

Claims Review

Copy Cat

A naval architect was approached by a customer to design a catamaran workboat. The customer provided the naval architect with a plan of their existing workboat and requested the final design and specification was to be based on that boat. The customer's stamp was on the plan and the naval architect assumed that the customer was entitled to use the plans.

The workboat was designed and a press release was issued to the trade press. Another naval architect saw the press release and claimed the catamaran was built to their design. They issued a "Cease and Desist" letter against the naval architect. It then became apparent that the customer had placed their stamp over the third party naval architect's details.

ITIC's member did however make significant design and specification changes to the original plans. ITIC instructed a barrister who specialised in copyright matters to consider whether these changes created a new design. The barrister advised that the onus of proof

on the naval architect was high as there was clear evidence that a third party's design was passed to them and clearly influenced their design. He was of the opinion that the changes to the original design were only refinements and did not evolve the design sufficiently far enough from the original.

The expert therefore advised that the only risk-free solution was to not continue with any of the existing designs otherwise if the build was to proceed the third party naval architect would seek an injunction to stop the work.

ITIC's member redesigned the workboat from scratch. The copyright expert reviewed the work and confirmed that the second design appeared to be original. The project proceeded with the customer and the workboat is now in the water.

Ultimately a claim for breach of copyright was prevented. ITIC covered the legal costs.

Cancellation confusion

Shipbrokers had arranged a voyage charter. They noted that the ship appeared to be delayed and would not make the original laydays. After discussing the options the broker understood that both the owners and charterers agreed to cancel the fixture.

The confirmation message recording the cancellation was - by mistake - only sent to the charterers.

Five days later it became apparent that the ship could still deliver within the originally agreed laydays and owners maintained

the fixture had not been cancelled, while charterers had in the meantime fixed an alternative ship to cover the position.

The ship was eventually fixed after 10 days waiting without employment, for a less attractive destination and at a rate substantially lower than the original fixture. The owners claimed US\$ 100,000 damages.

After a period of negotiation the broker contributed US\$ 40,000 to the owner's losses which was reimbursed by ITIC.



Dated description

Shipbrokers involved in negotiating period business received a revised description from the owners. The difference was that the original description described the ship as doing "abt 14 knots on abt 32 mt IFO" while the revision added "+ AE 2.6 mt". Unfortunately, the brokers used the old description when fixing the ship. Over the life of the fixture this led to a claim for US\$ 40,000 which was reimbursed by ITIC.

Code chaos

A shipper booked a shipment of 17 containers from Germany to China via Rotterdam, destination Jiangyin Terminal Fuzhou. The correct location code with the shipping line for this destination was CN JGY indicating the cargo was for Jiangyin International Container terminal, Fuzhou Fujian.

ITIC's member was the liner agent and used the code CN JIA in error. That code was for the Port of Jiangyin, located 900 km away by road.

The problem was only identified after shipment. The containers were discharged at Shanghai and redirected to the correct destination.

The total claim for transshipment and delay amounted to US\$ 70,000, which ITIC reimbursed.



Weight watchers

Ship agents were contacted by owners whose ship was being fixed to discharge at a West African port. Owners advised that they were intending to discharge 10 large tanks, each weighing 69 metric tons.

The agent prepared a proforma disbursement account but overlooked a section of the tariff headed 'Miscellaneous'. That section provided that all such cargo weighing above 50 tons or in excess of specified dimensions would be subject to a surcharge. The proforma disbursement account was sent to the owners without specifying the additional charges. The owners fixed their ship on the basis of the lower costs provided.

Before the ship arrived at port the manifest was sent to the terminal. This was the point that the additional costs were discovered. An invoice was sent to the shipper who rejected the extra costs as they had fixed on an 'all inclusive rate' with owners.

The owner claimed from the agent. While a proforma disbursement account is an estimate the agent had clearly been negligent. The agent was able to negotiate a 15% discount on the total bill with the terminal and the claim was settled for US\$ 22,600 which was reimbursed by ITIC.

Delay makes it unusual

ITIC has often assisted ship agents who have received demands from trustees in bankruptcy seeking to recover disbursements paid to the agent in the period shortly prior to their principal entering bankruptcy. The agent will frequently have settled with suppliers and face a loss if they have to return money. While ITIC does not cover the amounts at stake, agreed legal costs can be reimbursed under the debt collection cover.

Different jurisdictions have their own precise rules but generally these laws are intended to prevent individual creditors from wrongly jumping the queue and getting paid in full at the last moment rather than receiving

their proportion of the bankrupt's assets. Many jurisdictions have laws that provide that if the payments were made in the usual course of business on usual terms the trustee in bankruptcy cannot recover them.

