Introduction

The purpose of this paper is to set out in practical terms the most important legal issues which will need to be considered in the immediate aftermath of a maritime accident. Certain of these issues will need to be dealt with straightaway. Others, such as forum shopping, limitation and security are equally important, but will not be a priority on day one. Nonetheless, we have included sections on these topics because one needs to be alive to them when dealing with the urgent fall out straight after a casualty.

It is important to distinguish the practical aspects to casualty management from the legal aspects. The practical steps will focus on limiting the physical losses, preserving evidence, and dealing with the media to ensure that the owners’ name in the marketplace is protected. we do not intend to cover these aspects although they are crucial to the casualty management operation. The most important legal functions relate to minimising exposure and maximising recovery prospects. Those managing the casualty need to make a rapid assessment of the various potential claims, some of which will overlap and/or conflict with each other. Many parties will be involved, and rapid court applications may be necessary, for example to interview the crew before they disappear from the scene. The nature of these steps will vary depending on which side you are on.

What we propose to do is firstly set out a “nightmare” scenario, which is based on a blend of a number of actual matters we have dealt with in the past. Then we will set out some initial response factors which should be put in motion in such an eventuality on behalf of the owners involved and their insurers. Then we shall set out the various different insurances involved and the different insurers who will have an interest in the matter. This leads on to potential conflicts of interest which can arise, for example between owners and their insurers where there has been a breach of the policy such as unseaworthinesss in the case of the hull insurance. Then we shall go through the various different types of claim which can arise against owners and/or in relation to recovery measures from third parties such as the owners.
of a colliding vessel. These types of claim are as follows: contractual claims; tortious claims (including collision claims and pollutions claims); criminal proceedings (against the vessel’s crew); and salvage claims on behalf of salvors.

Finally we shall deal with forum shopping, limitation and security. The latter are issues which will need to be addressed with a great deal of care at a later stage, but they should also be borne in mind in the early stages of the case management process.

A “nightmare” scenario

This nightmare scenario is difficult to manage not only at a practical level, but also at a legal level, partly because of the conflicting potential jurisdictions involved and partly because of the different claims and counterclaims, and the number of different parties involved.

The Maltese-flagged oil tanker M.V. “NIGHTMARE” is managed in Greece on behalf of Maltese owned registered Owners who are beneficially owned by a Bermudan company which has a branch in Germany. There is one sister vessel M.V. which is owned by the same Bermudan company, and this is the demise-chartered to an associated Swiss company. The “NIGHTMARE” was time chartered to a Danish company, who have sub-voyaged chartered the vessel to a Brazilian company for one voyage from Brazil to Singapore, carrying a full cargo of crude oil. Singapore is a 1976 Limitation Convention jurisdiction. Brazil has the little known 1924 Limitation Convention, limiting liability in some circumstances to the value of the vessel after the casualty. Further, in Brazil, there is no Hague/Hague-Visby or Hamburg package/weight limitation and very few defences for Owners. Various versions of the Bill of Lading purport to incorporate an (unspecified) charterparty whilst others incorporate the terms of the time charter. The time charter contains a New York Arbitration clause, and the voyage charter contains an English Arbitration clause. On sailing from the Brazilian port, the “NIGHTMARE” collides with a local tug, the “BAD DREAM” which sinks, with all hands being lost, holing the tanker which explodes causing significant damage to the vessel, a likely total loss of the cargo (which is on fire) and pollution affecting fishing off the Brazilian coast. One new member from the “NIGHTMARE” dies and the others are rescued. The Master of the “NIGHTMARE” is an alcoholic and was drunk. The hull insurers of the “NIGHTMARE” are in Japan, France and London. The local Courts in both Brazil are notoriously slow and problematic.
As indicated, this type of scenario creates a large number or headaches, not least in relation to the number of potential jurisdictions involved, each with their different advantages/disadvantages and different limitation regimes.

As to the various parties likely to be involved in casualty such as this, these would include the following: the owners/managers of both the tanker and the tug, both sets of crew and their families, the P&I Club of the tanker, the hull insurers of both vessels, local businesses (including hotels and fishing interests), the cargo interests (B/L holders and/or voyage charterers and the cargo insurers), time charterers, the salvors, and the local authorities. All of these parties might be legally represented, although commonly owners/P&I/hull insurers in respect of each vessel will be jointly represented (see ‘Conflicts of Interest’ section below).

Initial response

Assuming we were acting for the owners of the “NIGHTMARE” on behalf of the P&I Club, there are a number of immediate steps which would need to be taken, as in the initial stages of any large casualty, including pollution incidents.

Firstly, we would receive a phone call from the Club who would give me the basic details and parties involved, etc. We would check with our case register and ascertain that we were not representing any other party. Then we would immediately call the client back to accept instructions and to discuss what needed to be done in greater detail. The following main points might be considered:

1. Contacts – who were the principal parties and had they been notified? The Club might confirm that the owners and managers had contacted their hull brokers and would provide me with home and contact details, mobile and fax numbers.

2. Were the crew being looked after? We would ascertain that any crew who needed medical assistance had received this and were being put up at a hotel. In addition arrangements would be made in respect of the perished crew member, for his body to be repatriated, etc.

