Contents – Intermediary Oct '96

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

Ship Managers' Liability for P&I calls

The Bankruptcy of a shipowner will not only cause problems for a mortgagee bank and for suppliers of goods and services to his ships, but also to his ship manager who may receive a bill for outstanding supplementary of release calls from the shipowner's P&I club.

A contract between a ship manager and a shipowner has no binding effect on a P&I club. Therefore the ship manager who seeks to rely on the indemnity in a ship management contract may be sorely disappointed.

A ship manager needs P&I insurance because he is the operator of a ship, and in many jurisdictions faces the same liabilities as a shipowner. A P&I club, whether within the International Group (IG) or outside that group, will offer cover to a ship manager, both as a Member in his own right, and as a joint member or co-assured. The manager is offered cover as a joint member at no additional cost, as the Club is not providing any wider cover to an owner who is contracting out of his management than to an owner-operator. This is important to a manager as he could not afford to pay an additional call to a P&I club out of an average annual management fee of between US$ 80,000 and US$ 120,0000 per ship.

There is no universal P&I Club practice in relation to joint membership as different clubs describe joint membership in different ways. For the purposes of this article, the expression "joint member" indicates "full" membership of a P&I club and this makes the manager jointly and severally liable for supplementary, release or catastrophe calls, The alternative status is best described as "co-assured" and it recognises that a manager is not liable for P&I calls. Co-assureds are usually offered misdirected arrow cover or group affiliate status. Some Clubs will name the co-asssureds, while others will note them but not name them on the P&I insurance documents.

Until the mid 1980s a ship manager could only be a joint member and so was liable for P&I Clubs' calls. Others, such as crew agents, were considered suppliers of services and not owners and so could only be co-assured. The pooling agreement, which is the governing document of the IG, now allows a manager to be co-assured. Historically ship managers who offer technical, operations, commercial, crewing and insuring services to the shipowner are named as joint members on the P&I insurance. Such ship managers are therefore accepting a substantial credit risk for unpaid calls, but do obtain cover in their own right, and are therefore able to enjoy identical cover to that of their principal, the shipowner.

There can be problems with co-assured status

The advantage of co-assured status for a manager is that it carries no liability for unpaid calls. This has to be weighed against two distinct disadvantages. The first is that when the shipowner's cover ceases, so does that of all co-assureds. The manager is therefore uninsured and, as an operator of the ship, directly exposed to P&I claims from third parties. The second is that the cover offered by a P&I club to a co-assured is only to the limit that the shipowner would have been able to establish. If a shipowner is able to limit his liability to, say, US$ 1 million, the ship manager maybe sued successfully for US$ 2 million, as he would be unable to limit his liability to that of the shipowner in that particular jurisdiction As a joint member, the manager would be indemnified for the full amount of the claim but, as a co-assured, the manager would be covered only up to the shipowner's limit of US$ 1 million.

Some managers provide only a crew management service. The crew will be employed by the crew manager who is not acting as an agent of the shipowner, but as a principal in the supply of crew. The crew manager may place, in his own name, a separate P&I crew risk insurance to that of the shipowner, who will then exclude that risk under his P&I insurance. The crew manager still needs to be on the owner's insurances (including hull and P&I) for the same reason as the ship manager. However, a crew manager is naturally more reluctant to accept the credit risk of joint membership if he is only supplying the crew. If the crew manager accepts co-assured status, he faces the same liability exposures as a ship manager. This dilemma is not helped by confusion between P&I clubs as to whether they will allow a crew manager to be a joint member. Most of the IG Clubs will allow a crew manager to be named as a joint member, but some will not.

A manager may seek to reduce his liability to P&I Club calls by obtaining an indemnity from the shipowner in the ship management agreement. However, a contract between a ship manager and a shipowner has no binding effect on a P&I club. Therefore, the ship manager who seeks to rely on the indemnity in a ship management contract may be sorely disappointed. This is not to say that it should not be in the contract, but rather that it will not protect the manager from a claim from the P&I Club. The standard ship management agreement is the BIMCO "Shipman". Unfortunately clause 13 of that contract, which relates to insurance, is drafted on the basis that the manager will be named as a co-assured and not as a joint member. BIMCO is revising the "Shipman" contract in the near future and will no doubt consider changing that clause to reflect the necessity of a ship manager being named as a joint member.

