ITIC
SPECIALIST PROFESSIONAL INDEMNITY INSURANCE

Welcome to the Spring edition of the ITIC Claims Review, which is published to coincide with the March 2013 meeting of ITIC's Board of Directors in Tokyo, Japan.

Claims review 27

March 2013

Documentation disclosure

A manager for a number of cruise ships was sued by the shipowners in a court in the USA in respect of alleged failure to oversee the maintenance, negligence in the provision of the manning and for negligent advice in relation to stability problems experienced by one of the ships. The plaintiffs alleged that theses breaches of contract caused them to incur increased maintenance and repair costs as well as lost profits.

The rules on disclosure of documentation in US litigation are very onerous and the amount of documentation requested by the plaintiffs in this litigation was enormous. There were demands that the managers produce over 5 million documents and such was the magnitude of the request for documentation that the court ordered that a specialist company be employed to track emails specific to the management of these vessels.

The costs of the court appointed email tracking firm was USD 350,000.
The average monthly legal costs incurred were USD 110,000 for each of the 12 months prior to trial.

At an early stage the managers and ITIC concluded that the case was without merit. However, the substantial legal costs likely to be incurred (which the winning party cannot recover in US litigation) meant that, if a sensible settlement offer was made, it would be considered. However, at no stage was such an offer made by the plaintiffs who continued to claim in excess of USD 20 million.

This case went to trial. The court dismissed all the claims. The plaintiffs appealed and the managers also put in a counter claim for their fees, costs and other expenses incurred. This helped to shorten the appeal process as the plaintiffs eventually dropped their appeal and their motion for fees and costs and paid to the managers a settlement of USD 375,000 to ensure that the managers dropped their counter claim.

Although the managers had comprehensively won the case the legal costs incurred of USD 2.7 million were covered by ITIC.

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BY **THOMAS MILLER**

Surveyors sued for loss of evidence

A firm of surveyors was appointed by an insurance company to investigate the cause of a fire at a factory in America. The cause of the fire was alleged to be a faulty forklift truck.

Following a joint inspection of the factory premises, the surveyors took control of the forklift and other artefacts and made arrangements to store them elsewhere. The forklift remained at these premises for several months. No clear arrangements had been made about who would pay for this storage. The storage invoices were not paid and eventually the company who was housing the forklift sold it for scrap.

The owners of the factory claimed significant insured losses and additional uninsured losses in excess of the policy limits. They believed that they could recover the losses above their insurance limits from the forklift suppliers due to the fact they alleged that the fire was caused by the forklift.

The factory owners contended that the forklift's destruction prevented them from pursuing their claim for the uninsured losses against the forklift suppliers. They held the insurance company responsible who in turn sought to hold the surveyors liable.

The insurance company settled the factory owner's uninsured loses claim for USD 1m. The insurance company then commenced an action against the surveyors for recovery of this sum.

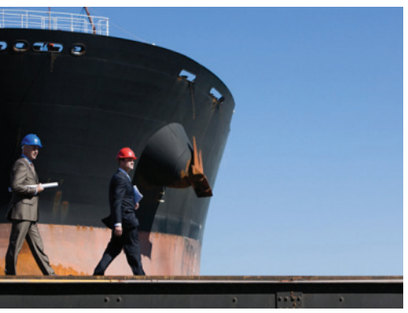
A US lawyer was appointed by ITIC to provide advice on liability and protect the surveyor's interests. The lawyer advised that the surveyors would definitely have an exposure, although there were arguments that could be used to reduce their liability. Issues included who had actually had responsibility to pay the storage company and whether the member should be responsible for the storage company's possibly unlawful action in selling the forklift.

A major concern for both parties was the legal costs which are not recoverable by the winning party in the USA. These would have been very large if the matter went to trial. Therefore, negotiations were entered into and the matter was settled for 25% of the original claim against the member.

