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## **Liability of Classification Societies\***

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### 1. Introduction

The safety of a ship depends on its structure, equipment, shape, disposition and its specific purpose, which varies from one ship to another; the purpose of one ship may be the carriage of persons or goods, the purpose of another may be fishing, towing, the rendering of assistance or any other purpose. The safety of a ship also depends on the nature of the cargo (which determines the danger inherent in its carriage), the composition of its crew, labour conditions and the education and level of communication between its members, on the use of signals and the proper function of telecommunications, as well as on other related factors. As a principle, every State, after taking into consideration all the above factors, is entitled and also obliged to ensure the safe navigation of ships flying its flag by implementing all the measures imposed especially by international rules, processes and generally accepted practices (UNCLOS, Art. 94 §§3, 4 and 5). However, the flag State itself, in view of the inflexibility and the lack of vigilance that dominates the administration and management of its affairs, is not always in a position to secure effective control of the ships flying its flag, especially in the case of a minor State having developed a significant merchant fleet.

This has contributed to the appearance of, an increase in and the development of certain specific organizations, the Classification Societies. Every classification society undertakes on the one hand to express its opinion mainly towards the shipowner about the degree of his ship's compliance with the technical rules that the classification society has formed and to rank the ship under one of the five ships' classes existing worldwide; on the other hand, it

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\* Session III.D. National reports received from: Canada, A. Braën; Germany, W. Wurmnest; Greece, L. Athanassiou; Italy, M. Comenale Pinto; Japan, S. Kozuka & M. Yoshida; US, S. Sucharixul.

undertakes to execute a public service, i.e. to ascertain, on the basis of an authorization by the flag State, the compliance of national ships with the national and international regulations concerning ships' safety and to issue the relevant certificates.

Thus, this expanded role of the classification society, being placed among the preventive measures of maritime safety as it aims to avert ships' accidents, no longer constitutes a simple private matter between itself and the other contracting party (the shipowner, the charterer, the buyer, the ship's insurer or another person interested in the ship), but is of a great interest to the public benefit as well, as it may result in serious financial consequences for persons who are not on board the ship and have no relation to it, especially when the above role is not performed in an impartial, trustworthy and effective manner. This is the reason why every legal system must discourage not only the shipowner or the master but also any other person (such as the classification society) who significantly affects the ship's safe navigation from developing practices of tolerance or convenience that set aside objectivity and reliability in the selection of a classification society and persuade the latter to render services which violate the models in force and fail to secure a high level of safety for the ship. This must be pursued through the imposition at a national and international level of civil, administrative as well as criminal penalties which must be dissuasive, proportionate and internationally harmonized and which contribute to the establishment of a climate of safety.

In particular, as far as the civil liability of classification societies is concerned, it needs to be observed that the principal aim of this liability is to provide compensation for the damage which is wholly or partially caused by its behaviour, just as in every other form of compensation liability. In the second place, however, the above liability forces the classification societies to render services of a higher quality, services that justify their preventive character and as a consequence contribute to the improvement of ships' safety. Under this perspective it must be examined whether the tasks of the classification societies and especially the nature of their services vis-à-vis a certain ship affects their liability and the nature and extent thereof (1). Furthermore, the way in which the issue of their compensation liability is dealt with must be explored, in other words whether the compensation obligation is solely contractual (2) or whether it can also be in tort (3). Considering that the classification societies' services are of great interest to the public benefit, the issue of the relations between the State and classification societies, especially in view of liability, stands out (4). In addition, in view of the fact that classification societies, especially the most significant ones, are not solely active in the context of one legal system, it becomes obvious that the above matters need to be examined with one eye on the international horizon.

## 2. The Role of Classification Societies

As pointed out above, the principal need in the modern era is for the level of ships' safety and navigation to become as effective as possible-The fulfillment of this need is mainly pursued by the State, which is made up of administrative services and legal persons subject to public law, which in their turn check the compliance, especially of national ships, with the national and international safety standards in force; the above administrative services and entities do not render their services in accordance with financial principles or, even if they do so, do not aim at making a profit but merely at avoiding a loss. In order to cope with the insufficiency of the public administration and to save money, the majority of countries assign a significant portion of the tasks in question to private organizations, i.e. the classification societies, which operate under several forms.

### 2.1. Meaning and Structure

Classification societies are usually entities formed under private law which operate as non-profit organizations or as Sociétés Anonymes.<sup>1</sup> Their function has been significantly developed in the context of the major transformations that have taken place in the field of marine transport.

#### 2.1.1. Development

The first classification societies (Lloyd's Register of Shipping, Bureau Veritas) mainly aimed at informing the underwriters about the advantages and disadvantages of the ships anchored in national ports as well as about the insurance terms of ships and cargoes within the particular insurance markets. Their role was useful not only to the underwriters, but also to shipowners, because they could persuade the latter to keep their ships in good condition. Their role was also useful to importers and exporters of goods as well as to other persons engaged in marine trade, as it contributed to dangerous and poorly maintained ships being put out of service. The performance of this role was a purely private matter because it mainly protected those who had dealings with the classification society and only coincidentally served the general interest.

It therefore becomes obvious why ships' underwriters crucially contributed from the very beginning to the establishment and function of classification societies. Den Norske Veritas is a characteristic example. Within this classification society underwriters still retain a right to vote in its controlling bodies. It is obvious that through classification societies underwriters

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<sup>1</sup> The example of the Italian classification society "Registro Italiano Navale" (RINA) is indicative and therefore worth mentioning. Initially it was a public entity. In 1947 it was restructured into a legal person under private law. In 1969 it finally took the form of a SA. (RINA S.p.A.). See Italian Report; A. Zampieri, *Il registro Italiano Navale: ruolo, struttura e prospettive* (unpublished thesis, Università di Genova, 1991).

were able to influence shipowners. In the course of time shipowners became more active and gradually took over the control of classification societies. The dependence of classification societies on underwriters and of some of them on shipowners negatively affected the reliability and impartiality of their judgment. Nowadays, classification societies are self-controlled, and are subject to a system of self-regulation by the persons who manage them.

Moreover, in the course of time classification societies started to agree with shipowners on surveying ships according to the technical rules formulated by the classification societies themselves and to rank the said ships in categories or classes according to their capacities and potential. Thus, the class expressed (and still expresses) the safety status which, according to the respective classification society, the ship provided (and provides) in view of its constructive and mechanical strength and its special uses.

In the modern era, classification societies supervise ships from the stage of their building and throughout their operational life under the terms of an agreement concluded initially with the shipbuilder and concerning each single ship. After the completion of the ship's building, such an agreement is entered into with the shipowner. This supervision consists of examining the naval architect's designs, the construction materials, the progress of the building process, the mechanical, electrical, saving and cargo-discharging facilities and equipment and the supervision of sea trials. Following this examination, the classification society awards the ship a certain class i.e. it assures the other contracting party that the ship corresponds to the technical specifications which have been laid down by it and incorporated into detailed regulations. This helps the shipowner to have the ship insured at a reasonable cost. These regulations are drafted by specialized and experienced naval architects and engineers and combine scientific research with applied knowledge and long experience. Finally, they are subject to approval by a special committee.

It is obvious that, in view of ships' safety, not only the award but also the maintenance of the ship's class is of great importance. For a ship to maintain its class, the classification society will need to supervise any repairs and conduct regular, special and interim surveys.

Thus classification societies served the two most significant needs of commerce, i.e. speed and safety. And that is because serving these needs presupposes that the marine mission's participants are well informed about seaworthiness, in other words, they possess information upon which they can rely.

However, the building of increasingly larger ships and the transportation of great quantities of hydrocarbons and other hazardous or noxious substances have as a result that more extensive damage is caused by ships affecting an exceptionally large number of persons. In most cases these persons have no relation to the ship whatsoever, and, if they do, this relation is extremely remote. The prevention of such damage entails not only specialized knowledge and great experience but also increased expenses. For these reasons we can no longer view the

classification society's duty as a merely private matter between itself and the shipowners or cargowners and other persons interested therein. This duty, which contributes to the protection of the environment and consequently protects the interests of third parties outside the confines of the ship and who have no actual relation to the ship itself, has gained a wider social dimension in the modern era and thus every measure which supports its effectiveness should be approved. The first such measures were taken by classification societies themselves; they are a form of self-regulation.

### 2.1.2. Self-regulation

Although the establishment of a classification society, as is apparent from the above remarks, presupposes co-operation between persons possessing special scientific or technical knowledge, great experience, and also the gathering of major capital, the constant increase in the number and size of ships has led to the multiplication of classification societies internationally. Nowadays, the number of classification societies certainly exceeds sixty; the eleven most significant ones have created the "International Association of Classification Societies" ("IACS"). This International Association pursues the development of a uniform course of action by its members and the improvement of the services rendered by them by means of self-regulation based upon its reorganization (1991) and thus the emergence of a know-how and quality guarantee for its members. To serve this purpose the Association has: (a) drafted and adopted a Code of Ethics<sup>2</sup> for its members; (b) programmed a certification system to ensure the quality of services (c) supported the formation of an agreement between its members, which obliges each of them not to award a class before all pending inspections are carried out and before all recommendations made by the previous classification society are followed (d) adopted programmes of special, intensive inspections in order to safeguard the effective fulfillment of safety standards such as the programme of a detailed survey of oil-tankers and carriers of chemical substances and cargo-vessels which fall under certain categories (e.g. old age), as well as the programme of a detailed survey and evaluation of ships under charter according to their condition. It is self-evident that such evaluations influence a charterer's choice. Furthermore, the Association issues directions in relation to the implementation of the Regulations mainly in cargo ships and in relation to the formation of uniform standards on the technical safety rules which differ from one classification society to another.

In view of the above, a classification society being a member of IACS enjoys enhanced reliability in the international field and assists the prestige and role of the Association as a

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<sup>2</sup> Its last revision took place in March 2005.

non-governmental organisation. The selection of members by IACS should be based upon objective criteria that do not discriminate between the members, otherwise Arts. 81 §1 and 82 of the European Communities Treaty (ECT) might apply.

Having said the above, it should be noted that IACS is an association between businesses. As a result, the agreements and decisions of its members are likely to limit or to impair competition within a certain market and thus to be subject to the prohibitions set out by Art. 81 §1 ECT. Nonetheless, these prohibitions can be mitigated if it is accepted that agreements and decisions of a technical nature do not fall within the above provision's field of application.

This view is based upon Regulation 4056/1986, which provides (in Art. 2 §1 sec. a) that the prohibition of Art. 81 §1 ECT does not refer to agreements "which lay down or apply in a uniform way specifications or models concerning ships and other transport means, material, provisioning, and permanent installations". The fact that the Regulation determines that its provisions (including the above) are to be applied to the maritime transport industry does not entail that it excludes the classification societies from the application of the above Regulation's provisions, as classification societies are, par excellence, the enterprises which set technical standards for ships. However, the decisions and agreements of IACS are not always of a technical nature. Thus, if the relevant agreement or decision includes a commercial element, e.g. in the form of data exchange about customers, it is then likely, prima facie at least, to be considered as hindering competition. However, even these cases can be excluded from the prohibition, according to Art. 81 §3 of the ECT, if they contribute to the improvement of production or distribution of goods or services or to the promotion of technical or financial progress and do not impose restrictions which are unnecessary or do not give the collaborating businesses the opportunity to abolish competition within a major part of the relevant market.

Moreover, it should be observed that the agreement between classification societies which provides for data exchange, whenever a customer chooses another classification society, is intended to deter non-compliance with safety rules and to prevent the non-performance of repairs or works of maintenance that the former classification society had considered necessary. On the one hand, an agreement of this kind assists transparency; on the other, it contributes to the abolition of competition between the members of IACS which represent the largest portion of the relevant market) and hinders the performance of activities by classification societies which are not Association members and do not participate in the agreement. IACS raises objections arguing that the agreement in question does not have a financial character as pricing is not included in its competences. This argument is debatable, however. Of greater significance is its allegation that, in spite of an agreement of that kind and the attempt to establish new technical safety rules, there is indeed intense internal competition

between the members, which is specially attributed to the worldwide development by each of the members of a dense surveyors' network, to the difference in the services rendered, to the potential of instant servicing and to the quality of the rendered services.

If the increase in the number of classification societies is to be added to the above factors, it is perceivable why the appropriate circumstances within the relevant market tend to develop intense competition that worsens the quality of the services rendered by classification societies and, by extension, the safety of ships. The worsening of their services raises the matter of the specifications to be met by classification societies so that a reliable application of the technical rules takes place. At this point the question as to why a violation of either anti-trust laws or unfair competition laws by classification societies should not lead to liability towards any party that has suffered losses because of such a violation invariably arises.<sup>3</sup>

### 2.1.3. Recognition

Directive 94/57<sup>4</sup> has thus been adopted within the European Union which sets inter alia certain criteria or terms for the recognition of a classification society. These criteria reproduce decisions A739 (18) and A789 (19) of the IMO and are divided into "general" and "special".

#### 2.1.3.1.

General criteria include objective assessments and determine that a recognized classification society must: (a) prove that it possesses extensive experience in the evaluation of the design and structure of merchant ships; (b) have at least 1,000 ocean-going ships larger than 100 g.r.t. registered with it, and the overall gross tonnage registered must be more than five million tons; (c) exclusively employ at least 100 surveyors; (d) possess a full set of rules and regulations which are published, amended and improved through research and development programmes; (e) annually publish a list of the ships registered with it; and (f) neither be controlled by shipowners, naval architects or other persons engaged in the building, equipping, repair or exploitation of ships nor base its growth upon one commercial enterprise alone.

#### 2.1.3.2.

Special criteria determine that a recognized classification society should: (a) employ sufficient, specialized personnel and be in a position to cover its professional needs worldwide

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<sup>3</sup> Greek Report, p. 32-36.

