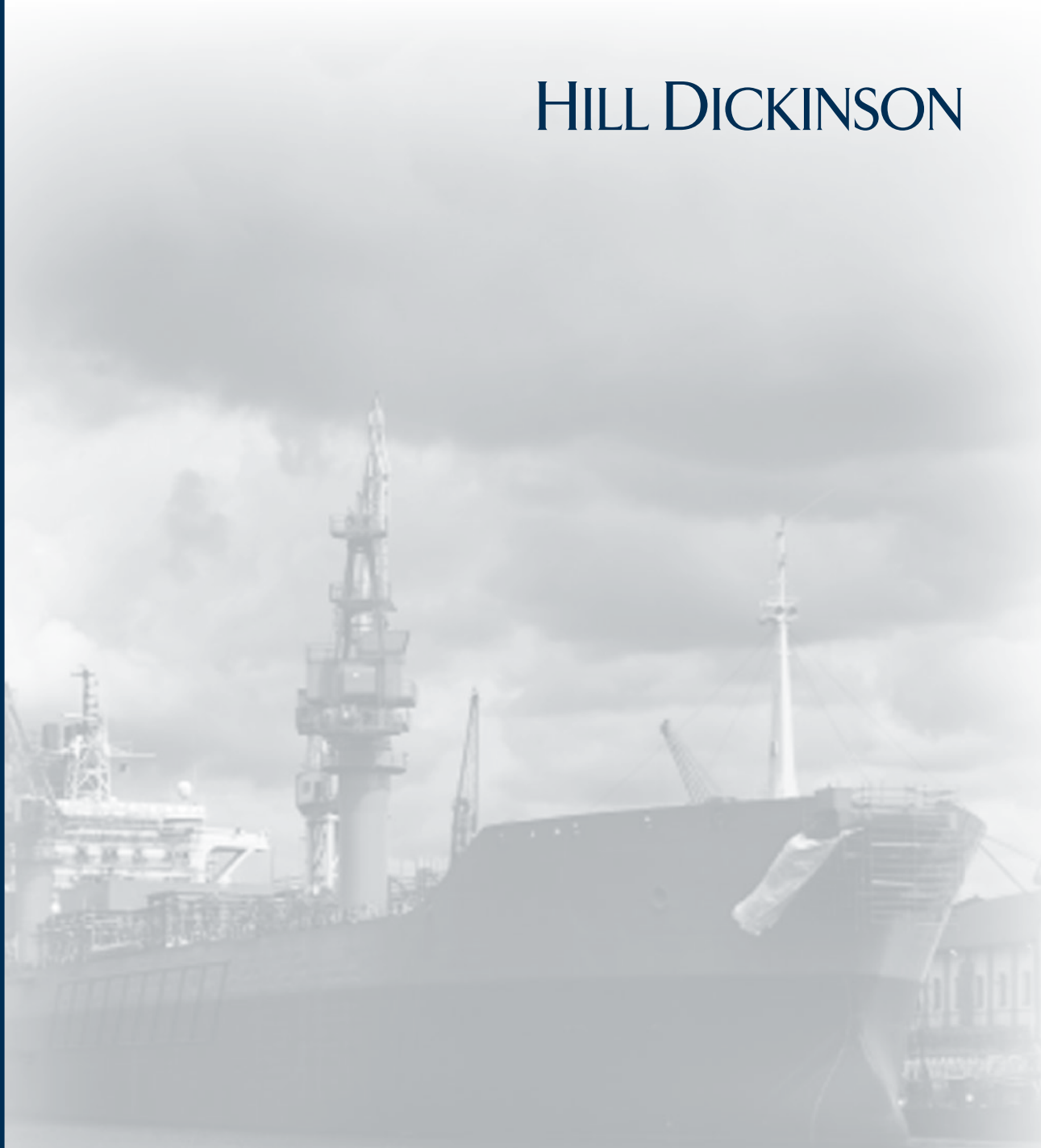
April 2008

HILL DICKINSON



Marine Newsletter

HILL DICKINSON

OFFICIAL LAWYERS
EUROPEAN CAPITAL OF CULTURE

08 Liverpool

Contents

Letters to the editors

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

Stephen Cropper: Obituary

We are very sad to report the sudden and untimely death of Stephen Cropper on 4th April. He was just 60.

Stephen was a highly respected maritime lawyer. He was mainly an admiralty man and a "wet" lawyer of the old school, a man of maritime casualties, collisions and salvages, but his interests and abilities covered a great variety of carriage and coverage disputes. He had great warmth and generosity of spirit, a keen mind and a sharp wit. He was a gifted linguist, raconteur and mimic, an accomplished public speaker and a bon viveur and gourmet. He had an enormously active life outside work and a large and international network of clients and friends.

Stephen was born in 1947. He attended Derby Grammar School and St John's College, Oxford. He was a lifelong Derby County supporter. He was a fine sportsman: a first class Oxford and school and county hockey player, a member of Vincents at Oxford, and he later played for the Cygnets and Slough Hockey Club. He retained an active interest in and connection with sport all his life, whether as a member of the MCC, as a regular fixture at Twickenham, as a keen skier and in his network of friendships with top class sportsmen in the worlds of rugby and cricket. He remained instantly recognisable to anyone from his Oxford days - clever, cheerful, loyal, ebullient and irreverent.

Stephen was admitted to the Roll in 1974, joined Hill Dickinson & Co in April 1978 and became a partner in 1982. In 1989 he was a founding partner in the newly created Hill Taylor Dickinson, which merged with Hill Dickinson LLP in 2006. Over almost 30 years he developed an extensive practice, mainly in admiralty work. He was a robust man of huge stamina and considerable physical courage. He was enormously widely travelled, to conventional, exotic and sometimes dangerous destinations. He had a particularly wide and loyal body of friends and clients in Japan, Holland, Russia and Germany.

Stephen quietly accumulated a body of significant, high value cases, most of which never reached the Law Reports. His creed was to settle matters on the right terms - always a commercial solution and never a soft compromise. He was a principled individual and a strong-minded opponent, handling some of the largest Lloyd's Form salvage cases, from the LNG Taurus in the early 1980s to more recently the largest ever SCOPIC claim. He handled the navigational and limitation aspects of the Bowbelle/Marchioness collision, and represented the Dutch navy in its construction claim against the London Market. He drafted one set of the Liverpool & London P&I Club Rules, and acted in a catalogue of collisions, groundings, sinkings and explosions, and fire, piracy, energy and war claims.

