ITIC
SPECIALIST PROFESSIONAL INDEMNITY INSURANCE

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Ask the Editor

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ITIC IS MANAGED BY **THOMAS MILLER**

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

The ITIC board met for their March board meeting in Singapore. There was a drinks reception at the Asian Civilisations Museum which was attended by many members, insurance brokers and other important contacts. This was also attended by the TT Club who by chance also had their board meeting in Singapore during the same week.

We would like to extend our thanks to those of you who continue to submit questions for our "ask the editor" feature. Please send any questions that you may have to askeditorCR@thomasmiller.com.

This edition of the Claims Review provides a selection of marine cases recently handled by ITIC. We hope that these case stories 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

A series of unfortunate events

An offshore surveying firm signed a contract with an oil company, for the provision of geophysical surveys and geotechnical surveys over certain gas fields.

The gas extraction in that field had been interrupted some time before and the oil company was looking at re-starting extraction and further developing the field. The purpose of the survey was to provide an assessment on the condition of the seabed and fields before new drilling operations could commence.

During the provision of the surveys several events occurred, delaying the commencement and completion of the services by approximately 281 days.

The oil company claimed that the delay was caused by, amongst others, failure of equipment, issues with the ships that had been chartered by the surveyors, defective work, and non-completion of obligations and rectifications.

Therefore, it was clear that some delays claimed were not caused by the negligence of the surveyor, for example, those caused by operational issues with the ships or delays caused by bad weather. However, some delays were caused by the negligence of the surveyor and/or their subcontractors, for example failure to ensure the correct equipment was on board the vessel.

Furthermore, the contract contained a liquidated damages clause, which capped the surveyor's liability for delays at 10% of the contract price (approx. US$ 900,000). Originally, the claimant viewed all the delays as one event and claimed one cap. However, they subsequently advised that they were entitled to claim under three separate limitation caps of US$ 2,700,000. **The claim eventually settled at US$ 1,200,000. This was covered by ITIC.**

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Heartless owner

A yacht manager performed a successful coordination of a medical emergency response in respect of a crew member that felt ill. A helicopter collected the crew member from the yacht and took him to a hospital onshore. The costs, paid directly by the manager, were US$ 30,000.

The owner subsequently refused to reimburse the manager for the costs on the basis that retrospectively doctors opined the crew member had been exaggerating when self-reporting on his situation (the crew member believed he was in cardiac arrest) and that the manager should have known that the crew member was prone to exaggeration having a reputation as a hypochondriac.

ITIC defended the yacht manager's position that on the basis of the feedback received by the crew member the response was appropriate and in line with SOLAS requirements.

The owner remained adamant they would not pay and also refused to pass the matter on to their P&I Club as they were worried about their worsening loss record and upcoming renewal. The yacht management agreement stipulated the manager should be a co-assured on the P&I policy and therefore, the manager could report the matter directly. However, it transpired that the owner had not complied with their duties which deprived the manager of the right of a direct recovery from the P&I Club.

Ultimately, ITIC negotiated a recovery from the owner on the basis that (a) the manager's actions were reasonable and proportionate and (b) if the manager had been co-assured as they were supposed to be, the claim would have been recoverable.

The full claim of US$ 30,000 was recovered from the owner.

Be conditioned to check conditions

Managers were responsible for a ship between 2014 to 2017 subject to a shipman contract. After redelivery they were put on notice of a claim from the owners who alleged that they had suffered losses exceeding US$ 500,000 due to the managers' negligence. However, this negligence was not fully particularised.

In anticipation that a formal claim might follow, ITIC arranged for surveyors to inspect the ship and prepare a report so as to be able to assess and/or defend any such claim. This report noted that there were a number of deficiencies in the condition of the ship upon her redelivery to the owners, many of which the surveyor believed should have been rectified by the managers prior to the redelivery. One issue for the managers in terms of defending any claim was the lack of evidence regarding the condition of the ship when they first took it on as they had not taken any survey at that point – or shortly thereafter (which is something ITIC always recommend managers do).

Some 12 months later the owners' lawyers sent a demand for US$ 800,000 which included repair costs, off hire costs and bunkers which they alleged stemmed from the managers' negligence and the owners commenced arbitration.