3. Pollution – had there been pollution? Clearly there had but it would be too early to estimate how much oil had been spilt. Nonetheless we would recommend that ITOPF (experts who deal with pollution incidents on behalf of the International Oil
Pollution Compensation Funds) should be instructed to attend and monitor the spill as soon as possible, if appropriate.

4. Salvage – what was being done to save the vessel? Establishing whether an LOF had been agreed with the salvors and that the salvors are taking all possible steps to fight the fire on board the vessel.

5. Inquiries – it is likely that local administrative inquiries would be held. We would recommend sending one of our master mariners or an independent investigator to assist the crew during those investigations and at the same time to try to find out the causes of the explosion and fire. We would also appoint local representatives and lawyers.

6. Causation – we would recommend that our investigator/master mariner should be accompanied by a fire expert, together with any other appropriate surveyors in order to establish causation. Documents will need to be gathered and witness statements will need to be taken through interviews. Confidentiality and legal privilege will be vital issues here, but these are more relevant to investigation than casualty management.

7. Our investigator would then travel out to the casualty as quickly as possible to join up with owners’ emergency response team. At that point, we would set up a conference call with all the essential parties (the Club, hull brokers, hull underwriters, managers of the vessel, etc) on a daily basis in order to review the situation over the previous 24 hours, agreeing on future action to be taken, and to monitor the owners’ emergency response plan that had been put into effect. Thereafter, this conference call could be convened at the same time each day in order to make sure that everyone was fully aware of what was going on and to make sure that the parties did not duplicate or trip up over each other.

These are the urgent initial response actions which could typically take place in a case such as this. We shall now turn to insurance issues and potential for conflicts of interest, prior to discussing the types of claim which will typically arise in similar cases, and how one deals with them in the early stages.
**Insurance/Conflicts of Interests**

It will always be vital for the solicitor to be clear from day one as to whom he is acting for (eg. owners, or their insurers, in which case which insurer) in case there is a conflict of interest, commonly where there are potential insurance coverage issues and the insurer might be considering pulling cover.

If the accident involves a collision then usually there is a split of liability (say, three fourths/one fourth) under the running down clause which means that both the shipowners’ hull underwriters and their P&I Club will have an interest. The same solicitor is normally instructed to act for all of the parties in a collision accident and will continue to do so throughout unless he discovers a potential conflict of interest between his respective clients. At that stage he should write to each of his clients advising them that they should seek separate representation but not disclosing to them what he has discovered. Unless, as often happens, the clients agree that the solicitor can continue to act for one of them, the involvement of the originally instructed solicitor should come to an end.

If the accident involves, say, the total loss of a vessel following a sinking at sea with or without the involvement of a fire, the concerned underwriters may decide to have separate representation from the outset as they may suspect that there may be coverage issues.

The Marine Insurance Act 1906 is the principal act governing policies of marine insurance and in Section 17 it declares that a contract of marine insurance is a contract based upon the utmost good faith and, if this is not observed by either of the parties, then the contract may be avoided by the other party. By Section 18 the assured must disclose to the insurer every material circumstance which is known to him and if he fails to make such disclosure the insurer may avoid the contract. In the majority of litigated disputes concerning insurance coverage issues there is an allegation of non-disclosure. Section 39 relates to warranties of seaworthiness of the ship, and in a voyage policy (e.g. hull policy granted for one voyage only) there is an implied warranty that at commencement of the voyage the ship is seaworthy. If the vessel is not seaworthy, that is a breach of warranty and under English law insurers are discharged from liability from the date of the breach, whether or not the breach was causative of loss. There is no such implied warranty in a time policy (the most common type of hull policy, for a period) that the ship shall be seaworthy at any stage but (also under s.39) where, with the privity (knowledge) of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness. If the hull underwriter declines to pay the claim then the shipowner would normally turn to his
P&I Club for support in pursuing the claim against the hull underwriters. However, if the P&I Club has also raised coverage issues then this avenue will not be open to the shipowner.

In circumstances where the parties have decided to be separately represented from the outset, problems can arise unless the collection of witness evidence is properly controlled. All parties will require access to surviving crew members in order to take their evidence. In order to avoid later disputes as to what the witnesses actually said, it is probably best to agree on a joint interview of the witnesses by all parties with the questions put to the witnesses and the answers given by them being recorded verbatim. Whilst this does not make for the most readable witness statements, it will overcome later arguments between the parties as to the actual evidence. If each of the parties merely makes notes of what the witnesses have said, then transforming these notes into agreed witness statements will be almost impossible as each party will want to put his own interpretation of the evidence into the agreed statement. The taking of witness statements is however more of an investigation issue which is the subject of another paper.

**Contractual Claims**

It will be essential at an early stage to obtain copies of all contracts of carriage relevant to the voyage in question. Essentially there are three types of contractual documents which are likely to be in existence at any particular time, each of which will give rise to different claims and liabilities. Firstly, there are the bills of lading, assuming the vessel is loaded. Secondly, there may be a voyage charter in existence; and thirdly, there may be a time charter. There may indeed be chains of time charters and voyage charters, of which the owner may not be aware. However, the owners should at least have copies of, and be aware of, those charters to which they are a party. There could be many bills of lading in existence, for example in the case of a casualty involving a container ship. This is less likely in the case of a tanker.

