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The Intermediary – September 1999

THE MAGAZINE OF ITIC
THE PROFESSIONAL INSURER

Signing off…

Many ITIC ship agent, ship broker and ship manager Members become needlessly involved in matters which should only concern their principals because of carelessness in the way that they represent themselves to others. If a company signs off a contract in its own name (whether it is a charterparty, a cargo booking note or an order for bunkers) without making it clear that the company is acting as agent for and on behalf of another party, there is a risk that the company will be deemed to have contracted on its own behalf.

It is likely that agents and brokers make this mistake all too frequently, but it only causes problems when the principal is unable or unwilling to meet his obligations to his contractual partner. The general rule in most jurisdictions is that one who acts as an agent does not become personally bound on a contract that he makes for a principal. However, lack of care can land the agent or broker in the middle of a dispute that has nothing to do with him. The broker or agent may even in the end have to satisfy debts or liabilities to his principal's contractual partners. How can this be avoided? The agent or broker or manager should always sign off every communication "ABC Company, as agent only for and on behalf of XYZ Company".

In some countries, even if the agent mentions his agency capacity, he can still be personally liable if he does not disclose the name of his principal. In the case of Hutcheson v Eaton (1984) it was held that the signature "ABC Company, agent" was merely descriptive (in a similar way to "Mel Gibson, actor") rather than an indication of the capacity in which the company acted in a particular transaction. In order for the agent to be acting in a representative capacity, he needed to sign off "ABC Company, as agent only".

Even where the contracting party is aware that the company is an agent, it is still necessary for the agent to sign off "as agent only" and to disclose the name of his principal. Why, when everyone knows that a company is in business as an agent, is this necessary? Firstly, the agent enters into numerous contracts himself (e.g. for office supplies). Secondly, in today's market ship agents have extended their services to include activities such as freight forwarding and warehousekeeping, where they act as a
principal. Parties who enter into a contract with the agent need to know exactly who their contractual partner is. If the principal becomes bankrupt the unpaid suppliers of goods and services will look for someone from whom to recover their outstanding

funds. In the case of ship agents the danger of relying on the knowledge of vendors is well illustrated by the case of Maritime Stores Ltd. v H.P. Marshall & Co. Ltd. (1963).

The defendants were ship agents in Middlesbrough for the foreign charterer of a ship that was loading
steel pipes. Before loading began Marshall and the stevedores met on board the ship and agreed that certain lashings and supports were needed for the deck cargo. Marshall told the stevedores to order the necessary equipment and to "send the bill to me". No doubt he meant "send the bill to me as agents for the charterers and I will see that it gets paid". When the charterers went bankrupt the court found Marshall to be personally liable and the judge found that the fact that Maritime Stores knew that Marshall was a ship agent was "in no way determinative of the issue". He found on the
facts of the case that the contract was made between, and only between, Maritime Stores and Marshall and that Marshall was personally liable.

Agents can even become liable for cargo claims if they are not careful. Some agents provide cargo insurers with the gift of inadvertently contracting in their own name. If the carrier is bankrupt, or the
carrier's bill of lading carries a jurisdiction clause in some far-flung place, cargo interests will welcome being able to sue a ship agent in his local jurisdiction. In addition, if they can get the courts to accept that the agent contracted himself to deliver their cargo in good order and condition, they can then avoid the limitations on the carrier's bill of lading. Agents do not routinely have standard trading conditions and they could find themselves exposed to full liability, plus consequential losses, if they are not careful.

In a case that was recently heard in Denmark, a Danish ship agent was found liable to cargo insurers for damage to a cargo of refrigerated pork. The agent booked the pork onto his principal's service to Estonia, but when it arrived at Tallinn it was found that the veterinary documents did not match the cargo which was not allowed to enter the country. The shipper requested that the pork be returned to Aarhus but, due to Christmas and New Year holidays, it could only be returned two weeks later. The agent had booked the cargo onto his principal's ship again, and the principal's bill of lading was
issued for the return. It was discovered that the pork had been off power during the time it was ashore at Tallinn, and the cargo insurer sued the agent and the line.

The Danish courts found the agent to be liable for the damage (an amount of US$40,000) and to be responsible for everyone's costs, including those of the carrier. The agents were found liable because, when the cargo was booked, they failed to make it clear that they acted as an agent on behalf of the shipping line. The agents also regularly acted as freight forwarders in their own name.

There are exceptions to the rule. For example, in the case of the SANTA CARINA (1977) it was held that charterer's brokers who orally requested other brokers on the Baltic Exchange to procure bunkers for a ship were not personally liable even though they had failed to give details of their
principal. Their capacity as agent had, however, been clear to their opposite number. If the brokers had also operated a bunker department it is unlikely that they would have escaped liability.

Although ship brokers normally sign off charterparties and other formal documents "as agents/brokers only" they generally do not sign off other communications in this way. Is this practice is safe? There are a number of nineteenth century cases on this point most of which tend to the view that the broker should make it clear that he is

not contracting on his own behalf. However, in Wagstaff v Anderson (1880) the court's decision in favour of the ship broker was partly based on the grounds that "ship brokers usually do not act for themselves". The best that can be said on this point is that in order to be sure that ship brokers are protected by their agency capacity, they should make it clear that they are signing in their capacity as brokers. However, in the light of the well-established tradition that they frequently do not do so, they should be able to argue successfully that a custom
of the trade exists to the effect that they should not be held personally liable on contracts made without qualification.

In order to try to avoid difficulties of this kind, the following guidelines should be observed:
_ Sign off all documents "as agent only for and on behalf of XYZ Shipping Company".
_ If invoices are received in your name, send them back and have them re-issued in the name of the principal; e.g. "Owners/Charterers of M.V.... c/o ABC Agency Co".
_ Although ship brokers may be protected by custom of the trade, it would still be safer for them to sign off "as broker only for and on behalf of ..."
_ Where brokers act as intermediate brokers between two other brokers (and not as sub-brokers) the recommended course would be to sign "as broker only" and to leave the question of the identity of the principal to be decided, if necessary, on the facts.
_ If you are a liner or tramp agent, send out a letter every six months to the suppliers of goods and services to your principals informing them of your agency status. If you need a suitable wording, please contact ITIC.

"The general rule in most jurisdictions is that one who acts as an agent does not become personally bound on a contract that he makes for a principal"

Intermediary news

ASBA golf day
In spite of ITIC being willing to pay claims whenever justified, disappointingly there was no opportunity to do so when the Club sponsored a hole-in-one at the Association of Ship Brokers and Agents (U.S.A.), Inc. (ASBA) 96th Annual Golf Outing at the Knickerbocker Country Club in Tenafly, New Jersey.

The 6th hole, a par three of 168 yards, offered the golfer who could manage an ace a cash prize of US$ 3,000 – which ITIC had insured with the National Hole-in- One Association. Unfortunately, the
feat was not achieved by any of the ship agent and ship broker members of ASBA, and their guests, who competed in the event. A win for the insurers on this occasion.

