

2011

# Limitation of liability of classification societies

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**WORLD MARITIME UNIVERSITY**

Malmö, Sweden

**Limitation of Liability of Classification Societies**

by

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**Republic of Korea**

A dissertation submitted to the World Maritime University in partial  
fulfillment of the requirements for the award of the degree of

**MASTER OF SCIENCE**

**in**

**MARITIME AFFAIRS**

**MARITIME LAW AND POLICY**

2011

## DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

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## Abstract

Title of Dissertation: **Limitation of Liability of Classification Societies**

Degree: **MSC**

Classification societies have existed for more than 200 years and have played a crucial role to improve and to secure safety in the international shipping industry by virtue of their highly qualified surveyors and knowledge of vessels and technology. However, recently, their role and credibility in the maritime sphere has been undermined by a series of fatal casualties that resulted in several lawsuits to claim huge compensations for damage against classification societies. In this vein, the dissertation analyzes current legal regimes on the classification societies in selected countries, and examines existing international conventions in terms of application for the liability of classification societies. In addition, some considerations were evaluated to develop a new international convention.

Traditionally, in claims against classification societies, the courts in most countries have held decisions in favor of them. However, at present, the courts seem to envisage their liability, although they still maintain a position of reluctance to hold them liable due to consideration of current policies including non-delegable duty of shipowners, who have to ensure the seaworthiness of their vessels, and the absence of a common legal regime to limit the liability of classification societies.

Thus, considering extension of activities of classification societies, specific legislation for the liability of them would be necessary in the international maritime industry to protect the current classification system and also to care for classification societies' other parties suffering huge damage caused by negligence of the societies. In this regard, it is preferable to develop a new international convention with considerations including a legal basis for liability such as a fault-based liability system and harmonization of other existing liability regimes for determining a reasonable level of limitation.

**KEYWORDS:** Classification, Classification society, Contractual party, IACS, Liability, Limitation, negligence, Third party

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## List of Abbreviations

ABS	American Bureau of Shipping
BV	Bureau Veritas
CCS	China Classification Society
CLC	International Convention on Civil Liability for Oil Pollution Damage
ClassNK(or NK)	Nippon Kaiji Kyokai
CMI	Comité Maritime International
CRS	Croatian Register of Shipping
DNV	Det Norske Veritas
EMSA	European Maritime Safety Agency
EPIL	Encyclopedia of Public International Law
GL	Germanischer Lloyd
HNS (Convention)	International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea
IACS	International Association of Classification Societies
IMO	International Maritime Organization
IOPC Fund	International Oil Pollution Compensation Funds
IRS	Indian Register of Shipping
ISM Code	International Safety Management Code
KRS	Korean Register of Shipping
LLMC	Convention on Limitation of Liability for Maritime Claims
LR	Lloyd's Register
MARPOL	International Convention for the Prevention of Pollution from Ships
OPA	Oil Pollution Act
PRS	Polish Register of Shipping



RINA	Registro Italiano Navale
RS	Russian Maritime Register of Shipping
SOLAS	Convention for the Safety of Life at Sea
US	United States of America

## 1. Introduction

Lord Steyn stated in the House of Lords that;

“[o]wners have apparently never successfully sued a classification society in England or elsewhere for breach of a contractual or tortious duty in and about the performance of their contractual engagement for a survey of a damaged vessel.”<sup>1</sup>

However, it seems that the factual situation has changed, as time has passed. Recently, ABS and RINA, which are full members of IACS, had claims brought against them by various parties for huge amounts of compensation based on their negligent surveys on the vessels, *Prestige* and *Erika* which were deemed to cause vast environmental damage in numerous coastal States. Additionally, because of these casualties, EU took actions to monitor and supervise recognized classification societies by adopting administrative sanctions known as Erika I, Erika II and post-Erika and amending existing regulations on activities of classification societies. IMO also has taken actions to develop IMO resolution A.739(18) *Guidelines for the authorization of organizations acting on behalf of the administration in 1993*, IMO resolution A.789(19) *Specifications on the survey and certification functions of recognized organizations acting on behalf of the administration in 1995* and their amendments to provide international standards for recognized organizations, which are mainly composed of classification societies, and to regulate them through enforcement of the resolutions by Member States of IMO. Thus, given the fact that classification societies were initially regarded as self-regulating organizations, which regulates themselves by their own quality system in IACS (an international association composed of thirteen major classification societies), the actions that have been taken by various States to audit the auditors might imply that recent classification societies have failed to establish relevant credibility toward their stakeholders who are no longer tolerant of faults or negligence of classification societies that may cause enormous pecuniary damage in the maritime industry.

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<sup>1</sup> *The Nicholas H.* (1995). 2 Lloyd’s Rep 299 (CA) 310.

With regards to their liability, the courts in most countries have seemed reluctant to make a decision that classification societies are liable to their contractual and third parties, even though their faults have been found in the court process. This reluctance, customarily, has originated from the non-delegable duty of shipowners who ultimately have to be responsible for their vessels to be seaworthy so that the classification societies could disclaim a duty that has to be proved by claimants in terms of proximity between the damage and breach of duty in the courts. Furthermore, in present, the court's reluctance has been affected more by policy considerations in that there is no specific international legal regime covering all matters of classification societies' liability that can collapse current classification systems by giving an immense pecuniary burden to them. Moreover, in this regard, if there is absence of classification societies, all Flag States should take over their part of services such as statutory surveys, which may also cause a monetary load to governments.

In other words, even though most of the courts still maintain their position in favor of classification societies, many stakeholders envisaging their liability to indemnify injured parties are trying to undermine this position. Accordingly, considering that the services of classification societies can occur over five continents, it would be necessary for the maritime industry to develop an international standard for the liability of classification societies based on their faults, including clauses to limit their liability as well, so as to motivate classification societies to carry out their services with more care and to preserve the current classification system effectively.

In this regard, this paper will examine the existing legal status of classification societies by virtue of their historical development and the International Associations of Classification Societies. Then, in order to fulfill a further detailed analysis of the legal basis for the liability of classification societies, the UK law,

the US law, and the Korean law will be analyzed and evaluated with regard to their leading cases on this issue. The liability of these entities towards their contracting parties, third parties and towards Flag States will be dealt with, and implications of liability of the societies will also be reviewed in terms of legal analysis of each country. In addition, based on the analysis of each country's law, the current international legal regime in relation to limitation of liability will be examined in terms of major cases concerning the liability of classification societies to elaborate and to afford some principles to facilitate the development of an international convention. The paper will scrutinize existing international conventions to limit the liability in the maritime industry by way of inquiring whether these are applicable to the classification societies. Finally, the paper intends to deliberately provide some crucial principles to be considered if a new convention would be developed in the international perspective.

## 2. Classification societies

### 2.1. The norm of the classification

In former times, ships deemed to be classified according to the condition of their hull and equipment. The classification of ships has been awarded by classification societies who indicated their class by using the capital letters A, E, I, O or U for ships' condition of the hull due to the first use of them by Lloyd's Register of Shipping<sup>2</sup>. Moreover, good (G), middling (M) or bad (B) were used for the classification of the equipment onboard. These letters were replaced with numbers 1 to 3 adding letters later on. For instance, if a ship got 'A1' from a classification society, it meant that it was in the highest class and that it had fully complied with the rules of the classification society.<sup>3</sup> However, nowadays, this phenomenon has varied in different classification societies that give their own symbols or letters to ships that are constructed in compliance with their rules.<sup>4</sup> In addition, these letters no longer indicate classification of ships. In other words, since it is no longer accepted that a vessel fails to meet their standards which correspond to the international regulations as minimum standards, the symbols given by classification societies indicate that ships are in the class, whereas in former time the symbols reflected the class of ships according to the degree of application of their rules in the condition of ships. Hence, the term 'classification' now means no more than the compliance with standards, while the word itself can give other expression to those who have no background of the maritime industry.

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<sup>2</sup> Lay, H.G. (2010). *Marine Insurance – A Text book of the history of marine insurance including the functions of Lloyd's Register of Shipping*. London: Lightning source UK Ltd. p.161, 177

<sup>3</sup> IACS. (2011). *Classification societies – What, why and How?* p.5. Retrieved July 24, 2011 from the World Wide Web:

[http://www.iacs.org.uk/document/public/explained/Class\\_WhatWhy&How.PDF](http://www.iacs.org.uk/document/public/explained/Class_WhatWhy&How.PDF)

<sup>4</sup> American Bureau of Shipping (ABS): A1; Bureau Veritas (BV): I; China Classification Society (CCS): CSA 5/5; Croatian Register of Shipping (CRS): 100A1; Det Norske Veritas (DNV): 1A1; Germanischer Lloyd (GL): 100 A5; Indian Register of Shipping (IRS): SUL; Korean Register of Shipping (KRS): KRS1; Lloyd's Register (LR): 100A1; Nippon Kaiji Kyokai (ClassNK): NS; Polish Register of Shipping (PRS): KM; Registro Italiano Navale (RINA): 100-A-1.1 or C; Russian Maritime Register of Shipping (RS): KM.

Generally, the classification of a vessel includes several different activities in its process to determine whether a vessel is in or out of class. Firstly, a technical review of the design plans and related documents for a new vessel is carried out to verify compliance with the applicable Rules. Secondly, surveyors from a classification society attend the construction of the vessel in the shipyard to check that the vessel is constructed in accordance with the approved design plans and classification rules. Thirdly, surveyors also inspect the relevant production facilities that provide essential components to the ship such as the steel, engine, and generators which should conform to the applicable rules. In addition, they also verify that the components meet the requirements of applicable rules. Then, subsequent to the above process, the ship builder and shipowners can request the classification society to issue a class certificate and if the result of the process is satisfied, the assignment of class may be approved and a certificate of class will be issued. In addition, once in service, the owner must submit the vessel to a specified program of periodical class surveys to keep its class. The periodical surveys would be carried out onboard the vessel to verify that it would be continuously meeting requirements of the relevant rule for maintaining its class.<sup>5</sup>

Through the entire above process, the classification society would verify that vessels are built properly in compliance with the society's rules and regulations for securing the safety of the international shipping industry. However, the classification of a vessel does not guarantee its seaworthiness since it is possible to confirm its seaworthiness only through a very thorough and time-consuming inspection.<sup>6</sup> The aims of the survey for classification are to achieve a balance between safety and economic requirements. In other words, to improve a ship's seaworthiness, the classification should be carried out. At the same time, it requires minimum standards of seaworthiness, reflecting the economic demands

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<sup>5</sup> IACS. (2011). *Supra*. p.7.

<sup>6</sup> Miller, M.A. (1997). Liability of Classification societies from the perspective of United States Law, *Tulane Maritime Law Journal*, Vol.22, No.1. p.83.

of the stakeholders on reducing costs for maintaining its class with a condition which corresponds to the standards.

In this vein, the process of classification recently has roles in the private sector based on a private contract with either shipowners or shipyards and also in the public service upon agreements with Flag States to provide statutory surveys that are normally governed by public law on vessels flying the flag of the states. In other words, classification societies were born initially for covering the interest of the private entities, especially marine insurers, whereas in recent years their services have been extended as public entities based on the agreements of the flag states.<sup>7</sup> Therefore, both services of the classification of a vessel as a private function and statutory services as a public function can be usually afforded from a classification society at the same time.<sup>8</sup>

## **2.2. The evolution of the classification societies**

### **2.2.1. The origin of the classification societies**

After 1690, Edward Lloyd's coffee house on Lombard Street in London was the place where the captains of ships would meet for the maritime trade. In this time, to justify putting one's money behind a voyage venture, it was necessary to assess the risk of whether a ship was seaworthy and was likely to return from its voyage.<sup>9</sup> Subsequently, in 1760, the first register called '*Register of Shipping*' was instituted by a society of underwriters in London to be charged with the independent assessment and to report the result of assessment on constructions and seaworthiness of merchant vessels. It kept records of vessels' information including previous and present names of the vessels, names of the owners and the

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<sup>7</sup> Lagoni, N. (2007). *The Liability of Classification Societies*. Berlin: Springer. p.8.

<sup>8</sup> *Ibid.* p.8

<sup>9</sup> Smith, J.J. (2011). On a flood tide: Classification societies and Canada's marine industry in 2020. *Martin's Marine Engineering Page*. Retrieved Aug 4<sup>th</sup>, 2011 from the World Wide Web: <http://www.dieselduck.net/library/01%20articles/2011-Class%20Society%20-%20JJ%20Smith.pdf>. pp.2-3.

masters, the ports between which the vessel traded, the tonnage, number of crew, and number of guns carried, the port and year of construction, as well as a classification stating the condition of hull and equipment.<sup>10</sup> Then, the Register of Shipping published its first book, the so called '*Green Book*' in 1764 for the exclusive use of the enrolled underwriters, while the information in the book was also available through the *Ship's Lists* that were kept in Lloyd's Coffee House for the general use of shipowners, merchants, masters of vessels and underwriters.<sup>11</sup>

In 1797, the rule of the '*Green Book*' was changed so that the classification of a vessel would be based merely on its place of building and age. In this time, the shipbuilders in southern port of the United Kingdom were regarded as having a higher quality to build ships than those in northern ports. Then, vessels from the south were more favorable as they could be classed for 13 years, whereas the vessels from the north could only be classed for 8 years. This discrimination between builders in different areas of the UK triggered the creation of the new Register Book of Shipping that was known as '*Red Book*' founded by a society of shipowners in 1799 as a competitor to the '*Green Book*'. Nonetheless, after 35 years of the long competition, *the Lloyd's Register of British and Foreign Shipping* in 1834 was established by merging two registers. It is currently known as *Lloyd's Register of shipping* (LR). The first volume of *the Lloyd's Register of British and Foreign Shipping* recorded all vessels of 50 tons or more that were registered in the United Kingdom. However, from 1838, the Register Book included only vessels that had been surveyed by the exclusive surveyors of the classification society. Then, the committee of the society, and not the individual surveyor solely provides a certificate of class. In addition, based on the recommendation of the Committee of Inquiry that had been assigned in 1826, the society developed its own rules for granting a class. Eventually, from this time,

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<sup>10</sup> Lay. *Supra*. p.25

<sup>11</sup> Lagoni, N. *Supra*. p.10



*the Lloyd's Register of British and Foreign Shipping* had already begun to perform its function in the same way as LR does today.

However, the first classification society as the modern model is the *Bureau Veritas* (BV), which was renamed from an “Office of information for marine insurers” in 1829.<sup>12</sup> In 1821, several of the large insurance companies located in Paris were insolvent, since there was an unprecedented series of shipwrecks in the winter. After these accidents, premiums were reduced due to competition between insurance companies that had survived. However, despite these disappointed moods, two insurers and a broker founded an “office of information for marine insurers” in Antwerp<sup>13</sup> in 1828 to provide insurers and all maritime sectors with information on how to deal with their competitors, and particularly on preserving themselves from underwriting risks of bad ships.<sup>14</sup> Additionally, it also controlled its registered vessels under its own rules for granting a class.

Consequently, these two societies were the center of the classification of vessels at that time, while many of the international classification societies were being founded during the 19<sup>th</sup> century for providing information to their regional customers in the same way as their precedent societies.<sup>15</sup>

### **2.2.2. Development of classification**

During the second half of the 19<sup>th</sup> century, since the Registers made it possible for marine insurers to control risks due to awareness of vessels' actual conditions, their role was appreciable to maritime insurers in terms of giving them economic

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<sup>12</sup> *Ibid.* p.10.

