ITIC SPECIALIST PROFESSIONAL INDEMNITY INSURANCE

2019 edition

The Superyacht Wire

Superyacht

ITIC is the leading provider of professional indemnity insurance to superyacht professionals, insuring more than 150 companies worldwide. The team at ITIC has a complete understanding of the risks, combined with a high degree of claims experience.

Any professional working in the superyacht sector will face day-to-day exposure to risk, but will be able to rely on ITIC to help reduce potential hazards. To demonstrate potential liabilities in this sector, the following claims scenarios may be helpful:

Yacht manager's failure to maintain yacht – when engines or equipment fail on a yacht, an owner may turn to the manager to recover their losses.

Yacht broker's misdescription – if a yacht is not what the buyer or charterer was hoping, they often seek to blame their broker for misrepresenting the deal.

Yacht agent's negligence - if the port services for the yacht are not arranged in a timely manner, the charter can be delayed. The owner may then turn to the agent to recover their losses.

Naval architect's negligence – superyachts are complex structures. Errors in the design can lead to very expensive losses.

Crew manager's failure to appoint suitable crew – if the crew are not certified to perform the jobs for which they are hired, the owner will be in breach of the terms of his insurances and the yacht manager will be liable.

The following selection of articles from this edition of The Wire will give you practical information on loss prevention, as well as on contract terms, illustrated by a variety of claims examples.

ITIC IS MANAGED BY **THOMAS MILLER**

Diving into trouble

A yacht broker was the central agent for a yacht moored in the USA. During a pre-purchase survey, the engine's RPM was lower than it should have been. The owner decided to remedy this by reconditioning the yacht's propellers.

The central agent instructed a firm of diving engineers to inspect the propellers. The engineers decided that they should remove the propellers so they could be properly investigated.

The first diver decided not to wait for his colleague before he started to remove the propellers. Unfortunately, the yacht's davits broke and the propeller dropped onto the diver cutting his leg. Subsequently, the cut on the diver's leg became infected. This became a serious issue.

The diver's attorney issued proceedings against the yacht owner and the central agent claiming substantial damages for the bodily injury, pain and suffering, future disability, medical costs, future care and loss of earnings.

In the USA legal costs are unrecoverable. Therefore, even if the yacht broker could have successfully defended the claim the costs incurred would have been "wasted".

Fortunately, the broker had insurance with ITIC, which covered the defence costs of US$ 50,000.

Stick with Shipman for superyachts

In a recent article in a superyacht publication, a lawyer suggested that as yachts were very different to oil tankers, BIMCO Shipman 2009 (Shipman) was not a suitable document to use. This is nonsense.

The difference between a yacht and a ship has become blurred over the years due to the increase in the size of the yachts. Twenty years ago a fifty metre yacht would have been considered large, today it is seventy metres plus. Yachts and tankers are very different types of vessel but the legal and regulatory framework they operate in is the same. If you are the manager of a yacht over 500 GRT, you are also the operator of the vessel under the ISM Code. The management agreement you have must protect you, especially if the owner of the yacht may be inexperienced in all matters marine.

ITIC understands yacht managers have different duties towards a yacht owner compared to those of a tanker manager, but if you are managing a yacht, there is absolutely no reason why you should accept greater liabilities. We therefore recommend that your management agreement be on terms no more onerous than Shipman. A few of the key provisions of Shipman are detailed below:

Agency: A yacht manager acts as the agent of the owner and the yacht management agreement must reflect that agency status. If a yacht owner asks you to act in any other capacity, you should refuse.

Joint Assurance: As the operator of the yacht you are exposed to the same risks as if you were the owner. It is vital, therefore, to have the same protection. A manager could feasibly take out their own insurance covering their operational exposure to the vessel, but the cost would be wasted as it costs the owner nothing to name the manager as a joint assured on all insurances taken out in respect of the yacht you manage.

Negligence: Where you offer a professional service of yacht management, you need to be insured in the event you act negligently. The management agreement must only make you liable where you fail to perform the management services in accordance with sound yacht management practice. You should be very cautious if the wording is changed. Do not accept "sound" being replaced with "first class" as your liability would increase considerably and you may not be insured.

Limitation & Indemnity: Under Shipman you can limit your liability to ten times the annual management fee. Liability is therefore commensurate with the income you are earning. The owner also should keep you indemnified where you have not been negligent. Do not agree to any changes.

Dispute Resolution: The usual dispute resolution in a management agreement is either arbitration in London or New York. If you are asked to include a different forum you must be cautious as Shipman has been drafted by Anglo-Saxon lawyers. If you are asked for a different jurisdiction or law to apply to your management agreement, you must take advice from a lawyer in that jurisdiction as to how your liabilities would be affected. We do not recommend US law or jurisdiction for disputes under the contract, as the position as to costs, limitation and publicity are not as favourable as in the UK.

Legal Certainty: The Shipman contract has been the focus of much litigation. Lawyers and also arbitrators have a good knowledge of the liabilities that flow from this agreement. If a bespoke agreement is drafted it can increase legal uncertainty and consequently legal costs. Stick with Shipman, or a derivative thereof.

The lawyers acting for the owner's interest may come from a non-shipping background, and some of the above concepts may appear alien to them. However, if it is explained why you are insisting that they remain in the contract, most will acquiesce. If they do not, you should consider if it is worth taking on the management of the yacht. Please contact ITIC if you need advice on your management agreement.

January sails - everything must go!

An agent was appointed by the owner of a sailing super yacht calling at a Mediterranean island.

The owner required two spinnakers to be taken off the yacht and forwarded for repairs at another port.

