

marine, trade and energy

Piracy and cargo insurance

Did cargo owners act too soon in abandoning their cargo? Are ransom payments contrary to public policy, such that they can be ignored for this purpose?

In February this year the Commercial Court (Mr Justice Steel) handed down its decision in Masefield AG -v- Amlin Corporate Member Ltd [2010] EWHC 280 (Comm). At the heart of the case was the Somali pirate attack on the vessel "BUNGA MELATI DUA" in August 2008.

The increased piracy activity around the Gulf of Aden is notorious and has resulted in much discussion in the shipping and insurance markets. It is probably therefore no surprise that the subject has now reached judicial quarters. But what does one make of modern piracy? Does it require a new approach? Unsurprisingly, there have been few guiding decisions, save for example the "ANDREAS LEMOS" (1982) and the "PETRO RANGER" (2001).

In Masefield -v- Amlin the issue concerned coverage under a cargo policy. The defendant insurers (Amlin) had issued an open cover including cover for loss by piracy and theft. The claimant assured (Masefield) sought to recover under that policy for the value of its cargo of biodiesel on board the hijacked vessel.

Masefield argued that the vessel's capture by Somali pirates meant that it was "irretrievably deprived" of its cargo and therefore the cargo had become an actual total loss under section 57(1) of the Marine Insurance Act 1906.

Alternatively, Masefield said its cargo must be a constructive total loss (CTL) under section 60(1) of the Act on the basis that its actual total loss appeared to be unavoidable so the cargo had been reasonably abandoned. In either scenario Masefield asked the court to ignore the ransom payment made by shipowners, because it argued that such payment was contrary to public policy.

The vessel, her crew and cargo had been captured on 19 August. Negotiations for release are said to have begun fairly shortly afterwards. Yet on 18 September Masefield gave notice of abandonment of its cargo to Amlin, but just some ten days later shipowners paid a ransom and so secured the release of the vessel, cargo and crew. The vessel arrived at her intended disport on 26 October, where the cargo was discharged undamaged (although it seems there may have been arguments on market value, given seasonal fluctuations).

Actual total loss (ATL)

Section 57(1) of the Act provides that a cargo will be an ATL if it is no longer the thing insured or its owner is "irretrievably deprived" of it. The court confirmed that the test of irretrievable deprivation is an objective one, based on the facts as they exist at the time and without regard for whether those facts are known or apparent to the assured.

However, that does not prevent a court from looking at what happened after notice of abandonment - it may do so if the actual events assist in assessing the future probabilities.

Amlin put forward expert evidence on the background to the Somali piracy crisis, including the general modus operandi and the apparent objectives of the pirates. That evidence went unchallenged, and was in line with information publicly available during the extensive media coverage over the last 18 months. The court concluded that those involved with this vessel, including Masefield, would have been fully aware that the vessel and her cargo were likely to be recovered. In particular the court was persuaded by the fact that the vessel was released about ten days later, so the cargo was recovered quickly and safely. Significantly, this matched the pattern of other vessels seized and released in the spate of attacks in 2008.

The court also considered authority supporting the proposition that to be "irretrievably deprived" of the cargo, Masefield would have to show that it was legally and physically impossible to recover it. It did not matter that such recovery might require disproportionate effort and expense. The question was whether a recovery was in fact impossible. Here too Masefield had only lost possession of its cargo and not the property (ownership) in it. Looking at



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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.

the methods of the Somali pirates, there was a strong indication that the vessel and cargo would be released, and it was more a question of when, not if. That presently appears to be the reality of modern piracy, particularly in the Gulf of Aden.

Constructive total loss (CTL)

As noted above, an ATL requires that recovery is in fact impossible. As an alternative, Masefield argued that the capture by pirates meant that recovery was so uncertain that an ATL appeared unavoidable - in other words that its cargo was a CTL under section 60(1) of the Act. (The court was not asked to consider section 60(2) as this was expressly excluded in this policy.)

The court considered that the vessel and its cargo would not have deteriorated significantly in the short period up to the abandonment to Amlin, that the ransom request was not extraordinary in the circumstances and it was only a tiny proportion of the overall value. Most importantly, Masefield had lost only possession of, and not property in, its cargo.

This meant that Masefield did not meet the criteria for a CTL. It was not enough that the cargo was abandoned - there had to be an abandonment of any hope of recovery. Yet here the indications were that both shipowners and Masefield had "every intention of recovering their property and they were fully hopeful of doing so". Also, for the reasons outlined above, an ATL was not considered unavoidable.

Ransom payments

Masefield argued that, when considering whether its cargo was an ATL or CTL, the court should ignore the ransom payment. It said such a payment, though not illegal, was contrary to public policy.

The court was unimpressed with this argument, for three key reasons:

- ransom of payments are not illegal as a matter of English law;
- statutes exist to deal with the legality or otherwise of ransom payments, and the courts should not adopt a legislative function; and
- while it may be that ransom

payments encourage repetition, the only viable option to keep the crew safe is to pay a ransom. The court noted here that diplomatic or military intervention was unlikely.

Two further points were persuasive:

- The existence and importance of kidnap and ransom cover in the insurance market (and the result that those policies would then probably be unenforceable)
- The recoverability of ransom payments as a sue and labour expense

Masefield had further argued that it had no duty to pay a ransom, and so again this factor should be ignored. The court considered that irrelevant. What mattered was whether such expenditure would or might result in recovery of the cargo. Also, payment here was reasonable as it was a small percentage of the value of the property.

Masefield apparently steered clear of arguments on the legality of ransom payments. This has been one of the hot topics in the market, particularly in a General Average context. While therefore the court was not asked to consider this issue, one might note with interest that Mr Justice Steel nowhere suggested that Masefield was wrong in its acceptance that a ransom payment was legal. Indeed, one of the key factors behind the decision was that a ransom payment was accepted as legal.

It must be emphasised that although one can present a general picture of the Somali piracy attacks and their modus operandi and motive, each case will as always turn on its own facts. As matters presently stand, there is no proven link to terrorism. If such was ever established one would surely see a quite different approach to ransom payments. Either way, cargo interests will have to consider carefully their position before seeking to abandon cargo and to recover under a policy of insurance.

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Hong Kong Convention

Alex Bramwell of the Singapore office reviews the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships (the Hong Kong Convention)

On 15 May 2009 the Hong Kong Convention was adopted at a diplomatic conference there, attended by delegates from 63 countries. It has been open for ratification since 1 September 2009 and will remain so until 31 August 2010. It is aimed at ensuring that the recycling of a ship does not pose an unnecessary risk to human health or safety or to the environment.

It will heavily influence requirements for ship construction, maintenance and recycling, and when in force it will affect companies involved in all aspects of ship construction, design, classification, repair and recycling, and also the operation of vessels throughout their life.

Before the Hong Kong Convention

At present the Basel Convention of 1989 governs ship recycling. This stipulates that transportation of a vessel for the purpose of scrapping is prohibited if the state where the scrapping is to take

place does not have environmentally sound management of ship dismantling activities.

The text of the Hong Kong Convention has been developed over the past three years, with input from IMO Member States and relevant non-governmental organisations, and in cooperation with the International Labour Organisation and the parties to the Basel Convention.

Coming into force

The Hong Kong Convention will come into force 24 months after a total of 15 states have unconditionally ratified it. The combined merchant fleet of such states must constitute not less than 40% of the gross world merchant tonnage, and the combined maximum annual ship recycling volume of such states during the preceding ten years must be at least 3% of the gross tonnage of the combined merchant shipping of those states.

What it covers

The Hong Kong Convention is intended to apply to newbuilds and existing ships sailing under the flag of a State Party to it. It will also apply to ship recycling facilities operating under the jurisdiction of a State Party. The definition of a ship includes all vessels which operate, or have operated in, the marine environment, including submersibles, floating craft, floating platforms, self-elevating platforms, floating storage units, floating production storage and offloading units, and also vessels stripped of equipment or under tow.

