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Reimbursement of Damage Prevention Costs in Maritime Logistics in the Event of an Anticipated Breach of Duty According to (Correctly Applied) German Law

Presented at the 23rd International Congress of Maritime Arbitrators (ICMA XXIII) in Singapore on 24 March 2026

*In 2023, the German Federal Court of Justice (*Bundesgerichtshof*, BGH) held that a charterer's air freight costs were recoverable as 'delay damage' (*Verzugsschaden*), even though the expenses had been incurred before any contractual default (I ZR 140/22). While commercially pragmatic, the decision has drawn criticism for relying on expansive normative reasoning that departs from both the statutory wording and established principles of causation under German law.*

*This paper reconstructs the sea and land transport arrangement at issue, in which the charterer, facing imminent production downtime in Mexico, arranged urgent air shipment at its own cost. It then examines two key legal concerns: the BGH's treatment of prevention costs as 'damage' and its retrospective construction of 'adequate causation' to justify compensation. As an alternative, the paper proposes characterising such expenditure as a quasi-contractual claim for reimbursement (*Aufwendungsersatz*), offering a more doctrinally coherent and textually faithful approach. This approach avoids interpretive leaps and provides greater legal clarity to cross-border users of German law, thereby providing maritime arbitrators and counsel with a framework for analysing expense recovery claims in charterparty and logistics disputes governed by German law.*

German private law does not have an easy time abroad; various reasons for this have been discussed.[1] One reason why it is difficult to promote German law internationally is that even the highest courts do not always readily subsume everyday situations under the provisions of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) – provisions once praised for their precision, clarity, and completeness[2] – even where this means that the elements of a claim are not satisfied. Instead, the courts sometimes devise ways of bringing a situation within a basis for a claim to achieve a desired outcome.

A vivid example is the judgment of the Federal Court of Justice (*Bundesgerichtshof*, BGH) of 20 April 2023 (I ZR 140/22), in which the First Civil Senate, responsible for transport law, apparently driven by result-oriented reasoning,[3] ordered the defendant to make payment.[4] While the outcome itself may be convincing,[5] the reasoning behind it is far less accessible to (potential) users of German law, especially lay readers abroad. This difficulty lies mainly in how and where the BGH introduced corrective normative value judgments.

The criticism herein is not directed against normative reasoning as such, but against its unnecessary use in questionable places. Nor is the point to deny the legitimacy of normative elements within statutory provisions or to argue for the general primacy of descriptive ones. Not everything can be captured in purely descriptive legal terms; many matters require legal and moral – that is, normative – evaluation. Often, a topic remains open to debate even after legislation, sometimes quite intentionally so. But is German private law really so incomplete, outdated, or detached from reality that it cannot address a fairly ordinary factual situation such as the present case, and that normative judgments must therefore be inserted at an

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[1] See *Pfeiffer*, ZRP 2024, 2; *Domhan*, Internationale private Streitschlichtung, 2022, pp. 41–45; *Müller*, IWRZ 2020, 1; *Graf von Westphalen*, IWRZ 2019, 193; *Wernicke*, ZRP 2014, 34; *Kötz*, AnwBl 2010, 1; *Eidenmüller*, JZ 2009, 641; *Triebel*, AnwBl 2008, 305.

[2] On this triad see *Zweigert/Kötz*, Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts, [3]1996, p. 143.

[3] See also *Harm*, RdTW 2023, 382, 384, at 24.

[4] BGH, NJW 2023, 3285.

[5] See *Katelouzou*, NJOZ 2025, 768, 777, at 60; *Harm*, RdTW 2023, 382, 384, at 25; *Ostendorf*, JZ 2023, 881, 882, 884; *Riehm*, ZIP 2023, 2620, 2626.

inappropriate point in the statute? Why not simply apply the provisions that the law itself designates for such evaluative considerations?

The claim advanced here is that in April 2023 the BGH went too far in placing its normative reasoning where it did, and that the case underlying its decision could have been resolved just as convincingly, perhaps even more convincingly, through normative reasoning consistent with the wording and structure of the law. The following discussion explores this claim. If it transpires that normative reasoning need not be misplaced, the BGH's end result would become far more comprehensible.

