P R E S E N T A T I O N

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5th International EUMOS Symposium

on cargo securing, transport packaging and safe logistics

ORGANISATION: EUMOS
1140 Brussels, Jules Bordetlaan 164

DATE: 14th September 2017

LOCATION: WKO
Austrian Chamber of Economics
1045 Vienna, Wiedner Hauptstraße 63

TOPIC

CARGO SECURING

Legal information about the new standards, directives and laws

REVIEW

4th Symposium in 2015

- LEGAL SITUATION / CARGO SECURING
- DIR 2014/47/EU of the European Parliament and the council on technical roadside inspection of the roadworthiness of commercial vehicles

  Annex I Risk rating: minor, major, dangerous deficiency

  Annex II Scope of technical roadside inspection

  Annex III Principles of cargo securing zur Ladungssicherung

  Anhang IV Specimen more detailed roadside inspection report

In fact, the inspecting officers in different countries use different checklists

REVIEW

Years of attempts to create a uniform checklist at least for Germany and Austria have to date failed.

Currently employed checklists:

- Austria: KONTROLLDATENBLATT (inspection data sheet) – cargo securing
- Germany: PRAXISHANDBUCH (practical handbook) cargo securing
  Attachment cargo securing BASIC DATA
  DOWN LASHING
  DIAGONAL LASHING

Sticking to these means you will be safe not just on the roads, but also in the case of inspection.

REVIEW

GENERAL RECOMMENDATION

Inspection of cargo securing is, to a high extent, personal DISCRETION

An exact CALCULATION is, due to the numerous premises that are part of the roadside inspection, simply impossible!

- IF POSSIBLE CERTIFIED TRAILER
- GOOD TRANSPORT PACKAGING
- GAPLESS LOADING
- SUFFICIENT NUMBER OF STRAPS

CURRENT

- The Directives must be transformed into national law by the member states.
- Again, this will happen at different speeds for different member states
- As of 18/07/2017, Austria has sent out an enactment on the RISK CLASSIFICATION SYSTEM DIR 2006/22/EU:

  Obligation to set up a system for the risk classification of companies

In Austria, the risk classification system has now also been extended to the classification of deficiencies identified as part of the technical roadside inspection and to violations against cargo securing provisions.

Comes into force on: 20/05/2019

CURRENT

The speakers following me will present more on the implementation of technical roadside inspections in Germany, Austria and Europe, as well as on the technical aspects of cargo securing. I will thus concentrate my further remarks on legal aspects and especially on questions of LIABILITY in connection with cargo securing.

LIABILITY

- CRIMINAL LAW
- CIVIL LAW

LIABILITY / CRIMINAL LAW

As a rule, there are 3 persons who can be made responsible for infractions in terms of criminal law:

1. Driver
2. Carrier
3. Loading agent

VEHICLE DRIVER

- **§ 102. Duties of the vehicle driver**

  (1) The vehicle driver may only put the vehicle into operation once they have, as far as is reasonable, ensured that **the vehicle to be driven by themselves** and any trailer to be pulled by it **as well as its cargo correspond to the respective regulations;**

  From **§ 61 par. 1 StVO** in connection with **§ 58 par. 2 StVO**, it becomes clear that the storage of cargo according to regulations is always the responsibility of the driver, and this is the case even if they have not loaded the vehicle themselves (OGH 30/01/1974, item 1752/73).

  RESULT:

  Diligence, knowledge of the legal situation and reasonableness of acquiring knowledge about the legal situation are required by the authorities to such an extent that, instead of fault in the form of “negligence”, a success in the form of an infraction, which is the subject of the complaint, is present.

Carrier/Registered keeper

- **§ 103. KFG Duties of the registered keeper of a vehicle or trailer**

  (1) The registered keeper is to ensure that the vehicle (truck and trailer) and its cargo – without prejudice to any exceptional permissions or authorisations – correspond to the regulations of this Federal law and the enactments made on the basis of this Federal law;

  The registered keeper is thus, as a brief summary, liable in accordance with § 103 KFG

- for the flawless technical and legal condition of the vehicle (length, width, height, weight, brakes, lights etc.)
- for the securing of cargo according to regulations

Actual loader

With BGBl. I No. 60/2003, made known on **13/08/2003**, § 101 par. 1a KGF was standardised.

