

marine, trade and energy

200 years in the maritime world



Image courtesy of National Museums Liverpool

Hill Dickinson celebrates its 200th anniversary this year and will be hosting functions throughout, to mark an event which is of particular significance to the firm's marine, trade and energy practitioners.

Hill Dickinson is rooted in very substantial maritime history, having already comfortably passed its centenary when first instructed on behalf of White Star Line in what is perhaps the most famous maritime casualty of all, the "RMS TITANIC" on 14 April 1912. Instructions in respect of the "LUSITANIA" followed, and ever since the firm has maintained its

strong reputation for work in maritime casualties and marine matters in general. Reflecting on this, managing partner Peter Jackson said "I am proud to be a member of a firm with such a long and distinguished maritime tradition. Building on that, the firm's strength, depth and diversity is enviable and enables it to look forward with great confidence to serving all aspects

of the maritime community in the years to come". Head of the marine practice group Maria Pittordis agreed, adding that "very few marine firms can claim two centuries of unbroken lineage, and a modern approach, allied to a strong sense of history, is a very distinguishing feature of Hill Dickinson's maritime practice".

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Letters to the editors

We would welcome any comments readers may have on the articles in this newsletter, or on any related topic, and would be happy to publish suitable commentary in a subsequent edition. Please contact the editors, whose details are on the back page.

Stop press... Hot 100, 2010

Managing partner Peter Jackson was listed among the 'Hot 100, 2010' in the supplement to the 4 January edition of The Lawyer. Noting growth across the firm's core practice areas and referring to last year's merger with Middleton Potts, the article closed with the very encouraging comment "Mr Jackson's firm is on the up".

Stop press... Philip Wareham - EU and competition specialist

Hill Dickinson is delighted to announce that on 4 January Philip joined the London shipping team as a legal director and head of the firm's EU and competition team, which provides specialist advice on EU, competition and trade regulatory matters. Philip has specialised in maritime competition law for over 16 years, and was responsible for the legal sections of the Fearnley report on Tramp Shipping Services, written for the European Commission in 2007 and summarising the impact of EU law on shipping pools and other commercial agreements.

Philip works for a variety of clients, from large multinational shipowner groups to small family-owned companies. He is well known on the EU competition law scene, particularly as the Treasurer of the European Maritime Law Organisation (EMLO) and is the editor of the forthcoming EMLO Guide to EU Competition Law in the Shipping and Port Industries, a compendium by leading maritime lawyers on most of the key issues affecting both those specialist areas, and businesses generally. Philip is also chairman of the Ports & Terminals Group, a trade association representing the British port industry abroad, and recently spoke at the Global Ports Conference on the impact of EU state aid rules.

Philip is a frequent writer and presenter on a variety of EU and regulatory law topics, and joins Hill Dickinson at a time when marine, trade and energy interests are subject to increasing regulation on all aspects of their business.

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The year in brief...



Rory Grout offers a quick review of a sometimes surprising and often painful 2009.

Last year is unlikely to be remembered fondly by the shipping industry.

The financial crisis which developed in the final quarter of 2008 was by early spring 2009 a global recession, with freight and hire rates landsliding below operational costs. Recent reports have highlighted the severity of the situation - top container lines reportedly incurred US\$12 billion of losses in the first nine months of 2009. As a result, albeit with some criticism from market analysts, some have turned to their national governments for support. Others have taken steps to reduce operational costs by ordering slow steaming of vessels.

The recent problems have been compounded by over-capacity and the prior hunger for new tonnage generated in the heady days before the bubble burst. Tentative indications of a stabilising market in the final quarter of 2009 have been met with scepticism, and attributed by commentators to much tonnage being kept at anchor or in lay-up.

The global chill has taken its inevitable toll. Large companies such as Eastwind, Britannia Bulk, Armada, Transfield and Samsun Logix Corporation have all seen insolvency, and it cannot be doubted that more will join their ranks.

Inevitably we have seen a collapse in the order books for newbuilds and the battle between existing purchasers and the yards over newbuilds in progress looks set to continue.

All this has unsurprisingly meant a very busy year for litigators. Appointments of arbitrators reached an 11 year high, and there has been an increase in satellite litigation as creditors have attempted to seek security by way of freezing orders, arrests and injunctions, with much related activity since the demise of the Rule B attachment over Electronic Funds Transfers and ensuing attempts to hold on to attached funds held in New York.

There has also been the striking decision in West Tankers Inc -v- RAS Riunione Adriatica di Sicurta, which may yet prove to diminish England as a centre of international arbitration, and has certainly provided the opportunity for nuisance litigation in other European jurisdictions in relation to contracts that seem plainly to carry a London arbitration clause.

Shipping operators and their insurers have also had to deal with the problems of piracy, most notably off the Horn of Africa, which has escalated in the past 12 months, with no immediate resolution in sight. The first nine months of 2009 saw 114 vessels boarded by pirates, and despite some 30 warships patrolling vessels and their crew continue to be captured and held to ransom.

2010 is predicted to be a 'crunch year' in shipping. However, rather than the cold shocks of the opening months of 2009 it is expected that the emphasis will be on restructuring and forbearance, as shipping operators are most likely forced to deal with the lower freight rates. No doubt the netting agreements and negotiations prevalent in 2009 are set to continue, and with these there are likely to be success stories and the consolidation of commercial relationships.

Of key significance to the survival of shipping businesses will be the attitude of the financing banks. To date it seems that ship-financing banks have been slow to draw a line under bad debts, but it is not clear whether this trend will continue in 2010 or, if so, for how long. So it is uncertain whether significant confidence can return to the shipping industry in 2010, but it is sure that all will be seeking as soon as possible to banish the gloom of 2009 and to move towards a brighter 2010.

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Bad bunkers - blame the charterer?

In a recent LMAA arbitration, Hill Dickinson successfully defended a claim for alleged off-specification bunkers. The case did not develop the law on this subject but it raised interesting factual issues, and provided an insight into both the nature and weight of the burden of proof in bunker quality claims. It also highlighted the essential need to assess rigorously the merits at an early stage. Andrew Lee of the Singapore office discusses these matters.

The facts

Hill Dickinson acted for a sub-charterer who stemmed bunkers in Gibraltar in 2003. Contemporaneous documentation revealed nothing unusual during delivery. The bunkers were not consumed until some weeks after loading, by which time the shipowner had obtained an analysis which showed them to be within specification: by then the vessel had been redelivered under the sub-charter.

The shipowner later reported that the vessel had experienced problems with her main and auxiliary engines a matter of hours after the bunkers had been drawn into the vessel's service tank. The vessel's machinery was severely damaged. She proceeded to a port of refuge for temporary repairs before sailing to a further port for permanent repairs.

Samples were drawn from the tank into which the bunkers had been stemmed as well as the settling and service tanks. Bunkers in the settling and service tanks were found to be heavily contaminated with catalytic fines and used lubricating oils. The bunkers in the storage tank were found to be within specification, apart from a sample drawn from the sludge at the bottom of the tank.

The shipowner's claim

The shipowner put forward the following allegations in support of the proposition that the Gibraltar bunkers caused the damage, despite the clean samples:

- The bunker supplier interrupted delivery with 50-70 m/t still to be loaded.
- A dispute ensued between those on the vessel and the bunker supplier, following which the latter agreed to load an additional 50 m/t.
- The drip sampler had been removed and the sample divided before the additional 50 m/t were loaded.
- The last 50 m/t loaded, which had not been sampled, must have been heavily contaminated with catalytic fines and used lubricating oils.
- Loaded last, this final 50 m/t would have been consumed first, hence the lack of contaminants found in the storage tank (the 'last in, first out' theory).

The defence

Our client's principal defence was that the shipowner could not discharge the burden of proof i.e. that on the balance of probabilities the Gibraltar bunkers did not cause the damage. The shipowner

objected on the grounds that our client was not advancing any positive case as to why the damage only occurred once the Gibraltar bunkers were being consumed. However, we considered that advancing a positive case in circumstances where our client simply did not know how or why the damage occurred would simply limit the scope of the defence. That said, we did raise the issue that the relevant storage tank had been in use for nearly five years without cleaning, and it was inevitable that contaminated deposits would have built up in the tank over time. There would come a time when these deposits might reach a critical level and be sucked up into the settling tank and consumed.

Another significant element of the defence was that shipowner should be responsible for taking samples and testing the entire bunker stem. On the owner's own case, if it had sampled the entire stem, the bunkers would not have been consumed. Hence, the loss was caused by the shipowner's own failure.

Evidential issues

The shipowner had no contemporaneous evidence that the bunkers were supplied in two tranches, or that there was any dispute with the bunker suppliers. We contended that it was highly implausible that there would



have been a dispute of the nature indicated by shipowner without a record in the log or notice of protest.

The shipowner released their experts' reports to us in 2004, early in the dispute, presumably to try to bring about an early settlement. However, our experts thought that the shipowner's case was without serious merit.

The shipowner's expert evidence relied on witness statements from two chief engineers on board the vessel at the time the vessel called at Gibraltar. We asserted that these statements were discloseable, and ultimately applied for their disclosure in 2008. Our application was successful and the shipowner duly provided us with two witness statements which were dated 2008. As these statements might have been different to those provided to the shipowner's experts in 2004 we asked for the originals. We ultimately obtained the original statements and they were materially different to the 2008 statements. Indeed, the witnesses' recollection of events had apparently evolved and sharpened considerably over time, which inevitably tarnished their credibility.

It emerged during oral evidence that although one of the witnesses had asserted in his first statement that

the bunker suppliers had originally shortloaded 70 m/t of fuel, he actually believed that only 50 m/t had been shortloaded, but asked for 70 m/t as a negotiation strategy, referring to this as 'monkey business'. This further damaged his credibility.

Technical issues

One of the points made by the shipowner was that if after five years bunker storage tanks were liable to collect deposits that might reach a critical level, capable of destroying a main engine, most vessels would essentially be 'ticking time-bombs'. Overall, the oral expert evidence suggested that there is some truth in this. However, the nature of the storage tank and its use in this case would have made it particularly susceptible.

The last in, first out theory might seem convincing at first blush, but was found to be too simplistic to explain how the bunkers in the tank would have actually behaved. The storage tank in question was riddled with stringers, lightening holes and mouseholes which would have ensured that some of the fuel from the last 50 m/t loaded would have spread throughout the tank and would not have been consumed. The shipowner's assertion that the Gibraltar bunkers contained used lubricating oils fell away almost entirely on the

basis that, by their very nature, the lubricating oils would have dissipated throughout the storage tank - why then were there no significant traces found in the tank after the event?

