**Journal of Maritime Law & Commerce,** Vol. 45, No. 2, April, 2014

# *Liability of Classification Societies: Cases, Challenges and Future Perspectives*

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## I
## INTRODUCTION

This article addresses the role and liability of classification societies. The inability to establish international uniform liability principles results in conflicting national case law. An up-to-date and critical analysis of the relevant Belgian (case) law is currently missing.[1] To compare and place the 'Belgian approach' in a broader perspective, the situation in the United Kingdom (UK) and the United States (U.S.) will be discussed. More important is that this article will also examine recent judgments and pending cases on liability issues. Future perspectives, challenges, and suggestions as to the role and liability of classification societies will subsequently be put forward. The overall conclusion is that shared liability between classification societies and their co-contractors, whether shipowners or Flag States, is a just and appropriate system. However, holding classification societies liable for their negligence will only be reasonable and fair if they can rely on a currently non-existing limitation of liability regime. Furthermore, (inter)national maritime governments and organizations should, each within their own scope of activities and jurisdiction, focus again on the debate about the liability and role of classification societies.

## II
## CLASSIFICATION SOCIETIES: PRELIMINARY CONSIDERATIONS

Classification societies are broadly defined as "organizations which survey and classify ships according to their condition for insurance and other

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[1] See for earlier contributions: Marc. A. Huybrechts, *Classificatiemaatschappijen of de schone schijn doorkruist?* in: X, LIBER AMICORUM JACQUES PUTZEYS 471-472 (BRUYLANT 1996); Marc. A. Huybrechts, *De Classificatie-maatschappij en haar aansprakelijkheid*, 6 T.V.R. 1-5 (1997).

purposes."[2] Classification societies are independent legal entities hired and paid for by the owner of the vessel that is to be classified. They establish basic minimum standards for the design, construction and maintenance of the principal hull and machinery components of ships. They issue certificates upon which important sectors of the maritime industry rely as an assurance that the classed vessel is likely to be reasonably suited for its intended use.[3] Classification services perform a vital function with respect to the insurability and marketability of vessels.[4] Besides the shipowner and purchaser, the principal maritime insurers, cargo interests, and charterers rely on their activities before providing financial coverage or hiring the vessel. A certificate allows them to make a reasonable assumption as to the condition of a ship and the risks it represents.[5] This is referred to as the private function of classification societies: a 'classification contract' is agreed with the shipowner or the shipyard in accordance with class regulations.[6]

From this private function, the role of classification societies gradually expanded to cover public tasks. This is referred to as statutory certification, and embodies more police duties.[7] According to Article 94 (3) United Nations Convention on the Law of the Sea (UNCLOS), a Flag State has the duty to take appropriate measures for vessels flying its flag to ensure safety at sea. States often delegate statutory powers to classification societies as Recognized Organizations (RO's) to implement and enforce international maritime safety standards.[8] Consequently, a classification society acting on behalf of a Flag State is bound by two contracts; the first one with the Flag State itself, an 'agreement on the delegation of power,' and the second one with the shipowner for the performance of the obligatory statutory surveys, a 'statutory survey contract.'[9]

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[2]Marine Insurance Glossary, *Glossary of Marine Insurance and Shipping Terms*, 14 U.S.F. MAR. L.J. 332 (2001-2002).

[3]Machalle A. Miller, *Liability of Classification Societies from the Perspective of United States Law*, 22 TUL. MAR. L.J. 77 (1997); Nicolai Lagoni, *The Liability of Classification Societies*, 43-50 (SPRINGER 2007); IACS, *Classification Societies: their Key Role*, IACS PUBLICATIONS 5-6 (2011).

[4]Juan L. Pulido Begines, *The EU Law on Classification Societies: Scope and Liability Issues*, 36 J. MAR. L. & COM. 488 (2005).

[5]Damien L. O' Brien, *The Potential Liability of Classification Societies to Marine Insurers under United States Law*, 7 U.S.F. MAR. L.J. 404 (1995); Hannu Honka, *The Classification System and its Problems with Special Reference to the Liability of Classification Societies*, 19 TUL. MAR. L. J. 3 (1994); Miller at 82-88 (1997); Lagoni at 11-26 (2007).

[6]Lagoni at 43-46 (2007).

[7]Alan Khee-Jin Tan, *Vessel-Source Marine Pollution: the Law and Politics of International Regulation*, 44 (CAMBRIDGE UNIVERSITY PRESS 2006).

[8]Begines at 488 (2005); Lagoni at 50-53 (2007); Anthony Antapassis, *Liability of Classification Societies*, 11 E.J.C.L. 13 (2007).

[9]Lagoni at 53-55 (2007).

## III
## THE INTERNATIONAL ASSOCIATION OF CLASSIFICATION SOCIETIES (IACS)

The increase in the number of classification societies by the end of the 19th century led to severe competition. This resulted in a decline of the quality of their services. Each society had its own standards which allowed shipowners to 'class hop.'[10] Against this background and in order to enhance the public confidence in classification societies, the International Association of Classification Societies (IACS) was created in 1968. The aims of IACS are to harmonize the regulations and standards of its members, to facilitate the exchange of technical knowledge, to prescribe minimum requirements, and to offer training for class surveyors. Furthermore, IACS assists international regulatory bodies in the development, implementation, and interpretation of statutory regulations and industry standards in ship maintenance and design.[11] In 1998, IACS adopted the Transfer of Class Agreement (TOCA).[12] Under this regime, the 'gaining classification society' has the right of access to the full classification history of the vessel, whereas the classification society 'losing the vessel' must make all the existing class history available. Its aim is to provide a reliable exchange of information between the concerned societies. The system prevents 'class hopping' and makes it virtually impossible for sub-standard ships to remain within the IACS regime.[13]

The effectiveness of the activities and the functioning of IACS have been criticized. It was not regarded as a self-policing organization by its members for a long time. This was due to weak relationships between classification societies at all hierarchical levels. Whereas technical information was exchanged between societies, it is argued that "neither strong ties between top executives, nor a tradition of cooperation in policy matters have ever existed."[14] Other different problems remain, although IACS established several transparency-enhancing measures. IACS implemented a quality certification system that is mandatory for its members. Since only 13 societies are IACS members, the certification system does not affect the other existing

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[10]Begines at 493 (2005); Lagoni at 26 (2007). See in general Philippe Boisson, *Classification Societies and Safety at Sea: Back to Basics to Prepare for the Future*, 18 MAR. POLICY 373 (1994).

[11]Article 2, Charter International Association of Classification Societies 2009, available at <www.iacs.org.uk/document/public/explained/IACS%20Charter%20and%20Annexes.pdf>.

[12]IACS, *Procedure for Transfer of Class*, available at <www.iacs.org.uk/document/public/Publications/Procedural_requirements/PDF/PR_01A_pdf87.pdf>.

[13]Boisson at 375 (1994); Miller at 77 (1997); Lagoni at 24-26 (2007).

[14]Franco Furger, *Accountability and Systems of Self-Governance: the Case of the Maritime Industry*, 19 LAW & POL'Y 466 (1997).

classification societies. In addition, classification by IACS members includes about 90 percent of the world tonnage and over 50 percent of the vessels in the world fleet. As such, small vessels and shipowners with limited organizational capacities remain outside the IACS safety framework.[15] Furthermore, the IACS database which registers compliance with the International Safety Management Code (ISM)[16] is incorrect. It excludes information from administrations which directly certified vessels but did not submit their data. Consequently, the database underestimates the percentage of ships that comply with the ISM Code.[17] Finally, some urge[18] IACS to restrict the margin of discretion which individual members have in relation to certain Unified Requirements such as the Polar Class regulations.[19]

More important are the potential infringements by IACS activities of Article 101 and Article 102 of the Treaty of the Functioning of the European Union (TFEU).[20] IACS regulations cover approximately 90% of the world's cargo tonnage. This implies that IACS rules are the *de facto* minimum industry standards. They create a significant competitive advantage for societies complying with the IACS requirements.[21] The European Commission argued that IACS members have a strong position in the vessel classification market, and that a restriction of the competition on this market would be possible.[22] Certain IACS procedures might infringe Article 101 TFEU by: 1) preventing classification societies which are not already members of IACS from joining the international association, 2) prohibiting their participation in IACS working groups, and 3) preventing them from accessing IACS technical background documents.[23] IACS failed to enact "admission require-

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[15]Russell Harling, *The Liability of Classification Societies to Cargo Owners*, 1 L.M.C.L.Q. 7 (1993), as referred to in Honka at 7 (1994).

[16]The purpose of the IMO International Management Code for the Safe Operation of Ships and for Pollution Prevention (International Safety Management (ISM) Code) is to establish a management system in shipping companies to ensure the safe operation of ships and to prevent pollution.

[17]Mary Campbell Hubbard and Antonio J. Rodriguez, *International Safety Management (ISM) Code: A New Level of Uniformity*, 73 TUL. L. REV. 1611-1612 (1999).

[18]Erik J. Molenaar, *Arctic Marine Shipping: Overview of the International Legal Framework, Gaps and Options*, 18 J. TRANSNAT'L L. & POL'Y 321 (2010).

[19]These Rules are applicable to ships (e.g. icebreakers) intended for navigation in ice-infested polar waters.

[20]See Antapassis at 6-7 (2007); Rüdiger Dohms and Piergiorgio Rieder, *Commitment Decision in the Ship Classification Case: Paving the Way for More Competition*, 1 EU COMPETITION POLICY NEWSLETTER 41-45 (2010).

[21]John Kallaugher and Andreas Weitbrecht, *Developments under the Treaty on the Functioning of the European Union, articles 101 and 102, in 2008/2009*, 8 E.C.L.R. 309-310 (2010).

[22]European Commission (2009/C131/13), Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case 39.416-Ship classification; also discussed in Anna Emanuelson, *Standardisation Agreements in the Context of the New Horizontal Guidelines*, 2 E.C.L.R. 71 (2012).

[23]Sven Sattler, *Standardisation under EU competition rules-the Commission's New Horizontal Guidelines*, 32 E.C.L.R. 346 (2011).

ments that were objective and sufficiently determinate so as to enable them to be applied uniformly and in a non-discriminatory manner and to provide an adequate system for including non-IACS [classification societies] in the process of developing IACS technical standards."[24] As a response, IACS established qualitative membership criteria and guidance for their application. Moreover, it allowed non-member classification societies to participate in technical working groups and granted them full access to IACS technical resolutions and related background documents. A European Commission Decision from October 14, 2009 made the IACS commitments legally binding.[25] This decision made an end to the Commission's inquiry but it did not conclude whether there had been an infringement of the competition rules. It remains unclear to what extent IACS will comply with its commitments. The Commission can however impose a fine of up to 10% of IACS' total turnover without having to prove any violation of the competition rules in case IACS breaks its legal commitments.[26]

## IV
## LIABILITY OF CLASSIFICATION SOCIETIES: THE LEGAL FRAMEWORK

### *A. CMI: A Failed Attempt*

The Comité Maritime Internationale (CMI) decided in June 1992 that a Joint Working Group on the Study of Issues of Classification Societies would begin with the study of the rights, the duties, and the scope of the liability of classification societies. However, in the first Session it was decided that issues of statutory limitation and regulation of civil liability of classification societies would be examined in a future study.[27] The Group's activities were nevertheless useful insofar as they established the Principles of Conduct for Classification Societies.[28] This was strengthened by the intro-

[24]Emanuelson at 71 (2012).

[25]EU Commission Decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case 39416 Ship classification (October 14, 2009).

[26]X, *Ship Classification Market: IACS Commitments made Legally Binding*, 264 EU FOCUS 7-8 (2009). In this regard: Commission Press Release, *Antitrust: Commission Paves Way for More Competition in Ship Classification Market by Making IACS' Commitments Legally Binding*, EUROPEAN PRESS RELEASES (OCTOBER 14, 2009).

[27]Frank L. Wiswall, *Report and Panel Discussion concerning the Joint Working Group on a Study of Issues re Classification Societies*, CMI YEARBOOK 229 (1994).

[28]As reported in CMI Yearbook 100-106 (1995) and reprinted in Frank L. Wiswall, *Classification Societies: Issues Considered by the Joint Working Group*, 2 I.J.S.L. 171, 183-5 (1997).

duction of Model Clauses which incorporated provisions to limit the liability of classification societies.[29] The clauses needed to be included in agreements between classification societies and shipowners or national governments. The proposed measures were a positive step and more than welcome in the maritime industry in which clauses drafted by classification societies themselves prevailed.[30]

The Model Clauses have not been adopted by the CMI because of differing opinions between shipowners and classification societies on the maximum limits of liability. The Clauses are nevertheless relevant because they serve as guidelines for societies when drafting their General Conditions.[31] The Joint Working Group argued that a classification society should not be held liable unless its management violated the standard of reasonable care, or if its servants or agents committed a deliberate act of gross negligence which directly caused the harm.[32] The fairest and most effective way to determine the limits of a classification society's liability should be based upon its services provided to the vessel, and not upon the ship's tonnage. It needs to be measured by examining the fee that the shipowner paid for the services and subsequently be limited to a multiple of this fee.[33] The Model Clauses suggested to limit the liability of a classification society to an amount that is ten times the fee, with a maximum of $4,000,000.[34] However, each society was able to amend the Clauses according to its own commercial concerns and domestic law. In addition, they were not binding for the contracting parties when contrary to mandatory legislation.[35]

Since the duties and responsibilities under a classification society's regulations only affect the relationship with the shipowners, third-party interests were not assumed to be the intended beneficiaries of these regulations. Classification societies do not owe any contractual obligations under the terms of their class rules to third parties. As such, a legal duty of care can only arise in connection with the public statutory surveys, and not in connection with private classification activities.[36] Unfortunately, in the fifth Session of the Working Group it was decided to postpone the discussion

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[29]Documents for the Centenary Conference, CMI Yearbook 334-342 (1996).

[30]José M. Alcantara, *Shipbuilding and Classification of Ships. Liability towards Third Parties*, 58 ZBORNIK PFZ 142 (2008).

[31]Lagoni at 298-299 (2007).

[32]Wiswall at 233 (1994).

[33]Antapassis at 49 (2007).

[34]Begines at 499 (2005).

[35]Antapassis at 49 (2007).

[36]There are nevertheless circumstances under Belgian law where a legal duty exists with regard to private certification activities. An example is the duty of care owed by elevator installers-repairers to third parties. See: Court of Appeal Ghent, March 8, 1983, R.W. 321 (1985-86); Court of Appeal Ghent, May 15, 1995, T. Aann. 369 (1996); Court of First Instance Brussels, March 13, T.Verz. 820 (2001).

about the content and the scope of the Model Clauses. However, the consensus was that a classification society should not be liable to third parties if, without notice to the classification society, the shipowner is in default of his obligations under international or domestic law, and that fact caused the loss.[37]

The Model Clauses also addressed the liability of classification societies when acting on behalf of Flag States. Classification societies can be liable in several ways when performing statutory functions. These include administrative, civil, and criminal liability. Classification societies can however rely on certain legal protections granted by Flag States. Immunity from jurisdiction is especially important because it prevents classification societies from claims in other jurisdictions.[38] Most Flag States for whom classification societies perform statutory duties do not have legislation which confers immunity.[39] The CMI suggested incorporating clauses in the contractual relationships with Flag States stating that societies act as servants and agents of national governments. They should be able to rely on a liability and limitation regime similar to that provided to government employees performing similar surveys.[40] Since no other provisions were included in the Model Clauses, it was clear that the precise scope of the limitation principles had to be addressed by national or EU legislation.[41]

The Working Group also drafted Principles of Conduct for Classification Societies, and they were adopted by the CMI General Assembly in 1994.[42] Whereas the Clauses aimed to minimize a classification society's liability, it was held that "limitation is a palliative which in the long run cannot be an adequate response to the problem of the Societies' exposure to civil liability."[43] The Principles were considered as recognized and wide-accepted standards to evaluate the survey activities of classification societies.[44] They are applicable to all classification societies, whether or not member of IACS. In addition, they also cover all private and public services.[45] Compliance with the Principles of Conduct should be held as *prima facie* evidence that a society has not been negligent.[46]

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[37]Wiswall at 230-233 (1994); Alcantara at 142 (2008).

[38]Philippe Boisson, *Classification Society Liability: Maritime Law Principles must be Requestioned?*, CMI YEARBOOK 249-250 (1994).

[39]Wiswall at 230 (1994).