Stephen's was a life lived to the full; a professional life of fulfilment and high achievement and a personal life packed with action and enjoyment. He is survived by his wife Kate and his mother, to whom all at Hill Dickinson send their sincere condolences. He is and will be sadly missed by the partners and staff of Hill Dickinson, by his many friends, and by all who knew him. His memorial will be held at St Botolph's Church, Aldgate in the City, on 7 May 2008.

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STOP PRESS...

Hill Dickinson is delighted to announce that its marine and commodities expertise in London has been further strengthened by the arrival of Kamal Mukhi, who is qualified in England and India. Kamal has practised in the shipping and international trade sectors in the City, and in New Delhi as a dispute resolution and corporate lawyer. Kamal's clients include ship-owning companies and some of the largest trading houses in India.

STOP PRESS...

Our congratulations go to Bobby Nolan of the Manchester office marine team who, with effect from 1 May 2008, is promoted to partner. Bobby joined Hill Dickinson in 1998 having spent the previous 3 years working in-house for a large plc. She has a caseload consisting mainly of cargo recoveries and freight liability claims arising out of the carriage of goods by road, sea and air. She also has experience of domestic haulage regulatory work, and regularly deals with policy coverage issues. We wish Bobby continued success in her new role.

STOP PRESS...

We are also delighted to announce that the yacht team will be joined, in May, by Martin Penny, a senior marine partner with many years' experience of yacht-related litigation and commercial work, having been a partner at Holmes Hardingham since 1999. Martin is also a seasoned offshore sailor, with transatlantic experience.

Yacht Team

Our yacht litigation capability will be further strengthened by the arrival of another experienced solicitor, Jessica Taylor, from our insurance liability team, also in May. Jessica has strong litigation credentials and will work alongside Martin Penny, Elliot Bishop, Barnaby Wright and the rest of the yacht team:

Tony Allen - Head of Yacht Team

James Lawson, Malcolm Entwistle, Panos Pourgourides - Partners, Transactional & Finance

Roddy Palmer, Malcolm Taylor - Partners, Finance & Aviation

David Reardon - Associate, Transactional & Finance

Oliver Ross - Associate, Transactional, Finance & Aviation

Barnaby Wright - Associate, Litigation & Dispute Resolution

Elliot Bishop - Solicitor, Litigation & Dispute Resolution

Steve Ross - Solicitor, Finance & Aviation

Pawel Wysocki, Thomas Frei - Solicitors, Transactional

Charles Morgan - Solicitor, Employment, Crew Contracts

Sarah Marshall-Ellison - Paralegal, Transactional & Registration

Over the past 12 months the yacht team has advised on more than 150 newbuild, sale and purchase and financing transactions, in connection with yachts totalling 4 nautical miles in length and with a value of around €5 billion.

Responsibility for Container Stowage

In February last year the 868 TEU UK-flagged container vessel "Annabella" suffered a stow collapse in a stack of seven 30ft containers during a voyage from Rotterdam to Helsinki. The bottom two containers were crushed by the weight of those above. Fortunately the damage was limited, but the consequences could have been catastrophic as the top three units in the stack were tank containers carrying butylene gas (IMDG Class 2.1).

The subsequent investigation by the Marine Accident Investigation Branch (MAIB), which is part of the UK's Department of Transport, highlighted the complexities and the commercial pressures under which the short-sea container industry operates today, from which even ships like the "Annabella", modern and highly professionally managed, are not immune.

The MAIB found that one of the causes of the incident was that the computer software used by the charterers or operators to plan the stowage did not recognise 30ft containers. Neither did the vessel's computerised loading programme. As a result the software assumed that the maximum permissible stack load was 240 tons. But this was the limit for 40ft containers, and was 90 tons greater than the maximum stack weight for 30ft containers indicated in the vessel's Cargo Securing Manual (CSM). The actual stack weight was found to have been 225 tons, but neither ship nor shore staff were alerted to the resulting danger.

The MAIB report also pointed to other features contributing to the incident, not least that the cargo planners had no access to the vessel's detailed stability information and CSM, that they had limited marine experience or training, that the containers had allowable stack weights below the ISO standard and that the vessel's "very intensive schedule" left the crew insufficient time to verify or approve proposed cargo plans. The report recommended that the International Chamber of Shipping should work with the industry to promote a best practice safety code, to try to ensure that the requirements of a vessel's Safety Management System were met.

In the case of the "Annabella", the charterers planned the cargo stowage, while the actual loading and stowage operations were performed by the loading terminal, under the supervision of the Chief Officer. These circumstances raise important questions as regards responsibility for stowage:

- Where does liability for bad stowage lie?
- Is a charterer who performs stowage operations relieved of liability where the Master or Chief Officer intervenes in or supervises the loading and stowage?
- Does the Master have a duty to intervene where bad stowage results, or might result, in his vessel becoming unseaworthy?

This article does not attempt to apportion legal responsibility between the parties in the "Annabella" case, but simply comments on some answers which might be found in English case law.

The starting point, and the position at common law, is that the duty to load, stow and discharge the cargo falls on the carrier. The standard terms of most container operators' bills of lading expressly say so (see, for example, clause 9 of the BIMCO Conlinebill 2000). However, the parties to a contract of carriage, whether under a bill of lading or charterparty, are free to agree the extent of the carrier's loading obligations, and the terms of the contract can transfer those obligations to the shipper[1]. While, in the container trade, such terms are unlikely to appear in a bill of lading, within charterparties they often give rise to disputes. We now consider certain aspects of that.

Clauses in a charterparty relating to responsibility for stowage as between owners and charterers has been compared to a game of shuttlecock, with each party seeking to limit the scope of its responsibility through the incorporation of protective wording. Thus for example an unamended clause 8 in an NYPE timecharter providing that "charterers to load under the supervision of the captain" transfers responsibility for stowage from the owners to the charterers[2], but the addition of "and responsibility" after "supervision" moves responsibility back to the owners[3].

