

Reply by the German Maritime Law Association
to the CMI Questionnaire of 12 November 2013
“2006 Guidelines on Fair Treatment of Seafarers
in the Event of a Maritime Accident (the Guidelines)”

Introduction

In Germany the Federal Bureau of Maritime Casualty Investigation (Bundesstelle für Seeunfalluntersuchung, BSU), Federal Higher Authority subordinated to the Federal Ministry of Transport and Digital Infrastructure registers and investigates all types of marine accidents to or on board German flagged ships world-wide. Within the German territorial waters the BSU acts regardless of the flag(s) of the ship(s) involved.

The sole objective of BSU accident investigations is to determine the circumstances and causes as well as the contributing factors of the accident with a view to preserve life and avoid accidents in the future, not to apportion blame, or settle liability or claims. The BSU will immediately investigate the accident and in case of damage or loss of life the German public prosecutor’s office investigates. The investigative process of the BSU focuses on the accident and/or marine pollution and future prevention.

For this purpose the investigation of maritime accidents under German law is basically codified in the German Maritime Safety Investigation Law (Seesicherheits-Untersuchungs-Gesetz, SUG) of 16 June 2002 (which entered into force on 20 June 2002), as last amended 24 May 2016. The SUG provides for the national implementation of the 2006 guidelines on fair treatment of seafarers in the event of a maritime accident (the Guidelines).

§ 9 paragraph 2 SUG clearly regulates that investigations of maritime accidents must follow the “no blame principle”. The investigation of maritime accidents in accordance with the SUG is never directed against a seafarer.

1. *Have the Guidelines been passed into the law/s of your country?*

Yes. For more detailed information please see the answer to question No. 5 etc.

2. *If the Guidelines have been passed into the law/s of your country, have all or some of the paragraphs of the Guidelines been passed into the law/s of your country?*

Yes, all paragraphs have been passed into German law. For more detailed information please see the answer to question No. 5 etc.

3. *- not applicable*

4. *If some or all of the paragraphs of the Guidelines have been passed into the law/s of your country, does the law/s give rights to seafarers which are enforceable in your courts?*

Yes. For more detailed information please see the answer to question No. 5 etc.

5. *If some or all of the paragraphs of the Guidelines have been passed into the law/s of your country, please identify the specific law/s: ie title of the law/s, and date of the law/s, and relevant provisions in the law/s (plus additional information to questions Nos. 1. – 4.)*

The investigation of maritime accidents under German law is basically codified in the German Maritime Safety Investigation Law (SUG) of 16 June 2002. The Guidelines must be followed in accordance with §§ 10, 20 SUG. The German national implementation mechanism has a complex structure, which is explained in the following.

In view of the purpose of the law to improve maritime safety and the prevention of pollution by ships including labour protection of persons employed on seagoing vessels and protection of the marine environment directly connected with it, and so reduce the risk of future marine casualties, § 1(1) SUG stipulates that all investigations of maritime accidents have to be conducted with due regard to valid international maritime casualty investigation regulations, which include the Guidelines. The Guidelines which have to be taken into account in the conduct of maritime accident investigations are specified in the appendix to the SUG, to which i.a. § 2 SUG (international maritime investigation regulations) explicitly refers. Section C No. 2 of the appendix to the SUG explicitly refers to the 2006 guidelines. The legal technique of referring to EU and international regulations in the appendixes A-E to the SUG does, however, not mean that the 2006 guidelines automatically have the status of a national law. Referring to the 2006 guidelines in section C No. 2 of the appendix to the SUG has only declaratory and not constitutive effect with regard to transformation of the international guidelines into

