

TORTIOUS CLAIMS AGAINST SHIPBUILDERS: AN ITALIAN PERSPECTIVE

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I am delighted and honored to be here among such important and authoritative members of the shipping world.

I will try to offer a brief synthesis of the preconditions under which a tortious claim can be brought forward under Italian Law, and in what cases it may represent an opportunity to Shipowners but also, to some extent, to third parties.

We could set four main issues to deal with.

First of all:

WHO can bring a tortious claim against a shipbuilder.

The answer could be a **Shipowner**. But we may also imagine an action in tort against a shipyard brought by a **third party** who has been damaged by a defective ship.

We would then have to figure out:

WHEN is convenient to start an action in tort.

Most of the times it will be a situation in which **the contractual protection is not sufficient or cannot be invoked**.

We may think of some examples:

- when the Claimant is a third party in respect of the contract itself;
- when in the contract there is a valid and operative liability exemption clause;
- when the contractual action is subject to a time bar which has not been met;
- when the damage appears after the expiry of the contractual guarantees;
- each time Claimant seek compensation for damages which are validly excluded by contract;

Now the question would be:

WHAT are the legal grounds for an action in tort under Italian Law.

Well, tortious claims under Italian Law require a very specific, and most of the times heavy, burden of proof to be discharged.

The main rule is given by **art. 2043 c.c.** according to which Claimants must provide evidence of a willful or culpable misconduct on the side of the Shipyard.

Claimants should also give evidence of the damages they suffered and of the causal link between the conduct and the damage.

The possibility to provide such evidences should be considered as a precondition of this type of action.

The **conduct** appears then to be a **key element** of this legal scheme, as well as the most difficult element to be proved, especially with regard to the willfulness and culpability of the same.

Among the potential conducts, or misconducts, which may lead to a tortious liability of the Shipyard, there is the **wrongful design/manufacturing of parts of the ship**.

Italian Courts admit the possibility, also for third parties, to seek compensation for damages arising from such a conduct.

For example, in a decision dated 1980, an Italian Court declared that a company operating a fishing boat, was entitled to sue in tort the shipyard which built it. The action was started in order to seek compensation for the damages suffered following the loss of the rudder during the fishing which determined the stop of the activities, and a substantial economic loss.

In that case, the action was brought by a third party (Claimants were not originally part of the shipbuilding contract) under the legal scheme just described and referable to art. 2043 c.c..

The wrongful design of the rudder was ascertained through a **technical survey**.

However, the Court did not grant any compensation for the economic losses suffered by Claimants.

This decision is actually quite old.

Italian Courts are now much more flexible in relation to the type of **damages** that can be compensated as a consequence of a tortious action.

It is a matter of fact that the scope of tortious liability in Italy has been enlarging in the last years.

We will analyze this issue in a moment.

There is also a bolder, and quite suggestive, legal scheme under which it could be possible to start a tortious legal action.

This scheme is offered by art. 1669 c.c. of the Italian Civil Code, a rule which normally applies to the ordinary building contracts.

This rule states that the builder remains liable to his principal for any damage (but also for a mere risk of damages) arising from wrongful design or construction, for **ten years** from the delivery.

Now, the applicability of this action to a shipbuilding contract was admitted by the Italian Supreme Court in a **decision dated 1956**, but it is strongly disputed by the most important authors.

The reason of this argument lies in the possibility, contested by the authors, to make a legal comparison between a ship and an immovable property and so to rely on such rule, which, basically, provides a **law based guarantee**.

In the just mentioned 1956 case, the Supreme Court stated that the shipbuilder could be liable for a wrongful design/manufacturing of some parts of the hull which compromised the watertightness of the ship.

Builder's liability was in the end excluded because it was ascertained that: 1) the shipowner had operated the vessel being aware of such problems, and also that 2) the vessel was declared and maintained in class since its delivery.

An action based on art. 1669 c.c. could have some advantages in respect to an action based on art. 2043.

This because the first one is assisted by a **presumption of liability against the builder** while the second one needs the discharge of the burden of proof just described.

Recent decisions of the Italian Supreme Court confirm that the action based on art. 1669 c.c. can be brought also by third parties.

In order to complete this short comment on the Italian perspective, let's focus on:

WHAT damages can be compensated by a successful action in tort.

In case of an action brought in tort, all the limitations provided in the contract **should not operate**: this is particularly important with regard to the **economic damages** which may arise from the loss of time, the compensation of which, most of times, is expressly excluded by the contract.

The possibility to seek compensation in tort both for **direct damages** (as for example ship's repair costs, or damages to other ships or port structures or to the environment etc.) and for **consequential economic damages** (towage/salvage costs, loss of hire etc.) is, in fact, admitted both by the Italian courts and by the authors.

These few hints on a potential tortious claim against a shipbuilder might be summed up as follows:

WHO can bring a tortious claim against a shipbuilder: besides the Shipowners, we could also think about third parties (let's think about an oil spill due to a wrongful design/manufacturing of a tanker vessel);

- WHEN** **it is possible to start such a legal action:** in all those cases in which the contract guarantees cannot be invoked/used (contractual time bars and exemptions, third parties who cannot rely on contract in order to seek compensation for damages; cases in which compensation is demanded for damages expressly excluded by contract);
- WHICH** **legal scheme may be used to set up a tortious claim:** art. 2043 of Italian Civil Code, but also, to some extent, art. 1669 of Italian Civil Code;
- WHAT** **kind of damages can be compensated by a successful tortious claim:** according to Italian most recent cases, it is possible to conclude that a tortious claim could obtain compensation for both direct and consequential economic damages;

I hope this few hints were of interest. Many thanks to everyone for the attention.