

## Making a yard's supplier liable for a shoddy vessel

by Dr. Jan Dreyer, partner at Hamburg law firm Dabelstein & Passehl

If a vessel is defective, the shipowner will usually first try to hold the shipyard liable under the building contract. However, this may turn out to be a difficult task if the warranty period has expired or if the claim is not recoverable because the shipyard is bankrupt or situated in a country where the jurisdiction is unfavourable to the owner, writes Jan Dreyer. This is particularly true of the Chinese and Korean jurisdiction - both countries play a major role in the shipbuilding industry – which are known for time-consuming proceedings and difficulties in enforcing long awaited judgement. As a result, the owner may have an interest in claiming directly against the shipyard's suppliers, if their financial standing is sufficiently strong.

In Germany, the principles of product liability are laid down in the Product Liability Act. However, as the Product Liability Act is aimed at protecting the consumer, it only applies to products intended for private use. Although privately used yachts play an increasing role in shipbuilding, the main emphasis still lies on commercial vessels. Hence, in most cases the Product Liability Act will not be applicable.

But, some of the regulations contained in the Product Liability Act are generally transferred to the product liability in tort based on sec. 823 of the German Civil Code. The main difference between the two regimes is that the tortious liability requires a negligent act on the part of the manufacturer whereas the Product Liability Act provides for a strict liability. The German jurisdiction has developed the following requirements:

- defective product put in circulation by its manufacturer,
- damage to persons or property distinct from the defective product itself,
- causal link between the above conditions, and
- negligence of the manufacturer.

The crucial question is whether a product can be considered “defective”. Pursuant to the Product Liability Act, a product is defective if it suffers from a defect in the design, manufacturing or incorrect or incomplete instructions. The *design* is defective if the manufacturer does not act in conformity with the technical and scientific standards prevailing at the time the product was put into circulation. A *manufacturing defect* requires deficiencies in the construction of the product caused by a lack of efficient quality control. *Instruction defects* refer to deficiencies in warnings and instructions necessary for the safe use of the product.

It was decided recently by the German Federal Court that the term “manufacturer” also includes component part suppliers of a larger product. In the underlying case, a vessel was fitted with an additional guide-wheel between rudder and propeller, a so-called “*Grim'sches Leitrad*”. This guide-wheel was manufactured by a supplier of the shipyard using a certain lubricant for its bearing. During operation at sea, the guide-wheel was lost due to a malfunction of the lubricant which turned out not to be operable in temperatures below 35° centigrade. The manufacturer of the lubricant, a subcontractor of the supplier of the guide-wheel, had stated in his product documentation an operational area for the lubricant between -30° centigrade and +150° centigrade.

The court held the manufacturer of the lubricant liable for damages suffered by the owner for the loss of the guide-wheel and the repair of the vessel and the merits of the case can be summarised as follows:

- The manufacturer of the lubricant breached his duty of instruction under sec. 823 para. 1 of the German Civil Code. The manufacturer of the lubricant was under a duty to ensure that no harm to the property of the end-user of the lubricant would be caused by his product, even if his product was reprocessed by the manufacturer of the guide-wheel.
- The responsibility of the manufacturer for the use of the product within the designated purpose is not limited to the general utility of the lubricant but includes any use advertised and described by the manufacturer in the product documentation.
- The owner is entitled to claim for damages in respect of the lost guide-wheel, even though the guide-wheel was already fitted with the unsuitable lubricant at the time the vessel was delivered to the owner. The protection of the owner's property under sec. 823 para. 1 German Civil Code includes interest in the integrity of those parts of the guide wheel which were initially free from any defect.

Pursuant to this judgement, the owner of a ship has a non-contractual claim against any supplier and even sub-supplier of the yard involved in the construction of the vessel. Even though any damages for defective deliverables is generally excluded under liability in tort under sec. 823 of the German Civil Code, the owner is entitled to claim for damages for damage to the defective parts of the vessel itself.

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