CONTENTS

The Intermediary - November 1998

THE MAGAZINE OF ITIC

Year 2000

The Year 2000 problem, or the "millennium bug" as it is sometimes called, arose several decades ago when the memory resources of computer chips were very limited and programmers were encouraged to save disk space by storing the year as a two digit field rather than four digits. As a result many computer systems, as well as electronic equipment containing embedded microprocessors, will be exposed to the risk of malfunctions as their time clocks roll over to one second past midnight on 1st January, 2000 as they will be unable to tell whether it is the year 2000 or 1900. Earlier problems may also be experienced when computers are asked to recognise other dates such as
9/9/99. In addition, there may be problems posed by the presence of the leap year in 2000.

This phenomenon may affect not only the PCs and mainframe computers that support your business, but also the embedded microprocessors in electronic equipment such as fax machines, lift controls and office environmental control systems. Malfunctions in such systems could result in them shutting down or just providing incorrect data. You will appreciate that there is now a very real risk that unless immediate steps are taken to ensure that all your computer systems and electronic equipment is able to recognise the year 2000, substantial losses could be caused to you, and to your customers.

The Club, as your professional liability insurer, must therefore ask you to implement thorough checks of all your computers and equipment by experts to ensure that it is year 2000 compliant. In the event of a claim on you which has resulted from any of your computers or equipment failing to recognise the year 2000, the Club will expect you, in accordance with Rule 3.3, to be able to satisfy the directors that the liability did not arise from a failure by you to take reasonable steps to establish proper systems and controls and to exercise proper supervision. This would include checking all your computers and equipment. At your next renewal the following clause will be included in your terms and conditions:-

"You are insured for your liability and costs arising out of the breakdown or malfunction, by virtue of a failure in electronic date recognition, of any computer programme, system, network, software or equipment, but only to the extent that you can evidence that you have taken adequate steps to ensure that your equipment and/or any equipment for which, although not in your possession or ownership, you may be responsible under the terms of any contract with a principal or other party, is in all material respects compliant. The Directors' decision as to what shall constitute a valid claim in these circumstances shall be final."

Finally Members should be very careful in connection with letters which they are asked to sign which include a guarantee or indemnity to principals, or others, in respect of any adverse consequences that may arise as a result of the failure on their part, or of any of their sub contractors, to be fully year 2000 compliant. If such letters are received they should be submitted to the Club.

The above is a copy of a circular sent to Members of ITIC in September 1998.

The role of the P&I correspondent

ITIC insures the professional liabilities of many of the world's leading P&I Club correspondents and this article examines the role of correspondents as well as their potential exposure to claims.

The correspondent acts as the P&I Club's local representative and his principal function is to deal with the various problems which can confront the shipowner member when his ship is within the jurisdiction in which the correspondent is located. Whilst the role of the correspondent is not that of an agent he is expected to stand in the shoes of the P&I Club insofar as the ship's master and the P&I Club member is concerned. The correspondent will handle claims and solve problems, whether or not they will give rise to a claim covered under the P&I Club rules. In order to handle such matters he may need to enlist the assistance of local experts such as surveyors, lawyers and other professionals.

This entails the necessity for the correspondent to be familiar with the expertise that is available in
his area and to provide proper instructions in order to retain control over the handling of the matter. Many of the problems that arise involve local authorities such as the harbour master, customs and immigration officers with whom the correspondent should have a good working relationship.

Additionally, the P&I Club will expect the correspondent to be the "eyes and ears" of the Club and to provide relevant information regarding any changes to local laws or statutory requirements and to advise on any claims trends of which the correspondent becomes aware.

Loss prevention is an important part of everyday life within the P & I Club and the correspondent has an invaluable part to play in advising the Club on such issues. A major marine casualty is obviously of
prime concern to both the member and the Club and speed of response is crucial to effective problem solving. Whilst owners and ships are now obliged to have disaster or major casualty response plans, the Club and its correspondents should be similarly equipped. Every correspondent office should be in a position to respond effectively and efficiently to any casualty which may arise on its shores.

This might consist of a tanker grounding or perhaps passengers from a cruise liner who need to be evacuated and found accommodation ashore prior to repatriation. Contingency plans for such events are essential and the Club would expect the correspondent to have such plans well documented.

In addition to the expectations of the Club, on many occasions the correspondent receives instructions directly from a Club member to provide assistance in all manner of matters which may, or may not, be of a P&I nature. Because correspondents are listed within the Club handbook, members will turn to them to assist in dealing with their local problems. If those problems are not of a P&I nature, fees and expenses will

be debited directly to the Club member since they will not be recoverable from the Club.

A P&I Club correspondent is of course potentially liable for claims which might arise as a result of any negligence or breach of duty which causes a loss to the Club or its members. Similarly he is also vulnerable to claims for breach of warranty of authority. One such case occurred recently when a P&I Club correspondent was requested to attend on board a ship to survey a cargo of 2000 metric tonnes of bulk fertiliser, which had been contaminated by residues from a previous cargo. The correspondent and the cargo interests reached agreement on a depreciation allowance of US$ 22 per
tonne. The correspondent, after several telephone conversations with the P&I Club, obtained verbal agreement to the compromise, and made a written offer of settlement to the cargo interests, which was accepted.

