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The Intermediary

THE MAGAZINE OF ITIC THE CLUB FOR INTERMEDIARIES FEBRUARY 1998

The objective of The Intermediary is to bring the Members of ITIC information on recent legislation, court decisions, claims and other matters of general interest. We also hope that circulation of The Intermediary among Members' staff will assist with loss prevention.

ITIC Broker wins commission award in California

An American shipbroker and Member of ITIC was recently awarded his full commission by a Los Angeles Federal Court in litigation with an American shipowner. ITIC assisted its Member in the recovery. In April 1990 a Long Beach refiner, distributor and marketer of petroleum products, chartered the tanker TEXACO FLORIDA from her owners ("the April 1990 charterparty"). The April 1990 charterparty was for a period of six months, with options for two additional six-month periods. The broker involved in the charter was paid a commission based on the standard commission rate of 1.25 percent of the charter hire received. In October 1990, a company affiliated to the charterers purchased the tanker from Texaco and was assigned all rights and assumed all obligations under the April 1990 charterparty, including the obligation to pay the broker his commission. As and when the new owners received charter hire, they paid the broker's commission. The charterers, through the broker, exercised an option to extend the charterparty. As the expiration of the extended charterparty neared, the new owners sought from the broker rate and market information specific to the ship.

At about the same time the charterers advised the broker of their interest in extending the charterparty for a further period of one year with a one-year option, to commence at the end of the then current charter. The broker advised the new owners of the charterers' interest and invited the new owners to submit their rate proposal. Various informal discussions continued between the parties and by early July 1991 the new owners were ready to make a firm offer to the charterers to extend the charterparty. They did so through the broker. The rate offered by the new owners included the commission to the broker. The new owners continued to negotiate the extension of the charterparty through the broker. They also continued to use the broker despite being warned by a representative of the charterers that if the broker's services were used they would be obliged to pay the broker's commission. Some time later the new owners and the charterers began negotiating directly instead of through the broker. The new owners, however, did not want to pay commission and in negotiations with the charterers stated that the charterers should pay the broker his commission if they thought the broker should be paid. In December 1991, the charterers accepted the new owners' proposed rate and the agreement was formalised in a charterparty dated January 1992. This charterparty substantially mirrored the original April 1990 document. The broker, however, was advised by the new owners that no further commission would be paid to him. As a result of the new owners' refusal to pay commission the broker commenced legal proceedings in the Los Angeles Superior Court to recover commission of US$ 141,970 plus interest. The broker also sought punitive damages for fraud and demanded a jury trial. The new owners removed the action to the Federal District Court. The broker's case against the new owners included the following allegations:

1. That senior management at the new owners had reached a secret agreement to use the broker as a broker without any intention of paying commission.
2. That the new owners had defrauded the broker by secretly cutting them out as a broker whilst continuing to use the broker's services.
3. That the broker had been engaged by the new owners as a broker and was therefore entitled to be paid commission.

4. That the January 1992 charterparty was in reality an extension of the original April 1990 charterparty.

In response the new owners contended:
1. That the broker was never engaged as a broker and furthermore provided nothing of value to the January 1992 charterparty.
2. That it was not their policy to cut out a broker, but brokers were not used by the new owners in charters between affiliates.
3. That the January 1992 charterparty was a new agreement and not an extension of the original April 1990 charterparty.

After a nine-day trial, the jury unanimously found in favour of the broker and awarded the full commission of US$ 141,970. Whilst the jury decided there was no express contract to pay the broker his commission, it found there was an implied agreement based on the conduct of the parties to pay commission for the period covered by the January 1992 charterparty. The jury also found for the broker on his quantum meruit claim (an equitable claim based on the concept that no one who benefits by the services or goods provided by another should be unjustly enriched thereby; under such circumstances the law implies a promise to pay a reasonable amount, notwithstanding the absence of a specific contract). Finally, the jury found clear and convincing evidence that the new owners had concealed a material fact (i.e. that they did not intend to pay the broker his commission). Although the jury could have awarded punitive damages as a result of such a finding, it declined to do so. The new owners appealed the judgment in favour of the broker. The Court of Appeal affirmed the district court's decision to award the broker the full commission of US$ 141,970. The Court of Appeal also held that the broker's contract claim was governed by federal admiralty law - not California state law - because charterparty brokerage has a significant impact on maritime commerce. The broker was represented by the Long Beach maritime firm of Cogswell Woolley Nakazawa & Russell and the assistance of Mr Alan Nakazawa in the preparation of this article is acknowledged with thanks.

