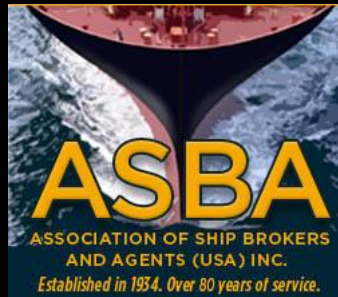


October 2020 NEWSLETTER

Website link - for up-to-date
information and photos



Includes . . .

- Rich Reisert Reports
- Message from the Director
- ASBA Gasvoy
- Calendar of Events
- ASBA Education Certificates Awarded

And more . . .

Richard Reisert - ASBA Legal Counsel Reports

THE FOREIGN CORRUPT PRACTICES ACT: PITFALLS FOR THE UNWARY

Oftentimes our members will be asked to sign agreements that contain an undertaking to comply with the U.S. Foreign Corrupt Practices Act (“FCPA”), UK Bribery Act or some other ant-bribery law. The initial reaction of the party asked to agree to such a provision will typically be an assumption that it will never engage in bribery or corruption and to sign the contract. If the party is based in the United States and conducts its business predominantly in the U.S., an accompanying reaction may be to assume that it has nothing to worry about because it does not engage in foreign activities. Proceeding under these assumptions without a clear appreciation of what such laws require or prohibit may cause a party to run afoul of these laws and become subject to substantial fines and penalties.

Bribery charges, settlements and convictions in the shipping industry continue to make headlines in the shipping media which demonstrates that those involved either do not understand the law or will knowingly violate it in order to gain a competitive advantage.

In order to enhance understanding of the FCPA, the U.S. Department of Justice and Securities and Exchange Commission have recently revised and published their *Resource Guide to the U.S. Foreign Corrupt Practices Act* (<https://www.justice.gov/criminal-fraud/file/1292051/download>). Their guidance confirms that the essential premise of the statute is to prohibit “offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business.” While this overriding principle is straightforward and would seem to be readily capable of compliance, it is in the nuances of the law where the unwary may find themselves in danger.

1. Who is a Foreign Official?

For a payment to be considered prohibited by the FCPA it must be made to a “foreign official” but it may not always be clear if the potential recipient of the payment or other thing of value falls into that category. For example, the recipient could be an employee of a company that is considered an “instrumentality” of a foreign government which may depend on the degree of ownership or control exercised by the foreign government. Thus, an employee of a state-controlled shipping company such as COSCO or the Shipping Corporation of India might be considered a foreign official for FCPA purposes, and the law applies to both high level officers and low-level employees of the company. Keep in mind that the FCPA prohibits payments or improper gifts to an “official” (i.e., an individual person) so a gift to a foreign government generally (such as a gift of water purification equipment) would be permissible.

2. Payments to Non-Governmental Third Parties.

Caution and due diligence must be exercised when making payments to consultants, agents or intermediaries who might use part of the payment to unduly influence a foreign official. FCPA enforcement cases frequently feature inflated or ill-defined payment or commission structures involving advisors and consultants hired to assist in obtaining a government contract. The amount or structure of the payment to the third party might imply that the company knew or should have known that some of the payment or commission would likely be passed on to a government official.

3. What Constitutes a Thing of Value?

In addition to cash, things of value may include gifts, travel and entertainment if they are intended to obtain or retain business and if they are of such a value that they might unduly influence the foreign official. While cab fares, reasonable meals, entertainment or company promotional items might not be improper, more extravagant gifts such as first class air travel to a sporting event with accompanying spending money might be prohibited. The question is one of degree which might depend on the relative value of the gift in the country where it is given. While travel to a sporting event might be prohibited, travel to a company’s manufacturing plant so that a foreign official can inspect how industrial equipment that the country intends to purchase is made, might be permissible. Companies may use charitable giving as a way to foster good will with current or prospective customers that happen to be a foreign-owned. However, the DOJ brought charges against a pharmaceutical company that used charitable donations to a bona fide foreign charity that was headed by a foreign official to induce that official to steer business to the company.

4. Permissible Payments.

(a) Payments Permitted by Local Law. A payment to a foreign official that might otherwise be prohibited by the FCPA, might not be prosecuted if the target of the investigation can show that the payment was allowed by local law. In practice, this affirmative defense is unlikely to provide a safe harbor given that the laws of foreign countries rarely if ever permit corrupt payments. The defense was rejected by federal courts in cases involving the local laws of Azerbaijan, Antigua and the Dominican Republic.

