ITIC
SPECIALIST PROFESSIONAL INDEMNITY INSURANCE

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Claims Review

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ITIC IS MANAGED BY **THOMAS MILLER**

Welcome to the October edition of ITIC's Claims Review.

The ITIC board met for their September board meeting in Genoa. There was a drinks reception at the Hotel Cenobio dei Dogi which was well attended by many members, insurance brokers and important contacts.

We would like to extend our thanks to those of you who continue to submit questions for our "ask the editor" feature. Please send any questions that you may have to askeditorCR@thomasmiller.com.

This edition of the Claims Review provides a selection of marine cases recently handled by ITIC. We hope that these case stories will be of interest to you and will also help you to identify potential problems in order to avoid these types of situations occurring in your businesses.

The Editor

Something fishy

ITIC's member is a designer of fish farms. They designed a fish farm which was fabricated in Asia and delivered to the end user based in the UK.

It became apparent when the fish farm was in situ that the sockets (holders into which poles for fencing, lights, moorings etc. can be inserted) along the structure had been designed incorrectly.

The original design required these sockets to be 9mm thick. However, by mistake on this occasion, the design had been altered to a thickness of only 3mm and this was not spotted by the designer. As a result, the sockets were too weak and tore when used.

Consequently, the farm could not be used by the end user. Investigations took place as to how best this could be resolved. Fixing the sockets in situ would be extremely expensive, if not impossible, due to the galvanisation process the steel required. It would actually be cheaper to fabricate a completely new structure in Asia and ship it to the UK.

However, this solution led to other problems because of delays which could have led to a loss of profits claim in excess of US$ 4m.

Even moving the fish farm would have been very difficult. There were high costs of towing and storage - if a place to store it could even be found. Potentially the structure would have had to be broken up for scrap and stored on land. The sum for scrap would not have covered the moving and storage costs.

Fortuitously, another fish farming company offered to take the structure for US$ 1.1m on an "as is where is" basis and agreed to pay all the costs of moving the structure to their facilities. Thus the costs for towage and storage were avoided. The end user was then refunded the money they had paid. This was the most cost effective resolution of the options available.

The client paid US$ 1.1m for the structure. This was repaid to the end user to settle the claim. ITIC reimbursed the designer in full as this was the extent of the claim and there was no profit element to this.

Bad Bills

A ship agent was presented with a correctly endorsed bill of lading by the consignee's nominated clearing agent and in line with usual procedures issued the Delivery Order for clearing the cargo. The container was then cleared by the consignee from the port and subsequently was returned empty.

The agent then received notice of a claim from the shipper through the carrier advising that the original bills of lading remained in the bank as they had not received payment from the consignee. As a result the ship agent undertook a full review of the documentation and noted that there were some small discrepancies with them. It turned out the bill of lading they were presented with was a fake.

The main areas of difference were the terms and conditions on the reverse of the bill, the carrier's stamp was different from the correct one and the dates were mismatched.

As a result, following discussions with ITIC, it was agreed that this was not a fraudulent or deliberate release but rather a mistaken negligent release. As such, it fell within the ITIC cover and the carrier's claim (passing on the shipper's claim) was settled for US$ 124,000.

ITIC looked to the possibility of recovering the monies from the fraudulent consignee, but they had disappeared.

Unamended disaster

In the MYBA charter agreement if an owner sells the yacht after they have already agreed a charter they have to pay damages to the charterers. The amount of the damages depends on the amount of notice they give the charterers. They also have to pay the charterers' broker commission on the damages.

A central agent (broker) was negotiating a charter and was asked by the owner to amend the relevant provisions such that the usual damages, if the owner sold the yacht prior to the charter, would not be payable. Presumably the owner was considering selling the yacht. Unfortunately, during negotiations the broker forgot to make the amendments.

The owner did sell the yacht and therefore cancelled the charter within 14 days of its commencement. The charterer and the charterer's broker demanded the full return of the charter fee plus the liquidated damages of 50% as was their right in the unedited MYBA agreement.

The liability was clear-cut, the broker was asked to do something, which they failed to do and the owner incurred a liability which had the broker done as instructed probably would not have been incurred.

Therefore, ITIC reimbursed the broker in full when they paid the owner the sum they had to pay in liquidated damages (less their commission) of EUR 75,000.

Surplus sulphur

A port agent was asked by the Master of a ship what the sulphur requirements were at berth.

