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Lebuhn & Puchta is a nationally and internationally active commercial law firm with a team of 17 specialised lawyers, including seven partners. Established in 1950 and located in Hamburg, the traditional heart of the firm's practice lies in the maritime and insurance sectors, as well as in corporate law and M&A. The firm's core fields of practice also include general commercial law, trade, transport and logistics, reinsurance and renewable energy, in particular offshore wind. In matters of shipping and ship finance, Lebuhn & Puchta is long established as one of the leading firms in Germany. The firm's lawyers who advise on German and on English law, are frequently instructed in high-volume, complex, as well as internationally-set matters and are recognised for their work at the interface between shipping and corporate law. The team of lawyers who maintain professional contact with shipping experts around the world offers advice across the entire maritime law spectrum, including the sale, purchase and finance of ships of all kinds. The firm's client base includes shipyards, shipowners, ship management companies, inland shipping operators, classification societies, protection and indemnity clubs, other insurers and insurance brokers, as well as various companies from the offshore industry.

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1. Maritime Finance: Legal Incentives for Maritime Finance Entities and Projects

1.1 Draft of Maritime Finance Law

In Germany, there is no specific instrument of law seeking to promote maritime finance business. There are, however, a number of facilities that serve as an incentive to invest in ocean shipping (see **1.6 Fiscal Incentives**,below).

1.2 Maritime Finance Entity

Under German law, unlike some other systems of law, there is no defined maritime finance entity encompassing a variety of maritime players (such as banks, vessel owners, managers and intermediaries) that is subject to a particular set of regulations aimed at supporting the maritime finance business.

1.3 Entities Subject to Maritime Finance

See **1.2 Maritime Finance Entity**,above.

1.4 Maritime Finance Projects

Against the background to **1.2 Maritime Finance Entity**, above, something similar to a maritime finance project for the purposes of German legislation may be sought. For a potential shipowner, the process would typically include acquiring a vessel, ie by having it built or by purchasing it on the market, financing the vessel and making the arrangements to obtain permission to fly the flag of its choice, which may involve establishing the company in a foreign flag state to which the vessel is bareboat-chartered.

1.5 Maritime Projects' Eligibility for Incentives

See **1.2 Maritime Finance Entity**,above.

1.6 Fiscal Incentives

German law features a number of mechanisms to promote German shipowners, such as permission to fly a flag other than the German flag. Also, there is a tonnage tax system in place. Finally, a vessel owner may deduct the regular income tax from the crew members' wages without passing it on to the tax authorities.

Permission to Flag Out

As a rule, a vessel owned by a German company would be entered in one of the German ship registers. The ship register is concerned with private law issues, such as the identification of the vessel owners, the property in the vessel and mortgages. Normally, a ship owned by a German company must fly the German flag. However, the German vessel owner may obtain permission to fly a foreign flag, despite the vessel being entered in a German ship register.

This permission is granted for a maximum of two years, but is renewable. Once the vessel has valid permission to fly the foreign flag, it may not fly the German flag. Shipowners' principal motive for leaving the German flag is to reduce operational costs.

Further, permission to fly a foreign flag is granted only if the resulting drawbacks for German shipping are compensated. This requires that the vessel owner, irrespective of the foreign flag, must have one or more workplaces on board reserved for maritime training for a set period of time (based on the vessel's tonnage). The respective jobs may relate to ship mechanics and/or nautical or technical officers' assistants, and need not be reserved for German nationals or those of European member states.

If the vessel owner proves it is not possible to provide training positions on the flagged-out vessel, permission may be granted to make payments to a maritime educational foundation established by the German Shipowners' Association in lieu of the training. The respective amounts will reflect the costs for providing corresponding positions on the vessel. If the owner fails to observe the requirements for the permission to flag out the vessel, the authorities may withdraw this permission.

Tonnage Tax

The tonnage tax regime may be applicable to a shipowner, resulting in a privileged calculation of the profit made from the ship's operation. The vessel must be managed from Germany and operated in international trade, ie used to carry passengers or goods to, from or between foreign ports.

The tonnage tax regime is available in relation to vessels owned or managed by the shipowner, as well as to chartered vessels (if the shipowner concurrently owns vessels operated in international trade).

