ITIC
SPECIALIST PROFESSIONAL INDEMNITY INSURANCE

47

October 2022

Claims Review

PAGE 02 →

Certainly not certified

PAGE 07 →

Negligence in obtaining authority for incurring charges

In this issue:

ITIC IS MANAGED BY **THOMAS MILLER**

Welcome to the October edition of ITIC's Claims Review. The first Claims Review of the new Carolean age.

We were deeply saddened to hear of the passing of Her Majesty Queen Elizabeth II last month. ITIC would like to take this opportunity to offer the Royal Family our heartfelt condolences at this time and also to welcome the new Sovereign, King Charles III.

The ITIC board met for their September board meeting in Copenhagen. The board meeting was followed by a drinks reception, which was well attended by many members, insurance brokers and other important contacts.

Sadly, the issues in Ukraine continue and so do the sanctions imposed by the UK, EU and USA. We have recently sent an update on the latest position that can be found on our **Russia Ukraine conflict web page.**

We would like to extend our thanks to those of you who continue to submit questions for our "ask the editor" feature. Please send any questions that you may have to **askeditiorCR@thomasmiller.com.**

This edition of the Claims Review provides a selection of marine cases recently handled by ITIC. We hope that these case stories will be of interest to you and will also help you to identify potential problems in order to avoid these types of situations occurring in your businesses.

The Editor

Certainly not certified

A Ship Sanitation Control Exemption Certificate ("SSCEC") was due to expire in two months' time.

The ship manager made inquiries for renewal of the SSCEC at the next port. The local health authority at the next port offered to inspect the ship and, if all was in order, issue a six-month renewal certificate for US$ 1,226.

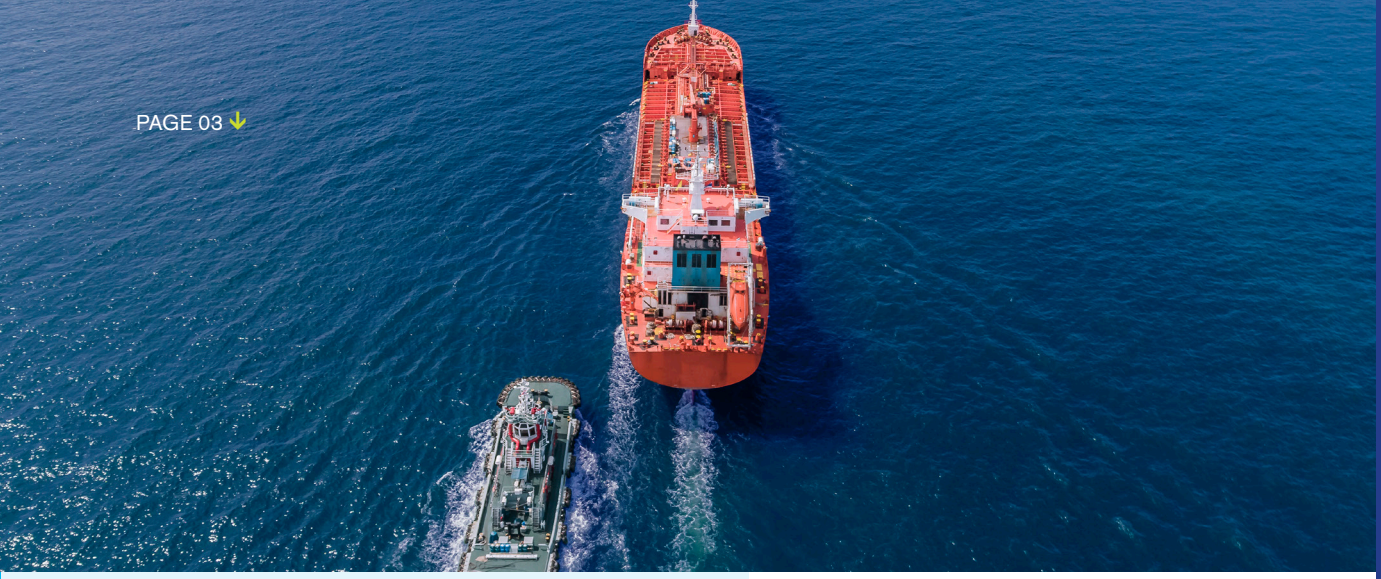
The manager declined this offer based on information that the same renewal was available at the following port for free.