The agent replied that fuel with an upper limit of 0.5% sulphur must be used, whereas in fact it was an upper limit of 0.1%. The authorities, upon inspection of the ship, found she had not transferred over to 0.1% and fined the ship EUR 12,000.

The owner claimed against the agent. There was a clear error on the part of the agent and ITIC agreed to reimburse the claim in full.

Interview with Ioanna Efthymiou

Trainee account executive

How long have you worked at ITIC?
It's been only one month since I joined ITIC.

What is the biggest challenge when it comes to claims?
I have a legal background, and the most challenging aspect at the moment is responding to claims and reviewing the relevant contracts from an insurer's perspective.

For example, when a member asks us to review a contract I need to look at the particular clauses that may affect the cover and/or the member's liability. A law firm may look at clauses concerning say, payment terms, but that is not a matter for an insurer.

What is the most memorable claim you have handled?
Since I've been with ITIC for only one month, I haven't handled very complex or particularly memorable claims yet. I find ship management claims the most exciting ones though.

What is your favourite part of dealing with claims?
I love dealing with people from all around the world. Everyone has their own unique style in communicating their concerns and you need to see things from their perspective in order to understand and help them out.

Any life ambitions or future goals still to achieve?
I'd love to travel to Korea and Japan.

What is your favourite saying?
"It's never too late."

What are your hobbies and favourite pastimes?
I love reading and having discussions with family and friends, putting forward arguments and exploring their viewpoints on several subjects.

What is your favourite food?
My Mom's Greek roast chicken and potatoes.

What is your favourite film?
I don't think I have a favourite film. "The Shawshank Redemption" is one of the best films I've seen though. Another film that has stuck with me for years is a Korean film named "Always".

What is the last book you read or music you downloaded?
The last book I read is "The Black Moon", the fifth novel in the Poldark series of historical novels exploring the life of a family in Cornwall back in the 18th century. I love the way the author, Winston Graham makes the characters and the era feel so real.

Any pet hates?
I have a love-hate relationship with cats.

If you weren't working at ITIC, what would you be doing?
I would be enjoying a long honeymoon.

Management mistakes

A ship manager managed two ships for the same owner pursuant to two BIMCO Shipman contracts.

For one ship, the owners alleged that the managers mismanaged their ships by failing to identify deficiencies, arrange and supervise maintenance and repairs, implement the ISM and PMC systems on-board, and communicate properly with the crew.

Owners further alleged that the managers failed to provide them with sufficient information in respect of 'extraordinary' expenditure to allow owners to make an informed decision on whether to approve incurring the cost.

For the second ship the owners made various allegations including failure to plan a crew change, failure to dismiss the crew for misconduct, which allegedly meant the crew were not suitably qualified, and failures to adequately maintain the ship.

Owners presented their claims under various heads of damages including cost of repairs, loss of hire, cost of bunkers, and port and agency costs.

The total claim was for US$ 9.5m. BIMCO Shipman contracts limited liability to US$ 1.5m for each ship.

The ship managers accepted that there had been some mismanagement on their part. Therefore, there was significant litigation risk. Furthermore, costs incurred in fighting the claims would be significant – in the hundreds of thousands, if not more. Finally, a lot of management time would be used in defending the claims. As a result, with ITIC's assistance, the managers met with the owner for settlement talks.

Following several rounds of settlement talks both ships were eventually settled at US$ 700,000 each (US$ 1.4m total). ITIC paid this claim less the deductibles.

Gas field of dreams

An offshore surveying firm, offering geophysical surveys, signed a contract with an oil company for the provision of geophysical surveys and geotechnical surveys over offshore gas fields.

The gas extraction in that field had been interrupted some time before and the oil company was looking to re-start the extraction and further develop the field.

The purpose of the survey was to provide an assessment of the condition of the seabed and fields before the oil company would consider the next steps for the exploitation of the fields (assessment of the remaining gas reserve, reactivation of the platforms, new drilling operations, etc.).

During the provision of the surveys several events occurred, delaying the commencement and completion of the services by approximately 300 days.

The oil company claimed that the delay was caused by the failure of equipment, defective work and non-completion of obligations.

