

International Max Planck Research School for Maritime Affairs  
at the University of Hamburg

Jürgen Basedow  
Wolfgang Wurmnest

# Third-Party Liability of Classification Societies

*A Comparative Perspective*



Springer

HAMBURG STUDIES ON MARITIME AFFAIRS 2

International  
of the Office

ch School of Maritime

Jürgen Basedow  
Wolfgang Wünnest

# Third Party Liability

HAMBURG STUDIES ON MARITIME AFFAIRS 2

International Max Planck Research School (IMPRS)  
for Maritime Affairs  
at the University of Hamburg

---

# Hamburg Studies on Maritime Affairs

## Volume 2

---

*Edited by*

Jürgen Basedow  
Peter Ehlers  
Hartmut Graßl  
Hans-Joachim Koch  
Rainer Lagoni  
Gerhard Lammel  
Ulrich Magnus  
Peter Mankowski  
Marian Paschke  
Jürgen Sündermann  
Richard Tol  
Rüdiger Wolfrum

Jürgen Basedow · Wolfgang Wurmnest

---

# Third-Party Liability of Classification Societies

A Comparative Perspective

Professor Dr. Dr. h.c. Jürgen Basedow, LL.M. (Harvard)  
Dr. Wolfgang Wurmnest, LL.M. (Berkeley)  
Max Planck Institute for Foreign Private Law  
and Private International Law  
Mittelweg 187  
20148 Hamburg  
basedow@mpipriv-hh.mpg.de  
wurmnest@mpipriv-hh.mpg.de

ISSN 1614-2462  
ISBN-10 3-540-26184-2 Springer Berlin Heidelberg New York  
ISBN-13 978-3-540-26184-1 Springer Berlin Heidelberg New York

Cataloging-in-Publication Data applied for  
A catalog record for this book is available from the Library of Congress.  
Library of Congress Control Number: 2005928642

This work is subject to copyright. All rights are reserved, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilm or in any other way, and storage in data banks. Duplication of this publication or parts thereof is permitted only under the provisions of the German Copyright Law of September 9, 1965, in its current version, and permission for use must always be obtained from Springer-Verlag. Violations are liable for prosecution under the German Copyright Law.

Springer is a part of Springer Science+Business Media  
springeronline.com

© Springer Berlin · Heidelberg 2005  
Printed in Germany

The use of general descriptive names, registered names, trademarks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

Softcover-Design: Erich Kirchner, Heidelberg

SPIN 11495239 64/3153-5 4 3 2 1 0 – Printed on acid-free paper

# Preface

Classification societies are charged with the technical supervision of maritime shipping to enhance the safety of life and property at sea by securing high technical standards of design, manufacture, construction and maintenance of seagoing vessels. Each and every shipping catastrophe caused by a technical defect reminds the maritime world of the central importance of the vessel's proper technical supervision. Correspondingly, the liability of classification societies has become a particularly discussed issue over the past years. Their contractual liability is usually limited by general terms and conditions incorporated in the classification rules and cases brought by typical contracting partners of classification societies, such as ship owners and ship yards, are not an issue in the current debate. However, one can note a substantial worldwide increase of actions brought by parties who are not in privity with classification societies.

This study focuses on third-party liability of classification societies. It originates in an expert opinion on selected issues relating to third-party liability which the authors compiled for the German classification society Germanischer Lloyd AG. Driven by the highly interesting legal issues and unexplored shores in this area of law, we continued our research and are able to present a relatively comprehensive overview on the law on third-party liability of classification societies. Given the origins of our work, the discussion of limitations of liability clauses is based on the standard terms and conditions of the Germanischer Lloyd, version 2005.

