A SHIPPING LINE IN LIQUIDATION AN EVENT NOT ALWAYS UPPERMOST IN CARGO UNDERWRITERS' MINDS

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It must be difficult for the lay-person - and I include myself in this category - to fathom why it is that a shipping line, seemingly of some considerable worth and reputation, is put into liquidation. As far as underwriters are concerned, the liquidation of a carrier is not a particularly high ranking factor when considering most risks. In fact, it would be true to say that of all the perils which might prevent a vessel from concluding its voyage, liquidation would have to be very low down on the list.

Underwriters, like most shippers, may be forgiven for thinking that shipping lines are prosperous companies owning large ships or fleets, carrying valuable cargoes with freights invariably pre-paid or otherwise secured and - dare one mention at a venue such as this - frequently employing major firms of lawyers to represent their cases. Hardly the picture of down-and-out poverty or sailing close to the financial brink - as it were. We have heard how ocean carriers occasionally cry poor but even through depressed shipping years carriers have always seemed to be sufficiently resilient to sail through difficult times. They carried on - so to speak.

So, when underwriters and our insured clients find that they are left up a creek not only without the proverbial paddle but without the entire vessel and that a voyage has been discontinued, we must admit in all honesty that it does take us somewhat by surprise.

Surprises are, however, the stuff of an underwriter's trade. And so it was, when the fate of the ABC Container Line suddenly became clear to underwriters, cargo owners and intermediaries, that underwriters had to decide rather quickly on what their position was and how a liquidation was to be dealt with under the terms of their various covers. If the truth of the matter be known then it may be admitted that for many of us there was a large degree of uncertainty as to what to do and what to say.

But how many incidents?

Let's assume for the moment that underwriters' policies covering cargo interests onboard the vessels in question include say a JC93 Insolvency Extension Clause. For the purposes of accumulation, calculation or reinsurance treaty claims (stop loss or excess of loss covers) and maybe some deductibles, insurers would need to determine with their re-insurers and clients how a liquidation involving several ships is to be viewed ie. as one incident or as several separate incidents.

If there are six different vessels owned by, say, three ostensibly separate companies arrested at six different ports at six different times, could one reasonably view this as one event? However, is the arrest at the different locations to be deemed as the proximate cause or is that merely a remote cause or consequence of the single act of bankruptcy being instigated by the line's financiers? There are of course differing points of view and the answer hopefully is contained in the way the words are arranged around deductibles or treaties. We undertook some considerable research into this question and we were eventually referred to the 1967 Suez conflict where several vessels were blocked in the Canal because of one act of international conflict. I understand that the London and French markets interpreted the question of accumulation or number of incidents differently at that time -which is not surprising - but that is another story.

What is deemed to be covered?

Understandably, most ordinary shippers have very little idea as to which shipping line is actually carrying their goods. It makes little difference to them if it is the ABC or XYZ Container Line. There are of course some exceptions where insureds or cargo owners are very familiar with the

names of ships and the identity of carriers or sometimes they are kept informed of these matters by their freight forwarders.

Whatever the respective state of knowledge of the cargo owner, eventually - sometimes sooner than later - the cargo owner finds that his cargo is unlikely to arrive at the expected time and I guess that many cargo owners just accept this as a normal shipping delay if they do not know any better.

An underwriter's list of cargo exposures in such cases may literally trickle in or come in an unexpected flurry.

However, where cargo owners are working on a tighter time schedule as far as delivery of cargo goes or the product is perishable, we find that the enquiries to us are likely to be more immediate.

The enquiries in this regard are quite basic - but not necessarily immediately answerable- and normally go along the following lines:

1. What has happened?
2. What can be done to expedite delivery?
3. Am I covered? - and in the rare case of the liquidation,
4. What do you mean I've got to pay the freight twice?

This is where some of underwriter's real difficulties emerge. It is difficult to explain to most shippers or consignees that, having paid its freight, the shipping line is now unable to continue or conclude the voyage. Also, we regret to advise you, Mr cargo owner, that under the Institute Cargo Clauses (exclusion 4.6), insolvency of the carrier and losses that flow from that insolvency are, well, not exactly covered. Furthermore, if your broker has a broad form placing slip -including the

appropriate extensions- then some of your costs may well be recoverable. If not, well then, we will have to see what we can do.

