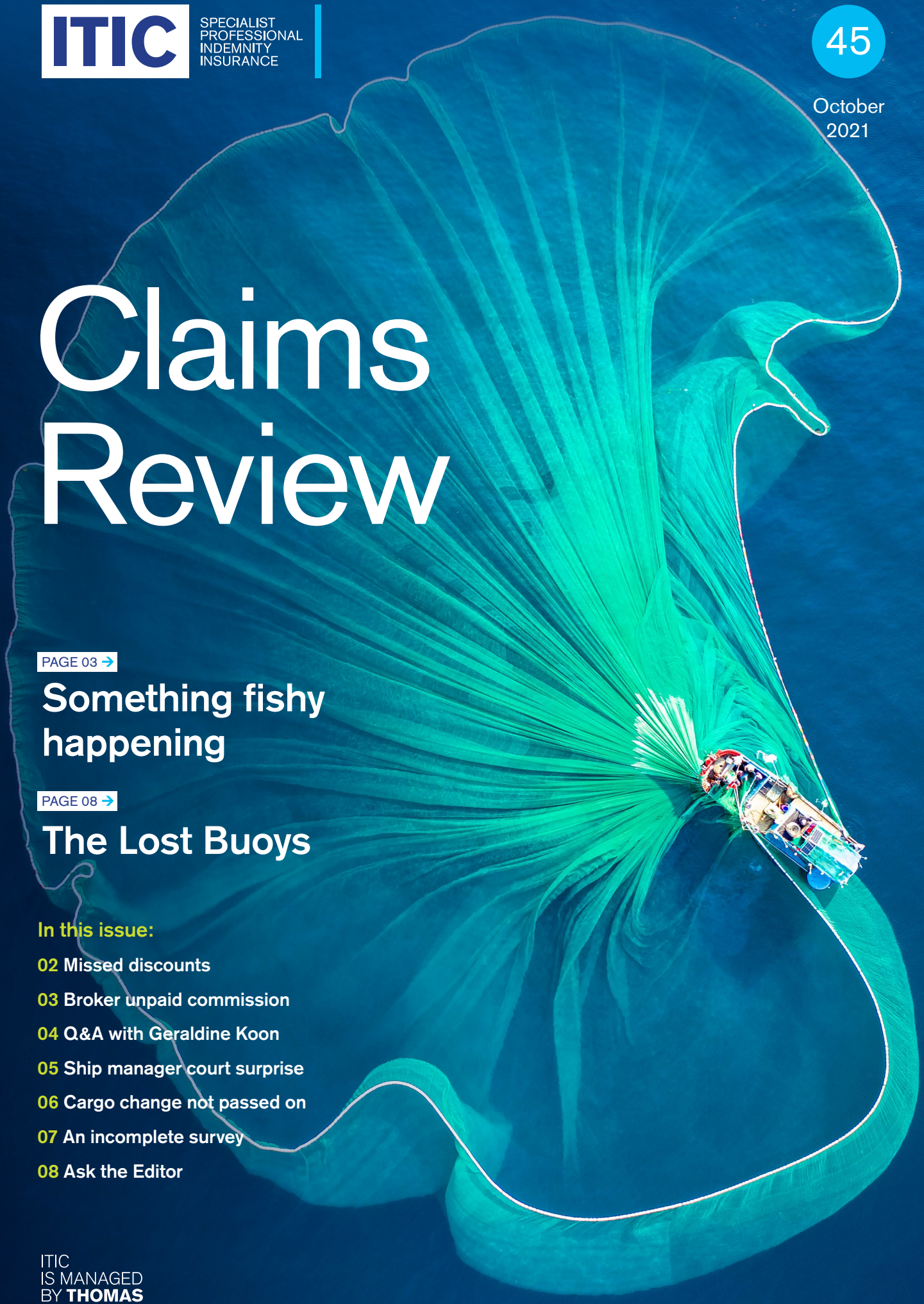
ITIC
SPECIALIST PROFESSIONAL INDEMNITY INSURANCE

45

October 2021

Claims Review



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ITIC IS MANAGED BY **THOMAS MILLER**

Welcome to the October edition of ITIC's Claims Review.