Alister Inglis
ITIC regrets to announce the death of Alister Inglis on 15th December, 1998. Alister was the founder of Sureness Marine Services Ltd. in Hong Kong, which had acted as ITIC's correspondent for a number of years. Sureness was also the general correspondent for the Britannia P & I Club and had acted in that capacity for approximately thirty-five years. Alister had lived in Hong Kong virtually all his life and his knowledge of the Far East was extensive. He enjoyed an excellent relationship with many of ITIC's local Members and was always available to assist any local shipbroker, agent or ship manager with any difficulties they might encounter. He was also active in helping the Club with its
marketing campaigns thereby assisting in the development of a substantial and valued membership in Hong Kong.

Our sincere sympathies are extended to his wife and two children.

Freddie Clemo
Sadly we also have to report the death of another of ITIC's overseas correspondents, Freddie Clemo, who died on 22 March, 1999 after a short illness. Fredrick Clemo was born in Hong Kong and spent much of his early career in the former colony. On moving to the Philippines he worked in senior
management positions for a number of liner agency companies and in 1975 formed Pandiman Philippines Inc. which soon became the correspondent for virtually all the major P&I Clubs.
Freddie was a larger than life character and made an outstanding contribution to the Philippine shipping industry. He was awarded the MBE for services to UK/Philippine relations. He will be greatly
missed by all those who came to know him.

Our sincere sympathies are extended to his wife and three children. Norwegian Shipbrokers Association

Andrew Jamieson, ITIC's legal adviser, conducted a workshop in April at the annual meeting of the Norwegian Shipbrokers Association. His presentation was entitled "Avoiding Insurance Claims"
and was presented on the MS KRONPRINS HARALD while sailing between Kiel and Oslo.

Changes to telephone numbers in the United Kingdom
As a result of heavy demand for telephone lines, OFTEL, the UK Government's industry watchdog, has identified six areas in the country which will need more numbers by the year 2000. These are
London, Portsmouth, Southampton, Coventry, Cardiff and Northern Ireland. The prefix for inner London areas have changed from (0)171 to (0)207 and for outer London from (0)181 to (0)208. ITIC's new number is therefore (0) 20 7338 0150. These changes were introduced on 1st June, 1999. The new codes and numbers will run parallel with the old codes and numbers. Parallel running will
cease as from 15th October, 2000.

Marcus Iles

Marcus began his career in shipping insurance in 1994 when he joined the Steamship Mutual P&I Club. He spent four years working for the Indian claims department where he specialised in dry cargo claims. Marcus joined ITIM in November last year as an Account Executive. His shipowners' P&I Club
background may mean he is familiar to some of our correspondent and marine surveyor members as well as the shipping principals of ITIC members who are ship agents and ship managers. The Club is pleased to welcome Marcus to the ITIM team.

The high cost of winning

The following article appeared in a recent edition of the ITIC Claims Review. It is reproduced here as it has generated considerable interest including a comment in one well-known publication that "mediation is the way to go, unless you're in the legal profession". Readers who would like to know more about mediation are recommended to read the article on page 10 of this issue of the Intermediary on the subject of Alternative Dispute Resolution.

One of the most important aspects of ITIC's insurance is the payment of legal costs. Even if the Member has absolutely no liability for the claim against him, a defence has to be prepared and the costs can be substantial. ITIC recently asked ten firms of London solicitors for an estimate of costs for a three day court trial of a hypothetical but fairly routine claim against a shipbroker.

The average response was US$ 100,000 for defence costs (including expert witnesses, etc.). If the shipbroker were to lose the case, he would become liable for 75-80% of the opponent's costs (which would be for a similar amount). The total costs of a routine case would therefore amount to
US$ 180,000 without taking into account the amount of the claim itself. Even more expensive have been the costs of arbitration of ship management claims which rarely amount to less than US$ 300,000. In the English courts (and others) a successful defence or prosecution means that the winning party can recover a major part of his costs. This is not the case in other jurisdictions and ITIC's Members often have to pay substantial unrecoverable costs.

A firm of US oil traders needed a tanker to load an oil cargo for the USA at a Nigerian port. Their broker approached an intermediate broker in Belgium, who fixed a tanker through the owner's broker. The tanker waited two weeks at the Nigerian port for a cargo which did not materialise. The
owner subsequently obtained an arbitration award of US$ 200,000 against the US charterers, but was unable to enforce it as the charterers were insolvent. The owner then sued the intermediate broker in the Belgian courts alleging breach of warranty and/or negligence. The court case extended over several years and, even though the broker was eventually successful in defending the claim, no part of the defence costs could be recovered.

Even in jurisdictions where costs are recoverable, the shortfall can be substantial. When a steel cargo loaded on the deck of a ship was damaged by seawater, the receivers claimed the value of the damage
from the ocean carrier because the bills of lading were not claused for deck stowage. The ocean carrier paid the claim and sought reimbursement from his agent in the Singapore courts, on the grounds that the agent should have claused the bills of lading. Over the next seven years several attempts were made by the Club to settle the claim, as it was obvious that costs were overtaking its value. No reasonable settlement proved possible and in 1996 a full court hearing took place, which resulted in victory for the agent. However, the agent's legal costs amounted to US$ 135,000 of which only US$ 85,000 were recovered. The "victory" cost US$ 50,000.

A practical review of the proposed amendments to U.S. COGSA

Ship agents and brokers must interface on a daily basis with shipowners and operators. As such, they must have a working knowledge of the laws that govern the rights and liabilities of carriers and cargo owners.

The primary United States legislation in this area is the Carriage of Goods by Sea Act ("COGSA") which was enacted in 1936. It is expected that later this year the United States Congress will enact major revisions to COGSA. This article will provide a brief synopsis of the major proposed changes to COGSA under the new legislation. The present COGSA applies to shipments to and from the United States in foreign trade (46 U.S.C. §1300) and governs a carrier's obligations from the time when the goods are loaded until the time the goods are discharged (46 U.S.C. §1301(e)).

Essentially, COGSA applies to foreign shipments to and from the United States from what has been colloquially called "tackle to tackle." Under the revised regime, COGSA's scope will be expanded. The new statute will apply to "any contract of carriage covering transportation to or from the United

States" (proposed COGSA § 3(a)) from the time goods are received by a carrier up to the time they are delivered to a person authorised to receive them (proposed COGSA §2(a)(8)). Furthermore, a contract of carriage is defined, in part, as "a contract for the carriage of goods either by sea or partially by sea, by one or more other modes of transportation, including a bill of lading…" (proposed COGSA §(2)(5)(a)(i)).

However, domestic transportation contracts and charterparties are not contracts of carriage, as defined by the new COGSA. Consistent with the expanded scope of the proposed statute is the new definition of who is considered a "carrier" under the statute. Presently, a "carrier" includes the owner or charterer who enters into a contract of carriage with a shipper (46 U.S.C. §1301(a)). The new COGSA defines the term "carrier" to include contracting carriers, performing carriers and ocean carriers (proposed COGSA §2(a)(1-4)). The contracting carrier is self-explanatory and the ocean carrier is, quite simply, the owner, operator or charterer of a ship used to carry goods. However, under the new statute, "inland carriers, stevedores, terminal operators, consolidators, packers and warehouses," will, for the first time, be recognised as COGSA carriers under the definition of performing carrier" (proposed COGSA §2(a)(3)(B)). In addition to the parties defined above, a performing carrier will include "a party... who performs, or undertakes to perform, any of a contracting carriers responsibilities under a contract of carriage, including any party that performs or undertakes to perform, or procures to be performed, any incidental service to facilitate the carriage of goods, regardless of whether it is a party to, identified in, or has legal capacity under the contract of carriage...". Intermediaries, such as agents or managers, must pay particular attention to this language in the statute in order to guard against involving themselves in scenarios that will trigger their status as a COGSA "carrier".

