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ITIC CIRCULAR - SURVEYORS SIGNING INDEMNITIES

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Sometimes ITIC's surveying members will be asked by a ship owner, with whom they have no contract, to sign an indemnity, disclaimer, waiver or release before they are granted access to the vessel. This is obviously a very different situation to when the surveyor is agreeing terms between themselves and their own principal.

An example of this could be if the surveyor is asked to sign an indemnity or waiver by a vessel owner before allowing them onboard, when appointed by a prospective buyer to perform a pre-purchase survey or when appointed by cargo insurers to inspect cargo aboard a vessel.

What must you consider?

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

The surveyor could be asked by a vessel owner to sign:

- (a) a disclaimer or waiver of all the surveyor's rights to claim against or sue the ship owner, the vessel and their servants and agents should he have any cause to do so; and
- (b) an indemnity to the ship owner, the vessel and their servants and agents for any loss or damage they suffer as a result of the surveyor's attendance on their vessel, howsoever caused (which may include claims against them by third parties);

The surveyor's principal will be waiting for the survey to be conducted and consequently the surveyor will be under pressure to board the vessel.

As far as Part (a) is concerned you should bear in mind the following:

- Under English law (the Unfair Contract Terms Act 1977), a party cannot exclude or limit their liability for death or personal injury caused by their negligence. Therefore, if a surveyor is injured or killed whilst on board through the owner's negligence, the owners will be liable irrespective of whether the surveyor signed the release or not. However, is the disclaimer subject to English law? In most cases it won't be.

So don't sign it.

- Such a disclaimer may affect their employers' liability insurance or other insurance policies held by the surveyor.
- For all non-personal injury claims (e.g. damage to property 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.

If the owner (or their servant or agent) breaks, for example, the surveyor's laptop because he is careless, the surveyor will not want to be barred from issuing a claim for the loss he has suffered. However, if the surveyor places his laptop on a surface known to be hot and the laptop melts, this loss would have resulted from his own negligence and, therefore, it would be unfair to hold the owner responsible. In fact the owner may have a claim against the surveyor for any damage caused by the melting laptop.

For Part (b) please bear in mind that:

- Surveyors should only agree to indemnify the owner for losses the owner suffers as a result of the surveyor's negligence or wilful misconduct. 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 from the surveyor for the loss they suffered (ie repairs, loss of use of the vessel etc). 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. The important thing to remember is that you will only have insurance cover for losses caused by your negligent performance of the survey. If a loss is suffered by the owner and it is not caused by your negligent performance, but you have signed the waiver, then you will be liable, but will have no insurance cover.

ITIC Suggested Wording

If you are asked to sign an indemnity and/or waiver prior to boarding a vessel, we would suggest that you refuse and that nothing at all be signed. However, if this proves impossible you may want to present the owner with the following wording:

"In consideration of your allowing [the Surveyor], its agents and/or servants ("the Company") to board the above vessel 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 Owners") 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 losses they suffer (including claims brought by any third party) arising from the Company's negligent acts and omissions or wilful misconduct whilst onboard the vessel.

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 at the time of the dispute."

Finally, the surveyor may want to include a clause in their own terms with their principal that allows them to recover any losses they may suffer which are not caused by their own negligence as a result of performing the survey.