When the cargo interests submitted their claim for US$ 44,000 to the Club, the Club refused to pay alleging that the correspondent had no authority to make the offer of settlement. Not unnaturally, the consignees sued the P&I Club; they also sued the shipowner and the correspondent. Lawyers were
appointed to defend the correspondent.

Ultimately the court found, with the aid of contemporaneous notes, that the correspondent did in fact have authority from the P&I Club. However, the case illustrates how important it is to have
written authority. P & I Club correspondents can also be vulnerable to overlooking time limits and
extensions. In one case a correspondent, acting for charterers' liability insurers, failed to appreciate that a letter of guarantee had expired. Although the correspondent had obtained the necessary
time extensions from the shipowner, the ship had been sold and the owner was bankrupt. The guarantors were approached for an extension but refused on the grounds that their letter of guarantee had been issued in exchange for a counter guarantee from the shipowner which had also expired.

The role of P & I Club correspondents has essentially remained the same ever since they were first appointed. However, it is certainly the case that with today's advances in technology and communications they will be expected to provide an efficient and speedy service. At the same time they must minimise the cost of dealing with claims on behalf of the Club for the benefit of
members overall.

We are grateful to Phil Nichols of the UK P&I Club for his assistance in writing this article.

Fast and low cost arbitration

Further to the article which appeared in the October 1996 edition of "The Intermediary", we are pleased to announce the successful completion of ITIC's first FALCA; one of the first such decisions to be announced. The dispute concerned a Member who had been requested to arrange stevedoring services with the local port authority for a consignment.

The port authority's charges were based on weight or volume, depending on the commodity. The agent was asked by his principal to declare the cargo by weight, but the port authority subsequently

charged by volume. The principal refused to pay the extra charges and insisted the Member was liable for them. The arbitration dealt with the technical issue of whether the port authority had the right to
change from charging by weight to volume, and also whether the Member was liable. The arbitrator found that the port authority was acting within its rights and that the member was not liable for the
extra costs.

What is FALCA?
It is essentially a non-aggressive means of solving a dispute where a third party (the arbitrator) is required to give a considered opinion relying only on documents. This arbitration procedure differs from most in that a strict timetable is laid down and each side is only allowed to submit documents. The obvious advantage of a timetable is that it forces the parties to concentrate on the task in hand and does not allow them to use delaying tactics. The award has to be published within 8 months which allows both parties to settle their dispute in a relatively short time.

Why use this method when there are other forums?
It's easy to understand, and is indeed fast and low cost. In times of spiralling legal fees and increasing
litigation, it is a wonder that anything connected with the law can be described as low cost.

The procedure is eminently suitable for disputes arising out of agency agreements and for smaller disputes in general which can be settled with reference to documents only. The LMAA (London Maritime Arbitration Association) has a wealth of experience in all fields of shipping and it is therefore not difficult to find a suitable arbitrator to deal with cases.

If Members would like to consider putting a FALCA clause into their contracts, the Club will be pleased to assist.

The FALCA Rules were the brainchild of Thomas Miller Defence, and solicitors, Clyde & Co.

Intermediary news

This edition of The Intermediary is the first in the Club's new colours. It also features our new logo. The changes reflect ITIC's role as the leading international insurer of transport professionals. We hope you like them.

Anyone who would like to know more about the range of activities for which ITIC can provide professional indemnity cover, should contact Charlotte Kirk or Stuart Munro.

Loss prevention for Marine Surveyors
With the increasing awareness of the need for surveyors to carry professional indemnity cover, ITIC was asked to speak at the International Institute of Marine Surveyors' Seminar aboard HQS
Wellington in April 1998. The paper - "Loss Prevention for Marine Surveyors" delivered by Andrew Webster, concentrated on four main areas which can give rise to claims:- libel and slander, report writing, taking instructions and inspections.

Claims affect not only the bank balance but also the firm's reputation with the latter representing the surveyor's most effective marketing tool.

ITIC Board of Directors

The Club has announced the retirement of Russi Cooper from its Board. Mr. Cooper retired at the meeting in London in September 1997 after more than 12 years as a Director of ITIC (and previously of Transport Intermediaries Mutual). He was presented with an inscribed fountain pen by the Club's Chairman, Paul Vogt. Mr. Cooper had been a ship agent, first with Patvolk and later with J.M. Baxi & Co., for more than forty years, and is an ex-President of the Ship Agents Association of Mumbai and of the Federation of Ship Agents Association of India. He continues to be a member of the Panel of Arbitrators of the Indian Council of Arbitration and acts as a consultant to the Club's Mumbai
correspondents.

Singapore Board Meeting
The ITIC Board met in Singapore on 21st April, 1998. The agenda included a number of important topics such as the ISM Code and the Year 2000 problem. A reception was held the same evening for
Members, brokers and other representatives of the Singapore shipping community. The following day ITIC co-sponsored with the Singapore branch of the Institute of Chartered Shipbrokers a well attended Seminar on the subject of the ISM Code. Speakers included the Chairman of ITIC, Paul Vogt, and local ITIC Director, Steven See. The ITIC and ICS Singapore branch Chairmen also exchanged gifts.

Paul Vogt and several other Board members also attended an ITIC seminar and reception held in Kuala Lumpur on 16th April, 1998.

