DECEMBER 2013

INTERNATIONAL COMMERCE

Strategic, regulatory and operational insight from Holman Fenwick Willan

WEAVING A NEW SILK ROAD

PROTECTIONISM AND TRADE AGREEMENTS

MINING: DIGGING DEEP TO REALISE PROFITS

SHIPPING FINANCE GOES PRIVATE

CYBER LIABILITY: UNDER COVER THREATS

holman fenwick willan hfw

WELCOME

Despite increasingly evident signs of a recovery, the ripples of the economic crisis and subsequent downturn continue to impact the world economy.

The spectre of protectionism has been raised, as we find on page 6, constricting the potential for economies to trade their way out of difficulty. Progress towards free trade has so far been slow and incremental.

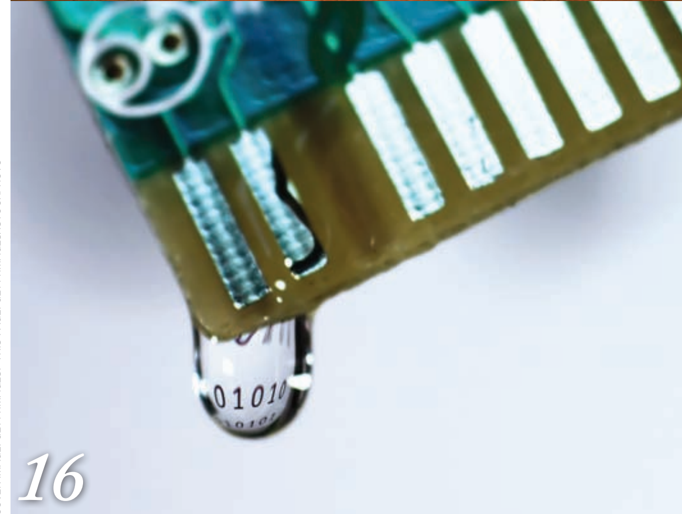
New solutions for trade might help catalyse change of the type already seen in ship and offshore financing. We examine on page 12 how the withdrawal of traditional sources of finance has seen private equity step in, with intriguing results.

Mining, too, is in a period of adjustment amid constrained revenues, as we show on page 10. Increasingly, infrastructure considerations such as effective supply chain management are needed to enhance operational efficiency.

Rapidly evolving cyber risks also require companies to take careful stock of their position, as we explain on page 16. Insurance is an important piece of the protection puzzle, but avoiding gaps and duplication needs specialist advice.

Indeed, we are confident that our understanding of the issues facing global businesses makes us an ideal partner to help navigate an unsettling time. I hope that *International Commerce* offers an informative introduction.

RICHARD CRUMP
SENIOR PARTNER
HOLMAN FENWICK WILLAN



COVER IMAGE: GETTYIMAGES. THIS PAGE: GETTYIMAGES/ISTOCKPHOTO

Contents
DECEMBER 2013

12

18

04 **IN BRIEF**
New regulations for extractive industries; the P3 Alliance; tightening the reins on case management; state immunity defence eroded.

06 **WEAVING A NEW SILK ROAD**
Trade agreements now seem to be back on the agenda. But the devil is in the detail for such agreements, with many struggling to reach fruition.

10 **MINING FOR NEW IDEAS**
The mining industry's boom times seem to be over. The focus is changing as mining companies consider how to manage infrastructure and supply chains more cost effectively.

12 **SHIPPING FINANCE GOES PRIVATE**
As banks reel from the downturn in shipping, other investors have spotted an opportunity. But many of these investors have at best limited experience, raising new challenges.

16 **UNDER COVER CYBER THREATS**
Insurance is an increasingly crucial risk management tool for companies that are struggling to keep pace with cyber threats, but may not be the whole solution.

18 **HOPE SPRINGS ETERNAL**
New Year 2013 saw the launch of the first new major player to enter the UK building materials market for many years. Starting out in a challenging economic climate, Hope Construction Materials arrives aptly-named.

22 **HORIZONTAL CONTRACTING**
Collaborative contracting in the logistics sector can help companies benefit from reduced costs and greater convenience, and so increase efficiency and profits.

23 **AROUND THE WORLD**
A snapshot of developments in HFW's international offices.

If you have any questions about the issues raised in this publication, please contact Tania Phayre, Holman Fenwick Willan, on +44 (0)20 7264 8546

Produced by Grist,
21 Noel Street, Soho, London W1F 8GP
Publishing director: Mark Wellings
Editor: Tania Phayre
Deputy editor: Sam Campbell
Art director: Andrew Beswick
Proofreader: Alan Friedler
Commercial director: Andrew Rogerson
T: +44 (0)20 7434 1447
Website: www.gristonline.com

Holman Fenwick Willan LLP
Friary Court, 65 Crutched Friars, London EC3N 2AE.
T: +44 (0)20 7264 8000 F: +44 (0)20 7264 8888

© 2013 Holman Fenwick Willan. All rights reserved.

While every care has been taken to ensure the accuracy of the information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice.

Holman Fenwick Willan LLP incorporates the firm's London, Brussels and Shanghai offices. Holman Fenwick Willan France LLP incorporates the firm's Paris and Rouen offices. Holman Fenwick Willan Switzerland LLP incorporates the firm's Geneva office. Holman Fenwick Willan Middle East LLP incorporates the firm's Dubai office. Holman Fenwick Willan International LLP incorporates the firm's Piraeus office. Holman Fenwick Willan Singapore LLP incorporates the firm's Singapore office. Our practices in Hong Kong, Melbourne, Sydney and Perth remain as partnerships. Our São Paulo office is operated by a corporate entity.

Holman Fenwick Willan is the data controller for any data that it holds about you. To correct your personal details or change your mailing preferences, please contact Craig Martin on +44 (0)20 7246 8109, or email craig.martin@hfw.com

holman fenwick willan hfw

INBRIEF

Emerging legal and commercial issues for international business

New regulations for extractive industries

ISTOCK IMAGES

Companies engaged in the extraction of natural resources, such as oil, gas, mining and logging, might be subject to the new EU regulations on transparency and disclosure requirements.

Alongside transnational anti-corruption regulations, the Extractive Industries Transparency Initiative (EITI) Standard has been introduced to improve transparency. It requires comprehensive project-by-project reports to be submitted by multi-stakeholder groups (government, industry and civil society).

Mirroring the EITI Standard, the Accounting Directive requires the annual reporting of all material payments made on a country and a project basis. The threshold above which reporting is mandatory is set at €100,000 within a financial year, including a single payment as well as a series of related payments.

Affected companies should prepare new codes or frameworks for corporate governance to regulate their economic behaviour, also ensuring they are able to implement the compliance programme and remain on top of transparency and disclosure issues.

When entering into a new project, assess carefully the project and the arrangement and check whether disclosure is permitted under local law and the respective contract. Companies should consider renegotiating the terms of contracts to establish proper payment procedures and ensure that the confidentiality provisions permit disclosures to be made when required by law.

Logging firms are among those potentially affected by new transparency and disclosure requirements

The P3 Alliance

One of the primary objectives of the proposed global operational alliance (the P3 Alliance) between Maersk Line, Mediterranean Shipping Co and CMA CGM (the P3 Partners) is rationalisation, including port and terminal calls.

KPIs are the primary tool used by both shipping lines and port operators to measure and compare the efficiency and performance of terminals, and are used as minimum agreed service levels.

Service levels are independently negotiated, will differ between terminals and can be influenced by the interrelationships between service providers and port users. The P3 Partners may seek to renegotiate certain terms and conditions of their existing terminal services agreements (such as berthing windows and handling charges).

In any negotiation or renegotiation of KPIs, terminal operators and shipping lines will seek to establish some balance. For example, too onerous KPIs risk terminal operators being made systematically liable for liquidated damages in case they are not able to deliver in accordance with the terms of the contract. On the other side, they will seek guarantees from the shipping lines in respect of minimum throughput during the term of the agreement and failure by shipping lines to meet such minimum throughput may entitle the terminal operator to receive liquidated damages from the shipping line to compensate them.

