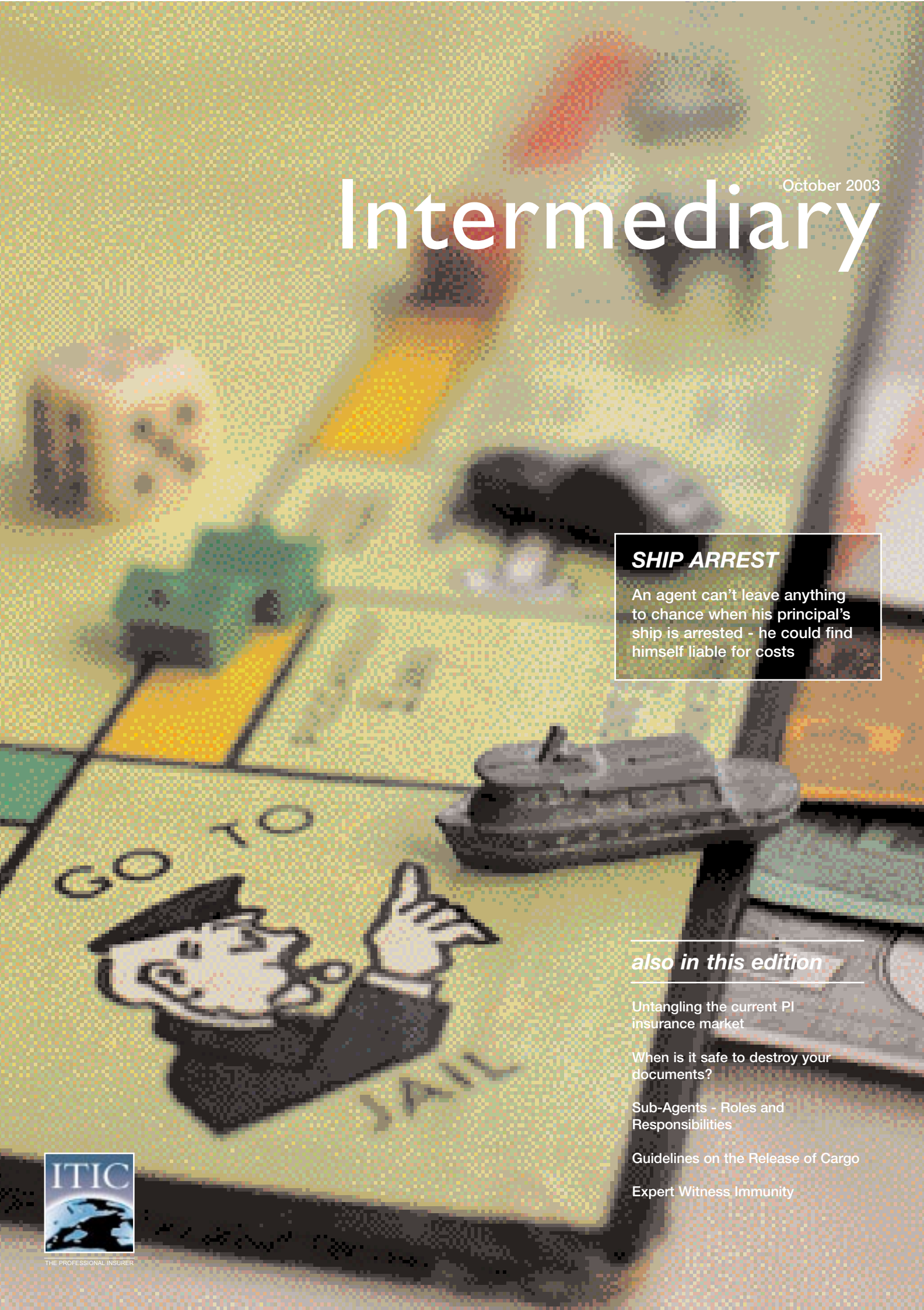
October 2003

Intermediary



SHIP ARREST

An agent can't leave anything to chance when his principal's ship is arrested - he could find himself liable for costs

also in this edition

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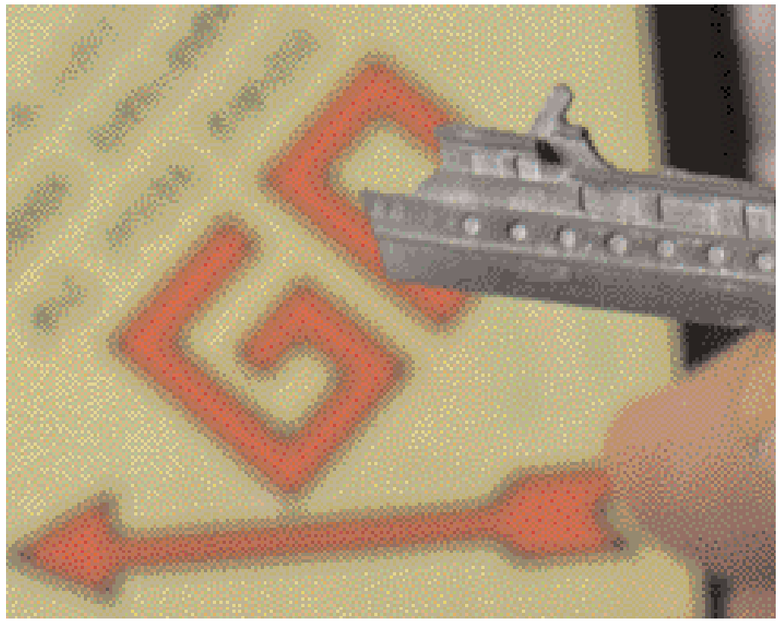

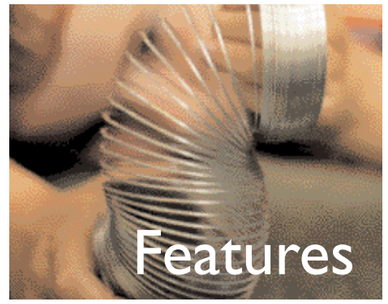

Features

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Untangling the current Professional Indemnity Insurance Market

Many of those involved in the marine services industry will have experienced the damaging side-effects of the current hard insurance cycle. Professional indemnity insurance is one particular area where the hard market has been most acute, with huge premium increases, reduced cover and, in some cases, insurance being withdrawn entirely. The increase in insurance costs has hit hard and hurt at every level.

Those who have experienced it will know the consequences of the hard market and the widespread difficulties in finding the appropriate insurance cover at a reasonable price. However, the reasons behind the situation may not be fully understood or indeed have been adequately explained by their insurance advisers. Vague throw away comments about market cycles, underwriting profits and most prevalent of all, the aftermath of the 11th September, 2001 World Trade Centre attacks, are all routinely utilised by insurance providers as reasons for premium increases and coverage restrictions. However, the true reasons, particularly in the area of professional indemnity insurance, may not be fully appreciated by those seeking such cover.

Of course, insurance markets are, like all financial markets, cyclical by nature and, following the extensive soft market period between 1995 and 2000, when premiums had fallen to extremely low levels, it had been inevitable for some time that the insurance market would harden in due course. However, the severity of the hardening process, particularly in the areas of liability insurance (employers liability being the worst hit, followed by professional indemnity) took many by surprise and was caused by a number of contributing factors, beyond the inevitable up-turn of the cycle.

Profitability of insurers

An Office of Fair Trading summary of findings on the UK liability insurance market published in June 2003 ('the OFT report') states that liability insurers as a group have been making underwriting losses for the last decade with ratios of 120% - i.e. claims plus expenses exceeded premium income by 20%. This position was clearly unsustainable and appeared to result from insurers routinely ignoring the commercial realities of business in order to achieve short-term growth over long-term stability and profitability.

The increase in external corporate investors, often American, particularly into the Lloyds market, led to a stronger demand to restore profitability and rate on return. However, this drive to return to profitably may have been more gradual had other factors not intervened.

Performance of the Investment market

During the soft market, insurers had, to a large degree, offset their underwriting losses with investment returns, especially when you consider that in liability insurances there is often an extended period between receipt of the premium and the claims payment. The downturn in the investment market after 2000 ended insurers ability to underwrite unprofitably whilst recovering these losses in the stock market.

Reinsurance capacity problems

The reinsurance market has hardened significantly in recent years, with major reinsurers of liabilities increasing the cost of cover for direct insurers by between 60% and 80%, while also being more selective about the risks they took on and providing less cover, which in turn meant that direct insurers had to take on a greater amount of risk themselves. Restrictions in cover, such as in respect of asbestos, also had a wide-spread affect on the ability of the direct insurance market to provide cover.

Insurer insolvencies

While the number of insurer insolvencies in recent years has not been as large as thought likely at one stage, the collapse of the Independent Insurance Company was nonetheless significant. As a major insurer of Employer's Liability insurance, compulsory in the UK, all claims which were not met by this organisation, were subject to recovery under the Financial Services Compensation Scheme (previously the Policyholders Protection Scheme), which in turn is funded by contributions from all insurers. The collapse of the Independent consequently led to increased payments by insurers into the scheme, which had to be recovered in turn from policyholders, across all classes of business.

The collapse of the Independent Insurance Company undoubtedly also had the further effect of encouraging insurers and their shareholders to accelerate the drive to restore profitability, whilst seeking to eradicate any corresponding practices that had led to the Independent's demise.

Long-tail nature of liability insurance

The long tail nature of liability insurance does create immense difficulties for insurers in trying to predict how claims will develop in the future and, therefore, take them into account when setting the premium. For example, mesothelioma arising from asbestos exposure has an average latency period of 33 years. Consider how an under-writer setting a premium and terms for an employers liability or workers compensation policy 33 years ago could possibly have adequately factored in claims arising from asbestos exposure at that time. It is not possible. Consequently claim payments have to be recovered from elsewhere.

Increased insurer regulation

Within the UK, the major overhaul in insurance regulation by the Financial Services Authority (FSA) will lead to greater costs of compliance, whilst the introduction of a risk based regulatory approach will, it is predicted, encourage insurers to manage risk more effectively. They will also focus to a greater degree on long term profitability and commercial sustainability, which should, in turn, lead to steadier pricing and less dramatic swings in the insurance cycle. This approach will discourage a return to the (in hindsight) largely irresponsible under-writing practices, which gave rise to the soft market conditions of the second half of the 1990's.

Reforms to legal systems (Woolf and CFAs)

Again, within the UK, the introduction of conditional fee arrangements (CFAs) has led to an increase in the number of claims made (the OFT report suggests rises averaging 78% amongst the top ten liability insurers), whilst many insurers argue that the Woolf reforms, which were designed to speed up settlement of claims in the UK, have merely led to an increase in the costs of getting claims settled. All this against a backdrop of a legal system where courts continue to 'generally appear to interpret the law in a manner which entitles people to compensation' (OFT report), regardless, it seems, of the long-term financial feasibility of such an approach.

Other market forces

As premiums increased, so capacity reduced, because the solvency margin, which regulators require for general insurers under European Directives, is effectively expressed as a percentage of premium. This reduction in capacity has in turn led to a more selective approach, with insurers tending to concentrate on the most profitable existing business. As a consequence of this, competition largely ceases and premiums naturally continue to increase. Only the introduction of new capital can stop this spiral but, to date, liability insurance has remained unattractive to potential new entrants. This will change when premiums reach certain levels of profitability.

