

Shipping E-Brief



INTERNATIONAL
LAW FIRM

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Shipping

The “new New York Rules”! Time to hold your breath?

The United Nations Commission on International Trade Law (“UNCITRAL”) Working Group on Transport Law recently adopted the final “*Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*”. This aims to overhaul the existing international maritime liability conventions, including the Hague, Hague-Visby and Hamburg Rules. The consequences for the carriage of goods by sea and the apportionment of insurance costs are potentially significant. As currently drafted, out goes the “errors of navigation” defence and the obligation to exercise due diligence becomes continuous throughout the voyage, not just before and at the beginning. However, contrary to Article III, rule 8 of the Hague Rules, a carrier doing business with a regular shipper under a so-called “volume contract” would be able to contract out of most of the obligations and, for example, fix a very low package limit.

The current draft is the culmination of 12 years of discussions and detailed negotiations, by the Comité Maritime International (“CMI”) from 1996 to 2002, and by UNCITRAL from 2002 to the present, in co-operation with inter-governmental and non-government organisations. It will be presented to the UNCITRAL Commission for a final round of negotiations in New York in June 2008, with a view to submitting it to the UN General Assembly (also in New York) for conclusion and approval in November 2008 – hence the name we have given it in the title above. Assuming approval is granted, the “New York Rules” (not to be confused with the so called “New York Convention” on enforcing arbitration awards – nothing is easy in shipping) will become open for signature and ratification. To become international law, the Convention will only need a minimum of 20 countries to ratify it. But it will be up to Contracting States to ensure that the provisions contained in it apply under their domestic law.

Some of you reading this may be sceptical. The Hamburg Rules were agreed in 1978 but did not come into force until 1992. The UN’s Multimodal Convention 1980 never attracted enough support to enter into force. The difference, we understand, is that this Draft has the backing of some very influential countries (including the U.S.) and this

means it probably will become law, but nothing is certain.

The Draft Convention aims to create a modern and uniform law concerning the carriage of goods which include an international sea leg, but it is not limited to port-to-port carriage of goods. As such, the Draft Convention may most accurately be described as a ‘maritime plus’ convention. Whilst there are many changes to the carriage of goods by sea regime envisaged by the Draft Convention, perhaps the most relevant of those concern the liability of the carrier, which we shall comment on briefly.

- The fault-based liability regime as contained in the Hague-Visby Rules, whereby the shipper must establish fault by the carrier, is maintained in the Draft Convention. However, the list of defences available to the carrier has been significantly reduced by the abolition of the ‘nautical fault’ defence which, under the Hague-Visby Rules, relieves the carrier from liability for any “Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship”. Rather, under the Draft Convention, when a casualty is due to a navigational error (for example) the ‘nautical fault’ defence will no longer be available to the carrier. UNCITRAL’s rationale for such a change was that whereas in the 1920s and 1930s the master could not establish instant contact with the shipowners - and therefore such a defence was reasonable - that defence cannot be justified in an age of instantaneous communications.
- Under the Hague-Visby Rules the carrier has an obligation to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage. Under the Draft Convention, this obligation has been extended, so that the carrier would be obliged to exercise due diligence to make “and keep” the ship seaworthy not only before and at the beginning of the voyage, but also “during the voyage”. This proposed continuing obligation to exercise due diligence throughout the voyage has also stemmed from today’s era of instantaneous communications, whereby it was felt that shipowners are capable of being kept informed of changing circumstances concerning the vessel’s seaworthiness throughout the voyage.

- Whereas the Hague-Visby Rules only govern the carriage of goods between loading onto the ship and discharge, the Draft Convention covers the period of carriage from 'door-to-door'. As such, a further proposed amendment to the liability regime under the Draft Convention is that the carrier shall be responsible for the goods from receipt until delivery: "The carrier shall... properly and carefully receive, load, handle, stow, carry, keep, care for, discharge and deliver the goods."
- The liability compensation levels have been raised in the Draft Convention. Under the existing Hague-Visby Rules, the carrier's liability is limited to 2 special drawing rights ("SDRs") per kilo or 666 SDRs per package, whichever is the higher. Under the existing Hamburg Rules, the carrier's liability is limited to 2.5 SDRs per kilo or 835 SDRs per package. Under the Draft Convention, however, the carrier's liability is limited to 3 SDRs per kilo or 875 SDRs per package.
- However, in the case of "volume contracts" (which could apply to a series of as little as 3 shipments a year), the parties will be free to contract out of most of the obligatory liability regime contained in the Draft Convention, provided the contract "contains a prominent statement that it derogates from this Convention", and that the "volume contract is individually negotiated or prominently specifies the sections... containing the derogations". Carriers will not be allowed, however, to contract out of their obligations to: exercise due diligence to make and keep the ship seaworthy; properly crew, equip and supply the ship, or; provide information, instruction and documents. Nor can carriers contract out of their unlimited liability for losses resulting from acts or omissions done with their reckless intent.

A full copy of the Draft Convention (A/CN.9/645) can be found annexed to: http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html.

We shall continue to monitor developments during the course of the year and will keep you

updated in our quarterly Shipping E-Brief. Those of you with a keen interest in this may want to attend the CMI Conference in Athens in October this year where the draft will be debated prior to submission for a "yes" or "no" to the UN General Assembly.

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Golden Lucy 1 - does an unidentified signature amount to an endorsement "in blank" of a bill of lading?

A "to order" bill of lading can be endorsed to a named party, to that party's order, or "in blank". In *Hilditch Pty Ltd v Dorval Kaiun KK (The "Golden Lucy 1") (No 2)* (2008) 741 LMLN 1 a cargo of oil was contaminated on discharge, by the vessel's other cargo of caustic soda. The Australian Court held that it was unnecessary for all three original bills of lading to be endorsed and that an unidentified signature on the reverse of a bill was in fact an endorsement "in blank" by the shippers, resulting in the bill becoming a bearer bill. In addition, under the amended Hague Rules, the failure of the plaintiff cargo receivers to stop the discharge of the cargo, when aware of contamination, did not excuse the defendant shipowner from its duty properly and carefully to discharge the goods carried.

The plaintiff cargo receivers ("H") purchased a cargo of Yubase 6 (a lubricant for motor engines) from SK Corporation of Korea ("SK") CFR from Ulsan, Korea, to Port Botany in Australia. On 1 June 2006, SK chartered the *Golden Lucy 1* from the defendant shipowner for the voyage. The *Golden Lucy 1* also carried a part cargo of caustic soda for delivery to another consignee at Port Botany.

H opened an irrevocable letter of credit with the National Australia Bank in favour of SK, a requirement of which was for a full set of shipped on board bills of lading made out to the order of SK and endorsed in blank. A set of three bills of lading was issued by the shipowner's agent on 18 June 2006 made out to the order of SK, with H as the notify party. The bills contained a clause paramount, incorporating the amended Hague Rules as contained in Australian legislation.

H received one of the original three bills of lading from the National Australia Bank, in early

July 2006. This bill carried two signatures on the reverse side. The first did not identify the name of its author, nor on whose behalf he or she had signed. The second signature purported to be an authorised signature of the Export-Import Bank of Korea. This bill was presented by H to the shipowner's agents in Australia, so that discharge could commence.

