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International and Maritime Law

**The Polygram**

**Choosing the Battlefield in  
Marine Insurance Litigation**

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*To be certain to take what you attack  
is to attack the place the enemy does not protect.  
To be certain to hold what you defend  
is to defend a place the enemy does not attack.*

*Sun Tzu*

The premise underlying Sun Tzu's thinking, from his "Art of War", is essentially a dictum known to successful generals over the ages - - - fight your battle on a field of your own choosing.

The concept is certainly as true in international litigation as anywhere. Legal disputes with multi-jurisdictional dimensions should always be analyzed with this consideration in mind. Moreover, marine insurance disputes may be one of the more fruitful areas to employ this stratagem.

Consider a hull policy, placed by London brokers, with a non-exclusive forum selection clause (England), involving a loss in United States waters that ripens into a dispute between a Middle Eastern ship owner and a Far Eastern underwriter. Assume that an appropriate federal court in the United States has specific jurisdiction over the dispute (likely because of an applicable state statute). The result is a dispute offering a choice of suit in a United States federal court or the Commercial Court (part of the Queen's Bench Division of the High Court) in London (on the fair assumption that neither party wants to litigate on the others' "home field").

There are many ramifications going to the choice of forum, most beyond the scope of this piece. Hopefully, the analysis, however, can quickly get beyond the question solely of the difference between the hourly rates of American lawyers and

English solicitors, though such things will always be a consideration.

Perhaps the most important factor to consider is the legal scheme that the court is likely to apply to the dispute. In a United States forum, under the Supreme Court's decision in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), a ship owner can on occasion find an edge. That is because a United States federal court will look to applicable state insurance law to supplement relevant remedies and legal concepts. (Note: A precisely worded choice of law clause might point the court in another direction; however, it must be otherwise binding and not subject to being interpreted as non-exclusive). Two significant examples immediately spring to mind: (1) appropriate facts could give rise to a claim of bad faith (e.g., inadequate claim investigation), raising the prospect of exemplary damages; and (2) a defense implicating the breach of an express warranty may be sustainable only if causally connected to the loss. These considerations, not availing in an English forum, might militate strongly in favor of a United States situs for the litigation in the proper case.

On the other hand, absent such considerations, there may be certain benefits to litigating these disputes in an English forum. There are some practical considerations working in favor of such an option. First, the quality of the judges sitting on the Commercial Court should be acknowledged,

particularly in such a specialized area as marine insurance. Further, the streamlined docket system in the Commercial Court may mean that a case can be heard there almost twice as fast as in a United States federal court. Indeed, in the appropriate case, underwriters may want to consider a declaratory judgment proceeding in London, more or less as a preemptive strike, to lock in English marine insurance law without the embellishments possible to the assured in a United States forum.

Litigation costs are, in the final analysis, a significant consideration. While it cannot invariably be said that matters are in all respects equal, it does seem to be the case that while legal fees charged by prominent London solicitors and barristers tend to be higher than their American cousins (at least in the maritime field), trial preparation in United States federal courts tends to be more involved and time consuming, and therefore more costly. Not only is the litigation process wearing on the parties, but at some point it must feel to the anxious client that “justice delayed, is justice denied”.

For certain cases there is perhaps a happy medium. Where appropriate, certain London barristers, of unquestioned competence and prominence, will accept instruction from foreign lawyers. Thus, the bulk of case preparation can be accomplished by counsel closest to the facts and witnesses, and often the client. Frequently this may prove to be the most cost-effective basis.

For matters that optimize the client’s chance of maximum recovery, the forum with the most felicitous view of the law can hardly be questioned as the optimum choice. Nonetheless, the “business” peace of mind that comes from an expeditious resolution should not often be discounted, absent strong countervailing considerations.

**Strategic key: In preparing for battle, give the utmost attention to choosing the battlefield, as you do to choosing your generals. But remember, there can never be enough arrows in your quiver.**

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