

Shipping

Contributing editor
Kevin Cooper



2017

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH 

Shipping 2017

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Germany

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Newbuilding contracts

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

Generally, the builder of a vessel needs to provide physical possession of the vessel to the shipowner, and both parties have to agree that ownership of the vessel is transferred. The exact date and time of transfer of title is usually documented by the execution of a protocol of delivery and acceptance by both the builder and the shipowner. Simultaneously, a builder hands over to the shipowner a bill of sale. This is the usual procedure for a vessel which is completed in compliance with the underlying shipbuilding contract and accepted by the shipowner as such. The shipbuilding contract usually provides for the relevant procedure of delivery of the vessel by the builder to the shipowner.

However, the builder of a vessel and the buyer under the relevant shipbuilding contract may agree on a transfer of ownership of the vessel when it is still under construction. In such a case, the ship is recorded in the registry for ships under construction. A German particularity is that a vessel under construction may only be recorded if at the same time a mortgage is recorded against the vessel. However, in most cases, the vessel under construction is recorded in the name of the shipbuilder and a mortgage is recorded in favour of the yard's bank financing the construction phase (and such bank often provides refund guarantees).

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

A guarantee granted under German law needs to be granted in writing. There are no other formalities to be satisfied. There is nothing comparable to a SAFE registration of a refund guarantee issued by a Chinese bank, for example.

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

Yes. If the customer has a valid claim against the yard to deliver the vessel, but the yard refuses to do so, this claim can be pursued in court (or by arbitration, as the case may be). But gaining a final and binding judgment will take several months at least, and if the yard files an appeal it may even take several years. On the other hand, there might be a substantial financial risk for the yard not to deliver the vessel to the shipowner, as in the current market the final instalment under a shipbuilding contract is usually the highest. If the yard ultimately loses the proceedings, the shipowner may not only be entitled to have the vessel delivered, but may also be entitled to compensation for any loss.

It might be possible to obtain a preliminary injunction to compel delivery of the vessel before the final judgment. But the courts' requirements would be very high, as delivery of the vessel to the shipowner would create a factual situation with serious impact. It would require, generally, very good prospects of winning the regular proceedings: for example, a situation in which the yard has no obvious reason not to deliver the vessel.

4 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 shipbuilding contract would usually provide for certain claims for deficiencies of the vessel after delivery by the builder to the shipowner within a guarantee period of 12 months. Thereafter, the shipowner may still raise a claim against the builder if any deficiencies become apparent, but usually the obligations to prove a claim would then be much higher for the shipowner. Damage resulting from such deficiencies may also be claimed under the shipbuilding contract. If the initial buyer of a vessel intends to sell the vessel on to a third party, this final buyer may only raise any contractual claim against the builder in an instance where the rights under the shipbuilding contract have been assigned.

Generally, the German Civil Code may provide for a claim in delict for damage or personal injury as well as for product liability under the Product Liability Act (in addition to the rights under the shipbuilding contract).

Ship registration and mortgages

5 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?

Germany provides three different types of register to record a vessel, all three held and administered by the local courts: (i) for seagoing vessels, (ii) for inland waterway vessels, and (iii) for vessels under construction.

A German owner of a vessel of 15 metres length or more is obliged to record its vessel in the German registry. In addition, if the owner is majority-based in the EU, the vessel may be recorded in the German registry.

6 Who may apply to register a ship in your jurisdiction?

Any German citizen or entities with their place of registration in Germany and with the majority of voting rights held by Germans must record a vessel in Germany. Individuals or entities having their residence in the EU may apply to register their ship in Germany. Owners that are recorded outside an EU jurisdiction may, under certain circumstances, apply for a German flag if they appoint a person in Germany who takes responsibility for satisfying all the technical, social and administrative obligations applicable to a vessel pursuant to German law. It is also possible for a German bareboat charterer of a foreign registered vessel to obtain permission to fly the German flag (although in such a case it would not be a typical dual registration as is known from other bareboat registries).