Claims brought against the shipowner under the bill of lading will be for cargo damage or loss, and such claims will generally be brought by the receivers and/or their cargo insurers. Claims brought against the shipowner under the voyage charter may again be for cargo damage, and often the terms of a voyage charter will be incorporated into the bill of lading. Claims brought against the shipowner under the time charter would usually be for delay and return of hire.
The shipowner may have a counterclaim or claim on his own behalf against cargo interests if, for example, it could be argued that the cargo itself had been the cause of the accident. This might occur for example where the cargo is misdescribed, in the case of dry cargo, where this leads to a fire or explosion due to the stowage position allocated by owners relying on the description in the bill of lading. Claims may be brought against the time charterer where the charterers have in breach of the charter ordered the vessel to an unsafe port, or have failed to stow the cargo properly, where that is the charterer’s responsibility. Likewise, claims may be brought against the voyage charterer on similar grounds.

It may take some time for owners’ solicitor to obtain access to the contractual documents relating to the voyage. In particular, it may take months before the bills of lading are available, and these will usually be the most crucial contractual documents relating to any cargo claims. This is especially the case in those trades where the bills of lading are usually charterers’ bills rather than owners’ bills, such as in the container trades. Further, there may be cases where there are multiple bills of lading, with different groups of these incorporating different charter parties and being subject to different law and jurisdiction provisions.

Jurisdiction is a crucial issue which will always arise in the case of a casualty situation (see ‘Forum Shopping’ below). This is mainly because different liability regimes and in particular different limitation regimes will apply depending on the jurisdiction where claims are dealt with (see ‘Limitation’ below). Owners will clearly want claims dealt with where they can limit their liability as much as possible. On the other hand, cargo interests (for example) will want to sue owners where they can recover as much as possible, i.e. where owners can limit their liability as little as possible.

Limitation can refer to package limits under the Hague/Hague-Visby and Hamburg Rules. This will be relevant to cargo claims in particular, as one of these regimes will usually be incorporated into the B/L. For the purposes of this talk we will refer mainly to tonnage limitation, which will often come into play in the relatively early stages of a large casualty.

**Limitation**

We will discuss vessel (or tonnage) limitation at this stage in the context of contractual claims, but these comments on limitation actually apply to many monetary claims against owners, including “tortious claims” such as collision and personal injury. It is important to note, however, that certain types of claim are excluded from standard tonnage limitation (the 1976 Limitation Convention). The principal exclusions are claims for salvage (by salvors
against owners of salved property), claims for oil pollution damage (although these are limited separately by the Civil Liability Conventions), general average and nuclear damage. Also, the position with regard to wreck removal is not universally subject to the 1976 Limitation Convention.

Limitation is one of the main battlegrounds in relation to forum shopping, although there are other reasons why each of the parties may favour different jurisdictions for their claims. We cover those aspects below.

With a large claim it is perfectly conceivable that the shipowner may wish to limit his liability. This may equally be the case where there has been a collision and the colliding vessel’s shipowner may also be the paying party. In such a case, either shipowner may seek to limit.

Where an owner is entitled to rely on limitation under one of the conventions or under the national law of a relevant jurisdiction, he can try to assert this right in two ways. Firstly, the owner may be entitled to raise limitation as a defence to any particular claim as and when it is pursued. Alternatively, where there is a dispute as to jurisdiction, the owner will make an application to set up a limitation fund in the jurisdiction of his choice, the purpose of which is to force all other claimants to come to that jurisdiction and sue owners there. This can lead to the claimants arguing that the jurisdiction selected by owners is not the appropriate forum, on the basis of “forum non-conveniens”.

There are various vessel limitation systems in existence. One system is a) based on the value of the vessel at the time of the loss. There are relatively few ‘value limit’ countries, but they include the USA, where the shipowners’ liability could thus be zero if the vessel was sunk before the end of the voyage. There is, however, an exception for loss of life and personal injury claims. Most countries however will have signed up to one of the international conventions, in particular b) the 1957 Convention of Limitation of Liability for Maritime Claims or its successor c) the 1976 Limitation Convention. Some countries will have their own limitation systems, or will have no limitation system at all. We will not go into the actual limits within this paper, but for the Conventions these are calculated based on the tonnage of the vessel. The 1976 limits are significantly higher than the 1957 limits. There is also the 1996 Protocol to the 1976 Convention which further increases the relevant limitation sums, and this has been signed up to by some jurisdictions.
The main difference between the 1957 and 1976 Conventions, apart from the smaller limit per tonnage in the 1957 Convention, is the fact that the test for breaking limit is considered to be much more difficult under the 1976 Convention.

The 1957 Convention gives the shipowner the right to limit “unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner” (1957 Convention Article 1(1)). Thus if the owner knew of the causative fault giving rise to the incident, then the right to limit is lost.

This can be contrasted with the position under the 1976 Convention where the shipowner has an absolute right to limit unless the other party proves “the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result” (76 Convention Article 4). It can be seen that mere knowledge is not enough for the purposes of the 1976 Convention; one has to be either reckless or have intended for the incident to occur.

