from the ship 'over the ship's rail' ashore, while delivery is the transfer of possession of the cargo to a person ashore. Delivery and discharge may occur at the same time but it is not necessary that they do. However, the court held that delivery – the transfer of possession of the cargo – is an activity performed by the shipowner.

The words of the LOI contained a clear request to deliver the cargo to a named receiver and an agreement by the owner to comply with that request in return for a number of undertakings given by the charterer. If the owner misidentified the party, and delivered to another party, there is the risk the owner would not be entitled to an indemnity as it had not satisfied the pre-conditions of the LOI.

The court found that the owner need not know whether the party named in the LOI is entitled to possession of the goods, only that the party to which it delivers the goods is the party the charterer requested.

The Club therefore recommends that, as well as inserting the name of the specific party to which delivery is to be made under an LOI, the following words should be included in the LOI

'X [name of party] or to such party as you believe to be or to represent X or to be acting on behalf of X.'

The suggested wording is designed to ensure, as far as possible, that if Members believe the party to which physical delivery of the cargo is given is X, or acting on behalf of X, they can rely upon the terms of the LOI.

involves Iran and Members should regularly check Industry News on the Club's website: www.nepia.com/publications/industrynews/

The full text of the regulations can be found on the UK government's treasury website: www.hm-treasury.gov.uk/d/council_regulation_eu_961_251010.pdf

A useful commentary/guidance notice can be found on the UK government's treasury website: www.hm-treasury.gov.uk/d/public_notice_reg961_271010.pdf

Ship-to-ship transfer operations: a new chapter

Inherently hazardous ship-to-ship (STS) transfer operations are becoming more common, which in turn has lead to larger and more frequent claims when things have gone wrong. However, new regulations and case law look set to make STS operations safer and less litigious in future.

New MARPOL requirements

The International Convention for the Prevention of Pollution from Ships (MARPOL) contains a new chapter 8 in annex I that came into force on 1 January 2011 and governs most STS operations.

A feature of the new regime is that MARPOL has directly adopted the standard of the International Chamber of Shipping (ICS) and Oil Companies International Marine Forum (OCIMF) *Ship to Ship Transfer Guide* rather than lay down a separate set of operational regulations and recommendations. The direct adoption of the ICS/OCIMF guide into an international convention emphasises the growing importance of industry-led initiatives over imposed solutions.

The new chapter applies to all oil tankers of 150 GT and above engaged in the transfer of oil cargo with another oil tanker at sea on or after 1 April 2012. It does not apply to

- bunkering operations
- oil transfer operations with fixed or floating platforms
- STS operations for the safety of life or property or to minimise pollution damage
- warships.

Oil tankers must carry and comply with an STS operation plan approved by the vessel's flag state and in line with the *IMO Manual on Oil Pollution*, section 1 (prevention), and the ICS/ OCIMF guide.

While the safety of each vessel remains the responsibility of the master, the regulations require a qualified person to be in overall advisory control of the STS operation. Initial analysis suggests that the status of such a person will be analogous to that of a pilot.

Coastal state control

Regulation 42 of MARPOL annex I gives reporting control of STS operations to the coastal state within territorial seas, generally 12 nautical miles, and the exclusive economic zone, which is generally 200 nautical miles.

Exclusive economic zones were established by the 1982 UN Convention of the Law of the Sea (UNCLOS), which gave coastal states limited jurisdiction over commercial activity and environmental issues while protecting the traditional freedoms of navigation for the benefit of all nations. Control of STS operations is a significant development and experience suggests that coastal states will use this new power to protect their commercial interests as well as the environment.

Liability between vessels

Traditionally, damage claims arising from STS operations were treated on the basis of 'knock-for-knock', but in recent years there have been attempts to apply the International Regulations for Preventing Collisions at Sea or no-fault liability, neither of which concepts fit easily into the factual or legal relationships in STS.

A recent judgment of the High Court of Hong Kong gives valuable guidance on the liability regime between vessels engaged in STS. The court held that the claimant vessel faces a high burden of proof in establishing the necessary causative negligence before such a claim can even be considered. STS operations are hazardous and, even with high standards of skill and care, accidents are foreseeable.

If an incident was an accident – there was no causative negligence - then there is no basis for a legal claim between the vessels and the correct approach is knock-for-knock. The judgment is particularly persuasive as each side was represented by experienced and well-respected international shipping law firms. In emphasising the concept of the accident over the growing trend towards strict liability, the court has given the marine sector and its regulators a valuable lesson.

Members can view the full judgment (reference HCAJ 133/2006) at the Hong Kong legal reference system website: http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=66472&QS=%2B&TP=JU