

Reply by the German Maritime Law Association

to the CMI Questionnaire of 19 February 2020

“Unified Interpretation for Standard to Break Limitation”

I. PRELIMINARY QUESTIONS

1. Has your jurisdiction ratified the following conventions (the ‘**Conventions**’):

- a. International Convention on Civil Liability for Oil Pollution Damage 1969 (**CLC 1969**)

Yes, the CLC 1969 has been ratified by Germany and entered into force on 18 August 1974. However, the CLC 1969 has been denounced by Germany with effect from 15 May 1998 (cf German Federal Law Gazette 1997, volume II, no 38, p 1678). Nevertheless, the CLC 1969 as amended by the CLC 1992 remains in force (please see below).

- b. 1992 Protocol to the CLC 1969 (**CLC 1992**)

Yes, Germany has ratified the CLC 1992 by law of 25 July 1994 and the revised version of the CLC 1969 as amended by the CLC 1992 entered into force on 30 May 1996 (cf. German Federal Law Gazette 1994, volume II, no. 34, p. 1150 and German Federal Law Gazette 1996, volume II, no. 19, p. 670).

- c. Convention on Limitation of Liability for Maritime Claims 1976 (**LLMC 1976**)

Yes, the LLMC 1976 had been ratified by Germany and entered into force on 1 September 1987 (cf. German Federal Law Gazette 1986, volume II, no. 25, p. 786 and German Federal Law Gazette 1987, volume II, no. 18, p. 407). However, as of 13 May 2004, the LLMC 1976 has ceased to be in force (cf. German Federal Law Gazette 2005, volume II, no. 6, p. 189). Nevertheless, the LLMC 1976 as amended by the LLMC 1996 remains in force (please see below).

- d. 1996 Protocol to the LLMC 1976 (**'LLMC 1996'**)
(references to **'LLMC'** shall be understood as references to either LLMC 1976 or, where applicable, to LLMC 1976 as amended by LLMC 1996)

Yes, Germany has ratified the LLMC 1996 by law of 27 June 2000 and the LLMC 1976 as amended by the LLMC 1996 entered into force on 13 May 2004 (cf. German Federal Law Gazette 2000, volume II, no. 20, p. 790 and German Federal Law Gazette 2004, volume II, no. 42, p. 1793). That same day, as stated above, the LLMC 1976 ceased to be in force in Germany.

- e. International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 (**'HNS 1996'**)

No, Germany has not yet ratified the HNS 1996.

- f. 2010 Protocol to the HNS 1996 (**'HNS 2010'**)
(references to **'HNS'** shall be understood as references to either HNS 1996 or, where applicable, to HNS 1996 as amended by HNS 2010)

No, as with the HNS 1996, Germany has not yet ratified the HNS 2010. However, the German government has announced that it intends to ratify the HNS 1996 as amended by the 2010 Protocol to the HNS 1996 ('HNS 2010') and the relevant national stakeholders have been invited to comment the draft of the German implementing legislation for HNS 2010 in July/August 2020.

- g. International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (**'Bunkers Convention'**)

Yes, the Bunkers Convention has been ratified by Germany by law of 8 July 2006 (German Federal Law Gazette 2006, volume II, no. 18, p. 578) and entered into force on 21 November 2008 (cf. German Federal Law Gazette 2008, volume II, no. 20, p. 786).

- h. Nairobi International Convention on the Removal of Wrecks 2007 (**'WRC'**)

Yes, the WRC has been ratified by Germany by law of 29 May 2013 (German Federal Law Gazette 2013, volume II, no. 12, p. 530) and entered into force on 14 April 2015 (cf. German Federal Law Gazette 2014, volume II, no. 29, p. 1113).

2. Please indicate whether the a.m. Conventions apply directly in your jurisdiction or whether the stipulations have been translated and incorporated into domestic legislation.

All Conventions referred to in this questionnaire (CLC 1992, LLMC, Bunkers Convention as well as WRC) which have been ratified by Germany yet are directly applicable law in Germany. Sec. 611 of the German Commercial Code ("Handelsgesetzbuch" – HGB)

makes explicit reference to LLMC, CLC 1992 and Bunkers Convention for limitation of claims covered by the said conventions.