(b) Payments Made Under Duress. Payments made to foreign officials in response to a genuine extortion demand or under threat of physical harm will not give rise to FCPA liability because they cannot be said to be made with corrupt intent or to obtain or retain business. The FCPA recognizes that real-world situations may arise where a payment is required to avoid tangible threats to health and safety. However, the defense will not apply to payments made as a *quid pro quo* for gaining access to a market or being granted a government contract. Thus, in *United States v. Kozeny*, 582 F. Supp. 2d 585 (USDC SDNY 2008), it was held that “while the FCPA would apply to a situation in which a ‘payment [is] demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract,’ it would not apply to one in which payment is made to an official ‘to keep an oil rig from being dynamited,’ an example of ‘true extortion.’ The reason is that in the former situation, the bribe payer cannot argue that he lacked the intent to bribe the official because he made the ‘conscious decision’ to pay the official. In other words, in the first example, the payer could have turned his back and walked away -- in the latter example, he could not.”

(c) Facilitating or Expediting Payments. The FCPA does not prohibit payments made to facilitate or expedite routine government action. The government official would ordinarily be required to perform these activities anyway and the payment was simply intended to have them completed more expeditiously. Examples of such routine actions given in the DOJ’s *Resource Guide* include administrative actions such as processing visas, “scheduling inspections associated with contract performance or inspections related to transit of goods across country” or “protecting perishable products or commodities from deterioration.” On the other hand, a large payment made to a government official to permit the entry of a shipment that was not otherwise in compliance with local law or to avoid a required inspection would likely be in violation of the FCPA.

5. Jurisdictional Reach of FCPA.

The anti-bribery provisions of the FCPA can apply to conduct occurring both inside and outside the U.S. Even if the target of the bribe and the place where it occurs is in a foreign country, the U.S. will have jurisdiction if any means of U.S. interstate commerce is used in furtherance of the corrupt foreign payment. Thus, sending or receiving emails, text-messages or telephone calls through the U.S. or using the U.S. banking system to facilitate a foreign corrupt payment can lead to a prosecution by the DOJ. Likewise, a foreign affiliate of a U.S. company or that affiliate’s employees can lead to charges being brought against the U.S. company even if every element of the corrupt conduct occurred outside the U.S.

Conclusion.

Shipping companies are often required to engage with foreign government officials when bringing ships and cargoes into port and may find themselves contracting with a state owned or controlled entity in relation to the charter of a vessel or the sale and purchase of cargo. These interactions or transactions should trigger a heightened awareness of the applicability of the FCPA. Companies with non-U.S. affiliates and employees need to be particularly vigilant. Adopting and enforcing a company-wide [Anti-Bribery Policy](#) such as the model policy found on the ASBA website will assist with compliance.

* * *

(The views expressed in this article are intended to provide general guidance on the subject and may not be applicable in all jurisdictions and in all circumstances. Specialized advice should be sought about your particular circumstances).

Message from the Director:

Dear Members,

As always, I hope that this finds all safe and healthy. What a year this has been!

I want to extend my thanks to your Board of Directors, led by Arthur Savage – ASBA President, for their hard work and commitment in serving the members of the Association during these trying times.

Despite having to cancel our Annual Cargo Conference, our "Taste of the Cargo Conference" Webinar was well received by those in attendance. If you missed it, find a link below to the recording. The Conference Committee did an excellent job in defining and coordinating the event that served as a placeholder for 2020. Sure do hope we'll be able to reconvene in Miami, Sept. 29 – Oct. 1, 2021.

I also want to thank Rich Reisert for his article in this edition of our newsletter. Rich spends quite a bit of time in the selection and drafting of the article. It would be beneficial to know if you found it of interest. If so, please send me a quick email. Also note that Rich welcomes your suggestions, pass those along as well.

Finally, thanks to you, our members, for remaining committed to your Association. If we can be of assistance in any way, please do not hesitate to email or call.

Warmest regards,
Jeanne

Agency Affairs Update

Jim Papp, Chairman of the Agency Affairs Committee and President of Transmarine Navigation Corp., hosted their meeting this week. After seven years of service as Chair, Jim is stepping down. For the record, this is not an easy assignment as the Committee is very active hosting two or three meetings each year. Jim has been an excellent Chair; attentive and tireless as he spear-headed the many issues and initiatives addressed by the Committee. It is truly been my pleasure to work with him and I am delighted that he will continue to serve on the Committee.