The oil as initially discharged appeared cloudy and obviously contaminated. It was thought by H's surveyors that all that was needed was for the lines and pumps to be stopped, clear of any residue left from the previous cargo (of molasses). However, after stopping the oil remained cloudy. Discharge continued nonetheless. After discharge, the whole cargo was found off specification and to be commercially unusable. Subsequent testing identified that the oil was contaminated with caustic soda.

H claimed damages of AUD560,013.56 from the shipowner, on the basis that the latter had breached its duty properly and carefully to discharge the oil, within the meaning of article 3 rule 2 of the amended Hague Rules.

The shipowner denied that H had title to sue, arguing (1) that all three bills in the set had to be endorsed, and (2) that the bill presented by H had not been endorsed by SK, because the signature on the reverse of the bill was not identified, while the signature for the Export-Import Bank of Korea was irrelevant – being a mere administrative measure in its capacity as a correspondent bank to record its satisfactory examination of the relevant documents stipulated in the letter of credit.

The shipowner further denied that it was in breach of article 3 rule 2. It claimed that, if wrong on its arguments about title to sue, it could rely upon the article 4 rule 2 (i) exception in that the omission of H to stop discharge once the contamination was known was an "*omission of the... owner of the goods, his agent or representative*".

The Australian Court held that H did have title to sue for the loss. It rejected the shipowner's argument (2), finding that the first signature on the bill of lading appeared to be the same as the signature on the SK commercial invoice and that it operated as an endorsement in blank. It was not clear what role the Export-Import Bank of Korea played in the dealings with the bill of lading. However, as the bill had been endorsed by SK, the Court held the signature of the Export-Import Bank of Korea did not effect the character of the bill as a negotiable instrument endorsed in blank.

The Court also rejected the shipowner's argument (1) that all three bills of lading in a set needed to be endorsed. The bills of lading contained the time honoured clause confirming that the master had signed three original bills of lading "*... of this tenor and date, one of which being accomplished, the others will be void*". H was entitled to delivery of the cargo as it was the holder of the bill of lading. On presentation of the bill by H to the shipowner, the bill of lading was, as it said, "*accomplished*". The other two originals became void.

The Australian Court further rejected the shipowner's argument that part of the loss was caused by acts or omissions by H, in permitting discharge to continue when it knew the oil was in good condition in the ship's tanks but was discharging at the manifold in a contaminated state. The Court concluded that the damage arose from the shipowner's breach of article 3 rule 2 properly and carefully to discharge the cargo, including *its* failure to stop the discharge. No loss would have occurred if the shipowner had had a sound system for preventing contamination taking place during discharging. The shipowner's failures were the commonsense cause of the loss.

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Dead freight and safe port warranty - *Archimidis* at the Court of Appeal

In *AIC Ltd v Marine Pilot Ltd* [2008] EWCA Civ 175 the Aframax tanker *Archimidis* was only able to load two thirds of her intended cargo because a severe storm shortly before her arrival had silted up the channel. The Court of Appeal, overturning the previous decision of Mrs Justice Gloster, held that Charterers were liable for dead freight because they had not supplied a full cargo. In addition, owners also had a potential unsafe port claim because the term "Load one safe port Ventspils" meant what it said, namely Charterers were giving a warranty that the port was safe.

In January 2005 the Aframax tanker *Archimidis* was chartered to load "minimum 90,000 mts" of gasoil at Ventspils for discharge in Belgium. This was her sixth consecutive voyage to Ventspils for the same Charterers pursuant to a charter on an amended Asbatankvoy form. However, due to an exceptional storm shortly before the vessel's arrival, the channel at Ventspils had silted up. In response to the Charterers' query, the Master's NOR stated

that the vessel only expected to load about 67,000 mts. This was the maximum amount she could safely load given the reduced draft in the main channel. The Charterers had plenty of cargo available and, to quote the tribunal, they “formally “tendered” for loading a quantity of 93,410.495 mt”, but “since all concerned were aware that it would not be possible for the vessel at that particular time to load this quantity, that was a gesture without legal significance.”

Unsurprisingly, Owners brought a claim for dead freight, relying on clause 3 of the Asbatankvoy charter which states: “Should the Charter fail to supply a full cargo, the Vessel may...proceed on her voyage.....In that event however deadfreight shall be paid at the rate specified in Part 1...”. The Charterers rejected the claim on the basis that they had supplied a full cargo and the vessel had deliberately called for less.

The Tribunal (Messrs Gaisford, Macfarlane and Moss) found in favour of Owners. They held that Charterers had failed to supply a full cargo because their “tender” of 90,000 mts was without legal significance. Furthermore, as Charterers were entitled, under an additional clause in the charter, to top the vessel up outside port limits using STS, they could not choose not to do this and avoid a claim for dead freight. Therefore, for both these reasons, the dead freight claimed succeeded.

On appeal the Tribunal’s award was carefully analysed by the Judge who made it clear that she was bound by the Tribunal’s findings of fact. The Judge noted that the Tribunal had held, as a matter of fact, that the Charterers had formally tendered for loading a full cargo and that the Master had told the Charterers that the vessel could only load 67,000 mt. This could not be stripped of legal significance merely because all the parties knew that it would not be possible for the vessel to load such a cargo. Therefore, the Judge held that Charterers had complied with their obligation under clause 3 to supply a full cargo. As regards the STS issue, the Judge held that this was a “right” which Charterers could exercise if they wished. Charterers could not be made liable for dead freight if they chose not to exercise it.

The Court of Appeal took a broader approach to the analysis of the Tribunal’s findings and summarized them as follows: Everybody knew there that the vessel could not load more than

67,000 mts and when the Master tendered his NOR all he was doing was giving a technically informed statement of the maximum quantity of cargo that could be loaded in the circumstances. The Charterers had formally “tendered” for loading 93,000 mts but they knew it would not be possible for the vessel to sail with this much cargo onboard. If the Charterers wanted to load a full cargo they had a choice. Load a full cargo and wait for the channel to be dredged or load 67,000 mts and top up by STS. Charterers had chosen neither. Therefore, “the thrust of the arbitrator’s conclusions was...not as the judge held, that the Charterers tendered full contractual performance...but that the Charterers decided that the least unattractive option was to have the vessel sail away with less than the minimum contractual quantity”. This was why the Tribunal had referred to “tendered” in inverted commas. For this reason the Court of Appeal allowed the dead freight claim to succeed and there was no need for the Court to consider the STS issue.

Owners had also brought their claim on the basis that Charterers were in breach of the safe port warranty in the charter. The issue for the Court of Appeal was whether there was a safe port warranty at all given that the port was named in the charter. This question has been the source of much debate over the years. Charterers sought to argue, relying on Dixon CJ’s dissenting judgment in *The Houston City* and Mustill J’s comments in the *Mary Lou* (not to mention two London arbitration decisions in the 80’s and 90’s), that all “1 safe port *Ventspils*” means was that both Owners and Charterers agreed, at the time of entering into the charter, that *Ventspils* was a safe place (and therefore Charterers were not giving a warranty as to the safety of that port). Neither the Tribunal nor the Judge agreed. And in the light of recent decisions in *The Greek Fighter* and *The Livanita* (see our previous Shipping Ebriefs) it was perhaps not surprising that the Court of Appeal upheld this view. If Charterers’ argument succeeded then there would be no difference between a charter that said “one safe port *Ventspils*” and one that simply said “*Ventspils*”.

