

26 March 2004

## **TO ALL MEMBERS**

Dear Sirs

### **US Customs Regulations – Advance Electronic Presentation of Cargo Information**

Further to our Circulars dated 17 and 20 February 2004, efforts have continued to obtain clarification of the CBP's definition of a Carrier for the purpose of achieving compliance with the new regulations. Although no clear written confirmation of the position has yet been issued, the CBP has provided a number of rulings and presentations giving some indication of the approach that they seem likely to adopt. These are summarised below:

#### ***Initial CBP advice***

The CBP initially defined the Carrier as the 'entity that controls the conveyance'. In the CBP's analysis, since the Head Owner or Bareboat Charterer hires the crew and is responsible for a vessel's day to day navigation, either or both would be considered to be the Carrier. The CBP subsequently suggested that rather than taking a formal position on the identity of the Carrier, it would prefer to see industry parties work out amongst themselves who (either Owners or Charterers) would be responsible for compliance with the regulations. Prior to this change in position, the CBP had verbally advised that it had not anticipated the numerous contractual transactions which can make up a charterparty chain. While the CBP would give no general guidance as to whether Owners or Charterers would be responsible for complying with the regulations, it invited parties to request a formal ruling as to the identity of the Carrier under the circumstances of a particular charterparty. The process for obtaining such a ruling can be accessed at the CBP [website](#)

#### ***CBP rulings***

The International Group has been advised of at least two rulings issued by the CBP where the Time Charterer was determined to be the Carrier and the party to whom the CBP would look for compliance with the regulations. This includes not only responsibility to comply with electronic manifesting of cargo information via the vessel AMS system, but also the requirement to post an International Carrier Bond and to use the Time Charterer's SCAC code on bills of lading issued for the cargo. In support of the rulings, the CBP has noted that it was the Charterer who controlled the type of cargo and location at which the vessel was to load and discharge and who, therefore, was in 'control' of the vessel for the purposes of the regulations. In another ruling, the CBP found that the Carrier was the party who formerly was responsible for providing the vessel agents with the information used to prepare the CF1302 cargo declaration.

While the CBP rulings are technically only applicable to the particular charterparty arrangements presented by the party requesting the ruling, they are posted on the CBP [website](#) and do serve as guidance as to how the CBP is likely to rule in a similar case.

Notwithstanding these rulings, the CBP has not determined that it will be the Charterer in all cases who will be considered the Carrier.

#### ***CBP Seminar 18 March 2004***

Because of the continuing uncertainty as to the identity of the Carrier, on Thursday, 18 March 2004, a meeting was held by the CBP in New Orleans to attempt to address the industry concerns. The CBP repeated its position that due to the complicated charterparty chains underlying the operation of vessels – which were not anticipated at the time that the regulations were promulgated – it had decided that the industry was the best suited to determine who amongst Owners and Charterers was the Carrier.

For the purposes of guidance, the CBP advised that it views the Carrier as the entity that “controls” the vessel, which includes: a) determining ports of call; b) controlling the loading and discharge of the cargo; c) having knowledge of cargo information; d) issuing bills of lading; and e) has typically provided the Customs Form 1302 cargo declaration or the cargo information to prepare the CF 1302 to the vessel agent. Therefore, depending on the particular terms of a charterparty, either an Owner or Charterer could be found to be the Carrier responsible for compliance. When pressed for further guidance as to who is the Carrier where the Owner issues the bill of lading and the Charterer undertakes the other activities highlighted above, the CBP indicated that it would only respond to questions in writing about a specific charterparty, and submitted for a formal ruling to CBP headquarters in Washington.

#### ***Practical Steps***

As a practical matter, it is recommended that Members seek to agree terms in any new fixtures allocating responsibility for compliance with the regulations including the filing of the manifest, SCAC and ICB for vessels calling in the US. In this regard, work is continuing towards the preparation of a suitable suggested charterparty clause, to reflect recent developments in the CBP’s approach to the definition of a Carrier. As for existing charters that do not stipulate which party bears responsibility for compliance, Members may attempt to agree in writing in advance of US trade as to which party will comply with the regulations and how the cost of so doing will be allocated, so to avoid the risk – to both Owners and Charterers – that can result from non-compliance.

If the parties fail to agree over responsibility for compliance, it is understood that under US law the CBP is authorised to assess fines and penalties not only against the Carrier, but also against the Master and the vessel. In addition to possible action against them by the CBP, where deemed to be the Carrier, Charterers who act unreasonably also face exposure to whatever rights of recourse may be available to Owners under the relevant charterparty.

Members are reminded that the CBP will commence enforced compliance of the new regulations as of 2 April 2004, for voyages commencing on or after that date.

Yours faithfully  
A BILBROUGH & CO LTD  
(MANAGERS)