

Welcome to the latest edition of TT Talk, number 23 in the series.

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1. ISM Code in full force as from 1 July 2002

The International Safety Management Code has applied to tankers, bulk carriers, passenger ships and high-speed cargo craft since 1 July 1998. Effective 1 July 2002, it will apply to all other types of ship, including container ships. Under this Code, operators of ships are required to implement an effective safety management system, certified by a Document of Compliance for their office functions and a Safety Management Certificate for each ship. The introduction of the Code to the liner shipping sector will have an effect, not only upon the liner operators but also on the NVOs that use their services.

The good news for TT Club Members using liner services is that the Code should play an important role in maintaining and enhancing the quality of ships available to the market, and could thus result in fewer problems for transport operator Members.

On the other hand, the Code could indirectly have a negative effect on the quality of recourse available to transport operators in the unlikely event that they use the services of liner shipping operators who fail to comply with the Code. The reason is that most liability insurers for the liner operators will require that valid ISM certificates are maintained as a condition of cover. This is the case, for example, with the International Group of P&I (Protection and Indemnity) Clubs - which together insure over 90% of the world's deep sea fleet against liabilities arising out of the operation of ships. The Clubs in the Group do, however, tend to treat each case on its merits and a measure of flexibility may be available, for example, in the case where a ship's ISM Certificate expires during the course of a voyage.

The close attention paid by port state control to ISM compliance perhaps makes it unlikely that a liner shipping operator would be other than compliant, but TT members may wish to check that the ship in question is ISM compliant, and should beware of using tonnage where this is not the case - even if the rates may look more attractive.

The International Association of Classification Societies (IACS) has produced a "white list" of certificated ships. This list is updated quarterly from information made available to IACS. The list may be downloaded from the IACS website at

<http://www.iacs.org.uk>

but it is also possible that a ship may have been audited and certificated by a flag state administration whose records are not included on the IACS list.

2. Maritime Security - the US Customs' C-TPAT Initiative

In July 2002 the US Customs service launched a new security initiative called the 'Customs - Trade Partnership Against Terrorism' or C-TPAT for short.

The following note is based on a Loss Prevention Bulletin posted to the website of the UK P&I Club (the largest mutual insurer for liabilities arising from owning/operating ships) in early July: -

US Customs Service Commissioner Robert C. Bonner has announced that Customs will begin taking applications in mid-July from the global transportation community for membership in the Customs-Trade Partnership Against Terrorism (C-TPAT) program. C-TPAT is an initiative between business and government to protect global commerce from terrorism. Unveiled in April, the program initially sought membership from major importers of goods into the US. To date, just over 230 importers have agreed to participate.

"This marks the next step in our plan to join forces with the private sector and keep the avenues of the world economy free of terrorist infiltration," said Bonner. "We expect this phase to progress quickly since we are building on the already firm foundation of Customs carrier programs." One such program was the 'Sea Carrier Initiative' instigated several years ago with liner operators, which was heavily focused on drug smuggling, piracy and stowaways.

The C-TPAT program calls upon importing businesses to establish policies to enhance their own security practices and those of business partners involved in the supply chain. Once these policies are in effect, imports by these businesses would be given expedited processing at ports of entry. Commissioner Bonner stressed that swifter processing is just one of the benefits extended to business by US Customs.

As from 15 July, warehouse operators and carriers by air, sea and land are all invited to participate. Membership is voluntary but it is likely that all liner operator Members of the World Shipping Council will sign up. The WSC issued a statement on July 18 saying: "Ocean carriers representing over 75% of the capacity serving America's international liner trades have already declared their intent to sign up to this security program. The industry is highly supportive of Commissioner Bonner's C-TPAT initiative."

The US Customs authorities advise that participating in the scheme will give members the following potential benefits:

- a reduced number of inspections;
- an assigned account manager;
- access to the C-PTAT membership list;
- eligibility for account based processes;
- an emphasis on self policing, not Customs verifications.

For further information, contact Industry Partnership Programs at Telephone: +1 202 927 0520 or e-mail: industry.partnership@customs.treas.gov

The relevant website address is

<http://www.customs.ustreas.gov/enforcem/tpat.htm>

3. Burden of Proof shifts in China

With effect from 1 April 2002, it will be easier for claimants in personal injury lawsuits to succeed before the Chinese courts.