<sup>4</sup> Directive 94/57 EU of 22 December 1994 on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administration (Official Gazette 319, 13 Dec. 1994, 20) has been amended by the Committee's Directive 97/58 EU of 26 Sept. 1997 as well as by EU Directive no. 2002/84 of 5 Nov. 2002 (Official Gazette 324, 29 Nov. 2002, 53).

with exclusive or non-exclusive operators; (b) be governed by a Code of Ethics; (c) comply with the authorities' demands as far as the secrecy of information is concerned; (d) supply the competent authorities with data; (e) consistently practice a certain quality policy; (f) certify the internal quality system according to the certification programme of IACS; (g) prove that it possesses the ability to form and maintain a full and adequate regulatory system and carry out surveys in accordance with the international conventions; (h) be certified by an independent body of controllers, recognized by the state of the classification society's establishment; and (i) allow the authorities and other interested persons to participate in the formation of its rules.

#### 2.1.3.3.

Every member state has the authority to recognize, in accordance with the above European Union criteria, a classification society. It must inform the European Commission and the other member states about the recognition of a classification society. The Commission has the sole right to request the revocation of such recognition if it determines that the recognition does not comply with the Directive's criteria. Every member state is entitled to request the Commission to allow the recognition of a classification society for three years, although it may not fulfil the general criteria and especially those referring to the number and tonnage capacity of ships as well as to the number of surveyors. The three-year term may be extended.

Every member state which recognizes a classification society is obliged to examine every two years whether this classification society complies with the general criteria and to disclose the results of its examination. It is also obliged to establish terms of collaboration between the competent administrative authorities and the classification society according to the directions of the IMO. For this purpose every member state should enact special provisions and provide for a written agreement to be entered into between the competent authority and the classification society, whereby the obligations of the classification society the supervision by the competent authority, the disclosure of substantial information as well as the classification society's representation within the member state where it has been recognized and established are stipulated.

#### 2.1.3.4.

The principle of the freedom of establishment and the rendering of services within the European Community refers to classification societies which meet the aforementioned quality criteria and have, therefore, been recognized. On the other hand, this principle entails the abolition of exclusive rights that were granted to state classification societies of a state character or origin and which did not allow access to the relevant market. Thus, classification societies which set up "Community companies" according to the provisions of the ECT and

fulfil the quality criteria referred to above are entitled to render their services in all member states. “Community companies” are those classification societies which have been set up under the law of a member state and have their registered office, their central management, or their main establishment within a member state. It is irrelevant who paid the capital, who controls the classification society and what this person’s nationality is. It is sufficient that an economic bond exists between the classification society and the member state. Classification societies having their main place of business outside the EU may be recognized by a member state and be established within it subject to the condition of reciprocity.

The rules briefly described above aim at contributing to the reliability of classification societies which are recognized by a certain member state and especially of those which are members of IACS, thereby increasing the quality of the services offered by them and consequently reducing the potential risks and causes of their liability. This system has gradually been examined in the modern period. Its examination relates not only to the objects of classification societies’ services (floating drilling rigs, warehouses, oil or natural gas platforms, aircraft, etc.), but also to the extent of their services. Apart from the services briefly referred to above, classification societies have been gradually authorized to render services of a public character, something which has made them important factors in the safety of human life and property at sea.

## 2.2. Activities Especially of a Public Character

As is generally accepted, the safety of human life and property as well as the protection of the marine environment is mainly a state issue, an issue for the international community of states. This does not mean that shipowners and other persons involved in merchant shipping play a secondary role. States have enacted a constantly increasing number of international rules concerning the organization and operation of merchant shipping. Some of these rules refer to classification societies, which are regarded as a means for protecting the general interest.

### 2.2.1. Relevant Rules

The formation of the rules in question began many years ago and they determined the minimum requirements for ships’ safety and the protection of the marine environment. They have been the work of the International Maritime Organization (IMO) and the International Labour Organization (ILO). They are extremely detailed because they refer to ships as a whole or to various parts or specifications thereof (a ship’s structure, mechanical equipment, composition and competence of the crew). They are often subject to revision dictated by new facts and the constant development of naval technology.

The above rules include, indicatively, the following: the 1966 international convention on Load Lines, the 1973 international convention for the Prevention of Pollution from Ships, as modified by the 1978 Protocol; the 1974 international convention for the Safety of Life at Sea as amended and complemented by the 1978 Protocol; the 1976 international convention (No. 147) on the minimum safety standards of merchant vessels; and the 1978 international convention on Standards of Training, Certification and Watchkeeping of Seafarers. The rules in question have been accepted by the majority of maritime countries.

#### 2.2.1.1.

However, effective, compliance with the provisions of these rules is not equally high. The fact that many shipowners and other persons involved in merchant shipping avoid in many ways improving ships' safety conditions when the quality of the services rendered by them is not rewarded, contributes to the insufficient implementation of these rules. During a period of increased demand for ships, all the available ships – even those not really suitable for the carriage in question – are chartered. During a period of recession in the freights market and thus a lesser demand for ships, unsuitable ships also tend to be chartered exactly because they request cheap hire. The owners of such ships combine the acquisition of short-term profit with decreased operation costs by avoiding compliance with the demands of safe navigation because these demands increase the cost of keeping ships in service. They therefore take advantage of certain legal orders with the Ships' Register where their vessels are registered and find a variety of ways to decrease operation costs, such as saving fuel at the expense of charterers, using inaccurate certificates to decrease port dues and charges, speeding up the process of loading and unloading, using old ships defectively maintained and undermanned etc. These cases do not simply indicate that shipowners do not voluntarily comply with maritime safety standards, as personal interest often differs from the general good but also question the effectiveness of the competent state authorities and of classification societies with regard to the application of the aforementioned international rules.

#### 2.2.1.2.

In addition, these findings have shown that a ship does not only run risks due to its technical function. The risks taken by shipowning companies in connection with the management of the ship are equally significant. Thus the centre of gravity of ship safety, which was once located in its technical function, has been in a way shifted for the first time in our times to the ship's management by the shipowning company, i.e. to a field which has an intensely private character and traditionally functions under a state of liberalism and self-regulation.

Consequently, the “IMO” has adopted the International Safety Management Code and included it in the ninth chapter of the International Convention for the Safety of Life at Sea (SOLAS). Thus from 1 July 1998 the management of the majority of ships was subjected to public control. Every shipowning company is entitled to determine its own management model, as long as this model corresponds with the Code’s demands.

In particular the shipowner, manager, charterer or other person engaged in the ship’s operation is obliged to establish and run a safety management system going through all fields of organization, ashore as well as at sea, and including:

- a. the introduction of a safety management system, i.e. of a set of procedures and directives which ensure the safe management of ships and the protection of the environment pursuant to the international rules and the rules of the flag state;
- b. the appointment of a person authorized to function as an intermediary between the ship and the shipowning company and, in general, the improvement of the communication between the ship and the shipowning company;
- c. the enactment of methods of casualty announcement, crises management, the conducting of internal audits and management supervision.

Relative legislative work has also been carried out on the EU level. This work does is not intended to substitute or to modify the work of the IMO. On the contrary, this work aims at enhancing substantial implementation within the member states through the drafting of mandatory and uniform rules

It is in this constantly developing context that classification societies operate. And thus, their work increasingly acquires the characteristics of a public service.

### 2.2.2. The Issuing of Safety Certificates

The aforementioned International Conventions for the Safety of Life at Sea (SOLAS), for the Prevention of Pollution from Ships (MARPOL) and on ships’ Load Lines give the flag state the right to authorize internationally recognised classification societies to survey ships registered with its Ships’ Register and fly its flag, to award a class to such ships and to issue, attest, extend and renew the certificates provided for by the said Conventions concerning the compliance of national ships with the provisions thereof.

#### 2.2.2.1.

The aforementioned EC Directive 94/57 obliged the member states to harmonize their relevant provisions with the provisions of the said Directive. The member states, some enthusiastically while others were not so enthusiastic, did harmonize their provisions and delegated the general or special surveys of ships, the marking of load lines, the issue of the relevant certificates as well as the supervision of shipbuilding and repairs to recognized

classification societies. These classification societies conclude a special agreement with the interested member state, which can be regarded as a contract of public service. It is not just a simple administrative licence to exercise a particular private activity. It is a delegation to perform a public service in view of the number and importance of the certificates that classification societies are entitled to issue: cargo-ships' safety certificates, cargo-ships' equipment and telecommunications certificates, international oil pollution prevention certificates etc.

Nonetheless, the distinction between private (commercial) activity and public service is not always clear. Regardless of that, however, the authorization by a state of a classification society to carry out the above indicates the trust of this state towards the specific classification society. The intensity of this trust is determined by the extent of the authorization. It may be that the authorization is given for the issue of only one certificate i.e. the load line certificate, as is the case in the United States where the US Coast Guard is the competent authority to conduct the remaining surveys and to issue all other certificates. It is also likely that a state authorizes certain recognized classification society(ies) to carry out every survey or inspection provided for by the state's legislation but retains for its state authorities the competence to issue the relevant certificates.<sup>5</sup>

However, the states usually authorize recognized classification societies to issue safety certificates.<sup>6</sup> As mentioned above, every authorized classification society carries out a ship's survey not only to award it a class but also to confirm its maintenance. In order to confirm the maintenance of a ship's class, every classification society carries out initial, regular, special and interim surveys.

The regular survey lasts longer than the other types of survey and is more detailed. It includes the annual survey of the hull, engines and equipment as well as a diligent intermediate survey which takes place every second or third year, the inspection of the ship's bottom which takes place every five years and a diver's inspection or a ship's dry-docking which is performed every two and a half years, the detailed inspection of the hull, machinery and equipment which takes place every five years, the boilers' inspection which is performed biannually; and the propellers' and the main shaft's inspection which takes place at different times depending on the ship's initial structure, any data about damage and the shaft's state in

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<sup>5</sup> This is the case in Germany, where the shipowner has two different options: either to enter into an agreement with a recognized classification society for a survey of its vessel and then to submit the classification society's report to the competent state authority and to request the issuance by the said authority of the relevant certificates or to request the state authority itself to survey the ship which is quite unusual (*see* German Report).

<sup>6</sup> Canada gives the Minister of Transport the right to authorize classification societies to survey motor ships and issue the relevant safety certificates. Shipowners may request either a certain classification society or the competent state authority to survey their ships (*see* Canadian Report). Furthermore, the Greek State allows classification societies to be authorized to conduct all or certain surveys of Greek cargo ships and issue, attest, extend and renew all or some of the certificates which the international conventions provide for (*see* Greek Report).

general. It is possible that the ship's annual survey is expedited or delayed; the annual survey may be delayed for a three-month period while the other types of survey may be delayed for a maximum period of six months.

The special surveys are carried out especially in cases of casualties, restructuring, the ship's sale or damage which may affect the ship's class and requires repairs.

The SOLAS Convention imposes that a classification society, following the necessary surveys, decides on whether the ship should maintain its class and, in the case of cargo ships, issues the safety certificates. The same obligation is imposed by Directive 94/57 EU in connection with all ships flying the flag of a EU member state. Thus the revocation of a class and the striking off of a ship from a classification society entails the cancellation of all certificates issued for that ship.

The aforementioned international conventions do not include detailed technical provisions in relation to the equipment and structure of ships. Thus, classification societies conduct the technical surveys of ships according to their own technical regulations formed for the purpose of certifying ships' seaworthiness. It then becomes apparent that classification societies not only participate in the conduct of the survey, but also in the formation of its technical framework; this fact supports the view that classification societies perform a public service.

#### 2.2.2.2.

Traditionally, classification societies have not been occupied with the composition and organization of crews nor with the management of ships, although these factors affect ships' seaworthiness and may result in maritime casualties. However, as it was pointed out, the Safety Management Code, which has been in force since 1 July 1998, has obliged the person responsible for the operation of the ship to lay down and observe a safety management system involving both the shipowning or managing company and the ship itself. A Document of Compliance is issued to the company certifying that it has performed the obligations imposed on it by the Code and a Safety Management Certificate is issued in connection with the ship. The issuance of these certificates and the periodical examination of the observance of the safety management system, especially with regard to cargo-ships, is also delegated to recognized classification societies. However, the issuance of the Document of Compliance is largely assigned to a state authority, which, for the issuance of the above Certificate, is based upon the survey made by the classification society.

It can be easily realized, however, that the attribution and maintenance of a ship's class do not depend solely on the above surveys effected by a qualified classification society but also on a development of a relationship of trust between public authorities, shipowners and classification societies. Additionally, the development of such a relationship requires a constant briefing of and collaboration between shipowners and classification societies which

is based upon the obligations arising from the aforementioned legislative context and the agreement between them. Furthermore, the state which has authorized a classification society is obliged to inform and control it, because the multiplication of classification societies and the development of significant competition between them has led to the existence of classification societies which do not provide satisfactory services in order to facilitate shipowners; as a result, poorly maintained ships carry out transportation and many shipowners solely regard the purchase of a ship as a means of gaining profit basing the operation of their ships upon the decrease in their maintenance and operation costs.

Those classification societies, breaking their aforementioned obligations, permit shipowners or any other contracting party to raise compensation claims. It is likely, however, that the violation by the classification societies of their obligations also affects in a negative way third parties who are not contractually bound to the classification society causing the damage. These third parties may be related to the ship or its cargo, such as the buyer of a ship, the mortgagee who may have financed its acquisition, the ship's or cargo's insurer, the crew members, the passengers, the charterer, the cargo's shipper or receiver or they may be persons not connected with the ship in any way whatsoever, such as fishermen, shell producers and people who own businesses close to the seashore in general, who suffered damage due to the sinking of a poorly maintained ship and the subsequent oil spill in their marine area. The persons in question can also put forward compensation claims against the classification society which inspected the sunken ship, basing them upon liability in tort.

It is our belief that the liability of classification societies is not a subject which can be easily examined in one legal system only, in particular because the most significant classification societies develop a worldwide activity.

### 3. Contractual Liability

Within the main maritime legal systems – except for the system of the United States – court decisions dealing with classification societies' contractual liability matters are rare. This is mainly attributed to the fact that classification societies' clients (shipowners, shipbuilders and others) avoid filing lawsuits against them for a variety of reasons. In any case, in order to express an opinion on this subject one should focus one's attention on the set of obligations undertaken by a classification society under the classification agreement and on the particular nature thereof. The nature of the aforesaid obligations affects the particular legal nature of the agreement and the legal significance of the certificates issued by the classification society.

### 3.1. Correlation between Obligations and Liability

As already pointed out, classification societies enter into an agreement with shipbuilders or shipowners. These are private law contracts. However, the services rendered according to their terms may vary. This is the reason why we shall focus our attention on the most typical agreements of this kind.