7 What are the documentary requirements for registration?

A shipowner needs to provide the German registry with the following documents.

- In preparation for the registration:
 - an application with the required details of the vessel (eg, name, type, home port, place and year of build, IMO number, name of owner, legal basis for obtaining title);

- the identity card of the owner, or – more likely – if the owner is a company an excerpt from the relevant commercial register; and
 - a tonnage certificate on measurement of the vessel.
- Upon actual delivery of the vessel to the shipowners:
- the bill of sale and protocol of delivery and acceptance as proof of ownership; and
 - the deletion certificate from the previous registry or, in the case of a newly built vessel, non-registration evidence by a certificate signed by the builder, confirmation by a local authority, or a legal opinion by a local lawyer (to have confirmation of no double registration).

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

Flagging out by way of dual registration is a structure often used by German shipowners. Such flagging out needs to be based on a bareboat charter agreement between the owners of the vessel and a certain entity acting as bareboat charterer. The bareboat charterer is usually a special-purpose company belonging to the same group of companies as the owners.

A vessel would be registered in the underlying German registry (upon satisfaction of the above-mentioned requirements), and the shipowners can apply to the German Federal Maritime and Hydrographic Agency (BSH) for permission to fly a foreign flag for a maximum of two years.

German shipowners use such dual registration, in particular, to fly the flag of Liberia, the Marshall Islands, Antigua and Barbuda, Cyprus, Malta or Gibraltar.

While working on the requirements to be fulfilled towards the underlying German registry and the BSH to obtain the relevant flagging out permission, a shipowner needs to apply to the flag state for dual registration. Once the BSH grants its permission, the right to fly the German flag is withdrawn for the relevant period.

As said above, in the other direction (ie, from an underlying foreign registration towards Germany) it is possible for a German bareboat charterer to obtain permission to fly the German flag (but without any registration in a German bareboat registry).

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

Mortgages recorded against a vessel are registered in the same registry as the relevant vessel. This may be any of the three types of registry for vessels (including for those under construction), as noted above. The ship registries are maintained at the local courts (which are also in charge of the commercial registry and the real estate registry). The competent court is usually the court at the home port of the ship.

Mortgages are recorded in section III of the registry, setting out the amount of the mortgage, the details of the mortgagee, the details of notarial acceptance by the shipowner and the date of the mortgage's registration.

Limitation of liability

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

Germany is a signatory to the Convention on Limitation of Liability for Maritime Claims, 1976 as amended by the Protocol of 1996 (LLMC). However, Germany ceased to be a signatory to the original Convention of 1976 (effective date of denunciation: 13 May 2004). Therefore the Convention does not apply in respect of those states that were party to the original Convention but not to the amendment.

Germany made a reservation pursuant to article 18 LLMC regarding claims in respect of wreck removal (article 1 (d) and (e)). These claims are regulated by section 612 of the German Commercial Code (HGB). As a consequence, an additional fund has to be established for these claims. The rules for this fund again follow the rules of the LLMC (eg, for the limit). Furthermore, claims in connection with the Bunkers Convention 2001 are also covered by the limitation.

The new limits of the LLMC, which were introduced by a further amendment to the Convention in 2012, have been applicable in Germany since June 2015. The claims that can be limited are listed in

article 2 LLMC; the persons who can limit their liability are set out in article 1.

Limitation for claims in connection with oil pollution damages resulting from maritime casualties involving oil-carrying vessels is regulated by the International Convention on Civil Liability for Oil Pollution Damage (CLC).

11 What is the procedure for establishing limitation?

In order to establish limitation in accordance with article 11 LLMC, a fund must be set up at a German court serving for all relevant claims caused by the incident. Upon application, the competent court may order that instead of a cash deposit, security must be provided for the relevant amount.

An application to constitute a limitation fund is only possible after legal proceedings in Germany have been initiated. The fund is calculated pursuant to article 6 LLMC and for oil pollution damages pursuant to article V CLC.

