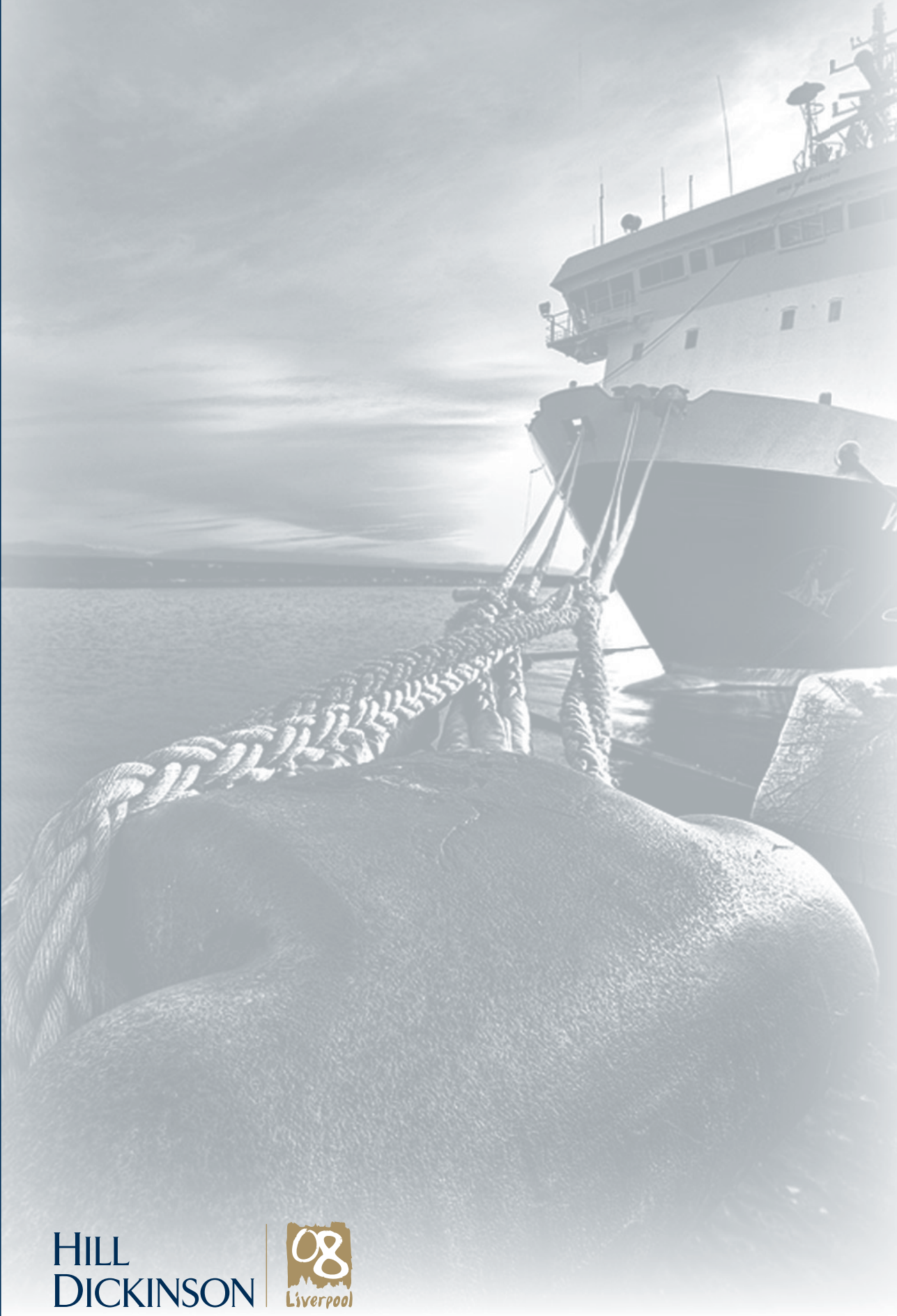


January 2008

HILL DICKINSON



Marine Newsletter

HILL  
DICKINSON |   
OFFICIAL LAWYERS  
EUROPEAN CAPITAL OF CULTURE

# STOP PRESS...

## Hill Dickinson makes historic move to new headquarters in St Paul's Square, Liverpool.

Four sites go into one in Liverpool's largest single letting of office space.

Liverpool's largest law firm Hill Dickinson is moving the first of 550 partners and staff into state-of-the-art headquarters in the city's largest single letting of office space.

December saw 225 partners and staff as the first to occupy some of the 130,000 sq ft of Grade A office space over seven floors at the iconic St Paul's Square development.

The firm's full Liverpool complement of 550 partners and staff, including the marine team, is due to move from four separate sites across the city to the St Paul's building by March.

This is the latest chapter in the development of the burgeoning national law firm that has been in Liverpool since 1810.

Tony Wilson, senior partner at Hill Dickinson, said: "This is indeed a truly historic development for Hill Dickinson. We were fast outgrowing our former premises and needed to bring everyone together under one roof for the benefit of the firm, our staff and most importantly, our clients. This dynamic and inspiring building can not only accommodate our existing staff and client needs but gives us space and flexibility in which to expand further."

"St Paul's Square demonstrates that Liverpool is continually moving forward commercially, financially and architecturally and that local successful firms such as Hill Dickinson are fully committed to the city."

## Contents

<u>CTI Group Inc v Transclear SA (2007)</u> <u>EWHC 2070 (Comm) [2007] EWHC 2340</u>	2
The Decision in Premium Nafta Products Limited	4
The Business of Shipping	5
Asbestos Update	6
The Cost of Compliance: "The Elli and The Frixos" [2007] EWHC 1890	8
Sardinia 'Luxury Tax' – A U-Turn?	9
Letters of Intent	10
More from the Cayman Islands	11



## CTI Group Inc v Transclear SA (2007) EWHC 2070 (Comm) [2007] EWHC 2340

**Can a contract between a buyer and seller be frustrated where the supplier refuses to supply the cargo to the buyer? This issue was considered in a recent appeal of an Arbitration Award in which Hill Dickinson LLP acted for the Claimant/Appellant buyer CTI ("C").**

### The facts

C planned to export a cargo of cement to Mexico in an attempt to break a cartel operated by an entity called Cemex in that market. C asked Transclear SA ("T") to source a quantity of about 27,000mt of cement from Asia for loading in bulk onto their vessel which was, at the time, in China for dry dock repairs.

