ITIC
THE PROFESSIONAL INSURER

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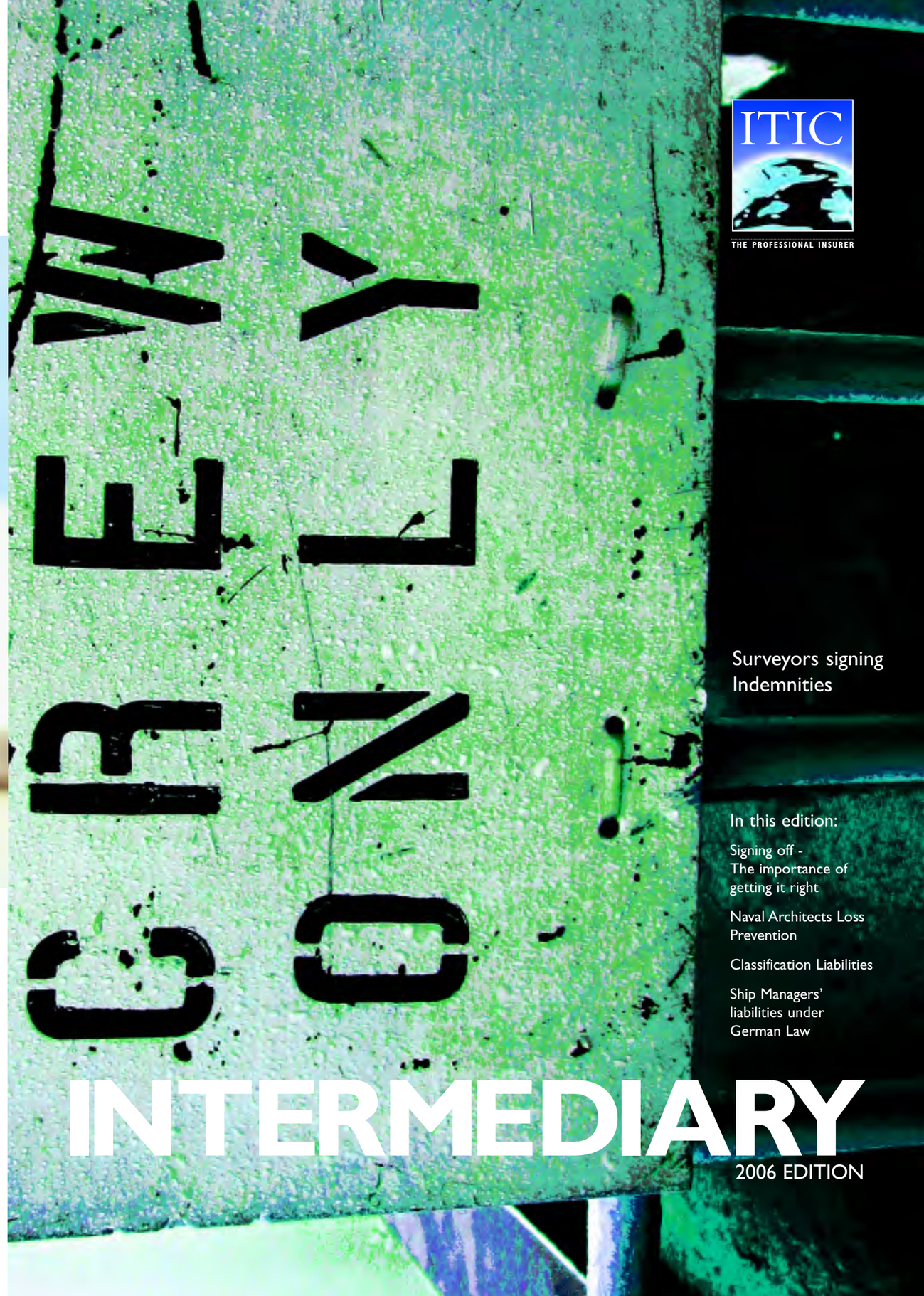

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Surveyors signing Indemnities

In this edition:

Signing off -
The importance of getting it right

Naval Architects Loss Prevention

Classification Liabilities

Ship Managers' liabilities under German Law

INTERMEDIARY

2006 EDITION

Welcome from Harry Gilbert

Chairman ITIC

I am delighted to introduce this latest edition of The Intermediary. It is designed, as ever, to be informative and practical on the one hand, while remaining straightforward and readable on the other. It also seeks to provide you with information about the continuing development of the Club and details of those within the Managers' offices that you may have cause to contact.

Your Club has had another excellent year, and now serves nearly 1800 Members from around the world. Our financial position is strong, and we have once again been able to announce a "mutual dividend" in the form of a continuity credit. It is your Board's hope that this trend will continue, but we all understand that it cannot be taken for granted and will always depend on the Club's strategic and financial development.

ITIC insures many different professions within the transport industry and it is impossible to include articles that will touch on every member's professional life in each edition. However, the thread that runs throughout this edition is that care must be taken throughout our working careers, and that ITIC can help you if something goes wrong. This edition of The Intermediary includes articles on signing indemnities as a surveyor, ship management in Germany and how intermediaries should sign off documents, how agents should word pro-forma disbursement accounts and loss prevention for naval architects.

You will also find details of changes within the Managers' office following recent retirements and new appointments. These changes are highlighted at pages 12 and 13 and are also set out on the Club's recently revised website. The Managers continue to provide a seamless 24-hour service for us all, and when things do go wrong we know we can look to them for assistance in the expectation that the service we receive will be consistently first class.

Finally, I would like to thank you, the Members, for the support and enthusiasm you give to your Club. It is my intention that it should always be an organisation run for the benefit of us, its Members.

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SURVEYORS SIGNING INDEMNITIES

Sometimes the Club's surveying members will be asked to sign indemnities, disclaimers, waivers or releases before the ship owner authorises the surveyor to board the ship. This is obviously a very different situation to when the surveyor is agreeing terms between themselves and their own principal. A surveyor may be asked to sign an indemnity / waiver when appointed to perform a pre-purchase survey or when appointed by insurers to inspect a ship following an accident.

What must you consider?

It should be remembered that the surveyor will be acting on behalf of his principal (who instructed him to perform the job). It is likely that there will already be terms and conditions between the surveyor and his principal containing various waivers and indemnities. The indemnity/waiver required by the owner will be a completely separate agreement.

Before allowing the surveyor on board he could be asked by a ship owner to sign:

a) a disclaimer or waiver of all the surveyor's rights to claim or sue against the ship owner and his servants and agents should he have any cause to do so; and

b) an indemnity to the ship owner and his servants and agents for any loss or damage suffered howsoever caused;

Obviously the surveyor's principal will be waiting for the survey to be conducted and, consequently the surveyor will be keen to board the vessel.

As far as Part **a)** is concerned a surveyor should consider the following:

- Under English law (The Unfair Contract Terms Act 1977), a party cannot exclude or limit their liability for death or personal injury. Therefore, if a surveyor is injured or killed whilst on board, the owners will be liable irrespective of whether the surveyor signed the release.
- For all non-personal injury claims– ie damage to tools or loss of income, the surveyor should only waive his rights to claim for such losses if the loss or damage suffered was caused by his own negligence or wilful misconduct.

  Therefore, if the owner (or their servant or agent) breaks the surveyor's laptop, the surveyor should not be barred from issuing a claim for the loss he has suffered. However, if the surveyor placed his laptop on a surface known to be hot and the laptop melted, this loss would have resulted from his own negligence and, therefore, it would be unfair to hold the owner responsible.

For Part **b)** surveyors should:

- only agree to indemnify the owner for losses suffered as a result of the surveyor's negligence or wilful misconduct. Therefore, as in the example above, if the surveyor left his laptop on a hot part of the engine and it melted, causing damage to the engine, it is reasonable for the owner to be entitled to claim back the loss suffered (ie repairs, loss of use of the ship etc) from the surveyor. However, if the owner or their employee or agent placed the laptop on the engine themselves, it would be unreasonable for them to be able to claim any losses from the surveyor. Similarly, if the surveyor places his laptop on a surface which ordinarily should not be hot, but which is hot due to a "technical malfunction", it would be unreasonable for the surveyor to have to indemnify the owner for any damage caused as a result. In fact, in that situation, the surveyor should be able to claim his loss from the owner.
- ensure that the surveyor is insured for the amount specified by the owner.

