ITIC SPECIALIST PROFESSIONAL INDEMNITY INSURANCE

2018 edition

The Wire

Superyacht

ITIC is the leading provider of professional indemnity insurance to superyacht professionals, insuring more than 100 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 does not turn out to be what the buyer was hoping for, they often seek to blame their broker for misrepresenting the sale.

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**

There is a lot at stake

A yacht broker acted for potential buyers in negotiations for the purchase of a superyacht. An MOA was entered into, where the yacht broker agreed to act as stakeholders for the buyers' deposit of US$1.25 million, which was 10% of the purchase price.

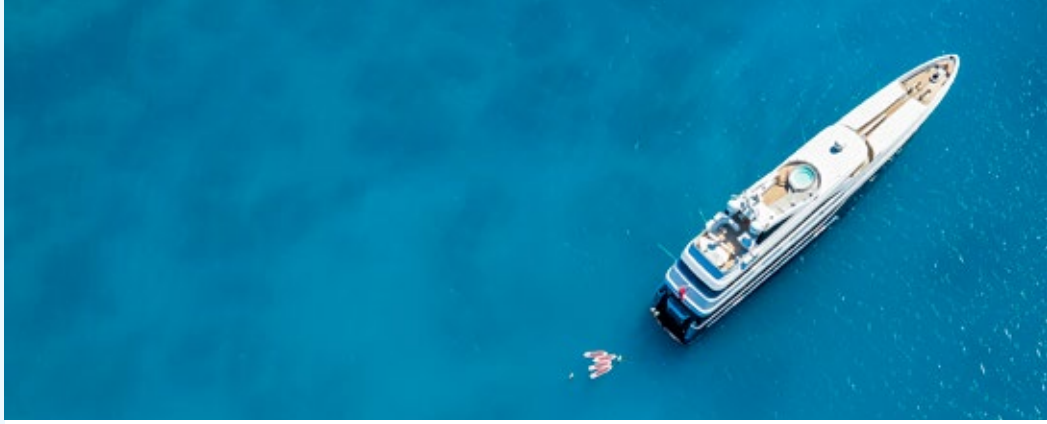
The MOA was subject to a successful completion of the sea trial and condition survey. The buyers had the opportunity to reject the vessel within 24 hours of the sea trial and 7 days of the condition survey. There was a further right to reject the yacht subject to the existence of defects which affected her operational integrity or rendered her seaworthy.

Contrary to the sequence of the MOA, the condition survey was conducted before the sea trial. On the basis of this survey the buyers decided to reject the yacht, and the broker acting as buyers' broker drew up a rejection message. This rejection did not specify the defects or comply with the time limits in the MOA. The broker also acting as stakeholder returned the entire deposit to the buyers.

The sellers subsequently alleged the rejection had been wrongful because proper notice had not been given in compliance with the MOA. Although expert advice was obtained which suggested the yacht was probably in a condition where she could have been rejected, the notices drafted and given by the broker did not comply with the MOA.

The buying company had been established solely for the purpose of buying the yacht and did not have easily traceable assets to pay any claim from the seller. The seller therefore sued the yacht broker for wrongfully paying away the funds from the stakeholder account. Advice from legal counsel suggested the broker would be found liable.

In addition to the uncertain prospects of recovering this from the buyer, the message of rejection had been negligently drafted by the broker. Consequently the buyer could potentially have a counter claim against their broker. The claim by the sellers was therefore settled in the sum of US$875,000.



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.

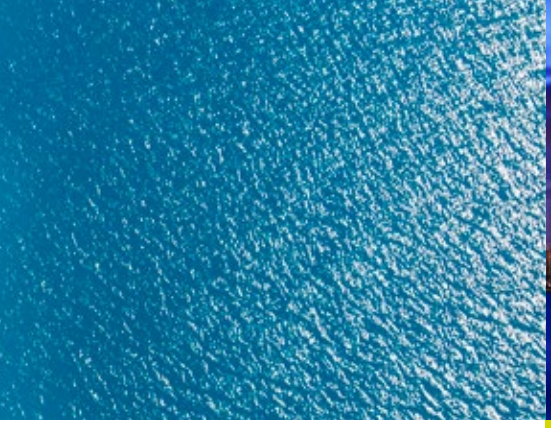
Negligence: Where you offer a professional service of yacht management, you need to be insured in the event you act negligently. The management agreement must only make you liable where you fail to perform the management services in accordance with sound yacht management practice. You should be very 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.

A lawyer 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.



Incorrect calculations

A naval architect was appointed to re-design and certify part of a mast support structure on a large sailing yacht. The naval architect had no involvement in the original design of the yacht.

As the refit neared completion, the architect realised that the calculations he was using in relation to the strength of the plate on which the mast was to sit were incorrect. This could have resulted in the mast pushing through the plate when the vessel was operated. Significant work (including stripping out part of the accommodation and fuel tanks) was required to install a thicker plate.

When this additional work was completed, the architect was presented with an invoice which his clients alleged represented the additional costs incurred by them as a result of the architect's late discovery of the incorrect calculations.

