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Germany
Shipping

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This country-specific Q&A provides an overview of shipping laws and regulations applicable in Germany.

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Germany: Shipping

1. What system of port state control applies in your jurisdiction? What are their powers?

Germany is a signatory of the 1982 Paris Memorandum of Understanding and has transferred the Directive 2009/16/EC on port state control into its domestic law.

The competent executive authority is the Ship Safety Division (*"Dienststelle Schiffssicherheit"*) of the *"Berufsgenossenschaft Verkehrswirtschaft Post-Logistik Telekommunikation"* (*„BG Verkehr"*), an employer's liability insurance association which for historic reasons acts as a person entrusted by the Federal Government.

The Ship Safety Division may inspect vessels without warning and is authorised to detain a vessel or to deny it entering a German port.

2. Are there any applicable international conventions covering wreck removal or pollution? If not what laws apply?

Germany is a state party to Nairobi Convention on the Removal of Wrecks, 2007 which was implemented by Federal Act and entered into force in May 2015.

Further, it is a state party to the International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978 as well as to the International Convention on the Control of Harmful Antifouling Systems on Ships, 2001 and to the International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004.

Finally, Germany is also a state party to the International Convention on Civil Liability for Oil Pollution Damage ,1992, the Fund Convention, 1992 and the Supplementary Fund Protocol, 2003 as well as the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 all of which were transferred into domestic law.

3. What is the limit on sulphur content of fuel oil used in your territorial waters? Is there a MARPOL Emission Control Area in force?

German territorial waters are to their full extent part of the Sulphur Emission Control Areas ("SECA") established by the IMO in the North Sea and Baltic Sea. The respective limit for sulphur is 0.1 %.

4. Are there any applicable international conventions covering collision and salvage? If not what laws apply?

Germany is a party to the Convention on the International Regulations for Preventing Collisions at Sea, 1972 ("COLREG") which are transferred into German domestic law. However, it should be noted that within German territorial waters ("3 mile zone") the COLREG are heavily modified by the German Traffic Regulations for Navigable Maritime Waterways.

Further, Germany is a state party to the Collision Convention, 1910 and the International Convention on Salvage, 1989, both of which have been transferred into domestic law in the German Commercial Code (*"Handelsgesetzbuch"* or *"HGB"*). Neither of the two Conventions will find direct application in Germany.

5. Is your country party to the 1976 Convention on Limitation of Liability for Maritime Claims? If not, is there equivalent domestic legislation that applies? Who can rely on such limitation of liability provisions?

Germany is a party to the Convention on Limitation of Liability for Maritime Claims 1976, as amended by the 1996 Protocol.

6. If cargo arrives delayed, lost or damaged, what can the receiver do to secure their claim? Is your country party to the 1952 Arrest Convention? If your country has ratified the 1999 Convention, will that be applied, or does that depend upon the 1999 Convention coming into force? If your country does not apply any Convention, (and/or if your country allows ships to be detained other than by formal arrest) what rules apply to permit the detention of a ship, and what limits are there

on the right to arrest or detain (for example, must there be a "maritime claim", and, if so, how is that defined)? Is it possible to arrest in order to obtain security for a claim to be pursued in another jurisdiction or in arbitration?

Germany is a member state of the 1952 Arrest Convention. Yet, Germany did not ratify the 1999 Arrest Convention.

It is generally possible to arrest in Germany to obtain security for a claim to be pursued in another jurisdiction or in arbitration. Judgments of foreign courts, however, must be recognised in Germany.

7. For an arrest, are there any special or notable procedural requirements, such as the provision of a PDF or original power of attorney to authorise you to act?

There are no particularly noteworthy formal or procedural requirements for an arrest application – in fact an application could in theory be made orally before the competent court's clerk and could even be made without a lawyer. Yet, in practice, an arrest application is always submitted by lawyers in writing.

