ITIC

SPECIALIST PROFESSIONAL INDEMNITY INSURANCE

Claims review 34

April 2016

More than you were asked to do?

Marine surveyors in Germany were engaged by charterers to attend the loading of a cargo and report on any damage caused by the stevedores. The subsequent emailed instructions contained (in translation) the following provisions:

"We hereby order the following:

- Supervision of the loading/preloading survey
- Reporting of eventual damages to the coating or the material - and time of damage
- Reporting of negligence while handling of the material and loading
- Detailed documentation with photos of the loading operations
- This time no continuous supervision will be necessary, only during the important moments (commencement of loading operations - change of shift - securing of the cargo)."

The loading and lashing was completed and the ship sailed. Three days later there was a large noise from the cargo hold and the ship developed a 30 degree list. The master reduced the list by ballasting and diverted to a port of refuge. The cargo was discharged, sorted on the quay, reloaded, lashed and secured. About 600ts of damaged cargo was left behind. Over 10 days later the ship sailed to continue the voyage.

Owners alleged that the cargo had shifted due to poor stowage and ultimately obtained an arbitration award against the charterers for €1.56 million. The charterers subsequently held the surveyors and the stevedores (who loaded the cargo) jointly liable for €1.56 million.

ITIC arranged for lawyers to represent the surveyors. The claim was rejected on the basis that (1) the stevedores were responsible for the loading and stowage and (2) the surveyors instructions were limited to reporting on stevedoring damage caused during loading. The potential difficulty with this defence was that the charterer's email instructions could potentially be interpreted as giving a wider obligation. In the circumstances a contribution to settlement of the claim of US$ 156,100 (about 10%) was agreed.

Although the contribution made was, in percentage terms, relatively modest the claim is an example of how the wording of instructions can potentially widen the scope of the surveyor's liabilities. If the brief is understood to be restricted to a specific task it is important to make sure this is clearly recorded.

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IS MANAGED
BY **THOMAS MILLER**

Shipbroker leaves message for another day

A London broker was the sole broker in relation to a contract of affreightment ("COA"). The COA contained a base freight rate for Rotterdam discharge. The freight rate was stated to be on the basis of a specified discharge rate.

The broker was told by charterers that in the future they may wish to sell a cargo for discharge at a port that was not mentioned in the COA. The charterers had indicated that this would be at a slower discharge rate than the figure used for Rotterdam. The owners responded that if the discharge rate was the same as Rotterdam it would be the same freight.

The broker noted that owners had not responded on the basis of the lower discharge rate and carefully reported to charterers exactly what had been said. At this point the broker went on holiday and was on a beach when he received a message from charterers which read:

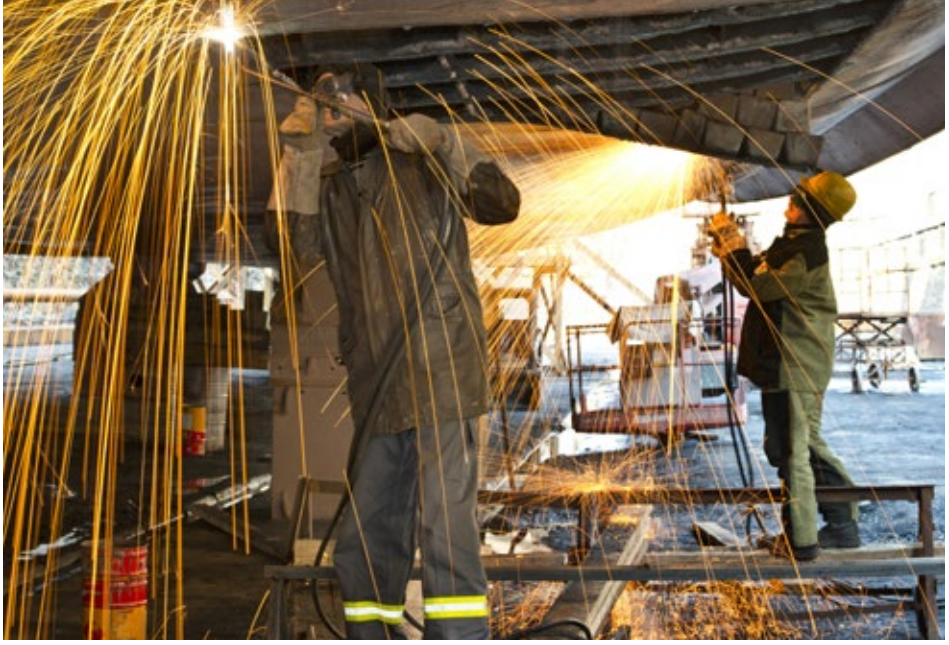
"As we had discussed last week we have noted owners confirmation to use same Rotterdam CP rate for discharging vessel basis the same discharge rate. We confirm the same and shall let owners know as and when we have cargoes."

