MARINE CARGO RECOVERIES IN THE CREDIT CRUNCH ERA

A PRESENTATION
FOR
SINGAPORE GIA

BY

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I should like to thank the Singapore GIA for their kind invitation and for asking me to present to you this afternoon.

You have heard a detailed and excellent presentation by Mr. Sumeet regarding some of the things that can go wrong on a voyage and, indeed, the contractual position. My task this afternoon is to try to share with you some of the issues that face those of us who set out to try to recover the money that has been paid out when something goes wrong and cargo is damaged as a result. In particular, I would like to highlight some of the difficulties that the current economic position is presenting, some of which may actually be changing the way that business is being done.

You may well be wondering what qualifies me to stand up in front of such an experienced and knowledgeable group as yourselves and attempt to shed any light on this particularly tricky subject. Perhaps therefore you will allow me very briefly to give you a little bit of my own background first.

I have a South African law degree from many years ago, specialising in the laws of contract and sale and purchase. However, I must confess that, having qualified, I did not find this to be the most interesting of jobs, checking the wording of contracts all day. I therefore sought my fortune in the Far East where for 7 years, I was an officer in what used to be the Royal Hong Kong Marine Police, reaching the rank of Senior Inspector. I commanded a deep sea search and rescue vessel and attained my master Mariner's ticket in the process. When I left the police there, I immediately joined W K Webster in the UK where, for 5 years, I worked in the Casualty Management Department, dealing with many of the types of incidents that Mr. Sumeet has been mentioning earlier before heading back out East both to start up and run the Casualty Management Department in our Singapore office and later, to run the Singapore office itself. I returned to the UK some eight years ago where I

now head up our recoveries operations worldwide although of course I take every possible opportunity I can to return to Singapore!.

1. INTRODUCTION

Why should insurers concern themselves with the recovery process? The majority fully appreciate the benefits of pursuing professional and successful recoveries. This has not always been the case.

There have been significant periods of time where investment income was substantial. This helped Insurers to balance their books or make a positive return. The various global economic crises during the 1990s drastically changed that and Insurers focused on alternative ways to minimise their losses. Recoveries is clearly one such area.

As it happens, I first arrived in Singapore just as the Asian financial crisis was beginning. Many of you will recall this but this was different than what we are facing at present because it was still a somewhat localised crisis whereas what we have been through in the past 18 months or so is probably the first ever global financial crisis and, I would suggest, certainly the first one that any of us in this room has ever lived through. Nevertheless, the turmoil in Asia in the late 1990s was, in my case at least, fundamental in shaping my views as to both the importance of recoveries and the way that these need to be conducted in both good times and bad.

Surprisingly, and despite everything that has happened recently, world trade is holding up and, thankfully, very few insurers have gone to the wall.

However, this in itself has led to some problems because overcapacity and high levels of competition have placed considerable pressure on Insurers to settle claims quickly in order to maintain or increase market share. This policy is considered by many to be vital to their continued existence since premium income, i.e. cash flow, can become paramount. At the same time, operating costs are rising and margins are being squeezed.

Whilst, as I have mentioned above, world trade has continued, there is no doubt that there has been a downturn in what you may term the smaller claims. These have tended to be in areas such as consumer goods because of a fall in demand. However, the reverse is that large claims on commodities have risen substantially. There is no doubt whatsoever that a contributory factor to this is the slowing down of demand. A couple of years ago, a cargo of steel, for instance, may have arrived with a few dents and a little bit of rust. However, the receiver was so desperate for this steel to put through his mill that he would be quite happy to accept it, process it (maybe lodging a small claim in the process) and get on with his life. Nowadays, however, the same damages may well give rise to a claim for a total loss.

I am in no way saying that there are companies that are professional claimants. Companies are not in the business of making insurance claims. However, I think we are all well aware that if the goods are no longer needed and there is what may appear to be a valid reason to reject them, then the temptation may be too great in some instances. This brings with it, obviously, a host of new problems, particularly when investigating and settling a claim, and, indeed, in opponents attitudes towards good faith.

Greater emphasis, therefore, is being placed on the recovery process as a means of covering or improving loss ratios.

Obviously, recoveries are also important from the hull insurer's point of view. However, this paper will concentrate primarily on cargo recoveries and will inevitably concentrate more on English law than any other. Since many contracts do provide for English law and / or many domestic laws are based on the Marine Insurance Act of 1906, English law predominates.

Finally, the main items for discussion are considered in this paper in "chronological" order simply for ease of explanation. It will, of course, be appreciated that these items in reality will run side by side and have to be considered together. They cannot be dealt with consecutively. Indeed, as will be seen at the conclusion, many of the steps that need to be taken have to be considered immediately at the time that the loss is first known or notified. The steps taken at this stage ensure the greatest chance of success.

2. **PROOF OF LOSS**

2.1 This item seems not only self-explanatory but also patently obvious. In reality, a large number of possible recovery claims are lost through lack of evidence as to (quantum of) loss.

Broadly speaking, there are two areas for consideration:

(a) Evidence / proof that the goods were in sound condition when placed in the custody / control / responsibility of a third party ("Carrier"); and

(b) Evidence / proof that, when the goods were or should have been delivered by the carrier, they were lost, damaged, etc. and, if so, to what extent.

2.2.1 In both cases, the necessary evidence is not necessarily so difficult to produce. Certificates of origin, certificates of quality, analysis results, packing lists, container load plans, mate's receipts and bills of lading, for example, provide very strong indications as to the quality and condition of the goods when they were given into the care of the carrier. These documents should be relatively straightforward to obtain since they are largely in the control of the shipper.

We shall be considering later the problems which can arise where there is more than one leg to the voyage. In these circumstances, documents

evidencing the condition of the cargo or the packaging / container should be obtained for each leg of the voyage, e.g. equipment interchange receipts.

2.2.2 Of all the above documents, the most important is the bill of lading. A clean bill of lading, i.e. one that does not indicate any reservations as to the quantity or condition of the cargo, certainly makes life much more difficult for the carrier. Such a clean bill of lading is prima facie evidence that the carrier accepts the cargo in sound and good condition. It is not 100% foolproof. Care must be taken, however, that an apparently clean bill of lading may in fact be qualified by pre-printed clauses, sometimes in small print and sometimes not immediately apparent.

2.2.3 Increasingly prevalent as well nowadays is a practice which is strictly illegal but in fact is encouraged by the banking system. This is the insistence by banks when negotiating letters of credit that clean bills of lading must be issued. We are thus encountering many circumstances where clean bills of lading are issued against letters of indemnity and very often dirty bills of lading are also issued but not the bills that are negotiated. It is not unheard of for us to start a recovery process only to have the dirty bills then put in front of us. Not a situation we enjoy.