The tonnage tax principle does not, as the term may indicate, relate to a tax levied on the vessel's tonnage, but to the calculation of its profit. This in turn triggers the regular taxes to be determined on that profit. The assumed profit is calculated on the basis of fixed rates determined by the vessel's tonnage. As a result, it would be to the owner's benefit if the actual profit made exceeded the profit calculated under the tonnage tax regime. On the other hand, the calculated profit will stand, even if the actual profit made by the vessel falls short.

Withholding Income Tax

Finally, shipowners are entitled to withhold income tax payable on crew wages on board German-flagged vessels. The vessel owner or employer deducts the regular income tax payable under German law from the crew's wages, but holds on to the money rather than passing it on to the tax authorities. In this way, the seafarers' interests are not affected. The purpose of this regime is to put German shipowners in a position comparable to their foreign counterparts, who, in many cases, do not need to pay income tax in respect of their crews.

1.7 Labour Incentives
German law provides another incentive to keep vessels under the German flag. It is based on the International Shipping Register (ISR), which at the time of its introduction in 1989 sparked heavy political dispute. The ISR is not a public register, but merely a record kept by the federal maritime authority in which ships operated in international trade may be entered. This requires that the owner predominantly uses the vessel to carry passengers or goods to, from or between foreign ports.

Entry in the ISR triggers a regime enabling the shipowner to provide for the application of a law other than German law (the norm for German-flagged vessels) in labour contracts with crew members.

The German provisions on social security, however, remain applicable to all crew members. The German Constitutional Court has confirmed that ISR legislation, to the extent discussed here, does not violate the German constitution, and is valid and binding.

1.8 Immigration Incentives
German law does not provide for any particular immigration incentives.

1.9 Documents Required for Authorisation
See **1.2 Maritime Finance Entity**,above.

1.10 Constitution of Maritime Finance Authority
In Germany, there is not one entity responsible for maritime finance. Rather, there are a number of players acting in different roles. The Federal Maritime Authority (*Bundesamt für Seeschifffahrt und Hydrographie*) is responsible for allowing the flagging out of vessels (see **1.6 Fiscal Incentives**, above) and for maintaining the ISR (see **1.7 Labour Incentives**, above).

The tax authorities are concerned with tonnage tax issues and questions relating to the withholding of income tax. Finally, the German Shipowners' Association may provide assistance in relation to the flagging out of vessels (see **1.6 Fiscal Incentives**,above).

1.11 Expiration of Incentives
The permission granted to a German shipowner to fly the flag of a foreign state is limited to a period of two years (see **1.6 Fiscal Incentives**, above). The other regimes, ie tonnage tax, the right to withhold income tax and the vessel's entry in the ISR (see questions **1.6 Fiscal Incentives**, and **1.7 Labour Incentives**, above) are available throughout and not subject to limitation.

2. Substantive Provisions for Limitation of Liability for Maritime Claims

2.1 LLMC 76
See **2.2 1996 Protocol**,below.

2.2 1996 Protocol
Germany is a party to the 1996 protocol to the convention on Limitation of Liability for Maritime Claims 1976. The protocol, with its significant increase of liability limits, came into force in Germany on 13 May 2004. Germany has terminated LLMC 1976 and is party only to the convention in the amended form of the 1996 Protocol.

The limitation convention in the form of the 1996 Protocol is directly applicable under German law pursuant to Sec. 611 of the German Commercial Code. Germany has made use of certain reservations as permitted by the limitation convention. Accordingly, German national law provides for specific rules for the limitation of liability of pilots, and limitation in respect of the following:

- claims for wreck removal;
- claims against small ships (under 250 tons); and
- claims in respect of damage to harbour works, basins and waterways and aids to navigation.

2.3 Other Provisions for Limitation of Liability
Germany is a party to the 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims 1976.

2.4 Limitation of Liability Time Bar
German law does not provide for a specific limitation of liability action. Rather, the constitution of a limitation fund is regarded as a mere defence and is admissible only if legal proceedings have been instituted in Germany in respect of claims subject to limitation. Therefore, there is no time bar for filing a limitation of liability action.

The procedural rules relating to the constitution and distribution of a limitation fund are governed by the Shipping Distribution Statute 1986, as amended in 2013.

It is worth noting that, under German law, limitation of liability may also be invoked as a defence in proceedings without establishing a limitation fund (see Article 10 (2) LMC).