The broker felt that the message did not require action and did not forward it to owners.

A few months later the charterers nominated a cargo on that basis. The parties disagreed about the freight rate. Charterers insisted that they had a deal at the Rotterdam freight rate. Owners said that the rate they had given was merely indicative and they had not made a formal offer.

Charterers brought a claim against the broker. They pointed out that they had sold the cargo on the basis of the Rotterdam freight rate. They claimed that had the broker passed on their "acceptance" message owners would have responded saying the rate was only an indication and not binding. In those circumstances charterers would not have sold the cargo at the same price.

Ultimately a solution was reached. Owners reduced their freight requirements to nearer the Rotterdam figure and the broker contributed US$ 50,000 to the additional freight. ITIC reimbursed the broker.



Design defects

A marine consultant was engaged to undertake the design, approval and tender process in respect of the construction of a double hulled bunker barge. The barge was intended to service the local market and to replace an existing barge which had a licence to operate with two years left to run. The customer and marine consultant signed a "Professional Services Agreement" (the "Agreement").

The marine consultant sub-contracted the design of the barge to a naval architect.

The customer entered into an agreement with a Vietnamese shipyard for the construction of the barge. Construction commenced but the project fell behind schedule and the Professional Services Agreement was terminated by the customer. The customer alleged that there had been numerous delays caused, at least in part, by design errors.

The design defects alleged to have delayed the project included:

- Inadequate bow height
- Excessive noise (The customer said the design failed to take account of IMO prescribed noise limits)
- Failure to include an aft peak bulkhead in the design.

The marine consultant's position was that the customer was not entitled to terminate the Agreement because the delays had been due to multiple acts of disruption and interference with the naval architect's work by the customer. In addition the marine consultant claimed that any design errors were simple to remedy.

The customer entered into an agreement with the owners of another bunker barge to charter that barge for a period of 6 years. The unfinished hull in Vietnam was sold for scrap.

The customer commenced proceedings against the marine consultant and the naval architect claiming that they had suffered losses in the amount of US$ 10m.

Experts were engaged to advise on liability. It was clear that while there were design errors these were not as serious as alleged by the customer. Forensic accountants reviewed the quantum of the customer's claim. Their review of the alleged losses indicated that, on one view, the customer had in fact gained a financial advantage as a result of their hiring of a substitute barge.

The matter was resolved by mediation and settled for US$ 5m.

Not by rail

A ship agent booked two containers of manganese ore to be shipped from Surabaya, Indonesia to an inland container depot in India via Mumbai.

The carriage from Mumbai port to the inland container depot was to have been by rail. When the containers arrived at Mumbai it was discovered that there was a ban on the transportation of manganese ore by rail. The two containers had to be transported to the inland container depot by road.

The consignee claimed US$ 19,500, being the costs of trucking the containers as well as additional expenses incurred in India, from the shipping line who in turn directed the claim to the ship agent. ITIC reimbursed the agent.

No inspection today

Ship agents in Australia were nominated by the charterers of a bulk carrier loading grain.

Prior to loading, local regulations required that the vessel was inspected by a quarantine officer and it was the agent's responsibility to make these arrangements, which included submitting a booking form to the quarantine department.

The ship agent spoke to the quarantine officer over the phone, but then forgot to submit the written request for an inspection until 10 minutes after the designated cut-off time.

The agent realised his error, and spoke to the quarantine officer but he was non-committal and could not confirm that an inspection could take place immediately upon arrival of the vessel at the berth (which he would have been required to do had the written request been sent in time).

In the end, the inspection did not take place until 24 hours after the vessel's arrival. As a result, loading was delayed by 24 hours and the agents received a substantial claim not just for the lost time but also for cancellation charges the charterers had to pay to the terminal operators for stevedores and other service providers who had been booked. A settlement of US$ 50,000 was agreed.

No Aussie grains - what never?

Not all errors lead to a financial loss although the broker may lose the principal's business.

A recent "near miss" involved a broker fixing the time charter of a bulk carrier. The owner specified that he wanted the agreement to be "no Aussie grains" reflecting the high costs of complying with Australian regulations. The charterer countered on the telephone "no Aussie grains as first cargo".

