

# soundings

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## Message from the Managers



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The Managers are aware that for the past three or more months the shipping sector has undergone a very difficult period. These conditions are forecast to last for some time until market confidence has been restored particularly to the worldwide banking and financial markets. Notwithstanding this uncertain period the Managers wish all Members a Christmas period which is filled with enjoyment and positive expectation for the year ahead.

## Piracy

**The subject of piracy has dominated the shipping journals in recent months. Although naturally the overriding concern is the well being of a ship's crew, the threat of piracy can give rise to complex legal issues.**

The majority of piracy related enquires concern whether in the current climate a ship is obliged to transit the Gulf of Aden. The starting point for any discussion is the terms of the governing charterparty. These can vary widely although in most cases the Bimco Conwartime or Voywar clauses are incorporated.

Both of these clauses define "War Risks" to include "acts of piracy, acts of terrorists, acts of hostility... by any person, body, terrorist or political group which in the reasonable judgement of the Master or Owner, may be or are likely to become dangerous to the vessel."

The Conwartime clause further provides that "the vessel shall not be ordered to or through any... place, area or zone... where in the reasonable judgement of the Master or the Owner the ship may be, or is likely to be exposed to War Risks".

The use of the term "reasonable judgement" incorporates an objective standard, and requires an assessment

of the risk of a piracy attack by reference to what other masters or owners may typically do. At present, given that the majority of ships transit the Gulf of Aden safely it might be difficult to argue that a piracy attack is likely to occur. However, this might change if the number of incidents increase or if more owners/operators refuse to transit the Gulf of Aden.

From an owner's perspective any refusal to transit this area could bring with it P&I and other implications. It is important that Members speak with their P&I Association before taking any decisions which could result in a breach of the contract of carriage.

Another issue which arises concerns the possible overlap between hull and war risks insurance. As a result of recent incidents in the Gulf of Aden there is currently some discussion as to whether hull terms should continue to include piracy. Members are advised to review their hull and machinery policies carefully and obtain specific advice as necessary.

## Rule B attachments

**In current market conditions Rule B attachments are being seen as never before. The Managers have heard that the New York courts have been granting up to 35 new orders per day. Last year the average was 3 to 5 per week. In view of this, the following is a brief summary of the Rule B procedure and some issues which have recently arisen.**

The procedure is available for claims which fall under the US court's definition of a "maritime claim". A recent ruling in New York allowed an attachment for a sale and purchase dispute, but also confirmed that the procedure did not extend to claims under newbuilding contracts.

An order can be made where the defendant "cannot be found within the relevant district." Some operators have sought to avoid attachments by appointing a local agent and registering to do business in Manhattan, but maintaining no other links. However this does not always work. The Managers were recently able to obtain a Rule B attachment, even though the defendant had a local agent in New York.

In theory, a Rule B order only attaches funds in the hands of a bank at the moment it is served. However to avoid the chaos of lawyers constantly serving orders, banks now treat service before 9 am as being effective for the remainder of that day. In the event of multiple attachments against the same funds, the party who attaches first takes priority over later attachments.

In a recent case in the US Second Circuit Court of Appeals, it was argued that

funds in transit in New York were the property of the intermediary bank, and not the sender of the funds. This case had been anticipated as a possible threat to the continuation of Rule B. However the court expressly confirmed that a transfer in the possession of an intermediary bank is the property of the originator, thus ruling out a challenge to Rule B on this ground for the foreseeable future.

The procedure does have its detractors, not least the banks which argue that Rule B attachments orders disrupt commerce (and many banks are currently swamped with such orders). It is also clear that some New York judges disagree with the remedy.

Rule B orders have been a useful weapon in a claimant's armoury. Nevertheless, sophisticated defendants are finding ways to avoid banking through New York. Moreover there is an increasing variety amongst New York judges' to their approach to Rule B applications. Members should always be alive to other methods of securing claims. In the next issue of Soundings the Managers will be reviewing the recent arrest developments in South Africa.

## UKDC ship vetting seminar

The subject of ship vetting has always provoked strong opinions, and last month's UKDC annual autumn seminar, held at the Galaxy Room of the Athens Hilton was no exception, when the question was "Ship vetting: improving standards or more burdens for owners?"

The Managers' own speakers were joined by Captain Fintan Cullen of Ship Vet Services, a well-known expert in the field of oil major/SIRE and CDI vetting who took the audience through the development of the oil major "approval" system, from its inception to the way in which it operates today, as well as giving some practical guidance for owners.

Alan Mackinnon, Senior Director of Claims, then gave an insight into what to look for – and more importantly what to avoid - when negotiating and agreeing oil major approval clauses. To conclude, the focus moved to the dry bulk market, with Marc Jackson looking at RightShip approval and the recent case of the Silver Constellation which has been supported by the Association.

Lively debate ensued over drinks afterwards. Few opinions changed, but it is hoped that the seminar at least gave food for thought.

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