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A survey of judicial standards for imposing liability on the classification societies : potential liability under the ISPS Code

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WORLD MARITIME UNIVERSITY

Malmö, Sweden

**A SURVEY OF JUDICIAL STANDARDS FOR
IMPOSING LIABILITY ON THE CLASSIFICATION
SOCIETIES: POTENTIAL LIABILITY UNDER THE
ISPS CODE**

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

MASTER OF SCIENCE

In

MARITIME AFFAIRS

(MARITIME LAW AND POLICY)

2014

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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: **A Survey Of Judicial Standards for Imposing Liability on the Classification Societies: Potential Liability under the ISPS Code.**

Degree **MSc**

This paper surveys judicial standards developed and enacted in different jurisdiction for the imposing or rejecting of liability for classification societies. The survey is carried out with a view of arguing that potential liability of classification societies under the ISPS Code may exists.

A brief look is therefore taken of the role of classification societies regarding surveying and certification of ships. An attempt to standardise rules and standards for ship survey by the International Association of Classification Societies (IACS) will also be looked at.

An overview of the functions of the classification societies is taken. The paper identifies two traditional functions of the classification societies namely, quasi-flag state (public) function and private function. Quasi-flag state function involves instances wherein flag state administrations delegate their authority to perform duties imposed upon them by conventions generated by the International Maritime Organisation (IMO). Under private function many cases will be examined in order to see judicial standards for imposing or rejecting liability that were developed in different jurisdictions.

An overview of flag states' and ship owners' duties under the ISPS Code will be laid out. Areas under the ISPS Code where statutory duties may be delegated to the Recognized Security Organisations (RSO's) will be identified.

Potential disputes for non-compliance with the ISPS Code caused by the detention and delay of a vessel will be looked at. It will then be argued that such disputes may give to a contractual or tortious liability against classification societies. The question whether a claim against classification societies for damages for non-compliance with the ISPS Code can be allowed will be tested against judicial standards in different jurisdictions.

This paper will end with the summary and conclusion wherein salient arguments will be summarised and a view that courts will still be reluctant to impose liability upon RSO's for non-compliance with the ISPS Code be expressed. This paper will also suggest that common law jurisdictions must follow civil law jurisdiction in determining existence of liability of classification societies.

List of Abbreviations

ABS	American Bureau of Shipping
BV	<i>Bureau Veritas</i>
BCC	Belgian Civil Code
CSO	Company Security Officer
EMSA	European Maritime Safety Agency
EU	European Union
IACS	International Association of Classification Societies
IMO	International Maritime Organization
ISM CODE	International Management Code for the Safe Operation of Ships and for Pollution Prevention
ISPS CODE	International Ship and Port Facility Security
Load Lines	International Convention on Load Lines
LRS	Lloyd's Register of shipping
MARPOL from Ships	International Convention on the Prevention of Pollution
NKK	Nippon Kaiji Kyokai
QSCS	Quality System Certification Scheme
RINA	<i>Registro Italiano Navale</i>
RO	Recognized Organization

RSO	Recognized Security Organisation
SGM	<i>Societes Generale des Minerais</i>
SOLAS	International Convention for the Safety of Life at Sea
SSA	Ship Security Assessment
Turkish CoD	Turkish Code of Obligations
UNCLOS	United Nations Convention on the Law of the Sea
UNCSI	United Nations Convention on Jurisdictional Immunity of States and Their Property

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Chapter 1

Introduction

When persons, either natural or juristic, enter into contractual relationships or where a party owes a duty of care or is negligent in performing his duties in terms of a statute or law of torts, duties and obligations ensue. If either party suffers damage or loss due to non-performance of a contractual obligation, non-observation of a duty of care or negligent misrepresentation, the question of liability arises - contractual or tortious. The rule is a universal one and should bind everyone equally for the sake of legal uniformity and certainty. The rule should equally apply to classification societies without an exception.

It is said that historically classification societies are the ‘offspring of union of marine insurers and vessels’ established for the purpose of providing technical assistance needed by ship owners for seaworthiness of the ship and by insurers to ensure that ships that they are insure are indeed seaworthy¹. However, as early as 1923² there have been lawsuits against classification societies for damages either on the basis of contract or tort. Since then, there has been lot of litigation against the classification societies with the results that courts in different jurisdictions appear to be reluctant to saddle classification societies with liability, albeit that in none of those cases litigants have

¹ Happe, D. (2013). Liability of Classification Societies. *Maritime Business Forum*, 1-13. The author gives a historical overview of the establishment of the first classification society by the ship owners and insurers. If this is still true today, the possibility of piercing the corporate veil is not far-fetched.

² The French case of *Amor - (1923) 3 DOR 384* is one of the earliest decisions which dealt with the question of liability of classification societies.

asked the court to pierce the corporate veil³. It is a position that courts assume generally under the pretext of public policy, policy consideration, justice and fairness, public order, legal policy - whatever designation a particular court may use to describe such an abstract jurisprudential conceptions. However, in a few jurisdictions the question of liability of classification societies is governed by Codes⁴.

It is important to understand the practical environment or scope within which liability of classification societies arise in order to create an argument that similar problems will probably arise in cases of non-compliance with the requirements of the ISPS Code. To this end, this paper will give an overview of the role of the classification societies in maritime sector and the attempt by the International Association of Classification Societies (IACS) to formulate uniform standards and rules for surveying and classifying vessels⁵. The role of classification societies may traditionally be divided into public function and private function. Public function entails that a flag state administration authorizes a classification society to perform statutory duty usually under a convention adopted by the flag state. A glimpse into public function is important and relevant to this paper as compliance under ISPS Code mainly falls under it. Particular attention is paid to the duties of the Recognised Security Organisations (RSO) regarding ship security assessment (SSA), ship security plan (SSP), verification and issuing of the International

³ The doctrine of piercing the corporate veil is an antithesis to the principle of limited liability in company law. Under this doctrine courts may disregard formal dichotomy that exists between shareholders and the company in order to fix liability to the shareholders who unconscionably abuse the protection gained from the principle of limited liability. However, courts in different jurisdictions have, as in cases of liability of classification societies in torts and contract, developed different judicial standards as a basis for piercing the veil which leads to a lack of predictability. On this topic see for example, cases of *Cape Pacific Ltd v Lubner Controlling Investments Pty Ltd and others* 1995 4 SA 790 A.

⁴ For example in Greece the question of liability of classification societies is governed by the Greek Civil Code Art. 94 read with the Presidential Decree 482/1980, both are grounded on SOLAS Regulation 6.

⁵ See Sadlers, P. (2013). The role of classification societies, Recognized Organizations and IACS. Bulletin, 108(3), 86-88. Where he gives historical overview of the role of IACS.

Ship Security Certificate (ISSC). Other duties relating to the port facilities are mentioned for completeness sake as they raise issue of sovereign immunity – an issue beyond the scope of this paper. Private function of classification societies emanates from a contract with ship owners or operators in terms of which the former survey and classify ship. This function has largely been litigated on in different jurisdictions for breach of contractual and tortious duties.

It is a general view that the purpose of surveying and classifying ships by classification is to ensure safety of life and property at sea, as well as protection of marine environment. This view overlaps with the non-delegable duty of ship owners or operators to furnish a seaworthy ship. It is on this basis on which many claims for liability are premised. It is likely that this issue will arise in cases for liability for non-compliance with the ISPS Code because the definition of ‘a seaworthy vessel’ now includes non-compliance with the requirements of conventions. Many cases were brought for liability against classification societies for negligent misrepresentation, failure to exercise due diligence, breach of duty of care and implied warranty as well as breach of statutory duty of care and negligence under certain Codes. Each jurisdiction developed its own judicial standards for determining liability for classification societies. The result is a lack of legal certainty in this area of law which has actuated debate amongst legal academics for years now. Thus, this paper is an surveys judicial standards for imposing liability on classification societies in different jurisdictions and to explore the potential liability under the International Ship and Port Facility Security Code (ISPS Code). This paper will conclude with the salient points that will have been made in the body. Suggestions and recommendations will be put forward in an attempt to pave the way forward towards legal certainty.

Chapter 2

The Role of classification societies

By definition, classification societies are generally professional non-profit organisations that traditionally provide specialist services to the shipyards, ship owners and maritime administrations (hereinafter ‘administration’) under classification agreements. It is said that originally they are the ‘offspring of union of marine insurers and vessels’⁶. The services that these societies⁷ provide range from examining designs, construction materials, monitoring building of the ship and mechanical fittings in the ship, supervision of sea trials, providing regular surveys of the ships and acting as delegee of administrations in carrying out flag state responsibilities. In nutshell, they survey ships for insurance and marketability, and classify ships on behalf of private entities and public authorities respectively for compliance with rules and standards, regulations, national laws and international conventions.

Classification societies perform survey in accordance with their rules⁸ and standards.

⁶ Happe, D. (2013). Liability of Classification Societies. Maritime Business Forum, 1-13. Retrieved from http://www.shippinglbc.com/content/uploads/members_documents/Webfile_-_Classification_Societies.pdf. The author gives a historical overview of the establishment of the first classification society by the ship owners and insurers. The author said that the reason for the establishment of the classification societies was to ensure vessels’ seaworthiness.

⁷ International Convention for the Safety of Life at Sea (SOLAS), International Convention for the Prevention of Pollution from Ships (MARPOL), 1973 and International Convention on Load Lines (LL), 1966 refer to the classification societies as Recognised Organisations (RO’s). But note that not all RO’s qualify as classification societies.

⁸ See SOLAS Amendments to Annex, Chapter II-1, Part A-1, Regulation 3-1 which recognises that the rules of a “Recognised Organisation” should supplement survey requirements as contained in the convention and applicable national standards of the administration concerned.

Furthermore, the International Association of Classification Societies (IACS)⁹ formulated general rules to be followed by members in an attempt to create uniformity. The origins of the IACS can be traced back to the meeting of the Load Line Convention in 1930 where it was recommended that there was a need for uniformity in the application of standards of the strength of ships.¹⁰ In 1968 IACS was born and its aims are to establish, review, promote and develop minimum technical requirements in relation to design, construction and survey of ships and other marine units, assist international regulatory bodies and standards organisations to develop, amend and interpret regulations and industry standards in ship design, construction and management, with a view to improving safety at sea and prevention of marine pollution, and provide a Quality System Certification Scheme (QSCS) that its Members shall comply with, as an assurance of professional integrity and maintenance of high professional standards.¹¹ IACS has an observer status at IMO. It may be noted that not all classification societies are members of IACS. IACS has only 12 members.

As between ship owners and classification societies, the latter award a class to the ship evidenced by a classification certificate as a confirmation that the vessel complies with the society's rules and standards. Contractual arrangements between ship owners and classification societies involve a duty to certify ships regarding design, construction and maintenance. Furthermore, administrations delegate powers to classification societies to conduct statutory surveys and issue compliance certificates. Charterers, cargo owners

⁹ IACS formulate certain rules for members. See for example Common Structural Rules for Tankers and Bulk Carriers adopted by IACS Council on 14 December 2005 and implemented on 01 April 2006. IACS has 12 members to date namely, American Bureau of Shipping, Bureau Veritas, China Register of Shipping, DNV GL AS, Korean Register of Shipping, Indian Register of Shipping, Lloyd's Register, ClassNK, Polski Rejestr Statow S.A., RINA Services and Russian Maritime Register of Shipping.

¹⁰ http://www.iacs.org.uk/document/public/explained/CLASS_KEY_ROLE.pdf.

¹¹ IACS Objectives, Strategy and Short-Term Plan 2013-2014.
<http://www.iacs.org.uk/document/public/explained/IACS%20Strategy%202013.pdf>.

and insurers rely on the class certificates to make a business decision. On the other hand, ship buyers also rely on the class certificate to determine whether to proceed with the sale agreement. Crew members may as well depend on the class certificate when entering into an employment agreement. Against this background, one can easily envisage the importance of the role played classification societies in shipping industry. In light of the above, classification societies are expected to perform their duties properly and with due care and protection of categories of persons who rely on their certificates¹². In order to bring this paper within the scope of liability of classification societies under the International Ship and Port Facility Security (ISPS) Code, there are some preliminary issues that warrant a brief discussion.

¹² See Happe, D. supra note 6 at page 1 where he re-emphasised that classification societies are formed with the view of offering technical assistance to improve seaworthiness.

Chapter 3

Quasi-Flag state function of classification societies

Although the majority of cases which deal with liability of classification societies arise out of private function of classification societies and the fact that judicial standards developed therein are relevant to assessing whether such liability would be tenable under the ISPS Code, there are also few cases which involve torts based on statutory function of classification societies and that are particularly relevant to this paper. On that score, it is imperative now to point out other international instruments that confer powers to contracting governments to authorize classification societies to perform certain statutory certification and compliance services. It is important to mention those conventions as most of them, if not all, authorize flag states to delegate statutory duties to classification societies. In several cases concerning liability of classification societies, causes of action were based on the reliance on statutory certificates issued in terms of those conventions¹³. It is also necessary to mention briefly the conventions because later on this paper will look at the potential liability of classification societies under the ISPS Code with respect to carrying out of ship security assessment (SSA), approving ship security plans (SSP), verification and issuing of the International Ship Security Certificate (ISSC).

