SEEHANDELSRECHT

INTRODUCTION

I. Basic features of the law of the sea

A. Concept of the law of the sea

The law of the sea (maritime law; droit maritime) is the special law of shipping. Like inland waterway law, railway law, land transport law, aviation law and motor vehicle law, it forms part of traffic law (Teil des Verkehrsrechts).
In view of the peculiarities of maritime traffic, the law of the sea differs considerably from the other traffic laws in its structure and content.
It is most closely related to inland navigation law, the norms of which partly coincide with those of the law of the sea.
Despite its special character, the law of the sea is not a closed legal system.
It is embedded in general law and builds on it, insofar as it does not contain any special norms which, by virtue of their independence, exclude the supplementary use of general legal norms.

B. Outline of the law of the sea

The law of the sea includes numerous groups of special norms, some of which are governed by public law and some are governed by private law.
A clear integration of these maritime laws, regulations, boarding conventions, etc. into these two areas of law however, is often not possible.
Many laws contain both public and private law provisions, and the boundaries very often vary. Having said that, the following legal-dogmatic structure of the law of the sea can be formulated as follows:

1. Public law of the sea

a) International law of the sea
It includes the rules of international law for shipping in peace and in war. In terms of peace law, the rules governing the freedom of the high seas, the free use of international shipping lanes, the boundaries of territorial waters, the rights to the continental shelf (Festlandssockel), the use of foreign territorial waters, calling at foreign ports and the legal status of foreigners are particularly paying importance to warships and other state ships used by sovereign law.
Martial law concerns, among other things, the right to award prizes, the right to blockade, the rules on contraband and the legal status of neutral ships.

b) State and administrative law of the sea.
This area of law includes numerous regulations serving public order and safety in maritime traffic, e.g. on flag law, ship registration law, ship safety, ship surveying, maritime law, pilotage, the investigation of marine accidents, etc.
Some of these regulations are based on boarding conventions and
as far as they have worldwide validity, a character similar to international law.

c) Maritime Criminal Law.
This includes special criminal law norms that criminalize violations of maritime law, such as a violation of the rules of maritime law, flag law or the duty of obedience of the seafarer on board.

d) Maritime Procedural law.
This subtitle includes the provisions on arrest and foreclosure in seagoing vessels, on the special place of jurisdiction of the home port and on the procedure for the declaration and the presentation of dispatch.

e) Seafarers Employment and Social Rights
This extensive group includes in particular the social law provisions of maritime labor law and the social insurance of seafarers.

f) Commercial Maritime Law.
This includes all legal measures that serve to promote the merchant fleet, such as granting public funding. Loans, subsidies and guarantees for the construction and purchase of merchant ships.
This also includes all measures to protect the German merchant fleet in international competition, in particular to protect against the competition of so-called "flags of convenience" (Billigflagen) as well as against flag discriminations and the controlled competition of state or state-controlled shipping companies (compared to § 556 III C 3).

2. Private maritime law

a) Maritime trade law.
This includes all matters regulated in the fifth book of the HGB
with the exception of marine insurance law.

b) Marine Insurance Law.
This special law, which the law counts as part of maritime trade law, is traditionally treated by jurisprudence as a special area outside of maritime trade law.

c) Maritime Labor Law.
It includes all norms of labor law for seafarers that are private and not social law.
Because of the close connection between all provisions of maritime labor law, this area of law is usually summarized as a uniform special law.

d) Other private maritime law.
This last group includes, in particular, all norms relating to the ownership of a seagoing ship and its encumbrance with ship mortgages. In addition, there are other private law regulations, such as those relating to ship charters and sea will (Seetestament, emergency testament).

C. Special features of the law of the sea

1. Common Danger Solidarity
Large part of the law of the sea are decisively shaped by the fact that they take into account the dangers of shipping and the isolation of the ship at sea.
Despite the modern development of technology, especially communications technology, the circumstances are still decisive today.
Modern technology has created new sources of danger, navigating with the help of radar through the denser traffic in narrow fairways orunder poor weather conditions, the failure of technical equipment, which can never be ruled out, as well as human failure in the operation of the increasingly complex machines and devices on board, have created new sources of danger.
The idea of solidarity, which was decisive for the law of the sea in ancient times and the Middle Ages, is therefore still largely determining for today's law of the sea.
This solidarity idea has found its strongest expression in the solidarity against common dangers like in the general average issues.

