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WORLD MARITIME UNIVERSITY

Malmö, Sweden

**LIABILITY OF CLASSIFICATION
SOCIETIES IN
AMERICAN AND ENGLISH LAW**

By

YU JINGMING

The People's Republic of China

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

SHIPPING MANAGEMENT

2000

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: **Liability of Classification Societies in English and American Law**

Degree: **MSc**

This dissertation is an analysis of liability of classification societies to shipowner and third party in English and American law.

In terms of some leading cases in common law, liability of classification societies is really a contentious issue. On one hand, it is misguided that classification societies should not assume the liability even if they fail to take reasonable care to perform their duties. On the other hand, however, societies have been increasingly treated as additional ‘deep pocket’ defendants. Furthermore, in this circumstance, strict liability or unlimited liability is often imposed upon classification societies.

First of all, the paper will identify societies’ roles and significance in maritime community. Secondly, based on high-profile cases such as *The Sundancer*, *Nicholas H* and *Ramsgate Walkway*, etc., and concepts and principles of contractual and tortuous liability under legal regime of common law, it will be discussed and examined that what and how liabilities of classification societies are. Next, defense of societies to their current and potential liabilities will be investigated and assessed. Finally, conclusion and recommendation will be made to balance interests of all in whole maritime group and then as to achieve a controllable, predictable and harmonious situation.

KEYWORDS: Liability, Classification societies, Strict liability, Unlimited liability, Contractual and tortuous liability, Defense.

TABLE OF CONTENTS

DECLARATION	II
ACKNOWLEDGEMENTS.....	III
ABSTRACT.....	IV
TABLE OF CONTENTS.....	V
TABLE OF CASES.....	VII
TABLE OF LEGISLATION	IX
LIST OF ABBREVIATION	X
1. INTRODUCTION	1
2. ROLE AND SIGNIFICANCE OF CLASSIFICATION SOCIETY.....	3
3. GENERAL THEORIES OF LIABILITY	7
3.1. COMMON LAW DEFINITION	7
3.2. THE TEST OF REASONABLE SKILL AND DUTY OF CARE.....	8
4. LIABILITY OF CLASSIFICATION SOCIETIES TO SHIPOWNER.....	11
4.1. LIABILITY IN CONTRACT	11
4.2. IMPLIED WARRANTY OF WORKMANLIKE PERFORMANCE.....	14
4.3. LIABILITY IN TORT	16
4.4. CONCURRENT LIABILITY IN TORT AND CONTRACT	20
5. LIABILITY OF CLASSIFICATION SOCIETIES TO THIRD PARTIES	25
6. APPRAISAL OF POSSIBLE DEFENSES BY CLASSIFICATION SOCIETIES ..31	
6.1. PROXIMATE CAUSE AND FORSEEABILITY	31
6.2. RELIANCE AND CONTROL.....	36
6.3. EXEMPTION CLAUSE.....	39
6.4. STATUTORY IMMUNITY	44
6.5. HIMALAYA CLAUSE-CHANNELING OF LIABILITY	48

6.6. NON-DELEGABLE DUTY	51
6.6. CONTRIBUTORY NEGLIGENCE AND JOINT LIABILITY.....	53
6.7. LIMITATION OF LIABILITY	57
7. SUMMARY AND CONCLUSION	65
REFERENCES.....	68
ANNEX A IMO RESOLUTION A.739 (18).....	71
ANNEX B CMI MODEL CONTRACTUAL CLAUSES.....	78
ANNEX C TYPE OF CLASS SURVEYS.....	84

Table of Cases

Aegean Sea.....	62
Bosnor, S.A. de C.V v. Tug L.A. Barrios,	9, 57
Caparo Industries PLC v. Dickman and others	34, 35
Carbotrade S.p.A v. Bureau Veritas.....	38
Cargill Inc. v. Bureau Veritas	38
Dillingham Tug & Barge Corp v. Collier Carbon & Chemical Corp.,.....	8, 31
East River.....	21
Forsikringsaktieselskapet Vesta v. Butcher & Others.....	22
Great American Ins. Co. v. Bureau Verita,	8, 40, 52
Harris v. Wyre Forest and Smith v. Bush	43
Hedley Byrne and Co Ltd v. Heller & Partners Ltd.....	35
Krohner v. Yacht Systems Hawaii, Inc.....	9
International Ore & fertilizer Corp. v. SGS Control Services, Inc.	13
J.Stapleton	56
Montgomery Ward & Co. v. Scharrenbeck	21
Marc Rich & Co. v. Bishop Rock Marine Co. (Nicholas H).....	32, 34,36, 53,65
Navieros Oceanilos, S.A. v. S.T. Mobil Trader,	15
New Zealand Shipping Co Ltd. v. AM Satterthwaite Co Ltd.,.....	49
Ramsgate Walkway.....	58

Ross v. Caunters and Ministry of Housing and Local Government v. sharp.....	37
Riverstone Meat v. Lancashire Shipping Co.(Muncaster Castle),.....	49, 51
Royal Embassy of Saudi Arabia v. S/S Ioannis martinis,.....	40
Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.....	14
Somarelf v. American Bureau of Shipping,.....	14, 17
Sundance Cruises Corp. v. American Bureau of Shipping (The Sundancer)	11, 16, 21, 36, 42, 45
Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd.....	21, 24

Table of Legislation

Brussels Convention 1962 on Nuclear Merchant Ships	
Art. 11.2	50
Hague Rules	53
Hague-Visby Rules	
Art.4, para. 2	59
Health and Safety Act	58
Law Reform (Contributory Negligence) Act 1945	
Sec. 1 (1)	54
Law reform (Contributory of Negligence) Act 1945.	22
Restatement (Second) of Contracts	
Sec. 351	11
Restatement (Second) of Torts	
Sec. 311.....	25
Sec. 552.....	18, 25
International Convention for Safety of Life at Sea (SOLAS) 1974,	48
The International Convention on Limitation of Liability for Maritime Claims of 1976	
Art. 1	62
Art. 2	62
Unfair Contract Terms Act 1977	
Sec. 2 (1)	43
Sec. 2 (2)	43
United States Oil Pollution Act of 1990	50

LIST OF ABBREVIATION

ABS	American Bureau of Shipping
AC	Appeal cases. House of Lords and Privy Council decisions
All E.R	All England Reports.
AMC	American Maritime Cases, Baltimore, Maryland, U.S.A.
BV	Bureau Veritas
CMI	Comite International Committee
F.	Federal Reporter, being U.S. District Court and U.S. Circuit of Appeals decisions form 1880 to October 1924..
F 2d.	Federal Report (second series), being U.S. District Court and U.S. Circuit of Appeals decisions from November to July 1993.
F 3d.	Federal Report (third series), being U.S. District Court and U.S. Circuit of Appeals decisions.
F.Supp.	Federal Supplement, U.S. District Court decisions
Lloyd's Rep.	Lloyd's List Law Report
LMLCQ	Lloyd's Maritime and Commercial Law Quarterly
MARPOL	International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto.
MEPC	Maritime Environment Protection Committee
MSC	Maritime Safety Committee
NKK	Nippon Kaiji Kyokai
QSCS	Quality System Certification Scheme
STCW	International Convention on Standards of Training, Certificates and Watchkeeping for Seafarers, 1978, as revised in 1995
SOLAS	International Convention for the Safety of Life as Sea
U.S.	United States Supreme Court decisions
W.L.R	Weekly Law Reports. Reports of United Kingdom decisions published weekly

Chapter One

Introduction

Classification societies play a vital role within the maritime community. They set the standards for the design, construction and maintenance of vessels. Classification societies serve as the unofficial policeman of the maritime world, using independent verification processes to ensure that seaworthy vessels are in service. We can say that there are no other bodies with the depth of knowledge, experience and expertise of the major classification societies. So it is no wonder that as the world demands higher standards of safety of ship and environmental protection, the burden of meeting this pressure naturally falls primarily on classification societies. Over the years the maritime industry has increasingly depended heavily on classification societies.

Even though classification societies are usually as impartial investigators and messengers, they often find themselves in the middle of disputes between or among shipowners, charterers, cargo owners, underwriters, and other claimants. In common law, shipowner has an implied warranty to exercise due diligence to make ship seaworthy. When the loss or damage results from shipowner's failure to make ship seaworthy, he will be liable for injured party. However, in most cases, the injured party cannot recover his full compensation from a negligent shipowner due to two factors. One is that the shipowner is allowed to limit its liability under national law or international convention regardless of Hague Rule, Hague-Visby Rule or Limitation of Liability for Maritime Claims Convention. Another factor is that ship is often the shipowner's sole asset and may be lost or have a value less than the injured party's damage. Consequently, claimants must look to other remedies for recovery.

A logical candidate is the classification society, which was intricately involved in the process of trying to ensure that the vessel was seaworthy. As a result, these maritime professionals are often blamed for “starting the whole thing” when a casualty occurs or a dispute erupts and are increasingly seen as litigation targets for those who feel they have received a bad shake in the larger game of maritime commerce or recreation. Actually, Societies have seen an increase in the frequency of claims against them as additional deep-pocket defendants, particularly by third party claimants.

Whether classification society should be held liable to a shipowner and/or third parties and what and how their liabilities should be are always a contentious and unresolved issues. The objectives of this dissertation are, based on common law system, to

- (1) discuss the role and significance of classification societies;
- (2) explore current and potential theories under which classification societies may be held liable to shipowner and third party;
- (3) examine defences to those liabilities.

Chapter Two

Role and Significance of Classification Society

The role which classification societies fulfil is unique and encompasses every conceivable aspect of marine safety. There is no other system that provides all sectors of the maritime industry-shipowners, charterers, financiers, underwriters, cargo owners and flag and port state administrations with a high professional technical service.

The concept of seaworthiness is relevant to many transactions in maritime commerce, such as in the carriage of goods and passenger, the chartering of vessels, the sale and purchase of ships, and vessel employment contracts. When contracts between the shipowner and a member of any of the above-mentioned groups often refer to the vessel's class, class certificates and classification society assessment are important as evidence of seaworthiness. Ultimately, it is the commercial imperative that a vessel stay in class, and the pressures on owners to ensure that class is maintained.

The societies' surveyors attend during the building of new ships, set the standards for the materials used, and provide pre and post-delivery guidelines, in order to assess whether the vessel may be classed in accordance with the regulations of the societies. Societies' surveyors, in given enough time and money, could exhaustively review the vessel's plans, its design features, shipyard record during construction. The surveyors must be familiar with the vessel's design, construction, maintenance history, repair history, and damage history in order to truly appreciate the vessel's strengths and weaknesses. While a vessel is being traded, the society will carry out periodic surveys, and any failure to comply with recommendations made by the society will result in class being withdrawn or retention of class, with the result that the vessel will no longer be covered by insurance, and will be unable to trade.

This is a reason why the classification societies are indispensable in maritime industry. In practice, shipowner does not have the time for such a study. Time is money. In addition, shipowner could not afford the cost of such a thorough survey for each and every vessel seeking insurance coverage. However, a classification society, by virtue of its always being involved in the design, construction, maintenance, and repair of the vessel, has vital information at its fingertips. By monitoring all phases of a vessel's service life, the classification society has a finger on the vessel's pulse. Given that scrupulous rules and standards of classification societies, vessel in class is seemed to be seaworthy.

It may be worth reminding ourselves that classification societies was originally formed at the request of hull underwriters in order to obtain independent evaluations of a vessel's seaworthiness and to ascertain whether to extend coverage to such vessel. Societies provides a critical function with respect to the insurability and the marketability of a vessel. It is the fact that the vessel is granted class, and maintains class which the hull underwriters will look to in order to satisfy themselves she is seaworthy, and therefore take an insurable risk.

Similarly, cargo owners, before entering into a contract of carriage, require that the vessel is seaworthy to carry cargo safely and efficiently. At the same time, cargo underwriters rely on the assurance of seaworthiness that societies affords although they do not require seaworthiness or classification warranties as compared to hull and P & I club. However, cargo underwriters have the right to remove coverage upon reasonable notice that class of particular vessel carrying insured cargo has been revoked. The fact that a cargo owner has no practical method for verifying the seaworthiness of the carrying vessel also provides the foundation of another important function of classification societies. Each classification society publishes a periodic updated register containing the names of the vessels that are enrolled in the society are in class.

Consequently, Cargo owners and underwriters will depend upon classification societies to serve as independent appraisers of a vessel's seaworthiness.

Classification societies are also important for chartering business. When a particular vessel become suddenly not available in relatively volatile chartering market, the charterer is required to act quickly and decide whether to arrange for the another vessels for trading. However, the charterer usually does not appoint a surveyor to inspect the vessel to ascertain its seaworthiness. Because it is impractical. Meanwhile, the shipowner is not willing to deviate his vessel hundreds or thousands of miles to loading port to let charterer's surveyor board the vessel to inspect it. Probably, the shipowner would get nothing after wasting substantial amount of sailing time to the loading port with subsequent loss of revenue each day. The most practical solution turns to the classification societies. When the shipowner informs the charterer that vessel is in class, the charterer can rely upon the classification society's assurance the vessel is seaworthy and fit for the service.

As well as these traditional private classification societies' functions, the societies has increasingly performed their public role in the past thirty years. Governments require vessels to be seaworthy in order to protect human life and marine environment against the perils of the sea. However, almost certainly, governments do not perform these responsibilities by themselves. Consequently, Societies are effectively charged with performing a public service in ensuring safety at sea, and are engaged by governments to conduct statutory surveys, and to issue certificates on behalf of those governments in accordance with international regulations and conventions, such as Safety of Life at Sea 74 (SOLAS), Pollution Prevention Convention (MARPOL 73/78), International Convention on Standards of training, Certification and Watchkeeping (STCW 95) and 1966 International Convention on Load Lines. The members of the International Association of Classification Societies (IACS), which between them class over 90% of

the world's cargo-carrying vessels on a tonnage basis, have been delegated authority to undertake statutory surveys by well over 100 flag states. In addition, IACS members are fast assuming delegated authority to undertake audits for compliance with the International Safety Management (ISM) Code under a new SOLAS Chapter IX.

As a result, all members of the maritime industry rely on classification societies based on the confidence and trust in roles and characteristics of classification societies. Therefore, whole maritime community has evolved to the point that societies are now an integral part of the maritime commerce to such an extent that reliance on classification societies as a strong label of seaworthiness is unavoidable in every business.

But classification societies, like any other bodies or system, are not perfect. The classification societies' technical staff could fail to detect divergence from the rules when reviewing the vessel's drawings; The surveyors could fail to detect that the shipyard has used improper materials during the construction; The surveyors could not exercise due care to detect defects while inspecting vessels or to notify promptly to the owner some defects and divergence; The society's branch office could permit a vessel owner to defer the periodical special survey of a critical item of machinery when in fact that piece is unfit to run. Any failure by any classification society's representative would result in the loss or death of life and loss of or damage to the vessel, carried cargo. Whatever and however loss or damage occurs, the question arises as to whether the classification societies should be liable to the injured parties and what kind of liability they should assume.