The Hong Kong Convention is intended to cover a vessel throughout its whole life cycle, and the installation or use of hazardous materials must be prohibited by the State Party which is the flag state for the vessel concerned.

Vessels will be subject to various surveys during their operational life, first of all (for newbuilds) immediately before the

vessel goes into service, or before an International Certificate on Inventory of Hazardous Materials is issued (see further below). A renewal survey is required at least every five years, and if a vessel undergoes significant structural modification an additional survey will be required to ensure continuing compliance.

At the end of a vessel's life, a final survey will be carried out before it is taken out of service and recycled. This is designed to ensure that all of the following comply with the convention's requirements:

- the ship recycling facility;
- the Inventory of Hazardous Materials; and
- the Ship Recycling Plan. This is a vessel-specific plan which must be provided by the ship recycling facility in compliance with the relevant guidelines in the convention.

International Certificate on Inventory of Hazardous Materials

Vessels must hold an International Certificate on Inventory of Hazardous Materials, which must be updated throughout a vessel's operational life. This will be issued by the vessel's flag state and is intended to identify hazardous materials (defined in the convention), their location within the vessel and their approximate quantities. Some hazardous materials will be absolutely prohibited in newbuilds, and if present the vessel will not be able to obtain this certificate.

It is intended that existing vessels must comply with the requirements as far as practicable. They must do this no later than five years after the Hong Kong Convention enters into force, or before going for recycling, whichever is sooner. Existing vessels must therefore produce an Inventory of Hazardous Materials, identifying the relevant hazardous materials, and prepare a plan describing the visual or sampling check by which the Inventory has been prepared, taking into account the developed guidelines of the IMO.

Who will enforce it?

For all vessels operating under their flag or under their authority, State Parties must enforce the convention's provisions by domestic legislation. Ship recycling facilities under a State Party's jurisdiction must likewise comply with domestic

regulations intended to ensure that they are designed, constructed and operated in a safe and environmentally sound manner, in accordance with the regulations of the convention.

Recycling vessels

A vessel which is to be scrapped must first be issued with an International Ready for Recycling Certificate, and can only be recycled at a facility empowered under the convention as fully authorised to carry out all aspects of the recycling set out in the Ship Recycling Plan.

Recycling facilities shall only accept vessels that comply with the convention, so a shipowner's choice of facility is likely in future to prove more limited.

Effect of the convention

It has been urged that the convention does not go far enough, and merely legitimises the infamous breaking yards of India, Pakistan and Bangladesh which account for approximately 90% of the shipbreaking market. Also, some environmentalists and labour leaders have criticised the convention for only requiring a ship to provide an inventory of hazardous materials on board before being sent for recycling, rather than stipulating that any such materials are identified and disposed of beforehand.

However, the Bangladesh Government issued a Statutory Regulatory Order on 26 January 2010, blocking the import of end-of-life ships from which toxic

materials (like asbestos, heavy metals and PCBs) have not been removed. Thus it has decided to ban the entry into its national territory of ships for dismantling which are not accompanied by a suitable pre-cleaning certificate issued by the country of export.

But that has not been without local repercussion. On 21 February this year 30,000 Bangladeshi workers protested in Chittagong over a government decree plainly aimed at improving environmental standards in the industry, and the head of the Bangladesh Shipbreakers Association has been reported as saying that the new order is "tantamount to a death sentence for the industry."

Plainly the full effect of the Hong Kong Convention will not be known until it comes into force, but with the recent activity in Bangladesh and the great likelihood that other countries will follow suit, two directly opposing questions loom:

- Does the convention go far enough in seeking to improve environmental standards and safety within breaking yards?
- Do the environmental benefits justify inevitable great upheaval for all industry sectors involved in a ship's life cycle, with the potentially major economic implications?

We shall see.

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A nip and a tuck for GAFTA 100

GAFTA will shortly be releasing a range of amendments to its much-used contract forms. Among the most significant of these will be the new version of GAFTA 100, the form that has, until now, governed CIF contracts. Traders have grown used to using GAFTA 100 for amended “C” term contracts, to cover sales on CIFFO, C&F and C&FFO terms. To reflect this, the new GAFTA 100 will apply to all these terms and traders will have to take care to ensure they know the changes and amend the form to suit each contract they conclude.

Many readers will be familiar with the basics of the terms that the new form will cover. In short, these are as follows:

- CIF: the sellers organise freight and arrange insurance; both elements feature in the price paid for the goods. The sellers pay for discharge costs to the ship’s rail and the buyers pay them beyond the ship’s rail.
- CIFFO: as for CIF, except that the buyers meet all discharge costs.
- C&F: the sellers organise the freight but not the insurance, which is the buyers’ responsibility. Discharge costs are the same as they are under a CIF sale.
- C&FFO: as for C&F, except that the buyers meet all the discharge costs.

The new GAFTA 100 reflects the commercial differences between these similar contract terms and the provisions of the contract form allow an easy selection between them. This will enable traders to conclude contracts without having to draft as many bespoke terms for their agreement in order to permit departure from the CIF terms to which the form was previously confined.

The changes to the form, and their impact on the parties’ responsibilities under the contract, are as follows:

Clause 3 – Price and destination. This clause now provides alternatives to permit the parties readily to choose between CIF, CIFFO, C&F and C&FFO terms.

Clause 9 – Nomination of vessel(s) for contracts concluded on C&F/C&FFO terms. This clause requires the sellers to nominate the intended carrying vessel to the buyers by a date agreed between the parties or, at the latest, before the commencement of loading. The seller must ensure that the nominated vessel complies with the Institute Classification Clause and another requirements set out in the contract. The purpose of this

clause, which only applies to C&F and C&FFO terms, is to permit the buyers to insure the goods.

The sellers can substitute a nominated vessel, but the new vessel must comply with the clause. That means the substitution must be made before loading commences, or else insurance cover would be compromised.

Clause 10 – Appropriation. Previously, the form required notice of appropriation to give the “approximate” weight shipped. The new form requires the notice to state the “presumed” weight shipped. This is an attempt to make the language of the contract more precise, since the notice, coming as it does after the issue of the bill of lading, need not be approximated but can contain a specified weight presumed to be correct on the basis of the bill of lading.

Clause 13 – Discharge. This clause is now divided between CIF and C&F terms and the Free Out versions of these. For CIF and C&F trades, discharge is to take place as fast as the vessel can deliver in accordance with the custom of the port. The sellers pay the costs of discharge from the holds to the ship’s rail and the buyers pay the costs from the ship’s rail onwards.

For CIFFO and C&FFO trades, the costs of discharge are for the buyers’ account. There are now detailed laytime and demurrage provisions, incorporating the charterparty rate for these. A common problem is also addressed in this clause: where the carrying vessel is on time charter, so that demurrage is not payable to the vessel owner, the daily rate of hire is to be taken as the demurrage rate for the purposes of the sale and purchase contract. At a stroke, this should eliminate a source of disputes between buyers and sellers over demurrage claims where the carrying vessel is on time charter.

Clause 17 – Insurance. As you would expect, this clause is now divided to provide for sellers to insure for CIF and CIFFO terms and for buyers to insure for C&F and C&FFO contracts.

Clause 19 – Force majeure, strikes etc. There are small changes to this clause: previously, if an extension to the shipment period was needed after a force majeure notice was served, the shipper was to serve a further force majeure notice no later than two business days after the end of the contractual shipment period, specifying the port(s) of loading from which the goods were intended to be shipped. Any shipments effected after the contract period of shipment were then limited to those nominated ports. In the new contract form, that notice must be served no later than the last day of the contract period of shipment. Since the proper service of notices in a force majeure situation can be critical, it is important to have this change in mind.

As always, the parties are free to alter the standard terms of the GAFTA form as they wish. However, the trade should be aware that, from the effective date of the new forms, a contract that simply incorporates ‘GAFTA 100’ will have the effect of incorporating the new terms and not the old ones. That could affect the rights and obligations of the parties. Care is needed to ensure that both parties appreciate the terms to which they are potentially agreeing when they make their trades, and the message to the trade is to look out for news of the publication dates for the new forms, likely to be during the spring of this year.