<sup>13</sup> In 1832, it had been moved its base to Paris due to many of French Insurers being in business near to Paris Stock Exchange.

<sup>14</sup> Boisson, P. (1999). *Safety at sea, Policies, Regulations & International Law*. Paris: Bureau Veritas (BV). pp. 120-121

<sup>15</sup> ABS in 1862, CCS in 1956, CRS in 1949, DNV in 1864, GL in 1867, IRS in 1975, KRS in 1960, NK in 1899, PRS in 1936, RINA in 1861 and RS in 1913 were founded. (Lagon, N. *Supra.* p.11; IACS. (2011). *Supra.* p.6.)

benefits. However, their role had been changed from the current assignment for ratings to certification of vessels due to three reasons which occurred with the passing of passing.

The first reason for the change was market forces with shipowners. In other words, shipowners as customers of classification societies desired certain period ratings that would be a valid for reasonably long terms for a vessel, after carrying out a complete survey on the vessel or its construction.<sup>16</sup> In addition, they also wished to recognize ratings of their ships before publication of these ratings in the Register, to assure their validity, since the ratings would remain for a number of years. Thus, their services were adjusted by the forces to be more in relation with shipowners rather than underwriters.

The second reason for the change was due to technical matters in relation to the term ratings. The emergence of the term ratings forced the societies to introduce a more uniform approach, such as an unified ship construction code.<sup>17</sup> Hence, the first rules of LR for wooden ships were published in 1835, and those for Iron ships, in 1855. The BV also had published those in 1851, and 1858. These rules were more favorable to merchant navy engineers and mechanics than the former shipmasters in the recruitment of surveyors. In addition, shipyards also began to be considered as customers to the Registers due to delivery of vessels with given ratings. Finally, in this vein, these rules gradually transformed to be on obligatory reference for assessing ship safety, since it was deemed to be a guarantee of assessment if vessels were in compliance with their requirements.

The last reason for the change of their role arose from the development of statutory service. In the second half of the 19<sup>th</sup> century, matters in relation to regulating safety at sea were gradually taken over by maritime authorities from

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<sup>16</sup> Boisson, P. *Supra*. p.122.

<sup>17</sup> *Ibid*. p.122.

private organizations, since they were genuinely the matters concerned with states or international communities. Furthermore, hereto dealing with the complexities of surveying ships, the authorities needed to empower the societies to inspect vessels for safety of shipping. For instance, LR and BV were the first societies to assign freeboard to British ships by the United Kingdom board of Trade.<sup>18</sup>

Consequently, at present, the norm of class has been superseded from a rating for insurers by the concept of a term rating of a ship in the Register based on particular conditions of the rules. Then, these changes led the Registers to be renovated to classification societies in the modern sense.

### **2.3. The International Association of Classification Societies**

In recent times, classification societies differ in size, number of employees and even their legal status. Some of them carry out surveys in certain determined geographical regions with a few surveyors, whereas the others perform their work over the whole five continents with many surveyors. Moreover, most classification societies have a role as non-profit associations and private concerns in the maritime industry, while some of them have enjoyed the status of public entities invested or established by governments. This diversity has affected the consistency in development of surveying vessels to grant class. In other words, while the leading societies which have been engaged in classification from the start of the class execute complete surveys based on universal unification codes which were invented by themselves owing to harmony with the international conventions or consensus for safety of the sea, there are many that do not meet the minimum conditions for performing their role properly.<sup>19</sup>

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<sup>18</sup> *Ibid.* p.122.

<sup>19</sup> *Ibid.* p.123.

Following from these difficulties, the International Load Line Convention of 1930 recommended collaboration between classification Societies to establish uniformity in the application of the standards for strength upon which freeboard is based.<sup>20</sup> It took the form of international conferences in the first stage, and then it changed to the specialized working groups.<sup>21</sup> Subsequently, the first conference of major Societies in 1939 was held with the attendance of ABS, BV, DNV, GL, LR and NK, having the same opinion on further cooperation between the Societies. In 1955, there was a second major conference among classification societies held to establish Working Parities on specific topics. Then, in 1968 seven leading societies<sup>22</sup> reached the agreement to found the *International Association of Classification societies* (IACS). In the following year, the IACS acquired a consultative status to the International Maritime Organization (IMO) with recognition of its significant role in maintaining the safety of the international shipping industry.<sup>23</sup>

Presently, IACS is composed of thirteen member societies<sup>24</sup> and, in the IMO, the only non-governmental organization with Observer status that is able to develop and apply Rules.<sup>25</sup> It aims to standardize the different rules and regulations of its members, to facilitate the exchange of knowledge and to offer training for surveyors.<sup>26</sup> Additionally, to approach these aims, it has invested in development and application of its rules and verified compliance with international and/or national legal regime on behalf of Flag Administrations. While it is completely dependent on each government of the international community such as IMO to determine the acceptable level of risk associated with the conduct of marine

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<sup>20</sup> IACS. (2011). *Supra*. p.6.

<sup>21</sup> International Association of Classification Societies (IACS). (1998). *Achievements 1968-1998. The IACS Briefing No. 7*. London: Author. p.1.

<sup>22</sup> The leading societies engaged to grant the classification were ABS, BV, GL, LR, NK, DNV and RINA.

<sup>23</sup> IACS. (2011). *Supra*. p.6.

<sup>24</sup> In present day that was August 2011, ABS, BV, CCS, CRS, DNV, GL, IRS, KRS, LR, NK, PRS, RINA and RS were members of IACS.

<sup>25</sup> IACS. (2011). *Supra*. p.6.

<sup>26</sup> Lagoni, N. *Supra*. p.24.

transport, in the sense of classification, IACS has been the only International Non-Governmental Organization to promote minimum requirement for its member societies through IACS Guidelines, Recommendations and Resolutions such as Unified Requirements (URs), Common rules, Unified Interpretations (UIs), Procedural Requirements (PRs).<sup>27</sup> Especially, IACS Resolutions have considerable effects on the shipping industry. Since member societies of IACS cover the classification of 90% of the world's cargo carrying tonnage to be classed, whenever IACS develops and publishes its new Resolutions, its new technical requirements will be executed by naval architects, shipyards, shipowners and manufacturers of the goods concerned to maintain their class and technology to be the latest and to accomplish their contractual obligations to either the buyer or class. Therefore, IACS plays a significant role in accelerating implementation of the safety measures from IMO by adopting or revising IACS Resolutions.<sup>28</sup>

In addition, for technical analysis of maritime casualties, IACS may collect information on the defects and ships through the exchange of information among member societies. In other words, the member societies in IACS swap their information to identify technical defects of certain type of ships as causes of accidents. In the instance of the accident of *Erika*, it had been reported that its sister ship had been identified as having a certain type of deck defect. As member societies of IACS class more than 90% of the world's tonnage, it is valuable to exchange such information to improve the safety of vessels.<sup>29</sup>

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<sup>27</sup> All Resolutions of IACS concerning to promote the minimum requirement for member societies generally may be developed through specialist Working Groups superintended by the General Policy Group (GPG) of IACS. The categories of Resolution are as followed;

- 1) Unified Requirements (URs): minimum technical requirements adopted by the IACS members. URs can be reserved if there is technical matters for member societies directly to implement the URs
- 2) Common Rules: IACS URs covering broad areas of classification requirements without reservations.
- 3) Unified Interpretations (UIs): uniform interpretations of Convention Regulations or IMO Resolutions on those matters which are necessary of more precise explanation.
- 4) Procedural Requirements (PRs): matters concerned with technical issues of procedure.

<sup>28</sup> Lagoni, N. *Supra*. p.25

<sup>29</sup> *Ibid*. p.25

## 2.4. Challenges to the classification societies

As mentioned above, classification societies could be described as non-profit organizations that devote their assets to establish the quality and integrity of vessels by establishing technical standards for vessels and assisting the maritime industry and regulatory bodies in terms of safety of shipping and prevention of marine pollution. However, even if they have notably endeavored to improve safety in the international shipping industry, in the last twenty years they have seen huge challenges in terms of their liabilities with a number of lawsuits wherein claimants attempted to seek huge compensation for their damage from classification societies, which might never have 'deep pockets'.<sup>30</sup> In this case, the multiplication of classification societies and the extension of their scope would be possible reasons.

Firstly, regarding the multiplication of classification societies, the main initiative would be that they have competed among themselves to take up more parts of the market of classification. Although thirteen leading classification societies, which have covered ninety percent of world tonnage classed, have created the IACS to pursue the development of uniform standards and improve the quality of their services by the Quality System Certification Scheme (QSCS),<sup>31</sup> each society executes its surveys according to its own rules so that they have de facto competition among the societies. Recently, certainly more than sixty classification societies have been established in the world, beginning with only a few societies in the beginning.<sup>32</sup> The multiplication of competitors tends to

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<sup>30</sup> *Sundance Cruises Corp. v ABS*, 799 F. Supp. 363, 1992 AMC 2946 (S.D.N.Y.) 1992), aff'd, 7 F. 3d 1077, 1994 AMC 1 (2d Cir. 1993), cert. denied, 114 S. Ct. 1399 (1994); *Otto Candies v Nippon Kaiji Kyokay Corp*, US Court of Appeals - Fifth Circuit, 17 Sept 2003; *The Morning Watch* (Mariola Marine Corp v Lloyds Register of Shipping) Q.B. (Com Ct) 15 Feb 1990 547; *Natcraft Pty Ltd & Anor v Det Norske Veritas & Anor (The Sundancer)* [2001] QSC 348 (27 September 2001) published at <http://www.austlii.edu.au/cases/qld/QSC/2001>.

<sup>31</sup> Antapassis, A. M. *Supra*. p.5.

<sup>32</sup> Boisson. P. *Supra*. p.

develop intense competition that might result in worsening the quality of the services afforded by classification societies, and by extension, the safety of ships. Additionally, in the majority of cases, since shipowners have the burden of payments for both classification services and even the mandatory statutory surveys, it is well possible for classification societies to be forced to offer certain favors to shipowning companies that have large fleets to get either classification services or statutory surveys on behalf of governments of Flag States.<sup>33</sup> Consequently, it may happen for those favors to result in the negligence, recklessness or fault of classification societies causing maritime casualties so that they would be subject to indemnify the damage of shipowners or third parties.

Secondly, in relation to the extension of the scope of classification societies, they were not concerned with matters of shipping management, which may have considerable effects on ships' seaworthiness and also contribute to maritime casualties. Nonetheless, according to the International Safety Management (ISM) Code adopted in 1994 and came into force in 1998 as chapter IX of SOLAS, the classification societies may be involved in the management of shipping by being authorized to carry out surveys on shipping companies to verify that they performed obligations imposed by the code.<sup>34</sup> The ISM Code prescribes that shipowning companies were subject to determine their own management model corresponding to the Code's requirements. Thus, matters of the management of international shipping came to be subjected to public control; moreover, at the same time, classification societies have taken part in this control by issuing the Documents of Compliance to the companies and Safety Management Certificates to the ships on behalf of Flag States after surveying them according to the Code. Accordingly, it is more likely that classification societies would be sued by claims from third parties based on the extent of their capacity that would involve potential causes of the damage to those who are related to the ship or its cargo.

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<sup>33</sup> Lagoni, N. *Supra*. p.27; To make clear, that would not mean that classification societies mainly would be operated according to economic interest from shipowners.

<sup>34</sup> Antapassis, A. M. *Supra*. p.13.

Due to this extension, it would involve more stakeholders who are seeking compensation to cover their damage as much as possible.



### 3. The liability of classification societies in selected countries

Even though almost sixty classification societies have been established around the world, there were few reported cases where someone sought compensation for damages against classification societies. However, recently, several significant cases such as those wherein the French government and other parties instituted claims against RINA in relation with the accident of *ERIKA* (2000), and the Kingdom of Spain brought action against ABS before the U.S. District Court (2004) were enough to bring the public attention to matters of liability of classification societies. Therefore, this chapter will undertake a legal analysis of selected countries in either common or civil law country, regarding liabilities of classification societies, so as to analyze differentiation of each legal frame work to clarify the legal issues regarding liabilities.

#### 3.1. English law

Traditionally, English law has influenced considerably on regulating the safety of the international maritime industry. Regarding the position of classification societies in the scope of maritime safety, the construction of their legal status also has been derived very much from English law. Bearing this in mind, given the case of English Law, matters related with the liabilities of classification societies arise based on general private laws, which are especially either contract law against contractual parties or tort law in a case of tortuous behavior against third parties, since there is no rules to distinguish the liability of the private service, namely classification, from that of the statutory survey in the exercise of public duties as public servants on behalf of the State.<sup>35</sup>

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<sup>35</sup> Lagoni, N. *Supra*. p.237.

### 3.1.1. Liability to the contractual party

In general, the survey of classification societies is carried out under contracts between parties and the societies. Hence, the societies could be liable to contractual parties by virtue of a breach of a contractual duty or a breach of an implied contractual duty to exercise reasonable care and skill.<sup>36</sup>

#### 3.1.1.1. Contractual duties

Under Common law, if someone has engaged in a contract, he agrees to be obliged to perform duties stipulated with his capacity that would be guaranteed impliedly.<sup>37</sup> In addition, these duties grant the defendant to have a strict liability.<sup>38</sup> For this reason, the extent of duties and the implied warranties in the contract would be the nucleus of arguments in a lawsuit arisen from breaches of the contract. In this vein, since classification societies owe a number of contractual duties to their clients, when a society breaches such duties, it would be liable for the damage caused to its clients without reference to the fault. Although duties of the societies entirely depend on the individual contract, they may be categorized briefly in accordance with situations that could be expected as follows.<sup>39</sup>

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<sup>36</sup> The claim may also be arisen under the tort of negligence. However, in this case, contracts for classification societies normally include definitions of obligations for societies to provide their services. In this case, the law of tort in English law does not impose any wider duties regardless duties enumerated in the contracts. (See *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* [1986] AC 80; *Downsview Nominees Ltd. v. First city Corporation* [1993] AC 295) Hence, duties of classification societies to contractual parties in tort can be limited to obligations given in contracts. (*Ibid.* p.65)

<sup>37</sup> Lagoni. N. *Supra.* p. 60.

<sup>38</sup> *Raineri v. Miles* [1981] A.C. 1050: Lord Edmund-Davies states that ‘it is axiomatic that, in relation to claims for damages for breach of contract, it is, in general, immaterial why the defendant failed to fulfil his obligation, and certainly no defence to plead that he had done his best.

<sup>39</sup> Lagoni. N. *Supra.* p.60.

Firstly, the case that classification societies provide the direct causes to the damage to others would compose a breach of duty.<sup>40</sup> For instance, a surveyor from a society may negligently drop his survey hammer into a cylinder of the main engine and cause damage to the ship's main engine. However, in this case, since the liability is obvious, it would not be arguable in the legal issue.

Secondly, the instance that damage to others was caused indirectly by classification societies could constitute a breach of obligations. In this sense, the classification society is not considered as sole provider of causes to the damage. In other words, to result in damage, there would be additional actions from others, which may not be a breach of duty in itself.<sup>41</sup> For instance, although a surveyor issues a certificate after the inspection of the ship that might not meet all requirements of the society in fact, the certificate cannot solely create an accident. However, when the vessel is operated without compliance with the standards, an accident may occur due to the non-compliance with the requirements. Then, matters of damage that may occur the liability of the classification society can arise out as the result of an accident.