Presently, the time in which a lawsuit may be commenced under COGSA is one year from the time of delivery or the date the delivery should have taken place (46 U.S.C. § 1303(6)). Under the proposed COGSA, the one-year statute of limitations will remain in effect. However, the proposed COGSA codifies the carrier's time to bring an action for contribution or indemnity to three months after a judgement against a carrier or a settlement is reached with the carrier. Brokers should be particularly aware of the revision in the new COGSA that invalidates foreign forum selection clauses and foreign arbitration clauses if the goods are loaded or discharged in a U.S. port, or if the carrier receives or delivers the goods in the United States. This section of the statute overrules the Supreme Court case of Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995) which found forum selection clauses to be presumptively valid.

Another major change in the revised COGSA proposes an increase in the aggregate liability of arriers from $500 to 666.67 Special Drawing Rights (adopted from Hague-Visby Rules) per package (proposed COGSA §9(h)(1)(A)).

Also of particular significance to carriers is proposed section 9(h)(3)(i and ii) which, for the first time, negates by statute, the carrier's right to limit its liability if an act, within the privity or knowledge of the carrier, is done recklessly or intentionally or, if there is an unreasonable deviation in the contract of carriage, which the carrier knew or should have known would result in damage.

The foregoing synopsis highlights some of the significant changes to COGSA, which are being proposed in the U.S. Congress. Intermediaries, such as brokers or agents, should familiarise themselves with these changes in order to understand and better serve the large number of principals, who will be impacted by the new COGSA.

This article was contributed by Stephan Skoufalos of Skoufalos & Llorca of Stamford, CT and George Chalos of the Chalos Law Firm, New York.

Telex No. 211698 USTC GR Ship Agents Beware!

December 1996
Aqaba, Jordan
Instructions purporting to come from a `Capt. Argiris" of "Atlantic Shipping Piraeus" concerning alleged call of m.v. ANJU" - 15 crew joining the ship

February 1997
Amman, Jordan
Instructions purporting to come from "Capt. Dimitris" of "Suwanta Shipping Piraeus" concerning alleged call of m.v. SUWATNA 1" - 5 crew joining the ship

July 1997
Djibouti
Instructions purporting to come from "Sealink Trade Inc, Piraeus" concerning alleged call of "m.v. SOMA" - 10 crew joining the ship

September 1997
Eilat, Israel
Instructions purporting to come from "Unit Shipping, Piraeus" concerning alleged call of "m.v. ALEX 4" - 12 crew joining the ship

August 1998
Haifa, Israel
Instructions purporting to come from "Sealink Shipping, Piraeus" concerning alleged call of "m.v. SUWA" - 12 crew joining the ship

May 1999
Lisbon, Portugal
Instructions purporting to come from "Capt. Dinos" of Attiki Shipping Piraeus" concerning alleged call of "m.v. SOMA" - 11 crew joining the ship

All these instructions were received by ITIC Members. What do they have in common?
In every case, though the name of the ship may be the same as, or similar to that of another vessel in existance, the ship did not exist. Nor, though the names may be similar to those of genuine entities, did the instructing entity exist. All these notifications originated from the same telex number in Piraeus - 211698 USTC GR.

In the case of the alleged call of the SOMA at Lisbon in May 1999 the ITIC Member contacted the Club and was alerted to the situation. He was, therefore, able to avoid becoming involved. However, this did not stop the perpetrators from attempting the same trick with another agent in Lisbon, and thereafter three agents in Copenhagen. In some cases the "crew" simply disappeared once they had been delivered to their hotel by the agent, but in others the agents had to pay their hotel bills and repatriation costs. The agents also risked being fined by the immigration authorities. If you receive a telex from 211698 USTC GR - Contact ITIC Immediately.

7 Surveying the risks

For the serious surveyor, professional indemnity or PI cover is certainly highly desirable but just how much at risk is the average surveyor? Chris Spencer of C.F. Spencer has helped to defend several claims against his fellow surveyors. As he explains, although the eventual outcome is often a successful judgement for the defence, this is frequently of little consolation for the financial worry and damage that can be done to a surveyor's good name.

One argument is that if you are uninsured then you may not be sued since the primary reason for suing someone is to obtain money. If there is no fund to draw on then there is no purpose in litigating. Just make sure your house is owned by the youngest child and isn't in your name.

The other side of the coin is, in my view, the sensible one. Obtain good cover at the best
price and add the cost into your overheads. Your clients will not mind a slight increase in
charge out rate that allows you to stay in business and thereby continue to provide them with their service. The potential for getting it wrong should not be underestimated. The most usual scenario
is the misunderstanding between a client's expectation of the result and your understanding of the instruction… a difference, that is all. However, if the client feels that what he paid for isn't what he received then he may feel justified in claiming for that difference.

Small craft surveys are fraught with difficulty in that many surveyors do not explain clearly what the client will get, i.e. there is no understanding of the contract. It is only surprising there are so few claims. There are also instances of the "try on" to just collect some settlement fee and ease a client's cash flow. Not many claims go all the way and most settle out of court. The amount may not be great but it will still hurt if you do not have a policy to fall back on. In the big ship world, it is equally easy to miss something. It is no good burying one's head in the sand and assuming that because you have good clients, good surveyors and good relationships that it will always continue thus. The maxim is "you are only as good as your last job" and to be realistic, anyone can make a mistake.

An on or off hire survey could be found lacking if too much faith is placed on the Chief Engineer's
figures. Charterers will have no compunction in collecting what is theirs. Damage that has been missed could have the same consequence if later found and disputed by one party. There are numerous cases of mistaken calculations in oil inspections relating to bill of lading, ship's and outturn figures.

Sometimes it must surely be easier to sue the party making the mistake rather than the owner or the charterer. Clausing of contracts with exclusions may help but the law will decide in the end just what is excluded and what is not. Pre-shipment inspections are also a ready market for mistakes, steel being a prime candidate. A vast array of other pre-shipment inspection goods are shipped on the back of a surveyor's attendance and certification that all is correct. If once the cargo arrives it is found not to be as shipped commercial pressures may mean that the supplier will put it right. He may also, however, choose to sue the surveyor for the cost difference of having to undertake this far from his own base. As surveyors our task is not made any easier, by the fact that cost appears too often to be an overriding factor. We need to educate our clients to their problems and all surveyors should avoid rate cutting, as it doesn't do anyone any good, least of all the client. To satisfy the client we have to get the job done properly; that means well-trained and motivated surveyors and in turn means clients who understand our problems. It is necessary to keep the dialogue

running to ensure that there is no misunderstanding of instructions. The client should be advised of the surveyor's view on the matter under instruction as soon as possible. He may discard it, but at least he had it to think about and cannot claim later he didn't know.