If you face a claim

What then can a manager do if he faces a claim from a P&I Club for non-payment of calls because he is named as a joint member ? The manager may wish to consider one of the following steps :

(1) Ask the P&I Club to provide copies of all the insurance documentation as a matter of routine.

The manager does not always arrange the insurance of the ship under his management; it may be placed by the owner directly or via his insurance broker. The manager is therefore not always aware of the financial problems of the shipowner. If the manager ceased his services to the ship in, say, February 1995 but was not informed by the P&I Club concerned that supplementary or release calls had not been paid, he will be understandably concerned about this problem being raised some 18 months later. If the manager had been informed earlier by the Club he might have been able to deal with the problem before all the ship management accounts were finalised. We recently heard of a manager who was first informed of outstanding calls some two years after the debt arose, and only then via debt collection agency. The ship manager was not impressed especially as he had entered ships with that Club for more than 20 years.

(2) Use commercial relationships.

In the example quoted above, the manager was able to negotiate with the club involved because both sides wanted to "save face" ship mangers now place increasingly large amounts of business with a wide range of P&I market. Clubs may not find it sensible to antagonise a ship manager for relatively small outstanding sum if that manager is placing P&I insurance worth many millions of dollars.

(3) Look closely at the P&I Club's Rule books.

The P&I clubs do have different wordings and explanations as to the type of cover they offer. It may be that what the club thinks is a liability under their Rules does not bear scrutiny when subjected to legal analysis.

(4) Pay the outstanding calls.

Not the most popular option, but one which may best protect the ship manager's interest if he places insurance for other ship owners in that club under his own fleet entry. Cancellation of cover for one ship may affect the insurance of all. If cover has been cancelled, the P&I club will only reinstate it if the call is paid insofar as it relates to the manager. When a P&I club cancels cover for non-payment of calls, it does so retrospectively, so the handling of any claim not

secured by a P&I guarantee will be discontinued. Claims for crew death and bodily injury are usually still dealt with as a matter of public policy.

(5) Choose a Club that is reviewing its attitude to ship managers

P&I clubs need to review their attitude to ship managers, and perhaps consider offering managers joint membership with a restricted liability for unpaid calls.

Some clubs will now provide the ship manager with insurance documentation even if the ship is not directly entered by the manager. Others are reviewing their Rules in order to better protect a manager if one owner within the fleet entry fails to pay his calls. Furthermore, the decision as to the type of entry will be left to the manager concerned. If a ship manager wishes to accept the liability risk, as opposed to the credit risk, by being co-assured as opposed to a joint member, then some clubs will allow this.

P&I clubs are professional operations staffed by people who know the shipping industry well. Most problems with outstanding P&I calls are dealt with in a commercial manner and to the satisfaction of both parties. However, as has been demonstrated recently, this is not always possible, especially if large sums are at stake.

Intermediary News

We would like to draw attention to some problems reported by Members.

Bogus crews for phantom ships

In 1988 the Club issued a circular notifying Member in the European Community of several instances where agents has been appointed for the call of a newly acquired ship at a northern European port by the buyer of the ship. One of the duties of the agent was to arrange for the new owner's third world crew to take over the ship. The agent in each case arranged for entry visas, travel, accommodation, etc. for 20-30 crew who disappeared shortly after their arrival. The agent subsequently found out that there was no such ship, and the only intention was to introduce illegal immigrants into the EC. The agent was left to foot all the bills, including potential fines from the immigration authorities. BIMCO recently warned its members about the same problem and ship agents in Canada have experienced similar situations. The only difference was that the ship did exist but was in lay-up and, needless to say, did not belong to the alleged "buyer". Any Member who believes that he has been selected to look after a bogus crew for a phantom ship should let the Club know immediately.

Forged bank telexes

Over the past few months the same unscrupulous charterer has twice managed to get ship agents to allow ships to sail before disbursements are received, by sending a fake bank confirmation that a remittance had been made. In both cases the agent received a telex which apparently originated from a London bank. When the funds did not arrive, the Club contacted the bank, who denied that the telexes originated from them.