Usually the activity of a classification society with regard to a certain ship begins upon the conclusion of an agreement with a certain shipbuilder which has undertaken to build the ship on behalf of a third party. Under this agreement, the classification society is obliged to examine the construction drawings of the ship, to inspect the shipyard, to check the personnel's, subcontractor's and materials' quality, to supervise the construction of the ship and its sea trials and finally to award it a class, if it estimates that all the above elements comply with the rules formed by the classification society and with the applicable Regulations. IACS has harmonized some of these rules which are thus applied by its members. This classification society's evaluation, although it may be relied upon thanks to the classification society's expertise, the quality criteria required for its recognition and accreditation, and hence, its enhanced professional prestige, is nothing more than an independent opinion about the newly built ship. As soon as the shipowner receives delivery of the ship from the shipyard, the contractual relation which connects the shipyard with the classification society terminates.

At this point, the shipowner enters into an agreement with a classification society – usually the one which supervised the shipbuilding – whereby the classification society undertakes to inspect the ship following its own rules and perform, additionally, all inspections and checks which are essential for the ship's safety. Accordingly, the classification society is obliged to inspect the ship and issue the safety certificates provided for by the Regulations or, in case it has not been authorized, to issue an attestation confirming the ship's compliance with the requirements of these Regulations, so that the shipowner may acquire the relevant safety certificates from the competent state authority.

In the event of a purchase of a second-hand ship the buyer, following the acquisition thereof, may wish to transfer the ship to another classification society. In such a case, the shipowner concludes an agreement with a new classification society, which is obliged to perform all the essential inspections in order to award the ship a class and furthermore to conduct all the surveys required for the maintenance of this class. In any event, when a ship has already been awarded a class by an internationally recognized classification society, this class is usually accepted.

Nevertheless, apart from those general agreements shipowners also conclude special agreements for the rendering of special services by classification societies not covered by

the general classification agreements. The most significant among those are the agreements referring to the performance of a special inspection by the classification society due to a crack or damage or the issuance of a certificate confirming the ship's class upon the shipowner's request.

### 3.1.1.

The agreements between classification societies and shipowners or other contracting parties are largely based on the principle of freedom of contract. However, the obligations contained therein usually allow these agreements to be categorized under one specially regulated type of contract or another. In spite of these agreements having more or less similar contents, various opinions have been expressed in the international legal field in relation to the obligations undertaken pursuant thereto.

#### 3.1.1.1.

In the French legal system it has been adjudicated that classification societies do not guarantee a particular result or the completion of specific work, especially not the ship's seaworthiness, but merely undertake to render certain services, such as providing information, advice or attestations, according to the rules applied by the common sensible person (obligation de diligence<sup>7</sup>). For this reason the agreements in question have been regarded as agreements render independent services.<sup>8</sup>

The plaintiff shipowner has the burden of proving that the defendant classification society did not display the required diligence and, consequently, violated its duties under the agreement. As long as the classification society undertook solely the obligation to display the necessary diligence, the certificate issued by it does not provide an irrefutable presumption with regard to a ship's seaworthiness but – according to the prevailing view – a refutable presumption that the parts of the ship, which the classification society surveyed, are in good condition. As far as the meaning of diligence is concerned, the French courts are strict concerning classification societies, as they accept that their obligation to render consulting services has so much increased that the classification society substitutes the shipowner in the technical works that the classification society itself supervised and which are relevant to the ship's operation and that it does not perform its duty to provide advice if its survey does

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<sup>7</sup> With respect to this distinction *see* the classical treatise by A. Tunk, *La distinction des obligations de resultat et des obligations de diligence* 449 (1945).

<sup>8</sup> *See* Court of Appeal of Paris, 12 Dec. D.M.F. 1972, 292 Commercial Court of Paris 9 May 1972 D.M.F. 1972, 559 Commercial Court of Le Havre 25 Aug. 1978 D.M.F. 1979, 103; Rémond-Gouillond, *Droit Maritime* (1993) no 345.

not include all possible changes in the density of the cargo.<sup>9</sup> This general and systematic obligation imposed on classification societies by the Courts has been criticized in the legal literature.<sup>10</sup>

### 3.1.1.2.

Greek theory and jurisprudence are also orientated towards this direction as they accept that the classification society renders an independent service, not subject to the shipowner's or any other contracting party's control. Such service, however, does not entail the obligation to compensate any damages sustained and does not bring by itself the ship into a state of seaworthiness. For this reason the fees charged by the classification society refer to the rendering of the service and not to the performance of certain works. As a consequence, it has been categorized as an open-ended agreement to render independent services which is governed by the Greek Civil Code and in particular by the provisions dealing with labour contracts and complementarily by those dealing with the mandate agreement.<sup>11</sup> It is likely, however, that the parties will agree, in the context of freedom of contract, that the classification society shall perform a particular project e.g. prepare a certain study. In such a case Civil Code provisions dealing with the agreement for the provision of a certain project shall be applied.<sup>12</sup>

In the context of the most usual contract of independent services the classification society is obliged, according to Art. 652 of the Greek Civil Code, to perform its task with a degree of diligence exceeding that of the "common sensible person". The degree of the classification society's diligence will be assessed on the basis of the terms of the agreement and the society's expertise necessary for the performance of the task undertaken by it. The society's abilities known to the shipowner or any other contracting party or the abilities that the shipowner or any other contracting party should have known, will also be taken into account. (Civil Code Art. 652).

In spite of the aforementioned remarks, in the context of the Greek legal system it has been argued that the classification society's liability can be grounded on Art. 8 of Law 2251/1994 concerning consumer protection, as amended and currently in force. This provision deals with the liability of the supplier of services for the damage caused by its own fault and provides that the supplier's fault is presumed. As a result, the person who suffered the damage has the burden of proving the damage and the causal link between the supplier's act or omission and the damage. The supplier of services has to counter-prove that he did not perform wilfully

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<sup>9</sup> See Cour de cassation, 30 May 1980, D.M.F. 1981, 146.

<sup>10</sup> L. Jambon, *Le naufrage du Number One 563* (2006).

<sup>11</sup> See Greek Report; Court of Appeal of Piraeus 2014/2004 *Naftiki Dikaiosi* 2004, 172.

<sup>12</sup> See Greek Report.

or negligently any unlawful act.<sup>13</sup> However, although it may be argued that the classification society could be considered as “supplier of services”, I am not of the opinion that the shipowner suffering damages from the services of a classification society may be regarded as a consumer. The shipowner, in his capacity as a shipping businessman, is not in a worse position than the classification society, neither are the services rendered by the latter beyond the sphere of the shipowner’s business command.<sup>14</sup>

### 3.1.1.3.

The way the German legal system deals with this matter presents differences from the positions set out above. However, it is not diametrically contrary to the provisions in force in the aforementioned legal systems. With regard to the issue discussed here, the German Federal Court of Justice took a position only once in a case concerning an agreement with a classification society to supervise the construction of the hull of a yacht. The German Court held that the obligations of the classification society in that case were similar to the obligations of an architect when constructing a building. Both the architect and the classification society contribute to the successful realization of the project and both must ensure that the ship or building conforms with the construction plans. As a result, the Court held that the agreement must be regarded as a contract of labour. This characterization is arguable in German theory as the classification societies undertake to produce a certain specified result when, for example, they examine the construction plans or survey the hull and machinery of a ship. It must be noted, however, that various obligations arising under the classification agreement have to be performed periodically, for instance revision of the construction plans, the issuance of the class certificate and periodical surveys of the ship; this fact adds the element of duration to the agreement in question.<sup>15</sup>

Even in the context of the German legal system, the classification society which performs its contractual obligations under the classification agreement, that is – in most cases – to survey certain parts of the ship and to evaluate them according to its classification rules – does not actually warrant the ship’s seaworthiness. Thus, the shipowner, the master or the carrier are not relieved of their duty to provide a seaworthy ship suitable for the carriage of the cargo.<sup>16</sup>

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<sup>13</sup> Greek Report.

<sup>14</sup> See E. Perakis, The meaning of consumer according to the law 2251/1994 (in Greek) (1995) p. 32.

<sup>15</sup> German Report.

<sup>16</sup> *Id.*

#### 3.1.1.4.

In the Japanese legal system there is no case law concerning this matter. It is argued in legal theory that the classification agreement is a contract of mandate rather than a contract to provide a project, as it cannot be contended that the classification society undertakes to produce a certain specified result. Taking into account, however, that the provisions of the Japanese Civil Code (Art. 643 et seq.) which regulate the contract of mandate are *ius dispositivum*, it is crucial to examine the terms that the parties have incorporated into the classification agreement in order to deal with the issue of a classification society's liability. Usually the terms that the classification society Nipon Kaiji Kyokai incorporates into the agreements it concludes, impose on the classification society in question the obligation to display the required care and diligence and to render its services in a professional and technically acknowledged way. If the relevant terms are examined closely, it becomes apparent that the classification society when awarding a class or certifying the maintenance thereof simply and solely declares that through its diligent inspection nothing came to light that could lead to the conclusion that the ship did not comply with the classification society's rules. Thus the terms included in the agreements of the Japanese classification society do not actually deviate from the provisions applied to the contract of mandate in connection with the obligations of the person receiving the mandate and their breach.<sup>17</sup>

#### 3.1.2.

The matter of the classification society's contractual liability within other legal systems is dealt with by the examination of the contents of the agreement and in particular the classification society's obligations towards the other contracting party; and not by subsuming the agreement under a specific type of contract.

##### 3.1.2.1.

Particularly in the English legal system, if my research is accurate, there does not seem to be a judicial precedent regarding the matter of the contractual liability of a classification society. Despite this, in the context of the *Nicholas H.* case<sup>18</sup> – which concerned the tort liability of a classification society towards a third person – the English Court of Appeal moved on to clarify certain obligations which constitute the contractual duties of a classification society. First and foremost, a classification society is bound by the classification agreement under which it must survey the ship and award it a class or not according to its own rules. It is also obliged to

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<sup>17</sup> See Japanese Report.

<sup>18</sup> *Lloyd's Law Rep.* 1992, p. 482.

inform the other contracting party about any cracks, warps and other faults of the ship. After all, it is the classification society which determines whether or not a ship corresponds to the rules and standards adopted by it or which are in force according to relevant provisions; in the case of general average the classification society must express its opinion about whether the ship continues to comply with these rules and, if not, to determine the necessary repairs which need to be carried out. If the classification society fails to fulfil these obligations due to negligence, a matter of liability in the form of a breach of the contract arises. It is certain however that, under the agreement, the classification society has no duty to guarantee the ship's seaworthiness. According to the law in force the shipowner is the one that has to guarantee the ship's seaworthiness and cannot transfer his obligation to any other party, i.e. the classification society.<sup>19</sup>

### 3.1.2.2.

Under Canadian Law and in view of the federal character of the State of Canada we should point out that every issue which is relevant to a particular maritime case or dispute, i.e. a case or dispute arising from merchant shipping and navigation in general, is compulsorily regulated by "Canadian maritime law", that is the federal rules which have been enacted in order to govern maritime cases or disputes. Wherever Canadian maritime law provides nothing, the rules of English maritime law are applicable, that is rules and principles of navigation as well as those of common law applied by English courts, as the aforementioned rules and principles have been adopted by Canadian jurisprudence. The issue of the classification society's liability towards the shipowner or other contracting party for a false or negligent survey or certification of the ship's condition is a maritime dispute and, as a result, is subject to the provisions of Canadian maritime law. Taking into account, however, that both Canadian and English maritime law do not contain any special provisions concerning the matter in question, the rules and principles to be applied are those that the English courts of common law have adopted, to the extent that these rules and principles have been accepted by Canadian jurisprudence. In any case, there is no precedent concerning the classification society's liability.<sup>20</sup>

In view of the above, the classification agreement determines the contents and nature of the obligations to be undertaken by the classification society. As long as the agreement contains no ambiguous or unclear provisions, it must be accepted that the classification society is burdened with all the duties that arise directly from the agreement's wording. Under common law, Courts traditionally distinguish between the contractual obligation, the non-performance of which allows the other contracting party to repudiate the contract and to claim damages;

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<sup>19</sup> See P. F. Cane, *The Liability of Classification Societies*, 1994 LMCLQ 363.

<sup>20</sup> See Canadian Report.

the obligation which has the character of a common guarantee, the non-performance of which allows the other contracting party only to request damages; and the contractual commitment, the non-performance of which may give the other contracting party certain rights depending on the results of the aforementioned non-performance. As a result, classification societies' liability mainly depends on the terms of the agreement. As already pointed out, the decision of the English Court of Appeal on the *Nicholas H.* case, although it dealt with the tort liability of a classification society towards third parties, did highlight at least two obligations which have already been mentioned and characterize the operation of classification societies.

### 3.1.2.3.

On the other hand, the issue of the contractual liability of classification societies has been repeatedly dealt with within the context of the American legal system. The relevant American jurisprudence is very interesting, first because it is consistent and, second, because it has proceeded to examine the purpose of the relevant provisions. The first, important judgment concerned the ship "Tradeways II" which sank during its voyage from Antwerp to the US. The classification society "Bureau Veritas" had surveyed the ship, a month prior to the sinking, after receiving instructions from the shipowner (annual regular survey) and the charterer (a special and much more detailed survey). The latter survey led to the suspension of the ship's class until several technical faults were repaired. However, with regard to some other faults, such as defects in the double bottom, the classification society asked for the same to be repaired with a certain period of time. The shipowner's and charterer's underwriters filed a compensation lawsuit against the classification society, contending that the ship's sinking was due to the faults of the ship which had not been repaired in time with the classification society's consent; this fact implicated that the classification society had negligently fulfilled its contractual obligations and in particular its implied guarantee that it performs its duties following principles of science. The plaintiff underwriters had serious difficulties in proving the classification society's negligence and that the faults which the classification society had failed to ascertain or correctly assess caused the ship's sinking. For this reason the plaintiffs argued that the classification society when issuing the class certificate guaranteed the ship's seaworthiness to the other contracting party. The plaintiffs were basically requesting that the presumption of the ship's unseaworthiness formed by the American jurisprudence be applied to classification societies: the shipowner is presumed not to have performed his duty to provide the charterer or the shipper with a seaworthy ship capable of carrying the particular cargo in case the ship sinks under regular circumstances and no explanation may be given about the causes of the sinking and nor can the sinking be attributed to negligent conduct. The Court did not accept the application of the above presumption upon classification societies as this presumption presupposes, according to American jurisprudence, the actual checking

of the construction, maintenance and operation of the ship. The classification societies, however, simply perform an indirect control of economic use since the class certificate is necessary only for the ship's insurance; neither was the contention accepted that classification societies guarantee the performance of their duties according to the principles of science thus protecting the shipowner from potential liability, especially towards third parties. A classification society is obliged to survey the ship and certify that it complies with rules set by the classification society itself or, if the classification society finds defects, it is obliged to advise the shipowner or the other contracting party accordingly and to indicate the necessary repairs. As a result, the classification society does not supervise the construction, restructure or maintenance of a ship.