If an officer authorised by the person of the driver or registered keeper for the loading of the vehicle or trailer is present, they must, without prejudice to **§ 102 par. 1 and § 103 par. 1**, ensure that par 1a-c and e are adhered to.

- The liability of the driver and carrier is not removed, rather, the liability of the loading agent is **added to it** (VwGH 20/05/1998, item 97/03/0258).
- The law does **not** speak of the **loader**, but **rather** of the **authorised officer**.

Authorised officer

By judgement of the VwGH, authorised officers in the sense of par. 1a) leg. cit. are those that are concerned with

- *conducting the loading,*
- *planning the order of the loading process and*
- *thus in particular also determining the amount of loading goods*

(VwGH 12/02/1986, item 85/03/0046).

In practice, these conditions apply to the following persons:

- Dispatcher;
- Head storeman;
- Actual loader;

Authorised officer

A fundamental feature of the violation of this provision is thus the **person** who **ACTUALLY** – be it by giving instructions OR through their own manual work – **influences the loading process**.

This person must be determined by the authority.
only very limited duty of disclosure

General recommendation:

- Initially, do not give any details
- Give details only as part of the administrative criminal proceedings
- **after** learning the specific criminal charge,
- **after** learning the specific contents of the records and
- **after** potential legal counsel

LIABILITY / CIVIL LAW

§ 1295 par. 1 ABGB

Everyone has the right to demand compensation from the damaging party for damage caused through fault of the latter; the damage may have been caused through a violation of a contractual duty or without relation to a contract.

§ 1304 ABGB

If, in a case of damage, the damaged party is also at fault, they shall share the damage with the damaging party in proportion, and, if the proportion cannot be determined, in equal parts.

LIABILITY / CIVIL LAW

Supreme Court judgement 1

Supreme Court of Justice (OGH)

Date of decision 21/05/1997

Reference number 3Ob2035/96b

CLAIMANT: CARRIER

DEFENDANT: LOADING AGENT

CARGO: 5 packages with construction parts

LIABILITY / CIVIL LAW

Supreme Court judgement 1

FACTS OF THE CASE:

- Loading was conducted by the employees of the loading agent.
- Each package consisted of four pieces of sheet metal with a length of around 6m, a height of around 2.2m and a weight of around 16t.
- The packages concerned were supposed to be loaded vertically.
- The driver of the complaining party expressed concern about this being an impairment to the safety and stability of the rig.

LIABILITY / CIVIL LAW

Supreme Court judgement 1

- The concerns were allayed by the employee of the loading agent, especially by pointing to the fact that sheet metal packages of this kind had always been loaded in this way and that it was technically and practically proven that no problems would be caused by this form of loading.
- The employees of the loading agent, in agreement with the driver, secured the metal packages with straps and installed wooden wedges in between the packages.
- The employees of the loading agent expressly instructed the driver to tie the cargo units down with a chain.
- This tying down of the sheet metal with a chain was neglected by the driver.

LIABILITY / CIVIL LAW

Supreme Court judgement 1

- Only around 400m from the company premises of the loading agent, an accident occurred in the second corner, during which the entire front part of the load toppled off the trailer.
- This caused severe damage, in particular to the trailer
- The carrier then put in a claim for compensation against the loading agent and based their claim for relief on § 1313a ABGB
- ***§ 1313a.*** *Whoever is committed to a service to someone else, is liable to this party for the* ***fault*** *of their legal representative as well the persons they employ for the fulfilment of the service,* ***as they would be for their own****.*

LIABILITY / CIVIL LAW

Supreme Court judgement 1

with the reasoning:

- the employees of the loading agent did not conduct the securing of cargo according to regulations,
- the loading agent is thus liable for the incurred damage

LIABILITY / CIVIL LAW

Supreme Court judgement 1

FIRST INSTANCE

The claim for relief was **rejected**:

REASONING:

- The vertical way of loading had always been conducted by the employees of the defendant; no problems had ever occurred due to this.

- Due to the vertical loading, the driver had a telephone conversation with his dispatcher, who, on contacting the defending party, was also told that this way of loading corresponded to common practice of the defending party.