3. Is the wording of domestic provisions incorporating art. V(2) CLC 1969/art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS/art. 6 Bunkers Convention/art. 10(2) WRC into domestic legislation different to the original text of the Conventions?

No, as the conventions are directly applicable law in Germany their original text is the only authentic text. However, a German translation of the authentic text has been made and published in the German Federal Law Gazette. In practice, the German text might be used by German Courts but they are required to refer to the authentic text for interpretation.

- 3a. If the answer to the previous question is in the affirmative, what are the differences? –

Not applicable.

4. If your jurisdiction has not ratified the Conventions, does your jurisdiction recognise a right of limitation of liability for claims that would otherwise fall under the Conventions (the ‘**Equivalent Claims**’)?

Not applicable.

- 4a. If the answer to the previous question is in the affirmative, what are the requirements for breaking the right to limitation for Equivalent Claims?

Not applicable.

5. Are there any general principles of law in your jurisdiction that may serve to break the right to limitation otherwise than through the specific provisions contained in the Conventions (e.g. abuse of right)?

No, German law does not provide for a general principle that would otherwise serve to break the right to limitation. While Sec. 242 of the German Civil Code stipulates the principle that anybody must act in good faith when exercising his rights and/or fulfilling his obligations this principle does not generally entitle the Courts to set aside statutory rights where they consider the result to be unfair.

“PERSONAL ACT OR OMISSION” – Attribution to the person liable

6. How is the requirement for a “personal act or omission” in art. V(2) CLC 1992, art. 4 LLMC, and arts. 7(5) and 9(2) HNS interpreted in your jurisdiction?

The requirement of a “personal act or omission” as set out in Art. 4 LLMC is understood to mean that the liable party must act itself. For breaking the limitation it is necessary to establish that an act or omission of the liable party has caused the damage. Fault on the part of vicarious agents is not regarded as sufficient.

The focus on the liable party also means that a liable party can invoke the limitation of liability while the limitation is breached with regard to another party; e.g. a charterer may claim the limitation of liability in spite of the owner acting with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

Art. V (2) CLC 1992 is considered to be identical to Art. 4 LLMC in all material respects. Therefore, the requirement for a "personal act or omission" is understood as stated above.

Due to the same wording, the interpretation of "personal act or omission" in Art. 7 (5) and 9 (2) HNS will also be based on the understanding of Art. 4 LLMC.

7. Where the party entitled to limitation is an entity, what are the requirements for attributing an act or omission to the party entitled to limitation?

The Conventions themselves do not answer the question of whose acts or omissions are attributable if the party entitled to limitation is an entity. The German legislator has therefore addressed this question in Section 616 (1) of the German Commercial Code. Where the party entitled to limitation is an entity, only the act or omission of a member of the body authorised to represent (the board of directors or the managing director) or of a shareholder authorised to represent is attributable. It then depends on whether the conduct of that person meets the requirements of Article 4 LLMC.

It is generally accepted that this provision refers to Art. V (2) CLC 1992 and Art. 4 LLMC.

In addition, German case law on organisational fault may apply in the context of maritime law and thus with respect to breaking of limitation of liability (see e.g. BGH, 29.07.2009, I ZR 212/06; published in Transportrecht 2009, 331, 335). Therefore, if the damage is due to a gross organizational deficiency and if the body authorised to represent the company was aware of this, the right to limit may be denied.

8. Are there court decisions or legal texts in your jurisdiction where the right to limitation under the Conventions or equivalent domestic legislation has been broken (or where it has been submitted that such right should be broken), respectively confirmed (or where it has been submitted that such right should be confirmed), for acts/omissions of:

There are no reported court decisions in Germany that directly deal with the breaking of limitation under Art. V (2) CLC 1992, Art. 4 LLMC or Art. 7 (5) and 9 (2) HNS. However, Sec. 5 b of the German Inland Navigation Act ("Binnenschiffahrtsgesetz") which has incorporated the CLNI (Strasbourg Convention on Limitation of Liability in Inland Navigation of 04.11.2988) also requires a personal act or omission for breaking the limitation of liability. As the CLNI has been widely modelled after the LLMC and Sec. 5 b of the German Inland Navigation Act corresponds to Art. 4 LLMC court cases referring to this provision may give some valuable guidance also for maritime law. The same is true for provisions of German maritime law concerning the breaking of liability limits under a contract of carriage by sea according to Sec. 660 para. 3 HGB (German Commercial Code, version valid until April 2013) respectively Sec. 507 no. 1 HGB (version in effect as from 28. April 2013). Sec. 507 no. 1 HGB contains the provision that corresponds to art. IV (5)(e) of the Hague-Visby Rules (see question 22 b. below).