Hopefully many of you are beginning to get back to your office and life is becoming a bit more normal again. ITIC successfully hosted an almost complete board meeting (two directors joined the meeting virtually, with everyone else physically attending) at the end of September in London, for the first time since 2019. It was great to see the board back together after such a long time apart.

Whilst some travel is starting to pick up again, we are continuing to produce a number of webinars and podcasts, so that we can reach more of you than ever before. All of our webinar recordings can be found on the ITIC website: https://www.itic-insure.com/knowledge/webinars/ Numerous topics are covered, including shipbrokers' simple slips, IMO 2021, current claims trends for ship managers and a three part ship arrest series. There is also a webinar entitled "virtual robbery" which outlines cyber frauds and how all members can protect themselves against such digital threats. We continue to urge members to be vigilant against online frauds, particularly any requests to change bank details.

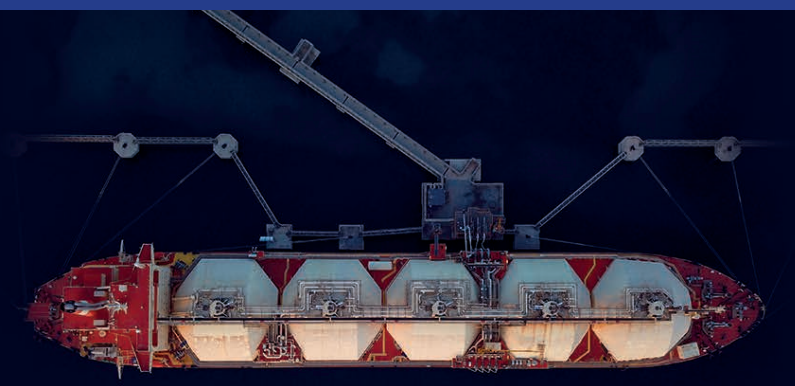
New episodes of ITIC's podcast series, ITIC Insight, continue to be released and uploaded to all of the major podcasting platforms, including Spotify, Apple Podcasts and Google Podcasts.

Episodes are hosted by members of the ITIC team, exploring a key topic with external guests or hosting an interview with a board member or insurance broker.

You can find all episodes here: https://www.itic-insure.com/knowledge/podcasts/

This edition of the Claims Review provides a selection of marine cases recently handled by ITIC. We hope that these case histories will be of interest to you and will also help you to identify potential problems in order to avoid these types of situations occurring in your businesses.

The Editor



Size matters

A ship agent was informed by one of their LNG clients that they should have benefited from a quantity discount on pilotage tariffs available at the port for which the agent had erroneously not applied.

The discount was available to individual ships, or a consortium, if the ship or consortium of ships achieved the frequency in calls indicated in the scheme within one calendar year.

There were a number of discount rates available, calculated on the length of the ship in metres and the amount of calls made. The lowest number of calls where the discount could start to apply was 18-36. Over 180 calls provided the largest discounts.

The client claimed that they were entitled to discounts for the years 2018, 2019 and 2020 which would have totalled EUR 280,000. One of the conditions to obtain the discount was that the application must have been made no later than 31st December of the year to which the discounts applied. Therefore, as the agent was not made aware of this issue until 2021 they were already time barred from claiming the discounts for the previous years.

The agent had previously claimed for the discounts in respect of the fleet of another client but the application had been rejected because the fleet had not made enough calls to qualify. Based on those numbers the agent did not apply for the LNG client as they had made even fewer calls. However, the LNG fleet had much larger vessels than the previous fleet.

The agent had negligently failed to realise that due to the bigger size of the vessels in the LNG fleet fewer calls were required to qualify for the discount. Whilst the smaller sized vessels required at least 61-72 calls a year to qualify for the discount, the LNG vessels qualified after only 18 calls.

As a result, it was clear that the vessels were entitled to the discount and the agent had not applied for them.

The claim was settled for the full amount of EUR 280,000 by the agent, who was reimbursed by ITIC.

Something fishy happening

A broker negotiated the sale of a fishing vessel. A Memorandum of Agreement ("MOA") was signed between the buyers and sellers which included a clause providing that the broker would be paid 2% of the total purchase price by way of commission.