Having decided that the charter did contain a safe port warranty, the next issue was whether the draft restriction meant the port was unsafe. The classic definition of safety, as referred to by the Court and taken from Sellers LJ in *The Eastern City*, is as follows:

“...a port will not be safe unless in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship.”

A port does not have to be safe at all times and Charterers argued that one obvious way to avoid any danger in the current situation was for the Master, as he did, to only load a part cargo. However, the Court of Appeal confirmed that as a matter of English law a port can be unsafe if it is necessary to lighter to get into or out of it. Whether this was indeed the case was a matter for the Tribunal and the case has been referred back to the Tribunal on this issue. The Tribunal will need to decide whether the storm and silting up of the channel was “an abnormal occurrence”. If it was not, the unsafe port claim probably succeeds, unless Charterers are able to rely on Clause 19 of the Asbatankvoy charter and a “perils of the sea” exception. But in the light of the finding on the dead freight issue, this may not be necessary.

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Rome I - what law can govern your contracts of carriage and sale contracts?

Ince & Co’s shipping and trade practice is built on the fact that our clients choose to do business on contracts that provide for English law. We have, therefore, been taking a close interest in the European Commission’s efforts to regulate the law that parties can choose in their sale contracts and contracts of carriage when doing business.

The background to this is the Rome Convention 1980 which established uniform rules for choice of law between the member states. This was implemented into English law by the Contracts (Applicable Law) Act 1990. In December 2005 the European Commission published its proposal to replace the Convention with a Regulation – called Rome I. The Commission’s initial proposal was that contracts of carriage (but not contracts of sale) should be governed by the law of the country in which the carrier has his habitual residence.

The Rome 1 Regulation was agreed by the Council and the European Parliament in December 2007 and should be formally adopted shortly. It will then come into force in 18 months time. The UK has been participating in the negotiations, and is currently deciding whether it should seek to opt

into the Regulation or not. The good news for those who want English law to govern their contracts, is that the Commission’s initial proposal is no longer on the table. There is complete freedom of choice in sale contracts and the carriage of goods, but some limitations in relation to the carriage of passengers.

Article 4 deals with sale contracts. If the parties forget to put a choice of law clause in their sale contract, then the governing law will be that of the place where the Seller has his habitual residence. Article 5 deals with “contracts of carriage” – both goods and people. So far as the carriage of goods is concerned, if the parties have failed to include a choice of law clause then the contract will be governed by the law of the country where the carrier has its habitual residence, provided the place of receipt or place of delivery or the habitual residence of the consignee is also in that country. If it is not then the law of the country where the agreed place of delivery is situated shall apply.

As regards passengers, there is not complete freedom of choice. The parties are limited to choosing the place where the carrier has his habitual residence/place of central administration, the place where the passenger has his habitual residence or the place of departure/destination. As a result of this it will not be possible for a non UK based cruise/ferry company to insert English law as a matter of course in all its contracts of carriage.

Article 6 deals with consumer contracts, but does so expressly without prejudice to contracts of carriage. Therefore, for container lines contracting with members of the public (as opposed to professional shippers and freight forwarders) there should be no problem with them continuing to insert English law in their bills of lading and seaway bills.

If anybody is interested in providing comments on this to the UK Ministry of Justice, the closing date is 25 June 2008.

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Winds of change: ship air emissions

MARPOL Annex VI

(1) Background: Trade and the Environment

The biggest issues of our day, and understandably so, are climate change and the environment and the two are of course intertwined. Until recently, the bulk of regulation applied to land-based operations but that has been changing. A study in *Science* in 1997 found that ship's engines are amongst the world's highest polluting combusting sources per tonne of fuel consumed. Although this was a controversial finding, it was against this background, and in response to a general increasing global concern about the affects of air pollution, that the IMO convened an International Conference on Air Pollution from ships, in London in 1997. At that Conference, MARPOL Annex VI (The Protocol of 1997) was adopted and was the culmination of the IMO's efforts to establish a policy on the prevention of air pollution from vessels as well as to contribute to the reduction of air pollution on a global level.

Annex VI came into force on 19 May 2005 – that being 12 months after the date on which not less than 15 states, the combined merchant fleets of which constituted not less than 50% of the world's merchant shipping, became parties to it.

As at late last year, there were 47 countries (including the UK) representing almost 75% of world tonnage which had ratified Annex VI. It is anticipated that the US will join the list of signatory states shortly.

Matters don't stop there: there are regional initiatives (European Union) and state initiatives (e.g. California) which either have or are on the verge of setting rather tighter limits than those to be found in MARPOL Annex VI.

To put matters in perspective, over 90% of world trade moves by sea. The cost of fuel was some US\$130 per tonne in 2002, increasing to about US\$244 per tonne in 2005 and peaked at US\$357 per tonne in the summer of 2006. According to a recent press report, one owner estimates that fuel costs have now risen to something like 4 times his crewing costs and can account for in excess of 50% of total ship operating costs. What is quite certain is that meeting the requirements for low sulphur fuel oil will push prices yet higher and therefore

have an impact upon all of us, in terms of increased freight costs.

(2) The Regulations

As stated, MARPOL Annex VI came into force on 19 May 2005.

Annex VI sets a global cap of 4.5% on the sulphur content of fuel oil and provides for special "SOx Emission Control Areas" (SECA's) to be designated with more stringent control on sulphur emissions. In these areas, the sulphur content of fuel used on board ships must not exceed 1.5%. Alternatively, ships must fit an exhaust gas cleaning system (scrubber) or use any other technological method to limit sulphur emissions.

The Baltic Sea was designated as a SECA in the Protocol and the sulphur limit of 1.5% came into force from 19 May 2006. The English Channel and North Sea became a SECA on 22 November 2007 (although under EU Directive 2005/33, the SECA came into force on 11 August 2007!).

(3) Amendments to MARPOL Annex VI

The Independent Tanker Industry Association, INTERTANKO, does not feel that MARPOL Annex VI goes far enough in regulating sulphur emissions and has put forward its own proposal. An article in *Bunker World* (February 2007) put it thus:

"The pressure is for the IMO to prove it can provide emissions reductions. If it fails, there could be a plethora of regional and local regulations, which is the last thing the global shipping industry wants. In this context, the Independent Tanker Industry Association INTERTANKO has proposed that shipping abandon fuel oil bunkers in favour of distillates with a 1% sulphur cap. It suggests the switch could be made by 2010".

The same article goes on to suggest that there is considerable support for INTERTANKO's proposal, with IMO Secretary-General Efthimios Mitropoulos saying that the proposal "May be as significant a change as when ships first changed from coal to oil".

The latest development was achieved at the 57th meeting of the Marine Environment Protection Committee of the IMO which took place at the IMO between 31 March and 4 April 2008. Unanimous agreement was reached on more

stringent standards on the sulphur content in ships' fuel. As a first matter, "Sulphur Emission Control Area" has been replaced by "Emission Control Area" (ECA) as the regulations will now apply to both SOx and NOx.