8a. The Master?

No.

8b. Crew members?

The German Federal Supreme Court ("Bundesgerichtshof" – BGH) held that the limitation of liability was not breached in the following case (BGH, 26.10.2006 – I ZR 20/04, published in TranspR 2007, 36; decision relates to Sec. 660 III HGB):

(a) Due to the deck watchkeeping officer falling asleep on his watch, a vessel ran aground. The watch alarm was turned off and there was no second deck watchkeeping officer on the bridge.

(b) The court held, that even though proper watchkeeping measures are minimum safety requirements, the shipping company was not at fault. They could trust the captain being aware of and compliant to requirements of the STCW-Code.

8c. The Designated Person Ashore/Company Security Officer?

No.

8d. Other individuals within the entity entitled to limitation?

The Higher Regional Court of Nuremberg held that the limitation of liability was broken in the following case (OLG Nürnberg, 30.03.2017 - 9 U 243/14 BSch, TranspR 2017, 263, decision relates to Sec. 5 b of the Inland Navigation Act):

(a) The shareholder authorised to represent the entity incorrectly estimated the clearance height of a bridge and hit the bridge with an extended crane.

(b) The court held that it is an elementary breach of duty of care to refrain from sufficient height control when crossing under a bridge. The Court qualified the defendant's behaviour as reckless.

8e. Third-party contractors (e.g. agents of the vessel)?

(1) The Higher Regional Court of Stuttgart held that the limitation of liability is not breached in the following case (OLG Stuttgart, 20.08.2010 - 3 U 60/10, TranspR 2010, 387, decision relates to Sec. 5 b of the Inland Navigation Act):

(a) The charterer had commissioned an outfitter with, among other things, the cargo disposition. Due to incorrect loading, the ship got into an imbalance and goods went overboard.

(b) It was argued by claimants that the mere transfer of the task constituted an organisational fault and that the failure to carry out stability control is a fault. The court, however, did not assume any organizational fault and held that any fault related to stability control was not attributable to charterers.

(2) The German Federal Supreme Court held that the limitation of liability was breached in the following case (BGH, 29.07.2009 – I ZR 212/06, TranspR 2009, 331, decision relates to Sec. 660 para. 3 HGB):

(a) The carrier had instructed a sub-carrier with the transport of goods. Due to incorrect securing of the cargo its trailer tilted and got damaged.

(b) The court held that an actual presumption implies an elementary breach of duty on the part of the carrier when such carrier is unable to outline measures on how sufficient securing of cargo was ensured. The presumption of an elementary breach of duty of the carrier extends to its managing director. In order to rebut organisational fault, the carrier (resp. the managing director) would have had to show that proper instructions were given on how to adequately secure the cargo.

(3) The German Federal Supreme Court held that the limitation of liability was not breached in the following case (BGH, 18.06.2009 – I ZR 140/06, TranspR 2009, 327, decision relates to § 435 HGB):

(a) The carrier passed over cargo to a sub-carrier, instructing him to ship it in a container. Instead, the cargo was shipped openly.

(b) The court held that a carrier may trust given instructions to be followed accordingly. There is no elementary breach of duty in not controlling the adherence to the instructions.

II. “WITH THE INTENT”/“RECKLESSLY” – Degree of fault

9. How is “intent” in art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS or relevant implementing domestic legislation interpreted in your jurisdiction?

Under German civil and commercial law, intent is understood as a wilful act or omission conducted with the knowledge that a damage will occur (German term: “Vorsatz”). In addition to this general definition, jurisprudence has further developed a more specific analysis of different types of intent, leading to three sub-categories with slightly deviating requirements. From a German civil/commercial law perspective, however, such detailed segmentation into sub-categories is not of significant relevance insofar as liability is concerned; once the requirements of one of the three sub-categories are fulfilled, intent is considered to exist.