A. Facts of the Case

The plaintiff, a transport insurer, claimed USD7,600 from a logistics company (L) by subrogation and USD5,000 via contractual assignment, totalling USD12,600.

The policyholder, S GmbH (S), was obliged to supply a Mexican car manufacturer with cockpit modules. Under a framework freight contract with S, L transported parts from various locations across Europe to Bremerhaven, packed them in containers, and shipped them to Veracruz. Sea transport usually took up to nineteen days.

One shipment was scheduled to begin on 24 June 2017 and arrive on 13 July 2017. However, the designated vessel suffered engine failure. On 30 June 2017, L informed S that the parts would instead be loaded onto another vessel, departing a week later.

On 6 July 2017, L said the parts would be shipped on a third vessel departing 10 July 2017, expected in Mexico 25 July 2017.

Also on 6 July 2017, S twice requested L to consider earlier alternatives or air freight at L's expense, warning of production risks, but L refused, claiming the parts were already containerised. On 10 July 2017, L again refused air transport.

S then engaged a freight forwarder, shipping identical parts by air on 20 July 2017 at USD12,876.03. The insurer reimbursed S minus saved sea freight (approximately USD276.03) and a USD5,000 excess.

S did not seek to terminate the contract with L. The third-ship delivery, arriving around 25 July 2017, allowed S to meet its continuing obligations. The dispute concerned only reimbursement of the air freight costs.

B. Limited Nature of the Claim and Applicable Legal Framework

The dispute did not concern S's primary claim under the framework freight contract, nor any right of termination or rescission. It related solely to a separate payment claim against L.[6]

L was responsible for both the land and sea legs of transport, making this a matter of freight law. The relevant provisions include section 425 of the German Commercial Code (*Handelsgesetzbuch*, HGB) on liability for delay and Article 23(5) of the Convention on the Contract for the International Carriage of Goods by Road (*Convention relative au contrat de transport international de marchandises par route*), which governs road transport. However, neither provision applied here, as maritime freight law took precedence.

According to the BGH, maritime freight law applied under section 452a HGB as the delay was attributable to the sea portion.[7] The same conclusion follows in any event from section 450 no. 2 and 452 HGB, as the sea route (Bremerhaven–Veracruz) was the longer leg. However, maritime freight law (sections 481 to 535 HGB, including section 488 HGB) contains special liability rules but no specific provisions for delay-related losses;[8] these are governed by general civil law.[9] Accordingly, L's liability is determined under sections 280 et seq. BGB.

C. No Contractual Claim Under the General Law of Obligations

If, contrary to the BGH, one refrains from supplementing or correcting the law through normative considerations, S has no payment claim against L under the general law of obligations in sections 280 et seq. BGB.

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[6] Only those German legal provisions deemed relevant to the subject of this article are translated below; others are omitted.

[7] BGH, NJW 2023, 3285, 3286, at 27.

[8] Rabe/Bahnsen/*Rabe*, § 498, at 168.

[9] Cf. BeckOGK-HGB/*Kirchhof*, § 423, at 9.

I. No Claim for Damages in Lieu of Performance

A claim by S for damages in lieu of performance under sections 280(1) and (3), 281, 282, or 283 BGB is excluded from the outset. Neither S nor the plaintiff transport insurer ever asserted such a claim.

An analogous application of sections 280(1) and (3), 281 BGB, or section 323(4) BGB to the reimbursement of air freight costs, as sometimes suggested in the literature,[10] is not possible on the present premise of strictly adhering to the statutory wording of German law without expansive normative reasoning.

II. No Claim for Damages for Delay in Performance

S is likewise not entitled to damages for delay in performance. To assert such a claim, the requirements of section 280(1) BGB and, under section 280(2) BGB, the additional conditions of section 286 BGB must be satisfied.[11] Without resorting to excessive normative interpretation, these conditions were not met.

