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LOSS AND DAMAGE UNDER MARINE CLAIMS

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I — Loss and damage to cargo

What loss and damage can be claimed for? Not every shortage or damage can be claimed because many commodities suffer a normal minor loss (freinte de route) during a voyage.

Loss in Bulk

Wine in bulk always has a loss or "freinte de route".[1] Wine in bottles, on the other hand, has no such loss and no "freinte de route" is allowed.[2] Flour [3] has certain loss in bulk, as has cement in bulk.

Minor damage

Certain commodities packed in cartons and bags will normally suffer a small amount of damage through normal handling. In the Canadian trade, approximately half of one per cent of the bags of a shipment of cement will be torn although this will not result in a loss of half of one per cent of the total shipment, because the cement can be re-bagged. In France, where the packing would appear to be different and not five or seven-ply bags, the "freinte de route" has been higher and even up to 4% [4] and 5%,[5] i.e., 4% and 5% of the bags carried are expected to be damaged.

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1 *Cour d'Appel de Montpellier* (Tessala et Canastel) 1958 D.M.F. 220. The "freinte de route" of wine in bulk was taken as 0.25% being the custom at Sete, the port of discharge.

2 *Cour d'Appel d'Aix* 1959 D.M.F. 468.

3 *Cour d'Appel de Douai* (James Lykes) 1957 D.M.F. 100. A loss of 0.68% in flour was held reasonable because the normal freinte was 0.5% to 1%.

4 *Cour d'Appel de Rouen* (Rémois) 1957 D.M.F. 536.
Tribunal de Commerce du Havre (Ville de Fort Dauphin) 1957 D.M.F. 547.

5 *Tribunal de Première Instance d'Abidjan* (Julia) 1958 D.M.F. 408.

A Court has declared that potatoes inevitably suffer minor damage by way of condensation, staining or wasting so that a small percentage loss should not be the responsibility of the carrier.[6]

Fully matured garlic will have some deterioration.[7]

Unpacked automobiles suffer minor scratches and the carrier is not responsible for these. The leading case for years has been *The Southern Star* [8] where it was held that carriers are responsible for all but "slight dents and scratches". Since then a number of French Courts have held carriers responsible for damage to unboxed automobiles.[9]

Where the carrier in a grain shipment makes up from one consignee for the loss of another consignee, then the carrier cannot claim the small percentage loss.[10]

Tallow seems to have one-quarter of one per cent loss and this seems normal in a shipment because of tallow sticking to tanks, pipes, etc.

Settlement formulas for inevitable losses

Many commodities suffer small losses and damage no matter what care is given to them. Unpacked autos, cement in bags and newsprint

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[6] *M.D.C. Ltd.* v. *N.V. Zeevart* (1962) 1 Lloyd's 180.

[7] *The Daido Line* v. *Thomas P. Gonzalez Corp.* 1962 A.M.C. 1295. U.S. Court of Appeals: Arrived sound market value "necessarily includes an appropriate discount for the normal deterioration of the type of cargo involved during the course of an ordinary voyage when shipped in good order and condition."

[8] 1940 A.M.C. 59. "The sentence 'Uncrated at owners risk of damage' does not mean that the owner assumes damage to the automobiles from whatever cause arising but only such damage as might be attributed to the fact that the automobiles are not crated. The clause is to be strictly construed and does not relieve the carrier from negligence, in loading, handling or discharging, even if negligence would not have caused the damage if the automobiles had been crated."

"The carrier can relieve itself by exception only as far as slight scratches and surface marks which might be sustained without the carrier's negligence. Reasonably careful handling is necessary to relieve carrier but damage which by its appearance and nature would indicate that it resulted from something more than slight dents and scratches is chargeable to negligence of the carrier."

Norman and Burns v. *Watermans SS Corp.* 1952 A.M.C. 1583. The phrase stamped on the face of the bill of lading "Used car, unboxed, not responsible for any indentation, breakage, scratches, etc." was held no defence to negligent handling and stowage.

Am. Motor Sales v. *Furness, Withy* 1958 A.M.C. 911.

[9] *Cour d'Appel de Rouen* (Saint-Luc) 1962 D.M.F. 279.
Tribunal de Commerce de Rouen (Turckheim) 1960 D.M.F. 231.
Tribunal de Commerce de la Seine (Jupiter) 1960 D.M.F. 427.

[10] *Cour d'Appel de Rennes* (Massalia) 1960 D.M.F. 149.

always have some damage. Carriers and cargo underwriters can often avoid considerable expense, legal fees and time by recognizing this "freinte de route" and by acting in concert. A single surveyor is employed and the findings accepted by agreement made in advance. The claims are then settled by a formula. For example, it was agreed at one time that carriers would not be responsible for one-half inch cuts on the sides of newsprint rolls or ¾ inch cuts on their ends. Similarly a formula can be reached as to unpacked automobiles — scratches which can be repaired for less than $7.50 are ignored in one formula which is presently in effect.

The advantage of an agreed formula lies not only in the saving of expenses to both parties, but the carrier knows its responsibility and therefore takes care while the shipper attempts to keep the actual cost of repairs down.

Burden of proof

The burden of proving the damage is upon the claimant who must also show that the loss is higher than the "freinte de route".[11]

Subsequent damage

Where a water carrier has caused damage to containers and subsequently damage is done inland, it has been held that the original carrier is responsible.[12] For this reason many carriers cooper before

[11] *Cour d'Appel de Douai* (Hoegh Clair) 1957 D.M.F. 410. "C'est au réceptionnaire à apporter la preuve que le manquant par lui allégué est supérieur à la freinte de route normalement admise."

[12] *Stein & Goitein* v. *U.S. Lines* 1955 A.M.C. 722. Wool tops wrapped in paper and burlap were redelivered torn and hook holed. "The damage to the contents may be inferred from damage to the wrappers." p. 723. "But even assuming that the soiling occurred only after delivery to the truckman as a result of damage to the wrappers caused while in respondent's custody, the respondent is nevertheless liable. The damage by dirt, whether on the truck or at the warehouse, was a direct result of the damage to the protective covering of the wool tops while in respondent's custody." p. 724.

