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ANY OTHER BUSINESS

Maritime Security: definition of the terms “ownership” and “control” of ships

Submitted by the International Confederation of Free Trade Unions (ICFTU)

SUMMARY

Executive summary: This paper is a response to the note by the Secretariat (LEG 84/13/1) and proposes a definition of “Beneficial Ownership” and “Control” to be used in the context of maritime security and to be incorporated in any future development of Notional Regulation F and identifies relevant corroborative information/documentation.

Action to be taken: Paragraphs 12 and 13

Related documents: MSC 75/ISWG/5/9 and LEG 84/13/1

Introduction

1 The Maritime Safety Committee’s Intersessional Working Group on Maritime Security (“ISWG”) identified twelve recommendations to be considered by the Maritime Safety Committee at its seventy-fifth session (“MSC 75”) for further elaboration. The Legal Committee was asked to contribute to item 9 of the ISWG’s recommendations and specifically to provide a workable definition of the concepts of beneficial ownership and control in the context of maritime security to be incorporated in the text of a notional Regulation F for hypothetical inclusion in Chapter XI of SOLAS.

2 MSC 75 desired to enhance the *preventative* capabilities of Contracting States and the relevant Port Authorities. Accordingly, it is submitted that any notional regulation should address the inadequacies which may exist within a civil rather than criminal law context which would remain the province of the relevant prosecuting authority. For example, the notional regulation could not seek to incorporate criminal powers which arise by statute, Mutual Legal Assistance Treaties or by recent understandings for shared information entered into by G7 Ministers for specified criminal acts.

The underlying need for transparency: the need for change

3 The tragedy of September 11 2001 has heightened the need for improvement in all aspects of maritime security. The maritime industry is susceptible to terrorist acts within the context of shipowning structures which were developed in the latter half of the twentieth century. The reorganization by the vast majority of shipowners of their vessels into separate legal entities,

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albeit that the individual vessels continue to be financed and managed as a fleet, has the net effect that the true beneficial owner/controlling interest is cloaked with a veil of anonymity. The fact that the registered owner is disclosed is immaterial since that company will rarely have any real connection to the control and beneficial ownership of the vessel.

4 The practical security risk of disguising beneficial ownership and control are obvious. By way of recent practical example, the “**Karine A**”, a Tongan flagged vessel, was seized by Israeli commandos in international waters carrying 50 tons of weapons. The true beneficial ownership and control of the vessel and therefore accountability for the grave incident, remains shrouded in mystery. Certainly no compelling evidence has been adduced to support the Tongan registry’s contention that legal and beneficial ownership of the vessel was vested in an Iraqi national.

The legal framework

5 In many jurisdictions, most notably the United Kingdom, the concept of a limited liability company having a separate legal identity is firmly established. This results in a Court’s reluctance to lift the “veil of incorporation” to look at the true ownership position. The exceptional situation is where there is evidence of a sham or fraud. However the burden is on the maritime claimant to produce evidence of a sham to the Court and this burden is an extremely high one.

6 Furthermore, in many situations the publicly available information regarding the ownership of vessels is extremely limited. A typical structure would be that a vessel is registered in a particular jurisdiction; the registered owner is also incorporated in that state; the local search information reveals either nominee directors and shareholders or directors who are also directors of the vessel’s managers and shareholders who are registered companies in another jurisdiction; those companies acting as shareholders themselves may have nominee directors; and often the shareholding in those companies are bearer shares, namely, there is no registered shareholder and the shareholder is the individual who at any given point in time is holding the bearer share or shares. Such anonymity, which is legitimised by the jurisdictions in which those companies are registered, enables shipowners to operate in a virtually invisible manner.

7 At international level, the Arrest Convention of 1952 tentatively raised the issue and attempted to define the concept of “ownership”, in the context of establishing the right of a claimant to arrest a ship to secure/enforce a maritime claim. Article 3(2) of the Convention states as follows:

“Ships shall be deemed in the same ownership when all the shares therein are owned by the same person or persons”.

8 This definition however does not offer any meaningful protection. The shares in a company which owns a vessel will frequently be held by nominees or exist only as bearer shares. In essence, the 1952 Arrest Convention addresses a bygone era, prior to the inception of one ship companies where a single corporate entity owned an entire fleet of vessels. The practical reality is that the Arrest Convention does no more than define registered or legal ownership leaving the crucial issues of beneficial ownership and control untouched.

9 The much heralded Arrest Convention of 1999 failed to seize the opportunity to define ownership more accurately by reference to beneficial ownership and control as distinguished from registered/legal ownership. Significantly, in the drafting stages of the 1999 Convention the CMI proposed that the question of piercing the corporate veil through interpretation of “ownership” should be left to national law. Subsequently, in the Autumn of 1998,

United Kingdom representatives indicated that support could be attracted for a more positive provision allowing for the arrest of “associated” ships by providing a possible definition of beneficial control/ownership. However this was not supported and furthermore, the 1999 Arrest Convention has failed thus far to attract a sufficient number of ratifications to enable it to enter into force.