Chapter Three

General Theories of Liability

3.1. Common Law Definition

“Classification societies” have been defined as “non profit-making bodies directed by committees of persons representing shipowners, shipbuilders, engine-builders and underwriters for the purpose of ensuring ships are properly constructed and maintained in a seaworthy and safe condition. They make rules governing ship construction, arrange and carry out surveys during the building of a ship and throughout the vessel’s trading life. They also conduct research into forms of construction, efficiency and safety of sea-going vessels, offshore equipment such as oil-rigs and shore plant ” (Sullivan 1998)

Legally, classification societies are marine professionals, with duties arising from, and commensurate with, their perceived competence. Broadly speaking, by whatever legal theory employed, failure to discharge these duties is malpractice. Professional persons in general and those who undertake any work calling for special skill are required not only to exercise reasonable care in what they do, but also to possess a standard minimum of special knowledge and ability.

Regardless of whether the surveyor’s duties derive from custom, classification society rules, common law, statute, contract, their work fall into two major duties:

- (1) to inspect and classify the relevant vessel in accordance with the society’s rules and standards
- (2) to detect the defects, notify to and recommend or warn of interested parties for taking appropriate action..

This chapter will explore the leading liability cases in an attempt to unravel the core meaning of surveyor's professional standard of duty of care to perform his responsibility.

3.2. The Test of Reasonable Skill and Duty of Care

While a surveyor's duties are arguably flexible and dependent upon the circumstances, a general duty to use due care in making his recommendations, detecting all perceptible defects of the vessel encountered during inspection, and notifying (at least) the owner thereof is clear.

In *Great American Ins. Co. v. Bureau Verita*, 338 F.Supp.at 1011-12, 1973 AMC 1472 (S.D.N.Y. 1972), the court uttered some legal pronouncements that have influenced subsequent decisions. The court identified two duties owed by a survey and classification society to its clients, one of which is the use of due care to detect defects in ships which the society surveys and the other of which is to notify the owner or charterer of such defects. For breach of latter duty, tort liability may be imposed.

In *Dillingham Tug & Barge Corp v. Collier Carbon & Chemical Corp.*, 548 F.Supp.691 (N.D.Cal, 1981), 707 F.2d 1086, 1984 AMC 1990 (9th Cir. 1983), the plaintiff purchased a river barge and had it modified for a one-time ocean tow from Galveston, Texas, to Portland, Oregon, via the Panama Canal. Following the loss of the barge off the west coast of Mexico, the barge owner sued the marine architect who had designed the modifications and the surveyor who had approved the barge for the voyage. The Court apportioned fault as follows: sixty percent to the tug, twenty percent to the marine architect, and twenty percent to the surveyors. The surveyors' negligence involved his failure to detect errors in the marine architect's stress and stability calculations. The

court further found that having undertaken the duty, the surveyor could not delegate the responsibility to an independent contractor.

In addition, In *Bosnor, S.A. de C.V v. Tug L.A. Barrios*, 796 F.2d 776, 1987 AMC 2956 (5th Cir. 1986) the court held that the duty to inspect and notify requires the information reported to be correct.

Again, in *Krohner v. Yacht Systems Hawaii, Inc.* 644 P.2d 738 (Haw. Ct. App. 1983), the court found the duty to inspect and notify was breached despite the surveyor's attempt to transform the nature and purpose of his survey. The plaintiff purchased the boat after the surveyor issued a report which provided that the vessel appeared to be in good condition and was considered to be a "satisfactory insurance risk". The report did qualify its findings by explaining no removals were made during the inspection and that the bottom was not inspected because the vessel lay afloat. Despite the shortcomings, the surveyor felt there was "no reason to suspect the condition" of these uninspected areas.

But, five weeks after purchasing, the buyer began to notice running rust and other discoloration on the inside surface of hull. The buyer had it hauled out of the water to the drydock. The drydock report stated:

"Most areas [of the bottom] product were soft enough to allow a knife to be poked in ½ to ¾ of an inch. Some areas allowed the knife to go completely through.

...The majority of the planking on the bottom of the boat was removed. The exposed frames were mostly rotten....Some frames were so soft, they could be broken out by hand." (see *id.* at 741)

After the Court of Appeals of Hawaii fully affirmed the trial court's holding that the findings of fact with respect of the breach of duty were reasonable and not against the weight of the evidence, the court stated:

“ The surveyor attempts to negate this duty to detect and warn by distinguishing an insurance and financing survey from a condition survey, and contending that a less extensive inspection is required for the former. According to the surveyor’s own testimony, however, the only difference between the two kinds of surveys is that the condition survey includes a listing of merely cosmetic defects. Thus, we conclude that in both an insurance and financing survey and a condition survey, a marine surveyor has the duty to use due care to detect and give notice of perceptible structural defects.

The duty to use “due care” means that a marine surveyor will be held to a standard of “good marine surveying practice,” i.e., what is “customary and usual in the practice.” In this case, the trial court concluded that the surveyor owed to the plaintiff buyer “a duty to use such ordinary care and caution in the exercise of his profession as would be expected of a similarly situated individual in the City and County of Honolulu, State of Hawaii...” (see *id.* at 742)

Chapter Four

Liability of Classification Societies to Shipowner

4.1. Liability in Contract

In *Sundance Cruises Corp. v. American Bureau of Shipping(The Sundancer)* [1994] 1 Lloyd's Rep 182 , the plaintiffs (Sundance Cruises Corp) converted a passenger car ferry into a cruise liner. They engaged the defendant classification society (ABS) to provide survey certificates both for their own insurance purposes and in order to satisfy statutory requirement for registration of the vessel in the Bahamas. ABS was nominated under the relevant Bahamian legislation to provide the certificates required for registration. The society issued a series of one-voyage provisional certificates followed by five-month provisional SOLAS and Load Line certificates in June 1984, two days before the first public cruise. A week later, the ABS issued an interim class certificate back-dated to the same date as the safety certificates. Thirteen days after the first public cruise. The M.V. Sundancer, on her third voyage, ran aground off the coast of British Columbia, tearing a hole in the hull. She was eventually moored at a paper mill's dock where the 500 passenger were evacuated. During the evacuation process the listing became so severe that some passengers suffered personal injuries.

In *the Sundancer*, the claim based on breach of contract was rejected. Subject to comments (f) to section 351 of the *Restatement (Second) of Contracts*, the limitation of foreseeability falls in recoverable damages. In addition, Section 351 points out the interests of justice do not always require that a party breaching a contract must pay damages for all of the foreseeable losses that have been incurred, stating that “there are unusual instances in which it appears from the circumstances either that the parties assumed that one of them would not bear the risk of a particular loss or that, although

there was no such assumption, it would be unjust to put the risk on that party.” The Section 351 then notes that one such circumstance occurs when there is an extreme disparity between the loss and the price charged by the breaching party.

So one of the main reasons given by the U.S. Court of Appeals in *The Sundancer* for the decision that ABS was not liable for its failure to detect defects in the vessels was the disparity between the fees charged by ABS(\$85,000) and the damages claimed by SC(\$264 million) showed that the society could not have intended to assume the risk of loss of the vessel. But this is a very weak argument indeed. Of course, the reasonable expectations of a contracting party are related to the price paid and conduct which would be a breach of an cheap contract might not be a breach of a expensive one. But all these are beside the point in the present context because it was assumed by the court in *The Sundancer* that ABS had breached its contract with SC. In a world where liability insurance is pervasive there is no justification for a general proposition that a professional fee which is only small fraction of the amount at stake in the transaction shows that the professional cannot have intended to assume the risk of liability commensurate with the amount at stake. In any particular case there might be evidence that the fee charged did include the premium for appropriate liability insurance. Such evidence might relate to the dealings between the disputing parties, or it might relate to customary behavior in the relevant commercial community. Therefore, disparity between the fee charged and the amount at stake appears to be very equivocal.

Yet, even if there were evidences to support the conclusion that the defendant did not intend to assume the risk that the plaintiff might lose its investment as a result of negligence on the defendant’s part, it would not follow that the defendant should not be liable in contract for the plaintiff’s loss. It would follow only if the view were taken that the function of contract law is to give effect to the intention of the defendant or to commercial practice. It is clear that contract law is not designed to give effect to the

intentions of one of contracting parties but to the mutually agreed intentions of them both. When they are in dispute about their intentions, the law must settle the dispute by some criterion other than one which gives automatic priority to the intentions of one of them. As for commercial practice, this would be determinative only if the view were taken that contract law is designed to give effect to settled expectation however unfair or unjust they may be.

However, in *International Ore & fertilizer Corp. v. SGS Control Services, Inc.* 38 F.3d at 1283-84, 1995 AMC at 950, the appeals court disagreed district court's holding that a large disparity between the contract price and the damages sought for breach of the contract will disallow recovery of consequential damages. The appeals court therefore affirmed the award of damage under a contractual theory. The court states that the buyers' justifiable reliance on the certificates of proper weight "was not an indirect or collateral consequence of the action of the surveyors. It was a consequence which, to the surveyors' knowledge, was the end and aim of the transaction." (see *id* at 1284-128, 1995 AMC at 950-52) Similarly, the classification society's surveyor's performance of an accurate inspection rather than a cursory one was "the end and aim of the transaction." (see *id.*)

The fact that the surveyor charged a seemingly low fee relative to potential liability hardly suggests that the parties failed to contemplate the surveyor's bearing the risk of a negligent inspection. The surveyor performs similar professional services on a frequently recurring basis and can insure against liability for inaccurate inspections which result in major damage. Then, the surveyor can set its prices accordingly. Classification societies and shipowners are sophisticated repeat players in a competitive market for inspection services. It is fully aware that a negligent inspection may cause the loss.

4.2. Implied Warranty of Workmanlike Performance

In Somarelf v. American Bureau of Shipping, 704 F.Supp.59, 1989 AMC 1061 (D.N.J. 1989), the owner lodged his claim upon contractual indemnity and tort-based indemnity. The contractual indemnity claim was based upon the implied warranty of workmanlike performance in *Ryan Stevedoring*.

The United States District Court for the District of New Jersey held in *Somarelf* that the owner did not have a contractual right of indemnity noting that *Ryan Stevedoring* and its progeny were based on an implied warranty of workmanlike service that arises only in the presence of a special relationship between the shipowner and the contracting party of such a nature that the indemnitor has taken control of the ship in connection with matters involving the safety and the prevention of maritime accidents. In so holding the court found that the classification society's services in preparing a tonnage certificate did not concern the safety or prevention of accidents or otherwise compromise the safety of the vessels. According, the court found the absence of the special relationship upon which *Ryan Stevedoring* is predicted. In resolving the issue on this basis, the court implicitly recognized or at least suggested that, under appropriate circumstances, a shipowner could have a *Ryan Stevedoring* indemnity claim.

In *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.* 350 U.S. at 124 134, 1956 AMC at 9-17 (1956), the problem was the liability of a stevedoring company. A longshoreman had been injured in connection with the loading of cargo. He claimed and received damages from the shipowner. The injury was found to be caused by an unsafe loading method. The shipowners requested indemnity from the stevedore. The United States Supreme Court found that the stevedore had given the shipowners an implied warranty of workmanlike performance and that the injury was the direct result of a breach of that warranty.

The best explanation of the theory of warranty of workmanlike performance is probably provided by Schoenbaum:

“At common law the warranty of workmanlike performance (WWLP) is a mere label that was coined no doubt by an inventive judge or litigant to mean that the obligor in a service contract has a duty to perform his or her task with reasonable care, skill and diligence. Thus the WWLP is a legal “construct” that was originally rooted in the concept of negligence.” (1994, p190)

Schoenbaum also discusses at length the two distinct elements of Ryan WWLP: (1) “a contract warranty applicable between parties with contractual privity or on a third party beneficiary theory” (1994, p191) and (2) “an implied indemnity theory.” (1994, p192)

But, how far the WWLP extends today is a difficult question. In *Navieros Oceanilos, S.A. v. S.T. Mobil Trader*, 554 F.2d 43,46, 1977 AMC 739,744 (2d Cir. 1977), the majority view is that indemnity should be granted if the “critical elements” of Ryan are present. The shipowner is liable without fault and the harm is caused by one with whom he has a contractual relationship. Moreover, the courts looked very carefully at the contract to see if there was the requisite contractual relationship if the contractor in fact had the operational control necessary for implied indemnity. Indemnity will also be denied if concurrent negligence on the part of the shipowner prevents the stevedore or other marine contractor from doing his lawful job. If indemnity is denied for any of these reasons, the court will allow contribution, and the damages will be apportioned on the basis of comparative fault.

In *Sundance Cruises Corp. v. American Bureau of Shipping(The Sundancer)* [1994] 1 Lloyd’s Rep 183 , the owner sued the classification society, alleging that “defects compromising the vessel’s watertight integrity” caused the sinking. The owner claimed that, if ABS had not been negligent, certain defects in the vessel which caused her to

sink would have been detected by ABS and the vessel would not have been classed and so would not have set sail until they had been corrected. The owner argued that the Ryan doctrine applied to classification societies. Under the Ryan doctrine, the classification society could be liable for damages in contract, based on the implied warranty of workmanlike performance.

The Sundancer court interpreted Ryan to state that the classification society did not undertake structural work, nor did the society have any control over the conversation work of the vessel. Because the society merely inspected and certified the vessel, it did not create the defects in the vessel's seaworthiness. The court noted that "the services and activities of a classification society differ markedly from those provided by a stevedore." Thus, the court held that the Ryan doctrine did not apply.

4.3. Liability in Tort

In *the Sundancer*, [1994] 1 Lloyd's Rep 183, the owners also sought damages in tort, including claims of negligence, gross negligence, and negligent misrepresentation. The owners alleged that defects in the vessel that were undiscovered by the classification society proximately caused the sinking. The court found that one of the two defects had existed over a period of twelve years and the other over a period of four years, and not one surveyor had noticed them. Nonetheless, the court found no gross negligence. The plaintiff's negligent misrepresentation claim was rejected because it was not established that the owners would have requested the society to supply information for their guidance. According to the court, surveys were requested only to fulfill the administrative requirements for putting the vessel into service.

In *Somarelf v. American Bureau of Shipping*, 720 F.Supp. 441, 1989 AMC 2330 (D.N.J. 1989), the time charterers of two vessels sued the American Bureau of Shipping (ABS) for inaccuracies in its certification of certain net tonnage specification. These inaccuracies caused the time charterers to incur extra Suez Canal charges that they could not recover from their sub-charterers. The time charterer settled with the vessel owners for \$ 222,000, and the vessel owners sought indemnification from ABS.