ITIC suggested wording

If asked to sign any indemnity / waiver prior to boarding a vessel, ITIC would suggest that ideally nothing at all be signed; and if this is impossible the following wording be used:

"In consideration of your allowing [the Surveyor] its agents and/or servants ("the Company") to board the above ship for the purposes of carrying out a survey on behalf of the Company's principal(s), the Company hereby undertakes not to make any claim against the Owner, their servants or agents ("the Owner") for any losses suffered by the Company (other than those for which the Owner cannot exclude their liability by provision of statute) provided such losses occurred solely due to the Company's negligent acts and omissions or wilful misconduct.

Further, the Company hereby agrees to indemnify the Owners against any claims brought by any third party arising from the Company's negligent acts and omissions or wilful misconduct whilst onboard the ship.

This Agreement shall be governed by and construed in accordance with English law. Any disagreement or dispute arising from this Agreement is subject to the exclusive jurisdiction of the English High Court, or if agreed in writing between the parties, arbitration in London, subject to the provisions of the Arbitration Act 1996, or any statutory modification or re-enactment thereof for the time being in force, and the current rules of the LMAA from time to time in force."

This text can be downloaded from the publications section of www.itic-insure.com

SIGNING OFF

the importance of getting it right

ITIC insures many companies whose job it is to arrange contracts on behalf of a principal between the principal and a third party. A problem which continues to produce many claims is the failure to clarify, when arranging the contract, that they are acting ***"as agent only"***.

The law in most jurisdictions stipulates that an agent does not become personally liable under the contract he arranges on behalf of his principal. However, agents who are careless in putting together contracts often end up having to meet the principal's obligations under the contract in the event that the principal is unable or unwilling to do so. The agent may present the claimant with a much more attractive target than the actual principal, who may be insolvent. Agents have been found liable to pay unpaid bills, cargo damage claims, claims resulting from defective bunkers etc. merely because they forgot to add *"as agent only"* when signing off the contract in question.

Bunker Brokers

A bunker broker (who also acted on occasion as a bunker trader) ordered bunkers for the operator of three ships at a total cost of US$186,000. Six months later the operator went bankrupt without paying the bunker suppliers, who then issued a writ against the bunker broker alleging that he had ordered the bunkers for his own account. Although e-mails from the company mailbox had an automatic sign-off which included the necessary footnote making it clear (as appropriate) when the company was acting *"as broker only"*, most of the individual brokers worked from their personal mailboxes, which had no such automatic footnote. The courts found that the bunker broker had not made its agency status clear and that the bunker suppliers were entitled to look to the broker for payment.

Ship Managers

Suppliers of services to ships under management are entitled, if the manager has not made it clear that he is ordering goods and services as an agent for the owner or bareboat charterer, to look only to the manager for payment. When signing purchase orders for supplies to a ship, managers must always state that the supplies are ordered by the managers *"as agents only"* for the shipowner or bareboat charterer. If he has not, then in most jurisdictions he is personally liable. Ship managers are often more financially sound and reputable than the principals they represent. Suppliers will often allow credit to a ship manager, but not to a single ship owning company. This is what the courts will look at.

Ship Agents

Ship agents order numerous goods and services on behalf of their principals. If a shipping line becomes bankrupt, suppliers will look to get paid by any means and from any party. Ship agents often make life difficult for themselves by accepting cargo bookings, invoices etc. in their own name, which show the agent as *"the carrier"* or *"the shipping line"* instead of returning the booking note or invoice, asking that it be re-issued in the name of *"ABC Agency Co. as agents for XYZ Shipping Line"*.

In one case involving a shipping line which had become insolvent, the line's agent was facing claims from two feeder lines for unpaid freight totalling US$175,000. The agent had, over a considerable period, allowed the feeder lines' agents to issue bills of lading showing the agent as the shipper on the feeder bills of lading, and invoices addressed to the agency company. The feeder line is the sub-contractor of the actual ocean carrier, and the name of the shipper on the feeder bills of lading should either be *"XYZ Shipping Lines"* or *"ABC Agency Co. Ltd as agents for XYZ Shipping Lines"*.

Ship Brokers

Ship brokers do not currently face the same problems that other agents do if they fail to sign off *"as brokers only"*. 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. This is not to say that there have not been claims against ship brokers where it is alleged that they acted as principals in charterparties. Therefore, in order to protect their agency status, ship brokers should also make it clear that they are signing in their capacity *"as brokers only"*.

Guidelines for agents to avoid contracting as a principal

- Sign off all documents *"as agent only for and on behalf of XYZ Shipping Company"*;
- E-mails to be signed off *"as agent only"* or *"as broker only"* even if personal mailboxes are used;
- If invoices are issued in your name, return them for re-issue in the name of the principal; e.g. *"Owners/ Charterers of M.V.... c/o ABC Agency Co"*;
- Do not accept feeder bills of lading which show you, rather than your principal, to be the party contracting with the feeder company;
- 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 ship agent or a ship manager, send out a letter every six months to your principals' suppliers informing them of your agency status. This should not be an unaddressed circular as you may need to use it as evidence that you have made your agency status known to any particular supplier. ITIC would be happy to provide a suggested wording if required.

Other pitfalls

Failure to disclose name of principal

In some countries, even if the agent signs off *"as agent only"*, he may still be found by a court to be personally liable if he fails to disclose the name of his principal. For absolute safety agents need to sign off *"ABC Company as agent only for XYZ Company"*.

"Agent" or *"as agent only"*?

In an English law case heard in 1984 it was held that the word *"agent"* in the signature *"ABC Company, agent"* was a descriptive title rather than an indication of the capacity in which the company acted in a particular transaction. In order for the agent to make it clear that he is acting in a representative capacity, he needs to sign off *"ABC Company, as agent only"*.

DO NOT sign off *"as agent only"* when you are not

A company entering into a contract on its own behalf must not sign off *"as agent only"*. If a company purports to sign off *"as agent only"*, when they intended to act as a principal, the company could lose its rights under the contract. You cannot avoid personal liability under the contract by alleging agency status and at the same time maintain your own rights under that same contract.

Conclusion

Claims against companies who intended to act as agents in transactions succeed all too often. Even if an allegation that an agent has contracted personally is successfully defended, this will not be without considerable expenditure of time, trouble and legal costs. Do not make life more difficult for yourselves.

Get it right first time – take care in signing off.

Six months later the operator went bankrupt without paying the bunker suppliers, who then issued a writ against the bunker broker

LIABILITIES OF SHIP OWNERS ATTACHING TO AGENTS

In many countries ship agents, and, in some cases ship managers, can find themselves involved in claims as a result of their joint and several liability with their principal, be that the ship owner or charterer.

This exposure arises as a result of either local law or port statute (statutory liabilities). Examples include cargo claims, payment of freight tax, customs duty and penalties, removal of wrecks, abandoned cargo, containers, etc., dock damage, immigration fines and repatriation costs, and oil pollution. These liabilities should, in the normal course of events, be handled by the principal and, where appropriate, their P&I Club.

The agent may also be liable, either at law or by port statute, to pay the principal's commercial debts, such as port and harbour dues, pilotage, bunkers/stores and repairs. Statutory liabilities form part of the cover provided by ITIC but commercial debts are not insured, as they can theoretically be taken care of by a prudent agent obtaining funds in advance.

In most jurisdictions, even where there is a joint and several liability, the principal, and not the agent, is the prime target for claims (eg although ship agents in Singapore are jointly and severally liable for dock damage and wreck removal, in practice the port authority will always look to the principal to ensure that security is provided before the ship leaves the port). However, in other jurisdictions (eg Pakistan) the ship may be allowed to sail and the port authority will send their bill to the ship agent, who then has to obtain payment from his principal. In the United Kingdom, the agent's liability is restricted to the costs and fines relating to illegal immigrants.