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Dishonesty need not be proved in order to establish fraud under English commercial law

[Cavel USA Inc. and Kenneth Edward Randall -v- Seaton Insurance Co. and Stonewall Insurance Co \[2009\] EWCA Civ 1363](#)

The English Court of Appeal has held that the concept of 'fraud' in an English commercial (insurance) law context in a case having an international flavour is not confined to deceit flowing from a fraudulent misrepresentation. It has a much wider application and can extend to cases without the need to establish dishonesty on the part of the person against whom the fraud is alleged.

The Court of Appeal allowed in part the appeal by Seaton Insurance Co and Stonewall Insurance Co, from preliminary rulings as to the meaning of a 'term sheet' signed by Seaton and Stonewall on the one hand and by Cavell USA Inc and its Chairman Kenneth Randall, documenting the termination of their contractual arrangements in respect of run offs of the defendants' American insurance business. The run-offs were managed by Cavell who acted on behalf of Seaton and Stonewall in adjusting and paying claims and in making reinsurance recoveries from reinsurers (NICO). The run offs were originally subject to New York jurisdiction and arbitration clauses.

Seaton and Stonewall alleged that in breach of contractual or fiduciary duty

Cavell and/or Mr Randall sub-contracted the conduct of the run-off to NICO and that they were therefore unable to look after the proper interests of Seaton and Stonewall; that was because Seaton and Stonewall wanted a speedy run-off and, if possible, a sensible and reasonably-priced commutation from reinsurers, whereas NICO's interest as reinsurers was to benefit from the substantial premiums which they had received and defer the payment of claims for as long as possible. It was said that NICO provided substantial separate business to Cavell as an inducement to Cavell to sub-contract the run-offs and that Cavell dishonestly benefited from that arrangement and concealed the existence of the sub-contracting agreement from their principals.

Seaton and Stonewall therefore decided to terminate the relationship. That was done by way of a 'term sheet' which provided that Mr Randall was: "[discharged from all actions, causes of action, suits, claims and demands whatsoever, whether at law or equity which \[any claimant\] ever had, now has or hereafter can, shall or may have against Randall for, upon, or by reason of any matter, cause or thing whatsoever arising out of or in connection with any business, commercial, contractual or other arrangements between or involving either of them as at the date of this term sheet, save... in the case of fraud on the part of Randall.](#)"

The term sheet was to be governed by and construed in accordance with English law and the parties submitted to the jurisdiction of the English courts.

Having executed the term sheet, the defendants instituted fraud proceedings against the claimants in New York. They said they were entitled to bring their fraud claim in New York and that they were not confined to bringing claims which would, as a matter of English law, be regarded as claims in deceit.

The claimants issued proceedings in the Commercial Court for a declaration that the claims should have been brought in England. The English judge, at first instance, interpreted the expression

"claims in fraud" as meaning claims in deceit.

The Court of Appeal stated that the phrases "or equity" and "in the case of fraud" did not sit well with confining fraud to deceit. The meaning of "fraud" in a commercial document with an international flavour should not be equated with the definition used in a criminal law context.

Dishonest abuse of fiduciary position = 'fraud'?

Dishonesty is not a necessary element in the cause of action of abuse of fiduciary position.

In contrast to the common law crime of conspiracy to defraud, deception, as opposed to dishonesty, is the key element of civil fraud. The court referred to [Kensington International Ltd -v- Republic of the Congo](#) [2008] 1 WLR 1144. The court, in that case, considered that conduct involving dishonest abuse of a position (in which a person is expected to safeguard the financial interests of another person) with a view to gain for himself or another, or causing loss or risk of loss to another, could be described as deception of a kind.

However, the fact that a fiduciary may be liable for abuse of position without being dishonest does not mean that a person abusing his fiduciary position can never be regarded as fraudulent. Some abusers of position will be acting dishonestly; others might consider that they were entitled to act as they did or that they were acting for the benefit of their principal.

In 2002 a Law Commission report called 'Fraud' considered whether abuse of fiduciary position should be a criminal offence and concluded that there should be a criminal offence of 'fraud' where "with intent to make a gain or to cause loss or to expose another to a risk of loss, a person dishonestly

- (1) makes a false representation;
- (2) wrongfully fails to disclose information; or

(3) secretly abuses a position of trust."

The Law Commission gave various instances of frauds which did not necessarily involve deception including "making a secret gain or causing loss by abusing a position of trust or fiduciary duty". The Law Commission recommended that secret abuse of position was fraud and should be the subject-matter of potential criminal liability. This is now contained in section 4 of the Fraud Act 2006.

In [Armitage -v- Nurse](#) [1998] Ch 241 a trustee was to be exempted from liability for loss or damage "unless such loss or damage shall be caused by his own actual fraud". The court held that the trustee was under no liability in the absence of any dishonest intention. The court said that care was needed when applying concepts relevant to the tort of deceit to a breach of trust, because breaches of trust were of many different kinds. The phrase "actual fraud" was "not used to describe the common law tort of deceit".

Thus in a commercial context the concept of 'fraud' is wider than the concept of the tort of deceit, where a fraudulent misrepresentation (or equivalent) is required.

The Court of Appeal therefore made a declaration that the exception "in case of fraud" in the term sheet is not confined to claims in deceit but extends to at least some cases of dishonest abuse of fiduciary position.

The court added that a defendant is not to be held to have acted dishonestly unless he was doing something that ordinary people would regard as dishonest and he knew this i.e. the criminal law test of dishonesty. The court saw no reason why this should not apply to any dishonest abuse of fiduciary position contemplated by the term sheet.

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The fast approaching deadline for customs accreditation

Richard Allingham and Adrian Marsh review some new legislation which is of great importance to those involved in international trade.

The deadline to apply for HMRC accreditation for the latest fast-track import/export procedures is the end of June this year. Companies involved in international trade, especially freight forwarders, need to apply now for the relevant CSP or AEO accreditation.

In recent years companies have been able to take advantage of the Customs Simplified Procedures (CSP) to fast-track the clearance of imports and exports. CSP allow importers/exporters to speed up the removal or release of most third-country imports/exports (i.e. movements involving countries outside the EU) by making a simplified online declaration. However, new EU legislation recently implemented in the UK (effective from 1 January 2010) requires those wishing to operate CSP to meet enhanced criteria.

Changes to the rules

CSP fall into two categories, Customs Freight Simplified Procedures (CFSP) in relation to imports, and Simplified Declaration Procedures/Local Clearance Procedures (SDP/LCP) in relation to exports. As from 1 January 2010 all companies currently using CSP (or those wishing to use it for the first time) have to satisfy much tougher criteria covering three separate areas of their business, namely customs compliance, accounting systems and financial solvency. These new criteria, set by HMRC, are now very similar to those which apply to Authorised Economic Operators (AEO) status.

The new deadline

Any importer, exporter or freight forwarder currently using CSP is required to submit an application to HMRC for re-authorisation before 30 June 2010, or it will lose its status and the associated benefits. Although the compliance procedure is now more strict, there are clear benefits to being CSP-registered. The recent changes also enhance the relevance of AEO status, as an AEO need not apply for re-authorisation for CSP. So the deadline for registration or re-registration for CSP is indeed fast approaching, and given the limited resources available to HMRC those wishing to apply for CSP or AEO status should immediately prepare and submit their application and take the necessary steps to ensure that their internal procedures meet with the new criteria.

The Export Control System (ECS), which was introduced in July 2009, is an electronic system used for tracking indirect exports that leave the EU. Those companies that are AEO or CSP-registered benefit from less stringent data requirements when completing their ECS declarations, and as such (compared to non-registered companies) are able to take advantage of a fast-track clearance system.

Market impact

The new requirements for CSP have been introduced by the EU and HMRC in an attempt to standardise and harmonise customs procedures throughout the global economy. This partnership approach is further illustrated by the introduction of the C-TPAT regime in the US, and the planned implementation of similar schemes in China and elsewhere around the world.