Our view, based on the expert evidence obtained in 2005, was that it was impossible that the used lubricating oils had derived from the Gibraltar bunkers, and it was highly improbable that the catalytic fines had derived from the same source.

Conclusions

To prosecute a bunker quality claim successfully, a shipowner will require good evidence. This was a claim which was very likely to struggle, as the bunker samples taken on loading established that the bunkers met the specification. Although the shipowner's experts supported the claim, their evidence was not accepted. Expert evidence should always be assessed very carefully and tested as far as possible, whether in support of or in opposition to a client's interest. In our view, this was a case that our clients should not have had to defend.

We are currently seeking recovery of our client's costs on an indemnity basis.

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Choil Trading SA -v- Addax Energy SA [2009] EWHC 2472 (Comm)

Paul Taylor considers the latest English Commercial Court case to consider jurisdiction in the context of Article 17 of the Lugano Convention.

Defendants tend to assume that a court first seised of a dispute will do its utmost to retain jurisdiction to hear that dispute. However, the very recent case of Choil Trading SA -v- Addax Energy SA illustrates that the Commercial Court in London is prepared to apply autonomous European law concepts and exclude national principles of contractual construction when determining jurisdiction under European conventions.

Representatives from two Swiss oil trading companies met in Geneva in April 2008 to discuss a possible joint venture where each would combine their respective spheres of expertise, in the US Gulf and in West Africa, to buy and sell on low sulphur fuel oil. However, no written agreement ever materialised from these discussions. The parties began entering into trades, sale contracts ('physicals') and futures contracts ('derivatives'), but very soon disputes arose as to whether those trades fell within the alleged joint venture and how profits and losses would be allocated.

Choil Trading issued a Claim Form in London in December 2008 against Addax Energy, represented by Hill Dickinson. Choil claimed damages for breach of the alleged JV. The damages claimed related to profits (i) from physicals performed (ii) from physicals Choil alleged would have been performed and (iii) from derivatives, some of which hedged against the physicals and some of which were purely speculative.

Our immediate view upon being instructed was that where the alleged cause of action was the breach of a joint venture agreement discussed between Swiss companies, to be performed in Geneva, the only proper forum for the dispute was that of Geneva. Addax

therefore filed an application before the Commercial Court challenging jurisdiction and it was this application which resulted in a decision of Mr Justice Field on 28 September 2009.

The general rule of the Lugano Convention (applicable to Switzerland as an EFTA country) and the Brussels Regulation 44/2001 (for EU countries) is that a defendant must be sued in the courts of its domicile.

One of the key exceptions to the general rule is where the parties agree that the courts or arbitrators of another country shall have jurisdiction to determine their disputes.

A jurisdiction agreement, according to Article 17 of the Lugano Convention and Article 23 of the Brussels Regulation, shall be:

“(a) in writing or evidenced in writing, or (b) in a form which accords with practices which the parties have established between themselves, or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.”

In this case, Choil sought to overcome the lack of a written jurisdiction agreement in the alleged joint venture agreement by asserting that Article 17(a) was nevertheless satisfied by the English jurisdiction clauses found in the physicals.

Choil also argued that it was a recognised usage in the oil trading business that contracts were governed by English law and English jurisdiction.

The judge found that it was common

ground between the parties that:

“(i) The burden is on Choil to demonstrate “clearly and precisely” that it is the subject of a consensus between the parties that the English court should have jurisdiction over it;

(ii) The concept of consensus for the purposes of Article 17 is an autonomous concept;

(iii) Choil must establish a good arguable case that it has discharged the burden on it, which generally means that it must show that it has a much better argument than does Addax that the requirements of Article 17 are satisfied (see Salotti [1976] ECR 1831; Bells Distilleries BV -v- Superior Yacht Services Limited [2007] 1 WLR 12).”

Choil failed to convince Mr Justice Field on all counts.

The judge clearly recognised that the contract in issue was the alleged joint venture and the jurisdiction clauses in subsequent physical contracts did not have the scope to apply to disputes, which were “of a quite separate character”, under the JV as to the allocation of profits and losses. Furthermore he considered that Choil could not cherry pick the jurisdiction clauses of the physical contracts alone when the alleged JV also comprised more than 100 derivative contracts, the majority of which referred disputes to New York arbitration.

Addax adduced expert evidence that there was no recognised usage of only English jurisdiction clauses in oil trading contracts both generally and in terms of joint venture agreements, and the court found that there was no evidence of such usage for oil trading JVs.

Of particular interest was the judge's recognition of the autonomous nature of the European law concept of parties'

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consensus that a contract was subject to a particular jurisdiction. He found that consensus was absent and that there was no question of incorporating into the alleged oral JV an implied term as to jurisdiction by reason of English law principles of business efficacy (i.e. to perfect the inadequate nature of terms agreed).

In the closing passages of Mr Justice Field's judgment, he acknowledged Switzerland as a mature legal system fully versed in determining financial disputes and so declared that the Commercial Court had no jurisdiction to hear Choi's claim.

It was clear in this case that the traders who discussed the potential for business cooperation for mutual gain never directed their attention to what law or jurisdiction would govern any dispute. Thus one party's subsequent attempts to find alternative constructions for any agreement failed to overcome that hurdle of party consensus.

Rarely are thoughts of dispute resolution in the minds of traders, which is why their in-house or external lawyers should be involved in finalising agreements. If not, the parties may find themselves bound by the default rules of international conventions on law and jurisdiction.

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The "BYFORD DOLPHIN"



In the current economic climate, commercial contracts are likely to encounter increased scrutiny and challenge. Stephanie Belcourt discusses a recent judgment in the case of BP Exploration Operating Co Ltd -v- Dolphin Drilling Limited [2009] EWHC 3119 (Comm).

In this case Mr Justice Steel had to rule on the proper construction of a drilling rig charter, where the claimant sought a declaration that it was permitted to terminate at any time under the following clause:

"22.1 The COMPANY shall have the right by giving notice to terminate all or any part of the WORK or the CONTRACT at such time or times as the COMPANY may consider necessary for any or all of the following reasons: a) to suit the convenience of the COMPANY..."

The claimant argued that this allowed it to terminate even before the commencement date, by paying a termination fee and upgrade costs, but without any liability for loss of profits.

The defendant countered that the agreement could not be terminated until after the prescribed commencement date, and that it could only otherwise be terminated by way of a repudiatory breach, urging that to allow the claimant what was described as a 'call option' was commercially absurd and irrational. The financial implications of an early termination were very considerable, as the parties had entered into an agreement for three years at a daily rate of \$410,000.

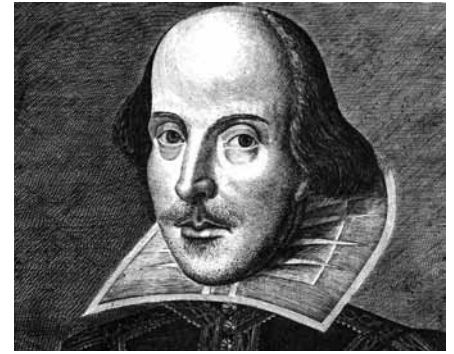
The judge followed the principles of contract construction set out by the House of Lords in Chartbrook -v- Persimmon Homes Ltd and said: "If on the one hand the words used by the parties are straightforward (albeit giving rise to a harsh outcome in the circumstances that have arisen) and on the other hand it is difficult to reformulate the relevant provision in a manner which avoids the harsh result, the court will be the more ready to accept that the commercial parties, with their competing interests feeding the negotiations, meant exactly what they said."

Had something gone wrong with the language of this contract? The defendant argued that something undoubtedly had, and that it would be clear to a reasonable person that the clause was subject to an "implicit proviso" that the claimant's entitlement to terminate at its convenience could only be exercised after the commencement date.

The judge disagreed, observing that one of the difficulties with this argument was that the clause was essentially derived from the industry's own standard Leading Oil & Gas Industry Competitiveness (LOGIC) Conditions of Contract, Edition 1. Though he recognised that for the defendant the financial consequence of his decision would be severe, he was not persuaded that there was something wrong with the language of the contract or that the claimant's construction gave rise to a commercial absurdity.

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Rule B, or not Rule B?



Rory Grout discusses two recent US decisions which will greatly lessen the use of the familiar Rule B application. Until these rulings, Rule B applications were a popular, cost-effective and often straightforward means of obtaining security by way of an attachment of a defendant's funds passing through the New York banking system, and were especially useful where the defendant had no readily identifiable assets. Rule B lawsuits constituted 33% of all lawsuits filed in the Southern District of New York, and from October 1 2008 to 31 January 2009 alone maritime claimants filed 962 such lawsuits, seeking to attach a total of US\$1.35 billion.

On 16 October 2009 in the case of Shipping Corporation of India -v- Jaldhi Overseas Pte Ltd, the United States Court of Appeal for the Second Circuit overturned the 2002 Winter Storm decision, which had allowed the attachment in marine claims of a defendant's US dollar Electronic Funds Transfers (EFTs) through New York banks.

The Winter Storm decision gave birth to the Rule B phenomenon and held that an EFT was a defendant's property that could be attached as security for a maritime claim. Thereafter Rule B attachments were increasingly used by marine claimants as a first choice weapon in seeking security.

The recent decision in STX Panocean (UK) Co -v- Glory Wealth Shipping Pte Ltd did however reduce to some extent the scope of the Rule B attachment, deciding that a foreign defendant could avoid it on grounds of lack of jurisdiction by simply registering as a domestic corporation with the New York Secretary of State. However, the real blow to the potency of Rule B attachments was the 16 October SCI ruling in which it was decided that EFTs are in the temporary possession of an intermediary bank. Thus for the

purposes of New York law it was held in SCI that EFTs cannot be said to be the property of either the originator or the beneficiary, and therefore cannot be subject to an attachment.

There was a further very significant development less than a month later.

On 13 November 2009 in Hawknet Ltd -v- Overseas Shipping Agencies the US Court of Appeal Second Circuit confirmed that the SCI decision is to apply retrospectively to all existing and pending Rule B proceedings, and not just to prospective filings.

The decision gave rise to two notable consequences:

- First, claimants with pending Rule B proceedings filed prior to the SCI decision will most likely have their claims dismissed
- Second, claimants with Rule B attachments actually obtained prior to SCI must now look for alternative arguments as to why such attachments should be maintained and/or take steps outside New York to try and re-attach by other means the released funds returning to the originator.

The aftermath of SCI and Hawknet

has proved to be confusing, with the opposing camps of New York judges applying the decisions with sometimes conflicting results. In addition, we are still expecting an important decision on a further argument as to whether a Rule B attachment obtained prior to SCI can be maintained and will report on the decision as soon as it becomes available.