Therefore, on the one hand, one might want to gamble for the lower 1957 limit if one were sure that the owner did not know of the causative factor, or alternatively one might want to go for the higher 1976 limit which is more difficult to break.

A claimant will often seek English jurisdiction in order to apply the 1976 Limitation Convention with its higher limit of liability, or an owner will want it as this limit is harder to break. This happened, for example, in Caspian v Bouygues [1997] 2 Lloyd’s Rep 507. The owners and time charterers of a tug that lost its barge under tow in Cape Town commenced limitation proceedings in England rather than South Africa which applied the 1957 Convention, because the 1976 Limitation Convention is more difficult to break than the 1957 Convention. The Court held that England was the proper jurisdiction for the limitation action despite South Africa being the natural forum for the liability issues. The Court of Appeal confirmed the first instance decision that there was nothing unusual in determining a limitation action at a forum different from that of liability. In other words, liability could be determined in South Africa with quantum being determined in England.

Knowledge of the different regimes is therefore crucial and can lead to decisions needing to be taken at a very early stage as to where any subsequent litigation might take place in order to best protect the position and utilise the “most favourable” limitation proceedings available, where there is a choice. We consider forum shopping further below.
**Tortious Claims**

In addition to the contractual claims which may arise out of an accident, there may also be claims of a tortious nature. The most obvious examples in a casualty scenario would be collision claims, personal injury claims, and pollution claims.

If the accident concerns a **collision**, then there may well be claims based upon the negligent navigation of the vessel that led to that collision.

The standard of the navigation will be judged on the compliance or non-compliance with the Convention on International Regulations for Preventing Collisions at Sea of 1972 by which all ships are meant to abide – these regulations apply internationally to all vessels at sea, as the Convention has been ratified by most countries. If all ships followed the regulations to the letter then arguably no ships should ever collide. However, ships are navigated by humans and human error will never be eliminated. Further, commercial pressures are ever-present and, for example, whilst the international regulations lay down that every vessel must at all times proceed at a safe speed, the pressure to maintain schedules means that this requirement is often overlooked even when visibility is severely restricted. The operation of the regulations is technical and outside the scope of this paper, but the basic principle is to “drive on the right”.

The basic principle for collision claims, as originally established in the 1910 Collision Convention, is that liability is apportioned according to blame, i.e. contributory negligence applies. The Court may thus decide that liability should be apportioned on an 80/20 basis. In that case the party 80% to blame (“vessel A”) will have to bear 80% of “vessel B”’s loss, whereas 20% of vessel A’s loss will be borne by vessel B. In practice the claims and counter-claims will be netted off against each other. It may well be that vessel B, which is only 20% to blame could end up being the net payer of damages to vessel A, if vessel A suffered more damage.

Whilst the jurisdiction to govern contractual claims is normally set out in the contract, this is obviously not the case with tortious claims. However, often the parties can agree jurisdiction in some neutral or acceptable forum and English law and jurisdiction is often deemed to be acceptable. Where claims are very large, however, limitation issues may come into play and then the claimant and the defendant will be looking to try to impose a jurisdiction which is most favourable to their opposite interests.
To successfully manage an accident, such as a collision, for the shipowners and their underwriters it is essential that the evidence of the factual witnesses is taken as soon as possible and by somebody who is well-versed in the collision regulations, such as a legally qualified Master Mariner. The number of factual witnesses in a collision case is likely to be small and limited to the bridge and engine room watch keeping teams which may include the Master if for example the collision occurred in reduced visibility. The human memory can play tricks and there is a tendency to forget certain events whilst exaggerating others. The longer the delay in obtaining the evidence, the less reliable will the memory of the factual witnesses be. Generally speaking, once the factual evidence has been obtained, including all the documentary and instrument data, then it is necessary to instruct a suitably qualified independent expert witness to produce a report and to express a view as to the quality of the navigation of both colliding vessels.

It is worth mentioning personal injury claims in passing. If crew are injured or killed in an accident, they or their dependants will claim against the responsible shipowner and the respective P&I Club will usually deal with the claim. Some jurisdictions award far higher damages than others, and wherever possible claimants will try to bring an action in the USA.

Collision claims and personal injury claims will, together with cargo claims, all fall within the liability which owners can limit under the Limitation Conventions.

If the accident involves an oil tanker and oil pollution then the owners of that tanker face strict liability for damage so caused (with few exceptions) under the CLC Conventions, where these apply (the USA has its own even stricter regime called OPA 1990). They can avoid liability if they can prove that the pollution was caused by an act of war or serious natural disaster or if it was wholly caused by the act or omission done with intent to cause damage by a third party. They could also claim exemption if the pollution is wholly caused by the negligence of public authorities in maintaining lights or other navigational aids but it may be very difficult to prove that any such negligence was wholly causative and not contributed to by the negligent navigation of the vessel itself. So, for example, the owners of the “LIMBURG”, which was subject to a terrorist attack in 2002, were able to claim exemption from liability because the damage was wholly caused by a third party with the intention of causing that damage.