[40]Wiswall at 230, 232 (1994); Huybrechts at 441-443 (1996).

[41]Begines at 499 (2005).

[42]As reported in CMI Yearbook 100-106 (1995); Antapassis at 49 (2007).

[43]Wiswall at 232 (1994).

[44]Antapassis at 49 (2007).

[45]Wiswall at 233 (1994).

[46]Begines at 498 (2005).

*B. EU Legislation: An Appropriate Framework?*

Regulation (EC) 391/2009 and Directive 2009/15/EC deal with the liability of RO's acting on behalf of national governments. Directive 2009/15/EC imposes cooperation agreements between administrations and classification societies, and deals with potential liability claims in this regard. Member States that delegate certifying functions to RO's shall set out a working relationship between their competent administration and the classification society that acts on their behalf. The working relationship shall be regulated by a formalized written and non-discriminatory agreement, or other equivalent legal arrangements. It shall set out the specific duties and functions assumed by the organizations, and must include several provisions.[47] Since a classification society is contractually bound to act on behalf of the Flag State and its surveyors mostly have a contract of work or agency, the loss caused by their negligence may be recovered from the maritime administration as it bears final responsibility. However, two legal persons are concerned in the delegation agreements: the national government, and a company that acts on its behalf. Nevertheless, it is a natural person who performs the survey tasks forming the basis of Flag State responsibility. As such, it is generally assumed that when a society performs functions on behalf of Flag States, the liability for its acts or omissions is directly (in civil law systems) or vicariously (in common law systems) that of the State which must ensure compliance with the conventions it has ratified.[48]

Begines argues that the Flag State should be liable for negligent acts committed by a classification society. Clients or third parties may either sue the RO, the government, or both parties. It is only in exceptional cases that a society will be held solely and directly liable for negligence in tort when performing public duties.[49] However, Cane concludes that it is not clear whether state liability in tort can be applied in this context.[50] The Supreme Court of the Netherlands held in a recent case that imposing state liability is not evident. By referring to the lack of 'relativity' as required in Article 6:163 of the Dutch Civil Code, the *Hoge Raad* decision found that the State could not be liable for the loss caused by the sinking of a vessel. The issuance of certificates of class contributes to the public welfare and

[47]Article 5 Directive 2009/15/EC on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations.

[48]Begines at 514-520 (2005); Lagoni at 50-55 (2007). See in general: Frederick B. Goldsmith, *River Pilot, Marine Surveyor, and Third-Party Inspector Liability*, 26 TUL. MAR. L.J. 483-486 (2002).

[49]Begines at 520 (2005).

[50]Peter Cane, *The Liability of Classification Societies*, L.M.C.L.Q. 364 (1994).

enhances the safety of life at sea. Safety regulations are not intended to protect against purely financial and economic loss, and do not indemnify the shipowner in this regard.[51]

Due to different conceptions of liability in the context of statutory classification, the EU intervened and aimed to harmonize the existing liability regimes. Article 5 of Directive 2009/15/EC states that the agreement between the national government and classification societies acting on its behalf has to include provisions concerning financial liability. The Directive aims to establish shared financial liability when activities of the classification societies cause harm for which the government is liable. Under the circumstances set out in Article 5, 2, (b), the administration is entitled to financial compensation from the RO to the extent that the loss, injury, or death was caused by the latter one.[52] However, liability of classification societies to shipowners or third parties is not covered, and courts have to rely on national legislation in this regard.

One of the problems is the unclear phrasing and the use of undefined terms in the Directive. There seems to be no difference in treatment between the notions of 'reckless act' and 'gross negligence.'[53] Consequently, the liability of classification societies might be restricted to major faults, and the implication is that they cannot be liable for minor faults or ordinary negligence.[54] It is rightly argued that excluding minor faults from the scope of the Directive does not fit in the post-*Erika* and *Prestige* era. It would be justifiable to hold classification societies liable in cases of ordinary negligence.[55] Furthermore, the Directive lacks the necessary standards against which the reckless or gross negligent acts of RO's must be evaluated. Whereas specific regulations of classification societies might be relevant, general principles of national tort law could set the level of professionalism expected from a society.[56] Finally, it is not clear upon which ground the limitation figures in the Directive are based. The minimums of €4 and €2 million, for personal injury or death and other losses respectively, do not reflect the maximum financial liability of classification societies.[57]

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[51]The Linda, Supreme Court, May 7, 2004, CO2/310HR NJ 2006, 281 with comment from Hijma.

[52]See in general: Robert Wilson, *Effect of European Law on the Liability of Classification Societies*, 18 MAR. RISK INT. 20-22 (2004).

[53]Begines at 524-527 (2005).

[54]Similar problems arise with the Belgian Royal Decree of 13 March 2011 implementing the Directive. It uses *omission volontaires, faute grave, omission par négligence ou par imprudence.*

[55]Begines at 526 (2005) referring to Javier Arroyo, *Problemas juridicos relativos a la seguridad de la navigacion maritime (Referencia especial al 'Prestige')*, 20 ANNUARIO DE DERECHO MARITIMO 39-40 (2003). Also see article 3 TEU: *The Union's aim is to promote [...] well-being of its peoples.*

[56]Begines at 529 (2005).

[57]Lagoni at 324-325 (2007).

## V
## LIABILITY OF CLASSIFICATION SOCIETIES: BELGIAN LAW

### *A. Contract and Tort Law in Belgium*

Although an in-depth analysis of Belgian contract and tort law is beyond the scope of this contribution, it is nevertheless helpful to describe the general basic legal principles of liability as they are applicable to classification societies.

#### *1. Liability to the Contracting Party*

Article 1101 of the Belgian Civil Code (BCC) defines a contract as "an agreement by which one or more persons obligate themselves to one or more other persons to give, to do or not to do something."[58] Four requirements have to be met for a contract to be valid and binding: all parties must have reached mutual consent to create a legal obligation (*consentement*); all parties have to be legally competent (or have the legal capacity) to contract (*capacité à contracter*); the contract has to have a legal object (*object*); and the parties must have a valid cause/reason to contract (*cause de l'obligation*).[59]

Against the background of the *animo contrahendae obligationis*, parties are free to determine the content of their contract, the contractual terms, and the obligations. Article 1134 BCC further imposes the principle of performance in good faith of any agreement (*bonne foi*). It is the expression of the duty of loyalty owed by each contractor to the bargain reached between the parties, a duty to not offend the mutual confidence as to the content of the contract.[60] In addition, Article 1135 BCC states that contracts do not only obligate to what is expressly agreed between the parties, but also to all the consequences attached to these explicit obligations by equity, custom or the law (statutes and regulation).

Belgian courts address the contractual liability of classification societies from the perspective of the nature of their contractual performances. They

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[58]Own translation of Article 1101 BCC which reads: "Een contract is een overeenkomst waarbij een of meer personen zich jegens een of meer andere verbinden iets te geven, te doen, of niet te doen."

[59]Article 1108 Belgian Civil Code. See in general: Jacques Herbots, *Belgium*, in Jacques Herbots INTERNATIONAL ENCYCLOPAEDIA FOR CONTRACTS 39-40 (Kluwer Law International 1998); Walter Van Gerven and Sofie Covemaeker, *Verbintenissenrecht*, 719 (Acco 2006).

[60]Sophie Stijns, Dirk van Gerven and Patrick Wéry, *Chronique de jurisprudence. Les obligations: les sources (1985-1995)*, 702 J.T. 33-35 (1996); Walter van Gerven and Sofie Covemaeker, *Verbintenissenrecht*, 58-59 (Acco 2001); Jan Martien Smits and Sophie Stijns, *Inhoud en Werking Van de Overeenkomst Naar Belgisch en Nederlands Recht*, 40-43 (Intersentia 2005); Hubert Bocken, *De goede trouw bij de uitvoering van verbintenissen*, R.W. 1043 (1990).

are obliged to perform to the best of their abilities and/or insight, which means that they have to apply the normally required diligence (*obligation de moyens*), and are not necessarily required to actually achieve a specific anticipated result (*obligation de résultat*). This general qualification has implications for the content and the scope of a classification society's specific obligations, and especially for the allocation of the burden of proof.[61] Plaintiffs will have to provide evidence that a society did not apply reasonable efforts to comply with the contractual requirements, such as detecting shortcomings in the vessel. The applied standard of behaviour is that one should act as a *bonus pater familias*. This means that the behaviour should be that of a reasonable, careful, and professional classification society placed in the same circumstances. This has to be considered on the basis of the actual facts and circumstances of each specific case (*in concreto*). However, it is often made objective by relying on external circumstances such as professional (classification and certification) knowledge.[62]

Most contracts contain a provision that explicitly limits the duty of the classification society to the display of the necessary diligence without assuring a particular result. This is strengthened by the inclusion of indemnity and exoneration/exclusion clauses limiting the liability in case of a breach of the contractual duty of care.[63] The latter ones are contractual provisions that protect a classification society from being sued by its co-contractors for damages, negligence, or non-performance, or under which its liability is limited. Exclusion clauses are valid under Belgian law if they do not violate public policy, public morality or common decency, and or any principles of mandatory law. Since the decision by the *Cour de Cassation* of 25 September 1959,[64] an exclusion clause must meet three requirements to be valid, binding and enforceable: (1) it must not conflict with public policy or mandatory law aiming to restrict the defendant's liability possibilities; (2) it must not be applicable to personal fraud or to an intentional act of the debtor; and (3) it must not render nugatory the actual content of the obligations or the contract.[65] The last requirement is often problematic in the context of classifica-

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[61]Walter van Gerven and Sofie Covemaeker, *Verbintenissenrecht*, 32-33 (Acco 2006); Jan Roodhooft and Cathy Vanackere, *Definitie en enkele soorten*, in Jan Roodhooft, *Bestendig Handboek Verbintenissenrecht*, 40 (Kluwer 1998).

[62]Aurélie Gerth, Denis Waelbroeck and Kelly Cherrette, *Belgium National Report*, EUROPEAN COMPETITION ACTIONS FOR DAMAGES 4-5, available at <ec.europa.eu/competition/antitrust/actionsdamages/national_reports/belgium_en.pdf>; Hubert Bocken and Ingrid Boone, *Inleiding tot het schadevergoedingsrecht:buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, 100-102 (Die Keure 2011).

[63]See infra part V.2 and V.5.

[64]Court of Cassation, September 25, 1959, Arresten Hof van Verbreking, 1960, 86, Pas. 1960, I, 113.

[65]Alois van Oevelen, *Exoneratiebedingen en vrijwaringsbedingen*, in: Vincent Sagaert and Dirk Lambrecht, *Actuele Ontwikkelingen inzake Verbintenissenrecht*, 11-19 (Intersentia 2009).

tion activities. In the case of the *Paula*, the court held that the exclusion clauses invoked by classification societies had to be rejected on the ground that they invalidated the substance of their contractual obligations.[66] Indemnity clauses on the other hand are provisions under which a party (classification society) assures to compensate the other party (shipowner) for any harm, liability, or loss arising out of the contract. Belgian courts accept their validity as long as they comply with the public legal policy and common decency.[67]

In the unlikely case that the contract does not contain a provision specifying that the classification society is only held to apply reasonable efforts, recourse to general legal principles is necessary. Here, the majority view applies the idea of interpreting agreements.[68] If specific delimitation of the contractual obligations is open for doubt, Article 1156 BCC requires judges to rely on the actual common intention of the parties to determine the meaning of the contract. An important criterion to interpret the contract is the degree of certainty to which a classification society is able to achieve a particular result.[69] Since a class certificate only confirms the seaworthiness of the vessel at the time it is issued, there is inherently an element of uncertainty in a classification society's contractual obligations. Therefore, it can be argued that a classification society only has to perform services to the best of its abilities. A minority view, however, relies on Article 1135 of the BCC and the notion of good faith to interpret the precise content of a classification contract.[70] Additional non-explicitly agreed obligations, such as the requirement to inform parties of technical deficiencies, could arise out of a classification contract.[71] This criterion is more subjective and takes case-related circumstances into account.[72]

A final aspect concerns the question whether shipowners having contracted with a classification society can ever recover in tort against its contractual party, given the Belgian doctrine of non-concurrence of liability in contract and in tort (*non-cumul des responsabilités).* Legal scholars have reached different interpretations with respect to the case law of the *Cour de*

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[66]The Paula, Court of Appeal Antwerp, May 10, 1994, R.H.A. 1995, 301-331.

[67]Van Oevelen at 30-34 (2009).

[68]See Pierre Van Ommeslaghe, *Droit des obligations I*, 40-41 (Bruylant 2010); Van Gerven and Covemaeker at 33 (2006); Thierry Vansweevelt, *De civielrechtelijke aansprakelijkheid van de geneesheer en het ziekenhuis*, 110-114 (Maklu 1992).

[69]Leentje Van Valckenborgh, *De kwalificatie van een verbintenis als resultaats-of middelenverbintenis*, 5 T.B.B.R. 222-229 (2011).

[70]Robert Kruithof, *La théorie de l'apparance dans une nouvelle phase*, 28 RCJB 80 (1991).

[71]Hugo Vandenberghe, *De grondslag van de contractuele en extra-contractuele aansprakelijkheid voor eigen daad*, 7 T.P.R. 147(1984).

[72]Van Valckenborgh at 230-231 (2011).

*Cassation* on this question.[73] According to one interpretation (*verfijningstheorie*), concurrence of liabilities is possible when (1) the behavior of one party constitutes not only a breach of contractual obligations but also a breach of a general (*i.e.* extra-contractual) duty of due care, and (2) the harm for which compensation is sought does not consist of the loss of the benefits that were to be expected from the performance of the contract or harm that is a consequence of such loss. Another and more restricted view (*verdwijningstheorie*) holds that a claim in tort between contracting parties is only possible (1) when the behaviour on which the claim is based does not constitute a breach of contract but solely a breach of a general (*i.e.* extra-contractual) duty of care, and (2) the harm for which compensation is sought is not the result of or caused by an act that (also) can be qualified as a breach of contract.[74] Whereas older case law[75] and a majority of legal scholarship[76] seemed to favour the second reading of the decision of the highest court, recent decisions increasingly seem to support the first and less restricted view. The First Chamber of the *Cour de Cassation* held in the case of *Tiércé Franco Belge* that a contractor can claim in tort when an act of his co-contractor constitutes both a breach of contractual obligations, and a breach of the general duty of care.[77]

As such, the harm for which compensation is sought determines the scope of recovery in tort between contractors. Article 1149 BCC stipulates that damages due to a creditor have to compensate him not only for the losses that he actually incurred but also for the gains of which he was deprived (*réparation intégrale du dommage*). Because of this (broad) wording, the requirement that a party has to suffer "not merely contractual losses" for a recovery in tort to be available will rarely be met. Consequently, many authors assume that the post-*Tiércé Franco Belge* case law will most likely

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[73]See Court of Cassation, December 7, 1973, R.W. 1973-1974, 1597; Court of Cassation, April 8, 1983, R.W. 1983-84, 164; Court of Cassation, September 28, 1995, Arr. Cass. 1995, 287; Court of Cassation, September 29, 2006, N.J.W. 2006, 946; R.W. 206-07, 1717; T.B.O. 2007, 66; Pas. 2006, I, 1911; Court of Cassation, November 27, 2006, R.A.B.G. 2007, 1257.

[74]See discussion and further references in Thierry Vansweevelt and Britt Weyts, *Handboek Buitencontractueel Aansprakelijkheidsrecht*, 98-99 (Intersentia 2009); Bocken and Boone at 41-48 (2011).

[75]Court of Cassation, September 28, 1995, Arr. Cass. 1995,825 and Pas. I 1995, 856; Court of Cassation, May 23, 1997, Arr. Cass. 1997, 563 and Pas. I 1997, 583.

[76]Alois van Oevelen, *De betekenis van het stuwadoorsarrest van het Hof van Cassatie voor het maritieme recht, bijna dertig jaar later*, in: Eric van Hooydonk, *Stouwers, naties en terminal operators het gewijzigde juridische landschap. Antwerpse zeerechtdagen*, 161-178 (Maklu 2003); Hugo Vandenberghe, Marc Van Quickenborne, Steven Decoster and Koen Geelen, *Overzicht van rechtspraak 1979-1984. Aansprakelijkheid uit onrechtmatige daad*, T.P.R. 1602 (1987).