The agreed purchase price was US$ 12m. The MOA provided that the buyer was entitled to withhold payment of the final US$ 1m from the purchase price until the seller had delivered to the broker a "Deletion Certificate" confirming that the vessel had been removed from the seller's national ship registry. The buyer paid US$ 11m. The remaining US$ 1m was not paid, and no Deletion Certificate was provided.

As the full purchase price had not been paid the seller refused to pay the shipbroker any commission at all.

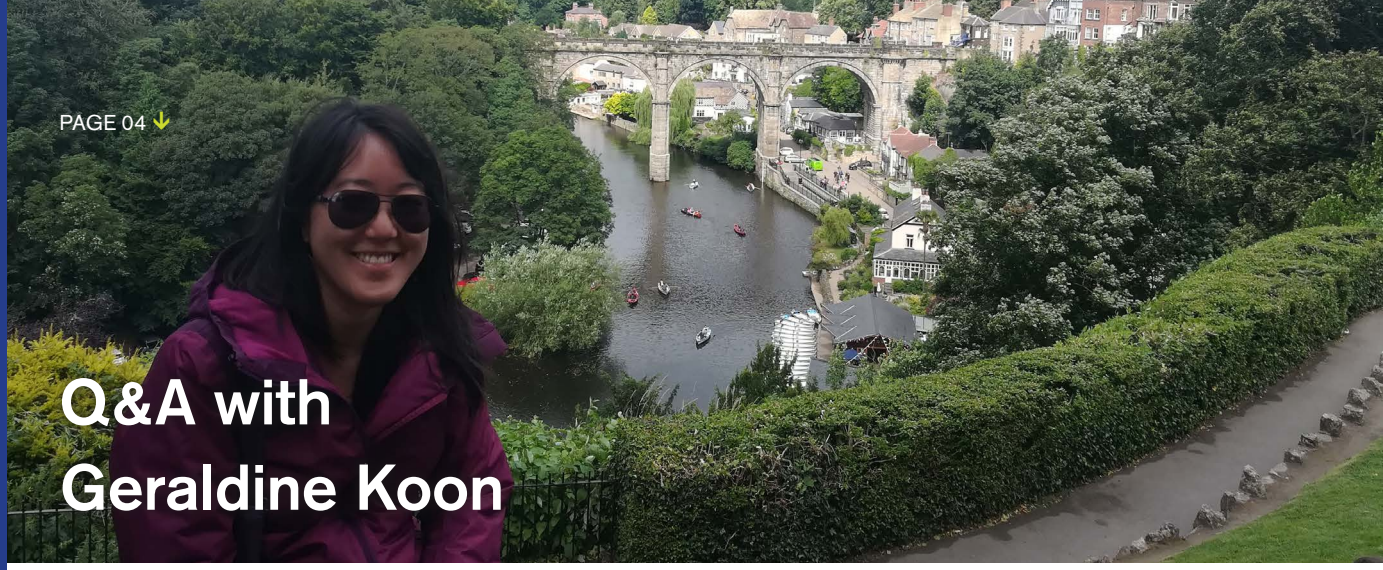
The seller had not been able to provide the Deletion Certificate because the vessel had two charges attached to it for a combined sum of US$ 1m. The seller claimed that they did not have the money to remove the charges and wanted the buyers to pay it for them.

The broker contacted ITIC as they considered that despite the issue with the final payment they were still entitled to be paid their commission on the US$ 11m actually paid. ITIC agreed and the broker placed their own charge on the vessel in an effort to obtain security for their claim. Whilst this did not prompt any response from the sellers, it meant that no Deletion Certificate could be issued without the broker's commission charge being lifted, so if the transaction was to move forward the broker was in a stronger position.

At the same time, the broker commenced arbitration against the seller in London, this being the dispute resolution mechanism in the MOA. The sellers refused to engage in this process and the arbitrator issued an award in favour of the broker for US$ 220,000, plus interest and costs (plus a further US$ 20,000 commission if the final US$ 1m was eventually paid by the buyer).

