JUNE 2012

INTERNATIONAL COMMERCE

Strategic, regulatory and operational insight from Holman Fenwick Willan

AVIATION'S CLOUDY FUTURE

CAN THE INDUSTRY EMERGE FROM RECENT TURBULENCE?

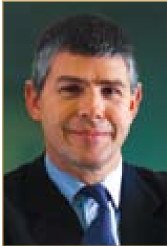
SHIPPING FIGHTS TO STAY AFLOAT

LONDON: A SOFT TOUCH FOR THE 'WILD EAST'?

M&A DOWNSIZES AMID ECONOMIC TURMOIL

holman fenwick willan hfw

WELCOME



The dust from the global economic crisis is starting to settle, allowing a clearer picture of the world economy to emerge. Nevertheless, continuing uncertainty means the future is hard to predict. In this issue of *International Commerce* we assess the changing face of hard-pressed industries.

Aviation was already suffering from low margins before events like the Icelandic ash eruption and looming legislation changes have added further pressure. Yet, as we find on page 6, the current troubles may help the industry to move towards a sustainable future.

Shipping, which boomed in the pre-crisis era of cheap credit, is also undergoing a period of consolidation. Shipping firms have begun to buckle under the weight of debts and some are seeking the protection of Chapter 11 legislation. But Chapter 11 is just one of several options, we explain on page 10.

Mergers and acquisitions (M&As) might be expected to have risen as bargains are snapped up. In fact, M&A activity has fallen among large corporates, as we point out on page 16, but is continuing in some areas.

Investors' interest in mining has remained. But there are different standards of corporate governance and some listings are courting controversy, as we discover on page 12.

Even as a fragile recovery begins to take hold, the effects of the downturn are still being felt, not least in financial institutions (see page 18). We hope *International Commerce* offers assistance in plotting a path to prosperity.

RICHARD CRUMP
SENIOR PARTNER
HOLMAN FENWICK WILLAN

COVER IMAGE: ARCAID IMAGES. THIS PAGE: ISTOCKPHOTO, CORBIS

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INBRIEF

Emerging legal and commercial issues for international business

Standard private security contract wins support

ELINOR DAUTLICH, HOLMAN FENWICK WILLAN

GETTY IMAGES/AFP

As the scourge of maritime piracy continues to take its toll on international trade, the use of armed guards on board vessels is becoming increasingly common, particularly in the Gulf of Aden and the Indian Ocean.

HFW has been influential in the development of the latest Baltic and International Maritime Council (BIMCO) maritime standard contract, GUARDCON, which is tailored for the employment of private military security companies (PMSCs) to provide security guards on board merchant vessels.

GUARDCON provides an industry standard set of terms governing the relationship between shipowners and PMSCs, and between ship masters and onboard security guards. Balancing the ship master's absolute authority under the International Convention for the Safety of Life at Sea with the need to protect the ship master from criminal liability and allow security guards the right to self-defence during a pirate attack has been the main challenge for GUARDCON.

GUARDCON is the result of consultation between all stakeholders: shipowners and operators, PMSCs, multiple insurer interests, flag states and other interested governmental bodies. It is expected that the contract will be widely adopted by the industry. Its release closely follows recent regulatory changes by, among others, the UK government.

Elinor Dautlich, HFW Partner and member of the BIMCO subcommittee tasked with drafting GUARDCON says: "With its focus on vetting, licensing, insurance and the specific allocation of risk and liability, GUARDCON sets the standard in the drive for quality in private security for the maritime industry. Critically, where there has been such demand for a carefully considered contract in this very complex and dangerous field, GUARDCON benefits from broad industry support at its outset."

Myanmar: open for business?

Recent elections and economic and political reforms in Myanmar may be a watershed in the resource-rich country's challenging political landscape. Some foreign investors are now eyeing Myanmar, but there are still risks to be considered.

Myanmar has suffered more than five decades of isolation and economic stagnation. But its resource reserves are potentially significant.

The extent of oil and gas reserves is disputed, but the presence of French and US energy companies, despite the continuing sanctions in place, is a clear indication of the current interest. Myanmar is also endowed with other resources, including timber, minerals, precious stones, fisheries and agricultural products.

Despite the government's apparent eagerness for change, investors should be cautious. Regulatory uncertainty is a big concern – it is unclear what rights, protections and tax incentives will be offered. Myanmar, ranked as one of the world's most corrupt countries, is a hard place to do business, especially for companies covered by anti-bribery legislation with extraterritorial reach.

Myanmar's infrastructure has had decades of neglect. Significant investment in transport, energy and telecommunications will be needed and the workforce has little or no experience of modern technology and business practices.

The disparity between official and black market exchange rates, restrictions on international payments and transfers, and ongoing sanctions by Western nations also present obstacles.

Due diligence and protection are advisable. A local partner can help, but there should be a strong joint venture agreement – particularly when dealing with pre-emption rights and political risk. Investors should consider political risk insurance or other mitigating strategies, adopt Western governance positions and seek early legal/accountancy advice. Look to independent, recognised experts to substantiate resource assets. Always consider the least attractive outcome from the outset and plan appropriately.

HFW assists in set-up of European Bulk Oil Traders' Association

The European Bulk Oil Traders' Association (EBOTA) has been launched to represent the interests of its members on issues such as: REACH; biofuel trading; sustainability and the EU Renewable Energy Directive; and rules and procedures for trading platforms and price reporting agencies.

EBOTA is a group of leading oil trading companies, comprising BP, Chevron, ConocoPhillips, Hetco, JP Morgan, Litasco, Mercuria, Morgan Stanley, Noble, Petrochina, RWE, Trafigura and Vitol.

HFW has been closely involved in the establishment of EBOTA, drafting its constitutional documents, advising on competition law and intellectual property issues, and providing EBOTA's secretariat.

More information on the association can be found at www.ebota.eu

Charterers face Australian oil pollution liability

The Maritime Legislation Amendment Act, which came into force on 5 December 2011, amends the Navigation Act 1912 and Protection of the Sea (Prevention of Pollution from Ships) Act (PSPPSA).

Deterrence against pollution has been increased by: introducing new offences relating both to operating a ship and failing to report ship movements in ecologically sensitive areas; setting out a formalised regime for penalties; extending the list of persons who may be charged with an offence; and increasing the maximum penalty for oil discharge offences.

Previously, only the owner and master of a vessel were deemed to have committed an offence if there was a discharge of oil or oily mixture. But PSPPSA has expanded this to include charterers, and has increased the maximum penalty from A$55,000 (US$57,000) to A$2.2 million (US$2.28 million) for individuals, and from A$275,000 (US$285,000) to A$11 million (US$11.4 million) for corporations.

Defences are limited by a narrow definition of "non-intentional damage", excluding: damage caused by negligence of a master or owner, even if carried out without intent; deterioration resulting from failure to maintain ship or equipment; and defects that develop during normal operation of ship or equipment. Courts may interpret broadly the term 'charterer'.

The master is subject to new obligations not to "negligently or recklessly" cause pollution or to "fail to prevent such pollution". A person can be penalised as an accessory, which could include charterers. The maximum penalty for an aggravated breach (involving serious harm to the environment), or for being an accessory, is A$660,000 (US$683,000) for individuals and A$3.3 million (US$3.4 million) for corporations.

Traders chartering vessels to load or discharge in Australian ports should negotiate additional protection by way of indemnities from owners and consider additional insurance cover.

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Satellite interference in focus

Space-based capabilities and applications have become increasingly important, but the risk of interference has often been overlooked. Compensation in relation to damage caused by launches and satellites usually comes after damage from another space object.