The claim was ultimately settled for US$ 250,000. This offer took into account the litigation risk and the difficulty the managers were likely to have in evidencing what they considered to be the condition of the vessel when they had taken over the management. It also accounted for the fact that the next stage in the arbitration was to have witness statements taken, which would have cost at least US$ 50,000, so by settling these costs were avoided.

Interview with Matthew Offers

How long have you worked at ITIC?
12.5 years

How do you balance claims handling with your other roles and responsibilities?
It isn't always easy as claims often require more time and involvement due to the need to review previous correspondence, current correspondence and draft a response.

What is the biggest challenge when it comes to claims?
Trying to manage the member's commercial relationship with the claimant who very often is a client that they wish to maintain a long term relationship with – especially when the member does not appear to have done anything wrong.

What is the most memorable claim you have handled?
One I do remember is from my first year at ITIC which involved a reefer cargo of tulips which required specific changes in temperature during the voyage to ensure they were in good condition on arrival. Once I fully understood the process, which at the time seemed very involved, I was just amazed at how a seemingly innocuous error of judgement could cause such a large loss.

What is your favourite part of dealing with claims?
People like to find somebody who can help when they are in trouble, to hopefully sort things out for them. It is great when we can do this.

Any life ambitions or future goals still to achieve?
I'd like to set aside some time for travel in areas that I have not managed to get to yet, like the Far East and Australia/NZ.

What is your favourite saying?
Common sense is not that common.

What are your hobbies and favourite pastimes?
I play golf badly but I am at a stage in life when more physical activities are not advisable.

What is your favourite food?
A cold beer and a lamb vindaloo every time, much to my daughter's annoyance.

What is your favourite film?
Probably one of the usual suspects like the Godfather or All the President's Men, but more recently I did think that the new Top Gun film was well worth a watch on a Friday night.

What is the last book you read or music you downloaded?
I've just finished Robert Galbraith's The Ink Black Heart which involved the murder of an online creative type and the strange world inhabited by online trolls, it is very good but at nearly a thousand pages be prepared to set aside some time.

Any pet hates?
Far too numerous to list here as any of my colleagues/family will confirm!

If you weren't working at ITIC, what would you be doing?
I would presume I had won the lottery and be sat by my own pool.

Payment problem

A ship agent was appointed by owners who asked them to arrange a ship inspection for their ship which had been detained by the MCA (Marine and Coastguard Agency).

The agent was told by the MCA that they would not perform the inspection until both the inspection request form and the fees had been received at the same time. Although the owner transferred the funds in advance, they only sent the completed form a few days later. The agent was therefore not able to make the payment to the MCA until they had also received the inspection request form. The form was finally received on a Thursday afternoon and the agent sent the form and payment to the MCA on Friday upon receiving the green light from Owners. However, through no fault of the agent, the payment was only credited on the Monday, and the MCA would not carry out the inspection until the funds were cleared.

The owners alleged that members were negligent in not paying the MCA as soon as they had received the funds. They calculated the losses due to the ship being held in port during a weekend at £75,000.

Owners appointed lawyers who sent several emails regarding their claim. ITIC refuted their arguments in detail, including citing various provisions of the terms and conditions which had been incorporated - namely that there was no liability for delay which was not caused by the agent and there was a limit of liability of the agency fee (£1,500). The owners gave up and went silent.

In the meantime owners continued to refuse to pay the agent for their agency fees/disbursements, which totalled approximately £55,000 over five ship calls, all beneficially owned by the same owners.

ITIC advised the agent to wait until the nine month time bar (in the terms conditions) for claims against them had passed before chasing their own claim. After the nine months, ITIC sent letters to the owners demanding payment but received no response. This was followed by a threat of arrest and commencement of proceedings.

A response was received from the owner offering to drop hands. ITIC pointed out that their claim was now time barred. Owners had no choice but to agree that the debt was undisputed and finally paid the outstanding £55,000. ITIC covered the legal fees of £7,000.