The dangers of the sea and the isolation of the ship during the voyage also require the master's comprehensive authority, which, however, has already been restricted by social legislation. The extensive powers of the master, which he still has outside the home port according to current law, are no longer justified in view of today's news media, as this extension was the case in the days of sailing ships.

2. Internationality
Another peculiarity of maritime law is its internationality, which has already been partially in use.
Numerous international conventions, especially those that deal with the safety of the sea, have the consequence that many areas of the law of the sea are the same for all or most of the states involved in shipping or these areas are essentially regulated in the same way.

The circumstances must be always taken into account in the application of German maritime law, insofar as it regulates such matters, within the legally permissible framework.

As before, the development of the law of the sea is driven by the idea of legal standardization, although this is unfortunately least expressed in the case law.
The reproach made by Basedow ZHR 147 (1983), 340 against the science of the law of the sea, which he believes to be in a deep crisis, textbooks and commentaries can be read to this day as follows,

"as if German maritime law was primarily intended for coastal shipping between Glückstadt and Nordenharn",

however, it is just as frivolous as it is exaggerated and shows a lack of knowledge of the sub-areas of maritime law that are important for practice and their treatment in literature.

D. Separation of the law of the sea

1. Separation from land and air traffic law

Overlapping of these rights with the law of the sea is rare. They mainly occur in through freight traffic, especially in the context of through bill(s) of lading.This is most evident in container traffic, which today carries the majority of general cargo.

2. Separation from inland waterway law

This separation poses many problems. In principle, the law of the sea applies to seagoing vessels and the BSchiffR (Inland Waterways Act, Binnenschifffahrtsgesetz) to inland vessels.

Allocating a ship to one of these categories can be difficult in borderline cases. In addition, coastal waters, sea waterways and, in some cases, inland waterways are used jointly by both types of ship, which results in further legal application problems.

Particularly controversial, however, is the application of the law to so-called mixed (combined) voyages that lead both by sea and through inland waterways, as well as purely sea voyages by inland waterway vessels and purely internal voyages by seagoing vessels (see Intro I B, C).

II. History of the Law of the Sea

Today's maritime law has long historical background. The seafarers of the Mediterranean area had already developed rules that differed from the rest of the law in history, taking into account the peculiarities of maritime traffic, the principles of which were decisive for the later legal development and are still in effect today. The law of the sea is thus the oldest special law among all methods of transport.
In view of the objective of this commentary, only a brief outline of the history of the law of the sea can be given here. Detailed descriptions can be found in Endemann IV 1, 9; Wagner I 33; Wüstend HB 11, SHR 20. Cf. also Sotiropoulos 4 on the history of shipowner liability.
On the history of sea freight law, see Section 556 I F.

A. Historical Background

Today's law, traced back to Roman law, partly based on Greek law, recognized, among other things, four legal structures:

1. The foenus nauticum, a sea loan given to the exercitor (shipowner or operator) to cover the risks of the sea by the creditor (Geldgeber) before the start of the voyage,
Art 701 ADHGB (1861) was used to provide this possibility in state law regulation of this sea loan, now called improper Bottomry (Bodmerei).
However, since the federal states have not made use of this, there is no corresponding provision in the HGB.
Since the 1st SRÄG (1972) there is no longer the legal institution of the actual bottomry, which was regulated in § § 679-699.

2. The actio exercitoria, provided methods of enforcement of legal rights challenging the obligation of the shipowner or operator (exercitor navis) in addition to the master (magister navis) from legal transactions, and bounded by the actions of the master
Until the introduction of the ADHGB (1861), this regulation was still valid in the German legal community.
In English law, this system still used to a certain extend today, (cf. Sotiropoulos 114).