Rationalising port and terminal calls can throw up complex legal issues related to KPIs

ISTOCK IMAGES

The proposed P3 Alliance is an interesting backdrop for port operators to consider the mechanics of terminal services agreements – port operators must be mindful of this interplay between commercial and legal considerations and cater, as far as possible, for its evolution when entering into, negotiating or renegotiating such agreements.

The industry will watch with interest the outcome of the 17 December 2013 summit in Washington, where regulators from the US, Europe and China will discuss competition between container lines.

Tightening the reins on case management

The sheer volume of documents involved in large and complex court cases means mistakes can happen despite care and attention. A recent Australian High Court decision requires legal advisers to think carefully about the principles of case management.

The *Expense Reduction and Analysis Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* case was ostensibly all about the inadvertent waiver of the client's legal professional privilege attaching to discovered documents.

Of the approximately 60,000 documents, only 13 were in issue by the time the litigation reached the Court of Appeal of New South Wales. Nine of the 13 documents were found to have been disclosed inadvertently.

The High Court observed that the litigation was substantial and "should have been averted", taking the opportunity to highlight the overriding purpose of the Civil Procedure Act (CPA), which requires that the court "facilitate the just, quick and cheap resolution of the real issue".

The High Court emphasised that solicitors must determine, not only whether there is any real, substantive benefit in disputing the return of inadvertently disclosed documents, but also facilitate the overriding purposes of the CPA. These obligations apply equally both to in-house counsel and to arbitrations.

The Court also noted that the Australian Solicitors' Conduct Rules stipulate that a solicitor must return material which is known or reasonably suspected to be confidential, where that solicitor is aware that the disclosure was inadvertent. The New Solicitors Rules, which will take effect from 1 January 2014, will codify this provision into New South Wales law and place a formal obligation on legal advisers.

State immunity defence eroded

In a case set to have significant impact for international traders seeking to rely on immunity defences, the English Commercial Court has held that Iraq's national oil trading company, SOMO, has a separate corporate status from the Iraqi State and is therefore not entitled to rely on State immunity to avoid payment of a final arbitration award of $9 million.

The judgment handed down on 18 November 2013 found that "there is no sovereign immunity that prevents the operation of the Third Party Debt Orders and the receivership orders in respect of the promise to pay made to SOMO under the letter of Credit", rejecting SOMO's insistence that it may rely on State immunity to avoid paying demurrage bills dating 2004–7.

This decision represents the potential erosion of the State immunity defence for all state-owned trading companies worldwide seeking to evade payment of their debts.

International traders, particularly those doing business with nationally owned companies, stand to benefit from the Court's ruling. The long-term impact of this judgment against SOMO, stripped of its State immunity defence, should be of interest to the commodity trading world at large and to international oil traders in particular. Both sides were given leave to appeal certain issues.

EVENTS DIARY

Cargo Insurance in Practice
Geneva, 16 January 2014
HFW Partner Paul Wordley and Associate Ciara Jackson will be speaking on cargo insurance as part of the firm's annual Geneva seminar series.

Offshore Wind Power Conference
HFW, Friary Court, London, 29 January 2014
HFW will be hosting a conference on offshore wind power, looking at where the current market is, how the market is developing and where it is going in the future. HFW experts will be joined by a number of industry speakers.

Chamber of Shipping Dinner
London, 3 February 2014
A team of HFW Partners will be attending this annual industry dinner.

Litigation in West Africa
London, 5 February 2014
HFW Partners Stanislas Lequette and Xavier McDonald will be hosting a seminar for P&I Clubs focussing on legal proceedings in West Africa.

Commodity Derivatives Regulation and how it affects traders in Switzerland
Geneva, 13 February 2014
As part of our Geneva seminar programme, HFW Partner Robert Finney and Associate William Hold will be presenting on EU commodity derivatives regulation giving specific focus to how traders in Switzerland are affected.

APRAG Melbourne Conference 2014
Melbourne, 26 – 28 March 2014
HFW is delighted to be gold sponsor of this annual arbitration conference. Partner Nick Longley will be speaking on the public policy exception to enforceability, with particular focus on regional idiosyncrasies, and Partners Damian Honey and Chris Lockwood will also be attending the conference.

For further details, please contact
Sarah Vertanness, Events Manager:
Telephone: +44 (0)20 7264 8324
Email: events@hfw.com

WEAVING A NEW SILK ROAD

After signs of increasing 'beggar-my-neighbour' protectionism in the wake of the financial crisis, trade agreements now seem to be back on the agenda for the US, Europe and Asia. But the devil is in the detail for such agreements, with many struggling to reach fruition.

WORDS POLLY BOTSFORD

What do steel pipes, bananas and hormones in beef have in common? They were all at the centre of trade wars and stand-offs where countries threatened – and sometimes even realised – tit-for-tat tariffs on imports.

There were fears that the global financial crisis would cause greater protectionism and a new wave of trade wars. In fact, what we have is trade talks: inter-state engagement towards a number of bilateral and multilateral regional free trade agreements (RTAs). For example, there are currently talks involving the EU and the US, between 12 countries within the Pacific Rim region stretching from the US to Australia and Vietnam, as well as between the EU and South East Asia.

However, it is possible that current international dialogues will never reach a conclusion (or at least not the conclusion that was expected). The more recent 'mega-regionals' have been talked about for a long time already, particularly an EU–US deal, and there is a sense that negotiators may have bitten off more than they can chew both in geographical scope and content. In his State of the Union address, President Obama talked up the creation of the largest free trade zone in the world, but progress may not be smooth – France has already demanded protection for its film and television industry and the project has been put on the back burner before.

Whether or not these particular deals come to fruition, another problem is that the greater the focus on bilateral RTAs the less focus there is on the World Trade Organisation's (WTO) multilateral free trade approach: the Doha Round of the WTO has stalled and some fear for the longer-term credibility of the organisation.

There is no disputing the proliferation of RTAs since the 1990s, with around 400 now registered with the WTO. The EU has just secured an agreement with Singapore which it hopes will pave the way for agreements with other South East Asian countries such as Malaysia and Vietnam.

Bringing together the many regional trade agreements will be challenging

The ultimate hope is that separate agreements could be stitched together to form an EU–ASEAN (Association of South East Asian Nations) trade deal to keep the EU in the economic loop of the Asian markets. The ASEAN region is the EU's third largest trading partner, exchanging €206 billion of goods and services in 2011. Nicholas Richards-Bentley, a Lawyer in HFW's Brussels office, says: "The EU invests heavily in the ASEAN region and trades significant levels of high-end goods too. The EU–Singapore agreement is a key stepping stone towards cementing the EU's relationship with ASEAN."

But looming over these discussions are two even larger deals: the EU–US Transatlantic Trade and Investment Partnership (TTIP) and the twelve-country Trans-Pacific Partnership (TPP).

Delicate balancing act

If it goes ahead, the EU-US trade deal will be the biggest agreement to date in terms of the volumes of trade involved, with the EU and US reported to trade $2.7 billion of goods and services each day. The TTIP was launched at the G8 summit in Northern Ireland in 2013 and is set to conclude by summer 2014 (though the consensus is that this timetable is near impossible). Negotiations are not done publically so the exact details are unknown, but any agreement is likely to include a reduction of tariffs and would also tackle non-tariff barriers (NTBs), such as regulations on car safety or drugs trials, by bringing a level of regulatory harmonisation or convergence in these areas. The TTIP is tipped to deliver economic gains to the EU of €119 billion a year.

The TPP is equally ambitious as it covers such a vast area and encompasses 12 contrasting economies, such as Vietnam, Japan and Brunei. TPP negotiations are also not in the public domain but any agreement would involve substantial tariff reductions and also deal with non-tariff issues. If it happens, the TPP will

GETTY IMAGES

constitute countries that collectively generate 40% of global GDP.

