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The Contemporary Perception of Classification Societies from a Legal Perspective

B. Obinna Okere Jr

Submitted to the University of Wales, in fulfilment of the requirement for the Degree of Doctor
of Philosophy of Law

Swansea University

Year: 2007

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Summary

The thesis focuses on classification societies in all facets of their relationships with different categories of clients. The particular clients here are the ship-owners and ship-yards with whom they contract in a private capacity; and there are the flag-states, on whose behalf they undertake certification duties, in a public capacity. These contracts have their unique features and at the same time share some similarities. Further, there are the third-parties, mostly comprising cargo-owners, who have resorted to suing class due to the limitation clauses in the contract with the ship-owners. This thesis analyses this position as well.

A library-based research on court decisions and scholarly articles will be conducted for this thesis. There will be Interviews with personnel in the industry and attendance at seminars relating to the subject. The trend of the nature of the relationships with classification societies across different jurisdictions, with emphasis on England and America, will be analysed

The thesis intends to arrive at some conclusion with recommendations on the direction classification societies should take, regarding the current position they find themselves in with all parties, especially third-parties up in arms against them for the alleged notion that they are owed a duty of care in the course of their operations. Resolution by way of enacting a statutory provision to govern their liability or their ability to limit it, with both sets of clients will be analysed as well as the suggestion that has been touted by a couple of maritime States that classification societies should concentrate on a particular role to dispel any notion of a conflict of interest.

DECLARATION

This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

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Preface

Classification Societies have until recently enjoyed a near perfect anonymity, which would give credence to Lord Steyn's comment in the *Nicholas H* that ship-owners have never have never been successfully sued classification societies in the over 150 years of the societies' existence¹. They occupy a unique position of dealing with all spectra of the maritime world both in a private and a public, and this has caused some unrest with parties who feel that there is some conflict of interest.

The classification societies themselves insist that they live on their reputation in assessing vessels according to their rules and regulations. In the course of acting for the ship-owner in a private capacity, they slip on that hat, and when they acting in a public role on behalf of a flag-state, they slip on that hat accordingly.

The atmosphere in which classification societies operate is one in which there is no, at present, statutory law per se governing their liability in their dealings at least in a private capacity. The public contracts entered into with flag-states for whom they perform statutory certification duties in line with the International Maritime Organisation (IMO) regulations and guidelines² have been given further statutory backing by the European Union (EU) Council Directive 94/57, which itself has been updated by the 2001/105 Directive. The earlier Directive had no liability clause, which readily eased the way for the 2001/105 Directive following the *Erika* sinking.

The thesis essentially analyses classification societies operations with clients, both private and public, and looks at the contracts these parties enter into. The public contracts with the flag-states³, which have incorporated the liability clause in the EU Directive, appear to be straightforward. This clause, however, has been incorporated in such a way that the flag-state in a contract with the classification society (referred to in this instance as a recognised organisation) has to be found liable for wilful or gross negligence by a court of law or arbitration, before it has recourse to the classification society that had certified the vessel on the flag-state's behalf.

The practicality of finding a state liable in a duty of care to an individual is not without its peculiarities and this has been commented on by experts⁴ in the industry and this is the currently the subject of a new proposal⁵, which has undergone several readings at the European Parliament, on another Directive to possibly replace EU Directive 2001/105. This is inn line with more rigorous accountability following the *Erika* and *Prestige* accidents.

¹ **Marc Rich & Co and Others v. Bishop Rock Marine Co. Ltd, Bethmarine Co Ltd and Nippon Kaiji Kyokai (Nicholas H)** [1995] 2 LR 299 at 310.

² IMO Assembly resolution A.739(18); Assembly Resolution A.789(19),

³ Please see the Danish Maritime Authority 2005 Agreement in the appendices and which is analysed in chapter of the thesis on contractual relationship between classification societies and their clients.

⁴ Mikelis, Nikos 'Liability of Classification Societies – Does the EU Bite', Seminar of London Shipping Law Centre, December 10, 2003

⁵ Draft EU proposal (COM(2005)0587 – C6 – 0038/2006 – 2005/0237 (COD))

Regarding the contracts with private individuals, Ship-owners and ship-yards, the standard-form contracts appear to reign supreme and these will be analysed in this thesis. These contracts, which may be deemed as being iron-clad by the Classification societies' clients, may have their basis in being so from the fact that unlike other sectors of the maritime industry, they do not have any statutory form of protection limiting their liability to contractual parties or third-parties in tort.⁶

The courts in the cases analysed in this thesis, so far, have followed the refrain that classification societies act in a welfare capacity and this coupled with no legal statutory protection have ironically provided some element of protection to class. With the work currently on going at the European parliament, this thesis contemplates that the same vein should be undertaken regarding the private role of classification societies.⁷

This research is based on case-law, interviews conducted, seminars attended and information available to me by March 30, 2007.

B. Obinna Okere Jr

Cardiff

March 2007

⁶ Note the *Toju Maru* case [1971] 1 LR 341; [1972] AC 242, following which the Limitation of Liability Act for Maritime Claims, 1976 was promulgated after salvors were found liable on a duty of care, in spite of acting in a charitable capacity.

⁷ As at 1997, the Comité Maritime Internationale (CMI) started on the project of proposing a law to govern the private contractual liabilities of classification societies and this is currently in abeyance.

Acknowledgement

Undertaking a PhD research is a long, long, lonely, tortuous journey, as I was reliably informed by my supervisor on my enrolment. This has been made bearable by the support of a loving family, a band of ardent colleagues and friends and a host of university staff ever ready to assist in any endeavour.

The idea for the thesis was a result of a brain-storming session, of which there were many, with my lecturer, Anthony Rogers (now a dear friend) during my masters programme at Cardiff University. The *Erika* sinking, at this time, was a barely a year old and the furore it left in its wake was putting it mildly, topical. We found that while Classification societies seemed to be at the centre of that accident, there was barely any legal research or material on them. I do thank him for the tutorship and encouragement.

I have had the immense pleasure of working on this thesis under the superb supervision of Prof. D. Rhidian Thomas, who jocularly assured me that he would hardly constitute a shoulder to cry on in my darkest moments of the research and nearly throwing in the towel. How wrong he was!!! I found in him a steady source of information and guidance for which I would be always grateful. I am delighted to have had the assistance of Prof. Richard Williams, Dr. Baris Soyer, Dr. Gottard Gauci, and Dr. Theodora Nikaki, who have collectively steered me in the right direction, when I've found myself at the cross-roads.

The thesis has also benefited from the help of certain individuals in the industry, particularly, Jim Harrison, the legal director of Lloyds Register, who graciously invited to their offices for an interview and gave me an insight into the operations of an industry that had hitherto been ephemeral to me. He remained a constant source of the on goings of class especially at the European Parliament (EU). Andrew Kennedy, also of Lloyds Register, has been gracious in providing me with further developments in the very rare case-law on class. They I must also commend the kind assistance of Sun Jing of the International Association of Classification Societies (IACS), who was a steady source of information, especially on the progress of the proposals being initiated by IACS, both at the IMO and at the EU. Thanks also to Gerard Matthews of the London Shipping Law Centre of the University College London (UCL) who always had relevant material or information for my purposes.

I am grateful to Prof. Andrew Tettenborn of the University of Exeter, who graciously accepted an invitation to a colloquium hosted by Swansea University to speak on Classification Societies. He proved an incredible melt-pot on his views regarding class. Thanks also to Prof. Martin Davies of Tulane University, who also came to the colloquium and shared his views particularly on the ongoing *Prestige* case in New York.

To my loving family, parents, Prof & Mrs B Obinna Okere; my siblings, Tata, Nyeski n' Cheki and friends and relatives, too numerous to mention and indeed my God-children for the constant care. I am indeed grateful to Dr. Hakeem Seriki and Neshmet Ohaegbulam for their assistance in the proof-reading and formatting the thesis respectively and to Vivian, thank you.

Finally, I have drawn strength to go this distance, through my faith and the intercession of our Lady to whom this thesis is dedicated.

Introduction

A. Definition of a Classification Society

The definition of a Classification Society will depend on the angle from which it is perceived. This could be from the point of view of a ship-owner, a cargo-owner, a flag-state or an insurance company. The Societies, on their part, obviously hold themselves in the highest esteem, and the Courts appear to uphold this stance going by the decisions given in some of the legal actions brought against the Societies.¹ In this connection, the International Association of Classification Societies (IACS) provides that:

“Classification Societies are organisations that establish and apply technical standards in relation to the design, construction and survey of marine related facilities including ships and offshore structures. These standards are issued by the Classification Society as published rules. A vessel that has been designed and built to the appropriate rules of a society may apply for a Certificate of Classification from that Society. The Society issues this Certificate upon completion of relevant classification surveys.”²

IACS further stipulates that a Classification Society is ‘an independent organisation that has no commercial interests related to ship design, ship ownership, ship operation, ship management, ship maintenance or repairs, insurance or chartering.’³ The societies ‘lay down rules for determining the “scantlings”, or dimensions for all the sections of the ship in terms of and

¹ See generally Phillipe Boisson ‘Are Classification Societies Above the Law?’ www.maritimeadvocate.com/i2_clas.htm

² IACS, ‘What are Classification Societies’, www.iacs.org, January 2004, 2

³ *ibid*, 2

amongst others, the length, beam, draught and depth. A ship built to the scantlings in Lloyd's rules, for example, is designated in the Lloyds Register as being classed "100A". Luddeke explains that:

"The figure '1' placed after the ship's classification character is called the equipment numeral and indicates that her anchors, cables and hawsers are in a good and efficient condition and are also in accordance with the rules. Should the vessel be built under supervision of the classification society and later in her life change to another, the '100A' will usually be followed by the figure '4'. Vessels which are constructed under the Classification Societies' Special Survey system are given the symbol of the Maltese Cross in front of their classification character. This also applies to ship's engines and refrigeration machinery if they are built under survey"⁴

Classification Societies have been further defined by Goldrein and Turner as:

"...independent commercial organisations staffed by marine surveyors who work with shipyards, ship-owners, insurance companies and flag state authorities in matters relating to the construction, maintenance and repair of ships. One of the principal objectives of the Classification system is to enhance the safety of life and property at sea by securing high technical standards of design, manufacture, construction and maintenance of mercantile and non-mercantile shipping. In relation to a second-hand ship, this objective is pursued by means of a regime of regular surveys by surveyors of the Classification Society with which the ship is entered."⁵

⁴ Luddeke C., Marine Claims – A Guide for the handling and prevention of marine claims, London, LLP, 1996, p. 22-23

⁵ Goldrein, I. & Turner, P. Ship Sale and Purchase, 4th ed, LLP, London, 2003, p.2

However, ship-owners, ship managers, underwriters and cargo-owners may hold a contrary opinion that the Societies have not necessarily lived up to their expectations⁶ because to classify a vessel entails that the Classification Society has the expertise and therefore, is in a position to certify that a vessel is seaworthy. Judge Tyler in ***Great American Insurance Co. v. Bureau Veritas***⁷ used the aspect of the duty of a Classification Society to its Clients to define a Classification Society when he noted that:

*"The first duty ...is to survey and classify vessels in accordance with rules and standards established and promulgated by the society for that purpose. The second duty of a classification society is that of due care in detection of defect in the ships it surveys and the corollary duty of notification thereof to the owner and charterer."*⁸

Classification Societies' duties are performed by surveyors whom they employ and they are often put in the same category as third-party inspectors. They are deemed indispensable in the maritime industry and a vessel virtually cannot sail legally without the services of such an organisation. Clarke put it succinctly when he says:

"A Classification Society sets standard for the quality and integrity of vessels and performs surveys to determine whether vessels are in compliance with the classification society's rules and regulations, national laws, and international conventions. If a vessel passes inspection, the classification society either issues a certificate attesting to the vessel's conformity with the

⁶ For the position of ship-owners, underwriters and cargo-owners on the perception that Classification Societies have not adhered to the contract in their view of classifying their vessels in line with their rules and regulations, see generally Miller, Machale A., 'Liability of Classification Societies from the Perspective of United States Law', *Tulane Maritime Law Journal*, Winter 1997, 75, who writes from that perspective.

⁷ 1972 AMC 1455

⁸ *ibid* at 1472

applicable rules, regulations, laws and conventions or endorses an existing certificate with a visa reflecting the survey. If the vessel fails to pass the inspection, the Classification Society either does not issue the certificate or withdraws the existing certificate.

Without Classification Certificates, vessels cannot operate because classification is a prerequisite for ship registry and insurance coverage."⁹

The last sentence in the above quotation has been the refrain in a number of cases¹⁰, where the judges have held *inter alia* that the reason for obtaining a Classification Certificate was to facilitate insurance premiums at a bargain. Without the certificate, the vessel will have to settle for an extremely high premium. Further, the perception in the industry is that with a classification Certificate, there is some confidence in the credibility of the vessel to undertake a voyage.

Current events and legislation in Europe have also brought about the position whereby vessels without the necessary classification requirements are detained in ports or even not allowed to land in certain ports. In this correlation, these vessels may not be allowed to trade should they not have the required classification either.¹¹

⁹ Clark, Peter D., 'An American Admiralty Law Viewpoint on the Changing Role of Classification Societies', www.navlaw.com/navlaw/menus/seal/class.htm

¹⁰ **Marc Rich & Co and Others v. Bishop Rock Marine Co. Ltd, Bethmarine Co Ltd and Nippon Kaiji Kyokai (The Nicholas H)** [1995] 2 LR 299; **Sundance Cruises Corporation v. America Bureau of Shipping (ABS) (The Sundancer)** [1994] L.R. 183;

¹¹ Under **Article 7b of Directive 95/21/EC** (as amended), ships of a certain type are refused access to community ports if:

- they fly the flag of a state appearing in the black list (see below), as published in the annual report of the Paris MOU on port state control, and have been detained for the third time in the course of the last 24 months or;
- they fly the flag of a state described as "very high risk" or "high risk" in the black list, as published in the annual report of the Paris MOU on port state control, and have been detained for the second time in the course of the last 36 months.

B. Aim of Thesis

This thesis desires to bring to the fore the concept of Classification Societies which prior to the grounding of the *Erika* at the Bay of Biscay in Brittany, North France, and the fairly more recent sinking of the *Prestige* off the coast of Spain, had enjoyed a reasonable amount of anonymity which helped their cause in their representation as 'neutral third parties'¹². It explains the concept of Classification Societies to the 'man on the street' from a legal perspective and does not concern itself with the technical workings of Classification, which may pertain more to the realms of marine architecture and engineering.

The thesis observes that Classification Societies have emerged from a combination of different factors, the core being a need for safety of the vessel at sea. It recognises the opinions of the Courts in different jurisdictions that responsibility for the safety of the vessel is the exclusive responsibility of the ship-owner. The role of class in this regard appears to be limited to inspecting and surveying the vessel according to that particular classification society's rules and regulations and no more than that. The thesis will analyse this position in certain jurisdictions¹³ and suggest a way forward for the apparent face-off between Class on the one

¹² The *Erika* and the *Prestige* are the two current events in the maritime world for which Classifications Societies in time to come will always be remembered. The two incidents have formed the bases of the work that has been undertaken by the European Parliament in re-assessing the, accountability, liability and responsibility of Classification Societies and this is discussed in detail in chapter 4. For a discussion on the positive impact of Class, see generally, Clark, Peter D., op cit

¹³ Most of the case law on classification societies are from the United States of America, while there have been several from the United Kingdom and a smattering of cases from Europe, Australia and Canada, all of which are analysed in the relevant chapters of contract section and the tort section.

part and ship-owners, cargo-owners and third-parties, on the other part, that have been affected by the fallen vessel which had been classified by the Society in contention.

C. Methodology

The thesis adopts a simple methodology of analysing case law in different jurisdictions involving classification societies in arbitral or contentious proceedings. It also takes into huge consideration the work currently being undertaken by the European Parliament in this regard, which, so far, has been the most extensive in seeking a solution to the dire straits that classification societies appear to find themselves in. Certain interviews have also been conducted with core personnel in the industry for this thesis.

D. Structure of the Thesis

The thesis is divided into five chapters, with an introduction and a conclusion which constitutes the last chapter. Chapter 1 is on the origin and development of classification societies. It examines the basis of the evolution of some of the classification societies and observes that certain factors guided the creation of some of the societies such as safety in the case of Lloyds Register, and political expansion in the case of RINA, and nationalisation in the case of NKK. Chapter 2 is on the contractual relationship between Classification Societies, Ship-owners and Flag-States. It examines the different contracts that class enters into in a private capacity with the ship-owner on the one hand and the contracts it enters into, in line with its public role, with

Flag-States on the other hand. Chapter 3 is on the tortuous relationship between Classification Societies, Ship-owners and Flag-States, which examines the criteria used to ascertain liability of a party in the event of a dispute. Chapter 4 is on The IMO (International Maritime Organisation) and European Union (EU) Initiatives on Classification Societies and it examines the progress specifically made the EU parliament in producing Directives for the regulation of classification societies. Chapter 5 is the conclusion, which summarises the thesis and proffers recommendations for the effective correlation between class and other parties including the ship-owner, cargo owner, underwriters and flag-states.

Chapter 1
Origins and Development of
Classification Societies

1.1 Introduction

Classification Societies have evolved over the years from initially being solely concerned with the safety and maintenance of dry-cargo vessels and tankers.¹ Most have diversified their role beyond the traditional surveying and inspecting of ships and have gone on to include in their repertoire 'qualitative and quantitative analysis in a broad spectrum of onshore industries from boiler and machinery analysis in the power industry to giving advice to the rail industry.'² This study, however, is largely confined to the perception of Classification Societies *vis-à-vis* the shipping industry and their original role following their emergence, of classifying vessels for the purpose of safety according to their regulation and standards.

Generally the same need led to the founding of the various Classification Societies, which was essentially the need for a body of experts in different aspects of a vessel who can collectively verify that the vessel complies with the rules and guidelines of the organisation relating to that particular type of vessel. There was also the need for a guide to underwriters (who initially requested the information) in fixing a premium on a request from a Ship-owner to insure the vessel with them. What presents itself here is that the Underwriters were the initial clients of the Classification Societies. In this section, I shall discuss the origins of some of the main Classification Societies and what, particularly, led to their emergence besides the points made above. It will be seen that besides the need for some form of report on the state of a vessel from a particular body (for instance in the case of Lloyds Register), political and economic

¹ See generally Clark, Peter D., *op cit*; Durr S.D, 'An Analysis of the Potential Liability of Classification Societies: Developing Role, Current Disorder & Future Prospects'; thesis for the award of LLM, University of Cape Town

² D. Croom-Johnson, *Accountability of Classification Societies –'Insurance Issues'*, London Shipping Law Centre, February 21, 2001

inclinations (Registro Navale Italiano) and notions of nationality (Nippon Kaiji Kyokai) had their part to play as well in the history of some Classification Societies.

1.1.1 Evolution of a Coffee-house - Lloyds Register

Classification Societies arose out of the need to assure certain parties in the maritime world, the ship underwriters, that the proposed venture was a risk worth taking. Coffee houses were the meeting points for a mix of people with vested interests in vessels coming in and out of London during the 17th and 18th century, with the first coffee-house starting business in 1652³. One such coffee-houses was owned by Edward Lloyd at Tower Street, who called himself the 'coffee-man', and later moved to Lombard Street at Christmas 1691, near the General Post Office.⁴ Underwriters, particularly, converged on Lloyd's coffee house which was gathering the reputation of having the most readily available news on shipping affairs. This led to the emergence of *Lloyds News* in 1696, which had duration of just a few months due to its unfortunate reference to certain proceedings in Parliament. Not to be deterred, bulletins took the place of *Lloyds Lists* in which ships were described, albeit without any formalised mode of survey, in a bid to attract to insurers. The erstwhile newspaper eventually resumed business in 1734 as *Lloyds List and Shipping Gazette* and has the reputation of being the second oldest continuously published newspaper existing after the official *London Gazette*.⁵

³ IACS, 'What is a Classification Society', www.iacs.org, January 2004

⁴ 'Lloyds Register of Shipping', www.mariners-l.co.uk/ResLloydsRegister.htm

⁵ op cit, IACS, 'What is a Classification Society'

The bane of marine insurers has always been some way of ascertaining that a vessel was fit enough to undertake a voyage prior to an underwriter taking it up in its books. This led some of the regular underwriters at Lloyds to initiate in 1760, a system for the inspection of the hull and machinery of a vessel, which included details of the vessel's owner(s), the master, its characteristics and condition. This resulted in the first *Lloyds Register Book* and covered the period 1764-1766. The method of classification for the hull of a vessel according to quality was graded A, E, I, O, or U, while the machinery was initially graded G, M, or B, where G stood for 'Good', M was 'Middling' and B was 'Bad'. The grades, G, M, B were eventually substituted with 1, 2 and 3, with the result that a vessel classed as 'A1' was the highest recommended quality of vessel and conversely one classed as U3 was as bad as they come. Other Classification Societies emerged from a fusion of insurance companies, a development influenced by an anxiety at the rate of marine accidents at sea.

Between 1800 and 1833, two separate registers emerged concurrently, the Green Book by the Underwriters and the Red Book by the Ship-owners, following a dispute between underwriters and ship-owners. While the coverage of these registers was similar, they were not identical, because details of some vessels included in one register did not necessarily feature in the other register. By 1834, a new Society, which was independent of both Underwriters and Ship-owners, and called the *Lloyds Register of British and Foreign Shipping (LR)* emerged to supervise the survey of vessels and to publish the *Lloyds Register of Shipping*. 1837 saw the creation of the Classification Committee by the Lloyds Register General Committee, with powers to assign, suspend and withdraw class. Interestingly, the Classification Committee comprised outside members like ship-owners, charterers, underwriters and Protection and Indemnity (P&I) Club representatives, which helped to make for a credible fair decision-making

process. LR continued business as a voluntary classification society and initially had only details of vessels it had surveyed and classed.⁶ This position changed in 1875, when details of every British vessel over 100 tonnes was included in the Register, whether they had been classed by *Lloyds Register* or not. A further change occurred in 1890, when details of not just British vessels, but also foreign merchant vessels of over 100 tonnes were included in the register. Prior to 1890, the few foreign vessels in the register were those that traded regularly with Great Britain.

Today, *LR* prides itself as being the premier Classification Society, with the other Classification Societies usually deferring to it for advice. It has been party to many joint ventures with other classification societies due to its experience⁷ and it is not unknown in maritime circles that many an Underwriter especially in the United Kingdom will readily prefer LR to classify a vessel in its terms of contract with a Ship-owner. Presently the Society is in a consortium agreement with two other Classification Societies (American Bureau of Shipping and Det Norske Veritas) collectively called the LAN Group in the International Association of Classification societies (IACS), which has recently been responsible for drawing up the common rules for tankers.

⁶ Apparently smaller vessels and earlier steamships do not appear in the earlier volumes of *Lloyds Register(LR)*. This could be an indication of the esteemed standards of the organisation, that not so reputable owners may have considered it not worth their while registering their vessels with *LR*.

⁷ Collaboration between Lloyds Register, ABS and DNV made the headlines in 2001. Other Classification Societies in IACS were averse to the union as they (LR, ABS and DNV) were already the major members in IACS with the most tonnage in their individual registers.

These Rules were to be approved for entry into force by January 1, 2006, but was delayed until April 2006.⁸

1.1.2 RINA

This Society went through three main stages; firstly foundation, development and consolidation, which was the period between the creation of the Italian Kingdom and the First World War; secondly, nationalisation, which was the period between the First World War to the Second World War; and thirdly, revival and internationalisation, which was the period from the Second World War to the present time. Most of the development occurred in the first stage. The Society was established in 1861 in the maritime town of Genoa as REGISTRO ITALIANO, in response to the needs of the Ligurian shipping world and following an initiative of the Associazione della Mutua Assicurazione Marittima (Mutual Marine Insurance Association), itself established in Genoa in 1857 by ship managers and owners or “ship shareholders”, to cover the risks relevant to losses and/or damages relevant to the hull and rigging of sailing ships), to comply with the requirements of Italian maritime operators, ship managers and owners, similarly to what previously done in Great Britain and France.⁹ The idea, amongst others, was to assess the fitness of ships for the purpose the intended to trade; serve as a guarantee to interested parties such as ship-owners, charterers, cargo-owners and underwriters; and to safeguard human life at sea and prevent sea pollution.

⁸ The new standard applies to all double hull oil tankers equal to or above 150 meters in length and all bulk carriers, single or double side, and equal to or above 90 meters in length. The new rule requirements, both for oil tankers and bulk carriers, introduce a radical shift towards more computerisation of the rule formulations and structural assessment.

⁹ ‘Origins, History and Development of RINA Group – Registro Italiano Navale’, [www.rina.org/uploaded_files/Sect-A2-R3\(2\).PDF](http://www.rina.org/uploaded_files/Sect-A2-R3(2).PDF)

There were both economic and political motives behind the establishment of the Italian Register. Economically, ship managers, ship-owners, captains, brokers, shipyards and insurers coming together and overcoming the contrasts connected with their individual interests and rather focusing on common economic interests, led to lower insurance costs through mutual insurance associations. These associations between beneficiaries marked down premium and an Italian register, as a non-profit national body reduced classification costs to about a third of what obtained with Lloyds Register and Bureau Veritas. Politically, the Italian Kingdom had managed to unite the various regional fleets under a single flag. This gave the State, then with a population of twenty (20) million inhabitants, the semblance of a force to be reckoned with in the international maritime world.

Classification of vessels was divided into three categories:

- i. degree of reliance measured through the General Synthetic Assessment expressed by a decimal number ranging from 1.00 for full efficiency to 0.50 for sufficient efficiency
- ii. Evaluation of the Hull assessed through Roman Numerals in decreasing value, I, II and III.
- iii. Evaluation of Rigging including the mast, gear, cables, sails and mooring assessed through Roman Numerals again in decreasing order

The founders of Registro Italiano were aware of the potential of the development of the Society on account of the size of the national fleet. They were convinced (as already mentioned) of the

necessity of having an Italian body for the classification of ships, in order not to penalize home vessels and to reduce the registry cost.¹⁰ To attain some credibility and to modify the organisation, representatives of the shipping world of the main Italian ports were involved to help overcome localism and to achieve formal recognition by the Italian State.

In a bid to give the Register a more national flair and to overcome any regional perception, firstly, responsible persons in the Chambers of Commerce and insurance companies located in the main Italian ports were entrusted with the management of the Society; secondly, the head office of Registro Italiano was left in Genoa and the Chairman of the Chamber of Commerce of the Ligurian chief-city was designated the chairman of the Register due to the considerably large maritime interests there; and thirdly, the Royal Italian Government formally recognised the Society. 1870 saw the promulgation of the Royal Decree dated September 29, 1870 recognising the Register as a public utility and non-profit-making body. The credibility of Registro Italiano was further increased with the promulgation of **Merchant Marine Minister Decree** on April 29, 1881, which recognised the equivalence of surveys and appraisals carried out by the Register alongside official surveys.

In as much as Registro Italiano's functions were almost at par with State functions, the Register still suffered from some deficiencies, such as the fact that it was the creation of small ship-owners and shipyards with limited capital, so much so that between 1881 and 1883, another Classification Society, Veritas Italiano, attempted to usurp the place of Registro Italiano, though

¹⁰ Italy at this time comprised city-states including amongst others Genoa and Venice which were autonomous and the development of the Italian served as a cohesive factor. For a more general discussion, please see [www.rina.org/uploaded_files/Sect-A2-R3\(2\).PDF](http://www.rina.org/uploaded_files/Sect-A2-R3(2).PDF) - 'Origins, History and Development of RINA Group – Registro Italiano Navale'

unsuccessfully. Larger shipping companies¹¹ that managed the subvention aided line services attempted to protect their interests by forming another register called the Registro Nazionale in 1909 with larger shipyards, and certain representatives of the state maritime department which included the Merchant Marine Ministry, the Naval Engineering Duty Corps and the Harbour Offices. This particular Register was modelled on the British Corporation Register, founded in 1891 in the United Kingdom, which on its part was designed to compete with Lloyds Register.

Inevitably, the newer Register gained recognition by the Italian State, bearing in mind certain factors, including, firstly, Registro Nazionale adopted technical Regulations for the design and manufacture of vessels made of steel, with a lower hull weight as well as a higher average strength compared to the standards of Registro Italiano. Secondly, besides Ship-owners, underwriters and representatives of the Chambers of Commerce, the Chairmen of the Higher Council of the Merchant Marine and the Harbour Trust, the Directors of the prominent shipyards, and the high-ranking officers of the Naval Engineering Duty Corps and the Harbour Offices were co-opted in the management of the Registro Nazionale. On Nazionale's part, besides constituting some competition, it was going to derive from an alliance with Registro Italiano the benefit of a radical reform and some modernisation that would not have been achieved without the backing of the State. It was therefore worthwhile for the two Italian Registers to join forces, which was realised on June 28, 1910, and the name Registro Nazionale Italiano (Italian National Register), which had the advantage of maintaining the tradition and prestige of up to fifty years of existence, the adaptation of Technical Regulations

¹¹ Some of these shipping companies included Cantieri Riuniti dell' Adriatico, Monfalcone, Italy, Cantiere Navale Triestino, Monfalcone and N. Odero & Co, Genoa. There were renowned companies who built vessels for clients worldwide.

to the requirements of modern vessels and the involvement of representatives of the State, the larger shipping companies and shipyards.

The Register's name was changed again on November 8, 1917 to Registro Navale Italiano (Italian Shipping Register) and by the end of the First World War, it fully participated in trade agreements for the revival of merchant marine activity in conjunction with other Classification Societies¹² for the purpose of mutual representation and harmonisation of requirements in the relevant countries. Yet another amalgamation took place on June 9, 1921, with the merging of the Register with Veritas Adriatic. This Register was an offshoot of the Austrian-Hungarian Veritas, itself affiliated to Lloyds Register. The registered office was moved to Rome, while the management remained in Genoa. By 1927, the Italian Register by virtue of Royal Decree No. 2163 of June 9, 1927 added the service and classification of aircrafts engaged in commercial traffic for the transport of passengers, mail and cargo to its repertoire, enabling it to issue *'certificati di navigabilitia* (seaworthiness certificates) and it assumed the name Registro Italiano Navale ed Aeronautico, RINA (Italian Shipping and Aeronautic Register). This was until 1938, when the another Royal Decree (No. 1922 of November 24, 1938) sets up the Registro Aeronautico Italiano (Italian Aeronautic Register, RAI), which is subject to the control of the Air Ministry.

Between 1937 and 1938, the Society entered mutual agreements with Bureau Veritas, Germanischer Lloyd and Lloyds Register for dual class and mutual recognition of relevant

¹² These societies included the British Corporation Register, American Bureau of Shipping and the Teikoku Kaiji Kyokai (presently Nippon Kaiji Kyokai)

certificates, leading to the first congress of Classification Societies holding in Rome on May 3, 1939 on a common agreement for a uniform application by all States of Load Line Regulations earlier approved at the London Conference in 1930. Following the Second World War, the agreements with other Classification Societies which had abated in the interim resumed again between 1950 and 1953. The Load Line Convention in 1966 in London had the Society's Director-General, Dr. Lorenzo Spinelli presiding over the Technical Committee, and later holding the office of the Chairman of the Maritime Safety Committee (MSC) of the International Maritime Organisation (IMO) in 1973

The development of the European Union (EU) led to a prominent change in the philosophy of the Society because prior to the adoption of the Directive 94/57/EU¹³, RINA was the only authorised body to classify Italian vessels and issue the relevant certificates under the international Conventions. The EU brought some diversification with the result that the monopoly of RINA classifying the Italian vessels was dispensed with and there was some healthy competition with the international Classification Societies. This led to RINA opening branches in every other maritime location world-wide in true international style and by 1999 it had branches in Fort Lauderdale, Hong Kong, Istanbul, London, Piraeus, Rotterdam, Shanghai, and Singapore.

The next major milestone in the history of RINA, following the sinking of the *Erika* on December 12, 1999, is analysed in the EU section of this thesis¹⁴.

¹³ This Directive, along with the amending Directive 2001/105, is discussed in detail in the chapter on the EU section of this thesis. The Directive deals with the regulation and accountability of classification societies.

¹⁴ Chapter 4

1.1.3 Nippon Kyoji Kyokai (NKK)

This is the Japanese Classification Society established in 1899 in Tokyo, and it was originally called Teikoku Kkaiji Kyokai (TKK) (the Imperial Marine Association). The aim was to promote the regulation and development of the shipping and ship-building industries in Japan. By 1905, the Society formulated had Rules for the assignment of Load Lines to facilitate services related to load assignment, ahead of similar rules created by the Japanese Government.¹⁵ It classified its first vessel, the *Kwanan Maru* in 1920, and had its class notation, NS*, formally registered in the Classification Clause of the Institute of London Underwriters in 1926, from which it received instant recognition as an internationally active Classification Society. By 1929, TKK reached one million gross tons of ships under its classification.

The Society changed its name to Nippon Kyoji Kyokai (the Japan Marine Association) in 1946, following the end of the Second World War. After the devastation of the war, the Japanese marine industry gradually recovered and the services of NKK were required once again to survey and inspect Japanese vessels. It had over ten million vessels in its classification by 1966, and this capacity progressed to one hundred million vessels by 1997. The Society, today, boasts of 126 million gross tonnes under its classification.

NKK felt the need to distance itself from the perception of being involved with the domestic fleet, following the notion that it functioned at the instance of Japanese-owned vessels and to its credit, it currently has a credible amount of foreign owned and flagged vessels under its classification. In its bid to further reflect its internationalisation, it towed the line of other

¹⁵ History of ClassNK, www.classnk.or.jp/hp/nk_e/aboutnkhistory.htm

Classification Societies and established branches and exclusive surveyor offices world-wide, starting with London and New York in 1962; Rio de Janeiro, Buenos Aires, and Marseilles in 1980; Hamburg and Bilbao in 1982; and in its centenary year in 1999, established the exclusive surveyor office in Durban, South Africa. The Society has had the privilege of holding the chairmanship of the International Association of Classification Societies (IACS) both in 1971 and in 1988.

The Society has featured in a couple of land-mark cases, **Marc Rich & Co and Others v. Bishop Rock Marine Co. Ltd, Bethmarine Co Ltd and Nippon Kaiji Kyokai (The Nicholas H)**¹⁶ and **Otto Candies v. Nippon Kaiji Kyokai**¹⁷, which will be analysed in the tort section of this thesis.

1.2 Origin of International Association of Classification Societies (IACS)

This is the governing body that regulates the affairs of the top classification Societies in the world. As noted earlier, it was created in 1930 during the Load Lines Convention of that year with the aim of aligning the interests of the various Classification Societies to achieve some element of unanimity and with a view to promoting safety of life and vessel at sea. The current members of IACS include, American Bureau of Shipping (ABS), Bureau Veritas (BV), China Classification Society, Det Norske Veritas (DNV), Germanischer Lloyd (GL), Korean Register

¹⁶ [1995] 2 LR 299

¹⁷ United States Court of Appeals Fifth Circuit, filed September 17, 2003 No. 02-30842

(KR), Lloyds Register (LR), Nippon Kaiji Kyokai (NKK), Registro Italiano Navale (RINA), and the Russian Register of Shipping (RRS).

IACS came into further significance on attaining an associate status at the International Maritime Consultative Organisation (IMCO), presently the International Maritime Organisation (IMO).

IACS can trace its origins back to the International Load Line Convention of 1930 and its recommendations. The Convention recommended collaboration between classification societies to secure "*as much uniformity as possible in the application of the standards of strength upon which freeboard is based...*". Following the Convention, RINA hosted the first conference of major societies in 1939 - also attended by ABS, BV, DNV, GL, LR and NK - which agreed on further cooperation between the societies. This was, of course, delayed by the Second World War.

Although the first international maritime conference was held in 1889, technical regulation within international shipping safety did not truly come to the fore until the establishment in 1948 of the International Maritime Consultative Organisation (now IMO), by the United Nations. Since then, class rules have become increasingly prominent as the recognised technical basis of ship structural and engineering systems safety.

A second major class society conference, held in 1955, led to the creation of Working Parties on specific topics, with the first, on hull structural steel, in 1957, laying the foundations for more

than 200 Unified Requirements and the many Unified Interpretations and Recommendations that IACS has today.

IACS was formed by seven leading societies on 11 September 1968. The value of their combined and unique level of knowledge and experience was quickly recognised. In 1969, IACS was given consultative status with IMO, with the first Permanent Representative appointed in 1976. It remains the only non-governmental organisation with Observer status which is able to develop and apply rules. The status of the standards developed by member societies was enshrined in the International Convention for the Safety of Life at Sea (SOLAS) Chap. II-1, Reg. 3-1, applicable from 1 July 1998.

A Permanent Secretariat was formally established in London in 1992, expanding the IMO representative's office. Until then, the Secretariat had been found by the Society holding the Chairmanship of Council, which is held on an annual basis by each Member in turn.

1.3 Statutory basis of Class

Class in their capacity as surveyors of vessels for the purpose of safety on the seas have their statutory origin from the **Load Line Convention, 1966** as well as the **Convention on the Safety of Life at Sea (SOLAS) 1974** and it has been noted that this Convention 'provides them with an element of statutory immunity or perhaps one should say an element of statutory shielding from proceedings made against them in tort.'¹⁸ These Conventions derive from the

¹⁸ D. Croom-Johnson, 'Accountability of Classification Societies – Insurance Issues', London Shipping Law Centre (LSLC) February 21, 2001

Geneva Convention on the High Seas, 1958 and the **United Nations Convention on the Law of the Sea (UNCLOS) 1982** under the duties of a Flag-State upon the registration of a ship. **Article 94** particularly specifies that the Flag state must "*effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag*" and take "*such measures for ships flying its flag as are necessary to ensure safety at sea...*"¹⁹ Most Flag States delegate the duty of putting the effects of the Conventions into practice to Classification Societies, who merely act on behalf of flag States in a statutory capacity and in this regard are termed Recognised Organisations.

i. The Load Line Convention, 1966

The predecessor of this Convention, the **Load Lines Convention 1930**, actually brought **The International Association of Classification Societies (IACS)**, into existence, with Registro Italiano Navale (RINA) hosting the first conference of the main societies in 1939...which agreed on further co-operation between the societies. The 1930 convention encouraged collaboration between classification societies to ensure "as much uniformity as possible in the application of the standards of strength upon which freeboard is based..."²⁰ The Load Lines Convention was originally the creation of a Member of the British Parliament, Samuel Plimsoll, who was concerned about ships that were sent to sea overloaded to make the ship-owner a huge profit so long as the ship and cargo got to the destination safely. He and other concerned individuals, on their initiative, introduced legislation to prevent ships from embarking on voyages if so overloaded that they could be rendered unseaworthy. Parliament adopted what was

¹⁹ *ibid*

²⁰ www.iacs.org.uk/pdf/class

called the 'Plimsoll Mark' in the **Merchant Shipping Act 1876** whereby the prohibition against potentially overloaded ships was achieved by calculating what deadweight of cargo the ship could safely carry and making a mark on the ship's hull to indicate the draft to which she could be safely loaded. If that mark were submerged the marine authorities would step in and prevent the ship from sailing until it has been lightened sufficiently to put to sea with adequate freeboard. It soon recognised that vessels trading in one area of the world, might need a greater margin of safety – a greater freeboard – when navigating in different parts of the globe at different seasons. Dear & Kemp note that:

... A mark painted on the sides of British merchant ships which indicates the draught levels to which a ship may be loaded with cargo for varying conditions of season and location. The Plimsoll Mark shows six loading levels, those which may be used in tropical fresh water; fresh water; tropical sea water; summer, sea water; winter, sea water; and winter, North Atlantic, for vessels under 100 metres (330 ft) in length.²¹

The 1966 Convention specifies that a Load Line Certificate is issued to a ship upon satisfaction of the fact that the vessel has the required strength for its capacity. The Department of Transport in the United Kingdom is responsible for ensuring the correct plimsoll marking (named after Samuel Plimsoll) of vessels with load lines, but this task is invariably delegated to the classification societies with which a vessel is classed, and this Society places its initials on either side of the 'plimsoll line'. 'The plimsoll line has the added advantage of calculating the vessel's minimum freeboard and maximum

²¹ Dear I.C.B. & Kemp P. *The Oxford Companion to Ships and the Sea*, 2nd ed, Oxford University Press, 432

displacement in salt water in a summer zone.²² The vessels are built or maintained in conformity with the rules of a Classification Society, depending on if it is a new build or an existing build. A link can be observed at this point through the relationship between the International Maritime Organisation (IMO) and Classification Societies because the latter puts into practice the goals of the former. Some of the particular requirements of the Load Line Convention that need to be adhered to are freeboard computation, conditions of assignment, which includes intact and damage stability.²³ These coupled with the Rules of a Classification Society on the structure of the ship have to be complied with to ensure the issue of a Load Line Certificate.

ii. Safety of Life at Sea Convention (SOLAS), 1974

This was first adopted in 1914 following the sinking of the R.M.S. Titanic in 1912 with the loss of 1500 lives²⁴. It went on to have four versions. The SOLAS Convention adopted in 1929 entered into force in 1933; the Convention of 1948 entered into force in 1952; the Convention of 1960 entered into force in 1965; and the last version of 1974 entering into force in 1980. The 1948 SOLAS Convention was quite remarkable in the sense that this was the year the **International Maritime Organisation (IMO)** was formed under its then name, **Inter-Governmental Maritime Consultative Organisation (IMCO)**. In 1978, a Protocol on SOLAS was initiated by the International Conference on Tanker Safety and Pollution Prevention. A new Protocol in 1988, replaced that of 1978. Both the Convention and the Protocol have been amended

²² Luddeke, C., op cit p.23

²³ These constitute the public role of a classification society which incorporates the goals of the IMO in its contract with a flag State to issue certify vessels registered with the latter on its (flag state's) behalf as discussed in the Contract chapter of this thesis.

²⁴ www.pya.org/solas.htm

several times as the need arose, but they still invariably impose the mandate on flag administrations to ensure that vessels comply with the tenets of the SOLAS Convention and Protocol. The SOLAS Convention proposes that passenger ships for the purpose of voyages must have a Passenger Ship Safety Certificate, while Cargo ships of 500 gross tonnes and above used for international trade ought to have a Cargo Ship Safety Certificate. Every part of the vessel is thoroughly inspected and certified to be in good working condition before SOLAS Certificate is issued. The ship parts include among others, boilers, pressure vessels and other appurtenances, main and auxiliary machinery (these include steering and associated control systems) and other electrical installation.

Currently, the most definitive basis for class regarding their position while acting on behalf of Flag-states, particularly in the European Union, emanates from the **EU Directive 94/57** amended by the **EU Directive 2001/105**, which some of the major maritime jurisdictions have incorporated into their national laws, following *Erika* and *Prestige* incidents.²⁵

1.4 Classification and Marine Insurance

Classification is underscored by the importance which underwriters attach to it. Miller notes that 'Classification Societies initially were formed at the request of hull underwriters as a means to obtain independent evaluations of a vessel's seaworthiness (with respect to the hull and

²⁵ These are discussed in detail in the chapter on the EU and class in this thesis. The EU has been credited with covering huge grounds more glaringly perhaps than any other organisation in its efforts to deal with contemporary issues arising with class.

machinery) and to ascertain whether to extend coverage to such vessel.²⁶ This relationship is revealed in the Classification Clause in the earlier Institute Time Clauses Hulls (ITCH) of 1983 amended in 1995, 2002 and 2003. The clause basically refer to the classification of a vessel as being vital to the continued insurance of the vessel, whereby if any of the terms of the Classification is not complied with, it can lead to the termination or nullification of the contract of insurance between the Ship-owner and the Underwriters.

The nature of the business between a Classification Society and the Underwriter was symbiotic in terms of the Society having the necessary details of the vessel in its archives, especially if the vessel had been constructed according to its rules and guidelines and it has from inception been involved in the design, construction, maintenance and repair of the vessel. This is not to say that a surveyor in the Underwriter's employ cannot assess the condition of the vessel prior to its being underwritten, but the task of conducting such a survey as a prelude to insurance is one that would not necessarily render all the necessary information due to the length of time, and the cost of an extensive survey and inspection would take. The problem here is two-fold and it is a combination of time and expertise.²⁷

Firstly, were the Insurer's surveyor to inspect the vessel prior to insurance, there would be only so much that he would be able to discover in a limited period of time. A Classification Society, on the other hand, will know the particular details to look for, especially if it has had prior dealings with that vessel regarding earlier surveys, or was involved in its design and

²⁶ Miller, M.A., 'Liability of Classification Societies From the Perspective of United States Law', *Tulane Maritime Law Journal*, Winter 1997, 82

²⁷ For an elaboration on this view please see generally Miller, M.A, *ibid*, p. 82

construction. Secondly, the magnitude of such a task is deemed to be one best left to the experts (the classification society), who are aware of the intricacies of any particular type of vessel. They will be in a position to ascertain that the hull and machinery of the vessel is suited to the particular voyage it proposes to undertake. Miller analyses the inadequacy of an underwriter's surveyor performing preliminary in terms of the theoretical and the practical. He says:

"In theory, the typical condition and valuation survey, which occasionally is performed prior to extending coverage, is of limited value and utility in determining whether a vessel actually is

seaworthy. An ocean-going, commercial vessel is a highly complex piece of machinery that, in a very real sense is an entity with a life of its own. A condition surveyor cannot ascertain the true state of a vessel's condition or analyse its seaworthiness by a mere inspection without a more historical perspective. The surveyor must be familiar with the vessel's design, construction, maintenance history, repair history, and damage history in order to truly appreciate the vessel's strengths and weaknesses...

In practice, however, a ship-owner simply does not have the time for such a study. Time is money; list revenues accrue each day the vessel is out of service while being surveyed."²⁸

The symbiotic relationship between Classification Societies and marine underwriters is again visible in the Institute Time Clauses Hulls (ITCH) of 1983 and 1995. On 1st November 2002 a new set of standard clauses applicable to policies of hull and machinery insurance became available for use. The traditional title of the Institute Time Clauses - Hulls was dispensed with and the new clauses were termed International Hull Clauses. They were developed by the

²⁸ *ibid* at 83

London market Joint Hull Committee (JHC) in alliance with ship-owners, brokers and other interested parties and, although they contain many new provisions, those responsible for the drafting were able to overcome the daunting task of a major rewrite of the 1983 and 1995 Institute Time Clauses. Instead, they concentrated on updating the earlier clauses to reflect current practices and the increased importance of the roles of ISM, flag states and classification societies in connection with ship safety. The JHC drafting committee in a bid to reflect the true international flair of the clauses, especially by the change from 'institute time clauses' to 'international hull clauses' travelled to the major maritime locations worldwide to elucidate on the new clauses and glean the necessary feedback from them. This culminated in the 2003 IHC.

The relationship between the Classification Society and the Ship-owner is one that ties in with the contract between an Underwriter and that same Ship-owner. Classification clauses are deemed to be warranties²⁹ in marine insurance as covered by **S.35, Marine Insurance Act, 1906**.³⁰ O'May notes that the emphasis is on promissory warranties, whereby an 'assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negates the existence of a state of facts'³¹ In *Pindos*

²⁹ Please see generally Soyer, B. Warranties in Marine Insurance (2nd ed) (London: Cavendish Publishing, 2005) for a treatise on warranties

³⁰ Section 35 of the MIA, 1906 provides:

1. An Express warranty may be found in any form of words from which he intention to warrant is to be inferred
2. An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.
3. An express warranty does not include an implied warranty, unless it be inconsistent therewith.

³¹ O'May D. and Hill J., Marine Insurance Law and Policy, (London: Sweet and Maxwell, 1993) p.78

Shipping Corporation v. Raven (Mata Hari)³², the vessel was insured under a time policy, which included a warranty 'warranted class maintained'. She sank in a storm and was out of class at time of sinking. The Court found in favour of the Underwriters, although the vessel-owner contended that it had not intended the terms of the insurance should include the warranty.

The **Institute Time Clauses Hulls (ITCH) 1995** in Clause 4.1 categorically states "it is the duty of the Assured, Owners and Managers at the inception of and throughout the period of this insurance to ensure that the vessel is classed with a Classification Society agreed upon by the Underwriters and that her class within that Society is maintained." This is reproduced and further elaborated in Clause 13.1 of the 2003 International Hull Clauses (IHC)³³ What we can observe here is a link to what some judges of a more conservative persuasion have maintained

³² [1983] 2 Lloyds Rep. 449

³³ Clause 13.1 stipulates 'At the inception of and throughout the period of this insurance and any extension thereof

- 13.1.1 the vessel shall be classed with a Classification Society agreed by the Underwriters
- 13.1.2 there shall be no change, suspension, discontinuance, withdrawal or expiry of the vessel's class with the Classification Society
- 13.1.3 any recommendations, requirements or restrictions imposed by the vessel's class with the Classification Society which relate to the vessel's seaworthiness or to her maintenance in a seaworthy condition shall be complied with by the dates required by that Society
- 13.1.4 the Owners shall hold a valid Document of Compliance in respect of the vessel as required by chapter IX of the International Convention for the Safety of Life at Sea (SOLAS) 1974 as amended and any modification thereof
- 13.1.5 the vessel shall have in force a valid Safety Management certificate as required by chapter IX of the International Convention for the Safety of Life at Sea (SOLAS) 1974 as amended and any modification thereof

that the main reason a Ship-owner will classify a vessel is to obtain better insurance rates/premiums.³⁴

Hodges³⁵ notes that prior to the promulgation of Clause 4.1 (ITCH) 95, Ship-owners apparently had a free hand in their choice of Classification Societies and they could unilaterally change the Society during the period of their vessels' insurance with an Underwriter. Not surprisingly, Clause 4.1 of the 1995 ITCH (now Clause 13.1 IHC 2003) came about the same time as the revised International Association of Classification Societies (IACS) Transfer of Class Agreement (TOCA). By virtue of TOCA, Ship-owners are compelled to comply with all existing recommendations and surveys by incumbent Classification Societies within a strict time limit before transferring to another Classification Society. The latter Society only accepts the vessel after ensuring that the overdue survey and recommendations have been complied with.

Going by the provision of the Clause 13.1.1 of IHC 2003, it would appear that the Underwriter with whom the Ship-owner chooses to insure the vessel has the final prerogative as to which Classification Society should survey the vessel. To this end, the choice of the Underwriter will feature significantly in the course of the Ship-owner's and ship-yard's deliberations on the construction or conversion of the vessel. The relationship between Classification Societies can also be gleaned from the IACS weekly Transfer of Class data and from January 1, 1996, the **Associates Ships in Operation Services** data was expanded to make information readily available on proper request to interested parties comprising underwriters, Port State Control Authorities and P&I Clubs.

³⁴ Judge Pratt in the *'The Sundancer'* [1994] 1 Lloyds Rep, 183 at 212

³⁵ Hodges S. Law of Marine Insurance (London: Cavendish, 1997) p.47

While cl.4.1 ITCH (95) relates to the choice of the Classification Society agreed by insurer and maintenance of the vessel's class within that Society, cl.5.1 ITCH (95)³⁶ relates to the change from one Classification Society to another. Here again, we observe another connection with the TOCA Agreement. What this provision contemplates is a relationship of absolute fidelity between the Society and the Ship-owner, more so from the ship-owner. The predominance of this clause is emphasised by the preceding bold print, which says, "**it shall prevail notwithstanding any provision whether typed or printed in this insurance inconsistent therewith**". That cl.5 overrides cl.4 is quite apparent by the preliminary note in the former clause, coupled with the terms used in the provision regarding their contravention. An abrogation of cl.4 results in discharging the Underwriters from liability, while a departure from cl.5 results in the automatic termination of the insurance contract. As Hodges notes, "the net result is the same: the underwriter is freed from liability as from the date of breach. The contract is neither void nor voidable *ab initio*..."³⁷

In as much as Underwriters hold Classification Societies in such high standing, this does not appear to be visibly reciprocated by the Classification Societies. The Responsibility and Liability

³⁶ cl.5.1 provides thus: Unless the Underwriters agree to the contrary in writing, this insurance shall terminate at the time of change of the Classification Society of the Vessel, or change, suspension, discontinuance, withdrawal or expiry of her Class therein, or any of the Classification Society's periodic surveys becoming overdue unless an extension of time for such a survey be agreed by the Classification Society, provided that if the Vessel is at sea such automatic termination shall be deferred to until her arrival at her next port. However where such change, suspension, discontinuance or withdrawal of her Class or where a periodic survey becoming overdue has resulted from loss or damage covered by Clause 6 of this insurance or which would be covered by an insurance of the vessel subject to current Institute War and Strikes Clause Hulls - Time such automatic termination shall only operate should the Vessel sail from her next port without the prior approval of the Classification Society or in the case of a periodic survey becoming overdue without the Classification Society having agreed an extension of time for such survey

³⁷ Hodges, op cit

Clause of the ABS contract, proclaims *inter alia* that except a particular entity is identified as the Owner of the Vessel, nothing in the Agreement of Certificate or report issued under the Agreement shall be deemed to create any interest, right, claim or benefit in any insurer or other third party.³⁸ A possible explanation for the less than equal acknowledgement of the Underwriter on the part of Class could be that the parties they (Class) currently recognise in a contract are the Ship-owner and the Flag-state, thereby retracting the optimum recognition they might have had for marine insurers at their (Class's) inception and transferring it to Ship-owners and Flag-states.³⁹ Underwriters unfortunately do not appear to have moved on, and this could be explained by virtue of the fact that Class still performs the same task as it did when underwriters were their primary client, however, it is a bit more first-hand with the ship-owner and his vessel being parties to the contract with Classification Societies, and no more the object as obtained in the erstwhile contract with the Underwriter.

It might be necessary at this point to note that where there is an action against a Classification Society, this is usually instituted by the Ship-owner's underwriter or P& I Club (analysed below), base on subrogation, whereby the Ship-owner's claim has been paid by virtue of his cover and the insurer stands in the place of Ship-owner to recover the claim.

³⁸ Clause 14 of the ABS Request for Class Agreement. This part of the clause goes on to end with: ***“It is understood and agreed that nothing is expressed herein is intended or shall be construed to give any person, firm or corporation, other than the signatories hereto and any identified “Owner” any right, remedy or claim hereunder or under any provisions herein contained; all provisions hereof are for the sole and exclusive benefit of the parties hereto.***

³⁹ This is notwithstanding the fact that the premium set by underwriters on a vessel is reliant and directly proportional to the classification which that vessel currently bears.

1.5 Class and Protection and Indemnity Clubs (P&I Clubs)

Protection and Indemnity (P & I) Clubs operate essentially in the same way as Marine insurers/underwriters with the underlying difference being that they cover losses which the latter will not cover such as oil pollution and war risks, and also provide cover for the balance (one-fourth) that the initial underwriter has not covered in the insurance agreement with the ship-owner. While operating in the same mould as conventional Underwriters, it is inescapable that they rely (albeit indirectly) on classification to assist in fixing a premium.

The present P&I Clubs are the remote descendants of the many small hull insurance Clubs that were formed by British shipowners in the 18th century. These were set up by groups of shipowners, drawn in each case from a small geographical area, who were dissatisfied with the scope and cost of the hull insurance then provided by the two companies, the Royal Exchange Assurance and the London Assurance, who had been granted a statutory monopoly in 1720. This monopoly excluded other companies from such business and these hull Clubs which were essentially unincorporated associations or co-operatives of shipowners came together to share with each other their hull risks on a mutual basis, each being at the same time an insured and an insurer of others.⁴⁰ This is still the basic concept of the present P&I Clubs, despite the fact that they are now incorporated so that in law it is the Club and not the individual Members who provide the insurance.

1824 saw a decline in hull Clubs due to the cessation of the monopoly of the earlier mentioned hull insurance companies, whereupon shipowners found the need to create similar associations

⁴⁰ See generally, Dear I.C.B. & Kemp P. The Oxford Companion to Ships and the Sea, 2nd ed, Oxford University Press, 432

for a different purpose. The need sprang partly from the steady increase from the middle of the 19th century onwards in the burden upon British shipowners of liabilities to third parties. It became more usual for injured crew members to seek compensation from their employers, and claims by dependants of crew members who were killed were facilitated by **Lord Campbell's Act of 1846**. The possibility of claims by passengers was greatly increased by the same Act and by the vast numbers of passengers who constituted the flood of emigrants to North America and Australia in the second half of the century. Shipowners needed cover against these risks. They were also becoming increasingly aware of the inadequacy of the insurance cover that they did have in respect of damage caused by their ships in collisions with other ships.⁴¹ The usual cover for claims by other ships and their cargo for damage caused in collision excluded altogether one fourth of such damage and, more seriously, was limited in amount (apparently the maximum recovery under the policy, including both damage to the insured ship and liability for the damage it had caused, was the insured value of the ship).