New Address
More than one year since the Club moved offices, post is still being sent to the old address. Please note that ITIC is now at:
International House,
26 Creechurch Lane,
London, EC3A 5BA.
Telephone and fax numbers remain the same.

Electronic Mail
The Club now has an e-mail address as follows: ITIC@thomasmiller.com

Please ensure that you state your name and that of your company in your messages.

Pay your premium in Euros
With effect from 1st January, 1999, the Club will additionally be underwriting in Euros. Should you wish to make use of this new facility, then please let your ITIC underwriter or Stuart Munro know.

"SHIPMAN 98"
As will be seen from the article on page 16, the new BIMCO Shipman form for use by ship managers has been produced. We would like to thank BIMCO for the acknowledgement in their special circular, number 3, dated 19th August, 1998:
"Given the importance of this work and to ensure that "Shipman" remained the industry standard third party ship management agreement, it was decided to entrust the draft revision work to a sub-committee composed of experts within the ship management field represented by the International Ship Managers Association (ISMA), shipowners and legal and insurance experts. Valuable input was
received from the International Transport Intermediaries Club (ITIC)."

Ship broking conference

ITIC's legal adviser, Andrew Jamieson, spoke at the Lloyd's List Shipbroking Conference in September 1998. His paper was entitled "Professional Negligence – Are brokers facing a litigious world with enough protection?". Andrew also addressed the Danish Shipbrokers Association at a dinner held at the Royal Copenhagen Yacht Club. His paper was entitled `Avoiding Claims in a Difficult Market'.

Port Agents and the ISM Code

The ISM Code came into force on 1st July, 1998 for passenger ships, chemical tankers and bulk carriers. In due course, but not later than 1st July 2002, it will be extended to cover other cargo ships and offshore drilling units of 500 gross tonnage and upwards. Port agents might wish to consider obtaining full details of the "designated person" of their ship owner principals. Under the Code every company must designate a person or persons ashore having direct access to the highest level of management. In the event that a ship is detained for non-compliance with the ISM Code port agents may be caught in the middle of a dispute between the authorities, on the one hand, insisting on immediate action to remedy any non-compliance, and the owners on the other, arguing that their ship is already fully compliant.

The Ship Arrest Handbook

Lloyds of London Press has published the Ship Arrest Handbook edited by Paul Smith, ITIC consultant and editor of the Intermediary. The book reviews arrest procedures in 35 jurisdictions around the world.

The contribution of shipbroking research to the shipping industry

A personal view by Dr. Philip Rogers, MD of SSY Consultancy & Research Ltd

With so many shipping decisions driven by "gut feeling" and instinct, what is the role of shipbroking research today? Industry players sometimes forget that it was not until relatively recently that any formal research existed at all. Even today there are just a handful of companies that can afford the expense of a research department. At the same time, somewhat paradoxically, there is a wealth of information in circulation. There have never been more specialist shipping magazines, newspapers and consultants. But does this mean that better decisions – and fewer mistakes - are being made?

If the answer is no and the instinct of most shipowners still predominates, then what is going wrong? Has shipbroking research failed the industry or is the industry being swamped by this oversupply of information?

Initially it is necessary to define the role of shipbroking research. In most cases, and certainly in the case of SSY, this role has four strands, usually in the form of a written report, for a client about a specific topic. This might typically mean something like the prospects for Panamax vessels over the next five years. Second, it means supporting brokers in presentations and expressing impartial views about the market situation. This impartiality is critical and I will return to it later. Third, it means undertaking consultancy for clients who are

not part of the mainstream of shipbroking. Representative clients here would include governments, international organisations, ports, solicitors, etc.

Fourth, the research departments have a role in generating publications - usually weekly or monthly market reviews and forecasts. These regular reports provide the staple cash flow that these departments need in order to survive. Consultancy revenue is rather like sale and purchase
income - highly erratic. If one were to add a fifth role for these departments, it would be a showcase for the company as a whole. Through the regular publications an impression of the company as a whole can be obtained. If the research is serious, professional and original in its thinking then this can be the trigger that leads a new client to pick up the phone to one of our brokers. However, research is not just about analysing the past. The need is for forecasts but what many potential users of research departments seem to forget is that these departments will rarely voice their opinion about the market in public. After all what is served by telling all of the market the answers to their questions? It can be all too easy for research to be assumed to be talking the market up or down. A research department services its own clients whether they are clients of the brokers or direct contacts. The departments themselves are busier than ever and many are the largest they have ever been. It is no idle boast to say that research departments are consistently the hardest working sections of any shipbroking company. So why, exactly, do we still have huge swings in the market?
Is it because research departments "get it wrong"? On the contrary, the track record of most dedicated research departments is often very close to the mark. Take, for example, the case of fleet renewal, usually the most contentious and opinionated area of the market.

A research department will often be the first to identify a "gap" in the market. When it does, what does it do with the information? Inevitably the news will leak out and of course others in the industry will also be undertaking their own research independently. At the same time it can be several months between an identifiable gap appearing and the first orders for those vessels to fill the gap being placed. When this happens there is also often a build up of orders that have been held back by owners not wanting to be the first to commit.

In due course this wall of orders is delivered and the market turns down. Their new ships values slump, owners feel they have been let down and research departments are cursed. So what are
research departments to do, caught as they are between a rock and a hard place? Inevitably they must publicise their findings, yet if they do the market responds by over-ordering.