Unfortunately, the renewal available at the following port, whilst free, was valid for one month only from the date of inspection. This would not have been of any help as the renewed certificate would expire before the original would have expired.

The manager therefore had to look to the next port of call, where the ship was due to arrive one month before the SSCEC's expiry. That port was in the USA and under US law, no port or local health authority can issue a SSCEC. The subsequent port was also in the USA and by the time the ship reached there, the SSCEC had expired and the ship was into her 30-day grace period allowable for a ship to renew an expired SSCEC.

When she received orders to proceed to a port in South America for discharge, it was clear that the ship would reach the port only after the expiration of the grace period. Indeed, on her approach, the port authorities informed her that she would not be allowed to berth.

To obtain the SSCEC, she had to deviate to another South American port at a cost of US$ 127,000. This was more than 100 times the original cost for the certificate's renewal at the first port. The owners claimed the difference, together with off-hire and bunkers, totalling US$ 162,000, to which the manager had no defence and therefore had to pay. **ITIC reimbursed the manager this amount less their deductible.**



Unauthorised unconditional extension of laycan

A shipbroker acted for both the owners and charterers in a fixture. Different shipbrokers within the company acted for each party.

The parties concluded a fixture with laycan for 20th August. The ship was delayed due to bad weather. The charterers would not be able to find a replacement so agreed to accept the ship arriving late by 25th August, but as they did not wish to grant a laycan extension, the late arrival was agreed only in consequence of the ship being on a spot basis. This meant that notice of readiness ("NOR") would be accepted on berthing only and not on arrival.

These messages were duly passed to the principals. The owners then advised that the ship would be further delayed and requested another laycan extension to 31st August. During verbal communication between the two brokers, the charterers' broker advised the owners' broker that further late arrival would only be accepted on the same terms as the first, namely that there was no "extension" and NOR would be tendered at berth. This was agreed. However, there was a further delay and on this occasion the charterers' broker simply confirmed agreement to a laycan extension to 5th September with no further conditions.

The next day, upon discussion with the charterers, the charterers' broker realised the issue and sent an email to the owners clarifying that the ship had only been accepted on a spot basis, as per the previous agreements, with time not counting until the ship was at berth.

The owners responded a week later, having seen that although they arrived at the load port on 4th September, there were delays in the port such that they could not berth until 16th September. They disagreed that time would start running from the ship berthing only, and claimed demurrage from arrival at the port on 4th September.

Legal advice confirmed that the charterers had indeed granted an extension to the laycan with no condition regarding when NOR would be accepted. As a result the charterers had to settle the owners' demurrage claim of US$ 140,000. This was claimed against the broker and ITIC reimbursed the full amount.

A bunker based barney

A shipbroker advised ITIC that they were owed US$ 68,000 of commission from a sale and purchase of a ship.

They had acted as the buyer's broker and had signed a commission agreement with the seller's broker where the seller's broker agreed to pay US$ 68,000 to the shipbroker upon the completion of successful delivery and receipt of the purchase monies for the subject ship.

A Memorandum of Agreement (MOA) was signed between the seller and the buyer. A few weeks later, the sale was completed upon the successful delivery and the receipt of the purchase monies by the seller. However, the seller's broker did not pay the shipbroker's commission arguing that a dispute had arisen between the seller and buyer relating to bunkers and they had also not received their commission from the seller.

ITIC contacted the seller advising that the deal had successfully concluded and therefore commission must be settled without further delay. They argued that they were not happy with the shipbroker's performance and that they would not pay any commission until the dispute over bunkers was resolved.

ITIC made it very clear that the dispute arose after the successful completion of the sale and purchase transaction, and that the seller had received the full payment for the ship from the buyer. Therefore it had nothing to do with the sale contract itself. Further, ITIC explained that the shipbroker, as buyer's broker had no duties and/or liabilities to the seller since they only acted for the buyer. Therefore, the argument that the seller was not happy with the shipbroker's performance was without merit.

The seller was advised that if the commission was not settled immediately ITIC would take whatever legal steps necessary to assist the shipbroker including, but not limited to, commencing legal proceedings.

Shortly thereafter ITIC received the seller's agreement to pay the shipbroker's commission less US$ 1,000 in respect of legal fees they had incurred. The shipbroker agreed to the deduction and were paid US$ 67,000 the next day.

