ***"[...] reversed or has become ineffective and it appears that the claimant's claim did not exist when the [arrest] was decided, the claimant is obliged to compensate the defendant for the loss he has suffered as a consequence of the [arrest] or to have it reserved."***

This is a strict liability, i.e. liability is not dependent upon any kind of negligence, blameworthiness etc. on the part of the creditor.

According to Section 15-15 of the NEC the arrest will lapse without cancellation if:

- a disbursement is given in the arrested assets, or
- the creditor fails to meet a deadline to give security or to start legal proceeding or to start legal enforcement of the claim
- the creditor has not started legal enforcement of the claim, within one year after the arrest is given, or
- the defendant pays out the claim, or the claim lapses for other reasons or the debtor is legally acquitted of the claim, or
- the creditor give up his rights given by the arrest, or
- the creditor is given an enforcement judgement for his claim and disbursement is not filed within one month after the ruling has legal force.

First Company Law Directive - Company Identity Requirements

Whilst incorporating a company may be the easiest way of limiting one's liability, recent legislation means that the administrative burden of managing a company has got harder. The first Company Law Directive and First Company Law Amendment Directive has amended the English Companies Act 1985 and now requires a company's name to appear legibly in:

- All its business letters
- All its notices and other official publications
- On all its websites
- On all bills of exchange, promissory notes, endorsements, cheques, orders for money or goods purporting to be signed by or on behalf of the company, and
- All bills, invoices, receipts, letters of credit

In addition, the company's business letters, order forms and websites have to include fuller particulars, including:

- The company's place of registration
- The company's registration number
- The address of its registered office

All these requirements apply to companies incorporated in England and Wales whether or not the documents they produce are in hard or electronic copy or any other form. The introduction of these provisions was timed to coincide with the implementation of the E.U. Transparency Obligations Directive and to allow early delivery of the benefits e-communications – including significant cost savings to business, improved accessibility to information, and, where applicable, enhanced immediacy of dialogue between companies and shareholders. It will certainly involve companies in carrying out some work updating their letterheads and other documentation, whether on paper or electronic form, but should benefit consumers and clients alike.

We have also ascertained requirements for companies situated in the following jurisdictions:

GERMANY

Limited companies have, for reasons of transparency, been obliged to provide similar information. However, this has now been extended to all companies entered on the commercial registers in Germany, whether they are sole traders, partnerships, limited liability partnerships, limited companies or public companies. The information that must be included is::

- The company's place of business
- The court where it is registered
- The commercial register number

In addition, in respect of limited companies the first name and family name of all directors must be included and further information must be provided for public companies. The regulations also apply to faxes and emails.

Companies which offer interactive and media services are bound by further obligations and violation of any of these regulations can be punished with fines of up to EUR 5,000.

FRANCE & SPAIN

Similar legislation has recently been passed in France and Spain, although the amount a company can be fined for non-compliance differs.

NORWAY

Whilst most information regarding companies, including the business name and number, identity of the members of the board of directors and general manager (including information about positions in other businesses held by these individuals, form of organisation, type of enterprise, date of incorporation, amount of share capital and authority to bind a business), may be found in the National Company Registry, some information must be provided by the business themselves, including their unique nine digit organisation number which must be included, together with the name of the business, on websites, letters and business documents and also the VAT numbers.

CANADA

The federal nature of Canada means that each province has its own legislation and Law Society. We understand that in British Columbia and all Atlantic provinces the requirement to list corporate registration number and/or registered office details on letters and correspondence does not exist. The same also goes for the provinces of Ontario and Quebec.

AUSTRALIA

Under Australian law the only information that companies registered in Australia must provide is the Australian business number (ABN) on all stationery. Companies do not have to provide the ABN on emails or websites.

UNITED STATES OF AMERICA

The United States of America allows each state to decide individually on its own corporate procedure. In New York, there is no equivalent to the Companies Act. Instead, under Section 408 of the Business Corporation Law, the corporation must file a biennial statement that sets forth:

- The name and respective business address of the CEO
- The street address of its principal executive office
- The post office address within or without this state to which the Secretary of State can mail a copy of any process against it

The State of New York then makes the corporate information available to any person on the Secretary of State website.

Most U.S. States, including Florida, Texas, California, New Jersey and Connecticut require a corporate name to include the words "corporation, company, incorporated or limited". This designation, however, has never been interpreted to require a corporation's name to be included on all signage, letterheads, company forms, phone listings and the like. The omission of a corporate name indicating subsequent business dealings does not extinguish the existence of the corporation or place personal liability on the agent who signs the contract for the company. United States corporations avoid the repeated production of the company registration, place of registration and office addresses on business letters, by placing the burden on the individual to seek out incorporation information at the office, or website, of the Secretary of State.