There is a separate right to plead limitation as a defence in proceedings according to article 10 LLMC without setting up a fund. However, this option is not available in respect of claims for oil pollution damages.

12 In what circumstances can the limit be broken?

In accordance with article 4 LLMC, a party shall not be entitled to benefit from limitation of liability if it is proven that this party acted either with the intention to cause a loss or recklessly and with knowledge that such loss would probably result. For oil pollution damages article V.2 CLC contains a comparable rule.

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

Germany is not a party to the Athens Convention. However, the European Union has enacted the 'Athens Regulation' (Regulation (EC) 392/2009) whereby the Athens Convention was basically introduced as EU law. Therefore the rules of the Athens Convention are in fact applicable in Germany. Being a European Regulation, its terms take precedence over German law dealing with such claims.

Port state control

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

The Ship Safety Division of the BG Verkehr is in charge of port state control (PSC) in German ports, monitoring adherence to the relevant port state regulations. It performs its tasks on behalf of the German federal government. In any event, and as in any other jurisdiction, vessels entering German territory must adhere to relevant environmental and criminal laws alongside port-specific provisions.

15 What sanctions may the port state control inspector impose?

If the PSC inspector reveals a deficiency, this will be discussed with the vessel's master and will set a time frame for rectification of the deficiency. Rectification may be required before the vessel's departure from the port or prior to arrival in the next port (in which case the work may be undertaken by the crew on the voyage).

If, however, a major deficiency is revealed and the vessel is deemed unfit to proceed to sea, or the deficiency poses an unreasonable risk to the vessel, crew or environment, the PSC inspector may inform the vessel's flag state or classification society to request an audit, and the PSC may impose a detention. The detention of the vessel would be maintained until the relevant deficiencies have been rectified and approved by the PSC in a further inspection.

16 What is the appeal process against detention orders or fines?

An appeal may be made within one month of the date of notification and should be submitted in writing to the PSC. This appeal does not, however, suspend the detention if immediate enforcement is ordered (which will usually be the case). In order to reinstate the suspensory effect of the first appeal (which will then suspend the detention order), another appeal to the administrative court is necessary.

Classification societies

17 Which are the approved classification societies?

The classification societies for German-flagged ships approved pursuant to an agreement with the German Ministry of Transport are:

- American Bureau of Shipping (ABS);
- Bureau Veritas (BV);
- DNV GL;
- Lloyd's Register of Shipping (LR);
- Nippon Kaiji Kyokai (Class NK);
- Korean Register (KR);
- Registro Italiano Navale (RINA); and
- Russian Maritime Register of Shipping (RS).

All societies are authorised to represent the German flag state in matters of ship safety and the marine environment (ie, SOLAS, ISM, Load Line and MARPOL).

However, not all societies may represent the German flag state in all relevant areas. For example, BV and KR are excluded from representation in maritime labour law issues. NK, KR and RS must not represent in navigational and radio equipment issues, and RS may not represent on ship and port security aspects (ISPS).

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

Given that only a very few cases have been decided by German courts, it is not certain whether or to what extent classification societies may be held liable. Usually a classification society limits or excludes its contractual liabilities towards their contractual counterparts. If such agreement is being upheld, a shipowner may only raise a claim in delict against its classification society. A third party without a contractual link to the classification society may also raise a claim in delict (eg, if this third party may be considered as a beneficiary under other parties' contract or in the case of tort generally).

However, in the case of a third party the classification society might be able to defend a claim by stating that it has exercised reasonable care when selecting the inspection officer. In this case the liability in delict would not apply.

Collision, salvage, wreck removal and pollution

19 Can the state or local authority order wreck removal?

If the wreck poses a danger to the environment, the public in general, or to the safety and efficiency of maritime traffic, the relevant German authorities (in particular the Central Command for Maritime Emergencies and the Waterways and Shipping Department) may instruct the owner or anyone exercising control of the vessel (eg, as demise owner) to remove the wreck.