[77]Court of Cassation, September 29, 2006, AR C.03.0502.N; Kristof Van Hove, *Noot onder Cass 29 September 2006*, T.B.O. 67 (2007); Ingrid Boone, *Samenloop contractuele en buitencontractuele aansprakelijkheid verfijnd*, N.J.W. 947 (2006); Eric Dirix, *Rechterlijk overgangsrecht*, R.W. 1756 (2008-2009).

not change much in the concurrence of liabilities doctrine in Belgium. However, when contractual loss is strictly interpreted as the loss of contractual advantages, claims in tort law between a shipowner and a classification society will most likely be more successful.[78]

An exception to the exclusion of liability in tort between contracting parties is generally recognized when the act comprising the breach of contract also constitutes a criminal offence. As negligently causing physical injuries and harm constitutes such an offence, a ship- owner can bring a claim in tort against a classification society in cases where such harm has been the result of a breach of the general (non-contractual) duty of care, or a violation of a statutory or regulatory rule by a classification society.[79]

*2. Liability to Third Parties*

A class certificate can never be used by the shipowners as absolute proof of seaworthiness. Although classification societies do not act as a shipowner's insurer, their liability to third parties can be invoked when a certificate is delivered in breach of general principles of care. Articles 1382-1383 BCC state that a person has to provide compensation for the harm caused by his fault. Claimants will have to demonstrate the fault of a classification society, the harm they suffered, and the causal link between both. The fault can lie in the breach of any statutory or regulatory rule or in negligence, which means a lack of compliance with an unwritten general duty of care. Under Belgian law, it is generally accepted that companies performing functions such as classification societies, not only have a contractual duty of care to their contracting party, but can also be held to have a general duty of care to everyone who can be affected by their services. This includes parties to whom it is not contractually bound.[80] Therefore, a classification society can be liable to third parties if it does not correctly perform surveys, or issues certificates that violate its own standards and regulations. Furthermore, they have to detect technical shortcomings, and notify this information to all involved parties. Compliance with their general duty of care has to be judged according to the *bonus pater familias* criterion. This implies that the behaviour should be that of a normally careful classification society placed in similar circumstances. The evaluation of a classification society's services has

[78]Vansweevelt and Weyts at 105 (2009); Hubert Bocken, *Samenloop contractuele en buitencontractuele aansprakelijkheid. Verfijners, verdwijners en het arrest van het Hof van Cassatie van 29 September 2006*, 169 N.J.W. 722-731 (2007); see also: Court of Cassation, June 7, 2010, AR C.09.0586.N (unpublished). *Contra*: Court of Cassation, November 27, 2006, R.A.B.G. 2007, 1257.

[79]Bocken and Boone at 47-48 (2011).

[80]See infra part V.

to be done by referring to the moment when the damaging behaviour occurred (*i.e.* at the moment when the certificate of class was issued).[81]

Before discussing Belgian case law on the liability of classification societies, the doctrine of personal immunity of a contracting party's performance agent (*agent d'exécution*) will briefly be described.[82] This doctrine developed by the *Cour de Cassation* implies that an agent performing the contractual duties of a principal can only be liable in tort to the contracting party of a principal for whom he is performing these duties[83] in cases where the principal himself could be held liable in tort to his contracting party. Considering the strict requirements for the concurrence of liability in contract and liability in tort between contracting parties,[84] a performance agent will most likely not incur such liability, and as he cannot be held liable based on the contract between his principal and his contracting party as he is not a party to that contract, Belgian doctrine considers performance agents generally to be "immune" from liability to the contracting parties of their principals.[85]

The question arises whether a classification society can be considered as a performing agent of the shipowner, and can therefore be "immune" from liability to the contracting parties of the shipowners, such as cargo owners, passengers, or purchasers. Courts repeatedly held that by classifying a vessel, classification societies do not perform the shipowner's contractual obligations. A classification society is not an agent acting on behalf of the shipowner but is considered to be a 'normal' third party. Consequently, classification societies cannot rely on the personal immunity principles developed by the *Cour de Cassation*.[86] There is no legal or procedural barrier preventing co-contractors of the shipowner from proceeding in tort against classification societies under Belgian law.[87]

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[81]See Bocken and Boone at 99-105 (2011); Gerth, Waelbroeck and Cherrette at 4-5.

[82]See Ignace Claeys, *Samenhangende overeenkomsten en aansprakelijkheid: de quasi-immuniteit van de uitvoeringsagent herbekeken*, 143-239 (Intersentia 2003).

[83]The agent is the person to whom a contracting party confides the actual performance of his own contractual duty. See: Herman Cousy and Dimitri Droshout, *Liability for Damage Caused by Others under Belgian Law*, in: Jaap Spier and Francesco Donato Busnelli, *Unification of Tort Law: Liability for Damage Caused by Others*, 50 (Kluwer Law International 2003).

[84]See supra on the non-concurrence of liabilities.

[85]Court of Cassation, December 7, 1973, R.W. 1973-1974, 1597. Also see Bocken and Boone at 49-50 (2011).

[86]See infra part V.

[87]Eric van Hooydonk, *Eerste Blauwdruk over de Herziening van het Belgisch Scheepvaartrecht*, 195-196 (Maklu 2011).

*B. The Case of the Ruki*[88]

H., acting on behalf of classification society Unitas, surveyed the *Ruki* after some repairs were performed. On July 14, 1969, he suggested the vessel should be classified as A/2-1. On August 5, 1969, Unitas delivered a certificate of seaworthiness to the shipowners. The vessel was granted class 2 with additional notation A/2-1. On November 30, 1969, an insurance policy covering the liability of the carrier/shipowner was agreed with Naviganda Corporations. On May 30, 1970, an additional insurance contract was agreed between L'Océanide and Malteries Léon Dreyfus to cover the cargo of barley during the voyage from Sens to Leuven. The day after, the vessel stranded on the Scheldt in Zele (Belgium). According to an expert report, this was due to imprudence of the skipper. It was held that the skipper should have been aware of the low water level, and of the possibility that the vessel could be damaged by sailing on the river. The damaged vessel could be anchored to the port in Dendermonde but salvors and the fire brigade did not manage to keep it afloat, and it sank shortly after.[89]

The expert report revealed several shortcomings with regard to the technical maintenance of the vessel. It was argued that some defaults (such as damage and rust to the bulkhead) already existed when the vessel stranded on the Scheldt. Its unseaworthy state had gradually developed during the years before the incident, and the large amount of rust (2.30 meters) in particular could have been detected by an accurate class survey.[90] L' Océanide claimed financial recovery as subrogated insurers from Unitas and its surveyor. It held that the cargo would only have been insured if a valid certificate was issued. However, the survey was not done in an accurate and correct way since the vessel had several shortcomings. Unitas nevertheless issued a certificate and should therefore be held liable for gross negligence.[91]

The court affirmed the presumption that a certificate of class only attests the seaworthiness of the vessel at the moment it is issued just prior to the intended voyage. Since the certificate dated from August 1969 and the incident occurred ten months later, it would be difficult for the plaintiffs to invoke it as proof of a seaworthy vessel. Furthermore, the mere possession of a certificate was not automatically a proof of reasonable care by the shipowner as to the vessel's seaworthiness. It could therefore not exempt him from liability. The court concluded that the vessel was unseaworthy and consequently not appropriate to use for maritime commercial activities.[92]

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[88]The Rukie, Court of First Instance Dendermonde, January 11, 1973, R.H.A. 1973, 127.

[89]The Rukie, R.H.A. 1973, 129-130.

[90]The Rukie, R.H.A. 1973, 130-131.

[91]The Rukie, R.H.A. 1973, 129.

[92]The assigned class refers to a state that was "relativement moins satisfaisaint."

The court further held that classification societies have to apply the normally required diligence, and are not necessarily required to achieve a specific anticipated result. Finally, L' Océanide did not manage to establish the necessary causality between its insurance contract with Malteries Léon Dreyfus and the issuance of the certificate by Unitas. The claim was consequently dismissed.[93]

### *C. The Case of the Paula*[94]

The *Paula* was constructed in 1897. Maintenance was carried out in the 1950's to modernize it. A class certificate was issued by Unitas in 1961. After additional repairs took place in 1966, the vessel was bought by Mr. S. in 1977. Unitas carried out new surveys in November 1977, and recommended other maintenance. Although some of the maintenance was carried out shortly thereafter, other aspects were performed between 1979 and 1980. Unitas subsequently issued a certificate valid until February 15, 1982. The vessel was given class A/2, being the highest class for vessels older than 40 years. A new certificate was issued by Nautilus covering the period from February 11, 1982 to April 15, 1982. The vessel was classed as 2 indicating that it was in an optimal condition.

A charter party was agreed between the owners of the *Paula* and Rhenus Antverpia for the carriage of 1.475 tons of coal. On March 22, 1982, the *Paula*, commanded by P. and his wife, anchored in the port of Antwerp close to the Société Générale des Minerais' (SGM) installations and next to the *Nortrans Elna* for transhipping the cargo. During the transhipment of coal between the two vessels under supervision of Stocatra Antwerp, serious damage occurred to the *Paula* that resulted in the sinking of the vessel with the loss of life of Mrs. P. As a consequence, the intended buyer of the coal, Intercom Corporations, never received the cargo.[95]

Insurance Company of North America, Intercom and Rhenus Antverpia claimed recovery for the loss of the cargo from the shipowners and SGM (ABT Stocatra), the company that shipped the coal on the *Paula*. The shipowners required both classification societies to indemnify them against these liability claims. Unitas and Nautilus were also summoned by the cargo owners by cross appeal. Similar claims in tort for economic loss were made by SGM against the shipowners and both classification societies. Antwerp also claimed recovery from the shipowners for the rescue and salvage costs.

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[93]The Rukie, R.H.A. 1973, 129.

[94]The Paula, Court of Appeal Antwerp, May 10, 1994, R.H.A. 1995, 301-331.

[95]The Paula, R.H.A. 1995, 306-307.

Unitas and Nautilus were again requested to indemnify the shipowners against this claim. In the first instance, the court only granted the claims against the shipowners by the owners of the cargo, by Antwerp and SGM. All claims against the classification societies were dismissed.[96]

The cargo owners and the city of Antwerp appealed against the judgment and urged the court to hold Unitas, Nautilus, the shipowners, and SGM jointly and severally liable for the pecuniary losses. They advanced that the accident was caused by the negligent loading of the coal and the unseaworthy condition of the vessel. Besides the negligence of the shipowners and SGM, both classification societies issued a certificate of class even though the *Paula* was unseaworthy. This caused the loss of the cargo and the other harm.

The shipowners argued that they relied on the certificates issued by the classification societies that indicated the seaworthy state of the *Paula*. In addition, the contractual exclusion of liability clauses with both classification societies did not apply because of their illicit content. As such, Unitas and Nautilus were summoned to indemnify the shipowners against contractual claims. SGM refuted all liability since Belgian legislation only assigns the skipper as being responsible for supplying and loading the vessel properly. SGM equally referred to the liability of the classification societies because of issuing the certificates of class.[97]

Unitas argued that the sinking of the vessel and the subsequent losses were caused by the careless loading of the coal. Moreover, the shipowners could not rely on the certificate of class because it merely represents an indication of the vessel's condition. It can only be considered as a proof of seaworthiness at the moment it is issued. Not only had the certificate already expired when the *Paula* sank, but no proof of causality could be established between the harm and the issuance of the class certificate. In addition, Unitas could rely on several exoneration clauses stating that the issuance of the certificate did not result in its personal or vicarious liability to contractual and tortuous claims. Nautilus sought indemnification on the same grounds: the careless loading of the cargo caused the incident, the state of the vessel was not connected to the occurred loss, and it could also invoke contractual exemption clauses. Furthermore, it was argued that the *Paula* had previously been under supervision of Unitas. Nautilus had only issued a certificate so that the vessel could sail to the shipyard for the necessary maintenance. Consequently, the shipowners should be fully liable for all harm since they continued to use the vessel for commercial purposes.[98]

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[96]The Paula, R.H.A. 1995, 301-308.
[97]The Paula, R.H.A. 1995, 310-311.
[98]The Paula, R.H.A. 1995, 310-311.

Using Mr. Vergauwen's expert report and additional studies of the Department of Naval Construction of the Ghent University, the Court of Appeal examined all liability claims against the shipowners and both classification societies. It concluded that the shipowners and Nautilus were jointly and severally liable for the sinking of the vessel and the subsequent harm. The court held that the liability of classification societies has to be considered based on the actual facts and circumstances of each specific case. It occurs when a certificate of class is delivered in breach of the general principle of duty of care. The classification society Nautilus was held liable because it provided a certificate that maintained an unseaworthy vessel in class and allowed it to pursue commercial activities. The exoneration clauses invoked by Nautilus were rejected on the ground that they would make nugatory the content of the classification society's contractual obligations, and because they were not binding on third parties.

By referring to the different surveys done between 1979 and 1982, the court argued that it was not certain whether the other classification society Unitas delivered a certificate in breach of the general principle of due care. The court based its assumptions on the expert report which failed to ascertain the causal link between the issuance of the certificate and the loss as such. Several surveys were organized between the aforementioned period, and whereas a periodical survey was required by the latest on February 15, 1982, the shipowners ignored the request and rather 'hopped' to another classification society to prolong the certificate. The shipowners were personally responsible for the unseaworthy state of the *Paula* by not complying with the requirement of Unitas to perform a survey on the shipyard, but instead relying upon another classification society.[99]

### *D. The Case of the Spero*[100]

This case involved the careless classification by Unitas of the *Spero* which sank after a corroded input water pipe leaked. The vessel was built in 1952, and was bought in 1982 by Mr. V.L. After some repairs had been done on the *Spero*, it was classified by Unitas as Class 1 in May 1986. The assignment of class was valid until June 30, 1988. The *Spero* sank on the 5th of January 1987 on its way to Auby on the Upper-Scheldt near to Oudenaarde. The shipowners claimed that it collided with a sharp object. This was however rejected as it became obvious that a corroded input water pipe was the cause of the sinking. The court concluded that the vessel was unseaworthy even

[99]The Paula, R.H.A. 1995, 313-317.

[100]The Spero, Court of Appeal Antwerp, February 14, 1995, R.H.A. 1995, 321-331.

before the cargo was loaded. As the *Spero* took several hours to sink, the court argued that had normal safety measures, such as using a water-pump, been taken by the skipper to keep it afloat, the sinking could have been prevented. The omission to take necessary measures is not a nautical fault under the meaning of Article 47 of the Belgian Maritime Act,[101] but constitutes an improper management of the cargo.[102] Consequently, the shipowner cannot rely on the limitation of liability principles that are only applicable to nautical faults.[103] Furthermore, he cannot invoke the classification work done by Unitas as a defense. The classification of the vessel in Class 1 was insufficient to prove that the owner took all measures to make the vessel seaworthy according to Article 31 of the Act of the 5th of May 1936 on the Charter of River Crafts.[104] A certificate does not guarantee the seaworthiness of a vessel. It remains a non-delegable duty of the shipowner. Although a certificate may serve as evidence of seaworthiness, and indicate that the vessel complies with class regulations, it does not fulfil the obligations of the shipowners to maintain the vessel in a seaworthy condition.[105]

The expert report by Mr. L. revealed that Unitas was not justified in issuing a first class status to the vessel. The report stated that the water pipe was already heavily corroded at the time of the last survey in May 1986. This negligence caused the sinking of the Spero. The court concluded that the issuance of the certificate was a professional fault which constituted a breach of the classification society's general duty of care. Moreover, a classification society is not acting as an agent on behalf of the shipowner in his contract with cargo owners. It is a 'normal' third party to cargo interests and can therefore not rely on immunity principles for the principal's agent.[106] As such, a classification society has a general duty of care to anybody who could be affected by its activities. The Court further held that, although a certificate of class is not an absolute proof of seaworthiness, it does not protect a classification society from liability due to its careless surveys. As the fault of the shipowner and Unitas both contributed to the same loss, the court argued that they were jointly and severally liable for the sinking of the *Spero*.[107]

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[101]Article 47 Loi contenant le Livre II du Code de Commerce. De la navigation maritime et de la navigation intérieure du 21 aout 1879. This article implements the provisions of the LLMC Convention into Belgian law.

[102]Court of Cassation, October 2, 1959, Pass. 1960 I, 145; Court of Cassation, January 13, 1976, R.W. 1976-77, 1695; Court of Cassation, March 21, 1985, T.B.H. 1986, 433.

[103]Frank Stevens, *Beperking van aansprakelijkheid: Zeevaart en Binnenvaart*, 13-14 (Larcier 2008).

