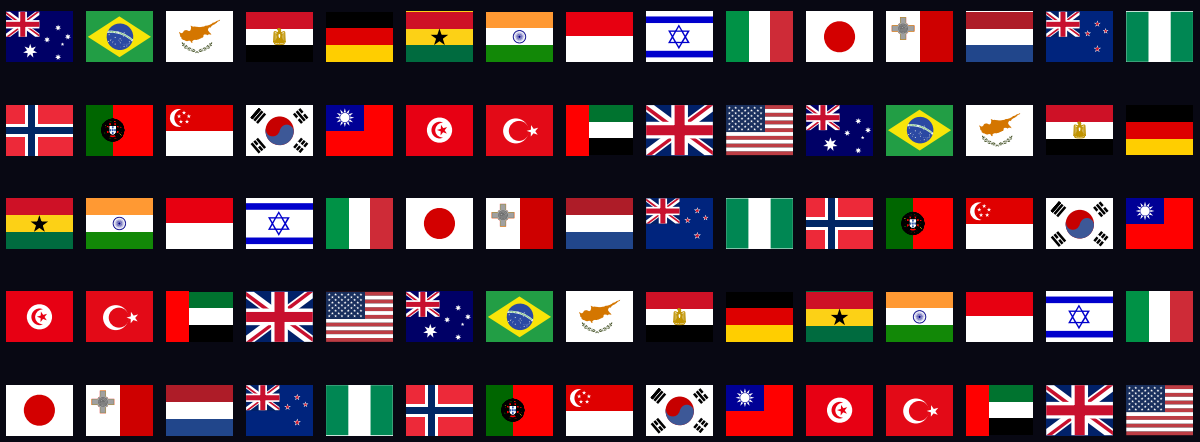
SHIPPING

Germany



LEXOLOGY
Getting The Deal Through

Consulting editor
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Shipping

Consulting editors

Kevin Cooper, Nico Saunders

MFB Solicitors

Quick reference guide enabling side-by-side comparison of local insights into newbuilding contracts; ship registration and mortgages; limitation of liability; port state control; classification societies; collision, salvage, wreck removal and pollution; ship arrest; judicial sale of vessels, carriage of goods by sea and bills of lading; shipping emissions; ship recycling; jurisdiction and dispute resolution; international conventions; and recent trends.

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Contributors

Germany

Henrike Koch
h.koch@kdb.legal
KDB.legal KOCH BOËS

Axel Boës
a.boes@kdb.legal
KDB.legal KOCH BOËS

Heyo Eyiah
h.eyiah@kdb.legal
KDB.legal KOCH BOËS

NEWBUILDING CONTRACTS

Transfer of title

When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

Germany is one of the few jurisdictions that makes a difference between passing of the title and payment of the price owed on the basis of the underlying contract. In a way, the transfer of title of a separate agreement between the parties with the sole aim to agree on the passing of the title. This is referred to as the principle of separation and abstractions under German law. The parties are therefore free to agree that the title in the ship can change at any time, which is mostly made upon payment of the last instalment under a newbuilding contract.

There are also rules regarding the transfer of title by law, like when a part is used in a new, bigger segment or if supplies are changed in structure when used. However, it is also possible and common to retain the title until payment is received in full, thus to determine when the title was actually passed, the whole situation including first the shipbuilding contract, and then the contracts with third-party suppliers, the process of manufacturing. German law also allows registration of a vessel under construction after keel laying in a dedicated register that can secure the later transfer of title by a specific caveat together with the registration of mortgages.

Law stated - 31 July 2023

Refund guarantee

What formalities need to be complied with for the refund guarantee to be valid?

The form and the content of a refund guarantee are only limited by general legal principles regarding the validity of an agreement and the parties are basically free to agree on every mechanism they deem fit. If the guarantee should be directly enforceable, it must be made in writing (wet ink signature). It is further common to detail the duration of the guarantee, which can also be established by a certain action or event, and to include waivers of defences against the enforcement, such as making the guarantee due in the first demand of the creditor.

Law stated - 31 July 2023

Court-ordered delivery

Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

If the delivery of the vessel is refused by the yard despite the obligation under the shipbuilding agreement to do so, it would be possible to compel the yard to release the vessel with a temporary injunction. The court will then test on the basis of prima facie evidence whether the right to have the vessel released has been wrongfully denied. However, to be eligible for such temporary court judgment, the applicant needs to also provide sufficient evidence of the urgency of the release, otherwise only the general application to release the vessel, made to the competent German court is possible.

For an application to release the vessel on the basis of a temporary injunction, the competent court at the location of the vessel will have jurisdiction unless the main action is already otherwise pending. Under Brussels I Regulation, German courts will also acknowledge and implement rulings of European courts as temporary injunctions if the basic requirements of article 42 paragraph 2 and article 2 lit a of the Regulation are met. In case there are judgments from foreign courts outside the European Union, it remains to be established first whether they can be enforced in Germany as well.

Law stated - 31 July 2023

Defects

Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

The codified German contractual law does allow for an unlimited claim for rectification first of any defects and will, if such rectification fails, is denied by the yard, or is not possible, grant a claim for compensation of damages in an unlimited amount, up to the total interest in a vessel free of defects, including consequential losses such as loss of profit, loss of business and even loss of goodwill.

It is therefore very common to detail the rights and obligations in case of defects in the shipbuilding agreement and limit the compensation of damages to any direct losses and include time bare periods for any claims to be made. This limitation is possible, unless any defects are caused by wilful misconduct, or a person is harmed. German law will recognise the shipbuilding agreement as the primary source of any liability unless it conflicts with the named mandatory rules.

Thus, the liability is first established between the parties of the agreement only but can be assigned to any subsequent buyer of the vessel, up to the extent originally agreed under the shipbuilding contract.

Further, the German Product Liability Code only details liability if the product causes damage because of its deficiencies, not damage to the product itself, but would apply in case the yard does not fulfil its obligations and therewith causes harm to other items or persons, which is a liability towards third parties.

Law stated - 31 July 2023

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

In the German register of seagoing commercial vessels, a distinction is made between:

- the registers of seagoing vessels (also called the first register); and
- the International Shipping Register (ISR, also called the second register).

There is no German nationwide uniform first register, but the registers of seagoing vessels are kept by certain district courts. The respective jurisdiction depends on the home port of a ship. Sea-going vessels over 15 metres in length owned by German owners have to be entered in a maritime register. Shorter ships can be registered if the owner wishes. A tonnage certificate needs to be provided as pre-requisite for the registration. If a vessel is owned by a non-German owner, it can be registered in Germany in the first register upon application of the owner, but it is mandatory to have a German flag agent, assuming the responsibilities towards the German authorities for the vessel.

If a vessel is only supposed, either by its construction or operation, to trade solely within German inland water, it will be registered in the ship register with this purpose.

The German first register also allows for the registration of natural persons as owners as well as joint owners, or

owners by share.

The ISR, on the other hand, is a uniform register and is administered by the Federal Maritime and Hydrographic Agency. Entry in the ISR (second register) is not mandatory, but allows vessels owned by German owners to fly a foreign flag while remaining registered in a German register as underlying register.

A separate ship construction register is kept at the local court at the location of the yard and allows ships or floating docks (ship constructions) that have not yet been completed to be entered if they are to be encumbered or foreclosed. The registration is voluntary and only possible if a ship mortgage is registered at the same time, or a compulsory auction is applied for. The entries must therefore be complete and credible, as they are required for the purposes mentioned.

Law stated - 31 July 2023

Who may apply to register a ship in your jurisdiction?

Every vessel owned by a German citizen or German company must be registered in one of the German ship registries. The German register rules follow the principle of territoriality. However, upon application to register the vessel in the German second register, approval can be granted for the vessel to fly a foreign flag. The German register allows both natural persons and companies to be registered as owners, as well as joint owners or owners of shares.

All non-German citizens can apply for the registration of their vessel in the German first register, including the German flag, and are eligible to be registered in their foreign legal form as well, but have to appoint a German flag agent who will then assume the responsibility for the registration of the vessel towards the German authorities.

Law stated - 31 July 2023

Documentary requirements

What are the documentary requirements for registration?