Part of the records one keeps should include precisely the sort of information that will later justify your actions and conclusions; without it you may not be able to defend your position no matter how
justified. Notes of telephone conversations, verbal instructions, times and dates, copies of diary entries, notes made in the surveyors' notebook are all vital to the "audit trail".

Chris Spencer of C. F. SPENCER & CO. LTD contributed this article.

Debt collection service –some practical guidance

ITIC's Rule 10 provides ship agent and ship broker Members with cover for additional legal expenses and debt collection. This article (in the form of an interview with ITIM's Paul Monteith who has specialised in debt collection for many years) provides an insight into how the managers undertake this service as well as giving some practical guidance to Members as to how they can facilitate the task of the claims handlers who deal with such cases.

1. What is the information you need from a Member in order to start the debt collection process? In the case of ship agents, the Club requires a copy of the disbursement account and a copy of the
communication setting out the original appointment. In the case of ship brokers, the Club needs the
commission invoice as well as a copy of the charterparty. In all cases, it is also important to supply copies of any correspondence with the debtor, particularly any communication where the debt is admitted. It obviously saves time if we are supplied with this information in the first instance. The
time element can, of course, be critical where there is the possibility of arresting a ship in respect of the outstanding claim.
2. Why is it important to give early notification to the Club of an outstanding debt? Many Members ask us how long they should wait before informing us about overdue outstandings for action under the provisions of Rule 10. Whilst we do not as a rule tell our Members how to run their businesses, many of the debts that the Club is asked to collect have been outstanding for a considerable period. We would recommend that Members employ a credit control regime that does not allow invoices to remain outstanding for more than 40 days from the issue of the invoice at most without triggering an enquiry or notification to ITIC - build the Club into YOUR credit control system. Furthermore, from a practical point of view, there are two reasons why the Club should be asked for assistance earlier rather than later:
a) Firstly, the older the debt the more difficult it is to collect. This is particularly relevant if the ship that incurred the debt in the first place has been sold and/or the ship owner, time charterer or voyage charterer has been declared bankrupt.
b) Secondly, most countries operate a time-bar within which a ship may be arrested. This can be one year after the time when the claim first arose. This is therefore particularly important, in the case of items in a disbursement account such as harbour dues, pilotage, canal dues and cash to Master. These items often constitute a maritime lien with a right of arrest notwithstanding the fact that the balance of the items in the disbursement account is due from charterers.
3. Can the Club act if the debt is disputed?

If the principal is disputing either the whole or part of the debt then it is important that we should be given this information. Disputes must normally be resolved before the debt collection process can be initiated. However, the Club is often able to resolve such disputes and in the majority of cases, these have been in favour of the Member.
4. Is it always possible to arrest a ship for an outstanding debt and what are the practical considerations that apply?
a.) Whether a ship can be arrested depends on the type of claim. As a generalisation, most maritime countries will allow a ship to be arrested for outstanding disbursements that the ship owner has incurred. Claims for outstanding commission due to a ship broker are more complicated and the possibilities of arrest are more limited.
b.) The arrest of a ship is not something that should be undertaken without careful consideration of the consequences. To detain a ship in port, even for a day beyond its schedule, may cost an owner or operator many thousands of dollars. It is, therefore, highly unlikely that any kind of commercial relationship can be restored between the respective parties once an arrest order has been obtained.

Two of the main considerations when contemplating an arrest are the location of the ship and, once located, whether an arrest in a particular jurisdiction is possible or desirable. If the claim is one for which an arrest can be made, practical considerations then need to be taken into account, e.g. whether it is necessary for the claimant to give security for costs, damages and interest and how quickly an arrest order can be obtained. The costs of the arrest (and whether they can ultimately be recovered from the defendant) are also an important factor in deciding whether to proceed. The consequences of a wrongful arrest must also be considered since they differ from one jurisdiction to another.

5. Can a ship agent take any action to avoid a bad debt in the first place?
Most of the debts that the Club is asked to collect on behalf of ship agents are cases where there is an outstanding balance of a disbursement account. A balance will normally arise in cases where there has been an unforeseen event during the call of the ship that has inflated the final account. However, we see other instances where the principal has failed to remit any advance funds to the agent.

Naturally, in such cases, the agent must make a commercial decision as to whether to undertake the work or whether to refuse the agency until he actually has the money in his bank account. The Club would always recommend extreme caution where no money has been remitted particularly where the principal is unknown. There is also the possibility of detaining the ship in port at the time if funds have not been received. This can be done by requesting the port authority to refuse clearance to the ship. The Club's assistance can also be given in such instances.

6. In how many jurisdictions around the world is it possible to arrest a ship for debts due to Members of ITIC?
I would estimate that there are approximately 40 jurisdictions in which ITIC has successfully arrested ships on behalf of its Members. Some jurisdictions are particularly "user friendly" and others pose some difficult problems. For instance, a power of attorney is sometimes required and it may be necessary to have the documentation translated into the local language. The provision of counter security can also act as a deterrent in some cases.

7. Is there any final piece of advice you would give Members on this subject?
The most important factor is to notify the Club at an early stage of an outstanding claim. Many Members are reluctant to place a debt in the hands of a third party for collection in case it jeopardises their prospects of future business. However, this begs the question whether it is worth preserving

a commercial relationship when the other party fails to honour his obligations by paying the amounts due even though they are clearly undisputed.

Alternative dispute resolution

Alternative Dispute Resolution (ADR) has for many years been a feature of the litigation process in a number of jurisdictions around the world such as Australia and the United States. As a result of the implementation of the Woolf reforms it will shortly take on a much more prominent role in the UK. The Woolf reforms (named after Lord Woolf) consist of a major review of the Civil Procedure Rules applied in both the High Court and County Courts of England and Wales. In essence the main purpose of the reforms is to introduce a complete change of culture in case handling and procedure. Furthermore judges will invite parties to consider whether the dispute of particular issues can be resolved through ADR and to facilitate the use of ADR the judges may adjourn any case as appropriate.

The adoption of ADR arises for a number of reasons including doubts as to the cost effectiveness of litigation and arbitration under existing procedures. There is also a desire in many instances to preserve ongoing commercial relationships. However, by far the most compelling reason to use
ADR is that settlement is invariably achieved at an earlier stage and, indeed, that cases are settled which would not otherwise have been but for the use of ADR.

Different Types of ADR
Although the most commonly used form of ADR is mediation, the mini trial and Early Neutral Evaluation (ENE) are also in frequent use.

Mediation
Unlike traditional litigation conducted in court or arbitration, ADR involves the appointment by the parties of a mutually acceptable mediator. The function of this mediator is to assist the parties to reach an agreed settlement. The mediator acts as a facilitator to the settlement negotiations rather than making a judgement on who is right or wrong. Formal training and industry experience enables the mediator to guide the parties towards consensus. If however no such consensus is found, no settlement takes place. The proceedings remain private and confidential throughout.

Mini Trial
The mini trial is a more elaborate procedure involving a tribunal comprised of senior executives of the disputing parties, often accompanied by a neutral expert who can advise the tribunal on technical or legal issues. Although the procedure resembles an abbreviated trial, with legal representatives making submissions on behalf of the parties, evidence is usually submitted in an informal way and the
decision reached will not usually be binding unless the parties so agree beforehand.