Some of these clauses are well known, e.g. “Shipper’s load stow and count”. When applied to an FCL shipment, even though the B/L has no reservations, clearly the carrier has no way of knowing the quantity of cargo in the container and is therefore likely to be exempt from liability if there is a shortage upon discharge. Whether that is in fact the case will depend on circumstances and will depend on jurisdiction, a subject we will consider later.

But, for example, there are several jurisdictions in the Middle East where the carrier may be liable for shortage even from an FCL container.

2.3 Similarly, upon the taking of delivery of the goods, a hatch survey, a discharge survey, tallies, stevedore outturn reports, Customs certificates, etc. can all give an indication of apparent loss or damage.

It is most important that the goods are inspected by the receiver at the earliest opportunity and that any loss / damage is notified immediately to the carrier. We shall deal with this aspect when considering time limitations.

2.4 There are many times when recovery action is prejudiced at this early stage. These are the four most common:

(i) Too long a time is allowed to pass between discharge / delivery of the cargo and notification of the claim to the carrier. A delay inevitably makes it far more difficult to prove that the loss occurred whilst the cargo was in the custody of the carrier rather than at some later time when the carrier can no longer be held responsible. In some cases, the delay can be fatal to the claim.

To avoid or minimise disputes with the carrier, it is sensible that a joint survey, if at all possible, be arranged.

(ii) Goods, particularly bulk cargoes, may be received in full but in a contaminated / damaged condition. Quantifying loss can be a practical problem. Proving percentage depreciation, proving costs of

re-conditioning, proving fitness only for an alternative purpose, proving best possible salvage price, etc. all take time and all cost money. However, these steps have to be considered and have to be fulfilled otherwise the carrier, or his liability insurer, will simply repudiate the claim. Professionals in a particular trade may know instantly that certain cargoes have a limited, or indeed no, value. Proving to a carrier, however, that all alternative options were fully considered will be necessary if a successful recovery action is to be maintained.

(iii) It is not sufficient simply to prove the quantum of loss. It is necessary to prove that appropriate steps were taken to mitigate the loss. The problem for cargo insurers is that it is not enough simply have to show that they found an alternative market, that they actually incurred reconditioning costs, etc. They have to demonstrate that they looked at all possible options, investigated them appropriately, and took reasonable steps to achieve the best possible mitigation. In most jurisdictions, it is not necessary to show that the best possible price was achieved, just that the insurer acted reasonably and obtained the best reasonable price.

A difficulty in this approach is that it is almost impossible to prove a negative. An insurer can demonstrate the steps he has taken, but it is quite difficult to overcome hindsight criticism from the carrier that he should also have taken other steps. That is why, in most jurisdictions, the courts impose a test of reasonableness rather than expecting the cargo insurer to have conducted an exhaustive investigation of all possible avenues.

The development of internet based services has allowed certain new options to become open to the cargo insurer. An open auction facility (similar to E-Bay) exists which attracts buyers from a much wider area. The open auction system, rather than a sealed bid system, tends to produce better mitigation values and at the same time serves to demonstrate to the carrier that as many people as possible were openly included in the tender process.

(iv) Losses of relatively low value have attracted a different form of claims handling. The practical reality of today's market is that the costs of surveying, handling and adjusting smaller claims are sometimes considered uneconomic. There are many arguments as to whether this is a true or a false saving, but nonetheless low value claims may be reimbursed by insurers without survey. Indeed, in very highly competitive markets, certain claims may be settled even without presentation by the assured of the relevant policy / shipping documents / evidence of loss. Whilst this may facilitate the claims payment process, and may save investigation costs, it goes without saying that it is impossible to prove the loss to a third party carrier. In the absence of any relevant documentation proving that the cargo was lost or damaged, and proving quantum of such loss, a recovery is not possible.

2.5 When assessing quantum, it is important to note that the starting point is not the insured value of the cargo (regardless of whether or not there is a Valued Policy) but the sound arrived market value.

Usually, this value is a little less than the insured value, since the insured value typically includes 10% uplift. But where a commodity value has significantly increased, the claimant is fully permitted to pursue recovery in excess of the insured value. Of course, the reverse also applies!

For the sake of good order, cargo interests should remember that they may pursue recovery for uninsured as well as insured losses, e.g. for losses beneath deductible.

2.6 A successful recovery action requires, as a pre-requisite, (prima facie) evidence as to the condition of the cargo when it was given into the custody of the carrier and also as to the condition of the non-delivery of the goods when handed to the receiver by the carrier.

3. TITLE TO SUE

3.1 Under English law, in respect of sea transit, the position has been much simplified by COGSA 1992. Section 3 defines who may or may not be able to claim. Essentially, but not exclusively, the rightful holder of the relevant bill of lading has title to sue under the contract of carriage. It does not matter when he obtains the relevant bill of lading as long as he is the rightful holder of that bill of lading at the time that he claims.

3.2.1 Prior to COGSA 1992, title to sue had to be considered by reference to the Bill of Lading Act 1855. Then, it was necessary for the claimant to prove that he had title to the cargo at the date of the loss, not at the time of making the claim. This was, as a matter of practice, often difficult if not impossible to prove.

For example, certain cargoes are traded and on-sold many times during a voyage; oil cargoes, in particular, may be traded up to 20 or 30 times during the course of only a 3 or 4 day voyage. If a loss occurs en route, it is impossible to state with any certainty which party had title to the cargo at the exact time of the loss.

Alternatively, a bulk cargo may have been shipped which was intended for distribution to several receivers; contamination occurs during the voyage; the individual parcels themselves, therefore, will not have been ascertained at the time of the loss. In such circumstances, it is impossible to say which receiver will / did suffer the loss at the time that it occurred.

Naturally, there are devices that help overcome this problem. For example, claims can be brought in the name of the shipper and of the receiver and, if needs be, of any interim party in the sale chain. This is cumbersome and expensive because all the parties have to agree to be represented and have to provide documentary proof of their role in the shipment. Obviously, some of these parties will already have been paid for the cargo and may not be willing to take part.

Alternatively, relevant assignments can be made in favour of the end receiver. This will permit him to claim, either for himself or as a trustee for others in the chain.

In our experience, opponents are now routinely putting us to the test on almost every case. In our view there is no doubt that this is a definite tactic to try to put as many obstacles as possible in the way of a recovery in the current trend to everything possible to avoid paying recoveries.

3.3 There can be procedural difficulties. Under English law, it is necessary to pursue claims in the name of the cargo owner, even if he has been reimbursed under the cargo insurance. Even where a Release / Receipt & Subrogation Form has been provided by the assured to the insurer, legal proceedings still have to be conducted in the name of the cargo owner. This is not the case in all jurisdictions, for example in Germany, where claims may be pursued in the name of the insurer directly.