The benefits of CSP, and more particularly AEO registration and status, will become increasingly important as similar initiatives are introduced by governments outside the EU. The recent global downturn has meant that many trading companies have greatly reduced their stock inventories, opting instead for 'just-in-time' supply chains. Analysts believe that this trend is likely to continue for the foreseeable future, which in turn will increase the demand for ever more efficient and complex supply chains.

ECS, CSP and AEO controls are all designed to facilitate the faster and more efficient cross-border movement of goods. Aligning the regulatory criteria for export/import regimes with those for an AEO has created the framework required to accelerate the movement of goods and thus facilitate further expansion of global trade. AEO or CSP registration must now be a priority for the freight forwarding sector, and may well become a 'kite-mark' demanded by purchasers of logistics services. Companies not registered in these ways will surely find themselves at a competitive disadvantage.

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Breach of the Data Protection Act 1998: new powers allow the Information Commissioner's Office to impose fines of up to £500,000

Outlining a significant increase in statutory powers, Bobby Nolan and Edward Banks highlight this important but often unfamiliar area, which can affect all involved in international trade.

The Data Protection Act 1998 (DPA) imposes a range of obligations on any business, employer, professional or government department which is responsible for processing personal data. Any such entity is likely to be a "data controller", defined in the DPA as "a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be processed". This definition is extremely wide, and will cover a large number of businesses and organisations.

Any material held which contains personal information about clients or employees - including, for example, marketing lists, contact information or contractual documents - might be classed as personal data, and may therefore be subject to the DPA. Brokers, surveyors, insurers and logistics companies in particular should be aware of these provisions, as it is highly likely that they will be using information containing personal data on a daily basis.

The Information Commissioner's Office (ICO) can issue enforcement notices against data controllers who are in breach of the DPA. Failure to comply with such a notice is a criminal offence which may lead to prosecution. It is also an offence knowingly or recklessly to obtain, disclose or procure the disclosure of personal information, or to sell or offer to sell it. The maximum fine used to be £5,000 but from 6 April 2010 any data controller held to be in serious breach of the DPA might face a fine of up to £500,000.

These new rules are very significant, and all data controllers will need to be

particularly vigilant. Data security is likely to be key here, and it is imperative that an organisation can adequately demonstrate that it has systems in place which are sufficient to protect all data held by it.

Aside from the financial implications, there is also a very serious risk of damage to reputation if a fine is imposed, as the ICO lists all enforcement action on its website. It has also been known to issue press releases in the event of high profile breaches.

We consider that it is highly and increasingly important for organisations to move DPA compliance to the top of their priority agendas. We have a specialist team dealing with all data protection issues, and can provide guidance on any concerns that you may have.

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Delays, demands, duress and damages

Stephanie Belcourt and Rebecca Maddison discuss the recent case of Kolmar Group AG -v- Traxpo Enterprises Pvt Limited [2010] EWCH 113, in which the court held that a seller had used economic duress and intimidation to force a buyer to agree a very large increase in price, and thus that the buyer was entitled to more than US\$2.2 million in damages.

Facts

Kolmar (the buyer) agreed to buy from Traxpo (the seller) a cargo of 15,000 mt of methanol, +/- 5% in the buyer's option at \$255/mt, with a further 2,000 mt at \$265/mt in the buyer's option, for FOB shipment within September 2007. But the market price later leapt and the seller sought to escape its obligations by increasing the price and reducing the quantity of cargo.

At the fourth of a total of seven suggested amendments to the letter of credit the seller presented a 'take it or leave it' proposal at \$351.90/mt. The buyer had already incurred substantial demurrage as the vessel had been ready for loading for about a fortnight, though only 2,776 mt had been loaded. The buyer's customer needed the full cargo as soon as possible, and while the buyer protested that the prices were exorbitant, the seller threatened to walk away from the contract if its new terms were not agreed. The buyer had no alternative but to agree, and arranged further amendments to the letter of credit incorporating the increased payment terms.

Due to resulting delays with the letter of credit, the product suppliers were reluctant to release methanol, so the vessel could not maintain its loading rate and was ordered off the berth. The buyer later purchased 2,500 mt from an alternative supplier, and eventually the vessel sailed with cargo totalling 14,795.438 mt.

The buyer promptly brought proceedings on the basis that the seller's actions had been wholly unlawful and had amounted to economic duress, as the buyer had had no alternative but to submit in order to satisfy its own customer, and the court reviewed the law as to the timing of the opening of the letters of credit, and on economic loss and intimidation.

Letter of credit

The seller sought to defend on the basis that it was not obliged to perform the contract at all, because the buyer had failed to provide an acceptable letter of credit, and the court first considered the time by which a purchaser must provide a letter of credit if the contract does not set a deadline. Ruling that in these circumstances the letter of credit has to be provided by the beginning of the shipment period, the court found that

while, here, the buyer had not done that, the seller had waived this requirement. It had done so by asking for up to seven amendments, by stating that it had no objection to loading and by not suggesting that the contract was to be regarded as at an end or that it was not obliged to ship for want of a satisfactory letter of credit. Throughout, the buyer had continued to perform by making the vessel ready for loading and amending the letter of credit, albeit against its will.

Economic duress

The authorities establish the following principles:

- Economic pressure can amount to duress, provided it may be characterised as illegitimate and has constituted a 'but for' cause, inducing the claimant to enter into the relevant contract (or variation), or to make a payment.
- A threat to break a contract will generally be regarded as illegitimate, especially where the defendant must know that it would be a breach of contract if the threat was implemented.
- It is relevant to consider whether the claimant had a 'real choice' or a 'realistic alternative' and could, if it had wished, equally well have resisted the pressure, and for example pursued practical and effective legal redress. Lack of any reasonable alternative can be a very strong indication that the victim of the duress was indeed influenced by the threat.
- Lack of protest may be of some relevance when considering whether the threat had coercive effect, but even a total absence of protest does not mean that the payment or other step taken was voluntary.

The court held that the buyer had agreed to make amendments to the letter of credit to increase the price and reduce the quantity of the cargo "as a result of illegitimate pressure amounting to economic duress on the part of [the seller] which left [the buyer] with no practical choice but to agree to pay an increased price for such methanol as it did receive". The methanol had been purchased to supply a very important customer, and it was exposed to increasing significant claims for demurrage and possibility very substantial deadfreight. Contemporaneous protests had been made but they had been ignored, and the court understood

that there was a "practical limit" to the extent to which the buyer could protest where it was in such a vulnerable position and the seller had wrongfully threatened to walk away from the contract.

Intimidation

The court held that the seller's demands for price increases, backed by coercive and unlawful threats that it would not perform, amounted to intimidation. This tort is established where:

- the defendant makes a demand, backed by a coercive and unlawful threat;
- the claimant complies because of that;
- the defendant knew or should have known that compliance would cause loss and damage to the claimant; and
- the defendant intends its demand to cause loss and damage to the claimant.

The seller was fully aware, and intended that the buyer should comply with its demands in a way which would cause it loss.



Conclusion

The buyer recovered in restitution or by way of damages for intimidation in the form of economic duress, and by way of damages for short delivery, demurrage and shifting expenses.

While of course keen negotiation and making the best of a strong position are two of the key tools of international trade, this decision is a reminder that there are boundaries to that and that the English court will provide redress if illegitimate coercion usurps hard bargaining.

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As between assured, producing broker or placing broker, who bears the loss?



[Dunlop Haywards \(DHL\) Ltd and Others -v- Barbon Insurance Group Ltd and Others \[2009\] EWHC 290](#)

The claimants were part of the Erinaceous Group of companies which provided property services. The first claimant (DHL) was acquired by the Erinaceous Group from another group of companies. At the time of the acquisition, DHL undertook commercial property valuation work. DHL's business was subsequently acquired and carried on by the second claimant (Dunlop Haywards).

