Strict German law to apply on foreign terminal or road transport losses?

by Dr. Jan Dreyer, Partner

Dabelstein & Passehl
Hamburg, Leer

(IUMI Professional Partner)

I. Introduction

Today I would like to draw your attention to recent developments in German maritime or more precisely transport law in two different areas. The first refers to a recent decision of the German Federal Court based upon the decisions of regional courts and courts of appeal defining nearly every sea transportation contract as a multimodal transportation contract and applying German transport law to all parts of the multimodal transport. Being not the first time the German Federal Court had to deal with the matter one can say, that it meanwhile used its opportunities to build up a fascinating case law. The reason why I chose these decisions as a topic could also be described as follows:

How to expand the possibilities of recourse in what seems to be a pure foreign case to Germany against a German forwarder – for the benefit not only of all lawyers involved but also for the insurers having paid for the damages?

In the second part you will hear the story of the legal David against Goliath or with other words the local Court of Hamburg against the Freight Forwarders' Association. The Court has denied the freight forwarders to limit their liability in accordance with the Montreal Convention when they apply their General freight forwarders Terms and Conditions, ADSp. Although this case apparently refers to aviation law it might also

have an impact on maritime and general transportation law. This will be subject of the second part of my presentation.

II. Recent decisions

1 The first decision I would like to report on is a decision which started in front of the Regional Court of Hamburg, went on to the Hanseatic Court of Appeal in Hamburg[1] and became final, when the German Federal Court on the one hand affirmed the former judgment of the Hanseatic Court of Appeal[2], on the other used the opportunity having a case regarding a multimodal transport brought in front of, to draw a line between the sea and land transport leg.

1.1 Before I will tell you the decision of the court, I would like to give you some background on the case:

The case concerned a transport of printing machines from Bremerhaven in Germany via Portsmouth to Durham in the USA. Claimant is the Transport insurer of the shipper and defendant is the freight forwarder who issued a multimodal transport bill of lading in which it was named as carrier.

The Defendant instructed a third company to carry out the sea transport of 11 boxes in which the printing machines were packed to Portsmouth. One of the boxes with a weight of roughly 25,000 kg was damaged on the terminal in Durham during ranging, when it fell down from the so-called Mafi-trailer when it was handled there. The damaged box had been located on the Mafi-trailer already during loading in Bremerhaven together with another of the boxes and it stayed thereon during the sea transport with the vessel. During discharging of the vessel the Mafi-trailer with the two boxes had been towed by a tractor to a warehouse which was located about 300 meters from the vessel. From thereon the boxes should have been loaded onto a truck. In order to unload the two boxes their security chains had been taken off and the first box could be loaded successfully onto the truck.

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[1] Hanseatisches Oberlandesgericht Hamburg (Hanseatic Court of Appeals), 6 U 178/103, dd. 19.08.2004, TranspR 2004, p. 402 et seq.
[2] BGH (German Federal Court), I ZR 138/04, TranspR 2007, p. 472 et seq.

Then, in order to load also the second box the trailer was shifted and during this shifting it fell from the Mafi-trailer. The damages sustained amount to around € 230,000.00 plus costs for repacking and experts of about € 10,000.00. The first instance, the Regional Court of Hamburg, had applied pure German maritime law limiting the Defendant's liability to two Special Drawing Rights per kilogram in accordance with section 660 paragraph 1 of the German Commercial Code leaving the Claimants behind with € 170,000.00. The Claimants appealed against the decision of the first instance claiming that the box was not damaged during the sea transport, but rather that the shifting of the box from the Mafi-trailer to the truck has to be regarded as a separate mode of transport applying strict land transport law.

The defendants were of the opinion that the shifting of the box was only an annex to the sea transport and did not form an own transport leg with a separate liability regime.