The architect sought advice from ITIC as to how to respond to this. ITIC instructed an independent expert to provide an opinion as to the alleged costs. ITIC then negotiated a settlement with the claimants, based on the opinion obtained.

Remit regarding a refit

A yacht manager was contracted to provide crew management and ISM consultancy for a superyacht. Although the manager was not contracted to provide technical management, the owner sought their advice on two refits. The manager reviewed the scope of works and the budgets from the refit yards as a favour to their client.

Unfortunately, both of the refit budgets overran and the owner claimed that the managers had been in breach of their duty of care by failing to recommend suitable repair yards, failing to budget properly and failing to properly supervise the refits.

The owners alleged that while the management contracts had said that the manager was not providing technical management they had in fact done so.

A formal claim was made against the manager for EUR 900,000 and a sole arbitrator was appointed by the parties.

The manager denied that they had accepted any responsibility for the refits. The owners own staff had chosen the yards. The manager had commented on the scope of works and the budgets provided but had not managed the refits. They had simply been kept in the loop in correspondence.

The owner claimed that he had expected his managers to take an active role.

In addition, the majority of overspend was due to the works which were required by the yacht's classification society. The owner had not suffered a loss due to the alleged negligence of their manager. The owner was obliged to pay the costs to keep the yacht in class.

The matter went to mediation where the claim was firmly rebutted. Ultimately ITIC agreed to the payment of US$25,000 in settlement. This was far less than the owner claimed he had incurred in legal costs. ITIC also paid the substantial costs of defending the claim of over US$110,000.

Although the owner's allegations lacked merit the claim is an illustration of the dangers of informally providing advice outside the scope of the contract.

The Wire - Superyacht

A very taxing matter

A yacht manager arranged on behalf of the owner to store a helicopter ashore whilst not in use. During a routine inspection by customs, it was found the helicopter had stayed in the country for more than six months and was therefore now liable for payment of VAT in the amount of £115,000.

Prior to arranging the storage, the manager had a meeting with the storage company. The manager had believed that an agreement had been reached where the company would be responsible for tax matters. However, the meeting was not followed up with written instructions. The company alleged that although the matter had been discussed, nothing had been agreed.

The owner was scheduled to board their yacht and required the helicopter to be delivered. The helicopter had since been seized by customs, and in order to release it, the manager had to pay the full amount of the VAT. The storage company rejected any liability for the failure to warn the manager that the helicopter had to be taken out of the country before VAT was payable. Lawyers were instructed to consider a recovery action against the storage company. However, due to a lack of written advice obtained from lawyers, there was less than a 50% chance of recovery. The manager was reimbursed by ITIC in full for the VAT of £115,000.

A burnt out case

After a survey on her electrics, a yacht was purchased and taken to a yard to be refurbished. After further inspection, the yard reported that there was in fact substantial damage to her wiring and that a complete rewiring was required. While this was being carried out, the yard discovered structural damage, which seemed to have been caused by a previous fire, or fires. Gutting would be necessary for repairs, but this could cost more than the yacht was worth.

The electrical surveyor was uninsured, and the claim against them was settled for a small sum. The purchaser then claimed against the yacht broker, alleging misrepresentation and breach of fiduciary duty on the basis that the broker had been aware of the fire damage and had failed to disclose it to the buyer.

It became clear that there were significant disagreements between the seller, who maintained that the broker had been informed about the fire damage, and the broker, who maintained that the sellers had not told them. Either way, the purchaser had not been informed.

Unfortunately there was no written evidence to support the broker's position. There was, therefore, a significant risk in litigating the matter, not only on liability but also because the very substantial legal costs in doing so would not be recoverable in the US courts even if the broker successfully defended the buyer's claim. It was, therefore, decided to make an offer of partial settlement, of US$925,000 without any admission of liability. There were also legal costs incurred and the total amount of this claim was US$1,400,000.

It is important for brokers to maintain, in their daybooks, detailed written logs of conversations with clients, and that anything of importance is committed to writing.

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 owners 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 owners 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 owners 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 managers and the alleged damage. The court also held that the claimants 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.

Don't rock the boat

A yacht broker incorrectly marketed a yacht as having zero speed stabilisers, which it in fact did not have.

The owners of the yacht brought a claim against the broker alleging that this misdescription in the run up to the summer season had cost them lost chartering income of EUR 500,000.

ITIC analysed the claim from the owners and realised that only one single week's lost charter had resulted from this error. The yacht brokers had been able to find charters that season regardless of the misdescription. Furthermore, owners had not complied with the broker's request to keep the yacht fully available for charter, instead putting it into the yard for repair work during this period.

Faced with these arguments, the yacht owner reduced his claim to EUR 30,000. ITIC continued to assist the yacht broker in rejecting the claim from the yacht owner, until the yacht owner decided to withdraw his claim.

ITIC
IS MANAGED
BY **THOMAS MILLER**

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.
tel + 44 (0)20 7338 0150 fax + 44 (0)20 7338 0151 e-mail ITIC@thomasmiller.com web www.itic-insure.com