Under the United Nations Convention on the Law of the Sea (UNCLOS) state parties

¹³ For example see *The Erika*, French Court of Appeal Paris, March 30, 2010, no. 08/02278-A, D.M.F. 2004, 849 in which RINA issued an International Safety Certificate even though the surveyors were aware of the technical and administrative defaults of the vessel,

have powers to confer nationality to a ship which entitles the ship to fly its flag¹⁴ and the *quid pro quo* to the flag state being the exercise of jurisdiction and control over the ship. Thus, flag state administrations should take such measures as to ensure seaworthiness of the ship¹⁵ in accordance with international conventions forming part of their national laws. To that end, the International Maritime Organization (IMO), an organisation enjoined with powers to regulate ship safety in terms of property and life, prevention of oil pollution at sea, and to ensure security on board a vessel and at a port facility, has for years adopted conventions requiring state administrations to conduct regular surveys¹⁶ and issue certificates in accordance with its national laws. Under the International Convention for the Safety of Life at Sea (SOLAS) state administrations are required to survey cargo ships and issue certificates such as safety construction certificates¹⁷; the International Convention on Load Lines (Load Lines) requires survey of ships and the issuing of certificates such as load line certificate and tonnage certificate¹⁸; and the International Convention on the Prevention of Pollution from Ships (MARPOL) requires administrations to conduct surveys on all oil tankers and issue an international oil pollution certificate¹⁹. Furthermore, the International Management Code for the Safe Operation of Ships and for Pollution Prevention usually called the International Safety Management (ISM) Code²⁰ and the ISPS Code are such other measures that ensure on-

¹⁴ United Nations Convention on the Law of the Sea (UNCLOS) Article 91.

¹⁵ UNCLOS, Article 94(3).

¹⁶ UNCLOS, Article 94(4)(a).

¹⁷ SOLAS Annex, ch.1 Part A, Regulation 2(b) and Part B, Regulation 6

¹⁸ Load Lines article 2(2). Load line certificates contain information that a ship has capabilities of carrying cargo in a stable condition. Note that maritime administrations such as Panama and Egypt require tonnage certificate to pass through Panama canal and Suez Canal.

¹⁹ MARPOL article 2(5) and Annex I, Regulations, paragraph 1(b).

²⁰ Resolution A.741(18) as amended by MSC.104(73) MSC.179(79), MSC.195(80) and MSC.273(85).

board ship safety and ship and port facility security, respectively.

Due to a lack of technical skills in many flag state administrations, the duty imposed by UNCLOS upon those states would thereby be frustrated.²¹ IMO recognised the gap and responded positively and addressed the gap. The result was that under SOLAS²², Load Line²³, MARPOL²⁴, ISM Code²⁵ and ISPS Code²⁶ administrations are allowed to delegate their administrative responsibilities to specialists such as classification societies which the conventions sometimes refer to as “Recognised Organisations” (RO) or “Recognized Security Organizations” (RSO) – depending on the instrument. As mentioned above, third parties rely on those certificates when making their business decision. It is on that basis why certificates issued by classification societies are of relevance importance in the context of tort and contract law.

The conventions do not contain any guidance as to how liability of RO’s/RSO’s should be determined and dealt with, so that it is left to national laws to fix it. Regional EU Directive 2009/15/EC however, contains guidelines regarding liability of classification societies recognized by it. Article 5 of the Directive provides for the shared financial liability between administrations of national governments and classification societies for

²¹ It may be noted that some administrations have personnel qualified to conduct survey. For example in New Zealand the Ministry of Transport through Marine and Industrial Safety Inspection Services survey ships and issue class certificates.

²² SOLAS Chapter 1 Part B, Regulation 6.

²³ Load Lines, Article 3.

²⁴ MARPOL Annex 1, Regulation 4, Paragraph 3.

²⁵ In terms of paragraph 13.2 of Part B of the ISM Code organisation recognized by the administration may issue Certification of Compliance with the requirements of the ISM Code.

²⁶ In terms of paragraph 4.3 of Part B of the ISPS Code recognized organisation may carry out Ship Security Plan approvals and also issue International Ship Security Certificates on behalf of the administrations.

tortious claims arising in relation to statutory certification, which causes harm and for which a government is liable.²⁷ Thus, article 5(2)(b) requires the classification society to compensate administration, under circumstances mentioned therein, to the extent that the loss, injury or death was caused by the RO. With regard to liability of classification societies towards third parties like ship owners, cargo owners, charterers, and so on, the Directive is silent. Therefore, courts are to rely on their national legislation to determine liability for those categories of persons.

²⁷ Directives 2009/15/EC of the European Parliament and of the Council of 23 April 2009. (2009). Official Journal of the European Union, 131(48), 47-56. Take note that the Directives are used in this paper to support the argument that, at least, they have a degree of predictability.

Chapter 4

International Ship and Port Facility Security (ISPS) Code

The attack on the twin towers on 11 September 2001 caused a feeling of alarm within the shipping sector and thus a need to protect ships and port facilities around the world became pressing. The culmination of such great shock was the adoption of the ISPS Code on 01 July 2004 - a maritime security measure developed and recommended by IMO and implemented through SOLAS, 1974 chapter XI-2. ISPS Code contains two parts namely, Part A and Part B. Part A contains mandatory provisions relating to the appointment of security officers for ship and ports facilities. It also covers security measures such as security assessments and security plans for ships, port facilities as well as verification, certification of security system and security equipment and security levels. Part B of the Code contains non-mandatory guidance relating to the implementation of part A of the ISPS Code.²⁸

The Code applies to ships engaged on international voyages which include cargo ships, including high-speed craft, of 500 gross tonnages and upwards as well as mobile offshore drilling units and port facilities serving such ships engaged in international voyages.²⁹ Majority of the ships that are involved in international voyages are cargo ships of more than 500 gross tonnages and are those in respect of which claims for liability had arisen. Non-compliance with ISPS Code by those ships is very relevant to

²⁸ A full text of the ISPS Code accessed at <http://www.svg-marad.com/Downloads/International%20Conventions/ISPS%20Code.pdf>. Each part of the Code comprises of 19 sections. However, Section 19 of Part B does not additional guidance. A copy of a book published by the IMO may also be accessed online as 'International Ship & Port Facility Security Code and SOLAS Amendments 2002. (2003). 1-91' at http://www.ubak.gov.tr/BLSM_WIYS/DISGM/tr/HTML/20130304_142647_66968_1_67502.pdf.

²⁹ ISPS Code section 3.1 of Part A.

the liability of classification societies.

4.1 ISPS Code and Sovereign immunity

Each ship shall carry on board a ship SSP approved and reviewed by the administration³⁰. The approval and review may be entrusted to an RSO³¹. The approval and review of the SSP may be entrusted to an RSO which means that it is possible that the administration may not have direct contact with the SSP from the stage when it is developed up to a stage where it is approved or reviewed³². In principle where an administration delegates its duties to an agent, any benefit or liability that arises from such legal relationship accrues to or against the principal and, accordingly the issue of liability will be dealt with in the context of state (sovereign) immunity³³. The doctrine of sovereign immunity is governed by national legislation³⁴ and it prohibits suits against government departments and even appointees without its consent³⁵. For example section 279 of the Bahamian Merchant Shipping Act of 1979 provides that

Every officer appointed under this Act, and every person appointed or authorised under

³⁰ ISPS Code section 9.1 of part A.

³¹ ISPS Code section 9.2 of part A.

³² This is distinguishable from delegation of authority to an RSO for the port facility security assessment and port facility security plan because, although the carrying out of port facility security assessment and the developing and maintenance of port facility security plans may be delegated to an RSO, approval and review thereof cannot be delegated. It follows therefore that invoking state immunity may be limited under this circumstance as the administration is required to approve and review.

³³ See Emerson, Robert W. and Hardwicke, John W Business Law, 5th Edition (1997) Baron's, New York p. 247 where agency was defined as "a legal relationship whereby one person acts for another".

³⁴ State immunity forms part of customary international law and it is embodied in the United Nations Convention on Jurisdictional Immunity of States and Their Property.

³⁵ See the case of *Erika*, Paris Court of Appeals, area 4, division IIE, General Register No08/02278, 30 March, 2010 p 325 where the governmental immunity was discussed.

this Act for any purpose of the Act, shall have immunity from suit in respect of anything done by him in good faith or admitted to be done in good faith in the exercise or performance, of any power, authority, or duty conferred or imposed on him under this Act.

Similar legislation exists in the United States in terms of which any act on behalf of the United States and which is of maritime nature and thus subject to admiralty, is immune from suits under Suits in Admiralty Act, 46 U.S.C. App (SIAA).

Legislative immunity may go against the purposes of conventions such as SOLAS and MARPOL and to this end it was commented that –

“It seems a strange policy to provide extensive legislative protection to civil servants and governmental appointees with responsibility for protecting life and property at sea without giving a court the opportunity to decide whether a liability exists”.³⁶

State immunity is however not absolute as it may be waived by the defendant under the United Nations Convention on Jurisdictional Immunity of States and Their Property (UNSCI). Article 8 of UNSCI provides that ‘a State (in this regard classification society) cannot invoke immunity from jurisdiction in a proceedings before a court of another State if it has (a) itself instituted the proceedings; or (b) intervened in the proceedings or taken any other step relating to the merits’. This principle was applied in the *Erika* case in which it was held that RINA renounced state immunity by participating in the criminal proceedings without invoking sovereign immunity³⁷. Traditionally, state immunity cannot be applied where the state entity or appointee (in this regard RSO)

³⁶ Honka, Hannu 1, *The Classification System and its Problems with Special Reference to the Liability of Classification Societies*. 19 Tul. Mar.L.J. 1 (1994 at 634).

³⁷ *The Erika*, no. 08/02278-A, 323-324.

exercised its authority negligently³⁸. Therefore, if an RSO entrusted with the approval or review of SSP exercised approval or review negligently such an RSO cannot invoke sovereign immunity.

4.2 Recognised security organisation (RSO) and certification

Administrations may delegate their duties with respect to carrying out SSA, developing and preparing SSP, conducting verification of SSP and subsequently issuing or endorsing of the ISSC RSO's³⁹. SSA is an essential element and integral part of the process of developing and updating the SSP. The person responsible for ensuring that SSA is carried out is the Company Security Officer (CSO) but the CSO may delegate such authority to an RSO, in which case CSO must ensure that the assessment is properly carried out. SSA includes an on-scene security, with the following elements:

1. identification of existing security measures, procedures and operations;
2. identification and evaluation of key ship board operations that it is important to protect;
3. identification of possible threats to the key ship board operations and the likelihood of their occurrence, in order to establish and prioritise security measures; and
4. identification of weaknesses, including human factors in the infrastructure, policies

³⁸ Nicolai Lagoni *The Liability of Classification Societies* [2007] Springer, Hamburg at page 243 where he said that 'the principle of immunity does not protect the classification society if the claim is based on the negligent exercise of the authority that was granted to the classification society'. Cf article 2(1)(b)(iii) of the United Nations Convention on Jurisdictional Immunity in which "state", for the purpose of jurisdictional immunity was defined as, inter alia, agencies or instrumentalities of the state or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State.

³⁹ Section 8 and 9 of the ISPS Code. For the purpose of this paper there is an assumption that RSO or RO refers to a classification society.

and procedures.⁴⁰

It must be noted that the contract in terms of which an RSO carries out a SSA exists between the ship owner and the RSO. Thus a CSO must ensure that the RSO nominated must carry out the SSA with appropriate skills⁴¹. Where the RSO carries out its duties without due care or negligently under the contract and a third party suffers damage as a result, the latter may have a tortious claim against any such classification society. Such situation may arise where, for example where a classification society in carrying out SSA fails to identify weaknesses which do not appear on the document of compliance issued under the ISM Code and the crew members give them falsified information for fear of being implicated and/or dismissed⁴². The importance of SSA cannot be overemphasised as it is the one on which subsequent ship security plan is based.

With regard to SSP the CSO must ensure that SSP is developed from an SSA, submitted to the administration or an RSO authorised by the administration for approval, and thereafter the implementation and maintenance of the SSP. The CSO may appoint an RSO to prepare SSP for a specific ship. Each ship shall have a Ship Security officer (SSO) responsible for maintaining the implementation of the SSP, including amendments to the plans⁴³. Contracting Governments should set security levels which should be included in every SSP. ISPS Code provide for 3 security levels. At security level 1 each vessel is required to maintain minimum appropriate protective security

⁴⁰ ISPS Code section 8.4.