As highly experienced cement traders, T was well aware of Cemex's domination in the Mexican cement market. They were also aware of C's intention to ship cement to Mexico, and had discussed with C the possibility that Cemex might use its influence to try to prevent C's vessel from loading cement destined for the Mexican market. Notwithstanding this, T was confident that they would be able to source a supply of cement for loading onto C's vessel. However, to safeguard against any possible intervention from Cemex, T suggested that the certificate of origin and an inspection certificate should not show a destination, and further that all other ship's documents should show the destination as Honduras.

T found an available source of cement at Padang, Indonesia, and the fob contract between T and C was finalised. In pursuance of this C ordered the vessel to Padang for loading. However, shortly before arriving off Padang, T terminated the contract. T advised C that they were no longer in a position to load the cargo at Padang because "high management" in Jakarta had instructed the shippers not to load the vessel. It appeared that Cemex owned 25% of the supplier's parent company and had used its power to prevent the suppliers from loading cement onto C's vessel.

T subsequently found an alternative supply of cement in Taiwan at a higher price. T remained confident that C's vessel would be loaded successfully, but again suggested that the ship's documents should show Honduras as the destination. A substitute fob contract was made, and C instructed the vessel to sail to Taiwan for loading. While the vessel was en route to Taiwan, T advised C that the Taiwanese suppliers were no longer willing to load the cement onto C's vessel

and it was therefore ending the parties' sale arrangements. It was apparent that the suppliers had been pressurised into refusing to load the vessel by another Taiwanese company which had a major supply contract with Cemex. Neither C nor T could find any other available sources of cement in Asia, and in mitigation of its losses C instructed the vessel to sail to Novorossiysk (via the Suez Canal) where she was able to load an alternative cargo of cement at a price between the two "failed" contract prices.

## C's claim

C claimed loss and damage of about US\$400,000 arising from T's breach including (1) loss of time (2) the cost of bags ordered by C stamped "Indonesian origin" (3) the difference between the first contract price and the price paid in Novorossiysk (4) the cost of extra bunkers used (5) various additional port expenses and (6) the Suez Canal charges.

## The Tribunal's award

In an Award dated 1 December 2006 a Tribunal of three LMAA Arbitrators dismissed C's claim and held:

1. that the contract (or contracts) had been frustrated when they became 'commercially impossible' to perform; and
2. that a term was to be implied that, if Cemex intervened to prevent the contractual cargo from being available in Asia, then 'all bets were off'.

The Award did however provide that had C's claim succeeded, C would have been entitled to damages for claims (3) to (6). This was about US\$300,000 plus interest.

## Frustration

The Tribunal's decision caused great surprise both on the issue of frustration and on the implied term, all the more so in view of the very small amount of time that had been spent on these matters at the hearing – only about 15 minutes of a 2 day hearing.

The defence of frustration is notoriously hard to establish. English law distinguishes between (1) cases where a contract becomes impossible to perform for reasons which are outside the parties' control (e.g. strikes, storms, earthquakes, embargoes) and (2) cases where the contract becomes impossible to perform because of something for which one of the parties is responsible. In the first type of case, the contract may be frustrated. However, in the second, it is not. In this case, the cause of the 'impossibility' was the refusal of T's subcontractor (the cement supplier) to load C's vessel. The contract had therefore become impossible to perform because of a matter for which the seller, T, was responsible.

## The Appeal to the High Court

C obtained permission from the High Court to appeal the Arbitration Award, and the appeal was heard before Mr. Justice Field in July this year.

The appeal was on the grounds that the Tribunal's decision on frustration and the implied term was obviously wrong in law, and that no reasonable Tribunal could have made such a decision.

One of the points argued on appeal was whether the fault of a supplier could be attributed to a seller where there was no legally binding contract between the seller and the supplier. This was important because a party is not entitled to rely on frustration if the event on which he relies was his fault or

responsibility. Counsel for C argued that the Tribunal had failed to apply this fundamental principle: the fault of the suppliers (i.e. their failure to supply the promised cargo) should be attributed to T, because the suppliers were those to whom T had delegated the performance of the contract with C. It was also argued that the fact that there was no binding contract between T and the suppliers did not matter, as the Tribunal had held that the agreement between T and the suppliers was tantamount to a contract. What mattered was whether or not T had engaged or arranged to use a particular supplier.

On this, Mr Justice Field disagreed, and held that the default of a supplier can only be attributed to a seller where there is a legal obligation between the seller and the supplier. As the Tribunal had found that there was no such legal obligation, C failed on that point.

However, Mr Justice Field did agree that, as a matter of law, the contract had not been frustrated. He held that once it had been found that the contract was impossible to perform, the key question was whether the risk of failure of supply was on the sellers or on the buyers. In this case the risk was with the sellers, and the Award was wrong. The Judge made the following points:

- Where a seller makes an unqualified promise to sell, he bears the risk of failure of his supplier where (1) that source is not the specified source, or the goods are not specific goods and (2) the supplier is not excused by frustration, e.g. it is physically and legally possible for the supplier to make delivery, but he chooses not to.
- There is always a risk of supplier failure, and it is the seller who is in a position to protect against this by either (1) making a binding and enforceable contract with the supplier with an appropriate jurisdiction or arbitration clause, or (2) making his promise to the buyer conditional on the goods being available for delivery.

Mr Justice Field also held that neither of the two contracts could be said to contain the supposed implied term, as it was "fundamentally inconsistent with the effect of the contract's express terms". Furthermore, the term was not necessary to give the contract business efficacy, or so obvious that either it went without saying or should be implied as a matter of law.

## Appeal to the Court of Appeal

But that is not the end of it. Following Mr Justice Field's decision on frustration, T made an application for an order that, even if the contract was frustrated, C had not suffered any loss and therefore no damages were payable. The Judge dismissed T's application, and awarded C the same amount as the Tribunal would have awarded if they had not found the contract to have been frustrated.

T then sought permission to appeal to the Court of Appeal. This was granted, but only on the issue of frustration. The appeal is due to be heard between April and July this year.

The instinctive feeling is that this contract was not frustrated, but there are no authorities exactly on this point. This might explain why the decision has received so much attention, and indeed we understand that it is already the subject of discussion in the academic world. Meanwhile, work on the appeal continues and we will publish the outcome in this Newsletter.

