ITIC
SPECIALIST PROFESSIONAL INDEMNITY INSURANCE

Claims review 31

September 2014

Expensive expenses

A ship was fixed on a charterparty form containing a time bar clause that provided that all claims, charges and expenses had to be submitted within 90 days of the completion of the discharge or otherwise would be deemed waived.

The fixture also incorporated a set of additional clauses one of which related to expenses incurred if the ship called at a named port. This provided that the owners would pay in the first instance and be reimbursed by the charterers on submission of all invoices and supporting documents. No time limit was specified in this clause.

The commercial manager collated the expenses related to the specific port call and sent them to the charterers sometime after discharge and certainly more than 90 days after discharge. They were looking at the port expenses clause on its own in the charterparty, rather than reading the contract as a whole.

The charterers rejected the claim on the basis that it was time-barred. The commercial manager relied on the fact that there was no specific time bar in the additional clause. Legal advice was obtained and the Member was advised that the additional clause did not negate the general time bar clause as there was no conflict between them. The expenses claimed were therefore time barred.

The claim of USD 200,000 was paid by ITIC.

It is generally understood that, under English Law, where there is an inconsistency between negotiated terms, such as the main terms in a recap, and incorporated pro forma or standard terms, then the negotiated terms will prevail. It is important however, to remember that the circumstances when this rule applies are very limited.

The court will give effect to the document as a whole. There is a danger in assuming that statements in the recap will automatically override provisions in the pro forma covering the same topic. If two provisions can work together then that is how the court will interpret the document. If you don't carefully consider the details you may not get the result you anticipated.

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IS MANAGED
BY **THOMAS MILLER**

Translation troubles

Notice of readiness was tendered by a ship on arriving at a port in the Middle East. The local port agent then submitted all the relevant cargo declarations, which included a document which the agent had translated into Arabic and English, which described the cargo and the names of the consignees.

The ship arrived on 21st October and the only berth at which the ship could discharge was occupied until 31st October. A mistake in the translation was noticed on 27th October and the ship was not able to berth until the errors had been corrected and the documents resubmitted. This delayed the ship from 27th to 31st October – the last three days of the overall delay.

The owners claimed against the port agent for the full ten day period stating that due to the documentary error the ship had not legally been able to berth. The owners could not pursue the charterers for the demurrage relating to the first part of the delay.

ITIC assisted the Member in negotiating a settlement based on 50% of the overall delay of USD 110,000, which was paid by ITIC.

Wheat-a-mix up of port costs

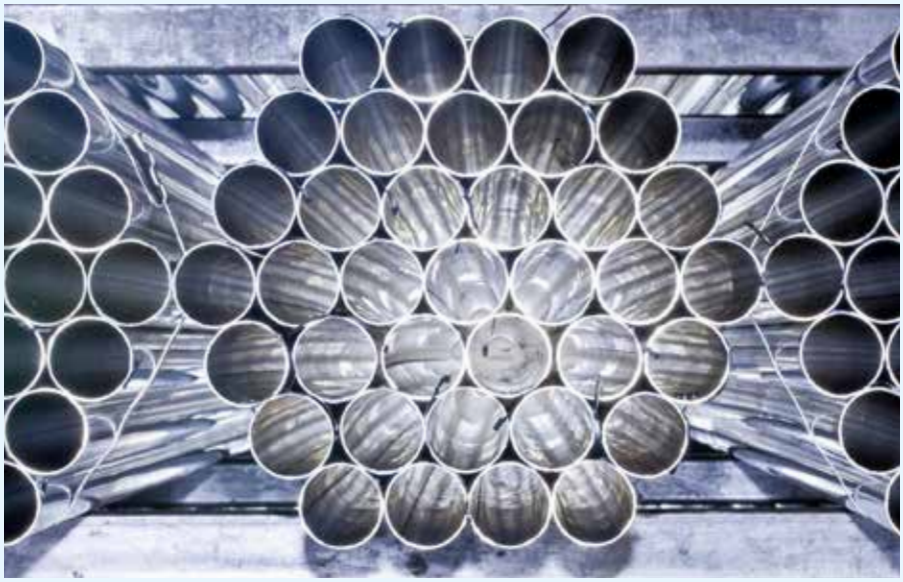
A mistake in the calculation of port dues for two pro forma invoices happened when a ship agent incorrectly used the cheaper rate for malt, instead of that for wheat. The cargoes of wheat were discharged from two ships and the final invoices for port dues were sent out, before the error was discovered.