But these agreements are hugely ambitious undertakings, which may never be realised because their scope is much greater than traditional trade agreements, and often contain provisions that challenge national policies and regulations: "These agreements raise fundamental issues for national governments," says Hazel Brasington, Partner at HFW. "For instance, Australia must balance its desire to keep intact its image as a place with high levels of bio-security (delivering 'clean food') with its need to engage in RTAs or multilateral agreements that could dilute that image."

These agreements raise fundamental issues for national governments.

HAZEL BRASINGTON, HOLMAN FENWICK WILLAN

Indeed, a Trans-Pacific Strategic Economic Partnership Agreement (TPSEP) between Brunei, Chile, New Zealand and Singapore was first reached in 2005. The TPP proposes to significantly expand the TPSEP, and is now on its twentieth round of talks. The main sticking point is reported to be the issue of intellectual property (IP) rights: in broad terms, the Asian economies are concerned that the US is negotiating for greater IP protection that would undermine their ability to make things such as generic drugs. As Richards-Bentley says, it is the last part of any trade agreement that is the hardest. "The toughest issues are decided on right at the end, so you may get 95% of the issues agreed, but it is the last 5% that could scupper the whole thing. Also, the goalposts keep shifting and other countries, such as South Korea, may yet join negotiations."

As for the EU-US agreement, because it focuses so much attention on NTBs rather than tariff reduction, the main hotspots are likely to be caused by domestic regulatory concerns across a number of sectors. Dan Ikenson, Director of the Herbert A. Stiefel Center for Trade Policy Studies at the Cato Institute in Washington DC, cautioned in a recent paper that the TTIP could easily become "a decade-long transatlantic cocktail party for negotiators, advisers and lobbyists."

Updating the WTO

Yet, these bilateral and multilateral RTAs appear to stand a better chance of getting agreed than the multilateral WTO agreements, whose talks have stalled. Although the WTO has been considered an important preventative tool against trade wars and protectionism since its inception in 1995, the Doha Round of talks, which started in 2001, have made little progress.

The WTO needs to update itself, says Ikenson. "The world is a very different place to what it was when the Doha Round started. There is greater negotiating power among nations which were previously listeners, such as Brazil, India and China."

"Since the last WTO round – the Uruguay Round – was completed in 1994, the scope of what passes for trade issues is much broader and now includes internet commerce, the role of state-owned enterprises participating in the global market and NTBs as opposed to tariff reduction. Indeed, ambitious, multilateral agreements involving 159 countries may be a relic of the past."

A history of free trade

c.100 BC – Stretching more than 6,000km, the Silk Road links Europe, Central Asia, the Subcontinent and East Asia, its trade becoming a significant factor in the development of many civilisations.

1776 – Adam Smith writes The Wealth of Nations but very few trading countries pursue free trade, not even the newly de-colonised US which introduces its first tariff in 1789, only 13 years after independence.

1846 – Symbolic repeal of the Corn Laws, tariffs on grain into England. This is followed by several European free trade agreements in the 1860s, such as between England and France.

1930 – Smoot-Hawley tariff in the US introduces duties on 20,000 imported goods. Some argue this contributes to the Great Depression.

1947 – Following the economic devastation of WW2, creation of General Agreement on Tariffs and Trade – 23 countries agree to rationalise trade tariffs.

1957 – Treaty of Rome creates common market of the EEC.

1978 – China's Communist Party decides to reform its economic system and open up to foreign trade.

1987 – With Gorbachev comes liberalisation of foreign trade in the Soviet Union. It also gains observer status at the General Agreement on

The toughest issues are decided on right at the end, so you may get 95% of the issues agreed, but it is the last 5% that could scupper the whole thing.

NICHOLAS RICHARDS-BENTLEY, HOLMAN FENWICK WILLAN

There is also an argument that the greater the number of RTAs outside the WTO, delivering what is referred to as 'WTO-plus' agreements, the more the WTO loses its credibility. This is a problem not least because the WTO has shown itself to be useful and respected as a body for dispute resolution in trade fallouts, treading a delicate path between upholding supranational agreements and respecting national sovereignty.

Indeed, there have been a staggering 467 disputes put before the WTO since its inception almost 20 years ago. Richards-Bentley says: "Although the WTO dispute resolution system may not always function ideally, it would be unfortunate to see the importance of this relatively well-tested mechanism decrease in the face of less-tested dispute resolution mechanisms contained in some bilateral and multilateral RTAs."

Facing a dead end?

For instance, the single undertaking approach, which posits that nothing is agreed until everything is agreed, may explain the failure to conclude the Doha Round. "Requiring that agreement be reached on all issues before a deal is inked, gives too much leverage to tangential issues and empowers governments to effectively take hostages, which is an anathema to reaching agreement," argues Ikenson. "Allow smaller agreements to be reached in succession and something big could be achieved."

With respect to the TTIP negotiations, Ikenson argues that "negotiators should divide up the issues, rank them in order of importance, and spread them over a number of years."

The other way perhaps to limit the scope of the WTO's ambitions and therefore make agreement more likely is not to insist that all 159 member countries sign up to each agreement at once. Instead, one can get the agreement of a few countries and others can join later on – a strategy known as plurilateralism. Some WTO agreements have already done this, such as the Agreement on Government Procurement and the Information Technology Agreement.

Not everyone believes that RTAs threaten the multilateral approach and see a place for both in parallel, however. Ronald Stewart-Brown of the UK's Trade Policy Research Centre recognises that RTAs can add materially to the benefits of the multilateral trading system. But, he says, often their trade liberalisation benefits are much less than their negotiators like to claim. Reasons include the exclusion of higher tariff foods and agricultural produce from tariff reduction provisions, restrictive rules of origin and the practical difficulties of addressing non-tariff barriers through RTAs.

There is yet another thesis when it comes to free trade: that the surest path is unilateral free trade, namely each country voluntarily deregulating and removing its own barriers to trade. This is because RTAs in particular make free trade ever more complicated by slicing up the world into a kaleidoscope of different arrangements. But such action is rare. At least for the time being the mega-regionals march on.

hfw

• **Polly Botsford** is a legal and current affairs journalist.

For more information, please contact Folkert Graafsma, Partner, Holman Fenwick Willan,
+32 2 643 3404
folkert.graafsma@hfw.com

Tariffs and Trade (GATT) and a year later signs normalisation agreement with EEC.

1986–1994 – Uruguay Round of GATT creates WTO.

1994 – North American Free Trade Agreement (NAFTA) comes into force. Proliferation of bilateral RTAs ensues.

1995 – Geneva-based WTO is born on 1 January. Currently has 159 members.

1998 – Appeal decision on long-running dispute between EU and US on hormones in beef. The Appellate Body of WTO confirms original WTO Panel reasons that EU ban on livestock with hormones is not based on sufficient scientific evidence and is in breach of trade agreements.

1998 – Rising freight flows from Asia-Pacific region to destinations in Central Asia, Caucasus and Europe mean the ancient Silk Road could be making a comeback with the International Transport Corridor Europe–Caucasus–Asia (TRACECA), which also includes the development of trade relations and the integration of the economies of participating countries. A corresponding unified regulatory basis and tariff rules are being developed.

2001 – Doha Round of WTO is launched in Qatar. Doha Development Agenda has 21 points. Doha has missed original deadline of 2005 and subsequent deadlines.

2004 – Long running billion-dollar dispute between Airbus (EU) and Boeing.

2013 – December ministerial meeting of Doha Round. The final fling?

MINING FOR NEW IDEAS

The mining industry's boom times are over and the focus has changed. This year has seen billions in write-downs, with many projects shelved or put on hold as mining companies consider how to manage infrastructure and supply chains more cost effectively.

WORDS CAMILA REED

As shareholders demand better returns and more fiscal discipline, the mining industry is changing the way it operates: there are new CEOs at five of the top 10 companies. Moving from production frenzy towards productivity focus, the emphasis is now on managing costs.