national law. This means that the regulations of the Guidelines shall be respected by national law, but by referring to the 2006 guidelines in the appendix to the SUG they do not have the status of directly binding national law. In order to be binding, the regulations of the Guidelines have to be explicitly implemented into national law. This regulatory technique is well known in German legislation i.e. from the German Ship Safety Act (Schiffssicherheitsgesetz, SchSG). The national legal technique to refer to applicable EU and international regulations in an appendix to the respective national law aims to clearly identify relevant international regulations in the specific field of law for those applying the law. The Guidelines are, however, greatly reflected in EU Directive 2009/18/EC of the European Parliament and of the Council of 23 April 2009 (establishing the fundamental principles governing the investigation in the maritime transport sector and amending Council Directive 1999/35/EC and Directive 2002/59/EC), as well as in the SUG. Article 18 of the Directive regulates that “In accordance with their national law, Member States shall take into account the relevant provisions of the IMO guidelines on the fair treatment of seafarers in the event of a maritime accident in the waters under their jurisdiction”. § 3 SUG specifically refers to the implementation of EU regulations. The regulation states the German federal government agencies have the inspection powers, legislative and intervention powers as outlined in section B and E of the appendix to the SUG, which refers to Directive 2009/18/EC and (section B No. 2). § 10 SUG stipulates in which investigations the international regulations referred to in section C of the appendix to the SUG are to be applied. § 20(4) SUG explicitly provides for a specific implementation regulation with regard to the 2006 guidelines. § 20(4) SUG states that section c of the appendix to the SUG, especially the 2006 guidelines, have to be taken into account by the BSU when conducting their investigations, as published in the Official Journal of the Federal Ministry of Transport (Verkehrsblatt) in 2010.

Seafarers who fall within the scope of German law are fully protected by the applicable regulations in the SUG in connection with the Guidelines and also by other German laws, especially the German Administrative Procedure Act (Verwaltungsverfahrensgesetz, VwVfG), the German Code of Civil Procedure (Zivilprozessordnung, ZPO) and the German Code of Criminal Procedure (Strafprozessordnung, StPO). These laws provide high levels of protection to anybody in the area of German jurisdiction.

The content and regulatory objective of the Guidelines can be found in several German laws which provide for a fair treatment of seafarers as well as for any other person in the territory of German law. In view of the regulatory content of the Guidelines, “the fair treatment of seafarers in the event of a maritime accident”, the SUG is the most specific German law. As outlined, by referring to the Guidelines in section C of the appendix to the SUG the German lawmaker clarified in general that the Guidelines shall be respected under national German law. Further, § 20(4) SUG explicitly provides for a specific implementation regulation with regard to the 2006 guidelines.

Therefore a seafarer can rely on his/her rights to fair treatment in the event of a maritime accident in accordance with the SUG in connection with the Guidelines as well as the additional applicable national regulations.

In summary, all paragraphs of the Guidelines have to be respected in accordance with §§ 2, 3, 10, 20(4) in conjunction with Sections B No. 1 and C No. 2 of the Appendix to the SUG.

6. and 7. - not applicable

8. *Do the laws of your country require that a seafarer must be informed of the basis on which an investigation into a maritime accident is being conducted?*

Yes, under German law a seafarer must be informed of the basis of the investigation. The obligation to inform concerned parties in legal affairs about the legal basis of any procedure is a leading principal in the system of German law. According to the German constitution (GG) and especially the right of effective judicial protection and due process (Art. 19(4) GG) an investigation can only be conducted if based on a clear legal ground. This general principal has to be respected by every authority that carries out a legal procedure. § 22 SUG gives the authorities explicit rights of investigation. The SUG itself does not explicitly stipulate such an information obligation of the authorities involved in the investigation. However, an obligation to inform seafarers of the basis of the investigation follows from the general information obligation under German law as well as from §§ 2, 3, 10, 20(4) SUG in connection with the Guidelines.

Furthermore in case of a criminal law investigation of the incident, the StPO provides for information obligations which are even more detailed than the information obligation of the SUG in connection with the Guidelines. For example, §§ 136 (First Examination), 163a StPO (Examination of the Accused) determine several obligations of information. These information obligations are very important principals in German criminal law.

In summary, seafarers have to be fully informed by the authorities concerned with maritime casualty investigations as well as the authorities concerned with criminal investigations, this includes information about the legal basis of the investigation as well as information about the rights of the concerned seafarer.

9. *Can a seafarer be detained as part of an investigation into a maritime accident, or as part of a trial?*

Yes, a detention of a seafarer is generally possible on basis of German law. With regard to the legal basis for such a detention of a seafarer it has to be clearly

differentiated between a criminal investigation and an investigation of a maritime accident on basis of the SUG. The, German investigative process allows detention in case of risk of escape and severe liability. As part of an investigation into a maritime accident on basis of the SUG without a criminal trial a detention is, however, only theoretically reasonable and not of any practical relevance because the investigation of maritime accidents in accordance with the SUG is never directed against a seafarer.

