

Bribery Act 2010 and its impact on Shipping Companies – *Quid pro quo?*

The Bribery Act 2010 is expected to come into force on 1 July 2011. The intention is to update existing out of date legislation.

The Act creates offences of offering or receiving bribes, bribery of foreign public officials and failure to prevent a bribe being paid on an organisation's behalf. An important feature of the Act is that it will have extraterritorial application which means that anti-corruption compliance will also apply to offences taking place outside the UK.

The Act applies to 'organisations' which have a sufficiently close connection with the UK such as UK nationals and persons ordinarily residing in the UK. It will also cover bodies incorporated in the UK as well as organisations which merely represent the overseas principal organisation in the UK, such as UK agents to an overseas company.

An immediate concern for shipping companies is the fact that in certain ports around the world, bribery is deemed to be an accepted custom which keeps the "trading pattern" stable. When a vessel calls at these ports, "facilitation payments" are an inevitable consequence if shipowners and other interested parties wish to avoid delays.

One can immediately foresee the difficulties that shipping companies will face. A prohibition on bribes will, in practice, make it impossible for shipping companies to carry out their legitimate business activities in some parts of the world.

If these companies or their 'associated persons' engage in 'bribes' as defined by the Act, significant penalties are at stake.

The Act, however, provides that a shipping company can protect itself by ensuring that "adequate procedures" are in place so that all employees and/or any other associated entities are aware that they cannot engage in bribes.

Whilst the guidance issued by the Ministry of Justice gives an indication of how these 'adequate procedures' should be implemented, this remains a rather grey area. One positive aspect is that in cases of facilitation payments prosecutors will consider 'very carefully' what is in the public interest before prosecuting. Nonetheless, even though it is recognised that small bribes/payments are common practice in some countries, it does not eliminate these from the scope of the Act but simply suggests an organisation should allow sufficient time within which to negotiate or resist these payments to third parties.

While it is early days, it does not seem that the Act will "facilitate" shipowners' business where they operate from the UK. Anyone who may be affected should ensure that the appropriate procedures are in place in order to reduce risk before the Act comes into force.

From Malta to Swinerton Moore



Swinerton Moore are delighted to welcome Christine Vella who has joined as an assistant solicitor.

Christine has a Master's Degree in Shipping Law from the University of Southampton where her main areas of study were International Trade Law, Carriage of Goods by Sea and Admiralty Law. She also holds a doctorate of laws from the University of Malta where her studies including commercial law and maritime law. She is admitted as a solicitor in Malta and England and Wales.

Christine joins the firm after 2½ year as a syndicate executive with Steamship Mutual dealing with both P&I and Defence Matters. Christine speaks English, Maltese, Italian and French. We hope that many of our clients will have the pleasure of working with Christine in the near future.

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Shipping Matters

UNPRINCIPLED

TTMI SARL v. Statoil ASA [2011] EWHC 1150 (Comm)

The disponent owners' ultimate parent company was named as the time chartering owner by mistake in the fixture recap. The voyage was performed and freight was invoiced by the disponent owner. The disponent owner then made a demurrage claim but the arbitrator held that he had no jurisdiction.

On appeal the Court decided that (1) the recap recorded a contract between the holding company and the sub-charterer; (2) there was no evidence that the disponent owner could act as an agent for the holding company; but (3) a contract was formed by conduct. Therefore the award was set aside and the matter remitted.

I DECLARE

West Tankers Inc. v. (1) Allianz Spa (2) Generali Assicurazione Generali Spa [2011] EWHC 829 (Comm)

The Court held that it had power to enforce a declaratory award. The Owners had obtained a declaratory award against charterers stating that they were not liable for damage caused as a result of a collision. Charterers' subrogated insurers (*who held a Club LOU*) began proceedings in Italy after the London arbitration had commenced. The declaratory award was made an order of the Court so that it would be enforceable throughout the EU and defeat the Underwriters' claim in Italy.