The agent was asked to arrange temporary storage until the repairs could be organised. The agent instructed their sub-contractor, who was usually responsible for removing garbage from the quay, to take the sails away for temporary storage. Nine months later the yacht owner asked for the whereabouts of the sails. The sub-contractor had ceased business. The agent realised that they had not been invoiced for storage and unfortunately the sails could not be found.

The owner held the agent responsible. ITIC agreed to reimburse the cost of new sails, with a reduction for betterment.

Crew contract confusion

Yacht managers were instructed by the owner to terminate the employment of two crew members. Both crew members were French nationals employed by the owner. The managers gave the crew a month's notice as required by their contracts which were said to be subject to "United Kingdom law".

Subsequently lawyers representing the former crew members alleged that the owner terminated the contracts without any consideration for the procedures that must be followed under French law. They commenced litigation against both the owner and the managers and arrested the yacht (which was in French waters) to obtain security for their claim.

The owner complained that while they, as the employer of the crew, had issued instructions to terminate the employment contracts the managers had not obtained any advice or guidance as to the procedural requirements under French employment law. The owner alleged this was negligent and had left them exposed to a claim under France's strict employment laws.

French lawyers advised that should the matter go to litigation, the former crew member's claims stood a good chance of succeeding as, despite the contract's provisions, French law would apply. This was because the two individuals had been in France at the time of their employment. Technically there is no "United Kingdom law" as England and Wales, Scotland and Northern Ireland have separate legal systems. The claims came to a total of EUR 194,680 and included damages for loss of earnings and compensation pursuant to French mandatory employment law.

In view of the advice the owner settled the crew claims for about EUR 75,000. The managers denied that they were responsible for obtaining employment advice but ultimately agreed to contribute a third of the settlement.

Helicopter hiccup

A film production company chartered a yacht for a one-day photo shoot.

The charterer needed to land a helicopter on the yacht as part of the filming requirements. Unfortunately, the yacht's helicopter operations certification was out of date. At the time a compromise was reached to use a helicopter, but not to actually land it on the yacht.

However, the charterer was not very happy. ITIC's member was the central agent for the yacht owner. The charterer brought a claim against the owner and the central agent for EUR 73,000 plus their legal costs , alleging that the yacht had been misrepresented to them. They alleged they had specifically requested a yacht capable of allowing a helicopter to land and the broker had confirmed that this yacht was suitable for that purpose. A representative of the charterer brought their claim against the broker in France. ITIC paid for the costs of a French lawyer to defend the member's position.

It was argued that, as their claim was based on the terms of the charter party and this contract provided for arbitration in London, the court should decline jurisdiction in favour of the London arbitration clause.

The court did rule that the arbitration clause was applicable and declined jurisdiction. They also awarded the central agent EUR 8,000 in costs. As a result, the claimant decided to completely drop their claim.

It’s all a matter of class

A yacht broker and manager acted for a client who wanted to purchase a yacht for family use but which he would also be able to charter out commercially.

The client became interested in a yacht that was registered solely for private use. It was appreciated that the yacht would need to obtain commercial registration status and that work would have to be undertaken to bring the yacht into compliance with requirements for commercial registration.

The broker arranged pre-purchase surveys to be carried out and obtained advice in relation to the flagging and commercial compliance. Although the survey and advice was obtained from third parties the broker provided a summary and added their own comments. The advice included a change of registry but the yacht would remain with the same classification society.

The yacht was purchased and a management contract was agreed covering the management and supervision of the conversion.

The works on the yacht proved more substantial than expected. Class disagreed with Flag about what was required. In addition there were works that had not been identified in the pre-purchase surveys. As a result, time and the costs increased. The yacht management agreement was terminated and the owner, subsequently, commenced an arbitration. They claimed US$ 6.7 million.

The claims submissions contained two areas of complaint - one in relation to the activity as a yacht broker and one as a yacht manager.

The broking complaint alleged negligence in respect of investigations into obtaining commercial registration with the ship registry and the consequential class society requirements. The owner alleged that, as a result of being misled, they paid too much for the yacht and wasted money on the conversion works. A difficulty faced by the broker was that they had not checked the position with the Classification Society before the yacht had been purchased.

The yacht management complaint alleged that the costs of the refit vastly exceeded the original budget and that the overrun in the refit works led to a substantial loss of charter income over the summer season. The amount claimed from this complaint was US$ 2.6m. The yacht management contract contained a limit of US $1.4m. The main concern was that there was a real prospect that the tribunal would feel that there had been a lack of planning when managing the refit.

The parties held a mediation in July 2018 and although a settlement was not reached on the day the parties continued negotiations and the claims were settled for a total of US$2.25m.

Don’t do favours

An owner of a superyacht asked a yacht manager as a favour to recommend a Master for an upcoming charter. The yacht manager hoped to acquire the management of the yacht.

No formal contract was in place between the manager and the owner of the yacht, as the manager simply brought the two parties together on an informal basis.

After many delays with the commencement of the charter, the yacht owner claimed that the Master was both unsuitable for the size of the yacht and negligent in performing what was reasonably expected from him. As a result of his alleged negligence, the yacht owner sustained damages including the loss of the charter.

The yacht owner brought a claim and ITIC appointed lawyers to defend the member’s position. ITIC and the manager believed the claim to have been exaggerated, as it was not supported by any real evidence or documentation. However the claimant continued to pursue the claim.

The court held that the yacht manager had not properly checked the Master’s references and consequently the manager had not fulfilled their duty as they were requested to do. However, the court also held that there was no causation between the breach by the manager and the alleged damage. The court also held that the claimant could not prove, or sufficiently demonstrate, that had the references been properly checked and the Master screened, the results of that checking would not have led to the Master being chosen.

As a result the claim against the yacht manager was denied and the yacht owner was ordered to pay the costs of the proceedings.

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