Infrastructure is the biggest cost in many projects and for too long not enough attention has been given to managing supply chains, which are very underdeveloped in comparison to other sectors.

Change is coming as miners partner with logistics companies or others with projects close by in remote locations, as seen in some of the iron ore projects in the Republic of Congo. Miners are also looking at how to structure their supply chains, while logistics companies are offering a range of solutions to add value and cut costs.

"Companies are trying to take risk out of their business," says Duncan Irvin, Global Director of the Mining Sector, Industrial Projects Group, DHL Global Forwarding.

"Major mining houses are divesting assets and keeping what they consider their most valued projects."

BRIAN GORDON, HOLMAN FENWICK WILLAN

Mining – key findings

- During 2012, the Top 40 production volumes *increased by 6%*.
- Second year in a decade that *mining revenue didn't increase*.
- Net profit was *down 49%* to *$68 billion*. At only 8%, Return on Capital Employed (ROCE) was the lowest it's been for a decade.
- China consumes around *40%* of global metal production and will continue to be the industry's most important customer.
- Capex for 2013 is forecast to be *$110 billion*, some *21%* lower than 2012.

Source: PWC, Mine 2013 – A confidence crisis

Stretched

This aim is more challenging given the location of many projects. Half of the industry's 40 largest miners by market capitalisation have the bulk of their operations in emerging countries, the most ever.

From Africa to Latin America and Central Asia resource nationalism and community activism is on the rise, putting the brakes on a number of projects. Some governments have rewritten mining laws and contracts, appropriated assets and looked to fill fiscal gaps with extra taxation on miners.

This comes against a backdrop of lower commodity prices, even as PWC reports that the top 40 miners increased dividends by 9% to $38 billion.

The pressure has seen majors like BHP Billiton, Rio Tinto and Anglo American make huge write-downs or withdraw from projects. In January 2013, Rio Tinto announced a $14 billion write-down on its acquisitions, while Anglo American took a $4 billion write-down on the value of its delayed Minas-Rio iron ore project in Brazil, after the cost of developing the mine and associated infrastructure spiralled. Later in the year Anglo withdrew from a plan to develop a copper deposit in Alaska in a sign of its new Chief Executive's desire to purge marginal projects.

Increasing returns from what remains is vital, leading to cost-cutting programmes.

False economy?

As costs are cut litigation is rising, says Paul Wordley, Partner at HFW. "Mining houses are now very cost conscious and looking at legal options available to them to renegotiate existing projects and contracts. This means that in terms of legal needs they are looking for litigators to lead the analysis of these arrangements so as to support renegotiation by their transactional lawyers."

Deal outlook

Major mining houses are divesting assets and keeping what they consider their most valued projects, selling off what others may consider crown jewels, explains Brian Gordon, Partner at HFW. He predicts that there could be smaller deals to create a new mega company.

Equally, he expects the trend of trading houses like GlencoreXstrata, Vitol, Mercuria, Noble and others to buy assets to secure off take to continue, along with a rising interest in the sector by private equity – which has recently linked up with some of mining's top names to hoover up undervalued assets.

Former Xstrata boss Mick Davis is one of several former chief executives of mining companies who have launched mining investment vehicles. Aaron Regent, former Chief Executive of Barrick Gold, and Roger Agnelli, ex-boss of Vale, are also on the hunt for assets, backed by funds and banks.

The other keen buyer of undervalued assets will be China, consumer of around 40% of global metal production. "The Chinese will continue a buying spree of cheap producing assets," says Blycha, adding that there has been a shift in the type of buyers away from just the major state-owned companies to smaller or private companies, trading and transportation firms.

The Chinese are also starting to use Australia as a springboard to Africa, he says. With some 220 Australian junior mining companies with over 600 projects in 42 African countries, Australia is by far the biggest mining investor in Africa. "The Chinese are realising that buying these cash-strapped junior listed companies allows great access to projects in Africa."

CORBIS

HFW Partner Matthew Blycha says that the trend is noticeable in Australia, where foreign investors, who have not been getting the expected returns from mines, have responded by ripping up contracts. He expects significant arbitration and litigation in the mining, oil and gas sectors.

But there are other ways to address these weaknesses, says Catherine Emsellem-Rope, Senior Associate at HFW, such as sharing risk with logistics companies or trying to sell services. "If you have invested in barges and rail cars, for instance, why not sell that as a logistic service to a third party?"

DHL's Duncan Irvin believes there is now an awareness of the cost of logistics. He sees companies with mine projects in remote locations looking at modularisation.

Rather than ship in all the equipment for a mine or processing plant and build at the mine site, companies are designing, building and shipping in something more heavily engineered they know will work. "Shipping costs may be bigger but it reduces risk," he says. "It happens most where there is limited infrastructure – there is a benefit to modularise."

DHL is working on a number of projects in Central Asia where there is a lot of interest in increased modularisation, which Irvin thinks will be an increasing trend. At the opposite end of the scale, he adds, some companies are keeping things cheap and cheerful, reducing complexity as far as possible.

Ivan Thuynsma, Global Head of Mining at DAMCO, is positive about the effect of these changes. "I am optimistic in the long-term but in the short-term we are going to feel the pinch of the mining companies withdrawing their spending and contemplating the best way to use their cash." hfw

For more information, please contact Brian Gordon, Partner, Holman Fenwick Willan, +65 6411 5333, brian.gordon@hfw.com

• **Camila Reed** writes on financial markets, commodities and energy.

SHIPPING FINANCE GOES PRIVATE

As banks reel from the downturn in shipping, other investors have spotted an opportunity. The money is certainly much needed, but investors moving in on a sector where many have at best limited experience raises new challenges.

WORDS SANDRA SPEARES

The market crash of 2008 still casts a long shadow in shipping. Finance has become increasingly tight as loan-to-asset values and related financial ratios have moved out of kilter. Owners are struggling just to cover their costs.

In some sectors, freight rates have fallen so far that many owners and operators are under extreme financial pressure just to keep up with debt service to their banks.

In many cases, asset prices have dropped below the loan amount and loan covenants are being breached; and in some cases earnings are not enough to cover operating expenses. Banks have been doing their best to "kick the can down the road" in the last few years. But the road has turned out to be a cul-de-sac.

Some shipping banks are seeking to exit the sector altogether, while others are concentrating on their top-end clients. The regulatory capital demands of Basel III will have further constraining effects. Banks including Lloyds, Bank of Ireland, Nord LB and Commerzbank are selling portfolios, attracting considerable interest: the number of interested investors participating in round two of the bidding war for Commerzbank's portfolio was in "double figures", according to Tony Rice, Partner at HFW.

While banks have been doing everything they can to avoid enforcement and recovery action, they are increasingly unable to defer any further. Enter private equity (PE).

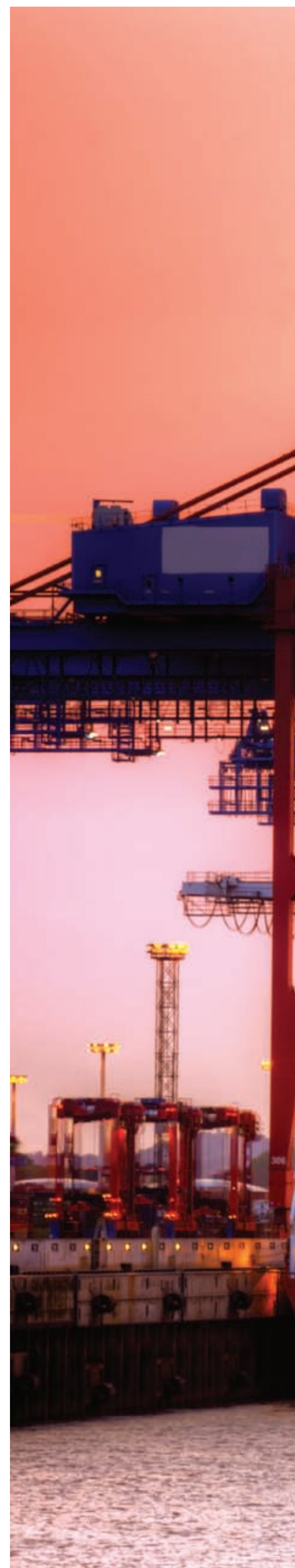
Loan rangers

Some opportunistic PE and investment funds are now looking at taking on distressed shipping assets, or buying up shipping banks' loan portfolios. PE companies have seen opportunities in deflated asset values and ships at relatively attractive prices. They are also cooperating with banks to take over and invest in ships or form joint ventures with shipowners who managed not to over-order newbuildings at the wrong time.