3. The receptum nautarum (actio ex recepto), according to which the shipowner is also liable in the case where the cargo is lost or damaged, unless he can prove force majeure.
This strict liability can still be found in Art 607 ADHGB (1861); it was only converted into a fault liability with the possibility to provide proof to be released from liabilirt by the HGB in 1897 (see. § 556 I A, B).

4. The lex Rhodia de jactu laid down rules on the distribution of the damage that had been caused by the magister (master) to rescue the ship and her cargo from a common danger, for example cargo thrown into the sea in a storm to keep the ship afloat. As in general average, these principles can still be found today in all maritime laws (see. § 700 I, § 700 D).

B. Development until 17th century

In the Middle Ages, different particular rights developed mainly under customary law, the content of which showed many similar traits through loan word (borrowing, Entlehnungen) and loan translation (calque, Nachbildungen).

These rights were fixed in writing in collections of sayings of the sea and guild courts, in the statutes and arbitrariness of the sea trade guilds, in city rights and in private law books.

Of particular importance some were:

1. The Consolato del Mar (Book of the Consulate of the Sea) for the Mediterranean, which contains a summary of the case law of the Maritime Court of Barcelona.

2. The so-called Visby Maritime Law for the area of the Hanseatic League, which is based on a Flemish reorganization of the Rolles des Jugements d'Oléron. A collection of rulings of the maritime court of the French island of Oléron from the 12th and 13th centuries and additions around 1400 at the instigation of Brügger Hanse were recorded.
As "water law" (Waterrecht), it was recognized by custom in the areas of the North Sea and Baltic Sea.

3. The so-called Recesses of the Hanseatic League is the recorded resolutions of the Hanseatic League from 1369 to 1614. The recess of 1614 was of particular importance: The Honorable Hanseatic Cities Ship Regulations and Law of the Sea.

4. The maritime law provisions of the Hamburg City Law from 1497 to 1603; on this ius maritimum hanseaticum ("The inheritance of the Hanseatic cities, shipping regulation and sea law, which binded their citizens, especially the ship brokers, charterers, skippers and ship crew") 1667.

5. Although the separation of the jurisdiction of the Courts of Common Law has long been controversial, the jurisdiction of the Admiralty Courts, which is authoritative for English law of the sea and claimed jurisdiction in all maritime matters since the 14th century,
"The Black Book of the Admiralty" was created as a handbook for the English courts.

It contained rules of the law of the sea developed in the 19th century and was partly based on the Rolles des Jugements d'Oléron. With a few exceptions, a codification of parts of the law of the sea did not begin until the 19th century.

C. 17th and 18th centuries

In the 17th century, a period of extensive national legislation began on the European continent with the increase in the power of the sovereigns.
The following are of particular importance:

1. The Ordonnance de Ia marine of 1681, issued by Colbert under Louis XIV. It contained a clearly structured summary of public and private maritime law.
Its regulations were largely adopted by the Code de commerce (Ccom) issued under Napoleon I in 1807.

2. The Ordinance of Bilbao, which received its last version in 1737 and which contained the provisions of the law of the sea in Spain and its colonies.

3. The Prussian General Land Law (Allgemeine Landrecht - ALR) of 1794, which in Part II Title 8 § § 1389 ff and 2359 ff regulated the law of the sea in a very broad and casuistic manner.

D. The General German Commercial Code of 1861

1. On April 17, 1856, the Federal Assembly of the German Confederation decided to set up a commission to work out the draft of a General Commercial Code for the German federal states.
This commission met in Nuremberg, for the maritime law of Hamburg. The draft, completed in 1861, became law in almost all German federal states in the same wording on the recommendation of the Federal Assembly.
In its 5th book, the ADHGB (1861) contained private maritime trade law. Its regulations were based entirely on the needs and experiences of the sailing ships of the time.
In 1869 the ADHGB (1861) became federal law of the North German Confederation and then in 1871 Reich law (see Makower XV ff).