LIABILITY / CIVIL LAW

Supreme Court judgement 1

- The employees of the defendant, who conducted the loading, expressly pointed out to the driver that the lashing needed to be done in an especially diligent and orderly manner.
- The driver employed synthetic straps
- These were stretched across the metal sheets, being secured on one side and then lashed down on the other side.
- A chain or steel bands were not used for the lashing of the load.
- If lashing had been done with a chain or steel bands, the load would not have toppled over

LIABILITY / CIVIL LAW

Supreme Court judgement 1

LEGAL ASSESSMENT

- Although loading was conducted by the employees of the defendant,
- the lashing was done solely by the driver of the rig belonging to the claimant.
- For the vehicle driver, there is an obligation to ensure a storage of the cargo that is safe for traffic. He is thus responsible and must check this safe storage correspondingly.
- This responsibility falls to the driver even if he has not loaded the vehicle himself.

LIABILITY / CIVIL LAW

Supreme Court judgement 1

SECOND INSTANCE

The appeal court did not grant the appeal of the carrier and affirmed the judgement of the first instance, adding the following as part of its reasoning:

- There is no regulation in the law and the CMR about who is obligated to conduct the loading process in the relationship between carrier and sender of the transport goods, therefore this is decided according to the respective agreement and the accepted standards in each individual case.
- Again, the principle applies that the party which is more suited to the task in terms of practicability in the specific individual case is then "**master of the loading process**" and thus obligated to conduct the loading.

LIABILITY / CIVIL LAW

Supreme Court judgement 1

- Just as the defendant contractually took on the loading of the rig,
- The driver then on behalf of the claimant took on the legal responsibility to bring about the securing, which means the final and crucial fastening of the goods onto the vehicle surface **himself**.
- The responsibility for this can thus only rest with the driver, and thereby, represented by him, with the claiming party.
- The driver was obligated to ensure safe-for-traffic storage of the cargo and to check this cargo correspondingly by the legal driver duties of § 61 par. 1 StVO, § 102 par. 1 KFG.

LIABILITY / CIVIL LAW

Supreme Court judgement 1

Supreme Court of Justice (OGH)

The Supreme Court of Justice granted the appeal, thereby finding in favour of the carrier and explained that **fundamentally**:

- Neither HGB nor CMR contain an obligation to load and store the goods.
- It is **up to the parties to form a contractual agreement** about who is to conduct the loading process; even Art. 41 CMR does not exclude such an agreement.

LIABILITY / CIVIL LAW

Supreme Court judgement 1

- It can be agreed **not only** that the carrier is obligated to load and store the goods, **but also** that they must check the loading and storage conducted by the sender.

- In the case of damage to the goods in consequence of improper loading or storage, **the Supreme Court of Justice as of now takes the following position as consistent case-law**: if the carrier has neither taken over nor actually conducted the loading, they are not liable for such damages **even when** they have occurred only during the journey.

LIABILITY / CIVIL LAW

Supreme Court judgement 1

- In the case which is to be assessed here, **no** express agreement was made about who was to be responsible for loading.
- The employees of the defending party, as the sender, were involved in loading to the extent that they loaded the metal sheets onto the trailer and then, as was determined, secured them with wooden wedges and wire.
- The lashing was then not undertaken by the defending party but rather by the driver of the claiming carrier, who was made aware by the employees of the defendant that the lashing needed to be conducted in a particularly diligent and orderly manner.

LIABILITY / CIVIL LAW

Supreme Court judgement 1

- If loading was not the responsibility of the carrier, the **actual help of the driver with loading is not an issue**, as this help is not the object of the contractual duties arising from the transport contract and represents an action outside of the liability timeframe.

- Rather, the driver of the vehicle, while lashing down the load under the instruction of the employees of the defending party, took action as their accessory (§ 1313a ABGB). His actions are to be attributed **not** to the claiming, **but rather** the defending party.

