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CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT – A SHIPPING PERSPECTIVE

Darren Smith, Partner and Julia Dodds and Claire Hamm, Associates, all from the Risk and Liability Group in our Birmingham office, consider the impact of the Corporate Manslaughter and Corporate Homicide Act on the shipping industry.

On 26 July 2007 the Corporate Manslaughter and Corporate Homicide Act 2007 finally received Royal Assent. This marked the conclusion of more than ten years of debate and false starts for this legislation, which first saw light of day in the Labour Party Manifesto in 1997. The law itself has, however, been 11 years in the making, since the Law Commission first recommended changes to the law in 1996.

Many thought the Bill was going to fail again at the last hurdle following a long-running game of parliamentary ping-pong between the Commons and the Lords over whether the Bill should include deaths in custody. Ministers have now agreed that the scope of the law is going to be extended in the future to cover such deaths.

At almost the same time as the Bill was being passed the Health and Safety Executive ("HSE") released figures showing that the number of workplace deaths in the UK has significantly increased in the 2006/2007 period. In some regions of the country the number of deaths has more than doubled. This is a significant reversal of the trend of the last few years which had cumulated in the 2005/2006 year having the lowest number of workplace deaths ever recorded.

The HSE described the situation as unacceptable stating that they would be taking a robust line with regard to enforcement where such incidents occurred.

The introduction of the Act and the release of these statistics show why all deaths in the workplace will be under particular scrutiny from now on.

When will the Act start?

The Act will become fully operational in April 2008. This lead-in period will give the enforcing authorities, including the Health and Safety Executive and the Crown Prosecution Service, time to train their staff to ensure that they can properly investigate and assess whether a fatality should result in a Corporate Manslaughter prosecution.

The extent of the new legislation

The Act will apply to England, Wales, Scotland and Northern Ireland as well as the seaward limits of the territorial waters of the United Kingdom, United Kingdom registered merchant vessels, British controlled aircraft and offshore installations covered by the Petroleum Act 1998.

The Act therefore will apply to all vessels calling at UK ports as well as ship owning companies registered in the UK and ships registered under Part 2 of the Merchant Shipping Act 1995. In excess of 13 million tonnes of British registered vessels will be subject to the Act wherever they are in the world.

It is estimated that the UK based Fleet and its associated operations directly employs about 250,000 people. An even greater number of ships will be subject to the Act when in UK waters and ports. The potential effects of an incident in these circumstances could be both dramatic and drastic for the ship concerned.

What is the new offence?

An organisation will be guilty of the offence if gross negligence in the way in which it is managed, or the way in which its activities are organised, causes a person’s death. The key factors are that the gross breach has to occur at the senior management level and the standards of that management have to fall far below standards found in similar organisations.

The role of senior management

Senior management is defined under the Act as being persons (this can be either an individual or the senior management as a whole) who play significant roles in:-

1. The making of decisions about how the whole or a substantial part of an organisation’s activities are to be managed or organised, or

2. The actual managing or organising of the whole or a substantial part of those activities.

The focus of any investigation following a fatality is going to be on the role management has played in the build up to that fatality and the manner in which management decisions were taken. Clearly, organisations that have a responsible approach to safety have nothing to fear from the Act. It will only affect those who have either been reckless in their decision making process or have knowingly taken decisions to proceed in a way that could result in a foreseeable death occurring.

Although the Act refers to the actions of senior management, the offence is one for which the organisation would be prosecuted; there is no scope for individuals to face charges under the Act. In the shipping context it will be important to establish the senior management structure of the organisation concerned. Until the Act it was necessary to establish who the “controlling mind” of the organisation was in order to mount a prosecution of corporate manslaughter. This approach was fraught with difficulties for the prosecuting authorities, as was highlighted in the case of the HERALD OF FREE ENTERPRISE.

Although the investigation into the disaster identified a “disease of sloppiness” and negligence at every level of the ferry operator’s
hierarchy, it was not possible to show which part of the controlling mind had taken the decision to allow ferries to sail with the bow doors open. Although a prosecution for manslaughter was brought, it failed because of the inability to establish precisely who was responsible for the decision resulting in the disaster. If this situation is compared to a potential prosecution under the Act, then it is possible to see that the senior management standards would not be sufficient to discharge the duties under the Act and that the chance for a successful prosecution for corporate manslaughter will be greatly increased.

The Duty of Care

The scope of those to whom the organisation owes a duty of care is very broad. It includes not just the organisation’s own employees or other people working for that organisation or providing services to it, but also anybody to whom the organisation owes a duty of care because it is an occupier of premises, because it supplies goods or services, or because it is involved in construction or maintenance operations, or the carrying out of any other activity on a commercial basis, or the keeping of any plant or vehicle. There is also a catch all provision that refers to the keeping of “other things” which will only become clear as and when the courts have ruled on what “other things” will include.

The range of individuals to whom a duty of care is owed will therefore depend upon the nature of the organisation’s activities and could easily include large sections of the public, for example in the transport sector; this therefore could include ferries and cruise ships as well as cargo vessels. The duty of care extends not only to the time spent by individuals on the vessels but all procedures relating to loading and discharge as well.

How will it be decided if a new offence has been committed?

The Act identifies various factors that a jury or judge will need to consider. In deciding whether there has been a gross breach of duty, the court must consider whether the organisation has failed to comply with any relevant health and safety legislation and if it has, the court must then consider how serious that failure is and how much of a risk of death that breach poses. The Act says the court may also consider whether the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to lead to safety failures. An assessment of a defendant’s general corporate culture can therefore be legally relevant.

How will the new offence be punished?

The penalties include fines – with no maximum limit – and remedial orders. These orders allow the court to order the organisation convicted of corporate manslaughter to take steps to remedy the management failure leading to death.

It is also possible for the court to impose a publicity order requiring the convicted organisation to publicise the details of its conviction and the amount of any fine.

What do you need to do to prepare for the new legislation?

In organisations where the issue of health and safety is taken very seriously and where they respond to advice received on safety improvements, there is probably little that needs to be done. The intention of the law is to capture those organisations that have such a poor management structure, or are prepared to take such great risks, that the inevitable result is someone being killed.

There has been concern that the new legislation may encourage some organisations to attempt to delegate health and safety responsibilities to those at a much lower level in the organisation to protect the organisation from criminal liability. However, given that the entire basis of the Act is the positive actions of the senior management or their failure to act in a reasonable manner, such a step could in itself be seen as a gross breach of duty of care.

Nevertheless, even in the most safety conscious organisation, the best advice has to be that now is the time to act and that the organisation should look to appoint someone at a senior level to be responsible for health and safety. Provided that individual has sufficient powers to implement health and safety changes and acts reasonably on the advice received from those with particular expertise in any area of the organisation’s operations where safety is a factor, then even if there is an unforeseen fatality, the organisation should not face a prosecution for manslaughter. The senior person who is appointed is not the fall guy for such matters, but is actually the reverse and shows that the organisation has taken its responsibilities very seriously.

Providing an organisation acts reasonably, it has nothing to fear from the new legislation. It is only in those organisations where perhaps profit is placed before safety or where no regard at all to safety is taken that there could be something to fear.

There is no doubt that, come April 2008, the Health & Safety Executive will be monitoring closely the management structure and processes in any organisation where they are investigating a fatality, to determine whether there is sufficient evidence to refer the matter to the prosecution authorities to consider a prosecution for corporate manslaughter.

With the number of workplace fatalities in the UK remaining static, it is inevitable that at some point in the future a high profile prosecution will be brought with all incumbent publicity.

It would be a sensible precaution for any organisation that has hazardous operations to consider how it would respond to a corporate manslaughter investigation. In particular, organisations should consider how they would deal with issues such as legal representation of those who may be interviewed and expected to give evidence. Consideration needs to be given to any particular language difficulties that may be
encountered with crew members of ships and the fact that some investigations may relate to instances occurring on ships thousands of miles away from the UK, but whose registration brings them within the legislation. Individual representation will need to be considered as individuals may still be prosecuted under Health and Safety legislation relating to the activities resulting in the alleged incident and there is clear significant potential for a conflict between different members of an organisation’s management when it comes to such interviews.