⁴¹ Ibid section 8.2. IACS has published guidelines for the approval and reviewing of ISSC and developing SSP in a document known as IACS Proc Req. 2009/Rev.1 2010 and which may accessed at http://www.iacs.org.uk/document/public/Publications/Procedural_requirements/PDF/PR_24_pdf109.pdf.

⁴² Syamantak Bhattachrya, *The effectiveness of the ISM Code: A qualitative Enquiry*, Marine Policy 36 (2012) 528-535 at 533

⁴³ ISPS Code section 9.1.1 of Part A read with section 4.3 (1) of Part B.

measures as well as preventive measures against security incidents which include ensuring the performance of all ship security duties; controlling access to the ship; controlling the embarkation of persons and their effects; monitoring restricted areas to ensure that only authorized persons have access; monitoring of deck areas and areas surrounding the ship; supervising the handling of cargo and ship's stores; and ensuring that security communication is readily available. At security level 2 the ship is required to maintain appropriate additional protective security measures shall be maintained for a period of time as a result of heightened risk of a security incident as well as additional protective measures specified in the SSP. At security level 3 there must be security incident which is probable or imminent and further protective measures specified in SSP must be implemented.⁴⁴ The Code also requires that SSP should be reviewed and where review is entrusted to an RSO, such RSO that is reviewing the existing SSP should not be the one that have prepared or approved it. Therefore the section envisages a situation where there will be two RSO involved in the process. One RSO will be responsible for preparing SSP thereby performing statutory private function by virtue of a contract between ship owners and the RSO, and the second RSO will perform a statutory public function by virtue of authority conferred to it by administration to approve or review SSP's on the latter's behalf⁴⁵. The fact that the CSO has to ensure that SSP is developed in accordance with ISPS Code endorses prevailing legal position that the duty to provide a ship that is seaworthy is always borne by the ship owner and cannot be delegated to any other person including an RSO⁴⁶.

The Code also requires that the CSO must arrange for verification of a ship by the administration or where the duty is delegated, by the RSO. This means that the

⁴⁴ Section 2 of the ISPS Code read with sections 7.2, 7.3 and 7.4.

⁴⁵ See section 9.4 of Part B of the Code.

⁴⁶ *Dixon v. Sadler* (1839) 5 M&W 405 aff. (1841) 8 M&W 895.

administration may delegate the authority to do verification to the RSO. Verification will include initial, renewal and intermediate verifications. Initial verification shall take place before the ship is put into service or before ISSC is issued and will include a complete verification of the ship's security system and any associated security equipment and the approved SSP. Secondly, administration shall determine intervals during which renewal verification should be carried out. The purpose of renewal verification is to ensure that the security system any associated security equipment of the ship fully complies with the requirements of the Code and SSP, in a satisfactory condition and fit for the service for which the ship is intended. Thirdly, at least one intermediate verification which include inspection of other security system and any associated security equipment.⁴⁷ Once the SSA is approved or reviewed the administration, or through RSO, may issue or endorse the ISSC which certifies, inter alia, that the ship is provided with an approved SSP.⁴⁸

Although there has not been any case which ever came before a court of law that involves liability of classification societies under ISPS Code, previous cases may give guidelines as to what would be the judicial position if a classification society breaches the duty of care or act negligently when carrying out the ship security assessment and/or preparing or approving, or reviewing and approving ship security plan as well as issuing invalid ISSC. What follows below is a quick survey of cases on the issue of liability of classification societies to see what courts in different jurisdictions have held. That is to say, what judicial standards are there for determining liability. The survey will assist in determining what prospects of success are there for ship owners or third parties who may in future institute tortious claim where there is a breach of duty of care or negligent misrepresentation by RSO.

⁴⁷ Section 19.1 of Part A of the Code.

⁴⁸ Ibid section 19.2 read with appendix 1 of Appendix to part A.

Chapter 5

Private function of classification societies

Ship owners enter into classification agreements with classification societies in terms whereof the latter surveys and assigns a class to a ship. The survey stretches from design survey up to periodic survey during the lifespan of the ship. The classification agreement may be one for the confirmation of class certificate⁴⁹, it may also be one intended for carrying out repairs⁵⁰, one for issuing class certification upon completion of the construction of a vessel⁵¹ and survey for re-entry classification⁵². Quite recently governments entered the legal arena as private third parties claiming damages for pollution over their marine territories against classification societies. In this regard they sought to rely on the certification by the classification society⁵³. Under ISPS Code, classification societies also enter into contractual arrangements with ship owners and/or administrations to perform to mentioned above

Problems arise where a classification society conducts a survey in a negligent manner, in

⁴⁹ *The Amor* case supra.

⁵⁰ *Great American Insurance Company et al. v. Bureau Veritas* 338 F. Supp. 999 (S.D.N.Y. 1972).

⁵¹ *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F. 3d 1077, 1084 (2nd Cir. 1993).

⁵² *Otto Candice v. Nippon Kaija Kyokai*, 2002 WL 1798767,1,3 ff.(E.D.La. 2002).

⁵³ *Prestige. Reino de Espana v. ABS*, No. 10-3518 (2d Cir. Aug.29, 2012). For more information on public function of classification societies see Nicolai Lagoni *The Liability of Classification Societies* [2007] Springer, Hamburg pages 234-256.

breach of duty of care or in breach of implied warranty⁵⁴ and other parties, relying on the veracity of the information provided in class certificate, suffer damages as a result. What legal remedies are available for the aggrieved parties or entities under such circumstances? In different jurisdictions liability of classification societies has been and still is a bone of contention which courts find it difficult to grapple with.

5.1 Tortious liability of classification societies

In most jurisdictions liability of classification societies is founded on the law of tort or delict⁵⁵ for damages suffered by ship owners and third parties. In such cases the general principles of law of tort are applicable. However, due to the special nature of the classification agreements courts in different jurisdictions have formulated different tests for tortious liability. Cases have been brought before courts in different jurisdictions for claims for damages against classification societies for negligent misrepresentation and for breach of duty of care. The approaches adopted by those courts are largely similar but there are also remarkable differences. What follows next is the exposition of cases that were brought before courts in the US and UK as well as some Civil Law jurisdictions. What follows is the exposition of judicial standards for liability under different causes of action namely, negligent misrepresentation, failure to exercise due diligence, breach of a duty of care, breach of implied warranty and Statutory duty of care and negligence.

⁵⁴ The warranty to perform services in a workmanlike manner is usually dubbed the 'Ryan warranty' as it was first recognized in the case of *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124 (1956).

⁵⁵ Take note that in this essay the words tort or delict are used interchangeably and the author will be inclined to the use of the word "delict" as he comes from a system in which such word is widely used in legal texts.

5.1.1 Negligent misrepresentation

In the United States of America classification societies may be held liable for negligent misrepresentation. Under US law claims based on tort of negligent misrepresentation against classification societies are governed by Article 552 of the Restatement (Second) of Torts with the title ‘Information Negligently Supplied for the Guidance of Others’. Article 552 (1) provides that

“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”.

However, this criterion is not applied rigidly but on a case by case basis. For example, in *Somarelf v. American Bureau of Shipping*⁵⁶ the court rephrased the test for negligent misrepresentation under the Restatement (Second) of Torts and required *Somarelf* to prove that:

“(1) [American Bureau of Shipping] in the course of its profession, supplied false information for Somarelf's guidance in a business transaction; (2) ABS failed to exercise reasonable care in gathering the information; (3) Somarelf relied on the false information in a transaction that ABS knew the information would influence; and (4) Somarelf thereby suffered pecuniary loss”.⁵⁷

It was held that *Somarelf* had to prove only that American Bureau of Shipping (ABS)

⁵⁶ 704 F. Supp. 59, 1989 AMC 1061 (D.N.J. 1988) at 429.

⁵⁷ *Ibid* at 429.

had a general knowledge that a third party would rely on the Suez Canal special tonnage certificate and the sub-charterer relied on that certificate with regard to the fees charged by the Suez Canal authority. The court did not require *Somarelf* to prove specific knowledge that ABS had knowledge that *Somarelf* in particular would rely on the veracity of the information contained in the tonnage certificate. Proof of general knowledge and pecuniary loss was sufficient proof to satisfy the Article 552 test provided that *Somarelf* falls under “persons” provided in Article 552(2) (a). Those are persons or one of a limited group of persons for whose benefit and guidance ABS intended to supply the information or knows that the recipient intends to supply it. It is questionable whether general knowledge as required in *Somarelf* would satisfy the element of knowledge under negligent misrepresentation⁵⁸. In *Sundance Cruises Corp v. American Bureau of Shipping*⁵⁹ ABS issued classification certificates, and statutory certificates on behalf of the Bahamian government. The ABS classification certificate was a provisional certificate confirming that the vessel was in compliance with ABS rules. The statutory certificates were, *inter alia*, SOLAS certificate confirming that the vessel complied with watertight integrity relating to the condition of the hull of the ship. While sailing along the coast of British Columbia the hull of the vessel came to a contact with the rock and developed a hole through which water entered ship compartments. Eventually, the ship ran aground. The plaintiff owners sued ABS alleging that but for, *inter alia*, negligent misrepresentation by the ABS about the condition of the hull during

⁵⁸ Ibi 18 at For the test for negligent misrepresentation see *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999); *Fed. Land Bank Ass'n of Tyler v. Shane*, 825 S.W.2d 439, 442 (Tex. 1991); see also *Roof Sys., Inc. v. Johns Manville Corp.*, 130 S.W.3d 430, 439 (Tex. App.-Houston [14th Dist.] 2004, no pet.); *Taylor Elec. Servs., Inc. v. Armstrong Elec. Supply Co.*, 167 S.W.3d 522, 526 (Tex. App.-Fort Worth 2005, no pet); and *Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 921 (Tex. 2010).

⁵⁹ *Sundance Cruises Corp. v. Am. Bureau of Shipping*, 799 F. Supp. 363, 1992 AMC 2946 (S.D.N.Y. 1992), *aff'd*, 7 F.3d 1077, 1994 AMC I (2d Cir. 1993).

a conversion work in Sweden the vessel would not have run aground.⁶⁰

The court, after reciting four elements of negligent misrepresentation, concluded that the purpose of a classification certificate is to ‘procure insurance and operate its vessel’ and that information contained therein serves only as guidance⁶¹. As was already mentioned, the application of the section 552 of the Restatement is done on a case by case basis, the court distinguished *Sundance* from *Somarelf* on the basis that in the latter case classification certificate was issued for operational purposes while on the former the licence and statutory certificates were issued for regulatory purposes. On appeal before the Second Circuit court it was held that the plaintiff cannot rely on a classification certificate that the vessel is soundly constructed⁶².

In *Carbotrade SPA v. Bureau Veritas*⁶³ the charterers of the cargo ship the Star of Alexandria instituted a claim against BV on the basis that BV endorsed a hull certificate despite the fact that its surveyor, Konstantinos Stavropoulos, failed to withdraw the certificate after he noticed that the vessel’s wing tanks were leaking. Carbotrade alleged that such omission constituted negligent misrepresentation and contributed to the sinking of the vessel which caused Carbotrade to suffer damages when they lost the cargo of cement. New York District Court required the charterers to establish that there was ‘a relationship approaching privity between the defendant and third party’⁶⁴ in order to allow the claim for negligent misrepresentation made against Bureau Veritas (BV). The district court also noted that classification certificates are not issued with the purpose of

⁶⁰ See Martin Porsche, *Questions on The Liability of Classification Societies. Responsibility or recovery?* Master thesis, Lund University (2004) p. 16-18 for the summary of the case.

⁶¹ Ibid note 44 at 377.

⁶² Ibid.,

⁶³ 901 F. Supp. 737, 745, 1996 AMC 561 (S.D.N.Y 1995).

⁶⁴ Ibid at 747-48.

guaranteeing safety⁶⁵. In *Cargil Inc v. Bureau Veritas*⁶⁶ the cargo owners, shippers and assignees instituted an action for damages of their cargo on the basis that BV issued several certificates confirming that the vessel Pacific Dawn was fit to sail despite the fact that there were some overdue surveys that were not conducted.⁶⁷ The plaintiffs did not succeed with their claim for negligent misrepresentation as the district court held that they could not rely on class certificates as BV did not know that they would rely on them. Furthermore, it was held that cargo owners did not ask for a specific guidance.

In *Otto Candies, L.L.C v. Nippon Kaiji Kyokai Corp*⁶⁸ the purchaser Otto and the seller owner of the vessel “Speeder” entered into a memorandum agreement for the purchase of the vessel. The agreement was subject to the condition that Nippon Kaiji Kyokai (NKK) should conduct a survey free of recommendations. After survey NKK issued a Class Maintenance Certificate and Otto paid the purchase price. Otto sought to transfer the vessel from NKK to ABS. ABS conducted survey and found several deficiencies and recommended some repairs. Otto paid some thousands of US dollars for the repairs whereupon ABS issued an interim classification certificate. Otto then sought to recover cost of repairs from NKK alleging that the information contained in the Class Maintenance Certificate was negligently misrepresented. The U.S. Court of Appeals held that liability against classification societies must be limited as far as possible and that the duty of ship owners and charterers to maintain seaworthy vessels is not delegable to classification societies.⁶⁹ After noting the disadvantages of imposing

⁶⁵ Ibid at 748.