In Court Line Lord Atkin considered that the word "supervision" alone was no more than a reservation of the Master's right to protect his vessel from bad stowage, and did not impose a duty on the Master to intervene in the stowage. There were two exceptions:

- Where the Master actively supervises the cargo operations and loss or damage is attributable to that supervision. But this requires actual intervention, beyond a mere review of the stowage plan.
- Where loss or damage is attributable to want of care in matters pertaining to the vessel of which the Master was (or should have been) aware but the charterers were not - for example, stability.

What Court Line and other subsequent cases left unanswered was whether bad stowage by the charterers, which makes an otherwise seaworthy vessel unseaworthy, gives rise to a breach by the owners of their seaworthiness obligations. This issue was considered by the Commercial Court in CSAV -v- MS ER Hamburg[4].

That case arose under a timecharter on an NYPE (1946) form with an unamended clause 8 (so responsibility for stowage was on the charterers), but also containing a Clause Paramount placing a Hague Rules duty on the owners to exercise due diligence to make the vessel seaworthy at the commencement of the voyage. The vessel sustained severe damage as a result of an explosion of a calcium hypochlorite cargo carried in a container stowed adjacent to a bunker tank. This cargo became unstable during the voyage when the bunkers in the tank were heated, which caused the container to heat up. So when the vessel sailed she was unseaworthy, due to the stowage of the container next to the bunker tank. The Court had to decide whether the damage was caused by breach of the charterers' obligation as to stowage or the owners' obligation as to seaworthiness.

The charterers argued that there was actual supervision of the stowage by the Chief Officer, since he had approved their proposed stowage plan for the dangerous goods. However, the Court did not accept that the mere approval of a stowage plan by a deck officer amounted to an assumption of liability by the owners; otherwise, a Chief Officer on a chartered vessel would be inclined to refuse to review a proposed stowage plan altogether.

The Court also found that on the facts the second Court Line exception did not apply. The charterers had contended that the day-to-day distribution of bunkers between tanks and their heating were matters unknown to them and solely within the province and knowledge of the vessel. However, the Court agreed with the Arbitrator that there was nothing preventing the charterers from ensuring a safe and IMDG-compliant stow of the container, which they had failed to achieve by choosing a location next to a bunker tank.

The charterers further argued that there was a third exception, whereby owners owed a duty to intervene in the stowage of the cargo to avoid unseaworthiness. This also was rejected. As noted in the Imvros[5] (where deck cargo was lost overboard due to inadequate lashing), the question under the NYPE form was not whether the owners were under a duty to intervene in loading, but rather whether they owed that duty to the charterers. The dominant and effective cause of the loss was not negligence on the part of the vessel but on the part of the charterers - bad stowage remained bad stowage, even where it rendered the vessel unseaworthy. The Judge further concluded that the heating of the bunkers was not a breach by the owners of their duty properly and carefully to carry the cargo, as it was an act in the management of the vessel so there was a defence under Art IV r.2(a) of the Hague Rules. The substantial loss and damage accordingly fell on the charterers.

There seems to be a reality gap between, on the one hand, the limited supervision which a Master and his crew can effectively exercise during an intensive loading schedule at a busy container terminal, and on the other the consequences of contractual terms placing liability on owners for bad stowage. Recent case law suggests that the Courts may have some sympathy for owners and crew, but unless heed is given to the MAIB's call for greater attention, cooperation and time to be invested by all parties in the planning and loading of containers, such losses – and disputes – will continue.

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1. The Jordan II [2003] 2 Lloyd's Rep 87, affirming Pyrene Co. Ltd. -v- Scindia Steam Navigation [1954] 1 Lloyd's Rep 321
2. Court Line -v- Canadian Transport [1940] 1 Lloyd's Rep167
3. The Shinjitsu Maru No 5 [1985] 1 Lloyd's Rep 568
4. [2006] 2 Lloyd's Rep 66
5. [1999] 1 Lloyd's Rep 848

Arresting your own ship – an interesting take on security

In a recent Canadian Federal Court judgment in the case of F.C. Yachts Ltd. -v- Splash Holdings Ltd & Ors the Court considered the merits of what it described as a "most peculiar action" - the arrest by an owner of its own ship in order to secure a claim against the mortgage holder.

The background merits some explanation to understand the result. The claimant, F.C. Yachts Ltd. ("FC"), was a British Columbia-based company which operates under the name Rayburn Custom Yachts and specialises in the construction of custom motoryachts of approx 30m LOA. FC contracted with Splash Holdings Ltd ("Splash") for the construction of two such yachts. Each yacht was ordered on the basis of a separate construction contract, on virtually identical terms. One of the yachts was at a more advanced stage of construction, and therefore a more valuable asset, at the time the dispute between FC and Splash escalated.

FC alleged that Splash defaulted on stage payments in respect of the construction of one of the yachts and therefore arrested both yachts to secure its claim. The basis of the arrest, or the claim in rem against the partly completed yachts, was FC's assertion that Splash was the "beneficial owner" of both yachts notwithstanding that FC was described in the contract documents as the owner. Splash applied to the Court for the release of both yachts on the basis that FC was in fact the beneficial owner at all times and thus unable to exercise in rem jurisdiction.

The building contracts provided for the retention of title in each yacht by FC until delivery, whilst granting to Splash certain security rights against each yacht in the event of FC's default during the construction period. Splash's rights were recorded in the public records of the Registrar of Shipping as those of the holder of a builder's mortgage against each yacht.

The Court held that, whilst FC had an action against Splash in respect of the payment default, it had no rights in rem against the yachts themselves as Splash was not the owner but a mortgagee. The Judge commented that in this instance "although ownership has its advantages, on the facts of this case, [FC] would have been better off holding a builder's mortgage, or even holding no security at all."

This odd statement certainly provides food for thought, but from a legal perspective FC's actions seem surprising given the apparently clear contractual provisions confirming the builder's risk and title until delivery. The Court addressed this particular point by discussing the distinction between the concepts of "legal" and "beneficial" ownership. In the present case, however, although the decision by Splash to take 'title' on delivery in international waters, and not before, was seemingly guided by tax considerations, the Court held that FC could not be construed as having been the "legal" owner for the benefit of Splash. Ownership would only pass on delivery. FC held title in both yachts for its own benefit. It was the sole legal and beneficial owner. In the words of the trial Judge, FC was "in no sense fronting for Splash."

