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## Cover risks correctly

Legal liability for damage to goods and compulsory insurance for rail transport companies



### THE AUTHOR

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As in all branches of the economy, the transport sector is also subject to certain legal standards. These are intended to regulate relations between individual contractual partners.

For a long time in Germany, however, there were a variety of different laws that determined conditions for the carriage of goods and liability for damage to goods. With the German Transport Reform Act of 1998 legislators finally managed to standardise and simplify freight law.

In this connection, the general rights and laws of the transport business have been incorporated in the Fourth Book of the German Commercial Code (abbreviated as HGB in German). There, the special regulations of the freight business are defined in the subdirectory of the fourth paragraph.

With the liberalisation of the European transport market, in addition to the revision of local transport law in the German Commercial Code (HGB), the regulations for international rail transport were adjusted. Thus, the special regulations applicable to cross-border transport on the rails were concluded in the Protocol of Vilnius of 1999, in a convention concerning international carriage by rail, abbreviated as the COTIF (Convention relative aux transports internationaux ferroviaires). The special requirements for goods carriage were set in Appendix B to the COTIF, particularly in the CIM (Regles uniformes concernant le contrat de transport international ferroviaires des marchandises).

German legislators have concluded special requirements for freight carriers in the

German Goods Transport Act (abbreviated as GüKG in German). This act is of little significance in the relation between client and freight carrier, but is mentioned at this point due to the compulsory insurance required for commercial goods transport.

This article goes into detail about the different national and international statutory provisions for rail transport companies. This is intended to help rail transport companies to be able to better assess and protect themselves against their risks in future.

## Statutory provisions

Firstly, the German Commercial Code forms the basis for all transports carried out. If transport across German borders is concerned, international rules apply in addition. For rail transport these are the provisions of the COTIF with Appendix B – the CIM for goods transport.

The international legal basis always takes priority over local provisions.

### German Commercial Code

If goods are carried exclusively on the territory of the Federal Republic of Germany, the national transport law of the German Commercial Code applies. There, in accordance with Section 425, it is determined that the freight carrier is generally liable for damage caused by the loss of or damage to the goods during the time from taking over the goods for carriage up to delivery or due to exceeding the delivery deadline.

The freight carrier is generally freed of liability if they could not avoid the damage even by exercising great care and could not avert the consequences of the damage (Section 426 HGB) or insofar as the damage is attributable to certain risks (Section 427 HGB).



Ill. 1: Anyone carrying valuable goods should be well insured against damage.

Legislators have, however, limited the compensation to be paid from liability. The following paragraph goes into precisely this issue with a detailed presentation of the freight carrier's liability.

### COTIF/CIM

If goods are transported in the territory of more than one state, international transport law applies with the special convention concerning international carriage by rail, the COTIF. In Appendix B of these provisions – the CIM – the standard legal provisions for carrying out carriage and for liability during carriage are regulated.

The COTIF/CIM is an international convention to which almost all European states are signatories. Thus the COTIF/CIM has become mandatory law. What is decisive here is that these provisions are also valid even if they are not expressly agreed in freight contracts. In addition, what is particularly important is that these international legal bases take priority over all local acts, ordinances and business terms and conditions.

Analogous to the statutory provisions for internal transports, there are also limitations of liability for the duty to perform for cross border carriage of goods. The next paragraph on freight carrier's liability goes into this in more detail.



Ill. 2 A large accident is not necessary for liability to be incurred.

### Other legal provisions

For the sake of completeness, at this point it should be mentioned that there are a variety of additional German and international acts and ordinances that regulate the carriage of goods by rail. These provisions relate primarily to the extensive technical aspects of railway goods transport, however. They have little significance to the relation and liability between client and freight carrier.

## Liability

Rail goods transport services are based on quality requirements from which rights and duties arise and that should take the special necessities of carriage of goods into account. If the railway company does not meet these quality requirements, the freight carrier is liable in accordance with national and international legal provisions.

Legislators have codified the absolute liability (duty of care) as the basis for liability. This means the freight carrier is liable, including without fault. In this connection they are liable for their own behaviour, but also for the actions and omissions of all persons whose services they use to carry out carriage.

National and international legal ordinances overwhelmingly provide liability in the extent of Special Drawing Rights (SDR). Special Drawing Rights are artificial units of currency the exchange rate of which is defined by a basket of important world currencies. On 3 January 2012 1.8559 Euros were equivalent to one SDR.

### German Commercial Code

Liability is set in the German Commercial Code for all freight contracts conducted in Germany. As already mentioned, however, the following restrictions are agreed there.

In the event of the loss of or damage to goods, general liability is limited to 8.33 units of account for every kilogram of the gross weight of the transport goods and the packaging. In addition, freight, public expenditure and other costs have to be refunded. In deviation from this standard, however, German legislators grant the contracting parties a freely selectable maximum liability amount in a corridor between 2 and 40 Special Drawing Rights.