Q&A with Charlotte Kirk

Charlotte Kirk, ITIC's commercial director, sits down to chat with the Claims Review editor, as part of this regular interview series in which we get to know ITIC's claims handlers. In this interview Charlotte explains why the "frozen fish claim" is the most memorable claim she has handled and shares her love of all things water/boat related.

How long have you worked at ITIC?

My ITIC career started 34 years ago in 1988, when I was a claims handler at CISBACLUB. I left to work in Cyprus at what is now Marsh. I then started at ITIC just after the merger between CISBACLUB and TIM 30 years ago. The team at ITIC are great to work with, we have a brilliant insurance product and some really interesting members, many of whom have been insured with us for so long that it seems that they are very much part of the ITIC family.

How do you balance claims handling with your other roles and responsibilities?

The claims team, of Mark, Geraldine and Fiona, are very supportive if there are other things going on, which are taking more of my time.

What is the biggest challenge when it comes to claims?

I don't think that there are any challenges. It's just a matter of working through what's what. Sometimes there is a commercial challenge for the member, which can then lead to a bit of a discussion.

What is the most memorable claim you have handled?

The frozen fish claim. The member called on a Saturday morning to say that they had set a number containers of antibiotics at -23 degrees C, when they should have been at +5 degrees C. When asked why, they said that they usually only shipped frozen fish and -20 was the usual temperature. The claim ultimately cost US$ 350,000.

What is your favourite part of dealing with claims?

Trying to resolve the issue quickly without the member losing the commercial relationship with their principal.

What is your least favourite aspect of claims handling?

When they start to get too legal.

What is your favourite saying?

"Let's go!"

What are your hobbies and favourite pastimes?

I help to run a rowing club for 12 to 18 year olds. It's great to see them starting off – looking very under confident and wobbly, through to them gaining skills and technique and winning medals. Several of our juniors have then gone on to win at Henley Royal Regatta, the Oxford and Cambridge Boat Race and world championships. All very satisfying.

What is your favourite film?

I'm rubbish at watching films and don't tend to have any firm favourites, although I'll always watch "Chitty Chitty Bang Bang" and annoy my family by singing along. My dad took my brother and I to see it one Christmas Eve, whilst (I assume) my mum wrapped presents. The whole outing must have backfired as spectacularly as the car in Chitty Chitty Bang Bang, as we were both awake all night with nightmares about the child catcher (sorry to spoil the plot for anyone who hasn't seen it).

What is the last book you read or music you downloaded?

Sea Wolf by Jack London – it was a gripping yarn and I'd recommend it to anyone, as long as you like ships and the sea.

Any pet hates?

Probably too many to list out, but currently the saying "let me reach out" – yuk!

What is your favourite place in the world?

Being by the water or on a boat of some variety. I grew up living 100m away from the Bristol Channel watching the ships coming into Avonmouth, helping with the local rescue service (which has now been adopted by the RNLI) and doing lots of dinghy sailing with my dad, which I loved. I now co-own a traditional Thames Waterman's cutter, which I enjoy rowing at the weekends.

If you weren't working at ITIC, what would you be doing?

Who would want to work anywhere else? Although, while at school I had a summer holiday job working in a sail loft making sails for mainly traditional craft, such as Bristol Channel Pilot Cutters. Often the sails were so big that we had to make them in 2 parts and wouldn't actually get to see the finished product until we took them to the boat – quite a scary moment. I enjoyed it all, particularly the hand sewing of the reefing points and clews. So, maybe I'd still be there!

Tariff trouble

A hub agent was appointed as the ship's protective agent by the owner. The charterer was an oil major.

Two months after the ship called at a Libyan port, the local sub-agents appointed by the agent informed them that there had been an increase in applicable tariffs with retroactive effect. The sub-agents did not quantify the increase and as a result the agent believed the increase to be inconsequential.

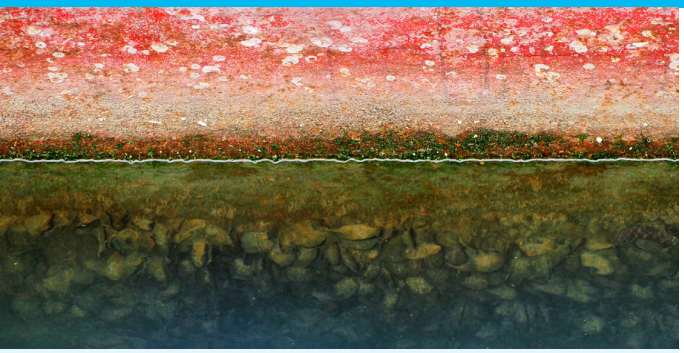
The Pro Forma Disbursement Account ("PDA") was estimated at EUR 14,000. However, when the Final Disbursement Account ("FDA") was provided it was for EUR 87,000. Furthermore, it was issued after the contractual time bar in the charterparty for passing port costs onto the charterers due to a delay by the port in providing the relevant invoices. Needless to say, the charterers refused to pay the costs stating that the matter was timebarred.