1.2 The Court of Appeal, sticking to its line of judgment, decided in favour of the Claimants and applied the more than four times higher limitation of liability in accordance with multimodal transport law according to the land transport leg. According to the Hanseatic Court of Appeal the transportation of the cargo from the ship to the warehouse is to be considered as an own leg of transport and not only as an annex to the sea transport, if it is of a certain complexity and length.

1.3 Before the Federal Court of Justice decided in our case, it had made another decision on the 03.11.2005[3] considering the matter, what can still be seen as part of the sea transport leg and what is to be esteemed as part of the land transport. This decision was based upon another case rendered by the Court of Appeal in Celle[4]. There it stated that at least in cases where no special circumstances prevail the loading and unloading of cargo is to be deemed part of the sea transport leg as far as the activities of the port terminal are concerned.

[3] Bundesgerichtshof (Federal Court of Justice), I ZR 325/02, dated 03.11.2005, TranspR 2006 p. 35 et seq.
[4] OLG Celle, 11 U 281/00, dated 24.10.2002, TransPR 2003, p. 253 et seq.

1.4 Once our case was brought in front of the Federal Court of Justice by the defendants, the Federal Court affirmed the former judgment of the Hanseatic Court of Appeals awarding damages to the plaintiffs according to land transport law. However it did not break with its own line of approach developed in the Celle-Case regarding the application area of maritime law in doing so. The court achieved the result in generally narrowing the wide approach of the Hanseatic Court of Appeal in a kind of obiter dictum without any relevance to the specific case.

1.5 While declining the revision and therewith confirming the appeal, the Court clarified explicitly its opinion, that under normal circumstances actions like bearing, discharge and shifting within the port are to be considered as belonging to the sea transport leg, because of the close connection of those actions to the sea leg.

Stating this, the Court then pointed out, that in the case at hands things were different because the damage occurred not before the cargo was forwarded to the truck but during the forwarding process. Therefore, the Court rendered the Celle-decision more precisely. It took the forwarding process to the truck, which is assigned for further transportation, as the shifting point between the applicability of maritime transportation law on the one side and road transportation law on the other. That way the Federal Court was able to affirm the judgment of the Hanseatic Court of Appeal and clarifying its point of view developed in the Celle case. One could say used its chance to kill to birds with one stone.

1.6 The decision has several remarkable aspects three of which I would like to highlight here.

1.6.1 The first is the question of the applicable law. The Federal Court, as the Hanseatic Court of Appeal before, had applied German law to all legs of the transport because the parties to the freight contract had agreed on German law. Even if they had not expressly agreed on German law to be applicable,

German law should be applicable as it has to be assumed that the contract shall be subject to substantive German laws if both parties have their principle place of business in Germany.

This aspect has to be seen in the light of the German multimodal transport law which provides for in section 452 a German Commercial Code the following:

> *"If it has been established that the loss and/or the damage to the goods or the incident that led to a delay, has occurred on a certain transportation leg, the liability of the carrier has to be established according to such law as would have been applied if the contract had been concluded only for such part of the transport*." (Abbreviated office translation.)

You will remember that the part of the transport which led to the damage in our case was performed in the United States. Therefore, one could be of the opinion that what we call in Germany "the hypothetical law" to be applied to such transportation leg would have been the law of the state of Virginia but the court made it clear that the parties to the contract, i.e. the shipper and the carrier, by agreeing on German law to apply had also agreed that German law should apply also to every other part of the transportation being performed outside Germany. Of course, this choice of law does not apply to the contract between the carrier and the terminal operator in Virginia. I will revert later to the trap which this creates for the forwarder.

1.6.2 Being the second aspect, the Federal Court has, as mentioned above, drawn a clear line regarding the question how far the application of maritime law has to be extended onto the shore. Or better: Where the sea carriage with its liability regime does end, and where the land transport with its liability regime does start.

1.6.3 Now we come to the third and really important aspect, being contemporaneously the intersection, why I am reporting on that case: the

impact the German law has on multimodal transports even after the completion of the sea leg.