In 1874 the risk of liability for loss of or damage to cargo carried on board the insured ship was first added to the cover provided by a protection Club. The values of cargoes had risen and cargo underwriters had become keener on recovering their losses from shipowners, in which they were encouraged by a somewhat more sympathetic approach by the courts. After 1874 many Clubs added an indemnity class to provide the necessary cover. Subsequently, most of these separate classes have been amalgamated with the class reserved for the original

⁴¹ The first protection association was formed in 1855. This was the Shipowners' Mutual Protection Society, the predecessor of the Britannia P&I Club. It was intended to operate like a mutual hull club, but to cover liabilities for loss of life and personal injury and also the collision risks excluded from the current marine policies, particularly the excess above the limits in those policies. Other similar associations followed suit.

protection risks, and today the distinction between the two classes has virtually disappeared within the P&I Clubs.

Today P & I Clubs, which cover the ship-owner's third-party liability, practise a premium policy based on the number of casualties attributable to the ship operator. If a company's loss record shows frequent claims for compensation then the club (comprising other ship-owners) might decide that the higher level of risk justifies raising premiums and/or applying a higher deductible to claims. Furthermore, the larger P & I Clubs have set up their own inspection systems, which focus mainly on points not covered by classification societies. Additionally, some clubs are requiring direct access to a particular ship's class records, while others only accept ships that are "in class" with IACS members.⁴² Also, in terms of liability insurance, the International Group of P & I Clubs made has made the ISM Code compliance a condition of cover in member clubs.⁴³

⁴² Boisson, Philippe, *Safety at Sea — Policies, Regulations and International Law*, Edition Bureau Veritas, Paris at p. 432.

⁴³ The ISM Code Brings Change - And for the Best, (Fairplay Magazine, June 7, 2001 at pp. 25-26) – The International Safety Management (ISM) Code adopted by IMO Assembly Resolution A.741(18) – 1993, is one of the major tasks that IACS with their expertise have undertaken on behalf of Ship-owners and Flag Administrations with credibility.

CHAPTER TWO

Contractual Relationship between Classification Societies and Ship-owners and Flag-states

2.1 Introduction

Traditionally, a contract is an oral, written or implied agreement between two or more parties with an intention to create a legal relationship. An offer made by one party is accepted by another for the sale of an item or provision of a service in return for consideration. Essentially, parties are free to agree to terms of their contracts, and until fairly recently, in the United Kingdom in particular¹, there has not been much interference by the state in terms of legislation, when agreeing a contract. For a contract to have legal force in England and Wales, it must have been effectively agreed and concluded in regard to the terms of the contract or most of the essential terms would have been agreed, with the rest to be negotiated, for the existence of a contract to be upheld.² This varies from the position in civil law jurisdictions and the United States of America, where a mere intention to negotiate or a contract to negotiate to agree a contract is legally recognised. The position in the United Kingdom is that such a contract is likely to be one couched in the one hand in vagueness due to no precise meaning, and on the other hand, in ambiguity, due to an inability to proffer any of the likely interpretations of the contract.

Further, while there is the concept of freedom of contract, this is clearly limited by the fact that the Courts will not enforce a contract if it is found to be contrary to public policy, in spite of the intention of the parties.³ 'The courts follow such a course only when necessary to protect a public interest offended by the contract'⁴

¹ Sale of Goods Act, 1893; Sales of Goods Act, 1979; and Supply of Goods and Services Act, 1982.

² R. Goode, Commercial Law, 2nd ed, 1995, p.79, see generally,

³ See generally Giesel, G.M., Corbin on Contracts: Contracts Contrary to Public Policy, Vol. 15, (Newark: Matthew Bender, 2003)

Goode describes contract as involving the exchange of equivalents,⁵ a corollary to the idea of exchange is that the parties will individually keep their end of the deal, especially where they are of considerably equal bargaining power. With this in mind, we look at the pace of the exchange in the contract, whereby its performance is simultaneous and immediate⁶ or the performance is expected to span a certain period of time, or set over several distinct stages.

A Classification Agreement is on its construction, which will be analysed in this section, one that is not immediate in terms of time. For a new build classification, it is estimated that a Society's surveyors would spend about 4000 hours on the vessel.⁷

Aligned to contract, is commercial law, which is 'the branch of law concerned with rights and duties arising from the supply of goods and services in the way of trade.'⁸ Commercial law effectively translates to being all encompassing in view of the fact that there are more parties affected by the relationship between parties to a contract than the contracting parties themselves. To this extent, it will appear to replicate the essence of tort law. Erstwhile, commercial existed as a fairly distinct source of law, which had the privilege of its own special courts employing it, prior to its assimilation into common law. Goode observes that:

"The maritime courts, the courts of the Fairs and the Boroughs and the Staple Courts, in company with the commercial courts of the Middle Ages, determined disputes not by English domestic law but

⁴ *ibid*, p.2

⁵ Goode, *op cit*, p.69

⁶ *ibid*, p.70

⁷ Harrison, J, 'Accountability Classification Societies – The Role of Classification and Market-oriented and Policy Issues, [2001] 2 L.S.L.C.

⁸ *ibid*, p.19

according to the 'general law of nations based on mercantile codes and customs such as the Laws of Oléron and reflecting international maritime and commercial practice. To these courts, as to their counterparts elsewhere in the civilized world, came not only our own merchants but foreign traders from all parts of Europe, content to have their disputes resolved by tribunals which, though located in England were conversant with foreign mercantile usage and with the concepts of the civil law as well as the common law'.⁹

Lex mercatoria or the law of merchants was widely credited as being a mix of laws from different international jurisdictions from which common law, and by necessary implication contract law, borrowed in many aspects before evolving into what is presently the English commercial law. Of relevance here is the notion of consideration as it existed prior to the English law of contract, whereby it was generally accepted that there was a right to a sum of money in the provisions of a bill of exchange or promissory note even if such bill of exchange or promissory note was not executed under seal. Common law displaced this position by acceding to the binding force of contracts under seal and that consideration for a promise was required not to be a past consideration as well as flow from the promisee¹⁰.

⁹ Goode, *op cit*, p.3-4. He notes that Oléron, off the west coast of France and sometime in the ownership of the English Crown as a commune of the province of Guienne (Aquitane) was hugely reputed for the decisions of its mercantile community regarded as the highest authority in England, with the Rolls of Oléron being promulgated by Richard I and produced in the Black Book of the Admiralty.

¹⁰ *Ibid*, p.5

In common law, a contract was initially required to be in a particular form before it could be stamped with the 'badge of enforceability'¹¹ and this was in line with the **Statute of Frauds, 1677**, and a method of ensuring the veracity of an agreement was if that agreement was made in writing. This proved to work some hardship that most of the provisions of the Statute of Fraud were repealed in 1954.¹² Form still exists in certain types of contract by way of a deed including a lease for a period of more than three years; and a gratuitous promise. McKendrick identifies the following prerequisites of a deed as:

- a. The document should bear the word 'deed' or have some indication on it that it has the effect of a deed
- b. The document must be signed by the maker of the deed and the signature must be witnessed by at least one person.
- c. The person executing the deed must show by conduct that he intends to be bound by the deed.¹³

While the requirement of form in contracts appears to the layman to be a position of one trying to be more safe than sorry has had its detractors, Fuller¹⁴ pointed out that while it might be somewhat exerting, form had the following positive functions:

¹¹ McKendrick, E. Contract Law, 3rd ed, Macmillan 1997, p.68

¹² *ibid*, p.68

¹³ Law of Property (Miscellaneous Provisions) Act, 1989, s.1(2), (3). This Act abolished the requirement of a deed to be under seal as well.

¹⁴ Fuller, 'Consideration and Form', *Columbia Law Review*, (1941), 41, p.799, quoted by McKendrick, E. Contract Law, 3rd ed, Macmillan 1997, p.68

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- a. Providing evidence of the existence and content of a contract. This is a basic protection afforded parties who undertake a written agreement, which agreement they have the benefit of referring to in the event of a dispute. Such agreement will most probably have a clause therein for resolving a dispute, should one arise.
 - b. Acts as a caution to parties from lackadaisically signing agreements and ensure they understand the magnitude of the transaction they propose to undertake
 - c. Provide a simple and external test of enforceability.

Atiyah, however, is of the opinion that the 'insistence on form is widely thought by lawyers to be characteristic of primitive and less well-developed legal systems'¹⁵ While it might some advantages of having some agreements in writing or to be evidenced in writing, it may be quite inconceivable for every single agreement to follow this route. McKendrick offers the simple analogy having to sign an agreement for each time he bought a morning newspaper would be ridiculous and impractical.¹⁶ Arguments have been rife on the effect of the requirement for contracts to be in writing. Two types of contracts may be essentially the same, but the Rules may insist on one contract being written, and the requirement of writing being dispensed with in the other contract.¹⁷ As has been noted already, certain contracts can only be made in writing,

¹⁵ Atiyah, *An Introduction to the Law of Contract*, 5th ed, (Oxford: Oxford University Press, 1995), p.163

¹⁶ McKendrick, *op cit*, p.70

¹⁷ In English law, contracts of guarantee are required to be in writing, while contracts of indemnity are not so required.

including one for the sale of a house, this coming within the range of a contract for the sale or other disposition of an interest in land, which is governed by the **Section 2 of the Law of Property (Miscellaneous Provisions) Act, 1989**. There is as yet no clear distinction on whether all the terms or some of the terms of such a contract need to be in writing. The following case though hints at the possibility of a preliminary agreement to the agreement proper for the sale of a house being upheld by the Courts.

Typically, in a Classification Agreement, what constitutes the consideration will be the price albeit in instalments agreed between the Classification Society and the Ship-owner for the survey and inspection of a New Build Vessel, according to the rules of the Classification Society¹⁸; and also the price agreed between the Classification Society and the Flag-state for the classification of the vessels in the latter's register to ensure compliance with relevant international conventions.

Advertisements by Classification Societies could constitute an invitation to treat, because it is presumed that Class is courted by ship-owners who wish to have their vessels classified by a certain Classification Society. On the offer of the Ship-owner, the society then accepts to survey and inspect the vessel according to its rules and guidelines.

¹⁸ See generally Goldrein, I. & Turner, P. Ship Sale and Purchase, 4th ed, (London: LLP, 2003), p.2. The contract to classify a vessel could also be entered into with the particular classification society by the ship-yard on the ship-owner's behalf, either in the case of new build or a conversion.

2.2 Potential Contractual Relationships and Status of Class as a Contractor

A Classification contract by its nature will not necessarily be one for the sale of goods, rather it more aptly fits the mould of a contract for the supply of services. These two forms of contract, the first governed by the **Sale of Goods Act, 1979**, and the second governed by the **Supply of Services, 1982**, have a fundamental difference between them. In the former, the duty on the seller/supplier of goods is strict, whereby he is compelled to supply goods, which are of satisfactory quality and non-defective. In a contract for services, the provider is usually under a duty to exercise care and skill that is expected in that particular trade. In effect, what a seller proposes is more or less a 'guarantee', that he will tender the goods identified in the contract.¹⁹ In a contract for the supply of services however, such as a Classification contract, it has been widely noted that a Classification Society does not guarantee the seaworthiness of a vessel. Rather, it proposes to survey and inspect a vessel in line with its published rules, guidelines and standards.²⁰ In line with **Section 4** of the **Supply of Goods and Services Act, 1982**, though, the responsibility of the seller/provider is elevated to a strict liability position, where materials have to be provided under the contract as well.

The requirement to exercise due care and skill as provided in the **Supply of Goods and Services Act**, imports, it will appear, the element of tort into a contract. The corollary of this is that where the parties will have remedies in contract, where services are involved remedies in

¹⁹ Note the **Niru Battery Manufacturing case** where one of the defendants, SGS, was liable to oversee the loading of the particular goods it had specifically identified. SGS was by all means not a seller of goods in this case, rather it was a supplier of services, not unlike a classification society.

²⁰ *Great American Insurance Co. v. Bureau Veritas* (1972) 1455; *Sundance Cruiselines Corp v. American Bureau of Shipping (ABS) (The Sundancer)* (1994) Lloyds Rep, 183

tort are likely to emanate from the contract as well. Goode²¹ notes that in a contractual setting, the elements of contract, tort and restitution can become manifest. Therefore, in one matter, a claim in contract can take the form of the plaintiff who has not obtained the mutually agreed service that he has paid for. A claim in tort may arise from the same setting, thereby terming it a contractual tort. It may have the added ingredient of negligence in performing the service, or misrepresentation in the ability or expertise in performing the service. The claim in restitution may take the nature of an action for recovery of funds expended towards the provision of the contracted service. Restitution is usually invoked where there has been a total failure of consideration. Distinguishing factor in a restitution claim is that the defendant has benefited from the contract with the innocent party/plaintiff, who has not obtained his expected bargain.

The range of work that class performs means that it enters into various types of contracts. They provide specialist service and like every other organisation need to earn revenue to fund their operations and adequately remunerate their staff. To continue with their research and development, Classification Societies need some means with which they can operate.

The conventional parties that a Classification Society will contract with for the provision of classification services are the Ship-owner and Flag-states, and these represent the various capacities in which Classification Societies perform their duties, as regard a ship-owner, often in a private capacity, essentially to survey and inspect the hull and machinery of the vessel, and with a Flag-state in a public capacity, to ensure certain international conventions²² are complied with.

²¹ Goode, *op cit*, p.71

²² These include the SOLAS Convention, 1974 and the Load Line Convention, 1966

It should be noted that the majority of the actions between class and another party have been largely instituted by the other party, whether it is the ship-owner²³ in contract or in a tortious capacity stemming from the contract; or the cargo-owner²⁴ in a purely tortious capacity. Considering the nature of the specialisation of classification societies, it is imperative that a contract is entered into by it and another party requiring its services. Should there be a dispute between the parties the contract will be the focal point of reference in a bid to resolve such dispute, in the belief that both or all parties in the contract had fully intended to be bound by the clauses in the contract. In effect, parties will refer to the contract between them initially and resort to any remedies contained therein before looking for an alternative means of recompense available to the aggrieved party²⁵. In this regard, the never-ending battle between contract and tort emerges in terms of which form of law between the two should supersede the other where there is a claim.²⁶ Krauss believes it is the general presumption, in the course of undertaking to be bound by the tenets of a contract, that both parties are of equal bargaining power. Where this is not the position, the State may come to the aid of the 'lesser' party through the mechanism of tort in the event of a dispute or a breach of the term of a contract.²⁷

The primary duty of Classification Societies, as the relevant cases discussed in this study illustrate, is to survey and inspect a vessel and ensure it is seaworthy according to their published rules and standards to embark on a voyage with regard to passengers and/or cargo.

²³ The morning Watch (1990)

²⁴ The Nicholas H [1996] 1 Lloyds Report 299

²⁵ American Bureau of Shipping v. Tencara & Others, United States Court of Appeals for the Second Circuit, March 17, 1999; Docket No. 98-7823 (L)

²⁶ See generally, Krauss, M. "Restoring the Boundary, Tort Law and the Right to Contract", Cato Publications, Policy Analysis, June 3, 1999

²⁷ *ibid*, p.3

Class basically brings into practice the aims of the guidelines and standards of the International Maritime Organisation (IMO) and the international conventions, which the IMO has helped to put in force. These Conventions include the Load line Convention of 1966 and the Safety of Life at Sea Convention, 1974.²⁸ These had their origin from the United Nations Convention on the Law of the Sea (UNCLOS) under the duties of a flag state upon the registration of a ship. Article 94 of UNCLOS particularly specifies that the flag state must “*effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag*” and take “*such measures for ships flying its flag as are necessary to ensure safety at sea...*”²⁹ Most Flag States delegate the duty of putting the effects of the Conventions to Classification Societies, who merely act on behalf of flag States in a statutory capacity and in this regard are termed Recognised Organisations.

The relationship between a Ship-owner and a cargo-owner will necessarily be governed by the Hague, Hague-Visby or Hamburg Rules, which delineates the extent of the Ship-owner's responsibility towards his vessel and the cargo on it in a contract. This duties³⁰ imposed by the Hague Rules has been held to be one which is non-delegable to another party by the Ship-

²⁸ These have been discussed in Chapter 1 of the thesis.

²⁹ *ibid*

³⁰ The most important duty here is the duty on the ship-owner to ensure that the vessel is seaworthy at the beginning and usually during the course of the voyage. This is also replicated in the marine insurance contract between the ship-owner and the underwriter of the vessel, whereby should it be proven that the vessel was not seaworthy at the time of the voyage, the insurance is deemed null and void. Please see generally, **Marine Insurance Act, 1906** and the **International Hull Clauses (IHC) 2003**

owner³¹, and in this connection we analyse the duties of a Classification Society and a Ship-owner in a contract to classify a vessel. There are different types of contracts which can arise between a Ship-owner and a Classification society and these include a contract for the survey of the construction of a brand new vessel, a survey for the conversion of a vessel from one purpose to another and a periodic survey during the working life a vessel.³² In these contracts, while certain obligations remain unchanged, others will vary according to the particular type of contract. These contracts purport to establish the position of the Ship-owner and that of the Classification Society and the extent to which the Classification society is responsible for the survey and inspections they conduct on the vessels.

The contract between the Classification and the Flag-State is one that varies slightly from that between the Society and a Ship-owner in the sense that the Flag-State appears to adopt a dominant role akin to that of the Classification Society in its contract with a Ship-owner. The purpose of this chapter will be to analyse the peculiar provisions in a Classification contract between the various parties it enters into agreements with.

2.3 Range of Standard Form Classification Contracts

In this section, some of the clauses in the agreement between class and ship-owners for both new construction vessels and an existing vessel will be analysed. This constitutes the private role of classification societies Further, I shall analyse the clauses in the agreement between a

³¹ Great American Insurance Co. v. Bureau Veritas (1972) AMC 1455

³² Please see the classification contracts in the appendix section.

flag-state and classification societies, therein referred to as recognised organisations (RO), and this constitutes the public role of classification societies.

Certain factors that feature in these contracts include the issue of equal bargaining powers between the parties. In the contract between the Classification Society and the Ship-owner, it will appear that the Society has the advantage from the seemingly rigid clauses that appear to favour the Classification Societies. In the contract between the Flag-state and the Classification Societies, however, the Flag-state in the form of its national maritime organisation appears to be the party with the upper hand in the agreement.

2.3.1 Private Contracts

2.3.1.1 Common Terms in Lloyds Register (LR) Contract for Marine Services during Construction

Lloyds Register is the premier classification society and it has a standard form contract with which it enter into legal relations with prospective client ship-owners/shipyards. The contract over the years has undergone some modification to the clauses to reflect current times, particularly with regard to the liability clause.³³ This is due, in no small part, to the spate of legal actions being instituted by the plaintiffs against classification societies over classification work that has been undertaken on their vessels or in the case of third-parties (usually cargo-owners),

³³ Clause 12 of the Lloyds Register Contract for Marine Services during construction. This clause has been said in the industry to render LR just about 'untouchable' should an action for breach of contract or duty of care be brought against LR by a prospective plaintiff.

for classification of the vessel ferrying their cargo. The clauses in the contract include as follows:

1. **Definitions**

In these terms and conditions; (i) "Services" means any and all services provided to the Client by any entity that is part of the Client's vessel, equipment or machinery; (ii) the "Contract" means this agreement for supply of services, and (iii) the "LR Group" means LR, its affiliates and subsidiaries, and the officers, directors, employees, representatives and agents of any of them, individually or collectively

It is presumed that the services provided by LR include anything remotely related to the survey and inspection of the vessel in order to obtain a Classification Certificate. The term 'Client' is not defined and due to practice it is usually the Shipyard constructing the vessel that contracts for the services of the Classification Society on behalf of the Ship-owner.³⁴

A typical classification agreement is preceded by a prior agreement between the Ship-owner and the Ship-builder. When the Planning Committee of the Shipyard approves the design of the vessel, the choice of the Classification Society to use comes into play. Ideally, the builder would have a Classification Society it usually works with, which the builder may suggest to the Ship-owner. On the other hand, the Ship-owner might have an idea of the Classification Society he wants to work with, especially if such has been recommended by the insurance company

³⁴ American Bureau of Shipping v. Tencara & others, Docket No. 98-7823 (L), 98-7893 (XAP); <http://law.touro.edu/2ndCircuit/March99/98-7823.html>. Here the Shipyard contracted for the services of the classification society, ABS, as an agent of the ship-owner.

that he proposes to insure the vessel with.³⁵ The theory of classifying a vessel with a reputable Classification Society - typically a member of the international Association of Classification Societies (IACS) - is based on the fact that the insurance premium payable by the Ship-owner is considerably lower if his vessel is classed with a reputable organisation.

On reaching a consensus on the choice of the Classification Society³⁶, a contract is agreed between the Society on the one hand and either the Shipyard Manager, Ship Designer or the Owner's Representative on the other hand, to survey the vessel based on the Society's Rules, Guides and Standards. Generally, what the Classification Society will undertake to perform initially is a Special Survey, which is executed once every fixed period of years, whereby the vessel is given a thorough inspection. This is followed by an annual inspection, executed every year in the interim period of the special survey.

The 'LR Group' has been defined to include the Organisation with all its directors, employees and associates, individually and collectively. This suggests that should any of LR's surveyors undertake his activities on behalf of the Classification Society, there could be the element of vicarious liability in the event of an action by an aggrieved party against the services executed by LR.

³⁵ Clause 13.1.1 of International Hull Clauses (IHC) 2003 which provides that 'the vessel shall be classed with a Classification Society agreed by the Underwriters'

³⁶ More often than not, the choice of the Classification Society will be at the discretion of the Underwriter for the vessel with whom the ship-owner proposes to insure the vessel.

2. **FACILITY AND ACCESS**

The Client agrees to give the LR Group entity concerned every facility and necessary access to carry out the Services and undertakes to familiarise itself with the appropriate Rules and Regulations and, where appropriate, ensure that all sub-contractors and suppliers of components, materials or equipment do the same. The Client also agrees to oblige its sub-contractors and suppliers to arrange the necessary plan approval surveys and to pay the LR Group entity's associated fees.

In this clause, the client is required to ensure that LR is given a favourable environment to perform their duties for the vessel, through access to necessary materials in terms of survey plans. In the same vein, the onus is placed on the Client to pay LR's fees and be aware along with their associates of LR's rules and regulations. This may be an extra step on LR's part to dispense with any allegation that they have not performed their work as required whereby they may refer to their rules and regulations for clarification. The mode of payment of fees is not mentioned in this particular clause on the mode of payment whether it will be in instalments or full payment made prior to performance of classification work or after the said performance.

1. *The survey procedures undertaken by the LR Group entity including those followed during periodical visits are published in the Classification Rules and Regulations. Surveyors will not be in continual attendance at the builder's premises. As construction and outfitting are continuous processes, the Client has the overall responsibility to the prospective owner to ensure and document that the requirements of the Rules and Regulations, approved drawings and any agreed amendments made by the attending surveyors have been complied with at all times.*

This clause is the first indication of the responsibility laid on the Client in the contract. It stipulates that the surveyor will not always be on site, thereby suggesting that LR cannot be said to be in control of the vessel, which then falls to the Client in this instance. This is reflective of one of the issues that arose in the **Great American Insurance Co. v. Bureau Veritas**³⁷, **Sundance Cruises Corporation v. America Bureau of Shipping (ABS)**³⁸ and **Marc Rich & Co and Others v. Bishop Rock Marine Co. Ltd, Bethmarine Co Ltd and Nippon Kaiji Kyokai (The Nicholas H)**³⁹ regarding the question whether a Classification Society is in control of the vessel to make it liable to the Ship-owners and cargo-owners respectively in a duty of care. The Client is designated as the party responsible to the prospective owner with overall responsibility of adhering to compliance with the Rules and Regulations of the drawings and any amendments by the surveyors. This will appear like an extension of the Hague-Visby Rules where the Ship-owner is solely responsible for the seaworthiness of his vessel. In the **Sundancer**, it was held that the Ship-owner and not the Classification Society in that case, ABS, was ultimately responsible for and in control of activities aboard the vessel, which included the conversion, repairs and its maintenance.⁴⁰

2. *The interpretation of the appropriate Rules and Regulations for classification is the sole responsibility and at the sole discretion of the LR Group entity concerned*

Issue that arises here is that in the course of negotiating the contract for supply of classification services, the Client has no input in the drafting of the contract, with no

³⁷ 1972 AMC 1455

³⁸ [1994] L.R. 183

³⁹ [1995] 2 LR 299

⁴⁰ [1994] L.R. 183 at 212

amendments to the standard contract and has to rely on the LR's interpretation of the terms in the contract.⁴¹

5. Payment

The Client agrees to pay all undisputed portions of invoices for the services within 30 days of the invoice date. LR reserves the right to charge interest at an annual rate of 2% above the greater of the London Interbank Offered Base Rate (LIBOR) or the equivalent in the country where the Client maintains its principal office on any amount remaining unpaid beyond 30 days, and may withhold any or all Services until the arrears, including interest are paid.

This is a fairly straightforward clause which stipulates the penalty should the Client fail to pay an invoice after 30 days it has been issued. The issue of whether the payments can be made in instalments appears to be at the discretion of LR, since no mention of payment by instalments in the clause. What obtains in practice is that there may be a private arrangement to pay in instalments for which an invoice is issued. There may therefore be five instalments of fee payments for which five invoices will be issued⁴²

⁴¹ A representative of LR advises that in practice there is usually no input from the Client on this issue, who are comfortable with the clauses in the contract.

⁴² The American Bureau of Shipping (ABS) actually provides in its 'Request for Class Agreement for New Build at Clause 3a that '*Fees are normally payable in three instalments unless alternate arrangements have been agreed upon by both the Client and ABS. Any such special arrangements should be defined in section II on page 2. Fee quotations are based on a definite scheduled completion date fixed at the time of entering into this Agreement. Should services extend beyond the anticipated completion date, additional charges in accordance with the then current fee schedule shall be assessed and invoiced along with the cost and expenses. This also applies to services performed at any subcontractor.*

Where payment for class survey is agreed to be in instalments, certain factors have to be ascertained here, which include:

- i. is there a co-relation between such payment and classification by stages?
- ii. is the agreement to be interpreted in such a way that a section of the vessel is inspected according to the part of the classification fees that have been paid?
- iii. would the Client's failure to pay an instalment detract from the general duty to classify the vessel?

The above questions may appear to be answered in the affirmative following the position in the *Buena Trader*⁴³. The survey by stages was one of the issues between the parties (Buyer and Seller). Expert evidence was given to show that this was a convenient method of classifying a vessel, especially one involved in long voyages most of the year. At least 20% of the vessel is thereby required to be classified each year, over a period of five years. The survey by stages employed in this case could imply that a fee instalment could have been agreed in the contract between Lloyds Register, the Classification Society involved in that case, and the Seller, Sea Tanker Shipping (PTE) Ltd.

An instructive case here is *Fraser Shipyard and Industrial Centre v The 'Atlantis Two'*⁴⁴ which concerned the order of priorities where classification and survey fees fell.

⁴³ [1978]2 Lloyd's Rep 325

⁴⁴ (August 4, 1998) No.T-111-98 (F.C.T.D.)

This was an application by Lloyd's for an order that it be given priority for amounts due to it for classification services rendered to the "Atlantis Two" in 1997 and 1998. At the time of the motion the "Atlantis Two" had been ordered to be sold *pendente lite*. The Acting Marshall had requested that Lloyd's make its books and records available to potential purchasers. Lloyd's refused to do so or to provide further classification services unless the Acting Marshall agreed to pay its outstanding account in full. The Acting Marshall declined to pay the outstanding account and the matter came before the court on the motion by Lloyd's. At the initial hearing of the motion the Prothonotary urged the parties to attempt to reach a settlement of the dispute. The parties were, in fact, able to achieve a settlement which was ultimately included in an Order. The settlement was that Lloyd's would make its records available but reserved the right to claim priority for its fees. Notwithstanding the settlement, the Prothonotary issued reasons in which he commented that Lloyd's came to the court with "unclean hands" and that, under the circumstances, it would have been premature and improper to have granted Lloyd's immediate priority. The Prothonotary further commented that the English practice of having the Marshall recommend payment of classification society fees at the conclusion of the sale (provided there has been an enhanced sale price as a result of the classification societies cooperation) was a sensible and workable practice.

7. Confidentiality

The LR Group will keep confidential and not use or disclose to any third party any technical information or operating data (other than ship plans available on the LR Group classification website: www.cdlive.lr.org) derived from the Client in connection with the Services except as may be required by law or as may be requested by the

Client. This obligation will survive termination of the contract. This obligation will not apply to any technical information or operating data that was in the LR Group's possession before its disclosure to the LR Group entity in connection with the Services, that is or becomes part of the public domain through no fault of the LR Group or that otherwise becomes available to the LR Group from an independent source not under a confidentiality obligation.

This is a conventional clause that alludes to confidentiality to be maintained by both parties. By this clause, LR is required not to disclose information emanating from the relationship between it and its Clients, and this duty survives even the duration of the contract. The exception though appears to be that, should the information have come within LR's knowledge prior to entering the contract, or the information somehow becomes public through no fault of LR, then the obligation to maintain the confidentiality in that regard is dispensed with. The issue that arises here is how it will be ascertained that the information being made public was through no fault of LR.⁴⁵ The clause does not specify how LR will be deemed not to be at fault for the dissemination of the technical information. It can only be inferred that this may be resolved by the parties through the medium chosen for the resolution of disputes.

8. *The Contract continues in force until terminated by LR or by the Client, after giving the other party 30 days' written notice*

⁴⁵ It will appear from a cursory glance at the clauses in the contract that they are designed to favour and perhaps overly protect the classification societies. This is a feature of most standard form contracts, where it cannot be said that parties are of the precise equal bargaining power. See generally Krauss, M. "Restoring the Boundary, Tort Law and the Right to Contract", Cato Publications, Policy Analysis, June 3, 1999

9. *If the Contract is terminated by LR or by the Client before the Services are completed, the fees will be calculated on a pro rata basis up to the date of the termination. Any reasonable costs directly attributed to early termination and any amounts then due will immediately become payable.*

Clauses 8 and 9 both relate to termination of the Contract and Clause 9 in particular refers to the termination of the Contract before LR completes its Services on the vessel. It clearly stipulates that reasonable costs resulting from early termination and any erstwhile amounts possibly resulting from earlier unpaid invoices are liable to be paid immediately. There is no indication that LR will exercise a lien over the vessel or property of the Client should these amounts remain unpayable following the termination of the contract.

Still on termination of the contract, Clause 4 of the **ABS Request for Class Agreement for a New Build**⁴⁶ provides for the termination of the contract by ABS in the event of default in payment of a fee instalment and the property of the Client in ABS' possession is subject to a lien.⁴⁷ Should LR purport to exercise a lien over the Client's property, the ruling in *Ismail v. Richards Butler*⁴⁸ may be a guide, which typifies the position in a similar relationship between a Solicitor and a Client. In this case, the issue at stake was the defendant's lien over the

⁴⁶ This contract is the American equivalent of the LR contract for Marine Services during Construction and it has virtually gone through has gone modifications as the Lloyds Register contract.

⁴⁷ The Clause provides "*In the event of a default in the payment of any fees assessed in accordance with this Agreement, ABS shall have the right to terminate this Agreement and cancel classification; the vessel, as well as all plans, drawings, specifications, information and reports in possession of ABS, shall be subject to a lien for the payment of all fees and expenses due and owing by virtue of this Agreement and the termination or default hereof.*"

⁴⁸ [1996] Q. B. 711

plaintiff's papers for the latter's lack of payment of solicitors' fees. The Court was in accord with the lien exercised over the papers, but decided to apply the rules of equity by way of the plaintiff (Ismail) paying a security into the Court, which amounted to the same sum claimed by their defendant former solicitors. It is possible that in a similar situation where a Ship-owner neglects to pay an instalment of fees and the Classification Society exercises its lien, the Ship-owner may be compelled to pay some security into the Court's account, which could be equal to the amount originally claimed by the Classification Society.

What stands out in the above case however, is the notion that where a professional such as a solicitor discharges himself from the performance of his contractual duty, such a professional it appears, will not be in a position to exercise its lien over the Client's documents as was proposed in the *Ismail* case⁴⁹.

10. **Class Certificate not constituting Seaworthiness**

LR's services do not assess compliance with any other standard other than the applicable rules and codes of Lloyds Register of Shipping , international conventions, or any other standards that are expressly agreed in writing by LR and the Client. Without limiting the generality of the foregoing, the issuance of a class certificate does not in itself constitute a guarantee that the vessel is seaworthy and does not relieve the owner or operator of the vessel of its non-delegable duty to maintain the vessel in seaworthy condition.

⁴⁹ *ibid*, p.721 The general principle regarding a Solicitor who discharges himself from acting on his Client's behalf is that he cannot exercise any lien over the Client's documents.

This clause is particularly indicative of the furore between classification societies and their detractors in terms of the function of a classification certificate. Judicial precedents so far hold that the effect of a valid classification certificate is only enable ship-owners obtain favourable insurance premium, and not to guarantee the seaworthiness of the vessel, which is solely the ship-owner's responsibility,⁵⁰ and general maritime law stipulates that the Ship-owner is responsible for activities aboard his vessel and ultimately for its seaworthiness.⁵¹ The international conventions mentioned above will necessarily include conventions like the SOLAS, Load Line, MARPOL, etc which have been initiated by the IMO and bring into play the public role of classification societies.

11. *If the Client requires classification services relating to vessels, machinery, or equipment in a jurisdiction in which LR itself does not do business (including without limitation Brazil, Canada, Greece, and the United States of America), the Client hereby acknowledges and agrees that these services will be performed by a subsidiary or affiliate of LR that is part of the LR Group and that is authorised to conduct classification surveys and issue certificates on the vessel, machinery, or equipment, or by another person or entity that has been approved by LR to perform services.*

It is quite credible that shipping being such a global phenomenon, LR could be asked to classify a vessel in virtually any part of the world. It (LR) appears to prepare itself for this eventuality by requiring any of its subsidiaries or affiliates to undertake classification duties on

⁵⁰ Sundance Cruises Corporation v. America Bureau of Shipping (ABS) [1994] L.R. 183

⁵¹ Hague Rules 1924, Hague-Visby Rules 1968, and the Hamburg Rules, 1978

its behalf. It is expected that these will be exclusive surveyors⁵² who are licensed to operate in the jurisdiction where such vessel or machinery is located.

12. Limitation of Liability

In providing Services, information, or advice, the LR Group does not warrant the accuracy of any information or advice supplied. Except as set out in these Terms and Conditions, LR will not be liable for any loss, damage, or expense sustained by any person and caused by any act, omission, error, negligence, or strict liability of any of the LR Group or caused by any inaccuracy in any information or advice given in any way or on behalf of the LR Group even if held to amount to a breach of warranty. Nevertheless, if the Client uses the Services or relies on any information or advice given by or on behalf of the LR Group and as a result suffers loss, damage, or expense that is proved to have been caused by any negligent inaccuracy in information or advice given by or on behalf of the LR Group, then LR will pay compensation to the Client for its proved loss up to but not exceeding the amount of the fee (if any) charged by the LR for that particular service or information, or advice.

This clause is the *pièce de résistance* in the contract. It endeavours to limit the liability of any LR worker remotely connected to LR. An issue that must be borne in mind however is the compatibility of such a clause with the **Unfair Contract Terms Act, 1977**. This Act came into existence in a bid to dispense with the often unequal bargaining powers between parties in a

⁵² The use of exclusive surveyors has come highly recommended by the EU following the *Erika* and was one of the highlights in the Erika I package. Please see the chapter on the IMO and EU initiatives on class.

contract.⁵³ Thompson says that the Act's '*principal aim is the control of contract terms and of notices, that purport to exclude or restrict liability that would otherwise arise in tort or for breach of contract*'⁵⁴ The core of this Act may well be in its Section 2 whereby an exclusion clause is required to pass the test of reasonableness. The section states as follows:

- 1.) A person cannot by reference to any contract term or to a notice of given to persons generally or to particular persons exclude or restrict his liability for death or personal injuries resulting from negligence.
- 2.) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.
- 3.) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.

Most of the cases against classification societies have been over loss of cargo, in effect property interests. Therefore, where cargo interests are involved, section 2(1) of the Unfair Contract Act might so far not apply to Classification Societies. The provisions in the

⁵³ See generally, Thompson, P.K.J., Unfair Contract Terms Act 1977, (London: Butterworths, 1978) p.1 – 'Despite the its title, the Act's provisions are not limited to *contract terms*, they also apply too *notices* that purport to exclude or restrict liability in tort'; Mann, F.A., 'Unfair Contract Terms Act 1977 and the Conflict of Laws', (1978) 27 I.C.L.Q. pp. 661 - 664

⁵⁴ Thompson, P.K.J., Unfair Contract Terms Act 1977, *ibid*, p.1

classification contract, which appear to insulate Class immensely, may well be dispensed with where there is a situation of death and personal injury though.⁵⁵ Further, from the provisions of section 2(2), the test of reasonableness would appear subjective, and it is well worth considering who assesses the reasonableness of the exclusion or restriction of liability. Besides repudiating any form of responsibility at all for any act or omission that could have derived from LR, the clause will appear to not to be feasible for non-compliance with section 2(2) of Unfair Contract Terms Act, 1977, which stipulates that "*in the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.*"

Where the contract is agreed to with this limitation of liability clause, it is most likely that in the event of a breach of a term of the contract by LR, there will be recourse to tort provisions to resolve the dispute.⁵⁶ In as much as this particular clause, in form, is termed "Limitation", in substance it is essentially an 'exclusion of liability' clause, repudiating any form of liability even for a breach of warranty in the contract. The Unfair Contract Term Act negates the inclusion of such a term as an exclusion clause so long as the plaintiff disputing the term can be deemed to be a consumer. It is worth mentioning that the Exclusion clause in the **Sundancer**⁵⁷ was held by the Judge to be so extensive that it breached public policy, where the clause excluded all liability on its part towards the other party.

⁵⁵ Hobhouse, LJ in **Perrett v. Collins (1998) 2 LR 255**

⁵⁶ Clause 12 of the LR contract serves to protect LR, which would leave the ship-owner with no option, but to resort to tort law, invoking the provisions of the Unfair Contract Terms Act, 1977.

⁵⁷ **Sundance Cruises Corp v. American Bureau of shipping**, [1994] L.R. 183, 1994 AMC 1, 114 S.Ct (1994)

13. **Loss of Profit – Economic Loss Clause**

Notwithstanding the previous clause, the LR Group will not be liable for any loss of profit, loss of contract, loss of user, or any indirect or inconsequential loss, damage, or expense sustained by any person caused by any act, omission, or error or caused by any inaccuracy in any information or advice given in any way by or on behalf of the LR Group

This clause provides that no party (it is contemplated that third parties may be included here) may hold LR liable for loss of profit, loss of contract or loss of use. In effect this clause stipulates that LR cannot be held responsible for any economic loss that any party⁵⁸ may incur through any act or omission performed by LR or on its behalf. The Courts have in the few decisions involving classification societies regarded them as not liable in economic loss to plaintiff ship-owners or cargo-owners, which sort of loss has not been favourably looked upon in the British jurisdiction⁵⁹. This may not be the case for instance in Australia and Canada, where claims for economic loss have been dispensed with more often in favour of the claimant.⁶⁰

⁵⁸ In this instance, this could be an exclusive surveyor acting on LR's behalf

⁵⁹ *Marc Rich & Co and Others v. Bishop Rock Marine Co. Ltd, Bethmarine Co Ltd and Nippon Kaiji Kyokai (The Nicholas H)* [1995] 2 LR 299; *Mariola Marine Corporation v. Lloyd's Register of Shipping (The Morning Watch)* [1990] 1 Lloyd's Rep. 547

⁶⁰ *Rivtow Marine Ltd v. Washington Iron Works* [1974] SCR 1189; (1973) 40 DLR (3rd) 530; *Caltex Oil (Australia) Pty v. The Dredge Willemstad* (1976) 136 CLR 529; *Perre v. Apand Pty Ltd* (1999) 198 CLR 180; *Fortuna Seafoods P/L Trustee for the Rowley Family Trust v. The Ship Eternal Wind* [2005] QSC 4 Supreme Court of Queensland, 14 January 2005

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14. *No LR Group entity will be liable or responsible in negligence or otherwise to any person not a party to the agreement pursuant to which any certificate, statement data, or report is issued by an LR Group entity for (i) any information or advice expressly or impliedly given by an LR Group entity, (ii) any omission or inaccuracy in any information or advice given, or (iii) any act or omission that caused or contributed to the issuance of a certificate, statement, data or report containing the information or advice. Nothing in these Terms and Conditions creates rights in favour of any person who is not a party to the Contract with an LR Group entity.*

This clause particularly mentions third parties and states that they do not derive any rights from this contract.⁶¹ This provision apparently adopts the same stance as most of the English and America case-law observed in the earlier clause. The **Nicholas H** held that a cargo-owner cannot hold a classification society liable in a duty of care to him if there was no indication that he relied on the certificate of that classification society or much less was aware of the particular society that surveyed the vessel ferrying the cargo.

This clause coupled with the preceding one, are both the crux of the arguments being levelled against Classification Societies by Ship-owners and third parties like cargo owners. Besides repudiating any form of responsibility at all for any act or omission that could have derived from ABS, the clause will appear to not to be feasible for non-compliance with section 2(2) of Unfair Contract Terms Act, 1977, which stipulates that “in the case of other loss or damage, a person

⁶¹ This will appear to be at divergence with the provisions of the **Contract (Third Parties) Act 1999**

cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness."⁶²

15. *No omission or failure to carry out or observe any stipulation, condition or obligation to be performed under the contract will give rise to any claim against LR or any other LR Group entity, or be deemed to be in breach of contract, if the failure or omission arises from causes beyond that entity's reasonable control.*

What constitutes 'causes beyond reasonable control' may well be a matter left to the Courts to decide, where there is indeed a failure or omission to perform a term in the Contract.⁶³ It is possible that the parties may have a preamble to the contract that could delineate the instances where either party may not be liable for non-observance or non-performance of a term or condition in the contract.

⁶² **Perrett v. Collins [1998] 2 L.R. 255 at 262**, where Hobhouse LJ in dispensing with the requirements of fairness, justice and reasonableness where proximity has been established said '... none of the more sophisticated criteria which have been used in relation to categories of liability for mere economic loss need to be applied in relation to personal injury.' The facts of this case are discussed in the next chapter on class and tort.

⁶³ An Act of God could be included in the schedule to contract as a cause beyond LR's control. However, in the unlikely event that an exclusive surveyor working for LR should be inspecting the vessel and in disregard to health and safety procedures happens to be smoking a cigarette, which he fails to stub out and that results in the damage to the vessel, it is envisaged that this would not fall in the category of 'causes beyond reasonable control.'

2.3.1.2 Terms in the ABS Request for Class Agreement for Classification of an Existing Build

The role of a classification society in a contract with a ship-owner to survey and inspect an existing build can be the same in form as the contract for a new build. A particular difference besides the obvious one of there already being a physical vessel in the former type of contract, and that the vessel is yet to be built in the latter type of contract, is the fact that in the contract to survey an existing vessel, the classification society might have been in an earlier contract with another (or even the same) ship-owner to provide classification services for the vessel. In this regard, the classification society will be in on somewhat familiar territory with the vessel.⁶⁴

The terms in this particular Agreement follow the same format as the one for a new build vessel, except for some variation in a few clauses, which obviously point to the vessel to be classified being an already existing build. These differing clauses will be highlighted as follows:

Payment Conditions

It is mentioned in paragraph (a) that "*Fees for classing this vessel are payable for services provided regardless of whether or not the vessel is classed*"

⁶⁴ Evidence of the classification society having previously surveyed the vessel ideally should be in the records of the vessel. Where the ship-owner or shipyard (if the vessel is being converted from one purpose to another) usually engages the services of a particular classification society, it would be more comforting to re-engage this classification society to survey the current vessel especially as it has had previous dealing with it.

While the related clause in the Agreement for a new build specifies that the fees for the classification are payable in three instalments, the current clause herein merely states that the fees are payable. This may imply that it is possibly a one-off, non-negotiable payment. This could be justified by virtue of the fact that the vessel being an already completed construction may not warrant the amount of fees payable in the case of a new build, wherein more attention to detail could be required in its very construction. Further, being an already existing vessel, it is more than likely that the vessel is already in class, or at most has been classified by another Classification Society, thereby, but not definitely, dispensing with most of the survey and inspection that the current Classification Society has to do.

Assignment & Sale

The second paragraph in this clause reads as follows:

*"If Client shall breach any provision hereof or shall become insolvent, enter voluntary or involuntary bankruptcy or receivership proceedings, or make an assignment for the benefit of creditors, or should the vessel be arrested or sold at auction or at a Marshall's sale, ABS shall have the right (without limiting any other rights or remedies which it may have hereunder or by operation of law) to terminate this Agreement, whereupon, ABS shall be relieved of any and further obligation hereunder and Client shall be liable to ABS for all resulting damages. **ABS's right to require any previous waiver, forbearance, or course of dealing hereunder shall not affect strict performance of any obligation***

The last sentence highlighted in the above clause in italics ends with the following sentence in the corresponding Clause in the ABS Agreement for a new build:

“ABS’s right to require strict performance of any obligation hereunder shall not be affected by any previous waiver, forbearance, or course of dealing”

Relevant question here is what precisely does ABS require? Both contracts (for existing build and new build) require strict compliance with the terms of the contract. At first glance, however, it will appear that the emphasis in the Agreement for an Existing Build is on ‘previous waivers, forbearance, or course of dealing’, while the emphasis in the Agreement for a New Construction Vessel is on ‘strict performance of any obligation’ under the Classification Agreement. It is further observed that the part of the clause in the Existing Build Agreement in contemplation is written in the present tense, ‘shall not affect...’

Access

The last paragraph in this clause in both the Agreements for a New Build and an Existing Build reads as follows:

Client shall provide ABS with the following documentation before issuance of a full term classification certificate:

- a. *Plans and calculations required by the Rules for review*
- b. *Technical description and data, including material specifications*

There is a sub-paragraph (c) in the relevant portion of the Existing Build Agreement, which reads

'All the necessary documentation as required under IACS for transfer of class'

This marks an essential difference between the New Build Agreement and an Existing Build Agreement because in the former case, the vessel is being classified with ABS from inception to the eventual completed construction, therefore no other Classification Society is involved. In the latter form of Agreement though, the vessel might have done the rounds between various Classification Societies, hence the need for the documents that have accompanied the vessel from the beginning. This ideally will be governed by International Association of Classification Societies (IACS) inspired **Transfer of Class Agreement** which was initiated after the **Erika** aftermath of December 12, 1999 to implement transparency in the Classification system and prevent rampant class-hopping in a bid to evade the mandatory requirements by reputable Classification Societies.

2.3.2 Public Contracts

The contracts that the classification societies undertake in this regard are with flag-states where the position that obtains with ship-owners and ship-builders in a private contract is somewhat reversed. In this contract, the classification undertakes to assess that the vessels

registered with the maritime administration of the flag-states observe the guidelines and standards stipulated by the IMO.⁶⁵

**2.3.2.1 TERMS IN THE DANISH CLASS AGREEMENT 2005 BETWEEN DANISH
MARITIME AUTHORITY AND FOLLOWING RECOGNISED ORGANISATIONS:
American Bureau of Shipping, Bureau Veritas, Det Norske Veritas, Germanischer
Lloyd, Lloyds Register, Nippon Kaiji Kyokai and RINA Sp.A. Registro Italiano
Navale Group**

The current Agreement was agreed between the Danish Maritime Authority (DMA) and the above-mentioned Classification Societies in May 2005⁶⁶ largely in response to the European Union Directive 2001/105/EC, which in turn largely owed its origin to the *Erika* sinking in December 1999. Some of the pertinent clauses in this Agreement will be reviewed both in their capacity herein as express terms.

⁶⁵ The Load line Convention of 1966 and the Safety of Life at Sea Convention, 1974, as discussed in Chapter 1 of the thesis.

⁶⁶ Please see the DMA Agreement with its Annexe I in the thesis appendices. The Agreement has been entered into with the Classification Societies (recognised organisations) at various times from April 1996, with a new one entered in February 2001 following the adoption of the European Union's Council Directive 94/57/EC. This agreement instituted a system of a "more permanent" legal agreement supplemented by a number of technically oriented annexes. A new set of annexes was issued 25 February 2002 and the delegation was brought in line with the SOLAS amendments entering into force on 1 July 2002. The "Danish Class Agreement 2003", is a revision of the 2001 agreement and rewriting of the 2002 annexes. The Danish Class Agreement May 2005 includes the original agreement issued 27 September 2003, and a revised annex I and II primarily because of the new MARPOL Annex VI, but also with the intention to improve the reporting scheme of the RO to the DMA. In addition, a new annex III includes the Danish National Regulations additions).

1. Introduction

- 1.1 *This Agreement is issued in accordance with Technical Regulation no.5 of 9 August 2002 on recognition and authorisation of organisations undertaking ship inspection and survey.*
- 1.2 *The Technical Regulation contains regulations which implement the European Union's Council Directive 94/57/EC (as amended – 97/58/EC and 2001/05/EC) on common rules and standards for ship inspection and survey organisations and for the relevant activities referred to as the “Class Directive”*
- 1.3 *Further, the “Guidelines for the authorisation of organisations acting on behalf of the Administration”, IMO Assembly resolution A.739(18) and the Annexes thereto, hereinafter referred to as “Resolution A.739(18)”, and the “Specifications on survey and certification functions of recognised organisations acting on behalf of the Administration, IMO Assembly Resolution A.789(19), hereinafter referred to as Resolution 789(19), is agreed upon by the **American Bureau of Shipping, Bureau Veritas, Det Norske Veritas, Germanischer Lloyd, Lloyd's Register, Nippon Kaiji Kyokai, RINA S.p.A Registro Italiano Navale Group**, hereinafter referred to as ‘RO’ and the DANISH MARITIME AUTHORITY, hereinafter referred to as “DMA” with respect to the performance of statutory surveys and the issuance of relevant certificates*
- 1.4 *Irrespective of this Agreement, the ministry of Business, Trade and Industry and the DMA are responsible for survey, certification and other matters relating to the seaworthiness of Danish Registered Ships pursuant to Danish Legislation.*

2 Purpose

2.1 The purpose of this Agreement is to authorise the RO to perform survey and certification services to the extent given in the Annexes to this Agreement.

2.2 The purpose of this Agreement is also to define the scope, terms, conditions, requirements and co-operation between RO and DMA, relating to all Danish registered ships or Mobile Offshore Drilling Units (MODUs) in class by the RO and to the Companies responsible for operating the Danish registered ships and MODUs.

This introductory clause specifies the parties to the Agreement as well as the statutory force behind it. It points out early in the contract that the Danish legislation will apply on issues regarding the seaworthiness of the Danish registered vessels, thereby signifying the relevant choice of law to guide the Agreement.

23 Obligation of the RO to Class at least One Ship Under the Danish Flag

23.1 With reference to the Class Directive Article 5.1, the DMA may restrict the number of organisations authorised to carry out survey and certification services in accordance with the needs of the DMA

23.2 The DMA will not authorise new ROs unless the RO is able to document that at least one ship will be surveyed and certified by the RO within a reasonable time-frame. The following clauses 23.4.3 and 23.4.4 are also applicable to new signees to this agreement

23.3 *If, an RO which is authorised by the DMA ceases to have any ships under the Danish Flag in class the RO shall inform the DMA without unnecessary delay*

23.4 *If the RO is not, within a reasonable time-frame able to survey and certify at least one ship under the Danish Flag, the DMA may instate the following procedure:*

23.4.1 *Supervision of the RO according to section 13.1 will be suspended*

23.4.2 *If the RO fails to survey and certify one ship under the Danish Flag for a prolonged time the DMA may choose to terminate this Agreement, cf. section 16*

23.4.3 *After receiving information from the RO, according to section 9.3, that ship will be surveyed and certified by the RO, the DMA will decide whether any additional actions is deemed necessary*

23.4.4 *The DMA will audit the RO within 6 months of the ships certification at the expense of the RO*

This section designates the core responsibility of the Classification Societies to the DMA and the necessary nexus of undertaking the statutory certification of a Danish-flagged vessel on behalf of the DMA. It is possible that ship-owners may prefer the certification of a particular Classification Society for the conventional survey and inspection. The clause does not indicate the method of choosing of any particular Classification Society to undertake the statutory certification of the vessel. It could be that the selection process is at the discretion of the DMA to select the Classification Society and perhaps on the strength of the proposal that the Classification Society may present.

2.3.3 Co-relation between the Private and Public Classification Contracts

The two types of contracts (with a ship-owner/shipbuilder on the one hand, and with a flag-state, on the other hand) that a classification society which delineate its private and public role respectively can have common clauses which run through both types of contracts, and these will be analysed here.

2.3.3.1 Common Terms in ABS Request for Class Agreement for Classification of New Construction Vessels and the Danish Maritime Authority Class Agreement

a. Accessibility to Information

Clause 8 of DMA Agreement – Information and Liaison - General

- 8.1 *RO and the DMA, recognizing the importance of technical liaison, agree to co-operate toward this end and maintain an effective dialogue.*
- 8.2 *The RO invites the DMA to participate in relevant technical Committees, etc.*
- 8.3 *The relevant regulations, rules, instructions and report forms shall be written in the English language*
- 8.4 *The RO agrees to report to the Administrator information pertaining to services performed pursuant to this agreement as follows. To this end RO shall:*

8.4.1 *Provide the DMA with electronic access⁶⁷ to all Rules and Interpretations⁶⁸ relevant to the DMA in respect of work carried out by RO in accordance with this Agreement*

8.4.2 *Provide the DMA with access to forms, reports, checklists and instructions that the RO surveyors use when conducting surveys on Danish Ships in question according to the Annexes of this Agreement*

Clause 7 of the ABS Agreement – Access

ABS, its officers, employees, servants or subcontractors shall have access to all vessels, drawings, plans, records, places of manufacture and assembly or other items necessary to complete the requested services. Client shall also grant access to auditors from ABS, the International Association of Classification Societies (IACS) or flag Administration when requested by ABS and accompanied by ABS personnel.

By these clauses in the Agreements, the need for co-operation between the parties to the contract is reflected to dispense with possible bureaucratic red tape during the tenure of the Agreement. The avenue is then created for the free flow of data between the parties.

⁶⁷ By way of the Internet, CD-ROM, etc. If the actual regulations are not available on an electronic format the RO shall provide the Danish Maritime Authority with one paper copy and keep it updated.

⁶⁸ For instance, a statement that only IACS Unified Interpretations are used and where they are accessible electronically

Section II of the ABS Agreement and Sections 10 and 11 of the DMA Agreement are similar regarding the mode of contact between the parties. ABS recommends that 'all correspondence should be addressed to **American Bureau of Shipping, CDC Centre, 16855, Northchase**

Drive, Houston, Texas, 77060 USA'. Such communication includes the payment of fees either for classing a vessel or for re-classing and modifying a vessel. It further stipulates that other addresses may be applicable as designated from time to time in writing between the parties, and notices are required to be in writing, which are effective upon receipt, unless they are sent by telex or fax and repeated by mail, in which case they are effective upon dispatch⁶⁹

b. **Communication between the Parties**

Clauses 10 and 11 of the DMA Agreement, titled '**RO (Recognised Organisation) Way of Communication**' and **DMA Way of Communication** respectively stipulate the method of communication between the parties to the Agreement. Section 10 of the DMA Agreement is as follows:

10.1 *"The primary way of communication between the Danish Maritime Authority and the RO are through the RO main representation in Denmark, unless otherwise agreed between the DMA and the RO"*

⁶⁹ asterix to section on Notices in the ABS Agreement

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- 10.2 *The RO main representative in Denmark must be a legal party capable of representing the RO in a Danish Court of Law, cf. section 22 of the agreement*⁷⁰
- 10.3 *The RO shall provide an official e-mail address for the purpose of this communication*
- 10.4 *For practical purposes, correspondence concerning new buildings, the fleet in service, specific ships or MODUs may be solely between the DMA and the RO main representation in Denmark or any part of the RO organisation to the discretion of the RO (e.g. field office)*
- 10.5 *For use in case of accidents or other incidents involving ships at MODUs under Danish Flag, the RO shall provide the DMA with a point of contact (Contact by phone, fax and e-mail) that is responsive all year, 24 hours a day.*

The above indicates amongst others, the requirement for the RO (Classification Society) to have some presence in Denmark for ease of communication, and such representation must be capable of representing the Classification Society in court.⁷¹ With these in place, there is no question that in the event of an action brought against the DMA and any of the ROs it has an agreement with, that the RO will be represented in court, without the inconvenience of distance forestalling the appearance of the RO representative in the Danish Court. This provision also indicates in subsection 10.3, the need for improvement in technology through the request for the provision of an e-mail address, which is

⁷⁰ Section 22 of the DMA agreement titled Representation states: “The RO shall establish a local representation of a legal nature on the territory of Denmark to ensure legal personality under Danish law and the competence of Danish national courts.”