Debt Collection

recovery of monies and legal expenses under Rule 10

The 50% of the Club's Members who avail themselves of the Club's debt collection service by purchasing the optional cover under Rule 10 (recovery of monies and legal expenses) will be aware that the Club has considerable success in collecting their debts. They may still be surprised to learn that, since ITIC was formed from the merger of TIM and CISBA in 1992, the Club has collected no less than US$ 18 million for its Members.

The cover is mainly used by shipbrokers and port agents to recover their outstanding brokerage and disbursements. Although the Club's success has been notable, many debts are incapable of being collected because the debtor is bankrupt, or the ship has been sold, and we believe that the following guidelines may assist Members in avoiding bad debts:-

Port agents

Obtain advance funds.

If your principal is unwilling to provide advance funds, or only remits part of your pro forma disbursements, contact the Club to see if anything is known about the company. If the Club is already pursuing outstanding debts from the same principal, it is essential that the funds should be secured before the ship sails.

Find out for whom you are acting

If your instructions are from a company who describe themselves "as agent only" ask them for whom they are acting as agents. Just because the party instructing you is a substantial shipowning or management company does not mean that the party they represent is equally substantial. You may find that the party to whom you are offering your services is not one to whom you would knowingly extend credit. On occasions we find that the "agent" is himself a creditor of the party he represents and is, therefore, highly unlikely to discharge the debt to the port agent.

Similarly, you must regularly notify the suppliers of goods and services to ships under your agency that you are acting "as agent only" and let them know the identity of your principals, otherwise you could find yourself being pursued through the courts by those suppliers.

Find out who is going to pay

The problems facing the port agent acting for charterers were referred to in the December 1995 edition of "*The Intermediary*". If there are several parties involved with a ship under your port agency, you must immediately establish who is going to pay for each service. The Club frequently sees claims where the port agent has ordered goods and services e.g., port or stevedore costs, without first establishing who is going to pay. If there is any dispute between the owner and charterer over who is liable to pay under the terms of the charterparty, both parties could refuse to pay. The agent might then be forced to settle the charges himself. When a port agent sends his request for pro forma disbursements to his principal, he should include the following sentence as precaution:

"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".

Shipbrokers

The shipbrokers' commission is set out in a specific clause in the charterparty and it is beyond the scope of this article to consider the various terms of charterparty commission clauses. However it is important to appreciate that, under English law, the broker, not being a party to the charterparty, has no direct right of action to enforce the commission clause. ***[NB. This position changed in 2000 – see articles in March 2000 and September 2001 editions of The Intermediary]***

FONASBA had addressed this potential problem in a one page document, the International Brokers Commission Contract. This lays out the terms under which commission is payable and establishes where, should a dispute arise, arbitration proceedings should be held. The document is particularly useful for the competitive broker who may be dealing with an unknown shipowner who, without the existence of a clear contract for payment of commission, might be difficult to pursue through the courts.

Shipbrokers' commissions are traditionally payable by the owners unless there is an agreement that brokerage will be deducted by charterers from freight or hire. Normally it is preferable for the shipbroker to leave the liability for paying commission with the shipowner (who at least owns the asset which may, in some jurisdictions, be arrested to secure the outstanding debt) rather than agreeing that the charterer can deduct his commission. However, if the charterer is a substantial entity (a large grain

house or oil major) or very well known to the broker, this advice may not be appropriate.

Never forget that fixing without subsequently gaining your commission is a total waste of time and money.

Collecting the debt

The Club is conscious of the necessity for Members, whether they be agents or brokers, to maintain commercial relationships with their principals. The Club's first communication need therefore be only a polite reminder that the invoice may have been overlooked. ITIC has dealt with more than 1,500 debts for its Members in the last four years and the Club is well known to both owners and charterers.

If the funds are still not forthcoming the Club can then, with the agreement of the Member, take a more aggressive stance. The Club has arrested more than fifty ships in the past year in many different jurisdictions and has also arrested bunkers, frozen funds, and otherwise done whatever proved necessary to achieve a successful recovery.

Do not leave it too long before seeking the Club's assistance

Contact the Club within a reasonably short period after the debt has been incurred. The older a debt, the harder it is collect, especially if the ship has been sold and the debtor is bankrupt. In some countries the time limit for collecting a debt is as little as two years, so you may find that you have no legal redress against the debtor company.