Egg Harbour 1946 A.M.C. 1160. Here the carrier was held responsible for discharging oil and gasoline into a single tank ashore and thus mixing it.

Armco International v. *Rederi A/B Disa* (Astri) 1945 A.M.C. 1064. Iron plates were damaged by acetic acid leaking from a drum stowed above the plates. Held

a) "so far as there was uncertainty as to the extent of the damage which happened while the plates were on board, the vessel had the burden of proof;"

b) "the damage which happened ashore was the direct result of negligence of the ship while the plates were on board; liability for the consequences of such negligence did not end when the cargo went over the rail. The ship having failed to prove how much of the damage was attributable to the negligence, if any, of the consignee in the care of the cargo after discharge, was liable for the entire damage."

they deliver. On-carriers should either insist that the original carrier cooper the goods or should cooper the goods themselves. Otherwise, it may be extremely difficult to avoid damage. Coopering without advising of the cooperage and/or topping up barrels of olives is, in effect, a fraud if clean receipts are received after coopering.

Two causes of damage

Where it is difficult to distinguish between two causes of damage, then the carrier has usually been found responsible.[13] For example, where there has been an error in the management of the ship and an error in stowage, both of which have caused damage to cargo, the carrier has been held responsible.[14] In the same way, where damage was caused by a strike (for which the carrier would normally be relieved) and also by bad stowage, the carrier was found responsible for all the loss when it could not separate the damage.[15] Similarly, carriers have the duty of separating damage which arose from peril of the sea and from unseaworthiness.[16]

Hook holes

Hook holes are a common cause of damage and the carrier is responsible for the ensuing loss.[17]

II — Measure of damages

The rules are silent on what damages are the responsibility of the carrier and, in consequence, most countries have applied the fundamental principle of "restitutio in integrum" which is that the claimant must be put back into the same position it was in before the damage was done.

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[13] *Empresa Central Mercantil* v. *Brasileiro* 1958 A.M.C. 1809. Carrier issued a clean bill of lading when there was rust damage. Then it did not distinguish what was done during the voyage and what afterwards. Carrier held responsible for the whole loss. See also *Armco International* v. *Rederi A/B Disa* (Astri) 1945 A.M.C. 1064.

[14] *General Artigas* 1955 A.M.C. 725.

[15] *U.S.A.* v. *Apex Co.* 1949 A.M.C. 1704.

[16] *The Otho* 1943 A.M.C. 210.

[17] *Stein & Goitein* v. *U.S. Lines* 1955 A.M.C. 722.

Tribunal de Commerce d'Alger (Formigny) 1958 D.M.F. 411. The bill of lading was claused "sacs de réemploi" but the carriers were held responsible for hook holes done by stevedores.

Cour d'Appel d'Aix (Carbet) 1958 D.M.F. 475. Hook holes are indefencible even in a port where the use of stevedore hooks is general. The carrier should strictly deny their use.

A & P Tea Co. v. *Brasileiro Patrimonio* 1963 A.M.C. 443.

Restitutio in integrum

In cargo claims "restitutio in integrum" has meant arrived sound market value less arrived damaged market value. It is very important to remember, however, that arrived sound market value is only a rule of thumb which is subject to many exceptions in order to bring it within the basic principle of "restitutio in integrum". Lord Wright in *The Edison* [18] cited in *A.B. Karlshamns* v. *Monarch S.S. Co.*[19] stated the principle clearly when he said: "the dominant rule of law is the principle of restitutio in integrum, and subsidiary rules can only be justified if they give effect to that rule." See also Lord Sumner in *The Chekiang* [20] where he referred to a "rule of thumb" and added "The measure of damages ought never to be governed by mere rules of practice, nor can such rules override the principles of the law on this subject."

Arrived sound market value

Arrived sound market value less arrived damaged market value has been now accepted as the "rule of thumb" measure of damages for cargo claims.[21] At times the Courts have made the calculation by deciding what percentage of the cargo has depreciated and then have applied this percentage to the arrived sound market value.[22] If the shipment is a large shipment, then the arrived sound market

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[18] (1933) 45 Lloyd's 123 at p. 130; 1933 A.C. 449 at p. 463.

[19] (1949) 82 Lloyd's 137 at p. 154.

[20] (1926) 25 Lloyd's 173 at p. 175; (1926) A.C. 637 at p. 643.

[21] *Empresa Central Mercantil* v. *Brasileiro* 1957 A.M.C. 218. "The measure of damage was the difference between the sound market value of the goods at destination and their damaged value at that point."

Goltzman v. *Rougeot* 1955 A.M.C. 361.

Norman and Burns v. *Waterman S.S. Corp.* 1952 A.M.C. 1583. Trucks were damaged. The court held that the cost of repairs was not the proper measure of damages because the trucks would have depreciated even if fully repaired. The proper measure of damages was arrived sound market value.

Saturnia (Chestnuts) 1958 A.M.C. 1785.

R.T. Jones Lumber Co. v. *Roen S.S. Co.* 1960 A.M.C. 46 (U.S. Court of Appeals).

Steel Inventor 1941 A.M.C. 169.

Tribunal de Commerce de Rouen (Nido) 1962 D.M.F. 294. "...les dommages intérêts doivent être calculés d'après la valeur de la marchandise litigieuse au port de destination, à la date du déchargement."

Tribunal de Commerce de Marseille (Duala) 1950 D.M.F. 598.

Cour d'Appel de Rennes (Maneah) 1961 D.M.F. 281. Arrived sound market value was taken as of the actual day of arrival and not the expected day of arrival.