Again, in relation to vessels not registered in the UK but which are involved in incidents in UK waters or a UK port, particular consideration will need to be given as to how, particularly where the management is based outside the UK, such investigations are to be managed on behalf of the management and the crew to be interviewed. The senior representative of the management could well be the captain of the vessel, who himself could face questioning over the incident. It can be clearly seen therefore that the extent of the new legislation could throw up considerable problems in relation to incidents involving shipping.

The organisation therefore should give early thought as to how it would arrange representation for different individuals who may be involved, and how in itself it would wish to be represented. Early discussions with insurers and brokers would also be recommended to see the extent of the insurers’ willingness to cover the cost of such separate representation. These are not the sort of questions you want to be asking when you have investigators at the door requesting to interview different members of your staff.

In short, our advice has to be to plan for the worst now, so that should it happen to your organisation, you are in a position to respond quickly and appropriately.

**LANDMARK CASE ON ECONOMIC TORT**

The House of Lords’ decision in *OBG Limited v. Allan [2007] UK HL 21* was an important one on economic tort. “Economic tort” refers to “inducing breach of contract” and “unlawful interference with trade”.

The leading opinion on economic tort is now that of Lord Hoffmann who drew a clear distinction between two different economic torts, namely “inducing breach of contract” ([Lumley v. Gye (1854) 3 E & B 114](https://en.wikipedia.org/wiki/Lumley_v._Gye)) and “unlawful interference with trade” – which he referred to as “causing loss by unlawful means”.

Inducing breach of contract is a tort in which the defendant becomes liable as “an accessory” to the breach of contract of another. The essence of this tort is that the defendant has deliberately (i.e. with intent) induced or procured a breach of contract by persuading another to act in breach. It is not enough if, as in *OBG*, the receivers may have caused a breach of contract or prevented performance without intending to do so. Equally, it is not enough if the defendant has assisted another to break his contract without realising it.

Lord Hoffmann traced the unlawful means tort back to *Garret v. Taylor (1620) Cro Jac 567* and *Tarleton v. McGawley (1793) Peake 270*. In each case, the defendant did an unlawful act with the intention of causing harm thereby to the claimants’ business and was held liable in tort for the damage thus caused. This gives rise to “primary liability” and does not depend upon persuading another to break a contract; i.e. “accessory liability”. Lord Hoffmann further held that “acts against a third party count as unlawful means only if they are actionable by that third party” – the principal qualification to this general rule being where there is no cause of action only because that third party does not suffer any loss. Lord Hoffmann said that just as the tort of inducing breach of contract requires an intention to cause a breach, so the tort of wrongful interference with business requires an intention to cause loss.

Lord Hoffmann rejected “the unified theory” whereby the courts have treated liability for “inducing breach of contract” as “unlawful interference with trade”, stating that the two forms of economic tort must be treated as separate, with different ingredients, because (as outlined above) inducing breach of contract is a form of “accessory liability” whereas unlawful interference with trade is a form of “primary liability”.

Some practical implications of *OBG Limited v. Allan [2007] UK HL 21* which are likely to have an impact upon shipping litigation are that:

- Liability for economic tort now arises where a person intends to do a wrongful act. The test to be applied is fundamentally subjective and depends upon showing that the defendant actually had the relevant intention.

- There should be fewer cases, such as *OBG*, in which the claimants select the most favourable features of each tort whilst ignoring their requisite limiting features.

- It will be easier to strike-out misconceived economic tort claims in respect of which the necessary knowledge and intention have not been pleaded.

In September 2007 the Senate Commerce, Science and Transportation Committee approved the Ballast Water Management Act of 2007 (S1578) which would authorise the Coast Guard to set national standards for ballast water to prevent invasive species from entering US waters.
MINIMUM PERFORMANCE PRINCIPLE AND THE DATE TO ASSESS DAMAGES

Halani Lloyd, an Associate, and Matt Evans, a Trainee, both in our Dry Shipping Group, comment on a recent LMAA arbitration, in which the Tribunal was asked to consider two principles fundamental to English contract law: the minimum performance principle and the duty to mitigate loss.

The case concerned a Contract of Affreightment (“COA”) where Charterers failed to provide two cargoes within the required shipment periods. Charterers did not dispute liability but claimed that the quantum of their liability was far below that alleged by Owners.

The Minimum Performance Principle

The parties accepted that Owners’ losses (ie their profits lost on each shipment) were to be calculated by taking the difference between the COA freight rate and the market rate for each shipment. This raised two critical questions: against which voyage and which dates were Owners’ losses to be assessed? The charterparty provided options for both load and discharge ports and also required Charterers to nominate a laycan spread within each shipment period.

Charterers argued that the minimum performance principle dictated the answers to these questions. By way of example, in Kaye Steam Navigation v Barnett (1932) 48 TLR 440, Owners’ damages were assessed on the basis that the cargo owner, who was in breach, would have opted to discharge at the port that would have put Owners to the greatest expense pursuant to the minimum performance principle. Applying the same principle here, Charterers said that Owners’ losses should be assessed on the basis that Charterers would have nominated the voyage and laycan period for each shipment that was least favourable to Owners.

Ultimately, the minimum performance principle was held to determine which voyage Owners’ losses should be assessed against. A less straightforward issue was whether the principle also applied to the question of dates. Owners argued that the principle did not apply because Charterers did not have any optional methods of performance but simply one obligation: to nominate a laycan within the shipment period. Alternatively, Owners argued that the relevant time to assess damages was the time of Charterers’ breach on each shipment. It was at that time, Owners contended, that they as Owners had to go into the market to find a replacement cargo and mitigate their losses. The Tribunal preferred Owners’ submissions.

Mitigation

The mitigation aspect of the case arose as a result of the following facts. After Charterers failed to declare one shipment, Charterers proposed a possible alternative fixture to Owners requiring, however, a short extension to the laycan. Evidence was given that the market freight rate was much lower at that time than the COA rate, although the market was rising. However, Owners refused the extension sought. Charterers argued that Owners had thereby failed to mitigate their losses. Had they accepted Charterers’ proposal, Charterers contended that Owners would have sustained minimal, if any, losses in respect of the shipment. Owners alleged that their refusal of Charterers’ offer was unreasonable given the volatility of the market at the time. Owners further argued that Charterers’ proposal had been too vague and was not in fact one of mitigation but of substitution or settlement.

The Tribunal rejected these arguments, finding that Owners had indeed failed to mitigate their losses. The Tribunal noted that if Owners had really been concerned with the volatility of the market, they could have fixed “on subjects”. In the event, Owners’ losses on the shipment were calculated by deducting the freight that Owners would have earned had they accepted Charterers’ offer from the profits that Owners would have earned had Charterers performed the shipment under the COA.

Conclusions

This arbitration follows a number of recent, high profile cases on damages issues such as The ACHILLES [2007] All ER (D) 32 and The GOLDEN VICTORY [2007] 2 Lloyd’s Rep 164. The decision reinforces, first, the need to consider carefully and cautiously any alternative offers put by a contractual counterparty in breach. Of greater interest, particularly in light of the paucity of authority directly on point, is the question as to the relevant time for assessing damages where charterers fail to nominate a shipment within the required spread; in particular, what application, if any, the minimum performance principle will have in this context. No doubt this issue is one to watch in future cases.
CARRIAGE OF STEEL COILS – AUSTRALIAN APPELLATE COURT UPHOLDS CARRIER’S LIABILITY FOR CONDENSATION DAMAGE

Halani Lloyd, an Associate in our Dry Shipping Group, updates us on an appeal decision of the Full Court of the Federal Court of Australia in a case in which there was much international interest in 2005 when the decision of the Federal Court of Australia was handed down.

The Federal Court found two carriers liable for corrosion damage to steel coils carried from Japan to Australia for reasons including their failure to install dehumidifiers in the holds. The Full Court of the Federal Court of Australia has recently handed down its decision on appeal (CV Sheepvaartonderneming Ankergracht v Stemcor (Asia) Pty Limited [2007] FCAFC 77). The Court has upheld the trial judge’s decision against the carriers.

Background

Two cargoes of steel coils were carried in the vessels “ANKERGRACHT” and “ARCHANGELGRACHT” from Japan to Australia during the Northern Hemisphere winter in early 2002. Upon discharge, the coils were found to have suffered corrosion damage. The trial judge found that this had been caused by condensation.