The authorities are also entitled to remove the wreck themselves, which is usually done by instructing a specialised salvage company, particularly if the owner is not taking care of removal (eg, if the owner has abandoned the vessel).

The German authorities will raise a claim against the owner for reimbursement of (reasonable) costs and expenses for the removal, but the owner may be entitled to limitation of liability (see question 10) or other defences. The German authorities may apply for an arrest of the vessel, particularly where no sufficient security has been put up.

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

In this context, the terms of the following conventions are applicable in Germany:

- in respect of collisions: the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 (incorporated into the German Commercial Code in 1913); the International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision (1952); and the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collisions or other Incidents of Navigation (1952);
- in respect of wreck removal: the Nairobi International Convention on the Removal of Wrecks 2007;

- in respect of salvage: the International Convention on Salvage (1989); and
- in respect of pollution: the International Convention on Civil Liability for Oil Pollution Damage (CLC) and the International Convention on Civil Liability for Bunker Oil Pollution Damage.

21 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 local form of salvage agreement; therefore Lloyd's standard form of salvage agreement is acceptable and often used. There is no restriction with regard to the party who may carry out salvage operations. Usually these tasks are carried out by specialised salvage companies.

Ship arrest

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

Germany is a signatory to the International Convention Relating to the Arrest of Sea-Going Ships (1952). It is not, however, a signatory to the International Convention on the Arrest of Ships 1999. It may be worth noting that German law may give rise to further possibilities to arrest, for example, a vessel, bunkers or cargo.

23 In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested?

Pursuant to article 8(4) of the Arrest Convention (1952), the rules set out in the Convention do not alter the rules of arrest of a German ship. This leads to a minor difference in respect of what claims can lead to an arrest. While for German-flagged ships domestic law provides that any claim for payment against the owner of a vessel is sufficient, for ships flying the flag of another member state the list in article 1 applies. The law governing the claim, not its nature, changes the situation in respect of arresting a ship.

Arresting a sister ship is possible as long as 'sister ship' means another ship of the same owner. However, if the owner is an SPV owning just this one ship, it will not be possible to arrest a ship that is merely associated with the vessel in connection with which the claim arose (ie, where both SPVs belong to the same group of companies).

24 What is the test for wrongful arrest?

German law provides for strict liability in the case of wrongful arrest. Irrespective of any 'bad faith' or 'fault' on the part of the claimant, he or she would be obliged to provide compensation for proven loss caused by a wrongful arrest (including, but not limited to, any compensation for damage caused in relation to security which has been put up). The arresting party may be liable for unlimited compensation.

25 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?

As only a claim against the owner of the vessel is required to arrest it, such a claim against the charterer of the vessel would generally not be sufficient to arrest the vessel. The arrest of a ship for a claim against a bareboat charterer (ie, a demise owner of the vessel) is only possible if the relevant claim is based on a maritime lien. A rather theoretical basis for an arrest of a vessel by a bunker supplier would be a claim of the charterer against the owner in delict (as there would usually be no contractual link).

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

There is so far no consistent and clear jurisdiction on the requirement for the arresting party to put up security. As the intention in the recent reform of the relevant legislation was rather to lower the barrier for ship arrests, this would be an argument against the requirement to put up security.

Therefore some legal writers argue that courts are no longer allowed to order the arresting party to provide security. On the other hand, section 921 of the German Code of Civil Procedure still clearly states that it is at the discretion of the court to order the need for security.

The form of security will be determined by the court. Usually, the competent court determines the form of security, either by paying a deposit to the court in an amount as ordered or by providing a bank guarantee from a bank acceptable to the court.

The amount of security (determined by the court) is not related to the amount of the claim but rather to the possible compensation that the arresting party may have to pay if the arrest ultimately turns out to be wrongful. As this is at the discretion of the court, guidance for the judge may be the charter rate which the owner could lose if the ship is off hire.

27 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?

