



SPECIALIST
PROFESSIONAL
INDEMNITY
INSURANCE

Claims review³⁰

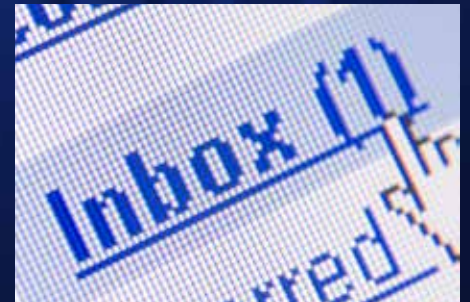
March 2014

Two channel communications

At the outset of negotiations the principal instructed his broker that they were prepared to pay a daily rate plus a lumpsum for redelivery in the Far East. The principal and the broker were communicating on an electronic messenger system while the broker was having exchanges with the other party via email.

The broker unfortunately overlooked that the principal had specified that the lumpsum would only be payable if the vessel was redelivered in the Far East. While an initial offer and subsequently a recap message was copied back to the principal via email the principal did not notice that the lumpsum would apply worldwide.

When the principal found that the lumpsum was payable in any event they made a claim against the broker. Although the broker had clearly made a mistake the principal had failed to respond to the emails showing what was being negotiated. The principal pointed out that they had been communicating via the electronic messenger system on which the broker had confirmed that the vessel had been fixed in accordance with instructions.



Ultimately a compromise was reached with the broker contributing to the extra costs in the event the vessel was not redelivered in the Far East.

There is a danger when using more than one form of communication and Members should ensure that care is taken.

(The wrong) final destination

A shipper booked three shipments of nine containers to an inland container depot but the documentary team at a ship agent's office input the cargo as arriving at the discharge port only without documenting the onward journey.

This error was noticed and a corrected bill of lading was issued to the shippers, but the agent failed to update the computer system, which controlled the movement of cargo. When the containers arrived at the port, the customs authorities rejected the shipper's request to transport the containers to the depot, because the Import General Manifest showed the destination as the port.

The shipper had already paid for rail transportation between the port and the depot, but due to the agent's negligence the cargo had to be formally imported and then transported by road. The added cost of moving the containers by road was paid by the agent.

ITIC reimbursed the agent the additional transport costs.



Counting confusion

A new regulation was issued by local maritime authorities in South America, stipulating the type and number of tugs to be used depending on the size of a vessel.

A ship agent provided a pro forma invoice to a shipowner, but incorrectly accounted for the number of tugs to be used. When the vessel arrived the error was noticed, however there was not an additional tug available and one had to be chartered from another port.

The shipowner brought a claim against the agent for the extra expenses and idle time, which totalled USD 70,500. As the error was clearly the fault of the agent, ITIC settled the claim in full.

Port agents need to be aware of all new regulations and to ensure all their staff are briefed correctly.

Ensure you incorporate your standard terms and conditions

Shippers of a cargo of wheat instructed a marine surveyor to survey and certify the holds of a bulk carrier as fit for loading.

The surveyor issued a certificate of fitness to load and 70,000MT of wheat was loaded.

Following the arrival of the ship at the discharge port the local authorities ordered the stevedores to stop discharge operations as they suspected that the cargo was heat damaged. A subsequent survey report, obtained by the shippers, indicated that the cargo was contaminated by delaminating paint, rust, dirt and paint powder from the ship's holds.

The shippers negotiated a reduction in price with the receivers as a result of the deterioration of the cargo, and pursued a claim against the shipowners under the terms of the contract of carriage. That dispute was resolved at a mediation, but the shippers then brought a separate claim against the surveyor. They were seeking to recover alleged losses, including loss of sale proceeds, additional hire paid to the owners and costs, on the basis that the surveyor had negligently certified the vessel as fit for loading in circumstances when it was not.

The claim was for in excess of USD 1m.

ITIC appointed lawyers and expert evidence was sought. That evidence suggested that the damage may have been caused by Bobcats used in discharging the cargo. The surveyor also had terms and conditions which – if properly incorporated into their business dealings – would have reduced their liability to a fraction of the shipper's claim. Unfortunately the surveyor had not explicitly made the shipper aware of the terms and conditions, so it was unlikely that a Court would find that these had been incorporated into the business dealing.

It also became apparent that after the surveyor had inspected the vessel, customs inspectors had carried out an inspection and had ordered that the vessel should be cleaned prior to loading. This was both helpful and unhelpful for the surveyor: while it was a strong indication that the surveyor had failed to properly carry out his survey, it also arguably meant that it was not the surveyor's report that the shippers were relying on, but instead custom's approval to load.

A mediation took place but the claim could not be settled. Negotiations continued nevertheless, and the matter was resolved with the surveyor contributing to around 30% of the claim, which was covered by ITIC.



This claim shows how important it is for terms and conditions to be incorporated into all business dealings. Guidelines as to how to incorporate your terms and conditions can be found at : <http://www.itic-insure.com/rules-publications/article/guidelines-on-incorporating-standard-terms-and-conditions-129819/> (which needs to be cut and pasted in full in your browser).