Major 'shock losses' (WTC, Enron etc)

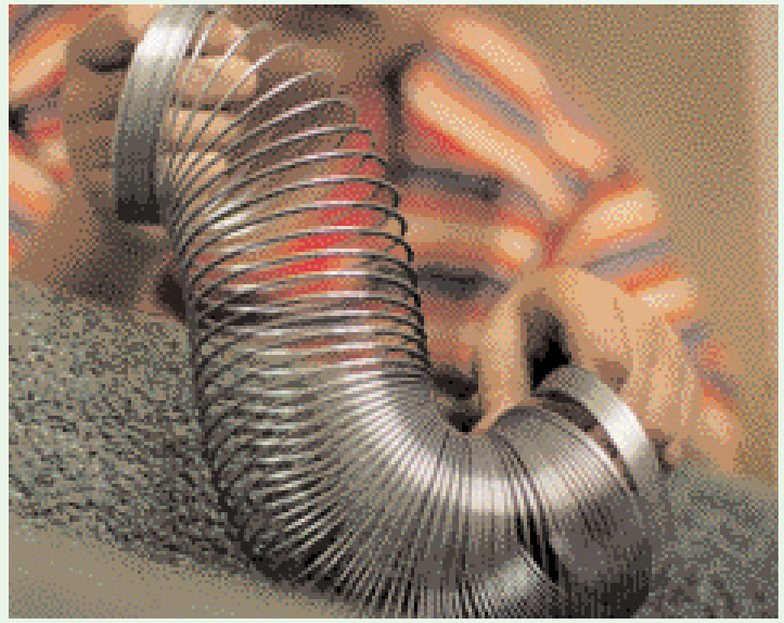
Whilst undoubtedly over-used as an excuse for the hard market, as one simply cannot ignore the effect that the World Trade Centre (WTC) losses had on the insurance market, not to mention the losses that have accrued to the insurance markets as a result of the financial mis-management of Enron, WorldCom and the Independent Insurance Company. Worst of all are asbestos liabilities which are estimated by actuaries Tillinghast-Towers Perrin to actually exceed the insurance losses of the WTC attacks. Major losses such as these take huge amounts of premium out of the insurance market which have to be replaced quickly in order for an insurer to be able to continue trading, in accordance with solvency requirements. In the aftermath of the WTC attacks, insurers concentrated on writing short-tail business (e.g. property), where returns can be made more rapidly, rather than long-tail insurances, such as liability insurance, which further contributed to the acute shortage of capacity in these areas.

Whilst these 'shock losses' did not cause the hard market, they had the effect of kick starting, in the most dramatic manner possible, the sudden increase in insurance premiums and loss of capacity. The classic hard market magnified several times.

The future

The OFT report suggests that the 'bulk of the corrective action will have been taken by Autumn 2004'. This may well be true, but, it is unlikely that the market will begin to drop significantly again in the immediate future for a number of reasons.

1. For reasons already outlined above, the FSA regulatory environment within the UK will make it more difficult for insurers to



price risks too competitively, if there is any evidence to suggest that this approach is not sustainable in the long term.

2. The investment market will need to start performing better and, while there have been some signs of recent improvement in this area, it may be many years, decades even, before rates on return match those that were seen at the end of the 1990's.

3. Insurers will continue to push premium prices up for as long as they think they can get away with it. That is simply business, and it is a duty they have to their external shareholders, who are far more demanding in this day and age than even 10 years ago. Until market pressures put an end to premium increases, they will continue and, even if they are not as acute as they have been over the last 2 years, it is very difficult to see a period when premiums will begin to fall again significantly in the immediately foreseeable future.

However, there are signs that the worst of the hard market is coming to an end and experienced observers (of the professional liability insurance market, in particular) believe that there will now be a welcome period of relative premium rate stability, commencing towards the end of this year and the beginning of 2004.

Our thanks for this article go to Marcus Elwes FCII of Miller Insurance Services Ltd
www.millerinsurance.co.uk

When is it safe to destroy your documentation?

In the United States recent legislation has criminalised the intentional destruction of documents.

ITIC is frequently asked to advise Members from different jurisdictions who have been requested to produce their files for examination. Usually, it is because their principals have a dispute with another party and their lawyers wish to consider the Member's files for evidence which could assist in the preparation of a case; equally, it could be because the Member himself is facing a claim in respect of a matter which occurred several years previously.

It is self evident to state that any business must develop a system for the maintenance and ultimate disposal of its business records. In the light of the Enron saga, unusual or inconsistent destruction of documents, contrary to, or in the absence of, an existing record retention policy could even lead to a finding, (or at least, an inference) of bad faith.

Indeed, a duty to preserve such documentation is owed by an agent to his principal. There are no clear rules but, in general, you have a duty to preserve documents created in the course of your duties so that you can, if necessary, subsequently make them available to your principal. Put simply, keeping documents can prevent you from receiving a claim for your failure to retain them if this failure causes a loss to your principal.

The question that arises is when is it safe to destroy documentation? The answer is that it depends on the limitation/timebar period which exists in local jurisdictions.

Members in England and Wales or those who enter agreements based on the laws of England and Wales, either on their own account or on account of their principals, should be aware that the limitation period for actions in contract and tort is six years from the date on which the cause of action arose. A claim form must be issued within that time for it to be valid. It may not, however, be served until after the limitation period has expired and it is for this reason that ITIC advises these Members to destroy documentation only after seven years from the completion of a transaction. The extra year is a safety net to protect Members from valid claims which are not served until after the expiry of the limitation period. The situation is the same in Australia, New Zealand, Singapore and most other jurisdictions based on English common law.

In the United States, recent legislation has criminalised the intentional destruction, alteration and/or concealment of documents under certain circumstances. This is not to say that US courts require businesses to preserve every last scrap of paper for decades, simply on the basis of the possibility that a particular document could be relevant to unforeseeable proceedings. However, besides various federal laws which require companies to maintain documents in relation to employees for set periods, most limitation periods expire after six years and so again the basic rule of thumb is that documents may be destroyed after seven years from the date of completion of the transaction.

Of course, the time bar situation is quite different in civil law jurisdictions. For example, in actions in tort in Spain, there is a one year time bar, whereas, in contractual claims, the time bar is fifteen years. Therefore, if the same logic were to be applied, Spanish Members should keep their documents for sixteen years.

In France, claims in contract and in tort against ship agents are subject to a statutory one year time bar. However, the time bar for actions by tax authorities is three years, so it would be normal for French ship agents to preserve their documents for four years. Ship brokers, and other marine professionals, are not subject to any statutory regime so they are subject to the common law time limit of ten years.

The German Commercial Code stipulates that documents should be kept for either six or ten years. Those which should be maintained for ten years include accounting documents, balance sheets, inventories and other company books, while documents created in the course of one's business activities, such as contracts, offers and fixtures and related correspondence, including file notes, letters and e-mails, and documents created in relation to any litigation, should be maintained for six years. Members involved in litigation in Germany should be aware that, under certain circumstances, a party may substantiate its allegations merely by relying on the allegation that the opponent possesses the relevant document. If the document is one that should have been maintained under the German Commercial Code and the opponent cannot produce it, the Court has the discretion to consider the allegation as proven.

This advice is produced for general guidance only. Members should always seek advice from the Club and from a local lawyer to clarify the position in each individual case.

ITIC would like to thank the following for their contribution to this article:

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Master of all you survey

John Noble, chief executive of the Salvage Association, looks at the challenges facing the restyled organisation, and at why good surveyors need good support and advice from their liability insurers

The Salvage Association (SA) has been an integral part of the London insurance market for as long as anybody can remember. Fundamental change within the last two years has seen it reborn as an independent entity, but it still retains the same objectives and needs as the original organisation.

The old Salvage Association was run by a committee of London market underwriters and managed on their behalf by an executive committee. Its work was 100 per cent for the London marine insurance market. In addition it was funded for most of its life by a levy based on a percentage of the premiums paid to underwriters and, in the case of bigger jobs, by a certain amount of fee income.

Although the old SA was a not-for-profit business, it entered the new millennium losing in the region of £3m a year, and in 2001 was bought out by British Maritime Technology (BMT). From that moment on, it became an independent organisation. It still works mainly for the London insurance market, with about ninety per cent of its work continuing to come from that source. However it is no longer tied to any market association, and its objective is to continue providing the highest quality of service and expertise while achieving commercial viability.

The man chosen to head up the new Salvage Association was John Noble, a seafarer who came ashore in the late seventies to work briefly for a P&I Club before embarking on a marine surveying career with Murray Fenton that was to make his name. John moved quickly to address critical issues within the SA, rationalising admin, cutting back on certain ancillary services, and sharpening core activities - and it's working. Today, the SA is in operating profit, and is retaining its traditional insurance market work while attracting business from new sectors.

Initially, the SA retained all the surveyors who worked for the old organisation. Some have since retired or been relocated, but the emphasis now is on increasing the size of the workforce while maintaining its quality and expertise. John does comparatively little hands-on surveying these days, but he hasn't forgotten the pressures under which today's surveyors are obliged to operate.

All SA surveyors are salaried, full-time employees. John sees it as a priority to keep in touch with them, travelling to meet them to better understand the difficulties under which they operate. Since taking over at the SA, he says he has on occasion been "horrified" at some of the practices he has found which have served to increase the pressures on surveyors while profiting the bank balances of unscrupulous principals. "People know it goes on," he says, "but they look at it as the cost of doing business. That is just not acceptable. Against this background, it has been said by one or two people that the SA needs to be more flexible. But I would rather be inflexible than corrupt. Client interests must be protected. All our surveyors may have to speak for their reports in litigation."

John well understands the importance to surveyors of the sort of support that can be provided by a good liability insurer. He has a long association with ITIC, which currently provides the SA's errors and omissions insurance. He recounts specific instances over the years when has he has been grateful for the support provided by ITIC, sometimes all the way through to litigation.

"It is very difficult for a surveyor to operate without insurance cover," explains John, "and that is becoming increasingly the case. It may be tempting for the one-man-band operation to try it, but the consequences of getting it wrong are just unthinkable. But of course getting the right sort of cover at a reasonable cost is not so easy. As the liabilities - and the potential for them - get bigger, so the cost of providing cover increases. In my experience, survey companies like ITIC because of the add-ons it provides."

The Salvage Association produces guidelines for its surveyors covering everything from certification and standard formats for reporting, to health and safety. This year, it is launching its ShipShape document, which incorporates generic conditions to cover condition surveys, which the SA can carry out for hull and machinery underwriters, charterers, P&I clubs and others. The guidelines are important, but not as important as finding the right people.

John Noble says it is not easy finding good surveyors. The Salvage Association is more fortunate than most, and received more than sixty quality responses to a recent advertisement for a surveyor to fill a vacancy caused by retirement. But it is important to get the right person for the right job. There are plenty of marine engineers who would make good surveyors and who are looking for survey work, but comparatively few master mariners in the same position.

So what qualities does it take to make a good surveyor? John Noble doesn't have any doubts. "Quality and integrity are the most important requirements," he says, "and the ability to write an articulate report which is respected by professionals and capable of being understood by laymen." All that, plus the comfort of knowing that you have professional support and advice when things go wrong.

Beating the bugs

Dr Tim Moss and Dr Daniel Sheard of Brookes Bell Jarrett Kirman are regularly instructed in cases involving insect infestation and the fumigation of cargo. This article examines how fumigants should be safely and effectively used to avoid potential legal problems. It concludes by explaining the proliferation of resistant strains of insects.

Damage to grain by insects is encountered in every grain-producing country. To reduce this damage, pesticides must be deployed to control the insect population. Fumigants are pesticides administered in gaseous form. They have established themselves as an effective and flexible tool in this process. Compared to other formulations, fumigants have a distinct advantage in that they may be effectively applied to large bulks of stored grain. The gas can permeate commodities that other formulations cannot, and this is ideal for use in cargo holds. The most widely used fumigant on ships is phosphine. This is administered by placing solid preparations containing aluminium or magnesium phosphide on or beneath the cargo surface, which react with atmospheric moisture to produce phosphine.