Ownership of a vessel under construction is obviously a matter of negotiation for the parties, and a delicate balance needs to be struck between security granted to the shipbuilder and the buyer. The usual course in respect of commercial vessels is the provision of refund guarantees for pre-delivery instalments to secure the buyer, with the builder having possession and title to the vessel until delivery (see for example, the NEWBUILDCON

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form produced by BIMCO). By contrast, build contracts in the superyacht industry often provide for title passing to the buyer during the course of building. Perhaps the onset of the "credit crunch" will more often lead to title passing to a buyer during the course of the build if refund guarantees become harder to obtain. I add, finally, that it remains important to ensure that the contractual provisions dealing with the passing of title are sufficiently precise to avoid ambiguity in the event of any pre-delivery disputes.

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"Best efforts...reasonable endeavours" - what does it all mean?

There are some mysterious ingredients in a great many shipbuilding contracts, charter agreements and other commercial contracts, which are liberally sprinkled about and are expected to govern a wide range of contractual undertakings.

These are the expressions "reasonable endeavours", or "best efforts", which are used to characterise certain contractual undertakings given by one party to another in circumstances where the acts to be undertaken are difficult to define when the contract is drafted. The idea is to inject greater certainty into areas which cannot be clearly defined, but the result is often to create more confusion.

Much has been written about these "endeavours" or "efforts" clauses, how they are generally qualified by the words "reasonable" or "best", and the legal effect that such language will have on the obligation that is to be performed. Some maintain that the two are distinguished by the fact that with "best efforts" the Court would expect the relevant party to sue and that with "reasonable efforts" this would not be necessary. Others urge that one would be expected to incur costs for the one but not the other. Many use expressions borrowed from the United States, such as "best commercial efforts" presumably in order to offer more than "reasonable efforts" while qualifying and thus limiting the scope of "best efforts".

These objective distinctions might be useful were it not for the fact that they are not convincingly supported by the available law. Since the guiding principle of the commercial lawyer has always been the quest for certainty, it is in many respects astonishing that this "fudge" has survived for so long and that the Courts have not been more robust in clarifying the issue. One consolation is that there is no material difference between the words "effort" and "endeavour", so that is not an issue. We need only be concerned with the words that qualify them, and for that reason I will refer to "efforts" throughout.

At the beginning of the last century the language used was principally "best efforts", and the test applied was not only objective but also pretty robust requiring that the party providing such an undertaking "must, broadly speaking, leave no stone unturned". This test was so onerous that it largely disappeared from view and the confusion continued. In seeking to shine a light into this often impenetrable area, many lawyers cast around for a "sliding scale" by which these various expressions could be measured. They started to adopt expressions based on "reasonableness" and in the cut and thrust of commercial negotiation "best efforts" were (and still are) downgraded to "reasonable efforts", or vice versa. How the distinction was coherently explained to lay clients is a mystery and was largely a function of the imagination of the practitioner involved, but the law was still very vague on the point.

To put this into perspective it is useful to establish the outer limits of the available expressions as currently applied. It is safe to say that the expression "reasonable efforts" represents the baseline. The Courts would never support the idea of enforcing undertakings that were not "reasonable", so that was clearly a good place to start. This also meant that the Courts would not expect the giver of the undertaking to act in a manner that conflicted with his commercial interests. That meant that he could avoid performing acts that would give rise to additional costs or result in the loss of profits. This is a principle that still largely prevails today.

At the other end of the scale, the expression "best efforts" was still considered to be the high-water mark of such undertakings, the word "best" being the superlative that cannot be bettered. So a "best efforts" or "best endeavours" undertaking is just that. The person giving the undertaking must "give it his best shot". As the law stands this falls well short of an absolute obligation or guarantee, which is a significant departure from the "no stone unturned" case referred to earlier. If a "best shot" is not good enough that is just one of those things, although the Courts will be entitled to examine the extent to which the provider of the undertaking did indeed give it his "best shot" and would expect him to do all that a reasonable person reasonably could do in the circumstances.

So far, so good, but while this sets the outer limits, how do the Courts deal with the other expressions that flow unchecked from the fertile imagination of the commercial practitioner, and will they provide any guidance on the hierarchy that is to be applied to them? In the mid 1980s there was a significant addition to what has become known as the "efforts clause", namely the use of the word "all". Thus it was recognised judicially that the expression "all reasonable efforts..." was something more than "reasonable efforts" while remaining less than "best efforts". This sounded promising. We were back to an objective sliding scale and were being offered an intermediate point between "reasonable" and "best". This was based on an interesting logic, namely that the obligation to use "reasonable efforts" in performing a particular act or in achieving a particular objective would probably only require a party to take one reasonable course or a limited number of reasonable courses, and not all of them. If a party chose ineffective courses, provided that he acted in good faith he would not be faulted, because he had tried. He might not have tried very hard, but the Courts would accept that he had made the effort. An obligation to use "best efforts" would require a party to take all the reasonable courses available. Applying that principle "all reasonable efforts" would be very close to "best efforts", and would require the giver of the undertaking to explore all the reasonable possibilities that were available, although the use of the superlative "best" will probably ensure that the expression "best efforts" will remain the ultimate test.

So now there are three expressions - "reasonable efforts" as

the baseline, "best efforts" at the top end of the scale and "all reasonable efforts" somewhere in the middle. But a recent case has added another twist which is of great interest to the careful draftsman. It was suggested that where the contract actually specifies certain steps that have to be taken as part of the exercise of reasonable efforts, those steps will have to be taken, even if such action involved sacrificing a party's commercial interests. This is an open invitation to increase materially the scope of "reasonable efforts" by reference to something that is specific and measurable. One good example of this is where best efforts are to be used in a shipbuilding contract to build to a standard achieved in a previous comparable contract, or where a party undertakes to produce documentation, source material or to perform to an industry standard. This, at least, provides the Court with some objective reference by which to judge the efforts made.