The owners had no choice but to pay the FDA as they needed to call at the port again and there was a significant risk of their ship being arrested if the costs were not paid. As such, the FDA was paid and the owners claimed against their protective agent for the difference due to a lack of notification of the increased costs.

It transpired that the new tariff had been printed before the time bar and therefore, if the owners had been informed by the agent, they could have calculated the amount due on the basis of the new increased tariff, despite not being able to present an invoice within the time period allowed.

Nevertheless, ITIC advised that, due to the late provision of some invoices by the port, it was always unlikely that the time bar would have been complied with. However, the late invoices were not the full amount of the claim and therefore it was possible the remainder of the costs could have been recovered. The owners were threatening to commence litigation if the matter was not resolved.

ITIC successfully negotiated a settlement of 50% of the difference and reimbursed the agent EUR 36,373.



A foul up

A commercial manager was held responsible by owners for failing to arrange a pre-departure survey for the fouling of the hull. The ship had had an extended stay at a port and that created a requirement to check for marine growth.

The owner alleged that the manager, having been made aware of the ship's departure time had not made the arrangements in a timely manner. This subsequently caused a delay to the ship departing and as a result, the charterers brought a claim against the owner for off-hire costs under the terms of the C/P.

Expert evidence on the liabilities of a commercial manager in such circumstances was obtained which confirmed that the manager did have a responsibility for arranging the survey.

As a result the owner's claim was settled in full for US$ 185,800. This was reimbursed to the manager less their deductible.

Feeling the heat

Following the discharge of the cargo from a ship a shipbroker was presented with an invoice for heating expenses amounting to US$ 70,000 by the owners to be passed on to the charterers.

However, the invoice was issued to the wrong counterparty. The shipbroker asked the owners to revise the invoice by addressing it to the correct counterparty before they would send it on to charterers.

A revised invoice was never received and the shipbroker neglected to follow-up with the owners. Almost a year later, the owners started to press for a confirmation of payment for the invoice. As no revised invoice had been received, the shipbroker passed the original invoice to the charterers.

Unfortunately, the claim for heating costs was now time-barred as per the charterparty conditions which required the claim to be submitted within 90 days from completion of ship's discharge.

Charterers refused to pay the claim and the owner looked to the shipbroker. It was argued that a fifty-fifty split of liability should apply. Whilst the broker had not passed on the incorrectly addressed invoice and had not followed up on the matter, the owners had addressed the invoice to the wrong counterparty and were asked to provide a corrected version which they never did. Further, they also neglected to chase for the payment for almost a year.

A settlement was agreed at this level and the shipbroker paid the owners US$ 35,000 which ITIC reimbursed.

A delayed description

A ship agent based at a transhipment port was required to submit a declaration to customs authorities in respect of a container of 990 cases of cigarettes being transhipped at that port.

The agent was required to submit, as part of an EDI transmission, a copy of the bill of lading (B/L) by 0830. They submitted the B/L two hours late, and without a cargo description. At 1800 the same day they submitted an amended bill of lading which included the cargo description.

One week later, the customs authorities detained the container on the basis that the cargo was not declared within the prescribed period. After three months had passed, the authorities approached the agent and advised that they would release the cargo in exchange for the payment of a deposit (which the agent paid, so as to mitigate a potential claim from cargo interests), and subsequently levied a fine against the agent of over US$ 400,000.

A lawyer was instructed to appeal against the fine on the basis that the ship agent's error was a simple administrative one not intended to assist in the smuggling of illegal tobacco products. The lawyer also advised that as the ship agent had provided all but the cargo description in the EDI declaration, they had in fact complied with the requirements of the relevant legislation.

The appeal was lodged but was rejected by the authority so the ship agent appealed to the department of finance. Unfortunately, they also rejected the appeal so, on the advice of the lawyer acting for them, the agent filed a further appeal in the administrative court. The case was ultimately heard by the Supreme Court, who found in the agent's favour and ordered the return of the deposit, in full, to the agent.