3.4 This problem can be overcome by careful wording but this is an excellent example of why it is never too early to consider recovery. If recovery action is only reviewed after the claim has been paid, it is quite possible that a simple subrogation form will have been completed and then recovery action in either Germany or England will have been prejudiced. It is necessary to consider what possible recoveries exist before the subrogation form is signed and completed.

3.5 . The second problem which can arise is that the insurer has paid the claim to the wrong party. Typically, cargoes may be sold CIF, with risk and title passing to the receivers on shipment. It is the receivers who will have title to sue. However, the receivers may be reimbursed by the shippers and it is the shippers who receive the claim indemnity from the insurers. It is possible, in these circumstances, that the recovery action is prejudiced because the subrogation is

provided to the insurers by the shippers, but the shippers do not have title to sue. This is quite a common failing. It tends to occur where the insurer and the shipper have a close relationship and / or where exchange control regulations make it easier for the insurer to pay the shipper rather than the receiver.

In summary, it is vital that proceedings are brought in the name of the person who has title to sue. Otherwise, a good claim with strong merits can simply be lost because of procedural oversight.

4. IDENTITY OF OPPONENTS

4.1 It should never be forgotten that the same loss could give rise to multiple recovery actions against more than one possible opponent. There may be several losses. There may be several relevant contracts. In addition, claims may also be made in tort or under statute.

It is impossible to consider here all the possible variations.

4.2.1 In a movement of goods from A to B, more than one type of loss may have arisen, possibly at different times during the transit, possibly on different legs of the transit. It may also not be possible to determine exactly when and how the loss occurred. In such circumstances, any person involved in the transport chain may have a potential liability and may therefore be obliged to reimburse, or at least contribute towards reimbursement of, the loss sustained. An example, which is not uncommon, but which is quite complicated may be:

A cargo may have been shipped under a freight forwarder's in-house bill of lading on board a container ship, itself owned by X but bareboat chartered to Y who, in turn, slot chartered space to A, B & C, each of whom issued ocean bills of lading. The vessel is involved in a collision. Cargo is damaged and general average is declared. Salvage services were provided by two salvors and the vessel was taken to a port of refuge. The cargo was discharged ashore, to allow temporary repairs to the vessel, and such discharge was conducted negligently by the stevedores. The cargo was re-loaded and the

vessel proceeded to a port for permanent repairs. at which time the cargo was discharged and transhipped to destination.

4.2.2 Some of the potential claims are:

- Defence of the general average claim brought by the owners of the carrying vessel.
- Defence of the salvage claims.
- Pursuit against the carrying vessel for PA losses.
- Pursuit of a claim in tort against the colliding vessel for PA losses and recovery of any general average or salvage payments.
- Pursuit in tort against the salvors and / or stevedores for negligent damage to cargo at the port of refuge.
- Recovery action under the freight forwarder's in-house bill of lading.
- Recovery action under the ocean bill against the relevant (slot) charterer.
- The bill of lading may contain a Demise Clause or Identity of Carrier Clause, naming a third party as carrier for the purposes of the contract of carriage, and recovery may lie against him.
- The ocean bill of lading may be a multimodal bill of lading or a through transport bill of lading allowing the use of sub-contractors to perform parts of the voyage, and recovery may lie against him / them.

There may be other claims. However, it can be seen that there are potentially several quite distinct claims, some of which can be pursued against one party, some against another, and some against more than one party.

4.2.3 Great care must be taken to identify all the different possible losses, e.g. damage to cargo caused during loading operations, damage caused by collision, damage caused in trying to save the vessel and cargo ("made good"), damage caused by salvors, etc. Each of these separate losses needs to be quantified individually. Every person who may have been liable, either in whole or in part, for any one or more of these losses needs to be identified. A decision has to be made whether a claim lies against these people and, if so, under contract or in tort. Only when all the possibilities within this matrix have been considered can the merits of a recovery action be considered.

4.2.4 Finally, with regard to sea transit, great care must be taken carefully to read all the relevant documents. Some bills of lading contain ambiguous clauses, conflicting clauses, etc. A regular problem which occurs is that of trying to identify exactly who the carrier might be under a particular bill of lading.

(i) Some bills of lading may define the "carrier", but may do so ambiguously. Different courts in different jurisdictions may have different interpretations as to the validity of the clause or its interpretation.

(ii) Some bills of lading will have a demise clause or identity of carrier clause. This clause may suggest that a party other than the issuer of the bill of lading is actually the carrier. Some jurisdictions will give effect to this clause, for example England, and others may not. Indeed, there are some jurisdictions where legal advice is conflicting.

(iii) Some bills of lading have cleverly drafted conflicting clauses. We have seen bills of lading that, in Clause 1, carefully define who the carrier is; however, careful perusal of the huge amount of small printed clauses, right to the very end, reveals that, whilst the carrier may be acting as principal most of the time, if the claims arise in the United States, then he is deemed to be acting only as an agent for someone else. Leaving aside what interpretation a court may place on this clause, it is important to ensure that the right person is sued in the first place!

(iv) Finally, some bills of lading will try to exonerate the carrier from liability for portions of the voyage that he does not personally undertake, e.g. feeder vessel transhipments. These can give rise to complications.

For example, a container carrier may issue bills of lading from various Far Eastern ports to various European ports. However, within Europe, there are only two ports of call, the others being serviced by feeder vessels. A feeder vessel may sink. The master ocean bill of lading may try to exempt the carrier for liability for any losses whilst the cargo is in the care of the feeder vessel. The feeder vessel B/L, probably made out to the carrier and not to the individual cargo interests, may seek to exempt the feeder operator on the basis that he is only acting as agent for the carrier. We have a Catch-22.

4.2.6 Virtually all of the problems highlighted above can be overcome, but experience and great care is required in understanding exactly what types of loss have been faced and exactly which party is liable for what loss.

4.3 I do not wish to go into detail regarding the various road carriage regimes such as CMR today – it would take too long. However, one very important issue I would like to raise here is a practical one. It is virtually impossible in most road carriage case to be able to get security from opponents. In today's difficult times, we often find that the individual road haulier has gone out of business, leaving a recovery totally impossible. Thus, the speed with which recoveries are conducted has never been more important.

4.4 International and domestic rail claims are extremely rare. For the purposes of this presentation they can effectively be ignored. It is worth noting that most international rail shipments operate under CIM, a protocol extremely similar to CMR.

4.5 Air freight shipments are somewhat different. In many respects, the claims and the recoveries are much more simplified and straightforward than sea transit or CMR shipments. The key problem to overcome is that of ensuring that the appropriate defendant under the appropriate contract is pursued. Typically, shipments will be arranged through a freight forwarder who will issue separate in-house air waybills to his various clients. These shipments will then usually be consolidated under a master air waybill issued by the airline but showing the freight forwarder as the shipper / receiver.