To register a vessel in one of the German ship registers, the notarised application needs to state the details of the requested registration and include the following documents:

- international tonnage certificate;
- copy of the bill of sale (for a ship already in service) or shipyard construction certificate (for newbuildings);
- copy of commercial register extract;
- copy of the personal identification document of the managing director of the shipowning company; and
- on the day of changing the flag, deletion certificate from the previous flag registry (for ships already in service).

To be allowed to fly the German flag, all requirements regarding the safety of the vessel and its operations need to be met. A complete list of the necessary documents and certificates can be found here .

Law stated - 31 July 2023

Dual registration

Is dual registration and flagging out possible and what is the procedure?

As the registration of a vessel owned by a German citizen or company is mandatory in one of the two German ship

registers, it is very common to apply for the permit to fly a foreign flag and register the vessel in the second German register. The permit can be granted up to the maximum duration of two years and is subject to a compensation fee for the support of the German shipping trade. Upon receipt of this approval, the vessel can be bareboat registered in every other register that allows a bareboat registration or provides a flag registration only. The same applies to all foreign owners who voluntarily registered their vessel in a German register.

Upon bareboat registration in a foreign register, vessels will continue with the German register as underlying register, evidencing the ownership.

Due to the structure of the German ship registers, no bareboat registration or flag registration without full registration of the ownership in Germany at the same time is possible.

Law stated - 31 July 2023

Mortgage register

Who maintains the register of mortgages and what information does it contain?

Each German ship register has a separate register for mortgages, kept for each registered vessel. An instrument duly notarised is eligible for registration. The information to be published is at the discretion of the creditor, however, it needs to be sufficient to identify the secured obligation and the creditor beyond doubt. It is not necessary to register the amount, but very common. The same applies to the underlying finance document. It is also possible to register mortgages as cross-collateral or as joint security.

Upon registration, the register will also record the date of the registration and the name of the person making the recordation.

If there are more than one mortgage, the rank will be determined on the basis of first registered, first served.

Law stated - 31 July 2023

LIMITATION OF LIABILITY

Regime

What limitation regime applies? What claims can be limited? Which parties can limit their liability?

Germany has ratified the Convention on Limitation of Liability for Maritime Claims of 19 September 1976 (CLL 1976). Likewise, the Protocol of 02 May 1999 (P-CLL 1999), which essentially provided for the increase of the maximum amounts as well as the introduction of the tacit acceptance procedure with regard to the amendment of the amounts, was also ratified. From a technical point of view, however, no incorporation of the norms into German substantive law has taken place; rather, section 611 paragraph 1 sentence 1 of the German Commercial Code indicates that liability for maritime claims can take place on the basis of the 1976 CLL and the P-CLL 1999.

According to section 611 paragraph 1 sentence 2 and paragraph 2 of the German Commercial Code, both the Bunker Oil Convention of 23 March 2001 (BOC) and the Oil Pollution Damage Convention of 27 November 1992 (OPC) apply in the same way.

Under article 15 of the CLL 1976, it is possible to establish national rules besides the convention. Germany did so to a rather small extent by sections 611 to 617 of the German Commercial Code containing provisions, such as the limitation of liability for small ships in section 613 of the German Commercial Code or the limitation of the pilot's liability in section 615 of the German Commercial Code.

As the aforementioned conventions apply exclusively to seagoing vessels, different rules apply to inland water vessels

in Germany. Ultimately, the Strasbourg Convention of 27 September 2012, ratified by Germany, applies to inland vessels in the context of limiting liability in the event of damage.

However, unlike for seagoing vessels, there is no parallel provision to section 611 of the German Commercial Code. Rather, the provisions of the Strasbourg Convention have been incorporated into German national substantive law into sections 4 to 5L of the Inland Navigation Act. As the regulations correspond to the Strasbourg Convention, a look directly at the Convention is also sufficient.

Due to the applicability of the various conventions, many claims are limitable. Here is a non-enumerative list of the most important claims that can be limited by establishing a liability limitation fund:

- claims for death or personal injury, article 2 a CLL 1976;
- claims for loss of or damage to property, article 2 a CLL 1976;
- claims for delay in the carriage of goods, passengers or their baggage, article 2 a CLL 1976;
- claims arising out of bunker oil pollution, BOC; and
- damage resulting from oil pollution, OPC.

By virtue of the application of article 1 paragraph 1 and 2 CLL 1976, the following persons may limit their liability:

- the owners of the vessel, that is:
  - the registered owner;
  - the outfitter according to section 477 of the German Commercial Code;
  - the shipowner according to section 476 of the German Commercial Code;
  - the charterer;
  - the manager: This is not mentioned in the official German translation. Nevertheless, the manager can also limit liability because he is explicitly named in the binding English version of the CLL 1976;
- the liability insurer of the ship, article 1 paragraph 6 CLL 1976;
- the salvor of the ship, article 1 paragraph 2 CLL 1976; and
- any person whose conduct is attributable to the owner, article 1 paragraph 4 CLL 1976.

The change (increase) in the maximum amounts, which took place within the framework of the tacit acceptance procedure with effect from 8 June 2015, also applies in Germany. The change was implemented at national level by adapting the Maritime Liability Limitation Ordinance.

Law stated - 31 July 2023

Procedure

What is the procedure for establishing limitation?

Regarding the procedure, Germany decided in favour of a special jurisdiction of the Hamburg District Court according to section 2 of the Shipping Distribution Order. In this respect, all German applications for the establishment of a liability limitation fund must be addressed to the Hamburg District Court.

After the application, the district court determines the liability sum by order, which must then be paid in by the party initiating the liability limitation proceedings. After the payment of the corresponding sum, the proceedings are opened by order of the Hamburg Local Court. Pursuant to § 8 paragraph 1 sentence 1 of the Shipping Distribution Order, the liability limitation fund is deemed to be established from this point in time.

As soon as this has been completed, a custodian is appointed, and a public summons is issued to identify the creditors in question. The creditors now approach the court and register their claims in accordance with sections 13–16 of the Shipping Distribution Order before these are determined by the court. The debtor can lodge an objection against this determination. As soon as the claims have been finally determined, the distribution of the fund begins.

Law stated - 31 July 2023

Break of limitation

In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

There is a possibility that the limitation of liability may be broken. The CLL 1979 states in article 4 as follows: 'a person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with intent to cause such loss, or recklessly and with knowledge that such loss would probably result.'

Under German law, the examination of a possible breach of the limitation of liability takes place in a three-step process. First, it must be examined whether there is a duty of liability at all. If this is affirmative, it is examined whether damage has occurred that is limitable under the CLL 1979 and would also have to be limited in amount because it exceeds the maximum amount of liability. If this is also the case, it must ultimately be examined whether the liable party has lost its right to limit liability under article 4 CLL 1979. The burden of proof for this is, of course, borne by the person entitled to compensation.

The answer to this question depends very much on the individual case and is hardly predictable due to the rather vague wording. Although no proceedings are known to date in which the limitation of liability has been broken, this is rather due to the small number of established limitation of liability funds and less to the fact that the legal hurdles of article 4 CLL 1979 are too high.

Law stated - 31 July 2023

Passenger and luggage claims

What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

Germany has not ratified either the Athens Convention relating to the Carriage of Passengers and their Luggage of 1974 or the Protocol of 2002.

German law has created its own provisions in sections 536 to 552 of the German Commercial Code, which essentially correspond to the provisions of the 2002 protocol to the Athens Convention.

Law stated - 31 July 2023

PORT STATE CONTROL

Authorities

Which body is the port state control agency? Under what authority does it operate?

In German ports, port state controls are conducted by the Ship Safety Division of the German Professional Association for Transport. The primary base for their work is the Paris Agreement on port state controls, the Paris Memorandum of Understanding (Paris MoU), among the following:

- the SOLAS Convention (Chapter 1 Regulation 19);
- IMO Resolution A.1155(32);

- European law the Directive 2009/16/EC; and
- German law section 12 of the Ship Safety Ordinance and section 138 of the German Maritime Labour Act.

Law stated - 31 July 2023

Sanctions

What sanctions may the port state control inspector impose?

Often port state control officers reveal deficiencies during the inspection of a ship. The inspector shall first discuss these deficiencies with the ship's master and notes them in his or her inspection report. He determines a deadline for the rectification of each deficiency.

