SHIP MANAGEMENT INTERNATIONAL

Issue No 77 January/February 2019

New year, new fortunes?

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Don't become liable for the charterer's default

By Andrew Jamieson, Claims Director, International Transport Intermediaries Club (ITIC)

ITIC has dealt with claims where commercial managers have ended up making good the financial default of the charterers who hired their principal's vessel.

The starting point, as with most shipmanagement issues, is the management agreement. Contractual terms that impose obligations to conduct unreasonable levels of due diligence on potential charterers must be avoided. Seemingly vague obligations only to fix with 'reliable charterers' can cause problems when a charterer fails to perform. Even when the obligations are balanced it is important for the managers to make sure they follow the procedures set out in the contract.

In a recent claim, an appendix to the commercial management agreement contained a list of approved charterers. The main body of the agreement provided, "The manager shall seek approval before fixing with any charterer that does not appear on the list and shall obtain owners' approval before fixing". The vessel was fixed to a charterer who was not on the list. The charterer failed to pay the final hire and ultimately went into liquidation owing nearly $200,000.

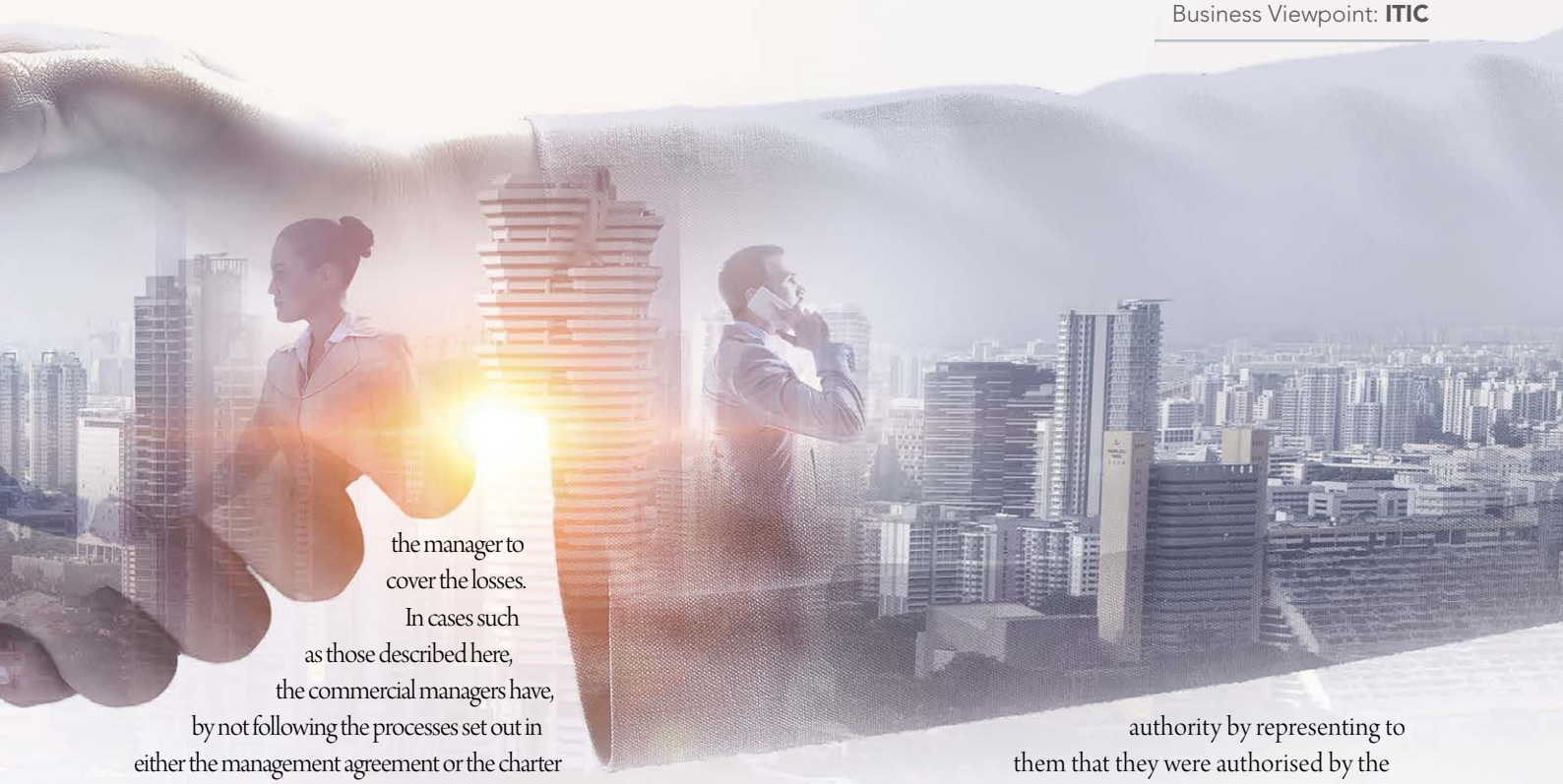
The manager had sent the owners a message informing them that they had put the vessel on subjects for a time charter. They named the charterers and outlined their trading activities. The message also highlighted some provisions the charterers wanted in the fixture. Although the level of information was greater than would have been provided for an 'approved' charterer, the message did not expressly say that these charterers were not on the list and did not seek the owner's authority to fix with them.