DHL received a number of claims from lenders, said to arise from negligent or fraudulent valuations. DHL notified the claims to their professional indemnity insurers. The insurance cover was in two layers: a primary layer of £10 million and an excess layer of £10 million. The primary layer insurers accepted the claims up to the limit of indemnity. The excess layer underwriters rejected the claims because the cover was limited to the group's commercial property management activities and did not cover valuations.

The indemnity cover for the relevant year had been obtained for the Erinaceous Group by the first defendant (HPC), a

general insurance broker specialising in commercial and property insurance, which was itself a subsidiary company of the Erinaceous Group. HPC had been instructed to assimilate and renew the existing insurance programmes for the expanded group, including for the newly acquired DHL.

Forbes was the placing broker used by HPC in connection with the renewal. HPC had also appointed Forbes for the placement of the Erinaceous covers in the previous year.

Liability of the producing broker

The claimant companies claimed against HPC in contract and in tort for failing to obtain the required excess insurance cover.

The court referred to the General Insurance Standards Council (GISC) 'Commercial Code of Conduct' which provides in particular:

"Core Principles

In the course of their general insurance activities members should;

1.1 act with due skill, care and diligence;

...

1.3 seek from commercial customers such information about their

circumstances and objectives as might reasonably be expected to be relevant in enabling the member to fulfil their responsibilities to them;

...

take reasonable steps to give commercial customers sufficient information in a comprehensible and timely way to enable them to make balanced and informed decisions about their insurance;

Practice Notes

Information About Proposed Insurance

Members will provide adequate information in a comprehensive and timely way to enable commercial customers to make an informed decision about the general insurance products.

Members will explain the differences in the relevant costs of the types of insurance which in the opinion of the member will suit the commercial customers' needs. In so doing, members will take into consideration the knowledge held by their commercial customers when deciding to what extent it is appropriate for commercial customers to have the terms and conditions of a particular insurance explained to them.

Members will advise commercial

customers of the key features of the insurance proposed including the essential cover and benefits, conditions or obligations and the period of cover. In so doing members will take into consideration the knowledge held by their commercial customers when deciding to what extent it is appropriate for commercial customers to have the terms and conditions of a particular insurance explained to them.”

The court recognised that the ascertainment of a client’s insurance needs was the function of the producing broker rather than the placing broker.

It was accepted by HPC that it was not instructed to obtain excess cover for the group as a whole, and for a limited class of activities, namely “commercial property management activities”, but instead to obtain excess cover which protected DHL on equivalent terms to the prior DHL cover. The court said that the clear distinction between property management and property valuation was well recognised in professional indemnity insurance.

HPC was in breach of its admitted duties. It had failed to review the terms of the cover and spot the reduced scope of cover. It followed that HPC had also failed to draw the reduced scope of cover to the attention of its client. It had failed to exercise reasonable skill and care. The claimants’ claim for £10 million succeeded in full against HPC.

Contributory negligence on the part of the assured?

In the context of a claim against insurance brokers it is necessary to consider whether the client has been guilty of “neglect of what would be prudent in respect of their interests” – the “Superhulls Cover” case [1990] 2 LLR 431.

In cases where the insured was a sophisticated insurance client, a plea of contributory negligence has succeeded – see the “Superhulls Cover” case (20% reduction) and National Insurance and Guarantee Corp -v- Imperio Reinsurance Co [1999] Lloyd’s Rep IR 249 (30% reduction).

In the present case the alleged fault consisted of the client’s admitted failure to read the terms and conditions of the

excess cover. HPC relied on the fact that they were dealing with the financial director (FD) of the group who should be regarded as a relatively sophisticated purchaser of insurance. However the court accepted that the FD was primarily concerned with the financial terms and had asked for several quotes from the broker.

Further the broker’s summary dealt solely with the primary layer and did not mention the excess layer at all. It focused on certain specifics, notably price and payment terms.

The preparation of an executive summary reflected the broker’s perception that the FD needed a summary of the most immediately significant features of the cover because he would not be expected to trawl through the detail for himself. Nor was the FD asked by HPC to read or to check its detailed renewal report.

The court found that DHL had reasonably relied on HPC to obtain the required cover and was not at fault for failing to review the terms of the cover in detail. HPC had summarised the renewal terms without drawing attention to the reduced scope. If DHL had read through the renewal review they would have noticed the limitation in cover and if DHL had been at fault for failing to do so that could have been regarded as a cause of the damage suffered. However, considering the relative causation as between DHL’s fault and HPC’s fault the court concluded that there should be no reduction for contributory negligence.

Liability of placing broker

HPC in turn claimed against the placing broker.

The court found that the initial quotation for the excess layer obtained by Forbes related to DHL only, as in previous years. However, Forbes understood that it had been instructed to obtain cover for commercial property management. It therefore re-brokered the risk, on the basis that it was to cover commercial property management activities for the group, and terms with insurers were agreed on that basis.

The duties that arise in a client/broker relationship also arise in a producing broker/placing broker relationship, namely:

- To exercise reasonable skill and care to fulfil instructions and perform professional obligations
- Carefully to review the terms of any quotations and indications received
- To explain the terms of the proposed insurance
- To use reasonable skill and care to arrange for a policy to be prepared that accurately and unambiguously reflects the agreement with the insurer

The court found that Forbes was negligent in failing to query the change from cover for DHL to cover for the group for commercial property management. Forbes was also in breach of a contractual term that cover would be obtained on no worse terms and conditions than the expiring cover. The placing broker argued that the breaches of duty by the producing broker eclipsed any causal effect of any breach of duty on its part, so that the producing broker was the sole effective cause of the claimants’ loss. The court did not accept this. Forbes’ failures were causative, but responsibility for the failure to obtain the necessary cover should be apportioned 80% to HPC and only 20% to Forbes.

Conclusions

In the “Superhulls Cover” case, where underwriters failed to read a 48 months restriction in their reinsurance cover and relied on the brokers’ representation that the reinsurance was as original, the court attributed 80% of the loss to the brokers and 20% to the insurer. In the present case, where the assured was not an insurance professional, the same 80/20 split was chosen but the assured shouldered none of the loss, which was apportioned 80%/20% between the placing and producing brokers.

While brokers will retain responsibility for market analysis and for selection of the most suitable product, this case highlights once again the dangers of inadequate communication and use of selective executive summaries to clients, and the need for placing and producing brokers to emphasise in writing that clients must themselves check that the proposed terms correspond with their instructions and requirements.

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Setting foot again on "PADRE ISLAND"

Stuart Armstrong and Rhys Clift review some proposed new Third Parties (Rights Against Insurers) legislation, within which the "FANTI"/"PADRE ISLAND" 'pay to be paid' defence survives.

The Third Parties (Rights Against Insurers) Bill received its second reading before the House of Lords on 9 December. It represents a long awaited overhaul of Third Parties (Rights Against Insurers) Act 1930. This Act is considered flawed, at least so far as claimants are concerned, in that it includes the requirement for claimants first to establish a claim against the insolvent entity (the wrongdoer). Both the existence of the claim and the amount of the liability have to be established by legal action, arbitration or agreement. This requires claimants to bring two actions, which increase the expense involved.

The new Bill provides that a claimant may sue an insolvent wrongdoer's insurer directly without having first to sue the wrongdoer. The claimant will be entitled to ask the same court for declarations both as to the wrongdoer's liability to the

claimant and as to the insurer's liability to the wrongdoer.

The policy rights of the insured wrongdoer are transferred to the claimant, who is entitled to meet policy conditions (such as notification requirements) as if standing in the insured's shoes. However, a claimant is not required to comply with policy conditions requiring the provision of information or assistance to the insurer. A claimant may serve a notice requiring the insurer to provide information regarding the policy. The notice may also be directed at any other person whom the claimant reasonably believes to hold policy information, such as a broker. The recipient must comply with the request within 28 days.

But the so-called 'pay to be paid' defence mechanism currently available to P&I Clubs under the 1930 Act survives. While the Bill provides generally that an insurer may not rely on such clauses, there is an exception for marine insurance if the claim is not in respect of death or personal injury. Marine insurance is as defined in the Marine Insurance Act 1906.

