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Marine, Trade and Energy Newsletter

HILL DICKINSON

Our Singapore office opens
in March...



Contents	Page
Stop Press: Our Singapore office opens in March...	3
<u>Pratt -v- Aigaion Insurance Co SA</u> : interpreting ambiguous warranties in insurance contracts	4
Seizure, security and status quo	5
The Maritime Labour Convention	6
Title, trusts and trouble	8
Spanish Matriculation Tax - an update	9
Alcohol at sea	9
The Department for Transport's procurement predicament	10
Jersey Shipping Registry - a brief update	11
When an arrest is close to home...	11
Law and jurisdiction clauses	12
<u>Stocznia Gdynia SA -v- Gearbulk Holdings Ltd</u>	12
<u>The "Front Comor"</u>	13
<u>Metvale Ltd and another -v- Monsanto International Sarl and others</u>	13
<u>Farenco Shipping Co Ltd -v- Daebo Shipping Co Ltd</u>	14
Profiles	15

STOP PRESS...

Valentine's Day this year marked the fifteenth anniversary of the opening of Hill Dickinson's Greek office. Since 1994 the office has grown from one partner (Patrick Hawkins) and office manager (Natassa Giannaka) to four partners, six assistants and seven support staff. Another partner and two further assistants are soon to join, and a detailed feature on this flourishing office will appear in the next edition of this Newsletter.

Letters to the editors

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

STOP PRESS...

Hill Dickinson is delighted to announce that on 10 February the cruise industry appointed Maria Pittordis, who specialises in cruise operator work, as chair of the European Cruise Council's Tourism and Consumer Affairs Committee.

Combining the strengths of the European Community Shipowners' Associations (ECSA) and the Passenger Shipping Association (PSA), the Council represents all leading cruise companies which operate in Europe. It advocates their interests among the various EU legislative and other bodies in all matters of ship operation and shipping policy, promotes cruising by the European public, and seeks to expand the European cruise market.

Hill Dickinson is an associate member of the ECSA and the PSA (the UK-based association of cruise and ferry companies), and one of the tasks of the Committee chaired by Maria is to represent the industry on issues arising within an ongoing EU consultation on passenger rights.

EVENTS

On 15 November the leading Spanish newspaper El Mundo published a lengthy article on James Lawson's Barcelona presentation to Spanish Government representatives and the Spanish superyacht industry on Matriculation Tax and VAT issues.

The Hill Dickinson Yacht Team's successful 4 December London seminar on regulatory issues concerning yachts carrying 13 or more passengers was detailed by The Yacht Report on its website Synfo.com, available at <http://www.synfo.com/news/allnews.asp?id=12867>.

On 5 December Edmund Woollam attended a conference in Liverpool, sponsored by Merseytravel, on local investment and regeneration and the related role of the transport infrastructure.

On 5 January Associate Mary Prentice began a 3 month secondment to BP Shipping.

On 4 February Associate Tony McDonach began a month's secondment to Markel Energy.

Between 18 and 20 February Martin Penny and David Reardon gave a presentation at the Flagship Superyacht Academy's Client Representation Course at the Marriott Hotel in Southampton.

In March, Edmund Woollam will attend the Railtex exhibition at Earls Court, a leading exhibition for suppliers to the rail industry.

Between 9 and 11 March Martin Penny will be presenting at the ABYA Senior Brokers Course at the Marwell Hotel near Winchester.

Between 12 and 14 March Tony Allen and Panos Pourgourides will attend the Abu Dhabi Yacht Show.

On 31 March Pawel Wysocki and Jessica Taylor will be giving a presentation at the YBDSA Annual Conference at the Royal Institution of Naval Architects in London.

Nicholas Phillips, Roderick Palmer, Peter Mavroghenis and Alan Speed are hosting a seminar in Moscow on 22 April at the Marriott Royal Aurora Hotel which will cover topical issues in shipping and will be followed by a reception and lunch. Invitations will be despatched shortly, but if you would like to attend please contact one of the organisers.

On 22 and 23 June members of the Hill Dickinson Yacht Team will be presenting at the Future of Superyachts Conference in Palma.

Edmund Woollam will continue to attend the quarterly meetings of the rail industry's Fourth Friday Club, with presentations by Network Rail on the Thameslink Project and Transport for London on London 2012 preparations, and an address by Andrew Adonis, the DfT minister responsible for rail.

STOP PRESS...

As outlined in recent articles in the legal press, Hill Dickinson is opening an office in Singapore.

As part of its substantial and growing marine practice, Hill Dickinson has many clients in the Far East in general and in the Asia Pacific region in particular, and its own presence there (which is partly in response to local interest and client demand) will allow the Marine, Trade and Energy Group and other Groups within the firm to service clients' needs from a location nearer at hand and closer in time, and also to respond directly and rapidly to marine casualty and other instructions. A high proportion of the world's tonnage trades in Asia, and almost a third of all casualties occur in Asian waters.

A forthright move in the current economic climate, the opening of the Singapore office reflects confidence in the underlying strength of the marine industry in the region, following what has been a very significant expansion. Many owners and operators are now firmly and centrally based there, and related organisations like P&I Clubs, ship managers, salvors, marine underwriters and brokers are moving into the area as part of an unmistakable demographic shift to the Far East. A major economic centre in its own right with superb infrastructure and a Government committed to related investment, compact Singapore already hosts more than 750 ship operators, some of them very substantial. A key location on the world's major trading route and with an extensive port complex that is one of the busiest in the world, Singapore handles very substantial tonnage and container traffic, and a famously efficient airport ensures easy and convenient access to all locations.

Singapore is thus a natural home for a major shipping practice handling all manner of casualty, salvage, P&I, FD&D and insurance work, as well as commodities matters, commercial litigation and other business activity - such as commercial property, corporate work and aviation - for which the firm's other Groups are renowned. There will be close linkage with the firm's many established relationships with clients in, for example, India, Thailand, Malaysia, Japan, South Korea, Indonesia and of course the other economic powerhouses of China and Australia, and as well as obvious dovetailing with the London market the firm anticipates close liaison with its successful Piraeus office, in view of the large amount of Greek tonnage trading in Asian waters.

The office will be located in the vibrant and exciting environment of Singapore's Central Business District at No. 8 Shenton Way, #44-05 (Hill Dickinson LLP), Singapore 068811, and while further appointments from the local market are expected shortly the office will be staffed initially by Tony Goldsmith, Andrew Lee and Jim Leighton.

Partner and Master Mariner Tony Goldsmith specialises in casualty work, including salvage, wreck removal and also charterparty and cargo disputes. He acts for leading worldwide salvors and P&I Clubs, hull underwriters and many major shipowners, and has particular experience in dealing with local port and police authorities and of investigating

and handling cases involving fires, explosions, collisions, groundings and strandings.

Associate Andrew Lee qualified in 2003 and handles a variety of wet and dry shipping disputes, marine insurance and general commercial litigation. Andrew has spent time living in China, and after qualifying as a solicitor worked in Dubai for a number of years. His client base includes salvors, P&I Clubs, hull underwriters, port operators and shipowners.

