

RECOVERY OF TRANSPORT CARGO CLAIMS IN ARGENTINA

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NOTA

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RECOVERY OF TRANSPORT CARGO CLAIMS IN ARGENTINA

Thank you very much David for inviting me to participate in this important Seminar. I hope my comments about how the recovery of transport cargo claims works in Argentina are useful to the international colleagues that are attending the Conference. As you are listening, my English is not as good as I desire, but I am confident you will understand my exposition better than the Romans and Greeks did in the past.

The story is the following: There was a dispute between different groups of Greek citizen about if the Romans were worthy to receive Greek Culture, Science and Philosophy. So Greeks decided to name a representative to communicate Romans, and as they spoke different languages, they used hand signs. Depending on the result of the discussion, Greeks will debate if Romans are ready to receive its knowledge.

So the Greek began showing the Roman one finger up (Forefinger right hand). The Roman answered showing three fingers up (Thumb, forefinger and middle). Then the Greek showed the Roman the palm of his right hand open and finally the Roman answered showing the fist clenched.

The Greek representative returned to the Assembly and he explained to its wise people: The Romans deserve our Culture. I told the Roman representative, with one finger up, "There is one God", and he answered me with three fingers up "Yes, but in fact there are three, because of the Trinity". Then I explained him, with the palm of my hand open that "God knows everything, and he is patient and calm" and the Roman replied with the fist clenched, answering that "God has also the strength and power, in case he needs to use it as a last instance alternative". The Greek Assembly was surprised about how mature Romans were, and they decided to bring all their knowledge to them.

The Romans representative, after receiving the favourable opinion of the Greeks, was considered a hero. And he was invited to tell its nationals how he obtained the great honour to learn from Greek Culture. The Roman explained as follows: When the Greek representative showed me one finger, he threatened me to put it into my eye, so I said to him I will put two fingers in their eyes and the thumb in his mouth, so I will blow up their teeth. The Greek answered he will slap in my face with his palm wide open, and I replied I will knock him out with a punch.

So, I hope my comments could be more understandable than the Romans ones.

I will refer only to international transport cargo claims (It means the ones between other country and Argentina) where the final destination is a place located in my country, then I will not take into consideration the domestic transport (Between places located in Argentina) nor the outbound traffic (When the place of origin is situated in my country). Under Argentinean Law, as a general rule, the place of destination will be the connection point to consider the jurisdiction to file a claim and also it will determine, in principle, the applicable law to such cargo claim against carrier, because delivering the goods at destination is the more characteristic lending of a contract of carriage.

1) Sea Transport cargo claims: The Argentine Republic adhered to the Brussels Convention on Bills of Lading 1924 (the Hague Rules) in 1960, and the Navigation Act of 1973 incorporated the principles of the 1924 Convention as well as the majority of those laid down by the Protocol of 1968 (the Visby Rules). However, Argentina did not ratify such Protocol. A Paramount clause on the reverse side of a bill of lading stipulating that the Hague Visby Rules applied is valid under Argentinean Law and Practise.

2) Air Transport cargo claims: The Argentine Republic adhered to the Warsaw Convention of 1929 as amended at The Hague according to Protocol of 1955. On 1988 Argentina adhered to the four Montreal Protocols of 1975. A Paramount clause on the reverse side of an airway bill, stipulating merely that the Warsaw and Hague Convention applied, may increase the limit of carrier liability, if the Montreal Protocols are not stated in the wording of such paramount clause.

3) Road Transport cargo claims: The Argentine Republic adhered to some Conventions with neighbour countries, such as: a) Commercial Terrestrial Law Treaty of Montevideo, 1940, with Paraguay and Uruguay, where it is stated that the validity and the formalities of the transport contract must be considered according to the law of the place where the bill of lading is issued but with respect to the fulfilment of the duties of the parties related to cargo, the law of the destination place must be applied. b) Convention on International Terrestrial Transport of Santiago, 1991, with Brazil, Chile, Paraguay, Uruguay and Bolivia, where in general obliges the carrier to issue a Bill of Lading for international transport (By road and by rail).