In theory, any marine insurer could include a 'pay to be paid' clause in a liability policy so as to defeat the main purpose of the Bill. It remains to be seen whether there

will be any appetite for such clauses outside the P&I Clubs.

If, in the current political climate, the Bill completes the parliamentary process and is enacted without any further amendment, claimants' time and cost should be saved because separate proceedings should no longer be necessary. Claimants will have a right to obtain insurance policy information more quickly in order to establish the likelihood of success. The Bill also removes the requirement for a dissolved insured company to be restored to the register of companies. It should also be noted that, save for notification requirements, an insured's obligations to comply with policy conditions and common law requirements (for example, the duty of utmost good faith) remain. Failure to comply may therefore still constitute a defence to any third party claim.

It is not intended that the provisions of the Bill apply to contracts of reinsurance.

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UK rail franchises – back to the future

The rail industry in the UK has always been a political football. However, there appears to be an emerging consensus among our main political parties that the way that private operators are contracted by franchise agreements to operate rail services needs to change. Most current such agreements have a term of five to seven years but it is now proposed to let upcoming franchises (e.g. Greater Anglia, East Coast mainline) for much longer periods, such as 20 to 22 years.

The impetus for this has come from the example of Chiltern Railways, very much the exception to the rule at the moment as its franchise has a 20 year term - albeit with a periodic review at the 13th year point. Having such a long term has motivated Chiltern's owners (formerly Laing, and now DB Regio, a subsidiary of Deutsche Bahn) to invest not only in the operation of the services but also in the rail infrastructure. A series of projects has been led by Chiltern, together with industry partners, to improve the infrastructure over which it operates. This has included new platforms at Marylebone, a new park and ride station at Warwick Parkway, platform extensions and the double tracking of sections of line where track had been infamously torn up in the 1960s to leave long single track sections. Chiltern has recently announced an ambitious project to create a spur to Oxford from Bicester and effectively create a new second mainline route from Oxford to London.

The argument is therefore that if other operators had similar long franchise terms, investment in their networks could be driven forward by them, rather than by Network Rail with its cash constraints. In some ways this is back to the future, as with the privatisation of the railways in the mid 90s the intention was to let franchises for long terms to allow operators commercial flexibility. However, the very public failings of

certain operators, especially perhaps the ill-fated Connex, led the Government to impose tighter management control on the railways. The paradigm of the last decade has been that operators should get on with the day job of running their trains on time (monitored and controlled in minute detail by performance regimes embedded in their franchise agreements), while the public sector leads on improvements to the network e.g. through the West Coast mainline upgrade or the Channel Tunnel rail link.

This fitted nicely with the business models of the bus operators who have come to dominate that industry, such as Stagecoach, Arriva, Go-Ahead, National Express and First Group. Franchise agreements were 'de-risked', and could be run with minimal capital investment by the owning groups. However, if the paradigm shifts as proposed we are likely to see a very different group of businesses taking an interest. These could be overseas state rail operators. So far, Deutsche Bahn has involvement through Chiltern and in the Wrexham, Shropshire and Marylebone Railway open access operator, and is bidding to take over Arriva. Nedrail, a subsidiary of the Dutch state rail operator NS, has interests in MerseyRail and Northern Rail, and Keolis (part owned by the French SNCF) is in a joint venture with Go-Ahead on a couple of franchises. Other European operators have from time to time made bids for franchises, e.g. the Danish operator DSB. This might seem puzzling, as these businesses are not particularly profitable, but the reason for this interest is probably that it is a route to expertise in operating railways in a private sector environment. Such would be very useful if either their home networks became privatised or, as in Germany, they had to fight off private sector contenders to run regional services.

Another important consequence of the paradigm shift will be in the rolling stock market. In the UK, passenger rolling stock is almost invariably owned by 'ROSCOs' (bank subsidiaries who run rail-specific leasing businesses), and leased to the train operating companies, who in the jargon are the 'TOCs'. If a TOC only has a five to seven year franchise, owning its own rolling stock rarely makes sense. If however it has a 20 to 22 year franchise and the opportunity to borrow at cheap rates (as the likes of Deutsche

Bahn certainly do) then it might well make sense for the TOC to have the assets on its own balance sheet.

Because the rail leasing market is complicated and barriers to entry are high, there has been little enthusiasm by lenders to challenge the dominance of the ROSCOs. Changing the rolling stock finance market from a leasing model to debt-funded model would attract a lot more potential investors. There is an additional benefit in this for the state. In order to encourage ROSCOs to fund the build of new rolling stock with the prospect of only a short operating lease matching the franchise term, the Government has had to give guarantees to the ROSCOs (called 'section 54 undertakings' - a reference to the Railways Act 1993) that the rolling stock will continue to be leased after a franchise handover. These will be less frequently required if the funding model for the industry changes as described above.

There are of course disadvantages. Arrangements would be needed to stop businesses hoarding rolling stock and thus preventing competitors from making credible franchise bids. At the time of privatisation, the Government (through what was then called the Office of Passenger Rail Franchising - 'OPRAF' - whose functions have now passed to the DfT) gave itself a degree of control over how the ROSCOs disposed of or otherwise allocated rolling stock. This was achieved by the 'OPRAF-ROSCO' agreement. A wider framework agreement may now be necessary, joining in the TOCs also insofar as they are or become significant owners of rolling stock.

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In the penalty area during extra time?

There has been much recent discussion of recoverable damages following late redelivery of a vessel, and parties are increasingly seeking to provide for that in negotiated charterparty terms. The decision in [Lansat Shipping Co Ltd -v- Glencore Grain BV \(25 March 2009\)](#) is a reminder that provisions whose key rationale is deterrence and which stipulate disproportionate payments will be disallowed as penalty clauses.

The court considered an appeal against an award concerning a clause in an amended NYPE charterparty between Lansat Shipping Co Ltd (the owners) and Glencore Grain BV (the charterers).

The owners let their vessel "PARAGON" under a time charterparty for three to five months, and the charterers redelivered just over six days late. It is established that if orders are accepted for a final voyage which proves to engage the vessel beyond the latest permissible redelivery date, an owner should be paid for the extra time at the market rate. Thus the normal measure is the market rate for the length of the overrun. However, by clause 101 this charterparty sought to alter that, as follows:

"Charterers hereby undertake the obligation/responsibility to make thorough investigations and every arrangement in order to ensure that the last voyage of this Charter will in no way exceed the maximum period under this Charter Party. If, however, Charterers fail to comply with this obligation and the last voyage will exceed the maximum period, should the market rise above the Charter Party rate in the meantime, it is hereby agreed that the charter hire will be adjusted to reflect the prevailing market level from the 30th day prior to the maximum period date until actual redelivery of the vessel to the Owners".

The owners therefore claimed the market rate from 30 days before the latest possible redelivery date to the actual redelivery date, which yielded an additional US\$471,603.32, a sum more than four and a half times the normal measure. On a preliminary issue the tribunal and the appeal court had to consider if this was unenforceable as a penalty. To be valid, such a provision must be a genuine pre-estimate of loss or damage, and compensation for the innocent party's loss – rather than deterrence from breaking the contract – must be its primary purpose. These considerations must be examined when the contract is made, not on the occasion of breach.

The owners argued that clause 101 was valid because it prescribed damages for if the charterers breached the contract by ordering an illegitimate last voyage. (A last voyage order is not legitimate if the charterer orders the employment of the vessel which cannot reasonably be expected to be performed by the latest date the charterer is obliged to redeliver it. If such an order is given, the owners can choose whether to comply - they are not bound to.)

Seeking to distinguish this from a claim for damages for late redelivery, the owners urged that loss consequent on what proved to have been an illegitimate last voyage should be calculated from when the order to perform it was given, since any overrun showed that the owners had been deprived of the opportunity to re-fix in the market at a point earlier than the latest possible redelivery date - the giving of an order that an owner might have refused, but did not for lack of logistic information usually entirely in a charterer's domain. Such loss was not the normal measure for late delivery. The owners relied on evidence that the average voyage duration for a vessel like the "PARAGON" was 60 days, submitting that as 30 days was half that this was demonstrably a genuine pre-estimate of loss.