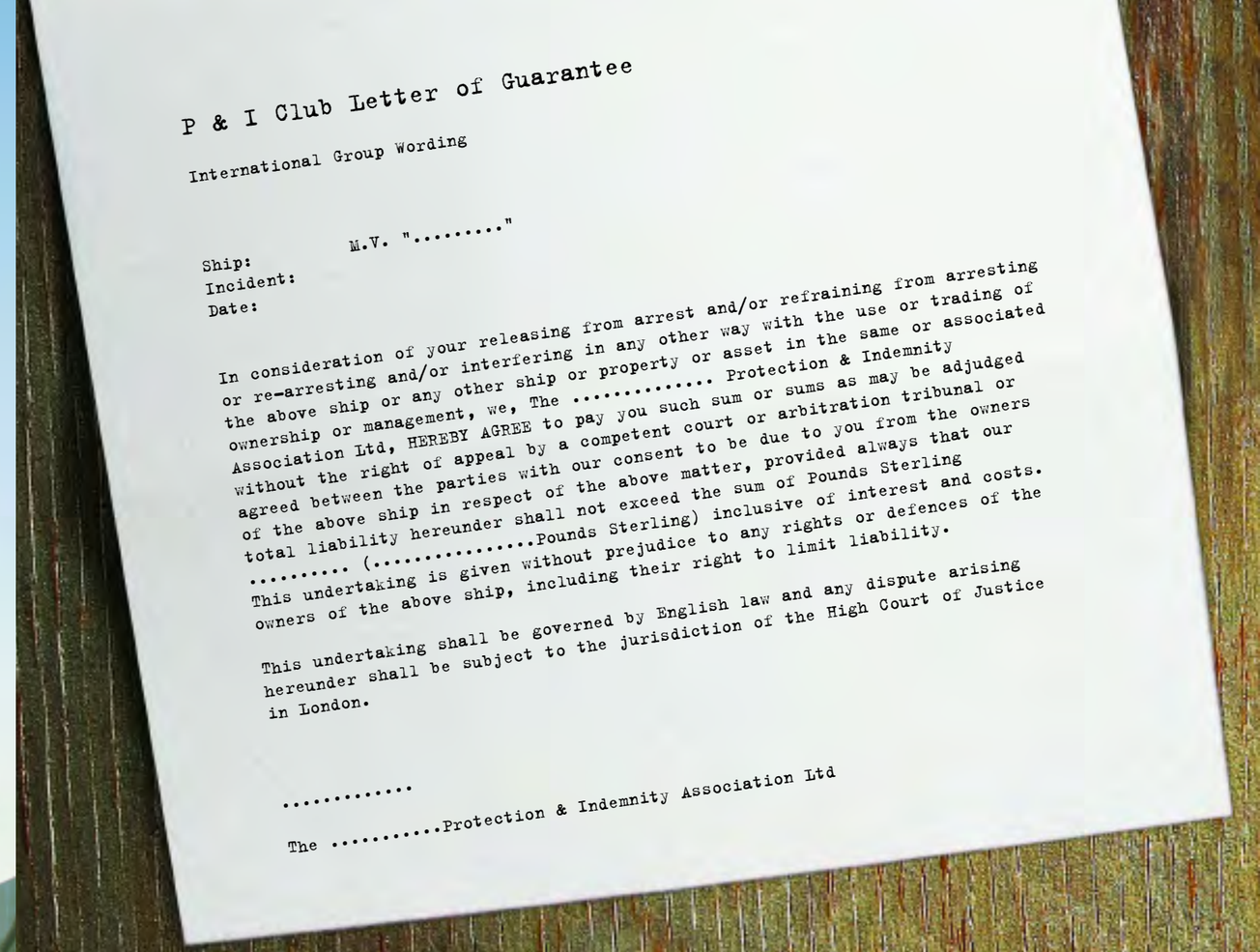
ITIC's experience has revealed that the authorities in the following countries may look to the ship agent, rather than the principal, for various liabilities;

Argentina
Australia
Bangladesh
Brazil
Canada
Chile
Ecuador
Colombia
Ecuador
India
Kuwait
Pakistan
Philippines
Singapore
Spain
Taiwan
Turkey
United Kingdom
United States of America
Venezuela

This is not an exhaustive list, and consideration must be given to changing laws and revising port authority enactments.

Of the countries listed above, several have legal systems which take many years to process claims. This means that during the intervening years there is always the risk that the ship will be sold, or the owner will cease trading, in which case the agent will be left to deal with the claim.

If the agent becomes aware of the claim while the ship is still in port, attempts should be made, with the assistance of ITIC if necessary, to obtain a P&I Club letter of guarantee (LOG) before the ship sails. If there is substantial damage to cargo or a dock damage which cannot be defended or disputed then it may be possible to do this amicably. When a LOG is provided it is essential to check the wording of the letter to ensure that the agents' liability is protected fully and that adequate consideration is given in respect of both interest and legal costs. The "International Group of P&I Clubs", which is made up of 13 separate and independent P&I Clubs, have an agreed standard LOG wording, and this is set out opposite.



P & I Club Letter of Guarantee

International Group Wording

Ship: M.V. "....."
Incident:
Date:

In consideration of your releasing from arrest and/or refraining from arresting or re-arresting and/or interfering in any other way with the use or trading of the above ship or any other ship or property or asset in the same or associated ownership or management, we, The ..... Protection & Indemnity Association Ltd, HEREBY AGREE to pay you such sum or sums as may be adjudged without the right of appeal by a competent court or arbitration tribunal or agreed between the parties with our consent to be due to you from the owners of the above ship in respect of the above matter, provided always that our total liability hereunder shall not exceed the sum of Pounds Sterling ..... (.....Pounds Sterling) inclusive of interest and costs. This undertaking is given without prejudice to any rights or defences of the owners of the above ship, including their right to limit liability.

This undertaking shall be governed by English law and any dispute arising hereunder shall be subject to the jurisdiction of the High Court of Justice in London.

.....

The .....Protection & Indemnity Association Ltd

Whilst it is not always possible to obtain a LOG based on this wording, the above is preferable and can be used as a guide if necessary.

ITIC has a number of other suggested LOG wordings for dealing with specific types of claims in certain countries, i.e. for expenses/fines incurred by agents in respect of illegal immigrants into Australia and the United Kingdom, customs dues and penalties in India, customs dues and penalties and cargo claims in Pakistan, all of which can be provided by the Club.

In the event that the claim falls outside of the scope of P&I Clubs cover, or a P&I Club refuses to provide a LOG for any other reason, the agent should look directly to his principal for security, preferably in the form of a bank guarantee.

It is probable that the courts will not allow the ship agent to arrest the ship for an anticipatory claim but it may be possible where there is an actual claim on the ship agent (eg from the port for damage to harbour installations).

When first made aware of any statutory liability claim, the agent should immediately inform his principal of the loss/claim and seek confirmation that they (the principal) will indemnify the agent as per his duty and obligations in accordance with the laws of agency and any current agency agreement.

Whilst it is preferable to obtain formal security in respect of the claim, be that in the form of a P&I Club letter of guarantee or a cash bond/bank guarantee, consideration should be given to the reputation and status of the principal. In some cases it may be acceptable to receive the principal's written confirmation that his P&I Club is handling the matter, protecting both owner's and agent's interests.

In the event that the principal does not co-operate with the request for security, the agent should contact ITIC who will approach the principal and/or the P&I Club directly with a view to obtaining security. Additional assistance is always available from the Club's local correspondent. The correspondent will be experienced in the type of claim faced by the agent and this may be the best and most economic way to deal with it. As the agent may be jointly liable with the principals, the local correspondent may already be involved, and may be defending the agent's interests already.

An earlier Intermediary article ("misdirected arrows – ignore them at your peril" October 2002) addressed the problems faced by agents where claims are brought against them where they do not have joint and several liability and where there is no basis in law for a claim against them. This is available from the Club's website www.itic-insure.com.

FONASBA/ITIC ISPS Clause

In July 2006 the Federation of National Associations of Ship Brokers and Agents (FONASBA) conferred "Standard Document" status on an ISPS clause, drafted with the assistance of, and approved by, ITIC. FONASBA recommends that the clause, which is headed **"FONASBA Standard Clause for Limiting Agents Liability for Filing ISPS Code Compliance Information"**, be included in agents' standard trading conditions or any other document relating to agents' liabilities to principals.

The purpose of the FONASBA/ITIC ISPS clause is to clarify the role and responsibilities of the agent in transmitting ISPS information from the ship to the port in accordance with the port's requirements. The clause makes it clear that the agent's responsibility is to transmit the information to the correct party within the required timescale, but that the agent is not responsible for the accuracy of the information provided, nor is he responsible for matters beyond his control, such as the late provision of information by the Master or technical problems (such as computer failure).