In order to allow you to understand this aspect, I would like to explain the general contractual constellation regarding the possibilities to recover claims for cargo damages occurring outside of Germany, involving a German exporting company and freight forwarder.

1.6.3.1 Germany being still being one of the most important export nations for industrial goods has a strong export industry for all kinds of plants and machines etc. Most of such export sales contracts provide for CIF delivery to a named port or place of destination in the foreign country. This means that the seller has to provide for transport and insurance for the goods to be delivered and accordingly concludes the transport contract, typically by instructing a German freight forwarder. German forwarders exclusively work on basis of the German Forwarders Conditions, ADSp, which provide for the application of German law. Nevertheless, the freight forwarder will use all means of transport and conclude various contracts for land transport, sea transport and/or air transport underlying various jurisdictions as the case may be. Those parties will use their own contract forms. In particular the big shipping lines will use their bill of lading forms, which refer to their national law and jurisdiction.

1.6.3.2 Having delivered the cargo to the port of loading, alongside ship, the contractual duty of the seller to deliver has been fulfilled and being loaded onto the vessel the risk and title will pass on to the buyer despite the fact that the seller has provided for transport and insurance. If now – as in the reported case – damage occurs to the cargo in the port of discharge the buyer is already owner of the damaged cargo and will put forward claims against every party he can get hold of. First of all, he will try to seek reimbursement from the carrier under the bill of lading and maybe against the terminal operator. However, the bill of lading will in many cases provide for a law other than German law, unless a German carrier is performing the sea carriage, and furthermore a clause denying liability for any damages occurred on land. It will

also contain a paramount clause entitling the carrier's people including their sub-contractors such as the terminal operator to rely on the same defence.

I am not an expert in US law but if in our case the Buyer or his insurer, respectively, seeks recovery from the carrier he may end up with a payment of USD 500.00 under the COGSA, unless the limitation of liability can be broken for other reasons. If there is no such chance, it is worth trying to get the full damages, in our case € 230,000.00, by trying to sue the German freight forwarder.

1.6.4 It is now the question how the receiver of the cargo can sue the German freight forwarder under German law. He might have claims against the carrier under the bill of lading which does not provide for German law or even a claim of tort against the cargo handler none of which claims is subject to German law.

But the contract between the Seller and the freight forwarder is subject to German law and within this contractual relationship all transport legs are also subject to German law. It is furthermore established that the receiver of the cargo is a so-called Third Party Beneficiary under the freight contract between the shipper and the freight forwarder. As such Third Party Beneficiary the buyer of the cargo is entitled to claim in its own right damages from the freight forwarder. For such claim the claimant can benefit from the higher liability limits as provided for by German law.

In granting damages for this accident and stating, that the accident occurred in the area of the road transportation, the German courts indirectly stated, that German law is also applicable to a claim of the consignees against the German forwarder if the cargo suffers loss on the final road transport leg. Even though the land transport was undertaken completely in the US where, if it had been a separate contract, clearly US law would have to be applied in relation between the freight forwarder and the shipper, this part of the transport was covered also by the multimodal transport contract being subject to German

law. As a consequence the receiver of the cargo could be considered as a Third Party Beneficiary under the principles referred to herein above.

1.7 Result: The U.S. cargo receiver has a claim against the German Forwarder, regardless of what the U.S. law or the contract with the local haulier provides in respect of limitation. But even better: According to another recent decision of the German Federal Court[5] German law applying to the contract is also relevant for determining whether the party in default acted so carelessly that there is no limitation of liability at all.

As German courts are rather generous in allowing to break limitation of liability in land transport, the German forwarder may face unlimited liability towards the cargo receiver, with only limited or even no chance for a recovery from the terminal or the trucker.

[5] Bundesgerichtshof (Federal Court of Justice), I ZR 168/03, dated 29.06.2006, TranspR 2006 p. 466 et seq

2 In the second part of my presentation I would like to shortly refer to a decision of the Local Court of Hamburg[6] which of course has not as strong influence as the German Federal Court. However, the first reaction of the Freight Forwarders' Association was not to appeal against the Court's decision but to alter the recommendation for the General Terms and Conditions for freight forwarders contracts, (ADSp), thus showing how serious the Association takes this lower court decision.

