ITIC
SPECIALIST PROFESSIONAL INDEMNITY INSURANCE

Claims review 33

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What fuel?

A port agent was appointed by the owners of a chemical tanker to attend a vessel in respect of a call at a European port. As the agent did not have an office at that particular port, they engaged their usual sub-agent to assist locally.

Prior to the vessel's arrival, the master of the vessel sent an email to the agent asking for advice regarding whether there were any restrictions on the type of fuel that could be used whilst the vessel was both alongside and at "outer roads".

The agent passed this request to their sub-agent, who in turn approached the local harbourmaster. At this particular port, the responsibility for enforcing the EU Directive relating to the use of low sulphur fuel rested with the harbourmaster. The harbourmaster advised that the vessel was required to burn low sulphur marine gas oil from her arrival at outer roads. This advice was passed back to the master who followed these instructions.

As the vessel waited at anchorage it became clear to the master that he would not have sufficient low sulphur fuel on board to complete operations and, as the vessel was unable to take on additional low sulphur fuel at that port, the owners decided to divert to another port to replenish their supply. The vessel returned to its intended discharge port and operations proceeded without further disruption.

The agent subsequently received a claim from the owners of the vessel for around US$ 150,000. The owners alleged that the information provided to them by their agent was incorrect, and that the local regulations only required vessels to burn low sulphur fuel whilst alongside the berth, and not at anchorage. Low sulphur fuel was more expensive, so the owners were claiming for the additional costs incurred in burning this fuel when - they claimed - this was not necessary, as well as the costs of diverting the vessel to take on the additional low sulphur fuel.

Discussions with both the agent and the sub-agent confirmed that the sub-agent had simply passed on the instructions received from the harbourmaster, and that the agent had passed this, word for word, to the owners. Lawyers were appointed who mounted a vigorous defence to the claim which was subsequently withdrawn. ITIC covered the legal costs of defending the agent.

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IS MANAGED
BY **THOMAS MILLER**

What cost cover?

A ship broker was negotiating a voyage charter with an East African discharge range. The charterers were concerned about the potential costs of additional piracy cover which, if applicable, was to be for their account. The broker discussed the costs with owners and a lump sum of US$ 150,000 was agreed. The broker reported back to the charterers that they had "an East Africa clause" limiting the cost. A clause was inserted into the main terms recap "plus lump sum US$ 150,000 all inclusive for piracy cover". Both owners and charterers agreed the recap.

The parties then agreed to widen the permissible discharge range to include a Singapore - Malaysia option. The full recap contained the same wording regarding the cost of piracy cover.

The ship discharged in Singapore and the charterers refused to pay the piracy insurance premium. They understood that the fixture was on the basis that premium was only payable if the ship discharged in East Africa. The owners pointed out that the terms of the recap were clear and the lump sum was not limited to the East African option. The Singapore option had involved transiting an area for which additional cover had been applicable.

The charterers paid the additional amount and then reclaimed it from the broker.

The charterers had received the full recap and the terms were clear. They claimed that as the broker had been negotiating on the basis of East Africa only they should have made certain that the lump sum only applied to East Africa and not the added Singapore option. The broker had told the charterers that they had secured an "East Africa Clause" and this placed the charterers' reading of the recap in context. On balance it was felt that in a dispute between the broker and charterers a court would find the broker liable for negligence.

ITIC reimbursed the ship broker the US$150,000 for the additional war risks premium.

Expert failings

It is four years since the English Supreme Court held that expert witnesses involved in legal proceedings no longer enjoyed protection from liability for negligence. This is a case of a global marine consultancy firm which was engaged as experts by the underwriters of a hull & machinery policy.

A fire had caused substantial damage to the insured vessel. Owners claimed the ship was a Constructive Total Loss ("CTL") alleging the cost of repairing her was in excess of her insured value. The insurers rejected this claim alleging that the vessel was capable of economic repair. The vessel was scrapped and the dispute was solely as to the amount the insurers were obliged to pay out under the policy.

At an early stage the owners made an offer to settle the claim by accepting US$1,136,000 plus their legal costs. The underwriters did not accept the offer and litigation was commenced by the owners.

The consultants were appointed by the insurers to provide expert advice/evidence on what it would have cost to repair the vessel.

On accepting the engagement, the consultants were provided with considerable documentation. This included two independent quotations from Chinese shipyards on the cost of repairs and some calculations from the builder of the vessel that indicated the steel weight for the accommodation block was 312 tonnes.

The consultants issued a report, advising that the vessel was not a CTL.

The report was based on the quotes from the two shipyards and the steel weight the insurers had obtained from the ship builder.

In due course the owners served the report of their technical expert. This had been prepared using a different methodology (a "new-build approach") to the one adopted by the consultants. The owners' report contrasted significantly with the consultants' one in using an estimated steel weight total of 542 tonnes to repair the accommodation block and concluded that the total cost of repairing the vessel was US$6m. A figure that would have made the vessel a CTL.