Please contact ITIC if you wish to obtain a copy of the FONASBA/ITIC ISPS Clause.

DRAFTING PRO-FORMA DISBURSEMENT ACCOUNTS

ITIC has recently received a number of enquiries from ship agents who have experienced problems with principals not settling disbursement accounts in full because they are different from the pro forma disbursement account originally provided by the agent. ITIC would therefore suggest placing the following wording on all pro-forma disbursement accounts so that your principal is well aware that the pro-forma document is simply an estimate and is liable to change.

> "Please note that this is a pro-forma disbursement account only. It is intended to be an estimate of the actual disbursement account and is for guidance purposes only. Whilst [the Agent] does take every care to ensure that the figures and information contained in the pro-forma disbursement account are as accurate as possible, the actual disbursement account may, and often does, for various reasons beyond our control, vary from the pro-forma disbursement account. You are required and are liable to pay upon demand, the full amount described and shown in the actual disbursement account. This duty exists regardless of any difference between the figures in this pro-forma disbursement account and the actual disbursement account. For the avoidance of doubt, this pro-forma disbursement account is not a contractual document."

This text can be downloaded from the publications section of www.itic-insure.com

Perhaps more accurately in this instance, the question is really when does a ship cease to be a ship for the purposes of arrest. This was the issue addressed by the Ghent Court of Seizures.

A Maltese-registered car-carrier suffered a serious fire in Antwerp in July 2004. After a survey, a certificate of total loss was issued. She was bought by a scrap dealer, free of mortgages, arrests and other encumbrances. Her new owner deleted her from the Maltese register and towed her as a 'shipbreaker's ship' to Ghent under a shipbreaker's insurance policy.

She was arrested for outstanding debts. Her new owner, the scrap dealer, challenged this. The Court considered the matter according to the Belgian procedural rules and the 1952 Arrest Convention.

According to the Belgian Maritime code, the Court may allow the arrest of seagoing vessels, and the court had to consider whether the ship was still in this category. The court considered the following points. According to the Maritime Code, a seagoing vessel is one which is destined or customarily used to carry on trade at sea for profit. The court also referred to the necessity for the vessel to ply the seas and be subject to the perils of the sea.

The court found that the above criteria no longer applied to the ship in question. The ship was burned out; she was not entered in any register; she had been bought and insured as scrap; all the usual conditions regarding the contract of sale or purchase of a seagoing ship had been deleted; the ship agent was employed to attend to her requirements as a wreck. She was described as a 'ship' when sold to the scrap dealer, but this was considered to be unimportant. Overall, therefore, she was not seaworthy and therefore could not be considered a seagoing ship.

The arrest was lifted, but the court dismissed the claim for damages for vexatious arrest as unfounded.

WHEN IS A SHIP NOT A SHIP?

SHIP MANAGEMENT GERMAN STYLE

Ahead of ITIC's Directors' Meeting in Hamburg in September 2006, Roger Lewis looks at ship management German style.

In recent years liner operators have been rushing to Germany for their new tonnage. Several have set up their own ship management companies in Germany. They have done so because, during the 1990s, Germany's tax laws were amended to encourage private investment in merchant shipping. This developed into the tonnage tax system of 1999, which was amended in 2006 and has fuelled a surge in private investment in shipping in Germany.

Nowadays, private individuals, faced with low investment returns elsewhere, favour the purchase of shares in "*fonds*" created to purchase and operate new ships, usually container ships. An ever growing number of finance houses now specialise in managing such projects on behalf of private individuals. Many ship owners have chosen to expand their own fleets by transforming themselves into ship managers, tasked with the job of supervising the construction and operation of these new ships. As markets move, other operators including those of tankers, bulkers, heavy-lift and other specialised tonnage are also showing an interest.

Shares in the single ship-owning company, typically a *GmbH* and *Co. Kommanditgesellschaft (KG)*, are purchased by private investors with the ship manager retaining a minority ownership. A ship management agreement establishes the duties of the owner and manager during the period of management. Typically ships are delivered from the yard into the hands of liner operators under long-term time charter.

What are the risks for the managers of *KG* financed ships?

1 Any ship manager taking on the management of a *KG* financed vessel must first have considered carefully the challenges of working on behalf of a group of private investors.

2. Another challenge is finding sufficient numbers of qualified and experienced shoreside personnel. The successful future managers will be those who plan and invest well ahead in the training of not only crew but also superintendents and operational staff ashore.

How can ITIC help?

There are four simple steps that a ship manager can take to protect himself. Most of them apply to ship managers throughout the world, not just in Germany.

1) **Modern contract wordings**

In the event of an error or omission on the part of the ship manager leading to financial losses for the ship owning company, the first document that is going to be analysed in detail is the ship management agreement. This document needs to be prepared carefully.

Jan Hungar of Ince & Co., Hamburg has provided his view on some of the issues to consider in a well constructed German ship management agreement (or *Vertragsreedervertrag*).

(i) A *Vertragsreedervertrag* needs to reflect that the ship manager or *Vertragsreeder* is more than an ordinary third party ship manager. The Vertragsreeder is often involved as the arranger and "true" buyer/seller of the ship for which the KG and its investors then provide the finance. The contract must therefore balance the interests of the *Vertragsreeder* as long term manager of the vessel and the interests of the individual investors as legal owners of the vessels on the other.

A Vertragsreedervertrag is a tailor made contract. A BIMCO SHIPMAN agreement is not recommended for use, even when modified.

(ii) The *Vertragsreedervertrag* should be subject to German law as the contract relates to a German shipfonds vessel.

(iii) The scope of work of a *Vertragsreeder*, his duties and the power to represent the owners are in general more extensive than those of a third party ship manager and this needs to be reflected in the contract.

(iv) For tax saving reasons it is recommended to distinguish clearly in the contract between certain management activities such as (1) management during construction period (if any), (2) preparation of the management and (3) management itself.

Moreover, it is important that the contract reflects that the management will be conducted almost entirely from within Germany to meet the tonnage tax requirements. Subcontracting to service providers abroad is only permitted in limited areas such as, for example, the provision of ratings.

(v) Exclusion or limitation of liability requires careful drafting to avoid being rendered invalid. In general, exclusion or limitation of liability requires a more specific wording than under English law. In this regard, the following issues ought to be distinguished:

(a) liability arising out of cardinal and marginal obligations under the contract;

(b) liability for death or personal injuries and other claims; and

(c) liability arising out of gross negligence on one side and simple negligence and lesser degrees of culpability on the other.

Furthermore, consideration must be given to cover liability risk connected with tax issues. It is still not entirely clear whether the German tax authorities will ultimately side with the owners' and managers' interpretation of the tonnage tax laws on conformity issues. The existing statutory instrument is not sufficiently clear in this regard and, as a result, the contract should be sufficiently flexible to accommodate possible changes in the German tax system and their consequences.

ITIC also offers the following guidance to all ship managers worldwide

2) **Co-assurance**

Ensure that you are co-assured on all of the ship's operational insurances, such as P&I, hull and loss of hire. Whether the ship owner manages his own vessel, or contracts some of the duties to a manager, the risk is the same for the underwriter. It is also a condition of ship management cover with ITIC.

3) **Operate with appropriate systems and controls ashore**

Mistakes can always happen but you can minimise the chances of something being overlooked. Holiday periods and staff absence through illness are a time to be especially careful. It is at this time when staff have to handle unfamiliar tasks.

4) **Sub-contractors**

Be aware that, in the event of negligence by a sub-contractor to whom you entrust certain management responsibilities, it is the "head manager" who will be responsible for his sub-contractor's actions. Take care to ensure that any sub-contract is on back-to-back liability terms and, essentially, that the sub-manager has in place well chosen liability insurance.

ITIC is available for any ship manager who wishes to discuss their management agreements, loss prevention activities or liability insurances.

Our thanks for this article go to Jan Hungar of Ince & Co., Hamburg, who provide advice on German and English law.

THE ITIM TEAM

We have reorganised the ITIM team, promoting Stuart Munro to Club manager and commercial director and Roger Lewis to underwriting director, Adam Jacobson and Alistair Mactavish to director; their new roles are communications director and general manager respectively. Robert Sniffen has been promoted to an account executive.

