With daily news coverage on the European migrant crisis and its humanitarian and economic impact, the issue of illegal immigration and clandestine entry is firmly in the public conscience. There has been an unprecedented increase in migrants attempting to cross the Channel this year with thousands camped in Calais and Coquelles, waiting for an opportunity to reach the UK, whether via the ports or the Channel Tunnel. With most cargo carried into the UK via these French ports, Adrian Marsh takes a look at the impact this has had on retailers, wholesalers and manufacturers and their supply chains.

The extent of the problem
To tackle clandestine entry, extra measures such as security checks at border crossings and improved physical security at the Eurotunnel terminal are being employed. UK Border Force and the French authorities have prevented more than 39,000 attempts to cross the Channel illegally in 2014/2015 and the Eurotunnel alone has blocked 27,000 attempts since January.

The potential for physical damage and contamination to goods by clandestine entry into a trailer is clear and the extra measures in place may reduce the risk. However, with these extra measures come extra delays in transportation time which is impacting upon cargo interests’ supply chains and in some cases resulting in the loss of goods. The problem has recently been further exacerbated by the temporary closure of the Eurotunnel and the actions of the striking French dockworkers.

Legal position
Deliveries can be affected in one of three ways: delay to the supply chain, reduced quality of goods or contamination. Cargo interests (and their insurers) who suffer may wish to consider recourse against their hauliers. However, any such recourse is not clear cut and cargo owners should be aware that they may not be able to recover their full losses in any event.

Migrant crisis and its effect on importers

>>> continues on page 3
Welcome

Welcome to our October edition of *in transit*. As we witness our industry evolving on a daily basis, one agenda we all share is a desire to be on top of the latest developments. *in transit* is a short newsletter which aims to bring to your attention some of the latest news in the cargo and logistics market from a legal perspective. We hope you enjoy it.

One of the issues which will not have escaped anyone’s attention is the migrant crisis. In this edition, we consider some of the problems the crisis presents for the transport and insurance sector. And just when you thought it was safe to come out from behind the curtain to face the Insurance Act 2015, the Law Commission reveals plans for additional provisions. See Tom Turner’s glance at the proposals included in the Enterprise Bill 2015.

For those of you who do not know our team, it is time you were introduced. Please see the back page for a profile of our cargo and logistics team.

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**Back from the dead:**
The new Enterprise Bill proposes punitive measures for late payment by insurers

It was only in February 2015 that the Marine Insurance Act 2015 was given Royal Assent. As underwriters, claims teams and brokers began the task of implementing changes to their systems in anticipation of the Act coming into force in August 2016, some may have thought that they had at least seen off one of the Law Commission’s most controversial proposals: to introduce punitive measures against insurers who fail to pay claims within a reasonable time. However, that relief will be short-lived.

The new Enterprise Bill had its first reading in the House of Lords on 16 September and Part 5 of the Bill proposes to introduce an implied term to the Insurance Act 2015 that places an obligation on insurers to pay claims within a reasonable time. The Bill is part of the government’s wider strategy to assist start-ups who suffer from poor cash flow. One of the aims of the implied term is to help get businesses back on their feet after suffering a loss.

Insurers, however, will be concerned at the likely impact the implied term will have on how they deal with claims, particularly the prospect of facing significant claims for consequential losses. Undoubtedly insurers will face extra pressure to pay claims, even when legitimate investigations are being carried out, for a fear of facing a claim themselves. No doubt the proposal, if it is enforced, will lead to increased litigation, not least to establish precisely what is ‘reasonable time’.

Inga Beale, chief executive of Lloyds, has warned the Treasury that the new law is ‘fundamentally flawed.’ The suggestion made by Beale is the proposed law should exclude ‘large risks.’

According to the Bill, ‘reasonable time’ will include time to investigate and assess the claim, and ‘all relevant circumstances’, including the type of insurance and the size and complexity of the claim, along with factors outside the insurer’s control, will be considered.

The second reading of the Enterprise Bill in the House of Lords was on 12 October. The next step is for the Bill to go to the House of Lords’ Committee stage.