In terms of SOx emissions the key elements of the agreement are these:-

- 2010 ECA limit for sulphur content in fuel oils reduced to 1.0%
- 2012 Global limit reduced to 3.5%
- 2015 ECA limit reduced to 0.1%
- 2020 Global limit to 0.5% but a review in 2018 (with the authority to delay implementation) will determine if this is achievable
- 2050 Global limit to 0.5% irrespective of the result of the 2018 review

As the BIMCO report on this matter states:-

"The ambitious timetable presents a considerable challenge for the industry and one which could result in significant additional fuel costs".

The next MEPC meeting is scheduled for October 2008 and it is anticipated that this meeting will formally adopt the amended Annex VI for entry into force by 1 March 2010.

Winds of change!

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New CONGENBILL

BIMCO has recently revised the 1994 edition of the CONGENBILL and as of 31 March the old form is no longer available from BIMCO's printers. When stocks of the old form run out we should start to see the 2007 edition crossing our desks on a regular basis. Older readers who remember the change over from the 1978 version to 1994 may have a view as to how long this is likely to take, but as this bill of lading is used for many dry cargoes we thought our readers involved in the dry market would appreciate a summary of the changes.

The main changes from the CONGENBILL 1994 are as follows:

1. The signature box has been amended in order to meet the requirements of Article 20 of the UCP 600 rules and to make it more clear who has signed the Bill of Lading and on whose behalf. BIMCO has also taken the opportunity to re-style the form with a new box layout theme consistent with its other recently published standard forms.
2. A new box has been added to allow the name/principal place of business of the carrier to be clearly identified for the avoidance of doubt.
3. The box used for "Time used for loading" has been removed. This has been done because it was felt that this provision was no longer relevant to the trade and therefore it served no useful purpose to retain the box.
4. The terms and conditions found on the reverse of the Bill are largely unchanged with the exception of the General Clause Paramount which has been replaced by the latest edition published by BIMCO. This favours the Hague Visby Rules with the SDR Protocol over the Hague Rules.
5. Readers should remember that under English law you need to have an express reference in the Bill to the charter party law and jurisdiction clause if that clause is to be incorporated into the Bill. This was one of the main reasons for amending the standard bill in 1994. Building on this point and given the recent trend for "Alternative Dispute Resolution" clauses in charters, the express incorporation of the law and arbitration clause of the charterparty into the Bill now also includes a reference to a "Dispute Resolution Clause".
6. A minor amendment has been made to the General Average Clause to remove the phrase "or any subsequent modification thereof" after the words "York-Antwerp Rules 1994". This has been done to reflect BIMCO's policy to recommend that general average should be adjusted in accordance with the 1994 Rules and not the 2004 Rules which it believes to be less favourable to shipowners.
7. The reference to "The Charterers, Shippers and Consignees expressly renounce the Belgium Commercial Code, Part II, Art.

148” has been deleted to reflect the international nature of the intended use of the document.

CONGENBILL 2007 was approved by BIMCO’s Documentary Committee in Copenhagen in November 2007 and the paper edition of CONGENBILL 1994 was officially withdrawn by BIMCO on 31 March 2008. This means that stocks of the 1994 edition, are no longer available from BIMCO’s authorised printers and have been replaced by the 2007 edition. The objective of withdrawing the 1994 edition is to encourage the industry to establish the 2007 edition as the standard CONGENBILL used.

The revision of the CONGENBILL, however, is in no way intended to compromise the current use of the 1994 edition which when properly used remains a valid and legally binding document. In order to assist the industry during the transition period both versions of the CONGENBILL will remain available in electronic format on BIMCO’s online document editing system, “idea” (under the Bill of Lading section of the catalogue of BIMCO documents), until 31 December 2008, when the 1994 electronic edition will also be withdrawn.

Sample copies of CONGENBILL 2007 can be downloaded free of charge from BIMCO’s website at www.bimco.org.

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Hong Kong ship arrest and court sale

Hong Kong, which continues to follow the English legal system, is well-known as a favourable ship arrest jurisdiction in Asia. The combination of an impartial judiciary, the rule of law and procedural efficiency – not to mention the absence of any requirement for counter-security – make Hong Kong an attractive forum for international claimants seeking security for their claims.

Arrest and Release

The vast majority of ships arrested in Hong Kong are released within a matter of hours against security provided by way of a P&I Club letter of undertaking. The arresting party is however not obliged to accept a Club LOU, and can insist that security be provided by way of the more complex ‘bail bond’, in effect an undertaking in a standard form given to the court by two sureties (such as banks or insurers) who are generally required to have a presence within Hong Kong. This issue tends to arise where the arresting party is intent on

forcing Hong Kong jurisdiction for a claim which may have no connection with Hong Kong other than the fact that the ship is within Hong Kong waters.

Steps are, however, underway to simplify the release procedure, so that only one surety (e.g. a P&I Club) is required to file the bail bond. The Hong Kong Admiralty Court Users’ Committee and Admiralty Judge have proposed the necessary amendments and it is hoped that these will be incorporated into the court rules later in the year.

Court Sale of Ships

In response to a report prepared by Bill Amos and David Beaves of Ince & Co, the Hong Kong Admiralty Court has made a number of revisions to the procedures relating to the court sale of ships. The invitation to tender process has been streamlined, and no longer will investigations be made of the capacity and legal authority of intending buyers – with resultant savings in costs and time. It is also relatively common for buyers to purchase the ship through a different single purpose nominee company (i.e. other than the company which submitted the tender offer) for tax or risk management purposes. The buyer’s ability to use a nominee has now been regularised by way of a tripartite addendum to the tender documentation, which again will simplify and streamline the court sale procedure in Hong Kong.

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Cargo retention clauses and deductions from freight

In *London Arbitration 3/08* (2008) 734 LMLN 3 Charterers, in reliance on a cargo retention clause contained within a voyage charter, made a deduction from freight equivalent to the volume of liquid (pumpable) cargo which an independent surveyor determined remained on board after completion of discharge. Owners commenced arbitration proceedings asserting that Charterers were not entitled to make the deduction. The Tribunal held that since cargo retention clauses represent a departure from the well established rule of English law that freight is sacrosanct, Charterers were obliged to bring themselves squarely within the provisions of the wording of the clause. In these particular circumstances the Tribunal held that the surveyor’s report was inadequate to satisfy the requirements of the cargo retention clause, and as such, Charterers had not been entitled to make the deduction from freight.

The vessel was chartered on the Shellvoy 5 form to perform a voyage, with a cargo of Belayim blend crude oil, from Egypt to Sikka, India. Clause 14 of the charterparty provided as follows:

*“Shell additional Clauses – February 1999
14. Cargo Retention Clause.*

If on completion of discharge any liquid cargo reachable by vessels fixed pumps of a pumpable nature remains on board (the presence and quantity of such cargo having been established, by an independent surveyor, (appointed by Charterers and paid jointly by Owners and Charterers), Charterers shall have the right to deduct from freight an amount equal to the FOB loading port value of such cargo, cargo insurance plus freight thereon; provided, however, that any action or lack of action hereunder shall be without prejudice to any other rights or obligations of the Charterers, under this charter or otherwise.....”

