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# THE WIRE

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## Marine Surveyors and ITIC

**ITIC provides professional indemnity (PI) insurance to marine professionals for claims which are brought against them due to losses suffered by their customers or other third parties as a result of their negligence, error or omission. ITIC, as a specialist, not-for-profit provider of professional indemnity insurance, is a natural choice for those requiring protection from claims who work in the marine sector.**

This edition of The Wire is for marine surveyors and consultants. The focus will be how marine surveyors and consultants can manage risk, in order to avoid claims and protect the assets of their company through good practice, as well as sharing some recent claims examples.



ITIC  
IS MANAGED  
BY **THOMAS  
MILLER**



### Duncan Mann, Senior marine surveying underwriter

Duncan is a senior underwriter and claims handler, responsible for ITIC's members based in the Middle East, Indian Subcontinent and the North East of England. In addition, Duncan is responsible for overseeing ITIC's global development of the marine surveyor and consultant sector.



## ITIC's experience is that claims presented against marine surveyors and consultants are surprisingly varied, as you will see from the following...

### More than you were asked to do

A marine surveyor in Germany was engaged by charterers to attend the loading of a cargo and report on any damage caused by the stevedores. The subsequent emailed instructions contained (in translation) the following provisions:

"We hereby order the following:

- Supervision of the loading/preloading survey
- Reporting of eventual damages to the coating or the material - and time of damage
- Reporting of negligence while handling of the material and loading
- Detailed documentation with photos of the loading operations
- This time no continuous supervision will be necessary, only during the important movements (commencement of loading operations - change of shift - securing of the cargo.)"

The loading and lashing was completed and the ship sailed. Three days later there was a large noise from the cargo hold and the ship developed a 30 degree list. The master reduced the list by ballasting and diverted to a port of refuge. The cargo was discharged, sorted on the quay, reloaded, lashed and secured. About 600MT of damaged cargo was left behind. Over 10 days later the ship sailed to continue the voyage.

The owner alleged that the cargo had shifted due to poor stowage and ultimately obtained an arbitration award against the charterer for €1.56 million. The charterer subsequently held the surveyor and the stevedores (who loaded the cargo) jointly liable for €1.56 million.

ITIC arranged for lawyers to represent the surveyor. The claim was rejected on the basis that (1) the stevedores were responsible for the loading and stowage and (2) the surveyor's instructions were limited to reporting on stevedoring damage caused during loading. The potential difficulty with this defence was that the charterer's email instructions could potentially be interpreted as giving a wider obligation. In the circumstances a contribution to the settlement of the claim of US\$ 156,100 (about 10%) was agreed.

**Although the contribution made was, in percentage terms, relatively modest the claim is an example of how the wording of instructions can potentially widen the scope of a surveyor's liabilities. If the brief is understood to be restricted to a specific task it is important to make sure this is clearly recorded.**

## Underwriters fall out with expert witness over valuation of fire-damaged vessel

**ITIC has reported a case in which hull and machinery insurance underwriters commenced proceedings against a marine consultancy firm for alleged negligence in failing to properly review shipyard quotes in respect of the cost of repairing a fire-damaged vessel.**

The insured vessel had suffered extensive fire damage. The owner claimed that the ship was a Constructive Total Loss (CTL) (the cost of repairing it would be in excess of its insured value). The insurers rejected this contention, maintaining that the vessel was capable of economic repair. The vessel was ultimately scrapped, and a dispute over the amount the insurers were obliged to pay under the policy arose.

At an early stage, the owner made an offer to settle the claim by stating that they would accept \$1.136m, plus their legal costs. Underwriters rejected the offer, and owners commenced litigation. The underwriters engaged a marine consultancy firm to provide expert advice/evidence on what it would have cost to repair the vessel. The consultants issued a report stating that the vessel was not a CTL. This report was based, in part, on two independent quotations from Chinese shipyards and detailed calculations from the builder of the vessel which indicated that the steel weight for the vessel's accommodation block was 312 tonnes which had been provided by their client.