"by far the most compelling reason to use ADR is that settlement is invariably achieved at an earlier
stage and, indeed, that cases are settled which would not otherwise have been but for the use of ADR"

Early Neutral Evaluation
ENE involves a judge (or other agreed person) reviewing evidence submitted by the parties and providing a preliminary view on the merits. This view is non-binding and is designed to give the parties an indication as to how the court or arbitrators may regard the merits of their case. If no resolution is reached at this stage, the "judge" can play no further part in any future proceedings without the consent of the parties.

Although any discussions which take place during the ADR process are confidential and "without prejudice", recent judicial statements have given the clear message that a party's unwillingness to enter into ADR, and in some cases even a party's conduct during ADR, may be taken into account in determining costs awards. Otherwise the process does not compromise the privilege which normally attaches to settlement negotiations.

The Philosophy of ADR

The possibility that the recommendation of ADR by one side in the dispute might be viewed as weakness by the other side, has led in the past to some reluctance by the parties to initiate the process. However, it is increasingly accepted that ADR processes are at least, if not more, often initiated by parties with strong cases who wish to bring the matter to a speedy conclusion, thereby minimising costs. The courts increasingly raise the prospect of ADR at directions and other interlocutory hearings, requiring the parties to try ADR before proceeding to the next stage of more traditional litigation.

Although the majority of ADR processes take place in parallel with court proceedings, increasingly this system of resolution is being initiated before formal proceedings are issued.

Mediation in Practice

A mediation normally commences with a joint session at which each party, accompanied by legal representatives and by at least one authorised decision maker, sets out his case. At this stage there is usually an opportunity for the parties to participate in an exchange of views in relation to the issues in dispute. Although there is no strict format laid down for the conduct of a mediation, a series of private meetings generally occurs following the initial joint session. At this stage the mediator has an opportunity to explore the views of each party, in complete confidence, in an effort to find common ground and bring the parties to an acceptable and commercially viable resolution. If an outline settlement is reached, then a final joint session usually concludes the mediation at which heads of agreement are drafted for signature.

If the mediation is unsuccessful and resolution is not achieved, parties may nevertheless have gained a clearer appreciation of the force of their opponent's case. This has had the effect in a number of cases of parties arriving at a settlement within days or weeks of the mediation's conclusion. Even if settlement is not achieved on all issues, the result is invariably to reduce the number of matters in dispute and thereby considerably shorten the length of the subsequent trial or arbitration.

The Benefits of ADR

While the benefits of ADR will differ from party to party and case to case, the most significant and common advantages include:

_ A reduction in costs of litigation.
_ Earlier resolution of disputes.
_ Confidentiality.
_ Preservation of commercial relationships and/or market reputation.
_ Choice of a wider range of settlement solutions.

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Sub Agency Agreements

The practice of a ship agent employing a sub-agent in order to undertake tasks in a port in which the agent himself does not maintain an office will be familiar to many readers of The Intermediary. The custom appears to be on the increase and this seems to be due to the principal's wish to deal with a reduced number of agents worldwide, leaving the agents themselves to make their own arrangements as to local representation. FONASBA (The Federation of National Associations of Shipbrokers and Agents) has recognised the demand for a standard document and has recently published the first edition of a sub-agency agreement. This was adopted at FONASBA's last annual meeting in Slovenia in October 1998. The document has also been approved by BIMCO (the Baltic and International Maritime Council).
…use the FONASBA Sub-Agency Agreement as it sets out the responsibilities and duties of the parties in a clear and straightforward document

FONASBA are also the publishers of the Standard Liner Agency Agreement and the General Agency Agreement (for Liner Services) both revised and adopted in July 1993. The FONASBA Sub-Agency Agreement follows the general layout of the Standard Liner Agency Agreement and contains
clauses dealing with general conditions, accounting and finance, remuneration, insurance, duration, duties of the sub-agent, duties of the general agent and, finally, jurisdiction. As an alternative to setting out an extensive list of the sub-agent's duties, the Agreement refers to the agency agreement between the line and the general agent and leaves the parties to identify the duties set out in that document which are to be performed by the sub-agent in place of the general agent.

Although it is not the purpose of this article to comment on the individual clauses of the FONASBA Sub-Agency Agreement, it is important to note that the text includes an indemnity by which the
general agent is obliged to indemnify the sub-agent against all claims, charges, damages and expenses which the sub-agent may incur in connection with the fulfilment of his duties under the Agreement.

The indemnity does not, however, extend to matters arising by reason of the wilful misconduct or negligence of the sub-agent. Although the FONASBA Standard Liner Agency Agreement contains a similar clause by which the liner principal is obliged to indemnify the agent, most agreements
drafted by liner companies or their lawyers, contain no such provision. It is, therefore, important that agents should endeavour to negotiate the inclusion of such a clause when first being appointed by a new liner principal.

One problem that can sometimes arise in the context of relationships between liner principal, agent and sub-agent, is the situation where the agent becomes insolvent owing money to the sub-agent. In
these circumstances does the sub-agent have a remedy against the liner principal? A case in the United States, which was heard several years ago, illustrates the importance of a sub-agent ensuring at the outset who is to be responsible for his remuneration in the form of commission on freight.

The facts were as follows: E.S. Binnings ("Binnings") an agent in the Gulf ports, sued the shipping line for outstanding commission in the sum of approximately US$500,000. The shipping line had previously hired a New York steamship agent, F.W. Hartmann & Co. Inc. ("Hartmann") as its general agent for liner activities in North America. The contract between Hartmann and the shipping line allowed Hartmann to appoint sub-agents in ports where Hartmann did not maintain an office. Hartmann appointed Binnings to serve as Hartmann's sub-agent for the US Gulf and the ports of New

Orleans and Houston. This contract between Hartmann and Binnings required the former to pay the latter a 3% commission on all outbound cargo shipped through New Orleans and Houston. Between 1981 and 1984 Hartmann's financial position began to deteriorate and during the course of 1983 and 1984 Binnings accepted promissory notes from Hartmann for approximately US$300,000 for outstanding commissions.

Subsequently, Hartmann ceased trading and Binnings sought to recover from the shipping line. The court found that there was never any contract between the shipping line and Binnings and that the former had no liability for the latter's commissions. The court reached its conclusions based on the following facts:

1. Hartmann had no authority under its contract with the shipping line to bind the latter directly or indirectly to Binnings for the payment of Binnings' commissions and Hartmann did not do so.
2. Binnings alleged it assumed that Hartmann had authority to commit the shipping line to pay Binnings' commissions but the facts did not support that contention. To the contrary, the facts established that Binnings never understood that the shipping line was responsible for the payment of Binnings' commissions.
3. The shipping line never agreed to pay commissions to Binnings.
4. Binnings never advised the shipping line of the amount of commissions it was receiving for the services it performed.

This case clearly demonstrates that Members who act as sub-agents in respect of liner business in the absence of any specific agreement between the principal and the general agent, will not act as the principal's agent. They would therefore have no remedy against the carrier in the event of the insolvency of the general agent. If, however, the carrier is to be bound then a clause should be inserted in the liner agency agreement along the following lines:

"Subject to any written instructions to the contrary, the agent shall have authority to appoint sub-agents to perform services on behalf of the principal and the agents so appointed shall act as the principal's agents."