Eventually the buyers re-appeared and expressed an interest in wanting to properly register the vessel in their preferred registry – which they could not do whilst it was still registered in the original country. They had instructed London lawyers who also agreed to act as escrow agent in dealing with the exchange of documents and funds so as to ultimately allow the Deletion Certificate to be obtained. The buyer agreed that they would transfer the outstanding funds, which the seller agreed would be used to lift the charges on the ship register. The broker then agreed to lift their charge on the proviso that their commission would be paid. Once in possession of the Deletion Certificate and the final US$ 1m, the escrow agent simultaneously passed the certificate to the buyer, the commission to the broker and the balance of the purchase price to the seller.

The broker recovered US$ 240,000 in commission and the legal costs of US$ 25,000 were covered by ITIC.



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Q&A with Geraldine Koon

Geraldine is the newest member of the ITIC team, joining as a senior claims executive in August 2021. In this interview Geraldine sits down to chat with the Claims Review editor, where she outlines what she is looking forward to the most about her new role and we learn why Geraldine hates high shelves…

How long have you worked at ITIC?
I joined ITIC in August, so just over two months ago, which has flown by very quickly!

Where were you working before you joined ITIC?
I spent the 8 years before joining ITIC in private practice as a solicitor at Ince and MFB Solicitors, dealing with shipping claims, and in particular, casualty claims.

What are you looking forward to doing in your new role? I am looking forward to continue learning more about members' businesses, meeting members in person and travelling to see them.

Any life ambitions or future goals still to achieve?
I love travelling, so I hope to go backpacking in many more countries once that becomes possible again. I also love learning languages as that is a great way to get to know more people and their culture. I would like to learn another language or two and improve my fluency in the current ones I know.

What is your favourite saying?
Hmm tough one, "to err is human" is quite nice since it is close to the ITIC slogan "everyone makes mistakes." To combine my love for travel and Lord of the Rings, I'd say "not all who wander are lost…"

What are your hobbies and favourite pastimes?
I enjoy playing board games, swimming and cooking.

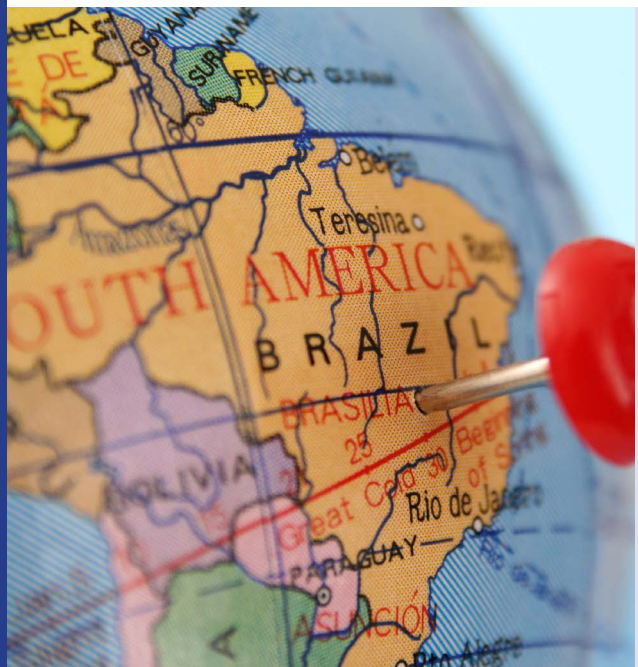
What is your favourite food?
I love food in general, but I have particularly enjoyed South East Asian food during my travels in several countries in the region.

What is your favourite film?
I quite like fantasy films and my favourite is the Lord of the Rings movies, and in particular the Fellowship of the Rings. It has fantastic scenery and music, and it also brings back nostalgic memories of seeing the movie with my college friends.

What is the last book you read or music you downloaded?
The ITIC Rule Book! More seriously, I enjoy historical novels and recently read The Glass Palace by Amitav Ghosh.

Any pet hates?
Tall shelves that I cannot reach! Or cars that stop on pedestrian crossings at red lights, forcing pedestrians to walk around them…

If you weren't working at ITIC, what would you be doing?
Probably travelling around the world and learning different languages (if I did not need to work at all!).



Miles not Acu-rate

A commercial manager was instructed to plan a voyage to Acu Port, Brazil.

