

## JOINT WORKING GROUP ON A STUDY OF ISSUES RE CLASSIFICATION SOCIETIES

LONDON, 10 MARCH 1997

### REPORT

The Joint Working Group on a Study of Issues re Classification Societies (**CSJWG**) was formed in 1992 upon an initiative of the Executive Council of the Comité Maritime International. The issues taken under consideration centre upon the legal rights, duties and liabilities of the Classification Societies, and the relationship between the Societies and the shipowners. The principle upon which the CSJWG was established is that measures which are adopted through co-operative efforts within the industry are generally felt preferable to those which originate outside the industry. The premise for this undertaking is that the Classification Societies play a unique and increasingly vital role in the promotion of maritime safety and environmental protection. It is a unique role because the Societies carry out as agents of governments the statutory survey and certification which is established and mandated by law, while they also perform their traditional private classification function applying rules established by the Societies in co-operation with the industry. It is an increasingly vital role because a broader range of statutory work is being delegated to the Societies by more governments, while at the same time both the regulations established by law and the classification rules grow in complexity. As expressed in the judgement of the House of Lords in the case of *The Nicholas H.*, the present-day role of the Societies is “to promote safety of life and ships at sea *in the public interest.*”<sup>1</sup>

A serious problem was felt to be the increasing frequency of claims against the Classification Societies as additional ‘deep pocket’ defendants. If this increase in the claims exposure of the Societies were to continue unchecked, the Societies could, *in extremis*, be forced to withdraw some of the services which they perform in the public

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<sup>(1)</sup> [1995] 2 Ll. Rep. 299, 311 (H.L.E.), *per* Lord Steyn [*Emphasis supplied*].

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interest — the necessary result being a deterioration in maritime and environmental safety. Since this concern revolves around maritime private litigation of civil liability, CMI was felt to be particularly well equipped to organise a study of the issues and to assist in formulating recommendations. CMI has provided organisational and secretariat services for the Group.

The CSJWG has held thirteen working sessions over nearly a five-year period. The individuals contributing to this effort have brought to bear a wide variety of relevant experience, largely gained in work with the international organisations most concerned with the subject. However, it is to be understood that the participation of these individuals as members of the Group is wholly without prejudice, and does not imply *a priori* any endorsements of the work product.

It is the consensus of the Group that the most broadly acceptable solution to the Societies' increased exposure to claims is to attack the problem at its roots in a preventive manner. One of the sources of difficulty has been that what the Societies do, and how and on whose behalf they do it, is not set forth to the general public in any uniform manner. For this reason the CSJWG has formulated Principles of Conduct for Classification Societies (see **Annex A** to this Report, dated London, 21 October 1996), 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 surveys, and in order to achieve the desired end, the Principles of Conduct are intended to be applicable to *all* Classification Societies including those who are not members of the International Association of Classification Societies (**IACS**). Likewise the Principles of Conduct must apply whether or not a given Society is organised as a privately-owned corporation, or is established and/or owned by a Government and organised as a public corporation, or is otherwise structured.

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. A claimant would in such case need to prove either that the Society had not complied with the Principles of Conduct or that these standards were so obviously deficient in the respect material to the case that the Society could not reasonably have applied them. The Group is however aware that experience may from time to time require review and adjustment of the Principles of Conduct by the Group.

Virtually from the outset of its work, the Group has considered whether the Classification Societies should be brought within the ambit of the International Convention on Limitation of Liability for

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Maritime Claims; its conclusion is 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. It is the strong consensus of the Group that the Classification Societies should be afforded protection under an international convention on Limitation of Liability. To provide at least a partial answer for the present to these concerns, the CSJWG has produced a set of model contractual clauses (see **Annex B** to this Report, dated London, 10 March 1997) which, *inter alia*, regulate and limit the liability of the Societies. In the form now proposed by the Group, these clauses stand as recommended models for use by individual Societies, which may modify them in accordance with commercial practice, particular national law or regulation, or otherwise as found appropriate.