ITIC covered the cost of the litigation, which was approximately US$ 40,000.

Ferry fiasco

A designer was appointed to provide outline design services in respect of an upgrade to a ferry service and then to advise the client on technical matters during the subsequent build.

Once the ferry was in service, the client alleged that it suffered from multiple issues. The main issues were allegations that there were problems with the hydraulics and engines. There were also reports of excessive noise. Ultimately, the client claimed that all of these issues forced them to close the service and that they would likely have to scrap the ferry entirely and build a new one as the costs of fixing the issues would be so expensive. The designer disputed that any of the issues arose from their design or that they had been negligent in providing the design.

The client commenced proceedings against both the designer and the builder of the ferry for £13.2m (£8.6m against the designer). Lawyers appointed for the designer advised that the merits of the claim were weak and suggested that a settlement value of around 12% should be sought, which was approximately £1m. The client was also looking for interest and costs.

Lawyers also advised that the costs to litigate this claim would be extremely high - approximately £3m per party, due to the technical nature of the claims and the quantity of documentation and number of experts required. Therefore, a trial should be avoided if possible.

A settlement was reached at a mediation whereby the client accepted a joint offer of £2.8m from the designer and builder in full and final settlement of their claim, interest and costs. This was split 50/50 between the two defendants.

ITIC reimbursed the designer £1.4m less the policy deductible.

PAGE 07

Towage and tug tribulations

A company providing both broker and agency services was appointed to assist with arranging the discharge of a large project cargo from their principal's ship on arrival and getting it transported to another port in the same country.

The options were explored and the best solution was to put the cargo onto a barge and for the barge to be towed to the next port.

The broker asked for quotes for the towage and tug from a tow company. This company provided quotes without much detail on daily hire rates and, in turn, the broker passed these quotes to their principal with even less detail attached and occasionally with inaccuracies. As a result, the principal was under the impression that they had agreed a contract for a fixed fee for the transport of the cargo of some £65,000 plus some limited port costs and that the whole operation would take around two weeks.

The tow company went ahead and hired the tug and tow pursuant to standard BIMCO contracts. However, due to an issue with the discharge of the cargo from the principal's ship, the tow company was asked to cancel the contract a few days later. This was done and a second contract was arranged some time later. The transport of the cargo then faced further issues and delays due to adverse weather conditions. Ultimately, the transport took over two months.

After completion the tow company issued their invoice, which together with the port costs, totalled over £285,000. This included costs for the original cancelled contract. Whilst the principal eventually agreed to pay the tow company some of the hire and the port costs, they refused to pay a number of the invoices on the basis that they had not agreed to incur such fees, including the cancellation fees of the original contract. In total, £124,000 remained in dispute and the broker was under pressure from both parties to resolve the issue.

ITIC assisted with the negotiations between the parties, pushing back on a number of fees that were much higher than what had been advised and on some demurrage and cancellation terms that had not been agreed. It was also put to the principal that ultimately, even though the transport ended up being more expensive for them than they thought, the job was performed, and would likely have cost around the price invoiced in any event. Further, the broker could not be held liable for the weather delays.

Ultimately, the tow company offered to discount their fees by £40,000 which left £84,000 in dispute.

It was agreed that the principal and broker would split these costs between them. ITIC reimbursed the broker £42,000.

Forgotten Pilot

A ship agent based in the USA was appointed by the owner of a ship due to arrive in Texas.

The agent ordered a pilot for Monday as instructed by the ship. The purpose of the ship's visit was to take on additional crude oil that was loaded onto barges in Corpus Christi. There was a delay with the barges and this delay was advised by the barge owner to the agent. Therefore, it was clear to the agent that the pilot would not be needed. However, the agent forgot to cancel the pilot and the ship incurred the charges in any event. **The owner made a claim in Texas for US$ 22,000. There was no defence and it was settled for US$ 17,000.**

Conflict causes loss of commission

A shipbroker fixed a ship between owners and charterers which was due to load grain from Ukraine.

Shortly thereafter they received notice from the charterers to cancel the fixture as the Ukrainian ports had been closed as a result of the Russian invasion and therefore, they were unable to proceed to the load port.