2.5 Claims Subject to Limitation of Liability
The maritime claims listed in Article 2 of the convention are subject to limitation of liability. Accordingly, liability may also be limited under German law in relation to these claims, the most important being the following:

- loss of life or personal injury occurring on board or in direct connection with the operation of the ship or with salvage operations;

- loss of or damage to property occurring on board or in direct connection with the operation of the ship or with salvage operations; and
- consequential loss resulting therefrom.

In addition, Sec. 611 German Commercial Code provides that claims under the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (Bunker Oil Convention) are also subject to limitation under the rules of the LLMC.

2.6 Claims not Subject to Limitation of Liability

Claims listed in Article 3 LLMC are excepted from limitation, including:

- claims for salvage;
- claims for contribution in general average; and
- claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage, 1992 (CLC Convention).

Under the specific rules of German law, a shipowner may not limit liability for claims of crew members if the contract is governed by German law. Moreover, claims for the reimbursement of costs incurred by pursuing the claim in legal proceedings are excepted from limitation.

As mentioned above, Germany has made use of the reservation provided for in Article 18 LLMC and has inserted specific rules for claims for wreck removal in its national law. According to these rules, claims for wreck removal are subject to a separate limitation fund which is specifically reserved for these claims, Sec. 612 German Commercial Code.

2.7 Conduct Barring Right to Limitation of Liability

Under German law, the provision of Article 4 LLMC is directly applicable. It provides that a person loses his right to limit his liability if the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

From a German viewpoint, the question as to whose personal act is relevant to determine the degree of fault if the shipowner is a company is not answered in Article 4 LLMC. This gap has been closed by a provision of German national law, Sec. 616 German Commercial Code. Under this rule, the right to limitation is lost if a member of the management board has acted with intent or wilful misconduct.

The claimant who pursues a claim subject to limitation against the shipowner bears the burden of proof in respect of the circumstances necessary to establish intent or wilful misconduct on the part of the shipowner. Among the reported German court decisions, there is as yet no known case in which a claimant has successfully established such a high degree of personal fault of the shipowner under Article 4 LLMC.

2.8 Limitations of Liability

The limitations fixed in the LLMC were increased by an IMO Resolution in 2012 by way of tacit acceptance according to Article 8 of the Protocol 1996. Germany has applied the increased limitation since 8 June 2015.

Accordingly, the following limits under Article 6 LLMC are applied by German courts for claims arising out of any distinct occasion (other than passenger claims):

- In respect of claims for loss of life or personal injury, the limit of liability is 3.2 million special drawing rights (SDR) for a ship with a tonnage not exceeding 2,000 tons.
- For a ship with a tonnage in excess thereof, the following amounts apply in addition to the above amount:
  - (a) SDR1,208 for each additional ton between 2,001 and 30,000 tons;
  - (b) SDR906 for each additional ton between 30,001 to 70,000 tons; and
  - (c) SDR604 for each additional ton in excess of 70,000 tons.
- In respect of other claims, the limit of liability is SDR1.51 million for ships with a tonnage not exceeding 2,000 tons.
- For ships with a tonnage in excess thereof, the following amounts apply in addition to the above amount:
  - (a) SDR604 for each additional ton between 2,001 and 30,000 tons;
  - (b) SDR453 for each additional ton between 30,001 and 70,000 tons, and
  - (c) SDR302 for each additional ton in excess of 70,000 tons.

2.9 Breaking Shipowners' Right to Limit Liability

A party can break the shipowners' right to limit liability if it proves that the prerequisites of Article 4 LLMC are fulfilled. It is necessary to establish that the shipowner acted with intent or recklessly and with knowledge that the loss would probably result (see answer to **2.7 Conduct Barring Right to Limitation of Liability**, above).

2.10 Acceptable Guarantees

The German statute governing the establishment and distribution of a limitation fund (Shipping Distribution Statute 1986, as amended in 2013) regulates the way in which the fund must be established. As a general rule, it is by cash deposit of the limitation amount, fixed by the competent court according to the limits of Articles 6 and 7 LLMC. Alternatively, at its discretion the court may allow the fund to be established by way of a guarantee. The court will have to be convinced that the guarantor is financially sound and

will be able to honour the guarantee. Major bank and insurance company guarantees will usually be acceptable, as will LOUs from large and well-known P&I Clubs.