The court recognized that the shipowner may be entitled to indemnification from the classification society based upon tort. Vessel owners claimed against ABS under a tort-based theory of indemnity for negligent misstatement, which the court addressed as follows:

“The base purpose of tort-based indemnification is to shift the burden of compensating the victim of a tort to the party who is principally, if not solely, responsible for the tort’s occurrence. As the Court previously stated indemnification has usually been available only where the party seeking it was merely passively negligent while the would-be indemnitor was actively at fault. ‘Passive negligence’ has been limited to instances in which the indemnitee was vicariously or technically liable. Where the party seeking indemnification was itself guilty of acts or omissions proximately causing the plaintiff’s injury, tort indemnification is inappropriate.” (see *id.* at 451, 1989 AMC at 2345-46)

The court found that vessel owners were merely “ technically liable” to the time charterers because of the warranties in the charter party. Thus, the owners could make a tort-based indemnification claim against ABS, because it was ABS that was “actively at fault” by virtue of its miscalculation of Suez Canal tonnage, which directly led to the loss. (see *id.* at 452, 1989 AMC at 2346)

Finding that a claim for negligent misrepresentation exists under general maritime law based on section 552 of *Restatement (Second) of Tort*, the court decided that the vessel owner would be entitled to tort indemnity in the event that it could show negligent misrepresentation on the part of the classification societies. Under section 552 of *Restatement (Second) of Tort*, negligent misstatement is are recognized as follows:

- (1) one who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
- (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
 - (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
 - (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Then, the court delineated three prerequisites that the shipowner must establish in order to recover for negligent misrepresentation under section 552 of *Restatement (Second) of Torts*:

- (1) ABS in the course of its profession, supplied false information for the time charterer's guidance in a business transaction;
- (2) ABS failed to exercise reasonable care in gathering the information;
- (3) the time charter relied on the false information in a transaction that ABS knew the information.

The court felt that ABS had failed to use reasonable care in its calculations, and therefore clearly supplied an incorrect Suez Canal tonnage certificate, one that was needed by both the owners and charterers for guidance in business transactions. As to the third and fourth criteria, the court said:

“The time charterer plainly relied on the Suez Canal figures when entering into voyage charters.... Beyond the issue of the time charterer’s actual reliance, it is also clear that the time charterer had a right to rely on ABS’s figures by virtue of the warranties contained in the time charter. Although the time charter were negotiated before computation of the Suez Canal figures, the warranties...effectively incorporated the Suez Canal figures into the time charter agreements between the time charterer and the vessel owners.” (see *id.* at 453, 1989 AMC at 2348)

As far as ABS’s knowledge is concerned, in the judge’s view, plaintiff was required to prove that ABS, through its relevant employees, had knowledge and understanding of the importance of its national tonnage certificates and Suez Canal special tonnage to the maritime industry and specifically, that ABS, when issuing Suez Canal tonnage certificates with no disclaimer and not specifically addressed to any single party, understood that parties such as time charter and voyage charter, as well as owners, would properly and foreseeably rely on the Suez Canal special tonnage certificates issued by ABS. Plaintiff succeeded in meeting its burden of proof on this issue.

Finally, in regard to proof of pecuniary loss, the court held that the evidence clearly supports the proposition that the time charterer suffered financial loss as result of ABS’s negligence. The Suez Canal differential is based in large part on the special tonnage certificate and there is no question that the time charterer could have charged a higher differential to its voyage charterers had the correct net tonnage been known. Since the court found all four criteria were met, ABS’s conduct was found to constitute negligent misstatement.

4.4. Concurrent Liability in Tort and Contract

It has been questioned whether or not concurrent liability should exist both in contract and in the tort of negligence. Furthermore, it is clear that in those circumstances where claims in contract and in the tort of negligence exist concurrently, the nature and extent of the duty of care in the tort of negligence is affected by the terms of the contract. It is submitted that it is not always easy to reconcile the numerous decisions relating to this area of law.

There is no bright line rule for defining the difference between a surveyor's contract and tort although the distinction is certainly one of substance. For example, contract can oust any tort duties under right circumstances. Contractual duties can also be significantly reduced by agreement. On the other hand, only tort law squarely provides for contribution. Chartles M. Davies commented:

“ Because negligent performance of services is normally a breach of warranty of workmanlike service, the distinctions between causes of action based on tort theories and contract theories have often been blurred by counsel and courts, though the theories are discrete. Because third parties may enjoy the benefits of joint and several liability of joint tortfeasors and the rights of the parties to contribution or indemnity may turn on the theory of law on which recovery is based the distinctions between tort and contract theories should be preserved” (1994)

The relationship between tort and contract in the context of surveyor liability was explored in *Sundancer Cruises Corp. v. American Bureau of Shipping*. [1994] 1 Lloyd's Rep 183. The Plaintiff's claims based on tort were also barred by virtue of the *East River* 476 U.S. 858, 1986 AMC 2027 (1986) doctrine, which states that when claims are based on contract, no tort claims under certain more specified preconditions are possible. Incidentally, *East River* doctrine does not bar tort claims based on personal injuries.

Yet, it appears that courts have not come to a consensus in this area. For instance, in *Montgomery Ward & Co. v. Scharrenbeck*, 204 S.W.2d 508, 510 (Tex.1947), the court held that where a party's breach of contract results in damage beyond the loss of the benefit of the bargain, the injured party may have causes of action in tort **and** contract. The court found not only that an insufficient repair (which led to even greater damage) not only violated a duty to repair found in the contract, but also that the failure to use reasonable skill and diligence breached a common law duty, providing a basis for plaintiff's tort action.

In author's opinion, with reference to Lord Sarman's judgement in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd* [1986] 1 AC 80, any tortious duty of care, if it exists, will have been defined by the scope of those contractual rights and liabilities which the relevant parties have agreed. Thus the contract between the parties is seen as being the issue which is of primary importance whereas the duty of care in tort of negligence is at best relegated to a position of secondary importance.

If it is accepted that claims for breach of contractual duties and duties of care in the tort of negligence are capable of existing concurrently, one may well question the significance of existence of any tortious claim if it is governed by the primary contractual relationship between the parties and thus cannot confer any greater benefit/liability than that which the parties have contractually agreed. The importance of the existence of a concurrent duty of care is clear in the following two instance:

- (1) The most obvious of these must be where the contractual cause of action has become time barred. In most instances, the limitation periods for causes of action in the tort of negligence will expire later than those limitation periods for the contractual causes of action even though they may arise from the same facts. This situation really could raise complex issues for any court to consider. But from the public policy point of view, the continuation of

causes of action in the tort of negligence following the expiration of contractual causes of action should be enhanced. Because major function of classification societies involve safety of life and prevention of pollution of environment.

- (2) The existence of a concurrent duty of care is of importance when deciding issues of contributory negligence. It has already been seen that the contractual relationship is responsible for limiting the scope of a duty of care. Conversely, by reference to contributory negligence, the existence of a duty of care can limit or reduce the potential contractual liabilities of the parties. The issue about contributory negligence will be discussed at length in Contributory Negligence of Chapter Six.

Actually, the existence of a concurrent duty of care will be more complex when deciding issues of contributory negligence. In *Forsikringsaktieselskapet Vesta v. Butcher & Others* [1988] 1 Lloyd's Rep 19, the Court of Appeal considered the power to apportion blame under the *Law Reform (Contributory of Negligence) Act 1945*. The court identified three categories of cases when the question could be asked in each of the categories as to whether or not the *Law Reform (Contributory of Negligence) Act 1945* applied:

- (a) where the defendant's liability arose from some contractual provisions which did not depend upon negligence on the part of the defendant;
- (b) where the defendant's liability arose from a contractual obligation which is expressed in terms of taking care (or its equivalent) but does not correspond to a common law duty to take care which would exist in the given case independently of contract;
- (c) where the defendant's liability in contract is the same as his liability in the tort of negligence independence of the existence of any contract.

The court held that facts giving rise to claims falling only within the third category could give rise to a finding of contributory negligence under the 1945 Act. The principal judgement of the Court of Appeal was delivered by O'Connor LJ. He considered that he had to consider in detail the wording of the 1945 Act. Section 1 of *Law Reform (Contributory of Negligence) Act 1945* provides:

“1. Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by the reason of the default of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks fit and equitable having regard to the claimant's share in the responsibility for the damage...”

In his judgement, O'Connor LJ indicated that he was of the view that concurrent liability in contract as well as in tort existed, he stated as follows:

“...this is but a recognition of what I regard as a clearly established principle that where under the general law a person owes a duty to another to exercise reasonable care and skill in some activity, a breach of that duty gives rise to claims in tort notwithstanding the fact that the activity is the subject matter of a contract between them. In such a case the breach of duty will be a breach of contract...” (see *id.* [1988] 1 Lloyd's Rep 29)

The crucial portion of this statement which needs to be analyzed is his Lordship's reference to “general law”. He proceeds to argue that there is power to apportion in contractual cases but only in the third category, as cited above, where liability in contract is the same as in tort independent of the existence of any contract. Therefore, one should assume that he is, by specifying the term “general law” making reference to a contractual duty to exercise all reasonable skill and care which arises irrespective of the existence of any express contractual provision to this effect. However, it is surprising

that his Lordship did not consider other circumstances further, that is, 1945 Act could apply to the first and second category as well.

His approach reveals a contrast and distinction from the views of Lord Scarman in *Tai Hing* [1986] 1 AC 80. If the view of Lord Scarman were to be applied to these facts, the finding would surely have been that duties of care in the tort of negligence exist in the first and second category as well, albeit that the scope of that duty of care is governed and limited and is secondary to the scope of the contractual duty itself, However, even upon the basis of the reasoning of O'Connor LJ, the necessity for the existence of the duty of care in the tort of negligence may be clearly seen.

Chapter Five

Liability of Classification Societies to Third Parties

From a conceptual view, as far as the American law is concerned, claims of injured third party against classification societies fit the Restatement's concept of negligent misrepresentation like a glove.

On one hand, if **physical damage** is involved, section 311 of the *Restatement (Second) of Torts* will address a cause of action for negligent representation. Section 311 (1) provides:

“One who negligently gives false information to another is subject to liability for physical harm caused by action take by the other in reasonable reliance on such information, where such harm results

- (a) to the other, or
- (b) to such third persons as the actor should expect to be put in peril by the action taken.”

Thus, we can conclude that section 311 of the *Restatement (Second) of Torts* creates a cause of action for negligent misrepresentation involving risk of **physical damage** when the following prerequisite are present:

1. The defendant must negligently provide false information;
2. The recipient of that information must have taken action as the result of relying on that information;
3. Physical damage must result form that action; and
4. The injured third person must be one whom the defendant knows or should expect to be imperiled by the negligent misrepresentation.

On the other hand, section 522 of the *Restatement (Second) of Tort* (referred to Liability in Tort in Chapter Four) create a cause of action for negligent misrepresentation causing **pecuniary loss** when the following prerequisites are met:

1. The defendant is engaged in a business wherein he supplies information for the guidance of others in their business transactions;
2. The defendant in the course of that business supplies false information;
3. The defendant fails to exercise reasonable care or competence in obtaining the information;
4. The plaintiff is one to whom the defendant intended to supply the information or one to whom the defendant “knows that the recipient intends to supply it”;
5. The plaintiff justifiably relies upon the information supplied by the defendant; and
6. The plaintiff suffers a pecuniary loss as a result.

It is worthy noting that section 311 of the *Restatement (Second) of Torts* is applied where physical damage is involved, and section 552 focuses upon instances when only pecuniary loss is present. Section 552 sets more rigorous standards than section 311 because class of potential plaintiffs suffering pecuniary loss without concomitant physical damage can be quite broad so that it could invoke substantial and indeterminate amount and class if the limitation is not carried out in this respect.

For example, a cargo owner sustains damages as the result of classification society’s failure to enforce its rules, adequately review the design of a vessel, and/or adequately inspect a vessel. If he attempts to sue the classification society, all of the elements for a cause of action in tort are based upon negligent misrepresentation. If the damage is physical damage, such as rotten fruit due to defects in ventilation. Section 311 of the *Restatement (Second) of Torts* could be applied if all four of its prerequisites are met:

1. The defendant-classification society has negligently provided false information because classification society permitted a vessel to remain in class when in fact the vessel does not meet the classification society's rules and standards and the classification society's representative knew or should have been aware of this non-compliance. Consequently, the classification society had negligently conveyed inaccurate information;
2. The shipowner, as recipient of that information, relies upon the presence of classification certificates aboard the vessel that the vessel is in class and/ or cargo owners entrust their cargo to a vessel knowing that the usages and practices of the trade are such that only classified vessels are offered for service notwithstanding without such a representation;
3. Physical damage results from that action by virtue of the cargo owner having agreed to ship its cargo on a vessel which in fact is unseaworthy when that unseaworthy condition, which should have been discovered by the classification society, causes damage to the cargo; and
4. The classification society knows that cargo owners rely upon the classification certificate as assurance that the vessel is reasonable fit and that the cargo owner will be imperiled by entrusting its cargo to the unseaworthy vessel.

But, if the pecuniary damage is involved such as loss of profit due to delay arising from repair of substantial deficiency which classification society should have detected, a cause of action against classification society could be subject to section 552 of *Restatement (Second) Torts* if the prerequisites are met:

1. The classification society has engaged in a business wherein it supplied information relating to the seaworthiness of a vessel for guidance of shipowners, cargo owners, charterers and underwriters in their business transaction.

2. The classification society in the course of that business has supplied false information by maintaining the vessel in class thus representing that the vessel is seaworthy when in fact it is not;
3. The classification society has failed to exercise reasonable care or competence in obtaining the information upon which the issuance of a classification was based or maintaining the certificate in existence inasmuch as representatives of the classification society have failed to properly review plans or drawings and/or have failed to properly survey the vessel;
4. The cargo owner is one to whom the classification society knows that the shipowner, as the recipient of the classification information, intends to supply it; and
5. The cargo owner justifiably has relied upon classification status in deciding to ship its cargo aboard the vessel.

With reference to the above, it appears that the major problem is whether classification society knows third parties, such as cargo owners, charterers and insurers, rely on the classification certificates as assurance that the vessel is seaworthy and fit for trading. As a matter of fact, the activities of a classification society consist of formulating rules pursuant to which seaworthy vessels may be built, reviewing the design plans and drawings of new buildings in order to ensure that the design of the vessels complies with the rules, inspecting construction to ensure that the vessel is built in accordance with those approved plans, and surveying the vessel during the course of its service life in order to ensure that it is being maintained in accordance with the society's rules and standards.