Previously a marine engineer and marine claims consultant, Jim Leighton also has a substantial academic background in maritime law. He has been working closely with Tony and Andrew in London and will continue to assist them in all marine matters in Singapore.



Tony Goldsmith



Andrew Lee



Jim Leighton

Relishing the prospect of servicing the firm's clients and developing its business in and from Singapore, Tony Goldsmith said: "We have many clients throughout Asia and there is a strong opportunity to build on business in this region. An office in Singapore puts us in a good, central location from which we can service much of Asia, and growth in this area is key to our business plans for 2009 and beyond. As a firm we excel at marine and insurance work, and we know that our clients will derive great benefit from our close and direct presence in what is one of the world's busiest shipping and trade locations."

Managing Partner Peter Jackson observed: "It is a bold step to open a new office in the current economic market and this demonstrates our commitment to invest in the firm's future. Tony has championed our opening in Singapore and, being both a lawyer and Master Mariner, he has the right credentials to head up the new office. We have based the business model on our successful operation in Piraeus, and (as well as very much else) having a team on the ground will enable us to attend casualties and urgent situations immediately."

Maria Pittordis, head of the firm's Marine, Trade and Energy Group, added: "This strategic expansion in one of Hill Dickinson's core business areas indicates the firm's strength at this difficult time. Clients in the Far East and elsewhere will be able to tap into our expertise and resources from a dynamic new and nearby location, and we look forward to building closer and also many additional relationships in this still fast-growing and exciting region."

Hill Dickinson's Singapore office is expected to be fully operational by no later than Wednesday 18 March.

STOP PRESS...

New team members

Bobby Sharma (Company/Commercial)

Specialising in asset finance, with particular emphasis on ships and aircraft. Bobby has joined the company commercial team in London, where he will continue to act for shipowners, charterers, banks and shipyards in relation to the sale and purchase, finance, construction, registration and leasing of newbuilds and older tonnage, and for banks and operators concerning financing, leasing and acquisition of commercial and private aircraft.

Javed Ali (PI/Regulatory)

Javed joined Hill Dickinson on 1 December, having been Senior Legal Advisor for Thomson Holidays and in charge of litigation and regulatory and media compliance, representing the company on the ABTA Code of Conduct Committee, advising on the Package Travel Regulations and the Consumer Protection from Unfair Trading Regulations 2008 and dealing directly with the ASA and the Broadcast Advertising Clearance Centre. As part of the overall PI/Regulatory Team Javed will handle a varied personal injury caseload, and within the Cruise and Ferry Team he will assist with the increasing amount of holiday and travel-related work.

Christiana Cleridou (PI/Regulatory)

With an LLM in international law from Bristol University and an MA with distinction in European law from London University, former Cypriot barrister Christiana is also an English solicitor. A native Greek speaker and fluent in English, she joined Hill Dickinson on 5 January from the Louis Group in Cyprus, where as an in-house advocate she handled a broad range of passenger, crew and other cruise ship claims. Christiana also worked in the Ombudsman's Office in Nicosia, and has great experience complementing detailed knowledge of the Athens and Montreal Conventions and the Package Travel Regulations and related EU provisions.

William Tsang (Company/Commercial)

William joined Hill Dickinson as a Partner on 2 January. With emphasis on Lloyd's, run-off and exit strategies, William specialises in non-contentious insurance and reinsurance matters, and also has expertise in corporate finance transactions in the technology, media and telecommunications sectors.

Brett McCulley (London Employment)

Qualified in both Australia and England, Brett joined Hill Dickinson on 5 January. For further details please see the full profile of this Team on page 15.

Pratt -v- Aigaion Insurance Co SA: interpreting ambiguous warranties in insurance contracts

The 21 metre stern trawler "Resolute" owned and skippered by Mr Pratt caught fire whilst alongside at North Shields. Mr Pratt had the benefit of a contract of marine insurance which contained the following warranty:

"Warranted owner and/or owner's experienced skipper onboard and in charge at all times and one experienced crew member."

There was a fire on board which ostensibly was an insured peril. At the time of the fire the vessel had been temporarily left unattended by its crew of four, including Mr Pratt, following a day's fishing. Two repair quotes were obtained which were both for more than the insured value. The insurer refused to pay out under the policy on the grounds that the owner/skipper had left the vessel unattended in breach of the above warranty.

Mr Pratt argued that "at all times" in the warranty should be interpreted as meaning "whilst underway", or "navigating" and, if further qualification were needed, to include "whilst the vessel is working" to take into account activities such as landing her catch.

The Admiralty Court Judge disagreed and held that the warranty should be read literally, that is "at all times" means at all times. Permission was granted to appeal to the Court of Appeal.

The Court of Appeal relied upon the general principles of construction and reaffirmed the position that any clause within a contract must be construed having regard to its context within the contract. In particular, the contract also required the vessel to be navigated by two medically fit persons, one of whom was competent to be in command.

In addition the Court of Appeal looked at the other background factors, or as put by Lord Hoffmann in Investors Compensation Scheme Ltd -v- West Bromwich Building Society [1998] 1 WLR 897, the "surrounding circumstances" and "factual matrix" i.e. those facts which a reasonable man would regard as relevant.

The background facts which would have been known to each of the parties were then applied. The relevant background facts included that the "Resolute" was only permitted under EU Regulations to fish for 227 days in any year and that similar vessels are often tied up for days at a time between trips. Furthermore, given the rudimentary living quarters on board, it was accepted that the crew would not ordinarily be expected to live on board, and certainly not for 365 days a year, which, had insurers' interpretation been accepted, and given the tight financial margins precluding employing a relief skipper and crew, the owner/skipper would have been required to do.

It was held that the warranty, when read as a whole, was designed to protect the vessel, and in turn the insurer, at times where the skipper and one experienced crew member could be expected to be on board, the principal time being when the vessel was being navigated or under way. The problem in the Court of Appeal's view was whether "at all times" needed further qualification and, if so, to what extent. While the Court of Appeal accepted that it probably extended to include times when the vessel was working, such as landing her catch, there was great difficulty in establishing how far that extension went due to the ambiguous nature of the clause. As the clause was ambiguous, under the contra proferentem rule, the Court of Appeal held that it should be construed against the insurer. The insurer relied heavily upon two previous cases, the "Newfoundland Explorer" and the "Milliasan", both of which concerned similarly-worded warranties, which were distinguished on both their facts and circumstances.

The Defendant insurer has been refused permission to appeal to the House of Lords by the House itself.

While Mr Pratt was held not to have breached the warranty, as in so many other areas of life prevention is better than cure. We advise that all parties (including their brokers) to an insurance contract take great care when reading the terms. Owners, in particular, should make sure that they understand the policy to satisfy themselves that it fulfils their needs. If there is any doubt they should consult their broker before taking out the policy. Insurers will also need to satisfy themselves that any warranty is not so wide as to be unreasonable.

John Hulmes and Andrew Glynn-Williams of Hill Dickinson LLP acted on behalf of Mr Pratt.

