SPECIALIST PROFESSIONAL INDEMNITY INSURANCE

# The Wire

The newsletter for insured members of ITIC. February 2013

**Welcome to the twelfth edition of The Wire. The Wire is published and sent to insured members of ITIC and insurance brokers several times a year. This edition focuses on issues faced by professionals involved in the investigation or handling of transportation claims, including surveyors, loss adjusters, P&I Club correspondents, specialist investigators and expert witnesses.**

**Those appointed to investigate, handle or provide advice following an incident are relied upon by the instructing party to provide sound, concise and timely guidance. However, mistakes happen, and the instructing party can be quick to blame their expert when something "goes wrong".**

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

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ITIC IS MANAGED BY **THOMAS MILLER**

## Professional Indemnity Insurance for P&I Club Correspondents

ITIC insures over 70 P&I club correspondents globally. We are aware that at least one International Group club is considering that all their correspondents obtain professional indemnity insurance. We anticipate that a number of other clubs will follow suit. ITIC has recently commented on a proposed P&I club contract for its correspondents and highlighted areas where, ITIC believes, the correspondent should not held liable. ITIC has also commented on what it considers is a reasonable limit of liability for a P&I correspondent. ITIC knows that a P&I club correspondent works hard for the clubs and owners that they represent. If you would like advice on any contract sent to you, please do contact us.

Irrespective of whether correspondents are required by the clubs for whom they act to take out insurance, correspondents clearly face an exposure to claims from both their principals and third parties in respect of the work they undertake in investigating and responding to an incident. ITIC has handled, on behalf of its correspondent members, claims arising out of missed time bars and acting without the principal's authority in conducting settlement discussions. The following case, handled by ITIC on behalf of one of its correspondent members, illustrates the importance of having adequate insurance in place...

## Settlement Without Authority

A P&I club correspondent was requested to survey a cargo of 2,000 metric tonnes of bulk fertilizer, which had been contaminated by residues from a previous cargo.

The correspondent, having carried out the survey and after several telephone conversations with the P&I club, obtained verbal agreement to offer the cargo interests a depreciation allowance of USD 22 per tonne, which was accepted. When the cargo interests submitted their claim for USD 44,000 to the P&I club, the club refused to pay, alleging that the correspondent had acted without authority in offering settlement. The consignees therefore sued the P&I club and the shipowner, and the correspondent was involved, on the grounds that if the court found that he had no authority, then he would be liable under the doctrine of breach of warranty of authority. The case went to court in London. As the correspondent had no confirmation in writing, the dispute turned on which witness was believed. The court eventually found that the correspondent had been authorised to make the offer.

If the correspondent had not made a convincing witness, and had not kept contemporaneous notes, he would have had to pay the claim, plus interest, plus the costs of some of the other parties involved, and would have faced a liability in excess of USD 100,000.

## Marine & Civil v SGS

**A recent case in the Australian Federal Court *(Marine & Civil Construction Company Pty Ltd v SGS Australia Pty Ltd)* serves as a reminder of the importance in ensuring that surveyors and consultants clearly and promptly notify the party instructing them of any limitations as to the services that the surveyor or consultant is to provide, before the contract for the provision of services is concluded.**

In early 2006, Marine & Civil Construction Company Pty Ltd (M&C) were engaged to arrange the transportation of a crane loaded on a barge from Dampier, Western Australia, to Koolan Island, where the crane was required for the construction of an iron ore offloading wharf. The crane weighed 250 tonnes and its boom measured 67m (the crane could not be constructed on the island so had to be transported with the boom assembled).

M&C engaged a third party to design the sea fastenings of the onboard equipment and crane, prepare a towing plan and undertake a barge stability analysis. M&C were advised by their insurers that a warranty survey report would be required as condition of insurance for the voyage. M&C were put in contact with SGS Australia Pty Ltd (SGS), and sent to SGS the following instruction:

*"We require maritime survey to be completed for onhire/offhire reports and warranty survey for towing purposes for tugs and crane barges…"*

SGS responded to this request with the following email:

*"Warranty surveys are only conducted by the Classification Society however we are able to provide you with a survey report. This is a report of our findings at time and place of intervention but I must stipulate is not a Certificate of Seaworthiness for towing…"*

M&C proceeded on this basis and SGS produced their report. That report contained the following qualification:

*"Sea fastening were checked by us, with barge in static condition. In that condition they appeared to be satisfactory (Please note that we were not provided with test certificates of the lashing material)…"*