(ANTI) SUITS YOU

Tryggingarfelagjio Foroyar P/F v. Cpt Empresas Maritimas SA [2011] EWHC 589 (Admlty)

Following a fire off the Chilean coast the owners agreed with a Chilean company for the provision of fire fighting services. They were unsuccessful. A second company was then contracted on an amended BIMCO Wreck Hire Form and they succeeded in extinguishing the fire. Underwriters brought proceedings against the first salvor claiming they had made matters worse. The parties' expectation in relation to the contract with the first company was that it would be on the BIMCO Form and, therefore, the first company was entitled to an anti-suit injunction preventing Underwriters from suing them in Chile.

ISPP – OR NOT ISPP

Polestar Maritime Ltd v. YHM Shipping Co. Ltd. & Anor (2011)

This concerned a sale under the NSF 1993. The seller was to supply the buyer with all certificates that it had at the time of inspection. Prior to the MOA buyers' surveyors noted that a sewage plant would be required in order to obtain an ISPP Certificate. The MOA was signed before, but the vessel was tendered for delivery after Annex IV became operative.

The buyers rejected the vessel which was detained by the local port authority because, amongst other things, it did not have an ISPP Certificate. The Buyers cancelled the purchase but, later that day, the Sellers obtained an exemption from the flag state.

The arbitrator found for the buyers because there was no ISPP Certificate and the vessel was detained. The appeal was allowed. The obligation was to supply certificates existing at the time of inspection, otherwise there would be uncertainty. The waiver came within lines 242 to 255 of the NSF 93 giving the sellers "*three banking days to make arrangements for the documentation [required under the NSF]*".

Permission has been given to appeal to the Court of Appeal. The case raises issues that often arise on an (ef)fluent market.

LIFTING THE VEIL

Antonio Gramsci Shipping Corporation & Ors v. Oleg Stepanovs [2011] EWHC 33 (Comm)

This is a rare case where the corporate veil was lifted in order to allow charterparty claims against the controlling mind of the companies. The issue arose on an application to set aside permission to serve out of the jurisdiction, so it should not be regarded as a final judgment on the point.

Claims were made against a number of one ship companies incorporated in off-shore jurisdictions ultimately owned by the Latvian Shipping Company ("*LSC*"). The claimants argued that the offshore companies had been used dishonestly to siphon off profits for LSC and that senior executive officers of LSC, including the defendant, were beneficial owners of the off-shore corporations. The claimants relied on the English jurisdiction clause in the charterparties to obtain permission to serve out against the defendant.

On the facts the corporate defendants had no independent or non-fraudulent existence having been set up for the purpose of the alleged fraud in order to abuse the company structure. It was not necessary to show that the defendant was in sole control where there were a number of wrong doers with a common purpose. The application to set aside service was refused. This will be an interesting case to follow to see whether the law on lifting the corporate veil is developed.

EXPERT TEASE

Finally three cases on experts.

In *Ricky Edwards-Tubb v. J.D. Wetherspoon Plc [2011] EWCA Civ 136* the Court confirmed that it has power to order disclosure of an earlier expert's report following a change of experts even before proceedings are commenced.

In *Paul Wynne Jones v. Sue Kaney [2011] UKSC 13* the Supreme Court (*sitting with seven Justices because of the importance of the case*) has abolished immunity from liability in negligence for expert witnesses. Will this be a "*floodgates*" case leading to further satellite litigation, will it make expert evidence harder to obtain or is it all really a storm in a teacup because experts already recognise that their overriding duty is to the Court and not to their client?

Meat Corp of Namibia Ltd v. Dawn Meats (UK) Ltd [2011] EWHC 474 (Ch) concerned instructing an expert previously instructed by your opponent. One party made an approach to an expert with a view to instructing her as its expert in the proceedings and provided confidential and privileged information relating to that party and its business. The expert did not accept the offer. Subsequently she agreed to act for the other side as expert. They agreed that any information received from the original party should remain confidential and privileged.

The Court said that the relationship between the expert and the instructing party was not the same as a solicitor/client relationship and even though privileged information had been given to a potential expert witness in significant quantities that would not exclude the expert from acting.