

# marine, trade and energy

## Is a carrier liable for its master's negligence?

Tasman Orient Line CV -v- New Zealand China Clays Ltd & Others, Supreme Court of New Zealand [2010] NZSC 37, [2010] 2 Lloyd's Rep 13

Readers of a previous edition of this newsletter may recall the facts of this case, and the decision of the New Zealand Court of Appeal. Briefly, the master of a container vessel took a shortcut inside a small island, and the vessel grounded and was holed. Instead of immediately reporting the damage and calling for assistance, the master first proceeded at full speed to a point on the route which he should have taken, and his other actions made it clear that he was doing this in an attempt to conceal the fact that he had taken the shortcut. The cargo on board was damaged, and would not have been damaged if the master had reported the incident immediately and called for assistance without delay.

The New Zealand Court of Appeal held that the carriers were not protected by the wording of Article IV rule 2(a) of the Hague-Visby Rules "Act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship", saying that the words "navigation or management of the ship" were only speaking about actions done in order to prosecute the vessel's intended voyage or directed towards the safety of the vessel, crew and cargo. The carrier would not be protected in respect of action by the master which was "fundamentally at

odds with the purpose of both the contract of carriage and the legislative regime designed to achieve a sensible compromise between competing interests".

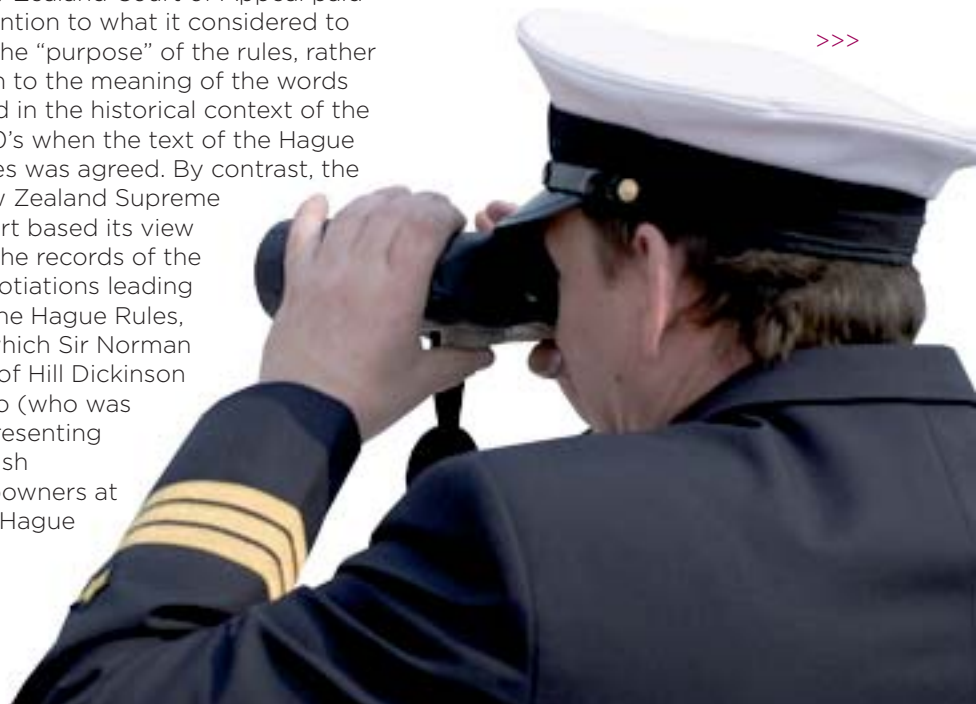
The Supreme Court of New Zealand has now reversed this decision, and held that the carriers were entitled to rely on the exception in the Hague-Visby Rules.

As we mentioned previously, the New Zealand Court of Appeal paid attention to what it considered to be the "purpose" of the rules, rather than to the meaning of the words used in the historical context of the 1920's when the text of the Hague Rules was agreed. By contrast, the New Zealand Supreme Court based its view on the records of the negotiations leading to the Hague Rules, in which Sir Norman Hill of Hill Dickinson & Co (who was representing British shipowners at the Hague

Conference) spoke of the text which he proposed for Article IV rule 2(a) (and which the Conference accepted) as "our old words" - "the words which from time immemorial have certainly appeared in all British bills of lading".

On this basis, the Supreme Court held that the carriers were protected in respect of every sort of decision by the master of the ship in the course of the voyage which was a decision in relation to the ship (as distinct from

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Morphed in the medium...

Page 6



CIP contracts of sale and freight forwarders - whose liability is it anyway?

Page 10



Damages - fixed or limited?

Page 18

## Contents

Is a carrier liable for its master's negligence?	1
Stop press...	2
<u>Kookmin Bank -v- Rainy Sky</u>	4
<u>Fortis Bank and Stemcor UK Limited -v- Indian Overseas Bank</u>	5
Morphed in the medium, the needle in the haystack and the perils of e-disclosure	6
Enforcement of FOSFA arbitration awards – a cautionary tale	8
CIP contracts of sale and freight forwarders – whose liability is it anyway?	10
Remoteness of damages – a return to <u>Hadley -v- Baxendale?</u>	12
Piracy and off-hire in time charters	13
SHIPMAN 2009 – an analysis	14
Awards versus judgments – a question of time bar	16
Damages – fixed or limited?	18
Team profile: casualty response team	20
Stop press...	22
A tribute to Graham Jackson	23
Events	24

## 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 expands Korean practice with arrival of Kwang-Kyu Park

Hill Dickinson is delighted to announce that on 26 July 2010 Kwang-Kyu Park, a Korean national, joined the firm's marine, trade and energy practice group, based in its London office. He has been specialising in shipbuilding matters throughout his career although he also

has general experience of shipping, trade and finance. He will be an important part of the firm's efforts to expand its shipbuilding legal practice and with Korean shipyards in particular, building upon the reputation already established within this region.

Mr Park qualified at Sinclair, Roche & Temperley where he was an associate for more than two years, prior to building his career at Stephenson Harwood for a number of years before establishing his own practice at the London office of DeRook, a substantial Korean firm.

Maria Pittordis, head of Hill Dickinson's marine, trade and energy practice, commented: "Korea is one of the world's largest marine markets, both in shipping and shipbuilding. The fact that we have attracted someone of Kwang-Kyu's reputation to the firm and now have two Korean nationals onboard demonstrates the level of our seriousness and commitment to the Korean market."

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## International Salvage Union announces appointment of Rob Wallis as new legal adviser

The International Salvage Union (ISU) has announced that Hill Dickinson shipping partner Rob Wallis will succeed Mr Archie Bishop as its new legal adviser. The appointment is effective

from the conclusion of the ISU Annual Meeting 21-23 September 2010.

President of the ISU, Mr Todd Busch said of the appointment: "...I am delighted to welcome Rob Wallis. He has great experience of salvage law and is a well-known and much respected lawyer in the shipping markets. We are honoured that he is joining us and that he will bring his 35 years of maritime law experience and expertise to bear on issues of common interest to marine salvors."

Commenting on his appointment Rob Wallis said: "It is a privilege to be the ISU's new legal adviser. Archie has been a wonderful servant to the salvage industry and I am looking forward to taking up the reins and to serving the whole of the industry through the ISU."

>>> continued from page 1

the care of the cargo), provided that it did not amount to barratry.

It was accepted that at the Hague Conference it was understood and agreed that acts by the master or crew would not fall under Article IV rule 2(a) if they were barratry, so that the carriers would be liable to cargo interests in case of barratry.

The Supreme Court went on to hold that for the purposes of the Hague-Visby Rules, the definition of barratry should require that the master or crew acted with the intention of causing damage to the ship or cargo, or recklessly in the sense of being aware that such damage might result and not caring whether or not the damage did result. On this basis, the Supreme Court upheld the carriers' appeal, because the cargo claimants had not pleaded or proved any allegation that the master of "TASMAN PIONEER" knew that damage would probably result or was aware that it might result and did not care.

The English Courts often pay regard to decisions of the New Zealand Courts. However, it is likely that in circumstances such as those in this case, the English Courts would hold that the carriers were not protected by the Hague-Visby Rules, for three reasons:

1. The conduct of the master of "TASMAN PIONEER" might be considered to amount to a "deviation" (indeed, even taking the short cut may have been a "deviation"). The judgments of the New Zealand courts in this case do not seem to consider the line of authority in terms of "deviation" at all.

2. In *The Hill Harmony* [2001] 1 Lloyd's Rep. 147, the English House of Lords held, in effect, that the words in Article IV rule 2(a) "Act, neglect or default... in the navigation or in the management of the ship" would only apply in relation to deliberate decisions (as distinct from negligence) if they were within the range of decisions that a reasonable master might consider necessary in terms of navigation and seamanship. Thus, the exception in the Hague-Visby Rules would not protect a carrier in respect of a deliberate

decision by the master which was outside that range. The decision taken by the master of "TASMAN PIONEER" after the grounding certainly appears to have been well outside that range. (The judgment of the New Zealand Supreme Court refers in passing to *The Hill Harmony*, but does not consider any part of the reasoning which led the House of Lords to its decision.)

3. The way in which the New Zealand Supreme Court defines "barratry" is open to question. The Supreme Court looks for a definition elsewhere in the Hague-Visby Rules, in the wording at Article IV rule 5(e), which restricts the carrier's right to rely on "package limitation", and the wording in Article IV bis rule 4 which restricts the right of the carrier's personnel to rely on the defences and "package limitation" in the rules. However, finding a definition in this way is completely contrary to the overall approach which the Supreme Court adopted, which should have led them to look for the meaning of the word barratry in the historical context of the 1920s, when Article IV rule 2(a) was adopted. In fact, the word had (and still has) a well-established meaning.

The word barratry is more often used in the context of marine insurance, where loss by barratry is covered by standard policies of hull and cargo insurance. However, under English law it is an established principle that where the same words are used in bills of lading (or in the Hague-Visby Rules) and in policies of marine insurance, the words have the same meanings. (The words may be applied differently in the two contexts, because exception clauses in bills of lading may be read in accordance with a rule that the carriers may not be protected if a loss results in part from their negligence or the unseaworthiness of their vessel, while in policies of marine insurance it is a requirement that a peril insured against should have "proximately" caused the loss. However, despite these differences in application, the meaning of phrases such as "perils of the seas" is the same in bills of lading and in insurance policies.)

Referring to Arnould on Marine

Insurance (17th edition), as long ago as 1806 Lord Ellenborough pronounced that:

"Any wilful act of known criminality or gross malversation, though not intended for the owners' prejudice, indeed even though intended for their benefit, would yet, if in fact it operated to their prejudice, be barratry in the master." (Arnould 23-34)

Arnould expands on this definition, saying:

"Where the act of alleged barratry is in itself manifestly unlawful, as in the case of illegal trading with the enemy... no proof need be given, in order to show the act barratrous, of the master's having acted with a fraudulent intent to injure his owners;

...

