ITIC Claims Review

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Welcome to edition 14 of the Claims Review. ITIC periodically publish selections of cases which have been handled by the Club. This edition provides a general selection of claims ITIC has resolved over the last year. These claims could happen to anyone. We hope that these 'case histories' will be of interest to Members and help them identify potential claims exposure.

TWENTY TWO YEARS IN TAIWAN

ITIC has just concluded its oldest case. This involved a ship agent in Taiwan, who acted for the call of a tanker at Kaohsiung in 1982.

Part of the ship's cargo – 500 metric tonnes of Toluene Di-Isocyanate (TDI) - was discharged into a bonded shore tank awaiting delivery against production of the original bill of lading. In the event, the consignee managed to siphon off the cargo from the tank without producing the bill of lading and without paying for the goods. A Taiwanese bank commenced legal action in the Kaohsiung High Court against the tanker owner and the agent for US$560,000, the value of the cargo because, in Taiwan, the local agent for a foreign company has joint and several liability with the foreign company.

The High Court initially found in favour of the owner and agent, and the bank appealed to the Supreme Court of Taiwan. There followed an extraordinary period spanning more than twenty years where the case was referred back and forth between the High Court and the Supreme Court on procedural grounds no less than six times. It was not until the end of 2004 that the Supreme Court of Taiwan finally rejected the bank's appeal. The agent had won the case with the assistance of ITIC, but the legal costs were in excess of US$90,000.

STEVEDORE SLIPS

During loading at Los Angeles, a ship's master received a report of an injury to a stevedore, who had allegedly slipped on a patch of grease on board. The master notified the ship manager of the incident; the master also noted that, in his opinion, the alleged injury was a "fabricated story".
The manager simply filed the report from the master, and failed to advise the matter to the ship's P&I insurers. Thirteen months later, a summons from the Los Angeles court was served on the owner at the manager's office. The stevedore was claiming US$1,000,000 for his alleged injury. The claim against the owner was eventually settled for US$ 900,000 but the P&I insurers, relying on a clause in the insurance policy under which the assured had to report any incident at the latest within twelve months of the assured becoming aware of it, only agreed to pay 50% of the claim (or US$450,000) on an 'ex gratia' basis. The owner successfully claimed the balance of US$450,000, plus legal costs of a further US$50,000, from the manager, which was indemnified by ITIC.

VIOLATION OF THE US 24-HOUR RULE

A container of whisky was booked from Felixstowe to New York. Since 2002 it has been a requirement that carriers must provide full details of all containerised cargo shipped to a US port from a foreign port to the US Bureau of Customs and Border Protection (CBP) via the Automated Manifest System (AMS) 24 hours before the container is loaded on the ship.

The cargo was booked by the agent's Glasgow office and was inadvertently allocated a booking reference that had already been used for a previous booking of whisky for the same ship.

Consequently, when the documentation clerk attempted to input details of the container in order to issue a bill of lading, the computer system indicated that the booking had already been allocated a bill of lading number. The documentation clerk, believing this to be a duplicated booking for the same container, did not enter the details of the container and the cargo details were transmitted via the AMS without the inclusion of this container. When the 'shipped on board' list was received from the port of loading it was discovered that the container had been shipped un-manifested.

The CBP will not allow cargo to enter the U.S. if it has not been declared properly and the carrier is not allowed to issue a manifest corrector. Fortunately the ship called at Hamburg before it sailed for New York and it was possible to remove the container at that port. Substantial costs were incurred for re-stowage, storage, loss of container hire, etc.

However, if the mistake had not been discovered and the unmanifested container removed before the ship was ready to berth at the US port the consequences could have been much worse.

The ship would certainly have been fined, and the cargo could have been confiscated. In a worst case scenario the ship could have been refused permission to enter port.

A BURNT OUT CASE

After a survey on her electrics, a yacht was purchased and taken to a yard to be refurbished. After further inspection, the yard reported that there was in fact substantial damage to her wiring and that a complete rewiring was required. While this was being carried out, the yard discovered structural damage, which seemed to have been caused by a previous fire, or fires. Gutting would be necessary for repairs, but this could cost more than the yacht was worth.