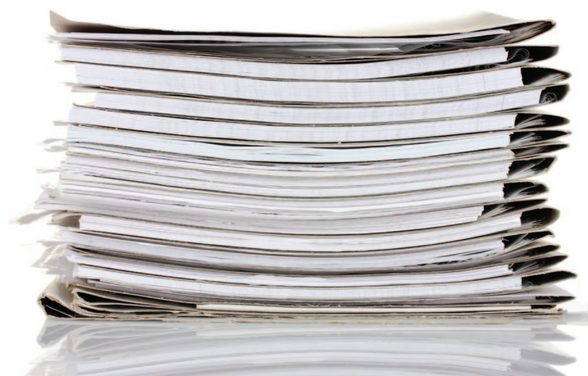
The day after the survey report was provided, the tow commenced. Later that evening, the wind strengthened and sea conditions became rough. Early in the morning of the next day, the tug's crew noticed that the sea fastenings securing the boom of the crane to the barge had failed and that parts of the crane were being dragged behind the barge. Severe damage had been caused both to the crane and to other items on the barge. That same day, the tug and the barge returned to Dampier.

M&C subsequently commenced proceedings against SGS, the party who had designed the fastenings, and the tug operators, seeking to recover approximately AUD 600,000 being the cost of repairs to the crane and boom. M&C settled the dispute with the designer and the tug operators, leaving SGS as the only defendant. M&C's claim was essentially that SGS had impliedly or expressly warranted that the securing arrangements were suitable and seaworthy (a warranty that M&C said was false) and that M&C had suffered a loss as a result of this alleged misleading and deceptive conduct in contravention of Section 52 of the Trade Practices Act 1974.

The Judge found that while M&C had requested a "warranty survey", both in the acceptance of their instructions and again in the survey report itself, SGS had made it quite clear that they were not providing a "warranty survey" and that M&C (who, despite their assertions to the contrary, the Judge deemed could not be said to be inexperienced in the maritime industry) cannot have relied on the report provided by SGS as a "warranty survey". It therefore followed that SGS were not found to have been in breach of the relevant provisions of the Trade Practices Act. M&C's claim was dismissed, and they were ordered to pay SGS' costs.

As well as providing a timely reminder of the importance of understanding the instructions being given to surveyors/consultants, and notifying the instructing party of any limitations, qualifications or additional information required, this case also highlights that these exchanges should be put in writing. This case was heard over 6 years after the original discussions took place, and various witnesses from both parties were called to give evidence. Had SGS not stated quite clearly in writing the parameters of their report, and had instead to rely on the recollections of their staff, the result could have been quite different due to memories having faded over time.

The case also contained discussion as to whether M&C were "experienced in the industry", and it is clear that when dealing with less experienced clients, courts will likely impose a higher onus on surveyors to make it clear what they can and cannot be expected to include within their report.



## Surveyors Signing Indemnities

**Sometimes ITIC's surveying members will be asked by a ship owner, with whom they have no contract, to sign an indemnity, disclaimer, waiver or release before they are granted access to the vessel. This is obviously a very different situation to when the surveyor is agreeing terms between themselves and their own principal.**

**An example of this could be if the surveyor is asked to sign an indemnity or waiver by a seller when appointed by a prospective buyer to perform a pre-purchase survey or when appointed by cargo insurers to inspect cargo aboard a vessel.**

**What must you consider?**
It should be remembered that the surveyor will be acting on behalf of their principal (who instructed him to perform the job). Therefore, it is likely that there will already be terms and conditions between the surveyor and their principal containing waivers and indemnities. The indemnity/waiver required by the owner will be a completely separate agreement between the surveyor and the owner.

**The surveyor could be asked by a vessel owner to sign:**

(a) a disclaimer or waiver of all the surveyor's rights to claim against or sue the ship owner, the vessel and their servants and agents should he have any cause to do so; and

(b) an indemnity to the ship owner, the vessel and their servants and agents for any loss or damage they suffer as a result of the surveyor's attendance on their vessel, howsoever caused;

Obviously the surveyor's principal will be waiting for the survey to be conducted and consequently the surveyor will be keen to board the vessel.

**As far as Part (a) is concerned you should bear in mind the following:**

- Under English law (the Unfair Contract Terms Act 1977), a party cannot exclude or limit their liability for death or personal injury caused by their negligence. Therefore, if a surveyor is injured or killed whilst on board through the owner's negligence, the owners will be liable irrespective of whether the surveyor signed the release or not. However, is the disclaimer subject to English law? In most cases it won't be. So don't sign it.
- Such a disclaimer may affect employers' liability or other insurance policies held by the surveyor's employer.
- For all non-personal injury claims (ie damage to property or loss of income) the surveyor should only waive his rights to claim for such losses if the loss or damage suffered was caused by his own negligence or wilful misconduct.

