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ITIC Ship Management International columns



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BY **THOMAS
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Introduction

Here are the articles written in 2023 by ITIC for Ship Management International magazine. The ITIC column in Ship Management International provides loss prevention advice and opinions on topical events and issues.

You can read the articles online at:

<http://shipmanagementinternational.com/>

It's a blame culture – so be careful what you say!



Managers are often required to produce a report post-incident, whether for Flag State, Owners or in accordance with the Vessel's SMS, for example. While it is helpful to have a report outlining the facts of the incident, what went wrong, and what could be improved, managers must take care when drafting a review of this kind that any findings are not used against them or their principal. The ISM code promotes a no-blame culture. However, when something goes wrong, it can be the very opposite.

Any incident may lead to a dispute and costly litigation. Parties involved will inevitably ask for any reports into the incident and scrutinise them for anything that can be used to assign blame and liability.

ITIC regularly see reports and correspondence issued by managers keen to state they were negligent and apologise to owners for the sake of appeasement and provide a "good service". However, in some instances, this encourages owners to bring a claim against managers (or a third party to sue owners) for the incident or other issues, especially when relationships deteriorate at a later stage or when owners want to find an excuse for non-payment of management fees. It should be remembered that an apology can be taken as an admission of liability. This could put the manager in breach of their insurance policy which usually states that liability must not be admitted.

Managers should therefore ensure when reporting on the incident that they do not comment on anything outside their knowledge and, is not strictly necessary to the understanding of the incident. As far as possible, any report should contain factual statements only, not opinions or apportionment of blame or liability. The former is for experts to comment on, and the latter, for lawyers, based on the relevant laws and contractual provisions.

How an issue is described and blame is assigned can make significant differences in liability or how allegations or arguments regarding liability are shaped. For example, under the SHIPMAN agreement, broadly speaking managers are not liable where the crew has caused this issue, even if they have been negligent. However, they could potentially be in breach of the contract where the crew's incompetence was caused by the manager's failure to



**By Geraldine Koon,
Legal Advisor, ITIC**



provide proper training, where they have a duty to do so.

Further, where the crew is incompetent, the vessel may be considered to be unseaworthy and leave owners unable to defend against certain claims from third parties.

Managers should also remember that any incident can be the result of one or multiple causes, and often, until the issues are fully investigated, it will not be possible to say which factors were causative. They should, therefore, be careful when setting out the reasons for the incident. Liability under the Shipman is restricted to where the loss has been caused "solely" by the manager.

Where not necessary, the report should not refer to other documents as this immediately brings attention to material that may ultimately not be relevant. For example, it will likely not be essential to include the performance review history of a crew member.

Finally, in case of any doubt, managers should refer the matter to their insurers and/or lawyers so that the draft report can be reviewed first before being finalised and sent.

If managers feel that they may face some claim, they should also avoid discussing the issue internally in writing and should be careful what they say in correspondence to owners. Should the matter be litigated subsequently, under English law (and many other jurisdictions), such correspondence would be disclosable to the other side, so managers should take care not to prejudice their position. Again, managers are advised to inform their insurers and lawyers as soon as possible. This would also make it more likely that litigation or legal advice privilege may be asserted over subsequent correspondence on the matter, so these documents would not need to be disclosed in litigation. ●

Managing unplanned refits

By Chloe Townley, Senior Account Executive, ITIC



When it comes to unplanned refits, such as emergency dry docking due to damage, the responsibilities of the ship manager are often not recorded in much detail in SHIPMAN 2009 or agreed in advance. What are the potential pitfalls a ship manager needs to look out for in this situation?

The majority of the issues faced by a ship manager for an unscheduled refit come down to the fact that the fee, scope of work or procedure for agreeing to the budget were not properly agreed in advance of the work. Whilst under SHIPMAN 2009, the ship manager can act in their absolute discretion to perform their management services (including for example requirements of Class), if the costs go over-budget for any reason, this is typically where the relationship between the parties deteriorates. The ship owner will look to put the blame on the ship manager, alleging the costs were unnecessarily incurred/high due to some alleged failing of the ship manager, even if the repairs were unavoidable. This is especially true where ship owners find themselves with a shortage of funds for unplanned works.

In reality, the ship manager should only face a claim if the costs over-run causing a loss (i.e. were unavoidable) and were due to their negligent management of the budget (or failure to properly supervise the refit), but there are steps a ship manager can take to try and minimise exposure, regardless of whether the cost was avoidable or not.

