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Welcome to the Spring edition of the ITIC Claims Review, which is published to coincide with the March 2012 meeting of ITIC's Board of Directors in Sydney, Australia.

Claims review²⁵

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Telex release goes wrong

Liner agents frequently have to arrange for cargo to be released against bills of lading surrendered at the loadport – the so called “Telex Release”. This type of release is risky as no bill of lading is collected at the discharge port and frequently results in misdelivery of cargo.

In a recent case two containers were shipped to a port in the Netherlands by a shipper; both containers were consigned to the same company. The shipper gave instructions to the load port agent to release one of the containers and this authority was passed to the discharge port agent, who mistakenly released both containers.

The consignee never paid for the second container, and the shipper appointed lawyers to pursue recovery of EUR 76,000, the value of the cargo in the second container, from the shipping line. The claim was eventually settled, after negotiation, for EUR 66,000, which was claimed from the discharge port agent.

Mistakes in arranging Telex Release are a constant and growing source of claims against ship agents, and members are recommended to read the article on ITIC's website on this subject. “Telex Release by E-Mail” – Intermediary September 2007.

ITIC
IS MANAGED
BY **THOMAS
MILLER**

Beware the “poor” ship owner!

ITIC has seen a trend of claims against ship managers by ship owners who are facing hard times. As a result of their financial difficulties they resist paying for the full maintenance for the ship and also owe the ship manager funds not only for their own fees but also for disbursements paid on the owner's behalf. When the ship manager tries to collect the funds due, invariably they are faced with a claim for negligence in the management of the ship. In ITIC's experience, once the ship owner fails to put the manager in funds, the situation rarely improves, and usually deteriorates. The resulting claims are time consuming and costly to defend. To assist in the ship manager's defence, it is of utmost importance that the ship manager's records and correspondence with the ship owner are clear and in good order, as illustrated in the claim example below.

A dispute arose between the manager of a ship and the owner concerning a balance of funds owed to the manager. It was agreed that those funds would be put into an escrow account. The matter remained idle for five months, until the owner raised a claim, through their lawyers, against the ship manager for alleged negligence. The owner's claim was that the ship manager was in breach of their duty to maintain the ship in an efficient employable state and as a result they had suffered significant losses. The claim put forward by the ship owner was in excess of USD 17 million and included alleged

losses of the vessel's future employment, alleged expenses paid by the ship owner for repairs/spares/dry dockings, alleged reduction in the vessel's market value and other additional damages.

The ship manager rejected these allegations in full and lawyers were appointed by ITIC to defend their member's position. The ship manager advised that the vessel's condition deteriorated due to the age, constraints of trade by spending and maintenance restrictions imposed by the owner. The manager further stated that the owner was fully aware of the deficiencies and the condition of the ship when it was taken under management. Despite this, the owner did not take the necessary steps to facilitate remedial action.

pursued the claim against the manager. However, the manager was fortunate in that their files and correspondence on this ship were in good condition and a thorough audit trail for every decision required regarding the running and maintenance of the ship existed. The ship was eventually scrapped, but the owner continued to maintain that they had a claim against the manager, although they were unable to provide any proof or document their losses.

Eventually, after two years, the claim was finalised on a drop hands basis. The total cost of the legal fees to defend the innocent ship manager totalled USD 250,000.

Lawyers for the owner aggressively



A lost volume discount

A ship agent was appointed to provide agency services to a fleet of ships. One of the duties of the agent under the contract was to liaise with the local Canal Authority to make all necessary arrangements for the fleet to pass through the Canal promptly and without delay. In addition, the agent was to advise the fleet operator in writing of all applicable tariffs and available discounts. One of the discounts was a volume incentive rebate, calculated on the basis of cargo volumes carried through the Canal over a period of one year.

In order to claim the volume incentive rebate, the agent was required to present the Authority with a standard form for each ship at the time it transited the Canal. Unfortunately this requirement was overlooked by the ship agent for a period of three months. During

these three months 36 ships in the fleet transited the Canal, and the total discounts were in the region of USD 2.7 million.