The difference between the invoiced port dues and the correct port dues for the first ship was EUR 9,000 whilst the difference between these two rates for the second ship was EUR 5,000. The owner refused to make up the shortfall because, relying on what they had been told, the owner had on-charged the lower amount to the charterer.

The claim was settled by ITIC.

Even small value errors such as this put pressure on commercial relationships. Attention to detail is important.

Failure to forward full information



A shipbroker received a request to find a suitable ship for a shipment of steel pipes. Shortly after negotiations had commenced the charterer called to inform the broker that there was an additional dunnage requirement of approximately 7cm between each of the layers of pipes. Unfortunately the broker failed to forward this new information over to the owners.

Only once the ship was fully fixed did it transpire that the dunnage requirement meant that the ship was too small to carry the cargo.

The charterers could not use the ship for the intended cargo. The owners refused to accept the unilateral cancellation of the fixture and reserved their right to deadfreight in the absence of a full cargo being fully shipped. Unfortunately efforts to find alternative employment were unsuccessful. As the shipbroker had not passed on the message, the claim was passed onto them.

After a brief discussion regarding the amount of the owner's claim it was settled by ITIC in the sum of Euro 40,000.

It is important to ensure that all correspondence is passed between the relevant parties, preferably in writing, so there are no misunderstandings.

Polite persistence pays off

A ship agency had persistent problems obtaining settlement of port disbursements from a recognised and important ship operator in Vietnam. They reported the problem under their ITIC, Rule 10, additional legal expenses and debt collection cover.

ITIC has a global network of correspondents covering most of the world's ports. On this occasion, ITIC's local correspondent established a dialogue, in writing and verbally, with the debtor, and persisted with this approach. Persistence paid off, with the full settlement of all debts being obtained, without recourse to any formal legal recovery procedure. The cost of the local correspondent was covered by the debt collection cover.

ITIC's Rule 10 insurance covers the costs of recovering commission, disbursements and fees owed to shipbrokers, ship agents and marine surveyors. ITIC has been extremely successful in assisting in the recovery of monies and has collected more than USD 155m since 1992.

ITIC often has to get involved to preserve commercial relationships and will try to resolve matters through negotiation, before litigation is commenced.

Loose lips...

A young trainee shipbroker, no more than a few months in the job, attended a function at a major industry conference. He was introduced to a young associate attorney from a prominent local law firm. He asked her "what are you working on?", to which the reply was that she had been working on the arrest of a ship belonging to an owner who she named. The broker responded that he was aware of the ship and the owner, as they were working on something for them as well.

They exchanged business cards and went on their separate ways to speak to other guests at the reception.

The broker had forgotten about the conversation with the attorney until days later a subpoena demanding documents relating to the owner's trades arrived at the broker's office.

SMS

Charterers who had entered a COA asked the shipbroker if they could increase the volume of cargo which had already been booked. The broker, who was working from home, contacted the owner via SMS to ask if there was additional space available on the ship, as charterers might want to increase the volume depending on how much space was available.

The owner responded "max load 18k", which the broker passed on to the charterers, who had already booked 15,000mt. The charterer then proceeded to sell an additional 2,500mt of cargo to their client.

Once the sale was concluded and the ship nominated, it transpired that there was no extra space available. It seemed in fact that the extra space was never available.

As the charterers were committed to a sales contract to deliver the cargo they had no option but to book the extra cargo via another ship on the spot market. The freight rate was approximately USD 80,000 higher than it would have been under the COA.

The charterers held the owner responsible, but the owner rejected the claim on the basis that there was no formal offer/option given for the additional space. Charterers then looked to recover the additional cost from the broker, as the broker did not make it clear that they did not have a firm option to ship the additional cargo.

The matter was ultimately concluded with each party absorbing some of the costs. The broker's contribution was USD 34,000, which was reimbursed by ITIC.