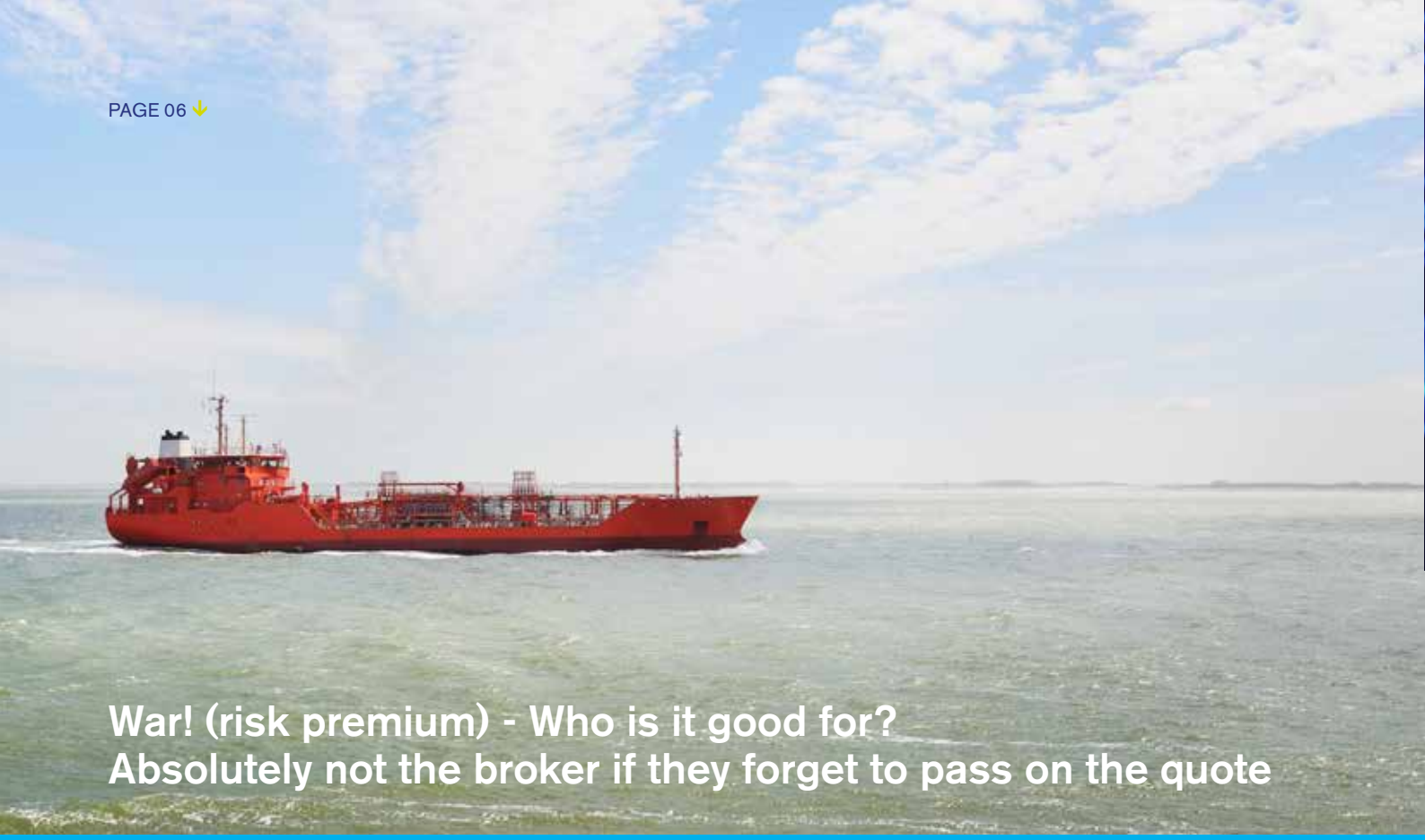
Therefore, some of the delays claimed were not caused by the negligence of the surveyor. For example, some were caused by operational issues with the vessel that had been chartered for the purpose of the survey.

However, some delays were indeed caused by the negligence of the surveyor and/or their subcontractor, such as their failure to ensure the correct equipment was on board the vessel.

The contract itself contained a liquidated damages clause, which capped the surveyor's liability for delays at 10% of the contract price (which was US$ 1m).

Originally, the claimant viewed all the delays as one event and claimed one cap. However they realised that they were actually entitled to three separate limitation caps under three contracts so the claim as capped increased to US$ 3m.

Eventually the matter was settled at US$ 1.5m.