The Club's minimum sum in dispute

The Club has a minimum sum in dispute, which is determined by the Directors and, for any debt less than this amount, the Club cannot incur legal or other third party costs. Currently the minimum sum is US$ 3,500. It does not, of course, make economic sense to spend more collecting the debt than the amount of the debt itself.

Two of the Managers' staff are concerned solely with debt collections and have acquired expert knowledge as a result. The Club is sometimes asked by Members to appoint lawyers to assist them in collecting monies which are properly due to their principals (such as freight or cargo-related charges) especially where the agent acts in a "del credere" capacity. Unfortunately, the Club cannot use its resources to collect funds due to parties other than the Members and it is for the principal to make his own arrangements (possibly through his Defence Club) for legal expenses insurance for collecting freights.

Finally, if you do not have cover under Rule 10, but would like a quotation, please communicate with the Managers. The collection by the Club of a debt that would otherwise have been written-off could more than exceed your total annual premium.

Marine Surveyors' Liabilities

As a marine surveyor it may seem you are there to be shot at by just about everyone! Not only may those who have instructed you try and hold you liable if things go wrong but you may find that third parties claim to have suffered as a result of something you have done.

It is, perhaps, the unique position of a marine surveyor, as someone who will produce a report which may be seen and possibly relied upon by parties other than his original client, that has given rise to questions as to the extent of a surveyor's liabilities.

The purpose of this articles is to examine briefly the extent of those liabilities and to give what we hope will be some obvious suggestions about how potential problems could be avoided.

The surveyor's duty

You will have been retained by your client either verbally over the telephone, or in writing, or a combination of the two. The written contract may just be an exchange of correspondence or something more detailed.

Whether the terms of the contract expressly say so or not there will be, implied in every contract, a term that the surveyor will carry out his work with the due skill and care of a competent surveyor in the circumstances of a particular case.

The circumstances which will be taken into account by the court will be the extent of the surveyor's instructions from his client. In other words, a court would look at what the surveyor had been asked to do. Oral evidence will often be important.

Whether the survey is a pre-purchase inspection of a vessel, an on or off-hire survey in relation to a charterparty, or a cargo survey, it is in the surveyor's interests to define for his clients, at the very outset, the precise extent of the work he is to undertake and specifically what matters are to be excluded. We have seen a number of disputes between a surveyor and his client as to the extent of the work that had been agreed to be carried out where the client's expectations invariably exceeded those of the surveyor! To avoid such difficulties we cannot emphasise enough the need to be specific about the extent of the work to be undertaken.

Quite apart from the duties the surveyor will owe under his contract with his client, he also owes him a duty of care under the law of tort. It is for this reason that many claims are framed in negligence as well as in breach of contract. The extent of the duty is the

same as in the contract, namely to carry out the job with the reasonable skill and care of a competent surveyor in the circumstances of the case.

Although the duty is the same in both contract and tort, there is a legal difference when it comes to the question of a breach of those duties. There may be differences in damages where a claim is framed in contract rather than in negligence. The most significant difference is, that, under his contract, the surveyor owes the duty only to his client whereas a duty of care is not necessarily so confined. It is, therefore, important to see if the law allows the surveyor to be liable to someone other than his own client.

To whom is the duty of care in tort owed ?

There is, of course, no question that the duty of care extends to the surveyor's client but, given that the duty is independent of a contractual relationship, need the surveyor fear attack from any other quarter?

The law of negligence is part of that body of English law that is under continual review by the English courts. The courts are bound by a system of precedent formed by previous legal decisions going back over many years and it is up to the courts to develop that precedent as new factual situations come before them. As far as a surveyor's task is concerned he will be making statements, usually in a written report, upon which someone is going to rely and a claim will usually arise when the party relying on those statements claims to be out of pocket as a result of them. The courts have always been reluctant to restrict situations in which liability can arise for financial loss through statements negligently made. They have done so by restricting the duty of care to situations where a "special relationship" exists between the innocent party and the wrongdoer. Under this restriction liability would arise only where the wrongdoer was aware of the transaction that the innocent party had in mind and knew that the innocent party would rely on his advice.

It may seem, therefore, that a surveyor, who knows his report may be seen and relied upon by a third party, would have a liability to that third party if he suffered financial loss.