The decisions on the cases *Amoco Cadiz*<sup>21</sup> and *Sundancer*<sup>22</sup> tend, *mutatis mutandis*, to agree with these positions. The American jurisprudence has tried to support the views in question by putting forward arguments which, however, do not always seem to be respected by the contracting shipowner. For example, the remark that the purpose of the class certificate is the ship's insurance under reasonable terms and consequently it cannot be used to prove that the shipowner has displayed the required diligence in order to provide a seaworthy ship, ignores the fact that this certificate is of considerable value, taking into account its reliability within the market. After all, the fact that the shipowner is burdened with the cost of restoration of the damage (which is insurance-covered) could probably be justified vis-à-vis the claims of third parties but not towards the classification society as this would entail that the classification society is not liable although it performed its contractual obligations defectively. In any case, the fact that the shipowner may be aware of the ship's faults or may not have kept the ship in good running order for a long time could make him, according to the rule of double fault, liable or co-labile in this particular case; however, the shipowner may not be presumed to be wholly liable so that the classification society is exempted from liability. Furthermore, the argument that the classification society's low fees in relation to the damage exclude the classification society's liability for compensation seems rather feeble.<sup>23</sup>

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<sup>21</sup> *Re. The "Amoco Cadiz"*, *In re* oil spill by the Amoco Cadiz off the coast of France on 16 March 1978, United States District Court N.D. Illinois, February 11 and April 16, 1986 AMC 1945 (1986).

<sup>22</sup> *Sundance Cruises Corp. v. American Bureau of Shipping*, United States District Court, S.D. N.Y. 1992, 799 F.Supp.363, 1992 AMC 2496.

<sup>23</sup> See J. Bar-Lev, *Liability of a Vessel Classification Society Cannot be Based on Warranty of Seaworthiness*, 4 JMLC 334 (1973); P. F. Cane, *supra* note 19; H. Honka, *The Classification System and its problems with special reference to the liability of classification societies*, 5 E.T.L. 620 (1996); M. Miller, *Liability of Classification Societies from the perspective of United States Law*, 21 Tul. Mar. L. J. 75 (1997).

### 3.2. Clauses which Limit or Exempt from Liability

One of the reasons why the number of shipowner lawsuits against classification societies is limited is based upon the limitation of liability or exemption clauses that classification societies incorporate in classification agreements. In particular, the standard written terms of the agreements in question provide that the classification society is fully exempted from every form of liability in connection with the rendering of services or, instead, that its liability will be limited up to a certain amount. This clause is often accompanied by the “hold harmless” clause, that is, the clause under which the shipowner or other contracting party undertakes to cover any damage that the classification society may sustain due to third parties’ claims grounded on non-performance or the poor performance of its contractual duties.

Those contractual clauses which allocate liability are established on the principle of freedom of contract and are not wholly disapproved of by various legal systems.

#### 3.2.1.

In French jurisprudence the dominant view is that the contracting parties may agree on the classification society’s exemption from liability to the extent that it did not act in bad faith, i.e. when the classification society does not act fraudulently or with gross negligence. Thus the exemption clauses in question do not cover cases of fraud or gross negligence.<sup>24</sup>

#### 3.2.2.

Under English law the clauses which limit classification societies’ liability or exempt them therefrom are valid provided that (a) the contracting party, against whom these clauses are put forward, was aware of the content thereof – which is presumed whenever clauses are incorporated into the contract’s text and are covered by the parties’ signatures; (b) the exemption clauses are reasonable and refer to liability solely for physical damage (Unfair Contract Terms Act 1977).

#### 3.2.3.

In the Canadian legal system there is no pertinent legislation. In view of the maritime nature of these matters, the legislation of a province cannot be applied. The Federal Courts

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<sup>24</sup> See French Supreme Court 15 May 1923 D 1925 I p. 15; 15 Jun. 1959 D 1960 p. 97 with a remark by Rodière; Court of Appeal of Paris 11 Feb. 1922 Ren. Intern. Droit Mar. 1922 p. 568; Court of Appeal of Aix 15 Feb. 1957 DMF p. 196; Court of Appeal of Tynida 23 Feb. 1955 DMF 1956 p. 87; Commercial Court of Paris 26 Jun. 1953 DMF 1954 p. 174; Commercial Court of Marseille 6 Jan. 1978 DMF 1978 p. 510; Maritime Arbitration Court of Paris 115/5 Apr. 1974 DMF 1974 p. 635.

of Canada generally accept the validity of those clauses, on condition that the contracting parties are aware of the content thereof, which is presumed every time the exemption clauses are incorporated into the text of the contract and are covered by the partners' signatures. It should be pointed out, however, that the Canadian Courts interpret the clauses in question *pro proferentem* and usually try to put them aside by burdening the liable party with side obligations. Thus a clause as discussed above would be applicable only if the liable party had performed its principal obligations. If the non-performance of a contract breaches the core of the contract itself, the court considers that the contract (including the clause in question) ceases to exist.

#### 3.2.4.

In the German legal system classification societies may agree with their other contracting parties that they shall have no liability or that their liability shall be limited. These contracts, however, do not fall into the category of consumer contracts but of contracts between businesses. For this reason, the standard contract terms must comply with the general principle of good faith (§307 BGB). According to this principle, standard contract terms are null and void if they disadvantage the other party to an extent which is incompatible with the requirement of good faith. In case of doubt, an unreasonable disadvantage is presumed if a provision cannot be reconciled with essential basic principles of the statutory rule from which it deviates (§307 (2) no. 1 BGB) or if the provision so restricts essential rights or duties resulting from the very nature of the contract that there is a risk that the purpose of the contract will be frustrated (§307 (2) no. 2 BGB). The standard contract terms used by Germanischer Lloyd in its 2005 Classification Rules can be deemed to apply under §§ 307 et seq. BGB.<sup>25</sup> Under different legal regimes the Regional Court of Hamburg held that the relevant restrictive clauses were valid.

#### 3.2.5.

In the context of the Japanese legal system, the Japanese classification society Nippon Kaiji Kyokai has included in its standard contract terms a general clause providing for its exemption from liability for any kind of act, omission or fallacy by itself or its managers, employees, agents or subcontractors. Another clause follows which provides that in the event of damage proved to arise from any kind of wilful act, omission or fallacy by the classification society or its managers, employees, agents or subcontractors, or from any inaccuracy regarding information or recommendation made by the classification society or in its name,

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<sup>25</sup> See German Report.

the classification society shall be liable for compensation only up to the sum of the fee which it agreed and collected. It must be observed, however, that there is no Japanese court decision on the validity of these clauses.<sup>26</sup>

### 3.2.6.

It could be argued that, with regard to the clauses of limitation of liability or exemption of classification societies therefrom, the American jurisprudence seems to be much more cautious mainly on the grounds of public policy. In particular in the cases “Tradeways II”<sup>27</sup> and “Sundancer”<sup>28</sup> these clauses were held to be null and void because “such total exemption from liability is overbroad and unenforceable as contrary to public policy.” In the “Amoco Cadiz” case<sup>29</sup> the court, although it expressed reservations concerning exemption clauses, finally regarded them as an indication that the classification society had not undertaken a contractual obligation of compensation towards the shipowner.<sup>30</sup>

### 3.2.7.

Under Greek law the clauses in question are void if they exempt in advance the classification society from its liability arising out of wilful misconduct or gross negligence. The same applies to the clauses which exempt in advance classification societies from their liability arising out of slight negligence in case the shipowner or other contracting party is in the service of the classification society as well as if the liable classification society operates following a concession by the State. Furthermore, the classification society may not be exempted from liability in case the relevant exemption clauses were not the subject of negotiation between the parties and, finally, when these clauses refer to an exemption from liability in the event of damage caused to elements consisting a person’s personality, such as health, freedom and integrity (Civil Code Art. 332 as in force).<sup>31</sup>

## 4. Tortious Liability

When a ship sinks or for any reason becomes a total loss, a significant number of persons put forward claims, such as the master, crew members, passengers or their successors, the buyer, the charterer, the shipper, the receiver, the ship’s or cargo’s insurers, the ship’s mortgagees,

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<sup>26</sup> See Japanese Report.

<sup>27</sup> 338 F.Supp. 999,1010 n. 6.

<sup>28</sup> Lloyd’s Law Rep. 1994, p. 195.

<sup>29</sup> Regional Court of Northern Illinois 11 Feb. and 15 Apr. 1986 AMC 1945 (1986).

<sup>30</sup> See specially J. Gordan, *The liability of Marine Surveyors and Ship Classification Societies*, 19 JMLC 305-306 (1988).

<sup>31</sup> See M. Stathopoulos, *General Law of Obligations* (2004) §6.2 p. 327.

port facility enterprises and the public entities which manage and operate the port. The number of claimants becomes even larger and additionally includes persons not connected with the ship, such as fishermen, businessmen who own seaside hotels, restaurants and marine venues etc. if the ship sinks loaded with hydrocarbons or other substances which are harmful and noxious to the marine environment.

On the other hand, the shipping entrepreneur usually forms with others a company the purpose of which is to operate the acquired ships. The reason for the setting up of a company is that only a portion of the shareholders' property is thus exposed to the business risk. The shipping entrepreneur has to select a company type provided for by the legal system of the country which is designated as the centre of the company's business activities. Normally, the chosen type of commercial (maritime) company has legal personality, may have rights and is subject to obligations, carries out under a corporate norm every lawful act related to the operation of the ship(s) and may own the ship. The fact that the financial consequences of the ship's operation finally concern the partners or shareholders is of secondary importance to the dealings of the company and may not solely award to every shareholder or partner the capacity of co-shipowner or to the only shareholder or partner the capacity of shipowner. This shipowning company, in case of a total loss, is exposed to a large number of claims and is entitled to limit its liability according to the 1976 London International Convention concerning limitation of liability or, if it is the owner of one ship only, it has the option not to limit its liability, if the ship is its only asset. In view of the above, the maritime creditors whose claims cannot be satisfied in full or in part on account of the limitation of liability by the shipowning company, attempt to become fully or partially satisfied by the ship's classification society – which is usually of a great financial status and is not included in the persons entitled to limit their liability according to the aforementioned international convention – by contending that it is liable for compensation according to the applicable law.

The compensation claims of those persons who are third parties towards the classification society are mainly based upon tort. In certain legal systems, such as the German, the relevant claims are based upon the agreement concluded between the classification society and the shipowner, because this contract develops a protective effect in favour of third parties.<sup>32</sup>

In order to better comprehend the matter, we shall set out the way in which continental legislations cope with this matter and then examine the positions which have been accepted by Anglo-American legislations.

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<sup>32</sup> C. Brandi, *German perspective: responsibilities of classification societies*, in J. Lux (Ed.), *Classification Societies*, 67 (1993).

#### 4.1. Continental Legislations

We shall focus our attention on French, Italian, German and Greek law as well as on Japanese law (because of its relation to German law).

##### 4.1.1.

Under French law every person who wilfully causes damage to another person is obliged to pay compensation for the damage (Civil Code Art. 1382). According to this rule, the judge determines whether the person who has caused damage to others acted wilfully or not. However, the judge may not distinguish between persons who suffered damage and are entitled to protection and those who are not. In the MV “Elodie II” case, the Court of Appeal of Versailles ordered Bureau Veritas to pay damages to the buyer of the said ship because the ship had defects that rendered its operation impossible. These defects had existed for a long period of time and the classification society had failed to spot them despite its repeated surveys.

##### 4.1.2.

The matter of classification societies’ liability towards third parties has caused a debate in German law where several views have been proposed concerning the grounds on which lawsuits by third parties against classification societies should be based.

##### 4.1.2.1.

German jurisprudence has gradually extended the liability of professionals for false advice and recommendations, through the development inter alia of the theory of “contracts having a protective effect in favour of third parties.” The extension of the contractual protection to third parties is based upon the distinction between principal contractual obligations and secondary (or parallel) obligations. Only the latter may constitute parallel duties towards third parties who fall within the protective field of the contract; thus, these third parties are entitled to compensation based on the contractual obligations of the debtor of the main contract. This doctrine of “contracts having a protective effect in favour of third parties” intends to set aside certain characteristics of German tort law which had unjustifiable consequences. First of all, the main provision of §823 (1) BGB does not allow for compensation for pure economic loss.

Secondly, the liability for an agent's actions allows the principal to be exempted from his liability for a tort committed by this agent if he proves that he diligently chose and supervised that agent.<sup>33</sup>

In any event, three conditions must exist in order for the contract to have a protective result towards third parties: (a) a close relation between the third party and the contracting party who would have a contractual claim, had it been damaged by the breach of the protective duty ("proximity concerning the performance of duties"). Furthermore, the party who caused the damage must be in a position to predict that the third party would suffer damage from the performance of the contract; (b) the third party's protection should be in the interest of the contracting party. German jurisprudence deals flexibly with this condition and extends its application to claims which exclusively concern compensation for "pure economic loss"; (c) the third party must be worthy of protection, i.e. must not be entitled to compensation by its own legal right.<sup>34</sup>

In the context of the case MV "Hecht V" the Court of Appeal of Hamburg<sup>35</sup> examined the classification society's obligations towards the buyer of the ship. During the performance of minor technical works, provided for in the "Memorandum of Agreement", the buyer found serious faults affecting the ship's class and informed Germanischer Lloyd accordingly so as to prevent the latter from issuing a class maintenance certificate without recommendations, as the issue of a certificate without recommendations was a condition for the delivery of the ship from the seller. Nonetheless, the classification society in question did confirm the ship's class on the basis of data kept with its records and obliged the buyer to take delivery of the ship. Bureau Veritas, as a successor classification society and following a request by the buyer<sup>36</sup> refused to award the ship a class unless major repairs were carried out. The buyer claimed compensation for the cost of these repairs from the previous classification society, given that the ship's seller had been declared bankrupt.

