The Shipping Law Review

Eighth Edition

Editors

Andrew Chamberlain, Holly Colaço and Richard Neylon

The Law Reviews

THE SHIPPING LAW REVIEW

EIGHTH EDITION

Editors
Andrew Chamberlain, Holly Colaço and Richard Neylon

THE LAWREVIEWS

PUBLISHER
Clare Bolton

HEAD OF BUSINESS DEVELOPMENT
Nick Barette

TEAM LEADERS
Jack Bagnall, Joel Woods

BUSINESS DEVELOPMENT MANAGERS
Katie Hodgetts, Rebecca Mogridge

BUSINESS DEVELOPMENT EXECUTIVE
Olivia Budd

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Hannah Higgins

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Caroline Fewkes

SUBEDITOR
Martin Roach

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-828-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADAME GONZÁLEZ DE CASTILLA & BESIL

A KARITZIS & ASSOCIATES LLC

ANDRADE DIAS & ASSOCIADOS – SOCIEDADE DE ADVOGADOS, SP, RL

ASIALEGAL LLC

BAE, KIM & LEE LLC

BLACK SEA LAW COMPANY LLC

BLOOMFIELD LP

BOSE & MITRA & CO

COSTA, ALBINO & LASALVIA ADVOGADOS

FRANCO & ABOGADOS ASOCIADOS

GAUCI-MAISTRE XYNOU

GORRISSEN FEDERSPIEL

HARRIS & CO MARITIME LAW OFFICE

HESKETH HENRY

HFW

IN LAW OFFICE

JORQUIERA & ROZAS ABOGADOS

MAPLES GROUP

MESTRE ABOGADOS

MORGAN & MORGAN

PALACIOS, PRONO & TALAVERA

PPT LEGAL

SABATINO PIZZOLANTE ABOGADOS MARÍTIMOS & COMERCIALES

STUDIO LEGALE MORDIGLIA

TMI ASSOCIATES

VERALAW (DEL ROSARIO RABOCA GONZALES GRASPARIL)

CONTENTS

PREFACE

The aim of the eighth edition of this book is to provide those involved in handling shipping disputes with an overview of the key issues relevant to multiple jurisdictions. We have again invited contributions on the law of leading maritime nations, including both major flag states and the countries in which most shipping companies are located. We also include chapters on the law of the major shipbuilding centres and a range of other jurisdictions.

As with previous editions of *The Shipping Law Review*, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry: competition and regulatory law, sanctions, ocean logistics, piracy, shipbuilding, ports and terminals, offshore shipping, marine insurance, environmental issues, decommissioning and ship finance.

Each jurisdictional chapter gives an overview of the procedures for handling shipping disputes, including arbitration, court litigation and any alternative dispute resolution mechanisms. Jurisdiction, enforcement and limitation periods are all covered. Contributors have summarised the key provisions of local law in relation to shipbuilding contracts, contracts of carriage and cargo claims. We have also asked the authors to address limitation of liability, including which parties can limit, which claims are subject to limitation and the circumstances in which the limits can be broken. Ship arrest procedure, which ships may be arrested, security and counter-security requirements, and the potential for wrongful arrest claims are also included.

The authors review the vessel safety regimes in force in their respective countries, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, as are the local rules in respect of collisions, wreck removal, salvage and recycling. Passenger and seafarer rights are examined, and contributors set out the current position in their jurisdiction. The authors have then looked ahead and commented on what they believe are likely to be the most important developments in their jurisdiction during the coming year. This year, we welcome Costa, Albino & Lasalvia Sociedade de Advogados as the new contributors of the chapter focusing on maritime law within Brazil. There are also two new jurisdictions in this edition – Israel (Harris & Co) and Mexico (Adame Gonzalez De Castilla Besil) – and Portugal makes a return, with Andrade Dias & Associados as the new contributors.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations Conference on Trade and Development (UNCTAD) estimating that the operation of merchant ships contributes about US$380 billion in freight rates within the global economy, amounting to about 5 per cent of global trade overall. Between 80 per cent and 90 per cent of the world's trade is still transported by sea (the percentage is even higher for most developing countries) and, as of 2019, the total value of annual world shipping trade had reached more than US$14 trillion. Although the covid-19 pandemic has had a significant effect on the shipping industry and global maritime trade (which plunged by an estimated 4.1 per cent in 2020), swift recovery is anticipated. The pandemic truly brought to the fore the importance of the maritime industry and our dependence on ships to transport supplies. The law of shipping remains as interesting as the sector itself and the contributions to this book continue to reflect that.

