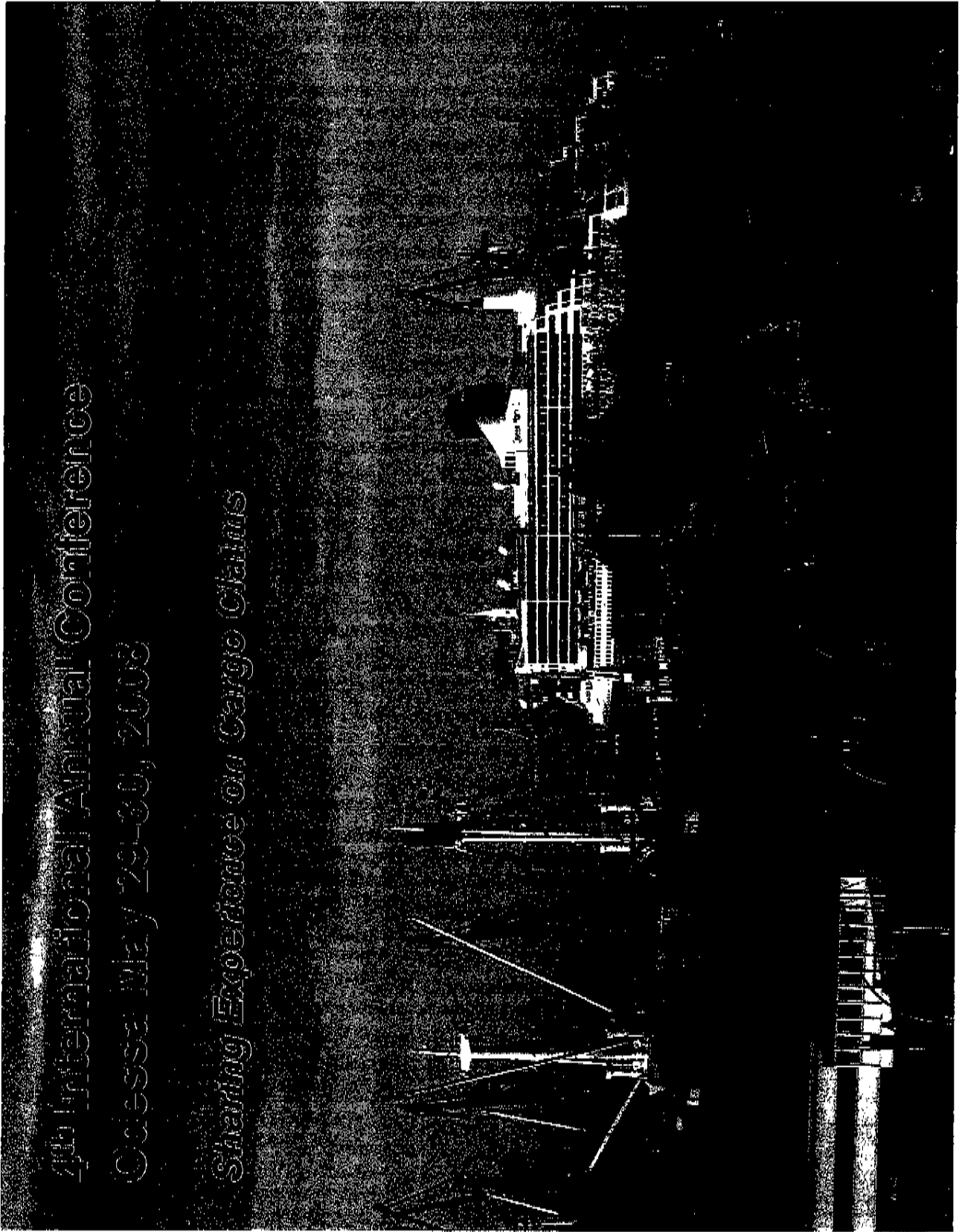


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Sharing Experience on Cargo Claims



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Handling Cargo Claims Sharing Experience The German View

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Ladies and Gentlemen, Mr. President,

Sharing Experience, what a brilliant idea! We all know the good old proverb saying that if you have three lawyers discussing the same issue you will have at least five different opinions on the same subject. So although the maritime community from the very beginning has been an international one, it is quite important to understand the "local specialties", or - to be more precise – to know the differences in the courts' attitude and the maritime lawyers' practice.

