ITIC SPECIALIST PROFESSIONAL INDEMNITY INSURANCE

Marine surveyors & consultants

Claims Review

The claims examples reproduced here have all featured in issues of The Claims Review and are all case studies which have either been paid by ITIC or where assistance has been provided. These examples should be invaluable in helping you to identify potential claims exposure within your business. ITIC recommends that you review your procedures continuously in order that you avoid these types of situations occurring to you and your business.

The dangers of assumption

A large construction firm was undertaking building works on an island. In order to construct part of the project, a large crane was needed to be shipped by barge from the mainland.

The construction company asked ITIC's member, a marine consultant, for advice in relation to the carriage of the crane. This included the stowage and lashing arrangements. The advice provided included the separation of the crane boom from the main crane structure to avoid heavy stresses during carriage.

The construction company replied that they did not want to remove the boom due to the extra expense, but were happy with the other advice provided. As the marine consultant was not asked for an alternative method of lashing the boom, it was assumed that an alternative method had been sought.

During the voyage to the island, the vessel encountered heavy weather and the boom broke free from the main crane structure. There was a large amount of damage to the crane, and to a vehicle which was stowed on the deck at the time.

As the construction company had hired the crane they had to pay the rental company for the damage in the first instance. They then made a claim against the marine consultant for US$850,000 for failure in their duty of care to provide proper securing advice.

The marine consultant had made the assumption that no further advice was required but, due to their involvement in the project, was aware that the shipment was going to go ahead. Although they had recommended the separation of the boom from the crane, they had not made clear the likely consequences of not doing so. While the greater part of the blame would lie with others involved in the shipment the claim was settled by ITIC on behalf of the marine consultant for US$220,000.

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Collateral damage

A US bank instructed a marine surveying company to provide a valuation of a client's vessel to assess its suitability to be used as collateral for a loan. The bank was to be provided with a preferred ship mortgage by their clients.

The marine surveyors valued the vessel in mid 2007 as being worth US$900,000. On that basis, the bank alleged that they issued two business loans to their clients worth US$1,200,000, plus credit of an additional US$400,000 partly secured on the vessel.

In the latter part of 2008 the bank's clients defaulted on their loans. The bank seized the vessel and appointed a second surveyor to perform an updated survey on the vessel. This survey, in December 2008, valued the ship at only US$210,000, some US$690,000 less than the original survey.

The bank issued a claim against the marine surveyors in excess of US$1 million, representing the difference between the two valuations plus other associated costs. The marine surveyors argued that their valuation was correct at the time it was given; the global economic crisis had occurred between the two valuation dates and many vessels had dropped significantly in value over that period.

During the subsequent investigation, another valuation of the vessel undertaken in mid 2007 was found, which valued it in the "US$200,000" range. It was argued that the discrepancy in the valuations was due to the marine surveyor being informed by the chief engineer that the engines had recently been overhauled and had just to be 'hooked up'. The 2007 survey was conducted on the basis that the engines were of no use at all and that new engines would need to be purchased. It seems that the latter view was in fact correct, with the lower valuation being more accurate.

The matter was scheduled to be heard by a jury and there was a serious risk of an adverse finding. Even if the claim had been successfully defended legal costs were unrecoverable in the jurisdiction in which the trial would have taken place. In all the circumstances, ITIC settled the matter for US$200,000.

Wrong test used

In many trade contracts, where the specification of the product is important, buyers and sellers will often agree that the quality will be determined by an independent expert and that the expert's findings shall be "final and binding on both parties save for fraud or manifest error". In one case, an independent expert was appointed to test an oil product. Part of his instructions was to use a specific testing method (method A) to determine the density of the product. The expert decided not to use the testing method A, but instead substituted a more modern method (method B), which was deemed to be more accurate.

The product was sold on and a dispute arose regarding the specification. Although the expert had produced a report setting out his findings, these were not "final and binding" determinations because the method used did not comply with the contract. The buyers challenged the findings and what should have been a foregone conclusion became a protracted dispute. The seller was ultimately successful but sought to recover his irrecoverable legal costs from the expert who had not followed instructions. These were paid by ITIC.

Surveyors and other experts must ensure that they carry out instructions to the letter. If they intend to make changes they must obtain the customer's written authority to do so. If they do not, then they are likely to face claims for losses caused by their failure to follow the instructions given.

An innocent surveyor has to pay

A surveyor in Australia was appointed by a bank. The instructions provided to the surveyor were clear. They were to confirm the value of the vessel being built at a local yard and to certify to the bank when additional funds could be drawn down during the construction period. The bank confirmed that the surveyor was not required to monitor the standard or quality control of the ship's construction nor its conformity with design.

Defects were found in the ship after construction and the owners sued the ship builder, the surveyor attending to the quality control of the build and also the surveyor acting for the bank. Legal proceedings against all parties took two and a half years to conclude. A settlement of US$235,000 was reached at mediation with all parties contributing. ITIC agreed to contribute US$23,500 towards the total settlement and a further US$5,000 was incurred in legal costs.

ITIC always instructs marine surveyors to obtain clear instructions and/or to confirm in writing the exact services they are to provide. Unfortunately this does not always protect surveyors from legal action. This is an unfortunate example of where the cheapest option is for a surveyor to contribute to a settlement even though his instructions and responsibilities were clear from the very beginning.

Nineteenth-century yacht sinks

A marine surveyor was instructed to determine the suitability for towage to a drydock of a steel hulled yacht built in the nineteenth century. The surveyor produced his preliminary report which stated that, although the yacht needed a major re-fit, the towage could be undertaken subject to certain stringent requirements.