On the other hand, where the act itself, as in cases of deviation, is not, on the face of it, criminal or fraudulent, proof must be given of a fraudulent or criminal intent on the part of the master, either to benefit himself or to injure his owners, before such act can be adjudged barratrous." (23-35)

The actions of the master of "TASMAN PIONEER" following the grounding would seem to have been "manifestly unlawful" (or "gross malversation", whatever exactly that may be). Alternatively, if they were not "on the face of it criminal or fraudulent", it is clear that the master's intention was to benefit himself. The situation is parallel to the case where the master or crew of the vessel engage in a little smuggling on their own account. They may well not intend to injure the owners' interest and they may well consider that there is no serious danger of their smuggling being detected. However, if the smuggling is detected and the result is the loss of the vessel, then that will be a loss by barratry.

Thus, an English court might well hold that the damage to the cargo on "TASMAN PIONEER" caused by the master's actions following the grounding was damage caused by barratry, in respect of which the carriers would be liable.

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## Kookmin Bank -v- Rainy Sky [2010] EWCA Civ 582 demonstrates that refund guarantees to secure a buyer's interest may not be as good as first appears.

Kookmin Bank issued six on demand advance payment bonds on similar terms to secure certain obligations assumed by a Korean shipyard (the builder) under six materially identical shipbuilding contracts made with the buyers.

Under each shipbuilding contract, the buyers were entitled to require the builder to refund the full amount of all advance payments made in the event of the builder's insolvency, or similar. Under paragraph 2 of the advance payment bond, the buyers were entitled, on certain specified grounds, to repayment of any pre-delivery instalments. Pursuant to paragraph 3 of the bond, the refund guarantor guaranteed "all such sums due to you under the contract".

The insolvency of the builder did not give the buyers a right to terminate. However, it did give a right to demand a refund of pre-delivery instalments. The dispute therefore stemmed from the distinction between a refund obligation following rejection/termination and a refund obligation following insolvency.

Following payment of the first pre-delivery instalments, the builder entered into a debt workout procedure which the buyers treated as an insolvency event. The buyers therefore demanded repayment of the instalments. The builder did not pay and the refund guarantor refused to satisfy the buyers' subsequent demands under the bonds.

The issue before the court was whether the words "all such sums due to you under the contract" in paragraph 3 of the bond referred to any refunds due under

the shipbuilding contracts, including the insolvency of the builder (as contended by the buyers), or whether the bond only covered the circumstances set out in paragraph 2 (as contended by the bank), that is:

"...you are entitled, upon your rejection of the Vessel in accordance with the terms of the Contract, your termination, cancellation or rescission of the Contract or upon a Total Loss of the Vessel, to repayment of the pre-delivery instalments..."

The above quoted circumstances did not include the insolvency of the builder.

At first instance, the Commercial Court found in favour of the buyers. Simon J held that the bank's argument that the bond would only respond to the refund obligations following termination or rejection as set out in paragraph 2 of the bond would produce a "surprising and uncommercial result". This would mean that the buyers would be without security in the event of the builder's insolvency, such event being the most likely to require security.

The bank sought leave to appeal, which was granted. The Court of Appeal held by majority decision that the words "all such sums" used in paragraph 3 of the bond referred to the sums set out in paragraph 2. The Court of Appeal took the view that this must be the case, as otherwise paragraph 2 would serve no purpose. In reaching its decision, the Court of Appeal also looked at the shipbuilding contracts, despite them being separate contracts between the

buyers and the builder, not the buyers and the bank. The court's interpretation of the shipbuilding contracts was such that they did not impose an obligation on the builder to obtain a bank guarantee for the repayment of the pre-delivery instalments in the event of the builder's insolvency.

In contrast to the first instance decision, the Court of Appeal gave a "natural and ordinary" interpretation to the wording of the bonds. The Court of Appeal recognised that the first instance judge was correct to state that the provision of security to protect the buyers from the insolvency of the builder was desirable. However, they further stated that this was not sufficient to depart from the "natural and ordinary" interpretation to which the court was bound to give effect.

Furthermore, the court found that there may be several reasons why the builder was unable or unwilling to provide security in the event of insolvency and why the buyers were prepared to take that risk. The bank's contention could therefore not be considered to produce an "absurd or irrational" result. So as not to impose a meaning of the bond's terms which was based on the judges' speculation of the parties' intentions, the court was obliged to give effect to the "natural" meaning of the bond's terms.

The case does not create new law. However, it does serve as a timely reminder that the court will not necessarily impose a commercial interpretation.

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## Kate Docton discusses the recent case of Fortis Bank and Stemcor UK Limited -v- Indian Overseas Bank [2010] EWHC 84

The court was required to determine, as a preliminary issue, whether Indian Overseas Bank (IOB) was precluded from relying on a valid documentary discrepancy in relation to drawings made under five letters of credit (L/Cs). The main issue for the court to determine was whether Article 16 of the Uniform Customs and Practice 600 (UCP 600) contains an implied obligation on a bank to return documents promptly to the presenter following the decision to reject the documents for non compliance with the credit.

Article 16 of the UCP 600 deals with discrepant documents and provides:

"a) When a nominating bank acting on its nomination, a confirming bank, if any, or the issuing bank determines that a presentation does not comply, it may refuse to honour or negotiate.

b) When an issuing bank determines that a presentation does not comply, it may in its sole judgement approach the applicant for a waiver of the discrepancies. This does not, however, extend to the period mentioned in sub-article 14(b).

c) When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter.

The notice must state:

- i. that the bank is refusing to honour or negotiate; and
- ii. each discrepancy in respect of which the bank refused to honour or negotiate; and
- iii. (a) that the bank is holding the documents pending further instructions from the presenter; or  
(b) that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver; or  
(c) that the bank is returning the documents; or  
(d) that the bank is acting in accordance with instructions previously received from the presenter.

d) The notice required in sub-article 16(c) must be given by telecommunication or, if that is not possible, by other expeditious means by no later than the close of the fifth banking day following the day of presentation.

e) A nominated bank acting on its nomination, a confirming bank, if any, or

the issuing bank may, after providing notice required by sub-article 16(c)(iii)(a) or (b), return the documents at any time.

f) If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation..."

Stemcor is an international steel distributor and had five sales contracts under which they sold various quantities of containerised scrap metal. IOB issued five L/Cs in favour of Stemcor in respect of the contracts and these L/Cs were expressly subject to the UCP 600. The L/Cs were duly made available by negotiation with Fortis' London branch each naming Stemcor as beneficiary. Stemcor made a number of drawings under each of the L/Cs. In relation to drawings under four of the L/Cs, IOB rejected a number of documents as discrepant and sent return notices pursuant to Article 16(c)(iii)(c) UCP 600. In respect of the earlier rejections, Fortis responded urging IOB not to return the documents, but to accept and pay. IOB later rejected the presentations made in respect of the fifth L/C which had been under consideration and served a notice indicating that it was holding them pending further instructions.

Approximately two months later Fortis requested the urgent return of the documents. They did not receive the documents immediately and informed IOB that, in accordance with Article 16(f), their failure to return the documents was an affirmation of the presentations as compliant.

IOB's notices stated that it was exercising the option in Article 16(c)(iii)(c) and to return the documents. In relation to the drawings under the fifth L/C, IOB's notices stated that it exercised its option under Article 16(c)(iii)(a) to withhold the documents pending further instructions.

Fortis argued that in accordance with the provisions of Article 16, a refusal notice must indicate what documentary disposal steps are being taken. Since a refusing issuing bank must make such a statement then it must actually take the steps which it says are being taken. If an issuing bank does not act in accordance with its document disposal statement in its refusal notice then it does not act in accordance with the provisions of Article 16 and must therefore be precluded from relying on its

refusal. Fortis also claimed that, whilst not explicitly set out in UCP 600, Article 16 requires documents to be returned to the presenter reasonably quickly after a bank has issued a return notice. Finally, Fortis contended that IOB's silence and inaction in response to Fortis' request for the return of the documents involved was an election not to refuse to honour or negotiate the documents.

IOB argued that once an issuing bank has sent a formally adequate refusal notice, it is contractually permissible for it to do nothing whatsoever with the documents or act inconsistently with what is said in the refusal notice. IOB argued that, unlike the wording of UCP 500, UCP 600 does not expressly require a bank to act in accordance with a return or hold notice. There is no express term in Article 16 requiring an issuing bank so to do. Article 16(c) states that the bank must give notice and "the notice must state (i) that the bank is refusing to honour or negotiate; and (ii) each discrepancy... and (iii) (a) that the bank is returning the documents." IOB stressed that the claimants' case necessarily involved the implication of terms and to imply such terms as suggested by the claimants would not be a proper interpretation of Article 16.

The court held that a purposive approach to construction was appropriate and the court should generally seek to construe the UCP as contractually incorporated so as to reflect "the best practice and reasonable expectations of experienced market practitioners". The proper construction of Article 16 did impose an obligation on the issuing bank to act in accordance with the disposal statement it had made in its Article 16(c)(iii) notice. Alternatively, such an obligation should be implied. Where the notice stated that the documents were being returned or held pending or in accordance with instructions, the bank was obliged to act in accordance with such a statement with reasonable promptness. By its delay in returning the documents and its later failure to comply with Fortis' instruction to return the documents with reasonable promptness, IOB had failed to act in accordance with Article 16 and was precluded from relying upon the relevant discrepancy.

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# Morphed in the medium, the needle in the haystack and the perils of e-disclosure



## Morphed in the medium

In the past, the physical difficulty of writing and later typing regulated in some measure what was created and what was sent. Letters were shorter and crucially there was more time to think. Post and contracts could be signed, say, only by managers or directors and communications would be filtered through the sensibilities of secretaries.

The advent of the word processor, but most particularly of email, then text messages, messaging systems and, in some businesses, social and business networking sites, has changed the landscape beyond recognition. All grades of personnel can now easily create messages, by email and possibly by text and instant message, and send them out. Supervision may be difficult or impossible, minimal or non-existent. And remote working makes the risk more acute, as the PVM Oil Futures allegedly drunken oil trader case (BBC News online 29 June 2010) so eloquently demonstrates.

Further, the ease of creating and sending has been coupled with a significant change in business etiquette; the language has morphed in the medium. Many who generate messages and records cannot type; so text is foreshortened. The customary salutations and courtesies of correspondence have been eroded. It is increasingly rare in email, and certainly in text and instant messaging systems, to express thanks or to ask permission. The choice of vocabulary has changed, often shorter, blunter. And moreover the boundaries of what is acceptable (or what people think is acceptable) in the work environment have been eroded. The informality of the medium has encouraged informality and indiscretion in content. Thus: "It is well known that people say things in emails which they would not dream of putting into a letter or a minute or a formal note..." ([Digicel \(St Lucia\) Ltd -v- Cable & Wireless PLC](#) [2008] EWHC 2522). And with the bombardment of incoming messages there is a parallel, irresistible desire to reply immediately, with the lurking danger of the 'reply to all' button.