"After a nine-day trial, the jury unanimously found in favour of the broker and awarded the full commission of US$ 141,970"

Intermediary News

Shipbrokers and the Law Lloyds of London Press has recently published "Shipbrokers and the Law" written by Andrew Jamieson, legal advisor and director of ITIM, ITIC's management company. The book sets out in a non-technical way the major liabilities and rights of shipbrokers and gives a thorough explanation of the broker's entitlement to commission. "Shipbrokers and the Law" has received a number of favourable reviews and is a valuable addition to every shipbroker's bookshelf.

Paul Smith, whose name will be familiar to many Members of ITIC, has left ITIM and established his own consultancy business, Paul Smith Associates. He was employed by the managers of ITIC and its predecessors for some twenty years and was the Club Secretary for much of that time, as well as being appointed to the position of Marketing Director in 1992. Paul will continue to assist ITIC with the handling of specific projects on a consultancy basis and will remain as editor of The Intermediary.
His new address is:
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Croydon, Surrey CR0 1NG.
Tel No. 0181 686 6535 Fax No. 0181 688 4010
and e-mail paulgd.smith@virgin.net.

Electronic Mail
The rapid growth in the use of electronic communication has opened up a new area of risk , much of which represents uncharted territory. Members should therefore be careful as to what information they include in their e-mail communications, whether internal or external. In a recent case in England

the Norwich Union Insurance Group was ordered to pay a rival insurer £450,000 damages plus legal costs after a defamatory message was circulated internally by e-mail. The communication included unfounded rumours about the financial viability of the rival insurer.

ITIC Board of Directors
The Club has announced the retirement of Benjamin Wong from its Board. His farewell meeting took place in London in April when the Club's Chairman, Paul Vogt, presented him with an inscribed fountain pen to mark his long and distinguished service as a director of both ITIC and its predecessor, Transport Intermediaries Mutual (TIM).

"Ship Agent's Obligations and Remedies" - BIMCO residential course
Julia Mavropoulos, claims manager and director of ITIM, and Paul Smith, ITIC consultant, both spoke at a BIMCO residential course held in Copenhagen. Subjects included "Agents and Statutory Liabilities", "Bills of Lading (Pitfalls for Agents)" and the "Ship Agent's Remedies in Collecting Outstanding Disbursements". This course was complimentary to one held earlier in the year on the subject of "Shipbroker's Obligations and Remedies" at which Andrew Jamieson, ITIC's legal advisor, and Paul Smith were speakers. Recent Publications ITIC has recently published the latest edition of The Claims Review. This was a special ship agents' edition devoted exclusively to "Ten Golden Rules for the delivery of cargo". The Golden Rules are illustrated by examples of cases involving ship agent Members of ITIC in recent years. If you would like a copy please contact the Managers.

New Address
Since the last issue of The Intermediary was published the address for the Club has changed. The Managers are now located at International House, 26 Creechurch Lane, London EC3A 5BA. Telephone and fax numbers remain the same.

New face at ITIM

We are pleased to welcome Andrew Webster as a new member of the ITIM team. Andrew is a qualified shipbroker with a degree in geography. After taking his degree, Andrew began his shipping career in the offices of one of ITIC's shipbroker Members concentrating on towage and salvage. During that time he qualified as a member of the Institute of Chartered Shipbrokers. He then worked overseas as a trader for a firm specialising in damaged commodities. Upon returning to the UK he took up a position as a claims executive with the UK P & I Club before making the move to ITIM earlier this year.

Ship Agents' Liabilities "Himalaya" Clause or Standard Trading Conditions?

Ship agents, like other professionals in the transport industry, need to limit their liability to an amount which is commensurate with their remuneration. Carriers by sea, air and land set out their contractual obligations and limitations in either bills of lading, or airwaybills, CMR notes or standard trading conditions. One of the most important developments in connection with the question of an agent's liability has been the general acceptance in a number of countries of the effect of the so-called "Himalaya clause" in a bill of lading.

The clause originates from a decision of the English House of Lords in the case of The Himalaya (1954) 2 Lloyd's Rep. 267 where a passenger on a P&O liner sued the master in connection with an injury sustained while on board the ship. The passenger ticket contained a clause which protected the carrier from any action brought against the master. The House of Lords decided that, although the carrier was entitled to provide not only for himself but also for those engaged to carry out the contract, he had not done so. Since the ship's servants or agents were not covered by the immunities on the ticket the master was found liable in tort for the passenger's injuries.

Following this decision ocean carriers included a Himalaya clause in their bills of lading. The text of a typical Himalaya clause is as follows, although it is more likely to be found under the heading "sub-contractors" or "exemptions and immunities of servants, agents, etc."