⁷¹ It may be considered an indication of Denmark’s sovereignty to make this stipulation on local representation and the reference to ease of communication would imply that ideally a Danish speaker, if not a Danish national, would be considered. Obviously, using Danish nationals would necessarily create employment for the local surveyors, who know the environment in which they operate.

practically immediate, compared to mere mail, which with no surprises can get lost in the post. Email is a virtually an improvement on the fax.

Section 11 DMA Way of Communication

11.1 *The DMA shall provide RO with the necessary documentation for the purpose of RO's provision of statutory certification services*

11.2 *The DMA will provide access to the above-mentioned documentation on its web-site*

11.3 *Any questions about interpretations and/or ambiguities of this agreement shall be forwarded directly to DMA's "Class Society Secretariat"*

Bearing in mind that Class undertakes the statutory compliance of vessels with international conventions, subsection 11.1 of the DMA Agreement reiterates this position. In this section, the onus is on the DMA to make accessible any documents/information that will enhance the RO's performance of their duty.

c. **Limitation of Liability**

Clause 15 of DMA Agreement - Liability

15.1.1 *If liability arising out of any incident is finally and definitely imposed on the Danish Government by a Court of law or as part of the settlement of a dispute through*

*arbitration procedures, together with a requirement to compensate the injured parties for loss of or damage to property or personal injury or death, which is proved in that court of law to have been caused by a wilful act or omission or gross negligence of the RO, its bodies, employees, agents or others who act on behalf of the RO, the administration shall be entitled to financial compensation from the RO to the extent that the said loss, damage, injury or death is as decided by that court, caused by the RO.*⁷²

Sub-sections 15.2 and 15.3 are identical to the above Section 15.1 up to the point of the word 'extent'. Here subsection 15.2 ends with *'the administration shall be entitled to financial compensation from the RO to the extent that the said personal injury or death is as decided by that court, caused by the RO, up to but not exceeding an amount of €5,000,000.* Subsection 15.3 ends with *'the administration shall be entitled to financial compensation from the RO to the extent that the said loss or damage to property is as decided by that court, caused by the RO, up to but not exceeding an amount of €2,500,000.*

15.4 *Neither party shall be liable to the other for special, indirect or consequential losses or damages resulting from or arising out of services performed under this Agreement, including without limitation loss of profit, loss of production, loss of contract, loss of use, business, interruption or any other special, indirect or consequential losses suffered or incurred by any party howsoever caused.*

15.5 *If the DMA is summoned or is expected to be summoned to answer for such liability as mentioned above in this Article, the RO shall be informed without undue delay.*

⁷² This is reflective of the current incidents of the *Erika* and the *Prestige* which are both discussed in the IMO and EU chapter of the thesis.

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- 15.6 The DMA shall, for information purposes, send all claims, documents and other relevant material to RO. RO shall be entitled to provide support and/or participate in the defence of such claim, if RO deems it necessary or appropriate.*
- 15.7 If the DMA fails to plead all appropriate available defensive measures then the RO shall not be required to indemnify the DMA in accordance with the clauses 15.1, 15.2 and 15.3 above*
- 15.8 The DMA shall not enter into any commitment or agreement within the framework of this Agreement, which involves acceptance of such liability, as mentioned in sub-clauses 1,2 and 3 above, without the prior consent of RO*
- 15.9 While acting for the DMA under the Agreement, the RO shall be free to create contracts directly with its clients and such contracts may contain RO's normal contractual conditions for limiting its legal liability*
- 15.10 For the avoidance of doubt, nothing contained herein shall create or is intended to create any new cause of action in favour of the DMA or third parties*

This is one of the more pivotal sections of the DMA Agreement and other similar Agreements of this nature that obtain in the European Union (EU). This is due to the fact that the earlier subsections of 15.1, 15.2 and 15.3 were actually conceived by some of the northern European member countries of the EU (including Denmark, Sweden and Norway), the United Kingdom's Maritime and Coastal Agency, and the International Association of Classification Societies

(IACS) together called the 'Gothenburg Group'.⁷³ Together, they proposed what was termed the 'Gothenburg Formula', whereby in the event of death or personal injury resulting from the wilful act or negligence of a Classification Society, such Classification Society should be liable to not more than €5,000,000. In the same vein, where loss or damage resulted from the wilful act or negligence of the Classification Society, that Society's liability will be limited to €2,500,000. This proposal was presented to the European Commission and the European Parliament, who were amenable to the suggested liability regime. The enforceability of the Gothenburg Group Formula however needed the final stamp of approval of the European Council of ministers before it could become valid.

The Gothenburg formula was eventually adopted and modified to guide the final liability provisions of Classification Societies to national maritime administrations in the EU Directive 2001/105/EC, which replaced the 1994 Directive of 94/57/EC. This latter Directive notably had no liability provisions on the responsibility of Classification Societies to national maritime organisations, and the initiative was taken by the International Maritime Organisation (IMO) in October 1995 on this instance by virtue of a Model Agreement. Incidentally, Section 15.1 of the DMA Agreement is modelled on the IMO Agreement, which states:

"If a liability is finally and definitively imposed on the State of the Administration for loss or damage which is proved in a court of law to have been caused by any

⁷³ Harrison, J., 'Accountability of Classification Societies – The Role of Classification and Market-oriented and Policy Issues', (2001) 2 LS L C 1. Following the sinking of the *Erika* in December 1999, leading to the issue of Classification societies' liability through its perceived wilful act or negligence, Italy adamantly refused to concede a ceiling amount to which classification societies acting on its behalf in certifying vessels in its (Italy's) register would be liable, preferring instead the option of the classification societies' unlimited liability.

*negligent act or omission by the Recognised Organisation ('RO'), its officers, employees or others who act on behalf of the RO under this Agreement, the Administration is entitled to seek from the Recognised Organisation compensation up to but not exceeding the amount of financial liability defined in the standard terms and conditions of the RO.*⁷⁴

More than any other factor, the *Erika* sinking in December 1999 galvanised the EU into action to produce what resulted in the 2001 Directive. The liability figures, however, differ slightly between the Gothenburg Formula and the liability provision in Article 6 of the 2001/105/EC Directive, whereby the amount of €5,000,000 advocated by the Gothenburg Group upon death or personal injury caused by the RO is substituted for €4,000,000 in the 2001 Directive, and the amount of €2,500,000 liability upon loss of property or damage to property is substituted for €2,000,000. Harrison explains that the figures in the Gothenburg Formula which were intended to be maximum figures were converted to minimum maxima figures in the course of drafting the 2001 Directive. He said:

"In practical terms this means that each EU Member State cannot grant a financial cap on the liability (to it) of its Recognised Organisation for an amount less than the figures quoted (which is Euro 4 million in

⁷⁴ IMO (MSC/Circ.710). The situation that presents itself here is that flag-state actually has to be found liable for loss or damage by a court of law before that flag-state can revert to the classification society that was involved in the certification of the vessel in contention can be in turn be held liable for negligent act or omission. This may all look good on paper as has been, but the viability of the provision in practice has been questioned. See generally, Mikelis, Nikos 'Liability of Classification Societies – Does the EU Bite', Seminar of London Shipping Law Centre, December 10, 2003

respect of death and Euro million in respect of loss of or damage to property) – but can insist on higher financial caps/limits or no limits at all!”⁷⁵

Clause 16 of ABS Agreement – Limitation of Liability

If any party to this Agreement relies on any information or advice given by ABS and suffers loss, damage, or expense directly thereby which is proven to have been caused by the negligent act, omission or error of ABS, its officers, employees or agents, or from breach of any implied or express warranty of workmanlike performance in connection with the services, or from any other reason, then the combined liability of American bureau of Shipping, its officers, employees, agents or subcontractors to Client or any other person, corporation, partnership, business entity, sovereign, country or nation, will be limited to the greater of a) \$100,00 or b) an amount equal to ten times the sum actually paid for the services alleged to be deficient.

The limitation of liability may be increased up to an amount twenty-five times that sum paid for services upon receipt of Client’s written request at or before the time of performance of services and upon payment by Client of an additional fee of \$10 for every \$1,000 increase in the limitation.

ABS shall in no circumstance be liable for indirect or consequential loss or damage (including, but without limitation, loss or profit, loss of contract, loss of use) suffered by any person

⁷⁵ Harrison, J., ‘The Framework of the EU Directive relating to Classification Societies’, “Liability of Classification Societies – Does the EU Directive Bite?” London Shipping Law Centre, December 10, 2003, p.3

resulting from any failure by ABS in the performance of its obligations under this Agreement. Under no circumstances whatsoever shall any individual who may have personally caused the loss, damage or expense be held personally liable.

This provision is covered amongst others by the 1995 IMO Model Agreement, which recommended that 'while acting for the Administration under this Agreement the RO shall be free to create contracts direct with its clients and such contracts may contain RO's normal contractual conditions for limiting its liability.'⁷⁶ The DMA Agreement also provides for this eventuality in Subsection 15.9. This is further reminiscent of the **Sundancer case**⁷⁷, where the Bahamian Government delegated its statutory vessel compliance duties to ABS and at the same time, ABS had a contract with Sundance Cruise Corporation to classify the vessel. The fact that ABS was acting on behalf of the Bahamian Maritime Authority, however, was enough for the Court to grant ABS immunity from action by the Plaintiff.⁷⁸

The ABS Limitation of Liability Clause in the last paragraph features the tort issues of non-liability for economic loss. The plaintiff in a case against ABS will have to prove the necessary element of foreseeability on the part of ABS as well as having suffered actual loss. It further implies that ABS is vicariously liable for the acts of its employees. By this, the ABS employees are safe in the knowledge that there will not be a suit against them in their personal capacity.

⁷⁶ IMO (MSC/Circ.710)

⁷⁷ [1994] Lloyds Report, 183, 1994 AMC 1

⁷⁸ This point will be further analysed in the following chapter on class and tort.

d. **Termination of Contract**

Clause 16 of DMA Agreement - Withdrawal, Suspension or Termination of Authorisation

16.1 *The DMA is entitled to withdraw fully or in parts the authorisation given to the RO, if the latter no longer fulfils the criteria referred to in Clause 13.1⁷⁹, or if the proper body of the European Union requests the withdrawal of the recognition*

16.2 *Notwithstanding the criteria specified in Clause 13.1 above, the DMA may suspend the authorisation to carry out tasks specified in this Agreement, if it considers that RO can no longer be authorised. In case of such a suspension, the DMA shall inform the Commission of the European Union in accordance with the principles of the Class Directive*

16.3 *If this Agreement is breached by one of the parties, the other party shall notify the violating party of its breach in writing. The latter shall within 30 days inform the former about the steps it intends to take, and remedy the breach without undue delay, but within 90 days at the latest, failing which the notifying party has the right to terminate the Agreement immediately.*

16.4 *Either party may terminate this Agreement by giving the other party 12 months written notice*

⁷⁹ Clause 13.1 of the DMA Agreement states: The DMA is entitled to satisfy itself that the RO effectively carries out its functions in accordance with this Agreement and that the RO's quality system continues to comply with the requirements of Appendix 1 of the Annex to the IMO Assembly Resolution A.739(18) and to fulfil the criteria set out in the Annex to the Class Directive

The corresponding term in the ABS Agreement for a New Build is the Clause titled

'Assignment and Sale:

"If Client shall breach any provision hereof or shall become insolvent, enter voluntary or involuntary bankruptcy or receivership proceedings, or make an assignment for the benefit of creditors, or should the vessel be arrested or sold at auction or at a Marshall's sale, ABS shall have the right (without limiting any other rights or remedies which it may have hereunder or by operation of law) to terminate this Agreement, whereupon, ABS shall be relieved of any and further obligation hereunder and Client shall be liable to ABS for all resulting damages. ABS's right to require strict performance of any obligation hereunder shall not be affected by any previous waiver, forbearance, or course of dealing"

These clauses essentially indicate the means by which the Agreement can come to an end prior to the time originally intended by the parties. The DMA clause gives some specific notice period ranging from 30 days, 90 days to 12 months depending on the particular situation that arises. The ABS clause though in the Agreement with the Ship-owner does not specify any particular notice period, rather the suspension/termination of the Agreement seems to be dependent automatic with no avenue for redress. This is possibly due to the fact that an assignment or a sale is by its nature final, especially in the instance of an innocent purchaser with no previous knowledge.

e. **Dispute Resolution – Choice of Law**

Ideally, the choice of law that will govern a classification contract (both in a private and a public capacity), especially in the event of a dispute, should be clearly stipulated in a contract. In the rather unlikely event that such a choice of law is not so stipulated, the Court could be guided by, but not limited to, the intention of the parties where that is fathomable particularly, the place of business of the parties, where contract is to be performed or the place of accident if it is sinking or grounding involved.⁸⁰

Clause 14 of ABS New Build and Existing Build agreement - Arbitration

Any and all differences and disputes of whatsoever nature arising out of this Agreement shall be put to arbitration in the City of New York pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by ABS, one by Client, and one by the two so chosen. The decision of any two of the three on any point or points shall be final. Until such time as the arbitrators finally close the hearings either party shall have the right by written notice served on the arbitrators and on an officer of the other party to specify further disputes or differences under this Agreement for hearing and determination. The arbitration is to be conducted in accordance with the rules of the Society of Marine Arbitrators, Inc. The arbitrators may grant any relief other than pure punitive

⁸⁰ In the United States of America, the Courts there are generally guided by **Lauritzen v. Larsen (1964) 345 U.S. 571**, which involved a choice between the law of the United States and that of Denmark. The Court therein identified seven factors to be considered in making choice of law decisions which include: i.) place of the wrongful act, ii) law of the flag, iii.) allegiance or domicile of the injured, iv.) allegiance of the defendant ship-owner, v.) place of contract, vi.) inaccessibility of a foreign forum, and vii) the law of the forum.

damages which they, or a majority of them, deem just and equitable and within the scope of the Agreement of the parties, including, but not limited to, specific performance. Awards made in pursuance to this clause may include costs including a reasonable allowance for attorney's fees and judgement may be entered upon any award made hereunder in any court having jurisdiction. ABS and Client hereby mutually waive any and all claims to punitive damages in any forum

Client shall be required to notify ABS within thirty (30) days of the commencement of any arbitration between it and third parties which may concern ABS's work in connection with this Agreement and shall afford ABS an opportunity, at ABS's sole option, to participate in the arbitration.

Clause 14 of the DMA Agreement – Governing Law and Settlement of Disputes

14.1 *The Agreement shall be governed by and construed in accordance with Danish law. Any dispute arising in connection with this Agreement, which cannot be settled by negotiations between the parties, shall be settled finally by the Civil Court in Copenhagen.*

14.2 *In the performance of statutory certification services hereunder, RO, its officers, employees, agents or others acting on its behalf are entitled to all the protection of law and the same defences and/or counterclaims including, but not limited to any immunity from or limitation of liability as would be available to the DMA and its own staff surveyors or employees if the latter had conducted the statutory certification services in question.*

Both clauses provide for the venue for the dispute resolution in New York and Copenhagen respectively. In the ABS Agreements, arbitration is specified as the medium in the event of a breach of the term of the Agreement. However, the word 'arbitration' is not precisely mentioned, but hinted at in the DMA Agreement. It envisages some sort of negotiation between the parties before final resort to the Civil Court. Clause 14.2 of the DMA Agreement is again instructive regarding the position of Classification Society acting on behalf of a Flag-state, where an action is brought against it by a Ship-owner⁸¹

In contracts of an international nature, arbitration is gradually assuming the role of the first and preferred option for dispute resolution in the event of a dispute between the parties.⁸² It is reputed to be more convenient, less contentious, less bureaucratic, and less susceptible to the rigours of litigation, and it is obviously more acceptable if parties are in a long-term relationship in which case litigation might only serve to further deteriorate the problem. Parties tend to be more flexible, particularly, in their choice of law, and their *forum conveniens*, and choice of arbitrators. The nationality of the parties does not as a matter of course bear on the choice of law to be employed in the Arbitration.⁸³

⁸¹ The Sundance Cruises Case, op cit

⁸² For a historical perspective on the choice of Arbitration in the event of a dispute, see generally, Redfern, A & Hunter, M., with Blackaby N. & Partasides C., Law and Practice of International Commercial Arbitration, 4th ed, (London: Sweet & Maxwell, 2004); Karmali, A.E.. International Commercial Arbitration, (Bombay: N.M.Tripathi Private Limited, 1974) p.13

⁸³ Redfern & Hunter, *ibid* , p1:

“... at its core, international commercial arbitration remains much as it always was. It is a private method of dispute resolution, chosen by parties themselves as an effective way of putting an end to disputes between them, without recourse to the courts of law. It is conducted in different countries and against different legal and cultural backgrounds, with a striking lack of formality. There are no national flags or other symbols of state authority. There are no ushers, wigs or gowns – simply a group of people seated at around a row of tables, in a room

Often, it will be provided in the Arbitration Clause that the decision of the arbitrators is final. The arbitrators comprise one appointed by each party and then one chosen by the appointed arbitrators to act as a kind of umpire.⁸⁴ They conduct the arbitration in accordance with the Rules of the Society of Maritime Arbitrators, Inc. Also included in this clause is the term that the arbitrators can grant orders so long as they are not punitive damages, which they deem just and equitable, and are covered by the Agreement between the parties. Such orders include but are not limited to specific performance.

While arbitration shares some features in common with litigation, such as formality (which is getting more prominent in arbitration), delay, cost and enforceability, it has certain advantages over litigation, which include:

- a. Option of Institutional arbitration – Here a set of rules aimed at a particular trade or industry are in place to guide a specific proposed arbitration. In the ABS Request for Class Agreement, the Rules of the Society of Maritime Arbitrators are recommended.
- b. Specialists in a particular field acting as the Arbitrators – This has the added advantage of having experts presiding over a dispute with the expectancy on the part of the parties that the proceedings will be expedient. Apparently, this can work both
- c.
- d.

hired for the occasion. To an outsider, it would look as if a conference or business meeting was in progress. It does not look like a legal proceeding at all.”

⁸⁴ this is the instance in Clause 14 of the ABS Request for Class Agreement

ways in the sense that the fact that the Arbitrators are well-versed in their field could only make them even more expensive.⁸⁵ Carr says:

“Cost and speed are often cited as or an advantage, however this may not always be the case. Arbitrators with specialist expertise and experience, for example, in the construction industry or computer industry are expensive. A dispute involving complex issues is likely to be calculated on a daily basis. Despite popular belief, Arbitrators are not necessarily speedy. Arbitrations involving intricate issues may last as long as court proceedings. Moreover, in an arbitration agreement, parties may need to resort to court proceedings where an issue of law needs clarification (see section 45 of the Arbitration Act, 1996), or where the issue involves a third party who is not subject to the arbitration agreement”⁸⁶

- c. Where parties opt to go to arbitration in a class agreement, to resolve disputes, it provides a certain element of privacy (keeping out third parties), which is not guaranteed in a conventional action in court. A typical arbitration is usually is conducted with just the parties, their counsel and the arbitrators in presence, quite unlike the picture of a court, what with the throng that could accompany each of the parties and the general public arena. It has been argued though that privacy does not

⁸⁵ Article 5.3 of the London Court of International Arbitration (LCIA) Rules provides:

‘Before appointment by the LCIA Court, each arbitrator shall furnish to the Registrar a written resumé of his past and present professional positions; he shall agree in writing upon fee rates conforming to the Schedule of Costs; and he shall sign a declaration to the effect that there are no circumstances known to him likely to give rise to any justified doubts as to his impartiality or independence, other than any circumstances disclosed by him in the declaration. Each arbitrator shall thereby also assume a continuing duty forthwith to disclose any such circumstances to the LCIA Court, to any other members of the Arbitral Tribunal and to all parties if such circumstances should arise after the date of such declaration and before the arbitration is concluded.

⁸⁶ I. Carr, Principles of International Trade, (London: Cavendish, 1999) p.138

necessarily equate to confidentiality, in as much as arbitrations are considered confident, since information therein is not available to third party. Carr notes however that is lost where parties opt to go for.

A point to note in the Arbitration clause is the provision that the decision of the Arbitrators is final. This is not necessarily the case in practice. It is possible that a party could challenge an award by virtue of procedural deficiencies⁸⁷, or that the award was not given in the light of equity and good conscience. A case which though not involving classification societies, but could offer some guidance, is ***Macob Civil Engineering Ltd.(MCE) v. Morrison Construction Ltd(MC)***⁸⁸. The defendant Morrison challenged the validity of an adjudicator's award on the ground that it breached natural justice. The decision was made over payment for a construction contract and MCE sought to enforce the decision, which had been made under the Scheme for Construction Contracts (England and Wales) Regulations 1998 Schedule Part 1. MC's argument was two-pronged. Firstly, it maintained that the adjudicator's decision was not binding on the parties for breaching natural justice until it was determined and agreed in line with paragraph 23 (2) of the Regulations that it was a valid decision; secondly, the Court was precluded from enforcing the decision by virtue of Section 42 (1) of the **Arbitration Act, 1996**.⁸⁹

⁸⁷ A final arbitration award may be set aside, for instance, where an earlier award in which the tribunal had jurisdiction is a nullity because one of the parties had ceased to exist by the time of the final award. ***Kazakhstan v Istil Group Inc [2006] EWHC 448 (Comm)***

⁸⁸ [1999] 15 Const. L.J. 300; Times, March 11, 1999

⁸⁹ This provides "unless otherwise agreed by the parties, the Court may make an order requiring a party to comply with a pre-emptory order made by the tribunal.

The Court held in favour of MCE granting the declaration, as follows:

1. Parliament tried to facilitate the quick resolution of construction contracts by enacting the Housing Grants, Construction and Regeneration Act, 1996, wherein adjudicators' decisions are enforced pending final resolution of the original dispute on appeal. The word 'decision' not being qualified, retained its ordinary meaning and remained a decision under the Act, even if a party challenged its validity
2. The contract between MCE and MC appeared to exclude the provisions of the Section 42, Arbitration Act, 1996.
3. The Court will hesitate to grant a mandatory injunction to enforce a decision and an affected party could always issue proceedings claiming amount due, followed by summary judgement application to remedy the non-payment in such a decision.

Aligning the above case and the provision in Clause 14 of the ABS agreement, that an arbitration award is final, could the contract be said to exclude the equivalent of Section 42 in the American Arbitration Act? Following the outcome in *Macob v. Morrison*, it could be safely assumed that a Court will deem an award between ABS and a client Ship-owner as 'final' leaving the Ship-owner to such remedies as enumerated in the third paragraph of the Court's decision.

The above analogy helps to rationalise the provision in Clause 14 on the award of the Arbitrators being final, because, in practice, it is most probably envisaged that there will be some voluntary reference to the Court for the purposes of further elucidation on the terms of the contract.⁹⁰

2.4 APPLICATION OF THE ROME CONVENTION AND CONFLICT OF LAWS

The Rome Convention applies to contractual obligations in situations involving a choice of laws - even where the law designated by the said contract is that of a non-contracting State. Article 1 (2) gives instances where the Convention does not apply and include:

- a. questions involving the status or legal capacity of natural persons;
- b. contractual obligations relating to wills, matrimonial property rights or other family relationships;
- c. obligations arising under negotiable instruments (bills of exchange, cheques, promissory notes, etc.);
- d. arbitration agreements and agreements on the choice of court;
- e. questions governed by the law of companies and other corporate and unincorporate bodies;

⁹⁰ An arbitral award will not necessarily be final where issues arise therefrom on questions of law. See *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd* [2006] All ER (D) 21 (Mar), where an appeal against an arbitral award on a question of law under the Arbitration Act 1996, section 69, and the Technology and Construction Court Guide suggested that the award was the only relevant (or admissible) document. Practitioners have advised that this is too restrictive and the court should also receive any document that had been referred to and was needed to decide any question of law arising out of the award.

- f. the question of whether an agent is able to bind a principal to a third party (or an organ to bind a company or body corporate or unincorporate);
- g. the constitution of trusts and questions relating to their organisation;
- h. evidence and procedure;
- i. contracts of insurance which cover risks situated in the territories of the Member States (re-insurance contracts are covered, however).

Article 1(2) (d) of the Convention excludes an Arbitration Agreement or Agreements on choice of Courts in a Contract from the realm of the Rome Convention. This will be due to the fact that a properly drafted Arbitration or Choice of Court Clause should at any rate stipulate the law of the Particular country/countries that will govern the Contract.⁹¹ In spite of this, **S.46 (3) of The Arbitration Act, 1996** provides that *'If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.'* This will invariably set the stage for the Rome Convention to regulate this portion of the contract.

Article 1 (2) (f) also refers to the inapplicability of the **Convention** to agency contracts, executed on behalf of the principal in relation to a third party. This is in line with the peculiar laws of agency that are usually in place in this regard and in the construction of the Contract, reference can be made to these laws to govern the aspect of the agency.

⁹¹ The Choice of law and Jurisdiction Clause of the Lloyds Register Request For Classification of Existing Vessel states: *'Any dispute, claim, or litigation between LR and the Client arising from or in connection with the services provided by LR, shall be subject to the exclusive jurisdiction of the English courts and will be governed by English Law.'*

Where the option of arbitration is inserted in a contract as a means of dispute resolution, it is the rule that this should be adhered to before any other means. Recently, the option of arbitration being mandatory where it has been provided for in a contract was made all the more glaring. The case of **American Bureau of Shipping v. Tencara & others**⁹² aptly illustrates the positions in **Articles 1 (2) (d) & (f)** above. Here, there was an agreement between Tatiana Lamazou, the owners of the Tag Haeur, and Tencara shipping yard for the construction of a racing yacht that could "circumnavigate the globe in less than 80 days in competition for the Jules Verne Trophy." The terms of the Agreement included amongst others that the vessel will be classed according to the quality standards and norms permitting approval of...the American Bureau of Shipping (ABS), which was to be undertaken on Lamazou's behalf by Tencara; Owners would be solely responsible for registering the vessel under the French flag; the Owners would provide all necessary assistance to Tencara to ensure the yacht met the approval of the French Authorities. To this end, a request for class agreement was entered into by ABS and Tencara. The vessel was delivered, but met with some mishap. The other parties, Lamazou and the Underwriters sought to bring an action in court against ABS, which the latter sought to dispense with by virtue of the arbitration clause in the classification contract.

The District Court, the Court of first instance ruled that Tencara was bound by the terms of the Arbitration Clause in the Agreement, dispensing with Tencara's argument that it was acting as an agent on the Owner's behalf. The Court held that an agent could act on its behalf as well as the principal's in the course of agreeing a contract. Tencara could not detract from the fact that it had benefited from fulfilling its ship construction contract by engaging the services of ABS for classification. Further, the Owners were held bound by the terms of the Arbitration Clause as

⁹² Docket No. 98-7823 (L), 98-7893 (XAP), <http://law.touro.edu/2ndCircuit/March99/98-7823.html>

well to the extent that it had been the Classification Agreement had been entered into by Tencara on their (Owner's) behalf. Judge Calabresi also made a point, which has been echoed in **The Sundancer**⁹³ and **Somarelf v. ABS**⁹⁴:

"We agree with ABS that the Owners received such benefits including, (1) significantly lower insurance rates on the 'Tag Heuer', and (2) the ability to sail under the French Flag"⁹⁵

Davies has referred to what he calls the "Catch-22 position" in the course of a third-party trying to institute an action against a Classification Society. In effect, the more closely linked the third-party is linked to the Classification Society, the more likely that that third-party will be bound by the jurisdiction selected in the contract between the Classification Society and the contractual party that the Classification Society and the third party have in common (here it will be the ship-owner, the ship-yard, or the charterer). Conversely, the more distant the third-party is from the contract between its contractual party and the Classification Society, the less likely, that third-party will be bound by the terms of the jurisdiction Clause in that contract and as such this could be the very thing that could dissociate the Classification Society from the third-party.⁹⁶

The position in English law can be gleaned from **Fibreco Pulp Inc. & others v. Star Shipping A/S & others**.⁹⁷ This was an appeal from the order of the Prothonotary in which the

⁹³ [1994] Lloyds Report, 183, 1994 AMC 1

⁹⁴ 1989 AMC 1061

⁹⁵ <http://law.touro.edu/2ndCircuit/March99/98-7823.html>, p.4

⁹⁶ Davies, M., 'Classification Society Liability in the United States', International Colloquium on Maritime Legal Liabilities, Institute of International Shipping and Trade Law, UWS, September 14-15, 2006.

⁹⁷ (October 20, 1998) No. T-2178-96 (F.C.T.D.)

Prothonotary order that the action be stayed not only against parties to an arbitration agreement but also against Defendants not parties to the agreement. The case involved two shipments of pulp from Squamish, British Columbia to Finland via Rotterdam. The Plaintiffs were the vendor of the pulp, the buyer of the pulp for resale, and the ultimate buyer/consignee of the pulp. The Defendants were the Squamish terminal, the charterers, Star Shipping A/S, and the owners of the various ships that carried the pulp. The buyer of the pulp and Star Shipping had entered into a contract of affreightment that contained an arbitration agreement in favour of London arbitration. The Prothonotary held that pursuant to the **Commercial Arbitration Act** he had no alternative but to grant a stay of proceedings against Star Shipping.

The Prothonotary further noted, however, that the more interesting question was whether the action ought to be stayed against the other Defendants who were not parties to the agreement. The Prothonotary referred to **Nanisivik Mines Ltd. v Canarctic Shipping Co. Ltd.**⁹⁸, where the Court of Appeal ordered a stay against persons not parties to an arbitration agreement on the grounds that "disposing of the issues between the two parties to the arbitration agreement might, more likely than not, resolve the entire litigation". In reliance on this decision, the Prothonotary noted that London arbitration "may well resolve the whole claim" and consequently ordered that the entire action be stayed.⁹⁹

⁹⁸ (1994), 113 D.L.R. (4th) 536

⁹⁹ It will appear from the **Fibreco Pulp Inc** case that where in English law is the choice of law, the same catch-22 position referred to by Davies above in Davies, M., 'Classification Society Liability in the United States', *op cit*, will apply, since the Court saw it fit to apply a stay of proceedings against third-parties who were not party to the arbitration agreement. This would imply a co-relation were roles to be reversed and such third-parties wished to institute a claim against the party in a different contract with their own contractual party, they (the plaintiff third party) would be caught by Davies' catch-22 theory and be bound by the choice of dispute resolution (usually arbitration) in the third-party contract.

By virtue of **Article 3** of the **Rome Convention, 1980**, the signatories to a contract may choose the law applicable to the whole or a part only of the contract and select the court which will have jurisdiction over disputes. By mutual agreement they may change the law applicable to the contract at any time in deference to the principle of freedom of choice. This is what typically obtains in well-drafted contract whereby there should be no recourse to the Rome Convention on the applicable choice of law to govern the contract. In the odd, rather unlikely chance that a choice of law and forum has not been clearly inserted in the contract, then the Rome Convention becomes well-suited to regulate those aspects.

Regarding contracts for the supply of goods and services, **the Rome Convention** as implemented by the **Contracts (Applicable Law) Act 1990** was designed to protect the rights of the consumer, through special provisions, according to the principle of the protection of the weaker party. Unless the parties decide otherwise, such contracts are governed by the law of the country in which the consumer has his habitual residence. In no circumstances may the choice of law work to the disadvantage of the consumer or deprive him of the protection afforded by the law of his country of residence where it is more favourable. These rules do not apply to contracts of carriage or contracts for the supply of services in a country other than that in which the consumer has his habitual residence.

The **Rome Convention** in Article 5 stipulates its application to consumer contracts. For our purposes, we may assume that the ship-owner/ship-yard can be deemed consumers. As pointed out in **Article 4**, in the event there is no clear stipulation of the choice of law that will govern the contract, the law of the country where the consumer has his habitual residence will supersede. The chances of the provision in **Art 4 (1)** occurring are quite slim because a typical



contract will invariably include the law of the country and forum that will govern/construe the contract. However, the choice of law made by the parties may still defer to law of the country of consumer's habitual residence in certain instances.¹⁰⁰

Therefore, in a situation where the choice of law in the contract is stipulated to be English law, and the consumer's habitual residence is not in the United Kingdom, it could well be that the clause may be dispensed with on evidence that the Ship-owner can be deemed a consumer. This situation, yet again may not arise in view of **Art.4 (5)**, which advises that the earlier paragraphs in Art.4 may be disregarded 'if it appears from the circumstances as a whole that the contract is more closely connected with another country.' Here the insertion of English law as the choice of law is in line with its heritage as the seat of maritime law in the world and having a set of rules in the field seen by all in the industry as most reflective of it.

2.5 ILLUSTRATIVE CASES ON CHOICE OF LAW

The first case in this sub-section represents the position on choice of law as well as the required jurisdiction in the event of a dispute surrounding the particulars of a Contract of

¹⁰⁰ Art.5(2) of the Rome **Convention** provides – "Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence: -if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
-if the other party or his agent received the consumer's order in that country, or
-if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy."

Insurance of a vessel. This case is unique in that the clauses in question in the Contract of Insurance are on the classification of the vessel.

2.5.1 Sun Alliance & London Insurance Plc, Watkins Syndicate Singapore Pte Limited, Swiss Re, Groupama Transport v. Pt. Asuransri Dayin Mitra TBK, P.T. Pelumin and/or Owners The "No 1 Dae Bu"¹⁰¹

The vessel, No1 Dae Bu, was insured by ADM, and reinsured by Sun Alliance through a broker. It was insured on the MAR 91 Policy, and on a voyage cover which was stated for a voyage from Yeo-Su Port in South Korea to Batam in Indonesia. It was also insured on a Time Policy for 43 days from June 28, 2006 to August 9, 2006. The insurance was under an Endorsement by the broker's cover note whereby the cover for two vessels owned by Pelumin and already insured by ADM was extended to the present vessel.

On 4 July, the Vessel was struck by a typhoon. At the time she was anchored half-a-mile off-shore at Yeo Su. Work was being carried out on the engine preparing for the voyage to Indonesia. The anchor dragged and the Vessel went aground on a breakwater just off-shore.

The Hull cover was for "Trading" in "Indonesian waters only". An additional premium was payable for cover for the delivery voyage from Korea to Indonesia which was "subject to vessel being in class and crewed to class standards". "All other terms and conditions" were as provided for by the Policy.

¹⁰¹ 2006 WL 901127 (QBD (Comm Ct)), [2006] EWHC 812

The Reinsurance was also extended to cover ADM's exposure under the Endorsement by an Addendum No 04 to the main cover. Notably, the Addendum, in contrast to the Endorsement, included cover for the Vessel "whilst in Korea, her sea trial and a delivery voyage from Yeo Su Port ... ETD 04 or 05/07/04 to Batam, Indonesia ETA between 15-20/07/04". Apparently, in the course of the brokers negotiating an extension of the reinsurance in the underlined terms they forgot to do the same for the insurance.

It turns out that ADM was in fact fronting for Re-insurers. 99.67% of the risk was ceded to the Re-insurers due to Indonesian regulatory requirements. The consequence was that the leading role in evaluating and pricing the risk was taken by Re-insurers (and, in particular, by "Sun Alliance") and Marsh negotiated the reinsurance before placing the insurance with ADM.

On the choice of law, the Court observed that The ITCH provides "this insurance is subject to English law and practice". The IV and War Risks cover are, by express reference to other Institute Time Clauses, also subject to English law and practice. The Endorsement was subject to the terms and conditions of the Policy. Further, The Rome Convention as implemented by the Contracts (Applicable Law) Act 1990, applied to contracts of insurance covering risks situated outside the EEA. Article 3(1) of the Convention provided that a contract is governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty. In the Judge's opinion, the provisions of the contract of insurance in this case amply fulfilled that requirement to show that there was an express choice of English law.

In terms of jurisdiction, "MAR 91", the Maritime Policy Form, provided expressly that the "insurance shall be subject to the exclusive jurisdiction of the English courts, except as may be

expressly provided herein to the contrary." Since both the Policy and the Endorsement incorporated the Marine Policy Form and neither contained any express provision to the contrary, it followed that the claims by Pelumin under the insurance and by ADM in the proceedings were by agreement, subject to the exclusive jurisdiction of the court.

The vessel was initially classified with the Korean Register of Shipping, a member of the International Association of Classification Societies (IACS) as at September 2003, when it was hit by the typhoon Maemi. The classification was suspended in March 2004, and by July 2004, it had been cancelled. The vessel was then classed with the International Maritime Bureau (IMB) of Panama by the sellers on June 28, 2004, and IMB issued interim Classification Certificates. The Plaintiff gave evidence that the IMB is in the lowest category of classification societies such that it is not a classification society at all "by any international standards". Further, vessels entered with the IMB "probably would be viewed with suspicion by most port authorities and certainly by any international marine underwriter." Had the Plaintiff been made aware of the KR's discontinuation as the Classification Society, it would have recommended a proper survey of the vessel. For some reason though, ADM was advised that the vessel was in KR's classification and evidence was not given to show that ADM was aware of the true position.

The Court identified 5 issues in the case, which were:

the warranty issue

the voyage cover issue

the Clause 4.1 ITCH Issue

the Coverage Issue; and

the Seaworthiness Issue

On the first issue, the Court opined that in the light of Sun Alliance's evidence, there could be no real doubt that the reference to Class KR was a warranty even if the test in law did involve (which it does not) a requirement that the relevant statement affect the underwriter's judgment of the risk. The judge could not see any possible answer to ADM's submissions on the Warranty Issue and on that on this ground alone ADM was deemed not liable to indemnify Pelumin for the damage to the Vessel.

For the second issue, the Endorsement clearly stated that cover for the delivery voyage was "subject to vessel being in class and crewed to class standards". This is in Plaintiff Counsel's argument pointedly referred to as being classed with KR, and not with some or other classification Society. Further since the KR class had been dispensed with as at the time of the loss of the vessel, it followed that derogation from this clause relieved ADM of any liability to Pelumin in this regard.

The third issue on Clause 4.1 of the ITCH, the Judge did not readily concede that ADM had a valid point in this regard since KR had already suspended their cover prior to the beginning of the policy. The fact that the KR was finally cancelled just after the policy started did not seem to be of much consequence.

The fourth issue on the coverage period did not favour Pelumin because the available cover it could have relied on was the 'from' policy for the voyage from Yeo Su to Batam. This was not

to be though because as at the time the vessel grounded, it was in no condition to commence a voyage, whereby the risk would have attached.

The fifth issue in the judge's opinion was a non-issue due to the engine having been removed from the vessel and it was not going to be returned till after the date the typhoon occurred. Evidence by the Salvage Association that had surveyed the vessel before and after the loss reflected that the vessel may have avoided going aground had the main engine been in place.

In concluding the Court ruled that English law was the choice of law and England was the forum chosen by the parties by virtue of the Contract of Insurance and the Endorsement that stemmed from it. Evidence from Counsel to ADM that the decision in the UK will support the application ADM intended to make in Indonesia also helped the Court to come to the conclusion that it was well suited to grant the discretionary relief of declarations of non-liability of ADM to Pelumin.

This case in applying it to classification societies points to the possibility that every relevant document¹⁰² and instance will be examined in a bid to ascertain to ascertain the choice of law as well as the forum intended by the parties in the unlikely event that this is not already evident from the classification contract between the parties.

¹⁰² Contracts of insurance for the vessel and P & I coverage will invariably contain a classification clause. See generally Clause 13 IHC 2003 as discussed in Chapter 1 of the thesis.

2.5.2 LUCIEN B. CALHOUN; ROBIN L. CALHOUN, (individually and as Administrators of the state of Natalie K. Calhoun, deceased) v. YAMAHA MOTOR CORPORATION, U.S.A.; YAMAHA MOTOR CO., LTD.¹⁰³

This case presents the American position on the issue of Choice of law especially with no prior contact between the parties. Here, a 12-year old girl, Natalie Calhoun, while on holiday with family friends died following an accident while cruising on a 'Wave Jammer' jet-ski. Action was brought by her parents and some of the issues in the case involved what choice of law will govern the compensatory damages and the punitive damages and what law would govern the standard of the liability of the defendants. The District Court, while conceding that this was a case that 'sounded in maritime law' ruled that the Law of Pennsylvania, of which the Calhouns were citizens, should govern the issue of compensatory damages, while the law of Puerto Rico should govern the standard of the liability to be applied in this case. Further the District Court decided that the law of Puerto Rico would govern the standard of the defendant's liability.

Incidentally, the law of Puerto Rico did not provide for punitive damages, whereby the District Court granted partial summary judgement in favour of Yamaha and dismissed the portion of the claim by the Calhouns for punitive damages.

The three issues before the Supreme Court were:

1. Did the District Court err in deciding, on remand, that partial summary judgment should be granted to Yamaha, precluding any claim by the Calhouns for punitive damages, on the ground that (a) the availability of punitive damages should be determined by the

¹⁰³ United States Court Of Appeals For The Third Circuit No. 99-1378, Filed June 23, 2000.

remedial law of Puerto Rico, the situs of the tragic accident giving rise to the suit, and
(b) the law of remedies of Puerto Rico makes no provision for punitive damages?

2. Did the District Court err in deciding, on remand, that the Calhouns' entitlement to seek particular categories of compensatory damages should be determined by the law of remedies of Pennsylvania, the state of residence of Lucien and Robin Calhoun and of their daughter Natalie, rather than by the law of remedies of Puerto Rico, the situs of Natalie's fatal accident, and hence that Yamaha's motion for partial summary judgment should be denied insofar as it sought to preclude the Calhouns from seeking compensatory damages in conformity with the law of remedies of Pennsylvania?
3. Did the District Court err in deciding, on remand, that the jurisdiction whose substantive liability law is the source of the Calhouns' claims is Puerto Rico?

On the first issue regarding the relevant jurisdiction on damages, the Court of Appeal observed that this was divided between if its jurisdiction is grounded on diversity issues whereby the Court would choose the law of the State where it was situated and the action had been instituted, or if jurisdiction was grounded in admiralty law, whereby the federal choice of law would obtain. The plaintiffs had initially conceded that this appeared on the face of it to be an admiralty case. They changed their position though on the realisation that the Wave Hammer could be deemed a recreational water vehicle and not a commercial one, which could hamper their claim and opted for the jurisdiction of Pennsylvania instead.

The Court observed that prior to 1972, the 'locality test' authorized the exercise of admiralty jurisdiction in all matters in which the incident giving rise to the cause of action occurred on the navigable waters of the United States. This changed with the introduction of the "Significant relationship to traditional maritime activity Test" or the Executive Jet Standard¹⁰⁴. This was applied in **Sisson v. Ruby**¹⁰⁵, where the Court held that admiralty jurisdiction was available to adjudicate a cause of action concerning a fire that started on board a pleasure yacht, and proceeded to damage several other boats as well as the marina at which the owner docked the yacht. It was held therein that "the need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by vessels, commercial or non-commercial."¹⁰⁶

Finding considerable similarities between the case at hand and the ones above, particularly **Richardson v. Foremost Ins. Co.**¹⁰⁷, the Supreme Court ruled that the federal choice of law will govern the jurisdictional question since the Wave Hammer, while not exactly a conventional motor vehicle was still one in the nature of a maritime activity. The Court thought this was in

¹⁰⁴ In **Executive Jet Aviation, Inc. v. City of Cleveland**, 409 U.S. 249 (1972), where an airplane crashed into Lake Erie shortly after takeoff, the Court held that an airplane crash did not bear such a relationship to traditional maritime activity, and that the exercise of admiralty jurisdiction was not appropriate. This standard was also applicable in **Richardson v. Foremost Ins. Co.**, 457 U.S. 668 at 674-675 (1982), where two boats that were being used for recreational purposes, but had never been utilized for commercial purposes, had collided on the Amite River in Louisiana. In as much as there was no nexus to commercial activity, and citing the need for uniform rules of conduct and the fact that a pleasure boat collision could potentially impact maritime commerce, the Court held that "the negligent operation of a vessel on navigable waters . . . had a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction."

¹⁰⁵ 497 U.S. 358 (1990)

¹⁰⁶ *ibid* at 367

¹⁰⁷ 457 U.S. 668 (1982)

order 'so long as the incident in question, and the vehicles utilized therein, bore some relationship to traditional maritime activity and could, in any way, impact upon the flow of maritime commerce'¹⁰⁸ The Court of Appeal was mindful of the fact that the vessel the deceased struck might have been a commercial vessel with the result that navigation in and around the marina would have been difficult and this further served to justify the exercise of jurisdiction to be admiralty based on the provisions of **28 U.S.C. S 1333(1)**. Thus the exercise of federal choice of law jurisdiction was in place by the District Court.

Lauritzen v. Larsen,¹⁰⁹ was considered, which involved a choice between the law of the United States and that of Denmark, and the Court therein identified seven factors to be weighed in rendering choice-of-law decisions: i.) place of the wrongful act, ii) law of the flag, iii.) allegiance or domicile of the injured, iv.) allegiance of the defendant ship-owner, v.) place of contract, vi.) inaccessibility of a foreign forum, and vii) the law of the forum. Many of these factors (e.g., law of the flag, allegiance of the defendant ship-owner, and inaccessibility of a foreign forum), however, do not apply to the present dispute, which concerns entirely domestic interests.

The Court observed that the position in *Lauritzen* had been applied in a purely domestic setting to **Scott v. Eastern Air Lines, Inc.**¹¹⁰ It noted that the airplane in *Scott* could have crashed

¹⁰⁸ 99-1378, June 23, 2000, 10

¹⁰⁹ 345 U.S. 571 (1964)

¹¹⁰ Inc., 399 F.2d 14 (3d Cir. 1968). Here an airplane bound for Atlanta -- with a layover in Philadelphia -- took off from Logan Airport in Boston only to crash into Boston Harbor shortly thereafter. The survivors of one of the passengers on board that flight sued the airline in both tort and

anywhere including Boston Harbor, the Hudson River, or Long Island and it was merely chance that the plane went down in the territorial waters off the coast of Massachusetts, as opposed to, for instance, New York or New Jersey. Natalie, however, had intentionally travelled to Puerto Rico and intentionally operated the WaveJammer in Puerto Rico's territorial waters. This being so, there was no possibility that Natalie's accident could have occurred anywhere other than in Puerto Rico. The Court determined that the Lauritzen factors, viewed as a whole, represented a departure from the application -- in admiralty cases -- of the *lex loci delecti* rule and a move toward analyzing which state had the most significant relationship to the incident and the dominant interest in having its law applied.

On the issue of jurisdiction, and in view of the right to obtain the most amount of damages for its citizens, the law of Pennsylvania was deemed to be the proper choice of law on the issue of compensatory damages since the Calhouns were domiciled in that state. Further the rationale behind compensatory damages was to make the victim whole again, and in this regard the state of Pennsylvania was best suited to this by way of the Calhouns citizenship there. The laws of Puerto Rico was ruled by the Court to be the appropriate choice of law for punitive damages because the Puerto Rico was the State that had an interest to regulate and deter reckless conduct on its territorial waters, whether commercial or recreational. Puerto Rico also had an especially strong interest in maintaining the safety of the waterways surrounding the island to

contract, and the Court of Appeal determined, with respect to the tort issues, that the Lauritzen factors would govern whether Massachusetts or Pennsylvania law would apply.

preserve the economic benefits it derives from both tourism and other commercial enterprises.¹¹¹

On this basis, the Court of Appeal decided that the District Court did not err in ruling that it would apply the law of Pennsylvania in the determination of compensatory damages and the law of Puerto Rico in the determination of punitive damages.

On the third and final issue of the applicability of Puerto Rican law as the standard of the defendant's liability, the Court of Appeal had regard to the Supreme Court decision of the **The Harrisburg**¹¹², where the Court held that since Congress had not seen fit to provide a cause of action for wrongful death in admiralty cases, it would be inappropriate for the federal courts to create such a cause of action from federal common law. Therein the Supreme Court had said: *"the rights of persons in this particular [action] under the maritime law of this country are not different from those under the common law, and it is the duty of courts to declare the law, not to make it."*

The Court of Appeal in the present case noted that this then paved the way for State Courts to institute their various levels of liability for causes of action in admiralty instances and was instrumental to **The Tungus**¹¹³, which held that "decisions of this Court long ago established that when admiralty adopts a State's right of action for wrongful death, it must enforce the right

¹¹¹ The Court of Appeal referred to the **Puerto Rico Act No. 48 (1986)** which provided that "The State . . . must be watchful for the owners of vessels, sailors, and water skiers to also be prudent in their enjoyment and practice of their recreational activities, for their benefit and that of the bathers."

¹¹² 119 U.S. 199 (1886)

¹¹³ 358 U.S. 588 (1959)

as an integrated whole, with whatever conditions and limitations the creating State has attached"¹¹⁴ In effect, the **Harrisburg** and **The Tungus** suggested that courts entertaining such causes of action were to apply state law liability standards.

With uniformity as the guiding principle, the Court of Appeal looked to the decision of **The Moragne v. United Marine Lines, Inc.**¹¹⁵ , where that Court overruled the decisions of the **Harrisburg** and **the Tungus**, commenting on a fairly cynical note that that the rule adopted in **The Harrisburg** "had little justification except in primitive English legal history – a history far removed from the American law of remedies for maritime deaths."¹¹⁶ It thereby created a federal cause of action under the federal common law for wrongful death to provide a remedy for survivors of seamen killed in territorial waters.¹¹⁷

In view of the above, the Court of Appeal in the present case observed that creating a uniform system by which activities and events on the waters of the United States would be adjudicated was such a matter of concern to the Framers that they placed Admiralty as among the powers of the newly-created federal government.¹¹⁸ It thus held:

"Uniformity, as Yamaha forcefully argues, is a rather strong concern in the instant matter. If we were to adopt the District Court's holding that the substantive standards by which an admiralty defendant's

¹¹⁴ *ibid* at 592

¹¹⁵ 398 U.S. 375 (1970)

¹¹⁶ *ibid* at 379

¹¹⁷ *ibid* at 409

¹¹⁸ See U.S. CONST. art. I, S 8, cl. 10 (granting Congress the power "[t]o define and punish Piracies and Felonies committed on the high seas").

liability is adjudged is governed by the law of the state in which the alleged injury occurred, there would be no uniformity in such standards...Accordingly, we hold that federal maritime standards govern the adjudication of a defendant's (here, Yamaha's) putative liability in an admiralty action brought pursuant to a state wrongful death/survival statute"¹¹⁹

This case serves to illustrate the American position on the issue of choice of law and jurisdiction. It appears somewhat different from the position with Classification Societies, because here there had been no contact or much less contact between the Calhouns and Yamaha, therefore, the choice of law and forum/jurisdiction had to be ascertained by the Court with no particular contractual document to refer to. In contrast, the contract with the Classification Society actually specifies the operative law to govern the contract and the forum of which country which will serve as jurisdiction in the event of a dispute between that classification and the Ship-owner or the Flag-State.

2.5.3 Curtis Callan Welding v. Stolt Comex Seaway Holdings, Inc.¹²⁰

This is a more recent, albeit it again, American case, which illustrates the position that the terms of a contract (in this case, Service Agreement) will be strictly adhered to in its construction by a Court of Law, especially where the choice of law governing the contract needs to be ascertained.

¹¹⁹ 99-1378, June 23, 2000, 22

¹²⁰ United States Court of Appeals for the Fifth Circuit: Judges Jones, Smith, and Stewart: No. 04-30003 (5th Cir. 2005): 22 February 2005

Curtis Callais, Sr. ("Curtis") was president and chief executive officer of Curtis Callais Welding, Inc. ("Welding"). In 1995, Welding entered into a Master Service Agreement (the "Agreement") with a company that through acquisition and name change became Stolt Offshore, Inc. ("Stolt Offshore"). As a result of this change, the Agreement was amended to provide that Stolt Offshore, and all of its subsidiaries and affiliates, including Stolt Comex Seaway Holdings, Inc. ("Stolt Holdings"), would be deemed signatories to the original Agreement. The Agreement contained a choice-of-law provision that provided general maritime law would govern any disputes that arose.

Brian Laine ("Laine") was an employee of Big Inch Marine Systems, Inc. ("Big Inch"), another Stolt Offshore subsidiary. Laine was severely injured on the job when a crane capsized; Curtis was supervising the crane operation. Laine filed a negligence claim in a Louisiana state court against Curtis in his individual capacity, and Triple C Fabricators, Inc. ("Triple C"), another company working at the site that was responsible for machinery involved in the accident. (Other parties involved settled with Laine.)

Although Welding was not named as a party to the state court suit, it nevertheless demanded that Stolt Holdings indemnify and defend it in accordance with the terms of the Agreement. Stolt Holdings rejected Welding's request, contending that the lawsuit was against Curtis in his individual capacity and that the Agreement did not include an obligation to defend and indemnify Welding's agents or employees. Welding thereafter filed suit in a Louisiana federal district court, alleging that Stolt Holdings, as Stolt Offshore's affiliate, breached its obligations under the Agreement by failing to defend and indemnify Welding. Welding moved for summary judgment, and Stolt Holdings filed a cross-motion for summary judgment dismissing the claim.

The district court concluded that the Agreement's choice-of-law provision was enforceable and that the claim was covered by the general maritime law. Pursuant to the plain language of the Agreement, the district court held Stolt Offshore (including, by the terms of the Agreement, Stolt Holdings) was only required to defend and indemnify Welding, and not its employees or affiliates. Accordingly, Stolt Holdings' cross-motion for summary judgment was granted. Welding appealed from the district court's decision, alleging that when the accident occurred, Curtis was acting in the "course and scope of his employ" for Welding and thus should have the benefit of the indemnity clause in respect of negligence claims filed against him.

The Fifth Circuit concluded that the district court had properly enforced the Agreement's choice-of-law provision, such that the general maritime law was the proper law to apply in interpreting the Agreement's terms. The Court noted that the Agreement's indemnity clause was "unambiguous and unequivocal" regarding the parties' intent and endorsed the lower court's reliance on **Babcock v. Continental Oil**¹²¹, in which the Court had held that an indemnification agreement between a company and a contractor did not cover the contractor's employees with regard to indemnification for personal injury claims because the agreement expressly provided coverage for only the company's agents and employees, and not for the contractor's agents or employees. The court reiterated the principle that "under general maritime law, when evaluating a contract, a court cannot look beyond the written language of the document to determine the intent of the parties unless the disputed contract provision is ambiguous. Moreover the contract must be read as a whole and the words must be given their plain meaning."

¹²¹ 792 F.2d 1346 (5th Cir. 1986)

In applying **Babcock** to the instant case, the Fifth Circuit concluded the Agreement's language was unambiguous and must be narrowly construed. While the Agreement expressly included Stolt Offshore's affiliated or parent or subsidiary companies (including Stolt Holdings), as well as those companies' agents, officers, directors, and employees, there was no such express provision expanding the definition of Welding to include its affiliated companies or personnel. Further, while the Agreement expressly stated that Welding was to defend and indemnify Stolt Offshore beyond the company itself, the Agreement could not be read to suggest that Stolt Offshore's obligation to defend and indemnify Welding went beyond the confines of that company.

The Court pointed out that it was an "extraordinary obligation" for one company to indemnify another for its own negligence and that the Agreement clearly did not provide Stolt Offshore with any such express notice that it might have to indemnify Welding's agents or employees. The Court concluded that the Agreement's express coverage for Stolt Offshore's agents, employees, subsidiaries and affiliates in one section, and its omission of this expansive duty of coverage in respect of Welding, was "highly persuasive" evidence that the parties did not intend that Stolt Offshore's duty of defence and indemnification should expand beyond Welding, the company, to include Curtis in his individual capacity or as Welding's agent. The Fifth Circuit thus affirmed the district court's granting of summary judgment in favour of Stolt Holdings, and dismissed Welding's claims.