An obligation under section 280(1) BGB arose from the contract between S and L, namely their framework freight contract, in

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[10] See *Ostendorf*, JZ 2023, 881, 884.

[11] Translated, the sections read as follows:

Section 280. Damages for breach of duty

(1) If the debtor breaches a duty arising from the obligation, the creditor may demand compensation for the damage incurred as a result. This shall not apply if the debtor is not responsible for the breach of duty.

(2) The creditor may only claim damages due to delay in performance under the additional condition set out in Section 286.

(3) The creditor may only claim damages in lieu of performance under the additional conditions set out in Section 281, Section 282 or Section 283.

Section 286. Default by the debtor

(1) If the debtor fails to respond to a demand from the creditor after the due date, the debtor shall be in default as a result of the demand. The demand shall be equivalent to the filing of an action for performance and the service of a demand notice in summary proceedings.

(2) A demand is not required if—

1. A time for performance is specified in the calendar,
2. Performance must be preceded by an event and a reasonable time for performance is specified in such a way that it can be calculated from the event in the calendar,
3. The debtor seriously and definitively refuses to perform,
4. For special reasons, taking into account the interests of both parties, the immediate occurrence of default is justified.

[…]

accordance with section 311(1) BGB.[12] S did not issue a demand after the due date, as generally required under section 286(1) BGB.[13] The framework freight contract constitutes a general cargo freight contract, which is a contract to produce a work,[14] under which the carrier is obliged, pursuant to section 423 HGB,[15] to deliver the goods within the agreed period or, if no period is agreed, within a reasonable period that a diligent carrier would be granted under the circumstances.

As no delivery period was agreed, the due date depended on what period L could reasonably be granted. Given the two announced replacement transports, either 13 or 25 July 2017 constitutes the due date. S did not issue a demand after either date. Instead, it requested L to organise air transport before 13 July 2017, namely on 6 July 2017.

The demand was dispensable under section 286(2) BGB.[16] It was not, however, dispensable due to a serious and final refusal to perform by L under section 286(2) no. 3 BGB.[17] L remained willing to perform and did so, but not until 25 July 2017 (or shortly thereafter). The demand was dispensable because the performance period was calendar-based, or, after a preceding event, a reasonable period could be calculated according to the calendar pursuant to section 286(2) no. 1 or no. 2 BGB.[18] In other words, performance under section 423

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[12] Translated, the section reads as follows:

Section 311. Obligations arising from legal transactions and similar arrangements

(1) Unless otherwise stipulated by law, a contract between the parties involved is necessary in order to establish or modify an obligation arising from a legal transaction.

(2) […]

[13] See fn. 11.

[14] Cf. MüKo-HGB/*Pötschke*, § 481, at 17.

[15] Translated, the section reads as follows:

Section 423. Delivery period

The carrier is obliged to deliver the goods within the agreed timeframe, or within a period that a diligent carrier would reasonably be expected to adhere to, given the circumstances (delivery period).

[16] See fn. 11.

[17] See fn. 11.

[18] See fn. 11.

HGB[19] was due either by 13 or 25 July 2017, or nineteen days after the ship's departure.

Furthermore, the demand was dispensable under section 286(2) no. 4 BGB[20] because the immediate occurrence of default – immediately after the due date[21] – was justified for special reasons, taking into account the interests of both parties. Here, the special reason was that concrete damage to S was foreseeable even before performance was due, owing to a potential production stoppage in Mexico caused by the interruption of regular sea transport announced by L. L was aware of this risk after receiving a corresponding warning from S. S's interest in having L in default immediately after the due date and in holding L liable for damages without further delay was therefore worthy of protection, whereas L's interest in awaiting a demand before being liable under section 280(2) BGB,[22] was not. Accordingly, the First Civil Senate, seeking to clarify this previously uncertain aspect of maritime freight law regarding damage caused by delay at sea,[23] regarded making default dependent on a creditor's demand as a mere formality. Given that the debtor, according to his own statements, could not comply with such a requirement, the demand was considered dispensable.[24]