ITIC arranged for local lawyers to determine whether there was any way in which the discounts could still be claimed. However, the Canal regulations were extremely clear. Failure to follow proper procedures meant that the entitlement to the rebate was lost. There were no legal grounds on which to claim the discounts if the agent had failed to file the necessary paperwork. However, following negotiations with the Canal Authority, they agreed to allow part of the rebate. The lost rebates totalled USD 1.2 million. It was clear that the agent had caused this loss to the fleet operator, who was reimbursed. ITIC in turn reimbursed the agent.



Putting pressure on for payment

Due to local port requirements a ship was required to be escorted through restricted waters into and out of a port by a tug. The owner asked the ship agent to arrange for the tug on their behalf and to invoice them directly. The ship entered the port in early August and sailed three days later. The ship agent sent the full invoice a week later for the outstanding balance of USD 30,502. The agent sent many reminders to the owner, but did not receive a reply and was struggling to obtain payment.

The ship agent asked ITIC to assist; ITIC contacted the owner on behalf of the agent. ITIC tracked the ship and threatened arrest, and soon received confirmation from the owner that the payment would be made in full. Subsequently, the ship agent was reimbursed the full amount. Sometimes ITIC needs to arrest ships to obtain repayment for members, but often contact from ITIC and possibly the threat of arrest is sufficient.



Assumptions = Claims

A commercial manager arranged for a ship to load cargo at a port which the ship had not previously called and of which neither the commercial manager or the ship owner had any previous experience. The commercial manager estimated, without checking with the agents, that the disbursements at the port would cost in the region of USD 10,000 and used this sum in the voyage calculation.

On arrival it transpired that the port was small and that tugs were required to assist the ship to and from the berth. Furthermore the port was close to a holiday resort and as such there were additional fire and pollution protection services which were compulsory.

The final disbursement account totalled USD 65,000. The owner was expecting to earn on the basis of the original calculation and claimed the USD 55,000 balance from the commercial manager, which was reimbursed by ITIC.



Collision causes a loss of commission

Shipbrokers fixed a bulk carrier for a time charter of 90 days. The first voyage was via a port in Thailand where cargo was loaded for discharge at an African port. Unfortunately, during the outward passage, the ship collided with a tanker. There was no serious damage other than that, as a result of the collision, the tanker hit a dolphin (part of the port structure) which was damaged. As a result, the bulk carrier was arrested by the local authorities and was not released until two months later. In the charterparty, there was a clause giving the charterers the option to cancel if the ship

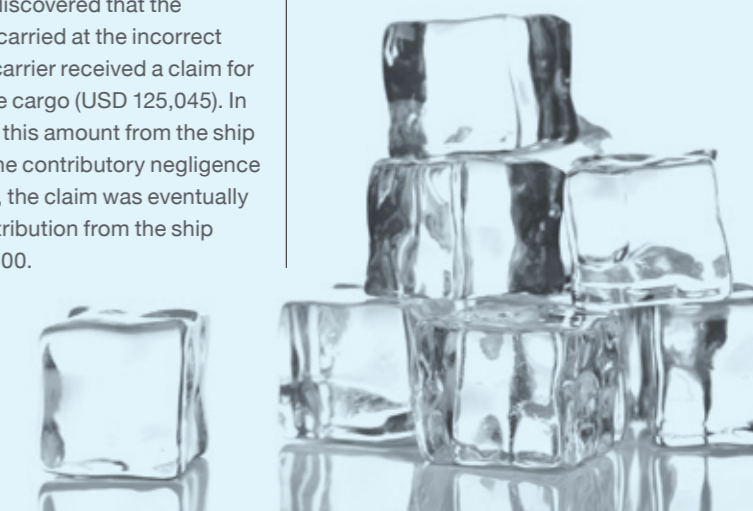
had been off hire for 30 consecutive days, and they decided to exercise this option and cancelled the remainder of the charterparty. The shipbrokers had purchased ITIC's optional loss of commission cover and made a claim for their lost commission. The duration of the voyage until the collision and arrest was 43.1875 days, leaving 46.8125 days remaining of the minimum period. In addition, at the time of the arrest, the ship was nominated to perform a further voyage with another cargo. The commission was fully re-imbursed by ITIC.

