



RECENT EU DEVELOPMENTS

Message from the Europe Committee

This EUROPE UPDATE hopefully finds you the reader in good spirits at the start of another bar year, in particular during or after another successful ABA Section of International Law seasonal meeting, this time the 2015 fall meeting in the beautiful city of Buenos Aires. Our Europe Committee presented a program at the meeting on contrasting European and Latin American approaches to deal-making which will doubtless make for spirited debate (Patrick Del Duca, Florian Jorg, Elena Bojilova, Lucila Escrina and Pat English). We have also been successful in submitting a program for the spring 2015 meeting in Washington DC on the corporate aspects of the ever topical subject which is the inversion of the US listed public company (with Co-Chair Bojilova as program chair).

Hard as it is to believe, the time is also approaching to propose Europe Committee programs through the Co-Chairs for the 2015 fall meeting in Montreal, Canada so please don't be shy in reaching with your ideas and proposals!

We also take this opportunity to offer our congratulations to our tireless editor, Michael Balistreri, for the due recognition he received in August for what is now the Europe Committee's award-winning newsletter! EUROPE UPDATE received the award for Outstanding Committee Newsletter of 2014. The award was shared with the India Committee to whom we extend our warmest congratulations. The awards ceremony was held at a luncheon at the ABA 2014 Section of International Law Retreat on August 7, 2014 at the Harvard Club of Boston where Michael accepted the award as editor - congratulations Michael!

Finally, as always, the Co-Chairs welcome outreach from any Europe Committee member who desires to step forward to participate in the work of the Committee. Join us on our monthly calls, the times and dates of which are distributed through the committee listserv!

Pat English, Mattia Colonelli and Elena Bojilova, Europe Committee Co-Chairs

A Note from the Editor

Welcome to another bar year, and our 10th edition! Recently, EUROPE UPDATE was named as one of two best International Section committee publications. One of the greatest joys of being the Editor in Chief of the EUROPE UPDATE is the opportunity to compile and present thoughtful commentary and insight to our members, from our members. It is an honor to be associated with the contributors who have filled these pages during my editorial tenure these past two years. As we embark on yet another bar year, I am certain EUROPE UPDATE will showcase many more. I welcome any Europe Committee members who wish to serve as guest editors to organize future Hot Topic editions, as well as join the publication staff for this new bar year.

- **Michael L. Balistreri** (michael.balistreri@roberthalf.com), **Editor in Chief**

Issue 10, November 2014

Contents

U.S. and E.U. Regulatory Conflict and Cloud Data Protection	3
The EU's Data Privacy Regulation and Chancellor Merkel's Political Tightrope	6
Corporate Inversion, Migration, Immigration, and Citizenship	8
Evolution of European Regulation on the Posting of Workers in the Framework of the Provision of Services: New EU Directive on the Enforcement of EU Directive 96/71/EC	10
The Effectiveness of the European Bank Stress Tests	12
EU's Free Movement Rules Come Under Challenge	15
After 150 Years, An Update to Germany's HGB: Moving Closer to the "Managerial Employee" Standard Under U.S. Case Law	18
All for one and one for all, and the Commission against everyone (Saving the EU from the TTIP)	20



**ABA Section of
International Law**
Your Gateway to International Practice

**After 150 Years, An Update to Germany's HGB:
Moving Closer to the "Managerial Employee"
Standard Under U.S. Case Law**

by Erik Kravets & Audrey Kravets

This article will first review the German Maritime Law Reform of 2013. It will then discuss, briefly, captain's liability as a "managerial employee" under German and US law.

Elements of the *Handelsgesetzbuch* Reform

First, as result of the recent reform, the number of code provisions has been reduced by more than half. This has not led, however, to a practical simplification: removal of obsolete provisions, which were not applied anyway, requiring that case law remain forensically dominant in such instances.

Second, a statutory basis has been provided for the use of electronic bills of lading. Whilst highly debatable in terms of their practical security and utility, § 516 (2) HGB makes it clear that electronic bills of lading are equivalent to old-style bills of lading. The only proviso contained in the code is that the "authenticity" of the document must be ensured, and the "integrity of the transcription" of the electronic bill of lading remain safeguarded, criteria which may be subject to dispute from provider to provider.

Third, (non-negotiable) sea waybills – long used by large international carriers – now enjoy a statutory basis in § 526 (1) HGB. However, the introduction of this paragraph does not alter the existing legal landscape and should be regarded as declarative.

Substantive changes have, however, been made to liability rules.

In § 510 HGB, the carrier owes the "standard of care of a prudent merchant", which is analogous to the general

EUROPE UPDATE

commercial law provisions. The fictional standard is that of an "idealized" carrier typical of the relevant business sector (here: ocean shipping). Ameliorating this standard is a variety of exculpatory provisions:

- § 500 HGB stipulates strict liability on the carrier's part for damaged cargo that was loaded above deck without permission of the shipper, whereby the cargo damage must be of the sort typically caused by carriage above deck;
- § 499 HGB still stipulates certain special damage causes which, if affirmed by the court, provide release from liability to the carrier. Among these are, inter alia, "perils of the sea" (Nr. 1), war and geopolitical risk, quarantines (Nr. 2), court seizure (Nr. 3), strikes or other employment-related matters (Nr. 4), shipper's or stevedore's mistakes relating to insufficient or poor packaging (Nr. 5), the nature of the cargo ("*gefährgeneigtes Gut*"), i.e. especially susceptible cargo (Nr. 6), carrying live animals (Nr. 7), saving lives at sea (Nr. 8) and salvage (Nr. 9).
- § 509 HGB discusses the "sub-contracted carrier" ("*ausführender Verfrachter*"), providing the shipper with an additional debtor in the event of cargo damage, under certain circumstances and conditions.
- § 510 HGB protects carriers by stipulating that the shipper or consignee must without undue delay report any damage to the cargo, with failure to comply leading to a reversible presumption that the cargo was intact and undamaged.
- § 477 HGB limits the liability of owners (and potential carriers) by providing them the possibility

DISCLAIMER: The materials and information in this newsletter do not constitute legal advice. EUROPE UPDATE is a publication made available solely for informational purposes and should not be considered legal advice. The opinions and comments in EUROPE UPDATE are those of its contributors and do not necessarily reflect any opinion of the ABA, their respective firms or the editors.