ITIC has seen a case where the refit budget overran and the ship owner brought a claim for EUR 900,000 against the ship manager. There was no formal agreement in place for the management of the refits. The majority of the overspend was due to the works required by the classification society and therefore the ship owner had not suffered a loss due the alleged negligence as they

had to pay the costs to ensure the ship remained in class regardless. To conclude the matter, at the minimum cost, ITIC settled the claim at a fraction of the amount claimed. Although the ship owner's allegations lacked merit, the situation may have been avoided or minimised if the obligations had been clear from the outset. It is worth noting the urgency of the required works may too need to be taken into account – if the work to keep Class could have been done at a later date in a cheaper location, a ship manager could be criticised for arranging it sooner, costing more. In this situation, the ship owner's prior approval should be sought.

Protecting yourself as a ship manager should involve agreeing the initial budget at the outset of the project with the ship owner, and the process for subsequent revisions to the budget, i.e. each month to set out the revised budget and request ship owners to pay funds in advance. It is important that the ship manager adheres to any process agreed to demonstrate competent management of the budget and refit.

Additionally, it is worth agreeing with the ship owner the fee for the refit, including specifics such as how many visits the superintendent will make to the ship. Additional days will then carry a fee in excess to the contracted number. Without this, if the work is more complex than anticipated requiring excess visits, the ship owner can dispute that the ship manager is entitled to charge more.

Taking care to formally agree details with the budget and scope of work included in the fee, as well as careful record keeping, clear and timely and frequent communication both with the yard and the ship owner, could go a long way in minimising allegations of negligence on the part of the ship manager for cost overruns. ●



PI insurance protects against crew negligence



By Robert Hodge, Director & General Manager, ITIC

ITIC has a long association with Cyprus, from providing cover to the first ship managers nearly 40 years ago to opening our European office there this year. Over the years, ITIC's cover has been shaped, as the industry has developed – to include cover for crew management, commercial and pool management.

One of the specialities of Cyprus is crew management, and ITIC has seen a steady increase in the number of claims made against ship and crew managers that have arisen purely from crew negligence. P&I or hull insurers should cover claims arising from crew negligence. They are not the responsibility of the supplier of the crew, namely the crew manager. For example, in the event that a fully certificated and qualified chief engineer cause damage to a main engine due to an error, the claim should fall against the hull and machinery underwriters. The fact that the chief engineer made a mistake does not mean the manager was negligent.

It is a condition of ITIC's insurance that BIMCO CREWMAN or SHIPMAN is used. These documents state: "...managers shall not be liable for any acts or omissions of the Crew, even if such acts or omissions are negligent, grossly negligent or wilful..."

This was very important in the following claim where the manager took on a ship, including the provision of the crew.

The ship was heading towards Shanghai, and the master reported that she had experienced excessive vibration after passing close to a buoy marking a wreck. The manager subsequently received an anonymous message from the vessel advising that she had hit a wreck. When the ship reached its final destination, it was dry-docked and damage was noticed.

The manager was co-assured on the hull policy, but the owner commenced arbitration proceedings claiming that substantial additional costs had been incurred.

The claim was based on an allegation that the manager was vicariously liable for the actions of the master. The manager's defence was simply that, under the terms of the agreement, they had no liability for the crew's negligence. The manager's sole obligation was to provide an appropriately qualified crew.

Negotiations and investigations by experts and lawyers continued for the next five years, and substantial costs were incurred. The arbitration hearing was scheduled to take place; however, the owner (probably realising that his claim for crew negligence was unlikely to succeed) served an entirely revised claim backed by a lengthy report from an expert. The claim was fundamentally altered and was now focused on the manager's application of the ISM code and the role of the DPA. A further allegation was made that the bridge team suffered from fatigue at the time of the incident and that the manager should have been aware of this.

By this time, the costs of investigation and preparing the defence had reached US\$ 1,000,000. A defence was submitted, and the manager's lawyers were confident that the claim could be successfully defended. Still, it was recognised that the hearing could last up to seven days, resulting in legal costs in the region of US\$ 750,000, in addition to the US\$ 1,000,000 already spent in preparing the defence.

The owner offered to settle the claim on a "drop hands" basis, with both sides bearing their costs. Although the manager felt they had been presented with an extremely weak case, they could not rule out the possibility of adverse findings. Accordingly, the offer was accepted.

This case shows how important it is to use the correct contract and to have insurance to cover the legal costs of defending even weak claims. The defence of a manager is always expensive. ●



Therein lies the RUB

Ship managers who agree to manage a ship with a fixed premium P&I insurer that may trade to Russia or Ukraine must do so with great caution.



By Robert Hodge, Director & General Manager, ITIC

It is a condition of ITIC's insurance that all ship managers are named as fully co-assured on the owner's insurance, including Protection and Indemnity (P&I) policies. It is also a condition that such insurance is with a P&I Club who are members of the International Group (IG).