S, however, did not suffer any damage within the meaning of section 280(1) BGB.[25] Under the natural concept of damage, damage is any involuntary loss of material or immaterial goods resulting from a specific event.[26] 'Voluntary' means deliberate self-imposition,[27] thus 'involuntary' means without consent. It does *not* mean undesirable, for what many regard as undesirable may still be done voluntarily (such as visiting the dentist or consulting a lawyer). A production stoppage in Mexico cannot be regarded as a damaging event, as it did not come about. The air freight costs incurred by S constitute

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[19] See fn. 15.
[20] See fn. 11.
[21] Misunderstanding this *Harm*, RdTW 2023, 382, 383–384, at 21.
[22] See fn. 11.
[23] *Goebel*, LogR 2023, 161, 164.
[24] BGH, NJW 2023, 3285, 3288, at 42.
[25] See fn. 11.
[26] BeckOGK-BGB/*Brand*, § 249, at 8.
[27] MüKo-BGB/*Krüger*, § 256, at 3.

a financial outlay that, although undesirable, was voluntarily undertaken to prevent potentially higher costs of an impending production stoppage, since L refused to arrange air transport at its own expense. From a natural perspective, these costs do not constitute damage suffered by S, but rather voluntarily incurred expenses to avert damage.

The natural concept of damage is usually supplemented and modified by a normative one,[28] allowing losses that are not naturally regarded as damage to be treated as such; in other words, individual cases are assessed evaluatively.[29] This allows undesirable but voluntarily incurred payments to be regarded as damage,[30] for instance, where the payer felt compelled to make the payment. Whether the payer was entitled to feel that way then becomes the next normative question, assessed from the perspective of a reasonable person in the payer's position.[31] As these circumstances vary from case to case and can render damage potentially limitless, an upper bound on compensability must be established through an overall assessment.[32] This shows that recourse to the normative concept of damage readily risks moving several steps away from the legal definition itself and detracts from the focus on the actual subject matter. A further consequence is the need to construct case categories, which can come at the expense of the law's overall coherence and clarity.

Departing from the natural interpretation, the BGH normatively qualified S's air transport costs as damage caused by delay,[33] arising from the obligation of the party causing the damage to reimburse the injured party for the costs of measures taken to mitigate or prevent the damage.[34] In doing so, the BGH treated voluntarily incurred damage-prevention costs as damage and, through this normative assessment, introduced a correction it regarded as necessary under the natural concept.

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[28] BeckOGK-BGB/*Brand*, § 249, at 8.

[29] MüKo-BGB/*Oetker*, § 249, at 23.

[30] Cf. BeckOGK-BGB/*Lorenz*, § 256, at 5.

[31] Cf. BeckOGK-BGB/*Brand*, § 249, at 10.

[32] Id.

[33] BGH, NJW 2023, 3285, 3288, at 50.

[34] Id., at 51.

But even if the air transport costs are regarded as damage, there is no causal link between the delay as a breach of duty and the damage, as required by section 280(1) sentence 1 and section 280(2) BGB.[35]

Causality, too, begins with a natural perspective: any behaviour whose removal would prevent the damage is causal.[36] Here, if one disregards the delay that occurred without a demand – that is, assuming L *had* performed by 13 or 25 July 2017 – the air transport costs would *still* have been incurred, as S had already commissioned air freight beforehand. Hence, the alleged damage occurred *before* the breach of duty, and there is no causal link between the delay and the costs.

Normative corrections to causality may exclude inadequate causes, that is, those that are entirely improbable[37] and fall outside the protective purpose[38] of the liability standard, but they can only restrict natural causality retrospectively; they can never replace it, as section 280(1) sentence 1 and (2) BGB[39] ('the damage incurred *as a result*', 'damages *due to delay* in performance') require at least natural causality.[40] The BGH did not follow this reasoning. Instead of focusing on the costs actually caused and incurred, it treated the hypothetical production-loss costs prevented by air transport as decisive[41] and held that air transport costs were to be reimbursed on the same basis as those averted production-loss costs.[42] No explanation was offered for this equal treatment, but the BGH stated that by incurring the air transport costs, S fulfilled its obligation to prevent and mitigate damage under section 254(2) sentence 1 BGB,[43] a breach of

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[35] See fn. 11.