Not all insurance policies cover claims brought in the USA. ITIC's cover has no jurisdictional limits and therefore defended a European surveyor who had a claim made against them in the USA.

Stability study

A naval architect provided a stability study on a barge which guaranteed it would remain stable up to a maximum cargo load of a specific weight. The condition of this guarantee was that for the barge to maintain stability it had to be loaded as per the loading plan and ballast had to be dispersed in conformity with the plans drawn up.



When the vessel was loaded she capsized. It appeared that there had been an error in the naval architect's calculation and a total of EUR 831,150 was claimed for the loss of cargo. ITIC negotiated with the claimants on behalf of the naval architect. The claim was eventually reduced to EUR 400,000 and paid in full by ITIC.

Defective design

A marine engineering consultancy designed a seawater storage tank for a newly built power plant. They were instructed by a major European engineering contractor. After its construction, cracks began to appear in the structure thereby shortening its anticipated lifespan significantly. The contractor chose to demolish the water storage tank and rebuild it. They then brought a claim against their subcontracted consultant for EUR 2 million. Expert views on the effectiveness of the initial design were exchanged. With both parties still willing to avoid litigation if at all possible, an ITIC supported settlement of EUR 280,000 was agreed.

This claim illustrates how ITIC will try to resolve genuine liability claims without recourse to litigation. The appropriate use of experts can bring the matter to a conclusion without the hostility generated by litigation and associated costs.

Commission collection

A shipbroker acting for charterers was owed USD 25,000 of commission by an Indian voyage charterer. The charter party provided that the charterer would deduct the commission.

ITIC wrote to the charterers, but did not receive any response. ITIC ascertained from local sources that the charterers were in deep financial trouble.

Nevertheless, a local lawyer was appointed to pursue the debt. ITIC further heard that it was rumoured the Indian charterer was to have a large investment from a foreign investor.

A letter was sent to the charterers stating if they did not pay the outstanding commission, winding up procedures would be commenced. This is where an application is made to the local court to place the debtor into liquidation. Again, the charterer's did not respond with any offer of settlement. ITIC, as promised, commenced the winding up process, which prompted an immediate payment to the shipbroker from the charterer.

Not plugged in

Three containers of pork were shipped from one European port to another. The containers were discharged from the ship, but the discharge port agent had overlooked the instructions to keep the container on power and the units were not plugged in until 11 days later.

The reefer logs showed that the cargo had been at the correct temperature whilst on the ship, but that it was only after discharge that the temperatures started to rise.

The port agent faced a claim of USD 45,000, which they had to pay. ITIC reimbursed the ship agent in full.

Claims from the incorrect setting of reefer containers are one of the most frequent claims experienced at ITIC. Ship agents need to ensure that they have the processes in place to ensure that they correctly manage reefer containers.

Missed message

A shipbroker missed a message from owners explaining that the vessel they were fixing needed to inert tanks before loading. The message was therefore not seen by the charterers. The vessel was then fixed.

Once the vessel arrived it was apparent that the tanks needed inerting. A claim against the broker was made for loss of time of USD 30,000. Clear negligence on the part of the broker meant the claim was quickly paid.

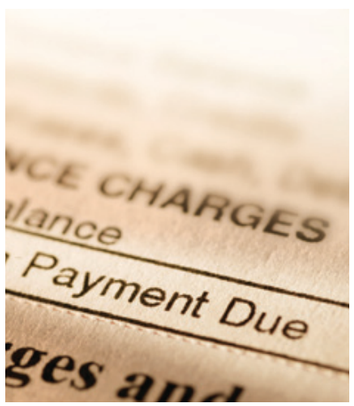
Chasing unpaid fees

ITIC were notified by a ship agency member, based in Canada, that they were owed over CAD 70,000 from a local company.

The company were declared bankrupt and ITIC instructed lawyers to get the ship agent's properly listed as a creditor.