[104]Loi sur l'Affrètement Fluvial du 5 Mai 1936.

[105]The Spero, R.H.A. 1995, 327-328. Also see Peter D. Clark, *An American Admiralty Law View Point on the Changing Role of Classification Societies*, 5 SEA LAW (2010).

[106]See supra part V.

[107]The Spero, R.H.A. 1995, 321-329; Huybrechts at 3 (1997).

*E. The Case of the Dune*[108]

The *Dune* was bought by Mr. G. and Ms. A. on April 7, 1998. It was purchased 'as is' and delivered to the claimants on the day that the contract was signed. The contract foresaw that the vessel would be delivered under a certificate of class. Prior to the purchase of the vessel, a report about its condition was issued by Mr. V. On April 7, 1998 Unitas was requested to effectuate a special survey on the *Dune*. On April 17, 1998 Unitas issued a class certificate which was valid until April 7, 2003. A new engine was placed in the ship in 1999, and subsequent maintenance works on the bottom boards was performed. Additional repairs were done on the ship's propeller in August 2001. During cleaning to the bottom planking, it became clear that both the planking and the bilge planks were damaged. The shipowners requested Euroclass, a second classification society, to survey the vessel. The inspection report concluded that the *Dune* was unseaworthy, and recommended immediate repairs. On September 11, 2001, Bureau Veritas (previously Unitas[109]) was summoned to appear in court. An expert was asked to examine whether the issuance of the certificate on the 7th of April 1998 was considered justified, to what extent the vessel was seaworthy, and whether the recommended works were necessary to render the *Dune* seaworthy again.[110]

The Commercial Court first affirmed that a certificate attests the state of the vessel at the moment that the survey is done. A survey has to be adapted to the particular nature of the ship and its construction materials. However, the shipowner is fully responsible to ensure that the vessel remains seaworthy between the periodic surveys. Second, the court referred to the report which revealed that the vessel was unseaworthy due to several shortcomings in the bilge plank. The court agreed with the expert that the *Dune* must already have been unseaworthy in 1998, and that the classification society was consequently not entitled to issue a certificate on April 17, 1998.[111]

More important are the considerations addressing the liability claims against Unitas. The court held that a classification society is only obliged to apply the normally required diligence, and is not necessarily required to achieve a specific anticipated result. The claimants argued that Unitas failed to fulfil its contractual obligations. Not only because it did not perform the required maintenance but also due to its negligent and careless survey of the

[108]The Dune, Commercial Court Antwerp, September 20, 2006, A/02/04109 (unpublished).
[109]The Dune, A/02/04109, 5 (unpublished).
[110]The Dune, A/02/04109, 4 (unpublished).
[111]The Dune, A/02/04109, 6-8 (unpublished).

vessel in April 1998. The report revealed that the survey was inaccurate since Unitas did not establish the necessary preparations. The court held that the absence of these preparations implied that the classification society did indeed not use all reasonable efforts. Unitas negligently issued the certificate, especially because relying on it endangered the life of the crew and the maritime industry in general.[112]

However, with regard to the causality between the harm and Unitas' negligence, the court doubted whether the unseaworthy state of the vessel was a direct consequence of the negligent survey. It is important to examine what financial or economic advantages the shipowners would have obtained if the survey had been done correctly. The report concluded that the *Dune* was already unseaworthy when the certificate was issued in April 1998. The shipowners' benefit would not have been a seaworthy vessel but merely a certificate of class in case of seaworthiness, or an absence of it in case of unseaworthiness. Unitas' contractual default was not the direct and proximate cause for the harm by the owners. The loss would have occurred even without a negligent survey. The absence of a certificate would only have consequences for the conditions under which the *Dune* was sold. These considerations could, however, not be evaluated by the court since the shipowners did not refer to them in their argument (*non ultra petita*). Consequently, their claim for recovery against Bureau Veritas was unfounded and subsequently dismissed.[113]

## VI
## LIABILITY OF CLASSIFICATION SOCIETIES: UK AND U.S. LAW

### *A. United Kingdom*

As opposed to their Belgian counterparts, courts in the United Kingdom generally do not recognize third-party liability of classification societies.[114]

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[112]The Dune, A/02/04109, 8-9 (unpublished).

[113]The Dune, A/02/04109, 9-10 (unpublished).

[114]For discussion: Honka at 25-30 (1994); Lagoni at 59-259 (2007); Huybrechts at 447-450 (1996); Colleen E. Feehan, *Liability of Classification Societies from the British Perspective*, 22 TUL. MAR. 163-190 (1997); Jürgen Basedow and Wolfgang Wurmnest, *Third-Party Liability of Classification Societies: A Comparative Perspective*, 15-21 (Springer 2005); Peter Cane, *Classification Societies, Cargo Owners and the Basis of Tort Liability*, L.M.C.L.Q. 433-435 (1995); Peter Cane, *The Liability of Classification Societies*, L.M.C.L.Q. 363-376 (1994); B.D. Daniel, *Potential Liability of Classification Societies to Non–Contracting Parties*, 19 U.S.F. MAR. L.J. 33-74 (2007); David H. Reissner and Michael Wood, *No Duty of Care Owed by a Classification Society*, 4 (1) INT. I. L. R. 30-31 (1996); Feng Tan Keng, *Of Duty*, 112 L.Q.R. 209-212 (1996).

Tort liability is based on the existence of a duty of care. Three requirements have to be met in each case to recognize that classification societies are under a duty of care: 1) can a classification society reasonably foresee that a specific third party will rely on its certificate; 2) is the relationship between the classification society and the third party close enough to create a duty of care; 3) would it be fair and reasonable to impose a duty of care on the classification society?[115] Whereas the foreseeability requirement will easily be met, a third party will often be unable to prove sufficient proximity between its economic loss and the role of the classification society.[116] There is often no contract between both parties. In addition, "the primary purpose of the classification system is, as Lloyd's rules make plain, to enhance the safety of life and property at sea, rather than to protect the economic interests of those involved, in one role or another, in shipping."[117] Classification societies fulfill a role that in their absence would have been met by Flag States.[118] If there is nevertheless sufficient proximity between the parties, it is often unfair, unjust, and unreasonable to impose a duty of care on classification societies. It would interfere with the international regulatory regime that imposes the primary liability of care, this means assuring the seaworthiness of a vessel, upon the shipowner. In addition, a classification society is not bound by the contract of carriage and cannot rely on (international) limitations of liability provisions.[119,120] Compared to the situation in Belgium, UK courts tend to invoke the broader maritime context when examining liability issues.[121]

The *Ramsgate* case undermines the assumption that classification societies cannot be held liable to third parties under UK law.[122] Because of the

[115]Boisson at 244 (1994). See in general: Vera Bermingham and Carol Brennan, *Tort Law*, 43-107 (O.U.P. 2012).

[116]Mariola Marine Corp. v. Lloyd's Register of Shipping (1991) E.C.C., 103; Mariola Marine Corp. v. Lloyd's Register of Shipping (1990) 1 Lloyd's Rep., 547; Marc Rich & Co. AG v. Bishop Rock Marine Co. Ltd. (1993) E.C.C., 121; Marc Rich & Co. AG v. Bishop Rock Marine Co. Ltd. (1994) 1 W.L.R., 1071; Marc Rich & Co. AG v. Bishop Rock Marine Co. Ltd. (1996) E.E.C., 120; Reeman v. Department of Transport (1994) P.N.L.R., 618.

[117]Per Justice Phillips in Mariola Marine Corp. (1991) E.C.C.,114.

[118]Marc Rich (1996) E.E.C., 146-147 and Reeman (1994) P.N.L.R., 635.

[119]According to article 1 of the 1976 London Convention on Limitation of Liability for Maritime Claims (LLMC), shipowners and salvors may limit their liability. Shipowner means the owner, charterer, manager and operator of a seagoing ship. Salvor means any person rendering services in direct connection with salvage operations.

[120]Per Lord Steyn in Marc Rich (1996) E.E.C., 144 and further. See however dissenting opinion by Lord Lloyd of Berwick in Marc Rich (1996) E.C.C., 122 and further.

[121]See for example Lord Justice Saville in Marc Rich (1994) 1 W.L.R., 1080-1081; Lord Justice Mann in Marc Rich (1994) 1 W.L.R., 1086 and Lord Justice Balcombe in Marc Rich (1994) 1 W.L.R., 1089. In general: Huybrechts at 5 (1997).

[122]Health and Safety Executive v. Port Ramsgate Ltd (1997), unreported.

collapse of a passenger walkway at Port Ramsgate, Lloyd's Register breached its duty under section 3(1) of the Health and Safety at Work Act 1974. It admitted to have failed in ensuring public safety. The society was ordered to pay a penalty of £500,000 with the additional cost of £252,000.[123] The court however acknowledged the important role of Lloyd's Register in the international maritime community. Justice Clarke found it significant that Lloyd's assigned large sums to research and development, and to staff training. It was held that the failure was due to personal errors, and that the classification society's regulations and standards were satisfactory. Lloyd's nevertheless strengthened its procedures to prevent anything falling through their safety net in the future.[124] Justice Clarke believed that Port Ramsgate bore the lesser share of responsibility due to its reliance on the expertise of a classification society. Some have argued that the *Ramsgate* case could possibly increase liability claims for negligent surveys.[125] However, this seems unlikely because of the above-mentioned policy considerations and the three-part test of foreseeability, proximity, and fairness in negligence cases.

With regard to contractual liability claims by, for example, shipowners against classification societies, reference must be made to general principles of UK contract law. Classification societies can be held liable for breach of a contractual duty, for breach of an implied contractual duty to exercise reasonable care and skill, or for breach of a duty which the classification society owes to the shipowner irrespective of contractual terms (*i.e.* tort liability). Whether a breach of a contractual duty arises is determined by the individual classification contract. Nevertheless, a breach is generally related to the direct causation of harm to others by classification societies, to damages indirectly caused by classification societies, to negligent behavior by classification societies, and to improper classification rules. With regard to the implied contractual duties, a classification society has to perform its contractual services and activities with reasonable care and skill. Finally, the contracting party also has a cause of action based on the tort of negligence. In case specific contractual obligations exist, tort law does not impose wider duties. A classification society's responsibilities in tort correspond to the duties that are owed to the parties in contract.[126]

However, classification societies can rely on several defenses to contest the alleged claims. First, they can invoke clauses that exempt or limit their

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[123]John Barber, *Ramsgate Walkway Collapse: Legal Ramifications*, 17 CONSTR. L.J. 25-27 (2001).

[124]J.C. Chapman, *Collapse of the Ramsgate Walkway*, 76 STRUCTURAL ENGINEER 9 (1998).

[125]Sean D. Durr, *An Analysis of the Potential Liability of Classification Societies: Developing Role, Current Disorders and Future Prospects*, University of Cape Town, Research and Graduate Publications (1996) available at <web.uct.ac.za/depts/shiplaw/theses/durr.htm>.

[126]Lagoni at 59-65 (2007); Antapassis at 19-20 (2007); Boisson at 238-239 (1994).

liability. To be valid and binding, such clauses have to be expressed clearly and without ambiguity.[127] Whereas limitation clauses will generally be accepted, exemption clauses are limited to purely material damage resulting from negligence, and are only acceptable insofar as they are reasonable.[128] Classification societies can also refute liability if their client fails to comply with certain legal and contractual obligations, such as informing classification societies about defects or damages, requesting maintenance work, and exercising due diligence under the Hague-Visby Rules.[129]

### *B. United States*

U.S. case law on the liability of classification societies is far from clear and uniform.[130] A classification contract is a maritime contract, and is consequently governed by federal law.[131] American courts recognize that a classification society has certain duties in tort. The first duty is to survey and classify a ship in accordance with its own regulations and standards. A second duty is to assure due care in the detection of defects in vessels it surveys, and the subsequent notification thereof to shipowners and charterers. However, only a breach of the second duty (detection and notification) gives rise to liability claims in tort.[132] Similar to the situation in the UK, U.S. courts have largely rejected third-party claims against classification societies. Besides the non-delegable nature of the shipowner's duty to assure the seaworthiness of his vessel, this is mainly due to severe requirements with

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[127]Lagoni at 66 (2007) referring to Chitty, *On Contracts*, 161 (Sweet and Maxwell 2004).

[128]See Unfair Contract Terms Act 1977; Richard Lawson, *Exclusion Clauses*, 129-131 (Oyez Longman 1983).

[129]Boisson at 238-239 (1994).

[130]For discussion: Miller at 75-115 (1997); Lagoni at 59-259 (2007); Goldsmith at 463-515 (2002); Honka at 13-24 (1994); Daniel at 233-295 (2007); Huybrechts at 450-457 (1996); Damien L. O' Brien, *The Potential Liability of Classification Societies to Marine Insurers under United States Law*, 7 U.S.F. MAR. L.J. 403-420 (1995); Robert G. Clyne and James A. Saville, *Classification Societies and Limitation of Liability*, 81 TUL. L. REV. 1399-1433 (2007); Rory B. O' Halloran, *Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp.: In a Novel Decision, the Fifth Circuit Recognizes the Tort of Negligent Misinterpretation in Connection with Maritime Classification Societies and Third-Party Plaintiffs*, 78 TUL. L. REV. 1389-1400 (2004); Claude L. Stuart and Evan T. Caffrey, *Liability of Marine Surveyors. Adjusters. and Claim Handlers*, 22 TUL. MAR. L.J. 1-75 (1998); Bryan D. Starer, *Liability, is it Just Around the Corner? An Advocate's View of a Classification Society and its Duty*, CMI YEARBOOK 260 (1994); Courtney P. Cochran, *Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp.: Further Extending Negligent Misrepresentation to Protect Third-Party Buyers That Rely on Erroneous Certificates Issued by Vessel Classification Societies*, 28 TUL. MAR. L.J. 616-617 (2004).

[131]Lagoni at 71-72 (2007).

[132]Great American Insurance Co. v. Bureau Veritas, 338 F. Supp. 999 (S.D.N.Y. 1972); Great American Ins. Co. v. Bureau Veritas, 478 F.2d 235 (2d Cir. 1973); Gulf Tampa Drydock Co. v. Germanischer Lloyd, 634 F.2d 874, 1982 AMC 1969 (5th Cir. 1981), Continental Insurance Co. v. Daewoo Shipbuilding & Heavy Machinery Ltd., 707 F. Supp. 123 (S.D.N.Y. 1988).

regard to claims for negligence or negligent misrepresentation. Whereas older case law often required negligence by classification societies,[133] more recent judgments seem to rely on a society's negligent misrepresentation to examine liability.[134] To have an actionable claim in negligence, plaintiffs must prove that the classification society owed them a duty of care. A breach of that duty must be established, and the society's conduct must be the proximate cause of the harm (proximity). In addition, plaintiffs must show the existence and scope of losses.[135]

With regard to claims for negligent misrepresentation, classification societies can only be liable if certain requirements are met. Whereas Section 311 of the Restatement (Second) of Torts addresses physical harm, Section 552 deals with pecuniary loss. A classification society will be liable to third parties if, (1) the representation was made by a society in the course of its business, or in a transaction in which it has a pecuniary interest; (2) a society supplied false information for the guidance of others in their business; (3) a society failed to exercise reasonable care or competence in obtaining or communicating the information; (4) the third party is one to whom a society intended to supply the information or one to whom the classification society knows that the recipient intends to supply it; and (5) the third party suffers pecuniary loss by justifiably relying on the misrepresentation.[136]

These specific and narrow requirements are rarely fulfilled, especially because third parties often fail to establish reliance upon a class certificate.[137] Only a limited group of persons can rely on those principles, namely those for whose benefit and guidance a classification society intends to supply the information, or knows that the recipient intends to supply it.[138] Classification societies are often not informed about all the details and reasons why a class survey was ordered. Consequently, they rarely misrepresent anything to the

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[133]See 338 F. Supp. 999 (S.D.N.Y. 1972); 478 F.2d 235 (2d Cir. 1973); Steamship Mut. Underwriting Ass'n v. Bureau Veritas, Great American Ins. Co. v. Bureal Veritas, 380 F. Supp. 482 (E.D. La. 1973).

[134]See Otto Candies L.L.C v. Nippon Kaiji Kyokai Corporation (NKK), 2002 WL 1798767 1 (E.D. La. 2002) affirmed in Otto Candies. L.L.C. v. Nippon Kaiji Kyokai Corp., 346 F.3d 530 (5th Cir. 2003); Somarelf, Elf Union and Fairfield Maxwell Services Ltd. v. the American Bureau of Shipping, 704 F. Supp. 59 (N.J 1989); In Re Eternity Shipping, Ltd., 444 F.Supp.2d 347 (Md. 2006).