I will show you a synopsis of the principal aspects applicable to cargo claims in my country:

Mode	Legal Basis	Period of Liability	Extent of Liability/Limits
Rail-International	Argentinean Commerce Code	Reception / Delivery	NO LIMIT
Road-International	Argentinean Commerce Code	Reception / Delivery	NO LIMIT
Air Freight-International	Montreal Protocols 1975	Reception / Delivery	USD 27.5 (17 SDR) per kilo 3*
Sea-International	Hague Rules	Shipped on board / Discharged	USD 20,786 by package or unit
Combined (Multimodal Transport)	Argentinean Multimodal Act	Reception / Delivery	2*
Warehouse	Argentinean Commerce Code	Reception / Delivery	NO LIMIT

Exclusions of Limit of Liability	Notice of Claim after reception of damaged goods	Time Bar	Remarks
	Immediately	2 years	1*
	Immediately	2 years	1*
Willful Misconduct; No Air Way Bill	14 days	2 years	
Unseaworthiness; Willful Misconduct	Previous to taking the goods from Port	1 year	The limit depends on the quotation of gold
Unseaworthiness; Willful Misconduct	5 days	1 year	1*
	Previous to taking the goods	10 years	

1* There are some Conventions in South America but for practical reasons in Argentina, in Import traffic, Argentinean Law is applied.

2* If the damage occurred during passage by sea or by air, the applicable limit is the limit of such special regime. If it is unknown where the damage occurred, the limit is USD 86,189 (Subject to quotation of an ideal currency named Argentinean Gold. The Argentinean Gold is quoted in Argentinean Pesos every three months by the Argentinean Central Bank). So 400 Argentinean Gold per package or unit (That is the limit stated in the Argentinean Multimodal Act) must be exchanged first to Argentinean Pesos and then to United States Dollar.

3* If the Montreal Protocols of 1975 do not apply, for example because of the omission to name them on the reverse side of the Airway bill, the limit of liability is USD 415 per kilogramme.

Quotations: Troy Ounce = USD 883 (New York market, May 13th 2008).-

SDR = USD 1.61927 (May 13th, 2008).-

Argentinean Gold = \$ 689.51 (May 13th, 2008).-

USD = \$ 3.20 (May 13th, 2008).-

TIME BAR

This is a subject common to all types of recovery of transport cargo claims. In Argentina the time bar period is fixed by Statute, and it is a matter of Public Order, it means that it is not possible to decrease the time period fixed in a Convention or an Act by a private agreement between the parties, or stating a clause in a bill of lading. A time to suit clause is not valid in Argentina, if the time bar period is lower than the statutory period.

The time bar period is the one corresponding to the applicable transport mode, as stated above (2 years for road, rail and air transport; 1 year for sea or multimodal transport).

SUSPENSE OF TIME BAR

According to Argentinean Civil Code, Section 3986, second paragraph, it is possible to suspend for a year the time bar period if the defendant was formally put on notice of the cargo claim, and it is requested to settle a precise amount of money. In such a case, it is possible to obtain an additional year to file a complaint before the courts. This can be done by an out of court notification or starting a mediation process, previous to the judicial action. So, cargo claimants can gain one year to the applicable time bar period corresponding to the type of transport. Therefore, claimants will have 2 years to file a judicial complaint in sea and multimodal transport, and 3 years in rail, road and air transport.

However, in air transport recoveries, Argentinean Supreme Court decided that the suspension of time bar through an out of court notification is not applicable because the right to request a compensation for damages against airplane companies is extinguished if the judicial action is not filed before two years from the date of arrival at destination or from the date on which the aircraft ought to have arrived.

JOINT INSPECTION OF THE DAMAGED GOODS

One of the important issues that must be taken into account to preserve the right of claim against carrier (In all types of transport) is to make a joint inspection of the damaged goods. It means that a carrier representative and a cargo representative must

survey the damaged goods at the same time and in the same place, and then they must sign a bilateral certificate of inspection. Under Argentinean Law, private surveys or unilateral inspections are not considered valid by the Courts in order to proof the state and condition of the goods. Even notary minutes and certified photographs can be disputable in legal cases.

The system is easy: Cargo owner (Or its representative, for example customs broker, or even the adjuster of the cargo insurance coverage) must request carrier to make a joint inspection of the damaged goods. In the majority of the cases, there is no problem and the parties agree how to handle the survey of the merchandises.

But if carrier representative refuses to do it, or simply he does not go to the place where the inspection should be done, the only way to preserve the action against carrier for damages to the goods is to request a Judicial Expert Witness to survey the cargo. So, a formal presentation before a Civil and Commercial Judge must be done in order to name an official surveyor. This procedure is useful for cases where the amount of cargo damage is of economic importance, so in small cases it is not recommendable, because justice tax must be paid and also the opponent lawyers fees (Concepts that are recoverable in the future recovery action).