Yet interference, whether unintentional, from defective equipment or operator error, or intentional, can also be a significant threat. Intentional interference can include the 'jamming' of TV and radio transmissions, hacking, acts of terrorism, acts of commercial sabotage and acts of war.

International telecommunications conventions have provisions over harmful interference but fail to provide effective sanctions. Insurance might be thought to offer protection, but in fact most space insurance policies specifically exclude the risk of electromagnetic and radio frequency interference.

Five major international broadcasters called upon the World Radiocommunications Conference meeting, held earlier this year in Geneva, to consider ways in which to halt activities that contravene the EU constitution and Article 15 of the Radio Regulations.

But any change is likely to take time, since the development and ratification of optional international agreements and codes of conduct can be very slow. Enforcement is also difficult, especially for universal sanctions against countries that contravene regulations to which they may or may not be signed up. Such situations usually must be resolved by diplomacy.

In the meantime, robust insurance coverage for interference in its various forms is likely to become a more pressing consideration.

EVENTS DIARY

TOC Europe
Antwerp, 12 – 14 June 2012
HFW Associate Matthew Gore will be speaking at this conference, which the firm is pleased to be sponsoring.

AIRMIC 2012
Liverpool, 13 – 15 June 2012
The AIRMIC Conference brings the insurance and risk management industry together to share experiences, influence forward thinking and network.

Oil & Gas Trading Operations
London, 18 – 20 June 2012
HFW Associates Martina Kelly and Matthew East will be giving presentations focusing on security for the deal and bills of lading in oil and gas trading respectively.

Managing Logistics Supply Chains
London, 10 July 2012
HFW is pleased to be hosting this annual seminar in association with the Freight Transport Association. HFW Associates Catherine Emsellem-Rope and Matthew Gore will be presenting.

Australian Grains Industry Conference
Melbourne, 31 July – 1 August 2012
HFW is pleased to sponsor this conference, which brings together the Australian and the global grain industry to analyse the latest trends and to network.

Africa Downunder
Perth, 29 – 31 August 2012
HFW Partner James Donoghue will be attending this annual mining conference.

Capital Link Global Derivatives Forum
New York, 6 September 2012
HFW Partner Brian Perrot will be speaking at this conference which the firm is pleased to be sponsoring.

International Marine Claims Conference.
Dublin, 26 – 28 September 2012
HFW will be sponsoring the annual International Marine Claims Conference. HFW Partners Toby Stephens and Richard Neylon will be speaking.

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WINGING IT: AVIATION'S CLOUDY FUTURE

Recent turbulence in the air transport industry has seen profits plunge. But changes to the industry may yet herald a sustainable future.

WORDS GRAHAM NEWTON

The turmoil of the past decade has led some commentators to remark that crisis is the air transport industry's natural state. As 9/11 was followed by the SARS and H1N1 viruses, volcanic disruptions and the global economic recession, to name but a few, it is hard to disagree.

Giles Kavanagh, a HFW Partner and Head of the Global Aerospace Team, says the immediate future looks no less volatile. "The International Air Transport Association (IATA) forecast for 2012 is a 0.6% margin ($3.5 billion profit) – and that's a best case scenario. If the European sovereign debt crisis bites deeper than expected, airlines could lose $8.3 billion."

Several major issues remain unresolved, which may further pressure the sector, Kavanagh says, most notably the European Union Emission Trading Scheme (EU ETS). The scheme, which came into effect at the start of the year, forces airlines to pay for some of their carbon emissions. Airlines have no problem with the principle – positive economic measures are one of the four pillars of aviation's environmental strategy alongside improvements in technology, operations and infrastructure.

The real bone of contention is the extraterritorial ambition of EU ETS, explains Kavanagh. "An airline beginning or ending a journey in Europe must pay the EU for emissions for the entire journey. Airlines have argued this is contrary to the Chicago Convention, which clearly states that every nation has sovereignty over its airspace."

Thrown out

A legal challenge, instigated by US carriers through the Air Transport Association of America, and supported by IATA and the National Airlines Council for Canada, was thrown out by the Court of Justice of the European Union (CJEU), which ruled that, among other things, the EU is not a signatory to the Chicago Convention and that EU ETS only applies if an aircraft is taking off or landing in Europe. The CJEU ruled that EU ETS is no different to other European aviation laws (on safety, for example), which are applied to aircraft flying into or out of the territory.

"The debate rumbles on," says Sue Barham, a HFW Partner. "A number of countries were involved in a joint resolution arguing against the EU ETS and some, such as China, have ordered their carriers to refuse to comply with the scheme."

In the meantime, US legislative measures have been put in place to emphasise the imperative for the EU to work through ICAO on the issue and calling on the US government to use "all political, diplomatic and legal tools" at its disposal to ensure that EU ETS is not applied to US carriers.

A global solution

EU ETS has also come under fire for lacking a mandatory obligation for revenue to be used for environmental mitigation efforts. Giovanni Bisignani, the former IATA Director General and CEO, referred to the scheme as "a cash grab that would do nothing to reduce emissions".

Barham explains that aviation was carved out of the Kyoto Protocol specifically because it was recognised that the International Civil Aviation Organisation, the civil aviation arm of the UN, was the right place to tackle global aviation issues. This argument was reinforced at the 2010 Copenhagen UN Framework Convention on Climate Change meeting.

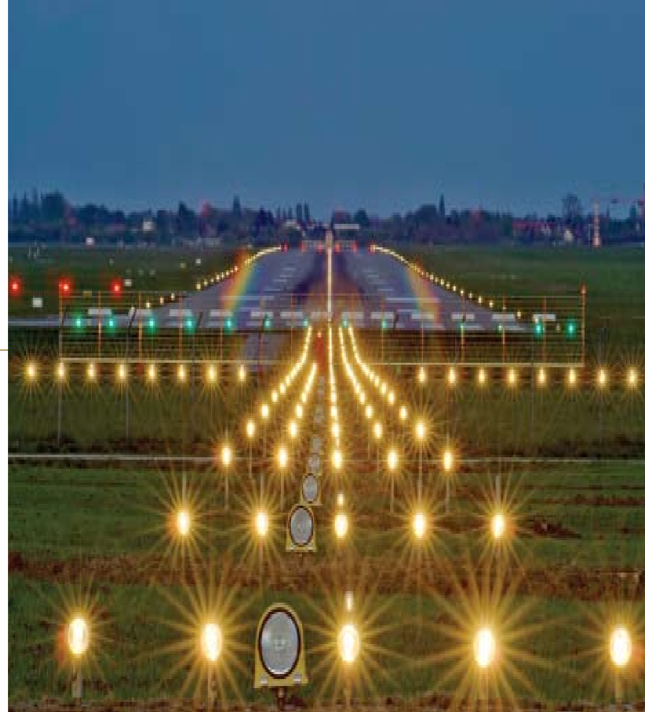
The EU's steadfastness has been built on the belief that a global solution is still some way off, explains Barham. "But they may have to rethink. With some countries prohibiting their airlines from participating in the scheme, the threat of retaliatory measures and restrictions on traffic rights, as well as other ongoing legal challenges, the imperative to find a compromise is ever increasing." All parties have indicated a preference for a global solution, including the EU.

Airlines must comply, for now at least, although carriers are at varying levels of readiness. Compliance can be complex, with confusion over measuring standards and data formats. But failure to comply is

GETTY IMAGES

• **Graham Newton** has 15 years experience in aviation writing and is the editor of *Airlines International*

> *A number of countries were involved in a joint resolution arguing against the emission trading scheme and some, such as China, have ordered their carriers not to comply.*
>
> **SUE BARHAM, HOLMAN FENWICK WILLAN**



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> Governments are strapped for cash so the APD will be around for a while yet.
>
> GILES KAVANAGH, HOLMAN FENWICK WILLAN

not an attractive option because it could have significant adverse financial consequences for the airlines, including fines and the loss of free allowances that could otherwise be available to them.