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Seizure, security and status quo

No Judgment or Award is any good unless it can be enforced, and a difficult economic climate has led to increased efforts to secure assets that might otherwise be moved beyond reach. This article is a timely review of what are probably the two most favoured methods.

Freezing Injunction

Formerly a Mareva injunction, this is a discretionary remedy which seeks to restrain a defendant from dissipating assets that are in the jurisdiction. Under section 37 (1) of the Supreme Court Act 1981 the English High Court has power to grant interim injunctions if it is “just and convenient”, and section 37(3) confers specific power in respect of the freezing injunction.

Four requirements need to be satisfied for a freezing injunction to be granted:

1. The claim must be justiciable (i.e. it can be validly tried) in England and Wales: Siskina -v- Distos Compania Naviera SA [1979] AC 210. A claim is justiciable here if either:
 - a. the defendant can be served within the jurisdiction;
 - b. an overseas defendant submits to this jurisdiction; or
 - c. the case falls within CPR Parts 6.19 or 6.20 (now Parts 6.33, 6.36 and 6.38), provisions which allow the defendant to be served overseas with proceedings issued here. The permission of the Court is sometimes, but by no means always, needed;
2. The claimant must have a good arguable case: the “Niedersachsen” [1983] 2 Lloyd’s Rep. 600;
3. The defendant must have assets (which can include, but are not confined to, money) within the jurisdiction. Sometimes a Court can grant a freezing injunction against a second company owned, directly or indirectly, by the defendant if there is credible evidence that assets apparently owned by the second company belong in fact to the defendant: Atlas Maritime Co SA -v- Avalon Maritime Ltd (No. 3) [1991] 1 WLR 917 and TSB Private Bank International SA -v- Chabra [1992] 1 WLR 231;
4. Lastly, it must be shown that there is a risk that the assets will otherwise be removed from the jurisdiction. This requirement, which can involve notions of likely moral culpability on the part of the defendant, is often the most difficult and keenly contested aspect.

In exceptional cases the Court can grant an order affecting assets overseas (a worldwide freezing injunction), even if there are no assets here:

Derby -v- Weldon (No.2) [1989] 1 All ER 1002 and in Dadourian Group International Inc -v- Simms [2006] 1 WLR 2499 the Court of Appeal clarified the principles to be applied when trying to enforce a worldwide freezing injunction abroad.

Rule B Attachment, under the Federal Rules of Civil Procedure.

This US Court remedy is currently so popular that in some places the Courts have been overwhelmed by applications.

Although the practice of attachment is an old one, the possibility of attaching an EFT (Electronic Funds Transfer) in US Dollars was only recognised in recent years in the leading case of Winter Storm Shipping LTD -v- TPI 310 F.3d 263 (2d. Cir. 2002). The later case of Aqua Stoli Shipping -v- Gardner Smith Pty Ltd 384 F. Supp. 2d 726 (S.D.N.Y. 2005) has clarified the requirements for a Rule B attachment:

1. The underlying claim must be a maritime one;
2. The defendant must not (see below) have a presence in the jurisdiction;
3. The defendant must have “tangible or intangible” (hence an EFT is attachable) assets within the jurisdiction;

A defendant can avoid or at least attack a Rule B attachment by providing the claimant with alternative security for the claim, or by showing that the company is registered to do business in the jurisdiction, and thus does have a presence there (there has been much hasty registration activity in view of this commonly cited provision, on which an important ruling is presently awaited), or by seeking a “prompt” hearing, at which the claimant has to show that the attachment should continue. It is also possible to counterclaim for wrongful attachment, but this is difficult as bad faith needs to be shown.

A Brief Comparison

Although the practical effect of these remedies is different, in that a freezing injunction restrains a party from dissipating assets, whereas a Rule B attachment blocks access to funds, in that they are not released to the defendant by the bank, the object of both is to obtain and retain adequate security for the claim.

At the moment, it seems that a United States Rule B attachment is, in practical terms, easier to obtain than a freezing injunction, as there is no need to prove the immediate presence of assets within the jurisdiction.

However, the commercial implications of the strategy for obtaining security should always be assessed at the outset. Each situation should be carefully considered in the light of the specific circumstances of the case, and in most cases it will be wise to seek even outline legal advice before deciding whether and if so how to apply for or defend against one of these remedies.



Health, medical care, welfare and social security protection – The Maritime Labour Convention 2006

Introduction

In the first article in this series, at page 12 of the July 2008 edition of this Newsletter, we focused on the accommodation and recreational requirements for seafarers under the Maritime Labour Convention 2006 (the “Convention”). In the second article at page 16 of the November 2008 edition we highlighted the mandatory requirements for seafarers’ conditions of employment. This third and last article summarises shipowners’ liability for seafarers’ health, medical care, welfare and social security protection.

Overview

The Convention consolidates no less than 68 maritime labour instruments on seafarers’ living and working conditions. It aims to achieve worldwide protection for all seafarers, defined as persons employed or engaged or working in any capacity on board ships covered by the Convention – which with only a few exceptions applies to all ships (whether publicly or privately owned) ordinarily engaged in commercial activities. With an estimated 1.2 million people working at sea worldwide, the Convention’s great importance and global scope is obvious.

As for the two previous articles in this series, we summarise below the provisions which will apply when the Convention comes into force. The ILO’s target for this is 2011, but this depends on ratification by 30 ILO Member States with at least 33% of the gross tonnage.

Seafarers’ rights

Under the Convention every seafarer will have the right to health protection, medical care, welfare measures and other forms of social security protection.

(i) Medical care

A country which has ratified the Convention (a “Member”) must ensure that seafarers on their flag vessels are covered by adequate measures concerning their health. Seafarers must have access to adequate and prompt medical care while working on board. Health protection and medical care must be comparable to that which is generally available to workers ashore, and where practicable seafarers must also be able to visit a doctor without delay in ports of call. In principle, this health protection and care must be provided free to seafarers.

Also, when seafarers on ships in a Member’s territory require immediate medical care, access must be provided to that Member’s medical facilities on shore. The Convention also addresses related matters like the use of a standard medical report form, specific requirements for medical care facilities on board (such as a medicine chest, and the presence of a qualified doctor for certain voyages), and medical training and equipment.

(ii) Shipowners’ liability

Members must ensure that seafarers have suitable assistance and support from the employing shipowner as regards the financial consequences of sickness, injury or death during employment. There are provisions detailing shipowners’ liability for the costs of seafarers’ sickness and injury and for compensation in the event of death or long-term disability due to an occupational injury, illness or hazard.

(iii) Health and safety protection and accident prevention

Seafarers must be provided with occupational health protection and must be able to live, work and train on board ships in a safe and hygienic environment. Members must implement legislation and related measures (which are to be regularly reviewed, and revised if necessary), including:

- a. the establishment and promotion of occupational safety and health policies and programmes on ships;
- b. reasonable precautions to prevent occupational accidents, injuries and diseases;
- c. onboard programmes for the prevention of occupational accidents, injuries and diseases, and continuous improvement in occupational safety and health protection; and
- d. requirements for inspecting, reporting and correcting unsafe conditions and for investigating and reporting onboard occupational accidents, including keeping and analysing comprehensive statistics.

