Reform of **German maritime law** underway

After nearly nine years of discussions and considerations, Germany has finally passed a new maritime trade law. **Michael Karschau**, of Grimme and Partner, provides an overview and highlights those points which will have substantial relevance to the maritime industry when dealing with German shipping law

From the age of sailing-vessels…

The former maritime trade law in Germany dated back directly to the provisions of the general German Commercial Code of 1861 (ADHGB). Those provisions have been transferred into the Commercial Code of the German Reich in 1900 (HGB) with slight adjustments. Even in those days practitioners criticised the move, saying those provisions were already outdated and needed reform. In the following years, several amendments were made. The most important ones were the transmission of the Hague rules of 1924, the Brussels convention of 1957, the Athens convention of 1976, and the Visby-protocol of 1968. These amendments were only a patch-up, not a restructuring. The law missed out on adaptation to today's developments.

In 2004, several distinguished academics and practitioners (the commission) were asked by the federal ministry of justice to provide a draft for a reform. The first draft was submitted in 2009. One of the proposals of the commission was to terminate the Hague rules so that Germany would be free to make a maritime trade law of its own. This proposal was not met. Germany remains a signatory state of the Hague rules. As before, Germany is not a signatory to the Visby protocol of 1968. Nevertheless, all the provisions of the Visby protocol remain in force in German national law. Neither the Hamburg Rules nor the Rotterdam Rules are in force.

… Into the information age

With this latest reform, Germany finally decided to move the law from the age of sailing vessels into the information age. Overall, of the 304 former provisions only 143 remained. The whole systematic approach was changed. Several outdated provisions were simply deleted like the "Partenreederei", a special maritime commercial company dating back to the days of the Hanseatic League.

The first subsection (Articles 476 – 480 HGB) defines the persons involved in shipping, especially the owner, carrier, the crew and the captain. The second subsection (Articles 481 – 552 HGB) deals with contracts of carriage, bills of lading and liability. Already two provisions are dealing with an electronic bill of lading (BOLERO B/L). The third section deals with charter parties (articles 553 – 569 HGB) while the fourth addresses in articles 570 – 595 HGB emergencies like collisions, salvage and general average. Questions of lien are mentioned in the fifth section (Articles 596 – 604 HGB), followed by the (one and two year) limitation periods are mentioned in the articles 605 – 610 HGB of the sixth subsection. Finally, the right of the owner to limit his liability (Articles 611 – 617 HGB) is dealt with in the seventh subsection.

Highlights of relevance

Now, what is new? Especially, which provision may be of relevance for the international maritime industry?

a) *The executing carrier*

According to Article 509 HGB, the person carrying out a carriage is jointly-liable for damage with the owner. An executing carrier is the person / company actually carrying out the carriage. Shippers thus have another potential debtor. The executing carrier is only liable for damages during his actual care. This provision is only applicable if the parties agreed on German law for the main contract of carriage between owner and shipper.

This provision is, for example, relevant for the liability of terminals. If a terminal loads the goods onto the vessel by order of the carrier the terminal would be deemed to be an executing carrier. For damages during loading/unloading the shipper would have a direct claim against the terminal. According to article 512 subs 2 HGB, this liability may not be excluded by General Conditions or an Himalaya clause.

b) *Delay*

Hamburg Rules and Rotterdam Rules have provisions dealing with liability for delay. In Germany, we had and still have no similar provisions. Instead, the general provisions of the civil code are applicable. For a valid delay claim the shipper needs to send the carrier a qualifying reminder. This reminder is only possible in cases were delivery is due. As almost always an


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"estimated" time of arrival (ETA) was agreed, the time when delivery is due is very hard to determine.

As a side note, this is a perfect example that Germany neither incorporated the Hamburg Rules nor the Rotterdam Rules. In fact, the Rotterdam Rules will only be taken into account in a further reform, "if [and not when!] the Rotterdam Rules have been ratified by Germany".

c) *Charterer's bills of lading*

The new German trade law does not accept charterer's bills of lading. For example, BIMCO's CONGEN B/L rules in Article 1 of the conditions of carriage, that "all terms and conditions, liberties and exceptions of the charter parties […] are herewith incorporated". This is deemed to be unclear under the new German Law and will not be accepted as a clause of the bill of lading (Article 522 subs 1, Sentence 2 HGB). Any conditions will have to be written on the bill of lading.

Seen from an international point of view, this is a drastic change from international usage. Shippers and carriers alike will have to pay a close look to the actual conditions, eventually charterers will have to redraft their Bs/L. This is especially of relevance for the arbitration clauses of the charter party. Under CONGEN this clause will be valid between carrier and shipper; under the new German Law it will be invalid.

d) *Nautical errors and fire*

Article IV subsection 2 a and b of Hague-Visby deny a responsibility of the carrier and the damage in connection with an act, negligent or default of the master and with fire. Germany had a similar provision which was deleted. It is still possible, though, to agree on such exclusion in general conditions.

This change is of substantial relevance for cargo interests who instructed a German forwarder for the sea-carriage. If a consignment was lost or damaged due to nautical default or due to fire, the carrier would have been able to rely on the exclusion. Under the former law, the contractual carrier (the forwarder) could also have relied on this exception.

Take for example the recent fire on board the M/V *MOL Comfort* in June this year and let us assume that the carrier may rely on fire. German forwarders with cargo on board the vessel could be liable under the new German maritime law, as long as they had not adjusted their own general conditions. Most of the German forwarders have not reacted that fast and still had their outdated general conditions without such an exclusion. So cargo interests may have a valid claim against German freight forwarders out of a contract of carriage even if there was fire on board a vessel.

e) *Arrest*

In Germany, an arrest will be from now on as easy as in Belgium or in the Netherlands. Under the former law, it was nearly impossible to gain an arrest in Germany. One had to provide the court with a "special urgency" of the arrest. Such a special urgency was only accepted if enforcing a judgement would have been impossible or significantly difficult without the arrest. Enforcement in liner vessels with regular German or European destinations e. g. was accepted to pose such a danger. Besides, the arresting party had to pay a substantial security. Under the new rules, there is no such "special urgency" request any more. "Vessel" covers ocean-going and inland ships as well as sailing yachts and other leisure ships. The arrest order can be served upon the captain. It is still not clear yet if a security still is necessary. It is advisable to plan for a request of security. A wrongful arrest now does not pose the risks it did before. Under the former legislation, if the special urgency requirement mentioned above was assumed wrongfully this would have led to a liability of the arresting party. Without this requirement, arrests have now become considerably less risky.

Conclusion

It was time for Germany to reform the maritime trade law after nearly 150 years and the reform was well made. The new German maritime trade law is more in line with the current international practice – albeit it deviates in some parts. It is, after all, a specific German approach to this matter. The rules regarding the liability in case of a fire, the executing carrier and the charterer's bill of lading provide opportunity for cargo interests. It is further fair to assume that arrests of vessels especially in the port of Hamburg and in the smaller ports of Bremerhaven, Wilhelmshaven, Kiel and Rostock will become more common. ***MRI***


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