

# DABELSTEIN & PASSEHL

Rechtsanwälte  Hamburg · Leer



## WRECK REMOVAL FROM A GERMAN PERSPECTIVE

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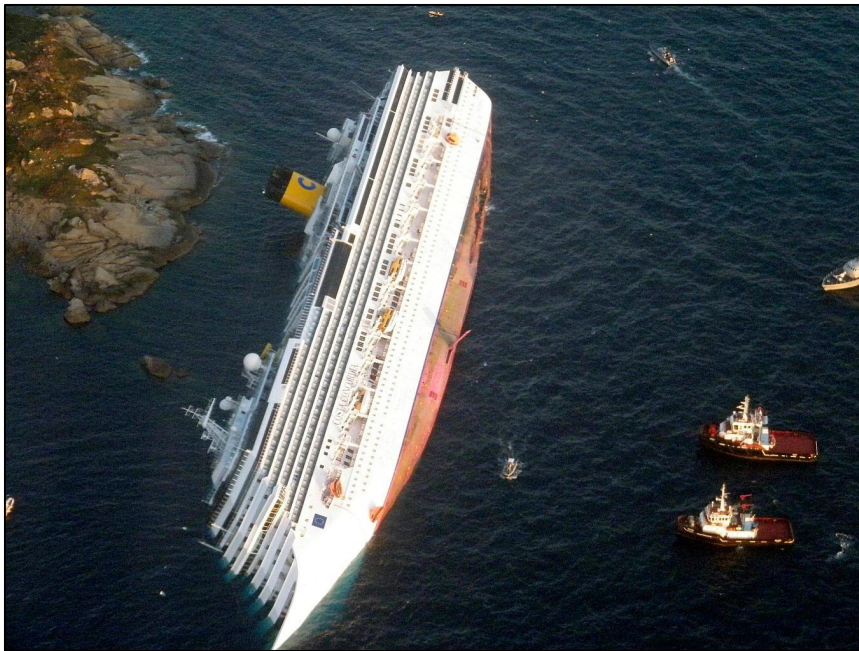
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## Wreck removal: A delicate issue...





Ahh, this wreck type we are talking about



# Wreck removal within the German EEZ

## Wreck removal within the German EEZ

### Applicable law:

- Nairobi International Convention on the Removal of Wrecks 2007 (**WRC**) in force since 14th April 2015
- Until now: **24 contracting states** whose combined merchant fleets constitute appx. **58,08 % of the gross tonnage** of the world's merchant fleet
- Bahamas, Cyprus, **Germany**, Liberia, Malta, Panama, **United Kingdom** et al.
- **Convention area:** The member state's **EEZ** (art. 1 par. 1 WRC)

## Wreck removal within the German EEZ

### Core Points of the WRC:

- Mainly related to a **wreck** that constitutes a **hazard to navigation or marine environment**
- Art. 1 par. 4 WRC: „‘Wreck‘, following a maritime casualty, means:
  - Ø a sunken or stranded ship; or
  - Ø any part of a sunken or stranded ship; or
  - Ø any object that is lost at sea from a ship and that is stranded, sunken or adrift; or
  - Ø a ship that is about, or may reasonably be expected, to sink or to strand.

## Wreck removal within the German EEZ

### Core Points of the WRC:

- Registered Owners' obligation in case of a marine casualty resulting in a wreck: **Removing the wreck** (art. 9 par. 2 WRC) **or bearing costs** for removal by authorities (art. 10 par. 1 WRC)
- **Mandatory insurance** for wreck locating, marking and removal costs for registered ships >300 gross tonnage (art. 12 WRC)

## Wreck removal within the German EEZ

Liability of the Registered Owner for wreck removal costs (art. 10 par. 1 WRC)

- Limitation of liability not affected (art. 10 par. 2 WRC)
  - Important: LLMC 1976
- Germany: **wreck removal costs excluded from LLMC** limitation, but possibility for the owner of the wreck to establish a **second fund** for such costs with LLMC limits applicable, see sec. 612 German Commercial Code



## **Wreck removal within the German EEZ**

### Insurance aspects

- Insurance amount: LLMC limitation applicable (art. 12 par. 1 WRC)
- Direct claim against insurer (art. 12 par. 10 WRC):
  - Insurer can invoke the defences of the registered owner
  - Exception: No defence of insolvency and winding up of the registered owner

