

## Industry needs to find its voice in German marine insurance review

by Dr. Dieter Schwampe, partner at Hamburg law firm Dabelstein & Passehl

Abolish, retain or update German marine insurance law – but don't do it without consulting those who know, says **Dieter Schwampe**

Germany's marine insurance market has enjoyed a relatively peaceful existence for more than 100 years despite increasing legislative attention. It has always operated under statutory law regulating marine insurance, but legislators have taken a somewhat laissez-faire attitude towards it.

During the great codification at the end of the 19<sup>th</sup> century, the old marine insurance law of 1861 found its way into the new commercial code. No one complained. Marine insurance was considered to be an area in which the merchants – ship owners, traders and insurers - best looked after their own interests. The law was not mandatory and legal relations were governed by insurance conditions and insurance customs.

Respect for market forces even once legislators became active in non-marine insurance in 1908. The *Versicherungsvertragsgesetz*, the Insurance Contract Act, which may well be considered an early example of consumer protection legislation in Germany, declared itself inapplicable for reinsurance and marine insurance. In 1919 the marine market effectively created its own law, the *Allgemeine Deutsche Seeversicherungsbedingungen*, the German General Conditions of Marine Insurance. These conditions, which were reformed in 1973 for cargo insurance and in 1978 for hull insurance with some minor later alterations, formed the basis for all marine insurance business in Germany, without any legislative interference.

But it appears that this era may be ending. Last spring, the Ministry of Justice published a 570-page report by a commission on the reform of the Insurance Contract Act (<http://www.bundesjustizministerium.de/media/archive/667.pdf>). The move came four years after the Ministry had expressed the view that the Act regulating non-marine insurance was so out-dated that mere alterations would not solve its problems. Areas highlighted were life and health insurance. Marine insurance, not governed by the Act at all, was - to no one's surprise – not mentioned. The Commission appointed by the Ministry consisted mainly of judges, lawyers, professors and commercial men, all of the highest reputation but, one may say, all more or less unacquainted with marine insurance.

So the market was all the more surprised at the fact that the Reform Commission extended its recommendations to marine insurance. The mechanics were simple: marine insurance disappears from the old Act, which excluded the application for marine insurance, so that the Act now also applies to marine insurance. As for the recommendation in respect of current statutory marine insurance law - just abolish it. Since then, nothing has been as it was. Marine insurers issued a press release rejecting the proposal. Various articles were published, some defending the proposal, but most criticising it. To complicate matters even further, the Ministry of Justice recently established another commission, this time for the reform of the German shipping law which is contained in the Commercial Code. The Commercial Code, as explained, is also home to the statutory provisions on marine insurance. Will we see another reform commission extending its work to marine insurance? And if so, what will be the recommendations?

What really is surprising is that hardly anyone would have expressed the view that the statutory marine insurance law requires change. If one examines the tasks set by the Ministry

of Justice for the Reform Commission on non-marine law, it is obvious that marine insurance was not only out of focus, but indeed completely off the agenda. The same applies to shipping law. The legal provisions mostly date back almost 150 years, but does this mean that they cannot be the appropriate framework for a competitive and functioning industry? For almost a century statutory law for the German marine insurance has been nothing more than a loose guideline.

Much could be said – and in fact has already been said – as to whether the peculiarities in marine insurance justify a separate statutory regime. Similarly one may be critical in respect of the promises of those supporting the new proposals, namely that marine insurance can opt out of almost all provisions of the new law. What remains is that marine insurance law is subject to statutory law aimed to protect the consumer. This may appear rather odd, bearing in mind that marine insurance players have created their own rules and customs over centuries in constant exchanges on an equal level. Does the step become more justified by – correctly - pointing out that other areas of insurance law, such as product liability insurance for multinational companies, do not require consumer protection either?

Reform commissions generally are good instruments to prepare law reforms. Things become difficult, however, when there is a danger that a report from a commission is not used as the basis for discussion but might turn out to be a draft law already, which only needs a vote in parliament. Transport insurers have given a reasonable response. They do not deny that the existing law may be looked at critically nor do they object to change. They simply ask what has proved to be an efficient way of law making: Ask those in the marine industry, notably insurers, ship owners, forwarders, importers and exporters, chambers of commerce, banks, shipyards and the rest for their views on the existing law and their thoughts on change. ADS 1919 and its amendments and alterations were established by these means and the rules have been accepted for almost 100 years. The ministry and law makers should listen to what the industry has to say. They are the ones, after all, whose lives will be governed by the law.

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