Foils fitting failure

The design of a passenger ship was undertaken by a naval architect, who was appointed by a ship yard. Once the ship entered service, a number of problems were reported by the operator.

ITIC appointed a technical advisor, who stated that the main issue concerned the way that the foils were fitted onto the vessel's hull. The naval architect had designed the fittings for the foils. Although the design had been used on similar passenger vessels and had worked well, this particular vessel was providing a regular service in shallower and rougher waters. The additional forces of the operating conditions had not been taken into account at the design stage, despite being included in the original specification.

The technical advisor recommended that the architect should contribute further towards the repair costs, before the vessel lost a foil.



ITIC agreed that repairs should be made to avoid the matter escalating. The final cost was Euro 70,000.

In claims involving technical issues the appointment of an independent expert will often get to the heart of the matter quicker and with less confrontation than involving lawyers. ITIC will always seek to resolve issues without unnecessary damage to your commercial relationship.



Zeroing in on the mistake

A ship agent issued a manifest for seven containers of fruit to be shipped from the Caribbean. The system used did not allow for a zero figure to be put in front of the decimal point, so the temperature read as “-.5C”.

The crew misread the manifest and set the temperature of the containers at ‘-5.0° C’. However, before sailing the Master queried the figure with port agent, as he was concerned that the fruit was being carried at -5.0° C. The agent confirmed that the manifest was correct, misreading his own entry to the manifest.

The fruit arrived damaged at the discharge port. The shipowner made a claim on the port agent of USD 360,000, which was paid by ITIC.

The price of proving innocence

A ship agent was named as a second defendant by cargo interests in a claim for damage to significant quantities of imported aluminium.

The ship agent had not been involved with the damage to the cargo, but had merely been included in the legal proceedings. ITIC, on behalf of the ship agent requested that the shipowner instruct their lawyers to include the defence of the ship agent’s interests, along with those of the owner’s.

The owner’s P&I Club agreed to defend the ship agent and a judgement in favour of the defendants was passed. However this judgement was appealed and then overturned. In the meantime the ship owner went into administration and the P&I Club was no longer in a position to support the claim.

ITIC instructed the lawyer to continue defending the ship agent. The case was then heard by an appeal court who found in favour of the claimants. This decision was appealed in the Supreme Court, who passed judgement confirming that the case filed against the agent lacked substance. The total costs incurred amounted to US\$ 95,000.

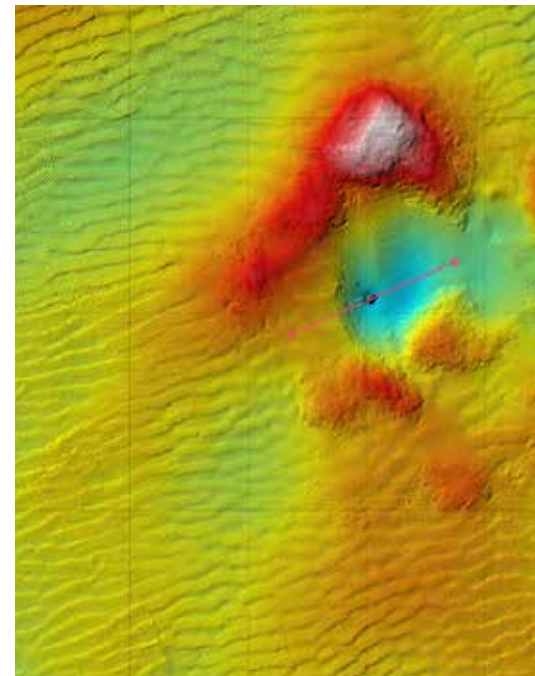
This claim shows the high price of proving innocence. As with a number of claims seen by ITIC, this example illustrates that you don’t need to make a mistake to be sued and you could find yourself on the receiving end of legal proceedings, even if you are not at fault. You should also read the report on legal costs on the back page of this document.

Hydrographic howler

A hydrographic surveyor was appointed to conduct a survey for a harbour authority. The surveyor made a mistake taking the readings as they had not allowed for the depth of the transducer on the survey vessel. A total of three data sets were taken, each containing the same error. This resulted in the readings showing half a metre too little and the harbour authority restricted access to the harbour for certain seagoing vessels.

Fortunately the parties involved were able to reach an amicable solution instead of bringing a claim against the surveyor.

It is very unusual for such issues to be resolved so harmoniously and more often than not ITIC has to get involved, whether to preserve commercial relationships, or in order to support Members through the litigation process.



A sinking feeling

A naval architect was approached by a research and development company who had produced a prototype “wave power generator” (WPG), a floating device used to convert ocean wave energy into electricity using air pressure created by waves. The naval architect was engaged to provide the necessary design and stability approval for the prototype, as required by local regulations.