In order to do this they used their own voyage calculation system. Unfortunately, the operator/ system generated a calculation based upon Acu, in the north east of Brazil – as opposed to Acu Port in the west - which equated to a difference of 1,288 nautical miles.

The charter was fixed on this basis resulting in a lower hire rate. The difference was US$ 960 per day. As a result the owner incurred losses of US$ 55,464.

There was no defence available to the commercial manager and the claim was paid in full by ITIC.

Court case confusion

A crude oil tanker suffered an explosion during repairs in the UAE resulting in severe damage to the vessel.

An extensive investigation was conducted by the UAE authorities and the matter was closed without any action being taken against the Master, the owner or the ship managers. The vessel was subsequently sold unrepaired and a settlement was reached between the owner and their hull & machinery insurers. The ship managers were not involved in this claim settlement.

Under the ship management agreements, the owner was obliged to name the manager as a full co-assured under the vessel's insurances. At the time of settling the claim, neither the owners nor insurers asserted any claim against the managers. The managers believed the matter to be over.

In 2019, some seven years after the event, the managers became aware that insurers had commenced litigation against them in the UAE in 2013.

The insurers' claim was against the managers and five other defendants, including the port agent, the inspecting chemist and various companies that had been repairing the ship.

The claim was for US$ 26m net of the vessel's scrap sale proceeds. All the other defendants were represented in the proceedings, but as the managers were unaware of the claim, they were not. The court ultimately found the manager liable and awarded the insurers US$ 20m plus interest at 9% until payment. The claims against the other defendants were dismissed.

Once the managers became aware of the UAE proceedings, with ITIC's assistance, they took steps to overturn it. The matter was appealed but it was dismissed on the basis that "it was not permissible." That decision was further appealed in 2020 and again, the appeal was rejected.

Therefore, despite no wrong doing, the ship manager had a liability to the insurers for US$ 20m plus interest in the UAE. However, it was extremely difficult for insurers to enforce the award outside the Gulf Cooperation Council as the UAE have no reciprocal enforcement agreements with any other countries, including where the manager was based. As the manager had no presence in the UAE and no assets in the country, the insurers were in a difficult position.

As a result of this ITIC commenced arbitration proceedings, on behalf of the managers, against the owners to tie any litigations elsewhere back to the management agreement and to secure an indemnity from the owners pursuant to the agreement.

As a result, a 'drop hands' offer was informally made by the managers to a settlement approach from insurers. This was rejected. In June 2020, subsequent to further exchanges between the parties a "without prejudice" settlement offer of US$ 540,000 was made, as this was the manager's maximum contractual liability limit under the management agreement. This was countered by the insurer with an offer of US$ 12.5m. After much negotiation, a settlement of US$ 1m was agreed as a full and final settlement of all court and arbitration proceedings. **The legal costs involved were almost US$ 500,000. The settlement and the costs, a total of US$ 1.5m, were paid by ITIC.**

Clause for concern

A shipbroker negotiated a short time charter on behalf of disponent owners (owners). The broker had worked with the owners for several years and it was their usual practice for the broker to use the rider terms of the owners' head charter when fixing sub charters. This meant the rider terms of the head charter and the underlying charters would be the same.

Towards the end of the charter period the ship was left idle for several days at anchorage. At redelivery, the owners insisted the ship had to undergo hull cleaning before they would accept her. They also claimed hire for all the time she was idle. However, charterers insisted that they had no obligation to pay hire under the terms of the charter, just the hull cleaning if required. It turned out the rider clauses in the sub-charter were different to those in the head charter.

Unfortunately, the broker had passed to the charterers a copy of a different charter's rider terms, not the disponent owner's rider terms. The charterers were therefore in their right to reject payment of the extra hire whilst the vessel was inspected and undergoing cleaning.

Ultimately the ship did not require cleaning but had already lost ten days in ballast to reposition to a port where the hull cleaning could have been performed if the ship had indeed required it. The charterers offered to pay for the hull inspection and no more. The owners stood by their claim of about US$ 75,000 for time in ballast and turned to the broker for a recovery. As the broker had sent terms to the charterer that the owners had not agreed there was very little defence. **A deal was reached whereby the broker paid the owners US$ 65,000. The amount was reimbursed by ITIC.**

Propane-ful mistake

A shipbroker arranged a fixture of regular monthly shipments of propane by way of a COA.