This case establishes that in the course of making the contract, the parties should have due regard to the construction of the clauses in the contract, enough to foresee different instances relating to a particular issue or aspect in the contract/Agreement. Failing this, the parties will be

bound by the provisions of the Contract as they stand with no further imputation from the Court as to the intention of the parties, rather the clauses of the Contract will speak for themselves

2.6 EXCLUSION, EXCULPATORY, INDEMNITY AND LIABILITY CLAUSES

These clauses can go by any of the above names and often have the same effect, even if the clauses strictly represent varying levels of liability. They are inserted in a contract and are designed to allocate risks between the parties to the contract. Exclusion or exemption clauses have been described by Mckendrick as having a definitive or defensive role¹²². Typically, such a clause stipulates that the party relying on the clause will not be responsible or liable to the other party in the event of a loss or damage to that party or his property. The effectiveness of an exclusion clause to forestall the liability of the supposed responsible party will necessarily depend on the wording, construction and interpretation of the clause.

Where they are perceived to perform a definitive role, exclusion clauses are designed to expressly stipulate the stance or position of the parties to the contract allocating the agreed rights and liabilities, where an event occurs that can work to bring the contract to an earlier end than was the intention of the parties. They point to where the parties stand in the event of a dispute between the parties upon the termination of the contract.

¹²² McKendrick E., Contract Law, 3rd ed, (London: Macmillan, 1997) p. 192. See generally, Atiyah P.S., An Introduction to the Law of Contract, 5th ed, (London: Oxford University Press, 1995)

Also, exclusion clauses can act as a sort of defensive mechanism that the party offering his services, in our study herein being the Classification Society, falls back on where an express or implied condition or warranty is breached by the party offering the services. This is the more popular view of exclusion clauses and has often been regarded as such (defensive role) by most Courts in jurisdictions on both sides of the Atlantic. Here, they work to protect the defendant from any claims from the plaintiff upon the termination of the contract regarding the breach of a condition or warranty in the contract. These conditions and warranties in the contract can be couched in such a way that their breach can render the contract null and void, or voidable.

A limitation clause in a contract purports to do as it implies, to limit the possible liability of a party to an agreed amount expressly stipulated in the contract. Courts are usually more favourably disposed to these clauses, since they do not totally dispense with liability on the part of the professional offering his services. In a Classification Agreement and other similar agreements, a limitation of liability clause can state that the professional is liable to no more than the amount, which has been paid for the services of the professional. Where properly put in a contract, it can help to put in perspective the position of the parties especially where an event occurs that brings the clause into play.

In the ABS Classification Agreement, the Limitation Clause therein reads as follows:

“ABS MAKES NO REPRESENTATIONS BEYOND THOSE CONTAINED IN SECTIONS 1 AND 11 HEREOF REGARDING ITS REPORTS, STATEMENTS, PLAN REVIEW, SURVEYS, CERTIFICATES OR OTHER SERVICES, EXCEPT AS SET

OUT HEREIN, NEITHER ABS, NOT ITS OFFICERS, EMPLOYEES OR AGENTS SHALL BE LIABLE FOR ANY LOSS, DAMAGE OR EXPENSE OF WHATEVER TYPE OR KIND SUSTAINED BY ANY PERSON DUE TO ANY ACT, OMISSION OR ERROR OF ANY NATURE, EVEN IF HELD TO AMOUNT TO A BREACH OF WARRANTY."

The above clause will be more akin to an exclusion clause because it purports totally dispense with the liability of ABS, where the ship-owner suffers any loss, damage or expense, even where a warranty has been breached.

Indemnity clauses perform the same role as exclusion clauses; however, they propose that where a party is rendered liable to another party, the latter will provide some protection to forestall the liability of the former. This is usually inserted in a contract by way of the party receiving the services from the contractor/professional making the latter a co-insured in the insurance, which the innocent party takes out for the subject of the contract, vessel classification is insisted upon by a marine insurer, who can go as far as stipulating the particular classification society that the ship-owner should classify the vessel with.

Sander v Alexander Richardson Investments d/b/a Yacht Club of St. Louis reflects the impact of an exculpatory clause, which could be merely glossed over when agreeing a supposedly conventional contract.

Mr and Mrs Jessup had a house boat named the 'A-OK', which was moored at a Yacht club marina following a written slip rental agreement. Mr. Jessup noticed a fuel leak which he the

Yacht club service department to fix. He was informed that this could not be done within his specified time frame and was promptly directed by the Club's general manager to use the services of one of the Yacht Club's maintenance workers, Mr. Shulte. The general manager gave the plaintiff his assurance that Mr. Shulte was qualified to carry out the job professionally.

Mr. Shulte examined the boat and recommended that the fuel-pump needed changing which he did. When Mr. Jessup started the A-OK days after the work, it burst into flames, spread to other boats docked on the marina and left some damage in its wake.

The other boat owners and the Yacht Club filed claims for their damaged boats and grounds accordingly, whereby the Jessups had to file a limitation of liability suit in Federal Court. Meanwhile the Jessups and the Yacht Club filed negligence claims against each other.

The Yacht Club sought to rely on an exculpatory clause printed on the back of each boat owners' slip rental agreement purporting to release the Yacht Club for any liability for damages such as were incurred due to the subject fire, as one of its defences. The clause provided:

19. INSURANCE: TENANT AGREES that he will keep the boat fully insured with complete marine insurance, including hull [property] coverage and indemnity and/or liability insurance. THE LANDLORD DOES NOT CARRY INSURANCE covering the property of the TENANT. THE LANDLORD WILL NOT BE RESPONSIBLE for any injuries or property damage resulting, caused by or growing out of the use of dock or harbor facilities; that the TENANT RELEASES AND DISCHARGES THE LANDLORD from any and all liability for loss, injury (including death), or damages to person or property sustained while in or on the facilities of LANDLORD, including fire, theft, vandalism, wind storm, high or low waters, hail, rain,

ice, collision or accident, or any other Act of God, whether said boat is being parked or hauled by an Agent of LANDLORD or not.

The District Court at the trial ruled in favour of the Jessups, that the Exculpatory clause was invalid since it was one which absolved the Yacht Club of all liability and the Yacht Club was negligent. Alternatively, the Court held that the clause was not precise enough to negate to liability of the Yacht Club. Further the Court was of the view that the clause was 'overreaching' and thus did not reflect the unequal bargaining power of the parties. The Yacht Club, arguing that the Clause validly excluded them from liability, appealed this decision to the Eight Circuit Court of Appeals.

The Court of Appeal had to consider if the exculpatory clause was as unequivocal and precise as one should be, even if it did not totally excluded the liability of the Club. The boat owners argued that the clause did not state anywhere in the agreement that the Club will be exonerated from liability for an action stemming from its own negligence or fault. The Circuit Court was inclined to rule that the contract was constructed in such a way to shift the risk to the boat owners especially in term of insurance.

The Court observed in its ruling that in as much as Exculpatory Clauses are not held in absolute favour in maritime contracts, they are usually put in place by businessmen aiming at a more credible distribution of the risk. It appears the Court of Appeal saw the boat-owners' argument that the Yacht Club ought not to rely on the Exculpatory clause to escape its negligence as an instance often found in towage contracts such as bailment, employment

contracts and other public service contracts, and contrasted this with the position whereby parties should be in a position to enjoy freedom of contract.

On the issue of public policy, certain hypothetical scenarios were set by the Court, which in its opinion would have altered the position of the liability of the Yacht Club. These included the notion that the boat owners could have negotiated the terms of the slip rental agreement to alter or dispense with the exculpatory clause or the boat owners could have even moved their boat to another marina entirely, which had more favourable terms! Also on the public policy angle, the Court observed that there was a distinguishing factor between a ship-repair contract where a ship-repairer exercises some control over the vessel to execute some work on it, and a slip rental agreement since there is actual work undertaken on the vessel in the first instance and in the second one, there is no actual done on the boat per se, but the involvement of the marina was limited to use of its grounds.

The Circuit Court substituted its judgement for that of the trial District Court on both issues of public policy and the excessiveness of the clause in not reflecting the unequal bargaining power of both the boat owners and the Yacht Club. This decision has left most of the maritime arena in America in derision and prompted Michael Orlando, a Florida-based lawyer to comment as follows:

"Unquestionably, John Q. Public boat owner is in no position to get any marina to take the exculpatory clauses out of the typical form contracts. While Donald Trump, with his multi-hundred-foot yacht may be able to have a "businessmen's" relationship with a marina, 99.99 percent of boat owners cannot.

As further "proof" for the results-oriented approach on the issue of overreaching, the court then substituted its judgment for that of the trial court even though it notes that the facts addressing the issue were not well developed in the record. In the author's view, the court should have remanded the matter for retrial on the issue of overreaching. Fairness dictates that when "new law" is being created as was done in the Eighth Circuit, the parties should be allowed to work-up their facts and issues with the new law in mind."

2.7 POSSIBLE CONTRACTUAL ACTIONS AGAINST CLASS

1. Non-performance in whole or in part
2. Performance, which is defective – duty to perform in workmanlike manner (possible application of Ryan's warranty)¹²³
3. Recourse action – Ship-owner has been held liable to 3rd party, but Ship-owner on his part says that it is due to fault of class in the first place.
4. Subrogated action against class – Insurer subrogated in place of Ship-owner after indemnifying ship-owner.

¹²³ See generally, Tettenborn, A., 'The Liability of classification Societies: More awkward than it look?' International Colloquium on Maritime Legal Liabilities, Institute of International Shipping and Trade Law, UWS, September 14-15, 2006, where he suggests that Class may also be liable in contract for 'over-precaution' and gives the instance of class 'insists on repairs which are not in fact necessary, with the result that she is needlessly taken out of service.

2.7.1 Great American Insurance Co. v. Bureau Veritas¹²⁴

Non-performance in whole or in part, defective performance, recourse action and subrogated action against class can jointly or severally often feature as the ingredients of a case and this was the position in the **Great American Insurance Co. v. Bureau Veritas**. This is a unique case in the sense that it is a continual reference point on class in contemporary legal texts governing their perceived liability to other parties. For this purpose, a broad account of the case will suffice.

The subject of this case was a liberty one compartment vessel called the *Tradeways II*. She was over 20 years old and had been variously named, owned and classed. Prior to her sale to the owners in this case, World Tradeways (WT), she was named the *Amelia*, and at the time she was built had been named *William H. Dell*. In the course of the negotiation for the sale to WT by the immediate previous owners, Mar Rojo Naviera (MRN), WT retained the services of a Mr. Thomas W. Morgan, a Consulting Engineer and marine surveyor based in Vancouver, British Columbia, to survey the *Amelia*. The survey was undertaken for which a report was submitted on June 3, 1965. Although numerous defects were found in the vessel, the *Amelia* was reported to be in "average condition for a liberty of her vintage and that if repairs were effected, she might give 8 years of service to her purchasers"¹²⁵ This report was in the sole possession of WT and no hint of it was given to Bureau Veritas (BV), who performed an annual survey on the vessel 3 months later. Mr. Morgan, however, in private correspondence to BV

¹²⁴ 1972 AMC 1455

¹²⁵ *ibid*, 1458

said he glossed over the unsafe condition of the vessel in a bid not to embarrass BV, under whom the vessel was classified.

WT by a Memorandum of Agreement dated July 8, 1965 agreed to purchase the *Amelia* from MRN, which terms required the vessel to be delivered to WT at a UK or continent port "with present BV class maintained free of recommendations and free of average affecting class". To this end, she was delivered to Antwerp, where a BV surveyor, Mr. De Witt, for purposes of an annual survey, surveyed the outer hull and "for curiosity sake the tween deck of the holds in the vessel. While he did not survey the lower decks, he did shine his torchlight in a cursory fashion."¹²⁶ The vessel's class was thus confirmed on Sept 22, 1965.

Meanwhile, WT time chartered the *Amelia* now renamed *Tradeways II* to Midlands in an agreement signed on Sept 16, 1965. Both parties individually took a policy with the Plaintiff Insurance Companies, WT with Steam Mutual Underwriting on Sept 17, 1965 and Midlands with Great American Insurance Group on Sept 21, 1965; all with a similar warranty that *Tradeways II* was in class. The Time Charter between WT and Midlands was concluded on Sept 25, 1965.

Midlands on taking possession of *Tradeways II* engaged the services of BV for an "on hire" survey, to which Mr. De Witt being familiar with the vessel was assigned. This being a more thorough inspection, he discovered a plethora of defects, particularly '4 portside shell frames in the No.1 hold to be severely wasted; holes existing in the No.1 deep tank covers; and the

¹²⁶ *ibid*, 1458

frames of the bulkhead between the No.2 and the No.3 holds bent and distorted.¹²⁷ *Tradeways II* had its class certificate withdrawn after this discovery and following various discussions between DeWitt and Loze, WT's representative to which a Mr. Van Soom, BV's head at the Antwerp office, was invited to intercede on the impasse. After further examination, on September 28, 1965, Van Soom sent a letter to WT comprising 2 sections, one on immediate repairs to restore class, other on deferrable repairs. Deferrable repairs included the four portside wasted frames and the deep tank tops in the No.1 hold.

On its part, WT commenced an action to rescind the vessel's sale following its declassification. Repairs on vessel were carried out including some deferred ones, but not the defects of the frame and the tank top of No.1 hold, with class eventually restored on October 7, 1965.

The vessel had a Chinese crew and arrived in Antwerp on Oct 1, 1965 to take over the vessel. The Master, a Captain Wang King, personally inspected the *Tradeways II* and found the condition of the internal areas with the deferred repairs satisfactory, excepting the deck plating on both sides of No.3, which in his opinion were weak and wasted. Vessel was fully loaded by October 14, 1965 with 9,600 tons of steel coils and plates for shipment to the Great Lake parts.

Vessel commenced voyage on October 15, 1965, but suffered some 6-hour delay due to a steam condenser pipe failure. On recommencing, the logs indicated that the voyage was smooth, but for continuous water pumping in the engine room, boiler room and tunnel bilges. These pumps were also constantly breaking down and getting fixed by the crew. A storm ensued, which from the Captain's testimony was not exceptional, but still impacted on the

¹²⁷ *ibid*, 1459

vessel. The storm affected the No.1 hold with water being pumped out of it, but as it worsened the water spread to No.2 and 3 holds, and pumping commenced there as well. SOS calls were placed after the Captain ordered the engines stopped. Lifeboats, which were launched to get to the vessels sank resulting in some of the crew swimming to the rescue ship, the *Londoner* and others retreating to *Tradeways*. Pictures were taken of *Tradeways*, which showed her “slightly down at the bow, but sinking on an essentially even keel”¹²⁸ An American Naval P-3 aircraft eventually rescued the Captain and remaining crew on board by dropping a lifeboat close to the vessel. Vessel sank shortly after and casualty was put down to a loss of 11 lives.

Causation of sinking

The argument was put forward by the Plaintiffs (the subrogated insurers for WT and Midlands) was that BV in undertaking to survey *Tradeways* as to its seaworthiness did so negligently and breached its warranty to perform in a workmanlike manner.

To prove BV erred in its duties and warranties, the onus was on Plaintiffs to show by evidence that BV caused the sinking. This, Plaintiffs purported to show this by stating that the vessel sank due to failure of the 4 frames in forward area of vessel letting water into No.1 hold and this spread to No.2 hold through the transverse bulkhead separating the Nos. 1 and 2 hold. The District Judge dispensed with this argument when he said:

“In my view, plaintiffs have failed to establish the direct theory of causation. Almost of necessity, there is no direct evidence that the four wasted frames in the No.1 hold failed and allowed initial entry of

¹²⁸ *ibid*, 1461

seawater. In major part then, plaintiff's proof of causation relies on the statement and deposition of Captain Wang King, the engine room log, some photographs apparently, but not certainly by crew members of rescuing vessels, and the testimony of their expert witness. This evidence is infected by a variety of infirmities which will be summarised hereinafter. Mr. Ganley, plaintiff's expert did testify that the probabilities were that the initial entry of seawater was caused by the failure of the four wasted frames in the No.1 hold. Ganley, however candidly admitted that he could not offer no firm opinion to this effect"¹²⁹

Tyler, DJ found the deposition of Captain Wang King before trial wherein *inter alia* he threw the deck log overboard because it was too wet, and his earlier unsworn statement wherein he said his first mate has rescued the log, rather at variance. It did not help matters either that Mr. Tolhurst, manager of plaintiff Steamship Mutual Underwriting Association Ltd claimed in his deposition that his company was in possession of the above-mentioned log after vessel sank. He further stated in his deposition that owners of rescuing vessels were not amenable to providing his agents with information on the sinking. The Judge did not find this credible since the rescuing vessels had reported by radio to Lloyds Intelligence Reports of October 23, 1965, that *Tradeways II* broke in two before sinking.

In terms of causation, Judge Tyler was disposed to the opinion that the *Tradeways II* was not lost through the alleged wasted four frames of No.1 hold, the deep tank holes and a supposed defective transverse bulkhead. The deep tank was essentially for storing dry cargo and bearing in mind that besides the bulkhead being a deferred repair, several surveyors and investigators agreed that the bulkhead was not in not in grave danger. What appeared more credible was information Plaintiffs claimed was not made available them, being the Lloyds Intelligence

¹²⁹ *ibid*, 1463

Reports on the vessel breaking into two before sinking. Also hurried and faulty storage of cargo weakened the Plaintiff's case.

Unseaworthiness

The Court relied on **Federazione Italian Dei Corsozi Agragi v. Mandask Compania De Vapores, S.A.**¹³⁰ where it was held that a vessel is presumed unseaworthy if it is lost under ordinary conditions with no other explanation; and while the presumption operates against owner/charterer, it was held in that case to be applicable to parties responsible for the condition of the vessel. To bring Bureau Veritas under the cadre of persons responsible for the condition of the vessel, Plaintiffs needed to prove two points;

- a. Vessel was unseaworthy on departure from Antwerp
- b. A classification society bears responsibility for seaworthiness of vessel it surveys.

Both points were not favourable to Plaintiffs because on the first point, all the experts were in concurrence that the wasted frames received little stress and deep tanks held dry cargo resulting in their repairs being deferred.

¹³⁰ 1968 AMC 315

On the second point, BV was not responsible for or in control of *Tradeways II* in as much as this presumption was applied in **The Marine Sulphur**¹³¹, where the designer-converter of the vessel in that case was held liable because it negligently rebuilt a vessel which was effectively unseaworthy. BV in the present case did not build or design the *Tradeways II*. From the 'control' point of view, that the *Tradeways II* could not have sailed without being in class, Judge Tyler held that while this might have practical or even economic consequences, *Tradeways II* could still have sailed without insurance or at a higher premium.

Functions of Class

Following Plaintiffs' claims of BV breaching its duties and warranties can only be determined by analysing the functions of a Classification Industry. Judge Tyler noted the following as:

"In the course of both of the surveys performed by the Defendant on *Tradeways II* in September, 1965, Bureau Veritas exercised its function as a classifier of ships. In agreeing to classify *Tradeways* Bureau Veritas undertook no more than to make a statement that the condition of the ship either was or was not in conformity with published standards in the Society"¹³²

The above he observed is done through a special survey initially, then every four years afterwards. There is then an annual survey, which is less rigorous, conducted every year.

On the second function of class, he said;

¹³¹ 1970 AMC 1031

¹³² 1972 AMC 1455 at 1469

"In addition to classifying ships and conducting surveys for that purpose, Bureau Veritas conducts other surveys on demand. An example of course is the "on hire" survey performed on *Tradeways* at the request of the charterer, Midland. As Bureau Veritas explained in its survey report, its purpose in undertaking to perform this survey was to 'survey and notice, describe and report on the general state of condition of the *Tradeways*. In asking for this service, Midlands was seeking advices as to the seaworthiness of the vessel as well as information pertaining to her ability to perform the charter it had contracted for"¹³³

Plaintiff's claims were three-fold. Firstly that BV erred in annual survey of *Tradeways II* because De Witt did not inspect the internal hull. To this, the Court was of the opinion that since BV's rule book stipulated that a surveyor may consult the vessel's documents, in lieu of physical inspection, the annual survey could be said to have been executed.

The second argument was that the "on hire" survey did not identify the same defects as in the earlier Morgan Report which resulted in unworkmanlike and/or negligent procedure. The Court observed in this regard, firstly, that this was a mere difference in opinion between two experts.

Secondly, BV's survey was more extensive in the time spent surveying the *Tradeways II* and thirdly the Morgan report was in the exclusive possession of the Plaintiffs and were they so concerned they would have made it available to BV.

The third argument was based on an alleged breach of warranty to the effect that BV restored the classification of *Tradeways II* in spite of defects, leading to Plaintiffs being deceived as to the seriousness of repairs affecting the class thereby affecting the seaworthiness, leading to

¹³³ *ibid*, 1469

the sinking. Judge said that the Plaintiffs did not show negligence or breach of warranty on individual defects or the aggregate of the defects. If aggregate of the defects was the contention, then in his opinion repair of some of the defects can render vessel seaworthy. In the event defects affecting class alluded to individual defects, there was still no evidence the deferred defects affected class.

Other Theories of Liability

Judge Tyler, aligned the case with contractual and tort theories, of which the contract theories will be dealt with in this section of the study. On contract, he analysed **Ryan Stevedoring Co v. Pan-Atlantic Corp**¹³⁴, where a longshore man was hurt in the course of off-loading cargo, which had been stored by a stevedore employed by the ship-owner. The ship-owner was sued and he sought indemnity from the Stevedoring on the basis that the stevedore created the unsafe condition leading to the unseaworthiness of the ship-owner's vessel. Ryan appealed on two basic principles of admiralty law:

- a. Non-contribution among joint tort-feasors in non-collision cases
- b. Ship-owner's failure to supervise loading in the first place superseding or intervening cause dispensing with Ryan's liability.

¹³⁴ 1956 AMC 9

The Supreme Court held Ryan was liable under a warranty to perform its contractual services in a workmanlike manner, and failure of ship-owner to detect the faulty stowage was no defence to the contractual claim for indemnity.

Judge Tyler noted that the Ryan Warranty ideally restricted to maritime contracts, which on their part comprise unique rules guiding the obligations and liabilities of ship-owners towards seamen and accidents and consequent them has been extended to acts of "ship cleaners, painters, repair yards, launch operators, pilots and towing companies."¹³⁵ Ryan Warranty originally meant for hazards caused by a contractor was eventually extended to defects not created by contractor, but which should have been detected nonetheless as held in **DeGioia v. United States Lines**.¹³⁶ This position hence, observed Judge Tyler, would make BV liable to plaintiffs even where the latter were well aware of defects prior to BV's survey, but neglected to rectify the defects. However, the Judge refused to apply the Ryan Warranty to this case because the burden of ensuring the seaworthiness rested on the ship-owner/charterer. He further used the theme of immediate control of the vessel as resting on the ship-owner, which such control a Classification Society does not exercise.

Further, the nature of Ryan's activity on the vessel in that case was couched in the form of an implied warranty, which was 'comparable to a manufacturer's warranty of the soundness of its manufactured product'¹³⁷ BV's activity on Tradeways II was not deemed to be in the same mould as it did not in the course of its survey provide a service, which resembled a 'product'

¹³⁵ *ibid*, at 1475

¹³⁶ 1962 AMC 1747

¹³⁷ 1956 AMC at 15

like Ryan's stevedoring, leading to injury 'because of the herefore mentioned fact that a classification society is virtually powerless to perform any acts or create any conditions upon a vessel; it can only recommend that the owner or charterer do so'¹³⁸

This decision, though over thirty years old, is one which has guided judges in more recent cases, and has more often than not resulted in holding Classification Societies not liable to other parties. It is worth noting though that there are certain issues involving class since this decision, which have conspired to affect the liability of Classification Societies to other parties. This position will appear to be more glaring in the tanker industry with wet cargo. The focus on Class can be more rampant, for instance where the cargo on a vessel is crude oil as opposed to some other dry cargo. Should there be an oil spill, undoubtedly, the effect will be more far-reaching, than a mere collision resulting in the loss of dry cargo. This is due to the possible sheer pollution of the environment in terms of the fauna, flora and the sea itself.

Analysing the **Great American case** though, it has had some amount of criticism. Judge Tyler in the case observed the two duties of class as firstly surveying and inspecting the hull and machinery of a vessel in accordance with the rules and standards of that particular society; and secondly informing the owner of the vessel about the defects discovered in the vessel in the course of such survey and inspection. On the first duty, it will be expected that a Classification Society will establish clear and valid rules, guidelines and standards by which it operates, whereby adherence to them when classifying a vessel will well and truly render such vessel seaworthy, in spite of the fact that in maritime law,¹³⁹ the Ship-owner is 'solely' responsible for the seaworthiness of his vessel.

¹³⁸ 1972 AMC 1477

One cannot help but observe that without class, a Ship-owner is 'virtually powerless' to undertake any venture with his vessel. Other big players in the maritime field such as Port State Control, marine insurance companies and Protection and Indemnity (P&I) clubs make it imperative in their contracts with ship-owners that their vessels are classified with reputable Classification Societies, imperatively, members of IACS (International Association of Classification Societies) and even then particular members of IACS. Should the vessels not be registered with A Classification Society, the vessel is deemed to be doomed to a life of mediocrity on the high seas.

In as much as a lot of emphasis is placed on Classification Certificates by virtually every player in the maritime world, the particular parties with whom Classification Societies agree contracts are ship-owners and Flag-states through their national maritime administrations. This will tend to put the ship-owners in a precarious position, due to the much touted rule that the ship-owner is solely responsible for safety conditions on his vessel. With the acknowledged reliance placed on Class, it will hint at the responsibility on their part to formulate clear rules and guidelines in the course of surveying and inspecting vessels, and not to hide behind the rules that lack coherence and clarity, where there is a fallout resulting from a possible negligent inspection, which they undertook.

¹³⁹ Hague Rules 1924, Hague-Visby Rules, 1971 and Hamburg Rules, 1978

2.7.2 Somarelf v. American Bureau of Shipping¹⁴⁰

This case presents another example of an action by a Ship-owner against Class. Here, a classification society was held liable for negligent misrepresentation to a ship charterer for whose benefit it furnished an incorrect Suez Canal special tonnage certificate. The United States Court of Appeal, Fifth Circuit¹⁴¹ pointed to the fact that the certificate was used, *inter alia*, to calculate fees for passage through the Suez Canal and that the theory behind this case predates, but is consistent with the court's *dicta* in *Sundance*¹⁴². ABS had been requested to measure two vessels, for which a Suez Canal special certificate was issued for each vessel. The measurements, however, were carried out incorrectly and the Time-charterer of the vessels was compelled to pay some additional charges to the Suez Canal Authority, which it had not retrieved from the sub-charterers.

The Time charterer sought to be indemnified by the Ship-owner, who in turn sought to be indemnified by the Classification Society, ABS, bring an action against it both in contract and tort. The action in contract was based on the implied warranty of workmanlike performance stemming from **Ryan Stevedoring Co v. Pan-Atlantic Corp**¹⁴³. Focusing on control, the United States District Court for the District of New Jersey was of the opinion that the Ship-owner had not dispensed control of the vessel to ABS in terms of the safety and prevention of maritime accidents by virtue of preparing and issuing a tonnage certificate. The particular relationship which had existed between the parties to imply a warranty of workmanlike

¹⁴⁰ 1989 AMC 1061

¹⁴¹ *Otto Candies LLC v. Nippon Kaiji Kyokai (NKK)* reported September 17, 2003, p.8

¹⁴² [1994] *Lloyds Report*, 183; [1994] AMC 1. This case is discussed below

¹⁴³ 1956 AMC 9

performance was held not to apply in this case, for which the claim in contract failed. The Court, however, went on to advise that a claim in tort could suffice and this will be reviewed in another chapter.¹⁴⁴

2.7.3 Sundance Cruiselines Corp v. American Bureau of Shipping (ABS)¹⁴⁵

This was another major instance of an action in contract against class was, where a cruise-liner sank from flooding after it struck an underwater rock. Sundance Cruises claimed against The American Bureau of Shipping (ABS) for (1) negligence, (2) gross negligence, (3) negligent misrepresentation, (4) breach of contract, and (5) breach of the *Ryan* implied warranty of workmanlike performance in issuing the relevant certificates. Sundance had purchased an over-night car ferry and proceeded to convert it into a luxury cruise ship at a Swedish shipyard. It desired to register the vessel with the Bahamian government and this flag registration required following several international safety conventions including 1.) a safety certificate signifying compliance with the 1974 Convention on the Safety of Life at sea (SOLAS); 2.) a certificate relating to compliance with the Load Line Convention; 3.) a Tonnage certificate; and 4.) a Classification certificate.

Sundance had engaged the services of ABS in Sweden to classify under its Class rules and to perform regulatory checks on behalf of the Bahamian government in line with the statutory and class certificates. When the vessel hit the rock, two watertight compartments were flooded,

¹⁴⁴ Please refer to the section on the Tortious Relation between Class and other Parties

¹⁴⁵ [1994] Lloyds Report, 183, 1994 AMC 1

passed through the vessel's bulkhead 124 and in the unvalved grey-water system, that culminated in progressive flooding and its sinking at a nearby pier.

Immunity

In its defence, ABS sought to rely on the immunity it derived from acting on behalf of the Bahamian government. The Bahamian **Merchant Shipping Act of 1976, Section 279** provided:

"Every officer appointed under this Act, and every person appointed or authorized under this Act for any purpose of this 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, or in the purported exercise or performance, of any power, authority or duty conferred or imposed on him under this Act."

On the issue of immunity, to be precise, sovereign immunity, the questions arise: are there any circumstances in which immunity is dispensed with? Are the Courts always reluctant to find for the plaintiff where a State is a defendant or a defendant acts on behalf of a State? Where the State is held to be immune from liability, is this an indication that the plaintiff has had access to justice? The Sundancer was registered under the flag of the Bahamian government. ABS classified the vessel under the auspices of the Bahamian government. Since ABS was acting on the government's behalf, could the Bahamas possibly have been joined as a co-defendant in the case for the purposes of liability? This is where the issue of sovereign immunity comes into play.

Sovereign immunity is a defence available to a State, through which it can prevent legal actions from being brought against it by a private individual or company. The immunity can also be extended to private individuals or companies, who undertake an act on behalf of a State. This is for a myriad of reasons the most obvious being to avoid a spate of diplomatic rows between two countries (or more) and also the virtual impossibility of enforcing a judgement against a sovereign nation. In more recent times though, the Courts appear to lean towards a more relaxed view on the issue of immunity century and especially depending on the nature of a particular transaction as opposed to the strict that obtained at the turn of the 20th century. Where a vessel is employed for commercial purposes, the courts it appears will be reluctant to hold that vessel immune legal action. Possibly it is submitted this position could be extended to the flag of the vessel. In **Trendtex Trading Corp v. Central Bank of Nigeria**,¹⁴⁶ a Swiss company based in London entered into a transaction with the Nigerian Ministry of Defence for the sale of cement. The defendant on the Defence Ministry's instructions opened letters of Credit in favour of the plaintiff. Six consignments were shipped though not delivered, but four consignments were paid for by the London branch of the bank. Trendtex claimed for the price of the two unpaid consignments as well as other ancillary costs. The defendant resisted the claim on the basis of immunity that it was acting on behalf of the Nigerian government in the issuance of the Letters of Credit. It was held in favour of the plaintiff that the jurisdiction of the court covered the actions of the bank, issuing Letters of Credit, and this was not covered by immunity of the Nigerian government.

¹⁴⁶ [1977] 1 Lloyds Rep. 581

Further, in **the Sundancer case**, Judge Pratt pointed out, that Sundancer had not provided evidence to prove it suffered damage from the issuance of the Classification Certificate itself.¹⁴⁷ A point that could be made here is, could it have been 'foreseen' that in the course of issuing a certificate, the Society would inadvertently cause damage to the vessel. This would tie in with the comment of the judge that when motorists are licensed to drive vehicles by a licensing authority, where the motorists have an accident, they cannot be held liable to the licensing authority for their own negligent driving. There would obviously be situations where this opinion would be feasible. However, a pertinent question would be thus: In the event the cause of an accident is ascertained, and it so happens that, but for the detection of a faulty valve or plug (such detection being apparent under reasonable inspection), the accident would not have occurred, would the licensing authority have a case to answer in this regard? It will appear to be proper procedure and justice exercised towards the innocent party, in this case the ship-owner, where he has indicated his stance as a responsible person by bringing forth his vessel to be surveyed and inspected by the Classification Society. The Classification Society in this case, being the professional expert with the wherewithal ought to execute a proper evaluation of the vessel, and thereby detect any mishaps or 'accidents waiting to happen.' Miller on this issue commented on the **Great American Insurance case** that the Ship-owner was aware of the defects in the vessel before it sailed, therefore the Classification should not bear the risks resulting from such a loss. He says however:

"While this reasoning is sound, it raises the interesting question of what result should be reached when the ship-owner does not know of the defect. The proper resolution of that legal issue, it would seem, depends upon the ship-owner's reasonable expectations and the explanation for its lack of knowledge.

¹⁴⁷ *The Sundancer*, op cit, p.7

If, with the classification society's knowledge, the ship-owner consciously relied upon the classification society to perform certain vessel-surveying and/or performance-monitoring tasks that the ship-owner otherwise would have performed, the ship-owner's detrimental reliance unquestionably should spawn a viable cause of action against the classification society"¹⁴⁸

A peculiar factor in **The Sundancer** was the approach by the Ship-owner on the one hand to initially register with the Bahamian Government, thereby making the vessel liable to Bahamian jurisdiction, and on the other hand seeking for the jurisdiction of New York to govern the matter following the sinking. It was made clear in the case that any number of jurisdictions would have sufficed ranging from Sweden where most of the inspection took place to Canada where the vessel berthed. However, some of the greater issues that could have been highlighted in this case appear to have dissipated in view of the fact that since ABS was acting on behalf of the Bahamian government, the former derived immunity from the latter. A contradiction of sorts obtains here. From the facts of the case, the vessel was obviously registered with the Bahamian government in order to dispense with the rigid stipulations involved in getting classified by a highly regarded Society. The Court, however, was in no hurry to allow the ship-owner evade the consequence of his actions, in as much as this favoured ABS at the same time.

Another point that was made out in **Sundancer** is the fact that the value for which the vessel was classified was about seven times less than the amount for which the owners sought damages. As the judge said:

¹⁴⁸ Machale A. Miller, 'Liability of Classification Societies From the Perspective of United States Law', TMLJ, Winter 1997, 75, at 93

"Sundancer [the owner] may not create a condition of seaworthiness, exercise all control over the reconstruction and servicing of the vessel and then burden a classification society with liability that is seven hundred times that of the fee for the Classification contract"¹⁴⁹

In addition, comment (f) to section 351 of the Restatement (Second) of Contracts Act, 1981, in the Court's opinion, worked against the ship-owner in terms of the amount of damages he might have been entitled to from ABS upon a breach. This Act deals with the issue of foreseeability in regard to damages that an innocent party can recover. Comment (f) of Section 351, Restatement (Second) of Contracts Act states *inter alia* that 'there are unusual instances in which it appears from the circumstances either that the parties assumed that one of them would not bear the risk of a particular loss or that, although there was no such assumption, it would be unjust to put the risk on that party'

To this end, the Court upheld, the owner could not seek to impose such a liability on the Society. Comments have been made in this regard especially by Cane who saw this as a weak argument. This is bearing in mind that a classification society may be covered by liability insurance and as such the disparity between the amount it charges and that it is sued for might not necessarily paint a true picture.¹⁵⁰ Miller paints a picture of irony when he says 'in some respects Sundance Cruises a classic example of good facts making bad law'¹⁵¹

¹⁴⁹ 1994 AMC at 13

¹⁵⁰ Cane, P. (1994) LMCLQ 366

¹⁵¹ Machale A. Miller, op cit at 97

2.7.4 International Ore & Fertilizer Corp. v. SGS Control Services, Inc.,¹⁵²

Cane's argument above on the inconsequence of the sum of money paid for a service and resulting claim for damage due to breach of contract or negligence is replicated in this American case of United States Court of Appeal, Second Circuit. Here SGS, an independent ship-hold inspector, had negligently misrepresented the cleanliness of the three ship's cargo holds through issuance of its survey Certificates for the Plaintiff's vessels--a breach of its contract, resulting in cargo contamination, and that both causation and \$713,666.27 in damages were properly proven. SGS earned \$150 for its cargo hold inspection and certification services. The court found that, since SGS's services were governed by a written contract, under either general maritime law or New York state law, it could not be held liable for the *tort* of negligent misrepresentation. It described SGS's actions as "negligent breach of contract."¹⁵³ Interestingly, the judgement against SGS was reduced by 50% for the plaintiff's "contributory negligence." The mixing of a contract-based judgement with a tort-based reduction of that judgement appears from the opinion to be based more on the court's finding that the plaintiff had committed a procedural error in its appeal, than on any recognition that contract-based damages could be reduced by the plaintiff's contributory negligence.¹⁵⁴

SGS was found to have breached an 'implied duty to perform the contract in a workmanlike fashion' and a peculiar observation is the fact that the Court was not deterred by SGS charging a rather low fee to forestall its possible liability for negligent inspection. SGS, the court held,

¹⁵² 38 F.3d 1279 (2nd Cir.1994), cert. denied, 515 U.S. 1122, 115 S.Ct. 2276 (1995),

¹⁵³ *ibid* at 1284

¹⁵⁴ *ibid* at 1286

regularly performs its professional services and “can insure against liability for inaccurate inspections, which result in major damage to cargo.”¹⁵⁵ This observation is starkly at variance with the finding in **The Sundancer**. Every matter is readily decided with due regard to the circumstances surrounding it in particular. What can be readily deduced as a differentiating factor between the International Ore & Fertilizer Corp case and the **Sundancer** is the fact that the latter derived immunity from the Bahamian government. Further, the Court stated that another distinguishing factor this case and the **Sundancer** is that the Ship-owner in the latter case engaged the services of ABS was “merely to . . . take advantage of the insurance rates available to a classed vessel.”¹⁵⁶ Some cynics may retort that this comment is a concerted effort to protect Class from action by disgruntled ship-owners, in as much as the services undertaken by Class and organisations like SGS are quite similar in nature, albeit SGS do not play in the same international field as do Classification Societies.

2.8 POSSIBLE ACTIONS BY CLASS AGAINST SHIP-OWNERS/SHIPYARDS

These may arise in form of the following:

1. An action for breach of a clause in the agreement, such as default in payment or opting for non-agreed form of dispute resolution
2. An action against precluding Class from performing or providing the service what it has been contracted to execute.

¹⁵⁵ *ibid* at 1284

¹⁵⁶ 38 F.3d 1279, 1285

As noted earlier, the more regular pattern in an action involving Class is that the action is usually instituted by the ship-owner or the other party with whom class contracts. However, there can still be the odd case where the action has been brought by the Classification Society. It is not entirely impossible that the Classification Society can also counter-claim when there is a suit against it, and this suit can be considered by the Court on its own merits. **American Bureau of Shipping v. Tencara & others**¹⁵⁷ represents an example of an action by class against a Ship-owner and its agents who were the ship-builders. ABS in this case sought to enforce the arbitration clause in the agreement between itself and the ship-yard who were acting on the instructions of the Ship-owner. The case has been discussed earlier under the Arbitration section of contracts in this chapter.¹⁵⁸

2.9 REVIEW OF PECULIAR CLASSIFICATION CLAUSES IN CONTRACTS OTHER THAN CLASSIFICATION CONTRACTS

Interpretations of Classification contracts have ranged from one of a rather relaxed view of the contract to what currently obtains as the utmost adherence to what is specified in a contract. The recent decision of **The Niobe**¹⁵⁹ portrays the current stern position of adhering to the terms of a Classification contract. In this case, the defendant sellers sold an ore/oil bulk vessel to

¹⁵⁷ United States Court of Appeals for the Second Circuit, Decided March 17,1999; Docket No. 98-7823 (L), 98-7893 (XAP)

¹⁵⁸ Please see analysis on Arbitration Clause in ABS Agreement and the Danish Maritime Authority (DMA) Agreement with Classification Societies

¹⁵⁹ [1995]1 Lloyd's Rep 579

buyers by virtue of a Memorandum of Agreement dated May 14, 1987. The Agreement had particular clauses inserted, especially Clause 11, which said:

“The vessel with everything in it belonging to her shall be at Seller’s risk and expense until she is delivered to the Buyers, but subject to the conditions of this contract, she shall be delivered and taken over as she is at the time of inspection, fair wear and tear excepted. However the vessel shall be delivered with present class free of recommendations. The Sellers shall notify the Classification Society of any matters coming to their knowledge prior to delivery, which upon being reported to the Classification Society would lead to the withdrawal of the Vessel’s Class or to the imposition of a recommendation relating to her class”

Clause 19 of the same Agreement had the following

“...vessel to be delivered with present class fully maintained, free of recommendations and free of all average damages affecting class.”

On delivery of the vessel, the engine automation room was found to be obsolete and upon arbitration, the Arbitrator, in reference to Clause 11, made an award in favour of the Sellers. He ruled that the relevant date of matters coming to seller’s knowledge prior to delivery was from the date of the contract, if the plain meaning of the words were to be had in regard.

On appeal to the Commercial Court, Justice Gatehouse found in favour of the Buyers, holding that the term “coming to their knowledge” pre-dated the specific date on the contract and the date of the Buyer’s inspection. To this end, he remitted the case to the Arbitrator to ascertain if

matters had arisen between the last survey date and the time of delivery. The Sellers appealed to the Court of Appeal, where 'matters coming to their knowledge' was held to be from the date of the contract between the parties. Per Saville, J:

"The words appear in a contract made on a specific date and form part of one of the contractual promises of the Sellers made on that date. It seems to me that they necessarily point to knowledge

acquired after that date. I simply cannot give them any other meaning. They refer to the future and not the past¹⁶⁰

There was some strong reliance by the Court of Appeal on the earlier decision in *The Buena Trader*, which featured in the present case in regard to the issue of Seller's obligation to Buyer to inform relevant Classification Society of anomalies arising in vessel.

2.9.1 The Buena Trader

In the *Buena Trader*, the oil tanker of the same name was the subject of the sale between Compania de Navegacion Pohing S.A. and Sea Tanker Shipping (PTE) Ltd. Negotiations started through telex messages on November 20, 1971 and the proposed sale was in line with the Norwegian Memorandum of Agreement, which its clause 16 said:

¹⁶⁰ [1994]1 Lloyd's Rep 490

"The vessel shall be charter free, class maintained free of recommendations, free of average damage affecting class with all trading certificates clean and valid at the time of delivery"

Clause 17 had the following:

"The vessel is to be delivered with continuous machinery survey cycle up to date at time of delivery"

Regarding the issue of the continuous machinery survey cycle, this was in line with Rule 808 of the then Lloyd's Register Classification Rules and it provided:

"When at the request of the owners, it has been agreed by the Committee that the complete survey of the machinery may be carried out on the Continuous Survey basis, the various items of machinery should be open for survey in rotation, so far as practicable, to ensure that the interval between the consecutive examination of each item will not exceed five years. In general, approximately one-fifth of the machinery should be examined each year."

After a series of offers and counter-offers, the Buyers sent off a telex thus:

"Buena Trader sale confirmed. Dollars 680.00 cash per Seller's last offer. But view survey cycle to be up to date at time of delivery. Buyers anticipate this will be about 75% or even more, which please request ship/Lloyds to clarify"

Buyers refused to accept delivery because firstly sellers replied six (6) hours after the stipulated 11.00 hours, and secondly the survey cycle was not "up to date" per required by Rule 808 of the Lloyds Register. Only 25% of the survey cycle had been done as opposed to the anticipated 75%. The Buyers further argued that the Sellers were obliged to inform the Classification Society of defects in arising in the vessel.

On arbitration, which was decided in favour of sellers, arbitrators gave award in form of the following stated case:

- i. Was there concluded contract between the parties?
- ii. Were buyers liable to sellers for refusing acceptance of delivery?

In the Commercial Court, Mocatta J held that there was a contract by virtue of the conduct of the parties; 75% was a mere hope/anticipation and not contractual; Clause 17 in reference to Rule 808 had not been complied with, which entitled the buyers to refuse delivery and wear and tear of vessel did not go to the root of the contract. To the Arbitrator's first question, Judge answered in the affirmative, that there was a contract between the parties. To the second question, he said ruled that the Buyers were not liable to sellers in damages.

In the House of Lords, it was held that 75% was merely anticipatory especially since Sellers side did not insert 75%¹⁶¹ when formal Memorandum of Agreement was signed.

On the issue of “up to date” it was held that reliance should be placed more on the actual practice in Lloyd’s Register where “if any item is not examined within 5 years of its last examination, Lloyds will write to the Owners drawing this to their attention and if no action is taken, vessel will be taken out of class”¹⁶². This co-relates with the finding on 75% in view of the fact that this did not necessarily need to be adhered to especially if none of the items warranted inspection.

Thirdly, on the issue of implied duty of Sellers to inform their Classification Society of defects arising in their vessel, it was held on reliance on expert evidence, that there was no such duty. This point is of particular relevance in this study and this was the basis of the Court of Appeal decision in *The Niobe*. Lord Denning noted that while in an ideal world, sellers ought to notify Classification Societies of defects, this did not happen in practice, to which end, no implied duty existed for sellers to notify.

The House of Lords in their decision on 20% of survey regarding the “up to date” theme relied somewhat on the decision in *United Shipping Company Ltd v. Assicurazioni Generali*¹⁶³.

¹⁶¹ *ibid*, p.328

¹⁶² *ibid*, p.328

¹⁶³ [1929] Vol. 34, 323

2.9.2 United Shipping Company Ltd v. Assicurazioni Generali

Here, an English company sold a vessel to Italians, who paid partly and left the rest of the price on mortgage. Apparently, not inclined to rely on a mortgage of the unpaid price, the sellers secured insurance policies and a guarantee from one of the insurers of the vessel.

The vessel was classed with the British corporation, B.S* and had been issued with an interim Certificate, to enable her go from Dunkirk to another port for repairs. Yet another Certificate "under reservation of repairs for classification" was issued in February 1927 was issued for to enable the vessel go for coal in any part of the United Kingdom, before proceeding to Trieste during which the steering gear failed during the journey from Cardiff to Ancona. The Sicilian insurance companies admitted that salvage claims, but not particular average damage on the grounds that the vessel had lost its class.

Judge Wright in the Commercial Court held that the vessel did not lose its class. On appeal, Scrutton J was of the opinion that the conduct and level of communication between the Classification Society and the vessel indicated that at all material times, the vessel was classed as at the time of loss. It was his opinion that a third party, in this situation the Sicilian insurance companies had no place in interpreting the relationship between a Ship-owner and his Classification Society in terms of the specifying when the Classification Society should or should not maintain a vessel in class.

2.9.3 The Niobe¹⁶⁴

Following these opinions was the House of Lords decision in *The Niobe* on further appeal from the Buyers on the issue of the need for sellers to notify their Classification Societies on defects arising in their vessels. Lord Mackay noted that the contentious classification clause¹⁶⁵ in the present case (on seller notifying the Society on defects arising in vessel) from the Norwegian Sales Form was express, while in *The Buena Trader*, which the Sellers sought to rely on, its equivalent clause was implied. Further, he observed that the Arbitrators had aptly noted the significance of both the periods before the date on the contract as well as after the date on the contract, in as much as they settled for the latter, when he said:

“True, there is no enforceable obligation until after the contract is made but that is no reason for confining the scope of the obligation, once incurred, to the period subsequent to the contract. The two periods are quite separate. There is nothing inherently contradictory or even unusual in contractual obligations dating back. Every commercial consideration seems to point in favour of Mr. Rokison's argument that the contractual obligation was intended to be co-extensive with the obligation to the classification Society. So if the language of Clause 11 permits, I would wish to give it that effect”¹⁶⁶

¹⁶⁴ [1995]1 Lloyd's Rep 579

¹⁶⁵ Clause 11 of the Norwegian Sale Form (1983), which read, “...*However the vessel shall be delivered with present class free of recommendations. The Sellers shall notify the Classification Society of any matters coming to their knowledge prior to delivery, which upon being reported to the Classification Society would lead to the withdrawal of the Vessel's Class or to the imposition of a recommendation relating to her class*”

¹⁶⁶ 1995]1 Lloyd's Rep 579 at 582

In effect the usage in commercial practice of considering periods prior to the date of the contract as well as the fact that the Arbitrators had cast their mind to this was, in Lord Mackay's opinion, enough to signify some positive hesitance on the part of the Arbitrators on the true nature of the need for seller's to inform their Classification Society on defects in their vessel.

Lord Mackay also emphasised that it was a play on words that apparently stalled the revelation of the true position of things when he said:

"Grammatically, the phrase 'coming to their knowledge' is an adjectival present participle governing the word 'matters.' The phrase has no temporal significance in itself, as one can demonstrate by changing the language. If the sentence had said 'the sellers shall notify the Classification Society of any matters coming to their knowledge, whether before or after the date of the contract' it could not have been suggested that 'coming to their knowledge' was grammatically incorrect, even though it related to the

past as well as the future. Of course the phrase may take colour from its context, and may in some contexts point only to the future, as in some of the examples which Mr. Milligan put before your Lordships. But in the present context the adjectival phrase is as apt to cover knowledge acquired before the contract as after".¹⁶⁷

The above decision indicates the current position of the contractual relationship between Classification Societies and Ship-owners, especially regarding the duty of the latter to inform the former of defects in their Vessel. Where the Ship-owner does not keep to the tenets of the contract with the Classification Society, the Society can see itself as being discharged from liability. Incidentally and more likely than as a fall-out from the issues in *The Niobe*, Hodges

¹⁶⁷ *ibid* at 583

and Hill observe that some changes have been made in the Norwegian Sale Form which will appear to strengthen the position of the Seller of a vessel. They note:

"A comparative study of the text of Clause 11 in the 1987 and the 1993 versions of the Norwegian Sale Form, respectively reveals that in the later of these two versions the requirement upon the seller that he should advise his classification society of damage affecting class, which appears in the 1987 version and was at issue in *The Niobe has been omitted*"¹⁶⁸

2.10 CONCLUSION

There would indeed appear to be a gradation of legal decisions on the issue of the duty to inform Classification Societies of defects or matters arising in vessel. These range from:

- i. No duty on sellers to inform Classification Society
- ii. Obligation on seller to inform Classification Society from period of contract not necessarily before contract
- iii. Obligation on seller to inform Classification Society of any issues/defects at any time, pre- or post-contract.

¹⁶⁸ Hodges, S. & Hill, C., Principles of Maritime Law, (London: LLP, 2001) p.42

Lord Saville aptly observes that the compromise (ii) above arose out of a combination of I and iii to ameliorate the rigid position adopted in the *Buena Trader*, where it was held that no duty rested on Seller to inform his Classification Society of defects. The *Buena Trader* had itself relied on the majority decision of Scrutton and Greer, LLJ in ***United Shipping v. Assicurazioni***. In this latter case, the Lord Justices ruled that besides the fact that the Seller had no duty to inform resting on him, an insurance company that guarantees a vessel is a third party and has no right to ascertain in what instances a Classification Society could withdraw or suspend its Certification.

The above position can be said to be the state of affairs regarding the contractual relationship between a Classification Society and another party (Ship-owner) until recently following the incidence of some remarkable accidents in the maritime arena bringing to question the culpability of Classification Societies and to this end a stricter adherence to the terms of a Classification Contract. This has been rather glaring after the collision of the *Erika*¹⁶⁹, which has seen the evolving of some theories of liability of class, being proposed certain quarters in the maritime field¹⁷⁰ by albeit from a tort point of view, which is the focus in another section of our study.

The general attitude initially adopted by the Courts appeared to be one where the contract would spell out certain basics, but the actual practices in the course of things portrayed another

¹⁶⁹ The vessel, *Erika* sank in Brittany, off the west coast of France, in December 12, 1999, which is widely believed to have resulted from the corrosion leading to the eventual cracking of its hull and a gory oil pollution of the region.

¹⁷⁰ The Gothenburg group Initiative, EU Commission and Parliament initiative.

picture entirely. This however has changed with the House of Lords decision in ***The Niobe***¹⁷¹, which holds the Ship-owner to inform at all times. In terms of Contract, Classification Societies have not yet been held liable by a Court of law to a Ship-owner. Would this stem from the shroud of non-liability which Classification contracts are wrapped in? Suffice it to say that going by the decision in **Great American Insurance Co. v. Bureau Veritas**¹⁷² it will appear foolhardy trying to hold Class liable in contract especially where such contract is inundated with clauses glaringly dispensing with liability from mere limitation to the point of total exclusion. Holding the Societies liable in tort has appeared to be a more worthwhile and viable venture.

¹⁷¹ 1995]1 Lloyd's Rep 579

¹⁷² 1972 AMC 1455

Chapter 3

The Tortious Relationship between Classification Societies, Ship-owners and Flag-States

3.1 Ascertaining a Tortious Relationship

In the course of considering the tortious relationship between the two parties, a Classification Society and a Ship-owner, certain aspects need to be borne in mind. For instance, when a Ship-owner engages the services of a Classification Society, in what precise capacity does the Society act? Further, are there certain duties and obligations that are implicit in the relationship between the parties and what is the nature of these duties and obligations?

We could start by the definition of a tort, which Pollock says that:

"There...is too much talk about definitions. A definition strictly speaking is nothing but an abbreviation in which the user of the term defined may please himself..."¹

This notion would appear to readily give the impression that just about anything could constitute a tort, especially when observed from a subjective point of view. Rather, the aim of the law of torts has been said to be a more expedient avenue as Street observed:

"It is the function and purpose of the Law of Torts that are of greater import, and these are matters which can be explained in comparatively simple terms. The law of torts is concerned with those situations where the conduct of one party causes or threaten to cause harm to the interests of other parties"²

¹ Pollock, Book Review (1931) 47 LQR 588, quoted by M. Brazier, Street on Torts, (London: Sweet & Maxwell, 1988), p.3

² *ibid*, p.3

Interests, in this connection have been patterned after Pound's definition as:

"a claim or want or desire of a human being or group of human beings which the human being or group of human beings seeks to satisfy and of which, therefore, the ordering of human relations in civilised society must take account"³

In the context of this study we have to ascertain what interests are involved. That should be the desire of a Ship-owner to have his vessel surveyed and inspected by a Classification Society according to the rules and regulations of that Classification Society for the purposes of insurance and other statutory requirements. Interests here, on a corollary, can also include the desire of the Classification Society not to be held liable to the Ship-owner for alleged negligent classification of the said vessel.

Prosser and Keeton define Torts simply as:

"Broadly speaking, a Tort is a civil wrong, other than a breach of contract, for which the Court will provide a remedy in an action for damages"⁴

Oliphant observes the inadequacy of this sort of definition emphasises on damages, following Sir Peter Winfield's definition, which says:

"Tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages"⁵

³ R. Pound, *Selected Essays*, quoted by M. Brazier, *ibid*, p.3

⁴ Prosser and Keeton, *Torts*, 5th ed, (1984), p.1

⁵ WVH Rogers, *Winfield & Jolowicz on Tort*, 17th ed, (2006), p.4

Oliphant argues, perhaps rightly so, that a claim for damages are not the only sort of remedies a claimant would seek of the Court.

A vital point of consideration will be to ascertain the sort of tort that can evolve between a Classification Society and a Ship-owner. The typical torts range from trespass, slander, libel, passing-off, deceit, nuisance, and conspiracy to what Street refers to as 'negligent interference with personal, proprietary and economic interests'⁶ This latter category of torts is in line with the contemplation of this study and it is a more recent development of tort, which has not quite witnessed the same passage of time and precedents to give it a further element of credibility. Two factors feature here: negligence, and economic interests. In effect, we are examining a situation, where a Classification Society can be alleged to be liable to a Ship-owner or indeed any other party for the negligent classification of a vessel, which has resulted in some loss (economic among others) to these parties.

Torts emanating from proper contracts between parties will be analysed before advancing to pure torts arising between parties with no contractual link between them. The distinction between these two is not particularly clear cut especially when you bearing in mind that certain contracts are made for the benefit of a subject who is not a party to the contract (third party), which is not unlike how Classification Societies first entered into contracts with marine insurers.

⁶ M. Brazier, Street on Torts, op cit, p.6

3.2 Contractual Torts (torts that arise from a contract)

On entering a contract, there are express and implied terms in that contract between the parties. The express terms are vivid enough, while the implied terms are the terms which when derogated from will constitute a 'contractual tort'.

An action in tort against Class may be an action in tort in association with the contractual relationship between the parties, or a pure action in tort between parties with no prior contractual relationship. The action in tort will be based on establishing a duty in care flowing from the Classification Society to the party bringing the suit against it. It follows that the duty of care will be more glaring where there is a pre-existing contract between the parties, which can be termed a 'contractual tort' as opposed to a 'pure tort' action, where it will be a third party to a contract, if any, instituting an action.