2.11 P&I Clubs' IOUs

See **2.10 Acceptable Guarantee**, above.

2.12 Other Claims

Once a limitation fund has been established in accordance with the German Shipping Distribution Statute, any claims subject to limitation must be pursued against the fund. Any other legal action against the shipowner in relation to the claims will become inadmissible, including the arrest of a ship.

If proceedings relating to a claim that is subject to limitation are already pending when the limitation fund is established, these proceedings will be stayed. Prior arrests of ships will have to be lifted by a respective court order upon application of the shipowner if the limitation fund is established.

3. Procedure for Judicial Sale of Vessels Before Maritime Courts

3.1 Local Maritime Courts

The purpose of a judicial sale of a vessel is to enforce a judgment against the vessel owners. The creditor who has obtained a judgment may also decide to enforce it by way of a mortgage on the vessel entered in the register in relation to his or her claims. In practice, however, creditors will normally proceed by way of a judicial sale. Further, the respective creditor may also enforce the judgment against the vessel owners against any other of their assets, such as claims for outstanding hire and freight.

Before the judicial sale of the vessel is ordered by the court, a number of requirements need to be met. The basis of a forced sale is a judgment in favour of the creditor against the vessel owner for payment. A judgment against the owner pro hac vice (normally the bareboat charterer), the manager or a charterer of the vessel is not sufficient.

The judgment may be issued by a German court or by a court located in an EU member state. Judgments handed down by non-EU courts need to be recognised and declared enforceable by a German court. In lieu of a judgment, a German court will accept an arbitration award against the owners, rendered by a German or a foreign tribunal. The award, however, must be formally recognised and declared enforceable by a German court or a court of an EU member state.

In practice, judgments and awards are the most common types of titles against the vessel owners. Also, banks involved in the financing of the vessel may rely on notarised documents in which the vessel owners submit to an immediate enforcement in respect of outstanding amounts in cases of default.

Creditors who have a mortgage or a maritime lien in the vessel may wish to proceed against the vessel. To that end, they require a judgment against the vessel owner (or the owner pro hac vice) ordering forbearance of enforcement proceedings in the vessel.

Further, before a judicial sale may commence, the respective creditor requires the confirmation of the court that they are entitled to enforce the underlying document, eg the judgment. Normally, this is a mere formality dealt with by simply adding a remark to that effect on the judgment.

Finally, the judgment (including the confirmation added by the court that the document is subject to enforcement) must be formally served upon the vessel owner (not the owner pro hac vice). This may require considerable efforts, especially if the owner's place of business is in some offshore location. In which case, the service of documents may be subject to international conventions, the formalities of which must be closely observed. German law does not permit the service of documents relating to a judicial sale of the vessel upon the master as an agent of the vessel owner. In practice, however, this has occurred in a number of cases and ultimately been accepted by the courts.

3.2 Notification of Judicial Sale

As a matter of German law, the judicial sale of the vessel is publicised in the official information system of the court. Further, it is required that a notification is also made in a suitable shipping publication (such as Lloyd's List).

3.3 Appraisal of Vessels

A formal determination of the vessel's value is not required in judicial sales under German law. The minimum bid allowed is determined by the amount of the claims that have priority over the claim of the creditor pursuing the judicial sale, together with the costs of the judicial sale. However, the court and any participating creditors, as well as the potential bidders, may wish to seek a private evaluation.

3.4 Judicial Sale Proceedings

It is possible that no bids are made in the course of the auction or that those made are refused by the court. In that situation, the judicial sale proceedings are stayed. The court must determine a second hearing in which potential buyers may place bids. If this auction bears no fruit, the judicial sale proceedings are terminated and the vessel is put under forced administration.

3.5 Minimum Bids

The minimum bid accepted by the court is determined by the amounts of the claims that have priority over the claim of the creditor pursuing the judicial sale (the claim of that

creditor is not relevant for the minimum bid) and the costs of the proceedings. The minimum bid requirements apply only to vessels entered in a German ship register and not to foreign vessels.