Finally, mention should be made of the environmental regulation of the shipping industry, which has been gathering pace this year. At the International Maritime Organization's (IMO) Marine Environment Protection Committee, 72nd session (MEPC 72) in April 2018, it was agreed that international shipping carbon emissions should be cut by 50 per cent (compared with 2008 levels) by 2050. This agreement will now lead to some of the most significant regulatory changes in the industry in recent years, as well as much greater investment in the development of low-carbon and zero-carbon dioxide fuels. The IMO's agreed target is intended to pave the way for phasing out carbon emissions from the sector entirely. The IMO Initial Strategy, and the stricter sulphur limit of 0.5 per cent mass/mass introduced in 2020, has generated significant increased interest in alternative fuels, alternative propulsion and green vessel technologies. Decarbonisation of the shipping industry is, and will remain, the most important and significant environmental challenge facing the industry in the coming years. Unprecedented investment and international cooperation will be required if the industry is to meet the IMO's targets on carbon emissions. The 'Shipping and the Environment' chapter delves further into these developments.

We would like to thank all the contributors for their assistance in producing this edition of *The Shipping Law Review*. We hope this volume will continue to provide a useful source of information for those in the industry handling cross-jurisdictional shipping disputes.

Andrew Chamberlain, Holly Colaço and Richard Neylon
HFW
London
May 2021

Chapter 3

COMPETITION AND REGULATORY LAW

Anthony Woolich and Daniel Martin[1]

I INTRODUCTION

Parties' freedom to contract may be restricted by a number of factors, the most significant of which for the maritime sector are likely to be regulatory controls relating to competition law, anti-bribery legislation and international trade sanctions. The first two categories of restrictions are considered below and the third is considered in the 'International Trade Sanctions' chapter.

II COMPETITION LAW

Historically, the global shipping industry has been exempt from many of the requirements of competition law; however, developments within the European Union, especially the repeal of the block exemption for liner conferences in October 2008[2] and the lapsing of the industry-specific guidance on anticompetitive practices,[3] have made an awareness of competition law a priority within the industry. Given that EU competition law, administered by the European Commission (the Commission) places the most stringent competition restrictions on the shipping industry of any jurisdiction, this section focuses on EU law.

There are three pillars of EU competition law, which replicate the three main concerns of competition law worldwide, namely:

a the prohibition of anticompetitive agreements (especially cartels between competitors);
b the prohibition of abusing a dominant market position; and
c the merger control regime.

The Commission has wide powers to investigate breaches of competition law, including the right to search premises and interview personnel. It may also impose fines of up to 10 per cent of worldwide annual turnover on companies for the breach of a prohibition; for these reasons compliance is important.

The Commission is also responsible for regulating state aid within the European Union.

1 Anthony Woolich and Daniel Martin are partners at HFW.
2 http://europa.eu/rapid/press-release_IP-13-122_en.htm.
3 id.

i The prohibition of anticompetitive practices between competitors

This prohibition appears at Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). It applies to all agreements, decisions and concerted practices between companies that may affect trade between EU Member States, and that have the object or effect of negatively affecting competition within the EU's internal market. It potentially applies to both anticompetitive practices between direct competitors (horizontal agreements, for example, through a liner consortium) and companies at different levels of the supply chain (vertical agreements, for example, between a liner company and a shipper). Examples of anticompetitive practices include price-fixing, an agreement to divide markets or customers, or an agreement to place limits on production. Any agreement that contravenes the prohibition will be automatically void and unenforceable,[4] subject to the possibility of being able to sever non-infringing aspects of the agreement. Parties may be subject to heavy fines (up to 10 per cent of group worldwide turnover): in February 2018, the Commission imposed a total fine of €395 million against four maritime car carriers for participation in a cartel.[5] In addition, third parties that can show loss may sue for damages. Some practices may also be criminal offences.

The anticompetitive practices must have the object or effect of preventing, restricting or distorting competition within a particular market. Hardcore cartels, including agreements for the exchange of information on prices, will be deemed to have the object of restricting competition.