A port state control officer has various options to require rectification:

- the deficiency has to be rectified prior to the ship's departure;
- the deficiency has to be rectified latest in the next port of call;
- the deficiency has to be rectified within 14 days;
- the inspector informs the flag state of the ship; and
- the inspector requests corrective measures by the shipping company according to the International Safety Management-Code (ISM-Code).

As all deficiencies and required rectifications are entered into the European control database THETIS, other port states can check whether the deficiencies have been rectified. Port state control officers may impose detention on ships with major deficiencies (ie, the ship must not leave the port of inspection). A ship is detained when it is unfit to proceed to sea or the deficiencies pose an unreasonable risk to the ship, its crew or the environment.

The ship is kept under detention until the rectification of all deficiencies has been verified by a port state control officer by means of a re-inspection.

Law stated - 31 July 2023

Appeal

What is the appeal process against detention orders or fines?

When a ship is detained the port state control officer will inform the shipowner on his or her right of appeal. The appeal shall be made either by the shipping company or the operator.

The appeal shall be made by letter or fax within one month of the date of notification of the detention order of the Trade Association For Transport, Postal Logistics And Telecommunications (current contact details can be found here).

An appeal by email will only be effective if the email contains a document that is personally signed by the appellant as an attached document.

In accordance with the provisions of section 80 paragraphs 2 and 4 of the Code of Administrative Procedures, any such appeal will not suspend the detention if immediate enforcement is ordered. The reinstatement of the suspensory effect can be applied for separately at the Administrative Court Hamburg.

Law stated - 31 July 2023

CLASSIFICATION SOCIETIES

Approved classification societies

Which are the approved classification societies?

The following classification societies are approved by the German Federal Hydrographic Office:

- American Bureau of Shipping;
- Bureau Veritas;
- DNV;
- Korean Register;
- Lloyd´s Register of Shipping;
- Nippon Kaiji Kyokai;
- Registro Italiano Navale; and
- China Classification Society.

While the China Classification Society is not entitled to deliver service for security and Maritime labour law purposes, all other classifications societies are. Besides that, all the listed classification societies are entitled to deliver service with regard to ship safety and marine environmental protection as well as Radio and navigation equipment.

In the context of radio and navigation equipment, there are other classification societies that can be accessed via the website of the German Federal Hydrographic Office. The website can be found under the following link and is also available in English.

Law stated - 31 July 2023

Liability

In what circumstances can a classification society be held liable, if at all?

Under German law, the classification societies are not liable as guarantors for the safety of the ship. Nevertheless, they establish the rules that must be observed and control them.

Should a third party suffer damage due to the fault of the classification society, the classification society can be held liable according to the principles of the so-called contract with protective effect for the benefit of third parties.

Law stated - 31 July 2023

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

Can the state or local authority order wreck removal?

If the Waterways Act (WaStrG) applies to the removal of the wreck, which is the case for inland waters, it allows the state authority in article 30 WaStrG to remove the wreck itself and to impose the costs on the shipowner, charterer, owner or outfitter of the ship.

If the Nairobi International Convention on the Removal of Wrecks 2007 applies due to the location of the wreck, which is the Free Economic Zone of Germany, article 9 paragraph 2 requires the owner to remove the wreck within a

reasonable time. If this does not happen, the respective state can remove the wreck and claim the owner for the costs according to article 10. There is an insurance obligation for this claim according to article 12 of the Convention.

Law stated - 31 July 2023

International conventions

Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

The Convention for the Unification of Certain Rules of Law Relating to Collisions between Vessels from 1910 was originally incorporated into German substantive law but was denounced by Germany in 2002. Therefore the 1989 Convention on Salvage was ratified by Germany, which is not applied domestically. Domestically, the regulations of section 574 et seq of the German Commercial Code apply. These originally go back to the 1910 Convention, but now essentially correspond to the provisions of the 1989 Convention.

Law stated - 31 July 2023

Salvage

Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory form in Germany as far as the salvage contract is concerned. Therefore, the Lloyd's standard form is accepted and commonly used.

A salvor is anyone who becomes active in the sense of section 574 paragraph 1 of the German Commercial Code to render assistance to an endangered object. There are no further requirements as to whether and how the person rendering assistance is required to do so, so that in particular no professional status as a salvor is a prerequisite.

If several companies or persons participate in a salvage operation, it is to be assumed that each of them is to be regarded as a salvor in its own right.

Law stated - 31 July 2023

SHIP ARREST

International conventions

Which international convention regarding the arrest of ships is in force in your jurisdiction?

Germany has ratified the 1952 Arrest Convention by statute dated 21 June 1972. When making this ratification, Germany used the option to make reservations in accordance with article 10 lit. a and lit. b of the said Convention. Together with this ratification, the German legislator made small adaptations to the German law to implement the 1952 Arrest Convention but decided against fully incorporating the provisions of the Convention in the relevant German codifications. Therefore, the 1952 Arrest Convention – within its scope of application – is of direct application in Germany and will supersede the general provisions on the arrest of a debtor's assets as a preliminary and protective measure.

Germany has not ratified the Arrest Convention 1999, Maritime Liens and Mortgages Convention 1926 and Maritime Liens and Mortgages Convention 1993. However, the 1972 statute on a reform of certain aspects of the maritime law implemented to a large extent the contents of the 1967 Convention for the Unification of Certain Rules relating to

Maritime Liens and Mortgages. Hence, national German law largely reflects the content of the 1967 Convention, despite this Convention not having entered into force.

Law stated - 31 July 2023

Claims

In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

Regarding vessels flying the flag of a contracting state of the 1952 Arrest Convention, article 2 of that Convention applies, meaning that such vessels can be arrested only on grounds of maritime claims as defined in the Convention, except for the arrest made by public authorities for their claims under German law.

For vessels flying the flag of a non-contracting state or vessels flying the German flag, article 8 paragraph 2 of the Convention provides that those may be arrested in respect of any other claim for which the law of the relevant contracting state permits arrest. In the case of Germany, that means that there is no limitation to specific grounds: All payment claims against the legal owner of the vessel (in personam claims), irrespective of the specific grounds for such claims, can justify an arrest of the vessel (and of any other assets of that owner within the jurisdiction of the court) to secure said payment claim. The same applies to claims that are not yet payment claims of a specific amount, but which may be transformed into such payment claim in the future: a typical example would be a statutory or contractual indemnity against third-party claims.

The concept of an in rem action is not familiar to German law. Where the arrest is not based on a maritime lien, a vessel can be arrested in order to obtain security for in personam claims against the legal owner of the vessel at the time of the arrest. Hence, to seek an arrest in connection with a claim against, for instance, the former owner, or the bareboat charterer, the applicant would have to show that there is a concurring personal liability of the current owner in relation to such claim (for instance, based on tort or an applicable fraudulent transfer statute). An arrest of the vessel in order to secure a claim against the time charterer is therefore not possible. However, German law would allow the arrest of other assets, such as the bunker.

Law stated - 31 July 2023

Maritime liens

Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

When the maritime lien is recognised under the applicable law, such as the law of the relevant transaction or the law of the flag state, German courts will recognise the maritime lien as well.

Where German law applies, only the following liens are recognised (section 596 of the German Commercial Code):

- wages due to the master and other members of the crew;
- public dues relating to the vessel, navigation, port call or pilotage;
- liability for personal injury or loss of life or for damage to property in connection with the operation of the vessel, excluding, however, claims relating to damage to property capable of being based on contract;
- salvage rewards, special remuneration and salvage cost; claims for general average contribution against the owners or against the carrier entitled to payment of freight; wreck removal claims; and
- claims of social security bodies (including loss of employment insurance) against the owners.

Law stated - 31 July 2023

Wrongful arrest

What is the test for wrongful arrest?

Section 945 of the German Civil Procedure Code provides that the applicant for an arrest is liable for loss sustained by the defendant (ie, usually the legal owner of the vessel) in cases where the arrest was not justified at the time the arrest warrant was issued, or where the arrest is lifted because main proceedings for payment are not commenced within the time limit set by the court.

