ITIC SPECIALIST PROFESSIONAL INDEMNITY INSURANCE

Ship broking

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.

Who pays for heating?

When a tanker broker arranged a voyage charter, the recap e-mail stated that the lump sum freight was inclusive of maintaining loaded temperature. The cargo description also stated "vessel to maintain loaded temperature".

There were discussions between the broker and the charterers, with the charterers asking if the price included heating (allegedly without stating whether maintaining heat or heating up). The broker told them it did, but did not specify what this referred to.

It is normal for the vessel to pay the costs of maintaining the temperature of the cargo as loaded. The pro forma that was used for this fixture was silent on the issue of the costs of heating up. It was noted that Clause 25 (a provision that charterers would pay the costs of increasing the temperature of a cargo) of the charterer's additional terms had been deleted. The reason for this deletion was probably that the charter was based on a pro forma which had been used on a clean products charter where such provisions were not necessary.

The owners insisted that the lump sum freight only included maintaining temperature as per the fixture recap. The charterers faced a bill of US$170,000 for heating up the cargo and stated they had sold the cargo on the basis the freight covered all costs. They claimed they had been mislead by the broker. Ultimately the claim was settled at US$100,000, which was paid by ITIC, less the deductible.

ITIC IS MANAGED BY **THOMAS MILLER**

Ship brokers' right to commission – three common situations

ITIC is often asked whether a ship broker is entitled to claim their commission. It is very important to remember that each case should be considered on its own facts.

Ship broker cut out of negotiations

There can be few greater sources of annoyance to brokers than the feeling that they have made the necessary contacts only to be deprived of the commission.

This is a difficult area, but a broker does have a right where a principal cuts him out of the negotiations and completes the transaction without him. The leading case is Allan -v- Leo Lines (1957), in which the court held that the broker is entitled to commission if his efforts were the "effective cause" of the contract. It is clear that this does not mean that the broker must be the only reason the deal was struck. That would be an impossible standard. However, the broker must materially contribute to the securing of the deal.

There is no single stage which negotiations must reach, such as agreement on main terms or inspection, before the broker is entitled to commission. In the case previously referred to the judge held that the important factor was the introduction.

Cancellation of charterparty

A number of charterparty forms such as GENCON and BALTIME contain specific clauses which provide for the broker to receive compensation in the event that the agreement is cancelled. In the absence of this type of clause the broker unfortunately does not have a right to commission if a principal merely chooses to cancel the agreement.

Continuation of charterparty

The NYPE charterparty provides that commission is payable not only on hire earned under the charterparty but "also on any continuation or extension". There may be a practical problem in showing that a continuation or extension has taken place, but the clause clearly does provide that the broker has a right to commission in these circumstances. In the absence of a clause it is difficult to see on what basis the broker could claim that he should be paid further commission.

Addendum omission

Ship brokers arranged a sub-charter. As is often the case the main terms of the sub-charter were fixed with the details "otherwise as per as the head charterparty".

The sub-charterer asked for a copy of the head charterparty for his review. The head charter had been sent to the broker together with a separate addendum. Unfortunately, while the broker passed the charterparty to the sub-charterers they failed to forward the addendum. The fixture was concluded but without the sub-charterer being aware of the addendum.

The addendum contained provisions in relation to the costs of hold cleaning in the event that the vessel carried cement. This cargo had originally been excluded under the head charterparty but had subsequently been permitted on the terms agreed in the addendum. The addendum provided that the sum of US$7,500 could be paid by the charterer in lieu of hold cleaning. The carriage of cement under the sublet had been agreed in the main terms but the terms relating to the costs of hold cleaning had not been passed to the sub–charterer.

The charterer was left with an obligation to pay the head owner for hold cleaning but was unable to reclaim the money from the sub–charterer. The broker had to reimburse his principal the US$7,500.

February is the shortest month

Ship broker fixed a vessel for an initial period of 3 months with subsequent optional periods of 3 months. The optional periods were declarable 30 days prior to expiry of the preceding period. The charterer was a regular client of the broker and the broker kept track of such options for them. Unfortunately when counting back to calculate when the notice was due the broker overlooked the effect of February only having 28 days. The notice was given late.

The owner had the right to reject the option and either ask the charterer to pay more or fix the vessel elsewhere. On this occasion the owners however waived their rights and continued the fixture at the existing rate.

ITIC sees many claims which involve time – whether it be calculating time, or missing time bars. You should ensure that you have systems in place to avoid being involved in these types of dispute.

Demurrage dispute doesn't delay commission

Ship brokers arranged a voyage charter between Rotterdam and the Far East. The charterparty was subject to English law, based on the Asbatankvoy form, and provided that the brokers would receive 1.25% commission.