⁶⁶ 902 F. Supp. 49, 1996 AMC 577 (S.D.N.Y. 1995).

⁶⁷ See Nicolai Lagoni note 22 at p. 169 for the summary of the facts in *Cargill, Inc.* case.

⁶⁸ *Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp.*, 346 F.3d 530, 532, 2003 AMC 2409 (5th Cir. 2003).

⁶⁹ Ibid at 535.

liabilities on classification societies the court applied the elements of tort under Article 552 of the Restatement and concluded that classification societies are not liable to exhaustive numbers of persons for negligent misrepresentation but ‘limited to those persons whom the engagement is intended to benefit’⁷⁰. The court also added that classification societies must actually know that third persons would rely on the misinformation, that mere foreseeability is not sufficient⁷¹.

The attitude of the US courts regarding imposing liability on classification societies for negligent misrepresentation either under Article 552 of Restatement (Second) of Tort or general maritime principles can be summarised thus:

- (a) a general knowledge that a third party would rely on the tonnage certificate;⁷²
- (b) the plaintiff cannot rely on classification certificate that the vessel is soundly constructed;⁷³
- (c) a relationship approaching privity between the defendant and a third party and class certificates are not issued with the purpose of guaranteeing safety;⁷⁴ and
- (d) classification societies are not liable to exhaustive numbers of persons for negligent misrepresentation but ‘limited to those persons whom the engagement is intended to benefit and that classification societies must actually know that third persons would rely on the misinformation, that mere foreseeability is not sufficient.’⁷⁵

Negligent misrepresentation in connection with classification certificate under UK law is

⁷⁰ Ibid at 535-36.

⁷¹ Ibid

⁷² Ibid note 28.

⁷³ Ibid note 33.

⁷⁴ Ibid note 35 and 36.

⁷⁵ Ibid note 40 and 41.

treated as follows: In the case of *Nicholas H*⁷⁶ the cargo owner plaintiffs claimed a balance for damages suffered as a result of failure to exercise duty of care by NKK surveyor. Lord Steyn in a dictum expressed an opinion that there might be a possibility that classification society may be held liable for negligent misrepresentation if there were direct exchanges between cargo owners and classification society⁷⁷. The UK law position was crisply put by B.D. Daniel where, after analysing the reasoning of the court in *Nicholas H*, he concluded that liability for negligent representation arises where there was a direct contact between the plaintiff and the classification society whereby the latter undertakes to provide the former with information and the former relies on that information which results into damage⁷⁸.

5.1.2 Due diligence

In most jurisdiction, claims for liability for failure to observe duty of due diligence usually arise in the context that the ship owner has non-delegable duty to provide seaworthy ship. However, under certain jurisdictions failure to observe a duty of due diligence is governed by codes. For example, under Turkish law liability for failure to observe due diligence is governed by Turkish Code of Obligations (CoD). In the case of *Cerrahogullari Umumi Nakliyat Vapurculuk & Ticaret TAS v Lloyd's Register of Shipping*⁷⁹ the claimant ship owners instituted a claim against the defendant, Lloyd's Register of Shipping (LRS) for negligent issuing of the classification certificate for the tanker *Efes*. The vessel was time-chartered to the Transatlantic Bulk Shipping AB. The

⁷⁶ *Marc Rich & Co. AG v. Bishop Rock Marine Co. Ltd.*, [1995] UKHL 4, [1995] 2.

⁷⁷ *Ibid* at 314.

⁷⁸ Daniel, B. D. (2006-07). Potential Liability of Marine Classification Societies to Non-Contracting Parties. U.S.F. Mar. L.J., Vol. 19(2). at 245.

⁷⁹ Istanbul *Denizcilik ihtisas Mahkemesi* Case no. 2006/173, verdict no 2008/147.

vessel experienced bad weather during its Atlantic Ocean passage from Belgian port of Ghent to the Canadian port of Cartier. *Efes* was scheduled to load a cargo in Cartier but upon survey by representative of LRS and Canadian Port Authority it was found to be unseaworthy contrary to the periodical certificate issued in Istanbul by *Mugesan AS*, in terms of a sub-contract with LRS, and the difference was said to be somewhere between 50-100 per cent. The defects related to thickness of the hull according to the salvage report placed before the Port of Cartier administration. Temporary repairs on *Efes* were carried out in Halifax whereupon the Port of Cartier issued a temporary certificate for the ship to sail back to Istanbul where it was eventually scrapped. As a result the time-charterer cancelled the charter party and alleged that it had suffered damage of over US\$2.5m. The plaintiff time-charterer sued LRS for damages for allegedly making negligent misrepresentations on periodic survey certificate regarding the vessel's seaworthiness as they did not correctly reflect the true condition of *Efes*. The plaintiff thus alleged that the defendants were in breach of its duty of due diligence to ensure that the vessel was seaworthy.

The defendants disputed the claim on the basis that (i) there was no causal link between the seaworthiness of the ship and its actions; (ii) that the defendants cannot be liable under the contract between itself and the ship owners on the basis of the exemption and limitation clause in the contract; (iii) that the sub-contractor *Mugesan AS* who actually carried out survey was negligent and accordingly liable but not the defendants; (iv) that the damage to the hull of the ship might have developed when the vessel experienced bad weather during its Atlantic ocean passage.⁸⁰

The defendants were found liable on the following basis: The court reasoned that

⁸⁰ See Ataergin, V. S. (2011). Liability of Classification Societies for the Negligence of Sub-Contractors under Turkish Law. *JIML*, 83-89 for the translated version of the case of Istanbul Denizcilik Ihtisas Mahkemesi Case no. 2006/173, verdict no 2008/147. See the other article by the same author where the author discusses the case from a seaworthiness of a vessel' s perspective.

contract between LRS and the defendants was a contract of mandate which is based on the principle of trust and under Turkish law it is governed by the Turkish Code of Obligations. Section 391(1) of the Code provides that under the contract of mandate in terms of which the contractor assigns its duties to a sub-contractor, the contractor is under a *duty of due diligence* when choosing and instructing a sub-contractor. The court found that LRS was under a duty of care for the survey and classifying of the vessel. With regard to the exemption clause the court ruled that sections 99 and 100 of the Code regarded exemption clause as null and void for contractor's and/or subcontractor's gross negligence respectively, if such exemption clause is stipulated in a contract based on, *inter alia*, trust.

With respect to gross negligence on the part of contractor the court stated contractor's legal position and said that section 391(2) of the Code imposes on a contractor a duty to act and instruct sub-contractor with due care and section 99(1) regarded as null and a void contractual immunity from liability for a gross negligence and/or fraudulent act. However, the exemption from liability is allowed under section 99(2) only for minor negligence. With respect to gross negligence on the part of sub-contractor, the court stated that section 100(1) of the Code imposes liability on a contractor where the contractor delegates right or the performance of a duty to sub-contractors and the latter causes for the damage during their performance. Section 100(2) and (3) allow the contractor to exclude liability for the performance of a duty by sub-contractor wholly or partly where such duty of performance was granted as a privilege by the government provided that it is a minor negligence in the contract.⁸¹

5.1.3 Duty of care

Under the US law classification societies may be held liable for failure to observe duty

⁸¹ Ibid. See the learned author's translation at page.

of care when surveying or classifying a vessel. Such duty may arise from a warranty and it should also be proved that the breach of duty was the one which caused the damage suffered. It is however not easy to prove causation because US courts hold the view that ship owners have non-delegable duty to ensure seaworthiness of the ship but not classification societies. In the *Great American Ins. Co. v. Bureau Veritas*⁸² insurers instituted a claim for the loss suffered as a result of the sunken ship for which BV warranted and failed to inspect and survey the vessel in a workmanlike service. Although counsel for the plaintiffs did not raise the issue regarding a duty of care owed by the BV to the plaintiffs, the court found that the facts presented an opportunity for that question to be answered. In a dictum Judge Tyler considered the question what duties classification societies owe to its clientele⁸³. Judge Tyler identified two duties:

1. ‘... duty to survey and classify vessels in accordance with rules and standards established and promulgated by society for that purpose’⁸⁴; and
2. The duty to use due care to detect and warn of hazards⁸⁵.

The possibility of the success of the claim for liability under the first duty was rejected on the following basis:

- a. That it is a ‘long standing policy or rule that the owner of a ship has a non-delegable duty to maintain a seaworthy vessel’;
- b. That ‘imposing liability on classification societies might confer benefit upon ship owners, ship operators and charterers’⁸⁶; and

⁸² *The Great American Ins. Co. supra.*

⁸³ *The Great American Ins. Co. at page 1010.*

⁸⁴ *Ibid at 1011-12.*

⁸⁵ *Ibid at 1012.*

⁸⁶ *Ibid at 1012.*

c. That the theory of liability would –

(i) ‘... place the ultimate responsibility for seaworthiness on an organisation which has contact with the vessel for only brief annual periods, whereas the owner who is always present in respect to his vessel would elude liability in many cases’; and

(ii) ‘... making the classification society an absolute insurer of any vessel it surveys and certifies would not be commensurate with the amount of control that a classification society has over a vessel and would not accord with the parties intent, the fees charged or services performed’⁸⁷.

One of the ground which the court advanced in rejecting success for the claim for liability for failing to observe the duty to survey and classify vessels in accordance with rules and standards established and promulgated by a society, was that the recognition of such duty would make the classification society to be liable for amount of money which does not accord with, *inter alia*, fees charged. Thus this ground supports the view that classification societies are non-profit making organisations that promote collective welfare. However, this view was rejected by Lord Lloyd when he stated that

"But why should this make any difference? Remedies in the law of tort are not discretionary. Hospitals also are charitable non-profit making organisations. But they are subject to the same common duty of care under the Occupier's Liability Acts, 1957 and 1984 as betting shops or brothels. Take again the position of salvors. They also fulfil an important public role. It was argued in *The Tojo Maru* that salvors should receive every proper inducement on grounds of public policy, and that to hold them liable for the negligence of their servants in the course of salvage operations would only serve to discourage their beneficial activities. This is very similar to the argument advanced in

⁸⁷ *Ibid* at 1012.

the present case. It did not succeed in *The Tojo Maru*, and should not, I think, succeed here. It is not as if N.K.K. [is] unable to afford the cost of insurance. It is the third largest classification society. A.B.S., another non-profit making classification society, had a net income of £1 m. in 1990 on operating revenues of £12 m.. In par. 21(c) of his statement, Mr. Mitsuo Abe, executive vice-president of N.K.K., doubts whether N.K.K. would be able to survive if they were held liable for claims such as the present. I have to say that I view this assertion with a good deal of scepticism."

With regard to the second duty, that is the duty to use due care to detect and warn hazards Judge Tyler held that ‘ a ship’s surveyor or classification society should be charged in law with the reasonable duty of detecting all perceptible defects of the vessel encountered during the survey and notifying the owner and/or character thereof’⁸⁸. In the case of *Amoco Cadiz*⁸⁹ the duty of care owed by a party to a contract to another received yet another judicial test. This time it was the plaintiff *Amoco* claiming for indemnity and contribution against ABS which *Amoco* paid towards the judgment debt for the damage to the environment pursuant to oil spill off the coast of Brittany, France. The district court had to determine whether ABS could be held liable under Section 324A of the Restatement (Second) of Torts for failure to adhere to a duty of care to approve the design and ensure proper construction of the vessel which *Amoco* relied on.. Section 324A provides that

“a party is liable to a third party only if its failure to exercise reasonable care increases the risk of harm, if it has undertaken to perform a duty owed by the other party to the third party or if the harm is suffered because the other party or the third party relied upon the undertaking”.

⁸⁸ *Ibid* at 1013.

⁸⁹ *In re Oil Spill by Amoco Cadiz Off the Coast of France* on March 16, 1978 (“*Amoco I*”), 1984. AMC 2123, 2124 (N.D.111.).

The claim was rejected on the basis that *Amoco* failed to prove that it relied on the ABS undertaking⁹⁰ - proximate cause. (So far it appears that ‘proximate cause’ is the reason for courts’ rejection of claims under this heading). The Fifth Circuit Court in the case of *Gulf Tampa Drydock Co. v. Germanischer Lloyd*⁹¹ failed to answer the question whether classification society has a duty of care its clientele in respect of repairs ordered by its surveyor but instead remanded the matter to the district court for the determination of same. It follows that the failure by the Fifth Circuit Court to establish whether there was a duty of care on the part of Germanischer Lloyd served as a bar for the determination of causation. The duty to discover operational defects which caused leakage into the cargo holds came under consideration in the case of *Continental Insurance Co. v. Daewoo Shipbuilding & Heavy Machinery Co.*⁹². The cargo insurers claimed under subrogation for damages occasioned by the breach of duty of care which ABS owed towards the cargo owners. The district court⁹³ held that

- a. ‘ABS’s duty is delimited by its contract with Daewoo’⁹⁴;
- b. ABS ‘was required to certify not to the absolute seaworthiness of the vessel, but only to the vessel's conformity to ABS Rules’⁹⁵;
- c. ‘[T]o extend a classification society's duty to the operational details of the vessel's

⁹⁰ Ibid at 2125.