In our analysis of the impact of tort on Classification Societies, this will be categorised into the effect of tort between a Classification Society and its contractual partner (Contractual tort); and the effect of tort between a Classification Society and a third party (3rd) party. The second form of tort relationship is the most obvious type and has witnessed more disputes involving Classification Societies.⁷ Thus is due to the fact that most of the third parties instituting the action against Class usually have a limited recourse to damages or compensation from the

⁷ *Otto Candies v. NKK* [2003] United States Court of Appeals Fifth Circuit, filed September 17, 2003 No. 02-30842; *Marc Rich & Co and Others v. Bishop Rock Marine Co. Ltd, Bethmarine Co Ltd and Nippon Kaiji Kyokai (The Nicholas H)* [1995] 2 LR 299; *Sundance Cruises Corporation v. America Bureau of Shipping (ABS) (The Sundancer)* [1994] L.R. 183; *Mariola Marine Corporation v. Lloyd's Register of Shipping (The Morning Watch)* [1990] 1 Lloyd's Rep. 547

parties they are in actual contract with and may see Classification Societies as a more certain avenue of funding their loss.

The Classification Society is, upon a contract with a Ship-owner for its services to survey and inspect a vessel and thereby classify it according to the Society's rules and regulations, under a duty to act responsibly. Boisson points out that the contract fundamentally entails '..the implied warranty to perform the survey in a safe and competent manner, so as not to expose the Ship-owner to risk of loss or liability to others'⁸ Following this angle, where this warranty is not complied with, is it the true picture that the Classification society would be liable to the Ship-owner where he incurs loss or liability to others?⁹ There does not appear to be a clear-cut answer to this because majority of the cases we have dealt with in the preceding chapter indicate that Ship-owners have not been very successful over the years in claiming in contract or in tort from origination from the contract, against a Classification Society. This apparently steady state of affairs appeared to have been interrupted by the fairly recent case, **Otto Candies v. NKK**¹⁰ which held that Class can indeed be liable to a third-party especially where there is evidence of reliance on the advice of the Classification Society by that third-party. The Societies, on their part, have fortified themselves with clauses in their contracts whereby they will be indemnified by the Ship-owners should any blame come their way.

⁸ Boisson, 'Classification Society Liability: Maritime Law Principles. Must they be requisitioned?' (1994) *CMI YEARBOOK* 235

⁹ Lord Wright in **W. Angliss Case** [1927] 28 Ll. L.R. 202 at 214 had said: "Similarly, the carrier might perhaps be held liable if the naval architect whom he employed to supervise the design, applying current standards, failed to detect a definite error in design, although I do not think that he would be so liable for an error on the part of one of the classification societies, such as Lloyd's, which occupy a public and quasi-judicial position."

¹⁰ United States Court of Appeals Fifth Circuit, filed September 17, 2003 No. 02-30842. This case is discussed further in this chapter.

How have Classification Societies been described in the context of this study? Basically, Classification Societies are bodies recognised and working in line with the **Safety of Life at Sea (SOLAS) 1974 Convention** that inspect, survey and classify vessels according to specific categories according to the Society's own Rules and Regulations. Peter Clark gives an almost exhaustive description of the traditional role of Classification Societies when he says:

"A Classification Society sets standards for the quality and integrity of vessels and performs surveys to determine whether vessels are in compliance with the Classification Societies Rules and Regulations, national laws and international conventions. If a vessel passes inspection, the Classification Society either issues a Certificate attesting to the vessel's conformity with the applicable Rules, Regulations, national laws and international conventions or endorses an existing Certificate with a visa reflecting the survey. If the vessel fails to pass the inspection, the Classification Society either does not issue the Certificate or withdraws the existing Certificate"¹¹

Lord Steyn in the **Nicholas H** identified some of the functions of Classification Societies that:

"...Classification Societies have classified merchant ships in the interest of safeguarding life and ships at sea. For this purpose, Classification Societies attend to the building of ships in order to determine whether the ships merit classification in accordance with their standards. Classification Societies also conduct periodic surveys of ships to ascertain whether ships are entitled to retain classification"¹²

While Classification Societies may purport to perform a certain set of functions, it would seem that they mean various things to different classes of individuals. This position would in no small

¹¹ P.D. Clark, "An American Admiralty Law Viewpoint on the Changing Role of Classification Societies", SEA LAW, Clark, Atcheson & Relsert, navlaw.com

¹² Marc Rich & Co. v. Bishop Rock Marine Co Ltd (The Nicholas H) [1995] Vol.2, 299

means hamper the specificity of the duty of care a Classification Society would owe (if at all) to another party. Andrew Craig-Bennett offers that:

“Classification Societies seem rather odd beats. They are certainly corporations. Some are companies, some are charities, many enjoy privileged status in the eyes of the law and they interact with many other corporations and individuals, not always in ways that a lawyer would recognise as a simple contract. Increasingly, and uneasily, they interact with that amorphous fellow, the Man in The Street as well... These interactions whether we categorise them as contractual or as stake holding relationships or as something else again, are fiendishly difficult to understand, and perhaps the Buddhist fable of the four blind men and the elephant applies.”¹³

The above analogy, if we can call it that, typifies a situation where an individual might be ill at ease to delineate the extent to which a Classification Society can be held accountable to another party for alleged non-observance of its duties to that party.

3.3 Duty of Care

The graduation of the tort of negligence from one of criminal liability (trespass *vi et armis*) to one of civil liability is one of the rare uncharacteristic traits of English law in its ability to evolve.¹⁴ Negligence on coming into its own has gone through some further cleansing to which end, the term duty of care has been coined to signify the presence of negligence in any one

¹³ ‘Accountability of Classification Societies – The Role of Classification and Market-oriented and Policy Issues’, (2001) 2 LS L C

¹⁴ See generally M. Lunney & K. Oliphant, *Tort Law, Text and Materials*, 2003, Oxford, p. 4

situation. Simply put, a Plaintiff has to prove that the Defendant owed a duty of care to him in an action for negligence.

The notion of duty of care, on its part, has been sought through a varied number of tests and theories, particularly where there is no pre-existing relationship (contract) between the parties. We need to remind ourselves that at this juncture that tort originated or was more readily held to have occurred between parties in an existing relationship. This instance, though, has broken away from the original mould thanks to the advance in technology (the industrial revolution playing a huge part) and other related factors, to the discomfort of the Courts who required a more visible nexus between the parties.

Refocusing on our study of Classification Societies, their contractual relationships with other parties has been multi-faceted and not precisely clear-cut. At their inception, Classification Societies had a foremost relationship with the marine insurance companies who needed some specialised, classified information on the vessels whose owners sought to insure their hull and machinery with the particular insurance companies. This was a contract between two parties with a third party being the subject of the contract with the effect that there was no contract between the Classification Society and the ship-owner!¹⁵ This ideally was the same position between Classification Societies and Cargo-owners, whereby there was no contract in such a situation between the Classification society and a Cargo-owner, the only nexus between the parties being the fact that the former had classified the vessel and the latter had used the same vessel for carriage of his cargo. In the event of a dispute, the only grounds of action would have

¹⁵ Such contracts led to the emergence of the **Contracts (Third Party) Acts, 1990**

been based on a relationship rooted in tort. However, it was not apparent in every case that the Classification Society would have notice of the prospective cargo -owner. This was one of the bases of the opinion of Lord Steyn in the **Nicholas H**¹⁶ that in the course of NKK classifying the vessel it had no idea who the cargo-owners were enough to have the former owe a duty of care to the latter because 'there was no contact between the cargo-owners and the classification society.'¹⁷ A proper contractual relationship between the Classification Societies and Ship-owners eventually evolved with the advance of marine affairs and a bid by Ship-owners to enhance their credibility. The features of these contracts have been analysed in the previous chapter and the focus in this section will be the torts that can arise from a contractual or non-contractual setting.

Negligence has given rise to numerous definitions and comprises certain essential constituents, which Lord Wright in **Lochgelly, Iron & Coal Co. v. Mullan**¹⁸ noted thus:

"In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: It properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing"¹⁹

We therefore follow the above direction to decipher the juxtaposition of a duty, its breach and the consequential damage emanating from Classification Society towards a Ship-owner.

¹⁶ *Marc Rich & Co. v. Bishop Rock Marine Co Ltd (The Nicholas H)* [1995] 2 Lloyd's Rep. 299 (H.L.)

¹⁷ *ibid*, p.314

¹⁸ [1934] AC 1

¹⁹ *ibid* at p.25

3.4 Guidelines to Recognising a Duty of Care

The following can be regarded as the premises on which the Courts recognise a duty of care in tort flowing from one party to another. These include:

- Neighbourhood Principle

- Duty not to make a careless statement to be relied on in **Hedley Byrne**²⁰

- The two-way test in **Anns v. Merton County Council**²¹

- The three-way test in **Caparo v Dickman**²²

- Knowledge that Plaintiff, as an individual and not indeterminately, will suffer economic loss

- Assumption of responsibility

- Incremental test

In trying to ascertain liability, regard should also be had to the nature of the Plaintiff's loss, which includes personal injury, damage to property, economic loss. Personal injury and damage to property seem clear enough, but pure economic loss has been simply defined as

²⁰ [1964] AC 465

²¹ [1978] AC 728

²² [1990] 2 A.C. 605

'loss that does not arise out of physical damage suffered by the claimant.'²³ Indeed, a rather obvious and more conventional perception of an economic loss will be one whereby a plaintiff incurs due to the loss of possibly expected profits resulting from the act of another person.²⁴ A claim against Class has been deemed to be one for economic loss²⁵. Opinion is divided between assessing responsibilities from the view of the act of the Defendant on the one hand and the effect such an act has on the Plaintiff on the other hand. Baker is of the view that the modern perception of negligence leans more towards the quality of the act of the Defendant than the nature of the loss suffered by the Plaintiff.²⁶

3.4.1 Neighbourhood Principle

Decidedly the most famous case in the English law of tort and rather well-known in every common-law jurisdiction worldwide, this principle was propagated by Lord Atkins in **Donoghue**

²³ Lunney & Oliphnat, p. 340

²⁴ See generally the Scottish case of **Landcatch Ltd v International Oil Pollution Compensation Fund (The Braer) [1999] 2 LLR 316**, where claims had been advanced against the Fund arising out of the grounding of the "Braer" off the Shetland Isles in January 1993. In that case, the Inner House of the Court of Session had denied recovery from the Fund for economic loss suffered by certain salmon farmers in Argyll who raised smolt (young salmon) each year to on-sell them to fish farmers in the Shetlands for on-growing in salt waters to maturity. The fishing ban imposed by the authorities after the Braer accident brought this business to a halt for both 1993 and 1994. Whilst the Court of Session accepted that the statute imposed liability for pure economic loss, that did not cover secondary or relational claims such as those of the Argyll smolt farmers. In reaching its conclusion, the court applied considerations similar but not identical to those which had led to the development of a rule against such claims at common law.

²⁵ Perrett v. Collins (1998) 2 Lloyds Rep 255 at 263 per Lord Hobhouse

²⁶ J.H. Baker, Introduction to English Legal History, (2002) Butterworths, p.402

v. Stevenson²⁷. On August 26, 1928, the appellant drank a bottle of ginger-beer, manufactured by the respondent, which a friend had bought from a retailer and given to her. The bottle contained the decomposed remains of a snail which were not, and could not be, detected until the greater part of the contents of the bottle had been consumed. As a result she suffered from shock and severe gastro-enteritis. She accordingly instituted the proceedings against the manufacturer. The case which, was to be determined in accordance with Scottish law was before the English House of Lords not for trial but on a preliminary issue to ascertain if the Appellant had a cause of action against the Respondent. On agreement between counsel for the parties; the earlier judgement in the matter from the Courts of session; and Lord Atkins' research, it was found that English and Scottish law were identical on this instance of law. The particular issue sought to be resolved was 'whether the manufacturer of an article of drink sold by him to a distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health?'²⁸ The laws of Scotland and England according to Lord Atkins provided that 'in order to support an action for damages for negligence, the complainant had to show that he has been injured by the breach of a duty owed to him in the circumstances by the Defendant to take reasonable care to avoid such injury'.²⁹

He acknowledged however that the case did not necessarily concern itself with the existence of a breach of duty, but that if a duty actually flowed from the defendant to the appellant to take care. A poignant observation by Lord Atkin was that there were no general English opinions

²⁷ [1932] AC 562

²⁸ *ibid*, 578

²⁹ *ibid*, p.579

hinting at a general application in governing the relationships between parties, which give rise to a duty to take care. It is observed that this is more or less an anomaly that has continued to this day.

The policy of resisting as much as possible the possibility of 'opening the floodgates', whereby a precedent is set by a case which enables prospective Plaintiffs to inundate the Courts with frivolous claims was clearly borne in Lord Atkin's mind when he said:

"The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy."

This case nonetheless has set about the most prominent principle in the Law of Tort and has, at the risk of being begged, been referred to in every case to do with the issue of establishing a duty of care. Lord Atkin, who apparently had a strong Christian background that was described as a constant in his life, looked to the correlation between law and morality to give his perception of a duty of care to allude to a duty not to injure your neighbour.³⁰ He gave the principle as:

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely

³⁰ G. Lewis, Lord Atkin (London: Butterworths, 1983) referred to by Lunney & Oliphant, op cit, p.100

and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”³¹

Lord Atkin apparently looked to foreseeability and proximity in his neighbour principle, some of the central themes in quest of establishing a duty of care in tort. He relied on **Heaven v. Pender**³² where the Plaintiff who was on a stage held by ropes supplied by the defendant dock-owner was injured in the course of painting a ship. The ropes were found by the County Court to be unfit and damages were awarded to the Plaintiff, which judgement was reversed by the Queens Bench Division. On appeal to the Court of Appeal, Brett MR in that case found for the Plaintiff on the basis of the physical proximity of the Plaintiff to the Defendant or rather the Defendant's property. Brett MR (later to become Lord Esher) said in **Le Lievre v. Gould**³³ that the earlier case of **Heaven v. Pender** 'established that under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property.' **Le lievre v. Gould** had to do with the issue of reliance on a statement made by one party to another and relied on by a third-party. Here, a surveyor prepared certificates for a mortgagor. The mortgagee relied on these certificates, where upon he brought an action against the surveyor. It was held that the surveyor owed no duty of care to the Mortgagee. Lord Esher therefore distinguished between **Heaven v. Pender** on the one hand, and **Le lievre v. Gould** on the other hand by virtue of physical proximity. Lord Atkin opined that proximity did not have to be physical for a duty of care to exist.

³¹ Donoghue v. Stevenson [1932] AC 562 AT 580

³² [1883] 11 QB 503

³³ [1893] 1 QB 491

Another of the numerable cases relied on by Lord Atkin was **Oliver v. Saddler & Co.**³⁴ Here, a firm of stevedores employed to unload a cargo of maize in bags provided the rope slings by which the cargo was raised to the ship's deck by their own men using the ship's tackle. The Plaintiff was a shore porter who transported the cargo to the dockside by the shore porters. The porters relied on examination by the stevedores and had themselves no opportunity of examination. The House of Lords reversed the decision of the First Division and held that there was a duty owed by the stevedore company to the porters to see that the slings were fit for use, and restored the judgement of the Lord Ordinary, Lord Morison, in favour of the Plaintiff. According to Lord Atkin, the decision in *Oliver v. Saddler & Co.* 'was based upon the fact that the direct relations established, especially the circumstance that the injured porter had no opportunity of independent examination, gave rise to a duty to be careful.'³⁵

Can this position help the cause of a cargo-owner against a Classification Society by virtue of the fact that they (cargo-owners) are neither in a position, nor have the opportunity to inspect the assessment of the Classification Society, thereby deferring to the Society's expertise where the roles of the Stevedores and ship-porters are substituted for Classification Societies and cargo-owners? This is especially glaring where the Classification Society purports to rely on an argument that the cargo-owner cannot maintain a claim against it because there is no evidence that the cargo-owner was aware of which Classification Society has been engaged to survey the vessel. The Courts going by the Lord Steyn's opinion in **The Nicholas H** have chosen to

³⁴ [1929] AC 584

³⁵ *ibid*, p.586

adopt a somewhat more restrictive view of proximity and foreseeability in this regard³⁶, compared to that espoused by Lord Atkin. In as much as this case had to do with a defective product, the principle nonetheless set the pace for modern perception of negligence. By way of analogy, where the defective product (the slings) in *Oliver v. Saddler* is substituted for the defect service (recommendation by the NKK surveyor) in *The Nicholas H*, it is submitted that on this particular basis judgement ought to have been found for the cargo-owners.³⁷

Lord Macmillan adopted a more pragmatic approach in arriving at the conclusion that the Appellant in *Donoghue v. Stevenson* was owed a duty of care. While acceding that the Plaintiff will obviously bring herself within an exception to the contract between manufacturer and retailer of the drink, he said:

"If on the other hand, you disregard the fact that the circumstances of the case at one stage include the existence of a contract of sale between the manufacturer and the retailer and approach the question by asking whether there is evidence of carelessness on the part of the manufacturer, and whether he owed a duty to be careful in a question with the party who has been injured in consequence of his want of care, the circumstance that the injured party was not a party to an incidental contract of sale becomes irrelevant"

The above statement will appear to strengthen the case for ship-owners and other third parties seeking to institute an action in tort against Classification Societies, whereby the existence of a

³⁶ *Marc Rich & Co and Others v. Bishop Rock Marine Co. Ltd, Bethmarine Co Ltd and Nippon Kaiji Kyokai (The Nicholas H)* [1995] 2 LR 299. The element of it being fair, just and reasonable has been added to the formula as will be seen further in this chapter.

³⁷ The NKK surveyor had advised the owners of the vessel on permanent repairs, but eventually opted for temporary repairs until the vessel, the *Nicholas H* arrived at the next port. The vessel however did not make it to the port.

prior contract between the Classification Society and a vendor ship-owner should not deter from holding the Classification Society responsible for the damages from the effect of a contract between the vendor Ship-owner and a purchaser Ship-owner, charterer or cargo-owner stemming from a recommendation by that Classification Society. Ideally, this supposition should impact even more where the Classification Society is well aware that its recommendations will be eagerly awaited by other parties not in a contractual relationship with it, but they (the third parties) have such a relationship with other parties with whom it (the Classification Society) has a contractual relationship.³⁸

3.4.2 Duty not to make Careless Statements to be relied on by third-party - Hedley Byrne Case

Le Lievre v. Gould, which emphasised on the need for physical proximity for statements made by a party and relied on by a non-contractual party was only relevant until the landmark case of **Hedley Byrne & Co v. Heller & Partners Ltd.**³⁹ The latter brought a breath of fresh air to a long line of instances whereby plaintiffs had no remedy against defendants for the latter's negligent statements which the former might have relied on. The principle enunciated in this case was deemed to be the exception to the earlier perception of no claim for an economic loss. In as much as the plaintiffs lost in this particular case, the record was set straight that a duty of care was owed in such a situation In this case, the plaintiffs had requested their bankers

³⁸ The *Nicholas* H [1995] 2 LR 299 at 314, where Lord Steyn advanced the element of reliance by the cargo-owner on the classification society's recommendations. This is discussed further in this chapter.

³⁹ [1964] AC 465

to furnish them with the financial status of a company they expected to do business with. This enquiry was further made of the bankers of the other company and the defendant bankers gave incorrect references, which gave the impression that the proposed deal was a worthwhile venture. This reliance resulted in the loss of £17,000 to the plaintiffs. The defendant bankers had however inserted a clause wherein they expressly disclaimed any responsibility, and to this end the plaintiffs were unable to recover their loss of £17,000.

Counsel for the Defendant had set out three issues in his argument which constituted the basis of Lord Devlin's opinion:

- a. There was no general duty not to make careless statements unless there was a contractual or fiduciary duty; a relationship of proximity, or a financial loss resulting from physical damage.
- b. A situation whereby a banker gives a reference to a third party who is not his customer cannot be termed a special or proximate relationship.
- c. If a special relationship can be found between bankers and third parties, in this case should the defendant be liable due to an express disclaimer which said "Strictly confidential and given on the express understanding that we incur no responsibility whatever in furnishing it"⁴⁰

Prior to **Hedley Byrne**, the House of Lords had ruled in **Candler v. Crane, Christmas & Co.**⁴¹ that a potential investor in a company who had specifically asked to see the company accounts before making an investment in the company was not owed a duty of care by the Defendant. The Defendants were auditors to the Company who had been asked by the managing director

⁴⁰ ibib, p.515

⁴¹ [1951] 2 KB 164

of the company to prepare the accounts. This was carelessly prepared and contained some false statements. The Plaintiff relied on the accounts and suffered the loss of his investment when the company folded up within a year after the request for the account. A majority of the Court held that in favour of the auditors, with Lord Denning dissenting when he asked:

“to whom do these professional people owe this duty? They owe the duty, of course, to their employer or client, and also, I think, to any third person to whom they themselves show the accounts...”⁴²

Lord Denning's opinion guided the House of Lords in **Hedley Byrne**, where Lord Devlin categorised a position where one seeks information from another party as a special relationship. He emphasised that these relationships were 'not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships, which...are equivalent to contract, that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract.'⁴³

It is noteworthy that for an assumption of responsibility to manifest, it does not have to be a duty necessitated by the operation of law or one imposed by statute. Rather it should be one where there is more or less a positive act on the part of the defendant. As Lord Devlin said

"I have had the advantage...of studying the terms which your Lordships have framed by way of definition of the sort of relationship which gives rise to a responsibility towards those who act upon information or advice and so creates a duty of care towards them. I do not understand any of your Lordships to hold that it is a responsibility imposed by law upon certain types of persons or in certain sorts of situations. It

⁴² *ibid*, 434

⁴³ *Hedley Byrne* at 529

is a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction."⁴⁴

The notions of 'assumption of responsibility' and 'reliance' were embarked upon in this case by Lord Devlin, in the sense that the bank had assumed a responsibility towards the plaintiff when it gave the statement of account, which the plaintiff was expected to rely on. The theme of assumption of responsibility was also the focal point of finding a duty of care on behalf of the plaintiffs in **Henderson v. Merrett**, which will be discussed below. In this latter case, Lord Goff extended the duty in this instance. Assumption of responsibility in Hedley Byrne was viewed as a sort of alter ego to proximity, as had been used by Lord Atkin in *Donoghue v. Stevenson*. Hedley Byrne established that where there is an assumption of responsibility where a person proffers information to be used by another and such information is to be relied on. It will appear that the way proximity and foreseeability are entwined and not mutually exclusive in a bid to prove a duty of care, the same will apply to the themes of assumption of responsibility and reliance.

When an assumption of responsibility is observed in a case, it might still be negated by the presence of an express disclaimer, going by the facts of Hedley Byrne, which resulted in the Plaintiff not succeeding in his claim against the bank. Lord Devlin was inclined to the opinion that:

"A man cannot be said voluntarily to be undertaking a responsibility if at the very moment when he is said to be accepting it he declares that in fact he is not. The problem of reconciling words of exemption

⁴⁴ Hedley Byrne v. Heller [1964] AC 465 at 530

with the existence of a duty arises only when a party is claiming exemption from a responsibility which he has already undertaken or which he is contracting to undertake. For this reason alone, I would dismiss the appeal."⁴⁵

In effect, the respondents were successful in the appeal against them based solely on the insertion of the disclaimer in the statement made for the benefit of the appellant. Hedley Byrne is largely celebrated for affirming the first two issues in the respondents case that:

- a. There is a duty not make a careless statement to another party especially where one will rely on it
- b. A special relationship is created between a banker and a third-party who is not a customer of the bank, and this is similar to the sort of relationship that exists between a solicitor and a client.

Using the above analogy and interposing it in the relationship between a Classification Society and a Ship-owner, it could be submitted that there is an element of an assumption of responsibility. However, if there is an express disclaimer of responsibility at the same time, it could well be that this serves to negative the initial responsibility assumed to have been undertaken. This will invariably lead to a situation where a party approbates and reprobates at the same time, to which end there would have been no need for the plaintiff to approach the defendant for its services.

⁴⁵ *ibid*, p.533

3.4.3 Lord Wilberforce Two-way test in *Anns v. Merton*⁴⁶

In this case the appellants, who were long lessees of a block of eight maisonettes, brought an action against the respondents, the lessor council, as well as the builders of the flats. The crux of the matter was that the foundation of the maisonettes ought to have been 3 feet deep, however, they were built on a foundation of 2 feet 6 inches instead, resulting in cracks developing on the floors and walls of the flats, for which the appellants brought an action for want of a duty of care.

Lord Wilberforce noted that the two principles to be distinguished in the case regarding liability for acts of builders on behalf of a housing authority were:

1. Whether a local authority is under any duty of care towards owners or occupiers of such houses as regards inspection during the building process.
2. What period of limitation applies to claims by such owners or occupiers against the local authorities?

Relying on what he called the trilogy of cases that established a duty of care - *Donoghue v. Stevenson*, *Hedley Byrne v. Heller & Partners* and *Dorset Yacht Co. Ltd v. Home Office* - , Lord

⁴⁶ [1978] AC 728. While the position in this case has been repealed and replaced by *Murphy v. Brentwood Council* in England, it is still law in Canada as seen in the cases of *Rivtow Marine Ltd v. Washington Iron Works* [1974] SCR 1189, (1973) 40 DLR (3rd) 530; and *Canadian National Railway Co v. Norsk Pacific Steamship Co* [1992] 1SCR 1021, (1992) 91 DLR (4th) 289. These cases are discussed in the next subsection of the Three-way test in *Caparo v. Dickman* [1990] 2 A.C. 605, by way of comparison.

Wilberforce maintained that it was not necessary to limit a current matter within these cases, but to go through a two way test, as follows:

“First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise”⁴⁷

He made a certain distinction in this case bearing in mind that the Council was a public authority, and performed its duties under a statute which could allude to its immunity from action. It was his opinion that the issue of ‘neighbourliness’ proposed by Lord Atkin did not necessarily feature here neither was there an element of control as between two individuals which would negate the essence of performing an act under a statute. He therefore used the term ‘operational’ to assess the extent to which a duty of care can flow from a public authority to a plaintiff. He approached this aspect in the following manner:

“Most, indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area of policy. The courts call this “discretion” meaning that the decision is one for the authority or body to make, and not for the courts. Many statutes also prescribe or at least presuppose the practical execution of policy decisions: a convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area. Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many “operational” powers or duties have in them some element of “discretion.” It can safely be said that the

⁴⁷ [1978] AC 728 at 751

more "operational" a power or duty may be, the easier it is to superimpose upon it a common law duty of care."⁴⁸

Lord Wilberforce focused on the health and safety aspect of the claim of the Plaintiffs, where in his opinion the Housing Authority erred in the course of their operation to ensure that the required depth of the foundation of the flats was strictly followed. It will appear that he viewed this requirement as operational to warrant the attachment of a common law duty of care. If it was recognised that there was a duty, the duty was to abide by the statutory provisions regarding the required depth for the foundation of the flats. These statutory provisions, in his opinion had been made for the protection of the owners/occupiers of the flats and to derogate from them was tantamount to being liable for the personal injury of the plaintiffs. As he stated:

"The damages recoverable include all those which foreseeably arise from the breach of the duty of care which, as regards the council, I have held to be a duty to take reasonable care to secure compliance with the byelaws. Subject always to adequate proof of causation, these damages may include damages for personal injury and damage to property. In my opinion they may also include damage to the dwelling house itself; for the whole purpose of the byelaws in requiring foundations to be of a certain standard is to prevent damage arising from weakness of the foundations which is certain to endanger the health and safety of occupants. To allow recovery for such damage to the house follows, in my opinion, from normal principle. If classification is required, the relevant damage is in my opinion material, physical damage, and what is recoverable is the amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying and possibly (depending on the circumstances) expenses arising from necessary displacement."⁴⁹

One of the important factors in this case is the element of economic loss in the case. It is observed that the actual health and safety of the Plaintiff had not yet been affected, though it

⁴⁸ *ibid* at 754

⁴⁹ *ibid*, at 759

was possibly imminent. The position on economic loss is analysed further below especially as it obtains in certain jurisdictions.

3.4.4 Three-way test in *Caparo v. Dickman*⁵⁰

In this case, Caparo Industries had shares in Fidelity, another company, for which Dickman was its auditor. Caparo bought more shares prior to Fidelity's audited accounts being made public for the tax year, March 31, 1984. As soon as the accounts were published, which indicated a pre-tax profit of £1.2m, Caparo made a takeover bid for Fidelity. Fidelity had made a loss of £400,000 however, for which Caparo brought an action against Dickman. Caparo claimed that the auditors owed them a duty of care since as potential investors, they had relied on the reports to increase their shareholding in Fidelity. The Auditors were held to be owed a duty of care to Caparo, by the Court of Appeal in view of Caparo being existing shareholders, whereupon the Auditors appealed to the House of Lords.

Lord Bridge examined not only if auditors of a company owed a duty to the shareholders, rather to what extent the duty was owed. At the beginning of his judgement, he observed that there were the traditional and the modern approaches of establishing a duty of care. The traditional view, he said, was by identifying various specific situations, which all on their part had their particular characteristics. He commented further that in as much these different situations fell within the realm of negligence, they were 'sufficiently distinct to require separate definition of the essential ingredients by which the existence of the duty is to be recognised.'⁵¹

⁵⁰ [1990] 2 A.C. 605

⁵¹ *ibid* at 616

He also recognised that there was the modern approach, which entailed looking for 'a single general principle, which may be applied in all circumstances to determine the existence of a duty of care'⁵². Both approaches derived from Lord Atkin's dicta in *Donoghue v. Stevenson*, where he mentioned the quest of the Courts in the classification of duties on both sides of a relationship 'whether manufacturer, salesman, or landlord, customer, tenant, stranger and so on'⁵³ Lord Bridge however reiterated Lord Atkin's proviso on the second modern approach that:

"To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials."⁵⁴

In Lord Bridge's view, Lord Wilberforce's two-way test was rather limited, to the extent that decisions in other cases following *Anns v. Merton* had advocated against a general principle being set to prove a duty of care. He then deduced that another element should combine with the factors of foreseeability and proximity, which he pointed to as the requirement that it be fair, just and reasonable to impose such a duty. In his words, he proposed:

"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other"⁵⁵

⁵² *ibid* at 616

⁵³ [1932] AC 562, 579-580

⁵⁴ *ibid* at 580

⁵⁵ *Caparo v. Dickman*, *op cit*, 618

He acknowledged that the law had swung between the traditional approach of observing different instances leading to a duty of care, and the modern approach of a quest of a general principle, and at the same time cautioned against using the terms, proximity and foreseeability as practical tests because they 'amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope.'⁵⁶

Lord Oliver in the same case, looking to the **Hedley Byrne Case** gave his perception of the circumstances from which a duty of care can be said to arise from a negligent misstatement:

1. the advice is required for a purpose, whether particularly specified or generally described, which is known, either actually or inferentially, to the adviser at the time the advice is given;
2. the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose;
3. it is known, either actually or inferentially, that the advice so communicated is likely to be acted on by the advisee for that purpose without independent inquiry; and
4. it is acted on by the advisee to his detriment.⁵⁷

⁵⁶ *ibid* at 618

⁵⁷ *ibid*, at p.638

Lord Wilberforce's two way test of proving a duty of care in negligence has apparently been displaced by the three-way test advanced by Lord Bridge in *Caparo v. Dickman*. Be that as it may, Lord Wilberforce's test still holds sway in Canada. Four years before *Anns v. Merton* was decided, the Canadian Supreme Court had already allowed recovery for pure economic loss and awarded damages to the plaintiff in that case for the loss of use of a crane, which had been negligently repaired by the defendant in **Rivtow Marine Ltd v. Washington Iron Works**⁵⁸. The defendants had refrained from informing the plaintiffs therein that a similar crane belonging to another client had collapsed and killed someone. Plaintiff sued for loss of use of the crane as well as the cost of repairs of the crane in spite of the fact that there was no actual physical damage. Ritchie J nonetheless held:

"I am conscious of the fact that I have not referred to all relevant authorities relating to recovery for economic loss under such circumstances, but I am satisfied that in the present case there was a proximity of relationship giving rise to a duty to warn and that the damages awarded by the learned trial Judge were recoverable as compensation for the direct and demonstrably foreseeable result of the breach of that duty. This being the case, I do not find it necessary to follow the sometimes winding paths leading to the formation of a 'policy decision'"⁵⁹

Almost two decades later, in **Canadian National Railway Co v. Norsk Pacific Steamship Co**⁶⁰ the Canadian Supreme Court, relying on **Anns v. Merton**, yet again allowed recovery for economic loss to the Respondent-plaintiff (CN) when the Appellant -defendant's tug, "Jervis Crown", in heavy fog damaged the bridge, which CN had contractual licence from a third party to use and maintain. There were four main railway companies that used the bridge for transportation and upon the accident they all had to reroute their traffic, which ended in delay or

⁵⁸ [1974] SCR 1189, (1973) 40 DLR (3rd) 530

⁵⁹ *ibid*, at 547

⁶⁰ [1992] 1SCR 1021, (1992) 91 DLR (4th) 289

non-transportation at all of freight. CN was the principal user of the bridge by virtue of having 85% to 86% of the railways that used the bridge in its ownership. The owner of the bridge, the Department of Public Works (DPW), instituted an action against Norsk and Norsk was held liable in damages to PWC.

La Forest J on the theme of CN being in a joint venture with DPW, while dissenting, said it was unclear to him 'why the current state of the law on contractual relational economic, which channels claims to the property owner is unsatisfactory at least in the area involving sophisticated parties' and he dispensed with idea of a 'special relationship' between CN and Norsk.

McLachlin J who gave the lead judgement of the Court put the issue before the Court simply as

"whether a person who contracts for the use of the property of another can sue a person who damages that property for losses resulting from his or her inability to use the property during the period of repair"⁶¹

In her opinion, Norsk was well aware of the importance of the bridge (the only rail bridge in the area) because bearing in mind it was privy to the consequences of the bridge's closure to CN's operations prior to the current case. As she said:

"The loss was identifiable, the victim identifiable, the damage almost inevitable. The defendants ought to have known that the plaintiff would suffer economic loss as a result of their negligence. In fact, they even had actual knowledge that such a loss would occur. They even knew of the precise manner in which this

⁶¹ *ibid*, at p.357

plaintiff would be harmed. Would we deny recovery in such a case? Liability would in no way be out of proportion with the neglect. There is no danger of indeterminate liability."⁶²

The judge in the above quote clearly itemised the main issues to be considered in the quest of seeking a duty of care against a defendant and following the course if this section, it will appear that she followed the European model seen in the various civil codes in European jurisdictions.⁶³

3.4.5 Knowledge of the Defendant that the Plaintiff, as an individual and not indeterminately, Will Suffer Economic Loss

Where the defendant in a suit is explicitly or impliedly is proved to know or is imputed to have the knowledge that his action in result in economic loss to the plaintiff in that action, such defendant will be liable in a duty of care to the plaintiff. This is only so far as the defendant will not be liable to the plaintiff '*in an indeterminate amount for an indeterminate time to an indeterminate class*.'⁶⁴ This position appears to have taken strength in Australia following the case of **Caltex Oil (Australia) Pty v. The Dredge Willesmstad**.⁶⁵ Here, there was an oil pipeline which was damaged in the course of dredging operations in the Botany Bay in Australia. At one side of the Bay was an oil refinery, the owner of the pipeline, and this pipeline was connected at the other end of the bay to an oil terminal owned by the plaintiff. Following the damage to the pipeline, the plaintiff had to resort to a costlier means of transporting the oil

⁶² *ibid*, at p. 390

⁶³ Article 1382 of the French Civil Code, S. 162.6 of the Dutch Civil Code

⁶⁴ This was famously re-iterated by Cardozo CJ in *Ultamares Corporation v. Touche* (1931) 174 N.E. 441

⁶⁵ (1976) 136 CLR 529

from the refinery to the terminal, and in as much as it did not have a proprietary interest in the pipeline, the plaintiff sought damages from the defendant, the owner of the dredger. Gibbs J found in favour of the plaintiff and particularly said that:

‘..a duty may be owed to the plaintiff where the defendant has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence’⁶⁶

What can emerge from the above comment is the possible assumption that a duty is not owed to the Plaintiff by the defendant where the defendant does not have any knowledge or the means of knowledge that the plaintiff either on his own suffered loss.⁶⁷ This will necessarily on the facts of each case. It is imagined that adducing evidence to disprove knowledge of the plaintiff by the defendant may well prove a tall order especially if the Plaintiff has a high profile

The case of **Perre v. Apand Pty Ltd**⁶⁸ was fairly similar to the Caltex Oil case. Involved here was a group of companies and individuals who owned land in South Australia on which they grew potatoes. These were processed and exported to Western Australia. It turned out that the defendant, Apand, sent potato seedlings to the neighbours of the plaintiff, which eventually became infected with bacteria wilt. Incidentally, Western Australia legislation prohibited the importation of potatoes which had been cultivated within a 20 kilometre radius of any area affected by this plant disease. The Plaintiffs brought an action against the defendants for economic loss, in as much as there was no personal injury or injury affecting their property and

⁶⁶ *ibid* at 555

⁶⁷ (1976) 136 CLR 529 at 602, where Jacobs J said that an action lay in negligence where the ‘physical effect’ upon property owned by the claimant was such that it could not be used.

⁶⁸ (1999) 198 CLR 180

no contact between the parties but for the action of the defendant in sending the seedlings to South Australia which impacted on the plaintiff.

Applying this formula to Classification societies, the ideal premise would be if the Society knew in the course of surveying and inspecting a vessel that its decision would be likely to sway a possible plaintiff, in the position of a cargo-owner, to use the vessel for the carriage of his goods.⁶⁹ Another consideration would be if such positively impact on the vessel's insurer, who may use the results of the classification to set a premium for the vessel. This premise may be further strengthened where there is proof that the Classification Society indeed had actual knowledge and not just imputed knowledge.

RJ Tilbury and Sons (Devon) Ltd, v. The International Oil Pollution Fund 1971 (the "Sea Empress") Court of Appeal: Kennedy, Chadwick and Mance LJJ, 7th February 2003

The tanker, "SEA EMPRESS", grounded off Milford Haven in February 1996 and there was an escape of crude oil into the sea. The Government imposed a fishing ban off the Welsh coast which included an area where whelks were caught and supplied to Tilbury in Devon who in turn processed the whelks for Korean buyers. The ban brought an immediate end to the catching of whelks and thus destroyed Tilbury's business with its Korean buyers.

⁶⁹ *Otto Candies v. NKK* [2003] United States Court of Appeals Fifth Circuit, filed September 17, 2003 No. 02-30842. In this case, the classification society was actually aware of the new buyers of the vessel in this case and the sale was dependent on the result of the survey. This ties in with the issue of reliance, which Lord Steyn had referred to in the *Nicholas H* [1995] 2 LR 299 at 314.

Section 153 of the **Merchant Shipping Act (MSA) 1995** sets out the extent of the liability of the shipowner, **s.157** limits it (in the absence of actual fault and privity) and **s.175** makes the Fund liable to compensate where the damage exceeds the ship-owner's liability under **s.153** as limited by **s. 157**. The plaintiffs brought an action against the Fund which had resisted their claim for compensation.

The Court of Appeal held that Tilbury's loss was a form of secondary economic loss which fell outside the intended scope of the statute which was closely focussed on physical contamination and its consequences. Tilbury was not engaged in any local activity in the physical area of the contamination. Its interest was in landed whelks, not in the whelks in their natural habitat. The contamination prevented local fishermen, whose physical activities were closely affected by the contamination of the waters and of whelks, from supplying Tilbury with the landed whelks for which it had contracted. Tilbury's resulting loss arose from its inability to carry out processing the whelks at points far away from the contaminated areas.

In reaching its conclusion, the Court accepted that it was legitimate to bear in mind that while the general policy of the common law to limit the recoverability of claims for pure economic loss, common law rules could not be absolutely decisive. Thus, although it was not necessary to decide it, Mance LJ was prepared to assume that there could be claims under the statute for loss suffered by the fishermen, which would not, however, be recoverable at common law, even assuming negligence. In making that assumption, he emphasized the very close relationship between the contaminated waters and the fishermen's activities and loss. It would follow that a plaintiff in the stead of the fishermen in this case may be better placed seeking alleviate their loss by resorting to relevant statutory provisions.

The court held that the term "damage" includes physical and economic loss. It had no difficulty accepting that the whelk fishermen who had suffered immediate interference with their work from the spill could recover economic loss under the scheme in principle. However, the court decided that the secondary economic loss suffered by the claimant (as a result of the failure of the claimant's suppliers to deliver, rather than as a direct result of interference by the oil) was not sufficiently proximate to fall within the scheme, even if foreseeable. In a concurring judgment, Chadwick LJ placed importance upon the fact that the liability of the Fund was subject to financial limits in accordance with the Fund Convention of 1971. This led him to believe that the test of causation to be applied was restrictive, in the sense that it should operate so as to enable those whose loss was more proximate to recover in full by excluding from participation in the common fund those whose loss was less proximate.⁷⁰

3.4.6 Assumption of Responsibility

This theme had been touched upon in **Hedley Byrne case**, when Lord Devlin said this could arise in any relationship, which but for lack of consideration would amount to a contract. Working from this premise, it would mean that there would be an assumption of responsibility in a contractual relationship or one imposing a fiduciary duty on one for the benefit of another.

⁷⁰ It is quite likely that this case might have been decided differently in another jurisdiction. The perception of economic loss in Australia for instance does not apply the seemingly stringent measures adopted in the United Kingdom and America as seen in the **Fortuna Seafoods P/L Trustee for the Rowley Family Trust) v. The Ship Eternal Wind [2005] QSC 4** Supreme Court of Queensland, 14 January 2005, which is discussed further in this section. This case is almost similar with the exception that there was no oil spill involved in the Australian case. With that in mind, it is fairly likely that the **Fortuna case** may have been decided differently had the events occurred in the United Kingdom.

Smith v. Eric S. Bush⁷¹ gives a fairly vivid portrayal of this concept. Involved here was the relationship between a valuer and the purchaser of a house. The purchaser sought to buy a house and engaged the services of a mortgagee, who in turn instructed the valuer. The mortgagee was going to lend the purchase money to the purchaser subject to a successful valuation of the property by the valuer. The purchaser paid the valuation money directly to the mortgagee, and the valuer was aware that the purchaser would be informed of the valuation if it was successful. In effect, the valuer understood that the purchaser was likely to rely on the facts of the valuation in the purchase of the property. The survey revealed that the property was in good condition. It turned out however that the chimney stack in the house collapsed whereby the purchaser brought an action in tort against the valuer.

The case was continually appealed and eventually got to the House of Lords who collectively held that there was sufficient proximity to give rise to a duty of care from the valuer to the purchaser and even though the valuer had a limitation of liability waiver in place, this did not stand up to the **Unfair Contract Terms Act, 1977**. Also, it was standard practice, in their opinion, for the purchaser of a modest house to rely on the opinion of a surveyor. The judges, however, were not unanimous in their varied reasons for the proximity. Lord Templeman found the relationship between the purchaser and the valuer similar to a contract when he said:

"The valuer is a professional man who offers his services for reward. He is paid for those services. The valuer knows that 90 per cent of purchasers in fact rely on a mortgage valuation and do not commission their own survey. There is great pressure on a purchaser to rely on the mortgage valuation. Many purchasers cannot afford a second valuation. If a purchaser obtains a second valuation the sale may go off and then both valuation fees will be wasted. Moreover, he knows that mortgagees, such as building

⁷¹ [1990] 1 A.C. 831

societies and the council in the present case, are trustworthy and that they appoint competent valuers and he trusts the professional man so appointed. Finally the valuer knows full well that failure on his part to exercise reasonable skill and care may be disastrous to the purchaser."⁷²

Lord Griffiths did not appear entirely comfortable with the label 'assumption of responsibility' because had the surveyor in **Cann v. Willson**⁷³ or the accountant in **Candler v. Crane, Christmas & Co.**⁷⁴ (cases approved and followed by the House of Lords in **Hedley Byrne** in imposing a duty of care) '*actually been asked if he was voluntarily assuming responsibility for his advice to the mortgagee or the purchaser of the shares, I have little doubt he would have replied "Certainly not. My responsibility is limited to the person who employs me."* The phrase "assumption of responsibility" can only have any real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts upon the advice.'⁷⁵ He perceived an assumption of responsibility to exist as follows:

"in what circumstances should the law should deem those who give advice to have assumed responsibility to the person who acts upon the advice or, in other words, in what circumstances should a duty of care be owed by the adviser to those who act upon his advice? I would answer only if it is foreseeable that if the advice is negligent the recipient is likely to suffer damage, that there is a sufficiently proximate relationship between the parties and that it is just and reasonable to impose the liability. In the case of a surveyor valuing a small house for a building society or local authority, the application of these three criteria leads to the conclusion that he owes a duty of care to the purchaser."

⁷² *ibid*, 852

⁷³ (1888) 39 Ch.D. 39

⁷⁴ [1951] 2 K.B. 164

⁷⁵ *Smith v. Eric Bush*, *op cit*, 862

In effect, Lord Griffith fell back on the formula adopted that was eventually initiated in **Caparo v. Dickman**⁷⁶

Lord Jauncey of Tullichettle on his part, while dispensing with the opinion that the relationship was similar to a contract gave his insight to the situation as opting to:

"...approach the matter by asking whether the facts disclose that the appellants in inspecting and reporting must, but for the disclaimers, by reason of the proximate relationship between them, be deemed to have assumed responsibility towards Mrs Smith as well as to the building society who instructed them.

There can be only an affirmative answer to this question. The four critical facts are that the appellants knew from the outset: (1) that the report would be shown to Mrs Smith; (2) that Mrs Smith would probably rely on the valuation contained therein in deciding whether to buy the house without obtaining an independent valuation; (3) that if, in these circumstances, the valuation was, having regard to the actual condition of the house, excessive, Mrs Smith would be likely to suffer loss; and (4) that she had paid to the building society a sum to defray the appellants' fee.

In the light of this knowledge the appellants could have declined to act for the building society, but they chose to proceed. In these circumstances they must be taken not only to have assumed contractual obligations towards the building society but delictual obligations towards Mrs Smith, whereby they became under a duty towards her to carry out their work with reasonable care and skill. It is critical to this conclusion that the appellants knew that Mrs Smith would be likely to rely on the valuation without obtaining independent advice."⁷⁷

In summary, while the judges arrived at the same opinion of proximity between the valuer and the purchaser, they used different routes in their reasoning with Lord Templeman basing his on

⁷⁶ [1990] 2 A.C. 605

⁷⁷ *ibid*, 871

the relationship's equivalence to a contract; Lord Griffith basing his on the 3-way step initiated in **Caparo v. Dickman**; while Lord Jauncey based his on the valuer assuming responsibility to both the purchaser and the mortgagee.

In **Hendersen v. Merrett**⁷⁸, there was a dispute between Names, persons who wanted to be registered underwriters at Lloyds, and their Managing agents. To be appointed as a Name entailed appointing underwriting agents to underwrite for the names. These agents could either be members' agents, managing agents or a hybrid of the first two. By 1990, where a prospective Name opted for a members' agent, they entered in to an Underwriting Agency Agreement and the members' agent arranged for the Name to join a syndicate managed by the other kind of agents, managing agents. Professional underwriters engaged by the Managing Agents did the actual underwriting for members of the managed syndicates. Names became Direct Names if their agents acted in both capacities of members' agent and managing agents. For indirect Names, the underwriting agents entered a Sub- Agency Agreement with the managing agents of the chosen syndicates on behalf of the Names.

By the Agency Agreements Byelaw of 1985, the Council of Lloyd's required the standard agency agreement to be in the form of and to include the terms set out in the first schedule to the byelaw and the standard sub-agency agreement to include the terms set out in the second schedule to the byelaw, prior to 1987. After 1989, an individual entered into both a Members' Agents Agreement and a Managing Agents Agreement. In the Agreement, the Agent acted on behalf of the Name to underwrite at Lloyd's for the Name's account and acted in his absolute discretion on the acceptance of risks and reinsurance (closing) of one year of the Name's

⁷⁸ [1994] 2 Lloyds Rep. 468

account. In the Sub-Agency Agreement between member and manager agent, the latter had all the “powers, authorities, discretion and rights”⁷⁹ conferred on the former, delegated to them. These managing agents also had the absolute discretion regarding underwriting and reinsuring at Lloyds to the extent, which the member agents had in the original Agency Agreement with the Names.

Names claimed against members for breach of duty in underwriting some businesses on their behalf and for not exercising reasonable care and skill in their stance as “reasonably competent, diligent and efficient professional underwriters.”⁸⁰ The managing agents on their part denied such a duty existed going by the contractual Agency Agreement and Sub-Agency Agreements. Further they argued, such a duty of care was not only extra-contractual, but an economic loss and at most they were bound not to exercise bad faith.

In awarding judgement to the Names, Lord Goff said, “I am of the opinion that this House should now, if necessary, develop the principle of assumption of responsibility as stated in *Hedley Byrne* to its logical conclusion so as to make it clear that a tortious duty of care may arise not only in cases where the relevant services are rendered gratuitously, but also where they are rendered under a contract.”⁸¹

With this case, the law would appear to be that where there is a perception of one party knowingly giving information for the benefit of another or a party expressly requires another to

⁷⁹ *ibid*, p. 469

⁸⁰ *ibid*, p.469

⁸¹ *ibid* p. 497

perform a certain duty within or without the confines of a contract, the party giving the undertaking might just be held to owe a duty of care to the undertaker.

In **Williams and Another v. Natural Life Health Foods Limited and Mistlin**⁸², the issue of the personal assumption of responsibility by a Director of a company distinct from that of the company arose in an action by franchisees. In 1980 Mr. Richard Mistlin, the appellant, started to work in the health food trade. In 1983 he opened a health food shop in Salisbury. In 1986 he formed Natural Life Health Foods Limited, a company incorporated with limited liability, in order to franchise the concept of retail health food shops under the name "Natural Life Health Foods." Mr. Mistlin was the managing director and principal shareholder of the company. Mr. Mistlin's wife was a nominal shareholder and she was also employed by the company. Two other individuals were the only other employees of the company. Both had some experience of the franchising business.

In 1987, Mr. David Williams and Mrs. Christine Reid, the respondents, approached the new company with a view to obtaining a franchise for a health food shop in Rugby. The respondents asked for a brochure and an employee gave them one. The brochure described the company's system as "a proven concept" and stated that a Mr. Mistlin opened Salisbury Health Foods in 1983, a store that has been a leader in the trade ever since and had been awarded 'Retailer of the Year' in 1983. It was still a regular winner of awards and competitions within the industry and was the pilot unit for the NATURAL LIFE franchise network. The Natural Life banner had the following inscription:

⁸² HOL, April 30, 1998

"YOUR VERY OWN HEALTH FOOD STORE UNDER THE NATURAL LIFE BANNER

offers you

Independence and Security

Substantial Income

Freedom to run your own business

Full support from an experienced company

bulk buying power

new product knowledge

on-going training"

While the facts of this case may not appear to tally with our current discussion, the comments by Lord Steyn in his lead judgement stand out in terms of the various means of ascertaining a duty of care, where he said:

"It is clear, and accepted by counsel on both sides, that the governing principles are stated in the leading speech of Lord Goff of Chieveley in *Henderson v. Merrett Syndicates Ltd.* [1995] 2 A.C. 145. First, in *Henderson* it was settled that the assumption of responsibility principle enunciated in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465 is not confined to statements but may apply to any assumption of responsibility for the provision of services. The extended *Hedley Byrne* principle is the rationalisation or technique adopted by English law to provide a remedy for the recovery of damages in respect of economic loss caused by the negligent performance of services. Secondly, it was established that once a case is identified as falling within the extended *Hedley Byrne* principle, there is no need to embark on any further inquiry whether it is "fair, just and reasonable" to impose liability for economic loss. Thirdly, and applying *Hedley Byrne*, it was made clear that "reliance upon [the assumption of responsibility] by the other party will be necessary to establish a cause of action (because otherwise the

negligence will have no causative effect)." Fourthly, it was held that the existence of a contractual duty of care between the parties does not preclude the concurrence of a tort duty in the same respect."⁸³

The provision of services, therefore, like making a statement can lend itself to an assumption of responsibility by the defendant. However, actual reliance on that assumption of responsibility is a requirement. Added to this formula is the notion that where the performance of services is concerned, the element of if it is 'fair, just and equitable' to find a duty of care for economic loss is dispensed with. Finally from the above quotation, a contractual duty of care may also involve a tortious duty of care at the same time. This primarily means that the same set of facts may present various angles of claims and remedies.

The respondents in the above case lost the appeal because the House of Lords deemed that the personal liability of the Director/owner of Natural Life Health Foods was not at any time in jeopardy, whereby he personally assumed responsibility to the franchisees and making him liable to them. The avenue of the limited liability company effectively kept in check the personal liability of the appellant in as much as the company eventually wound up and the Director would have been the next, most obvious target. In Lord Steyn's opinion, by creating a legal company, risks were effectively transferred from the person of the Director to the company.

3.4.7 Incremental Test

The opinion in this method is that each case has its particular ingredients whereby the attempt to initiate a general set of principles in a bid to establish a duty of care will detract from the true essence of the case. In effect, the case has to rely on its own individual characteristics.

⁸³ **The Nicholas H [1995] 2 LR 299 at 309**

Brennan J. in the High Court of Australia in **Sutherland Shire Council v. Heyman**⁸⁴ said:

'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.'

The judge's comment above entails the extension of the jurisprudence of the notion of duty of care as opposed to sticking a regular model of some sort, which risks being overstretched. This method on its own will not readily appear to defer to the system of relying on precedents, or where it does to apply it sparingly.

3.5 Duty Of Care And Its Application To Classification Societies

With an idea of how the duty of care in negligence has developed from case-law and the various methods propounded in recognising it over the years, we refocus on the current issue of Classification Societies. They have managed over the years to take a back seat in the maritime scheme of things upon contention between parties, usually a ship-owner and a cargo-owner, and have hardly sought to come to the fore of their own accord. This could be testament to their fervent idea of neutrality. However, much as the need for privacy would have been ideal, a few cases have managed to come about with the attempt to lay blame squarely on the shoulders of the Societies. It is interesting to note that most of the cases have been within the American jurisdiction, or more pointedly have involved the American Bureau of Shipping⁸⁵, the frontline American Classification Society.

⁸⁴ (1985) 60 A.L.R.1, 43-44

3.5.1 W. Angliss & Co (Australia) Proprietary Ltd. v. P & O Steamship Navigation Company⁸⁶

As noted above, Classification Societies did not feature as parties per se initially, rather they were given a mere mention usually favourably in the course of litigation between a carrier and a charterer. One of the earlier cases was **W. Angliss & Co (Australia) Proprietary Ltd. v. P & O Steamship Navigation Company**. Judge Wright noted that this was actually an Underwriter's case against a ship-owner for indemnity. The cargo was frozen lamb carried in *The Cathay* from Australia to England, was contaminated by oil fumes. The fumes had leaked from oil ballast and this was contended to be due to the construction of the single riveting bar connecting the 'tween to the bulkhead in line with the recommendations of Lloyds Register in 1917 as at the time the vessel was classified. The Judge obiter held that a ship-owner was expected to follow certain procedure and was also

"liable for all such duties as appertain to a provident and careful carrier acting as such by the servant and agent in his direct employment. If he has a new vessel built he will be liable if he fails to engage builders of repute and to adopt all reasonable precaution; for instance, requiring the builders to satisfy one of the well-known classification societies, such as Lloyd's Register, and engaging skilled naval architects to advise him and skilled inspectors to supervise the work."⁸⁷

Since the ship owner had engaged the services of Lloyd's Register, he was held to have exercised due diligence that in his opinion occupied a 'public and quasi-judicial position.'⁸⁸ The

⁸⁵ It would appear that there is no end in sight just yet, with the *prestige* case involving ABS currently ongoing in court in New York. Please see following chapter on IMO and EU initiatives on Class.

⁸⁶ (1927) 28 Ll. L. Rep. 202

⁸⁷ *ibid* at 214

⁸⁸ *ibid*, 214

aspect of Classification Societies holding such a post was considered in the Nicholas H and will be analysed in depth in another chapter. Suffice it to say at this point that Classification Societies were revered to the point of being almost inculpable, and so no direct action was brought against them.

3.5.2 **Mariola Marine Corporation v. Lloyd's Register of Shipping (The Morning Watch)**⁸⁹,

The position of non-action against Classification societies seem to have changed with the action in tort against Lloyds Register in **Mariola Marine Corporation v. Lloyd's Register of Shipping (The Morning Watch)**, wherein a purchaser of a vessel, *The Morning Watch*, a steel hulled motor yacht, sued Lloyds for negligent misrepresentation in the classification of the yacht. The yacht, built in 1962 according to the 1958 Rules of Lloyds Register, was subject to special survey in line with the Lloyd's Class Rules every four years. The vendor of the yacht in October, 1984 requested a special survey in view of a pending sale.