The CLC Conventions of 1969 and 1992 also operate in shipowners’ (and their insurers’) favour as a mechanism for the limitation of liability for pollution claims. Typical claims will include claims eg. from local authorities for the expense involved in
containment/recovery/dispersal and clean-up, environmental claims, and claims for pure economic loss brought by fishing interests, hotel/tourism interests, marina owners, shipyards, and even power stations and desalination plants. If such claims together exceed the CLC limit, further compensation might be available through the Fund Conventions (1992 and, prior to that, 1971) where these apply.

Whereas strict liability for tanker owners arises under the Civil Liability Conventions, many coastal states have been quick to enact their own rules against polluters and these are not restricted to the owners of oil tankers. However, no doubt those states would argue that their rules are directed against those who cause deliberate acts of pollution rather than accidental acts, even though the boundary between the two may be very hazy.

The desire of coastal states to protect their coastlines can backfire with disastrous results. The case of the "PRESTIGE" immediately springs to mind. In that case an admittedly ageing tanker suffered serious structural failure while sailing off the Spanish coast in adverse weather conditions. Salvage assistance was sought and the advice of the professional salvors was that the vessel should be taken into a place of refuge where she would be sheltered from the weather and her cargo could be transhipped. Had their advice been heeded then the Spanish authorities would have authorised her movement to a suitable harbour or bay where any pollution could have been easily controlled and thus pollution damage kept to a bare minimum. However, politicians often do not have the time to consider practicalities but always seem to have a knee-jerk reaction to protect their perceived voting base. The Spanish authorities ordered the PRESTIGE to be towed away from the coast even though they must have realised that she could not survive in the extreme weather conditions and she did not, sinking and creating massive oil pollution over more than one country’s coastline.

Criminal Proceedings

The subject of criminalisation of seafarers has caused intense debate over the last few years both internationally and locally. The desire in some countries to be seen to be prosecuting someone whenever there is a marine accident in their territorial waters usually means that it is the master of the vessel who lands up in court, whether or not he is actually to blame for the accident, because he is the easiest person to prosecute. Many experienced commentators have warned that this tendency is likely to adversely impact upon the recruitment and retention of qualified seamen at a time when there is already a global shortage of such seamen.
In many jurisdictions, local inquiries may end up with minor convictions involving a modest fine for e.g. the master, but these can have far-reaching consequences and be persuasive in respect of liability within any civil proceedings.

If a marine accident occurs in United Kingdom territorial waters then in all probability it will be investigated by the Marine Accident Investigation Branch ("MAIB"). The aim of any MAIB investigation is to try to establish the cause of any marine accident and to give guidance as to how such accidents may be prevented in the future. The MAIB is not interested in prosecuting wrongdoers and evidence given to them is confidential. The prosecuting role falls to the Maritime & Coastguard Agency ("MCA") and they are not slow to exercise their powers.

The Merchant Shipping Act 1995 creates a number of statutory offences for which the master of a vessel can be arrested:-

- **Section 58 - Conduct endangering ships, structures or individuals**

  Under this section it is an offence for any person to do any act which causes or is likely to cause the loss or destruction of or serious damage to his ship or his ship’s equipment or the loss or destruction of or serious damage to any other ship or structure or the death of or serious injury to any person. It is also an offence for someone to omit to do anything required to preserve his ship or its equipment from being lost, destroyed or seriously damaged or to preserve any person on board his ship from death or serious injury or to prevent his ship from causing the loss or destruction of or serious damage to any other ship or any structure or the death or serious injury to any person not on board his ship. To commit an offence the act or omission must be deliberate or amount to a breach or neglect of duty or the master or seaman in question must have been under the influence of drink or drugs at the time of the act or omission. A person found guilty on summary conviction can be liable to a fine of up to £5,000, whilst a person convicted on indictment may be imprisoned for up to two years or fined or both.

- **Section 77 – Official logbooks**

  An official log book must be kept on board every United Kingdom ship and regulations made under the act specify what must be entered into the official logbook and to who and in what circumstances the official logbook must be produced. Contravention of the regulations is an
offence punishable by a fine not exceeding £500. However, anyone intentionally destroying, mutilating or rendering illegible any entry in an official logbook shall on summary conviction be liable to a fine not exceeding £2,500.

• **Section 91 – Report of dangers to navigation**

It is the duty of the master of any UK ship to report dangers of navigation to ships and authorities in the vicinity and failure to carry out this duty will render the master liable to a fine of up to £2,500.

• **Section 92 – Duty of ship to assist the other in case of collision**

This section imposes a duty upon the master of each ship, insofar as it can be carried out without danger to his own ship, to render all possible assistance to the master and crew of the other ship as may be necessary to save them from danger and to remain in the vicinity of the other ship until he has ascertained that no further assistance is required. It is also a duty of the master to exchange with the master of the other ship details of the name of his ship, the port from which it had left and the port for which it is bound. Failure to carry out his duty to render assistance can make the master on summary conviction liable to a fine not exceeding £50,000 or imprisonment for up to six months or both. Whilst on conviction on indictment he can be fined or imprisoned for up to two years or both.