Looking ahead, and while the dust still settles in the wake of the SCI bombshell, without the possibility of a Rule B attachment of EFTs claimants in maritime disputes must now return to more traditional methods of obtaining security, such as worldwide freezing orders. That said, it must also be remembered that Rule B is not dead, and may still be an effective weapon for claimants seeking security where the defendant has tangible assets, such as ships or bunkers, within the US court's jurisdiction. In addition, it must be remembered that EFTs, even in the hands of an intermediary bank, remain subject to attachment under Admiralty Rule C whenever there is a lien on the particular funds.

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Substandard construction of newbuildings in China

Before the credit crunch, globalisation fuelled an unprecedented demand for shipping, with China emerging as the new 'workshop of the world'. Powered by strong international demand for newbuildings, coupled with strong administrative support from central Government, Chinese shipbuilding expanded rapidly. In 1990, China's order book was about 2m GRT, or about 3% of world market share. By 2008 this had increased to 8.4m GRT, or 34.4% of world market share, placing China behind only South Korea. This rate of growth has presented China's shipbuilding industry with huge technical challenges, not all of which it has successfully overcome.

China's shipbuilding industry is hugely diverse in terms of quality, experience, management capabilities and facilities. There are over seventy significant shipyards in China, and hundreds of smaller yards. China's larger state-owned shipbuilders have considerable years of experience, backed with large resources, and in order to meet the sharp rise in demand, newer green-field yards have emerged. To keep up with demand, and encouraged by the state, they have had to recruit large numbers of unskilled workers. Such new ventures have been left vulnerable to rising material costs. Others with weak or over-extended finances have been forced to cut corners on build quality, particularly those building a type or design of vessel for the first time, and having underestimated the technical challenge. Many simply lack proper and effective quality assurance and quality control procedures.

In some cases, Class surveyors have struggled to supervise and monitor the construction of so many newbuildings. This is because there are simply not enough experienced Class surveyors in China to supervise properly the huge number of newbuildings under construction. This raises the question whether some are being delivered with Class certificates that ordinarily should not have been issued, or issued only with recommendations. This appears to be borne out by Port State Control detentions of newly built vessels from China. We have also seen examples of defects that, although falling outside

Class and regulatory requirements, will nonetheless likely prevent a buyer from using the vessel to her maximum earning potential.

We therefore recommend that buyers supervise closely the build process to ensure that appropriate quality control standards are met. It is perhaps no coincidence that a number of newbuilding disputes have arisen were under re-sale contracts. These offer the attraction of new tonnage, but without the delay between order and delivery under a newbuilding contract. However, buyers are taking a much greater risk with re-sale contracts, which obviously do not have the same extensive rights of supervision and inspection that will usually exist under a typical newbuilding contract.

Buyers are afforded limited protection against substandard construction by the builders' warranties found in standard newbuilding contracts. Such commonly require the builder to deliver a newbuilding meeting the contractual requirements, including the specifications, class and regulatory requirements, and to rectify all defects discovered during the warranty period (usually 12 months) resulting from faulty workmanship or materials. They do not provide a general guarantee of quality, and the builder accepts no financial liability from the buyer's losses caused by deficiencies or shortcomings in the vessel. It has been held that warranties are effective in excluding liability for defects arising from breach of express

terms as to construction standards, unless there is such liability under the warranty itself: the "SETA MARU" [2000] 1 LLR 367.

Builders' warranties do not apply to defects existing on delivery, and only cover defects discovered after the date of delivery and acceptance of the vessel. If a defect is outstanding upon completion of sea trials, but insufficiently serious to justify the buyer's rejection of the vessel, the parties will usually agree at the time of delivery that this should be treated as a warranty item, by clausing the protocol of delivery and acceptance with wording to the effect that the buyer's acceptance of the vessel is subject to the builder's commitment to rectify the defect as soon as possible afterwards.

The shipping industry could be faced with a 'ticking time bomb' if recent cases that we have dealt with are representative of the build quality emerging from some private Chinese green-field yards. Vessels from these yards are more likely to experience greater down-time and reduced lifespan. They will probably have a higher incidence of accidents and claims, and some P&I Clubs already have in place systems to track ownership of these vessels as part of coordinated condition survey programmes.

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Claire Messer and Laetitia Malan review some very recent changes under the Montreal Convention 1999.



New limits of liability under this convention came into force on 30 December 2009, and have now been certified in the UK by statutory instrument.

Article 24 of the Montreal Convention provides that the limits of liability are to be reviewed by the International Civil Aviation Organisation (ICAO) at five-year intervals, by reference to an inflation factor corresponding to the accumulated rate of inflation since the date of entry into force of the convention.

In accordance with Article 24, the ICAO recently undertook such a review, which resulted in a proposal to increase the limits of liability. These revised limits have now been enacted in the Carriage by Air (Revision of Limits of Liability under the Montreal Convention) Order 2009, which came into force on 30 December 2009.

The limit of liability in relation to the destruction, loss, damage or delay of cargo has been revised from the old limit of 17 SDRs per kilogramme to 19 SDRs per kilogramme.

Note that the increased limit of liability

is in respect of the Montreal Convention only. Other air carriage conventions do not have this so-called 'escalator clause', and their limits are unchanged. For example, the limits under Warsaw-Hague as amended and under the Montreal Protocol No 4 remain at 17 SDRs.

One should be alert to the possibility that carriers will continue to use their current standard form of air waybill beyond December last year. It is also worth noting that regardless of the limits of liability which may appear on the reverse of the waybill, carriers under the Montreal Convention will not be able to contract for a limit lower than the now revised statutory limit of 19 SDRs.

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The BIMCO piracy clause



Fred Konynenburg compares the new BIMCO piracy clause with Conwartime 2004.

Hill Dickinson has been consulted by a number of clients both during and after the recent BIMCO discussions which resulted in its publication of a new piracy clause. In particular, many vessel operators are committed to long-term time charters which include Conwartime 2004. When they enter spot negotiations for sub-charters, it is possible that brokers may incorporate the new BIMCO clause, leading to inconsistency between different fixtures in the charterparty chain as to the terms on which the vessel may be instructed to proceed through dangerous areas.

For this reason, it will be helpful to review the differences between the two clauses:

1. Paragraph (a)(ii) of Conwartime 2004 is much wider than paragraph (a) of the BIMCO clause, which is expressly limited to 'piracy'. The wording in Conwartime 2004 encompasses a broad range of risks which "may be dangerous or are likely to be or to become dangerous". On the other hand, there is a view that Conwartime 2004 only applies to matters arising after the date of the fixture, whereas the BIMCO clause applies to risks arising before and afterwards.

2. The scope for the master to refuse voyage orders is much more limited under the BIMCO clause. Both clauses require the master to exercise his "reasonable" judgement. However, paragraph (a) of the BIMCO clause is drafted in absolute terms: the "area" must, in his judgement, be dangerous due to "actual, threatened or reported acts of piracy". In contrast, paragraph (b) of Conwartime 2004 is more vague. The threshold is merely that the vessel or crew "may, or are likely to be" exposed to the risk. Thus, it is sufficient if there "may be" a danger, which is likely to be easier to establish.

3. Both paragraph (b) of the BIMCO clause and paragraph (g) of Conwartime 2004 require the owner to notify the charterer immediately of any refusal. However, what happens next is very different. Under the Conwartime 2004 provision, the charterer must nominate an alternative safe port

for discharge within 48 hours, failing which the vessel may proceed to a port of its own choice. The equivalent provision under the BIMCO clause does not contain a time limit for providing alternative orders.

4. Under paragraph (d) of Conwartime 2004, war risks insurance is for the owner's account, but if additional premium or calls become payable due to the vessel's passage through a dangerous area, they are to be reimbursed by the charterer. The position is essentially the same under paragraph (d)(iii) of the BIMCO clause.

5. The provisions dealing with intervention by governments and other entities under paragraph (f) of Conwartime 2004 and paragraph (c) of the BIMCO clause are similar, save that the latter says that the charterer must bear the consequences of any indemnity claim by the bill of lading holders or third parties arising out of such intervention, unless this is covered by the owner's insurance.

There is no such express provision in Conwartime 2004. However, in practice there may well be no difference, as the owner is in any event entitled to an indemnity from the time charterer against liability incurred as a consequence of complying with charterer's orders, as a matter of implication if not express provision.

Moreover, the bill of lading will normally incorporate the terms of one of the charters in the contractual chain, which may well include the BIMCO or Conwartime clause. If the former, the bill of lading holder will be subject to the same express indemnity provision at the end of paragraph (c). If the latter, the owner will be protected by the provision in paragraph (g) which requires the charterer (and therefore, it is submitted, the bill of lading holder) to make an alternative nomination, failing which the owner will be entitled to take matters into its own hands. Additionally, paragraph (h) stipulates that nothing done in accordance with the provisions of Conwartime 2004 will constitute a deviation under the charter and, therefore, the bill of lading, so there

should be no valid claim provided that one of the clauses is incorporated. It is questionable whether this type of clause would be incorporated into bills of lading in the absence of express words of incorporation.

6. Under paragraph (d)(i) of the BIMCO clause, the reasonable costs incurred due to any risk of piracy as a result of the vessel proceeding in accordance with the charterer's orders are for their account. There is no equivalent provision under Conwartime 2004. The view has been expressed that under common law the vessel would remain on hire. If that is correct the charterer would continue to be liable for bunkers under the sub-charter. However, it would not be liable for any other costs resulting from the risk of piracy which do not fall within their usual or stipulated obligations under the charter, unless these could be squeezed into the charterer's express or implied obligation to indemnify the owners for complying with orders.

7. The provisions for payment of additional crew bonuses or wages are essentially the same under paragraph (d)(ii) of the BIMCO clause and paragraph (e) of Conwartime 2004.

8. The position regarding payment of hire is potentially problematic. As stated, there is a view that under common law the vessel remains on-hire during the period of delay caused by an act of piracy. Conwartime 2004 does not contain any provisions on the point. In contrast, the BIMCO clause is very specific: the vessel remains on hire but, pursuant to paragraph (f), only for 90 days. The obligation to pay hire will then stop until the vessel is ready to resume charter service.

It remains to be seen how these potential discrepancies will work out in practice, but as ever it is advisable for brokers, operators and traders to keep a very close eye on such matters during fixture negotiations to ensure that the basis on which they charter in or out is consistent with the position elsewhere in the chain.

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Marine terrorism : reviewing the ISPS Code

In this article Kate Docton and Laura Dobbs consider this rapid legislative response to the threat of terrorism.

