

Ship Versus Ship Collision Claims



COLLISION: A FICTIONAL SCENARIO

Imagine a chemical tanker is proceeding towards Singapore to discharge part of its cargo. On the approach to the port, it collides with a much larger vessel, a containership. The collision causes damage to both ships; the chemical tanker has some structural damage to its bow and bulbous bow section, but the containership is more seriously damaged, with two large puncture holes, one high above the waterline, the other below.

Because of water ingress, the containership begins to list and the services of a competent salvor are required to stabilise the vessel and take it under tow to a safe berth.

There are no reports of pollution or bodily injury to the crew, but local authorities decide to undertake a full investigation into the circumstances of the incident.

After a technical assessment, it is determined that the containership will need to be temporarily repaired at the emergency berth. Thereafter, it will have to make a short voyage to an appropriate dry-dock for repairs.

INTRODUCTION

Ship versus ship collisions are often dangerous events with the potential to bring areas of difficulty to insurance claims that clients may not be prepared for.

While such accidents may be relatively infrequent, it is important that clients take proactive steps to manage these situations and avoid detrimental outcomes.

Failure to act efficiently and appropriately could:

- Jeopardise the ability to recover in full under the collision liability insurance.
- Undermine future strategies that seek to minimise liability towards the opponent(s).
- Result in unwanted legal and jurisdictional complexities.
- Create avoidable delays and additional financial exposures.

Early engagement with insurers, legal representation, technical survey experts, and crew are vital components in the management of collision cases.

Here, we discuss the key areas that may be common to such events and, using a fictional account of a collision incident between two vessels, we examine some of those issues through the lens of a hull and machinery policy. We will assume that the policy is written on the basis of the Institute Time Clauses (1/10/83) and where clause 8 has been amended to include 100% collision and not a three-quarter share of liability, as is the default position.

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The likely total time for all repairs to the containership is 30 days.

By contrast, it is determined that the chemical tanker can be repaired quickly, in as little as two days.

Assuming that the chemical tanker belongs to our client, here are some of the considerations to which we attach the greatest importance. They are presented in no particular order.

SURVEYS

In the aftermath of this significant collision, hull insurers will want to appoint a surveyor. Predominantly, the surveyor's role will be to assess the damage to our client's vessel, advise on options for repair, and report on the facts leading to the collision. The surveyor would not be expected to offer an opinion as to which vessel is more or less liable, or to speculate on the causes of the collision, particularly when such commentary would be unsupported by evidence at such an early stage.

The surveyor may also be called upon to perform a "without prejudice" survey on the containership. This will provide an insight into the damages sustained by the collision "opponents". It is an unfortunate fact that opponent claims can

often include costs relating to repairs that did not arise from the collision. Any contemporaneous expert evidence that shows the actual damage resulting from this incident alone may prove to be a valuable tool for ultimately reducing the opponent's claim.

The surveyor may also be instructed to conduct a separate "speed and angle of blow" survey, which will attempt to provide preliminary answers on the course and velocity of both vessels in the moments before impact. Again, such data is not intended to decide on issues of liability, but will be an aide in the discussion process between both sides.

Ideally, the surveyor should maintain contact with the containership owners and seek an invitation to any repairs they carry out. Again, this is to ensure that the repair costs (which form part of the opponent claim) relate solely to the collision.

There is no obligation on the opponent to allow anyone access to their vessel; however, more often than not, ship-owners and their insurer interests will co-operate in an effort to maintain professional and amicable discourse with one another.

ADMISSION OF LIABILITY

It may be a very obvious point, but there should be minimal contact with the opponent. Under no circumstances should any communication be sent that admits or infers an acceptance of liability. To do so may severely jeopardise a client's ability to recover under their insurance policy. Any communications with opponents need to be managed carefully, and this is usually part of the lawyer's remit.

APPOINTMENT OF LAWYERS

The assured will need to appoint a competent lawyer. The lawyer can help with a broad range of issues as part of the defence and/or attack strategy against opponents. In addition, the appointment will, in certain legal systems, create privileges that protect the right of a client to communicate with their legal team without the fear that those communications will later be disclosed to third parties as part of the litigation process.

While it is clear to our clients that the damages to their ship are not substantial, it is also obvious that the total damages, physical and financial, suffered by the opponent vessel are large. It is too early to assess who is more or less liable for the collision, but if the majority of the liability for the collision is ultimately found to rest with our client's vessel, then their contribution to the overall collision recovery will be very significant, heightening the need for experienced legal representation. Paradoxically, even if our client has only a small amount of liability for the collision, this could still lead to a significant claim under their hull and machinery policy.

