



Loss of earnings in the wake of a collision

A shipowner's loss of earnings can form a significant part of a collision claim. Awareness of the ways of calculating loss of earnings claims can be useful in both presenting and challenging this type of claim. This Gard Insight looks at some general principles and methods applied by the courts.

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A recent Gard example

A product tanker was hit by a bulker while at berth. Although the extent of the physical repairs - and therefore the repair costs - were relatively limited, the damaged tanks required stainless steel plates which had to be specially ordered. Long lead times led to a significant loss of earnings. As owners were able to document this loss with care and precision, leaving little room for doubt, the case against the owners of the bulker was settled quickly and amicably.

Basic principles

A claimant not only has the burden of proving that it has lost earnings as a result of the collision but also that it has suffered an actual loss. The fact that a ship has been unable to trade due to repairs being carried out is generally not enough, though it raises an obvious presumption that the shipowner has indeed suffered some sort of loss.

In the majority of jurisdictions, the principle of *restitutio in integrum* governs the measure of damages. This means that a shipowner who suffers a loss of earnings due to the negligence of another party will be put back into the position it would have been *but for* the negligence. Therefore, the shipowner must prove what the ship would have earned had the collision not occurred. This means that if the repairs are performed during a pre-arranged dry-docking period for example - there will be no loss.

The methods used to prove the loss depend on the facts of each case and one approach is not necessarily better than another. The optimal way is largely dependent on the trade patterns of the ship at the relevant time.

Ships on time charter

If a ship is damaged in a collision it will usually go off-hire until it has been repaired and able to function again under the terms of the charterparty. The shipowner can rely on specific off-hire statements and invoices from charterers. The loss will consist of:

- a fixed amount per day for the total time the ship is off-hire
- the bunkers consumed during the off-hire period, and
- any additional charges the time charterer may have incurred.

If the time charter has been justifiably cancelled as a result of the unavailability of the ship, the loss of earnings from that point onwards will be the difference between what the ship would have earned under the cancelled charter and what was actually earned during the same period.

Ships trading on the spot market

For a ship trading on the spot market, the approach is more flexible to calculate its loss of earnings. The starting point will be the total number of days the ship is unable to trade due to repairs, including removal time to the shipyard. However, losses may extend beyond the actual repair period, especially when the market has fallen in the meantime. If a shipowner can prove that it lost an actual fixture on the spot market due to a collision and necessary repairs, the potential net income from that fixture will be compared with the ship's actual net income until the date the lost fixture would have ended. This is known in some jurisdictions as the *time equalisation method*, most recently approved in the English case of *THE ASTIPALAIA* [2014] EWHC 120*.*

For situations where a ship trading on the spot market is not fixed for her next voyage, the way to calculate the loss will depend on whether the ship was operating in an established or specialist trade.

For established trades such as the VLCC trade, fixture data is readily available throughout the year. It is a relatively simple exercise for a broker to work out what a VLCC would have earned at the relevant World Scale rates for a given period. Provided the ship would have obtained employment with a reasonable degree of certainty, the estimated charter earnings will be compared with the ship's actual earnings for the period using the *time equalisation method*.

For specialised trades and trading patterns with little continuity, market data will be less readily available and reliable, so the loss of earnings calculation in each case will be more fact specific. In these cases, the best approach may be to present the average time charter equivalent earnings of the ship for a limited period around the time of collision, e.g. the casualty voyage and the voyages preceding and following the casualty. For some trades, it may be relevant to present income statements for even longer periods, however, the more remote the evidence, the more difficult it will be to prove that the figures are a true representation of the loss.

In the Norwegian collision case of *Rana Frakt v ROBAS* (LG-2013-173128) one party based its loss of earnings on two annual audited income statements, however the Court of Appeal made a discretionary reduction of about 33 per cent due to the lack of evidence relating to tangible fixtures the ship would have been engaged in during the period of repairs. That said, the mere fact that the loss of earnings cannot be quantified *exactly* will not be fatal to a claim.

FFO claims

Loss of earnings claims can arise in other contexts, e.g. where a ship damages a quay or shore based crane and renders part of a terminal unusable. The underlying assumptions and calculations involved can be complex and the appointment of a forensic accountant with knowledge of the local accountancy rules and tax law may very well be necessary in order to properly defend a shipowner's position.

Checklist

Whether claiming or challenging loss of earnings claims, the following should be submitted:

- Evidence of the total period claimed for, such as:
 - Master's statement of facts
 - copies of the deck log
 - the off-hire statements from charterers.
- A summary of the daily net loss of earnings for the total period and the underlying documentation relied upon, such as:
 - the charterparty and recap
 - the off-hire invoice
 - a statement from a broker of potential earnings or income statements where a time charter equivalent rate per day is arrived at.
- Evidence of any mitigation, e.g. that the claimant:
 - has chosen the quickest and most reasonable repair option, or
 - has used other ships in its fleet to perform the contractual obligations of the damaged ship.
- Evidence of the average utilisation of the ship. For ships actively trading only 80 per cent of the time, it is clearly unreasonable to claim a loss equating to 100 per cent utilisation during the period of repairs.

Final note

It is well worth spending time and effort in presenting loss of earnings claims in a clear and unambiguous manner, so that both parties understand the figures presented and the assumptions behind them. This can help achieve a quick settlement in a collision dispute.

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