Article: Cargo Recoveries – 6 Essential Issues

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In this paper, aimed at junior to middle level claims handlers, Linley Taylor looks at 6 points that are important when pursuing recoveries successfully. Whilst many claims handlers will not be personally responsible for recoveries it is nevertheless vital that they should have an awareness of the essential issues so that these are kept in mind during the handling and settlement of the insurance claim.

1. Time is of the Essence - Time Limits (Time Extensions)

If the time limit for commencing suit is passed the claim is dead.

This then requires:-

i. An immediate appreciation of what the time limit is on any given claim when it is first received. Claims will be subject to International Conventions or if no Convention applies, the terms of a Charter Party or the Carrier's conditions of carriage. The first step is to establish what is the contract of carriage under which the claim lies and therefore what is the time limit.

At present, in the vast majority of claims, there is a one year time limit if the Bill of Lading is subject to the Hague, Hague Visby or US COGSA or it has a Clause Paramount in the Bill of Lading- so that the Hague, Hague Visby Rules etc apply contractually rather than compulsorily.

This needs to be confirmed when first looking at the papers.

If the claim is subject to a Charter Party then the express terms and any terms incorporated into the Charter Party need to be studied as Charter Parties are not subject to the terms of International Conventions and may contain time limits as short as 3 months and as long as 6 years.

Forms of transport other than sea carriage may be governed by other International Conventions e.g. CMR - covering international road carriage in Europe- which will have specific time limits. In the case of CMR, the time limit is 1 year, although there are some different ways of calculating when the 1 year starts to run and how it continues to run.

Purely domestic road carriage maybe governed by the Carrier's conditions alone or in certain countries it will be regulated by domestic legislation.

ii. When it expires 1 year from the date of delivery means that the time limit expires 1 year, less 1 day after delivery. So for example a delivery on the 3rd of October means that a 1 year time limit would expire at midnight on 2nd October the following year.

iii. An efficient method of recording when the time limit expires. The correct date MUST be recorded on this first review. If an incorrect date is recorded and gets into any system then you may be on course to losing the claim. Often it is best for 2 people to independently assess the time limit and make sure that they agree on the same date! When the date has been assessed it needs to be accurately recorded in a system that contains sufficient alerts to allow the case handler to take action to protect the time limit. Some people use a diary system others a calendar or such like on a computer. Whichever system is used it must be understood by all those involved in the claim.

iv. A plan of how the time limit will be protected - a plan of what action to take. Often extensions of time will be requested from the Carrier or his representatives. We will return to this later,

but if extensions are allowed under a particular Convention a written request and an extension granted pursuant to that request by the Carriers side may well be the path chosen to allow further time to achieve an amicable settlement.

It may be that extensions are sought verbally- perhaps by telephone and indeed granted in the same manner, but it is imperative that any extension so granted should be properly confirmed in writing , that the time extension granted should clearly state on whose behalf the time extension is granted and the date the extension itself expires.

We recommend the use of the phase “up to and including” [3rd October] rather than for example “up to” or “to” [3rd October]. Clearly the word “including” leaves no doubt that the last day for taking action is the 3rd not the 2nd of October.

A time limit missed by 1 day has the same effect as the time limit missed by a month. The claim is dead.

Sufficient time must be allowed before the time limit expires to take any action which will be necessary if an extension is not granted.

What is ‘’sufficient time ‘’ needs to be considered on a case by case basis depending on the jurisdiction/ arbitration clause and what steps would be necessary to protect time by the issue of proceedings/ arbitration in the appropriate jurisdiction and how long those steps will take. We will return to this in Section 5 below.

2. What is it Worth?

It may be stating the obvious but the amount of effort and expense spent in pursuing a recovery has to be proportionate to what the claim is worth. So how much is involved and commercially what steps should be considered to secure a recovery? Is there any reason why a small claim has a greater significance than the size of the claim initially suggests – for example, is it a first in a series of similar claims so that it assumes a greater commercial significance than it otherwise would?

3. Recoverability

i. What is the financial limit of liability? Without completely moving on from the considerations in Section 2 above, one needs to assess how, if at all, the claim is limited by any financial limitation clauses in the particular contract of carriage.

A claim of US Dollars 1 million could be limited to an insignificant amount if, for example, the damaged cargo is contained in 2 or 3 packages weighing very little where only a nominal recovery could be made under the Hague or Hague Visby Rules.