[22] *S.S. Sweepstakes* 1950 A.M.C. 209.

value of the shipment must be taken as a single unit and the closest practical measure of this value is wholesale value.[23]

Arrived sound market value is difficult to calculate unless there is a market with published listings at the place of discharge as is sometimes the case in grain, rubber and sugar shipments.[24] C.I.F. value, although easier to calculate, is not a true measure of damages because arrived sound market value will include cost, insurance, freight, customs duties (which may be refunded, however), administrative expenses (for arranging the purchase and the shipment) and a fair margin of profit.[25] The practice of taking invoice value or C.I.F. value and then deducting salvage, although giving an immediate figure, unjustifiably favours the carrier because C.I.F. is not arrived sound market value while salvage is arrived damaged market value. It would be fairer to deduct from C.I.F. value the salvage value at the place of shipment. (It is, of course, unlikely that such a salvage figure is obtainable.)

Claimants usually claim insured value in any event, which value is C.I.F. or invoice value plus 10%, 15% or 20%, etc. This again is an unsatisfactory figure although it is usually close to arrived sound market value because of the reluctance of underwriters to insure at a figure higher than true value. One practical compromise is to settle for a sum half-way between C.I.F. value and insured value but this is only valuable for settlements out of court. In court the measure is arrived sound market value less arrived damaged market value.

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[23] *The Trade Wind* v. *David McNair* 1956 Ex. C.R. 228 affirming 1954 Ex. C.R. 450. "The amount of damages recoverable for delivery of a cargo in a damaged condition is the difference between the cargo's arrived sound wholesale market value and its arrived damaged wholesale market value."

[24] *The Arpad* (1934) 49 Lloyd's 313. It was held that where there is no market to ascertain market value some other system must be used. But to take the invoice value of the sale to the consignee is not proper, nor is the price contracted by the consignee with some third party. One must study all indices to get the value at discharge.

[25] Carver, 10th Edition, at page 990 refers to *O'Hanlan* v. *Great Western Railways* (1865) 6 B & S 484 and adds "it was held that the value in such a case must be ascertained by considering their cost at the place of manufacture and expenses of transit and adding a reasonable sum for profit to the importer."

[26] *Stein & Goitein* v. *U.S. Lines Co.* 1957 A.M.C. 272. Wool tops were damaged but sold all the same at market price for sound tops and the buyers did not complain. Thus it was held there was no loss and no claim.

Knute Nelson 1942 A.M.C. 356. Tin plate was damaged and the underwriters of cargo paid a loss of $10,117.00, being 52% depreciation. The tin plate was reconditioned for $1,073.00 and although not made like new it was used for the original purpose. The U.S. Court of Appeals held the carrier was only liable for $1,073.00 to cargo underwriters.

If, of course, damaged goods sell for the same sum as undamaged goods, then there is no claim.[26] Where the damaged cargo was transported to destination for storage and not for sale in the foreseeable future the measure of damages was held to be price at embarkation plus freight and customs duties in *Instituto Cubanon* v. *Star Line.*[27]

Where cargo normally deteriorates slightly during a voyage, then it has been that the "... market price necessarily includes an appropriate discount for the normal deterioration of the type of cargo involved during the course of an ordinary voyage when shipped in good order and condition."

In *Instituto Cubano* v. *Star Line*[28] the damages awarded by arbitrators for the loss to molasses were based "on the short delivery less 1% customary innage."

At this point it is perhaps worthwhile repeating that arrived sound market value less arrived damaged market value is a rule of thumb and that "restitutio in integrum" is still the fundamental principle of calculating damages.

Profits

Not all damages are due claimant but only those which a) are direct and natural consequence of the breach of contract, and b) arise from facts which are known to defendant or were made known to him or should have been known to him. This principle has been stated in many well-known decisions of which perhaps the most famous in the English-speaking world is *Hadley* v. *Baxendale.*[29]

A fair margin of profit is included in arrived sound market value but loss of special profits resulting from loss of markets and loss of profits on other goods cannot be usually included in the damages a carrier may claim because they are too remote. Occasionally, special damages are allowed, but they too must not be remote and must be

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[27] 1958 A.M.C. 166.

[28] *Daido Line* v. *Thos. P. Gonzalez* 1962 A.M.C. 1295.

[29] (1854) 23 L.J. Ex. 179; (1854) 9 Exch. 341; 18 Jr 358; 2 C.L.R. 517. Here the delivery of broken mill-shaft was delayed and eventually the whole mill was shut down. Loss of profits was not awarded. "For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances; nor were the special circumstances, which perhaps would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by defendant.

Anglo-Saxon Petroleum v. *Adamastos* (1958) 1 Lloyd's 73. The House of Lords held that loss or damage in Section 4) (1) and Section 4) (2) of Cogsa was not limited to physical loss or damage to goods.

such that the carrier could have expected them when he entered into the contract.[30]

Mitigation of damages and expenses

Claimant must do every thing in its power to mitigate the loss. On the other hand, legitimate expenses of claimant resulting from efforts to lessen the loss are the responsibility of the carrier.

These expenses are added to arrived sound market value or are deducted from salvage. If surveyors are employed by the consignee to calculate the extent of the loss and to suggest ways to keep the loss at a minimum, then their fees are the responsibility of the carrier.[31] Normally, however, surveyors are employed to settle the claim between the consignee and the underwriters and to prepare proof in a possible claim against the carrier. The expense of these services of the surveyor cannot be charged against the carrier. Reconditioning expenses, on the other hand, are usually the responsibility of the carrier.[32]

Abandonment

The consignee, if owner of the goods (e.g. in virtue of a C.I.F. contract, the consignee is owner as soon as the goods are loaded on board and the bill of lading, the invoice and insurance policy delivered to him) cannot refuse to receive the goods. The principle of abandonment even when applied to insurance policies only allows the assured to abandon if done immediately after the loss and then the underwriter may refuse the abandonment. The consignee, who is owner of the goods, cannot refuse delivery of damaged goods nor of sound goods which have been delivered many months later. The owner of the goods must receive them and then dispose of them claiming later on for the loss suffered. On the other hand, after a wreck when delivery is impossible the owners of the cargo should be consulted before disposing of cargo.[33]

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[30] *Copiapo* 1943 A.M.C. 412. Daily subsistence of an agent waiting at Panama for a lost shipment to arrive and airplane transportation in an effort to locate the merchandise was not allowed.