Thirdly, although similar to the second case, since it is likely to involve different aspects of liability, it would be worthwhile to distinguish the case that the negligent behavior may constitute the breach of duty.<sup>42</sup> For instance, the classification society can be liable for the fact that the certificate is issued negligently even though it has been discovered that the ship has not fulfilled the rules of the society after the inspection of the ship by the surveyor. In other cases, if the certificate or the class had been granted to a ship with certain conditions, then, when the condition is no longer valid based on the factual situation, the

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<sup>40</sup> *Ibid.* p.60.

<sup>41</sup> *Ibid.* p.60.

<sup>42</sup> *Ibid.* p.63.

classification society can be liable for the withdrawal with the condition that the society would not vacate negligently the certificate of the ship.<sup>43</sup>

Lastly, it might be arguable that the liability of the society can occur with matters in relation with its rules, themselves. In other words, the rules of the classification society for the inspection have to be up to date for the safety of the shipping industry by analysis of the technical causes of the accident, since the service provided is based on these rules that are incorporated in the contract. Hence, in general, since a vessel or a part of it can not be considered to be safe with the reason that the rules of a society are no longer state-of-the-art, a breach of contract can be comprised in relation with application of the old rules defined to potentially cause serious defects on vessels. Otherwise, the rules of the society should afford the same level of safety as if the rules have been improved in regards with the construction and the structure of vessels, if the society deviates from its rules.<sup>44</sup>

#### **3.1.1.2. Implied terms**

Commercial agreements in a contract are usually expressed in writing. Additionally, statements made by the parties during negotiations may also determine the terms of the contract. Moreover, the part of the agreement may be constituted by other terms of contract, which are not expressly declared. Such terms may be implied by law, since it would be hard for the parties to have the opportunity to agree on all possible incidents and events that may arise under a contract. In English law, these implied terms might be applicable into contracts of virtually any nature, involving arbitration, agency, building, technology licenses,

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<sup>43</sup> *Ibid.* p.63.

<sup>44</sup> *Ibid.* pp.63-64

sales of goods, supply of services and real property.<sup>45</sup> Furthermore, for application of the terms implied, there is the general principle that an implied term may be used in specific cases to avoid an unfair action of the contract. Hence, before a term is implied into a contract, a court would take into account the objective intentions of the parties in terms of conditions stated in the contract expressly.<sup>46</sup>

In this vein, since classification societies provide services of surveys for either classification or statutory certificates under contracts, they may be liable for breaches of terms implied into contracts between themselves and either shipowners or shipbuilders. Moreover, in a contract for supply of services, terms are implied that the service supplier will exercise reasonable skill and care throughout the course of delivering the services, and that services will be carried out within a reasonable time,<sup>47</sup> if there is no specific agreement to determine a certain time-frame.<sup>48</sup> Therefore, when a classification society delivers surveys, it needs to consider the reasonable skill and care and time as well.

The ‘reasonable time’, which is rarely argued in a court in this context, would be normally determined by what the parties had in mind when the parties engaged in

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<sup>45</sup> Gillhams Solicitors. (2011). Contracts & Disputes: Importance of Implied Terms. *Legal Articles, Business & Commercial, Contract Terms*. Retrieved September 2, 2011 from the World Wide Web: <http://www.gillhams.com/articles/141.cfm#>

<sup>46</sup> *Ibid.*

<sup>47</sup> Implied terms may be sourced variously from which include legislation of general application in commerce such as consumer protection legislation and Sale of Goods Act; specific legislation applicable to a particular type of transaction such as conveyances of interests in land: Law of Property Act 1994, contracts for marine insurance: Marine Insurance Act 1906 s 39, and contractual licenses to enter property: Occupiers’ Liability Act 1957; International conventions and common law principles created by court decisions. (Gillhams Solicitors. (2011). Sources of Implied Terms in English Contract Law. *Legal Articles Business & Commercial, Contract Terms*. Retrieved September 2, 2011 from the World Wide Web: <http://www.gillhams.com/articles/142.cfm>)

In this case, Supply of Goods and Services Act 1982, Section 13 (Implied term about care and skill) would be applicable as followed; ‘In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill’; see also section 16 (Exclusion of implied terms, etc).

<sup>48</sup> *Ibid.*

the contract. In addition, the ‘reasonable care and skill’ are generally construed as the average care and skill expected and taken by ordinary persons, viz. ‘*the man on the Clapham Omnibus*’ which is a reasonably educated and intelligent but non-specialist person.<sup>49</sup> In this case, surveyors from the societies need professional care and skill as the reasonable care and skill, which is not less expertise, skill and care than other ordinarily competent members of their profession throughout the course of delivering the services,<sup>50</sup> since they are regarded as technical professionals in surveying. Accordingly, to establish a claim against a classification society upon this context, the court must scrutinize whether the classification society has failed to exercise the standard of care and skill that is the compulsory requirement for an ordinary professional of the classification society.<sup>51</sup>

### 3.1.2. Liability towards third parties

#### 3.1.2.1. Tort of negligence

Whenever a maritime accident happens, third parties who are not engaged in the contracts of the classification society also might suffer from the damage. Mostly, in this case, shipowners would cover the damage by virtue of either insurance or international funds. However, since shipowners normally can limit their liability, it is not likely that third parties can receive full compensation from shipowners, or even any compensation at all if there is no insurance for shipowners. Therefore, classification societies are often targets of third parties claiming for compensation of the damage.

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<sup>49</sup> *Hall v Brooklands Auto Racing Club* (1933) 1 KB 205; *MacFarlane v. Tayside Health Board* (1999) 3 WLR.

<sup>50</sup> *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582; *Eckersley v. Binnie* [1988] Con. LR 1; *Bolitho v. City and Hackney Health Authority* (1997) 4 All ER 771.

<sup>51</sup> For a guidance of the standard care of classification societies, it is referable to IMO Res. A.739 (18), Res. A.789 (19) and Res. A.948 (23)

In English courts, classification societies have enjoyed legal favor in matters of liability toward third parties.<sup>52</sup> Generally, in English law, this liability would be covered by the tort of law, especially, by the tort of negligence.<sup>53</sup> This tort is composed of three preconditions. Firstly, it is necessary for the defendant to owe a duty of care to the plaintiff. Secondly, there should be an act or enunciation of the defendant in such a way with regard to breaking that duty of care. Thirdly, there should be subsequent damage suffered by the plaintiff after breach of the duty of care.<sup>54</sup> In the courts, a major argument in the tort of negligence is whether a duty of care exists to the plaintiff and how such duty can be defined.<sup>55</sup> For these matters, three criteria, which are foreseeability of damages, the proximity between the parties and general principles of justice, and reasonableness have been developed by cases to test for the existence of a duty of care in a given case.<sup>56</sup> However, it is normally difficult for a case to meet these three conditions exactly, since the cases in relation with duty of care are very various, based on each case. In addition, the tort of negligence in common law regarding duty of care is only a facet of the construction of liability. Thus, in tradition, most claims of negligence of classification societies are also hard for plaintiffs to prove based on the three criteria. However, nowadays, it has been changed slightly based on recent cases so that the duty of care of the classification society or its marine surveyor toward third parties can be established when the plaintiff succeeds in ascertaining the proximity between the parties and foreseeability of the damage.<sup>57</sup>

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<sup>52</sup> Basedow, J. & Wurmnest, W. (2005). *Third-Party Liability of Classification Societies, A Comparative Perspective*. Berlin: Springer. p.15.

<sup>53</sup> Under the Contracts (Rights of Third Parties) Act 1999, there can be certain conditions in contracts to grant third parties specific rights. In this case, third parties may claim their damage against the defendant, based on breaches of implied duty or negligent behavior in terms of their rights described in contracts. Additionally, this claim will be dealt with same principles of protection for the contractual parties, described in the previous section. However, in practice, the cases to confer rights on third parties in contracts are rarely happened. (Lagoni. N. *Supra*. p. 106.)

<sup>54</sup> Jackson, R. M., Powell, J. L., and Stewart, R. (2011). *Jackson & Powell on Professional Liability (Common Law Library)*, 7<sup>th</sup> Revised edition. London: Sweet & Maxwell. §1-13.

<sup>55</sup> Lagoni. N. *Supra*. p.65.

<sup>56</sup> Basedow, J. & Wurmnest, W. *Supra*. p.16

<sup>57</sup> *Ibid*. p.16; In case of *Caparo industries Plc v. Dickman*, [1990] 1 AC 605, Lord Oliver held that;

### 3.1.2.2. Liability of classification societies to third parties

The principles to decide whether the defendant owes a duty of care to the plaintiff were iterated in the case of ‘*The Morning Watch*’.<sup>58</sup> In this case, the purchaser of the yacht ‘*Morning Watch*’ filed a claim against LR for suffering economic loss based on negligent misstatements of the classification society, which the plaintiff relied on. In the case, the plaintiff insisted that the classification society had failed to exercise duty of care owed to the purchaser. However, while the court re-conformed the requirements of foreseeability, proximity, and fairness, the court found that the plaintiff failed to demonstrate the proximity between the classification society and the damage to the purchaser.<sup>59</sup>

Later, this matter was reviewed again in the case of *Nicholas H.*<sup>60</sup>, in which cargo owners brought a claim against the classification society, NK. In this case, the vessel loaded the cargo in South America to carry to Italy and USSR. During its voyage, a crevice was found, and the vessel deviated to Puerto Rico. Then, a further crack was discovered while it was anchoring. To test out these cracks, the surveyor from NK arrived and after the inspection, realized that there were substantial cracks in the shell-plating, and recommended that the shipowners repair it immediately. However, temporary repairs were done to the vessel in San Juan, and it continued on its intended voyage, with the surveyor’s report recommending further repairs to be done after the voyage, since the cost of repairs

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‘ It is difficult to resist the conclusion that what have been treated as three separate requirements are, at least in most cases, in fact merely facets of the same thing, for in some cases the degree of foreseeability is such that it is from that alone the requisite proximity can be deduced, whilst in others the absence of the essential relationship can most rationally attributed simply to the court’s view that it would not be fair and reasonable to hold the defendant responsible.’

<sup>58</sup> *Mariola Marine Corporations v. Lloyd’s register of Shipping*, 1990 Vol. 1, Lloyd’s Law Rep. 547.

<sup>59</sup> *Ibid.*; The court held that “the primary purpose of the classification system is, as Lloyd’s Rules make plain, to enhance the safety of life and property at sea, rather than to protect the economic interests of those involved... in shipping”

<sup>60</sup> *Marc Rich & Co.A.G. v. Bishop rock Marine Co Ltd (The Nicholas H)* [1992] 2 Lloyd’s Law Rep. 481 (QB); [1994] 1 Lloyd’s Law Rep. 492 (AC); [1995] 2 Lloyd’s Rep. 299 (HL).



would be considerable due to discharging and reloading of the cargo. In addition, the surveyor also recommended that the vessel be sustained in the class, considering its condition. Nevertheless, the vessel subsequently sank during the voyage with all of the cargo owing to haphazard repairs to the cracks. The cargo owners institute action against the NK, as the classification society, based on tort of negligence for recovering their balance of losses, which could not be covered by the shipowners, being USD 5.5 million. They alleged that the surveyor was negligent in accepting the temporary repairs and recommending that the ship sail.

The House of Lords upheld the decision of the Court of Appeal that the seaworthiness of the vessels is primarily for the liability of shipowners and the classification society is only supplementary in this subject. Even though the society had been negligent in declaring the ship is seaworthiness, the society would not be liable for the damage of the cargo owners. Hence, in this particular case in which proper preservation of the cargo was the obligation of ship's operator, the necessary proximity so as to prevent the cargo owners' loss of interest by obliging the classification society to exercise due diligence did not exist.<sup>61</sup> In addition, the court also considered the case that classification societies would be exposed to large claims by third parties of the damage if it was held that a duty of care existed to the cargo owners. It is possible that such claims would interfere the international legal system developed by the Hague and Hague Visby Rules, by which shipowners would be entitled to recover their damage from a subsidiary party in the carriage of goods by sea. Thus, the court would be reluctant for the duty for seaworthiness of ships to be transferred from shipowners to others, i.e. classification societies which are not parties to the contract of carriage and not applicable to advantage of the tonnage limitation liability system.

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<sup>61</sup> However, prior to decision of the House of Lord, the Queen's Bench Division held that the classification society was liable for the damage of cargo owners due to being negligence in issuing the certificate. Since the court considered being the foreseeability alone sufficient to impose the classification society duty of care towards the cargo owners.

### 3.1.3. Exemption and limitation of liability

Generally, in contracts for classifying vessels, there are clauses providing exemption from the liability of classification societies, or, instead, limitation of the liability to restrain up to certain amounts. This clause is frequently accompanied by the clause of ‘hold-harmless’ where if classification societies are subject to claims for damage, based on non-performance or poor performance of their contractual duties, shipowners or other contracting parties cover this damage. Even though these contractual clauses are not universally recognized in all different legal systems, they can be established and recognized in most countries under the principle of private autonomy.<sup>62</sup>

Under English law, the clauses are valid under conditions that the contracting party recognizes the content of the contractual clause which limits classification societies’ liability or exempts them therefrom as it is presumed that the contracting party would cover thereof whenever clauses are incorporated in the contract, and that the exemption clauses are reasonable and solely for physical damage.<sup>63</sup>

Therefore, in context of the contracts, the liabilities of classification societies towards contractual parties are measurable. However, those to third parties are still exposed to unlimited liability, since there are principally no relevant legal tools to exempt or limit the classification society’s liability toward third parties. Considering the dual function of the classification society<sup>64</sup> they can often be involved in claims for damage against them, grounded on their negligent performance, since all conventional vessels should have to have taken certain surveys from Flag States or classification societies on behalf of Flag States, for securing the safety of international shipping by virtue of the international

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<sup>62</sup> Antapassis, A.M. *Supra*. p.23.

<sup>63</sup> *Unfair Contract Terms Act 1977*.

<sup>64</sup> See Chapter 2.

conventions which broadly cover many interest of stakeholders of maritime transactions. Additionally, in English court, if physical loss has been caused in the case that there are no applicable limitation provisions to establish the duty of care, and once the plaintiff proves foreseeability and proximity, the dependant might be liable for the physical loss. Consequently, under these circumstances, it is more likely for classification societies to be exposed to unlimited liability for the damage of third parties.

#### 3.1.4. Recourse of the State

Under English law, as the Secretary of State has delegated authority to issue statutory certificates to certain classification societies, a party suffering damage related with classifications could file a claim against the Crown based on any tortuous acts committed by a classification society when acting on the behalf of the Crown.<sup>65</sup> In the case that the Crown has been sued, firstly, it has to determine whether the classification society is an employee or an independent contractor in the context of the English law, since the Crown has different amounts of control over each of them for their work, so that the Crown would have different responsibilities to them. If there exists the right for the employer to control over the method of performing the work, the other would be considered an employee.<sup>66</sup> However, the Crown does not control the method of work of the classification society, even though its maritime authorities supervise classification societies under the European Directive 94/57/EC. Hence, classification societies carrying out statutory surveys on the Crown's behalf would be regarded as independent contractors.