The Court of Appeal of Hamburg ruled that the ship's buyer had an interest worthy of protection, as the certificates issued by a classification society should reflect the condition of the ship as this is ascertained from the ship's surveys. This means that the classification agreement develops protective results towards non-contracting parties, such as the ship's buyer. The extension of the force of this agreement to certain third (non-contracting) parties logically entails that the buyer is bound by the parties' contractual undertakings. In this context the classification society had committed no fault, because it was instructed to reconfirm the ship's class according to data kept in its record. The fact that the "class

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<sup>33</sup> See German Report; Brandi, *supra* note 32.

<sup>34</sup> German Report.

<sup>35</sup> Decision of 14 Jun. 1990 DMF 1998 p. 496.

<sup>36</sup> Nevertheless Ch. Breitzke, (*German Perspective: Defence*, in J. Lux (Ed.), *Classification Societies*, 69 (1993)) considers that the buyer is not generally worthy of protection.

maintained” certificate did not actually reflect the condition of the ship was attributed to the breach by the shipowner of its obligation to inform the classification society; for this breach, however, the classification society has no liability.

The question of the protective action of the classification agreement towards other persons, i.e. the charterer, shipper, or cargo’s receiver, remains open.

It is remarkable, however, that several objections have been raised as to whether the contract between the classification society and the shipowner or the shipbuilder can have a protective effect for the buyer or any other person connected with the operation of the ship who, in fact, rely on the information provided by the classification society. Those who disagree with the doctrine of “protective effect” maintain that the aforementioned persons and in particular a ship’s buyer is not, in principle, worthy of protection. Exceptionally, the buyer of a ship is worthy of protection when, for instance, the classification society is aware of the buyer’s identity and allows the buyer to participate in the ship’s survey.<sup>37</sup>

#### 4.1.2.2.

With regard to tortious liability, classification societies are held liable in case they violate unlawfully and wilfully or negligently a right or interest referred to in §823 (1) BGB such as life, body, health, freedom, ownership or “a right equivalent thereto”. In the context of this provision tortious liability may be established when a person creates, through his activity or his assets, a source of risk likely to damage other people’s rights and interests. In other words, this person is obliged to protect third parties from the hazards he causes. It is arguable that the classification society falls within this category. The reason is that a ship not complying with the technical rules set by the classification society itself is not safe and, consequently, it may cause damage to people’s health, life, or assets. It is also likely that the managers of the classification society are found liable according to the aforementioned provision of §823 (1) BGB, as these persons are obliged to organize the labour conditions and business activity in such a way that no damage is caused to third parties.<sup>38</sup>

Furthermore, according to §823 (2) BGB, every person who violates a provision of law aiming at protecting other persons is obligated to compensate the persons protected thereunder. The technical rules established by a classification society do not fall within the category of these provisions as they are of a private origin. Thus, the violation of these rules does not establish a compensation claim according to the provision of §823 (2) BGB.<sup>39</sup>

Apart from the above, according to §826 (2) BGB, liability for compensation for every damage caused tortiously emerges in the case of a damage caused wilfully and contrary

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<sup>37</sup> See German Report.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

to public order. The meaning of “wilfulness” includes both “dolus directus” and “dolus eventualis”. With regard to experts’ liability the German courts have minimized the standards required in order that “wilfulness” be held proven. If the defendant acts recklessly or unscrupulously, the Courts tend to consider that he wilfully caused the damage. Thus a classification society is likely to be considered liable according to § 826 (2) BGB if, for example, it ignores recklessly serious faults concerning a ship’s safety or in case it issues a certificate based on an inspector’s report who had not inspected the ship before drawing up his report.

The inspectors engaged by classification societies worldwide can be regarded as agents. In the event that these inspectors violate wilfully or negligently any rights or interests protected by 823 (1) BGB or a legal provision which intends to protect people according to §823(2) BGB or causes damage wilfully and contrary to public order, according to §826 BGB, the classification society shall be held liable according to §831(1) sec. a’ BGB. Nonetheless, the classification society may be released from its liability if it proves that it chose and supervised its agents (inspectors) diligently.

The issue of classification societies’ liability in tort has rarely appeared in German jurisprudence. The first judgment<sup>40</sup> was delivered in a case concerning a lawsuit brought by the buyer of the ship “Industrie” against Bureau Veritas. The buyer filed a lawsuit for compensation grounded upon §826 BGB, because the class certificate should not have been issued since the classification society was aware that the ship did not meet the technical requirements established by the classification society itself. The Reichsgericht rejected the lawsuit as the plaintiff had failed to prove that the classification society had caused the damage wilfully. Two decisions by the High Federal Court of Hamburg followed, which were based upon the perspective that the classification agreement has protective effects towards third parties. The aforementioned judgments limited the protective range of the contract towards third parties.

#### 4.1.3.

Similar to German tort law is the Japanese law. If a third person files a lawsuit against a classification society claiming compensation for damage caused allegedly by the classification society, the provisions of the Japanese tort civil law are to apply (Art. 709) if, of course, Japanese law is the applicable law. In the context of these provisions, a classification society may be held liable on three conditions: (a) A wilful or negligent act or omission by the classification society; (b) Damage caused by this act or omission; (c) Proximity between the damage and the act or omission. The fact that the damaged party may have relied upon

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<sup>40</sup> RG 4 Nov. 1907. *Hanseatische Gerichtszeitung* 1908 no. 77.

the class or a certain survey of the classification society is not a special element of the tort, however it may be of importance concerning the matter of proximity. Besides, it is essential that the classification society is burdened with a duty of providence in order to be regarded as tortfeasor. This duty includes both the duty to foresee the harmful result and the duty to avoid it. Each of these duties depends on the classification society's room for action. There is no judicial precedent where a classification society was held liable and to what extent towards third parties.

#### 4.1.4.

Under Italian law, classification societies may be held liable for compensation to third persons. This liability arises when the classification society violates its duty of reasonable providence which burdens it during the performance of its obligations. This mainly takes place whenever a classification society ignores the rules enacted by itself.<sup>41</sup>

#### 4.1.5.

Under Greek Civil Liability Law, a person is liable for compensation to another person in the event of a tort. The liability in tort is provided for by Article 914 of the Greek Civil Code, namely: "A person who wilfully or negligently has unlawfully caused damage to another shall be liable for compensation."

On the basis of the above article, the prerequisites for the liability in tort are: (a) an act (or omission) by a person; (b) this act must be unlawful; (c) negligence (or intent) on the part of the person; (d) damage and (e) an adequate causative link between the act (or omission) and the damage suffered.

It is generally accepted that, as far as the prerequisite for the "unlawful" act (or omission) is concerned, Art. 914 is a blank norm (blank rule), which means that the substantive content of this prerequisite (i.e., the "unlawful" act or omission) does not derive directly from Art. 914, but from other provisions of Greek substantive Law, to which Art. 914 refers. These other provisions that prohibit or permit an act shall determine whether this act is "unlawful" in the sense of Art. 914.<sup>42</sup>

It is well established in Greek legal theory and court precedents that an act (or omission) is "unlawful" under Art. 914 not only when it contravenes a special prohibitory provision, but also when it violates the general duty of safety and care. According to Art. 914, an act is

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<sup>41</sup> See Italian Report.

<sup>42</sup> See A. Georgiadis, in A. Georgiadis & M. Stathopoulos, *Greek Civil Code Commentary*, Art. 914 no 6 (1982); P. Filios, *Special Law of Obligations* §164 B (1986); P. Sourlas, *Breach of a contractual obligation as a matter of tortious liability towards third persons* (in Greek), 1983 *Nomico Vima* 449; I. Spyridakis, *The concept of "unlawful" according to art. 914 c.c. (in Greek)* (1999) p. 45 *et seq.*

“unlawful” even in the case where an ordinary person who is able and under a legal obligation fails to pay attention to the safety and care of other persons and goods, which he encounters, even if there is not a violation of a specific existing legal provision of a prohibitory or obligatory nature. This broader concept of “unlawful” is based on the principle of good faith,<sup>43</sup> as well as on the general attitude of the Greek legal order.<sup>44</sup>

Thus, under Greek Law, an internationally recognized classification society which has been granted by the State the authority to survey, examine and certify vessels to ensure that they comply with the standards set by the classification society’s rules and regulations, national laws and international conventions, is under a general duty of care and protection of the interests of other persons, by taking, for instance, the appropriate measures in order to protect any such other person from the risks which derive from the unseaworthiness of the vessel. This general duty of care and protection applies to both Greek and foreign flag vessels and is grounded on Regulation 6 (“Surveys and Certificates”) of SOLAS 1974, which was ratified by virtue of Law 1045/1980.<sup>45</sup>

Furthermore, this general duty of care and protection is specifically established in Arts 8 and 9 of Presidential Decree 482/1980.<sup>46</sup> Although as a matter of course, these articles refer only to Greek vessels, they represent the general attitude of the Greek legal order under which the classification societies are obliged to carry out their duties (i.e. the survey, examination and certification of vessels) diligently and not negligently. The fact that the legal system

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<sup>43</sup> Arts 281 and 288 of the Greek Civil Code. The District Court of the Southern District of New York (July 13, 1998, 1998 WL 397847 *Carbotrade v. Bureau Veritas*) held that an act (or omission) is “unlawful” under Art. 914 of the Greek Civil Code not only when it violates a special prohibitory provision, but also when it contravenes the general duties of safety and care and the general principles of good faith and decent business usage, as well as the general attitude of the Greek legal order. Consequently, it was not necessary to decide whether any of the provisions of the Safety of Life at Sea (SOLAS) Convention, Greek Presidential Decree 482/1980, and article 278 of the Greek Penal Code were violated in casu because the Court held that Article 914 does not require such a violation as a precondition for tort liability.

<sup>44</sup> M. Stathopoulos, *General Law of Obligations* (2004) §15 p. 798.

<sup>45</sup> This regulation – as modified by the SOLAS Protocol 178 – provides:

(d) When a nominated surveyor or recognized organization determines that the condition of the ship or its equipment does not correspond substantially with the particulars of the certificate or is such that the ship is not fit to proceed to sea without danger to the ship, or persons on board, such surveyor or organization shall immediately ensure that corrective action is taken and shall in due course notify the Administration. If such corrective action is not taken the relevant certificate should be withdrawn and the Authorities shall be notified immediately; and, if the ship is in the port of another Party, the appropriate authorities of the port State shall also be notified immediately. When an officer of the Administration, a nominated surveyor or recognized organization has notified the appropriate authorities of the port State, the Government of the State concerned shall give such officer, surveyor or organization any necessary assistance to carry out their obligations under this regulation. When applicable, the Government of the port State concerned shall ensure that the ship shall not sail until it can proceed to sea, or leave port for the purpose of proceeding to the appropriate repair yard, without danger to the ship or persons on board.

<sup>46</sup> Art. 8 §3 provides that

The certificates issued by the Classification Societies are no longer recognized as valid if the vessel’s condition does not any longer correspond with the contents of the certificates or damages are sustained affecting the vessel’s ability to navigate safely or if the vessel loses her class”, while by virtue of Art. 9 §1 the classification societies “are obliged to suspend the validity of the certificates issued by them if one of the reasons listed in Art. 8 §3 occurs.

imposes this general duty upon the classification societies additionally derives from (a) Art. §2 of Presidential Decree 482/1980, which provides that classification societies are also authorized to survey “vessels under foreign flags in Greek ports so as to ascertain that their actual condition satisfies the indications set out in the safety certificates”, and (b) from Art. 12 of the same Presidential Decree, whereby the Greek State may revoke the authorization granted to a classification society if it does not fulfil in an adequate and satisfactory manner the requirements of the granted concession, i.e., if it negligently or erroneously issues, attests, extends, or renews the certification of vessels.

Thus, a violation by the classification society of its duties is per se “unlawful” within the meaning of Art. 914 of the Greek Civil Code. Furthermore, it should be considered that the “unlawful” act of the classification society affects any person, who as a result of the unprofessional conduct of the classification society is exposed to the aforementioned risks and sustains damage.

The fact that a classification society proceeds to the survey of a vessel, by virtue of a contract with the owner of the vessel, does not exclude the liability in tort of the classification society towards persons who sustain damage and who are not bound by a contract with the classification society.<sup>47</sup> The reason for this is that the contract sets in motion the fulfilment of the classification society’s obligations, the content of which is determined not autonomously, but by jus cogens (compulsory) provisions and by the general attitude of the Greek legal system, as well as by the International Convention, also applicable in Greece, which impose upon the classification societies the general duty of care for the interests of third parties against risks related to the safety of vessels, when these risks can be prevented with the proper survey and certification of the vessels by the classification society. Consequently, the violation of these duties is in itself, i.e., independently of the existence of a contract, an “unlawful” act within the meaning of Art. 914 of the Greek Civil Code.