The owners claimed the unpaid hire from the managers. They argued that, had the managers actually sought authority, that would have triggered a process whereby, as a matter of routine, the owners would have carried out background checks. These, it was claimed, would have included seeking advice from a credit reference agency. The owners said that this would have shown that the charterers had been having financial problems for some time, and the fixture would not have been authorised. Ultimately, the parties reached a compromise, with the managers contributing to the losses.

Some managers are given precise limitations on the terms of any agreement. One agreement seen by ITIC provided that the managers could not fix the vessel for more than a specified number of days without approval. The managers failed to obtain approval for a fixture which (at its longest permitted period) could have extended beyond the authority they had. When the market rose towards the end of the fixture the owners claimed for the difference between the fixture rate and the prevailing market rate.

In many fixtures the performance of the charterers is guaranteed by another company. It is important that commercial managers take steps to ensure that any obligations to provide a guarantee are followed through. The guarantee is a separate agreement. The manager should get something from the guarantor. Under English law the guarantee needs to be evidenced in writing and signed (not necessarily manually) by the guarantor or someone authorised by the guarantor.

ITIC has seen situations where the terms of the guarantee were set out in the recap. Once the fixture had been concluded, nobody followed up to get the guarantee signed. When the charterer defaulted, the guarantee proved to be legally unenforceable. The owner looked to



the manager to cover the losses. In cases such as those described here, the commercial managers have, by not following the processes set out in either the management agreement or the charter party, found themselves covering large sums owed by defaulting charterers.

• Separately, the International Transport Intermediaries Club (ITIC) recently represented a shipbroker accused by an owner of breach of warranty of authority in a dispute arising under a non-performing contract of affreightment (CoA).

The shipbrokers had negotiated the terms of a CoA between the charterers and the ship owners, receiving all their instructions from an agent purporting to act for the charterers. The CoA provided for a minimum of 18 shipments to take place over a 12-month period but, when the charterers failed to nominate any cargoes during the period of the CoA, the owners began proceedings against them, claiming damages of $3.1m. In their defence, the charterers denied being a party to the CoA and alleged that neither the shipbrokers nor the agents had authority to negotiate or enter into the CoA on their behalf.

The owners then joined the shipbrokers into the proceedings, alleging that they had breached their warranty of authority by representing to them that they were authorised by the charterers to conclude the CoA. They added that, if the brokers did not have such authority, then they would be liable for the loss suffered.

Liability for breach of warranty of authority does not, under English law, depend on any negligence on the part of the shipbroker. It is, however, specifically covered under ITIC's rules. The shipbrokers maintained that they had not purported to represent the charterers and said that the owners had known that the brokers were acting on the agent's instructions. The agents, meanwhile, claimed that they had been authorised to conclude the CoA.

After filing their defence, the charterers did not take an active part in the proceedings. The matter went to mediation between the remaining parties but did not settle on the day. Following the mediation, the owners indicated that they would be willing to accept a substantial reduction in their claim. The brokers and agents were able to negotiate a split of the settlement, with the agents paying the largest proportion. ITIC reimbursed the shipbrokers' contribution of $260,000. ●