Sometimes Judges accept official reviews without the presence of a carrier representative, for example the inspections made by an Argentinean Customs Officer, but this is an exception, because the system works with joint surveys.

In air transport cargo claims the bilateral certificate of inspection made in due time is accepted as objection or complaint or notice of claim related to the delivery of cargo in a damaged situation. In cases of total non delivery of goods, Argentinean Courts decide there is no need to complain to the carrier.

In sea cargo recovery actions the time to tender the notice of claim to carrier is less determinant and it is possible to overcome some delay, if it is proved that the goods were damaged before consignee took possession of the merchandises.

USUAL STEPS OF A RECOVERY CARGO CLAIM IN ARGENTINA - DURATION OF PROCESS

Depending on the defendant and the case (Experience sometimes teaches us it is a waste of time to file an out of court presentation to try to reach an amicable agreement with the opponent party), a recovery cargo claim can follow three different stages:

- 1) Out of Court Claim

- 2) Mediation Process
- 3) Judicial Complaint

1) The out of court claim is a valid way to close small recoveries or cases where the defendant has a settlement policy. The usual procedure is to send a letter of claim to the carrier agent with copy of the supporting documents. Our experience is that if this stage lasts more than three months, there are very few chances to reach a positive recovery and then it is better to start a mediation process.

2) The mediation process is a very informal procedure, easy, cheap and quickly. Everything that is being discussed at the hearings is secret and can not be used as proof in a future legal action. The only request is to have a power of attorney in order to represent claimant.

There are two types of mediation processes: The official and the private. The differences are basically two: In the official mediation the mediator is drawing by the court and time bar is suspended against all the defendants included in the mediation since the presentation of the formulary before the Assignment Office of the Federal Civil and Commercial Courts.

In private mediations, the mediator is chosen by the plaintiff and time bar is suspended when the registered letter is sent to the defendant in order to notify the date time and place of the first hearing.

Mediators have no power to issue a decision and the only function they have is merely trying to convince the parties, through persuasion, to try to reach an amicable agreement. In Federal Civil and Commercial Courts of Buenos Aires, mediation is an obligatory process previous to filing a legal action before the courts.

Normally, mediation process lasts no more than three months and the total cost is less than USD 300 (Three hundred United States Dollars).

3) In order to start a judicial case in Argentina it is necessary to have all the original documents at hand (And if not, pointing out who has the original document in its possession), and pay the justice tax. All proof measures must be offered at the beginning of the case, together with the complaint. Everything must be done before the defendant receives the formal notification of the complaint. So it is important to investigate and provide the Argentinean lawyer with all possible information about the

recovery action, because due to procedural reasons at a later stage it is not possible to amend or to include new measures of proof in the legal action (Like other statements, documents, points to be analysed by expert witnesses, etc.). The duration of proceedings depends on the complexity of the recovery action and the necessity to issue rogatory letters to other countries, but a normal case lasts about five years since the complaint is summoned to the defendant and until the Appeal Court decision is obtained.

CIVIL AND COMMERCIAL FEDERAL COURTS

In Argentina, international transport matters are considered by Federal Courts. Civil and Commercial Federal Courts with address in Buenos Aires City are the principal courts of the country with respect to international transport matters. There are eleven First Instance Judges and three Courts of Appeal. Both Courts considered the recovery actions in full (It means there is a double instance for the analysis of the proofs and the laws applied).

As international transport matters sometimes involve the interpretation of federal rules, it is possible to reach the Supreme Court, only with respect to law matters and neither facts nor proofs.

JUSTICE TAX

In Argentina, it is a plaintiff duty to pay 3% of the amount of the lawsuit, plus interests, at the beginning of the legal action. If the judgement is in favour of the claimant, in general it is possible to recover the amount paid as justice tax from defendant. The justice tax is applied only in court cases, not in the mediation process previous to the lawsuit.

INTERESTS

Legal interests in Argentinean Federal Civil & Commercial Court cases are running at the same rate as the banks lend money, it is called the active rate. Interests are about 20% by year if the currency of the claim is the Argentinean Peso or about 15% by year if the currency of the claim is the United States Dollar. Interest is to be paid from the date of notice of claim or from the moment the debtor is in default.