With reference to question 26, the competent court has the discretion to determine the form and amount of security. Paying the amount to the court or providing a bank guarantee will usually be preferred. Theoretically the amount can exceed the value of the ship, depending on the circumstances of the claim for which the arrest is made, any additional interest and costs, and potential compensation.

The court may review the amount and form of the security at any time. If the amount is deemed to be too high the court's decision might be appealable. Additionally, both parties may agree on different security (insofar as form and amount are concerned).

28 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?

Usually no power of attorney is required for an attorney to commence the arrest proceedings at the competent court. The court will usually rely on the lawyer's statement that he or she has been properly instructed to act on behalf of the arresting party.

However, if the authorisation of the acting lawyer is contested by the other party (even if just for tactical reasons), the lawyer should be prepared to present a power of attorney to the competent court. Therefore we recommend either presenting the power of attorney to the court right away or to at least be prepared to present such power of attorney in case the other party contests proper authorisation. If such power of attorney is granted by a party outside Germany, it might be recommendable to have it notarised and apostilled (if the state of execution and notarisation is party to the Hague Convention) for the sake of completeness. Apostille would be acceptable in Germany, as Germany is a party to the relevant convention.

As to the claim for which the arrest is made, the arresting party will have to provide prima facie evidence in respect of the facts and circumstances of the claim. Any documents supporting the arresting party's position, such as charter parties, survey reports or correspondence, need to be presented to the court. An affidavit of the creditor (or the competent manager) stating that all facts and documents presented to the court are true will suffice.

Generally, no other formalities (legalisation or apostille) are required. While the arrest application itself must be filed in the German language (as the court language is German), most courts will probably accept any other documents supporting the claim in English. The preparation and proceedings in court may only take a few days.

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

The court bailiff will take possession of the vessel, and he or she will prevent the ship from departing. The bailiff is also responsible for guarding and safekeeping the vessel while the arrest is in place. If necessary, the bailiff or the court will hire professional companies to maintain the vessel. The arresting party will have to provide the bailiff with advance payments to bear the costs of the vessel's maintenance.

30 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?

There is no obligation to pursue proceedings on the merits in Germany just because the vessel has been arrested in Germany. But when the

vessel has been arrested in Germany this can constitute jurisdiction by German courts. If the vessel has been arrested without proceedings on the merits having started (in Germany or elsewhere), the court will – upon application of the shipowner – order that legal actions on the merits must be commenced within a reasonable time. The court will set a time limit (often about one month). If the claimant does not comply within this time period, the arrest will be lifted upon application of the shipowner.

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

No, there are no other forms of attachment orders or injunction available.

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

German law does not provide discovery procedures such as, for example, those under US law. Instead, every party must provide proof of the facts or circumstances stated to the benefit of itself.

However, this may lead to unfair situations, particularly if the opponent is in possession of all the necessary documents that are relevant to prove certain aspects in the proceedings. In such cases the court may decide that the burden of proof lies rather with the opposing side to attract this party's cooperation.

Surveys or other statements by experts appointed just by a party are not considered as evidence by a court. They are instead considered as a statement by a party, but the surveyors may be appointed and heard as witnesses in the proceedings. Only the findings of a court-appointed surveyor may be considered as evidence.

In order to preserve evidence German procedural law provides for separate proceedings (for example to determine the cause of a fire in a ship's engine room before the damage is repaired and any evidence is lost). In these proceedings experts may be appointed by the court and the findings will later on be admissible in the proceedings on the merits.

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

Theoretically, this would be possible because an arrest can be made pursuant to German law in respect of any asset or property of a debtor. However, as indicated in the answers to questions 23 and 25, the owner of the bunker must be the debtor of the relevant claim. If the claim exists against the shipowner, but the bunker belongs to another person (eg, the bareboat or time charterer) an arrest of the bunker would not be possible. Additionally, arresting bunkers (or basically any assets other than the vessel) is more difficult because a good reason for the arrest must be proven to the court. Such a reason may exist where any delay would result in serious difficulties in enforcing a judgment.