3.6 Judicial Sale Auction Date
On the auction date, at the time and place determined by the court, the assistant judge in charge of the judicial sale opens the proceedings by formally requesting that the attending parties place bids. In relation to any valid bid, a security of 10% of the offered amount must be placed immediately. Invalid bids are rejected by the court. The minimum period within which bids may be made is 30 minutes. However, the court will normally give all interested parties reasonable time to come forward with bids. Bids are accepted only if they exceed the preceding bid.

After the final valid bid is accepted by the court, the auction participants have the opportunity to comment upon it. The court, having determined that there is no reason to reject the bid, will formally issue an order accepting the last bid. Once that order is binding, property in the vessel is transferred to the winning bidder.

3.7 Prospective Bidders
German law does not require that parties attending an auction relating to a judicial sale of a vessel and intending to make bids be represented by local counsel.

3.8 Actions Required to Participate
Prospective bidders must be present when the auction begins. Only oral bids may be made on this occasion. Also, the potential bidder must ensure that court-approved security is posted and that documentation confirming this is available when the first bid is placed.

Security must cover 10% of any subsequent higher bid from the bidder. As such, the assistant judge will confirm only that sufficient security has been provided and will not disclose the actual amount to the other bidders.

3.9 Sale Price Timeline
Once the court order accepting the winning bid has become binding, property in the vessel is automatically transferred to the bidder. No further formalities are required. German law does not specify any particular period of time within which the bidder must effect payment of the balance in relation to the winning bid. Rather, the creditors entitled to the proceeds of the sale may claim directly from the bidder. They are secured by a mortgage on the vessel, which is entered in the register. This does not apply to vessels entered in the register of a foreign state.

3.10 Other Bids
There are no restrictions as to who may place bids at the auction. In particular, all creditors are entitled to attend and to make bids.

3.11 Winning Bidder and Arrest Expenses
German law does not, in relation to vessels entered in a German ship register, contemplate that any bid not covering the costs of the judicial sale (and the prior-ranking claims) will be accepted (see **3.5 Minimum Bids**, above). This does not apply to foreign vessels.

4. Carriage of Goods by Sea Claims

4.1 Carriage of Goods
Germany is a member state of the Hague Rules of 1924, ie, the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading. Germany is not a signatory of any of the successor conventions, eg, the Hague-Visby Rules (Brussels Protocol 1968) or the Hamburg Rules (UN Convention on the Carriage of Goods by Sea, 1978) or the Rotterdam Rules (UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008).

However, regarding the Hague-Visby Rules, it is important to note that domestic German maritime law has incorporated the provisions of the Visby protocol, though it has not been ratified.

4.2 Rules Applicable to Cargo Claims
In principle, domestic German maritime law, as codified within the German Commercial Code, applies to all cargo claims. However, if the case involves a bill of leading governed by the Hague Rules of 1924, the German provisions apply only to the extent they are in accordance with the Hague Rules.

4.3 Scope of Rules
German carriage of goods by sea rules form part of German domestic maritime law, which has incorporated the provisions of the Visby protocol. The rules cover the general obligations of the contracting parties resulting from either a contract for the carriage of general cargo or a voyage charter contract, as well as liability issues and time bar. There are also specific regulations regarding bills of lading. These rules apply to any commercial carriage. If the case involves a bill of lading issued in a contracting state to the Hague Rules, the rules apply only to the extent they are in accordance with the Hague Rules.

4.4 Bill of Lading Evidence
German law distinguishes clearly between the contract of carriage on the one hand and the bill of lading on the other. The contract of carriage obliges the carrier to carry the goods

by ship and to deliver them at their destination, while the shipper must pay the freight in return. In contrast, the bill of lading is a security paper certifying the right to delivery of the goods. Depending on the circumstances of the case, however, a bill of lading may evidence the terms of the contract of carriage by virtue of commercial custom.

4.5 Contracting Parties
The contracting parties in a carriage of goods by sea contract are the respective carrier and the respective shipper who entered into the contract.

4.6 Cargo Claims
Under the contract of carriage, the shipper is first entitled to pursue cargo claims. After arrival of the goods, however, the consignee is also entitled to pursue cargo claims in his or her own name. Beyond the right to delivery this includes possible claims due to loss of or damage to the goods or delayed delivery.

4.7 Suing for Cargo Claims
Both the contractual carrier and the actual carrier (ie, the party that performed the carriage in whole or in part as a matter of fact) can be sued under the contract of carriage, at claimant's option. The carrier and the actual carrier are liable as joint and several debtors.