The most important impact of this is that the claimant will have higher recovery prospects, particularly package limitation prospects (see below), in pursuing the claim against the airline rather than the freight forwarder. However, the air waybill contract is between the airline and the freight

forwarder, not between the airline and the cargo interest. It is therefore necessary for cargo interests to protect their rights against the freight forwarder, at the same time trying to obtain from him an assignment of any rights against the airline. This is usually obtained in exchange for a hold harmless that cargo interests will not pursue a claim against the freight forwarder. Cargo are then free to claim against the airline directly.

4.6 Having considered which possible claims might exist against which parties, it will be necessary to consider appropriate jurisdiction and proper law.

5. **FORUM**

5.1 In claims under contract, a preferred or agreed forum is often expressly stipulated in the relevant document. There may, therefore, be limited choice. But that is not always the case.

5.2.1 Even where a particular forum is expressly written into a contract, this does not necessarily prevent action from being commenced elsewhere. The law in certain jurisdictions automatically allows for claims to be brought within that jurisdiction regardless of any express jurisdiction / forum clause. Probably the best example is a country which is a signatory to the Hamburg Rules and the shipment is to or from that country. The courts in such a country will always entertain a claim regardless of any clauses contained within the bill of lading. Concurrently, there are proposed changes to United States federal legislation which may allow a claimant to have a choice of forum regardless of pre-printed forum clauses in the bill of lading.

5.2.2 In a similar way, there are jurisdictions which do give effect to forum clauses but only in certain circumstances. France is one such country. Congen bills of lading, issued under Gencon charter parties, are common forms of bills of lading. The standard jurisdiction clause refers to the relevant jurisdiction clause within the charter party. Let us assume there is a shipment to France. The charter party provides for Russian law, Moscow arbitration and the bill of lading (properly) refers to the charter party terms. In such a case, the English courts would give effect to that contractual provision. The French courts, however, would only force the receiver to arbitrate in Moscow if the charter party had been physically attached to the bill of lading, which is almost

never the case. If not so attached, the French courts would therefore decide that the receiver would not know the terms of the charter party and would not therefore be bound by the requirement to arbitrate in Moscow. If he wished, he could commence legal proceedings in France. This may prove to be quite advantageous in cases where French law is either clearer or better for the claimant than Russian law.

5.2.3 Of rather more interest, however, is the fact that the courts in certain jurisdictions retain discretion to accept, or may be "flexible" in their approach to questions of, forum and jurisdiction. Occasionally, this is because their constitution or law permits such a flexible approach. Occasionally, it will be because the contractual terms are unclear. More often than not, however, the Courts may well be influenced by political or nationalistic tendencies, and there are those jurisdictions where corruption is more common! Thus, the following set of circumstances has actually occured:

A bill of lading was issued to cover a voyage from the People's Republic of China to Germany. The bill of lading provided for any dispute to be settled in London, English law to apply. Cargo interests were domiciled in South Korea. There was a major casualty on the voyage. The prospects of successfully pursuing a recovery action in London were poor; the shipowners had good defences. However, cargo interests were a major Korean company, as were their Korean insurers. The Korean courts found that they were able to accept jurisdiction and, since security had been obtained, cargo interests found themselves in an extremely strong position. This "unexpected" forum assisted the claimants to negotiate a very favourable commercial settlement. It will be noted that Korea was neither the country of loading nor discharge. It

was also not the contracted jurisdiction and no other party at all had any connection with Korea apart from the cargo interests. It is therefore necessary to be aware of such "commercial" opportunities that may arise from time to time.

5.3 Such forum selection, i.e. choosing the jurisdiction most favourable to the recovery action, requires not only an appreciation of the possible choices open to cargo interests but also an understanding of the legislation likely to be applied in those jurisdictions. The claimant has to consider the balance between the law most likely to assist him versus the likelihood of actually getting paid.

5.4 Forum selection may not always be voluntary. For example, different jurisdictions and legal systems may apply different time limitations in respect of the same type of claim. It is possible that a jurisdiction which is to be preferred on the merits of the claim must be foregone in favour of a poorer jurisdiction where the claim is not time barred.

5.5 It is necessary to be aware of the principle of "Court First Seized". There will be occasion when more than one forum is available. One will be good for the claimants, one will be better for the carrier. Where this is the case, it is necessary to move quickly to start proceedings in the preferred forum as soon as possible. Then, if the carrier commences proceedings in a different forum, it is usually possible to halt those second proceedings, and sometimes to have them dismissed, on the basis that the matter has already been referred to litigation elsewhere and that another court is already hearing the matter. In

other words, proceedings were started earlier in another jurisdiction and that court has already been seized of the dispute.

There are several occasions where carriers have successfully started proceedings in jurisdictions favourable to them; claims, which would have good merit elsewhere, have then failed. We can turn to CMR for an excellent example of this. Within Europe, particularly if there is any remote connection with The Netherlands, carriers are very quick to apply to the Dutch courts in respect of Negative Declaratory Proceedings. In other words, before any action has been started by cargo interests, the carrier applies to the court for a judgement that he is not liable for any losses. In this example, there are two problems. The first is that the Dutch courts become the courts first seized and therefore it is difficult to pursue proceedings elsewhere. The second is that Holland is currently very pro-trucker and anti-cargo and also does not give effect to the concept of wilful misconduct (which we shall discuss later).

5.6 "Uncertainty" can work in the claimant's favour. There may well be occasions where the merits of the claim are balanced or where, in a particular jurisdiction, the claimant has very limited prospects of success. An alternative jurisdiction may exist which is not particularly sophisticated in maritime claims and may well not have a specialised maritime court. The outcome of any litigation will be unpredictable. Whilst it may be unwise to proceed to full scale litigation, this unpredictability cuts both ways. The carrier, or his liability insurers, may be equally unwilling to proceed in that court. This uncertainty could well enable a claimant to negotiate a reasonable settlement with the carrier where such settlement would not have been obtainable in a more sophisticated or contractual jurisdiction.

5.7 Finally, care must be taken to avoid inadvertently being caught up in the "wrong" jurisdiction. This does from time to time occur, particularly when considering the question of security. You may also end up with exchange control difficulties that will stop you getting the money out of a country, even if you win.

6. SECURITY

6.1 Let us assume that proof of loss and title to sue have been established and also that appropriate opponents and forum have been chosen. All is by no means finalised.

It may well be the case that a good claim for recovery exists, at least in theory. However, by their very nature, recovery actions take some time to pursue. During the interval between discovering a loss and then succeeding in establishing liability, whether by negotiation or through the courts, many adverse developments could arise. The most obvious and fatal is when the carrier no longer has any assets. The claimant may well find himself with a Pyrrhic victory; the carrier admits liability but because of a lack of any finance or assets, he pleads an inability to pay. If the claimant can trace no assets that he can attach, it follows that he will receive no cash. In short, the claimant wins the case but does not get paid.

