

# Deutscher Verein für Internationales Seerecht

## Deutsche Landesgruppe des Comité Maritime International

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### COMITE MARITIME INTERNATIONAL

#### THE IMPLEMENTATION IN NATIONAL LAW OF MANDATORY INSURANCE PROVISIONS IN INTERNATIONAL CONVENTIONS

#### QUESTIONNAIRE TO MEMBER ASSOCIATIONS

#### ANSWERS FROM THE GERMAN MARITIME LAW ASSOCIATION

#### (DEUTSCHER VEREIN FÜR INTERNATIONALES SEERECHT E.V.)

#### 1. Licensing

**Does an insurer wanting to insure the risks under the Convention referred to above need a license?**

*Yes, a license is obligatory for any insurer who wants to do business in Germany. There are no particular requirements for certification to insure Convention-risks if, however, a German insurer wants to insure those risks or if a foreign insurer wants to do business in Germany the certification according to German insurance supervision laws (Versicherungsaufsichtsgesetz) may be required. The statutory source for answering questions regarding licensing of insurance companies is found in the German Act on the Supervision of Insurance Undertakings (VAG). For the question at hand the Sections 1, 5 and 7 are applicable.*

##### *Section 1*

*Undertakings subject to supervision*

*(1) Subject to supervision under this Act are undertakings which carry on insurance business and which are not social insurance institutions (insurance undertakings), as well as pension funds within the meaning of section 112 (1) below.*

##### *Section 5*

*Authorisation; application; documents to be submitted*

*(1) Insurance undertakings may not carry on business without authorisation from the Supervisory Authority.*

##### *Section 7*

*Permissible legal forms; non-insurance business*

*(1) The authorisation may only be granted to public limited companies, mutual societies and corporations and institutions under public law.*

*(1a) The head office must be located in Germany.*

**If so,**

**1.1 must it be a national license, or do your respective authorities accept licenses issued by foreign bodies?**

*Not applicable.*

**1.2 What are the consequences if an insurer issues a policy without the respective license?**

*Business without a license may be a criminal or an administrative offence under insurance supervision law but does not affect the validity of the insurance contract and the direct action as such.*

**1.3 Is there an obligation of a licensed insurer to conclude insurance contracts?**

*There is no such obligation.*

**2. Certification**

**2.1 Will a certificate issued by a convention state**

**2.1.1 be recognized in your state without any preconditions?**

*A certificate issued by a convention state will be recognized without any preconditions if it has been issued in accordance with Art. 7 Bunkers Convention (Art. 7 para 9).*

**2.1.2 be subject to investigation whether insurance satisfying the convention requirements actually exist?**

*A certificate issued by a convention state will not be subject to investigation whether insurance satisfying the convention requirements actually exists.*

*Germany will request consultation with the issuing or certifying State should it believe that the insurer or guarantor named in the insurance certificate is not*

*financially capable of meeting the obligations imposed by the Bunkers Convention (Art. 7 para. 9).*

**2.1.3 be rejected if there is evidence that there no valid insurance at all or that the insurance is not satisfying the convention requirements?**

*If a consultation with the issuing or certifying State has led to the result, that the insurer or guarantor named in the insurance certificate is not financially capable of meeting the obligations imposed by the Bunkers Convention a certificate issued by a convention state will be rejected if there is evidence that there is no valid insurance at all or that the insurance is not satisfying the convention requirements.*

**2.2 Does the authority in your state in charge of issuing the certificate**

**2.2.1 require a license of your state or is it sufficient that the insurer is licensed in another state?**

*In the application procedure, the competent German authority, Federal Office for Ocean Shipping and Hydrography (Bundesamt für Seeschifffahrt und Hydrographie – BSH) will only accept insurance documents issued by insurers that are subject to supervision by the Federal Office for Financial Services Supervision (Bundesanstalt für Finanzdienstleistungsaufsicht - BaFin), which are members of the International Group of P&I Clubs, or in respect of which the BSH has received confirmation of the insurer's solvency from the insurance supervisory authority of the state in which the insurer is domiciled.*

**2.2.2 investigate the insurance conditions before issuing a certificate?**

*The BSH investigates the details of the Blue Card but does not investigate the insurance conditions.*

**2.2.3 investigate the financial standing of the insurer?**

*The BSH investigates the financial standing of the insurer.*

**2.2.4 investigate the license of the insurer?**

*The BSH investigates the license of the insurer in individual cases.*

**3. Statutory Law**

**3.1 Does your national law contain any provisions specifically designed to transform the above mentioned provisions in international conventions into your national law?**

*German domestic law contains provisions to transform the international conventions as a whole into German law (only CLC and Bunker Convention, not HNS, Nairobi or Athens). But German domestic law does not contain any provisions specifically designed to transform the licensing or certification or any other specific provisions of the international conventions into German law.*