SAFE FUMIGATION

The IMO publication "Recommendations on the Safe Use of Pesticides in Ships" (forming part of the supplement to the IMDG Code (2000 Edition)) outlines provisions essential for safe fumigation. Every master who is due to load a cargo to be fumigated must be completely familiar with the current edition of this document. In this section of the article some of the more important provisions of the IMO Recommendations are examined.

i) Fumigation continued in Transit

If fumigation is to be conducted entirely in port or anchorage, then the IMO Recommendations state that the ship must be vacated by the crews. However, if fumigation is to be continued in transit, it is a fundamental requirement that this can only be conducted at the discretion of the master. If the decision is taken to continue fumigation in transit, then at least one officer and one crew member should be trained by the fumigator-in-charge. These trained representatives are responsible for monitoring the fumigant and maintaining safety for the duration of the fumigation at sea. Also, suitable respiratory protection and gas detection equipment must be on board and the crew should be aware of relevant first-aid procedures.

ii) Importance of Gas-tight Cargo Spaces

The IMO recommends that the fumigator-in-charge and a trained representative of the master, or other competent person, should determine if the empty cargo spaces can be made sufficiently gas-tight before loading commences. This is essential: fumigant leakage poses a considerable danger to human health. In this regard, acute phosphine intoxication has been implicated in the deaths of a number of seamen. Also, if holds are not adequately sealed, then the correct dose of the fumigant might not be delivered - and the fumigation could be unsuccessful. Sometimes the design of a ship will make it inappropriate to fumigate a hold. For example, a ship which we have attended had an access fitted between a cargo hold and a passageway in the accommodation. If even a small leak had occurred, then intoxication or even the death of crew members could have resulted. We have heard of cases in which a number of fatalities have occurred as a result of the accumulation of fumigant that had subsequently leaked via unplugged hatch coaming drains in confined spaces. If the fumigator-in-charge considers that the risk of fumigant leakage is unacceptable, then he should not conduct fumigation of that space. Moreover, he should provide the master and other interested parties with a signed statement regarding his findings.

iii) Fumigant Dispersal

Following application of the fumigant and having carried out the necessary checks, the fumigator should provide instructions to the master regarding fumigation dispersal. Dispersal by ventilation will be prescribed by the fumigator to take place after a certain exposure time. The IMO recommends that a minimum of 24 hours before arriving in the discharge port, the master informs the relevant authorities that fumigation in transit has been conducted.

iv) Residue Disposal

The IMO recommends that instructions on correct disposal of the residues are provided by the fumigator. When phosphide has completed reacting, it forms a relatively inert residue of aluminium or magnesium hydroxide. However, even after a long exposure time, unreacted phosphide can still be present within the preparation residue, which will continue to produce phosphine. Also, if the residues are handled with bare hands, the phosphide can react with moisture in the skin to cause burns.

v) Fire Risks

In addition to general procedural knowledge, the fumigator-in-charge should be familiar with the properties of the fumigant and should communicate this knowledge to the relevant crew members. With phosphide application for example, in addition to the toxic risks, there is a hazard of fire. If the solid preparation is wetted, then the rate of reaction is increased and the heat created can be sufficient to cause fires or even explosions.

EFFECTIVE FUMIGATION

i) Correct Concentration

Although IMO Recommendations supply valuable information regarding fumigation procedures, there is little information regarding the use of specific fumigants. Applying the proper concentration of fumigant to the cargo space for the correct duration is essential in ensuring an effective fumigation, and this is the responsibility of the fumigator-in-charge.

ii) Placement of Fumigants

Fumigants do not necessarily diffuse homogeneously within a hold, and may have to be strategically placed in order for the correct dose to reach all parts of the stow more quickly. For example, the United States Department of Agriculture (USDA) Fumigation Handbook prescribes considerably longer exposure times following placement of phosphide tablets on the commodity surface than those placed several metres beneath the stow surface. The USDA do not recommend surface placement on any commodity greater than twelve metres in depth.

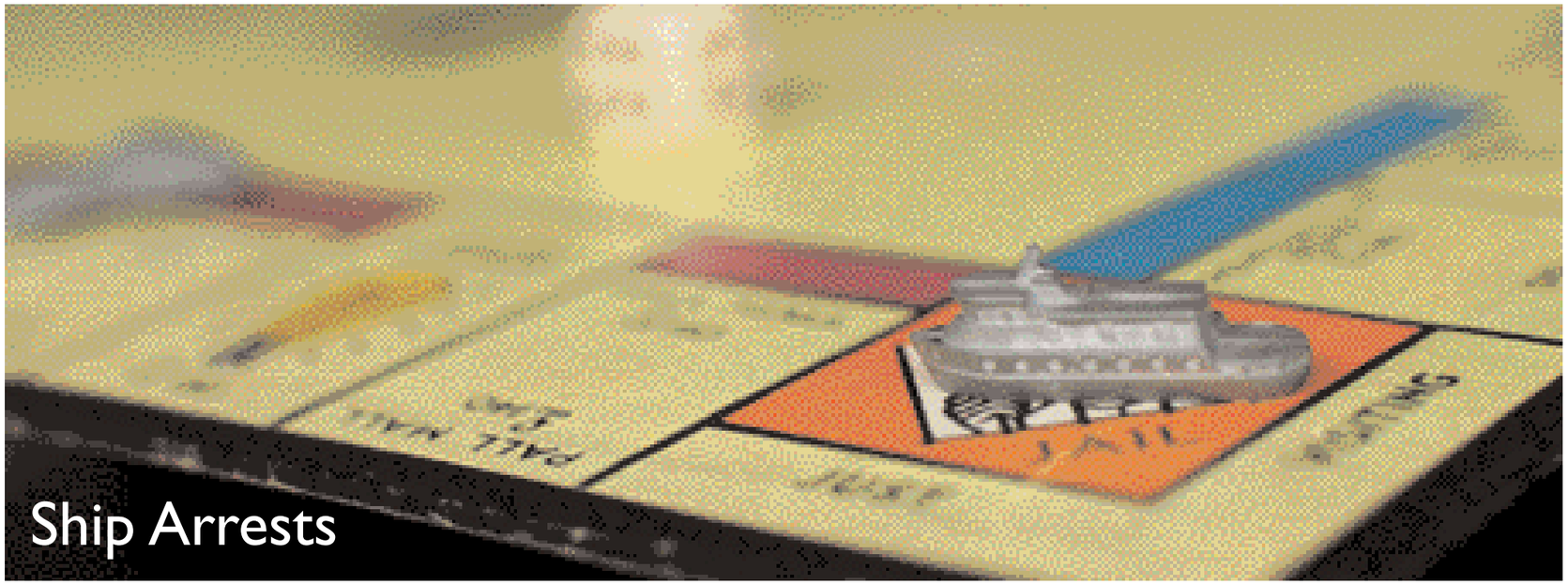
ii) Temperature

The effect of temperature on fumigation efficacy is well understood. At lower temperatures, insects are less active and therefore the rate at which they take up the fumigant is reduced. Also, absorption of the fumigant by the cargo is increased while the rate of diffusion of the fumigant within the commodity will decrease. These effects will combine to necessitate an increase in the dose required for effective fumigation. In general, fumigation conducted at lower cargo temperatures requires longer exposure times. A major producer of a phosphide formulation stipulates that their product should not be used when a commodity's temperature is below 5° C.

THE RESISTANCE PROBLEM

We have recently been involved in cases where fumigant concentrations were directly measured in a cargo space. The results showed that the correct dosage of phosphine gas had been maintained for the required duration. Nevertheless, significant productions of live insects had survived. In our view the most likely explanation of these results may be pesticide resistance. In a situation analogous to the rise in bacterial resistance to antibiotics, fumigant resistance is thought to be caused by inefficient fumigation: such fumigation provides a selection pressure that results in the survival of more resistant strains of insects and their subsequent proliferation. Several scientific studies have demonstrated the existence of certain strains of insect species, including the frequently encountered Tribolium spp., resistant to a variety of fumigants, including phosphine. If the practices of fumigation aboard ships cannot be adapted to the increased resistance of insects to pesticides, then a considerable increase in infestation problems can be expected in future years.

Our thanks for this article go to Brookes Bell Jarrett Kirman, www.brookesbell.com



Ship Arrests

The port agent who is unfortunate enough to be appointed by the owner or charterer of a ship which is arrested immediately it arrives at the port, can face unforeseen and adverse consequences. The arrest is often by a third party who is totally unknown to the agent, and concerns a dispute of which the agent has no knowledge either. While the shipowner or the charterer may have done something to deserve the expense and inconvenience of having the ship arrested, the innocent ship agent also becomes embroiled in wasted effort and expense. Quite often, the arrest indicates that the owners are in a bad financial predicament, which is yet more bad news for the port agent.

If the arrest is resolved quickly, then there will be no problem for the agent. However, if the owner or charterer is insolvent, an arrested ship can remain under arrest for months, until the arresting party (for example, a mortgagee bank) applies to the local court for the judicial sale of the ship. The problem for the agent arises because, while the ship is sitting in port, it is incurring port charges, which in some jurisdictions (especially common law jurisdictions) are for the agent's account, even though he has nothing to do with the original arrest. If and when an agent finds himself in this position, it is important that he takes immediate steps to avoid any unnecessary liability for port disbursements incurred from the date the ship was arrested.

Common law jurisdictions (such as England, Hong Kong, Singapore, Nigeria, Australia etc.)

In common law jurisdictions, the Admiralty Marshal is the court official who authorises and controls every arrest. The agent should contact the Admiralty Marshal with the request to be appointed as the Admiralty Marshal's agent. If the Admiralty Marshal agrees to do this, and he often does, then all port disbursements and the agent's own fees from the date of the arrest become a preferred charge against the ship and will have to be paid before the ship can be released. If the ship is eventually sold by court auction, these charges become a first preferred charge against the proceeds of sale and they even rank in priority above claims for crew wages and mortgages. The same is also true in South Africa where, if a ship is sold, then at the time of the appraisement and sale of the ship, the court will instruct the Admiralty Marshal to appoint an agent and that agent's fees will rank first in the order of priorities, on the basis that the agent can claim his fees and disbursements as preservation costs. This means that any port disbursements will be a preferred charge against any fund created by the sale of the ship. There is no reason at all why, in such a case, the original agent appointed by the owner or charterer should not also be the Admiralty Marshal's agent.

Civil law jurisdictions (such as France, Italy, Belgium and Holland)

In civil law jurisdictions the situation is different. In these jurisdictions the actual arrest is carried out by a bailiff, who is a court appointed official. An agent faced with this problem cannot ask to be the bailiff's agent in the same way that an agent in a common law jurisdiction can ask to be the Admiralty Marshal's agent. In civil law jurisdictions, it is up to the agent to make sure he is being reimbursed by the owners or the charterers. If the agent is not receiving any payment from his principal whilst the ship is under arrest, he should immediately relinquish the agency as, if the ship is eventually sold by court auction, the agent will not have a preferred claim and could end up having to pay the port costs during the arrest while the arresting party receives the sale proceeds.

Acting as an Expert Witness

There are ITIC Members who offer to act as an expert witness as a regular part of their professional practices. There are, however, a number of other Members who are occasionally asked to act in this capacity without specifically seeking the appointment. This article will look at the role of being an expert witness and the potential liabilities.

The English courts have commented on the role of the expert witness and made the following points:

1. The role of an expert witness is to provide independent assistance to the court and the parties by giving an objective, unbiased opinion in relation to matters within their area of expertise. It is important that the expert witness should never assume the role of advocate for the parties.

Many peoples' view of experts is summed up by the following story. A doctor was giving evidence in a case where an employee was suing for a work related injury. Asked by the defendant's lawyer whether in his opinion the claimant was inventing his symptoms the doctor replied "yes certainly". The doctor then paused and added "unless I had been retained by the plaintiff in which case I would accept them as post-traumatic stress". Experts are not there to "take sides". They must maintain their independence.

2. The expert's evidence is to explain technical matters or give evidence of market practice. This is very different from the expert witness stating what he himself would have done in similar circumstances. In addition, the expert's role is to place evidence before the court for the court to decide upon.

One of the most common mistakes made by inexperienced experts is to attempt to "solve the case". It is not the expert's role to replace the judge.

3. The expert should co-operate with experts employed by the other party in attempting to narrow down technical issues in dispute. Experts should attend without prejudice meetings for the purpose of trying to find areas of agreement and to define areas where the experts disagree. This will be set out in a joint statement of experts for the court.

Although it is common for people to regard one expert as "theirs" and the other experts as the "opposition", the process between experts is intended to be co-operative and aims to provide an unbiased report for the court to rule upon. This is very different from providing support for one party's position.

4. The expert's evidence should be seen to be an independent product of the expert uninfluenced by the principal's position in the litigation.

A survey conducted by a training company several years ago found that one in ten expert witnesses had been pressurised by a lawyer into changing their evidence before the case had gone to court. In 1993, in the "Ikarian Reefer", the Court of Appeal pointed out that the expert evidence given on behalf of a ship owner was clearly not independent.

5. The expert witness should always make it clear when a particular question or issue is outside his knowledge.

Inexperienced experts sometimes fall for the temptation of attempting to assist by giving an opinion of the matter without staying within the strict confines of their expertise. If this is revealed by cross-examination it can lead to embarrassment as well as discrediting the expert's testimony.

6. The expert should always be willing to reconsider his opinion. This is particularly so if the expert is given new information or has reconsidered the facts in the light of the opinion of the other expert. The expert's duty is to give independent advice to the court not to support the principal come what may.