The model clauses are divided into Part I dealing with agreements between the Classification Societies and Governments concerning statutory survey and certification work, and Part II dealing with the Rules for classification of ships — in so far as these Rules form part of the contractual agreement between the Classification Society and the shipowner. Part I is self-explanatory. As to the regulation of liability arising in the performance of statutory survey and certification work, it is the view of the Group that because of the inherent public policy issues this is best dealt with by encouraging the adoption of appropriate national legislation as well as embodying the suggested provisions in the agreements between Classification Societies and Governments. Part II of the model clauses is subdivided into an enumeration of the responsibilities of the Societies and the shipowners respectively on the one hand, and the liability and contractual limitation of the Societies on the other hand.

With regard to the exposure of the Classification Societies to claims both by shipowners and by third-party plaintiffs, it is important to note at the outset that there has been no attempt to give the Societies any immunity from suit upon a claim arising out of activities related to the Rules; it is a strongly-held view within the Group that civil litigation and/or the threat of litigation operates as a spur to awareness of the damaging consequences of certain acts or omissions. The Societies which accept the model clauses will by so doing recognise the duty of reasonable care (or its equivalent under applicable national law) towards the shipowners in the performance of their classification functions.

In developing the provisions of the model clauses, which provide some limitation of the civil liability of the Classification Societies, a number of alternatives were considered. Foremost among these was

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the basing of limitation upon the tonnage (grt) of the ship in question, as in the Limitation Convention and commonly in national laws regarding shipowners' limitation of liability. But while the classic limitation of a shipowner's liability has been the *fortune de mer* — the value of the ship, tackle, and pending freight — this is not accepted by the Societies as a valid measure of the risk of a Classification Society, which performs essentially the same services regardless of the size or value of the classed ship. Uniform among the Rules of the various Classification Societies is the declaration that classification and certification do not constitute a warranty of the seaworthiness of the ship, which the Societies have always held not to be and never to have been the purpose of classification. It is not the size of the ship, but the service rendered by the Society — whose value is measured by the amount of the fee for the service which is payable by the shipowner — which in the final consensus of the Group forms an acceptable basis upon which to calculate a limitation of liability.

In formulating the clauses dealing with limitation of liability, the Group examined a number of provisions presently existing in the Rules of several Societies. For example, the limitation of a multiple of the relevant fee in the Rules of one Society is 5, with a set amount of liability if no fee has been charged. The multiple of fee in the Rules of another Society is 10 or a stated amount - whichever is greater. This limitation may be increased in some instances by the purchase of a higher multiple: the Rules of one Society provide that a multiple of up to 25 may be secured by the shipowner prior to actual performance of the service(s), upon payment of an additional fee for each unit of increase in limitation. Based upon such examples of current practice, 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 greater — but does not cap the limitation amount by a stated figure.

Thanks are due to those who have given freely of their time to participate in this work —

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Respectfully submitted,

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## ANNEX A

**PRINCIPLES OF CONDUCT  
FOR CLASSIFICATION SOCIETIES****Introduction**

1. The following Principles of Conduct for Classification Societies have been drafted on the initiative of the Comité Maritime International (CMI) by a Joint Working Group of representatives of concerned Non-Governmental International Organisations, as described in the Group's Report. These Principles of Conduct are intended to be consistent with and to develop further the Guidelines for the authorisation of Organisations acting on behalf of the Administration, as established by the International Maritime Organization (IMO).<sup>1</sup>
2. Each Classification Society which adopts these Principles of Conduct shall maintain a status under national law such that, with respect to the surveys which it carries out and the reports and certificates which it issues, it stands independent of shipowners,<sup>2</sup> governments (except when acting as the agent of a government for purposes of statutory survey and certification) and all other parties having an interest in classification or statutory certification of a ship or ships.<sup>3</sup> The Classification Society shall not enter into any agreement or understanding which would contravene its independence.
3. Each Classification Society which adopts these Principles of Conduct shall ensure that the agreed services pursuant to its Rules for classification or its agreement for statutory certification are performed impartially and in good faith.
4. Each Classification Society which adopts these Principles of Conduct undertakes via its contracts with clients to perform all agreed services related to ship classification and statutory certification using reasonable skill, care and judgement.

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<sup>(1)</sup> See, e.g., Res. A.789(19) of November 1995.

<sup>(2)</sup> "Shipowner" for the purposes of these Principles of Conduct shall mean the individual or juridical person in a contractual relationship with the Classification Society.

<sup>(3)</sup> "Ship" for the purposes of these Principles of Conduct shall include any type of vessel or other unit which is classed with or otherwise surveyed or certificated by the Classification Society.