**If so, could you**

**3.1.1 summarize the main characteristics of those provisions?**

*The respective acts of parliament only ratify and make applicable the mentioned international conventions.*

**3.1.2 provide the IWG with an English translation of those provisions?**

*Not applicable.*

**3.2 If your national law does not contain any provisions specifically designed to transform the above mentioned provisions in international conventions into your national law, does your national law then contain general provisions on mandatory insurance, which also apply to the mentioned provisions in the international conventions?**

*No, there are no such general provisions on mandatory insurance which would also apply to the provisions in the international conventions.*

**If so, could you**

**3.2.1 summarize the main characteristics of those provisions?**

*Not applicable.*

**3.2.2 provide the IWG with an English translation of those provisions?**

*Not applicable.*

### **3.3 What does you private international law provide for as the applicable law,**

#### **3.3.1 if the claimants are national persons or companies, but if the insurer is a foreign company?**

*If the above-mentioned international conventions (CLC or Bunker) apply, then their provisions regarding direct actions apply (art. 7 par. 8 CLC and art. 7 par. 10 Bunker Convention).*

*Other than that, German domestic private international law does not provide for an applicable law to direct actions in any statute. However, the European regulation no. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) which is mandatorily applicable by German courts provides in its article 18 that the person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.*

*The law applicable to the non-contractual obligation is then also determined by the regulation Rome II; it is usually the *lex loci delicti*; if the person having suffered damage and the person liable both have their habitual residence or seat in the same country, then the law of that country shall apply. The law applicable to the insurance contract on the other hand is determined by the European regulation no.: 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) which is also mandatorily applicable by German courts; for insurance contracts covering a "large risk" the law applicable to such insurance contract can generally be chosen by the parties.*

*As under German domestic law there is no direct action of the person having suffered damage against the insurer of the liable person, a German court could only accept such direct action if either the law applicable to the non-contractual obligation or the law applicable to the insurance contract is a foreign law and such foreign provides for a direct action. Neither the nationality of the person or company having the suffered damage nor the nationality of the insurer is directly of relevance.*

#### **3.3.2 if the claimants are foreign persons and companies, but if the insurer is a national company?**

*See 3.3.1. above.*

#### **3.3.3 if the claimants and the insurer are foreign companies?**

*See 3.3.1. above.*

#### **4. Jurisdiction/Proceedings**

##### **4.1 Does your national law contain provisions on jurisdiction of courts for direct claims against Insurers?**

*German national law does not contain provisions on jurisdiction of courts for direct claims against insurers. However, Article 11 (2) of the Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgement in civil and commercial matters ("Jurisdiction Regulation"), which is mandatorily applicable by German courts in civil and commercial matters, expressly refers to direct claims by the injured party against the insurer, where such direct actions are permitted.*

*In the following, when answering questions on national law, this shall include stipulations in the Council Regulation (EC) No. 44/2001 ("Jurisdiction Regulation").*

##### **4.1.1 Does your national law allow foreign claimants to directly sue national insurers in your national courts?**

*German national law does not prohibit foreign claimants from directly suing German insurers in German courts. Foreign nationality of a claimant is generally irrelevant as regards jurisdiction of German courts.*

##### **4.1.2 Does your national law allow foreign and national claimants to directly sue foreign insurers in your national courts?**

*Yes, if the foreign insurer is domiciled in a Member State of the European Union and the claimant is domiciled in Germany or the event took place in Germany. According to Article 60 of the Jurisdiction Regulation, for the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its (a) statutory seat, or (b) central administration, or (c) principal place of business. An insurer who is not domiciled in a Member State of the EU but has a branch, agency or other establishment in one of the Member States shall in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.*

##### **4.2 Does your national law allow that the direct claims against an insurer are subject to an arbitration clause?**

*Yes, generally speaking a direct claim against an insurer may be subject to an arbitration clause. However, since the injured person will generally not be a party to the Insurance Contract, the arbitration agreement needs to be concluded after the incident.*

**4.3 Does a judgement against the liable party bind the courts of your country in a direct action against an insurer as regards the merits and quantum?**

*There exists no statutory law on this aspect in Germany. It is an open question whether in marine liability insurance the court deciding on insurance aspects is bound to what has been decided on liability.*

**4.3.1 Does this also apply to judgements in default?**

*See 4.3 above.*

**4.3.2 Can the insurer invoke that the court having decided on the claim against the party liable has not had jurisdiction?**

*See 4.3 above.*

**4.3.3 Can the insurer invoke that the party liable has not been properly served with proceedings and no opportunity to defend itself?**

*See 4.3 above.*

**4.3.4 Can the party liable (read: insurer) invoke that the party liable has not defended itself properly?**

*See 4.3 above.*

**4.5 Can the claimant under your national law sue the person liable and the insurer in the same proceedings?**

*Yes, if the court has jurisdiction for both defendants according to the German Code on Civil Proceedings or the Jurisdiction Regulation as the case may be.*