So what is "special" about handling cargo claims in Germany?

Let me concentrate on

- A. The contract of Carriage**
 - 1. Jurisdiction and Arbitration Clauses, valid?**
 - 2. Who is the right defendant?**
 - **The IoC-Clause.**
 - **The German "Fixkostenspediteur".**
 - 3. The scope of the sea-carriers liability? What about the terminal?**
 - 4. The Error in Navigation- and the Fire-Excuse, still alive?**
 - 5. The one-year-time limit; at risk with claims in tort?**
- B. The Hague/Hague-Visby-Rules: What is the position in Germany?**
- C. A Few General Remarks on Claims Handling in Germany**

A. The Contract of Carriage

1. Jurisdiction and Arbitration Clauses

You may be faced with this issue twice. (1) Am I safe with the jurisdiction clause in my B/L when dealing with a cargo claim? (2) Is it valid (and wise?) to agree on Germany Law and Jurisdiction?

(1) Am I safe with my jurisdiction clause in the bill of lading?

The answer under German Law is generally, yes! Unless the clause directs claimants to a jurisdiction with a standard less than the Hague-Rules.

A valid jurisdiction clause under German Law then covers all claims under the Contract of Carriage,

however, the jurisdiction clause does only bind the carrier named in the contract or mentioned on the front page of the bill of lading vs. the shipper and vice versa! The owner is due to the decisions of our Federal High Court (latest decision in Feb. 2005) only bound by such jurisdiction clause if he has been part of the negotiations when the bill of lading has been issued or he has later accepted such clause.

There is no specific wording required; it is even sufficient to limit the clause to the question of law

.. shall be decided in accordance with laws of the country where the carrier has his principle place of business ..

or the jurisdiction:

.. shall be decided by the courts where the carrier has his principle place of business ..

The law mentioned gives an implied indication to the competent court and vice versa! Of course for good orders sake you will only use a complete worded clause.

What about an Arbitration-Clause? Again, there are no specific requirements for such a clause and in Charter-Parties jurisdiction clauses are widely used.

(2) Is an arbitration agreement valid? No, doubt yes. We will learn a bit more about arbitration during the GMAA-Presentation; so here it may be sufficient to give you the fine wording.

GMAA-Arbitration Clause:

All disputes arising out of or in connection with this contract or concerning its validity shall be finally settled by arbitration in accordance with the Arbitration Rules of the German Maritime Arbitration Association.

(Abbreviated version: "GMAA-Arbitration")

2. But, please note! A clause giving the carrier the choice either to call the ordinary courts or go for an arbitration panel is held not valid

2. Who is the right defendant?

(1) The IoC-Clause:

Be aware, the IoC-Clause is generally not valid under German Law! The Federal High Court recently ruled (see above) that if a carrier is named in the contract or on the front side of a bill of lading this is regarded as an "individual agreement" and overrules any nomination of the owners as the carrier in the b/l-conditions; those b/l conditions are only "standard business terms" and have to stand back against the "individual agreement" (decision as of Feb 15th, 2005; ref. I ZR 40/04). So the carrier is the one named on the b/l not the owner!

(2) The German „Fixkosten-Spediteur“

Interesting to know that you may not be sued by a German Shipper, even if he still has 3/3 original bs/l in his hands as the German shipper may go after his – probably German - freight forwarder. Of course, in general: the freight forwarder under German law is only obliged to arrange for the dispatch of the goods but he becomes liable like a carrier as soon as he contracts on fixed freight terms!