**Alexandra Saxty**  
alexandra.saxty@hilldickinson.com

# The Decision in Premium Nafta Products Limited

## **The recent House of Lords decision in Premium Nafta Products Ltd v Fili Shipping Company Ltd (the “Fiona Trust”) has clarified the extent to which an arbitration Tribunal has jurisdiction to deal with the validity of the underlying contract.**

An arbitration Tribunal’s jurisdiction derives from the agreement in the contract between the parties. But what happens when there are questions as to the existence or validity of the contract itself?

The House of Lords decision in the “Fiona Trust” deals with this issue in the context of eight charterparties allegedly procured by bribery. In so doing, Lord Hoffman and Lord Hope provide valuable guidance on two significant areas:

- Does the expression “any dispute arising under this charter [contract]” cover questions as to the validity of the contract?
- In what circumstances are arbitration agreements valid when the contracts in which they are contained might not be?

The House of Lords upheld the decision of the Court of Appeal, finding that the arbitration Tribunal had jurisdiction to consider the validity of the charterparties, and the arbitration agreements contained in the charterparties were valid even if the charterparties themselves might not be.

### **Reasoning**

Where there is an issue as to construction of any contractual term, the Court will assess the intention of the parties.

The House of Lords said that businessmen usually enter into contractual obligations for logical reasons. As such their intentions may be easily ascertained. Arbitration agreements are generally entered into for reasons of neutrality, expertise, privacy, availability of legal services at the seat of arbitration, speed and efficiency.

In the light of these factors, The House of Lords asked whether, on the balance of probabilities, the businessmen in this case would have intended that questions as to the validity of the contract be decided by one tribunal (the Court) but questions as to performance of the contract by another (arbitration). The House of Lords identified a presumption that this is not what rational businessmen would have intended. Unless there was clear language indicating that the parties intended different types of dispute to be adjudicated by different tribunals, the arbitration agreement would apply to all disputes arising under the contract.

The House of Lords referred also to previous decisions where the terms “arising under” and “arising out of” had been given different meanings by the Court with “arising under” being given a narrower interpretation than “arising out of”. Lord Hoffman strongly supported Longmore LJ’s view in the Court of Appeal that such a semantic approach should not be taken to matters of construction, where it might defeat the intention of the parties.

The House of Lords also considered whether there was any conceptual reason why an arbitration tribunal should not be able to adjudicate on the validity of contracts containing arbitration agreements.

The pre 1993 law on this point was clear. If a contract was invalid then an arbitration agreement contained within it would also be invalid. An arbitration tribunal would not therefore have jurisdiction to consider the validity of the contract.

The post Arbitration Act 1996 law on the point was made equally clear by section 7, which codified the reversal of the old position:

“...an arbitration agreement which forms or was intended to form part of another agreement... shall not be regarded as invalid, non-existent or ineffective because the other agreement is invalid.”

In essence the main contract and arbitration agreement are to be considered independently. Section 7 thus incorporates a so-called “doctrine of separability”.

Notwithstanding this doctrine, the shipowners asserted that both the charterparties and arbitration agreements were capable of being rescinded owing to the alleged bribery. If the rescission was effective, there would be no binding arbitration agreement.

The House of Lords found that the arbitration agreements would not be invalid or capable of rescission just because the charterparties might be.

Their Lordships then analysed whether the arbitration agreements themselves were capable of rescission by virtue of the alleged bribery. They found that there was no evidence that bribery might have played any role in either the inclusion of the arbitration agreements in the contracts, or in their terms. Accordingly, the arbitration agreements were not found to be invalid or capable of rescission.

### **The repercussions**

The “Fiona Trust” decision represents an important success for English arbitration and the freedom of businessmen to decide how they wish contractual disputes to be adjudicated. There will inevitably be fewer Court hearings concerning the validity of arbitration agreements as a result of this decision.

While in some circumstances arbitration agreements might be rescinded or found to be invalid, the reason for the invalidity or rescission must relate to the arbitration agreement itself. Failing this, in the absence of clear words to the contrary, the arbitration Tribunal will have jurisdiction to adjudicate upon all issues relating to the contract, including the validity of the contract.

The decision may cause parties and their advisers to consider the issues that they wish to be decided by arbitration and those that they wish to be heard by the Courts. However, if the House of Lords is right, the average businessman will not want some disputes heard by one tribunal and other disputes heard by another.

**Andrew Lee**  
andrew.lee@hilldickinson.com





## The Business of Shipping

**John Hulmes and Colin Lavelle look at a less glamorous end of shipping, namely the recovery of outstanding freight and other charges, and identify a number of practical ways of increasing the prospects of recovery.**

A well known professor of shipping law addressing first year students last year opened a lecture by stating that “Shipping is about the business of the carriage of goods and passengers”. A Greek shipowner’s son promptly interjected “No, that is wrong. Shipping is like any other business, it is about making money”. The student was perfectly correct. No shipowner can stay in business unless he is able to extract profit from the business and ensure that invoices and charges are paid.

Although we are sometimes asked to pursue claims for outstanding freight, more often the freight has been paid by the shipper and the problem concerns the recovery of additional charges payable relating to the carriage, including container demurrage, quay rent and additional handling charges. By the time these charges arise, the goods are often already shipped and sitting on the quay.

Most shipowners include a lien clause in their bills of lading which allow them to hold goods and documents of title. The merchant may shout and scream for the delivery of the goods but a properly incorporated lien clause provides a powerful weapon and negotiating tool for the shipowner. Frequently now seen is an “extended” lien clause which seeks to attach not only to sums owed in relation to the goods held but also to other debts owed by the same merchant. Whereas English law allows the enforcement of the extended lien clause, many jurisdictions only allow exercise of a lien for debts relating to the particular goods, e.g. France. This can cause problems even in the UK if the bill of lading incorporates an overseas jurisdiction clause.

The lien clause only gives a right to hold the goods, although this is often the key bargaining tool to extract payment. However it does not give the right to sell the goods – this right depends upon an express provision giving the shipowner the right to sell.

We frequently come across lien clauses that do not provide for the lien to cover the cost of exercising the lien. In Jarl Tra v Convoys [2003] 2 Lloyd’s Rep, 459 it was held that in the absence of clear wording the lien clause does not cover the costs of exercising the lien, including warehousing.

