

Circular

TO: THE MEMBERS

Ref: 2012/6

September, 2012

ENFORCEABILITY OF CHARTERPARTY GUARANTEES

The Association has been involved in a number of cases which involve the enforceability or otherwise of charterparty guarantees. As a result of ineffective drafting or the failure to comply with other formalities, Members have found themselves unable to enforce otherwise good claims.

Members will no doubt be aware of the reasons for asking a third party to guarantee performance by their contractual counterparty, which could include factors that the counterparty has no readily identifiable assets, is located in a jurisdiction where enforcement procedures may be unreliable or there may be certain reputational issues. Given the importance of such guarantees there are steps that should be taken when agreeing to such a guarantee, these can include:

- The guarantee should use wording that effectively provides the protection that the Member is seeking. For example, it should be payable on demand and contain a suitable choice of law and jurisdiction that will assist with enforcement in due course;
- Any guarantee should preferably be contained in a separate document signed by the party guaranteeing performance and not simply be contained in the charterparty and with words such as “guaranteed by [X]”;
- If the guarantee is to form part of the main contract, the wording should still be drafted in such a way that the terms of the guarantee are fully expressed and, most importantly, the guarantor signs and acknowledges its obligations under the guarantee;
- If the person signing the guarantee is purporting to do so as agent for the guarantor, or with its authority, the Member should satisfy itself that the person signing has the proper authority. A Member should not assume

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that a shipbroker or the Member's counterparty has authority to bind the guarantor;

- The entitlement of the guarantor to provide the guarantee in accordance with any local laws or regulations should be checked. For example, where a Chinese bank or other company provides a guarantee, this must be approved by and registered with the State Administration of Foreign Exchange. Otherwise the guarantee may not be enforceable in due course;
- Other formalities may need to be observed. Under English law, the guarantee must be in writing and signed by the guarantor or its authorised agent. This differs from other contracts, where there is not a need for the agreement to be in writing.

The above factors will be taken in to account by the Directors in the exercise of their discretion pursuant to the Association's Rules in determining support for a particular case which involves the enforcement of charterparty guarantees. If a Member has any questions or concerns arising from this Circular, please approach your usual Club contact.

Yours faithfully,

THOMAS MILLER DEFENCE LTD
Managers