§ 459 HGB (German Commercial Code) reads:

„If as payment a certain amount is agreed upon, which includes payment for the carriage, the freight forwarder with regards to the carriage is entitled to the rights and bound by the obligations of a carrier“

You will realize the consequence:

A freight forwarder – acting on fixed freight terms – may become a party to a sea-carriage contract and may be liable like a carrier.

3. The scope of the sea-carrier's liability

Generally speaking, the carrier is liable as long as the goods are in his custody. In your b/l- lading conditions you may of course limit your liability "from tackle to tackle".

However, the widely discussed issue in Germany right now is, whether the operations on a terminal are regarded as

- A. part of the land leg?
- B. part of the sea leg?
- C. separate part of the transport?

So you may become liable as a multimodal-operator rather than only as a sea-carrier!

This is of great importance as for the sea-leg the carrier is liable up to 2 SDR/kg, while on the land-leg the limitation in Germany is 8,33 SDR/kg, and finally the terminal – if a separate part of the transport makes the carrier all of a sudden a "multimodal-operator" – may be liable up to 8,33 SDR/kg and with a considerable risk of a breaking through the limitation.

Three decisions of the German courts may highlight this issue:

(1) When the sea-leg ends and the land-leg do actually begin?

The view of the German Bundesgerichtshof (Federal High Court) is expressed in a most recent decision called "The Atlantic Concert"

Facts:

Two crates of a large printing machine enroute from the German port of Bremerhaven to Durham/North Carolina were discharged in Portsmouth on a MAFI-trailer. After the first crate had been loaded on the truck and the second one was unlashd the MAFI-trailer was moved in order to lift the second crate from the other side of the truck, and the crate fell off the MAFI-trailer and the printing machine was heavily damaged.

Cargo underwriters filed a claim arguing that loading the truck was (first) part of the land-leg and did not belong to the sea-leg for the good reason that the 8,33 SDR/kg-limitation of the land leg covered the total claim, while the 2 SDR/kg-limitation of the Hague-Visby-Rules only 30%.

Decisions:

The Landgericht Hamburg (Regional Court) granted only 2 SDR/kg with the argument that any terminal is regarded as part of the sea-transport; and Underwriters appealed. The Oberlandesgericht Hamburg (Hamburg High Court) overruled and held that a transport on a terminal, if for more than just a few meters, must be regarded as a separate part of the multimodal transport and granted the limitation of the land-leg, i.e. 8,33 SDR/kg, which led to full recovery! Now, defendants appealed to the Federal High court, which had held in a former decision:

- Transport on a terminal is no separate leg of a multimodal transport,
- unless there are „special circumstances“, which the Court, however, did not define,
- the terminal operations belong to the sea-leg till the goods are placed on the truck.

And the arguments were:

- Discharging of the goods from a vessel and terminal operations have the closest link to the sea-carriage.
- The duty of an ocean carrier does only cease when the goods are delivered to the consignee or the next „operator“.
- The application of maritime law would be unreasonably „restricted“.

The decision was widely discussed in Germany and often criticized. So the Federal High Court obviously reconsidered this former decision and now held, that the land leg starts, when the operations to load the truck which was supposed to carry the cargo to the final receivers has started, instead of " ... when the goods had been loaded on the truck"!

My Comments: I do agree, but the crucial question is, whether in fact the actual operations must have been started.
That may highlight the next decision!

- (2) What about terminal operations after the sea-carriage while the container is "waiting" to be trucked to the final receivers?

Facts:

A Container with shoes was discharged in Rotterdam into a container stack, however, as the so-called "goose-necks", necessary to secure the container on the truck, were broken the container was trucked to a repair-shed. Then welders worked on the container and obviously the heat of the welding set the cargo inside – 200 cartons with ladies shoes – on fire. Claimants – cargo-underwriters – argued that the sea-carriage had already been terminated and the welding was expressly done to make the container fit for the trucking; therefore the carrier was not entitled to rely on the 2 SDR/kg limitation of the Hague-Visby-Rules.