As the major classification societies are global players, liability issues might arise in many legal systems. Therefore, we highlight this topic in a comparative perspective. Further, liability issues in maritime and shipping law are embedded in a legal framework originating in public international law. Therefore, the issues have to be viewed in their international context. Against the background of these international experiences, this study endeavors to assess what claims third parties may assert against classification societies under German law, and to what extent limitations of liability agreed upon between a classification society and its contracting partners can be upheld with regard to third parties. We concentrate on private law issues and touch upon governmental liability only in the passing. Further, we limit ourselves to the discussion of possible bases for liability and do not address many other legal questions, such as statutes of limitation or causation. When translating the provisions of the German Civil Code (*Bürgerliches Gesetzbuch*) we have benefited from the translation given by *Ian S. Forrester, Hans-Michael Ilgen & Simon L. Goren* (The German Civil Code, Revised Edition [as amended to January 1, 1992], Fred B. Rothman & Co.: Littleton/Colorado, 1994).

The German Civil Code was recently reformed by the Act to Modernize the Law of Obligations (Schuldrechtsmodernisierungsgesetz) which came into force on 1 January 2002. *Geoffrey Thomas* and *Gerhard Dannemann* translated the Act's major provisions into English. Their translation can be found online at the German Law Archive (<http://www.iuscomp.org/gla/>).

We are indebted to *Michael McGuire*, Ph.D., *Ulrike Naumann*, BCL (Oxon) and *Simon Schwarz*, LL.M. (Cantab) for their invaluable assistance in preparing the English manuscript. Without their help this book would not have seen the light. Moreover we should like to thank *Ingeborg Stahl* and *Christian Perlebach* for editing the final version of our manuscript before it went into print.

Hamburg, March 2005

Jürgen Basedow & Wolfgang Wurmnest



# Summary Contents

<b>Preface.....</b>	<b>V</b>
<b>Contents.....</b>	<b>IX</b>
<b>About the Authors.....</b>	<b>XIII</b>
<b>Abbreviations.....</b>	<b>XV</b>
 <b>Introduction .....</b>	 <b>1</b>
 <b>Part 1: The Role of Classification Societies in the Shipping Industry .....</b>	 <b>5</b>
A. Scope of Activities .....	5
B. Economic Background of Ship Classification.....	7
C. Class and Classification Rules .....	8
D. Classification Surveys.....	9
E. Conclusion.....	13
 <b>Part 2: Third-Party Liability of Classification Societies in</b>	
<b>Selected Legal Systems.....</b>	<b>15</b>
A. England .....	15
B. New Zealand .....	21
C. Australia .....	22
D. United States of America .....	26
E. France.....	33
F. Conclusion.....	38
 <b>Part 3: The Basis for Liability under German Law .....</b>	 <b>39</b>
A. Third-Party Liability for Advice and Recommendation – Systematic Foundations.....	39
B. Contract to Provide Information.....	44
C. Contract with Protective Effects towards Third Parties .....	45
D. Claims based on the Doctrine of <i>Culpa in Contrahendo</i> .....	72
E. Claims based on the Law of Delict.....	75
F. Conclusion.....	81

<b>Part 4: The Extent of Liability under German Law –</b>	
<b>Selected Issues.....</b>	<b>83</b>
A. Contributory Negligence .....	83
B. Limitation of Liability.....	85
C. Conclusion .....	98
<b>Part 5: Conclusion.....</b>	<b>101</b>
<b>Bibliography .....</b>	<b>105</b>
<b>Table of Cases.....</b>	<b>113</b>
<b>Table of Main Statutes.....</b>	<b>117</b>
<b>Index.....</b>	<b>121</b>

# Contents

<b>Preface.....</b>	<b>V</b>
<b>Summary Contents.....</b>	<b>VII</b>
<b>About the Authors.....</b>	<b>XIII</b>
<b>Abbreviations.....</b>	<b>XV</b>
 <b>Introduction .....</b>	 <b>1</b>
 <b>Part 1: The Role of Classification Societies in the Shipping Industry.....</b>	 <b>5</b>
A. Scope of Activities .....	5
B. Economic Background of Ship Classification.....	7
C. Class and Classification Rules .....	8
D. Classification Surveys.....	9
E. Conclusion.....	13
 <b>Part 2: Third-Party Liability of Classification Societies in Selected Legal Systems.....</b>	 <b>15</b>
A. England .....	15
I. Basic Principles .....	15
II. Liability under the Tort of Negligence .....	16
B. New Zealand .....	21
C. Australia.....	22
I. Basic Principles .....	22
II. Liability under the Tort of Negligence .....	23
D. United States of America .....	26
I. Basic Principles .....	26
II. Liability under the Tort of Negligence .....	27
III. Liability under the Tort of Negligent Misrepresentation .....	30
E. France.....	33
I. Basic Principles .....	33
II. The Case Law .....	35
1. Ship Buyer Cases .....	35
2. Other Third-Party Cases.....	37
F. Conclusion.....	38

