

## The Wire: Focus on Spain 2014

November 2014

### Welcome to this special edition of The Wire:

ITIC has been providing Professional Indemnity insurance to the Spanish market for almost 30 years. ITIC has around 50 Members based in Spain, some of whom have been insured by ITIC since the 1980s.

This special edition of The Wire introduces ITIC's new Spanish representatives – Hispania P&I Correspondents - to a wider audience. It also look at the potential impact of the recently enacted New Spanish Maritime Navigation Law for ITIC's Spanish Members, and provides details as to other products offered by ITIC which may not be familiar to our Spanish readers.

ITIC visits different regions of Spain throughout the year. If you would like to enquire about future travel plans, or make an appointment to meet with Tom Irving, ITIC's Account Executive for Spain, please e-mail [ITIC.News@thomasmiller.com](mailto:ITIC.News@thomasmiller.com)

We hope that the following selection of articles below will provide both interesting reading and practical loss prevention advice.

### ITIC's Spanish Team:



#### **Tom Irving – ITIC Senior Account Executive**

Tom Irving is the Senior Account Executive at ITIC responsible for the Club's Spanish business.

Tom joined ITIC in 2011, having previously worked for the TT Club in Australia.

Tom is legally qualified in New Zealand and Australia. He is a member of ITIC's legal team. Tom has an understanding of Spanish.

Tom's full biography can be read here: <http://www.itic-insure.com/contact-us/itic-people/contact/tom-irving/>

In June 2014, ITIC announced the appointment of a new correspondent in Spain, Hispania P&I Correspondents. Hispania, based in Barcelona, is a well-known company in the maritime sector in their role as P&I Clubs and TT Club correspondent.

The Hispania team looking after ITIC is made up of the following members:



### **Rosana Velasco – Director / Claims Executive**

Rosana has a Law Degree from the Barcelona Central University. Before working as an advisor and claims handler in maritime and transport incidents, she worked in a law firm in London and in Barcelona. In 1996, Rosana joined the P&I Dept. of Witty S. A., a well-known and long-standing P&I correspondent in Spain, handling all types of transport incidents on behalf of P&I Clubs, other transport insurers, and ship owners/operators. In 2008, Rosana co-founded Hispania P&I Correspondents, of which she is a shareholder and Director. Rosana speaks Spanish, English, Italian and Catalan.

### **James McKinnell - Director / Claims Executive**

James has a Law Degree from the University of the West of England, Bristol. Before working as an advisor and claims handler in maritime and transport incidents, he worked for law firm in Manchester and Barcelona. In 2000, James joined the P&I Dept. of Witty S. A., handling all types of transport incidents on behalf of P&I Clubs, other transport insurers, and ship owners/operators. In 2008, James co-founded Hispania P&I Correspondents, of which he is a shareholder and Director. James speaks Spanish, English and Catalan.

### **Ana Escanilla - Underwriting & Marketing Executive**

Ana studied Chemistry and has taken several courses in International Commerce and Port Operations, as well as holding a Group A Certificate as Exclusive Insurance Agent, from the Insurance Mediators' College (CECAS). Ana works primarily providing Underwriting assistance for transport related insurance risks, and also handles maritime claims and incidents. She has been working in these roles since 1988, when she joined the P&I Dept. of Witty S. A. In 2008, Ana joined Hispania P&I Correspondents. Ana speaks Spanish, English and Catalan.

James, Ana and Rosana also rely on the very valuable support of their back office colleagues in Barcelona, and also their other offices in Vigo, Valencia y Palma de Mallorca.

## **New Spanish Maritime Navigation Law:**

*Carlos Perez, a Partner at Perez Albors & Co, looks at the impact that the much-anticipated introduction of the new Spanish Shipping Act is expected to have on the liabilities of ship agents and ship managers. We are most grateful to Carlos for his contribution.*

The new Spanish Shipping Act has recently been approved with the support of the majority of the members of the Parliament and will enter into force on 25 September 2014. Indeed, after years of discussions between all political parties under several governments, the Act has finally been passed by the Parliament with a wide consensus. This will hopefully provide the shipping sector with a stable and safe legal framework.

The Act is a long-awaited reform for a key sector in the Spanish economy, and aims to update and

codify Spanish shipping law, as well as to overcome the existing contradictions between the International Conventions in force in Spain and Spanish domestic law.