Overlapping taxes

Matters are complicated by 'green' taxes – airlines complain of being charged several times for the same emissions. The UK Air Passenger Duty (APD) was instigated as a green tax, for example, and the German departure tax has also been given a coat of green paint. "There are no signs of the APD disappearing," suggests Kavanagh. "Governments are strapped for cash and so taxes like the APD will be around for a while yet."

Such levies may be short sighted though. According to IATA, a Dutch aviation tax earned the government $412 million, but cost the country $1.6 billion as passengers either stopped travelling or drove to gateways in neighbouring countries. Ireland also dropped a proposed aviation tax when figures showed it would result in a loss of $429 million and 3,000 jobs.

Airlines will push back against taxes with growing resolve in 2012, arguing that air connectivity is a key driver in global trade. Some 33 million jobs and around $3.5 trillion in economic activity depend on airlines.

The purchase of new aircraft is a key consideration in both the environmental debate and in wider economic terms. There are some 12,000 aircraft on order up to 2020, worth around $1.3 trillion. All offer better operating economics and fewer emissions. But how will airlines pay for them?

Credit is sparse, so buying them outright is becoming more difficult. Although the US Ex-Im Bank and other export credit agencies facilitate transactions, the new Aircraft Sector Understanding has tightened the level of assistance and made it more expensive. The Basel III regulatory framework will add to the pressure, as banks may further limit their aircraft financing activity or even exit the sector altogether.

Pros and cons of leasing

About 30% of the aircraft flying today are leased on an operating lease basis. Airlines pay a premium for this, but Zohar Zik, a HFW Consultant, says the practice will grow as airlines increasingly think in the short- to medium-term, look to reduce capital risk wherever possible and generally want their assets off their balance sheets. However, he warns that leasing aircraft involves a lot of exacting back-office work and can lead to exposures. The full cost of leasing (in time and money) is rarely factored in to the cost/benefit analysis. Zik also questions how flexible leasing really is. "If you've signed a five-year agreement, does that really help when the market could be capsized by a single event?"

Two distinct types of lease have had contrasting fortunes in recent years. Operating leases (including financings through sale and leaseback transactions – selling an aircraft and then leasing it back) are increasingly popular, as they reduce capital commitments and free up vital cash. "On the other hand, tax leasing – a means of getting capital allowance as an owner, but also tax deduction on your rental – has been disappearing since 2006, as loopholes close," says Zik. "This trend is likely to continue", he adds.

Batteries not included?

The carriage of dangerous goods recently hit the headlines. In September 2010, a UPS cargo plane crashed in Dubai after a fire in the cockpit. Al-Qaeda's Yemen cell claimed responsibility, but "suspicions remain that lithium batteries were involved, leading to US Federal Aviation Administration (FAA) restrictions on carrying them in bulk on passenger flights," explains Mert Hifzi, a Holman Fenwick Willan Partner. "Some carriers have banned the carriage of lithium batteries. Others say they are perfectly acceptable as long as the packaging is of the requisite standard," Hifzi says. Compliance is down to individual airlines but this will change. The new FAA Reauthorization Bill calls for the FAA to harmonise with International Civil Aviation Organisation standards on lithium batteries.

> *If the European sovereign debt crisis bites deeper than expected, airlines could lose €8.3 billion.*
>
> GILES KAVANAGH, HOLMAN FENWICK WILLAN

Passenger rights

Whether rented or owned, airlines must fly their aircraft to make a profit. When the Icelandic volcano, Eyjafjallajökull, erupted in 2010, grounding 100,000 flights over the period of a week, the industry lost an estimated $1.8 billion.

Stringent passenger rights legislation, which airlines have long fought, is responsible for much of this loss. The regulation is under review, with amendments anticipated over the next 12 months. As it stands, airlines face heavy expenses when flights are delayed or cancelled, even if the root cause – bad weather or volcanic eruptions, for example – is beyond their control.

The 2010 volcanic disruption was particularly bitter, as flights were grounded by the authorities even though tests showed the skies were safe. At least that particular problem looks to have been solved; airlines can now make operational decisions based on a proper risk assessment.

The issue of tough compensation laws remains. Compensation rulings have previously used a draconian interpretation, but the hope is that common sense will prevail. "There is a glimmer of hope for the airlines," says Kavanagh. "There may be a limit on the number of days they are obliged to provide care and assistance. But there won't be massive changes."

Freight goes paperless

Even without passengers to worry about, the air freight sector has more than enough on its plate. Goods account for about 11% of global airline revenues, but it can be far more important than that to individual carriers. Modernisation is transforming the sector.

IATA's e-freight programme is the major initiative. It will remove the need for endless forms, resulting in a speedier and more reliable air freight service, and a cost reduction of nearly $5 billion. It has been slow work so far, as much to do with the regulatory environment as technical issues, with about 10% penetration on live trade lanes. The ultimate goal is 100% e-freight, but the more immediate target is 15% e-air waybill use in 2012. "A paper trail will become an electronic trail," says Mert Hifzi, a HFW Partner and Head of the Asia Aerospace Team. "There shouldn't be any problem with implementation but there is the matter of cost and how fast it can be done."

Top concerns

- Emissions regulation and green taxes
- Financing for new aircraft
- Passenger rights legislation on flight delays and cancellations
- Cargo requirements

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E-commerce, trade facilitation, information standards and an Air Cargo Advanced Screening (ACAS) programme with the US Customs and Border Protection Agency are currently under discussion.

In fact, cargo security has recently become something of a hot potato (see 'Batteries not included?', below left). ACAS is focused on high-risk cargo in particular, but there is a general move to secure cargo at origin. The concern is that it is impractical to carry out all screening onsite at airports because of restrictions on space and time.

The future

Maintenance, repair and overhaul (MRO) is also changing and should reap the rewards of some persuasive initiatives. The Boeing GoldCare lifecycle management maintenance programme, for example, was initially developed to service the 787 Dreamliner fleet, but is now being offered to other Boeing aircraft types, most notably 737NGs. "Structured (and priced) properly, these programmes could lead to a win-win situation across the board, with Boeing gaining access to new and thus far untapped revenue streams that are paid to it in advance by airline customers," says Zik. "The airlines will have their scheduled maintenance cost fixed and paid for in advance, and MROs benefit from having their bills paid directly by Boeing and not the airlines.

"Getting all this right, however, is very difficult indeed, not to mention that Boeing still needs to get the lessor community comfortable with the arrangement and happy to forego the cash cow that is maintenance reserves in the process," he adds.

Other challenges have no clear strategy. Debates about liberalisation continue. Few disagree that the industry needs consolidation, but so far cross-border mergers have remained elusive. "It is a matter of political will," says Kavanagh. "Flag carriers still seem to be part of the national image. But 40 years ago nearly every airline was state-owned. That has changed considerably and so the next logical step might be taken in the near future."

Whatever the coming challenges, airlines will need to find the right solutions if they are to shoulder ever-greater environmental responsibilities while moving away from single digit profit margins and towards a sustainable future.

hfw

BAILING OUT SHIPPING

Shipowners who renege on mortgage repayments have often had their ship arrested by the bank and sold. However, lenders and borrowers are increasingly seeking less dramatic solutions.