PE can assist in taking ships out of the bank portfolio and refinancing them. "Asset values are at historically low levels, and the PE investors 'see upside' in various shipping sectors, particularly product tankers and chemical carriers," Rice says.

At the same time they have been buying up loan portfolios from banks: Oaktree Capital bought about $1 billion from Lloyds. PE firms look at different ways and means to realise their investment, says Rice. "In some cases they will flip it quickly by allowing the owner to buy out the loan at a discount above what they paid, or they will run with it for the yield and hope asset values recover, or they may look to restructure the transferred deal with the owners."

When bank loan documents are negotiated there are provisions concerning the rights of banks to sell



ISTOCKIMAGES

Investors have been attracted to lower asset values

down their loans. Borrowers will often seek to ensure that if its loan is sold down, it can only be sold with the borrower's consent. There may also be an express requirement that any buyer must be another bank, not a fund. "That is because borrowers prefer to have relationship-driven banks as their lenders, not PE funds who are seen as being differently motivated and more unpredictable", says John Forrester, another HFW Partner working on such transactions.

> *Investors see a viable investment with a reliable positive cash flow.*
>
> **IAN CHUNG, HOLMAN FENWICK WILLAN**

Risky returns

Investor Wilbur Ross is one PE investor who argues that PE involvement in shipping may herald a move away from the 'swashbuckling' shipowners of the past, resulting in less fragmented company profiles and more sophisticated business models.

But the involvement of PE is not without problems. Enforcement rights and concerns surrounding issues such as the arrest of vessels and maritime liens can be stumbling blocks.

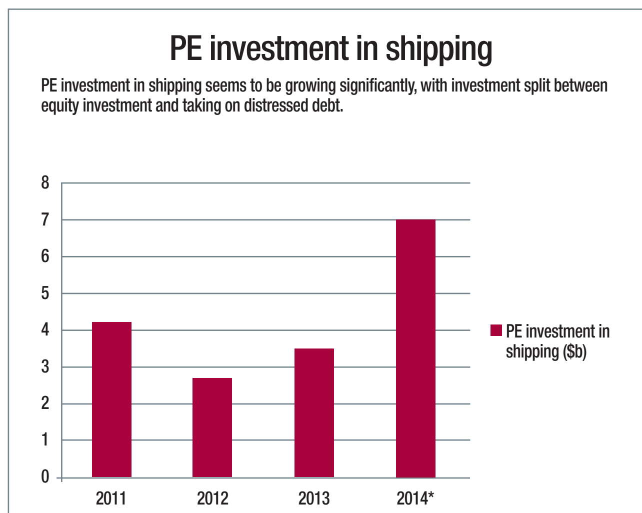
Depending on the type of transaction, PE investors may take an interest in vessels or their operation, or may take a share of a bank's 'interest' in those vessels as a debt provider and ship mortgagee. Some PE interests inject funds directly into a shipping company in return for an adjusted return and some degree of control. In such cases, they would require assurances that the company is being run in a way that is beneficial to their interests.

With a few notable exceptions, hedge funds and PE houses rarely specialise in shipping to the same degree as a bank, believes Forrester. "Quite often, the teams in these organisations might be doing a steel deal one day and a shipping deal the next day. That would be unusual in a bank."

"There is no real generic model for how PE operates", he says. Some will go into distressed ships; others will buy new or second-hand ships and trade them. Some will look for a mixed portfolio and others for a very specialised portfolio. Some funds are run by shipping specialists with in-house knowledge, whereas others have to contract in relevant shipping expertise. Some will come in on the debt side rather than the equity side. That in itself raises all sorts of issues because in some cases only one bank will be involved and, therefore, the owner effectively has a new counterparty. Alternatively, a syndicate of banks may be involved, with the PE investor only comprising one part of the lending syndicate. A degree of cooperation with other members of the syndicate may be necessary in circumstances where

PE investors in shipping should watch out for:

- Longer investment windows prevalent in shipping.
- Sanctions regimes and how these affect the industry.
- Flag state requirements and the tax regimes of individual ship registries.
- Competition issues.
- Responsibilities under legislation such as the UK Bribery Act 2010 and the US Foreign Corrupt Practices Act (FCPA).
- Liability issues, including strict liability in pollution incidents.
- Variables such as how trade is affected by different routes or market conditions.
- Cabotage, single ship structures and piercing the corporate veil.



Source Marine Money, deals year to July 2013 (*Wilbur Ross head of WL Ross & Co has predicted that PE investment could double in the next year)

• Sandra Speares is a journalist specialising in the shipping industry.

> *Asset values are low and the PE investors 'see upside' in various shipping sectors, particularly product tankers and chemical carriers.*
>
> TONY RICE, HOLMAN FENWICK WILLAN

Offshore buoyancy

Despite the difficulties in the traditional shipping market, the offshore marine market has continued to be attractive to banks and investors. Unlike other shipping markets, this sector has remained relatively strong during the last decade. "We haven't had the downturn that we've had in the tanker market or the bulk carrier market," explains Ian Chung, HFW Partner. We have seen an increasing number of PE interests participate in this business, mainly because they see the end users being oil companies and the rates being stable. Investors see a viable investment with a reliable positive cash flow. It suits their business model and what they are looking for."

Shipping and offshore marine services are increasingly perceived very differently, Chung says. Shipping is seen as the carriage of goods and owning assets that are physical and fluctuate in value, whereas the offshore sector is often seen as a service providing business. "When an oil company comes to charter an offshore support vessel or rig from a service provider they look at the brand. They are not just hiring the asset, they are also assessing whether their requirements can be met by the provider."

The offshore marine industry is an easier business to understand for PE investors, says Hari Krishna, Associate at HFW, compared to the traditional shipping cycles. The offshore oil industry also has plenty of old hands which adds a layer of stability, Krishna believes. Many enter the market with a view to buying distressed assets, but the existence of such assets depends on the end user of those assets. Having an oil company as the end user creates a less volatile environment, so PE has opportunities to create efficiencies on the management side rather than the revenue side.

Pragmatic approach

Rates have held steady in the offshore marine industry for longer, so investors are more likely to realise the returns for which they are looking.

Typically, businesses with national oil companies as end users are most attractive to PE investment, although assets vary in value and different segments attract different investors. "PE is able to buy in at an acceptable price and then leverage that, either by taking on conventional debt or through Islamic finance," Chung says, adding that whether or not Islamic finance is used comes down to what the market is like at the time and levels of liquidity. The investment horizon depends on the fund itself, but typically this will be between four and seven years before an exit, either by an on-sale, a merger or an IPO.

Hong Kong-based HFW Partner Patrick Cheung doesn't believe HK PE investors are looking at the long-term and that, as such, longer-term commitments are difficult to sell to such investors.

According to Krishna, the offshore accommodation market is very capital intensive and has seen considerable interest from international PE funds. When the price tag creeps over $100 million, traditional bank financing starts to give way to PE investment, which then looks to leverage its exposure.

The reality is that people will take the cheapest form of money they can find, so the bond market has also been very active for a couple of years. For instance, the Sea Trucks deal, on which HFW advised, was Norway's largest high yield bond issue at $575 million.

Several variables affect what you can and cannot do, Chung says: the size and type of investment, having an operating offshore business that investors want to see, and having the right capital structures in place.