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5. Each Classification Society which adopts these Principles of Conduct accepts the following duties:
  - (a) To publish Rules for the classification of ships and Guidelines for other services, to review them regularly, and to update them when necessary;
  - (b) To carry out its plan approval and its surveys in accordance with the requirements set forth in its Rules and Regulations and its other published requirements;
  - (c) To establish and maintain an international network of offices to provide survey and certification services where they are customarily required;
  - (d) To utilise suitably qualified persons in the performance of its services;
  - (e) To achieve and to maintain compliance with the International Association of Classification Societies (IACS) Quality System Certification Scheme (QSCS), as revised, or, at the discretion of the individual society, with a published quality system based upon the ISO 9000 series of quality system standards and which is at least equivalent to the IACS QSCS in effect; and
  - (f) To carry out a programme of technical research and development related, but not necessarily confined, to improvement of ship and equipment safety and of classification standards.
6. The provisions of the quality system of the classification society shall govern all matters related to performance, conduct and objectives.

**Standards of Practice and Performance:**

Each Classification Society which adopts these Principles of Conduct undertakes to exercise the following standards of practice and performance in discharging its duties and responsibilities:

*A: Technical, administrative and managerial:*

- (a) To establish and maintain such personnel and management structure as will ensure the performance of agreed services in accordance with its respective quality system;
- (b) To maintain its Rules, Regulations and Guidelines in a systematic form;
- (c) To take such action with regard to the application of its Rules, Regulations, Guidelines and other requirements as will facilitate compliance with them;
- (d) To comply with the applicable requirements of national maritime Administrations for the statutory survey and certification duties delegated to it in respect of ships flying their respective flags.

*B. Technical personnel:*

- (a) To establish and maintain appropriate standards for training and qualification of its technical staff;
- (b) To establish and maintain periodic reviews of such standards for training and qualification;
- (c) To require, prior to an individual's performance of plan approval, surveys or other engineering services, education of such technical staff by means of successful completion in a recognised institution<sup>4</sup> of a course of relevant technical studies; and either
  - (i) successful completion of a programme of technical training;<sup>5</sup> or
  - (ii) sufficient and documented prior employment experience at an appropriate technical level and relevant to their authorised tasks.

*C. Certificates and reports:*

- (a) To issue classification reports and, where appropriate, certificates in conformity with its Rules and Regulations, and to issue statutory certificates in accordance with the applicable requirements of national maritime Administrations.
- (b) To maintain records of the documents referred to in (a) for so long as the ship in question remains classed by the Society, plus a further period of at least five years thereafter.
- (c) To make copies of the documents referred to in (a) available:
  - (i) upon request, to the owner or other person in an equivalent contractual relationship with the Society;
  - (ii) to third parties when authorised in writing by the owner or other person in an equivalent contractual relationship with the Society or when directed to do so by judicial or administrative process; and
  - (iii) to the flag or other national Administration having the necessary legal authority.

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<sup>(4)</sup> The term "recognized institution" includes but is not limited to:

- (i) degree-granting academic institutions; and
- (ii) training organizations or programs certified by flag Administrations in accordance with standards established by the International Maritime Organization.

<sup>(5)</sup> "The RO [Recognized Organization] should have implemented a documented system for qualification of personnel and continuous updating of their knowledge as appropriate to the tasks they are authorized to undertake. This system should comprise appropriate training courses including, *inter alia*, international instruments and appropriate procedures connected to the certification process, as well as practical tutored training; and it should provide documented evidence of satisfactory completion of the training." Report of the IMO Sub-Committee on Flag State Implementation, FS13/17, 23 March 1995, Annex 5, p.8.

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(d) To publish periodically a register containing the principal particulars of ships relevant to classification.

*D. Confidentiality:*

Subject to Section C above, each Classification Society which adopts these Principles of Conduct undertakes to treat as confidential all documents, materials and information relating to classification and statutory matters.

**ANNEX B****MODEL CONTRACTUAL CLAUSES****Introduction**

The following model contractual clauses have been drafted on the initiative of the Comité Maritime International (CMI) by a Joint Working Group of representatives of concerned Non-Governmental International Organisations, as described in the Group's Report. These clauses are intended to reflect the increasingly important role which Classification Societies play in maritime affairs with regard to safety, not only in the performance of quasi-governmental functions with regard to statutory survey and certification but also in the performance of their traditional classification work for the maritime industry.