WORDS JULIAN MACQUEEN

The global fleet expanded massively during the pre-crisis decade-long boom when, in the rush for growth, owners found US capital markets offered cheap and easy funding. Come 2008, the shipping industry suddenly found itself sliding into a vicious downturn where the value of a company's main assets – its fleet – had fallen below the purchase price. Whereas in previous downturns, ship finance banks had enough of a capital cushion to support companies, in this downturn the cupboard is bare.

Some of the worst affected listed shipping companies have sought the protection of Chapter 11 legislation under US bankruptcy law. The debtor must have a "domicile, place of business or property" in the US, but deposit accounts and retainers in the US, among other things, can allow the use of Chapter 11.

HFW Partner Stephen Drury explains that an automatic stay of proceedings with international effect is highly useful, given shipping's global reach. Also, 'debtor in possession' status, which allows the company and its existing management to stay in place while working towards a solution, is crucial for shipping and its cyclical markets.

"Chapter 11 can easily metamorphose into full form liquidation."

STEPHEN DRURY, HOLMAN FENWICK WILLAN

Chapter 11 legislation can allow the company breathing space to come up with a credible rescue package. But such a move is not without danger.

"Chapter 11 filings for indebted companies that are hopelessly insolvent and do not have any demonstrable creditor support for a reorganisation plan could easily metamorphose into full form liquidation proceedings under Chapter 7 of the US Bankruptcy Code," warns Drury.

Too much shelter?

Two recent high profile shipping reorganisations, Omega Navigation and General Maritime, are both listed in the US and are currently under court protection. Omega Navigation is one case where "demonstrable creditor support" is a moot point.

HSH Nordbank, the senior secured lender, has locked horns on that very issue. The German financier has an outstanding loan of $242.7 million with the George Kassiotis-led tanker company. Together with other creditors, HSH led a united front in a push to secure Chapter 7 status. But to no avail.

Criticisms that Chapter 11 affords companies too much shelter do not always take account of the legal

Closed spigots

According to Dealogic, 2007 saw some $116 billion lent to the shipping industry. By 2009, this had dropped to $35 billion, and although lending climbed to $51 billion the following year, it was still less than half the total of three years earlier. Opportunities for fresh loans remain slim.

Petrofin Bank Research in Greece has said that bank lending to shipping will remain tight this year, with the portfolios of the leading 40 ship finance banks virtually static since 2010. By far the majority of these banks are European. Bar Nordic entities Nordea and DnB, few established ship finance players are active. Indeed, the eurozone crisis has compounded the situation. BNP Paribas and Société Générale are cutting back their shipping operations as management tries to deleverage dollar-based businesses.

These moves follow big players' attempts to quit the market altogether. Lloyds Banking Group tried unsuccessfully to find a buyer for its shipping loan book – the haircut required proved too drastic.

Two of the biggest players – Germany's HSH Nordbank and the UK's RBS, with historical shipping books of around $40 billion and $30 billion, respectively – are looking at a significantly reduced market share. Deutsche Schiffsbank is also reducing its shipping exposure.

HSH has put around $11 billion into a 'bad bank' for loans to be worked out over time. Typically, the loans will belong to medium-sized German shipping companies, which have complained of being abandoned by their bank. RBS is set to run down its shipping activities to around 55% of the present size.

process, which is by definition litigious and, therefore, offers no guaranteed outcomes.

"Tactics play a big part, but banks and borrowers often forget this," says HFW Associate Jasel Chauhan, citing Omega as an example. Filing in Houston, Texas, rather than any other US bankruptcy court "has probably helped its case", he adds.

Indeed, lawyers with litigation and shipping industry knowledge – as opposed to pure finance or insolvency experience – can prove their worth in such cases.

In the Omega case, Judge Karen Brown has allowed cash collateral to be used until 16 April and given a 30 May deadline for the tanker operator to present a reorganisation plan to the court. However, the case seems bound for mediation.

In contrast, General Maritime's entry into Chapter 11 was marked by consent. Oaktree, one of the company's backers, is putting up $175 million to ease the process along – and in return for a sizeable chunk of equity. Work on its reorganisation plan is in hand, but a challenge from bondholders and unsecured creditors has shown that, even where bank support is provided, Chapter 11 is no soft option.

Commercial solutions

Realism is crucial when forging any agreement.

"Companies go bankrupt because they run out of cash, not because their assets are nominally undervalued," says Keith McRae, Managing Director of shipping asset management at DVB Bank.

Public and private companies are under different pressures, explains McRae, who is regularly involved in restructuring projects. Listed companies have the added pressure of potential negative media coverage, which can alert trade creditors, such as bunker suppliers, leading to the arrest of a ship and kick-starting insolvency proceedings.

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But for McRae, a floundering shipping firm that tries to stave off its demise through Chapter 11 "is a testament to the failure of the financier". The way forward is to be goal-based and guided by "the art of the possible", he says.

Chauhan agrees. "Ultimately, it is a question of being focused on commercial solutions."

Such pragmatism is perhaps why the rash of bankruptcies and subsequent fire sale of assets predicted when ship values tumbled at the start of the recession has yet to happen.

"The banks don't have the cash; their liquidity is constrained," says independent Shipping Analyst Craig Jallal. "The last thing they want is undervalued assets on their books."

Greek tragedy?

Whether more shipping companies will go down the restructuring road remains to be seen. Greece is a good place to look for clues.

"The Greek market tends to be a weather vane for what will happen in shipping globally," says Chauhan, who is based in Piraeus. Greek owners are looking hard at restructuring. "Crunch time has arrived for many different banks and owners."

The downside of not restructuring, according to McRae, is "pretty horrible".

Shipping does have a way out. CMA CGM, the French liner giant, successfully restructured $5 billion of debt via an injection of fresh capital, a bond issue and the agreement of 70-odd financial institutions.

Yet the main shipping markets are likely to stay depressed for at least 18 months, just as unfunded tonnage will continue to come into the market – one recent estimate puts this at $60 billion for 2012. With ship finance banks as restricted as their shipping clients, there is everything to play for.

hfw

• **Julian MacQueen** is a former editor of *Lloyd's Shipping Economist* and has worked for *Tradewinds*

DIGGING THE DIRT

Resources companies are coming to London with different corporate governance standards, including some from the 'Wild East' – Russia and the 'stans'. What does this mean for the City as it emerges as world leader in this sector?

WORDS GRANIA LANGDON-DOWN

Mining, historically, has not been for the fainthearted. Potential dangers in remote locations of emerging markets include terrorism, civil unrest, military repression, arbitrary changes in contract rights and legislation, resource nationalism and financial turmoil – not to mention disease, environmental hazards and plant shutdowns.

Understandably, mining companies seeking to raise money from stock market listings want 'sophisticated' investors who fully appreciate the risks.

While the Toronto Stock Exchange (TSX) lays claim to the top spot, with more than half the world's public mining companies, the overall market cap for listings on the London Stock Exchange (LSE) and the total number of fundraisings (more than one-third) allows London to claim that it hosts more big mining companies than any other major exchange.[1]

But controversy at the end of 2011 about the perceived opaque dealings of some organisations listed on the LSE led to claims that London is being seen as a 'soft touch'.

HFW Partner Nick Hutton disagrees. "The City has been raising capital for mining and resources companies from around the world for 150 years. They are attracted by the pool of capital, the strength of the markets – which are well-regulated, but open, the court system, the depth of experience among professional advisers and the fact that companies are not discriminated against just because of their industry or geography."

The UK's corporate governance regime – its 'comply or explain why you aren't' approach – recognises that one size does not fit all, Hutton argues. Mining companies, for instance, have additional reporting obligations, while the LSE's premium listing standard requires extra governance boxes to be ticked.