The coils were cold rolled steel but had no chromate coating and were un-passivated, making them highly sensitive to corrosion. Neither the Owners nor the Master were informed expressly of this. It rained during loading operations, leading the trial judge to the conclusion that it was more likely than not that water had entered the holds with other cargo and dunnage. Condensation was found to have occurred after loading, during the course of both voyages.

The vessels’ holds did not have dehumidifiers. However, the trial judge found that the shipper was familiar with the vessels and the nature of the holds. The carriers also ventilated the holds numerous times during both voyages and, on all but one occasion, ventilation occurred only when the air dew point temperature outside the hold was lower than that inside the hold. The trial judge accepted that there was a practice of ventilating cargo holds in accordance with this dew point rule. The rule addressed the risk of condensation forming on the cargo as the vessel travelled south into warmer climates.

Nevertheless, the trial judge found that the carriers had breached their obligations under Article 3 Rules 1 and 2 of the Australian amended Hague Rules. (This is a modified version of the Hague-Visby Rules, enacted by the Australian Carriage of Goods by Sea Act 1991 (Cth)). In particular, his Honour Emmett J found that the vessels had been unseaworthy because they had no dehumidifiers to remove water that might enter the holds on cargo or dunnage, such entry being foreseeable. As the installation of dehumidifiers into the vessels was “practicable”, in his Honour’s view, the carriers were found liable for failing to exercise due diligence to make their ships seaworthy. Furthermore, the trial judge considered that ventilation had probably resulted in the ingress of air containing water vapour into the holds rather than the removal of water vapour from the holds, because the dew point rule offered only an approximate estimate of the suitability of prevailing conditions for ventilation. His Honour observed that, for this reason, it was standard practice in the shipment of steel from cold to warmer climates not to ventilate the holds.

Decision on Appeal

Forty-four grounds of appeal were pleaded by the carriers, who argued inter alia that the Court had applied the Hague Rules’ seaworthiness obligation as though it imposed an absolute duty on the carrier to make the vessel seaworthy rather than a duty to exercise due diligence to make the vessel seaworthy. They contended that in the absence of evidence...
that dehumidifiers were installed in conformity with an industry practice or standard, together with the findings at first instance of proper practice in the ventilation of the holds and proper maintenance and correct operation of the hatches, they could not have breached Article 3 Rules 1 or 2. The carriers asserted that the effective cause of the corrosion of the coils was “cargo sweat” which was an inevitable consequence of voyages such as those in question and not attributable to unreasonable conduct on the part of the carriers.

The Court (comprising Ryan, Dowsett and Rares JJ) found against the carriers in two separate judgments.

The majority, Ryan and Dowsett JJ, upheld the trial judge’s decision under Article 3 Rule 2, agreeing that the carriers had failed to care properly and carefully for the cargo. Cargo interests’ expert evidence had been to the effect that non-hygroscopic cargoes such as steel (ie cargoes which do not absorb or attract moisture) should not be ventilated; that if it is necessary to do so, this should be done in accordance with the dew point rule; and that as this rule is difficult to apply in practice (because of difficulties in ascertaining the temperature of all the cargo), ventilation should be permitted only where the external air dew point temperature is three or five degrees lower than that in the hold. The majority held that ventilation should not have occurred on either vessel, and such ventilation as occurred was capable of causing, and did cause, condensation causing corrosion.

Separately, Rares J held that the imprecision of the carriers’ systems to measure when to ventilate allowed the introduction of moisture into the holds during ventilation and this justified the trial judge’s finding of a breach of Article 3 Rule 2. Like the majority, Rares J cited the House of Lords’ decision in Albacora SRL v Westcott and Laurance Lyon Ltd [1966] 2 Lloyd’s Rep 53 in which it was held that the word “properly” in Article 3 Rule 2 added something to “carefully”: namely a requirement that the carrier’s function be performed in accordance with a sound system. Both the majority and Rares J considered that the carriers’ system of caring for the goods, which included ventilation, had not been “proper” or “sound”.

Significantly however, on the seaworthiness issue, the majority did not agree with the findings of the trial judge. The majority held that there was no evidence of any practice of installing and using dehumidifiers and thus the duty to exercise due diligence could only have required such a step if the vessel and its crew might not otherwise have been able to deal with the problem. Evidence had been given that the crew undertook mopping and wiping to remove moisture from the holds in addition to ventilation.

Rares J differed from the majority on the seaworthiness issue, after giving detailed consideration of the authorities on Article 3 Rule 1 including both English and Australian cases. His Honour held that the carriers had to install dehumidifiers if they were to exercise due diligence, given the real risk of cargo sweat and that weather conditions would not permit ventilation to occur.

All three judges agreed with the trial judge that the carriers were unable to rely on any Article 4 defences.

Conclusions

This case is likely to attract the attention of the English Courts and other common law jurisdictions, given its detailed examination at appellate level of the carrier’s obligations under Article 3 Rules 1 and 2 of the amended Hague Rules. From an industry perspective as well, the case gives some interesting guidance (and precedent in Australia) as to the standard of care required by carriers of steel coils to satisfy their obligations under the amended Hague Rules.

The decision on appeal somewhat ameliorates the effect of the judgment at first instance, to the extent that the majority found that the carriers had complied with their seaworthiness obligations. However, the fact that the carriers remained liable for the condensation damage despite having had a system for caring for the cargo that was in accordance with usual practice, and despite cargo interests’ prior knowledge that the vessels did not have dehumidifiers in the holds, as well as their failure to inform the carriers of the cargo’s particular sensitivity to corrosion, may suggest a tilting of the balance of risks struck by the amended Hague Rules in favour of cargo interests, at least in Australia. Other common law jurisdictions ought not to go this far. Carriers of steel coils to Australia should take suitable precautions.

HANDBY GUIDE TO UK ADVERTISING LAW

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The team is producing a Handy Guide to UK Advertising Law. It provides a useful introduction to the laws and codes governing advertising in the UK and examines a number of relevant areas of law including trade marks, copyright and libel.

If you would like to receive a copy of the Guide, please e-mail Kerry Fountain on kfountain@ReedSmith.com.
**FITNESS FOR SERVICE – ‘LEGALLY FIT’**

Alan Curran, an Associate in our Dry Shipping group, reviews the recent decision in *Golden Fleece Maritime Inc and another v St. Shipping and Transport Inc (the “ELLI” and the “FRIXOS”) [2007] All ER (D) 16*.

On 2 August 2007 the Commercial Court delivered its judgment in this case in which the Court considered the impact of the new MARPOL requirements for double-skinned tankers carrying fuel oil (Regulations 13 F-H) on charters made before those regulations came into force.

The *ELLI* and the *FRIXOS* were both double sided vessels chartered on the Shelltime 4 form for the carriage of crude/dirty petroleum products. Although the sides of the cargo tanks were protected by a wing ballast tank they were defined by their classification society to be only partially double sided. The wing ballast tanks extended between the same frames as the cargo tanks but there were slop tanks that were not fully protected by a ballast tank but which were, for just 2.6 metres of an overall length of 223 metres, only protected by bunker tanks. Since these tanks were not protected by spaces “not used for the carriage of oil”, on the coming into force of the MARPOL requirements the cargoes that the vessels could carry were restricted; indeed the majority of commercially traded fuel oils could not be carried. The issue between Owners and Charterers that the Court had to consider was who bore the risk of this under the charters.

The charters required that at delivery the vessel must be:

• “in every way fit to carry crude petroleum and/or its products”; and

• “in every way fit for the service” required of her.

In addition there was an obligation on Owners that, throughout the charters, whenever required by “the passage of time, wear and tear, or any event” (emphasis added), they would exercise due diligence to maintain or restore the conditions mentioned above to make the vessel in every way fit for carriage of the stated cargoes and to perform the service required of her.

Many charters have obligations concerning fitness for service (e.g. NYPE line 22 or Balttime clause 1) but this is, more often than not, an obligation to be fulfilled at delivery which, if breached, could entitle a charterer to cancel. Here, the Court found that if the vessels had not been in compliance with MARPOL regulations at delivery, such that they could not have carried fuel oil as anticipated, then Owners would have been in breach.