The provision only applies to loss suffered as a result of the enforcement of an arrest order. This liability does not depend on whether the applicant acted negligently or in bad faith, it is a strict liability. The liability is unlimited. However, a general rule is that the defendant in the arrest proceedings being entitled to claim under section 945 may only ask for compensation of its own loss, but normally not for loss sustained by third parties (for instance, charterers). This general rule has been confirmed by the German Federal Court of Justice; however, this decision leaves some room to argue that there might be specific circumstances under which the owners should be entitled to claim for third-party damage as well.

Law stated - 31 July 2023

Bunker suppliers

Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

Article 45 paragaph 2 of the Introductory Law to the Civil Code provides specific rules of conflict of laws for statutory liens on means of transport, such as a maritime lien. The creation of a maritime lien is subject to the law of the secured claim, so lex causae . That means that German courts will recognise, for instance, a maritime lien for necessaries securing the purchase price claim of a supplier of bunkers, if the law applicable to the relevant purchase price claim (ie, the law of the contract) recognises such maritime lien for necessaries, which is not known to German law. Most legal authors take the view that the reference to the law of the secured claim excludes a renvoi under the international private law of that jurisdiction. This will most probably only apply to a very limited number of cases.

It is, however, possible, to arrest the bunker with court order in accordance with the rules of the German Civil Code, if it can be established that German courts have jurisdiction and if the applicant can prove the urgency of the arrest, whereas the procedural standards are quite high.

Law stated - 31 July 2023

Security

Will the arresting party have to provide security and in what form and amount?

Under sections 921, 108 of the Civil Procedure Code, the judge has a discretionary power to decide on whether the applicant is required to provide security, and if so, for what amount.

Where judges have a discretionary power, decisions are less predictable. However, a general rule of thumb could be described as follows: The more solid the claim documentation in the arrest application, the greater the chance of obtaining an arrest without having to provide security.

Furthermore, there are cases where the applicant may have an interest in developing and sharing (with the court)

thoughts on the likely loss that could be caused to the defendant as a result of the enforcement of the arrest, because this potential exposure should determine the security amount.

It is also in the discretion of the judge whether he or she allows any other means of security. The default security is a cash deposit with the competent department at the court.

Law stated - 31 July 2023

How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

The Civil Procedure Code provides (in section 923) that an arrest order needs to specify a specific amount of money to be deposited (in cash) in order to have the arrest lifted. This is a reference to a cash deposit with the local court or other competent public body under the applicable regional statutes. The amount will be the amount of the arrest claim plus a lump sum for expected cost of the main proceedings, as well as interest accruing during the main proceedings.

The court is entitled to order an alternative type of security to be provided.

Even without a specific court order, the cash deposit can be replaced by an irrevocable bank guarantee issued by a bank authorised to do business in Germany. The defendant can apply for permission to provide security by other means than cash deposit or German bank guarantee, in accordance with section 108 of the Civil Procedure Code. The court has a discretionary power to grant such permission. In maritime matters, some judges may be willing to permit a guarantee from a foreign bank or insurer (including a club letter). Other judges may be reluctant to grant such permission. Hence, often the parties will try to reach an agreement on the type and wording of the security. The court will not interfere if the parties agree on any other type of security.

Law stated - 31 July 2023

Formalities

What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

The arrest procedure starts with an application filed by a German qualified lawyer, although this is not compulsory. No POA is required but advisable to avoid delay if so requested. The application must be in the German language and supported by prima facie evidence as to the claim. This is mostly provided by a sworn affidavit of a competent manager of the creditor confirming that the facts stated in the application are true. Some courts request that all attached documents be translated into German. The application and all attachments will have to be provided electronically only.

When all documents are available, an arrest may be prepared in a day. The statutory time limits are then as follows: The arrest order, once received, may only be executed within one month from its delivery to the applicant. The execution will be done by the court's bailiff on a special order of the applicant, not by the court. The applicant also has to make sure that service of the arrest order to the ship's owners is duly made or at least applied for within one week after the ship has been arrested and within the one-month time limit mentioned before. If one of these time limits has not been observed the arrest will be lifted if the ship-owners apply so to the court. Once the vessel left the arrest port, the arrest con no longer be executed.

Law stated - 31 July 2023

Ship maintenance

Who is responsible for the maintenance of the vessel while under arrest?

In order to understand the position of German law, one needs to bear in mind that there is a clear distinction between (1) the arrest warrant, which is a court order allowing the applicant to have assets of the defendant (such as a vessel) arrested, and (2) the execution of the arrest warrant (ie, the attachment of the vessel).

The attachment of tangible assets (including a vessel) in Germany is handled by bailiffs, which are court officers. Such attachment is a two-step process:

- As a first step, the bailiff is taking the relevant asset into his or her possession.
- This is (usually immediately) followed by a second step, which consists of one of the following:

- the bailiff marking the item as attached, but handing it back to the person who had possession prior to the first step being executed, this person being supposed to hold the item in custody until enforcement proceeds further (ie, until a forced sale will be initiated), or the bailiff taking the item into his custody.
- According to the relevant statutory law, handing the marked item back into the custody of the former possessor is the normal procedure, and taking it into the bailiff's own custody is the exception. However, in the case of the arrest of a (seagoing) vessel, there will usually be exceptional circumstances justifying the taking over into the bailiff's custody: In the first alternative (item being marked and handed back), the former possessor is entitled to use the item; in the case of a vessel, that would often mean leaving the jurisdiction of the court; accordingly, this standard approach is not workable for an arrest of vessels.
- When the bailiff carries out the attachment of the vessel, he or she would therefore usually take it in his or her custody, which includes a duty to guard the vessel and to keep it insured. The bailiff will be requiring the applicant to make advance payments covering the expected expenses, including an insurance premium.

The procedure described above regarding insurance of the vessel after seizure is not clearly governed by the relevant statutory and administrative rules but reflects the current practice of the bailiffs acting in German ports.

Law stated - 31 July 2023

Proceedings on the merits

Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

An application to arrest the vessel does not providing an obligation of the applicant to also start a procedure regarding the merits of the case in Germany. This will have to be determined on the basis of the underlying conflict or agreement.

This question, however, is relevant with regard to the strict liability under German law for wrongful arrest and a later proceeding of the defendant, claiming compensation of damages: Under German law, obtaining an arrest warrant requires the applicant to put forward a specific claim for which security is sought. To obtain the arrest, there is no need to fully prove such claim. Therefore, if it later turns out that there was no justified claim to be secured that would mean that the arrest was – from the beginning – not justified. That would be a typical case for liability under section 945 of the Civil Procedure Code.

In proceedings for compensation under section 945 of the Civil Procedure Code, the court would have to follow the decision on the merits in the main action if that decision (of a court or arbitral tribunal) is considered to be binding on

the defendant or arrestor. That is determined under the general rules on the binding effect of German court judgments or the recognition of foreign judgments or arbitral awards. Thus, in the typical case that the judgment or arbitral award rendered in the action on the merits (and rejecting the claim on the merits) will be considered binding on the defendant or arrestor, the court deciding on a liability claim will find that the defendant or arrestor is liable under section 945 without having to review the case on its own.

Law stated - 31 July 2023

Injunctions and other forms of attachment

Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

No, not with regard to the vessel as asset.

Law stated - 31 July 2023

Delivery up and preservation orders

Are orders for delivery up or preservation of evidence or property available?

German Civil Procedure Code provides for independent evidence proceedings, also referred to as evidence preservation proceedings, a fundamental step in German civil procedure law in many cases. The aim of this procedure is to secure and establish evidence of a certain fact before main proceedings take place or are intended. Independent evidence proceedings are a way to obtain a judicial determination and have a variety of applications within civil procedure law.

Other than within the limits of this independent procedure, the comprehensive disclosure of documents is alien to German civil law. If a party is not willing to disclose any documents or facts, it may simply lose a procedure due to the burden of proof.

Law stated - 31 July 2023

Bunker arrest and attachment

Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

It is possible to arrest the bunker in accordance with the general rules of the German Civil Procedure Code. While the arrest of a vessel is privileged with regard to the procedural rules, a bunker can be arrested on the basis of the general rules regarding the attachment of tangible assets. Besides providing evidence of the underlying claim, the applicant also needs to provide sufficient justification for the urgency of the security measure.