[36] MüKo-BGB/*Oetker*, § 249, at 103; BeckOK-BGB/*Flume*, § 249, at 280.

[37] MüKo-BGB/*Oetker*, § 249, at 109; BeckOK-BGB/*Flume*, § 249, at 284.

[38] MüKo-BGB/*Oetker*, § 249, at 120; BeckOK-BGB/*Flume*, § 249, at 288.

[39] See fn. 11.

[40] Cf. MüKo-BGB/*Oetker*, § 249, at 104; BeckOK-BGB/*Flume*, § 249, at 280.

[41] BGH, NJW 2023, 3285, 3288, at 50.

[42] Id., 3288–3289, at 51.

[43] Translated, the section reads as follows:

Section 254. Contributory negligence

(1) If the injured party contributed to the damage through their own fault, the obligation to pay compensation and the extent of the compensation to be

which L could otherwise have invoked.[44] Thus, the costs of averting such damage, namely, a production stoppage, were considered 'for legal reasons adequately causally caused by the delay'.[45]

In essence, this created a fictitious adequate causality for normative reasons, a dogmatic artifice or foreign body[46] bypassing the causality requirement 'somewhat nonchalantly'.[47] Under this approach, the creditor, within the scope of its obligation to prevent and mitigate damage, is required to act in place of the debtor even before the debtor is obliged to perform, giving rise to significant conceptual and practical difficulties.[48]

III. No Claim for Damages Arising from Other Breaches of Duty

S likewise has no claim for damages arising from any other breach of duty by L. Such a claim would require the conditions of section 280(1) BGB to be met, without being precluded by sections 280(2) or (3) BGB.[49] Without resorting to unnecessary normative assessments, this is not the case.

An obligation required under section 280(1) BGB arose from the framework freight contract concluded between S and L. Whilst L breached its general duty to perform in accordance with that contract – having insisted that it would not perform on time –, this alone does not give rise to a claim for damages due to delay in performance.[50] That reasoning of the lower court[51] overlooks the fact that section 280(2) BGB introduces an additional requirement for such

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paid shall depend on the circumstances, in particular on the extent to which the damage was caused predominantly by one party or the other.

(2) This shall also apply if the fault of the injured party is limited to his failure to draw the debtor's attention to the risk of unusually high damage which the debtor neither knew nor had to know about, or to his failure to avert or mitigate the damage. The provision of Section 278 shall apply mutatis mutandis.

[44] BGH, NJW 2023, 3285, 3288, at 52.

[45] Id., 3289, at 53.

[46] As noted by *Riehm*, ZIP 2023, 2620, 2623–2624.

[47] As noted by *Ostendorf*, JZ 2023, 881, 883.

[48] Id.

[49] See fn. 11.

[50] *Gutzeit*, NJW 2023, 3289

[51] See OLG Hamburg, RdTW 2022, 397, 399.

claims and that section 286(2) no. 3 BGB limits exceptions to cases involving a serious and final refusal to perform.[52]

Nevertheless, it remains conceivable that L breached a duty of care under section 241(2) BGB,[53] as read with section 280(1) BGB and without conflicting with sections 280(2) or (3) BGB.[54] In this respect, and in light of the creditor's interest in preventing or mitigating imminent significant damage, a duty corresponding to the injured party's own obligation to mitigate damage under section 254(2) sentence 1 BGB[55] may be recognised.[56] If such a duty is accepted, there is strong indication that L violated it: despite being expressly warned by S of a concrete risk of production stoppage, L refused to arrange air transport.

The same conclusion may follow if one assumes a duty on the debtor's part to respect the creditor's reliance on the debtor's ability and willingness to perform, in other words, a duty not to jeopardise the purpose of the contract.[57] Even if such a duty is recognised, it remains debatable whether L violated it by adhering strictly to the framework freight contract with S, following his contractual catalogue of services without deviation, and refusing to assume additional costs, even at the risk of potential liability for delay. At what point does meticulous adherence to a contract become a breach of duty? If, however, the duty of non-jeopardisation is understood broadly, so that the purpose of the contract must not be jeopardised at any stage of its performance, there is again a strong indication that L breached this duty.