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<sup>65</sup> Under *The Crown Proceedings Act 1947*, the vicarious liability of the Crown had been established for its employees in the course of the employment, suspending the immunity of the Crown for its acts.

<sup>66</sup> Lagoni, N. *Supra*. p.238.

In this regard, the Crown might have liability as a private employer for an independent contractor. In other words, the Crown would be liable for which negligently selects the independent contractor, employs an insufficient number of workers, or which interferes in the work of the independent contractor so as to result in damage or which authorizes a tort committed by the independent contractor.<sup>67</sup> The employer may also breach a duty towards the plaintiff if he delegates a non-delegable duty to the independent contractor. Lastly, the Crown also would be liable for the exercise of statutory obligations by the classification society, including implementing measures to check the vessels and their compliance to marine environmental regulations.

Regarding the Crown's liability, it can have recourse to the classification society based on the agreement between these two parties.<sup>68</sup> However, practically, it is hard for the plaintiff to establish the Crown's liability by proving negligence or a tort in the course of their work, since the crown's duties in the context of the statutory survey provided by classification societies has been limited as the aforementioned. Hence, it is hard to find cases wherein the Crown requests the recourse to the classification society on their loss.

### 3.2. US law

In the United States (US), there have been a number of cases in relation to the liability of classification societies and marine surveyors as defendants or third-party defendants.<sup>69</sup> In addition, there have been many cases brought by non-US citizens before US courts.<sup>70</sup> Some actions were dismissed based on the doctrine

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<sup>67</sup> *Ibid.* p.239.

<sup>68</sup> *Ibid.* p.239.

<sup>69</sup> Gordan, J.D., III. (1988). The Liability of Marine Surveyors and Ship classification Societies. *Journal of Maritime Law and Commerce*, Vol.19, no.2. Ohio: Jefferson Law Book. p.301.

<sup>70</sup> Basedow, J. & Wurmnest, W. (2005). *Supra.* p.26.

of *forum non conveniens*,<sup>71</sup> whereas other cases were concluded according to foreign law imported by US courts.<sup>72</sup> Yet, in the most cases, US law was applied. In this regard, it would be possible to have legal benefits in construction of law on the liability of the classification societies by analyzing US law and cases which have been significantly accumulated, since US jurisprudence has been consistent.<sup>73</sup>

Regarding most of the cases in the US, the courts have held decisions in favor of the defendant of classification societies and surveyors, based on factual grounds due to the claimant's failure to prove causation, although breaches or faults from the defendants were shown. However, recently, it seems that US courts attempted to recognize the liability of a classification society toward shipowners or third parties. Therefore, the next section will examine the liability of classification societies by virtue of leading cases to analyze the position of the court regarding this matter.

In addition, it is notable that, since there is no specific regulation to distinguish the liabilities of civil services and public services rendered by classification societies, general private law is applied in court decisions on the matters of liability based on the breach of contract and warranty of workman like performance, tort of negligence and negligent misrepresentation in tort law.

### **3.2.1. Liability of classification societies to shipowners**

In fact, US law is grounded in common law so contract law in the US is similar to English contract law. Hence, if a classification society engages a contract with a

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<sup>71</sup> For instance, the case of *Ioannides et al. v. Marika Maritime Corp. et al.*, 928 F. Supp. 374 (S.D.N.Y.1996), The court held that US had little interest in providing a forum for a case.

<sup>72</sup> For instance, the cases of *Carbotrade v. Bureau Veritas*, 901 F. Supp. 737 (S.D.N.Y. 1995); *Carbotrade v. Bureau Veritas*, 99 F. 3d 86 (2<sup>nd</sup> Cir. 1996); *Sealord Marine v. American Bureau of Shipping*, 220 F. Supp. 2d 260 (S.D.N.Y. 2002).

<sup>73</sup> Antapassis, A.M. *Supra*. p.21.

client, it would be obliged to carry out its contractual duties which can be expressly or impliedly warranted, otherwise it would be liable, if breaches of contractual duties cause foreseeable damage to the other parties. Nonetheless, the scope of obligation in virtue of warranties and conditions in a contract with a classification society is dependent on the individual contract.

The case of *Great American Insurance Company v. Bureau Veritas*<sup>74</sup> has been referred to in several cases to hold their judgments. In this case, a vessel navigating to the United States from Antwerp, Belgium sank with the loss of its the entire cargo and eleven crewmembers. The vessel was required to take the annual survey composed of inspection on hull and outer parts of the ship, and periodical survey once every four years for more thorough internal inspection, in order to maintain its class. The vessel had been surveyed and classified one month before the accident. Then, several days later, the vessel charterer took an ‘on-hire’ survey at his own expense to uncover defects in the lower holds. Subsequently, the classification of the vessel was withdrawn as a result of the ‘on-hire’ inspection, which found severe defects the holds. For reclassifying the vessel, it is necessary to repair certain defects immediately, but some other repairs, including four frames wasted in portside and No.1 hold deep tanks, could be postponed until the following annual survey. The shipowner and a number of subrogated insurance companies as plaintiffs insisted that the classification society as the defendant carried out its inspection negligently and in breach of a warranty of workmanlike service, and that the profits of the owner and subrogees were being affected by the defendant’s breaches of duties and warranty.

The court found two causes of action; one based upon negligently carrying out contractual services and the other upon the breach of the implied warranty of workmanlike performance. In spite of these causes, the court dismissed the plaintiff’s suit according to the two grounds that the plaintiff had failed to

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<sup>74</sup> 338 f. Supp. 999 (S.D.N.Y. 1972)

ascertain the society's negligence on the survey and casual correlation between the sinking of the vessel and unseaworthy conditions alleged as the matters to be discovered by the defendant's surveyors. The court also found that the principle to be presumed, as a vessel is unseaworthy at the commencement of the voyage, if the vessel is lost under ordinary sea condition without any explanation, could be relevant solely to those who are responsible for and in control of the vessel. Thus, in this vein, the court held that the plaintiff had failed to establish the unseaworthiness of the vessel upon its departure on its terminal voyage, since the defendant was not the responsible for and in control of the vessel.

In the case, the court, assuming causation could be established, also stated that the defendant has only two obligations that the tort or contractual liability of the defendant was ultimately based on. First, survey and classification of the vessel for the owner were to do "no more than to make a statement that the condition of the ship either was or was not in conformity with certain published standards established by the society".<sup>75</sup> Second, for the owner and charterer concerning the 'on-hire' service, it would be notification and advice of the detectable defects in the course of inspecting the vessel for making the vessel seaworthy by the necessary repairs.

In this regard, as to breach of the first duty, the court ascertained that the owner has the non-delegable duty to make the vessel seaworthy in reference with practical policy considerations that a party who is in charge of and in control of the vessel during its service life would be responsible for the seaworthiness of the vessel, if it is possible for shipowners, charterers, and others to bring an action based on a warranty of compliance of the vessel with standards developed. Further, the classification society is not an entity to make profits by using its assets, so that it did not have the financial resources, and was neither an absolute insurer of the vessel in terms of its services. Hence, the opinion subsequently

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<sup>75</sup> *Ibid.* at 1010.

concluded that a theory of *Ryan*<sup>76</sup> warranty could not be extended to this case, stating that “Virtually all a society can do is observe and report to the owner whatever its inspections reveal.”<sup>77</sup> As to the second duty, the opinion concluded that under general negligence principle, the classification society would be liable for failure to discover and to inform defects. Additionally, this rule would be applicable both to ‘on-hire survey’ and classification services.

However, regarding the decision of the court in the case, it could be criticized in virtue of some practical points with recent trends of classification. As to the first obligation defined by the court, it could be considered to be too restrictive in scope. Contrary to the past time, considering the expansion of classification societies’ functions in relation to surveillance over vessels and their company to improve the safety of international shipping, the societies’ roles would have been extended to fundamental level affecting on domestic legal systems concerning ship safety, since it is more likely for Flag States to delegate their authorities to inspect vessels flying their flags to classification societies, especially IACS. Therefore, it would be more likely to impose duty of care on classification societies in providing services of classification to survey vessels in accordance with its rules which are adequate international standards or rules devised by the classification society.<sup>78</sup>

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<sup>76</sup> *Ryan Stevedoring Co. v. Pan Atlantic Corp.*, 350 US 124 (1956). Under a theory of Ryan warranty, if a classification society fails to detect, with reasonable efforts, the defects that had to be repaired after notification, the society can be liable contractually for all foreseeable results by breaches of implied warranty of workmanlike performance under the condition that the classification societies should be able to be assumed to have a control over the vessel, although shipowners still has non-delegable duty on maintaining the vessel seaworthy. (Bar-Lev, J. (1973). Liability of a vessel classification society cannot be based on warranty of seaworthiness; see *Great American Insurance Company v. Bureau Veritas*, 338 F. Supp. 999 (S.D.N.Y. 1972). *Journal of Maritime Law and Commerce*, Vol.4, No.2. p.336.

<sup>77</sup> 338 f. Supp. 999 (S.D.N.Y. 1972) at 1015; in contrast to the stevedore’s operation a classification society does not provide any hazards or defects in the course of inspection, and can not either repair or force to repair such defects.

<sup>78</sup> Miller, M.A. *Supra*, note.5. p.95.



Concerning the liability of classification societies to other parties, in the case of *Somarelf v. American Bureau of Shipping*<sup>79</sup>, the court held that the shipowner could be entitled to recover the damages from the classification society under tort of negligence. In that case, the society, which the vessel was registered in, had been asked to issue a Suez Canal Special tonnage certificate. However, as a result of carrying out inaccurate measurements of the vessel, the Suez Canal required the time charterer to pay an additional charge. Subsequently, the shipowner was required by the time charterer to indemnify the additional charge that the time charterer could not recover from its sub-charterer. Then, the owner claimed for the charge against the classification society based on contractual and tort rights of indemnity.

In relation with the contractual indemnity claim that was based on the implied warranty of workmanlike performance,<sup>80</sup> the court deduced that there was no contractual right of indemnity of the ship owner. In order to establish an implied warranty of workmanlike service, there should be a special link between the shipowner and the potential indemnitee in such a way that the indemnitor should have been in charge of the vessel in terms of safety. In this vein, the court stated that the service rendered by the classification society in this case was not involved in the safety. Nevertheless, concerning the tort, the court concluded that the shipowner could be indemnified, based on tort of negligent misrepresentation that appeared in the certification issued negligently by the classification society. The court also stated four requirements to establish the negligence of misrepresentation in tort, based on the ‘Restatement (Second) of the Law of Torts (1977) Section 552’<sup>81</sup> that deals with information negligently provided for others. First, faulty information should exist in the course of the defendant’s business for

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<sup>79</sup> 704 F.Supp. 59 (D.N.J.1989)

<sup>80</sup> *Ryan Stevedoring Co. v. Pan Atlantic Corp.*, *Supra note.33*.

<sup>81</sup> § 552. Information negligently Supplied For The Guidance Of Others, Topic 3. Negligent Misrepresentation, Chapter 22. Misrepresentation And Nodisclosure Causing Pecuniary Loss, Division 4. Misrepresentation in restatement (Second) of Torts of Restatement of the law-Torts (The latest has been from 2009)

guidance of the plaintiff's business transaction. Second, there should be a failure of the defendant to exercise due care to collect the information. Third, the defendant should recognize that the information would give effects onto the plaintiff who has relied on it. Forth, there must be monetary damage suffered by the plaintiff. In regards with those requirements, the court held that the shipowner as the plaintiff proved all the requirements and then succeeded in the claims against the classification society.

In sum, traditionally, the US courts have the position to provide decisions in favor of the classification societies. However, comparatively, in recent cases<sup>82</sup>, classification societies could not have anymore superior status against the shipowners and contractually other parties in lawsuits, despite their public services on behalf of Flag States and characteristics as non-profit institutions to improve maritime safety which, in their absence, would be solely the burden of Flag States, which would suffer from the financial burden of performing statutory surveys on their vessels. Furthermore, it is notable that the courts tend to envisage the liability of classification societies by developing the tort of negligent misrepresentation in general maritime law to apply to claims on liability of classification societies in the courts. Bearing in mind this development, it seems that classification societies possibly have more chance to owe duty of care to contractual parties, which can bring in action for recovery of damages against them by trying to prove the four requirements related with tort of negligent misrepresentation.

### **3.2.2. Liability of classification societies towards third parties**

In US courts, the case on the liability of classification societies towards third parties had been considered under the tort of negligence and tort of negligent

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<sup>82</sup> *Somarelf v. ABS* Supra, note.36; *Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp.*, 2002 WL 1798767 (E.D.La. 2002), 346 F.3d 530, 2003 A.M.C. 2409 (5<sup>th</sup>.Cir.(La.)2003), 2004 WL 179442, 72 USLW 3668, 72 USLW 3672 (U.S.2004).

misrepresentation. Whereas courts considered the tort of negligence in older cases, in relatively recent cases, the tort of negligent misrepresentation was a major basis for the decisions from courts.

Firstly, regarding the tort of negligence, the necessary principles to hold a tortfeasor liable have been delineated in the previous section of the English law. Likewise, in US law, there also should be a duty of care to establish a tort in negligence on due care between the plaintiff and defendant.<sup>83</sup> After the establishment of the duty of care in the case of ‘*Great American Insurance Company*’<sup>84</sup>, an insurer of the ship brought an action against the classification society, BV, to recover money paid arising from the settlement of claims for the sinking of the insured vessel in the case of *Steamship Mutual Underwriting Association Ltd.*<sup>85</sup>. In the case, the court stated that the plaintiff failed to establish the exact cause of the sinking of the vessel, although it was convinced that there was negligence on the part of the defendant in carrying out the survey before the last voyage. Moreover, even though the surveyor from the defendant failed to gauge shell plate and to perform internal inspections on certain double-bottom tanks, so as to fail to exercise a duty of care to detect discoverable defects of the vessel in the course of its service, the plaintiff failed to prove evidentially that the sinking was caused by some defect which was discoverable by proper inspection by the defendant. Consequently, the court discharged the case due to a lack of causation, denying application of a doctrine of unseaworthiness in favor of the plaintiff in reference to *Great American Insurance v. Bureau Veritas* and other relevant case law.

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<sup>83</sup> Prosser, W. L. & Keeton, W. P. (1984). *On the Law of Torts*, 5<sup>th</sup> edition. St. Paul Minnesota: West Publishing Company. p.269.

<sup>84</sup> *Great American Insurance Company v. Bureau Veritas*. *Supra note.34.*; However, in the case, the court did not take further discussion on whether a duty of care of the defendant existed toward third parties, since the plaintiff failed to ascertain a casual link between the duty of care alleged and the collapse of the vessel.

<sup>85</sup> *Steamship Mutual Underwriting Association Ltd. v. Bureau Veritas*, 380 F. Supp. 482 (E.D.La. 1973)

As adjudications of the several cases in US courts, the classification societies are deemed to owe a duty of care toward third parties to perform their service duly in accordance with their rules, but, in general, the court still contemplates non-delegable duty of shipowners to provide the seaworthiness of vessels for its decision. In this vein, US courts maintain the position of reluctance to hold classification societies liable for economic losses or damages caused from injured cargo,<sup>86</sup> since the courts recognized a duty of care to be owed by a defendant only in limited cases occurred in physical damage to person or to property.

