

## **Reform of German maritime law**

**On April 25, 2013, a fundamental reform of the German maritime law entered into force. The reform legislation not only restructures the whole fifth book of the German Commercial Code (*Handelsgesetzbuch*, “HGB”), but contains many substantive changes, which will be relevant for members who conduct business with relation to Germany. As the reform is comprehensive, the following elaborations will provide only a concise general overview over the reform and will then turn to some questions of particular relevance for ship owning members.**

### **General overview**

Although there have been punctual reforms to adapt international conventions, like for instance the Hague Rules and the Salvage Convention, the major part of the fifth book of the HGB remained unchanged since 1861. Thus, many provisions were outdated and did not cope with the requirements of modern maritime business. The German legislator has now adopted a basic reform that seeks to meet the today’s needs of ship owners, carriers, shippers and other maritime players. Many obsolete legal concepts were abolished, new contract types expressly addressed and rules adapted to modern means of transportation.

One of the areas mostly disputed was the question, whether Germany should remain a member State of the 1924 Hague Rules. The Expert Commission appointed by the German Ministry of Justice for the preparation of a draft law, had recommended to withdraw from the Hague rules in order to allow the new law to do away with the error in navigation/management of the vessel and the fire defense. Finally it was decided, however, to remain a Hague Rules state.

### **Exclusion for navigational errors and fire: explicit exclusion required**

Despite continuing to be a Hague Rules state, Germany has abolished in its national law the statutory defenses of error in navigation/management of the vessel and fire. Instead, the law now allows the carrier to exclude his liability for these matters by way of contractual agreement. Whilst the new law largely is mandatory and, where it is subject to deviating agreements by the parties, requires individual agreements, the exclusion of liability for error in navigation/management of the vessel and the fire may be contained in standard business terms. This means that such clauses may in particular form part of bill of lading conditions.

Many commonly used international standard terms, like for instance the CONLINEBILL, refer to a liability in accordance with the Hague Rules where applicable. Although it is certainly the object and purpose of such regulations to avail the carrier of the privileges under the Hague Rules, caution calls to deem it possible that the courts might be critical whether the mere reference to the Hague Rules is a sufficiently clear clause for a contractual agreement that the mentioned defenses are available to the carrier. Until this is confirmed by the courts it may be safer to include express language into bills of lading.

In relation to other Hague Rules states, Germany is bound to provide for a statutory error in navigation/management of the vessel and the fire defense, and this is what the actually so provides.

### **Liability of performing carrier**

Under the previous law, if the contract of carriage had been concluded between the shipper and a contractual carrier, who in turn sub-contracted the carriage to an owner, the owner actually performing the carriage was only liable to the consignee under a bill of lading (where issued).

The new law introduces the concept of the performing carrier, which is also known in other international conventions. The person actually performing the carriage is liable to the shipper as if he was the (contractual) carrier. The performing carrier can invoke all defenses available to the contractual carrier; if the shipper and the contractual carrier have agreed to extend the latter's liability, the performing carrier is only bound by such extension if he has agreed in writing. Combined with the lack of a statutory defense for error in navigation/management of the vessel and fire, if German law applies members might find themselves as performing carriers without the mentioned defenses, if the contractual carrier has not agreed on them with the shipper.

### **Deck Carriage**

Finally, also in German law the age of the containerization has arrived. Loading on deck is no longer prohibited *per se*. Rather, if goods are stowed in a container and the deck is suitable for carrying containers, the consent by the shipper is not required. But else, loading on deck remains prohibited in the absence of consent by the shipper and will entail a strict liability of the carrier. If under deck carriage was agreed, the carrier is even liable without any limitation for damage caused during on-deck carriage.

### **Charter bill of lading**

It is good practice that bill of lading issued in connection with e.g. a voyage charter contract contain clauses incorporating all terms, conditions and exceptions, partly also arbitration and choice of law clauses, into the bill of lading. The widely used CONGEN bill of lading is an example for this. The new law makes this practice impossible. Clauses to which the bill of lading merely refers, do not form part of the bill of lading. This will be one of the most drastic changes of the new law. Whether it affects the members will depend on what the charter party provides in respect of arbitration and applicable law.

### **Sea-waybills**

The new German maritime law seeks to keep pace with international trade usage, seeing a general decline of the bill of lading and a replacement by other transport documents like the sea-waybill. Now, the HGB expressly includes a regulation of the sea-waybill, which serves as *prima facie* evidence for the conclusion and the terms of the contract of carriage. The rules applicable to the B/L concerning its content are to be applied respectively; however, instead of the party actually delivering the goods ("Ablader" or actual shipper), the sea-waybill has to include the name of the (contractual) shipper. Thus, members should be careful whether the person named in a sea-waybill is really their contracting partner. If a third party is entered as the shipper, it is presumed that this person is the shipper and it could seek claiming damages for loss or damage to cargo from the owner despite the fact that there was no contract with this person.

## **Charters**

The new law does not only contain specific provisions on voyage charters, but for the first time also on bareboat and time charters. Whilst the rules on voyage charters are partly mandatory (e.g. in respect of the carrier's liability for loss of or damage to the goods), the rules on bareboat charters and time charters are. Given the common use of charter party forms in this area, it is expected that the new law in this respect will not have too great a practical impact.

## **Facilitating the arrest of vessels**

While there is a number of "arrest-friendly" jurisdictions in Europe, Germany was known for its relatively strict prerequisites for arresting vessels. Claimants had to establish that they not only had a claim against the vessel, but also that there was a reason for arrest. Under the new law now, the claimant only has to show his claim, but does no more have to show a reason for arrest. Members have to expect, thus, that their ships will be more vulnerable to arrest in Germany now.

## **Advice to Members**

The reform of the German maritime law has brought about several substantive changes that will also affect the interests of members. In order to protect against liability risks, members are recommended to seek the assistance of legal advisors, in particular to adapt their terms and conditions used for business related to Germany.