ITIC SPECIALIST PROFESSIONAL INDEMNITY INSURANCE

# THE WIRE

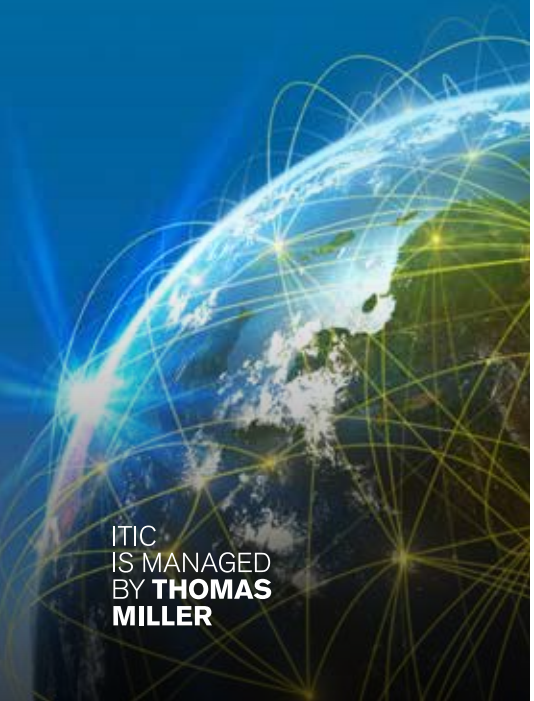
OFFSHORE & HYDROGRAPHIC

*The newsletter for insured members of ITIC. March 2014*

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, naval architecture, offshore and hydrography.

The following selection of articles from The Offshore and 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 MILLER**

## Contract check list for offshore and hydrographic consultants

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 general by nature. The more specific requirements of the contract, such as detailing the scope of the services you will provide will be recorded somewhere else, usually a "Scope of Work" or purchase order. In such a document you should detail all the works you will 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 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 in general terms and conditions 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 & 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 already 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/).

# Hold Harmless Clauses are not always Mutual!

ITIC provides an insurance related contract review service to all of its members. As the leading professional indemnity insurer for the offshore and hydrographic sector, we are often asked to review contracts which contain a mutual hold harmless or knock for knock clause. We are usually told that the presence of this clause in a contract means the risk of a claim is either significantly reduced or even non-existent! No contract is completely risk free. However, if the clause is worded carefully, and is balanced between both contracting parties, it is good contractual risk management and can help to reduce the chance of a successful claim of negligence against you.

A mutual hold harmless indemnity regime provides that each party to the contract agrees to take responsibility for, and to indemnify the other, against injury and loss to its own personnel and property and its own 'consequential losses'. This is intended to be effective even if the accident and related losses are caused by negligence.

The mutual hold harmless clause in the LOGIC standard form contracts, does seek to create balance. However, in many of the contracts we review, the party with the greater bargaining power will naturally seek to swing the balance back to their favour. Consequently, there are a number of pitfalls to consider. We shall provide a few of these below. This shall be viewed from an English law and a professional indemnity insurance perspective.

### Insurance

First, when asked to review contracts with a mutual hold harmless clause, ITIC would suggest that your other insurers are notified. Potentially you are signing away the recovery rights of both your property and employers' liability insurer. Therefore, you should seek authority from them before signing a contract containing a mutual hold harmless clause.

### They may not be mutual

It is staggering how often we see contracts where "the consultant shall indemnify the company against any and all losses," but there is no reciprocal benefit to the consultant. Furthermore, the clause can be more beneficial to one party, as one side may be carrying out all of the work, using only their employees and property. The clause should be read carefully to ensure there is a mutual provision.

### Third party damage

The mutual hold harmless clauses seen by ITIC, although setting out the losses suffered to the property or employees of the contracting parties, will often leave the distribution of third party liabilities unclear. If, for example, you act as a hydrographic consultant on a survey vessel, you should be protected from third party claims arising from the operation of the vessel. The consultant should not be responsible for potentially multi-million dollar pollution liabilities, or collision damages to third party property. These should fall upon the party who has insurance for these liabilities, such as the vessel's protection and indemnity or hull and machinery cover.