The ship completed discharge and freight was paid to owners in full. The brokers accordingly invoiced for their commission on the freight. The commission amounted to US$28,750. The owners also claimed demurrage from the charterers which was disputed.

The brokers invoice remained unpaid and after 3 months they chased for payment. Owners responded that they would only pay commission when the demurrage claim was resolved:

The brokers sought ITIC's assistance as they purchased ITIC's Rule 10 "additional legal expenses insurance and debt collection" cover. ITIC advised that this was a classic tactic used by owners seeking to delay or avoid paying commission. The argument did not have any legal merit.

ITIC contacted the owners pointing out that the Asbatankvoy commission clause clearly says commission is payable "on the actual amount freight, when and as freight is paid". Freight had been paid and the commission was payable.

In addition the owner's attempt to withhold this commission pending resolution of a demurrage claim was against market ethics. The Baltic Exchange's Code reads:

7. Withholding payment of undisputed sums, including commission to brokers, on any earnings received is unacceptable.

ITIC threatened legal action against the owners/the ship and the owners paid the commission in full.

Two channel communication

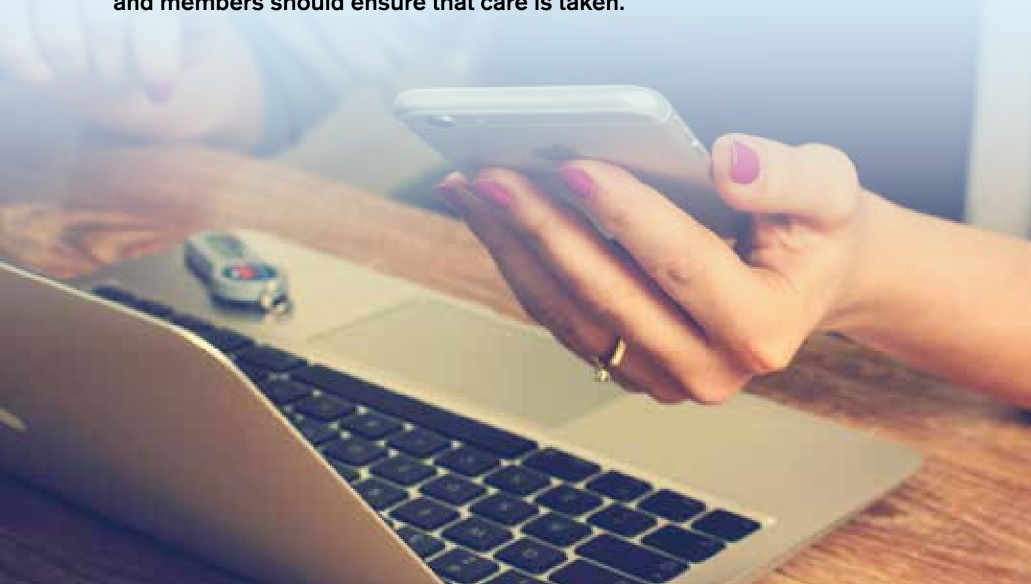
At the outset of negotiations the principal instructed his broker that they were prepared to pay a daily rate plus a lump sum for redelivery in the Far East. The principal and the broker were communicating on an electronic messenger system while the broker was having exchanges with the other party via email.

The broker unfortunately overlooked that the principal had specified that the lump sum would only be payable if the vessel was redelivered in the Far East. While an initial offer and subsequently a recap message was copied back to the principal via email the principal did not notice that the lump sum would apply worldwide.

When the principal found that the lump sum was payable in any event they made a claim against the broker. Although the broker had clearly made a mistake the principal had failed to respond to the emails showing what was being negotiated. The principal pointed out that they had been communicating via the electronic messenger system on which the broker had confirmed that the vessel had been fixed in accordance with instructions.

Ultimately a compromise was reached with the broker contributing to the extra costs in the event the vessel was not redelivered in the Far East.

There is a danger when using more than one form of communication and members should ensure that care is taken.



A Friday afternoon failure

A ship was fixed for a trip timecharter for two voyages, with an option for a third. In accordance with the recap the option was to be declared by the charterers on completion of loading on the second voyage. The fixture had been negotiated via brokers in two different offices of the same broking company.

The third trip option was exercised by charterers on a Friday afternoon. The broker who received the message forwarded it to his colleague in the other office. Unfortunately, that broker did not immediately pass it on to the owners.

The ship completed the second voyage on the Sunday but it was not until Monday that the message declaring the option was passed on to the owners.