This is where the impartiality of research is important. Opinions in research are developed by continuous market analysis. These may, or may not, coincide with the general market view as expressed by most brokers. Occasionally this will be at odds with the perceived market view and efforts may be made to force researchers to "adapt" their view for the sake of concluding a deal. This is a slippery slope that inevitably leads to the client suffering in the long run.

What conclusions can be drawn? If research is so wonderful and has all the answers why do we still have massive swings in the market? Three points need to be made:-

Researchers (along with everyone else) can never forecast the often large and unexpected swings in the market caused by unpredictable factors such as a shortage of water in the Panama Canal, or an oil price rise by OPEC, or a decision to import millions of tonnes of steel by China. Neither can they

foresee a grain harvest failure and the grain trade itself remains a major influence, some would say the major influence, on the market. Not all the trade and industrial data that forms the backbone of any demand forecast is available on a timely or comprehensive basis.

It is not the role of research to warn the market about these forthcoming swings - but it is its role to warn its clients.

Finally, it remains a fact that the vast majority of owners, charterers and banks never commission research geared to their particular needs. It is difficult to quantify precisely but I
would estimate that serious independent research, such as that which can be obtained from an
accredited shipbroking company, is undertaken by no more than 1% of these interested parties. So rather than blaming research they should actually be beating a path to our door!

Current developments in charterparty clauses

It is essential that the language of standard shipping documentation should reflect current practice in the various trades and sectors for which the documents were originally drafted and the updating and revision of shipping documentation is an important, although often time consuming task. Standard forms of charterparties, for example, start to lose their credibility if there are more rider clauses and amendments than original text.

Additional clauses and amendments will, of course, always be a feature of charterparties depending on the circumstances of each particular fixture. Nevertheless an evenly balanced and up-to-date charterparty should minimise the necessity for too many additional clauses. The principal organisation concerned with the development of standard shipping documentation is the Baltic and International Maritime Council (BIMCO). Over a period of more than 90 years BIMCO has developed a large number of standard charterparties, bills of lading and other forms and contracts which are used in numerous shipping transactions worldwide every day.

ITIC is represented on the BIMCO Documentary Committee and recent examples of drafting work carried out by this Committee include the following:-

Standard ISM Clause for Voyage and Time Charterparties
Although most standard charterparties contain fairly comprehensive provisions requiring the owner to ensure that the ship is in full compliance with all relevant international rules and regulations and in
possession of necessary certificates to permit the ship to trade within the agreed trading limits, BIMCO decided to respond to the demand from members who asked for a specific reference to the ISM Code to be included in their charterparties.
In drafting the Standard ISM Code Clause, BIMCO considered that it should contain the following essential elements:-

Reference to compliance with the Code by the ship and its shore management throughout the currency of the charterparty.

A requirement for owners to provide charterers with copies of the relevant Document of Compliance (DOC) and Safety Management Certificate (SMC) upon request.

Primacy to be given to the liability provisions of the charterparty over those provided in the ISM Clause in order to maintain the balance of the charterparty.

A remedy for loss, damage, expense or delay caused by failure of "the Company" to comply with the Code where there is a causative connection between failure of "the Company" to comply with the ISM Code and the loss or damage caused.

Standard Law and Arbitration Clause
The November 1997 meeting of the BIMCO Documentary Committee authorised the drafting of a revised Standard Law and Arbitration Clause. The impetus for this revision was the new UK
Arbitration Act 1996 and one of the key issues addressed by the BIMCO Sub-Committee that was formed was to remove all references to Arbitration Acts that pre-date the latest statute, in order to clarify and emphasise the repeal of earlier Arbitration Acts. In order to provide the widest possible application to various types of agreement the term "Charter Party" has been substituted by "Contract" throughout the new clause.

The Sub-Committee was also conscious of the fact that occasionally the appointment procedure of arbitrators can be protracted.

"In September 1995 BIMCO established a sub- committee for the purposes of drafting a new general purpose time charterparty"

In order to avoid the parties being able to use delaying tactics, the revised clause was drafted so as to limit the time between the first notice being served and the arbitration panel being formally constituted to a period of 14 calendar days. This is significantly shorter than the time permitted under the non-mandatory provisions of the Arbitration Act 1996 which could allow a party up to a maximum of 51 days under certain conditions.

Under the new clause by default, the reference is to three arbitrators. Failure by one party to appoint an arbitrator within the specified time results in the first appointed arbitrator being appointed without a requirement for a further notice to act as sole arbitrator. To avoid any possible misunderstanding between the parties, the party whose arbitrator has been appointed sole arbitrator must advise the
other party that such an appointment has taken place.

Standard Scrap Metal Clause
Although there are guidelines for the safe loading and stowage of scrap metal, charterparties for this cargo rarely, if ever, fully incorporate them. Given the substantial risk of hold damage caused by
the careless loading of scrap metal into unprotected holds, it was felt by BIMCO that a standard clause providing safe loading and stowage guidelines and a remedy for damage would be welcomed by
owners participating in this trade. The key elements of BIMCO's Scrap Metal Clause are as follows:-

owing to the hazardous nature of metal borings, shavings and turnings when carried in bulk (dealt with by the IMO Code of Safe Practice for Solid Bulk Cargoes) their carriage is expressly excluded;

charterers are required to instruct the terminal operators or stevedores to load and stow the cargo in compliance with the IMO guidelines;

compliance with the IMO guidelines not to affect the counting of laytime;

magnets cannot be used for loading and/or discharging; however, this does not preclude the parties from agreeing otherwise;

charterers are liable for any stevedore damage to the vessel. All costs for repairs to be for charterers' account and any time used in repairing the vessel to count as laytime.