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Jurisdiction

A couple of recent cases have highlighted the importance of establishing the appropriate jurisdiction in which to pursue a claim.

The first case is Scottish & Newcastle International Limited (Respondents) -v- Othon Ghalanos Limited (a company incorporated in Cyprus) (Appellants) [2008] UKHL 11 and was handed down by the House of Lords on 20 February 2008.

Scottish & Newcastle International Limited ("S&N") sought to recover the price of goods sold from the buyer (Othon Ghalanos Limited). S&N is based in Scotland, and Ghalanos is a company registered in Cyprus. The contract concerned 11 consignments of cider shipped from Liverpool to Limassol in the summer of 2004.

The House of Lords was asked whether the English Court had jurisdiction to hear the claim and whether English law applied to it. S&N claimed that article 5(1)(b) of Council Regulation (EC) No 44/2001, as well as English legal precedents, meant that English law applied to the particular contract made between the parties since the cider was or should have been delivered by S&N to Ghalanos in England. The High Court and Court of Appeal agreed with S&N's legal position and agreed that English courts had jurisdiction over this claim. These judgments were challenged by Ghalanos, who claimed that S&N should pursue its claim in the Cypriot courts.

Ghalanos stated that all 11 pro forma invoices showed the FOB price (as Ghalanos had requested in their original order letter). Two of them stated expressly, in a box with the printed heading "Terms of delivery and payment": "Free on board. Payment due 90 days from date of arrival". The others stated "Cost and Freight Limassol. Payment due 90 days from date of arrival".

Ghalanos's primary case was that Limassol was the contractually agreed place of delivery under the sale contract. Ghalanos also stated that the company's staff would not in practice be able to inspect the goods until after their arrival in Cyprus, and relied on the provision for payment 90 days after that date.

S&N argued that the place of delivery was Liverpool, because that was where the goods were delivered and the place where responsibility passed to the buyer. It was common ground between the parties that, in terms of article 5(1)(b) of Council Regulation (EC) No 44/2001, the English Courts did not have jurisdiction unless, according to English law, the cider was "delivered" in England - more particularly, on shipment at Liverpool.

Lord Mance illustrated the operation of article 5(1)(b) when he said:

"The basic rule contained in article 5(1)(a) is that a person domiciled in a Member State may be sued in another Member State in matters relating to a contract in the Courts for the place of performance of the obligation in question. But article 5(1)(b) radically alters the effect of this provision by providing that, for its purpose and unless otherwise agreed, the place of performance of the obligation in question shall be, in the case of sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered."

The House of Lords agreed with S&N that all its obligations as sellers were discharged in Liverpool. This was because this was where the goods were delivered. As a consequence, Ghalanos's appeal to the House of Lords was dismissed and the dispute could be heard in the English Courts with English law applying.

The second case is (1) Verity Shipping SA (2) Chartworld Shipping Corporation -v- NV Norexa & Others [2008] EWHC 213 (Comm). This case involved a shipment from Argentina to Antwerp. The bills of lading incorporated the English law and London arbitration clause from the charterparty. At Antwerp the whole cargo was condemned by the Belgian health authorities. NV Norexa ("Norexa") started proceedings in Antwerp, and the court appointed a surveyor. The shipowners (Verity Shipping SA & Chartworld Shipping Corporation) wanted the matter to be dealt with by arbitration in London. They pointed out that the bills of lading incorporated English law and a London arbitration clause from the charter. As a consequence, they applied for an anti-suit injunction in favour of arbitration in London. They obtained it, but its continued existence was challenged by Norexa.

The English High Court discharged the anti-suit injunction. In so doing it stated that in such proceedings it would take into account when exercising its discretion (to grant or to continue an anti-suit injunction in favour of arbitration) whether there was a risk of inconsistent decisions being obtained in two jurisdictions.

In this case there was a significant risk that the London arbitrators and the Court in Antwerp would reach conflicting decisions. The High Court also noted that there had been a two year delay in obtaining the anti-suit injunction in England. This was a material point, because during the delay the Antwerp Courts had been dealing with the case. Had there been no delay, the anti-suit injunction may not have been discharged.

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Bottomry in the Baltic

In aid of a recent arrest, a Court in Szczecin has rediscovered this rarely seen doctrine.

This firm recently arrested a vessel in Poland in respect of a claim under a loan agreement. What makes a seeming ordinary case noteworthy is the Court's recognition of the claim as a defined "Maritime Claim" by invoking the unfashionable doctrine of bottomry.

The client was a UK-based fish trading company which had granted an unsecured loan to the Russian owner of a deep-sea trawler flying the Russian flag. The loan was simply to meet the cost of repositioning the vessel in a different fishing zone. Repayment was to be made by regular instalments according to a strict timetable, but the owner defaulted at a very early stage and the client obtained this firm's assistance in arresting the vessel while she was undergoing repair at Szczecin, Poland.

Under Polish law the arrest of sea-going vessels is governed by the 1952 Brussels Arrest Convention (the "Convention"), the Polish Civil Procedure Code and the Polish Maritime Code. The most important of these is the Convention.

Arresting a vessel in Poland is advantageous in that the procedure is short, inexpensive and effective. It requires the arresting party to file a written application to the Court supported by evidence of the claim (translated into Polish), and confirming that the claim is a defined "Maritime Claim" under Article 1.1 of the Convention. The application is heard ex parte (i.e. without the presence of the vessel's owner), and in most cases an order is made within 2-3 days. The arrest is made by the Marshall, whose fee is the greater of 2% of the claim or €3,150.

The client's difficulty here was that the claim did not seem to fall comfortably within any of the "Maritime Claims" defined by Article 1.1 of the Convention, with the possible exception of bottomry.

Bottomry is an obscure legal concept invented in the fifteenth century as a way to allow a vessel's Master to obtain emergency funding. If, for example, a vessel needed urgent repairs during its voyage, or there was some other urgent necessity, and it was not possible for the Master to contact the owner for funds, the Master could himself borrow money on the security of the vessel by executing a bottomry bond. However, due to the ease and rapidity of modern communications and a bottomry bond's relatively low priority compared to other security, their use declined greatly and the subject largely became of interest only to legal historians.

