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# The Wire

The newsletter for insured members of ITIC. March 2012

The Wire is ITIC's e-newsletter which is sent to insured members of ITIC and their brokers several times a year. Each issue focuses on a different area for transport industry professionals, including marine, aviation, rail, naval architecture and hydrography.

The following selection of articles from The Hydrographic Wire will give you practical information on loss prevention, as well as on contract terms, illustrated by a variety of claims examples.

To sign up to receive copies of The Wire, or to read any of these articles in their entirety, please visit <http://www.itic-insure.com/rules-publications/the-wire/>

ITIC  
IS MANAGED  
BY **THOMAS  
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## Contract check list for hydrographic surveyors

**Whenever you are appointed by a client, you must make sure that the terms of your appointment are recorded in your contract. It is usual for such a contract to be in various parts.**

For example, you should have your own general Terms & Conditions on which you will always contract. See ITIC's Standard Terms and Conditions for Hydrographic Surveyors at: <http://www.itic-insure.com/rules-publications/article/standard-trading-conditions-for-hydrographic-surveyors-consultants-2610/>

General Terms & Conditions will be suitable for every contract you enter into as they will be very general by nature. The more specific requirements of the contract, such as detailing the scope of the services you will provide will be recorded in a "Scope of Work". In such a document you should detail all the works you are prepared to undertake. You should also pay special attention to any work which is not going to be undertaken by you, but which your client could reasonably assume would be. If it is reasonable for a lay client to assume you would be undertaking a task and they relied on that reasonable assumption, you could be held to have a liability for non-performance.

Key issues for you to consider, are:

- **exclusion and limitation clauses**
- **jurisdiction and law**
- **time bars**
- **indemnity**
- **force majeure**
- **and the right to sub contract.**

Whenever you intend to enter a contract your Terms and Conditions should be made clearly available to your potential client before the contract is agreed (and preferably signed). It is extremely difficult, if not impossible, to rely on contractual clauses which were not brought to a client's attention before they agreed to enter into the contract. The only time you may be able to rely on such clauses is if you have a previous course of dealing with that same client and have used such clauses in the past – so in effect, the client is aware of them.

For a definitive list of key issues to be considered, please read this article in full on ITIC's website (<http://www.itic-insure.com/rules-publications/the-wire/>)

# Will the use of ECDIS lead to more marine casualties and allegations of unseaworthiness?

**The rationale for the adoption of Electronic Chart Display and Information System (ECDIS) was to contribute to safe navigation; reduce navigational work load; aid passage planning, monitoring and positioning in one system; offer danger warning alarms and provide an efficient facility to update the chart portfolio. If the implementation of ECDIS meets these requirements then its adoption will have the same impact as radar which was introduced in the 1950s. We hope, however, ECDIS will not suffer the same failings as radar: over reliance, crew complacency, or inappropriate and incorrect use as the consequences will be more severe.**

The signs suggest that even prior to the mandatory requirements for carriage of ECDIS there have been failures where the system has been employed: to detect small islands; navigate clear of shallow ground; use an echo sounder; check the passage plan, identify navigational aids; use the appropriate chart and failure to keep a proper lookout. All of these situations were attributed to over reliance, complacency, inappropriate and incorrect use of ECDIS equipment. Sound familiar?

Consequential liability costs, in the aftermath of marine casualties, are increasing. It is inevitable that the insurance industry will pick up these costs and, therefore, will be vigorous in their investigations to ascertain the cause. Of major importance will be to conclude the vessel was seaworthy, at the commencement of the voyage, as this may prejudice insurance cover and also the right to seek contributions in the event of salvage and general average. The carrier's ability to rely on the available defences for cargo liability claims may also be prejudiced if the vessel is found to be unseaworthy.

The focus of investigation when grounding, stranding or collision occurs is always the navigation of the vessel. Following adoption of ECDIS the system will be under close scrutiny. Will seaworthiness be a real issue and why is ECDIS a potential problem?

Firstly, the introduction of ECDIS is mandatory with effect from 1st July 2012 for all new passenger ships over 500gt and new tankers over 3,000gt. New cargo ships over 10,000gt and 3,000gt will be required to have ECDIS as

their primary means of navigation from 1st July 2013 and 2014 respectively. All existing ships will gradually adopt the system up to 2018. Against a background of low freight rates and poor financial support, owners will want to implement ECDIS at the lowest operational cost.

The 'system' includes hardware, software, electronic charts, back-up and, vitally important, navigational officers training which over time, may be the largest financial burden.

Secondly, the regulations, the labyrinth of requirements the 'system' has to meet in order to be approved by the relevant authorities are:

## **1. SOLAS V Regulation 19.**

ECDIS equipment must be type approved to the performance standards set down by IMO.

ECDIS must have approved back-up arrangement in case of breakdown

ECDIS must use official electronic navigational charts (ENC) supplied by an authorised national hydrographic office which are updated using a correction service.

If no ENC is available for the area of navigation an official raster navigational chart (RNC) must be used with a correction service.

ECDIS being used as a primary aid to navigation in raster mode must have a paper chart folio as back-up.

