International Commerce

September 2012

INDIA BULLETIN

Welcome to our latest India Bulletin. In this edition, we lead with an article on piracy which continues to be a major threat to Indian shipping. We also look at the impact of sanctions on India's need for oil. Staying with India's power requirements, the competition between Australia and Indonesia to provide coal to Indian buyers has been intense. We look at the challenges and opportunities in this sector, particularly as a result of recent Indian legislative changes.

The Indian Supreme Court's recent decision in *Bhatia Aluminium Company Limited v Kaiser Aluminium Technica*, has renewed the focus on enforcement of foreign awards. In this context, we also look at the enforcement of Chinese performance guarantees.

The recent interest in the shipbreaking of the "Oriental Nicety", perhaps more famously known internationally under her previous name "Exxon Valdez", is a timely reminder of this vital industry. The key regulatory issues involved in shipbreaking are highlighted in this comprehensive article.

We finish this Bulletin with an article on freight rates, which reminds us of the continuing difficulties in the market and the effects on the different players involved.

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin or your usual contact at HFW.

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Piracy update

The Indian Shipping Summit 2011 included a fascinating and passionate debate hosted by the international journalist and broadcaster, Nisha Pillai. The audience was captivated by the issues discussed and in particular the experiences of a Master whose ship had been seized. His personal tale provided a powerful reminder of the dreadful reality of piracy and its impact on the lives of the seafarers involved.

Piracy remains a significant problem for all involved in the shipping industry. Recent developments include the publication of the BIMCO Guardcon and BMP 4, the establishment of an international task force on ransom payments and the identification by the Office of Foreign Asset Control (OFAC) of six additional specially designated nationals under the Somalia sanctions programme. Piracy has also led to a number of legal disputes, with the English High Court handing down a number of judgments of key importance.

In the *"Saldanha"*[1] it was held that if "piracy" is not a specified off-hire event under the charterparty (NYPE 46), the vessel cannot be placed off-hire. This is to be contrasted with the decision in the *"Capt Stefanos"*[2] where it was found that if capture/seizure is specified as an off-hire event under the charterparty, then the vessel is off-hire and the "seizure" does not need to be by a government authority.

Last year, in *Masefield v Amlin*[3] , it was held that a hijack is not an actual total loss nor theft. The Court also found that ransom payments to pirates were not illegal.

1. [2010] EWHC 1340 (Comm).
2. [2012] EWHC 571 (Comm).
3. [2011] EWCA Civ 24.

This year there have been three more judgments. In the *"Triton Lark"*[4], it was held that an owner may refuse voyage orders if, in the reasonable judgment of the owner or Master, there is a real likelihood the particular vessel would be exposed to acts of piracy. Whether a 1 in 300 risk qualified was left open to the tribunal to decide. *"Lehmann Timber"*[5] provided guidance on the exercise of a lien post-hijack, the Court finding that it is reasonable for the lienee to require a GA bond before releasing the cargo. However, the associated cargo storage costs may fall for the lienee's account. Most recently, in the *"Paiwan Wisdom"*[6], it was held that the words "passing Gulf of Aden always allowed with H&M insurance authorisation" is an acceptance by owners of Gulf of Aden piracy risks, but not Mombasa war risks. Therefore, owners can refuse to call at Mombasa if (within the meaning of CONWARTIME 2004) there is a real likelihood that the vessel would be exposed to acts of piracy. It is not a requirement under CONWARTIME 2004 that the relevant war risk must have increased since the date of the Charterparty.

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4. [2012] EWHC 70 (Comm).
5. [2012] EWHC 844 (Comm).
6. [2012] EWHC 1888 (Comm).

The effects of international sanctions on Indian shipping

The eyes of the world have been on law makers in the EU and the US, as increasing sanctions against Iran continue to impact on shipping companies worldwide, particularly those engaged in trading and shipping Iranian crude oil. Currently India, China and Japan are the largest buyers of crude oil from Iran but the recent EU restrictions, and their impact on EU insurers and reinsurers has seriously affected the ability of shipowners in those countries to meet domestic demand. While Japanese and Chinese shipowners have been able to rely on domestic insurance providers, Indian shipowners, despite India receiving an exemption from the most recent US sanctions, can no longer count on the EU and US P&I clubs with which they normally deal.