"But it is normally thrown in for nothing!"

Once underwriters had an idea as to which cargoes they had an interest in and had fielded enquiries from brokers and cargo owners, it quickly became apparent to all that some risks included the extension and, for no particular reason, others did not.

This exposure resulted in some shall we say "fancy foot-work" by some of those without the extensions to quickly attempt to have it inserted retrospectively wherever possible.

The reason, of course, being that if underwriters threw in this extension to anyone who asked for it entirely *gratis,* why then should it then be denied to any parties who had failed to include it only because they were unfamiliar with its existence or had just never considered it ?

Market Opportunity Lost?

Partly because of its infrequent use, the JC93 Insolvency Extension Clause and other similar extensions have rarely been tested the minds of underwriters and intermediaries as to exactly how this extension is to be applied.

Underwriters and other interested parties including solicitors called a meeting in Sydney in March 1996 to ventilate these issues. In my view it was a real opportunity for underwriters to combine their talents to formulate a joint response to all of our market on what was covered and what was not.

There seemed to be sufficient work for several committees. However, for a number of good reasons (read commercial pressures and politics), this unfortunately never came to pass. Suffice to say that commercial considerations and encouragement from intermediaries determined the fate of some claims.

Alas, not unlike the discharge operations of the arrested vessels, there was not to be any uniformity in our market's response to the situation - which is a pity.

The Extension Clauses - What do they mean?

Once again the draftsmen have not been particularly helpful. The extensions use words such as "all reasonable, practicable and prudent measures were taken", and "... to establish the financial reliability...".

It sounds very much like the extension is insisting that some act or action must have been undertaken to "establish" financial reliability.

The word "all" is used as opposed to "some" or "a" when referring to the measures which need to be taken.

Who is to decide the reasonableness of such "measures"?

How is it ever possible for the ordinary shipper to ever establish the financial reliability of a carrier? It just seems to be a nonsense.

So, if we do not intend shippers to conduct due diligence tests with each cargo booking before the Insolvency Extension can "kick in" then why do we not say what we mean? Words like "If an insolvency is entirely fortuitous to the insured then ..." I would suggest be an improvement over the negative test we have at the moment.-even if it only needs to be applied once in a blue moon.

And what of claims in respect of cargo damage ?

Fortunately, most of the claims we were called upon to consider involved re-freightment costs which are clearly covered by the extensions where they applied.

There were however a few interesting conundrums where perishable products had diminished their use-by dates to unacceptable levels which would not have occurred but for the delay. The delay had come about as a direct consequence of the insolvency. While the extension clause brought these claims back in as an insured peril, there was however the application of the delay exclusion to consider which reads "excluding loss or damage or expense proximately caused by delay, even though the delay may be caused by a risk insured against ...".

Then there were further cases where there was damage caused by combinations of delay and heating/sweating/wetting all of which may not have occurred but for the delay. Your classic hen-and-chicken circuitous argument with no clear assistance from the words in the clauses.

Who Pays for Demurrage, Sue and Labour or Rebirthing Costs etc?

In short, underwriters do - providing the appropriate extension is in place. But what if another cargo is preventing ours from being discharged? Are underwriters expected to finance every permutation of expense caused by delay upon delay? Probably they are.

But what if our cargo owner is insouciant as regards the fate of his or shipment or is slow in getting the cargo transshipped or does not co-operate which the co-ordinating solicitors - how do underwriters measure the extent of their prejudice? There are obviously no easy answers to much of this and each case needs to be played on its merits.

And in Conclusion.

Apart from whingeing about clauses and words which don't quite work and do not assist the underwriter when these rare incidents occur, what are underwriters left to ponder now that the dust has settled and the bills have been paid?

It all seems so remote and far away- like a ship slipping slowly over a faraway horizon. Talk of a recovery attempt via the unsecured debtors route seems like a prospect too ghastly to contemplate.

But if these liquidations are to become more common place (and there is no evidence to suggest that they will - but who knows?) then underwriters would have to seriously consider defining exactly what the cover is that they are "throwing in for gratis" and how much longer they can afford to do so in an oftentimes softening market with ever widening covers and ever dwindling premiums.

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