Beneficial ownership and control: definitions

9 There are a variety of definitions of beneficial ownership and control in domestic law. It is submitted that there are no clear definitions at international level. The definitions of “beneficial ownership” and “control” in the 2001 OECD Report, *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes*, are broadly worded. This is fitting to take account of multiple ownership structures. In the public law context, a definition might be framed as widely as States permit focusing on what information is being sought, for example the person with ultimate power: the *beneficial owner* of the ship who exercises true control over the asset. In the context of private law any definition will be complex and in seeking to define beneficial ownership and with it, control, in this limited context of transparency for security purposes, it is submitted that any definition must expose and address the weaknesses of the current system. Therefore it is submitted that “control” in this context must be viewed exclusively as the ultimate decision-making responsibility and accountability i.e true control and to that extent the concepts of Beneficial Ownership and Control should be seen as one and the same. This would both reflect overwhelming practical reality as well as prevent resistance to the regulation by artificial attempts to distinguish between beneficial ownership and true control.

10 To take the matter forward and provide advice to the ISWG, it is submitted that a revised composite Notional Regulation F be developed to assist the relevant authorities in deterring, detecting and investigating unlawful acts involving the use of sea going vessels. Having done so it is submitted that the range of documentation which a Contracting State can request must act as a further safeguard. Some relaxation of requirements may be appropriate in the context of public limited companies with disclosure obligations and Contracting States will exercise their discretion in recognising the veracity and reliability of any publicly available corporate information subject to which more detailed requests as proposed in the definition may or may not be made.

11 A proposed definition is contained at annex.

Requested action

12 The Committee is invited to consider the issues raised in this paper.

13 As it has been previously suggested that the issues raised are extremely complex and as workable solutions have to be secured, it is recommended that IMO should, as provided for in operative paragraph 2 of IMO Assembly resolution A.22/Res.924, take note of the considerable work the OECD has undertaken on these issues and formally request its expert input in the further elaboration of the transparency aspects of enhancing maritime security and that this be accomplished in time for the December 2002 SOLAS Conference.

ANNEX**DEFINITIONS OF "OWNERSHIP" AND "CONTROL" IN THE CONTEXT OF
MARITIME SECURITY****PROPOSED DEFINITION**

1 Contracting Governments may require vessels proposing to enter their ports to provide information for security purposes which can include information relating to the beneficial ownership and control of the vessel.

2 Contracting Governments shall ensure that information regarding the beneficial ownership and control of their flag vessels is available in a form which is capable of being transmitted in response to a request made under paragraph (a).

3 The Beneficial Owner and/or person(s) with a controlling interest in a vessel will be the registered shareholder, being a natural person or persons with the majority in number of, or of voting rights in respect of, or the greater part of the value of the shares, held otherwise than as a nominee or at the direction of another natural person or persons, either in the company which legally owns a vessel or in an intermediary company or companies which own(s) the shares in the company which legally owns a vessel ("the intermediary company").

4 For any ownership structure other than that referred to in paragraph 3 above, the Beneficial Owner and/or person with a controlling interest in a vessel shall be the person who directly or indirectly controls the vessel.

5 Where the Beneficial Owner and/or persons with a controlling interest has transferred operational control of the vessel, he shall nonetheless remain responsible for all matters arising out of the vessel pending production of information and documentation acceptable to the Contracting State, identifying a natural person or persons to whom operational control of the vessel has been transferred.

6 The range of information/documentation which Contracting Governments shall, in response to a request, be able to transmit will include, but not be limited, to the following:

- (i) copies of notarised non-bearer share certificates, held otherwise than as nominees, for all the shares in the company which legally owns the vessel and/or in the intermediary company;
- (ii) a copy of the notarised Shareholder's Agreement governing all shares held in the company which owns the vessel and/or in the intermediary company;
- (iii) a copy of the notarised vessel's mortgage, identifying the person and/or corporate guarantors;
- (iv) a copy of the notarised Partnership Deed identifying General and Limited partners;

- (v) a copy of the notarised audited Partnership Accounts;
- (vi) a copy of the notarised Trust Deed;
- (vii) copies of all notarised documentation recording the instructions of the Settlor;
- (viii) a copy of the notarised Statutes and Articles of the Foundation; and
- (ix) documentation evidencing the ultimate recipient of income and/or profit generated by the vessel,

7 Failure to provide any and all information/documentation requested by the Contracting State shall result in appropriate action being taken against the owner and/or operator and/or manager of the vessel.