6.2 It is thus necessary to give careful consideration, in the very early stages of a case, to the obtaining of security for the claim. The most common manner, depending upon jurisdiction, is for the claimant to arrest or detain the carrier's ship. At the very least, he should threaten to carry out an arrest. The arrest can then be lifted once appropriate security has been provided, e.g. a P&I letter of undertaking, a bank guarantee, a cash deposit, etc.

Security is not purely limited to the arrest of a vessel. Depending upon the identity of the opponent, a number of possibilities exist – attaching bank

accounts by Mareva, arresting bunkers belonging to a charterer, attaching H&M proceeds in the hands of the broker, obtaining Garnishee orders, entering caveats on ship's registers, etc. In the past few months, one very useful tool has been removed from us, however. That is the Rule B attachment in New York which has unfortunately become all but impossible to use.

6.3 Care has to be taken to ensure that the item being arrested belongs to the opponent. Arresting the wrong asset could open the claimant to a counterclaim for wrongful arrest and thus to pay damages. One of the more common examples is where cargo is damaged during a voyage but liability will ultimately rest with the charterers, not with the shipowners. The obvious asset to arrest for security is the ship. However, if no good claim lies against the shipowners, arresting the ship will lay claimants open to a counterclaim for damages for wrongful arrest. The consequential costs could be significant.

6.4 It is the common and usual practice to release an asset against provision of a suitable guarantee, usually from a P&I underwriter within the International Group. The general wording tends to be similar between the Cubs in respect of nearly all types of claim. However, it is the job of the Clubs to try to avoid liability and they will frequently try to be clever in the wording of their guarantee. It is equally necessary, therefore, for the claimant to be watchful and ensure that the wording of the guarantee is sufficient to protect him.

A common oversight is failing to ensure that not only is there an obligation on the guarantor to pay in certain given circumstances (e.g. upon final court

judgement), but also that the guarantor agrees to accept service of any necessary legal proceedings. A simple letter of guarantee merely promising to pay any judgement which may be obtained against a carrier could in itself be useless. It may be that, if the carrier ceases to exist, a claimant will not be able to start legal proceedings and / or to obtain a judgement and / or pursue the claim at all. In these circumstances, because the guarantor / Club has not agreed to accept service of proceedings, there is no judgement which can be obtained and therefore the guarantor does not have to pay.

6.5 Care must be taken to ensure that the claimant does not end up in the wrong forum. For example, there is a voyage from Spain to Malaysia. The bill of lading provides for any disputes to be heard before the Singaporean courts. On the merits, Singaporean jurisdiction is favourable to claimants. However, the carrier has no assets in Singapore and therefore, even if the claimant wins his case, he will have difficulty getting paid. The claimant, however, can arrest the vessel in Malaysia. In some jurisdictions, such as South Africa, it is possible to arrest the vessel in that jurisdiction but at the same time allowing for the substantive claim to be heard in another jurisdiction. In Malaysia, this is not the case. Therefore, the claimant can arrest the vessel in Malaysia, thereby ensuring that he has assets against which to enforce his judgement, but the Malaysian courts will insist on hearing the substantive claim. The shipowner may have better defences in the Malaysian courts than in the Singaporean courts and thus Malaysian jurisdiction is unfavourable to the claimant. Here, we would have a difficult situation for the claimant. Singapore is likely to grant judgement in his favour but the claimant may have problems getting paid; Malaysia is likely to find for the defendant but, if the claimant succeeds, at least he will get paid.

In short, if the jurisdiction is unfavourable on the merits, it is dangerous to arrest within that jurisdiction for security.

6.6 If attempts to obtain security are pursued, care should be taken not to be under-secured. This is a risk which may occur if claims have not yet properly been quantified, or if security is provided inclusive of interest and costs. In the first case, it may take time to discover further damages or to realise the true quantum of loss. The initial amount of security obtained may be insufficient. In the second case, security inclusive of interests and costs may not be sufficient if the recovery action takes many years and / or involves one or more stages of appeal. The claimant, therefore, should ensure that either he has sufficient security or has flexibility in the wording to request more security, should it be required.

6.7 It is also vital to know whether counter-security in favour of the carrier may be required. It is necessary to know which jurisdictions require counter-security and, if so, at what level and in what form. Some jurisdictions require counter-security either in a fixed sum or at 5% of the value of the claim, whereas in others counter-security may be as high as 25% of the claim, e.g. Taiwan. In some jurisdictions, a letter of guarantee may be acceptable, whereas in others a cash deposit may be required.

It is important to have these aspects in mind where, for example, the merits of the claim are balanced. On the one hand, carrying out an arrest may put

pressure on the carrier; however, putting up substantial cash counter-security puts pressure on the claimant himself.

7. TIME

7.1.1 It is vital for claimants to be aware of the various time limits which may apply:

- in various types of case
- at various stages of the case
- in various jurisdictions.

7.1.2 It is also important to note which time limitations:

- simply cause a change in procedure
- are flexible or capable of being appealed
- are fixed and cause the claim to fail.

7.1.3 Therefore, it is necessary to know which time limits apply in each jurisdiction for each type of claim – air, road, sea – and for each type of claim – particular average, general average, collision, etc.

7.2 Air freight claims are the most straightforward. The Warsaw Convention provides that written notice of damage must be delivered to the carrier within fourteen days of delivery, failing which the claim will be irrevocably time barred. The Warsaw Convention does not make reference to "loss". It is prudent, however, to issue notice within fourteen days simply to avoid any later arguments. Assuming that this initial notice has been sent, it is usually a one year time limitation which applies within which the claim must be pursued.

7.3.1 Transit by sea is a little more complicated. The first time "limitation" which may be applicable under certain regimes is that of notifying carriers within three days of discharge / delivery of any loss or damage. This is by no means a fatal time bar. It is one which merely affects the burden of proof, which will be discussed in a separate section.

7.3.2 It will be necessary to refer to the domestic laws of each country to determine the exact time bars which are applicable. Under English law, PA claims need to be pursued within twelve months of the date of delivery or the date that delivery should have been effected (and it is therefore prudent to take the first day of discharge or the date of loss in the case of non-delivery); for collision claims, within two years of the collision; for GA claims, many time limits apply – six years from the date of the general average incident and / or six years from the date of providing security and / or six years from the date of the adjustment depending on the party claiming and the nature of the claim. And so on.

7.3.3 Once legal proceedings have commenced, there will be fixed time limits within which various steps have to be taken. Non-compliance can result in the claim being thrown out. The claimant not only loses his claim, he incurs his costs and probably a high per centage of the carrier's costs.

