UK DEFENCE CLUB

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soundings

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Message from the Managers

The Posidonia exhibition is recognised as one of, if not the leading maritime exhibition in the world. This year's exhibition takes place between 2nd and 6th of June, 2008. As in previous years Thomas Miller Hellas will be holding an Open Day at their office at 93 Akti Miaouli on Thursday 5th June between 1200 hrs and 1800 hrs. Please feel free to come along and join us at this Open Day which is always a very enjoyable occasion.

On a separate note, Marc Jackson has now joined Thomas Miller Hellas as the Defence Senior Claims Director within the office. Marc replaces Paul Kaye who spent nearly five years in Greece. Paul has now returned to Area Group L7 in London, the Group which is dedicated to Northern European Members.

Daniel Evans, Club Manager.

UKDC
IS MANAGED
BY **THOMAS MILLER**

Sovereign Immunity

In a recent English High Court ruling, The Grain Board of Iraq v Tsavliris Salvage [2008] EWHC 612 (Comm), a department of the Iraqi government was unable to rely on state immunity to defeat a claim for contribution to salvage.

This case provides a useful opportunity to consider the position under English law when Members contract with state entities.

English law provides a presumption that a state is immune from English court proceedings. However this is subject to a number of exceptions. These include commercial transactions entered into by that state, which are defined to include any contract for the supply of goods or services. This exception should therefore embrace most shipping transactions.

However the majority of shipping contracts contain arbitration clauses. An arbitration agreement should amount to a waiver of sovereign immunity, but occasionally intervention by the English court may be needed to enforce the agreement. In this scenario a further exception to the principle of state immunity applies, provided the arbitration agreement is in writing.

Occasionally there might be the need to secure or enforce a claim against the assets of a state. Difficulties may be encountered when dealing with diplomatic assets or those of a central bank. However ships owned by a state can be arrested in England to enforce a claim against that state, provided that at the time the cause of action arose, the ship was in use or intended for use for commercial purposes.

It follows therefore that state immunity can rarely be invoked successfully in the context of a shipping transaction. As the recent ruling shows however, this has not stopped some states from claiming immunity to avoid debts and Members should consider these risks when contracting with state owned entities.

soundings

Bunker quality disputes

With rising fuel costs it appears that the incidence of bunker quality issues is also on the rise. These claims can be notoriously difficult and expensive to resolve and depend largely on the quality of the evidence that is available during and after the bunker process. The following is a non-exhaustive guide to some critical things to consider to reduce or preferably eliminate the incidence of these claims.

The first and arguably the most important step is to have a comprehensive charterparty bunker specification clause. Short form bunker description clauses should be avoided. It is preferable that the clause makes reference to an internationally recognised fuel standard for the particular ship - for instance International Standard ISO 8217:2005 - Specifications of Marine Fuels.

Before bunkering commences the ship should be provided with the necessary documentation concerning the bunkers. This should be thoroughly checked to ensure that the quantity that is supplied is correct along with such aspects as viscosity and density. The bunker delivery note should also refer to sulphur content in accordance with Marpol Annex VI.

In terms of sampling it is important that samples are taken from the ship's manifold by either an automatic sampler or continuous drip sample and that this is physically witnessed by the ship's crew. The supplier can also be invited to witness the sampling and sealing of the bottles. A request should also be made for the ship's crew to witness the sampling on the barge and the subsequent sealing of the supplier's sample. This process should be documented in detail particularly if the supplier refuses to allow the ship's crew to witness any sampling being undertaken. Obviously it may not be possible for the ship's crew to continually monitor the entire barge sampling process however they should witness some of the process along with the sealing of the sample bottles.

Four samples are usually taken during bunkering. One sample is generally sent to a testing agency, one sample is given to the supplier and the third sample being retained on-board. In addition the fourth sample, the Marpol sample, should be taken and kept in a separate location. This sample should not be used in a bunker dispute. This Marpol sample along with the bunker delivery note should be retained on-board for one year for Port State Control inspections.

It is preferable that bunkers are not used until the analysis results are received. If the results indicate that the samples are outside the required specifications the bunkers should be segregated. The supplier and/or charterer should immediately be notified of the results of the tests. This is important as there may well be time limits within the bunker supply contract for notification of any claims.

If the bunkers are used prior to the analysis results being received and engine problems have occurred it is important that those events are documented and damaged components retained. As well as the Managers, a Member's hull and machinery or damage to hull underwriters should be notified immediately.

Throughout the bunkering process the most important aspect to consider is the *quality* of the contemporaneous evidence. Cases undoubtedly turn on the quality of that evidence and it is crucial that events are fully and accurately documented.

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Time for a change - time for Newbuildcon?

Late last year Bimco released its eagerly anticipated standard newbuilding contract, known as Newbuildcon. Bimco and members of the drafting committee have been involved in a number of presentations to highlight some of the key benefits of this new contract.

So what does it mean to the industry? For many years both builders and buyers have relied on contracts used on previous occasions. These contracts are by and large based on the SAJ form contract. Those contracts may have worked well in the past however many contain clauses which are either not balanced or have not been amended to reflect current building or other practices. New yards have also been established in many jurisdictions and may not have their own contracts.

Given these developments a new, modern and balanced contract is to be welcomed. Not only is the contract divided into logical sections mirroring each stage of the project process it also contains standard refund guarantee wordings. This should provide much comfort to financiers given that the wordings have been reviewed by banking experts. The contract also contains a number of other modern developments including the inclusion of an expert determination clause as an alternative means of dispute resolution.

Although some commentators have questioned the timing of the release of such a contract given the current market conditions, from the Managers' point of view such concern is misplaced. No one can realistically doubt the need or the value of having a modern, standard newbuilding contract irrespective of prevailing market conditions.

The Managers were closely involved in the drafting of this contract and Members wishing to have more specific details should contact their Account Manager.