A case reported to ITIC in the USA ended with a different outcome for two offices of the same worldwide agency company. The trustee in bankruptcy of their principals attempted to reclaim US\$ 107,000 from the ship agent's office in Africa and US\$ 70,000 from one in Europe.

ITIC arranged for a US lawyer to make representations on the agent's behalf.

The trustee in bankruptcy accepted that disbursements paid to the African office were made in the usual course of business and therefore did not have to be returned.

A dispute arose regarding the disbursements paid to the European agency office. The only difference was there had been considerable delay in that agent invoicing for his disbursements. The invoice had been submitted shortly before the bankruptcy for an earlier call. After a period of negotiation the member agreed to return US\$ 12,000 to settle the matter.

ITIC covered the cost of the US lawyer.

The importance of terms

A surveyor was appointed by an insurance company to assess damage suffered by a yacht following a heavy storm.

The insurance company did not confirm cover and the yacht owner issued legal proceedings against not only the insurance company but also the surveyor. The claim alleged not only a wrongful failure to pay the claim but also that the defendants had engaged in unfair and deceptive acts.

The claim was for the alleged cost of the damage to the yacht of US\$ 62,000. Under the heading of deceptive acts the claimant demanded US\$ 100,000 for mental anguish and US\$ 30,000 for attorney fees.

ITIC arranged for a local lawyer to defend the surveyor's interests. The insurance company denied that they had any responsibility for the claimant's decision to sue the surveyor and invited the surveyor to contribute to a settlement.

However, the surveyor had agreed to do the work on the basis of their terms and conditions. These contained an indemnity for claims from third parties not caused by the surveyor's negligence. In the circumstances the insurance company settled the claim without the surveyor providing a contribution.

ITIC reimbursed the surveyor's legal fees.

This claim shows how important it is for terms and conditions to be incorporated into all business dealings. ITIC's terms and conditions for surveyors and consultants, and guidelines for incorporating these, can be found at: <https://www.itic-insure.com/knowledge/standardtrading-conditions/standard-tradingconditions-indemnity-wording/>

Double trouble

A ship agent in Central America made two mistakes in relation to cargo on a ship coming into port which led to two customs fines.

The first error was that the agent misinformed the customer about the time limits for making a customs declaration. This led to a fine being imposed for late declaration.

The second error was that the agency employee in charge of entering the tariff codes typed an incorrect code, resulting in another custom fine of 20% of the taxes.

The customer claimed the amounts of the fines plus the costs of demurrage and storage for an additional week sorting out the problems before they could retrieve the cargo from the terminal.

ITIC reimbursed a total of US\$ 25,243 and the ship agent arranged further training for their staff.

Cows come home

A container of frozen beef was carried on a liner service between Australia and China.

Seven days after the ship departed Australia, the shipper realised that they had failed to obtain the necessary health certificate from the Australian Department of Agriculture and Water Resources prior to exporting the container. The shipper emailed the carrier's load port agent instructing them to return the container to Australia upon its arrival in China, without clearing Chinese customs.

The shipper received no response from the agent.

The shipper emailed the agent again 8 days later asking them to advise the status of the container, at which point the agent contacted the carrier who advised that the container had already landed in Shanghai and it was too late to send the container back to Australia without it being inspected by Chinese customs authorities.

That inspection took place, which required the Chinese authorities to break the container's seal. The container was subsequently returned to Australia but not before being delayed by about two months in China.

Because the container seal had been broken, upon its return to Australia the container was treated as a new import (rather than the return of goods previously shipped from Australia) so was subject to a full inspection by Australian quarantine authorities. Eventually the container was shipped back to China.

The whole Chinese and Australian inspections caused a delay of about two months, during which time the container remained on power, incurring additional costs.

The shipper argued the additional costs would have been prevented had the agent

acted upon their first request to turn the container around. The shipper brought a claim against the carrier for around US\$ 50,000, which the carrier passed onto their agent.

The claim had two components. As well as the additional costs the shipper claimed they had also been forced to agree a commercial discount in the sale price of the meat with their Chinese customer.

ITIC discovered that if the agent had acted on the email promptly the container could have been returned to Australia on the same vessel without the involvement of Chinese customs authorities. The additional costs were settled. Liability for the discount in the sale price was excluded under the terms of its bill of lading.

The claim was ultimately settled for US\$ 20,000, for which the agent was reimbursed by ITIC.

Parcel problems

A shipbroker was arranging a fixture involving the loading of a variety of parcels.