The authority to sell goods as a matter of right is normally set out in the contract. The wording of the clause must be clear and without ambiguity or it will be necessary to apply to the Court. The benefit of the contractual right of sale is only as good as the salvage sale value of the goods. Too often the value of the goods is substantially less than the actual debt. It is essential that the shipowner or its agents closely monitor the period that goods are held before the right to sell is exercised. Warning bells should always sound where there is a low value commodity such as scrap paper, personal goods etc. Frequently goods are left to lie on the quay for months. Rather, the shipowner or its agents should adopt a rigorous protocol to deal promptly with goods not claimed by the merchant.

The liquidation or administration of the merchant is a recurring nightmare leaving the shipowner to scabble around to obtain payment of outstanding charges. There is a common misconception that the exercise of the lien clause will allow a shipowner to gain an advantage over other creditors. It was held in Bristol Airport plc –v- Powdrill [1990] BCC 130 that the exercise of a lien amounted to the equivalent of commencement of proceedings and therefore required prior permission of the Court or the administrator. However, a party exercising a lien is not in breach of the insolvency legislation until there has been an unqualified refusal to hand the goods over to the administrator. For example, it would be reasonable for a shipowner to exercise a lien pending enquiries as to who has title in the goods. Often the administrator seeks to claim title to goods but it is ultimately found the shipper still has title. We do not automatically rule out the exercise of a lien in such circumstances, particularly when seeking to preserve an asset, but the situation needs to be handled very carefully. Notice of the exercise of a lien before an administration or liquidation notice is probably not affected by the Bristol Airport case: therefore strike early when in doubt.

Liquidation of the shipowner’s local agent is perhaps a greater potential catastrophe. There are numerous examples of agents having been placed in liquidation over the last few years owing large sums in respect of freight and other charges collected from the merchant under the bill of lading. Many may recall the Worldfast liquidation a few years ago. Fortunately, our shipowner clients were able to recover the vast majority of the debt owed by demonstrating to the liquidator that all freights etc received by Worldfast which could be traced were held on trust for the shipowner and did not form part of the general liquidation fund. Had that not been the case the shipowner would have recovered only a small dividend. The trust argument will only succeed if the contract with the agent makes it clear that all receivables such as freight are held on trust.

The wording of the contract with the debtor, whether it is a contract with the agent, the bill of lading, or the terms and conditions of the liner agents, can provide a vital tool to recover debts and expenses. For example:

- the recovery of container demurrage and quay rent can often be problematic due to lack of certainty. A number of our liner agent clients have considerably improved their prospects of recovering these items by including very clear clauses in their terms and conditions setting out the precise basis upon which the additional charges are claimed.
- the contract, or terms and conditions, should seek to identify the capacity of the contracting party. Too often we encounter claims where the party invoiced is a freight forwarder who seeks to allege that it has acted as a mere agent.
- correctly worded clauses can provide for recovery of the administration costs of pursuing payment of invoices (in addition to interest). It is also possible, in certain instances, to provide for recovery of costs on an indemnity basis.

Recovery of freight and related costs is more than just debt collecting. It should form part of a cohesive business plan that has an emphasis on minimising debt and providing the requisite tools if a debt has to be pursued. The dividends flowing from a proper system can be considerable. It is foolhardy to undertake the risk and expense of shipping goods and passengers only to see profit disappear due to a lack of investment in the less glamorous end of the business.

**John Hulmes and Colin Lavelle**  
john.hulmes@hilldickinson.com  
colin.lavelle@hilldickinson.com



## Asbestos Update

### **Grieves & Others v FT Everard & Sons Limited & Others (2007)**

The House of Lords on 17 October 2007 upheld (by a unanimous judgment) the majority decision of the Court of Appeal that pleural plaques are not a compensatable injury. They held that there is no cause of action because plaques (a condition which does not give rise to any disability or direct risk of future other asbestos-related disease) do not constitute actionable harm or injury. The argument that the combined effect of the plaques, the general future risks which their presence indicates and the anxiety caused by knowledge of those risks does constitute an actionable injury was rejected.

It was also considered by the House of Lords whether Mr Grieves should be entitled to recover compensation for psychiatric injury caused by his worry that he may in the future go on to develop one of the other asbestos-related diseases. It was decided that he should not. That was on the basis that an employer was entitled to assume that the creation of a relatively low risk of future asbestos-related disease would not cause psychiatric illness to a person of reasonable fortitude (and that such illness was, in the absence of specific evidence of particular vulnerability in an individual, therefore not foreseeable).

In his judgment, Lord Scott pointed out that an employer owed its employees a contractual duty of care as well as a tortious duty, and that in his opinion the employers were in breach of their contractual duty. Damage does not have to be shown in order to establish a cause of action for breach of contract as all that is necessary is to prove the breach. He was of the view that it might be well arguable that breach of a contractual duty to provide a safe working environment for employees will justify an award for contractual damages to compensate the employees for subjecting them to the risk of contracting in the future a life-threatening asbestos-related disease. This possibility was also commented on by two of the other Law Lords, but was not considered in any detail as the point was not raised in any of the claims and had not been pursued in any argument before the House of Lords.

It remains to be seen whether any such claims for contractual damages are pursued in the future. We think that unlikely, because such claims would not necessarily succeed

(notwithstanding the comments made in the House of Lords) and, in any event, any damages recovered would probably only be negligible.

Therefore, a Claimant will in the future only be able to claim for pleural plaques in England or Wales if the contractual argument is successful or if legislation is introduced as it was by way of the Compensation Act 2006 after the House of Lords determined that mesothelioma was a divisible condition. However, in England and Wales there does not appear to be the same impetus or press coverage in support of legislation as there was in relation to mesothelioma, presumably because people die from mesothelioma whereas pleural plaques cause no injury.

The position in relation to pleural plaques in Scotland was considered after the decision in Grieves by Lord Uist in the case of Helen Wright -v- Stoddard International Plc and Novartis Grimsby Limited. In a supplemental opinion Lord Uist followed the House of Lords and concluded that it is not that pleural plaques cause harm which is de minimis, but that they cause no harm at all.

However, following lobbying, the Scottish Cabinet agreed at its 27 November 2007 meeting to introduce a Bill which will reverse the House of Lords judgment and enable those negligently exposed to asbestos who have been diagnosed with pleural plaques to be able to raise and pursue actions for damages in Scotland. The provisions of the Bill will be backdated to the date of the House of Lords judgment and the Government is currently considering what the earliest opportunity is for the Bill to be placed into the Legislative Programme. Therefore, there remains the possibility that once such legislation is passed in Scotland, the English parliament will be pressurised into introducing similar legislation.