The fact that the vessels were physically fit to carry the cargoes is not the only criteria to be assessed, as Owners had argued. The vessels were not “legally fit” for that carriage. They could not, therefore, be described as in every way fit to carry the permitted cargoes. The legal “unfitness”, such as an absence of the necessary documentation/certification for a particular trade/cargo as the case may be, will therefore render a vessel unfit for these purposes. The Court here, in reaching this conclusion, observed that an owner’s obligation as to a vessel’s seaworthiness includes cargoworthiness. A vessel that is unable to carry a permitted cargo as at delivery would therefore be unseaworthy. However, here the vessels were not in breach of the charter’s requirements at delivery. The issue of fitness to carry permitted cargoes only arose at a later stage on the coming into force of the MARPOL requirements.

Here, the wording of the charters (amended Shelltime 4) made it clear that the obligation regarding fitness for service was continuing. Owners were required to do more than just maintain the original condition but also to restore it if lost. When the MARPOL requirements came into force the *ELLI* and *FRIXOS* were no longer legally fit to carry fuel oil, a permitted cargo. They could not therefore be described as “in every way” fit to carry the cargoes permitted under their charterparties. As noted above, the physical characteristics of the ship are not the only issue. The vessel also has to have “legal fitness”. Although they were physically fit, when the MARPOL regulations came into force during the currency of the charters, the vessels’ legal fitness to carry fuel oil was lost.

There were a number of alternative arguments advanced by the Owners to avoid the burden that the MARPOL regulations would put on them. They argued that the new regulations meant that fuel oil could not be carried legally and was therefore an unlawful cargo under the Charterparty. This was quickly dismissed by the judge as an argument that turned the obligations of the charterparties on their head. The lawfulness of a cargo relates to the characteristics of the cargo, not a vessel’s ability, or lack thereof, to carry it lawfully. Owners also argued that the Vessel was fully compliant with the MARPOL regulations that applied to their vessels. They argued that they did not promise the vessels could carry all cargoes to which MARPOL applies. Again this was dismissed as turning the true position on its head. The warranty from Owners was as to the vessels’ ability to carry fuel oil: that was lost and had to be restored. In both these arguments Owners had sought to isolate particular clauses and construe them in a vacuum. It is normal to look at a contract as a whole and to view particular clauses in the context of the whole agreement. It is perhaps not surprising then that Owners failed to persuade the Court where they sought to construe clauses without reference to the balance of the charterparty, which clearly impacted on the meaning of those terms.

The loss of the ability to carry fuel oil triggered an obligation to restore the fitness for service that had existed at delivery. In failing to do so, Owners were in breach of the charterparty. The Owners were therefore obliged to make such alterations to the vessels as would be necessary to comply with the new MARPOL regulations. Unfortunately for the Owners that obligation existed regardless of the cost of the necessary alterations.
THE EXPANSION OF THE PANAMA CANAL AND ITS IMPLICATIONS FOR SHIPPING

Rupert Talbot-Garman, an Associate in our Dry Shipping Group, provides a full fact file on the Panama Canal and its expansion.

Introduction to the Panama Canal

The Panama Canal is a major ship canal that traverses the Isthmus of Panama in Central America, connecting the Atlantic and Pacific Oceans. Construction of the Canal was one of the largest and most difficult engineering projects ever undertaken. It has had an enormous impact on shipping between the Pacific and Atlantic, obviating the long and treacherous route via the Drake Passage and Cape Horn at the southernmost tip of South America. A ship sailing from New York to San Francisco, via the Canal, travels 9,500 km (6,000 miles), well under half the 22,500 km (14,000 mile) route around Cape Horn. Although the concept of a canal near Panama dates back to the early 16th Century, the first attempt to construct a canal began in 1880 under French leadership. After this attempt failed and saw 22,000 workers die, the project of building a canal was attempted and completed by the U.S. in Panama in the early 1900s, with the Canal opening in 1914. The building of the 77 km (48 mile) Canal was plagued by problems, including disease (particularly malaria and yellow fever) and landslides. By the time the Canal was completed, a total of 27,500 workers were estimated to have died in the French and U.S. attempts.

Since opening, the Canal has been enormously successful, and continues to be a key conduit for international shipping. Each year more than 14,000 ships pass through the Canal, carrying more than 205 million tons of cargo.

The Canal can accommodate vessels from small private yachts up to fairly large commercial ships. The maximum size of vessel that can use the Canal is known as Panamax; an increasing number of modern ships exceed this limit, and are known as post-Panamax vessels. A typical passage through the Canal by a cargo ship takes around 9 hours.

The Canal's present geography

The Canal consists of seventeen artificial lakes, several improved and artificial channels, and two sets of locks. An additional artificial lake, Alajuela Lake, acts as a reservoir for the Canal.

From the buoyed entrance channel in the Gulf of Panama (Pacific side), ships travel 13.2 km (8.2 miles) up the channel to the Miraflores locks, passing under the Bridge of the Americas. The two-stage Miraflores lock system, including the approach wall, is 1.7 km (1.1 miles) long, with a total lift of 16.5 meters (54 ft) at mid-tide. The artificial Miraflores Lake is the next stage, 1.7 km (1.0 mile) long, and 16.5 metres (54 ft) above sea level. The single-stage Pedro Miguel lock, which is 1.4 km (0.8 miles) long, is the last part of the ascent with a lift of 9.5 meters (31 ft) up to the main level of the Canal.

The Gaillard (Culebra) Cut slices 12.6 km (7.8 miles) through the continental divide at an altitude of 26 metres (85 ft), and passes under the Centennial Bridge. The Chagres River (Río Chagres), a natural waterway enhanced by the damming of Lake Gatún, runs West about 8.5 km (5.3 miles), merging into Lake Gatún. Gatún Lake, an artificial lake formed by the building of the Gatún Dam, carries vessels 24.2 km (15.0 miles) across the Isthmus. The Gatún locks, a three-stage flight of locks 1.9 km (1.2 miles) long, drop ships back down to sea level.

A 3.2 km (2.0 mile) channel forms the approach to the locks from the Atlantic side. Limón Bay (Bahía Limón), a huge natural harbour, provides an anchorage for some ships awaiting transit, and runs 8.7 km (5.4 miles) to the outer breakwater. Thus, the total length of the Canal is 77.1 km (47.9 miles).

The Canal’s efficiency and maintenance

Increasing volumes of imports from Asia which previously landed in the U.S. West coast ports are now travelling through the Canal to the East coast. The total number of vessel transits in fiscal year 1999 was 14,336; this fell to a low of 13,154 in 2003, due, at least in part, to global economic factors, but rose to 14,194 in 2006. (The Canal’s fiscal year runs from October to September). However, this has been coupled with a steady rise in average ship size and in the numbers of Panamax vessels transiting, so that the total tonnage carried rose steadily from 227.9 million PC/UMS tons in fiscal year 1999 to 296.0 million tons in 2006. Given the negative impact of vessel size on the rate of transits (for example, the inability of large vessels to cross in the Gaillard Cut), this represents significant overall growth in Canal capacity, despite the reduction in total transits. The Canal set a traffic record on 13 March...
2006, when 1,070,023 PC/UMS tons transited the waterway, beating the previous record of 1,005,551 PC/UMS tons set on 16 March 2004.

The Canal administration has invested nearly US$ 1 billion in widening and modernizing the Canal, with the aim of increasing capacity by 20%. The Canal authority cites a number of major improvements, including the widening and straightening of the Gaillard Cut to reduce restrictions on crossing vessels, the deepening of the navigational channel in Gatún Lake to reduce draft restrictions and improve water supply, and the deepening of the Atlantic and Pacific Entrances of the Canal. This is supported by new vessels, such as a new drill barge and suction dredger, and an increase of the tugboat fleet by 20%. In addition, improvements have been made to the Canal’s operating machinery, including an increased and improved tug locomotive fleet, the replacement of more than 16 km of locomotive track, and new lock machinery controls. Improvements have been made to the traffic management system to allow more efficient control over ships in the Canal.

The Canal’s global competition

Despite having enjoyed a privileged position for many years, the Canal is increasingly facing competition from other quarters. Although remote, speculation continues over a possible new canal through Mexico, Colombia or Nicaragua that will be capable of accommodating post-Panamax vessels, and two private proposals for a railway linking ports on the two coasts.