On April 3, the South China Morning Post, a leading English language newspaper in Hong Kong ran an article headed **Directive Shifts burden of proof** - *Onus to fall more heavily on defendants in civil injury lawsuits*

The article said:

"The Supreme People's Court in Beijing has introduced a regulation that shifts the burden of proof in most personal injury civil lawsuits, by requiring defendants to provide compelling evidence that they are not responsible for the plaintiff's injury. Prior to the April 1

implementation of the Civil Litigation Evidence Regulation, Chinese law put the onus solely on plaintiffs to provide evidence substantiating their allegations.

Specifically the regulation makes it easier for victims to win in cases of medical malpractice, patent violations, workplace safety and construction accidents, environmental pollution, attacks involving domestic animals, substandard consumer goods and contractual and employment disputes."

Quoting Tong Fei, a lawyer with the Beijing City Jingdu Law Firm, the paper said that the regulation was fairer to personal injury victims, especially in cases of medical malpractice, as it required defendants to reveal evidence they might otherwise refuse to relinquish. "The regulation doesn't apply to all civil cases or to any criminal cases, but instead tries to provide a more level playing field in cases where the victim is at a disadvantage in obtaining evidence," Mr Tong added.

Additionally, the regulation gives plaintiffs greater power by allowing them to submit audio and videotapes recorded without the other person's knowledge as evidence in some situations. Previously, such evidence was inadmissible. "As long as you don't imperil the other party or ruin their reputation by taping them, the court will now be far more likely than before to accept the recording as valid evidence in court," he said.

Edgar Wong, of the Club's office in Shanghai has identified three areas where the Regulation could impact the Club and its Members:

Injury to person by an operation that is greatly hazardous to surroundings

This refers to workplace safety. An 'Operation hazardous to Surroundings' means operations such as those involving high pressure, high voltage, combustibles, explosives, highly toxic or radioactive substances or high speed means of transport. The Regulation reiterates that the defendant shall have the burden of proof as to that the incident and/or damage was caused by victim deliberately. This will concern those of Club's Members who handle mainly dangerous goods cargoes.

Environmental Damage Claims

Regarding claims for damage caused by environmental pollution, the defendant has the burden of proof to establish that it is entitled to enjoy the immunities under the relevant law and that there is no causation between its behaviour and the consequences of the pollution accident.

Personal Injury Claims

Regarding the personal injury claims in tort caused by collapsing, detaching or dropping down of any buildings or facilities (including any objects from such buildings and facilities), its owners and managers have the burden of proof as to its exemption from liability.

These last two items potentially concern all Members with operations in China, since they are relevant to their exposure to Third Party Liability.

4. New Civil Liability Law in New South Wales, Australia

In response to what is described as the 'Public Liability Crisis' in Australia, arising from the recent high-profile collapse of certain insurers and the hardening market for the insurance of public liability risks, the Government of New South Wales has introduced legislation to amend significantly the law in relation to actions for damages in cases of personal injury.

The new Act, the Civil Liability Act, limits the amounts that can be awarded for loss of earnings to a maximum of three times the average weekly earnings of all employees in the state of NSW at the date of the accident. It also sets a maximum figure for general damages (covering pain and suffering, loss of expectation of life and disfigurement) at A\$350,000. It

sets a threshold of 15% of a most extreme case, before general damages can be awarded at all and provides that no interest will be paid on them.

The Act also impacts on the lawyer-client relationship:

- by providing that, where the award of damages does not exceed A\$100,000, the maximum costs that will be recoverable for legal services provided will be 20% of the award or A\$10,000, whichever is the greater;
- legal services must not be provided unless a practitioner believes that the claim will, more likely than not, succeed. Action contrary to such belief could amount to professional misconduct.

The effect of the Act is to limit significantly the amount of awards and costs in personal injury litigation, and thereby to increase the insurability of public liability exposures in New South Wales.

This note is based on a newsletter dated 2 July 2002, issued by the Australian law firm, Norton White.

The TT Club's agents in Sydney add that similar legislation has been passed in Queensland as the Personal Injuries Proceedings Act 2002 (Queensland). This legislation includes the same provisions as the NSW act for loss of earnings and similar provisions in terms of costs recoverable. It does not, however, provide for general damages to be capped, and is therefore unlikely to be as effective in limiting exposure.

5. Conclusion

We hope that you will have found the above items interesting. If you would like to have further information on any of them, or have any comments you would like to make, then e-mail the Editor at tt.talk@ttclub.com. We look forward to hearing from you.

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