### **Pinder -v- Cape Plc (2006)**

Mr Justice Ramsey concluded that Mr Pinder's mesothelioma was caused or materially contributed to by his exposure to asbestos at the tip at Scout Road when he played there as a child in the 1950s, and that the asbestos waste at the tip came directly from the Defendant's asbestos factory.

The case turned on whether Cape could reasonably have foreseen that their acts and omissions in disposing of asbestos waste in a tip in the 1950s would be likely to injure children such as Mr Pinder who played in the area. The Judge held that it was only in the 1960s that secondary and intermittent exposure to asbestos outside the workplace became a concern. He felt the level of exposure to asbestos in this case was not sufficient to give rise to a foreseeable risk of injury in the 1950s, and that in addition it had not been established that Cape knew or ought to have known at the material time that children were playing in the waste at the tip. He concluded that Mr Pinder was outside the class of person who Cape should have foreseen as potentially being affected when directing their mind to the disposal of asbestos waste material, and the claim therefore failed.

### **Beryl Jones (deceased) -v- Metal Box Limited & Crown Cork and Seal Limited (2007)**

Mrs Jones worked as a packer on the production line at the Defendant's factory from about 1954 to 1968. The NVO transfer belts on which she worked from about 1963 to 1968 were made of woven material comprising chrysotile (white asbestos) contaminated with tremolite.

It was accepted that asbestos dust from the transfer belt could have been released into the atmosphere by the components falling onto the transfer belts, when the belts got jammed, deteriorated, or were changed, or during sweeping up of the asbestos dust that came from the belts.

His Honour Judge Hickinbottom concluded that from 1963 to 1968 the Claimant was intermittently but regularly exposed to small amounts of asbestos dust resulting from these operations. He also accepted this exposure had caused the Claimant's mesothelioma.

The Judge then went on to consider the Defendant's knowledge of the risks of asbestos at the material time and, after reviewing the evidence of the engineering experts, concluded that by the end of 1965, after publication of a Sunday Times article (on the dangers of the low levels of asbestos exposure) they ought to have been aware of the link between minimal exposure to asbestos and mesothelioma, and should at least have made some form of enquiry as to the extent to which asbestos was used in their manufacturing processes. They were a major company during the 1960s, operating 20 substantial factories, and employed Safety Officers and medical/nursing staff. He concluded a review of the Defendant's processes ought therefore to have begun by early 1966, and should have taken less than 6 months to complete. He found that had such a review been conducted, the Defendants would then have accepted the need to change the belts to a non-asbestos alternative by at least the autumn of 1966. He accordingly found them liable to the Claimant.

This decision demonstrates the difficulties faced by an employer in avoiding liability in post 1965 low-level exposure cases.

### **Wright -v- Stoddard International (2007)**

Briefly referred to above, this is a Scottish case dealing with divisible asbestos conditions such as asbestosis and pleural thickening. The Court of Appeal in England in the case of Holtby -v- Brigham & Cowan (Hull) Limited TRL12.4.2000 held that where a divisible disease such as asbestosis was contracted as a result of cumulative exposure with a number of employers, then those who were sued were only liable to the extent of their contribution towards the Claimant's condition. This means that a Claimant's damages can be reduced to take into account exposure with any employer who has not been sued.

This practice has been followed in Scotland for a number of years, but in Wright Lord Uist declined to follow Holtby and concluded that where a Claimant proved that a single

Defendant made a material contribution to even a divisible injury or illness, that Defendant should be liable in full for causing the injury (and not just to the extent of his contribution). He concluded that the onus was on the Defendant to pursue other expositors for a contribution.

Although this decision is not binding on any other Outer House Judges, and is a slightly surprising one, it will no doubt be cited frequently by Claimants' solicitors. Serious consideration will therefore have to be given to seeking a contribution from employers who have not been sued in all Scottish divisible injury asbestos cases in which the point is raised.

### **Donald Cameron (Deceased) -v- Vinters Defence Systems (2007)**

The deceased died from mesothelioma and his widow made a claim under the Pneumoconiosis etc (Workers Compensation) Act 1979, signing a declaration that during the period of her claim she would inform them if she received any compensation or initiated any Court action in respect of the deceased's death. She received an award under the 1979 Act and then commenced legal proceedings against Vinters. Her solicitors argued that the PWCA award was a 'benefit' within the scope of Section 4 of the Fatal Accidents Act 1976 and so should be disregarded. It was also argued that, as her claim under the Act was paid and concluded before the proceedings were commenced, she had no obligation to notify the DWP.

Holland J held that the PWCA award was not a 'benefit' that accrued to the Claimant, so as to come within the scope of Section 4 of the 1976 Act. It could only arguably come within Section 4 due to the shrewd timetabling adopted by the Claimant's solicitors, to take advantage of the DWP's liberal approach to exercising the powers granted by the 1979 Act. Had proceedings been commenced in a timely fashion, no award would have been made. Therefore, the Claimant was obliged to give credit to the Defendants for the sum received under the 1979 Act.

### **Guidance for mesothelioma claims**

A draft practice direction (yet to be endorsed by the Rules Committee) has now been prepared to be distributed to all Courts and practitioners in England and Wales to give guidance on the handling of mesothelioma claims. These indicate that the "show cause" procedure adopted by Master Whitaker in the High Court in London should also be adopted by all other Courts. The suggestion at present is that either with the Particulars of Claim, or in any event not less than 7 days before the CMC, the Claimant should serve all liability witness statements, pre-action letter of claim and Inland Revenue Schedule, and can then request at the CMC that the Defendants should show cause why judgment on liability and causation should not be entered and a standard interim payment of £47,000 made. The Defendants would either have to show cause at the CMC or within a given period thereafter. In urgent cases the assessment or trial would generally not be more than 16 weeks from service of the Claim Form, a request may be made for evidence to be taken on commission before trial at any time, and also in urgent cases the Court would not require that there be a 3 month period between the protocol letter of claim and the issue of the Claim Form.



