

The Wire: Focus on Germany

Welcome to this German edition of The Wire.
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Professional Indemnity Insurance with ITIC

ITIC is the world's leading insurer of professionals who provide services to the transport industry, with over 80 years experience of consistently providing comprehensive cover at cost effective premiums.

Why choose ITIC?

- **ITIC provides professional indemnity insurance at cost.** ITIC is the mutual insurer for the transport industry with no external shareholders or underwriters to take a profit from the business.
- **ITIC pays dividends annually.** Any surplus funds in each year are shared by the assureds in the form of continuity credits.
- **ITIC understands your business.** ITIC's specialist knowledge of your business will make it quicker and easier for you to obtain the support you will need and to claim on your PI insurance.
- **ITIC is more than just insurance.** As an assured at ITIC you will receive support from a team who understand the unique situations and liabilities that your business faces.
- **ITIC will provide a sympathetic approach.** ITIC understands that you will often have commercial relationships which will need preserving and will assist in helping to allow the business association to continue. Also ITIC's unique "discretionary insurance" clause could also support any claim which may not normally be paid by a PI policy.

ITIC Fact File

- Comprehensive professional indemnity insurance, and public liability, cover provided consistently for more than 80 years
- Worldwide insurance cover
- US\$ 50 million gross premium
- US\$ 91 million free reserves
- US\$ 70 million dividends paid to Members over the last 18 years
- Annual premium from US\$ 1,500 up to US\$ 1 million
- US\$ 145 million of disbursements and commissions collected for Members since 1992
- 2,000 Members
- In more than 100 countries
- Backed by at least "A" rated security
- Authorised by the Prudential Regulation Authority and Regulated by the Financial Conduct Authority and Prudential Regulation Authority
- ITIC welcomes enquiries from all insurance brokers, or direct

Ilka Frischen – Account Executive



Ilka Frischen works as an Account Executive for ITIC focusing on the German market. Ilka is a lawyer and underwriter and has worked in Sydney for some of ITIC's members in their claims departments and practiced as a solicitor in a maritime law firm in Sydney. Ilka speaks German, as her native language, English and Spanish.

Roger Lewis – Underwriting Director



Roger joined in 1993 and is Account Executive for ITIC's members in Switzerland, China and Taiwan. As Underwriting Director he leads a team of ten staff responsible for the underwriting, and renewing, of ITIC's membership. Roger has also overseen ITIC's development in Germany, for nearly 20 years, and leads the team of three that take care of ITIC's second largest geographical market. He is also a Member of the Institute of Chartered Shipbrokers.

Matthew Offers – Account Executive



Matthew is responsible for underwriting and claims for Germany, Africa, Portugal and Gibraltar. He joined in 2010, from a UK national insurance broker, having previously worked for an International Group P&I Club as a claims handler and underwriter. Matthew is responsible for ITIC's member's in Hamburg.

On the Arrest of Vessels in Preliminary German Insolvency Proceedings

Is an arrest of a vessel owned by German ship owners possible during preliminary insolvency proceedings? The significance of this question has increased in the current crisis, however, the German case law does not give a clear answer.

Background

German insolvency proceedings consist of two stages. During preliminary insolvency proceedings – the first stage of German insolvency proceedings – a preliminary insolvency administrator examines the financial status of the relevant company and investigates on behalf of the insolvency court whether the grounds required for opening (actual) insolvency proceedings are fulfilled. Depending on the outcome of these preliminary proceedings, insolvency proceedings are either commenced or dismissed due to lack of assets. Once the insolvency proceedings have been commenced, the debtor's power of administration and disposition of assets is transferred to the insolvency administrator. Additionally, creditors are prohibited from arresting assets of the insolvent estate during insolvency proceedings.

During the preliminary insolvency proceedings German law expressly limits insolvency courts to prohibit arrests only into moveable property. The purpose of this provision is to preserve the company's working capital and to avoid a race amongst the creditors to pursue enforcements against moveable assets during the preliminary proceedings.