Therefore, if the owner (or their servant or agent) breaks the surveyor's laptop, the surveyor will not want to be barred from issuing a claim for the loss he has suffered. However, if the surveyor places his laptop on a surface known to be hot and the laptop melts, this loss would have resulted from his own negligence and, therefore, it would be unfair to hold the owner responsible. In fact the owner may have a claim against the surveyor for any damage caused by the melting laptop.

**For Part (b) please bear in mind that:**

- surveyors should only agree to indemnify the owner for losses the owner suffers as a result of the surveyor's negligence or wilful misconduct. In the example above, if the surveyor left his laptop on a hot part of the engine and it melted, causing damage to the engine, it is reasonable for the owner to be entitled to claim from the surveyor for the loss they suffered (ie repairs, loss of use of the vessel etc). However, if the owner or their employee or agent placed the laptop on the engine themselves, it would be unreasonable for them to be able to claim any losses from the surveyor. Similarly, if the surveyor places his laptop on a surface which ordinarily should not be hot, but which is hot due to a "technical malfunction", it would be unreasonable for the surveyor to have to indemnify the owner for any damage caused as a result. In fact, in that situation, the surveyor should be able to claim his loss from the owner.

**ITIC Suggested Wording**
If you are asked to sign an indemnity and/or waiver prior to boarding a vessel, we would suggest that you refuse and that nothing at all be signed. However, if this proves impossible you may want to present the owner with the following wording:

"In consideration of your allowing [the Surveyor], its agents and/or servants ("the Company") to board the above vessel for the purposes of carrying out a survey on behalf of the Company's principal/s, the Company hereby undertakes not to make any claim against the Owner, their servants or agents ("the Owners") for any losses suffered by the Company (other than those for which the Owner cannot exclude their liability by provision of statute) provided such losses occurred solely due to the Company's negligent acts and omissions or wilful misconduct.

Further, the Company hereby agrees to indemnify the Owners against any claims brought by any third party arising from the Company's negligent acts and omissions or wilful misconduct whilst onboard the vessel.

This Agreement shall be governed by and construed in accordance with English law. Any disagreement or dispute arising from this Agreement is subject to the exclusive jurisdiction of the English High Court or, if agreed in writing between the parties, arbitration in London, subject to the provisions of the Arbitration Act 1996, or any statutory modification or re-enactment thereof for the time being in force and the current rules of the LMAA at the time of the dispute."

## 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 he deemed to be more accurate.

The product was on-sold 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 the instructions.

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.

## Damage to Harps

Marine surveyors based in the Far East were instructed by the insurers of a cargo of HRSG harps (which are metal tube modules used in power generation) to conduct a pre-shipment inspection and to advise on loading and stowage. The cargo was loaded at a Malaysian port and the loading was overseen by the surveyor, who verbally notified the cargo interests of his reservations about the packing of the harps and the stowage. The reservations were ignored.

On a voyage to Australia (the intended destination) the ship encountered heavy weather. When the cargo was unloaded it was found to be heavily damaged. An expert was appointed by ITIC, who advised that although some of the damage was caused by bad packing, the major part of the damage was caused by bad stowage and inadequate lashing. The consignees sued both the ocean carrier and the surveyor. An arbitration took place and the consignees were awarded USD805,000, of which the ship owner paid USD491,000 and the surveyor paid USD314,000.

The marine surveyor's defence would have been much stronger if he had put his reservations about the packing and stowage in writing.

## Standard Trading Conditions for Surveyors and Consultants

Whenever you are appointed by a client, you must ensure that your terms and conditions are incorporated in your contract, if it is possible to do so. ITIC's recommended Standard Trading Conditions for Surveyors and Consultants can be found at: http://www.itic-insure.com. Your terms and conditions should be made clearly available to your potential client before the appointment is agreed. It is extremely difficult, if not impossible, to rely on terms and conditions which were not brought to a client's attention before they agreed to instruct you, as they will claim they do not form part of the contract. The only situation in which you may be able to rely on such clauses is if you have a previous course of dealings with that same client and have used such clauses in the past so, in effect, it is impossible for the client to argue that they were not aware of them.

While the requirements for properly incorporating terms and conditions into your business dealings may vary from country to country, you must draw your contractual counterparty's attention to your terms and conditions before you conclude the contract. It is therefore imperative that at least a reference to your terms and conditions, but ideally the full set of terms and conditions, is included in any quote or estimate which you give to your client before they confirm your instructions. We would also recommend that you add onto your email signatures an endorsement such as:

"All work is undertaken subject to our standard trading terms and conditions a copy of which is available on request [or a copy of which is available on our website at http://www.(link to the terms on your website).com]."

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