“No servant or agent (which expression shall include an independent contractor) acting solely on behalf of the carrier shall be under any personal liability whatsoever for any loss, damage or delay whatsoever whensoever and howsoever caused. Without prejudice to the generality of the foregoing, every term and exception herein upon which the carrier is or would be entitled to rely shall extend to protect every such servant or agent. For the purposes of this clause the carrier shall be deemed to be acting as agent on behalf of and trustee for the benefit of all persons who are or may be his servants or agents from time to time which persons shall to this extent be deemed parties hereto.”

If this clause is included in the bill of lading an agent can avoid liabilities for loss and/or damage to cargo in his possession provided the act which gave rise to the loss occurs during the contract of carriage and the bill of lading contains a Himalaya clause. These two requirements are found in the English High Court decision Raymond Burke Motors Limited v. The Mersey Docks and Harbour Co. (1986) I Lloyd’s Rep. 155. A container of motorcycles was stored in a container park, away from the quayside at Liverpool, awaiting the arrival of the carrying vessel, where a truck operated by an employee of the Mersey Docks & Harbour Co. struck and damaged it. The question which the court had to decide was whether the dock company could take advantage of the Himalaya clause in a bill of lading which had not been issued at the time of the damage. What was relevant was not whether a bill of lading had been issued, but whether the contract of carriage had already come into existence at the time the container was damaged. The court decided that the contract of carriage had not yet come into existence and therefore the defendants were not entitled to take advantage of the exception clause in the bill of lading. The court considered, on the information available, that a through bill of lading would not have been issued and that the contract of carriage would only commence once steps were taken to load the container onto the ship. This was deemed to be when a straddle carrier was despatched for the purpose of picking up the container.

Therefore, when a ship agent performs a duty on behalf of the carrier (whether shipowner, charterer or liner company) and in the performance of those duties causes damage or loss to the cargo owner, he would normally (although not in all cases) be entitled to the defences provided by the Himalaya clause in his principal’s bill of lading. The clause does not, of course, protect the carrier from claims by his customer or protect the agent from any claim by his principal for reimbursement. Why, if he has the protection of the carrier’s bill of lading, does a ship agent need his own standard trading conditions? The answer is that there will always be circumstances where the carrier’s bill of lading terms do not apply, which could leave the ship agent liable for the full value of any loss, unless he has the protection of his own standard trading conditions. For example, if the ship agent provides services to the cargo owner, such as collecting cargo from or delivering it to the merchant's premises or arranging customs clearance or consolidation of groupage cargoes, he is no longer representing the carrier. Instead he is providing a service to the cargo interests, either as an agent or as a principal. It is, therefore, recommended that ship agents have their own standard trading conditions.

The Association of Rotterdam Shipbrokers and Agents have had their own standard trading conditions for many years, as have the Danish Shipbrokers’ Association. Ship agent members of the Institute of Chartered Shipbrokers are also entitled to use their own standard trading conditions. It is not enough for the agent to have standard trading conditions; they must be notified to the customer before the contract is formed, otherwise they are not incorporated into the contract. Under the laws of many countries, it is sufficient to add a footnote to the bottom of booking forms, headed notepaper, faxes, telexes and invoices to the effect that “all business is transacted subject to the standard trading conditions of ...., a copy of which can be obtained on application.”

Another method of notifying customers is to print standard trading conditions on the reverse of documents and company notepaper. In some countries, however, this method of notifying customers is not sufficient and they would not be deemed to have been incorporated into the contract unless the clients had both received a copy of the conditions, and signed and returned them to the company wishing to rely on them. Members of ITIC in various countries should find out the legal requirements in their country in order to incorporate their standard trading conditions into their contracts.

It is important that the standard trading conditions are notified to the customer before the contract is finalised. If a guest registers at an hotel and there is a notice on the reception desk (where the guest can read it before he signs the register) to the effect that the hotel will not be responsible for the loss of the guest’s personal items from his hotel room, then this provision is incorporated into the guest’s contract with the hotel. If, however, the hotel has the same notice up in the guest’s room (rather

than at the reception desk) then it is simply too late to change the terms of the contract which was formed at the reception desk. It is therefore not sufficient to place a footnote notifying the existence of standard trading conditions on the invoice, which does not reach the customer until after the contract has been performed. It is important that the footnote be placed on booking notes, telexes and other communications sent to the customer when the contract is formed. It is also advisable to send copies of standard trading conditions periodically to customers so that, if the agent has to limit or reject liability on the basis of the standard conditions, the customer does not receive an unwelcome shock.

"Standard trading conditions must be notified to the customer before the contract is formed"

Financial strength of ITIC

"The Club's strong financial position has allowed it to introduce the concept of a continuity credit"

The financial strength of an insurer is becoming an ever more important consideration for the buyer of insurance and his broker. In order to fully appreciate the financial strength of ITIC, it is important to also consider the results of Transport Intermediaries Mutual Insurance Association Limited (TIM) which acts as ITIC's offshore reinsurer. TIM is based in Bermuda and has no other function than the reinsurance of ITIC.