Judicial sale of vessels

34 Who can apply for judicial sale of an arrested vessel?

In order to apply for the judicial sale of a ship, the creditor will need to obtain an enforceable title. This could be a final and binding judgment (or, as the case may be, an arbitration award) or an enforceable notarial deed. The arrest of the ship is not a precondition to a judicial sale. Any creditor with the aforementioned title may apply for judicial sale.

35 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?

An application by a creditor is required for the commencement of sale proceedings. The court will set a date for the auction to be carried out. It will also inform the involved parties and publish the date in maritime publications. The highest bidder wins the auction and must pay the proceeds to the court. The duration of the whole process depends on various factors, but it can take months until the proceeds are distributed. The court costs depend on the value of the vessel.

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

All costs associated with the procedure of the judicial sale will be settled first. Secondly, the maritime liens (if any) are settled, to be followed, thirdly, by the mortgagee's claim. Thereafter, the remainder of the funds will be for the applicant or creditor, but one needs to consider other 'ordinary' claimants at the same rank seeking settlement of their claim.

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

The result of a judicial sale will be that the purchaser receives the vessel sold free from any encumbrances (including maritime liens).

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

The judicial sale of a vessel outside Germany would be recognised in Germany similarly to the recognition of a foreign judgment (ie, it depends on the place of the court decision).

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

Germany signed the Convention in 1994. The Convention entered into force in 2004 internationally, but it was never ratified by Germany and therefore it is still not in force in Germany.

Carriage of goods by sea and bills of lading**40 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?**

Only the Hague Rules are in force in Germany. However, the rules of the Visby amendment have mainly been incorporated into the German Commercial Code in 1986. Although Germany was host to the conference in Hamburg, it never did ratify the relevant convention (ie, the Hamburg Rules do not apply in Germany).

Given that Germany completely overhauled its codification of maritime law in 2013, it seems unlikely that Germany will ratify the convention for the Rotterdam Rules in the near future.

Carriage at sea begins as soon as the carrier obtains possession of the goods for the purpose of transportation; it ends upon delivery of the goods to the recipient.

41 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?

The German Commercial Code provides general rules for combined (multimodal) transportation.

International rules that may take precedence and that can also apply in such cases are:

- air transportation: the Convention for the Unification of Certain Rules for International Carriage by Air 1999 (Montreal Convention), which replaced the Warsaw Convention;
- road transportation: the Convention on the International Carriage of Goods by Road 1956 (CMR);
- rail transportation: the Convention Concerning the International Carriage of Goods by Rail 1999 (COTOF-CIM 1999); and
- inland vessels: the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI).

42 Who has title to sue on a bill of lading?

While the details under German law vary depending on the type of bill of lading, generally the lawful holder of the bill of lading or the party otherwise entitled under a bill of lading is authorised to raise a claim. Possession of the bill of lading might be relevant for the answer to that question.

43 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?

In order to effectively incorporate the terms of the charter party into the bill of lading, the charter party agreement should be attached to the bill of lading (or at least the main content of the relevant clauses should be repeated in the bill of lading). A mere reference in the bill of lading to the charter party may not be sufficient (in the case that the charter party is not attached). If the terms of the charter party have been duly incorporated, this includes jurisdiction and arbitration clauses.

44 Is the 'demise' clause or identity of carrier clause recognised and binding?

After certain arguments about the question of whether or not the identity of carrier clause is binding under German law, the Federal Court of Justice ruled in the 1990s on two cases and denied the clause's validity. Therefore the identity of carrier clause cannot be regarded as binding under German law.

45 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?

If a bill of lading does not identify the contractual carrier or if it identifies a person as the contractual carrier who is in fact not the carrier, the shipowner has rights and duties under the bill of lading. This includes the liability for any damage to cargo. Where a contractual link is missing, German law may provide for liability of the actual carrier of the goods. The actual carrier may, however, derive defences from the law and from the contract entered into by the contractual carrier and the shipper.