The Law Commission has also given an optimistic assessment of the potential cost implications to the insurance industry. It estimates that the industry will incur implementation costs of c.£200,000, litigation costs of c.£500,000, spread over five years; and further costs of c.£3.77 million to deal with unmeritorious late payment claims over a 10-year period.

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Delay in delivery
Cargo interests must establish either that the duration of the transit was unreasonable in all of the circumstances or that the haulier failed to comply with an agreed delivery date and further, that the delay caused financial loss. Given the situation faced by hauliers at the French border crossing, it is perhaps unlikely that liability will attach if the delays were unavoidable. However, even if cargo interests can establish a claim against the haulier on the face of it, that claim will be limited, under Article 23(5) of the Convention on the Contract for the International Carriage of Goods by Road 1956, to the haulier's carriage charges.

Quality of goods
Delay in delivery of perishable goods, such as fresh produce, could lead to a shortened shelf life or a significant reduction in the quality of the goods. This may be treated as damage and the limitation for delay under Article 23(5) may not apply, rather damages will be calculated based on the market value of the goods at the time of collection, subject to a limitation of liability under Article 23(3) of CMR, calculated at the rate of 8.33 SDRs per kilo.

Contamination
Problems also arise where migrants manage to enter the freight vehicle. The breaking of a security seal or TIR cord and clandestine entry into a vehicle carrying cargo intended for clinical use or human consumption, such as medical devices, pharmaceuticals or foodstuffs, often leads to the immediate rejection of the entire load. Cargo interests, mindful of brand issues and the strict regulatory framework, are not usually prepared to take any risk, given the potential for contamination. However, the rejection of cargo in the absence of evidence of contamination or physical damage often leads to disputes between cargo interests and their logistics providers, who are only liable for the diminution in value of the cargo caused by damage (i.e. adverse physical change) during the transit. Claims arising out of cargo destroyed as a result of a risk of contamination are likely to be rejected by hauliers and their insurers on the basis that the cargo was destroyed as a result of a fear of loss/damage and not as a result of actual loss or damage.

Recap - where does this leave importers?
To successfully claim against the haulier, cargo interests must first establish that the cargo has actually suffered damage or contamination. In a claim for delay only, losses will be limited to the carriage charges.

Cargo owners (and their insurers) would be well advised to appoint a surveyor at the earliest opportunity to inspect the cargo and identify any evidence of damage or contamination. A joint inspection with the haulier's appointed surveyor is preferable as it may avoid arguments at a later date over the condition of the cargo. However, whilst an inspection of the cargo may help cargo interests to mitigate any loss and identify/evidence any damage or contamination, it is unavoidable that some cargo owners will feel that their commercial interests and duty to their customers remains best served by rejecting the entire load. An inspection may not completely discount the risk of contamination and consumers would not wish to consume food or pharmaceuticals which have been carried in a vehicle for several days with numerous stowaways. Clandestine migration attempts have been a very real issue for hauliers, insurers and importers for many years, and will continue in the future. While there are avenues of recourse to help cargo interests limit the impact of the financial losses, these are unlikely to place them in a neutral position. Early consideration must be given to the best way of mitigating this situation taking into account both the legal and practical realities.

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A cargo of iron ore was shipped from Iran to China under a bill of lading which was issued ‘to order’, with no named consignee or notify party. An Iranian company, which had contracted to sell the cargo to a Chinese company, was the shipper of the cargo and was named as shipper on the bill of lading.

The vessel arrived at the Chinese discharge port, but nobody presented the bill of lading to take delivery. The reason was that there was a dispute between the Iranian shipper and the Chinese buyer as to what sum (if any) remained to be paid in respect of the cargo. The shipper kept possession of the full set of original bills of lading.

The shipowner arranged for the cargo to be discharged into a warehouse fairly near to the discharge port. The warehousekeeper was entitled under its contract to exercise a lien (with a power of sale) in respect of unpaid storage charges.