EXPERT WITNESSES FEES

As a general rule, the party who loses the case will assume the expert witnesses fees. Expert witnesses are named by the Judges. There are different official lists of expert witnesses, divided according to their speciality. The amount of the expert witnesses fees are regulated by the Judges and in general the percentage is from 3 to 8 % of the amount of the lawsuit including interests.

LAWYERS FEES

Cargo claims attorneys usually attend the clients request under a “No win no fee agreement”. The standard percentage is 20% of the amount recovered for the client. Sometimes there are different percentage scales if the matter is concluded out of court, in mediation or in court.

However, if the recovery action continues until the final decision is issued by the Judge, and the complaint is rejected, plaintiff normally must borne the fees of the opponent lawyer, which in general are fixed by the Judge in the range of 10 to 20% of the amount of the lawsuit including interests in first instance, and 1/3 of such percentage in the appeal proceedings.

CLAIMANTS WITH NEITHER ADDRESS NOR ASSETS IN ARGENTINA

It is possible the defendant raise, at the same time he is answering the complaint, an exception so that the claimant guarantees the costs of the legal action, in case he loses the lawsuit.

If the plaintiff has neither permanent address nor assets in Argentina, the Judge can impose a cash deposit or a bail bond or even an insurance warranty for about 20% of the amount of the legal action.

However, if the plaintiff is a company organised under the laws of a country which is a party or adhered to the Civil Procedure Convention, celebrated in The Hague in March 1954, as Argentina ratified such Convention, section 17 applies and it is not possible for the Argentinean Judge to impose a deposit or a bail bond to the foreign plaintiff.

MEASURE OF DAMAGES: ARRIVAL SOUND MARKET VALUE

The extend of the damage is established in section 277 of the Argentinean Navigation Act, and also in section 179 of the Argentinean Commercial Code.

The value of the goods will be calculated as at the place and date of discharge, according to the contract, or as to the date and place on which they should have been discharged.

The value of the goods is determined according to the price fixed by the commodity exchange, or, otherwise, according to the current market price. In the absence of one or the other, the value of the goods damaged or lost is determined according to the normal value of goods of the same nature and quality.

The principle is that the value of the goods must be considered according to the wholesale market quotation, and without the V.A.T. (Value Aggregate Tax).

Argentinean Courts ruled that if the merchandises are imported by only one company or person, or the goods could suffer from technologic depreciation (For instance computers, TV, electronic equipments, etc.), the value of such effects must be calculated taking into account the commercial invoice value of the purchase operation, plus the freight paid, plus the insurance premium amount quoted, plus Argentinean customs taxes and duties, plus an expected profit of the operation on behalf of the importer, which in general is fixed by Courts in the percentage of 40% of all the added values already mentioned. This procedure is known as indirect method to establish the value of the goods (Instead of the direct method, which is the usual and general one, it means to take the market price of the effects).

As Argentinean cargo insurance policies usually cover the CIF value of the goods plus customs taxes, duties and costs, plus an imaginary benefit of 20% on behalf of consignee, the amount paid by the insurance company to the assured could be less than the market price of the product or the value of the goods calculated using the indirect method. So, it is possible and in fact it is rather usual that carriers receive in Argentina two different claims for the same incident: One from the insurance company subrogated in the rights and actions of the assured, until the amount effectively paid to the consignee, and the other claim from the owner of the goods, for the difference between the market value of the merchandises less the amount compensated by the insurance company.

It is worth to mention that in Argentina it is not possible to claim carriers a recovery under an ordinary transport contract covered trough a bill of lading for a higher amount than the arrival sound market value of the goods, so loss of market or loss of future business or loss of reputation are matters excluded in normal transport cases.

JOINT AND SEVERAL LIABILITY OF THE ACTUAL CARRIER AND THE CONTRACTUAL CARRIER

Section 171 of the Argentinean Commercial Code, Section 292 of Argentinean Navigation Act, Section 153 of Argentinean Aeronautic Code and Section 20 of Argentinean Multimodal Act adopt the same solution with respect to transport cases where there are different contractual carriers and actual carriers. With respect to cargo owner who suffer the loss or damage to the goods, all the carriers are jointly and severally liable, but then such carriers have the possibility to take a recovery action against the carrier who really lost or damaged the merchandises, if it is known where the event occurred.

However, there are some interesting legal disputes in cases of Full Container Load cargoes discharged from the vessel with the original seals in order and without remarks with respect to the external aspect of containers.