The electrical surveyor was uninsured, and the claim against them was settled for a small sum. The purchaser then claimed against the yacht broker, alleging misrepresentation and breach of fiduciary duty on the basis that the broker had been aware of the fire damage and had failed to disclose it to the buyer.
It became clear that there were significant disagreements between the seller, who maintained that the broker had been informed about the fire damage, and the broker, who maintained that the sellers had not told them. Either way, the purchaser had not been informed.

Unfortunately there was no written evidence to support the broker's position. There was, therefore, a significant risk in litigating the matter, not only on liability but also because the very substantial legal costs in doing so would not be recoverable in the US courts even if the broker successfully defended the buyer's claim. It was, therefore, decided to make an offer of partial settlement, of US$925,000 without any admission of liability. There were also legal costs incurred and the total amount of this claim was US$1,400,000.

It is important for brokers to maintain, in their daybooks, detailed written logs of conversations with clients, and that anything of importance is committed to writing.

RIOTOUSLY USEFUL COVER

There are occasions when events outside a ship broker's control can scupper the hard work which has secured a fixture.

A tanker broker fixed a ship on a voyage basis to lift two million barrels of crude oil in Nigeria for discharge on the west coast of India. Unfortunately, before the ship delivered, riots and civil unrest erupted in the Delta area, and militants threatened to blow up oil facilities. The ship owner declared the charter frustrated on the basis that the port of loading was not safe. The freight was almost US$3,000,000, and the broker's commission of 1.25% was US$37,500. Fortunately, the broker had purchased ITIC's optional loss of commission cover on an 'all risk' basis.

Once it had been established that the broker had not arranged a substitute fixture for the ship, the Club paid the broker the commission which he would have received, less the deductible.

ITIC offers two levels of loss of commission insurance – 'All Risk' and the more restricted 'Total Loss/Constructive Loss only'.

Contact your insurance broker or your ITIC underwriter for a quote.

MAJOR WITHDRAWAL

A ship manager was appointed to provide technical and crew management for a pair of newly-built tankers, which were fixed on period charters.

The charterparties stipulated that the ships should at all times be acceptable to oil majors, to whom the ships would be sub-chartered. Numerous deficiencies were logged on the SIRE (Ship Inspection Reports Exchange) report on the first ship, and she even collided with a berth. As a result, two oil majors put a 'technical hold' on all ships managed by the ship manager. The time charterer off-hired both vessels while the deficiencies were being rectified and the crews trained. The ship manager was found liable for loss of hire and expenses.

The final cost to the ship manager was US$105,000.

The manager could well have been liable for more, but it was considered that the owner had contributed to the problem by not giving the manager time to familiarise itself with the new ships.

LUXURY LIABILITIES

A surveyor carried out a pre-purchase survey and sea trial on a yacht in the Indian Ocean, and a joint survey to confirm the condition of the vessel prior to handover to the new owner in the Mediterranean four months later.

Neither survey included an internal inspection of the machinery. Unfortunately, immediately after handover, the starboard main engine failed. The seller and the surveyor were put on notice of a claim by the buyer.

The seller considered that the yacht was at the buyer's risk after sale in accordance with the terms of the MOA,

and also because the engine failure had occurred subsequent to a sea trial full survey and final inspection.

So was the surveyor liable?

The manufacturers were summoned and inspected the engine. Their conclusion was that the problems were caused by the failure of an engine-driven seawater pump seal, which could not have been inspected without removing the pump. The scope of work which the surveyor had contracted to perform did not include internal inspection, so the cause of the engine failure was outside that scope. The US$150,000 repair costs had to be borne by the unfortunate buyer.

It is important for surveyors to clarify the exact scope of the intended survey, and also to set out explicitly what the survey does and does not cover.

PAPER-CHASE

A broker was engaged to arrange two connected transactions in forward freight agreements (FFAs): one was to buy the average of the Panamax indices for the second quarter of the year, and the other was to sell the average of the Handymax routes for the same period.

This is known as a 'spread', and is entered into when a client anticipates that rates for the two types of ship will move in opposite directions. There are obviously far fewer terms to be negotiated for an FFA than for fixing a ship, and, consequently, a simple mistake can be fundamental to the viability of the whole deal. In this instance the broker mistakenly bought the Handymax FFA rather than selling it.