The new Act expressly repeals, among other provisions, Book III and other articles of the Spanish

Commercial Code, the 1893 Ship Mortgage Act, the 1949 Carriage of Goods by Sea Act and the 60/1962 Salvage Act (except for the provisions of Title II, which will continue in force as regulations).

**Ship agents** deserve special attention under the new legal framework set by the Act as follows:

- Ship agents will not be liable vis-à-vis the cargo receivers for loss or damage to the cargo, nor for delay in its delivery, although they will of course remain liable to their shipowner or ship operator principals for damage caused by their own negligence.
- However, when signing bills of lading following instructions from their Principals, ship agents will have to state the name and address of the latter. Otherwise, ship agents will be jointly and severally liable together with the shipowner or the ship operator, as the case may be.
- In addition, it should be noted that ship agents will have the duty to receive any claims and protests for loss or damage to the goods made by the cargo receivers, all of which they must notify to the shipowner or the ship operator immediately.
- The Act further provides that ship agents will be liable in the same way as freight forwarders or port operators (for cargo handling) when they act as such and not as ship agents only.

**Ship managers** should also note that the Act provides that, when dealing with third parties, the managers must state that they act for and on behalf of the ship owners and provide the identity and address of the latter in any contracts they enter into. If the managers do not do so, they will be considered jointly and severally liable with the owners towards those third parties.

Spain is recognised as an important worldwide shipping centre due to its unique and strategic geographical location. The new Act comes at a crucial time when the structural reforms and austerity measures are bearing fruit and, hence, the new legal framework is expected to become an important milestone for the Spanish shipping sector.

## **ITIC's Spanish Website:**

This week ITIC is celebrating the launch of their new Spanish website. This translated version of the main ITIC website is available at <http://www.itic-insure.com/es/>

This site features translations of the key pages, with the rest of the site and some of the downloadable documents still being available in English.

The site incorporates many translated areas, such as:

- Who we insure – Gain an understanding of the various sectors ITIC can offer professional indemnity insurance for
- Get a quote - Complete a proposal form and receive an obligation free quote
- Talk to one of our experts - Easily get in touch with the Account Executives responsible for Spanish business or a member of ITIC's Claims Team

Take a look for yourself at: <http://www.itic-insure.com/es/>

## **ITIC's Additional Products:**

Readers may not be aware that, in addition to professional indemnity cover, ITIC also offers a range of additional products including debt collection, loss of commission cover, cash in transit insurance and directors' and officer's insurance. These additional risks are usually added by endorsement to the main policy.

### **Debt Collection:**

In the last 20 years, ITIC has recovered more than US\$ 145 million in unpaid commission, outstanding port disbursements, survey fees and other debts for ITIC Members. The insurance pays the legal costs of pursuing the debt. Tact and professional courtesy is vital in order to preserve commercial relationships. Often a polite reminder is all that is needed to secure payment. If legal proceedings are, however, necessary, ITIC's specialist team will use whatever legal means necessary to try to recover the monies owed to you.

### **Loss of Commission Cover:**

Loss of commission insurance is as essential for shipbrokers and ship managers as business interruption protection 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. Insurance 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.

### **Cash in Transit and Money Insurance**

Shipowners often require their agents or managers to deliver cash to ships whilst in port. The risks are obvious. The ship agent or ship manager needs insurance to cover cash when it is temporarily in his custody, whether during transport to the ship, in a strong room at his office, or in a safe at home or on the managed ship. ITIC provides a product offering this combination of insurances which can be offered either on a single occurrence or annual basis.

### **Directors' and Officers' (D&O) Insurance**

Directors' & Officers' insurance, or D&O, provides financial protection for the directors and officers of your company in the event that they are sued in relation to the performance of their corporate duties.

ITIC's D&O policy protects both individual directors from claims against them in person and also the company that has to indemnify them. It also includes, at no extra cost, coverage for employment practice liability claims from employees alleging discrimination, harassment, unfair dismissal, etc, as well as insurance coverage for the legal costs of responding to alleged breaches of corporate regulations, authority requirements or corporate statutory duties.

Please contact Hispania P&I or ITIC directly if you would like to receive a quotation for any of these products. You can find examples of claims paid out under such insurances on ITIC's website.