This last point raises an interesting question. What is the expert's position if he is compelled to change his mind and inform the principal that the case is not, after all, as strong as previously considered? The courts have recognised the difficulty faced by experts. The expert is therefore granted some immunity from liability. That immunity is not, however, absolute and relates to a limited set of circumstances. An expert witness who gives evidence at trial is immune from being sued in respect of anything he says in court. This immunity also extends to the contents of a report he adopts in giving evidence. The claimant cannot get round this immunity by suing on the report rather than the evidence itself. The immunity does not, however, protect an expert who has also been retained to advise on the merits of a party's claim in litigation even if it was intended that the expert would be a witness at the trial if the litigation proceeded.

The courts have pointed out that the law relating to the extent of an expert witness's immunity is still in the course of development. The immunity granted to professional experts has been criticised. Until recently, English barristers were granted immunity for the work they did representing their clients in court. That immunity has been removed. It is therefore quite possible that the immunity granted to experts will be similarly eroded.

In practice, there is an obvious difficulty in separating the work done into the two categories of adviser and expert. One of the issues that has been considered is where, as a result of the meeting of experts, one of them changes his mind. The courts have considered that, in these circumstances, the duty to the court must override the expert's fear of being sued for departing from a previously held position. Each case has to be considered on its own facts and there will be grey areas where it is unclear that the expert will be immune from liability.

The potential liability for experts means that the duty should not be undertaken lightly. In any event, it is recommended that, before agreeing to act, a potential expert witness checks his professional indemnity insurance to make certain that he would be covered should a claim be forthcoming.

After the success of the last Forum in 2000, the Club is pleased to announce that it will be holding a second Forum on 28th and 29th September, 2004. The purpose of the event is to discuss topics of mutual interest and to provide training opportunities. The Forum will also allow Members to network with companies in their field of business. Speakers at the last Forum included Peter Kerr Dineen, currently Chairman of the Baltic Exchange, Harry Gilbert of Wallem Group Ltd and John Noble of BMT Ltd. It was at this Forum that shipbrokers launched a counter-offensive against the dot.com onslaught on their territory and received extensive press coverage. Members are being asked to provide input to the next Forum at a dedicated website www.itic-forum.com. The event will be held at the Dorchester Hotel in Mayfair, London with a nominal administration fee payable by Members.

Evening entertainment will be provided at The Roof Gardens in Kensington and at a local English pub in Mayfair.

It's your Club, it's your Forum and we look forward to seeing you there.

See www.itic-forum.com to find out more.

ITIC News

Joining Crew or Illegal Immigrants?

Fraudsters continue to involve ship agents in the smuggling of illegal immigrants by pretending they are joining crew. In the past twelve months over twenty approaches to ship agents have been reported to ITIC.

The Club has issued warnings on this subject which has regularly featured in the Intermediary. Two loss prevention circulars have also been issued.

As a result, most ship agent Members have either realised themselves that they are being approached by crew smugglers, or (if they are not sure) have asked the Club to check out the so-called shipowners. However, some agents experienced very near misses, and one had already addressed a letter to an embassy authorising visas by the time the Club confirmed it was yet another fraud. The "crew" had to be stopped at their departure airport before they could board the aircraft.

The majority of the attempts by crew smugglers over the past twelve months involve a company in Chittagong, Bangladesh which describes itself as "one of the leading shipping companies in Bangladesh". Another feature of recent reports is the targeting of agents in South American countries. ITIC Members in Argentina, Chile, Ecuador, Peru and Uruguay have reported approaches to the Club.

Targeting Africa

Ship agents in Africa may feel that they are not likely to be the target of crew smugglers but this is not the case. Sometimes the object of the fraudsters is solely to make money from the illegal immigrants and there is no intention to get them to the country of their choice. In 2001 twelve "crew" arrived at Khartoum, Sudan to join a non-existent ship - the cost to the ship agent of maintaining and repatriating them totalled US$21,000. In late 2002 two ship agents in Africa, one in Douala, Cameroun and one in Port Gentil, Gabon, were asked by the same bogus US company to attend joining crew from the Indian sub-continent who were allegedly joining a fish factory ship. Thirty three crew arrived at Douala and six crew arrived at Gabon. As these countries are not usually targeted by illegal immigrants, neither of the agents realised they were dealing with crew smugglers until substantial costs had been incurred. The thirty nine "crew" had to be maintained and repatriated at the agents' cost. The thirty nine illegal immigrants had bought their own one-way airline tickets and had each paid US$1,000 to the smugglers. Whether they were seamen deceived into thinking they were getting a well paid job on a foreign flagged ship, or were illegal immigrants, hoping to board a plane for Europe or North America, is unknown. All that is known for certain is that the crew smugglers earned US$39,000 and it cost the agents US$50,000 to repatriate them.

Relaxing your guard can result not only in expense (immigration fines, hotel bills, repatriation costs, etc.) but also in a massive waste of time and effort. The former is insured by ITIC, but the latter is not. Agents must continue to be vigilant. If in doubt ask the Club to check the status of new principals asking for crew changes or to send their staff to discuss "future business" with you.

Co-assurance for ship managers: The Club explains its position

ITIC makes it a condition for its ship management Members to be co-assured because ship managers are deemed to be the ship operator in many jurisdictions around the world. By being named on the hull and P&I policies, the ship manager is only taking advantage of the cover that has been available to the ship owner in the past when the technical function of managing the ship was still in-house. The insurer is not offering any more cover by including the ship manager as a co-assured. The ship owner has only sub-contracted some of the functions he used to perform himself, to another company.

Ship managers need to be co-assured because they are paid a limited fee for the management of the ship. Compared to the value of the ship and the hire or freight earned, the management fee is a very small part of the overall cost of running the ship. It is clear that ship managers cannot afford to take out separate P&I and hull insurance to protect their own interests up to the full value of the ship. This is even more of an issue if that insurance is already available, for no additional cost, as part of the owner's standard marine insurances.

Whereas P&I insurers are used to naming the ship and crew manager as a full co-assured, there is sometimes more opposition from hull underwriters, who want to resist expanding the cover to the ship operator as well. They would rather see the manager as a target for a subrogated claim than as a co-assured. Insisting that cover be provided as a co-assured on hull policies (using the managers obligations under the ITIC insurance policy if necessary) certainly helps focus the minds of the owner and the hull insurer on the need to name the manager as well.

Under a BIMCO Shipman 98 contract, the owner provides an indemnity to the manager. Potentially, any subrogated claim from a hull or P&I underwriter that was not caused by the fault of the manager as set out in the ship management contract, could be reimbursed by the owner via this indemnity. The owner would then be in the unique position of having been paid out by the underwriter only to have to pay it back to the ship manager under the management contract. Not ideal!

ITIC is there to cover claims of negligence against the manager arising out of the management of the ship. This often involves matters that would not be covered on a P&I or hull policy, such as fraud by staff, post fixture errors, operational errors etc.

ITIC therefore makes it a requirement for a ship manager to be co-assured, not to avoid claims for negligence against the manager - that is what ITIC insures - but to protect the manager from claims that are rightly the responsibility of the owners.

Further guidelines on the release of cargo

In 2003 the Club reissued the ITIC Guidelines for the Release of Cargoes. These Guidelines have generated much interest from the membership and the press and have provoked some questions, which are dealt with below.

Can cargo be released without collecting an original bill of lading if the bill is non negotiable or "straight"?

It is established law that cargo cannot be released without production of a "bill of lading ... or similar document of title". (Section 1 (4) of the UK COGSA 1972). However, in some jurisdictions a non negotiable (or "straight") bill of lading is not legally a document of title because it does not allow ownership of the goods covered by the bill of lading to be negotiated or transferred. This means that, in some jurisdictions cargo can be released to the named consignee in a "straight" bill of lading without production of the original document. The ITIC Guidelines warn that the ship agent cannot assume that there is a right to release in these circumstances and that he should check his local law and always get his principal's authority before so releasing.

In the past year there has been much publicity surrounding two cases involving non-negotiable bills of lading. The decisions reached in these cases make it imperative that agents always obtain written instructions from their principals before releasing cargo without first taking the non negotiable bill of lading. The first case was decided by the Court of Appeal of Singapore (Voss v APL [2002] 2 Lloyd's Rep 707). A Mercedes car was shipped by Voss from Germany to a buyer in South Korea. Non negotiable bills of lading were issued. The carrier delivered to the named consignee in South Korea, without collecting the original bill of lading, which had been retained by the shipper, Voss. The Korean buyer failed to pay, and Voss successfully sued the carrier, APL. The Singapore Appeal court found that APL should not have delivered without first obtaining the "straight" bill of lading.

The second case involved "The Rafaela S" and was heard in the English Court of Appeal. "The Rafaela S" did not involve the release of cargo - but whether a "straight" bill was a document of title and therefore a "bill of lading or similar document of title". The Court of Appeal found that non negotiable bills of lading are documents of title and it therefore follows that they need to be produced in order for delivery to be effected.

The effect of local law on a carrier's delivery obligations is itself a complex area. It is fairly well known that agents in the USA can deliver to the named consignee in a bill of lading marked "non negotiable" without the obligation to first collect that bill of lading. Indeed the US courts may find that the carrier has no right to refuse to deliver in these circumstances. The carrier in this case is in a very difficult position as he is at risk of claims from both the shipper and the receiver. In addition, if the law of the country where the goods are loaded for the USA does not allow the carrier to deliver cargo without collecting the non negotiable bill of lading, then the carrier can still find himself facing a valid claim in that jurisdiction for what is a legal release of cargo in the USA. He may then seek to recover from the agent who has released the cargo.

> Releasing cargo without taking in exchange "straight" bills of lading has become extremely dangerous, and ship agents should not do so without their principal's instruction in writing.

Can cargo be released to a party holding the full set of three Original bills of lading if the bills of lading are "to order" and not properly endorsed?

This question was asked by three different Members of ITIC. Physical possession of the full set of three bills of lading does not make the party in possession the proper holder and therefore entitled to delivery of the cargo. He could have stolen them or found them in the street. In a recent case reported to ITIC, the full set of original bills of lading was stolen from a motorcycle courier who was delivering them to a bank. The thief was the "Notify Party" who presented them to the ship agent, took delivery of the cargo and disappeared. Even though the agent had recovered the full set of three original bills of lading, the consignee on the bill of lading was "To order of the Bank of Commerce", and none of the bills of lading had been endorsed by the Bank of Commerce. The ocean carrier was therefore liable to the bank, and obtained reimbursement of his claim from the agent, who had delivered goods against an improperly endorsed bill of lading. In this case, the agent should have contacted the Bank of Commerce.

Copies of the ITIC Guidelines for the Release of Cargo 2003 can be found on the Club's website:
www.itic-insure.com

The 24hr Rule

USA Customs 24 Advance Manifest Rule

Following the tragic events of 11th September 2001, the US Government put in place various security measures to assist the Bureau of Customs and Border Protection (CBP) (until recently known as the US Customs Service) in locating import containers and shipments which could pose a terrorist threat.

At the end of 2002, the CBP introduced the **24-Hour Rule**. This Rule requires sea carriers loading containerised cargo for the USA at foreign ports to provide cargo manifests containing full details of cargo to the CBP through the Automated Manifest System (AMS) **24 hours prior to loading on the ship**. Although much has been written on the subject, ITIC has delayed providing its comments until the impact of the Rule on sea carriers and their agents became more apparent. Although the impact of the 24 Hour Rule is still not entirely clear, in response to numerous enquiries from Members we set out below our current understanding of the position.

The details of cargo which must be entered into the AMS are very specific and must include the following:

(i) name of last foreign port before the ship departs for the USA;

(ii) carrier SCAC (the unique Standard Carrier Alpha Code assigned to each carrier) - this can relate to the ship owner, a joint service partner or an NVOC;

(iii) carrier-assigned voyage number;

(iv) date ship is scheduled to arrive at first US port in Customs territory;

(v) numbers and quantities from the carrier's ocean bills of lading, either master or NVOC, as applicable;

(vi) name of first foreign location (which need not be a sea port) where carrier took possession of cargo destined for the USA;

(vii) precise description (or Harmonised Tariff Schedule [HTS] numbers under which cargo is classified) and weight of the cargo or, for a sealed container, the shipper's declared description/weight;

(viii) shipper's complete name and address, or identification number, from all bills of lading;

(ix) complete name and address of the consignee or the cargo owner or owner's representative, or identification number, from all bills of lading;

(x) name of ship, country of registry, and official ship number;

(xi) name of foreign port where the cargo is laden on board;

(xii) internationally recognised hazardous material code when such materials are being shipped;

(xiii) container numbers (for containerised shipments); and

(xiv) numbers of all seals affixed to containers.