• **Section 98 – Owner and master liable in respect of dangerously unsafe ship**

If a ship which is in any port in the United Kingdom or is a United Kingdom ship in any other port and that ship is deemed to be dangerously unsafe then both the master and the owner of the ship shall be guilty of an offence. Whilst there are limited statutory defences, a person found guilty shall on summary conviction be liable to a fine not exceeding £50,000 and on conviction on indictment to imprisonment for a term not exceeding two years or a fine or both.

• **Section 131 – Discharge of oil from ships into certain United Kingdom waters**

Unless a master can show that the oil was discharged for the purpose of securing the safety of any ship, preventing damage to any ship or cargo or saving life then he will be guilty of an offence if he discharges oil into United Kingdom waters. On summary conviction he can expect a fine not exceeding £250,000.
• **Section 136 – Duty to report discharge of oil into waters of harbours**

This section imposes a duty upon the master to report any discharge of oil from a ship in any United Kingdom harbour to the harbour master or harbour authority. If he fails to do so, he shall be liable to a fine not exceeding £5,000 on summary conviction.

• **Breach of the Collision Regulations**

The Collision Regulations of Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1996 provide that the master or officer of the watch responsible for the conduct of the vessel at the relevant time shall be liable of an offence if he contravenes the collision regulations unless he can show that he took all reasonable steps to avoid the offence. If found guilty that person can be fined and/or jailed for up to two years. If the offence concerns failure to comply with the rules of a traffic separation scheme then the fine will be up to a maximum of £50,000.

Whilst the above criminal offences only apply in the UK, they give an idea of the type of criminal liability that can fall on seafarers in any jurisdiction, which can in turn have consequences for liability in the tortious and contractual claims.

**Salvage**

Salvage claims are really a form of contractual claim. The salvor comes onto the scene and carries out a service, usually on agreed terms, involving the saving of the vessel and cargo. Usually there will be a written contract. The basic principle is that the salvor will be awarded a proportion of the salved values of the vessel, cargo and any other goods saved, such as bunkers, usually on a ‘no cure no pay’ basis, although being compensated in any event for expenses involved in preventing pollution/environmental damage. The amount of the salvage ‘reward’ will depend on the value of the vessel/cargo salved and the amount of danger, the element of pollution prevention etc. This amount will then be apportioned between the hull and cargo insurers, in proportion to the values of their interests which have been salved.

Probably the most widely used salvage contract worldwide is Lloyd's Open Form which, despite various amendments, remained until relatively recently a “no cure – no pay” contract. Therefore under the contract a salvor could expend a great deal of time and effort but if he
produced no tangible result in the salving of either the vessel or her cargo he was entitled to no recompense in the form of a salvage award under the contract.

Professional salvors invest large amounts of money in both personnel and equipment and it had long been felt that the “no cure – no pay” contract offered them little incentive to involve themselves in difficult casualties. In 1989 the international community gave birth to the Salvage Convention which came into international force in July 1996 with the accession of Italy. The convention effectively codifies the law of salvage. Article 13 specifically recognised that the salvor should have responsibilities towards the environment and, where the actions undertaken by him produced environmental benefits, he should be rewarded for this by way of an enhanced reward out of the ordinary salvage fund. The enhanced award under Article 13 would therefore be borne by the salved vessel’s hull underwriters, together with the cargo underwriters if the vessel was loaded at the time, with each paying in proportion to the values of their insured interests. However, the Salvage Convention went further in Article 14 by providing that the salvor should be able to recoup its expenses where it had been involved in a salvage operation involving a risk to the environment, even where pollution had not in fact been avoided. The compensation under Article 14 would only arise where the salvor’s expenses had not been met by the salvage award under Article 13. This could be because the property actually salved was of insufficient value to justify a salvage award which covered the salvor’s expenses or indeed where no property had actually been salved and thus there could be no award under Article 13. The funding of an Article 14 award rests solely on the shipowner but in practice upon his P&I insurers rather than his hull underwriters.

For all the good intentions of the Salvage Convention and in particular of Article 14 of that convention problems soon arose in its interpretation. Salvage arbitrators had to grapple with coming to a fair rate for the salvor’s expenses and the difficulties facing them led to the case of the “NAGASAKI SPIRIT” going all the way to the House of Lords. Nobody was happy with the situation and in 1999 the SCOPIC clause was born following agreement between the international group of P&I Clubs and salvors. The SCOPIC clause is designed to be a voluntary addendum to the Lloyd’s Open Form salvage contract and when it is invoked it replaces the provisions of Article 14 of the Salvage Convention. Under the SCOPIC clause there are agreed rates for salvage equipment and personnel and the clause also provides for a shipowner’s salvage representative (“SOSREP”) to attend on board during the salvage and to be consulted by the salvors in decision-making. Prior to SCOPIC once a salvage agreement had been entered into, although the master and crew of the casualty had to render the salvors every assistance, they had no input into the salvage operations. From a
salvage management point of view their role was limited to keeping a careful record of all stages of the salvage services including the weather conditions and perceived dangers. Now, when SCOPIC is invoked and a SOSREP appointed, usually by the owner’s P&I Club, the owners through the SOSREP can influence how the services are carried out even though the ultimate decision-making still rests with the salvor. Further, the SOSREP is obliged to produce daily reports of the salvage services for the concerned parties.

