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Claims review 32

March 2015

Safety Management System ("SMS") failure

An inspector of CARB - California Air Resources Board (the clean air agency of the state of California) – boarded a ship in July 2011 managed by an ITIC Member at the Los Angeles Terminal.

The Chief Engineer was asked if he was aware of the revised CARB 2009 California Regulations effective from 1st July 2009 which required vessels to switch main engine, auxiliary engines and auxiliary boilers to low sulphur fuel when in Californian Regulated Waters. The Chief Engineer told the inspector that he was only aware of the requirement to switch auxiliary engines to low sulphur fuel, in accordance with the Regulation effective from 1st January 2007.

The Master checked the Safety Management System but was unable to locate the 2009 requirement. The CARB inspector then went through the records of fuel switchover for the main engine, auxiliary engines and auxiliary boilers, and ascertained that the ship had called at Californian ports 17 times between 2009 and 2011 without switching over the main engine or the auxiliary boilers. CARB imposed a penalty on the ship owners, of US$283,500, for the failure to switch fuel during 17 port calls.

The owners claimed against the managers on the basis that the managers had been negligent. In 2009 a fleet circular had been sent to all vessels by the managers setting out the change in regulations, and asking that it be displayed in a prominent position. The managers therefore initially rejected the claim as resulting from crew negligence (which was excluded in the BIMCO management agreement). The owners did not accept this rejection on the basis that the managers had failed to update the SMS.

As it was considered unlikely that the manager would successfully defend a claim resulting from his failure to update the SMS the claim was paid in full.

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Crane costs confusion

A ship agent was contacted by charterers. The charterers asked the agent to obtain a quote from a local port on how much it would cost to discharge two parcels weighing 70mt using the shore crane. The agent contacted their usual sub-agent in the port, by telephone, and were given an estimate of US$2,750 per shift, so a total of US$5,500. This estimate was passed by the agent to the charterer, and on this basis the cargo was fixed.

A few weeks later the agent received a message from the shipping line that the shore crane at the port could only lift 50mt and the parcels were too heavy to be discharged by the ship's crane. The charterers asked the agent to enquire about discharging at another nearby port. The agent was notified that the cost of hiring the shore crane at the next port for the two parcels would be US$66,382 a difference of US$60,882. The charterers advised the agent that they had priced and booked the cargo based on the estimated costs provided by the agent and would claim the difference from them.

As the sub-agent had been notified that the two parcels weighed 70mt when the booking was made, ITIC looked to the sub-agent to pay the difference in the discharge costs. However, the sub-agent was able to produce an email, which they had sent to the ship agent before the cargo was fixed, which said:

"CARGO MORE THAN 50 MT, NEW PORT RULES, USE SHIP CRANE OR RORO".

The ship agent had clearly overlooked the information that they had been provided and as such paid the difference in the costs of US$60,882, which was reimbursed by ITIC.

Performance problems

Operators of a passenger and ro-ro ferry service appointed a naval architect to design a 45m landing craft ferry. The design was to be based on that of an existing vessel operated by the company.

Prior to commencing the design work, the parties entered into a design agreement, under which the naval architect's liability was limited to approximately US$750,000.

Shortly after the vessel was launched, the operators noticed various issues relating to its performance, including vibration, lack of manoeuvrability and stopping capability. The vehicle loading ramp was also at an excessive angle in certain conditions, making the loading of vehicles difficult and, in some cases, impossible.

The operators took the view that urgent rectification work was required so that improvements could be made before the approaching summer season.

The vessel was dry-docked and third party experts were engaged to provide a report detailing the extent of the problems and their potential cause. Based on the findings of the report, the operators brought a claim against the naval architect for US$3.5m, alleging that the performance issues were attributable to errors in design. The operators subsequently acknowledged that the naval architect's liability to them was limited to US$750,000.

ITIC appointed an expert naval architect to inspect the vessel and comment on the extent to which the apparent performance issues could be attributed to design errors. The expert found that the naval architect was at fault, but that the claimant had incurred significantly more costly and extensive rectification work than was necessary.

