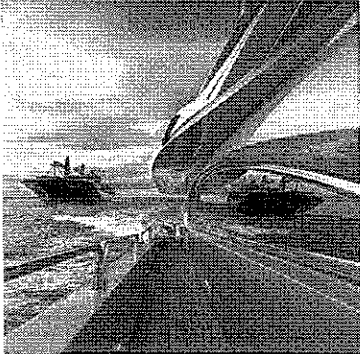


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**1st International Recovery
Conference New York,
June, 12 - 13 2008**

The German Practise

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Welcome to Hamburg

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**International Congress of Maritime Arbitrators
5 - 9 October 2009
Riverside Hotel - Hamburg**

An important event in every maritime and commercial arbitrator's diary, the International Congress of Maritime Arbitrators (ICMA) is a forum for maritime arbitrators, lawyers, underwriters and claims handlers from around the world to deliberate on and exchange views and news of professional interest. Held in different major cities each time, its next stop is Hamburg. ICMA 2009 promises to be an exciting Congress. (www.icma2009.com)

NOTE: ©2008 Information herein is simplified and provided for discussion purposes only – not to be construed or utilized as legal advice. Counsel should be consulted for specific claims.

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To Do List „German Recovery Practise“

1. The Legal Basis: Land – Sea – Air
2. The (Legal) Practise: What is special in Germany?
 - a. Jurisdiction- and arbitration-clauses,
 - b. subrogated underwriters' work,
 - c. „Fixkostenspediteur“ as Multimodal-Operator,
 - d. Package limitations and how to overcome same,
 - e. Security for costs and Claims?
3. The Legal Action: Procedure - Costs - Fees - Time

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1. The Legal Basis: Land – Sea – Air

**Recovery in Germany
National/International**

Land/Truck	Land/Rail	Sea	Brown-Water	Air
HGB/CMR	HGB/CIM	„Hague-Visby“	HGB/CMNI	HGBWA-MP

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National Transport by truck, rail, barge and airplane

4th Book HGB = Handelsgesetzbuch (German Commercial Code)

1. General principle of liability: strict liability with exclusions!
2. Exclusions: utmost care, insufficient packaging, inherent vice!
3. Liability for: loss, damage and delay, no consequential damage!
4. Limits (1) Damage / loss: Commercial value, but max. 8,33 SDR/kg.
(2) Delay and other claims: Max. 3 x freight amount!
5. Contractual modifications: ? Yes, by individual agreement, if no consumer!
6. Overcome the limits: damage caused with intent or recklessly with the knowledge that damage would probably occur!
7. Notice of Claim: At the time of delivery, if not visible: 7 days, otherwise safe delivery is assumed!
8. Time bar: 1 Year from delivery, if „5.“: 3 Years!

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International Transport

1. Truck : CMR (since August 24th, 1961)
2. Rail : CIM (since July 1st, 2006)
3. Brownwater : CMNI (since July 2008)
4. Sea : Hague-Rules (but incorporation of Visby-Prot.)
5. Air : WA/Guadalajara (since May, 31st, 1964) and Montreal Convention (since July, 28th 2004)

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German Maritime Law. General Overview

1. Germany ratified the Hague-Rules of 1924 by transformation into the HGB (German Commercial Code) on Aug., 10th, 1937.
2. Germany has not signed the Visby-Protocol, is therefore regarded a Hague-State!
3. But it has incorporated the the Visby-Protocol into the HGB with effect from 31.07.1986, so basically under German Law a carrier is liable under a regime like the Hague-Visby-Rules.
4. Two important exemption:
 - (1) when no claim letter in time, cargo interests to prove not only that the damage or loss occurred while the cargo was in the custody of the sea-carrier, but also carriers' negligence!
 - (2) 1 Year time is a time-bar, no prescription!

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German Maritime Law, Basic Principles

1. General principle of liability: liability of the sea-carrier is assumed, he can prove that by due diligence of a prudent carrier the damage couldn't have been avoided!
2. Exemptions: Error in navigation, fire, deck-cargo if agreed.
3. Liability for: loss, damage and delay, no consequential damage!
4. Limits : Damage / loss/delay: Commercial value, but max. 2 SDR/kg or 666,67 SDR/package, whatever is the higher.
5. Deviant agreements? No, if a b/l has been signed.
6. Overcome the limits? intend of the carrier to cause such damage or recklessly and with knowledge that damage would probably occur!
7. Notice of Claim: When discharging has been finalized; if not visible: within 3 days
8. Time bar: 1 Year from delivery, if „5.“: 2 Years!

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2. The Legal Practise: Anything „special“ in Germany?

a. Jurisdiction- and arbitration-clause:

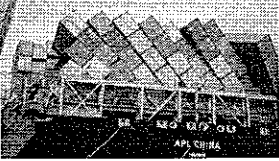

Maritim Law: Valid, unless it directs to a jurisdiction with a standard less than the Hague-Rules (The German "Sky Reefer" position).
HGB: Valid, if no consumer involved or against the law, i.e. CMR.
however, please note!
No discretion for the carrier to choose competency of the ordinary courts or of an arbitration panel !

The most common arbitration clause = 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")*

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b. subrogated underwriters' work,
know for whom and against whom you work!
Who is the right defendant? Is the „IoC-Clause“ valid?
Who is the right claimant? Need for a subrogation form?
- Legal subrogation (cessio legis) and
- subrogation by handing over the claim docs.