Law stated - 31 July 2023

JUDICIAL SALE OF VESSELS

Eligible applicants

Who can apply for judicial sale of an arrested vessel?

Every creditor that has an enforceable legal title against the owner of the vessel can apply for the judicial sale of the vessel if the vessel is within the competence of German courts.

Law stated - 31 July 2023

Procedure

What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

A judicial sale of a German flagged vessel can be applied for as a ship auction, with is mainly governed (with minor deviations) by the provisions on the compulsory auction of real estate and will be conducted by the bailiff. The district court in whose district the ship is located has jurisdiction as court of enforcement. The applicant needs to provide evidence of his title, which could either be an enforceable judgment or a mortgage, including a clause that it can be enforced directly.

Once the judicial sale starts, the ship will be guarded and preserved if the forced auction is ordered and the date of the auction is announced in a shipping journal.

A foreign flagged vessel can also be put through a judicial sale, but this procedure will follow the procedural rules of the auction of any other assets than real estate (execution of chattel). The procedure is quite similar to the forced auction of a German flagged vessel; however, there are some privileges regarding the minimum purchase price that has to be obeyed for German flagged vessel but are more lenient for foreign flagged vessels.

The costs depend on the actual value of the claim and the target auction price of the vessel. As an example, for a claim amount and later purchase price of € 5,000,000, the creditor needs to assume costs of about € 62,000, including legal fees and court fees. It is in the discretion of the bailiff in charge of the vessel to request advances for the costs of security and other upkeep. In any case, the costs will be deducted from any proceeds of the auction first, but the court and bailiff might nonetheless request cost advances.

The duration of the proceeding depends on the court of execution and its general workload. Courts in the bigger German seaports of Bremerhaven and Hamburg might be more willing to react within a reasonable time due to previous experience and personal competence of the judges. It might, however, be reasonable to assume a, average duration of about 12 months from application to distribution of the proceeds after a successful auction.

Law stated - 31 July 2023

Claim priority

What is the order of priority of claims against the proceeds of sale?

The priorities under German law, in case of the forced sale of a sea-going vessel registered in Germany, or a similar foreign vessel, are as follows:

1. costs of the forced sales' proceedings (section 109 paragraph 1 of the Forced Sales Act);
2. rarely applicable: in case of bankruptcy of the owners, costs of the insolvency estate for the valuation of the assets to be auctioned (section 10 paragraph 1 no. 1a of the Forced Sales Act);
3. creditors secured by a maritime lien (sections 10 paragraph 1 no. 4 and 11 paragraph 1 of the Forced Sales Act and section 602 of the Commercial Code); among those creditors, the following priorities apply (see section 603 (1) of the Commercial Code):

- wages due to the master and other members of the crew;
- public dues relating to the vessel, navigation, port call or pilotage;

- liability for personal injury or loss of life or for damage to property in connection with the operation of the vessel, excluding, however, claims relating to damage to property capable of being based on contract;
- salvage rewards, special remuneration and salvage cost; claims for general average contribution against the owners or against the carrier entitled to payment of freight; wreck removal claims; and
- claims of social security bodies (including loss of employment insurance) against the owners;

Note: If a maritime lien secures interest or other periodic claim items, only the positions for the current year and the two years before that are sharing this priority;

1. creditors secured by a mortgage (section 10 paragraph 1 no. 4 and 11 paragraph 1 of the Forced Sales Act and section 602 of the Commercial Code) or a mortgage-like position obtained by a ship arrest; amongst those creditors, the following priorities apply (see section 11 paragraph 1 of the Forced Sales Act and section 25 of the Act on Ownership and Mortgages in Vessel;
2. claim of the creditor(s) initiating the forced sales' proceedings (unless such claim is already covered by one of the items listed above);
3. claim of secured creditor(s) having acquired their security rights after commencement of the forced sales' proceedings; and
4. interest claims or other periodic claims of creditors secured by a maritime lien or by a mortgage (or other creditors under 4 above) for time periods earlier than two years prior to the current year.

Law stated - 31 July 2023

Legal effects

What are the legal effects or consequences of judicial sale of a vessel?

As the legal transfer is made by auction, the purchase is the highest bidder and will receive the title free and clean of all encumbrances, whether registered or not. All creditors will have to apply for distribution of the proceeds of sale and will be considered following the mandatory ranking of creditors, while the costs of the judicial sale will always be satisfied first.

Law stated - 31 July 2023

Foreign sales

Will judicial sale of a vessel in a foreign jurisdiction be recognised?

This depends on the legal quality, such as judgment equivalent of the judicial sale in the respective foreign jurisdiction, and whether the judicial order made therein is enforceable without additional enforcement procedure in Germany. This question might, however, only be of relevance if the vessel is registered in the German ship register and the transfer of title of deletion of the vessel from the German ship register needs to be applied for on the basis of the foreign judicial sale.

Law stated - 31 July 2023

International conventions

Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

Germany is neither a member of the International Convention on Maritime Liens and Mortgages 1967 nor 1993 but has transformed the 1967 Convention into the German Commercial Code. However, cargo claims arising out of charter parties or other contracts have been deleted.

Law stated - 31 July 2023

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

Germany is a contracting state to the Hague Rules, so they are binding under international law. The Hague Rules were implemented by incorporating them into the German Commercial Code. Thus, the German Commercial Code applies domestically, although it corresponds to the Hague Rules. Consequently, the Hague Rules themselves are not applicable domestically.

Unlike regarding the Hague Rules, Germany is precisely not a contracting state to the Hague-Visby Rules. Nevertheless, these rules were also implemented by incorporating them into the German Commercial Code.

In some places, the incorporation of the Hague–Visby Rules conflicts with the Hague Rules of 1924. Because Germany is only bound by the Hague Rules of 1924 from the perspective of international law, article 6 Introductory Act to the Civil Code exists. This provision always modifies the rules in the event of a conflict (Hague Rules apply and German law deviates by incorporating the Hague–Visby Rules) in such a way that effectively not the Hague–Visby Rules but the Hague Rules apply.

Unlike the Hague and Hague–Visby Rules, Germany is neither a contracting state to the Hamburg Rules nor have they been incorporated into German national maritime law.

Germany has neither ratified the Rotterdam Rules nor incorporated them into German law.

The central provision for the carrier's liability in German law is section 498 of the German Commercial Code (HGB). According to this, the carrier is liable for damage caused by loss or damage during the period of custody.

The period of custody means the time between the taking over of the goods for carriage and the delivery of the goods. Accordingly, the time of taking over is the time from which the goods for carriage have come into the direct possession of the shipper. Since the carrier must accept responsibility for the conduct of his or her auxiliaries, this usually does not occur with the loading of the goods by the carrier himself, but with the acceptance of the goods by the quay handling company commissioned by the carrier.

Delivery is completed when the carrier hands over the goods after carriage to the legitimate consignee in such a way that the latter comes into possession of the goods.

Law stated - 31 July 2023

Multimodal carriage

Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

In principle, the provision of section 452 of the German Commercial Code applies to multimodal transport within Germany. Most of the provisions of this section are referral provisions that apply the German transport law for road transport from section 407 of the German Commercial Code to the entire transport.

However, there are various exceptions to this principle resulting from unimodal agreements that extend their scope to the relevant leg of the multimodal carriage:

- CMR: According to article 2 CMR, the rules of the CMR for 'pickaback transports', where the goods and the truck are loaded together onto another means of transport, apply to the entire transport. If the damage occurs on a leg of the journey and the event giving rise to the damage can only have occurred on this special leg of the journey, the hypothetical law of this leg of the journey shall apply in accordance with article 2 paragraph 1 sentence 2 CMR.
- Montreal Convention: The Montreal Convention applies to multimodal carriage in accordance with article 38 for the air leg of the transport.
- CIM 1999: If carriage by means of transport other than carriage by rail is only of a complementary nature, the provisions of CIM in accordance with article 1 section 4 apply to the entire transport operation.

Law stated - 31 July 2023

Title to sue

Who has title to sue on a bill of lading?