The charterers responded that the purpose of the clause was to provide a remedy for late redelivery, not compensation for performing an illegitimate last voyage. Further, the owners did not have to accept an



illegitimate last order, but if they did the result would be no different - late redelivery and the same loss. Therefore, clause 101 was not a genuine pre-estimate, but a penalty.

The court said that the relevant question was what loss has been caused to the owners by the breach, and a claim for damages for failure to redeliver on time and one for overrun following an illegitimate last voyage were indistinguishable. If the owners accepted an illegitimate last voyage order, their recoverable loss was the vessel's market-rate earnings not from when the order was given but simply for the extra period if overrun happened. The owners who had performed an illegitimate last voyage had not lost the opportunity of an earlier redelivery, since either they had by choice let that opportunity go or it was not one they ever had, as a charterer is not obliged to redeliver before the last permissible date.

So the court ruled that the main function of clause 101 was to deter the charterers from breaching their obligation to redeliver the vessel on time, and as such was a penalty, and also adopted the reasoning of the tribunal that the clause allowed recovery of an "unconscionable" amount (such also being payable, for example, if the vessel was redelivered a mere one hour late) and so did not constitute a genuine pre-estimate of damage


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Fred Konynenburg reviews a 2009 decision which set down a number of key guidance points for traders and their advisers.

The "MERCINI LADY" came before the English Commercial Court last year, and involved the sale of 38,500mt of gasoil on FOB terms. The contract contained an express exclusion of any implied or express "guarantees, warranties or representations" as to the "merchantability, fitness or suitability" of the gasoil, which was loaded at Antwerp 17 January 2007 but found to be out of specification on arrival in Spain four days later. Samples drawn from the shore tanks prior to shipment were within specification and the resulting certificates were therefore clean.

After reviewing several relevant authorities, Field J made a number of important statements, as follows:

- In the absence of any provision to the contrary, under an FOB contract there was an implied condition pursuant to section 14(2) of the Sale of Goods Act 1979 that the goods were of satisfactory quality both at the time they were delivered to the vessel and for a reasonable time afterwards.
- There was a further implied term that goods would remain within specification for a reasonable time following shipment.
- What was a reasonable time depended on the circumstances, including (a) the prospect that the goods, once delivered, would be carried by sea to ultimate destination (b) the nature of the goods and (c) the extent to which the seller was aware that the buyer intended either to trade the goods or put them to his own use.

- There was no objective concept of a "normal voyage" for the purpose of determining what in the circumstances was a reasonable time. Each case would depend on its own facts.

This case has attracted considerable debate in the market. Buyers who trade on FOB terms are also operators of vessels. It has often been assumed that a clear demarcation exists between the liability of sellers for pre-shipment issues with the goods, and that of the carrier under the bill of lading (or owner under a charterparty) following shipment, but such no longer exists. The liability of the carrier for inherent defect, quality or vice in the goods is excluded under Article IV (2) (m) of the Hague-Visby Rules, so formerly an FOB buyer who received clean certificates final from his seller would have had no remedy, save perhaps in a case of proven fraud. But following the "MERCINI LADY" it will be easier for an FOB buyer to seek recourse from his seller. Additionally, the decision may provide ships' interests with greater ammunition to resist claims for transit damage to the goods where their condition or quality on shipment is suspect, even though clean certificates of analysis have been issued.

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The perils of drinking whilst at sea

A close-up photograph of a hand in a red sleeve pouring champagne from a bottle into a flute glass. The glass is partially filled with bubbly liquid. In the foreground, a cork lies on a textured surface. The background is a blurred view of a boat deck and the sea.

Generally speaking most seafarers whilst on company business are either limited in the amount of alcohol that they can consume or are completely prohibited from drinking alcohol. It should be noted that 'on company business' can extend to periods of joining and leaving a vessel, such as in the airport.

The amount of alcohol allowed to be consumed, be it zero or above, is generally set out either in the shipping company drug and alcohol policy or the laws that pertain to the nationality of the vessel and/or the jurisdiction the vessel happens to be in at a particular time.

Drug and alcohol policies started to appear following the OCIMF publishing guidelines for the control of drugs and alcohol on board ships in 1990. Where companies allow alcohol to be consumed in a limited and controlled manner the drug and alcohol policy usually sets out the maximum number of alcohol units to be consumed in a specified period of time and a stipulation that no alcohol shall be consumed within a set period before taking the watch or commencing work.

This set period is often four hours. Where a company runs a dry ship, again the policy will stipulate this. It should be noted that to avoid inconsistency, the levels set out in the policy should be the same as, or lower than, any particular laws that apply to the flag state of the vessel.

A drug and alcohol policy is enforced through the crew member's employment contract, such that it will generally be a term of that contract that the crew member must adhere to the policy. Failure to comply is usually a disciplinary offence and can lead to dismissal.

It should also be noted that ship owners often have a drug and alcohol policy not just because this is a good method of regulating alcohol on board, but because those employing the ship, i.e. the charterers, require it through clauses in charterparties. This is often the case with the offshore and tanker industry. Any breaches of the drug and alcohol policy may result in commercial consequences for the owner.

It should also be remembered that terminals, particularly oil terminals, may have a requirement that no alcohol can be consumed whilst alongside. A breach of this could again result in commercial consequences for the owner.

The other means by which alcohol is regulated on board is through legislation. The laws of the flag state will apply to the vessel. So, for example, the laws of the UK apply to British registered vessels. In addition, if landward of the UK's baseline of the territorial sea, crews on foreign-flagged vessels are subject to the laws of the UK.

In the UK, the Railways and Transport Safety Act 2003 (the Act) specifically sets out limits on the quantity of alcohol allowed to be consumed on board. Part 4 of the Act applies to a professional master of a ship, a professional pilot of a ship, and a professional seaman in a ship while on duty. The prescribed limits of alcohol for the purposes of the Act are, in the case of breath, 35 micrograms of alcohol in 100 millilitres, or in the case of blood 18 milligrams of alcohol in 100 millilitres. The Act applies to all UK registered ships and to all foreign ships in UK waters (see above). Part 4 of the Act has its origins

in the recommendations of Lord Justice Clarke following his various reports into the "MARCHIONESS" incident on the Thames. The Act seeks to supply a regime for seafarers similar to that which already exists for road users in the UK. It also supplements certain sections of the Merchant Shipping Act 1995, for example section 58(2), where a master or seaman of a UK flagged vessel or a foreign vessel in UK waters will be guilty of an offence if their conduct causes or is likely to cause an endangerment to a ship, structure or an individual and they are under the influence of drink at the time. Charges will generally be brought under either section 58(2) of the Merchant Shipping Act or section 78 of the Railways and Transport Safety Act 2003, depending on the circumstances of the case.

A breach of the Act can result in a fine or a jail sentence of up to two years.

Similar and harsher laws exist in other countries, an obvious example being in Saudi Arabia where alcohol is completely prohibited. The master should always check in advance of entering a particular country what the alcohol laws are pertaining to that country. The best method of checking is often through the local agent or through the local P&I correspondent. Ignorance of the law in the UK, and probably in other countries, is generally no defence.

An interesting point arises out of the Act, concerning the master. As stated above the Act applies to a professional master of a ship and a professional seaman of a ship while on duty. But is a master always on duty? What about the master of a vessel tied up in port, who would like a bit of 'downtime' and goes ashore for some rest and relaxation?

In a relatively recent case which we defended*, a master was prosecuted under the Act and the court had to decide whether a master was always "on duty" for the purposes of the Act. The master's vessel had tied up for the night, was not required to work until the following morning, and was complying with all harbour regulations. The master had temporarily handed over the vessel to the chief officer who was fully competent in all respects to deputise.

The master went ashore and had a few beers, and came back to the ship later that evening. A completely unrelated incident occurred not long after his return on board, and this necessitated police assistance. In dealing with the matter the master himself was breathalysed and subsequently arrested for exceeding the limits set out under the Act.