[135]Lagoni at 145-149 (2007); Boisson at 244 (1994).

[136]See Miller at 100-107 (1997); Daniel at 233-243 (2007).

[137]See for example: Great American Ins. Co. v. Bureal Veritas, 338 F. Supp. 999 (S.D.N.Y. 1972); aff'd 478 F.2d 235 (2d Cir. 1973); Sundance Cruises Corp. v. American Bureau of Shipping 799 F. Supp. 363 (S.D.N.Y. 1992), affirmed, 7 F. 3d 1077 (2d Cir. 1993), cert. denied, 114 S. Ct. 1399 (1994); Cargill, Inc. v. Bureau Veritas, 902 F. Supp. 49 (S.D.N.Y.1995); Carbotrade v. Bureau Veritas 901 F. Supp. 737 (S.D.N.Y. 1995); Carbotrade v. Bureau Veritas 99 F. 3d. 86 (2d Cir.1996); Carbotrade v. Bureau Veritas 216 F. 3d. 1071 (2d Cir. 2000); In re Eternity Shipping Ltd., 444 F.Supp.2d 347 (Md. 2006).

[138]Restatement (Second) of Torts, §552 (2) (a).

aggrieved party.[139] However, each case has to be assessed taking into account its particular facts, and liability of classification societies to third parties can be possible in certain circumstances.[140] This is especially true if a classification society negligently performs its services, and if the injured party relied upon it as an independent verifying entity.[141]

This is further strengthened by the fact that within the common law approach, there are two opposing presumptions. Courts in the UK generally assume that classification societies promote the collective welfare. They were created to enhance safety of lives and property at sea.[142] U.S. case law emphasizes that classification societies do not take over a shipowner's obligations by agreeing to inspect and issue a certificate of class. The purpose of a certificate is not to guarantee the vessel's safety, but merely to permit shipowners to take advantage of the insurance rates available for a classed vessel.[143]

U.S. law allows claims against classification societies as contracting parties on several grounds: breach of contractual duties (expressly or impliedly warranted), warranty of workmanlike performances (*Ryan* doctrine), and tort law (negligence and negligent misrepresentation).[144] *Ryan* was a case in which stevedores created a hazard aboard a vessel. The subsequently developed *Ryan* doctrine implies that when a shipowner is found liable for negligence based on the unseaworthiness of his vessel, and the violation was one over which he had no control, the owner has an implied right of indemnity against the stevedoring company whose actual wrongdoing caused the injury. The stevedoring company controls the vessel and is more capable than the shipowner to avoid accidents while unloading cargo.[145] However, the *Ryan* doctrine is generally rejected in relation to activities of classification societies.[146]

Classification societies can rely on indemnity and exclusion clauses to refute their liability under certain conditions.[147] Their liability is also reject-

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[139]Steven Block, *No Class Act: A Bad Survey Lands a Classification Society in Hot Water*, FORWARDERLAW LIBRARY (2003) available at <www.forwarderlaw.com/library/view.php?article_id=631>.

[140]See reasoning in Cargill Inc. v. Veritas, 902 F. Supp. 49 (S.D.N.Y. 1995).

[141]See for example Somarelt v. American Bureau of Shipping, 704 F. Supp. 59 (D.N.J 1989); Otto Candies LLC v Nippon Kaiji Kyokai Corp., 346 F.3d 530 (5th Cir. 2003); Psarianos v. Standard Marine, Ltd, 728 F. Supp. 438 (E.D. Tx. 1989).

[142]See supra Marc Rich & Co. AG v. Bishop Rock Marine Co. Ltd. (1996) E.E.C., 146-147.

[143]Sundance Cruises Corp. v. American Bureau of Shipping, 799 F. Supp. 363 (S.D.N.Y. 1992), affirmed, 7 F. 3d 1077 (2d Cir. 1993), cert. denied, 114 S. Ct. 1399 (1994); In re Enternity Shpping Ltd., 444 F.Supp.2d 347 (D. Md. 2006).

[144]Lagoni at 71-72 (2007); Boisson at 236-239 (1994).

[145]Ryan Stevedoring Co. Inc. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956); Lagoni at 144 (2007).

[146]See in this regard Sundance Cruises Corp. v. American Bureau of Shipping, 799 F. Supp. 363 (S.D.N.Y. 1992), affirmed, 7 F. 3d 1077 (2d Cir. 1993), cert. denied, 114 S. Ct. 1399 (1994); In re Eternity Shpping Ltd., 444 F.Supp. 2d 347 (D. Md. 2006); Somarelt v. American Bureau of Shpping, 720 F. Supp. 441 (D.N.J 1989).

[147]See discussion and overview in Lagoni at 96-99 (2007); Honka at 15-18 (1994).

ed when the shipowner fails to comply with his legal or contractual obligations.[148] This is especially relevant against the background of the non-delegable duty of seaworthiness. A society does not take over this obligation by attesting whether a vessel conforms to class regulations. As mentioned above, a certificate permits shipowners to rely on advantageous insurance rates.[149] Consequently, U.S. case law[150] and especially the reasoning in the *Sundance* case[151] "[sounds] the death knell for suits against classification societies by vessel owners and their subrogated insurers."[152]

## VII
## RECENT JUDGMENTS ON THE LIABILITY OF CLASSIFICATION SOCIETIES

### *A. Introduction*

The previous parts discussed older case law on the liability of classification societies in Belgium, and briefly examined this matter in the U.S. and the UK. This section will examine the most recent and most important judgments or pending cases on the liability of classification societies. The analyses will include the case of the Dune (Belgium), the Erika (France), the Prestige (United States), the Deepwater Horizon (United States), and the Al-Salam Boccaccio 98 (Italy).

### *B. Again: the Dune*[153]

The Antwerp Court of First Instance held that Unitas/Bureau Veritas did not apply reasonable efforts when it surveyed the Dune. The classification society acted negligently when issuing the certificate without first performing the necessary preparation. The court nevertheless concluded that the unseaworthy state of the vessel was not a direct consequence of the negli-

[148]Boisson at 236-239 (1994).

[149]See Sundance Cruises Corp. v. American Bureau of Shipping, 799 F. Supp. 363 (S.D.N.Y. 1992), affirmed, 7 F. 3d 1077 (2d Cir. 1993), cert. denied, 114 S. Ct. 1399 (1994); 444 F. Supp.2d 347 (D. Md. 2006).

[150]See Great American Ins. Co. v. Bureau Veritas, 338 F. Supp. 999 (S.D.N.Y. 1972); 478 F.2d 235 (2d Cir. 1973); Sundance Cruises Corp. v. American Bureau of Shipping, 799 F. Supp. 363 (S.D.N.Y. 1992), affirmed, 7 F. 3d 1077 (2d Cir. 1993), cert. denied, 114 S. Ct. 1399 (1994); 380 F. Supp. 482 (E.D. La. 1973).

[151]See Sundance Cruises Corp. v. American Bureau of Shipping, 799 F. Supp. 363 (S.D.N.Y. 1992), affirmed, 7 F. 3d 1077 (2d Cir. 1993), cert. denied, 114 S. Ct. 1399 (1994).

[152]Miller at 96 (1997).

[153]The Dune, Court of Appeal Antwerp, February 18, 2013, 2001/AR/1676 (unpublished).

gent class survey. Causation between the harm and the society's negligence was not proven, and the claim for recovery was unfounded and dismissed.[154]

The Antwerp Court of Appeal also concluded that the classification society was negligent because it did not establish the necessary preparation. The plaintiffs would not have bought the Dune if the class certificate was not issued. They claimed the repayment of the purchase price of the vessel together with the repair and maintenance costs, reduced the price of the sale of the Dune in July 2002.[155]

According to article 1150 BCC, a debtor is only required to compensate for the contractual damages which have been foreseen or were foreseeable at the time the obligation was contracted, unless the non-performance of the contract is caused by the debtor's intentional fault. In addition, article 1151 BCC stipulates that, even in the case of intentional non-performance of the contract, contractual damages are to include, with regard to the loss incurred by the creditor and the gain of which he was deprived, only for an immediate and direct consequence of the non-performance of the agreement. Against this background, the court held that the repair and maintenance costs to make the Dune seaworthy did not constitute plaintiffs' contractual damage. The court however concluded that it was beyond reasonable doubt that plaintiffs suffered pecuniary loss because of the classification society's fault. The recoverable loss was estimated *ex aequo et bono* at €35.000.[156]

### *C. The Erika*

The Erika sank on December 12, 1999 in the Bay of Biscay, some 60 nautical miles off the Brittany Coast in France. The tanker was carrying 31,000 tonnes of heavy fuel oil. The sinking resulted in pollution of about 400 kilometers of French shoreline.[157] The Erika was classed by Registro Italiano Navale (RINA) which renewed the class certificate in November 1999. The vessel was inspected several times between 1991 and 1999 by Port State Control inspectors and Flag State surveyors. The Erika was also approved by most of the major oil companies which carried out vetting inspections prior to accepting the tanker. The vessel's classification and statutory certificates were valid at the time of the sinking.[158]

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[154]See supra V.

[155]The Dune, 2001/AR/1676, 13-18 (unpublished).

[156]The Dune, 2001/AR/1676, 18-20 (unpublished).

[157]Eduard Somers and Gwendoline Gonsaeles, *Consequences of the Sinking of the M/S ERIKA in European Waters: Towards a Total Loss for International Shipping Law*, 41 J. MAR. L. & COM. 59-60 (2010).

[158]Oya Z. Özcayir, *The Erika and its Aftermath*, 7 INT. MAR. L. 230-235 (2000).

Proceedings were instituted by the Conseil Général de la Vendée against the shipowners, the owners of the cargo (Total), and RINA. By the end of 2005, the judicial inquiry by a panel of experts revealed that the Erika sank because of serious corrosion of the internal structures of its construction.[159] This conclusion was reiterated in the decision of the Tribunal Correctionnel of Paris on January 16th 2008.[160]

RINA and the shipowners deliberately acted together to reduce the amount of steel used for structural repairs in order to save costs at the expense of the safety of the vessel, its crew and the marine environment. The shipowner and the classification society were negligent because they failed to detect and recommend the necessary repairs that would have assured the safety of the vessel.[161] The shipowners received certificates that did not correspond to the actual state of the Erika, and used the vessel for commercial purposes although they knew that maintenance was necessary. RINA on the other hand issued an International Safety Certificate even though it was aware of the technical defaults.[162] The expert report included measurements of the wreck revealing a level of corrosion that exceeded the values that were acceptable under RINA's own regulations.

The court further found several problems with regard to the classification society's thickness measurements that were taken in a special survey about 16 months before the casualty. Measurements of non-existing parts, and the absence of a surveyor during this activity were especially worrying. Clear indications of structural weakness already existed and were extensively documented. The court also criticized RINA for not suspending the certificates when the shipowner failed to comply with his financial obligations. RINA willfully violated safety regulations, deliberately jeopardized the safety of the ship, and endangered third parties. RINA was held criminally liable for creating unreasonably dangerous conditions, and was ordered to pay a maximum fine of $500,000.[163]

The Tribunal Correctionnel rejected Flag State immunity. The existence of a (factual or textual) link between public certification and private classi-

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[159]Permanent Commission of enquiry into accidents at sea, *Report of the Enquiry into the Sinking of the Erika off the Coasts of Brittany on 12 December 1999*, 53-143 (2005).

[160]The Erika, Criminal Court of First Instance Paris, 11th Cham., January 16, 2008, no. 9934895010, 210-214.

[161]Vincent J. Foley and Christopher R. Nolan, *The Erika Judgment-Environmental Liability and Places of Refuge: a Sea Change in Civil and Criminal Responsibility that the Maritime Community must Heed*, 33 TUL. MAR. L. J. 44 (2008).

[162]See Michael G. Faure, *Criminal Liability for Oil Pollution Damage: An Economic Analysis*, in: Michael G. Faure et. al, *Maritime Pollution Liability and Policy: China, Europe, and the U.S.*, 183-185 (2010).

[163]The Erika, Criminal Court of First Instance Paris, 11th Cham., January 16, 2008, no. 9934895010 slip op. at paragraph 141; Foley and Nolan at 64-70 (2008).

fication services, the relations of the Flag State Malta with the various classification companies, or even the objective of 'public service' which would be pursued with the classification activities, had neither the purpose nor the effect of linking the activities to the exercise of sovereignty of the State whose flag flies on vessels classified by RINA.[164] In addition, RINA was not granted protection under Article III (4)[165] of the 1996 International Convention on Civil Liability for Oil Pollution Damage (CLC).[166]

The Erika was the first case in which the channelling provisions of the Convention were interpreted.[167] Liability for oil pollution is channeled to the registered shipowner, and claims against other parties involved in the voyage are not allowed.[168] RINA held that it had performed services for the Erika in the sense of Article III paragraph 4 (b) and could therefore not compensate for the damages. However, the court emphasized that a person performing services for a vessel in the sense of Article III paragraph 4 (b) should necessarily be someone who directly participates in the maritime voyage. This was not the case for RINA because of the lack of proximity with the Erika.[169]

The Paris Cour d'Appèl issued its judgment on March 30, 2010.[170] The court examined several objections made against the application of immunity principles on RINA's classification activities. Statutory certificates established by classification societies cannot be considered as simple administration acts (actes de gestion) but are issued to enhance the public interest (actes de puissance publique). The Erika could not have sailed under the Maltese Flag without RINA's (necessary) certification services. RINA acted

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[164]The Erika, no. 9934895010, 214. Also discussed in Francesco Siccardi, *Immunity from Jurisdiction are CS Entitled to it (a) as Recognized Organizations acting for Flag States (b) when Performing Class Services*, in *Classification Societies Regulatory Regime and Current issues on Liability*, 60-61 (Reed Smith, London Shipping Law Center, 21 February 2013) available at <www.shippinglbc.com/content/uploads/members_documents/Webfile_-_Classification_Societies.pdf>.

[165]This article reads "no claim for compensation for pollution damage may be made against the owner otherwise than in accordance with this Convention. Subject to paragraph 5 of this Article, no claim for compensation for pollution damage under this Convention or otherwise may be made against: (a) the servants or agents of the owner or the members of the crew (b) the pilot or any other person who, without being a member of the crew, performs services for the ship [...] unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."

[166]The CLC is an international maritime convention that was adopted to ensure that adequate compensation would be available where oil pollution damage was caused by maritime casualties involving oil tankers. The convention places the liability for such damages on the owner of the vessel from which the polluting oil escaped or was discharged. Subject to a number of specific exceptions, this liability is strict. Limitation of liability is, however, possible if the owner is not guilty of actual fault.

[167]Foley and Nolan at 69-70 (2008).

[168]Somers and Gonsaeles at 64 (2010).

[169]The Erika, no. 9934895010, 234-235; Gonsaeles and Somers at 64 (2010).

[170]The Erika, French Court of Appeal Paris, March 30, 2010, no. 08/02278-A, D.M.F. 2004, 849.

as RO for Malta, and should therefore be able to enjoy immunity. With regard to RINA's (private) classification certificates, the court emphasized that class regulations are part of a set of rules which condition the statutory certification, by virtue of the reference made by the SOLAS Convention[171] and the Load Lines Convention.[172] Moreover, class regulations contribute to ensure an activity of public service, namely to improve the safety at sea.[173]

However, the Cour d'Appèl, relying on article 8 of the United Nations Convention on Jurisdictional Immunities of States and their Property (UNCSI),[174] decided that RINA had renounced the privilege of immunity. According to article 8 UNCSI, "a State [recognized organization] cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has: (a) itself instituted the proceeding; or (b) intervened in the proceeding or taken any other step relating to the merits." The court held that RINA waived any Flag State immunity by participating in the criminal proceedings without ever invoking a right to sovereign immunity.[175]

RINA was found guilty of an environmental crime because it was aware of the poor condition of the vessel and the high degree of corrosion. It had nevertheless issued certificates of compliance on a number of occasions without prior inspection. The court affirmed that, while the CLC provides coverage for civil liability, RINA had an independent role, and could therefore not benefit from the protection regime under Article III (4) of the Convention.[176]

The Criminal Section of the French Cour de Cassation largely upheld the Court of Appeal's judgment in its recent decision.[177] RINA was criminally convicted because of involuntary (marine) pollution due to its imprudence when renewing the class certificates. The Cour d' Appèl had nevertheless been wrong in deciding that RINA could not benefit from the provisions in Article III 4 (b) of the CLC. However, the Cour de Cassation decided that the harm had resulted from RINA's own recklessness, and it could therefore not enjoy the channeling of liability under the Convention.[178] The question of

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[171]See International Convention for the Safety of Life at Sea (1974), Regulation 3.1, Structural, mechanical and electrical requirements for ships.