Following the devastation of the 9/11 attacks, the shipping industry was on heightened alert to the possibility of terrorism involving vessels and port facilities worldwide. The swift response of the International Maritime Organisation (IMO) was to adopt resolution A.924(22), "Review of measures and procedures to prevent acts of terrorism which threaten the security of passengers and crews and the safety of ships". This called for a detailed consideration of all measures already adopted by the IMO to combat acts of violence and crime at sea, and resulted in the immediate enactment of the International Ship and Port Facility Security Code (the ISPS Code).

Believed to be the fastest ever introduction of IMO legislation, the ISPS Code introduced a comprehensive set of measures to enhance the security of ships and port facilities on an international scale. It was implemented through Chapter XI-2, "Special measures to enhance maritime security" in the International Convention for the Safety of Life at Sea (SOLAS), and compliance was deemed mandatory for the 148 SOLAS contracting parties.

The ISPS Code provides an international framework of minimum security arrangements through which governments, ships and port facilities can co-operate to detect and deter acts which threaten security in the maritime transport sector. It prescribes responsibilities for governments, shipping companies and shipboard, port and facility personnel to "detect security threats and take preventative measures against security incidents affecting ships or port facilities used in international trade".

The ISPS Code is a two part document. Part A provides mandatory security requirements and Part B provides guidance notes for implementation. It

does not stipulate specific measures that each port must adopt – rather, it outlines a framework of requirements, for example for ship security plans and security officers, to allow ships and port facilities to evaluate risk. It applies to passenger ships and cargo ships of 500 GRT and upwards, as well as to port facilities serving such ships engaged on international voyages.

The ISPS Code takes the approach that ensuring the security of ships and ports is a risk-management activity, and in order to determine what security measures are appropriate individual governments must assess the threat and evaluate the risk of a potentially unlawful act. As well as combating the risk of terrorism, the ISPS Code has also been credited with dealing with other security-related issues, such as piracy, theft, smuggling and stowaways. It has also been welcomed as increasing the efficiency, effectiveness and transparency of port and ship operators, as well as promoting better control of port areas, more efficient goods flow and personnel, and tighter documentation and paperwork.

However, it has not been without criticism. One of its principal problems is that its efficacy depends on how precisely the relevant provisions are implemented and enforced by the SOLAS contracting states. The ISPS Code provides a framework of security requirements but does not set standards, and leaves it up to each state to provide the specifics of implementation: for example, it requires the appointment of qualified ship and port facility security officers, but does not set minimum training standards or say what constitutes a "qualified" security officer.

So it has been argued that possible inconsistency in application and interpretation of the code has led or will lead to concerns about a lack of regard for international security procedures in some parts of the world, and to notions that the code requirements are not in some places being implemented with

the vigour required to minimise the threat of a terrorist attack.

Some critics question the likely long-term success of this legislation, expressing concern that many port and ship operators treat the ISPS Code as "nothing more than a checklist with temporary priority", and suspicion that some view compliance merely as an additional and onerous burden, with no likely meaningful improvement in overall security planning.

Further, as noted, the ISPS Code does not apply to vessels under 500 GRT. Such are found everywhere in the maritime industry, including in areas of heightened risk, so concerns have been raised that this means further vulnerability in the marine security regime.

Such broad criticisms have led some to suggest that the issue of tightening security is still given insufficient priority in the shipping industry, and there continue to be calls for more to be done to protect the shipping world from attack. International Chamber of Commerce International Maritime Bureau Director, Pottengal Mukendan, has acknowledged that more needs to be done, saying;

"The ISPS Code is a necessary first step in establishing a global maritime security framework, but it has to be recognised as only a baseline standard... the code alone cannot defeat the challenges facing maritime security".

The crux of the problem is that every ship and every port is different, and it is impossible to regulate the entire shipping world on one universal standard scale. Responsibility has to lie with individual governments to provide a sufficient level of maritime protection to its ports and ships.

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"A reasonable approximation of reality"

Equitas Ltd -v- R&Q Reinsurance Co (UK) Ltd:
Equitas Ltd -v- ACE European Group Ltd [2009]
 EWHC 2787 (Comm)

In a recent test case, the High Court has held that a reinsurer may use actuarial models to prove X/L losses underwritten within the London Market Excess of Loss spiral.

The dispute concerned a claim to recover the Kuwait Airways ('KAC') and British Airways' ('BA') loss of aircraft during the first Gulf war, and the costs relating to the Exxon Valdez oil spill of 1989.

From 1991, for some five years or more, the KAC and BA losses were paid on the basis that they arose out of one event - the Iraqi invasion of Kuwait. However in 2003, in the Scott-v-Copenhagen test case, the Court of Appeal held that the KAC and BA losses should not have been aggregated.

The pollution caused by the grounding of the Exxon Valdez resulted in substantial claims against the Exxon companies and, in turn, by the companies against their insurers, under three heads: property, marine liabilities and public and third party liability. All of these categories were grouped together for the purpose of onwards claims within the LMX spiral. However, as a result of the decisions of the Court of Appeal in Commercial Union -v- NRG (1998) and King-v- Brandywine (2005) it became apparent that parts of the claims were irrecoverable and ought to have been excluded from the LMX spiral.

The effect of the LMX spiral was therefore to considerably exacerbate claims, and each loss had given rise to payments in excess of US\$6 billion.

The court considered 26 contracts - 14 relating to KAC and 12 to Exxon Valdez. All were retrocessional level XL contracts with limits of cover in excess of a stipulated amount (attachment point) on an each and every loss basis, and by reference to the syndicate's ultimate net loss.

All the reinsurance contracts incorporated the Joint Excess Loss Committee Excess Loss Clauses, which provide:

"1. REINSURANCE CLAUSE

1.1..... the reinsurers hereon shall indemnify

the reassured in settlement of its net loss (as defined in clause 2 below)...

1.3 It is a condition precedent to liability under this contract that settlement by the reassured shall be in accordance with the terms and conditions of the original policies or contracts.

2. NET LOSS

2.1 'Net loss' under this contract means the sum paid by the reassured in settlement of loss, damage, liability or expense....after deduction of all salvage and recovery including recovery from all reinsurances other than those specified....

2.2 Where salvage, recovery or other payment is received or recovered after a settlement under this contract, the indemnity shall be adjusted as if it had been received before settlement was made.

2.3 Nothing in this clause shall be construed to mean that a claim is not recoverable until the net loss has been finally determined.

3. EVENT CLAUSE

3.1 'Loss' under this contract means loss, damage, liability or expense arising from any one event...."

Many of the reinsurance contracts incorporated the following 'Settlements Clause' as found in Hill -v- Mercantile & General Reinsurance Co PLC 1996:

"All loss settlements by the Reassured including compromise settlements and the establishment of Funds for the settlement of losses shall be binding upon the Reinsurers, providing such settlements are within the terms and conditions of the original policies and/or contracts ... and within the terms and conditions of this Reinsurance."

The principal issue was whether the fact that the LMX market had wrongly

aggregated certain losses and included irrecoverable losses precluded Equitas (Berkshire Hathaway's run-off vehicle) from claiming otherwise recoverable losses.

Equitas acknowledged that the effects of the spiral made it impossible to quantify the recoverable losses by a conventional method, and argued that its losses properly attributable to R&Q were capable of being proved, and that it had done so on the balance of probabilities through the use of actuarial modelling. The models provided discounts to strip out the wrongly aggregated or irrecoverable elements.

R&Q (formerly Brandywine) denied liability unless Equitas could prove that "each claimant syndicate's current ultimate net loss for correctly aggregated Kuwait loss settlements and recoverable Exxon loss settlements exceeds the relevant attachment point of the relevant reinsurance contracts and, if so, by how much?"

R&Q argued that Equitas must present claims stripped of irrecoverable losses, and adjusted to take account of the effect of the United Nations Compensation Commission (UNCC) refunds paid to Equitas on behalf of Iraq. The losses of individual syndicates could not be proved by a generalised actuarial model.

R&Q contended that under the settlements clause Equitas was required to present correctly aggregated losses, upwards through the spiral, and should not be permitted to work backwards from wrongly aggregated losses. Nor could market practice resolve the problem.

Equitas recognised that its the models did not seek to reproduce the actual spiral, but asserted that the models provided reasonable representations of the relevant

features of the spiral and produced results representative of those of actual syndicates.

The High Court drew a distinction between legal and factual or evidential obligations. As to the former the House of Lords decision in Hill -v- Mercantile & General Reinsurance Co PLC (1996) is authority for the proposition that the relevant form of Settlements Clause requires the insurer/reinsured, to prove that the settlements are within the cover of the policy reinsured and within the cover created by the reinsurance.

However, neither the Settlements Clause itself nor legal precedent supported R&Q's assertion that Equitas must present correctly aggregated losses upwards through the spiral. The court said that it is one thing to posit that the loss must fall within the cover of the inwards policy, but another to require proof of liability under each and every underlying contract. As a matter of logic it does not follow that because (at some much lower level in the spiral) a claim may have been paid outside the cover furnished at that level, a settlement at a higher level cannot satisfy the rule in Hill -v- Mercantile. There could have been a contractual provision covering how Equitas was to prove claims, but the Settlements Clause did not stipulate this.

Though the market practice was of limited value in such a novel situation, it had always operated on the basis of collection notes rather than insisting on strict proof of loss.

The court also disagreed with R&Q's objection to the use of models as a matter of principle. Equitas was entitled to adduce such evidence as it chose to satisfy the burden of proof. In simple terms, the models were computer programmes intended to represent the passage of the KAC, BA and Exxon losses through the LMX spiral, and to indicate the effect on the spiral losses incurred by each of the relevant participants (i.e. its ultimate net loss) of the incorrect aggregation of losses (in the case of KAC/BA) and the payment of irrecoverable losses (in the case of Exxon). The models dealt separately with the KAC and Exxon losses. Their parameters were different, reflecting, inter alia, the different underwriting years, markets and timing of mixing between recoverable and irrecoverable elements of losses.

The input of the models was based to a significant extent on actual data from the Lloyd's Claims Office Support System and the "MAX" database, which contains details of the outwards reinsurance contracts purchased by all Lloyd's Syndicates. The models were based on analysis of actual data concerning the reinsurance of Lloyd's Syndicates, including the Lloyd's Syndicates in question, of 3,797 KAC contracts and 2,470 Exxon contracts, grouped together into 446 and 305 separate reinsurance programmes respectively.

From that information there was ascertained on a programme by programme basis (i) total amounts of coverage (ii) number of layers and (iii) excess points, and on a layer by layer basis (iv) the number of shares or signed lines and (v) the percentage amount of each share or signed line.