Just because the message has been delivered quickly there is an unreasonable expectation that a fast response must be provided; in the mind of the sender and the receiver. But act in haste, repent at leisure. Emails, for example, can be distributed by the creator or recipient, intentionally or unintentionally, to a vast audience at the touch of a button, with devastating consequences, including, the loss of legal advice privilege or the onward publication of a libel.

Other hazards are obvious; the risk of misunderstanding and easy offence which may disrupt otherwise smooth business relationships and the creation of records which are inappropriate for the business environment and potentially compromising to the defence or prosecution of claims.

These new electronic systems have, therefore, created new risks for business and for individuals. There is a pressing need to regulate how individuals within business express themselves, in the documents they create, in the messages they send and in the records they keep as

part of routine daily work. And the more business relies on remote communication in a text format, on computer and other electronic communications systems generally, rather than discussion face to face or in formal correspondence, the more pressing the problem.

## The needle in the haystack and the perils of e-disclosure

Litigation and arbitration fall into certain basic phases: pleadings, where the parties make their allegations and set out their case; disclosure, where each side produces to the other for review all documents relevant to the matters in issue (with the important exception of privileged documents like legal advice); exchange of witness statements; exchange of experts reports; and trial/final hearing.

Disclosure is regulated by Part 31 of the Civil Procedure Rules. Particular rules are under development for e-disclosure. This is an evolving field. A review of Part 31 is beyond the scope of this note, but the scale of the task it imposes can present a significant challenge in the management of any case.

Disclosure is a key phase; a first glance at part of the evidence to assess the allegations in the pleadings. Once it was a relatively straightforward matter confined to hard copy documents - letters, memos, reports, accounts, slips, wordings, policies and the like. These new electronic systems have, however, irrevocably changed the conduct of legal process, whether arbitration or litigation. Disclosure means that parties will have at some stage to produce electronic records for review by their opponents. The process may be costly because there may be huge quantities of data. And there is the increased risk that such 'documents' may be damaging to the prospects of defending or prosecuting claims; or at the very least embarrassing and damaging



to business relationships. Electronic disclosure is now a matter of routine, but whether it is done well is quite another matter.

There are two particular problems we touch on here. First that the necessary disclosure may not be found and produced for inspection and secondly, that it will.

### It will not be found

A whole industry of experts has grown to manage the efficient gathering, collating and analysing of such electronic data, with ever more sophisticated software search systems. There are hazards here for the unwary. In Earles [2009] EWHC 2500 the judge found that neither party had given proper disclosure and consequently neither had taken steps to preserve potentially relevant phone or email records. The court found that the conduct of e-disclosure by the defendant bank had fallen below expected standards and took this into account when allocating costs; a serious consequence.

The trial judge, commenting on the Earles case in a seminar speech earlier this year (March 2010) observed that it:

".. exposes serious flaws in the understanding and practices... even in blue chip firms and companies, of what is required in electronic disclosure and the lack of data control, retention and readiness strategies in even the largest most sophisticated organisations where electronic records are a modern way of business life".

### It will be found

Conversely, those responsible for data creation and management should assume that if an 'unfortunate' document or message has been created it will, like the needle in the haystack, be found.

All of these new systems create 'documents' and store them on PCs, central servers, back up servers Blackberrys and mobile/cell phones. An indelible digital footprint is created; it does not disappear but lies waiting. What may then come as an uncomfortable surprise to potential litigants (and their employees) is the range and depth of the probing that e-disclosure may entail. It can require the production of all relevant records from central servers, personal computers, laptops, back up tapes, mobile phones, notebooks and the ever growing list of

hand held devices. This can include mail, calendar, spreadsheet and document files. All the so-called meta-data may also be recovered (original author, creation date, hidden notes, amendments, identity of blind copy parties). And deletion may not be a wise way to attempt to remove inconvenient material; even after deletion it may be recovered from hard disks (as demonstrated most recently by the Chelsea barracks litigation, BBC News online 25 June 2010).

And with the practice of copying messages and reports ever more widely to large numbers of recipients the likelihood of being pricked by the needle in the haystack is that much greater.

## Conclusions

The management of any form of written communication or record keeping is a key element of risk management, as is remote access to business systems. It is likewise a key aspect of the management of cost in actual or potential litigation. And there may be insurance coverage issues.


E-protocols - what you could or should send and receive, what you could or should create - are obviously essential, but if these are primarily a device to regulate behaviour after the event (work place discipline) they have largely missed the point. Giving lengthy protocols to employees, managers and directors can often be a complete waste of time. They may never be read (even if they are "signed as read and understood").

The hazards of e-commerce need to be explained in person, with examples of the alarming pitfalls, so that the problem is genuinely understood such that a moment's inadvertence should not lead to a lifetime of regret (we are running talks on the subject).

Businesses need to give careful thought to what is required in electronic disclosure and to 'data control, retention and readiness strategies'. It may be too late if such thought is only applied after a dispute has arisen or proceedings have been commenced.

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Note: this is an updated and amended version of an article first published by the Chartered Insurance Institute, the original of which can be found at <http://www.cii.co.uk/knowledge/londonmarket/>



# Enforcement of FOSFA arbitration awards – a cautionary tale

The case of Grains & Fourrages -v- Papas Olio JSC, (to whom we shall refer as “G&F” and “Papas” respectively) has been widely reported in the legal press recently.

The dispute between the parties arose out of a contract for the sale by Papas to G&F of a quantity of Bulgarian sunflower seeds for delivery in November and December 2006 and was the subject of a FOSFA arbitration award. Its importance to traders worldwide is principally due to the main issue which was whether or not a contract had been validly made, since there was no paper contract signed by both parties. Given the amount of trade that is done without the apparent need for signed contracts, a decision on this point is surely of interest to all traders.

The problem is, whatever the findings of the FOSFA arbitrators, whether or not the award is enforceable depends upon who you are trading with and where they are domiciled or carry on business.

## The background to the case

In this case, a contract was agreed both orally and in email exchanges between brokers for the two parties on 8 November 2006. In fact, G&F and Papas had previously contracted with each other using the same brokers. In this instance, a contract confirmation on similar terms to those previously agreed (and containing a

FOSFA arbitration clause), was sent by G&F’s brokers to Papas’s brokers on 9 November for signature and return by Papas. Papas did not sign and return the confirmation but nor did they deny the contract. On 16 November G&F’s broker chased Papas’s broker for an update as to their loading intentions for the seeds and, having received no reply, chased again on 21, 24 and 27 November. Papas themselves finally responded on 1 December to say that partly due to “unusually sharp market fluctuation” they considered that negotiations were continuing and that no contract had been finalised. The fluctuation referred to was the price of the sunflower seeds, which had risen sharply throughout November.

## The arbitration award

As it was clear that Papas were not going to perform the contract, G&F held them in repudiatory breach of contract and gave notice of arbitration. At first, Papas insisted that they would “fight their corner” but they took no part in the arbitration proceedings. They did, however, receive communications from FOSFA and G&F’s London lawyers

throughout. In September 2007, the FOSFA arbitrators issued their award finding that a valid contract had been made by the parties through their respective brokers and that the contract had been repudiated by the non-performance of Papas.

At that point, Papas tried to bring an appeal against the award but they did so out of time. Papas also suggested for the first time in November 2007, that the broker acting on their behalf did not have their authority to enter into the contract.

At common law, if a broker has represented that he is acting for a party, and has acted for them in the past, the presumption is one of valid representation. The burden of proof is therefore upon the party he allegedly represents to prove that he does not have authority, rather than the other way around.

When FOSFA declined to permit the attempted appeal to proceed, Papas brought an arbitration claim in the High Court to try to force FOSFA to convene a Board of Appeal to re-consider the case. FOSFA took no part in those proceedings and the claim was defended by G&F. The

High Court dismissed the claim, finding that the request for appeal was indeed made out of time. Papas then appealed to the Court of Appeal, where the appeal was also dismissed. The FOSFA award has therefore been upheld in the English Courts.

## Enforcement of the award

That, however, is only one half of the story. G&F have sought to enforce the award in Bulgaria, under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The convention is supposed to enable the courts of contracting states to recognise and enforce each other's arbitration awards and does not permit the foreign court to reconsider the substance of the award. The legal principle of *res judicata* (already judged) applies. A decision on the merits of the dispute has been made and that decision is not to be undone by an enforcing court unless there are very good reasons, such as evidence of fraud. There was no such evidence in this case.

The Court of First Instance in Sofia refused to recognise the FOSFA award by giving Article II(2) of the convention a very narrow interpretation. That article requires contracting states to recognise an arbitration agreement in writing that is "an arbitration clause in a contract or a separate arbitration agreement contained in an exchange of letters and telegrams". The Bulgarian court relied on this article to say it did not have to enforce the award because (a) it did not accept that there was a valid contract containing an arbitration clause because the contract confirmation had not been signed by Papas and (b) that there was no evidence that the broker acting on behalf of Papas had valid authorisation to conclude the contract.

G&F appealed the decision using the following arguments:

- The arbitrators had decided that there was a valid contract.
- The parties had contracted previously on the same standard form (which terms included the FOSFA arbitration clause).
- The same brokers had represented the parties previously.
- International commercial practice recognises the existence of valid contracts concluded orally and by

exchanges of correspondence.

- Article II of the New York Convention accepts that an arbitration clause can be valid even if agreed in an exchange of correspondence.
- The Arbitration Act 1996 says that "the reference in an agreement to a written form of arbitration clause ... constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement."

Despite all these points, and supportive caselaw put forward by the Bulgarian lawyers representing G&F, the Court of Appeal in Sofia followed the lower court's decision and refused to enforce the award for precisely the same reasons as the lower court.

These decisions completely undermine the award itself which had already determined that the contract containing a FOSFA arbitration clause was validly made, despite the lack of signature. Further, Papas had not proved that the broker did not have authority.

It is somewhat ironic that Papas brought an arbitration claim in England in respect of the same contract (and therefore implicitly acknowledged the validity of the arbitration clause) but the Bulgarian courts chose to ignore this.

There is one further appeal possible in Bulgaria before taking the case to the European Courts and that is to the Supreme Cassation Court. However, that court decides whether a case merits an appeal or not and the indications are that it would refuse to allow a further appeal. In the light of the decisions of the lower courts, even the Bulgarian lawyers could only say:

"As you are probably aware there is much criticism of our court system at the moment on the part of the European Union, one of the reasons being that the judges rule too formally on cases that are not usual for their practice so far. Under the circumstances we are very skeptical about an eventual further appeal."

G&F are therefore left with an award they cannot enforce in Bulgaria, despite that award being upheld by the Court of Appeal in England. The 'reasons' of the Bulgarian courts for not enforcing the award strike at the heart of commodities trading in Europe – and indeed elsewhere – where it is common for negotiations

to be held via brokers and for no paper contract to ever be signed.