Legal involvement in salvage services does not usually arise until those services are nearing completion. It is then that the question of security for the salvor’s claims arises and the question as to whether the salvors have redelivered the vessel to a place of safety. As to the quantum of security, frequently this will be in dispute, but in practical terms it is usual for the security to be provided as demanded by the salvor but to be provided under protest as to the amount. Attempts can then be made to reduce the amount of the security if it is considered excessive and even if these fail, the arbitrator has power to penalise the salvors if, in his opinion, the security demanded was excessive. As to the place of safety this is normally agreed between the salvors and ship owners at the outset. Subsequently events may render this agreement ineffective. Several coastal states erect such hurdles to entry to one of their ports that re-delivery at one of those ports becomes effectively impossible. Thus salvors may be forced to tow a casualty vast distances before they can find a place of safety where they can re-deliver the casualty.

The LOF form contains a London arbitration clause, so in many cases salvage claims will be sorted out after the event through the parties’ representatives here, although it is far rarer for these disputes to go to a hearing these days than previously.

**Forum Shopping**

‘Forum shopping’ means a party choosing a jurisdiction which is the most favourable for his claim (or defences if he is the defendant) and which will best advance his claim/defences, where the proper jurisdiction is arguable.

At the outset of a casualty where there are a number of different claims and various different possible jurisdictions, such as in the above “nightmare” scenario, it will be necessary to compare the relative merits of each relevant jurisdiction. Much of this problem can usually be removed by agreeing law and jurisdiction at the time of agreeing security, but this might not always be possible.
We shall now run through a number of considerations which should be taken into account by claimants and defendants alike when weighing up potential competing jurisdictions. Most of these points will apply generally to any type of claim relating to shipowners' liabilities.

1. **Security** - the need to ensure the claim is secured is a major concern for claimants when pursuing a cargo (or e.g. collision) claim. In some jurisdictions, the arrest of a vessel or attachment of assets is only possible where the claimant also commits himself to proceedings on the merits in that jurisdiction. In other jurisdictions the arrest of a vessel or attachment of assets may be granted purely as security for proceedings on the merits elsewhere. Often the discussions of security wordings provide both parties with the opportunity to agree a specified law and jurisdiction for the underlying claim. See further on ‘Security’ below.

2. **Hague, Hague Visby or Hamburg Rules** - a cargo claimant may be in a substantially better position e.g. under the Hague Visby Rules as opposed to the Hague Rules from the point of view of package/weight limitation or under the Hamburg Rules from the point of view of the harsher liability regime against the ship. Also, under the Hamburg Rules, losses arising from delay are expressly recoverable (up to 2.5 times the freight), whereas under the Hague-Visby Rules, from an English law perspective, the rules of remoteness and foreseeability will apply. Depending on the jurisdiction which applies to the claim, the Hague/Hague-Visby/Hamburg rules may be automatically applicable by statute, irrespective of any Clause Paramount etc. incorporating any particular liability regime.

3. **Ship's Limitation** – See above. If the claim is large (principally therefore in practice a total loss or casualty situation) it is vital to consider what regime will apply to limit the vessel's overall liability, usually according to the vessel's tonnage but in some jurisdictions according to its value. This is usually the most important forum shopping issue for owners in a large casualty.

4. **Recoverability of damages/Different merits** - some foreign jurisdictions will apply their own law, even where another law is specified in the contract. This can lead to situations where it is necessary to weigh up where the claim is more likely to succeed on the merits. Likewise, more may be recoverable by way of damages in some jurisdictions than in others. For example, "moral damages" (for loss of reputation etc.) are available in some Latin American countries, and punitive damages are available in the USA, on top of any damages designed to put the claimant back into
the same position as if the contract had been performed without a breach (or as if the tort had not occurred).

5. **Evidence and Discovery Procedures** - the approach to evidence generally will vary from jurisdiction to jurisdiction. For example, in many Latin American jurisdictions a party is not obliged to produce evidence which goes against his case. The other extreme is perhaps England with its very wide disclosure obligations, subject to privilege. Specifically, there may also for instance be the possibility of obtaining an order for a judicial survey from the Court, wherever the vessel happens to be.

6. **Possible Procedural Difficulties** - these would include for example the following issues:

- Do insurers need to be named as claimants? This is often required e.g. in Latin America, but in England the insured’s name would be used.
- The requirements for foreign claimants to put up counter-security (or security for costs), where they have no assets in the jurisdiction, will vary from place to place (form and amount). For example, in Brazil the Order could be for a cash deposit of 25% of the claim.
- Is there a need for a power of attorney to initiate proceedings? This is not required in England, but it is in many civil law countries.
- Are voluntary extensions of time for commencement of suit recognised? In Brazil, for example, they are not – a Court application is required.
- Foreign limitation periods may be much shorter than the English equivalents.
- Some countries may not recognise a cause of action which is part of English law. Others may allow claims which would not be actionable here.
- Remedies may differ, especially at the interim stage. For example, not all countries have an equivalent to our search orders. Other countries exercise much tighter control over the defendant’s property pending trial than others under freezing injunctions or their equivalent, and give creditors greater rights to an early judgment.
- There may also be different rules on, for example, whether a claim carries interest on the claim itself (including the rate and date from when it runs) or on judgments. Likewise, currency devaluation can be a problem in some jurisdictions (e.g. Argentina and Brazil).
7. **Costs** - In England a successful claimant is also entitled to recover the bulk of his legal fees and disbursements (say two thirds). In some other jurisdictions legal costs are not recoverable or only to a limited extent. In Brazil for example the costs are awarded to the winning party’s lawyer rather than the clients themselves. In some jurisdictions, again including Brazil, costs awarded are based on the value of the amount awarded rather than the amount of work involved. This can be punitive on the loser where large amounts are awarded, or punitive on the winner where relatively modest amounts are awarded. Also contingency fee systems are found in many jurisdictions.