There have been several bond issues for companies in the Middle East in recent years, but historically it has been a slightly less common alternative than conventional or Islamic finance, Chung says. "We see a lot of interest particularly in areas like offshore accommodation, drill rigs, and large fleets of offshore support vessels."

---

the PE fund might prefer otherwise.

Perhaps recognising this potential weakness, some PE houses are focusing on a very specific, narrow segment of the market so that they can build up expertise, Forrester says. Others with less knowledge of the industry have engaged shipping consultants, most of whom have come from shipping banks that have been downsizing their shipping portfolios.

For those that understand shipping and are willing to take a risk, ships in some segments can be acquired at values significantly below the market value. Occasionally, ships may be under arrest in a hostile jurisdiction with the possibility that creditors are pushing for a judicial sale in order to raise funds to pay them off.

Given the significant legal fees and upfront costs involved, PE funds are always taking a risk that the deal could subsequently collapse. But this tends not to be the case, and the resultant rewards usually justify the calculated risks taken.

Private equity is another source of capital to shipping, but there are no fixed investment models or strategies. Shipping companies have actively sought out PE backing when funding a new project. Ultimately, it's all about simply ensuring the financial flow into shipping deals.

hfw

For more information, please contact John Forrester, Partner, Holman Fenwick Willan, +44 (0)20 7264 8134
john.forrester@hfw.com
Tony Rice, Partner, Holman Fenwick Willan, +44 (0)20 7264 8315
tony.rice@hfw.com
Ian Chung, Partner, Holman Fenwick Willan, +971 4 423 0534
ian.chung@hfw.com

UNDER COVER CYBER THREATS

Companies are struggling to keep pace with cyber threats, from liabilities and reputational issues associated with a data breach, to business interruption caused by a focused attack and the consequences of intellectual property theft. Insurance is an increasingly crucial part of a company's armoury.

WORDS STUART COLLINS

Cyber threats have rapidly evolved with more targeted and potentially damaging attacks, but not all companies have kept up with these changes. Worryingly, many are relying on old technology and methodologies, according to Rik Ferguson, Global VP Security Research at Trend Micro, a provider of online content security and threat management solutions.

Peter Schwartz of HFW's Insurance and Reinsurance Group, questions whether this is appropriate or adequate to protect a major commercial asset class.

Insider threat

Large-scale randomly-targeted opportunistic attempts to steal personal data have mostly given way to precise, sophisticated attacks that target intellectual property. Energy, telecoms, governments, manufacturing and financial services are most frequently attacked, says Ferguson.

"Criminals may now look to gain access to one or more computers within an organisation and spend considerable time looking for useful data – such as usernames and passwords – which they then use to explore a company's network further," Ferguson says. For example, data stolen in a 2011 cyber-attack on internet security provider RSA was used to compromise the systems of its clients, including the defence contractor Lockheed Martin.

Organisations increasingly realise that technology touches almost every part of their business as well as their customers, especially now that use of personal devices for work and cloud computing is so common.

Also, it is becoming easier and cheaper for criminals to access tools to exploit systems and steal data, says Tom Quy, cyber broking specialist at Miller

"You may not need a standalone cyber policy if you look to get the most value from your PI policy."

JOHN BARLOW, HOLMAN FENWICK WILLAN

Insurance Services LLP. However, the physical threat is also rising, whether from disgruntled employees or through bogus staff who enter premises to access systems or steal data. For example, earlier this year would-be thieves posed as IT engineers to access computers at branches of Barclays and Santander in the UK.

Companies and governments are growing increasingly concerned with physical damage and business interruption (BI) caused by cyber incidents, especially for critical infrastructure, says Ben Beeson, a cyber expert at insurance broker Lockton International.

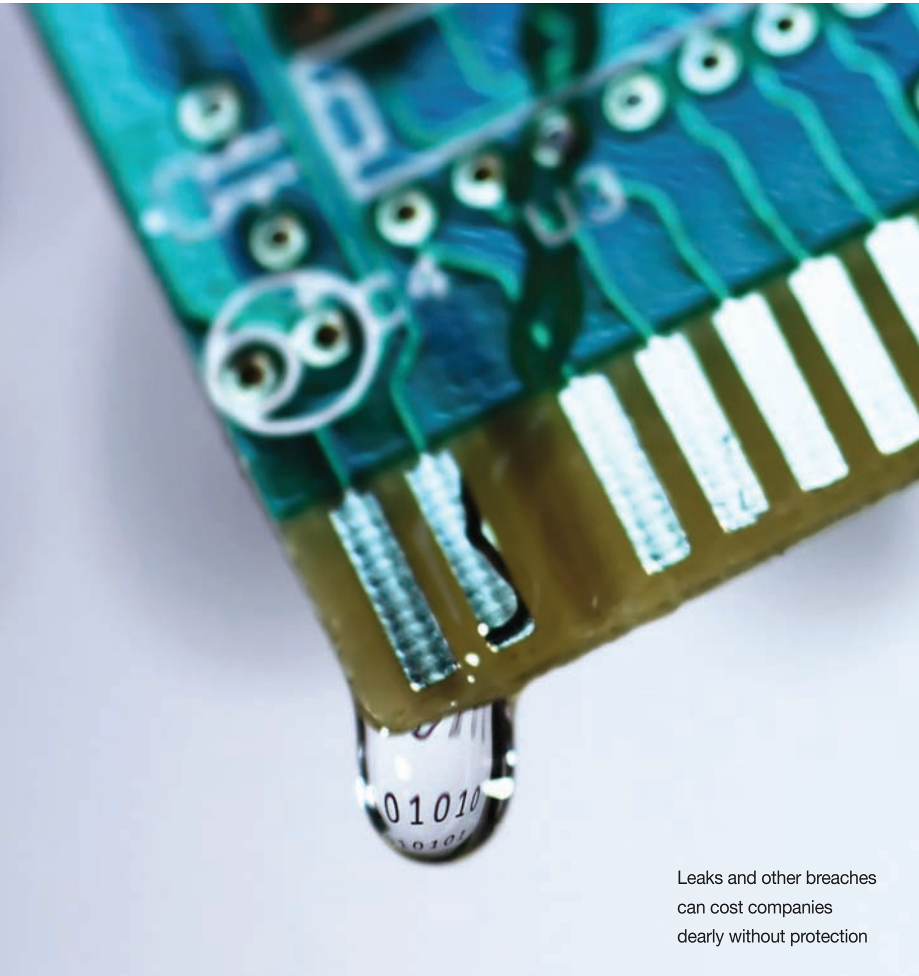
The Stuxnet code, which targeted centrifuges used in the Iranian nuclear industry, highlighted the risk to control systems used in the energy, transport, utilities and manufacturing sectors. A cyber incident – criminal, terrorist or accidental – could lead to equipment failure, resulting in BI and physical damage from fire and explosion. A survey conducted by the Business Continuity Institute found that unplanned outage of IT/telecoms was in fact the single largest cause of supply chain BI.

Companies are starting to take a different approach to security, says Ferguson. Rather than purely focusing on building fortress-like defences to keep criminals out, he advises thinking proactively and taking a holistic view. "Assume that a breach will happen – offsetting that risk needs to be an important part of the risk management and security portfolio," he says. "Your security needs to let you know as soon as possible that you have been compromised so that you can mitigate the damage."

Turning the worm

Insurance is an increasingly viable way to mitigate these risks. In recent years insurance products have

• **Stuart Collins** is former Managing Editor of *Insurance Day* and Deputy Editor of *Business Insurance Europe*.



Leaks and other breaches can cost companies dearly without protection

matured and are now broadening out to address new areas like cyber-related BI and property damage.

Standalone cyber products to cover the liabilities and costs associated with data breaches are well established. Insurance against physical damage and non-physical BI losses-triggered cyber products have been added to some policies.

Many cyber insurance policies look similar, but there are significant differences in wordings. Coverage should be tailored both to particular industry needs and concerns, and to the risks to which individual businesses are exposed commensurate with their risk appetite and balance sheet strength, Schwartz advises.