Following completion of loading, the Master signed a bill of lading for 556,594.20 barrels (bbls) of crude oil. Surveyors were subsequently appointed by Charterers, as independent surveyors to make a determination of fuel remaining on board (“ROB”) after discharge, as provided for by Clause 14, and Owners agreed with the appointment.

Shortly after discharge was completed in India the ROB tank inspection took place. In his ROB report, the surveyor computed a total ROB of 3906 bbls. The surveyor determined that, of that quantity, 403 bbls was non-liquid (and “unpumpable”) and 3,503 bbls was liquid (and “pumpable”). The ROB report was endorsed by the Master with the remark, *“The above mentioned liquid cargo are considered non-liquid”*.

The printed form of the Report also contained, near the foot, the words:

“LIQUID OIL or FREE FLOWING OIL is usually considered by the Industry as “Pumpable cargo”. NON LIQUID (Sediment/Sludge) are considered by the Industry as “Unpumpable cargo””.

Owners contended that the ROB’s were solid, unpumpable and not reachable by the vessel’s fixed pump and, to the extent that there was any liquid cargo on board, it was trapped by solid ROB. The Charterers on the other hand contended that all of the requirements of Clause 14 had been met by the

surveyor’s report, and as such, they were entitled to deduct the CIF value of the 3,503 bbls of liquid ROB.

The Tribunal held that provided an independent surveyor made a determination on completion of discharge that liquid cargo of a pumpable nature reachable by the vessel’s fixed pumps remained on board, then such a determination entitled Charterers, as per the terms of Clause 14, to deduct the CIF value of the liquid remains from freight. Charterers did not need to prove their entitlement to retain the amount deducted, by bringing a formal cargo claim. Instead the deduction from freight would be on a permanent basis as the independent surveyor’s determination was final in this respect. However, the Tribunal went on to make it clear that, because Clause 14 gave Charterers a right under the Charterparty which they would otherwise not have, it was incumbent upon Charterers to bring themselves squarely within the provisions of the wording of the clause, which had to be read strictly.

In this case the Tribunal held that no challenge could be made to the surveyor’s independence and it was not in doubt that the determinations made were on completion of discharge. However, while the surveyor distinguished between liquid and non liquid ROB and inserted terms such as “pumpable” and “unpumpable” into his report, the words at the foot of the printed form, and in particular the phrase *“usually considered by the industry”*, implied that the liquid cargo might not be pumpable. To satisfy the requirements of Clause 14, the surveyor had to say in an unqualified way that the liquid ROB cargo was pumpable and, for that reason, the Tribunal found the description in the report to be inadequate.

The other matter, on which the certificates were silent, was whether or not the liquid ROB cargo was reachable by the vessel’s fixed pumps. While it is known that oil tankers are generally designed to keep pumpable residues to a minimum level, the Tribunal held that such knowledge, which might imply that pumpable cargo was always reachable, was insufficient. Instead, to fulfil the requirements of Clause 14 the fact that the liquid ROB cargo was reachable by the vessel’s fixed pumps had to be certified.

In making this determination the Tribunal made clear that they were aware of the fact that surveyors generally were very reluctant to state a cargo was reachable by a vessel’s pumps. However, given that clauses such as Clause 14 had to be construed strictly against Charterers, and that it was for the

Charterers to get themselves wholly within the provisions of such a clause, it was not appropriate to adopt an approach as to what surveyors said or wrote that was anything less than rigorous.

Accordingly, in this case the Tribunal held that, because the surveyor's report did not certify in an unqualified way that the liquid cargo was pumpable and reachable by the vessel's fixed pumps, Charterers had failed to bring themselves within the provisions of Clause 14 and, in this respect, Owners claim succeeded.

However, this was not the end of the matter as Charterers brought a counterclaim for damages, Clause 14 being without prejudice to any further right of Charterer's to claim under the charter in respect of short delivery. In this respect the Tribunal held that the evidential burden was upon the Owners to demonstrate that the presence of such a significant quantity of ROB was not the fault of the vessel and, in this case, the Tribunal held that Owners had not discharged that burden. So far as quantities were concerned, however, the Charterers did not demonstrate to the Tribunal's satisfaction that the Owners were responsible for any shortage in excess of the 3,503 bbls of liquid ROB certified by the surveyor. Charterers counterclaim therefore succeeded and Charterers were awarded damages to the exact same amount as was originally deducted from freight.

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Sale of Ships – forfeit of deposit - enforcement against guarantor

In **London Arbitration 4/08** – 735 LMLN 3(2), 23.01.08, a dispute arose under an MOA between the Sellers and X, who, under the MOA were guarantors of the Buyer. By an addendum to the MOA, X had nominated Y, a one-ship Liberian company as Buyer as if originally named in the MOA. Y failed to pay the purchase price in time and Sellers exercised their right to cancel the contract and forfeit the deposit. Sellers obtained an award against Y, but they failed to release the deposit. Sellers successfully claimed against X as guarantor.

The Sellers had originally entered into the MOA with X for a company to be nominated, whose performance was to be guaranteed by X. The 10% deposit was paid by X and was held in a joint account on terms that it could only be released against signatures from both the Sellers and X. Subsequently, X nominated Y as Buyers.

Upon cancellation of the MOA Sellers sought forfeiture of the deposit and successfully obtained an award against Y which provided that they should take steps to procure the release of the deposit. Y refused, so Sellers brought the present proceedings against X. Sellers' claim against X was for damages in the amount of the deposit, or alternatively an order that X take steps to procure the release of the deposit and accrued interest to Sellers.

X defended the claim on the basis that the Tribunal had no jurisdiction over them and that they retained no residual liability under the MOA. They argued that they were only ever acting as agents for a company to be nominated and were not a party to the MOA. Alternatively, even if they were a party to the MOA, they argued that they had subsequently been replaced by Y under the terms of the Addendum. X also argued that they were not bound by the proceedings (between Sellers and Y) to which they were not a party and that they were entitled to have the substantive issues as to whether Sellers were entitled to forfeiture of the deposit heard.

The Tribunal rejected X's arguments. It was found that X were a party to the MOA when it was entered into and were therefore a party to the arbitration clause and were subject to the jurisdiction of the Tribunal. X could not have been acting as agent for a non-existent principal. Further, the Addendum, by which Y took over responsibilities and liabilities as Buyers, did not release X from their own, separate responsibilities under the MOA. X remained bound by the obligations of a guarantor and their duties as signatories to the deposit account. The Tribunal considered that this was in line with commercial realities and accepted practice in ship sale and purchase. Very clear words in the MOA would have been needed for the conclusion sought by X to apply, which effectively sought to deprive Sellers of the benefit of having a deposit at all.

X asserted that they were entitled to have the substantive issues determined in these proceedings and they put forward an argument of breach by the Sellers because the ship was not ready. The Tribunal found that these matters were irrelevant to the proceedings in hand, which dealt only with the guarantee of Y's performance by X and Y's obligation to procure the release of the deposit. In any case, the present Tribunal would not have found in X's favour on the substantive issues. Sellers' claim succeeded in full.

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“Pier Dues” and “Quay Dues” - standard terms v rider clauses.