It is not necessary to find written evidence of anticompetitive practices for a determination that a contravention of Article 101 of the TFEU has occurred; parallel market behaviour between companies may be enough to evidence a breach if it can be determined that companies have knowingly substituted practical cooperation between them for the risks of competition. This issue arose in the Commission's investigation into price signalling in the liner shipping industry, which was initiated as a result of the Commission's concerns that the industry practice of publishing intended future rate increases could have contravened the Article 101 prohibition. Following its investigation, the Commission adopted a decision in July 2016 that did not conclude that the conduct investigated infringed competition law, but required the carriers under investigation to adhere to legally binding commitments in respect of price announcements for three years.[6]

Article 101(3) of the TFEU accepts that some practices that appear to be anticompetitive, and therefore a breach of Article 101(1), are good for competition if they allow greater efficiency and technical progress to be made, provided that customers are able to benefit from these improvements to a fair extent; for example, through lower prices or more regular services, and any restrictions are indispensable to achieve the benefits, while not eliminating competition.

Because of the large economies of scale that exist within the liner shipping industry, a special block exemption regulation (BER)[7] applies to liner shipping consortia, which allows them to pool resources and certain information, allowing for greater efficiency. The BER

4 Treaty on the Functioning of the European Union, Article 101(2).
5 http://europa.eu/rapid/press-release_IP-18-962_en.htm.
6 http://europa.eu/rapid/press-release_IP-16-2446_en.htm.
7 Commission Regulation (EC) No. 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty [establishing the European Community] to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia).

was prolonged most recently in March 2020 and will apply until at least 25 April 2024.[8] The Commission found in its evaluation that the BER results in efficiencies for carriers that can better use vessels' capacity and offer more connections. These efficiencies result in lower prices and better quality of service for consumers. The Commission's evaluation showed that both costs for carriers and prices for customers per twenty-foot equivalent unit (TEU) have decreased in recent years by approximately 30 per cent, and quality of service has remained stable.

The BER does not, as its name might suggest, exclude shipping consortia from the scope of Article 101 of the TFEU – rather, it details what types of agreements shipping consortia may make that will satisfy the Article 101(3) exemption criteria. It allows practices such as the joint operation of port facilities, fixing timetables and calling points, and obliging members of the consortium only to charter space on vessels owned by the consortium in certain circumstances. However, 'hardcore restrictions' such as price-fixing, market allocation or capacity limitation that is not in line with market demand are still prohibited. Additionally, the BER is only available to consortia whose members (within and outside the consortium) have an aggregate share of 30 per cent or less of a relevant market,[9] and that do not impose penalties on members that wish to withdraw from the consortium. If the members of a consortium have a share of more than 30 per cent of a relevant market, the consortium will have to self-assess whether its operations comply with competition law on that market.

Given that there are now only three major liner shipping consortia on deep-sea routes, that the number of major deep-sea carriers has reduced as a result of consolidation within the industry and the bankruptcy of Hanjin Shipping, and that nearly all major deep-sea carriers belong to one of the consortia, the BER has arguably become less relevant. Currently, at least one of the major consortia may be expected to have a market share of more than 30 per cent in any particular deep-sea market. It is interesting to note in this respect that the Hong Kong Competition Commission has included a market share threshold of 40 per cent within its block exemption order, issued on 8 August 2017, for vessel sharing arrangements, which has common features with the BER.

Although there is no ability for a liner shipping consortium to gain prior regulatory clearance in the European Union (unlike in certain other jurisdictions, such as the United States), the Commission has not yet objected to the formation of one of the three major alliances that are currently operating (2M, Ocean Alliance and THE Alliance).

ii Abuse of a dominant market position

This prohibition, which appears in Article 102 of the TFEU, is aimed at outlawing unilateral behaviour by a company holding a dominant position in a market that has anticompetitive effects. Examples of this behaviour are predatory pricing, applying dissimilar conditions to equivalent transactions with other parties or 'bundling' of products.

8 Commission press release IP/20/518 (https://ec.europa.eu/commission/presscorner/detail/en/ip_20_518, last accessed 16 April 2021).

9 Calculated by reference to the total volume of goods carried in freight tonnes or TEUs. Commission Regulation (EC) No. 906/2009 OJ L256/31, 28 September 2009, Article 5(1).