However, in this particular case it is important to note that according to the German translation of article 4 LLMC as well as the translation of articles 7 (5) and 9 (2) HNS 2010 (which has not yet been ratified by Germany) intent only exists if and insofar as the requirements of the first sub-category of intent (referred to as “Absicht”), which is the strongest kind of intent, are fulfilled. Compared to the general definition of intent, such requirements of the first-subcategory are only fulfilled if the act or omission is conducted with the purposeful will to cause a desired damage. Although it therefore appears that the exemption of limitation foreseen by article 4 LLMC will only apply under very limited circumstances (as sufficient evidence of such requirements described above being fulfilled is rarely obtained), the strict implementation and translation of “intent” as per article 4 LLMC under German law has no real practical relevance as once the requirements of any of the three sub-categories referred to above are fulfilled, such act or omission would automatically fulfill the requirements of “recklessness” as per article 4 LLMC. Hence, this would be considered conduct barring limitation of liability as stipulated by article 4 LLMC anyhow.

10. How is recklessness under art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS or relevant implementing domestic legislation interpreted in your jurisdiction? Does

negligence qualify as recklessness ('Qualifying Negligence') under art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS in your jurisdiction?

The term "recklessness" under article V (2) CLC 1992/ article 4 LLMC/ and also (although HNS 2010 has not yet been ratified by Germany) articles 7 (5) and 9 (2) HNS 2010 (German term: "Leichtfertigkeit") is understood as an objective standard that corresponds with the objective specification of the German equivalent of gross negligence, as developed and defined by German jurisprudence. In contrast, negligence in general does not qualify as "recklessness" under article V (2) CLC/ article 4 LLMC under German law.

According to the definition developed by the German Federal Court of Justice in a large number of cases which however do not concern article V (2) CLC 1992 or article 4 LLMC, "recklessness" requires an act or omission that infringes fundamental and obvious duties of care and constitutes a serious violation of standards of safety. Over the past decades, the German courts have rendered a great number of decisions on a variety of individual cases mainly in relation to loss or damage to cargo under contracts of carriage (by road) that involve recklessness. Thereby, they have developed a case-law which provides guidance on whether such requirements are met. It remains a core principle, however, that the safety measures that need to be taken by the carrier must be considered on a case-by-case basis. In general, the standard and extent of the safety precautions required tend to increase in relation to the underlying risk involved.

Until today, there is no reported court case yet where a German court has decided on the issue of breaking limitation of liability under CLC 1992 or LLMC. However, as explained under lit. 8. above, court decisions on Sec. 5 b of the German Inland Navigation Act or on Sec. 660 para. 3 / 507 no. 1 German Commercial Code may give guidance.

10a. If the answer to the previous question is in the affirmative, what are the elements of Qualifying Negligence under art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS?

Not applicable.

11. What is the standard for recklessness under art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS?

As outlined under answer 10 above, the standard for "recklessness" under article 5 (2) CLC 1992/ article 4 LLMC and also (although HNS 2010 has not yet been ratified by Germany) articles 7 (5) and 9 (2) HNS 2010, corresponds with the standard of gross negligence developed by German jurisprudence. It is important to note, however, that the standard of "recklessness" is not used in an isolated fashion in terms of liability under German civil/commercial law but only in connection with the further requirements of "knowledge that such damage would probably result" (please refer to answer 14 below). Together, they form an independent legal term which constitutes an autonomous degree of fault under German law that, in its degree of severity, ranks between gross negligence on the one side and intent (irrespective of the respective subcategory) on the other.

12. How is “actual fault” in art. V(2) CLC 1969 interpreted in your jurisdiction?

First, it is important to note that the term "actual fault" in article V (2) CLC 1969 is not interpreted/translated individually but only in combination with the subsequent term "privity". Together, "actual fault" and "privity" form an individual standard that is understood as "personal fault". Contrary to article V (2) CLC 1992, the requirements with regard to such degree of fault are significantly lowered as not only intent and recklessness but also negligence of any kind (including slight negligence) is sufficient under the German interpretation of article V (2) CLC 1969 to prevent the owner from being entitled to rely on the limitations of liability provided for by the convention.