**ABA Section of
International Law**
Your Gateway to International Practice

of shifting their liability onto an involved ship chandler by conveying to the shipper the name and address of the ship chandler.

A major exception to the trend of providing exculpatory possibilities to the carrier is the removal of the statutory liability exclusion for nautical error and fire. Now, the parties will have the possibility of autonomously contracting for such an exclusion, but given current market bargaining power, it is fair to say that this is a blow to carrier interests. Also note the contrast with the liability exclusion under COGSA § 4(2)b.III.

German vs. US Liability

The personal liability of the master as a quasi-merchant (§§ 511, 512 HGB old version) has been abolished; the master's liability is now like that of a key employee. In its place, we find § 479 HGB, which sets forth specific captain's rights, and his obligation to keep a logbook. The rules on captain's liability are terminologically and conceptually oriented toward the liability of the "branch manager"; as such, it is not unreasonable to assert that the HGB's concept of the ship's captain is that he is the "ship's manager" and ought to be treated analogously. The parliamentary reasoning explained that the captain's legal position, "in time, has developed into that of a quasi-employee" and he should no longer be treated as a merchant¹. The captain's power of representation allows him to transact any business that is "typical" for the operation of the ship². These are the same malleable provisions found in the HGB regarding commercial proxy power (*Handlungsvollmacht*, cf. § 54 HGB) given to key managerial employees.

On the other hand, the US Liability Act does not limit the liability of the ship's master or crew. However, the US Limitation of Liability Act (US Liability Act) of 1851 limits shipowner (!) liability in a casualty to the post-casualty

EUROPE UPDATE

value. As one can imagine, the post-casualty value of a vessel is considerably lower than before³. The US Liability Act only limits a ship-owner's liability for damage that results without the owner's "privity or knowledge"⁴. If an otherwise cautious and conscientious master of a ship makes a navigational error and the ship runs aground, there is a strong case to be made that the shipowner had no privity or knowledge of the navigational error and is, therefore, shielded from liability⁵. If, however, the shipowner was negligent in its hiring of the master, the owner's liability shield is in jeopardy.

Yet, if the shipowner was made aware of faulty navigation equipment but failed to make the necessary repairs or replacements prior to the casualty⁶, then the shipowner faces liability. This provides an incentive for the owner to hang the master out to dry. The shipowner's lawyers have an incentive to build a case against the master because a master's negligence – especially when out of character – means liability is likely to end before reaching the owner. Whether the owner's privity or knowledge can be extended to actions on the ship can also be affected by who, exactly, on the ship is at fault for the accident. The higher up the managerial hierarchy, the more likely the owner, and the individual or individuals involved, have privity or knowledge.■

¹ *Entwurf der Bundesregierung eines Gesetzes zur Reform des Seehandelsrechts*, p. 43: "Dabei soll dem Umstand Rechnung getragen werden, dass sich die ursprünglich unternehmerähnliche Stellung des Kapitäns im Laufe der Zeit in eine arbeitnehmerähnliche Stellung gewandelt hat."

² Czerwenka in: *Das Gesetz zur Reform des Seehandelsrechts*, p. 42.

³ An amendment to the US Liability Act requires that, in cases of death or personal injury, the liability fund for payment is increased an amount equal to \$420 per ton based on the ship's tonnage. 46 U.S.C. § 183(ab) (2000).

⁴ 46 U.S.C. § 183(a) (2000).

⁵ "[A] mistake of navigation by an otherwise competent master or crew will not bar limitation." Thomas Schoenbaum, *Admiralty & Maritime Law* 5th ed. (2011) at 192-93.

⁶ In the case of personal injury or death, the master's privity and/or knowledge is, in most cases, imputed to the owner.



EUROPE UPDATE

ABA • Section of International Law • Europe Committee

EUROPE UPDATE

American Bar Association

Section of International Law,
Europe Committee©

Europe Committee Website:

[http://apps.americanbar.org/dch/committee.cfm?
com=IC825000](http://apps.americanbar.org/dch/committee.cfm?com=IC825000)

**Read all our newsletters
on the website and Linked In!**

Europe Committee LinkedIn Group -

ABA International II:Europe:

[http://www.linkedin.com/groups/ABA-
International-II-Europe-4378315/about](http://www.linkedin.com/groups/ABA-International-II-Europe-4378315/about)

The Europe Committee continuously seeks qualified professionals prepared to contribute their time and talents to continue developing a more active Committee. This is a prime opportunity to become involved with a community of lawyers that share an interest in Europe and European law, who are fellow American Bar Association members.

The Europe Committee welcomes any suggestions, ideas or contributions to enhance this occasional publication.

If you are interested in participating actively with the Committee, please contact any member of the Committee Leadership.

Europe Committee Hot Topics Newsletter Editorial Board:

Guest Editor, Europe Update Current Issue:

Recent EU Developments

Anna Engelhard-Barfield

Editor In Chief

Michael L. Balistreri

Robert Half International Inc.

California, United States