4.8 Carrier
When the carrier is mentioned on the front page of the issued bill of lading, while the general terms and conditions provide for a so-called Identity of Carrier clause (IoC clause), according to which the owner of the vessel is supposed to be the carrier, the IoC clause is ineffective.

In its decision dated 22 January 1990, the German Supreme Court found that the designation on the front page prevails over the IoC clause in general terms and conditions. Otherwise, if a bill of lading identifies the wrong person as carrier or fails to identify the carrier at all, the owner operating the vessel is deemed to be the carrier by law.

4.9 Suing the Vessel
Under German law, it is not possible to sue the vessel in rem for cargo claims.

4.10 Right in Rem or Maritime Lien
Under German law, cargo claims do not give rise to a right in rem or maritime lien.

4.11 Tort
Under German law, claims in tort can be pursued in addition and in parallel to contractual claims.

4.12 Himalaya Clauses
German statutory maritime law extends the scope of the carrier's limitations of liability to claims in tort against the carrier's servants or members of the crew. There is no extension of the limitations of liability to other independent contractors of the carrier.

4.13 Immunities
German maritime legislation excludes the carrier's liability to the extent the loss of or damage to the goods results from the following:

- perils, dangers and accidents of the sea or other navigable waters;
- war or hostilities, social unrest, acts by public enemies, or measures taken by sovereigns, as well as quarantine restrictions;
- seizure by a court;
- strikes, lockouts or other restraints of labour;
- acts or omissions by the contractual or the actual shipper, specifically insufficiency of packing or improper marking of the cargo units by the contractual or actual shipper;
- inherent features or characteristics of certain goods that make them particularly susceptible to damage, particularly by way of breakage, rust, internal spoiling, drying, leakage, or normal wastage in bulk or weight;
- the carriage of live animals;
- measures to save human life at sea; and
- salvage measures at sea.

4.14 Limitation of Liability Regime
According to German statutory maritime law, the compensation for total or partial loss of goods or for damage to the goods, including the costs for the assessment of the loss or damage, is limited to the amount of SDR666.67 per package or per unit or to the amount of SDR2 per kg of the goods' gross weight, whichever is higher.

If a container, pallet or any other article of transport is used to consolidate cargo units, then each package and each unit listed in the bill of lading or a similar accompanying document as being contained in a given article of transport is deemed to be a 'package' or 'unit' in terms of the limitation regime. If the bill of lading or the similar accompanying document does not does not provide this information, the given article of transport is considered to be a package or unit. With regard to claims under a bill of lading governed by the Hague Rules of 1924, however, it is important to know that in such a case the limitation of liability regimeprovides for the limitation to the amount of SDR666.67 per package or per unit only.

4.15 Burden of Proof in Cargo Claim
With regard to cargo claims, the crucial liability of the carrier under German statutory maritime law is the carrier's liability for the loss of or the damage to the goods that occurred while the carrier was in charge of the goods, ie between the time of taking over the goods and delivering them. In respect to this liability, the burden of proof follows a rather complex

scheme depending on the facts of the case, in particular on whether the vessel was unseaworthy.

However, the following can be said as a general rule:

- the claimant alleging loss of or damage to the goods bears the burden of proof in respect of the fact that:
  (a) any loss or damage occurred; and
  (b) the loss or damage occurred while the goods were in the carrier's custody.
- Once this is established by the claimant, the carrier's fault is presumed. To prove the absence of fault, the carrier needs to explain and prove the circumstances that caused the loss or damage, and establish that these circumstances could not have been avoided by a prudent carrier exercising due diligence. This requirement applies also with regard to the carrier's servants, the vessel's crew or any independent contractors, unless the parties agreed otherwise in the contract of carriage or the bill of lading, as the case may be;
- if one of the typical excepted perils (such as perils, dangers and accidents of the sea or war, hostilities, social unrest, etc) is involved, the carrier might in addition rely on these particular grounds for exclusion of liability for its defence. The carrier, then, needs to prove that:
  (a) the particular excepted peril on which the carrier relies did occur while the goods were in the carrier's custody; and
  (b) this was causative for the loss or damage, whereby there is the legal presumption of causality, if according to the facts of the case there is a preponderant probability of causality;

- regarding cases where the claimant has established lack of seaworthiness or cargoworthiness, either of which is likely to have caused the loss or damage according to the facts of the case, the carrier needs to prove that the lack of seaworthiness or cargoworthiness could not have been discovered at the outset of the voyage by the exercise of due diligence.