[31] *Tribunal de Commerce de Rouen* (Matelot Bécuwe) 1950 D.M.F. 604.

[32] *Radja* 1953 A.M.C. 1888. "Where a shipment (of tea) is damaged (by salt water mold) even though the actual value of the damaged portion is small in comparison to the total cost of restoration, if inspection and reconditioning were necessary the full reconditioning expenses is an allowable item of damage."

[33] *Freeman & Co.* v. *Macandrews* (1929) 35 Lloyd's 35. Oranges were landed and disposed of after a week without notifying the owners. The court found this to be a fault but as the disposition of the oranges was the best possible in the circumstances, no damages were awarded.

Burden of proof

The burden of proving the damages is on the claimant. Thus testing a percentage only of a large number of bags of a shipment suspected of damage can be a dangerous practice [34] unless the claimant can prove through its surveyor or otherwise that the percentage taken was reasonable and fair. On the other hand, to laboriously test at great expense a large shipment is not "to mitigate the loss" and on this ground the testing of only a percentage is reasonable.[35] The safest procedure is to call the carriers to the survey and at that time decide upon the course to be taken.

Divided damages

Where the loss and damage is the result of two causes of which the carrier is responsible for one and claimant the other, then the damages should be divided in proportion to the effect of each cause. For example, where cargo is damaged by poor ventilation (for which the carrier is responsible), and a strike (for which the carrier is not responsible), the damage should be divided according to a percentage based on the extent to which each cause resulted in the damage.

The carrier has the burden of dividing the damages and where the damage cannot be divided it has been held that all the damages are the responsibility of the carrier. One of the most famous judgments in this regard is *The Vallescura*.[36]

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[35] *Fabre S.A.* v. *Mondial United* 1963 A.M.C. 946. Here the U.S. Court of Appeals held that a projection of a sampling of damaged window glass at a joint survey, without sampling the whole shipment, was proper.

[34] *Beck* v. *Vizcaya* 1950 A.M.C. 2123; 1949 A.M.C. 1923. Before a joint survey could be held, part of the damaged shipment had been loaded into freight cars. Surveyors agreed not to unload the shipment but to examine those bags which remained and make a projection of the sampling. Thus only 75 bags of 291 were tested and 47 showed damages. It was held that proof was made as to only 47 bags and that the consignee who had the burden of proof had not fulfilled that burden. An agreement of surveyors did not bind their principals. The judgment of surveyors "would carry persuasive weight with their principals and with the Court, nevertheless, in litigation it is only evidence."

[36] 1934 A.M.C. 1573. The Supreme Court of the United States ruled that where onions were damaged by poor ventilation due in part by rough weather causing hatches to be closed and in part by neglect of the master and crew in keeping them open in fine weather, the carrier was responsible for the whole loss because it was impossible to determine what damage was due to which of the two causes. The Harter Act applied but the principles of damages under the Harter Act and the Hague Rules do not seem to differ.

Saturnia (Chestnuts) 1958 A.M.C. 1785. Here the Vallescura rule was followed and the carrier held responsible for the whole loss because it could not separate damage caused by a strike, from damage caused by poor ventilation.

(*continued on next page*)

Invoice value clauses

Invoice value clauses in bills of lading have now been declared null as have all pro-rata clauses and all other clauses which reduce the carrier's responsibility to less than arrived sound market value. Such clauses are invalid because they are contrary to Rule 3(8) being a "clause... relieving the carrier or ship from liability for loss or damage... otherwise as provided in these Rules..." They are also invalid in virtue of Rule 4(5) if they reduce the carrier's liability to less than the per package limitation.

The Harter Act is replete with jurisprudence on "true valuation" clauses. The distinction between clauses which "relieve" and those which "value" was never clear. Mr. Justice Sidney Smith, of the Exchequer Court of Canada, in *Nabob Foods* v. *The Cape Corso* [37] cut cleanly through this jurisprudence and held that under the Rules no clause may relieve or even "lessen". He cited the *Steel Inventor,*[38] *The Campfire* [39] and the *Ferncliff.*[40]

The Harry Culbreath,[41] *Tribunal de Commerce de Marseille* (Duala)[42] and *Foy & Gibson* v. *Holyman and Sons* [43] are judgments even more on the point. From all these decisions, one must conclude that under the Hague Rules even a generous valuation clause is invalid if in any way it prevents claimant from obtaining arrived sound market value.[44]

More than the per package limitation can be agreed upon but it must be specifically agreed upon as was held in *Shackman* v. *Cunard,*[45] where a paramount clause invoked Cogsa and the bill of lading also had a clause that in the event of short delivery the price should be market price at port of destination. The market value per package

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Celestial 1962 A.M.C. 1965. The trial court awarded the claimant 15% of the total damage because the carrier laoded in the rain while the carrier was relieved for 85% because sweat was held to be an act of God. The Court of Appeal held the carrier responsible for 100%, because the carrier had not shown exactly what part of the loss was due to sweat and what to rain. The Vallescura rule was thus applied. One gathers, however, that had the carrier been able to divide the damages the award would not have been 50-50 but according to the exact proportion proven.

[37] 1954 Ex. C.R. 335; (1954) 2 Lloyd's 40.

[38] 1941 A.M.C. 169; (1940) 35 Fed. Supp. 986.

[39] 1946 A.M.C. 644.

[40] 1939 A.M.C. 403, 1420.

[41] 1952 A.M.C. 1170.

[42] 1950 D.M.F. 598.

[43] 79 Lloyd's 339.

[44] See also Case and Comment William Tetley, 1956 Canadian Bar Revue 1196.

[45] 1940 A.M.C. 971.

was $10,000.00 but the Court held that the limitation was only $500.00 because the carrier by including the paramount clause in the bill of lading had intended to take advantage of all the benefits of the Rules.

The rate of exchange

Three exchange problems may arise.