In this regard, attention is called to IMO Assembly Resolution A.789(19) and MSC Circ. 710 / MEPC Circ. 307 on Guidelines for the Authorization of Organizations Acting on Behalf of the Administration,<sup>1</sup> and to EU Council Directive 95/57/EC of 22 November 1994 on Common Rules and Standards for Ship Inspection and Survey Organizations, &c.

The model clauses define and clarify, subject to applicable national law, the circumstances under which the civil liability of the Societies and their employees and agents should be regulated or limited. The rationale for such regulation and limitation is set forth in the Group's Report.

These model clauses are intended to be read in conjunction with both the Report and the Principles of Conduct for Classification Societies produced by the same Joint Working Group and dated 21 October 1996.

**MODEL CLAUSES****PART I : For inclusion in agreements between the Societies and Governments —**

1. (a) The duties and functions of [*Classification Society*] pursuant to this agreement are as specified in Annex I attached.<sup>2</sup>
  - (b) [*Administration*] shall be given the opportunity to verify that the quality system and performance of [*Classification Society*] continues

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<sup>(1)</sup> As expanded in the Reports and Annexes of the Flag State Implementation Subcommittee (FSI) of the IMO's MSC and MEPC, currently FSI 3/17 [23 March 95], §§8.35-8.38 and Annex 6, §§6.5-6.6.

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to comply with the requirements specified in Annex I attached. In this regard [*Administration*] may utilise appropriate audit methods, including recognition of audits performed on [*Classification Society*] by an independent body of auditors effectively representing the interests of [*Administration*], such as the IACS QSCS auditors. The Principles of Conduct for Classification Societies referred to in the Introduction above shall be the standard <sup>3</sup> for measurement of performance by [*Classification Society*].

- (c) [*Classification Society*] shall report to [*Administration*], in accordance with the procedures agreed between them, the information specified in Annex II <sup>4</sup> concerning surveys and certification performed by [*Classification Society*] on behalf of [*Administration*], and shall promptly notify [*Administration*] of any change in the status of the classification of a ship which is classed by [*Classification Society*] and is flying the flag of [*State*].
2. In carrying out the duties and responsibilities specified in Annex I, whether pursuant to applicable international agreements, conventions, national legislation, or this agreement, [*Classification Society*] acts solely as the agent of [*Administration*], under whose authority or upon whose behalf it performs such work.
  3. In any claim arising out of the performance of a duty or responsibility, or out of any certification with regard to work covered by Annex I, [*Classification Society*] and its employees and agents shall be subject to the same liabilities and be entitled to the same defences (including but not limited to any immunity from or limitation of liability) as would be available to [*Administration's*] own personnel if they had themselves performed the work and/or certification in question.<sup>5</sup>

**PART II: For inclusion in the Rules of the Societies (which contain the terms of agreements between the Societies and Shipowners) —**

4. Responsibilities of [*Classification Society*] —
  - (a) [*Classification Society*] when acting pursuant to these Rules certifies

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<sup>(2)</sup> A model for Annex I is not offered. It is intended that Annex I should contain the technical and operational requirements to be agreed between the Government and the Classification Society.

<sup>(3)</sup> Without prejudice to the application of other internationally-agreed standards which are at a minimum substantially equivalent to those contained in the Principles of Conduct.

<sup>(4)</sup> It is intended that Annex II should contain the detailed reporting requirements to be agreed between the Government and the Classification Society.

<sup>(5)</sup> References to applicable provisions of national law should be added following the text of the clause. (Amendment of national law may need to be pursued in some States.)

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the classification of a ship<sup>6</sup> to the shipowner,<sup>7</sup> and does not certify the condition of the ship for any purpose other than the assignment of classification under these Rules.

(b) In carrying out its obligations pursuant to these Rules, [*Classification Society*] agrees that the Principles of Conduct for Classification Societies referred to in the Introduction above shall be the standard for performance of its services.

5. Responsibilities of the shipowner —

(a) It is the responsibility of the shipowner:

- (i) to maintain a classed ship, its machinery and equipment in compliance with the Rules and requirements of [*Classification Society*]; and
- (ii) to operate the ship in accordance with all applicable Rules and conditions of class.