ITIC entered into negotiations with the operators in order to resolve the matter. The claim was settled for slightly less than the limit of liability under the contract.

Turbo technical trouble

An air charter broker received a request to act for a principal who was seeking to charter an aeroplane for a flight two days later from Scotland to Morocco. The broker reviewed the available options for the principal and recommended the use of a small business jet which would offer a short flight time and enhanced comfort. However, the principal wanted a cheaper alternative and the broker instead looked to source a small turbo-prop for the flight.

The broker was unable to identify a suitable aircraft from his normal network. However, a colleague advised of a small operator who they had used before at short notice. This operator did have an aircraft available and the lease agreement was quickly drawn up. As part of his usual due diligence processes, the broker checked the air operator's certificate (AOC) and details of the aircraft registration on the CAA website. He also obtained verbal assurances from the operator that the aircraft met all continuing airworthiness requirements.

Shortly after the planned departure time the broker received another call from his principal saying that the aircraft had diverted into East Midlands Airport with a technical defect. The broker eventually made contact with the operator and learnt that the aircraft technical problem was related to a known defect that had been deferred for some time under the provisions of the minimum equipment list. The aircraft was consequently not airworthy for several days while the defect was rectified.

The principal accused the broker of negligence. He claimed that the broker had failed to exercise reasonable care when sourcing the aircraft, and held the broker liable for the costs of leasing an alternative aircraft. ITIC defended the broker's position as it was felt that the broker had acted with all due skill and care, and had taken all the steps that a reasonable broker would have done in such a limited time frame.

A settlement was eventually reached, but the legal costs incurred were substantial. Both claim and costs were covered by ITIC.

Architect's oversight

A naval architect entered into a contract with a shipyard to design the structure and access arrangements for new lifeboats and their davits to be fitted to a specific vessel.

The naval architect undertook the design analysis using data received from the manufacturer of the lifeboats and produced design drawings.

The naval architect understood that the yard would seek classification society approval of these designs before commencing the build work under the terms of the yard's contract with the ship owner.

However, due to time restraints and pressure from the ship owner, the yard decided to commence building prior to obtaining approval from the classification society. The lifeboat support structure was manufactured and installed by the yard according to the naval architect's design. The yard subsequently noticed that the davits were flexing under operation even without the lifeboats.

An internal investigation within the naval architect's office determined that an error had occurred whereby figures had been entered incorrectly into their computer programme. Information provided by the lifeboat manufacturer in kNm had not been converted into kNmm as required by the naval architect's computer programme. The result was that calculations were out by a factor of 1000. This error was not identified during the naval architect's quality assurance process and as a result, the structural platform, as designed and built, was not fit for purpose.

The yard raised a formal complaint advising the naval architect that the work on the davit support structure had to be rectified because of their error. A few months later they claimed that rectification had cost £347,254.

ITIC assessed the claim and was also able to raise arguments that the contract terms excluded some components of the claim and that the yard should not have commenced construction before the classification society had approved the designs.

A settlement was eventually agreed at £255,000.

Weight watching

A firm of agents was asked to book a tractor for shipment from Europe to the Middle East. They quoted a rate based on the weight and realised after the booking was confirmed that they should have quoted a rate based on the cubic meters of the vehicle. The difference was a freight amount of US$12,500. The agents negotiated with the shipping line, who agreed to reduce the amount they required by US$5,000. ITIC paid the remaining amount.

Boom and bust

A liner agent booked a container of calcium hypochlorite to be moved from a port in the Middle East to Europe. Calcium hypochlorite is a dangerous cargo, with an IMO classification of 5.1. The shipping line had sent clear instructions to the agent prohibiting the loading of this cargo, along with a number of other dangerous cargoes. The agent appeared to have overlooked this instruction.

Both the cargo and the container were clearly marked as dangerous cargo, so were shipped on deck as per regulations.

Unfortunately the cargo auto-combusted onboard the vessel and caused damage to four other neighbouring containers, their cargoes and the ship. The total claim was in excess of US$700,000.

Cargo claims were pursued against the shipping line, who ultimately settled each of the claims out of court. The total cost was US$130,000, including legal costs. The shipping line held the agent responsible and ITIC reimbursed the agent in full, less the deductible.