It also gives me great pleasure to announce that Jason Kelly, Executive Vice President of Moran Shipping Agencies, has agreed to take the helm as Chair. As you will recall, Jason recently stepped down as ASBA's Treasurer. I am delighted to have the opportunity to work with him again in his new role as Chairman.

Did you Enjoy A Taste

of the

ASBA CARGO CONFERENCE

Thanks are extended to our Panelists:

Keith Heard, Lennon Murphy & Phillips
Jonathan Hala, ExxonMobil
Robin Heath, Diamond S Shipping
Tim Wellman, Norvic Shipping USA
Capt. Mohan Muppidi, Fleet Management
Ray Hornosky, North Harbour Shipping
Mike Ogle, Norton Lilly International
Jim Papp, Transmarine Navigation Corp.
Brian Vogdes, True North Chartering

[LINK TO VIEW WEBINAR ON YouTube](#)

Main Course

What Would you Do? Panel

Statement of "Incorrect" Facts

- MV Happy Warrior arrives mouth of Paraná River, Argentina
- Loadberth is occupied by a vessel discharging fertilizer which is delayed due to adverse weather.
- Vessel waits 10 days at anchorage then proceeds to berth.
- SOF details rain times while vessel was at anchor as well as during load operations. C/P terms are WWD but cargo is not weather sensitive.
- Master on completion of loading refuses to sign SOF as is, wants to sign under protest.
- Terminal insists SOF must be signed as is or vessel faces detention.
- Owner's calculate demurrage \$150K, Charterer's calculate \$12K dispatch.

COC – Waiver or Not?

- Tanker discharges in New York, vessel's COC had expired by a matter of days.
- USCG NY granted a 90 days waiver given insufficient personnel due to COVID.
- While in NY, Owners fix next cargo which will be loaded Philadelphia.
- Agent in Philadelphia sends routine pre-arrival message to Master. Master's reply includes details of the 90 days waiver issued in NY.
- Just prior to arrival, USCG Philly advises the agent that a COC inspection will need to be done, waiver issued in NY was only good for NY.
- Next COC inspection available in 2 days.

ASBAGASVOY

Under the leadership of Soren Wolmar, the Charter Party and Documentary Committee worked with BIMCO to release ASBAGASVOY this month. Many thanks are extended to Soren for his time and hard work on this important charter party.

Drop us an email to request a copy of the new charter party and explanatory notes.

CALENDAR OF EVENTS

2020

November 2

- Commercial Trade Transactions Online Course

December 10-11

- Business of Shipping II - Charter Party Problems Live Seminar
 - Hampton Inn & Suites, Stamford, CT

2021

January 28

- Annual General Meeting, Harvard Club - NYC

February

- Shipbroking & Chartered Vessel Operations Online Course

March

- Maritime Law Online Course

May 3

- ASBA Cup Golf Tournament, Mt. Kisco Country Club, NY

June 24

- ASBA's Womanship Sunset Cruise, Stamford, CT

Sept. 29 - Oct. 1

- ASBA Annual Cargo Conference - Eden Roc, Miami Beach, FL

November

- Pre-Holiday Social, Rye Grill & Bar - Rye, NY

MEMBER UPDATES

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CONGRATULATIONS STUDENTS!



ASBA DIPLOMA RECIPIENTS

Marco Pineda Gallardo - Chartering
Waclaw T. Kuza - Chartering
Kenny Robert LeTissier - Chartering

Shipbroking & Chartered Vessel Operations Online

Buse Aleyana Bayram
Alexandra Henly Ervin
Marco Pineda Gallardo
Nathaniel J. Hebert
Captain Timothy Kelly
Maria L. Salazar Luvecce
Miguel Edmundo Masembo
Anders Korning Matheisen
Hector E. Meillon Flores
Kevin O'Brien
Jack Peterson
Luis A. Urdaneta Eraso

Commercial Trade Transactions Online

Bret Bahr
John R. Chadwick III

Basic Principles of Chartering

Home Study Course

Scott C. Dozier
Valerie Nettles

Maritime Law Online

Bertram C. Morah
William Dale Nickson
Bert J. Strong, Sr.

Steve Clark
Matthew Cruder
Erika Cueto
Paul J. Gaffney
Marco Pineda Gallardo
Brian Hass
Chris Howard
Travis D. Johnson
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