(b) It is the responsibility of the shipowner to ensure:

- (i) that plans and particulars of any proposed alterations to the hull, equipment or machinery which could invalidate or affect the classification of the ship are submitted to [*Classification Society*] for prior approval; and
- (ii) that all repairs or modifications to hull, equipment or machinery which are required in order that a ship may retain her class are carried out by the shipowner in accordance with the Rules and requirements of [*Classification Society*].

(c) It is the responsibility of the shipowner:

- (i) to make a classed ship available for survey in such a manner, location and condition as to ensure that all surveys necessary for the maintenance of class can be carried out by [*Classification Society*] at the proper time and in accordance with the Rules and requirements of [*Classification Society*]; and
- (ii) to ensure that there is compliance with the requirements of [*Classification Society*] resulting from such surveys.

(d) It is the responsibility of the shipowner to inform [*Classification Society*] without delay:

- (i) of any change of the ship's flag, ownership, management or name ;
- (ii) of any collision or grounding of the ship;
- (iii) of any other damage, defect, breakdown, incident of navigation

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<sup>(6)</sup> "Ship" for the purposes of these Principles of Conduct shall include any type of vessel which is classed with or otherwise surveyed or certificated by the Classification Society.

<sup>(7)</sup> "Shipowner" for the purposes of these Principles of Conduct shall mean the individual or juridical person in a contractual relationship with the Classification Society.

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- or proposed repair which might invalidate or affect the ship's classification; and
- (iv) of any change in the intended or actual use of the ship which might invalidate or affect the ship's classification.
6. A failure by the shipowner to fulfil the foregoing responsibilities may in the reasonable exercise of discretion by [*Classification Society*] result in, among other measures, suspension or cancellation of classification or the withholding of certificates or reports by [*Classification Society*].<sup>8</sup>
7. [*Classification 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:
- (a) attributed to [*Classification Society*] or its employees, agents or other persons acting on behalf of [*Classification Society*], when such act or omission violates the standard of reasonable care;<sup>9</sup> or
- (b) by any employee of [*Classification Society*] unless acting outside the terms or scope of his employment; or
- (c) by any agent or other person acting on behalf of [*Classification Society*], unless such act or omission exceeds the authority granted by [*Classification Society*] to such agent or such other person.
8. Without prejudice to clause 7 above, in respect of any claim arising out of the performance of services pursuant to these Rules, [*Classification Society*] shall not be liable for any indirect losses.
9. Any liability of [*Classification Society*] for a claim arising out of the performance of a service pursuant to these Rules shall be subject to limitation as follows:
- (a) The limit of liability of [*Classification Society*] in respect of a single claim shall be the amount of the fee for the service giving rise to the liability multiplied by 10 or 3,000,000 units of account, whichever is the greater amount.
- (b) When more than one service has given rise to liability, the service for which the highest fee was charged shall be the service upon which calculation of the limit of liability is based.

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<sup>(8)</sup> It is recognized that it is also a common practice of Classification Societies to provide in their Rules that failure of the shipowner to make timely payment of fees charged for services rendered may, in the reasonable exercise of discretion by the Society concerned, result in suspension or cancellation of classification or the withholding of certificates or reports.

<sup>(9)</sup> Different standards or terms may be substituted in accordance with applicable national law.

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- (c) The unit of account referred to above is the Special Drawing Right ("SDR") as defined by the International Monetary Fund. The SDR shall be converted into the national currency of the State of the claimant's nationality on the date when the fee for the service giving rise to liability was charged or the date of the occurrence of the incident, whichever is earlier.
10. Any dispute arising out of or in connection with these Rules and any issues concerning responsibility, liability or limitation of liability shall be determined in accordance with the law of [State].<sup>10</sup>
11. Any suit or proceeding in respect of a claim arising out of or in connection with these Rules or the performance by [Classification Society], its employees or agents of a function pursuant to these Rules shall be instituted in or transferred to the appropriate court of [State and venue],<sup>11</sup> which shall have exclusive jurisdiction to hear and determine any such dispute.

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<sup>(10)</sup> This will normally be the State of domicile or situs of the Society.

<sup>(11)</sup> In order to survive the common law test of *forum non conveniens*, the venue must be a reasonable one in terms of its legal system, the demonstrated competence of its courts in such cases, and its convenience to the claimant and to witnesses.