In principle, the carrier is obliged to issue a bill of lading. However, a precise distinction must be made as to the contractual situation of the parties. If a so-called contract of carriage of general cargo according to section 481 of the German Commercial Code is in question, the obligation to issue a bill of lading exists according to section 513 paragraph 1 of the German Commercial Code. This obligation also exists for voyage charters under section 527 paragraph 2 of the German Commercial Code. The time charter does not, in principle, require the issue of a bill of lading, although the requirement may be agreed by the shipowner.

The party entitled to the issue of a bill of lading is regularly the consignor.

Law stated - 31 July 2023

Charter parties

To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

The compulsory information to be included in a bill of lading can be found in section 515 of the German Commercial Code. The bill of lading usually concerns the last contract in a long chain of contracts.

The different contracts are all legally independent. Thus, if a ship is chartered out by the owner to a time charterer and an arbitration clause in favour of an English arbitration court is agreed in this agreement, this does not prevent an arbitration clause in favour of a German Arbitration court from being effective in the bill of lading.

Law stated - 31 July 2023

Demise and identity of carrier clauses

Is the ‘demise’ clause or identity of carrier clause recognised and binding?

The highest German court in civil matters, the Federal Court of Justice, classifies identity of the carrier clauses in the bill of lading conditions as general terms and conditions. These are examined very comprehensively to prevent abuse. According to the Federal Supreme Court, identity of the carrier clauses are invalid clauses if the bill of lading clearly indicates on the front a party other than the shipowner. The provision from which the ineffectiveness finally results is section 305 b of the German Civil Code, which prefers individual agreements to general terms and conditions in their effectiveness.

Law stated - 31 July 2023

Shipowner liability and defences

Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

Charter parties and the bill of lading are two different contractual relationships. In this respect, the direct contractual partner of the charterer is the holder of the bill of lading. A major exception to this basic rule is the so-called adjective liability of the shipowner.

This type of liability is laid down in section 480 of the German Commercial Code. According to this provision, the shipowner becomes a co-debtor vis-à-vis the injured party in addition to the charterer if a member of the ship's crew or a pilot working on board has made him or herself liable for damages to third parties in the course of his or her work. This type of liability covers not only contractual but also tortious claims that have arisen in the course of an activity for the shipowner.

To avoid unfair liability on the part of the shipowner who has chartered out his or her ship and is hardly involved with the operation of the ship anymore, the provision of section 477 of the German Commercial Code was established. According to it, the ‘outfitter’ is treated as the shipowner in relation to third parties. An outfitter is one who uses a ship not belonging to him or her for acquisition. This is usually the charterer. Accordingly, the effect of adjectival liability ultimately affects mostly the person who would already be liable under the bill of lading and precisely not the actual owner of the ship.

Law stated - 31 July 2023

Deviation from route

What is the effect of deviation from a vessel’s route on contractual defences?

Unless otherwise stipulated in the contract, the carrier’s only obligation is to deliver the goods to the destination on time and without defects. In this respect, German law does not have a separate provision on what happens if a route other than the one originally planned is used.

However, if the change of route results in a delay in delivery, this is quite problematic for the carrier. Unlike cargo damage and total loss, there are no special regulations within the German Commercial Code for delay. Accordingly, the party whose cargo is delivered in default has to resort to the German Civil Code. According to section 286 BGB, the injured party has a claim for damages if non-delivery has taken place despite the due date and a reminder. This claim

for damages is not only limited to compensation for value, but also includes other damage items, such as loss of profit. The provisions of general German civil law also do not know a limitation of liability in terms of amount.

Law stated - 31 July 2023

Liens

What liens can be exercised?

The most important liens in Germany are the so-called ship creditors' rights. These ship creditor rights arise by law to secure certain claims against the ship. If it is a seagoing vessel, these ship creditors' rights, which can be used within the framework of a lien, can only arise if the ship is operated commercially. If the ship is an inland waterway vessel, the ship creditor's rights also arise if the ship is not operated commercially.

The claims that legally give rise to a ship creditor's right are listed in the catalogue of section 596 of the German Commercial Code:

- wage claims of the master and the other persons on the ship's crew;
- port dues as well as pilotage dues;
- claims for damages for death or injury to persons and for loss of or damage to property, insofar as these claims arose out of the use of the ship; however, claims for loss of or damage to property are excluded if the claims are derived from a contract or can also be derived from a contract;
- claims for salvage, special compensation and salvage costs; claims against the owner of the ship and against the creditor of the cargo for a contribution to general average; claims for the removal of the wreck; and
- claims of social security institutions including unemployment insurance against the shipowner.

Because the ship creditor's right is inseparably linked to the claim from the catalogue of section 596 of the German Commercial Code, it expires if the claim itself has also expired.

Any international conventions on this issue have neither been ratified nor implemented in Germany and are therefore without relevance.

Law stated - 31 July 2023

Delivery without bill of lading

What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

If the carrier delivers the goods to someone who was not authorised in the bill of lading, liability arises from section 521 paragraph 4 of the German Commercial Code. Because this is, strictly speaking, a case of loss of cargo, the provisions on loss of cargo within the contract of carriage of general cargo apply mutatis mutandis. This means that the carrier, if he or she has delivered to a non-authorised party, is liable under the bill of lading as if the goods had been lost, but he or she can adhere to the limitations of liability under the contract of carriage for general cargo. Only the limitation of liability to compensation for loss of value according to section 502 HGB is no longer available to the carrier, so that he or she must also compensate the loss of profit of the person entitled under the bill of lading.

Law stated - 31 July 2023

Shipper responsibilities and liabilities

What are the responsibilities and liabilities of the shipper?

The shipper shall effect the unloading of the goods to be shipped within the contractually agreed time in accordance with section 486 paragraph 1 sentence 1 of the German Commercial Code.

Furthermore, according to section 482 paragraph 1 of the German Commercial Code, the shipper is obliged to provide the information on the goods necessary for the performance of the carriage before handing over the goods. If the goods to be transported are dangerous, the shipper's labelling obligations under section 483 of the German Commercial Code are extended to the effect that the exact nature of the danger must be described and precautionary measures to be taken must be given. As the last secondary obligation, the shipper must pack the goods properly in accordance with the requirements of section 484 of the German Commercial Code.

However, the foremost duty of the skipper is, of course, according to section 481 paragraph 2 HGB, to pay the carrier for the proper performance of the contract of carriage.

Law stated - 31 July 2023

SHIPPING EMISSIONS

Emission control areas

Is there an emission control area (ECA) in force in your domestic territorial waters?

Yes, within the North Sea and the Baltic Sea area.

Law stated - 31 July 2023

Sulphur cap

What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

The German Shipowners' Association (VDR) has issued guidance on compliance with the sulphur limit value of 0.10 per cent in an emission control area (ECA) (Industry Guidance on Compliance with the Sulphur ECA Requirements). This includes, in particular, information on the conversion process from heavy fuel oil to low-sulphur marine fuels as well as information on the use of new low-sulphur marine fuels (such as HDME50).

In accordance with the United Nations Convention on the Law of the Sea (UNCLOS) national states can check and enforce against foreign flagged vessels in their ports for noncompliance with marine environmental regulations (especially article 212, 222 UNCLOS) within their national law. Only as regards vessels under flags of MARPOL ANNEX VI States, a port state may also enforce against vessels in their ports in respect of violations of the sulphur emission limits, which occurred beyond the internal waters, territorial waters or exclusive economic zone (EEZ), where the evidence so warrants (especially article 211, 218 UNCLOS). In accordance with German law, this would include all measurers that are necessary to prevent further breach of the rules, such as a detention until the status is rectified.

Under UNCLOS, coastal states only have restricted at-sea enforcement powers as to foreign vessels navigating in their territorial sea or its EEZ. Foreign vessels enjoy the right of innocent passage in the territorial sea (article 17 pp. UNCLOS) and the freedom of the high seas in the EEZ (article 58 paragraph 1, 87 paragraph 1 a) UNCLOS). The coastal state may only undertake physical inspections on the spot of foreign vessels navigating in its territorial sea, where

there are clear grounds for believing the vessel has, during its passage in the territorial sea, violated its laws and regulations adopted in accordance with UNCLOS or applicable rules and standards for the prevention, reduction and control of pollution from vessels, such as sulphur limits under MARPOL ANNEX VI. Inspections of foreign vessels under flags of MARPOL ANNEX VI states navigating in its EEZ or territorial sea may only be undertaken, where there are clear grounds for believing the vessel has, in its EEZ, committed a violation of the sulphur limits under MARPOL ANNEX VI, resulting in a substantial discharge causing or threatening significant pollution of the marine environment (article 211, 220 UNCLOS).

