



SPAIN'S MLA RESPONSES TO THE QUESTIONNAIRE ON CLASSIFICATION SOCIETIES

Madrid, 1st June 2021.

The answers to this Questionnaire have been prepared by the following members of the SMLA/AEDM : Ms. Mercedes Duch, Mr. Raúl González-Hevia, Mr. Jaime Albors, Mr. Víctor Mata, Mr. Jesús Casas, Mr. Diego de San Simón with the kind help of Mr. Luis Guerrero, Marine and Offshore Director, Bureau Veritas Spain.

Preamble

A new mandate was given to this IWG on Classification Societies in London at the end of 2018. The mandate concerns two completely different areas:

1/ The liability of Classification Societies towards third parties in the framework of their classification activities

Considering the different treatments given to Classification Societies – whose activities are similar worldwide – by courts in common law and civil law jurisdictions, we have thought that it would be of great interest -- because the aim of the CMI is uniformity -- to conduct a brainstorming exercise on the reasons behind these different approaches and, eventually, on how to bridge the gap.

For the time being, the Statutory activities of Classification Societies by delegation of Flag States are not included in our works.

2/ Possible Amendments to the LLMC and CLC

Existing International conventions do not include Classification Societies among those who are entitled to limit their liability for Maritime claims. As a result, Classification Societies are often unfairly exposed to third party claims arising from major maritime casualties as representing "a deep pocket".

Even though it is known that amendments to the LLMC and CLC are not currently on the foreseeable agendas of any international organizations, it has been considered that further work on this issue might be useful.

For a number of reasons, the work on these two topics has been delayed and it has been decided to start with the third-party liability and to deal with possible amendments to the limitation conventions at a later stage.

We will set off by sending a questionnaire which is the method of work commonly used by the CMI. You will therefore find hereinafter the questionnaire that has been prepared by the IWG.

Those interested in Classification Societies have certainly observed that the number of court decisions on the liability of Classification Societies is limited worldwide, even more so considering that a number of these deal not with liability as such but with jurisdiction and/or applicable law issues.

There are therefore, in fact, very few decisions actually dealing with the liability of Classification Societies in the framework of their classification activities and moreover they have been rendered in a few countries only. Hence the case law on which we will work is not very extensive but of course essential.

We would be grateful if NMLAs could respond to the questionnaire before the end of August.

Comment of the SMLA to the preamble of the questionnaire: The SMLA notes that the preamble contains personal opinions (e.g.: “unfairly” or as representing “a deep pocket”) that are not necessarily shared by the SMLA but opinion is not given as it is not requested. The answers to the questionnaire cannot be interpreted in the sense that the SMLA officially shares the contents of the preamble.

Questionnaire

Question 1:

Is there any legislation (or regulation) specifically dealing with the classification activities of Classification Societies in your country?

Response 1:

Yes. The Spanish Shipping Act 14/2014 (hereinafter “SSA”) deals with the Classification Societies. Chapter IV of said Act under the heading of “On the safety of ships and classification Societies”, articles 97 to 107 SSA, rules Classification Societies together with some aspects of the safety of ships.

Particularly, article 106 regulates the function and responsibility of classification societies and article 107 rules the inspection and certification of naval artefacts.

- Article 106. Function and responsibility of classification companies.

1. *By means of a classification contract, the classification company certifies that a ship or any of its components or fittings complies with the terms established in the relevant class rules.*

2. *Classification companies shall be held liable for damages and losses caused to those who contract with them and that are a consequence of lack of diligence by them in inspecting the ship and in issuing the certificate.*

3. *The liability of classification companies to third parties shall be determined pursuant to Spanish Civil Law, without prejudice to the applicable International and European Community Law provisions.*

- Article 107. Inspection and certification of naval artefacts.

The implementing regulations shall determine the specialties regarding the regime of inspection and certification of naval artefacts.

In addition, there are some other minor regulations mainly focused on operational rules of the Classifications Societies as Royal Decree 927/2020, of 27 October, extending the scope of action of the Inspection of Vessels and Survey Organizations, and amending Royal Decree 877/2011, of 24 June and Royal Decree 357/2015, of 8 May.

Question 2:

On what basis does your court retain jurisdiction in respect of a third-party claim against a Classification Society:

- . **domicile of the defendant,**
- . **locus delicti,**
- . **joinder with other defendants.**
- . **rules of the Society**
- . **others?**

Response 2:

Several factors that may be considered by a Spanish Court in deciding its jurisdiction to hear a third-party claim against a Classification Society are those ruled by the Judicial Power Act No. 6/1985 of 1 July (Official Gazette No. 157 of 2 July and its amendments, "LOPJ").

Article 22ter LOPJ gives priority to the domicile of the defendant to retain jurisdiction. In case that defendants have no domicile in Spain, the criteria to be followed by the Spanish Courts would be the locus delicti, irrespective of the nationality of the parties (article 22 quinquies LOPJ). In case of joint and several liability, Spanish Courts will retain jurisdiction when one of the defendants has its domicile in Spain.