ITIC does accept some fixed premium P&I providers on a case-by-case basis. However, caution is required as the insurance market now require that most insurances contain an exclusion for claims arising out of Russia, Ukraine or Belarus - also known as the RUB exclusion. This will exclude any claim arising from the Russia-Ukraine war and in any territory or area where the conflict is ongoing.

RUB exclusion is now included within all fixed premium covers, but not in the cover provided by IG P&I Clubs on a mutual basis.

The wording of the RUB exclusion is wide. The drafting of the exclusion was presumably worded to exclude war-related incidents. However, could it be used to exclude a claim which has nothing to do with the war? If a ship has a P&I claim (such as pollution) that has nothing to do with the war but is simply within Russian territorial waters, an unscrupulous insurer could exclude the claim based merely on its location.

A prudent ship manager managing a ship trading to Russia or Ukraine should insist on cover with an IG Club on a mutual basis. Some fixed premium insurers even exclude Russia trading in full. One manager accepted a ship into their management, which, unbeknownst to them, had such a trading restriction. There was cargo

damage in Russian waters, and the P&I insurer denied cover. This left the manager potentially exposed to an uninsured claim if they were sued along with the owner (which is not uncommon).

The above instance highlights the importance of managers asking for and checking the insurance cover for every ship they manage to ensure that: firstly, the P&I is with an IG Club; secondly, they are fully co-assured; and finally, to consider the impact of the exclusions under those insurance.

If the manager is arranging the insurances on behalf of the owner, they must consider the potential impact the exclusions have. An ITIC ship manager member failed to recall that the hull policy excluded Cuba. The cover was placed when the ship had been trading under the terms of a charter party that excluded Cuba from the acceptable range. The ship entered a new charter party and was not only trading to Cuba but also sustained a fire in Cuban waters. The ship manager faced a claim for the owner's uninsured losses of US\$ 500,000.

The professional indemnity insurance ITIC offers members does not contain a RUB exclusion. So, for example, if a ship you are managing is detained in Russian territorial waters due to deficiencies and a claim is brought against you by the owner for negligent management of the ship, this claim will not be excluded simply due to the fact of the ship's location at the time. If ITIC does not insure you, we suggest you check with your insurer on their position. ●



On the front foot with PI insurance

The International Transport Intermediaries Club (ITIC) can help ship managers stay a step ahead in tackling today's marine Professional Indemnity (PI) insurance challenges, as CEO Tom Irving explains.

The world has seen several significant events over the past four years, which have affected different parts of the shipping industry, including the marine insurance sector, which has seen notable changes to professional indemnity (PI) insurance and claims, according to Tom Irving, CEO of ITIC, one of the world's leading providers of PI insurance to the transport industry.

"PI insurance is part of our member's risk management strategy for their business," he explains. "This gives the ship manager peace of mind and protects the company against claims. The benefit of having cover from a company such as ITIC, which insures more than 150 ship managers, is you have an insurer who understands the business and risks ship managers face and who speaks the language of the ship manager.

"If a member has a problem, we do not start from scratch. We have the knowledge and specialty to address these challenges, and most of the time, we have handled similar cases before. The key for ITIC is maintaining an insurance company that understands the business and that pays continuity credit to our members."

However, ITIC is facing the headwinds of more complex and higher value claims from across the maritime landscape, with vessel mismanagement and fraud cases on the rise and anticipated challenges for ship managers resulting from the expansion of the existing EU Emissions Trading Scheme (ETS) to the shipping industry very much at the forefront of ITIC's thinking.

The Covid-19 pandemic already broke a number of traditional conventions, including how and where people work, with many now hybrid workers. According to Irving, while ITIC saw some PI claims that usually "would not happen if the person was working in an office with supervisors on hand", the impact was less than initially feared.

"During the pandemic, many regulations and measures, such as when and how crew changes were made, changed at the drop of a hat," he says. "There was a resulting increase in claims as ship and crew managers failed to follow updated regulations effectively." Moreover, geopolitical events since, including the war in Ukraine, have put increased strain on the marine insurance sector to continue providing adequate levels of cover.

However, "As an insurer, we are in a strong position to withstand inflationary pressures, notes Irving. "Our focus remains on our core business. We might expect an increase in the volume of claims, and with economic pressure, claims will also be more costly now than, for example, 10 years ago. However, we are well prepared to weather these storms."

Members' risks

The impact of the EU ETS (Emissions Trading System), which comes into force in January 2024 for the marine sector, remains a critical issue for ship owners and managers, with uncertainty about the potential risks and claims that may arise. Ship managers are concerned about how the new rules will affect them, says Irving, as well as the potential of being dragged into disputes around the management of the scheme.