Noise and vibration on board ships must be continually reviewed, in order to improve the protection of seafarers from the adverse effects of those.



The Convention also deals with the safety and health education of young seafarers and the need for international cooperation between Members in relation to health and safety protection and accident prevention.

(iv) Access to shore-based welfare facilities

Members will have to ensure that adequate welfare facilities and services are provided to seafarers. Where such facilities exist within their territories, Members must ensure that they are easily accessible and available for use by all seafarers, irrespective of nationality, race, colour, sex, religion, political opinion or social origin and irrespective of the flag status of the vessel. Furthermore, Members are required to positively promote the development of welfare facilities in appropriate ports in their countries.

Provision is made for additional matters, including:

- a. measures designed to expedite the free circulation of “welfare materials” (e.g. films, books, newspapers and sports equipment) for use by seafarers on board and in welfare centres ashore;
- b. the availability of shore-based welfare and recreational facilities, for example meeting and recreation rooms, sports, outdoor and educational facilities and where appropriate facilities for religious observance and personal counselling;
- c. the dissemination of information among seafarers concerning facilities open to the general public in ports of call, particularly transport, welfare, entertainment and educational facilities and places of worship, and also information about facilities provided specifically for seafarers;
- d. the availability of hotels or hostels, where needed, whose facilities must be comparable to good-class establishments and located where possible in good surroundings away from the immediate vicinity of the port area; and
- e. where necessary and possible, provision for accommodating seafarers’ families.

The Convention also deals with the protection of seafarers in foreign ports, and requires Members to encourage the establishment of welfare boards, which must regularly

review welfare facilities and services to ensure that they are appropriate, taking into account any developments in the shipping industry.

(v) Social security

Members are required to take steps, according to their own national circumstances, to achieve comprehensive social security protection for seafarers. To the extent provided for in a Member’s national law, seafarers and their dependants will be entitled to benefits no less favourable than those available to shore-based workers. The matters which must be addressed with a view to achieving this are: medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors’ benefit, all complementing the protection stipulated elsewhere in the Convention.

Further standards and guidelines are established, for example the principle that these measures may be contained in laws or regulations, in private schemes or in collective bargaining agreements, or in a combination of these.

Conclusion

Given the global nature of the shipping industry, it is clear that seafarers need special protection. As can be seen from the above and our two previous articles, within what will be a full review of the maritime labour law framework the Convention aims to bring about improved and enforced minimum working and living conditions for seafarers. It seeks to codify standards which are intended to reflect current industry practice, and heralds the overall notion of a more socially responsible shipping industry.

We hope by this series of articles to have summarised the key tenets of this wide-ranging Convention, and will later issue updates on its ratification and, when known, its timetable for coming into force. If you need any further details in the meantime, please approach either Nick Humphreys or the Newsletter editors at our London office, or your regular contact at Hill Dickinson.

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Title, trusts and trouble - the insolvency of BA Peters plc

The 2007 administration of BA Peters plc attracted plenty of press coverage, and a recent decision shows that its issues are still being resolved and its effects felt well into 2009. It is easy to dwell on the negative aspects of the Peters case, but the judgment allows one to highlight valuable precautionary guidance on two fundamental matters in vessel (in this case, yacht) sale and purchase transactions, namely ownership and money.

1. Who had title?

In 2006 one of Peters' dealers ("D") ordered a Sealine F37 motoryacht, pursuant to its annual purchase commitment with Peters. At Peters' request the entire purchase price was paid by D into Peters' client account. However, when D came to collect the yacht from Sealine in August 2007, Sealine refused to deliver as it had not been paid by Peters.

Sealine eventually agreed to release the yacht to D, on the basis of an agreement that property in the yacht would remain with Sealine until receipt of the entire purchase price from Peters. But Peters went into administration before the funds were transferred, and Sealine then claimed title to the yacht. The Judge analysed the contractual framework of the dealer agreements between Peters and Sealine and between Peters and D and concluded that, as Peters had implied authority to sell goods on Sealine's behalf, it had authority to confer good title on any sub-purchaser. D, and not Sealine, had contracted with Peters, and since D had performed its part of the bargain by paying the purchase price to Peters, unencumbered title had passed to it.

Sealine had argued that it had effectively 'reserved' title by means of an email exchange with D immediately before delivery, when D confirmed that property in the yacht would remain with Sealine until receipt of payment from Peters. Sealine urged that this was sufficient to displace any notion of a transfer of title to D. The Judge disagreed, holding that title had already passed to D by virtue of Peters' authority, as noted above, and could not simply revert to Sealine, even under an apparently purposive bargain: any such agreement between D and Sealine would be, as the Judge ruled, "void for common mistake as to the ownership of the property".

While of course the decision was based on an analysis of the particular contractual framework, and, especially, on the resulting authority to confer title, this case offers an important and highly topical reminder to buyers and sellers in a complex contractual chain that they cannot necessarily by agreement fix who has title at what may prove to be the crucial time.

Sealine therefore had only limited recourse. The terms of the agreement with Peters stipulated that Sealine retained a "security interest" in all products sold and in all proceeds of sale until payment in full. So they had an unregistered charge over the sale proceeds, thus becoming a mere general creditor of an insolvent Peters.

2. Were deposits held in trust?

The Court also had to consider the fate of money deposited by many of Peters' clients, pending disbursement in connection with their purchase of yachts from Peters.

In breach of its obligation to pay those monies into a designated client account, Peters had mainly used its current account, and the funds were mixed with other monies belonging to Peters, and used to pay other debts. The Judge held that the affected clients were only unsecured creditors of Peters, and those clients appealed to the Court of Appeal.

The Court of Appeal held that although the clients seemed to have a strong case against Peters for breach of trust, they did not in fact have a proprietary claim against the funds themselves. The breach was Peters' failure to hold the funds in a designated account, but the result was that the funds never became part of any trust such that they were separate from Peters' general assets. So the clients had no proprietary claim, and could only rank alongside the other unsecured creditors. Had Peters held the payments in the separate client account, the clients would have been able to trace them back to that account and their position would have been greatly improved.

Conclusion

This decision emphasises that, especially in the current economic climate, buyers, sellers, agents, dealers, manufacturers and others involved in any supply chain should carefully review their contractual arrangements and their resulting rights and obligations. Commercial decisions will always have to be made, but suitable risk management and prudent trading practices can greatly reduce exposure to losses in these difficult times.

For buyers, the focus should be on protecting the investment, by for example ensuring that funds are indeed paid into a designated client or (better) a specific escrow account. Where commercial considerations permit, as well as seeking title to the vessel under construction buyers might also obtain security from the builder or yard, by way of a performance bond or bank guarantee over the whole or part of the purchase price. As ever, a balance needs to be struck between the needs of the builder and the requirements of the buyer.

If, later, problems emerge, it must be remembered that a seeming workable solution involving clear consensus on the passing or retention of title might not prove valid, to the possible detriment of one of the parties. In most cases advice should be sought at an early stage in order to avoid the potential pitfalls.