7.4.1 Road haulage claims are different yet again. Claims should be notified within 7 days of delivery / non-delivery, unless the CMR note specifies otherwise. Claims for total loss become time barred one year and sixty days after the date of collection of the goods by the haulier, not the date that the goods

should have been delivered or the date of the loss. Claims for partial loss or damage become time barred one year after the date of delivery.

Of course, if there are different domestic haulage conditions, different time bars can apply.

7.4.2 It is necessary also to return to the fundamental issue of whether the haulier is a CMR carrier or a freight forwarder. If he is a freight forwarder, then in the UK, a nine months limitation applies, not one year.

7.5 The above are just some examples of the different time limits which may be applicable and the importance of understanding fully the nature of each type of claim.

7.6.1 Suspension of time. In certain jurisdictions, in respect of sea transit, the taking of certain steps can suspend time. In other words, time begins to run as usual but if claimants take specific steps, then time is either suspended (until another action takes place) or is permanently interrupted. For example, in Brazil, appointing a surveyor will automatically suspend time. It is not always clear whether this suspends time indefinitely or whether time begins to run again after the expert's report is produced, but either way it is necessary to ensure that amended time limit periods are carefully noted and followed.

7.6.2 In CMR cases, once a written claim is put to the haulier, time is automatically suspended. It remains suspended until the haulier repudiates the claim in writing. It is very dangerous to rely upon suspension of time in higher value cases and it is always better to get either a written time extension or a written

confirmation that time has been suspended. As a matter of practice, it is also important that the claim file is carefully reviewed. It is often the case that recovery action is started some time after the claim has been investigated, adjusted and settled. However, it is quite possible that there are exchanges within the claims file, in the very early stages, where the carrier has been held liable and has responded by return that he repudiates the claim. The suspension of time, therefore, no longer applies and a revised time bar will be already in place before the recoveries file is activated.

7.7 Time extensions. To obtain an extension, it is necessary to know what the time limit is, how national law interprets that time limit and whether an extension is in fact possible. As an example, let us consider the one year time limit under the Hague Rules as applicable in Europe. Under English law, the time limit runs from the date that the goods were delivered or should have been delivered and agreed time extensions are accepted by the courts. In Greece, the one year time limit is applicable but runs from 31 December of the year in which the loss occurred; thus, whether the loss occurred on 2 January 2005 or 28 December 2005, the one year time limit commences on 31 December 2005; Greece also accepts time extensions. Turkey, on the other hand, applies the same dates as England but time extensions are not allowed; the Turkish courts apply a strict interpretation to the one year time limit and therefore legal proceedings must be commenced within one year if the claim and recovery has not first been finalised.

7.8 Finally, one has to consider the effect of the Hague, Hague-Visby and the Hamburg Rules and now the Rotterdam Rules. Where these are incorporated into the contract of carriage, there is a stipulation that any

agreement or national time bar which is shorter than the time bar provided by the Hague, Hague-Visby or Hamburg Rules will be ignored. Therefore, if a bill of lading provides for a nine month time limitation period, provided one of the above regimes is applicable, the claim will not become time barred after nine months but only after twelve months.

Another by-product of the Credit Crunch and the trend of finding any ways possible to avoid liability is to grant time extension which are very cleverly worded. For instance, opponents may say that they are minded to grant a time extension. Unless this si clarified before the time bar operates, it is highly likely that opponents will subsequently insists that whilst they may have been minded to do so, they did not actually grant an extension and thus the claim is now time barred.

Many extensions are now granted with a number of conditions attached. Again, this only amounts to an offer to grant an extension. If the conditions are not explicitly addressed in advance and agreed, then it is almost certain that opponents will claim that the time extension was not granted because there was no meeting of the minds and thus no contract.

8. BURDEN OF PROOF / DEFENCES

8.1 This, of course, could be an entire lecture topic of its own. Additionally, it is also completely bound up with the other issues covered in this paper, such as choice of appropriate forum.

8.2 First and foremost, it is not worth the time and effort of commencing a protracted recovery action if the claimant can only prove a prima facie claim but cannot, at the same time, defeat the defences likely to be put up by his opponent. It is pointless proceeding with the claim if those defences will succeed.

Therefore, a detailed understanding of the possible various defences, and their inherent respective strengths, is required. Some defences are relatively easier to overcome than others. A fire defence under the Hague Rules, or a negligent navigation defence in respect of a grounding, are in themselves rather difficult to overcome. They can of course be defeated but the claim value should be sufficiently high to warrant the effort and expense of investigation.

There then also needs to be a detailed understanding of any regimes which may govern, in full or in part, the recovery claim – the Hague Rules, the Hague-Visby Rules, the Hamburg Rules. Defences under these various regimes will differ.

8.3.1 Also, what the claimant and what the carrier has to prove, and when he has to do it, will fluctuate. An example of this changing burden of proof is as follows:

- The claimant may be able to adduce evidence that the goods were in sound condition when they were placed into the custody of the carrier. He may also be able to show that the goods were damaged upon delivery. Prima facie, therefore, a claim against the carrier has been established.

- In response, the carrier may rely on one of the many defences under Article IV of the Hague-Rules. The carrier is in fact saying that he accepts that the cargo is damaged, and indeed that it may have become damaged on the voyage, but he is not liable because of one of the specified exceptions.

- To overcome this, the burden is then shifted back to the claimant to allege, together with prima facie evidence, that the shipowner cannot rely on any of the defences under Article IV because the ship was unseaworthy prior to and at commencement of the voyage in question. This unseaworthiness deprives the carrier of his right to rely on Article IV defences.

- Now, the burden shifts again back to the carrier to prove that, even if the vessel was unseaworthy, then (i) such unseaworthiness was not discoverable by the exercise of due diligence or (ii) such unseaworthiness was not causative of the loss. In other words, a prudent shipowner, acting reasonably, would not have known about the unseaworthiness (e.g. perhaps due to latent defect) or that the loss in question was due to other

causes altogether and the unseaworthiness was irrelevant, i.e. the unseaworthiness did not cause the loss.

8.3.2 This shifting of argument between the parties is very usual. Only a very small per centage of claims are so clear and so well documented that a carrier automatically accepts liability.

It is very important, as the arguments develop, continually to review the evidence and continually to assess the merits and prospects of success. It may well be that a claimant realises that his chances of success have shifted from, say, 75:25 to 30:70. He may wish to drop the case or he may now consider some of the other aspects we have been talking about, e.g. a possible alternative jurisdiction (should one be available). For example, the carrier may have a fire defence to the claim and the cargo interest may not be able to show unseaworthiness. However, the shipment may have been to Brazil. Notwithstanding any jurisdiction clause, the Brazilian courts will accept jurisdiction in respect of voyages to Brazil. Further, defences which are available to a carrier in Brazil are severely limited, essentially to Acts of God only. The Brazilian courts do not give effect to a fire defence. Therefore, realising that the prospects of success in the original jurisdiction are remote, a claimant may well shift to another jurisdiction to increase his chances of obtaining a negotiated settlement.

