Questionnaire on Classification Societies

Responses from The Maritime Law Association of the United States

August 31, 2020

Question 1:

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

Response 1:

Legislation and regulatory law in the U.S. do not directly address classification activities in the private sector.

Title 46, Section 3316, Subsection (c) of the United States Code addresses classification of U.S. government vessels and inspections on behalf of the U.S. government and some of its provisions touch upon classification activity in the U.S. In relevant part, the statute provides:

> (c) (1) A classification society (including an employee or agent of that society) may not review, examine, survey, or certify the construction, repair, or alteration of a vessel in the United States unless the society has applied for approval under this subsection and the Secretary has reviewed and approved that society with respect to the conduct of that society under paragraph (2).
>
> (2) The Secretary may approve a person for purposes of paragraph (1) only if the Secretary determines that—
>
> (A) the vessels surveyed by the person while acting as a classification society have an adequate safety record; and
>
> (B) the person has an adequate program to—
>
> (i) develop and implement safety standards for vessels surveyed by the person;
>
> (ii) make the safety records of the person available to the Secretary in an electronic format;
>
> (iii) provide the safety records of a vessel surveyed by the person to any other classification society that requests those records for the purpose of conducting a survey of the vessel; and
>
> (iv) request the safety records of a vessel the person will survey from any classification society that previously surveyed the vessel.

There are also provisions in sec. 3316 for delegations to foreign classification societies.

Related regulations for Classification Societies' activities as Recognized Organizations are contained in Title 46, Part 2, Subpart 2.45, entitled "Classification Society Activities." Subsection 2.45-10(a) states:

> A classification society (including an employee or agent of that society) must not review, examine, survey, or certify the construction, repair, or alteration of a vessel in the United States unless it is approved under the provisions of this subpart.

Further, Section 2.45-15, entitled "Approval Requirements," states:

> (a) A classification society may be approved for purpose of §2.45-10 if the following conditions are met:
>
> (1) Vessels surveyed by the classification society must have a worldwide port state control detention rate of less than 2 percent based on the number of Recognized Organization (RO)-related detentions divided by the number of vessel inspections for at least 40 port state control inspections for the past 3 years;
>
> (2) The classification society must not be identified in the most recent publication of "Port State Control in the United States" as a Priority I and as having more than one RO-related detention for the past 3 years;
>
> (3) The classification society must comply with the minimum standards for an RO recommended in IMO Resolution A.739(18), Appendix 1 (incorporated by reference, see §2.45-5.);
>
> (4) The classification society must be an RO for at least one country under a formal written agreement that includes all of the elements described in IMO Resolution A.739(18), Appendix 2 (incorporated by reference, see §2.45-5.);
>
> (5) The referenced country that is cited for satisfaction of the requirement of paragraph (a)(4) of this section for which the classification society is an RO—
>
> (i) Must be signatory to each of the following: The International Safety of Life at Sea Convention (SOLAS), the International Convention on the Prevention of Pollution from Ships (MARPOL 73/78), the International Convention on Load Lines (ICLL), 1966, and the Protocol of 1988 relating to the ICLL, 1966; and
>
> (ii) Must not be identified as a flag state targeted for additional port state control action by the Coast Guard or any regional port state control secretariat.
>
> (6) The classification society must use a system to—

(i) Make its safety records and those of persons acting on behalf of the classification society available to the Coast Guard in electronic format;

(ii) Provide its safety records and those of persons acting on behalf of the classification society to another classification society that requests those records for the purpose of conducting surveys of vessels; and

(iii) Request the safety records of a vessel to be surveyed from any other classification society that previously surveyed that vessel.

(b) Where sufficient performance records are not available from a regional port state control secretariat, the Coast Guard may consider an equivalent safety performance indicator proposed by the classification society seeking approval.

Question 2:
On what basis does your court retain jurisdiction in respect of a third-party claim against a Classification Society:

Response 2:

Each of the following factors may be considered by a U.S. court in deciding whether to exercise jurisdiction:

1. Domicile of the defendant;
2. Locus delicti;
3. Joinder with other defendants; and
4. Potentially the jurisdiction stipulated in the Classification contract/Certificate and/or the Rules of the Society.