Fortunately for surveyors and those involved in a similar advisory capacity, the courts have further restricted the duty of care as highlighted by the 1990 landmark case of Mariola Marine Corporation - v- Lloyds Register of Shipping ("Morning Watch"). In that case a Lloyds surveyor had given an 80 foot steel hulled motor yacht, the "Morning Watch", a periodical special survey and had passed her as 100 A1. The surveyor knew that a purchaser was interested in the yacht at the time and that purchaser decided to rely on the class certificate as confirming the yacht's good condition at the time he purchased her. Subsequently after delivery the owner discovered substantial defects with the yacht which were enough to take her well outside Class. The purchaser looked to Lloyds to reimburse him for the substantial repair costs. He had, after all, relied on the Lloyds surveyor's report, as the surveyor well knew.

Lloyds declined to reimburse the purchaser and the case went to court. The purchaser argued that the necessary "special relationship" existed and the court accepted that the surveyor had been negligent. The court, however, decided that Lloyds did not owe a duty of care to this purchaser, or indeed to any future purchaser of a vessel who was likely to rely on a pre-purchase classification certificate issued by Lloyds. Whilst it would appear that public policy played no little part in the decision it produced an important precedent greatly limiting the possible liability of a surveyor whose reports may be relied upon by those other than his client.

Conclusion

Although the range of possible parties from whom a Surveyor might face claims is limited, he would still owe a duty to his client.

To minimise the likelihood of such a claim the surveyor's starting point must be a careful definition at the outset of the services to be provided. Particular consideration should also be given to making quite explicit in the survey report any limitations to the investigation to which the surveyor had been subject. He should also advise where further investigation by the client or a specialist expert would be considered prudent. Where a client may be present at the time of survey then no reliance should be placed on any oral comments made to the client which could later be denied. Instead it is important to ensure that everything found at the time of the survey finds its way into the written report.

Switch bills of lading

The practice of issuing switch bills of lading is increasing.
What are they, why are they issued, and what are the risks?

A "*Switch bill of Lading*" is issued by, or on behalf of, the carrier in substitution for the bill of lading issued at the time of shipment.

There are number of reasons why switch bills are issued. The common link is that, from the point of view of the holder of the bills, the first set of bills is unsuitable under one of the sale and purchase contracts for the goods in question. Carriers often feel under commercial pressure to issue switch bills in order to satisfy the requirements of the customers. Examples of reasons why switch bills are issued are that:-

(a) the original bill names a discharge port which is subsequently changed (e.g. because the receiver has an option or the good are resold) and new bills are required naming the new discharge port:

(b) a seller of the goods in a chain of contracts does not wish the name of the original shipper to appear on the bill of lading, and so a new set is issued, sometimes naming the seller as the shipper. A variation on this is where party does not wish the true port of loading to be named on the bill;

(c) the first set of bills may be held up in the country of shipment, or the ship may arrive at the discharge port in advance of the first set of bills. A second set may therefore be issued in order to expedite payment, or to ensure that delivery can take place against an original bill;

(d) shipment of goods may originally have been in small parcels, and the buyer of those goods may require one bill of lading covering all of the parcels to facilitate his on sale. The converse may also happen i.e. one bill is issued for a bulk shipment which is then to be split.

Where switch bills are issued, the first set should be surrendered to the carrier in exchange for the new set. There is usually no objection to this practice. However, the switch bills may contain misrepresentations e.g., as to the true port of loading. If a receiver suffers loss as a result of this, then the carrier and his agent may be at risk.

In practice the switch bill set is often issued not against surrender of the first, set, but against a letter of indemnity. That may happen in any of the examples given above, and clearly will be the case where the first set has been delayed. Switch bills of lading issued in these circumstances may leave the carrier and his agents extremely exposed. The switch bills may be negotiated to a buyer who expects the goods to be delivered to him. The shipper holding the first set might not yet be paid by his buyer. The carrier may therefore be faced with claims from the shipper holding the first set of bills, and from the holders of the second set. The carrier will probably deliver the goods to one of these parties, and be liable to compensate the other. Any indemnity which the carrier has obtained may well be worthless.

