Hamburg, February 2014

New German Maritime Legislation

With effect from 25th April 2013 new maritime trade legislation intended to modernise and simplify the German maritime law entered into force. This article identifies the German law legal framework, sets out the most significant changes to the law and makes some comments on what ship owners and charterers as well as their P&I Associations may wish to consider in the future.

Legal framework

Germany is and continues to be a 1924 Hague Rules only contracting state. However, already before the recent reform came into force Germany had widely incorporated the 1968 Visby Protocol provisions into the domestic legislation without ever having actually adhered to the protocol. Broadly, the German international private law in a very complicated provision determined that in most cases the domestic law conforming to the Hague-Visby Rules applied whereas if a trade was compulsorily subject to the Hague Rules then the Hague Rules applied.

Since the decision was made not to give notice of termination of the Hague Rules under the new law the distinction between the application of the Hague Rules and the German maritime law in the German international private law remains operative (section 6 Introductory Law of the German Commercial Code). In this context the mechanism of deciding whether the Hague Rules as incorporated into German domestic law apply has been considerably simplified. The Hague Rules are only applied if a bill of lading is issued in a Hague Rules only contracting state, such as in the United States. Consequently, in the vast majority of cases the

new maritime law applies. It remains based on the Hague Visby Rules. The new law constitutes a shorter, clearer and more systematic arrangement of the German statutory provisions of maritime law. As matters stand currently Germany intends to adhere neither to the Hamburg Rules nor to the Rotterdam Rules. Against that background it is to be expected the new German maritime law will remain in force in its fundamental design for a considerable period of time.

The most significant changes to German maritime law

Some of the most significant changes to German maritime law can be identified as follows:

Exclusions from liability (errors in navigation, fire and tackle-to-tackle)

The new law has abolished the exclusion from liability for damages due to errors in navigation or fire. Contrary to the Hague Rules and Hague Visby Rules system the carrier can no longer exclude its liability by a reference to the law. Instead the parties to a contract can agree on an exclusion from liability in such circumstances. An agreement to that effect can be brought about also by way of incorporating general terms and conditions, such as those in a bill of lading or sea waybill (section 512 (2) German Commercial Code – HGB).

The position is different as far as tackle-to-tackle clauses providing for an exclusion from liability for the period before and afterwards are concerned. While under the old law carriers could exclude their liability by virtue of individual agreements and the incorporation of general terms and conditions this is no longer possible under the new law in general terms and conditions (section 512 (1) HGB). Instead the carrier remains in principle liable for losses of and damages to goods while they are in its (or its subcontractors') custody.

The actual carrier

Under the new law a number of new parties potentially involved in a transport are introduced. The most important one is the actual carrier (section 509 HGB). It is defined as that party which actually performs all or part of the transport but does not qualify as contracting carrier. The term actual carrier can be understood to comprise sub-carriers, (disponent) owners under charterparty contracts and terminal operators. The actual carrier bears a liability which is substantially identical to the contracting carrier's under the principal contract of carriage with the shipper vis-à-vis that shipper regardless of what is agreed between the contracting carrier and the actual carrier under their separate contract.

Transport documents

The new law provides for two important changes in respect of transport documents. First, the terms of a charterparty contract, including choice of law and jursidiction clauses, are only validly incorporated into a bill of lading if they are explicitly reproduced in the bill of lading (section 522 HGB). The mere reference to the terms of the charterparty contract, such as in clause (1) of the Conditions of Carriage of the Congenbill 2007 form, is not sufficient under the new law. Secondly, the new law allows for electronic bills of lading and sea waybills to be issued although the details thereof remain to be determined by government regulation (sections 516, 526 HGB).

Time-bar of recourse claims

The German law one-year time-bar regime has differed from the Hague Rules and Hague Visby Rules concepts for about a dozen years particularly because it covers all claims under any maritime contract of affreightment, because it bars the remedy but not the right and because

the running of time can be suspended by the parties negotiating the claim or its circumstances. The new law has introduced a further difference in respect of recourse claims (section 607 HGB). The time-bar of a recourse claim amounts to one year. In this context the running of time starts when the creditor of the recourse claim settles the original claim or when the original claim is finally and unappealably adjudged solely if it notifies the debtor of the recourse claim of that claim within three months from learning of the damage and the identity of the debtor of the recourse claim. If these conditions are not met the running of time of the recourse claim starts at the time of the (fictitious) delivery.

Provisions on time and bareboat charterparty contracts

Statutory provisions in relation to time and bareboat charterparty contracts were introduced with the new law (sections 553 ss. HGB). They include, for instance, a lien of the owner on the time charterer's movables on board the vessel, including bunkers, as well as on the time charterer's claims for payment of freight from shippers resulting from contracts performed with the time chartered vessel (section 566 HGB).

Ship arrest

Finally, an important change was made in respect of the pre-requisites of a ship arrest. Contrary to the old law to successfully apply for a ship arrest order it is not necessary for the applicant to show a so-called reason why an arrest be granted (section 917 German Civil Procedure). This was understood as the creditor being at risk of recovering the claim if forced to wait for the enforcement of a judgment on the merits. Under the new law it is sufficient for the applicant to demonstrate a good prima facie claim only. Furthermore, the service of the arrest order under the new law can be effected on the captain of the ship (section 619 HGB).

Comments

For ship owners and charterers applying German law to their contracts the following is worth considering, and P&I Associations may wish to ensure their Members do so. First, it is important to include a term in the bill of lading and sea waybill conditions that provides for an exclusion from liability in case of an error in navigation or a fire. Secondly, if it is intended to incorporate charterparty contract terms into a bill of lading or sea waybill they need to be set out word by word. A general reference does not meet the requirements. Thirdly, a (disponent) owner qualifying as an actual carrier can be held liable by the shipper under the contract of affreightment. Consequently, (disponent) owners may wish to consider in future the terms under which their respective contractual partners contract with their customers. Moreover, the recourse against the contractual partner needs to be observed. Fourthly, a recourse claim becomes time-barred after one year from the (fictitious) delivery unless its creditor notifies its debtor of that claim within three months from learning of the damage and the identity of the debtor of the recourse claim. As a matter of precaution the one year time-bar should be observed in all cases.

Dr. Christoph Horbach
Rechtsanwalt
Fachanwalt für Transport-und Speditionsrecht
Mediator

Blaum Dettmers Rabstein
Rechtsanwälte
Bremen Hamburg München

Alter Wall 55, 20457 Hamburg
Telefon: +49 - 40 - 36 97 74 0 (- 52 Frau Birr)
Telefax: +49 - 40 - 36 97 74 10
E-Mail: horbach@bdr-legal.de
Internet: www.bdr-legal.de

Blaum Dettmers Rabstein Rechtsanwaltspartnerschaft mbB, Sitz Bremen, AG Bremen, PR 120