LIABILITY / CIVIL LAW

Supreme Court judgement 2

Supreme Court of Justice (OGH)

Date of decision	29/04/2009
Reference number	7Ob165/08b
CLAIMANT:	CARRIER
DEFENDANT:	SENDER (indirect employer of the claimant)
INTERVENING PARTY:	Contractor of the defendant
	Employer of the claimant
CARGO:	several transducers and oil transformers

LIABILITY / CIVIL LAW

Supreme Court judgement 2

FACTS OF THE CASE

- The carrier had the order to transport several transducers and oil transformers as scrap products.
- The transport order included the note: “without oil”
- At the first loading point, the transducers were loaded onto the vehicle. The claimant reversed into the building with the truck. The transducers were supposed to be lifted onto the truck in an upright position by a crane.

LIABILITY / CIVIL LAW

Supreme Court judgement 2

- Due to the size of the transducers, an upright transport of the transducers was not possible, as the maximum allowed height of the truck - four metres - would otherwise have been exceeded.
- During the loading of the transducers, two employees of the sender and the claimant were present.
- All together made the decision to transport the transducers lying flat for the aforementioned reason.

LIABILITY / CIVIL LAW

Supreme Court judgement 2

- It cannot be determined whether one of the persons present first had the idea for the lying-flat transport on their own, or who initiated this.
- The transducers were then lifted onto the truck with the crane, set down lying flat and lashed down with straps in this position.
- When the claimant arrived at the second loading point, he noticed that oil had leaked into the loading space of the trailer. The reason for the leakage of oil was on the one hand that the transducers had been transported lying flat, and on the other hand that the oil drain screws, which ensure the seal of the transducers, were not installed.

LIABILITY / CIVIL LAW

Supreme Court judgement 2

- The oil was mopped up, sequestered with a special cleaning fluid, then removed with a high-pressure cleaner, the missing oil drain screws were installed, then the transformers were loaded on and the transport was continued.
- On the next day, the transducers and transformers were off-loaded on the company premises of the defendant. During this, a further leakage of oil was observed, which had led to damage to the trailer.
- The carrier then made a claim for this damage against the sender by way of a lawsuit.

LIABILITY / CIVIL LAW

Supreme Court judgement 2

FIRST INSTANCE

The claim for relief was **granted**:

REASONING:

- A purchasing contract existed between the seller and the defendant regarding the transducers and transformers.
- With the handover to the carrier commissioned by the defendant, the risk and liability was transferred to the defendant.

LIABILITY / CIVIL LAW

Supreme Court judgement 2

- The defendant should have informed the claimant that it was possible for oil to leak from the transducers and transformers and
- that these transducers and transformers were thus supposed to be transported in an upright manner only.
- A driver cannot be expected to acquire all necessary technical knowledge for the goods that are to be transported.

LIABILITY / CIVIL LAW

Supreme Court judgement 2

SECOND INSTANCE

The appeal court granted the appeal of the defendant and disallowed the claim for relief.

REASONING:

- The claimant derives their claim for compensation from the improper loading of the goods by the employees of the loading agent.

- Regarding the transducers that were to be transported, an email between the claimant and the employer is to be interpreted to mean that the lashing with straps, that is, the safe-for-transport securing of the goods in the transport vehicle, must be conducted by the driver himself.

LIABILITY / CIVIL LAW

Supreme Court judgement 2

- Based on the contents of the transport order, at least the loading of the transducers was the responsibility of the sender.
- It would thus have been the responsibility of the sender to ensure the packaging necessary for this specific form of transport. The reason for the damage to the vehicle of the claimant was the leakage of oil due to missing oil drain screws and the lying-flat transport of the transducers.
- This does not represent a deficiency in the required safe-for-transport loading process.

LIABILITY / CIVIL LAW

Supreme Court judgement 2

- Regarding the defendant, a liability based on improper loading is thus not an option, rather it would be a liability based on insufficient packaging according to Art. 10 CMR.
- The claimant did expressly refer to insufficient packaging. The sender in the sense of Art. 10 CMR is always the contractual partner of the carrier.
- A liability of the defendant is ruled out, as she did not participate in the loading process or the neglected packaging.
- The defendant is thus **not passively legitimised** for the claim being made.

LIABILITY / CIVIL LAW

Supreme Court judgement 2

Supreme Court of Justice (OGH)

The Supreme Court of Justice sustained the appeal and thus found in favour of the carrier:

REASONING:

- The damages caused to the carrier‘s means of transport by improper loading of the goods and other costs are not mentioned in the CMR – which also applies to domestic transport – because it does not contain any regulation about who is to conduct the loading and storage of the goods.