We also welcome Robert Crichton and Stephanie Belcourt who have joined the team as trainee account executives.

We set out brief biographies of all the ITIM staff below:

Adam Jacobson
Communications Director

Adam joined ITIM in 2001 from Rayfield Mills, a specialist firm of shipping lawyers based in Newcastle. He is an admitted solicitor who has practised solely in maritime law since qualifying in May 1999. Adam has previously lived in France and Spain and speaks both French and Spanish. Adam is the area executive for France, Portugal, Spain, Gibraltar and Africa.

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Alistair Mactavish
Director and General Manager

Alistair worked as a claims executive for Steamship Mutual P&I for 10 years before joining ITIM in 2001. He is the account executive for South East Asia, Central and South America, Scotland and Ireland.

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Andrew Jamieson
Legal Advisor and Claims Director

Andrew is ITIC's claims director. He has been with ITIM since its foundation in 1992 and and was previously with CISBACLUB. Andrew is a barrister. He is the author of "Ship Brokers and the Law" (LLP Ltd, 1997) and a wide range of articles for shipping journals. He regularly provides loss prevention presentations for Members and industry bodies.

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Charlotte Kirk
Marketing Director

Charlotte joined ITIM in 1992. Previously she worked in the chartering and operations department at Blue Star Line before going to work at CISBACLUB. Charlotte is a Fellow of The Institute of Chartered Ship Brokers and is the account executive for Cyprus, Middle East, Scandinavia, the West of England and South Wales.

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Christopher Arnold
Account Executive

Christopher Arnold joined ITIC in 2005, having previously worked as a shipbroker. He has a degree from Oxford and legal training. He won several Baltic Exchange prizes in the ICS examination. He is an account executive for Germany, and the South Coast of England.

+44 20 7204 2126

Mark Brattman
Assistant Legal Advisor

Mark joined ITIC in March 2004. He is a solicitor and qualified at City maritime firm Shaw and Croft in 2000. Mark undertook a wide range of shipping work at Shaw and Croft before moving to Beaumont & Sons in 2001 where he specialised in aviation claims, insurance and reinsurance disputes and general commercial litigation. Mark is now assistant legal adviser at the Club.

+44 20 7204 2905

Julia Mavropoulos
Consultant

Julia is the claims consultant of ITIM. She joined TIM in 1985 after working for a P and I Club correspondent office in Greece from 1970. She became claims director, but retired in 2005 and now works two days a week as a consultant.

+44 20 7204 2930

Paul Monteith
Senior Claims Executive

Paul has a law degree and prior to joining ITIM in 1992, worked for City solicitors Hedleys and CISBACLUB. He has 20 years experience in the maritime industry with a particular emphasis on the recovery of Member's debts.

+44 20 7204 2932

Steve Harvey
Finance Director

Steve joined Thomas Miller in 1969 and in those 37 years has worked with most of the Clubs managed by them. He is currently Finance Director and has been involved with the finances of ITIC and TIM since 1985. He is a fellow of the Association of Accounting Technicians.

Support Team

The team of account executives is assisted by Sandra Spurling, Sylvia Barwick, Elizabeth Rose, Lee Ennis and Janis Adams (not pictured).

Peregrine Massey,
Chairman

A barrister and mediator, Peregrine's career has seen him involved since 1977 in the management of a number of marine and professional indemnity mutuals within the Thomas Miller group. He is ITIM's chairman and leads the management team. He is also a director of Thomas Miller Holdings Ltd.

+44 20 7204 2148

Robert Crichton
Trainee Account Executive

Robert studied law at Liverpool University prior to working as a case handler in the general average and salvage department of WK Webster Co Ltd. He is currently studying for membership of the Institute of Chartered Shipbrokers.

+44 20 7204 2935

Robert Sniffen
Account Executive

Robert joined ITIM in 2001 and is the account executive for the US Gulf, Argentina, Uruguay, Paraguay, Venezuela, Caribbean, East/South East of England. He also assists Stuart Munro with Australia.

+44 20 7204 2938

Roger Lewis
Underwriting Director

Roger joined ITIM in 1993 having obtained a degree in International Transport Management from Cardiff University and having worked in liner agency for Evergreen. Roger is a Member of the Institute of Chartered Ship Brokers, and the underwriting director of ITIM and is the account executive for Germany, India and Northern England.

+44 20 7204 2926

Stephanie Belcourt
Trainee Account Executive

Stephanie joined ITIM in 2006 after completing her first degree in law and obtaining her masters degree in maritime law at Southampton University. She is now studying for her ICS exams.

+44 20 7204 2925

Stuart Munro
Club Manager & Commercial Director

After graduating in law, Stuart joined Thomas Miller as a claims executive for the UK P&I Club in 1985. He joined TIM in 1990 and is currently the Club Manager and commercial director of ITIM. He is also the account executive responsible for Australia, New Zealand, Far East, and the UK.

+44 20 7204 2933

Vincent Egon
Account Executive

Vincent joined ITIM in 2003 after completing a masters degree. He has successfully completed the Institute of Chartered Ship Brokers' exams, receiving a prize from the Baltic Exchange. Vincent is French. He is the account executive for Malta, Greece, Belgium, Netherlands, Turkey and the South West of England.

+44 20 7204 2906

Zareena Hussain
Training Director

Zareena is a director of ITIM. She worked for several years in oil trading/tanker chartering before graduating with a business degree from UCLA. Zareena also has extensive credit management experience, working as a credit analyst prior to joining ITIM in 1993. She is the account executive for USA, Canada, Italy and Switzerland.

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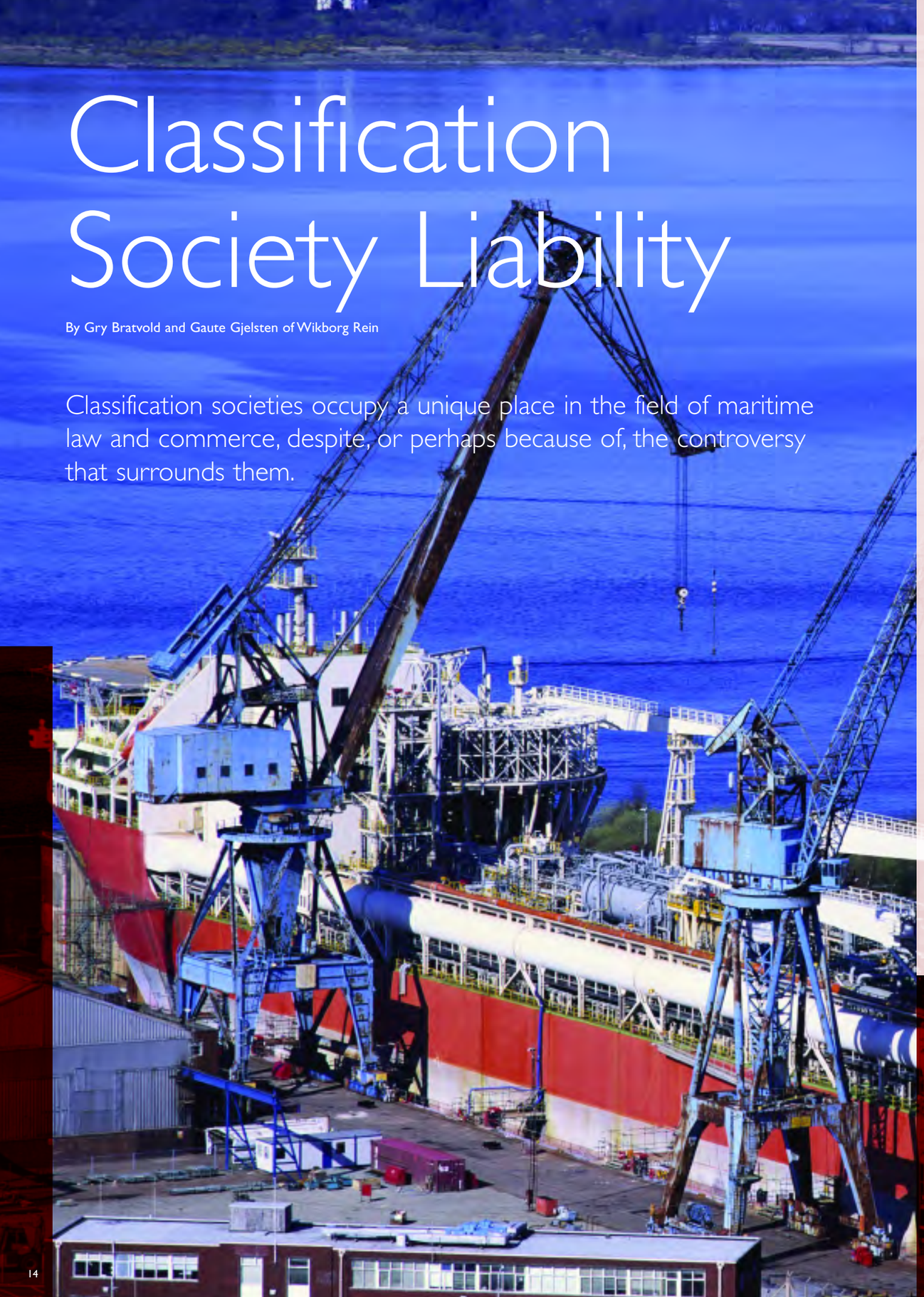
Classification Society Liability

