

Reply by the German Maritime Law Association
to the CMI Questionnaire of 27 January 2020
“General Average”

1. Does the law of your country contain provisions on general average?

Sec. 588 – 595 HGB (German Commercial Code) contain rudimentary substantive law rules on General Average.

Sec. 588 HGB defines the terms “General Average” and “Party to the Adventure” and provides the general rule that damages and expenditures resulting from a General Average shall be distributed among the parties to the adventure. Since the German maritime law reform in 2013 contributions for cargo are no more payable by the owner of the cargo at the end of the common adventure but by the party which bears the risk of loss at the time of the general average act.

Sec. 589 HGB concerns the effect of fault or neglect of a party to the adventure. Sec. 590 HGB defines the assessment of average, which may be claimed by the parties, while Sec. 591 HGB defines the assessment of contributions in General Average. Sec. 592 HGB contains rules on the distribution of General Average disbursement. A maritime lien on the ship is established in Sec. 593 HGB and Sec. 594 HGB provides rules on the lien that rests on the fuel and the cargo as well as on its execution. Sec. 595 HGB refers to the procedures pertaining to the settlement of the General Average.

In addition to these substantive rules on General Average, procedural rules concerning the judicial procedure for the confirmation of the General Average statement are contained in Sec. 402 – 409 FamFG (Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction).

1.1. If so, does such law provide that contributing parties have to provide security in respect of such contributions?

There is no statutory provision that directly obliges the contributing parties to provide security. However, according to Sec. 594 HGB (wording provided in Annex below), the parties entitled to a contribution have a lien on cargo and bunkers and the master is prohibited by law to delivery any such property subject to a lien unless sufficient security has been obtained. The German Commercial Code itself does not address the form of security but in practice it will be either cash or a guarantee provided by an insurer.

1.2. If so, are there statutory requirements for such security?

There are no statutory requirements pertaining to the type and content of the security. As a general rule, if the amount of the security proves to be in excess of the secured claim by more than 50%, the secured party is obliged to release the security to this extent.

1.3. If the law only requires security to be provided but no particular form, is it common in your country that cargo interests issue general average bonds and insurers issue general average guarantees?

It is to a certain extent common that a guarantee is issued by cargo underwriters and that a bond is issued by cargo owners, as this is recognised as international practice. However, from a legal perspective it is neither required that a guarantee or a bond must be issued, nor that both types of security must be issued concurrently.

2. Are there any wordings generally used in your country for such securities?

There is no standardised wording generally used in Germany, but various wordings as requested by various adjusters are used. There is no common understanding of the appropriate wording – which sometimes results in legal discussions as to the acceptable wording.

3. Does the law of your country have any requirements for the validity of such security (like original signature, notarization, consideration)?

Sec. 594 para. 5 HGB merely requires that the contributions are “secured” (“Sicherstellung”). As such, the general civil law requirements apply, foremost that the party making a declaration has proper power to bind itself or someone else (like a company or corporation). There are no other particular legal requirements regarding the validity of the security in case the security constitutes a commercial transaction of a merchant, which also includes cargo underwriters. A simple written security, even if submitted by email therefore suffices. There is no requirement as to notarization.

4. Do such securities usually contain provisions on applicable law and jurisdiction?

Yes. Provisions on the applicable law and jurisdiction should always be, and in most cases are, included to avoid uncertainties, since usually several parties domiciled in different jurisdictions are involved.

ANNEX:

Section 594 HGB (German Commercial Code)

Lien of the parties entitled to a general average disbursement; prohibition of delivery

- (1) To secure their claims to a general average disbursement, the parties entitled to such disbursements shall have a lien on the fuel and cargo of the contributing interests.*
- (2) Said lien shall take priority over all other liens on such property items, even if they arose earlier. If a given property item is subject to several liens pursuant to subsection (1), or if the property is also subject to a lien pursuant to section 585 (2), then the lien for a claim arising later shall take priority over the lien for a claim arising earlier. Any liens for claims arising simultaneously shall rank pari passu as between themselves. Section 603 subsection (3) shall apply mutatis mutandis.*
- (3) Liens pursuant to subsection (1) shall be extinguished one (1) year from the time when the claim secured thereby arose; section 600 (2) shall apply mutatis mutandis.*
- (4) The Reeder shall exercise liens on behalf of the parties entitled to a general average disbursement. Section 368 and section 495 (4) shall be applied mutatis mutandis to the enforcement of liens on the cargo.*
- (5) The master shall be prohibited from delivering property encumbered by liens pursuant to subsection (1) before the corresponding contributions have been adjusted or secured. If, contrary to the first sentence, the master in fact delivers the property, he shall be liable for the damages that he caused, by his fault or neglect, to the parties entitled to a general average disbursement. This shall apply even if the master acted on the instructions of the Reeder.*