# THE "PRESTIGE" IN THE AMERICAN COURTS

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This is a brief description and analysis of the Prestige case in the American Courts. I will mention first some general facts and information about the story (The "Facts") and abut the legal proceedings arising out of the sinking of the vessel ("Litigation: A General Perspective") and, afterwards, I will focus on the long and winding road followed by the parties in conflict before the US federal courts ("The US decisions"). Some final conclusions will also be provided ("Conclusions")

## *1. The Facts*

The Prestige was a single-hull oil tanker built in accordance to ABS Rules 1973. She was delivered in 1976. The Prestige was inspected periodically by ABS and listed in the ABS Record of Vessels with her class at all times. Right before the incident affecting the Prestige, she was inspected in Guangzhou (China) in April 2-19, 2001 (5-year revision) and in the United Arab Emirates in May 15-22, 2002 (annual revision). At the time of the sinking, the Prestige was flagged in the Commonwealth of the Bahamas (1994) and her registered owner was a Liberian company, Mare Shipping, Inc. The shipowner was Universe Maritime, Ltd. (Greece) and she was chartered to a Swiss company, Crown Resources, AG, owner of the oil carried by the ship at the time.

The Prestige was loaded with fuel oil at Saint Petersburg (Russia) on October 2002 and at Ventspils (Latvia) on November 2002. She was bound for Gibraltar where she was to receive further orders. On November 13, 2002, the Prestige was located near the Spanish coastline when waters entered into her in the middle of a storm suffering structural damages, which lead to her breaking in two and sinking on November 19 with 77,000 tons of fuel oil (+ 3 million gallons) at 140 miles off Finisterre (La Coruña, Spain). Environmental and economic damages were enormous.

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## 2. *Litigation: A general Perspective*

Out of the Prestige catastrophe, several legal proceedings were initiated. The most important ones arose in Spain and in the USA.

In Spain, criminal charges were filed against the master, the engineer officer, the first officer and the Merchant Shipping General Director (a Spanish Government official). Civil liability (tort) was also instituted simultaneously, before the same Court, against the insurer (London Club) and the FIDAC (direct liability) and against the registered owner, the shipowner and the "Reino de España" (subsidiary liability). ABS took no part in the proceedings.

The Spanish proceedings were investigated by the local court ("Juzgado de Primera Instancia e Instrucción nº 1") of Corcubión (La Coruña) and heard and decided by the Provincial Court ("Audiencia Provincial") of La Coruña. The decision was rendered in November 13, 2013. The accused parties were acquitted of criminal liability for environmental damages and only the Master, Mr. Mangouras, was declared guilty of disobedience to the authorities. No tort liability was imposed. The decision sent general waves of discomfort, but the Court was very clear in declaring that no liability could be imposed if no evidence of the origin of the disaster was provided.

Almost in parallel with the Spanish proceedings, claims against ABS, the Prestige's classification society, were initiated in the USA. At first, some Spanish regional authorities tried to open the way but they were soon *convinced* to let this task in the hands of the national government. Therefore, the "Reino de España" in its own name and in the name of others, as trustee, filed a claim against ABS (head and subsidiaries) before the federal courts of New York in petition of compensatory and punitive damages on the basis of ABS reckless classification, certification and inspection of the Prestige as a ship qualified to carry fuel oil (tort liability). Proceedings started in May 16, 2003 and finished in August 29, 2012 (over 9 years). The Courts involved were a) the District Court for the Southern District of New York (DC) and b) the Court of Appeals for the Second Circuit (CA). And four decisions were issued during the proceedings. The first one (January 2, 2008) dismissed the claim (DC). The second one (June 12, 2009) vacated the first decision and remanded for further proceedings (CA). The third decision (August 3, 2010) dismissed the claim again (DC). And, finally, the fourth decision (August 29, 2012) confirmed the previous decision from the DC (dismissal) but on alternative grounds (CA).

## 3. *The US decisions*

### *a) First decision*

In this first stage of proceedings, ABS essentially moved for "summary judgment" dismissing the claim of Spain on the basis of the CLC (one of ABS's dismissal grounds).

[The CLC is the International Convention on Civil Liability for Oil Pollution Damage 1969/1992, where a strict and limited liability system is applied to the owner of the polluting ship (article III.1 and 4) and exceptionally to "other persons" (article III.4). The CLC contains specific jurisdiction rules in article IX]

The DC accepted ABS's arguments and dismissed the claim on the basis of articles III.4b and IX.1 CLC.

The decision's rationale was as follows:

a) CLC applied to ABS since classification societies were a "person" in the sense of article III.4b ("*the pilot or any other person who, without being a member of the crew, perform services for the ship*").

b) Exclusive jurisdiction to hear cases based on the CLC is vested on the courts of the Contracting State in whose territory the incident had caused pollution (article IX.1). Pollution had affected Spain, which, as a Contracting State, must have filed its claim before the Spanish Courts. Therefore, on the basis of the CLC, US Courts had no jurisdiction to hear the claim.