However, by making use of the term "personal", German interpretation/translation has made it clear that article V (2) CLC 1969 will only apply if and to the extent that the owner himself is at fault. Accordingly, any degree of fault including intent and recklessness of the owner's agents, servants, employees and crew will not be attributed to the owner and thus not prevent the owner from relying on the limitations stipulated in article V (1) CLC 1969.

13. How is “privity” in art. V(2) CLC 1969 interpreted in your jurisdiction?

See comments to Question No. 12 above.

III. KNOWLEDGE OF THE LIKELIHOOD OF THE HARMFUL RESULT

14. How is the requirement for knowledge in art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS interpreted in your jurisdiction?

As mentioned above, there are no reported court cases on the breaking of limitation of liability under the CLC 1992 or LLMC. However, as almost the same wording is used in Sec. 507 no. 1 HGB (see above Question 8.) as well as in Sec. 435 HGB the respective interpretation of these provisions may provide guidance.

“Knowledge” under sec. 507 HGB is assumed if it is possible to conclude from the external circumstances that the person acting was aware of the probability of damage. That is the case when the person taking action has recognized the type of damage that is imminent and the general direction in which the imminent damage could develop, i.e. the possibility of “a damage”.

The German Supreme court usually draws its respective conclusions from the given external circumstances. According to settled case law, “knowledge” is defined as “the awareness, intruding from his reckless conduct, that damage will likely occur”. In cases in which the relevant person deliberately “closed his eyes” to the increased damage risk, he can be treated as if he actually had this awareness. However, due to the fact that such an “awareness” is an inner condition, for determining the “knowledge of the likelihood of damage” the determined reckless conduct must also justify this conclusion in terms of its content and the circumstances under which it occurred. Such conclusion can be drawn in the context of so-called “typical courses of events” (German: “typische Geschehensabläufe”): In particular, in the event of a violation of elementary due diligence measures in the operation and organization of a company, knowledge of the

existence of such grossly inadequate business operations may already suffice for assuming “knowledge of the likelihood of damage”.

15. Does imputed or background knowledge suffice for the purposes of art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS?

15a. If the answer to the previous question is in the affirmative, what are the relevant requirements?

Imputed or background knowledge may suffice under German law under certain circumstances. “Knowledge” is assumed if, inter alia, the person acting consciously closes himself off from the realization of the probability of damage (“turning a blind eye...”), or does not take preventive measures although he knew or should have known that such measures were of fundamental importance.

16. Does failure to obtain the necessary information suffice for the purposes of art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS?

16a. If the answer to the previous question is in the affirmative, what are the relevant requirements?

Failure to obtain necessary information may suffice for assuming “knowledge” under German law.

With regards to sec. 435 HGB, the German Federal Supreme Court held that in the event of a breach of elementary duties of care in the organization of a company, knowledge of the grossly deficient operational procedures already included knowledge of the probability of damage occurring (BGH, judgment dt. 2205.2014 – I ZR 109/13, TranspR 2015, 341).

In a decision regarding sec. 5 b of the German Inland Navigation Act (see above Question 8.d.) the Higher Regional Court of Nuremberg found that the master of a ship acted recklessly and with knowledge that damage will probably occur when he did not inquire about the exact passage height of a bridge before he passed under the bridge with the ship’s crane extended (OLG Nürnberg, 30.03.2017 – 9 U 243/14 BSch, TranspR 2017, 263).

IV. “SUCH DAMAGE”/“SUCH LOSS”

17. How has the term “such loss”/“such damage” (art. 4 LLMC - art. V(2) CLC 1996/arts. 7(5) and 9(2) HNS 1996, respectively) been interpreted in your jurisdiction?

“Such damage”/“such loss” under German law does not mean knowledge of the exact nature of damage in question or the chain of events that led up to that damage in all detail. It suffices that the relevant person has realized the general type of damage that was imminent and the general direction in which the imminent damage could develop.

The wording “such loss” contained in art. 4 LLMC is interpreted in the same way as “a damage” in sec. 507 no. 1 HGB and 435 HGB as well as sec. 5 b of the German Inland

Navigation Act. Knowledge of “a damage” within the meaning of the foregoing provisions does not require the person acting to foresee the damage in question in all detail.