It is important to ensure that all parties have the correct information. If you, as the broker, are not clear as to what has been agreed, it is unlikely that the other parties will be any clearer. Therefore a short message, in writing, should be sent to avoid any incorrect assumptions.

Confidentiality Agreements – an ITIC e-learning seminar

ITIC is increasingly asked to comment on confidentiality agreements, sometimes known as nondisclosure agreements.

The use of confidentiality agreements has always been common when parties are considering doing business but need to provide information to the other party before they enter a formal contract. In these circumstances the party providing the information will protect their interests by insisting the receiving party signs a stand-alone confidentiality agreement. Historically this has been associated with transactions such as the sale of corporations, but increasingly ITIC is seeing their use in a wide range of circumstances involving Members.

Consultants and other advisers needing access to information to enable them to provide their services are frequently asked to sign confidentiality agreements. Increasingly shipbrokers providing valuation services receive the same request. The important consideration is to ensure that the wording of the agreement does not unnecessarily restrict the Member's ability to do business with other clients.

To assist Members ITIC has created an e-learning seminar in which common provisions will be explained and some of the pitfalls to avoid will be outlined. The seminar will be available at www.itic-insure.com from late autumn onwards.

Timing can be everything

A recent case in which ITIC supported a ship agent Member in pursuing a claim in the New Zealand High Court shows that timing can be everything when it comes to pursuing a claim against a ship owned by a company in financial difficulty.

ITIC was contacted by the ship agent who had, over a period of time, acted for the bareboat charterer of a fleet of ships which regularly called at ports in New Zealand, to carry cargoes bound for Asian ports. The agent had been pressing their principal for settlement of their outstanding accounts. They became concerned when payment was not forthcoming and rumours were circulating in the market that the debtor may enter some form of insolvency proceedings.

Their fears were realised when the debtor applied to the South Korean Bankruptcy Court for an order commencing rehabilitation proceedings.

ITIC became concerned that the debtor would look to obtain protection against its ships being arrested in New Zealand (and other countries). Both New Zealand and South Korea are signatories to the Uncitral Model Law on Cross Border Insolvency ("the Convention"), and have incorporated its provisions into their domestic laws. The Convention is aimed at ensuring that no creditor takes priority over another, irrespective of where they are located.

Once it was established that, under New Zealand admiralty law, the agent was entitled to arrest one of the debtor's ships, proceedings were issued against this ship (known as an in rem action) and it was subsequently arrested at anchor off a port in New Zealand. An in rem action is directed at (in the case of admiralty law) a ship, as opposed to the owners or operators of the ship. The key benefit to the claimant is that he does not have to take action against the debtor company, who will likely be located out of the jurisdiction.

At this point, the agent had security for their claim – that security being the ship under arrest.

Three days after the arrest, the Korean court made an order placing the debtor into rehabilitation.

Subsequently the debtor was granted an order by the New Zealand High Court recognising the Korean rehabilitation proceedings, the effect of which was to trigger a stay of proceedings against the debtor.

Following discussions between the agent's lawyers and those appointed by the debtor's administrators the ship was released from arrest when alternative security was provided by way of payment of the funds due to the agent (as well as an allowance for interest and costs) into a Court bank account in New Zealand.

The agent then had to persuade the Court that the stay obtained by the debtor should not apply in respect of the agent's in rem action.

In doing so, the Court considered whether the agent would receive an unfair advantage if permitted to continue with their in rem claim. Crucially, when the debtor was placed into rehabilitation, their rights in the ship were subject to the agent's secured claim. For that reason, the Court decided that the agent would not be obtaining an advantage over other creditors.

As such, the agent was permitted to continue its admiralty claim. Given that there was no dispute that the agent was owed the funds, these were promptly paid out of the funds previously deposited by the debtor as security. The agent therefore made a full recovery, including interest, and ITIC received a recovery towards the legal costs incurred.

The agent's prompt notification of their claim to ITIC, as well as the fact that their files were in good order, allowed ITIC to quickly take steps on the agent's behalf to obtain security for its claim by way of the ship arrest. This ultimately saw the agent make a full recovery.

For further information on any of the products, services or cover provided by ITIC contact Charlotte Kirk at:
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