The Decision: The lower court of Hamburg accepted that and cargo-underwriters appealed. The Hamburg High Court during the recent hearing announced that it will probably dismiss the appeal as the mere fact that the container was repaired on the terminal does not lead to what the Federal High Court defined as "special circumstances", so storage on the terminal is still part of the sea-carriage. Cargo underwriters will probably call for a decision of the Federal High Court.

My Comments: I disagree. The sea-carriage was terminated when the container was stored. Welding the container was clearly preparing same for the land-leg, ergo, the limitation of the land-leg should apply.

- (3) So finally: What about terminal operations before a sea-transport?

Facts:

A German "Fixkostenspediteur" had been instructed to arrange the transportation of five concrete mixers from Germany to Mumbai/India. The shipment was carried to a terminal within the port of Antwerp waiting for the sea-carriage but after three weeks most of the shipment was found to have been stolen.

When sued for the full amount the "Fixkostenspediteur", which was in fact regarded as a carrier, argued the handling and storage of cargo in a port area was (already) part of the sea-leg with a maximum liability of 2 SDR/kg.

The Decision: While the lower court granted the unlimited amount on appeal the Hamburg High Court found that storage on a terminal before sea-carriage, even if storage in the port area lasts for several weeks is a "logical" part of the sea-carriage and therefore accepted the defendants' limitation of (only) 2 SDR/kg.

My Comments: Yes I do agree, when the container was discharged from the truck, the land-transport ended, the sole storage period is not what our Federal High Court would accept as an exemption from the general rule, however, problems will (again) arise when there might be "special circumstances"; i.e. what, if the cargo was shifted from one terminal to another and damaged enroute?

4. The Error-Navigation- and the Fire-Excuse

(1) The "Cita" – the sleeping watch-keeper,

Facts:

The MV "Cita" a 300-ft merchant vessel, built 1976, 241 TEUs, grounded off the south coast of the Isles of Scilly on March 26th, 1997 while en route from Southampton to Belfast; the reason was simple: the watch-officer, the only one on the bridge, fell asleep and the watch-alarm had been switched off – as usual. The charterers set up a limitation fund and the official receivers and owners denied all claims against the fund. Cargo underwriters started proceedings.

Decision:

The Landgericht Hamburg decided in favour of cargo underwriters, arguing that the vessel was unseaworthy and that charterers could not rely on the error in navigation defence. This excuse is only open for a prudent carrier. The defendant appealed.

The Oberlandesgericht Hamburg on appeal reversed the lower court's judgement, with the following arguments

- the vessel was properly manned and the chief officer was sufficiently trained and certified, the vessel was therefore not unseaworthy;
- the defendant did not act negligently as regards the organization of watchkeepers on board the vessel.
- The error in navigation excuse covers all "activities" in respect of navigation or other control of the vessel including omissions of the watch-keeper to alter the course or to check the compass or the radar due to the fact that he had fallen asleep.

The claim was dismissed and the claimant appealed to the Federal High Court, which confirmed and added

- the legislature despite a lot of criticism did not change the error in navigation defence when reforming the German transportation law, so the judiciary was not entitled to overrule that decision,
- Germany is a contracting state to the Hague-Rules, so it cannot change the law without terminating that international convention first.

My Comment

I (finally) agree. No, doubt, the decision is in line with both the Hague Rules and the Hague-Visby-Rules, on which the German law is based upon. However, it can be argued that the error in navigation excuse has to dealt with restrictively, because

- a. the excuse is historically and clearly comes from the former times of sailing vessels.
You may recall the collision of the automobile-carrier "Tricolor" with the "MV "Karibe" where in the appeal proceedings the perils of the sea defence was raised, but the New York Appeal Court found". "The Perils of the Sea have been with us since Noah sailed his Ark, and some will remain, but in the 21st Century, I think we can do better at reducing the risk of ship collision". I feel this wise argument could be used here as well. –
- b. and a more legal argument – there is a duty of the carrier to arrange for what is called the "cargo-worthiness"; see § 607 sub.2 of the German Commercial Code, which provides for the carriers' responsibility for loss or damage caused by a measure of the crew in connection with the cargo on board. However, the Federal Court held – and one has to concur - in this particular case that altering or not-altering the course

(2) The "Cape Arago" – shoes on fire.