Carriers of break-bulk cargo (defined as non-containerised cargo which is packaged or bundled) may be exempted from the 24 hour Rule but the US Customs will evaluate each application for exemption on a case by case basis. However, carriers of break-bulk cargo will still have to file their cargo declarations **24 hours prior to arrival at the US port**. Carriers of bulk cargoes (defined as homogeneous cargoes stowed loose in holds) are exempted from the 24 Hour Rule.

Penalties for failure to transmit manifest details in a timely manner, or for transmitting incorrect or incomplete details:

- issuance of "do not load" orders by the CBP, which could result in cargo being left behind;
- fines on sea carriers (by which is meant the carrier identified by the SCAC) - US$5,000 for first offence and US$10,000 each offence thereafter;
- refusal to issue, or delays in issuing, permits to discharge the incorrectly declared cargo, or even the entire ship;
- liquidated damages for NVOCs (US$5,000 for each offence).

The following should be noted:

- the US Customs will conduct post-departure audits to review whether the requisite 24-hour notice was given;
- generic cargo descriptions, such as "FAK" ("freight of all kinds"), "general cargo", and "STC"("said to contain") are not acceptable;
- the US Customs will penalise false information (e.g. providing incomplete information with the intention of correcting it after the 24 hour time bar);
- there is no need for a container to be at the load port 24 hours before loading - the Rule only calls for cargo details to be provided 24 hours prior to loading;
- FROB - freight remaining on board (by which is meant cargo loaded at a non-US port for a non-US port which will be on board the ship whilst it is at a US port) also needs to be fully declared to US Customs under the 24 Hour Rule, and will be treated exactly the same as cargo intended for the USA;
- sea carriers will be held responsible for misdeclarations by shippers which they have accepted in good faith. It will then be for the sea carriers to attempt to recover from the shippers;
- US Customs may initiate penalty actions against any party responsible for providing the required information;
- it is not permissible to enter the name of an NVOC as the shipper and the NVOC's agent as the consignee; the US Customs require the name of the actual shipper/consignee. It is also not permissible to leave the consignee blank, or to enter "To Order" or "To Order of Shipper" without entering the corresponding information in the consignee and notify party fields of the AMS.

Potential problems for ship agents:

- Although the main impact will be felt by sea carriers, ship agents will also be affected by this change in CBP procedures.
- agents outside the USA will be liable to their principals for losses resulting from their failure to pass on instructions not to load containers which are declared as "held" by the CBP. With several carriers (e.g. ship owners, joint service partners, NVOCs, etc.) all entering cargo details into the AMS for cargo loaded on the same ship, the agents for the ship at the load ports will have to carefully monitor CBP "do not load" instructions from the various carriers to make sure that terminals/stevedores are notified in a timely manner;
- agents in the USA acting for principals who do not have their own International Carrier Bond, may face customs fines against their own Bond for infractions by those principals;
- there may be multiple fines for minor infractions which principals may attempt to pass back to the agent;
- there may be attempts by principals to pass on responsibility to agents for misdeclarations by shippers.

ITIC insurance:

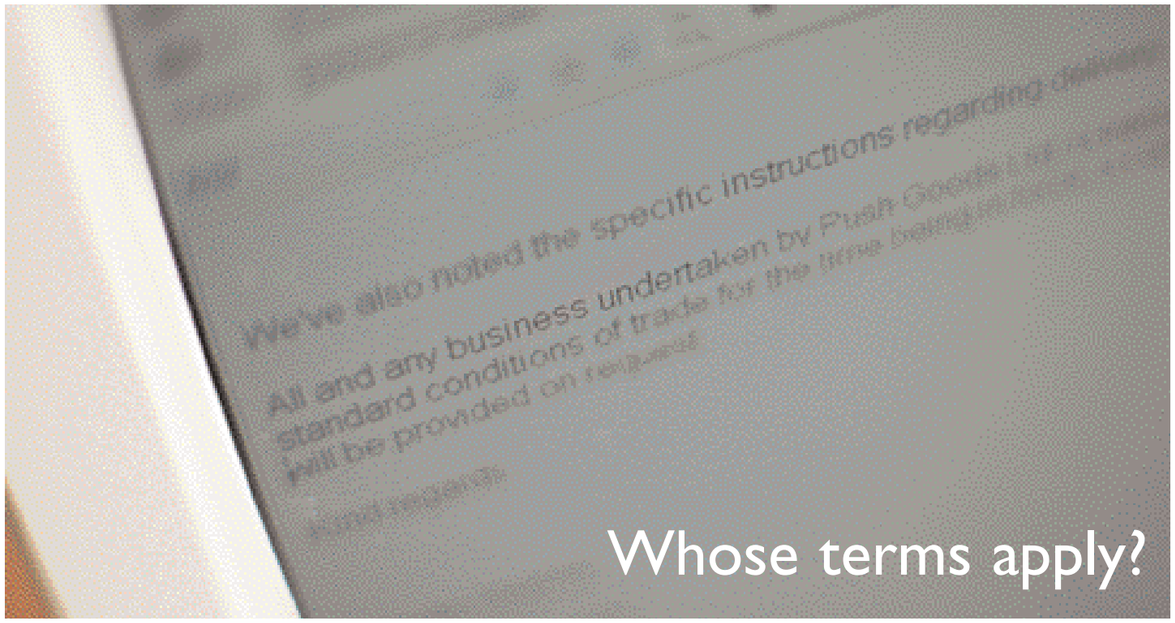
Ship agents are insured for liabilities to reimburse losses which result from their own negligence. An example of such a liability would be the loss caused by an agent making a mistake when entering information provided by the shipper in the manifest. However, if the shipper misdeclares the cargo (either accidentally or deliberately) then the agent would not be liable for any fines/delays/losses caused to the principal. The principal would, however, be liable for misdeclaration by the shipper and agents must (with the assistance of ITIC) reject attempts by principals to pass on such liabilities to them.

Conclusion

To date there has been little evidence of the widely anticipated problems envisaged when the 24 hour Rule was introduced. This has largely been due to the fact that the CBP did not begin to impose fines or to issue "do not load" instructions until May 2003. The CBP is said to have reviewed in excess of 2.4 million bills of lading between February and August 2003, and issued "do not load" instructions for about 260 containers in the same period. ITIC has so far not seen anything other than minor claims either against sea carriers or ship agents. However, this is not to say that the CBP will not in future enforce the Rule more rigorously. In view of the cost of administering the Rule, it is possible that there will come a time when the CBP attempt to recoup some of these costs by rigorous enforcement of the Rule.

There are also proposals from the European Commission to introduce a similar 24-hour Rule for goods imported into the EU. The need to provide extensive and detailed information on containerised cargo will increase rather than decrease, and agents should continue to act with care and to follow the instructions of their principals strictly.

The official document concerning the 24 hour Rule is the US Federal Register, Vol. 67. No 211 (ITIC can provide a copy if required). We also recommend that you read the "frequently asked questions" in the import section of the US Customs Service website at: www.customs.gov



Whose terms apply?

Battle of the Forms

Paul Dickie of Prettys reviews the perennial problem of parties fighting to incorporate their own terms and conditions into a contract.

Central to many transport disputes is the question of whose terms apply. The party entrusted with the goods will invariably seek to rely on its own bespoke terms or on trade association terms (such as in the United Kingdom BIFA, RHA, UKWA or ICS). The person entrusting the goods on the other hand may wish to avoid exclusions and limitations contained in many of those terms which are favourable to the party entrusted with the goods. This leads to attempts, at the stage where the contract is being formed, to ensure that one's own terms apply. It may be worthwhile at this stage pointing out that in the recent Court of Appeal decision in Granville Oils v Davies Turner [2003] WL 1822907 Court of Appeal, Tuckey LJ said that from "...general business experience...the [claimants] must have known that the transaction would be on terms. It was up to them to inform themselves of what those terms were..." So, doing nothing, even where one suspects that the other party may not have made a very good attempt to incorporate their own terms is not an option, if one wishes to be sure of incorporating one's own terms. This article looks at how best to ensure this in a situation where both parties are intent on incorporating their own terms. The cardinal rule is to be clear and positive in all one's messages as to: a) insistence on one's own terms; and b) rejection of the other side's terms. Inevitably however, if the other party is equally astute and careful, a stalemate will result. It is helpful to look at how the English courts have treated this question.

Traditionally, there was a view that the party who sent the last message purporting to incorporate its terms would win. This was known as the doctrine of "Who fired the last shot?" see, for example B.R.S. v Arthur V Crutchley Ltd [1968] 1 All E.R. 811. The legal analysis of that position is that where conflicting communications are exchanged, each is a counter offer so that if a contract results at all, it is on the terms of the final document in the series. However, this approach is rather rough and ready when the correspondence leading up to the conclusion of a contract is likely to differ considerably in each case.

In the leading case, of Butler Machine Tool Co Limited v Ex-Cell-O Corporation (England) Limited [1979] 1 Weekly Law Reports 401, the Court of Appeal found that despite the fact that the last message had been sent by the seller, the effect of the correspondence between the parties was that the seller had accepted the buyer's counter offer and that the seller's last message did not change the position.

Briefly, the seller had offered to supply a machine subject to certain terms and conditions, including a price escalation clause. The buyer placed an order for the machinery on a form setting out its own terms and conditions which differed from those of the seller (among other things they contained no price escalation clause). The buyer's message contained a tear-off slip to be signed by the seller and returned to the buyer acknowledging that the seller accepted the order on the terms and conditions stated therein. In its final message, the seller signed the slip and returned it with a letter saying it was entering the order in accordance with the offer (its own original offer). Despite this the court found that the reference to the seller's original offer was not made for the purpose of reiterating all its terms but only for the purpose of identifying the machines. Accordingly the seller had been insufficiently precise in its reply if indeed it had not wished to accept the buyer's terms and conditions.

If then one wants to incorporate one's own terms into a contract then it is important to do the following:

- continue to refer to the incorporation of one's own terms and conditions
- reject the other side's terms and conditions each time
- if necessary do not perform until an acknowledgment by the other party of acceptance of one's own terms has been obtained

Clearly, the last mentioned is often commercially unrealistic but, in such situations, a signed acknowledgment (as indeed there was in Butler) will be the best evidence of whose terms apply.

Provisions in order forms and the like that one's own terms and conditions will prevail over anything in the other party's documentation are likely to be valueless. Certainly such a provision was ignored in Butler.

If neither party has blinked, but performance of the contract has nevertheless taken place and then a dispute arises, the court may, in the absence of any ability to decide which party's terms and conditions apply, impose its own reasonable terms and conditions on the contract. A court may do so where, given a performed contract, the existence of both parties' terms and conditions side by side, being inconsistent with each other, is clearly impossible. The court, therefore, has room to imply terms to make the contract work. Prior to performance, however, it might be argued that such a contract is void for uncertainty with the result that performance may not in fact be ordered.

Finally, in a transport situation (unlike in Butler which was a sale of goods case), it may also be possible to argue more strongly for the terms of the party entrusted with the goods rather than the party entrusting them. This is because a goods owner is likely to have standard terms dealing with sale and purchase of the goods rather than standard terms dealing with their safekeeping, carriage and delivery. In the event of a dispute, sale and purchase terms are unlikely to have as much relevance to the dispute at hand, which will usually be about loss or damage to goods.

Our thanks for this article go to:
Paul Dickie
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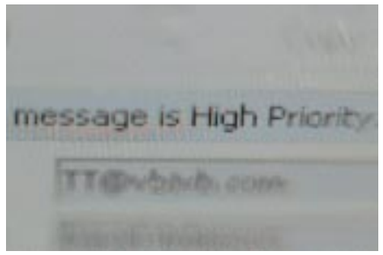


if necessary do not perform until an acknowledgment by the other party of acceptance of your terms has been obtained

Introduction contracts: cutting out the middleman

Now and then a broker might get to hear of a ship sale or other shipping transaction which has gone through, and the details of which sound familiar. Wasn't that the transaction he had introduced and worked on for that principal? - hadn't he been asked to close his file on that one? If the deal has in fact gone through, why hasn't he been paid his commission? Has he been cut out - and if so, what can he do about it? What will he have to prove to recover that commission? These problems have been examined in the English courts and this article examines the important propositions to be derived from the case law on the subject.