Each year Members of ITIC receive the accounts of both Clubs, together with a combined financial highlights report (see next page). The graph at the bottom of the report demonstrates the financial strength of the combined Clubs, with free reserves at the end of the 1996 Policy Year standing at almost ten million dollars. The 1997 draft figures confirm a further increase in the level of free reserves.

ITIC's strong financial position has allowed it to introduce, for the first time, the concept of a continuity credit. This was granted to Members at the renewal of their insurance in both 1996 and 1997 and is funded from the reserves of the Clubs. Reinsurance costs have also been reduced by ITIC's ability to share in the market reinsurance programme and, as and when the insurance market hardens, this benefit will become even more worthwhile. Last, but by no means least, the regulation of insurance companies by government bodies includes an increasing focus on solvency levels and underfunded insurers will find themselves facing increasing difficulties. A strong financial position is not only important for maintaining solvency margins, but also for allowing a greater proportion of risk to be accepted in times when reinsurance costs are high. This allows ITIC to maintain its policy of offering stability in the level of premium it charges rather than subjecting its Members to sharp increases based on circumstances outside its control. ITIC always underwrites responsibly and considers claims sympathetically whilst also ensuring the maintenance of its financial strength.

Liner Agency Contracts

ITIC is frequently requested to review draft liner agency contracts which have been presented to its Members for signature. Regrettably, if not surprisingly, these are often biased in favour of the liner principal. This, of course, reflects the relative strengths and bargaining positions of the two contracting parties and the fact that competition amongst agents to secure a new appointment is often intense. Although the Club appreciates that commercial considerations are often important, it is clearly dangerous to accept provisions which could have serious adverse consequences at a later date.

It is the purpose of this article to review a number of clauses which, in one form or another, are often included in liner agency contracts. Hopefully, this advice will provide general guidance to Members when conducting negotiations with prospective liner principals. However, specific help can always be requested from the Club on each individual occasion.

The first observation to be made is that the variations to be found in different liner agency agreements are considerable. Most are tailor-made by the particular liner principal depending on the trade, geographical area and scope of the agent's functions. A standard liner agency contract does, however, exist. This was first issued by FONASBA in 1978. It has subsequently undergone several revisions but although approved by BIMCO has not gained wide acceptance within the industry. This is because many liner principals believe that its terms go too far in favour of the agent. An opportunity may therefore exist for the creation of a standard contract which steers a middle course between the conflicting interests of principal and agent. Turning now to specific provisions in liner agency contracts: The appointment of sub-agents frequently causes difficulty. Most agreements will allow the agent to appoint sub-agents with the prior written consent of the principal and it is often useful to add a clause that such prior written consent should not be unreasonably refused. Between the principal and the agent it is often stipulated that the latter shall remain responsible to the former for the sub-agent's performance of the agreement.

Furthermore, that the agent should indemnify, defend and hold the principal harmless against any claims for loss, damage etc. caused by the negligence of any sub-agent. By contrast the FONASBA wording provides that the agent is not responsible for the negligent acts of the sub-agent unless the agent has failed to exercise due care in the appointment and supervision of such sub-agent. In any event in the same way that carriers invariably ask for evidence that the agent maintains professional indemnity insurance, it is prudent for the agent to insist that any sub-agent they appoint is also insured. Furthermore, the sub-agency agreement should, where possible, be back-to-back with the main agreement so that responsibilities and obligations imposed by the carrier on the agent can be passed down the line to the sub-agent in identical terms. FONASBA has recently drafted a standard sub-agency agreement which satisfies this requirement by annexing to the document an extract of the liner agency agreement entered into between the line and the general agent. Indemnity clauses are frequently included in liner agency agreements.

More often than not the clause will only be in favour of the principal. The agent undertakes to indemnify, defend and hold the principal harmless from all claims, penalties, costs and expenses resulting from his negligent act or omission. In a well balanced document there should be a reciprocal clause in which the principal undertakes to indemnify the agent against all claims, charges, losses etc. which the agent may incur in connection with the fulfilment of his duties under the agreement, save that the indemnity would not extend to acts arising by reason of wilful misconduct or negligence of the agent. The granting of credit by the liner agent is frequently excluded without the prior written consent of the principal or only in accordance with his credit policy laid down from time to time. Where consent has been given to the extension of credit the relevant question is whether the agreement obliges the agent to remit freight to the principal regardless of whether he has been paid or not.