In a recent case decided by the High Court of Singapore (Samsung Corporation v Devon Industries Sdn Bhd [1996] 1 SLR 469) a vessel had loaded a total cargo of 10,500 MT of soya bean oil. It appeared that the goods had been shipped by a number of different shippers in small parcels. The plaintiffs were the holders of bills of lading covering two parcels of 1,000 MT and 1,500 MT respectively. They tendered the shipping documents to the defendant buyers, who did not pay for the goods. The buyer was also the charterer of the vessel, and arranged for the shipowners to issue what were described as **"global"** bills of lading naming the buyer as the shipper. The defendants were able to negotiate those bills of lading, and were paid for the cargo (which they had not themselves paid for). In an action brought by the seller to recover the original first set of bills held by the buyer, the court said that the ship agent

(combined with the buyer) had unlawfully issued a second set of bills of lading in abject disregard of the sellers' interests. The buyer had acted fraudulently, with the co-operation of the ship agent.

Although the court did not expressly address the liability of the shipowners, or their agents, for having issued the second set of bills, there is little doubt that the owners and their agents would have faced claims from the holders of either the first set or the second set. There is no mention in the report of this case of whether the second set was issued against a letter of indemnity from the buyer/charterer, but the buyer was in dire financial straits, and so any letter of indemnity is likely to have been worthless. In any event, a letter of indemnity given in these circumstances may well be null and void.

Security Collections under General Average -

Guidelines for port agents

From time to time ship agents become involved in cases where a casualty has resulted in a General Average act. The agent may be called upon to collect security and a well organized collection is essential to prevent cargo either being unnecessarily delayed or from slipping through the net.

The principle of General Average was first formulated by the ancient Greeks in a maxim dealing with the question of jettison, but it is probable that the idea itself was of still more ancient origin. The modern principles are set out in the York-Antwerp Rules which define a General Average act as follows:

"There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure."

Events giving rise to General Average

The following are simple examples of General average situations:-

Casualty	**Type of Sacrifice or expenditure**
Standing	Damage to vessel and machinery through efforts to refloat. Loss of or damage to cargo through jettison or forced discharge. Cost of discharging, storing and

	reloading any cargo so discharged.
Fire	Damage to ship or cargo due to efforts to extinguish the fire. Port of refuge expenses.
Shifting of cargo in heavy weather expenses.	Jettison of cargo. Port of refuge expenses.
Heavy weather, collision, machinery breakdown, or other accident involving damage to ship and resort to or detention at a port.	Port of refuge expenses.

Many types of occurrences may give rise to a claim for salvage services. Rule VI of the York-Antwerp Rules provides that payments made in respect of salvage should be treated as General Average. Salvage services may be rendered under many different types of contract (e.g. a fixed lump sum, "no cure, no pay" etc.) and jurisdiction can also affect whether the shipowner is primarily liable for salvage or whether ship and cargo have a separate liability.

General Average Security

Usually it is the shipowner who is primarily concerned to see that rights in General Average are protected since it is usually he who is called upon to pay the General Average expenses. The shipowner has, as a condition of delivery of the goods, a lien on the cargo whilst in his custody for its contribution. In practice, the amount of the contribution can never be assessed at that time and the lien is therefore used to enforce the giving of satisfactory security instead of payment. Security usually consists of the signature by the parties to the Lloyds Form of Average Bond, together with either payment by the cargo owner of a cash deposit or provision of an insurers' guarantee, instead of a deposit.

Instruction to collect security

Agents at discharge ports may receive instructions from owners to collect security. Such instructions will usually be sent through a firm of average adjusters appointed by the owners. The instructions from the adjusters may include:

a. A draft message to consignees setting out brief facts of the casualty and security requirements.

b. Details of security required and forms to be used.

c. Details of reporting procedures.

d. It is very important that agents should promptly acknowledge that they have received and understood the instructions.

The forms which require completion are usually:

1. Average Guarantee

This is for signature by the insurer of the cargo and is used instead of a deposit. The following points should be noted:

a. The form should not be amended or limited in any way, For example, annotations such as "subject to policy liability" are not acceptable. Some insurance companies may insist on using their own forms in which case the average adjuster should be consulted.

b. Ensure that full details of cargo are given, including ports of loading and discharge, as well as container numbers.

c. Ensure that full details of the insurance company are given because the average adjuster will need to contact the insurer for information and settlement.

d. Ensure that the guarantee has been signed by a bona fide insurance company - sometimes forms are "accidentally" signed by the consignee or his brokers.