By Wednesday the owners stated, via the broking channel, that because they had not received the notice until the day after the loading had been completed the declaration was invalid and that they expected redelivery of the ship on completion of the second voyage.

The spot market at the time was extremely volatile but rising. Therefore the owners wanted the ship redelivered. The charterers clearly wanted to retain the ship to maximise the profit from the final voyage.

The market however changed again and after a week owners confirmed they would allow the third voyage. Both parties reserved their position. The business available to charterers was, by this stage, less profitable than at the time they had declared the option. They ultimately claimed the lost profits against both the owners and the brokers.

The brokers argued that the majority of the delay was caused by the unreasonable conduct of owners in refusing to agree to the third voyage. A settlement was ultimately agreed, with the broker's contribution reflecting their delay in passing on the message but not the subsequent fall in the market.

Time sensitive messages should always be followed up with a telephone conversation to ensure they have been received and acted on.

No Notice of claim

A demurrage claim for US$352,122 was passed onto the charterer by the broker within the 90 day charterparty time limit period. However, the charterer declined to pay the claim as they had not been given notice that a demurrage claim would be made within the 60 day period provided for in the charterparty. The owner had advised the broker within the 60 day period that a demurrage claim would be made but this had not been passed on by the broker.

Clause 15(3) of Shellvoy provides - (3) Owners shall notify Charterers within 60 days after completion of discharge if demurrage has been incurred and any demurrage claim shall be fully and correctly documented, and received by Charterers, within 90 days after completion of discharge. If Owners fail to give notice of or to submit any such claim with documentation, as required herein, within the limits aforesaid, Charterers' liability for such demurrage shall be extinguished.

In the past, this 60 day notification deadline that a demurrage claim was "coming" had not been strictly adhered to as the owner and charterer tended to concentrate on the 90 day demurrage time limit for the demurrage documents to be sent to the charterer. However, a tightening of procedures by the charterer meant that this claim was rejected. The owner then sought recovery from the ship broker.

The clause does provide that a failure to give notice extinguishes the claim and subsequent presentation of the claim within 90 days does not "remedy" the situation. In this case there were issues as to whether the previous conduct had amounted to a waiver of the right to rely on the 60 day notice period but ultimately the broker had failed to pass on the message and had to substantially contribute to the claim.

The failure to pass on claims documentation within the relevant time limit is the most common cause of claims against tanker brokers. Often wider claims clauses apply to insurance premiums, deviation, port costs and expenses and ITIC has settled liabilities arising from a failure to pass on these documents.

It is common for brokers to specify an e-mail address to which post fixture messages have to be sent. This should lessen the chance of an important message being buried among the large number of market circulars and negotiation messages received during the average day. ITIC published a recommended clause to be used at the bottom of recap messages setting out the post fixture communication details and the consequences of not using them. This is available on ITIC's website http://www.itic-insure.com/support/publications/claims-review/article/itic-post-fixture-clause-132138/ Some brokers have specific e-mail addresses for demurrage and other claims. ITIC is happy to advise on specific wordings for its members.

Check before answering

A broker was acting for the owner of a vessel trading in the Mediterranean. When considering an offer from charterers, which included the term "time from 1700 Thursday or a day preceding a holiday until 0800 hours next working day not to count even if used" the owner asked the broker for the weekend working times in Algeria.

The broker answered the owner's question without checking and got it wrong. The broker had advised the owner that the weekend working times were 1700 Thursday to 0800 Saturday, when in fact (as set out in BIMCO's holiday calendar) the correct answer should have been 1700 Thursday to 0800 Sunday - a difference of 24 hours.

The owner agreed to the fixture following this negligent advice and had calculated the freight rate on the basis of the shorter period the broker had given. The vessel was delayed in port. The laytime commenced later than the owner anticipated and the eventual shortfall in demurrage was claimed from the broker.

The result of the longer than anticipated weekends was a claim of US$25,527 which was settled by ITIC.

This is a classic example of how a claim could have been avoided if the broker had checked before answering.

Twenty Four hours is a long time in a falling market

A ship broker fixed an extension of a charter in direct continuation. However, the broker working the account had forgotten to include the charterer's "subject to 24 hours reconfirmation" in the negotiation.

When a clean recap was received from the owner's broker, charterers immediately replied that they had asked for 24 hours sub reconfirmation on the business.

The owners refused, as the subject was not part of the negotiations that they had seen and considered themselves fully fixed. Charterers failed to perform the extension and redelivered the ship to the owners. The owners fixed the ship to a different charterer, but the period of the new charter was shorter and the rate was lower.

The owners brought a damages claim against charterers and the charterers in turn brought a claim against the ship broker.

ITIC paid the amount of US$140,000 in settlement.

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