Arguments proposed by defendant counsel in **Morning Watch** were, (i) The agreement made by Mariola to purchase the vessel 'as is, where is' meant that the sale was conditional upon the vessel being at the time of conclusion of the contract and/or at completion properly classed 100A1 at Lloyd's. Had Mariola learned of the true condition of the vessel they could have refused to complete the purchase. (ii) Had Mariola known of the true condition of *Morning Watch* they could have rescinded the contract on the ground that it had been induced by

⁸⁹ [1990] 1 Lloyd's Rep. 547

misrepresentation.⁹⁰ These arguments it is submitted appear rather extreme and in relation to the **Hedley Byrne** case does not appear to be terribly “on all fours” with Hedley Byrne in view of the fact that there was no precise disclaimer as was the instance in **Hedley Byrne**.

Judge Philips in assessing if Lloyds owed a duty of care to Mariola Marine must have deferred to **Caparo v. Dickman** when he said:

“The circumstances in which a duty of care arises not to cause pecuniary loss by negligent misstatement have recently been considered in a number of cases in the Court of Appeal and the House of Lords. Counsel are agreed that the following broad principles are to be deduced from these cases. A duty of care will only arise where (i) it is reasonably foreseeable to the defendant that the plaintiff is liable to rely upon his statement; (ii) there is the necessary proximity between the plaintiff and the defendant; (iii) it is just and reasonable in all the circumstances to impose a duty of care on the part of the defendant to the plaintiff. In this case, as in most, the battleground relates to the second and third requirements, but the material facts have relevance in relation to all three.”⁹¹

The issue of foreseeability was easily dispensed with in favour of Mariola because the Vendor had expressly requested a special survey of the Morning Watch with a view to selling her in the Mediterranean. Further Judge Philips pointed to a circular issued by Lloyds Register to its surveyors on May 28, 1975 with particular reference to periodical and damage survey on yachts which said:

“It is extremely important that yacht surveys should be held strictly in compliance with the requirements of the relevant Yacht Rules. This is especially necessary as yachts tend to change ownership with reliance frequently being placed solely upon classification status. It is therefore of paramount importance

⁹⁰ *ibid*, p. 555

⁹¹ [1990] 1 Lloyds Rep. 547 at 556

to the Society that the following points are borne in mind when carrying out Periodical and Damage Surveys."⁹²

A follow-up to the above circular noted how Lloyds Register had been embarrassed by complaints from purchaser of yachts, who had discovered defects, which in their opinion (purchasers') should have been to the account of the previous owners. These complaints Lloyds Register found 'can be expensive and time-consuming and are harmful to the Society's reputation.'⁹³ Based on this evidence, Judge Philips was inclined to hold that foreseeability flowed from Lloyds Register to Mariola.

On the issue of proximity, Judge Philips had a look at some of Lloyds Objectives, which stated:

- "2. The objects of the Society are
- 2.1 To secure for the benefit of the community high technical standards of design, manufacture, construction. Maintenance, operation and performance for the purpose of enhancing the safety of life and property both at sea and on land and for this purpose but not otherwise the General Committee of the society may:
- a. Obtain the use of merchants, shipowners and underwriters, a faithful and accurate classification of mercantile shipping;
 - b. to approve the design of, survey and report on both mercantile shipping and non-mercantile shipping; yachts and small crafts of all kinds; on hovercrafts on amphibious and land or sea or sea-bed installations, structures, plant, etc; on machinery, apparatus, ,material components, equipment, production methods and processes of all kinds; for the purpose of testing their compliance with plans,

⁹² *ibid* at 556

⁹³ *ibid* at 557

specifications, rules, codes of practice, etc, or their fitness for particular requirements;

- c. act on behalf of any government or other authority in such capacity and to such extent as may be agreed in prospect of statutory requirements;
- d. provide any other technical service relating to ships and the maritime industry generally and technical inspection and advisory services in respect of land and sea based undertakings."

In the Court's opinion, a glaring feature in the objectives of Lloyds Register was that its main purpose was to enhance safety of life and property on land and sea. This in effect overrode any economic interests of the ship-owner, which was not readily identifiable in terms of physical damage or personal injury. Public policy therefore had a part to play in the decision of the Court to forestall the liability of Lloyds Register.

It was further observed that the request for classification was at the behest of the vendor. In as much as this was with a view to sell the yacht, the party that appeared to be owed a duty of care was the vendor and not Mariola, who was the purchaser of the *Morning Watch*. It will appear that Judge Philip strongly relied on the holding of **Caparo v. Dickman**, which was decided just prior to the case at hand.

In **Caparo v. Dickman**, as we might recall, the statement of account in that case was a statutory requirement going by the provisions of the Company's Act 1985. While the plaintiff in that case relied on the published accounts of the company it sought to take-over, it was observed by the House of Lords there that proximity had not been established by virtue of the

fact that the plaintiff had not specifically requested for the audit of the company. Hence, while there could be reliance, such reliance could not be justified, since this could unequivocally lead to a floodgates scenario of possible liable to just about every shareholder in the company who had had access to the published audit report. In the words of Philips, J:

“The facts of this case do not satisfy those requirements. The special survey was not carried out for this purpose of a particular transaction – although Mr. Maariner no doubt wished the Special Survey to be carried out before the vessel was put on the market as this was likely to enhance the sale prospects. No purchaser was in contemplation at the time of the survey. While it was possible that a purchaser would rely upon the Special Survey without independent inquiry this was not probable or highly probable”⁹⁴

The inference from the Judge's comment above could allude to that were there an identifiable purchaser at hand at the time of the special survey of the yacht, and this purchaser knew that Lloyds Register will undertake the survey, and by extension, Lloyds Register knew that the plaintiff was avidly waiting on the special survey before proceeding with the sale, the decision of the Court might just have swung in favour of the Plaintiff.⁹⁵

The Court therefore held that while there was reasonable foreseeability on Lloyd's Register's part, there was no indication of proximity between Mariola and Lloyd's Register to suggest a duty of care.

⁹⁴ *ibid*, at p.563

⁹⁵ East makes this observation as well in his contribution, ‘The Duty of Care in a Marine Context’, *Lex Mercatoria: Essays in International Commercial Law in honour of Francis Reynolds*, (2000, London LLP) 129-155 at 140. It is intriguing that this development is what presented itself in the *Otto Candies v. NKK case* thirteen years later in the United States, which decision was in favour of the Plaintiff

Regarding the issue of 'Just and Reasonable', since the requirement of proximity failed, there was no need to have recourse to the third leg of whether it was 'fair, just and reasonable' to hold a party liable for the lack of care and Lloyds Register was held not liable to Mariola in a duty of care.

While Judge Philips did not comment on the aspect of 'fair, just and reasonable, he did observe that:

“...insofar as negligence in relation to classification is liable to harm economic interests, I see no general ground for distinguishing between the economic interests of the charterer, the mortgagee, and the purchaser. All are foreseeably liable to rely on the class status of the vessel – often to the extent of making the maintenance of class a contractual condition – and all are at risk of being caused economic loss if class surveys are not carried out with proper skill.⁹⁶

Tettenborn comments though that Judge Philips dispensing with the financial interests of third parties in place of maritime safety '*may be a somewhat cavalier take on history (Lloyds Register, the oldest classification society dating from 1760, was precisely started to protect the financial interests of those dealing with ship-owners, as were most of its later followers)*⁹⁷. One of what we see from the above comment is the intermingling of the interests of the different parties who all come to rely on the advice of class in as much as it could be just one of the parties that had the initial contract/contact with the particular classification society and therefore any sort of relationship with the other parties will have to be in tort.

⁹⁶ *The Morning Watch*, op cit, 547 at p.559

⁹⁷ Tettenborn, A. op cit, p. 5

3.5.3 Marc Rich & Co and Others v. Bishop Rock Marine Co. Ltd, Bethmarine Co Ltd and Nippon Kaiji Kyokai (Nicholas H)⁹⁸

The **Nicholas H** went a step further in the quest to find Classification Societies liable in a duty of care, this time in an action brought by a Cargo-owner. This was therefore a case totally brought in tort. The **Nicholas H** in 1986 sailed from Peru and Chile with cargo of lead and zinc loaded for carriage to Italy and Russia. The vessel was compelled to deviate to Puerto Rico when a crack was discovered in the hull, and this increased in magnitude when the vessel anchored. A local agent of the Classification Society, Nippon Kaiji Kyokai (NKK), to which classified the vessel under its Rules, was appointed to survey her (**Nicholas H**) and he recommended permanent repairs at the earliest port before further commencement of her voyage.

Representatives of the Ship-owner were apparently horrified at this opinion, which led the surveyor, a Mr. Ducat, to re-recommended temporary repairs by scalant and welding, and these were done on site. In the course of these repairs, Mr. Ducat issued a second report, which approved the retention of the vessel's class until the assessment of the repairs at the discharge port. Vessel recommenced voyage, the crack reopened after a week, and the **Nicholas H** sank in the Atlantic Ocean with all cargo on board in the course of rescue operations with no loss of life though.

The cargo was valued at \$6m. By virtue of the Hague Rules, which governed the contract between the Ship-owner and Cargo-owners, the former's liability was limited to a sum of

⁹⁸ Marc Rich & Co and Others v. Bishop Rock Marine Co. Ltd, Bethmarine Co Ltd and Nippon Kaiji Kyokai (The **Nicholas H**) [1995] 2 LR 299

\$500,000. The latter thereby sought to claim the balance of \$5.5m from NKK on the basis of their surveyor negligently approving temporary repairs. Had there been no such approval, there would have been no loss, the cargo-owners argued.

On a preliminary question in the Queens Bench regarding the liability of the NKK to the Cargo-owners in a duty of care, Hirst J held that the defendants did owe a duty of care to the Plaintiff cargo-owners. He was not persuaded by the earlier decision in the *The Morning Watch*. This caused some stir and NKK appealed. The Court of Appeal, in favour of the Defendant Classification Society, reversed the ruling unanimously. Here Lord Saville in the lead judgement of the Court of Appeal initiated the 3 three-way test which had been employed in **Caparo v. Dickman**. He attempted to merge all three steps in one when he said:

“whatever the nature of the harm sustained by the plaintiff, it is necessary to consider the matter not only by enquiring about foreseeability, but also considering the nature the nature of the relationship between the parties, and to be satisfied that in all the circumstances it is fair, just and reasonable to impose a duty of care...Again in most cases of direct infliction of physical loss or injury through carelessness, it is self-evident that a civilised system of law should hold that a duty of care has been broken, whereas he infliction of financial harm may well pose a more difficult problem. Thus, the three so-called requirements for a duty of care are not to be treated as wholly separate and distinct requirements but rather as convenient and helpful approaches to the pragmatic question of whether a duty should be imposed in any given case. In the end whether the law does impose a duty in any particular circumstances depends on those circumstances...”⁹⁹

The case nevertheless went on to House of Lords, where by a 4:1 majority, with Lord Steyn giving the lead judgement and Lord Lloyd of Berwick dissenting, the Court of Appeal’s decision

⁹⁹ [1994] 1 L.R.492 at 496

was affirmed. Lord Steyn relied heavily on the decision of Lord Saville and while conceding that the defendant classification society could have foreseen the loss to the cargo-owners and that there was some proximity between the cargo-owner and the Classification Society,¹⁰⁰ he was not so inclined on the aspect of it being fair, just and reasonable to for Classification Societies to owe a duty of care to cargo-owners.

Lord Steyn categorised the issues involved in the case into six distinct headings as follows:

a. **Did NKK cause direct physical loss to Claimants?**

On reliance by counsel for MR on **Clay v. A.J. Crump & Sons**¹⁰¹, wherein, architect was held liable for a collapsed wall which he had assured the demolition contractor was safe, Lord Steyn inferred that a direct infliction of harm was involved as against the present case, where the person of the architect would have been the Ship-owner with whom MR had a direct relationship. However he thought, had an employee of NKK accidentally dropped a lighted cigarette into cargo hold containing combustible materials and leading to an explosion and loss of cargo, the contention against NKK by the Claimants would have been a strong one because this would be a directly inflicted loss.¹⁰² NKK in the present case however had not been required by MR directly to survey the Nicholas H.

¹⁰⁰ The surveyor had been sought to for the safety of the vessel, which Lord Steyn was comfortable to assume that safety of the vessel will necessarily include the safety of the cargo as well.

¹⁰¹ [1964] 1 Q. B. 533

¹⁰² The Nicholas H, p.314

b. **Reliance**

Lord Steyn was of the opinion that MR had no inkling of the particular Classification society, which the Ship-owner will use to survey his vessel. Lord Saville and Lord Balcombe, of the Court of Appeal, were disposed to rule that there was no precise reliance by MR on NKK's survey to suggest proximity. Lord Steyn refrained from making a categorical ruling, because it was not 'necessarily decisive, but it also contributes to placing the claim in the correct perspective'¹⁰³

c. **Bill of Lading Contract**

Further, it was decided that the Hague Rules, which governed the contract in the case herein, did not justify the imposition of a duty on NKK. In this regard, Lord Steyn said:

"The recognition of a duty of care in this case will be to enable cargo-owners, or rather their insurers, to disturb the balance created by the Hague Rules and Hague-Visby Rules as well as by the tonnage limitation provisions, by enabling the cargo-owners to recover in tort against a peripheral party to the prejudice of the protection of ship-owners under the existing system..."¹⁰⁴

¹⁰³ *ibid*, p.314. On this Tettenborn comments that incidence of a cargo-owner or third party relying on a classification society's recommendations is practice is quite slim, bothering on virtually impossible bearing in mind that the classification society would want to protect itself at all costs and avoid any contact with that third-party.

¹⁰⁴ *ibid*, p.315

A claim in tort put forward by the Cargo-owners was, in Lord Steyn's opinion, at divergence with the international trade system, with the possible result that Classification Societies, a third-party to the contract between the ship-owner and the cargo-owner in this case, may end up being more liable to the plaintiffs than the ship-owners.

d. **Contract between Classification Societies and Ship-owners**

Relying on **Pacific Associates Inc v. Baxter**¹⁰⁵ where there were series of contracts between the building owner, the contractors and the suppliers. went imposing liability on a remote party, a case proposed by Counsel for NKK, Lord Steyn ruled that NKK was a peripheral party not liable in tort, in view of the web of contracts between the ship-owner and Marc Rich.

e. **Position and Role of NKK**

Relying in part on the judgement of Lord Justice Wright in **W. Angliss and Co (Australia) Proprietary LTD. V. Peninsular and Oriental Steam Navigation Co. Ltd.**¹⁰⁶, wherein classification societies were held to occupy "a public and quasi-judicial position"; and on **Ship-owners** by Singh and Colinvaux¹⁰⁷, and eventually evidence on NKK's behalf, Lord Steyn on his part held NKK to be "an independent and non-profit-making entity, created and operating for the sole purpose of promoting the collective welfare, namely the safety of lives and ships at sea. In common with other Classification Societies NKK fulfils a role which in its absence would

¹⁰⁵ [1990] 1Q.B. 993

¹⁰⁶ (1927) L. L. R. 202 at 214, col.1

¹⁰⁷ (British Shipping Laws), vol. 13 (1967), pp.167-169, paras 391-394

have to be fulfilled by states” In this regard his Lordship concluded, that such a duty of care would be “to the detriment of their traditional role, a more defensive position”¹⁰⁸

f. **Policy Factors**

His Lordship was basically of the opinion that a duty imposed in this instance on NKK would expose Classification Societies to a barrage of potential cargo claims, in other words, open the flood-gates, which would lead to the former obtaining an extra layer of insurance. This, in his view, would ultimately lead to some hesitance in Classification Societies performing their duties effectively. Holding Classification Societies liable in a duty of care will lead them to a position of potential defendants in many cases and in that connection will put them in quite a defensive stance in classifying the vessels that particularly need their opinion.

On a final note, His Lordship decided that it would not be fair, just and reasonable to hold Classification Societies liable to cargo claims since “they act for the collective welfare and unlike ship-owners they would not have the benefit of any limitation provisions”¹⁰⁹

¹⁰⁸ On this France says: “If the more concern for a more defensive role means that classification surveyors will not permit vessels like the ‘Nicholas H’ to sail, then ‘defensive’ appears to be exactly what the industry wants” quoted by S.D.Durr, ‘An Analysis of the Potential Liability of Classification Societies: Developing Role, Current Disorder & Future Prospects’

¹⁰⁹ The Nicholas H p. 317

3.5.3.1 Analysis of the decision in *The Nicholas H*

This was a case that definitely took into consideration the main interests in the shipping industry particularly, the Ship-owner, Cargo owner and the Classification Society. While the decision is categorically applauded in certain quarters, it has no doubt left other factions in a dilemma.

East argues that the medium of the three-way test, particularly the last aspect of it that requires it be just, fair and reasonable to hold a defendant liable in a duty of care, has given the Courts the leeway to come to whatever conclusion they found to be fair in the circumstances, tailoring their findings of fact to the conclusion that they thought should be achieved. This was rather the case in **Reeman v. Department of Transport**¹¹⁰, where a couple, Mr & Mrs. Reeman, bought a fishing vessel in 1989. The vessel had a certificate issued by the Department of Transport to the effect that she complied with the necessary statutory regulations for her seaworthiness. A certain Mr. Jones was the particular surveyor, in the Department of Transport's employ, who had issued the certificate which incidentally contained some errors regarding the vessel's stability. These errors continued in the Certificate up to the point the Reemans bought the vessel. On the Department of Trade carrying out some stability tests on the vessel, it was discovered that certain requirements were lacking and she was rendered to trade. The Reemans brought an action against the Department of Transport for breach of their duty of care to them.

¹¹⁰ [1997] 2 L.R. 48

Robert Taylor J ruled that a duty of care was indeed owed to the Reemans after applying three-way test of foreseeability, proximity and if it is fair, just and reasonable. The first two tests were satisfied in the Judge's opinion by the likely communication of the Certificate to prospective buyers and their corresponding reliance on the certificate in their decision to buy the vessel.

The fair, just and reasonable aspect of the duty was resolved by the judge who held that there was no other party from whom the plaintiffs could remedy their loss and a duty was owed to purchasers of the vessel during the currency of the certificate issued by the Department of Transport. East has called this 'the bleeding heart test'¹¹¹.

The Department of Transport appealed the decision of the trial Court and in allowing the appeal, the Court of Appeal held that there was no proximity between the parties because where the death or injury to the crew of a certificated vessel did not result in a duty of care for economic loss due to insufficient proximity, it was hard to justify such proximity between the Department of Transport and the Reemans or any other party who may rely on the Certificate in the course of transactions with the risk of economic loss.¹¹²

The function of the Department of Transport in this regard was also defined by the Court of Appeal as on which regulated and promoted the statutory framework on safety at sea by imposing the duty of seaworthiness ultimately on the ship-owner. The aspect of holding the

¹¹¹ East, L., 'The Duty of Care in a Marine Context', Lex Mercatoria: Essays in International Commercial Law in honour of Francis Reynolds, (2000, London LLP) 129-155, 144

¹¹² This is a similar point that is echoed in the American case of the Sundancer analysed further below on the issue of a Classification Certificate not being issued as a guarantee to the ship-owner, but rather one used to garner worthwhile insurance premiums

Department liable on the basis of certificates to inform the prospective purchasers contemplating buying fishing vessels was not tenable in the Court of Appeal's opinion. As the builder of fishing vessels were not liable to future purchasers for the latter's cost of repairing defects in the vessels, so the Department of Transport in the course of regulating the seaworthiness of vessels should not be saddled with any more liability than the builders of the vessel.

A further interesting ruling in the Court of Appeal's decision was that the Reeman's had the option to protect themselves from loss by surveying the vessel or in the course of drawing up the contract for the sale of the fishing vessel, they could have inserted a clause for contractual warranties against risk in the event the Certificate did not give the true picture of the state of affairs in the vessel. This is indeed peculiar because as East mentioned:

“...Mr and Mrs Reeman had indeed retained a surveyor to check the vessel, who had also failed to spot the problem with stability. The surveyor had been a defendant to the action but had gone into liquidation. The point as to contractual warranties is also unrealistic, since in most cases the seller of the vessel is a one ship company that will have no assets”¹¹³

It can be fairly said that the Reemans in the above case did exercise some due diligence by engaging the services of a surveyor, but somehow things appear to have gone rather pear-shaped and the only credible party to hold liable in a duty of care would have been the department of Transport. The Court of Appeal, however, saw it differently and through the means of the three-way test held that the Department did not owe a duty of care to the

¹¹³ East, L., ‘The Duty of Care in a Marine Context’, *op cit*, 153

plaintiff/respondents. It can thus be seen that any result is achievable really so long as there is a set of facts to fit the a particular and where there is some flexibility, this will further enhance the ability of the Court to preliminarily decide on particular line of adoption and set the facts to suit that decision.

Classification Societies, so far in the United Kingdom and most of Euope, while escaping liability to third party cargo-owners, apparently envisage a situation where this might just change. Boisson suggests that:

“There are other issues bound up with this question. For example, in some jurisdictions class can incur liability to third parties. That must be tackled as part of a wider picture. There is also a set of principles of conduct which the CMI has drafted. Major classification societies broadly support the principles of conduct, and would not have a problem in living up to them. But they would insist on any new global model clause on limitation of liability being balanced by a clause which also excludes liability to third parties.”¹¹⁴

The crux of the current problem with Classification Societies lies mainly in the above comment. They, naturally, do not wish to be found liable in a duty of care to parties they contract with, and much less would they want to be found liable to parties whom they do not have a contract with and it is debatable that these third parties (in Class’s opinion) were aware of them in the first place.

¹¹⁴ issue 2, January 1998 www.maritimeadvocate.com/i2/htm

3.5.3.2 Limits of the need for consistency in following precedents

Safety, whether on the seas, on the road, or in the air, is an ideal to which the layman looks to, leading to the enormity and reverence of the obligation placed on the relevant bodies inundated with such responsibilities. In the **Nicholas H**, evidence was given that Mr. Ducat of NKK had the authority to prevent the further voyage of the vessel, by virtue of his earlier recommendation of immediate permanent repairs. It is presumed that safety of lives and cargo should be primary, to the exclusion of the cost of having to delay a voyage, a situation the ship-owners in **The Nicholas H** "balked at."¹¹⁵ Should the issue of public policy of it not being just, fair and reasonable to deem Classification Societies liable to plaintiffs in a duty of care due to the welfare function they exercise of catering to the safety of life and the vessel at sea, it could be presumed in the same vein that NKK was not entirely adhering to this perspective when its surveyor altered his original recommendation from permanent repairs to temporary repairs.

It is well understood that the Hague, the Hague-Visby and the Hamburg Rules govern the contract between ship-owners and cargo-owners, wherein certain rights and liabilities pertain to each party. This was apparently what Lord Saville at the Court of Appeal and Lord Steyn at the House of Lords looked to in arriving at their decisions in favour of NKK not being responsible to Marc Rich.

It should be the principle that a similar thread of standard runs through the various mode of commercial transportation be it by air, road or sea. A relevant case in point is **Perret v.**

¹¹⁵ The Nicholas H, p. 302

Collins¹¹⁶. Here the plaintiff was injured in an airplane, which kit had been bought and assembled by the first defendant, inspected by the second defendant to be in airworthy condition, and the third defendant issued a certificate of airworthiness. Lord Justice Hobhouse in delivering the lead judgement readily put paid to the argument of the second and third defendants that in line with the decision in favour of NKK in the **Nicholas H**, they did not owe a duty of care to the plaintiff. It should be noted though that while he seemed to regard the **Nicholas H** as almost pertaining to an economic loss as against a claim for personal injury in the case before him, his comments are still relevant. He said:

“It is a truism to say that any case must be decided taking into account the circumstances of the case, but where those circumstances comply with established categories of liability a defendant should not be allowed to escape from liability by appealing to some vaguer concept of justice or fairness; the law cannot be remote for every case. Indeed the previous authorities have by necessary implication held that it is fair, just and reasonable that the plaintiff should recover in the situations falling within the principles they have applied. Accordingly, if the present case is covered by the decisions in or the principles recognised by previous authorities – and it is – *Marc Rich* does not require us to depart from them; indeed we remain bound to follow them”¹¹⁷

¹¹⁶ (1998) 2 Lloyds Rep 255

¹¹⁷ *ibid* p.263. Note however, the recent American case of **In the Matter of the Complaint: of Eternity Shipping, Ltd and: Civil Action No. L-01-250 Eurocarriers, S.A. for Exoneration: from or Limitation of Liability**: Case 1:01-cv-00250-BEL Document 177 Filed 08/03/2006. In this case, ABS, was found not to be liable to the plaintiffs, one of whom was the mother of a ship-worker killed by a crane, which had been inspected by the Classification Society’s employee. The Court held that there was evidence that the ABS surveyor had done over and above what was expected of him in the course of inspecting the cranes in the vessel.

What follows here is the likelihood of finding a duty of care against a defendant, where there is personal injury or physical damage as opposed to what the Court will assume to be an economic loss. This was the observation of Lord Oliver in **Caparo v. Dickman**, when looking to both **Donoghue v. Stevenson** and **Hedley Byrne**, he said:

"The extension of the concept of negligence since the decision of this House in *Hedley Byrne & Co v. Heller & Partners Ltd.* [1964] A.C. 465 to cover cases of pure economic loss not resulting from physical damage has given rise to a considerable and as yet unsolved difficulty of definition, The opportunities for the infliction of pecuniary loss from the imperfect performance of everyday tasks upon the proper performance of which people rely for regulating their affairs are illimitable and the effects are far-reaching. A defective bottle of ginger beer may injure a single consumer but the damage stops there. A single statement may be repeated endlessly with or without the permission of its author and may be relied upon in a different way by many different people."¹¹⁸

In view of the above, it was Lord Oliver's opinion that it was ideal if there was a determinable person or class of persons, actually identifiable and actually harmed by the acts of the defendant. In order to avoid a situation whereby a defendant will invariably be held accountable to a plaintiff in negligence, the necessary limits in the form of 'relationship of proximity' had to be imposed. Where hypothetically such defendant was liable following the observed proximity, a further requirement that the attachment of liability for harm be 'just and reasonable' was imperative.¹¹⁹

¹¹⁸ [1990] 2 A.C. 605 at 632

¹¹⁹ *ibid*, 633

On the theme of proximity, a distinction could be drawn between the **Nicholas H** and the French case of **Elodie II**.¹²⁰ Lord Saville of the Court of Appeal in the former case, in his ruling observed that there was no evidence that the cargo-owners had any knowledge of the particular Classification Society that would survey the ship, thereby leading to the inference of proximity and foreseeability to warrant the liability of NKK. In the **Elodie II**, however, the future purchaser of the vessel had particularly requested the services of Bureau Veritas to survey her (the vessel) in as much as the injury suffered by the purchaser could be deemed to be economic loss by virtue of the action for damages and *financial injury*.

The importance of following established precedents is apparent in the above dictum of Lord Hobhouse in **Perret v. Collins**. This was possibly what Lord Steyn equally had in mind when he made the comment that ship-owners had “apparently never successfully sued a classification society in England or elsewhere for breach of a contractual or tortious duty in and about the performance of their contractual engagement for a survey of a damaged vessel.”¹²¹ This bring to the fore the issue of judicial activism vs. judicial passivity. In as much as we have the revered principle of the separation of powers, it is recommended that a show of judicial activism could be to the greater good. Lord Denning in **Candler v. Christmas Crane & Co**¹²² adamantly commented on this when he said:

¹²⁰ The **ElodieII** Tribunal de Commerce de Nanterre, 26 Juin 1992, Revue Scapel 1992, 109, D.M.F. 1994, 19

¹²¹ The **Nicholas H** p. 310

¹²² [1951] 2 K .B. 1951 p.164

“On the one side there were timorous souls who were fearful of allowing a new cause of action. On the other side, there the bold spirits who were ready to allow it if justice so require. It was fortunate for the common law that that the progressive view prevailed.”¹²³

It is particularly noted that Lord Lloyd in his dissenting judgement alluded to the dynamic nature of the law, when he used the example of **The Toju Maru**.¹²⁴ The fact that the salvors were performing a public duty did not deter the House of Lords in making a finding of unlimited liability against them (the salvors). This decision obviously led to the Convention on Limitation of Liability for Maritime Claims (The London Convention) 1976, which was brought into effect in the United Kingdom by the Merchant Shipping Act, 1979. This act was repealed though by the Merchant Shipping Act, 1995.¹²⁵ In the same vein, it is submitted that had the NKK been found liable, a similar scenario might have ensued, vis-à-vis, a possible enactment of the limited liability of Classification Societies. However, the bigger picture should not be lost: justice visibly done.

3.6 COMPARATIVE LEGAL APPROACHES

3.6.1 British Position

Cane¹²⁶ makes the distinction between ‘Interactional view of tort law’ where the original idea of tort law seeks to adjudicate between the injured and the injurer and the Risk-management view of tort law, where tort operates negatively and incorporates external factors such as risks and

¹²³ *ibid* p. 178

¹²⁴ [1971] 1 Lloyd’s Rep 341. Here Salvors were held liable in tort for damages incurred in the course of salvaging a vessel.

¹²⁵ Art 1 of the London Convention states that a salvor is “any person rendering services in direct connection with salvage operations.

¹²⁶ “Classification Societies, Cargo Owner and the Basis of Tort Liability” (1995) LMCLQ 433 at 434

possible effect on third parties in the general comity. He aligns the dissenting judgement of Lord Lloyd to the former and that of Lord Steyn to the latter and readily notes that “the choice of whether to favour one or the other of these two approaches is, some extent at least, a matter of personal ideological preference.”¹²⁷ He endeavours in his article to paint a picture in which the notion of personal responsibility for injury is marred by the inclusion of what he deemed irrelevant factors such as the state of the insurance market.¹²⁸

Lord Lloyd in his dissenting opinion noted that even the Hague Rules, on which basis the Ship-owner's liability was limited to \$500,000, was actually statutorily provided for in **S. 503 of the Merchant Shipping Act, 1894** (presently **s.185 of the Merchant Shipping Act, 1995**) and not in the former Rules. Incidentally this is the same provision that presently protects salvors in the performance of salving operations. It is submitted with respect that perhaps some similar provision could be enacted for Classification societies on the premise of **s.185** to garner some protection for them. This could be viewed in the light that the limited liability for salvors has not necessarily stood in the way of the execution of their humanitarian duties. Classification Societies in the course of their operation operations for the protection of life at sea could fall back on the limited liability where there is the odd occasion that there has not been the required extent of care on their part.

A further interesting observation by Lord Lloyd is the fact that contract law derives from tort law and not vice versa as was seemingly proposed by NKK. In effect, did the judgement of Lord Steyn seek to introduce a whole new dimension to the notion of tort law? In concluding his judgement, Lord Steyn noted that a lesser injustice was observed by the non-imposition of a

¹²⁷ *ibid*, p. 435

¹²⁸ *ibid* 435

duty of care on NKK. The fact remains though, that Marc Rich were left the eventual losers in the entirety of the case. In line with Cane's proposition of the interactional view of tort law, did Marc Rich do everything reasonable to protect themselves? He appears to answer to this in the affirmative. Even if the risk-management point of view is adopted, did Marc Rich optimally protect themselves? A commendable proposition of rationalising the decision of **The Nicholas** is suggested by Cane that:

"A different and simpler way of approaching the matter would be to say that since MR was acting in the course of a business, the law would presume that the level of protection it had bargained for was the commercially optimal level of protection. If such a presumption is rebuttable, it would be open to the claimant to call evidence to show that it would have bargained for more protection if it could have done so, but the distortions in the operations of the market precluded it. If the presumption is irrebuttable, it would amount to a rule that commercial cargo owners could not sue third parties in tort for negligence resulting in the destruction of their cargo while in transit"¹²⁹

This does not make the picture any clearer especially for the Claimant, who it would appear, is likely to be left counting his losses literally, especially if the presumption above is deemed to be irrebuttable that the level of protection which he had obtained for his cargo was the most optimal commercially available one. One cannot help but wonder that in practice, the plaintiff may have outdone himself in the course of searching for suitable insurance to cover his possible loss, and Class may well be aware of the sheer impossibility of obtaining enough cover. Should this be the case, the credibility of the Classification Society may be affected in the event of loss. This naturally is so far as the duty of care is deemed to extend from the Society to the plaintiff.

¹²⁹ *ibid*, p.437

Needless to say *The Nicholas H* has stirred various interests, and in the light of recent developments¹³⁰, it is expected that opinions more aligned to the cargo owner/third party from a British perspective would emanate from the House of Lords following the recent American decision of *Otto Candies v. Nippon Kaiji Kyokai*¹³¹, which is elucidated on below. East had observed of the *The Morning Watch* and *The Nicholas H* that:

“One of the interesting points to note here is the fact that this general discussion of the leading decisions on the doctrine of duty of care has already referred to six decisions of the House of Lords made in under 2 years on the same topic, some of them disagreeing with each other. This just shows that the current situation of law in this area is unsatisfactory. There appears to be a surplus of concepts and not every case will deploy all of them. The law of negligence seems to have become inordinately doctrinally complex in the last decade.¹³²”

While the above comment hints at a cacophony of some sorts, it is envisaged that with the work of the bodies like the European Union, there will be a more decisive course for the Courts to follow, while still deferring to the concepts which over the years have been moulded into law.

3.6.2 French Position

The French Courts have not been as stringent as the English and American Courts in the course of ascertaining if a Classification Society is liable to third parties. While to the layman, this could well be rooted in the French motto of *liberté, égalité et fraternité*, as well as the

¹³⁰ The Ramsgate Trial of the collapsed walkway at Ramsgate Port in April, 1994, wherein Lloyds Register was found liable for not ensuring public safety as well the two Swedish Companies who had designed and built the walkway

¹³¹ United States Court of Appeals Fifth Circuit, filed September 17, 2003 No. 02-30842

¹³² East, L., ‘*The Duty of Care in a Marine Context*’, *op cit*, 136

socialist-inclined system of government, the French Courts merely look to **Article 1382** of the Civil Code. This provides that a defendant is liable to a claimant in a duty of care on proof of negligence resulting in loss. In practice though, it would seem that the formula the French Courts have adopted is that of gross negligence as opposed to mere negligence. Courtois says:

“Whilst the proof of gross negligence or recklessness should not be required under French law involve the liability in tort of a classification society, as long as such liability is based upon Article 1382 of the Civil Code, it appears that the most recent decisions on the subject have retained the liability in tort of the classification society on the basis that it committed gross negligence within the performance of its function, or rejected it because no such negligence was committed”¹³³

3.6.3 Dutch Position

The Netherlands view of economic loss is also akin to that of France, where it provides in **Article 6:162 of the Civil Code, 1992** a person is liable for damage caused by an unlawful act (*onrechtmatig*) by:

- a. infringement of a subjective right

- b. an act or an omission violating a statutory duty, and

¹³³ B. Courtois, “Exposing Class Liability”, <http://www.maritimeadvocate.com>. France - Issue 22, April 2003

- c. conduct contrary to the general standard of conduct acceptable in society
(*'maatschappelijke betamelijkheid'*).

'Maatschappelijke betamelijkheid' has the same connotation as *"bon pere de famille"* contained in Article 1382 of the French Civil Code and both generally mean acceptable behaviour in society. Barendrecht¹³⁴ observes that this wide meaning has led the *Hoge Raad* (the Dutch Supreme Court) to suggest that the Dutch position of acceding to claims of economic loss should be decided a bit more strictly in line with the pattern in England and Germany.

Section 6:162.1 of the *Burgerlijk Wetboek* (Civil Code) of 1992 (BW), liability exists for damage caused by an unlawful act, an *'onrechtmatige daad'* which is *'toerekenbaar'*. Unlawful acts (*'onrechtmatig'*) include: (1) an infringement of a subjective right; (2) an act or an omission violating a statutory duty; and (3) conduct contrary to the general standard of conduct acceptable in society, the *'maatschappelijke betamelijkheid'*.

3.6.4 German Position

The German position apparently is one where the pattern is closely aligned to that of the English Courts of adopting a restrictive approach in a claim for economic loss. Sclechtriem notes that while the German Constitution (S.823) BGB regulates tort liability in Germany,

¹³⁴ J.M. Barendrecht, "Pure Economic loss in the Netherlands"
www.library.uu.nl/publarchief/jb/congres/01809180/15/b7.pdf

academic writings and judicial rulings have given another picture of tort liability entirely.¹³⁵ This will appear to generally fall into the civil law position that is fairly expansive in its quest to seek judgement for the plaintiff.¹³⁶

3.6.5 The American Approach

The American courts have witnessed a more steady flow of legal action regarding classification societies and other similar range of inspectors, which would appear to give the courts there more experience in dealing with issues on Classification Societies. This may be in part to it being a heavily industrialised environment and possibly to its alleged litigation-friendly environment. The results of the cases to be analysed in this section, however, have reasonably mirrored the position in England, leading to an element of a divide between the perception of classification societies in a common law jurisdiction and that which obtains in a civil jurisdiction. The cases analysed here, in line with this particular chapter, have been instituted in tort.

Coastal (Bermuda) Ltd v. E.W. Saybolt & Co.¹³⁷ deals with the issue of the liability of cargo inspectors. Here, the vessel MT HALKI was chartered by GHR Energy Corporation, and loaded residual fuel oil. Saybolt, a cargo inspection company was hired to do sample tests on the oil before during and after the loading. The oil loaded into the No. 6 hold of the vessel was bought

¹³⁵ See generally Schliechriem, P., 'Civil Liability for Economic Loss: Germany', 15th International Congress on Comparative Law, Bristol, 26 July to 1 August, 1998. He says: "As a kind of fall-back line, the drafters of German Civil Code have designed S.826 BGB as a general clause which allows recovery even for purely economic loss, but it requires intentional behaviour"

¹³⁶ Tettenborn, A. op cit, 5

¹³⁷ 826 F2D 424, 1988 AMC 207 (5th Cir 1987)

by Armada Transport and Refining Company. Tests were conducted on the some samples of the oil in this hold and some were found to fall below the required standard set by the American Society for Testing Materials (ASTM).

In **Sundance Cruises Corp. v. American Bureau of Shipping (The Sundancer)** ¹³⁸, a cruise-liner sank from flooding after it struck an underwater rock. Sundance Cruises claimed against The American Bureau of Shipping (ABS) for (1) negligence, (2) gross negligence, (3) negligent misrepresentation, (4) breach of contract, and (5) breach of the *Ryan* implied warranty of workmanlike performance in issuing the relevant certificates. Sundance had purchased an over-night car ferry and proceeded to convert into a luxury cruise ship at a Swedish shipyard. It desired to register the vessel with the Bahamian government and this flag registration required following several international safety conventions including 1.) a safety certificate signifying compliance with the 1974 Convention on the Safety of Life at sea (SOLAS); 2.) a certificate relating to compliance with the Load Line Convention; 3.) a Tonnage certificate; and 4.) a Classification certificate.

Sundance engaged the services of ABS in Sweden to classify the cruise-liner and obtain a Certificate under its Class rules and to perform regulatory checks on behalf of the Bahamian government in line with the statutory and class certificates. When the vessel hit the rock, two watertight compartments were flooded, passed through the vessel's bulkhead 124 and in the unvalved grey-water system, which culminated in progressive flooding and the Sundancer sinking at a nearby pier.

¹³⁸ [1994] L.R. 183

Justice Pratt, on the issue of the first three legs of claim against ABS in terms of negligence, gross negligence, and negligent misrepresentation, acknowledged that what the Court sought to resolve amongst others was if a Classification Society was responsible to a person who hired it for the impact of undiscovered defects. While relying on the earlier decision of Judge Knapp in the District Court, to the effect that Sundance had not presented any evidence and thereby failed to show any damage flowing from issuance of the classification certificate¹³⁹, it was Justice Pratt's opinion that a Ship-owner was not expected to rely on a Classification Society as a guarantee to the owner that the vessel was in an impeccable condition. He used the element of control to arrive at this particular part of his decision by noting that the Ship-owner was responsible for and in control of all the activities on board the vessel in line with the non-delegable duty of the Ship-owner to ensure a vessel is seaworthy. To this extent Sundance being the Ship-owner had the full responsibility of rendering the Sundancer seaworthy and ABS by virtue of inspecting and classifying her did not detract from the Ship-owner's prior duty.

It would appear from the holding in this case, that there was no chance of a Classification Society being ever held liable to a Ship-owner in a duty of care, especially when Justice Pratt pointed out that:

"We agree with the district court that Sundance's posture in this lawsuit is somewhat similar to one who causes a vehicle accident and then sues the Motor Vehicle Bureau for damages to his car because it issued him a driver's license that falsely represented his fitness to drive. Or, another example, Sundance may be here likened to a truckowner seeking recovery from a truck inspection service because it issued a safety certificate shortly before the truck's negligently maintained brakes failed.

¹³⁹ 799 F. Supp. at 393

Put simply, the purpose of the classification certificate is not to guarantee safety, but merely to permit Sundance to take advantage of the insurance rates available to a classed vessel."¹⁴⁰

In this regard, we could use the analogy of an MOT (Ministry of Transport) Certificate, the probable equivalent of a Classification Certificate in motor transport in the United Kingdom. Upon the occurrence of an accident, the driver apparently cannot hold the issuer of the MOT certificate liable to him in negligence¹⁴¹

The decision in the *Sundancer* has come under heavy criticism from certain writers, notably Miller¹⁴², who argues that the idea of a policy-based decision goes too far to protect the interests of Classification Societies to the detriment of credible plaintiffs like ship-owners, who have no other recourse to justice. He also attests that American law has provided an avenue for holding Classification Societies liable in the event of a dispute so long as certain criteria are

¹⁴⁰ <http://www.tourolaw.edu/2ndCircuit/Pre95/92-9153.html> , p. 8

¹⁴¹ The Highway Code prepared by the Department of Transport provides on MOT in **Law RTA 1988** sects **45, 47, 49 & 53** as follows "Cars and motorcycles **MUST** normally pass an MOT test three years from the date of the first registration and every year after that. You **MUST NOT** drive a vehicle without an MOT certificate, when it should have one. Driving an unroadworthy vehicle may invalidate your insurance. Exceptionally, you may drive to a pre-arranged test appointment or to a garage for repairs required for the test."

Where it is stated above that driving an unroadworthy vehicle may invalidate driver's insurance, implies where a car is not roadworthy, there is no MOT (where no MOT means no insurance), is reminiscent of Justice Pratt's view that all things being equal, a Classification Certificate was merely needed by Ship-owners to take advantage of insurance rates available to a classed vessel

¹⁴² Miller, M.A., 'Liability of Classification Societies from the Perspective of United States Law', *Tulane Maritime Law Journal*, Winter 1997, 75

fulfilled In this regard, he points to Sections 311 and 552 of the **Restatement (Second) of Torts, 1965**¹⁴³, which are not unlike **Article 1382** of the **French Civil Code** (which finds a defendant liable upon proof of negligence alleged by a Claimant and by the same token the Claimant has suffered loss).

The Sundancer was promptly followed by **Cargill Inc. v. Bureau Veritas**¹⁴⁴ where the court discussed how classification societies may be liable to third parties, here cargo owners, for misrepresenting the condition of a vessel through a survey and subsequent issuance of a classification certificate. To prevail on a claim of negligent misrepresentation, a third party must show that the classification society:

- a. supplied information at the plaintiff's request for its guidance,
- b. failed to use reasonable care in doing so,

¹⁴³ Section 311(1) of the Restatement (second) Torts provides:

One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, whether such harm results

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

Section 311(2) provides that such negligence should not may consist of failure to exercise reasonable care:

- a. in ascertaining the accuracy of the information
- b. in the manner in which it is communicated.

Section 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.

¹⁴⁴ 902 F.Supp. 49, 1996 A.M.C. 577 (S.D.N.Y.1995)

- c. knew the plaintiff would rely on the information for particular purposes, and
- d. plaintiff suffered an economic loss because it relied on the information.¹⁴⁵

In this case, however, the court found Cargill could not prevail on its negligent misrepresentation claim because it could not prove that it actually relied on Bureau Veritas' classification of the ship which held its cargo. Further, Cargill could not establish that Bureau Veritas knew that Cargill would be relying on the information for particular purposes. It will be observed that this is a sort of reflection on Lord Bridges three-way test in *Caparo v. Dickman*.

The current wave in favour of Classification Societies appears to have been clipped momentarily though with the recent decision in **Otto Candies v. Nippon Kaiji Kyokai**¹⁴⁶. Here the Plaintiff purchased a vessel from the original owner, Diamond Ferry, which took delivery of The SPEEDER, a high speed, aluminium hulled passenger vessel built by Austal Pty Ltd. in 1995. Diamond operated the vessel for about three years, after which period it took the vessel out of service and its Classification consequently lapsed. Otto Candies sought to purchase the Speeder through a Memorandum of Agreement in December, 1999, and one of the Clauses therein was that the Classification of the vessel should be intact before conclusion of the sale. NKK provided the said certificate and the sale was concluded. The plaintiff then engaged the services of the American Bureau of Shipping, (ABS) to survey the Speeder and have its current NKK Classification transferred to ABS.

¹⁴⁵ 102 F.Supp. at 53

¹⁴⁶ United States Court of Appeals Fifth Circuit, filed September 17, 2003 No. 02-30842

A commendable number of structural defects were discovered by the ABS surveyor, Demetri Stroubakis, and these included:

“damaged and wasted overhead spool piping sections that connect the cooling system machinery to the hull; a hull fracture in the port-aft main engine exhaust connection to the hull; fractured hull brackets, wasted cooling piping, leaks in the port and starboard stabilizer fins; excessive movement in the starboard stabilizer shaft; leaks in the port-forward main-engine sea strainer that filters the water used to cool the engines; disconnected and missing bilge pumps; gas and water leaks in the exhaust system; a faulty circuit breaker for the starboard generator; severe damage to the port-aft main propulsion gear; exterior and interior leaks in the main reduction gear oil coolers; damage to the starboard-forward main engine; damage and deterioration in the ventilation system for the port-aft engine; corroded hose and pipe connections for the main and auxiliary engine fuel and lube oil systems that created a severe fire hazard; leaking water-jet pump shaft seals; a heavily corroded port and starboard water-jet pump-bladder accumulator-block valve; and that the engine oil was sooty, black, and contained particulate matter which suggested problems with the machinery.”¹⁴⁷

The Court relied on **Somarelf v. American Bureau of Shipping**¹⁴⁸ where ABS was held liable to a ship charterer on the basis of negligent misrepresentation, for the incorrect Suez Canal Special Tonnage Certificate it had issued to the plaintiff in that case. Somarelf had visibly relied on this Certificate for the purposes of calculating fees for passing through the Suez Canal.

The Court in as much as it appeared to upset the cart in holding NKK liable in a duty of care to Otto Candies was quick to point out:

¹⁴⁷ *ibid*, p.3

¹⁴⁸ 720 F. Supp. 441 (D.N.J. 1989)

"...we emphasize that a claim for negligent misrepresentation in connection with the work of maritime classification societies should be strictly and carefully limited. The societies' surveys and certificate system are essential to maintaining the safety of maritime commerce, yet their activities should not derogate from ship-owners and charterers' non-delegable duty to maintain seaworthy vessels. Imposition of undue liability on classification societies could be harmful in several ways. The societies could be deterred in by the prospect of liability from performing work on old or damaged vessels that most need their advice. The spreading of liability could diminish owners' sense of responsibility for vessel safety even as it complicates liability determinations. Ultimately, broader imposition of liability upon classification societies would increase their risk management costs and rebound in higher fees charged to the societies' clients throughout the maritime industry. Whether such a risk is cost-efficient in an industry with well-developed legal duties and insurance is doubtful"¹⁴⁹

Lord Steyn's opinion in the **Nicholas H** that finding Classification Societies liable will only lead to them increasing their insurance premium and this will be deflected in the fees they charge ship-owners appears to be echoed above. While parties united against the revered position enjoyed by Classification Societies may be ecstatic at their upheld liability in *Otto Candies*, the Court also observed it would be somewhat foolhardy to assume that the death-knell has been sounded just yet for Classification Societies.¹⁵⁰ In this particular situation, NKK appears to have been a victim of its peculiar custom. East says:

¹⁴⁹⁻¹⁴⁹ United States Court of Appeals Fifth Circuit, filed September 17, 2003, No. 02-30842

pp 8-9

¹⁵⁰ It is the urban legend among the major Classification Societies that NKK may have escaped liability if it had been in constant contact with the head office in Tokyo during in the course of the events leading to the institution of the action by *Otto Candies*. This is in deference to the Japanese custom of not being seen to lose face with your elders and your superiors and the surveyors involved in the inspection of *The Speeder* did not liaise with Tokyo at the beginning of the dispute and insisted on going it alone. The decision by the Fifth Circuit has actually led to an Order in Japan that all NKK surveyors must, at all costs, inform the head office of any similar developments at the very onset in the course of an inspection. East also alludes to the peculiar Japanese system in

“The Attitude of NKK is probably influenced to a large extent by the market place in which they normally operate. Traditionally, they insured Japanese vessels; and Japanese ship owners do not, as a matter of policy, ever sue their classification society.”¹⁵¹

It is observed from the above cases that for a duty of care to lie, certain factors need to be identified. These include the element of foreseeability, proximity, the issue of being fair, just, and reasonable to impose the duty, an element of assumption of responsibility and reliance. Assumption of responsibility and reliance often go together in terms of a defendant being held to have assumed responsibility towards a Plaintiff in a certain situation governed by Tort and the Plaintiff relies on the Defendant's judgement. This duty of assumption and its corollary, reliance, have been held to feature where a Defendant actually 'speaks' to give his opinion to a Plaintiff, who 'listens' and relies on it. In **Hamble Fisheries Ltd. v. L. Gardner & Sons Ltd., (The "Rebecca Elaine")**¹⁵², the Appellants owned a number of fishing vessels. In 1985 they contracted with boat-builders to build what became the "Rebecca Elaine". Because of their good experience with Gardner engines the Appellants decided that the new vessel should be fitted with such an engine. The manufacturers did not sell engines direct and there was a chain of contracts between them and the boat-builders. The new vessel was commissioned on 1 October 1985. Her new Gardner engine was accompanied by a one year manufacturer's warranty against defects in workmanship or material and a manual which stated that its "pistons would run for 20,000 hours or more without dismantling and before replacement is necessary".

¹⁵¹ East, L., 'The Duty of Care in a Marine Context', *op cit*, 149

¹⁵² [1999] 2 Lloyd's Rep. 1

In May 1986 the manufacturers of the engine sold their business to the Respondents. The sale was of the entire undertaking, property and assets of the business as a going concern, together with the Respondents' right to represent that they were carrying on the business in continuation of and in succession to the manufacturers. Clause 9 of the Sale and Purchase Agreement provided that the Respondents would be responsible for and indemnify the manufacturers against all claims in connection with any products supplied at any time alleged to be defective in any respect whether such claim was based on contract, tort, statute or common law.

From early 1987 the Respondents began to receive reports that pistons in Gardner engines had broken or cracked before they should have done. The pistons concerned had all been manufactured by an independent contractor, Wellworthy Ltd. These pistons, as the Judge found, were liable to fail after only about one third of the running time stated in the manual. On the Judge's unchallenged finding by at the latest October 1987 the Respondents were on notice of a very real problem affecting the Wellworthy pistons which they realised might cause major engine failure or worse. However, despite this knowledge the Respondents chose not to warn those with engines fitted with such pistons which the Judge held they could have done by contacting known customers, authorised distributors and service agents, or by advertising in trade journals.

On 1st April 1988 when the "Rebecca Elaine" was 4½ miles south west of the Needles the pistons failed prematurely and the engine seized. Fortunately the vessel was towed to safety and the only loss was the damage to the engine itself which cost £25,972 to repair and loss of earnings which the Judge assessed at £21,344.

Lord Tuckey noted that where a Defendant chose to keep silent, it would be more daunting to detect a duty of care than in a situation where the Defendant actually spoke and gave an opinion thereby visibly assuming responsibility. This, it appears would be trying to draw the difference between an act and an omission. According to Lord Tuckey:

“So far I have not considered the significance of the fact that in this case the duty contended for is a duty to speak. In a case like Hedley Byrne where the defendant chooses to speak he is taken to have assumed responsibility from that fact alone. This is obviously not so where the defendant keeps silent. In Skandia the Court had to consider whether the underwriter of the defendant insurers who knew that a broker had issued a false cover note to the plaintiff bank owed a duty of care to warn the bank who lent large sums of money on the security of the cover. At p. 559; p. 794 Lord Justice Slade giving the judgment of the Court said: Can a mere failure to speak ever give rise to liability in negligence under Hedley Byrne principles? In our view it can, but subject to the all important proviso that there has been on the facts a voluntary assumption of responsibility in the relevant sense and reliance on that assumption. These features may be much more difficult to infer in the case of mere silence than in the case of misrepresentation.”¹⁵³

The comment above is an analogy between a positive action (where the defendant categorically makes a statement, albeit honestly) and an omission (where the defendant is well aware that the claimant has not been alerted to the true state of affairs and neglects to set things right). It will appear that the defendant in the second example who has omitted to speak up may be more culpable than the first example of the defendant who actually proffers an opinion. This culpability of the first defendant will naturally be more glaring should evidence be adduced that he did not necessarily believe in the veracity of his opinion, but gave it all the same. Therefore, a positive act of giving an opinion and an omission to give an opinion or

¹⁵³ibid, at p.5

rather speak up when a set of affairs needed to be set straight will both merit the same reaction of liability, where it is proven that the plaintiff relied on the advice of the first defendant, or the position of things which would have been altered had the second defendant spoken up.

In this case, there was no direct contact between the manufacturers and the plaintiffs. Hence no way of contract at all, but an action in tort. Could there have been any 'reliance' by the plaintiff on the defendant's products by virtue of the faith the plaintiffs had in the engines from previous experience? Any element of such reliance appears to have been dispensed with by Lord Tuckey in the case.

3.7 Developing Trends in Claims for Pure Economic Loss

This is a fast developing area of law generally, and in maritime law particularly, it necessarily impacts on our study of Classification Societies. In this instance, the plaintiffs often have no direct contact with the defendants, rather they may have a contractual relationship with the other party, who in turn has a direct relationship with the Classification Society.

Witting indicates that pure economic loss can arise from the following categories:

1. inherent defects in products or structures causative of no injury to persons or damage to other property (bad bargains);
2. relational economic losses, which occur when the claimant suffers a loss because of physical injury to the person or property of another upon whom he or she depends; or

3. misstatements and inadequately performed services.¹⁵⁴

He further advises that '*the circumstances in which recovery is available for pure economic loss are often much more restrictive than those in which recovery is available for wrongs to the person or property*'¹⁵⁵

The cases featured here spread across three jurisdictions – Australia, Singapore and the Netherlands.

3.7.1 Australia

3.7.1.1 Fortuna Seafoods P/L Trustee for the Rowley Family Trust) v. The Ship Eternal Wind [2005] QSC 4

The boundary in a claim for pure economic loss was stretched further with the recent case of the *Eternal wind*. The plaintiff was a separate, but related company to Fortuna Fishing Pty Limited (Fortuna Fishing), owner of the fishing vessel, *Melina T*, which was involved in a collision with the Panamanian registered motor bulk-carrier, *Eternal Wind*, owned by the Ganta Shipping SA. Fortuna Fishing made a claim for the loss for the loss of the *Melina T* against Ganta Shipping for negligence in causing the collision and this claim was settled. Fortuna

¹⁵⁴ Van Boom W.H., Koziol, H. & Witting C.A., Pure Economic Loss (Wien: Springer, 2004) p. 103. The author says that the common law jurisdictions of England, Canada, Australia and New Zealand offer 'direct protection with respect to category (3); each system except for the English offers direct protection with respect to (1); but there is limited protection with respect to (2).

¹⁵⁵ Ibid, p.103

Seafoods Pty Limited (Fortuna Seafoods) brought an action for the loss of profit it would have earned from the fish it would have processed and sold as the agent for Fortuna Fishing. This loss was established at \$163,256.00. The issue before the court was if Ganta Shipping SA owed a duty of care to Fortuna Seafoods, considering that its claim was for pure economic loss to the vessel owned by another company albeit related, Fortuna Fishing.