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c. „Fixkostenspediteur“ as Multimodal-Operator

- The German „Fixkosten-Spediteur“
- **General rule** for a freight forwarder under German Law: 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!
- As he organizes transport with different modes he becomes a multimodal operator!

The Consequences:
(1) He is liable for the complete transport-chain!
(2) For an unknown damage he is liable under the strongest regime!

The Problem:
If a sea-leg is included, where does it start, where does it end?

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This is the most important issue discussed in Germany right now,
In particular: Liability for terminal operations!

It depends on: Are they

1. part of the land leg?
2. part of the sea leg?
3. separate part of the transport?

The leading case:
- *The "Atlantic Concert"* -
Facts/Decisions/Comments

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The „Atlantic Concert“ (the multimodal-decision)

Facts:

1. A Freightforwarder „on fixed terms“ was ordered to ship two large crates from Bremerhaven to Durham/North Carolina.
2. In Bremerhaven placed on a Mafi-Trailer, discharged in Portsmouth.
3. Trucked some 300 meters on the terminal to be loaded on a truck.
4. First crate loaded safely on the truck, the second one was unlashed and fell off the MAFI-trailer.
5. And the printing machine was heavily damaged.
6. Cargo underwriters paid and instructed Segelken & Suchopar.

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Decisions:

1. The Regional Court granted 2 SDR/kg (only about 30% of the claim)
argument: any terminal is part of the sea-leg!
2. The Appeal Court (Hamburg High Court) regarded the terminal movement as a separate part of the transport, making it a multimodal transport, and granted 8,33 SDR/kg (covered the full claim).
3. Federal High Court finally confirmed the decision but denied a multimodal-transport, unless there are "special circumstances" and held:
Loading the truck was the start of the land leg and granted 8,33 SDR/kg.

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Comments:

I do agree!
And the Federal High Court revised a former decision where it held, that the terminal operations belong to the sea-leg till the goods are placed on the truck.

But two questions remain:

1. What are these "special circumstances" which may make the terminal operation a separate part of a multi-modal transport?
2. Is it necessary that the actual loading has been started?

What if welders burn off the container on the terminal?
- The "Cap Arago" (shoes on Fire) -

And finally when does the sea-leg start?
- Concrete mixers „lost in transaction" at the terminal in Antwerp -

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d. Package limitations and how to overcome same:

- **Legal Requirement:** intend of the carrier to cause such damage or recklessly and with knowledge that damage would probably occur!
- **The High Court's Position:** If the carrier ignores the cargo owners interest for a safe transport/storage in an „extreme" way:
 - Brownwater: Master starts voyage despite bad weather and put cargo at an unacceptable risk.
 - Truck: Overnight parking at unsafe parking lot in Poland and Italy, offering a hitchhiker a lift and the possibility to .
 - Storage: No inturn-, no outturn-control, no control of third parties at warehouse area, no documentation of ins and outs, no security despite knowledge of high value cargo, no guards at night when warehouse is located in „dangerous" area.

The advantage:
The carrier has to demonstrate his security management!

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e. Security for costs and claims?

(1.) No action for security for the claim unless the debtor acts fraudulently (hiding assets, transferring them abroad).

(2.) Security for costs, only if the claimant is located outside the EU, unless otherwise international treaties or a foreigner has sufficient assets in Germany.

USA: It depends on the position of each state!
New York: No security if the New York individual/company has a residential seat in Germany

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3. The Legal Action: Procedure- Costs - Fees - Time

- Preparations to start an action! „Short and Sweet“, but be aware: Right claimant/right defendant/time bar!
- Court fees to be paid upfront and in time to save the time bar!
- Calculated due to a fixed schedule!
- For an action of € 100.000,00 = € 2.000,00; 2/3 to be refunded if claim is withdrawn before a hearing or in case of a settlement .
- Attorneys' fees also calculated by a fixed schedule, generally „no cure no pay“ not permitted!
- For an action of € 100.000,00 = € (hearing + taking evidence)
- The winner is entitled to recoverable fees = those of the schedule.
- The first hearing probably after 3-4 months, judgement within a year.
- Appeal judgement after 18 months or 2 years,
- High Court Judgement after 3-4 years

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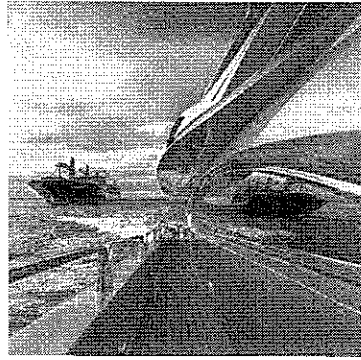
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5 Reasons for Recovery in Germany:

1. You may go after the “Fixkostenspediteur” in Germany.
2. The IoC-Clause is not valid, you may go after the carrier in a more convenient jurisdiction than the owner might be in.
3. In case of a multi-modal transport you may break through the limited liability with the argument of “grosse negligence”, unless the carrier proves that the damage occurred on the sea-leg.
4. If settlement negotiations fail, you may start proceedings easily.
5. You may expect not only a fair and speedy trial but also at reasonable costs (in particular when arbitrating with the GMAA).

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Thanks, ..
.. any questions?

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