Principled regime

"A comparison of the UK's regime with other well-established jurisdictions shows it is no less comprehensive or effective than that of other countries," says Hutton (see box, page 15).

Paul Colucci, UK Head of Dundee Securities, has experience of listing in London and Toronto. He highlights some differences: "The Canadian system is rules-based, while the UK's is principles-based. Smaller companies tend to list on Canada's junior market, the TSX Venture Exchange (TSX-V). However, it receives the same regulatory scrutiny as the main board, unlike the LSE and its junior market, the AIM market, where there is a wider gap in corporate governance regimes."

The rules are under scrutiny, however. The European Commission is working on an action plan setting out a global approach to corporate governance and company law, which it plans to issue by mid-2012. The Financial Services Authority (FSA) is consulting on proposed technical changes to the listing rules and

[1] TSX figures from TSX; London figures from LSE speaker at HFW seminar in November 2011

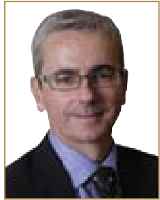
> *Companies are attracted to London by the pool of capital, the strength of the markets, the court system and the depth of experience among professional advisers.*
>
> **NICK HUTTON, HOLMAN FENWICK WILLAN**

ISTOCKPHOTO

whether the requirements for the premium listing standard should be enhanced.

Even under the current rules, investors will gravitate towards reputable companies, Hutton says. "The market is very keen to retain its reputation, so it won't touch anyone who may be involved in something like West African blood diamonds."

London has an allure because of the credibility listing in the UK brings, especially for Australian mining companies, says James Donoghue, a HFW Partner. But he warns of growing competition from the Hong Kong Stock Exchange because Australian resources companies are looking to access Asian capital.



> *London has an allure because of the credibility a listing in the UK brings.*
>
> **JAMES DONOGHUE, HOLMAN FENWICK WILLAN**

If African mining, or a Russian or 'stan' company is involved, typically investor appetite is better in the UK – followed by Switzerland and France – than in Canada, says Colucci. "Investors here are more comfortable with geopolitical risks. However, AIM is coming in for some flak for not being tough enough. A lot of clients we talk to are looking at going directly to the main board of the LSE because there is less of a stigma attached to it."

Scare stories

Canadian Brian Gordon, a HFW Partner, does not believe more regulation necessarily means a better functioning market, although he concedes attitudes may be difficult to change amid the fallout from the economic crisis. "The main market could learn from other exchanges, for instance requiring companies to display more of their information, as happens on AIM. But, overall, 'comply and explain' is an effective approach."

Scare stories risk tarnishing a jewel in the UK's crown, according to Gordon. "It isn't just the domain of either this sector or of foreign companies to have unsavoury practices," he says wryly. "The market can vote with its feet if it doesn't value the way a company is being run."

He highlights the "ton of pressure" that the LSE's AIM has come under because of perceived shady companies. "But AIM is the last remaining junior stock market that is a real growth market," he argues. "It has a relatively flexible approach, which is intended to give companies a real leg-up. Institutional investors, who make up the majority of the market participants, know the risks. But instead of rewarding it, there has been a real backlash that it is a dangerous market."

Unpalatable truth

The unpalatable truth is that mining is tough, says Gordon. "There is a heavy political element and you need to have people who can operate in some very dangerous places."

That leads on to the thorny topic of bribery. The UK's new Bribery Act is at the top of company agendas because of its extraterritorial reach and the blanket ban on any form of 'facilitation payments' to foreign officials.

The Act covers any company that carries on business or part of its business in the UK. But does that cover raising money in the UK? Will a foreign company be caught if it is UK-listed? Government guidance says it won't, but that may be challenged in the courts.

"Companies are doing their best to comply with the new rules," says Hutton. "But you can't get anything done in some countries without making a small payment to the relevant person. That is now illegal, even though a certain level of facilitation payments is accepted under the US and some European anti-bribery legislation.

"The aims of the Act are perfectly legitimate and to be applauded, but the drafting is so poor. You can make a payment to a foreign official provided it is permitted by the written law of the country. But what happens if the law is silent?"

Gordon says it is vital that companies seek advice from professionals on how countries operate politically, and how to deal with government attempts to appropriate assets. He says most UK PLCs already have anti-bribery policies, but companies are making sure their procedures are adequate – these will be their only defence if they face a charge under the Bribery Act of failing to prevent bribery.

Overstated concerns

Other concerns range from the genuine, to the overstated and the downright wrong.

UK companies' concern over the 0.5% stamp duty on UK-listed shares transfers is understandable, says Hutton. "Few other European countries have a similar duty. It is payable even if the transfer takes place on a

• Grania Langdon-Down writes for *The Times* and *The Guardian*

> *Overall, 'comply and explain' is an effective approach.*
>
> **BRIAN GORDON, HOLMAN FENWICK WILLAN**

Comparing UK corporate governance (CG) with other main jurisdictions

Canada – Companies listing in Canada are bound by a regulatory framework similar to the UK. But the Canadian system is rules-based, while the UK's is principles-based. Smaller companies tend to list on the TSX Venture Exchange (TSX-V), but it has the same regulatory scrutiny as the main board (unlike the LSE and AIM). TSX and TSX–V listed companies must issue financial reports quarterly, rather than twice yearly as in the UK. Canadian requirements for exploration reports are more rigorous than the UK.

Foreign companies listing on the Canadian markets must disclose shareholding interests exceeding 10%. The UK threshold is 3%.

Australia – The ASX CG Guidelines, Listing and Market Rules are enforced and the 'comply or explain' approach is applied. Listed companies are also governed by directors' duties, rules on the remuneration of directors and disclosure obligations on mineral resources and reserves under the Joint Ore Reserve Committee (JORC) code.

Corporate governance is high on the agenda. The ASX is reviewing the adequacy of the highly regarded JORC code, which needs updating. Laxity in the drafting has led to abuses.

Queries have been raised about mining entrepreneurs who exert considerable control over the company, with conflict between their role as founder and sponsor and majority shareholder, and their role as director and chief executive.

Recent legal cases mean directors must now understand the company's financial statements, rather than just relying on their auditor's report.

South Africa – Corporate governance generally follows the UK framework. Johannesburg Stock Exchange (JSE) listing requirements impose specific corporate governance requirements and companies must disclose compliance in their annual report. The King Report on CG has moved from 'comply or explain' to 'apply or explain', so a company can derogate from a suggested practice it believes is not in its best interests and still comply with the overarching principles.

Companies must also consider the Mining Charter, which sets out requirements in regard to black economic empowerment. Failure to comply could mean mining rights being suspended or cancelled.

Hong Kong – The Companies Ordinance applies to all companies incorporated in Hong Kong. The code on CG practices applies to companies listed on the Hong Kong Stock Exchange (SEHK) using the 'comply or explain' approach. There are two levels of recommendation. For 'code provisions', companies must give considered reasons for non-compliance. For 'recommended best practices', companies are encouraged, not required, to explain any deviation.

Indonesia – Companies listing on Jakarta's Indonesia Stock Exchange (IDX) must comply with the Code of Good Corporate Governance. The IDX has limited listing rules with simple corporate governance regulations. But the government recognises that its regulation needs to be brought in line with other jurisdictions if it is to grow. The mining industry is dominated by large, family-owned companies with strong political connections who are now looking to float. Until corporate governance and the general business environment improves, most of the big listings will continue to happen outside of Indonesia.

foreign market – the Frankfurt Stock Exchange, for example, will collect it and remit it to the UK."