A) If the place of the trial is not the place of delivery of the goods the Court will almost always order payment in the currency of the place of trial. To order payment in a foreign currency would be "specific performance" which few courts ever order. Thus exchange will have to be calculated. In order to put the claimant in the position he would have been in had the breach not taken place, the exchange rate should be taken as of the date of the breach, i.e. the time of the delivery (or the time the delivery should have been made in the case of non-delivery), with interests from date of delivery.

B) If suit is taken at the place of delivery, but if a limitation per package is applicable, which limitation is in a currency foreign to the place of delivery, then the exchange rate should be as of the date of delivery, again with interest from date of delivery.

C) If A) and B) are combined, exchange should still be calculated as of the date of delivery.

Such a rule of exchange taken together with the rule of granting interest to claimant from the date of delivery seems to be the best manner to fulfil the principle of restitutio in integrum.

The jurisprudence on the question throughout the world is sketchy. The French courts have set the rate as of the day of judgment.[46] In Canada, the authors and courts have agreed that exchange should be calculated on the day of the breach of the contract.[47] A

[46] *Cour de Cassation* (Loami Baldwin) 1961 D.M.F. 589. Damages of $1,886.00 were ordered under Cogsa and Defendant paid in francs at the rate of exchange on the day of arrival. The Cour de Cassation ordered payment at the rate of exchange of the day of judgment.

Cour d'Appel de Paris (Loami Baldwin) 1957 D.M.F. 89.

Cour de Cassation (Magnolia States) 1954 D.M.F. 518. The court held that the normal rule is to fix the exchange on the day of payment but in this case the rate at time of delivery prevailed because there was a custom to that effect at the port of delivery (Le Havre).

Cour d'Appel de Douai (Clearton) 1955 D.M.F. 92. Canadian Act applied.

Cour de Cassation 1954 D.M.F. 645.

Article by *Francis Sauvage* 1954 D.M.F. 383.

[47] Walter S. Johnson — Conflicts of Law — 2nd Edition, Wilson & Lafleur — p. 722.

Castel — Private International Law (Canada Law Book).

leading British judgment is *Di Ferdinando* v. *Simon, Smits*[48] where it was held:

> "The Plaintiff is entitled to have his damages assessed at the date of breach, and the Court has only jurisdiction to award damages in English money. The judge must therefore express those damages in English money, and in order to do so he must take the rate of exchange prevailing at the date of breach" (Bankes L.J. p. 412).
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> "On principle the matter appears to stand thus: When a plaintiff claims damages for breach of contract to deliver goods in a foreign country at a fixed date, the measure of damages is, if there is a market, the market value of those goods at the place where and on the day when they should have been delivered; and it is immaterial to prove that on the date of the judgment awarding damages the goods were either worth more or worth less than they were at the date of the breach" (Scrutton L.J. p. 414).
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> "Just as the Court has to exclude from the calculation of the damages the subsequent change in the value of the goods after the date of breach, so also it has to exclude the subsequent change in the value of the currency after the date of the breach; and for the same reason — namely, that the changes in value of the currency are too remote a consequence of the breach to be taken into consideration by the Court" (Scrutton L.J. p. 415).

The Visby Rules

The Visby Rules, the result of the 1963 Stockholm Conference of the Comité Maritime International, have fixed the per package limitation at 10,000 francs per package by a new article 4(5) first sub-paragraph. To the new article is also added the following:

> "The date of conversion of the sum awarded into national currencies shall be regulated in accordance with the law of the court seized of the case."

To fulfil the principle of restitutio in integrum national courts should fix the rate of conversion as of the day of delivery and add interest.

Interest

Interest should run from the date of the breach of the contract or in a cargo claim from the date of delivery or the day delivery should have been made.[49] Many national laws and courts do not follow this practice although to do otherwise is to violate the principle of restitutio in integrum. The knowledge that interest will be charged causes carriers to hasten their handling of claims and their attorneys in pushing along court proceedings.

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[48] (1920) 3 K.B. 409.

[49] *Norman and Burns* v. *Waterman S.S. Corp.* 1952 A.M.C. 1583 at p. 1587. Interest at 6% was granted from the date of the arrival of the vessel (August 28, 1948).

Tribunal de Commerce de Rouen (Matelot Bécuwe) 1950 D.M.F. 604. Interest at 5% was granted from date of delivery.

Canadian courts have discretion in awarding interest and in Canada the legal rate is 5%. If the judgment merely states "with interest" then interest is from the date of judgment.[50] Under Belgian law, interest appears to be 4½% in civil matters and 5½% in commercial matters and is due from the date of the service of the writ. Under Netherlands law, interest is generally due on judgments from the date of summons. In Great Britain, interest can vary from Court to Court and much is left to the discretion of the Judge although in the Admiralty Court interest normally runs from the event.

III — Notice of loss

Upon delivery of goods from a carrier, the consignee is obliged to inspect the goods and, if they are in bad order, to specify on the receipts the extent of the loss and damage. If the loss or damage is not apparent, then consignee must give notice within three days. The Convention reads as follows:

ARTICLE 3(6)

"Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

If the loss or damage is not apparent, the notice must be given within three days of the delivery of the goods.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods."

Notice in writing

From the foregoing it is clear that the notice must be in writing and it is universally accepted that bad order receipts are in effect notice in writing. The American Act, which was intended to clarify only and not to change the Brussels Convention, is to this effect and reads: "Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof".[51]

Notice must be proven and thus where a clean receipt has been given but the three days have not expired then a registered letter

[50] *Paterson & Sons Ltd.* v. *Canadian Vickers* 1959 Ex. C.R. 289.

[51] U.S. Carriage of Goods by Sea Act, 1936 Section 3(6) second paragraph.

is best of all,[52] although a telegram is a practical way of giving notice because it is quick and also can be proven.