General Time Charter Party - "Gentime"
In September 1995 BIMCO established a sub-committee for the purposes of drafting a new general purpose time charterparty. It had originally been the intention to revise the traditional ``Baltime'' charter but in view of strong opposition from the Documentary Committee it was decided
that it would be impossible to achieve any fundamental change to that document. It was therefore felt that the "Baltime" charter should not be subject to a radical transformation but that after a modest
revision of some of its terms it should be left as an alternative document to a new general time charter.

At the last meeting of the BIMCO Documentary Committee in Rome in May 1998 a `final' draft of the "Gentime" General Time Charter Party was placed before the meeting. It became apparent that further drafting was necessary on one particular aspect of the document and accordingly approval was deferred until the next meeting which will take place in November 1998. BIMCO Year 2000 Clause
BIMCO has recently examined the commercial and legal need for a balanced standard Year 2000 Clause for voyage and time charter parties that reflects the obligations of both owners and charterers. This clause does not place any obligation on either party to warrant Year 2000 conformity or compliance, or to specify that "effective" plans are in place to address the Year 2000 problem.
The standard Year 2000 Clause has been specifically developed for easy incorporation into charterparties without affecting their balance. Consequently, the requirements of the clause are designed so as not to prejudice the other rights, obligations and defences of the parties under the charterparty. In addition, specific remedies have not been provided for breach of the clause, in case this might affect the other rights, obligations and defences of the parties.

The full text of the clause is reproduced below: -
"Year 2000 conformity" shall mean neither performance nor functionality of computer systems, electronic and electro-mechanical or similar equipment will be affected by dates prior to or during the Year 2000.

Without prejudice to their other rights, obligations and defences under this Charter Party including, where applicable, those of the Hague or Hague-Visby Rules, the Owners and the charterers, and in particular the Owners in respect of the Vessel, shall exercise due diligence in ensuring Year 2000 conformity in so far as this has a bearing on the performance of this Charter Party.

The next issue of the Intermediary will contain a more detailed review of the "Gentime" Charter Party as well as a summary of other charterparty clauses which are under consideration by
BIMCO. In the meantime if any Member would like additional information on any of the clauses mentioned in this article they should contact the Club.

Pursuing claims in China

Outstanding fees, commissions and other charges are not at all uncommon in most businesses, but in shipping there can be significant problems in pursuing such claims when they are against companies from all over the globe. For parties with claims against China-based companies, this article is intended to give a brief overview of what steps can be taken against a stubborn debtor, whether proceedings in China offer useful benefits to the claimant, and how recovery can be made as straightforward as possible.
The first choice is whether to seek settlement or to pursue legal remedies. The approach to be taken to settlement of a debt at a reduced rate will depend partly

on the commercial relationship with the debtor and partly on the costs and prospects of recovery through legal proceedings. We shall therefore look at the question of legal proceedings and costs first. A major priority is to identify the correct jurisdiction in which the claim should be brought. There may, of course, be express provision in the contract between the parties as to where disputes should be resolved. If so, this gives a clear starting point as to where proceedings could be commenced. However, where there is an express agreement as to the choice of a jurisdiction other than China, this does not necessarily prevent a claim being brought against the debtor resident in that country, which may be desirable for reasons that will be given later.

Where there is no express provision in the contract, or for those considering what to include in their contract, the choice will be seen as being between the claimant's home jurisdiction and China. There are two considerations here. The most obvious is to find a jurisdiction that is favourable to the claim. There is little use in bringing the claim in a jurisdiction that, for any reason, does not allow the claim or would exclude any relevant evidence. However, where the claim is basically undisputed and the problem is really that the debtor is simply ignoring the requests for payment, the question of enforcability becomes more important.

Considering for a moment an English claimant. English court proceedings, whilst being more familiar to the claimant than Chinese proceedings, offer no easy route for enforcing in China any judgment
obtained. This can be contrasted with the position for UK arbitration awards which can be enforced in China under the New York Convention. Enforcement of arbitration awards in this way is generally
quite straightforward in courts in the major areas of China, although it can be more difficult in areas less familiar with international matters.

Where possible, therefore, there should be a preference for foreign arbitration rather than court proceedings from the point of view of ease of enforcement. The New York Convention has also been ratified by many other countries, including the USA, Australia, France and Germany, and therefore allows for the easy enforcement of arbitration awards from these countries. Foreign court proceedings can also suffer significant delays in relation to service of documents - we recently had one case where service of a writ from England on a company in Shanghai took in excess of six months.