LIABILITY / CIVIL LAW

Supreme Court judgement 2

An analogous application of Art. 17 par. 4c CMR in the case of the loading of goods by the sender is, due to the differing purpose of regulation (liability of the carrier for damages to goods), also not possible in the case of claims arising from the **damaging of means of transport** due to goods improperly loaded by the sender:

LIABILITY / CIVIL LAW

Supreme Court judgement 2

- ***Article 17 CMR***
- *1. The carrier is liable for the total or partial loss and for damage to the goods, if the loss or damage occurs **between the time of the transfer of goods and the time of delivery**, as well as for exceeding the delivery timeframe.*
- *4. The carrier is, subject to Article 18 paragraph 2 – 5, relieved of their liability, if the loss or damage resulted from one or several instances of special dangers of the following kind:*
- *c) Handling, loading, storage or off-loading of goods by the sender, the recipient or third parties who are acting on behalf of the sender or recipient;*

LIABILITY / CIVIL LAW

Supreme Court judgement 2

- The Supreme Court of Justice has **on numerous occasions declared** that the actual help of the driver with the loading process is not an issue if the loading was not the responsibility of the carrier, as this help is not the object of the contractual duties arising from the transport contract and represents an action outside of the liability timeframe.

- The sender of goods who loaded the transport vehicle is responsible for damages to the vehicle which were caused by loading which is not safe for transport; in the case of other duties to compensate for damage, the sender must hand over the goods to the carrier in such a way that no damages are incurred by them or their means of transport.

LIABILITY / CIVIL LAW

Supreme Court judgement 2

- In the circle of the persons who need to be included in this **protection area** of the transport contract about the loaded (scrap) products, there is in this case **also** the person who transported these goods as a **sub-carrier**.

- Here, the **defendant** is responsible for the incorrect loading by the **loading agent** (and seller of the scrap products), her **accessory**, according to **§ 1313a** ABGB.

LIABILITY / CIVIL LAW

Supreme Court judgement 3

Supreme Court of Justice (OGH)

Date of decision	20/10/2004
Reference number	3Ob166/04i
CLAIMANT:	HAULAGE FIRM/EMPLOYER
DEFENDANT:	CARRIER
CARGO:	CONSOLIDATED CARGO
	1st load: 3 coils
	2nd load: 1 pallet of premium steel

LIABILITY / CIVIL LAW

Supreme Court judgement 3

FACTS OF THE CASE

- The claiming haulage firm gave the defending carrier an order to transport three coils and one pallet of premium steel.
- The loading point was not at the hauling firm‘s premises, but directly with the supplier.
- During the transport, one coil fell onto another, damaging three coils and a bundle of premium steel sheet metal.

LIABILITY / CIVIL LAW

Supreme Court judgement 3

- The arguing parties made **no agreement** about who should conduct the loading of the goods onto the truck of the defending party or in which way this should occur.
- A driver of the defending party collected the goods from the loading point, whereby a forklift driver of the company from whose premises the goods were to be collected transported these to the truck with a forklift.
- The forklift driver did not drive onto the loading surface of the truck and advised the truck driver to use disposable pallets in order to pull them into the truck.

LIABILITY / CIVIL LAW

Supreme Court judgement 3

- The driver of the defending party then took over the coils from the forklift and pulled them onto the loading surface of the truck using disposable pallets and a pallet truck.
- He did not undertake any securing of the cargo, as this was, in his opinion, not necessary due to the weight of the coils.
- The reason for the tipping over of the coils and the damage resulting from this was the fact that the coils were not secured onto the truck.

LIABILITY / CIVIL LAW

Supreme Court judgement 3

- The claiming party demanded compensation from the defending party, alleging that the defending party had been charged with loading and storage.
- The damage was, according to them, attributable to improper cargo securing, as the driver of the defending party did not employ the required lashing straps.
- The defending party argued that they had not been tasked with loading and storage. According to them, there was no obligation on their part to check the loading and storage with respect to its safety for transport.