[172]See Regulation 1 Strength and intact stability of ships.

[173]The Erika, no. 08/02278-A, 322-323.

[174]United Nations Convention on Jurisdictional Immunities of States and Their Property (2004).

[175]The Erika, no. 08/02278-A, 323-324; Siccardi at 61-62 (2013).

[176]The Erika, no. 08/02278-A , 421-423; Erik Mink, *Erika process: French Appeal Court Pronounced Judgment*, 3 BLANK ROME MAINBRACE PUBLICATION (2010), available at <www.blankrome.com/index.cfm?contentID=37&itemID=2271>.

[177]The Erika, French Court of Cassation Paris, September 25, 2012, no. H 10-82.938, Droit Mar. Francais, 2012, 995; Martin Ndende, *Pollution marine par hydrocarbures (Affaire de l'Erika)*, 4 REV. DR. TRANSP. (2012).

[178]The Erika, no. H 10-82.938, 220-221.

Flag State immunity was not addressed by the court because RINA unequivocally renounced immunity by participating in the criminal proceedings.[179,180]

### *D. The Prestige*

On November 13, 2002 the Prestige developed a starboard list[181] about 50 kilometers from the Galician coast and began to leak oil. The ship's request for secure shelter and a safe harbor to pump off the cargo of oil was refused by the Spanish and Portuguese authorities. Arguing that the Prestige's draught was too large to enter into the port of refuge, the vessel was instead towed to the Atlantic Ocean. Rough sea conditions caused the vessel to break in two on November 19, 2002. A total of 64,000 tonnes of oil escaped from the vessel, and caused enormous environmental pollution and an economic disaster for the region.[182] Spain commenced proceedings against American Bureau of Shipping (ABS) in the United States District of New York.[183] Whereas the Prestige was listed as meeting all regulations for various certificates, the Spanish Government claimed that the vessel did not satisfy the 2003 ABS Fatigue Requirements.[184] ABS maintained that this did not cause the hull failure because the Prestige operated in a gentler environment than the criteria were developed for.[185] Spain argued that the technical deficiencies in the ship's construction would have been noticed upon a proper inspection. It claimed that the proximate cause of the damage had been ABS' negligent and reckless surveys. ABS had breached its duty to provide services with reasonable care, and negligently misrepresented the Prestige as fit to carry fuel cargoes.[186]

At first instance, ABS disputed Spain's allegations of wrongful classification and certification services. It argued that the CLC principles barred Spain's liability claims because a classification society qualified under the exemptions that Article III, 4, (a) provides for the shipowner's servants and agents and other persons that, without being a member of the crew, performed services for the ship within the meaning of Article III, 4, (b). Judge

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[179]The Erika, no. H 10-82.938, 15.

[180]See in general International Oil Pollution Compensation Funds, *Incidents involving the IOPC Funds-1992 Fund: Erika*, 3-5 (March 2013).

[181]This is the right-hand side of a vessel as one faces forward.

[182]Elizabeth Galiano, *In the Wake of the PRESTIGE Disaster: Is an Earlier Phase-out of Single-Hulled Oil Tankers the Answer?*, 28 TUL. MAR. L.J. 113-114 (2004).

[183]Reino de Espana v. American Bureau of Shipping 328 F. Supp. 2d. 489 (S.D.N.Y.2004).

[184]Justine Wene, *European and International Regulatory Initiatives Due to the Erika and the Prestige Incidents*, 19 M.L.A.A.N.Z. JOURNAL 58-59 (2005).

[185]Ship Structure Committee, Case Study XII, the Prestige available at <www.shipstructure.org/case_studies/Prestige.pdf>.

[186]Wene at 59-60 (2005).

Swain of the U.S. District Court for the Southern District of New York accepted this reasoning even though the U.S. was not a contracting party to the CLC. Accordingly, the CLC is applicable to Spain's claims against ABS in this action.[187] Referring to Article IX(1) CLC, the District Court decided that Spain's suit was barred. As a signatory party to the CLC, Spain was bound by its terms in the same way it would be by a contractual obligation. It must therefore pursue its claim before its own courts or those of another injured contracting state. Since the U.S. is a non-contracting party to the CLC, the District Court lacked the necessary power to adjudicate Spain's claims arising from the sinking of the Prestige. As such, ABS' motion for summary judgment, dismissing the plaintiff's claims, was granted because of the lack of subject matter jurisdiction.[188]

In a subsequent summary order, however, the Court of Appeals for the Second Circuit concluded that the District Court had erred in assuming that the CLC deprived it of subject matter jurisdiction. It overturned the decision and sent it back to the District Court for further proceedings.[189] Thereafter the District Court ruled that ABS was not liable for the sinking of the Prestige.[190] By referring to the *Lauritzen* case among others,[191] it was held that there was "a connection of Spain's claims to the United States that is more significant than the geographic contacts proffered regarding any other nation (including the flag nation) in this action." As such, Judge Swain applied the maritime law of the U.S. to ABS's motion for summary judgment.[192]

ABS argued that it could not be liable since U.S. legislation did not impose any duty of care on a classification society in the aforementioned circumstances. Spain held that ABS' motion had to be denied. It argued it should be able to recover if it could prove that ABS acted recklessly in setting its class standards, and/or certifying the vessel as meeting these standards. However, Spain failed to identify any precedential cases in which a classification society had been held to have a duty to prevent recklessness, and the District Court doubted whether such a duty could exist to coastal States. Imposing liability upon classification societies to refrain from reckless or negligent behavior to coastal States "would constitute an unwarranted expansion of the existing scope of tort liability. More importantly, by relieving shipowners of their ultimate responsibility for certified ships, such

[187]Reino de Espana v. The American Bureau of Shipping 528 F.Supp.2d. 459 (S.D.N.Y. 2008).
[188]528 F. Supp. 2d., 460 (S.D.N.Y. 2008).
[189]Reino de Espana v. The American Bureau of Shipping No. 08-0579-cv(L) (S.D.N.Y. 2010).
[190]Aysegul Bugra, *ABS held not liable to Spain by U.S. Court*, SHIPPING AND TRADE LAW 1-3 (2010).
[191]Lauritzen v. Larsen 345 U.S. 571 (1953).
[192]Reino de Espana v. American Bureau of Shipping, 729 F. Supp. 2d 642 (S.D.N.Y. 2010).

a rule would be inconsistent with the shipowner's nondelegable duty to ensure the seaworthiness of the ship."[193]

Furthermore, it was argued that a duty of care would undermine the existing relationship between shipowners and classification societies. Reference was made to the disproportionality between the small fees for classification services and the potentially unlimited scope of liability. The court confirmed that the appropriate parties should be accountable for oil spills that cause major economic and environmental damages. However, the Court held,

> the only question [...] is whether a classification society that performed services on behalf of a shipowner can properly be held liable to an injured coastal state on the basis of reckless certification-related conduct. The legal authorities discussed above demonstrate that it cannot; they do not distinguish between damages that are limited to private parties and damages suffered widely by the public.[194]

As such, ABS was entitled to summary judgment and its motion was granted.[195]

Spain appealed against the District Court's judgment. On August 29, 2012, the U.S. Court of Appeal of the Second Circuit affirmed the District Court's decision.[196] Without addressing "more broadly [...] the role of classification societies in maritime commerce and the potential duties of classification societies to third parties," the liability of a classification society in tort to a third party (such as Spain) for reckless conduct in connection with the classification of vessels did not need to be examined.[197] Even if it was assumed (arguendo) that ABS owed a duty of reasonable care, Spain "nonetheless failed to adduce sufficient evidence to create a genuine dispute of material fact as to whether [ABS] recklessly breached that duty such that their actions constituted a proximate cause of the wreck of the Prestige." As such, the District Court's grant of summary judgment to ABS was affirmed, "albeit on alternative grounds."[198]

In this way, the Court of Appeal's ruling ends the dispute between Spain and ABS. At the same time, however, the Court avoided addressing the key issue of third-party liability of classification societies. It falls short of clarifying the scope of the legal duty that classification societies owe to third parties.[199]

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[193]729 F. Supp. 2d 645-646 (S.D.N.Y. 2010).

[194]729 F. Supp. 2d 646 (S.D. N.Y. 2010).

[195]729 F. Supp. 2d 642-646 (S.D.N.Y. 2010).

[196]Reino de Espana v. The American Bureau of Shipping, 691 F.3d 461 (2d Cir. 2012).

[197]691 F.3d 476 (2d Cir. 2012).

[198]691 F.3d 463 (2d Cir. 2012).

[199]Also see Peter R. Knight and Christopher Foster, *Second Circuit Addresses the Tort Liability of Classification Societies to Third Parties in Reino de España v. ABS*, ROBINSON & COLE UPDATE ENVIRONMENTAL & MARITIME (2012), available at <www.rc.com/newsletters/Publications/2153.pdf>.

*E. The Deepwater Horizon*

On the 20th of April 2010, the mobile offshore drilling unit Deepwater Horizon was completing drilling operations in the Macondo Prospect oilfield in the Gulf of Mexico. There was a release of liquid and gaseous hydrocarbons during these operations. This resulted in the loss of 11 lives, the total loss of the drilling unit, and the continuous release of hydrocarbons into the Gulf. The flow was stopped on July 15, 2010, and the well was declared sealed on September 19, 2010.[200]

The offshore oil industry also relies on services provided by classification societies.[201] In this regard, IACS published Requirements Concerning Mobile Offshore Drilling Units[202] that must be incorporated into the rules of the individual IACS members.[203] The Deepwater Horizon was registered in the Republic of the Marshall Islands (RMI) and ABS was recognized as an organization to survey the drilling unit on its behalf. ABS performed the statutory survey inspections, and classed the unit with the highest rating for dynamically positioned vessels. Furthermore, the unit was also certified under the ISM Code and the International Ship and Port Facility Security Code by Det Norske Veritas.[204] ABS last surveyed the unit in 2006, and another full survey was only due for 2011. The society reported that it was last on the unit for an annual (interim) survey in February 2010.[205] Whereas BP maintains it is not the only company at fault, it is unclear whether financial recovery can be sought from both classification societies, particularly after the U.S. Coast Guard revealed that most of the certificates were valid until 2011.

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[200]Stephen Tromans, *Deepwater Horizon and its Legal Ramifications*, 5 INT. ENERGY L.R. 163 (2010); Office of the Maritime Administrator of the Republic of the Marshal Islands, *Deepwater Horizon Marine Casualty Investigation Report*, IMO Number: 8764597 I (2011) available at <www.register-iri.com/forms/upload/Republic_of_the_Marshall_Islands_DEEPWATER_HORIZON_Marine_Casualty_Investigation_Report-Low_Resolution.pdf>.

[201]Curry L. Hagerty and Jonathan L. Ramseur, *Deepwater Horizon Oil Spill: Selected Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE 17 (2010), available at <www.fas.org/sgp/crs/misc/R41262.pdf>.

[202]IACS Requirements Concerning Mobile Offshore Drilling Units (2012), available at <www.iacs.org.uk/document/public/Publications/Unified_requirements/PDF/UR_D_pdf149.PDF>.

[203]U.S. House of Representatives, Committee on Transportation and Infrastructure, *Hearing on Deepwater Horizon: Oil Spill Prevention and Response Measures and Natural Resource Impacts*, 27-28 (2010) available at <coast.cms.udel.edu/DeepwaterDrillRiskyDecision/1432_DeepwaterHorizonHearing.pdf>.

[204]Office of the Maritime Administrator of the Republic of the Marshal Islands at 2-3 (2011).

[205]U.S. House of Representatives, Committee on Transportation and Infrastructure at 28 -29 (2010).

*F. The Al-Salam Boccaccio 98 (Red Sea Ferry Disaster)*

The Al-Salam Boccaccio 98, an Egyptian Ro/Ro Passenger ferry, was operated by El Salam Maritime Transport. The registered owner was Pacific Sunlight Marine Inc. of Panama. The vessel sank on its way from Dubai to Safage, in southern Egypt, after a fire broke out on the car deck.[206] The water pumped out to quench the fire could not drain properly because of blocked scuppers on the deck. The water collected and destabilized the vessel which subsequently made it sink. The tragedy resulted in the loss of more than 1000 people. RINA was acting as an RO for Flag State Panama, and also provided private classification services for the shipowners.[207]

The Administrative Court for the Ligurian district in Italy preliminary held that RINA had to be considered as an Italian public administration due to the public, or at least administrative, nature of the delegated functions performed under the authority of the Italian Government. The classification and certification activities carried out by RINA are expressions of the public powers and prerogatives of the State.[208]

The Association of Victim's Families, represented by the ASB Consortium, subsequently filed a law suit against RINA in the civil court of Genoa. The Association claimed compensation of $132,000,000 from RINA. Plaintiffs argued that the society has been negligent in two ways. First, several requirements of naval stability were not met. The vessel was unsafe, and badly designed and equipped because of the structural modifications it previously underwent. Second, different conditions that assure the navigational safety of the vessel were violated. Plaintiffs advanced that the shipowners, the managers, the captain and the entire crew lacked the necessary competence, capabilities, means, and organization to guarantee the safety of the vessel and its passengers. RINA would have withdrawn the vessel's class if it had respected the ISM Code and other compliance documents.[209]

RINA contested these allegations and argued that it should be granted immunity because it acted as an RO on behalf of a Flag State.[210] Furthermore, RINA formerly was a public body (RINA Ente) but started to operate as a joint stock company in August 1999 (RINA SpA). RINA SpA

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[206]Tony Allen, *MV Al-Salam Boccaccio 98. History*, available at <www.wrecksite.eu/wreck.aspx?17507>.

[207]X, *Class on Trial*, 374 FAIRPLAY 26 (2012).

[208]Administrative Court Linguria, September 12, 2007, Dir. Mar. 2008,1449; Siccardi at 62-63 (2013).

[209]Marco Ferrero, *Press Conference on "Al Salam Boccaccio 98 Shipwreck,"* UFFICIO STAMPA & COMMUNICAZIONE (JULY 20, 2010), available at <www.ufficiostampatorino.com/2010/07/press-conference-on-al-salam-boccaccio-98-shipwreck>; Fairplay at 26 (2012).

[210]As discussed in X, *Class on Trial*, 374 FAIRPLAY 26 (2012).

can consequently not be held liable for the negligence of RINA Ente because before that time the vessel sailed under the Panamanian flag and RINA SpA became an RO.[211]

The Genoa civil *Tribunale* accepted that RINA could enjoy immunity from Italian judiciary as it acted as an RO on behalf of Panama. The court relied on several precedents (among which was the judgment in the *Erika* case[212]) to conclude that private companies do enjoy immunity from jurisdiction insofar as they perform public activities and duties delegated by Flag States. The court held that the distinction between (private) classification and (public) statutory services is irrelevant for the purpose of granting immunity because class certificates are required for each vessel to sail.[213]

The lawsuit in Genoa will nevertheless proceed because the classification and certification activities of the vessel, when it was still sailing under the Italian flag and before RINA became an RO, are subject to Italian law.[214] Although the overall conclusion in this case is 'to be continued,' the court confirms that classification societies can invoke sovereign immunity when they act as RO's on behalf of a Flag State.

## VIII
## EVALUATION

When examining third-party liability of classification societies, Belgian courts base their decision on generally applicable principles of contract and tort law. Classification societies are obliged to survey vessels to the best of their abilities without necessarily having to achieve a particular anticipated result. Courts established that they are not acting as shipowner's agents, and can therefore not rely on the immunity principles applicable to, for example, stevedores.[215]

Common law courts, on the other hand, often reject third-party liability claims against classification societies. In the UK, three requirements have to be met for a classification society to have a duty of care. Third parties will often fail to prove sufficient foreseeability and proximity between their eco-

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[211]For discussion Siccardi at 64-64 (2013); Abdel Naby Hussein Maboruk Aly contro RINA s.p.a., Il Tribunal Di Genova 8 March 2012, no. 9477 / 2010, 10; Andrea Moizo, *RINA will be tried in Panama for the Boccaccio*, 27 SHIP2SHORE (2012).