Secondly, the courts recently considered plaintiffs' reliance on the tort of negligent misrepresentation. In US, this tort would be applied for third party professional liability arisen in the lawsuits. As it was referred in the previous section, under the tort of negligent misrepresentation, a professional, who provides faulty information in his business for guidance of third parties, is liable for the financial damage suffered by third parties, if the professional fails to exercise due care in collecting the given information and recognizing that third parties would be affected by the information in virtue of their reliance on it.

In the case of *Sundance cruises corp. v. American bureau of Shipping*,<sup>87</sup> the court confirmed that the owner of the cruise ship *Sundancer* could not rely on the certificate issued by the classification society as a guarantee that the vessel was soundly built. Then, the court also stated that considering the dissymmetry between the service fee charged by the classification society (USD 85,000) and the damages sought by the ship owner (USD 264,000,000), it could not find the intention of the society to insure the vessel with bearing the risk of such liability, and that if such a liability was imposed on the classification society, the ship classification industry could not exist anymore. Further, it was also found that the

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<sup>86</sup> O'Brien, D.L. (1995). The Potential Liability of Classification Societies to Marine Insurers under United States Law, 7.2:403. *USF Maritime Law Journal*. San Francisco: USF School of Law. p.410.

<sup>87</sup> *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F. 3d 1077 (2<sup>nd</sup> Cir. 1993).

shipowner ultimately is responsible for and in control of the ship in her course of service life with a non-delegable duty to provide a seaworthy ship. In this vein, if a shipowner, as contractual party to the classification society, may not rely on the certificate of classification, establishing third party liability of classification societies based on the tort of negligent misrepresentation would be more stringent.<sup>88</sup>

In the case of *Otto Candies, LLC v. Nippon Kaija Kyokai Corp.*,<sup>89</sup> the classification society was liable for negligent misrepresentation on the certificate to the purchaser of the coastal passenger ferry *M/V Speeder*. The vessel was laid up in Japan for a long period. During this time, the vessel had not taken periodic survey from the classification society, ClassNK to maintain its class, which would expire after a certain period time. Then, the owner of the vessel requested a survey from ClassNK to recover its class, which required a more detailed inspection than the former inspection, since granting the classification was a requirement for transaction of the vessel to the purchaser. After the inspection, the vessel was re-classified by ClassNK with its certificates without outstanding recommendations or deficiencies. Thereafter, the purchaser completed the transaction of the vessel, and then applied for the inspection of ABS to transfer its classification from ClassNK to ABS. However, the surveyor from the ABS found a number of defects that would require repairs before ABS issued the certificate to classify it. Then, the purchaser paid USD 325,000 for repairs to the vessel to grant its classification, and thereafter, filed legal action against ClassNK to recover the cost for the repairs.

In this case, it is notable that usual confirmation of class certificate had not been concerned, instead, a certificate issued after a re-entry survey was mainly regarded. In this vein, the court ruled that the plaintiff might rely on the accuracy

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<sup>88</sup> Basedow, J. & Wurmnest, W. (2005). *Supra*. p.32.

<sup>89</sup> *Otto Candies v. Nippon Kaija Kyokai*, 2002 WL 1798767,1,3 ff. (E.D.La.2002).

of the re-entry classification in this special case where at the time the vessel was re-classified, ClassNK was aware of the pending transaction of the vessel, which could be directly affected by whether the class certificate issued. Consequently, the court affirmed the decision of the district court that ClassNK as the defendant was liable to the plaintiff Otto Candies based on the tort of negligent misrepresentation that its certificate included false messages declaring that the vessel was free of recommendations and deficiencies, which could guide the plaintiff's decision to buy the vessel, did not comply with its own classification rules.

In sum, US courts have largely given decisions in favor of the classification societies in claims by third parties. However, it is also possible for third parties to make classification societies liable in cases clearly providing class services not only to its contracting parties, but also to particular third parties.

### **3.2.3. Exemption and limitation of liability**

#### **3.2.3.1. Clauses toward contractual parties**

In relation with the liability to contractual parties, when plaintiffs may ascertain that a classification society should be liable under US contract law, it should be considered whether these societies might be in the position to limit or exculpate their liability under clauses stipulated in the contracts. For this reason, US Law has developed several provisions for such contracts that may include disclaimers of warranty liability, which reject claims under breaches of warranty; clauses to exonerate classification societies from negligence and other tort liability and to deny any claim for lack of care; clauses to release any claim under liability; clauses excluding consequential damages; clauses to limit the period that notice must be given or suit must be brought in; indemnity clauses to stipulate that the indemnitee, i.e. the classification society would be exempted by holding an

indemnitor to take over liability of the indemnitee. All above clauses can also be combined in a contract.<sup>90</sup> Normally, these provisions would be dealt with the autonomy of the parties. Thus, as far as commercial transaction between two entities which have equal bargaining power was formed according to the autonomy, the court will refuse to rewrite the transaction in the case that there is no evidence that one party has superior power to be able to use its position of advantage.

Regarding the application of the above conditions and clauses into the contracts of the societies, several restrictions have been established from the cases, to delineate what the classification society can stipulate in contracts.<sup>91</sup> Firstly, the US jurisprudence generally recognizes that exculpatory clauses are unenforceable in US court, since exculpatory clauses in the contracts including total exemption from liability are too broad to be accepted in the court as contrary to public policy.<sup>92</sup> Especially, in the case of *Sundance*,<sup>93</sup> the court held that these clauses were unenforceable against the public policy. In addition, it has been conformed in the case of *Amoco Cadiz*<sup>94</sup> that these clauses were just regarded as evidence that classification societies had not obliged to indemnify the shipowner, even though the court held that “some doubt whether the broad exculpatory clause contained within the certificate issued by is legally enforceable”.<sup>95</sup> Hence, although exculpatory clauses have different effects depending on cases, it is obvious that the clauses are in doubt to be enforceable.

Secondly, the doctrine of unconscionability may be appreciated to delineate stipulation on the limitation or exoneration clauses for classification societies. Unconscionability is a term having the definition that a defense can be against the

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<sup>90</sup> Lagoni, N. *Supra*. p.96.

<sup>91</sup> *Ibid*. p.96.

<sup>92</sup> Antapassis, A.M. *Supra*. p.25;

<sup>93</sup> 7 F. 3d 1077 (2<sup>nd</sup> Cir. 1993). *Supra*.

<sup>94</sup> *In re: Oil Spill by the Amoco Cadiz* 1986 A.M.C. 1945.

<sup>95</sup> Gordan, J.D., III. *Supra*. p.306

enforcement of a contract according to the appearance of terms that are excessively unfair to one party. In relation with unconscionability, the court considers both substantive matters and procedural matters. As substance of the contract the court considers whether there is unfairness in the terms, interest payments, or other obligations and as the matters in procedure, whether there is presence of a party's lack of choice, superior bargaining position or knowledge, and other circumstances surrounding the bargaining process.<sup>96</sup> In this regard, when the court has found the unconscionability, there are several possible remedies for the situation, including refusal to enforce the contract or to enforce only the offending clauses in the contract, or take other measures deemed to be necessary for the claim to be resulted fairly.

Lastly, *contra preferentem* would also be a consideration for the stipulation of classification societies that have sought exemption and limitation clauses. It is a doctrine of contractual interpretation that an ambiguous term will be construed against the party that has imposed it. Hence, exculpatory clauses in the contract of survey have to be specified in virtue of the scope of activities, events covered by the limitation and specific condition for establishing negligence,<sup>97</sup> since the court might regard total exemption for classification societies from their liability as an ambiguous clause.

### **3.2.3.2. Limitation and exemption from liabilities to third parties**

Regarding the liability of classification societies toward third parties, there is no specific theory to limit or exempt the liability. However, the courts of US have maintained a position in favor of classification societies in terms of their liabilities toward third parties. Especially, they presumed that the Ryan warranty<sup>98</sup>, which describes implied warranty of workmanlike performance that might be applied for

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<sup>96</sup> Lagoni, N. *Supra*. p.97.

<sup>97</sup> *Ibid*. p.97.

<sup>98</sup> See *Supra* note. 76.



other parties' liabilities, could not be applied in these cases. This is because they did not assume an implied contractual right for third-party beneficiary based on the absence of a control of classification societies over vessels, whereas shipowners have operation and control all the time on their vessels.<sup>99</sup> Nevertheless, it can still be questioned whether third parties such as cargo owners have established the classification societies liable based on tort of negligence in their surveys or tort of negligent misrepresentation in certificates provided. The classification societies might be exposed to a substantial burden of financial loss to indemnify claims, since, again, there is no specific theory to limit or exempt liability. Ultimately, it might be difficult for them to provide their services consistently, which, in their absence, would be in the responsibility of Flag States.

#### 3.2.4. Recourse of the State

Under US jurisprudence, solely departments and agencies of the Governments can enjoy sovereign immunity when they execute the public service. In this vein, since classification societies are regarded as independent contractors of the US governments, not agencies and departments of them,<sup>100</sup> in general, they cannot enjoy the benefit of sovereign immunity. However, in certain circumstances, they can be immune from their liability when they are performing statutory surveys as public services. Moreover, the leading cases show that an independent contractor enjoys immunity from liability, if the work performed by him is solely for the Government's interest.<sup>101</sup> In this regard, the statutory survey is *per se* an interest of the Government. Since the maritime authority principally should perform the statutory surveys on their vessels, and also should have ascertained the safety of the vessel consistently, even if the authority delegated such duties to classification

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<sup>99</sup> *Ibid.* p.188.

<sup>100</sup> In US law, ABS is solely recognized as the agent of the Government in matters related to classification for vessels owned by the Government based on 46 U.S.C.A. §3316, otherwise ABS is also regarded as an independent contractor with the Government when it carries out surveys other than classification or statutory survey on vessels registered in US.

<sup>101</sup> Lagoni, N. *Supra.* p.242; *Yearsley v. W.A. Ross construction Co.*, 309 US 18 (US 1940); *Bolye v. United Technologies Corp.*, 487 US 500, 108 S.Ct. 2510 (US 1988).

societies. Hence, if a classification society causes damage to other parties when it is carrying out statutory service solely for the interest of the Government, the liability of the classification society can be dismissed by the benefit of immunity. In consequence, for the reason that the doctrine of sovereign immunity prevents lawsuits against governmental entities, the recourse from the Government to classification societies could not occur<sup>102</sup> and also the classification society, itself, can enjoy the benefit of immunity under the specific condition aforementioned.

### 3.3. Korean (Republic of) law

In Korea's legal regime, there are two legal frames in relation to the liability of classification societies; one is the *Civil Act*, which covers claims arisen in private matters such as torts of negligence in surveys to issue classification certificates, which cause damage to contractual parties or third parties; the others are the *Ship Safety Act* and the *State Compensation Act* to cover the State's liability in terms of the statutory surveys afforded by classification societies. Hence, if a claim has been filed against a classification society, the court would apply the *Civil Act* to the case, since the service provided by the classification society is regarded as a private matter based on the contract, whereas, if a claim has been filed against the State based on negligence or torts in statutory surveys of a classification society, the court considers the *Ship Safety Act* and *State Compensation Act* to decide whether the state is liable or not. Furthermore, since Korea has adopted the civil law system, the court would primarily rely on the wording of these applicable statutes for the construction of law, which makes it possible to apply the

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<sup>102</sup> In regard to immunity, an injured party still can take legal proceedings against the Governments, if there is a waiver of immunity from the Government. However, in terms of the Federal Tort Claims Act, in cases for the *discretionary function*, it did not allow the waiver of immunity from the governments. In relation with the case for the liability of classification societies performing statutory surveys as an activity which relates to the traditional maritime activity of operating a vessel, although the courts will consider the Suits in Admiralty Act which does not embrace an explicit discretionary function exemption, there is precedents to establish an implied discretionary function therein. Therefore, this implied discretionary function would restrain the State of the waiver of immunity in relation with the liability arisen from statutory surveys of classification societies. (*Ibid.* pp.243-248).

legislation to the specific case through proper interpretation of provisions. In addition, for this particular case regarding the liability of classification societies, as there is no case law established yet in the Korean Courts, the interpretation of provisions would be the most significant court process to decide the judgments.

In general, in order to verify the applicability of the statutes to the cases related with the liability of classification societies, the court would examine the scope of application stipulated in the statutes. In this context, for contracts on the survey of classification, § 9 of the *Civil Act*<sup>103</sup> is applicable to the contract between classification societies and other parties. Additionally, regarding the statutory survey, the *Civil Act* has defined the relationship between the State and classification societies by § 11, article 680 *Definition of Mandate*, which prescribes that “a mandate shall become effective when one of the parties has entrusted the other party with the management of affairs and the other party has consented thereto”. Moreover, once a mandate has been engaged, a mandatary would have owed a duty of care and due diligence to the trustor under article 681.<sup>104</sup>

Lastly, it is notable that the courts in Korea have retained the position to apply the ‘principle of liability with fault’ in case of claims arisen from the damage.<sup>105</sup> Hence, unless classification societies breach warranties stipulated in the contracts, in order to establish the decision, the court would scrutinize whether there is a breach of due care, which might be implied in the contracts. In addition, this fault-based liability would also be applied to claims from third parties against classification societies in relation with the tort in services.

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<sup>103</sup> *The Civil Act*, §9 contract for work.

<sup>104</sup> *Ibid.* §11, Article 681 (Mandatary’s duty of care and due diligence): A mandatary shall manage the affairs entrusted to him with the care of a good manager in accordance with the tenor of the mandate.

<sup>105</sup> Lee, Y.C., Nam, D., & Lee, S.I. (2011). A study on the Legal Responsibility of Ship Survey. *Maritime Law Review*, Vol.23 No.2. Busan: The Korea Institute of Maritime Law. p.34.

### 3.3.1. Liability under the *Civil Act*

In Korea, similar to other countries, contractual parties may also file a claim against classification societies based on either breaches of warranties or tort of negligence under contracts, whereas third parties may institute claims on their damage under the tort of negligence of the societies.

Regarding breaches of warranties in the contract, the *Civil Act*, article 390 (Non-performance of obligations and compensation for damages) states that “If an obligor fails to effect performance in accordance with the tenor and purport of the obligation, the obligee may claim damages: Provided, that this shall not apply to cases where performance has become impossible and where this is not due to the obligor’s intention or negligence.” Hence, contractual parties can sue classification societies before the court based on this provision, if there is damage caused by breaches of obligations of the defendant under certain conditions prescribed in the provision.