In respect of the notification of loss or damage, German statutory law provides that the consignee or the shipper must notify the carrier in detail and in writing:

- on delivery of the goods, if the damage is externally discernible; or
- if this is not the case, within three days of the date of delivery.

Failure to give notice within these time limits does not deprive the shipper or the consignee of a claim for damage, but establishes the legal presumption that the goods were delivered without damage.

4.16 Time Bar in Cargo Claims

Claims under both a contract for the carriage of goods by sea and a bill of lading become time-barred after one year.

The limitation period commences on the date the goods were delivered or, in absence of delivery, on the date the goods should have been delivered.

If the claims arise from a voyage charter contract, the limitation period commences on the date the goods were delivered at the end of the last voyage, or is based on the date they should have been delivered.

4.17 Time Bar Extension

In principle, the parties can extend the time bar for claims under the contract for the carriage or under a bill of lading, with the exception of liability for intent.

An agreed foreshortening of the limitation period in a bill of lading has no bearing on third parties.

4.18 Validity of Jurisdiction and Choice of Law Clauses

In principle, German courts do recognise jurisdiction clauses and choice of law clauses contained in a bill of lading. It is important to note, however, that clauses seeking to incorporate terms by reference will not become part of the bill of lading. For example, the phrase 'All Terms and Conditions of the Charter Party are herewith incorporated' would fail to incorporate any of the clauses of the charter party, including its jurisdiction and choice of law clauses.

5. Marine Accidents in Waterways

5.1 Marine Accidents Law

In the first place, the parties' liabilities in marine accidents are determined by the international conventions applicable in Germany, the most prominent of which are:

- the CLC Convention, which concerns claims against the owners of tankers for oil pollution damage;
- the Bunker Oil Convention, on shipowners' liability for bunker oil pollution damage;
- the International Convention on the Removal of Wrecks, 2007, which allows the coastal state to claim the costs of wreck removal from shipowners (only applicable in the German exclusive economic zone);
- the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010, which covers the shipowner's liability arising from dangerous goods carried on the vessel (not yet in force); and
- the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, 1910,

which regulates the shipowner's liability in a collision of ships.

If none of the aforementioned international conventions is relevant, the parties' liabilities would be subject to the respective national law. That national law is determined by the principles of international private law. The basic concept is that the liability is determined by the law of the state in which the damage occurred. Thus, if there is an accident in German waterways (see question 2 below), German and any other European courts are bound to apply German law.

The respective European regulation, however, provides for two exceptions:

- if the habitual residence of the damaged party as well as the liable party is in one and the same state (other than Germany), the courts must apply the law of that state. It is assumed that that law is the proper law to determine liability issues between these particular parties; and
- if the parties involved in the maritime accident have a contractual relationship, European legislation on the law applicable to non-contractual claims provides that these claims are subject to the law applicable to the contractual claims. It is assumed that the parties wish to have all claims determined by the law relevant to the contract between them.

5.2 Definition of Waterways

German waterways include all inland waters where shipping may occur, such as rivers, lakes and canals. The same would apply to all ports, including their basins, locks etc, and other facilities located at such waters.

German waterways also encompass the German territorial sea, ie the area extending 12 nautical miles out to sea from the coastlines in the North and Baltic Sea. Any areas further away from the coastline are not considered to be German waterways, such as the exclusive economic zone and high seas.

5.3 Pilotage

In Germany, vessels entering and leaving ports are normally bound to use the services of a local pilot.

As a matter of German law, the pilot does not take command of the vessel to the effect of being considered the master of the vessel as far as navigation is concerned. Rather, the respective legislation assumes that the pilot merely is an adviser to the ship's command.

5.4 Damage Recovery by Shipowners

Under German law, a shipowner may, if justified in the circumstances, bring claims for damages against the local or federal authorities under the concept of state liability. Such a situation may arise in which an authority fails to observe its duties. In Germany, state liability is of a civil nature and gives rise to claims subject to private (not administrative) law. Normally, state liability would arise only if the respective authority's servants acted negligently. If the shipowner is successful in establishing negligence, state liability principles may apply.