If a company (including a group of companies) holds a stable share of 50 per cent or more of a relevant market, there is a rebuttable presumption that it holds a dominant position,[10] although a market share of 39.7 per cent has been found to constitute a dominant market position.[11]

A particular concern for the shipping industry is that Article 102 of the TFEU applies to collective abuse of a dominant market position as well as abuse by an individual company. Although this would seem to replicate the position under Article 101, EU jurisprudence has stressed that the two Articles address different situations.[12] In *TACA*,[13] a case involving a liner conference, the EU courts found that the level of integration between companies in a liner conference was such that the conference was able to act as an independent single entity in the market. Liner consortia with large market shares should be aware of the risks of potentially infringing both Article 101 and Article 102.

iii Merger control

Many states in the world have some form of merger control procedure whereby government agencies may review the potential effects on competition of a merger or acquisition within that state and, if necessary, prohibit mergers that have the potential to reduce competition significantly within a market.

The EU Merger Regulation,[14] which operates in addition to, and potentially to the exclusion of, the individual merger control regimes of EU Member States, applies where two or more previously independent companies merge, where a company acquires control of the whole or part of another company on a lasting basis, or where a full-function joint venture is formed, and financial thresholds are exceeded. A 'full-function joint venture' is defined as one that has resources to act as an autonomous market player, is not set up as temporary and has functional autonomy from its parent companies. The Regulation only applies to mergers involving companies with turnovers that exceed certain global and EU-wide thresholds and that have a significant amount of business in more than one EU Member State.

Mergers that meet the thresholds should be notified to the Commission before implementation, as the European Union has the power to fine the parties up to 10 per cent of their aggregate worldwide turnover if they do not do so. Parties should be aware that merger clearance can be an expensive and lengthy procedure. Further information about the EU merger control process, including the current turnover thresholds, may be found on the Commission's website.[15]

The Commission has reviewed the acquisitions of Hamburg Süd by Maersk[16] and OOIL by COSCO Shipping,[17] and the creation of Ocean Network Express through a joint venture between three Japanese lines.[18] Although the latter two transactions were cleared unconditionally, Maersk committed to terminate the participation of Hamburg Süd in

10 Case C-62/86 *AKZO v. Commission* [1991] ECR I-3359, [1993] 5 CMLR 215.

11 *Virgin/British Airways* OJ [2000] L 30/1.

12 Case T-51/89 *Tetra Pak v. Commission* [1990] ECR II-309, [1991] 4 CMLR 334.

13 Case T-191/98 *Atlantic Container Line v. Commission (TACA)* 2003 ECR II-3275, [2005] 4 CMLR 1283.

14 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L24/1, 29.1.2004).

15 See http://ec.europa.eu/competition/mergers/legislation/legislation.html.

16 https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8330.

17 https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8594.

18 https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8472.

five consortia. Had the commitments not been offered, the Commission found that links between previously unconnected consortia would have been created, and that these links would have resulted in anticompetitive effects on particular trade routes. This analysis is consistent with the Commission's approach to the acquisitions of Neptune Orient Lines (NOL) by CMA CGM[19] and of United Arab Shipping Company by Hapag-Lloyd,[20] where similar commitments were required. The European Commission has referred for Phase 2 reviews the proposed mergers in the shipbuilding sector between Hyundai Heavy Industries and Daewoo Shipbuilding & Marine Engineering[21] and between Fincantieri and Chantiers de l'Atlantique.[22]

The United States has a complex merger control regime administered by the Federal Trade Commission and the Department of Justice's (DOJ) Antitrust Division. It is applicable to joint ventures in certain situations. Parties should pre-notify a merger in the United States if it meets the applicable thresholds using the procedure set out in the Hart–Scott–Rodino Antitrust Improvements Act.

When considering any merger or joint venture, the parties should analyse in which jurisdictions they may need competition approval.

iv State aid

State aid is any advantage granted by a public authority of an EU Member State through state resources on a selective basis that distorts competition and may affect trade between EU Member States. The grant of state aid is generally prohibited unless it has received prior approval from the Commission. The Commission has produced sector-specific guidelines regarding the application of the state aid regime to the maritime transport sector.[23] A large number of state aid cases have concerned the maritime sector, including the Commission's investigation into the Maltese tonnage tax regime, which resulted in Malta committing to amend the regime in December 2017 to bring it into line with state aid rules.[24] On 2 May 2018, the Commission announced that it had decided under EU state aid rules to approve the grant of restructuring aid by Croatia to support the shipping company, Jadroplov.[25] On 16 December 2019, the Commission approved maritime transport support schemes in Cyprus, Denmark, Estonia, Poland and Sweden.[26] On 2 March 2020, the Commission cleared state support for several Italian ferry services but found other measures constituted illegal state aid.[27]