The Indian government, through state-backed insurance companies, has sought to counteract concerns by offering limited cover, understood to be up to US$50 million for hull and machinery and US$50 million for P&I risks. Cover at this level would be insufficient to satisfy major claims for loss or damage, or for a significant oil spill, where costs could exceed the cover many times over. The premium is also expensive, shown to be around ten times the price of a P&I club's usual premium. To this date the cover offered has been used sparingly. There have instead been calls from shipowners for the Indian government to provide full sovereign cover as has been adopted in Japan.

Indian shipowners may consider investigating alternative sources of cover, from insurers in Japan, China, Russia or the Middle East; but it is unclear how much cover would

be available to Indian shipowners and how much would be reserved for "domestic" shipowners. Such a switch may take months, however, as members weigh up the risk of a new entrant who is doing business with Iran. Government-backed insurers, with a finite amount of funds, may also seek to support their own shipowners first.

There is little sign that Indian refiners wish to reduce their import of Iranian crude oil. Although the heavy crude oil currently imported from Iran can be sourced from South America, the whole business structure of importing crude oil would be affected by a thirty day sailing from South America, as opposed to a sailing from Iran to India of only two to three days. Saudi Arabia is a possible alternative for crude oil imports but with Iran offering crude oil at continually competitive rates, its proximity and price will likely keep its demand high in India.

Shipowners will undoubtedly be concerned that if they are unable to satisfy India's demand for Iranian crude oil, importers may instead turn to Iranian tonnage. However, until more comprehensive cover is provided, those who continue to carry Iranian cargoes face significant risks, which need to be carefully weighed up. In essence, shipowners need to decide whether the benefits of carrying Iranian cargoes outweigh the risks of performing voyages under the present level of insurance cover.

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Indian power shortages and the benefits for Australian coal

The blackouts that occurred across India in late July 2012, affecting some 700 million people, highlight continuing problems in India's power sector. It is believed there are more people without electricity in India than anywhere else in the world - with at least ten of India's 28 states having a 25% electricity deficit. For a number of years India has made plans and policies for addressing this huge power deficit, such as the "power for all by 2012" policy and the Government's plans to develop Ultra Mega Power Projects (12 coal-fired power projects each producing 4000MW or more). The policies and plans while well-intentioned are failing to meet the existing deficit and are struggling to keep pace with the significant increase in demand resulting from India's rapid urbanisation and industrialisation. Significantly more investment will be needed in electricity generating and transmission capacity to address the deficit and cover expected future electricity demand.

A key issue in the development of new power projects is the availability of sufficient quantities of suitable coal. It is reported that newly commissioned power plants in India are running at half capacity due to lack of coal. Domestic coal cannot be produced quickly enough, with power producers needing to rely heavily on imported coal. Imported coal serves to secure supply but can expose purchasers to international market price fluctuations. In recent years, Indian companies have sought to mitigate these coal price risks and secure feedstock for their power plants by taking large equity stakes in foreign coal mines. This 'vertical integration' approach has resulted in some large acquisitions being made by Indian companies recently in Australia's coal sector. These include:

- The acquisition by Adani Enterprises of the Carmichael Thermal coal exploration project in the Galilee Basin, Queensland, which will include the development of a mine and railway at a cost of over AU$7 billion.
- The AU$750 million acquisition of Griffin Coal, a Western Australian thermal coal company, by Lanco Infratech Limited.
- The US$1.26 billion acquisition by GVK Power and Infrastructure from Hancock Coal, for an interest in the Alpha Coal and Kevin's Corner coal projects.