Many claimants may feel that proceedings in China are unlikely to be effective or that they will be biased in favour of the Chinese party. This is not an entirely fair perception of the court system in China. In respect of maritime claims, most coastal areas of China have specialist maritime courts under whose jurisdiction the claim would fall. Since being established these courts have rapidly become familiar with international disputes. Bringing proceedings in China certainly has advantages so far as the enforcement of any judgement or award is concerned. As regards any jurisdiction clause that makes the dispute subject to another legal system and would normally prevent the claimant from bringing his claim in China, most Chinese defendants would be happier to be sued in their home jurisdiction. It will be much less expensive for them than would foreign court proceedings where
they would have to instruct local lawyers to represent them. They are therefore likely to agree to a change of jurisdiction or otherwise not contest the service of Chinese proceedings in favour of
somewhere else.

If the parties agree to proceedings in China, this opens up additional possibilities for seeking pre-judgement security. Chinese courts can allow the arrest or seizure of assets in China in relation to a claim that is to be brought outside China, although

where the defendant is Chinese the court may decline the application. This can be avoided if the claim itself will be heard in a Chinese court. Where security is sought the plaintiff has to provide counter-security, sometimes in an amount equal to that claimed. Although this may restrict the usefulness of the procedure, if the problem is an unwilling debtor then the attachment of assets can sometimes be sufficient to produce the required results.

The enforcement of a judgement or award made in China is fairly straightforward. Provided the plaintiff can identify assets of the defendant, the court will allow these to be attached. Since a judgement has already been obtained no counter-security need be provided.

Chinese proceedings do, however, present certain complications and disadvantages. In court only Chinese lawyers can appear or represent the client, and proceedings can appear to be slow if the facts of the case are complicated since the court will hold several hearings before any decision is made. Further, the claimant's costs are generally not recoverable in the event that the court finds in his favour.

We would maintain that in certain situations Chinese proceedings may offer more benefit to the foreign claimant than might be expected. Certainly, if the claim is essentially undisputed, then it may be that the threat of, or actual commencement of, court proceedings, will bring about settlement discussions. We have had success in several cases where a serious threat of commencing proceedings in China has been sufficient to initiate and bring to a conclusion favourable settlement discussions. If a settlement agreement can be concluded this will put the claimant in a strong position even if payment is not made in accordance with that agreement, since the claimant can sue on the agreement itself rather than having to argue on the basis of the underlying contract.

This article was contributed by Adrian Clarke and John Lin of the Shanghai Representative office of Sinclair Roche and Temperley

Editors Comment: ITIC has, on a number of occasions, successfully arrested ships in China in order to obtain security on behalf of ship agent Members. However, difficulties can sometimes be encountered and if the ship is trading to other countries it may be more helpful to arrest in another jurisdiction.

Illegal immigrants posing as crew members

The reasons for emigrating are essentially the same today as they were at the Beginning of the century; deteriorating economic conditions coupled with political unrest. However, a hundred years ago there was a better balance between the so-called “generators” - countries from where people would emigrate and “receptors” - countries or continents, able to absorb a large influx of individuals. Europe was overpopulated to a degree which is difficult to imagine even today, but vast areas of South America, the USA, Canada and Australia were able to absorb the millions of people who sought a better life for themselves and their families elsewhere.

Immigrants still strive to create a better life for themselves and their families. However, the ``generators'' are generating far more immigrants than the ``receptors'' are able, or willing, to receive. Unfortunately, this has created an industry in which masses of people are moved illegally; a modern slave trade, turning immigrants into law-breakers.

This new slave trade is attractive to organised crime. Thought to be worth around US$1 billion a year in Europe alone, the penalties for getting caught are much lower than for arms or drug smuggling. World-wide earnings derived from illegal immigration are estimated by the magazine ``The Economist'' to be about US$ 5-7 billion per year!

A favourite method for organising illegal immigration is to arrange for the illegal immigrants to pose as ships' crew. Crews often fly long distances to board a ship in a port where a crew change can easily be arranged. The airport immigration authorities are well aware of the procedure for crews boarding ships and the documents required to obtain a transit visa. On the European continent, thousands of crew members board ships from all over the world every year and in most airports it is considered a matter of routine. However, some years ago, BIMCO and ITIC started receiving reports from port agents describing a new procedure for entering illegal immigrants into Europe and Canada.

The modus operandi is generally as follows: the port agent receives a request from a new principal. The fax or telex looks like most other faxes of this nature and, in his nominating fax or telex, the
"owner" explains that the ship will call at the port on short notice, mainly to obtain stores, provisions, fresh water or bunkers. However, the ship also requires a crew change and the agent is asked to submit a pro-forma disbursement account. The language is ``shipping'' and the ``owner'' uses the correct terminology and phrases.

The agent, busy with other ships in the port, quickly makes his calculations and dispatches his pro-forma. Later the nomination is confirmed. The ``owner'' now submits instructions for the crew change, ETA of the ship, status on bunkers stemmed, provisions to be delivered etc. He also submits flight details of arriving crew members - details which all serve to give the agent the impression that the ship is due to arrive as advised. Shortly after the crew is due to arrive at the nearest international airport, the agent receives a fax from the ``owner''.

`...Unfortunately, the ship has been delayed due to engine problems and you are therefore kindly requested to arrange hotel accommodation for the arriving crew - twelve persons in all.' The agent sends his driver to the airport to meet the crew. Based on the documentation submitted by the port agent, as well as passports and seamen's books, transit visas are issued for the crew to board the ship within forty-eight hours. The driver takes the crew to a hotel used in these situations and makes sure that all twelve are checked in.