# Wreck removal within the German Territorial Sea

## A little more complicated...

## Wreck removal within the German Territorial Sea

### Applicable law

- Germany did not extend WRC area to its Territorial Sea (art. 3 par. 2 WRC)
- twofold approach in German national law: wreck removal by public authorities **can be subject to public or to civil law**
  - **First step:** Check whether public authorities decided whether to act officially or to act privately
  - **Second step:** Check whether authorities fulfil requirements of the chosen law

## Wreck removal within the German Territorial Sea

### Wreck removal under German public law

- Sec. 24 par. 1 Federal Waterways Act (*Bundeswasserstraßengesetz, WaStrG*):  
*„The Federal Water and Shipping Authorities have the **task to take measures for the purpose of avoiding danger**, which are necessary to keep the federal waterways in a condition required for shipping“*
- Federal waterways = Territorial Sea (sec. 1 WaStrG)
- Sec. 28 par. 1 WaStrG:  
*„The Waterways and Shipping Offices are competent to **issue orders against responsible parties** according to sec. 25 WaStrG to fulfil their task according to sec. 24 WaStrG.“*

[...]



## Wreck removal within the German Territorial Sea

### Wreck removal under German public law

- „Responsible parties“ (according to general national police and regulatory law):
  - **Owners** of things which cause a danger or disturbance (Owner of the ship having become a wreck)
  - **Persons** who have **caused** a danger or disturbance (in case of collision: Owner of the ship that did not become a wreck)
  - **Persons** who can **control** and remove a danger or disturbance (Third parties)
- To „cause“ **does not require actual fault** of the addressee of the removal order

## Wreck removal within the German Territorial Sea

### Wreck removal under German public law

- Sec.28 par. 3 WaStrG: Public authorities are competent to remove wreck and to **charge costs to the responsible party** (similar to art. 9 par. 7, par. 8 WRC)
- Sec. 28 par. 4 WaStrG: Right to **limit liability** for wreck removal costs in accordance with sec. 612 HGB (second LLMC fund) remains unaffected

## Wreck removal within the German Territorial Sea

### Wreck removal under German civil law

- **Agent of necessity:** Somebody who **acts for someone else in the interest** of this party can claim reimbursement for expenses, see sec. 683 German Civil Code
- Is wreck removal in the interest of the ship owner?
  - Sec. 679 BGB:  
*„A will of the principal contrary to the agency is **disregarded** if without the agency a duty of the principal whose **fulfilment is in the public interest** would not have been fulfilled in due course.“*
  - Non-fulfilment in due course can already be assumed in case the ship owner is „**hesitant**“ with taking necessary measurements

[...]

## Wreck removal within the German Territorial Sea

### Wreck removal under German civil law

- No deadline, no formal requirements for agency of necessity
- Sec. 612 HGB **limitation applicable**
- **Critic** from legal literature: **Circumvention** of public law (esp. WaStrG) by agency of necessity is illegal
- Federal Supreme Court (*Bundesgerichtshof*, BGH) remains unimpressed for decades; **only restriction**: Authorities are **not allowed to switch** between both action opportunities



## Wreck removal within the German Territorial Sea

### Wreck removal under German civil law

- **New developments:**
  - BGH decisions (NJW 2004, 513; NVwZ 2008, 349) ruling that public authorities may act as agents of necessity, but **in case that the public reimbursement regulations are conclusive**, they can not claim reimbursement on a civil law basis
  - BGH decisions did not deal with WaStrG, but with general police law and fire and rescue law
  - Outstanding question: Are the **WaStrG** regulations regarding reimbursement for wreck removal costs **conclusive**?

## Wreck removal within the German Territorial Sea

### Wreck removal under German civil law

- **Recent development:**
  - Higher Regional Court of Hamburg decision (4th July 2014 – 6 W 22/14) rules that **WaStrG** regulations regarding reimbursement for wreck removal costs are **not conclusive**
  - Higher Regional Court decision not binding on BGH
  - Not foreseeable whether BGH will judge the same way

Two options:

Get the ship sunken before entering the  
German Territorial Sea

Or get a good lawyer ...

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THANK YOU!

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