The classification societies prepare a register listing each of the vessels enrolled in the society and then publishes that register so that members of the maritime community may refer to it when deciding whether to hire or insure a particular vessel. In turn, the

classification societies are aware that cargo owners, charterers, cargo underwriters, hull underwriters, and P & I club depend heavily upon a classification society's certification when making decisions to become involved with particular vessels.

Indeed, the classification society itself regards its role as that of an independent and impartial inspector and assessor. Those societies recognize that their job is to set standards and rules that, if met, will produce a vessel that is fit for its intended voyage. The classification societies further recognize that their role is to serve as an independent policeman to see whether indeed the shipowner is designing, constructing, maintaining, and repairing its vessel in accordance with those rules and standards.

Classification societies fully know the shipowner to pass classification status and data to third parties, such as cargo owners, charterers, hull insurers, etc. and the society recognizes that one of its primary purposes and functions is to provide assurance from an independent source to such third parties that a vessel is fit due to classification. Indeed, the very purpose of classification societies is to facilitate shipowners' dealing with third parties and to protect third parties who deal with and/or come in contact with their ships. In turn, cargo owners, charterers and insurance companies do conduct business on the basis of the fact that a vessel is classified in accordance with the classification process. They only deal with vessels that are enrolled in a classification society and maintained in class.

Classification societies can completely understand the complex interrelationship between classification status with the whole maritime community. They know that third parties are relying upon that information. In summary, under the American jurisdiction, the court should use the *Restatement of Tort* to find a cause of action based upon negligent misrepresentation, and under the appropriate set of facts, the courts should impose liability upon the classification society.

In English law, the action against classification societies by third parties should be based on the negligent misstatement. But, in terms of the criterion with regard to a cause of action in tortious liability, negligent misstatement in English law is similar to negligent misrepresentation. So far as surveyors or professional person are concerned, a duty of care may be owed to anyone who may reasonably be expected to rely on the advice given . No duty will owed if reliance on the advice cannot reasonably be foreseen.

The requirements of the tort are that the defendant (or his agent) must communicate considered advice in a business context to the plaintiff (or his agent) in the knowledge that the plaintiff will rely on it. It must also be reasonable for him to rely on it. It must also be reasonable for him to rely on that advice. The defendant is then under a duty to give careful advice. If he does not take reasonable care, he will be liable for losses caused by the plaintiff's reliance on the advice.

Chapter Six

Appraisal of Possible Defenses by Classification Societies

6.1. Proximate Cause and Foreseeability

In American law, proximate cause is considered as a surveyor's excellent defense. It means that even if the court finds that the surveyor has breached his duty to detect and warn the defects, such a breach must be a proximate cause of the loss.

In *Dillingham Tug & Barge Corp. v. Collier Carbon & Chem. Corp* case 707 F.2d 1086, 1092, 1984 AMC 2990, 1998 (9th Cir. 1983), the United States District Court for the Northern District of California had found the surveyor twenty percent at fault for the sinking of a barge based on the surveyor's failure to detect errors in a marine architect's stress and stability calculations in connection with the modification of a vessel.

But the United States Court of Appeals for the Ninth Circuit found that the plaintiffs had failed to provide evidence establishing that the surveyor's negligence was a proximate cause of the barge's capsizing. Therefore, Court of appeals reversed that portion of the district court's finding that imposed liability on the marine architect and the surveyor by the reasoning as follows:

“...mere negligence alone does not give rise to liability, rather, the negligence must have caused the injury... Causation, in this case, would necessitate a finding that, had the omitted calculations been performed, they would have demonstrated that the [condition of the vessel was] not in fact sufficient for the contemplated voyage. The trial judge did make such a finding; however, we believe that this finding was clearly erroneous...”

... The experts who testified at trial, including the expert called by [the owner], agreed that had [the tug] conducted the tow as they were advised to, the barge would have survived the voyage, and therefore the barge was properly designed for the voyage contemplated by the parties. If the [barge] were properly modified for the purpose of the contemplated voyage, then any negligence on the part of [the architect] in failing to make certain calculations was not the cause of the barge's sinking; the barge was lost due to [tug's] failure to conduct the tow properly.

...since the trial judge found [the surveyor] liable solely for a failure to discover [the architect's] negligence during its review of [the architect's] calculations, this finding was also clearly erroneous, and therefore must be reversed. ” (see *id.* at 1092-1093, 1984 AMC at 1998-1999)

As reflected in the *Dillingham* case, the requirement of establishing a proximate case relationship between surveyors' alleged negligence and damages can be a strong defense and a major obstacle for plaintiffs.

In contrast, English law in terms of this issue seems to be complex. In English law, every negligence case involves a judgment about whether there is a sufficient relationship of proximity between plaintiff and defendant before a duty of care ought to be imposed. If no duty to take care is owed, then no liability for negligence will lie. The principle criterion of liability is that of foreseeability. It must be foreseeable to the defendant that his conduct might cause injury to the plaintiff if he fails to exercise reasonable care.

In *Marc Rich & Co. v. Bishop Rock Marine Co., (Nicholas H)* [1992] 2 Lloyd's Rep. 481, [1994] 1 Lloyd's Rep. 492 (C.A.), The vessel "Nicholas H" was destined for Italy. On the voyage, the vessel deviated and anchored off San Juan, Puerto Rico, due to a crack in her hull. While in San Juan further cracks developed, the vessel's classification

society, NKK, was engaged to survey her. First, the surveyor recommended permanent repairs in San Juan port before the voyage to Europe. However, after temporary repairs using sealant and welding techniques, the surveyor issued a further report revoking his first recommendation and allowed the vessel to proceed to the next discharging port before completing the remaining repairs. The crack reopened after a week at sea due to welding of the temporary attachments. In spite of rescue attempts by the crew, the “Nicholas H” sank with all of its cargo. The cargo owners claimed shipowners \$6 million for the loss of the ore, but the shipowner's liability was contractually limited by the Hague Rules to \$500,000. The claim was settled for that amount. The cargo owner then brought a claim against the vessel’s classification society, NKK for the balance of \$5.5 million, plus interest.

In *Nicholas H*, the judge held that on the assumed facts of this case there was a very close and direct degree of proximity between NKK’s surveyor and the plaintiffs. Having first recommended that the vessel should not leave port without having undergone permanent repairs, the surveyor later recommended that she could sail after only temporary repairs had been done, knowing that she was fully loaded, and therefore knowing that if it was dangerous for her to go to sea in that condition, the goods were just as likely to be damaged or lost as the vessel itself. Then, the court held further that although it is true that surveyor had no actual direct physical control over the vessel in the sense that he could bar her sailing, the sanction imposed by his first report rendered it high probability that the shipowner could not sail (as in fact occurred).

Accordingly, there seems to be three elements in this finding of proximity: (1) the control exercised by NKK over the shipowner’s operations; (2) the fact that the cargo was known to be already on board the vessel by the NKK surveyor; and (3) the closeness in time and place of the survey and the casualty.

It is clear that a duty of care should be owed by professional men to third parties where there was no contractual relationship between them. However, subsequent attempts to define both the duty and its scope can create more problems than the decisions. In fact, there was no simple formula or touchstone to provide in every case a ready answers to the questions whether, given certain facts, the law would or would not impose liability for negligence, and how, in cases where such liability could be shown to exist, determine the extent of that liability. In *Nicholas H*, the judge held :”...I wish to emphasize that this conclusions is based simply and solely on those assumed facts, and has no general application whatsoever to any other situation which might arise between a classification society and cargo owners or other third party with whom they are not in contractual relationship.” ([1992] 2 Lloyd’s Rep 500)

To be frank, when relationship between classification societies and claimants is examined, phrases such as “foreseeability”, “proximity”, “neighborhood”, “just and reasonable”, “fairness”, “voluntary assumption of responsibility ” are not precise definitions. At best they were only labels or phrases descriptive of their very different factual situations which had to be carefully examined in each case before it could be pragmatically determined whether a duty of care existed and, if so, what was the scope and extent of that duty. In *Caparo Industries PLC v. Dickman and others* [1990] 1 ALL ER 568, Lord Bridge submitted that “proximity” and “fairness” are “little more than convenient labels to attach to the features of different specific situations which...the law recognizes pragmatically as giving rise to a duty of care”

Furthermore, in most case, negligent misstatement against third party causes economic loss rather than physical damage. The subject therefore raises the problem of economic loss and its recoverability in tort.

In English law in general the fact that economic loss is foreseeable consequence of a negligent act is insufficient to entitle the plaintiff who suffer that loss to recover damages. A person is not liable in the tort of negligence for the purely economic loss which he causes by his negligent deeds. But there is a notable exception in the case of negligent misstatement. The case which introduced the principle of liability for economic loss arising out of negligent misstatement is the case of *Hedley Byrne and Co Ltd v. Heller & Partners Ltd*.

The *Hedly Bryne* case established that people holding themselves out as being skilled professional could be liable in negligence for the economic loss they cause to those who rely upon their advice,. In certain circumstances (usually where the adviser is in the business of giving advice), “special relationship” exists so that the professionals owes a duty of care to the person relying upon his advice, in giving information or advice. The precise circumstances in which a special relationship will exist have not been defined, but the following words of Lord Morris in the *Hedly Bryne and Co Ltd v. Heller & Partners Ltd*. [1964] AC 465 have been often quoted:

“It should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such a skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words, can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgement or skill or upon his ability to make careful enquiry, a person takes it upon himself to give information or advice to, or allows this information or advice to be passed on to another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.”

In addition, the House of Lords in the *Caparo Industries PLC v. Dickman and Others* [1990] 1 All ER 568 considered that, where a duty of care in respect of negligent

statements did exist, the limit or control mechanism, imposed on the liability of a wrongdoer towards those who have suffered economic damage as a result of his negligence, depends on need to prove that the wrongdoer knew that his statement would be communicated to the plaintiff either as an identifiable class specifically in connection with that transaction or transactions of particular kind.

In *Nicholas H*, it is surprising that court held nature of loss of plaintiff 's cargo is physical damage. The argument is that cargo is tangible and so damage to cargo is physical. Consequently, the boundaries of liability for pure economic loss defined in *Hedley Byrne and Co Ltd v. Heller & Partners Ltd.* and *Caparo Industries PLC v. Dickmann and others* cases were rejected to apply to this case. But, in my opinion, cargo was clearly of purely economic value to Mar Rich plaintiff, who is a commodity dealer. I don't think that the distinction between tangible and intangible assets accurately expresses how most people feel about the world. I would say that a person's interest in his or her physical and mental health and well-being is never purely economic, but that a person's interest in tangible property often is. Conversely, I would accept that even a person's interest in intangible assets such as shares and bonds may in some cases not be purely economic. Accordingly, the line between injuries to economic interests in assets and injuries to non-economic interests in assets could be more reasonable than that between injuries to tangible assets and injuries to intangible assets when the question as to determines whether damage is physical or economic is solved.

6.2. Reliance and Control

In *The Sundancer* [1994] 1 Lloyd's Rep 183, the court found that the shipowner did not rely on the surveys because they were only administrative in character. Additionally, the

classification society had no physical control over the ship. In my eyes, these arguments appear to be not so compelling.

Briefly, I wholly agree with the judgement about the reliance of cargo owner on the classification society (NKK) in *Nicholas H* ([1994] 1 Lloyd's Rep 492) although plaintiff cargo owner lose the claim to NKK based on other arguments. The court of appeals in *Nicholas H* was of the opinion that only the shipowner had control over the cargo. But, on the other hand, the fact is that although the surveyor did not have physical control over the ship, he could have forbidden the ship to sail. A surveyor has control over the vessel in the sense that he can deny permission for the vessel to sail. If the vessel sails anywhere under sanction, the surveyor or his classification society would not be liable. Control means control over the situation, not physical control the vessel.

In some cases, loss is really suffered by the person only because that person relied on something said or done by another. But even if loss is inflicted on a person by the conduct of another despite the fact that the former did not rely on anything said or done by the latter, lack of reliance by itself is no bar to recovery. As a matter of fact, this position belongs to one of six categories in negligent misstatement. i.e. Advice given by a defendant to a third party resulting in loss to a plaintiff who does not rely on the defendant. The position is supported by *Ross v. Caunters and Ministry of Housing and Local Government v Sharp*. [1980] Ch 297 at 322-323. In *Ross v. Caunters*, the defendant solicitor negligently allowed a will to be witnessed by the spouse of an intended beneficiary. As a result, the plaintiff beneficiary was unable to take his bequest under the will. The only person, the plaintiff suffer loss was the plaintiff, but he had no contract with the solicitor and could not be said to have relied on him. But, the judge held that the solicitor is liable on basic negligent principles. He could have foreseen damage to the plaintiff, and there were no policy reasons for excluding a duty of care, as the only person who could have suffered loss was the plaintiff.

In *Carbotrade S.p.A v. Bureau Veritas* 99 F.3d 86, 97, 1997 AMC 98, 108 (2d Cir. 1996), the court favored the classification society based on reliance issue. The plaintiff didn't establish reliance upon the defendant's classification of the vessel. The court reached that conclusion by pointing out that the plaintiff had begun loading the vessel before the classification societies had completed its intermediate survey, the certificate had expired before loading began, and the plaintiff's surveyor knew of the unseaworthy condition yet the plaintiff chose to do nothing. However, those factors in this case is not so compelling. The commencement of loading prior to completion of the class survey and the expiration of the certificate before loading began are not *per se* strong augments. Because the cargo owner would be unaware of those circumstances, and even if he aware, the cargo owner probably would be justified in concluding that classification society's surveyor are present, adequate attention to be paid to the vessel's seaworthiness. In my personal view, reliance could be established but knowledge on the part of the cargo owner's surveyor of the unseaworthy condition can and should be fatal to recovery from the classification society if that surveyor had no assurance from the class surveyor that the problem would be rectified.

In *Cargill Inc. v. Bureau Veritas* 902 F.Supp.53 1996 AMC 582, the court found an absence of reliance based upon the following considerations:

- (1) the plaintiffs had not consulted the classification register;
- (2) the plaintiff hired their own independent surveyor to inspect the ship after the shipowner had completed repairs;
- (3) plaintiffs failed to demand an attestation of class to ascertain the vessel's present classification status; and
- (4) a number of the vessel's certificates had expired immediately prior to the commencement of loading

It seems to me that reasons articulated above are unreasonable. The cargo owners' failure to consult the defendant's register or to obtain an attestation of class is of no legal basis if interrelationship between classification societies and maritime community is correctly understood. As explained earlier, cargo owners fully expect classification to perform their function of ensuring that a vessel is maintained and in class and to remove the classification certificates from the vessel in the event that class is revoked, which effectively terminates the vessel's trading ability. The fact that a well classified vessel remains in service justifiably entitles a cargo owner to assume that the classification society has ascertained through its independent verification process that the vessel is seaworthy. Finally, I would like to reiterate that reliance on the classification societies by no matter who he is shipowner or third party, from the viewpoint of whole maritime community and role and function of societies in maritime commerce, should be examined and determined.