The Greek Courts have accepted in other similar cases that the conduct of the tortfeasor, even if based on a contract, may constitute an unlawful infringement of lawful rights or lawful

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<sup>47</sup> The decision of the Multimember Tribunal of First Instance of Athens 8909/1985, *Hellenic Justice Review* (“*Elliniki Dikaiosisini*”) 26, 1409, 1415, regarding the tort liability of the classification society towards the purchaser of a negligently inspected vessel is noteworthy. This motion was dismissed mainly because the action was not brought by the buyer of the vessel (who did not have a contract with the classification society), but rather by his nominee. This indicates that if the buyer had brought the action, the Court would have decided on the merits. After the court’s decision, the classification society (Lloyd’s Register of Shipping) settled the case.

interests of third parties,<sup>48</sup> provided that the act which caused the damage would in itself, i.e., independently of the contract, be unlawful, being contrary to the general duty imposed by Art. 914 not to cause negligently or intentionally damage to a third party.<sup>49</sup>

In light of the above, I am of the opinion that under Greek Law a classification society has the general duty of care for and the protection of the interests of third parties, such as the buyer of the vessel, the charterer or the shipper, in relation to risks relating to the safety of the vessel and the proper survey and certification of the vessel by the classification society. Consequently, under Art. 914 of the Greek Civil Code, a classification society is liable in tort for the negligent misrepresentation of the condition of the vessel it surveyed towards third parties suffering damages due to the usual course of events of the “unlawful” act. That means that the person who sustained the damage may fully recover any damages which seem justified in the natural course of events. The aforementioned compensation for damages is the principal rule in Greek Law, provided there is no other legal provision to the contrary. There is no such legal provision and consequently the compensation due includes, without any limitation, all kinds of damages, including interest, reasonable costs and legal fees, as well as loss of profit of the third parties suffering damages.<sup>50</sup>

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<sup>48</sup> Supreme Court (“Arios Pagos”) 462/1957, Legal Forum Review (“Nomiko Vima”) 6, 111 referring to the liability of a person, who delivered to the carrier improperly packaged electrical accumulators which exploded and destroyed part of the cargo, being in the ownership of a third party; Supreme Court (“Arios Pagos”) 81/1991, Legal Forum Review (“Nomiko Vima”) 40, 715, Court of Appeal of Athens 1039/1979, Legal Forum Review (“Nomiko Vima”) 27, 984 both referring to the liability of a manufacturer of standardized products against consumers, independently of the contract.

<sup>49</sup> Supreme Court (“Arios Pagos”) 967/1973 Plenary Session, Legal Forum Review (“Nomiko Vima”) 22, 505 held that the person who undertook under a contract the printing of subtitles to copies of two cinema films and negligently destroyed these copies, was also liable in tort.

<sup>50</sup> Several decisions of the Piraeus’ Tribunal of First Instance refer to the matter of classification societies’ liability in tort by reason of the sinking of the Greek ship *Dystos*. The family members of the victims filed law suits against the classification society of the ship as the classification society had allegedly conducted negligent surveys and issued certificates which confirmed unreservedly the seaworthiness of the ship although the ship, following its restructuring into a cement carrier, lacked stability, suffered electromechanical faults and cracks which needed to be repaired. Those decisions do not disclaim, in principle, classification societies’ liability in tort. However, they are of major interest with reference both to their grounds and pronouncement (with regard to this jurisprudence *see* Greek Report).

In particular this court held that a classification society is liable in tort whenever it is aware that the inspections are inadequately and deficiently carried out and yet takes no measure to prevent such inspections whilst conscientiously maintaining a practice which leads to the non-repair of the defaults and damage present in the ship (3346/2004, 3355/2004). Some other decisions of the same court rejected lawsuits against the ship’s classification society either because its omissions were not proved or there was no proximity *vis-à-vis* the cause of the damage. Furthermore, other decisions (4535/2004, 4536/2004, 4537/2004, 4538/2004, 4539/2004, and 4540/2004) rejected lawsuits because the claimants had been compensated, even partially, by the shipowner and thus had been deprived of their right to address themselves against the classification society (Civil Code, art. 926). The Court of Appeal of Piraeus, with a full set of judgments (1208/2005, 1217/2005, 1218/2005, 1219/2005, 35/2006, 36/2006, 37/2006, 71/2006, and 72/2006) disagreed with the above line of thinking and went on to determine that the classification society had to compensate the claimants as its unlawful and liable conduct was the actual cause of the damage.

## 4.2. Anglo-American Laws

English jurisprudence has dealt with the matter in a way that diverges from US jurisprudence. Canadian jurisprudence has not specifically dealt with the matter; the system in force in Canada facilitates the adoption of English views.

### 4.2.1.

Initially English Jurisprudence held in the pertinent case ‘Morning Watch’<sup>51</sup> that the classification society is liable in tort when: a) it could have foreseen the harmful consequences of its conduct; b) there is the necessary proximity with the damage caused which justifies the obligation for diligence on the part of the classification society; c) the recognition of such want for diligence is generally fair and reasonable. Nevertheless, it was not found that the necessary proximity existed between the services rendered by the classification society and the strictly financial loss of the ship’s buyer because these services aim at the protection of human life and property at sea; their purpose is not to safeguard the interests involved in sea trade.

The matter was reviewed in the case of *Nicholas H.*<sup>52</sup>

The vessel had loaded cargo in South America for carriage to Italy and the USSR During its voyage, the vessel deviated to Puerto Rico due to a crack in its hull. Further cracks appeared whilst at anchor. Nippon Kyokai, the vessel’s classification society, had a surveyor inspect it. The surveyor discovered significant cracks in the shell-plating of the vessel and recommended immediate repairs. The cost of these repairs was considerable as the vessel had to discharge and thereafter reload its cargo. However, after certain haphazard repairs were carried out, the surveyor recommended the maintenance of the vessel’s class and thus the vessel proceeded on its voyage to the port of destination. A day after its departure from Puerto Rico, the vessel’s welding which had been repaired offhandedly cracked and, following the rescue of the crew, the vessel sank with its cargo on board. The cargo owners agreed to settle with the shipowners to an amount of \$US 500,000, this amount being the limit of the shipowner’s liability according to the Hague-Visby rules. Subsequently the cargo owners filed

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<sup>51</sup> *Mariola Marine Corporations v. Lloyd’s Register of Shipping*, 1990 Lloyd’s Law Rep. I, 547. The Motor yacht ‘Morning Watch’ was sold in 1985 whilst possessing a valid class certificate. Thereafter it was found to have major defects, including corrosion, which rendered it unseaworthy. The buyer sued the classification society for economic loss on the grounds that the society had failed to observe its duty of care.

<sup>52</sup> Queen’s Bench Division, 1992 Lloyd’s Law Rep., 2, 481; Court of Appeal, 1994 Lloyd’s Law Rep. 1, 492; 1995 Lloyd’s Law Rep. 2, 299. See also C. Moore, *UK and Far East Perspective*, in J. Lux (Ed.), *Classification Societies* 43-49 (1993).

a lawsuit against the classification society in tort for the balance of their loss, being \$US 5.5 million. They argued that the surveyor had negligently accepted the temporary repairs and, had he not done so, the ship would not have sailed and its cargo would not have been lost.

The Queen's Bench Division held that the predictability alone was sufficient to give rise to a duty of care on the part of the classification society towards the cargo owners and, subsequently, the classification society was liable in tort to the cargo owners who had suffered physical damage due to the society's negligence in issuing the class certificate.

The Court of Appeal reversed this decision on the following grounds: a) the conditions laid down in the "Morning Watch" apply regardless of the nature of the loss; b) the necessary proximity which would impose on the classification society the obligation to exercise due diligence for the protection of the interests of the cargo owners did not exist in the particular case since the maintenance and preservation of cargo whilst on board was the obligation of the ship's operator; c) the uniformly and internationally applicable Hague-Visby Rules regulated the relations between carriers and cargo owners in a generally acceptable manner which renders the establishment of an additional liability on the part of the classification societies unfair and superfluous. The actual judgment definitely took into account more general considerations: it would not be tolerable for the classification society to have a wider liability than that of the shipowner who, in fact, was the one who had undertaken vis-à-vis the particular cargo owner to make available a seaworthy ship fit for the carriage of the particular cargo.

This decision was upheld by the House of Lords. It was held that a classification society would not be liable to cargo owners in tort, even if it had been negligent in declaring a ship seaworthy. This would be the case even where, following a survey, a ship promptly sails and sinks. The shipowner is primarily liable for his ship sailing in a seaworthy condition. The role of the classification society's surveyor is auxiliary. The classification society may only be liable towards the shipowner with whom it has entered into an agreement. There had been no agreement between the cargo owners and the classification society. Cargo owners rely on the shipowner to keep his ship seaworthy and to take care of the cargo. Moreover, the House of Lords was concerned that, should a duty of care be held to exist towards the cargo owners, classification societies would be exposed to large claims by cargo owners. Such claims would enable cargo owners to disturb the balance created by the Hague-Visby rules and tonnage limitation provisions, because the cargo owners would be entitled to recover in tort large sums from an ancillary party to the carriage of goods by sea, i.e. the classification societies. The Court, having in mind that classification societies act for the general welfare and perform a role which, in their absence, would have to be performed by states, was reluctant to interfere

with this international legal system which placed the duty of a ship's seaworthiness on the shipowner and not on the classification society which is not a party to the contract of carriage and which cannot benefit from the tonnage limitation liability system.

#### 4.2.2.

In the Canadian legal system the existence of a claim against a certain person based on this person's contractual liability does not preclude the establishment of a tortious claim against the same person. This tortious liability is subject to principles different from the principles of contractual liability. Thus, if a classification society performs its duties negligently, the person sustaining damage, although it may be a contracting party, is entitled to file a lawsuit based upon the tortious conduct of the classification society. As it has already been pointed out, the matter of the liability – including liability in tort – of a classification society is categorised as a maritime claim and is therefore subject to Canadian maritime law. Given that Canadian maritime law does not contain special rules regarding the matter in question, the rules and principles of common law are applied, in the same way that they are applied by English jurisprudence and are accepted by the Canadian courts.<sup>53</sup>

According to the common law, a person is held to be tortiously liable in case: (a) he has a duty of care or diligence towards another person, (b) fails to display the diligence which is required in such cases, (c) there is a proximity between his negligent conduct and the damage suffered by the claimant, (d) the nature of the damage is not utterly remote, (e) actual damage is suffered.

Consequently, proof that a duty of care exists becomes a substantial condition for the establishment of liability in tort. The obligation for compensation exists towards any person that the tortfeasor could anticipate would sustain damage. The generality of this rule permits the examination of the obligation for compensation in an indeterminable way. That is the reason why common law provided from the very beginning that a tortious obligation for compensation covers only compensation for physical damage. In the course of time the field of this obligation gradually came to include new categories of damage.<sup>54</sup>

However, this view of the Courts was put aside by the House of Lords in its decision in 1978 in the context of the case "Anns v. Merton London Borough Council".<sup>55</sup> Within the field of tortious liability the duty of care of the tortfeasor towards the damaged person exists as long as a link of proximity is proven between the two parties and the damage of one party is a reasonably predictable consequence of the other party's act or omission. The condition

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<sup>53</sup> For more details *see* Canadian Report.

<sup>54</sup> *See* A. Braën, *L'indemnisation de la perte économique en droit maritime canadien*, 1997 *Annuaire de droit maritime et océanique* 45.

<sup>55</sup> (1978) A.C. 728.

of proximity indicates the care which the tortfeasor has to display in relation to the lawful interests of the damaged person. The condition of predictability implies the case in which two persons are so close and the one is so affected by the other's act or omission that the latter bears first and foremost in his mind the influence of his act or omission. These two elements establish, as it was pointed out, a duty of providence of the tortious party in relation to the interests of the other party. However, this duty can be set aside by the Court on the grounds of general policy.

The Canadian Supreme Court followed the view expressed in the "Anns" case in order to determine whether an economic loss should be compensated or not.<sup>56</sup>

Given that the Canadian courts have not so far dealt with the matter of the tortious liability of classification societies towards third parties, whenever this matter emerges it is dealt with on the basis of the decisions of English courts in the "Morning Watch" and the "Nicholas H.", cases which were mentioned above.

In this context the decision of the Federal Court of First Instance of Canada in the case *Berhard v. Canada*<sup>57</sup> is of great interest. A ship arrived at the port of Vancouver in April 1997. Two inspectors of the Canadian Ministry of Transport discovered, following an inspection, damage to the main parts of the hull. The ship was immobilized until August 1997, although an inspector of a recognised classification society held the view that the ship could undergo minor repairs and thus maintain its class for so long as it was needed to go to China and undergo there extensive repairs at a lower cost. The shipowner as well as the ship's manager filed a lawsuit against the Federal State of Canada and claimed compensation because of the lower cost of repairs in China, the loss of income due to the ship's immobilisation, and the expenses for the ship's stay in port. The Federal Court of First Instance held that the shipowner's and ship's manager's damage is a reasonably predictable consequence of the acts or omissions that the State inspectors allegedly performed. The State inspectors were aware that the ship's immobilisation would entail a loss of income for the shipowner and its manager and that the repairs in Vancouver would be far more expensive. On the other hand, the administrative authorities are expected not to move to unnecessary ship immobilisations. Thus, it is neither unfair nor inclement that a duty of care should be imposed on administrative authorities towards the shipowner and the ship's manager. After all, there are no general policy reasons which could put aside this duty, as in fact its existence does not put the control programme of foreign ships sailing into Canadian ports at risk. This decision

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<sup>56</sup> *CN v. Norsk Pacific Steamship Co* R.C.S. 1992, 1021; *Cooper v. Hobart*, R.C.S. 2001, 537.

<sup>57</sup> 2004 CF 501 (J. Cambell).

was annulled by the Federal Court of Canada,<sup>58</sup> because it was judged that the compensation lawsuit against the State of Canada presupposes that the lawfulness of the administrative authorities' deeds had been previously examined.

In view of the above, it could be argued that a lawsuit by a shipowner or other contracting party against the classification society of the ship based on the latter's liability in tort would probably be upheld. However, in the event that a compensation lawsuit is filed by a third party who is related to the ship and can be insured against any damage caused by the classification society's tortious acts or omissions, reasons of general interest are likely to contribute to the rejection of such a lawsuit by the court.

#### 4.2.3.

In the context of the American legal system the liability of the classification societies vis-à-vis third parties is based upon the provisions of the Second Restatement of Torts Act which deal with the making of wilfully inaccurate representations. The establishment of such liability varies depending on the nature of the loss. It is more flexible in the case of actual loss. It is stricter in the case of financial loss.

In particular, when a classification society is sued in compensation for actual losses caused by tort, it is liable if: a) it wilfully supplied erroneous information; b) a third party acted relying upon such information; c) the result of such act was the occurrence of an actual loss; and d) the third party was an individual that the classification society knew or could have expected, according to an objective judgement, to run a risk by reason of such inaccurate representation.