ACTION REQUIRED

If your company is based in one of the jurisdictions that requires certain information to be included on your letterheads, emails and websites, you must comply or run the risk of incurring a fine. If you are not located in one of those jurisdictions that require such information to be included at this time, you still have a duty to keep yourself up to date with any changes to the legislation.

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ITIC News

ONLINE TRAINING TOOL - THE RISKS INVOLVED WITH BILLS OF LADING

ITIC has developed its first online training tool, "The risks involved with bills of lading", which is located on the homepage of ITIC's website, www.itic-insure.com.

ITIC's Claims Director, Andrew Jamieson, narrates a presentation which takes the listener through different scenarios through the life of a ship agent's involvement with a bill of lading – from the initial stages of issuing the bill to the final delivery of the cargo. Aspects covered include misdating bills, shipped on board, description of cargo and on deck/under deck cargo. The presentation includes two ITIC circulars "Guidelines for the release of cargo" and "Issuing switch bills of lading" and concludes with ten questions that allow the user to test their knowledge.

Anyone whose daily work involves bills of lading should have a look at this new tool and you can provide your feedback to ITIM's marketing director, Charlotte Kirk via e-mail: itic@thomasmiller.com.

INSTITUTE STANDARD TRADING CONDITIONS - 2007

ITIC has reviewed the ICS Trading Conditions and an ISPS clause has been included. The opportunity has been taken to update the conditions to meet present legal guidelines. The revised terms have been fully approved and are now available on application from Federation@ics.org.uk These Conditions are copyright and their use is restricted to company members and professional members acting as sole traders of Institute of Chartered Shipbrokers.

ITIC'S CLAY PIGEON SHOOT

On one of the very few dry days of July 2007, ITIC held its annual corporate shooting day at the West London Shooting School. Insurance brokers from across the UK joined Graham Taylor, Alistair Mactavish, Kevin Sandom and Stuart Munro of ITIM to either learn or fine-tune their shooting skills.

After a hearty breakfast, guns were loaded and clay pigeon traps set as the four teams set off under the watchful eye of their instructors. Throughout the day, each 'Gun' shot at over 100 clay pigeons under the tuition of some of the finest shots in the world, before the more serious competition took place. ITIC's Graham Taylor was awarded the title of 'High Gun' after shooting 44 of the 48 clays on offer. Matthew Ellis of Marsh was a close second.

Even though the majority of people awoke the next morning with bruised shoulders from recoil of the 12 bore shotguns, everyone that attended the shoot thoroughly enjoyed the day.

SUCCESS IN ICS EXAMINATIONS

Congratulations are due to Robert Sniffen and Graham Taylor of ITIM on passing the examinations leading to membership of the Institute of Chartered Shipbrokers.

The 2007 examinations of the Institute of Chartered Shipbrokers showed another year on year increase in the number of papers sat by students around the world.

The Institute remains unique in its ability to examine and award Chartered Shipbroker status in line with its Royal Charter. Founded in 1911, the ICS received its Royal Charter in 1920 and a supplemental Charter in 1984 opening up the way for international membership. Today, the ICS is the only internationally recognised professional body, representing shipbrokers, ship managers and agents throughout the world. With 23 branches in key shipping areas, 3500 individuals and 120 company members, ICS membership represents commitment to maintaining the highest professional standards across the shipping industry. The Institute was founded in the UK and has both strong European links and an increasing presence in Asia, Africa, North America and Australasia.

A major provider of education and training, the ICS sets and examines the syllabus for membership providing the shipping industry with highly qualified professionals. Through its learning programme, Tutorship, the ICS also runs a series of training courses, providing specialised knowledge for a range of personnel at all levels in the shipping industry. In addition it has a strong track record in preparing bespoke training packages for individual shipping and shipping related companies. ITIC is delighted to be associated with, and assist, the Institute of Chartered Shipbrokers.

FIXTURE FOUL-UPS

On 8th May 2007, ITIC sponsored an evening at the Baltic Exchange on the pitfalls facing shipbrokers. Drawing on the Club's 80 year experience of assisting shipbrokers, Andrew Jamieson, Claims Director of ITIM and author of "Shipbrokers and the Law" and Chris Arnold, an Account Executive at ITIM and former shipbroker, spoke about the issues which shipbrokers should be aware of during negotiations, and it was apt that they addressed the subject in the spiritual home of shipbroking. The main types of negligence and authority issues were explained, and examples of the most common types of claim were discussed. But these are only two aspects of the dangers faced by shipbrokers in the modern world. Shipbrokers' lifeblood is the commission they earn, and Andrew and Chris gave advice on how to help ensure that they are paid what they are owed, including availing themselves of the debt collection service offered by the Club. The presentation also addressed how to reduce the chances of falling foul of the laws concerning fraud, money laundering and defamation, and how the Club can help if problems arise.