The starting point involved inputting the number of players and their characteristics. Then, direct KAC/BA and Exxon losses were allocated to the players designated as direct writers of the risk. The next step involved randomly generating outwards reinsurance programmes on the basis of the input information and inwards reinsurance writings for each of the players. Although the models did not seek to recreate the actual spiral or to replicate all its features, Equitas maintained, that the programmes generated were "representative" not "hypothetical".

The output of each of the KAC/BA and Exxon models was produced on two bases. The first monitored the constituent elements of the loss on the basis that both recoverable and irrecoverable elements circulated round the spiral i.e. as had actually occurred. The second ran the models, with the irrecoverable elements included and excluded, enabling an across the board percentage discount to be calculated.

The court noted that in broad terms the wrongly aggregated BA element represented about 12.5% of the losses which first entered the spiral in 1991. Equitas submitted that these could properly be dealt with by the allowance of an appropriate discount. The discounts produced by the model could be increased to a maximum percentage (in the case of several contracts of 60-90%) and still leave a total loss to the relevant contract or layer - thus preserving

Equitas's right to recover in full under the reinsurance contracts.

In relation to Exxon, the irrecoverable direct property and PL losses amounted to about 6%. The discounts allowed by the model could be increased to between 20 and 50%, and a total loss to the relevant layers would still be produced.

Three 'reality checks' were also undertaken, comparing:

- The development, over time, of the aggregate ultimate net losses of all players in the models against the development of aggregate ultimate net losses of actual market participants;
- The final ultimate net loss figures for each player in the models against the corresponding ultimate net losses for actual participants; and
- Vertical exhaustion - the amount of reinsurance cover left available to the largest players in the model against the cover left available to some of the largest actual participants.

The court considered that actuarial modelling was complex, expensive, imperfect, and not ideal in the context of litigation. Nevertheless, the court concluded that on a balance of probabilities the modelled output did permit conclusions to be drawn with confidence as to the recoverable losses for each syndicate. In short, the models, which started with real data, finished with answers which were representative of the actual position - as the judge said, "a reasonable approximation of reality". They were therefore capable of establishing a minimum figure for the recoverable losses of each syndicate. The judge favoured a pragmatic approach in order to achieve what he regarded as the just outcome in the circumstances. The UNCC refunds had not yet processed through the spiral, but the judge accepted appropriate undertakings from Equitas to reflect these subsequently.

In recent years the courts have indeed shown an increasing tendency to adopt a pragmatic approach, which the markets should cautiously welcome. The extent to which 'approximate reality' becomes no more than 'virtual' in future remains to be seen.

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A limit on the application of the doctrine of separability in non EU cases

Emma Groves and Nicholas Phillips discuss the recent case of Rimpacific Navigation Inc -v- Daehan Shipbuilding Co Ltd [2009] EWHC 2941 (Comm)

It has long been established that where a defendant is domiciled in an EU member state, the validity of any arbitration or jurisdiction clause in a contract is not affected by the invalidity of the contract as a whole. In this sense the arbitration/jurisdiction clause is separable from the rest of the contract. However, the question of whether this doctrine would also apply where a defendant is not domiciled in a member state has only recently been considered, in the case of Rimpacific Navigation -v- Daehan Shipbuilding.

The claimant chartered two vessels to a company in the same group as the defendant. The defendant, a South Korean company, provided a guarantee to the claimant for the amounts due under the charterparties. The guarantee was governed by English law and provided for the exclusive jurisdiction of the English courts.

The freight market collapsed and the charterers failed to pay hire due under the charterparties. The claimant later issued Claim Forms in England under the guarantee and obtained permission to serve out of the jurisdiction. Permission was granted on the basis that the claimant had a good arguable

case that there was jurisdiction under CPR PD6B paragraph 3.1, i.e. that the claim was made in respect of a contract governed by English law or containing an English jurisdiction clause. The defendant contested liability on the basis that the person who signed the guarantee on its behalf did not have sufficient authority to do so.

Steel J accepted the defendant's argument that the doctrine of separability did not apply in this case. Therefore if the guarantee was invalid, the jurisdiction clause would also be invalid. Under PD6B paragraph 3.1 a good arguable case had to be made out that the underlying guarantee contract existed. It was not enough to show that if there was a contract it would arguably contain the law and jurisdiction clause relied on. The 'relevant contract' in this case was the guarantee as a whole, not the law and jurisdiction agreement.

Steel J also considered who had the better argument as to the proper law for determining the issue of ostensible authority (for the purposes of this application, it was accepted that the signatory did not have actual authority). The claimant relied on the general rule that the liability of a

principal to third parties is governed by the law applicable to the contract between the agent and the third party, in this case English law. However, the defendant argued that this rule should not apply, as a result of the Foreign Companies (Execution of Documents) Regulations 1994. The judge held that the general rule was not affected by these regulations. He further held that the regulations did not mean that the governing law for the purpose of ostensible authority should be South Korean, rather than English.

Taking all of the facts into account, Steel J held that under English law (the proper law of the contract) the claimant had much the better of the argument as to whether the signatory had ostensible authority. The defendant's challenge to jurisdiction therefore failed, and the judge held that the claimant was entitled to an anti-suit injunction restraining the defendant from pursuing its claim for declaratory relief in South Korea.

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The “OCEAN CROWN” [2009] EWHC 3040 (Admlty)



Natalie Jackson of the Greek office reviews this recent decision of the English Admiralty Court.

A legal battle was cast onto the salvage industry's stage recently when the ship and cargo interests in this matter sought leave to appeal an Appeal Arbitrator's award.

At the heart of the appeal were the principles of encouragement and proportionality. Ship and cargo respondents submitted that the Appeal Arbitrator had erred in law in respect of three issues. First, whether it is correct to take into account, as an enhancing factor in the assessment of salvage remuneration in LOF cases, the risk that the salvor and/or the salvage industry may experience difficult economic conditions in the future. Second, if so, whether it is permissible to take into account the actual economic conditions experienced between the date of termination of the services and the date of the award. Third, whether the principle in the “AMERIQUE” (1874) LR 6 PC 468 applies to all types of salvage cases, including complex and comprehensive ones. Leave to appeal was granted and the matter was heard before Mr Justice Gross.

With regard to the first two issues, which concern the principle of encouragement, Article 13 of the 1989 London Salvage Convention, which sets out the criteria for fixing the award, provides by sub-paragraph 1 that “The award shall be fixed with the view to encouraging salvage operations...”.

Mr Justice Gross first considered the risk of future difficult economic conditions as an enhancing factor.

While he did not wish to speculate on the level, if any, of consideration given to this factor by the Appeal Arbitrator, he indicated that “if the Reasons make it apparent that the arbitrator has wrongly taken a particular factor or factors into account, then it cannot necessarily be said that their inclusion made no difference”. Importantly, the judge emphasised that “there was no mention of this risk in the criteria enumerated in Article 13 of the 1989 Convention”. By taking such a risk into account, Mr Justice Gross *inter alia* acknowledged the danger of ‘double counting’, which would likely result in salvors enjoying both the advantage of having salvaged a very large fund and benefiting from an enhancement of the award because of the risk of a future downturn.

Crucially, on the second issue, the judge held that regard cannot be had to post-termination changes in the value of the salvaged fund, as such would impinge on fairness.

The third and, arguably, more critical issue related to the principle reflected in the “AMERIQUE”, namely that, while the value of the property salvaged should be considered in the estimate of remuneration, it must not be allowed to raise the level of the award to an amount altogether out of proportion to the services actually rendered.

The Appeal Arbitrator had stated that the significance of the “AMERIQUE” principle “dwindles away in complex and arduous [salvage] cases”, and observed that while proportion must

be maintained in all cases, “liberality is merited in complex cases”.

Mr Justice Gross, stating that the principle set out in the “AMERIQUE” is equally applicable to all cases and ought not to be restricted to straightforward ones, went on to say that “the application of this moderating principle is necessarily fact sensitive” - the salient point being that the value of the salvaged property itself must not lead to an award “altogether out of proportion” to the services actually rendered. This was of particular relevance in the “OCEAN CROWN” case, given the high value of the global salvaged fund, which was more than US\$166 million.

The judge allowed the appeal on all three issues, and remitted the award to the Appeal Arbitrator for reconsideration.

In summary, it was accepted that while it is imperative that salvage services are encouraged, such encouragement should be “by reference to factors prevailing at the time of the salvage in question”. Moreover, it has been confirmed that the “AMERIQUE” principle applies “to all types of salvage cases, including complex and comprehensive cases”. The judgment demonstrates a pragmatic balance of the principles of encouragement and proportionality.

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Low Sulphur Fuels - Council Directive 1999/32

With input from EU competition law specialist Philip Wareham, mariners Alan Speed and David Handley discuss some of the implications arising out of this legislation.

The increase in environmental laws and regulations affecting ships is not new. For some time the shipping industry has been criticised for ship-source pollution, though the precise extent of the environmental damage caused by ships is debatable. We have just passed the deadline for implementation of the EU directive on low sulphur fuel, adopted in 1999 and amended in 2005. This requires new legislation, in each of the member states, to control the amount of sulphur contained in marine fuels burnt in ships' main engines and auxiliaries while secured alongside in EU ports.

This should be interpreted as relating only to fuel burnt once a ship is safely moored alongside, and therefore should not impinge on safety issues such as a breakdown which might occur at sea when changing over fuels. However, changing over fuel burnt in, say, generators or auxiliary machinery in port is not entirely without risk.

An EU directive is only implemented by national legislation in the individual member states by, for example, a statutory instrument in the UK. Most directives only impose a minimum standard - here, for example, the standard contained in the directive is for vessels secured alongside in port - but there is nothing to prohibit an individual member state from imposing a stricter standard. The directive also allows individual member states to decide on the most appropriate penalty for failure to comply, and on whom that penalty falls. Therefore, until we see the legislation as enacted in all member states, we cannot rule out the possibility that in some states the penalty could be levied against the master and/or chief engineer, rather than the shipowner. For

the time being, shipowners and also masters might well need to check the requirements in individual states when fixing charters and prior to calls. This can conveniently be done through a ship's agent or P&I Club correspondent, or by checking news sources such as P&I Club newsletters.

For vessels which have not yet been modified to comply with the directive, the European Commission recommended on 21 December 2009 that when assessing the penalty for non-compliance each member state should consider whether the owners have made plans for the vessel to be adapted. Evidence to support a shipowner in that position would be required, including a contract with the engine manufacturer for the retrofit of new equipment, and a plan for that retrofit approved by the ship's classification society. One of the reasons for this recommendation was that the change to low sulphur fuel is not as straightforward as first thought, and has thrown up a number of challenging technical and safety issues.