6.3. Exemption Clause

For a considerable time, nearly all classification societies have inserted exemption clauses or disclaimer clauses. What form do they take? What is their justification? What is the attitude of the court towards them? These questions will be discussed in this sub-chapter.

In American law, if exclusion clauses in maritime contracts are not against public policy, they will be upheld. Certain conditions, however, determine their acceptability to a judge, that is,

- (1) parties should have relatively equal bargaining power;
- (2) protection afforded by exclusion clauses should extend only to ordinary negligence, not gross negligence;

(3) they are strictly construed in case of ambiguity.

In *Great American Insurance Company v. Bureau Veritas*, 338 F.Supp.999, 1972 AMC 145 (S.D.N.Y), 1973 AMC 1755 (2d Cir. 1973), a similar clause was important in determining the contractual relationship between the classification society and the shipowners: “ The Bureau Veritas declines any responsibility for errors of judgment, mistakes or negligence which may be committed by its technical or administrative staff or by its agent” (see *id.* at 1010, 1972 AMC at 1469) The district court judge stated that this clause was “ overbroad and unenforceable as contrary to public policy.” (*id.*)

In *Royal Embassy of Saudi Arabia v. S/S Ioannis Martinos*, 1986 AMC 769 (E.D.N.C. 1984), the court held that the following three exculpatory clauses, used by different surveyors involved in the same case, were void as against public policy:

“The foregoing inspection was undertaken and this certificate of readiness is issued on the following terms and conditions:

While the Officers, Directors and Committees of National Cargo Bureau, Inc. use their best endeavors to see that the functions of the Bureau are properly executed, the Bureau makes no warranty of any kind, either express or implied, including warranty of workmanlike service, respecting its work or services, and is not an insurer of cargo or other property or of the ship or of the safety of any personnel and disclaims all legal responsibility for any loss, damage, personal injury or death resulting from any act, default, omission, negligence, error or breach of any said warranties. Neither the Bureau nor its Officers, Directors or Committee members nor its surveyors, employees, representatives or agents are under any circumstances whatsoever to be held responsible or legally liable for any inaccuracy or error of judgement, default, omission, negligence or breach of warranty, either express or implied, including warranty of workmanlike service, arising or allegedly arising out of services of the Bureau, its surveyors or other employees, representatives or agents. ” (see *id.* 787-88)

The second clause read:

“The salvage association considers that the surveyor appointed by it is fully competent to carry out this survey but neither The Salvage Association nor the Surveyor shall in any circumstances be responsible or liable to any person for any act, omission, default or negligence in connection with the survey or the Certificate(s) or for any loss, damage or expense howsoever caused which may subsequently occur.” (*Id.* 788)

And the third exculpatory clause read:

“This Certificate is issued subject to the terms of the Confirmation of Request for Inspection and Approval of Survey. Neither The Salvage Association nor the Surveyor shall in any circumstances be responsible or liable to any person for any act, omission, default or negligence, whatsoever.” (*id.*)

Even though disclaimer provisions was made in the specific context, the court in *Royal Embassy* held surveyor’s duties was running from simple inspection, to notification, to taking full charge of relevant operations.

In the meanwhile, the court held that disclaimer provisions are generally upheld when they do not increase the likelihood that negligence will occur. Thus, if a marine surveyor were to board a vessel after it had been loaded by the stevedores and then examined the lashings and stowage, he would not be able to affect the quality of work already performed. Actually, he would merely be viewing the work to determine whether he should give the appropriate certificate of approval.

Even if the marine surveyor walked on the deck and made occasional suggestions for securing the cargo, the stevedores would be in a position to disregard the comments and proceed with their responsibilities. The marine surveyor was not taking control over the

stevedores. In truth, the stevedores, not the marine surveyors, would be in control and would normally seek to avoid negligent workmanship.

Yet, the court commented further that the degree of involvement of the marine surveyor can produce greater duties. If the surveyor is hired to inspect the vessel, and the surveyor instructs directly the actual manner in which the cargo is lashed, stowed, and secured, then he may owe a broader duty. In this situation the surveyor has control over whether the cargo is stowed in a proper manner or whether it is stowed in a negligent manner. This person would be in control over the workmanship. A disclaimer of liability in this last situation would tend to induce negligence. An exculpatory clause which tends to induce negligence "...is repugnant to traditional law and to sound policy." This court, therefore, concluded that the disclaimers herein are void as against public policy because facts were alleged which may place the Salvage surveyor and National Cargo surveyor in the situation where the surveyor took an active role in the direction of the securing of the cargo.

In *The Sundancer*, [1994] 1 Lloyd's Rep.183, the contract between ABS and the shipowner included several exemption clauses. For instance, the contract included American Bureau of Shipping Rule 1.25-a release clause-which provided in part:

"...Neither the Bureau nor any of its Committees and employees will, under any circumstances whatever, be responsible or liable in any respect for any act or omission, whether negligent or other wise, of its surveyors, agents, employees, officers or Committees, nor for any inaccuracy or omission in the Record or any other publication or the Bureau, or in any report, certificate or other document issued by the Bureau, its Surveyors, agents, employees or Committees." (see *id.* at 185-186)

An indemnity clause was also present in the contractually relevant documents. The court suggested that even if the wording in such a release clause were unambiguous, the clause

might violate public policy. As the clause in question was hidden behind several references, the plaintiff should have to produce further evidence regarding the actual intentions of the parties.

In English law this matter is governed by the *Unfair Contract Terms Act 1977*. Section 2 (1) provides that “A person cannot by reference to any contract term or to a notice given to persons generally to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.” Therefore, the disclaimer will be ineffective if it relates to liability for negligently caused death or bodily injury. Moreover, if the disclaimer seeks to exclude or restrict liability for other harm suffered as a consequence of the defendant’s negligence, it must satisfy a test of reasonableness if it is to affect the defendant’s liability. (see *Unfair Contract Term Act 1977 2 (2)*)

In *Harris v. Wyre Forest and Smith v. Bush* [1989] 2 WLR 790, [1989] 2 All ER 514. Lord Griffiths made it clear in his judgment that although he regarded the disclaimers given in the cases before him as unreasonable , he would not consider it unreasonable for professional men in all circumstances to seek to exclude or limit their liability for negligence. The judge held that the burden is on the surveyor to establish that in all the circumstances it is fair and reasonable that he should be allowed to rely on his disclaimer. In considering reasonableness, four matters should always be considered:

- (1) were the parties of equal bargaining power ?
- (2) would it have been reasonably practicable to obtain the advice given from an alternative source, taking into account costs and time?
- (3) The difficulty of the task undertaken.
- (4) The practical consequences of the decision on the question of reasonableness--taking into account the sums of money potentially at stake, the ability of the parties to bear the loss involved and the insurance position.

However, so far, UK courts have not had to hand down decisions on the validity of exclusion or disclaimer clauses issued by classification societies. Some decisions have been reached, however, on onshore disputes, showing that such a clause operates as a warning and may prevent the plaintiff from establishing breach of the duty to exercise reasonable care and skill or reliance on the report in relation to inaccurate or uninspected part.

It should say that if the exculpatory clause only against liability of classification society to shipowner is conspicuous, expressly agreed to beforehand, not *ex post facto*, and is not the product of unequal bargaining power (unconscionability), it would appear to remain a possibility of validity. Simply attaching the provisions to the survey report such as "without prejudice" is definitely invalid. On the other hand, if the exculpatory clause against liability of classification society to third party, it would appear there is no possibility. The absence of privity prevents those rules from binding third persons.

6.4. Statutory Immunity

A acceptable or specified exemption of classification society would have little effect on classification societies action on behalf of governments. Statutory surveys, such as SOLAS, Load Line, and MARPOL surveys may not be included in the exemption clause. But, it does not mean that classification societies do not have an opportunity to exclude their liabilities. In two recent litigated cases in the United States (*The Sundancer* and *Scandinavian Star*), the defendant societies have successfully asserted their entitlement to immunity from liability under the law of the flag state (Bahamas) in respect of such statutory survey. However, most states for whom the classification societies perform statutory surveys and certification do not have legislation which

confers immunity. Therefore, it appears that the desirable solution is to base exemption from liability on legislation. Actually, but, this is not an easy issue to deal with.

In *The Sundancer*, [1984] 1 Lloyd's Rep 183, ABS was nominated under the relevant Bahamian legislation to provide the certificates required for registration. The Bahamian Merchant Shipping Act includes a statutory exemption stating that any government appointee is immunized from liability for issuing statutory certificate in good faith. Therefore, the court held that the classification society could enjoy immunity from suit in respect of *bona fide* provision of these certificates. But, in this case, due to the certificate provided to plaintiff for insurance purposes, ABS enjoyed no such immunity.

The application of statutory immunity creates some specific legal issues. Historically, an absolute defense of sovereign immunity was allowed in customary international law to the foreign state or ruler. However, later a restricted version was applied, whereby commercial acts were excluded from this defense. Under the restricted version, which is nowadays generally applied, one has to separate between state acts (*acta jure imperii*) and commercial acts (*acta jure gestionis*).

Classification societies check and certify whether vessels comply with various state and international standards concerned with safety, prevention of pollution and so on, as well as with their own standards for the construction, maintenance and operation of vessel. They are employed both by governments which implement national law and international conventions for the purpose of the human life and environment and by shipowners and others such as insurers and cargo owners with an interest in the maintenance of those standards. They also provide ship surveying and damage investigation services to insurers, potential purchasers, charterers and so on..

It is typically said that classification societies perform both public and private functions. This difference has really been treated as a standard or argument whether classification societies assume liability as in *The Sundancer* case. But this statement is too simple. It is hard to determine whether any of the functions performed by classification societies is public. Public and private functions and characteristics could be overlapped. If a classification society acts as an independent contractor of government providing certification services, it is unlikely that the society would be restricted to be performing public functions. It is even less possible that a society would be held to performing public functions if it was employed by a non-governmental entity. On the other hand, if a society performed functions under statutory authority as a delegate of government, then it is more likely that its functions would be held to be public, but not everything which is done by or on behalf of governments, even under statute, is necessarily public in nature.

Even if a society is performing public function, the function of classification societies seem, as the matter of public law, to be operational in nature and to contain little policy elements although this is a tricky statement to make in the abstract without reference to any particular function and fact situation.

In addition, from the viewpoint of *The Sundancer* case, a major problem in terms of immunity is not whether to grant sovereign immunity to a state and its agents on the basis of international law, but whether to apply foreign, nationally legislative public law, the application of which would lead to immunity. According to Baade (1991), the principle of *ordre public* (acts against public policy) could apply to pierce the protective veil. Possible *ordre public* situations would be political asylum and refusal to extradite, recidivism, penology and moral character, subsidies and countervailing duties, foreign tax credits, foreign sovereign acts, bribery in government procurement, illegality, immorality and impossibility. One might argue, for example, that foreign legislative

immunity conflicts with the basic values of the legal system in the country of jurisdiction.

In *The Sundancer*, it seems Bahamian Merchant Shipping Act provides extensive legislative protection to these civil servants and governmental appointees with responsibility to protect life and property at sea without giving a court the option to determine whether liability exists. Obviously, a purely national immunity system seriously infringes upon the mandatory aims to protect safety and property at sea under international conventions. In this case, if by applying the *ordre public* principle, the court would take a position against a foreign government on whose behalf the classification society has exercised public authority under internationally unified rules. In my personal opinion, the only explanation is that English courts are not willing to hold that bodies performing regulatory and inspection functions of the type carried out by classification societies owe duty of care to individuals who suffer loss as a result of the negligent performance of such functions, even when those functions are operational; and especially if the functions are performed under some statutory provision. We can understand decisions and reasoning of courts in the cases in favor of the classification societies.

As a matter of fact, classification societies play fundamentally important role in the maritime community. If there was not any special legal regime to protect classification societies, their role as non-profit making entities designed to promote the safety of ships and lives at sea, would be undermined as societies would be obliged to curtail some services in the respect of public interest and exercise their role in a defensive manner. Consequently, only governments with sovereign immunity could take it on. But, as governments have not expertise and professional technician in the respect of ship safety as classification societies possess and they are immune from any potential liability for the fault or error, things will get worse, even creating catastrophe consequences.

Undoubtedly, The unique technical expertise of societies is indispensable to both flag state administrations and shipowners.

Under the latest development, classification societies has been granted an effective law-making mandate. Subject to a new regulation implemented in July 1998 under SOLAS 1974, the structural and engineering requirements of recognized classification societies become binding as a matter of international law. International Maritime Organization (IMO) has already formalized the “delegated authority” role of classification societies. (referred to the Annex A)

Thus, I don't want to deny the classification societies should have some privileges. But national statutory immunity can leave a lot of room for discretion. Uncertainty and difficult prediction are unavoidable. Furthermore, as far as these principles such as foreign sovereign acts and *ordre public* belonging to the scope of public law are concerned, politicians and diplomats can definitely deal better with this conflict than the courts. From my point of view, there should exist a international convention dealing with the liability of classification societies with regard to their public role and authority granted mostly by the whole maritime community at the level of international accession or agreement. Enacted law at the international level could be more effective than judge's discretion during determining the public functions of classification societies and dealing with their immunity.

6.5. Himalaya Clause-Channeling of Liability

In third party claims classification societies have tried to exclude their liabilities to third parties by a type of Himalaya clause. In light of Himalaya clause servant, agent and independent contractors of carrier shall not assume any liability to other person for any

loss, damage or delay arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment. Despite some tensions with the classical theory of contract, this clause is still accepted and necessary in most jurisdictions, presumably because the justice and convenience of the result is recognized.

In common law, a strict application of the doctrine of privity of contract may leave third parties in a position in which they face risks considerably greater than those undertaken by the contracting parties. While the parties to the contract can calculate the possible risks of loss and apportion the loss and insure accordingly, the same cannot be said of third parties, such as classification societies and stevedores. Consequently, one method of avoiding the effects of the doctrine of privity of contract is to treat one of the contracting parties as an agent for his employees, subcontractors or independent contractors. In *New Zealand Shipping Co Ltd. v. AM Satterthwaite Co Ltd.*, [1975] AC 154, machinery belonging to the consignees was damaged by the defendant stevedores in the course of unloading a ship. The defendants sought the protection of a limitation clause contained in the bill of lading which formed the basis of a contract between the carriers and the consignors. Accordingly, the disputes arose between two litigants, neither of whom was a party to the contract of carriage. The relevant clause provided that no servant or agent, including an independent contractor of the carrier was to be liable for any act or default while acting in the course of his employment. All of the members of the Privy Council agreed the an appropriately worded clause could protect a third party and a majority held that his clause did serve to protect the stevedore.