Question 3:
How many cases – if any – concerning the liability of Classification Societies to third parties, have been decided in your country?

Response 3:

U.S. courts have decided at least ten cases concerning the liability of Classification Societies to third parties. The seminal case regarding liability of Classification Societies, generally, is *Great American Insurance Company v. Bureau Veritas*, 338 F. Supp. 999, 1972 A.M.C. 1455 (S.D.N.Y. 1972), *aff'd*, 478 F.2d 235, 1973 A.M.C. 1755 (2d Cir. 1973) (dismissal of negligence and breach of warranty claims where plaintiff failed to prove causal relationship between Class Society's alleged negligence and vessel's loss). In most cases, courts have rejected liability of Class due to its limited involvement with the vessel and relatively minor fees, and the vessel owner's non-

delegable duty to make the vessel seaworthy and obligation to report defects to Class. *See, e.g., id.* In the few cases where liability has been found, there has been a showing of actual reliance on the Class Certificate and/or other certificates and reports. For example, in *Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp.*, 346 F.3d 530 (5th Cir. 2003), the U.S. Court of Appeals for the Fifth Circuit held that, "general maritime law cautiously recognizes the tort of negligent misrepresentation as applied to classification societies." However, that case did not involve a traditional classification activity; rather, the alleged negligent survey in question involved a ship sale survey in which the buyer established that it relied on the negligent survey report in purchasing the vessel. There are no known cases of third-party liability being imposed which involved traditional classification activity in the U.S.

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:

U.S. courts have rendered decisions involving each of the above. See Response 3. In addition, there have been claims for personal injury and death although these are rare in view of the shipowner's non-delegable duty to make the vessel seaworthy and are usually adjudicated via jury trials or settled.

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:

Third-party claims against Classification Societies in the U.S. have usually been based on tort theories including negligence, which generally requires that a duty of care was owed to the plaintiff and a breach of that duty was the actual and proximate cause of damages. Arguably, negligent misrepresentation is the only third-party claim against a Classification Society that is cognizable in U.S. maritime law. A claim sounding in negligent misrepresentation requires the following elements: 1) the supply of false information for the third party's guidance in a business transaction; 2) failure to exercise reasonable care in gathering the information; 3) justifiable reliance on the false information ; and 4) a pecuniary loss by the third party. *See Otto Candies, L.L.C.*, 346

F.3d at 535 (5th Cir. 2003) (citing Restatement (Second) of Torts §552). In this connection, the Court of Appeals for the Fifth Circuit stated that:

> The mere foreseeability that third parties may rely on such reports or certificates is also insufficient for purposes of section 552. … Comments to section 552 make clear that even parties that customarily rely on certain information are not entitled to bring a section 552 claim unless the information supplier knew at the time it supplied the information that it was for their benefit and guidance.
> …
> Thus, in this context, we reject any implication that classification societies can be liable for negligent misrepresentation to parties, including without limitation seamen, longshoremen, passengers, cargo owners, and charterers that may rely upon a survey or class certificate, absent actual knowledge by the classification society that the certificate or survey report was being provided for the guidance and benefit of the party.

Id. at 535-36.

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:
We are not aware of any such court decision.

Question 7:
Is a certificate of classification considered in your country as a certificate of seaworthiness?
If so, what is the reasoning?

Response 7:

No. Courts have stated that a Classification Certificate is merely an attestation that a vessel meets the requirements of the Classification Society's Rules based on the submittals provided for the design approval and at the time of the survey. *See, e.g., Sundance Cruises v. American Bureau of Shipping*, 7 F.3d 1077, 1078-79, 1994 A.M.C. 1, 1-2, 5-6, 8 (2d Cir. 1993). Thus, neither the shipowner nor any third party is entitled to rely on a classification certificate as a guarantee that a vessel is seaworthy. *See Otto Candies, L.L.C.*, 346 F.3d at 538 (5th Cir. 2003) ("The certificate or survey in no way guarantees a vessel's seaworthiness, however, but extends only as far as the nature of the survey performed.") Moreover, the shipowner, not the Classification Society, has a non-delegable duty under U.S. law and must remain ultimately responsible for the ship's condition. *Id.* at 535. U.S. courts have determined that it is inequitable to place ultimate responsibility for seaworthiness on a Classification Society having minimal and only episodic contact with a vessel, while permitting the shipowner/charterer, who possesses

far more familiarity with, and operational control over the vessel, to escape or transfer responsibility. *See Great American Insurance Company*, 338 F. Supp. at 1012 (S.D.N.Y. 1972). The imposition of such liability would effectively render the Classification Society an insurer of any classed vessel, which is not commensurate with the episodic contact that a Classification Society has with a vessel or the relatively minor fees it charges. *See id.; Sundance Cruises Corp.*, 7 F.3d at 1084 (2d Cir. 1993).