Critics have also voiced their concerns over the planned increase in Canal tolls, suggesting that the Suez Canal may become a viable alternative for cargo en route from Asia to the U.S. East Coast. Nevertheless, demand for the Panama Canal continues to rise.

The increasing rate of melting of ice in the Arctic Ocean has led to speculation that the Northwest Passage may become viable for commercial shipping at some point in the future. This route would save 9,300 km (5,800 miles) on the route from Asia to Europe compared with the Panama Canal, possibly leading to a diversion of some traffic to that route. However, such a route would still hold significant problems due to ice, at some times of year, as well as unresolved territorial issues.

The Canal’s future

With demand rising, the Canal is positioned to be a significant feature of world shipping for the foreseeable future. However, changes in shipping patterns – particularly the increasing numbers of post-Panamax ships – have necessitated the recently agreed changes to the Canal so that it may retain a significant market share. It was recently anticipated that, by 2011, 37% of the world’s container ships would have been too large for the present Canal, and hence a failure to have expanded would have resulted in a significant loss of market share. The maximum sustainable capacity of the present Canal, given some relatively minor improvement work, was estimated at between 330 and 340 million PC/UMS tons per year; it was anticipated that this capacity would have been reached between 2009 and 2012. Close to 50% of transiting vessels are already using the full width of the Canal’s locks.

An enlargement scheme similar to the 1939 Third Lock Scheme, to allow for a greater number of transits and the Canal’s ability to handle larger ships, has therefore been under consideration for some time. This enlargement scheme was approved by the Panamanian Government and, subsequently, this proposal to expand the Canal was finally approved in a national referendum (by 76.8%) on 22 October 2006.

The Canal’s expansion project

The current plan is for two new flights of locks: one to the East of the existing Gatún locks, and one Southwest of Miraflores locks, each supported by approach channels. Each flight will ascend from ocean level
direct to the Gatún Lake level; the existing two-stage ascent at Miraflores / Pedro Miguel will not be replicated. The new lock chambers will feature sliding gates, doubled for safety, and will be 427 meters (1,400 ft) long, 55 meters (180 ft) wide, and 18.3 meters (60 ft) deep; this will allow for the transit of vessels with a beam of up to 49 meters (160 ft), an overall length of up to 366 meters (1,200 ft) and a draft of up to 15 meters (50 ft), equivalent to a container ship carrying around 12,000 20-foot (6.1 m) long containers (TEU).

The new locks will be supported by new approach channels, including a 6.2 km (3.8 mile) channel at Miraflores from the locks to the Gaillard Cut, skirting around Miraflores Lake. Each of these channels will be 218 meters (715 ft) wide, which will require post-Panamax vessels to navigate the channels in one direction at a time. The Gaillard Cut and the channel through Gatún Lake will be widened to no less than 280 meters (918 ft) on the straight portions and no less than 366 meters (1,200 ft) on the bends. The maximum level of Gatún Lake will be raised from reference height 26.7 meters (87.5 ft) to 27.1 meters (89 ft).

The water storage basins adjacent to each lock chamber are staged in height to allow each of them in turn to be filled by gravity as the lock chamber drains.

Each flight of locks will be accompanied by nine water re-utilisation basins (three per lock chamber), each basin being approximately 70 meters (230 ft) wide, 430 meters (1410 ft) long and 5.50 meters (18 ft) deep. These gravity-fed basins will allow 60% of the water used in each transit to be re-used; the new locks will consequently use 7% less water per transit than each of the existing lock lanes. The deepening of Gatún Lake, and the raising of its maximum water level, will also provide significant extra water storage capacity. These measures are intended to allow the expanded Canal to operate without the construction of new reservoirs.

The estimated cost of the project is US$ 5.25 billion. The project is designed to allow for an anticipated growth in traffic from 280 million PC/UMS tons in 2005 to nearly 510 million PC/UMS tons in 2025; the expanded Canal will have a maximum sustainable capacity of approximately 800 million PC/UMS tons per year. Tolls will continue to be calculated based on vessel tonnage, and will not depend on the locks used.

The new locks are expected to open for traffic in 2015. The present locks, which will be 100 years old by that time, will then have greater access for maintenance, and are projected to continue operating indefinitely.

On 3 September 2007, work commenced on the expansion of the Canal, with thousands of Panamanians at Paraiso, Panama City, witnessing a huge explosion bite into a hill. However, the event was sadly marred by the death of a worker, killed when his truck hit an electric pylon. The first phase of the project will be dry excavations of the 218 meter (715 ft) wide trench connecting the Culebra Cut with the Pacific coast, removing 47 million cubic meters of earth and rock.

The Canal’s cargo volume

Based on ACP’s projections, during the next 18 years, cargo volume transiting the Canal will grow at an average of 3% per year, doubling for example 2005’s tonnage by the year 2025. As such, providing the Canal with the capacity to transit larger vessels will make it more efficient by allowing the transit of higher cargo volumes with relatively fewer transits and less water use.

Historically, the dry and liquid bulk sectors have generated most of the Canal’s revenues. Recently, however, the containerized cargo sector has replaced the dry bulk sector as the Canal’s main income generator, moving the dry bulk sector into second place. On the other hand, the vehicle carriers’ sector has become the third income generator, replacing the liquid bulk sector. Shipping industry analyses conducted by the ACP and top industry experts indicated that it would be beneficial to both the Canal and its users to expand the Canal due to the demand that would (and now will) be served by allowing the transit of more tonnage.

The question is, however, whether the trend upon which the ACP made those projections can continue for a generation. The growth in Panama Canal usage over the past few years has been almost entirely driven by increased U.S. imports from China passing through the Canal to ports on the U.S. East and Gulf Coasts. But it is increasingly recognized in both the U.S. and China that this imbalance in trade is unsustainable and will be reduced by some sort of adjustment in the coming years, though it is important to note that any such imbalance need not be made up by physically-shipped goods, but could be made by other trade such as intellectual property as China upgrades its intellectual property protection laws. The ACP, however, has presumed that it will not only not be adjusted, but will continue to grow for a generation as it has for the past several years. One of the central points of the Canal expansion proposal’s critics, most prominently made by former Canal administrator Fernando Manfredo, was that it was unrealistic to attempt to predict Canal usage trends over a generation, most improbable to expect that U.S. imports from China would continue to grow as they have the past few years over a generation, and irresponsible to bet Panama’s financial future on such a projection.

In Pacific Merchant Shipping Association v Cackette, 9th Cir, No 07-16695, 23.10.07 a federal appeals court lifted an injunction blocking California from requiring marine vessels to use cleaner burning fuels to power auxiliary engines, pending the appeal of a trial court decision that concluded the Clean Air Act pre-empted the requirement. It therefore permits the California Air Resources Board to enforce State rules reducing diesel emissions from domestic and foreign-flagged ships sailing within 24 nautical miles of the California coast. Stricter emissions standards began in January 2007 with tighter standards coming into effect in 2010. The merits of the legal issues are still before the Ninth Circuit Court of Appeals, which has said it will expedite appeals concerning these rules.
CLAIMING COMPOUND INTEREST

Matt Enston, an Associate in our Dry Shipping Group, comments on the recent decision of the House of Lords in Sempra Metals Ltd v Inland Revenue Commissioners [2007] UKHL 34 (“Sempra”) which indicates that compound interest is in principle recoverable in restitution claims, and as damages for breach of contract and in tort.

The position pre-Sempra

The Sempra decision represents an important development in the law relating to the recovery of interest in restitution and damages claims.

With regard to restitution claims – that is, claims for the return of property or unjustified gains to the rightful owner/beneficiary – pre-Sempra, the position was essentially that the courts did not have power to award compound interest. Therefore, where (for example) a party mistakenly paid a sum of money to another party, whilst the first party was entitled to recover the principal sum, it was unable to recover the interest on that sum which the second party would or should have received.

With regard to damages claims, claimants in the English Courts typically claimed interest on damages awarded to them, and the court has discretionary power to award simple (but not compound) interest under section 35A of the Supreme Court Act 1981.