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[52] *Ostendorf*, JZ 2023, 881, 882.

[53] Translated, the section reads as follows:

Section 241. Obligations arising from a contractual relationship

(1) By virtue of the contractual relationship, the creditor is entitled to demand performance from the debtor. This may also consist of refraining from a particular act.

(2) Depending on its nature, a contractual relationship may oblige each party to consider the rights and interests of the other.

[54] See fn. 11.

[55] See fn. 43.

[56] As noted by *Gutzeit*, NJW 2023, 3289, 3290.

[57] As noted by *Riehm*, ZIP 2023, 2620, 2624; BeckOGK-BGB/*Riehm*, § 282, at 50.

In any event, S did not suffer any damage within the meaning of section 280(1) BGB,[58] for the reasons discussed above: it voluntarily assumed the costs of air transport. The only exception would arise if such voluntarily incurred costs, aimed at preventing greater harm, were treated as damage on normative grounds. In that event, and assuming a breach of duty, a causal link between breach and loss would exist both from a natural and a normative perspective, subject in comparable circumstances to limits of adequacy and protective purpose. The law, however, does not require such an approach.

D. Contract-Like Claim for Reimbursement of Expenses

Even without resorting to excessive normative assessments, S still has a contract-like claim for payment against L, namely a claim by a voluntary agent for reimbursement of expenses under sections 683 sentence 1 and 670 BGB.[59] The requirements for this claim are met.

I. Acting on Behalf of Another Person Without a Mandate or Other Authorisation

The assumption of agency required under section 683 sentence 1 BGB is conceptually linked to the notion of performing work or services in connection with another person's affairs without being mandated by that person, as set out in section 677 BGB. The concept of 'performing work or services' within the meaning of section 677 BGB encompasses all forms of activity – legal, economic, or purely factual – including, in the present case, S's arrangement of air transport for production parts to Mexico.

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[58] See fn. 11.

[59] Translated, the sections relevant to this part read as follows:

Section 670. Reimbursement of expenses

If the mandatary incurs expenses for the purpose of executing the mandate which he may reasonably consider necessary under the circumstances, the principal shall be obliged to reimburse him.

Section 677. Duties of the voluntary agent

Anyone who performs work or services in connection with another person's affairs, without instruction from that person and without authorisation, must act in the principal's interests, taking into account their actual or presumed wishes.

Section 683. Reimbursement of expenses

If the assumption of agency is in the interest and in accordance with the actual or presumed will of the principal, the voluntary agent may demand reimbursement of his expenses like a mandatary. […]

The phrase ‘the affairs of another person’ refers to activities belonging to a legal or interest sphere other than that of the acting party, meaning they are subject to third-party control.[60] If the performance does not naturally fall within the principal’s legal or interest sphere, the decisive factor is the external manifestation of the voluntary agent’s will to act on the other’s behalf.[61] The pursuit of the agent’s own interests does not exclude such an intention.[62]

Here, the decision to arrange air transport concerned L’s sphere of interest. In taking this step, S also fulfilled its own obligation under section 254(2) sentence 1 BGB[63] to prevent damage arising from a production stoppage in Mexico due to delay. At the same time, however, S prevented L from being exposed to contractual liability for that same damage caused by delay.

Even without an explicit declaration that it was acting on L’s behalf, S’s intention to do so is evident from two circumstances: first, its earlier requests that L explore earlier shipping options or consider sending some parts by air; and second, S’s ongoing interest in maintaining its business relationship with L. That relationship depended upon L’s solvency and economic well-being, as well as the goodwill between the two parties, all of which would have been jeopardised had L become liable for delay.

S was neither mandated by L nor otherwise authorised to perform for L, as L had expressly refused to arrange air transport.