5.5 Inspectors

Germany has a Marine Accident Investigation Board (MAIB) in Hamburg purposed with investigating and analysing marine accidents. Its remit is limited to investigating incidents and establishing their underlying causes in order to develop preventative measures. The board is not concerned with failures of the persons involved or issues of negligence and liability. It will not refrain from carrying out the required investigations, however, if there is a chance that its findings could lead to criminal or civil liability of persons involved.

5.6 Marine Accident Investigations

The MAIB is bound to investigate what are internationally defined as 'very serious' marine casualties.

At the outset, a marine casualty is defined as:

- an event resulting in the death of or serious injury to a person, caused by or in connection with the operation of a ship;
- the loss of a person from the ship caused by or in connection with its operation;
- the loss, presumed loss or abandonment of the ship;
- material damage to the ship;
- the stranding or disabling of the ship or the involvement of the ship in a collision;
- material damage caused by or in connection with the operation of the ship; or
- damage to the environment brought about by the damage of the ship or ships caused by or in connection with their operation.

Further, it is required that:

- the vessel involved flies the German flag, irrespective of where the incident occurred;
- the incident occurred in German territorial waters or the German exclusive economic zone, irrespective of the flag of the vessel or vessels involved; or
- substantial German interests are involved, irrespective of the location of the casualty and of the flag of the ship or ships involved.

5.7 Types of Marine Accident

Marine casualties which are not considered to be very serious (see question **5.6 Marine Accident Investigations**,above).

5.8 Hearing Procedure Before Board of Inspectors
Once an investigation starts, the MAIB nominates an investigation leader and defines the scope of the investigation. They are, inter alia, authorised to:

- inspect the site of the marine casualty, including the ship or ships involved, as well as the crew accommodation;
- inspect the wreckage, cargo and equipment;
- take any kind of evidence, which may include the removal of wreckage, objects or substances, including the cargo;
- involve experts;
- require access to all information and records, including the ship's voyage data recorder;
- require the presentation of documents on board that may have a relation to the casualty;
- require access to all results of tests carried out in relation to persons involved, in particular those relating to alcohol and drugs;
- obtain information by inspecting all types of documents and records kept by, inter alia, the owner, the operator or the builder of the vessel, as well as its classification society;
- request assistance from foreign authorities;
- require an autopsy of crew members and other persons on board; and
- to have third parties removed from the site of the casualty.

Once the investigations are finalised, the MAIB will prepare a detailed report on its findings. There is no hearing before the board. The board is required to submit the report within 12 months of the casualty. The report is published, inter alia, on the website of the board. The board is entitled to issue safety recommendations, either together with the report or, in urgent cases, at any time in the course of the investigation.

5.9 Initiating Claims for Damages
If a shipowner wishes to bring claims for state liability against an authority following a marine accident (see **5.4 Damage Recovery by Shipowners**, above), it may commence proceedings before the ordinary civil courts. There are no particular formalities to be observed; proceedings against state entities follow the same scheme as proceedings against private parties.

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5.10 Time Bar for Filing Administrative Claims
Claims brought in respect of state liability are subject to private rather than administrative law (see question **5.4 Damage Recovery by Shipowners**,above). The regular time bar provisions relevant for claims against private parties are applied. The basic limitation period is three years from the end of the year in which the claim arose.

5.11 Types of Damages Claimable
Under German law, the liability of the state corresponds to any private individual's liability.

5.12 Unrecoverable Damages
See **5.11 Types of Damages Claimable**, above.

5.13 Events That Cannot Give Rise to Claims
State liability is not, per se, excluded in certain circumstances. However, the claimant who brings damage claims against the authorities must prove that their servants acted negligently. If the claimant fails on that point, the court will dismiss such claims.

5.14 Procedure for Filing Judicial Claims
Claims for state liability must be pursued before the regular civil courts. All rules under the Code of Civil Procedure apply. Ultimately, the court will render a judgment.

5.15 Time Bar for Filing Judicial Claims
See **5.10 Time Bar for Filing Administrative Claims**,above.

5.16 Exclusive Jurisdiction
Proceedings concerning state liability may be brought before any regular civil court that has jurisdiction according to the regulations of the Code of Civil Procedure.