Directors' pay has become contentious. "Most principals in public mining companies have a fairly substantial equity position so, unlike bankers, they have a direct stake in how their company performs so there is an incentive not to kill their company," Gordon points out. "That is a point lost on critics."

Hutton says that other concerns about the formal requirements for a UK listing have been overstated. Reports that large shareholders in listed companies are being restricted to 30% voting because of poor corporate governance are "nonsense".

"The Takeover Panel simply says you can't acquire more than 30% of the shares in a listed company without making a bid for all of the shares. It is nothing to do with corporate governance. The 30% limit is included in acquisition documents to avoid a bid obligation from arising in reverse takeovers." Of more concern, he says, is the anti-commercial approach being taken by the European Commission and Parliament. "It's all about point scoring."

Gordon agrees: "Increased European regulation will limit London's attractiveness. It's good that politicians recognise that the City's role as an economic powerhouse should be protected."

However, he acknowledges that praising the system can be risky in the current climate. "When a foreign resources company makes a mistake, critics will be waiting to say 'I told you so'. But we should recognise that the rules and the enforcement measures are in place. If shareholders don't value the set-up, they can sell their shares. London has carved out a role as a central location for the resources sector and we should be celebrating that rather than demonising it as 'foreign invaders' coming to the UK."

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GOING WITH THE GRAIN

The Grain and Feed Trade Association (Gafta) has been promoting international trade and protecting its members' interests since the Victorian era. But for Pamela Kirby Johnson, Director General of Gafta, its mission is more important than ever in today's globalised world.

WORDS JON ROBINS

Founded in 1878 by major grain trading houses, Gafta originally dealt with a handful of contracts mainly for the Baltic and Black Sea region. Some exports covered by Gafta in the early days, such as Egyptian wheat and Californian barley, now no longer need Gafta contracts.

But the original aim – to provide discipline through harmonised documentation such as standard trading terms for the international grain trade – is very much alive and well. Gafta's early incarnation provided the basis of a contractual regime that still underpins international trade some 134 years later: grain, animal feedstuffs, pulses and rice are still bought and sold under the terms and conditions of Gafta contracts. "The philosophy and aims are still exactly the same today as they were then in terms of promoting international trade and protecting our members' interests," explains Kirby Johnson.

The supply chain of crops Gafta covers is vital to world commerce: grain, feed, pulses, rice, spices and general produce are all used in a vast range of products.

Global reach

Kirby Johnson, who has headed the association since 1992, says its global reach has "increased enormously". Gafta's main office is in London, but there are smaller offices in Geneva, Beijing and Kiev in Ukraine, and it currently boasts members in 87 countries.

TRANSOCEAN PROGRESS

> *Our motto is free trade and free market access for all countries.*
>
> PAMELA KIRBY JOHNSON, DIRECTOR GENERAL OF GAFTA

Members' top priorities are establishing where the markets are, and identifying the factors impacting prices and availability. But the association is also involved in many other aspects of trade. "We provide everything except doing the actual trade itself. At that point we stand back," Kirby Johnson says. "Although we are there to promote trade, we can't intervene when it comes to prices – that is something no trade association can do – but, that said, we deal with pretty much all the requirements to ensure the smooth-running of any transaction, from having the correct documentation in place to providing a Continuing Professional Development Programme on good business practices, documentation, contracts, rules and legislation for the education for employees of Gafta members at courses or by distance learning."

The major trends in the marketplace are climate, economic crisis and political unrest, Kirby Johnson says. "Things change constantly. The major changes since 2007 have been the impact of the credit crunch and the financial crisis. That has made an enormous impact on the trade for a variety of reasons."

Droughts and floods over the last five years have affected harvests, where often demand has outstripped supply. After drought caused crops to fail in Ukraine and Russia, the breadbasket of Europe, the price of wheat rose 70%, partly because both countries banned exports.

On the world stage, Kirby Johnson points to the emergence of China and India "turning into major players" and of Brazil, which she says has "grown enormously".

"On a smaller scale, we've seen ice preventing goods being loaded in places where, until now, one would never have necessarily anticipated ice," she continues. "It seems as though almost all countries are impacted in some way by climate changes".

The turmoil has helped drive Gafta's membership to more than 1,300, with further growth anticipated for next year, continuing a two-decade-long year-on-year increase. "We've seen a massive increase in membership from Russia, Kazakhstan and Ukraine in the last 10 years. Their membership reflects internal pressure in those markets to put in place a proper system of regulation."

Free trade, market access

Regulatory and legislator hurdles are an important consideration for Gafta. "Our motto is free trade and good market access for all countries – which is very similar to the WTO liberalisation trade agenda," says Kirby Johnson. "What concerns us most is when countries introduce quotas and tariffs on agricultural commodities. That is a constant lobbying issue."

She points to the introduction of a wheat export

Quality assured

Consumer concerns over where food comes from are focusing buyers' attention on suppliers. The Gafta Trade Assurance Scheme (GTAS), which is open to all companies operating in the international grain and feed trades, covers each stage in the trading and logistics supply chain, from farm in the country of origin to delivery to the final end-user in the country of destination.

The idea is to promote the best professional practices, with the aim of maintaining consumer confidence in the handling and delivery of safe food and feed. According to Pamela Kirby Johnson, Director General of Gafta, the GTAS scheme was introduced "in reaction to consumers and supermarkets seeking assurance that their goods were at no risk when they were being transported – be they in a store, lorry, ship, or wherever else. The quality assurance scheme audits service providers."

Gafta is also looking to expand the scheme to include issues about sustainability – that goods come from a country where there is no adverse environmental impact, for example no deforestation, or from a country which complies with all the relevant labour laws.

Gafta at a glance

Gafta, the Grain and Feed Trade Association, is an international trade association, which represents international trade in agricultural products and general produce. It seeks "to promote international trade in grain, animal feed materials, pulses and rice and to protect the interests of our members worldwide, providing the support and international contacts they require."

Gafta has offices in London (16 staff) covering arbitration, events, training and education. There are also smaller offices in Beijing, China and Kiev in the Ukraine. It has over 1,370 members in 87 countries.

The Director General of Gafta, Pamela Kirby Johnson OBE, is responsible for the workings of the four Gafta offices. Through her representation of Gafta at many international forums and training programmes, she is widely recognised as an expert on a variety of trade issues, which include quality assurance, standards of best practice for all trade operations, contractual and dispute resolution issues, in promoting Gafta's prime aim for a free and open market.

Kirby Johnson was made an OBE in 2002. She is also the Secretary of the International Federation of Essential Oils and Aroma Trades, and Director of the Federation of Commodity Associations.

quota in 2010 by Ukraine, one of the world's top grain exporters. "There was actually no need to do so because they had a surplus. This is something we believe should be freely dealt with by companies and without government interference." The quota was lifted last year.

International legislation can also have a major impact, which is why Gafta's Geneva office monitors European policy-making. "We often have to make considerable representations to the EU. Europe itself imports a lot of material and there is concern about the limits that they put on the substances being imported into the EU, which might be out of step with other exporting countries. We do a lot of lobbying in the EU to try and ensure things operate on a harmonised level."

Concerns arising out of the movement of genetically modified organisms (GMO) are one example. "When materials are genetically modified, some countries have to approve those modifications. The EU can be very slow going through the approval process, so a lot of goods cannot be shipped to the EU."

Such global issues require wide-ranging engagement. Gafta is part of the International Grain Trade Coalition, comprising some 22 national and international trade associations with – as Kirby Johnson puts it – like-minded people from North America, Australia, Canada, Brazil, Argentina and China. The coalition brings together expertise and representation to advise governments on the commercial requirements and economics of the world's food, feed and processing industries, including advice on the implementation of the Cartegena Protocol on Biosafety, which covers the safe handling, transport and use of living modified organisms. "We are trying, through lobbying government, to get some synchronisation of approach to how they deal with GMO," she explains.