The judge in the case, Douglas, J observed that Fortuna Fishing and Fortuna Seafoods implied a connection, considering that both companies had the same man as a director in both companies, with him and the wife as shareholders in one company and the wife and son as shareholders in the other. Further the son was the master of the fishing fleet, and while both companies had separate bank accounts, funds may be transferred from one account to the other to accommodate expenditures accordingly Fortuna Seafoods was incorporated following some advancement in New South Wales legislation regarding the operation of export approved processing plant, which Fortuna Fishing had erstwhile undertaken along with the fishing aspect of its business. This resulted in a Fortuna Fishing dealing with the fishing and Fortuna Seafoods processing and selling the catch for a fee.

The two companies were found to be separate entities but fulfilled different aspects of the same business, and hence they formed a common commercial operation. The judge observed that the defendant should have known that a fishing vessel will necessarily have suppliers who process and sell their catch and therefore will necessarily be affected adversely by the loss of the fishing vessel.

The plaintiff was deemed an ascertainable class, whose loss was not indeterminate. Forrest considers that the Court may have arrived at this conclusion by concluding that this was a case of 'transferred loss', whereby the loss which would ordinarily fall on Fortuna Fishing was promptly transferred to Fortuna Seafoods.¹⁵⁶ Using the definition of a common venture as used by McLaughlin J in **Canadian National Railway v. Norsk Pacific Steamship Co**¹⁵⁷ to symbolise where a plaintiff will be entitled to recover if he and the owner of a damaged property were involved in a common venture¹⁵⁸, Douglas J ruled that Fortuna Seafoods was in the same position as Fortuna Fishing as if it actually owned the damaged fishing vessel, the *Melina T*. This relationship was enhanced by the presence of a contractual arrangement (in spite of the other inter-relationships of having the same owner, etc) between the two companies, and it was up to the Court to protect the interest borne from the contract. The contract on its part served to enhance the theme of a common venture for both Fortuna Fishing and Fortuna Seafoods since they operated as part of a single economic activity. Further, being part of a single economic activity, both companies could be construed as part of an ascertainable class, which was owed a duty of care because of the damage to the fishing vessel, which constituted a symbol of the relationship between them and Fortuna Seafoods had a contractual right to the catch.

Regarding knowledge on the part of the defendant, Douglas J relied on the **Caltex** and **Perre v. Apand** cases to conclude that the defendant's knowledge need not be limited to the owner of the vessel (in this case Fortuna Fishing). Cognisance was taken of the system of commercial

¹⁵⁶ Forrest, C, '*The Eternal Wind: Analysis and Comment*', (2005) II JIML, 180.

¹⁵⁷ [1992] 1 SCR 1021. The facts of this case have been discussed in this section.

¹⁵⁸ We will recall that the elements of foreseeability and proximity as used in the *Anns v. Merton* case (discussed earlier in this chapter) were instrumental in deciding this case. The issue of proximity here is aligned with the term 'common venture'

fishing in Australia where a group can comprise different companies performing different roles all towards the same purpose, and the defendant not giving any evidence in this regard served to buttress this custom in the judge's mind that the defendant may have been well aware of the custom as well. At any rate, the system of fishing in Australia, in the judge's opinion, was so entrenched that in the course of the *Eternal Wind* colliding with the *Melina T*, it should have had the interests of other possible companies in mind.

Another test for ascertaining a duty of care for economic loss to the plaintiff was by analysing the vulnerability of the plaintiff. This vulnerability was ascertained by the ability or inability of the plaintiff to protect himself from the loss complained of. The means of protection will be by obtaining an indemnity from a partner in a business relationship or by going it alone and insuring against such loss. Douglas found that it was hard to contemplate Fortuna Fishing indemnifying Fortuna Seafoods should any of its Fishing vessels sink, nor could Fortuna Seafoods insure against its economic loss on a viable insurance policy. This left it in a position whereby it was unable to protect itself from the loss which Fortuna Fishing suffered and was consequentially transferred to it.

This decision has apparently served to enforce the perception in the Australian Courts that for a defendant to be liable to a plaintiff for economic loss, he only has to have the means of knowledge of the defendant and not particularly the precise knowledge which the Exclusionary Rule advocates.

Balkin and Davis comment that the Exclusionary Rule epitomised by Cardozo CJ in *Ultramares Corporation v. Touche*¹⁵⁹ as 'liability in an indeterminate amount for an indeterminate time to an indeterminate class, which appears to be the norm in the British and American jurisdictions is not necessarily adhered to by the Australian Courts anymore. The authors express the contemporary position in Australia as:

"Liability for pure economic loss will be imposed on one who has knowledge or the means of knowledge, that the plaintiff, as a member of a determinate class, is unable to protect himself or herself against the loss which results from the defendant's negligent act or omission, provided that the imposition of such liability will not unduly fetter the defendant's legitimate commercial interests."¹⁶⁰

3.7.2 Singapore

3.7.2.1 PT Bumi International Tankers v. Man B&W Diesel SE Asia and Mirrlees Blackstone (reported in *Fairplay*, August 13, 2005)

Singapore appears to have towed the path blazed by Australia in the realms of economic loss. In this case, the first defendant, Man B&W SE Asia (MBA), based in Singapore, supplied the engine used in the Indian-registered vessel, the *Bumi Anugerah*, built for the plaintiff by the Malaysian Shipyard and Engineering. The engine was manufactured by the parent company of the first defendant, Mirrlees Blackstone, a company based in the United Kingdom and the second defendant in the case.

¹⁵⁹ (1931)174 N.E. 441

¹⁶⁰ Balkin, R.P. and Davis, J.L.R., *Law of Torts*, (3rd ed, Butterworths, 2004) 452

The engine for the *Bumi Anugerah* was delivered in March 1994 and the vessel itself was delivered to the owners in December 1994. Apparently, problems ensued with the engine within weeks of delivery with the vessel finally breaking down in September 1997. The Plaintiff commenced legal proceedings against both defendants, pleading that they (defendants) owed a duty of care 'to provide the engine that would be suitably manufactured and free from defect for the safe and proper operation of *Bumi Anugerah* in ocean voyages.'¹⁶¹ Since the engine was defective, the defendants had failed to exercise reasonable care and skill.

MBS and MBUK argued in their defence that the shipyard, MSE, had the responsibility to ensure the specifications of the vessel's speed, design, draught and engine power requirements complied with the vessel's performance criteria. They further argued that while they had a duty to provide an engine that was suitably manufactured and free from defect, this duty was limited to comply with the engine power and specifications as determined and specified by the MSE, and not a duty to Bumi to provide an engine for the safe and proper operation of the vessel on ocean voyages.

Following an amendment to their defence, the defendants sought to rely on a clause contained in the terms and conditions in a letter dated July 1993 by MBS to MSE (the shipyard) as well as clauses in the shipbuilding contract between the Bumi (the plaintiff) and MSE, to relieve the defendants from liability or at least limit their liability to Bumi. The defendants further argued that Bumi should not be allowed 'to leapfrog over MSE and take direct action against MSE's subcontractors because, by their contract with MSE, they had agreed that liability for the

¹⁶¹ *Fairplay*, August 13, 2005

suitability of the vessel and any damages sustained by reason of the vessel being defective would be regulated in a particular fashion.¹⁶²

The judge said she saw the issues in the pleadings in the case to comprise the following:

1. Whether MBS and Mirlee owed Bumi a duty of care to provide an engine that would be suitably manufactured and free from defect, built for the safe and proper operation of the vessel so that Bumi could have avoided the type of loss they sustained.
2. If such a duty of care was owed, was there a breach of duty in that the engine was defectively and/or negligently designed; and
3. If there was a breach, what damages did Bumi suffer and what was the company entitled to recover in damages?¹⁶³

Justice Prakash relied on the principles regarding the position of a party owing a duty of care to another party to avoid causing economic loss to that party, which were laid down in *RSP Architects Planners & Engineers v. Ocean Front* and *RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v. Management Corporation Strata Title Plan No 1075*, observed that these principles were capable of application in many instances.

¹⁶² *ibid*

¹⁶³ *ibid*

On the first issue, the judge's approach appeared fairly straightforward. She asked if there was a sufficient measure of proximity in the relationship between Bumi and the defendants, which would give rise to a duty of care to avoid the sort of loss being sued for. If such proximity was found to exist, the next step would be to ascertain 'whether there is any material factor or policy, which precludes such duty from arising.'¹⁶⁴ She dispensed with the defendants' argument about the propriety of Bumi 'leapfrogging' MSE to sue them when she said:

"the simple fact that a chain of contracts exist cannot, as a matter of policy, mean that in all circumstances each party in the chain is limited to suing only the party with whom he is in privity of contract for any damages sustained as a result of the transactions undertaken under the contract... There is no reason in law or in policy why Bumi, simply because they entered into a contract with MSE whereby they agreed that MSE would only be responsible for defects discovered and notified within 12 months and even then only for the cost of replacing those defects, should be barred from making a claim against the defendants who actually supplied the defective equipment, for their full losses more than 12 months after delivery."¹⁶⁵

For the second issue regarding if there was a breach of duty by way of defective or negligently manufactured engine where a duty initially exists, the judge stated that experts though engaged by parties to give evidence had a duty to the Court to be objective. She found that Bumi successfully proved that the engine supplied by the defendants was not suitable for the intended requirement of a 4,000 *rpm* rated engine. In as much as the experts could not specify the particular fault in the engine, the Judge was convinced that the defect in the engine must have stemmed from the design by the defendants.

¹⁶⁴ *ibid*

¹⁶⁵ *ibid*

The third issue dealt with the amount of damages payable to Bumi if the defendants were deemed liable for breach of duty. The judge observed that the plaintiff's damages were 'specific and calculable' and ought to have been pleaded as part of Bumi's claim and not left to be assessed. She however assessed the damages and found the first defendant liable to the plaintiff to the sum of \$939,589.675, and the second defendant was found liable to the sum of \$2,040,000. She maintained that the defendants were severally and not jointly responsible to Bumi for the duty to provide a suitable engine.

3.7.3 Netherlands

3.7.3.1 Van Hasselt Baggermij v. Dutch Shipping Inspectorate and Van Duijvendijk & Zoon (*The Annette*) Dutch Supreme Court 7 May 2004[C02/310HR]; S&S 2004/129; RvdW2004/67; JOL 2004/225

This is a rather recent Dutch case rooted in controversy due to the apparent equivocal stance of the decision bearing in mind the prevailing pulse in Europe.¹⁶⁶

Sometime in April 1993, the dredger, *Annette*, was moored with the attached supporting vessels, *Moonlight* and *Vrouwe Johanna*, all in the plaintiff's (Van Hasselt) ownership. A pushing barge, *Linda*, belonging to De Jong-Haakman, was stationed beside the *Annette* and some sand put into the barge. By 17.00 that evening, work ended and everyone left for the day,

¹⁶⁶ Following the *Erika* and *Prestige*, the European Parliament has been up in arms in stemming a repeat of such events, culminating in the Directive 2001/105, which is discussed in the next chapter on IMO and EU Initiatives.

only to return the next day to find that the *Linda* had filled with water, capsized and sank taking along with it, the *Annette*, the *Moonlight* and the *Vrouwe Johanna*.

Apparently, De Jong-Haakman had recently acquired the *Linda*, surveyed by the Dutch Shipping Inspectorate (DSI), who had used the services of a private surveyor, Van Duijvendijk. Following a partial survey based on the International Rules for Rhine Navigation Surveys, the *Linda* was issued with a certificate of seaworthiness, valid for seven years. Incidentally, two surveyors had advised both the previous owner of the *Linda* and the DSI that she was far from seaworthy and had actually been recommended that she be scrapped.

The plaintiff sued the owner of the barge, De Jong-Haakman; DSI; and Van Duijvendijk. De Jong-Haakman was dropped from the suit after it accepted liability to the tune of its limitation fund, while the other defendants denied their liability in the sinking of the vessels. The case did the rounds from the District Court to the Court of Appeal and terminated at the Supreme Court, where the unanimous decision in these Courts was that DSI and Van Duijvendijk did not owe a duty of care to the plaintiff. The Supreme Court held the view that:

“the Dutch state’s obligation (pursuant to its general responsibility for safe shipping) to observe due care when inspecting ships for the purpose of issuing or renewing a certificate of seaworthiness does not purport to protect a principally unlimited group of third parties against eventual proprietary and often unforeseeable damage as a result of the unseaworthiness or faultiness of the ship, wrongly not having come to light during the inspection carried out by, or under responsibility, of the State. Therefore, third

parties cannot derive any claim for compensation of proprietary damage against the State or its assisting surveyors from the fact that the inspection was carried out without due care."¹⁶⁷

The Dutch Supreme Court's decision has not been without its harsh critics who have looked to the criteria by which a Claimant can succeed in an action in tort against a tortfeasor. These include:

- i. there must be a wrongful act or omission, which (a.) affects the subjective right of the plaintiff; (b.) derogates from a statutory obligation or duty; or (c.) goes against the unwritten standard of due care that is observed in society
- ii. the act stems from the tortfeasor
- iii. the loss which the victim has suffered must be adequately proximate to the violation by the tortfeasor.

It was the plaintiff's argument that the defendant had erred in their duty, particularly in terms of i(b) and i(c) above. The picture which emerges from the plaintiff's argument shows that the **Manheim Act**, the international convention on navigation on the Rhine, governs the **International Rules for Rhine Navigation Surveys (Rhine Rules)** and the Act stipulates that

¹⁶⁷ Quoted by Blussé van Oud-Alblas, J. 'State Liability for Wrongfully Issuing Certificates of Seaworthiness': *The Annette* (2005)II JIML 316 at 317

the Rules should be interpreted in the light of international opinion. Following this premise, the plaintiff argued that in view of the earlier sinking of both the *Erika* and the *Prestige*, which the Dutch Government along with other European States had taken full cognisance of by going up in arms against classification societies with questionable standards, the requirement of proximity between the plaintiff's loss and the defendants' actions in the present case was achieved.

An interesting aspect of this case flows from the intention portrayed in the preamble to the Manheim Act regarding the Rhine Rules. Blussé van Oud-Alblas says of the Act that:

"The intention as stated in the Manheim Act (preamble), the international Rules for Rhine Navigation Surveys and the Dutch Inland Navigation Act, is to safeguard or warrant the safety of inland navigation, including the vessels. The Dutch Government is responsible for the due performance of these acts. The international rules therefore contain a 'safeguard standard' as opposed to an 'instruction standard.' The difference is that it is prevailing (Dutch) case law that, contrary to 'instruction standards', which only aim to provide a general instruction as to how the standard in question should be applied, those to whom a 'safeguard standard' is addressed may draw rights or claims if the standard is not met or if the rules are not properly applied or carried out by the Dutch Government"¹⁶⁸

What portends from the above is that any action covered by the Manheim Act and the Rules promulgated on its basis will have a safeguard effect or standard and not one that is merely instructional by which individuals in the plaintiff's position can claim where they actively engage

¹⁶⁸ Blussé van Oud-Alblas, J., *ibid* at 317

in inland navigation and they suffer a loss from the action of another in the position of the defendant. It will appear from the facts of this case, that the Dutch Government completely ignored the current trend in Europe on the position of Classification Societies for which the erstwhile Directive 94/57 was repealed to become Directive 2001/105 and regulating the affairs between Flag-States and responsible organisations performing as Classification Societies.¹⁶⁹ The Dutch government had been quite vocal on the liability of irresponsible classification societies with equally irresponsible standards who would be found liable to the Flag-State for whom they were performing a service so long as that Flag-State is initially held liable to a plaintiff.

The Supreme Court appeared to acknowledge the 'safeguard standard' in the Manheim Act and its related Rules, however it seems the Dutch government did a veritable *volte face* when the matter such as this stared it directly in the face – an apparent case of not putting your money where your mouth is. It could well be that there is a need to 'keep the slate clean' and perhaps not be the first casualty of the European Directive on the liability of the Maritime Administration of an EU Flag-state and its associated Classification Societies/surveyor. This indeed may allude to the notion that the impact of the *Erika* and the *Prestige* has been futile.

Blussé van Oud-Alblas observes that a possible drawback in the decision of the Supreme Court could be from its refusal to adhere to the 'Langemeijer Correction', which alludes to the

¹⁶⁹ Please see the next chapter on the IMO and EU initiatives on class, where the Directive 94/57 and Directive 2001/105 are discussed. The latter Directive provides for the liability of the classification society, where the state is found liable for gross or willful negligence

notion "that if, in case the of violation of a statutory obligation or duty (ib) above the violated standard does not serve to protect against the damage suffered by the victim, this does not per se lead to the conclusion that the principle of proximity (iii) has not been met, as it does not rule out the possibility that the act or omission is wrongful on the basis of one of the other criteria (ia and/or ic) as well."¹⁷⁰ This may be further interpreted to mean that even though criterion (ib) – violation of a statutory duty - may be couched in public policy and thus be a double-edged sword, the plaintiff still has the other criteria of (ia) – subjective right of the plaintiff being violated; and ic – the violation of a custom or usage of due care observed in society, to fall back on to prove that there was proximity between the defendant government's action/omission and his loss.

Economic loss from our study of the recent developments above is one notion that will necessarily have its attackers and its defenders. It also appears to have developed a jurisdictional trend, which may well assist in deciding the success of a claim. Canada and Australia both common law jurisdictions so far appear to adopt a different view from the United Kingdom and the United States of America in awarding a claim for economic loss, a stance similar to what generally obtains in Europe. There some irony presents itself with the Dutch decision discussed above. Perception would be that it may desire to tow the hard-line stance of its British and American contemporaries, but at what cost? The decision largely appears to be variance with the Civil Code of the Netherlands regarding the liability and it appears to defy the prescription of giving heed to contemporary opinions of the society¹⁷¹ (here the need to show

¹⁷⁰ *ibid*, 318

¹⁷¹ Section 6:162.1 of the *Burgerlijk Wetboek* (Civil Code) of 1992

and be seen to show some responsibility in the current saga surrounding class and the new Directives they have inspired.

Another interesting point from the economic loss cases is the application or non-application of the issue of public policy. Where this has been applied it has led to different result. It will appear that the judge in the **Fortuna Fishing case** sued the issue of public policy to rule in favour of the plaintiff when he took in cognisance the fishing practice in Australia and the plaintiff and others in their position will fare worse did he rule otherwise. The judge in the **PT Bumi case** does not appear to have given any chance to this concept when she asked the three questions that she deemed were the issues at stake – did the defendant owe the plaintiff a duty; was the duty breached; and the damages plaintiff was entitled in the event of breach! This appears fairly straightforward and may even be regarded as simplistic, but it echoes the position in most of the European jurisdictions.¹⁷²

The Dutch Supreme Court in the last case appears to have veered off the path regularly trodden in cases of this nature and adopted a stance not unlike one that may have been adopted in a British or American jurisdiction. That said the American jurisdiction may play a huge impact due to the unique system that presents itself there. It is widely perceived that the particular region in America may influence the course a case of this ilk will follow. The northern area is regarded as more inclined to decide in favour of the defendant in this case, a possible Classification Society where the business sector is more rampant, while the southern region may be more sympathetic to the plaintiff who may be seen as the downtrodden and defenceless party with no recourse but to the law. Considering the origin of Class as the brain-

¹⁷² Article 1382 of the French Civil Code

child of marine insurers, who underwrote vessels that cost a fair bit and thus needed an extensive overview of their prospective clients' vessels, the tenacity with which classification societies have evaded liability can begin to be understood. Starer says of this notion that:

"Since the 1970's, US courts of admiralty, especially in the Southern District of New York, have endorsed these arguments in an effort to protect these 'public watchdogs' that are essential to maintaining the safety of international maritime commerce. Classification societies were initially formed at the behest of hull underwriters as not-for-profit organisations whose objective was to provide independent evaluations of a vessel's seaworthiness. Governments subsequently employed them for similar purposes. Today, classification societies continue to perform the vital role of setting standards for the design, construction, and maintenance of vessels."¹⁷³

Should the above hold true, it will suffice that Class will continue to enjoy the protection of the Courts under the cover of public policy couched as 'just, fair and reasonable'. The current case involving the *Prestige* is avidly waited by all concerned and even the academic to see how marked the course of Classification Societies is.

3.8 The role of Inspection Companies as Professionals and the analogy to Classification Societies

The sensitive nature of classifying a vessel will put a Classification Society in the role of a professional. To this end, a professional is endowed with the responsibility of acting with the skill and competence commensurate with his specific endeavour in ascertaining the standard of

¹⁷³ Starer, B.D., 'Class Reform' http://www.maritimeadvocate.com/i30_clas.php

care he should exercise. Street suggests that "whether the defendant is a plumber or an architect, the primary question is whether in all the circumstances the defendant acted with the skill and competence to be expected from a person undertaking his particular activity and professing his skill"¹⁷⁴ The following recent cases may assist to put things in perspective in as much as they deal specifically with inspection companies, there is at best, some fair amount of similarity in the duties of these organisations in the cases, and of classification societies.

3.8.1 Niru Battery Manufacturing Co. v. Milestone Trading Ltd¹⁷⁵

Milestone, a company incorporated in Ireland and under the control of a Mr. Mahdavi sold 10,400 metric tonnes of lead ingots to Niru on a pro forma invoice in the sum of \$5,837,480. Niru approached its bank, Bank Sepah Iran, for a Letter of Credit in Milestone's favour in the sum of \$5,838,000. Under the terms of the contract, payment was to be by letter of credit opened by Bank Sepah Iran against presentation of a FIATA multimodal transport bill of lading and an inspection certificate issued by SGS certifying that "the quality and packing of the goods loaded are strictly complying with specifications of the goods indicated in the relative pro forma invoice and the terms of the L/C."

The lead was stored in warehouses which operated a system whereby each warehouse held 25 metric tonnes of lead and this was represented by a warrant issued by a London Metal exchange (LME) broker as Documents of Title. The warrants guided the sale and physical

¹⁷⁴ M. Brazier & J. Murphy, Street on Torts, 10thed, (London: Butterworths, 1999), p.246

¹⁷⁵ [2004] 1 Lloyd's Rep. 344

delivery of the Lead, without which there could be no access to the lead. To obtain an SGS Certificate, SGS needed to inspect and sample the lead, but Milestone needed to get possession of the warrants covering the lead for sale to Niru.

Milestone told its bank, CAI, that it would finance the bank's borrowing of warrants from an LME Broker. CAI agreed to Milestone's proposal and to ship the lead to Niru but insisted on holding on to the warrants as collateral until Milestone offset the cost of the lead. This posed a dilemma for Milestone and Mr. Mahdavi since without any warrants, not only would there be no Certificate, but also there would be no FIATA Bill of Lading (FBL) which would only be issued when the goods had passed to the carrier of forwarding agent. Further, without any FBL, Bank Sepah was not going to make any payment under the Letter of Credit to Milestone.

Mr. Mahdavi resorted to approaching a forwarding agent, who was persuaded to issue an FBL; SGS issued its Certificate which stated as follows:

"TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Based on the above, we hereby certify that the quality and quantity and packing of the goods loaded are strictly complying with specifications of the goods indicated in the relative proforma invoice and the terms of the L/C and any amendments made there to as presented to us by the buyer.

Above findings are limited to data and place of intervention only.

The Company is neither an insurer nor a guarantor and disclaims all liability in that capacity."¹⁷⁶

The above documents were all presented to Bank Sepah to pay under the Letter of Credit. The bank did not pay out immediately, and in November 1998 on the price of lead falling, CAI

¹⁷⁶ *ibid*, at 349

fearing for its security sold the warrants for the lead after consultation with Mr. Mahdavi, but without Bank Sepah's or Niru's knowledge. The funds from the sale were credited to Nikam's account, another company in Mr. Mahdavi's group. When Bank Sepah eventually paid \$5,795,560.65 in December 1998 which sum included a penalty for late payment, a Mr. Francis in CAI who knew Milestone had already sold the warrants advised Mr. Mahdavi to return the funds to Bank Sepah, but Mr. Mahdavi said he was "in negotiations with Niru" and returning the money would adversely affect his businesses. The same sum was again credited to Nikam's account after Mr. Francis liaised with the head of the legal dept of the bank. From the Nikam account, a sum of \$5,316,750 was paid to a metal broker, GNI Ltd. Meanwhile, Niru did not receive any lead ingots and its account with Bank Sepah was debited with the amount the bank had made out to CAI.

At the Court of first instance, the trial judge held SGS (whose position is akin to Classification Societies in this regard) was liable in tort to Niru and Sepah because it had issued certificates for goods which it had not even inspected nor sampled. It had not taken reasonable care to ensure that the goods were in the actually in the care of the freight forwarder and loaded on the ship, which negligence, while not the only cause was still an effective cause of Niru's loss. Of particular note in the trial judge's decision on SGS'S duty to Niru was that the information which SGS actually had did not as he put it in par. 82 of that Judgement, provide reasonable grounds for issuing a certificate in the form required by the Iranian regulations. In issuing a certificate in that form it was in breach of its duty of care to Niru.¹⁷⁷

¹⁷⁷ The Court of Appeal took this point into consideration and it seems it formed the crux of the case Niru had against SGS.

Milestone, CAI and SGS appealed the decision the High Court. Counsel for SGS argued that there should be a distinction between the duty to inspect the goods and a duty to ensure actual shipment of the goods. Clarke LJ, in the analysis of the appeal stated that:

"The Judge, in my opinion correctly, identified the relevant questions as what the surveyor was asked to do and in relation to what aspects of the seller's performance it assumed responsibility. I agree with the Judge that there is no reason why, depending upon the circumstances, a surveyor should not be asked, for example, to verify whether the goods have in fact been loaded on a vessel and so to certify if appropriate. I also agree with the Judge that, although a certificate will contain important statements about the quality and quantity of the goods, its primary importance lies in the very fact that it has been issued. As the Judge put it in par. 60, possession of a certificate covering the required matters enables the seller to demand payment under the letter of credit and triggers the corresponding obligation of the buyer to indemnify the issuing bank. I agree with the Judge that that is just as true if the surveyor is required to certify that the goods have been loaded as it is if he is required to certify that they are of contractual origin or quality."¹⁷⁸

The similarity between Classification Societies and SGS in the above case cannot be overstated especially in the aspect of issuing certificates, and it is observed that the fact of issuing a certificate can make or break a transaction in its and the possibility of its proceeding to a logical conclusion. It is also understood from the above comment that the issue of a certificate is not a trivial action, but one that places some responsibility on the issuing authority to take cognisance of parties with whom they do not necessarily contract with but whose business dealings are still very much affected by that very certificate.

¹⁷⁸ Niru Battery Manufacturing Co case, op cit, 352

SGS, knowing that Niru was an Iranian company, had tacitly agreed to comply with the Iranian regulations guiding the import of goods into Iran. This was evidenced by the expressly stated clause in the Central Bank of Iran's Circular No 60/1196 entitled "**The regulation on submission of inspection certificate for import goods.**"¹⁷⁹ There was also, a document entitled "IMPORTANT NOTE", which was on the back of an SGS Iran Inspection Request Form, included the following:

*"In accordance with the Iranian Regulations on submitting Inspection Certificate for Imported Goods the issuance of Inspection Certificate means the goods shipped on board the export carrier are identified by the inspectors as goods for destination of Iran require supervision of loading in addition to any other expressed or implied instructions. Please remember at all times that, when it comes to inspection of goods for Iran, the primary responsibility of the inspection body is towards the Iranian Government."*¹⁸⁰

There was yet another document, this time in bold capitals titled "REMINDER ON IMPORTANT POINTS ABOUT IRANIAN PROCEDURE" that specifically included the following statement as follows:

¹⁷⁹ *ibid*, 353-354. This Circular provided as follows 'The inspection company shall be free in selection of the required inspection procedure(s) and the place of commencement and completion of inspection (in terms of quantity and quality control operations and packaging by taking into account the type of goods.) However, inspection shall be completed by supervision on loading of goods and/or delivery thereof to the forwarder (for air freight and transport by railways). The inspection Certificates should clearly state that the inspected goods are exactly the same goods which are loaded on board the carrier for shipment and they fully confirm (sic) to the seller's proforma invoice, the terms of the relevant L/C and any amendment made to the L/C. The date of issuance of the inspection certificate must be *354 after or concurrent with the date of the bill of lading. Such confirmation must be specified in the terms of the L/C or sight draft (collectible bill of exchange).'

¹⁸⁰ *Ibid*, 354

"SUPERVISION OF LOADING IS AN OBLIGATION FOR IRAN BECAUSE YOU HAVE TO CERTIFY THE CONFORMITY OF LOADED GOODS. SO, WHENEVER - DUE TO ANY REASON YOU ARE NOT ABLE TO DO THAT, GET A LETTER OF INDEMNITY FROM SELLERS INDICATING THAT THE GOODS INSPECTED ARE REALLY THE ONES THAT ARE SHIPPED."

It is noteworthy that Milestone had requested Niru on SGS' suggestion to settle for a clause in the Certificate that the goods had been inspected, instead of loaded, which Niru refused following its bank's (Sepah) refusal. Sepah would have had to get approval from the Central Bank of Iran for this amendment and the Central equally refused this amendment. It was thus back to *staus quo*, whereby SGS would have had to actually supervise the actual loading of the lead on the vessel. In the event this amendment was allowed, it is envisaged that SGS would have adequately concluded its end of the bargain by acknowledging the FBL (of which the fact it was a false document, it may not have been aware of), and therefore the term 'loaded' would have sufficed by the freight forwarding taking over the goods. However the precise recommendation in the Iranian documents, in Lord Clarke's opinion put paid to that notion and he ruled that actual supervised loading of the lead was the mandatory intention by Iranian Government in this case.¹⁸¹

Regarding the breach of the duty of care, firstly, the Certificate where it indicated that the goods were marked "VEZARATE DEFA NIRU BATTERY MFG CO."¹⁸² was false because it represented goods which were still in the possession of CAI, which still held the warrants. Secondly, the Certificate did not establish the true state of affairs where it said the goods had been loaded.

¹⁸¹ *ibid*, at 357

¹⁸² *ibid*, at 359

SGS inspected and sampled 8400 metric tonnes of lead ingots at Gothenburg and opted to dispense with the remaining 2,000 metric tonnes at a warehouse in Helsingborg because it was part of the same production. The SGS administrative officer involved with the transaction wished to oversee the loading of the lead onto the vessel, but another colleague advised her that the FBL, which had been issued for them, will suffice. This administrative officer conferred with the Tehran Co-ordinating office in, which advised to comply with the 'layout and conditions of the Iranian Certificate.' The judge in the Court of first instance did concede that this may have been less helpful to SGS officer. Clarke LJ held that SGS understood the Iranian operations enough to realise that merely relying on the FBL, which ideally should indicate that goods have been loaded, was not the within the Contemplation of the parties.

On SGS'S argument that Milestone or Maritime Freight Services would not withheld the true position of the loading of the cargo had it asked, Clarke LJ was not so persuaded, as was neither the earlier judge in the High Court. The Court of Appeal held that had SGS asked the Warehouse operator to confirm the actual loading of the lead, they would have been in a position to ascertain the validity of the Certificate they issued instead of merely relying on the FBL.

3.8.2 AIC Ltd v ITS Testing Services (UK) Ltd¹⁸³

In March 1996, AIC purchased from Mobil Sales and Supply Corporation a mixed cargo of regular and premium unleaded gasoline on terms FOB Coryton Mobil Refinery Installation. The

¹⁸³ [2006] 1 Lloyd's Rep 1; [2005] EWCA Comm. 2122; 7 December 2005

terms of the contract provided that the cargo was to comply with Colonial Pipeline Specifications ("CPS"). The quantity and quality were to be determined at load port by mutually acceptable independent inspectors appointed by Mobil and costs of the inspection were to be shared equally. The results of the inspection would be "*final and binding for both parties save for fraud or manifest error*".

Mobil appointed ITS to inspect the cargo and their instructions included a copy of the CPS, which prescribed a maximum RVP ("*Reid Vapour Pressure*") of 9.0 psi as arrived at by test method ASTM D5191. It turns out that ITS used a different method, ASTM D323, and tested all four parcels. It however stated in its final report to AIC that only the final parcel exhibited a different result, but, after re-testing with a volumetric composite of all four tanks, the results were acceptable.

AIC sold the same cargo of oil to Galaxy Energy, who took over the loading of the oil. This was suspended however due to the rising pressure of the oil. AIC tried to argue that the certification which it had received from Mobil was in place when Galaxy refused the cargo following the rise in pressure.

On 16 April, following Galaxy's complaints, ITS arranged for residues of the load port shore tank samples to be sent for re-testing, this time using the ASTM D5191 method. The results of the re-tests showed higher RVP in three of the four samples and an overall average for the four tanks of 9.33 psi. Neither Mobil nor AIC were informed of the re-tests, nor of the results. In the course of a telephone conversation on 17 April, a representative of ITS stated, "*we will be*

standing by that certificate", when AIC referred to the certificate of quality ITS had issued. ITS by this time knew the results of the re-tests but said nothing about them.

Creswell J's observation of inspection companies is fairly instructive and a positive analogy can be made with Classification Societies where he said:

"It is convenient to refer by way of introduction to the position of inspection companies. Inspection companies are instructed in connection with domestic and international documentary sales because they are understood and expected to have the necessary facilities and expertise to enable them to determine whether the seller has performed its contract in the relevant respects and are trusted to exercise independent judgment. Although an inspection company may receive its instructions from the seller (in the present case from both the seller (Mobil) and the buyer (AIC)) it will be aware that its certificate is likely to be required for presentation to the buyer and any sub-buyer (in the present case Galaxy) and/or to a bank or banks as part of the documentation against which payment is to be made. An inspection company is aware, therefore, that the buyer and/or sub-buyer and/or a bank which ultimately has recourse to a buyer/sub-buyer, will rely on the existence and accuracy of its certificate in paying the price for the goods. The buyer and/or sub-buyer is the person whom the inspection company should have in contemplation as the person most likely to be affected by any error in the certificate. Absent contract, this is a classic example of the situation envisaged by Lord Morris in the Hedley Byrne case, in which a person with particular expertise is instructed to produce a report which he knows will be passed on to another, who can be expected to rely on it. It is inherent in the nature of the task undertaken by the inspection company that it assumes responsibility to the buyer and/or sub-buyer for what is stated in the certificate. That is the whole purpose of its employment.¹⁸⁴

¹⁸⁴ *ibid*, at 5

In its dealings with both AIC and Mobil, the Judge noted after analysing the International Standards in place at the material time (NAMAS Accreditation M10) which were reflected in ITS' own quality control manual, that ITS was obligated to :

- to determine whether Mobil had performed its contract with AIC in the relevant respects, applying the test methods specified in the instructions given;
- to exercise independent and impartial judgment and to act as an independent and impartial inspection company at all material times;
- to report the results of tests independently, accurately, clearly, unambiguously and objectively;
- to include in any certificate all information relevant to the validity and application of the test results and all information required by the test method and procedure used;
- to make it clear whether the results reported refer to tests carried out on a single item or a batch of items, including where relevant details of any sampling carried out;
- to include in any certificate:
 - any departures from standard condition;
 - reference to the test method and procedure used;
 - any standard or other specification relevant to the test method or procedure; and
 - deviations, additions to or exclusions from the specification concerned;
- to issue material amendments to any certificate in the form of a further document by way of a Supplement, with a statement to the effect that the same should be passed on to any person to whom the original certificate had been provided;
- where a complaint or other circumstance raised doubt concerning the quality of the tests, to ensure that the relevant work/tests were promptly audited and reviewed;
- where the audit/review findings cast doubt on the correctness of the test results so as to necessitate a supplemental certificate, to write to Mobil and AIC immediately, enclosing the Supplement with a statement to the effect it should be passed on to any person to whom the original certificate had been provided.

Essentially, ITS had erred on two grounds – firstly, it had neglected to inspect the oil with the agreed test of ASTM D5191, and secondly, even after it eventually used the initially agreed test on the cargo of oil after Galaxy's complaint and suspension of discharge, it maintained that 'it stood by its earlier Certificate', which was clearly not the true picture as things stood.

The analogy between the above defendant companies in the course of their duties and Classification Societies is not too far-fetched. Where reliance can be shown by the plaintiff on the actions of the defendant inspection company, a duty of care emanates. The courts appear to have gone the extra distance in the above cases in holding that the defendants ought to reasonably expect other parties besides the ones they are in actual contract with to rely on their expertise. This is more so where there are clear indications alluding to such like in the *Niru Battery case* where there were specific procedures regarding dealings with Iran, and in the *AIC case* where a particular method of oil testing was recommended but the defendant refrained from using it. By application to Classification Societies, in the *Nicholas H case*, where Mr. Ducat was called upon to assess the damage to the vessel, it can be assumed that he was well aware of the cargo in the vessel, enough to initially recommend permanent repairs, before being prevailed upon by the Ship-owner's representatives and re-recommending temporary repairs. With the intervention of the ship-owners, it can be argued that the Ship-owner ought to have incurred some further liability and not relied on his limitation of US\$500,000 because there has been some element of negligence/collusion on their part.

An ideal question to ask will be: what standard of care can derive from Classification Societies to other parties? Will it be the same standard expected of a medical practitioner to a patient; a solicitor to a client; a banker to his customer; or an architect to the owner of a building? It will

certainly fall in the pattern of what Lord Devlin termed a 'special relationship'¹⁸⁵ in *Hedley Byrne*. An idea of the level of liability or non-liability can perhaps be gleaned from the cases that have come before the Courts. The above professionals could be termed consultants as well and this is a mould classification Societies are fast garnering for themselves. Starer notes that while

Class supposedly charge a nominal fee for their services, they are more than making up for the difference by acting as consultants. He asks 'is the time-honoured perception of classification societies as not-for-profit entities whose main concentration is to protect the maritime community still accurate?' To this he vehemently replies:

"Unfortunately, the answer is no. Classification societies have gradually become more concerned with their company's bottom line than overall safety. Through synergy, classification societies have used their client contacts in the surveying world to offer a variety of for-profit consulting services. Unlike vessel surveying fees, which are relatively small when considered individually, consulting fees can be lucrative and add a new profit centre for classification societies. Granted, this business model is not unique to the classification society world. Accounting companies were working under the same auditing/consulting model for years until one of the worst corporate frauds in recent history - the Enron scandal - came to pass."¹⁸⁶

This does not bode well for the maritime industry should the fate of Enron and its auditing company, Arthur Andersen, befall the maritime arena and its various participants.¹⁸⁷ Perhaps it

¹⁸⁵ *Hedley Byrne v. Heller*, op cit, at p.515

¹⁸⁶ Starer, B.D., 'Class Reform', op cit

¹⁸⁷ Easily one of the major financial scandals of the 2000s, Enron in the United States of America until recently had Arthur Andersen as its auditors and it happened that the accounting company made huge profits from acting in a consultative role as well. This latter role made it gloss over the accounting practice of Enron's books which turned out to be false. The lead parties in the saga have recently been sentenced for the massive loss to the investors and staff of the company.

is a show of self-preservation, but most of the Classification Societies have taken up other pursuits not aligned by any stretch of imagination with marine vessel inspection and survey and have actually diversified to other forms of transport as well – rail, road and air.

With the cases of the *Erika* and the *Prestige* currently playing themselves out in the Courts, it remains to be seen if the hitherto seemingly, water –tight, picture of non-liability to third parties and contractual parties will be a thing of the past. For this all concerned parties avidly await.

Chapter Four.
The IMO (International Maritime Organisation)
and European Union (EU) Initiatives on
Classification Societies

4.1 Introduction

The *Erika* incident on December 12, 1999 made it all the more imperative for the need to revisit the existing EU Directive on Ship inspection and survey, the 94/57/EC, Directive whereupon the European Council invited the European Commission to introduce proposals on an effective amendment on the existing Directive. A 121-page document was the result of the deliberations, which initially advocated a 2-stage directive which was aimed at Port-State Control service; classification societies; tankers within a certain age-bracket and the need for double-hulled vessels as opposed to single-hulled ones. Lately, a third part has been included in what is termed the '*Erika III Package*'¹

This section will analyse the efforts of the key organisations which have guided and formulated policies affecting Classification Societies and the role they play, particularly the public role of undertaking statutory certification on behalf of national maritime authorities. In contemplation here are the **International Maritime Authority (IMO)** and the **European Union (EU)**.

4.2 International Maritime Organisation (IMO)

4.2.1 Origins and development

With shipping being the most global industry coupled with its element of danger, it became apparent that to foster safety at sea, treaties had to be adopted by maritime countries to be ratified into their national legislation. Some countries went as far as proposing for the

¹ Details of this package was released in November 2005, and is discussed later in this chapter

establishment of a permanent international body that will promote safety more effectively. This became even more glaring following the tragedy of the *Titanic* in April 1912, one of the most tumultuous maritime events of the early 20th century. By modern standards, the design of the *Titanic* made her appallingly vulnerable. Her "watertight" bulkheads, by design, did not extend all the way to the overhead because the engineers calculated that it was impossible for the ship to take on a trim or list sufficient for water to cascade over their tops if the bulkheads were of a certain height.

When *Titanic* struck the iceberg, these calculations were proven dismally incorrect. When people began abandoning ship, it became obvious that not nearly enough lifeboats were available. Many lives and much money were lost in this tragedy. Prior to the collision, every maritime country had made its own rules about ship design, construction, and safety equipment. The *Inter-Governmental Maritime Consultative Organization (IMCO)* was formed in response to the *Titanic* event, but was more or less in abeyance following the World Wars. After the war ended, IMCO was revived following a formal adoption of the Convention in Geneva in 1948 and entered into force in 1958.

The purposes of the Organization, as summarized by Article 1(a) of the Convention, are "to provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships". The Organization is also empowered to deal with administrative and legal matters related to these purposes.

The Governing Bodies of IMO are:

- 1) the Assembly, which meets every two years and is open to participation by all Member States; and
- 2) the Council, the only elected Body, composed of 32 Members (recently enlarged to 40 Members), which meets every six months.

The technical and legal work of IMO is carried out in specialized committees, open to participation by all Member States. Intergovernmental and non-governmental organizations, with specific competence and know-how, take active part in the work of IMO. The committees meet at regular intervals, in average every six months. The main committees are the Maritime Safety Committee (MSC), the Marine Environment Protection Committee and the Legal Committee.

The IMO sought primarily to update the Safety of Life at Sea Convention (SOLAS), which was adopted in 1960. Through the years, SOLAS has been modified and upgraded to adapt to changes in technology and lessons learned. With the adoption of the SOLAS Convention, others Conventions followed suit regarding the international maritime traffic, load lines and the carriage of dangerous goods.

With the IMO beginning to look like an incidence-based outfit, the *Torrey Canyon* episode in 1967 served to reveal yet another headache in the form of pollution. The amount of oil being transported by sea as well as the size of the tankers was growing astronomically and this reasonable cause for thought to the IMO. During the next few years IMO introduced a series of measures designed to prevent tanker accidents and to minimize their consequences. It also

tackled the environmental threat caused by routine operations such as the cleaning of oil cargo tanks and the disposal of engine room wastes - in tonnage terms a bigger menace than accidental pollution. The most important of all these measures was the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78). It covers not only accidental and operational oil pollution but also pollution by chemicals, goods in packaged form, sewage, garbage and air pollution.

IMO was also given the task of establishing a system for providing compensation to those who had suffered financially as a result of pollution. Two treaties were adopted, the Civil Liability Convention in 1969 and the International Convention on the Establishment of an International Fund for Compensation (The Fund) in 1971, which enabled victims of oil pollution to obtain compensation much more simply and quicker than had been possible initially. Both treaties were amended in 1992, and again in 2000, to increase the limits of compensation payable to victims of pollution.

Technological advancement and innovations came to play its part in the IMO with which it was able to make major inroads in marine communication especially in times of distress. A global search and rescue system was embarked upon as well the establishment of the International Mobile Satellite Organisation (IMSO), which potentially saw a marked improvement on radio messages to vessels. Further, the Global Maritime Distress and Safety System was initiated in 1992 and became fully operational in 1999, whereby a vessel situated on any sea in the world is assured of assistance at the sign of distress through messages transmitted automatically, especially if due to lack of time the crew on the distressed vessel cannot radio for help.

The IMO promptly turned its attention to the safety of tankers, bulk cargoes, liquefied gas tankers and other types of vessels. The welfare of crew members was not out of the picture either with the adoption of the **International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW)** which establishes basic requirements on training, certification and watchkeeping for seafarers.

IMO treaties/conventions can be broadly divided into three main groups: 1) those concerning safety of navigation²; 2) those dealing with preventing and combating marine pollution³; and (3) those regulating liability and compensation issues, especially in relation with damage by pollution.⁴ It is observed that these conventions invariably work hand in hand to the extent that

² Among the most important conventions adopted at IMO on safety of navigation are the International Convention for the Safety of Life at Sea (SOLAS 1974), which has been accepted by 145 States, whose combined merchant fleets represent 98.67 percent of the world tonnage; the Load Lines Convention (LL 1966), which has been accepted by 149 countries, whose fleets represent 98.63 percent of the world tonnage; the International Regulations for the Prevention of Collisions at Sea (COLREG 1972), which has been accepted by 140 States with 97.47 percent of the world tonnage; the Convention on Standards of Training Certification and Watch-keeping for Seafarers (STCW 1978), which has 140 States Party with 98.64 percent of the world tonnage; and the Convention on Maritime Search and Rescue (SAR 1979), which has been accepted by 73 countries, with 47.21 percent of the world tonnage. The data is based on the advice of a senior legal officer at the IMO.

³ The main anti-pollution conventions include: the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), which has been accepted by 121 States, whose fleets represents 96.41 percent of the world tonnage; the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matters (LC 1972), which has been accepted by 78 States, representing 69.30 percent of the world fleet; the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC 1990), which has been accepted by 66 States, representing 53.76 percent of the world fleet; and the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (INTERVENTION 1969), which has been accepted by 77 States, representing 71.21 percent of the world fleet.

⁴ The consequences of accidents are governed by a regime constituted by two IMO treaties: the Civil Liability Convention for Oil Pollution Damage, 1992 (1992 CLC) and the International Convention on

all vessels ideally cannot dispense with any of the certificates that the relevant Treaty covers. This is where Classification Societies operate in their public role of certifying these vessels on behalf of the Flag States with whom they are registered.

Despite the intentions of the IMO and its tenets to promote maritime safety and prevent pollution, resulting in numerous adoptions of Conventions, Resolutions and Regulations and the attendant amendments, it is sadly observed that they have not necessarily had the desired effect of being implemented by the member Governments into national law in their countries which has had some cynics refer to the IMO as a toothless bulldog.

Through the establishments of regional Port State Controls (PSCs) to inspect vessels arriving at national ports of member countries, IMO has attempted to regulate the implementation of its Conventions and Regulations. This is in conjunction with the initiative of EU Directive on PSCs proposed by the Commission as part of the Erika I package to strengthen port State inspections in EU States, which entered into force in July 2003

The World Maritime University, Malmö in Sweden, a brain-child of the IMO was established in 1983 in a move to provide training in technical knowledge and expertise to Governments and improve their maritime departments. Ideally, the idea behind the institution was that individuals employed in the various endeavours of the maritime sector of national Governments will benefit

the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (1992 Fund Convention). Together, these two treaties constitute a system for sharing the cost of liability for oil pollution damage between ship-owners and cargo owners.

from the training at the University, which has the benefit of the most notable lecturers formerly involved in every other facet of shipping.

The 90s saw the introduction of two initiatives in keeping with the tenets of the IMO on safety and prevention of pollution namely the International Convention on Standards of Training, Certification and Watch-keeping for Seafarers (STCW), 1978 which was amended in 1995 and entered into force in February 1997. This was promptly followed by the International Safety Maritime Code (ISM), which entered into force in July 1998 and applied to passenger ships, oil and chemical tankers, bulk carriers, gas carriers and cargo high speed craft of 500 gross tonnage and above. By July 2002, it became applicable to other forms of cargo vessels as well as mobile offshore drilling units of 500 gross tonnage and above.

Prior to September 11, 2001, IMO had begun work on the International Ship and Port Security Code, which was designed to provide guidance for shipowners and port facilities in establishing strict security procedures to prevent weapons of mass destruction and other contraband from being transported by ship. The tragic events of 9/11 created greater urgency to this effort and, in December 2002, new amendments to the 1974 SOLAS Convention were enacted. These amendments gave rise to the International Ship and Port Security Code, which went into effect on July, 1, 2004.

The ISPS Code required most ships and port facilities engaged in international trade to establish and maintain strict security procedures as specified in ship and port specific Ship Security Plans and Port Facility Security Plans. The concept of the Code is to provide layered and redundant defenses against smuggling, terrorism, piracy, stowaways, etc.

The IMO is also responsible for publishing the International Code of Signals for use between merchant and naval vessels.

On the issue of Class and in deference to IMO, deliberations were ongoing regarding the relationship between the Classification Societies and Ship-owners and Flag-states before the *Erika* met its fate on the Bay of Biscay in December, 1999. Proposals were being worked on by the **Comité Internationale Maritime (CMI)** regarding the modification of the contractual relationship between Classification Societies and their clients. Further, the IMO had already initiated proposals on the phasing out of single-hulled tankers in favour of double-hulled tankers in the amendment to the **International Convention for the Prevention of Pollution from Ships (MARPOL) 73/78** adopted on March 6, 1992 and effective from July 6, 1993. The measures therein recommended that vessels delivered on or after July 6, 1996 should have double hulls or an equivalent design to prevent oil pollution in the event of stranding or collision.⁵ 2026 was slated as the final deadline for the conversion of single-hull tankers to double-hull or equivalent design standard, which as will be seen in the course of this section was not adequate enough to prevent the plague of woe that single-hull designs can inflict.⁶

The **Comité Maritime Internationale (CMI)** on its part had actually proposed a model contract governing the relationship between class and ship-owners in 1998, just a year before the *Erika*

⁵ Also inclusive in those measures were recommendations for single-hulled tankers to be delivered before July 6, 1996 and the scheme for this set of vessels came into force on July 6, 1995, where by the provisions of Regulation 13F of Annex I of MARPOL 73/7 vessels delivered before June 1, 1982 were required to comply with double-hulled or equivalent design standards before turning 25 years old, an in some exceptional cases, 30 years old. In effect, the cut off date for these vessels was between 2007 and 2012.

⁶ The *Erika* and its attendant packages have worked to put the initial deadline of 2026 recommended by the IMO into abeyance.

mishap. It will be worthwhile to bring to the fore the antecedents of the Erika later in this section.

4.3 The European Union (EU)

4.3.1 Origins of the EU

Following the end of the Second World War, the desolation of Europe brought about a plan to re-unite the France and Germany to bring about a semblance of peace. This was achieved through the avenue of the European Coal and Steel Community (ECSC) at the initiative of Robert Schuman, the French Foreign Minister, who proposed that both countries' coal and steel production should be mutual. This came to be known as the Shuman Declaration.

This alignment appealed to Belgium, Italy, Luxembourg and the Netherlands, who collectively merged their national interests in these industries and in March 1957 with the signing of the Treaty of Rome, the members of the ECSC formed the European Economic Community (EEC) with the aim of developing a common market for goods and services. The Treaty also created the European Atomic Energy Community. Within this period, the Common Agricultural Policy to support farmers was also established.

The stage was now set for growth with the Denmark, Ireland and the United Kingdom joining in 1973.⁷ Greece joined in 1981; Portugal and Spain in 1986; Austria, Finland and Sweden in 1995; and the most inclusion occurred in 2004 with Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia joining in May 2004.

The members of the European Parliament were initially drawn from national parliaments, but in 1979 the first elections into the Parliament were held. Following this milestone was the **Single European Act** which came into force in 1987 and set out the timetable for the creation of the Single Market by 1993, leading to the world's largest trading area and the free movement of goods, capital people and services.

The term 'European Union' was adopted in the Maastricht Treaty in November 1993, which propagated new areas of European co-operation regarding foreign and security policy, justice and home affairs. The Treaty also introduced a timetable for the economic and monetary union leading to the single currency. With the Treaty of Amsterdam in 1999, the powers of the European Parliament were further extended in foreign policy and home affairs.

The end is not yet in sight in terms of the extending the boundaries of the EU, with the signing of the Treaty in Nice in December 2000, paving the way for even more countries in Eastern Europe and the Mediterranean to join the Union.⁸

⁷ The United Kingdom had earlier wished to join in the mid 60s, but this was strongly opposed by France, whose President then was General Charles DeGaulle, it tried again in 1969 and this time France under the leadership of Georges Pompidou, was tentatively amenable so long as the UK could prove that its economy would not prove to be a hindrance to the development of the Community.

⁸ There has been and still is a lot of debate regarding Turkey joining the EU. The country predominantly muslim has had Greece adamantly dissent to the prospects of the Turkey being a

The Euro was launched in 1999, and in 2002 became the currency for the EU except Denmark, Sweden and the United Kingdom. The latest 10 members that joined in 2004 have been mandated to fulfil certain economic criteria in terms of a high degree of price stability, a sound fiscal situation, stable exchange rates and converged long-term interest rates. The EU to this end has the benefit of the expertise of the European Central Bank to assist it in the assessment of the viability of the newer EU members adopting the Euro as their currency.

Today the EU has five main institutions which comprise the European Parliament that represents the peoples of the Member States; the Council of the European Union that represents the Governments of Member States; the European Commission, which is the Executive Body and initiates policy; the Court of Justice, which ensures that the Member States comply with the EU law; and the Court of Auditors, that controls sound and lawful management of the EU budget. In a speech at a Delegation visit to Japan, Ambassador Bernhard Zepter categorised the achievements of the EU as:

“Firstly, the introduction of a common currency, the Euro, adopted by 12 of our 15 Member States. The Euro is not only a necessary completion of the internal market but also a tool to stabilize the macroeconomic environment;

Secondly, the establishment of a common trade policy which takes into account the fact that in combining the trade of 15 Member States the EU is second to none in international trade. The pooling of competence has made the EU the most powerful actor in the multilateral trading system;

member in the future except it aligns itself as part of itself (Greece) Other EU members appear positive on Turkey joining the EU rather than it was an outsider.

Thirdly, the common agricultural policy to stabilize income on the highly volatile international agricultural markets, thereby contributing to food security and food safety as well as a stable social structure in rural parts of Europe;

Fourth, the common action in the field of communication and information through improvements in the European infrastructure and the creation of enhanced communication networks, including the GALILEO satellite navigation project;

Fifth, an important budget for common action the field of basic research and technological development, completing activities of Member States and interconnecting them through additional financial incentives;

Sixth, common policies and actions in fields like environmental protection, healthcare, consumer protection, transport ("trans-European Networks"), police and judicial cooperation, industrial policy, labour and social rights, culture and education and many other areas."⁹

The fourth and sixth points above are areas concerning Classification Societies where the EU has featured prominently in as much as it may appear that it may have needed the added impetus of some disasters for it to bite the bullet.

4.4 Events Prior to IMO and EU intervention on Class and Pollution

Public opinion has appeared been one of tolerance regarding pollution-causing vessel mishaps, and this was reflected by the inability of the IMO to effectively ascertain that its Regulations were ratified and made into national law by its member states. It should be mentioned at this point that most of the initiatives leading to Directives or Regulations from the IMO and other similar bodies have largely tended to be reactionary.¹⁰

⁹ Zepter, B, 'The European Union : an Area of Peace and Prosperity', http://jpn.cec.eu.int/home/speech_en_Speech20102005.php

The *Torrey canyon* mishap in 1967 brought to the fore the danger that increased growth in tankers and ship size caused to the environment. On March 18, 1967, the Liberian oil tanker, *Torrey Canyon*, operated by a subsidiary of the Union Oil Company of California and loaded with 121,000 tonnes of crude oil, ran aground between the Scilly Isles and the British coast. In spite of heavy response with dispersants and all available recovery means available, oil slicks drifted in the Channel, reaching the French and British coasts.¹¹

A distinguishing feature of the *Torrey Canyon* response operation was the excessive and indiscriminate use of early dispersants and solvent based cleaning agents, which caused considerable environmental damage. The dispersants were generally successful at their task of reducing the amount of oil arriving ashore and subsequently expediting onshore cleanup operations, but they were considerably more toxic than those used today and were applied in far greater concentrations, often being poured undiluted on slicks and beaches. Many of the detrimental impacts of the spill were later related to the high volume, high concentration and high toxicity of the dispersant and detergents used.¹²

The oil spill from the vessel manifested the enormity of such a situation considering the various means exercised in the clean-up exercise and had the added notoriety of the United Kingdom

¹⁰ In a bid to shy away from the perception of a knee-jerk reaction to maritime accidents, the erstwhile named Erika III package has been renamed the Third Maritime Safety Package as will be seen further in this section

¹¹ http://www.le-cedre.fr/index_gb.html

¹² <http://www.itopf.com/casehistories.html>

waiting a whole week before resorting to bombing the wreck due to uncertainty on the legal position of such an action.¹³

This accident made Europe discover a risk which had been neglected. It gave birth to the first elements of the French, British and European policies of prevention and response against great oil slick disasters. The IMO purported to eventually adopt the **MARPOL** in 1973. This was later amended in 1978. The *Torrey Canyon* was also incidental to the emergence of the **International Convention on Civil Liability for Oil Pollution , 1969 (CLC)**, which provided for the liability of Ship-owners for persistent oil discharge into coastal waters causing damage to third parties' property.¹⁴ Under the Convention, the Ship-owners could limit their liability from 2000 gold francs or US\$81 per limitation tonne to a maximum of 210 million francs, so far as they could prove no actual fault of privity on their part.¹⁵ Further tanker owners could invoke a limitation to a certain amount in the event they constitute a fund for that amount in the Court where the action had been brought.