The decision from the DC merits two comments:

a) The USA was not a CLC Contracting State (and the DC knew this), so the DC's jurisdiction should have been determined in accordance with the proper jurisdiction rules in force in the US.

b) The DC develops a "contractual theory" in support of the CLC's application: Spain is a CLC Contracting State. International Conventions, like CLC, create legal obligations akin to those created by contracts. Spain must respect its compromises under the CLC and refrain from filing claims out of the courts expressly mentioned in article IX.1 CLC.

*b) Second decision*

Spain appealed the DC decision and the CA vacated it and remanded for further proceeding consistent with its decision.

The decision's rationale was based on the following arguments:

a) The DC erred in holding that the CLC deprived it of jurisdiction to hear the claim. The US is not a CLC Contracting State and the CLC therefore is not applicable in the US.

b) The DC must ground its jurisdiction on the jurisdiction rules in force in the US.

c) The DC is not required to exercise its jurisdiction if discretionarily decides to apply principles of "forum non conveniens" or international comity.

d) If the DC wants to exert jurisdiction, a proper conflicts-of-law analysis must be conducted to determine which law governs the case.

The CA arguments were simply "PIL in a nutshell", a swift and concise reminder of the basic PIL concepts which the DC should have applied (but did not, for unclear reasons). The CA was also kind enough to provide the DC with arguments to step out of the case by pointing to venues like the "forum non conveniens" or international comity.

*c) Third decision*

When the litigation returned to the DC, the jurisdiction of the Court was no longer an issue. The DC accepted its subject-matter jurisdiction on the basis of diversity/admiralty grounds in accordance with jurisdiction rules in force in the US (page 1 of the decision: "*The Court has jurisdiction of the action pursuant to 28 §§ 1332 and 1333*"). The road was now open for the real battle: the determination of the applicable law and the analysis of the ground issues in accordance with such law.

In this respect, the DC performed first a conflict-of-laws analysis on the basis of federal maritime case-law (the "Lauritzen Triad" and subsequent decisions) and concluded that US law was applicable (federal maritime law + NY common law of torts) because the US was the place where the facts leading to the claim occurred (ABS acted following instructions coming from the US, irrespective of the inspection places). Spain had argued for the application of US law (or, alternatively, Spanish law). And ABS had requested the application of the law of the Bahamas (flag) or, alternatively, the law of China (inspection country) or of the United Arab Emirates (inspection place).

Moving to the ground issues, the DC identified the legal question as the following: whether a classification society which has provided services in respect of a vessel is liable for damages caused to a third party (coastal State) by a vessel's failure, on the basis of a recklessly-performed classification.

And the DC answered in the negative.

The DC argued that no precedent existed (or had not been provided) supporting the proposition advanced by Spain (framed in the legal question described above). On the contrary, previous court decisions on similar cases had put forward another arguments: a) the shipowner is ultimately (and the only person) responsible for furnishing a seaworthy vessel); b) Fees earned by classification societies are disproportionately inferior to claimed damages; c) Agreements between classification societies and shipowners clearly and expressly exclude classification societies liability vis a vis third parties; and d) there is no relation or contact whatsoever between classification societies and damaged third parties (principle of proximity).

*d) Fourth decision*

Finally, the CA affirmed the DC decision, but on alternative grounds.

Two ideas deserve some attention here.

First. The CA ignored the legal rule discussed at the DC level, i.e., that classification societies are not liable to coastal states for damages originated by ships recklessly classified by them.

And second. The dismissal of the claim, affirmed by the CA, was based on the fact that Spain had not provided enough evidence to convince a reasonable jury that ABS acted recklessly in the classification of the Prestige. This is probably the weakest part of the decision, which is as to say its biggest flaw. Probably, the letter (the "Kostazos fax") sent in August 2002 to an ABS

subsidiary by a former Prestige master alerting ABS of grave mechanical and structural problems aboard the vessel would have received a different evidentiary treatment by a court in another jurisdiction. But, apparently, according to standard agency principles in force in US law such communication was of no use at all as a warning to prevent a catastrophe like the Prestige.

## *4. Conclusions*

The outcome of the proceedings brought by the Reino de España against ABS in the US suggests several conclusions:

a) Spain was really unlucky with the management of the case by the DC in its first decision. Almost 5 years passed by before the issue of jurisdiction was finally solved. This is absurd in terms of time and of the quality of the work that should have been expected from the DC. Another court with a basic understanding of PIL issues would have produced a faster and fairer result. And Spain (both parties, in fact) would have saved time and money.

b) Spain was lured into the nightmare of "mermaid calls" of (punitive) damages with unfortunate consequences. It is not the first time foreign claimants get similar results after similar attempts to obtain what they cannot get in their own jurisidiction. But the Reino of Spain should have known better.

c) One could also question whether the liability of classification societies in US law vis a vis third parties was well-settled law so as to authorize entering into a long litigation abroad, having in mind in particular the litigation costs, which in the end fall on the (Spanish) tax payer.