⁹¹ 634 F. 2nd 874, 1982 AMC 1969 (5th Cir. 1982).

⁹² 707 F. Supp. 123, 1988 AMC 2526 (S.D.N.Y. 1988), aff'dw/o opinion, 888 F.2d 125 (2d Cir. 1989).

⁹³ The decision was confirmed in the Second Circuit Court in the reported case of *Cont'l Ins. Co. v. Daewoo Shipbuilding & Heavy Machinery Co.*, 888 F.2d 125, 1990 AMC 607 (2d Cir. 1989).

⁹⁴ Ibid note 61 at 123.

⁹⁵ Ibid at 123 -24.

management would both ignore the clear limits of its contractual duty and make it an absolute insurer of the vessel⁹⁶.

In *Sundance Cruises*⁹⁷ it was argued that counsel for ABS had acceded in one previous case that ABS has a duty to notify ship owner of the defects⁹⁸ nonetheless the district court rejected the claim as the plaintiff failed to prove that damages were proximately caused by the error made by ABS during the process of certification⁹⁹. In *Cargill Inc.* the district was seized with a claim made by cargo owners for damages against *BV* and the court rejected the claim on usual grounds namely, that ‘by classifying a vessel, a classification society is also not liable as an insurer of a vessel's seaworthiness to third party cargo owners’¹⁰⁰.

Another recent case where the court considered the question of duty of care was the *Prestige*¹⁰¹, which involves claims arising from a sinking of the ship *Prestige* that caused oil spill in Spanish marine territory. Spain instituted action against ABS for reckless breach of duty of care in surveying the ship to determine whether it complied with its rules and applicable statutes (statutory certification). The action did not however succeed on the basis that Spain failed to adduce sufficient evidence establishing that ABS recklessly breached a duty of care. Thus it was unnecessary for the Court to proceed and apply the ‘proximate cause’ test laid down in *Sundance* as the plaintiff failed to establish that the defendant recklessly breached the duty of care.

⁹⁶ Ibid 124.

⁹⁷ *Sundance Cruises* at page 46.

⁹⁸ See Machale A. Miller, *Liability of Classification Societies from the Perspective of United States Law*, 22 TUL.MAR. L.J. 75, 88 (1997). 379. *Sundance Cruises*

⁹⁹ Ibid at 393.

¹⁰⁰ *Cargill Inc.* at 124.

¹⁰¹ *Reino de Espana v. Am. Bureau of Shipping, Inc.*, 328 F. Supp. 2d 489 (S.D.N.Y. 2004).

Under UK Law classification societies may in theory owe a duty of care to a third party such as cargo owners however, in case of breach courts do not easily recognize such a duty. The seminal case in this regard is the case of *Nicholas H*. Due to the importance of this case regarding the question of liability of classification societies for breach of duty of care, it is imperative to look into the background of the case with some details. The suit arose as a result of the sinking of the vessel with the cargo of lead and zinc from Peru and Chile with destinations in Italy and the Union of Soviet Socialist Republic (USSR). Somewhere in the Pacific Ocean the vessel developed a crack on the hull. The services of NKK were employed and after surveying the vessel in Puerto Rico NKK recommended that the ship should go for dry docking where permanent repairs should be carried out. NKK also recommended that the cargo must be discharged during dry-docking. The owners of *Nicholas H* opted for temporary repairs without discharging of the cargo. When the temporary repairs had been completed NKK surveyor attended the vessel and gave instructions that the class of the vessel be retained on condition that the vessel will continue with the voyage but when it arrives in Italy another temporary repair should be carried out. While in the sea *Nicholas H* developed a crack on the area that was welded and that caused the vessel to sink with all its cargo. The cargo owners successfully sued the ship owner but for the limitation of claims under International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968 (hereinafter Hague-Visby Rules)¹⁰² they could not recoup the entire amount for damages. Hague-Visby Rules are rules applicable to the contract of carriage evidenced by a bill of lading between a shipper/carrier and cargo owners. The Rules provide that

¹⁰² Article 4 of the Hague-Visby Rules provides that '[n]either the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of § 1 of Article 3'.

the shipper or carrier liability, in case of loss cargo, is limited to certain amount¹⁰³ or if parties choose, they may set their own limit¹⁰⁴. Cargo owners then sought to recover the balance from NKK on the basis that it breached a duty of care when allowing the vessel to sail with temporary repairs as opposed to its earlier recommendation and such breach of a duty of care caused the loss of cargo.

It was held that such duty may only be recognized if it is fair, just and reasonable towards classification society to do so¹⁰⁵. In this regard the House of Lords in *Nicholas H* developed a test in terms of which factors that militate against recognition of a duty of care are weighed against those that speak in favour of recognition of the duty. Factors in favour of the recognition of the duty of care are inter alia, the proximity between the breach of a duty and damage suffered; reliance by the third party on the information provided by the classification society; and the need to promote safety of life, ships and cargo at sea¹⁰⁶. Factors that militate against recognition of duty of care are that ship owners are responsible for the seaworthiness of the ship; ship owners and cargo owners are protected under the International Convention for the Unification of Certain Rules of Law Relating to Bills Of Lading, 1968 usually called Hague-Visby Rules but classification societies are not. Furthermore, if the duty is recognised the balance created by the Hague-Visby Rules regarding limitation of liability will be destroyed; classification societies act for the welfare of the shipping community and other related industries; and recognition of the duty will discourage classification societies from surveying ships – a service which is vital for shipping business.

¹⁰³ Hague-Visby Rules article 4(5)(a).

¹⁰⁴ Ibid article 4(5)(b).

¹⁰⁵ *Nicholas H* at 316-17.

¹⁰⁶ Ibid at 313.

In *Nicholas H* the House of Lords found that the balancing process yielded the result that recognizing the duty of care against Nippon Kaiji Kyokai (hereinafter ClassNK) ‘would be unfair, unjust and unreasonable towards classification societies, notably because they act for collective welfare and unlike ship owners they would not have the benefit of any limitation provision’ provided for in the Hague-Visby Rules. It was further held that ‘the lesser the injustice is done by not recognizing a duty of care’¹⁰⁷.

5.1.4 Implied warranty (Ryan doctrine)

There is an implied warranty that classification societies should survey ships with workmanlike performance. Implied warranties are traditionally found in law of sales but have recently encroached into the terrain of maritime law. They come into existence by the operation of law unlike express warranties. Perhaps John R *et al* definition might be of assistance here:

“An implied warranty is a promise or representation that the vendor is presumed to have made as a matter of law, under the particular circumstances, in the absence of a binding agreement to the contrary”.¹⁰⁸

In the context of maritime law, the US law had long held the position that where, for example, the longshoremen sustain injuries because the ship owner failed to keep his vessel in a seaworthy condition the latter would be strictly liable. This position was however changed by the *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*¹⁰⁹ case in what is commonly known as the Ryan doctrine. The Ryan doctrine imposes an implied warranty in a service contract in terms of which service providers such as stevedores are

¹⁰⁷ Ibid at 316-17.

¹⁰⁸ Parkinson, J. R., & Sanders, H. E. (1959). Implied Warranty in Florida. U. Fla. L. Rev, 12(3), 241-265 at page 242.

¹⁰⁹ 350 U.S. 124 (1956).

to render services in a workmanlike performance. If the stevedore breach this implied warranty he must indemnify the ship owner for the 'reasonable amount paid to a third party, including reimbursement of fees and expenses incurred in defending the third party's claim'¹¹⁰. The Ryan doctrine was tested in the *Great American* where insurers instituted a claim for the loss suffered by the ship owners as a result of the sunken ship for which BV warranted and failed to inspect and survey the vessel in a workmanlike service. The court held that

'... imposing the Ryan duty on a classification society would ... work an unsound and unfair dilution of the nondelegable duty of ship owner or operator to furnish a seaworthy vessel'.¹¹¹

The decision in the *Great American* case was confirmed in the latter cases of *Sundance* and *Cargill Inc.* In *Sundance Cruises* the claim for maritime warranty was rejected on the basis that classification societies do not undertake to be liable for the unseaworthiness of a vessel¹¹² as the ship owner cannot delegate such a duty.

5.1.5 Greek and Belgian Civil Codes

Under certain codes of civil law jurisdictions classification societies may be held liable for negligent misrepresentation for failure to observe the duty of care and protection.¹¹³ In the Greek decision delivered by Multimember Tribunal of First Instance of Athens 8909 of 1985 it was stated in dictum that classification societies should be held liable in

¹¹⁰ Gorman, F. J. (1978-1979). Ryan Indemnity in Maritime Property Damage Cases: What of Proportionate Fault. U. Balt. L. Rev., 42-69 at p.42.

¹¹¹ *Great American* case at 1015.

¹¹² *Sundance Cruises* at 384-85.

¹¹³ See Anthony M. Antapassis, Liability of Classification Societies, Electronic Journal of Comparative Law, (December 2007), vol. 11.3 p. 34.

tort in favour of third parties who suffered damage despite the fact that the survey was conducted under a contract. This decision is in line with the general attitude of the Greek legal system and article 914 Of the Greek Civil Code. Article 914 read with 281, 8 and 9 as well as articles 2 and 12 of the Presidential Decree 482/1980 deems a conduct of a person (classification society included) unlawful if such conduct (or omission) is in breach of a duty of care and protection. The duty of care and protection must be exercised by a classification society when surveying a vessel so as to ascertain whether it complies with the conditions contained in safety certificates. Should it found that the condition of the vessel no longer correspond with certificates, classification society must revoke that certificate. In order to ensure that classification societies adhere to their rules and standards when surveying vessels, the European Union (EU) in terms of Regulation (EC) No 391/2009 and Directive 2009/15/EC (as amended after *Erika* disaster) entrusted European Maritime Safety Agency (EMSA) with powers to assess classification societies recognized by EU¹¹⁴. The assessment includes but not limited to the visits to ships. If EMSA finds that a classification society has failed to adhere to its rules and standards, article 12 of the Greek Civil Code confers authority to the Greek maritime administration to revoke authority granted to such a classification society.

Under the Belgian law a third party claimant may bring action in tort against a classification society. Liability of classification societies for torts is governed by articles 1382 and 1383 of the Belgian Civil Code (BCC). Article 1382 provides that '[a]ny act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it'. Article 1383 on the other hand provides that '[e]veryone is liable for the damage he causes not only by his intentional act, but also by his negligent

¹¹⁴ Classification societies recognised by EU are so far 10, namely American Bureau of Shipping (ABS), Bureau Veritas (BV), DNV GL AS, Korean Register of Shipping (KR), Lloyd's Register of Shipping (LR), Nippon Kaiji Kyokai (NK), Polish Register of Shipping (PRS), Registro Italiano Navale. (RINA) and Russian Maritime Register of Shipping (RS). <http://www.emsa.europa.eu/implementation-tasks/visits-and-inspections/assessment-of-classification-societies.html>.

conduct or by his imprudence'. The words 'man' and 'everyone' include classification societies. In principle, in order to succeed in a claim for damages against a classification society under BCC, claimant must prove traditional elements of tort namely, fault, harm suffered and the causal link between the fault and the harm suffered. It is correctly assumed that fault may take a form of breach of a general duty of care which involves negligent survey or a breach of statutory rule¹¹⁵. It was also said that the criterion for determining the extent of the general duty of care is the *bonus pater familias*¹¹⁶ in terms whereof a classification society is required to conduct a survey, inspection or issuing of certificates in manner an ordinary classification society of its kind perform such activities¹¹⁷.

The position of Belgian courts with regard to liability of classification societies may be seen through some few cases. In the case commonly known as *The Rukie*¹¹⁸ classification society, Unitas faced a claim for tort of gross negligence in surveying the vessel. It was alleged that classification certificate which Unitas issued should not have been issued under circumstances where there were damage and rust to the bulkhead. It was argued that such defects contributed to the sinking of the ship in Dendermonde, Belgium. The claim was based on the gross negligence on the part of Unitas. The court held that classification certificate attests to the seaworthiness of the vessel only at the time when it is issued. The court reasoned that duty of providing a seaworthy ship by the

¹¹⁵ See De Bruyne, J. (2014). Liability of Classification Societies: Cases, Challenges and Future Perspective. *J. Mar. L. & Com.*, 181-232 at p. 194.

¹¹⁶ See South African case of *Herschel v Mrupe* 1954 (3) SA 464 (A) 490 where Judge van der Heever remarked that the concept of *bonus paterfamilias* is not that of a timorous fainthearted always in trepidation lest he or others would suffer some injury. On the contrary he ventures out into the world, engages in affairs and takes reasonable chances. He takes reasonable precaution to protect his person and property and expects others to do likewise.