**John Caddies**  
john.caddies@hilldickinson.com

## The Cost of Compliance: “The Elli and The Frixos” [2007] EWHC 1890

**One of the central functions of a charterparty is to allocate risk between the two parties. But which party bears the risk of a change in international maritime regulations, the effect of which will restrict cargoes that the vessel may carry, or impose substantial obligations on an owner in terms of structural alterations? This is a question that the Commercial Court recently had to consider. The regulations in question were the MARPOL regulations imposing a requirement to carry heavy grade oil within double-hulled, or at least double-sided, vessels. In reaching its answer the Court had regard to common charterparty terms within a standard form. The answer is therefore of some significance. So which party does bear the risk? It appears, on the facts of the “Elli and the Frixos” at least, to be the Owners.**

### The charterparty

The two vessels in question were chartered on amended versions of the Shelltime 4 charterparty, the terms of which included the standard form undertakings as to the state and condition of the ship (clause 1) and the “duty to maintain” provisions of clause 3. This scheme is a familiar one: under clause 1 the Owners undertakes that at the date of delivery the vessel is to be in “every way fit to carry crude, petroleum and/or its products.....” and that the vessel “..... shall be tight, staunch, strong in good order and condition and in every way fit for the service.....”. The clause 1 undertaking extends to having on board “all certificates, documents and equipment required from time to time by any applicable law to enable [the vessel] to perform the Charter service without delay”.

Clause 1 thus concerns the seaworthiness of the vessel and the suitability for its trade *at the time of delivery*. Under the Shelltime 4 scheme, the Owners’ continuing obligation is set out in clause 3 under the “duty to maintain” provisions, which address the position where the vessel loses the characteristics which were required upon delivery. The Charterers’ remedies are set out within the clause and enable them to put the ship off hire and then to terminate the charter in the event that the defect is not remedied. The clause 3 maintenance obligation is not an absolute one; it is qualified by a requirement for the Owners to exercise due diligence. The standard form clause 4 obligation to carry “lawful merchandise” was found to include the carriage of fuel oil to “any part of the world within British Institute Warranties Limits”.

The additional typed clauses included an “eligibility and compliance” clause in relatively common terms. Pursuant to this clause, the Owners warranted that:

- The vessel was eligible under all “Application, Conventions, Laws and Regulations for trading to and from ports and places specified in Clause 4 of the Charter”;
- The vessel would have on board “..... all certificates, records, compliance letters and other documents required for such services ....”.
- The vessel “does and will fully comply with all applicable convention [sic], laws, regulations and ordinances of any international, national, state or local government entity having jurisdiction including .... MARPOL 1973/1978 as amended in the extended and SOLAS 1970 clause 1978/1983.....”.



### The vessels

The two vessels were “Aframax” tankers. Each vessel was described in the respective charters as being “double-sided”, as the cargo tanks were protected by wing ballast tanks. The extent to which the tankers were not fully “double-sided” gave rise to the dispute. Aft of the cargo tanks were two slop tanks used to carry cargo or retain cargo residues to be pumped ashore. Although the slop tanks were protected by ballast tanks for the majority of their length a small part in the uppermost section, amounting to about 2.6 metres of the vessel’s overall length of just under 230 metres (thus about 1.13% of the vessel’s length) was shielded by bunker fuel oil tanks.

### The regulations

The development of the relevant amendments to the 1973/1978 MARPOL Conventions has been driven by a series of high profile casualties – most notably the “EXXON VALDEZ”, the “ERIKa” (1999) and the “PRESTIGE” (November 2002). The latter casualty led to MARPOL seeking to catch up with the European Union with regard to the regulation of the carriage of heavy grade oil, in particular the accelerated phase-out of single hulled vessels. The Marine Environment Protection Committee of the IMO adopted regulation 13 (H) to enter into force on 5 April 2005.

The effect of regulation 13(H), in general terms, is that fuel oil cargoes can only be carried in double-hulled vessels after 5th April 2005, subject to certain exemptions contained within regulations 13 H (5) and (6). The exemptions allow the carriage of heavy grade oil in double-sided vessels subject to certain conditions. For the purposes of the exemption, the double side in question should not be used for the carriage of oil and must extend for the entire cargo tank length. Therefore neither “ELLI” nor “FRIXOS” satisfied the conditions for the exemption and were prevented from carrying fuel oil, one of the cargoes which the Owners had warranted that they were fit to carry.

The Owners’ evidence was to the effect that the changes necessary to allow them to obtain the necessary approval would have been substantial (US\$700,000 to undertake the remedial work and US\$400,000 in lost time).

## The dispute and the decision

The Charterers claimed that the inability to carry fuel oil was a breach of the charterparty and that they were therefore entitled to recover their losses (for example, one sub-charterparty was terminated) measured by lost revenue.

The Judge's response to the Owners' main arguments was as follows:

- The clause 1 obligation concerning the vessels' fitness related only to the physical condition. This argument was rejected: fitness for these purposes included legal fitness to carry fuel oil.
- As to the clause 3 obligation, the Owners similarly alleged that the exercise of due diligence to maintain or restore the vessel related only to the physical condition, not to compliance with regulations. Further, such an obligation would not require the Owners to re-build the vessels. Again the argument was rejected – what was required was taking the action necessary to allow the vessel to carry fuel oil and to be fit for the service.
- The trading options given to the Charterers in clause 4 were circumscribed by the lawfulness of the cargoes. Once it became unlawful to carry fuel oil as a consequence of regulation 13 (H), the Owners were no longer bound to carry such cargo. The Judge considered that such an argument turned the charterparty obligations on their head: unlawfulness in respect of the carriage of cargo which arises from the characteristics of the ship, not the cargo, is irrelevant.
- The fact that considerable expense would be involved. Again, the argument was rejected, even in the context of due diligence. In this regard the Judge found that the requirement was simple: "reasonable steps must be taken within a reasonable timetable"... and, significantly, "... no question of proportionality in terms of financial expenditure arises".
- As far as the additional "eligibility" clause was concerned, the Owners were simply warranting that they would comply with relevant MARPOL requirements, and would do so after the regulation came into force by not loading fuel oil. Again, the Judge dismissed the argument.

It followed that once the Owners were given notice by the Charterers to place the vessels in a condition to be able to carry fuel oil they were bound to do so, at whatever cost, or be liable to Charterers for the latter's subsequent losses.