Gafta has also made representations on the Markets in Financial Instruments Directive (MiFID), which provides harmonised regulation for investment services across the 30 Member States of the European Economic Area. "Most of the discussion so far has centred around the operation of the futures markets and we represent the physical cash markets. We are pushing for free trade."

Dispute resolution

Disputes inevitably accompany trade. This is also an area where Gafta can help – its 52 arbitrators offer services for parties using its standard forms of contract. There are typically about 200 cases on its books at any one time. "By and large, the vast majority of disputes are about whether somebody has fulfilled the contract, for example, either failing to comply with the delivery or shipment date or failing to pay," says Kirby Johnson.

While the clarity of contracts means major disasters or straightforward prohibitions usually do not result in disputes, the Ukraine wheat ban caused chaos, she continues. "There was so much uncertainty as to whether people should or should not fulfil their contracts."

London remains the main jurisdiction of choice for the resolution of such fall-outs, but there are "one or two countries biting at its heels hoping that they can take on that mantle", she says, citing Singapore as a good example. "However, the UK's Arbitration Act is so internationally-friendly that you can hold your arbitration anywhere."

Gafta arbitrations are intended to be for commercial people, so parties are judged by commercial people. "For a very long time, Gafta and the other trade associations would not allow solicitors or lawyers to attend their arbitration. We have relaxed that rule to a large extent and now in a vast number of cases each party will engage a lawyer. But they don't tend to turn up at a great number of oral hearings – a trade representative is generally used." hfw

• **Jon Robins** writes for *The Observer, Financial Times* and *The Times*

M&A GETS LEAN AMID DOWNTURN CHAOS

Last year saw about $2 trillion worth of M&A business globally, only about half of 2006-07 levels. But there is activity in areas less affected by the downturn and housekeeping acquisitions among mid-sized companies remain fairly buoyant.

WORDS POLLY BOTSFORD

The current economic turmoil is to blame for lower M&A activity, according to Alistair Mackie, a HFW Partner. "Due to significant global uncertainty, companies are going to wait and choose the right time to make deals. It is not now."

Scott Moeller, Director of the M&A research centre at Cass Business School, says an unforeseen deal may act as an M&A catalyst. "We need an unexpected trigger event in a sector that hasn't seen this type of activity at all, rather than a huge deal like the recent Glencore/Xstrata merger. The pharmaceuticals sector has seen some activity, so Glencore was not so unexpected. But it would be very unexpected if there was a deal of that size in financial services or in the industrial sector."

At the moment, such an impetus looks unlikely. Problems in the eurozone continue to dampen M&A prospects there. For many, this marks a sea change in the global M&A scene, away from European dominance. "There is undoubtedly much less European activity, far fewer sales," says Mackie. "Companies who have stuck it out this long are not going to put up for sale now; they are going to see this through. Instead, they are finding other ways out of difficulties, restructuring and so on."

And although there is fallout from the eurozone to the rest of the world, the effect is not as powerful as it once may have been, as Mackie says: "A lot of companies in emerging economies are dependent on the US and European markets. However, there is also a lot of trade which is bypassing the eurozone, for example intra-Asian trade such as that between China and Indonesia. This type of trade has really developed and these economies have a more proactive stimulus-led response to a recession, rather than Europe's batten down the hatches approach."

"There is a lot of trade that is bypassing the eurozone."

ALISTAIR MACKIE, HOLMAN FENWICK WILLAN

Changing focus

Another reason M&A activity has not recovered to 2006-07 levels is because the nature of the deals is changing. The trend is moving away from large companies getting their growth solely through M&As. Some of the biggest deals proposed never materialised, such as Prudential's plan to acquire AXA's European business.

Mackie says that, as M&As among larger organisations slow, activity among mid-sized companies is continuing. "Chinese companies, for instance, are increasingly looking internationally and are buying up companies in a variety of countries, despite the cultural differences." This is 'housekeeping' M&A on a smaller scale – still active, but not generating the value of pre-recession times.

The varying buoyancy levels of different sectors during the global economic downturn is reflected in their M&A activity. The shipping sector did not do well in 2011 and the outlook for 2012 is similar. This may, however, lead to some M&A activity, Mackie explains. "As more companies throw in the towel and the bigger players look to dominate the shipping market, there may be some M&A deals done."

In the ports sector the story is more cheerful, with some growth, mainly from China, that has kept up activity. Greater competition between different port terminals, particularly in transhipment, may also result in company activity.

Real growth, however, is in evidence in the

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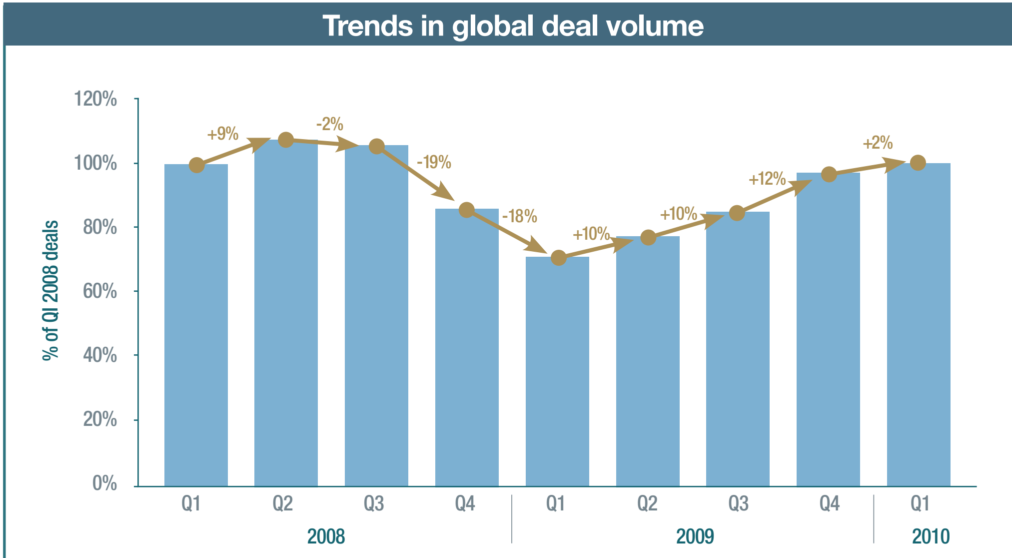

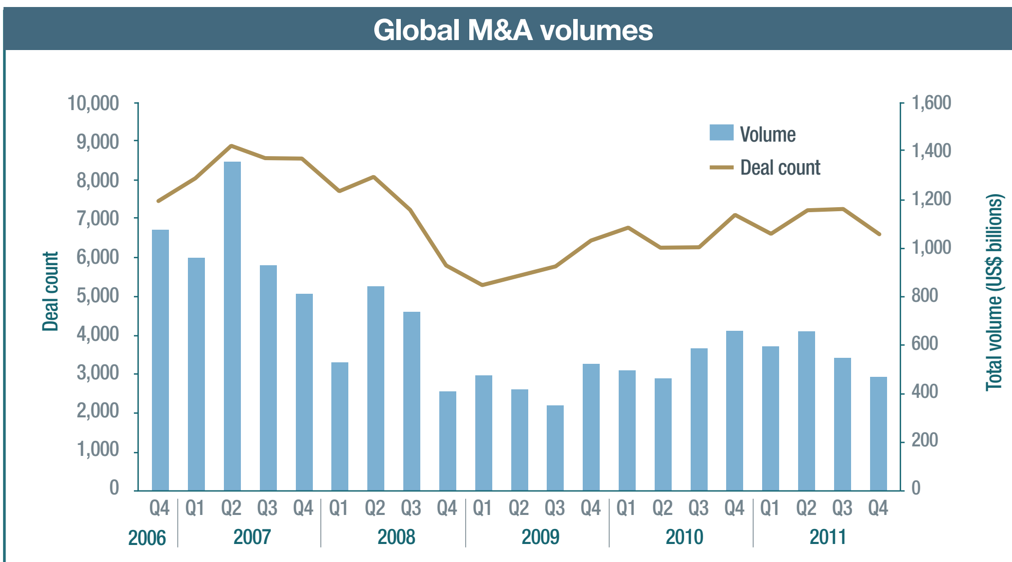

extractive industries, and in the new oil and gas terminals, such as Western Australia and Qatar, which may result in activity as infrastructure projects develop. These developments may have a knock-on effect on the tanker shipping business too.