### Gross Negligence

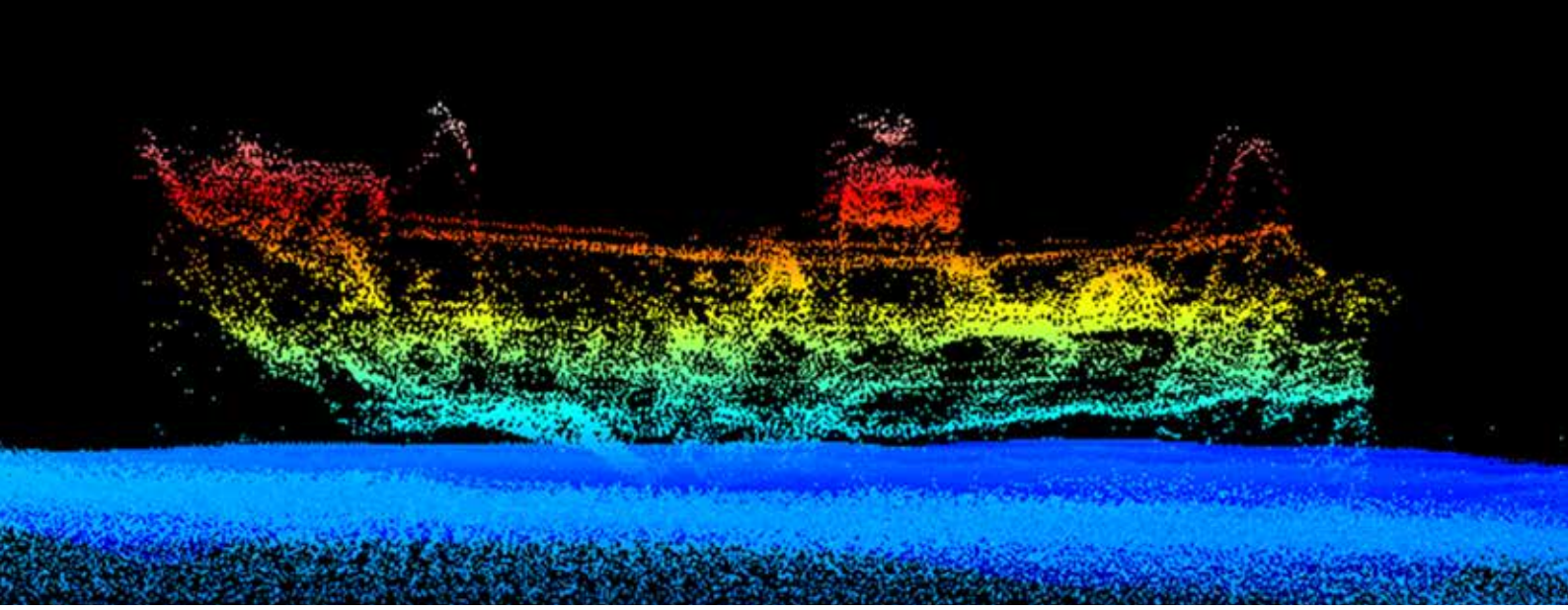
The hold harmless regime provides that neither party shall be liable to the other even where the loss occurred is due to the negligence of one party. However, in some cases we see the clause is amended to state this does not apply in instances of "gross" negligence. Therefore, if one of the parties is found to be grossly negligent they will not be held harmless. This might be fine if the contract was pursuant to Norwegian or US law.

Unfortunately, there is no true concept of gross negligence under English law. You should always operate under the assumption that you are negligent or you are not. Baron Rolfe, in - *Wilson v Brett* (1843) - stated that he "could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet." In other words "gross" did not add anything to the standard negligence test. That being said, if gross negligence is included in a contract, a tribunal will attempt to interpret it. The leading decision comes from Lord Mance in - *The Hellespont Ardent* (1997) – in which he found that gross negligence: is "conduct so

## Subsea telecommunication cable

A consultant was engaged to notify all interested parties along a route of a new telecommunications cable. The consultant did this in accordance with its principal's instructions. However, whilst laying the cable, the ship dragged its grapnel across the submarine transmission cable, which took power from the wind farm to the shore. A significant sum in damages was sought, including direct damages and consequential losses.

Court proceedings were brought directly against the ship owner. Although, the consultant carried out its role without fault, they were named in the proceedings as a joint defendant. Luckily the consultant had cover in place with ITIC, who paid for the legal defence. ITIC was also on hand to offer expert advice. However, it shows that you do not need to be negligent to have a claim made against you.



seriously negligent that the defendant should not be entitled to rely on the exemption clause." He further added that it is "very much a matter of degree and judgment," and, "all the circumstances must be weighed and balanced." It should be pointed out that Lord Mance was interpreting a contract pursuant to New York law. Therefore, his words are not binding, and his interpretation on gross negligence may not be followed by subsequent tribunals.