With regard to criminal proceedings a detention can only be imposed by the respective court in charge. Without a judicial decision a detention can only be imposed until the end of the next day after the detention. Detentions in connection with criminal offences cannot be imposed by the BSU but only by the criminal law enforcement agencies on basis of the StPO.

The SUG itself does not contain an explicit legal basis for detention of seafarers as a part of the investigation.

Anyway, as mentioned, a right for detention can follow from other laws, especially the criminal procedure. This is explicitly pronounced in § 19 SUG and also in the Guideline. In particular a pre-trial detention is reasonable if the seafarer stands in suspicion of a criminal offence. In this case a seafarer can be detained (as any other person in the scope of German law) on basis of the § 112 et seqq. of the German Code of Criminal Procedure (Strafprozessordnung, StPO). A detention on this basis has very high requirements and cannot be handed out easily and only by the court in charge.

10. *What safeguards exist if a seafarer is detained as part of an investigation into a maritime accident, or as part of a trial. In particular:*

As mentioned it has to be clearly differentiated between an investigation on the legal basis of the SUG and on the legal basis of the German Code of Criminal Procedure (StPO). Investigations on basis of the SUG have the objective to find out which circumstances led to the maritime accident and to prevent future maritime accidents.

The objection of the StPO is to find out if a person committed a criminal offence. The SUG compared with the StPO therefore grants its own set of rights to the authorities and persons involved in the investigation. Detentions of seafarers on the legal basis of the SUG have never been applied and are not of practical relevance because the investigation of maritime accidents in accordance with the SUG is never directed against a seafarer. Seafarers have all the rights every German citizen has. The trial generally has to start within 6 months after detention (§ 121 StPO). Seafarers are allowed to contact legal advice around the clock.

10.1 *Is there any provision in your country's law/s whereby a seafarer must be informed of his/her legal rights?*

Yes, under German law there are several obligations to inform seafarers about their legal rights. This is one of the basic principles in German law.

Under German law the parties of the proceedings always have to be informed on which legal basis measures are taken. This is a fundamental right in German law (Art. 19 (4) of the German Constitution, Grundgesetz (GG)) and must be observed very carefully by the investigation authorities. Both in accordance with the SUG in connection with general administrative procedural law and the Guidelines and in accordance with the StPO in cases of criminal investigations a seafarer has the right to be informed about his/her legal rights.

10.2 *Does a seafarer have the right to be provided interpretation services?*

Yes, a seafarer has the right to be provided interpretation service.

For a due process it is a fundamental right in German law for any person to be provided with a free interpretation service if needed to understand and follow an investigation or a process. With regard to the investigation of maritime accidents it has to be considered first that the objective of the SUG is to find out the cause of the accident and to prevent maritime accidents in the future. To get clear and complete testimonies an interpretation service is mandatory. The right for an interpretation service is not explicitly mentioned in the German Administrative Procedure Act (Verwaltungsverfahrensgesetz, VwVfG). §§ 23, 28 VwVfG in connection with § 185 of the German Courts Constitution Code (Gerichtsverfassungsgesetz, GVG) stipulate that an interpretation service is mandatory for a due process and a basic right in every investigation, process etc. which has to be (and in fact is) followed strictly.

Additionally the maritime authorities always are responsible for the protection, right and welfare of seafarers, see §§ 2, 3, 10, 20 (4) SUG in connection with the Guidelines. It is in the special interest of the BSU to obtain evidence and to provide an interpretation service if the seafarer does not speak German. Again, it is important to point out that the process under the SUG is never directed against the seafarer, but the information from the seafarer is in the interest of the investigation of the maritime accident.

In case of a criminal investigation on basis of the StPO the right for an interpretation service is regulated in §§ 136, 163a StPO and also results from Art. 6 of the European Convention on Human Rights (Europäische Menschenrechtskonvention, EMRK).

Furthermore the right for an interpretation service is mentioned in many other rules, such as §§ 114a, 259 StPO, § 187 GVG.

10.3 *Does a seafarer have the right to be provided free independent legal advice?*

The question has to be answered in two parts and cannot be answered generally with “yes or “no”:

For a maritime accident investigation on basis of the SUG there is no explicit right for a free independent legal advice, however, for a criminal investigation on basis of the StPO there is such a right for the seafarer.