The shipper never tried to present the bill of lading to the warehousekeeper nor to pay the storage charges. Instead, the shipper arrested the shipowner’s vessel (in India) on the basis of an alleged claim for damages for delivery of the cargo without production of an original bill of lading. By the time the claim came to be heard in the Commercial Court in London, the shipper’s claim was no longer based on an allegation of delivery without production of the bill of lading, but instead proceeded on the basis that the shipowner was liable in conversion because it had, without the authority of the owner of the cargo (the shipper), allowed a lien over the cargo to be created in favour of a third party (the warehousekeeper). Alternatively, it was argued that various things said or written amounted to a denial of the shipper’s right of access to the cargo. Both aspects of the claim failed. On the facts, there had been no denial of access – the cargo remained available on presentation of the bill of lading and payment of the accrued storage charges. So far as the creation of the lien was concerned, the bill of lading expressly permitted the discharge and storage of the cargo. In any event, even if there were no express provision in the bill of lading, there was under the well-established general law of bailment an implied right to discharge and store the cargo if the bill of lading holder failed to take delivery. The creation of a lien was a reasonable and foreseeable incident of the storage contract which the shipowner was impliedly authorised to conclude. The shipper must therefore have been taken to have authorised the creation of the lien.

The shipowner successfully counterclaimed for storage charges, which amounted to in excess of US$2 million, and the London Commercial Court ordered that the shipper deliver the original bill of lading to the shipowner to enable the cargo to be sold.

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Responsibility for loading and discharge under a charterparty bill of lading

Société de Distribution de Toutes Merchandises en Côte d’Ivoire & Ors -v- Continental Lines NV & Anr (The ‘Sea Miror’) [2015]

In this case the Commercial Court in London had to decide a preliminary issue on a point of law on the basis of assumed facts. The question was whether, assuming that damage to cargo was caused by stevedore negligence during loading or discharge from the vessel, liability for such damage lay with the carrier.

The bills of lading incorporated the terms of a voyage charterparty on the Synacomex 90 form. Clause 5 of the voyage charterparty provided as follows:

‘Cargo shall be loaded, spout trimmed and/or stowed at the expense and risk of Shippers/Charterers at the average rate of 1,500 metric tons per weather working day... Cargo shall be discharged at the expense and risk of Receivers/Charterers at the average rate of 1,500 metric tons per weather working day... Stowage shall be under Master’s direction and responsibility...’

It was accepted by the parties that by virtue of the words ‘Stowage shall be under Master’s direction and responsibility’ the carrier was liable for damage caused by bad stowage. It was also common ground that whilst loading, stowage and discharge is the obligation of the carrier at common law, responsibility for those functions can by an express agreement be transferred to the cargo interests (both at common law and under a contract subject to the Hague Rules), as confirmed by the House of Lords in The Jordan II [2004].

For cargo interests it was submitted that the mere fact that the expense of loading/discharge was to be for the account of cargo interests was insufficient to transfer responsibility to the cargo interests. As regards ‘risk’, it was submitted that risk should not be equated with responsibility, but should be interpreted as meaning the risk of loss/damage occurring fortuitously (without fault). In the alternative it was argued that it was to be interpreted as the risk of delay in the cargo operations.

The judge had scant regard for the second alternative (the risk of delay). Clearly the risk of delay was dealt with by the demurrage provisions in the charterparty, not by the provisions of clause 5.

As regards cargo interests’ primary argument, having considered a number of authorities, the judge concluded that ‘risk’ should be equated with responsibility. Clause 5 therefore clearly transferred responsibility for loading/discharging operations to cargo interests.

The judge’s conclusion is not surprising. He went on to state in the final sentence of the judgment:

‘It follows that, to the extent that it is established that damage to the bags of rice was caused by bad loading and/or discharge (as opposed to bad stowage) that damage is the responsibility of the cargo interests who cannot recover in respect of such damage from the carrier.’

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The Tianjin explosion – official investigation and Chinese litigation

Following the disaster at Tianjin Port, we examine the impact of the events on the logistics and marine insurance sectors with particular focus on the issues insurers face when dealing with the potential liabilities that may arise, and any subsequent indemnity/recovery actions.

On 12 August 2015, Tianjin Port in northern China was rocked by two major explosions which killed at least 173 people. A number of people are still missing and hundreds more were injured.