Notice must be given to the carrier and a law, custom, or practice of a particular country cannot overcome this, nor make the notice more complicated.[53]

When must notice be given

Notice must be given not at time of discharge but "at the time of the removal of the goods into the custody of the person entitled to delivery" under the contract of carriage. Normally the ship employs agents and stevedores at the port of discharge and when these persons deliver to the consignee or his trucker or an inland carrier then at that moment notice must be given for apparent damage or within three days for hidden damage. Some bills of lading are claused to the effect that the stevedores and agents, although paid and employed by the carrier, are the agents and préposés of the consignee. Certainly such a clause regardless of its validity in other respects could not shift the time of giving notice by the consignee from delivery to discharge because it would be reducing the consignee's rights under the Rules contrary to Rule 3(8). And if it were valid then the stevedore or agent as mandatory of the consignee could be responsible for their negligent act in not giving notice if they in fact had not done so. There would also be a presumption that the damage took place in the hands of the agent or the stevedore.

It is to be noted that by the French internal act of April 2, 1936, the delay is three days but Sundays and other holidays are not counted. The French article reads "dans les trois jours de la livraison, jours fériés non compris."[54]

The sanction

The sanction for not giving notice at "time of the removal" when apparent or within three days when not apparent is that the burden of proving that the condition of the goods at the time of delivery was the same as at the time of the bill of lading shifts from the carrier to the consignee. It has been mistakenly held on occasion that

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[52] *Cour d'Appel de Paris* (Doris) 1952 D.M.F. 145.

[53] *Lindner & Co.* v. *Farley and Feary* 1938 A.M.C. 805. Here Cogsa applied to a shipment to Brazil and the Court disallowed the plea of carriers that "a law, custom and practice at the Port of Santos, Brazil" called for notice to customs as well.

[54] Loi relative aux transports des marchandises par mer — 2 avril 1936.

the sanction for failure to give notice is that the consignee must prove the carrier's fault, i.e. negligence. This is not correct; the burden upon the claimant is only to prove the condition of the goods at time of removal. It also has been said that failure to give notice is a bar to suit. This again is not true. In other words, failure to give notice results in *prima facie* proof — a presumption *de juris tantum* — rather than the *juris* and *de jure,* which can be refuted by further evidence.[55] The failure to give notice results in no further sanction and is apparent from the American Act which was intended to clarify and which reads: "... if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered".[56]

It has been said that the notice is of little value because the consignee has the burden of proof in any event.[57] It is true that the consignee has the burden of proof of damage whilst in the hands of the carrier but if a clean bill of lading has been issued then if notice of loss has been given, the consignee has overcome that burden. Thus the notice as set out in the Rule is in effect very valuable to the consignee.

On-carriers, stevedores, terminal operators, truckers

If there are on-carriers, under a through bill of lading they must give the notice, because they are "the person entitled to delivery thereof". If they do not clause their on-carriage bill of lading or the receipt given to the original carrier, then they are doubly responsible to the consignee a) for their negligent act in giving a clean receipt, b) whilst the damage or loss is presumed to have taken place in their hands. The same is true of a trucker and a terminal operator who receive apparently damaged or short goods for the consignee at discharge and who give clean receipts.

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[55] *Southern Cross* 1940 A.M.C. 59. Failure to give notice before removal of merchandise is prima facie evidence of delivery of the goods as described in the bill of lading but can be rebutted. "Failure to give notice of claim does not preclude suit within one year".

Fire Assoc. of Phila v. *Isbrandtsen Co.* 1950 A.M.C. 2017.

Berkery v. *U.S.A.* 1949 A.M.C. 74.

[56] U.S. Carriage of Goods by Sea Act, 1936, Section 3(6) sixth paragraph.

[57] *Carver 10th Edition* p. 191. "The first paragraph of this rule appears to have little, if any, meaning as the burden of proving loss or damage is on the consignee in any event".

Scrutton 16th Edition p. 477.

Special notice clauses

Clauses in a bill of lading calling for a written notice of claim are valid under the Harter Act [58] if reasonable but not under the Hague Rules.[59]

Joint survey

There is one exception to the notice and that is where there has been a joint survey or inspection. It should be noticed that the joint survey must be "at the time" of receipt of the goods. When goods have been received in bad order, the carrier should be invited to survey them and the notice of loss which contains such an invitation places the consignee in an even stronger position. It is not necessary, however, to have a joint survey under the Rules.

When the carrier receives notice he should act and should use his right to ask that a joint survey be held.[60]

Assistance

It is to be noted that the carrier and receiver must give "all reasonable facilities" for inspecting and tallying the goods. One wonders if this permits the consignee to appear on board and personnally inspect the cargo there. Usually carriers object to this, because the consignee is likely to inspect the ship as well.

Cooperage

Many carriers cooper parcels and packages before delivery, rebag bagged goods and top up barrels of olives, etc., with salt water. Some carriers keep cooperage books where the record of all cooperage is noted. Others tag all packages that have been repaired so that the

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[58] *Newport, Mill Co.* v. *Mississippi Barge Co.* 1943 A.M.C. 793.

[59] *Zarembo* (U.S. Ct. of Appeals) 1943 A.M.C. 954. "Cogsa permits suit within one year regardless of bill of lading provisions prescribing a shorter time for either notice or claim".

Nashiwa et al v. *Matson Nav. Co.* 1954 A.M.C. 610. A three-day notice of claim clause was held invalid in virtue of Cogsa 1303 (8).

Elser Inc. v. *Int. Harvester* 1955 A.M.C. 1929 A clause requiring notice written within 30 days of the loss was held invalid under Cogsa.

Italian Importing Co. v. *Navigazione* (1930) 38 Lloyd's 22. Clauses calling for notice of damage before removal from deck, written notice of claim within 48 hours and presentation of the claim within two months all held invalid under the common law without considering British Act.

Coventry Sheppard & Co. v. *Larrinaga S.S. Co.* (1942) 73 Lloyd's 256. A ten-day notice of claim clause was held invalid under 3(8) of the Canadian Act by a British Court.

[60] *Cour d'Appel d'Aix* (Jamaïque) 1953 D.M.F. 381. The carrier when he receives a letter containing reserves must "user de son droit de demander qu'il soit procédé à la constatation contradictoire de l'état de la marchandise..."

recipient can be aware of the loss when the goods are received by it. To cooper containers with the result that the damaged or short condition of the contents cannot be suspected is a fraud. It is particularly unfair to on-carriers and truckers because they thus fail to give bad order receipts and rarely have a chance to give notice within three days.