Next morning, back in the office, the agent has a few questions for the ``owner'' and therefore tries to ring him. Strangely enough, nobody answers the phone in the ``owners'' office, even though it is certainly within office hours. Shortly afterwards the phone rings. It is the hotel manager who informs the agent that the twelve crew members had apparently disappeared from the hotel in the middle of the night. At this point, the agent realises for the first time that something is very, very wrong.

An enquiry is made to BIMCO, the IMB and ITIC into the background of the ship and the company. The agent is informed that the ship does not exist, or the details submitted do not fit the name of the ship. The ``owner'' is not listed in any current reference books. The phone numbers used are all mobile numbers.

Even though completely unaware of his actual role, the agent has just been instrumental in entering twelve illegal immigrants into his country. The methods and countries may differ slightly, but the
procedure is basically the same.

In most countries, the immigration authorities look upon such incidents very seriously. For example, the Canadian immigration authorities have the ability to impose serious sanctions and fines on a
company which has failed to exercise due diligence as a port agent. These economic sanctions start at approximately US$ 5,000 per illegal person but may be as much as US$ 21,000 per person. In other countries the agent will be held responsible for all costs involved in housing and repatriating illegal immigrants.

Illegal immigration is almost impossible to prevent, even if the immigration authorities were equipped with the most modern equipment to detect and prevent it. As an example, the US borders are generally considered to be well guarded, by a special federal police force, using high-tech equipment to detect illegal immigrants and prevent them crossing the borders.

US territorial waters are guarded by the US Coast Guard from air, land and sea. Yet, the US Immigration and Naturalisation Office has estimated that the USA houses 3.7 million illegal immigrants - and that this figure is growing by 300,000 a year.

What steps should the ship agent take? He should establish systems in his office whereby no new principals will be accepted without a thorough investigation into their background and performance. In its most simple form, an in-house questionnaire would suffice, listing full details of the principal and the information available concerning this owner and his trade record from outside sources. information can be obtained from ITIC as well as organisations such as BIMCO or professional credit enquiry agencies.

Some port agents may argue that time does not allow for such in-depth investigations. The question is whether port agents, exposed to this type of fraudulent activity, can afford not to have documented
procedures in place, demonstrating to the local authorities that they are in fact exercising due diligence in checking and verifying the true identity of the companies on whose behalf they are acting. If not, the financial consequences can be severe and, in some cases, devastating for the port agent.

Setting up such procedures for checking the background of all new principals approaching the company, has a very positive side effect. It substantially reduces the possibility of encountering principals with poor payment records and poor reputations. _

This article was contributed by Peter Grube of BIMCO.
"The agent will be held responsible for all costs involved in housing and repatriating illegal immigrants."

"Shipman" 98

The final draft of the "Shipman" 1998 form was approved at the BIMCO Documentary Committee meeting in May 1998. The primary objective behind the revision of the "Shipman" (and "Crewman") agreements, was to make clear the responsibilities of the owner and manager as a result of both STCW 95 and the ISM Code.

The basic form of the contract remains the same. The first amendment at part 1 of the contract is a box for the name of the party responsible for compliance with the ISM Code and this will be as a Technical Manager, where this service is provided.

At the beginning of part 2 there are a number of additional definitions including severance costs, crew insurances, management services, ISM Code and STCW 95. There are also changes to the following clauses:-

(a) clause 2
Appointment of Managers.
This has been substantially changed and the list of functions removed;

(b) clause 3
Basis of Agreement.
This provides that the manager shall carry out the management services "as agents for and on behalf of the owners".

This is a fundamental principle of "Shipman" which in the previous contract was buried within clause 2.3;

(c) clause 3.1
Crew Management.
This now contains eight parts, each dealing with one of the functions ordinarily performed by ship
managers. "Crewing" has become crew management and its terms enhanced to bring them into line
with the relevant parts of the "Crewman" contract. One of the problems of the old "Shipman" was
that the crewing provisions were relatively under-developed. This has now been corrected.

This clause makes it clear that the managers are obliged to provide suitably qualified crew in accordance with the requirements of STCW 95;

(d) clause 3.2
Technical Management.
This now requires the managers to be responsible for the "development, implementation and maintenance of a Safety Management System (SMS) in accordance with the ISM Code";

(e) clause 3.3
Commercial Management.
The old headings of "Freight Management" and "Chartering" are no longer specifically referred to,
both now being incorporated into the heading of "Commercial Management";

(f) clause 4
Managers' Obligations.
This clause states that where the managers are providing technical management, they shall be deemed
to be 'the company' as defined by the ISM Code, assuming the responsibility for the operation of the
ship and taking over the duties and responsibilities imposed by the Code (where applicable);

(g) clause 5
Owners' Obligations.
There is a corresponding obligation on the owners, where the managers are not providing technical management, that they shall be responsible for ISM Code

compliance. The owners also remain responsible for STCW 95 compliance if the managers are not supplying the crew;

(h) clause 6
Insurance Policies.
This clause in the old "Shipman" contract was amended by a BIMCO circular in January 1997. There is a minor alteration to that circulated clause and it relates to the refusal by the International Group of P&I Clubs to accept, as co-assured, any third party required by the managers. It has been made clear that this can only be done at the discretion of the underwriters;

(i) clause 11
Responsibilities & Liabilities.
Although amended, there is no fundamental alteration in the division of responsibility as between the
owners and managers. There is, however, one major change to make it clear that the managers are not responsible for the negligence of their crew, and that even if they do have responsibility for failing to exercise due diligence in their selection and employment, this responsibility is limited in accordance with the terms of clause 11. The following clause has been added to make this clear:

"Notwithstanding anything that may appear to the contrary in this contract, the managers shall not be liable for any of the actions of the crew, even if such actions are negligent, grossly negligent, or wilful, except only to the extent that they are shown to have resulted from a failure by the managers to discharge their obligations under clause 3.1, in which case their liability shall be limited in accordance with the terms of clause 11.2.1."