In order to give an example: under German interpretation of art. 4 LLMC any damage resulting from a collision would qualify as “such loss” if the vessel owner knew of the master’s frequent speeding and thought it possible that such speeding could cause a collision.

V. BURDEN OF PROOF

18. Who bears the burden of proof to show that the requirements for breaking the right to limit are fulfilled?

As art. 4 LLMC is drafted as an exception to the general rule of the shipowner’s right to limitation of liability the claimant bears the burden to prove that the conditions of art. 4 LLMC are fulfilled.

19. Is it possible under the procedural rules of your jurisdiction that the burden of proof may shift to the person liable under certain conditions?

The German Federal Supreme Court has established the principle of the so called “secondary burden of presentation of facts” (“sekundäre Darlegungslast”) in cases where the claimant can establish the likelihood of a reckless action on the part of the carrier but is unable to fully elaborate on and prove all details because the circumstances in question have happened in the carrier’s sphere only and evidence is not available to the claimant.

According to established case law of the German Federal Supreme Court, the carrier has an obligation to make an extended submission of facts, a so called “secondary burden of presentation” (German: “sekundäre Darlegungslast”). The carrier has to disclose his knowledge of the damage event and the ascertained cause of damage. He further must explain what security measures were taken in the organisation in order to prevent the damage. He is obliged to, as far as possible and reasonable, provide information on the relevant operating procedures. In particular, he must disclose what knowledge he has of the specific course of the damage and what causes of damage he was able to determine. However, the secondary burden of presentation does not shift the burden of proof to the person liable. It only gives him access to the information necessary to assess recklessness or knowledge of such damage.

VI. INDICATIVE REFERENCE TO OTHER CONVENTIONS

20. What is the wording used to implement art. 10(2) WRC and art. 6 Bunkers Convention in your jurisdiction?

20a. Wording of implementation of art. 10(2) WRC in German jurisdiction

The WRC itself does not contain specific rules granting the shipowner a right to limit his liability, but as art. 10(2) WRC provides, such right can follow from applicable national or international laws or regulations outside the scope of the WRC. It must be determined in each case in terms of international private law which legal regime may apply for the limitation of liability.

As art. 10(2) WRC exemplifies, the right to limit liability can derive from the liability regime of the LLMC (where applicable), which provides for rules concerning the limitation of liability for claims in connection with wreck removal in art. 2(1) (d) and (e) LLMC. However, by making use of the reservation provided for in art. 18 para. 1 LLMC, Germany has ruled out the application of art. 2(1) lit. (d) and (e) LLMC regarding cost claims arising from wreck removal. Instead, the limitation of liability for such claims is regulated separately in Sec. 612 of the German Commercial Code (HGB), which is applicable for claims under the WRC if German law applies.

Notably, Sec. 612 HGB concerns only claims for the reimbursement of those costs which are explicitly named in Sec. 612(1) no. 1 and 2 HGB, including (and especially) claims of the public sector. For these claims, the LLMC is applicable with the proviso that a privileged maximum amount of liability is assigned to the creditor in a separate liability fund, which is calculated according to art. 6(1) lit. b) LLMC. On the other hand, damage claims arising in connection with measures of wreck removal are not privileged in terms of Sec. 612 HGB; however, for such damage claims, art. 2 para. 1 lit. a) LLMC applies.

The translated wording of Sec. 612 HGB is as follows:

“Section 612 HGB

Limitation of liability for claims arising from the removal of a wreck

(1) The Convention on Limitation of Liability for Maritime Claims (section 611 (1) first sentence) shall apply to the claims set out below, with the proviso that such claims shall be subject to a separate limit of liability irrespective of their legal basis:

- 1. Claims in respect of the reimbursement of the costs of the raising, removal, destruction, or the rendering harmless of a ship which is sunk, wrecked, stranded, or abandoned, including anything that is or has been on board such ship, and*
- 2. Claims in respect of reimbursement of the costs of the removal, destruction, or the rendering harmless of the cargo of the ship.*

The claims set out in the first sentence shall not be subject, however, to the limitation of liability insofar as they concern remuneration contractually agreed with the responsible party.