IV — Delay for suit

The time available for a cargo claimant to take suit under the Hague Rules is set at one year by Article 3(6), fourth paragraph of the Convention, as follows:

> "... within one year after delivery of the goods or the date when the goods should have been delivered."

It should be noted first of all that the time begins to run from "delivery" and that the word "discharge" has not been used here although "discharge" is used elsewhere in the Rules, e.g. Rule 2 and Rule 3(2). The use of the word "delivery" must therefore be considered as deliberate and as having a different meaning from discharge. Delivery would seem to mean the moment when the consignee named in the bill of lading receives the goods. This would normally mean after delivery by the stevedores or agents or whoever is supposed to deliver. Nevertheless, if the bill of lading states that the carrier is not responsible after discharge from the vessel and that the stevedores are deemed to be agents of the consignee for purposes of delivery and the stevedores are in effect the agents of the consignees, then it can be argued that delivery dates from the date of discharge from the vessel.[61]

In a through bill of lading, delivery would be at the moment when the last carrier has delivered.[62]

When there is over-carriage, the date of delivery is the day the goods are returned and received by the consignee. Over-carriage does not appear to be a sufficient breach of the contract to overcome the necessity of claimant suing within one year;[63] nor is non-delivery.[64]

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[61] *Cour de Cassation* (Matelots Pillien et Peyrat) 1959 D.M.F. 661. "... le point de départ de la prescription annale de l'action en responsabilité du transporteur maritime est le jour où l'acconier ainsi choisi par le capitaine a pris, sous palan, livraison de la marchandise pour le compte du destinataire."

[62] *Tribunal de Commerce du Havre* (*Neva West et Condor*) 1961 D.M.F. 237.

[63] *Singer Hosiery Mills* v. *Cunard White Star* 1951 A.M.C. 988. It is to be noted that over-carriage (back from New York to England and a delay of five weeks) was not held to breach the whole contract and thus the year delay still applied although the carrier would have been held as the insurer if sued in time.

[64] *Hellyer* v. *NYK* 1955 A.M.C. 1258. "Non-delivery of cargo after the vessel arrives at the port of destination is not such a deviation (if deviation it be) as will avoid Cogsa one year limit."

In the discharge of a large lot, delivery would appear to be the day that the last piece of cargo discharged has been separated, and is available for delivery.[65] When there is non-delivery of a whole shipment or shortage of part of a shipment the Rules are clear — "the date when goods should have been delivered." Nevertheless the jurisprudence has been mixed and the best rule for a claimant to follow is to sue within one year of the day the vessel or shipment should have arrived and not within one year of advice that delivery is impossible.[66]

When there is authorized deck cargo, the one year delay does not apply[67] nor does the delay apply when the goods have not been loaded on board.[68]

To whom does the delay apply?

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[65] *Tribunal de Commerce de Marseille* (Loch Dee). 1949 D.M.F. 485. The vessel discharged October 7, 1945; survey began October 9, 1945 and separation of damaged cargo ended October 20, 1945. Suit taken on October 15, 1946 was held valid. The delay began the day cargo was in the effective disposition of claimant. (Disposition effective du réceptionnaire).

Loeb v. *SS Washington Mail* 1957 A.M.C. 267. A vessel landed her cargo October 8, 1951 and sailed. Sorting and delivery of the cargo continued from then to October 31, 1951 when the last cargo was delivered. The consignee received the last part of his cargo October 11, 1951. Suit was taken for shortage on October 14, 1952. Held: suit could be validly taken until October 31, 1952.

Tribunal de Commerce de Nantes (Brarena) 1952 D.M.F. 27. Delivery was held to have taken place when all the cargo was ashore and had been sorted for delivery and the consignee could see what was short and damaged.

Ungar v. *SS Urola* 1946 A.M.C. 1663.

[66] *Cour de Cassation* (Mète) 1952 D.M.F. 362. The carrier, because of the war, could not deliver at Oran but discharged at Istambul. When put in default by the shipper, the carrier declared it could not deliver and the Supreme Court of France held that this was the day from which the one year delay began to run.

Potter v. *North German Lloyd* 1943 A.M.C. 738. Cargo was to be carried from Hamburg to Portland, Oregon. Because of the war the vessel abandoned her voyage at Costa Rica on September 7, 1939. The cargo was transferred to another vessel of the same line where it stayed for 20 months. Finally, the second vessel was scuttled on March 31, 1941. Suit was taken May 26, 1941, but it was held suit was taken too late... a reasonable time for delivery after transshipment would have been six months after September 7, 1939.

Cour de Cassation (State of El Nil) 1951 D.M.F. 114. In a case of shortage, the Supreme Court of France took the position that the delay began when the delivery of most of the shipment took place (August 30, 1946) and not February 24, 1947 when the carrier advised that the eight lost cartons could not be found.

L.W. & P. Armstrong Inc. v. *Normacmar* 1952 A.M.C. 1088.

[67] *Aetna Ins. Co.* v. *Carl Matusek* 1956 A.M.C. 400.

[68] *Ins. Co. of N.A.* v. *SS Exminster* 1955 A.M.C. 739.

The delay applies to any carrier, including the charterer when the Rules are incorporated into the charter.[69] It also applies to any non-carrier who is bound to the Rules by contract. It has thus been applied to a terminal operator [70] even when the rules were not invoked in the bill of lading for the benefit of the terminal operator for responsibility after discharge. The delay applies to ship's agents, and stevedores under a charterparty when the charter invokes Cogsa.[71] The U.S. Government has been held to be bound by the delay, too.[72]

The U.S. Court of Appeals has held in a case where an arbitration agreement is incorporated in the bill of lading that the "arbitration agreement provides for resolution of controversy without a 'suit'." Therefore the one year time for suit of Cogsa does not apply to a demand for performance of an arbitration agreement.[73]

If a shipowner has been sued within the one year, the recursory action need not be taken within the year against the charterer, or by the charterer against the owner by way of recoupment or set off for claim for freight [74] or against another carrier [75] or against a stevedore.[76] It has been held that the action of the carrier against the shipper who issued a letter of indemnity must be taken within the year,[77] but the judgment is questionable as is pointed out in the commentary which follows it.