In the event of damage incurred as a result of exceeding delivery deadlines, liability is defined as a maximum of three times the amount of the freight.

For damage caused by breaches not incurred by the loss of or damage to the goods or by exceeding the delivery deadline and that are not damage to property or personal injury, liability is limited to a maximum of three times the amount that would be paid in the event of the loss of the goods.

Special exceptions, in which any liability of the freight carrier is deemed to be void, are documented in detail in Section 427 of the German Commercial Code (HGB). Examples of this include: unsatisfactory packaging by the consignor, carrying live animals and handling, loading or unloading the goods by the consignor. The freight carrier always bears unlimited liability for damage caused deliberately, regardless of all the provisions mentioned above.

### CIM

In international railway goods transport liability is currently regulated by Appendix B (CIM) of the COTIF (see above). The following is deemed to be agreed for liability there.

□ In the event of the loss of or damage to the goods the railway company has to pay compensation without additional damages that must not exceed 17 units of account

per missing/damaged kilogram of gross weight. In addition, freight, customs and other amounts paid due to carriage of the loss goods have to be refunded.

□ If damage is caused by exceeding the delivery deadline, the railway company has to pay compensation of a maximum of four times the freight.

Contrary to German legislation, in international liability provisions for railway transport no deviations from the maximum liability amounts set in statute are possible, however. The liability exclusion circumstances for railway companies defined in the German Commercial Code are also not provided in the CIM. Merely the unlimited liability for deliberately caused damage applies to an equal extent as in national law.

### Contractual liability

In accordance with the principle of freedom of contract, a free configuration of contracts is generally possible. For liability from freight contracts an adjustment by general terms and conditions or individual agreements is only possible to the extent that the statutory provisions presented above are complied with.

### Insurance

#### German Goods Transport Act (GüKG)

In Germany goods transport is subject to special statutory provisions. The German Goods Transport Act, which was actually developed for road transport, applies in full to rail transport, however. This is because no exclusion circumstances apply to railway transport in statutory provisions.

The German Goods Transport Act comes under commercial law and the standards developed there are aimed at the reliability of commercial freight transport. Therefore, these provisions ultimately have no significance for the contractual relations between consignor and freight carrier and thus generally for possible liability. However, due to the compulsory insurance for freight carriers these provisions are presented in more detail below.

#### Commercial goods transport

The carriage of goods for compensation or business purposes with vehicles that, including a trailer, have an approved total weight of more than 3.5 tonnes comes under commercial goods transport. According to Section 7a of the German Goods Transport Act insurance is compulsory for commercial carriage of goods with loading and unloading in Germany.

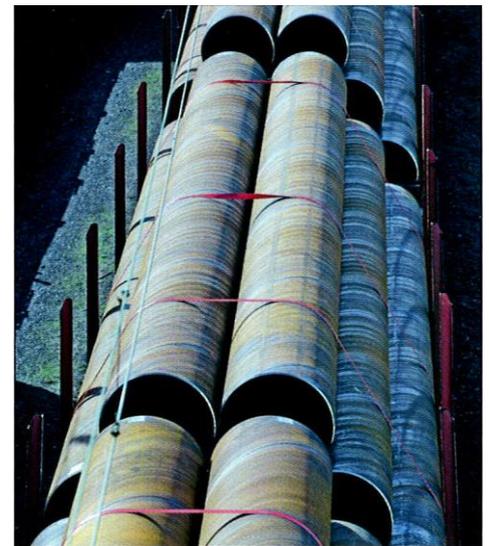
#### Compulsory insurance

Freight carriers are obliged to take out liability insurance, maintain this and verify it. This insurance must cover statutory liability

due to damage to goods and losses caused by delays during carriage with loading and unloading in Germany in accordance with the Fourth Paragraph of the German Commercial Code. The insurance total has to be at least 600,000 Euros per claim and the maximum annual indemnity cannot be less than two times the minimum insurance total. It is permitted to agree an insurance excess here. In this connection, however, it has to be considered that excessive insurance excesses can mean a "hollowing out" of the minimum cover total, thus contradicting the legislators' aim of stipulating compulsory insurance.

### Transport liability insurance

Transport liability insurance protects the freight carrier in satisfying justified and defending against unjustified claims to compensation from damage to goods, goods consequential loss and pecuniary loss. In this



Ill. 3: Sometimes it does not take much to make things slide and cause an insurance claim.

connection all risks from a carriage contract should be included in a transport liability or transport damage insurance policy.

In addition to customer specific arrangements for insurance cover with reference to the content of the insurance, sufficient totals covered and calculable insurance excesses, the legal provisions for goods transport on the rails within Europe should be taken into account in every case.

Furthermore, attention should always be paid that the possibilities of the insurer to exclude certain goods from the insurance cover from the outset or to limit the duty to compensate due to performance restrictions must not run counter to the desired insurance needed by the freight carrier.

Remark: Translated from the original German