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Limiting Liability under Bills of Lading - The German View -

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A. Principles of German Maritime Law

- I. Germany ratified the Hague-Rules of 1924 by transformation into the HGB (Handelsgesetzbuch = German Commercial Code) on Aug., 10th, 1937.
- II. Germany did not sign the Visby-Protocol as this could have been interpreted as a decision against the (coming) Hamburg-Rules, however, without signing the Visby-Protocol Germany incorporated the Visby-Rules into the HGB (“Handelsgesetzbuch” German Commercial Code) with effect from 31.07.1986.
- III. Germany has not signed the Hamburg Rules, as the international acceptance was poor..
- IV. Conclusio:
 1. Germany remains a party to the Hague Rules and is therefore under obligations at international law to the other Hague Rules nations.
 2. Although Germany did not sign the Visby-Protocol and although the “structure” of the HGB is very different to that of the Hague-Rules the effect is basically the same; so to all practical intents and purposes Germany is a party to the Hague-Rules. (I.e. the limitation is 2 SDR/kg or 666,67 SDR/unit whatever is the higher).
 3. There are only a few, however, significant differences:
 - a) While under the Hague-Rules a consignee, who does not lodge a claim-notice in time (= when discharging operations has been finalized), only has to prove that the loss or damage occurred while the goods were in the custody of the carrier German law requires that the consignee also proves that the loss or damage are also attributable to the carrier’s negligence.
 - b) While under the Hague-Visby-Rules the one-year-time-limit is clearly a suspension (discharged from all liability whatsoever, in German “Ausschlussfrist”) it is under German Law construed as a “normal” time bar (“Verjährung”) and it is possible – although not undisputed by German authorities – to interrupt the time bar by a simple written claim letter. And when it says “written” you should note that German courts do not accept fax and/or emails as sufficient “written”, but only (registered) letters. Time extensions are valid and accepted by the courts.
 - c) While under the Hague-Rules there is no provision as to the amount of compensation (of course except from the limits per

unit or kg) German law states that it is the balance between the sound market value and the value in damaged condition at the place and the time at which the goods are discharged from the ship (see also Art.4, Para 5b Hague-Visby-Rules).

Please note: In case of damage that may lead to a compensation exceeding the repair costs, which is accepted by German Courts!

VII. Different to bills of lading in Common Law jurisdictions, where there are three persons involved in the legal framework of the carriage of goods by sea (shipper, carrier and consignee/receiver) German law knows five and is more precise:

1. the *Verfrachter* (carrier)
2. the *Empfänger* (receiver),
3. the *Ablader* or person who delivers the goods to the carrier either directly or indirectly through some other party (**Please note:** This is the person entitled to ask for the bill of lading (in German “*Konnossement*”), this is more or less the shipper,
4. the *Befrachter*, the person who actually contracts with the carrier (the charterer)
5. the *Drittablader*, who delivers the goods to the carrier instead of the shipper. There is no exact English equivalent.

B. Limiting liability by “bill of lading”-clauses (“Konnossementsbedingungen”)

1. The Bill of Lading and the Contract of Carriage

The B/L usually contains the terms of the contract of carriage, but under German Law it is not necessarily the contract itself. The Shipper (to be more precise in German: The *Befrachter*) and the carrier conclude a contract of carriage according to general contract law and therefore German law (§ 656[4] HGB) provides that, in the relationship between *Befrachter* and the carrier, the contract of carriage applies and has precedence over the bill of lading; this is also applicable if the *Befrachter* is also the consignee/receiver under the bill of lading.

2. The transfer of an (negotiable) bill of lading

The B/L plays an important role as soon as it is transferred. This transfer transfers the whole contract of carriage itself, but only those provisions of the contract that have been recorded in the “*Konnossement*” are binding between the carrier and the new holder of the *Konnossement*.

3. What is compulsory applicable under German Law?

If to a contract of carriage a bill of lading has been issued and transferred to a third party acting in good faith § 662 HGB provides that certain provisions of the HGB apply compulsorily to the bill of lading. Those paragraphs are

- § 559 (sea- and cargo-worthiness),
- §563(2) and §§606-608 (liability for loss or damage),
- §§611 and 612 (written notice of damage, and time bar),
- §656 (evidentiary presumption of the bill of lading),
- §§658 and 659 (restitution of value for lost or damaged goods) and §660 (limitation amount).

4. To what extend may carriers limit their liability?

Please note: The German courts do regard b/l-clauses and clauses in charter-parties/Contracts of carriage as Standard Business conditions and therefore these clauses have to pass the “test” of the law against unfair clauses (integrated in the BGB, Bürgerliches Gesetzbuch, German Book of Civil Law).

The basic requirements of that test are:

- Are the clauses duly incorporated into the contract? (i.e. if a b/l has not been issued) ?
- Are the clauses “surprising”; may an opposing party acting in good faith expect those clauses?
- If a clause is not “clear”, who bears the risk that it may have two or even more interpretations?
- Does a clause lead to an unacceptable disadvantage to one party? It is in any case not valid if it the effect is contrary to basic principles of that specific type of contract
- If the clause proves invalid in one aspect it is invalid in toto!
- Individual agreements overrule Standard Business Conditions!