There are some minor amendments to other clauses and these will be covered in the useful preamble to the "Shipman" 98 contract, written by BIMCO which will be attached to the agreement.

Supplies of the "Shipman" 98 agreement will be available from BIMCO's printers from September 1998 onwards. Their details are as follows:-

Fr. G. Knudtzon A/S, Vallensbaekvej 61,
DK-2625 Vallensbaek, Denmark.
Telephone: + 45 4366 0707
Fax: + 45 4366 0708

Agents and conflicting interests

Most ship agents are aware of the conflict of interest which may exist if they represent two principals engaged in the same trade.

Indeed the FONASBA Standard Liner Agency Agreement contains a clause which states: "The agent undertakes not to accept the representation of other shipping companies nor to engage in NVOCC or such freight forwarding activities ... which are in direct competition to any of the Principal's transportation activities..."

However, an agent must never allow his own interest to conflict with his duty to his principal and there are other potential conflicts which agents may not have considered. If an agent accepts an "incentive" from a supplier of goods and services to a ship to place orders for the ship with that supplier he is in breach of his duty to his principal. If the principal finds out he can dismiss the agent and in some countries it would be a criminal offence. If the agent is asked to procure goods and

services for the principal and instead of passing on the cost he charges a higher price, then any such practice would constitute the taking of a "secret profit". The principal is then entitled to refuse to take the goods, and can also claim reimbursement of the agent's profit, or refuse to pay the agent at all.

An agent has a duty to provide his principal with material information which comes into his possession. In addition an agent must not make use of confidential information which he has acquired during the course of an agency. If the agency is terminated the agent would not, for instance, be able to provide a rival carrier with details of his ex-principal's customers.

These two duties can also give rise to a conflict when the agent has a dual agency. Agents are often appointed by charterers and simultaneously by owners as protecting agent. An agent can act for more than one principal with the consent of both, but the problems are obvious. For example, what should the agent do if he obtains knowledge as agent for the charterer which would adversely affect the owner? What if the charterer has failed to pay for tugs and pilots within a reasonable time thereby putting the owner at risk of having his ship arrested? Can the agent breach his duty of confidentiality to the charterer in order to fulfil his duty to disclose material information to the owner?

The courts are not particularly sympathetic to an agent who has allowed himself to be put into a position where he has a clear conflict of interest. In a recent case a port agent who released cargo without production of the original bill of lading on the instructions of the charterer, subsequently had to answer to the owner for failing in his duty of care. The charterer had become bankrupt and the unpaid shipper had successfully sued the shipowner, who in turn looked to his agent.

Another problem which arises where agents either represent more than one principal, or where they are nominated by one party for another party's account, is establishing who is going to pay.

Where there is a liner agency agreement, the question of who pays for what is clear. However, port agents have to be extremely careful to ensure that when they order goods and services they know who is going to pay. If the agent is both charterer's agent and owner's protecting agent it is sometimes difficult to establish who will pay for the various port and stevedoring charges. We often see cases where both parties point the finger at the other and both refuse to pay, leaving the agent in a "no win situation."

In a recent case, a ship agent in the Far East was nominated by the voyage charterer, a well known trading house, to be the agent for the disponent owner (a well known and reputable shipping company). The agent sent his list of pro forma disbursements to the disponent owner one week before the arrival of the ship at the port, but no response was received and no funds were emitted. In view of the reputations of the companies concerned, the agent allowed the ship to sail before funds were received, even though he had a personal liability to pay all port costs. About two weeks after the ship had sailed, he was informed by the disponent owner that the port costs were not for his account, but for that of the voyage charterer. The agent was caught in the middle of a dispute between these two parties, and twelve months later had still not been paid. After lengthy correspondence with both parties produced no result, a threat by the Club to arrest the ship finally persuaded the head owner to pay. The head owner recovered from the disponent owner, who presumably took his dispute with the voyage charterer to arbitration.

If an agent is appointed by both the owner and the charterer he should establish exactly who will pay for each service. If he is nominated by the charterer to be the owner's agent, it is a sensible precaution to obtain the owner's confirmation of the appointment. When the agent is asked to
order goods and services he should consider adding the following footnote to his communications to the party ordering them:

"Unless we are specifically advised by you that another party will be responsible for any services rendered to the ship before they are ordered, we will order such services on your behalf and for your account"

Agents should bear in mind when asked to act for two principals, that there is a danger that they may end up not satisfying the requirements of either. _

This is a reproduction of an article which appeared on the ITIC page of the Spring 1998 edition of the Ship's Agent & Broker magazine.