It may sound far-fetched but it seems that in the light of these decisions, if you are going to trade with a Bulgarian company, you would do well to take a 'belt and braces' approach and first ensure that you have written confirmation that the broker you are dealing with is authorised to enter into contracts on behalf of the party he (allegedly) represents, and that you must also ensure the contract is signed.

This may have the additional benefit of ensuring that the contract is properly performed. If, however, the contract is repudiated then the chances of enforcing an arbitration award may be considerably better than they would otherwise have been. Even then, it is feared that enforcement in Bulgaria will not be straightforward, notwithstanding its accession to the EU and adoption of the New York Convention.

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# CIP contracts of sale and freight forwarders – whose liability is it anyway?

In CIP sales, sellers often engage expert freight forwarders to procure the contracts of carriage and insurance which this Incoterm requires the seller to obtain for the buyer. Caroline Bridge reviews the Court of Appeal decision of [Geofizika dd \(respondent\) -v- MMB International Ltd and Greenshields Cowie & Co Ltd \(appellants\) \[2010\] EWCA Civ 459](#), in which Hill Dickinson acted for the successful appellant MMB International Ltd (the seller).

## Background

In October 2006, Geofizika dd (the buyer) purchased three ambulances from the seller on CIP Tripoli terms. The seller engaged the expert services of Greenshields Cowie & Co Ltd (the freight forwarder) to arrange the carriage and insurance. It was accepted by all the parties that the ambulances, which were brand new and uncontainerised, would

need to be shipped below deck. The freight forwarder made arrangements with a shipping line (the carrier) that they had not used before, but who advertised as operating a RoRo service out of Libya.

The carrier issued a booking note to the freight forwarder which stated “ALL VEHICLES WILL BE SHIPPED WITH “ON DECK” OPTION this will be remarked on your original bills of lading”. The reverse of the bill of lading contained a liberty clause which stated “Goods, whether or not packed in containers, may be carried on deck or under deck without notice to the merchant...”

The freight forwarder procured cover on an all risks/Institute Cargo Clauses (ICC) (A) basis, and gave a warranty to insurers that the ambulances would be shipped below deck.

Unfortunately, the ambulances were carried on deck, uncontainerised and unprotected, on the general cargo vessel MV Green Island, and two of the ambulances were washed overboard. Insurers refused to pay the claim. The buyer obtained compensation from the carrier, and pursued the seller for the balance of the value of the vehicles and for substantial hire charges for replacement ambulances. The seller, in turn, sought an indemnity from its freight forwarder, who denied liability, inter alia on the bases that:

- there was an antecedent agreement with the carrier that the ambulances would not be carried on deck, unless the face of the bill of lading was so claused; and
- the level of cover required in a CIP sale is minimum cover/ICC(C), which does not cover washing overboard.

## High Court decision

HH Judge Mackie QC first heard the case in 2009 in the London Mercantile Court. He found there was not enough evidence to show that the freight forwarder had unequivocally instructed the carrier to carry the ambulances below deck, or that they had carried out sufficient checks to ensure that the vehicles would be so carried. This not only placed the freight forwarder, and thus the seller, in breach of its duties in terms of procuring the contract of carriage; it also rendered both parties liable as the warranty that the ambulances would be shipped below deck was void. It was irrelevant that the seller/freight forwarder were only obliged to procure cover on ICC(C) terms, as this was not what had been done.

The seller was thus liable to the buyer (albeit the quantum of the buyer’s claim was reduced significantly) but was entitled to a full indemnity from its freight forwarder.



The freight forwarder appealed.

### Court of Appeal – contract of carriage

On appeal, the freight forwarder maintained that the booking confirmation amounted to an antecedent agreement that goods would only be carried on deck if the face of the bill of lading was claused accordingly. This argument had been rejected at first instance. However, the Court of Appeal held that it is longstanding practice that if goods are shipped on deck, a statement to that effect will ordinarily be found on the face of the bill of lading. On that basis, even though the booking note was not clearly worded, anyone in the trade would have understood it to mean that the face of the bill of lading would be claused if the goods were to be carried on deck. Since it was not, it followed that it was the carrier, and not the freight forwarder/seller, who had been in breach.

### Court of Appeal – contract of insurance

The Court of Appeal agreed with HH Judge Mackie QC that the freight forwarder had been negligent in giving a warranty that the ambulances had been shipped below deck without checking that the facts it was warranting were in

fact true. Dealing as it was with a carrier whom it had not used before, the freight forwarder should have taken due care to check that the ambulances were indeed carried below deck. It did not, and was therefore in breach of its duties to the seller, and placed the seller in breach of its obligations to the buyer.

However – and crucially – the Court of Appeal found that this negligence could not sound in damages, as the obligation on the CIP seller was only to provide cover on ICC(C) terms, which did not cover washing overboard in any event. It followed that the freight forwarder's negligent warranty was not causative of the buyer's loss. The Court of Appeal did not accept the buyer's contention that there was an obligation on the seller to procure insurance that matched the carriage actually performed, especially as the seller/freight forwarder had not known that the ambulances had not been shipped under deck.

### Conclusion

Whilst all three judges unanimously found the freight forwarder to have been negligent, the net effect of the decision was that the freight forwarder (and thus the seller) escaped liability in circumstances where the freight forwarder's negligence was not causative of the buyer's loss. The judgment

acknowledged the oddness of the expert freight forwarder being allowed to escape the consequences of their negligence. Indeed, strikingly, all three judges expressed their regret at the decision reached. As the seller argued to the Court of Appeal, the whole sorry saga could have been avoided if the freight forwarder had exercised more care.

This case highlights an unusual predicament for CIP buyers and sellers. The buyer was left with an uninsured loss with, it seems, no cause of action, either directly or indirectly, against the responsible freight forwarder. The innocent CIP seller, entirely reliant on its freight forwarder, has found itself caught up in a long and costly dispute despite having no positive claim of its own. Moreover, the negligent freight forwarder, whilst successful on appeal, was hardly exonerated – even though it was ultimately able to escape liability in damages, it had to go to the Court of Appeal to get this finding.

Whilst permission to appeal to the Supreme Court has been refused by the Court of Appeal, it remains to be seen whether the Supreme Court will entertain a further appeal from the buyer.

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# Remoteness of damages - a return to Hadley -v- Baxendale?

Sylvia Shipping Co Ltd -v- Progress Bulk Carriers Ltd (The Sylvia) [2010] EWHC 542 (Comm)

## Emma Groves discusses this recent Commercial Court decision

In the recent case of Sylvia Shipping Co Ltd -v- Progress Bulk Carriers Ltd (The Sylvia) [2010] EWHC 542 (Comm) the Commercial Court had to revisit the heavily debated issue of remoteness of damages in contracts. This is an area of law that has caused much confusion in the past, most notably in the House of Lords case of Transfield Shipping Inc -v- Mercator Shipping Inc (The Achilleas) [2008] UKHL 48. The difficulties which their Lordships' found in reaching a conclusion and the dissimilarities in the reasons behind that conclusion highlight the complications in this area of the law.

In the Achilleas, the vessel was chartered from the owner with redelivery due on 2 May 2004. In April 2004 the owner arranged a follow on charter with a third party at \$39,500 a day. However, the vessel was delivered nine days late by which time market rates had fallen, resulting in the owner having to negotiate a reduced charter rate of \$31,500 a day. The owner claimed \$1.3 million damages, based upon an \$8,000 a day loss for the entirety of the follow on charter.

In finding for the charterer and overturning three previous decisions to the contrary, the House of Lords held that the owner's damages were limited to the difference between the charter and market rates for the nine days' overrun: \$158,301. Two of the judgments adopted the traditional Hadley -v- Baxendale (1854) approach, namely "whether the loss claimed was of a kind or

type which it would have been within the reasonable contemplation of the parties at the time that the contract was made as being not unlikely to result", whereas two others adopted a broader "assumption of risk" approach which the fifth judgment impliedly approved.

In the recent case of the Sylvia, the factual circumstances were the reverse of those in the Achilleas. In this case, the charterer was claiming damages for loss of a fixture from the owner. The vessel was time chartered by the owner to the charterer who, in turn, entered into a sub voyage charter with the sub charterer. However, at the port of loading in Quebec, the Port State Control rejected the fitness of the vessel for loading. Delays caused by the necessary repairs resulted in the sub charter overrunning and, consequently, the sub charterer being cancelled. The charterer entered into a substitute charter, but at a less lucrative rate.

The charterer claimed loss of hire between the first sub charter and the second sub charter for the entirety of the first sub charter.

The owner argued that on the basis of the Achilleas decision the charterer's claim must be limited to the difference between the charter and market rates for the overrun period. However, the court, agreeing with the arbitral tribunal's findings, held that the charterer was entitled to damages based on the difference between the first sub charter and the second sub charter for the entirety of the first sub charter.

In reaching his decision, Hamblen J drew the following conclusions. The Achilleas

was an unusual case whereby the circumstances or general understanding of the market made it necessary to consider whether or not a party had assumed responsibility for losses of the kind in issue. Where the loss claimed reflected what happened in ordinary circumstances, as was the case here, then an assumption of responsibility could be presumed.

It would be within the reasonable contemplation of a shipowner that delay in arriving or being ready to load at the designated load port might result in the loss of a sub charter. If so, lost profit on such a sub charter would equally be within the reasonable contemplation: i.e. the loss is not too remote. In cases such as this, the damages which are generally recognised as being recoverable include the difference between the profit which would have been earned on the broken charterparty and the profit earned under the substitute charter or charters. Furthermore, there was no market understanding to the contrary.

Finally, the liability was not unquantifiable, unpredictable, uncontrollable or disproportionate as loss of a sub charter could never be for a longer period than the time charter itself. Since the loss was therefore within fixed limits, it was foreseeable and, as such, recoverable.

The Sylvia has therefore confirmed that the Achilleas did not introduce a new legal test for remoteness after all; rather it should be used only in the rarest cases. The ordinary Hadley -v- Baxendale rules of remoteness and foreseeability remain applicable.

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## Piracy and off-hire in time charters M/V “SALDANHA” (2010)

In light of the recent Somali piracy attacks there has been much discussion on the construction of charterparty terms. The London Commercial Court has now confirmed that a vessel will not be off-hire during a detention by pirates under the standard NYPE time charter. In confirming the position, the Court (Gross J) followed the arbitration tribunal's unanimous finding.

The appeal to the Court focused solely on the question of off-hire under clause 15 of the charterparty. Charterers argued that they could bring themselves within one of the three exceptions in NYPE clause 15, namely: (i) “detention by average accidents to ship or cargo”; (ii) “default and/or deficiency of men”; or (iii) “any other cause”.

### (i) Detention by average accidents to ship or cargo

Gross J held that the concept “average accident” must mean an accident which causes damage. The incident did not result in damage to the vessel. Gross J was also unable to accept that the incident could properly be described as an “accident”. Furthermore, although the wording “average accident” points towards a marine insurance context, Gross J held that the concept did not

mean detention due to any peril ordinarily covered by marine insurance and in this context, damage to the ship is an essential ingredient for the wording “average accidents... to ship” to apply.