8.4 Turning to road transport, there are a number of defences under the CMR, in particular Article 17. Over the last 24 months, a very regular defence is that of Article 17.4, namely that it was the shipper's responsibility to load & secure the cargo within, say, the container. This particular defence is being used

more and more and it is important that the shipper ensures that his cargo is properly packed, palletised, chocked, and secured within the container / wagon. This prima facie defence can be overcome, by virtue of Article 18.2, if the claimants can prove a proximate cause of loss, i.e. can point to a specific incident which caused the load to shift, topple, collapse, etc.

Second, in still quite rare but high profile losses, Article 17.2 affords the carrier an almost complete defence in respect of unavoidable or unpreventable events, the most high profile of which is armed hijacking. This defence is being increasingly used, not least because in both Asia and in Europe, particularly Western Europe, access to firearms is increasing and armed hijackings are rising as a consequence. The more sceptical may also believe that drivers, who may have actually left their trucks unattended, are alleging armed robbery and since there are no third party witnesses, this is a difficult defence to overcome.

8.5.1 Claimants should also consider limitation – package or vessel. A high value loss, with good merits, may only attract a low recovery because of limitation. If the carrier is entitled to limit liability, great care must be taken to establish to what financial level. It is quite possible that a claim may be strong but, if amicable negotiation is not successful, it may not be economically viable to pursue the claim through the courts.

Again, different jurisdictions, different regimes and different transits attract different limitation amounts.

8.5.2 In air freight claims, it is preferable to pursue the airline, where limitation is 17 SDRs per kilo, rather than the freight forwarder who is entitled to limit at 2 SDRs per kilo.

8.5.3 In road cases, if the haulier is a freight forwarder, a similar 2 SDRs per kilo will apply. However, as a carrier under CMR, the limit is 8.33 SDRs per kilo.

This in turn has to be compared against any domestic legislation. In the UK, for example, the RHA provides for a limit of GBP 1300 M/T.

8.5.4 Interestingly, there may be relatively minor domestic legislation which completely changes the position. In the United States, road haulage within a particular state allows the trucker to rely upon a very low limitation. However, if the road transit is across a State boundary, absolutely no limitation applies whatsoever.

8.5.5 In major casualty cases, for instance collisions or groundings concerning container vessels, the shipowner may seek to rely upon vessel limitation. There are essentially two Limitation Conventions – 1957 & 1976. The 1957 Limitation has quite a low limit for shipowners but it is relatively easy to break limitation. The 1976 has a much higher limit but it is very difficult to break limitation.

8.6 Regardless of type of transit – sea, road, air – it is generally quite difficult to break limitation. The greatest prospects of success arise if the claimant can prove wilful misconduct or gross negligence on the part of the carrier. As advised, this tends to be quite difficult, but does vary from jurisdiction to

jurisdiction. In the UK, proving that a shipowner acted with wilful misconduct is extremely difficult. In Germany, proving wilful misconduct under CMR is relatively easier.

8.7 In collision cases, there is a useful "secret" weapon for cargo interests which can be used sometimes. Certain jurisdictions, particularly certain States within the United States, operate the Innocent Cargo Rule. Let us assume that there has been a collision and both the ships are equally liable. Cargo has suffered loss. There may be a good claim against the colliding vessel for 50% of the loss but the claim against the carrying vessel may not succeed because the shipowner has a defence of negligent navigation. The claimant may be tempted not to pursue this balance 50% of his claim against the carrying vessel. However, if the claimant has the right to pursue his claim in a jurisdiction which operates the Innocent Cargo Rule, he could well make a 100% recovery. He may be able to bring a claim against the colliding vessel for all of his losses on the basis that the collision was not his fault and therefore he should not be penalised and should not be involved in a long and complicated collision dispute. It will then be for the colliding vessel to recover back from the carrying vessel 50% of the amount which he paid to cargo interests.

8.8.1 Another practical factor which claimants have to consider, particularly in big casualties, is whether to pursue the claim alone or whether to join with others in the recovery action. Generally speaking, joining with other cargo interests, for example in defending a salvage claim or a general average claim, is

simply good common sense. All cargo claimants will probably share the same interests and therefore they make two big gains:

8.8.2 First, they will all share the costs (involved in pursuing their claims) pro rata to their cargo values. Second, as a larger group, with a higher value aggregate claim, they are more likely to bring the carrier to the table and to negotiate an amicable settlement.

8.8.3 Of course, there are times when not all cargo interests have the same purpose, for example in a shipboard fire which was caused by one of the cargoes itself. That raises other difficult arguments with regard to recovery since claimants could be looking at recovery not only against vessel interests but also against the shipper, the load port agent and the shipper's liability insurers.

8.8.4 Whilst discussing joint action, it is worthwhile considering the concept of Single Liability Offset. In a collision case, Ship A will have claims against Ship B. Similarly Ship B will have claims against Ship A.. Also, Cargo A will have claims against Ship B. In a typical case, it is difficult for cargo interests to pursue those claims since all the evidence surrounding the collision is held by Ship A and Ship B, not by Cargo A. Therefore, Cargo A faces an uphill struggle to be successful in its claim.

One way of enhancing prospects of success is to join together with Ship A in their action. Ship A may well agree since it strengthens their claim, at least psychologically, and it means that Cargo A share in Ship A's costs of pursuing the action. The problem is that in such a shared action, Cargo A will recover less money

than if it pursued the action separately. The balance which needs to be considered, therefore, is assessing prospects of successfully pursuing the action alone versus the loss of quantum if cargo join together with ship.

8.9.1 Discovery: it is important to ascertain the type of litigation system which exists. In England, there is an adversarial litigation system, with each side having to fight the other and with specific rules as to which types of evidence have to be produced at which times. This can make life very difficult for the claimant. He may not know that certain evidence or documents exist and therefore he may not know to ask for them. More importantly, he will not know whether the carrier has withheld them (although the penalties against the carrier for deliberately withholding information can be quite severe). If, on the other hand, he makes a general enquiry for information and documentation, this is likely to be rejected by the carrier, and possibly by the courts, on the basis that it is merely a "fishing expedition", i.e. the claimant is not looking for anything specific but is merely just trying to see if there is any information which may help him formulate his claim.