These acquisitions, however, are not limited to the Australian coal sector. In recent years Indian companies including Adani, GMR and Essar have acquired stakes in various Indonesian coal mines and begun developing significant coal infrastructure. The competition between Australia and Indonesia (with Africa more recently beginning to play a role) to provide coal and assets to Indian buyers has been beneficial to India. However, recent legislative changes in Indonesia could see the competition balance shifting, with Australia gaining the upper hand.

"It is believed there are more people without electricity in India than anywhere else in the world..."

Indonesia's Benchmark Pricing Regulation, implemented through Regulation No.17 of 2010, requires all purchases of Indonesian coal to be made by reference to a benchmark price published by the Government each month. The published price is based on the average of prices shown in four international coal price indexes. The practical effect of the regulation is that Indian-owned Indonesian mining companies can no longer sell the coal they produce to their vertically integrated Indian power plants at a price below the benchmark price. It comes as no surprise that there has been significant lobbying by Indian companies in Indonesia for a relaxation of this regulation. In addition to the benchmark price, recent changes to Indonesian law affect foreign investment in the Indonesian mining sector. Government Regulation No.24 of 2012 requires foreign investors to progressively divest their shareholding in the mining licence (IUP) holding entity to Indonesians. The divestments start at a 20% divestment in the 6th year of investment and increase every year until the tenth year, by which time a foreign investor must have divested no less than 51% of its holding (and hold no more than a 49% shareholding). This new regulation significantly affects an investor's ability to secure a profitable return on investment and detracts from Indonesia's standing as a place for foreign capital. Indonesia has also implemented a domestic market obligation requiring Indonesian mining companies to supply a proportion of their production to domestic users.

Given India's recent widespread blackouts and the rapid urbanisation and industrialisation there will be a significant and immediate increase in capital spending on the power supply chain. A key link in that chain is coal supply. While Australia has recently damaged its reputation to some extent as a stable destination for foreign investment in the mining sector - through the introduction of new taxes - Indonesia's recent and more drastic legislative changes are likely to result in capital investment decisions being made in Australia's favour.

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Enforceability of Chinese guarantees: "The Vine"

In a recent decision, the English High Court has confirmed that it will enforce a Chinese guarantee, even if it has not been approved by the Chinese State Administration of Foreign Exchange.

The owners of the Capesize vessel, *"Vine"*[1], claimed more than US$5 million demurrage from their charterers following a lengthy period of delay at the load port. Having found for the owners on that issue, the judge then had to consider the enforceability of a guarantee that had been given by a Chinese Steel Mill, GIS, for the charterers' performance.

The sale contract in the case had been on FOB terms and GIS had therefore been obliged to procure the vessel for the cargo to be loaded. Consequently it made commercial sense for them to guarantee the charterers' performance.

1. "The Vine" [2011] 1 Lloyds Rep 30.

However, when the owners sought to claim under the guarantee GIS refused to pay, arguing that it was unenforceable. GIS's argument was, broadly-speaking, two-pronged. First they argued that the guarantee was void for illegality, having been entered into in breach of the Chinese State Administration of Foreign Exchange (SAFE) regulations; secondly they argued that the guarantee's signatory had no authority to sign it on their behalf.

As to the latter point, GIS were undone largely by the quality of their own evidence. In support of their argument they not only failed to adduce any evidence from the employee who had signed the guarantee, but they also gave such limited documentary disclosure that the judge drew an adverse inference that the employee did in fact have authority to sign the guarantee. Further, the judge found witness evidence given by the chairman of GIS to be so unsatisfactory that he was unable to rely on it.

So, on the issue of authority, GIS rather shot themselves in the foot. However, on the issue of illegality, the judge made findings that are of more general interest. The guarantee was unusual in that it did not have a choice of law clause in it. Accordingly, the judge was required to decide what the applicable law of the guarantee was. GIS argued that it should be Chinese law on the basis that GIS are a Chinese company listed on the Shanghai stock exchange, the letter of guarantee was signed and issued from their Guangdong office, and the guarantee purported to guarantee the liability of the charterers who were a company based and incorporated in Hong Kong, a special administrative region of the People's Republic of China.