The second excuse, which is somewhat unique for the sea-carriage and has no similarity for example in the regimes covering the land-transport, is the fire-excuse. You will recall the 2nd decision mentioned above under No.2. The question whether the welding on the terminal could be attributed to land-carriage or has still to be regarded as part of the sea-leg is not only relevant for the limit of liability but also for the application of the fire excuse. So if it is in fact part of the sea-leg one may consider whether the fire-excuse is still valid, which would not only limit the claim to 2 SDR/kg but simply exclude the carrier from its liability totally.

As said, the Hamburg Appeal Court has not yet decided this issue, however, it seems that it will attribute the welding and storage on the terminal to the sea-leg and follow the Federal High Court by saying:

- o the legislative despite a lot of criticism did not change the error in navigation defence when reforming the German transportation law, so the judicative was not entitled to overrule that decision,
- o Germany is a contracting state to the Hague-Rules, so it cannot change the law without terminating that international convention first.

5. The one year time limit: At risk with claims in tort?

Facts and Decision:

The general answer under German Law is: No! Although the time limit for claims in tort under German law is generally 3 years, for all claims for loss or damage arising out of a contract of carriage there is - as I would say - in Germany a common understanding that those claims do also fall within the scope of the one-year time limit.

In a recent case of January 2008 the Federal High Court highlighted this with regards to the one-year-time-limit as regulated by the German Commercial Code (see § 439 HGB = "Handelsgesetzbuch"). The court ruled, that § 439 provides for the "special rules for the time limit" in transport cases and must therefore be applied to all claims arising from transportation. If there is a valid contract of carriage and a clear link between the claim for damage and the transport, the special provisions of § 439 HGB overrules the more general limit for claims in tort.

My Comments:

Yes, I agree. We do need synchronization of the time limits with regards to claims arising from and directly connected with transportation. Cargo claims must be decided within a reasonable time in order not to lose the evidence or "the witnesses' memory".

However, please note under German maritime law the one year time limit is in fact a "time bar" and no prescription period; that leads to the fact that a claim letter may suspend the time bar till the carrier in writing rejects the claim!

B. The Hague/Hague-Visby-Rules, what is the position in Germany?

You may know that Germany is regarded as a Hague State, as it has not signed the Visby-Protocol! But as it has transferred the Hague-Visby-Rules into the German Commercial Code so basically under German Law a carrier is liable under a regime like the Hague-Visby-Rules, however, there is one specialty: If there is no claim letter at the time when discharging operations has been finalized, cargo interests not only have to prove that the damage or loss occurred while the cargo was in the custody of the sea-carrier, they have also the burden to show negligence of the carrier with regards to that specific damage or loss.

C. The Practice of Handling Cargo Claims in Germany

You will appreciate that the above legal aspects have a most significant impact on the practice of claims handling in Germany. I welcome your questions and I am open for discussion.

Just a few two notes:

1. As the sea-carrier

- is often located abroad, and includes a foreign jurisdiction clause in its charterparty,
- may exclude his liability for error in navigation and fire and finally
- may limit his liability to 2 SDR/kg

cargo claims are often directed to the German "Fixkostenspediteur" and you as owners, charterers or P+I-Club representatives are asked for a time extension only. Be sure you have collected all evidence as after years – when cargo claimants failed against the "Fixkostenspediteur" – you may not be able to gather same then.

2. However, if claimants pass by the "Fixkostenspediteur" you may consider early settlement; no doubt you will judge the merits of the claim, the claim amount and the possible legal expenses if the claim goes to court. In Germany lawyers' fees and court fees depend on the amount in stake. If you have let's say a claim for €100.000,00 court fees are about € 2.600,00 and lawyers' fees if the case is settled in the court about € 5.500,00 ex VAT (unless your lawyers works on a hourly basis. Pls note: Up to know German lawyers are generally not allowed to work on a no-cure-no-pay-basis.