Claim email sent to wrong address

Members, were shipbrokers between owners and charterers. Owners sent their demurrage claim to the shipbrokers to pass to the charterers. They sent it to the shipbroker's operations email address, despite 1) the recap specifying that any claims should be submitted to the brokers' claims email, 2) a further email the day after the fixture specifying the same email address and stating that important messages must be followed up with a call, and 3) the same email again being specified in the shipbrokers' email to owners reminding them of demurrage claims time bars. This final email also specified that if no acknowledgement was received, the shipbrokers should be alerted.

The owners' demurrage claim sent to the operations email was missed by the shipbroker. It was only seen by them two months later when they received an email from charterers asking for any demurrage claims and carried out an email search. The claim was passed on to charterers that day but charterers advised that the claim was already time barred.

Owners argued that the shipbrokers should have passed the claim on to charterers, irrespective of the email to which it was sent, which they did not. ITIC set out the various notices sent by the shipbrokers regarding the correct email to use and pointed out that they were not liable since the brokers' responsibility to pass on demurrage claims was on the basis that these were sent to the correct email address in the first place.

Owners did not pursue their claim, which eventually became time-barred under the shipbrokers' terms.

To hull and back

A yard contracted naval architects to provide designs for four identical hulls in the summer of 2021. The hulls were to be the basis of a passenger vessel, and three different owners were destined to take delivery of these.

During the sea trials, excessive vibrations were noted that risked causing damage to the hull's structure. With the architects' consent, initial modifications were made to the vessels but the problem persisted.

An expert was asked to provide an analysis to assist in identifying the root cause. This showed the problems clearly emanated from negligent design. On the basis of this report, the naval architect revised their design and further modifications were made to the first vessel. This resolved the issue and the first vessel was delivered.

Owners and the yard then looked to the naval architect to pay for the rectification costs of EUR 41,000. These were paid by ITIC.

Consignee conundrum

A ship was headed to a port of discharge to carry a petroleum product cargo. The charterparty contained a clause which allowed the charterers to change the port of discharge and subsequently the bills of lading in exchange for a Letter of Indemnity (LOI). The charterers invoked this clause. The owner prepared new bills of lading and sent these to the shipbroker to pass on to the charterer. However, the shipbroker forgot to pass on the new bills to the charterers.

In the meantime, charterers authorised the Master to sign the new bills of lading on the assumption that everything else, except the new port of discharge, had stayed the same. However, in the new bills the consignee name had, for unknown reasons, also been changed.

The new consignee collected the cargo before the error had been spotted. The actual consignee and the bank who had provided the letter of credit took action which delayed the ship.

These delays caused an initial loss to the charterer in the region of US$ 400,000.

The charterers claimed against the shipbroker for not passing the amended bills to them for review, as this, they say, lost them the chance to spot the error. ITIC reminded charterers of their duty to mitigate their losses and pointed out that it was the charterers who had authorised the Master to sign the new bills without actually having seen them.

After the charterers' mitigation of the claim, the damages amounted to US$ 75,000 which were then split three ways between charterers (as they had authorised the signing without seeing the bill of lading), owners (as they made the error with the consignee name) and shipbrokers (for failing to pass the document to the charterers for review). **ITIC paid US$ 25,000 in respect of the shipbroker's share.**

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Sinking feeling for tug owners

A ship agent was asked by the owners of a ship which was in difficulties in the Atlantic to arrange tugs to attend to the ship.

The agent arranged for tugs to attend the ship, but the ship subsequently sunk.

The agent received invoices from the tug company which they passed to the owner. The invoices totalled US$ 220,000.

The owner claimed that due to the loss of their ship they were in financial difficulties and unable to pay the invoice. They promised that payment would be made once the sale of one of their other ships had been completed but it was unclear when this might be. In the meantime, the agent was coming under pressure to settle the invoices of the tug company.

ITIC wrote to the owner but received no response. ITIC noted that another ship operated by the same owner was heading to a French port. France is considered an "arrest friendly" jurisdiction as it usually allows for the arrest of sister ships. The ship in question had a different registered owner but advice from French lawyers confirmed that an arrest should be possible as the beneficial owner appeared to be the same.