War! (risk premium) - Who is it good for? Absolutely not the broker if they forget to pass on the quote

A tanker was fixed for a voyage. The voyage included an option to call at an additional war risk premium (AWRP) area. As per the terms of the charter party the charterer was liable to pay the AWRP if the ship was to go to the area.

However, it was for the owner to obtain a quotation for AWRP and pass same to charterer for approval "as soon as possible" and "before the AWRP is paid by the owner."

The owner complied with the clause and passed the required information to the ship broker.

After the completion of the voyage, the owner notified the charterers of their claim for the AWRP.

At this point it became clear that the brokers had forgotten to pass on the initial quotation and as a result the charterers refused to pay the AWRP.

ITIC attempted to persuade the charterer to pay the AWRP as (a) they decided to go to the area knowing that they would have to pay an AWRP and (b) the quotation was in line with the market at the time. Therefore, the delayed notification was not causative of any loss to the charterers. However, they refused as the terms of the CP had been breached by the owners.

This meant that the owners had a valid claim against the broker. The full claim for the AWRP of US$ 60,000 was paid by ITIC.

Storage wars

In respect of a voyage charter, the charterer nominated an ITIC member as the discharge port agent.

The charterer asked the agent to confirm storage costs for the cargo up to such time when the consignee was to collect the cargo.

The cargo was not one the agent frequently worked with so they misread the applicable tariff and advised clearance included a 90 day storage period whereas in reality it was only 30 days with a daily charge thereafter.

The charterer, as a trader, agreed the sale price on the basis of the information provided by the agent.

When it later transpired that the charterer had to bear unforeseen storage costs which they could not pass on to the buyer, the charterer made a claim against the agent.

There was no defence available so ITIC paid the full claim of EUR 30,000.

Ask the Editor

Please continue to send in your questions – we are enjoying them. You can email us at askeditorCR@thomasmiller.com

I have been asked - Is there really a difference between negligence and gross negligence under English law?

English law has no real concept of "gross negligence" but the courts will try and give meaning to the parties intentions. Clearly, when people say "gross" negligence in a contract they mean something more than just "standard" or "regular" negligence.

Therefore, it all comes down to the degree of negligence. The classic definition of negligence is that (a) you owe your client/principal a duty of care, (b) you have breached that duty by acting without the reasonable skill and care one would expect from a reasonable person in your position (c) that breach caused the claimant a loss.

So when does regular or standard negligence becomes "gross negligence?"
As a starting point, look to see if it has been defined in your contract. If it is defined, the courts will try to apply that definition. If it is not defined, or the definition itself is unclear then the usual starting point is Lord Mance's judgement in Red Sea Tankers v Papachristidis (the Hellespont Ardent) [1997]. He said:

"Gross negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence. But, as a matter of ordinary language and general impression, the concept of gross negligence seems to me capable of embracing not only conduct undertaken with an actual appreciation of the risks involved but also a serious disregard of or indifference to an obvious risk."

However, it should be noted that the difference between negligence and gross negligence is one of degree and not kind.

There is no need for gross negligence to require dishonesty, bad faith or deliberate misconduct. Wilful default and reckless carelessness are usually separate legal concepts from gross negligence.

Cockerill J said in the Republic of Nigeria v JP Morgan Chase Bank NA, [2022] that gross negligence is "a notoriously slippery concept: it requires something more than negligence, but it does not require dishonesty or bad faith and indeed does not have any subjective mental element of appreciation of risk."

He went on to summarise that:
"…even a serious lapse is not likely to be enough to engage the concept of gross negligence. One is moving beyond bad mistakes to mistakes which have a very serious and often a shocking or startling (cf. "jaw-dropping") quality to them. The target is mistakes or defaults which are so serious that the word reckless may often come to mind, even if the test for recklessness is not met. That is why the Hellespont Ardent points one to actual appreciation of the risks involved or conduct which is in serious disregard of an obvious risk."

In summary, if there is no contractual definition, the courts will be looking for:

1. **Jaw-dropping, shocking and startling mistakes; and/or**
2. **An actual appreciation of the risks involved and disregarding them; and/or**
3. **A complete disregard for an objectively obvious risk, even if it was not appreciated subjectively.**

Therefore, if you can limit your liability to just instances of "gross negligence" in your contract, we recommend doing so as it is a higher standard for your counterparty to establish.

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