3. You may be asked to provide for security. Pls note that if your vessel is trading the Antwerp/Rotterdam/Hamburg range an arrest may easily be arranged. As to arrests in Germany pls note the homepage of www.shiparrested.com "Germany".

D. So my final Comments are:

Handling Cargo Claims in Germany is somewhat "balanced"; German law is neither a carriers' nor a shippers'/consignees' law:

As a carrier, you can also rely on:

- The 2 SDR/kg-limitation with nearly no risk to have that lifted,
- A wide application of the error in navigation-defence (The MV "Cita") and the fire-excuse,
- A counter-security bonus in case of an arrest.

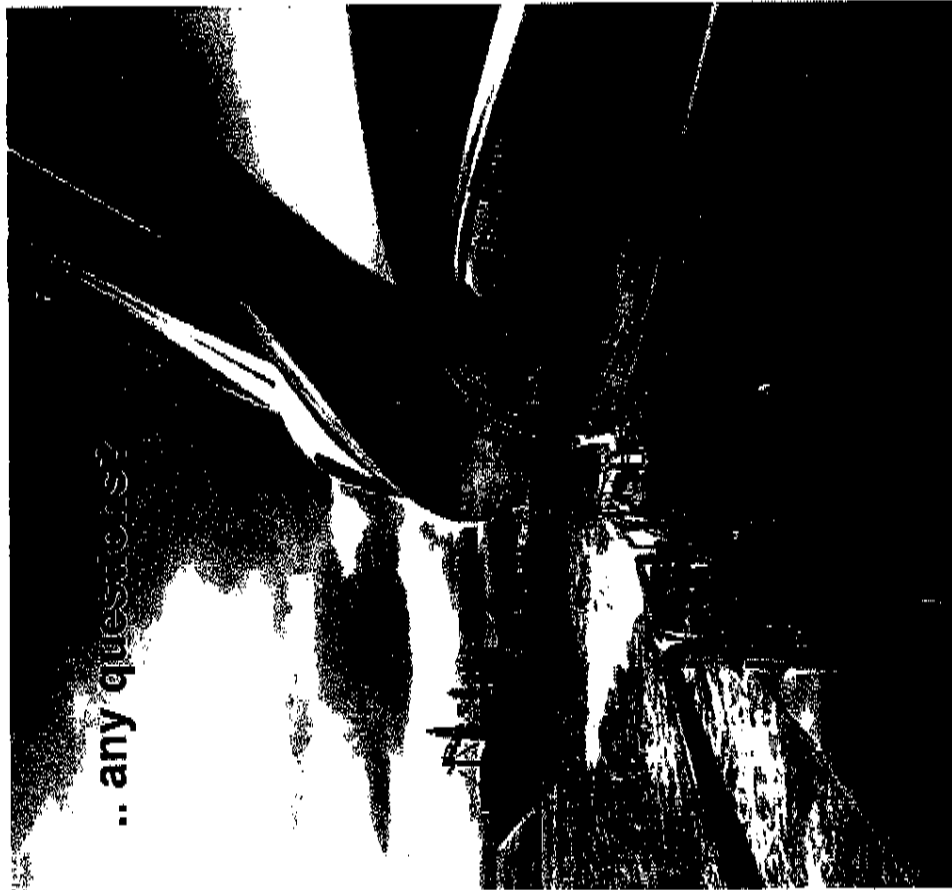
As a cargo-interest, your bonus is:

- You may go after the "Fixkostenspediteur" in Germany,
- The IoC-Clause is not valid, you may go after the carrier in a more convenient jurisdiction than the owner is in,
- In case of a multi-modal transport you may break through the limited liability easily with the argument of "gross negligence", unless the carrier proves that the damage occurred on the sea-leg.
- You may expect not only a fair and speedy trial but also a trial with reasonable costs, in particular when arbitrating with the GMAA!

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