Prior to accepting the instruction, the architect provided to his client his Standard Trading Conditions (STCs). Those included various liability exclusions and a clause limiting the liability of the architect to the amount of his fees.

Designs and drawings were approved by the architect, on the condition that the device was to be operated in “inshore and partially smooth areas” and was to be removed from service six months after being launched.

The scope of work continued to evolve and the architect was involved in re-designing the device to the client’s budget constraints. Eventually, the device was launched and operated successfully for two months before partially sinking in heavy weather. The maritime authorities required the device to be removed before it sank completely and became a navigational hazard.

The client subsequently issued proceedings against the naval architect alleging that the architect had failed to comply with terms of the design agreement, and claimed over USD 500,000 in damages. Lawyers were appointed by ITIC to act for the naval architect.

The lawyer’s advice was that the naval architect had strong grounds on which to defend the claim and that his STCs would stand up to limit his liability to around USD 10,000.

ITIC put up a robust defence for the architect, and the onus was put on the claimant to properly set out and evidence their claim. After some months of silence, the claimant’s solicitors advised that the claimant had no further funds to pursue their claim, and would therefore be withdrawing it.

The incurred legal costs of USD 40,000 were covered by ITIC.

This is another claim which illustrates the importance of contracting under well drafted STCs, particularly where, as in this case, the work involves cutting-edge designs.



Shipbroker gets lost commission

A shipbroker fixed a ship on time charter from owners to charterers and then a voyage charter from the time charters to voyager charterers.

The voyage charterers narrowed laycan to 12th July - 22nd July. At the time of fixing, the ship was discharging, with an expected departure on 17 – 18th June and then ballast to make delivery well within the agreed laycan.

The discharge of the ship was unfortunately delayed and on 18th June, while lifting a bulldozer from one of the holds to shore, an accident took place and the bulldozer was dropped on to the tanktop of the hold from 11m height. As a result the ship had to have the fuel oil tank under the hold pumped empty prior to any hot work, which was required. The ship was delayed more than one month and the voyage charterers cancelled the charterparty. The time charterparty was also cancelled.

As a result, the shipbroker had lost commission on both charters. However, they had purchased full loss of commission insurance and were able to recover the lost commissions under their policy with ITIC.



Grand theft marine

Cash was stolen from a Master's safe on a vessel. The matter was reported to the local police and investigated. The Master also initiated his own onboard investigations.

The safe had a combination lock and only the Master knew the combination number. It was thought, after the Master's investigation, that one of the crew was the thief, but he had left the ship before the missing cash was detected and was unavailable for further questioning. The suspected crew member was often seen in the Master's cabin and had possibly sighted the combination of the safe when he asked the Master for additional cash from his allocation.

ITIC's Member was insured for loss of cash on board and was reimbursed by ITIC the USD 18,000 stolen.



The high cost of enforcing your right to commission

A survey of London solicitors by ITIC shows the high cost of litigation. A simple claim for commission in the English Courts will cost over GBP 175,000.

ITIC gave a panel of London solicitors – all who had previously been instructed on cases involving ITIC's members – a claim scenario involving a broker who had been cut out of commission. The solicitors were asked to estimate the costs that the broker would have to pay to take the matter to court.

The average estimate of the costs was GBP 177,163.

The claim story given to the solicitors was based on actual cases financed by ITIC under its debt collection cover.

The scenario considered by the solicitors involved a sale and purchase broker. The broker claimed that he had introduced the principals and done the original groundwork towards the deal. The broker claimed they had then been cut out at the last minute and replaced with another broker who had simply "tied up the loose ends". The sellers denied they had any commitment to the brokers.

A dispute of that nature is likely to involve no more than a couple of witnesses and an expert giving evidence on each side.

If at GBP 177,163 the cost of winning was expensive then losing would be even more so. Under the English legal system a losing party is responsible for the opponent's costs. The solicitors estimated that the likely additional liability if the broker lost would amount to GBP 139,687.

This would bring the total costs liability faced by the broker to GBP 316,850.

The survey does demonstrate the value of ITIC's debt collection cover which pays not only for the broker's own costs but also for the potential liability to the opponent. ITIC has been providing this cover for many years (it can trace its origins back to the 1920s when the Club was formed specifically to collect unpaid commissions). Thankfully few cases proceed all the way to a trial and many will settle at an early stage, often without the need for formal legal proceedings. It is important however that brokers have a sufficient level of cover to fund the matter going to litigation.

If you wish to discuss your current level of cover or to purchase debt collection cover for the first time please contact your Account Executive or Charlotte Kirk.



For all updates and information follow ITIC on Twitter: @ITICLondon

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ITIC
IS MANAGED
BY **THOMAS
MILLER**

For further information on any of the products, services or cover provided by ITIC contact Charlotte Kirk at:
International Transport Intermediaries Club Ltd, 90 Fenchurch Street, London EC3M 4ST.
tel + 44 (0)20 7338 0150 fax + 44 (0)20 7338 0151 e-mail ITIC@thomasmiller.com web www.itic-insure.com
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