8.9.2 Other systems, particularly Roman law based jurisdictions, have an inquisitorial approach. This allows an "investigation" into the casualty at a much earlier stage. Indeed, the court itself, or a court appointed surveyor, may make enquiries of its own into the case. Sometimes the court may permit the claimant certain early rights. It is important to know which rules operate in which jurisdictions. France and Belgium, for example, operate this inquisitorial approach and a claimant can apply to the court for a court appointed expert to attend a casualty, review all the documents, interview the crew, etc. and the carrier cannot refuse.

8.9.3 By way of contrast, in Japan, there appear to be no developed guidelines on discovery whatsoever. It is on a case by case basis, and at the discretion of the court, exactly how fast matters develop and what documents have to be provided when. In England, discovery is allowed quite late in the proceedings, when claimants and carriers have already conducted quite a large number of investigations and are already committed perhaps to significant costs. Yet again, in many States within the United States, it is possible to apply to the courts for very early discovery, deposition of witnesses, etc. before the carrier has time to review the case himself, dispose of evidence, repatriate the crew, re-write the log books, etc.

8.10.1 Finally, care should be taken with regard to the future enforcement of any successful recovery action. This is more important where the claimant has not obtained security. A claimant may well decide that he has poor chances of succeeding in his recovery action in the jurisdiction expressly stipulated in the contract of carriage. He may opt for another jurisdiction where, on the merits of the claim, he is more likely to succeed. However, if he cannot enforce his claim, i.e. he cannot force the carrier to pay over recovery proceeds, the whole exercise will have been futile.

8.10.2 Choosing jurisdiction, therefore, needs also to take into account

(i) whether the carrier has any assets there which can be attached or

(ii) whether any judgement obtained in that jurisdiction can be enforced in another jurisdiction where the carrier does have assets and / or has his principal place of business.

8.11 It can be seen, therefore, that a full understanding of all the issues involved, in particular of the various defences available in particular jurisdictions, is extremely important.

9. GENERAL CONSIDERATIONS

9.1 As indicated at the outset, the main points outlined above cannot be taken one by one or in chronological order. They all impact on each other and frequently have to be considered at the same time.

9.2 Speed is of the essence. The benefits of acting quickly cannot be overestimated.

Cargo interests in particular could suffer because they are regularly behind the game. In major casualties, such as general average and salvage cases, they are usually the last to know of the incident and they have difficulties in obtaining information.

In more routine particular average cases, very often thought is not given to the recovery action until after the claim itself has been settled.

9.3 It is extremely important that an eye is always kept on recovery issues from the very outset of any claim or notification. When investigating the cause, nature and extent of loss, the opportunity should also be taken to getting information that would assist with the eventual recovery action. It may be extremely difficult to go back at a later stage to obtain that information. For example, even the assured may be unwilling to provide information or documentation once his claim has been settled. He is, after all, in the business of trading, not of assisting his insurers in pursuing recovery actions.

It might seem that this is obvious. However, valuable opportunities are frequently lost because such steps are not taken. The insured is primarily concerned with obtaining settlement of his claim. The insurer is concerned to have the claim properly valued and properly settled with his client. Frequently, at this early stage, neither party is particularly concerned about possible recovery. Some particular average losses may indeed take considerable time to be agreed between the insurer and the assured. If attention is only turned to the recovery action after all the formalities of the particular average claim have been completed, evidence relating to the possible recovery action will be harder to obtain, if not lost forever. Indeed, if attention is only turned at that time to the question of security, the vessel may have been sold, the carrier may have gone out of business, etc. and there are no prospects of a successful recovery.

9.4 This need for early thought is paramount and exists regardless of the type or size of claim. For example, in a major marine casualty where salvage services have been performed, early investigation will of course centre upon the facts of the case and the nature and value of salvage services. This is a prime opportunity also to investigate the cause of the casualty and possible recovery prospects.

9.5 Such early thinking or speed of action is crucial. The sooner that a claim is investigated and that evidence is gathered, documents collected, persons interviewed, then three benefits arise:

- There is a much better chance of obtaining a recovery.
- The recovery will be obtained much more quickly.

- The recovery may be greater.

9.6 Confidence, persistence and negotiating skills can make the difference between no or a poor recovery on the one hand and a good high value recovery on the other hand. After all, a claimant is asking his opponent to part with cash and no-one likes to pay out money. For the most part, a claimant will be dealing with a liability (P&I) insurer whose reason for living (at least so far as regards a recovery claimant) is to avoid paying claims. A lack of knowledge or of persistence or of negotiating technique will surely tip the balance in favour of the opponent and away from the claimant. Know your opponent, build up a relationship and gain his respect. This is a people business. Be assertive but not aggressive. Your recovery prospects will increase substantially.

9.7 Commercial awareness & reality, and commercial tactics, can yield significant dividends. Awareness of the strengths of the claimant or of the vulnerabilities of the carrier is very important.

The cargo interest may be an important client to the carrier. No express threat needs to be made, but clearly a carrier will wish to treat an important client fairly when considering the recovery claim. An extreme example of this will be in the specialised car carrying trade. Without doubt, motor manufacturers require high quality car carrier operators. Equally, the investment into car carriers only pays dividends if the carrier has excellent relationships with car manufacturers.

Equally, knowing the commercial concerns of the carrier can be useful. Consideration needs to be given to the type and extent of operation that the carrier pursues. Let us assume a collision between a brand new, technologically advanced and highly expensive cruise vessel on the one hand and a twenty-five year old, one-ship-owned bulker operating in the spot market. There is a disagreement as to apportionment of liability. Assuming that the bulker has several parcels of cargo on board, each cargo interest is entitled to pursue his claim separately. Therefore, a threat to arrest the cruise ship at successive ports of call in the United States and the Caribbean, in order to obtain security, will perhaps be sufficient to persuade the shipowner to make a higher settlement simply because the costs of disruption to his cruise schedule, and his consequent loss of reputation, would be greater than agreeing an enhanced settlement with the claimant.

9.8 It is not just what you know. It is how you apply it.

10. CONCLUSION

Recoveries should always have taken higher priority in the minds of insurers around the globe. Fluctuations in market conditions, in reality, raise or lower the relative importance of recoveries to an insurer. It is doubtlessly true to say, however, that an insurer who regularly focuses not only on risk management and loss prevention, but also on recoveries, will over a book of business have an improved loss ratio.

There are many technical issues that need to be considered. Without expert technical knowledge – the law, governing regimes, commodity characteristics, shipboard practices, regulatory regimes (e.g. ISM) – the prospects of success are poor. This is not an easy subject and an expert in recoveries is required if the most beneficial results are to be obtained.

Aside from technical knowledge, without doubt speed of action and negotiating skills are the keys which differentiate the successful from the unsuccessful. They enhance recovery prospects. Speedy assessment, swift action, good knowledge and high level negotiating skills are the only way to obtain meaningful recoveries.