A Contract

This might seem the most obvious of propositions, but it is important to bear in mind that unless an agent can show first of all who his principal is and secondly that he has an agreement with him sufficient to establish what his role is and his entitlement to commission, then there is no prospect of trying to claim any remuneration.

The identity of the principal may be a matter of some complexity in a chain of transactions and where competitive brokers are involved. However, if a shipbroker is going to claim a commission, he must know who he is looking to for payment and therefore should make sure that the person he regards as principal is aware and acquiescent.

In English law, the agreement does not have to be in writing, but it must be possible to ascertain in some way the terms of the agreement between the agent and his principal. For example, in 1998, in a case called Peter Nahum v Royal Holloway and Bedford New College, the Court of Appeal upheld the judge's finding that during the course of a telephone conversation an oral contract was agreed whereby Mr Nahum was instructed to contact potential buyers for some paintings owned by the Royal Holloway College. It was also held that the parties had agreed that any introduction made to the college by Mr Nahum would be subject to commission of 2.5% of the sale price of the paintings sold to the buyer he introduced. As a practical matter, of course, it is far easier if there is a written contract or at the very least some documentary evidence of the agreement and its terms. If therefore a shipbroker is contacted by a shipowner looking for help to find a buyer for one of his ships, then whether the request came in a letter or during a drink in the pub or a call on the mobile phone, it is always best to send something in writing back to the principal confirming those instructions.

Again, whilst it is always possible to argue that the terms of the agreement with the shipowner were that the broker would earn commission at the usual market rate on the successful completion of the transaction, it is a great deal better if there is evidence of agreement of the level of commission payable. If the broker becomes involved in negotiations in relation to the transaction, then it may be possible in addition to argue that the principal has accepted/acquiesced in the level of commission being discussed. However, unless there has been agreement in advance, it may not be completely obvious where there are multiple brokers involved in a transaction and the principals are simply being told what total commission is going to be payable.

The shipbroker is going to have to be able to show that he was the “effective cause”. Did he really bring about that transaction?

The other point to note about establishing that there is a contract between a broker and his principal is that it must be possible to determine what it was that the broker has to do to earn his commission - is mere introduction enough, or is further expertise or assistance required through the negotiations? However, if something more than a mere introduction is required, as Devlin J said in Allan v Leo Lines Ltd in 1957, "if a broker effects an introduction and is willing to go on with the usual business negotiation, it hardly lies in the mouth of an owner who takes it out of his hands to say that he has made no further contribution."

Effective Cause

Generally speaking, if the shipbroker can show that he had a contract with his principal which would result in the payment of a commission on conclusion of a transaction he had introduced, then he is going to have to be able to show that he was the "effective cause" of the transaction. Did he really bring about that transaction?

This question was examined most recently by the High Court in Seascope Capital Services v Anglo Atlantic Steamship & anr in 2002. This case concerned a ship finance intermediary (Seascope) which claimed that it had been cut out of a refinancing transaction by their principals, Anglo Atlantic. Seascope established that it had concluded a contract with those controlling Anglo Atlantic for the introduction of financing deals for two ships, the "Bolero" and "Barcarolle". They would also assist as required with the documentation. If the financing went ahead, Seascope would be entitled to a success fee. Of a number of different financing possibilities introduced by Seascope, one was a sale and charter back transaction involving the Royal Bank of Scotland. However, after some discussions with the bank and their principals, Seascope were asked to close their file. Some months subsequently, it was reported that the Bolero and Barcarolle had been refinanced on a sale and charter back basis through the Royal Bank of Scotland. Seascope claimed their success fee. The question of "effective cause" was examined in some detail by the court because Anglo Atlantic sought to argue that the financing deal that was in fact concluded with the Royal Bank of Scotland was different from the one Seascope had introduced. Furthermore, because those controlling Anglo Atlantic had an existing relationship with the Royal Bank of Scotland, they argued that Seascope had not brought the transaction about. The judge concluded that although the deal eventually concluded differed in a number of respects from the indication originally introduced by Seascope, it was essentially one and the same transaction. Furthermore, although those controlling Anglo Atlantic knew some of the people at the bank on a business/social level, the fact was that it was Seascope which had sourced the transaction and introduced their principals to the department and people in question. They had brought about the refinancing. Finally, and on the basis of Allan v Leo Lines, the fact that Seascope had closed their files and had not helped out with the documentation for the transaction did not prevent them earning their success fee, because that is what their principals had instructed them to do.

Conclusion

A shipbroker should, as a matter of practice, always try to ensure that there is a written record of any agreement concluded with a principal in relation to commission in order to reduce the scope for future argument. If that is done, then the question will in many situations boil down to whether or not the shipbroker can be said to have brought about a particular transaction. In the world of competitive broking, and in the small world that is shipping, that may not of itself be the easiest thing to show, but the English courts will take a common sense approach to the evidence.

Our thanks for this article go to
Joanna Steele
Partner
Bentleys Stokes & Lowless
www.bentleys.co.uk

Demurrage claims routinely run into tens, and sometimes hundreds, of thousands of dollars. Demurrage should be a matter between the owners and the charterers but often ITIC has to pay substantial amounts because a ship manager or shipbroker has not forwarded the claim documentation within the time permitted by the charterparty.

ITIC has seen a whole range of reasons for the non-delivery of the claim. These have included everything, from the broker failing to tell his post fixture department that the charterers had moved, to the far less avoidable, sudden liquidation of the courier company. The use of e-mail systems to deliver documentation has also given rise to issues. The effect of non-delivery is invariably the same - a demurrage claim of thousands of dollars is rejected by the charterers and the owners then claim the money from the shipbroker.

The provision of the time bar is frequently found in an additional clause as many printed charterparty forms, such as ASBATANKVOY, do not have such a provision. The clauses therefore vary considerably and may be within the text of a general time bar clause covering much more than just demurrage statements. It appears that ninety days is the average period, but this certainly cannot be relied upon, and the first rule is read the clause carefully.

An example of a specific demurrage time bar clause appearing in a printed form, is Clause 15(3) of SHELLVOY 5. This provides that:

"Owners shall notify charterers within 60 days after completion of discharge if demurrage has been incurred and any demurrage claim together with supporting documentation shall be submitted within 90 days after completion of discharge. If Owners fail to give notice of or to submit any such claim within the time limits aforesaid, Charterers' liability for such demurrage shall be extinguished."

The first sentence of the clause is in two parts. The first part provides that the owners shall notify the charterers within sixty days after completion of discharge if demurrage has been incurred. The second and separate provision is that any demurrage claims, together with supporting documentation, shall be submitted within ninety days. The second sentence of the clause makes it clear that both limits need to be complied with for the claim to be valid.

There is no requirement that the two conditions must be satisfied in separate documents provided that the first obligation of notification is fulfilled within sixty days. Therefore, if the charterers receive the demurrage claim and documents within those first sixty days, the claim would also act as notification and be valid. In practical terms, a problem can occur when no separate notice is given and the owners pass to the broker a full claim before the expiry of that sixty day period. The broker, perhaps lulled into a false sense of security by receiving the full claim, passes it on to the charterers well within the ninety day period, but unfortunately, after the expiry of the sixty day notice period. The charterers respond by pointing out that since they did not receive notification within sixty days then, under the terms of this clause, the claim is time barred.

Whether the charterers are right or wrong, will depend upon the position of the brokers involved and the applicable law. If the broker is representing owners, then clearly, the receipt of the documents by the broker could not constitute "submission" to the charterers. The position may well be different, however, if the broker concerned was acting as the charterers' broker.

The issue has arisen in arbitrations. LMLN 151 London Arbitration 8/85 was decided according to English law. Owners had to present their case to charterers before midnight on 13th June 1983. On 9th June 1983, the owners' agents sent the claim to a firm of shipbrokers asking for it to be forwarded to the charterers. The brokers, who had been the channel of communication throughout, forwarded the claim on 15th June. The charterers refused to pay on the grounds that it had not been presented in time. The owners argued that the presentation to the brokers had been sufficient. The arbitrators held by a majority that the brokers had, despite the charterers' denial, been acting as the charterers' brokers and accordingly, had authority to receive the documents on their behalf.

The fact that the owners can show that the demurrage claim was validly presented may not be the end of the matter as far as the brokers are concerned. If the charterers have been unable to pass on the claim to cargo receivers, they may demand compensation from their own brokers. The charterers' brokers may therefore be in no better position than the owners brokers would have been if the demurrage claim had been time barred.

In many cases there will only be one broker working between principals with whom they have established relationships. If this had been the case in the above London Arbitration and the brokers were intermediate brokers, the majority of the tribunal stated that the result would have been the same. If, however, the contract had contained a New York arbitration clause the outcome would probably have been different. In Sea River Maritime Inc. v. Enron Clean Fuels Co. S.M.A. No.3377 (1997) the panel identified such a broker as having a dual role alternating between being agent for the owner and agent for the charterer. The panel held that when transmitting notices from the owners they were the owners' agent.

It is important to remember that it is necessary for the owners to be able to show that the demurrage statement was actually presented. This was the issue in another arbitration (LMLN 337 London Arbitration 25/92) in which the tribunal accepted that a clause requiring the claim to be "presented to charterers" could have been satisfied by presentation to their brokers. The onus was, however, on the owners to prove that the claim had been presented to those brokers. In the case in question the owners had failed to provide any evidence that the claim had been delivered. The second rule is to always use a postal or courier service that will generate a receipt. When the receipt is received, keep a copy in the file.

An issue that has arisen in recent times is the use of e-mail to forward demurrage claim documentation. This has proved unsatisfactory if a dispute arises. The problem has been that the Member's system has only been able to show that the message was sent to their ISP (Internet Service Provider) and not delivered to the addressee. It is possible to set up the system to produce a receipt when the message is delivered. It is important to check that it has been safely delivered.

The reason that the broker is held liable for non-delivery is the allegation that they have been negligent. If, for example, the demurrage claim has been lost under a pile of paperwork or put in a filing cabinet and forgotten, it is clear that the broker has failed to exercise reasonable care and skill. There are, however, situations in which the position is much harder to determine.

If the owners sent the claim to their brokers so close to the deadline that it was impossible for them to forward it in time then clearly, the owners can have no cause for complaint. In practice, however, the more likely scenario is that the brokers have been slow to forward a claim that was already close to the time limit. In these circumstances it must be remembered that shipbrokers hold themselves out as providing a professional service and will be judged accordingly.

shipbrokers hold themselves out as providing a professional service and will be judged accordingly.