Thus, the question, then, is whether the classification society is entitled to the protection of this clause. It does not seem possible solely on the basis of the Himalaya clause, but referred to national law according to which the question on vicarious liability is decided. In *Riverstone Meat v. Lancashire Shipping Co. (Muncaster Castle)* [1961] A.C. 807, the

carrier was liable for the mistakes committed by shipyard repairer in connection with a classification society survey in case of the damage to goods. But exclusivity of liability of classification society cannot be settled by simply construing the rule in *The Muncaster Castle*. It requires a consideration of the whole structure of channeling in law and practice.

No one can protect a defendant by removing the right to take legal action from the victim who was not party to the contract. A legislative intervention is needed. This result is occasionally obtained by the technique of 'channeling', which consists of concentrating the whole of an industrial risk on a single person, presumed to be most appropriate to bear it. This involves two steps: first, a person is designated as liable for damage resulting from the incriminated activity; secondly, claims against other persons are prohibited. Such a system has been set up on an international scale for nuclear accidents and damage caused by oil pollution. Under the United States *Oil Pollution Act of 1990*, the shipowner is solely liable for oil pollution damage. The nuclear damage is also unlikely to involve the liability of a classification society, since Article 11.2 of the *Brussels Convention 1962* on nuclear merchant ships expressly provides for channeling of liability, which exclude any other liability except that of the nuclear plant operator.

But, there are still some points at issue about the protection offered by channeling. On one hand, it appears to be uncertain in dispute since either provisions with narrow scope provided by only one or two conventions being only an instrument of international law might not be ratified by the state where the legal action might be taken or the state fails to implement those flexible provisions on an international basis. On the other hand, where the shipowner's non delegable duty to provide a seaworthy ship is in question, this proviso could not fail to be satisfied. As the Tetley (1988) said, the viable solution appears to be "the channeling should be structured so that there are no gaps in the scheme of liability"

The basic principle behind channeling of liability is to ensure that the costs of wrongfully caused losses end up on the party best able to take precautions against similar losses probably being suffered in the near future. It seems right that a stronger deterrence signal should be sent to the owner who control, maintain and manage the vessel in most circumstances. But it should be worth nothing that classification societies play a critical role in maritime community and absolutely became core part of maritime commerce. From the viewpoint of the heavy reliance on classification societies by the whole maritime group-shipowners, cargo owners, insurers, etc., there should be a case where societies are imposed liability so as to give them a strong incentive to take care.

Therefore, in order to achieve a satisfactory channeling of liability for deterrence and precaution purposes, the ideal solution would be certain appropriate apportionment of responsibility between shipowners and classification societies based on the well structured system of channeling. On this basis, Himalaya clause will be examined on the facts of individual cases.

6.6. Non-delegable Duty

The shipowner has a duty to exercise due diligence to make the vessel seaworthy before and at the beginning of the voyage. In *Riverstone Meat Co. Pty v. Lancashire Shipping Co. (The Muncaster Castle)* [1961] A.C.807, this duty is said to be non-delegable, which means that shipowners can be sued for breach of this duty even if they employ an independent contractor to do the job necessary to make the vessel seaworthy and the unseaworthy state of the vessel is a result of actionable negligence on the part of the independent contractor. In *Great American Insurance* and *The Sundance* cases, We can see application of this argument judging whether or not classification society is liable.

It is true that in both cases classification society was an independent contractor of the shipowner and was employed, in part at least, to assist the shipowner in discharging its non-delegable duty to provide a seaworthy vessel. But the doctrine of non-delegable duties is part of the law of vicarious liability, and so it is simply irrelevant to an action (as in *The Sundancer*) for breach of contract brought by an employer in respect of loss suffered by the employer as a result of negligence of the contractor as opposed to an action by the employer against the contractor for a contractual indemnity in respect of the employer's liability to a third party arising out of the negligence of the contractor .

In *Great American Insurance Co. v. Bureau Veritas*, 338 F.Supp.1012, 1972 AMC at 1472-73 (S.D.N.Y. 1972) the court have wrestle with the issue of whether the existence of the shipowner's non-delegable duty to exercise due diligence to make the vessel seaworthy precludes the imposition of liability on a classification society for its negligence in failing to ensure that the vessel is seaworthy. This reasoning is absurd inasmuch as it fails to recognize that allowing an injured third party to recover from both the shipowner and the classification society when the negligent acts of both conjoin to produce a common harm is merely an application of the common law of doctrine of joint liability. Moreover, the fact that the shipowner has a non-delegable duty to make a vessel seaworthy does not create any deviation from the normal rule of tort that two parties at fault are joint tortfeasors, each of which is responsible for the loss. In short, no conceptual basis exists for exonerating a negligent classification society from liability merely because the shipowner is also guilty of negligence relating to the seaworthiness of the vessel.

Actually, a cause of action in favor of third parties against classification societies has no adverse effect on implies warranty of shipowner in common law. If the shipowner fails to provide a seaworthy vessel and the classification society, as the independent evaluator, fails to perceive that failure, both should bear the responsibility-the shipowner

responsible for breaching its warranty of seaworthiness and societies for his negligent representation. Furthermore, the mere fact that shipowner has a non-delegable duty does not reduce possibility of occurrence of negligent act or default on the part of the classification societies. So, in my personal view, main problem at present is how to meet the balance among shipowner, classification societies and third party. This issue will be described exhaustively in *Contributory Negligence and Joint Liability and Limitation of Liability* in Chapter Six.

6.6. Contributory Negligence and Joint Liability

Some courts, such as in *Great American Insurance Co.v. Bureau Veritas, The Sundancer and Nicholas H*, held that a classification society to be a joint tortfeasor would discourage shipowners from taking proper and effective measures to furnish a seaworthy vessel. Then this argument is as a basis for conclusion that negligent classification should be immunized from liability. Obviously, it is not persuasive. If it were so, then, in every case involving two parties at fault, the court should choose one or the other to be solely liable because finding them both jointly and severally liable might encourage one of the parties to commit torts in the future. The fact that any negligent party is held liable for its proportionate share of fault is an adequate deterrent to that kind of careless behavior in the future.

Furthermore, in *Nocholas H* [1992] 2 Lloyd's Rep. 481, [1994] 1 Lloyd's Rep. 492 (C.A.), the court held the imposition of liability on the classification society would destroy a carefully worked-out regime of rights and obligations of the shipowner and the cargo owner *inter se* established by the Hague Rules or Hague-Visby Rules. The Hague Rules do allocate risks and liabilities between shipowners and cargo owners, and there is good reason not to allow parties to contract governed by Hague Rules to evade their

duties between themselves through seeking to establish and enforce provisions and conditions not subject to such Rules. If societies were successful in recovering indemnification from shipowners in respect of loss suffered by cargo owners after classification societies indemnify third party due to their negligent act, the limitation of the liability of shipowners to cargo owners under the Hague-Visby would effectively be deteriorated. Shipowner would need to extend their insurance cover. These augments sound plausible. But, actually, it is not compelling and reasonable if liability of classification societies to third party relationship is only determined by allocation of risks and liabilities between shipowners and cargo owners.

In my opinion, disputes about liability of classification societies to shipowner should be dealt with based on principle of contributory negligence. In fact, in common law contributory negligence is always as defendant's useful defense. The apportionment principle of liability between classification society and shipowner can be found in the *Law Reform (contributory negligence) Act 1945*, Section 1 (1) provides;

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons...the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage..."

In general terms, contributory negligence consists of the shipowner's failure to take reasonable care for his own safety or his own interests. It follows that shipowner is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not as a reasonable man would have acted, he might be harmed, and fail to take care for his own interests. Certainly, the concept of causation and the defense of contributory negligence are impossible to divorce from one another, since the shipowner's contributory fault must be a legal and factual cause of the harm suffered. In determining whether shipowner's conduct is the cause of the damage suffered, it is necessary to ask

first, whether the plaintiff has been negligent and secondly, whether that negligence contributed to the damage.

Of course, on the side of the classification societies, due to the vast number of surveys conducted by classification societies each year, societies cannot always conduct thorough inspection for the vessel. Thus fault should be relevant to the thorough degree of a standard inspection for that type of survey. A specific and sound system exists under which standards for determining liability should be based on the type of survey rather than the number of survey conducted.

On the other side, when dispute involves third party, in my eyes, classification societies should be imposed liability to third party but only paying damage proportionate to his fault based on joint liability of shipowner and societies

The main problem is how classification society and shipowner share the responsibility for the damage suffered by third party. It seems to me that it is right and reasonable that the degree of responsibility of both parties is compared before 'share' of the responsibility for the damage is solved. In order to determine what this responsibility is, the courts should consider both the causative potency and the comparative blameworthiness of the conduct of both parties. The main difficulty with a comparison of the causative potency of the shipowner and classification society appears to be that a particular fact is either a cause of an event or it is not. It would be meaningless to inquire which of two acts is more a cause of the harm suffered. If the harm suffered would not have occurred but for both the classification society's negligence and shipowner's fault, then both must be causes of that harm. Accordingly, an enquiry based on solely on causative potency should result in a 50:50 apportionment in very case. However, if public policy, commonsense consideration and criterion of blameworthiness are also taken into account, the court appears able to tip the balance in favor of something other

than a 50:50 apportionment. In addition, to determine shared liability, the courts should also focus on the key elements of expertise, control, supervision, and ability to prevent accidents.

But, it is worth noting that shipowner is primarily responsible and classification societies is secondarily responsible for the third party. Shipowner has warranty of seaworthiness under common law. As said in Non-Delegable of Chapter Six, as the independent evaluator, the classification society is only liable for his negligent representation if he fails to perceive the defects which should have been detected. Cause of action against the classification societies is complementary to the shipowner's warranty of seaworthiness. It means that party (shipowner) primarily responsible for loss should not be allowed to escape liability on the ground that a party (societies) secondarily responsible is liable for it and only when third party cannot recover "adequate" compensation, third party is allowed to seek another remedy against secondarily responsible party (societies) From the point of view in *J.Stapleton* (1991) 107 L.Q.R. 249,273-274, tort liability are liabilities of last resort which should be imposed only when there is no other "adequate" remedy.

Therefore, according to above opinion, normal procedure to this type of the case should be: first, third party bring action against the shipowner based on the contractual relationship. Secondly, if action is dismissed, third party have no right to suit classification societies. Thirdly, if compensation to third party is below actual damage, he can take a legal proceeding against societies. Next, if classification society is proved to be at fault, he will be liable for the damage proportionate to his fault compared to that of shipowner and is entitled to limit his liability (to be discussed in Limitation of Liability of chapter Six). Finally, third party can recover the rest of damage from his insurer.

6.7. Limitation of Liability

From the leading cases in American and English law, the fact is relatively confusing that on one hand, the court submitted that no liability was imposed on the classification societies even if they failed to exercise due diligence to detect and notify the defects; on the other hand, the court held that societies were not only liable for their negligence acts but also not entitled to limit their liability.

In *Bosnor S.A. de C.V. v Tug L.A. Barrios* 796 F.2d 776, 1987 AMC 2956 (5th Cir. 1986), the surveyor argued that his liability, while not entirely exculpated, was limited to the cost of the survey by a clause in his survey report. The survey report at issue in *Bosnor* provided as follows:

“The surveyor agrees to use best efforts in behalf of those for whom this survey is make, however this report is issued subject to the conditions that it is understood and agreed that neither this office nor any surveyor thereof will have any liability for any inaccuracy, errors omissions, whether due to negligence or other wise, in excess of the actual charge made for this survey, and that use of this report shall be construed to be an acceptance of the foregoing.” (see *id.* at 781, 1987 AMC at 2962)

However, the United States Court of Appeals found that the surveyor had cited no record source establishing that any of the parties to the suit against the surveyor had agreed to the limited liability clause. The court noted that clause that purported to limit a party’s legal responsibility were strictly construed and to be given effect must clearly express the intent of all parties whose liability would be altered by the agreement. The court further found that, although the surveyor had prior dealings with the customer and had included similar language in prior reports with no objection from the customer, these

facts were insufficient to support a conclusion that the customer had agreed to the language for purposes of the case.

In *Ramsgate Walkway* case, classification society, Lloyd's Register, exposed to unlimited liability. Lloyd's Register pleaded guilty in the unprecedented criminal prosecution brought against it under the Health and Safety Act following the collapse of a passenger walkway at the UK port of Ramsgate in September 1994 in which six people died. For the oldest, largest and most prestigious classification society to admit responsibility in such a case is a major development. It is really landmark case. Lloyd's register admitted that he failed to identify that the walkway section was too stiff in torsion, due to unusually thick cladding (6mm) , to adapt the small rolling movement of the pontoon, and did not inspect the support details resulting in bad quality welding.

Societies really monitor the progress and performance of the work involved in every project. However, Patrick O'Ferrall, chairman of LR said: "while acknowledging our failure on this occasion, we wish to place it in the context of the project as a whole and the other parties involved." Actually, two Swedish companies involved in the design and construction of walkway failed to take into account wind and tidal forces affecting the ferry walkway. In addition, the port of Ramsgate failed to stipulate design specifications, and a safety critical component had been poorly welded, which had directly contributed to the accident. Furthermore, project was carried out with unseemly haste by the port authorities who were anxious to have new facilities in place in time for the Belgian state ferry operator BMT to start operating.

Safety can be enhanced through the application of rules and regulations of classification societies, but a safe operation requires the full participation of all parties involved. Societies do not design, manufacture, install, insure, possess, maintain or operate any of the installations or ships which they class or certify. Classification societies role is

concerned with checking aspects of the design, manufacture and installation and thereafter, the condition of the facility in operation on an annual basis. Societies are only able to carry out their role as part of the overall activity in which the designer, manufacturer, installer, owner and operator must fulfil their individual roles.

It is hard to predict what the long-term implications of the Lloyd's Register/Ramsgate case will be but the role and functions of classification societies in the maritime community have been distorted. Christopher Hobbs, a partner at law firm Norton Rose, commented : “ Lloyd's Register's plea raises interesting questions given that all other recent cases have exonerated class from liability to third-parties.”

However, interestingly, in high-profile cases such as *The Sundancer*, *Nicholas H* and *Star of Alexandria*, classification societies become imbued with the aura of immunity from legal accountability. The reasoning behind court decisions in favor of societies has touched the line of the outrageousness. No doubt these cases have negative effects on the maritime community. It is time to take some actions to reach a harmonious state in the respect of liabilities of classification societies.