**David Pitlarge**  
david.pitlarge@hilldickinson.com

## Sardinia 'Luxury Tax' – A U-Turn?\*

Readers may recall that in the May 2006 edition of this Newsletter we reported on the introduction of a new 'luxury tax' regime in Sardinia in respect of pleasure vessels, private aircraft and second homes. The widely unpopular tax, which was passed on 11 May 2005 under the reference Regione Sardegna Law No. 4, had many opponents, not least within the yachting community, and had widespread coverage both in the specialist yachting press and in various broadsheet publications.

The measures were initially passed subject to strong dissenting voices within the Italian government, who subsequently appealed to the Constitutional Court of Italy to overturn the legislation. The government's intervention was based, in essence, on a two-pronged challenge, namely that the tax:

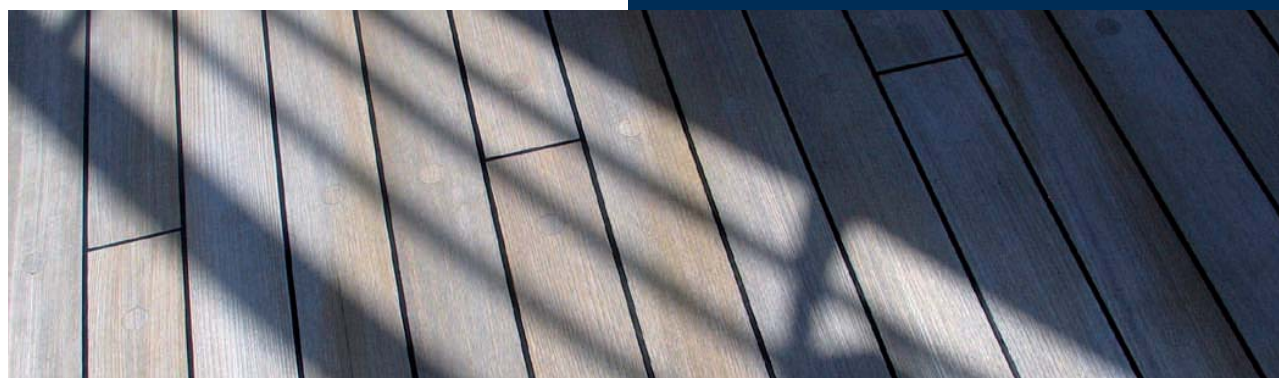
1. fell foul of the Italian Constitution because it conflicted with certain regulatory rules pertaining to central and regional taxation systems, and was discriminatory by targeting a certain proportion of the population (i.e. the wealthy); and
2. was contrary to the EC Treaty, as it affected freedom of establishment, the free circulation of goods and persons and was, effectively, anti-competitive.

The Sardinian authorities tried to placate the government by issuing a second law (Regione Sardegna Law No. 2 of 29 May 2007), in an endeavour to remove at least some of the objections. This merely reinforced the stance of the government, who objected to the new provisions on the same grounds and went a step further by declaring the second law incompatible with certain Constitutional Rules pertaining to the retroactivity of laws in tax matters. In consequence, the Italian government has now filed an additional complaint with the Constitutional Court, challenging the new laws.

Apparently the Sardinian authorities are refusing to back down, so the matter seems to be heading for a legal showdown. The Constitutional Court is considering the issues and a ruling is expected in the first quarter of this year. We intend to circulate a further update in this Newsletter before the summer season.

**Pawel Wysocki**  
pawel.wysocki@hilldickinson.com

\*We are most grateful to Roberto Bassi of the Italian law firm Siccardi Bregante & C for his assistance in preparing this article.



## Letters of Intent

**The rich are getting richer. In the latest report by Forbes, no less than 946 billionaires were identified. And what is number one on their Christmas wish list this year? A custom-built superyacht, of course.**

However, construction slots are in short supply. Some of the best-known builders have recently reported that they are fully booked until 2012 and beyond! As a result, an increasing number of buyers are turning to a letter of intent (“LOI”) for the purpose of securing some level of commitment from the builder, in particular as to the reservation of a construction slot, as early as possible.

### What is a LOI and what is its use?

A LOI is essentially an expression of an intention to enter into a contract, in this case a Building Contract, at some future time. In general, so-called “agreements to agree” are unenforceable under English law. Agreements to “negotiate in good faith” are treated similarly:

“The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty...” (Lord Ackner, *Walford -v- Miles* 1992, cited with approval by the House of Lords in *Bezan v Rausing & Ors.* 2007).

Rather than rely on such nebulous concepts, parties to a LOI should endeavour to agree detailed parameters for negotiating the Building Contract which can be set out in the LOI. Obvious examples include the price and other terms as to payment, design and specification, and the timetable for construction and delivery. To the extent that such matters can be agreed with sufficient certainty at the LOI stage, it will generally be possible – with careful drafting – to ensure that agreements will have binding effect.

There is, however, no hard and fast rule about whether or not a LOI will create legally binding obligations. The most important factor will be the language used. In relation to issues where no legal effect is intended, such should be set out in a clear statement that leaves no room for doubt. Conversely, where the parties to a LOI intend to be legally bound e.g. as to payment of a reservation fee by the buyer, or reservation of the relevant construction slot by the builder, this should be expressly stated.

In terms of structure, it will often be advisable to split the LOI into two distinct sections, clearly separating out (and identifying) those provisions which are intended to have legal effect, and those which are not.



Reservation of a construction slot by a LOI - some issues to consider:

### 1) Who will be party to the LOI?

The majority of the world’s privately owned superyachts are purchased through companies incorporated solely for that purpose. Such an entity is known as a special purpose vehicle or “SPV”. Often, the intended SPV will not have been incorporated when initial negotiations with the builder are taking place. If the LOI is to be signed by the buyer personally or by another company owned by the buyer, it should expressly give that party the right to assign its interest to such other person or vehicle as is required in the circumstances.

### 2) The timing of the slot

The LOI should make it clear that the date specified for the construction slot is the date when construction is intended to start.

Buyers might also consider whether the builder would be prepared (almost inevitably at a premium) to build in a right of first refusal over any earlier slots that become available e.g. through cancellation.

### 3) Balancing the parties’ interests

The buyer’s main objective will of course be to secure the slot with a sufficient degree of certainty, while reserving enough flexibility to change or cancel the slot if necessary.

The builder will expect to be compensated in a manner commensurate with the firmness of the commitment sought by the buyer. Equally, cancellation by the buyer is likely to have financial implications.

