ITIC claims review

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THE PROFESSIONAL INSURER

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Welcome to this edition of the claims review. Following a number of requests we have produced this as an electronic document. It will also be available from the Club's website - www.itic-insure.com

There have been several recent issues of significance to some Members, and these are included here as loss prevention articles, along with the usual range of claims experiences. We would ask that you circulate the claims review widely among your staff.

We would also welcome your feedback on format or content. Please send your comments to charlotte.kirk@thomasmiller.com

LNG - Safety @ Sea ?

MEMBERS MAY have seen reports in the shipping press regarding the worldwide shortage of LNG trained crew and the effect that this may have on safety. A major concern has been that commercial pressures have led not simply to wage inflation but to the recruitment of incompetent crew. The shortage of suitably certified masters and officers has allegedly led to individuals being employed when a check of their references would have revealed their employment record was less than satisfactory.

The Club recently dealt with a claim in which the manager was accused of recruiting a crew with inadequate gas ship experience. The managers had faced real difficulty in sourcing crew as the flag state limited the selection to their own nationals. A more extreme case reported in the press was where a master had allegedly been dismissed because of a drink problem. He was subsequently placed in command of an LNG ship for another owner.

That is not, however, the worst case of inappropriate officer selection. The Club is aware of one incident where an officer had deliberately caused a fire on a ship. It subsequently emerged that the crew manager had accepted a photocopy of his certificate with an explanation that the original was in London having a spelling mistake corrected. No basic checks of his employment record or qualifications had been made. A check would have shown that there had been a history of such incidents.

Managers should be able to reject claims for damage caused by crew negligence on the basis that their responsibility is for the selection of the crew but not for their conduct on board. The actual position is not always so simple. The fact that a crewmember has proper certification is not, of itself, sufficient if a reasonable manager would have realised he was not competent.

Lawyers working for shipowners have observed that, in an increasing number of cases, cargo claimants have attempted to look behind the certification of the crew. The claimants' tactic is to see whether they can expose the crew as incompetent and the ship as unseaworthy. The claimants' lawyers will investigate not only the interview process, but how the individual had been placed on board. A typical allegation would be that if the owner or manager had arranged for a proper induction, then they would have realised that the individual was not competent. Ship manager members of ITIC have faced detailed enquiries into their systems. Appropriate records of recruitment, training and reviews must therefore be maintained.

Members should check local regulations regarding the length of time for which documents should be kept. Although, as reported later in this claims review, it is sometimes necessary to research employment records for previous decades, it is clearly not possible to retain records indefinitely. As a general guide the Club recommends records should be retained for at least seven years.

Asbestos Exposure

A SHIP MANAGER received a formal notice of claim from a firm of solicitors representing a ship's engineer. The letter of claim explained that this gentlemen had been employed by the ship manager some 30 years previously when he was required to maintain boilers on various ships which included cutting into and removing asbestos used for cladding and covering pipes in the engine room. As a result of asbestos dust in the surrounding atmosphere, it was claimed that the engineer had recently been diagnosed as suffering from a respiratory illness. ITIC immediately replied to the claimant's solicitors pointing out that the engineer had in fact been employed by the owners of the ship in question, rather than by the ship managers. Nevertheless, the solicitors representing the engineer persisted with their claim.

On further investigation, ITIC located a firm of solicitors who were handling the collective defense of this claim on the part of a number of co-defendants for whom this gentleman had worked for at sea over previous years. ITIC obtained a copy of the engineers discharge book which revealed the names of the various ship owners who employed him but which did not include ITIC's ship manager Member. In further dialogue, the claimant's solicitors were persuaded of the limited involvement on the part of the ship manager and the claim was dropped. ITIC paid the legal defense costs.

An update on crew scams

THE CLUB first issued a circular as long ago as 1989 on the subject of ship agents being used by unscrupulous migrant smugglers to move illegal immigrants around the world. The Club continues to receive notifications from Members who have become victims of this crime and has seen many variations on the theme.

A recent example was the case that involved a ship called the "PROFESSOR BOGOROV". This is a genuine ship but in this case the owners were not involved. A European ship agent was appointed by a party claiming to represent the Academy of Sciences in Sevastopol, Ukraine to meet seven crew members at a local airport and then transport them directly to a hotel to await the arrival of the research ship "PROFESSOR BOGOROV". Unfortunately, the agent only contacted ITIC after the seven individuals had checked themselves out of their hotel and disappeared. The Club compared the fax and e-mail details with their database of operators of fraudulent crew changes. These had not been used in an earlier scam. ITIC then sent a message to its correspondent in the Ukraine in an effort to try and obtain information about the Academy of Sciences in Sevastopol. It was discovered that the individual purporting to represent the Academy of Sciences there was unknown to that institution. The Academy also had no involvement in the research vessel the "PROFESSSOR BOGOROV", which in any case was operating on the other side of the world. The agent was left to pay the hotel expenses and a fine from the immigration authority. These were covered by the Club.