While, on the face of it, the directive applies only to vessels secured alongside in EU ports, it nevertheless prompts a wider discussion about the requirements to burn low sulphur fuel.

Prior to entering a low sulphur fuel area, including the (MARPOL) North Sea special area, which of course already includes the UK, after reviewing the current time charterparty the master and chief engineer should consider meeting to discuss the requirements for the changeover to and from low sulphur fuel, and any technical issues that may arise out of that. This discussion could include concerns such as timing the changeover, particularly for the first

time, to occur in safe navigable water away from high traffic volumes in case anything unexpected should occur, and the requirements to stem different grades of fuel and the effect this will have on range and draughts. It would be wise to document this procedure (and also add this step to the safety management system) and at the very least thought should be given to logging the times of changeover.

Compliance with requirements to burn low sulphur fuel is not simply a matter of bunkering marine fuel with a sulphur content of less than 0.1% by volume. As many reading this will know, there is a number of technical implications arising from the use of low sulphur fuel, not least of which is having somewhere to hold the fuel. A set of tanks specifically designated as low sulphur tanks will be required, as in many cases will modification to machinery and its operation and in some circumstances a separate fuel system. Careful overall consideration should be given before making modifications, and the relevant manufacturers should be consulted. If modifications are made negligently or without consulting the original manufacturer, that may impact the vessel's insurance and any contractual claims due to mechanical breakdown.

Time charterparties normally stipulate the grade of fuel to be supplied by the charterer, and it will be necessary to review this thoroughly to ensure that the charter terms reflect these new requirements - for example there may be a technical conflict which prevents full compliance with the terms, such as the time it takes to switch between the two grades of fuel. Low sulphur fuel is more expensive, and obviously the time charterer will want to burn this



for the shortest possible time, whereas the ship's key concern will be safety and compliance with the regulatory requirements.

There are also issues to be considered when ships are fixed, and when purchased. Modification of tanks to contain low sulphur fuel will often be at the expense of tanks previously used for the carriage of other fuel grades. Modification may have an impact on the vessel's lifting capacity, stability, ability to achieve a certain trim or arrival draught, range and also (for the times in low sulphur areas) speed and consumption. For example, changing the use of an aft ballast tank to hold low sulphur fuel could mean that more fuel is carried than before, thereby reducing the weight of cargo that can be lifted, making it more difficult to avoid a stern trim, increasing the ship's departure draught after loading and possibly adding another slack tank to be taken into account in the ship's stability.

When purchasing, financing or bareboat chartering a ship, thought should be given not just to storage and handling of low sulphur fuel but also to any resulting modifications required to machinery and any changes to the way machinery should be operated and maintained. This might be one more point to add to a pre-purchase survey, and something else to consider before MOAs are actioned.

If the performance figures of the ship's plant differ significantly from when standard fuel is burnt, the time burning low sulphur fuel may need to be excluded from a time charterparty speed and consumption warranty.

Owners who operate with long-term bunker supply contracts (and thus usually receive more favourable rates) should also consider the implications that this directive has on the supply of fuel and the regime that they currently have for the testing of fuel. Legislation is unlikely to absolve a shipowner who burns non-compliant fuel which has been described by the supplier as low sulphur, so ideally an owner would receive the fuel test results - to be satisfied that the sulphur content is sufficiently low, and that the fuel is of proper quality etc - before burning the low sulphur fuel.

There is a number of other possible conflicts. For example, where a vessel is required by the time charterer to transit an area or enter a port which has a requirement to burn low sulphur fuel, but where the charterer has not supplied it, as perhaps it was not available at the last bunkering port. Here the charterer can be seen as morally responsible at the very least, but depending on the legislation in the relevant state the owner or his master or chief engineer could face a penalty.

Where the time charterers have failed to supply the correct fuel and the vessel is unable to comply with the directive, they might nevertheless seek to press the master to proceed, and disputes could arise as to which party bears the cost of any time lost as a result of him refusing. Whether the charterer can place the ship off-hire in this circumstance will depend on whether the requirements to burn low sulphur fuel are suitably set out in the charterparty. Most shipowners would seek to ensure that a ship would not be off-hire in this circumstance, and also that liability for any resulting cargo

claims would be the responsibility of the charterers. Where a ship manager is responsible for sourcing fuel, the management contract will need to be reviewed to take these new requirements into account, and possibly to deal with which party is ultimately responsible for penalties arising from non compliance. This is similar to other issues where ship managers are responsible for the vessel's compliance with rules and regulations.

This latest round of environmental legislation is far from clear, and it is quite possible that the unprepared master or shipowner could be caught out by the tangled web of interconnected legislation. It has been proposed that the Mediterranean should be designated as a special area, in a similar manner to the North Sea, but this is still at the discussion stage. In addition, moves to reduce carbon emissions - such as the recent Copenhagen conference - are going to push at technical and operational boundaries, seeking to ensure that the shipping industry can continue to play a full part in environmental protection. As ever, the burden will fall on shipowners to modify ships or build them to higher environmental standards, but those on board may prove to be the ones who bear the brunt of inspections and the criminalisation of failures to comply.

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A stringent regime on oil spills is set to continue

Single-hull tankers are to be phased out this year, but coastal states' tough stance remains. Robert Wallis and Jeff Park discuss this highly topical issue.

While the use of single-hull tankers is due to come to an end this year, following the incidents of the "Erika" (France, 1999) and "Prestige" (Spain, 2002), that of "Hebei Spirit" (Korea, 2007) offers a reminder that without international consensus on rules to combat oil pollution from ships, coastal states are likely to continue to apply stringent domestic criminal liability standards to owners and seafarers. Tanker owners and managers, especially of single-hull VLCCs, should beware the risks.

Among about 540 VLCCs worldwide, some 90 are single-hull tankers and even though the intended deadline for phasing them out is the end of this year, such vessels can continue trading until 2015 with Flag State dispensation. In the current economic slump, many are rushing to scrap their single-hull tankers, but others, seeking to obtain exemption, intend to continue their operation beyond this year, in the hope of market upturn and resulting competitive advantage on price. Owners should reflect on the often complex legal processes that can apply following a pollution incident and on the recent approach of the Korean courts, which is of great significance for trading tankers, whether under way or at anchor seeking shelter, awaiting orders, or simply before a call to berth.

In the "Hebei Spirit", the Korean lower appellate court recently confirmed the Supreme Court's decision that the charges of wilful destruction of property against "Hebei Spirit" and "Samsung No.1" be dismissed, but that they were both liable for causing the oil pollution.

While these decisions found that the "Samsung No.1" and her tug boats were mainly liable for the incident, the "Hebei Spirit" was also at fault because:

- As a fully loaded single-hull VLCC anchoring in an unsheltered area, "Hebei Spirit" had a greater duty of care to keep a more thorough lookout and to be ready to take action to avoid collision.
- The chief officer failed to keep a proper visual or radar lookout.
- The engine was not ready for immediate operation, to enable her to manoeuvre.
- The pollution response was inadequate. Hebei Spirit might not have been able to seal immediately the punctured tanks, but injecting inert gas was inappropriate and unnecessary and increased the amount and rate of oil spillage.
- The transfer of oil to other tanks (more than three hours after the collision) should have been done earlier.

Even in a state where MARPOL has been adopted, national laws can also apply, by for example UNCLOS Art 211(4), such that coastal states can legislate to prevent pollution in their territorial seas. There is continuing debate on the interaction between national laws and MARPOL provisions, raising controversial issues which were considered in the lead-up to the 2005 EU Ship Source Pollution Directive.

In the "Prestige" incident (Spain, 2002), the master was arrested and prosecuted under Spanish law; following the "Erika" casualty, the Paris High Court considered if there was a conflict between MARPOL and French law, but did not resolve the issue. In the "Hebei Spirit" proceedings, the Korean courts considered two main legal principles (a) breach of maritime safety rules, such as causing or contributing to a collision resulting in pollution and (b) a local authority prosecution for failing to take appropriate measures to prevent and minimise pollution or failing to comply with domestic environmental laws following an occurrence of pollution. Other jurisdictions will approach these matters under their own provisions.

Accordingly, the uncertainty as to which legal regime will be applied means tanker owners and managers must adopt stringent standards, which,



as the decisions in the “Hebei Spirit” show, will have to be met by vessels at anchor as well as under way and are of particular significance for single-hull tankers and will remain so in respect of those that continue to operate after the end of this year.

Following the above and other major pollution incidents, the majority of tankers accordingly operate to high standards. However, given progressively increasing worldwide environmental concerns and commensurate empowerment via conventions and domestic legislation, as shown by the “Hebei Spirit” and other cases coastal states will prosecute tanker owners, operators and crew if they cause or contribute to oil pollution. Compliance with what may be a myriad of standards will be particularly important for those who operate (and intend to continue to operate) tankers that present a higher level of risk.

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What should an anchored vessel do to avoid a collision and how can shipowners train their crews? In addition to COLREGS (Collisions Regulations - The International Regulations for Preventing Collisions at Sea), a detailed benchmark is given by the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (STCW Convention).

A vessel must use all available means, including radar or AIS, to assess any risk of a collision. Such shall be deemed to exist when the compass bearing of an approaching vessel is not seen to change appreciably or the distance between vessels is reduced (Rule 7 of COLREGS).

The duty officer must locate and plot his own vessel's position, checking if it remains securely at anchor. He must also ensure that a proper lookout (including inspection rounds of the ship and observance of weather and sea conditions) is always maintained and that the state of readiness of the main engines and other machinery is in accordance with the master's instructions and also that proper pollution responses are made in the event of a collision (Chapter VIII Part 3-1 of the STCW Convention).

If the vessel is anchored in an unsheltered location, the chief engineer must ensure that an efficient engineering watch is kept and that the main and auxiliary machinery is maintained in a state of readiness in accordance with the master's orders and he likewise must respond appropriately as regards pollution in the event of a collision (Chapter VIII Part 3-2 of the STCW Convention).

If a collision seems imminent, the vessel must take positive action in good time (Rule 8 of COLREGS).

Successful defences in low exposure asbestos claims



John Caddies, a partner in Hill Dickinson's personal injury and regulatory team and a specialist in asbestos claims, discusses three recent cases which suggest that the courts are prepared to question a claimant's account of asbestos exposure, and also to take into account an employer's knowledge of the dangers of asbestos, when exposure occurred and precautions put in place, matters of considerable interest to shipowners and operators and other employers of crew members.