### (ii) Default and/or deficiency of men

Charterers asked the court to determine whether, on the factual assumption that the officers and crew had failed to take recognised anti-piracy precautions, before and during the attack, these failures would fall within the exception “default of men”.

Gross J felt that the tribunal had correctly summarised the sense of the relevant wording as follows:

If the owners do not provide a workforce in the numbers necessary to perform the chartered services as owed by the owners to the timecharterers, when required, there is a ‘deficiency of men’; if the owners do provide the numbers necessary, but the workforce refuses to perform the services, there is a ‘default’. This is distinct and separate from an individual transient act of negligence by a crew member or officer in the carrying out of the owners’ chartered services.

Following on from this, charterers failed to satisfy the burden of bringing themselves within this wording. “Default of men” did not include a failure to take recognised anti-piracy precautions; it did not extend to the negligent or inadvertent failure to perform the duties of the master and crew. Rather, it required a refusal by the master and crew to perform the services.

### (iii) Any other cause

Gross J stated that the starting point was to underline that clause 15 in the charterparty contained the wording “any other cause” rather than the wording “any other cause whatsoever”.

Gross J turned to the judgment of Rix J in *The Laconian Confidence* (1997) which provides the following:

“...those words [i.e. “any other cause”], in the absence of “whatsoever”, should be construed either ejusdem generis or at any rate in some limited way reflecting the general context of the charter and clause...”

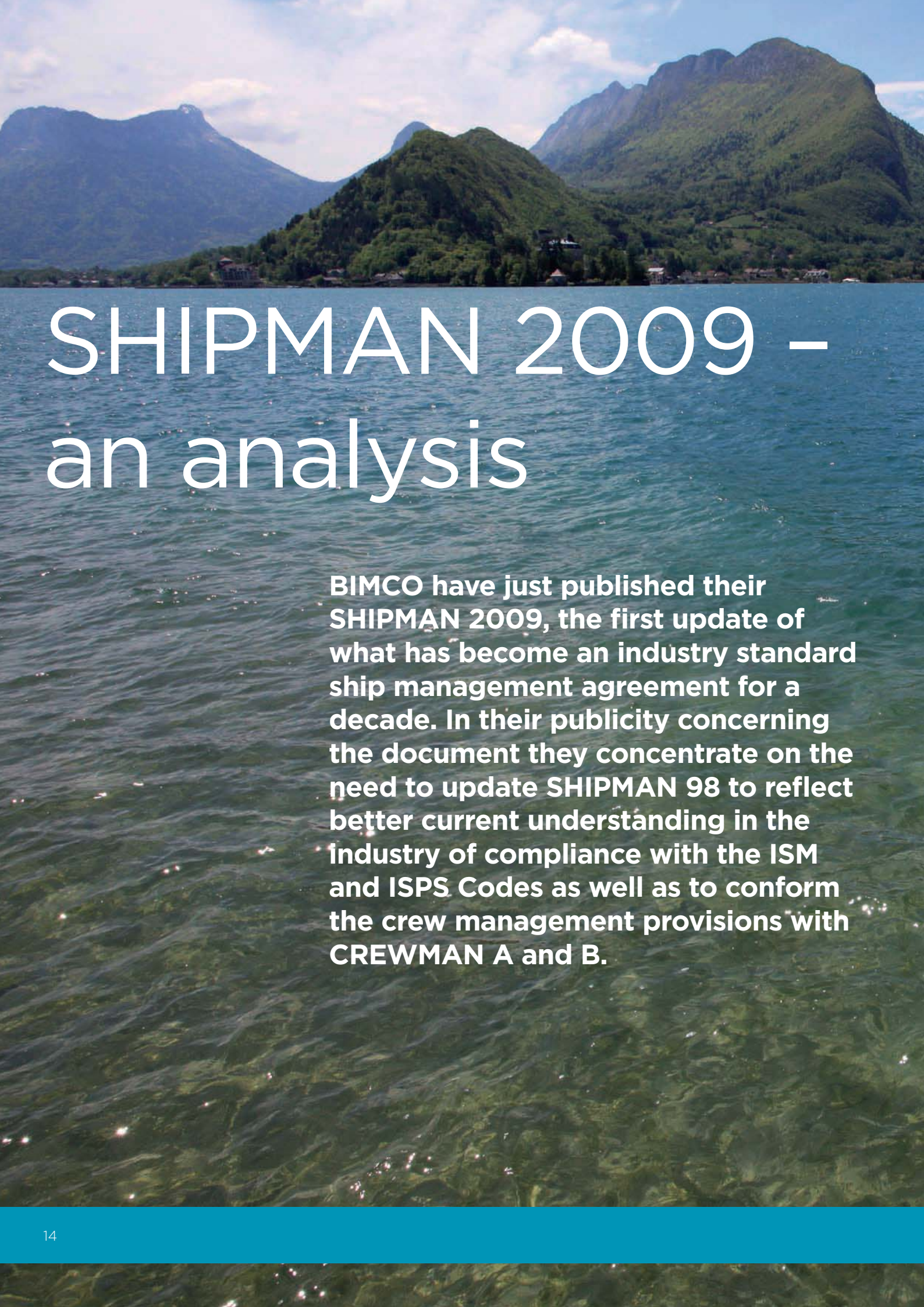
Gross J declined to distinguish *The Laconian Confidence* in the manner suggested by the charterers. He felt that whether regard was had to piracy, the effects of piracy or both, the incident remained a totally extraneous cause, falling outside the scope of the sweepup wording. The act of piracy was not ejusdem generis. It did not arise out of the condition or efficiency of the vessel, or the crew, or the cargo, or the trading history, or any reasonable perception of such matters by outside bodies.

In conclusion, Gross J held that the seizure of a ship by external factors is a recognised peril; but no such peril was covered by clause 15 of the charterparty. Accordingly, the charterers’ application was dismissed. He went on to suggest that should parties be minded to treat seizures by pirates as an off-hire event, the most straightforward and obvious way of doing so would be by way of an express provision in a ‘seizures’ or ‘detention’ clause. As an alternative “and at the very least” he commented that adding “whatsoever” to “any other cause” would assist but as he accepted that would have less certainty.

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# SHIPMAN 2009 – an analysis

**BIMCO have just published their SHIPMAN 2009, the first update of what has become an industry standard ship management agreement for a decade. In their publicity concerning the document they concentrate on the need to update SHIPMAN 98 to reflect better current understanding in the industry of compliance with the ISM and ISPS Codes as well as to conform the crew management provisions with CREWMAN A and B.**

However the redraft goes wider than this and while this analysis is not an attempt to pick up every single amendment (the excellent BIMCO explanatory notes can be referred to for this), it does seek to highlight some of the less well published changes that while sometimes small in textual terms may prove to have a major impact in the ship management industry.

In this regard we would highlight the following:

- a) Expansion and amendment of the insurance provisions
- b) Working language requirements
- c) Avoidance of hidden commissions
- d) Interest on late payment of management fees
- e) Owner's obligations
- f) Acceptance of manager's budgets
- g) Inclusion of ICC force majeure clause
- h) Duration and termination
- i) Mediation alternative

Dealing with each of these in turn:

a) The owner's insurance obligations under clause 6 of SHIPMAN 98 have been expanded and amended in clause 10 of SHIPMAN 2009. In particular:

- i) "blocking and trapping" has been added to war risks
- ii) optional insurance requirements have been added for kidnap, ransom and F,D & D;
- iii) the requirement to place cover with "first class" insurers has been replaced with "sound and reputable" insurers
- iv) there is also an attempt in the document to alert the parties to the need to ensure that between the owners' insurances and the crew insurances taken out by the manager there is no coverage gap.

b) SHIPMAN 2009 now clarifies that there must be a common working language aboard the vessel (though not necessarily English) but that each crew member should have a sufficient command of English to carry out his duties safely, e.g. in respect of ship to shore communications. This may be a particularly topical point given the recent European Parliament transport committee decision approving the use of English as

the formal working language for ship to shore communications.

c) In an attempt to avoid the practice of hidden commissions for commercial management activities it is stated that if any of the basic commercial management functions (brokering, bunkering and post-fixture) are to be excluded from the overall management fee then the remuneration for those services must be set out in an annex to the agreement. These provisions are unlikely to change market practice given an entirely nominal consideration can be put in the annex.

d) SHIPMAN 2009 now explicitly allows for late payment interest to be charged at an agreed rate (as inserted in Box 12). It is likely that most actual ship management agreements amended SHIPMAN 98 to include this in any event as otherwise statutory rates of interest might apply – which could be much higher than agreed rates, e.g. 8% over base is the current statutory rate in England and Wales.

e) Owners will be dismayed to learn that the Owner's Obligations clause (Clause 5 in SHIPMAN 98 and clause 9 in SHIPMAN 2009) is much expanded. However the additional obligations are mainly concerned with ensuring that where the manager is not doing the technical management, they can be reassured that regulatory requirements under ISM, ISPS and port state control are being met. SHIPMAN 98 dealt with this issue in principle but did not set out in detail what the manager should be entitled to expect. In addition this clause now also obliges owners where managers are providing crew to give prior notice to managers in case the vessel is to enter an insurance 'premium area' by reason of war risks, piracy etc and, more importantly perhaps, to meet any additional costs incurred thereby including replacing crew. We would expect this clause to be significantly watered down in practice.

f) Under SHIPMAN 98 managers were entitled to treat silence from owners as acceptance of their proposed budgets. This has been replaced by a mechanism to negotiate in good faith on the budget and failing agreement either party shall be entitled to terminate. This would seem

to have shifted matters in the owners' favour as managers are unlikely to want to exercise such an option.

g) The force majeure provisions have been conformed to the ICC standard – in reality this makes little difference as previously force majeure was defined as any cause beyond the parties reasonable control and that general wording has been retained at the end of an extensive list of the usual events. The effect of this change may be however that the parties will seek to negotiate the list of specific events and delete the general "catch-all". The clause also now contains a specific mitigation requirement – however reasonable efforts to mitigate would be likely to be expected by the courts or an arbitrator in any event.

h) The 'evergreen' nature of the contract has now been clarified and there is no stated termination date set out in Part 1. Termination is on notice but a provision has been added allowing the termination date in the notice to be flexed to occur on arrival at the "next mutually convenient port or place". While the clarification of the evergreen nature of the contract is to be welcomed, we would anticipate that disputes may arise as to what might be a "mutually convenient" port.

i) In common with all recent BIMCO documents a mediation alternative has been added to the dispute resolution clause. This is not designed to interrupt or delay arbitral proceedings but may provide an alternative means of resolving all or part of the dispute. This option may be of considerable use where there are ongoing commercial ties between the owner and the manager which could be damaged by an adversarial procedure.