In *London Arbitration 1/08 - 734 LMLN 2*, the vessel was chartered on the Asbatankvoy form to discharge “One safe berth safe port Bombay, Nex Pirpau Jetty Charterers’ Option.” Clause 12, Part 2 of the Asbatankvoy form charter stated, with our emphasis in bold:

*“DUES-TAXES-WHARFAGE. The Charterer shall pay all taxes, dues and other charges on the cargo, including but not limited to Customs overtime on the cargo... The Charterers shall also pay all taxes on freight at loading or discharging ports and any unusual taxes... **The Vessel shall be free of charges for the use of any wharf, dock, place or mooring facility arranged by the Charterer** for the purpose of loading or discharging cargo; however, the Owner shall be responsible for charges for such berth when used solely for the Vessel’s purposes, such as awaiting Owner’s orders, tank cleaning, repairs etc before, during or after loading or discharging.”*

Additional typed Clause 3, with our emphasis again in bold, stated:

*“Port charges, **quay dues** and similar dues on ship **are for Owners’** account, but all dues and duties on cargoes shall be for Charterers’/Shippers’ account.”*

Charterers arranged the discharging berth and invoiced Owners for “pier dues.” Owners commenced arbitration proceedings in which they claimed that pier dues were for Charterers’ account.

The Tribunal held that “pier dues” had the same meaning as “quay dues.” Additional typed Clause 3 clearly made these charges for Owners’ account. However, equally clearly, Clause 12 of the standard form made them for Charterers’ account.

As there was a clear conflict between the two terms, which could not be reconciled, the Tribunal applied the rule that provisions specifically agreed take precedence over those in standard form wording. Therefore, additional typed clause 3 overrode standard clause 12 and the pier dues were for Owners’ account.

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London’s Commercial Court keeps getting better!

Many clients choose to have their disputes decided by the Commercial Court in London because after the initial Court fee of US\$1,500-3,000, it is “free” to use. London Maritime Arbitration, in contrast, has a smaller initial fee of about US\$300, but thereafter the parties have to pay the Tribunal for the time they spend on the case. The Commercial Court is very aware of its importance as the World’s main venue for resolving shipping and trade disputes, and it has been making efforts recently to improve the service it provides.

Following the proposals and recommendations of the Commercial Court Long Trial Working Party Report, in February, the Commercial Court commenced a six month trial of the new procedure to be adopted in “Heavy Complex Cases”. This is aimed at ensuring that such cases are handled in the most efficient and cost effective way. Heavy Complex Cases have not been defined, but will depend on the complexity of the legal and technical issues the number of parties involved and the amount of money at stake. This initiative has been taken following harsh criticism of the procedure and case management of the Commercial Court in cases such as the BCCI/Three Rivers litigation, where the length of trial and the costs exceeded all expectations. Although the report focused on Heavy Complex Cases the recommendations in the trial period are being applied to all cases in the Commercial Court, which may intervene of its own volition even if the parties have already agreed directions.

A checklist highlighting the most important changes to the Commercial Court procedure is set out below:

- **Statements of Case**

These are not to exceed 25 pages in length without the Court’s permission. Formal Replies are to be pleaded only where necessary and are not to be used as an opportunity to go over issues already pleaded.

- **List of Issues**

This is not to exceed 10 pages, and is to be agreed at the first Case Management Conference (CMC). Thereafter, this document will be the focus for Disclosure, Witness Statements and Experts’ Reports, and it is to this List that these documents have to relate. Statements of Case will now take second place to this Court document.

- **Witness Statements**

These are to be as brief as possible (limits may be imposed by the Court), and, as mentioned, drafted by reference to the List of Issues. To avoid duplication of documents Witness Statements should not attach bundles of exhibits. There should be no overlap between the Witness Statements provided by any one party.

- **Experts' Reports**

These are to be as brief as possible and, as mentioned, drafted by reference to the List of Issues. Again, the Court may consider limiting their length.

- **Disclosure**

The Court is to take an aggressive stance on the extent of disclosure. Schedules are to be prepared by the parties setting out lists of the documents required, and the Court will identify the scope of disclosure by reference to the List of Issues and these schedules.

- **Client Accountability**

A senior client representative is to sign Statement of Truth at the outset and again before trial verifying the Statement of Case. An ADR statement is to be signed to confirm that appropriate methods of alternative dispute resolution such as mediation have been considered internally and between the parties. Clients may even be requested to assist the Judge at various case management stages.

- **Costs**

The parties are to furnish the Court with regular costs updates. The Court is encouraged to request payments on account where the sums involved are large, and if at any stage the Court considers a party has acted unreasonably, it should make costs awards to discourage that behaviour. If possible such awards should be assessed summarily and payment ordered immediately.

- **Technology**

The parties and the Court are to examine the use of IT to reduce the cost of the trial and minimise the burden of litigation. In this connection it is anticipated that the Commercial Court will have moved to a new building by 2010 when, it is hoped, trials will be on their way to becoming paperless.

- **Length of Trial**

Trials involving two parties should not be listed for more than 13 weeks. Opening and Closing speeches should not exceed 2 days (in the BCCI case, Counsels' openings were estimated to last in the region of 3 months).

By reducing the cost and length of Commercial Court trials, it is hoped that the new procedure will save money and time, making London an even more attractive jurisdiction in which to litigate. We will have to wait and see how well the new procedure has worked and what further changes may be required before final implementation.

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Crewman A and the undisclosed principal - who is the boss?

Ferryways NV v Associated British Ports [225] EWHC (Comm)

The court had to determine a number of preliminary issues between Ferryways, a Belgian shipowner/operator and ABP an English port owner/operator. The chief officer on board one of Ferryways' vessels died as a result of negligence on the part of the stevedores subcontracted by ABP. The vessel's P&I Club made a payment in respect of the death and of the cost of repatriating the body.

Ferryways sought to recover those sums from ABP because, as they saw it, they were the employer of the chief officer and had suffered a loss. ABP denied this and argued that the employer was the shipmanagement company, Ambra Shipmanagement Ltd ("Ambra"). Whether Ferryways could be described as the employer of the chief officer became the key preliminary issue.

Ferryways and Ambra entered into a standard BIMCO Crewman A Cost Plus Fee contract (the "CMA") which provided that the crew managers were agents for and on behalf of the Owners. On the basis of the CMA, Ambra engaged crew on employment contracts which described Ambra "as the Employer".

Consequently, as Ferryways was not stated to be the employer in the contract or to be the principal of Ambra, in order for Ferryways to take the benefit, it had to be as an undisclosed principal. However, under the law of agency, if the intervention by an undisclosed principal is

inconsistent with the terms of a contract, he cannot take the benefit of it.

While Teare J accepted that the CMA evidenced an intention on behalf of Ferryways that Ambra would engage crew as agent for and on behalf of Ferryways, he did not consider that it would follow that Ambra would always do so. That would depend on the terms of the particular crew contract.

Therefore, the question was whether the terms of the contract were inconsistent with the intervention of Ferryways as the undisclosed principal? Teare J looked at the whole contract of employment to decide whether the parties intended that only Ambra could take the benefit of the rights and obligations. There was no express provision to this effect. In addition, the applicable law of the contract of employment depended on the flag of the vessel, indicating that the ship owner was entitled to the rights and obligations of the employer.

