ITIC
SPECIALIST PROFESSIONAL INDEMNITY INSURANCE

Claims review 35

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Misread tariff

A South American port agent was asked by the owners of a vessel to provide a quote for the costs of discharging a shipment of project cargo.

The agent reviewed the port authority's official tariffs, and advised the owners that the stevedoring costs would be US$ 28.90 per metric tonne of cargo.

The cargo weighed 296 metric tonnes, so the owners calculated the stevedoring costs at approximately US$ 8,500 and quoted that in turn to the charterers of the vessel. The voyage was fixed on that basis.

The cargo was discharged and the stevedores invoiced the agent US$ 130,000 - costs which were passed to the owners who questioned them.

The agent then realised that the US$ 28.90 rate that they had quoted to the owners was the rate per cubic metre, not per metric tonne. The case was reported to ITIC who verified, via local correspondents, that the agent had simply misread the port tariff document.

The agent approached the stevedores who were willing to offer a discount on the costs, and ultimately the agent settled the claim for US$ 75,000, which was covered by ITIC.

Claims commonly arise from misread tariffs. In another recent case, ship agents in Australia quoted the incorrect port charges for a local port to their customer. Their customer then fixed on that basis and suffered a loss of AU$ 86,000. The claim against the agent was reimbursed by ITIC.

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Missing profit

A ship broker fixed a tanker for a two-year period to charterer ABC. It was subsequently renewed for a third year. During the course of the third year the brokers arranged a subcharter to XYZ. The subcharter needed to be on back to back terms with the original fixture.

The individual broker who arranged the sublet requested details of the original terms from his colleague who fixed the head charter. Prior to sending over the terms the colleague deleted what he deemed to be the financial details of the original deal - the hire, the period and an ice class profit share clause. This provided that in certain circumstances the ship owner received part of the market earnings from voyages. The colleague deleted the whole clause. The broker used the terms he received and the subcharter fixture was concluded on that basis.

Six months later the owner requested from ABC their earnings from the profit share. ABC in turn told the broker to contact XYZ and have them arrange payment of the profit share. Understandably the subcharterer was not willing to make any such payment as there was no profit share clause within the terms they had agreed.

ABC paid the owners as they were obliged to do and looked to the broker for reimbursement. Whilst it could have been argued that ABC had some responsibility for failing to check that the terms being agreed with the subcharterer were the same as they had agreed with owners, the brokers had clearly been negligent. The claim was for a modest amount of US$ 20,000 and was accordingly settled in full.

Tax troubles

A liner agent had been paying 2.5% of all freight paid on export cargo to the local tax authorities. Local regulations made the local agent jointly liable for the tax with the foreign carrier.

When the agent's financial controller left the company it was discovered that for a two year period the agent had not paid the tax during which time 24,000 TEUs had been exported. The apparent reason for the failure to pay freight tax was an enquiry made as to what items should be eligible for freight tax (whether it was just sea freight or included payments for road transport and other charges). Without consulting the principal or senior management the financial controller had made no payments while the issue was unresolved.

The unpaid tax amounted to US$ 425,000 and this was paid to the authorities out of the funds held back by the agent. The tax authorities charged interest on the sum which had to be met by the agent. ITIC reimbursed the agent the sum of US$ 86,000 under the terms of their entry.

Wasted time

A ship agent in the USA failed to update a local tug company of a change to a vessel's departure time. This resulted in the tug being prematurely dispatched to assist the ship. The tug company claimed for the wasted time which had to be paid for by the agent.

The original invoice amounted to US$ 21,000 but the agent was able to negotiate a discount leaving a claim of US$ 13,000. The agent was reimbursed under their ITIC cover, less the deductible.

Insufficient Blanking

A layup manager arranged the blanking of sea valves for a vessel going into cold layup.

The manager, as agent for the owners, arranged for a contractor to fit internal blanks to the sea valves. The main engine flooded when the valve to the main cooling sea water line was accidentally opened, causing serious damage to machinery and electrics. The damage survey found that the internal blanks were not fitted by the contractor correctly. The owner brought a claim against the contractor for about US$ 3 million. There was concern that the contractor would not be able to meet such a claim.

The owner then turned their attention onto the layup manager. They alleged that good practice would be for all sea valves to be fitted with internal blank flanges. In addition external sea suctions should be closed off by divers using fibreglass blanks fitted with neoprene seals. The layup manager had not arranged for the external suctions to be blanked. The owner argued that had the manager arranged for the external blanks to be fitted, there would have not been any flooding.