Pursuant to the doctrine of privity of contracts set out under article 1257 of the Spanish Civil Code, eventual jurisdiction clauses contained in the Rules of the Society would not be binding in case of a third-party claim.

In addition, the recent Judgment of the European Union Court of Justice (First Bench) of 7 May 2020 (LG and others v. RINA states that article 1.1 of the Council's Regulation (CE) 44/2001 of 22 December 2000 on jurisdiction must be interpreted in the sense that an indemnity suit against the private law entities that carry out a vessels' classification and certification activity in the name and on behalf of a third State is within the concept of "civil and commercial matter", to the effects of the said articles, and, thus, it is included in the scope of application of the Regulation, as far as such activity be not exercised by virtue of public power prerogatives in the sense of the Law of the Union"(...). The customary principle of international law on the immunity of jurisdiction is not contrary to the exercise by the national court of the Country judging the case of the jurisdiction that such Regulation sets forth in a claim of this nature when such court be satisfied that such organizations [the classification societies] have not exercised the public power prerogatives in the sense on the International Law."

The Regulation 44/2001 has been superseded by the Regulation 1215/2012 of 12 December. Its article 7.2) gives jurisdiction to the courts of the place where the damage occurred.

Question 3:

How many cases – if any – concerning the liability of Classification Societies to third parties, have been decided in your country?

Response 3:

Classification Societies appear indirectly in many cases of cargo damage and shipbuilding disputes in order to evidence questions of seaworthiness and compliance with applicable shipbuilding regulations. However, claims brought directly against Classification Societies are scarce.

We have only identified a Supreme Court Case on appeal from a Judgment of the Madrid Court of Appeal dated 9 June 1997 in connection with services provided by a Classification Society in the context of a shipbuilding contract. The Claimant owner of the Vessel commenced proceedings against the yard and the Classification Society for defects in the blades of the propeller of the vessel. The Judgment of the Court of Appeal reversed a Judgment of the Court of 1st Instance and considered the Classification Society liable for failing to identify a series of defects in the type of material used for the blades – which was defective and did not comply with the Classification Society's own rules. The Court of Appeal considered that the Classification Society breached its obligation of special vigilance in not identifying that the materials used did not comply with its own rules. The Court further considered that a negligent omission of its duties gave rise to liability and rejected the argument that the

Classification Society did not assume any liability towards its contractual counterparty or third parties.

The Supreme Court (Judgment of 20 March 2003) confirmed the Judgement handed down by the Madrid Court of Appeal considering that the Classification Society breached its obligation of vigilance during the construction process to ensure that the materials complied, not only with the technical specifications of the contract, but also the rules of the Classification Society.

However, taking into consideration the legal system on sources of Law, one Supreme Court Judgement does not properly constitute Case law and, therefore, Courts and Judges are not bound by the above decision of the Supreme Court.

Question 4:

On which of the following subject matters were these decisions rendered:

- . sinking or damage to a ship including pollution damage?**
- . action by cargo owners or their insurers or by charterers?**
- . sale of a secondhand ship?**
- . others?**

Response 4:

See above. Liability in respect of vigilance during a shipbuilding.

Question 5:

What is the legal basis used or considered in the decisions rendered, in your country, in cases of third party claims against Classification Societies:

- . tort**
- . duty of care,**
- . negligent misrepresentation,**
- . reliance on the classification certificate,**
- . others?**

Response 5:

As said under response 1 above, according to article 106.3 SSA:

“3. The liability of classification companies to third parties shall be determined pursuant to Spanish Civil Law, without prejudice to the applicable International and European Community Law provisions.”

This leads to the general tort law regulated by article 1902 of the Civil Code that reads:

“The person who, as a result of an action omission, causes damage to another by his fault or negligence shall be obliged to indemnify the damaged caused”.

Spanish Law is applicable under the “Rome II” Regulation (Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations), namely:

- Article 2.1.:
“For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, negotiorum gestio or culpa in contrahendo.”
- Article 4.1.:
“Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.”

and

- Article 7:
“The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.”

Question 6:

Has a court of your country-imposed liability on a Classification Society on the basis of insufficiency or incompleteness of their Rules?

Response 6:

Never, as far as we know.

Question 7:

Is a certificate of classification considered in your country as a certificate of seaworthiness? If so, what is the reasoning?

Response 7:

The certificate of seaworthiness (“Certificado de Navegabilidad”) is delivered by the Spanish flag Administration to its flagged vessels. The certificate of classification is not a true seaworthiness certificate, but the authorities consider it as equivalent. The scope is roughly the same.

Question 8:

What is the importance given, by your courts, in their reasoning on the liability of classification societies towards third parties, to the rules and regulations of the Society?

Response 8:

In Spain there is no case law addressing the matter of the classification societies’ liability towards third parties.