Further, the judgment of the House of Lords in President of India v La Pintada Cia Navigacion SA [1985] AC 104 indicated that a claimant could recover interest as damages for the loss of use of money if that loss fell within the second limb of the Hadley v Baxendale rule: that is, a loss which may reasonably be supposed to have been in the parties’ contemplation at the time they entered the contract as the probable result of a breach. Oddly, however, the judgment in that case indicated that interest losses were not recoverable under the first limb of the Hadley v Baxendale rule (that is, on the basis that they were losses arising in the ordinary course of things as a result of the defendant’s breach).

The judgment in Sempra

The Sempra case concerned a claim in restitution by Sempra Metals Ltd against the Inland Revenue for the time value of money (in the form of corporation tax) which had been paid prematurely under mistake and/or pursuant to the Revenue’s unlawful demand.

The main issue before the House of Lords was essentially this: is a claimant entitled to recover compound interest in restitution?

In essence, it was held that Sempra Metals Ltd was entitled to recover compound interest, on the basis that its premature payments had (unjustly) given the Revenue the use of the money. The Lords determined that Sempra was entitled to recover the time value of the money, and in accordance with the normal principle in restitution claims – which is to be distinguished from the compensation principle applied to damages claims – the time value of money was to be assessed according to the cost to the defendant of borrowing the money on normal commercial terms. In that respect, although it may in the normal course be open to the government to borrow money on more favourable terms than are available publicly, the Lords held that the time value of the money was to be assessed objectively. Therefore, given that money is typically borrowed on terms that require payment of compound interest, that was the measure of the benefit enjoyed by the Revenue, for which it had to account to Sempra.

Damages claims

Whilst the principal issue before the House of Lords in Sempra concerned a claim in restitution, the judgment also indicates that compound interest should as a matter of principle be recoverable as damages in breach of contract and tort claims, subject to the usual rules of proof and remoteness.

In other words, claimants will no longer be restricted to claims for interest on damages (under the Supreme Court Act), nor will they necessarily be required to frame their claim for interest losses as a claim under the second limb of Hadley v Baxendale. Instead, they may claim compound interest as damages, providing the losses are not too remote. This aspect of the judgment was obiter dicta, but it is likely to be followed by other courts.
The House of Lords was however keen to stress two points. First, that claims for interest would have to be specifically pleaded and proved – a general claim for “damages” would not suffice, and the court would not presume interest losses – and second, that the Sempra judgment should not be taken as meaning that compound interest will always be recoverable as damages: any claim for interest must be pleaded and proved as a separate item of loss.

Practical consequences

The precise nature of the court’s power to award compound interest will no doubt be explored and further clarified by the courts. However, at first blush, it seems that the practical effects of the judgment in Sempra are that:

1. a claimant may now claim in restitution compound interest on money which it paid by mistake; and
2. a claimant may also claim compound interest as damages, providing (a) it can prove its loss, and (b) the interest loss either (i) arose in the ordinary course, as a result of the defendant’s breach, or (ii) can reasonably be determined to have been in the parties’ contemplation at the time the contract was entered into as the probable result of the breach.

Finally, given that the right to recover compound interest as damages is a common law and/or equitable remedy, the relief should be available in arbitration, as well as in High Court litigation. The Arbitration Act 1996 does of course already provide arbitrators with discretion to award compound interest on damages.

OFF-HIRE CLAUSES AND CHARTERERS’ RIGHT TO CANCEL

Charlie Weller, a Partner, and Philippa Davy, a Trainee Solicitor, both in our Dry Shipping Group, consider a case arising in a falling market, where charterers locked into fixtures at an unprofitable rate look closely at any charter clauses entitling them to cancel if the vessel is off-hire for a prolonged period.

This was the position facing the charterers of The Fu Ning Hai.

There were three relevant clauses dealing with off-hire in the Charterparty:

(i) Clause 15 NYPE 1946, unamended,

(ii) Clause 56: a supplementary off-hire clause, providing that the vessel was to go off-hire in cases where the Charterer was prevented from using it due to “accident or breakdown…sickness…refusal to perform duties, oil pollution…capture/seizure or detention.” It also included the provision that “if the vessel has been off-hire for a period of more than 30 days, the Charterers are at liberty to cancel.”

(iii) The vessel was due to be dry-docked during the term of the C/P, and so, on fixing, clause 70 was inserted. This provided that the “vessel to be placed off-hire upon DLOSP one safe port Singapore/Japan range…put back on hire at DLOSP dockyard.”

The Facts of the Case

In fact, the dry-docking did not occur precisely as contemplated. Instead, prior to the dry-docking, the vessel’s Owners wished to fit in an extra voyage from South Kalimantan to South China for their own account, before taking the vessel to North China for dry-docking. Accordingly, the Owners requested permission from the Charterers, to take back the vessel earlier than anticipated so that this additional voyage could be performed. The Owners said that the voyage was to take approximately 15 days. The dry-docking was estimated at a further 15 days.

Charterers confirmed their consent:

“on the understanding that for the purposes of C/P clause 70 the Vessel will be off-hire on DLOSP discharge port…All rights/obligations under the C/P to be otherwise unaffected.”

On 23 September, the Owners wrote to the Charterers giving an estimated time from taking redelivery of the vessel until delivery back the Charterers,

“If all goes well, weather permitting, without guarantee”, of 36 days.

Pursuant to this agreement, the vessel was redelivered to the Owners on 9 October, and proceeded to complete its voyage and dry-dock. However, on 9 November, three days before the Head Owners were due to return the vessel into the charter service, Charterers sent a message stating that:

“Pursuant to C/P clause 56 of the subject C/P, we are at liberty to cancel the balance of the Charterparty…and we hereby given notice exercising our right under clause 56 to cancel the balance of the Charterparty.”

The Owners disagreed, and accepted the Charterers’ conduct as a repudiatory breach of the charterparty. The dispute went to arbitration.

The Arbitration Award

The Charterers’ case was that they were entitled under clause 56 to cancel the contract as the vessel had been off-hire for more than 30 days. The Owners contended that the condition was not fulfilled, as clause 56 did not apply to off-hire arising under the dry-docking clause. Alternatively, the Owners submitted that the Charterers’ claim was defeated by estoppel or waiver, on the basis that the Charterers had agreed to the vessel being taken out of their service for a preliminary voyage for Owners’ own account before the agreed dry-docking, and this was not ‘off-hire’ for the purposes of the charter.
The Arbitrator did not agree with the Owners, reasoning that dry-docking is “the occasion most likely to result in a delay of thirty days” and consequently Charterers would wish to protect themselves against it. However, he did not agree with the Charterers either, but on grounds which Charterers said, on appeal, had not been put to him in argument by either party.

The Arbitrator concluded that the agreement between the Head Owners, disponent Owners and Charterers was a different contract, the effect of which was to suspend the performance of the charter. As a result, the time out of service did not come within clause 56 at all. He held that while the period after the Owners’ preliminary voyage, when the vessel was actually in dry-dock, was ‘off hire’ within the meaning of clause 56, this period was less than thirty days and therefore did not assist Charterers.

Further, the Arbitrator held that the Charterers’ repeated reservations of “All rights/obligations under the C/P otherwise to be unaffected” were too general to preserve the right to cancel. Any attempt to reserve Charterers’ rights would have needed to be clearer to be effective.

The Appeal

The Charterers appealed on three points:

(a) Whether the vessel was off hire from 9 October 2005 within the meaning of clause 70, so that the Charterers were entitled to cancel on 9 November 2005;

(b) Whether the vessel was off hire within the meaning of clause 15 and whether the full working of the vessel was prevented by the relevant off hire event; and

(c) That there was a serious irregularity affecting the Award, as the point on which the Owners succeeded was one thought of by the Arbitrator himself, and that the Arbitrator failed to deal with the arguments central to the issues between the parties.

Mr Justice Morison agreed with the Arbitrator that what was established between the Owners and Charterers was an ad hoc agreement which, even though the precise terms were not known, “took the vessel out of the service of the C/P in a way not contemplated” at the time of fixing. During the period when no hire was being paid by Charterers to Owners, the vessel was therefore not ‘off hire’ within the meaning of clauses 15, 56 and 70; it was a period when hire was not paid pursuant to a special arrangement. “Effectively, the Charterparty was suspended during [Owners’] use of the vessel”.