The full guideline of the German Shipowner's Association can be downloaded here .

Law stated - 31 July 2023

SHIP RECYCLING

Regulation and facilities

What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

The International Convention for the Safe and Environmentally Sound Recycling of Ships, or Hong Kong Convention, is meant to address these problems. This Ship Recycling Convention was adopted by the International Maritime Organization (IMO) in 2009 will enter into force on 26 June 2025, which has become possible since Bangladesh and Liberia have recently joined the agreement. Germany is already a member state. The convention contains regulations for shipowners, shipbuilders, manufacturers, suppliers and for recycling yards.

The Hong Kong Convention will apply to all new and existing sea-going vessels with a gross tonnage of 500 or more. The new convention introduces two key components to be considered in future:

- Ship-specific Inventory of hazardous materials, which lists all hazardous materials such as asbestos, PCB, ozone depleting substances and antifouling paints containing TBT as well as their location and approximate amount.
- Authorisation of recycling facilities. Sea-going vessels may only be recycled by authorised yards complying fully with all environmental and safety requirements of the Hong Kong Convention.

Regulation EU 1257/2013 on ship recycling already implements some of the requirements for all ships:

- on international voyages;
- flying an EU flag; and
- with a size of 500 GT or more.

The above-mentioned Regulation on the recycling of ships applies and it contains, among other things, the following requirements:

- These ships may only be recycled on authorised recycling yards on the EU list of recycle yards.
- These ships must carry a ship-specific Inventory of Hazardous Materials/IHM stating as a minimum the hazardous materials on board (structure and equipment) listed in Annex II as well as their location and the approximate amount.
- These ships must hold a Certificate on Inventory of Hazardous Materials.
- Existing ships only require the Inventory of Hazardous Materials and the associated certificate from 31 December 2020.

- The Inventories of Hazardous Materials and the associated certificates are approved by the respective Flag State.
- The ships intended to be passed to be recycled must have a Ready for Recycling Certificate.
- Further information can be found in ISM Circular 03/2019.

Ships flying a flag of a non-EU state that call on a European port are required to carry an Inventory of Hazardous Materials as well as a Document of Compliance.

According to the EU Regulation, every member state designates a contact point that informs and advises on the topic. The contact point of Germany is the Federal Maritime and Hydrographic Agency.

Law stated - 31 July 2023

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

Which courts exercise jurisdiction over maritime disputes?

In Germany, with the exception of some special jurisdictions, all courts are in principle capable of deciding maritime disputes. In the absence of a choice of law, local jurisdiction under the rules of the Code of Civil Procedure is usually determined by the seat of the legal entity being sued. However, as the majority of Germany's maritime industry is located in Hamburg, Hamburg courts are regularly entrusted with maritime disputes. Due to this wealth of experience, the Hamburg courts are renowned for this type of dispute and regularly reach comprehensible and appropriate decisions through their expertise.

In this respect, it is not surprising that the Hamburg courts are regularly chosen by the parties as the competent court even before a potential dispute arises in the context of a choice of law.

Law stated - 31 July 2023

Service of proceedings

In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

With regard to service on the defendant, a distinction must be made.

If service is to be effected within the European Union, it is governed by Regulation (EC) No. 1393/2007, the EuZVO. This regulation is also applicable in relation to Denmark by means of an additional protocol and, in addition to civil and commercial matters, also covers insolvency proceedings, for example.

According to the EuZVO, service must be effected in two ways, whereby both ways have equal priority and the court decides at its own discretion as to the way is to be used:

- Service by postal services, by means of a registered letter with international advice of delivery, article 14 of the Regulation in conjunction with section 1068(1) of the Code of Civil Procedure.
- Service by transmitting agencies, article 4 EuZVO. In this case, the German court delivers the document to the foreign court that initiates service.

A translation of the document in non-German-speaking EU countries is generally not required. However, the service of a

German document may result in the defendant or addressee refusing to accept it. In this case, the sender can submit the translation or prove that the defendant or addressee understands German.

In addition to the EuZVO, the rules of the Hague Service Convention of 1965 also come into consideration, as Germany is a member of this convention. However, it only applies to civil and commercial matters.

The Hague Service Convention also has several ways of transmission. The most popular are the following:

- Service by post, article 10 of the Hague Service Convention. However, many countries – including Germany – have objected to service by ordinary mail.
- Transmission by direct communication, article 3, 5 of the Hague Service Convention. In this form of service, documents are served by the court in the plaintiff's state to a central office in the recipient state.

In the case of documents served under the Hague Service Convention, a translation must always be added.

Service in countries that are neither EU member states nor contracting states to the Hague Service Convention depends on rules that the countries (Germany and the country to be served) have agreed among themselves.

Law stated - 31 July 2023

Arbitration

Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

The German Maritime Arbitration Association (GMAA) has been in existence since 1983. It was founded by maritime lawyers and shipping merchants from Hamburg and Bremen and is based in Hamburg. The aim of this renowned arbitration court is to provide a cost-effective alternative to foreign arbitration courts (especially in London).

Since Hamburg and Bremen are major shipping locations in Germany and thus many maritime lawyers are also based in both cities, an arbitration clause in favour of proceedings before the GMAA is regularly found in contractual clauses of standard maritime contracts in the event of errors in the execution of the contract.

Law stated - 31 July 2023

Foreign judgments and arbitral awards

What rules govern recognition and enforcement of foreign judgments and arbitral awards?

In the context of recognition and enforcement of judgments of state courts, a distinction must be made as to which court the judgment originates from and where it is to be enforced.

If the judgment was issued in a member state of the European Union and is to be enforced in another member state, recourse must be made to European law. Within the European Union, there is Regulation 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This regulation enables the enforcement of a judgment issued in one country of the European Union against a party located in another country of the European Union in the country of destination. The procedural rules of enforcement are always based on those of the country in which the judgment debtor is domiciled.

In the context of judgments from non-EU member states, it is much more complicated. First of all, it must be checked whether an agreement under international law has been concluded with this state. If this is the case, recognition and enforcement are governed by the agreement. If this is not the case, the foreign judgment must be declared enforceable

in accordance with section 722 paragraph 1 of the German Code of Civil Procedure. The German court now examines the case in a complex procedure. The outcome of this can hardly be predicted with legal certainty in advance.

With regard to the recognition of foreign arbitral awards, the situation is somewhat different. Germany is a member state of the New York Convention of 1958, which obliges Germany to recognise and enforce arbitral awards rendered in another member state, subject to very narrow limits.

In summary, it can be said that the recognition of a foreign arbitral award coming from a member state can, through the application of the New York Convention, with high probability find recognition and the possibility of enforcement in Germany. The same applies to the decision of a court of the European Union. The situation is much more difficult with regard to the recognition of state judgments from non-EU countries.

Law stated - 31 July 2023

Asymmetric agreements

Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Although asymmetrical jurisdiction clauses are agreements that generally disadvantage one party, they are generally considered permissible by German state courts. The limit of what is permissible under German law is reached when the clause is found to be immoral under section 138 of the German Civil Code. This is primarily the case when one party forces the other party into an unfavourable asymmetrical agreement due to its superior market power.

On the other hand, an asymmetrical jurisdiction clause agreed in a form contract may fail due to the sometimes quite high requirements for general terms and conditions from German civil law. A recognised example here is the case where an asymmetrical jurisdiction clause does not clearly regulate the exercise of the right to choose, because the law on general terms and conditions requires that the provision be ‘clear and comprehensible’.

There is also no general prohibition for asymmetric jurisdiction agreements in favour of arbitral tribunals. Moreover, the review of arbitral awards in Germany is only possible within very narrow limits. From these two factors, it can be concluded that asymmetric choice of court agreements in favour of arbitral tribunals are even more easily valid and enforceable in Germany than those in favour of state courts.