In this case, however, the Polish Court accepted that the loan was a modern form of bottomry, agreed directly between the parties using modern means of communication and without the need for the Master's involvement. An arrest order was obtained, and the vessel was detained until the client received payment of its entire claim and interest.

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We are grateful to Rafal Czyzyk, of Marek Czernis & Co Law Office, for his assistance both with the arrest and this article.

More from the Isle of Man...

With a view to making the Isle of Man a more attractive flag state to both commercial ships and yachts, the Shipping Registry has recently made several changes to its policies.

Pre-registry surveys

It was a requirement that all commercial ships, regardless of age, had to be surveyed by an Isle of Man surveyor prior to being accepted on the Register. This is no longer the case, with vessels under 10 years of age being accepted without a prior on-board inspection, provided that the Registry is satisfied with the performance of the vessel and the owning/managing company. The availability of statistics and information on ship performance has improved, and this data can be used to assess the suitability of the ship. New builds will also not need to have a pre-registry survey. This should be a welcome change to potential owners of Isle of Man vessels, as it will significantly reduce the cost of registration.

Age limits

Previously, the Shipping Registry did not accept vessels which were greater than 15 years of age. However, the policy has changed and vessels up to 20 years of age can now be registered. If the ship is technically managed from the Isle of Man it may be possible to register even older vessels.

Ship types

Due to the continuing growth of the superyacht market and many large yachts choosing the Isle of Man flag, the Registry is now accepting passenger ships which were previously excluded from the list of accepted vessels. Yachts are increasing in size, and many owners do not want to be restricted to carrying only 12 passengers. In order to carry more, the vessel must comply with The International Convention for the Safety of Life at Sea 1974 (SOLAS) rather than the Large Commercial Yacht Code, and the Isle of Man Registry sees this as potential growth area. All commercial yachts carrying not more than 12 passengers must be inspected by an Isle of Man surveyor to ensure compliance with the Large Commercial Yacht Code, prior to being accepted for commercial registration. Surveyors will also now work closely with passenger ships to ensure compliance with SOLAS.

Increase in range of eligible countries

Previously, like other Red Ensign flags, only companies or shipping entities registered in EU/EEA countries and their dependent territories and citizens of those places qualified to own an Isle of Man registered vessel. A change of legislation in 2007 has enabled the Shipping Registry to accept citizens and bodies corporate incorporated in the countries listed below, as well as limited partnerships which have their principal place of business in these jurisdictions. The Registry believes that this will provide a 'smoother transition' when vessels change flag as there will not be the need to incorporate an EU/EEA company in order to flag with the Isle of Man.

Australia	Japan	Russia
Bahamas	Liberia	Singapore
Canada	Marshall Islands	South Africa
China	New Zealand	United Arab Emirates
Hong Kong	Pakistan	United States of America
India	Panama	

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The International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the "Bunkers Convention")

While tanker spillages tend to get the headlines, an enormous aggregate amount of persistent oil is carried by non tankers as bunker fuel, and there are many bunker spills from non tankers each year[1]. Surprisingly, however, there is currently no international legal regime in force governing liability and compensation for such spills. This situation will end on 21 November 2008, when the Bunkers Convention enters into force.

Background

Since entry into force in June 1975 of the International Convention on Civil Liability for Oil Pollution Damage (CLC) 1969, subject to certain limited exceptions tanker owners have been strictly liable for pollution damage caused by an oil spill from a laden tanker, though they can limit their liability unless the damage resulted from their own personal act or omission.

Since the 1992 Protocol to the CLC this regime has also applied to tankers in ballast, so all spills from tankers are covered, but there has been no such legislation on bunker spills from non tankers.

The Bunkers Convention changes that. So far, it has been ratified by twenty countries including Germany, Greece, Singapore, Spain and the UK. It is intended, broadly, to create an efficient system for compensating the victims of bunker spills from non tankers, by applying a regime similar to the CLC.

Main features

The Bunkers Convention will apply to pollution damage, and to reasonable measures taken after an incident to prevent or minimise such damage, arising from bunker spills from non tankers. Its main features are:

- **Definition of 'shipowners'** – there is a broad definition, which includes the registered owner, bareboat charterer, manager and operator of the vessel.

- **Geographical application** – the regime will apply to pollution damage (and preventive measures) caused in the territorial sea or exclusive economic zone ("EEZ"), or equivalent, of states party to the Convention.

- **Strict liability** – except in limited circumstances, for example where the pollution has been caused by an act of war, an intentional act of a third party, or the negligence of an authority responsible for conservancy, shipowners will be strictly liable. They may, however, escape liability to any extent that the damage was caused by an intentional or negligent act of the person who suffered it.

- **Limitation of liability** - shipowners will still be able to limit their liability for claims under the Bunkers Convention under other applicable limitation regimes. The Convention refers, for example, to the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC), as amended.

- **Compulsory insurance** - registered owners[2] of vessels over 1,000 GRT registered in a state which is party to the Convention must maintain insurance (or alternative security) to cover pollution damage up to the limit of liability applicable under the relevant limitation regime (but no more than the limit applicable under the current version of the LLMC as amended[3]). It is anticipated that in most cases P&I Clubs will provide the required cover.

- **Direct action** - claims for compensation under the Convention may be brought directly against the registered owner's insurers. The insurers can rely on some of the defences that would have been available to the registered owner, including the right to limit, but not bankruptcy or winding-up.

Possible issues

As with any new legal regime, the Bunkers Convention gives rise to several potential issues, of which perhaps the most significant are:

1. Who can be sued?

Whereas the CLC regime applies purely to registered owners, the Bunkers Convention applies far more widely. Thus claimants might commence recovery proceedings against any or all of the registered owner, bareboat charterer, or manager and operator of a vessel when pollution damage occurs, and this could result in significant wasted costs for a number of defendants. It might have been better to direct that all claims should first be made against the registered owners, with any other parties being pursued only if the registered owners failed to satisfy the claims.

2. Limitation issues

By Article 3(b) of the LLMC, claims for oil pollution damage under the CLC regime are specifically excluded. Conversely, the Bunkers Convention works on the basis that shipowners can limit their liability under, for example, the LLMC. This prompts a number of questions.