The explosions took place at a warehouse which contained an estimated 3000 tonnes of hazardous and flammable chemicals. Photographs and videos published in the media showed extensive destruction in and around the port and the blast waves, together with their impact on buildings, were felt several kilometres from the port. The buildings of several surrounding logistics companies were destroyed and large quantities of shipping containers were either crumpled or catapulted through the air, some even being blown from the container yard to nearby highways.

Whilst it is not yet clear what triggered the blasts, 10 people linked to Tianjin Dongjiang Port Rui Hai International Logistics Co. Ltd (‘Rui Hai’), including the president and vice-president, were detained by police within eight hours of the blasts.

In addition to the significant damage and casualties, the effects of the blasts are also being felt in the logistics and insurance industries.

Tianjin Port is considered the fourth largest global port in terms of cargo throughput. It is the largest port in northern China for the export of hazardous chemicals and is the main logistics hub for most cargo transportation in northern China.

As a result of the blasts, the Tianjin Transport Committee currently requires all dangerous goods to be taken to other ports and specifically precludes all terminal operators from devanning dangerous goods in Tianjin. The import and export of other cargo has also been significantly affected. The port has resumed operations but the impact on transport in the surrounding areas is still being felt. As expected, a number of shipping lines, forwarders and cargo interests are currently using other ports and facilities, which will no doubt result in increased costs being incurred.

Chinese lawyers have described the incident as causing ‘an earthquake’ in the local insurance industry with the expected total indemnities ranging from RMB 5 billion to 10 billion (equivalent to circa £500 million - £1 billion), which would surpass any previous major incident.

The China Insurance Regulatory Commission has required Chinese insurers to set up dedicated workforces to deal solely with the claims arising from this incident. Many insurance companies have already set up ‘green channels’, actively contacting their insureds and offering interim payments. We understand that major Chinese insurers have already paid out significant sums.

The potential liability of carriers and freight forwarders may depend upon the outcome of the government authorities’ investigations. Subject to those findings, it is possible that carriers/forwarders may be able to rely upon a force majeure defence under Chinese law or any applicable international convention or pursuant to the underlying contract, given the nature of the incident.

If Rui Hai is found to be liable for the blasts (after the conclusion of the current investigation) then cargo interests/insurers may be able to pursue their claims against this party and carriers/forwarders may be entitled to claim an indemnity. However, Rui Hai’s potential liability exposure is astronomical and it is therefore extremely doubtful that Rui Hai’s combined insurance cover and assets (both as yet unknown) will be sufficient to indemnify all affected parties in full.

In light of the significant number of casualties and losses arising from the disaster, any litigation will be politically sensitive. Chairman Xi Jinping and Premier Li Keqiang are already paying special attention to the events, with Chairman Xi Jinping instructing officials to ‘severely’ punish those responsible.

Any litigation arising from these events is therefore likely to be influenced by the Chinese government, and Chinese lawyers Shanghai Kai-Rong expect that the relevant court judgments will be sanctioned by high ranking party officials before release.

Chinese lawyers further believe that the litigation in China will be handled in a uniform manner and Chinese courts may stay proceedings whilst the official investigation report is finalised. Thereafter, it is expected that the local court in Tianjin may run a ‘test case’ to establish a precedent, with subsequent liability and recovery and indemnity claims likely to follow that judgment.

The effects of the events at Tianjin, and the liability, recovery and indemnity actions arising out of the same, will likely be felt for some time to come. Although the timescale for the conclusion of the investigation is still to be finalised, and the extent of the litigation that will follow is unclear, we continue to liaise with Chinese lawyers and we will provide updates as and when they are received. In the meantime, if you have any queries or have been affected by the events at Tianjin, please do not hesitate to contact us and our dedicated team will be on hand to assist you.

Finally, we must thank Chinese lawyers Shanghai Kai-Rong Law Firm (www.skrlf.com), for their assistance to date and for their first-hand knowledge of the unfolding events in Tianjin.

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About Hill Dickinson
The Hill Dickinson Group offers a comprehensive range of legal services from offices in Liverpool, Manchester, London, Sheffield, Piraeus, Singapore, Monaco and Hong Kong. Collectively the firms have more than 1250 people including 190 partners and legal directors.

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