The above summary is only intended to pick out some of the key changes that have been little publicised. It is not intended to be an exhaustive analysis. SHIPMAN 2009 is a complex document, more complex in many areas than its predecessor and in some ways more legally formalistic. Legal advice should always be sought before entering contracts of this type and this article is not intended as a substitute for such advice.

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# Awards versus judgments – a question of time bar

There are two ways of enforcing a judgment of an English court in England: (1) by bringing execution proceedings on that judgment itself and (2) by bringing a fresh action on the judgment with a view to getting another one. There are time limits that apply. The law now is that (a) a fresh action on a judgment may not be brought after six years of that judgment becoming enforceable and (b) permission must be sought for execution of a judgment that is more than six years old, but there is no time bar for doing this.

However, reaching this position was not straightforward. The Limitation Act 1980 provides “An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable” (section 24(1)). “An action” is defined as including “any proceeding in a court of law” (section 38(1)). On a plain reading of these provisions, it would seem that a fresh action on a judgment and execution proceedings are both a “proceeding in a court of law”, so that the six year time limit applies to both.

And so it was argued some years ago before the House of Lords in Lowsley -v- Forbes [1998] 2 Lloyds Law Reports 577. Yet Lord Lloyd, who delivered the judgment of the court, held that “an action” for the purposes of section 24(1) meant a fresh action on a judgment and not execution. Accordingly, it was only a fresh action that would be time-barred after six years. Even if Lord Lloyd wished to hold otherwise, he felt unable to do so. He disagreed with the reasoning in a case decided by the Court of Appeal in 1948 (W.T. Lamb & Sons -v- Rider [1948] 2 K.B. 331) which had been followed in a number of subsequent cases and called it “suspect”. In that case Lord Justice Scott, who delivered the judgment of the court, had drawn a distinction between a fresh action on a judgment and

procedural steps taken in executing that judgment. His view was that execution was excluded from the definition of action as “any proceeding in a court of law” and accordingly no time bar applied for execution. Prior to this, the meaning that the courts had given to the language of the section for over 100 years was that a judgment debt became barred at the end of the limitation period provided for: it was then not only too late to bring a fresh action on the judgment, it was also too late to execute. Since there was evidence that the reasoning in W.T. Lamb had been taken by Parliament as representing the existing law at the time of the enactment of the Limitation Act 1980 (which was a consolidating Act), Lord Lloyd did not think that it was open to the court to reconsider the reasoning in W.T. Lamb.

Is the position any different with arbitration awards? There are two ways of enforcing an English arbitration award in England: (1) by bringing an action on the award with a view to obtaining a judgment from the court encompassing the relief granted in the award and (2) by bringing an application for permission to enforce an arbitration award in the same manner as a judgment or order of the court. The first way is a common law action founded upon a breach of the implied promise to pay the award whilst the second is a statutory process under section 26 of the Arbitration Act 1950 (which applies to claims commenced before 31 January 1997) and section 66 of the Arbitration Act 1996 (which applies to later claims and is identical to section 26 in all material respects). Section 26 provides: “(1) An award on an arbitration agreement may, by leave of the High Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.” Section 66 provides: “(1) An award made by the tribunal pursuant to an arbitration

agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect. (2) Where leave is so given, judgment may be entered in terms of the award.”

The issue arose in National Ability SA -v- Tinna Oils and Chemicals Limited in a Scheme of Arrangement by Order of the High Court of Delhi with Tinna Finex Limited. The question for the court was whether an application for permission to the court under section 26 of the Arbitration Act 1950/section 66 of the Arbitration Act 1996 was time-barred under section 7 of the Limitation Act 1980, which provides: “An action to enforce an award, where the submission is not by instrument under seal, shall not be brought after the expiration of six years from the date on which the cause of action accrued.” Given the statutory definition of “action” in section 38(1) as including “any proceeding in a court of law”, an ordinary reading of these sections is that both ways of enforcing awards are clearly subject to the time-bar in section 7. The facts were as follows. National Ability (NA) a Panamanian company, had chartered their vessel to Tinna Oils & Chemicals Ltd (TOCL), an Indian company, under a charterparty in the Gencon form. Disputes that arose between NA and TOCL under the charterparty were referred to arbitration in London. By awards dated 19 November 1998 and 12 October 1999, the arbitrators awarded NA approximately US\$ 820,000, interest until the date of the award, the costs of the arbitration and interest on the costs. In the course of the arbitration proceedings, TOCL entered into a scheme of arrangement in India with Tinna Finex Ltd (TFL) under the Indian Companies Act. Enforcement proceedings were brought in India by NA against both TOCL and TFL, which are ongoing. Nonetheless, in 2008, almost ten years after the awards,



NA sought and obtained an ex-parte order from the High Court in London giving them permission under section 26 of the Arbitration Act 1950 to enforce the awards as a judgment against TOCL and also to enter a judgment in terms of the awards. TOCL applied to the court to set the order aside. The High Court held that the ex-parte order was obtained by serious material non-disclosure and discharged the order on that ground alone. The question then arose as to whether an application for permission to enforce the awards as a judgment of the court under section 26 would fail in any event because the limitation period under section 7 had expired.

NA argued that section 7 of the Limitation Act barred a fresh action on an award after six years but not an application under section 26. An application under section 26, they said, was not an action or a proceeding to enforce an award but instead a procedural step taken by way of, or as a prelude to, enforcement of an award, and section 7 did not apply to such procedural steps. They relied on the interpretation of "action" in Lowsley -v- Forbes and W.T. Lamb as referring only to a new action but excluding execution proceedings and submitted that there was no good reason why the enforcement of an award under section 26 should be treated differently from the execution of a judgment by being subject to a time bar. However, the section 26 application is a summary process, first introduced by section 12 of the Arbitration Act 1889 as an alternative to the action on the award. As such, it is an action or a proceeding in court, and not a mere step "taken by way of, or as a prelude to, enforcement of an award". Before the enactment of this act, the action on the award had become troublesome and expensive and a simpler and a more expeditious remedy was called for which this summary procedure was intended to provide. It is suitable

where liability on the award is reasonably clear and is not intended to be used where there is a difficult dispute on the issues or where there is reason to doubt the validity of the award. The choice between the two procedures for enforcement depended on whether the defences could be summarily dealt with, and it would be odd if different limitation rules were to apply depending on what defences there were to the enforcement of the award.

The High Court held that the enforcement of the awards was time-barred, and NA appealed. The Court of Appeal affirmed that decision. Lord Justice Thomas, who gave the judgment of the court, held that the application under section 26 was clearly a proceeding to which section 7 of the Limitation Act applied. The application under section 26 was an alternative to proceeding by way of the action on the award and it made little sense for the limitation period to be different given that both were a means of enforcing the award. The reasoning in W.T. Lamb on the execution of judgments was not followed and the interpretation given to section 24 of the Limitation Act because of that reasoning was treated as best seen in its own historical context. There was in any event a clear distinction between a judgment and an award. All measures of enforcement of an award rested upon the contract between the parties and the application for permission to enforce the award as a judgment under section 26 had to be seen in that context. In contrast, judgments were a pronouncement by the state through its courts and did not depend on a contract between the parties to be binding. It was also observed that it had been assumed in a number of cases and by the profession that the application under section 26 of the Arbitration Act 1950 was an action to enforce an award within the meaning of section 7 the Limitation Act.

So, unlike the execution of a judgment, an application for permission to enforce an award as a judgment must be brought within six years that the award should have been paid. If it is not, it will be time-barred and the court has no discretion to extend time.

It is significant that Thomas LJ in reaching his decision said that the court should be very reluctant to construe the legislation in a manner that did not follow its clear language. The language of the Arbitration Act was intended by its framers to be "sufficiently clear and free from technicalities to be readily comprehensible to the layman". Although the case was concerned with the provisions of the Limitation Act relating to arbitration, the court said that there was similar reason for giving the statutory language the ordinary and plain meaning which it has been understood to bear for many years. A large number of authorities were cited to the court on what the court referred to as "a simple point", and ordinarily it should not have been necessary to do so. Whether the citation of those authorities prevented the court from falling into a similar error with regard to section 7 of the Limitation Act on awards as it did in W.T. Lamb on judgments, where similarly clear words were given a special meaning, is not known. What is clear, however, is that the Court of Appeal in the National Ability case gave the wording of the statutory provisions their ordinary and proper meaning and in the process declined to put awards on the same footing as judgments. Perhaps the day is not far off when Parliament intervenes and corrects the error caused by W.T. Lamb so that the enforcement of judgments is once again subject to a time bar whichever way is chosen, like awards.

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# Damages – fixed or limited?

Robert Gay discusses the recent case of [Zodiac Maritime Agencies Ltd -v- Fortescue Metals Group Ltd \[2010\] EWHC 903 \(Comm\)](#), David Steel J., 28.4.2010



In December 2007 Zodiac (who are managers of a fleet of dry bulk vessels) and Fortescue (FMG) (an Australian iron ore producer) made a consecutive voyage charterparty for a single named vessel to carry cargoes of iron ore concentrates from Australia to China over a period of five years. In November 2008 FMG attempted to renegotiate the freight rate, and then sent a message advising that under “current circumstances” FMG would not be able to honour their freight commitments, which was followed by a telephone conversation and further messages.

At that time, the contract still had four and a half years to run. Zodiac claimed that FMG had repudiated the contract, and sued in the High Court in London.

In this judgment Mr Justice David Steel held FMG liable, and decided issues of principle with regard to the assessment of Zodiac’s damages. The judge remarked that he understood that in the light of his decisions on these issues, the amount which Zodiac would recover would be between US\$80 million and US\$85 million. The points of general interest in the judgment relate to the assessment of damages for the repudiation of a long-term shipping contract.

FMG had argued in its defence that the contract had been frustrated, or performance had been excused by force majeure. However, FMG withdrew these defences before the trial. (Compare [Classic Maritime Inc -v- Lion Diversified Holdings \[2009\] EWHC 1142 \(Comm\)](#), [2010] 1 Lloyd’s Rep 59, on which the present writer commented in (2009) 15 *Journal of International Maritime Law* 423, at pages 431 to 432.)

There remained an attempt by FMG to argue that what they had said at the end of 2008 did not amount to a repudiation of the contract. This attempt was not successful, and the judge held that FMG had repudiated the contract and were liable for Zodiac’s damages. Reading between the lines of the judgment, it appears that FMG’s legal department had devised a “script” by which FMG would only say that they were “suspending performance”. However, the CEO of FMG spoke with the managing director of Zodiac on the telephone, and either he failed to keep to the “script” or he failed to respond immediately to an e-mail sent by the managing director of Zodiac after this conversation, in which the managing director of Zodiac said that the CEO had stated that FMG were terminating the contract.

With regard to the assessment of damages, under English law there is a rule that where a charterparty has been repudiated, and there is an “available market” in which it is possible to re-fix for a period roughly equal to the period which the repudiated charterparty still had to run, then the law expects the party who is not in breach to re-fix for that period.