In practice there may, of course, be difficulties in persuading a liner principal to agree that sub-agents so appointed by the general agent shall in fact act as the principal's agents.

A similar case was heard in Canada in 1986 involving the bankruptcy of a general agent. Once again, the sub-agents were unable to persuade the court that there was any "privity of contract" (the contractual relationship between the two parties to the agreement) between the principal and the sub-agent. The Canadian Court was referred to an English case, Calico Printers' Association v. Barclays Bank and in particular to the judgement of Wright J. who said: "To create privity it must be established not only that the principal contemplated that a sub-agent would perform part of the contract, but also that the principal authorised the agent to create privity of contract between the principal and the sub-agent, which is a very different matter requiring precise proof".

In conclusion, agents who are authorised by their liner principals to appoint sub-agents would be well advised to use the FONASBA Sub-Agency Agreement as it sets out the responsibilities and duties of the parties in a clear and straightforward document. Copies can be obtained from the Club. _

Helpdesk at ITIC

In addition to the comprehensive insurance provided by the Club, all Members have access to free advice and guidance from the Club's "Helpdesk". The staff of ITIM, ITIC's management company, have all had industry experience and are trained to provide assistance across a wide range of potential problems.

If the Member's enquiry is unusual or requires specialist assistance, and ITIM's in-house team are unable to provide an answer, then a wide network of sources of information can immediately be called upon to assist. As a mutual existing for the benefit of its Members the Club will, in appropriate cases, commission legal and other opinions on industry developments, forthcoming legislation and so-forth in order to assist the Members.

The following are examples of the areas in which the Club regularly provides assistance:

Debtor Information

ITIC provides a full debt collection service to Members who purchase Rule 10 ("additional legal expenses insurance and debt collection") cover. This insurance covers the often heavy costs of investigating and pursuing debtors. Members do not face any extra or hidden expenses if litigation proves necessary. As a result of the provision of this service, the Club has acquired considerable knowledge of shipowners, charterers, operators and others who have failed to pay its Members.

ITIC is not a formal credit reference agency but the information it possesses can be of considerable value. The Club is careful to preserve the commercial confidentiality of individual Members who have sought assistance, but otherwise makes its knowledge freely available to Members. If a Member is proposing to do business with a principal for the first time, a call to the Club to see if it has any relevant information is recommended.

Standard Trading Conditions and Other Contracts

A large number of Members carry on their business under the terms and conditions of trade associations such as the Institute of Chartered Shipbrokers, the Rotterdam Shipbrokers Association and the British International Freight Association. The staff of ITIM have frequently to consider the application of the terms of these agreements and common amendments to them, when handling claims and can, therefore, provide advice on the practical effect of their various clauses. Many of the agreements used in different countries contain similar provisions and ITIC's international perspective can often be helpful.

A notable example of a standard form contract in wide international use is the BIMCO "SHIPMAN 98" contract. The Club has had extensive experience of the workings of this agreement, as well as its predecessors, and other similar forms such as "CREWMAN". A clause for use with SHIPMAN was recently suggested by the Club in relation to ship managers' responsibilities for Year 2000 problems.

It is not always possible for Members to trade on their standard terms and conditions and ship managers and liner agents are frequently presented with their principals' contract for signature. There is naturally a concern that these agreements contain provisions which are particularly onerous for the manager or agent.

The Club can provide guidance on these agreements and often suggest alternative wordings which may assist with negotiating a more balanced agreement.

ITIC frequently reviews other types of documents for its Members. Shipbrokers are increasingly asked to enter into confidentiality agreements and the Club is able to offer guidance with the
provisions of these. An aspect of its work which has proved popular is the Club's review of the wording of ship valuations. ITIC has helped Members engaged in a whole range of activities, including
surveyors and average adjusters, to draft disclaimers and other contractual provisions which can help reduce the risk of claims.

Sanctions and Trade Embargoes
It is a reflection of the world's political uncertainties that the Club has been so extensively involved in advising upon the extent and affect of United Nations and national government economic sanctions. In the last few years these have been imposed, varied and lifted in relation to Libya, Iraq and Yugoslavia. If Members are concerned about the legality of their involvement in a proposed transaction they can contact the Club for assistance.

Rules and Regulations
There is a whole range of laws and rules and regulations that may affect Members' businesses and upon which assistance can be given. The member states of the European Community have implemented the Commercial Agency Directive in a variety of ways and this has directly affected
the rights of ITIC Members on issues such as compensation upon the termination of their agency agreements. The affects of the ISM Code on ship managers was the subject of both a circular from the Club and a great deal of individual advice to Members. These are simply two examples of the range of
advice on rules and regulations that can be obtained from the Club.

Litigation Support
ITIC's Members are often caught up in legal disputes between their principals without being a recipient of a claim themselves. The Club is always pleased to assist Members who have received demands for documents or requests to give evidence, whether from their principals' lawyers or in the form of a formal court subpoena. The Club is occasionally asked to advise on the meaning of injunctions and other court orders serve upon its Members. In these cases the parties' lawyers may often attempt to give conflicting instructions to a Member. ITIC can, however, provide an experienced and independent source of guidance on the Member's position which is freely and immediately available.

The examples referred to in this article are simply a few from the wide range of subjects on which the Club's helpdesk is able to assist its Members. This assistance can be provided both directly from ITIM's London office and through the Club's established worldwide network of correspondents.

Board approval

ITIC Members might be forgiven for thinking that their Club is controlled by the managers. Underwriting quotes, claims payments and publications are all the responsibility of the managers; as indeed is the successful operation of ITIC. The Managers are, however, themselves responsible to ITIC's board of directors and it is the
Directors who make the important policy decisions, not the managers.

The directors of ITIC meet twice a year and held their last meeing in Paris in March. A review of the agenda for that meeting illustrates the range of subjects that are regularly considered by the Board.

Matters arising from the previous meeting included reports by the managers on the Year 2000 problem and a claim which the directors had previously considered. The overwhelming majority of claims are settled promptly and amicably, but very occasionally the managers have to take the view that the claim is not payable under the Rules of the Club. In such a case the Member is entitled to request that the merits of the claim be considered by his peers, the directors.

ITIC's reinsurance programme is one of the most fundamental aspects of the Club's long term security. It currently protects the Club from claims in excess of US$150,000 and the premium represents a substantial cost for the club. The financial strength, or security, of the Lloyd's syndicates and insurance companies providing the cover is also of great importance. The directors considered a verbal report from the Club's reinsurance brokers and, after discussion, approved the renewal of the Club's reinsurance policies for a period of two years.

The next item on the agenda required the directors to consider the terms on which Members should be offered renewal of their insurance with ITIC. As the majority of Members renew on 1st June, it was therefore appropriate for the Board to consider this question at their March meeting. The Club is in a strong financial position and has enjoyed a substantial investment income in recent years. However, ITIC is subject to EU regulation so far as its financial strength is concerned, and the managers reported an increase in both the number and value of claims for the current policy year.

The directors were also able to draw on their own knowledge and experience of the current state of the shipping market and the resulting financial pressures on the Club's membership. Taking all these factors into account, the directors decided that the continuity credit offered to renewing Members should be increased to a maximum of 20% as compared to 15% last year. The number of Members eligible for the maximum benefit was also increased in comparison with last year.