However, even if the claims have filed against classification societies, given the case that clauses of limitation or exemption are incorporated in the contracts according to private autonomy, the court can dismiss the cases under these clauses of the contracts. Since, in claims related with private matters, the Korean courts also consider the contracts first for their decision. At any time, in order to make the clauses for limitation or exemption enforceable, these clauses should be in the public order and morals, which would be delineated by cases. Moreover, while drafting these contractual conditions, the powers of bargaining between parties should not be excessively unfair in the entire course of the bargaining process and contract.<sup>106</sup> Especially, for including the pecuniary limitation in the contract, it can be referable to Article 398 of *Civil act*, which stipulates in para.1 as, that “the parties may determine in advance the amount of damages payable in the event of

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<sup>106</sup> *Ibid.* p.36

the non-performance of an obligation.” However, total exemption clauses for liability of parties are unenforceable also in Korea based on the *Regulation of standardized contracts Act*.<sup>107</sup>

With regards to torts of negligence for the classification societies, the related parties including contractual and third parties can institute claims on their damage based on article 750 of *Civil Act*, which stipulates as follows that; “Any person who causes losses to or inflicts injuries on another person by an unlawful act, willfully or negligently, shall be bound to make compensation for damages arising therefrom.” In this regard, to establish liability based on torts, the plaintiffs have to prove (1) the intention or the negligence of defendants causing the damage; (2) the infringement to the legislations or contracts; (3) existence of accountability for defendants in relation with the damage; (4) the damage caused by the defendant and (5) causation between the damage and negligence or intention provided by defendants.<sup>108</sup> In case of claims by third parties, mentioned again, since there is no specific regulation for conferring limitation of liability or imposing absolute liability to classification societies, they would be liable based on faults, when plaintiffs established torts in their service causing damage.

Additionally, it is notable that, in Korea, injured parties cannot sue a surveyor who carried out negligently an inspection on a ship as a delegation from a classification society, since his negligence should be deemed as that of the

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<sup>107</sup> Article 7 (prohibition of Exemption Clause) in the *Regulation of standardized contracts Act* stipulates that;

Any clause of a standardized contract concerning the liability of contraction parties that falls under any of the following subparagraphs shall be null and void:

1. A clause which exempts an enterpriser from liability for intentional or gross negligence on the part of the enterpriser, his/her agents, or his/her employees;
2. A clause which limits, without a substantial reason, the extent of damages payable by an enterpriser, or which passes a risk borne by an enterprise to a customer;
3. A clause which, without a substantial reason, excludes or limits the warranty liability of an enterpriser, tightens requirements that customers must meet to exercise their rights under the warranty thereof;
4. A clause which excludes or limits the warranty for the object of a contract for which an enterpriser has provided a sample, or has indicated the quality, performance, etc

<sup>108</sup> Lee, Y.C., *et al. Supra*. p.36.

classification society under Article 391 of *Civil Act*. Therefore, the classification society is obliged to compensate injured parties for their loss caused by negligence of its surveyor unless it exercised due care in the appointment of the employee, and the supervision of the undertaking.<sup>109</sup> However, since the court in Korea holds the position to be reluctant to dismiss vicarious liability of the classification society, when the injured parties has proved the negligence of a surveyor, it is rare for the classification society to disclaim his liability by proving due care exercised.<sup>110</sup>

### 3.3.2. Recourse of the State to classification societies

In Korea, generally, injured parties may take action against the State based on damage caused by negligence or tort of classification societies under the *State Compensation Act*, Article 2, para.1 which states that “when public officials or private persons entrusted with public duties ... inflict damage on other persons by intention or negligence in performing their official duties, in violation of the provisions of Acts and subordinate statues or ... the State or local governments shall compensate for such damage under this Act:...”. In this context, the issue of whether a surveyor can be deemed a private person entrusted with public duties and whether the statutory surveys are public duties would be the nucleus for the application of the provision.

Firstly, regarding a private person entrusted with public duties, the *Ship Safety Act*, Article 77, para.1 can be referred to. This article has set up requirements for the ship inspectors, stating “[...] the qualification for a ship inspection officer shall be applied *mutatis mutandis* to that for a ship inspector”. Based on these provisions, the surveyor can be regarded as a private person entrusted with public duties in the courts, since a surveyor from a classification society would be

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<sup>109</sup> *Civil Act*, Article 756, para.1.

<sup>110</sup> Lee, Y.C., *et al. Supra*. p.37.

imposed with the same duties as a ship inspection officer from the government under this provision.<sup>111</sup> Secondly, regarding the matter of whether the statutory surveys are a public service, it should be considered that if a ship owner did not gain certificates necessary for his vessel to sail for an intended voyage due to several severe defects in part of the vessel found after a statutory survey, the ship would be prohibited legally from sailing until finishing repairs of the defects, which have to be verified by a classification society or the public authority.<sup>112</sup> In other words, since the State has an intention to exercise the authority to control vessels sailing based on whether the certificate is issued after statutory surveys from classification societies, the statutory surveys are directly linked with the authority of the State to regulate matters of the shipping, so the statutory survey could be considered as a public service.

Bearing mind the above, in a claim against the State, if a plaintiff has succeeded to prove that there is damage inflicted to the plaintiff by the intention or the negligence of a ship inspector during the course of the statutory survey, the State would be liable for damage suffered by the plaintiff. In addition, the State subsequently can have recourse of limited amounts to the classification society that has carried out the survey. In this case, unless the classification society has performed the survey without gross negligence or intention to cause the damage to the vessel, the State can have recourse under Article 2, para.1 of the *State Compensation Act*. In other words, even though the State can be liable based on the negligence or the tort in the statutory survey, which can be committed by the classification society, the State cannot have recourse to it, unless the State can detect its gross negligence or intention to cause harm. Moreover, although the State can have recourse to the classification society, it will be limited by the amounts prescribed by the Presidential Decree of the *Ship Safety Act* according to its Article 67, para.3. This liability of the State has been iterated in the *Ship*

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<sup>111</sup> *Ibid.* p.41.

<sup>112</sup> *The Ship Safety Act*, Article 17; Article 74, para.3.

*Safety Act*, Article 67<sup>113</sup> to clarify the liability of the State in relation with classification societies.

Consequently, in the case that the State has recourse to the classification societies, it seems to be hard for them to be liable for loss of the State. Furthermore, even in the case that they have to indemnify the recourse from the State's loss, the amount of liability will be limited according to relevant provisions. However, considering the case that plaintiffs sued on their damage against the classification societies, there are no specific rules for limiting their liability. Although limitation clauses for liability can be incorporated in the contract of a survey, which can be enforceable to contractual parties, claims by third parties still would not be affected by those clauses due to absence of the interest with the contract. In addition, the courts in Korea normally maintain the position to be reluctant to dismiss vicarious liability in any case. Therefore, if claims arise out of injured parties to classification societies based on negligence of their surveyors, the court would tend to hold them liable for the damage of the injured parties.

### 3.4. Conclusion

Traditionally, when claims had arisen in relation with the liability of classification societies, the past jurisprudence in US and UK maintained positions in favor of classification societies since their services were regarded as a safeguard for retaining and improving safety in the shipping industry. Especially, regarding contractual parties, they seemed to occupy a certain superior status to either shipowners or shipyards by using exemption or limitation for their liability in

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<sup>113</sup> The *Ship Safety Act*, Article 67 (Liability of Compensation of Agency);

- (1) When the Authority, the classification corporation, an agency for examination, etc. of containers and an agency for inspection, etc. of dangerous articles (hereinafter referred to as an "agency for inspection") cause damage to third parties illegally in performing the affairs of the relevant agency, the State shall compensate such third parties for such damage.
- (2) With respect to the compensation for damage under the provisions of paragraph (1), the State may claim the relevant agency for inspection for indemnification when there is an intention or gross negligence by the agency for inspection.[...]



contracts. Although it was possible for shipowners who had huge fleets to force a classification society who had classified their vessels to give them certain benefits by disclosing implicitly their intention to move the vessels to other classification societies who were authorized to classify their vessels, it would rarely occur since few owners with huge fleets exist. In addition, the fact that in any case, shipowners had to have the classification for engaging contracts of carriage of goods by sea could be a factor to endue the classification society with a certain level of status toward shipowners.

However, presently, the status of classification societies has changed due to several factors including the emergence of a number of classification societies and extension of their role in the maritime sphere. In this regard, most countries would not tolerate anymore the negligence in classification and statutory surveys afforded by classification societies due to enormous damage and loss which would result from accidents caused hereby. Furthermore, the courts in certain countries are reluctant to dismiss the liability of classification societies, since they regard either classification or statutory survey as a legal device for securing the seaworthiness of vessels,<sup>114</sup> even if most countries look upon the statutory survey offered from them as no more than verifying vessels and their compliance with legal requirements of international conventions and domestic legislation at the time of surveying.

Consequently, classification societies nowadays could be exposed to more claims of injured parties by giving them more possibility to establish the societies liable for their damage, whereas in the precedents, it was difficult for plaintiffs to be indemnified by the societies based on the tort of negligence or even breaches of implied contractual obligations. Moreover, a more significant matter is that they

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<sup>114</sup> In case of Korea (Republic of Korea), the Ship Safety Act that prescribes the statutory survey on Korean vessels includes a provision stating that “the purpose of this Act is to protect the lives and properties of the nation by prescribing the matters necessary for maintenance of seaworthiness and safe navigation of ships.” in its Article 1 defining the purpose of the Act.

would be subject to unlimited liabilities toward third parties, given the case to ascertain tort of negligence in their services, since there is no specific legislation to limit the liability of classification societies in those countries.

## 4. The Limitation of liability of classification societies

Over the period classification societies have somehow been criticized in terms of their services including either classification or statutory certificates, it seems that their credibility has been eroded.<sup>115</sup> Additionally, in view of the gradually increasing social needs for safety of human life at sea and preservation of sound environment of the ocean, the classification societies seem to provide more cautious and diligent services for preventing claims arising, in terms of their liability. However, in contrast, issues on limiting the liability of classification societies have not been emphasized and clear from the international legal point of view, even though there have been a few attempts to raise arguments hereto in Comité Maritime International (CMI) and regional areas such as European Union (EU). Hence, this chapter is intended to examine the possible application of current legislation on the limitation of liability to the classification societies and possible legal frames to limit their liability in view of an international convention.

### 4.1. The limitation of liability in current legal regime

Regarding the limitation of liability in maritime claims, LLMC<sup>116</sup>, CLC<sup>117</sup> and HNS<sup>118</sup> Convention are common legal regimes in international shipping. Additionally, the limitation clauses in the Hague/Hague-Visby Rules can also be

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<sup>115</sup> Begines, J. L. P. (2005). The EU Law on Classification Societies: Scope and Liability Issues. *Journal of Maritime Law and Commerce*, Vo.36, No.4. p.490.

<sup>116</sup> The *Convention on Limitation of Liability for Maritime Claims* was adopted in 19 November 1976 by IMO and entry into force in 1 December 1986, which has been amended by Protocol of 1996 that was adopted in May 1996 and enforce in May 2004. (<http://www.imo.org>, the last access in 21<sup>st</sup> Sep. 2011)

<sup>117</sup> The *International Convention on Civil Liability for Oil Pollution* was adopted in 29 November 1969 by IMO and entry into force in 19 June 1975, being replaced by 1992 Protocol that was adopted in 27 November 1992 and enforced in 30 May 1996. (<http://www.imo.org>, the last access in 21<sup>st</sup> Sep. 2011)

<sup>118</sup> The *Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and noxious Substances* was adopted in May 1996 by IMO, however, has not been enforced. Then, a second International Conference in April 2010 adopted a Protocol to the HNS Convention (2010 HNS Protocol), for more State ratifying the original Convention by addressing the practical matters. (<http://www.imo.org>, the last access in 21<sup>st</sup> Sep. 2011)

referable in connection with claims arisen upon bills of lading. In addition, as a direct effort to limit the liability of classification societies, initiatives of CMI would be worth referring to the international perspective. There have also been regional and domestic efforts to limit the liability of classification societies.

#### 4.1.1. The current legislations on liability

When shippers institute claims on the liability of shipowners, the Hague or the Hague-Visby Rules, in general, apply for the limitation of liability of shipowners. The Hague/Visby Rules state in Article IV *bis* that;

- [...]
- (2) If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

[...]

Herein, if the classification societies can be regarded as servants or agents of the carriers when they provide their services negligently so as to be the legal basis for the claims of shippers, classification societies could potentially be entitled to limit their liability under the Hague-Visby Rules. Generally, a servant is ‘a person who is employed by another to do work under the control and direction of the employer’.<sup>119</sup> In other words, to be a servant of a shipowner, a classification society should be employed by the shipowner who has control and direction over it in the course of services provided by the classification society. However, the classification is usually carried out in accordance with its own rules announced publicly. In addition, although it is the privity of the contract between the classification society and the shipowner in terms of statutory survey or classification, it is hard to envisage that the shipowner exercises either control or direction over its course of services. Thus, the classification society is not a servant of the shipowner.

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<sup>119</sup> Garner, B.A. (2004). *Black's law dictionary, Eighth Edition*. St. Paul Minnesota: West, a Thomson business. p.1399.

Moreover, an agent is commonly recognized as ‘one who is authorized to act for or in place of another’.<sup>120</sup> In this vein, to be an agent for a shipowner, a classification society can represent the shipowner, acting as the principal. However, again although the classification society offers its service to the shipowner based on the contract, there is no such relation between them to allow the classification society to act on behalf of the shipowner. Consequently, the classification society always acts independently so that it is neither a servant nor an agent of the shipowner. In these regards, the Hague and the Hague-Visby Rules cannot apply to limit the liability of classification societies.

Regarding CLC 1969<sup>121</sup> as amended by the 1992 Protocol, it prescribes the exception clause for certain claims in article III (4) which states that;

(4) No claim for compensation for pollution damage may be made against the owner otherwise than in accordance with this convention. Subject to paragraph 5 of this Article, no claim for pollution damage under this Convention or otherwise may be made against:

[...]

(b) the pilot or any other person who, without being a member of the crew, performs services for the ship;

[...]

To apply this provision to the liability of classification societies, it should be possible for a classification society to be regarded as any other person who, without being a member of the crew, performs services for the ship. Simply, the service rendered by a classification society is for the safety of the ship and also it does not require being a member of the crew to perform the service. Hence, it is seemed that the classification society can enjoy the benefit of this proviso. However, the wording of ‘a pilot or any other person[...]’ is normally construed as meaning that the nature of the service should be somehow or other similar to

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<sup>120</sup> *Ibid.* pp.68-71.

<sup>121</sup> CLC 1969, Article III (4) stipulates that ‘... No claim for pollution damage under this Convention or otherwise may be made against the servants or agents of the owner.’ Thus, under this article, CLC 1969 could not applicable to classification societies as the same manner of the the Hague and the Hague-Visby Rules.

that of a pilot service.<sup>122</sup> Therefore, although the classification performs the services for the ship, their liability can not be limited by this provision, since the nature of services rendered by the classification society are not concerned with the navigation of the ship for those including docking or passing narrow channels in inland waters, which can be rendered as the service of a pilot.<sup>123</sup>

Regarding LLMC for claims of third parties, it is arguable whether the convention can include classification societies under article 1(4)<sup>124</sup> and article 9 (1) (a)<sup>125</sup>, if the shipowner has the responsibility for their act, neglect or default.<sup>126</sup> In regards to this argument, States ratifying the convention urged to include pilots in article 1 (4) and also highlighted that a limited number of persons could be entitled to limit their liability in the International Conference on the Limitation of Liability for Maritime Claims. In this regard, most countries have recognized that a case wherein a person is responsible for someone's act can occur between an employer and employee.<sup>127</sup> However, as the above already mentioned, classification societies have been viewed as independent contractors who can perform the business on their own account and are contracted to do certain works by their own methods. In this vein, it is unnecessary for shipowners to be in charge of the act, neglect or default rendered by classification societies under LLMC, considering

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<sup>122</sup> Lagoni. N. *Supra*. pp.288-290.

