**History of the CMI IWG on Classification Society**

From 1992 to 1997, a Joint Working Group, chaired by Frank Wiswall, conducted a Study on Classification Societies against which the number of claims had increased considerably as additional ‘deep pocket’ defendants.

The Group’s consensus was that the Classification Societies should be afforded protection under an international convention on Limitation of Liability for maritime claims but that “this must remain a long-term possibility which should be re-examined at such time as a substantial revision of the convention is next considered by the International Maritime Organization.”

Such a revision has not, since, been on any agenda of International Maririme Organizations.

In the meantime, considering that ‘’what the Societies do, and how and on which behalf they do it, is not set forth to the general public in any uniform manner’’, the Group has formulated ‘’Principles of Conduct for classification societies setting forth Standards which may be applied to measure the conduct of a Society in a given case.’’

The Principles of Conduct cover the activities of the Societies with respect to Statutory as well as classification. A demonstrated adherence to these published Standards ‘’should be held as prima facie evidence that the Society concerned in a case of Maritime loss had not acted in a negligent manner.’’

The Group was of the view that these Principles of Conduct ought to be reviewed and adjusted from time to time.

This recommendation has, however, never been followed in so far that the above Principles have never been applied.

In order to provide at least some protection to the Classification Societies, the Group has produced model clauses which regulate and limit the liability of Classification Societies, but only for contractual claims.

For Frank Wiswall, these model clauses ‘’stand as recommended models for use by individual Societies’’ but they may modify them to take into account commercial practice, particular law or regulation.

Two different model clauses were, in fact, prepared: The first, ‘’For inclusion in agreements between the Societies and Governments’’, the second, ‘’For inclusion in the Rules of the Societies which contain the terms of the agreements between the Societies and the shipowners.’’

(The above Principles of Conduct and the model clauses can be found in the CMI yearbook 1996 page 334 to 342.)

As regards the statutory works, because of the inherent public policy issues, the Group encourages classification societies to adopt appropriate national legislation and to embody the model clauses in the agreement between Classification Societies and Governments and to ensure, inter alia, that the Society:

(1) ‘’acts solely as the agent of the Administration under whose authority or upon whose behalf it performs such work’’, and

(2) is ‘’entitled to the same defenses, including but not limited to any immunity or limitation of liability, as would be available to the Administration own personnel if they had themselves performed the work or the certification in question.’’

The model clause concerning classification describes the respective responsibilities of the classification Society and of the shipowner and makes it clear that the classification society certifies the classification of a ship to the shipowner and does not certify the condition of the ship for any purpose other than the assignment of classification under the Rules. It emphasizes that the Society ‘’shall be liable only for claims arising out of the performance of services pursuant to these Rules if such claims arise out of an act or omission’’ attributed to it ‘’when such act or omission violates the Standard or reasonable care.’’

It enumerates the responsibilities of the shipowner and states that ‘’a failure by the shipowner to fulfil the foregoing responsibilities may in the reasonable exercise of discretion by the classification society result in (…) suspension or cancellation of classification or withholding of certificates (…) by the classification Society.’’

The model clause finally introduces a clause which provides ‘’some limitation of the civil liability of the Classification societies.’’ The debate within the Group has not focused on the principle of a limitation but, as A.W. Skou put it in his presentation on behalf of IACS to the centenary conference of the CMI (Year Book 1997 page 180) ‘’ on the appropriate level of Limitation.’’

Indeed, the basing of limitation ‘’upon tonnage of the ship’’, as in the Limitation Convention, was not accepted by IACS ‘’as a valid measure of the risk of a Classification Society, which performs essentially the same services regardless of the size of the ship. (…) It is not the size of the ship, but the services rendered by the Society - whose value is measured by the amount of the fee for the service which is payable by the shipowner - which forms (…) an acceptable basis upon which to calculate a limitation of liability.’’

After examining a number of provisions presently existing in the Rules of several societies, ‘’the Group has proposed a clause which bases limitation of liability upon either a multiple of the fee charged or a stated amount – whichever is the greater – but does not cap the limitation amount by a stated figure.’’

However, Classification Societies and Shipowners could not find an agreement on the appropriate level of limitation at that time.

The content of the above model clauses may have been used by Classification Societies but they have never been applied as such.

Considering that one ‘’should not give up the attempts that were made by the CMI with the industry in the 1990’s that came so close to an agreement between the Classification Societies and the industry they serve’’, John Hare proposed in Hamburg in 2014 to form an ad hoc committee within the CMI, headed by Karl Gombrii, to resume and complete the work and see if any progress could be made with the industry on the level of limitation.

IACS informed Karl Gombrii that it would be interested but ICS declined the offer. Therefore, Karl Gombrii‘s report to the Assembly in London in 2018 was that ‘’there is presently no scope for further work’’ within the framework of the mandate given to the IWG in 2015.

The work of the IWG had only concerned the contractual relationships between Classification Societies and Shipowners since 1992. The question of the tort liability of Classification Societies to third parties had been left aside, although in its above address to the Assembly in Hamburg in 2014, John Hare pointed out ‘’a singular lack of consistency of approach in the world’s courts’’ which ‘’leaves the liability of classification societies in a great state of uncertainty. This is the hole in the law that I would ask if we in the CMI should again seek to address.’’

In Agreement with Karl Gombrii, I proposed the Assembly in London in 2018 that the works of the IWG continue with a new mandate centered upon the court‘s approach worldwide of tort liability of Classification Societies with a view to better understand the difference of treatment of this issue between common law and civil law jurisdictions, but not only, and to make proposals to try ‘’to fill the hole in the law.’’

The questionnaire that has been prepared by the IWG and sent to all NMLA’s reflects the ambition of the Group in the hope that the answers will allow it to fulfill its mandate.

Luc Grellet

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