¹¹⁷ De Bruyne J, (204) at page 194.

¹¹⁸ *The Rukie*, Court of First Instance Dendermonde, January 11, 1973, R.H.A. 1973, 127.

owner does not depend on mere possession of classification certificate. On those ground the claim against Unitas was dismissed.¹¹⁹

Another case is the case known as Paula¹²⁰ involves a claim by the cargo owners and ship owner for indemnity against classification societies, Unitas and Nautillas. However, the claims against Unitas were dismissed as classification certificate issued by it had already been expired at the time when the damage (sinking of the ship and loss of the cargo) occurred. Furthermore, ship owner did not follow recommendations made by Unitas that maintenance service should be carried out on Paula. Ship owners opted for the transfer of the vessel Paula to another classification society, Nautillas and the latter issued classification certificate that was to be valid between 11 February 1982 and 15 April 1982. On appeal, cargo owners alleged that the vessel was in an unseaworthy condition and advanced that Nautillas was negligent in issuing classification certificate and as a result the cargo was lost. Nautillas argued that the cause of damage is attributed to the loading of the coal by a company known as Societes Generale des Minerais (SGM) which attended to the transshipping of the coal. Nautillas also relied on contractual exemption clause in the contract. The exemption clause was rejected on the basis that it renders nugatory the obligations that the classification society owe under the contract and that such clause is binding as between Nautillas and the ship owner but not binding against third parties. The court looked at the facts and circumstances of the case and concluded that Nautillas issued a classification certificate when the vessel was in an unseaworthy condition and allowed Paula to engage in commercial activities notwithstanding. It was thus held to be in breach of a general duty of care. Both Nautillas and ship owners were held jointly and severally. In the case of Spero¹²¹ Unitas

¹¹⁹ De Bruyne J, (2014) at page 194.

¹²⁰ The Paula, Court of Appeal Antwerp, May 10, 1994, R.H.A. 1995, 301-331.

¹²¹ The Spero, Court of Appeal Antwerp, February 14, 1995, R.H.A. 1995, 321-331.

faced yet another claim for breach of a duty of care for issuing a classification certificate despite that the input water pipe was heavily corroded. The faulty water pipe contributed to the sinking of the vessel. The court held that even though classification certificate is not proof of the vessel's seaworthiness, classification societies should not conduct survey in negligent manner.

In the *Dune*¹²² case the claimant ship owner purchased a vessel Dune in April 7, 1998 and implicit in the contract was that the vessel would be sold in a seaworthy condition. This was confirmed on the same date, upon periodic survey, by a classification certificate that was valid until April 7, 2003 and issued by Unitas. Later on it was discovered that the planking and the bilge planks were damaged. The ship owner engaged services of another classification society, namely Euroclass to survey the ship. Euroclass surveyed the vessel and compiled a report which revealed that the Dune was unseaworthy even when Unitas issued a periodic classification certificate in April 7, 1998 and immediate repairs were recommended. A claim was thereafter instituted against Unita (which was by now known as "BV") for damages in respect of repairs. The court held that the classification certificate attests to the seaworthiness of a ship at the 'moment' the survey is carried out. It was found that Unitas issued classification certificate negligently when the vessel was unseaworthy. It was held that Unitas failed to observe due diligence when it conducted the periodic survey. It was further held that Unitas did not apply reasonable effort when surveying the Dune. The claim was rejected however on the basis that "Unitas' contractual default was not the direct and proximate cause for the harm by the owners"¹²³. The Belgian Court of Appeal however conceded that Unitas' fault contributed to the pecuniary loss suffered by the plaintiff and as such

¹²² *The Dune*, Commercial Court Antwerp, September 20, 2006, A/02/04109 (unpublished).

¹²³ *Ibid* note 102 at 202.

ordered the former to pay *ex aequo et bono*¹²⁴ €5.000.

In nutshell, it is clear therefore that the Belgian courts determine the liability of classification societies in terms of the Belgian Civil Code and that in so doing they apply traditional elements of tort. It is also clear that the element of fault is based on the criteria of *bonus pater familias* which requires adherence to the standard conduct by classification societies in general¹²⁵. Belgian cases demonstrate that in determining liability of classification societies for surveying a vessel, the first step in the enquiry is to determine whether a vessel was seaworthy at the moment the survey was carried out¹²⁶. If it was seaworthy, then enquiry stops there because the duty is borne by the ship owner and a classification society. However, if it is found that the vessel was not seaworthy at that moment, the court will proceed to the second step namely, whether the classification society was at fault. That is to say that whether the classification society failed to observe due diligence when it conducted the survey¹²⁷ or was it in breach of general duty of care when issuing the certificate¹²⁸ or was it negligent in conducting the survey¹²⁹. The third step will be to determine whether the failure to observe due diligence or breach of duty of care was the direct and proximate cause of the harm suffered by the

¹²⁴ Ibid note 108 at 18–29 (unpublished). ‘The *ex aequo et bono* is a Latin term which means what is just and fair or according to equity and good conscience. Something to be decided *ex aequo et bono* is something that is to be decided by principles of what is fair and just. A decision-maker who is authorized to decide *ex aequo et bono* is not bound by legal rules but may take account of what is just and fair.’ <http://definitions.uslegal.com/e/ex-aequo-et-bono/>

¹²⁵ This is where the efforts by the IACS become more relevant as they are aimed at achieving uniform rules and standards for ship survey and classifying.

¹²⁶ *The Dune* case and *the Spero* case.

¹²⁷ *The Dune* case.

¹²⁸ *The Paula* case.

¹²⁹ *The Spero* case.

claimant¹³⁰. It is clear that judicial standards for determining liability of classification societies under Belgian law are clear-cut and provide better predictability in the law of torts.

¹³⁰ *The Dune* case..

Chapter 6

Potential liability for non-compliance with the ISPS Code

There is potential liability against ship owners, charterers, administrations, and ultimately RSO's for failure to comply with the requirements of the ISPS Code. The basis for liability against the ship owner or charterer will be a failure to provide a seaworthy ship. Attention is paid to two instances for liability namely, a claim by a charterer against ship owner and a claim by cargo interests against ship owner. In both instances a claimant may proceed against the classification society for the balance or jointly and severally with the ship owner. The basis for liability against the ship owner or charterer will generally be based on non-compliance with the requirements of the ISPS Code, that is to say failure to provide a seaworthy ship.

Traditionally, seaworthiness of the ship relates to the physical condition of the vessel but the need to protect property and life at sea as well as marine environment caused extension of this definition to cover non-technical side of the vessel. It is a settled law now that non-compliance by a vessel with the requirements of a convention renders a ship unseaworthy. This position was confirmed as early as 1839 in the case of *Dixon v. Saddler*¹³¹ where the court stated that

‘[I]t is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it meant she shall be in a fit state as to repairs, equipment, crew and in all respects to encounter the ordinary perils of the voyage insured, at the time of sailing upon it’.

Whether the words ‘in all respect’ in the above quote should include non-compliance with the requirements of a convention should not be a problem as in the latter case

¹³¹ (1839) 5 M&W 405 aff (1841) 8 M&W 895.

known as '*The Madeleine*', the court in relation to the issuing of De-Ratting Exemption Certificate stated that

'There was here an express warranty of seaworthiness and unless the ship was timeously delivered in a seaworthy condition, including the necessary certificate from port health authority the charterer had the right to cancel.'¹³²

Later in 1985 Kerr LJ in the *Alfred C Toepfer Schiffahrtsgesellschaft mbh v. Tossa Marine Co Ltd (The Derby)*¹³³ reasoned that

'The second respect in which the scope of [an express seaworthiness clause] has been held to go beyond the physical state of the vessel is that the vessel must carry certain kinds of documents which bear upon her seaworthiness or fitness to perform the service for which the charter provides. Navigational charts which are necessary for the voyages upon which the vessel may be ordered from time to time are an obvious illustration. For present purposes, however, we are concerned with certificates bearing upon the seaworthiness of the vessel. The nature of such certificates may vary according to the requirements of the law of the vessel's flag or the laws or regulations in force in the countries to which the vessel may be ordered, or which may lawfully be required by the authorities exercising administrative or other functions in the vessel's ports of call pursuant to the laws there in force. Documents falling within this category, which have been considered in the authorities, are certificates concerning the satisfactory state of the vessel which is in some respect related to her physical condition, and accordingly to her seaworthiness. Their purpose is to provide documentary evidence for the authorities at

¹³² *Cheikh Boutros Selim El-Khoury and Others v. Ceylon Shipping Lines Ltd ("The Madeleine")* [1967] 2 Lloyd's Rep 224 at p. 241. See also *Kopitoff v. Wilson* (1876) 1 QBD 377, 380, per Field J. where the learned judge in defining what seaworthy vessel means stated that such vessel must be 'fit to meet and undergo the perils of the sea and other incidental risks to which of necessity she must be exposed in the course of the voyage'. See also Soyer, B. (2001). *Warranties in marine insurance*. London: Cavendish on pages 73-74 in which a learned author he considered that failure to carry on board a ship certain certificates required in UK law renders a ship unseaworthy.

¹³³ [1985] 2 Lloyd's Rep 325 at 331.

the vessel's ports of call on matters which would otherwise require some physical inspection of the vessel, and possibly remedial measures—such as fumigation—before the vessel will be accepted as seaworthy in the relevant respect. The nature of description of such certificates, which may accordingly be required to be carried on board to render the vessel seaworthy, must depend on the circumstances and would no doubt raise issues of fact in individual cases.'

In the *Athenian Tankers Management SA v. Pyrena Shipping (The Arianna)*¹³⁴ the court defined what an unseaworthy vessel is in the following terms:

'... in the absence of authority, I can well understand that it is an inevitable presumption of fact that a vessel is unseaworthy if there is something about it which endangers the safety of the vessel or its cargo or which might cause significant damage to its cargo or which renders it legally or practically impossible for the vessel to go to sea or to load or unload its cargo, although even in those circumstances the question of whether the vessel has something about it, such as to have that effect, must be a question of fact.'¹³⁵

Thus, non-compliance with the requirements of an international instrument¹³⁶ or convention adopted by a flag state renders a ship unseaworthy. The same must be said for non-compliance with the ISPS Code.

Unseaworthiness of a ship may result into dire consequences for the participants in maritime trade, thus giving rise to commercial disputes. Under voyage charter party a

¹³⁴ . [1987] 2 Lloyd's Rep 376.

¹³⁵ Ibid at 389.

¹³⁶ The ship owners in *The Madeleine* case failed to comply with the De-Ratting Exemption Certificate issued in terms of the International Health Regulations (IHR) under the auspices of the World Health Organisation (WHO). It is said that '(IHR) are the means by which WHO aims to prevent, protect against, control, and provide a public health response to, the international spread of disease in ways that are commensurate with and restricted to the public health risks, and which avoid unnecessary interference with international traffic and trade. They form an international legal instrument that is binding on all states that are members of WHO.' <http://www.bipsolutions.com/docstore/pdf/15366.pdf>.

ship owner may face claims for liability for delays or detention arising either due to absence of invalid ISSC. The result will be that such vessel may be delayed for inspection¹³⁷. The charterer may incur costs due to delay or detention and the ship owner should be liable for failing to provide a seaworthy ship. The charterer may institute a tortious claim against the both the ship owner and an RSO that issued invalid ISSC negligently or in breach of a duty of care for the increased cost which, through delay or detention, proximately caused loss or extra charges.

A claim against ship owners and classification society responsible for issuing ISSC may also be brought by cargo interests for loss of cargo and lost profits¹³⁸ due detention or delay of the vessel for non-compliance with ISPS Code for carrying on board the vessel a valid ISSC. For such a detention or delay might cause significant damage to the cargo or makes it practically impossible to load or unload the cargo¹³⁹. However, under such circumstances cargo owners will seek to claim indemnity from P&I insurance cover. Where the insurer covers the cost or damages caused by such detention or delay, the insurer will accordingly be subrogated to the rights and obligations of the assured cargo owners. The P&I insurer will then institute a claim against the classification society which issued the invalid ISSC negligently or in breach of duty of care.

P&I insurers can indemnify the assured cargo owner only if the ship was seaworthy for

¹³⁷ Strickland, C. Y. (2004). *International Ship and Port Facility Security (ISPS) Code: Potential Commercial Disputes*. Canadian Maritime Law Journal, 2, 1-28 at page 11 where the learned author discusses the effect of delay and/or detention to the issuing of a valid Notice of Readiness. See also Fakhry, A. (2012). *Illegality of Maritime Contracts Breaching SOLAS/ISPS Code Maritime Security Legislation*. European Transport Law where he discusses breach of contractual obligations under the ISPS Code where he cited an example of a situation where a ship is denied entry into a port for non-compliance.

¹³⁸ Ibid. The learned author argues correctly that the liability of the ship owner is based on his failure to furnish a seaworthy ship.