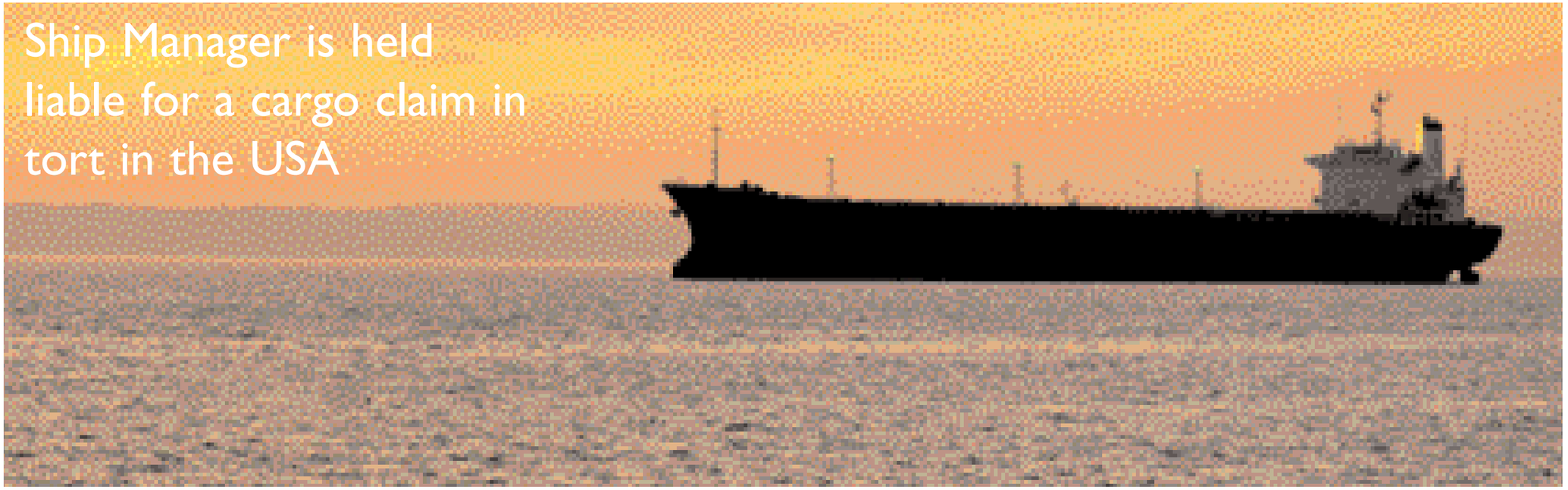
It is common to send important documents by courier. This raises the question as to what is the position if the courier company and not the shipbrokers is at fault. In practice the courier service will have been ordered by the brokers and will therefore be responsible to them and not the owners. The shipment will be subject to the terms of the courier's airway bill. These will limit the amount of compensation payable to the value of the physical package excluding any consequential loss such as a demurrage claim becoming time barred. Entrusting the documents to a specialist courier company is, however, clearly a prudent step, but the shipbrokers will have difficulty avoiding liability if they did not independently check to see that the package was received in time. It is not enough to post it and forget it. Accordingly, the third rule is to check that the demurrage claim has been delivered.

It is not uncommon for demurrage claims to be for considerable sums of money. The forwarding of documentation may appear to be a routine clerical task, but the effect of getting it wrong can be a claim of tens of thousands of dollars.

The three rules of avoiding such claims are:

1. Read the clause carefully
2. Use a service that records delivery.
3. Check it has been delivered.

Ship Manager is held liable for a cargo claim in tort in the USA



A recent decision in the United States District Court, Steel Coils Inc. v m/v LAKE MARION et al, has increased the risk that liability may be imposed on the manager deemed to be responsible for the operation or seaworthiness of a vessel. The case concerned the alleged sea water wetting of steel coils loaded in Latvia for discharge at US East Coast and Gulf ports. The receiver sued the owners and managers and also alleged a separate negligence claim against the managers as well. It was thought that the carrier's defences and limitation of liability (package or freight unit limitation) would be available not only to the vessel, her owners and charterers but also to the ship manager, who was acting as agent.

It is not unusual for a manager to be named separately as joint defendant with the owners on a writ. However, in this recent case in the United States, the separate action against the ship manager for negligent damage to cargo was recognised. The court found the manager was responsible for the operation, maintenance, manning and seaworthiness of the vessel and to be directly liable to cargo for any fault in the vessel that caused damage. Furthermore the owner's COGSA limitation of liability and defences could not be used by the manager even though he was the owner's agent. This particular case is specifically related to deficient hatch maintenance. The court accepted that the owner was responsible for the acts of its manager and could limit its liability by package limitation. However, the manager, even though acting on the authority of the owner, could not take advantage of the owner's limitation where there was no specific contractual extension of that limitation to the manager. Such extension is often provided by a Himalaya clause (the wording of which is given at the end of this article). The owner was able to limit his liability but the manager was found liable for the full amount of the claim without benefit of limitation. If the manager is fully co-assured on the owner's P&I policy, they will be covered as if the manager has cover in his own right.

The Managers of ITIC are often asked when they review contracts on behalf of ship managers whether the principal's request to drop the Himalaya clause is a reasonable one. This case is a perfect example of why the Himalaya clause is vital not only to the ship management contract but also to a bill of lading and a charterparty. Furthermore, it is also vital that the owners include in their contracts of carriage, whether these are charterparties or bills of lading, a provision extending the contractual indemnities and limitations (i.e. COGSA or similar) to the managers, operators or other agents. In some circumstances this can be accomplished simply by reference to or incorporation of a Himalaya clause into the charterparty and bill of lading in which the carriers are involved. Usually the Himalaya clause refers only to agents or independent contractors but as the manager is acting as agent for the owners they are usually considered to be within the interpretation of this clause.

The advice from P&I Clubs (one being Gard on their website), is to recommend that the following phrase should be included as part of the Himalaya clause in any charterparty or bill of lading.

"The term 'agent' shall be deemed to include the ship manager and ship operators".

It is worth considering an additional provision in your ship management agreement that the owner will incorporate the wording of a Himalaya clause in any bill of lading or charterparty. This is to protect the manager from claims in tort, such as cargo claims in the USA. If the owner then fails to include the Himalaya clause, he is in breach of the ship management contract. It is also necessary to incorporate a Himalaya clause in the ship management agreement not only to extend any limitations available to the manager to his sub-agent or contractor but also to protect the owner against attempts to breach limitation by only suing the manager. By having such a clause in the ship management contract the owner is also protected as the manager will not have to seek an indemnity under the ship management contract because no Himalaya clause was in place.

The wording of a Himalaya clause will alter slightly depending on whether it is incorporated into a bill of lading, charterparty or ship management agreement. Where it relates to a bill of lading rather than a ship management contract, the alternative wording is in brackets.

a compelling reason to have a Himalaya clause in your contract

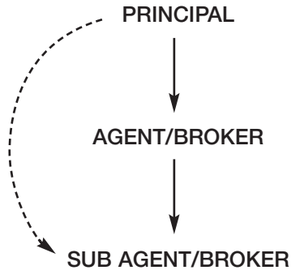
The Himalaya clause reads:

"It is hereby expressly agreed that no servant or agent of the Carrier, including every sub-contractor from time to time employed by the Carrier, shall in any circumstances whatsoever be under any liability whatsoever to the (Shipper, Consignee or Owner of the goods or to any holder of this Bill of Lading) owner for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained in every right, exemption from liability, defence and immunity of whatsoever nature applicable to the (Carrier or to which the Carrier) Managers is entitled hereunder shall also be available and extend to protect every such (servant) employee or agent of the (Carrier) Managers acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the (Carrier) Managers are or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including sub-contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this (Bill of Lading/Charterparty - delete as appropriate) to this agreement.

Sub-agents - Roles and responsibilities

This article will endeavour to examine the English law approach to the problems which arise when an agent or broker appoints a sub-agent or sub-broker.

The situation that gives rise to difficulties is set out in diagram form below.



The Problem

The question arises as to whether the contractual chain is as outlined by the unbroken arrows in the above diagram, or whether the contractual chain is as shown by the broken arrow. In this article where the terms "Principal", "Agent" and "Sub-Agent" are used with capital letters it is a reference to the parties shown in the diagram.

Looking at it from the Sub-Agent's point of view it will sometimes suit him to be the Agent of the Principal, for example where the Agent has gone into liquidation and the Sub-Agent is owed money arising out of activities performed in connection with the Principal's vessel. Demonstrating that the Sub-Agent, although appointed by another Agent, was in fact in a direct contractual relationship with the Principal may entitle the Sub-Agent to arrest the Principal's vessel or at least make a claim against the still solvent Principal. In such circumstances, the term Sub-Agent is a misnomer and the correct name would be Co-Agent.

In other cases the Sub-Agent will face a situation where the Principal is insolvent. He will then be keen to show that the solvent Agent was his Principal and the Agent is therefore responsible for paying him, whether or not the Agent has received funds from the Principal.

The English Law Approach

Under English law the courts will wish to establish the true contractual position. The key to doing that is to identify in what capacity the Agent made the appointment of the Sub-Agent. Did the Agent make the appointment acting as agent for the Principal and with the Principal's authority, effectively thereby appointing the Sub-Agent as a co-agent, or did the Agent act in its own right as a principal?

To examine whether a party acted as a principal or agent is a process which has vexed the courts for many years. As a result, the courts have adopted an approach of examining the facts of each case and applying some tests to see whether, on balance, the party concerned acted as an agent or principal when carrying out the relevant activity or function. It is a feature of cases where a court has to enquire as to the capacity in which a person or company undertook activities that the court will examine in detail the communications which passed between the parties and often witnesses of fact will be required to give evidence to the court as to what they said in telephone calls which may have occurred months or even years before the trial date. It is for this reason that this article will recommend that, at the outset of a contractual relationship, a great deal of time and trouble can be saved if communications are put in writing and care is taken over the exact wording used.

Some General Propositions

In deciding whether a party acted as an agent when making an appointment of a sub-agent, or whether the party acted as a principal, the court will have regard to the general rule of law that an agent may not delegate his authority to another person or appoint a sub-agent to do some or all of the tasks entrusted to him by his principal without either express authority or implied authority to do so from the principal.

Express Authority

If, at the outset of the relationship between the Principal and the Agent, the Agent knows that it will have to appoint a sub-agent (for instance in ports where it does not have its own office), thought should be given to recording, in an exchange of communications, how work for the Principal will be dealt with in those ports. A decision should be made whether the party appointed in that port is being appointed as sub-agent to the Agent or as the Principal's agent, albeit that the communication of the appointment and the routing of communications thereafter may be dealt with via the Agent. Such an exchange of communications would be evidence of express authority from the Principal to appoint the Sub-Agent.

Implied Authority

Implied authority to appoint a sub-agent may arise where

a) the principal knew at the time of the agent's appointment that the latter intended to appoint a sub-agent and raised no objection;

b) delegation of authority or the employment of a sub-agent is the normal practice in the trade in question and is not inconsistent with the express terms of the agency agreement;

c) from the circumstances of the case and from the conduct of the parties to the original contract of agency, it may reasonably be presumed that the parties intended that the agent was to have power to delegate his authority;

d) the act to be done by the sub-agent does not involve the exercise of any discretion but is purely ministerial;

e) in the course of the agency, unforeseen circumstances arise which make it necessary for a sub-agent to be appointed.

It will be readily apparent that, for the Agent to establish that he had implied authority in a circumstance where perhaps the Principal is denying that implied authority, a very careful examination of the facts and state of knowledge of each of the parties will have to be undertaken by the court. This will necessarily involve conflicts of evidence and witnesses having to recall detailed events which may have occurred months or years earlier. Again, any documentary evidence created at the time will be of the utmost importance in this situation.

Appointment of Sub-Agent without Authority from the Principal

If it is established that an agent appointed a sub-agent without authority from his principal to do so, the following consequences may arise:

i) The Agent would be liable to the Principal for breach of his duty not to delegate and may also be responsible to the Principal for the acts or omissions of the Sub-Agent.

ii) No contractual relationship will arise between the Principal and the Sub-Agent unless the Principal ratifies the appointment or it can be implied that the Principal has ratified it.

Appointment with Authority

Where the Sub-Agent has been appointed with the Principal's authority or the Principal subsequently ratifies the appointment of the Sub-Agent, normally the acts of the Sub-Agent will bind the Principal. The court may well find that the Sub-Agent is in a direct contractual relationship with the Principal provided that there is clear evidence that the Agent appointed the Sub-Agent whilst acting as agent for the Principal.

This brings us back to the question of examining whether when the appointment was made, the Agent acted as an agent or as a principal in his own right.

The Five Tests

In considering whether a party acted as agent or principal in carrying out any particular function the English courts Mance J developed the following five tests in Aqualon -v- Vallana [1994] I Lloyds Report 669, to assist the court in forming an impression as to whether a party is acting as a principal or agent:

1) The terms of the particular contract including the nature of the instructions given.

If there is no express contract drawn up between the parties it may be that one or other of the parties can rely on the incorporation of its trading conditions (provided that it can demonstrate appropriate incorporation of the conditions has taken place). Clause 5 of the BIFA 2000 conditions expressly enables the Agent to sub-contract the whole or any part of the services it is providing. The ICS conditions (2002) contain the following more positive statement:

"(7) The Company, with the consent of the Principal, shall have authority to appoint sub-agents to perform services on behalf of the Principal, including such services as may be subject to these conditions, remaining at all times responsible for the actions of the sub-agent."

Furthermore, the same ICS conditions provide that, in relation to the Company's transactions with the Supplier, the following condition applies

"(9) Unless otherwise stated in writing, when the Company is acting as a port agent or liner agent or booking agent it acts at all times as agent for and on behalf of the Principal and has authority to enter into contracts with the Supplier as agent for the Principal. The Company shall not be personally liable to pay any debt or expense to the Supplier from the Principal."