Further assistance for Ferryways could be found in three clauses in the employment contract which suggested that matters could be dealt with by the ship owner or operator and not by Ambra. These related to the grievance procedure, code of conduct and the safety management systems (SMS). In evidence it was accepted that while Ferryways was content to allow Ambra to select ratings, Ferryways were involved in the selection of the Master, Chief Officer, Chief Engineer and Second Engineer and that if the Master of one of the vessels could not resolve a grievance on board, he would discuss this with Ferryways' fleet manager whose decision would be final. It was also likely that the vessel's SMS would have been supplied by Ferryways' technical managers, not by Ambra.

These were strong indications that an entity other than Ambra would have rights and obligations of the employer under the contract of employment. The obvious contender being the owner or operator of the vessel on which the employee served.

Teare J concluded that the words "as the Employer" did not amount to a term that only Ambra may have rights and obligations as employer and it followed that the contract did not exclude Ferryways from being an undisclosed principal. Therefore, Ferryways was entitled to intervene in the contract of employment *as the employer* of the deceased.

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Confidentiality limits in London arbitration

The Court of Appeal has recently given an important judgment clarifying the question of confidentiality in national and international arbitrations.

As a matter of English legal principle, arbitration is a private process and typically the courts will place the parties' wish for confidentiality above the public interest consideration that disputes should be determined publicly. The dispute in *Michael Wilson v Emmott* arose in, what the Court described as, "unusual circumstances". Mr. Wilson, an English solicitor, had asked Mr. Emmott to join his company, Michael Wilson & Partners Limited ("MWP"), a firm providing legal services in Kazakhstan. Four years later Mr. Emmott left MWP and practised through two companies incorporated in the British Virgin Islands. MWP claimed that Mr. Emmott had been directing business from his former company in breach of contract and in breach of trust. Arbitration in London and court proceedings in England, New South Wales, the British Virgin Islands, Jersey and Colorado ensued. During the course of the London arbitration MWP alleged fraud and dishonest conduct on the part of Mr. Emmott. The Tribunal required MWP to drop these allegations and re-plead its case, which it did removing the explicit references to fraud. However, allegations that Mr. Emmott had acted fraudulently continued to be made in the court proceedings in New South Wales, in which the defendants were two other former employees of MWP, and the British Virgin Islands, in which the defendants were companies through which Mr Emmott had provided legal services. The original Points of Claim in the London arbitration had been disclosed in both the New South Wales and BVI proceedings. Mr. Emmott applied to the English court for an order permitting him to disclose the Amended London Arbitration Submissions and the skeleton argument before the arbitrators in the court hearings in New South Wales and the British Virgin Islands. This was on the basis that it was in the interests of justice that the documents be disclosed to avoid misleading the Courts of the BVI and New South Wales as to the nature of the allegations being pursued in the London arbitration. At first instance the Commercial Court allowed the application and so MWP appealed.

In dismissing the appeal the Court re-affirmed that there was an implied obligation on both parties to an arbitration not to disclose or use for any other purpose any document prepared for and used in an arbitration (including transcripts, notes of evidence

and the award) without the consent of the other party or an order of the court. However, the Court of Appeal also confirmed that there are limits to the privacy of arbitration proceedings and, whilst those limits were still in the process of development, the principal cases in which disclosure would be permitted included the following:

- (1) Where the parties have expressly or impliedly consented to disclosure;
- (2) Where disclosure is reasonably necessary for the protection of the legitimate interests of an arbitrating party;
- (3) Where the interests of justice require disclosure;
- (4) (Perhaps) where the public interest requires disclosure.

The Court of Appeal found in the instant case that as the submissions were produced for the purpose of arbitration, making use of them outside the arbitration would amount to a breach of the obligation to keep the arbitration private. However, disclosure was necessary to protect Mr. Emmott's legitimate private interests and was also in the interests of justice as there was a danger that the overseas courts might be misled. It was not necessary though for the entirety of the submissions to be produced and therefore some of the documents were rightly redacted to enable use of what was necessary, while preserving the privacy of the arbitration in relation to the remainder of the documents. The Court declined to explore the extent to which the "public interest" could require disclosure (even when disclosure was not required for the protection of a party's legitimate interests or was in the interests of justice) and so whilst this criterion appears to exist it remains unclear when it will apply.

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Business & Finance

Companies Act 2006 - further update

With effect from 6 April 2008 a further set of totally unconnected provisions will come into effect. These range from new laws on mergers, and divisions of public companies, arrangements and reconstructions, which will affect relatively few UK companies, to more

important matters relating to company secretaries and the preparation and delivery of accounts and matters relating to auditors.

Very briefly, we note below one or two key sections as follows:-

Part 12 - Company Secretaries

A private company is no longer required to have a secretary. However, generally we see no reason why existing companies would want to remove that position as often two "officers" are required to execute certain documents.

Part 15 - Accounts and Reports

While there are few substantive changes, the provisions have been redrafted and reordered in order to group together those particularly relevant to companies of different sizes and types. The main substantive changes are as follows:

1. Directors have a new general obligation not to approve accounts unless they give a true and fair view of the financial position of the company and, in the case of group accounts, the undertakings included in the consolidation as a whole.
2. The current exemption for parent companies which head medium-sized groups from the requirement to prepare group accounts is abolished.
3. Notes to companies' annual accounts no longer have to disclose transactions made between the company and officers other than directors.
4. The obligation to lay the annual accounts and reports before a general meeting is restricted to public companies. Therefore, the time for a private company to distribute its accounts and reports is no longer tied to the date of a general meeting. Instead it is required to send them out no later than the earlier of: (i) the date of actual delivery to the company's registrar; or (ii) the date of the six month deadline for delivery set out in section 442. This to our mind is yet another example of the legislation making the law for private companies harder to understand.
5. The period for filing accounts and reports is reduced to nine months after the end of the relevant accounting period for private companies and to six months for public companies. Was the one month reduction in each case really worthwhile?

Part 16 - Audit

This Part consolidates various provisions concerning auditors from the 1985 Act and makes some significant changes. For example where the auditor of a company is a firm, the auditor's report must now be signed by a "senior statutory auditor" who is defined as a person to be identified according to standards issued by the European Commission, or if there are no such standards, by guidance issued by the Secretary of State.

Two new criminal offences are created in relation to the auditor's report which apply both to an individual auditor and to any director or employee or agent of a firm of auditors who would be eligible to be appointed as auditor. Firstly, there is now an offence for any such person to knowingly or recklessly cause the report to include any matter that is misleading, false or deceptive in a "material particular". Alternatively, there is an offence for such person knowingly or recklessly to omit from the auditor's report any of the statements required where there are problems with the accounts. We wonder whether this will ever lead to any prosecutions - somehow we doubt it!

There are new rules on the departure from office of the auditor of a quoted company. There are also now new rights for members of quoted companies to require the company to publish on a website a statement raising questions about the accounts or about the departure of an auditor. These can be raised by members at the next meeting where accounts are to be discussed, although only in the case where members hold at least 5% of the total voting rights, or from at least 100 members holding shares on which an average sum of at least £100 per member has been paid up.