Where an agent guarantees to his principal the payment of freight and takes the risk of, for instance, the shipper or forwarder failing to pay, the agent is effectively acting as a del credere agent. If the shipper does default, the principal need look no further than his agent for payment of the outstanding freight. In this event the agent might argue that he is entitled to an additional commission for assuming this risk. Most agreements specify a number of events which may allow the other party to terminate - either immediately or after a period of notice. The bankruptcy, or special arrangement, or composition with creditors of either of the parties is an example which usually allows for termination forthwith. It is important to ensure that rights to terminate are reciprocal and not merely in favour of the principal alone. A breach of the agreement may also justify termination, but it is useful to include a caveat that this will apply only where the breach has not been remedied within a specified number of days after the other party has given written notice requiring such breach to be remedied. It is very rare for compensation provisions to be included in an agency agreement. Indeed it is sometimes expressly stipulated that the agent agrees to waive all and any of his rights to any compensation to which he may be entitled by law or by custom.

Liner agents should be careful not to assume responsibility for any delays to ships or damage to cargo arising out of the negligence or default of stevedores or terminal operators. The agent may be drawn into a dispute where he has been obliged under the agreement to arrange and supervise stevedoring activities. The position can be clarified by the insertion of a clause to the effect that "the agent will not be responsible for the negligent acts or defaults of any stevedores or terminal operators unless the agent fails to exercise due care in the appointment of such stevedores or terminal operators".

Principals frequently feel they are vulnerable in relation to the financial risk to which they believe they are exposed. This fear is, to some extent, justified following the failure in the past of a number of well known agency companies. In their attempt to overcome or reduce this exposure several methods have been adopted. These often include a requirement for the establishment and maintenance by the agent of separate trust bank accounts in order to receive both freight or other income on behalf of the principal, and funds received by the agent from the principal to cover disbursements and expenses. The object is to keep the funds entirely separate from those belonging to the agent, or to other principals, so that they can be easily identified. An alternative method is for the agent to open a separate bank account in the name of the principal operated jointly by both parties. All freight collections are deposited by the agent in this account without any deductions. Funds required for disbursements are then requested by the agent who provides details of estimated expenses. If approved, the principal authorises the agent to draw the requisite funds from the account. Similar protection can be given by means of bank guarantees in respect of monies held by the agent on the principal's behalf. Inevitably most agreements stipulate that such guarantees should be maintained at the agent's cost and should also be in a form acceptable to the principal.

In conclusion liner agents should give very careful consideration to the contents of agreements with their principals. Many clauses contain onerous provisions which can trap the unwary and cause difficulties at a later date. If in any doubt always obtain legal advice whether from your Club, your lawyers or your own legal department.

"Many clauses contain onerous provisions which can trap the unwary and cause difficulties at a later date."

"Without Prejudice"

ITIC is often involved in disputes between a Member and his principal or some other party. It is also common for Members to become involved in efforts to resolve disputes between their principals and other parties. A common post fixture function for shipbroking firms is the resolution of disputes that may have arisen during, and after, the performance of a charterparty. This is largely a matter of commercial negotiation but brokers may sometimes undertake small arbitrations on behalf of their client. Liner agents may also be involved in handling claims made against their principals.

A consideration that may arise during attempts to resolve any of these disputes is the use of the phrase "without prejudice". It is, obviously, beneficial to encourage parties to settle their differences without the need for a trial. It would also be impossible to have frank and open discussions in those negotiations regarding the merits and possible settlement of a dispute, if any admissions made, or concessions granted, could then be used in a subsequent trial or arbitration. The law therefore allows some exchanges between the parties, or their representatives, to be excluded from the rules of disclosure. These exchanges include communications between legal advisers and their clients and exchanges between the parties which have been made on a "without prejudice" basis.

The main requirement for the communication to be "without prejudice" is that it is made in relation to the settlement of a dispute. This does not mean that litigation or arbitration must have been commenced when the communication is made. When handling a claim a Member should use the phrase in appropriate circumstances, but the omission of the words does not automatically mean that an individual document becomes open or disclosable. This is especially true if it is part of a series of exchanges bearing the qualification "without prejudice".

It is equally true that the mere fact that a document bears the words "without prejudice" does not give it that status if it is not part of settlement negotiations. It is always important to consider whether it is desirable that a communication should be made on an open or "without prejudice" basis. A common technique is to write two letters, one containing the formal position and a second on a "without prejudice" basis transmitting any settlement offer.

Commission Insurance

The Club has received a number of enquiries from ship broker Members, either direct or through their insurance brokers, interested in insuring against loss of their commission.

This insurance is particularly important for brokers negotiating and fixing period business since the loss of commission arising out of the total loss of the ship in the early days of long term time charters can be very substantial.

ITIC's insurance is being offered in two forms:-
(1) loss of income solely as a result of total or constructive total loss and;
(2) loss of income due to any marine peril (including total loss), engine breakdown, strike or war risk affecting the ship or cargo.