[212]See supra VII.

[213]Abdel Naby Hussein Maboruk Aly contro RINA s.p.a., no. 9477 / 2010, 10; Siccardi at 62-63 (2013).

[214]Per Judge Pietro Spera in Abdel Naby Hussein Maboruk Aly contro RINA s.p.a., no. 9477 / 2010, 11-61.

[215]See Court of Cassation, December 7, 1973, RW 1973-1974, 1597; Van Oevelen at 161-178 (2003); Ingrid Boone, *De aansprakelijkheid van de stuwadoor voor het verlies van de hem toevertrouwde goederen (noot onder Cass. 1 Juni 2001)*, ALG. JURID. TIJDSCHR. 365-370 (2001).

nomic loss and the role of a classification society. Furthermore, holding classification societies liable is often not fair or reasonable. The situation in the U.S. differs to a certain extent. Classification societies have already been found liable to third parties when the strict requirements of negligence or negligent misrepresentation are met. However, plaintiffs often fail to prove causation (negligence) or reliance on certificates of class (negligent misrepresentation).

Basic legal presumptions of tort law might explain the differing approaches.[216] Belgium and several other civil law countries adhere to the 'equivalence principle' in tort law. This theory determines that a wrong is the cause of damage if it is a necessary condition for the occurrence of the damage. Every fault in the absence of which the harm would not have occurred to the same extent is treated in the same way.[217] Parties can be held jointly and severally liable if they both contributed to the same damages.[218] In the common law countries, proximate cause considerations are important. The proximate cause of an occurrence is always the dominant cause and is directly linked to the loss.[219]

Strict requirements have to be fulfilled in order to impose liability upon classification societies. More important is that courts in the UK and U.S. tend to systematically rely on universally recognized principles of maritime law. Reference is for example made to the non-delegable duty of a shipowner to ensure the seaworthiness of his vessel. Because of this fundamental principle, common law courts are reluctant "to admit that a classification society is under any safety obligations to third parties."[220]

The analysis of Belgium case law, however, revealed that its national courts rely on similar considerations. Classification societies do not take over the shipowner's or carrier's responsibility to provide a seaworthy vessel and/or properly carry goods. Moreover, a certificate can never be used by the shipowner as an absolute proof of seaworthiness.[221]

Other reasons can also be relied upon to explain the different views in the aforementioned jurisdictions. Courts in the UK refer to the broader maritime

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[216]Also see Huybrechts at 2 (1997).

[217]This is established by the *conditio sine qua non test* in civil law countries: causal connection exists between a particular act and an injury when the injury would not have arisen but for the act. In common law jurisdictions, similar principles apply to establish causation in fact through the 'but for test': but for the defendant's negligence, the plaintiff would not have been injured.

[218]Bocken and Boone at 78-86 (2011); Ulrich Magnus, *Unification of Tort Law: Contributory Negligence*, 26 (Kluwer Law International 2004).

[219]See Simon Deakin and Angus Johnston, *Tort Law*, 185, 185-213 (O.U.P. 2012); John Hodgson and John Lewthwaite, *Tort Law Textbook*, 49-81 (O.U.P. 2007).

[220]Boisson at 251-252 (1994).

[221]See supra V.

context to examine liability claims. The liability regime as set out in the Hague (-Visby) Rules and general insurance considerations are often invoked to reject third-party liability claims. Furthermore, the requirement that it has to be fair, just, and reasonable to impose a duty of care is an effective argument of last resort.

In the U.S., each case has to be assessed upon its particular facts. Classification societies will only be liable to third parties under strict circumstances. This is especially true if a classification society failed to perform its services correctly, and the injured party directly relied upon the certificate of class. In Belgium, the liability of a classification society is equally based on the actual facts and circumstances of a case. Liability will, however, be more easily recognized since it arises when a certificate is delivered in breach of a classification society's general duty of care. Such a duty to the public is in general more easily held to be present.

There are also major differences with regard to contractual liability claims by shipowners against classification societies. In Belgium it is unlikely that a contractual fault of a society will also result in liability in tort because of the 'non-concurrence of liabilities' doctrine.[222] This is different in the UK and the U.S., where a contractor can principally bring contractual and tort claims against a classification society. However, the *East River* doctrine equally bars claims in tort in the U.S. when there are no large disparities in bargaining power between the parties, and if the claims deal with losses that are purely economic.[223] The theory is related to (classification) services and implies that contract law provides adequate remedies "in a commercial setting [in which] parties have a bargaining power equal enough to allocate among themselves risks of defects."[224]

A more uniform approach exists with regard to the means of defence. A classification society can contest its liability if shipowners fail to comply with their contractual and legal obligations. Moreover, a society can exclude its liability by incorporating indemnity or negligence clauses in the agreement. However, Belgian courts reject them in the case of gross negligence because it would invalidate the significance of their contractual obligations. Similar considerations were relied upon in the *Great American* case in

[222]See supra V.

[223]East River S.S. Corp. v. Transamerica DeLaval, Inc. 476 U.S. 858, 106 S. Ct. 2295, 90 L.Ed.2d 865 (1986); Christopher Mickson, *Incorporation of the Economic-Loss Doctrine into Maritime Products Liability: East River Steamship Corp. v. Transamerica Delaval, Inc.*, (18) RUTGERS L.J. 375 (1987): the U.S. Supreme Court formally incorporated the principles of product liability into maritime law in this case. A manufacturer in a commercial relationship has no duty under maritime tort law to prevent a product from injuring itself. Liability for damage of this type only arises under contract.

[224]Lagoni at 82; 799 F. Supp. 363 (S.D.N.Y. 1992).

which Judge Tyler held that such clauses were overbroad and unenforceable as contrary to the public police.[225]

Finally, recent cases (such as the *Erika* and the *Al-Salam Boccaccio 98*) seem to imply that if a classification society does not itself institute the proceeding, intervenes in the proceeding, or takes any other step relating to the merits, it could invoke Flag State immunity for its statutory certification and classification activities. Recent judgments also indicate that the distinction between private classification and statutory certification services is steadily disappearing.[226] The judgments further acknowledge that if classification societies cannot rely on immunity principles, they will be reluctant to provide statutory certification services. This could result in a decrease of Flag Stage control on vessels, and in an increase of sub-standard shipping.[227]

## IX
## FUTURE PERSPECTIVES AND PROPOSALS

### *A. Liability for Classification Societies?*

Some scholars reject a general liability regime for classification societies for a variety of reasons: the non-delegable duty of seaworthiness of the shipowners; liability would make a classification society the absolute insurer of any vessel it certifies; the potential of liability would deter classification societies from surveying old or damaged vessels; classification societies can increasingly rely on Flag State immunity; proximity issues between third parties and classification societies; and the fact that societies cannot rely on internationally recognized limitation of liability principles.[228] Arguments in favor of liability for classification societies are: the non-delegable duty of the shipowner does not imply that no responsibility should rest on a negligent society, as both could be held liable; the fact that classification societies perform public functions cannot be a ground to exclude them from any liability to third parties; classification services are no longer just a private matter between a shipowner and the classification society; and classification societies can exclude or limit their liability by contractual

[225]As referred to in 799 F. Supp. 378 (S.D.N.Y. 1992).

[226]Also see Siccardi at 67 (2013).

[227]Also see Lagoni at 22-23 (2007).

[228]See Daniel at 247-253 (2007); Honka at 34 (1995); Lagoni at 304 -308 (2007); Huybrechts at 459-462 (1996).

agreement, or seek additional insurance coverage at a reasonable cost and pass it on to their clients.[229]

Against this background, shared (financial) liability between the shipowner and the classification society would be a fair and appropriate approach. Services of classification societies are relied upon by the entire shipping industry. Unlimited liability, however, would not only make them absolute insurers of all maritime activities, but would also restrict the scope of their services. Antapassis rightly argues that withdrawing traditional classification activities will decrease the safety levels of ships.[230] This could be to the detriment of 'promoting safety of life at sea' as put forward by the SOLAS Convention.

The argument that the international community would benefit from a "definitive court ruling rejecting all claims of third parties based on a supposed duty owed by a classification society"[231] can nevertheless not be accepted. Remedies in tort law are not discretionary, and a class certificate is more than a mere permission for shipowners to benefit from advantageous insurance rates. Classification societies can insure themselves under existing liability policies against their (contractual) negligence.[232] In order to prevent them from acting as "mere formal administrators,"[233] liability for their negligence should be imposed.[234] An appropriate liability regime for classification societies would enhance the quality of their services and encourage surveyors to be more diligent. In addition, the non-delegable duty of shipowners to ensure the seaworthiness of a vessel has to be reconsidered and redefined. Shipowners retain and pay classification societies to rely on their technical knowledge when it comes to ensuring international safety requirements. Why should a classification then not be liable for its own negligence to the extent it contributed to the loss?

All these arguments are only relevant insofar as classification societies are able to limit their liability. Most parties in the shipping industry can rely on international limitation principles which ensure that premiums for liability insurance in maritime commerce remain affordable. Classification societies are still not granted such protection. This is one of the main reasons why courts in common law countries are reluctant to impose liability. Classification societies were believed to serve the public good, and not to act

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[229]See Cane at 374 (1994); Antapassis at 2-3 (2007); Starer at 262-263 (1994); Huybrechts at 462-466 (1996).

[230]Antapassis at 48 (2007).

[231]Daniel at 295 (2007).

[232]Miller at 114-115 (1997).

[233]Honka at 33 (1995).

[234]Honka at 33 (1995).

as commercial actors when the limitation conventions were established.[235] Besides their changing role, there are several other reasons why classification societies should be able to rely on limitation of liability principles. They classify vessels and other assets which have a very high value and which are exposed to even higher liabilities. However, fees paid by a shipowner to a society are not in proportion with this liability exposure, but in accordance with the performed classification services. As such, it would be unfair to allow unlimited liability claims against classification societies.[236]

In addition, "hardly any insurance company will offer insurance for such claims against classification societies, which may also face considerably high passenger claims, especially if their liability is unlimited."[237] It is self-evident that classification societies would restrict their scope of services if they can incur unlimited third-party liability. This would not only be at the expense of safe shipping, but governments' and shipowners' agents would have to take over classification activities. This is problematic as they often lack the necessary expertise or control.[238]

Even if classification societies face unlimited liability, an injured party will not always be able to recover the total loss. Insurance contracts mostly include ceilings on compensation awards, and a classification society will have to compensate for the amounts above those contractual limits. However, a society could try to seek protection from the detrimental effects of insolvency by relying on general principles of company and insolvency law. Classification services are usually offered through limited liability companies, which are separated from other maritime activities in order to avoid the "knock-on effects of insolvency."[239] Lagoni argues that unlimited liability claims against classification societies will not guarantee effective compensation unless each and every separate company has sufficient funds, or the corporate veil[240] has been pierced.[241]

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[235]Jürgen Basedow and Wolfgang Wurmnest, *Classification Societies as General Insurers of Shipping Activities*, in: Gerard Kamphuisen, Birgitte Lauwerier and Nellie van Tiggele-van der Velde, *De Wansink-bundel: van draden en daden: liber amicorium ProfMmr. J.H. Wansink*, 30-32 (Kluwer 2006).

[236]Philippe Boisson, *Are Classification Societies Above the Law?*, MARITIME ADVOCATE (1998), available at <www.maritimeadvocate.com/classification/are_classification_societies_above_the_law.htm>.

[237]Lagoni at 305 (2007).

[238]Boisson (1998) at <www.maritimeadvocate.com/classification/are_classification_societies_above_the_law.htm>.

[239]Lagoni at 308 (2007).

[240]A situation in which courts put aside a company's limited liability and hold a corporation's shareholders or directors personally liable for the corporation's actions or debts. Also see: Karen Vandekerckhove, *Piercing the Corporate Veil: a Transnational Approach*, 788 (Kluwer Law International 2007).

[241]Lagoni at 308 (2007).

With regard to the legal and institutional organization of the shared responsibility approach, liability of classification societies, whether arising in tort or contract, should be related to the level of professionalism that can be expected from experts. This view is favored by academics[242] and confirmed by existing case law in Belgium[243] and the UK.[244] The conduct of classification societies and their potential liability could be assessed against the CMI Principles of Conduct. Their scope must be extended to cover all duties of classification societies and all aspects of their contractual relationship with shipowners. In addition, Flag States should implement the Principles into their domestic legislation to make them binding for contracting parties.

Because many cases involve negligence of both the classification society and the shipowner, the question rises *how* liability can best be apportioned between both parties. From a Belgian legal perspective, multiple tortfeasors will incur either "solidary liability" (*responsabilité solidaire*) or "liability *in solidum*" (*responsabilité in solidum*). Solidary liability implies that multiple tortfeasors commit a common fault (*faute commune*),[245] thereby willingly and knowingly inflicting damage upon an innocent third party. Liability *in solidum* means that multiple tortfeasors commit concurring faults (*fautes concurrentes*).[246] While there is no concerted action by the tortfeasors, their respective faults together caused the damage.[247] Under the "liability in *solidum*" approach, which is especially relevant in the context of this article, each tortfeaser's obligatory liability (*i.e.* its liability to the victim) covers the whole of the awarded damages.[248]

The party that paid full compensation to the victim, or paid a part of the compensation bigger than his own share, can seek appropriate contribution from, or has a right of 'recourse' against other parties held liable.[249] According to the Belgian *Cour de Cassation*[250] and confirmed in the above-

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[242]See for example Honka at 33 (1995).

[243]See supra part V.

[244]See supra part VI.

[245]This notion comes close to the concept of joint tortfeasors under English Law.

[246]This notion comes close to the concept of concurrent tortfeasors under English Law.

[247]Herman Cousy and Dimitri Droshout, *Multiple Tortfeasors under Belgian Law*, in Willem V.H. Rogers, *Unification of Tort Law: Multiple Tortfeasors* 30, 36-37 (Kluwer International Law 2004).

[248]Cousy and Droshout at 34-35(2004); Van Gerven and Covemaeker at 433-434 (2006); Bocken and Boone at 83-86 (2011); Vansweevelt and Weyts at 839-841 (2009) with further references; Court of Cassation, March 8, 2005, Arr. Cass. 2005, 555.

[249]For discussion see Marc Van Quickenborne, *Oorzakelijk verband tussen onrechtmatige daad en schade*, 130-134 (Kluwer 2007); Ludo Cornelis, *Le partage des responsabilités en matière aquillienne*, R.C.J.B. 320-341 (1993); Vansweevelt and Weyts at 835-841 (2009); Cousy and Droshout at 40-41(2004).

[250]Court of Cassation, 29 January 1988, Pass. 1988, I. 627; Court of Cassation, 18 January 2007, NjW 2008, 80. For similar principles of apportionment in cases of contributory liability: Court of Cassation, 1 February 1994, Arr. Cass. 1995, 129; Court of Cassation, 5 October, 1995, Arr. Cass. 1995, 844.

discussed Belgium case law on the liability of classification societies,[251] the criterion to apportion contributory liability among joint tortfeasors is the effect of each fault, *i.e.* its relative causal contribution, to the occurrence of the damage. This is in contrast with older case law of the *Court de Cassation*,[252] according to which courts had to apportion contributory liability among joint tortfeasors in proportion to the gravity of their respective faults.[253]

In the search for an harmonized/uniform approach, it is nevertheless more feasible to apportion liability between a classification society and a shipowner based on the gravity of their respective faults. In the first place, this would be appropriate because the degree of a classification society's negligence could be assessed against objective standards set out in the (implemented) Principles of Conduct for Classification Societies. The judge of the facts should be assisted by a committee of experts when deciding on this matter. Second, there is often a correlation between the gravity of a classification society's fault and the effect it has on the occurrence of the damage.[254] Finally, lower courts often still take into account the comparative gravity of fault when deciding on the apportionment of liability.[255] In addition, a recent judgment of the *Cour de Cassation* seems to open the door again to consider the gravity of each fault.[256]

### *B. The Belgian Maritime Code: Primus Inter Pares?*

In May 2007, a Royal Commission was set up with the aim to modernize Belgian maritime law and to create a new Maritime Code. The Commission held public consultations on the private law section of the finalized draft of a new Code between January and December 2011.[257] The role and the liabil-

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[251]See supra part V. and especially the case of the *Spero*.

[252]See for example Court of Cassation, January 27, 1981, Arr. Cass. 1981-1982, 669. For similar principles of apportionment in cases of contributory negligence: Court of Cassation, January 12, 1948, Pass. 1948 I, 26.