Extension of the time

Can the one year delay for suit he waived? In most countries it is common practice to extend the delay for suit because this benefits both carriers and claimants. The British Hague Rules Agreement of 1950 extends the delay for two years. Whether such an extension is

[69] *Cities Service Oil Co.* v. *U.S.A.* 1953 A.M.C. 1424. A charter incorporated Cogsa and although the delay for suit under the charter was two years, the U.S. Court of Appeals held that the one year delay of Cogsa applied.

The Church Bay 1957 A.M.C. 16.

[70] *N.F. of C.G. of Columbia* v. *Isbrandtsen Co.* 1957 A.M.C. 1571. One gathers that this judgment would not now stand in the light of the U.S. Supreme Court in Krawill Machinery 1959 A.M.C. 879.

[71] *U.S.* v. *South Star* 1954 A.M.C. 418.

....[72] *Grace Line Inc.* v. *U.S.A.* 1958 A.M.C. 1853.

U.S. v. *South Star* 1951 A.M.C. 2093; 1953 A.M.C. 1304; 1954 A.M.C. 418.

[73] *Son Shipping Co.* v. *DeFosse* 1952 A.M.C. 1931.

[74] *Puerto Madrin S.A.* v. *Esso* 1962 A.M.C. 147.

[75] *Lyons-Magnus* v. *American Hawaiian* 1941 A.M.C. 1550. The one year delay does not apply to a claim of one carrier against a connecting carrier. The only delay is "the usual admiralty rule of laches".

Tribunal de Commerce du Havre (Nova West et Condor) 1961 D.M.F. 237.

[76] *Byron Darnton* 1956 A.M.C. 1903.

[77] *Tribunal de Commerce de Rouen* (Capitaine Lacoley) 1953 D.M.F. 34.

valid will depend on the Rules of interpretation of statutes of the local Hague Rules Legislation. An extension seems to be valid in most jurisdictions.[78] A more difficult problem arises when protracted negotiations take place between carrier and claimant. One gathers that negotiations are a tacit waiver of prescription, especially when the carrier keeps the bill of lading and the other claim documents.[79] An offer of settlement after the one year delay in France would seem to interrupt the one year prescription.[80]

How is "suit brought"?

The manner in which suit is brought will depend on the practice of the Court where suit is to be taken. In most common law countries, the issue of the writ constitutes the bringing of suit.[81] In the Exchequer Court of Canada, suit is commenced by the issue of a writ. Suit is commenced in the Civil Courts of the Province of Quebec by the service of the writ and this would seem to be the case in the civil courts of other civil law countries.

Special suit clauses

A clause calling for actual service of the writ within one year was held valid under the Harter Act but invalid under the Rules.[82]

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[78] *Benz Kid Co.* v. *Kawasaki Kisen Kaisha* 1954 A.M.C. 130, 403, 2236.
J.A. Folger & Co. v. *United Fruit Co.* 1959 A.M.C. 664 and 2224.
A/S Motor Tramp v. *Ironco Products Limited* 1959 Ex. C.R. 299. An extension of time by the carrier would appear to be valid in Canada.

[79] *Buxton* v. *Rederi* 1939 A.M.C. 815. Suit was held valid when brought 16½ months after delivery but promptly after claim had been finally rejected by the carrier, where active negotiations had been conducted.
J. A. Folger & Co. v. *United Fruit Co.*, 1959 A.M.C. 664 and 2224.
Cour de Cassation (*Ligne Scandinave* v. *London Assurance*) 1959 D.M.F. 34. The carrier was held by the Supreme Court of France to have suspended the one year delay for suit by keeping the documents especially the bill of lading and also because the parties were in in constant "relations d'affaires, entretenant les meilleurs rapports, qu'aucun moment le transporteur maritime n'a exprimé l'intention de se prévaloir de la fin de non recevoir"...
Cour d'Appel de Montpellier 1951 D.M.F. 276. Here, "simples pourparlers" were not held to interrput prescription unless one can draw from them that there was "reconnaissance des responsabilités."

[80] *Tribunal de Commerce de Marseille* (Dives) 1951 D.M.F. 184. An offer made more than one year after delivery is binding and the common law prescription runs after that date.
Tribunal de Commerce de Marseille 1951 D.M.F. 88.
Cour de Cassation 1949 D.M.F. 58.

[81] *U.N. Administration* v. *SS Mormacmail* 1951 A.M.C. 1152.
Cypria 1943 A.M.C. 947.

[82] *J. Aron & Co. Inc.* v. *Askvin* 1958 A.M.C. 207, 1960 A.M.C. 314.

A six-month time for suit clause was held to be invalid and the one year delay of Cogsa was applied.[83]

Visby rules

At the Stockholm Conference in 1963 of the Comité Maritime International, two changes to the Hague Rules relating to the delay for suit were adopted.

The changes, which really only clarify, are to article 3(6) paragraph four, while a new article 3(6) bis is added.

In Article 3) (6) paragraph four is deleted and replaced by:

> "In any event the carrier and the ship shall be discharged from all liability whatsoever in respect of the goods unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. Such a period may, however, be extended should the parties concerned so agree."

In Article 3) after paragraph (6) shall be added the following paragraph (6) bis:

> "Recourse actions may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such recourse action has settled the claim or has been served with process in the action against himself."

The new Rules must still be adopted at a Diplomatic Conference and then be adopted by each signatory nation by national legislation. They are therefore far from being law. When finally adopted they will make it clear.

a) that the delay for suit can be extended by agreement;

b) that carriers have at least three months to take their recourse action.

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[83] *Buxton* v. *Rederi* 1939 A.M.C. 815.