That said, our main doctrine (in line with the European case law) agrees that the rules and regulations of the Society (in particular exoneration and limitation of liability clause inserted in the rules) shall not be enforceable against third parties.

Question 9:

What are the defenses available to a Classification Society sued in tort by a third party (assuming that the facts of the matter are not disputed)?

Response 9:

In the light of the response to Question 5, in tort actions third parties shall prove the following: (i) the existence of an act or omission that generates a reckless or negligent conduct attributable to the person or entity against whom the action is taken; (ii) the existence of a real and effective damage or injury; and, (iii) the causal link between the damage and the fault or negligence.

Under the general scheme of tort liability, and as far as the defenses available to a Classification Society are concerned, the Classification Society shall prove its due diligence in the issuance of the correspondent vessel’s certificates and/or that there is no causal link between the fault or negligence of the Classification Society and the damage caused.

Regarding the level of due diligence -to be proved-, our Supreme Court has concluded that, as a general rule to the tort liability scheme, the evidence of a “regulatory diligence” (understood as a regulatory care and prevention) shall

not be enough when the facts of the case show that the guarantees adopted to avoid foreseeable damages have been ineffective (Judgement of the Spanish Supreme Court of 29 October 2008, in a case of contamination of the land by the company that built a fertilizer processing plant using chemicals products).

Question 10:

Have Classification Societies the possibility to invoke, in your country, the limitation of liability inserted in their rules or in the classification certificates as a defense against a tort action of a third party? If so, please expand.

Response 10:

No. Such an invocation would not succeed. As already explained, the SSA sets out (article 106) that the liability of Classification Societies against a third party shall be determined pursuant to Spanish Civil Law, without prejudice to the applicable International and Community Law provisions.

The Spanish system of liability against third parties is based on the *alterum non laedere* principle, with a general duty of not harming any third party, and without the possibility of invoking the limitation of liability. According to the doctrine of privity of contracts ("*principio de eficacia relativa de los contratos*") set out under provision 1257 of the Spanish Civil Code, a limitation of liability rule/clause would only produce effects between the contracting parties.

Question 11:

Is, on one hand personal injury or death allegedly caused by negligence of a Classification Society and, on the other hand, economic loss, treated by your courts according to the same principles of law or different ones? In such a case please explain the differences.

Response 11:

Our Civil Courts would treat both situations based on the same principles of law.

Specifically, personal injury or death may have a different treatment in the event that the party suffering the damage (or fatally resulting dead) was an employee, since the principles of our general employment law would apply. An additional scenario may arise if the offended party (or the next of kind) decided to claim based before the Criminal Courts.

Question 12:

Please explain briefly the rules of procedure applied and of investigations carried out in your country in such matters concerning Classification Societies liability with particular emphasis on the role of:

- **private or court experts;**
- **witnesses.**

Response 12:

Rules on civil procedure in respect of parties, witnesses and experts' declarations and statements are established in the "Ley de Enjuiciamiento Civil – LEC" (Act on Civil Procedure) of 7 January 2000

Under the said "LEC" rules, discovery may be provided by means of oral evidence or written exhibit.

When the Court finds it necessary it may ask for further evidence or demonstration, and, then, the parties, in view of the same, may add to or modify their previous evidence.

Evidence is provided by witnesses, verbal reports, or by private or Court experts.

When in litigation or pre-litigation stages, reports on seaworthiness, structural or other issues, from professional and/or Class experts differ the Court, as mentioned, may obtain further evidence and/or appoint their own experts.

In addition, it is to be noted that inside the Ministry of Transport, Mobility and Urban Agenda there is a Commission for the investigation of maritime accidents and incidents called "CIAIM". CIAIM is in charge of carrying out the investigation of maritime accidents and incidents produced in or by Spanish civil vessels and in or by foreign civil vessels when they occur within internal waters, in the Spanish territorial sea or outside the Spanish territorial sea when Spain has significant interests. Said investigation is of an exclusively technical nature, its ultimate purpose is to establish the technical causes that produced it and to formulate recommendations that allow the prevention of future accidents and incidents, not being directed at any time to determine or establish guilt or responsibility of any kind. However, the results of said investigations usually are disclosed as (one of the) evidence of the circumstances surrounding the accident/incident.

Question 13:

Would a third-party claim against a Classification Society be subject to any time limitation or time bar in your country?

Response 13:

Due to the fact that our SSA makes reference, as explained, to the applicability of civil law to the liability of classification societies and general tort liability is applicable the legal time-bar is one year under article 1968 of the same Civil Code.

It is worth explaining that time bar can be protected or interrupted: (i) submitting a claim; (ii) by any formal notice to the debtor; (iii) by any recognition of the debt by the debtor. In practical terms this means that time bar is interrupted by any formal letter of claim sent to the debtor in tort (such as Notary's notice, registered post or fax, e-mail or even short message if its receipt by the responsible party is duly evidenced). Our Supreme Court case-law accepts that yearly repetition of such notices protects time bar "as it reflects the clear intention of the injured party to preserve its action".