It was successfully argued in the court that for the purposes of the Act a master could be "off duty". The court also agreed that the Act was never intended to punish masters in the circumstances in which this master found himself. The court accepted the argument that "on duty" meant "during the course of his employment as a professional master of a ship, when performing or when liable to be called on to perform, a safety critical function in the operation of the ship".

The court found that the master had no case to answer. However, the case concerned particular circumstances and should certainly not be relied on to assist in all instances. The majority of prosecutions brought by the Maritime and Coastguard Agency involve seafarers who are clearly on duty, such as for example a master who is over the prescribed limits shortly before departure. It is this sort of scenario for which the Act was created. The above case demonstrates how careful seafarers have to be, and despite being exonerated the master still spent many months of anxiety leading up to the case being heard.

In summary, it is important to be aware that it is very likely that whilst on board or on company business seafarers have to comply with alcohol regulations, whether through a company's drug and alcohol policy or through national laws. By drinking in excess of any limits set out the seafarer exposes himself to potential fines and/or jail, and the real possibility of dismissal.

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*For a fuller account of this particular matter, see page 3 in the September 2007 edition of this newsletter.



Maritime passenger rights – a short report from the Chair of the European Cruise Council’s Tourism and Consumer Affairs Committee

On page 2 of the February 2009 edition of this newsletter we reported that Maria Pittordis had been appointed to chair this committee. Maria now outlines the recent consideration of issues concerning carriage of passengers with special needs, in view of the text of the draft EU Regulation on maritime passenger rights presently going through the EU legislative mechanism.

It is indisputable that each year the cruise industry carries thousands of such passengers. While plainly it is in everyone’s interest for this to continue, on each occasion the priority must be to ensure that the carrier has enough information at the time of booking to enable the particular passenger to be carried safely, and also the suitably informed right in appropriate cases to decline carriage.

At present, in a very small number of cases, carriage is declined for health and safety reasons, normally concerning passengers with severe conditions requiring specialist treatment and equipment. The relevant risks are assessed and a decision taken by the carrier following input from a doctor and of course the master. Key considerations include operational and medical factors based on the particular circumstances, and take into account the ship’s structure, services and itinerary.

The European Parliament Rapporteur will shortly produce a draft report, highlighting

the remaining issues on this subject, and submit it to the European Parliament. A political decision is likely to be made within three months, and further lobbying on behalf of the cruise industry needs to happen now.

The committee’s main concerns for the cruise industry relate to disabilities which are not apparent on embarkation and where a risk to health may occur if the ship is unable to provide emergency specialist medical care or some other necessary facility. The committee has requested that Article 12 of the draft text is amended to require passengers to inform the carrier, prior to completing reservation, of any specific disabilities, medical conditions or medical needs, including any need for equipment, medication, care or other relevant assistance. This would enable the carrier to assess the risk and (with the help of medical advice) decide whether to proceed or whether to decline on health and safety grounds. The current draft text requires notification of these matters no more than two days before sailing. In most cases this would be after a carriage contract had been concluded, and the potential problems are self-evident.

For the same reason Article 7 is sought to be amended, to allow carriers to deny boarding where it is not possible to carry the passenger in a safe or operationally feasible manner. At present the ability to decline carriage is restricted to the

actual structure of the ship, criteria largely confined in effect to reduced mobility passengers. However, the most difficult and potentially dangerous scenarios can arise from unseen and unknown disabilities which may manifest themselves afterwards, when it can be too late. Examples include passengers who need daily dialysis, those with psychiatric illnesses involving violent outbursts and people with acute heart conditions. To deny the carrier the ability to decline carriage of such people could put their own and possibly others’ health at risk, and perhaps with no great likelihood of applicable medical insurance if major complications arose.

Alongside these issues the committee has been considering matters concerning package travel, and together with the Passenger Shipping Association has formulated a policy document which was sent to the European Commission in January this year. The aim is harmonisation across Member States on certain key issues arising from the EU Package Travel Directive. In particular, the committee is seeking a common Financial Protection scheme and also amendment of Article 5 to make suppliers (including airlines) directly liable to the consumer and airlines directly liable to the package organiser. The latter would enable the cruise industry to recover the millions paid out annually for luggage lost by airlines.

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Stop press...



EC phone home...



On 19 March 2010 the European Commission announced new rules to facilitate the use of mobile phones from on board ships in EU territorial waters. It has published a Decision that guarantees the availability of 900 MHz and/or 1800 MHz GSM radio frequencies for onboard communication services under harmonised technical and operational conditions. The Commission has adopted a Recommendation that EU Member States liberalise their authorisation regimes, so that any onboard services operator authorised in one country can provide services in the territorial waters of other EU countries without the need for further licences.

Visiting contract professor

Hill Dickinson is delighted to announce that Alessandro Giordano has been engaged by Sardinia's University of Sassari as a visiting contract professor, first lecturing there at the end of March on shipping and international trade matters at a postgraduate course called the 'SeaMaster'. A formative event for future generations within the Italian shipping market, and attended also by established industry figures, this was organised by the Italian Shipowners' Association, Confitarma, together with the Sassari Chamber of Commerce, in alliance with the Olbia Port Authority and the Italian Entrepreneurs' Association, Confindustria.

Alessandro was supported by Federica Cozzani, another of the London shipping team's Italian speakers, profiled in the February edition of this newsletter.

Revised rules for insurance pools

On 24 March the European Commission adopted a revised Block Exemption Regulation (BER) to replace Regulation 358/2003 which expired at the end of that month. Joint activities, including sharing of information, between competing insurers or reinsurers tend to be caught by the competition rules, with a serious risk of fines, but the BER provides an automatic safe harbour if the relevant conditions are met. However, it must be noted that the scope of this new automatic exemption is much more limited, and some arrangements will no longer benefit from block exemption at all. It is therefore essential for companies to review all their joint arrangements and assess them for compatibility with the new rules.

If you would like to discuss either of these matters or need further details, please contact the head of our EU and competition team at philip.wareham@hilldickinson.com

Collisions and criminal liability

In an article in the March edition of the Nautilus Telegraph, Emma Groves and David Handley discussed potential criminal liability arising out of marine incidents, in view of the sentences imposed recently by a Hong Kong court following a collision between the "NEFTEGAZ 67" and the "YAO HAI". For a copy of the article please email emma.groves@hilldickinson.com or david.handley@hilldickinson.com

Marine insurance – inherent vice – appeal to supreme court

Global Process Systems Inc & Anor -v- Syarikat Takaful Malaysia Berhad ("CENDOR MOPU")

The 17 December 2009 Court of Appeal judgment for the claimants in this important case on the ambit of "inherent vice" under the Institute Cargo Clauses (A) 1/1/82 has made it more difficult for insurers to rely on this defence. We are pleased to say that on behalf of the defendant insurers we have been successful in obtaining permission to appeal to the Supreme Court (previously known as the House of Lords). It is expected that the appeal will be heard in July 2010.

If you would like any more details or wish to discuss any related matter please email kamal.mukhi@hilldickinson.com or stuart.armstrong@hilldickinson.com



Team profile: groupe français

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Events

23 February - the London shipping team hosted a lecture for the Lloyd's Under 35 Marine Insurance Group, titled 'The Practical and Legal Implications of the Low Sulphur Fuel Directive'. This was presented by David Handley, who wrote a related article in the February edition of this newsletter, and drew a wide audience from the marine insurance market.

4 and 5 May - Rhys Clift will address the Second Annual CESAM conference in Cannes on piracy.

5 May - in association with the Warsash Maritime Academy, Maria Pittordis, Nicholas Humphreys and mariners Philip Haddon and David Handley will give a seminar at the Academy. With topics including the Merchant Navy Code of Conduct, emergency response plans, the Corporate Manslaughter Act 2008 and salvage and LOF, this is likely to be of particular interest to marine superintendents and deck officers. A place can be booked, free of charge, by contacting hdshipping@hilldickson.com.

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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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