First, since the Bunkers Convention does not create a separate fund for pollution damage, there is a risk that (owing to the pro rata system under the LLMC regime) some claims under the Bunkers Convention will not be satisfied entirely. That might be of particular relevance in relation to, for example, collisions, which can occasion very large claims. It would certainly be of relevance in states which are party to the Bunkers Convention and have ratified the LLMC but not the higher limits of the 1996 Protocol.

Second, there seems to have been an assumption that the LLMC regime will always apply to pollution damage falling within the ambit of the Bunkers Convention, but in some cases it might not.

Claims under the Bunkers Convention relating to (i) damage to property or (ii) infringement of non contractual rights would be subject to the right to limit under the LLMC. However, most other types of claim likely to be brought under the Bunkers Convention might not be. For example, if a bulk carrier broke its back in a state party's EEZ and spilt a large quantity of bunker oil, the state party would probably face enormous pressure to clear up the spill. The EEZ could extend for up to 200 miles from the state party's territorial waters, and the clean-up could be very expensive. However, the state's claim against the shipowner would not be for damage to property or for an infringement of non contractual rights, but for the costs of the clean-up. As such, the claim might not be limitable, and in the usual course of events the shipowner would be strictly liable for the claim.

Finally, it should be borne in mind that at present vessel owners often engage pollution prevention firms to try to clear up spills as soon as possible after they occur. This is often the quickest and most efficient means of dealing with instances of pollution. However, pursuant to articles 2(1)(f) and 2(2) of the LLMC, shipowners cannot limit their liability for the costs incurred under such a contract. As such, where the aggregate cost of claims against a shipowner and the cost of minimising the effect of pollution is likely to exceed the limitation fund, there may be reluctance on the part of the shipowner to take such pollution prevention measures.

Summary

The Bunkers Convention will close an obvious and undesirable gap in international legal coverage in relation to pollution from ships. However, it is not without potential problems. Although the victims of bunker spills will have the benefit of strict liability, there will be no extra funds to pay for the costs of pollution damage.

Just as now, in most cases claims for bunker spills from non tankers will be subject to the right to limit, and P&I Clubs will probably pick up the costs. However, in view of some of the rules on limitation, some shipowners may not be willing to take pro-active steps to deal with a spill.

Finally, in the most serious instances of bunker spills at sea, when steps need to be taken quickly, with knowledge that funding will be in place to cover the costs of pollution prevention, the limitation regime may not provide the necessary comfort.

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1. From 1989 to 1999, 25% of spills attended by The International Tanker Owners Pollution Federation Limited related to bunker spills from vessels other than tankers. Source: UK P&I Club Circular 3/99 - www.ukpandi.com/UKPandI/Infopool.nsf/HTML/ClubCircular0399.
2. NB. only those, not "shipowners" as more widely defined.
3. i.e the limits under the 1996 Protocol to the LLMC currently apply.

Sardinia "Luxury Tax" – An Update

As previously reported in the May 2006 and January 2008 editions of this Newsletter, the introduction (under references Regione Sardegna Law No. 4 of 11 May 2005 and No. 2 of 29 May 2007) of a new "luxury tax" regime in Sardinia in respect of pleasure vessels, private aircraft and second homes was challenged by the Italian government in the Italian Constitutional Court. This very unpopular tax has given rise to significant interest and debate within the yachting community, and the most recent developments are summarised below.

The Constitutional Court considered the merits of the government's challenge, and a ruling was handed down in February this year. The full text is currently awaited, but a press release from the Registrar Office of the Constitutional Court in Rome outlines the core points as follows:

- The "luxury tax" on second homes belonging to and/or acquired by non-Sardinian residents is contrary to the Italian Constitution and is therefore illegal.
- The special "annual tax" levied on pleasure vessels (of 14 metres in length and above) arriving or berthed in Sardinia between 1 June and 30 September does not breach the Italian Constitution and has therefore been upheld. However, yachts moored in Sardinia permanently will be exempt from the "annual tax."
- Lastly, the applicability of the 'annual tax' to charter yachts is to be referred to the European Court of Justice (ECJ) for a preliminary ruling under Article 234 of the EC Treaty. The ECJ will be asked to consider whether the "annual tax" is an anti-competitive measure, contrary to the EC Treaty.

The Constitutional Court's ruling is likely to give rise to mixed feelings. Abolition of the "luxury tax" on second homes will please many, but continued levy of the 'annual tax' on pleasure vessels will remain of great significance to the yachting community.

Lastly, while the reference to the ECJ of the 'annual tax' as regards charter yachts is plainly a positive step towards finality on this issue, a ruling cannot be expected until late 2008 or early 2009, so the uncertainly here will remain for many months.

We will circulate a further update in the next edition of this Newsletter.

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We are grateful to Roberto Bassi of Italian law firm Siccardi Bregante & C for his assistance with this article.

"Mini ISM"

A brief review, followed by commentary on ways to comply with some of the key provisions, with specific reference to Red Ensign flagged commercially registered yachts under 500GT.

The International Safety Management Code (ISM Code) seeks to ensure the efficient operation and safe management of ships in order to reduce casualties, accidents and environmental and pollution incidents. Most such things are due to human error, and the ISM Code provides an international standard for safe operation, with overall responsibility on vessels' owners or operators.

For trading tankers, bulk carriers and passenger ships, the ISM Code became mandatory in 1998 under Chapter IX of the International Convention for the Safety of Life at Sea, 1974 (SOLAS). The second phase of implementation came into effect in July 2002, and introduced mandatory compliance for all commercial vessels over 500GT, regardless of flag state, and this also applies to commercial yachts.

A fundamental requirement of the ISM Code is the implementation of a structured and documented system of procedures known as a Safety Management System (SMS). This ensures that the tasks and activities undertaken by personnel both ashore and on board are planned, organised and checked for compliance against the relevant international and national requirements, and also against those of the owner or operator, in aid of safety at sea, prevention of injury and the avoidance of damage to the environment.