The Managers of ITIC have created a database containing details of the numerous crewscams notified over the years and therefore have good records of the ships and people involved.

We have had a number of successes in preventing this type of scam. For example a company based in Athens contacted Members based in Djibouti, requesting their services for 50 - 70 fishermen joining a fish factory ship. The Member was suspicious and asked the Managers for their views. We duly checked records and found that the telephone numbers given were not Greek numbers and that the company did not exist. The Members declined the agency.

Arbitrating Commission Claims

THE CLUB has been making increasing use of developments in English law that allow shipbrokers to use arbitration to collect unpaid commission. In Nisshan Shipping Co. Ltd v Cleaves & Co., the court ruled that, although the charterparty arbitration clause only referred to disputes between owners and charterers, the broker's claim was also subject to to the arbitration clause.

There are a number of benefits for brokers. Arbitration is private and many brokers do not wish to be seen to be in conflict with their principals. The mechanics of starting international arbitration proceedings are much simpler than the need to comply with the requirements of court proceedings. It is therefore clearly in the brokers' interest to have an arbitration clause.

The majority of standard form charterparties do include arbitration clauses as part of the dispute resolution provisions. These clauses are broadly satisfactory. If the broker is asked to alter them, or draft a clause from scratch, there are some pitfalls to avoid.

There are two main aspects to dispute resolution provisions in charterparties. The first is the choice of law clause (eg that the contract will be determined according to English law). The second aspect is the jurisdiction clause (eg disputes to be heard by the High Court or Arbitration in London). The Club has seen a number of unworkable clauses coming out of attempts to compromise on these provisions. One notable example was a contract that provided "this agreement shall be governed by and construed according to the laws of England and Jordan". It is difficult to see how two laws will work simultaneously. Another arbitration clause provided that "In the event of contractual disputes on which the two parties cannot reach an agreement, each party is entitled to submit the same to arbitration in their respective countries".

The above are extreme examples but it is very rarely a good idea to try to mix different laws and jurisdiction. One claim dealt with by the Club involved a contract subject to English arbitration but with Italian law to apply. This provision greatly added to the costs of the dispute as an Italian lawyer had to come to England to give evidence on Italian law.

It is preferable to use a recognised clause such as the "LMAA/Bimco arbitration clause". This has the added benefit of including a small claims procedure which can also be very useful for shipbrokers recovering unpaid commission. Very few of these cases rely on disputed evidence and are ideal for solving by a private documents only arbitration.

Three cases of North and South

THE CLUB recently handled two claims where the error involved a mistake by an agent over whether the ship or cargo should proceed in a north or southbound direction. The third claim in this section involved the question of whether a charterer was liable to pay for delays transiting the Bosphorus in both directions.

A liner agent made a clerical error when filling in a transit booking form. Ticking the wrong box indicated that a northbound container was to be carried southbound. Fortunately this error was discovered before the container was loaded but by then no space was available on the principal's next northbound service. The unit was subsequently delayed and sadly the line lost the business of a major shipper.

On another occasion a Panama Canal agent booked the ship for a southbound instead of northbound transit. Again when the mistake was discovered there were no slots available in the correct direction. The result was a three day delay. The owners claimed USD 70,000 for the delay together with a transit cancellation fee (for the wrongly booked southbound transit) of USD 5,000.

Another ship was fixed for a cargo loading in the Black Sea. A shipbroker assured the charterers that they were only responsible for the costs if the vessel was delayed transiting the Bosporus when exiting the Black Sea. The broker believed that, since the voyage commenced at a Black Sea port, a term providing that the charterers were liable for such delays would not apply to the ballast leg to the load port. Unfortunately the wording of the charterparty meant that any delays in the Bosporus would be for the charterers' account. This applied whether the ship was entering in ballast or exiting having loaded. The ship was delayed on the ballast leg and the charterers claimed the costs from the broker.

Steel pipes & oil tanks

THE CLUB has dealt with a number of recent claims involving surveyors.

One surveyor was instructed to oversee the lashing of steel pipes. Unfortunately, the pipes were damaged on the voyage. The Club defended the claim that the lashing had been inadequate on the basis that the damage was due to heavy weather. One issue in the case was whether the surveyors had successfully incorporated their terms and conditions which would limit the damages claimed to 10 times their fee. An article on incorporating terms and conditions is available in the publications section of the Club's website. (http://www.itic-insure.com/pubs_one2.html)

Another claim involved the survey of an onshore oil tank. It was alleged that the surveyor had failed to spot rust patches. The tank had subsequently leaked. The Club discovered that subsequent to the member's inspection, the owners had had the tank shot blasted. This was very likely to have unearthed the evidence the member had been unable to see.