As a result of the cancellation of the fixture commission was not payable. Luckily the shipbroker had loss of commission cover with ITIC and the following term applied:

"Your commission income in respect of contracts for the charter, sale/purchase or management of a nominated ship not being paid by reason of your loss of legal entitlement to this income because of the termination of the contract due to:
war, invasion, acts of foreign enemies, civil war, rebellion or revolution;"

ITIC paid the shipbroker the full commission they would have earned under the charterparty had it proceeded as planned, which was US$ 48,125.

Holiday blues

A shipbroker was involved in a fixture where the charterer needed a ship at a certain time.

The charterer sent an email to the broker to narrow the laycan to 30 days but the broker was on holiday and the email was missed. It was not seen until two weeks later when the broker returned.

The email was immediately sent to the owner, but the owner could now not arrive at the dates requested by the charterer.

The charterer insisted on those dates as their buyer demanded it.

Eventually the owner managed to nominate another ship to perform the fixture on the dates required by the charterer. However, the freight rate was significantly higher than the figure originally agreed in the charterparty – US$ 104/MT as opposed to US$ 68/MT.

A claim was made by the charterer against the broker for the difference, which amounted to just under US$ 1m. The broker had no defence and therefore the claim was settled.

ITIC reminds members to have systems and controls in place for when people are away from the office (e.g. on annual leave) so that emails and important messages are not missed.

Redundant reservation

A ship agent was asked by their principal to enquire whether there was space to transit through the Panama Canal on a specific date. However, the agent misunderstood the request to check if a slot would be available, instead taking the request as instructions to book the slot.

In the end, the principal did not require the slot at all. The agent tried to void the booking, but the canal authority denied their request to do so. They therefore had to cancel the booking which led to cancellation fees of US$ 94,000 being charged to the principal.

The agent tried to seek a mitigation request from the authority but it was denied. The principal sought recovery of these charges from the agent. The agent had no defence and the claim was settled in full. The amount was covered by ITIC less the ship agent's deductible.

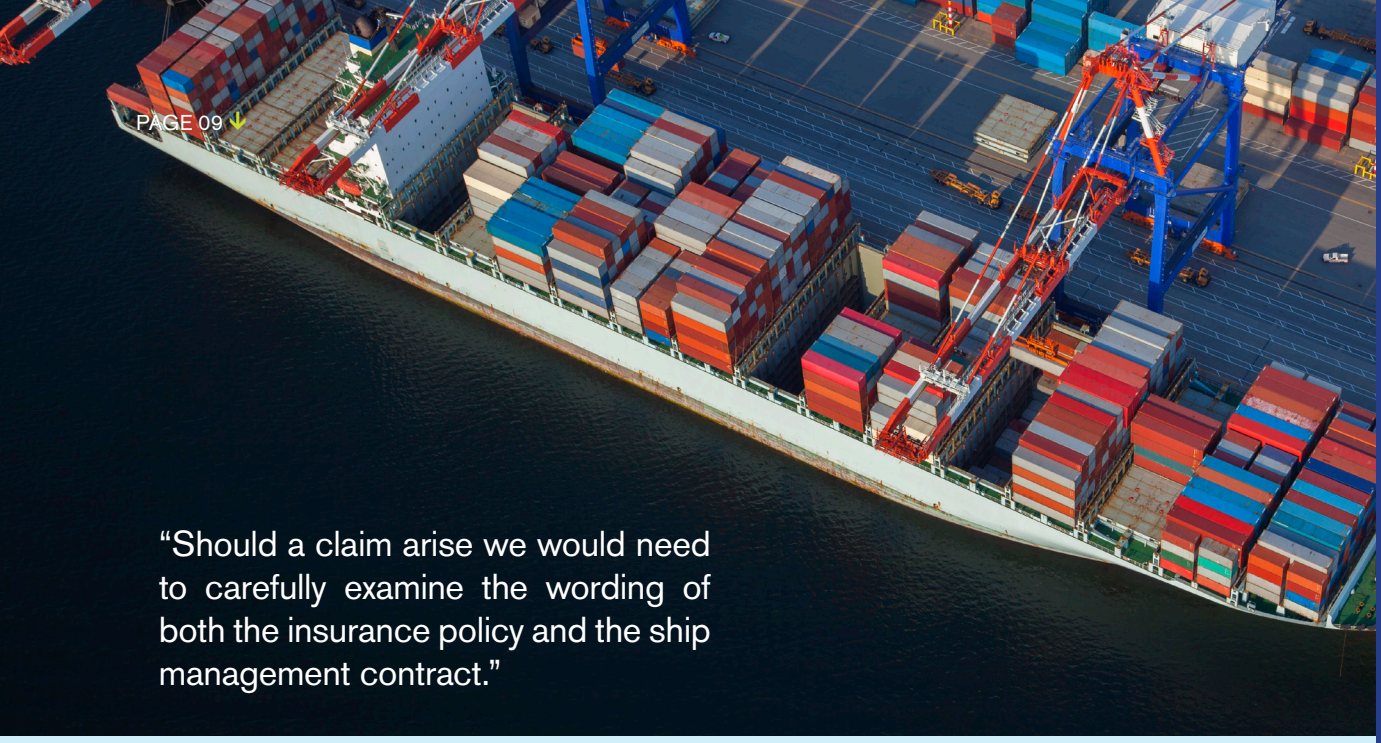
Frozen pastry D'oh!