Maritime accident investigations under the SUG focus on the on the accident and/or consequences of the accident e.g. marine pollution and future prevention of such accidents and not the finding of fault or liability of the seafarer (see above). Therefore it was not necessary for the legislator to provide free legal advice to a seafarer or any other witness within the SUG itself.

However, in case of a criminal investigation on basis of the StPO a seafarer has the right to obtain independent legal advice, § 137 StPO. Also a seafarer who is a witness in a criminal procedure has the right to obtain independent legal advice, § 68 b StPO.

10.4 *Does a seafarer have the right not to answer questions that may be considered self-incriminating, if so advised?*

The German legal system enshrines the basic principle that a person generally has the right to remain silent on questions that may be self-incriminating. The authorities have the duty to advise a concerned person of this fundamental right. Therefore under German law seafarers have the right not to answer questions that may be considered self-incriminating.

The right of silence with regard to potentially self-incriminating questions is also explicitly stipulated in § 26 (3) SUG. The maritime authorities have the duty under the SUG to advise a seafarer of this right. This is also true for criminal procedures – it is a fundamental right of the StPO and regulated in §§ 136, 243 (5) StPO. Every person under consideration of a criminal offence has to be instructed carefully about the right of silence.

According to § 136 Strafprozessordnung (StPO, i.e. Criminal Procedure Code) a suspect, arrested or not, has to be informed before any interrogation about the right to remain silent. It is not allowed to draw any inference from the complete silence of the accused in any stage of the criminal proceedings. However, it is allowed to draw conclusions if the accused remains silent only to certain questions about the alleged crime. Suspects cannot be heard under oath.

A person against which exist plausible causes of suspicion can be interrogated as an ordinary witness in criminal proceedings against another person. However, in

this case according to § 55 StPO, a witness can refuse to answer questions which could incriminate himself (or one of his relatives). The suspicious witness also must be cautioned about the right to remain silent. The German investigative process allows detention in case of risk of escape and severe liability under strict conditions.

10.5 *Are there any other due process safeguards provided to seafarers facing an investigation into a maritime accident, or as part of a trial?*

Under German law a number of safeguards are stipulated which provide for due process. Insofar seafarers can rely on their rights out of the SUG and the Guidelines and also on general German law principles with regard to due process as any other citizen.

11. *If the Guidelines have been implemented into your law, have they been relied upon/referenced in any cases? If so please comment further.*

There is no special case law available in respect to the Guidelines. However, as explained above, the principles enshrined in the guidelines are taken into account in the course of maritime accident investigation. Regarding the causes of maritime casualties the investigations of the Federal Bureau of Maritime Casualty Investigation (BSU) are finalised with the summary of the investigation results in an investigation report and the publication of the report. In the column “Investigation Reports” of the English website of the BSU all investigation reports are published by the Federal Bureau of Maritime Casualty Investigation and can be downloaded as pdf. Moreover all safety recommendations, annual statistics and a list of the current investigation reports are published, see:

http://www.bsu-bund.de/EN/publications/publications_node.html

12. *Does your Association have any comments, suggestions or recommendations on this subject?*

The rights of seafarers are fully protected under German law. The applicable regulations and procedures under German law in case of a maritime accident fully take into account the specific situation of seafarers and duly protect their rights in respect of an investigation without undue intervention. It should be highlighted that with regard to criminal proceedings there is no special law for specific professions such as seafarers but the general principles of criminal proceedings which have to be followed in all cases fully protect the rights of accused persons, irrespective of profession, gender etc.

In accordance with §§ 39 et seqq. SUG in connection with § 50 para. 4 SUG a driving ban can be directed against a foreign seafarer. In accordance with § 48 para. 1 SUG compulsory attendance can be mandated.

To sum up, the German Maritime Law Association fully supports the Guidelines and their spirit. Unfortunately, fair treatment of seafarers is still very often threatened and in practice too often not guaranteed when political decisions are made following severe maritime accidents etc. It remains an important task for all maritime lawyers as well as for industry, NGOs and governments represented at IMO to remind all parties involved that fair treatment of seafarers is a topic of greatest relevance and importance and that the Guidelines contain fundamental principles and rights which should not be sacrificed because of political pressure following a major ship accident.