Notwithstanding all these circumstantial connections with the PRC, the judge found that parties impliedly chose English law, alternatively that the guarantee was most closely connected with England, on the basis that the guarantee purported to guarantee the obligations of charterers under a charterparty that had an English law and jurisdiction clause in it. In coming to this decision the judge undoubtedly considered it significant that GIS appointed and/or controlled the charterers, and that the charterers had chartered the vessel *'for* [no] *reason other than that they had been requested to do so by GIS.'*

Having made this decision, the judge then came to consider the enforceability of the guarantee. It was not in dispute that the guarantee had been issued in breach of the SAFE regulations in China. On this basis GIS argued that they should not be held liable, as it would be contrary to public policy for the English courts to enforce an obligation which was unlawful in a friendly foreign state.

The judge found that in this case it would not be contrary to public policy to enforce the guarantee, on the basis that the Court had heard Chinese law evidence that the fact that an overseas guarantee has been issued without the SAFE authorisation would *not* result in the unenforceability of the *civil* liability otherwise arising from the guarantee, notwithstanding that the issuance of the guarantee is an offence and that the guarantee is null and void. Under Chinese law, there was the possibility that the civil liability would be reduced to 50% if it could be shown that both owners and GIS were culpable for the failure to obtain SAFE approval for the guarantee, but a civil liability subsisted nevertheless.

This unusual quirk of Chinese law enabled the judge to decide that enforcement of the guarantee would not be contrary to the principles of comity or English public policy, and therefore he held that GIS were 100% liable under the guarantee.

Prior to the decision in "The Vine" it was thought that a Chinese guarantee which lacked SAFE approval may not be enforceable. The case has broken new ground in illustrating that the English High Court will not shy away from enforcing Chinese guarantees, notwithstanding the fact that they have been issued in breach of the SAFE regulations.

This is of considerable practical importance, given the significance of Chinese companies and banks in the chartering and shipbuilding markets. While it will always be advisable to verify the authority of the signatory of a Chinese guarantee, to include an appropriate governing law and jurisdiction clause, and to check that your counter-party has obtained SAFE approval (or to procure an undertaking to that effect) before accepting a Chinese performance or refund guarantee; this decision shows that all may not be lost if any, or all, of these elements are missing, provided your case comes before the English courts.

Holman Fenwick Willan represented the successful claimant owners.

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Regulation of ship recycling: some thoughts on the current regime

Reputational issues

The method of shipbreaking applied at Alang is that of beaching. It is worth noting that India, Bangladesh and Pakistan, which together dominate the global ship recycling industry, all apply the beaching method of shipbreaking.

The shipbreaking industry as carried out in the Indian Subcontinent in general has had adverse comments both in the press and from environmental pressure groups on various occasions. The criticism has focussed on various aspects, including alleged unsafe working practices, inadequate protection against noxious substances, lack of environmentally responsible facilities for the disposal of hazardous wastes and deficient regulation of the industry.

The image of the industry in the Indian Subcontinent has not been helped by various news articles and documentaries seeking to portray shipbreaking industry workers as downtrodden and expendable.

Whilst there has been an element of truth in some such allegations, equally there is also an element of hypocrisy: the shipbreaking industry of the Subcontinent provides employment to thousands of workers in areas of otherwise very high unemployment, doing a necessary job that countries in the OECD lack the willingness and the facilities to undertake.

The shipping community has long recognised that the imposition of blame on solely the recycling facilities for this situation is neither commercially

realistic nor fair: when a shipowner can achieve as much as US$500 per lightweight ton for the sale of his end of life vessel, he is putting himself on an unequal playing field with his competitors if he chooses to accept a lesser price, or even pay from his own resources in order to have that vessel recycled in a "green" recycling facility.

Pollution: environmental controls/ legislation

There has always been a level of regulation of shipbreaking facilities, particularly insofar as concerns the cutting of oil tankers, the delivery of which to the breaking sites has always required the production of a "gas free" certificate enabling the safe operation of hot works and safe inhalation. In addition, shipbreaking has played and will play an integral part in the phasing out of the remaining single hull oil tankers which are to be removed from trading by 2015.