Terence Abraham -v- G Ireson & Son (Properties) Ltd & Stanley Reynolds t/a Reynolds & Spademan (2009)

The claimant worked as a plumber's apprentice and plumber with the first defendant from 1956 to early 1962, and as a plumber for the second defendant from 1962/1963 to 1965. Both defendants were small firms, and the claimant carried out plumbing work for them at domestic premises.

The claimant alleged exposure to asbestos from scorch pads while soldering, and from asbestos string for sealing the joints of soil pipes with both the first and second defendants. He also alleged that with the second defendant he would have cut up asbestos flues using a hacksaw. The claimant accepted that all of this work would only be carried out occasionally.

His consultant engineer alleged that the level of asbestos exposure from scorch pads would have been significant, accepted that any exposure from asbestos string would be very

small, and urged that the cutting of asbestolux boards must have taken place in the vicinity where the claimant was working, which would have resulted in significant exposure. The defendants' expert countered that any asbestos exposure from using scorch pads or string or from cutting materials containing asbestos would have been minimal.

The judge concluded that the claimant's asbestos exposure with the first defendant was very light and occurred intermittently, and though his exposure with the second defendant was more frequent it was nevertheless still modest and, overall, infrequent. Nevertheless, it could have been avoided altogether, and the overwhelming likelihood was that it had caused mesothelioma.

The judge then considered the literature and previous cases on an employer's knowledge of the dangers of asbestos. The defendants conceded that they were under a duty to inform themselves of the relevant statutes and the annual reports of the chief inspector of

factories. However, the judge pointed out that the legislation and the message in the annual reports was set in the context of the known risk of asbestosis and of occupational exposure to significant quantities of asbestos dust. The question was whether it should have alerted an employer whose employees' only exposure to asbestos was light and intermittent to the possibility that they might be at risk of contracting an asbestos-related injury. She distinguished Trevor Owen -v- Iron Mine Yorkshire Copper Tube (1995), and Jeromson and Dawson -v- Shell Tanker (UK) Ltd and Cherry Tree Machine Co Ltd (2001) on the basis that in all those cases it was held that the claimant was exposed to substantial amounts of dust. Indeed, in Jeromson and Dawson it was stated that if the exposure had been "limited, intermittent or occasional ... then a different conclusion might have been justified" and that "the issue was whether the degree of exposure in this case was such that a reasonable employer should have identified a risk".

The judge concluded that it was highly unlikely that an employer whose employees' only exposure to asbestos dust arose as a result of infrequent use of the relevant materials would have believed, on reading the literature, that he was or might be exposing employees to risk of an asbestos-related injury. Indeed, some degree of reassurance might have been afforded by the Ministry of Labour 1960 booklet 'Toxic Substances in Factory Atmospheres', which (while not setting a 'safe' level of asbestos exposure) gave a maximum permissible daily concentration of approximately 30 fibres/ml, far higher than the claimant's likely exposure. The position would have been different if the defendants had had any special knowledge or personal experience of asbestos dangers, but there was no evidence of that. Further, the judge considered it unlikely that a factories inspector would have advised them to take any precautions, as at that time asbestos products were still in use in domestic and other everyday settings.

The judge then considered the alleged breaches of Regulation 82 of the Building (Health, Safety & Welfare) Regulations 1948 and Regulation 20 of the Construction (General Provisions) Regulations 1961. These are identical, and state that if:

"...there is given off any dust or fume of such character and to such extent as to be likely to be injurious to the health of persons employed all reasonable practicable measures shall be taken either by securing adequate ventilation or by the provision and use of suitable respirators or otherwise to prevent inhalation of such dust or fume".

The judge held that the knowledge of risk must be relevant to the issue of reasonable practicability, and concluded that, as she had rejected the contention that the defendants should have appreciated that the claimant's asbestos exposure was such as to place him at risk of injury, it followed that they could not have been aware that asbestos dust was "likely to be injurious" to the claimant. Furthermore, as they did not know and could not reasonably have been expected to have known of the

risk of injury arising from the claimant's exposure to asbestos dust, it was not reasonably practicable for them to take any steps to protect him from it.

A similar approach was adopted in the following case:

[Iris Harrington \(Widow of James Harrington deceased\) -v- Department for Business Enterprise and Regulatory Reform \(2008\)](#)

The deceased had worked for the National Coal Board (NCB) as an apprentice bricklayer at Fryston Colliery from 16 January 1956 to 13 June 1958.

Evidence of asbestos exposure came entirely from his written statements, in which it was alleged that this occurred when he replaced the boiler bricklayer, who was off sick for at least a year. The boiler house had a large number of boilers, all surrounded by asbestos, with brickwork on top. Extensive piping was lagged with asbestos, which was removed with hammers during maintenance. The deceased had to take the brickwork off, re-set the asbestos and then re-brick it. The asbestos was very dry and crumbly, and perhaps a foot thick.

The deceased's interview notes, formal witness statement and reply to a request for further information all contained slightly different versions of the same theme, which was commented on by the opposing engineering experts. They reached agreement on all relevant aspects, including the fact that they found it difficult to conceive that the NCB would have allowed an 18 year old apprentice to work on boilers unsupervised, that the boiler lagging and pipework would probably have contained asbestos, that it would be very unusual for bricklayers to be involved in repair work and that his exposure to asbestos would on the balance of probability have been less frequent than that of a fitter - which they noted from other evidence would have been between once a week and once a fortnight. If the deceased's evidence was accepted then they agreed that he would have had exposure to asbestos, heavy at times but less so or negligible at others, and

that from 1956 to 1958 they would have expected the NCB to appreciate that prolonged or at least regular exposure to significant concentrations of asbestos resulted in asbestosis and an enhanced risk of lung cancer. However, they specifically stated that they were not sure whether the deceased would have had such levels of asbestos exposure, particularly bearing in mind the NCB's disclosed evidence.

The NCB had disclosed the colliery 'Starters & Leavers' book, as well as extracts from the accident book. This showed that the person who the deceased said he had replaced had worked underground at the colliery as a bricklayer from 27 January 1940 to 31 January 1969, and that he was involved in four accidents between 28 May 1956 and 27 November 1957, so he could not have been off work for 12 months, as alleged by the deceased. Further, the deceased himself was involved in two accidents in 1956, as well as witnessing a further accident, none of which took place in the boiler house.

The judge concluded that the deceased was plainly incorrect in suggesting that he only worked in the boiler house, his period of exposure to asbestos was unclear and much of his evidence as to how he was exposed to asbestos was unintelligible. He concluded that the deceased was not employed principally or solely to work in the boiler house, there was no evidence that he was exposed to asbestos while working in the pit village, and that while he may have witnessed fitters removing asbestos lagging such occurrences were infrequent and isolated. Finally, he concluded that it was impossible to say that the deceased's only exposure to asbestos was with the NCB, as his Inland Revenue Schedule did not show who had employed him from the age of 38 to 65.

The judge then considered the question of knowledge about asbestos. He pointed out that the link between asbestos and mesothelioma was not established until 1960, and accepted that for this claim, which concerned exposure from 1956 to 1958, the claimant needed to establish that the



deceased was exposed to significant levels of asbestos dust. He referred to the cases of Owen and Jeromson, but observed that they dealt with claims where an employee was exposed to significant or substantial amounts of asbestos.

The judge held that he was not satisfied that the deceased was exposed to significant or substantial amounts of asbestos during his employment by the NCB, and found that the NCB had no reason to suppose that an apprentice bricklayer working on the surface of the colliery would ever be exposed to significant or substantial amounts of asbestos, and consequently owed no duty of care to the deceased. For the same reasons he concluded that the deceased was not exposed to dust of such a character or in such quantity as to be likely to be injurious to his health, such as to give rise to a breach of Section 74(2) of the Mines & Quarries Act 1954. So the claim was dismissed. Also, in relation to causation, the judge said that if necessary he would have found that it had not been proved that the cause of the deceased developing mesothelioma was exposure to asbestos during his employment by the NCB.

Finally, the Court of Appeal has made it clear that for a claimant to succeed, evidence of both asbestos exposure and the failure of the defendant to take steps to prevent it must be demonstrated.

Brett -v- Reading University (2007)

The deceased was employed by Reading University as a clerk of works from 1983 to 1988, and for two years he was supervising the dismantling of the old library. He had told his wife that he was exposed to asbestos during work on the new library, and

there was some evidence that on one or two occasions he went into a room which contained asbestos. However, it did not appear that these visits occurred while any work was being carried out.

There was evidence that the contractors had been given instructions to take all necessary precautions, but none as to whether or not such had been taken. The claimant's engineering expert stated that the deceased would probably have encountered or disturbed asbestos-based materials himself, or would have been present while other tradesmen disturbed or used such materials. However, the critical question was whether the university had failed to take the necessary precautions to ensure that he did not inhale asbestos fibres. The Court of Appeal specifically put it that way as it is always for the claimant to establish the elements of his case, one of which is that the injury was caused by breach of duty on the part of the defendant.

The defendant's case was that the claimant had no direct evidence and no evidence from which it could be inferred that proper precautions were not taken. The contractors had gone out of business and neither party had traced any of their former personnel, and contemporaneous documents produced by the university showed a clear awareness of the need for contractors to comply with the Asbestos Regulations. The Court of Appeal held that the absence of any historical documents confirming compliance with the Asbestos Regulations was as consistent with compliance as with non compliance by the contractors.

Between 1940 and 1999 the deceased had worked for numerous employers

as an electrician, chargehand, site supervisor and clerk of works in engineering and construction work. There was a real possibility that he had been exposed to asbestos in many of these jobs, so it was not possible to argue successfully that developing mesothelioma meant that he must have been exposed during his employment with the defendant.

So the Court of Appeal held that, while the evidence allowed an inference that he came into contact with asbestos in the course of his work with the defendant, it was not sufficient to show or support an inference that the defendant had failed to take necessary steps to protect him from inhaling it. Breach of duty by the defendant was not established.

These cases show that mesothelioma claims can be successfully defended when there is no evidence of breach of the appropriate regulations, or if it can be shown that the levels of exposure were such that failure to take precautions was not negligent or in breach of the relevant regulations.

They also highlight the importance of a defendant obtaining its own lay witness evidence or contemporaneous documentation to demonstrate that the exposure alleged would have been at a low level and infrequent. Nevertheless, while still possible, it remains harder to defend such claims based on events said to have occurred after the link between asbestos exposure and mesothelioma was discovered in 1960, and more particularly after the Sunday Times article of 31 October 1965, warning of the dangers of low levels of asbestos exposure.

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New emergency towing requirements for vessels under SOLAS

These apply to all SOLAS vessels of any type built after 1 January this year, to all passenger vessels (whenever built) after 1 January this year, and will apply to all other vessels after 1 January 2012.



