



**NOVEMBER 16, 2009**

**CIRCULAR NO. 28/09**

**TO MEMBERS OF THE ASSOCIATION**

**Dear Member:**

**FD&D MATTERS: REQUIREMENT TO EXERCISE DUE DILIGENCE IN INVESTIGATING COUNTERPARTY FINANCIAL CONDITION**

Over the last eighteen months, your Managers have noticed a marked increase in the number of new FD&D matters, magnified, no doubt, by the turmoil which has characterized the global economy over that period.

In many cases, despite having strong merits in their favor, and in some cases even a favorable arbitration award or court decision already in hand, Members have been unable to enforce their claims because their contract partners have gone bankrupt, or simply disappeared.

When this happens, it is difficult for your Managers to justify FD&D support, regardless of the merits of the Member's claim, since the prospects for enforcement are so poor. As Members are aware, and as provided for by Class II, Rule 1, Section 4.5.vi, "*the prospect of enforcement of any claim by or against the Member*" is an important consideration when the Managers decide whether or not to support an FD&D matter and, if so, the extent of that support.

In order to limit the likelihood of such unfortunate circumstances occurring in the future, your Managers will henceforward require, as a condition of their exercising discretion on behalf of the Club to support a Member in an FD&D matter, that Members perform a due diligence investigation into the financial condition of their intended contract partners **prior** to entering in the fixture or other contractual engagement.

This obligation can be satisfied by commissioning a corporate or asset investigation from one or more of the following companies: Dynamar, MRC/Lloyd's Maritime Intelligence Unit, Gray Page, and/or Dun & Bradstreet, or some other internationally recognized asset investigation company. Your Managers may also consider information obtained from other sources such as BIMCO and/or Intertanko in assessing whether a Member has satisfied the obligation to perform due diligence in individual cases.

As mentioned above, such investigation will henceforward be a prerequisite to FD&D support for new matters involving claims for breach of contract. Prior to requesting FD&D support in these matters, Members will be required to provide the Managers with satisfactory evidence of having performed due diligence as well as the result of such inquiry.

If a Member cannot furnish the requisite proof, or if an investigation revealed that the counterparty was in poor financial condition, the Managers, in accordance with their broad discretion under the FD&D Rules, reserve the right to withhold support for any expenses incurred, or to be incurred, in the FD&D matter in question.



The Managers may also, at their discretion, support the matter only to the extent that the Member is able to obtain security for the claim. Under the recent ruling of the United States Court of Appeals for the Second Circuit in *The Shipping Corporation of India, Ltd. v. Jaldhi Overseas Pte. Ltd.*, the Rule B attachment in the US of electronic fund transfers (EFTs) is no longer available, and alternative measures to obtain security, including vessel or bunker arrests, are more costly. Members must always obtain the Managers' written approval before incurring any expenses associated with efforts to secure their claims.

While the Managers strive always to support and assist Members in all disputes falling within the scope of FD&D cover, such support is not open-ended. It is your Managers' hope that requiring Members to perform due diligence investigations of the type described above will not only protect the Members themselves from the consequences of contracting with financially precarious counterparties, but also save considerable sums that would be better employed in matters where Members have better prospects of ultimate success.

As always, your Managers stand ready to respond to any inquiries that Members might have regarding this issue, or generally.

Yours faithfully,

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