The legal measures possessed by western countries in order to prevent the exporting to the Indian Subcontinent of end of life vessels for recycling have proved to be inadequate to the task. The current legislation in Europe is the EU waste shipment regulation[1], implementing in the member states of the European Union the requirements of the Basel convention on the control of trans-boundary movements of hazardous wastes and their disposal[2].

According to the waste shipment regulation, ships being exported from EU member states for dismantling are classified as hazardous waste since they contain hazardous substances. As such, they can only be dismantled within countries of the OECD. However, this legislation, having an application to ships that is debatable, is almost always circumvented, thereby rendering both the Basel Convention and EU legislation ineffective.

In 2004 the parties to the Basel Convention invited the International Maritime Organisation (IMO) to develop mandatory requirements for ship recycling. As a result of the work of the IMO, particularly the IMO's marine environment protection committee, there has been developed a set of realistic guidelines to deal with all aspects of ship recycling: the so-called "cradle to grave" approach. These guidelines are comprised in the International Convention for the Safe and Environmentally Sound Recycling of Ships, which was adopted in May 2009 at a diplomatic conference in Hong Kong (the Hong Kong Convention)[3].

The Hong Kong Convention, which is yet to enter into force following its due ratification, intends to address all the issues around ship recycling, including the fact that ships sold for recycling may contain environmentally hazardous substances as well as addressing the concerns raised about the working and environmental conditions stated above.

The Hong Kong Convention also covers the design and construction/ operation of ships as well as their operation, so as to facilitate safe and environmentally sound ship recycling, incorporating strict certification and reporting requirements. In particular, ships to be sent for recycling will be required to carry an "Inventory of Hazardous Materials" or "green passport" which will be specific to each ship and carried onboard the ship through its working life.

In practice, notwithstanding the fact that the Hong Kong Convention's requirements are not yet formally in force, many individual shipowners and shipowner organisations have already put the requirements of the convention into effect in their own working practices.

Equally, the major cash buyers are acutely aware of the requirements of many of their shipowner customers to ensure, if required, that the ship to be recycled is dealt with in a recycling facility that complies with current best environmental practice.

For example, a cash buyer can easily provide to a shipowner counterparty the facility to monitor the recycling process either through their own onsite assessment team or by using a recognised third party verification scheme.

This enables a conscientious shipowner to check both that the recycling is being undertaken in a safe and environmentally responsible manner, and that waste is being managed and disposed of properly.

Of the three ship recycling countries in the Indian Subcontinent it can be said that India is the one that is the most advanced in terms of embracing the need to regulate the industry more effectively, in particular at the pre-beaching stage. As observed in the report made by Lloyd's Register (Ship Recycling - Practice and Regulation Today - June 2011):

"while the problems in Alang are undeniable, there is some evidence of improvements. Lloyd's Register went

1. Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.
2. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 22 March 1989.
3. The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 15 May 2009.

to Alang in 2008 and visited numerous yards, as well as the training centre and the asbestos disposal facility. It was noticeable that the more work a yard had , the less organised it was, but yards showed a general awareness of the problems and were certainly taking steps to solve them."

In recent months there has been a further attempt by the green lobby in India to derail the ship recycling industry in India. This came about following an application to the Indian Supreme Court in Delhi at the suit of an environmental group, The Research Foundation for Science, Technology and Natural Reseach Policy, for the barring of the beaching of the m.v. "Oriental Nicety", a dry bulker conversion of the former "Exxon Valdez", by reason of its content of allegedly toxic wastes, in breach of the Basel Convention. The vessel had been acquired for intended recycling but on the vessel reaching India in May 2012, it could not be beached as a result of the interim injunction obtained by the activists.

Following representations to the court by the vessel's owners, the court made its ruling, allowing the import of the "Oriental Nicety", stating in the process the need to ensure continued observance of the requirements of the Basel Convention, provided that any hazardous/toxic materials are contained within the super structure and not in the cargo holds.