Following a joint experts' meeting, at which there was considerable disagreement between the experts, the underwriter's counsel asked the consultants to prepare their own steel weight calculations (inclusive of the accommodation block) in order to rebut the owners' report. Drawing from their own calculations, the consultants concluded that the ship builder's initial steel weight figure was, in fact, inaccurate and that the cost of repairing the vessel was circa US$3.9m in excess of the total insured value.

On the basis of the consultants' new advice underwriters settled the proceedings with owners for US$1.3 million plus the owners' costs.

Underwriters then commenced proceedings against the consultants on the basis that they had been negligent in not properly reviewing the shipyard quotes. The underwriters claimed that, had they been properly advised, they would have been able to settle for a lower amount at an earlier stage. This would have reduced both their own costs and their liability for the owners' costs.

The consultants pointed out that the underwriters had rejected the owners' earlier offer before they were engaged. They had relied on the figures provided by the underwriters and it was not until after the joint experts' report that they were asked to make their own assessment.

The matter was settled at mediation. A feature of the dispute was that there was no document specifying what the consultants had been engaged to do. A large number of disputes involving consultants and other advisers would be avoided if the scope of work is clearly defined beforehand. See ITC's terms and conditions: http://www.itic-insure.com/rules-publications/standard-trading-conditions/

Lost bill

A cargo receiver presented to a ship agent's office an original bill of lading in respect of a parcel of Methyl tert-butyl ether (also known as MTBE). After acknowledging receipt of the bill of lading, the receptionist failed to pass it to the person in charge (PIC) of the particular vessel's call. The document was mislaid.

Prior to vessel's arrival the Master contacted the PIC and informed him that the original bill of lading was to be presented on board before the vessel would discharge the nominated cargo. A search of the agent's office for the missing document was unsuccessful.

The vessel successfully berthed and discharged another parcel, also under the same agency. However due to the missing bill of lading the vessel was not able to discharge the cargo of MTBE and was instructed by the terminal to depart the berth.

After provision of a suitable LOI the vessel successfully re-berthed and discharged the parcel of MTBE.

Owners presented a claim on the charterers for demurrage, shifting and towage expenses associated with the second berthing. This claim was in turn passed to the agent as all the costs incurred were due to the loss of the bill of lading. ITIC reimbursed the agent, less the policy deductible.

A number not a letter

A commercial manager sent vessel details to a port agent in the Far East. The agent needed the details to complete an advance declaration to the port authorities. The vessel name ended with the numeral one. When sending the message the commercial manager typed the name using a capital letter "I" rather than number "1". The agent repeated this in the documentation sent to the authorities.

This minor discrepancy lead to the vessel being denied entry until the paperwork was correctly submitted. Under the terms and conditions of the charter party the vessel was off hire whilst the documentation was amended and an appropriate declaration made to the port. The owners claimed their lost earnings from the commercial manager, who was reimbursed by ITIC under the terms of their policy.

This claim is an example of how a small clerical discrepancy can lead to significant delays and loss.

Two different ways to collect commission

The following describes two different ways in which ITIC's actions secured payment of outstanding commission. In both cases the commission was undisputed but the owners unreasonably delayed payment.

The first case involved commission on a time charter. Hire had been paid. ITIC made contact with debtors who confirmed that the commission was due. They said that it would be paid but could not give a date as to when the ship broker would receive it.

The ship broker became aware that the vessel was scheduled to call in South Africa, a jurisdiction which allows ships to be arrested for commission owed by the owners. ITIC arranged for local lawyers to arrest the ship on behalf of the ship broker and the outstanding commission was paid.

The second case involved an undisputed commission owed to a ship broker by Turkish owners. The owners were contacted by ITIC and its local correspondent but, despite promises, payment was not forthcoming. The vessel was no longer trading and arresting the vessel was not an option.

The registered owners of the vessel were a Maltese company. It was discovered that they had an ongoing legal dispute, which meant the company had to continue to exist. A Maltese lawyer was engaged to issue a statutory demand against the company and then commence winding up proceedings. The threat of insolvency proceedings meant the ship broker was paid in full.

Angry birds

A safety auditor was engaged by an oil & gas exploration company to conduct a routine operational safety audit of an air charter operator. The client was particularly interested in the safety performance of the operator's two turbo-prop aircraft. On arrival at the operator's base, the auditor was advised that one turbo-prop was undergoing routine maintenance at a maintenance repair and overhaul (MRO) facility in Canada.

The auditor conducted his safety audit on the remaining aircraft as per his standard procedure, examining the operations manuals and the pilot training, currency and aircraft maintenance records. He also conducted two spot checks on the aircraft to confirm that specific airworthiness directives had been complied with. No anomalies were found.

During the audit, the operator offered the auditor the opportunity to fly in the cockpit jump-seat so that he could observe the operational aspects of the aircraft. However, the auditor was unsure whether his insurance covered him to do that, and whether he could secure the necessary visas. He therefore declined the offer.

After 2 days on site the auditor returned to his office and later sent a report to the client stating that, on the basis of what he had seen, the operator would be capable of providing a safe charter service to his client.