The yacht was safely towed to the drydock, where the hull was sand-blasted and the yacht refloated. It then became obvious that water was entering the hull at several points and the yacht was put back into drydock.

After repairs the yacht was again refloated but sank at her moorings and became a total loss.

The hull underwriters declined to settle the owner's claim, and the owner commenced legal proceedings against them. The surveyor was joined into these proceedings as a Third Party by the hull underwriters, on the grounds that they had relied on the preliminary survey report when deciding to insure the yacht.

ITIC's lawyers were ultimately successful in having the surveyor struck out of the main action between owners and underwriters, as he had only provided a towage suitability survey, but at a cost of £45,000.

It is obvious from the above case that the surveyor was innocent of any negligence, but it illustrates the costs that can be incurred in defending an unjustified claim.

Surveyors sued for loss of evidence

A firm of surveyors was appointed by an insurance company to investigate the cause of a fire at a factory in America. The cause of the fire was alleged to be a faulty forklift truck.

Following a joint inspection of the factory premises, the surveyors took control of the forklift and other artefacts and made arrangements to store them elsewhere. The forklift remained at these premises for several months. No clear arrangements had been made about who would pay for this storage. The storage invoices were not paid and eventually the company who was housing the forklift sold it for scrap.

The owners of the factory claimed significant insured losses and additional uninsured losses in excess of the policy limits. They believed that they could recover the losses above their insurance limits from the forklift suppliers due to the fact they alleged that the fire was caused by the forklift.

The factory owners contended that the forklift's destruction prevented them from pursuing their claim for the uninsured losses against the forklift suppliers. They held the insurance company responsible who in turn sought to hold the surveyors liable.

The insurance company settled the factory owner's uninsured loses claim for US$ 1m. The insurance company then commenced an action against the surveyors for recovery of this sum.

A US lawyer was appointed by ITIC to provide advice on liability and protect the surveyor's interests. The lawyer advised that the surveyors would definitely have an exposure, although there were arguments that could be used to reduce their liability. Issues included who had actually had responsibility to pay the storage company and whether the surveyor should have been responsible for the storage company's possibly unlawful action in selling the forklift.

A major concern for both parties was the legal costs which are not recoverable by the winning party in the USA. These would have been very large if the matter went to trial. Therefore, negotiations were entered into and the matter was settled for 25% of the original claim against the surveyor.

Not all insurance policies cover claims brought in the USA. ITIC's cover has no jurisdictional limits and therefore defended a European surveyor who had a claim made against them in the USA.

Towing trouble

A ferry operating in North America was due to be towed to a shipyard to undergo a refit. A marine surveyor was engaged by the shipyard to undertake a "fit for tow" survey and provide a certificate of approval confirming that the towage arrangements as between the tug and the ferry were satisfactory. The marine surveyor completed his survey and issued the certificate of approval. Three days later, during the tow, the ferry took on water and sustained significant damage to her main machinery compartment.

The owners of the vessel brought proceedings against the shipyard, the tug company and the marine surveyor for repair costs of US$750,000. The owners alleged that the surveyor had been negligent in confirming that all watertight openings were closed, whereas expert evidence suggested that water had entered the vessel via open air vents. The surveyor's position was that these air vents were a rarity, that it was outside the scope of the survey to inspect these, and that liability should fall on the company undertaking the tow.

A mediation took place at which the owners acknowledged contributory negligence on their part and agreed to reduce their claim to US$500,000. All three defendants, including the marine surveyor, contributed to a settlement in this amount.

Outstanding survey fees

A P&I club asked a marine surveyor to carry out a condition survey on a ship. The surveyor noted several deficiencies and, as a result, the P&I club requested the surveyor to conduct a follow-up survey. Although the P&I club copied the instructions to the shipowner, it was not clear whether the P&I club or the owner would be responsible for the survey fee. Unfortunately, the surveyor did not question this when accepting the instruction; he merely carried out the survey and sent his report to the P&I club. The invoice was sent to the owner. The owner did not pay and the surveyor asked ITIC to collect the debt. It became apparent that the owner was in financial difficulties and could not pay the surveyor's invoice. ITIC negotiated on behalf of the surveyor with the P&I club and the owner and, eventually, the invoice was paid.

Terms and conditions for marine surveyors

Almost all cargo transported throughout the world is carried according to some form of contractual conditions. Ship owners, freight forwarders and other carriers carry on their business knowing they are protected by their trading conditions. It is perhaps surprising therefore that marine surveyors and consultants, who deal with the same ships and cargoes, seldom take steps to obtain the same protection.

Following consultation with a number of industry bodies, we have produced "ITIC's standard terms and conditions for surveyors and consultants," a set of draft clauses for members to consider using in their own trading conditions.

The specific requirements of individual businesses vary and accordingly no responsibility can be taken for the suitability of these terms and conditions to a specific business or contract. As with all contractual terms it is important that the user ensures that they are properly incorporated in their contract with their counterparty. Members should seek the advice of their usual legal advisor prior to using such terms and conditions.

Please refer to the guidelines on incorporating standard terms and conditions, for advice on using these terms: https://www.itic-insure.com/knowledge-zone/article/guidelines-on-incorporating-standard-terms-and-conditions-129819/.

These terms and conditions are available to members free of charge at https://www.itic-insure.com/knowledge-zone/article/itics-standard-terms-conditions-for-surveyors-consultants-5765/.

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 US$ 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.

Not on the lash

One surveyor was instructed to oversee the lashing of steel pipes. Unfortunately, the pipes were damaged on the voyage. ITIC defended the claim that the lashing had been inadequate on the basis that the damage was due to heavy weather. One issue in the case was whether the surveyors had successfully incorporated their terms and conditions which would limit the damages claimed to 10 times their fee.

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