The line between negligence and gross negligence can become blurred, and cases will turn on the facts and expert evidence. Moreover, tribunals may have differing opinions on how to apply the test against the facts, reaching differing decisions. On balance, the inclusion of gross negligence within a hold harmless clause in a contract pursuant to English law can lead to uncertainty and increased litigation costs.

Finally, it is understandable that contracting parties do not want the other to rely on a hold harmless clause, as a shield for reprehensible behaviour, beyond the ordinary test of negligence. However, as the line is blurred between that of negligence and gross negligence, a more delineated position to take, is between that of wilful default/misconduct and negligence.

### Indirect damages

A further and final point we see, is how consequential or indirect losses are defined in the mutual hold harmless clause. It is usual that these losses are excluded under contract. However, the distinction between indirect and direct loss can be complicated. The famous case of *Hadley v Baxendale* [1854] found that direct losses were those which arise naturally from the breach of contract, and is therefore foreseeable and recoverable. Whereas, indirect losses were recoverable, but only if they were reasonably foreseeable by both parties, as a possible result of a breach, at the time of contracting.

A common misconception is that all "loss of profits" are indirect losses. This is wrong. Loss of profits can be either direct or indirect, depending on the facts of the case. The following is taken from the hold harmless clause of a contract we have reviewed recently:

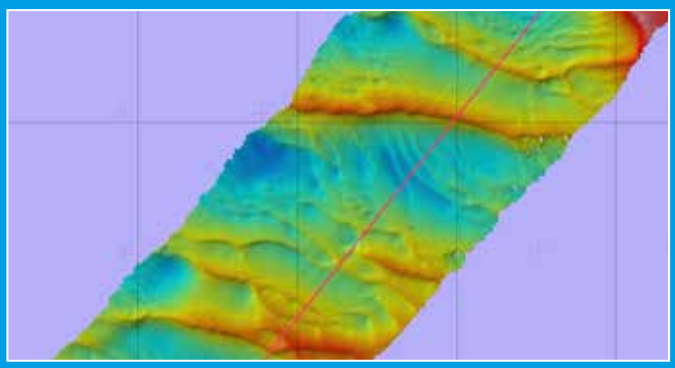
"The consultant nor the company shall be liable to the other… for any consequential indirect damage, that may be suffered by the other."

This clause could pose problems in the event of a claim, as it only excludes "consequential indirect damages." Following *Hadley v Baxendale*, dependant on the facts, loss of profit can either be a direct or indirect result of the breach. If, for example, a consultant was providing design work for sub-sea equipment and carried out the design negligently, not only could this cause damage to property, but also lost drilling time, leading to lost revenue and profit. In this example, a tribunal could find the loss of profit arose naturally from the breach, and therefore, is a direct loss not excluded under the above hold harmless clause. Taking into account the current day rates of drill rigs, this could form a substantial part of any claim.

The clause should be amended to state loss of profits are excluded, whether direct or indirect.

## Conclusion

**ITIC's advice is that you carefully review your hold harmless clauses to ensure that they are actually mutual and of benefit to you.**



## Bathymetric surveyor

A surveyor was contracted to carry out a debris clearance survey, including a bathymetric sounding. This survey was carried out and a report issued, but unfortunately, the depths on the report were not correct. The site was actually deeper than indicated. The principal, in reliance on this report, chartered a barge to clear the site, but was unable to work due to the water depth being too great. A claim was made against the survey company for the cost of the barge hire, which was reimbursed by ITIC.


# Insurance – who needs it?

Historically, offshore and hydrographic professionals 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 when buying insurance.

### What is Professional Indemnity Insurance and Why is it Important?

Lets 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 they have suffered a loss as a result of your professional negligence. The important part of the first sentence is 'alleges'; even if you are not liable, the costs of defending an incorrect claim for negligence are high.

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/**

For all updates and information follow ITIC on Twitter: **@ITICLondon**



ITIC IS MANAGED BY **THOMAS MILLER**

*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 fax + 44 (0)20 7338 0151 e-mail ITIC@thomasmiller.com web www.itic-insure.com