So how is the claim amount affected by any limitation clause(s) in the contract of carriage? The answer to this question again has a bearing on the resources employed to obtain the recovery.

ii. What contract conditions apply? Here an initial consideration of the merits is required. What liability is accepted by the carrier under the contract of carriage and do the circumstances of the case as revealed in the documents suggest that liability can be invoked?

This will involve consideration on a case by case basis, but at an early stage some assessment should be made of whether further evidence is necessary to make an accurate assessment on the question of liability and if so whether it can be collected. We will return to this later in this paper in Section 4.

iii. Who is the carrier and do they have any money? Can security be obtained? Who is the liable party and do they have assets sufficient to pay the claim or do they have liability insurance cover which will respond and cover any liability? There is no point pursuing a claim against a party who has no ability to pay.

Ships present a particular problem. They may well represent the only assets of a shipowner and it is an asset which will travel around from one jurisdiction to another. It could be sold or even be lost/sink.

Even if the shipowner at first glance appears to own a number of vessels it may be that on further examination they are each owned by separate (one ship) companies. Shipping law has the concept of “in rem” jurisdiction meaning that a claim can brought against the ship itself.

A cargo claimant can therefore sue the shipowner and, in addition, the ship and so long as he is able to make out a fairly basic case he will be able to arrest the carrying ship on which the damage occurred or another vessel owned by the owners of the carrying vessel at the time of the material voyage and by arresting the vessel it may in fact be possible to found jurisdiction for the claim itself.

Once a vessel is arrested the shipowner will have to provide security before the vessel is released from the arrest. If necessary the vessel could be sold under an order of the Court, but in most circumstances security will be provided by the shipowner either by some form of bank guarantee, but most commonly by the P&I Club with whom the vessel is entered providing security in the form of a Letter of Undertaking.

Indeed even the threat of arrest may provoke the P&I Club into providing security so that the vessel is not arrested at all.

A properly drafted Letter of Undertaking may provide not only security but an express agreement to the claim being decided in a particular Court or Tribunal and a Letter of Undertaking should also be drafted so as to cover the award of interest and any legal costs to the cargo claimant in addition to the principal claim amount.

Without security there is a real prospect that a claim will not be paid and so the prospect of obtaining security must be considered at an early stage.

With carriers other than sea carriers they may at least reside within the jurisdiction where proceedings would take place and so there may be assets within the jurisdiction to satisfy any judgement obtained.

A road carrier would hopefully have liability insurance in force. Usually this can only be ascertained by presenting the claim to the road carrier - who will invariably involve his insurers. A cargo claimant will usually not know what the terms of the liability cover are and whether the carrier has acted or failed to act in such a way in which will entitle the insurers to refuse to cover the carrier. This is a possibility which should be kept in mind.

So at this stage consideration should be given to whether the carrier is a substantial enterprise and whether there are assets that can be arrested or the threat of arrest used to obtain security, or in non sea carriage claims, whether there is apparently sufficient liability cover in place. This assessment should take place before significant sums are incurred in pursuing a recovery action, for if there is no money to pay the claim then any expenses incurred will simply be a waste of money.

iv. What jurisdiction has been agreed or is provided for in the Contract of Carriage? A claim which is subject to favourable jurisdiction where proceedings or arbitration could be started quickly and cheaply and where the claim would be fairly dealt with is going to have a greater potential recoverability factor than one where a really difficult or perhaps biased jurisdiction is relevant or where considerable formalities are required before any proceedings can be commenced.

4. Merits

i. What evidence is to hand? We return to a point considered briefly in Section 3(b) above.

As stated previously at an early stage some consideration needs to be made as to whether further evidence is required to make an accurate assessment on the question of liability.

In fact experience shows that an insured is more likely to be responsive to requests to documentation before the insurance claim is paid out rather than after he receives his money!

Documents get mislaid, memories fade, employees move jobs, potential witnesses become hard to trace. The passing of time will make evidence much more difficult to collect. Some evidence will become impossible to collect, so if there are significant gaps in the evidence "now" is the time to collect it. Collect evidence to fill them now, not "in the future".

ii. What further evidence should be obtained? This will obviously need consideration on a case by case basis, but firstly all material documents should be present: for example if the Bill of Lading incorporates the terms of a Charter Party, is the Charter Party actually in the file?