2. During the era of the ADHGB of 1861, fundamental changes in maritime traffic occurred in the years 1861-1899 due to the development of technology and maritime traffic.
The relatively small wooden sailing ships, which were heavily dependent on wind and good weather, disappeared more and more.
In their place came larger and larger ships constructed of steel and powered by machines, which were able to carry out their voyages on a relatively precise schedule.

In addition to the free transport of freight by tramp ships, regular liner services developed, some of which were used exclusively for passenger traffic and mail.

The numerous small capitalist partner shipping companies were increasingly replaced by financially strong stock corporations.
Gradually, international cartels of the shipowners, the so-called conferences, began to influence freight and transport conditions.
On-board operations also changed fundamentally. In addition to the crew trained in seamanship, other on-board personnel, in particular to operate the machines, have now also been hired on the steamers.
Since the invention of radio telegraphy, the modern communications media have reduced the isolation of the ship during the voyage and began to influence the position of the master as a representative of the shipowner outside the home port.

3. The applicable law did not take the changing circumstances into account.
The shipping groups involved helped each other by agreeing on private conditions with the shippers and the passengers instead of the largely compliant provisions of the law.

In view of the dominant position of British shipping at the time, these conditions were often taken from Anglo-Saxon models, whereby the mostly very casuistic formulations and the different legal terms made it difficult to interpret and adapt to the structurally different German law.
This development is not yet complete even today; it gave and continues to give rise to legal disputes.

4. The extremely liberal version of the laws of the time also offered multiple incentives to abuse the freedom. It made it possible to draw up contracts in the economic power struggle for selfish purposes.
In the field of sea freight law, liner shipping companies were able to largely prevail over the large number of freight operators and unilaterally use their advantage through standardized conditions with extensive exemption clauses.
In the field of emigration, serious abuses occurred, in particular through the exploitation of the mostly inexperienced emigrants by unprincipled agents using inhumane conditions of transport on the emigrant ships.
The seafarers were also exploited in many ways. Employment agents in the port cities, which found new ships for unemployed seafarers, often played a shady role.

E. Legal developments since 1900

1 . The 1897 Commercial Code

Together with the drafting of the German Civil Code (BGB), commercial law was also revised. The Commercial Code of May 10, 1897 (RGBl 219), which is still valid today with numerous changes, came into force on January 1, 1900 at the same time as the BGB (Art 1 EGHGB).

As expected, the new version of the maritime law was placed in the 4th book of the HGB and from 1.1.1986 as directed by the Accounting DirectiveG, moved into the 5th book. The structural change of maritime traffic was taken into account.

The maritime law of the ADHGB of 1861 was the "keystone of the sailing ship era ... a true reflection of the maritime economy and maritime law of that time" - Wüstend SHR 22.

It had also been recognized that the ADHGB was out of date due to steam shipping's being in the foreground and fading of some maritime law peculiarities, along with these, "but there was not enough time to redesign the difficult material" - Müller-Erzbach 42.

So it is not surprising when Wüstend (quoted work) praises the realistic legal perception of the Hanseatic Higher Regional Court of Hamburg as a correction to HGB, that was already in arrears when it came into force, fighting the developing structure of shipping.

The Hanseatic Higher Regional Court of Hamburg was the successor to the Higher Appeal Court in Lübeck since 1879 for all appeals in the three Hanseatic cities,
namely for Lübeck until 1937 and for Bremen until 1947, (and Hamburg) - see Lindenmaier in The Hanseatic Higher Regional Court, memorial to its 60th anniversary, 1939, pp. 142ff.

In its legal review after 1945, the HOLG Hbg (Higher Regional Court of Hamburg) continued this tradition of bringing law and reality into harmony, also by means of judicial legal training - see Rabe MDR 84, 881.