**4.5.1 Are there any requirements as to the domicile of the party liable or the insurer?**

*The domicile of the party liable or the insurer may be relevant for the question of jurisdiction for either defendant.*

**4.5.2 Does your national law contain provisions on what has to happen if the insurer requires that the party liable is joined as a further defendant?**

*German law does not contain any provisions allowing the insurer to require that the party liable is joined as a further defendant. However, German procedural law provides for a so called "third party notice", which – generally speaking – has the effect that the party liable may join the proceedings, not as*

*a further defendant but to support the defendant by way of own procedural actions such as submissions and motions, and that – no matter if the party liable so joins the law suit or not – anything decided in this law suit against the insurer is binding in a recourse action of the insurer against the insured. However, the claimant will not receive a judgement against the party liable in these proceedings.*

## **5. Particulars of direct action**

*Preamble: The German law contains various statutory provisions on direct actions against insurers, but none of those provisions apply to marine insurance. All questions of this part 5 of the Questionnaire, thus, would have to be answered in the negative. The Association, instead, has decided to answer the questions raised in this part 5 on the basis of the application in Germany of the Conventions referred to in the Questionnaire.*

### **5.1 Does your national law contain provisions according to which a direct claimant has to fulfil requirements for commencing a direct action against an insurer?**

*No.*

### **5.2 Does your national law contain provisions on burden and measure of proof which distinguish between a claim against the party liable under the respective convention and a direct claim against the insurer of such party?**

*No.*

### **5.3 What defences does your national law allow an insurer against a direct claim?**

*The law does not contain any particular provisions, but the insurer may invoke all defences which the insured is entitled to invoke. This includes the defence of contributory negligence of the insured party, i.e. the argument that the injured party has either partially or totally caused the damage himself. German law deals with this in § 254 Civil Code.*

### **5.4 Can the insurer take over the defence of the party liable, and has the insurer a statutory power of attorney to act for the party liable?**

*It depends on the contract whether the insurer can take over the defence of the party liable, but there exists no statutory power of attorney.*

**5.5 Are there any time limits in your national law for a direct action against an insurer?**

*There are no particular time limits applicable for direct actions against a marine insurer. Consequently the general time of 3 years according to § 195 Civil Code applies. According to § 199 Civil code time commences to run at the end of the year in which the claimant obtains knowledge of the circumstances giving rise to the claim and of the identity of the debtor, or would have obtained such knowledge if he had not shown gross negligence.*

**If so,**

**5.5.1 what protects such a time limit (e.g court proceedings; demand letters)?**

*Protection of a time limit is dealt with in §§ 203 et seq. Civil Code. The following leads, inter alia, to a suspension of the time limit:*

- a) negotiations in progress between claimant and debtor,*
- b) the bringing of an action for performance or for a declaration of the existence of a claim, for the grant of an execution clause or for the issue of an order for execution,*
- c) the service of a demand for payment in summary proceedings for recovery of debt or of the European order for payment in the European order for payment procedure in accordance with Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ EU L 399 p. 1),*
- d) arranging for notice to be given of an application for conciliation filed with a conciliation body established or recognised by the Land justice administration authority or, if the parties seek conciliation in mutual agreement, with any other conciliation body which settles disputes; if notice is arranged to be given shortly after the filing of the application, the limitation period is suspended immediately once the application is filed,*
- e) the service of a third-party notice,*
- f) the service of an application for evidence to be taken in independent proceedings,*
- g) the beginning of agreed expert opinion proceedings,*
- i) the service of an application for an attachment order, an interim injunction or an interim order, or, if the application is not served, the filing of the application if the order for attachment, the interim injunction or the interim order is served on the claimant within one month of its being pronounced or of its service on the debtor,*
- j) the filing of a claim in insolvency proceedings or in proceedings for the distribution of assets under maritime law,*
- k) the beginning of arbitration proceedings,*

- l) the filing of an application with the higher court, if the higher court must decide upon the court with jurisdiction over the claim and the action is brought within three months after the application has been disposed of, or the application for which a decision on jurisdiction is necessary is filed,*
- m) arranging for notice to be given of the first application for the grant of legal aid or procedural costs assistance; if notice is arranged shortly after the filing of the application, the suspension of the limitation period takes effect immediately when the application is filed.*

**5.5.2 Can the time limit be extended by agreement? If so, is the agreement with the insurer sufficient or does the party liable have to agree to the extension as well?**

*Yes. The agreement with the insurer is sufficient. No agreement by the party liable to such extension is required.*