The main variables in achieving this balance are likely to be:

a) How much will be paid for the construction slot and when? Generally, if a buyer is willing to pay more or to pay earlier, he will be able to demand an earlier or firmer commitment from the builder.

b) How much of any reservation fee (if anything) will be recoverable if the buyer decides to cancel the slot? Will there be a link between how early or late the slot is cancelled by the buyer, and how much can be recovered?

### Summary

A letter of intent can be used to secure a construction slot and provide a framework for negotiating a formal building contract. However, a simple “agreement to agree” and/or a “duty to negotiate in good faith” will be unenforceable in law.

Parties to a LOI should attempt, as far as possible, to agree on specific details, and then expressly state their intention to be legally bound. In no circumstances should a LOI be seen as anything more than an interim measure – a formal Building Contract should always be entered into.

It will be for the parties to consider how to resolve, among other matters, the issues identified in this article. Market forces, the relative bargaining positions of the parties, and their respective attitudes to risk, will all play a role.

**Panicos Iordanou**  
panicos.iordanou@hilldickinson.com

## More from the Cayman Islands...

**The Cayman Islands Shipping Registry (“CISR”) has recently proposed several amendments to the Merchant Shipping Law (2005 Revision) in order to provide a greater degree of flexibility for owners wishing to register their vessels there. The proposed changes include:**

### **Increase in range of eligible countries**

Previously, only companies or shipping entities registered in EU/EEA countries and their dependant territories and citizens of those places qualified to own a Cayman Islands registered vessel. The law will provide for an increase in the range of countries available by also including those listed in the Third Schedule of the Cayman Islands Money Laundering Regulations (2006 Revision). A list of additional countries is shown below:

Argentina	Canada	Panama
Australia	Hong Kong	Singapore
Bahamas	Israel	Turkey
Bahrain	Japan	United Arab Emirates
Barbados	Mexico	United States of America
Brazil	New Zealand	

### **Additional ports of registry - Bloody Bay/The Creek**

There will be two additional ports of registry, as alternatives to George Town. Bloody Bay and The Creek may be found in the small sister islands of Little Cayman and Cayman Brac, but there will still only be one administrative office, in Grand Cayman. The same vessel name may be registered under all of the three ports, which may prove useful when an owner wants a name that is already registered in George Town.

### **Certificates of registry**

This amendment will empower the Registrar of Shipping at his discretion to issue Certificates of Registry for indefinite or specified periods of time and allows him to renew or extend the period of validity on such terms as he may determine.



Other CISR policy changes include:

### **Minimum Safe Manning Document (“MSMD”)**

Previously, MSMDs were only required on yachts over 500GT engaged in trade. However, it is now CISR policy for all vessels over 24m issued with a Certificate of Compliance with the Large Commercial Yacht Code to be issued with an MSMD irrespective of mode of operation. Historically, such vessels were required to comply with the CISR manning requirements when engaged in trade, though they did not need to carry an MSMD.

In future, all such yachts which are to be flagged with the CISR will have to apply for an MSMD, which involves a detailed application form and the submission of plans. Such yachts already flagged with the Cayman Islands will be advised at their annual surveys that they need to apply. Yachts will need to comply with the manning requirements only when engaged in commercial activities, notwithstanding the fact that an MSMD has been issued. However, it is strongly recommended that the manning standards are always maintained, regardless of operation.

### **Registration services in the UK**

The CISR has recently started offering vessel and mortgage registration services in the UK, with an Assistant Registrar based in London on a part-time basis. By prior arrangement, the Assistant Registrar can be present at closings and produce some certification, which will minimise the delays involved in having to forward documentation to the Cayman Islands and the problems encountered with working in different time zones.

**Sarah Marshall-Ellison**  
sarah.marshall-ellison@hilldickinson.com

## About Hill Dickinson

Hill Dickinson offers a comprehensive range of legal services from offices in Liverpool, Manchester, London and Chester, and its associated firm Hill Dickinson International has offices in London and Greece. Collectively the firms have 152 partners and a complement of more than 1000 staff.

Hill Dickinson is a major force in insurance and is well respected in the company and commercial arena. The firm's marine expertise is internationally renowned and it has one of the largest marine practices in the UK following a merger with Hill Taylor Dickinson on 1 November 2006. The firm has an award winning property practice and is widely regarded as a leader in the fields of commercial litigation, employment, intellectual property, NHS clinical/health related litigation and private client.

## For further details please contact:

### David Wareing

#### Head of Marine

0151 471 5257

david.wareing@hilldickinson.com

## The editorial team:

### Tim Stephenson

#### Partner

020 7280 9119

tim.stephenson@hilldickinson.com

### Nicholas Phillips

#### Partner

020 7280 9102

nicholas.phillips@hilldickinson.com

## Hill Dickinson LLP:

### Liverpool Office

Pearl Assurance House  
2 Derby Square  
Liverpool L2 9XL

T: +44 (0)151 236 5400  
F: +44 (0)151 236 2175  
DX 14129 Liverpool

### Manchester Office

50 Fountain Street  
Manchester  
M2 2AS

T: +44 (0)161 817 7200  
F: +44 (0)161 817 7201  
DX 14487 Manchester 2

### London Office

Irongate House  
Duke's Place  
London EC3A 7HX

T: +44 (0)20 7283 9033  
F: +44 (0)20 7283 1144  
DX 550 City of London

### Chester Office

34 Cuppin Street  
Chester  
CH1 2BN

T: +44 (0)1244 896600  
F: +44 (0)1244 896601  
DX 19991 Chester

## Hill Dickinson International:

### Greek Office

2 Defteras Merarchias St.  
Piraeus, 185 35  
Greece

T: +30 210 428 4770  
F: +30 210 428 4777

### London Office

Irongate House  
Duke's Place  
London EC3A 7HX

T: +44 (0)20 7283 9033  
F: +44 (0)20 7283 1144  
DX 550 City of London

The information and any commentary contained in this newsletter are for general purposes only and do not constitute legal or any other type of professional advice. We do not accept and, to the extent permitted by law, exclude liability to any person for any loss which may arise from relying upon or otherwise using the information contained in this newsletter. Whilst every effort has been taken when producing this newsletter, no liability is accepted for any error or omission. If you have a particular query or issue, we would strongly advise you to contact a member of the marine team, who will be happy to provide specific advice, rather than relying on the information or comments in this newsletter.

[www.hilldickinson.com](http://www.hilldickinson.com)