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

The carrier will not be liable if the decision to deviate is made in order to save human life or undertake salvage at sea. However, the carrier may be held liable for any cargo damage that is caused by a deviation not justified due to any of the aforementioned reasons. In the case where damage to the cargo results from unjustified deviation, the carrier may not benefit from a limitation of liability.

47 What liens can be exercised?

The following liens can be exercised:

- maritime liens: wages of the ship's crew, public charges, claims to compensation for damages in respect of loss of life or injury (except for those claims that are based on a contract), salvage claims, wreck removal costs, claims of the social security authorities;
- by operation of law: the carrier has a lien on the goods that have been delivered to him to cover all claims under the contract for carriage of the cargo. The owner of the vessel has a lien on the property of the time charterer on board the ship (including fuel) in order to secure the amounts receivable under the time charter contract; and
- contractual liens: the parties are free to agree on liens on a contractual basis (subject to the granting party having possession or a lien).

48 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 without production of the bill of lading, he or she will be obligated to pay to the relevant holder of the bill of lading the damages just as if the cargo had been lost (as the primary obligation to deliver the same cargo again might be impossible to satisfy). In case of gross negligence the carrier may not be entitled to the limited liability.

49 What are the responsibilities and liabilities of the shipper?

It goes without saying that a shipper must pay the freight costs as agreed. Additionally the shipper must provide specific information

about the cargo in general (eg, measurements, numbers, weight), exact details about the danger and any precautions in case of dangerous goods. This has become even more important for container weight verification due to the amendment to SOLAS insofar as container vessels are concerned.

Furthermore the shipper must provide for sufficient packaging of the cargo in order to protect it against loss or physical damage. The shipper must also provide such documents and such information as are necessary for official processing (especially customs clearance).

The shipper will be liable for all damage that is caused by not complying with the aforementioned responsibilities.

Shipping emissions

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

Yes, sulphur emission control areas (SECAs) were established for the North Sea and the Baltic Sea. Therefore all domestic territorial waters of Germany are part of emission control areas.

51 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?

In the aforementioned SECAs, the sulphur content of the fuel used by ships must not exceed a maximum of 0.1 per cent. The authorities in charge conduct, on a regular basis and without notice, inspections of the vessel's records and (if deemed necessary) of the fuel used by that vessel. If proceedings against the owner, manager, or master of the vessel reveal non-compliance with the rules for low-sulphur fuel, fines of up to €50,000 may be ordered.

Jurisdiction and dispute resolution

52 Which courts exercise jurisdiction over maritime disputes?

Although Germany does not have specialised courts dealing only with shipping-related matters (such as admiralty courts in other jurisdictions), the district courts would regularly be competent in the first instance. The location of such a district court may follow for a dispute over contractual rights and obligation from the jurisdiction clause (if any) in the relevant contract. Other ways to determine the place of jurisdiction depend (for example) on the port where the vessel is or the location of the defendant's office. In a number of cases, the chambers for commercial matters at the district courts are in charge of maritime disputes. A professional judge is supported by lay judges (in such chambers these are usually commercially experienced individuals).

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

The relevant rules are mainly the Council Regulation (EC) 1393/2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters, as well as the Hague Convention of 15 November 1965 on the Service abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. In addition, the German Procedural Code contains rules for service outside of the jurisdiction.

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

The parties to a contract may agree on arbitration under the terms of the German Maritime Arbitration Association (GMAA). The GMAA has around 200 members, who may be appointed as arbitrators or mediators experienced in maritime law matters pursuant to German or English law.

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

Regulation (EU) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters deals with judgments from courts within the EU. Essentially, every member state has to recognise any judgment from the courts of other member states. In addition, the German Code of Civil Procedure provides rules for cases in which the aforementioned regulation is not applicable and no special bilateral agreements are in place. Germany has ratified the

Update and trends

Green shipping (in particular LNG) and cyber shipping are having an increasing impact and market participants are seeking a legal surrounding.