## **2. Flag State**

ECDIS equipment, back-up arrangement, paper chart folio back-up and crew training requirements must be Flag approved for each vessel.

## **3. STCW 95 Code**

In accordance with STCW the navigational officers should possess 'a thorough knowledge and ability to use navigational charts and publications' and 'ECDIS systems are considered to be included in the word charts'.

Under the 2010 Manila Amendments, which became effective from 1st January 2012, generic and type specific training will be required if ECDIS is fitted on board the vessel. Adequate proof of that training for all navigational officers must be available for verification.

## **4. ISM Code**

The ISM Code requires procedures to ensure that the safe operations of vessels operating internationally are in compliance with relevant international and Flag State legislation. The Designated Person Ashore (DPA), who has direct access to the "highest" level of management, has to ensure the shipboard Safety Management System includes instructions and procedures for the safe operation of ECDIS which includes training and this will be audited and recorded.

## **Conclusion**

Marine casualties usually result from a combination of causal links with human error seldom missing. The introduction of ECDIS on vessels with officers initially trained on the paper chart navigational system may significantly highlight this cause. Combine this with legislation and commercial pressures on owners, operators, managers and the crew, and the industry may need to recognise its initial shortcomings and plan accordingly. You can adopt and implement change by legislation but the industry has to be aware of the consequences.

We thank Martyn Haines of Clyde & Co for this article. To read this article in full please visit <http://www.itic-insure.com/rules-publications/the-wire/>



# Submarine Cables & Risk Management

**Effective risk management of construction projects at sea requires, in particular, a fundamental understanding of the necessary elements that combine to achieve thorough planning, preparation and delivery.**

Thus attention to detail; knowing the questions to ask and understanding the value of the answers received, is key to understanding and managing risk throughout the project lifecycle.

The multidisciplinary team necessary to deliver large projects consists of specialists and experts capable of directing and efficiently communicating advice and recommendations to senior management to enable them to make informed decisions, thereby significantly increasing the likelihood of achieving project delivery safely, on time, on budget, free of damage or latent defect and meeting the desired specification for handover to the operations team.

Maintaining an informed engineering perspective from the feasibility stage, and carrying on through the planning, design survey and consenting processes facilitates subsequent engineering. Contract management, ideally through a collaborative and participatory process, is the primary tool for the system owner or developer to influence the performance of the contractor. Consequently the construction and wording of the contract is fundamental to the ability of the client to monitor the contractor's performance and so to identify risk.

We thank Chris Sturgeon of Red Penguin for this article. To read the full article please visit <http://www.itic-insure.com/rules-publications/the-wire/>

# Insurance - who needs it?

**Historically, hydrographic surveyors have chosen not to purchase professional indemnity insurance, unless requested by the contract. The view being that they have been working for years and have never experienced a claim. However, in the current business environment which is increasingly litigious, there is a growing need for professional indemnity cover.**

Insurance to many companies is seen as an unproductive cost. This is especially true in small companies where it is one of the top three expenses. We often hear from the businesses we speak to that "insurance takes the profit out of a project". This is the wrong way to view insurance. A good insurer can add enormous value. To get the best from your insurance there are a number of important areas to consider.

## What is professional indemnity insurance and why is it important?

Let's start with a quick recap on what professional indemnity insurance is; quite simply it is liability insurance that covers businesses in the event that a third party alleges to have suffered a loss. Losses by the third party are generally incurred as a result of your professional negligence. The important word of the first sentence is 'alleges'; even if you are not liable, the costs of defending an incorrect claim for negligence are high, as in the following example:

A US court held that the then US Hydrographic Office (USHO) was not negligent in causing a passenger ship to ground between Nantucket and Martha's Vineyard after the ship's owners claimed that a reef had been charted negligently.

Firstly, the court held that the error on the chart was not a result of any negligence by the USHO because the organisation conducted the survey in 1939 with state-of-the-art techniques.

Secondly the court also held that there was no pressing need for the USHO's successor, the National Oceanic and Atmospheric Association (NOAA), to perform a new survey.

Finally the court held that the ship did not actually rely on the defective chart when fixing its course. Therefore, even if the chart had been defective, it did not cause the loss. The US Court of Appeal confirmed the second point, but the first was not mentioned in the judgment.

Although, there was no liability upon the USHO, the defence costs amounted to a small fortune, and in the US court system, the winning party does not receive a cost award. In this instance, the party was a large national hydrographic office, but the same could apply to anyone who is providing data or professional advice. The cost of being proven innocent can be high.

To read the full article please visit <http://www.itic-insure.com/rules-publications/the-wire/>

## On the Rocks

The Swedish Hydrographic Office produced a navigation chart with an incorrectly marked rock. A Russian tanker struck the rock and filed a claim against the organisation. The Swedish Supreme Court held that the Hydrographic Office was liable to the tanker owners for the consequences.

This included the damage to the ship. Additionally, the Court held that because the chart was defective, the owner had a valid defence to any claim for the clean-up costs of the resulting oil spillage and any pollution claims.

**Specialist professional indemnity insurance for transport professionals everywhere.**

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