The formal closure of a policy year is a significant event in that it confirms both that no supplementary call will be made for that year and that the Club's financial affairs are being well managed. Only the directors can elect to close a policy year and on this occasion they authorised the closure of the 1996 policy year with the surplus being transferred to the general reserve.

Claims represent a very important part of the Club's business and at each board meeting the directors receive a report on the ten largest claims that have been closed since the previous meeting. They also receive a report on the development of the paid and estimated claims for the past four years.

The financial health of any business is of importance to its directors and the ITIC directors received a financial report on each of the Club's open policy years.

The majority of board meeting agendas include an item of general interest to the membership of ITIC, and on this occasion the European Commission and British Government's "Quality Shipping Campaign" was debated.

The conclusion of the board meeting was followed by an evening reception at the Pré Catelan located in a pleasantly wooded area of Paris. Invitations had been sent to all ITIC Members in France and their
insurance brokers, together with other leading figures in the French shipping industry. A large number attended and were welcomed, in French, by the Club's chairman, Mr Paul Vogt.

"The Club is in a strong financial position and has enjoyed a substantial investment income in recent years"

www.ITIC-insure.com

ITIC - Now On the Internet

ITIC now has its own website. As well as describing the insurance cover given by the Club, other features include a proposal form which can either be downloaded or completed and submitted on-line, a list of contacts and a description of the specialist services available such as debt collection and commission income insurance.

We will continue to update this site and are currently developing a "Members Area" containing Club literature and other items of interest. This will be accessed using a secure password. We hope that you will visit the site on a regular basis.

Please forward your comments and any suggestions for any material you would like to see included.

1NVOC Bills of Lading

Some of ITIC's Members operate as non ship owning carriers and this article examines some of the pitfalls that can be encountered when issuing NVOC Bills of Lading.

You have paid the loss – can you recover from the actual carrier?
NVOCs need to pay careful attention when completing the "shipper" box on ocean bills of lading, or they risk not being able to recover loss or damage claims against a carrier. Putting the matter right can be a painful and time and cost consuming exercise. Freight forwarders often issue their own negotiable bill of lading to clients with the name of the actual shipper and consignee completed. In exchange, the forwarder gets the ocean carrier's bill of lading. Sometimes in the space for the name of the shipper, the forwarder's name is inserted with the addition of "on behalf of the shipper".

Problems can occur when there is a cargo loss or damage claim that is the fault of the ocean carrier. If the negotiable bill of lading is clean and the loss or damage occurred before delivery, the forwarder is often obliged to pay the cargo interests. But, when the forwarder turns to the carrier for redress, the carrier may challenge the forwarder's title to sue because of the phrasing of the bill of lading. The carrier may rely on the argument that the forwarder was merely acting as the shipper's agent and that the ocean carrier contracted directly with the shipper, not the forwarder. Although the forwarder may argue that he contracted directly with the carrier on the grounds that the forwarder's NVOC bill of lading was issued to the actual shipper and that he received lump sum freight and not commission from the shipper, the carrier may contend that it is only the ocean bill of lading that matters.

In order to avoid confusion and unnecessary risk, the freight forwarder should avoid using the notation "on behalf of" the actual shipper on the ocean bill of lading but enter only his own name in the box for shipper. For example a forwarder in the Far East issued a negotiable bill of lading to the shipper for a consignment of 6,600

cartons of canned mushrooms from Hong Kong to Seattle. On arrival, the consignee's surveyor discovered salt-water damage and a claim for US$38,000 was presented. The forwarder was clearly liable under his negotiable bill of lading and reached an amicable settlement with the consignee. The ocean bill of lading read `freight forwarder o/b shipper' and when the forwarder tried to recover from the ocean carrier, the carrier claimed that he had contracted directly with the shipper and the forwarder merely acted as the shipper's agent. The forwarder's settlement with the consignee had nothing to do with him, the carrier argued. The forwarder's case was that he was acting as a principal since he issued his own negotiable bill of lading to the shipper, from whom he received a lump sum freight and that he had no authority from the shipper to act as agent.

The straight bill of lading in the US trade NVOCs and shippers, who are not familiar with the US trade, may fail to realise the particular implications of the issuance of a `straight' or non-negotiable bill of lading. In most jurisdictions, the shipper under a straight bill of lading has exactly the same rights over the cargo as under a negotiable document. The consignee is usually obliged to present the original bill of lading to the carrier (or the carrier's agent) at destination before he can collect the cargo. If the consignee does not pay, the shipper still has the bills of lading and, effectively, controls delivery. In the USA, however, by statute (the Pomerene Act) the straight bill affords the seller no such protection. If a bill of lading is made out to a named consignee, all he has to do is to prove his identity in order to receive the goods.

The carrier has no legal right to withhold cargo and a consignee named in a straight bill can take legal action to enforce delivery, even though he is not in possession of the original bill of lading.

There is quite clearly a problem for shippers and NVOCs in other parts of the world, who may not realise the particular implications of issuing a straight bill of lading to a consignee in the USA. In order to avoid problems, NVOCs trading to the USA should issue `to order' bills of lading wherever possible. NVOCs should explain to customers who ask for straight bills of lading that there is no guarantee that the cargo will be held against presentation of the original bill of lading, and recommend the issue of negotiable bills, which do afford protection, instead. After all, a negotiable bill does not have to be negotiated through a bank; it only has to be endorsed by the shipper.

Clearly there will be clients –perhaps members of the same group – who do not require the protection of a negotiable bill, but many others may.

NVOCs should also be careful of accepting `Express' bills of lading from ocean carriers when they have issued their own negotiable documents. It is standard practice in the USA for carriers to release goods under express bills to the company that cleared the goods through customs and paid any charges due. There have been several instances of companies using this loophole to obtain cargo without going through the tiresome process of paying for it. A further precaution is for NVOCs to use negotiable ocean carriers' bills wherever possible, with their US partner as `notify' party, to provide additional security, particularly for FCL business.

Ad Valorem

A number of US Federal Circuit courts have held that in order for the carrier to be able to rely on the US COGSA package limitation of US$500, the bill of lading must

give the shipper a `fair opportunity' to declare a higher value so as to avoid the limitation. In order to give a `fair
opportunity' the bill of lading conditions must state the US COGSA package limitation and make it clear that a higher value may be declared by a statement of the value on the face of the bill of lading.
Some US Federal Circuits, such as the Second Circuit, go further and require that there must be an excess value declaration box on the face of the bill of lading to enable value to be inserted.

Conversely the Ninth Circuit Court of Appeal in Mori Seiki USA Inv. v ALLIGATOR TRIUMPH (1993) held that in so far as that circuit was concerned it was not required that an excess value
declaration box be pre-printed on the face of the bill of lading.

Although this is a decision to be welcomed by NVOCs, delight should be restrained by the realisation that many other circuits maintain the view that an excess value declaration box is required. Therefore, NVOCs should have an `ad valorem' box printed on the face of bills of lading used for carriage to or from the USA, otherwise they could find that the amount that they have to pay out for a loss or damage claim, is vastly different from the amount they can recover from the ocean carrier.