The broker failed to pass this qualification on. When the error was discovered both owners and charterers reserved their right to claim against the broker, although the fixture was for a six month period. The charterers did not ultimately have an Australian cargo and so no claim materialised. The principals opinion of the broker may have taken longer to repair.

Transhipment errors

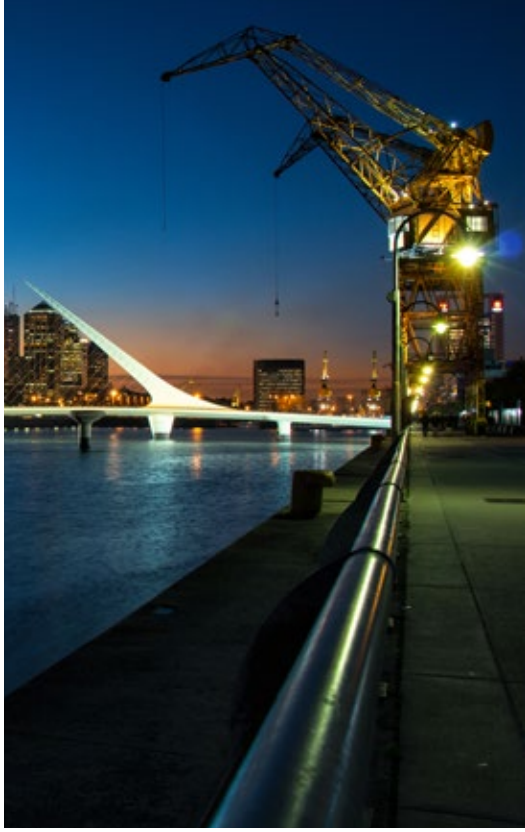
Every year ITIC deals with claims that result from errors by agents dealing with transhipment cargo. The following two claims are typical examples of the things that can go wrong. In one case no declaration was given to the authorities and in the other case the information given to the cargo interests was wrong.

An agent in Argentina failed to declare the cargo as transhipment cargo within 15 days of the vessel's arrival in Buenos Aires. This was a simple oversight in the agent's office. The obligation to make the declaration is strictly enforced and an automatic penalty of 1% of the value of the goods was immediately imposed. In this case the penalty was US$ 122,204. The agent who had failed to make the necessary declaration had to pay the sum the authorities demanded.

In the other case an agent in the Dominican Republic was involved in the transhipment of two containers that arrived from Cuba with a final destination of Haiti.

Under Dominican Customs Law, in common with many customs regimes, cargo awaiting re-exportation can only be held in storage without paying the relevant customs duties provided time limits and other regulations are complied with.

The agent kept in regular contact with the shipper who was waiting for some documentation to be provided by the consignee in Haiti. As time passed the agent obtained



an extension of the time limit for storage of the containers. Unfortunately when reporting to the shipper the agent made a typographical error and the email read that the extension expired on the 26th January when it should have said the 6th January. The result was that the cargo was impounded by customs when the containers were not exported before the deadline. Ultimately a penalty of just over US$ 25,000 was settled by the agent.

Shipbroker's commission saved from the waves

Shipbrokers specialising in the offshore market arranged the charter of a semi-submersible "flotel" (a type of accommodation unit). The contractual period comprised two separate periods in successive years.

Shortly after the first period had commenced the unit was hit by a 24 metre high wave causing substantial damage. Charterers issued a notice of termination of the remainder of the first period and reserved their right to cancel the second period if the significant damage to the unit was not repaired.

The shipbrokers had entered a written agreement for commission of 1% of the hire paid. The termination of the first period of charter ended the prospect of receiving that commission. Although the cancellation was the result of an event outside their control the shipbrokers faced a potential loss of income on the first period of US$ 206,444.

The shipbrokers had however protected their income by purchasing ITIC's loss of commission cover. ITIC's comprehensive policy covers the shipbrokers for "commission income [….] not being paid by reason of your loss of legal entitlement to this income because of the termination of the contract due to […] any perils consequent on, or incidental to the navigation of the seas".

ITIC covered the lost commission of US$ 206,444 that would have been payable for the balance of the first period. The unit was repaired and returned to charter for the second period. The shipbrokers therefore received commission for the second period in the usual way. Had the second period also been cancelled the lost commission would have been covered by the policy and the shipbroker's income protected.

ITIC offers two types of loss of commission cover, the simpler being loss of commission resulting from the charterparty being terminated due to actual or constructive total loss of a vessel. The more comprehensive cover includes loss of commission due to a charterparty being cancelled for a wide range of marine perils, such as heavy weather, fire, piracy, collision, engine breakdown and negligence of master or crew. Insurance is offered either on an individual declaration of a charter, sale or purchase, or the more popular annual cover for all fixtures concluded throughout the year.