When the classification society is sued for compensation for financial losses, the plaintiff third party must prove that: a) the classification society supplies by profession information to others for their guidance in their business transactions; b) in the course of its business it supplied erroneous information; c) it did not demonstrate due diligence in obtaining such information; d) the recipient of such information is the plaintiff himself or a third party to whom the recipient supplied such information, to the knowledge of the classification society; e) the plaintiff actually relied upon such information and thus suffered financial loss.<sup>59</sup>

It becomes evident from the above that the establishment of liability presents in concreto particular difficulties of mainly a probative nature which relate, in particular, to the condition

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<sup>58</sup> *Canada v. Bernhard*, FCA 2005, 267.

<sup>59</sup> See *East Rivers SS v. Transamerica Delaval Inc*, 476 US 858; 106 S.Ct 2295 (1986); *Great American Insurance Co. v. Bureau Veritas* 338 F. Supp. 999 (S.D.N.Y. 1992); *Cargill Inc. v. Bureau Veritas*, 902 F. Supp. 49, 1996 AMC 577 (S.D.C.N.Y. 1995); *Carbotrade S.p.A. v. Bureau Veritas* 901 F. Supp. 737, 1996 AMC 561 (S.D.C.N.Y. 1995), *Dir. Mar.* 1997 p. 1173.

that the third damaged party must have relied upon the information supplied by the classification society. Nevertheless, the U.S. courts are less demanding in cases of damages for personal injury or death.<sup>60</sup>

## 5. The Matter of the State's Liability Arising out of the Conduct of Classification Societies

As mentioned above,<sup>61</sup> a large number of States assign the surveys of ships flying their flag and the issue, attestation, extension and renewal of the relevant safety certificates to recognized classification societies. Some countries, such as Germany, provide shipowners with the option of either to conclude a classification agreement with a recognized classification society for the supervision and survey of their ships and then submit the classification society's certificate to the competent administrative authority in order for the safety certificates to be issued or to directly conclude an agreement with the competent administrative authority for the survey of their ships by inspectors employed by the State and the issue of safety certificates. Shipowners usually prefer the first option. Thus, classification societies actually assist the competent administrative authority, as they perform the necessary surveys upon which the administrative authority relies in order to issue the pertinent certificates. In a third category of countries, such as the USA, a recognized classification society is authorized to issue solely the load-line certificate. The remaining surveys are performed by the Coastguard, which also issues all other certificates.

It is clear from the foregoing that the matter of the liability of the State plays a major part especially in countries which delegate the performance of a public service to classification societies. Relevant to this is the matter of requesting provisional measures as well as enforcing judgements against the State and state organisations.

### 5.1. Basis of State Liability

In case a classification society causes damage during the performance of the public service assigned to it, the matter of State liability emerges. This kind of liability may be based upon the special provisions concerning State liability in tort for acts or omissions of its organs or officials or the provisions concerning its liability when acting as a principal.

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<sup>60</sup> See a summary review of American jurisprudence, relating to classification societies' liability towards third parties, *in* Sh. Barton, Possible third party liability of the Classification Society: Recent Developments, *Maritime Cyprus* 86 (1993).

<sup>61</sup> See above 2.2.2.

### 5.1.1.

In most legal systems there are special provisions which establish State liability for acts or omissions of persons who are closely connected to the State, are subject to the State's control while performing their duties and depend on the State when doing so. However, the particular conditions under which State liability is established differ from one legal system to another.

#### 5.1.1.1.

Under German law the matter of State liability is laid down in §839 BGB in conjunction with article 34 of the German Constitution. According to these provisions the Federal State or one of the German Länder is liable for losses caused by one of its officials if this official acted in breach of his official duty towards a third party. Defining "official duties" presents some difficulties if one defines this duty as the duty which the official owes to his employer (the State) and not as the duty which the State owes to its citizens. This narrow concept is rooted in the traditional regulation of the German governmental liability in tort, under which it was the public servant who was liable and not the State. However, article 34 of the German Constitution provides that the employing public authority is liable for the official as long as he acted under public law. With regard to State liability for negligent conduct of a classification society, it must be noted that there is no judicial precedent; in any case the definition of a "State official" is rather wide. It does not only encompass persons employed by public bodies but also those who have been granted a certain public function. Classification societies do not fall within the category of public servants, as their surveys that form the basis for the issuance of safety certificates by the state authority seem to be entirely a matter of private law; as already pointed out classification societies assist public authorities by conducting the necessary surveys upon which the authorities rely when issuing the relevant certificates. It is therefore argued that the classification societies are so closely linked with the administrative procedure for the issuance of the safety certificates that they must be regarded as State officials in the sense of §839 BGB.<sup>62</sup>

#### 5.1.1.2.

Moreover, in the Japanese legal system a classification society, to which the periodical survey of ships and their classification as "qualified ships" have been delegated by the State, does not issue safety certificates. These certificates are issued by the competent Japanese authority, which takes into account the ship's typification as "qualified" by a recognised classification society. Thus, a classification society seems to be a "designated corporation"

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<sup>62</sup> For more explanation *see* German Report.

that, under Japanese administrative law, is a type of company which the State has entrusted in order to perform some of its own administrative duties. There is no judicial precedent concerning State liability for a classification society's negligent conduct. Given that the State is entitled to perform a general control of classification societies and that it has no authority to instruct, revise or put aside a certain classification society's survey, it is quite unlikely that the jurisprudence concerning the liability of the city of Yokohama for negligent examination of the construction plans of a building will be followed thus establishing State liability for the negligent conduct of a recognized classification society.

In any case the right of compensation by the State is specially regulated by the Act on Compensation by the State. In case the State is held liable under this law, the person who caused the damage is not liable, although the State may, in its turn, claim compensation from the person in question. Consequently, a recognised classification society which conducted a necessary survey on behalf of the State is likely to be not liable towards a shipowner for conducting the survey negligently. The special provisions concerning State liability do not substantially differ from those of the Japanese Civil Code concerning tort. Thus, in order for this kind of liability to be established, an unlawful conduct in the course of the exercise of a public duty performed wilfully or negligently is required.<sup>63</sup>

#### 5.1.1.3.

Court jurisprudence in the United States has held that classification societies are not liable for services rendered under state authorisation, when the law of the flag of the vessel prevents legal proceedings against the flag state and its agents (classification societies) before the courts of foreign states, like the Bahamas law for instance. However, the majority of national legislations do not include provisions releasing classification societies from liability for the provision of services under the concession of state authority (i.e. statutory surveys).

#### 5.1.1.4.

Under Greek law the state authorises, by virtue of presidential decrees, recognised classification societies to draw load lines, to conduct all types of surveys regarding Greek vessels (i.e. preliminary surveys, regular, extraordinary and interim surveys), to attend ship construction, restructure and repairs, to verify the compliance of the vessel and its equipment with any national or international standards, as well as to issue and renew any certificates provided under any laws and regulations. It is evident that the Greek state authorises

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<sup>63</sup> See Japanese Report.

classification societies to carry out operations that would normally be carried out by a state authority. As a result, the Greek state renders classification societies quasi-‘cessionaires’ of a public service.

This raises the issue of the liability of the Greek state for inefficient services offered by classification societies and their servants and directors. It is possible to argue that lawsuits against the State can be based on two grounds.

The first one is the provision of article 105 of the Introductory Law of the Civil Code, which provides that the State has strict liability for unlawful and damaging actions by its organs. In particular, in order for State liability to be established, the act or omission has: a) to be committed by an organ of the State or other public entity, i.e. a natural person who is in the State’s service and exerts public authority; b) to be relevant to the State’s service and constitute an act of imperium or public welfare; c) to have taken place during the exercise of the delegated act of imperium; d) to be unlawful – although not necessarily with intent or negligently –, in other words to violate the service duty imposed on the State organ and to infringe a right or protected interest of a private person; e) not to violate a provision exclusively protecting the public interest. In the event that these conditions are met the State is held liable jointly and severally with the liable organ.

With regard to State liability for the inefficient conduct of a classification society it should be pointed out that the dominant view, based upon the “organic criterion”, considers the meaning of “organ” *stricto sensu* and thus refuses to include in its definition every organisation which is a legal person under private law, like classification societies.<sup>64</sup> It has been held that a classification society, having the form of a legal person under private law, does not possess the capacity of a state organ and, therefore, may not be regarded as part of the public administration. Accordingly, the State is not liable for the acts of classification societies or their servants.<sup>65</sup>

Subsequently, it should be examined whether the state may be held liable on the basis of its position as a principal for damages which are caused wilfully or negligently by the classification society during the performance of its duties (Civil Code Art. 922). The answer depends on the answer one shall give to the question of whether a classification society is a State servant or not. According to the dominant view in the jurisprudence, which is based upon the criterion of dependence, it cannot be argued that a classification society can be regarded as a State servant. Classification societies are legally and financially independent given that they are paid by the persons using their services and not by the State. The State

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<sup>64</sup> See Supreme Special Court 10/1987; P. Pavlopoulos, *The contract regarding the execution of a public project* 316 (1997).

<sup>65</sup> See Multimember Tribunal of First Instance of Athens 8909/1985 26 *Hellenic Justice Review* (“*Elliniki Dikaosini*”) (1985) pp. 1409, 1415.

merely performs acts of general supervision and does not supply them with instructions on the rendering of their services in concreto, with regard to which, after all, the State possesses no kind of expertise or experience.<sup>66</sup>

In view of the above, the legal significance of contractual clauses between classification societies and sovereign states providing that the former operate as agents or appointees of the latter and consequently enjoy the same level of legal protection is questionable.

## 5.2.

The matter in question is quite interesting from the viewpoint of European Law as well. The member States, in complying with the provisions of EU law, are obliged to apply the rules of recognition, selection and supervision of classification societies, such rules being embodied in their national legislation, as well as to secure the implementation of the relevant international conventions concerning control on ships and issuance of the safety certificates. Furthermore, the European Court of Justice has judged, especially in its decision on the Francovich case,<sup>67</sup> that a member State is liable towards private persons for violations of an EU law provision (regulations or directives transposed into national legislation) in case such violation: (a) refers to an EU law provision awarding rights to private persons; (b) is a major one; and (c) is proximately linked to the damage suffered by the private person. These conditions are evaluated according to European Community criteria because of the autonomous and peculiar nature of the legal system of the European Union.

Furthermore, it should be observed that this matter can also arise in the context of international conventions, i.e. international conventions ratified by a certain State and incorporated in its national law. Most of the international conventions concerning ships' and navigation's safety have become part of the EU legal system through Regulations or Directives. The 1974 International Convention concerning Safety Of Life At Sea (SOLAS 1974) relevantly provides in its Regulation no. 6 (Annex I) that every contracting State may entrust ships' surveys to recognised classification societies and, by doing so, it guarantees the completeness and efficiency of the survey.

In addition, with regard to safety certificates, Regulation no. 12(a)(vii) of the aforementioned International Convention provides that the competent State Authority undertakes responsibility for the certificates. It is evident that this State responsibility is entirely irrelevant to the principles which govern liability in the relation between agent and principal.

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<sup>66</sup> See L. Athanassiou, *The role and responsibility of classification societies (in greek)* (1999) p. 121.

<sup>67</sup> See European Court of Justice, C-6/90 A *Francovich et autres v. République Italienne* 19 Nov. 1991, 1991-1 p. 5357.

At this point we should examine briefly the relations between the State and a classification society and particularly the right of the State which was held liable for compensation to subsequently turn against the classification society and demand compensation. Directive 24/57/EC (Art. 6 § 2) provided in its initial form that the relations between States and classification societies are governed by a standard written form of agreement which determined the obligations and services of classification societies and did not allow for any discriminatory treatment. This Directive was amended by Directives 2001/105/EC and 2002/84/EC. Directive 2001/105/EC amended to a large extent Directive 24/57/EC in the matter of a classification society's liability for compensation to the State and additionally provided for an agreement between the aforementioned parties which creates no discrimination and contains the following:

(i) if liability arising out of any incident is finally and definitely imposed on the administration by a court of law or as part of the settlement of a dispute through arbitration procedures, together with a requirement to compensate the injured parties for loss or damage to property or personal injury or death, which is proved in that court of law to have been caused by a wilful act or omission or gross negligence of the recognised organisation, its bodies, employees, agents or others who act on behalf of the recognised organisation, the administration shall be entitled to financial compensation from the recognised organisation to the extent that the said loss, damage, injury or death is, as decided by that court, caused by the recognised organisation;

(ii) if liability arising out of any incident is finally and definitely imposed on the administration by a court of law or as part of the settlement of a dispute through arbitration procedures, together with a requirement to compensate the injured parties for personal injury or death, which is proved in that court of law to have been caused by any negligent or reckless act or omission of the recognised organisation, its employees, agents or others who act on behalf of the recognised organisation, the administration shall be entitled to financial compensation from the recognised organisation to the extent that the said personal injury or death is, as decided by that court, caused by the recognised organisation; the Member States may limit the maximum amount payable by the recognised organisation, which must, however, be at least equal to EUR 4 million;

(iii) if liability arising out of any incident is finally and definitely imposed on the administration by a court of law or as part of the settlement of a dispute through arbitration procedures, together with a requirement to compensate the injured parties for loss or damage to property, which is proved in that court of law to have been caused by any negligent or reckless act or omission of the recognised organisation, its employees, agents or others who act on behalf of the recognised organisation, the administration shall be entitled to financial compensation from the recognised organisation to the extent that the said loss or damage is, as decided by that court, caused by the recognised organisation; the Member States may limit the maximum amount payable by the recognised organisation, which must, however, be at least equal to EUR 2 million.

It becomes evident from the above that every member State is entitled to adopt in its legislation a system of quantitative limitation of the liability of classification societies.<sup>68</sup>

## 6. Applicable Law

During the last few years, the courts of most maritime nations have been confronted with the issue of the liability of classification societies towards third parties, in particular liability in tort. Although this issue has already arisen several times, it has not been dealt with by specific legislation in the major maritime jurisdictions. As a result, the issue is dealt with on the basis

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<sup>68</sup> Italian Report.

of general principles of tort law as such principles apply in each jurisdiction and national courts of maritime nations have adopted different interpretative approaches. Hence, the determination of the applicable law is of vital importance.