The withdrawal of sanctions against Iran are having an increasing impact on the German maritime industry.

For new (financing) structures, see question 62.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and there are certain bilateral treaties between Germany and other states.

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

A defendant should raise in the foreign court non-compliance with the relevant jurisdiction clause as a (formal) defence given that such proceedings would be not legitimate. If the court still decides in favour of the applicant, the defendant needs to go against the enforcement of the foreign judgment, as a court decision (if the requirements are satisfied) will be recognised and enforceable in Germany. Whether or not the defendant can later challenge the recognition of the foreign judgment in Germany depends on the specifics of the case.

57 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 sued in Germany despite there being a valid jurisdiction clause in place, the defendant may then raise this issue as a defence within the German court proceedings. The court would have to dismiss the case on the grounds that it is not competent to hear the case. If this argument is not heard and a judgment follows, one needs to consider actions against enforcement comparable to what has been said above.

Limitation periods for liability

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

Under German law various limitation periods apply depending on the nature of the claim. The regular limitation period (especially relevant for claims based in tort) is three years and will start at the end of the year in which the claim arose.

However, particularly in the maritime context, other codified periods may apply. For example, a two-year period is applicable to claims for damages for the death of or personal injury to a passenger; for the loss of, physical damage to or delayed re-delivery of luggage; for claims for wreck removal; claims to a salvage reward; and for claims resulting from ship collision.

Only a one-year limitation period applies to claims under charter contracts, claims to contribution in general average or claims under a contract for the carriage of goods by sea under a bill of lading.

The beginning of the period until the time bar needs to be examined carefully in any particular case, as this may start on the date of the incident or at some time at the end of the year in which the incident has occurred.

It is important to note that it is always possible to extend these limits by agreement between the relevant parties.

59 May courts or arbitral tribunals extend the time limits?

Time limits (for limitation periods for liability) may only be suspended by certain means, but not formally extended.

Miscellaneous

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

Germany incorporated the Maritime Labour Convention (2006) into the new Maritime Labour Act (SeeArbG) in 2013, which applies to all merchant vessels that fly the German flag. In addition, shipowners and masters of any ship flying a foreign flag have to ensure that the working and living conditions of the crew members on board meet the

requirements of the articles and regulations in conjunction with Part A of the Code of the Maritime Labour Convention (pursuant to section 137 SeeArbG). Compliance with these rules will be checked by the PSC.

61 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?

Although German law clearly provides that contracts must be fulfilled, there may be circumstances in which parties can seek relief from their obligations. The German Civil Code provides a two-tier system. If the parties concluded an agreement on the basis of certain facts which later prove to be wrong or if these facts have seriously changed and the relevant contract would not have been entered into if the changed facts had been known, the court may alter the content of the corresponding rights and obligations under a contract. If such a change is not possible in a reasonable manner given the relevant agreement and the relevant circumstances, the contract may even be terminated. Termination is also possible if there is a compelling reason and the terminating party can no longer be expected to fulfil the contract. However, the barriers for the aforesaid remedies (in particular the burden of proof) are quite high. The mere fact that the contract turns out to be economically disadvantageous will not suffice to meet the requirements.

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

The current market conditions in the German shipping market have had and still have a huge impact on commercial agreements. What was previously known as the KG model, with issuing houses setting up closed-end funds with hundreds of various private individuals to attract the equity portion for the acquisition of a ship, no longer works.

Various new structures are being set up in the form of joint ventures between German shipowners and investors from abroad, where the shipowners contribute vessels and ship management services and the investors contribute funds. German shipowners also enter into joint ventures with each other to increase efficiency. There have been a number of restructurings and warehouse solutions to cope with the current market. Insolvency administrators have also become constant participants in the shipping market.

All of these developments require a variety of complex legal structures. The German government has reacted with certain support measures to provide assistance to the industry.

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Getting the Deal Through

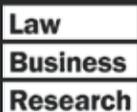
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