8. **Enforcement** - careful consideration must be given as to whether the judgment will be enforceable against the Opponent’s assets where they are located, assuming there is no security.

9. **Confidence in the local judicial system** - it is certainly justifiable to take into account perhaps less tangible factors that in combination give grounds for confidence or otherwise in another legal system e.g. familiarity with the lawyers, familiarity with the system itself, the length of time proceedings are likely to take and whether the jurisdiction is regarded as favourable generally for Owners or Cargo Interests and/or other claimants. The resources and expertise available to fund and staff the legal system vary from country to country. It is not uncommon to find, as I once did in Brazil for example, a 24 year old “trainee” Judge in charge of a US$100 million casualty case. Also, in some jurisdictions there is the risk of Judges being “influenced” by “inducements” offered by an opposing party, especially where the Opponents are influential “locals”.

10. **Ad hoc Submission to Arbitration** - arbitration is only ever an option if it is agreed by the parties. There may be instances where it might be desirable to reach agreement for Arbitration rather than Court proceedings e.g. a highly technical “unseaworthiness” dispute.
Security

One of the most important legal issues for claims arising from casualties is to ensure that all claims are adequately secured. This is particularly important, from a recovery angle, for shipowners in respect of collision claims, where the other colliding vessel is the paying party and its owners may be a one-ship company with no assets other than the vessel itself (which may have sunk). Cargo interests may equally be anxious to obtain security from the shipowners in respect of the likely claims for cargo loss and damage, mindful that there is no point in having a judgment against a shipowner whose only asset has been lost, especially if the hull proceeds have been dissipated. Salvors separately will be keen to obtain salvage security from the various interests (in particular the hull and cargo insurers). Where general average is concerned, general average security will also be required from the cargo interests, and this aspect will be sorted out generally by the average adjuster.

For the shipowner facing substantial cargo claims in a collision situation, the provision and collection/agreement of security is a good opportunity to seek to agree jurisdiction for such claims at the same time.

With regard to the amount of security to be agreed, an early view on the likely level of damage and loss is necessary in order to formulate a security demand or give proper consideration to a request for security from a third party. Jurisdiction and limitation issues arise taking into consideration factors mentioned earlier. Thus the provision by opponents of security with an offer of jurisdiction in a disadvantageous jurisdiction may not be as attractive as it initially appears.

In order for a letter of undertaking (security) to be binding as to jurisdiction, it is not enough for the security simply to provide that the guarantor will pay out under a judgment from a particular jurisdiction. Of itself, this will not give the party the right to bring a claim in that jurisdiction, and so additionally there will need to be an undertaking to instruct solicitors on request to accept service on behalf of the shipowners of proceedings brought by the guaranteed party, and confirming expressly that the shipowners agree to a specified law and jurisdiction.

Just as claims can be won and lost based purely on the choice of jurisdiction, claims can also become useless if the security provided is defective for some reason. Thus the wording needs to be extremely carefully drafted. Further, the party providing the security, which will usually be an insurance company (or bank, in the case of a bank guarantee) must be a
“safe” proposition which is good for its money and is likely to remain so throughout the life of the claim.

**Conclusion**

There will always be some overlap between issues relevant to casualty management and those relevant to casualty investigation. The focus of priorities will shift as one moves along the timeline, although longer term issues will still need to be borne in mind from the very outset.

The main legal issues to consider during the early stages of a casualty are:

- **Initial response:** co-ordinated management of the immediate issues relevant to claims and all the people assisting in dealing with such claims, in particular cargo claims, pollution claims, personal injury claims, salvage claims, and any criminal liability. The priorities are to minimise loss and maximise recovery prospects. How that is done will vary on the circumstances of the casualty, and different practical concerns apply to each class of claim.

- **Early co-ordinated collection of evidence and witness statements with a view to establishing causation,** to include appointment of appropriate experts. Confidentiality and privilege need to be maintained as to documents and information as far as possible. The casualty investigation process cannot be ignored in the early stages of a casualty.

- **Limitation and forum shopping:** it is essential to consider from an early stage in which jurisdiction it is in your client’s best interests to fight and defend claims, taking into account where the most favourable limitation regime is, as well as other factors.

- **Security must be obtained at an early stage from (and, where appropriate, granted to) counter-parties,** and this provides opportunities to agree jurisdiction.

Jonathan Bruce and Roger Miles
Elborne Mitchell
020 7320 9000
bruce@elbornes.com, miles@elbornes.com
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