Various permutations of parcels and holds were discussed during the negotiations. Although the quantities set out in the recap were 2 parcels of 6,000MT and 1 parcel of 2,600MT (a total amount of 14,600 MT) the broker had become confused during the discussions and the cargo had been described to the owners as being a total of 15,600MT. The owners had used that quantity as the basis for calculating the freight rate. The charterers eventually loaded 14,900 MT, but the owners invoiced for the full 15,600MT.

The shipbroker had to pay the freight difference of US\$ 30,638 which was reimbursed by ITIC.





A GAFTA gaffe

An ITIC member, who is a surveyor, was appointed in 2013 by a buyer to sample a cargo of 3,000 MT of Ukrainian sunflower seed cake at a discharge port in Spain under GAFTA Rules. There was an underlying dispute between the buyer and seller as to the quality of the cargo. The surveyor, insured by ITIC, sub-contracted the job to a surveyor in Belgium, who in turn sub-sub-contracted the sampling to their office in Spain. The Belgian subcontractor was GAFTA approved. However, the Spanish office was not.

The buyer lost a GAFTA arbitration (and an appeal) because the Spanish surveyor was a) not GAFTA registered and b) made various mistakes in the sampling. The buyer therefore brought a claim in negligence against the appointed surveyor based in the UK.

ITIC insures members for their services carried out directly or through a subcontractor. Therefore, ITIC covered the claim in full, which amounted to GB£ 14,000 in GAFTA fees and US\$ 61,545 representing their lost dispute. Unfortunately, the sub-contracted surveyor (both Belgium and Spanish offices) went into bankruptcy, removing any chance of a recovery.



Unpaid disbursements

A ship agent in Spain was owed US\$ 12,000 in outstanding disbursements by the owner of a tanker which had called at a Spanish port under their agency.

Having sent numerous chasers to the owners, the agent asked ITIC to pursue the owners on their behalf under the terms of their debt collection cover with ITIC.

ITIC wrote to the owners who replied that payment could not be made until they had received a freight payment from their charterers in respect of a completely different ship. ITIC responded to say this was an unacceptable excuse, and that if payment was not made the ship would be tracked with a view to arresting it at the next suitable port.

Given the relatively modest amount of the debt, ITIC needed to ensure that the agent did not arrest in a jurisdiction where the legal costs would be disproportionate to the

amount due. In these circumstances costs can be minimised and legal action made financially realistic if the agent makes sure that their accounts are presented in a clear and accurate manner.

The ship was due to head to Malta where ITIC instructed lawyers to prepare the arrest documents. Unfortunately, the ship did not enter Maltese territorial waters, instead performing a ship-to-ship transfer operation offshore, meaning that she could not be arrested.

Noting that the ship was heading for Greece, Greek lawyers were instructed to prepare and file arrest proceedings. The arrest papers were served on her arrival. Almost immediately, the debt was paid in full. ITIC covered the costs of both the Maltese and Greek lawyers under the agent's debt collection cover, which came to approximately US\$ 6,000.

Swan necked

A naval architect designed a series of motor yachts for a yard. As part of the design contract, they were required to provide a drawing showing the down flooding points of the yacht. This drawing was to be provided on an "as built" basis. However, the drawing was never provided.

One of the yachts produced by the yard suffered water ingress through the engine inlet in heavy weather causing engine damage. The cause was due to the pipe attached to engine inlet valve parting. The yard alleged they were not aware that the water inlet was the critical down-flooding point and if they did, they would have made the fitting stronger.

The yard submitted a claim of EUR 180,000 to the naval architect in respect of the engine damage and rectification costs.

ITIC defended the claim on the basis that the "as built" 3-d model of the yacht produced by the yard showed a swan neck fitting on the engine inlet pipe. The only reason this fitting would be used in the final build was due to the yard knowing that the inlet was a down flooding point. The swan neck fitting was there to raise the down flooding point. Furthermore, the naval architect was not responsible for the material used. It was clear the fitting used to attach the pipe to the inlet was weak and contrary to class regulations. The yard was clearly at fault in using inferior quality material.

The yard on the other hand claimed that if the drawing had been supplied, they would have known the inlet was a down flooding point and they would have used stronger materials.

Although ITIC felt the naval architect had the better case they were clearly in breach of the design contract by not providing the "as built" drawing which meant that there was an element of litigation risk. ITIC therefore suggested an offer of EUR 55,000 be made in respect of unrecoverable costs and litigation risk. This was eventually accepted.

See more online at itic-insure.com

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