With the introduction of the Large Commercial Yacht Code (LY2), it became a requirement for all Red Ensign flagged commercially registered yachts under 500GT also to have an SMS, and all yachts certified under The Code of Practice for the Safety of Large Commercial Sailing and Motor Vessels (LY1) had to implement an SMS by January 2007. Annex 2 of LY2 provides guidance on the development and implementation of an SMS for these yachts. While there is no specific reference to the ISM Code, the requirements of this Annex have become colloquially known as 'Mini ISM', as it is effectively a slimmed down version of the ISM Code.

In order to create a safe working environment, the guidance in Annex 2 of LY2 requires the owner or operator to address the following as part of an SMS:

- A health and safety protection policy
- Procedures to ensure safe operation of vessels in compliance with the regulations and rules
- Lines of communication between personnel, ashore and afloat
- Procedures for reporting accidents
- Procedures for responding to emergency situations

These mirror the functional requirements of the ISM Code, with one notable exception: the ISM Code also requires procedures for internal audits and management reviews.

In respect of the above, Annex 2 of LY2 provides additional guidance in relation to the health and safety protection policy, the responsibilities of the Master, personnel and training requirements, operational procedures, preparation for emergencies, reporting of accidents and maintenance of the vessel and equipment.

Just as for other types of vessel, it is vital that a yacht owner or operator considers how to put in place and develop an SMS, and there are several options. Each has advantages and disadvantages, but the governing factor should be whether the system actually enhances safe practice and management, instead of merely fulfilling a statutory requirement by "ticking a box". Reams of paper do not necessarily yield an effective SMS. On the contrary, such can be burdensome for the Captain and crew, and that will do little to encourage morale or promote continuous improvement.

There are three main sources of an SMS:

The Captain and crew create it

The Captain and crew are the most familiar with the operation of the yacht and can therefore most economically create an SMS to meet the particular requirements. However, some Captains and crew might not be well versed in the legislative requirements, or may otherwise find the task difficult and time-consuming.

A consultant could be engaged

A consultant can develop a bespoke system for the yacht, and the knowledge of the Captain and crew of the vessel's operating and shore procedures, allied to the experience of the consultant, can create an efficient and polished system. However, this is probably the most expensive option.

A generic system

Many yacht management companies offer an "off the shelf" system that is not specific to any particular yacht but is quick to implement. However, some provisions might not match existing operational procedures, and such systems will be made to work best when the crew have an input and can revise the procedures accordingly.

An advantage with the second and third methods is the optional provision of shore-based support. Although "Mini ISM" does not explicitly require a Designated Person Ashore (DPA) as the ISM Code does, there is a clear inference that the owner or operator and other shore-based personnel must aid the implementation of health and safety policies and assist in emergencies and periodic reviews. In this respect it may be useful to have onshore support, and some companies can provide that for yachts under 500GT.

The verification of the implementation of an SMS is done as part of the periodical surveys required by LY1 or LY2, unlike the ISM Code which requires external audits of both the owner or operator and the yacht. Although there is no requirement for internal audits, the guidance in Annex 2 requires a review of the system once every three years.

The Captain must always have complete authority to make decisions regarding the safety of the persons on board, and so must have full knowledge of the SMS, and all crew members should be conversant with the parts that are relevant to their position. The ISM Code states that "The cornerstone of good safety management is commitment from the top. In matters of safety and pollution prevention it is the commitment, competence, attitude and motivation of individuals at all levels that determines the end result". Plainly, it is in the interests of the owner or operator and Captain and crew for the system to work, and a good system is one which is easy to implement and maintain, without being draconian or overly invasive. Only when this is appreciated, rather than the system being a rote exercise to satisfy the authorities, will the true benefits of an SMS will be realised.

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We are grateful to Anthony Gradwell of Manta Maritime for his contribution to this article (anthony@mantamaritime.com)

New sponsorship and employment rules

Under new immigration rules being rolled out by the Border & Immigration Agency (BIA), UK employers wishing to employ staff from outside the European Economic Area must be registered as a sponsor and must agree to comply with various record-keeping and reporting duties. This is a new requirement for all employers and it is aimed to tie-in with a new points-based system scheduled to start in August/September 2008. All migrants allowed to come into the UK will also be required to obtain a biometric identity card.

If the application for sponsorship is successful, the employer will be able to issue certificates of sponsorship, which they allocate to the migrants coming to work for them in the UK. All licensed sponsors will be required to comply with various record-keeping and reporting duties including, for example, obliging the employer to report the following information or events to the BIA within 10 working days:

- If the sponsored migrant does not turn up to work on the first day of work;
- If he is absent from work for more than ten working days without the employer's consent;
- If his employment is terminated;
- If the employer stops sponsoring the migrant for any other reason.

A new system of penalties under the Immigration, Asylum and Nationality Act 2006 also came into force on 29 February 2008, making the employer liable up to £10,000 for employing an illegal migrant worker. The Secretary of State also has the power to serve notices requiring the payment of a penalty. The level of the penalty will be determined by the BIA, although it will no doubt be guided by the Code of Practice for the Prevention of Illegal Working, Civil Penalties for Employers. This sets out levels according to criteria such as the number of illegal workers in your workforce, the number of checks you carried out and whether you reported your concerns to the BIA.

There is also a new criminal offence for the employer or any officer (i.e. a director, manager or secretary, or any person purporting to act as such) who knowingly employs an illegal migrant worker, and this offence carries a maximum two year prison sentence and/or an unlimited fine.

There is however a statutory defence, and all employers should ensure they comply with the requirements in order to avoid the penalties. Employers must:

- Take reasonable steps to check the validity of the original identity document (i.e. passport);
- Check that the person presenting the document is the rightful holder;
- Make a copy of the relevant pages (i.e. front cover, any page with personal details and photograph, date of birth and/or signature, date of expiry or any page with UK immigration endorsements) before employing the individual;
- Keep all copy documents securely and in a form that can not be manipulated (i.e. pdf format); and
- Carry out a follow-up check at least once every 12 months after the initial check where the individual's right to work is restricted.

For more information on the new immigration rules please contact Charles Morgan of Hill Dickinson's Employment and Pensions Group.

Our employment team advises on all aspects of employment law affecting shipowners, yacht owners and a wide variety of marine and other businesses. The team has experience in both contentious and non-contentious areas, including commercial matters and related drafting such as MCA crew contracts and ancillary documents.

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