Loss of commission income insurance has been offered by the London and other insurance markets for some time. It is analagous to business interruption and loss of profits insurance. Relocation of a business as a result, for example, of a fire or flood can cause a serious loss of income. However, relocation for a shipbroker (which was forced on a number of firms in London following the IRA bombs) may not prove to be as financially serious as the loss of commission on a long-term time charter due to a ship being, for instance, strike bound at Santos.

The advantages of this cover compared to similar products are as follows:-

- individual fixtures need not be declared;
- comprehensive and flexible cover;
- competitive premium;
- uncomplicated policy wording.

In order to celebrate the launch of this new commission income insurance the Club will give a free extension to the policies of existing shipbroker and ship manager Members. This offer is available for a limited period up until the 31st May, 1998. It is also subject to the double insurance clause contained in Rule 13.9 of the 1997 Rules. The free cover period protects commission income/fees in the event of a total or constructive total loss of a ship up to a total of USD 20,000. Members are, however, being offered the opportunity to purchase a wider cover which could provide compensation for any commission lost due to marine perils such as the breakdown of engine equipment, the negligence of the crew and other perils at sea. Higher limits of cover are also available.

If you would like more information please do not hesitate to communicate with the Managers.

"Bolero" - the electronic transfer of commercial trade information

"The ability to move from a paper to an electronic environment will provide significant benefits to all participants in international trade"

It is estimated that currently three times more documentation is required to process an international consignment than was needed in 1970. Each document has to be prepared separately and the risk of a keying error is self-evident. Indeed, studies show that approximately 50% of all documents presented to banks under documentary credit arrangements contain some type of error resulting in delay whilst the document is returned for correction.

However, a new system called "Bolero" has been designed to eliminate these problems.

What is Bolero?
Bolero is a fully electronic environment for trade administration offering an electronic alternative to the documents supporting international trade. Beginning with the bill of lading which, due to its negotiable nature, has been the most difficult document to deal with, the system uses a series of EDIFACT (Electronic Data Interchange for Administration of Commerce and Transport) standard international messages, a central register to record who the holder of the document is at any one time and a security system based on digital signatures to pass electronic title to the document down the chain.

How Bolero works ......
The carrier receives the shipping instructions electronically, turns this data into a Bolero Bill of Lading (BBL), digitally signs this message and sends it back to the shipper via the registry. The registry will set up a record for this BBL giving it a unique consignment reference number and the shipper, when he confirms that he accepts the BBL, becomes the first recorded holder. When the shipper, or any other current holder, wishes to transfer the BBL to the next person in the chain, he sends a transfer request to the proposed new holder via the registry. On receipt of this, the proposed new holder will then accept or decline the BBL. If he accepts, he will become the new recorded holder. All the electronic messages relating to the BBL are also secured by the use of digital signatures so that the registry and the users can all be sure that the person sending the message is authorised to do so.

Of course, there are many other documents involved in an individual shipment, but since they (unlike bills of lading) are only pieces of paper carrying information and without any intrinsic value, these are easier to translate into their electronic equivalents. Indeed, many of the other documents already have EDIFACT messages designed and in use, which can be readily adopted by the Bolero service. Some other possible functions, such as full integration with customs systems, may take a little longer to achieve.

Prevention of Fraud
The paper bill of lading containing a manual signature can easily be forged. Bearing in mind that the average value of a consignment in international trade is approximately US$ 40,000 and that the value represented by a single bill of lading could be as high as US$ 60 million, it is no surprise that the maritime world suffers massive fraud. The replacement of paper with a system such as Bolero, based on digital signatures, should result in a considerable reduction in fraud, with attendant lower costs for all honest international traders.

Other benefits
As with the use of other electronic systems, the improved customer service that can result for all users with a well-planned implementation of Bolero makes the organisation more competitive. Customer service improvements tend to come about through the fast availability of more accurate information and through the ability to plan further ahead and achieve a closer partnership between supplier and customer. The biggest benefit of all, however, is the ability finally to integrate shipping systems with the manufacturing, order processing and accounting systems of traders. Transport documents are very often the missing link in achieving completely automated administration systems - Bolero makes it all possible.

The way ahead
The TT Club (a sister Club of ITIC) recently signed a joint venture agreement with SWIFT (The Society for Worldwide Financial Telecommunication) in order to commercialise the project. This joint venture will be responsible for the overall management of Bolero. It will also contract with service suppliers for the development and operation of key components of the service and provide an integrated service to end users. In particular the joint venture will contract with SWIFT for the provision of the central registry and security systems. The joint venture will also accredit network suppliers and establish standards for application vendors to build front end applications for Bolero.