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:

The Rules of a Classification Society represent an industry standard on minimum requirements for achieving and maintaining classification. They serve as notice of the classification requirements and may be examined when a third party alleges that they were not followed in the issuance of a Classification Society's allegedly inaccurate report or certificate. Class certificates, Class surveys, and Confirmations of Class usually contain their own terms and conditions or subject the document to Class Rules, and a legal question arises as to whether third parties claiming reliance on the Rules, Certificates of Classification or survey reports should be bound to their provisions and stipulations. Under the direct benefit estoppel theory, U.S. courts have bound third parties to arbitration and forum selection clauses. To date we are unaware of any cases binding third parties to classification disclaimers or limitations of liability.

For example, in *Hellenic Investment Fund, Inc. v. DNV*, 464 F.3d 514, 2006 A.M.C. 2312 (5th Cir. 2006), the court held that the plaintiff was bound by a forum selection clause in the DNV rules, noting that the Certificate provided that it was, "[i]ssued under the provisions of the Rules of Det Norske Veritas" and stating that, "Hellenic cannot embrace the Rules by bringing a claim under *Otto Candies* alleging, in essence, a violation of DNV Rules without accepting the consequence of those Rules."

However, in the *Prestige* litigation, the district court noted that the classification certificate stated:

> [ABS] represents solely to the vessel Owner or client of [ABS] that when assigning class it will use due diligence ... [ABS] further represents to the vessel Owner or other client of [ABS] that its certificates and reports evidence compliance only ... in accordance with the terms of such certificate of report. Under no circumstances whatsoever are these representations to be deemed to relate to any third party.

Reino de España v. Am. Bureau of Shipping, 729 F. Supp. 2d 635, 638 (S.D.N.Y. 2010), *aff'd on other grounds sub nom. Reino de España v. Am. Bureau of Shipping, Inc*., 691 F.3d 461 (2d Cir. 2012).

The Court went on to state that:

> Spain has identified no precedent for the duty it posits to avoid recklessness, and this Court is not persuaded that any such duty to coastal states attended ABS's vessel certification activities under federal maritime law. Spain's proposed rule—that a classification society owes a duty to refrain from reckless behavior to all coastal states that could foreseeably be harmed by failures of classified ships—would constitute an unwarranted expansion of the existing scope of tort liability. More importantly, by relieving shipowners of their *646 ultimate responsibility for certified ships, such a rule would be inconsistent with the shipowner's non-delegable duty to ensure the seaworthiness of the ship, a duty that is grounded in the practical reality that the shipowner "is ultimately ... in control of the activities aboard ship." *Sundance Cruises Corp.,* 7 F.3d at 1084 (noting that the shipowner "had full responsibility for the conversion, repairs and maintenance of the vessel"). **Spain's proposal would also run afoul of the intentions of the shipowners and classification societies contracting for classification services, as demonstrated by the instant certification's explicit disclaimer of any representation to a third party**, and the disproportionality between the relatively small fee paid to the classification society and the potentially limitless scope of third party liability. *Id.*

Reino de España, 729 F. Supp. 2d 635, 645–46 (S.D.N.Y. 2010) (emphasis added).

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:

Classification Societies may avail themselves of defenses similar to those that could be invoked by other defendants responding to tort claims. Although not an exhaustive list, these defenses may include: failure to state a claim upon which relief may be granted, time bar, laches, waiver, estoppel, accord and satisfaction, arbitration and award, release, claim preclusion, issue preclusion, fraud, assumption of the risk, and contributory negligence.

By far the most important defense is the lack of causation. That is, the failure to detect did not cause the damages being claimed.