Companies must ensure that they have the right cover and the right limits, and that the appropriate claims expertise and service is available, says Edward Rushton, an HFW Associate.

GETTYIMAGES

For more information please contact
John Barlow, Partner,
Holman Fenwick Willan
+44 (0)20 7264 8188
john.barlow@hfw.com
Peter Schwartz, Consultant,
Holman Fenwick Willan
+44 (0)207 264 8171
peter.schwartz@hfw.com
Edward Rushton, Associate,
Holman Fenwick Willan
+44 (0)20 7264 8346
edward.rushton@hfw.com

John Barlow, Partner at HFW, says that companies should not just accept a 'vanilla' cyber insurance policy. "Existing insurance products may have an element of cyber cover built in, or there may be an endorsement available to provide additional cover. But be careful not to pay twice over for these products – you may not need a standalone cyber policy if you look to get the most value from your PI policy. Review what protections you already have before buying new products."

hfw

Growing cyber liability

Data breach liabilities in Europe are in flux, says Rushton. Some European countries already have stricter data protection laws, such as Germany, while fines have been increasing in countries like the UK. The new General Data Protection Regulation aims for minimum standards across the EU.

Currently under discussion across the EU, the law may significantly increase liabilities and notification costs in Europe, and a legal requirement is proposed to notify third parties affected by a data breach. "If you manage risks and insure properly you will be in a position to notify quickly, which will help mitigate any potential regulatory action," says Barlow.

There are also implications for directors and officers, he adds. "If a company cannot show appropriate risk management and risk transfer it could give rise to claims."

While EU and US approaches differ – the US deems data protection a consumer right, preferring instead a combination of mostly ad hoc (light) legislation, regulation and self-regulation – a breach could still be extremely costly in the US.

Opting into the US-EU Safe Harbour, a streamlined process for US companies to comply with the EU Directive 95/46/EC on the protection of personal data, is one possibility. But many will still seek the protection of insurance, as in the EU.

Many data breach insurers offer a fast response service that gets legal, forensic and PR experts working quickly, as well as providing credit-monitoring services. Such cover helps address some of the reputational issues of a data breach.

Appropriately focused due diligence, information and IP audit, risk analysis, scenario testing and having a well-rehearsed, pre-appointed disaster response and recovery team in place will be a prudent investment, says Schwartz, and will help minimise loss, provide business continuity, save money and enhance reputation internally and with business partners.

CATERPILLAR
CAT

HOPE
Construction Materials

HOPE
Construction Materials
MAN
0845 5201 888
3046E
0787T
HOPE
Construction Materials
DA61 CHL

HOPE SPRINGS ETERNAL

New Year 2013 saw the launch of the first new major player to enter the UK building materials market for many years. Starting out in a challenging economic climate, Hope Construction Materials arrives aptly-named, as Hope's Chief Executive Chris Plant and Legal Director James Stirk explain.

WORDS JON ROBINS

Hope Construction Materials refers to itself as the UK's leading independent producer of cement, concrete and aggregates – products that, as the company puts it, "literally form the infrastructure on which modern life depends all over the world".

The company began business at the start of 2013 after acquiring some 180 sites and facilities from Anglo American and Lafarge. Two years earlier, the Competition Commission had ordered the two giants to sell off assets as a precondition to their merger and to pave the way for the entry of a new competitor into the market.

As Stirk explains: "When two majors – Tarmac and Lafarge – announced their intention to merge their cement, aggregates, asphalt and ready-mixed concrete operations in the UK, it was our industry's equivalent of announcing the merger of two high street banks."

The UK heavy building materials industry (cement, concrete, aggregates, asphalt) was, until the formation of Hope, dominated by five major players, four of which were UK cement manufacturers – Mexican-owned Cemex, Hanson (owned by Germany's Heidelberg Cement), Tarmac (owned by South African giant Anglo American) and France's Lafarge. The fifth is Aggregate Industries who are owned by Holcim of Switzerland but don't manufacture cement in Britain.

"In the cement industry there are very high barriers to entry," Plant explains. "You need an enormous amount of capital to set up a cement plant – hundreds of millions of pounds to get established. That's one of the reasons why there are few players making cement in the UK."

"The proposed Lafarge-Tarmac merger was always going to be subject to clearance by the competition authorities," continues Stirk, "and, ultimately, a referral by the British Office of Fair Trading to the UK Competition Commission. The Competition Commission was – at the same time, but under different statutory powers – undertaking an investigation into the functioning of competition in markets which were dominated by what they regarded as the oligopoly of the 'big five'."

Against this background the scrutiny of the proposed UK Tarmac-Lafarge merger was always going to be extensive. The Competition Commission wanted to ensure that there was healthy competition, especially within the cement and concrete sector. The outcome which resulted in the formation of Hope was a 'remedy' more than all parties had anticipated when the two-year journey through the regulatory process began.

The remedy proposed by the Competition Commission meant divestments comprising a large cement plant at Hope Works in Derbyshire; five or six key quarries up and down the country; a network of 170 plus concrete plants; and two asphalt plants. "It was a sizeable bundle of assets," says Plant.

A major player

The authorities also insisted that such a divestment had to be in a single package. "In other words, it could not be sold off in bits and pieces with a few plants here and a few plants there," says Stirk. "The authorities wanted a new major player in the UK market: someone who could compete on a national scale from day one – something that's very rare in any sector

Images provided by Hope ConstructionMaterials

"Wherever I go within the business I encounter positive, open and skilled colleagues who have the enthusiasm, ambition and ability to make us successful."

CHRIS PLANT, HOPE CONSTRUCTION MATERIALS

and certainly unprecedented in our industry."

And so as the two former companies were working towards their merger at the start of the year, they were also, in Plant's words, "trying to facilitate the separation of the part of business that had to be divested."

"We had to hit the ground running on 7 January," adds Stirk. "As well as achieve the separation of constituent assets from the parent companies, the novation of supply agreements for materials and services, and the setting up of transitional services agreements covering everything from payroll and pensions to IT and infrastructure. This was overseen by a monitoring trustee appointed by the Competition Commission to ensure the maintenance and preservation of business assets by the two parties pending completion of the divestments, not to mention complicated protocols designed to ensure compliance with the Competition Act throughout the process."

Plant continues: "With two months to go until day one we didn't have an owner or a name or a brand, we had no customers, no insurances or registrations, hundreds of vacancies, no supply agreements and very few business processes. Towards the end of the year, there was an increasing volume of work to be done by an evolving management team to make sure that we were capable of functioning when we hit the launch date. We wanted to ensure things would run as smoothly as possible. We knew we had to be a functioning business from day one and we just about did it.

"Despite the challenges, we succeeded in making January 7 our first day in business," Plant says. "Around three-quarters of the workforce transferred over from previous employers, but the other 25% – including management, commercial and technical staff – were recruited in the last three months of 2012. Looking back, it was quite peculiar but it's an amazing experience."

Solid platform for growth

In what Plant describes as a "shrewd business move", the divested assets were bought by Mittal Investments, the investment vehicle of the Mittal family, headed by steel tycoon Lakshmi Mittal.

Around one-quarter of Hope's workforce were recruited in the last three months of 2012, says Chris Plant, Chief Executive (left)

UK construction has been "in the doldrums for a number of years", comments Plant. "2012 was a particularly bad year for construction, compounding several previous years of financial difficulty. So it was a smart entrepreneurial manoeuvre to make an investment after the industry has been bumping along the bottom for a while."

Looking back over 2013, it's been a solid first 12 months for Hope Construction Materials, assisted by the cautious optimism of a recovering economy. "It is often said that construction is seen as one of the major barometers of economic health," comments Plant. "Cement production is right at the beginning of the construction supply chain. If we are starting to see movement in our business, then it is a good indicator that there is increasing confidence throughout construction.