Spanish Matriculation Tax – an update

We were recently asked to comment on a press report on an apparent ‘clamping down’ by the authorities in the Valencia region on yacht-owning UK residents. Several British yachts have reportedly been impounded and others have left to avoid that fate. The action is said to stem from enforcement of payment of matriculation tax (at 12%) on the value of the yacht. Apparently among those targeted were an English couple who have lived on board their yacht at Torrevieja marina for almost two years, seemingly without any issues being raised.

In view of the alarmist nature of the press report, it is worth clarifying a few points.

Matriculation tax, or the non-harmonised Spanish ‘special tax on certain means of transport’, is levied on the registration or use of a yacht in Spain. It applies to pleasure craft over 7.5 metres (21 feet) in length. The concept of “use” refers to the use of the yacht in Spanish waters by a person resident (or with a permanent establishment) in Spain where no application for registration of the yacht in Spain has been made within 30 days of the commencement of use. The “commencement” date is deemed to be either the termination of the temporary admission customs régime (or tourist registration scheme) in respect of the yacht, or the date when the user becomes resident or permanently established in Spain. The rules on residence are complex, but in essence if the period spent in Spain exceeds 183 days per annum matriculation tax will apply, unless the user can demonstrate a tax residency elsewhere. If levied at the time of acquisition, matriculation tax is calculated on the purchase price, and is otherwise based on a contemporaneous valuation.

It is unclear why the Valencia authorities have recently become so active on this, but it seems likely that their intervention was triggered not by the ownership of the yachts but on the basis of the residence rules described above.

As matriculation tax is a non-harmonised levy it is difficult to predict how the other Spanish authorities will apply the rules. The reports from Torrevieja do not necessarily suggest a nationwide campaign, but certainly those operating and/or living on board their yachts in Spain should ensure that they are fully familiar with the relevant regulations.

We have been assisting the Spanish Superyacht Association (the “AEGY”) in lobbying the Spanish Government to follow the lead of France and to some extent Italy and establish a charter-friendly environment in Spain. The requirement of a charter licence for any yacht wishing to charter in Spanish waters - itself dependent on the payment of matriculation tax - has all but decimated the Spanish charter industry, notwithstanding the superb facilities, infrastructure and cruising grounds. As France has discovered, direct income due to increased charter activity is likely to be significantly greater than the revenue from matriculation tax. The current economic conditions, coupled with the AEGY’s efforts and wider industry pressure, might just be the catalyst for change. This presents the interesting question as to whether those who have paid matriculation tax to obtain a Spanish charter licence and who are legitimately chartering in Spanish waters will be entitled to a refund if matriculation tax is ever abolished.

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Alcohol at sea

In the September 2006 edition of this Newsletter we noted that the Government had just completed a consultation on alcohol limits in relation to recreational craft, having reiterated a commitment to intervening at some stage, albeit that legislation was not imminent. Nearly three years later the Government has launched another consultation, this time on draft Regulations on precisely which vessels will be subject to proposed legislation such that being over the limit would be a criminal offence.

The Government had previously announced that it would introduce alcohol restrictions for leisure mariners similar to those in place for professional seafarers. The alcohol limit is intended to be the same as the road traffic limit of 80 milligrams per 100 millilitres of blood, and will apply to those persons involved in the navigation of a vessel.

It is proposed that the new measures will apply to larger, faster vessels, with an exemption for a limited number of smaller, slower craft, and this latest consultation seeks views on draft Regulations that would exempt non-professional mariners on vessels which are less than 7 metres and have a maximum design speed of 7 knots or less.

The Government has stated that it “takes alcohol abuse at sea very seriously”. It intends to introduce these new provisions in late 2009, and we will be issuing updates on this.

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The Department for Transport's procurement predicament



This article outlines recent difficulties that Government policy has visited on the availability of rolling stock

On 7 August 2008 the Competition Commission issued its provisional findings following an investigation into the rolling stock leasing market in the UK. This exercise had been instigated by the Department for Transport ("DfT") in view of its concern that rental rates for pre-privatisation rolling stock (the so-called "MOLA stock") had not fallen as might have been anticipated in a genuinely competitive market as the relevant assets reached the twilight of their operational lives. While (and this may occasion widespread surprise) the UK has the youngest train fleet in Europe, there are still substantial fleets of 1980 and early 1990 stock in service.

The DfT had claimed that the rolling stock leasing companies (colourfully known as "ROSCOs", and which at the launch of the investigation were all bank subsidiaries) were profiting within an oligopoly - a leasing market dominated by only a few major players - to an annual tune of about £150 million. As a proportion of the rentals were effectively being paid out of the subsidies to the operators under their franchise agreements, the DfT was concerned that taxpayers' money was being wasted. In the case of those franchises which were not subsidised, the allegation was that the ticket-buying public was paying more than was fair.

After exhaustive analysis of every leasing transaction since privatisation, the Competition Commission disagreed, and identified the following as key factors reducing potential competition in the leasing market (a) the DfT's own micro-management of franchises, which often meant that operators could not choose which rolling stock to lease (b) the short terms of franchises being granted by the DfT, which discouraged operators from investing in new rolling stock and (c) the Codes of Practice forced on ROSCOs at the time of privatisation, which prevented them from negotiating deals with lessees individually and without compulsorily offering the same terms to other operators. So an investigation that has cost many millions of pounds of public money in consultants' and lawyers' fees has laid the problematic market conditions at the door of the public sector.

The Provisional Decision on Remedies issued by the Commission on 16 December 2008 came as little surprise, recommending:

1. longer franchise terms (12-15 years);
2. looser franchise specifications; and
3. loosening the ROSCOs' Codes of Practice.

However, these recommendations have been comprehensively ignored, and they will probably remain so unless there is a change in the political environment.

But the investigation did have some substantial and surprising side-effects. It is reported to have been the factor that convinced both RBS and Grupo Santander to sell their rail leasing subsidiaries (Angel Trains and Porterbrook respectively), and HSBC to package its subsidiary HSBC Rail for sale by offshoring to Ireland. The buyers of these businesses are likely to be much more cautious about investing heavily in new rolling stock, and may simply want to maintain the portfolios roughly at current levels. Time will tell.

However, the UK Government is committed to a huge programme of rolling stock procurement, involving some 1,300 vehicles or about £2 billion in cost under current plans, and that is before consideration of the new stock which will be needed for CrossRail. To finance this without the involvement of the ROSCOs will be tough. The DfT has tried to structure new procurement so as to attract banks not currently active in the market, and for whom the ROSCO business model may not be attractive (because ROSCOs are maintenance and engineering businesses as well as leasing institutions). The Inter City Express procurement - whose purpose is to replace the ageing Inter City 125 units, and for which the preferred bidder was announced on 12 February - has thus been structured as a public-private partnership ("PPP") to attract financiers who are more familiar and comfortable with that model of project finance, as opposed to operating leasing.

Given the recent record of PPP in the transport sector (i.e. the debacle with the London Underground PPP and the administration of Metronet) one might be surprised at this choice of procurement route. Considerable sums have already been spent on consultants advising the Department on the best way to structure the procurement, as well as on the complex specification of the trains themselves, but the introduction of new trains is still many years off. Many industry observers have commented that if the DfT had not chosen to target the ROSCOs but had worked with them on this programme, a solution would already be in place.