Contact your ITIC Account Executive, or insurance broker, for more information.

Crossing the line

A marine surveyor was appointed by the owners of a ship that had been involved in a major casualty which had involved significant loss of life. There were potential criminal charges arising out of the incident.

The local police had taken possession of the vessel while investigations as to the cause were underway. The surveyor was invited to attend the vessel by the owner's fleet manager. On reaching the wreck no one stopped them from going on board. Subsequently a joint survey with all the parties involved including the Public Prosecutor was carried out. During the joint survey the member indicated to the Public Prosecutor various points of interest in the wreck. When queried about his knowledge of the places, the surveyor responded that he had been previously on board with the fleet manager. The surveyor had assumed that the fleet manager had been authorised to take him on board.

The Public Prosecutor considered charging both the fleet manager and the surveyor personally with tampering with evidence. The surveyor's employer had purchased ITIC's Directors and Officer cover. This additional

insurance covers legal costs arising from criminal charges that would fall outside the scope of a professional indemnity policy. A specialist criminal lawyer was appointed and the matter was resolved.

Directors' & Officers' insurance (D&O) is a personal insurance purchased by the employer for the benefit of its directors and officers. ITIC's D&O product protects both individual directors from claims against them in person and also the company that has to indemnify these senior staff.

Contact your ITIC Account Executive, or insurance broker, for more information.

Container weighing

With effect from the 1st July 2016 the IMO have put in place an amendment to the Safety of Life at Sea Convention (SOLAS) which will require that all containers loaded onto a ship for export have a verified gross mass (VGM).

This amendment restates and clarifies the shipper's existing responsibility to provide accurate cargo information, specifically in relation to the weight of containers being loaded. Therefore, shippers, freight forwarders, ship operators and terminal operators will all need to implement procedures to ensure they are prepared for this regulatory change.

The basic requirement:
Before a packed container is loaded the gross mass will need to be obtained and communicated. Where SOLAS applies it is a violation to load a container without VGM.

There are two methods of weighing, permissible under the SOLAS amendment: 1) weighing the container once packed, or 2) weighing all the contents and then adding those masses to the container's tare mass as shown on the door end of the container.

A carrier can rely on the shipper's signed VGM document and does not need to check themselves. However, the shipper's VGM declaration must be signed by an individual representing the shipper. If the shipper has failed to provide VGM, this can potentially be resolved at the load port, providing the marine terminal has the necessary equipment and processes in place.

Not permitted – estimating the weight. It is the shippers' responsibility to obtaining the VGM of the packed container by the use of calibrated and certified weighing equipment, and cannot use a "said to weigh" method.

Further information can be found here on the TT Club website:
http://www.ttclub.com/loss-prevention/publications/container-weighing/

Terms and Conditions for Shipbrokers

Many shipbroking companies, including most of the larger ones, have started using standard terms and conditions. ITIC has encouraged this development and has produced a sample wording - ITIC's Terms and Conditions for Shipbrokers - which members can adapt to the needs of their individual businesses.

ITIC's Terms and Conditions for Shipbrokers set out the services provided by the broker. They also cover the need to comply with sanctions, bribery, money laundering and other legislation. The broker's obligation is to act with appropriate skill, speed and within the authority they are given. Other clauses deal with obligations of confidentiality and post fixture communications. Some of these obligations are, to some degree, implied by law but having them spelt out gives clarity and certainty.

Inevitably one reason to use terms and conditions is to limit the broker's liability in the event something goes wrong. Without the protection of a contractual provision the broker can face wide and unlimited liabilities. The scale of liability is often disproportionate to the earnings of the broker. All other service providers in the maritime sector seek to limit their liability to a reasonable sum. Ship owners for example, enjoy the benefit of limitation of liability in relation to cargo and other claims. The industry standard Bimco Shipman 2009 contract limits ship manager's liability to 10 times the annual management fee. There is no good reason for shipbrokers not to have similar protection if a negotiation goes wrong.

ITIC's experience has been that the introduction of terms and conditions by brokers has worked well and urges those who have not done so to obtain the protection that standard trading terms can give. The ITIC Terms and Conditions for Shipbrokers are freely available to members at **http://www.itic-insure.com/support/standard-trading-conditions/**

Specimen Terms and Conditions for Surveyors, Consultants and Naval Architects produced by ITIC are also available to members free of charge at **http://www.itic-insure.com/support/standard-trading-conditions/**.

www.itic-insure.com

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