(2) The limit of liability pursuant to subsection (1) shall be calculated in accordance with Article 6 paragraph (1) letter b) of the Convention on Limitation of Liability for Maritime Claims. The limit of liability shall apply to the entirety of the claims designated in subsection (1), insofar as such claims derive from the same incident and arise against persons who belong to the groups of persons listed in Article 9 paragraph (1) letter a), b), or c) of the Convention on Limitation of Liability for Maritime Claims. Said limit of liability may only be applied to satisfy the claims specified in subsection

1); Article 6 paragraphs (2) and (3) of the Convention on Limitation of Liability for Maritime Claims shall not be applicable.”

20b. Wording of art. 6 Bunkers Convention as implemented in German jurisdiction

The Bunkers Convention does not contain any provisions regarding a limitation of liability for shipowners, but its art. 6 clearly states that the shipowners can limit their liability under any applicable national or international regime, such as the LLMC. Insofar, art. 6 Bunkers Convention contains a reference with regard to the legal grounds (German: “Rechtsgrundverweisung”), thus, in each case it must be determined in terms of international private law which legal regime may apply for the limitation of liability. If international private law leads to the application of German law, the provisions of the LLMC and Sec. 611 et subseq. HGB apply.

Sec. 611 para. 1 sentence 2 HGB expressly clarifies that the liability for damages from bunker oil pollution on the basis of the Bunkers Convention can be limited in terms of the LLMC. The persons entitled to damage claims based on bunker oil pollution rank equally with other creditors asserting claims for property damage; insofar, no separate maximum amount is established.

The translation of Sec. 611 para. 1 HGB is as follows:

“Section 611 HGB

Convention as to the limitation of liability

(1) The liability for maritime claims may be limited pursuant to the Convention on Limitation of Liability for Maritime Claims of 19 November 1976 (published in the Federal Law Gazette (Bundesgesetzblatt) 1986 II p. 786), as amended by the protocol of 2 May 1996 (Federal Law Gazette 2000 II p. 790), in the version respectively valid for the Federal Republic of Germany (Convention on Limitation of Liability for Maritime Claims). This shall also apply to liability for bunker-oil pollution damage in accordance with the International Convention of 2001 on Civil Liability for Bunker Oil Pollution Damage (Federal Law Gazette 2006 II p. 578) (Bunkers Convention).”

(Emphasis added by the author)

21. How have art. 10(2) WRC and art. 6 Bunkers Convention been interpreted in your jurisdiction in the context of breaking the right to limitation?

There are no reported court cases in Germany on the breaking of limitation of liability for claims relating to the WRC or Bunkers Convention.

VII. EQUIVALENT PROVISIONS

22. The same language for the test for breaking the liability limits is used in art IV (5)(e) of the Hague Rules as amended by the Visby Protocol:

- 22a. Has your country ratified the Hague-Visby Rules or enacted these rules into their domestic legislation?

Whereas Germany is a contracting state to the 1924 Hague Rules, it has not ratified the Hague-Visby Rules. However, the Hague-Visby Rules have been

incorporated into the Fifth Book of the German Commercial Code (Handelsgesetzbuch, "HGB") with certain amendments (e.g. according to the current German statutory law, neither "error in navigation" nor "fire on board" serve as defences against the carrier's liability, unless explicitly otherwise agreed in the contract of carriage or B/L).

- 22b. If the answer to the previous question is in the affirmative, how are the relevant criteria as listed above (II-V) interpreted in the context of the respective provision incorporating art. IV (5)(e) of the Hague-Visby Rules?

Similar to art. IV (5)(e) Hague-Visby, but with a slightly changed wording, Sec. 507 para. 1 no. 1 HGB provides that the exemptions from and limitations of liability shall not apply if

"the damage was caused by an act or omission that the carrier itself has undertaken with intent or recklessly and with the knowledge that damage would probably result". (office translation)

The interpretation of the relevant criteria as listed above (II-V) has already been addressed above together with examples from court cases. It is common understanding among German legal authors that the degree of fault defined in Sec. 507 para. 1 no. 1 HGB as well as the required "knowledge" correspond to the interpretation of art. 4 LLMC.