For one shipment the buyer required a different quantity of the cargo and messaged the broker with this request.

The operator in the broker's office failed to pass on the change of nomination and the usual cargo amounts were loaded. The sellers advised the buyers of the quantities of each cargo on board, at which point it became apparent that the change of cargo amounts had not been passed on.

The final receiver was not able to take delivery of the cargo as shipped and the additional cargo had to be discharged at a storage system and sold spot.

The broker's error in failing to pass on the message was causative of additional costs of deviation, demurrage, storage and a loss on the cargo sold spot.

The full loss totalled US$ 350,000. This amount was claimed from the shipbrokers and reimbursed by ITIC.

Tile shipper hits the roof

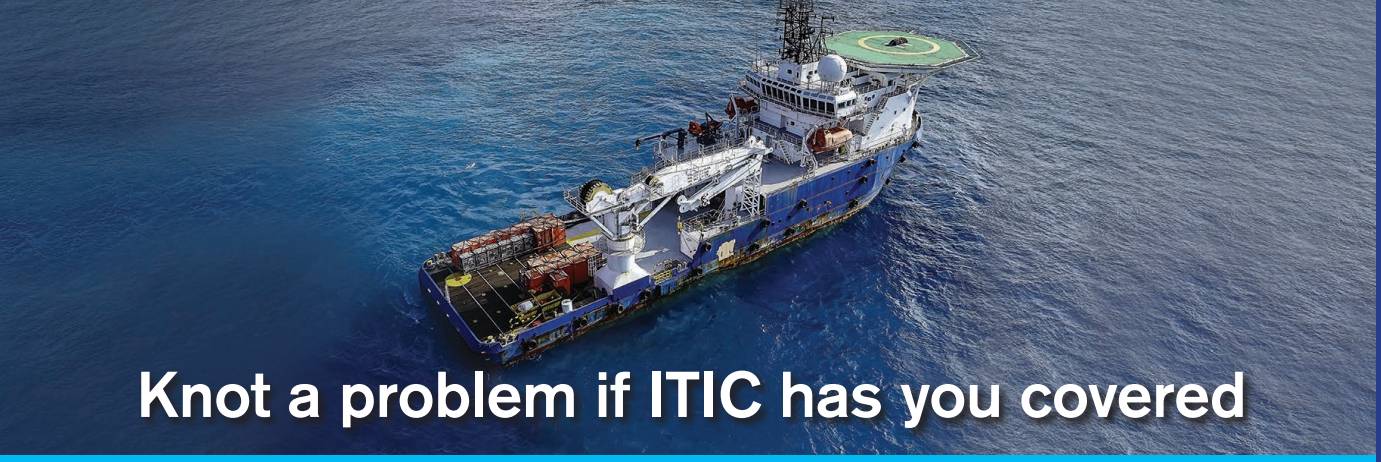
A liner agent accepted a booking for a shipment of 24 containers of roofing tiles which were to be carried by barge to the load port before being transshipped onto a vessel bound for the UK.

The agent entered the booking details into the line's booking system but failed to notice that the bookings were rejected by the line, due to lack of space. The agent went ahead and provided a quote to the shipper of US$ 2,300 per container, which the shipper accepted.

The containers were moved by barge and arrived at the load port at which point the mistake was noticed by the agent, who – without notifying the shipper – arranged for the containers to be shipped on the next available vessel. By this time, the freight rate had increased from US$ 2,300 per container to US$ 4,500 per container.

When the cargo arrived at the discharge port the line looked to the shipper to settle the additional ocean freight prior to releasing the containers to the consignee. The shipper refused to pay as they had not been notified of the higher freight rate, and had sold the goods to their buyer based on the US$ 2,300 container rate quoted by the agent.

The line looked to recover the difference in ocean freight from their agent on the basis that the shipper had a strong argument for not settling the outstanding amount. It was clear that the agent had been negligent in accepting the booking when they should not have done so, therefore the line was paid the difference in freight by the agent – the difference being US$ 2,200 per container x 24 containers = US$ 52,800. The agent recovered this sum from ITIC.