ARGENTINEAN JURISDICTION IN TRANSPORT CASES WHERE THE DISCHARGE PLACE OF THE GOODS IS LOCATED IN ARGENTINA

In all transport matters where the place of destination of the merchandises is located in Argentina, jurisdiction clauses stated on the reverse side of the bills of lading which refer the dispute to a foreign court or arbitrator are considered null and void.

Argentinean Supreme Court ruled in 1936 in the judicial case Compte Vs. Ibarra that such clauses had no value, because as bills of lading are contracts of adhesion, it is important to protect the rights of the Argentinean consignee, who suffered damages or shortages to the goods, and therefore the importer can claim before local courts the repair of his loss against carrier, notifying its agent. Later on, in 1973, section 614 of Argentinean Navigation Act stated the same solution.

However, Argentinean Jurisdiction in import transport cargo claims is not a matter of public order because it is possible that the local owner of the goods voluntarily agrees after the incident that the matter shall be resolved by a foreign court or arbitrator.

THE LIMIT OF LIABILITY IS A DEFENCE THAT MUST BE INVOKED BY THE CARRIER WHEN HE ANSWERED THE COMPLAINT

In air and sea transport matters in Argentina, limitation of liability must be expressly opposed by carrier as a defence when he answered the complaint. If carrier failed to do it at that stage of the lawsuit, then he can not benefit from the limit stated in the applicable Conventions. The Argentinean Supreme Court confirmed this rule in 1998 in re La Meridional Compañía Argentina de Seguros Vs. Iberia

Limitation of liability only refers to the principal amount claimed in the legal action, so interests, costs and fees are not included in the limit. As the limitation of liability is a benefit on behalf of the carrier, it must be interpreted on strictly basis.

The limit of liability must be calculated according to the market values of troy ounce or special drawing right at the date of the incident.

CONTAINERS

- 1) Package Limitation: The three Civil and Commercial Federal Appeal Courts of Buenos Aires jointly stated in a plenary and obligatory decision to the eleven First Instance Judges that the limit of liability applied on any package or unit enumerated on the front of the bill of lading, being not important if the package or unit is described in the column "Mark and Numbers" or in the column "Description of the Goods" of the face of the bill of lading. Such doctrine was ordered in 1989 in re "La Confianza Compañía Argentina de Seguros S.A. Vs. M/V Salvador or Ivaran Lines"
- 2) Carried on Deck: The Argentinean Supreme Court in the judicial case La Buenos Aires Compañía Argentina de Seguros S.A. Vs. M/V Gladiator ruled in 1998 that a clause stated on the reverse side of the bill of lading that allows the carrier to transport container on deck or under deck is a valid stipulation and therefore if containers on deck fell from the vessel to the sea due to a storm (Force 10 of the Beaufort scale), there is no recovery action on behalf cargo owner or its insurance company subrogated in the rights of the assured.

FREE IN AND OUT CLAUSE

According to Argentinean Courts interpretation, the F.I.O. clause merely displaces the costs of loading and discharging cargo from the vessel to the owner of the goods, but the liability for damages or losses occurred to the merchandises during such operations rests with the carrier, because the master of the vessel is still responsible for the care

and custody of the goods since the beginning of loading operations and until the end of discharge operations.

MINOR INEVITABLE TRANSIT LOSS

In liquid and dry bulk cargoes, Argentinean Courts in general accepted as a “reasonable loss” during carriage by sea a difference at discharge port of 2 % with respect to the loading figures stated in the bill of lading. The nature of the goods is the cause of such criterion adopted by the Judges. Exceptions can be found, but it must be considered specially on a case by case basis, taking into account the similar or different methods adopted at the loading and discharging port to measure or weight the cargo.

ROBBERY IS NOT A CASUS

In road transport cargo claims, robbery of the merchandises is not considered by Argentinean Courts as an Act of God which release carriers from their liability as bailee of the goods. Unfortunately, the frequency of such events in Argentina oblige carriers to adopt security measures such as armed surveillance of the cargo, and / or satellite control of the truck course of transport. The defence of “force majeure” is not accepted, unless preventive measures were taken by carriers.

I hope this brief and simple explanation about some of the most common circumstances referred to recovery of transport cargo claims in Argentina are useful to you and of course I am at your disposal if it is necessary to clarify a concept or you have any doubt or query about this subject.