An important point arises out of this decision for parties fixing period business which straddles scheduled dry-dockings. It is significant that both the Arbitrator and the Court found that had the dry-docking exceeded 30 days, the Charterers would have been entitled to cancel the charterparty. Accordingly, it appears that any express right to dry-dock the vessel given at the time of fixing will, in the absence of clear language to the contrary, be subject to the same cancellation regime as any other off-hire event.

The Court gave short shrift to the Charterers’ argument that there was a serious irregularity affecting the Award. He held that “not only was the Arbitrator not obviously wrong; rather he was obviously right.” The significance of this finding is that an appeal based on the claim that the Arbitrator used his own reasoning and arguments in deciding a case (rather than being confined to the parties’ submissions) is likely to fail where, in the view of the Judge on Appeal, the conclusions reached are clearly correct. A final point to note, although this did not appear in the parties’ arguments, was that the clause did not make it clear that it was concerned only with 30 consecutive days of off-hire, and not 30 days cumulated throughout the duration of the charterparty.

SVITZER ANNUAL PARTY

Richard Harvey, partner in the Shipping Group, recently attended the Svitzer annual party which this year was held at the top of the Gherkin, with spectacular views and a jazz trio for the 180 or so guests who struggled through the tube strike.

A large number of the great and the good from the mainly London shipping community were present. Towards the end of a short welcoming speech (reported with colour photo in Lloyd’s List 10 September, p 16), the Svitzer CEO, Robert-Jan van Acker took time to acknowledge Richard’s thirty years of service to Svitzer, and made him an unexpected presentation.

Richard has also recently travelled to Holland advising Svitzer on the content of a salvage training course they will be running for the shipping industry next year. This is the second such visit Richard has paid.

Richard has been appointed as a Director of the London Shipping Law Centre attached to University College, London.
EUROPEAN COMMISSION TO RE-EXAMINE THE PROTECTION OF SEAFARERS

Laurence Rees, a Partner and Kate French, an Associate, both in the Employment Group comment on the implications of the European Commission’s consultation paper on seafaring jobs in the EU.

On 10 October 2007 the European Commission released a first phase consultation paper entitled “Reassessing the regulatory social framework for more and better seafaring jobs in the EU”. The European social partners (EU-wide organisations representing management and labour) have until 21 November 2007 to provide their response. The outcome of this consultation could have important implications for the maritime sector.

Why consult on seafaring jobs specifically?

At present, many European Directives allow national governments to exclude certain categories of seafarers from the scope of various provisions of employment legislation. This is due to the particular nature of seafaring work, as such workers often regularly work away from their home countries, and on ships registered abroad. Traditionally, it has been thought to be impracticable to apply the same rules and regulations to seafarers as to other workers, but the Commission is now keen to ensure that seafarers receive adequate protection.

What areas are being consulted upon?

The Commission is consulting on whether or not adequate protection is provided by Directives in each of the following areas:

1. **Insolvency of employer.** Currently, Member States can exclude claims by certain categories of employees from the scope of protective legislation in this area (including seafarers), so long as adequate protection is provided for those employees through other guarantees. In addition, any Member State whose national law already excluded share-fishermen from the scope of such legislation is permitted to retain that exclusion. At present, only six Member States (including the UK) make use of these permitted exclusions in the case of seafarers. The Commission has concerns as to whether such exclusions are justified.

2. **European works councils.** Member States can exclude merchant navy crews from the scope of the EU Directive providing for the establishment of European Works Councils in EU-scale undertakings and groups of undertakings. European Works Councils are bodies set up by large European wide employers for the purpose of discharging the requirements for informing and consulting employees at European level. The UK has not made use of this exclusion, although it has provided mechanisms to adapt the legislation to seafarers by enabling seafarers to participate if central management allows them to do so. The Commission is questioning whether this exclusion remains justified, given that only a minority of the Member States make use of it and since the Directive may be flexible enough so that no specific exclusion is actually needed in any event.

3. **Information and consultation.** Currently, Member States cannot completely exclude seafarers from rights under the EU Directive on the establishment of information and consultation procedures at national level (e.g. Works Councils) but can make particular provisions for “the crews of vessels plying the high seas”. The UK made such provisions which allow seafarers to become representatives for information and consultation purposes if the employer permits this. The Commission proposes to examine whether the particular provisions applying to seafarers which exist are in conformity with the Directive.

4. **Collective redundancies.** The Directive relating to consultation with employee representatives about large-scale redundancies does not apply to the crews of seagoing vessels, and UK law makes use of this exclusion. As far back as 1991, the Commission viewed this exclusion as unjustifiable, and would like to see it re-examined.

5. **Transfers of undertakings.** Sea-going vessels are generally excluded from the scope of the EU “Acquired Rights” Directive (which is intended to protect employees’ rights on transfers of undertakings and businesses). The legislation implementing the Directive in the UK (the Transfer of Undertakings (Protection of Employment) Regulations 2006 – ‘TUPE’) does not in fact exclude seagoing vessels. Since a number of Member States take the same approach of not excluding sea-going vessels from their own legislation, the Commission considers that this exclusion has no real justification and should be removed. In practical terms, therefore, any review of this aspect of employment law would be unlikely to have any real effect in the UK.

6. **Posting of workers.** The EU “Posted Workers” Directive (which gives rights to posted workers between Member States) does not apply to “merchant navy undertakings as regards seagoing personnel”. The Commission believes that this exclusion remains justified.

7. **Health and safety.** There are in fact 28 Directives which deal with health and safety, and only two of these contain exclusions for those in the maritime sector (namely, those concerning the minimum health and safety requirements for the workplace, and the minimum safety and health requirements for work with display screen equipment). In addition, specific legislation, agreements and conventions have been introduced separately to cover the maritime sector, such as the ILO Maritime Labour Convention 2006, the ILO Work in Fishing Convention 2007, a Directive dealing with medical treatment on board vessels and a further Directive dealing with health and safety requirements on board fishing vessels (although
small vessels are currently excluded from the scope of this). The Commission believes this ‘small vessels’ exclusion to be justified but would like to see an end to the high level of work accidents in fishing.

8. **Coordination of social security schemes**. There is a general principle that workers and members of their families do not lose social security protection if they move within the EU. However, seafarers are only covered when the flag of the vessel is that of a country within the EU / EEA or Switzerland; and even then, workers from countries outside Europe may not be covered. In addition, the scope of the legislation providing for social security protection does not apply to certain insurance schemes and collective agreements, and this means that many seafarers miss out on certain social security rights, including pension rights. It should be noted that the ILO Maritime Labour Convention 2006 will provide some protection for seafarers as it aims to set a minimum level of social security protection comparable with the protection afforded to onshore workers resident in a Member State. The Commission believes further protection could be achieved by increasing the number of international agreements which incorporate social and equal treatment provisions.

**Questions raised by the commission**

The Commission has provided the Social Partners who are being consulted with a list of specific questions for consideration:

1. Do they share the Commission’s views as to which exclusions are justified?
2. Where the current exclusion is not justified, should seafarers be brought within the general scope of the legislation, and what priorities should be given to this?
3. Where the current exclusion is justified, is equivalent protection provided for by other means? Should specific legislation relating to seafarers be introduced?
4. How best can health and safety on board vessels be enhanced?
5. What should be done to improve the social security protection of maritime workers?

**What happens next?**

If, after reviewing the responses to this consultation, the Commission views Community action as being advisable, it will then consult further with the Social Partners on any proposal. This could result in EU legislation being amended to enhance protection for seafarers, and each Member State would then need to change its national laws to the extent necessary to ensure compliance with any new provisions, although this will take some time. The shipping industry should therefore “watch this space”.

**RICHARDS BUTLER HONG KONG WILL MERGE WITH REED SMITH**

Richards Butler Hong Kong will merge with Reed Smith on 1 January 2008, the highly respected Hong Kong practice becoming a fully-integrated part of Reed Smith. This means that we shall be able to provide our clients with service in key markets in the US, Europe, the Middle East and Asia. The combined firm will have a leading practice in Greater China, with more than 110 lawyers in Hong Kong, an operation in Beijing and plans to seek a licence to practise in Shanghai. The merger consolidates synergies in both firms’ core global strengths in litigation, finance, corporate and shipping.
Q&A: WITH RICHARD SWINBURN

Richard Swinburn is the Managing Partner of Reed Smith Richards Butler’s London office.