Documents supporting the arrest application, must be made available as prima facie evidence ("*Glaubhaftmachung*"). This is often done by way of e.g. an affidavit by the applicant. A Power of Attorney is not required but helpful to avoid delay. Although in practice most German courts are prepared to accept English documents, occasionally a judge may require translations.

The competent court for an arrest is the local court ("*Amtsgericht*") in whose district the vessel is located at the time of arrest. The local court judges are, in general, not experienced with shipping matters.

8. What maritime liens / maritime privileges are recognised in your jurisdiction? Is recognition a matter for the law of the forum, the law of the place where the obligation was incurred, the law of the flag of the vessel, or another system of law?

Germany is not a signatory to the International Convention on Maritime Liens and Mortgages 1967 or 1993. Yet, Germany has transformed the 1967 Convention into domestic law but contractual cargo claims are excluded. Maritime liens exist for crew wages, public port fees and pilot fees, non-contractual personal injury and death or damage to property, salvage remuneration, general average contributions and wreck removal as well as authority claims for social-security contributions against the owner. Maritime liens take priority over other liens and over mortgages. As per Art. 45 of the German Introductory Act to the Civil Code ("*Einführungsgesetz zum Bürgerlichen Gesetzbuch*" or "*EGBGB*") for the formation of maritime liens, the *lex causae* principle applies.

9. Is it a requirement that the owner or demise charterer of the vessel be liable in personam? Or can a vessel be arrested in respect of debts incurred by, say, a charterer who has bought but not paid for bunkers or other necessaries?

The wording of German law on arrest is wider than the 1952 Arrest Convention, i.e. an arrest can be made for obtaining security for any claim for payment.

However, an arrest will be granted only if the owner of the vessel is the debtor of the claim to be secured. If claims are covered by a maritime lien, e.g. against a bareboat or demise charterer, an arrest is also possible.

10. Are sister ship or associated ship arrests possible?

Yes, the arrest of a sister ship is possible if the sister ship is owned by the debtor. Similarly, if an associated ship is not owned by the debtor, such vessel cannot be arrested.

11. Does the arresting party need to put up counter-security as the price of an arrest? In what circumstances will the arrestor be liable for damages if the arrest is set aside?

It is in the discretion of the court to request security. If the court decides to request security, the vessel's daily charter hire may be taken as a broad rule of thumb plus the court's cost which mostly include costs for the vessel's safekeeping during the period of arrest. From a practical perspective and as time is usually of essence, it is therefore helpful if the arrestor liaises with its' bank before an arrest application is made in order to be able to provide security if so requested by the court to enable swift vessel arrest. In practice, security amounts and the basis for their calculation vary substantially.

For the execution of an arrest order the arresting party

will involve a court bailiff. The court bailiff will serve the arrest order on board and will take control over the vessel. The bailiff may request an advance payment for his safekeeping costs during the arrest.

In case the court's arrest order proves unfounded from the beginning, the arrestor is liable to the opponent for damages resulting from the arrest or from having put up security. Strict liability applies in the event of an unlawful arrest.

12. How can an owner secure the release of the vessel? For example, is a Club LOU acceptable security for the claim?

Every arrest order has to determine an amount of money that, if lodged, will suspend enforcement of the arrest order. The type of security provided is in the discretion of the court. Yet, generally security is provided by way of a bank guarantee which needs to be issued by bank entitled to operate in Germany. Alternatively, security may be provided in cash. Yet, this is rarely seen.

If the arresting party agrees, the court will not object that the arrested vessel may be released against presentation of a club letter from an IG P&I Club.

13. Describe the procedure for the judicial sale of arrested ships. What is the priority ranking of claims?

Naturally, an arrest order itself does not entitle the arresting party to initiate the sale of the vessel as the arrest is only a preliminary measure to safeguard enforcement of a potential court judgment. This is only possible after a final, unappealable judgment is obtained. Only then the arresting party may apply for a judicial sale of the vessel.