## **The importance of Standard Trading Conditions for Marine Surveyors:**

A recent case handled by ITIC illustrates the importance for marine surveyors (and, indeed, other shipping and transport professionals) to conduct their business activities under a suitable set of trading terms and conditions, in order to protect their position in the event of legal action.

A marine surveyor was instructed by the shippers of a cargo of wheat to survey and certify the holds of a bulk carrier as fit for loading. The surveyor issued a certificate of fitness to load and 70,000 metric tonnes of wheat was loaded. Following the arrival of the ship at the discharge port in the Middle East, the local authorities ordered the stevedores to stop discharge operations because they suspected that the cargo had been heat-damaged. A subsequent survey report, obtained by the shippers, indicated that the cargo was contaminated by de-laminating paint, rust, dirt and paint powder from the ship's holds.

The shippers had to negotiate a reduction in purchase price with the receivers as a result of the deterioration of the cargo. They then pursued a claim against the ship owners for their loss under the terms of the contract of carriage (which contained the usual limits of liability). That dispute was resolved at a mediation. The shippers then brought a separate claim against the surveyor. They were seeking to recover alleged losses in excess of \$1m, including loss of sale proceeds, additional hire paid to the owners, and their own costs, on the grounds that the surveyor had negligently certified the ship as fit for loading when it was not and they had been unable to obtain a full recovery from the ship owners because they had limited their liability.

ITIC appointed lawyers and expert evidence was sought. That evidence suggested that the damage may have been caused by bobcats used in cargo discharge operations. It also became apparent that after the surveyor had inspected the holds, customs inspectors at the load port had carried out their own inspection and had ordered that the holds were 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 the survey, it also arguably meant that it was not the surveyor's report that the shippers were relying on, but rather the approval given by the customs inspectors to load the ship.

The surveying company 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 company had not brought these to the attention of the shipper and, based on the legal advice obtained, it was felt unlikely that a court would find that the surveyor could rely on them to limit their liability.

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 per cent of the claim, which was covered by ITIC.

In this case, the surveying company did have a set of trading conditions, but unfortunately these had not been incorporated into their contract with the shipper before the survey was carried out. An individual surveyor or company may have an excellent set of terms and conditions tucked away in their desk drawer or hidden somewhere on their website, but unless these have been brought to the attention of their contractual counterparty, it will likely be found that they do not form part of the legal relationship between the parties, and the surveyor will not be able to rely on those terms in the event of a dispute.

The legal position regarding what steps must be taken for terms and conditions to be deemed incorporated into a contract will vary between different jurisdictions and the particular circumstances of the transaction in question will also be relevant. However, it is generally considered that the safest way to incorporate terms and conditions is for the party seeking to rely on them to have the other party/parties to a contract sign a copy of them prior to concluding the contract. A signature on a set of terms and conditions provides almost irrefutable evidence that the signatory agrees to be bound by them.

However, this is not always practical, and whereas larger companies may be able to obtain a signature in situations where they provide their customers with a credit facility (as a credit application form will likely be signed) for most surveyors and consultants, it may not always be practical to obtain a signature from their client.

In the absence of terms being signed, it will generally be acceptable for the surveyor to provide their customer with a copy of their terms and conditions or make them available by referring them to where a copy can be found (for example, a link to a website in an email signature) *before or during* the formation of the contract. ITIC frequently comes across situations where terms and conditions are printed on the back of an invoice sent to the customer after the contract has already been concluded and the work undertaken. In this situation, the surveyor won't be able to rely on the terms and conditions as they won't form part of the contract.

Practically, the most efficient way to bring terms and conditions to the attention of a customer will be for the surveyor to acknowledge a new instruction (whether that instruction is given over the phone or by email) with a brief email thanking the potential customer for the new instructions and stating something along the lines of: "All work undertaken is done so strictly in accordance with our Terms and Conditions, a copy of which is available at [link to website]. Copies are also available on request."

As a "last resort", terms and conditions may be deemed to be incorporated into a business transaction through the existence of a previous course of dealing between the parties, during which the terms were provided to the customer. However, courts are generally reluctant to retrospectively infer into contract conditions which were not specifically referred to during the formation of the contract.

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 surveyors and consultants, who deal with the same ships and cargoes, have traditionally failed to take steps to obtain similar protection.

ITIC has produced a set of standard terms and conditions for surveyors and consultants to consider using in their business dealings.