What is your full name:
Richard George Swinburn

Mother/father’s nationality?
British

Where were you born?
Corbridge, Northumberland

Any lawyers in family before?
No

What jobs, other than the law, did you consider?
Briefly being a doctor…before realising that I was not good enough at science!

What other jobs did you do in your summer hols etc?
Strawberry picking, nightshift factory work, petrol pump attendant, catering at Wimbledon and many others

How does working at RSRB’s compare to them?
They are all very different! Once in a while I think I might take a holiday in the summer and go back to work at Wimbledon!

What has been your favourite holiday destination to date?
Lots of different ones: Australia, Tanzania, France, West of Scotland

Have you been anywhere of particular interest on business?
Most “interesting” was probably either St Petersburg as Yeltsin “held” Gorbachev in his dacha, or Turkmenistan

If you could go to one place in the world where would it be?
Statue of Christ the Redeemer, Rio de Janiero, Brazil or perhaps Pentire Point, Cornwall on a cold, clear and windy day

Why?
The former because it is the most uplifting place. The latter because it is one of the most beautiful and wild spots.

Are you married?
Yes

Car?
Er…bashed up Volvo Estate…sorry!

Where do you live in London?
Wandsworth Common

How do you get into work?
Train and tube

What podcast did you last download?
Er…

Most played song on your i-pod?
It changes…presently most listened to albums Keane (Hopes and Fears) and Mika (Life in Cartoon Motion). Over time, Queen (Made in Heaven). Freddie Mercury had the best voice ever, and any Sting album (he’s a Geordie)

Last concert you went to?
Cannot remember!

Last item of clothing you bought?
Jeans and T-shirts (lots in the US)

Last five things on credit card?
Theatre tickets (Warhorse at National Theatre)/rugby tickets (South Africa/Barbarians)/restocking wine rack…

Last film you went to see?
Er…probably latest Harry Potter in the summer

Favourite actor/actress?

Favourite sport?
To watch…rugby, soccer, cricket. To play…tennis, running

How do you relax?
With my family and friends…or running

Do you have a personal role model – either at work or for life generally? If so, who?
I guess my parents!

We are meant to learn from our mistakes – what will you never forget?
Judge the mood before joking. I once found myself embroiled in an internal investigation at one of my holiday jobs. So serious was the suggestion that I thought they were joking. They weren’t!
STRENGTHENING THE POSITION OF LONDON ARBITRATION CLAUSES

Sally-Ann Underhill, the professional support lawyer in the Shipping Group, reports on the House of Lords judgment in the case of Premium Nafta Products Limited and Others v. Fili Shipping Company Limited and Others.

The decision concerns the scope and effect of arbitration clauses in Shelltime 4 form, but is of much wider application and extends to all arbitration clauses. Clause 41 of Shelltime 4 provides for any dispute arising under the charter to be dealt with by the English Courts unless one of the parties exercises an option to have the matter referred to arbitration. This constitutes an arbitration agreement, and the House of Lords dealt with it as if it was a basic arbitration agreement.

Two issues arose:

1. Construction – whether, as a matter of construction, the arbitration clause covered the question of whether the contract was procured by bribery (the underlying allegation being that the main agreement was in uncommercial terms which, together with other surrounding circumstances, gave rise to an inference that an agent acting for the Owners was bribed to consent to it).

Clause 41 provides for “any dispute arising under this charter” to be referred to arbitration. There is much legal authority as to the difference between such clauses and those referring to “disputes arising out of this charter”.

In the leading judgment, Lord Hoffmann held that the time has come (i) to stop arguing about the possible differences between such clauses, (ii) to give commercial effect to such clauses, (iii) to draw a line under the authorities to date, and (iv) to take on board the provisions of section 7 of the 1996 Act, which provides that “unless otherwise agreed by the parties, an arbitration agreement which forms or is intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement”. This means that from now on, all such arbitration clauses should be construed on the assumption that the parties intended that any dispute arising out of their relationship be decided by the same tribunal. This will be the case unless the language of the arbitration clause makes it clear that certain questions were intended to be excluded from the arbitrators’ jurisdiction.

In future, if parties wish to have issues relating to, for example, the validity of the agreement itself, dealt with otherwise than by the agreed arbitration tribunal, they will need to make express reference to this in their arbitration clause.

2. Separability – the issue of whether it is possible for a party to be bound by a submission to arbitration when he alleges that, but for, for example bribery, he would never have entered into the contract containing the arbitration clause. Reference was again made to the section 7 Arbitration Act principle of separability. The Lords held that the arbitration agreement must be treated as a distinct agreement, and can be void or voidable only on grounds which relate directly to the arbitration agreement itself. In this case, notwithstanding the suggestion that the agreement was in uncommercial terms, the agreement would, in any event, have been almost bound to include an arbitration clause, or some other jurisdiction clause. Reference was made to the fact that such clauses are not generally subject to minute scrutiny by the parties, as their purpose is clear. The judgment therefore clarifies that if a party wishes to dispute the validity of an arbitration agreement, it needs to adduce grounds which relate to the arbitration agreement itself, and are not merely of consequence to the validity of the main agreement.

The judgment is clearly a commercial one, and should introduce certainty into this area by reducing the number of challenges to London arbitration clauses and increasing their effectiveness.
WELCOME TO ...

Alan Curran joined our Shipping Group as an Associate in July 2007. Alan qualified with Hill Taylor Dickinson (now Hill Dickinson) in 2003 and later moved to Elborne Mitchell. He has a broad experience and advises in a wide range of shipping matters acting for P&I Clubs, Owners and Charterers. He is primarily focussed on dry shipping and works in particular on P&I and FD&D matters and bill of lading and charter disputes. Alan also has experience of admiralty and wet shipping matters. Alan is qualified as a Solicitor-Advocate and is a member of the Solicitors Association of Higher Court Advocates.

Ruth Allan de Maldonado joined Reed Smith Richards Butler’s Shipping Group as an Associate in September 2007 having trained with Hill Taylor Dickinson in London (now Hill Dickinson), qualifying in September 2007. During her training Ruth gained experience of both wet and dry shipping matters as well as shipping related corporate/commercial work and ship finance projects. She is now working mainly on dry shipping matters with Nick Shaw, Charlie Weller and Andrew Taylor. Ruth is fluent in Spanish and has a good working knowledge of French, having previously spent nine months working for Baker & McKenzie in Mexico and two years working and studying law in France.

Darren Smith is a Partner specialising in liability claims. He joined Reed Smith in 1994 to start up a Defendant Personal Injury Practice, which has developed into a specialist defendant practice for liabilities encountered by commercial operations. He has particular expertise in defending ship owners, ship insurers and industrial clients in relation to workplace industrial accidents and disease claims, including asbestosis and mesothelioma. He also has extensive experience in product liability matters, including group litigation.

Julia Dodds is a member of the Birmingham litigation team. She has experience of personal injury group litigation and product liability matters. She has acted for ship owners and crew management companies in respect of personal injury claims both from crew and others who allege their injuries arose as a result of failures in the operation of vessels. Julia is also involved in the EL Trigger Litigation relating to insurance cover for injuries resulting from historical asbestos exposure.

Claire Hamm became an Associate in 2007 having previously joined the firm in 2004 as a Legal Executive. She was announced as the winner of the coveted Peter Marsh Award 2004 by the Birmingham Branch of the Institute of Legal Executives for her great effort, commitment and enthusiasm for the Legal Executive course. She specialises in defending personal injury and product liability matters, including employers’, public and occupiers’ liability claims. This includes accident and disease claims. Claire leads the defence on many of the asbestos related claims that we handle in the UK, which have included claims from alleged asbestos exposure arising from work on board ships and other vessels.

John Watters joined the Shipping Group on 14 October 2007 as an Associate, having worked for Hill Taylor Dickinson (now Hill Dickinson) and completing his training contract in September 2007. During his training John focussed on shipping litigation, gaining experience of wet and dry matters as well as ship finance projects, and also spent six months in their Piraeus office. He will be working with Alex Andrews and Lindsay East principally undertaking dry shipping matters. He has travelled extensively and speaks fluent Portuguese having worked in Brazil for two years.