[253]As discussed in Britt Weyts, *De fout van het slachtoffer in het buitencontractueel aansprakelijkheidsrecht*, 318-324 (Intersentia 2003); Vansweevelt and Weyts at 829-841 (2009); Cousy and Droshout at 46-47 (2004).

[254]Also see Weyts at 406-407 (2003).

[255]See Court of Appeal Brussels, January 23, 1996, R.G.A.R. 1999, 13046; Court of Appeal Brussels, January 17, 1997, De. Verz. 1997, 501; Court of Appeal Ghent, June 5, 1992, Vl. T. Gez. 1994, 222.

[256]Court of Cassation, Septembre 26, 2012, AR P. 12.0377.F ('la gravité se définissant comme le caractère de ce qui peut entraîner de lourdes conséquences, il n'est pas interdit au juge de se référer à cette notion, ainsi comprise, pour arbitrer le poids relatif de deux fautes jugées par ailleurs également causales').

[257]Eric van Hooydonk, *Draft Belgian Maritime Code submitted to public consultation*, LLOYD'S MARITIME LAW TRANSPORT INSURANCE 4-5 (2011), available at <www.shipregistration.be>.

ity of classification societies is, however, not addressed in the draft, for several reasons. A separate section was not deemed necessary because this subject matter does not pose any (legal) problems in Belgium. A classification society is not acting as the shipowner's agent so it can incur liability to (third) parties that have contracted with the owner. Moreover, recent codifications in other countries also did not incorporate provisions about the liability of classification societies.[258]

It is regrettable that the Commission did not address this topic, especially because of the significance and importance of Belgian maritime legislation. Belgium has a central position in shipping matters,[259] extensive knowledge about nautical and maritime matters,[260] an excellent and open minded tradition of comparative law research, and a special interest in maritime law unification matters.[261] Against this background, and with the authority and expertise of the Commission members, a statement emphasizing the need for an international uniform liability regime or introducing a draft version of binding principles would have been welcomed. This is especially true because these concerns are currently not addressed by the EU, the IMO, or the CMI. A codification of liability principles into a well-structured and coherent text with additional suggestions or comments could have been a guideline and inspiration for law makers in other Flag States or in international organizations.

Did the highly technical and sophisticated German Bürgerliches Gesetzbuch not exert considerable influence over the codification process in Switzerland, Austria, China, Japan, Greece, Hungary, and Czechoslovakia? Have the advantages of the parity exception in civil law countries not influenced the United Kingdom to examine whether it would be desirable to enact similar provisions in its legislation? Does the EU intergovernmental open method of coordination not provide a framework in which Member States are evaluated by one another (peer pressure), and where best (legal) practices are adopted? All these examples show that countries are not legally isolated from each other. As such, the argument of the non-existence of liability provisions in other countries has to be rejected. Instead, Belgium

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[258] As discussed in Van Hooydonk at 195-196 (2011).

[259] The Port of Antwerp is for example an important transit port in Europe. It handles an annual amount of 186 million tonnes of international maritime freight, making the port Europe's second biggest one (<www.portofantwerp.com/en>). The port of Ostend realized traffic of 5 million tons in 2010, of which 70% was Roro and 30% bulk and general cargo (<www.portofoostende.be>).

[260] To name only two: Dredging, Environmental & Marine Engineering (<www.deme.be>) or Jan De Nul (<www.jandenul.com>).

[261] See the role of Belgium in the history of the CMI available at <www.comitemaritime.org/History/0,273,1332,00.html> or <www.imo.org/KnowledgeCentre/ReferencesAndArchives/Documents/CMI%20a%20brief%20history.htm>.

should take a leading role in the debate about the precise role and liability of classification societies. If not by particular suggestions or proposals, then at least by a statement that emphasizes the importance and relevance of this subject matter to the international maritime community.

### *C. The Way to a Uniform Approach*

#### *1. CMI and IMO*

Measures by the international community to overcome the opposing liability views are currently missing. After the introduction of the CMI Model Clauses and the Principles of Conduct,[262] no initiatives have been suggested to address civil liability issues. The once existing need for a harmonized approach no longer seems to be a priority. The international debate on this matter has been abandoned in favor of other maritime issues such as the technical cooperation between national governments, and prevention or the protection of the environment against oil pollution. However, clear and uniform provisions about the liability of classification societies will contribute to overcome some of these concerns. The scenario of IMO control on classification activities to "escape from the rather fascinating scenario where the body to be controlled pays for the control"[263] seems unlikely. Besides the strong reaction of classification societies against the proposals of IMO control,[264] it can be doubted whether the IMO financial and technical means will suffice to cover all classification services. Reliance on activities of the CMI is necessary since it seems/seemed to be the only body able to address this matter. Uniform principles could be achieved through extensive consultations between all relevant parties within the CMI framework. A conference hosted by the CMI re-establishing the Joint Working Group is necessary.

The conduct of classification societies and their potential liability should be assessed against the CMI Principles of Conduct. Their scope should be extended to cover all aspects of the contractual relationship between shipowners and classification societies. In addition, they have to be implemented by Flag States in their domestic legislation to give them mandatory effect in all contractual relationships with classification societies. The Principles should be used to define the standard of care of classification societies and their contractors.[265] Considering the scope of a shared liability approach, the discussion whether third parties are the beneficiaries of clas-

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[262]See supra at IV.

[263]Lars Lindfelt, *A Future for Classification Societies*, CMI YEARBOOK 254 (1994).

[264]As noticed in Lindfelt at 254 (1994).

[265]Also see Lagoni at 298-299 (2007).

sification rules is irrelevant.[266] Shared liability implies that a classification society should or would be liable if its management violates the standard of reasonable care, or if its surveyors' negligence caused the damage to the vessel.[267] The only question that a court has to address is to what extent the Principles of Conduct have been followed by classification societies.

Assuming that a classification society breached its obligations under the Principles, it should then be able to invoke limitation of liability provisions. Most parties in the shipping industry can rely on an international limitation regime.[268] Classification societies are still not granted such protection under any international convention.[269] Several suggestions have been made to overcome this gap ranging from the inclusion and immunization of classification societies under the 1976 LLMC Convention,[270] the 1992 CLC Convention,[271] the 2009 Rotterdam Rules,[272] or the establishment of a new international convention.[273] The limitation provisions for the 'maritime performing party' within the context of the Rotterdam Rules would be particularly relevant for classification societies. They perform or undertake to perform the carrier's obligations to ensure the seaworthiness of a vessel by periodically surveying its compliance with (statutory) safety standards.[274] In addition, the recent reasoning in the *Erika* case and in the case of the *Al-Salam Boccaccio* allows classification societies to rely on the CLC principles when they do not act recklessly.[275]

Another possibility is to incorporate the CMI Model Clauses in agreements between classification societies and shipowners or national governments.[276] The Clauses would then become standard-form contracts.[277] It has recently been argued that the limitation of liability could be based upon the

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[266]See discussion in Wiswall at 230-231 (1994).

[267]As argued in Wiswall at 233 (1994); Huybrechts at 441-443 (1996).

[268]See Norman. M. Gutierrez, *Limitation of Liability in International Maritime Conventions: the Relationship between Global Limitation Conventions and Particular Liability Regimes*, 416 p. (Taylor and Francis 2011).

[269]For discussion see Lagoni at 259-331 (2007); Basedow and Wurmnest at 30-32 (2006); Philippe Boisson, *Are Classification Societies Above the Law?*, MARITIME ADVOCATE (1998), available at <www.maritimeadvocate.com/classification/are_classification_societies_above_the_law.htm>.

[270]Daniel at 233 (2007). Contra see Lagoni at 284-287; Antapassis at 50-51 (2007).

[271]Daniel at 224-232 (2007). For opposing view: Lagoni at 288-290 (2007).

[272]Paula Bäckdén, *Will Himalaya bring Class down from Mount Olympus? – Impact of the Rotterdam Rules*, 42 J. MAR. L. & COM. 115 (2011).

[273]Lagoni at 304-331 (2007).

[274]As held by Bäckdén at 120-123 (2011).

[275]See supra VII.3 and VII.6.

[276]See Wiswall at 230-233 (1994).

[277]William Tetley, *Uniformity of International Private Maritime Law-The Pros, Cons, and Alternatives to International Conventions-How to Adopt an International Convention*, 24 TUL. MAR. L. J. 788 (2000).

ship's tonnage. Such a system will not depend on a classification society's own costs, the country where the activities are performed, or the market conditions.[278] The Clauses have to make sure that amendments according to classification societies' commercial concerns are not possible anymore. IACS might play a crucial role in ensuring compliance with these requirements. However, the 'contractual setting' of the Model Clauses makes it difficult for classification societies to invoke them in the context of third-party liability.

The former Model Clauses also addressed the liability of classification societies when performing public functions.[279] At the 20th meeting of the IMO Flag State Implementation Sub-Committee, the framework of the draft Code for Recognized Organizations was discussed. Several proposals by the EU to amend the draft Code, in particular to make the monitoring of recognized organizations and the mutual assistance between Flag States mandatory, were not supported. Other EU proposals, for example ensuring that Flag States only recognize organizations that meet the Code criteria and establish strong requirements for their independence, impartiality, and liability indemnity, were also not adhered to by other parties.[280] It remains unclear what the effect of this Code will be, especially since it does not address the civil liability of classification societies. One option is to incorporate some of the Code provisions into the CMI Principles of Conduct, or to extend the ambit of the latter ones. As such, the Principles will not only address the contractual duties between classification societies and the shipowner (private function) but also its relationship with a Flag State (public function). The Principles should contain the standard of care for Flag States that delegate statutory duties.

The CMI Principles should equally require Flag States to establish a formalized written working agreement with classification societies.[281] A State can be liable for the negligence caused by a classification society since the latter is considered to act as its agent. Shipowners or third parties may then either sue the recognized classification society, the maritime administration, or both parties. Some argue that classification societies should be exempted from direct actions of third parties, and only be submitted to the recourse of the Flag State on whose behalf they are acting.[282] However, the more claims a third party can initiate, the more likely it will be able to recover.

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[278]Lagoni at 323 (2007).

[279]Wiswall at 230 (1994);

[280]IMO Sub-Committee on Flag State Implementation, 20th Session (March 26-30, 2012), Code for Recognized Organizations available at <www.intermanager.org/2012/04/imo-sub-committee-on-flag-state-implementation-20th-session-26-30-march-2012/>.

[281]See Boisson at 57 (2003).

[282]Lagoni at 329 (2007).

Furthermore, a third party is not always informed of the public functions performed by a classification society. In addition, the apportionment of liability is a matter of law which does not affect the possibility of third parties to claim recovery directly against classification societies.[283]

The principles of shared financial liability should also apply in the relationship between the governments and classification societies acting on their behalf. The administration would be entitled to financial compensation from the RO to the extent that the loss, harm, injury, or death was, as decided by the court, caused by the management's violation of the standard of care, or by a surveyor's negligence. However, once a claim is filed, a classification society should again be able to rely on limitation of liability principles.

*2. The European Union*

The above-mentioned EU measures only address the recognition of classification societies, and their relationship with the administrations. The European Commission advanced that an independent joint body within the corporate structures of classification societies would prevent them from lowering their survey quality under market pressure. Under the *Erika* III-Package, the new punitive and withdrawal system allows the Commission to exercise more control over societies, and to better coordinate or supervise their activities. They will no longer be able to be more lenient to ships sailing under a non-EU Member State's flag because they have to ensure the necessary access to ships and ship files.

Finally, the principle of mutual recognition allows equipment manufacturers to apply the most stringent standards to increase their market access.[284] However, the subsequent amendments of supranational measures failed to take into account the suggestions made by different scholars to clarify the unclear and ambiguous provisions. Terms are still used incorrectly or inconsistently. What is covered by a 'wilful act,' 'omission' or 'gross negligence'? What about 'regular negligence'? The question also arises to what extent the public welfare will benefit from the competition between classification societies.[285] More important is that their private role and potential liability in this regard is not addressed within the EU framework. Uniform and harmonized provisions about the contractual relationship with classification societies and about liability claims in tort are nevertheless more than necessary.

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[283]As discussed supra in IX.

[284]European Commission Mobility and Transport, Adoption of the Third Maritime Safety Package, Classification Societies available at <ec.europa.eu/transport/maritime/safety/doc/2009_03_11_package_3/fiche02_en.pdf>.

[285]Also see Begines at 541-543 (2005); Mikis Tsimplis, *Classification Societies and Directive 94/57/EC: Time for Rethinking the Liability Issue?*, SHIPPING AND TRADE LAW 1-4 (2006).

Whereas the existing framework coordinates the conduct of classification societies and surely improves safety at sea, more needs to be done. The EU also needs to set up a working group in order to discuss the role and civil liability of classification societies. An advantage of the EU is that it can impose binding legislation upon its Member States, as opposed to the self-regulating measures by the CMI or the IMO. Fundamental principles with regard to the liability of classification societies to shipowners and non-contracting parties have to be reconsidered. Although there are currently no specific measures in preparation, it seems that the Commission has not intended to completely discard the opportunity to address the civil liability of classification societies in a future review of maritime safety policy. The EU becomes an important actor in the field of the civil and administrative liability of classification societies. EMSA is perfectly placed to play a significant role in this subject matter; if not by proposing an encompassing framework equivalent to the Principles of Conduct, then at least by bringing the debate to the attention of the maritime community again.

## X
## CONCLUSION

There remains a considerable difference between jurisdictions on the role and liability of classification societies. Case law in Belgium (and some other civil law countries) generally recognizes contractual and tort liability. Common law countries often acquit classification societies from third-party liability. This is especially true in the UK, even though the *Ramsgate* case revealed that societies can potentially be liable. Strict requirements have to be fulfilled for a classification society to owe a duty of care, or to apply the doctrine of negligent misrepresentation. From a technical legal perspective, harmonization can nevertheless be possible when reevaluating the application of the requirements in the domestic law of torts. The 'fair and reasonable' requirement could indeed make it possible to impose liability on classification societies to third parties. Similarly, a lack of causation, or limiting the scope of recoverable damages in civil law countries, can be used to reject third-party liability claims against classification societies.[286]

This article advanced the possibility of shared liability between classification societies and their co-contractors as a fair and appropriate system. The CMI Principles should consider all duties of parties and could subsequently be used to define their standard of care. Flag States have to imple-

[286]See Gerhard Wagner, *Comparative Tort Law*, in Mathias Reimann and Reinhard Zimmerman, *The Oxford Handbook of Comparative Law*, 1004-1024 (Oxford University Press, 2007).

ment the Principles into their legislation in order to give them mandatory application. As such, an encompassing uniform or harmonized regime could be established against which the conduct of all relevant parties will be assessed.

There is no reason why classification societies should not be able to limit their liability. The precise scope and the legal basis of limitation principles needs to be further examined by the relevant maritime actors. However, with maritime casualties such as the *Prestige* and the *Erika*, coastal States will probably be reluctant to negotiate limitation principles, whether in the form of a convention or by EU, CMI or IMO measures.

More significant is that the debate about the role and liability of classification societies is currently no longer addressed. Suggestions and discussions are lacking on the national (Belgium Maritime Code), supranational (EU), and international (CMI and IMO) levels. Shared financial liability and uniform limitation principles are only possible if the debate about the role and liability of classification societies is resumed. Each of the above mentioned 'levels' has its benefits. The European Union and maritime administrations can impose binding legislation. Activities of the (public) IMO or the (private) CMI are internationally oriented and could influence many States. A CMI joint working group consisting of representatives of all 'levels' and of other relevant organizations needs to be set up again. Belgium could thereby take a leading role because of its unique position and expertise in the shipping industry.

Earlier concerns have to be further examined and discussed. Is a dual role for classification societies desirable? Is it possible to include classification societies under existing limitation conventions? What about a new IMO convention for the limitation of liability for classification societies? What is the precise definition of concepts such as "negligence" and "gross negligence" committed by classification societies? What are the specific duties of Flag States and shipowners? How best to implement the CMI Principles of Conduct into domestic legislation? What about the application of Himalaya Clauses for classification societies? How to overcome the risk that classification societies are targeted as "deep pocket" defendants and therefore bear all costs of loss or damage? How should liability be apportioned between a classification society and a shipowner?

This article aims to 're-launch' the (international) academic debate on the liability of classification societies. This is more than necessary because maritime casualties in which the role and the liability of 'deep pocket' classification societies is at stake will surely increase.