In some decisions, including the HOLG Br (Higher Regional Court of Bremen), the knowledge is reflected, which was already described by Klefeker in a treatise published in 1798,
"From the General Average (Havareigroßa) or extraordinaire, especially according to the laws and customs of the imperial city of Hamburg" with the words:

"In no part of commercial law is a type of procedure established by long observance and custom so applied as in maritime law. Business at sea generally depends so much on circumstances and fortuitous events that even the most careful legislation is incapable
would calculate all cases in advance and do this according to ordinances.
The written rights here can only establish general principles, and must leave the application of them to individual cases to the discretion of reasonable judges, which of course is always an unpleasant necessity. "

2. Legislation after 1900 (changes to the HGB)

The legislature only hesitantly intervened in the development. Apart from a change in maritime insurance regulations in 1908, which is no longer of practical importance in view of the generally accepted agreement of the General German Maritime Insurance Conditions of 1919 (ADS), there were two circumstances in particular that made changes to maritime law necessary.

First, the law of the sea had to be adapted to the restructuring of social law in the domestic area. Then several boarding conventions in the field of maritime law, to which Germany had acceded, required a legal alignment through a new version of the relevant provisions of Book 5.

In addition to that, the maritime trade law was occasionally aligned with some other laws that affected the area of maritime law. Overall, the changes are as follows: (counted from a-u not listed here)

F. Other Maritime Legislation

In the other areas of the law of the sea, the legislature developed a lively activity mainly from the turn of the century.
A significant improvement in the social field was achieved through mostly mandatory norms. The employment relationship of seafarers was adapted to the social ideas of the time by the SeemO v 1902, replacing the SeemO v 1872; Today the SeemG v 1957 applies. The emigration system was driven by mandatory regulations in orderly channels (see § 678 A).
Flag law was reorganized in 1899, repealing previous laws; today the Flaggenrechtsges v 1951 applies in the version amended in accordance with the Third Legal ConsolidationCes (Federal Law Gazette 1990 I 1221).
Maritime traffic law was reorganized in 1906 and supplemented in 1927 by the sea waterway regulations; to today's regulation see § 734 I C 4.
The Strandungsordnung v 1874 was repealed by law.
Instead of the Maritime Accident Investigation Act v 1877, the Maritime Accident Investigation Act v December 6, 1985 (Federal Law Gazette I 1246) applies today.
Furthermore, partly due to international conventions, numerous laws and ordinances have been passed to regulate ship safety and manning, and regulate healthcare.
Through the Unification Treaty Act of September 23, 1990 (Federal Law Gazette I 885 ff, 1107 ff), various laws were supplemented, amended and brought into force in the new federal states with certain provisions. These, mostly marginal, new regulations are not referred to in the compilation of the most important regulations for today's law under title III, herebelow.

III. Legal sources of the law of the sea

A. Federal law (Bundesrecht)

The structure corresponds to the supplement to BGBl Part I - reference list - federal law - (latest edition)
Emigration (Auswanderungsweren)
Foreign service (Auswärtiger Dienst)
Voluntary jurisdiction (Freiwillige Gerichtsbarkeit)
Ancillary laws to property law (Nebengesetze zum Sachenrecht)
General commercial law (Allgemeienes Handelsrecht)
Foreign trade (Außenwirtschaft)
Nuclear energy (Kernenergie)
Water management (Wasserwirtschaft)
Maritime shipping (Seeschiffahrt)
Administration and general rules of shipping (Verwaltung und allgemeine Ordnung der Seeschiffahrt)
Traffic regulations (Verkehrsordnung)
Ship safety (Schiffssicherheit)
Regulation on dangerous sea freight v 4.1.1960 - Federal Law Gazette II 9, expired by Section 28 (2) Hazardous GoodsVSee v 5.7.1978 - Federal Law Gazette I 1017 - see Section 564b B 2.
Regulation on dangerous sea freight (VO über gefährliche Seefrachtgüter)

Ship's crew (Schiffsbesatzung)
Flag law (Flaggenrecht)
Sea pilotage (Seelotswesen)
Ship surveying (Schiffsvermessung)
Transport of cargo (Beförderung von Fracgtstücken)

B. State law (Landesrecht)

C. International Conventions (Internationale Übereinkommen)

IV. International Organizations

BIMCO
CMI
IHO (iho.int)
IMCO / IMO
IOC (ioc.unesco.org)
OECD
UNCTAD