There were other creditors, however, aspects of the agent's debt took priority over many claimants and ITIC managed to recover CAD 42,998 on behalf of the ship agent.

The case shows the importance of ensuring that claims are properly filed in liquidations.



Bangkok to bailiff

A large ship management company was asked, as a favour, to provide a master /skipper to a yacht to be sailed from Thailand to Spain. No formal contract was in place between the member and the owners of the yacht. Members simply brought the two parties together on an informal, one-time fee basis.

After many delays with the commencement of the voyage and the yacht still being in Thailand, the yacht owners claimed that the master was both unsuitable to undertake the voyage and negligent in performing what was reasonably expected from him. As a result of his alleged negligence, the yacht owners sustained certain damages including loss of earnings and enjoyment.

The yacht owner brought a claim and ITIC appointed lawyers, with yachting experience, to defend the member's position. ITIC and the manager believed the claim to have been exaggerated, as it was not supported by any real evidence or documentation. However the claimant continued to pursue the claim.

The court held that the ship manager had not properly checked the master's references and consequently the manager had not fulfilled their duty as they were requested to do.

However, the court also held that there was no causation between the breach by the managers and the alleged damage. The court also held that the claimants could not prove, or sufficiently demonstrate, that had the references been properly checked and the master screened, the results of that checking would not have led to the master being chosen.

As a result the claim against the ship manager was denied and the yacht owner was ordered to pay the costs of the proceedings. The next step was to enforce the judgment by serving it on the yacht owner. When payment wasn't made, the bailiff collected the funds from the owner.

Brokers liable for bunkers

A chartering broker arranged a fixture for a voyage from the Black Sea to Singapore.

The recap showed the identity of both the registered owners and the disponent owner with whom the negotiations had been concluded.

Disponent owners requested brokers to arrange to purchase bunkers and an order was placed with a physical supplier. The cost of the bunkers was USD 777,278. However, instead of ordering the bunkers on behalf of the disponent owners they mistakenly ordered them on behalf of the registered owner taking the name from the recap.

The bunkers were duly supplied and the ship signed for them. The physical supplier invoiced the registered owners c/o brokers for the cost of the bunkers supplied. The invoice was sent to the disponent owners but when payment was due they did not pay. On chasing for payment the disponent owner replied 'regarding the payment for bunkers, I have passed to the financial side and they should be arranging payment, the delay is due to our Company currently being audited and will be ending in the coming weeks'. Further requests for payment met with similar response 'getting information from financial side and will update soonest'.

Physical suppliers instructed lawyers to collect the monies owed.

When lawyers approached the registered owners they were told that the registered owners had never given any instructions for the purchase of the bunkers and that the responsible party should have been the disponent owners. If the bunkers had been purchased in their name then this was a misrepresentation on the part of the party who had provided the information to the bunker supplier.

Lawyers therefore turned their attention to the brokers saying they were responsible for breach of warranty of authority. There was no prospect of going after the vessel and the brokers entered a settlement with the bunker suppliers.

Take care with customs

A vessel loaded a cargo of bulk wheat in the UK. The shippers were a large trading company.

The trading company were obliged to issue a financial bond with the rural payments agency, which in the normal course of events would have been released following the shipment.

The agent received the documents on the afternoon of the ship's final day of loading and lodged the entry in the customs system that afternoon, but failed to notice that the cargo was not showing as "arrived" in the customs system. The ship subsequently sailed that evening without customs having an opportunity to inspect the cargo.

This resulted in the trading company losing their deposit.

The agent appealed to Her Majesty's Revenue & Customs (HMRC), but unfortunately they upheld the original decision which meant the repayment of the bond would not be forthcoming. The agent was held liable by the shipper.

ITIC handled several of these types of lost Common Agricultural Policy claims in the 2000s and we cannot recall one occasion when HMRC exercised flexibility when cargo was exported before customs had the opportunity to inspect it.

So, be careful with your customs entries.

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