The owner in turn submitted the report of their technical expert, which had been prepared using a different, 'newbuild' approach. This report used an estimated steel weight total of 542 tonnes to repair the accommodation block, and concluded that the total cost of repairing the vessel was \$6m, a figure that would have made the vessel a CTL. Following a joint experts' meeting, underwriters' counsel asked

their consultant to prepare their own steel weight calculations, inclusive of the accommodation block, in order to rebut the owner's report. Drawing from their own calculations, the underwriter's consultants concluded that the shipbuilder's initial steel weight figure was inaccurate and that the cost of repairing the vessel was in fact \$3.9m in excess of the total insured value. On the basis of this new advice, underwriters settled with the owner for \$1.3m, plus the owner's costs.

Underwriters then commenced proceedings against their consultant on the basis that they had been negligent in failing to properly review the shipyard quotes. Underwriters claimed that had they been properly advised initially, they would have been able to settle for a lower amount at an earlier stage. This would have also reduced their own costs and their liability for the owner's costs.

The consultants pointed out that the underwriters had rejected the owner's earlier offer before they had even been engaged and argued that, for their part, they had relied on the Chinese shipyard's calculations, which were provided by the underwriters. Moreover, it was not until after the joint experts' report that they were asked to make their own assessment.

Reporting that the issue was finally settled at mediation for GBP 305,000 and an agreement that both parties bear their own costs, ITIC says, "It is five years since the English Supreme Court held that expert witnesses involved in legal proceedings no longer enjoy protection from liability for negligence. It was a feature of this dispute that there was no document specifying what the consultants had been engaged to do. **A large number of disputes involving consultants and other advisers would be avoided if the scope of work was clearly defined beforehand.**"

## Crossing the line

**A marine surveyor was appointed by the owners of a ship that had been involved in a major casualty which had involved significant loss of life. There were potential criminal charges arising out of the incident.**

The local police had taken possession of the vessel while investigations as to the cause were underway. The surveyor was invited to attend the vessel by the owner's fleet manager. On reaching the wreck no one stopped them from going on board. Subsequently a joint survey with all the parties involved, including the Public Prosecutor, was carried out. During the joint survey the member indicated to the Public Prosecutor various points of interest in the wreck. When queried about his knowledge of the places, the surveyor responded that he had previously been on board with the fleet manager. The surveyor had assumed that the fleet manager had been authorised to take him on board.

The Public Prosecutor considered charging both the fleet manager and the surveyor personally with tampering with evidence. The surveyor's employer had purchased ITIC's Directors' and Officers' cover. This additional insurance covers

legal costs arising from criminal charges that would fall outside the scope of a professional indemnity policy. A specialist criminal lawyer was appointed and the matter was resolved.

**Directors' & Officers' insurance (D&O) is a personal insurance purchased by the employer for the benefit of its directors and officers. ITIC's D&O product protects both individual directors from claims against them in person and also the company that has to indemnify these senior staff.**

**Contact your ITIC Account Executive, or insurance broker, for more information.**





# Surveyors signing indemnities

Often ITIC's surveying members are asked by ship owners, with whom they have no contract, to sign an indemnity, disclaimer, waiver or release in favour of the ship owner, before they are granted access to the vessel. For example, when appointed by a prospective buyer to perform a pre-purchase survey or when appointed by cargo insurers to inspect cargo aboard a vessel.

ITIC has provided many surveyors with advice about how to tackle these requests and further information on this can be found on our website: <http://www.itic-insure.com/fileadmin/uploads/itic/Photos/SURVEYORS%20SIGNING%20INDEMNITIES.pdf>

## ITIC Suggested Wording

We suggest that in the first instance, any indemnity/waiver presented to you by the owner be declined. However, if the owner insists on a wording you may want to present the owner with the following:

"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 losses they suffer (including 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."



Finally, the surveyor may want to include a clause in their own terms with their principal that allows them to recover any losses they may suffer which are not caused by their own negligence as a result of performing the survey.

## Guidelines for incorporating Standard Terms and Conditions

Having an excellent set of Standard Terms and Conditions (Terms) in your desk drawer or on your website, is all very well, but unless you have incorporated them into your contract with your client, they will not form part of your legal relationship and you will not be able to rely on them should a dispute arise. It is therefore very important that you incorporate your Terms into your contract. ITIC provides detailed information on how to incorporate your Terms at <http://www.itic-insure.com/knowledge-zone/article/guidelines-on-incorporating-standard-terms-and-conditions-129819/>



[www.itic-insure.com](http://www.itic-insure.com)



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