The customer didn't want this FFA and didn't want the Panamax FFA without the Handymax. Regulatory practice dictates that verbal negotiations for derivatives are recorded, and the tapes showed that the broker was at fault. If the FFA contracts were allowed to run, the cost of the mistake would not be known until the end of the second quarter. It was decided to quantify and cap the potential damage by immediately going into the market to sell the two Handymax contracts – one which had been bought in error, and a second one which had been originally ordered to create the 'spread'. The loss amounted to some US$200,000, which the broker was asked to pay.

This expensive problem, although covered by the Club, could have been avoided if more attention had been paid throughout the negotiations, not just to the details of the individual transactions, but also to the customer's strategy behind them.

SOUTH AMERICAN SHIP ARREST

Following a voyage to South America, cargo receivers commenced an action against the ship owner for damage to cargo.

The ship owner's P&I Club appointed its local correspondent (a Member of ITIC) to arrange and monitor defence proceedings. After eight years the receivers won the action and the local courts provided for the arrest of four named ships from the owner's fleet. Two years later, a ship which belonged to the same owner but was not on the court's list called in the jurisdiction, and at the request of the cargo receivers the port authorities detained her.

Following the arrest, it emerged that the P&I Club correspondent had not notified the owner's P&I Club of the original judgement, which the owner claimed they would have appealed or settled had they known about it.

It was decided that the member would fund 50% of the owner's losses.

SMUGGLERS CAUSE AGENT TO LOSE BOND

The port agent generally has to put up a customs bond to allow a vessel to call at a US port. A small bulk carrier sailed from Haiti bound for Florida and entered the port of Tampa under the auspices of the Tampa agent's customs bond.

Searches of the vessel revealed two caches of cocaine. US law imposes fines of US$1,000 per ounce on controlled substances. However, the ship and the master and/or owner are not liable for these if it can be shown that the ship was engaged in common carriage, and that the master and/or owner had no knowledge of the presence of the controlled substances nor could have done so with the exercise of the 'highest' due diligence.

The ship was therefore allowed to sail by the authorities. Subsequently, a fine of US$500,000 was imposed on the owner, who had in the meantime disappeared. The US authorities then turned their attention to the local agent. After negotiation, the fine was reduced to US$100,000 (the value of the agent's bond) which the agent had to forfeit. ITIC indemnified the agent.

TROUBLE WITH TUGS

A naval architect's client commissioned the design of a tug but did not immediately build it. Two years later, the client contacted the naval architect and asked him to update the specification.

Four tugs were ordered. The client alleged that various defects in the revised specification had caused delays in the building of the tugs and claimed US$2.5 million in damages.

The Club investigated the claim which was found to be without merit. After negotiations the client offered to accept a settlement of US$500,000. This was felt to be excessive and the claim was finally settled on the basis of a nusiance value payment. However, the legal costs and experts' fees incurred in their defence amounted to US$150,000.

Without cover the naval architect would have had to fund these fees himself.

One of the main reasons why professional liability insurance is so important is that even when a claim does not succeed, the costs of defending it can be substantial.

OILY PROBLEMS

A number of governments are increasingly involving the private sector in their research and development. A ship manager contracted with the owner of an experimental hull platform to manage, operate and maintain it for a navy.

One of the manager's duties entailed the changing and analysis of the main engine lube oil. Over a period of only two years, it was necessary to change the lube oil 27 times. On each occasion, an independent testing company found a high debris content and fuel oil, from which it appeared that the lube oil was not acting adequately as a lubricant. Despite these results, the ship manager failed properly to investigate the cause of the persistent problem and eventually the ship suffered engine failure.

A report concluded that the lube oil had been providing inadequate lubrication, and that a prudent and competent superintendent should have conducted further investigations. The owner presented a claim for £800,000, which included many consequential damages and losses. As the manager was obviously at fault, the claim was contested on quantum, rather than liability, and the owner's claim was eventually settled for £590,000.

International Transport Intermediaries Club Ltd. – ITIC – is a mutual insurance company with over 80 years of experience of providing professional indemnity insurance to companies involved in the transport industry. For further information on any of the products, services or cover provided by ITIC contact Charlotte Kirk at: International Transport Intermediaries Club Ltd, International House, 26 Creechurch Lane, London EC3A 5BA, United Kingdom.

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