

The Wire: Focus on French Shipbrokers

Welcome to this special edition of **The Wire**.
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Introduction:

Debt Collection Insurance: is very popular with ITIC's Members and is included in the ITIC Rules at Rule 10. The cover assists in the recovery of outstanding debts (such as commissions, brokerage, survey fees and port disbursements). It also covers the legal costs involved in disputes under agency agreements. This cover pays the legal costs incurred in the recovery of the debt, but not the debt itself.

Commission Income Insurance: ITIC's loss of commission insurance is designed specifically for shipbrokers. It will pay the shipbroker's commission if the charterparty is cancelled due to one of the insured perils. The cover is offered at two levels; the first covers commission lost from an actual or constructive total loss only, and the second is full cover and insures loss of commission resulting from a wide range of marine perils.

Debt collection insurance:

In the last 20 years, ITIC has recovered more than US\$130,000,000 in unpaid commission, outstanding port disbursements, survey fees and other debts for Members. The insurance pays the legal costs of pursuing the debt. Tact is vital in order to preserve commercial relationships and often a polite reminder is all that is needed to secure payment. If proceedings are, however, necessary, ITIC's specialist team will use whatever legal means necessary to try to recover the monies owed to you.

Shipyard fails to pay sale and purchase commission

A sale and purchase broker acted for a shipyard in connection with the construction and purchase of three multi-purpose ships. Under the terms of a separate commission agreement, the shipyard was to pay 2% of the purchase price to the broker in four instalments at different stages of the construction of each ship. The instalments were not all made even though the construction and sale was accomplished; the brokers were owed considerable amounts of commission. Solicitors successfully attached property belonging to the shipyard, and eventually an amount of US\$ 515,0000 was recovered for the Member. Although the recovery took the best part of five years, and the legal costs were substantial, an outstanding result was achieved for the Member.

Recovery of unpaid commissions

Chartering brokers requested the assistance of the Club to recover commissions of US\$ 21,788 in respect of the fixture of several vessels over a period of more than a year. The Club's demands for payment were ignored and further action was under consideration when another Member reported that they had been unable to collect outstanding commissions of US\$ 5,789 due to them from the same principal.

Loss of Commission Cover:

Loss of commission insurance is as essential for shipbrokers as business interruption and loss of profits insurances are to other businesses. The loss caused by, for example, the sinking of a vessel on a long term time-charter could seriously diminish a shipbroker's income.

ITIC offers two types of loss of commission cover, the simpler being loss of commission resulting from the charterparty being terminated due to actual or constructive total loss of a vessel. The more comprehensive cover includes loss of commission due to a charterparty being cancelled for a wide range of marine perils, such as heavy weather, fire, piracy, collision, engine breakdown and negligence of master or crew. Cover is offered either on an individual declaration of a charter, sale or purchase, or the more popular annual cover for all fixtures concluded throughout the year. In the latter case, there is no need to make any further individual declarations as all fixtures within the limit of liability are automatically covered.

Constructive total loss commission insurance

The shipbroker who fixed the M.V. MSC NAPOLI for a period charter lost its right to commission when the ship, which was famously beached on the south coast of the UK, was declared a constructive total loss. The shipbroker insured his commission with ITIC and the Club paid US\$ 500,000 to the broker - the equivalent of the balance of the commission due over the remainder of the period charter. The shipbroker received his commission and had the advantage of it being paid up front.

Wider loss of commission insurance

A ferry on a regular route suffered many deficiencies, including engine breakdowns and machinery deficiencies and was often put off hire. Ultimately the charterers applied a clause in the charterparty which allowed them to terminate the charterparty due to the number of off-hire periods. The shipbroker had taken out ITIC's full loss of commission insurance and therefore claimed for the remaining period in which they should have received commission against the insured peril of the breakdown of the engine or equipment. The commission lost totalled US\$ 80,000 and was covered in full by ITIC.

SHIPBROKERS' RIGHT TO COMMISSION - THREE COMMON SITUATIONS

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

Shipbroker 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.

Fixture on behalf of non-existent or fictitious principal

Chartering brokers fixed a vessel on behalf of charterers in Panama. The vessel was time chartered for a voyage from Far Eastern ports to Arabian Gulf and Red Sea ports.

Soon after loading had been completed it became clear that the charterers were in serious financial difficulties and had not paid the owners' hire and other ancillary expenses. Furthermore, the owners were obliged to utilise their own funds to complete the contracted voyage and discharge at Red Sea ports.