A 40ft reefer container laden with 12 tons of frozen pastry and baking dough in pallets was booked to be transported from Europe to the Middle East via the port of Antwerp.

The cargo was loaded in the container by the shipper and the temperature set at -18c. This was fine until the transhipment port. The agent had booked the cargo into the carrier's system to be transported at +18c. Despite the bills of lading being issued correctly containing -18 as the temperature, the error in the booking system was not spotted until discharge in the Middle East. The cargo travelled from Antwerp to the Middle East at +18c and was a total loss.

The consignee tried to claim directly against the ship agent who had made the mistake in the booking system. Their claim was for the full commercial value of the cargo which was in excess of the limitation of liability the carrier would have been able to rely upon. The consignee was redirected accordingly.

The carrier was able to rely on the limitation of liability on the bill of lading and settled with the consignee. **The carrier then passed the claim to the agent who settled for EUR 30,000. This was reimbursed by ITIC.**


PAGE 09

"Should a claim arise we would need to carefully examine the wording of both the insurance policy and the ship management contract."

Ask the Editor

Please continue to send in your questions – we are enjoying them. You can email us at askeditorCR@thomasmiller.com

"Can an owner claim against us, as a manager, if we are co-assured on the ship's insurance policies?"

Thank you for your question. This is something we are asked quite regularly. The short answer is, if the claim is for a liability that is covered by the insurance, then the owner (and the insurer) should not be able to make a claim against you. A relevant case on this is The Ocean Victory [2017] UKSC 35. Lord Justice Mance summed up the situation well by stating that it made no sense for subrogated insurers to claim against a co-assured, for which they would then in turn have to indemnify that insured. Further, it was stated in Hopewell Project Management Ltd v Ewbank Preece Ltd [1998] 1 Lloyds Rep that once there is a co-insurance scheme in place, it is understood by the contracting parties and their subrogated insurers that there will be no claim by or in the name of one co-assured against another co-assured for losses covered by the insurance policy. In other words, both parties have essentially agreed that they will look only to the insurer for recompense, not to each other – even if there is no express waiver of subrogation clause.

This makes sense, as the manager essentially steps into the shoes of the owner. So the insurer is not really providing any extra cover – they are covering the owner who has happened to contract their role out to a third party manager. Therefore, if an issue arose with the ship's engines, this would be covered under the H&M policy and if there was an issue with say, the ship hitting a berth, the resulting damage to the berth should be covered by the P&I policy – even if both issues were ultimately caused by the negligence of the manager (as they would have been had they been caused by the negligence of the owner). However, where a ship is detained by port state control due to issues with the vessel and is out of action for a period of time and the owner suffers additional costs of repair (ie those above the costs they would always have been responsible for) and loss of hire – that would not be a claim covered by either H&M or P&I and therefore, the owner would be able to make a claim for the losses suffered against the manager.

This is the general principle but of course, should a claim arise we would need to carefully examine the wording of both the insurance policy and the ship management contract to establish the true position.

In conclusion, it is very important for the manager to be a co-assured on the ship's insurance policies AND also to have their own professional negligence cover.

For further information on any of the products, services or cover provided by ITIC contact Charlotte Kirk at:
International Transport Intermediaries Club Ltd, 90 Fenchurch Street, London EC3M 4ST.
tel + 44 (0)20 7338 0150 email ITIC@thomasmiller.com web itic-insure.com

itic-insure.com
+44 (0)20 7204 2928
@ITICLondon
linkedin.com/company/international-transport-intermediaries-club-itic-/