"The confidence and belief that things will get better is there now," he says. "We are looking forward to playing our role in the renewed development of major infrastructure in the UK. But equally we'll continue to support local builders working on small and medium-sized projects across the country. We have a broad spectrum of business customers, including many customers who use our limestone in other industrial applications, from power generation and steel making to glass production and cosmetics."

Hope, Derbyshire, is the location of the company's largest quarry and cement works

Plant says that Hope is involved in supplying a number of waste recycling facilities and energy from waste plants. "And housing is slowly coming back. Our cement business supplies to pre-casters who make concrete blocks. Concrete blocks have been flying off the shelves in the last few months – an indicator that people are preparing to do a lot of building."

What about the potential for taking the business abroad? "Cement is a commodity that moves around the world," Plant replies. But it is a 'low value for its weight' product. "Ultimately the majority of cement manufacturing is, and should be, local to where it is needed."

However, Plant is modest about the company's overseas ambitions. "The process that we have gone through so far has first been about stabilisation of the UK business, getting it onto an even keel, and then optimisation to drive efficiency, performance and levels of service never seen before in this industry. Once we have established our business in the UK, it is our intention to take that model elsewhere."

A determined culture

James Stirk reckons that Hope Construction Materials' unusual beginnings have helped to create a dynamic culture within its workforce. "We were formed in a unique way and that has meant the people who have joined us are all determined to make a difference and make a success of the new business."

He continues: "We are really encouraging that philosophy, under the leadership of our chairman Amit Bhatia, himself a young, dynamic and charismatic entrepreneur. We want people to be involved in the making of decisions – the antithesis of a top-down business."

It's a philosophy that is articulated in Hope's brand which, as Plant puts it, "isn't just a logo but a series of key values, defined from the outset with the input of people from within the business and industry leaders". These values are being 'reliable' (professional, skilled, delivering on promises…), 'understanding' (… listening to our customers, taking action to improve…), 'entrepreneurial' (… seeking opportunities and taking them…); and responsible (…for our colleagues, our stakeholders and for the environment…).

Although Hope has made a great start, both Plant and Stirk acknowledge that the company is at the beginning of a journey. "Although we have clearly defined our values, our vision and our strategy, it will take time for us to fully develop the culture and get it embedded at all 180 operations," says Plant. "That said, wherever I go within the business I encounter positive, open and skilled colleagues who have the enthusiasm, ambition and ability to make us successful. With that kind of commitment the sky really is the limit."

hfw

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

HORIZONTAL COLLABORATION

Collaborative contracting in the logistics sector can help companies benefit from reduced costs and greater convenience, and so increase efficiency and profits.

Collaborative arrangements across the supply chain can be mutually beneficial. But specialist advice is needed to ensure that collaboration does not fall foul of competition laws, that partners are suitable, aims are mutual, and that the agreements are as beneficial as possible.

For horizontal collaboration (i.e. collaboration between parties at the same level in the supply chain), the geographic dispersion of customers and supplier plants of potential collaborators is important. Collaborative practices are more sensible for products with similar patterns of demand and selling period/shelf life.

If horizontal collaboration is deemed appropriate, there can be different approaches: collaboration can see competitors come together to make arrangements on more-or-less equal footing. But this tends to be difficult to manage as collaborators must be a good fit.

The most common type of agreement is where a third party such as a logistics provider (3PL) orchestrates the collaboration. Placing an established supply chain in a shared user environment with its own infrastructure and support services has the least risk of things going wrong.

Successful models include collaboration on transportation between competing shippers (Nestlé and United Biscuits), collaboration between non-competing shippers with involvement of a 3PL (Kellogg (cereals) and Kimberly-Clark (toilet paper) with involvement of TDG (now Norbert Dentressangle)), and distribution by a 3PL to common customers of competitors (Tradeteam (beer and other drinks), now owned by DHL, which started as a joint venture between Bass and NFC).

Problems and Solutions

Despite the savings that can be derived from such collaborative schemes, many companies remain daunted by several concerns.

First, there are competition issues. Competition law prohibits agreements between competitors for the purpose or effect of distorting the market – breaches can lead to a fine of up to 10% of revenue and even criminal penalties. But this can be avoided by clever contract structuring and getting good legal advice. Where the participants in the contract are smaller players and are trying to reduce costs and pass a fair share of the benefit on to customers, or where they are not competitors, then they might not even need clearance from a country's competition authorities.

Secondly, there are confidentiality concerns, whereby one shipper may not want a competitor knowing the product volumes they are moving and other commercially sensitive information. However, engaging a third party to handle the logistics is a good way to address this key issue.

Thirdly, there are worries over how shared loads should be branded, especially in road transport. An arrangement may be established for joint branding on vehicles, although there are exceptions.

Finally, there is the question of precisely how cost reductions are shared. Legal advice will help demarcate these savings in as tightly worded a way as possible, based on the variables predetermined by each of the parties collaborating in the contract.

Ultimately, nearly every concern can be worked through. We are detecting, partly because of the still tenuous nature of the global economy and partly because of environmental considerations, a gathering momentum for entering into these types of collaborative contracts among both big firms and SMEs alike.

“Despite the savings that can be derived from collaborative schemes, many companies remain daunted.”

CATHERINE EMSELLEM-ROPE, HOLMAN FENWICK WILLAN

For more information, please contact
Anthony Woolich, Partner,
Holman Fenwick Willan
+44 (0)20 7264 8033
anthony.woolich@hfw.com
Catherine Emsellem-Rope,
Senior Associate,
Holman Fenwick Willan
+44 (0)20 7264 8279
catherine.emsellem-rope@hfw.com

hfw

HFW AROUND THE WORLD

A snapshot of developments involving Holman Fenwick Willan's lawyers.

❶ Dubai, Beijing and Hong Kong
Awards successes continue

HFW Dubai was presented on 29 October with the *Maritime Lawyer of the Year Award* at the Lloyd's List Middle East & Indian Subcontinent awards ceremony. The firm was awarded the *Shipping & Maritime Law Firm of the Year 2013* at the annual China Law and Practice awards in Beijing and took the awards for both *Shipping Law Firm of the Year* and the prestigious *Hong Kong Law Firm of the Year* at the annual Macallan ALB Hong Kong Law Awards 2013, held on 6 September.

❷ London and Damascus
HFW advises on worldwide freezing order against top Syrian businessman

HFW acted for US commodities giant Archer Daniels Midland Company in the successful application to the English High Court for a worldwide freezing order against top Syrian businessman Tarif Akhras, in relation to a claim for outstanding payment of $26 million. Akhras has extensive business interests in Syria, in grain and sugar as well as other soft commodities.

❸ Dubai
HFW advises Stanford Marine on $300 million syndicated loan

A team of HFW lawyers, led by Partner Ian Chung, has advised Dubai-based offshore services company Stanford Marine on a complex $300 million syndicated loan, involving Islamic finance and conventional finance tranches.

❹ London
HFW advises on high profile commodities acquisition

An HFW team of commodities, corporate and competition lawyers has advised long-term client Ecom Agroindustrial Corp Ltd on its acquisition of Armajaro Trading Ltd. The transaction brings together two highly regarded companies focused on the sourcing and supply of cocoa, coffee and sugar on a global basis.

❺ Brussels, London and Greece
HFW advises COSCO on €230m investment in Piraeus Port

A multi-jurisdictional team of HFW lawyers is advising COSCO on its €230 million investment to expand Pier III of Piraeus Port. Following an international tender run by the Greek government in 2008, COSCO Pacific Limited won the right to construct and operate Pier II and the eastern part of Pier III of the Piraeus container terminal for a 35-year period.

❻ Brussels and Beijing
HFW selected for China panels

HFW has been selected for two new panels convened by China's Ministry of Commerce (MOFCOM). The firm has been selected as one of 15 firms to provide advice on WTO and regional trade agreements, and cross-border dispute resolution. HFW has also been selected for a smaller panel to advise on trade remedy matters.

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

holman fenwick willan
hfw