SHIPPING & TRANSPORT - GERMANY

COVID-19, voyage charterparties and *force majeure*

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The closure of Chinese ports due to the COVID-19 pandemic raises the question of whether and under which conditions expenses and risks charterers may cancel their voyage charterparty in the event of the closure of a port due to COVID-19.

This article examines German law from the charterer's point of view and asks in particular what happens if a voyage charterparty contains no *force majeure* clause.

Force majeure

The principle of *force majeure* is inherent to German transport and shipping law (Fourth and Fifth Book of the German Commercial Code (HGB)). Take freight forwarders liability (Section 426 of the HGB) for example: the necessary due diligence measures concern the unavoidability of the loss of or damage to goods and failure to meet delivery deadlines. The unavoidability test is initially subject to all unforeseeable external events; in this respect, the exclusion of liability corresponds to a *force majeure* liability limit.(1)

However, when referring to the principle of *force majeure*, a distinction must be made between reasons for the exclusion of liability in favour of the owner and the possibility to cancel a voyage charterparty by the charterer.

A voyage charterer subject to Section 532 of the HGB may cancel the charterparty at any time and without giving reasons where it does not contain a *force majeure* clause.

Whether the owner can claim freight (less any expenses saved) (Section 532(489)(II)(1) of the HGB) or dead freight (Section 532(489)(I)(2) of the HGB) as well as demurrage depends on whether a case of "interference with the basis of the transaction" (Section 313of the Civil Code) can be assumed.(2)

If the charterer is unable to prove the requirements for "interference with the basis of the transaction" and thus cannot prove that the equivalence of performance and consideration as part of the objective basis of the transaction has been so severely disrupted by unforeseen changes after conclusion of the contract that the risk normally borne by one party is unreasonably exceeded (*clausula rebus sic stantibus*), the owner's freight or dead freight claim remains valid. In such case, the reason for the termination cannot be assigned to the owner and risk associated with the cancellation of the charterparty remains with the charterer.

Comment

Under German law, a charterparty can be cancelled without the owner being able to claim freight only if and insofar as the parties have agreed a *force majeure* clause and one of the cases mentioned in said clause has occurred.

If no *force majeure* clause has been agreed, the charterer must resort to the principle of the frustration of contract for an effective and cost-neutral cancellation of the charterparty. However, since the exact circumstances of each case are important, there is no conclusive legal certainty in applying the interference with the basis of the contract and the principle of the frustration of contract.

Apart from the question of whether and under which conditions charterers can cancel their charterparty in the event of the closure of a port due to COVID-19, the question arises under German as to which party bears the demurrage risk if the ship is factually fixed in the port during its effective tender (ie, notice of readiness).

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Endnotes

(1) Oetker, Handelsgesetzbuch, 6 Auflage 2019, Section 426(4).

(2) Rabe/Bahnsen – Seehandelsrecht, 5 Auflage 2018, Section 532(7); BGH, Urteil vom 6 December 1962 – BGH Aktenzeichen II ZR 112/61LG Hamburg, in VersR 1963, 183.