Since 1 January 2013, due to a law reform, an insolvency court may even order that moveable assets of the insolvent estate that are subject to a privileged lien (so-called *Absonderungsrechte*) or even assets outside of the insolvency estate (that must be separated from the proceedings, so-called *Aussonderung*), cannot be liquidated or retracted by the creditors, if they are essential to the company's continuation of business.

Concerning immovable property, the preliminary insolvency administrator can apply for a stay of a judicial sale with the competent enforcement court. Other possibilities to detain foreclosure measures as for example the arrest of a vessel do not exist in the wording of German insolvency law.

Registered vessels are considered immovable property under German law. Like real estate, they are registered in a register – the ship's registry. For this reason, strictly speaking, the wording of the German law does not allow an insolvency court to prohibit the arrest of a registered vessel as an immovable during preliminary insolvency proceedings.

View of Bremen's District Court

However, the Regional Court (*Landgericht*) of Bremen took a different view as long as the vessel is located abroad. According to an order issued on 14 August 2011 (court's reference number 2 T 435/11), though handed down prior to the above mentioned law reform, an insolvency court can prohibit the arrest of a vessel to prevent the ship from being sold before the commencement of insolvency proceedings. This resolution has been met with some criticism since the law did not provide for an unequivocal basis for prohibiting an arrest at the time.

Following the wording of German insolvency law, vessels can be arrested until insolvency proceedings have commenced. Only if – contrary to the law which clearly states that a vessel is immovable property – a vessel is considered movable property, the arrest of a vessel can be prohibited during preliminary insolvency proceedings.

Practical Consequences

Since the decision of the District Court of Bremen, it is unclear whether vessels can be arrested after the filing of insolvency but before insolvency proceedings have been commenced. In the meantime, other insolvency courts have prohibited arrests during preliminary insolvency proceedings, hence, following the view of the District Court of Bremen.

Even the above mentioned provision, in force since 1 January 2013, under which creditors (such as holders of a maritime lien) may be prohibited from an arrest during the preliminary insolvency proceedings, refers in its wording to moveable assets. However, the wording does not expressly exclude immovable assets. Under the new law a prohibition of an arrest during the preliminary insolvency proceedings might be argued by means of an analogous application of this provision.

Furthermore, it is not clear whether foreign courts (must) recognise a decision of a German insolvency court prohibiting the arrest of a vessel. Doubts arise in particular in respect of security rights in Bremen provided for in other European countries. According to the European Regulation on Cross-Border Insolvency (Regulation No. 1346/2000) such security rights are not subject to the effects of German insolvency proceedings in case the vessel is located outside Germany at the moment the Insolvency Court issues its decision. This means that, for instance, a Dutch shipyard could enforce its builder's lien by means of an arrest even though a German insolvency court has issued a decision according to which it is prohibited to arrest a vessel during preliminary insolvency proceedings. The legal position remains unclear in cases in which the European Insolvency Regulation is not applicable.

Experience shows that not all non-European Courts acknowledge decisions of German Insolvency Courts according to which arrests are prohibited. However, if a non-European Court allows an arrest and thereby disregarding the decision of a German Court, the creditor who applied for the arrest may be held liable for damages. This liability for damages would have to be pursued by the insolvency administrator, hence he would have to provide sufficient evidence of the damage suffered or actively challenge and claim restitution of the proceeds of sale. Especially

in respect of privileged creditors this might prove difficult to establish by the (preliminary) insolvency administrator, also in light of the fact that he would have to advance the costs of these proceedings from the insolvency estate.

Dr. Tim Schommer
Ince & Co Germany LLP

Telex Release goes wrong

Liner agents frequently have to arrange for cargo to be released against bills of lading surrendered at the loadport – the so called “Telex Release”. This type of release is risky as no bill of lading is collected at the discharge port and frequently results in mis-delivery of cargo.