2. Average Bond

This is for signature by the receiver. As for the guarantee, the agent should ensure the full details of the cargo and the consignee are provided. If possible, the agent should also ensure that the bond is accompanied by the actual commercial invoice for the goods as rendered to the receiver, (invoices raised for customs purposes etc. may often be misleading).

3. Deposit Receipts

If cargo is uninsured the average adjuster will advise a deposit amount expressed as a percentage of the invoice value of the cargo. The agent should ensure that:

a. The invoice produced is the genuine invoice reflecting the true value of the cargo.

b. The deposit receipt is completed correctly, and a photocopy retained on file.

c. The depositor understands that he must produce the original receipt in order to receive any refund after deduction of the contribution.

Instructions will be given regarding the handling of deposits. Agents should advise the average adjuster of any local restrictions or regulations likely to prevent onward remittance of deposit funds.

4. Special agreements

In certain cases special wordings may need to be incorporated in the security documents. An example is the standard form of non-separation agreement which relates to situations where some or all cargo is transhipped.

Release of Cargo

Although bonds and invoices will usually be returned to port agents, some guarantees may be sent direct to the average adjuster. Security may also be received by an agent that covers interests consigned to different ports or parties; when separate salvage security is being lodged the situation is complicated further. Co-ordination with the average adjuster is therefore essential.

Often the average adjuster will create a central database to record security received and cargo authorized for release. Agents will usually be asked to report regularly. Generally, the decision to release cargo will rest with the agent.

It cannot be too strongly emphasised that the appropriate security must in all cases be obtained before delivery of cargo. a promise to sign the relevant documents is insufficient, the actual signature of the parties being necessary before cargo is released. The agent should advise the owners and/or the average adjusters if there are likely to be any difficulties in holding cargo at the discharge terminal; for example, lack of space, local court action etc.

Cargo damage

There is a distinction between damage which is accidental in nature and that which results from a deliberate sacrifice for the common safety. The former is referred to as particular average and the latter as general average. Examples of particular average are damage due to fire, cargo lost overboard in heavy weather and cargo wetted in a hold flooded as a result of grounding. General Average would include jettison of cargo to assist refloating and cargo damaged by water while extinguishing a fire.

Where there is extensive General Average sacrifice damage to cargo and/or ship it may be necessary to appoint a surveyor to act in the general interest - usually referred to as the "general average surveyor". Such an individual is not required to investigate the

circumstances leading up to a general average situation (e.g. the cause of a fire) but once the situation exists his role is to:

1. advise all parties on the steps necessary to ensure the common safety of ship and cargo;

2. monitor the steps actually taken by the parties to ensure that proper regard is taken of the general interest;

3. review general average expenditure incurred and advise the adjuster as to whether the costs are fair and reasonable;

4. identify and quantify any general average sacrifice of ship or cargo;

5. ensure that the general average is minimized wherever possible, i.e., by reconditioning or sale of damaged cargo. Except in cases of extreme urgency or where communications are difficult, any significant action with regard to cargo (e.g. arranging for its sale at a port of refuge) must be taken in consultation with the concerned in cargo.

The authority and funds to make disbursements will generally come from the shipowner, usually via the master or the local agent. The general average surveyor, therefore, has no authority to order any particular course of action and his role is an advisory one. However, the surveyors impartial position and his influence on the eventual treatment of the expenditure will give his advice considerable weight with the other parties involved.

Assessing General average damage to cargo

It is important that the shipowner should be informed as soon as possible of the nature and approximate extent of any loss or damage to cargo and that the information should be conveyed in such a way that the approximate allowances in general average, if any, can be assessed. The general average surveyor should be consulted as appropriate when compiling this information.

Shipowner's duty to protect cargo

The shipowner has a continuing obligation as bailee to care for the cargo in his custody and, when necessary during the voyage, to make arrangements for re-conditioning or sale of such cargo. Whenever practicable, decisions in this respect should be referred by him to the cargo owner but this is frequently not possible, particularly in cases involving large container vessels.