19 https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7908.
20 https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8120.
21 https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9343.
22 https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9162.
23 http://ec.europa.eu/competition/sectors/transport/legislation_maritime_state_aid.html.
24 http://europa.eu/rapid/press-release_IP-17-5361_en.htm.
25 Commission Daily News MEX/18/3647.
26 Commission press release IP/19/6780 (https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6780, last accessed 16 April 2021).
27 Commission press release IP/20/367 (Cases SA 15631, SA 32014, SA 32015 and SA 32016) (https://ec.europa.eu/commission/presscorner/detail/en/ip_20_367, last accessed 16 April 2021).

III ANTI-BRIBERY CONTROLS

Since 2000, there has been a substantial increase in international cooperation and harmonisation to combat bribery and corruption. This is been led largely by the efforts of two organisations: the Organisation for Economic Co-operation and Development (OECD), whose Anti-Bribery Convention has now been adopted by the 36 OECD Member States[28] and eight non-member countries;[29] and Transparency International, which publishes the hugely influential annual Corruption Perceptions Index (a survey that, in 2019, rated perception of public sector corruption in 180 countries and territories).

The global efforts of these organisations are supported by national bodies and by industry groups, such as the Extractive Industries Transparency Initiative and, in the marine sector, the Maritime Anti-Corruption Network.

Enforcement is handled by national authorities, such as the Serious Fraud Office (SFO) in the United Kingdom and the DOJ in the United States.

i OECD Anti-Bribery Convention

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (commonly known as the OECD Anti-Bribery Convention (the Convention)) was signed in 1997 and came into force in February 1999.

The countries that have signed up to the Convention must adopt national legislation that makes it a criminal offence for the individuals and companies that are subject to their jurisdiction to pay a foreign public official to act improperly. Convention parties must also impose and enforce effective, proportionate and dissuasive criminal penalties for bribing foreign officials.

As well as the commitment to adopt national laws, the Convention parties have agreed to offer each other mutual legal assistance in identifying and investigating allegations of bribery, and to cooperate in monitoring and reviewing the implementation of the Convention into national law (see Section III.vi).

ii Legislation in the United Kingdom and the United States

Two pieces of legislation have arguably had the greatest impact in terms of raising the profile of anti-corruption efforts and changing industry practices.

The US Foreign Corrupt Practices Act (FCPA) was the trail-blazing legislation, enacted in 1977 and making it unlawful for US persons and entities to make payments to foreign government officials to assist in obtaining or retaining business.

The UK Bribery Act (UKBA) was passed on 8 April 2010, following criticism of the existing UK legislation by the OECD, and entered into force on 1 July 2011. The UKBA had two main objectives: to codify and consolidate existing UK legislation and to create a new offence, directed at commercial organisations that fail to prevent bribery being carried out by

28 Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

29 Argentina, Brazil, Bulgaria, Colombia, Costa Rica, Peru, Russia and South Africa.

their agents. As a result, it is a criminal offence to pay a bribe,[30] to receive a bribe[31] or to bribe a foreign public official.[32] It is also an offence for a company to fail to prevent others paying a bribe on its behalf;[33] this is considered in more detail in Section III.iv.

iii Comparison between the FCPA and the UKBA

The UKBA goes further than the FCPA in a number of key respects. In particular, although the FCPA criminalises only bribery of foreign public officials, the UKBA outlaws private (i.e., business-to-business) bribery. The UKBA criminalises not only the person paying the bribe (who would be caught by the FCPA) but also the person receiving the bribe (who would not be caught by the FCPA).

The other differences that are highly relevant in the maritime sector are the treatment of facilitation payments (granted an exemption under the FCPA but prohibited under the UKBA) and failure to prevent bribery (an offence under only the UKBA).

iv Facilitation payments and failure to prevent bribery

Facilitation payments are typically small, unofficial payments (sometimes called 'grease payments') made to secure or expedite a routine or necessary government action by a government official. In the maritime context, these might include gifts of cartons of cigarettes to pilots, cash given to inspectors to issue a certificate that holds are clean, and payments to officials to ensure that ships are called to berth in sequence, rather than being sent to the back of the queue. The UK authorities have stressed repeatedly that facilitation payments are bribes and are therefore illegal.