Knot a problem if ITIC has you covered

A consultant geophysical surveyor was on board a client's vessel performing a survey. Whilst measuring sound velocity in the water using a device owned by the client, the surveyor tied the measuring equipment with a poor knot which slipped, allowing the equipment to fall overboard. It was unrecoverable.

The surveyor's contract contained a knock-for-knock liability clause. This stated that the surveyor was not liable for any damage to the client's property, even if it arose from their negligence.

However, the contract was subject to Italian law and jurisdiction. Under Italian law limitations and exclusions such as knock-for-knock are only enforceable if they are specifically approved by the parties. This would mean having the parties' signature next to the clause. As these were standard terms and conditions the legal advice was there was a high chance that the knock-for-knock clause would not have been enforceable by the surveyor.

Therefore, the claim was settled on the best terms possible which was US$ 15,000 by ITIC.

Always get instructions in writing

A marine surveyor was requested to carry out an "On Hire Bunker" survey. Upon the surveyor's arrival at the ship, the Master verbally informed the surveyor that tank number 3 starboard and tank number 3 centre were outside of the chartering agreement and therefore should not be inspected.

The surveyor took the Master's word without checking with the instructing party and did not include the tanks in the survey.

It became apparent that the Master's advice was incorrect and the surveyor's client made a claim against the surveyor in the amount of US$ 38,000 due to losses they suffered as a result of the incomplete survey.

The claim was finally settled by ITIC at US$ 35,000.

This demonstrates that when performing a service you should not always listen to third parties' advices. You must always check with your instructing party. If there is a dispute, this should be resolved by the instructing party.

A poor technical point

A ship performed a charter and was then redelivered within the normal redelivery period as agreed under the charter party.

Shortly thereafter, the owners commenced insolvency proceedings and the ship was auctioned a year later. After the auction allegations came to light that the ship had been redelivered due to alleged poor technical management.

The ship management agreement contained an arbitration clause and arbitration was commenced by the owners. Owners put forward a claim for damages against the managers for alleged breach of obligations of the management contract.

The focus of the claim was the alleged faulty/delayed repair of an auxiliary engine which caused the charterers to put the ship off-hire and then, to terminate the charter. It was further alleged that this ultimately led to the insolvency of the owners and to the judicial sale of the subject ship which resulted in sale proceeds far below market price.

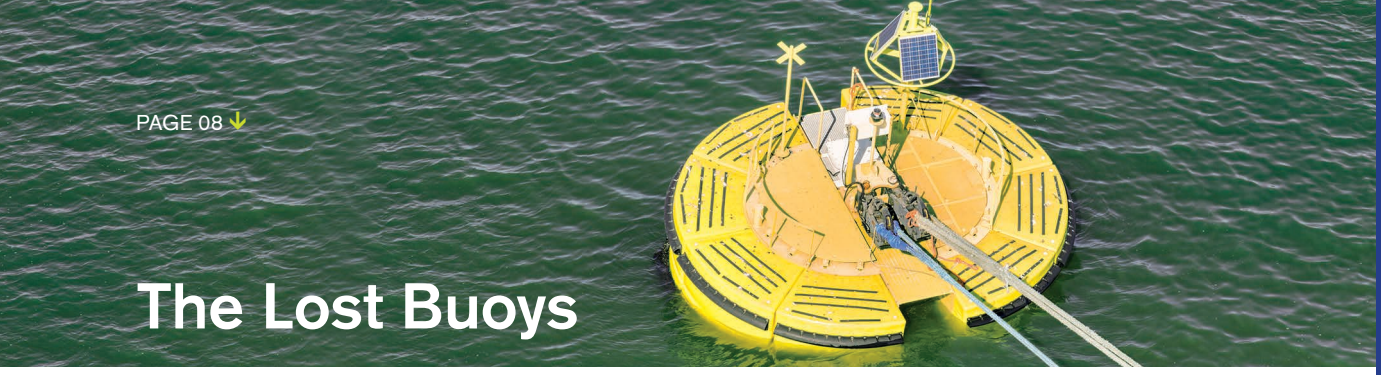
The owners claimed:
1. The difference between the market value of the ship and the price achieved at the auction;
2. Costs for failed maintenance/repairs of the auxiliary engines; and
3. Costs of the ship's voyage to the sale of the auction.