ITIC would like to thank the TT Club for permission to reproduce this article.

Liability insurance - a luxury or necessity?

A large number of ship and crew managers still operate without professional indemnity or liability insurance – by one calculation perhaps 40% of them. Why is this? Have the 60% who have chosen to protect themselves got it right or are they wasting their money? As the leading insurer of ship and crew managers' liabilities, the Club put forward its own views and looks at what the management industry has to say on the subject.

The main reason why so many ship and crew managers still trade unprotected is that they have yet to fully appreciate the dangers and risks that they are exposed to. There are three reasons for this;
_ Firstly, the management industry is a relatively young one. The number of people who have so far experienced a liability claim is small.
_ Secondly, only relatively recently has the ship manager's role and responsibility developed to the extent that he runs the risk of being found liable for his negligence.
_ Finally, and perhaps most importantly, the industry has yet to experience the full implications of the most recent change in its working environment.

Although much has been written about the possible effects of the ISM Code on ship managers, it is still too early to know whether the predicted dangers exist in practice. These three points require some further explanation:

A fast changing industry
Insurance of any kind responds to a demand from its customers. Without ships carrying cargo there would be no P&I or hull insurers. This demand takes time to grow. Today, no sensible ship owner would dream of setting sail without being properly insured. When P&I insurance was a novelty
in the mid 19th century, only the most cautious owners sought P&I protection.

In the form that they are recognised today ship managers have only existed for perhaps the last thirty years. This is not a long time in marine insurance circles. Not only does demand grow slowly, it also

takes time for insurers to produce a product suited to their customers. Insurance like that offered by ITIC to its ship manager members is never static. As the industry moves, experiences different problems and faces new liabilities, so the insurance must move with it.

The ship management industry is also an industry that has been forced to change considerably in its short life. Twenty years' ago, the few managers that existed were generally close to their ship owner
principals. The true third-party managers were yet to arrive. Management contracts, if they existed at all, often overlooked the question of liability. The manager/owner relationship invariably coped with the occasional failure on the part of one or other. However, from the mid-1980's onwards, with ships being repossessed by financiers and private investors becoming involved in ship owning, the demand for ship management expertise grew. Banks and investors were, however, unwilling to accept the shortcomings of their ship managers. If a mistake was made and the owner's investment suffered as a result, the manager had to pay.

In 1989, a forum of owners and ship managers produced the BIMCO Shipman Management contract. The contract aimed to find an equitable balance of responsibility between the owner and manager. A limit of ten times the annual management fee was chosen. Almost ten years later, this is now widely accepted as the industry standard. In itself, the Shipman went a long way towards defining the modern role of the ship manger. It also encouraged both the owner and manager to appreciate the responsibility and liability of both parties and, before something goes wrong, to have it clearly understood who pays what.

The ISM Code

Why should the ISM Code mean greater risk for the ship manager? Ensuring that a ship first complies with the Code, implementing the necessary safety management system, performing safety audits and maintaining compliance all creates work for the already overworked manager. Greater responsibility means more that can go wrong. Unfortunately, it is likely to get worse before it gets better.
As one commentator put it recently, "ISM is the first step in a self-governing regime." With more to do and more people watching, for every ship manager, getting it right first time becomes essential.

The public profile of ship managers is also altered by the ISM Code. Although a ship may have been under third-party or technical management before ISM, the world at large still viewed the ship owner
as the party responsible in the event of a maritime disaster. Now, with managers offering full or technical services being named under the Code as the party who has "assumed responsibility for the
operation for the ship" they are firmly and unquestionably in the shop window.

It is also possible that the documentation which the ISM Code requires a manager to complete will give any person wishing to claim that a ship is unseaworthy an "audit trail" of the circumstances affecting unseaworthiness. The reason why this is so dangerous for the ship manager is because, if an owner is found to have provided an unseaworthy ship, perhaps because of a well documented system failure by the manager, the owner loses his right to limit his liability under article 4 of the 1976 Limitation Convention. He may then be liable in full for the claim and would have no alternative but to look to the manager for payment. Hopefully, provided the manager is co-assured on the owner's P&I insurance, he would be protected. It is possible however that the manager's act or failure could be deemed to be so negligent that the P&I insurance cover is withdrawn. If this happens, the manager is on his own or, with luck, is ready to be rescued by his liability insurer, ITIC.

That is the insurer's view. But what does the ship management industry, and those who comment upon it, think about the need for ship and crew managers to insure themselves?
The subject of the potential loss of right to limit (and ISM code audit trails possibly helping to prove unseaworthiness) has been widely discussed in the ship management journals for some time.
However, evidence that this really could happen is perhaps best illustrated by an existing case that reached the House of Lords in 1984. Described by Herry Lawford of the UK P&I Club in Chapter 6
of the recently published 3rd Edition of Ship Management, as "the most celebrated case in the ship manager's lexicon", the MARION (1984) 2 Lloyd's Rep. 1 "came as a bombshell to most ship managers." Briefly, the facts of the case were as follows:

The MARION's anchor fouled and damaged an oil pipeline on the seabed in Tees Bay. The master had been navigating with an out of date chart upon which the pipeline was not marked. The ship's manager had previously instructed the master to dispose of all obsolete charts and had asked for confirmation that this had been done but the master failed to respond. A claim for US$ 25 million was made by the pipeline owners against the ship owner. Amongst other things, they argued that a proper system should have been in place to ensure charts were updated and the old ones disposed of and
the ship management company was named as the responsible party.

The House of Lords found that the ship management company, in particular its managing director, had a duty to ensure that an adequate level of supervision was exercised over the master. This duty had
not been fulfilled. Furthermore, they accepted the view of a lower court that in such a case one looks to the management company, not the ship owner, as being the party guilty of actual fault.

Nevertheless, it was the ship owner who lost his right to limit his liability. Rather than being liable for only the limited amount of US$ 1 million, the ship owner and his P&I Club had to settle the claim for close to the full amount of US$ 25 million. Had the ship manager not been co-assured on the same P&I insurance, he would have had to meet this payment himself.

The International Ship Manager's Association (ISMA) recently made ship management liability the subject of one of their member seminars. Four "nightmare scenarios" based upon actual events but
devised by Peter Martyr of the law firm Norton Rose looked at different situations whereby the manager could face a serious liability claim including cases of a delay causing a cancellation of a cargo stem and officers with invalid certificates. Presumably, without insurance, any ship managers who became embroiled in such problems might find themselves with a potentially life threatening liability.

Conclusion
Everyone has his or her own view about insurance. The Club believes that the majority of ship and crew managers who have chosen to be insured have made the correct decision. As this article
demonstrates, it is not only the possibly prejudiced view of an insurer of ship managers that they need to protect themselves.

Only time will tell what the true effect of the ISM Code is upon ship manager's liabilities but nobody could argue that it makes a manager's job less dangerous. It is not impossible that more and more

responsibility for the safe operation of ships will fall on the ship and crew manager's shoulders. If this happens then, as with ship owner's hull and P&I insurance, ship managers may find having a suitable professional indemnity or liability insurance an essential licence to trade which they cannot do without.

The above article appeared in the February 1999 Baltic Magazine Special Supplement on Ship Management.