The contractor had clearly failed to do their job properly and was primarily liable for the claim. The layup manager contributed US$ 250,000 to the overall settlement. The payment was reimbursed under their ITIC cover.

The case also illustrates how the outcome of claims can depend on how a manager contracts. In this case the manager had appointed the contractor as agents on behalf of the owner. The owner's claim lay directly against the contractor. If the manager had agreed to provide the blanking on a lump sum basis, the outcome could have been very different. The manager would have been liable for the actions of the contractor and left to pursue the contractor in a recovery action.

No Notice of claim

A demurrage claim for US$ 352,122 was passed onto the charterer by the broker within the 90 day charterparty time limit period. However, the charterer declined to pay the claim as they had not been given notice that a demurrage claim would be made within the 60 day period provided for in the charterparty. The owner had advised the broker within the 60 day period that a demurrage claim would be made but this had not been passed on by the broker.

Clause 15(3) of Shellvoy provides -
(3) Owners shall notify Charterers within 60 days after completion of discharge if demurrage has been incurred and any demurrage claim shall be fully and correctly documented, and received by Charterers, within 90 days after completion of discharge. If Owners fail to give notice of or to submit any such claim with documentation, as required herein, within the limits aforesaid, Charterers' liability for such demurrage shall be extinguished.

In the past, this 60 day notification deadline that a demurrage claim was "coming" had not been strictly adhered to as the owner and charterer tended to concentrate on the 90 day demurrage time limit for the demurrage documents to be sent to the charterer. However, a tightening of procedures by the charterer meant that this claim was rejected. The owner then sought recovery from the ship broker.

The clause does provide that a failure to give notice extinguishes the claim and subsequent presentation of the claim within 90 days does not "remedy" the situation. In this case there were issues as to whether the previous conduct had amounted to a waiver of the right to rely on the 60 day notice period but ultimately the broker had failed to pass on the message and had to substantially contribute to the claim.

The failure to pass on claims documentation within the relevant time limit is the most common cause of claims against tanker brokers. Often wider claims clauses apply to insurance premiums, deviation, port costs and expenses and ITIC has settled liabilities arising from a failure to pass on these documents.

It is common for brokers to specify an e-mail address to which post fixture messages have to be sent. This should lessen the chance of an important message being buried among the large number of market circulars and negotiation messages received during the average day. In October 2014 ITIC published a recommended clause to be used at the bottom of recap messages setting out the post fixture communication details and the consequences of not using them. This is available on ITIC's website http://www.itic-insure.com/knowledge-zone/article/post-fixture-clause-for-shipbrokers-130662/. Some brokers have specific e-mail addresses for demurrage and other claims. ITIC is happy to advise on specific wordings for its members.

Costly storage

A ship agent failed to spot that a bill of lading had specific instructions to arrange the delivery of 10 containers of cargo to the port's free zone, where the consignee would have enjoyed a free storage period of 21 days from the port authority.

Instead, the cargo was shifted to the customs yard, where the cargo immediately started to incur storage charges at a rate of US$ 5.33/ton. By the time the consignee took delivery of the cargo, one week later, US$ 25,500 in storage costs had been incurred.

ITIC reimbursed the ship agent. This is another example of where small mistakes can lead to significant costs being incurred.

Wrong holds

A ship agent issued bills of lading in respect of a cargo of different types of coal being transported to Canada. Due to human error, they confused the holds and indicated on the bills of lading that Coal Type A cargo was in holds 1, 3 and 5 and Coal Type B cargo was in holds 2 and 4. However, it was actually the other way around.

The cargoes were discharged to the wrong facilities. The receivers brought a claim against the owner which was passed to the agent.

ITIC arranged for lawyers to represent the agent. They argued that there was a discharge plan on the vessel (which was correct) and had the vessel been discharged in accordance with the discharge plan this claim would not have happened. In addition the receivers had a surveyor in attendance and his reports referred to the correct configuration of the cargo. The bills of lading were however clearly wrong and the agent ultimately contributed US$ 185,000 which was 45% of the claimed amount. ITIC reimbursed the costs of the settlement and the legal fees incurred.

Reports alone are not enough

Ship managers acted as managers of a vessel for a number of years until it was sold. When it was delivered in Northern Europe to the buyers, Class suspended the vessel's approvals due the state of its ballast tanks.