Law stated - 31 July 2023

Breach of jurisdiction clause

What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

If the question is to be understood in such a way that the claimant conducts the proceedings outside of Germany, European law should be consulted. According to article 31 paragraph 2 of Regulation 1215/2012 of the European Parliament, the court first entrusted (in the context of this question, the court wrongly entrusted) with the case suspends further proceedings until the correct court according to the choice of law has ruled. From the point of view of the defendant, in addition to the possibility of pointing out the lack of jurisdiction to the court that does not have jurisdiction, the defendant would also have the possibility of filing an action with the court that actually has jurisdiction. This would then take the form of a negative declaratory claim to the effect that the claims of the original claimant brought before the court without jurisdiction do not exist.

However, the aforementioned is only promising if the court without jurisdiction and accessed by the claimant is located within the European Union. National measures against proceedings in foreign courts that are not members of the European Union do not exist in German law.

Law stated - 31 July 2023

What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

If the defendant is confronted with an inadmissible action in Germany due to a breach of a jurisdiction clause, he or she has the right to point out to the court that it lacks jurisdiction as soon as he or she receives the claim.

However, the defendant must make this reference until the first oral hearing. As soon as the defendant appears at the oral hearing and is heard there, the German court before which he or she has proceeded in this way is deemed to have jurisdiction pursuant to section 39 of the Code of Civil Procedure and the defendant can no longer assert a lack of jurisdiction afterwards.

Law stated - 31 July 2023

LIMITATION PERIODS FOR LIABILITY

Time limits

What time limits apply to claims? Is it possible to extend the time limit by agreement?

The standard limitation period in Germany is three years - from the end of the year in which the claim arose and the creditor became aware or should have become aware of the circumstances giving rise to the claim (subjective period).

The objective, knowledge-independent maximum limit of the limitation period is 10 or 30 years. In the law on sales and contracts for work and services, the limitation period is even only two years from the date of purchase or acceptance – except in the case of goods for or the erection of buildings. Knowledge of the defect is irrelevant here. Especially in recourse cases, this period can be reached quickly. In Germany, claims are therefore usually pursued very consistently.

If several duties are breached at the same time – eg, several material or work defects, consultancy contract with several false statements – the limitation period starts separately for each breach of duty. This is particularly important in the case of knowledge-based limitation, if the claimant only gradually learns about the individual breaches.

If parties agree to longer time limits in an underlying agreement, this would be valid unless it can be ruled as an unfair clause in a standard agreement. It is always possible to agree the extension of the time limit between the parties for a foreseeable duration or until the end of a certain action, too.

Law stated - 31 July 2023

Court-ordered extension

May courts or arbitral tribunals extend the time limits?

The statute of limitations can be suspended by certain measures such as the initiation of a court procedure are arbitration. This has the effect that the period – for which the limitation is suspended – is not included in the limitation period. The statute of limitations is thus interrupted and continues to run after the end of the period of suspension. This is mandatory by law and will not have to be applied for explicitly.

In practice, the suspension of the statute of limitations is particularly relevant in the case of active proceeding – such as the initiation of certain proceedings or preparatory measures. The suspension of the statute of limitations during negotiations between the parties also plays a major role in German legal practice and has basically the same legal effect. There are also other actions suspending the time limits, such as the registration of a claim with an insolvency

table in Germany.

Law stated - 31 July 2023

MISCELLANEOUS

Maritime Labour Convention

How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

The Maritime Labour Convention (MLC) of the International Labour Organization (ILO) is known to many experts as the 'fourth pillar' of the international maritime regulatory regime. For good reason, as the Convention sets out mandatory minimum standards for decent working and living conditions for more than 1.2 million seafarers all over the world. Compliance with these regulations is controlled by means of periodical inspections by flag states and port states.

The convention globally entered into force on 20 August 2013. Germany ratified the MLC on 16 August 2013.

For vessels under the German flag, the Maritime Labour Act is the core of the implementation of the Maritime Labour Convention of the ILO in German law.

Basically, the Maritime Labour Act applies to each person, irrespective the nationality, who is employed or engaged on board a ship under the German flag. The procedure for the determination of medical fitness, apprenticeship on board and medical equipment have been placed on a uniform legal basis that corresponds with practical experience. The objectives of the Maritime Labour Convention concerning recruitment and placement, inspections on board and the social security of seafarers have been newly defined. The existing system of flag state and port state control has been extended to the inspection of seafarers' working and living conditions.

Law stated - 31 July 2023

Relief from contractual obligations

Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

Under German law, it would be possible to include price adjustment clause in an agreement, it also make such adjustment depending on indices or price valuations. But even without such explicit adjustment options under the agreement, German law provides a mandatory rule that a contract needs to be amended if the substantive commercial basis is changed, in accordance with this test: If the circumstances that have become the basis of the contract have changed so seriously after the conclusion of the contract that the parties would not have concluded the contract in such a way if they had foreseen this change, a disturbance or discontinuation of the basis of the contract pursuant to section 313 German Civil Code comes into consideration.

In principle, the primary legal consequence is the adjustment of the contract pursuant to section 313 paragraph j 1 German Civil Code. This takes place ipso iure . Only if an adjustment is not possible or is unreasonable for one party can rescission or termination be considered as an exception under section 313 paragraph 3 German Civil Code. For continuing obligations (eg, rent, lease, loan) there is also a special provision in section 314 German Civil Code.

German courts will also adjust any claim for compensation of damages to a fair amount if a change of circumstances led to an unfair burden and even refuse any compensation beyond the actual damage if this could be deemed punitive damage, which infringe the ordre public .

Law stated - 31 July 2023

Other noteworthy points

Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

No.

Law stated - 31 July 2023

UPDATE AND TRENDS

Key developments of the past year

Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

Against the background of global warming and climate change, the European Union has decided that ships of 5,000 GT and above must participate in international emissions trading.

However, this only applies to voyages between ports within the EU and those leading from the EU to third countries. Only half of the emissions from ships travelling from the EU to third countries will be covered to ensure that there is still an incentive to visit European ports.

From 2024, ship operators will have to buy emission allowances for 40 per cent of the emissions they produce. From 2025, the share will rise to 70 per cent, and from 2026, any emissions will be chargeable to operators.

In addition to the exciting question of whether implementation will work smoothly, there is also the question of who will have to bear these costs.

After some back and forth, the European legislator was able to decide to legally stipulate in the near future that the 'commercial users' of the ship have to bear the costs. Unfortunately, it remains unclear who exactly these commercial users are.

According to the abstract definition, they are those who use a ship for commercial purposes. However, because ship management agencies only do this indirectly and for the charterer or the owner of the vessel, they are not likely to be the ones who have to pay in the end. Rather, as things stand, the cost burden will have to be borne by the charterers or the owners of the vessels. Which of the two will ultimately have to pay has not yet been finally clarified.

Because the answer to this question of who pays is of utmost relevance and no clear answer has yet been found, the issue is currently attracting a great deal of attention. Particularly with a view to the obligation to purchase emissions taking effect from 2024.

Law stated - 31 July 2023

Jurisdictions

Australia	Holding Redlich
Brazil	Kincaid | Mendes Vianna Advogados
Cyprus	Chrysses Demetriades & Co LLC
Egypt	Eldib Advocates
Germany	KDB.legal KOCH BOËS
Ghana	Kimathi & Partners Corporate Attorneys
India	Phoenix Legal
Indonesia	Budidjaja International Lawyers
Israel	J.SPRINZAK Maritime Law Firm
Italy	Studio Legale Mordiglia
Japan	Okabe & Yamaguchi
Malta	Dingli & Dingli Law Firm
Netherlands	Van Steenderen MainportLawyers
New Zealand	Hesketh Henry
Nigeria	Creed & Brooks
Norway	Advokatfirmaet BAHR AS
Portugal	Ana Cristina Pimentel & Associados Sociedade de Advogados SP RL
Singapore	Haridass Ho & Partners
South Korea	Cho & Lee
Taiwan	Lee and Li Attorneys at Law
Tunisia	Achour Law Firm LLP
Turkey	Cavus & Coskunsu Law Firm
United Arab Emirates	Afridi & Angell
United Kingdom	MFB Solicitors
USA	Seward & Kissel LLP