¹³⁹ *The Arianna* supra. It must be noted that claims by cargo owners against ship owners are limited under the Hague-Visby Rules.

compliance with the ISPS Code at the commencement of the voyage. For example, under section 37 of the Canadian Marine Insurance Act, 1993 there is an implied warranty in every voyage policy that, at the commencement of the voyage, the ship is seaworthy for the purpose of the particular marine adventure insured. This position is also echoed by the Swedish P&I Club in more clear terms. Rule 10, section 1(2) of the Swedish Club provides that the Member must comply with the flag state's or other competent authorities' requirements relating to the entered ship's design, construction, adaption, fitment, condition, equipment, manning, safe operation, management and maritime security. It further provides that valid certificates covering such requirements, including ISM Code certificates, must at all times be maintained. If the Member fails to fulfil his obligations under the section, the Association may reject to compensate liabilities, costs or expenses caused by such failure. Thus, if the ship is found to be unseaworthy insurers may refuse to indemnify the assured the Member. The warranty of seaworthiness exist at commencement of a voyage and if it is established on behalf of the insurers that the assured was privy to such unseaworthiness then the assured will lose indemnity¹⁴⁰

In order to protect both insurers and the assureds, the Joint Cargo Committee developed clauses to cover compliance with the ISPS Code. Under the Cargo ISPS Forwarding (CIF) Clause the assured is required to pay for the additional premium covering extra charges properly and reasonably incurred in unloading, storing and forwarding of the cargo following release of the cargo from a vessel arrested or detained for non-compliance with the ISPS Code. Furthermore, in terms of Cargo ISPS Endorsement (CIE) Clause the assured cannot be indemnified if he knowingly ship cargo on a vessel

¹⁴⁰ Institute Cargo Clauses have similar provisions on clause 5.1. See also Hodges, S., & Carlile, R. (1999). *Cases and materials on marine insurance law*. London: Cavendish Pub on page 312 in which the author considered loss of insurance under Institute Cargo Clause 5.1 under voyage policies.

carrying invalid ISSC.¹⁴¹

In light of the above, the cargo interests may join the classification society with the ship owner in action for damages against the ship owner. If judgment is made against the ship owner then the insurer will indemnify the ship owner for the costs or damages provided that the ship was seaworthy at the beginning of the voyage. Alternatively, where the ship owner cannot claim indemnity from the insurer for non-compliance with the ISPS Code and the classification society was not joined in the suit by the cargo interests, the former may claim indemnity from the classification society.

¹⁴¹ See the Joint Cargo Committee, Suite 1085, Lloyd's, One Lime Street, EC3M 7DQ website accessed at http://www.ifinsurance.com/web/industrial/sitecollectiondocuments/insurance%20solutions/cargo/cargo%20conditions/cargo_isps_forwarding_charges_clause.pdf where it was provided in relation to CIE clause that '[i]n no case shall this insurance cover loss, damage or expense where the subject matter insured is carried by a vessel that does not hold a valid International Ship Security Certificate as required under the International Ship and Port Facility Security (ISPS) Code when, at the time of loading of the subject matter insured on board the vessel, the Assured were aware, or in the ordinary course of business should have been aware that such vessel was not certified in accordance with the ISPS Code as required under the SOLAS Convention 1974 as amended. This exclusion shall not apply where this insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject matter insured in good faith under a binding contract.' With respect to the CIF clause it was provided that '[i]n consideration of an additional premium to be agreed, this insurance is extended to reimburse the Assured, up to the limit of the sum insured for the voyage, for any extra charges properly and reasonably incurred in unloading, storing and forwarding the subject-matter to the destination to which it is insured hereunder following release of cargo from a vessel arrested or detained at or diverted to any other port or place (other than the intended port of destination) where the voyage is terminated due to such vessel not being certified in accordance with the ISPS Code as required under the SOLAS Convention 1974 as amended. This clause, which does not apply to General Average or Salvage or Salvage Charges, is subject to all other terms conditions and exclusions contained in the policy and to JCC Cargo ISPS Endorsement (JC 2004/050).'

Chapter 7

Argument for liability of RSO's

Having looked at the ISPS Code and the potential breach of ISPS Code requirements by way of non-compliance with the Code, it is at this point where this paper seeks to test breach of the ISPS Code using cases that were surveyed above. It has already been stated that one of the potential basis for liability may be an instance where ship owners fail to provide a seaworthy vessel by allowing the vessel to trade without valid ISSC. This may result into delays occasioned by inspection or detention by the coastal state in its exercise of port state control. The charterer or cargo owner may suffer damage as a result, thereby entitled to claim damages against the ship owner and the RSO severally and jointly. Liability against classification societies will be dealt with in accordance with national law of the forum. If, for example, a claim is brought before the US court then US law should apply.

Under US law an action for non-compliance with the ISPS Code may be made on the basis of negligent misrepresentation. To succeed under this head of claim, claimant has to prove the requirements provided for in the Restatement (Second) of Torts. However, the requirements enumerated in the Act are not applied rigidly but on a case by case basis. The Act was applied in *Somarelf* case and the court adjusted the test to facts of the case. Where a claim for negligent misrepresentation on the basis that the RSO has issued invalid ISSC the claimant must prove the following under the requirements of tort of negligent misrepresentation as applied in *Somarelf*:

- (a) that the classification society in the course of its profession, supplied false information for the charterer's or ship owner's guidance in business transaction;
- (b) that the classification society failed to exercise reasonable care in the gathering of the information;

- (c) that the claimant relied on the false information in a transaction that the classification society knew the information would influence claimant's decision;
and
- (d) that the claimant thereby suffered loss.

On the strength of *Somarelf* a classification society is not required to prove specific knowledge that the claimant would rely on the veracity of the information contained in the ISSC. The plaintiff is required to prove general knowledge. Thus, if *Somarelf* is used as guidance to determine liability for negligent misrepresentation for issuing invalid ISSC, claimant may succeed. It is doubtful whether on the strength of the *Sundance* the court will still hold classification society liable for issuing invalid ISSC. The reasoning of the court will probably be that the purpose of the ISSC is to procure insurance, operate the vessel and the information in it serves only as guidance that security measures under ISPS Code have been complied with¹⁴². It is true that ISSC is required to procure insurance cover under CIE and CIF clauses. It is also true that ISSC should be procured for the purpose of operating the vessel because a vessel can be denied access to an ISPS compliant port without ISSC. What will the US court likely to hold under this circumstance? One may surmise that each case must be dealt with on its merits as it was stated in *Somarelf*. This conclusion is not without difficulties, for the court in *Sundance* distinguished *Somarelf* on the basis that classification certificate is issued for operational purposes and the tonnage certificate is issued for regulatory purposes. The ISSC confirms that the ship complies with security measures imposed by the ISPS Code and each ship is required by her flag state to carry it on board at all times. Therefore, ISSC is issued both for operational purposes and for regulatory purposes. Under this circumstance what will the US courts likely to hold?

The last hurdle would be the requirement that classification society must have

¹⁴² *Sundance* supra at 377

knowledge that claimant will rely on the veracity of the information contained in the ISSC in order for the latter to succeed with a claim for negligent misrepresentation. On the strength of *Somarelf* the court will require not proof of specific knowledge but general knowledge. This position was however changed in the latter cases where the courts required proof that there is a relationship approaching privity between classification society and the third party claimant¹⁴³. If the court follows *Otto Candice* then the claimant must prove that the classification society actually knew that the former would rely on the misinformation contained in the ISSC. Thus the claimant cannot argue that classification society foresaw that the former would rely on the certificate¹⁴⁴. Apart from the test for liability based on the Restatement (Second) of Torts, it appears that US courts will try by all means necessary to limit liability of classification society for non-compliance as it holds the sacred view that the duty to provide a seaworthy ship is not delegable to classification society¹⁴⁵.

Under UK law the position there are no prospects of success for the claimant third party because the courts will require the claimant to prove that there was direct contact between himself and classification society whereby the latter undertakes to provide the former with information contained in ISSC and the former relies on that information. As for ship owner claimant there is some prospects of success as the ship owner enters into a contract with the classification society for issuing ISSC.

Liability for non-compliance with ISPS Code may be brought for failure to observe due diligence. This may be a situation where a classification society fails to exercise due diligence in appointing a surveyor or sub-contractor with the result that the ISSC becomes invalid. In common law jurisdictions and the US courts such claim may be

¹⁴³ *Carbotrade SPA* at page 747; It was confirmed in *Cargil Inc.*

¹⁴⁴ *Otto Candice* at page 535-36.

¹⁴⁵ *Ibid* at page 535.

made under breach of duty of care. However, under Turkish CoD classification society can be found liable for failure to exercise due diligence in appointing a surveyor or a sub-contractor. The claimant can proceed against the classification society that gave mandate to a surveyor or a sub-contractor to issue ISSC as the latter is required to exercise due diligence when choosing an agent.¹⁴⁶

Classification societies may also be held for breach of a duty of care for issuing invalid ISSC. This might happen where classification society fails to discover that security level assigned in the SSP is incorrect. If the classification society issues ISSC despite the defects in the ISSC, that will be regarded as a breach of duty of care. Classification society when issuing ISSC acts on behalf of the flag state administration thereby entitled to sovereign immunity. However, where classification society acted negligently or in breach of a duty of care it cannot invoke sovereign immunity¹⁴⁷. Under the US law classification societies has a duty of care, inter alia, to detect all perceptible defects of the vessel encountered during, for the purpose of ISPS Code, verification and issuing of the ISSC and notify the owner and/or charterer thereof. It was suggested that as in aviation law shipping companies are required under Maritime Transportation Security Act of 2002 (MTSA) to implement ‘reasonable security measure and that the failure to follow it automatically demonstrate a breach of duty’¹⁴⁸. Should the surveyor fails to notify the owner or charterer of the defects and the latter suffers loss proximately caused

¹⁴⁶ *Cerrahogullari Umumi Nakliyat Vapurculuk & Ticaret TAS v Lloyd’s Register of Shipping supra*.

¹⁴⁷ See Honka, H supra at note 29 where the US court found that it is a strange policy to deny court opportunity to determine liability of a tortfeasor on the basis of sovereign immunity.

¹⁴⁸ See Cox, S. L. (2013). The Advent and Future of International Port Security Law. *National Security Law Journal*, 1(1), 77-123 at page 105 where he briefly discussed potential liability of shipping companies with reference to the aviation case of *In re Sept. 11 Litig.*, 280 F. Supp. 2d, 279, 287 (S.D.N.Y. 2003). Note that the ISPS Code was implemented in the US law by Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2067

(2002).

by the failure to notify, then the ship owner has a tortious claim for breach of duty of care. In most of the cases¹⁴⁹ that came before US courts claims for breach of duty of care failed on causation. In *Amoco Cadiz* case the plaintiff sought indemnity and contribution from ABS under section 324A of the Restatement (Second) of Torts for failure to adhere to a duty of care to approve the design and ensure proper construction of the vessel which plaintiffs relied on. The court rejected the claim on the basis that Amoco failed to prove causal link between reliance on ABS' undertaking and the loss suffered. It is likely that claimant claiming for damages for breach of duty of care under ISPS Code may face similar difficulties as US courts will require it to prove that it relied on the RSO's undertaking¹⁵⁰. ISPS Code does not require RSO to make an undertaking that it will exercise a duty of care in issuing ISSC. As was already been mentioned under negligent misrepresentation that liability of an RSO towards third is restricted to persons an RSO is privy to, the same applies here. Where a third party cargo owner claims damages from an RSO for loss of or damage to the cargo proximately caused by detention of the ship and the former advances on the basis that the latter has breached a duty of care in issuing ISSC certificate that is invalid, it is unlikely that such claim can succeed. In *Continental Insurance Co. v. Daewoo Shipbuilding and Heavy Machinery Co.* US district court refused to extend liability to a third party insurer holding that ABS' duty of care is delimited by its contract with the shipyard. Even where RSO had admitted that it owed a duty of care to notify a claimant, US courts had rejected the claim on causation.¹⁵¹ Apart from causation, US courts are likely to reject claims for issuing invalid ISSC on the usual ground that RSO's are not liable as insurers of the

¹⁴⁹ See *Amoco Cadiz* supra where the plaintiffs' claim was rejected on the point of causation.

¹⁵⁰ See *Gulf Tampa Drydock Co. v. Germanischer Lloyd* where the court rejected the claim for breach of a duty of care on causation.