This is perhaps best explained by using some numbers in our scenario:

Imagine that the total claim put forward by the containership owner is US\$8 million, comprised of several repair elements and including a substantial amount arising from loss of use of the vessel.

Let us further imagine that our client's damages amount to a minimal delay to trade and US\$300,000 in terms of a repair bill.

Furthermore, imagine that liability is determined as 80/20 in our favour.

Crudely speaking, this would still mean that:

Our client and their insurers pay:

**US\$8 million x 20% =
US\$1.6 million**

And the containership owner and their insurers pay:

**US\$300,000 x 80% =
US\$240,000**

This would result in a net contribution from our owner and their insurers to the containership of US\$1.36 million, even though they were found to have played a very minor role in the collision.

The appointment of the lawyer should be agreed with the hull insurers. In our example, the hull insurers will pay most or all of the legal bill (subject to proven liability under the policy), and if a conflict arises between our client and insurers on the selection of legal representation, compromise should be achieved as soon as possible. There will be much work to do to protect a client's interests, and, in our experience, side arguments on the preferred choice of lawyer will be a distraction to the business of building a firm case during those early stages.

EVIDENCE PRESERVATION

The lawyers will interview the crew of the chemical tanker and give advice on the gathering and preservation of evidence. Among other things, the lawyers should help our client and their crew with the following:

- Taking legible, concise notes relating to the incident. The notes should not contain any subjective terms or offer opinions. They should simply record the facts and relative timing(s) of the events. The notes should be recorded as soon after the collision as possible so that opponents cannot argue on a point of recollection.
- Instructing the crew to take photographs of the damages to both ships and any other photographic evidence which might be of use in the long term.
- Retrieving electronic data from the electronic chart display information system (ECDIS) and voyage data recorder (VDR). This can be a difficult process and may require the services of a specialist data retrieval company.
- Taking copies of charts and bridge notes.
- Recording the information from the GPS, course recorders, gyro compass, radio systems, engine and weather logs, and radar.
- Preserving the vessel passage plans.
- If the collision occurred while under pilotage, establishing the timeline of orders given.

Under no circumstances should any communication be sent that admits or infers an acceptance of liability. To do so may severely jeopardise a client's ability to recover under their insurance policy.

- Instructing the crew to refuse permission for anyone to board the vessel without proper clearance. Ideally, that permission line should be managed via the shore-based management/ownership. A collision of this nature is likely to attract interest from many quarters. There may be attempts by third parties to access the vessel in order to gather evidence in support of their own claims. A crew member will need to be placed on watch to monitor who

comes and goes. Ideally, any authorised third party should be accompanied by an appropriate crew member at all times and given access only to parts of the ship that are approved in advance by lawyers and management. They should not be allowed to talk to crew members or seek to arrange ad-hoc interviews while aboard.

Of course, some of these proactive measures can be implemented by the client in advance of instruction of a lawyer.

GUARANTEES/LETTERS OF UNDERTAKING

On the basis of our example, it is clear that, once the investigations by the local authorities have been concluded, our client will be in a position to remove their vessel for repair and continue with the voyage much earlier than the opponent containership. One of our primary considerations will be to ensure that the assured has adequate security from the containership interests to cover their losses arising from the collision, regardless of how the apportionment of liability will ultimately play out. It would be sensible to try and obtain the security before the opponent vessel departs for repairs and/or continuation of voyage. This is simply because, if the opponent will not offer security, one of the options available to the assured would be to "arrest" an asset belonging to them. The easiest asset to arrest at that moment in time is the other vessel, and the simple knowledge by each side that this could happen usually provides enough encouragement to find a means to provide the appropriate security. As a brief note of caution, an arrest should be a last resort strategy. There are consequences for initiating an arrest that is ultimately proven to be "wrongful". Again, this is a complex legal area where the lawyer should advise further.

In our scenario, the method by which opponents provide security will depend on where the containership owners have insured their vessel for collision liabilities. If it is placed with a hull insurer then our client is likely to see an offer of security on the basis of a letter from the opponent's hull insurers confirming they will provide coverage under their collision liability insurance for the assured's losses, subject to proving their claim in terms of quantum and liability. If the hull insurer is unable to offer a letter directly, they may utilise the services of a surety company to provide a collision security on their behalf.

If the containership's collision liabilities are placed with a protection and indemnity (P&I) club, then the assured should expect the security will be provided in the form of a club "letter of undertaking", which will do much the same thing as a guarantee from a hull insurer.

