

MARCH 24, 2004

CIRCULAR NO. 9/04

TO MEMBERS OF THE ASSOCIATION

Dear Member:

USA – NEW AUTOMATED MANIFEST SYSTEM REGULATIONS: IDENTITY OF ‘CARRIER’

Reference is made to Circular No. 7/04 of February 18, 2004. In the meantime, the United States Bureau of Customs and Border Protection (CBP) has declined to provide a general ruling as to the identity of the Carrier who will be required to comply with the regulations where a ship is on time or voyage charter.

This supplemental Circular summarizes the currently available information as to CBP’s view of who may be considered to be the Carrier in relation to such ships.

Initial CBP advice

CBP initially defined the Carrier as the “entity that controls the conveyance.” In particular, the agency suggested that since the head owner or bareboat charterer hires the crew and is responsible for the day-to-day navigation of the vessel, either or both would be considered to be the Carrier.

CBP have subsequently suggested that rather than taking a formal position on the identity of the Carrier, it would prefer to see industry parties work out among themselves as to who (either owners or charterers) would be responsible for complying with the regulations.

Prior to this change in position, CBP verbally advised that the agency had not anticipated the numerous complicated transactions that can make up a charter party chain. While CBP would give no general guidance as to whether owners or charterers would be responsible for complying with the regulations, CBP invited parties to request a formal ruling as to the identity of the Carrier under the circumstances of a particular charter party chain. (The process for obtaining a formal ruling can be found on the CBP website at www.cbp.gov/xp/cgov/toolbox/legal/Rulings/ruling_letters.xml).

CBP has been inundated with numerous requests from owners and charterers seeking formal rulings.

CBP rulings

The International Group has been advised of at least two rulings issued by CBP where the time charterer was held to be the Carrier and the party to whom CBP would look to comply 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, 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 purposes of the regulations. In another ruling, CBP found that the Carrier was the party who formally was responsible for providing the vessel agent with the information used to prepare the CF 1302 cargo declaration.

While the CBP rulings are technically only applicable to the particular circumstances presented by the party requesting the ruling, they are posted on the CBP website www.cbp.gov and serve as guidance as to how CBP is likely to rule in similar cases.

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

CBP Seminar March 18, 2004

Because of the continuing confusion as to the identity of the Carrier, on Thursday, March 18, 2004, a meeting was held by CBP in New Orleans in order to address the industry's concerns.

CBP repeated its position that due to the complexity of the various contractual agreements which may be involved with respect to how a vessel charter party chain functions, of which the agency apparently was not aware at the time the regulations were promulgated, it was decided that the industry was best suited to determine who among owners and charterers was the Carrier.

For purposes of guidance, CBP advised that it views the Carrier as the entity that "controls" the vessel which includes:

- determining ports of call;
- controlling the loading and discharging of cargo;
- knowledge of cargo information;
- issuing of bills of lading; and
- the entity which has typically provided the CF 1302 cargo declaration or the cargo information to prepare the CF 1302 to the vessel agent.

Thus, depending on the circumstances of the particular charter transaction, either an owner or a 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 does everything else, 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 owners and charterers agree in any new charter party who will undertake to comply with the regulations including the filing of the manifest, SCAC and ICB for vessels calling in the U.S.

As for existing charters which do not state which party is to be responsible for compliance, owners and charterers should agree in writing prior to a vessel's arrival in the U.S. which of them will comply with the regulations and how the cost of so doing will be allocated, so as to avoid risk to both owners and charterers for failure to comply.

If the parties fail to agree as to which of them will comply, Members should be aware of the potential consequences. Under U.S. law, CBP is authorized 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 CBP, where deemed to be the Carrier, charterers who act unreasonably also face potential risks through whatever recourse may be available to owners under the relevant charter party.

All concerned are reminded that CBP will commence enforced compliance of the new regulations as of April 2, 2004, for voyages which commence on or after that date. As always, the Managers will be pleased to respond to specific enquiries, and generally, as the need may arise.

Yours faithfully,
Joseph E.M. Hughes, Chairman & CEO
Shipowners Claims Bureau, Inc., Managers for
THE AMERICAN CLUB