Bolero is different from previous initiatives because of its cross-industry approach. It is believed that this will ensure support from the key banks and transport operators who will brand, with their own name, the central service, add value to it and promote it to their customers.

The ability to move from a paper to an electronic environment will provide significant benefits to all participants in international trade, including liner agents. The Club, will of course, be monitoring the progress of this exciting project and further developments will be reported in the Intermediary. _

Issuance of Bills of Lading

Having become concerned at the increase in the number of claims that it had received as a result of the incorrect issuance of bills of lading, the Club issued two circulars in 1996; one relating to the problems that may arise when issuing “received for shipment” bills of lading and the other on different

types of bill of lading fraud. In the light of continuing claims being presented these are repeated below:-

Issuance of "Received for Shipment" Bills of Lading
In many countries, ship agents are asked to release "received for shipment" bills of lading to shippers. These bills of lading are used both as a receipt for the goods and for financing purposes. This practice can give rise to problems for the agent and his principal and the purpose of this circular is to identify some of them.

Assuming the carrier's responsibility for the goods commences at ship's tackle, the issuance of a "received for shipment" bill of lading by the carrier's agent could mean that the carrier becomes involved in claims for pre-shipment loss or damage, or for delay in shipment, which he would have otherwise avoided. In some countries, problems arise where the shipper fraudulently puts his own "shipped on board" stamp on a "received for shipment" bill of lading previously issued by the agent. Although, once it is proved that the shipper has indeed fraudulently affixed the stamp, any claims can be defended, this will not prevent aggrieved consignees from suing the carrier.

The practice is also the custom of the trade in many countries and a refusal to comply with a request for "received for shipment" bills of lading could mean that the carrier would lose business. However, the agent should always obtain his principal's authority before issuing such bills of lading; otherwise when the principal becomes embroiled in disputes with shippers or consignees he may look to his agent for reimbursement.

By far the most potentially dangerous practice is the issuance of a second set of "shipped on board" bills of lading, before the "received for shipment" bills of lading have been retrieved. The banks, having provided finance on the strength of the "received for shipment" bills of lading, are not willing to hand them back to the shipper until they have received negotiable "shipped on board" bills of lading in exchange. The ship agent may therefore find himself in the position of having two sets of original bills of lading in circulation for the same cargo. This practice gave rise to a case where shippers, who were in financial difficulties, used both sets of bills of lading to obtain credit from banks. When the shippers absconded, the banks looked to the agent for recovery and threatened to arrest his principal's ships unless the agent reimbursed them.

In an even worse case an agent had got into the habit of issuing "received for shipment" bills of lading before the cargo was received. The bills of lading were used for "pre-financing", but again there came a time when the shipper encountered severe financial difficulty, used the bills of lading to obtain "pre-financing" and declared bankruptcy without ever purchasing the goods. Again the ship agent was obliged to pay the bank.

In both these situations the shippers involved were substantial companies who had been shipping with the lines in question for many years. In both it had also become "custom of the port" for a ship agent to issue two sets of bills of lading for the same cargo. The majority of ship agents will already have systems and controls in place designed to avoid the problems described. However, observance of the following rules will further assist:-

Do not issue "received for shipment" bills of lading:
- without the carrier's authority;
- before the cargo is received.

Do not issue "shipped on board" bills of lading:
- without first retrieving any "received for shipment" bills of lading.

Bill of Lading Fraud
Some years ago the Club included an article on the dangers attached to "pre-dating and clausing" of bills of lading in its newsletter, "The Intermediary". Recent events have suggested that a further warning to Members on the perils of issuing bills of lading which contain incorrect information is timely.

Why does a shipper ask for a bill of lading containing incorrect information?

In most cases he will be paid by means of a letter of credit, and unless the bill of lading complies with its terms exactly, he will not be paid. The shipper, the carrier and the agent all know, or would be assumed to know, that in the vast majority of cases the bill of lading will be used to negotiate payment.

The most frequent requests from shippers are for the issuance of a bill of lading:

mis-dating

confirming loading on a date prior to, or subsequent to, the date on which the cargo was loaded. Pre-dating a bill of lading only two or three days earlier than the cargo was actually loaded on the ship is fraudulent;

incorrect description of cargo

bearing an incorrect description of the quality, quantity or condition of the cargo. The most frequent misdescription of cargo is "clean on board" in respect of cargo which is known to have been damaged in some way;

"shipped on board"

claused "shipped on board" before the cargo is loaded. In some cases before the ship arrives at the port or even in the knowledge that the cargo has been shut out from the voyage in question;

under deck bills of lading for breakbulk cargo shipped on deck

claused "shipped under deck" (or bearing no reference to shipment on deck) for cargo which is known to have been loaded on deck;

incorrect port of shipment

showing an incorrect port of shipment, in order to defeat boycotts by concealing the port of origin. Bills of lading are often "switched" at intermediate ports to disguise the origin of cargo to take advantage of the intermediate country's import quotas into, for example, the EU.