It is clear from the caselaw that this rule sets a limit to the damages which can be recovered. If there is an “available market” and a shipowner chooses not to re-fix for a period equal to the remainder of the repudiated charterparty but instead (for example) trades the vessel on the spot market and (as it may turn out) suffers greater losses than he would have suffered if he had re-fixed for the equivalent period, then his damages will be restricted to the amount which he would have lost if he had re-fixed for the



equivalent period. His additional losses will be treated as having resulted from his own independent decision instead of taking his chances on the spot market.

What is left unclear by the caselaw is whether this rule only sets a limit, or rather establishes a fixed measure of damages. Consider the position of a shipowner who does not re-fix for the period equivalent to the remainder of the repudiated charterparty and who (in the event) does better than he would have done if he had re-fixed for the equivalent period. (Perhaps he even does better than he would have done under the repudiated charterparty, so that in the end he does not suffer a loss at all.) If the rule establishes a fixed measure of damages, then the shipowner may be able to recover the amount which he would have lost if he had re-fixed for the equivalent period, even if he has not actually suffered any loss at all. If the rule does not establish a fixed measure of damages but only a limit, then the shipowner will not be able to recover any more than his actual losses.

It is clear from the points which were argued on behalf of Zodiac that Zodiac's legal advisers were intending to argue that the rule established a fixed measure of damages, so that Zodiac would be able to recover on the basis of a fixture for four and a half years at the rate obtainable in about January 2009, which would have produced an award of damages perhaps US\$20 million higher than Zodiac's actual losses. Indeed, the way in which Mr Justice David Steel speaks at one place in his judgment suggests that he also may have been thinking of the rule as establishing a fixed measure of damages rather than only a limit. However, because of the

specific points which the judge decided, he did not need to determine whether the rule of law does establish a fixed measure of damages, or only a limit.

The first point which the judge decided is the most significant, with regard to what counts as an "available market" for the purpose of this rule. The judge accepted evidence from the well-known expert witness Mrs Jean Richards that at the time in January/February 2009 owners were not willing to fix at current rates (equivalent to about US\$24,000 per day) for longer than one or at most two years, while charterers would not be willing to fix at any higher rate. On this basis, the judge held that there was no "available market" for a four and a half year fixture. In effect, the judgment decides that in order for there to be an "available market" it is not enough if it would have been possible for an owner who was absolutely determined to fix his vessel for a long period to find a fixture for his vessel. Rather, there is only an "available market" if there is a price which would attract both willing sellers and willing buyers.

The second point which the judge decided arose because it was common ground that a year after the repudiation, in about February 2010, there was an "available market" for fixtures of about three and a half years, that is, equivalent to the balance (a year after the repudiation) of the repudiated charterparty. The judge held that this was irrelevant. In effect, the judgment decides that the rule only applies if there is an "available market" to re-fix for the equivalent period immediately after the repudiation. The rule cannot apply at a later stage. If there is no "available market" immediately after

the repudiation then the shipowner will recover damages based on whatever his actual losses were.

The third point related to Zodiac's actual earnings from the vessel. In fact, Zodiac had an ongoing consecutive voyage charter with another party entered into in November 2007, and in March 2009 Zodiac had substituted the vessel as the performing vessel under this other charterparty. The judge held that Zodiac's decision to use the vessel to perform the other consecutive voyage charterparty was part of Zodiac's response to FMG's repudiation, and so once the vessel had begun to perform under the other charterparty, Zodiac's earnings from the other charterparty should be brought into account.

As a result, Zodiac's damages were to be assessed by comparing what it would have earned under the charterparty which FMG had repudiated with what Zodiac actually received as the earnings of the vessel (including what Zodiac would receive under the other charterparty up to about July 2013). It is interesting that, in considering what Zodiac would have earned under the repudiated charterparty, the judge made a small deduction (1.5%) in respect of "catastrophic contingencies" such as the possibility that the vessel might become a total loss before July 2013. It is not apparent whether the judge expected a similar deduction to be made from the amount in respect of Zodiac's future earnings from the other charterparty.

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# Team profile: casualty response team



Hill Dickinson's casualty response team has unparalleled experience in responding to major shipping, offshore and land-based casualties, disasters and emergencies worldwide.

The team is available 24/7 by calling +44 (0)20 7280 93 00.

The following, in alphabetical order, profiles each of our casualty response team members:

**1. Rhys Clift**, partner, has 25 years of experience specialising in insurance and reinsurance coverage, in a wide range of marine and non-marine insurance and reinsurance disputes and policy wordings and drafting. This includes hull, IV, P&I, war, yacht, energy, mortgagee interest, loss of hire, charterers liability, maritime casualties including explosions, fires, and sinkings, as well as charterparty and bill of lading disputes, and in fraud investigation. He undertakes work for underwriters, including Clubs, and assureds. Rhys has spoken and published widely on insurance and dispute resolution. He was shortlisted as a finalist in the Lloyds List Global Awards 2009 as Shipping Lawyer of the Year. He is a CEDR Solve Mediator and was shortlisted as a finalist in the biennial CEDR Awards for Excellence in ADR, 2006 (Innovation) and 2008 (Sector). He is a co-founder of the Maritime Solicitors' Mediation Service.

**2. Andrew Glynn-Williams** is a former mariner with Northern Marine Management (Stena Line), having sailed up to the rank of chief officer. Andrew sailed on tankers, ro-ro and high speed ferries. His work often

involves casualty investigation, including incidents involving fatalities. Andrew also handles defence cases as well as general P&I and insurance work. Andrew was heavily involved in the Court of Appeal matter, Pratt -v- Aigaion Insurance SA [2008] a case concerning allegations of a breach of warranty in an insurance policy.

**3. Tony Goldsmith**, partner, is an experienced master mariner with many years' experience in dealing with casualties worldwide. He acts for leading worldwide salvors, for all major P&I Clubs, hull underwriters and owners of vessels involved in casualties. He is particularly experienced in dealing with local port/police authorities in all relevant jurisdictions, including in the UK the Marine Accident Investigation Branch (MAIB) and Maritime Coastguard Agency (MCA). He has substantial experience of investigating and handling cases involving fires, explosions, collisions, groundings and strandings, drafting salvage and wreck removal contracts and advising on site during salvage operations. Tony also handles cargo theft cases and charterparty/contract of carriage disputes. In March 2009 Tony moved to

Singapore to open Hill Dickinson's new Asian office.

**4. Philip Haddon**, partner, served at sea with P&O from 1979 to 1991, initially on general cargo ships, reefer vessels and gas carriers, but for most of his sea career on cruise ships. His practice is based on a wide range of wet and dry shipping disputes of all types including charterparty disputes, unsafe ports/berths, bills of lading disputes, insurance matters and contract negotiations on almost all classes of ship. His particular specialist area is passenger shipping and he has been instructed in many of the most significant passenger casualties over the last 15 years. Philip is a trained ISM auditor and has completed the Company Security Officer's course under ISPS. He often advises on management systems and procedures and is involved in training shipping companies and their personnel in this increasingly important area.

**5. Patrick Hawkins**, partner, has over 20 years qualified experience in marine litigation covering a wide range of dry shipping disputes involving charterparty, bill of lading and MOA

litigation and arbitration. Patrick has worked in the Greek market for 17 years and for the last 13 years as a partner running the Greek office of the firm. He has also handled a number of marine insurance casualties over the years involving total loss investigation, collision, salvage and wreck removal.

**6. Andrew Johnson**, partner, qualified in 1984, and has over 20 years' experience of international dispute resolution. Clients include owners, P&I Clubs, FPSO operators, charterers, oil companies and insurers. He is co-author of "A Guide to the Hamburg Rules" and is a contributor to Marine Claims, both published by LLP. Andrew is listed as a leading individual within Legal 500, Chambers & Partners guide to the legal profession and the Legal Business Guide to Legal Experts and is profiled in the Chambers Global Guide to the World's Leading Lawyers. "Andrew Johnson has over 20 years' experience in international dispute resolution." He is recommended by The Legal 500 UK 2009 for shipping. Andrew is ranked in Chambers & Partners 2010 guide to the legal profession for shipping London. Andrew is lauded for his solid reputation and outstanding capabilities in international dispute resolution.

**7. David MacLeod**, is a master mariner and qualified solicitor. David sailed up to the rank of chief officer in container ships, tankers, dry-bulk carriers and ferries before joining Hill Dickinson. He is an associate based in Hill Dickinson's Liverpool office and is a member of the firm's casualty response team. In addition to conducting casualty investigations David's experience includes handling collision cases, salvage claims on behalf of salvors, ship and cargo interests, defending and prosecuting pollution cases, bills of lading and charterparty disputes, stowaway cases and ship arrests in the UK and overseas. David acts for P&I Clubs, hull underwriters, owners,

charterers, shippers, liner agents, port authorities, government agencies, bunker suppliers and ships' agents.

**8. Mike Mallin**, partner, served at sea from 1966 until 1978. He holds a master mariner's certificate and a degree in maritime studies (tech). He practises a wide range of wet shipping, dry shipping and marine commercial disputes, but inevitably his seagoing experience means that he deals in particular with problems arising out of maritime casualties, including collisions, salvage, marine insurance and contractual disputes of all kinds arising from casualties. Mike has been appointed as expert witness on English law on a number of occasions, including in relation to insurance coverage and charterparty issues. During his 30 years' practice as a shipping lawyer he has dealt with hundreds of marine casualties including many of the largest, and involving all types of vessels. He has taken cases successfully to the Court of Appeal and the House of Lords, including the 'Starsea', which is still the leading case on the duty of good faith in the marine insurance context.

**9. Alan Speed**, partner, was formerly at sea working on a wide range of ship-types including general cargo, reefers, LPG carriers, tankers, heavy lift vessels, passenger ships, container vessels, bulkers, dredgers and coasters up to the rank of chief officer. Alan joined the firm in 1992, qualifying as a solicitor in 1998 and being promoted to partner in 2007. Alan's work chiefly concerns casualties and incidents including collisions; contacts with locks, cranes and jetties; pollution; fires; groundings; piracy; navigation in ice; bunker quality problems; collapse of ship and shore cranes; cargo (including chemicals, bulk, steel, reefer and containers) shortages, stowage, damage, and contamination; ship management in respect of insurance and limitation of

liability; machinery and equipment damage and breakdowns; anchor and trawl-net damage to cables and pipelines; salvage; SCOPIC; unsafe port claims; total loss and insurance claims. He also deals with various 'dry' matters and is often called on to advise owners, agents, charterers and port operators on contractual and regulatory matters. Recently, Alan's work has included advising the owners and underwriters of ships captured by Somali pirates and advising clients on the legal, insurance and commercial aspects of both Somali piracy itself and precautions taken to avoid capture. He is one of the firm's ISM and ISPS specialists and regularly deals with ISM, security and STCW issues. Alan is a member of the Chartered Institute of Arbitrators, and is a trained mediator.

