

Liability in Germany under EU Ship Recycling Regulation

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Introduction

The EU Ship Recycling Regulation (1257/2013) implements the contents of the (not yet ratified) Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009. Among other things, the EU Ship Recycling Regulation stipulates that the dismantling of ships can be carried out only in certified and listed shipyards in accordance with specially established procedures.

The EU Ship Recycling Regulation is applicable to all 'ships' (ie, vessels of any kind that are or have been used in the marine environment). The only exceptions are warships, ships of less than 500 tons and ships which operate only in state waters and fly the flag of said state during their entire lifecycle. The regulation applies when a ship either flies an EU flag or makes its final voyage for scrappage from EU waters.

Liability for infringement

The EU Ship Recycling Regulation provides for no specific penalties. The adoption of an implementing law and the introduction of enforcement provisions for the regulation in Germany is planned for by the end of 2020. Until then, liability for violations of the regulation is governed by common German criminal and civil law only.

Criminal liability

German criminal law is primarily applicable to offences committed in Germany. However, according to Section 7 of the Criminal Code (StGB), German criminal law can also apply to offences committed abroad if the offender is considered 'German' under Article 116(1) of the Constitution and the act itself is punishable at the scene of the crime. Such a punishment abroad can be found, for example, in India, Bangladesh and Singapore.

Possible offences for natural persons are covered in Sections 324, 326 and 330 of the StGB. For example, Section 330 of the StGB punishes particularly serious environmental offences. Such environmental offences (eg, Sections 324 (water pollution or soil pollution) and 326 of the StGB (unauthorised handling of waste) are deemed to exist if:

- the removal of the impairment can be carried out only with extraordinary effort or after a long period;
- they were carried out due to greed; or
- another person is put at risk of death or serious damage to health.

The violation of Section 330 of the StGB is punishable by six months' to 10 years' imprisonment.

Legal persons can be punished and prosecuted only indirectly via the Administrative Offences Act (OWiG). Section 9(30) of the OWiG makes it a punishable offence for a managing director to act in a criminal manner or to enrich a company as a result (this can also be in the form of savings). In the event of an infringement of Section 9(30) of the OWiG, companies can be fined up to €10 million for intentional acts and up to €5 million for negligent acts.

Civil liability

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In addition to criminal liability, a violation of the EU Ship Recycling Regulation can also lead to liability under German civil law. Liability under Section 43(II) of the Limited Liability Companies Act (GmbHG) (ie, liability of the managing director for damages due to a breach of duty towards the shipowning company) and Section 280(I) of the Civil Code (ie, general liability for damages) come into consideration here.

A breach of duty by a managing director under Section 43(II) of the GmbHG can include non-compliance with criminal and administrative legislation (see above). According to prevailing opinion, the unlawful conduct of a managing director in an external relationship also constitutes a breach of duty in the internal relationship with the shipowning company. However, limited liability companies' need for protection cannot be assumed if all partners agreed to the managing director's actions. In such cases, a breach of duty which would give rise to liability is excluded.

Comment

As seen in several overseas cases, severe penalties can be expected for violations of the EU Ship Recycling Regulation. In *SEATRADE*, for example, the Rotterdam District Court imposed fines of €750,000 on a shipowning company and a one-year employment ban was imposed on its managing directors.

However, legal clarity on the exact scope of the criminal and civil liability penalties of the EU Ship Recycling Regulation in Germany and their extent will be reached only when the regulation is transposed into national law (ie, when national enforcement provisions are introduced). The enforcement provisions are expected to be based on German criminal law (and to be comparable with the Waste Shipment Act, which implemented the EU Waste Shipment Regulation (1013/2006)). It is also likely that there will be rules on circumvention, such as re-flagging from an EU flag to a non-EU flag prior to scrapping or moving a ship for scrapping from an EU port before it is scrapped.

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