From the viewpoint of the recent development, societies have been seen as additional ‘deep-pocket’ defendants. Actions brought directly against the classification society by the claimants who have a contractual relationship with the shipowner or carrier seem to be a more effective approach, because the society may not have the right to limit its liability in the same fashion as the shipowner or the carrier. Under the Hague-Visby Rules, according to paragraph 2 of Article 4, a servant or an agent of the carrier but not including an independent contractor shall be entitled to avail himself of the defenses and limits of liability which the carrier is entitled to invoke.

Certainly the societies' exposure to third party claims will be increased as a consequence. Meanwhile, Societies cannot rely on insurers to protect them in the event of a nightmare disaster such as death or injuries of life and oil spill. For instance, Lloyd's Register is covered for the claims alleging professional negligence. But this cover is constrained by its high cost and scarcity in the insurance market Lloyd's Register comments " in short, LR would like to be insured for every contingency, but regrettably it is not possible" Insurers would force societies to modify their responsibilities and curtail their exposure to problem areas. Whole maritime community, however, want them to broaden their responsibilities. Governments are relying more and more on the societies.

At present, societies are expected to assume increasingly risks which are uninsurable beyond a certain level without the benefit of a limited liability regime to fall back upon. Ultimately, they would be force to withdraw some of their services. No one wants this to happen. Classification societies liability has demonstrated a paradox. Almost probably, another situation is that the surveyor will no longer exercise his professional judgement based on his experience, but will be required to see that the strictest test are applied. Every inch of ship will require careful scrutiny to avoid the subsequent attribution of blame in event of failure. We can imagine the average drydocking time will take months rather than days and enhanced special surveys will take a large ship out of service for possibly more than a year. Is this what we really want? Is it really necessary to go to such extremes? Absolutely, the answer is no.

How can reach a amicable compromise? It appears to be viable and reasonable solution that classification societies are entitled to limitation of liability not imposed unlimited liability. Some one would hold that higher liabilities can make societies concentrate on their service, so higher liabilities will lead to higher quality. It is not logical argument. Classification societies work in a market driven by confidence and trust. If the customers

such shipowners, charterers and government don't trust certain classification society, it will not have any business required by those customers. Obviously, drive for quality is inherent in what class supplies. Exposure to higher liabilities only invoke reduction of professional services, not higher qualities. Shipowner can have a right to limit his liability under some international convention whatever it is Hague rule, Hague-Visby Rule or Limitation of Liability Convention 1976. Why isn't classification society entitled to this right? It seems to be both unfair and unreasonable. The reasons why classification societies need to limit their liability are as follows:

First, due to a large quantity of parties who classification societies have direct or indirect relationships with, such as shipowners, government authorities, cargo owners, charterers, underwriters, potential liabilities are rather huge. Liability is in an indeterminate amount for an indeterminate time to an indeterminate class.

Secondly, classification societies has to be at the cutting edge of technology to bolster and facilitate the safety in shipping industry. In some circumstances, societies cannot rely on past experience and must make decisions at the complex and unprecedented level. There are shortage of information and materials on the base of which to make decisions, yet everyone wants societies to make a definite statement of approval. The level of risks to potential liabilities must be very high.

Thirdly, societies perform their responsibilities on the basis of high value assets which are exposed to even higher liabilities. But the fees charged by societies are relevant to nature of type of services provided and have no links with size of asset value. A surveyor might take the same time and make the same charges during checking a given piece of construction or equipment whether the ship is relatively small bulk vessel or ultra large crude oil vessel.

From the above argument, it is understandable and reasonable that classification societies are entitled to same or similar right as the shipowners to limit their indeterminate liabilities.

Then, a question arises as to whether classification societies would have the right to global limitation as shipowners enjoy. The International Convention on Limitation of Liability for Maritime Claims of 1976 does not delineate whether societies are entitled to global limitation. With the reference to Article 1, shipowners and salvors are specifically mentioned to be entitled to limitation of liability. The term “shipowner” includes the “owner, charter, manager and operator of a seagoing ship”. Then, subject to Article 2, if a person brings an claim 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 the Convention. Therefore, one can presume that a classification society would have such right because society could avail its of the limitation of liability for an error or negligence provided for in the 1976 London Convention, proved that the claim made against it is one of those referred to in Article 2.

But, it is just reasoning and predicting. For instance, in *Aegean Sea* [1998] 2 Lloyd’s Rep 39, vessel was carrying a cargo of crude oil to a refinery in Spain. She grounded on her way to the berth, broke up and exploded. Most the cargo was spilled and claims were brought against the owners for 165 million dollars. The owners in turn sought an indemnity from the charterers under the charterparty for 65 million dollars on the basis that the charterers were in breach of their safe port warranty in the charterparty. The charterers argued that they were entitled to limit their liability to 12 million dollars under the 1976 London Convention. Actual definition of Shipowners includes the owner, charterer, manager and operator of a seagoing shipping. However, English High Court held that the charterers were not entitled to limit their liability in a claim by owners against them in their capacity as charterers. However, at the meantime, High court held

that charterers were entitled to the same benefit of limiting liability as the owners when they were effectively acting as owners. The judge found that the limitation regime was concerned with claims by third parties against all those entitled to limit. By the same reasoning, classification societies would be entitled to limit their liability as independent contractors in the course of employment under the 1976 Convention in respect of a claim for indemnity pursued by third parties but not owners. Obviously, if societies have not right to limit their liability against shipowners, the principle of limitation of liability will be crippled. To be frank, it appears to be still not so clear whether classification societies have a right of limitation of liability under London Convention. The exclusive international convention dealing with the liability of classification societies could be a most desirable choice.

On the other hand, even if surely societies have a limit of liability under London Convention, tonnage regime is not acceptable as it does not reflect nature of the work of the classification societies and ship size has no relevance to the value of the service. Difference between societies' responsibility and those of owners are substantial. Shipowner are controlling everything from trading to maintenance, manning of the vessel. Societies control none of them and simply check and survey vessels at determined intervals. It is quite unjust to expose two parties, at the different level of responsibilities and positions, to the same level of liability.

In my opinion, the most possible solution is a fee-based system to calculate a limitation of liability. Value of service rendered by classification societies is measured by the amount of the fee which is payable by the shipowner. Liability will be limited to the amount in the light of service fee multiplied by certain figure. Actually, since question as to whether classification societies are within ambit of the International Convention of Limitation of liability for Maritime Claims could not be foreseeable quickly enough to resolve present concerns, *Comite Maritime International* (CMI) has produced a set of

model contractual clauses (see Annex B) which regulate and limit the liability of the societies. However, the CMI initiative focuses solely on the contractual relationship and does not embrace the issue of third party claims. Alternatively, according to model contractual clauses, limitation multiple will be set by the classification society itself in its own rules and regulations based on market conditions and applicable law. (see Annex B, clause 10) It may rise more uncertainties and disputes.

Clearly, CMI model contractual clauses cannot resolve fully and completely the liability of classification society. In truth, at present there does not exist internationally recognized yardstick for measuring classification society performance. It appears to be an inevitable trend and consequence that international convention on liability of classification society is urged to emerge as soon as possible.

Chapter Seven

Summary and Conclusion

Classification Societies play a unique and increasingly vital role in the promotion of maritime of safety and environmental protection. The societies carry out as agents of governments the statutory survey and certification which is established and mandated by law, while they also perform their traditional private classification function applying rules established by the societies themselves. As expressed in the judgment of the House of Lords in the case of *The Nicholas H*, [1994] 1 Lloyd's Rep. 497, the present role of the societies is to promote safety of life and ships at sea in the public interest. The problem would arise as to whether classification societies are entitled to statutory immunity because the fact is that boundary between private and public functions is often overlapped.

The legal framework and concepts already are in place in this dissertation for the recognition of cause of action against classification societies either in contract or in tort. Regardless of whether the classification societies' duties derive from custom, society rules, common law, statute, contract, their major duties are to take due care to inspect and defect the defects in vessels and then notify the owner or charterer thereof. In theory, in terms of concurrent liability, basis of liability of classification society with shipowner or other parties with **contractual relationship**, whether based in contract or in tort, should be same. It means that any tortious duty of care, if it exists, will have been defined by the scope of those contractual right and liabilities which the relevant parties have agreed. If third party lodges the claim in tort, important factors to consider should include foreseeability, reliance and proximate cause.

Liability of classification societies is really a burgeoning issue. On one hand, from the viewpoint of some leading cases in common law system, it is misguided that classification societies should not assume the liability even if they fail to perform their duty merely because shipowners have non-delegable duty to make ship seaworthy or cannot bear this financial burden. We must admit that whole maritime group rely on the classification society as an independent verifier of the vessel's seaworthy condition. Whether based on principle of negligent misrepresentation in American law or negligent misstatement in English law, liability should be imposed upon the classification society. Indeed, the undeniable reality of human existence is that accountability is an effective means of securing high quality.

But, on the other hand, a serious problem was felt to be the increasing frequency of claims against the classification societies as additional 'deep pocket' defendants. The main reason is that societies may not have the right to limit their liability in the same fashion as the shipowners or carriers. If this increase in the claims exposure of the societies were to continue unchecked, the societies could, *in extremis*, be forced to withdraw some of the service which they perform in the public interest. The result will deteriorate whole benefit of whole maritime community, specially in the respect of maritime safety and environment. Furthermore, the imposition of strict liability or unlimited liability against the societies could lead to collapse of the classification system, then maritime commerce system. of performance.

Legal development in the area of global limitation of liability would perhaps lead to the same protection for classification societies as for shipowner. Additionally, the Himalaya clause could be extended to cover classification societies against third party, and specific exclusion clauses between the society and shipowner would be also enforceable. But all these are uncertain and often invoke controversy. Also, some defenses, discussed in this paper, asserted by classification societies, are just reasoning and predicting.

The most desirable solution, in my opinion, would be about shared liability and limitation of liability at the international mutually agreed level. Furthermore, the most reasonable and viable solution about limitation liability is not based on tonnage regime as provided for in the 1976 London Limitation Convention, but a fee-based system to calculate a limitation of liability. At the same time, it is worth noting that shipowner is primarily responsible for loss and cause of action against the classification societies is complementary to the shipowner's implied warranty of seaworthiness in common law. Therefore, only when third party cannot recover "adequate" compensation from the shipowner, liability in tort will be imposed upon classification society.

All in all, it would be wise and reasonable judicial policy to create a controllable and harmonious situation when liability is established. Corollary of the feasible principles of liability of classification societies should be a compromise and balance among all interests in maritime community. The proper and balanced use of the concepts put forward in this dissertation would match interests of all and prevent a chaotic and uncontrollable situation.

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ANNEX A

RESOLUTION A.739 (18) adopted on 4 November 1993

GUIDELINES FOR THE AUTHORIZATION OF ORGANIZATIONS ACTING ON BEHALF OF THE ADMINISTRATION

THE ASSEMBLY,

RECALLING Article 15(j) of the Convention on the International Maritime Organisation concerning the functions of the Assembly in relation to regulations and guidelines concerning maritime safety and the prevention and control of marine pollution from ships,

RECOGNIZING the importance of ships being in compliance with the provisions of relevant international conventions, such as SOLAS 74, Load Lines 66, MARPOL 73/78 and STCW 78, to ensure prevention of maritime casualties and marine pollution from ships,

NOTING that the Administrations are responsible for taking necessary measures to ensure that ships flying their States' flags comply with the provisions of such conventions, including surveys and certification,

NOTING FURTHER that, under regulation I/6 of the 1974 SOLAS Convention and regulation 4 of Annex I and regulation 10 of Annex II of MARPOL 73/78, the Administration may entrust the inspections and surveys to nominated surveyors or recognised organisations and further that the Administration shall notify the Organisation of the specific responsibilities and conditions of the authority delegated to nominated surveyors or recognised organisations,

DESIRING to develop uniform procedures and a mechanism for the delegation of authority to, and the minimum standards for, recognised organisations acting on behalf of the Administration, which would assist flag States in the uniform and effective implementation of the relevant IMO conventions,

HAVING CONSIDERED the recommendations made by the Maritime Safety Committee at its sixty-second session and by the Marine Environment Protection Committee at its thirty-fourth session,

1. ADOPTS the Guidelines for the Authorisation of Organisations Acting on behalf of the Administration, set out in the Annex to the present resolution;

2. URGES Governments as soon as possible to: (a) apply the said Guidelines; and (b) review the standards of already recognised organisations in the light of the Minimum Standards for recognised organisations acting on behalf of the Administration set out in Appendix I to the Annex to the present resolution;

3. REQUESTS the Maritime Safety Committee and the Marine Environment Protection Committee:

(a) to review the Guidelines and Minimum Standards with a view to improving them as necessary; and

(b) to develop, as a matter of urgency, detailed specifications on the precise survey and certification functions of recognised organisations;

4. REQUESTS the Secretary-General to collect from Member Governments information on the implementation of the present resolution.

GUIDELINES FOR THE AUTHORIZATION OF ORGANIZATIONS ACTING ON BEHALF OF THE ADMINISTRATION

General

1. Under the provisions of regulation I/6 of SOLAS 74Y article 13 of Load Lines 66, regulation 4 of Annex I and regulation 10 of Annex 11 of MARPOL 73/78 and article 6 of Tonnage 69, many flag States authorise organisations to act on their behalf in the surveys and certification and determination of tonnage as required by these conventions.

2. Control in the assignment of such authority is needed in order to promote uniformity of inspections and maintain established standards. Therefore, any assignment of authority to recognised organisations should:

2.1 determine that the organisation has adequate resources in terms of technical, managerial and research capabilities to accomplish the tasks being assigned, in accordance with the Minimum Standards for the Recognised Organisations Acting on behalf of the Administration set out in appendix 1;

2.2 have a formal written agreement between the Administration and the organisation being authorised which should as a minimum include the elements as set out in appendix 2 or equivalent legal arrangements;

- 2.3 specify instructions detailing actions to be followed in the event that a ship is found not fit to proceed to sea without danger to the ship or persons on board, or presenting unreasonable threat of harm to the marine environment;
- 2.4 provide the organisation with all appropriate instruments of national law giving effect to the provisions of the conventions or specify whether the Administration's standards go beyond convention requirements in any respect; and
- 2.5 specify that the organisation maintains records which can provide the Administration with data to assist in interpretation of convention regulations.

Verification and monitoring

3 The Administration should establish a system to ensure the adequacy of work performed by the organisations authorised to act on its behalf. Such a system should, *inter alia*, include the following items:

- 3.1 Procedures for communication with the organisation
- 3.2 Procedures for reporting from the organisation and processing of reports by the Administration
- 3.3 Additional ship's inspections by the Administration
- 3.4 The Administration's evaluation/acceptance of the certification of the organisation's quality system by an independent body of auditors recognised by the Administration
- 3.5 Monitoring and verification of class related matters, as applicable.