As other commentators have observed, the fact that the court sanctioned the import of the vessel in this particular case does not mean that environmental activists could not apply to prevent the importation of further vessels being imported for demolition by reason of other alleged breaches of the Basel Convention requirements; in particular for breach of the so called "prior informed consent" requirement for notification between the relevant authorities of the exporting and importing countries.

Whilst, for the present, the case has shown the supreme courts' apparent contentment to allow the relevant authorities (i.e. the Gujarat Maritime Board and the Pollution Control Board) to take charge of pollution and environmental issues at the Indian shipbreaking sites, there can only be real certainty once an internationally recognised set of guidelines on safe ship recycling processes is in place.

The case of the "Oriental Nicety" makes clear the case for the speedy adoption of the Hong Kong Convention by the governments of the countries concerned.

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Freight rate movement in container shipping

Freight rate movement in container shipping will continue to be an important issue for logistics providers in the remaining months of 2012. Logistics providers will therefore be aware of united calls from a number of container lines to maintain freight rate levels, despite the recent traditional peak season being quieter than expected in the containerised trade between Asia and Europe. Container lines have suggested that lower traffic levels could instead generate a need to increase freight rates in order for container lines to maintain profit levels.

> "Participants in the logistics sector will be watching closely to see if the recent fall in spot rates continues in response to the dropping utilisation levels and fall in traffic towards the end of the year."

This will come as a surprise to those in the logistics sector, who are hoping to see a repeat of the rate erosion that emerged as competing container lines flexed for market share in the first quarter of 2012.

The beginning of 2012 was dominated by oversupply in the market following a combination of newbuildings entering service and uncertainty amongst importers as a result of the Eurozone crisis. These factors caused substantial carrier losses.

Rate restoration was notable however in the second quarter of 2012 with spot rate increases seen universally across container lines. Average rates increased around fifteen per cent. between first and second quarters, aided partly by an improvement in demand, but also reflecting a concerted effort on the part of container lines to focus strategy toward profits.

Participants in the logistics sector will be watching closely to see if the recent

fall in spot rates continues in response to the dropping utilisation levels and fall in traffic towards the end of the year.

There are a number of measures that container lines may employ to ensure that freight rates remain both profitable and sustainable rather than moving toward rate erosion. Rationalisation tools may be used by lines to generate a supply-demand balance in the medium-term. Some container lines have intimated that they may take the decision to suspend some sailings, keep ships on berth for longer than usual, delay departures or slow ships down further. Other container lines have advocated a shift away from a focus on ship utilisation and the need to sail close to full capacity on every voyage, maintaining that freight rates may not be cut in the face of reduced utilisation. Of course, container lines will also continue to push for more favourable contract terms when seeking to protect freight rates in the future.

Potential factors that may cause rates to continue to fall remain the same. New capacity entering the container shipping sector will still have an effect but the extent in the medium and long run will depend on the level of restraint shown by banks and whether they back the projects of those in the sector promoting further newbuildings. Continued flat consumer demand in Europe and a fallout from the Eurozone crisis will also play their part in causing freight rates to lower.

The logistics sector will always seek lower rates, but at the same time, the sector would welcome a strategy that creates certainty. Logistics providers will be aware that constant fluctuation in freight rates may lead to strained relationships in the logistics chain as they struggle to predict prices for future months, potentially leading importers to consider sourcing their cargo from other markets. It is hoped that the decrease in traffic levels will lower rates for logistics providers but if not, providers will be hoping for certainty in freight rate levels at the very least.

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Conferences & Events

India Shipping Summit
Mumbai
(8-10 October 2012)
Hugh Brown, Paul Dean, Sam Wakerley and Anthony Woolich

Asia Mining Indaba Conference
Singapore
(29-31 October 2012)
James Donoghue, Brian Gordon, Cheryl Edwardes and Nick Hutton

Global Energy Conference
Geneva
(29-31 October 2012)
Jeremy Davies and Brian Perrott

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