2.1 The case concerns an air transport of gauging equipment from a village in the vicinity of Hamburg to a daughter company in the USA. The parties of the transport contract had agreed on a fixed freight and the contract was concluded on basis of the General Terms and Conditions, the ADSp. The transport organized by the Defendant contained an air transport from Frankfurt to New York and the cargo was delivered unfortunately not to the daughter company of the shipper but to a Third Party. The original receiver deemed the cargo to be lost and was provided with a replacement delivery. At some later stage the first cargo popped up and was delivered again to the receiver in the US who refused acceptance of delivery, so that the German shipper decided to ship the cargo back to Germany where it never turned up, because it was again and now finally lost during the re-transport to Germany. The transport insurers of the shipper paid the value of the lost cargo and sought recovery from the freight forwarder.

2.2 Under German law, a freight forwarder who agrees with his customer on fixed costs has the rights and obligations of a carrier, in case of air transport those of an air carrier. This leads to the Montreal Convention and the unbreakable limitation of liability in Article 22 para 3 of the Montreal Convention. So far the case is quite straight forward. What is special about this decision is that the freight forwarder was not allowed to limit its liability in accordance with Article 22 of the Montreal Convention to 918 Special Drawing Rights. The Court found that the freight forwarder was not entitled to limitation of liability in accordance with the Montreal Convention because it had submitted the transport contract

[6] Amtsgericht Hamburg (Local Court of Hamburg), 31A C 310/06, dd. 04.04.2007, TranspR 2007, 328 et seq.

to its General Terms and Conditions of the freight forwarders. The Court held that by doing so the defendant had expressed from an objective point of view that the entire contractual relationship between the parties should be regulated by the General Terms and Conditions, ADSp, as far as compulsory law does not prescribe otherwise.

No. 27 of the ADSp contains the declaration of the carrier that all limitations and exclusions of liability according to ADSp shall not apply if the damage is caused by intent or gross negligence or in case of breach of the main contractual obligations. Whilst the Montreal Convention does not allow breaching the limitations stipulated therein, Article 25 of the Montreal Convention provides for the possibility to waive all rights for limitation of liability. The Court held that no. 27 ADSp qualifies as such waiver and as a consequence held that the carrier could not rely on the limitation as provided for by article 22 (3) of the Montreal Convention.

The principle that a freight contract which is based on the ADSp contains a waiver of the right to limit liability in cases of gross negligence and even more important for the main contractual obligations could easily be transferred to contracts for multimodal transport or maritime transports. Maritime law provides for that limitation of liability can be broken if the carrier acted recklessly being conscious that the damage might occur. The difference between the definitions is not only a slightly different wording. So far we have not had a single case in Germany where limitation was broken in sea carriage, as opposed to land carriage. Of course it is not easy to prove gross negligence but it is definitely easier than proving recklessness and consciousness of damage to occur. The decisive difference is, however, to be able to claim the foreseeable damage in cases where the freight forwarder or – in case of applicable land transport law – his people break the main contractual obligations. This could leave the freight forwarder without limitation of liability for the majority of damage occurring.

As a consequence of the decision the Freight Forwarders Association has recommended to its members to alter the General Terms and Conditions and

to clearly state that in no event limitations of liability provided for otherwise by law shall be affected by any of the provisions of the ADSp. This prompt reaction shows that the people in the transport industry take the risk that the decision of the Local Court of Hamburg might be correct very seriously.

III. Summary

Summarising the above I would like to invite you to look for the possibility of recovery in Germany as soon as you get involved in a case where the cargo stems from Germany and was shipped from there or has any other link to Germany. It might well be that German law provides for higher limits and stricter standards of liability as the jurisdiction which is applicable at first sight.