The sellers faced a claim from the buyers which was settled. They then turned their attention to the managers issuing proceedings in which they alleged that they had not been kept sufficiently informed about the condition of the vessel's ballast tanks. In addition they claimed that the managers had failed to have the ballast tanks repaired during dry-docking in South Africa six months earlier. The claim amount was the difference in repair costs between undertaking the repairs in Durban and Northern Europe six months later.

The managers defended the claim on the basis that they had reasonably relied upon figures attained during the dry docking in South Africa and the owners had received copies of the reports obtained over the years. The court appointed expert produced their report stating that survey reports showed deterioration in the ballast water tanks for a number of years and these should have been investigated. If this had been done the repairs would have been undertaken earlier at less cost. The expert concluded that it was not enough that the owners had received copies of the reports and that "the manager was under a duty to bring the future need for substantial steel renewals clearly and unequivocally to the attention of the owner".

A negotiated settlement of US$ 700,000 was reached.

Guaranteed commission

Ship brokers in Asia were due commission on the sale of a vessel for scrap. The buyers performance of the Memorandum of Agreement (MoA) was guaranteed by their Hong Kong based affiliate.

The MoA was subject to Singapore Arbitration and stated:

"Purchase Price […] to Sellers bank account less 1% to [broker] as brokerage commission, which is to be deducted from Buyers balance payment."

The purchase went ahead but the buyers did not pay the brokers. The vessel was scrapped shortly after delivery.

The member had purchased ITIC's Rule 10 "additional legal expenses and debt collection cover". ITIC wrote to the buyers and their guarantor and when this didn't secure a response commenced arbitration in Singapore against both the buyers and the guarantor. The arbitration was uncontested and an award of US$ 54,500 plus interest and costs was obtained.

ITIC instructed Lawyers in Hong Kong to enforce the award against the guarantor. The threat of winding up the company persuaded the guarantor to settle the outstanding commission. ITIC reimbursed the unrecovered legal costs which were about US$ 20,000.

Short circuit

This claim involved one cargo owner, two brokers working at different offices, and three shipowners.

The cargo owners and shipowner number one had a COA. Shipowner number one was unable to use his own tonnage so contacted broker number one. Via that broker an agreement was reached with shipowner number two to carry the cargo at a freight rate of US$ 24.50mt.

Shipowner number two was talking to broker number two, who worked for the same company but in a different office from broker number one. Via broker number two an agreement was reached with shipowner number three, who would carry the cargo at a freight rate of US$ 21.75mt.

Owner number three nominated a vessel which was accepted by the cargo owner.

At this point, shipowner number two considered that he would make a profit of US$ 2.75mt. The cargo owner then asked to change the discharge port which would reduce the voyage distance and asked what the discount in freight would be. Shipowner number one passed the request to broker number one. Broker number one then contacted shipowner number two, who said that it would be a matter for owner number three to decide what discount was to be given.

Broker number one was aware that broker number two was travelling and so contacted shipowner number three directly. Shipowner number three, said the freight rate would be US$ 20.75mt (a discount of US$ 1mt).

Unfortunately, rather than re-contact shipowner number two (who would presumably have applied the same discount and passed a freight rate of US$ 23.50mt up the chain). The broker passed the rate of US$ 20.75mt to shipowner number one. This rate was agreed with the cargo owner.

When shipowner number two found he would not receive his profit of US$ 2.75mt he brought a claim against the brokers who had clearly failed in their duty to him. The total claim was US$ 168,000.

Cyber liability

This is an example of a number of similar messages received by ITIC in recent times:

"Good morning,
This message is to inform you that we have been victims of a cyber-attack by hackers entering our computer system. They managed to get in touch with one of the ship owners we represent and get them to transfer a large amount to their bank account"

It is in response to such attacks that ITIC has developed an extension to its existing cover, which will protect against liabilities arising from the unauthorised use of its members' computer networks. This will provide insurance to cover, among other things, misuse of computers operated by ITIC's members, together with any software and peripheral devices necessary to make those computers function - including servers, networking equipment and data storage devices.

The cover will respond in respect of acts by people who gain access to members' computer networks without their permission, or people who are granted access for a legitimate purpose but misuse that access to cause harm. The policy will cover a member's liability to pay compensation to a third party damaged by the unauthorised use of the member's computer network and all associated legal and experts' costs incurred by that member.

The majority of members will have already received an indicative quote of the cost of adding this endorsement to their cover and the uptake clearly shows the need for this type of cover. Any members who would like to discuss purchasing ITIC's third party cyber liability endorsement should contact their insurance broker or ITIC account executive.

www.itic-insure.com

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

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