II. Assumption of Agency in the Interest and According to the Actual or Presumed Intention

The assumption of agency was both in the interest and in accordance with the actual or presumed intention of the principal within the meaning of section 683 sentence 1 BGB.[64] L had an interest in preventing a production stoppage in Mexico, and thereby in preventing its own liability for damages caused by delay (liability that would have far exceeded the cost of air transport). Ensuring timely delivery

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[60] BeckOK-BGB/*Gehrlein*, § 677, at 11.

[61] Id., at 14.

[62] Id., at 15.

[63] See fn. 43.

[64] See fn. 59.

of the parts by air therefore served L's commercial and legal interests alike.

At the same time, L also had the actual, or at least the presumed, intention that S should arrange air transport. At the point when S was already considering this option, it was apparent to L that air transport would provide a rapid solution, avert a production stoppage, and thus prevent L's liability for delay. There is no indication that L actually or presumably intended to expose its own business to risk.

This assessment is not altered by the fact that L refused to organise the air freight itself or to bear the associated, undesirable costs. Section 683 sentence 1 BGB[65] does not require that the *expenses* themselves correspond to the principal's interests and actual or presumed intention; these costs were equally unwelcome to both parties. What matters is that the *assumption of agency* aligns with those interests and that intention, which it did in this case.

III. Expenses

Expenses are voluntary sacrifices of assets.[66] The air freight costs incurred by S therefore constitute expenses.

It is sometimes argued that such a sacrifice must also be made in the interest of another party. However, in the context of sections 683 sentence 1 and 677 BGB,[67] this view is inconsistent. The assumption and performance of the business in the principal's interest are already separate and independent elements of these provisions. To include 'interest' once again within the definition of expenses would thus amount to unnecessary duplication.

IV. Reimbursement of Expenses as If a Mandatary

Under section 683 sentence 1 BGB, the voluntary agent is entitled to reimbursement of expenses as if acting as a mandatary, through partial reference to section 670 BGB.[68] According to that provision, expenses incurred for the purpose of executing the mandate, and which

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[65] See fn. 59.

[66] BeckOGK-BGB/*Brand*, § 249, at 9; BeckOK-BGB/*Gehrlein*, § 683, at 5; MüKo-BGB/*Krüger*, § 256, at 2; MüKo-BGB/*Schäfer*, § 683, at 25.

[67] See fn. 59.

[68] MüKo-BGB/*Schäfer*, § 683, at 25.

may reasonably be regarded as necessary in the circumstances, must be reimbursed.

The expenses incurred by S were directly related to arranging air transport and were therefore incurred for the purpose of performing work or services. S was also entitled to regard these costs as necessary in the circumstances. The requirement of necessity is assessed by a mixed subjective–objective standard: it is met when, in the reasonable judgment of the agent, the expenses were suitable for pursuing the purpose of the transaction, appeared necessary, and were proportionate to the significance of the management of the business for the principal.[69]

Applied to the present case of voluntary agency without authorisation, this means that, in the absence of express instructions, an expense is reimbursable if, in retrospect, it was objectively necessary and reasonable,[70] taking into account the principal's objective interest. The decisive factor is not the overall management of the business but each specific expense.[71]

The air transport costs of USD12,600 served the purpose of ensuring the timely delivery of the parts to Mexico, thereby preventing an imminent production stoppage. At the latest, following L's announcement on 6 July 2017 that alternative shipping options were pointless and that it would take no action, these costs became necessary to make good, as swiftly as possible, the delay in the originally expected 13 July 2017 ship delivery by arranging air freight instead. Given the damage that a production stoppage would have caused, and for which L would have been liable to S, it was in L's objective interest for S to incur these costs.

E. Conclusion

The approach developed here leads to the same result as that reached by the BGH. Confronted with an unavoidable delay in sea transport, S incurred air freight costs of US$12,600 to prevent significantly greater losses from delayed delivery, for which L would otherwise

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[69] Cf. BeckOK-BGB/*Fischer*, § 670, at 11.

[70] Cf. MüKo-BGB/*Schäfer*, § 683, at 28.