¹⁵¹ See Machale A Miller above where he analysed *Sundance* case. See also *Prestige* case where Spain claim was rejected for failure to prove that ABS recklessly breached a duty of care.

vessels' seaworthiness to third party cargo owners.¹⁵²

Under UK law courts are reluctant to recognize that classification societies owe a duty of care towards third parties claimants¹⁵³. UK courts hold the view that recognition of such duty can happen only if it is fair, just and reasonable to do so towards the classification societies. To that end, English court in *Nicholas H* have developed a test in terms of which factors that favour recognition of a duty of care are balanced against those that militate against recognition¹⁵⁴. In *Nicholas H* one of the decisive factors which were found to be against recognition was the fact that cargo owners and ship owners are protected under the Hague-Visby Rules whereas the RSO are not. Ship owners' liability is limited under the Rules but classification societies' liability is not limited. Under the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea usually called Rotterdam Rules maritime performing party is entitled to limit its liability. However, RSO's cannot be a maritime performing party because ship owner (carrier) cannot delegate its obligation of providing a seaworthy vessel¹⁵⁵. So, coming into force of the Rotterdam Rules will not change the status quo of the UK law in this regard and the cargo owner claiming for loss caused by non-compliance with the ISPS Code will face the same reluctance of the UK courts to fix liability to an RSO for breach of a duty of care.

Service contractors such as classification societies should potentially be held liable for breach of implied warranty that they must render their services in a workmanlike

¹⁵² See *Cargill Inc.* at page 50.

¹⁵³ See the case of *Nicholas* above.

¹⁵⁴ *Ibid* at 313.

¹⁵⁵ Maritime Performing Party is defined as a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge.

performance¹⁵⁶. Where a ship owner is held liable for damages caused by issuing invalid ISSC, such ship owner will be indemnified under P&I policy. The P&I club will then be subrogated to the ship owner's rights and seek indemnity from the RSO that issued invalid ISSC. Under the US law claimant insurer claim will be governed by the Ryan doctrine which imposes unto service providers (such as classification societies) a duty to render services in a workmanlike performance. However, a claimant insurer cannot succeed with the claim of indemnity against the classification society as the Ryan doctrine was rejected in the *Great American* case on the basis that 'imposing such a duty would work an unsound and unfair dilution of the non-delegable duty of a ship owner or operator to furnish a seaworthy vessel'¹⁵⁷. It is for that reason why some jurisdictions enacted similar legislation to protect insurers from this eventuality. It is advisable that ship owners must include clauses such as CIE and CIF clauses to protect themselves from losing indemnity under these circumstances for failure to furnish a seaworthy vessel under ISPS Code.

So far it is difficult to see any prospect for success for the claimant whose claim for damages or compensation is based on non-compliance with the ISPS Code. However, under the BCC there is a prospect of success for claim against classification societies for non-compliance with the ISPS Code. This argument can be demonstrated using an example of a cargo owner claiming damages against ship owners and/or classification society. It has been argued that ship owners (and ultimately classification societies) may be found liable for non-compliance with the ISPS Code only if non-compliance is so fundamental 'such as relating to the SSP itself or can be traced back to shore based

¹⁵⁶ *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*

¹⁵⁷ *Ibid* at page 1015.

staff¹⁵⁸. In order to succeed with a claim for non-compliance relating to issuing or endorsement of invalid ISSC, the claimant must prove elements of torts under BCC. This may be demonstrated on a step by step basis –

1st step: Whether the vessel was seaworthy at the moment the survey was carried out. In case of non-compliance with the ISPS Code claimant has to prove whether ISSC was valid when it was approved or endorsed by reason of defects in the SSP. If it is found that it was invalid, then the vessel was unseaworthy upon issuing of the ISSC.

2nd step: Whether an RSO was at fault either by way of failure to observe due diligence or was in breach of a general duty of care or was negligent, when issuing or endorsing the ISSC.

3rd step: Whether any such fault was a direct and proximate cause of the harm suffered.

For cargo owners, BCC is in line with the protection they may get under the Hague-Visby Rules. Hague-Visby Rules imposes a duty on a carrier to provide a seaworthy ship before and at the beginning of the voyage¹⁵⁹ failing which liability arises: Provided that such unseaworthiness was caused by want of due diligence on the part of the carrier¹⁶⁰, provided further that where the carrier claims exemption under article IV he shall bear the burden of proof. It follows that under such circumstances cargo interests may succeed for claims against a classification society under BCC.

¹⁵⁸ Strickland, C. Y. (2004) made this argument with reference to the requirements of Certification under STCW. See also Moore C, "Maritime Security Issues –Cost of Compliance and Allocation of Liabilities", ICMA XV (February 14, 2004), at page 19, who holds the same view.

¹⁵⁹ Hague-Visby Rules, article III.

¹⁶⁰ Hague-Visby Rules, article IV.

Chapter 8

Conclusion

It has been established that the role of classification societies is to ensure safety of life and property at sea, and protection of marine environment in accordance with international conventions.¹⁶¹ Due to security concerns pursuant September 11 incident, SOLAS was amended with chapter XI-2 and the annexure came to be known as the ISPS Code. Under ISPS Code flag states administrations may authorize RSO's (classification societies to carry out SSA's, to develop SSP's, to conduct verification and to issue and endorse ISSC. RSO must perform these duties with care, protection, due diligence and without negligence. If a classification society is found to have breached those duties imposed by law, contractual or tortious claims may arise. However, with respect to the issuing of ISSC, classification societies may be exonerated from liability under the doctrine of sovereign immunity because they approve or endorse ISSC as a government appointee or agent. Sovereign immunity may potentially be lost if a classification society issues or endorses ISSC negligently, in breach of duty of care or without observing due diligence¹⁶². In the absence of sovereign immunity, classification societies may be held liable in contract or tort.

Judicial standards for imposing or rejecting liability are usually not uniformly applied internationally. Under the US law liability of classification societies for negligent misrepresentation is governed by Restatement (Second) of Torts and the criteria contained therein are applied on a case by case basis. They may however be summarised

¹⁶¹ See *Nicholas H* at page 313

¹⁶² It is no surprise why American authors do not support this doctrine. For a critique of sovereign immunity see Chemerinsky, E. (2001). *Against Sovereign Immunity*. *Stanford Law Review*, 53(1201), 2101-1224.

as follows: A general knowledge that a third party would rely on the tonnage certificate; the plaintiff cannot rely on classification certificate that the vessel is soundly constructed; a relationship approaching privity between the defendant and a third party and class certificates are not issued with the purpose of guaranteeing safety; and classification societies are not liable to exhaustive numbers of persons for negligent misrepresentation but 'limited to those persons whom the engagement is intended to benefit and that classification societies must actually know that third persons would rely on the misinformation, that mere foreseeability is not sufficient¹⁶³. Under UK law liability for negligent representation arises where there was a direct contact between the plaintiff and the classification society whereby the latter undertakes to provide the former with information and the former relies on that information which results into damage¹⁶⁴. Under Turkish law classification societies have been held liable for failure to observe due diligence in choosing the sub-contractor¹⁶⁵.

Courts in the US have refused to hold classification societies liable for breach of duty of care. Duty of care entails two duties namely, the duty to survey and classify vessels in accordance with its own rules and standards, and the duty to use care and warn hazards¹⁶⁶. Claims under this cause of action are governed by section 324A of the Restatement (Second) of Torts which encodes traditional elements of torts, namely fault, harm and causation. Courts in the US have refused claims because in some cases plaintiffs had failed to prove causation¹⁶⁷. However where causation was proved courts

¹⁶³ See page 27 of this text.

¹⁶⁴ See page 28 of this text.

¹⁶⁵ *Cerrahogullari Umumi Nakliyat Vapurculuk & Ticaret TAS v Lloyd's Register of Shipping Istanbul Denizcilik Ihtisas Mahkemesi* Case no. 2006/173, verdict no 2008/147.

¹⁶⁶ *Great American Ins. Co.* at page 1010.

¹⁶⁷ See the cases of *Amoco Cadiz*, *Sundance Cruises* and *Prestige* on pages 32-34 in the text.

rejected the claims on the basis of seaworthiness, fees charged and services performed and intent of the parties¹⁶⁸. A claim for liability on the basis of Ryan doctrine was rejected in the US court on the basis that it ‘would work an unsound and unfair dilution of the non-delegable duty of ship owner to furnish a seaworthy vessel¹⁶⁹’. Similar position is held by the UK courts where a duty of care may be held if it is fair, just and reasonable towards classification societies to do so. This criterion is achieved by balancing factors that favour recognition, and those that militate against recognition, of a duty of care. One of the factors which militate against recognition of a duty of care is ‘seaworthiness factor’¹⁷⁰.

There are few jurisdictions where civil codes provide for relatively clear criteria for liability of classification societies. Under Greek Civil Code failure to observe a duty of care and protection gives powers to revoke authority given to a classification society for performing statutory survey and certification. As already stated, in Belgium classification societies under BCC may be held liable for tort and in this regard BCC is in concert with requirements for liability under Hague-Visby Rules especially that which relates to due diligence (seaworthiness)¹⁷¹.

It is clear that non-compliance with the ISPS Code create potential liability against classification.¹⁷² This is so because such non-compliance renders a vessel unseaworthy that may lead to detention or delay. Parties such as cargo owner and charterers may

¹⁶⁸ See the cases of *Great American Ins. Co., Continental Insurance and Cargill Inc.*, on pages 31-34 in the text.

¹⁶⁹ See the cases of *Great American Ins. Co.* at pages 37-38.

¹⁷⁰ See *Nicholas H* on pages 35-37 in the text.

¹⁷¹ See text on pages 38-43.

¹⁷² See Strickland, C. Y. (2004). International Ship and Port Facility Security (ISPS) Code: Potential Commercial Disputes. *Canadian Maritime Law Journal*, 2, at page 8.

suffer financial damage as a result. Under these circumstances, they may institute proceedings against classification societies and ship owners jointly or severally or against a classification society for the balance where ship owner's liability is limited¹⁷³.

It was argued in this paper that classification societies are potentially liable for issuing invalid ISSC. That claims may be brought for negligent misrepresentation, failure to observe due diligence and breach of duty of care. Claims for misrepresentation under US law may however not easily succeed because of the reliance principle and 'seaworthiness factor'. The position under English law would be largely the same. Under Turkish law claims may successfully be brought for failure to observe due diligence when issuing and endorsing ISSC. The defence that an RSO appointed a sub-contractor to approve and endorse is not tenable as the contract of mandate is based on trust¹⁷⁴. Claims for breach of duty of care may potentially arise for issuing invalid ISSC. In the context of US aviation law breach of duty of care may be associated with a duty to implement reasonable security measures. However, generally courts are likely to reject claims for breach of duty of care on the basis of 'seaworthiness factor'. It is recommended that claims against classification societies for non-compliance with ISPS Code must be based on failure to implement reasonable security measures as applied in aviation security law and the fairness¹⁷⁵. The method to be used to determine liability should be the balancing of factors criteria which was applied by the English court in

¹⁷³ See pages 43-49 in the text.

¹⁷⁴ See Ataergin, V. S. (2011). Unseaworthiness and liability under Turkish law. *Shipping & Trade Law*, 11(5), 3-5 where the learned author discussed judge's decision in the case of Istanbul Denizcilik Ihtisas Mahkemesi Case no. 2006/173, verdict no 2008/147 where the judge reasoned that the defendant cannot rely on exemption clause in the contract to avoid liability because such reliance is not tenable under the Turkish Civil Code as the contract of mandate is based on trust.

¹⁷⁵ See De Bruyne, J. (2014). Liability of Classification Societies: Cases, Challenges and Future Perspective. *J. Mar. L. & Com.*, 181-232 at page 231 where concluded that 'shared liability' between classification societies and co-contractors as fair and appropriate system.

Nicholas H case. This method is similar to the one used by American courts. However, higher weight must be given to security concern¹⁷⁶ when balancing relevant factors¹⁷⁷ because maritime security is fundamental to smooth running of commerce. Classification societies should not be seen to be given excessive judicial protection because as service providers they can protect themselves by insurance¹⁷⁸. Otherwise, civil law countries positions should be adopted by common law jurisdictions as they have a degree of predictability instead of granting classification societies what was termed ‘blanket immunity’¹⁷⁹.

¹⁷⁶ See Fakhry, A. (2012). Illegality of Maritime Contracts Breaching SOLAS/ISPS Code Maritime Security Legislation. *European Transport Law*, 47(1), 3-10 at page 3 where he correctly expressed the view that violation of ISPS Code may have dire consequences such as denial of entry into ISPS compliant port.

¹⁷⁷ The achievement of the goal of maritime security should be in addition to those identified by B.D. Daniel supra at note 77, namely ‘promotion of safety in ocean-bound commerce, the responsible compensation of persons who suffer injuries or losses as a result and promotion of unnecessary expense that does not accomplish safety or fund responsible compensation’.

¹⁷⁸ See B.D. Daniel page on page 290-291 where he opined that the service businesses can minimize economic risk by insurance and the insurers in turn adjust the premium accordingly.

¹⁷⁹ Hare, J. (2009). The liability of classification societies. In *Shipping Law and Admiralty Jurisdiction in South Africa* (2nd ed., pp. 335-342) on page 335 where he mentioned he referred to ‘blanket immunity’ when criticizing the statement made by Pratt J in *Sundance* where the learned judge downplayed the role of classification of ensuring safety at sea but assumed that the purpose of a class certificate is only for the purpose of securing insurance cover.

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