The total claim presented to the manager was US$ 5m. Arbitration proceedings were commenced. Witness examinations took place and after the evidence was heard the arbitrators gave a direction, which indicated that the evidence heard was in favour of the ship manager. There was nothing conclusive as to poor technical management in respect of the auxiliary engine.

The claimants admitted that the arbitrators' direction could very well be interpreted that the claim would most likely be dismissed.

Consequently, the claimants made a settlement offer to withdraw their claim subject to the ship manager waiving their rights to claim a considerable proportion of their costs from them. The offer was accepted by the ship manager and a settlement agreement was concluded.

The costs for the defence proceedings amounted to US$ 190,000 which was covered by ITIC.



The Lost Buoys

A marine surveyor was asked by their client to review the suitability of a proposed mooring arrangement of a buoy weighing 250 tonnes and measuring 12m in diameter. The buoy was ultimately to be used by ships loading iron sands at a remote port.

Prior to being deployed for use, the buoy was placed on a temporary mooring within a harbour. During a storm, the mooring chain broke and the buoy washed up on a beach.

The owner of the buoy incurred costs of US$ 1.8m in recovering the buoy from the beach and repairing it.

The owner alleged that the surveyor had been negligent in:
1. identifying the mooring load calculation;
2. assessing the wind and wave load that the buoy would have been exposed to; and
3. assessing the mooring capacity.

The owner issued proceedings to recover their alleged losses. Both parties engaged their own set of experts and, as the trial approached, it became clear that the case would turn entirely on the expert evidence and how convincing each expert would appear in court. Therefore, defending the claim was not without much risk for both parties.

Shortly before the trial was due to begin, the plaintiff put forward an offer of settlement. This was rejected but allowed settlement talks to begin. Ultimately, the matter was settled by the marine surveyor for US$ 450,000. Whilst this was a large sum it was significantly less than the original claimed amount. **The settlement sum and legal fees of US$ 100,000 were covered by ITIC.**

Ask the Editor

Please continue to send in your questions – we are enjoying them.
You can email us at askeditorCR@thomasmiller.com

My commission is being withheld due to the charterers failing to pay demurrage. Can owners do this?

Thank you for this question. This is something we are seeing more and more often. The answer is, subject to the terms of the charter party, **NO** they cannot do so. Once the freight or hire is paid, this triggers the duty to pay commission to the broker. The fact that a charterer may later dispute, or simply not pay, demurrage, does not alter the fact that commission is due. Even if the principal alleges that the broker has in some way failed to perform post-fixture duties adequately, this should still not entitle the principal to withhold commission payments. This would simply allow the principal to bring a claim for damages in respect of any losses they suffered arising from the alleged post-fixture failings. They cannot withhold your commission.

As a ship agent, we have been asked to accept a Letter of Indemnity (LOI) from a P&I Club with a time limit of five years. Is this acceptable?

When an agent is provided with an LOI by a P&I Club it is usually because the owner of the ship has a potential liability in that jurisdiction for which the agent may be held jointly or even solely liable. In order to obtain security in respect of such a liability the agent will often try to arrest the ship. In order to stop this from happening, the P&I Club will often provide an LOI to the agent stating that in respect of the agent refraining from arresting the ship (or lifting the arrest where it has already happened) the P&I Club will agree to hold the agent harmless and indemnify them against all losses and liabilities stemming from the incident. At this early stage it is difficult to know when or even if a claim will arise. Therefore putting a time limit or expiry date on the LOI could leave the agent exposed if there is a delay in the commencement of the claim or if the claim takes many years to work its way through the legal system. We would therefore recommend that an LOI with an expiry date is not accepted. If there is absolutely no choice, you should at the very least make sure there is sufficient time for the claim to be brought in accordance with local time bars (for example in the UK the claimant may have six years to bring their claim - plus an additional year to serve it - so seven it total) and for it to progress through the legal system, which may take an additional few years.

For further information on any of the products, services or cover provided by ITIC contact Charlotte Kirk at:
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