**10. Robert Wallis**, partner, practises all aspects of admiralty law, particularly salvage and collision, charterparty and contractual disputes, marine insurance/reinsurance litigation and contractual/commercial disputes. His clients include marine insurance companies, P&I Clubs, shipowners and operators, shipyards, salvors and brokers. Rob has particular experience in the Far East, particularly Japan, Korea, and Singapore, Holland, Belgium, Italy and South America. "Robert Wallis is noted for salvage matters, charterparty disputes, and marine insurance litigation." He is recommended by The Legal 500 UK guide 2009 for shipping. Rob is ranked in Chambers & Partners guide to the legal profession 2010 for shipping London. Rob is chair of the London Admiralty Solicitors Group and an excellent and effective admiralty specialist who is especially well versed in salvage and collision cases. He has also recently been appointed legal adviser to the International Salvage Union.



# Stop press...

## EU competition law - investigation closed re Baltic Max Feeder scheme

On 26 March 2010, the European Commission issued a press release confirming, as had widely been expected, that it had closed its investigation into the planned "Baltic Max Feeder" scheme between operators of container feeder services for suspected infringement of European Union competition rules, as the parties had abandoned their scheme soon after receiving a statement of objections in January.

The scheme had already been watered down since it was first announced in summer 2009, with provisions relating to floor prices for container services having been removed, but it still raised potential pricing issues since it allowed the parties to take capacity off

the market so as to maintain a more favourable supply balance. Agreements that have the object of fixing prices, limiting capacity or sharing customers or markets are hardcore infringements that are presumed to be prohibited and will rarely, if ever, satisfy the four conditions for exemption.

The scheme had attracted widespread criticism from both shippers and competing feeder operators and there is no doubt that the swift intervention of DG Competition and its decision to open formal proceedings sends a clear warning that outside the strict confines of consortium agreements (where some rescheduling and capacity management by competitors participating in a consortium if in response to fluctuations in market conditions) capacity restrictions are basically "no no's" just as much as naked price fixing or price information exchanges between competitors.

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## 24 Peaks Challenge in the Lake District

On a wet and windy weekend in July, six members of Hill Dickinson's marine, trade and energy practice group conquered the gruelling 24 Peaks Challenge in the Lake District.

The team, consisting of Phil Haddon, Emma Groves and Kate Docton of our London office, Stuart Kempson and Andrew Glynn-Williams of our Liverpool office and Irene Anastassiou of our Piraeus office, scaled 24 mountains all over 2,400 feet (including five of the ten highest in England) in under 24 hours, supported by driver, Captain Chris Spencer.

The team was proud to be raising funds for Seafarers UK, a charity that fundraises and gives grants to over seventy different charities that help people who have worked at sea. This includes helping people from the Royal Navy, Merchant Navy and fishing fleets,

and their families. This is the year of the Seafarer and as such, we were keen to support the grass roots of our industry.

If you would like to donate to this worthwhile cause, please visit our JustGiving page at [www.justgiving.com/hilldickinson24peaks](http://www.justgiving.com/hilldickinson24peaks). Your support is appreciated.



## Piracy petition

At the end of May 2010, the International Transport Workers Federation (ITF), in conjunction with a diverse group of maritime industry bodies - including shipowners' associations, trade unions and insurers - launched a global electronic petition to call on governments worldwide to take a stand to end the scourge of piracy, and its threat to seafarers.

The aim is to collect half a million signatures by IMO World Maritime Day on 23 September. Please show your support for this worthwhile cause. The petition can be found at: [www.endpiracypetition.org](http://www.endpiracypetition.org) and further information on ITF's piracy campaign can be found at: [www.endpiracynow.org](http://www.endpiracynow.org).

## News from Piraeus...

Since the office was profiled in our June 2009 newsletter, celebrating its 15th anniversary, it has expanded both in terms of floor space and personnel.

The team has welcomed two new assistant solicitors: Tom Davies from our London office and Timon Karamanos joined from Norton Rose, and two new support staff: Venetia Kyritsi and Marsa Perdiki. In addition, Electra Panayotopoulos has settled in well since her move from London.

In September, the team invited clients to celebrate the expansion of the team's office space, which is modern and well-equipped and provides room for further expansion within the team.

In November, John Pople gave a presentation at the EMMA (Eastern Mediterranean Mediation Association) seminar, and Mira Milouseva is an active board member of the Young Shipping Professionals group.

# Graham Jackson

As many in the marine industry are aware, Graham Jackson sadly passed away on Sunday 15 August 2010. This followed a long illness which initially commenced with contracting bronchial pneumonia whilst taking evidence in Casablanca.

Graham was a senior assistant in the Liverpool shipping team having previously been the managing partner of Jackson Parton. During a long and successful career, Graham had also been a law lecturer and managing director at Noord Nederlands P & I Club.

I had the pleasure and fortune to work closely with Graham for the last few years of his professional career. It was too short a period. However in the short period that Graham was with the Liverpool shipping team of Hill Dickinson, we learnt to respect and admire his considerable qualities as a maritime lawyer.

Undoubtedly, Graham Jackson was one of the leading practitioners of his generation in the field of maritime law.

At a time when the law is increasingly seen as simply a commercial venture, Graham continued to regard and treat the law as a profession. He saw his role as to provide a specialist service to clients and to ensure that they received the very best legal advice.

Graham was genuinely interested in maritime law. Although Graham had a number of interests, undoubtedly knowledge and understanding of maritime law was his major interest. It was his hobby! At a time when legal knowledge for many modern day lawyers is what is set out in the various

internet databases, Graham had a genuine knowledge and understanding of maritime law. He had an encyclopaedic knowledge of case law; not just the main findings but the full facts of the case and the full reasoning why the court reached the decision.

Graham's legal knowledge was of necessity international in outlook. Graham had earlier in his career worked overseas in Holland at North Nederlands P&I and retained a close connection with the club and members throughout his career. He spent an essential part of his career with Jackson Parton before moving to Hill Dickinson in 2007 for the latter part of his career. Many of Graham's clients both at Jackson Parton and Hill Dickinson were overseas based although he also enjoyed close relations with many of the claims handlers at the West of England P&I Club.

Whenever a team member had a legal problem, Graham was always the first port of call. If he did not know the answer (which was rare) he would always assist you in finding the answer. He would always readily give you his time to fully explain not only what was the answer but also the thinking and reasoning behind the answer. Team members at Hill Dickinson routinely would arrive home late and explain to waiting partners that they had been in a detailed discussion with Graham. Nothing else needed to be said!

Clients should always be the key focus of a lawyer's life. Graham took client focus to a new dimension. Graham provided an exemplary service to clients. Nothing was too

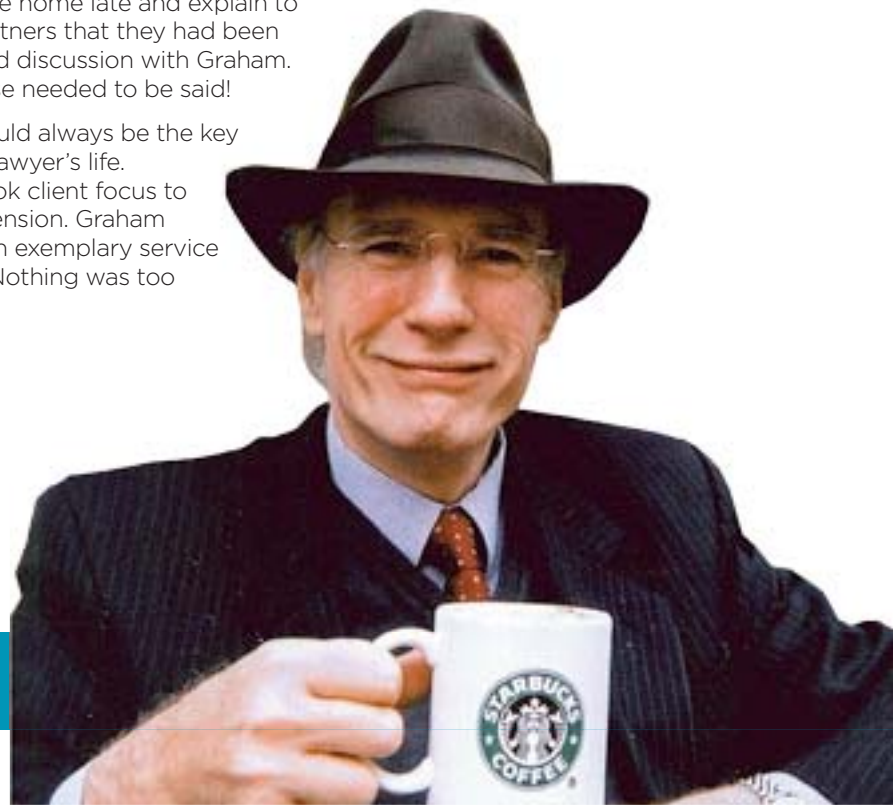
much trouble for him when responding to clients. The messages of condolence from clients, many of whom are leading overseas lawyers, are a testimony to the reputation of Graham, national and international.

I shall sorely miss Graham's wise counsel and company. I shall miss seeing Graham bedecked in his hat and scarf wandering back to the office during the early evening, coffee and cigarette break having been completed. I shall miss working with someone who reminded me why I wanted to become a solicitor. That the law is a profession, a calling and not simply a job.

I thank Jan, Alex and Olivia for sharing Graham with us for the last few years of Graham's life. Our hearts go out to you. We shall remember Graham with considerable affection, respect and admiration.

John Hulmes

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# Events

**5 May** - Martin Penny and Barnaby Wright attended the Professional Yachtsmen's Association Seminar in Monaco

**10 May** - Elliot Bishop attended the British Marine Federation's Stolen Boats and Marine Intel Annual Meeting in Marlow

**12 - 13 May** - Martin Penny and Elliot Bishop presented at the British Marine Federation annual marina conference in Brighton

**21 May** - The yacht team hosted a meeting with the Norwegian Hull Club

**7 June** - Martin Penny presented at the ABYA Yacht Brokerage Course in Winchester

**17 June** - Pawel Wysocki and Martin Penny attended the ABYA Conference in Reading

**21 - 22 June** - Pawel Wysocki gave a presentation at the 5th Annual Future of Superyachts Conference in Mallorca

**23 June** - Shipping clients were entertained at an al fresco showing of the World Cup match between England and Slovenia

**22 July** - The shipping team hosted a go-karting event which was attended by claims handlers at various P&I and Defence Clubs - the CTC Carnage team won the closely fought 132 lap endurance race

**14 September** - Maria Pittordis will chair the Consumer Affairs session at the Annual European Cruise Council Conference in Brussels addressing the 1990 EC Package Travel Directive and sales distribution development

**15 September** - Hill Dickinson will be hosting its 200th birthday celebration at Merchant Taylor's Hall

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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, Chester and Sheffield. Collectively the firms have more than 1,300 people including 190 partners.

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