As part of its involvement in revising the current BIMCO Ship Management (SHIPMAN) contract, ITIC is also involved in the subcommittee working on a standard Emission Trading Scheme Allowances (ETSA) subclause. The clause will allocate costs and responsibilities for obtaining, transferring, and surrendering emissions allowances (EUAs) for ships operating under an emissions scheme. A draft standalone was due to be presented to BIMCO's Documentary Committee for possible adoption by mid-October.

Irving says that one of the more prevalent risks facing ship managers are claims arising from the alleged failure to return vessels to owners in the same condition as when they were taken under their management. ITIC's advice is for managers to undertake a pre-management survey so as to be able to present evidence as to the condition of the vessel should a dispute arise.

In a similar fashion, he highlights that ITIC continues to see claims where ship managers oversee the refurbishment of vessels. Although these types of repairs should be made within a specific budget designated by the vessel's owner, often these run over budget, with ship owners increasingly looking at ways to recuperate any resulting losses – usually from the ship manager.

Cybercrime also continues to be a hot topic, with digital fraud becoming more common for those in the shipping sector as it digitalises. ITIC's advice is to double-check with suppliers in the event of requested payments to different accounts, as well as closer checks and controls of employees responsible for purchasing to avoid embezzlement.

Irving adds that ship managers should not only have PI insurance themselves but also be co-assured on the P&I and Hull policies of the owner. It is an ITIC requirement that P&I policies should be placed with an International Group (IG) P&I Club.

Regarding settlement, ITIC is known for quickly and effectively resolving issues and paying claims, with more than US\$ 450 million paid out in claims since 1992. Its claims team offers practical guidance on the best way forward, be it disputing a member's liability, attempting settlement negotiations or paying the claim.

"Problems are a natural part of any business, and the shipping industry is no different," concludes Irving. "What varies is the complexity involved in any maritime claim.

"For almost 100 years, ITIC has remained a stable partner for our members, helping them to weather many storms and ensure they are prepared for any eventuality. It is our aspiration to be here for the next 100 years, adapting with our members as their business changes so as to ensure that we can continue to tackle these global challenges together." ●



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EU ETS – do you feel secure?

By Robert Hodge



ITIC wrote an article for SMI in January 2022 critiquing draft legislation coming from the EU on the upcoming EU Emission Trading Scheme (ETS). This legislation, in part, sets out which party would ultimately be responsible for the payment (or non-payment) of emission allowances. At that time, it placed that responsibility squarely at the feet of the Document of Compliance (DOC) holder. This was a crazy proposition, considering the manager has no control over the commercial operation of the ship, and it did not follow the usual principle that the polluter pays. A failure to comply could result in fines (EUR 100 per tonne), detention or, at worst, the blacklisting of an entire fleet from EU waters.

Thankfully, the position has changed and the legislation now being considered states that the responsible entity will be the registered shipowner. The shipowner will then be able to transfer responsibility to the DOC holder or a bareboat charterer by a written agreement.

ITIC is on the BIMCO drafting subcommittee of the new version of SHIPMAN, which is planned to be published early next year. Much of the subcommittee's work to date has been spent on a new ETS clause (which, at the time of writing this article, had not been finished, but is hoped to be approved and released before the ETS deadline of 1st January 2024).

There are three scenarios which are envisaged. In the first, the shipowner remains the responsible entity for the surrender of the emission allowances. It is likely that

larger shipowners who have the ability and the capacity will want to keep the responsibility within their control. However, the manager will remain crucial to the owner as they have to provide the emission data to the owner so they can calculate and surrender the allowances.

In the second scenario, the owner retains responsibility but engages the ship manager on a consultancy basis to collect the emission data, arrange for it to be submitted and range for the payment of the allowances.

The third scenario is where the owner transfers the responsibility to the manager by a strict written mandate. Amongst the requirements for the mandate are that it must be an original signed by both the shipowner and the organisation assuming responsibility for compliance, or if a copy is provided, it must be certified as a true copy. This scenario is the riskiest for the manager as the credit risk will be significant. Many owners will not want to pay the manager in advance, but only on actual emissions and paid for in arrears. If this is agreed upon, the contract must be explicit on the financial security for the manager. This could be a cash deposit or issued as a number of allowances to be held on account (such as 45 days of allowances for the ship at full steaming).

ITIC's advice at this time is that if ship managers are not totally satisfied they have adequate financial security, they should not agree to be the responsible entity and only agree to assist the owner in their compliance with the scheme. The credit risk and penalties for non-compliance are just too onerous. ●