[71] Id., at 28.

have been liable. L is therefore obliged to reimburse S for these costs, and no demand was required.

This outcome is desirable. If, in cases of delay in sea or multimodal transport involving a sea leg, the charterer had to wait until the contractual due date of delivery before issuing an effective demand, only then could it arrange substitute transport. This would not only prolong the delay but also increase the resulting costs.[72]

The reasoning, however, differs from that of the BGH. According to the BGH, although the air freight costs were incurred before the delay occurred (and thus were not caused by the delay), they were nevertheless compensable as damage arising from that delay. The decisive considerations – that S voluntarily fulfilled its duty to prevent damage by assuming the air transport costs and thereby averted more serious harm – were treated by the BGH as normative assessments, yet without any clear legal foundation in its examination of the statutory elements of liability. A strict application of the law would have required it to deny the existence of those elements, namely the presence of damage and the causal link between the delay and that damage. The BGH thus affirmed a claim for compensation for damage caused by delay, but only at the cost of certain ontological, linguistic, and legal contortions that leave an uneasy impression.[73]

By contrast, the approach developed here denies the existence of compensable damage because its occurrence was successfully prevented; accordingly, any claim for such damage is excluded. The costs voluntarily incurred by S to avert that damage are, however, reimbursable by L as reasonable expenses. This interpretation is coherent in ontological, linguistic, and legal terms, and fully consistent with the statutory framework. It rests, in particular, on the central consideration that S fulfilled its duty to prevent damage by incurring the air freight costs – an assessment that fits squarely within the statutory elements of a claim by a voluntary agent acting without authorisation in another's affairs.

Thus, the case can be resolved without resorting to normative evaluations that diverge from those of the legislator (if only because the

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[72] See also *Harm*, RdTW 2023, 382, 384, at 25.

[73] As noted by *Ostendorf*, JZ 2023, 881, 883.

legislator has designated other places for such assessments). A solution that adheres more closely to the law is both clearer and more readily comprehensible than that of the BGH. It therefore offers users of German law, especially maritime arbitrators and counsel abroad, a principled and accessible way to analyse expense recovery claims in charterparty and logistics disputes.

F. Postscript: A Comparative Note on Singaporean Law

Finally, and briefly due to word limits, it is instructive to consider the ICMA XXIII host country. How might the case be resolved under Singaporean law?

In Singapore, the relevant doctrine is not that of 'damages' but of 'compensating advantages'.[74] The Court of Appeal has stated that 'the aggrieved party cannot recover avoidable or avoided loss; it may, however, recover expenses reasonably incurred in the course of taking mitigation measures'.[75] While this aligns with the approach taken here, the Court addressed only post-breach expenses, stating that 'the evaluation of the aggrieved party's conduct in mitigation ought to start from the date of the defaulting party's breach'.[76]

Accordingly, the exact position in Singapore with respect to pre-breach expenses of the kind at issue here remains unclear.[77] It has been proposed that the burden of proof should rest on the party in breach to show that such expenses did not contribute to avoiding loss. If the breaching party cannot discharge this burden, it must compensate the aggrieved party for the pre-breach expenses, provided the other conditions of the claim are satisfied.[78]

Such a proposed reversal of the burden of proof is, however, unexplained, and appears unnecessary in any event. The conventional approach, under which each party bears the burden of alleging and proving the facts on which it relies, is both simpler and more

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[74] *Tham/Tan*, in: Phang (eds.), The Law of Contract in Singapore, [2]2022, at 22.148–22.154.

[75] *The 'Asia Star'* [2010] SGCA 12, at [24].

[76] Id.

[77] *Tham/Tan*, in: Phang (eds.), The Law of Contract in Singapore, [2]2022, at 22.180.

[78] Id., at 22.176–22.187.

principled. This approach could be implemented by applying a necessity and reasonableness test analogous to that recognised under German voluntary agency law. It would be an example of different legal systems, even ones as structurally distinct as common law and civil law traditions, drawing on one another's solutions where those solutions prove coherent and workable.