In a recent case two containers were shipped to a port in the Netherlands by a shipper; both containers were consigned to the same company. The shipper gave instructions to the load port agent to release one of the containers and this authority was passed to the discharge port agent, who mistakenly released both containers.

The consignee never paid for the second container, and the shipper appointed lawyers to pursue recovery of EUR 76,000, the value of the cargo in the second container, from the shipping line. The claim was eventually settled, after negotiation, for EUR 66,000, which was claimed from the discharge port agent.

Misdescription of cargo capacity of vessel

A shipbroker Member acted for owners in the fixing of their ship to charterers. Unfortunately, when describing the cargo capacity of the ship, the figure of 119,995 cubic metres was given by the Member, whereas the correct capacity was 115,003 cubic metres.

The charterers submitted a claim for deadfreight, and the dispute was submitted to arbitration. The owners argued that the charterers had fixed the ship because it was of a well-known type, suitable for their purposes, and not because of any precise capacity figure. However, the arbitrators decided, by a two to one majority, that the error made by the brokers gave the charterers a right to recover damages from the owners.

The damages awarded to charterers amounted to US\$30,030 plus their costs. The owners demanded an indemnity from the brokers for this amount plus their own costs. The Club's lawyers advised that there was little defence to the claim, but were able to reduce the amounts claimed by the owners and charterers as costs. The claim was settled at a total of US\$75,000.

Ship management claim

A dispute arose between the manager of a ship and the owner concerning a balance of funds owed to the manager. It was agreed that those funds would be put into an escrow account. The matter remained idle for five months, until the owner raised a claim, through their lawyers, against the ship manager for alleged negligence. The owner's claim was that the ship manager was in breach of their duty to maintain the ship in an efficient employable state and as a result they had suffered significant losses. The claim put forward by the shipowner was in excess of USD 17 million and included alleged losses of the vessel's future employment, alleged expenses paid by the ship owner for repairs/spares/dry dockings, alleged reduction in the vessel's market value and other additional damages.

The ship manager rejected these allegations in full and lawyers were appointed by ITIC to defend their member's position. The ship manager advised that the vessel's condition deteriorated due to

the age, constraints of trade and by spending and maintenance restrictions imposed by the owner. The manager further stated that the owner was fully aware of the deficiencies and the condition of the ship when it was taken under management. Despite this, the owner did not take the necessary steps to facilitate remedial action.

Lawyers for the owner aggressively pursued the claim against the manager. However, the manager was fortunate in that their files and correspondence on this ship were in good condition and a thorough audit trail for every decision required regarding the running and maintenance of the ship existed. The ship was eventually scrapped, but the owner continued to maintain that they had a claim against the manager, although they were unable to provide any proof or document their losses.

Eventually, after two years, the claim was finalised on a drop hands basis. The total cost of the legal fees to defend the innocent ship manager totalled USD 250,000.

The quality of wheat

A firm of cargo superintendents sampled a shipment of wheat and tested it for various specifications including moisture, protein and admixture. Ten months later the cargo superintendents were sued for an amount of US\$ 80,000 by the buyers of the cargo, which had allegedly been found to be of inferior quality at the discharge port. The cargo superintendents' defence was hampered by lack of evidence, as no samples had been retained and no explanation could be given as to the difference between the laboratory results obtained at the discharge port and the load port. The claim was eventually settled with a substantial contribution from ITIC.

Naval Architect:

Naval architect members were contracted by ship owners to design the re-configuration of a vessel to maximize the load for the number of wind turbines per voyage. The conversion works were carried out by a ship yard on the basis of the member's design. Due to a design error the vessel could only load four turbines instead of the intended six.

The ship owners brought a claim against the naval architect for the costs of redesigning and rectifying the supports as well as the additional costs of performing more voyages. Expert opinion suggested that rectification works had to be carried out. The bill was picked up by ITIC, net of the applicable deductible, plus all the fees.