By Gry Bratvold and Gaute Gjelsten of Wikborg Rein

Classification societies occupy a unique place in the field of maritime law and commerce, despite, or perhaps because of, the controversy that surrounds them.



Classification societies enforce statutory requirements on behalf of flag and port states yet they are not government agencies themselves. They have the power to impose sanctions yet they also compete for the business of those who come under their scrutiny. They make and enforce the rules but also offer consulting services on how best to comply. Increasingly, this mix of roles and attitudes has struck many observers as problematic in the context of the discussion over whether classification societies should be made legally liable for their negligence. The three most frequently heard arguments against liability are:

- the relatively small size of classification fees cannot justify the potential liability exposure;
- the shipowner has ultimate responsibility for vessel seaworthiness; and
- the "special character" of a public service institution should provide relief from legal liability.

In today's world, classification societies are hardly unique among professionals who charge relatively small amounts for their services, yet still they risk a considerable economic liability for losses caused by their negligence. Other professionals customarily minimise the risk through different forms of insurance arrangements and increasingly the societies have done the same.

While the shipowner always remains responsible for his vessel's seaworthiness, he or she should be able to rely on the class certificate. But if the classification society is unwilling to accept legal responsibility for its judgments then how much credibility can an owner or insurer be reasonably expected to place in the certificate? In the case of newbuildings, the class representative (customarily paid by the yard) has not just performed one survey but rather been a regular presence on site throughout the vessel's construction. Under such circumstances, is it appropriate for a new owner to bear the risk of loss caused by the classification society's negligence if the vessel is designed, built and tested in accordance with the classification society's own rules, and where this control has led to a classification certificate and delivery of the vessel?

In Norway the authorities have delegated certain control functions through the Agreement of 1 July 1987 with annexes between the Ministry of Trade and Det Norske Veritas (DNV). This delegation has lead to some questions regarding the role of DNV. The tasks DNV performs on behalf of the authorities are considered to be more of a service than business nature. Activities of a service nature have traditionally held a protected position in Norwegian tort law, and there might be reason to ask if this protection has influenced the discussion on classification societies' liability for those tasks that are not performed on behalf of the authorities.

The claim that classification societies are public spirited service institutions deserving of special treatment with regard to liability dates back many years. Today, it must be examined in light of the fact that hospitals, health professionals, accountancy firms, and even government agencies are all now held legally liable for their negligence. While it is certainly true that classification societies perform important and valuable research on improving safety at sea, commentators have questioned whether it is still appropriate for that research to be carried out by each society individually. If classification societies are deserving of special treatment with regard to liability because of their public mission, then many believe the public mission would be more efficiently and effectively pursued by combining resources through one set of standards rather than the societies competing amongst themselves.

The long simmering debate over classification society liability was raised a notch in 2003 when the Spanish government sued the classification society responsible for classing the PRESTIGE: there are no signs of it cooling anytime in the near future. As shipowners are increasingly held accountable by class for their performance and actions, they are expecting nothing less than the same of classification societies. On the legal front, the trend is in favour of increased liability for government bodies dealing with matters of a "service nature" and classification societies seem unlikely to escape the same fate in the long term.

Our thanks for this article go to Gry Bratvold and Gaute Gjelsten of Wikborg Rein, Oslo, Norway.

As shipowners are increasingly held accountable by class for their performance and actions, they are expecting nothing less than the same of classification societies.

escrow accounts

ITIC has seen an increasing number of sale and purchase brokers being asked to hold deposits on behalf of the buyers and sellers. While not yet a feature of a large number of transactions, the practice is now sufficiently established that it may be considered part of the usual course of business of a sale and purchase broker. A member insured as a sale and purchase broker would therefore be covered by their entry with ITIC in respect of deals where they have acted as brokers. The cover would apply to negligence in operating the account.

This task is falling on shipbrokers due to a reluctance by banks to open closing accounts for S&P transactions. A major reason for their reluctance is the cost of complying with money laundering regulations. Shipbrokers may not face all the detailed regulations applying to banks, but they must ensure that they are aware of the local money laundering regulations and how they would apply to their businesses. A failure to comply with such regulations is a criminal offence and any penalties are likely to fall outside cover.

By accepting instructions to hold money on behalf of the buyers and sellers the broker accepts an obligation to both parties and cannot treat one more favorably than the other. This may create a difficult commercial situation if a dispute arises and one party believes that "their broker" should be doing more to support their position.

It is very important that the duties of the shipbroker are clearly set out in an escrow agreement signed by both buyers and sellers. The agreement should cover both how the money is to be held and the grounds upon which it is to be released.

The Baltic Code provides that members of the Baltic Exchange acting as brokers are required to operate a separate bank account for clients. The agreement will often specify that the money will be held separately from the funds of the broker. The parties will accordingly be protected if the broker becomes insolvent. There is a difference between a client account and one specially opened for a transaction. If, as is usual, the broker is using a general client account that should be made clear in the agreement.

The question of who will receive interest paid on the account should be set out. The broker should not, of course, specify what the rate of interest will be. A common provision is that the rate of interest is to be determined by the bank and shall be the rate for immediately available deposits. The interest on the money while held as a deposit is usually stated to belong to the buyer.

The most obvious concern is that the broker could release the funds wrongly and therefore face a liability for negligence. A good guiding principle is that the broker should avoid being placed in a position where he has to make a decision as to whether to pay out the funds or not.

It is very important that the duties of the shipbroker are clearly set out in an escr ow agreement signed by both buyers and sellers.

The normal wording is:-

" **The buyers and the sellers instruct the broker to release the funds in accordance with:-**

1) **a written instruction signed (jointly or in counterpart) on behalf of both the sellers and buyers;or**
2) **a final and unappealable decision of an arbitration tribunal or court*;or**
3) **an order of a court of competent jurisdiction."**

*There is a problem when releasing against a "final and unappealable" decision. This is because the broker is not in a position to assess whether such an award is "final and unappealable". ITIC recommends it is replaced with "a decision of an arbitration tribunal or court which appears on its face to be final". This provision has caused some principals concern but has been widely accepted.

The broker should seek advice if a dispute arises. Most court systems have a process where a person holding funds as a stakeholder can either pay disputed funds into court or ask the court to determine the issue. Sometimes a provision that the broker has the option at anytime to pay the funds into court is added. An agreement ITIC reviewed recently provided that the principals would reimburse any legal fees incurred by the broker in performing his duties.