The corporate offence of failure to prevent bribery[34] is a new offence, created by the UKBA. In essence, Company A will have strict liability if Person B, associated with Company A, bribes Person C, intending to obtain or retain business or an advantage in the conduct of business for Company A. There is a defence under which Company A can show that it had in place adequate procedures designed to prevent persons associated with it from paying bribes.

In assessing whether procedures are 'adequate', the courts will have regard to six guiding principles:

a proportionate procedures;
b top-level commitment;
c risk assessment;
d due diligence;
e communication (including training); and
f monitoring and review.

30 UK Bribery Act [UKBA], Section 1.
31 ibid., Section 2 of the UKBA.
32 ibid., Section 6 of the UKBA.
33 iibd., Section 7 of the UKBA.
34 id.

v Compliance with the UKBA

Businesses that are subject to the UKBA need to carry out a risk assessment to determine the locations, business partners and transactions that give rise to a corruption risk, and then implement policies and procedures to mitigate those risks.

Those procedures are likely to involve, as a minimum, due diligence on counterparties and agents, staff training and the adoption of suitable contract terms.

vi OECD monitoring

One of the key provisions of the OECD Anti-Bribery Convention is the agreement by the Convention parties to cooperate in monitoring and reviewing the implementation of the Convention into national law. This has led to a peer-monitoring programme by which OECD Member States will look at each other's national legislation and enforcement activities, in essence to check that all nations are doing their utmost to fight bribery and create a level playing field.

On 16 March 2016, the OECD published a Ministerial Declaration formally announcing the fourth phase of country evaluations (an earlier phase of country evaluations was a key driver in the adoption of the UKBA). This fourth phase focuses on national enforcement, which may indicate that the OECD considers that, although national anti-bribery legislation is broadly in place, not enough is being done by Convention parties to enforce it.

vii UK enforcement

Since the UKBA was enacted, we have seen only a relatively small number of prosecutions under the Act (and under older legislation for offences committed before the UKBA came into effect).

In December 2014, the SFO reported on successful prosecutions of two individuals under the UKBA[35] and one corporate under older legislation.[36] At the end of 2015, we saw the first UK settlement with enforcement agencies for a contravention of Section 7 of the UKBA and the first court-approved deferred prosecution agreement (DPA). Two corporates were sentenced in the first quarter of 2016: Smith & Ouzman Ltd and Sweett Group plc (which is the first company to have been convicted under Section 7 of the UKBA).

These enforcement actions do not provide the detailed judicial precedent on the precise scope of application of Section 7 of the UKBA that practitioners and others have been looking for, but they do at least demonstrate that the UKBA has teeth.

In September 2015, Brand-Rex Limited agreed a settlement with the Scottish enforcement authorities for a contravention of Section 7. Brand-Rex is a supplier of IT network hardware, headquartered in Scotland. The company employed a rewards scheme for its independent installers, who would sell Brand-Rex products to customers. Having achieved a certain level of sales, the installers would be entitled to various rewards from Brand-Rex, including vouchers for foreign holidays.

35 Serious Fraud Office [SFO], 'City directors sentenced to 28 years in total for £23m green biofuel fraud', https://www.sfo.gov.uk/2014/12/08/city-directors-sentenced-28-years-total-23m-green-biofuel-fraud/.

36 SFO, 'UK printing company and two men found guilty in corruption trial', https://www.sfo.gov.uk/2014/12/22/uk-printing-company-two-men-found-guilty-corruption-trial/.

However, without Brand-Rex's knowledge, one of these installers offered his holiday vouchers to the decision maker of one of his customers, who was then alleged to have been influenced to purchase Brand-Rex hardware as a result.

Having discovered the scheme, Brand-Rex appointed solicitors and forensic accountants to perform a detailed investigation, following which it self-reported to the Scottish Crown Office. Brand-Rex avoided criminal prosecution and paid a civil recovery order of £212,800, a sum calculated on the profit the company had made as a result of the bribes.