If the Agent can demonstrate incorporation of the ICS conditions in the relationship with the Principal these clauses will assist the court in deciding whether, when appointing the Sub-Agent, the Agent was acting as a principal in his own right or, as the ICS conditions suggest, was at all times acting as agent for the Principal.

Clause 2.02 of the FONASBA Standard Liner and General Agency Agreement (approved by BIMCO 2002) permits the agent (in consultation with the Principal) to appoint on the Principal's behalf and account Sub-Agents.

It can immediately be seen that if the Agent takes steps to incorporate and draw the Principal's attention to these institutional conditions, the court will subsequently be assisted in considering whether the appointment of the Sub-Agent was done on behalf of the Principal or on the Agent's own behalf.

In addition to the effect of the institutional clauses referred to above, communications between the parties at the time the appointment was made may be crucial and the parties should therefore consider at that time exactly in what capacity any appointment is being made and should express this clearly in their communications.

2) Any description used or adopted by the parties in relation to the contracting party's role.

Although use of the terms "Principal" or "Agent" may be helpful in giving an overall impression of what the parties intended, it is by no means determinative. Simply signing everything "as agent only" will not guarantee that the agent will be regarded as an agent, and on many occasions the courts have concluded that, notwithstanding the agent using such a term, the agent was in fact acting as a principal on that occasion.

3) The course of any dealings, including the manner of performance - at least so far as it throws light on the way in which the parties understood their relationship.

This will involve the court considering how functions were carried out by the parties in question and whether an inference can be drawn as to whether the Sub-Agent was acting for the Agent in carrying out its functions or whether in fact it was acting for the Principal. The degree of direct communication between the Sub-Agent and Principal will be important under this category. Indeed the knowledge of the identity of the Principal by the Sub-Agent will be an important consideration.

4) The nature and basis of any charging (in particular whether an "all in" fee was charged, leaving the contracting party to make such profit as he could from the margin between it and the costs incurred).

Again the invoicing route can often be a very important factor in the court's mind. If the Sub-Agent invoices the Agent and the Agent then invoices to the Principal a global sum, building into it a profit margin between the invoice it has received from the Sub-Agent and the cost it is charging to the Principal, this will tend to suggest that there was no direct relationship between the Sub-Agent and the Principal. This may be counter balanced by express agreement between the parties, for instance where the Principal has indicated that rather than receiving invoices from various Sub-Agents it would prefer to receive a single invoice from the main Agent or by the sorts of clauses referred to in the FONASBA agency agreement (see above). Nonetheless the invoicing route is something which agents should consider carefully when making an appointment of a sub-agent.

5) The nature and terms of any [CMR note/shipping document] issued.

This heading is only relevant where shipping documents have been issued by either the Sub-Agent or the Agent and may throw some light on whether, in issuing those documents, they did so as agent for the Principal.

Conclusion

When acting as the Agent you should take time to consider at the outset of the relationship with the Principal whether any of the functions being performed by the Agent will have to be delegated to a third party, for instance in a port where you do not have your own office. If this is likely to be necessary, the Agent should consider whether it would be prepared to make this appointment on the basis that the Sub-Agent so appointed enters into a direct contractual relationship with the Principal or not. If the Agent appoints the Sub-Agent as a principal, then the Agent will be liable to pay the Sub-Agent's remuneration (regardless of whether it has itself received payment from the Principal) and the Agent will also be liable to the Principal for the acts and/or omissions of the Sub-Agent. The Agent will want to charge a global fee and will be free to decide the profit margin within commercial limits. If this is the desired arrangement the Agent should consider excluding the Contract (Rights of Third Parties) Act 1999 by an appropriate clause.

The alternative is for the Agent to record clearly in writing with the Principal and with the Sub-Agent that, in making the appointment, the Agent is acting as agent so that the Sub-Agent will only be entitled to be paid by the Agent once the Agent has received payment from the Principal and, in the event of the Principal's default, the Sub-Agent will have no claim against the Agent. Furthermore this should also mean that the Agent will not be liable for the Sub-Agent's acts or omissions as the Sub-Agent will be carrying out its activities on behalf of the Principal. In reality the term Co-Agent is more appropriate in this scenario than the term "Sub-Agent". It is this type of result that the FONASBA standard agreement seeks to achieve. In this scenario it is more likely that there will be transparency regarding the Sub-Agent's charges and less scope for the Agent to make a profit margin on them.

If these matters are considered at the outset, appropriate evidence can be put in place in the form of a bespoke agreement, or by reference to institutional clauses, so that subsequent disputes can be dealt with relatively quickly and easily and the parties may avoid prolonged litigation or the detailed enquiries which the courts make in these situations.

Our thanks for this article go to
Dominic Ward
Partner
Andrew Jackson & Co. Hull
www.amj.co.uk

ITIM News

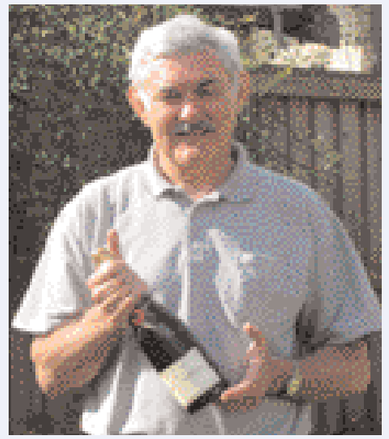
Redvers Cunningham, Julia Mavropoulos, Roger Lewis, Chris Gamber, Damian Mustard, John Hodges and Jeff Walford congratulate Chris Ryan, the winner of the ITIC Insurance Brokers' Golf Day, held on a warm autumn day last year

The Baltic Exchange Tennis Tournament 2003

Despite sweltering temperatures at the Surbiton Tennis Club in West London, ITIC/Thomas Miller's first pairing of Damian Mustard and Chi Wong successfully defended the Fehr Trophy at this year's Baltic Exchange Tennis Tournament. The draw clearly worked in the pair's favour, with a first round bye and the fact that the other finalists, E.A. Gibson's first pair, endured a marathon third-round match throughout the lunch break whilst Damian and Chi enjoyed their strawberries. Nevertheless, hard work still needed to be done in the semi-finals with a well fought win on number one court over Cargill.

ITIC/Thomas Miller's second pair again featured ITIC's Chairman, Paul Vogt, partnered this year by ITIM's General Manager, Roger Lewis. Although losing to E.A. Gibson's first pair, and eventual finalists, in the first round, superior fitness and stamina prevailed as opponents in a plate competition were either defeated or retired in the heat to the refuge of the club house.

This was an excellent event with a number of shipbrokers, owners and charterers being represented. Thanks must go to Perry Phua for again organising an excellent day's tennis. If you are a Member of the Baltic Exchange and would like to enter next year's tournament, which always takes place the week after Wimbledon, please contact Perry Phua at pbperera@totalise.co.uk



Crossword competition.

There was a huge response to last year's Intermediary crossword competition. It was obviously too easy!

The first name drawn out of the hat on 3rd January was Campbell Smith of Campbell Smith Enterprises Pty Ltd. (pictured).

Well done and we hope that you enjoyed the champagne.

Genoa Board Meeting

The ITIC Board met at the Jolly Hotel Marina in the port city of Genoa on 1st April 2003. Following the retirement of Mr. Peter Lampke from the Board, Mr. Christoph Döhle of Paul Günther Schiffsmakler GmbH & Co., Hamburg, was appointed as a Director of the Club and joined the Meeting.

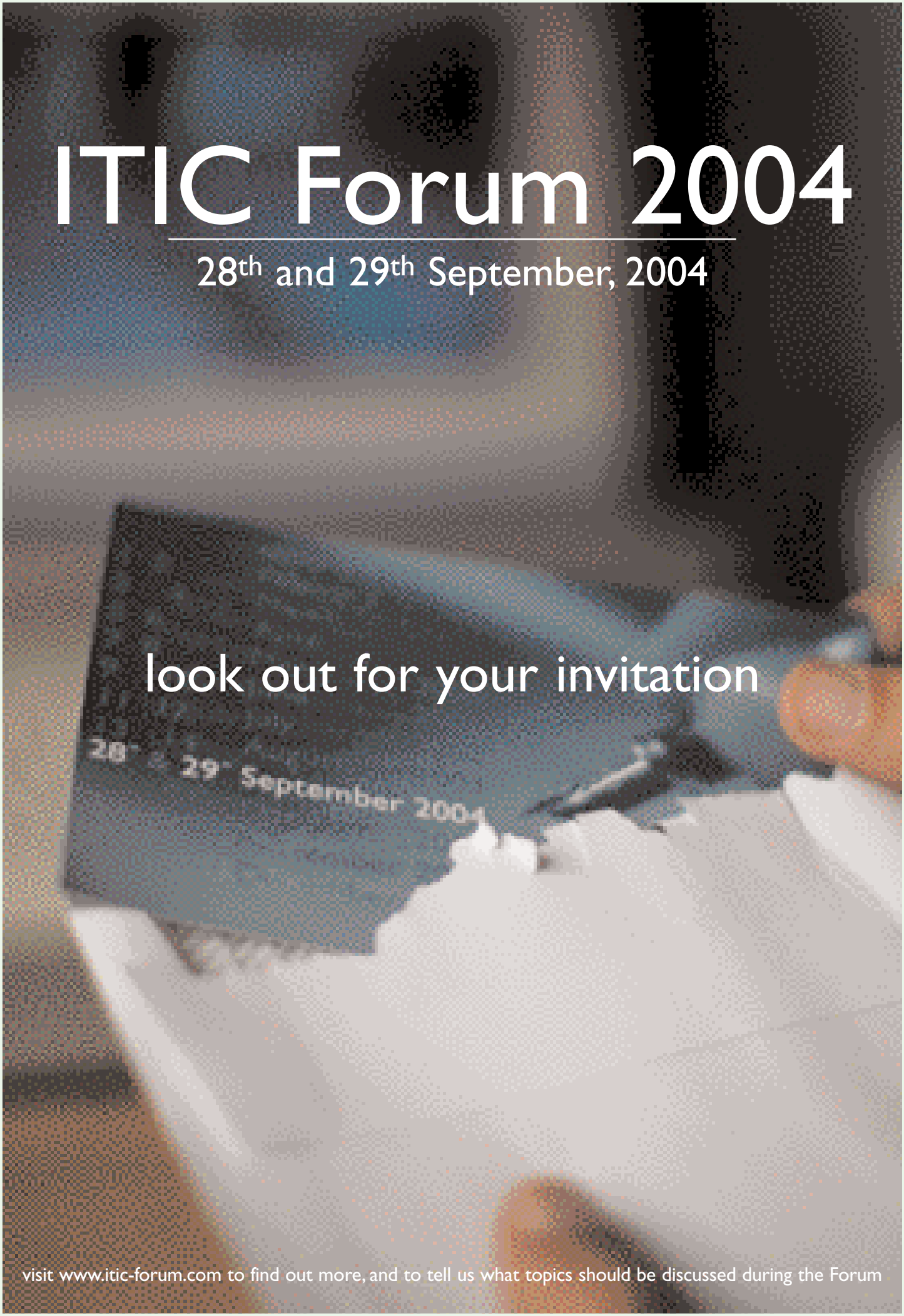
A full agenda saw the Directors considering management fee, Rule changes, renewal of the Club's reinsurances, free reserves of the Club, and the 1st June, 2003 renewal. They also agreed to the closure of the Club's 2000 policy year, thus leaving only two years open.

The Board considered that the equivalent of one year's gross premium still represented an appropriate maximum for the Club's global free reserves, thus opening the way for the payment of another year's continuity credit. Following a lengthy discussion it was agreed that the level of continuity credit payable to renewing Members from 1st June, 2003 should be maintained at the previous year's levels.

The Directors also noted that the Club's reinsurances had been extended to 2005 and that a record increase in premium and new Members was forecast for 2002.

At an evening reception, the Directors took the opportunity to meet Members from all over Italy and discuss current issues.

The next Board Meeting will be held in London in October 2003 and in March 2004 the Directors will be meeting in Sydney.


ITIC Forum 2004
28th and 29th September, 2004
look out for your invitation
visit www.itic-forum.com to find out more, and to tell us what topics should be discussed during the Forum