Brokers frequently ask about obtaining an indemnity from the principals. This will not prevent the broker being liable "come what may" but it is prudent to add something along the following lines:-

" **The buyers and sellers jointly and severally agree:-**

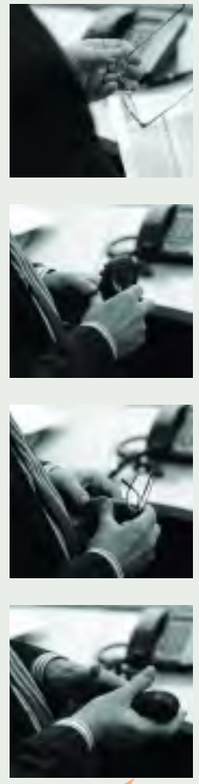
i) **to indemnify the broker upon first demand against all losses, liabilities, costs and claims and demands arising out of and in connection with our holding of the funds in accordance with his Escrow agreement; and**

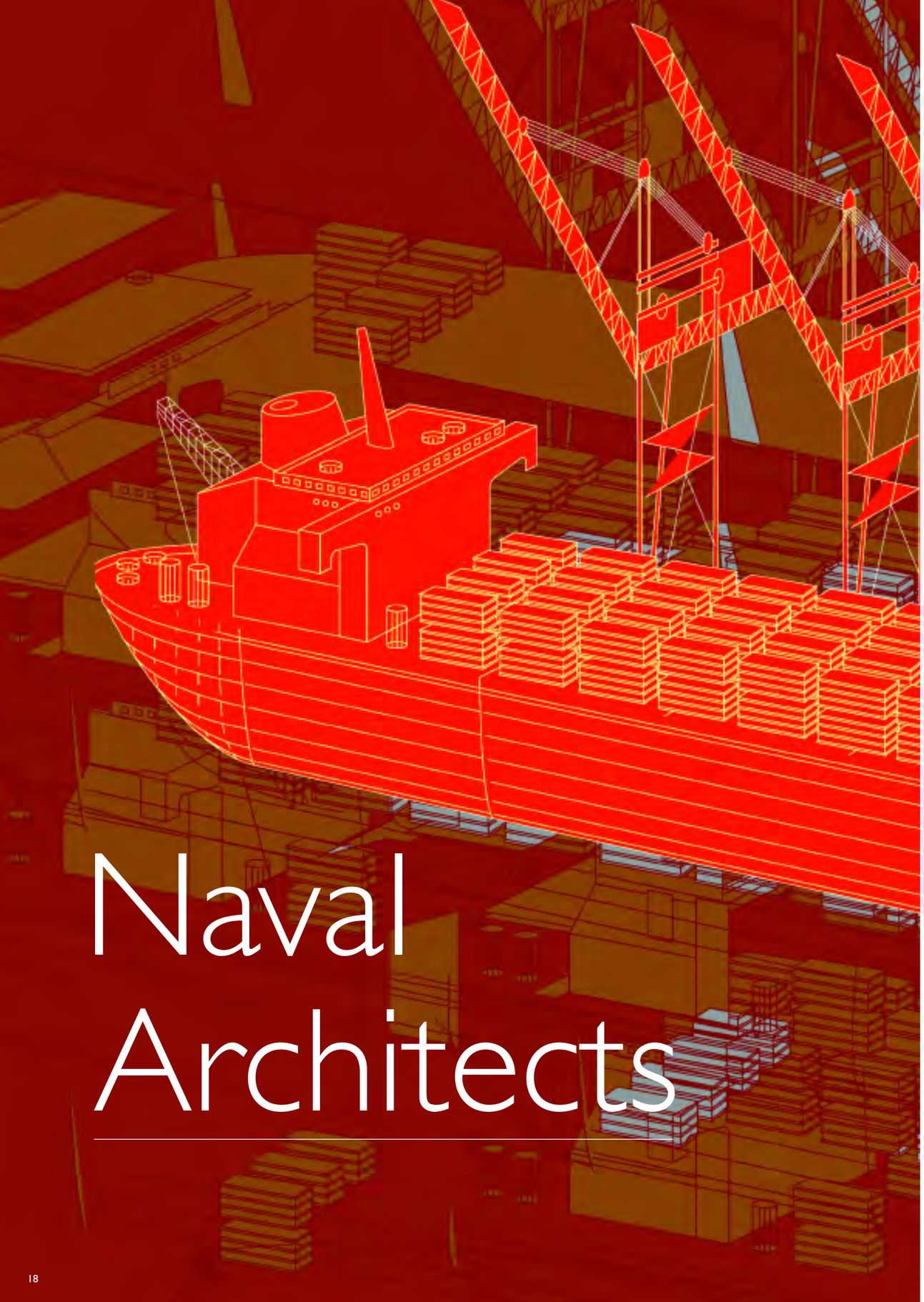
ii) **that the broker's only obligation is to hold the funds upon the terms set out in this Escrow Agreement. The broker will have no liability for any act or omission taken or not taken by him in good faith. For the avoidance of doubt it is the burden of the party alleging that the broker acted in bad faith to produce evidence thereof."**

The agreement should contain a choice of law and jurisdiction clause. The parties will often choose the same law and jurisdiction as governs the MOA. The escrow agreement is however a separate contract and there are obvious advantages in having it subject to the law and jurisdiction where the broker is based.

The managers are always available to advise on the wording of individual escrow agreements and assist members who are caught up in disputes regarding money they are holding.

Be aware of locak money laundering regulations ... a failure to comply is a criminal offence.





Naval Architects

Thoughts on loss prevention

ITIC insures an ever increasing number of naval architects. The challenges and claims encountered by naval architects are extremely varied, but the following article illustrates three of the common issues ITIC has seen faced by this profession. We hope that this risk prevention advice will be of use to both ITIC's naval architect members and other members employed in similar areas of work such as marine surveyors and consultants and new building supervisors.

Be specific from the outset

When negotiating a contract with a client, please ensure that those parts of the design for which you are not responsible (particularly those which the client may think you will be undertaking) are clearly defined as such in the contract. Your client will then not be able to claim that they had any reason to believe that your duties under the terms of your contract included the task you have specifically excluded. Conversely, please also make sure that all the tasks you do intend to perform under the contract are clearly defined.

A naval architect believed that they had no responsibility for the selection and design of the propellers on a ship they were contracted to design. The naval architect claimed that they were not experts in this field and would never hold themselves out as such. Indeed, there was no mention of them selecting and designing the propeller in the contract. However, the client believed that this task would be automatically included in the naval architect's duties. The propellers were later found to be the cause of major problems with the ship, and both sides blamed each other for the selection of the incorrect blade types. Obviously had the naval architect expressly stated in the contract that they would not be responsible for the selection of propeller blades, they would not have attracted any liability in this instance.

Changes to the agreement

Do not be pressured into agreeing changes to your designs if you are not entirely happy with them. If the ship yard or the ultimate buyer of the ship alters any part of your designs without your agreement, no matter how small, ensure that you notify all parties of the changes from your original designs and your disapproval of these changes.

A naval architect is paid to design ships according to the specification provided by his client. For instance, if the naval architect has designed the ship's hull to have a certain type of welding but the shipyard which actually performs the welding suggests that a lesser type of weld would be just as viable and cheaper. The naval architect may not be happy about the change but can be pressured into agreeing that the single weld will suffice. Unless you express your dissatisfaction with the change at this stage, you may prejudice your position if, once the ship is in use, cracks in the hull become apparent and the blame is placed on the single welding that the naval architect agreed to.

Misunderstanding of the project

Even though the architect believes radical new ideas may potentially be the answer to his client's problems, the architect must also take into account the environment in which the ship is due to operate and the task it is supposed to perform. Naval architects must avoid accepting liability for performance criteria that can be achieved only in optimum conditions.

The naval architect should be aware of the client's plans for the use of the ship and design it accordingly. ITIC has seen claims where the architect has designed a new type of ship using the latest technology available, but clients have claimed for various alleged problems with the ship including that (a) due to the design, passenger seats had to be removed for safety reasons, (b) the ship could not withstand the rough seas in the area it was designed to operate in and (c) the specified speed of the ship, whilst being achievable in optimum conditions only, was not achievable during the day to day operations, on the route required by the client.

Conclusion

In order to minimise the risk of exposure to claims, you should not only consider the factors set out above but also, in all cases, seek to limit your liability under the terms of the contract to a fixed sum. This may be up to ten times the fee you receive but, in some contracts ITIC has seen, the limit of liability has been fixed at the amount of the fee the architect receives for the design. A number of claims received by ITIC relate not to design defects but to build quality and, accordingly, the designer should always verify that the shipyard is building the ship to the specification and standards required by him.

ITIC News

Thomas Miller Australia

Marcus John (far left) and his team

The Sydney office was the first overseas office set up by Thomas Miller, and was established 30 years ago. The office has 8 staff and is located in the city, overlooking the Queen Victoria Building. TM(A) handles claims for over 130 Australian ITIC members. Membership in Australia comprises both marine and non-marine and include liner and tramp agencies, naval architects, marine surveyors, S&P and chartering brokers and ship managers.