Standard Bank plc agreed a DPA in respect of an indictment alleging failure to prevent bribery (i.e., a breach of Section 7 of the UKBA), which was approved by the Crown Court on 30 November 2015.[37] The charge (which has been suspended pursuant to the DPA) concerned a US$6 million payment by a former sister company (Stanbic Bank Tanzania) to a partner in Tanzania that the SFO alleged was intended to induce local politicians to show favour to Stanbic Bank Tanzania and Standard Bank's proposal for a US$600 million private placement to be carried out on behalf of the government of Tanzania. Under the DPA, Standard Bank plc agreed to pay a US$16.8 million financial penalty, a US$8.4 million disgorgement of profits, a further US$7 million in compensation and the SFO's costs.

Smith & Ouzman Ltd was sentenced in January 2016[38] for conduct that took place between November 2006 and December 2010 (i.e., before the UKBA came into effect). A confiscation order of almost £900,000 was made against the company, representing the gross benefit that accrued to the company as a result of the bribes that were paid to public officials in Kenya and Mauritania to secure contracts for the provision of ballot papers for elections.

In addition, the company was fined a little over £1.3 million. The fine was calculated in accordance with the UK's Definitive Guidelines on Sentencing for Fraud, Bribery and Money Laundering. These guidelines provide that the fine should be calculated by multiplying the gross profits for the contracts obtained by bribing the foreign official by a multiplier (ranging from 20 per cent to 400 per cent, depending on the facts).

In the case of Smith & Ouzman,[39] which fought and lost the case, the multiplier was 300 per cent, reflecting the high degree of culpability on the part of the company, which used its dominant market position to bribe foreign public officials for substantial gain over a sustained period.

Sweett Group plc was sentenced in March 2016, having pleaded guilty in the magistrates' court. A subsidiary of Sweett Group plc in the United Arab Emirates had paid bribes to secure a contract to provide project management and cost consultancy services on a hotel construction project.

A confiscation order of more than £850,000 was made (representing the gross profit deriving from the corrupt contract). Sweett Group plc was also fined £1.4 million, calculated by taking the gross profits for the contracts, multiplying them by 250 per cent to reflect Sweett's culpability and then applying a one-third discount for the early plea in the magistrates' court.

In January 2017, the SFO entered into a DPA with Rolls-Royce plc in respect of 12 counts of conspiracy to corrupt, false accounting and failure to prevent bribery.[40]

37 SFO, Case Information, Standard Bank plc, https://www.sfo.gov.uk/cases/standard-bank-plc/.

38 SFO, Case Information, Smith and Ouzman Ltd, https://www.sfo.gov.uk/cases/smith-ouzman-ltd/.

39 SFO, Case Information, https://www.sfo.gov.uk/cases/sweett-group/.

40 https://www.sfo.gov.uk/2017/01/17/sfo-completes-497-25m-deferred-prosecution-agreement-rolls-royce-plc/.

The conduct spanned three decades and involved Rolls-Royce's Civil Aerospace and Defence Aerospace businesses and its former Energy business and concerned the sale of aero engines, energy systems and related services. The conduct covered by the UK DPA took place across seven jurisdictions, namely Indonesia, Thailand, India, Russia, Nigeria, China and Malaysia.

As part of the DPA, Rolls-Royce agreed to pay £497.25 million plus interest and the SFO's costs of £13 million. At the same time, Rolls-Royce reached an agreement with the DOJ and a leniency agreement with Brazil's Federal Public Ministry. In total, these agreements resulted in the payment by Rolls-Royce of approximately £671 million (including US$170 million to the United States and US$25 million to Brazil).

A DPA with Tesco Stores Limited, entered into on 10 April 2017, was revealed in January 2019 following the lifting of reporting restrictions.[41] The DPA concerns the use of illegal practices by Tesco between February and September 2014 to meet accounting targets. As part of the DPA, Tesco agreed to pay £129 million and investigation costs of £3 million. The company was also required to implement a compliance programme during the three-year term of the DPA, which ended on 10 April 2020.