Germany has not signed the 2022 Beijing Convention on the Judicial Sale of Ships while the European Union has. As the Convention has not yet entered into force, the judicial sale of Ships in Germany is still subject to domestic law. The judicial sale of ships is governed by a generic judicial sales act which applies to any type of judicial sale. The priority of claims is rather complex. It goes beyond the scope of this format to lay these out in this brief Q&A paper.

14. Who is liable under a bill of lading? How is "the carrier" identified? Or is that not a relevant question?

The person obliged under a bill of lading ("*Konnossement*") is the person that executed the bill of lading. This person is considered as the carrier ("*Verfrachter*") although there may be a different contractual carrier ("*vertraglicher Verfrachter*").

In principle, the carrier can be identified from the bill of lading itself provided it names the carrier and the natural person signing the bill of lading had authority to do so.

Usually, the bill of lading will be signed by a natural person for and on behalf of the carrier. Pursuant to sec. 479 para. 1 HGB, the master has statutory power of attorney to sign for and on behalf of the owner ("*Reeder*") provided that the owner is the contractual carrier. Therefore, if the owner is not the contractual carrier because there is no (valid) contract of carriage, the bill of lading is invalid due to lack of statutory power of attorney. The master may, however, rely on individual authority vested by a power of attorney by the person named as the carrier. While the master usually has no such individual power of attorney, agents or brokers may have been vested with such authority.

Sometimes a bill of lading does not name a carrier. In that instance, if the bill of lading is signed by the master or an authorised representative of the owner, pursuant to sec. 518 HGB the bill of lading obliges the owner provided it does not name a carrier at all or provided it names a person as carrier that is not the contractual carrier.

15. Is the proper law of the bill of lading relevant? If so, how is it determined?

From a German perspective it is relevant to determine the proper law of the bill of lading to assess its validity and effect. However, unfortunately, there exists no codified conflict of laws rules as regards bill of ladings, so that the respective legal situation is not entirely clear and subject to dispute in literature.

For this publication, the situation can be summarized as follows: the law governing the rights to the bill of lading ("*Wertpapiersachstatut*") is the law applicable pursuant to art. 43 EGBGB which follows the doctrine of *lex rei situ*. The situation as regards the law governing the rights securitised in the bill of lading ("*Wertpapierrechtsstatut*") is less clear. If the bill of lading contains a choice of law clause, the chosen law will apply. If it does not provide for a choice of law, some sources in legal literature suggest that the law applicable at the port of destination will apply. Legal opinion on this question is, however, divided

and it is not certain that a German court will follow this approach.

16. Are jurisdiction clauses recognised and enforced?

Pursuant to the case law of the Federal Court of Justice ("*Bundesgerichtshof*") and the European Court of Justice jurisdiction clauses agreed between the shipper and the carrier which are inserted in a bill of lading bind the consignee under that bill of lading. It is, however, worthy of note that this case law is not applicable to jurisdiction clauses in seaway bills.

17. What is the attitude of your courts to the incorporation of a charterparty, specifically: is an arbitration clause in the charter given effect in the bill of lading context?

Pursuant to sec. 522 para. 1 HGB an agreement to which the bill of lading merely makes reference is not incorporated into the bill of lading. Therefore, pursuant to the official reasons submitted by the legislator when sec. 522 HGB was introduced in 2013 as part of Germany's new maritime commercial law, the typical bill of lading clause that „*all terms and conditions of the charterparty are herewith incorporated*" will have no effect under German law. However, explicit individual references to individual terms of the charter party are generally valid. Nonetheless, sec. 522 para. 1 HGB has been subject of much dispute in German legal literature: Some commentators suggest that such individual references would also have to restate the major terms of the provision referred to. As of today, there exits, however, no settled case law on what constitutes an explicit individual reference.