The office is headed by Marcus John, who is a qualified lawyer who practised law in London and Sydney before joining Thomas Miler in 1995. He and Iain Sharples, who joined the London office of Thomas Miller in the same year, have extensive experience in claims work for the UK P&I Club, TT Club and ITIC. They are assisted by Alison Cook who is well on the way to finishing her legal studies, completing her law degree next year. She joined Thomas Miller London in 2000 and returned home to Sydney in 2003.

In addition, the office is well experienced in advising on contracts, bills of lading, transport contracts, charterparties, disclaimers, standard terms and conditions, and the office has an active involvement in industry associations, particularly Shipping Australia Ltd.

ITIC members in Australia should report all new claims to the Sydney office, the address and contact details of which are PO Box Q697, Queen Victoria Building, Sydney, NSW 2000, Australia.

Tel: +61 2 8262 5800.

Fax: +61 2 8262 5858.

E-mail: sydney.itic@thomasmiller.com

Tony Payne – a career in shipping

Tony Payne has always been adaptable and enthusiastic for whatever task he was pitched into. That is certainly why he succeeded in the world of shipping, which he left upon his retirement as managing director ITIM on 31st March 2006.

Tony joined ITIM, and its predecessor TIM, from the outset, helping to shape it into one of the most successful organisations in the sector. However, he started his professional life as a management trainee for Port Line, a British shipping company, which made him work his passage to Australia where he worked in the Sydney office, before becoming a jackaroo in Queensland.

After a few months he returned to Port Line's offices where he was introduced to the intricate world of bills of lading inwards prior to spending a few more months dealing with bills of lading outwards. However, after eight months or so, Tony was beginning to get restless and accepted a job in Singapore. So began his entry into the world of ship agents. He was placed in charge of service to "sundry ships" that were usually making a bunkering call after weeks at sea serving China or South America.

While in Singapore, incidentally, there was a brief foray into modelling when Tony appeared in a cinema advertisement for Tiger Beer after being recommended by a colleague.

Subsequently he accepted a job as a deputy office manager for Gellatly Hankey in Saudi Arabia. He found that the firm was a Lloyd's agent, ship agent and agent for other businesses including the Australian Wheat Board, BMW and Sony.

Settled in Jeddah, Tony welcomed many visitors, one of whom was a leading London surveyor who asked what he knew of Greece. Behind the question was the search by Miller Insurance for someone to take over management of its Piraeus office, which was a Lloyd's agent and correspondent for UK P&I Club. That conversation led to Tony leaving his Saudi job for Piraeus in 1974, where he was to stay until 1985. Being so close to Greek shipping for 11 years was "very helpful".

In the early 1980s Thomas Miller decided to launch the first industry mutual since it formed the Through Transport Club. The new body went by the name of Transport Intermediaries Mutual, (or TIM), and Tony was invited to be general manager. Back he went to London for TIM, which then had a premium income of $1m or less and fewer than 100 members.

TIM was launched in favourable conditions and was doing well in competition with the mutual that had been in the same field for half a century, CISBA, (the Chartered and International Shipbrokers' P&I Association) managed by Tindall Riley. In 1992 it was decided the two should merge, which produced the newly named ITIC with 900 members and premium income of $12m. Today the Club has nearly 1,800 members and has a premium income of $35m.

It has proved a total success story in the mutual field. ITIC prides itself in having an excellent working relationship with the members, supported by its policy of giving staff the dual role of underwriting and claims and Tony played a key role in this development, having contributed to, and lead, the development of your Club. We wish him well in his retirement.

Tony Payne, front, with members of the ITIM board and Thomas Miller

Henrik Lehmann retires

Henrik Lehmann, Deputy Chairman of ITIC, retired in March 2006. His company, Lehmann Nordic A/S, became members of ISBA (International Shipbrokers and Agents P&I Club) in 1976. A couple of years later, Henrik was asked to join the board for the usual term of one year.

After the first couple of meetings, the board of ISBA approved the merger of ISBA with CSPI (Chartered Shipbrokers P&I, a Club established in 1925), and CISBA (Chartered and International Shipbrokers and Agents P&I) was born. Henrik was invited to remain on the board of the new Club, although his 12 months had elapsed.

In 1984, as the number of members increased and as competition appeared in the form of the Transport Intermediaries Mutual (TIM) run by Thomas Miller, the Board of CISBA, then chaired by Henrik, concluded that the time had come to invite a specialist company to manage the Club. Consequently, Tindall Riley (managers of Britannia P & I Club) were invited to run CISBA, and Henrik took a great interest in the growth of the Club under its new management.

The first discussions on the merger with TIM took place in 1989 and CISBA and TIM merged in 1992 to create ITIC. Henrik was appointed Deputy Chairman of the new Club.

Since then, the organisation has never looked back, first under the joint management of Tindall Riley and Thomas Miller, and from 1996 under the sole management of Thomas Miller. Members are still joining in increasing numbers, finances are going from strength to strength and Henrik is delighted to have been involved during the most successful period in the history of mutual insurance for transport intermediaries.

Henrik Lehmann receives his retirement gift from Harry Gilbert

ITIC Board of Directors

The Club has announced the retirement of Deputy Chairman Henrik Lehmann (as reported adjacent) from the board of directors. Steven See and Simon Morse have also retired from the board.

Peter French of BMT Ltd (London) and Bob Flynn of Mallory, Jones Lynch Flynn & Associates Inc (Geneva) joined the board in March 2006 and Terence Sit of Jardine Shipping Services (Hong Kong) and Bjorn Tonsberg of Wilhelmsen Maritime Services AS (Singapore) will join the board in September 2006.

Lloyd's Ship Managers Conference

Charlotte Kirk will be speaking at the 16th annual Lloyd's Ship Manager Ship Management Conference in Cyprus on 11th and 12th October 2006.

For more details visit : www.lloydslistevents.com/lm1778

Thomas Miller Hong Kong

The Thomas Miller Hong Kong branch is the Asia Pacific headquarters for Thomas Miller managed Clubs such as the UK P&I Club, TT Club and ITIC. The office has over 30 staff with a wide range of professional qualifications (e.g. ACII / LLB holders, master mariners, and qualified lawyers), who provide it with substantial experience and local expertise when serving the members of the various Clubs.

Harry Lee has recently completed a 19-month secondment to Thomas Miller's head office in London and has now returned to the Hong Kong branch. During his time in London, Harry trained with ITIC London, which he enjoyed very much. On his return, he now assumes claims handling and servicing responsibility for ITIC's Hong Kong membership, which mainly consists of liner and tramp agents, marine surveyors, ship managers, and S&P / chartering brokers.

Harry is an economics and law graduate with eight years experience in handling a wide range of claims in relation to logistics contracts, charterparties and bills of lading, terminal operations, real property and business interruption, cargo handling, third-party liabilities, and professional indemnity (for marine professionals).

Tour Pour La Mer

A dedicated team from ITIM successfully completed the 125 mile charity cycle ride from Greenwich to Le Touquet recently. The "Tour Pour La Mer" was organised by V Ships, together with the American Bureau of Shipping and Intertanko, to raise money for the Missions to Seafarers and the Sea Alarm Foundation.

ITIM's team comprised of Chris Arnold, Vincent Egon and Roger Lewis. Shaded from the morning sun by the masts of the Cutty Sark the team set off at a good pace in the direction of Dover. Not content with the considerable distance, the organisers decided that the cyclists would enjoy the challenge of a more scenic itinerary; eighty-two miles and an aggregate hill climb of three thousand feet. Later the team rolled into Dover and embarked on the ferry to Calais.

After a night's rest in the hotel, the second day saw a return to unrelenting hill climbs for the first thirty miles, followed by a gala dinner in Le Touquet.

The event has been a great success for the charities it supported as well as a lot of fun for us. ITIM collected GBP 1,700 and we would like to thank all who sponsored us in this event, especially Ravenscroft Shipping, who were extremely generous. We are all looking forward to be next shipping cycling event rumoured to the London to Amsterdam, via Harwich, in September 2007 and Members are, of course, welcome to join us.

Chris Arnold, Vincent Egon and Roger Lewis