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:

As stated in Response 8, we are not aware of any case addressing whether a limitation of liability provision contained in a Class certificate, Class Rules, or other Class document could bind a third party.

It has been argued that a bargained-for limitation of liability enforceable between the contracting parties should be logically extended to those parties claiming a benefit or reliance upon representations made by a Classification Society that arise solely out of a contractual undertaking by the Classification Society. *See* Robert G. Clyne and James A. Saville, Jr., *Classification Societies and Limitation of Liability*, 81 Tul. L. Rev. 1399, 1429 (2007). The authors argued that the imposition of unlimited liability would provide a third party with greater rights against a Classification Society than the original contracting party had under its contract for classification, and unfairly render the Classification Society an insurer of any classed vessel, which is not commensurate with the Classification Society's episodic contact with a vessel or the relatively minor fees it charges. *Id.* at 1406-07, 1430-31; *see also Great American Insurance Company* , 338 F. Supp. at 1012 (S.D.N.Y. 1972) (discussing, generally, the undesirable effects of exposing Classification Societies to liability that is not commensurate with their involvement with the vessel, the fees charged, and the intent of the parties); *Cargill Inc. v. Bureau Veritas*, 902 F. Supp. 49, 52, 1996 A.M.C. 577, 580 (S.D.N.Y. 1995) (extending the reasoning of *Great American* to claims of third parties). The authors further argued that, as a matter of public policy, no one benefits if the industry dedicated to fostering and improving safety at sea collapses under the weight of unlimited liability to third parties. Clyne and Saville, 81 Tul. L. Rev. at 1431.

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:

The same general principles of law apply to all negligence and negligent misrepresentation claims. See Response 5 above for the elements of these causes of action. However, U.S. courts do treat personal injury/death claims differently from purely economic loss claims. For example, the economic loss rule set forth by the United States Supreme Court in *Robins Dry Dock Co. v. Flint*, 275 U.S. 303 (1927), stands for the proposition that a party that does not have a proprietary interest in property which is physically damaged has no cause of action for their purely economic losses. Moreover, in the context of marine products liability, the U.S. general maritime law provides that no tort cause of action is available when a product injures or damages itself. *See East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858 (1986). In such cases, the parties (even third parties not in privity) are limited to a breach of warranty claim.

However, damage to other property or personal injury/death arising out of the defective product does give rise to a tort theory of recovery. *East River*, 476 U.S. at 871-75. The economic loss doctrine set forth in *East River* has been applied to claims against a classification society. *See Shipping Corp. of India v. ABS*, 744 F. Supp. 447 (S.D.N.Y. 1990) (granting summary judgment in favor of classification society on third party's tort claim).

These principles of U.S. maritime law raise the question as to whether a classification society sued for economic loss only can rely on its warranties and terms and conditions including a limitation of liability. To our knowledge no court has taken up the issue. For a greater discussion, however, please see the law review article cited in Response 10.

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:

In general, allegations of Classification Society liability must be litigated or arbitrated (where a contractual agreement to arbitrate applies). In U.S. federal courts which have original jurisdiction over admiralty cases including most cases involving classification societies, the Federal Rules of Civil Procedure apply and there are special Admiralty Rules contained therein.

In the U.S. judicial system, expert witnesses are almost always private rather than court-appointed. Fact and expert witnesses are questioned by the parties' attorneys in pre-trial depositions and trials and occasionally by judges at trial. Although the U.S. Coast Guard and the National Transportation Safety Board periodically conduct investigations of maritime incidents, and hear testimony from various witnesses (sometimes including Classification Society personnel), in an effort to identify factors that contributed to an incident in order to make safety recommendations for the prevention of similar ones, these investigations do not determine whether a Classification Society or any other party has civil liability. The conclusions of the USCG and NTSB reports are not admissible as evidence in litigation.

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:

Yes. The specific time bar would depend on the nature of the claim and the jurisdiction in which the claim is filed. Assuming the provisions of the contract for classification or

the Class rules do not apply, the statute of limitations for a tort claim can be anywhere from two to six years depending on the state court jurisdiction. Under the general maritime law, the doctrine of laches applies and generally follows an analogous state or federal prescriptive period.