In July 2019, the SFO entered into a DPA with Serco Geografix Ltd, pursuant to which Serco paid a financial penalty of £19.2 million and the SFO's investigative costs of £12.8 million, and took responsibility for three fraud offences and two false accounting offences. The offences were committed via a scheme to dishonestly mislead the Ministry of Justice as to the true extent of its parent company's profits between 2010 and 2013.[42]

In January 2020, the SFO entered into a DPA with Airbus SE, which agreed to pay €991 million in the United Kingdom in connection with five counts of failure to prevent bribery. The UK sum comprised disgorgement of profits (£491 million), a financial penalty (£333 million) and the SFO's costs (£6 million). These sums made up part of a record-breaking €3.6 billion total (the DPA also involved the US and French authorities) relating to conduct between 2011 and 2015 in Sri Lanka, Malaysia, Indonesia, Taiwan and Ghana (in each case, bribes paid in respect of aircraft orders).[43]

In October 2020, the SFO entered into a DPA with Airline Services Limited (ASL), pursuant to which ASL is required to pay £2,979,685.76 (consisting of a financial penalty and disgorgement of profits representing the gain of the criminal conduct) and a contribution of £750,000 towards the SFO's costs. ASL accepts responsibility for failing to prevent bribery arising from the company's use of an agent to win three contracts (together worth more than £7.3 million) to refit commercial airliners for Lufthansa. The agent also worked for Lufthansa and abused his position to provide a competitive advantage to ASL.[44]

41 https://www.sfo.gov.uk/cases/tesco-plc/.

42 https://www.sfo.gov.uk/cases/serco/.

43 https://www.sfo.gov.uk/2020/01/31/sfo-enters-into-e991m-deferred-prosecution-agreement-with-airbus-as-part-of-a-e3-6bn-global-resolution/.

44 https://www.sfo.gov.uk/2020/10/30/sfo-enters-into-deferred-prosecution-agreement-with-airline-services-limited/

Appendix 1

ABOUT THE AUTHORS

ANTHONY WOOLICH

HFW

Anthony Woolich read law at Jesus College, Cambridge, and has been a partner at HFW since May 2009. He specialises in competition law, public procurement, sanctions, export control, anti-bribery and anti-corruption, trade regulation, state aid, data protection and privacy, commercial contracts, joint ventures, intellectual property and information technology. He is admitted to practise law in England and Wales and the Republic of Ireland and by the Brussels Bar (Dutch section).

Anthony was ranked seventh in the most influential 10 lawyers in shipping worldwide by Lloyd's List for 2016, with his contributions on Brexit being highlighted. He is ranked in *Chambers* 2021, which states: 'Anthony Woolich has a "huge amount of experience in competition law and offers very pragmatic advice", according to interviewees. He represents clients in a host of merger clearance procedures as well as CMA investigations and compliance matters.' *The Legal 500* 2021 ranks HFW saying: 'HFW has strength across the board on state aid, competition litigation and issues concerning the intersection of EU law, commerce and competition. Clients laud the team's "deep understanding of the shipping industry".' It quotes clients as saying: 'Anthony Woolich is very approachable and client-centric, has an excellent ability to analyse, and is able to utilise international connections very effectively.'

DANIEL MARTIN

HFW

Daniel Martin read law at Downing College, Cambridge, and has been a partner at HFW since April 2013. He advises shipowners, operators, freight forwarders, insurers and brokers on a host of regulatory and compliance issues, including international trade sanctions, export controls, customs and anti-corruption legislation. He advises on all aspects of EU and UK legislation, and is familiar with the application of US sanctions to non-US persons.

Daniel initially specialised in advising clients on disputes arising from charter parties, bills of lading, marine insurance and logistics operations, and he uses that experience and expertise to provide detailed, practical advice that is tailored to clients in the shipping, logistics and marine insurance sectors.

As well as advising clients on the impact of international trade sanctions in particular circumstances, including ways to engage effectively with regulators, Daniel also advises on compliance procedures and controls that shipowners, logistics companies, banks, insurers and brokers should adopt to minimise risk. He regularly presents to insurers and others on recent developments in sanctions legislation and enforcement, and contributes to industry publications. Daniel also advises extensively on anti-corruption legislation, and his clients include the industry's Maritime Anti-Corruption Network.

Daniel is ranked in *The Legal 500* and he was featured in *Acritas Star Lawyers*, in which clients described him as 'down to earth, commercially minded, understands my business and thinking outside the box'.

HFW

Friary Court
65 Crutched Friars
London EC3N 2AE
United Kingdom
Tel: +44 20 7264 8000
Fax: +44 20 7264 8888
daniel.martin@hfw.com
anthony.woolich@hfw.com
www.hfw.com

an LBR business

ISBN 978-1-83862-828-4