The Club has seen many other types of bill of lading fraud and has listed only the most common forms. An agent may feel that he is not personally guilty of fraud because he is simply following his principal's instructions. This has little effect on the legal position; if an agent knowingly misrepresents the status of cargo he is equally guilty with his principal of fraudulently inducing an innocent third party to pay for goods which are not in accordance with the bill of lading.

A case heard in England in 1995 (Standard Chartered Bank -v-Pakistan National Shipping Corporation) illustrates the problems which may arise where an agent signs a false bill of lading knowing it to be false. Here the defendants knew that the date of loading was incorrect and were held liable for deceit. However, the condition of the goods and port of shipment were equally important items which must not be misrepresented. The agent may feel that he has secured his position by obtaining a letter of indemnity either from his principal or from the shipper. Such an indemnity is a worthless document in that it has been issued to support a fraud; it is therefore illegal and void and cannot be enforced in a court of law.

The agent should be aware of the fact that his principal is probably uninsured for the consequences of the issuance of a fraudulent bill of lading by his agent and, that the fraud will possibly have deprived his principal of the limitations incorporated in the bill of lading.

Although fraud by employees is covered by the Club under Rule 2 (b), fraud which is intended to confer benefit on the Member is excluded. A deliberate risk taken by the agent as a favour to his principal, or to a regular shipper, would almost certainly be regarded as being "for the benefit of the Member". The Club has seen claims totalling millions of dollars resulting from the issuance of fraudulent bills of lading. Agents come under considerable pressure from principals and shippers, but must always realise that their duty does not include an obligation to knowingly participate in a fraud.

If any further information is required, please contact the Club. The contents of this article should be brought to the attention of all members of staff who are involved in the issuance of bills of lading. _

Liability as a Manager for Crew Negligence

The Club has seen a steady increase in the number of claims made against ship and crew managers that have arisen purely from the negligence of the crew. Claims arising from crew negligence should be covered by P&I or hull insurers. They are not the responsibility of the supplier of the crew, namely

the ship or crew manager. For example, in the event of an error (by a fully certificated and qualified chief engineer) causing damage to a main engine, the claim should fall against the hull and machinery underwriters. The fact that the chief engineer made a mistake does not mean the ship or crew manager had been negligent.

However, a manager can be liable for negligence in the way in which he supplies crew. Essentially this will result from a shore based error, examples of which include the provision of uncertificated crew, failure to provide crew as per flag state requirements or failure to ensure proper medical examination of crew prior to employment.

The ship and crew manager can also face claims for crew negligence if the management contract is not tailor-made to the services that are being provided. The BIMCO "Shipman" contract (with the recommended amendment to the insurance clause) is widely used and also recommended by the Club as a balanced contract between the interests of the manager and the shipowner. The basis of the contract is one of agency which also extends to the provision of crew. Thus the employment contract is between the shipowner and the crew and not the manager and the crew. In such circumstances the manager would usually have a good defence to any claim made against him by the shipowner.

If the contract of crew employment is clearly between the manager and the crew and the BIMCO "Shipman" contract is used, the defence of agency may not succeed.

The shipowner considers the crew to be the employees of the manager and can refer to Clause 18.2 of the "Shipman" contract which states that the manager accepts liability for the "negligence, gross negligence or wilful default of the managers, their employees and agents". This is despite the fact that it is clear the clause is written to exclude ship – board negligence claims. As the manager is directly employing the crew there is considerable danger of confusing the agency status of the contract. An alternative contract, the BIMCO "Crewman", exists for the supply of crew who are employed by the manager. However, this does not cover the numerous other ship management services on offer such as technical, operational and commercial.

This point is being addressed by the BIMCO "Shipman" and "Crewman" sub-committee together with the implications of the ISM Code and STCW 1995 Convention. The new contracts should be available for use by early 1998. What does a manager do in the meantime? The Club's recommendation is that he should not seek to change his existing contracts but wait until the new BIMCO "Shipman" and "Crewman" contracts become available. However, he should also add a clause to his ship management contract to the effect that as a ship or crew manager he is not liable for claims arising from negligence by crew. The appropriate wording is already incorporated in the existing "Crewman" contract, and should be added after the last sentence of Clause 18.2 of the BIMCO "Shipman" contract, along with a descriptive meaning of the word "crew" as follows:

"Under no circumstances shall the managers be liable for any of the actions of the crew even if such actions are negligent, grossly negligent or wilful. Crew shall mean the master, officers and seamen of the numbers, rank and nationality listed at ...."

If any member requires further advice on this matter they should contact the Club.