Bright spots

Renewables, aerospace and defence were other winners in 2011. Figures recently published by PwC show renewables deals with an aggregate value of $53.5 billion for 2011, and aerospace and defence closing 341 deals with values reaching a record combined level of $43.7 billion.

Of course, given that M&A activity is driven much by the state of the equity market, doing well in 2011 is not a good gauge for 2012.

As Moeller explains, price volatility is an important consideration. “If we have huge volatility in markets, then companies won’t feel the price is right. You need at least six months of stability.” The equity markets have had a few good months, so if this continues, says Moeller, “M&A activity will come back in the second half of the year”.

Yet 2012 has the added problem of being busy politically, with elections in France and the US, and China expected to welcome a new Premier. Companies and the markets will be closely watching for any potential shifts of focus that emerge as a result.

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FINANCIAL INSTITUTION FRAUD CAN EXPOSE GAPS IN INSURANCE

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Financial institutions must understand their Crime and Bankers' Blanket Bond cover or they could face substantial uninsured losses if they fall victim to fraud, says HFW Associate, Graham Denny.

Financial institutions (FIs) have implemented highly sophisticated risk controls and strategies to fight fraud attempts by professional criminals outside their organisation. But the enemy within has proved harder to defend against, especially without hobbling employees' ability to operate in fast moving markets.

FIs are vulnerable to attacks from rogue traders or other employees in positions of trust – recent cases have resulted in billions of pounds worth of losses, underlining the importance of Crime or Bankers' Blanket Bond insurance. Such insurance cover can provide FIs with millions of pounds' worth of protection against losses caused by a malicious or dishonest employee. But FIs can find that their expensive policy is more limited in scope than they realised, leading to protracted disputes with insurers.

Disputes arising around policy wordings can start with the actual notification of the loss and the time taken to put together a proof of loss document. Both often have strict time limits and requirements, which can pose problems to an insured, depending on the complexity of the fraud and losses incurred.

Tricky definitions

Such policies will usually cover direct financial losses, as opposed to indirect losses: FIs may find that substantial sums can fall outside the cover provided.

Even the seemingly black and white aspects of wordings can create problems. The employee dishonesty cover provided by crime policies usually only responds to acts carried out by or involving an employee, so the definition of 'employee' in the policy can be a highly important factor. Contracted staff, for example in IT, could be implicated in a fraud. But if they are not remunerated directly by the insured company or under the insured company's control, they may not be classed as employees under the terms of the insurance.

"FIs may find that substantial sums fall outside the cover."

GRAHAM DENNY, HOLMAN FENWICK WILLAN

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The issue of the 'intent' by the perpetrator is another area that frequently creates disputes. Policy wordings usually stipulate that the fraudulent act must be committed by an employee with the intent of making an improper financial gain or causing loss to the employer. Problems can arise with this definition: for example, if a rogue trader's unauthorised transactions cause substantial losses, issues often arise as to whether that trader intended to cause his employer loss or whether his actions were undertaken to make an improper financial benefit. In relation to the latter, policies often exclude salary, fees, commissions, bonuses, salary increases, profit sharing "and other emoluments or benefits" from the consideration of the intent to make an improper financial benefit.

Get good advice

It is important to understand the scope of a crime policy and of other insurances that may be triggered by a fraud event. Forging a good working relationship with insurers also helps in the claims process. Some FIs are better resourced than others, and are therefore able to devote a greater amount of time to the insurance aspects of their business, and to relationships with their insurance brokers and insurers. Smaller FIs, which may have fewer resources, are likely to be more heavily reliant on their insurance broker.

To mitigate the dangers, FIs should be proactive in seeking expert advice on the scope and the wording of all their crime-related insurance policies. Guidance from the outset can save a great deal of time in insurance claims and help maximise the amount recovered.

Sympathy among shareholders and other stakeholders will be in short supply if the wrong insurance cover or limited insurance cover leaves a big hole in the balance sheet.

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HFW AROUND THE WORLD

A snapshot of developments involving Holman Fenwick Willan's lawyers at the firm's offices around the world.

1 London HFW acts in La Senza collapse

Freight specialist Uniserve has won the right to keep a cargo of lingerie after the collapse of high street retailer La Senza. A team of HFW lawyers acted for Uniserve after KPMG, La Senza's administrators, asked Universe to deliver goods worth around £2.2 million, without the immediate payment of Uniserve's charges and without the provision of an indemnity. The Managing Director of Uniserve said the judgment "gives companies like Uniserve comfort that if they contract on suitable terms they will be recognised as secured creditors in an administration". He also complimented the firm's work. "HFW did an excellent job to defend Uniserve against the unnecessary challenge by the administrators on Uniserve's legitimate legal position."

2 Melbourne HFW Partner named one of Lloyd's List Twenty-Five Faces of Australian Shipping

Gavin Vallely, Managing Partner of HFW's Australian offices, has been named in Lloyd's List DCN's Twenty-Five Faces of Australian Shipping. Cited for his key role in modifying the Australian Taxation Office's approach to the issue of royalty withholding tax, he is the only solicitor on the list.

3 Paris HFW advises COTCO on pipeline pre-financing

A team of HFW lawyers has advised the Cameroon Oil Transportation Company (COTCO) in the €75.3 million pre-financing for the development of the Chad-Cameroon pipeline to the Lom Pangar Hydro Power project. The pre-financing will help COTCO to complete modification work on several kilometres of pipeline, making it possible for the Cameroon government to build a dam reservoir at the confluence of the Lom and Pangar rivers.

4 Perth HFW expands in mining with new hire

In an expansion to its mining capabilities, HFW welcomes Cheryl Edwardes to its Perth office as a Partner. Edwardes, who is Western Australia's former Attorney-General and Environment Minister, joins from Hancock Prospecting Pty, where in her role as Executive General Manager – External Affairs, Government Relations and Approvals, she helped to secure most of the necessary government and regulatory approvals for the company's major mining and infrastructure projects.

5 Dubai and London HFW promotes three to Partner

The firm continues to invest across its core sectors, including aviation, insurance and logistics, with three internal promotions to partner. The firm's Dubai office is boosted by the promotion of Sam Wakerley, specialising in shipping, trade and insurance (marine and non-marine), while in London, Edward Spencer, an aviation insurance specialist who joined the firm with the former BLG aviation team, and Justin Reynolds, who focuses on logistics and multimodal transport, are welcomed to the partnership.

Holman Fenwick Willan has offices in São Paulo, London, Paris, Rouen, Brussels, Geneva, Piraeus, Dubai, Hong Kong, Shanghai, Singapore, Melbourne, Sydney, Perth.

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