The ship was arrested and in order to obtain its release the owner placed security by way of a cash deposit into the court's account. The ship was released. Negotiations took place regarding the beneficial ownership of the ship. **Ultimately, the tug owner agreed to lower their demands to US$ 100,000 and the matter was settled for this sum by recovering this from the owner.**

Test rained off

Hull and water damage became apparent on a boat, which the owner alleged should have been noted during a survey but had been missed by the surveyor. The claim total was US$ 33,000 and court documentation was issued.

A lawyer was instructed to defend the surveyor. It was discovered that the surveyor had not performed a moisture meter testing due to circumstances at the time of the survey (it had been raining and the boat had just been pulled out of the water). Instead, percussion soundings were performed and no water damage was discovered.

Therefore the question of the surveyor's liability rested on whether the surveyor had been negligent in failing to warn the claimant that he had not used a moisture meter, due to the circumstances described above.

The surveyor had a limit of liability in their terms and conditions of ten times their fee (this totalled US$ 8,450). **This was proposed as a settlement and the claimant agreed.**

Poor performance

A claim was made against a ship manager for alleged failure of their duty in the supervision of the crew leading to poor crew performance and a poor standard of maintenance. The claim brought forward was for US$ 1 million.

The claim was brought by subrogated Hull and Machinery insurers who had already paid out to the owner. The managers were, as per the management agreement, fully co-assured on the H&M policy. Therefore, the main defence was that one insured could not bring a claim against another insured if they had already recovered their loss from the policy. The claimant stated that as the manager had no proprietary interest in the ship they could not rely upon the co-assurance regime if negligence was shown.

ITIC sought the opinion of a KC who firmly rejected this, as although they may not have a proprietary interest in the ship, they do have an insurable interest. The claim was settled on a nuisance value of US$ 50,000. **However, legal costs of nearly US$ 200,000 were incurred which were paid by ITIC.**

Label liable

A port agent in the Middle East was appointed by a Line to assist in the discharge of 94 containers.

Subsequently the port authorities levied a fine of US$ 333 per container as they did not have the correct IMCO labels for the cargo being carried in the name of the agent.

The agent requested that the Line take responsibility for the fine and settle the dues with the port authorities directly. Unfortunately, following lengthy discussions the Line would not respond claiming that the containers were correctly labelled and that as this was a Government cargo the port authority should claim against the ministry of defence.

Due to the military nature of the cargo no pictures were allowed to be taken at the time of discharge, leaving the agent unable to prove the Line's argument.

As this matter was a fine levied by a port authority the claim was covered by ITIC and paid in full in the sum of US$ 30,561.