If you have any comments or need any further details on the matters raised in this article, please contact Edmund Woollam or the Newsletter editors.

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Jersey Shipping Registry – a brief update

At page 12 of the November 2008 edition of this Newsletter we outlined the Jersey Shipping Registry's application for Category 1 status within the Red Ensign Group. This would allow yachts of any size to flag on the Jersey Register. Among the benefits of this are that Jersey uses Sterling, is on GMT, and is adjacent to continental Europe but outside the European VAT regime. Subject to satisfying the other criteria, superyachts flagged on the Jersey Register could therefore claim Temporary Importation Relief (TI) from VAT when sailing in EU waters, hence an alternative to the current popular Cayman ownership and flagging arrangements.

Channel Islands flagged or owned yachts have historically benefited from TI relief, albeit subject to the limit on tonnage. In our November Newsletter we sounded a note of caution as to whether such yachts would continue to benefit from TI "on the water". Put simply, would every EU Port State Authority recognise that Jersey is outside the European VAT regime, and thus accept that a Jersey flagged superyacht could indeed operate in the EU under TI?

Recent interpretations by certain Port State Authorities (on the basis that the Channel Islands are within the EU customs territory) has led to real concerns that a Channel Islands flagged or owned yacht would be found not to satisfy the TI requirements, with the resulting liability to VAT penalties and related inconvenience. This can only heighten concerns that if Jersey obtained Category 1 status, ownership and registration arrangements would become subject to greater scrutiny. Usually, the larger the yacht the more attention it attracts.

The Jersey Shipping Registry is aware of these concerns, and has now provided us with a statement from UK HMRC confirming that, as long as all other criteria are met, HMRC will accept that a Jersey flagged or owned yacht can benefit from TI relief. Once this confirmation has been translated into the relevant languages, notarised and (probably) apostilled, we would hope that it would persuade all EU Port State Authorities that a Jersey (or indeed Guernsey) flagged and/or owned yacht can benefit from TI.

For Jersey to achieve Category 1 status much work is still to be done, and the expected end date is 2013. Once that is achieved, the Jersey Shipping Registry will be able to offer registration for any class or size of vessel, thus enhancing the range of options available for owners seeking the security of Red Ensign registration.

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When an arrest is close to home

In successfully resolving a difficult matter for a major South Coast marina client, we recently obtained guidance on the Court's approach to live-aboards in the context of recovery of unpaid mooring fees by arrest.

A live-aboard had accrued substantial arrears, and as negotiation had failed and other recovery routes - under the mooring contract and the Torts (Interference with Goods) Act 1977 - were not viable, an arrest was sought. Interestingly, the Court observed that it had not dealt with a case of this nature for many years.

The Supreme Court Act 1981 lists the categories of claim for which a vessel can be arrested, and we invoked "any claim in respect of the construction, repair or equipment of any ship or dock charges or dues". So the first question was whether "mooring fees" came within "dock charges or dues". While seizure of assets for unpaid "mooring charges" has previously been disallowed by the Court, there was no authority on this particular point and we managed to persuade the Court to order an arrest of the vessel.

Each case is likely to be fact-specific, and while this is not authority for arrest in all cases of unpaid mooring fees it certainly provides guidance on how the Admiralty Court might approach such matters, particularly relevant in the current economic climate where the arrest of vessels to secure outstanding debts is inevitably becoming more frequent. For example, in considering the Admiralty Marshall's powers to lock or move the yacht under arrest, the Court wished to know the owner's circumstances, such as his approximate age and whether there were any children living on board. There were not, and in all the circumstances the Court was prepared to make and enforce the orders sought. It will therefore be important to ascertain some of the live-aboard's domestic circumstances when considering this particular remedy, and it is not surprising that the Court will have regard to what it might think are deserving and disadvantaged defendants.

While this case had several unusual aspects, the inability of owners to pay mooring fees is an increasingly familiar - and at times distressing - problem. We recommend that mooring terms and conditions are checked carefully to ensure that suitable remedies are available if, regrettably, the need for them to be enforced arises.

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Law and jurisdiction clauses



In a time of increasing disputes arising from shipbuilding contracts, *CMA CGM SA -v- Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791 sends a reminder that jurisdiction and law clauses are ultimately enforceable.

Hyundai entered into four shipbuilding contracts with subsidiaries of ER Schiffahrt GmbH (“ERS”). Each shipbuilding contract provided, in article XIII, that “if any dispute should arise in connection with the interpretation and fulfilment of this contract” it should be referred to London arbitration. The contract also contained a clause providing that neither party could transfer its rights/obligations under the contract to a third party without prior written consent of the other party, such consent not to be unreasonably withheld.

CMA CGM wished to take the benefit of the contracts from ERS; however initially Hyundai refused. In response CMA CGM issued a tort-based claim in the French Court alleging that Hyundai had unreasonably withheld its consent. Whilst those proceedings were ongoing, four novation agreements were concluded, whereby Hyundai consented to ERS transferring its rights to CMA CGM. In each case the novation only took effect after construction work on the vessel had been completed. The novation agreement did not have an express provision as to jurisdiction, or what should happen in the French proceedings.

The French Court gave judgment, holding that Hyundai had unreasonably refused to consent to novation and thereafter awarded CMA CGM substantial damages which Hyundai paid. Hyundai then brought London arbitration proceedings against CMA CGM to recover the sums paid pursuant to the judgment in the French proceedings. Hyundai claimed that CMA CGM was in breach of Article XIII in each of the shipbuilding contracts. The arbitrators found in favour of Hyundai, on the basis that CMA CGM had breached the arbitration clause in the original shipbuilding contracts by failing to discontinue the French proceedings after the novation.

CMA CGM appealed to the High Court on two questions of law. It submitted that (1) the arbitration clause in the novated shipbuilding contracts did not apply to the dispute in the French proceedings, and (2) the arbitrators were bound by the French Court’s decision pursuant to Council Regulation (EC) No 44/2001.

In relation to argument (1) Mr Justice Burton found that the effect of the novation agreement was to substitute CMA CGM in the place of ERS as a party to the shipbuilding contracts. As from the transfer date, CMA CGM undertook as a party to the shipbuilding contracts to submit to arbitration any dispute arising in connection with the interpretation and fulfilment of the contracts. The arbitration clause did not only apply to disputes arising after the transfer date. The result of this

was that once CMA CGM became a party to the shipbuilding contracts it had to arbitrate a dispute that had arisen after the date of the shipbuilding contract, albeit that it did not have that obligation until after the transfer date. Furthermore, Mr Justice Burton found that the novation agreements were not self-standing; they simply “repeopled” the original contracts, leaving their provisions unchanged.

In relation to argument (2) no question of recognising the French judgment arose because there would be no French judgment on the hypothesis that instead of proceeding in France, CMA CGM brought its claim in London arbitration. Had the contract not been breached, then the parties would have both complied with their obligations to have the matter resolved by arbitration, and there would be no French judgment and no question of recognition could arise. Therefore the one thing that the London tribunal could not have done was to recognise a French judgment, since there would be no such judgment to recognise.