There are new rules by which a company and its auditor may enter into a liability limitation agreement ("LLA"), which is defined as an agreement seeking to limit the liability of an auditor to a company he has audited. This may cover, in relation to a company's accounts, negligence, default, breach of duty and breach of trust. This is made by the company approving the LLA by an ordinary resolution. This is a wholly new area of law and an interesting question arises as to why companies would enter into such an arrangement.

If you would like any further information on any of these matters, please let us know.

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Residence and domicile – The draft Finance Bill

Following the Budget on 12 March 2008, the Finance Bill which reflects the Government's current policy intentions for changes to the taxation of individuals resident but not domiciled in the UK, was published on 27 March 2008. Whilst there may still be changes to the detail, it is likely that the provisions set out in the Bill will, in essence, be enacted in the final legislation.

Since the issue of the Consultation Paper in December 2007 and the initial draft legislation in January 2008, the Government has clarified and modified some of its original proposals, but the effect remains that, with effect from 6 April 2008, the basis of taxation for those who are resident but not domiciled in the UK has fundamentally changed.

The main changes can be briefly summarised as follows:

1. Residence

The original proposal to count days of arrival in and departure from the UK as days spent in the UK has been amended, so that a person has to be present in the UK at midnight for that day to be counted as having been spent here when calculating residency. This means that someone who spends a day in the UK for a meeting and leaves before midnight should not be treated as having been present here for that day.

2. New Remittance Rules

2.1 The remittance basis of taxation will apply automatically to an individual whose foreign income and gains for any tax year are less than £2,000. This has been increased from the original proposal of £1,000.

2.2 Adults who have been resident in the UK for 7 out of the previous 10 years will only be able to opt for the remittance basis of taxation (i.e. to pay tax on UK income and gains but only on foreign income and gains which are remitted to the UK) if they make a claim for each year in which they wish to be taxed on that basis and pay a charge of £30,000 for each year in which such a claim is made. In that case, the taxpayer will not receive any personal allowances for income tax or the benefit of the annual exempt amount for the purposes of capital gains.

It has now been confirmed that if the funds used to pay the £30,000 charge comprise foreign income and/or gains, they will not be treated as taxable remittances provided they are paid directly to HM

Revenue & Customs to cover the £30,000.00 charge.

2.3 Taxpayers who do not make a claim to be taxed on the remittance basis will be taxed on their worldwide income and gains for that year on an arising basis.

3. Offshore Companies

With effect from 6 April 2008, individuals who are resident but not domiciled in the UK and who are participators in offshore companies, will be treated as having received gains when UK property is disposed of and the gain is realised, or when gains are realised from the sale of non-UK sited property and the proceeds remitted to the UK; similarly, when non-UK sited property is disposed of at less than the market value and that property or other assets derived from it are subsequently brought into the UK.

4. Offshore Trusts

4.1 The original far reaching proposals have been modified to some extent. The exemption from the Settlor charge for non-UK domiciled settlors of non-UK resident trusts will remain, although they, and other non-UK domiciled beneficiaries, will be liable to tax on receipt of payments (and this includes benefits in kind) if they are remitted to the UK after 6 April 2008.

4.2 Non-resident trustees will be given an option to rebase trust assets to the market value at 6 April 2008 for all assets held directly by the trust and any underlying companies. A rebasing election will mean that trust gains accruing but not realised prior to 6 April 2008 will not be chargeable if matched to capital payments made on or after 6 April 2008 to non-UK domiciled beneficiaries. The effect of this will be that on a subsequent disposal of an asset, the disposal value will be divided into pre 6 April 2008 gains/losses and post 6 April 2008 gains/losses.

These rules will apply to all gains realised by the trust whether on UK or non-UK sited assets. Non-domiciled individuals who have not elected for the remittance basis of taxation will be subject to tax whether or not the payment is remitted here.

It should also be noted that use of the rebasing election is to be coupled with the need to provide more detailed information about the relevant trust to HM Revenue & Customs.

Summary

These are extremely complex provisions and this is the briefest of summaries so it is important that all individuals who may be affected take professional advice.

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New leases and lease renewals - 10 key questions for occupiers

The answers to the following questions can make a significant difference to **occupation cost**. Most tenants of business premises will not have in-depth knowledge of real estate transactions or the leasing market, and only encounter them every five to fifteen years when looking for new space (or renewing an existing lease).

1. Cost of repairs and remedying defects – is it the Landlord or Tenant who pays?
2. Service charge – what should be included, what should be excluded?
3. Stamp Duty Land Tax – can liability be reduced?
4. Flexibility – how free am I to assign, sublet, share possession with group companies?
5. Rent review – does the detailed wording really matter?
6. Security of tenure – what does it mean? Do I need it? How will any break clauses work?
7. Uninsured damage – who bears the risk? (It is usually the Tenant unless it negotiates otherwise).
8. Power, utilities and cooling – do I need guaranteed minimum levels? Can I be sure that I can upgrade if necessary?
9. Alterations – how much freedom do I have? Will I have to pay for complete removal and stripout when the lease ends?
10. Environmental – who bears the cost of environmental compliance? (This is relevant where the building or the ground beneath it contains contaminants or other materials that may need to be removed, such as asbestos).

Tenants' agents and surveyors, when negotiating heads of terms, will focus mainly on the level of rent and basic issues; usually they will not think to challenge the Landlord's standard terms on other items. It can then be difficult or impossible to regain the lost ground following solicitors being instructed.

Tenants will often benefit by obtaining a degree of legal input during heads of terms discussions. For a modest amount of time spent early in the process it may be possible to markedly improve the deal from the tenant's point of view, leading to real savings over the life of the lease.

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Other News

New partner promotion at Ince & Co

From 1 May 2008, Ince & Co has promoted three people to partner, one in Hamburg and two in London



Markus Eichhorst

Markus joined the Hamburg office as a trainee and qualified in 2001 after studying law at the Universities of Kiel (Germany) and Essex (England). Markus covers all areas of the firm's contentious practice and is especially experienced in negotiating and litigating commercial disputes in shipping, trade, reinsurance and insurance. He is a member of the arbitration associations GMAA and DIS and of the Association of Insurance Science of the University of Hamburg.

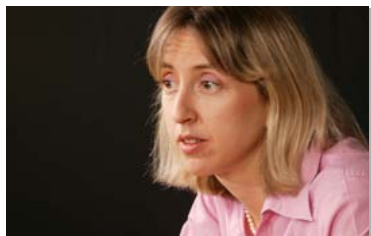
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Jonathan Goldfarb

Jonathan trained with the firm and covers both non-contentious and contentious work. His non-contentious work includes drafting and negotiating financing documents and commercial contracts in the shipping, shipbuilding and offshore oil and gas industries. He also acts in sale and purchase, resale and leasing transactions. On the contentious side, Jonathan has extensive experience in litigation, arbitration and mediation arising from the shipping industry and general commercial disputes. Jonathan is a member of our LNG group.

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Carol Searle

Carol has experience in a wide variety of contentious insurance matters with an emphasis on political risk, professional negligence and reinsurance. She has also handled international trade disputes and has a broad background in shipping disputes (cargo claims, charterparties, ship sales, collisions, pollution). She is dual qualified having originally trained and practised with Shepstone & Wylie in South Africa before moving to London when she joined Ince & Co after obtaining a Masters in International Business Law from London University.

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