**5.6 Under your national law, are the party liable and the insurer jointly liable?**

*Yes.*

**If so,**

**5.6.1 what legal consequences does your national law provide for such joint liability?**

*Each Debtor is obliged to effect the entire performance, but the claimant is only entitled to demand the performance once (joint and several debtors), the claimant may at his discretion demand full or part performance from each of the obligors. Until the entire performance has been effected all obligors remain obliged.*

*Performance by a joint and several debtor is also effective for the other debtors.*

*As to the internal relationship between the joint debtors, they are obliged in equal proportions in relation to one another unless otherwise determined. If the contribution attributable to a joint and several debtor cannot be obtained from him, the shortfall is to be borne by the other obligors obliged to adjust advancements. To the extent that a joint and several debtor satisfies the claimant and may demand adjustment of advancements from the other debtors, the claim of the claimant against the other debtors passes to him. The passing of ownership may not be asserted to the disadvantage of the claimant.*

**5.6.2 can the insurer file a cross action against his insured in the same proceedings?**

*The German procedural rules do not allow a cross action. The Association believes that the Conventions, when in force in Germany, will not be construed as amending the German procedural rules. All the insurer can do is file a third party notice (Streitverkündung) on the insured. But the insured has no obligation to participate in the proceedings.*

**5.6.3 do your courts in such a situation give effect to a jurisdiction or arbitration clause in the insurance policy?**

*As there is no possibility of a cross action, the problem does not arise.*

**5.7 Does your national law allow that the claimant assigns his direct claims to a third party?**

Yes.

**If so,**

**5.7.1 are there any requirements for the validity of the assignment?**

*Under German law an assignment is a contract and requires the agreement of the assignor and the assignee. As long as the assignment has not been notified to the debtor, he is released from his liability by payment to the assignor.*

**5.8 What qualifies under your national law as a *wilful misconduct*?**

*An intentional act, i.e. an act which is done with knowledge and awareness, including knowledge of the consequences of the act.*

**5.9 Does the insurer acquire rights against his own insured (the party liable) if he has to indemnify the direct claimant in circumstances, under which he would have avoided cover if he had been sued by the party liable and not by the direct claimant?**

*Yes. The insurer and the insured being joint debtors, the insurer acquires rights under the law of joint debtorship (see above answer to question 5.6.1), in particular a right of internal adjustment. This right will be for the full liability incurred by the insurer. Apart from that the insurer will also be entitled to a claim for unjust enrichment, as settlement of the claim by the insurer also releases the insured from liability (see above answer to question 5.6.1).*

**5.10 How is limitation of liability affected under your national law in cases of direct actions?**

*As provided for in LLMC 1995. There is a special provision in the German Code of Civil Procedure (§ 305a), according to which the court will issue a judgement subject to the reservation of limitation of liability, if the defendant does not put up a limitation fund but invokes limitation of liability as a defence (cf. Art. 10 LLMC).*

**5.11 Does your national law contain consequences, if the insurance contract contains provisions which are not consistent with the Conventions referred to above?**

*No.*

**If so,**

**5.11.1 are such provisions invalid?**

**5.11.2 is the whole contract invalid?**

**5.11.3 does the contract including such conflicting conditions remain valid, so that the insurance does not fulfil the requirements of the Conventions? What effect does that have under your national law?**

*Not applicable.*

**6. State Liability**

**Does your national law provide for liability of the state where to appropriate authority issues a certificate under the Convention, if it turns out**

**6.1 that there is no insurance contract at all?**

**6.2 that the insurance contract is not consistent with the provisions of the Conventions?**

**6.3 that the insurer is not financially stable and cannot satisfy all direct claims?**

*German law does contain a general provision for liability of the state when a state employed person (an official, in German "Beamter") breaches the duty imposed on him towards a third party:*

*The relevant law, para.839 of the German Civil Code ("Bürgerliches Gesetzbuch" - BGB) reads as follows:*

**Section 839**

***Liability in case of breach of official duty***

*(1) If an official intentionally or negligently breaches the official duty incumbent upon him in relation to a third party, then he must compensate the third party for damage arising from this. If the official is only responsible because of negligence, then he may only be held liable if the injured person is not able to obtain compensation in another way.*

*[(2) not of relevance]*

*(3) Liability for damage does not arise if the injured person has intentionally or negligently failed to avert the damage by having recourse to appeal.*

*If liability had been established the liability rests with the authority at which the "Beamter" has been employed. However, it should be highlighted that the burden of proof lies with the claimant, of course except for the exception as lined out in Section 839 sub.3 BGB.*

*Therefore in particular the claimant has to prove that the "Beamter" acted negligently when breaching a duty and - most important – that this particular duty was "in relation to the claimant", or - in other words- that the intention of this duty was to shelter or safeguard the particular claimant (contrary to a shelter/safeguarding for the "general public").*

Yours faithfully

- Dr. Jan-Thiess Heitmann -

(Secretary General)

- Dr. Dieter Schwampe -

(President)

14 October 2010