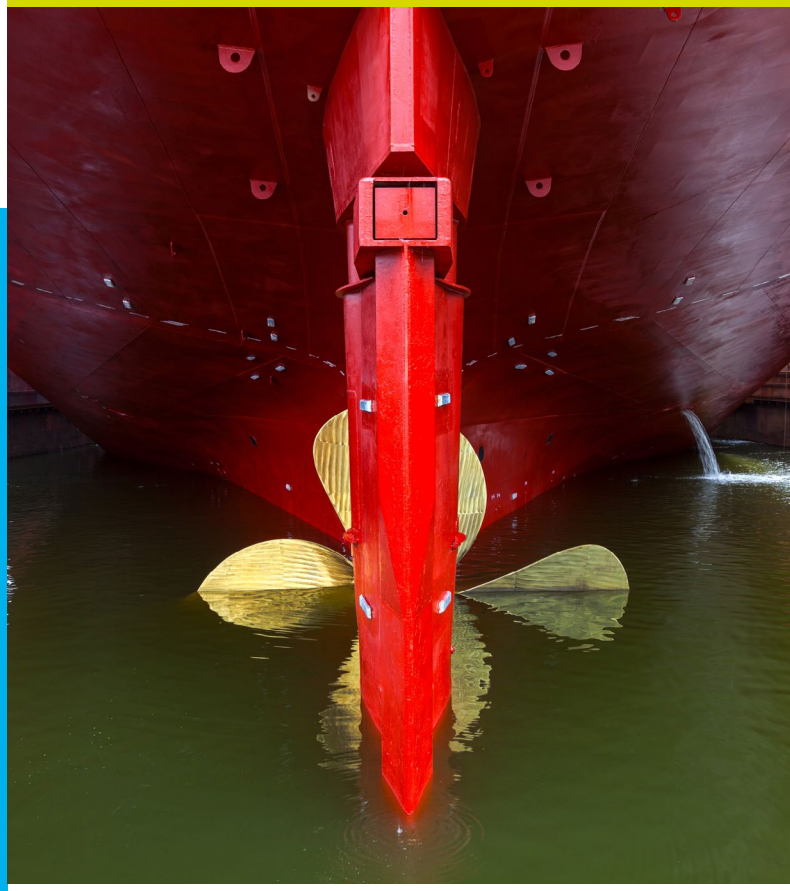
Bond, bonded warehouse

A ship agent took delivery of a cargo which was stored in a temporary storage warehouse at the port. The ship agent was meant to transfer and declare the cargo as "bonded". However, they failed to do so. The reason simply being they forgot.

As the cargo remained in the temporary warehouse for greater than the 90 days allowed, a customs penalty of EUR 75,000 was incurred.

There was no defence and the principal had to pay the penalty, which they claimed back from the agent.

This amount was reimbursed by ITIC.



Not ready for NOR

A ship agent in the US failed to issue a Notice of Readiness (NOR) to the terminal in time, resulting in a delay of just under five days.

The total amount the agent's principal was out of pocket was US$ 70,000. This was because had the agent tendered a valid NOR at the correct time time would have started running earlier. Due to the delay with the NOR the vessel was not on demurrage for part of the period which it would have been had the agent issued the NOR on time.

Luckily the agent had a good commercial relationship with their principal who agreed to accept 50% of their loss.

The total claim was US$ 35,000 which ITIC paid.

Ask the Editor

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

I have been asked to go to a mediation. Do I have to go – and what is it?

Thanks for this question, and it is something we are regularly asked. I am actually a big fan of the mediation process and many of our claims have been settled during or shortly after a mediation. Mediation is one of the Alternative Dispute Resolution (ADR) systems you often hear about. Alternative in this context being alternative to court litigation.

To address the first part of the question, the normal answer is no, you don't have to go. It is usually a voluntary process and ultimately it works better if people are there voluntarily rather than being forced unwillingly to attend. However, sometimes there may be a contractual obligation to attend. Other times the courts – as part of the litigation process – will require you to attend a mediation. Ultimately though, it is usually voluntary. That said, it is often frowned upon by the court if a party has refused (without a very good reason) to attend a mediation.

The actual mediation is simply a settlement meeting with a third party mediator to assist. The mediator is often a lawyer or expert in the field. Whilst the parties can, to an extent, do whatever they like in the mediation, usually all parties will begin in the same room with the mediator. Each party will state their case to the other. After this, the parties will retreat to their own rooms and the mediator will go back and forth between the parties trying to mediate a solution. Anything a party says to the mediator is completely confidential and the mediator will only pass it on with express instructions to do so.

The length of the mediation will be decided by the parties. Usually they are set for one day. We have seen deliberately short mediations ie 3 hours max. We have also had very long mediations where the matter is complicated and/or there are multiple parties.

The mediator is simply a facilitator and does not decide on the settlement terms like a judge or arbitrator. The settlement will be reached and agreed upon by the parties (or not). Due to this, there can be very imaginative solutions to problems which a court would be unable to accommodate.

Can we adopt new procedures to issuing bills of lading?

We occasionally get questions from ship agent members who issue bills of lading on behalf of owners, about whether they can adopt a different procedure to issuing the bills, for eg. sending a scan of the bill to the shipper who will then endorse the bill. Members should ensure that they discuss any new procedure fully with owners and get written approval from owners before changing an already approved process. While the new process may save time for all parties, where it is more difficult to know whether a bill of lading is an original bill, this potentially increases the risk of fraud. ITIC has seen increasing claims of fraudulent bills being presented to the disport agent and care must be taken that "original" bills are less easily reproduced or more easily recognised. Members should ensure that approval for issuing bills is also obtained from the actual party they are signing on behalf of – so if this is the Master/owners, approval must come from them, even if members are appointed or nominated by the charterers.

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