<sup>123</sup> The HNS Convention also stipulates the provision similar to that of CLC, so that classification societies can not be protected by this Convention, article 7(5), either, prescribing that; 'subject to paragraph 6, no claim for compensation for damage under this convention or other wise may be made against: [...] (b) the pilot or any other person who, without being a member of the crew, performs services for the ship; [...]'

<sup>124</sup> The Article 1 (*Persons entitled to limit liability*) included that '[...] 4. If any claims set out in Article 2 are made against any person for whose act, neglect or default the shipowner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this Convention; [...]'

<sup>125</sup> The Article 9 (*Aggregation of claims*) stipulated that '1. The limits of liability determined in accordance with Article 6 shall apply to the aggregate of all claims which arise on any distinct occasion:

(a) against the person or persons mentioned in paragraph 2 of Article 1 and any person for whose act, neglect or default he or they are responsible; [...]'

<sup>126</sup> Lagoni. N. *Supra*. pp.285.

<sup>127</sup> *Ibid*. pp.286-287.

national laws. Consequently, The limitation provisions of the LLMC cannot apply to classification societies.

In summary, even if there are a number of international conventions regarding limitation of liability, these are mostly concerned with those of either shipowners or limited persons other than classification societies. Additionally, matters related with liability of classification societies have remained upon national legislations that can be differentiated depending on each State.

#### 4.1.2. Initiatives of CMI

In 1992, the Joint Working Group on a Study of Issues re Classification Societies (CSJWG) was formed by the CMI's Executive Council to settle controversial issues in relation to activities of classification societies.<sup>128</sup> Subsequently, the CSJWG decided to produce the '*Principles of Conduct for Classification Societies*' and the '*Model Contractual Clauses*' after five years of work attended by various stakeholders in the shipping industry. CSJWG tried to cover both statutory and classification surveys through these documents that included issues related with liability and its limitation as the nucleus of arguments.

On the subject of the Principles of Conduct for Classification Societies, it covers all classification societies, including those regardless of their organization other than members of IACS.<sup>129</sup> The major purpose of the Principles is to set up a standard of care to discharge their duties and responsibilities subsequent to exercise standards of practice and performance in the Principles.<sup>130</sup> In other words, by clarifying standards of care as clauses enumerated in the Principles, if a

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<sup>128</sup> Begines, J.L.P. *Supra*. p.497.

<sup>129</sup> *Ibid*. p.498.

<sup>130</sup> The *Principles of Conduct for Classification Societies*, Article 4 state that '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.'

classification society exercises all standards in the Principle, it can discharge its duties and responsibilities based on *prima facie* evidence that it has acted according to clauses of the Principle.<sup>131</sup> Consequently, in general, it was recognized that the Principles of Conduct are likely to define the extent of potential liability of classification societies.

Concerning the Model Contractual Clauses, as the CSJWG considered drafting a new convention on the limitation of the liability of classification societies, which would take 8 to 10 years to be enforced effectively, it focused on the private agreements between either shipowners and classification societies or Flag States and the latter.<sup>132</sup> However, in terms of a clause for limiting the liability of classification societies, it seemed that they failed to decide on specific amounts.<sup>133</sup> Originally, it was the intention for the Model Contractual Clauses to provide a uniform clause for the contractual liability to engage the classification contracts between parties; however, it could not offer anything in terms of limiting liability of classification societies. Moreover, for matters in relation with third-party liability, CSJWG did not examine the Model Contractual Clauses through initiatives of CMI. Accordingly, this remained as a matter unresolved.

In conclusion, although the standards of care for determining the scope for the liability of classification societies were well established in the Principle of Conduct, it seemed to have failed to establish their specific limited liability as codified clauses.

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<sup>131</sup> The *Principles of Conduct for Classification Societies* include, in their context, that ‘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; [...]’; see also Begines, J.L.P. *Supra*. p.498.

<sup>132</sup> Lagoni.N. *Supra*. p.299.

<sup>133</sup> The *Model Contractual Clauses*, Part II, Article 9 prescribes that ‘The limit of liability [classification Society] in respect of [a single claim arising out of the performance of a service] [all claims arising out of a single incident attributable to the performance of a service] pursuant to these Rules shall not exceed [X million United States Dollars] [y times the fee charged by [Society] for the service in question or x million United States Dollars, whichever is the lesser amount] [X million united States Dollars or Y times the fee charged by [Society] for the service in question, whichever is the greater amount].’



#### 4.1.3. Council Directive 94/57/EC and 2001/105/EC of EU

In 1993, the EU begin to develop a comprehensive maritime safety policy in the community, and then, the Commission created the Directive 94/57/EC in the part of the initiatives to regulate recognized classification societies ensuring the maritime safety and conservation of the marine environment. Directive 94/57/EC on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations has two vital purposes.<sup>134</sup> The first is to set up measures for Member States of the EU to ensure that recognized classification societies that meet minimum criteria enumerated in the Directive solely perform the inspection, survey and certification of ships for conformity with the international conventions on safety of shipping and prevention of marine pollution. The second is to ensure that Member States delegate authorities to a recognized classification society in a non-discriminatory manner. This directive is related solely with matters of classification societies to eliminate substandard vessels from waters of Member States. In addition, by this directive, all Member States authorizing classification societies to carry out their services should monitor their activities and audit them.

Then, after the *Erika* disaster in the Gulf of Guascogne in 1999, Council Directive 2001/105/EC amending council Directive 94/57/EC was developed as the first post-Erika package measure,<sup>135</sup> since, in implementation of Directive 94/57/EC, several inadequacies were found. Especially, regarding the liability of classification societies, there was no detailed regime of liability in Directive 94/57/EC so that, when a maritime casualty occurred, it was not obvious to what extent classification societies could be liable. Thus, some provisions for liability were introduced in Directive 2001/105/EC, including clauses to express certain

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<sup>134</sup> Begines, J.L.P. *Supra*. pp.501-502.

<sup>135</sup> *Ibid.* p.504.

amounts as minimum liability<sup>136</sup> to be compensated by classification societies to Member States in the case of a casualty caused by a negligent or reckless act or omission of the classification society.<sup>137</sup>

Although a common legal regime for the liability of classification societies has been set up by Directive 2001/105/EC amending 94/57/EC, it includes only minimum standards for Member States that can introduce unlimited liability of classification societies, and also is restricted in the public services of classification societies for the Flag States. Therefore, it neither covers the liability of classification societies in private function nor the third parties liability of them in carrying out statutory surveys.

## **4.2. Lessons learned from precedents of the *Prestige* and the *Erika***

### **4.2.1. The *Erika***

On 12 December 1999, there was a gigantic catastrophe where the Maltese tanker *Erika* sank at the Bay of Biscay approximately 60 miles off the Brittany Coast. The *Erika* was one of eight sister ships which were built at Kasasdo Dockyard, Kudamatsu, Japan between 1974 and 1976. It was a single hull oil tanker ship of 19,666 gross tonnage with segregated ballast tanks. When the tanker sank, breaking in two parts during a storm, it was carrying 31,000 tonnes of heavy fuel oil. After the incident, the oil escaped from the ship to the Atlantic coast of France, then, spread out over about 400 km of beaches.

At the time of its sinking, the *Erika* was classified by RINA which is a full member of IACS and its statutory certificates were also valid. Additionally, an Italian company was managing the ship according to the International Safety

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<sup>136</sup> For Personal injury or death: at least € 4 million; for damage to property: at least € 2 million.

<sup>137</sup> EU Council Directive 2001/105/EC, Article 1 (5).

Management (ISM) Code being certified by RINA. Furthermore, several major oil companies such as Texaco, Exxon's subsidiary standard Marine, Repsol and Shell had chartered the *Erika* to carry their cargoes during the 1990s, after performing vetting inspections on the vessel. Lastly, in December 1999, the vessel passed several vetting inspections by most of the major oil companies.

Markedly, although compensation for persons suffering pollution damage as a result of the *Erika* incident had been made by the shipowner who was responsible for the first layer under CLC, and by the IOPC Fund for the second layer,<sup>138</sup> a number of other claims were filed against the classification society of RINA to recover losses. Because of this series of lawsuits against RINA, the oil pollution compensation system was criticized for 'the liability channeling to the shipowner', where there is no interest for either the cargo owner, charterer or other interest parties to act responsibly to the vessel.<sup>139</sup> In this vein, the incident of *Erika* seemed to result in a new climate wherein the public was no longer tolerant of any failure on the part of the maritime industry, especially classification societies which in recent years had gradually failed to establish their credibility. William A. O'Neil, the former secretary-general of the IMO, also mentioned after the incident of the *Erika* that, "like a stone cast into a pond, the sinking of *Erika*, is causing waves that are continuing to spread far beyond the original incident."<sup>140</sup>

Subsequently, according to a report, in 2005, submitted by experts appointed by the Commercial Court (Tribunal de Commerce) in Dunkirk, France, RINA failed

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<sup>138</sup> "The total amount available to pay compensation for this incident under the 1992 Civil Liability and Fund Conventions is €184 763 149. Payments of compensation have been made for a total of €129.7 million, out of which Steamship Mutual paid €12.8 million (ie the liability limit for the shipowner under the 1992 CLC) and the 1992 Fund €116.9 million. Therefore, there now remains some €55 million available for compensation."; see 'International Oil Pollution Compensation fund (IOPC Fund) 1992. (2011, June 14). *Incidents involving the IOPC Funds – 1992 Fund, Erika: Note by the Director (IOPC/JUL11/3/1)*. London: Author. para.8.1.'

<sup>139</sup> Özçayır, Z.O. (2000). The Erika and its aftermath. *International Maritime Law, Vol.7, Issue 7*. p.231.

<sup>140</sup> O'Neil, W.A. (2000). World Maritime Day 2000. *IMO News, Issue No.3*. p.16.

to detect that the ship had severe defects of the internal structures of its No.2 ballast tanks, which resulted in the sinking of the vessel. Additionally, the experts, in the report, stated that the level of corrosion was unacceptable under the standards of the classification society.<sup>141</sup> Consequently, based on the report, the Criminal Court in Paris adjudicated the four parties, including RINA as the classification society, criminally liable for the offence of causing pollution, delivering the judgment in January 2008, in which RINA was found guilty for its negligence in renewing the certificate of the *Erika* in virtue of an inspection that was carried out below the standards of the profession.<sup>142</sup> Then, RINA was fined €375,000. Furthermore, it is also notable that nowadays the IOPC Fund 1992 prepares for the recourse action against RINA and various parties before the Civil Court (Tribunal de Grande Instance) in Lorient to recover financial loss for the compensation to injured parties from the incident of *Erika*.<sup>143</sup>

#### 4.2.2. The *Prestige*

In November 2002, the Tanker *Prestige* registered in the Bahamas was bound for Asia from the Baltic with 76,972 tonnes of heavy fuel oil. The tanker started listing and leaking oil around 30 km off Cabo Finisterre (Galicia, Spain), and tried to seek a place of refuge in a Spanish port. However, the Spanish authority ordered the vessel to be towed away from the coast to the ocean, and then the vessel broke into two parts which each sank down to around 3.5 km depth. Due to its break-up and sinking, an estimated 63,000 tonnes of cargo escaped and leaked from the wreck over the following weeks at a declining rate. Subsequently, more or less 13,800 tonnes of cargo leaked out from the wreck was

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<sup>141</sup> IOPC Fund 1992. (2006, February 6). *Incidents involving the 1992 Fund, Erika: Note by the Director (92FUND/EXC.32/3)*. London: Author. para.8.3.

<sup>142</sup> IOPC Fund 1992. (2011, May 9). *Erika, France, 12 December 1999*. Retrieved September 25, 2011 from the World Wide Web: <http://www.iopcfund.org/erika.htm>

<sup>143</sup> Since some 50 parties have appeal to the Court of Cassation in relation with the compensation from IOPC Fund 1992, the Fund is waiting for the result of the appeal before making further decision on recourse actions; see also, IOPC Fund 1992. (2008). *Annual Report 2008, Report on the activities of the international oil pollution compensation fund in 2008*. pp.81-82. Retrieved September 25, 2011 from the World Wide Web: [http://www.iopcfund.org/npdf/AR08\\_E.pdf](http://www.iopcfund.org/npdf/AR08_E.pdf).

affirmed by the Spanish governments. Firstly, it caused the contamination on the west coast of Galicia, and then continued to spread out to the Bay of Biscay, affecting the northern coasts of Spain and France owing to the highly persistent nature of the cargo.

Subsequently, the Kingdom of Spain brought a legal action before the US District Court for the Southern District of New York for \$ 1 billion against ABS, the classification society for the *Prestige*, asserting that it was negligent for ABS to classify the vessel as fit. In this regard, Judge Laura Taylor Swain concluded that the lawsuit arising from Spain was impeded by the international Convention on Civil Liability for Oil Pollution, to which Spain and the Flag State of Bahamas are signatories.<sup>144</sup> In addition, Judge Swain also ruled that claims to request compensation for pollution damage in the waters of a party State should be filed before the courts of a party State to the CLC, stating that this case is *forum non conveniens* in her own court.<sup>145</sup> Then, Spain appealed to the appellate court of the US which filed then an *amicus curiae* brief to state its opinion that there was an error in the verdict given by the district court.<sup>146</sup> In this appellate court, Spain again alleged negligence of ABS in certifying the *Prestige*, commenting on RINA's conviction in the case of the 1999 *Erika* casualty that the French Criminal court gave the decision of fining RINA for its negligence in the survey on the *Erika*. After Spain won in the appellate court, the case came back to Judge Swain in the District Court of New York. Then, finally, Judge Swain rejected Spain's attempting to establish recklessness on the part of ABS, since Spain failed to establish the proximity between damage and the cause of the casualty<sup>147</sup> *vis-à-vis*

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<sup>144</sup> Joshi, R. (2009). Spain begins appeal over \$1bn *Prestige* claim. *Lloyd's List*, 26 March 2009

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> In terms of causation for the case of *Prestige*, IACS noted after its inspection on the vessel and audit ABS, that the reason for the vessel breaking in two was severe deficiencies in the ballast tanks, which ABS should find during its statutory surveys, whereas ABS suggested after its own investigation on the vessel, that a factor for the casualty would be the possible damage retained by the vessel during lightering operation at St. Petersburg.

recklessness, and to demonstrate the liability of classification societies in virtue of precedents that did not exist, with the additional comment as follows;<sup>148</sup>

“[Spain’s claim] that 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 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.”<sup>149</sup>

In light of the approach of the US Courts in relation to the liability of classification societies, the court still seemed to be reluctant to give a decision to hold them liable due to the potential to damage their activities, which in their absence Flag States should carry out possibly incurring a huge financial burden, to the extent that their business could collapse by exposure to unlimited liabilities in the current legal system without specific uniform international provisions to limit their liability, especially in cases of civil lawsuits.

### 4.2.3. Lessons learned

In two different claims from various parties against classification societies, the plaintiffs alleged negligence of the defendants based on tort for recovering their damage. However, one judgment was in favor of the defendant, while the other was not. Especially, in the case of the *Erika*, the classification society had been brought to civil and criminal action by many parties. As the result of the case, a number of administrative measures to prevent such incidents were taken by the EU, and RINA was held to be liable for its negligence. They have set up a uniform system to monitor all recognized classification societies by strengthening the role of the European Commission to prevent further casualties that could be caused by the same negligence as in the *Erika* case. In addition, the EU also established provisions of a common regime for the liability of classification

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<sup>148</sup> Joshi, R. (2010). ABS handed Prestige victory. *Lloyd’s List*, 03 August 2010; see also ABS scores Prestige victory. *Fairplay in 03 August 2010*.