Subsequently the brokers were advised by the ship's managers that their enquiries revealed that the charterers were not registered in Panama. Thereupon the Club made enquiries in Panama and Taiwan to establish the true status of the charterers were identical.

In due course lawyers acting for the managers of the vessel served a writ for US\$ 365,237 on the brokers alleging negligence in the negotiation of the charterparty and claiming that the charterers did not, in fact, legally exist.

A defence to the claim was mounted and the case was set down for hearing before the Court. By this time interest and costs added to the original claim meant that an adverse judgement would result in a claim on the brokers in excess of US\$ 500,000. As there was a real risk of judgement being given in favour of owners, negotiations were commenced which ultimately resulted in a settlement of the claim for US\$ 170,000.

Finally, it should be noted that a not uncommon case is where a company is in the course of formation and the broker enters into a contract on behalf of the proposed company before it has in fact been incorporated.

In such a case the broker is personally bound even if he expressly stipulates that he is only representing the company and qualifies his signature, e.g. signs adding the words "as agent only". The contract is then one between the broker as principal and the other party.

When the company comes into existence it cannot ratify the contract purporting to have been entered into on its behalf before the date of its incorporation.

Misdescription of cargo capacity of vessel

A ship broker Member acted for owners in the fixing of their ship to charterers. Unfortunately, when describing the cargo capacity of the ship, the figure of 119,995 cubic metres was given by the Member, whereas the correct capacity was 115,003 cubic metres.

The charterers submitted a claim for deadfreight, and the dispute was submitted to arbitration. The owners argued that the charterers had fixed the ship because it was of a well-known type, suitable for their purposes, and not because of any precise capacity figure. However, the arbitrators decided, by a two to one majority, that the error made by the brokers gave the charterers a right to recover damages from the owners.

The damages awarded to charterers amounted to US\$30,030 plus their costs. The owners demanded an indemnity from the brokers for this amount plus their own costs. The Club's lawyers advised that there was little defence to the claim, but were able to reduce the amounts claimed by the owners and charterers as costs. The claim was settled at a total of US\$75,000.

Broker's failure to pass voyage instructions to correct party

The broker acted for a chartering company with offices in the USA and Europe, and the agreement between them required the broker to advise the US company of the status of the charter arrangements for all shipments to the USA.

The US company entered into a contract of affreightment with owners to ship a cargo from Algeria to Louisiana. Owners nominated their ship, which charterers confirmed, and charterers issued voyage instructions which provided that the ship was to be tendered by 13/14 November. On or about 10th November, owners advised the broker that the nominated ship was not in a position to reach the Algerian port on time and suggested a replacement with new laycan 14/15 November. The broker erroneously passed this information to his principal's European company instead of the US company. On 11th November owners advised the broker that the replacement ship would not arrive until 15th November, which information was again passed to the European company in error. On 12th November the US company, having been advised by the European company of the change in the nominated ship, issued amended voyage instructions which still indicated laycan terms 13/14 November despite the fact that the European company had been advised that the ship would not arrive until 15th November. The ship duly arrived at 20.18 hours on the 15th but no berth was available until 19th November when loading began. The ship sailed on 21st November. Subsequently, owners made a claim on the brokers for US\$54,000 representing demurrage for approximately 3.6 days.

In recognition of their partial responsibility in failing to pass information to the correct party, the broker offered to contribute one-third but this was rejected. Eventually, settlement was agreed with the broker paying US\$36,000. Legal costs incurred were US\$4,000.

Incorrect discharge port

Brokers had acted on behalf of charterers in respect of a voyage charter from Nigeria to the US Gulf. In subsequently negotiating the terms of a preliminary round trip whereby the charterers would discharge some cargo in Dakar, Senegal before returning to load the cargo in Nigeria, the broker mistakenly reported the discharge port as being in the Ivory Coast and agreed the preliminary voyage with owners on that basis. The error only came to light after the fixture had been agreed and the cargo sold.

The owners agreed to perform the longer voyage to Dakar but at a higher rate than the one previously agreed. There was clearly no defence to the claim and the Club negotiated a settlement at US\$ 150,000.

This claim is a reminder of the potential consequence of simple errors.

Message on mobile - US\$900,000

When fixing a tanker to carry vegoil the charterer asked whether the tanks had been washed. The owner's broker telephoned the charterer's broker to inform him that the tanks had been "washed but not fresh water rinsed". The charterer's broker, who was contacted on his mobile phone while having lunch



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in a restaurant, mistook the message as being "fresh water washed". Salt left on the tank walls from a seawater rinse contaminated the vegoil to the tune of US\$ 900,000.