Appendix 1

MINIMUM STANDARDS FOR RECOGNIZED ORGANIZATIONS ACTING ON BEHALF OF THE ADMINISTRATION

An organisation may be recognised by the Administration to perform statutory work on its behalf subject to compliance with the following minimum conditions for which the organisation should submit complete information and substantiation.

General

- 1. The relative size, structure, experience and capability of the organisation commensurate with the type and degree of authority intended to be delegated thereto should-be demonstrated.
 - 2. The organisation should be able to document extensive experience in assessing the design, construction and equipment of merchant ships and, as applicable, their safety management system.
- Specific provisions

3. For the purpose of delegating authority to perform certification service of a statutory nature in accordance with regulatory instruments which require the ability to review applicable engineering designs, drawings, calculations and similar technical information to technical regulatory criteria as dictate by the Administration and to conduct field survey and inspection to ascertain the degree of compliance of structural and mechanical systems and components with such technical criteria, the following should apply:

3.1The organisation should provide for the publication and systematic maintenance of rules and/or regulations in the English language for the design, construction and certification of ships and their associated essential engineering systems as well as the provision o an adequate research capability to ensure appropriate updating of the published criteria.

3.2The organisation should allow participation in the development of its rules and/or regulations by representatives of the Administration and other parties concerned.

3.3The organisation should be established with:

3.3.1a significant technical, managerial and support staff catering also for capability of developing and maintaining rules and/or regulations; and

3.3.2a qualified professional staff to provide the required service representing an adequate geographical coverage and local representation as required.

3.4The organisation should be governed by the principles of ethical behaviour, which should be contained in a Code of Ethics and as such: recognise the inherent responsibility associated with a delegation of authority to include assurance as to the adequate performance of services as well as the confidentiality of related information as appropriate.

3.5The organisation should demonstrate the technical, administrative and managerial competence and capacity to ensure the provision of quality services in a timely fashion.

3.6The organisation should be prepared to provide relevant information to the Administration.

3.7The organisation's management should define and document its policy and objectives for, and commitment to, quality and ensure that this policy is understood,- implemented and maintained at all levels in the organisation.

3.8The organisation should develop, implement and maintain an effective internal quality system based on appropriate parts of internationally recognised quality standards no less effective than ISO 9000 series, and which, *inter alia* , ensures that:

3.8.1the organisation's rules and/or regulations are established and maintained in a systematic manner;

3.8.2the organisation's rules and/or regulations are complied with;

3.8.3the requirements of the statutory work for which the organisation is authorised, are satisfied;

- 3.8.4 the responsibilities, authorities and interrelation of personnel whose work affects the quality of the organisation's services, are defined and documented;
 - 3.8.5 all work is carried out under controlled conditions;
 - 3.8.6 a supervisory system is in place which monitors the actions and work carried out by the organisation;
 - 3.8.7 a system for qualification of surveyors and continuous updating of their knowledge is implemented;
 - 3.8.8 records are maintained, demonstrating achievement of the required standards in the items covered by the services performed, as well as the effective operation of the quality system; and
 - 3.8.9 a comprehensive system of planned and documented internal audits of the quality related activities in all locations is implemented.
- 3.9 The organisation should be subject to certification of its quality system by an independent body of auditors recognised by the Administration.

4. For the purpose of delegating authority to perform certification services of a statutory nature in accordance with regulatory instruments which require the ability to assess by audit and similar inspection of the relevant safety management system attributes of shore based ship management entities and shipboard personnel and systems, the following should, in addition, apply:

- 4.1 the provision and application of proper procedures to assess the degree of compliance of the applicable shore-side and shipboard safety management systems;
- 4.2 the provision of a systematic training and qualification regime for its professional personnel engaged in the safety management system certification process to ensure proficiency in the applicable quality and safety management criteria as well as adequate knowledge of the technical and operational aspects of maritime safety management; and
- 4.3 the means of assessing through the use of qualified professional staff the application and maintenance of the safety management system both shore based as well as on board ships intended to be covered in the certification.

Appendix 2

ELEMENTS TO BE INCLUDED IN AN AGREEMENT

A formal written agreement or equivalent between the Administration and the recognised organisation should as a minimum cover the following items:

1. Application
2. Purpose

3. General conditions
4. The execution of functions under authorisation
 - 4.1 Functions in accordance with the general authorisation
 - 4.2 Functions in accordance with special (additional) authorisation
 - 4.3 Relationship between the organisation's statutory and other related activities
 - 4.4 Functions to co-operate with port States to facilitate the rectification of reported port State control deficiencies or the discrepancies within the organisation's purview.
5. Legal basis of the functions under authorisation
 - 5.1 Acts, regulations and supplementary provisions
 - 5.2 Interpretations
 - 5.3 Deviations and equivalent solutions
6. Reporting to the Administration
 - 6.1 Procedures for reporting in the case of general authorisation
 - 6.2 Procedures for reporting in the case of special authorisation
 - 6.3 Reporting on classification of ships (assignment of class, alterations and cancellations), as applicable
 - 6.4 Reporting of cases where a ship did not in all respects remain fit to proceed to sea without danger to the ship or persons on board or presenting unreasonable threat of harm to the environment
 - 6.5 Other reporting
7. Development of rules and/or regulations - Information
 - 7.1 Co-operation in connection with development of rules and/or regulations - liaison meetings
 - 7.2 Exchange of rules and/or regulations and information
 - 7.3 Language and form
8. Other conditions
 - 8.1 Remuneration
 - 8.2 Rules for administrative proceedings
 - 8.3 Confidentiality
 - 8.4 Liability
 - 8.5 Financial responsibility
 - 8.6 Entry into force
 - 8.7 Termination
 - 8.8 Breach of agreement
 - 8.9 Settlement of disputes
 - 8.10 Use of sub-contractors
 - 8.11 Issue of the agreement
 - 8.12 Amendments

- 9 Specification of the authorisation from the Administration to the organisation
 - 9.1 Ship types and sizes
 - 9.2 Conventions and other instruments, including relevant national legislation
 - 9.3 Approval of drawings
 - 9.4 Approval of material and equipment
 - 9.5 Surveys
 - 9.6 Issuance of certificates
 - 9.7 Corrective actions
 - 9.8 Withdrawal of certificates
 - 9.9 Reporting

- 10 The Administration's supervision of duties delegated to the organisation
 - 10.1 Documentation of quality assurance system
 - 10.2 Access to internal instructions, circulars and guidelines
 - 10.3 Access by the Administration to the organisation's documentation relevant to the Administration's fleet
 - 10.4 Co-operation with the Administration's inspection and verification work
 - 10.5 Provision of information and statistics on, e.g. damage and casualties relevant to the Administration's fleet.

Appendix 3

Some other IMO resolutions and circulars concerning the Authorisation of recognised organisations acting on behalf of maritime administration as follows:

IMO Resolution A.789(19) "Specifications on the survey and certification functions of recognised organisations acting on behalf of the Administration".

IMO Resolution A.847(20) "Guidelines to assist flag states in the implementation of IMO instruments".

IMO MSC/Circ.710/IMO MEPC/Circ.307 "Model agreement for the authorisation of recognised organisations acting on behalf of the Administration".

IMO MSC/Circ.788/IMO MEPC/Circ.325 "Authorisation of recognised organisations acting on behalf of Administration".

ANNEX B

CMI Model Contractual Clauses

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

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

The model clauses define and clarify, subject to applicable national law, the circumstances under which the civil liability of the Societies and their employees and agents should be regulated or limited.

The rationale for such regulation and limitation is set forth in the Group's Report.

These model clauses are intended to be read in conjunction with both and Report and the Principle of Conduct for Classification Societies produced by the same Joint Working Group and dated 16 January 1996.

Model Clauses

Part I; For inclusion in agreements between the Societies and governments

1. (a) The duties and functions of [Classification Society] pursuant to this agreement are as specified in Annex I attached. (see **Note 2** below)

(b) [Government] shall be given the opportunity to verify that the quality system and performance of [Classification Society] continues to comply with the requirements specified in Annex I attached. In this regard [Government] may utilize appropriate audit

methods, including recognition of audits performed on [Classification Society] by an independent body of auditors effectively representing the interests of [Government], such as the IACS QSCS auditors. The Principles of Conduct for Classification Societies referred to in the introduction above shall be the standard (see **Note 3** below) for measurement of performance by [Classification Society].

(c) [Classification Society] shall report to [Government], in accordance with the procedures agreed between them, the information specified in Annex II (see **Note 4** below) concerning surveys and certification performed by [Classification Society] on behalf of [Government], and shall promptly notify [Government] of any change in the status of the classification of a ship which is classed by [Classification Society] and is flying the flag of [State].

2. In carrying out the duties and responsibilities specified in Annex I, whether pursuant to applicable international agreements, conventions, national legislation, or this agreement, [Classification Society] acts solely as the agent of [Government], under whose authority or upon whose behalf it performs such work.

3. In any claim arising out of the performance of a duty or responsibility, or out of any certification with regard to work covered by Annex I, [Classification Society] and its employees and agents shall be subject to the same liabilities and be entitled to the same defenses (including but not limited to any immunity form or limitation of liability) as would be available to [Government's] own personnel if they had themselves performed the work and/or certification in question. (see **Note 5** below)

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

4. Responsibilities of [Classification Society]

(a) [Classification Society] when acting pursuant to these Rules certifies the classification of a ship (see **Note 6** below) to the shipowner, (see **Note 7** below) and does not certify the condition of the ship for any purpose other than the assignment of classification under these Rules.

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

5. Responsibilities of the shipowner

(a) It is the responsibility of the shipowner:

(i) to maintain a classed ship, its machinery and equipment in compliance with the Rules and requirements of [Classification Society]; and

(ii) to operate the ship in accordance with all applicable Rules and conditions of class.

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

(i) that plans and particulars of any proposed alterations to the hull, equipment or machinery which could invalidate or affect the classification of the ship are submitted to [Classification Society] for prior approval; and

(ii) that all repairs or modifications of hull, equipment or machinery which are required in order that a ship may retain her class are carried out by the shipowner in accordance with the Rules and requirements of [Classification Society].

(c) It is the responsibility of the shipowner:

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

(ii) to ensure that there is compliance with the requirements of [Classification Society] resulting from such surveys.

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

(i) of any change of the ship's flag, ownership, management or name;

(ii) of any collision or grounding of ship;

(iii) of any other damage, defect, breakdown, incident of navigation or proposed repair which might invalidate or affect the ship's classification; and

(iv) of any change in the intended or actual use of the ship which might invalidate or affect the ship's classification; and

6. A failure by the shipowner to fulfill the foregoing responsibilities may in the reasonable exercise of discretion by [Classification Society] result in, among other measures, suspension or cancellation of classification or the withholding of certificates or reports by [Classification Society]. (see **Note 8** below)

7. [Classification Society] shall not be liable for any claim arising out of the performance of services pursuant to these Rules where such claim arises out of an act or omission:

(a) attributed to [Society] or its employees, agents or other persons acting on behalf of [Society], unless such act or omission violates the standard of reasonable care (see **Note 9** below) or

(b) by any employee of [Society] acting outside the terms or scope of his employment; or

(c) by any agent or other person acting on behalf of [Society], when such act or omission exceeds the authority granted in writing by [Society] to such agent or such other person.

8. Without prejudice to clause 7 above, in any claim arising out of the performance of services pursuant to these Rules, [Classification Society] shall be liable only for losses resulting directly from its act or omission. In no event shall [Classification Society] be liable for any indirect or consequential losses.

9. (a) Without prejudice to clause 7 above, any liability of [Classification Society] for a claim arising out of the performance of a service pursuant to these Rules shall be limited to the amount of the fee specified or calculated by [Society] in respect of the service in question, multiplied by "X". (see **Note 10** below)

(b) If any claims are made against an employee or agent or other person in respect of whose act or omission [Classification Society] is found liable, such person shall be entitled to avail himself of the limitation of liability provided in sub paragraph (a) of this paragraph, unless it is proved that the damage giving rise to the claim(s) resulted from an act or omission done by such person with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. (see **Note 11** below)

(c) For an additional fee or such other consideration as may be agreed between the shipowner and [Classification Society], the shipowner may secure a higher multiple than that set forth in sub-paragraph (a) above.

(d) the limit of liability of [Classification Society] set forth in sub-paragraphs (a) and (c) above shall not apply where it is proved that the damage giving rise to the claim(s) resulted from an actor omission of [Society] with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

10. Any dispute arising out of or in connection with these Rules and any issues concerning responsibility, liability or limitation or liability shall be determined in accordance with the law of [state]. (see Note 12 below)

11. Any suit or proceeding in respect of claim arising out of or in connection with these Rules or the performance by [Classification Society], its employees or agents of a function pursuant to these rules shall be instituted in or transferred to the appropriate court of [State and venue], (see Note 12 below) which shall have exclusive jurisdiction to hear and determine any such dispute. (see Note 13 below)

Notes:

1. As expanded in the Reports and Annexes of the Flag States Implementation Sub-Committee (FSI) of the IMO's MSC and MEPC, currently FSI 3/17 (23 March 95), paragraphs 8.35-8.38 and Annex 6, paragraphs 6.5-6.6.

2. A model for Annex I is not offered. It is intended Annex I should contain the technical and operational requirements to agreed between the Government and the Classification Society.

3. Without prejudice to the application of other internationally agreed standards which are at a minimum substantially equivalent to those contained the Principles of Conduct.

4. It is intended that Annex II should contain the detailed reporting requirements to be agreed between the Government and Classification Society.

5. Reference to applicable provisions of national law should be added following the text of the clause.

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

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

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

9. Different standards or terms may be substituted in accordance with applicable national law.

10. The actual number to be substituted for “X” will be set by the Classification Society in consideration of market forces and applicable law.

11. This provision is based upon Article 1(4) of the London Limitation Convention 1976.

12. This will normally be the State of domicile or situs of the Society.

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

ANNEX C

Types of Class Surveys

Type of Survey	Principal Content	Period/Year(s)
Special Survey	A thorough and complete survey of all the items: thickness measurements of the hull, pressure testing of the tanks, opening up and testing the running of the machinery; for tankers, especially tankers of more than ten years, it is more stringent and extensive	5
Annual Survey	A general examination of hull and appliance machinery, electrical plants, steering gear and fittings. It is mandatory for passenger ships.	1
Docking Survey	Required for the following items: the hull part below the deepest load waterline, rudders, thrusters, sea valves and overboard discharges	2.5
Boiler Survey	A survey containing external and internal visual survey of water/steam, drums and shell, casing and insulation, combustion chambers, oil burning units, etc.	2
Shaft Survey	A survey focusing on the shaft and bearings	At intervals