#### 6.1.

It should be observed that the rule that liability in tort is governed by the law of the place where the tort was committed ('*lex loci delicti*') is still strongly supported on the international level. However, it may prove difficult to determine the place where the tort was in fact committed, particularly when the various events that compose the tort in question have taken place in different jurisdictions, or have taken place in the same jurisdiction but their respective results have evolved in other jurisdictions. The following example illuminates how the '*lex loci delicti*' rule applies in order to determine the proper law of the tort: Suppose B, a company organised under the laws of Gibraltar, a dependent territory of Great Britain, owns vessel A; B charters vessel A to C, a company organised under the laws of Italy; C sub-charters vessel A to D, a company organised under the laws of a US state, to carry cement from Greece to the USA. The Italian charterer raised a claim in tort against the classification society E, alleging that the latter had carelessly surveyed the vessel in Piraeus before loading and affirmed its class certificate instead of revoking it; vessel A sank due to unseaworthiness in the Atlantic Ocean during its voyage from Piraeus to the US laden with a cargo of cement. On the basis of the above facts, the issue that arises is to determine the substantive law applicable to this dispute, i.e. a claim for damages due to liability in tort of classification society E against the chartering company.

In the context of the '*lex loci delicti*' rule, one could possibly be confronted with diverging interpretative approaches, since the tort described above is connected to more than one jurisdiction. With respect to torts connected to more than one jurisdiction, it has been proposed that precedence should be given to the law of the place where the tortious act was committed, or, in other words, the place where the act that led to the tort was completed. According to a diverging view, precedence should be given to the law of the place where the result that was necessary for the completion of the tort took place. According to an intermediate view, in determining the applicable law of the tort, both the place where the tort was committed and the place where the results of the tort evolved should be taken into account, and the party who suffered the loss may select between the two. According to another view, precedence should be given to the "prevailing" place, that is to the place where the main conceptual elements of the tort occurred. Furthermore, if the tort was committed by way of an omission, then, according to one view, the place of the tort is the place where the tortfeasant corpore was, while, according to another view, prevalence should be given to the

place the laws and regulations whereof imposed an obligation to take certain acts which were omitted and to the place where the result of the omission became evident, if the person who committed the omission was able to foresee this result.<sup>69</sup>

## 6.2.

In the aforementioned case it could be argued that the main conceptual elements of the illegal behaviour of the classification society were demonstrated on board vessel A during its passage through the high seas since the sinking of vessel A took place in international waters. Hence, one could conclude that the tort in question is governed by the law of Great Britain which is the state of the flag of the vessel, since the vessel, when passing through international waters, is deemed to be part of the territory of the state of its flag. It could also be counter-argued that Greece is the place where the illegal behaviour occurred, since it was in Greece where renewal and non-revocation of the classification certificate took place and Greece is the place where the classification society had its place of business. Furthermore, the main conceptual elements of a tort of this type should be considered to have occurred in Greece, because what is of the utmost importance is the illegal behaviour of the classification society as such. The vessel's sinking is an ancillary result of the illegality committed by the classification society and the latter could not possibly foresee the particular place where this result could occur. In addition, legal interpretations as to the applicable law of the tort should not lead to the reinforcement of the territoriality principle, by applying the law of the flag, and should not conclude that the loss (for example, the loss of cargo due to sinking in international waters) occurred in the state of the flag, because the consequences of this loss are amply evident in the place where the owner of the cargo has its place of business; this place is usually the destination port, because it is at this place where the financial results of the loss of the cargo accrue and it is at this place where additional financial losses – other than the loss of the cargo as such – are also sustained. In such cases the application of the *lex fori* should prevail.

## 6.3.

It thus becomes evident why certain jurisdictions, like the USA,<sup>70</sup> have progressively abandoned the 'lex loci delicti' principle and allowed the Courts to seek and apply the proper

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<sup>69</sup> On the above different views, see A.Tenekidou-Fragopoulou, *The tortious act according the Private International Law* (in Greek) (1956) p. 64 *et seq.*; D. Stamatiadis, *Questions relating to applicable law in the field of international torts* (in Greek), 1998 *Efimeris Hellinon Nomikon* 233 *et seq.*; L. Athanassiou, *supra* note 66, p. 103 *et seq.*; B. Audit, *Droit International Privé* (3<sup>rd</sup> ed. 2000) nos 177 *et seq.*

<sup>70</sup> See *Lauritzen v. Larsen*, 345 US 571, 1953 AMC 1210; *Romero v. International Terminal Operating Co*; 358 US 354, 79 S.Ct.468; *Hellenic Lines Ltd v. Rhoditis*, 398 US 306, 90 S.Ct.1731; P. Morris, *The proper law of the tort*, 64 Harv. L. Rev. 881 (1951); E. Moustaira, *The development of private international law in the United States of America, Tradition-Revolution-Counterrevolution* (in Greek) (1996).

law of the tort. The EU Draft Regulation for tort liability adopts as a general principle, subject to certain reservations and distinctions (art. 5), that the tort is governed by the law of the place where the loss occurs or may occur. However, if the surrounding circumstances indicate that the law of another State is more closely connected to the tort, then this law applies.<sup>71</sup>

## 7. Conclusion

The liability of classification societies is an issue that has received much attention during the last few years, as the number of cases where classification societies together with shipowners are sued by third parties progressively increases. It has been argued that, should this trend continue in the future, classification societies may be obliged to interrupt the provision of certain traditional services, which will necessarily result in a decrease in the safety level of vessels.

It was initially believed that the matter of liability could be dealt with through the improvement of the quality of services offered by classification societies and the adoption of appropriate contractual clauses in the agreements entered into between classification societies and states, or between classification societies and shipowners, as well as through the formulation of certain standard terms that would operate as model rules to which the parties involved could refer. The main purpose behind this approach was to allow classification societies to retain their respective individual characteristics, to safeguard the continuity of competition between them and to make it possible for classification societies to continue their respective operations under the law of the country where they have their place of business and be able to accept or reject at their discretion any standard contractual terms in their agreements with shipowners. However, the main problem was that, although services offered by classification societies are primarily destined to award a particular class to a vessel and are financially borne by shipowners, third parties – i.e. buyers of ships, charterers, cargo owners, insurers of vessel and cargo – also have legitimate interests in the provision of such services and, accordingly, in the contractual terms incorporated in the relevant agreements. In this context, attempts were made on both the international and the European level to improve the quality of the services of classification societies and to include in the contractual arrangements among states and classification societies clauses that were destined to minimise or limit the liability of classification societies. Simultaneously, attempts were made, under IACS auspices, towards the drafting of a Code of Ethics for Classification Societies; this code was indeed drafted and is destined to cover all the operations of classification societies, that is, not only ship surveys for classification purposes, but also statutory surveys that are carried out on

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<sup>71</sup> Comp. C.C.E. Nov. 30, 1976, *Mines de potasse d'Alsace*, Coll. 1976 p. 613; C.C.E. Jan. 11 1990, C.-220/88, *Dumez France v. Hessische Landes Bank*, Coll. 1990 I-49.

the authorisation of the state of the flag, as well as services offered by surveyors employed by classification societies and by independent surveyors. The principles contained in the aforementioned Code of Ethics were supplemented by model clauses that were recommended for use by individual classification societies and referred to the duties and liabilities of shipowners. The duties were set forth in detail, because they set the standard of reasonable diligence required and were a prerequisite for awarding a class to the vessel.

A Joint Group for the Study of Issues regarding Classification Societies was set up in 1992 upon the initiative of the “Comité Maritime International” (CMI). The Working Group drafted the “Principles of Conduct for Classification Societies”, which have been adopted, with some amendments thereto, by the CMI General Assembly in 1994. The CMI project considers the legal rights, duties and liabilities of classification societies, setting out the standards that could be applied to measure the eventuality of a classification society being implicated in a maritime casualty; it may be considered as a recognised yardstick used in order to determine the performance by a classification society. Furthermore, this project maintains that it is the service provided to a ship and not the ship’s tonnage that is the fairest and most accurate basis upon which the limit of classification societies’ liability should be calculated. This value is measured by utilising the fee payable by a shipowner, and limiting a classification society’s liability to a multiple of the fee charged by the society.

This regulation was actually in the form of general terms and conditions. Each classification society was able to amend them, according to its commercial policy or local law. In addition, these terms were not binding on third parties. They could not even bind the contracting parties themselves in cases where they were contrary to mandatory law; and the law of tort is mandatory law.

Hence, the issue of liability in tort of classification societies towards third parties, which has not been specifically regulated in most of the main maritime legislations, is dealt with on the basis of general provisions of tort law of the country whose law is applicable. As a result, there is a lack of international uniformity regarding both the applicable law and the nature and extent of liability under the applicable substantive law. On the other hand, the expansion of the operations of classification societies, their progressive transformation into organisations offering a public service in connection to ship safety and the enactment of strict standards for their recognition and the amelioration of their services have reinforced their credibility with respect to ship safety internationally; at the same time, these reasons reinforced the view that classification societies can be held liable in tort towards third parties for the non-performance of their services in the context of awarding a class to a vessel or certifying that this class is maintained, as well as in the context of surveying ships under the authority of the state of the flag. This approach has been further reinforced by the fact that courts have occasionally awarded large amounts as damages against classification societies,

mainly on the consideration that this would enhance the level of diligence and the quality of services and would, hence, contribute to prevention. A general principle in favour of the exemption of classification societies from liability in tort against third parties would not be accepted in most maritime legislations, particularly in cases where it is evident that the classification society has actual knowledge (or if such knowledge could easily be inferred) of any regulatory violations on the part of shipowners regarding any obligations arising under either international or national law, and knowledge of any loss which is attributable to such violation.

One would hope that IMO would encourage an open multilateral international convention defining the role of classification societies, the mode of their operations and the source of their powers, as well as whether they act on the authorisation of the state and what is the impact of some of their operations towards third parties. This means that a substantial part of the aforementioned Code of Ethics and model regulation regarding duties and liabilities of classification societies would be included in an international convention in the form of mandatory provisions. A convention of this kind would also clarify whether and to what extent the agreements among classification societies and shipowners grant any protection and, if so, to what extent to third parties that have legitimate interests in the ship.

Furthermore, as it is well known, maritime law is to a large extent the outcome of the serious risks of navigation. For this reason it is largely governed by two major principles, the principle of division of risks and the principle of limitation of liability. As a general rule, every person is held liable with his entire estate, present or future, for losses or damage caused to other persons. Maritime law, however, both in its national and international form, has enacted a long time ago various systems of limitation of liability, some of which are of a special character whilst others are of a general nature. The former relate to certain conventions. For instance, according to the Hague-Visby Rules, which have been adopted by most maritime countries, the sea carrier is liable for losses or damage up to a certain sum of Special Drawing Rights (SDR). Apart from this, he holds no liability for consequential losses, such as those caused by the problems possibly caused to the receiver because of the non-delivery of the transferred goods. This limitation of liability applies irrespective of the legal grounds of the legal action (i.e. either in contract or in tort). It also applies when the lawsuit is turned against agents or other servants of the sea carrier.

The general system of limitation of liability for maritime claims was laid down in the 1976 London International Convention. This Convention allows the shipowner and the salvor to limit their liability towards a large number of claims emerging during a ship's operation by creating a certain fund for the satisfaction of their creditors or by simply requesting the limitation of their liability. Apart from this, the Convention similarly allows other factors of the shipping business, such as the charterers, the ship's managers or the shipowner's servants

to limit their liability. However, it does not give this right of limitation of liability to the pilot or the classification society. The 1969 International Convention on Civil Liability for Oil Pollution Damage (as amended) allows, *inter alia*, “the pilot or any other person who, without being a member of the crew, performs services for the ship” to limit their liability. In view of this provision it is argued that classification societies are entitled to limit their liability according to the International Convention in question.<sup>72</sup>

In view of the above it would be desirable to proceed towards international uniformity regarding both the legal grounds and the extent of the liability of classification societies so that classification societies enjoy the same protection as the other participants of the shipping business. The first step was taken by Comité Maritime International through the establishment of certain principles of conduct for classification societies, which may be included in the agreements between the classification society and every interested State or the shipowner or another person interested in the safety of the ship. These principles have been adopted by the IMO and aim at the uniformity at an international level of the contents of the duty of care of classification societies.

Although important, this step seems to be insufficient, because it focuses on the contractual relationships and does not deal with third parties' claims. Furthermore, the Model Contractual Clauses between classification societies and States provide that the duties and functions of such societies are to be agreed upon between the two parties. On the other hand, the matter of a classification society's liability, especially the tortious one, is regulated under each national law by mandatory provisions. Mainly on account of this reason, this matter should be regulated by way of a multilateral, open international convention for the unification of certain rules on the liability of classification societies' contractual and tortious liability. It is remarkable that, in respect of classification societies' limitation of liability, several objections have been raised. However, as long as the notion of limitation of liability continues to be in force in the maritime sector, it is only fair that the limitation of classification societies' liability be adjusted to it. The CMI argues that the fairest and most accurate solution for the limitation of liability of classification societies should be based upon the value of the service provided to the vessel and not upon the vessel's tonnage. This value reflects the amount or the kind of work undertaken by each classification society and is assessed by utilising the fee charged by such society and paid by the shipowner. Some other participants in the shipping industry consider that the liability limit, geared towards the fee charged or a multiple thereof, is ridiculously low, and propose that the limitation of classification societies' liability, contractual or in tort, should be dealt with, under the auspices of IMO, through the revision of the 1976 International Convention on the Limitation of Liability of Maritime Claims.

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<sup>72</sup> See German Report.

I believe that classification societies could be brought within the scope of the above International Convention. The CMI is of the opinion that it will take too long to implement a new international convention and that a protocol amending the existing International Convention should not be supported. The failure of an effective international system designed to accommodate classification societies' liability for negligence in the rendering of their services, and to limit such societies' broad liability would always render the society vulnerable to unlimited liability towards third parties for negligent performance of their services and would, thus, always preserve the vast differences between their responsibilities and those of shipowners. On the other hand, the liability limit measured by utilising the fee or a multiple thereof charged by the classification society is extremely low and to the disadvantage of shipowners. When a shipowner attempts to recover his loss from a classification society, he is going to face a party with a lower liability limit and will, consequently, suffer loss even though he is not at fault.

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