Failing to go cold turkey

A ship agent, arranging for the export of a consignment of frozen turkeys, mistakenly notified the line's reefer engineers that the cargo needed to be carried at a temperature of +13 deg. C. instead of -25 deg. C.. The mistake went unnoticed and the cargo was loaded onto the ship accordingly.

The discrepancy between the bill of lading and the actual temperature of the container was also not noticed during an inspection of the containers by the crew of the vessel, prior to sailing. It was also later alleged that the container temperature went unchecked for the entire voyage.

When it was discovered that the turkeys had been carried at the incorrect temperature, the carrier received a claim for the total loss of the cargo (USD 125,045). In turn, they claimed this amount from the ship agent. In view of the contributory negligence by the ship's crew, the claim was eventually settled with a contribution from the ship agent of USD 30,000.



A commission won and then defended

A Norwegian shipbroker made a claim against their principal for the commission on two newbuildings. The principal had appointed the member as their exclusive broker. The broker introduced the principal to a shipyard but the principals completed the contract directly. The principal refused to pay commission and the broker sued.

The broker's claim was rejected by the trial court but the claim was successful on appeal.

The member obtained nearly USD 690,000 from the principals. The payment appeared to be just in time as shortly afterwards the principal went into liquidation.

Some time later the broker received an approach from the liquidators demanding repayment of the money. The relevant provisions of Norwegian law are contained in Section 5 -5 of the Satisfaction of Claims Act. This provides that a payment made by

an insolvent company may be voided if made within a three month period of the company going into liquidation.

The rule is not absolute because the payments will only be reclaimable if they materially worsened the company's payment capacity and were not "ordinary" commercial transactions.

The broker rejected the demand and the liquidators issued proceedings to recover the money. Lawyers mounted a strong defence and the liquidator eventually dropped the case. The broker having first sued for the commission and then sued again for its return was finally able to keep the money.



Addendum Omission

Shipbrokers arranged a sub-charter. As is often the case the main terms of the sub-charter were fixed with the details "otherwise as per as the head charterparty".

The sub-charterer asked for a copy of the head charterparty for his review. The head charter had been sent to the broker together with a separate addendum. Unfortunately, while the broker passed the charterparty to the sub-charterers they failed to forward the addendum. The fixture was concluded but without the sub-charterer being aware of the addendum.

The addendum contained provisions in relation to the costs of hold cleaning in the event that the vessel carried cement.

This cargo had originally been excluded under the head charterparty but had subsequently been permitted on the terms agreed in the addendum. The addendum provided that the sum of USD 7,500 could be paid by the charterer in lieu of hold cleaning. The carriage of cement under the sublet had been agreed in the main terms but the terms relating to the costs of hold cleaning had not been passed to the sub-charterer.

The charterer was left with an obligation to pay the head owner for hold cleaning but was unable to reclaim the money from the sub-charterer. The broker had to reimburse his principal the USD 7,500.



Tonnes of trouble

A European liner agent took a booking for a consignment of engineering equipment to be transported by short sea to the Netherlands. The agent issued a bill of lading in accordance with the shipping instructions but included the weight in the cargo description as kilogrammes rather than tonnes.

On arrival at the discharge port, Dutch customs levied a fine on the carrier of USD 10,500. With a clear audit trail of where the documentary error took place, not surprisingly, the shipping line settled this amount and passed on a prompt claim for reimbursement from their load port agent.



A date for your diaries

ITIC are hosting a cocktail reception in London on Thursday 27 September 2012 for all members, brokers and correspondents. This event coincides with the ITIC Board meeting in London and it will give you the opportunity to meet the members of the board. Please put this date in your diaries. More information will follow in due course.

International Transport Intermediaries Club Ltd. – ITIC – is a mutual insurance company with over 85 years of experience of providing professional indemnity insurance to companies involved in the transport industry. For further information on any of the products, services or cover provided by ITIC contact Charlotte Kirk at: International Transport Intermediaries Club Ltd, 90 Fenchurch Street, London EC3M 4ST.

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