Let’s try the test with a few clauses:

a) Jurisdiction Clauses:

Valid, as long as it directs to a jurisdiction with a standard not less than the German Law or at least the Hague-Rules (Please keep in mind: Germany is a Hague-State!).

b) Identity-of-Carrier Clause

“Limiting” liability by pointing to the owners and in connection with the jurisdictions clause gaining advantage? That is not valid under German Law (Bundesgerichtshof, TranspR 2007, p.119ff): *The carrier identified on the front page of the b/l cannot be changed by “Standard Business Conditions” on the reverse side because signing and accepting the “Name” on the front page is regarded as an “individual” agreement which overrules any standard business terms.*

c) Fire & Error in Navigation

Nothing special in Germany! Accepted by law and the Bundesgerichtshof rule (see the MV “Cita”, TranspR): *Even a sleeping 1st Mate is regarded as “navigating” the vessel because there is no justification for a restricted application of the error-in-navigation excuse, because the legislature 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, Germany is a contracting state to the Hague-Rules, so it cannot change the law without terminating that international convention first.*

Also the fire excuse is broadly accepted; even if welders repairing a container from the outside and burning the cargo inside the carrier may rely on the fire-excuse, unless the fire was caused by his personal negligence.

d) Deck-Cargo

The clause must identify the cargo specifically as “deck-cargo” (“...shipped on deck at shippers’ risk ...”). If the consignee accepts the bill of lading without lodging a protest he has accepted the deck-Cargo- Clause, too.

However, carriers may not escape from liability completely by simply pointing to a deck-cargo clause; they have to demonstrate

- a. that the cargo was properly secured on deck to withstand the “normal hazards” of an ocean/sea-voyage and
- b. (b) that the loss or damage occurred just because of a peril of the sea.

e) “Invoice-Clause”

Not valid as soon as it violates the right of the consignee to ask for the balance between sound and “damaged” market value; however, if there are no special circumstances the value of the cargo at the port of discharge will be certainly be not lower than the buying price at the port of loading.

f) “tackle to tackle” (“Landschadenklausel”)

The carrier shall be under no liability whatsoever for loss of or damage to the goods howsoever arising, if such loss or damage occurs prior to loading on or after discharge from the vessel even though freight for the whole carriage has been charged by the carrier.

This is one of the most discussed clauses in the German maritime industry and its validity is not yet “finally” decided by the Bundesgerichtshof.

The carriers are supported by the law, § 663 sub2 (2) HGB, which clearly states that: § 662 HGB (which provides that certain provisions of the HGB apply compulsorily to the bill of lading) is not applicable with regard to the obligations of the carrier to the time before loading the cargo on the vessel and after discharge.

Carriers in Germany also like to rely on what they call the “leading” decision: “Frozen Red Wine from Madeira” (Bundesgerichtshof, TranspR 1993, 248) although this decision is more or less an obiter dictum, as here the stevedores plugged the container to electricity not knowing that there was wine inside, which should not turn into ice (Wine) The crucial question was who’s turn was it to instruct the stevedores properly (and not whether there was damage only when the goods were “away” from the tackle.

In a later decision the Bundesgerichtshof (see TranspR 1997, 109 “The Fiona”) confirmed his opinion and argued, that

- The Cargo at that stage of the transport is normally no longer in the hands of a carrier but of those

from third parties, who are not under his influence and/or control.

Opinion:

But isn't the influence/command of the cargo-interest even less intensive? He normally does not even know who was ordered to do the on-carriage or the 1st leg of the multi-modal-transport? He shall direct claim to a company he never dealt with before.

- And German law against unfair trade requires that the clause is not contrary to basic principles of that specific type of contract. However, the first and primary duty of a reliable carrier is to protect the cargo and if he "fails" to compensate the loss. If he is entitled to discharge himself from all (!) liability, that basic principle is violated.
- The Bundesgerichtshof also that the clause is regarded as international standard and worldwide accepted.

Opinion:

Unacceptable, unless there is an international convention, such clause must be looked at with the national laws, because shippers and carriers need to know what their risk is.

- Finally the court held that the meaning of the clause is limited to damage or loss, which were caused (only) due to negligence of the carrier before loading and after discharge.

Opinion:

No convincing argument because a) it gives the parties a lot to argue (and maritime lawyers a broad field of service) and -much more important it ignores the doctrine, that a clause held invalid in a certain aspect is to be held invalid in toto (Verbot der geltungserhaltenden Reduktion).

C. Summary

1. Germany is a Hague-State (formal standpoint) but is practically a Hague-Visby-State.
2. Under German Maritime Law there is a fine distinction between the Contract of Carriage and the b/l; there could therefore be two (different) claims; one under the contract of carriage between the shipper and the carrier and one under the bill of lading between the consignee and the carrier.
3. The carrier may seek to limit his liability in both, the contract of carriage and the bill of lading. As long as the clauses so used are driven from International Convention (i.e. error in navigation) the German courts do accept them to a very broad extent, if they are Standard Conditions they have to pass the test.