LIABILITY / CIVIL LAW

Supreme Court judgement 3

Supreme Court of Justice (OGH)

- Neither the UGB (Austria) not the CMR contain a regulation about the obligation to load and store the goods.
- It is up to the **parties to make a contractual agreement** about who is to undertake the loading process; if the contractual parties make no agreement regarding loading, the loading is, in case of doubt, the responsibility of the loading agent.
- The relief from liability according to Art. 17 par. 4c CMR only aplies to actual facts,
- the sole decisive factor is who actually conducted the loading.

LIABILITY / CIVIL LAW

Supreme Court jurisdiction 3

- If several persons have worked together during the loading process, the operation is to be seen as having been undertaken by the party which was personally or by way of their employees supervising the situation.
- It is however to be taken into account who was obligated to conduct the loading, since other helpers are then usually seen as their **accessories**.
- The actual help of the driver with loading is not an issue, if the loading was not the responsibility of the carrier, as this **help is then not the object of contractual duties** arising from the transport contract and represents an action outside of the liability timeframe.

LIABILITY / CIVIL LAW

Supreme Court judgement 3

- In the present case, it cannot be said that the driver of the defending party had supervision of the loading process.
- The driver only virtually helped with the loading and followed the advice/instructions of an employee of the company from which the goods were to be collected.
- The liability for the incurred damage thus does not lie with the carrier, but the haulage firm itself.

LIABILITY / CIVIL LAW

Supreme Court judgement 4

FACTS OF THE CASE

- The claimant commissioned the haulage firm to transport 3 electric cabinets from Austria to Switzerland.
- The claimant was aware that there would be a transfer of goods and thus a consolidated shipment.
- The electric cabinets were collected by a truck of the defendant from the company premises of the claimant.

LIABILITY / CIVIL LAW

Supreme Court judgement 4

- The electric cabinets measured 190cm in height, 60cm in width and 50cm in depth, were screwed onto bottom boards (disposable pallets) with a size of 70cm x 60cm and were at extreme risk for tipping over due to their height.
- On the doors of the electric cabinets, casings with a computer keyboard were installed, which protuded out 20cm over the disposable pallet.
- The electric cabinets were wrapped in bubble wrap, the edges were secured by protective elements made of cardboard; the keyboards were wrapped in card.

LIABILITY / CIVIL LAW

Supreme Court judgement 4

- The selected disposable pallets were **not** sufficient for a consolidated shipment.
- The use of larger standard pallets (80cm x 120cm) would have secured the electric cabinets against damage and tipping over.
- The neglected use of standard pallets was just as **obvious** as the resulting lack of lateral closure on the loading surface and the directly related possibility of shifting as well as the high risk of tipping over.
- **Even so, the defendant did not make the claimant aware of this.**

LIABILITY / CIVIL LAW

Supreme Court judgement 4

- The electric cabinets were **lashed onto the truck according to regulations**, so that they could not tip over.
- They were then taken to the **defendant‘s terminal in Vienna**, where they were loaded **onto a swapbody**,
- transported to Switzerland by public transport,
- where they were loaded onto a different truck in the interim storage facility of the defendant and taken to the recipient.
- During the loading onto this truck, the driver noticed that on one of the electric cabinets, the keyboard was jutting out and the packaging was damaged.

LIABILITY / CIVIL LAW

Supreme Court judgement 4

- The **claimant** – based on the provisions of the CMR – claims compensation for damages from the defendant.
- The transported goods had been, according to her, sufficiently packaged and originally, when collected, also been lashed down inside the truck;
- however, after the transfer, they had then neither been tied down nor secured by the defendant during the time they were in her custody, meaning the electric cabinets had not even been rudimentarily secured against typical dangers of transport;
- as a consequence of this **grossly negligent conduct**, the damages were incurred.
- The defendant is said to never have made the claimant aware of the insufficient packaging, although the carrier is **obligated** to check the packaging undertaken by the sender.

LIABILITY / CIVIL LAW

Supreme Court judgement 4

The defendant made a motion for dismissal of the case.

- Although she ultimately did not deny that the damage occurred in her area of responsibility,
- she did refer to Art. 17 par. 4 b - c CMR, since the packaging selected by the claimant was unsuitable for preventing expectable damage, especially due to the high risk of tipping over and a keyboard protruding over the edge of the pallet.
- The damage would not have occurred if standard pallets had been used.
- The loading and off-loading, according to her, was the exclusive responsibility of the claimant.

