



IVR Colloquium 2023

Vienna | 5-6 October



Automated vessels and current concepts of (non-contractual) liability – German law perspective

Dr. Johannes Trost, LEBUHN & PUCHTA
Dr. Olaf Hartenstein, ARNECKE SIBETH DABELSTEIN
**Daniel Fritz, LL.M., GDV - Gesamtverband der
Deutschen Versicherungswirtschaft e. V.**

**Automated vessels and current concept of
(non-contractual) liability – German law
perspective**

**The existing legal regime and expected
difficulties with automated vessels**

Dr. Johannes Trost, LEBUHN & PUCHTA

Agenda – Part 1

- 1. Overview on the legal liability regime**
- 2. Concept of individual “fault”**
- 3. “Prima facie” evidence**
- 4. Limitation and acts barring limitation**

1. Overview on the legal liability regime

- 1. Collision Convention of 1960**
- 2. General law of tort**
- 3. Intent or negligence of a person on board**
- 4. Master on board**

2. Concept of individual “fault”

- 1. Individual subjective fault and its objective determination**
- 2. Degree of diligence and qualification of the person**
- 3. Historical background of “fault” based liability and alternatives**

3. “Prima facie” evidence

1. No legal presumption but practical significance
2. Typical situations allow to shift the burden of proof
3. **What would you say:** Who is “prima facie” at fault, the human person or the automated system in a collision situation among them?

4. Limitation and acts barring limitation

1. **Fault based liability is limited – CLNI**
2. **However – Art. 4 CLNI** – a person liable shall not be entitled to limit his liability if ... committed ... recklessly and with knowledge that such loss would probably result
3. **Is the system of privilege and sanction at stake?**

**Automated vessels and current concepts of
(non-contractual) liability – German law
perspective**

**Alternatives to Fault Based Liability –
“Liability for Objects” under German law ?**

Dr. Olaf Hartenstein, Arnecke Sibeth Dabelstein

Agenda – Part 2

- I. Luxury Animals, Trains, Cars, Consumer Products**
- II. Chicken Plague, Construction Sites, Snow Shoveling**
- III. Implications for Inland Waterway Shipping**

I. Luxury Animals, Trains, Cars, Consumer Products

1. strict liability / liability for objects: no fault required
2. German civil code (“BGB”) and other statutory law
 - 19th century industrialization, Savigny, Gierke - Jhering
3. “enumeration principle”, no analogy
4. international harmonization attempts:
 - DCFR Draft Common Frame of Reference (2008):
 - strict liability: enumeration (e.g. buildings, animals, products, cars)
 - PETL Principles of European Tort Law (2004):
 - strict liability for “abnormally dangerous activity”

II. Chicken Plague, Construction Sites, Snow Shoveling

1. Presumption of fault scenarios
2. BGB cases (e.g. buildings), but also case law, no enumeration
3. “traffic safety obligations”:
 - The creation of a “dangerous situation” ...
 - ... creates obligation to take safety measures
 - but no general rule to avoid all risks for everybody.
4. producers’ liability

III. Implications for Inland Waterway Shipping

1. **Strict liability ?**
2. **Presumption of fault ?**
3. **FOR COLLISIONS:**
 - **Geneva Convention 1960**
 - **some day a MASS code by IMO?**
 - **other potential debtors ?**

Automated vessels and current concept of (non-contractual) liability – German law perspective

Aspects of product liability and AI liability

**Daniel Fritz, LL.M., GDV - Gesamtverband der
Deutschen Versicherungswirtschaft e. V.**

Agenda – Part 3

- 1. Introduction**
- 2. Impact of the Directive on liability for defective products (PLD)**
- 3. Impact of the AI liability Directive (AILD)**
- 4. Key take-aways**

Introduction

- **Proposal for a Directive on liability for defective products from 28.9.2022**
- **Proposal for an AI Liability Directive (AILD) from 28.9.2022**

Impact of the Directive on liability for defective products (PLD)

- **Subject-matter of PLD unchanged**
 - property used exclusively for **professional purposes** is excluded
 - low impact on claims

Impact of the Directive on liability for defective products (PLD)

- **“Product” includes software**
 - irrespective of mode of supply or usage
 - providers of software as defendants
- **Digital service as component of the product**
 - interconnected with product, control of manufacturer
 - providers of data networks as defendants

Impact of the Directive on liability for defective products (PLD)

- **Disclosure of evidence**
 - disclose necessary technical information to the injured party in court, if the injured party shows plausibility of the claim for compensation
 - easier access to relevant evidence
 - balancing of disclosure with defendant's interest (confidentiality of trade secrets) necessary

Impact of the Directive on liability for defective products (PLD)

- **Burden of proof remains unchanged**
- **Rebuttable presumptions introduced**
 - presumption of defectiveness
 - *e.g. in case of failure to comply with disclosure obligations*
 - *Presumption may be triggered prematurely*
 - presumption of causal link between defectiveness and damage
 - *easier to establish a **typical** consequence of a defect*
 - presumption due to excessive difficulties of the claimant

Impact of the AI liability Directive (AILD)

- Affects fault-based liability regimes
- Introduces disclosure of evidence
- Introduces rebuttable presumptions (for non-compliance with duty of care, for causal link)
- Presumptions may conflict with
 - fault-based liability regimes (which require human behaviour)
 - Geneva Collision Convention 1960 (which prohibits legal presumption of fault)

Key take-aways (Part 3)

- Professional purpose property remains excluded from PLD
- Product under PLD covers software and digital services
- Disclosure of evidence and rebuttable presumptions may help claimants but comes along with difficult legal questions
- rebuttable presumptions in AILD may be challenging for fault-based liability regimes and under Geneva Collision Convention 1960



Thank you for your attention!