<sup>149</sup> *Ibid*.

societies to remove ambiguity caused by the absence of specific legislation in relation to the liability of classification societies.<sup>150</sup> However, unfortunately, the provisions prescribed solely the recourse of Member States of the EU against classification societies, when the Member States suffered from damage caused by the negligence of classification societies or would indemnify damage to other parties, because of their tort. In other words, when the classification societies are claimed directly by contractual or other parties, they can still be exposed for unlimited liability in the EU, owing to absence of specific legislation for such liability.

As the other side of the liability of classification societies, in the case of the *Prestige*, there is still judicial reluctance to impose liability on classification societies. However, such immunity of classification societies from liability and negligence claims may formulate a vicious circle to classification societies.<sup>151</sup> Accordingly, to fulfill such legal wants on matters of the liability of classification societies, it would be necessary to establish a uniform international legislation through a common approach to lessen the differentiation in numerous legal system of countries, contemplating services provided by classification societies in five continents. In other words, envisaging the vital roles of classification societies, as it would be inevitable for them to carry out their service to make sure that the world fleet is built and maintained in compliance with acceptable standards, they should be involved in an international legal regime of liability to protect privities and other parties of contracts from suffering unexpected damage, and also, at the same time, to afford a shelter of them by limiting their liability to preserve their high quality services of classifications for shipowners and statutory surveys on Flag State's behalf.

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<sup>150</sup> Han, L. & Yu, P. (2006). New developments regarding the liability of classification societies. *Journal of International Maritime Law (JIML)*. pp.247-248; see also Begines.J.LP. *Supra*. pp.501-506.

<sup>151</sup> Han, L. & Yu, P. *Supra*. p. 250.

### 4.3. Principles on limiting the liability of classification societies

In terms of a convention for the liability of classification societies, it might be initiated as a regional conference such as an EU directive or regional MOU; however, it should ultimately come with an international convention, considering their service occurs in anywhere on the globe. Moreover, although it would be necessary to consider a number of issues related with numerous stakeholders, national policies and international and domestic legislations on the liability of classification societies, there are some crucial considerations for developing a convention on the subject.

#### 4.3.1. A new international convention

Firstly, with regards to amending a current international convention potentially to reduce the time that could be expended to adopt an international convention, one might consider adopting a protocol for amendment to the LLMC, which seems to be the most suitable recent legal frame for the liability of classification societies. LLMC would cover maritime claims against shipowners, in relation to claims of loss of life or personal injury, and property claims.<sup>152</sup> Hence, by adopting an amendment as a protocol to the LLMC, which would include the expansion of application to classification societies, their liability can be limited. Nevertheless, the LLMC also contains an arguable matter in itself whereby the number of ratifications of the convention is relatively minor.<sup>153</sup> Accordingly, it would be possible for injured parties by negligence or omission of classification societies to do a sort of forum shopping between countries that ratify the LLMC or countries that have solely domestic rules on the liability of classification societies to gain legal benefits such as unlimited liability that might be claimed to recover their

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<sup>152</sup> See LLMC in the World Wide Web: <http://www.imo.org>.

<sup>153</sup> 51 countries accounting for 50.02% of world tonnage have ratified the LLMC 1976, and 41 countries accounting for 45.05% of world tonnage have ratified its Protocol 1996. (Source: <http://www.imo.org>). Latest accessed 27 September 2011.



damage as much as possible. As a result, it would be required to envisage a new international convention limited to matters of liability of classification societies.

#### 4.3.2. The legal basis of liability

Secondly, it would be arguable that a convention provides between strict liability or liability based on faults. Regarding a claim against a classification society, it has been recognized in previous chapters that a plaintiff has to prove the negligence and the proximity in the court to make them liable. However, it seems to be impossible for the plaintiff to succeed in establishing both of them, even if the classification society has responsibility for the casualty. In this regard, strict liability can offer compensation although it is very hard to ascertain the causation between the casualty and negligence or faults of the defendant, since the one who has strict liability should bear all kinds of damage occurred in relation with his business. For instance, the CLC and the HNS Convention provide for strict liability of the shipowner for damage caused by the respective cargo. Especially, according to CLC, the shipowner is strictly liable for damage caused by oil contamination to the coastal and the marine environment, regardless of whether there is negligence or not. However, such strict liability, in general, can be acceptable for particular dangerous activities, not for all the cases. In the case of oil transportation by tankers, the casualties related with loaded tankers are likely to be disastrous such as the cases mentioned in the previous section of *Erika* and *Prestige*.

In this vein, activities performed by classification societies cannot be considered as disastrous works, since the services that they offer are mainly composed of inspection activities onboard or in shipyards, which can be performed to check as to safety documents, structure of ships and specific parts that are informed to have possible deficiencies. These activities can be performed once a year for a ship or in a few visits to a shipyard where a ship is built. Hence, it is unlikely to deem the

activities themselves to be extremely hazardous or dangerous such as crude oil transportation. In this regard, it seems to be unfair to confer strict liability on classification societies. Given the case to grant it to classification societies, they could be liable for everything in relation with the operation of vessels registered to them and matters of vessels, themselves, since their services ultimately aim to ensure safety of the shipping industry, which can be tied up with all stakeholders of the shipping business. Consequently, in terms of their liability, they might be exposed to something over which they have no control and for which they were not responsible.<sup>154</sup>

Accordingly, the liability based on faults could be considered for the liability of classification societies, if it is encumbered for a convention to hold classification societies strictly liable to damage occurred. In terms of contracts between classification societies and other contractual parties, the fault-based liability would be unnecessary, since the liability between them would be regulated by contracts based on private law, especially, contract law. However, in the case of relations between third parties and classification societies, even though third parties would suffer from damage caused by their breaches of contracts, third parties' right to recover their damage could not be insulated under the contracts. Hence, an international convention on classification societies could cover their damage by suggesting defined and explicit duty of care of classification societies toward third parties in specific conditions that would be enumerated in a convention. In other words, if, under a convention, there is a breach of the duty of care which can be owed by a classification society to third parties suffering from damage or loss, they can file claims for compensation under the condition that there would be a causal link between the asserted loss or damage, which can be foreseeable for the classification society, and the breach of due care.<sup>155</sup>

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<sup>154</sup> Lagoni, N. *Supra*. p.319.

<sup>155</sup> *Ibid.* p.320.

### 4.3.3. Limitation of liability

Regarding the Model Contractual Clauses of CMI, there have been extensive discussions among CJSWG on whether tonnage or classification fees could be a basis to determine maximum pecuniary liability of classification societies. While the classification societies preferred to compute the maximum amounts of the liability based on classification fees, other stakeholders argued that the amount based on tonnage was more relevant as the current international legal regime adopted calculations for limiting maximum amounts based on a vessel's tonnage.<sup>156</sup>

In consideration of contractual parties to classification societies, the limitation of their liability based on fees charged would be relevant, since they provide services under contracts including service charges that imply guarantee of which type of service would be afforded. Conversely, for compensation to third parties, the liability based on a tonnage calculation system would be more appropriate, since third parties suffering damage caused by the negligence of classification societies would be rarely affected by the fees, which can be much different according to the country where the services are provided or the contracts engaged. Therefore, in this regard, it would be possible for the amount of liability to be various in the case that third parties suffer the same damage caused by same type of ship with same cargo, classified by different classification societies. However, a system based on tonnage could minimize this difference in the case that third parties suffer from the same damage, supporting consistent amounts calculated according to a vessel's tonnage and certain constant unit. Consequently, the liability amount computed by tonnage would be preferable to one based on fees of the classification societies for third parties liability.

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<sup>156</sup> *Ibid.* p.323.

In addition, CSJWG also had considerable arguments during drafting Model Contractual Clauses of classification societies on determining a reasonable level of contractual limitations on the liability of classification societies, which might be the most crucial to make a possible convention adopted and implemented by as many States as possible. However, subsequent to the arguments of CSJWG, establishing the level of contractual limitations left to future discussion due to differences in recognition of the limitation amounts of liability between classification societies, shipowners and other actors on the market.<sup>157</sup> Yet, regarding the current legal regime for liabilities in the international shipping industry, there are still referable considerations for establishing a convention for limitation of the liability of classification societies.

At the first, the current legal regime on liabilities in shipping tends to be channeling to shipowners, since they would apparently be responsible to maintain their vessels' seaworthiness in the course of their service life and have power to control, directly and indirectly, their vessels all the time. Hence, a convention also should maintain the position not to intervene in such channeling for harmonizing the current international legal system, as the level of liability would be established similar or less than the liability of the shipowners. Second, since most States have divergent perceptions on the level of limitations, it is almost impossible to develop a consistent level of limitations that could be accepted by all States. Hence, it would be more appropriate for a convention to afford a minimum standard of limitations such as that in LLMC rather than a single level that classification societies would have to indemnify. Finally, in relation with cargo claims, clauses for limitation of liability in Hague-Visby Rules should be considered to ensure its current balanced system between shipowners and cargo owners. In other words, if the level of limitations on liability of classification societies would be higher than that of shipowners in the Rules, it would be

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<sup>157</sup> Wiswall, F.L. Jr. (1997). Classification societies: issues considered by the Joint Working Group. *International Journal of Shipping Law*, Vol.2. pp.180-183.

possible that cargo owners would tend to institute claims against classification societies in the case of damage occurred based on negligence of classification societies and shipowners, deterring the already balanced system in the Hague-Visby Rules. Therefore, it also might be considered that the level of limitation in a convention would be established as less than that of the Hague-Visby Rules or as the same level of the Rules to correspond with the current legal regime.

In conclusion, regarding difficulties in establishing a limitation level of liability, there are numerous considerations including vessels' tonnage, fees charged by classification services, and harmonizing with the current international legal regime and states' policies on limitation of liability of classification societies. Accordingly, these should be considered in the development of a new convention on this subject to attract more States to accept it.

## 5. Conclusion

Classification societies have originated from the effort of underwriters to certify the status of ships by using assessment in virtue of ships hull and machinery, since the insurers needed to put their money behind the venture of voyages, controlling the risk. However, since matters of the safety of ships and the prevention of marine pollution from ships are issues of States and international communities, it was also necessary for public entities to assess the level of safety in terms of the entire facets of ships. In this vein, classification societies which had already assessed vessels for insurers became organizations authorized to serve surveys on ships on behalf of Flag States to verify whether ships were in compliance with either the national safety standards or international conventions as minimum safety standards. Bearing in mind these functions of classification societies, it is notable that in recent times several challenges in relation to their liabilities have arisen with their roles and developments.

Traditionally, when claims had arisen in relation to liability of classification societies, jurisprudence maintained a position in favor of classification societies since their services were regarded as a safeguard for retaining and improving safety in the shipping industry. Especially, regarding contractual parties, they seemed to have a certain superior status to either shipowners or shipyards due to incorporated exemption or limitation clauses for their liability in contracts. Although it was possible for shipowners who had huge fleets to force a classification society who had classified hereinbefore vessels to offer them certain benefits by disclosing their intention implicitly to move the vessels to an other classification society who was authorized to be inspect their vessels, it would rarely occur as few owners exist with huge fleets. Additionally, in any case, the fact that shipowners had to have certificates provided from certain classification societies for engaging contracts of carriage of goods by the sea could be also a

factor to endue the classification society with a certain level of status toward shipowners.

However, the status of classification societies is deemed to have changed due to several factors including the emergence of a number of classification societies and extension of their role in the maritime sphere. In other words, most countries, presently, would be intolerant of negligence in classification and statutory services afforded by classification societies due to enormous damage and loss that would result from an accident caused hereby. In addition, the courts in certain countries are reluctant to hold judgments in favor of classification societies, since they would envisage either classification or statutory survey as a device for securing the seaworthiness of vessels,<sup>158</sup> even if most countries look upon the statutory survey offered by them as no more than verifying vessels and their compliance with the legal requirements of international conventions and domestic legislation at the time of surveying. Consequently, classification societies could be exposed to more claims of injured parties based on the above facts, whereas, in the precedents, it was difficult for plaintiffs to be indemnified by the societies based on the tort of negligence or even breaches of contractual obligations.

In this vein, regarding the case that classification societies would be liable evidently based on tort of negligence in their service, a major problem to classification societies is that they can often be subject to unlimited liabilities toward third parties or sometimes even contractual parties, while shipowners, who would be primary responsible for damage suffered by injured parties have been limited for their liability toward other parties in terms of international rules and even domestic regulations, including Hague, Hague Visby Rules and Convention on Limitation of Liability for Maritime Claims. This situation of unlimited

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<sup>158</sup> In case of Korea (Republic of Korea), the Ship Safety Act that prescribes the statutory survey on Korean vessels includes a provision stating that “the purpose of this Act is to protect the lives and properties of the nation by prescribing the matters necessary for maintenance of seaworthiness and safe navigation of ships.” in its Article 1 defining the purpose of the Act.

liability of the societies and, in contrast, the limiting that of shipowners might result in claims being channeled to classification societies, which could conceivably lead to protests against the unbalanced treatment. Moreover, this channeling might undermine the basis of the current classification system, which is crucial to maintain safety in the maritime safety.

Therefore, it is necessary to develop specific clauses incorporated into the current legal regime of liability or an international convention to limit amounts of the liability for classification societies. In this regard, in relation to the current legal regime, the LLMC which covers third parties liability of shipowners can be mainly considered, since classification societies generally would be exposed to unlimited liability toward third parties, whereas for contractual parties, the certificate or the contracts of the classification mostly include exemption or limitation clauses for them. However, due to the small number of States ratifying the LLMC, it is difficult to produce a comprehensive perception on limitation of the liability of the societies in virtue of the development of an amendment protocol of the LLMC.

In this vein, considering awareness of the activities of classification societies, which can occur around the world, development of a new international legislation is needed for the liability of classification societies. Regarding a new convention, some crucial considerations should be scrutinized in terms of its relevance, including fault-based liability and, determining a relevant level of limitation. Regarding the current legal system on liabilities, CLC and HNS adopted a strict liability system, and LLMC a fault-based liability system. Normally, strict liability would be applied for those who perform extremely dangerous activities that can cause extraordinary damage to other parties. Yet, the services provided by classification societies could not be considered as dangerous activities. In addition, classification service, itself, cannot cause huge damage to other parties.



Thus, a convention on the liability of classification societies should be based on their faults.

Furthermore, regarding a reasonable level of amounts in the limitation of liability, it is referable that a convention would provide minimum standards of limitation for general acceptance by various countries, which have their own domestic legislation for liability. Additionally, existing international legislations regarding issues of liability also should be regarded for harmonization of conventions, which can prevent to overlap or contradiction among them, in terms of already established legal systems.

As professor Han puts it, “Classification societies have existed for more than 200 years and play a special role in the maritime industry. Their legal liability has never been clear, but new developments suggest that it is becoming more defined.” It is solely a matter of time before “a regime of limitation of liability for classification societies will eventually be established.”<sup>159</sup>

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<sup>159</sup> Han, L. *Supra*. p.243.

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