18. Is your country party to any of the international conventions concerning bills of lading (the Hague Rules, Hamburg Rules etc)? If so, which one, and how has it been adopted – by ratification, accession, or in some other manner? If not, how are such issues covered in your legal system?

Germany is a state party to the Hague Rules but not the Hague Visby Rules, Hamburg Rules or Rotterdam Rules.

Under German law, there is, however, no direct referral to the Hague Rules as they were originally incorporated into the HGB. However, when Germany adopted its new maritime commercial law in 2013 as part of the HGB, Germany incorporated the Hague Visby Rules in its new law so that the domestic law on bill of ladings resembles the Hague Visby Rules

However, a corrective mechanism was introduced Art. 6 of the Introductory Code to the German Commercial Code ("*EGHGB*") to enable Germany to comply with its obligations under international law. This provision ensures that vis-à-vis other state parties of the Hague Rules Germany applies the rules of the Hague Rules whereas otherwise the rules of the German Commercial Code provide for the liability rules of the Hague Visby Rules even if Germany is not a state party to these rules.

19. Is your country party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? If not, what rules apply? What are the available grounds to resist enforcement?

Germany is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which has also been transferred into Germany's arbitration law in the Tenth Book of the German Code of Civil Procedure ("*ZPO*").

To be enforceable in Germany, both German and foreign arbitral awards need to be declared enforceable respectively recognized and declared enforceable by a competent German court. The recognition and enforcement of foreign arbitral awards is governed by the rules of the 1958 New York Convention as per sec. 1061 para. 1 ZPO while a German arbitral award will not be declared enforceable pursuant to sec. 1060 ZPO if one of the prerequisites for the setting aside of an arbitral award set out in sec. 1059 ZPO is met. These prerequisites can be divided into violations of procedural rights and sovereign reasons. The first category comprises lack of an arbitral agreement, insufficient notification of the appointment of an arbitrator or other violations of the right to be heard and the insufficient formation of the arbitral tribunal. The second category comprises matters not arbitrable under German arbitration law and, more generally, matters in which enforcement would be incompatible with the German *ordre public.* Independently of proceedings for the enforcement of an arbitral award, these reasons can also be raised in matters for the setting aside for an arbitral award.

Beyond these remedies all remedies available to a debtor under the law of compulsory enforcement can be made use of to fend off execution measures.

20. Please summarise the relevant time limits for commencing suit in your jurisdiction (e.g. claims in contract or in tort, personal injury and other passenger claims, cargo claims, salvage and collision claims, product liability claims).

The general limitation period for *inter alia* claims in contract or in tort is three years from the end of the year in which the event giving rise to the claim occurred and in which the claimant became aware if the event and the person of the debtor.

This general limitation period is heavily modified for maritime claims by sec. 605 *et seq.* HGB:

Claims under a contract for ocean carriage, charter party claims, claims in general average and certain recourse claims between ship owners of vessels involved in a collision become time-barred within one year. In case of carriage claims the period will commence on the day the goods were delivered or should have been delivered. In the three other cases, the period will commence at the end of the year in which the event giving rise to the claim occurred.

Passenger claims, claims arising from a collision, salvage claims and wreck removal claims will become time-barred within a period of two years. The period for passenger claims will commence on the day of disembarkation or planned disembarkation or, in case of death, the day of death. The period for collision claims will begin on the day of collision whereas the period for salvage and wreck removal claims will begin on the day the respective work is concluded.

All limitation periods may be changed by contractual agreement or be suspended for various reasons.

21. Does your system of law recognize force majeure, or grant relief from undue hardship?

German private law does not recognize the concept of *force majeure.* However, statutory private law provides that a party will be relieved of an obligation if performance is impossible and that a party is entitled to a modification of contract in case circumstances that became the basis of the contract change seriously after the conclusion of contract and if the parties would not have concluded the contract had they foreseen this change. Such modification will, however, only be granted if performance of the unaltered contract is unbearable for the party concerned.

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