In such cases the shipowner must act himself, after taking the best advice possible, in the best interests of the cargo. Although the master has by law certain powers to act for

cargo in such matters, in practice no action should be taken by master or ship's agent to recondition, forward or sell cargo without prior reference to the head office of the shipowner, except in cases of extreme urgency. The advice of the general average surveyor should be sought in all matters affecting the handling and treatment of damaged cargo.

When cargo is sold at an intermediate port the proceeds should be held by the ship agent in a separate account pending instructions as to their disposal. The proceeds, less sale charges and brokerage, if any, belong to the cargo and must be kept intact. They should not be used to settle disbursements even though such disbursements are connected with the care and custody of the cargo, except with the agreement of the cargo interests.

Legal Update - FALCA Rules

A large number of ITIC's Members have first hand experience of the arbitration process. This may be as a witness in relation to a dispute involving their principals but frequently this method of dispute resolution applies to cases where they are the defendants.

Many liner agency agreements contain arbitration clauses as do some standard trading conditions, such as those of Institute of Chartered Shipbrokers. One benefit is that disputes are heard in private and the outcome is confidential, thus avoiding the publicity that can follow appearances in open court.

In an important development for London arbitration, the London Maritime Arbitrators Association (LMAA) have recently published their new FALCA RULES. The letters stand for "Fast and Low Cost Arbitration" and as such present a direct response to the most frequent criticisms of maritime dispute resolution in London.

The FALCA Rules set out to achieve their aims of speed and low cost in a number of ways. The reference will be to a sole arbitrator rather than a three person tribunal. The manner in which the single arbitrator is appointed has also been amended to avoid delay. The parties are encouraged to try to agree a sole arbitrator but in the absence of agreement a party wishing to refer his claim to arbitration merely has to send a note to the other party requiring them to agree within 14 days to the appointment of a sole arbitrator. If they are unable or unwilling to agree then the claimants invite the president of the LMAA to appoint a sole arbitrator.

The president is not restricted to appointing members of that association and can appoint any appropriation and can appoint any appropriate person. This will be useful in the event that the claim requires special expertise.

The imposition of a strict timetable is the essential feature of the FALCA Rules. The process should produce an award within approximately nine months from the arbitrator's appointment. This is largely achieved by passing control of the proceedings to the arbitrator. There will, for example, be no oral hearing except where the arbitrator requires examination of any particular witness or expert. It is clearly envisaged the this will only be done in rare circumstances. The other major development is that the discovery process has been subjected to the timetable and reduced to the exchange of relevant documents. In most cases this should greatly refuse the level of costs.

The rules are intended to be applied claims where the amount at stake is larger than US$ 50,000 below which popular LMAA small claims procedure remains applicable. The FALCA Rules provide that, unless otherwise agreed, they will cover claims for amounts of up to US$ 250,000. This means there are now three tiers of arbitration available; small claims, FALCA and, for the largest disputes, the LMAA's "full" terms. A draft charterparty clause incorporating the three options has been produced by the LMAA.

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

ITIC Director profiles

Steven See Chee Beng

Steven See started his career in 1966 with Wallem Shipping (Singapore), later training as a shipbroker. In 1974 he co-founded Singapore Shipbrokers, probably the first independent dedicated shipbroking firm in Singapore.

In 1982 he took the decision to launch his own new firm, Seatown Shipbroking. In the 14 years that followed, Seatown has grown under his leadership to the point where it now enjoys turnover in excess of Sin$ 100 million and employs 130 staff.

Steven See remains the CEO and major shareholder of Seatown and since 1993 has sat on the advisory panel of the Singapore Government's Trade Development Board Maritime Services Committee.

Steven See and his wife, Margaret, have two sons, David (23), himself a trainee shipbroker, and Daniel (22), a mechanical engineer.

Dirk Fry

After voluntary service as an officer in he German army, Dirk joined Hansa Line, sailing on several vessels as an apprentice, later qualifying with distinction as a Master Mariner and earning the title of 'Diploma Nautiker'. He continued to sail with Hansa until 1978

when he was invited to join the project team whose task it was to prepare for the reorganization of the Line.

In 1980 Dirk joined Columbia Shipmangement Ltd of Cyprus where he is currently Managing Director. He and his wife live in Limassol.