Also, when documents are referred to, for example, in a Survey Report are these documents in the file? If the Survey Report refers to documents such as Preloading Reports or Destruction Certificates are those documents in file?

Certain types of case have certain have opportunities that should not be lost. Chemical contamination cases for example. There may be samples taken that have not yet been analyzed.

Steps should be taken to insure that such samples are preserved intact in case they are needed for analysis at a future date.

Generally in cargo damage cases the following questions need to be asked when looking at evidence:-

How can I prove the cargo was in good condition when it was shipped?

How can I prove it was in a damaged condition when discharged from the ship?

How can I prove what was done to the cargo during the survey process, what vouchers should be present in the file to cover any expenses incurred? For example, if the cargo was reconditioned are the vouchers available to prove the recoverability of charges occurred?

5. Who is the Claimant?

Although this may already appear to be obvious given that an insurance claim will have been paid to the person entitled to the claim under the insurance policy / certificate, this issue does need to be considered from a technical point of view.

Is the party who has title to sue the same as was entitled to receive the insurance monies?

In practice many claims may be negotiated without this issue being examined in detail, but it is important to be aware that this will need to be closely examined if proceedings or arbitration are to be commended.

Most cargos will be traded during their voyage, maybe several times. The claimant could be the shipper or the end receiver or some intermediate buyer. Suing in the wrong name can be fatal.

So an examination of the documents, the Contract of Sale (if any), the Commercial Sales Invoice, and the sale terms on it, the Bill of Lading to see how that document is made out and what endorsements may appear on the reverse, are all crucial.

Often the insured will have title and will have received the insurance monies and in return signed a Subrogation Form so, in this situation, there will not be a problem.

It can be more of an issue when there are bulk shipments with several buyers where perhaps cargo has been loaded in a vessel and not ascertained to the particular contracts.

If the transfer of title to the party who has been paid the insurance monies is not ‘clear cut’ then this is potentially an issue where some legal input will be required.

6. Negotiating a Settlement

Negotiations leading to a settlement will take place in any number of ways but as and when a settlement is at the point of being concluded certainty is imperative and for this to be the case the settlement has to be accurately recorded in writing.

This can take the form of a formally drafted and signed Settlement Agreement, an exchange of emails or other correspondence or Memorandum of a meeting signed by the parties.

These are the essentials:-

i. Who is paying whom? Who is to put up the money and make the payment? Is this to be the carriers themselves or the P&I Club or insurers? Is the payment to come direct or through, for example, their lawyers? If this is clearly set out then everybody knows where the funds will originate and there will not be any later disagreement.

ii. Who is the payment being made to? Again there could be several potential parties, the claimant, the insurers, or other representatives or lawyers. The banks work in their own mysterious ways. It is important that it is clear as to how the payment is to be made and to whom, and that that person is expecting to receive the monies.

iii. An accurate description of the claim that is being settled. It is important to both parties that the claim being settled is accurately described. What contractual liability is being resolved and what goods the settlement relates to. Accuracy in recording the correct Bill of Lading details, container numbers and description of the goods etc will avoid disputes later.

iv. How much is to be paid and in what currency the payment will be made? Different currencies may have been used during discussions. The precise figure in the correct currency needs to be recorded and if some currency exchange is required for payment to be made then the date of conversion and the rate to be used needs to be included in the agreement or exchange of correspondence.

v. When will the payment be made? Invariably a time for payment will be agreed i.e. within 14 or 21 days or by a specified date. If such a term is not agreed then there is the potential for further conflict if the paying party does not make payment in a timely manner. The problem here is, what a "timely manner" is, if no terms regarding the date of payment have been made

vi. Where / to whom the payment will be made. The method of payment and the place where payment will be delivered needs to be agreed. Most often it will be the payee's bank i.e. by electronic transfer of funds, in which case full and accurate bank details need to be supplied. The banking system will go wrong if you give it the opportunity to do so!

If payment is to be made by some bank draft or cheque then the agreement needs to clearly state how and where that is to be delivered to the receiving party.

vii. Fees If a claim is to be out sourced what fees will be charged? Any recovery made through an outside agent will be made net of their fees. Compare their terms. Our terms are 10% of recovery plus any disbursements incurred with your approval or we will run the case under our competitive hourly rates.

Don't pay too much!!

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