The oil & gas exploration company engaged the operator for twice-weekly round trip flights in the turbo-prop aircraft. However, several months later the turbo-prop which the auditor had not seen crashed, causing significant bodily injury to passengers and damage to the aircraft. The investigation into the accident determined that, unknown to the operator, the pilots sometimes departed from the flight plan. On this occasion they had flown low over a lake

to get a good view of birds which were nesting on its banks. The aircraft suffered a large bird strike which shattered the windscreens and destroyed one of the two engines.

Claims were brought against the operator by those passengers who had suffered bodily injury in the crash. They alleged that the crash had occurred as a result of the operator's negligent operation of the aircraft. As the passengers were US Citizens, the claim was brought under US jurisdiction and the damages were in excess of US$10m. However, the operator contested liability and brought the auditor into the action on the grounds that had the auditor accepted the offer of a flight during his audit it was likely that he would have learned of the pilots' willingness to depart from their flight plans for non-operational reasons.

ITIC funded the auditor's defence against the claim. His decision to decline the offer of a flight in the jump seat was reasonable in the circumstances, and even if he had taken up the operator's offer of a flight, it was unlikely that the pilots would have flown recklessly at a low altitude with a safety auditor on board. Further, his report had clearly stated that he had not had the opportunity to inspect the aircraft that had crashed. The claim was successfully defended and the member's defence costs were covered under the terms of his insurance policy with ITIC.

Expert ruling

A naval architect based in France had designed a yacht for a customer (the claimant) which was to be built by a shipyard in Thailand. The vessel was built but suffered from structural deformities, including warping of the hull, essentially rendering her a total loss. The claimant alleged that the design of the yacht was negligent and, as such, this was the cause of their loss. The damages they claimed were substantial as they alleged (a) total loss of the vessel and (b) storage costs for a number of years. The claimant obtained expert reports in both Thailand and France and based their claim on the contents of these reports.

In France it is usual for the courts to appoint their own expert surveyor, who will review all the evidence available and present their own findings to the court.

The court expert was appointed and, whilst slightly critical of the naval architect's work, he insisted that the criticism was in respect of minor issues only and that these would not have affected the overall structural integrity of the vessel as alleged by the claimant. The naval architect's defence was based on the problems

being caused by (a) a change to their drawings without their consent, and/or (b) the use of inappropriate or inadequate materials, and/or (c) the incompetence of the shipyard in Thailand.

Despite the findings of the court expert, the claimant decided to pursue their claim. The claimant lodged an application with the court to have the court expert replaced as they disagreed with his findings. Ultimately, this application was unsuccessful and the matter progressed to trial in the Court of Marseille. The Court's decision was completely in favour of the naval architect, who was also awarded EUR 3,000 towards their legal costs (which totalled EUR 40,000 and were covered by ITIC).

Weak railway switches

A railway design engineer contracted with a third party to design a particular type of rail switches. The designs were drafted and the manufacture was contracted to a third party.

During the installation of the new points systems, it was revealed that a number of the switches were of an unsatisfactory condition.

Subsequent independent laboratory examinations revealed that the broken switches had an excessive percentage of a particular metal, making the structure fragile and causing them to break under normal loads.

There were also questions concerning the installation and whether correct procedures were conducted by the contractor.

Together with ITIC the designer reviewed the initial brief in conjunction with their initial design processes and drafts, and this revealed that all appropriate processes had been implemented in line with industry standards and that the reason for the failure was the manufacturing process and installation. These investigations were further backed up by expert evidence obtained by ITIC which assisted in the successful defence of the designer's interest in this case.

The course of the investigation and subsequent defence were covered in full by ITIC.

Follow the correct procedure

In the United States, the Merchant Marine Act of 1920 ("The Jones Act") in essence provides that all merchandise transported by water between U.S. ports must be carried on U.S. flag ships.

A liner agent for a non-U.S. carrier correctly manifested a shipment of nine reefer containers for discharge in Seattle, Washington. The vessel was also carrying in excess of 100 empty containers which were also due for discharge at Seattle. On departing the load port the agent received instructions to discharge all the empty containers upon arrival at Oakland, California.

While in the process of changing the port of discharge from Seattle to Oakland for the empty containers the agent also mistakenly changed the port of discharge on the nine loaded refrigerated containers in the bay which were sitting underneath the empty containers.

The refrigerated containers were discharged upon arrival at Oakland.

The agent had to solve the problem of the erroneous discharge by getting the refrigerated containers to Seattle as per the carrier's commitment under the bill of lading. It was not possible to move the cargo by road or rail because the containers were overweight.

The agent contacted the U.S. Customs and Border Protection ("CBP") about the erroneous discharge. The agent mistakenly believed that the notification to CBP was sufficient.

CBP took the position that a written application had to be made for the movement to be properly authorised. That application had not been made. An initial penalty of US$ 1.17m was assessed by CBP. Following numerous exchanges with the authorities, the fine was ultimately reduced to US$ 292,478 (being 25% of the initial penalty). This amount, less the policy deductible, was reimbursed by ITIC.

Join us at:

ASBA Annual Cargo Conference,
Miami – 30th September to 2nd October

Danish Maritime Days,
Denmark – 5th to 9th October

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