It is not necessary to provide the owners of the containership with a precise value of our client's claim. Indeed, at such an early stage it is unlikely that either side will have a clear idea of their total global recoverable losses.



But the figure should at least have a sense of realistic endeavour about it and reflect the likely full amount of our client's damages, plus an appropriate margin for error. It should be remembered that a letter of security is simply a mechanism by which the opponent insurers can demonstrate future payment of properly proven losses up to an agreed sum, and is not a promise to pay a fixed sum without question.

The lawyer should advise the client whether the offer of security from the containership interests is fit for purpose. Among other things, they will need to consider the following:

- Is the guarantee provider financially secure?
- Is the security correctly worded and conforms to known standards?
- Is the quantum of guarantee sufficient to meet the assured's global losses arising from the collision?

If it does not bear scrutiny, the lawyer may recommend that security should be obtained in an alternative form, such as a bank or cash guarantee.

And, for every action which our client takes in securing their losses, the same reaction can be expected from the owners of the containership. They too will want to ensure they have the protection of security and that it is in a form and of financial standing acceptable to opponents.

Generally speaking, hull insurers for marine collision liabilities are not under an obligation to provide security. More often than not they will assist the client, but, again, much will depend on who the hull insurers are and what the insurance policy says.

JURISDICTION

A competent maritime lawyer should also advise the client on issues of jurisdiction. At the time when parties in a collision are agreeing on the form of security to exchange with one another, they should also be determining which jurisdiction will apply in the event that they cannot ultimately resolve the claims between them amicably and the matter must proceed to trial or arbitration.

LIMITATION

In our example, we can see that the losses of the containership are likely to be quite large. As such, there may be an opportunity for our client to limit their liability under the applicable Convention of Limitation of Liability for Maritime Claims.

A successful limitation action effectively caps the maximum amount that a valid entity, such as a ship-owner, ship manager, or charterer and their insurers will have to pay to an opponent following a collision. The ability to limit is dependent on several criteria, including:

- The type of vessel.
- The vessel's tonnage.
- The type of claim.

As one might expect, this is a hugely complicated area and one which we could devote an entire adviser to. Suffice to say that, if this is a valid avenue of enquiry, we would expect lawyers to offer advice on the feasibility of instituting a limitation fund as part of their overall suite of guidance.

COLLISION LIABILITIES SPLIT BETWEEN HULL AND P&I INSURERS

As stated, we have considered this subject in the context of a hull insurance policy that responds for 100% of collision liability. However, it should be remembered that, in its unamended form, the Institute Time Clauses (1.10.83) only cover 3/4ths of that liability, the remaining 1/4th usually residing with the vessel's P&I club. In such a situation, care should be taken to ensure that the club and hull insurers are kept together throughout the process, and whichever party takes the lead role, they should be encouraged to seek the other party's approval at all key decision-making stages.

THE ROLE OF MARSH'S CLAIMS ADVOCACY

The highly experienced Marine Claims Advocacy team at Marsh assists clients in navigating through the dangers presented by these often difficult claims. Once we have been notified, we will appoint a claims advocate who will act as a single point of contact for our client, overseeing the claim to its conclusion. Among other things, the advocate will:

- Intercede early on issues that could de-rail strategy, such as facilitating early agreement between insurers and clients on appropriate legal representation.
- Provide detailed advice on options for arranging security to an opponent. This will include the management of information needed by a third-party surety company, if that is the most realistic method of arranging acceptable collision guarantees on the assured's behalf.
- Ensure full engagement by collision liability insurers at all key stages. Efficient decision making offers the best chance of proactively managing the assured's best interests.
- Maintain lines of communication between all client acting parties. This includes management of dialogue between hull and P&I insurers in circumstances where the insurance for collision liabilities is pooled.
- Be alert to the needs of our client's business. In the early stages of a collision incident, this means the urgent repair of the vessel and/or continuance of the intended voyage, with the minimum of inconvenience and financial loss arising from avoidable delay.
- Review the performance of third-party service providers, such as surveyors appointed by insurers, and ensure that the content they deliver is appropriate and within remit.

DISCLAIMER AND FINAL WORD

This is a general guide only and the example given is fictional. As such, it describes a very particular circumstance in the broad field of a technically difficult subject. The content is not meant to be used as generic advice for all collision claims. Each instance involving ship versus ship collision will have its own distinct characteristics, and clients will need to take advice based on those particular aspects. Marsh is not authorised to provide legal views and nothing within this communication should be taken as such. We would always recommend that on areas of law, clients should seek an appropriate legal opinion from a reputable and qualified source.

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