Regulation II-1/3-4 of SOLAS requires such vessels to carry an emergency towing plan, as for some years has been the special case of tankers.

There is no provision for Flag State or Class approval as part of statutory certification, though some states might well introduce such a stipulation for vessels under their flags or using their ports. Also the plan might be considered under part 8 of the ISM Code (emergency preparedness), and if so it would probably receive scrutiny

during an ISM audit, especially at the outset of these new provisions.

Guidance for the plan appears in the safety circular MSC.1/circ.1255, a copy of which is available on the IMO website. The plan must be well laid and suitable for emergency use, taking into account all factors, from available crew to vessel design.

Failure of such a plan in an emergency might give rise to legal issues in respect of salvage, cargo loss and damage

claims and perhaps general average, especially if the plan does not have at least some kind of official approval. If only in view of the nature of these services and the technical issues they can give rise to, in appropriate cases owners and operators may wish to consult salvage and towage specialists before finalising any plan or altering equipment as a result.

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Team profile: commodities team

Hill Dickinson's commodities team has extensive expertise in handling disputes and non-contentious matters which arise in domestic and international trade, and this extends to a broad range of goods and commodities, including softs, oils and their by-products, and metals. The team acts for shippers, traders and end-users, and advises trade associations and arbitrators appointed under their auspices. Following the merger in July 2009 with Middleton Potts, Hill Dickinson is now one of the leading providers of legal services to the commodities market, and is ranked as one of the top three commodities firms by independent legal directories such as Chambers and The Legal 500.



1. David Lucas, partner, was appointed head of the team following the merger with Middleton Potts. He was a founding partner of Middleton Potts and had been its senior partner since 2001. He has developed a wide client base, including commodity trading houses, bankers engaged in trade finance, insurers and ship owners and operators worldwide. David also regularly advises arbitrators appointed to determine disputes conducted under the rules of several of the major trade associations.

2. Jeff Isaacs, partner, has over 25 years' experience in advising on all trade and commodity-related matters, both contentious and non-contentious. He particularly specialises in arbitration disputes involving physical commodities, with emphasis on sugar, grain and steel. He also advises trade associations on arbitrations carried on under their auspices, including the Sugar Associations, GAFTA, LRBA and IGPA.

3. Andrew Meads, partner, was formerly a partner in Middleton Potts and has specialised in the areas of international trade and shipping since qualifying in 1998.

Andrew advises and represents clients in relation to commodity contracts and disputes and shipping matters, and with respect to letters of credit, trade finance arrangements and other aspects of international trade. He has considerable experience in arbitration before many of the major trade associations and has been instructed to draft arbitration awards in London arbitrations. He is also experienced in High Court litigation, where he is regularly instructed in high value disputes.

4. Fred Konynenburg, partner, was also formerly a partner in Middleton Potts, and is a recognised specialist in shipping and international trade litigation. He acts principally in Commercial Court, LMAA, GAFTA, FOSFA and RSA and SAL proceedings. His clients are energy majors, ship operators, soft commodity trading houses and their claims insurers. Fred writes regularly for the legal press, as well as giving frequent seminars on all aspects of his practice.

5. Stuart Armstrong, partner, originally specialised in cargo recoveries and multi-modal issues but now spends

increasing amounts of his time advising soft commodity traders in connection with their GAFTA and FOSFA disputes and related chartering issues. His clients include Austrian, Canadian, Chinese, Italian, Swedish and UK commodity traders and importers.

6. Paul Taylor, partner, formerly a partner at Middleton Potts, qualified as a solicitor in London in 1997. He worked for six years in Paris, qualifying as a French Avocat in 2004, and specialises in marine and non-marine insurance, shipping, international arbitration, international trade and general commercial litigation. Paul handles disputes for a wide variety of clients in the shipping, insurance and international trade sectors. He has appeared before courts throughout France and before arbitrators in ICC, CAP and CAMP proceedings, as well as representing clients in proceedings before the English courts and before arbitrators in LMAA, GAFTA, FOSFA and LME disputes.

7. Kamal Mukhi, associate, joined the team in December 2007 and is dual qualified in England and India. His main areas

of work include corporate law and foreign investment, and the resolution of commercial and corporate disputes by arbitration, in the High Court in New Delhi and before the Company Law Board.

8. Claire Messer, solicitor, specialises in international trade with a focus on marine cargo and goods in transit claims (including bills of lading, charterparties and international and domestic transport law) with an increasing role in commodities disputes. Multi-lingual (French, Spanish and basic Portuguese), Claire has experience in London Commercial Court litigation, arbitration and mediation. For two years running she has been accredited in Chambers as one to watch for multi-modal disputes.

9. Susan Leonard, solicitor, handles a mixture of international sale of goods, commodities and dry shipping disputes. She has been involved in a number of FOSFA, GAFTA, RSA, ICC and LMAA arbitrations and in commercial disputes in the High Court for a variety of clients including charterers, brokers and major commodity traders.

10. Christopher Lipka, solicitor, deals with a wide range of both non-contentious and contentious international trade, commodities and dry shipping matters. On the non-contentious side he has drafted commercial contracts and provided advice in relation to joint ventures. On the contentious side he handles a mixture of commodities, international sale of goods and dry shipping disputes and has been involved in LMAA, FOSFA, GAFTA, SAL and RSA arbitrations and in commercial disputes before the High Court.

11. Laetitia Malan is the team's current trainee, and provides core assistance with most of the ongoing cargo and commodities matters. Laetitia qualified as an industrial engineer in her native South Africa (her first language is Afrikaans) before converting to law. She previously undertook seats in the employment and personal injury and regulatory teams, and will move to her final training seat in March.

Team profile: Italian speakers

Hill Dickinson's London shipping team has no less than six casehandlers who are fluent in Italian, including three Italy nationals, all of whom regularly act for and assist with our Italian shipping, trade and insurance clients.

Federica Cozzani

Federica moved to London in 2001 and took the specialist law with Italian law degree course at University College, graduating in 2005 having spent her Erasmus year in her native Genoa. She joined Hill Dickinson as a trainee in 2007 and dealt with a wide range of non-contentious commercial work and much shipping and international trade arbitration and litigation. Following qualification in September 2009 she joined the London shipping team, and is currently dealing in particular with contentious marine and non-marine insurance and reinsurance matters.

Federica is an active member of the Italian community here, regularly attending Italian Chamber of Commerce events and meeting colleagues from Italian firms in London.

Francesco Tundo

Following graduation in 2004 with a first class law degree from Milan's Università Commerciale Luigi Bocconi, Francesco obtained an LLM in International Commercial Law at the University of Westminster, later completing both his GDL and LPC studies at London's College of Law.

He joined Hill Dickinson as a trainee in September 2007 and gained significant experience in employment, PI and regulatory, shipping and yacht matters. Following qualification in September 2009 Francesco joined the London shipping team, where he practises in dry shipping and marine insurance.

Alessandro Giordano

Alessandro is a dual qualified lawyer

(England and Italy) with an LLM with distinction in International Transport and Maritime Law from the London Metropolitan University.

He handles litigation, arbitration and mediation for a broad international client base, concerning dry shipping, charterparties, bills of lading, ship and yacht sales and shipping derivatives contracts. Before joining Hill Dickinson's London shipping team in September 2008 he was a claims executive at a leading P&I Club in London, following in-house experience with a major Swiss banking and insurance company in Milan and commercial litigation in private practice in his native Rome.

Alessandro has written a number of articles on maritime law topics, both in Italy and the UK.

David Godfrey

David was a founding partner of Middleton Potts. He headed its corporate and commercial department before the merger with Hill Dickinson, where he is now a consultant, continuing to specialise in corporate and commercial, banking and finance and also insurance and reinsurance, and highly rated in The Legal 500. Profiled as a leading lawyer in *Il Sole 24 Ore*, his substantial overseas client base has a very strong Italian core which includes banks and soft commodity and petrochemical traders, and amid broad commercial expertise his particular speciality is advising overseas corporations on their UK operations.

David Lucas

David is profiled as part of the commodities team on the opposite page.

Thomas Frei

Thomas is an assistant solicitor who specialises in transactional work. He is also fluent in French, and will be profiled in more detail as part of the practice group French speaking capability in the next edition of this newsletter.

Les nouvelles...

With a group of lawyers fluent in French, and thus able to transact business in spoken or written French, the marine practice group provides a variety of legal services, as well as regular updates on English commercial law, in French.

This group will be profiled in the next edition of this newsletter, but for details of our French speaking capability and to receive updates from us in French, please contact:

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Events

12 October - Tony Allen, James Lawson and Tony Goldsmith attended the Superyacht Conference in Singapore.

29 October - Panos Pourgorides and Martin Penny attended the Fort Lauderdale Boat Show.

9 December - Tony Allen gave a presentation at The 1st International Superyacht Coatings Conference in association with ICOMIA in Monaco.

7 December - James Lawson attended the launch of the first edition of the Superyacht Design Book at the Design Centre in London's Chelsea Harbour.

13 January - Robert Gay presented on the topic of 'Excluding Consequential Damages' at a London Shipping Law Centre seminar on offshore contracts attended by 70 guests at Irongate House, and chaired by Andrew Johnson.

14 January - under the title 'Between a rock and a hard place', the yacht team hosted a lunchtime seminar on topical yacht salvage issues.

15 January - members of the yacht team offered advice as part of the free legal surgeries hosted by the British Marine Federation at the London Boat Show.

2 February - Rhys Clift spoke as part of a Chartered Insurance Institute Masterclass on mediation.

From 3-5 February - John Pople, Robert Gay and Electra Panayotopoulos are presenting a BIMCO Masterclass on time charterparties in Athens.

8 February - Robert Gay is presenting on Unsafe Ports to a client audience at the firm's Piraeus office.

From 9-11 March John Pople, Robert Gay and Tim Stephenson will present a BIMCO Masterclass on time charterparties in Alexandria.

24 March - the London shipping team is hosting a further London Shipping Law Centre seminar on offshore contracts, dealing with the insurance aspects and following on from the 13 January event.

16 April - The shipping and yacht teams will host a seminar on current issues in the world of shipping and yachts. The venue will be the Marriott Royal Aurora Hotel, Moscow, and invitations and the programme will be distributed shortly. For further details please contact Nicholas Phillips (nicholas.phillips@hilldickinson.com) or Panos Pourgorides (panos.pourgorides@hilldickinson.com).

About Hill Dickinson

The Hill Dickinson Group offers a comprehensive range of legal services from offices in London, Piraeus, Singapore, Liverpool, Manchester and Chester. Collectively the firms have more than 1,100 people including 160 partners.

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