This decision therefore emphasises the consequence of failing to comply with jurisdiction and law clauses. It would be advisable to assume that if a contract contains an express clause that it is subject to certain law in a certain jurisdiction, that clause will be held to be valid. Any attempts to resolve disputes in more “favourable” jurisdictions may result in severe costs consequences for the unsuccessful party.

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Stocznia Gdynia SA -v- Gearbulk Holdings Ltd [2009] EWCA Civ 75 CA

At pages 3 and 4 of the July 2008 edition of this Newsletter we reported the first instance judgment in this matter. This was reversed by the Court of Appeal on 13 February this year. A bulletin was issued on 17 February, and we will be reviewing the decision at greater length either by a further bulletin or in our next edition. If in the meantime you need any more details or wish to consider this matter further, please get in touch with Rory Grout, the Newsletter editors or your regular contact at Hill Dickinson.

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The “FRONT COMOR” [2007] UKHL 4 and ECJ Case C-185/07

This article reviews in context the latest of three significant ECJ decisions which progressively limit the scope of the anti-suit injunction. At page 15 of the November 2008 edition of this Newsletter we considered the Advocate General’s opinion dated 4 September, and we maintain our view that the ruling extends to arbitration the risk of tactical devices and pre-emptive proceedings in breach of an agreed dispute resolution mechanism.

While disembarking here in 1066, William of Normandy lay on the beach and ate some of the sand, or else turned to advantage the poor omen of tripping and falling by clasping and displaying a handful. Either way, he cried that he had taken *seisin* of English land, thus cleverly hinting that the forthcoming battle was already half won. This ancient notion of *seisin* is echoed in modern rules which decide which country’s courts must be used to decide a dispute between parties from separate EC countries. First appearing in the Brussels Convention of 1968, they are now set out in EC Regulation 44/2001, and the cases of [Gasser GmbH v MISAT](#) and [Turner -v- Grovit](#) can only have encouraged those wishing to adopt William’s tactics in legal proceedings.

[Gasser](#) decides that where contracting parties have agreed that disputes should be heard by the court of country A but, in breach of that agreement, one of them starts proceedings in the court of country B (thus making that the “court first seised”), the B court must first determine if it has jurisdiction and the A court can do nothing until then. Following [Turner -v- Grovit](#), one cannot seek to rein in the breach by means of an injunction, even if the other party is acting in bad faith. Thus the “court first seised” must decide if it has jurisdiction while the contractually agreed forum sits idle, even when this is due to tactical manoeuvring devoid of merit.

This latest ECJ decision, given on 10 February this year, extends this doctrine to arbitration. Thus if, for example, the parties have agreed to resolve disputes by arbitration in London, but one of them (the likely respondent there) seeks to proceed as claimant in a court elsewhere in the EC – perhaps seeking a declaration of non-liability – no anti-suit injunction can be obtained to stop him. To some this is the latest and perhaps the clearest nod of approval given by the ECJ to those who would seek to manipulate any forbearance by an intending claimant in the agreed forum, by starting court proceedings elsewhere just to see what procedural, tactical or delay advantage might result.

Thus in much litigation and now arbitration, parties and their advisers will want to consider if swift action might be necessary, or whether, perhaps, there might prove to be no way to prevent even a mischievous opponent from taking “*seisin*” elsewhere and – to the mirth of William’s ghost – obtaining what could be a very significant advantage.

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Metvale Ltd and another -v- Monsanto International Sarl and others

This is a case concerning the interpretation of Article 1 of the Convention on Limitation of Liability for Maritime Claims 1976, which determined whether slot charterers could benefit from the limitation of liability.

Facts

In January 2007 the MSC Napoli (“the Vessel”) suffered damage in heavy weather and was beached on the south coast of England. The casualty had resulted in claims against the owners of the Vessel (“the Claimants”) in excess of £100 million. The Claimants therefore constituted a limitation fund (“the fund”) under the Convention in the sum of £14,710,000.

The hearing before Mr Justice Teare concerned a preliminary issue in which the Court was required to determine the following:

- whether slot charterers were shipowners for the purposes of the Convention on Limitation of Liability for Maritime Claims 1976 (“the Convention”) Article 1 and were entitled to limit their liability under the Convention and under the Merchant Shipping Act 1995 (“the Act”) and
- whether the limitation fund constituted was deemed to be constituted by the slot charterers under and for the purpose of the Convention and under the Act.

Held

Mr Justice Teare considered the meaning of the word “shipowner” in the context of Article 1 of the Convention and held that it did apply to slot charterers. The Judge observed that the purpose of the Convention is to encourage the provision of international trade by way of sea carriage. It was clear, following the decision in [CMA CGM SA -v- Classica Shipping](#), that the word “charterer” in Article 1(2) includes a time charterer. Furthermore, the ordinary meaning of the word “charterer” includes any type of charterer whether demise, time or voyage charterer and it should therefore include slot charterer.

It follows, according to Mr Justice Teare, that in accordance with the ordinary meaning of the word “charterer” and in the light of the evident object and purpose of the Convention, a slot charterer is within the definition of shipowner and therefore entitled to limit his liability.

In respect of the second issue, the Judge observed that under Article 11(3) of the Convention a fund constituted by one of the persons mentioned in Article 9 or his insurer shall be deemed constituted by all persons mentioned in Article 9. In the present case the fund was constituted by the Claimants. The Claimants are the owner of the Vessel and therefore are a person mentioned in Article 1(2) and consequently a person mentioned in Article 9.

It follows from this that since the slot charterers are charterers of the Vessel they also are persons mentioned in Article 1(2) and accordingly persons mentioned in Article 9. Therefore the Judge concluded that the fund was deemed to be constituted by slot charterers.

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Farenco Shipping Co Ltd -v- Daebo Shipping Co Ltd (the “Bremen Max”) [2008] EWHC 2755 (Comm)

The “BREMEN MAX” (the “Vessel”) is a bulk carrier which was owned at the material time by Pavey Services Ltd (“Pavey”). The Vessel was chartered on an amended NYPE form to COSCO Bulk Carrier Co Ltd (“Cosbulk”) and sub-chartered in turn under back-to-back charters to Farenco, Daebo and two further parties. (For convenience all parties will be referred to collectively or separately as the “Charterers” or the “Owners”, as the context requires.)

In March 2008 a cargo of sinter feed (“the cargo”) was loaded on board the Vessel at Tubarao for carriage to Bourgas. Ten bills of lading (“the Bills”) were issued by Pavey in respect of the cargo. On the Vessel’s arrival at Bourgas the Bills were not available. The Owners were requested to deliver the cargo without production of the Bills. Clause 68 of the charters provided for the Owners to allow discharge and release of the cargo against a Letter of Indemnity (“LOI”) signed by the Charterers worded in accordance with the Owners’ P&I club recommendation.

A LOI was provided by each of the Charterers to their respective counterparty. Each LOI was in the same form. The LOI provided by Daebo to Farenco stated as follows:

“... we, DAEBO ..., hereby request you to deliver the said cargo to KREMIKOVZI ... at PORT OF BOURGAS ... without production of the original bill of lading.