Commission collection in court

A ship broker had entered into an exclusive commission agreement with a ship owner, which provided for commission of 5% to be paid to the broker on the sale of any of their fleet of vessels even if sold through another broker. The broker heard that two of the owner's ships had been sold through another broker for EUR 30,300,000 each. The ship owners refused to pay the ship broker's commission of EUR 303,000. Lawyers were appointed and the commission claim was heard before the First Instance Court in January 2013. The court found for the ship broker and awarded the commission of EUR 303,000 plus interest and costs.

The ship owner appealed the decision of the First Instance Court to the Supreme Court, and put forward an allegation that the broker who had initially handled the sale had been incompetent. The ship owner also involved the local ship brokers' association in an attempt to evidence that the broker's employee had fallen short of industry standards. The response of the local association to the questions on competence posed by the ship owners was in favour of the ship broker.

In April 2014, before the expense of a trial in the Supreme Court had been incurred, the ship owner approached the ship broker with an offer of settlement at the commission amount of EUR 303,000 without interest and without the payment of costs. The costs in taking the matter to trial at the Supreme Court were estimated at a further US$45,000, but ITIC was informed that the particular Supreme Court was always reticent in awarding costs and was unlikely to award more than US$10,000.

As taking the matter to the Supreme Court would result in additional unrecoverable costs, and the ship broker was willing to forego the interest, ITIC agreed settlement at the commission amount of EUR303,000 plus the costs awarded by the First Instance Court of US$32,300. The costs incurred in the Supreme Court proceedings were waived.

ITIC Post fixture Clause

ITIC has recommended a post fixture clause for brokers to place at the end of recap messages. The following wording was endorsed by FONASBA at its annual general meeting in Gothenburg in October 2014:

"Important: Operations
It is essential that all messages in respect of operations be sent to the relevant email addresses (ops@broker.com). We can accept no responsibility for delay or other consequences if messages are sent to any other email address within the company. Please ensure that all important operational messages are followed up with a telephone call, especially after office hours."

Ship brokers receive a staggering number of messages every day. It is not surprising that sometimes messages do get missed. The failure to spot and pass on a post fixture message can have severe financial consequences. In one case a broker failed to pass on berthing instructions. The ship remained at anchorage and a substantial demurrage claim was passed to the broker. Use of ITIC's post fixture clause should lessen the chance of a claim resulting from an important message being missed among the large number of market circulars and negotiation messages received during a broker's average day.

A general guide to ship managers' undertakings – an ITIC e-learning seminar

ITIC's ship management Members have expressed concern when they are being asked to sign letters of undertaking. As such, ITIC have often been asked to provide advice and commentary. To answer some of the more general questions, ITIC has produced an e-learning seminar to highlight some of the issues to consider.

ITIC's Legal Advisor, Mark Brattman, will guide you through the purpose of a letter of undertaking, highlighting the key points and looking at how a letter of undertaking could affect your cover with ITIC.

The seminar is available at www.itic-insure.com

Beware of fraud

More and more cases of fraud are being reported to ITIC.

Fraudsters use brokers, agents and ship managers as a vehicle for crime. The result leaves them exposed to a liability as a result of somebody else's dishonesty.

Acts of fraud can be varied, and ITIC's experience has shown that fraudsters will often seek to "respectabilise" themselves by associating their actions with reputable companies. It is therefore important that brokers, agents and managers are aware of the ways in which the broking chain, and parties who assist operators in the day to day running of a ship, can be manipulated to assist in fraudulent transactions.

Whilst we appreciate that a large number of payments are processed by brokers and agents, changes to payee bank account details should always be treated with suspicion. There are very few legitimate changes to account details. Checks should be made with a separate confirmation of the change with the payee, preferably by telephone. The advice is to take separate steps to verify the instructions. Don't use the email reply button!

It is also important to have robust IT systems to minimise the opportunity for your emails and accounts to be hacked.

ITIC will be issuing further information on fraud in a Wire publication.

www.itic-insure.com

For all updates and information follow ITIC on Twitter: **@ITICLondon**

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