LIABILITY / CIVIL LAW

Supreme Court judgement 4

FIRST INSTANCE

The first court granted the claim for relief.

REASONING:

- Although an **obvious packaging deficiency** was present due to the use of a pallet that was too small, this is attributable to the carrier, as they did not inform the sender of this.
- Due to the obvious unsuitability of pallet that did not correspond to standard pallet measurements and was thus evidently insufficient, gross negligence is to be assumed.
- Therefore, the defendant, according to Art. 29 CMR, can neither invoke an exclusion of liability nor a limitation of liability.

LIABILITY / CIVIL LAW

Supreme Court judgement 4

Supreme Court of Justice (OGH)

- The defendant neglected all measures to prevent impending damage.

- The defendant

– did not make the obviously insufficient packaging known to anyone,
– nor did she undertake any safe-for-transport packaging herself
– nor did she secure the electric cabinets during the cargo transfer for the consolidated shipping.

LIABILITY / CIVIL LAW

Supreme Court judgement 4

- According to Art. 17 par. 1 CMR, the carrier is liable for damage to the goods, if this occurs between the time of the handover of the goods and the time of their delivery.

- With the liability according to Art. 17 CMR, it is a case of assumed fault with an elevated standard of care for the time between the handover of the goods for the fulfilment of the legal shipping duties and their delivery

- The carrier has the option to invalidate the assumed fault relating to themselves by proving that the conditions for a **reason for exclusion of liability** are met.

LIABILITY / CIVIL LAW

Supreme Court judgement 4

- The carrier is relieved of their liability if the loss or damage arises from the lack or insufficiency of the packaging, if the goods are, due to their nature, subject to loss or damage in case of lacking or insufficient packaging.

- In order for the carrier to be liable for the incurred damage without limitation, their qualified fault according to Art. 29 CMR must be proved.

LIABILITY / CIVIL LAW

Supreme Court judgement 4

QUALIFIED FAULTY CONDUCT OF THE CARRIER

whereby a limitation of liability and sharing of damages in accordance with Art. 29 CMR is ruled out and the carrier also cannot invoke exclusion of liability according to Art. 17 par. 4b CMR:

- no standard pallets were used
- no gapless lateral closure was undertaken
- as a result, the load was able to shift and there was a high risk of tipping
- in spite of the obviousness, the defendant did not make the claimant aware of this or seek instruction
- the conduct of the driver is thus attributable to the defendant as her accessory in the sense of § 1313a ABGB

LIABILITY / CIVIL LAW

Supreme Court judgement 4

CARGO TRANSFER

- If, during the transport, a **transfer of the goods** by the carrier or their helpers takes place, this handling occurs **within the timeframe of custody** and is thus fully subject to strict liability according to Art. 17 par. 1 CMR
- **The responsibility for cargo transfer mistakes is borne by the carrier,** who cannot invoke exclusion of liability according to Art. 17 par. 4c CMR

LIABILITY / CIVIL LAW

Jurisdiction in Germany

Jurisdiction in Germany is consistent with the preceding.

However, do note:

Federal Supreme Court (BGH)

Date of decision 28/11/2013

Reference number I ZR 144/12

The carrier is liable if the driver undertakes the loading of the transport goods on his own, without the knowledge or permission of the sender obligated to conduct the loading, because he (the driver) wants to cut down on waiting time, and in doing so damages the goods.

RESULTS

- If no agreement is made, the loading agent is liable according to civil law for damages arising from insufficient cargo securing
- Even if the driver helps with loading or conducts this on his own, the loading agent is liable, as in this case the driver is seen as an accessory to the loading agent in the sense of § 1313a ABGB
- Alternative contractual arrangements are possible
- In the case of gross negligence or malice on the part of the carrier, the responsibility flips and the carrier is liable without limitation; this without joint liability of the loading agent

RESULTS

If, during the transport, a transfer of the goods by the carrier or their helpers takes place, cargo transfer mistakes are the responsibility of the carrier

MANY THANKS

I look forward to exchanging thoughts with you

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