<b>Part 3: The Basis for Liability under German Law .....</b>	<b>39</b>
A. Third-Party Liability for Advice and Recommendation – Systematic Foundations .....	39
I. Legislative Restraint .....	39
II. Extension of Third-Party Liability in Case Law .....	40
III. Conclusion .....	43
B. Contract to Provide Information .....	44
C. Contract with Protective Effects towards Third Parties .....	45
I. Basic Concept .....	46
1. Classification Agreements .....	46
2. Legal Basis .....	47
3. Prerequisites for Expanding the Scope of Protection to Third Parties .....	48
4. Further Conditions for Damages Claims .....	50
II. Application to Classification Agreements .....	50
1. Differences as Compared to Typical Cases of Professional Liability .....	51
2. Restricting the Group of Claimants .....	52
3. Limitations of Liability in Maritime Law .....	53
4. Pure Economic Loss .....	56
III. Scope of Protection - Selected Third Parties .....	59
1. Ship Purchasers .....	59
a) Groundwork .....	59
b) Class Confirmation based on Records as they Stand .....	63
c) Class Confirmation after Special Survey .....	64
d) Erroneous Certification at Routine Surveys .....	65
2. Hull Underwriters .....	66
3. Shippers and Freight Forwarders .....	67
4. Cargo Underwriters .....	69
5. Crew Members and Passengers .....	69
6. Conclusion .....	72
D. Claims based on the Doctrine of <i>Culpa in Contrahendo</i> .....	72
I. Prospectus Liability .....	73
II. Liability of Agent Availing Himself of Special Relationship of Trust .....	74
III. Conclusion .....	75
E. Claims based on the Law of Delict .....	75
I. Liability under § 823 (1) BGB .....	75
II. Liability under § 823 (2) BGB .....	76
III. Liability under § 826 BGB .....	77
IV. Vicarious Liability under § 831 (1) BGB .....	78
V. Product Liability .....	78
VI. Conclusion .....	81
F. Conclusion .....	81

<b>Part 4: The Extent of Liability under German Law –</b>	
<b>Selected Issues .....</b>	<b>83</b>
A. Contributory Negligence .....	83
I. Misconduct by the Injured Party .....	83
II. Misconduct by Third Parties .....	84
B. Limitation of Liability .....	85
I. Background .....	85
II. Validity of Limitation of Liability Clauses .....	86
1. Restriction to Supplementary Performance .....	87
2. Liability Caps and Exclusions for Ordinary Negligence .....	87
a) Exclusion for Ordinary Negligence .....	88
b) Liability Caps .....	91
c) Limitation to Foreseeable Damage .....	91
3. Limiting the Personal Liability of Directors, Officers	
and Agents .....	92
4. Conclusion .....	93
III. Validity of Limitation of Liability Clauses towards Third Parties .....	94
1. Straightforward Cases .....	94
2. Liability Limitations and Contracts Having Protective Effects	
towards Third Parties .....	94
a) Subject-matter Review of Standard Contract Terms .....	95
b) Reliance on Liability Limitations does not Violate	
the Principle of Good Faith .....	96
C. Conclusion .....	98
<b>Part 5: Conclusion .....</b>	<b>101</b>
<b>Bibliography .....</b>	<b>105</b>
<b>Table of Cases .....</b>	<b>113</b>
<b>Table of Main Statutes .....</b>	<b>117</b>
<b>Index .....</b>	<b>121</b>