In consideration of your complying with our above request, we hereby agree as follows:

1. To indemnify you ... and to hold ... you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of delivering the cargo in accordance with our request
3. If, in connection with the delivery of the cargo as aforesaid, the ship, or any other ship or property in the same or associated ownership, management or control, should be arrested or detained or should the arrest or detention thereof be threatened, ... to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property ... and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention ..., whether or not such arrest or detention or threatened arrest or detention ... may be justified.
4. If the place at which we have asked you to make delivery is a bulk liquid or gas terminal or facility, or another ship, lighter or barge, then delivery to such terminal, facility, ship, lighter or barge shall be deemed to be delivery to the party to whom we have requested you to make such delivery. ...”

There was no evidence as to whom the cargo was delivered. Following discharge of the cargo, Stemcor UK Ltd (“Stemcor”) informed Pavey that they were the holders of the Bills and asked Pavey to deliver the cargo. Pavey informed Cosbulk of this and called upon them to honour their obligations under the LOI. Similar messages were passed down the line of charters. The Charterers failed to put up security and Stemcor therefore arrested the Vessel in Australia on 23 August 2008, forcing Pavey to put up security. Procedural remedies were successfully used by Pavey against Cosbulk which led to Farenco putting up security to avoid disruption to its business operations.

The key issues were as follows:

Was the obligation to provide security in clause 3 of the Farenco LOI no longer a current obligation, as the release of the Vessel had been secured?

The Judge found in favour of the Owners. The Judge stated that the intention and commercial purpose of clause 3 of the LOI was that the Owners should not have to suffer the arrest of the Vessel and that any security to prevent an arrest should not be put up by the Owners, but by the Charterers. The action of the Owners in putting up security had the effect of ending the detention of the Vessel and, to that extent, mitigated the loss caused by the Charterers’ breach but the Charterers nevertheless remained in breach of their obligation.

Under such circumstances the Judge held that an order for specific performance, requiring Daebo to replace Farenco’s security, was an appropriate remedy. Whilst the Owners would have an alternative remedy in damages for the cost of putting up security, specific performance would fulfil the commercial purpose and intention of clause 3 thereby putting the Charterers and the Owners in the position in which they would have been had the Charterers complied with their obligation.

Were the undertakings provided in the LOI conditional upon delivery to Kremikovtzi?

The Judge found in favour of the Charterers. The Judge stated that the obligation upon the Owners in clause 68 of the charters “to release the cargo on board” against the LOI obliged them to release, in the sense of deliver, the cargo to another person against the LOI. The person to whom the cargo was to be released/delivered without production of the Bills was to be found in the LOI, because clause 68 did not identify the intended receivers of the cargo. The Judge was unable to accept the Owners’ submission that the obligation of the Owners was to release the cargo to the Charterers so that the Charterers might deliver the cargo, because the delivery and transfer of possession of the cargo is an activity performed by the Owners. This was reflected in the terms of the LOI: the Charterers had requested the Owners to “deliver the said cargo to Kremikovtzi”. In addition, clause 4 of the LOI would be unnecessary if, upon discharge, the cargo was to be released to the Charterers in any event.

Since the undertakings were given in return for the Owners complying with the Charterers’ request that the cargo be delivered to Kremikovtzi without production of the Bills and not to anyone else it followed that if the Owners delivered to anybody else without production of the Bills the Charterers’ undertakings were not engaged.

Guidance on delivery

The Judge stated that shipowners need not enquire into whether the party to whom they are requested to deliver is entitled to possession of the cargo. Shipowners only need to know that the party to whom they deliver the cargo is the party to whom their charterers have requested that delivery be made. If shipowners are in doubt as to that they may ask their charterers to identify the receivers. If shipowners then comply with such representations as their charterers make as to the identity of the receivers the charterers will be estopped from denying that the shipowners delivered the cargo to the right party.

PROFILES

London Employment Team

Handling Court or Tribunal and also much non-contentious work, concerning land-based, maritime or aviation matters, and with clients including many in the financial services, telecommunications, marine and air industries, this team is ideally placed to offer expert support to employers and employees alike. The team has extensive experience of the whole spectrum of issues, including unfair dismissal, redundancy, transfers of undertakings and discrimination, with particular emphasis on the following : general employment law advice to corporate bodies (including substantial corporations) and litigation for them, where necessary; advice on business immigration; trade union and industrial relations advice to large public sector employers; advice to senior executives on their employment contracts and any termination consequences, and advice on team moves.

The team consists of:

Nick Humphreys, a Partner and the head of the team. Nick handles all aspects of employment law, including employment tribunal litigation and the management of individual and collective redundancies and TUPE transfers, and has detailed knowledge and experience of industrial relations law and trade union trade dispute litigation in the High Court. He has lectured at several UK universities and is the author of "Trade Union Law and Collective Employment Rights", a section editor of the Sweet & Maxwell Encyclopaedia of Employment Law and a contributor to "The Law of Termination of Employment" by Upex;

Brett McCulley, an Assistant Solicitor, who before joining Hill Dickinson qualified in Australia in 2001 and practised there for four years with one of Australia's largest firms, advising on unlawful dismissal, breach of contract, redundancy, equal opportunities and discrimination, and also acting in Court of Appeal matters involving spinal, neurological, endocrinological and asbestos-related disease. Now also qualified here, Brett has provided expert legal advice and representation on all aspects of English employment law to senior executives, major listed companies, private companies, NHS trusts and other public organisations, including London's largest single employer.

Laetitia Malan, who as the team's trainee provides core assistance with all ongoing employment law matters, following initial qualification as an industrial engineer in her native South Africa. Following her article in the November 2008 edition, at pages 6 and 7 of this Newsletter Laetitia writes again on the Maritime Labour Convention 2006. Trainee rotation in March takes her to the firm's Personal Injury and Regulatory team, with Emma Groves joining from one of the shipping teams.

Financial Regulatory Team

Regulations affecting all types of business are growing in scope and complexity, and enforcement activity is increasing. Acting within what are often wide investigatory powers, many regulators can search business premises and seize and retain documents and other materials, and what have become colloquially known as dawn raids are now commonplace.

Sudden and unannounced searches like this give rise to complex issues, and many corporate entities have procedures to enable them to respond so as to balance the valid exercise of powers with the preservation of rights and compliance with any relevant duties.

Hill Dickinson has a specialist Financial Regulatory Team whose experienced lawyers can advise on the financial regulations which apply to your industry sector, and their scope. Team members can also attend your business premises at short notice, train you in how to respond to any form of enquiry by a regulator and provide written guidelines on all related matters.

The team consists of:

Richard Green, Partner and Head of Team

Edward de la Billiere, Assistant Solicitor and Head of Financial Investigations and Criminal Fraud

Simon Ellis, Assistant Solicitor

Anna Stephenson, Assistant Solicitor

Michael Kenyon, Consultant

For further details on the Financial Regulatory Team please contact Edward de la Billiere at edward.delabilliere@hilldickinson.com or on 020 7280 9200.

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 over 150 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.

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