¹³ This incident laid the grounds for the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 (INTERVENTION 1969)

¹⁴ The *Torrey Canyon* was also innovative in advancing the now defunct Tovalop (Tanker Owners Voluntary Agreement concerning liability for Oil Pollution) and Cristal (Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution) Agreements. The former was a voluntary initiative by Tanker owners and came about in 1968/69. The latter was ancillary to the Tovalop and applied where cargo spill arose under the provisions of CLC, or the tanker was involved in the Tovalop agreement

¹⁵ The 1984 Amendment to the CLC in Art. V, Paragraph 1 provides, 'the Owner of a ship shall be entitled to limit his liability under this convention in respect of any one incident to an aggregate calculated as follows:

- a. 3 million units of account for a ship not exceeding 5,000 units of tonnage
- b. for a ship with a tonnage of in excess thereof, for each additional unit of tonnage , 420 units of account in addition to the amount mentioned in sub-paragraph (a); provided however that this aggregate amount shall not in any event exceed 59.7 million units of account.

The CLC led to the promulgation of the **International Convention on the Establishment of an International Fund for Compensation (The Fund), 1971**.¹⁶ The essence of the Fund Convention was to include the cargo interests, i.e. the oil industry in the scheme of things. It was perceived that liability alone on the vessel owners did not give a true picture of responsibility, and it applied where a tanker owner was not liable under the CLC; not able to fulfil the CLC requirement or the insurance is inadequate; or the value of damage exceeds owner's liability under CLC. At its inception, the maximum compensation the Fund could pay out was 450 million Francs or US\$89 million, which was amended in 1992 to 135 million units of account in Art 4 (4) (a)¹⁷. The limits payable to victims of pollution under the CLC and the Fund have been further increased whereby the Owner was liable to a maximum of US\$81 and the cargo-owners under the Fund liable to a maximum of US\$201 (inclusive of owner limit) for incidents prior to November 2003. For events after this date, both parties are liable to a maximum limit of US\$133million and US\$301 million respectively (which includes the amount paid by the vessel-owner or his insurer).

The incidence of the *Torrey Canyon* was almost duplicated in the *Amoco Cadiz*¹⁸, when the latter after undergoing steering failure in stormy weather broke up and spilled the whole cargo of about 219,617 tonnes of light crude in March 1978, polluting over 60 miles of the Brittany coast despite attempts to salvage the vessel and dropping anchor. It was a picture of confusion

¹⁶ Amended in 1992

¹⁷ This may increase to 200 million units where there are three parties to the Convention, whose companies in their territories have received oil equalling or exceeding 600 million units in the preceding year

¹⁸ [1984]2 Lloyds Rep, 304; United States District Court, Northern District of Illinois, Eastern Division, April 18, 1984

with various actions and counter-actions being filed by the parties in question. The subrogated owner of the cargo, Petroleum Insurance Ltd, who was the underwriter for the cargo-owners, Amoco International Oil Company., (AIOC) sued for the value of the cargo. AMOCO Transport (owner of the vessel) and AIOC, both subsidiaries of Standard Oil Company, were sued by a consortium of the French Government, the competent administrations, municipalities, individuals, businesses and associates (collectively called the French Claimants) for negligence during the construction, maintenance and operation of the vessel. One of the French administrative Departments, Conseil General des Cotes du Nord, and the Amoco parties (Amoco Transport and AIOC) all sued the salvor, Bugsier Reederei Und Bergungs, A.G., (owner of the *Pacific* which had attempted to salvage the *Amoco Cadiz*) for negligence which allegedly caused the grounding of the vessel. The French Claimants were sued by the Amoco parties for neglecting to prevent or contain the spill; and Cote du Nord sued the shipyard, *Astilleros* (builder of the *Amoco Cadiz*) for negligence in the design and construction, who was also sued in a third-party claim by the Amoco Parties for contribution and indemnity in the event they were held liable to the French Claimants.

The French Claimants were successful in their claim against the Amoco Parties, who were held entitled to claim some indemnity from the shipyard due to design and construction faults. The salvor was held not liable to the Amoco Parties or the French Parties 'because a salvor whose efforts are unsuccessful is not liable for losses sustained either by the owners of the property he has endeavoured to save or third parties, in the absence of proof of causative gross

negligence or wilful misconduct'¹⁹ Further AIOC, which was deemed not to be an agent of Amoco Transport but rather an independent operator, was liable to pay compensation to the plaintiffs under the CLC 1969. In as much as the United States was not party to the Convention, the CLC was not designed to exculpate major companies from suit, rather it was the Master (agent of the and crew of the vessel who are deemed incapable of bearing such financial liability and against whom action would be foolhardy. The counter-action against the French Claimants was held to be of no consequence because there was no duty owed by the French to the Defendants to cater for the welfare of its citizens in regard to the clean-up exercise.

The Classification Society that inspected and surveyed the *Amoco Cadiz* was the American Bureau of Shipping (ABS), and no precise statement was made on its possible liability by the American Court at that instance. It is widely believed that ABS was able to escape liability due to having contributed to the compensation of the victims of the *Amoco Cadiz* spill. This incident was unique in the sense that it spurred the EU into action for the first time. 'An ambitious programme of proposals was presented, which resulted, in the end simply, in a number of formal declarations or resolutions, encouraging Member-states to ratify the IMO and ILO Conventions'²⁰

¹⁹ *'The Amoco Cadiz'* ibid, p.336

²⁰ 'Communication from the Commission to the European Parliament and the Council on the Safety of the Seaborne Oil Trade', Commission of the European Union, Brussels, 21.3.2000, Com (2000) 142 final, p.4

The United States adopted a unilateral position upon the incidence of the *Exxon Valdez*, which culminated in the **Federal Oil Pollution Act, 1990 (OPA90)**²¹ whereby the vessel owner, demise charterer and an operator²² were jointly, severally and strictly liable. Interestingly, cargo-owners under the OPA90 do not play a part in or contribute to liability, unlike the position in the Fund Convention, 1971, amended in 1992. In defence of its supposedly softer approach towards pollution, the EU has said:

“Following the Erika and Prestige accidents, the EU acted urgently in order to establish a defensive mechanism designed to protect Europe against the risk of accidents and pollution. The EU has at times been reproached for having a calmer attitude than the United States which, through OPA 90 (Oil Pollution Act), reacted unilaterally to the Exxon Valdez accident. This disregards the fact that Europe is not in a situation comparable to that of the United States. Europe's basic problem is transit traffic, outside the jurisdiction of the Member States, involving high-risk vessels flying the flag of third countries: some 200 million tonnes of crude oil and petroleum products⁶ are moved each year off our coasts without control being possible in an EU port.”²³

Siccardi observes that the main focus of the CLC Convention is on the provision of adequate compensation for the victims of pollution, and not necessarily the sanction or punitive measures

²¹ Liability here entailed US\$1,200 per gross tonne or \$10million, the greater of any for tankers exceeding 3000 gross tonnes, and \$1,200 per gross tonne or \$2 million the greater of any for tankers of 3,000 gross tonnes or less.

²² Hill advises that legal opinion alludes to an operator as including a manager who is in control or possession, i.e. not including a time or voyage charterer, *Maritime Law*, op cit, p.443. Going by this premise, a plaintiff will be hard put to hold a Classification Society liable as being in control or possession of the vessel, going by the decisions in cases like *Great American Insurance Co. v. Bureau Veritas*, and the *Sundancer*

²³ www.europa.eu.int/comm/transport/maritime/safety/doc/package3/en/communication_en.pdf, p. 5

for the polluters or agents ancillary to the cause of the pollution²⁴, going by the preamble in both the CLC and the Fund Convention which both state '*convinced of the need to ensure that adequate compensation is available to persons who suffer damage caused by the pollution*' He adds to this point by denoting three factors, which include:

- i. the liability is channelled onto a subject who will not be necessarily and always the party primarily liable for the incident (in the case of pollution where the other vessel is entirely or partly to blame) nor the party having responsibility for the exploitation of the ship (where the vessel is chartered by demise – bareboat or similar Charter Party);
- ii. this liability is (or was) limited to comparably low values and protected by insurance;
- iii. the majority of the resources in the 1969-1071 system comes from the oil companies and is not related to the single incidents but to the quantity oil imported and generally such contribution considerably exceed the Owner's limit²⁵

He is also of the view that Class is implied to be among the parties who are exempted from liability under **Art. III (4)** of the CLC. The term 'channelling' is used to show the essence of liability being laid at the foot of the vessel-owner and as a throw-back to the notion that ideally he alone is responsible for the seaworthiness of his vessel subject to the relevant exceptions as enunciated in the Hague-Visby Rules. Art.III (4) states as follows:

²⁴ Siccardi, F. 'Pollution Liability and Classification Societies; Is the System a Fair One?', seminar at Piraeus, October 2004, p.319

²⁵ *ibid*, p. 321

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

- a. the servants or agents of the owner or the members of the crew;*
- b. the pilot or any other person who, without being a member of the crew, performs services for the ship;*
- c. any charterer (howsoever described, including a bareboat charterer) manager or operator of the ship;*
- d. any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;*
- e. any person taking preventive measures;*

- f. all servants or agents of persons mentioned in subparagraphs (c), (d) and (e);*

unless the damage resulted from their personal act or omission, committed with knowledge that such damage would probably result"

In his analysis, while acknowledging that certain authors²⁶ are disinclined to accept that Classification Societies are contemplated as parties exempted in Art.III (4) of the CLC, Siccardi gives a multi-faceted depiction of the various construction by way of interpretation in a bid to decipher if indeed Class is one of the exempted parties and he concludes that in line with the common law position in the United Kingdom and the United States, Classification Societies are most likely exempt. This does not however appear to be the position in the civil law jurisdictions

²⁶ Gauci, G. 'Oil Pollution at Sea', Chichester, 1997, p.108, and De La Rue, C. & Anderson, C.B., 'Shipping and the Environment', LLP, London, 1998, p.98

in Europe especially France²⁷, Italy²⁸ and Art.914 of the Greek Civil Code modelled on the former two. By virtue of the strict liability, in terms of the 'Classification Society committing a wrong; the claimant has suffered a loss; and the loss is consequence of the wrong,'²⁹ which the civil law jurisdiction operates, Class are more likely inclined to be found liable in the event of an action against them in that jurisdiction.³⁰

4.4.1 Directive 94/57/EC

With the OPA 90 taking force in the US, and instituting a regulatory framework on vessels, this had some impact on the EU. The 1990s introduced the element of qualified majority voting, which galvanised the adoption of the 94/57/EC Directive, which had the effect of:

- a. organising a stricter application of international trade at community level
- b. adoption of specific community provisions where IMO standards are lacking or inadequate³¹

²⁷ Art. 1382 of the French Civil Code – *'tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute dequel it est arrivé à le réparer*

²⁸ Art.2043 of the Italian Civil Code on Compensation for wrong acts – *'Any Fraudulent, malicious or negligent act that causes an unjustified injury to another obliges the person who as committed the act to pay damages'*

²⁹ Siccardi, op cit, p.331

³⁰ Please refer to the chapter on tort liability

³¹ Commission Report, op cit, p.5

On the theme of regulation, focus was cast on the administrations of flag-states and inspection and survey organisations – Classification Societies, and this paved the way for Directive 94/57/EC. Prior to the promulgation of this Directive, there was not a lot of focus on Classification Societies, as there was on flag- and port states. In as much as there were already certain international conventions, codes and resolutions in place regarding safety and prevention of pollution at sea, it was up to the flag-states and port state controls to ensure compliance with these international statutory requirements.

There was already the practice of delegating the compliance with international conventions to Classification Societies, however, there was no apparent pattern commensurate with the expected standards. As observed in the Preamble of Directive 94/57/EC:

“Whereas worldwide a large number of the existing Classification Societies do not ensure either adequate implementation of the rules, or reliability when acting on behalf of national administrations as they do not have adequate structures and experience to be relied upon and to enable them carry out their duties in a highly professional manner”³²

The above will appear to be in sharp contrast with the perception held of the older, more-established Classification Societies. Various authors³³ and the organisations themselves attest to the conventional practice of Flag-states delegating their vessels' statutory compliance duties to Classification Societies. More likely than not, the Classification Societies in contemplation in

³² 31994L0057, Council Directive 94/57/EC of November 1994 on Common Rules and Standards for Ship Inspection and Survey Organisations and for the Relevant Activities of Maritime Administrations.

³³ Machale Miller, 'Liability of Classification Societies from the Perspective of United States Law', *Tulane Maritime Law Journal*, Winter 1997, 75; Hannu Honka, "The Classification system and its problems with special reference to the liability of Classification Societies" (1994) 19 *Tulane Maritime Review*; and Jonathan Lux, *Classification Societies*. (1993)

the preamble are the lesser known organisations that do not have as much a stake as the older ones in protecting their reputation. Equally, these organisations do not necessarily have the wherewithal or easy access to research and development as the older Classification Societies.

With these in mind, grew the need to have in place some form of rules governing the survey and inspection activities of Classification Societies on behalf of Flag-states. What was in existence at this period were the Rules, Guidelines and Standards of the Classification Societies themselves on the one hand, and the Rules of the maritime administrations of the Flag-states on the other hand, with nothing at the international, or in this instance regional level to guide the relationship between Classification Societies and Flag-states. Below is a brief synopsis of the **Directive 94/57/EC**

Article 1

This article basically signifies the whole essence of the Directive and effectively constitutes a mini summary of the purpose of the Directive

Article 2 is on Definitions

Article 3

- a. Art.3.3 – Member-states to ensure that their competent administrations can assure an appropriate enforcement of the provisions of the international conventions regarding surveying, inspection and issue of certificates. What seems to obtain here is a double delegation. Firstly from the flag-state to the maritime administration, then from the

maritime administration to the Classification Society or recognised organisation as they are termed in the Directive. If there is any issue of liability, it will appear to lie with the competent administration of the Member-state going by the use of the words 'ensure' on the part of the member-state and 'assure' on the part of the maritime administration of the Flag-state.³⁴ It is also observed that maritime administration is the competent body to approve the first issue of exemption certificates.

Article 4 – Recognition

This provides for the criteria for recognition of Classification Societies by Member-State. Essentially the Classification Societies submit information to the Member-states based on criteria, following which the States will notify them appropriately of their recognition. Member-states then inform the Commission and other Member-states of recognition of the Societies. The Commission draws up a list of the Classification Societies, which it updates and they are termed 'Recognised Organisations'. This is published in the Official Journal of the European Communities.

Article 5 – Transparency and Objectivity

Ideally, Member-states should not refuse Classification Societies from working for them, however, they can restrict the number of Classification Societies that do work for them, which must reflect transparency and objectivity. Also there is an element of reciprocity involved

³⁴ Note *The Sundancer*, where ABS was held not liable *inter alia* because it was acting on behalf of the Bahamian Maritime Authority, whose sovereign immunity extended to it.

whereby a Member State allows a Classification Society of a third State to carry out required duties in Member State so long as a Classification Society in Member-State is accorded the same privilege in the third State.

Article 6 – Contract between Member-State and Classification Societies (Recognised Organisations)

Relationship between the above parties is crystallised by formal agreement between them which incorporates the Directive as well as international conventions such as the IMO Resolution A.739 (18). Duties and functions of parties are clarified with provision for periodical audit and inspection of vessels, availability of local representatives of the classification Society in the Member-State, and the Commission being notified of the working relationship between the parties

Article 7 – Committee

Provision for a Committee comprising representatives of the Member-states and chaired by a representative of the Commission. The Committee assists the Commission and is especially called in upon the suspension of a Recognised Organisation.

Article 8 – Amendment of Directive

This can be necessitated by amendments to relevant international conventions, codes and resolutions and as a follow up to the update of the criteria in the Annex in line with IMO provisions. Also the Council is responsible for ratifying relevant protocols to conventions and the simultaneous uniform application in Member-states.

Article 9 – Withdrawal of Recognition

Recognition can be terminated where the Classification Society does not fulfil the criteria in the Annex any more, with particular emphasis on its safety and pollution prevention records.

Article 10 – Suspension of Authorisation

Recognition can still be withdrawn even if Classification Society fulfils the criteria for being held as 'Recognised Organisations'. Here the Member-state seeking non-recognition of the Classification Society will inform the Commission and other Member-states with adequate reasons, and the Commission looks into the suspension. It will be acceded to where justified due to safety and environmental reasons. Where not justified, Member-state has to withdraw suspension.

Article 11 – Monitoring of Classification Societies

Member-states are to ensure that the Recognised Organisations fulfil criteria and required functions. This is done by monitoring them through the relevant competent administration or if the Classification Society is in another State, through that State's competent administration. Monitoring is biennial with report given to Member-states and the Commission by the following March 31 for domestic Classification Societies or by June 30 for Classification Societies in another Member-state.

Article 12 – Rights and Obligations of Port-States

There is the need for transparency for vessels flying a third State's flag by inspecting such vessels which bear certificates issued by Classification Societies that do not fulfil the criteria for

'Recognised Organisations.' Ships that do not meet international conventions are reported to the Commission and the Secretariat of the Memorandum of Understanding on Port State Control. Also the performance record of Recognised Organisations updated regularly and distributed among Member-states.

Article 13 – Procedure on Amendments, Withdrawal of Recognition, Suspension of Authorisation and Relevant Rules

The representative of the Commission submits a draft of measures to the Committee on the above, which deliberates on them and gives an opinion, based on weighted voting in the Committee, within a time limit specified by its chairman, who does not get to vote. In the event of a differing opinion from the Committee or no opinion at all, measures are referred to the Council. If Council does not act within three months, then the Commission adopts the measures.

Article 14 – Hull and Machinery Rules of Recognised Organisation

Member States to ensure that their vessel are constructed and maintained according to the above. Alternative rules other than the above are allowed only where the Commission and other Member States are duly informed (with no objection from them), that they are in line Directive 83/189/EEC, and there is no derogation from Article 13 above.

Article 15 – Periodical Consultation and Information among ROs

The ROs are required to confer with each other in regard to their technical standards and its implementation and notify the Commission of developments thereof. Port State Control administrations to be informed where there are reports of deficiencies or discrepancies,

change of class or declassing and ROs to withhold issuing certificates to a vessel its classification is compromised prior to confirmation competent administration that further inspection is not required.

Article 16 – Adoption and Communication of Directive

Member States are required to adopt Directive as their domestic law not later than December 31, 1995, which should have a reference to the Directive. The Commission is notified of such adoption, who communicates it to other Member States.

4.4.1.1 The Erika

The Erika, a 37,000 tonne Maltese single-hulled tanker, sank at the Bay of Biscay, off the coast of Brittany in France on December 12, 1999. The result, most prominent amongst others was the pollution of the ecological environment with the tanker's cargo, oil. The Italian Classification Society, Registro Italiano Navale, (RINA) had classified the tanker and along with the International Association of Classification Societies (IACS) bore the brunt of the criticisms levelled at this incident. In a news interview, Helge Midtun, who took over as the CEO of the Norwegian Det Norske Veritas (DNV) on May 25, 2000 said:

“DNV is disappointed that the international Association of Classification Societies (IACS) was unable to take firmer action at its Council Meeting last week in response to the Erika Accident. Ship Classification has a serious problem when the shipping market and public opinion expect firm and immediate action, yet the IACS response is to postpone the necessary decisions. We must look for the ways to restore the

confidence in class by improving the decision-making processes of IACS and how the organisation works"³⁵

This was in criticism of how IACS WAS alleged to 'paper over the cracks in the Classification system'³⁶ after the Erika incident. IACS on its part had initially released a statement on February 7, 2000 on the details of an Extraordinary Council Meeting on February 16, 2000 in Hamburg where IACS decided to strengthen its self-policing.³⁷ The decisions were:

- a. All ballast tanks adjacent to cargo tanks with heating oils should be examined internally on an annual basis after 15 years
- b. Immediate surveys will be enhanced to the scope of a special hull, with the exception of the dry-docking requirements for tankers and bulk-carriers of 15 years and older.
- c. Thickness measurements will be monitored more closely by an exclusive surveyor.
- d. The change of class procedure especially for certain older ships of 15 years and above to be enhanced by virtue of these particular vessels undergoing a special or intermediate survey, whichever comes first. This procedure will apply to any other type of ship over 20 years. Further, class records on thickness measurements to be supplemented by photos maintained in simple computerised format to be transferred from losing society to gaining society.

³⁵ www.marinelog.com/DOCS/NEWS/MMJun05.html

³⁶ *ibid*

³⁷ www.iacs.org.uk/press/2000/ExtCPR.pdf

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- e. IACS to urge IMO and EU Commission to harmonise the shipboard audits for the SMC with other statutory surveys in view of the fact of the satisfactory condition of a vessel being hugely reliant on its operation, and from the experience of the ISM on board audits.
 - f. Provision of an investigation Board, in the event of a serious casualty to make the necessary expertise available to the flag-state

The Erika represented what Ozcayir refers to as the polyglot nature of the tanker industry³⁸ by virtue of the Charterer being French, the owner being Italian, the crew were Italian, and the flag was Maltese, these obviously leading to the question of jurisdiction. The Erika commenced what resulted in her swansong on December 8, 1999 from Dunkirk, en route to Italy with a cargo of heavy fuel oil. Over 25 years old, the Erika was reaching the end of her shelf life and was what is called 'a bargain basement charter' in the industry by working for half the price of a safe modern tanker³⁹ She was one of eight sister ships built in Japan, safely built on a cheaper budget and reinforced with 10% less steel tankers of a similar size. Further, three of the sister ships had suffered major structural damage. These vessels came in handy at a time when oil charter prices increased in line with a tighter rein on tanker safety standards and the Erika and her sister ships were readily available for a reasonable price.

³⁸ Oya Ozcayir, 'The Erika and its aftermath', (2000) 7 IML 230-240, 230

³⁹ <http://news.bbc.co.uk/1/hi/programmes/correspondent/883110.stm>

The Erika ran into a heavy storm, one withstandable by tankers of its size. The storm worsened however and by midday, the vessel started listing to starboard by 10-12 degrees.⁴⁰ With tenacity of the storm, the vessel's hull cracked and started taking in water. According to the Captain of the Erika, 'the vessel began to unpeel like a sardine tin.'⁴¹ On the morning of December 12, 1999, it broke in two and sank 40 nautical miles off the southern tip of Brittany, spilling over 10,000 tonnes of heavy fuel oil, resulting in the pollution of almost 400 kilometres of the French coastline. The entire crew, 26 in total, was airlifted to safety. The two sections, with a further 15,000 tonnes of fuel oil remaining in the cargo tanks, sank in 120 metres of water about 100 km from the mouth of the River Loire. Minor leaks were sealed by remote operated underwater vehicles to await a salvage attempt when the weather improves. The spilt cargo was blown east towards the coast and on 25 December the first oil washed ashore. By early January of 2000, various stretches along a 400 km length of French coastline had been polluted, and thousands of seabirds had been oiled.

Among the actions taken by the Commission to limit the immediate environmental consequences of the Erika disaster, it facilitated assistance and at an early stage appointed a high level liaison officer on site, serving as a link between the French operational command and the foreign ships which were assisting. Following French requests, immediately passed on by the Commission, 26 kilometres of oil booms from 11 European countries as well as bird washing machines were immediately made available. Voluntary organisations assisted in particular by taking care of polluted birds. Experts of the Community task force on marine pollution were provided on request to assist the French authorities in the evaluation of the

⁴⁰ *ibid*

⁴¹ *ibid*

offers of service from private companies within Europe. The task force also coordinated a number of observers from the Member States who were given the opportunity to visit the polluted site and study the response operations in order to learn from the French experience. The Commission in contact with the French ministry of the Environment proposed to support an in-depth survey of the environmental consequences of the oil spill which would assess the impact of the pollution and of the cleaning techniques used and the results garnered from the survey was expected to be of paramount importance for all those dealing with accidental marine pollution. The Commission envisaged support to this survey to be about 300,000 €. ⁴²

The Classification Society whose certification the Erika bore, Registro Italiano Navale (RINA), conducted its own investigation into the incident, and maintained that there was no liability on its part. It called for diligent communication between a vessel and its classification society on defect; communication between Societies on a vessels' histories and possibility of relaying such information on sister ships of vessels with the Societies' certificates. The RINA CEO, Nicola Squassafichi observed that:

“Eight sister ships of the Erika class were built under two different Classification Societies, and have been classed by five different Classification Societies at some time in their lives. All of these ships have suffered structural problems. Three of them, other than the Erika were serious. No information about the history of these problems was available to RINA”⁴³

⁴² Official Journal of the European Communities, C 303 E/137, 24.10.2000

⁴³ ‘RINA Investigation Vindicates Society’, www.mgn.com/news/newsletter_details.-issue_161, Monday, February 14, 2000.

The Classification Society further noted that the sinking was the result of a small structural failure in the hull, which precipitated to further cracking and then sinking. As far as RINA was concerned, the hull was residually strong enough for normal operations at the time of sinking. RINA stated "its investigations proved that the calculated residual strength of the vessel, which was within International Association of Classification Societies (IACS) limits, should have been sufficient to withstand normal operations in the prevailing weather."⁴⁴ It proposed that some further reasons including poor workmanship and/or design during buildings repairs; poor loading; and the possibility of the vessel striking a floating object (iceberg?) could suffice for the sinking

The above may allude to RINA clutching at straws because the mere fact of poor design/build is a *sine qua non* for refusing or dispensing with class certification.

The Erika mishap was equally not without certain acquisition intentions following the sinking whereby Bureau Veritas (BV) attempted to take over RINA which merely served to stoke the embers of national pride. Initially, both BV and RINA as well as Germanischer Lloyd had earlier signed the Unitas Agreement on April 27, 1992 in Paris called the European Economic Interest Grouping in full. Under the collaboration, the Societies had the joint aim of enhancing the safety at sea and pollution prevention by adopting the common policies and the co-ordinate employ of resources in terms of

- i. research and development
- ii. classification rules

⁴⁴ February 29, 2000 MARSHALL ISLANDS NEWS BULLETIN No. 3

- iii. data processing
- iv. quality assurance
- v. personnel training
- vi. optimising of the network of survey station of the three member societies.

With the resources of these three combined, they presented a formidable competitor to other members of IACS. However, after the Erika episode, both BV and ABS offered to takeover the RINA. BV proposed to incorporate its Italian subsidiary, BV Italia into RINA Spa and then sell some BV shares to the parent company, Fondazione RINA. BV further expected to at a more opportune time to acquire some shares in RINA Spa. It appears however that national pride on the part of the Italian RINA put paid to the possibility of any takeover. In an interview with *Lloyds List*, Bernard Anne, BV's marine division managing director said:

*"Some two to three years ago, we were looking at some possibilities...It is something we said in the past, but today I cannot imagine anyone prepared for that. Today everyone is satisfied with the present situation. For me it is a closed box. It is a closed file. Today I do not see the opportunity...Shipping is going well for everybody, so you cannot imagine any need for any class to think they have any need in getting closer...Class activities are very traditional in some ways. In most countries where you have an original class, ship-owners are very attached. It is more difficult than in any other industry"*⁴⁵

The foregoing points to the notion that nationalisation⁴⁶ had a great impact in quelling the anticipated merger which was expected to rival the LAN group comprising Lloyds Register,

⁴⁵ *Lloyds List*, January 7, 2005, p.14

⁴⁶ The issue of nationalisation was the basis of the development and origin of the development of the Japanese Classification Society, NKK as well as observed in the introductory chapter of this thesis.

ABS and Det Norske Veritas (DNV). The Chairman of Lloyds Register, David Moorhouse, on his part acknowledged that:

"LAN has been a good success for us and, I know, for the other two members. We have been able to do things in a time frame that doesn't frustrate us and doesn't frustrate our clients"⁴⁷

He however acknowledges the fact of national pride amongst the core Classification Societies and opines that this is something that will change over time in a European context whereby merging two societies together could have significant benefits in the European context.

4.4.1.2 EU Commission Proposals on Amending Directive 94/57/EC

The Erika sinking brought to the fore the impact, if any, of the European Union Council Directive 94/57/ EC on Common Rules and Standards for Ship Inspection and Survey and for Relevant Activities of Maritime Administrations. The European Commission was called upon by the European Parliament and the Council of Ministers to submit proposals 'to tighten up the existing community regulatory framework'⁴⁸. In the introduction to the proposal, the Commission observed that:

"It has become clear that the normal framework for international action on maritime safety under the auspices of the International Maritime Organisation (IMO) falls short of what is needed to tackle the causes of such disasters effectively. The IMO suffers from a major handicap: the lack of a proper means

⁴⁷ Lloyds List, January 7, 2005, p.14

⁴⁸ 'Communication from the Commission to the European Parliament and the Council on the Safety of the Seaborne Oil Trade', Commission of the European Union, Brussels, 21.3.2000, Com (2000) 142 final

to verify how its regulations are applied throughout the world. As a result, IMO regulations are not applied everywhere with the same rigour. The evolution of maritime transport over the last few decades and in particular the emergence of 'flags of convenience', some of which fail to live up to their obligations under the international conventions, is tending to aggravate this phenomenon"⁴⁹

It was further observed that oil was the most globally shipped commodity, with the EU oil trade which represented 27% of the world trade being the largest in the world, followed by the US import which amounted to 25% of the world trade at the period of the Erika mishap. Equally noted was that 90% of the world trade involving the EU whether within or outside the EU was seaborne, the rest being by land, pipeline or inland waterways. Essentially, a lot of factors ranging from the EU oil trade and the aging tanker fleet to complacency on hull thickness combined to set the stage for the pollution mishap that was the Erika.

The proposals were initially split in two packages, the first on a short term basis (*Erika I*) and the other on a longer term basis (*Erika II*).

Erika I

a. *Rigorous inspection of ships using Community Ports, to be reflected in tougher measures against ships that are manifestly sub-standard, where ships older than fifteen years that have been detained more than twice in the course of two preceding years are banned from all ports in the European Union on the basis of a black list to be published by the Commission every six months. The inspection of the ships to be in line with the age of the vessel and information to be communicated to the port before entering it to facilitate proper inspection and Member*

b.

⁴⁹ *ibid*, at p.4

States to avoid the advance of ports of convenience by recruiting and training inspectors to survey the vessels more frequently and thoroughly.

- c. *A stricter monitoring of Classification Societies where Member States delegate power to them to inspect the quality of their vessels. The Commission will reserve the right to suspend or withdraw the Society's recognition through a simplified procedure and the latter to be held liable upon the occurrence of negligence. Classification Societies' records of good safety and pollution prevention will become essential to obtaining and maintaining recognition in the Community.*
- d. *A ban on single-hull oil tankers according to timetable largely based on the USA model to be split in three categories:*

Category 1 – Single hull oil tankers of MARPOL size without tanks in protective locations to be phased out by 2010 under USA OPA 90 and 2007-2012 under MARPOL, now to be phased out by 2005.

Category 2 – Single hull tankers of MARPOL size with partial protection of cargo tank area to be phased out between 2010 and 2015 under OPA 90, 2026 under MARPOL, now to be phased out 2010.

Category 3 – Single hull tankers below MARPOL size limit to be phased out by 2015, no deadline under MARPOL, now to be phased out by 2015.

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- a. *Full application of the EQUASIS database – This was initiated by the Commission and France with the aim of creating a central archive of information such as type, flag, ownership and ownership, relating to safety and quality performance on vessels that ply the European Union in particular and the world in general, which will be made accessible to charterers and ship operators through the internet.*
 - b. *Obligation of Member States to report or intervene in the event of threat of or actual pollution through improved surveillance of navigation on EU waters. Also need to identify vessels with potentially dangerous cargo and relay the information to the relevant parties.*
 - c. *Establishment of a European structure for maritime safety to effectively monitor the organisation of national inspections to ensure greater uniformity.*
 - d. *Development of a liability regime for parties deemed responsible for the cause of oil spills. The essence here was to go further than the existing regimes of the CLC and the Fund Conventions and increase the amount of compensation available to victims.*

The main thrust of this section is focused on the second part of the *Erika I* package on Classification Societies, which culminated in Directive 2001/105/EC

4.4.2 Directive 2001/105/EC

The call for a revision of 94/57/EC was deafening following the *Erika* coupled with some developments in European and international legislation. It was further apparent that the practical benefits of Directive 94/57/EC could be derived from a more community based system of recognition as opposed to the individual Member State granting recognition to a

Classification Society. Some of the international legislative amendments by this period included the IMO Assembly Resolution A.847 (20) on guidelines to assist Flag-States in the implementation of IMO guidelines adopted on November 27, 1997; the International Safety Maritime Code (ISM) adopted on November 4, 1993 through Assembly Resolution A. 741 (18); the Assembly Resolution A. 788 (19) on the implementation of the ISM Code by Maritime Administrations; and the Resolution A. 746 (18) of November 4, 1993 on the Survey Guidelines under the Harmonised System of Survey and Certification.

With the above amendments and initiatives having been undertaken at the international level, it was deemed imperative that their impact be extended to the EU, bearing in mind that most IMO Member States were notorious for a lackadaisical attitude in ratifying the Conventions into their national law. Further, the location of the EU necessitated the idea that a more regional approach in the adoption of IMO ideals would be more far-reaching with the *Amoco Cadiz* and the *Erika* accidents being virtually in the same area.

In retrospect, it was identified that the key factors of recognition of Classification Societies, their monitoring and their possible suspension will be better achieved and 'more effectively in a harmonised and centralised manner by the Commission with the Member States.'⁵⁰ The EU Commission, it is observed appeared to have come into its own with the adoption of the Council decision of 1999/468/EC on June 28, 1999 and this provided the procedure for implementing powers conferred on the Commission. With this in mind, the Commission was deemed better placed than Member states in their individual capacity to ascertain where a

⁵⁰ Paragraph 11 of Preamble to Directive 2001/105/EC

situation called for withdrawal of recognition from a Classification Society following an unsatisfactory safety and pollution prevention performance record.

Article 6 of 2001/105/EC is the most radically revamped of the provisions because it not only amends, but introduces a whole new element of liability where there is proof of a wilful act, omission or gross negligence. Article 6 (b) (i) reads *inter alia*:

“If liability arising out of any incident is finally and definitely imposed on the administration by a Court of law or as part of the settlement of a dispute through arbitration procedures, together with a requirement to compensate the injured parties for loss of or damage to property or personal injury or death, which is proved in that court of law to have been caused by a wilful act or omission or gross negligence of the Recognised Organisation, its bodies, employees, agents or others who act on behalf of the Recognised Organisation, the administration shall be entitled to financial compensation from the Recognised Organisation to the extent that the said loss, damage, injury or death is as decided by that court, caused by the Recognised Organisation.”

The paragraphs following the above were subject to many deliberations by both the Parliament and Council of the European Union. During a session of the EU Parliament on May 15, 2001, the following amendments were made by the Parliament on the position by the Council in the event of death or personal injury. The EU Council position read as follows:

“If liability arising out of any incident is finally and definitely imposed on the administration by a Court of law or as part of the settlement of a dispute through arbitration procedures, together with a requirement to compensate the injured parties for personal injury or death, which is proved in that court of law to have been caused by a wilful act or omission or gross negligence of the Recognised Organisation, its bodies, employees, agents or others who act on behalf of the Recognised Organisation, the

*administration shall be entitled to financial compensation from the Recognised Organisation to the extent that the said personal injury or death is as decided by that court, caused by the Recognised Organisation; **the Member State may limit the maximum amount payable by the recognised organisation, which must be at least equal to EUR 5 million** "*

The part in bold italics was amended by the Parliament to read, ***the Member State may limit the maximum amount payable by the recognised organisation, which must be at least equal to EUR 4 million and no more than EUR 7million***

In the event of loss or damage to property the above paragraph is virtually identical except for the figures, where the Council position was '***the Member State may limit the maximum amount payable by the recognised organisation, which must be at least equal to EUR 2.5 million***', which the Parliament amended to read '***the Member State may limit the maximum amount payable by the recognised organisation, which must be at least equal to EUR 2 million and no more than 4 million***'

Classification Societies which had erstwhile appeared untouchable now had a liability clause against them in the revised Article 6 of Directive 2001/105/EC in the event of death, personal injury, loss or damage to property due to a wilful act, omission or gross negligence on the part of the Classification Society. There was some hesitance in the course of resolving the limits of liability. The Gothenburg Group, a consortium of north European maritime countries, had advocated minimum liability of 5 million Euros in the case of personal injury or death, and 2.5 million Euros in the case of loss or damage to property. In the course of deliberating on the proposals by the European Parliament and Council, a maximum liability regime was resorted to

whereby there is a liability of at least 4 million Euros in the event of death or personal injury and a maximum liability of 2 million Euros upon loss or damage to property.

This provision has been the subject to certain criticism in terms of the fact that the competent administration of a Member State need firstly to be found liable before the recognised organisation (classification society) can pay up. It resembles a kind of poison chalice in terms of the fact that one has the onerous task of instituting an action or arbitration proceedings against the Member State and then judgement or an award made against that Member State. In this instance, the Member State acts as a sort of shield for the Classification Societies.

The success of this innovative provision has been given a time-frame within which to access its viability or success in paragraph 5 of Article 6, which says:

"The Commission shall not later than 22 July 2006, submit a report to the European Parliament and Council evaluating the economic impact of the liability regime provided for in this Article on the parties concerned, and more particularly, its consequence for the financial equilibrium of recognised organisations.

This report shall be drawn up in cooperation with the competent administration of the Member States and the parties concerned, in particular the recognised organisations/classification societies. The Commission shall, if necessary in the light of this evaluation, submit a proposal amending this Directive with more specific reference to the principle of liability and the maximum liabilities."⁵¹

⁵¹ In this regard, the EU Committee on Transport and Tourism has presented a draft report, to the European Parliament on November 6, 2006 for the fourth revision, on a proposal for another Directive on survey/recognised organisations (classification societies), following the Third Maritime Safety Package, [COM(2005) 585], which is discussed further in this section. This is targeted at replacing the 2001/105 Directive, which has been deemed not to have the necessary impact, in view of the *Prestige* incident

The Commission on the repeal of 94/57/EC has been endowed with more powers whereby it has a say in the granting and withdrawal of recognition, suspension and every major issue regarding Class. Where the Member State was, under 94/57/EC, in a position to act almost unilaterally regarding the Classification Societies it opted for to act on its behalf to comply with the issue of statutorily required certificates, the Commission is now practically in the driver's seat in a bid to create a more credible atmosphere of transparency and objectivity. Article 4 under Directive 2001/105/EC for instance has been amended to reflect that the Commission is responsible for granting recognition to Classification Societies and informing the other Member States of the development. Article 4 of Directive 94/57/EC reads thus:

1. *Member States may only recognise such organisations which fulfil the criteria set out in the Annex. The organisations shall submit to the Member States from whom recognition has been requested complete information concerning, and evidence, compliance with these criteria. The Member States will notify the organisations in an appropriate manner of their recognition.*
2. *Each Member State shall notify to the Commission and other Member States those organisations it has recognised.*

The amended Article 4 in Directive 2001/105/EC reads as follows:

1. ***Member States which wish to grant an authorisation to any organisation which is not yet recognised, shall submit a request for recognition to the Commission together with complete information on, and evidence of, compliance with the criteria set out in the Annex and on the requirement and undertaking that it will comply with the provisions of Article 15 (2), (4) and (5). The Commission, together with the respective Member States submitting the request, shall carry out assessments of the organisations for which the request***

for recognition was received in order to verify that the organisations meet and undertake to comply with the above mentioned requirements. A decision on recognition shall take account the safety and record and pollution prevention performance records of the organisation, referred to in Article 9. Recognition shall be granted by the Commission in accordance with the procedure referred to in Article 7 (2)

The above provision show the new developments of the Commission to be at the helm of affairs and the requirement of the safety and pollution prevention records of the Classification Societies, this latter which is not mentioned in 94/57/EC. Generally the provisions of the new Directive can give the picture of a mutual partnership between the Commission on the one hand and a Member State on the other hand, but the Commission with the upper hand in the event of a stalemate.

Similarly, just as the Commission is empowered to deal with granting of recognition to Classification Societies, so it has the power to withdraw the said recognition. The erstwhile Article 9 in 94/57/EC, which read

"1. Each Member may be requested, in accordance with the procedure laid down in Article 13 to withdraw the recognition of recognised organisations referred to in Article 4 which no longer fulfil the criteria set out in the Annex, where applicable"

This is now amended in 2001/105/EC to read as follows:

"1. The recognition of organisations referred to in Article 4 which no longer fulfil the criteria set out in the Annex or which fail to meet the safety and pollution programme records mentioned in paragraph 2 shall be withdrawn. The withdrawal of recognition shall be decided by the

Commission in accordance with the procedure referred to in Article 7 (2), after the organisation concerned has been given the opportunity to submit its observations.

The earlier Article 9 in 94/57/EC appears to give the Member State the authority to withdraw the recognition albeit it is requested to do so. However, under 2001/105/EC, it is unequivocal that the Commission has the mandate to withdraw recognition from a Classification Society after it has given the Classification Society in question the chance to defend its non-compliance with the criteria or its inability to maintain a decent level in its safety and pollution prevention campaign.

One main reason amongst others for which a Classification Society could have its recognition withdrawn from it is where it does not fulfil the minimum criteria, and these include that the Classification Society should have at least 1000 ocean-going vessels of 100 gross tons each, totalling not less than 5 million gross tons and each of the vessels must be 'in class' There is equally the requirement that each Classification Society has 100 exclusive surveyors, and it is not controlled by Ship-owners or Ship-builders. This latter requirement has been the main criticism levelled against Class following the *Erika* to the effect that Classification Societies might not be neutral third parties after all as they purport., due to the basic argument that ideally where a vessel has been certified 'A1' there ought to be no mishaps necessarily coming its way.

The body that undertakes the above assessment on behalf of the EU Commission is the **European Maritime Safety Agency (EMSA)**. EMSA came into effect following the *Erika* and

the *Prestige* accidents and was created by **Regulation (EC) N° 1406/2002**.⁵² It was charged with working to minimise the risk of maritime accidents, marine pollution from ships and the loss of human lives at sea by providing technical and scientific advice to the Commission. In particular, EMSA is authorised to exercise its mandate in the following: strengthening of the Port State Control regime; auditing of the Community-recognised classification societies; development of a common methodology for the investigation of maritime accidents; and the establishment of a Community vessel traffic monitoring and information system. The Agency is more or less an extension of the Commission and by virtue of the **Protocol between the Government of the Portuguese Republic and the European Maritime Safety Agency of September 22, 2004**, the Agency had its offices established in Lisbon, Portugal and further has the immunity conferred on it to almost the same extent as that on the Commission and other arms of the EU⁵³

4.4.2.1 The Prestige

This is one maritime disaster that is widely believed should not have happened at all bearing in mind its immediate predecessor, the *Erika*, and the work that had been undertaken in particular by the EU in bringing **Directive 2001/105/EC** into effect. In the course of a stormy weather off the west Galicia, the *Prestige* sustained a crack in the starboard side of her hull, on November

⁵² this has been severally amended by **Regulation (EC) N° 1644/2003** and **Regulation (EC) N° 724/2004**

⁵³ Article 2 of the Protocol stipulates that: “The Agency, its property and possessions, wherever these are, cannot be the subject of any coercive, administrative and legal measure in accordance with article 1 of the Protocol.”

13, 2002. This led to about several thousand tonnes of oil being spilled into the sea. The crew except the Master of the vessel and two other crew members were airlifted by the Spanish authorities, while the owner and insurer of the vessel put control of the vessel in the Dutch Salvage team, who and the vessel was towed out further to the sea, where bad weather however persisted. The *Prestige* was a twenty-six (26) year old Japanese built single-hull tanker that was registered in the Bahamas; owned by a Liberian company, managed by Greek operators, chartered by a Swiss-based Russian oil trader, sailed under the command of a Greek captain with an Asian crew and classified by the American Bureau of Shipping (ABS) in whose classification it remained throughout its working life⁵⁴. At the time of sinking, obvious questions of who to sue readily arose with the multi-jurisdictional quagmire just illuminated. It was reported at that time that:

José Mara Aznar, Spain's prime minister, has threatened legal action to recoup the cost of the environmental clean-up. But who could the prime minister sue? Lawyers say it has become increasingly difficult to enforce international maritime law at a time when companies and ship owners are cutting costs by registering their vessels in tax havens and hiring cheap, but often, poorly trained crews. The *Prestige* was no exception. Registered in the Bahamas, it was owned by Mare Shipping, a Liberian company, managed by Universe Maritime, a Greek company, and had been chartered by Crown Resources, a Swiss-based Russian commodities trader. So far, Spanish authorities have only been able to get hold of Apostolus Maguras, the Greek captain, who has been remanded in custody in the port of La Coruña.⁵⁵

⁵⁴ This was unlike the position with the *Erika*, whereby it used to be under the classification of Bureau Veritas before RINA took over its classification

⁵⁵ 'Messy Trail of Responsibility for Oil Disaster', *Financial Times*, November 19, 2002

The Spanish, Portuguese and French authorities were apparently repeatedly besieged by the Salvors for access to ports of refuge, and it is believed that the cargo and vessel could have been salvaged if the access had been granted.⁵⁶ France, possibly still reeling from the effects of the *Amoco Cadiz* decades earlier and the *Erika* just three years, may have thought it was a bit too soon to go through the responsibility attached to dealing with the horrors of an oil spill yet again. The *Prestige* had 77,000 tonnes of heavy oil, of which about 22,000 tonnes spilled into the sea when she eventually collapsed and sank about 100 miles off the coast of Spain and Portugal. A further 40,000 tonnes might have been spilled even after the sinking going by the report of the European Commission to the EU Council.⁵⁷

In the quest of whom amongst others to blame fore the spill, Spain made a bold political move of looking to Gibraltar for allegedly playing a part in the mayhem on the notion that the vessel was coasting towards that direction. The *Financial Times* reported the following on the accident:

"Politics also gets in the way. When the *Prestige* ran into trouble last week, the Spanish government jumped on the fact that the tanker was heading for Gibraltar - a territory claimed by Spain - to accuse the British colony of failing to comply with EU directives on the inspection of maritime vessels. Loyola de Palacio, a Spaniard and the EU's transport and energy commissioner, went further and blamed Gibraltar for the disaster.

Nonsense, replied the British government. In a letter to the European Commission, obtained by the *Financial Times*, Sir Nigel Sheinwald, permanent representative to the EU, says the *Prestige* was not operating to Gibraltar on its ill-fated last voyage. "The only time in the last five years that the *Prestige*

⁵⁶ 'Another Fine Mess', *Fairplay*, November, 2002

⁵⁷ Communication from the Commission, report to the European Council on action to deal with the effects of the *Prestige* disaster', Brussels, March 5, 2003, COM (2003) 105 Final, p.4

has stopped in Gibraltar was on June 13 2002, to refuel, without even entering the port," the letter says.⁵⁸

The *Prestige* served to display the despair involved in putting much discussed proposals into action. The general consensus after this accident was that, had the *Erika I* and *II* been implemented by the EU Member-states, the *Prestige* accident would not have occurred at all.

The particular proposals in question which the *Prestige* falls under are the second and third part of the *Erika I* package on the phasing out of single hulled vessels and classification societies respectively, which following the accident after which they were named, it was recognised that double-hulled tankers were the way forward in the quest for the prevention of pollution at sea. On the issue of Classification Societies, the EU Commission made the observation regarding the dual and supposedly conflicting roles of Classification Societies in their private and public capacity of acting for ship-owners and Flag-States respectively. The Commission noted as follows:

"Finally, another point which must be looked into is the practice where classification societies issue seaworthiness certificates for vessels on a commercial basis, on behalf of the ship-owner, and also by delegation, on behalf of the flag State which is supposed to monitor the vessel. As a result, the classification society sometimes seems to be judging its own case. The first objective should be to examine, together with the classification societies already recognised at Community level, how to change these practices and keep these different checks more separate.⁵⁹

⁵⁸ 'Messy Trail of Responsibility for Oil Disaster', *op cit*

⁵⁹ Commission Of The European Communities, Communication from the commission To the European Parliament and to the Council On improving Safety at sea in response to the *Prestige* accident, Brussels, 3.12.2002, COM(2002) 681 final

At its submission to the EU Parliament Committee on Regional Policy, Transport and Tourism Secretariat in March 2003, ABS maintained that prior to the sinking, the *Prestige* had undergone its annual survey over a period of 11 days in Dubai in May, 2002.⁶⁰ Earlier, she had undergone her Special Survey in Guangzhou, China in 2001, which itself was over a period of 46 days. The Spanish Government on its part sought the withdrawal of ABS's recognition as an approved Classification Society by the EU, to which ABS replied that the Directive gave conditions for the withdrawal of recognition, specifically that the safety and pollution performance records of all ships within a Society's classed fleet are to be considered to guard against the distortion created by any one incident, with data from the Paris MOU and other similar Port State control schemes as being the principal indicators of a Classification Society's performance.⁶¹

The Spanish government, which is attempting to reclaim the billions of dollars in damages caused by the *Prestige's* oil, has sued the American Bureau of Shipping, alleging negligence on ABS's part, asserting that the company bears significant responsibility for the tanker's setting out to sea in the first place. ABS has countersued the Spanish government, asserting that the government's decision not to supply the *Prestige* with a safe harbour worsened the effects of the oil spill. The perception is widely held in maritime circles, especially amongst Classification Societies that should the suit go in favour of Spain, it could lead to the downfall of ABS as a Classification Society in view of the damages being sought by Spain.

⁶⁰ 'ABS Casualty information', www.eagle.org/news/prestige/euparliament.html

⁶¹ Article 9 of Directive 94/57/EU amended by 2001/105/EU

Elaborating on ABS's counter-claim, the Classification Society has claimed that Spain erred in not providing a place of refuge to the *Prestige*, and that its lack of lack of action during the period leading to the vessel's sinking amounted to a violation of international law. These duties as far as ABS was concerned were enshrined in 'a range of treaties and conventions, including the UN convention on the law of the sea, the international convention on oil pollution preparedness, response and co-operation, and the salvage convention.'⁶² **The International Convention on Salvage** stipulates in **Art.11** that:

"A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provisions of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general."⁶³

Spain's response to this allegation has been one of falling back on the principles of *locus standi*, which goes to the issue of the capacity, position and status of a Classification Society in relation to a state, when the country retorted that:

"the treaties at issue are all agreements among states, creating rights and duties exclusively among themselves...Unclos and OPRC provide no basis for private claims, whether in the form of a cause of action or of an affirmative defence"⁶⁴

⁶² 'Madrid rejects ABS New York Court claims on unlawful action', *Lloyds List*, June 24, 2005, 3

⁶³ ' "Places of Refuge" - addressing the problem of providing places of refuge to vessels in distress', www.imo.org/safgety/mainframe.asp?topic id=746

⁶⁴ 'Madrid rejects ABS New York Court claims on unlawful action', op cit, 3

From the above, Spain is clearly attesting to the position of a Classification Society (in this instance, ABS) as a private party, not imbued with the rights and privileges that accrue to states in term of treaties and conventions which such states can derive benefits from. This will appear to be at variance with the ***Sundancer case***, whereby the defendant Classification Society, incidentally ABS, was able to derive from the immunity which pertained to the Bahamas (once again the State with which the *Prestige* was also registered) and thereby not deemed liable to the plaintiff in contract or tort (duty of care). It will appear that since ABS succeeded as being an agent of the Bahamas in the ***Sundancer Case***, the point being made by Spain on the basis that ABS not being a State cannot seek to rely on a Convention as defence which can only be relied on by a State will appear untenable because ABS was indeed acting on behalf of the Bahamas when it issued certificates for the *Prestige*. In effect, ABS could be assumed to have been subrogated in the place of the Bahamas in alleging a claim of non-provision of a place of refuge.

Spain's defence to ABS's claims are further manifested by its reliance on the IMO's resolution affirming 'that there is at present no international requirement for a state to provide a place of refuge for vessels in assistance'⁶⁵ because recent international law upholds a state's right to deny refuge. **Resolution A.949(23) on Guidelines on places of refuge for ships in need of assistance**, according to the IMO, are intended for use when a ship is in need of assistance but the safety of life is not involved. Where the safety of life is involved, the provisions of the **SAR Convention** should continue to be followed. IMO in this regard says:

⁶⁵ *ibid*, 3.

"The guidelines recognize that, when a ship has suffered an incident, the best way of preventing damage or pollution from its progressive deterioration is to transfer its cargo and bunkers, and to repair the casualty. Such an operation is best carried out in a place of refuge. However, to bring such a ship into a place of refuge near a coast may endanger the coastal State, both economically and from the environmental point of view, and local authorities and populations may strongly object to the operation. Therefore, granting access to a place of refuge could involve a political decision which can only be taken on a case-by-case basis. In so doing, consideration would need to be given to balancing the interests of the affected ship with those of the environment."⁶⁶

At a recent CMI colloquium held in South Africa in February 2006 on 'Instruments on Places of Refuge', the following comment was made regarding the IMO Guideline:

"It is intended that this code shall govern the actions of States, port authorities, shipowners, ship operators, salvors and others involved, where a ship seeks assistance, and recognises the importance of adhering to international Conventions relating to [the preservation of life;] the preservation of property and the environment, and seeks to balance those interests in a fair and reasonable way."⁶⁷

The operative term here will appear to be drawing a 'balance' between the needs of a Coastal State and a vessel in distress. There is an effort at some concord between the need and duty of a State to protect its environment, and the tanker in the control of its master to use his best endeavours to save the vessel in distress.⁶⁸ A fusion of customary international law and

⁶⁶ ' "Places of Refuge" - addressing the problem of providing places of refuge to vessels in distress', op cit

⁶⁷ www.cmi2006capetown.info/pdf/InstrumentonPlacesofRefuge.pdf, 2

⁶⁸ It is observed that under longstanding maritime tradition and the practice of good seamanship, the master of a ship faced with a serious emergency is expected to seek shelter to avoid disaster. To some extent the practice is codified in the revised Chapter V of SOLAS, which requires that the owner, the charterer or the company operating the ship or any other person, shall not prevent or restrict the master

existing Conventions and Guidelines results in a compromise whereby 'States and competent authorities have a duty to permit access to a place of refuge by a ship in need of assistance, unless it can be demonstrated, objectively, on reasonable grounds, that the condition of the ship is such that it and/or its cargo is likely to cause greater damage if permission to enter a place of refuge is granted than if such a request is refused.'⁶⁹

What then obtains is a kind of balancing act where the more dominant party in that situation (here the Coastal State) is expected to exercise some initiative and make a positive act of granting refuge.⁷⁰ **Article 98 of UNCLOS** recognises the duty to render assistance to vessels and persons in distress at sea as a well-established principle of international maritime law and

of the ship from taking or executing any decision which, in the master's professional judgement, is necessary for safe navigation and protection of the marine environment.

Similarly, SOLAS Article IV provides that ships which are not subject to the provisions of the Convention at the time of their departure on any voyage, shall not become subject to the provisions of the Convention on account of any deviation from their intended voyage due to stress of weather or any other case of force majeure.

⁶⁹ *ibid*, 3

⁷⁰ UNCLOS appears to have provisions to cover any of the parties in such a situation. Article 2, refers to the sovereignty of a coastal State over its land territory, internal waters, archipelagic waters and the territorial sea, thereby recognising the right of a State to regulate entry into its ports. Regarding marine pollution in particular, the right of a coastal State to take action to protect its coastline from marine pollution is well established in international law which relevant provisions in UNCLOS include Articles 194, 195, 198, 199, 211, 221, 225. On the other hand, the right of a foreign ship to stop and anchor in cases of force majeure or distress is explicitly referred to by UNCLOS in the case of navigation in the territorial sea (Article 18(2)), straits used for international navigation (Article 39.1(c)) and in archipelagic waters (Article 54).

However, the right of a foreign ship to enter a port or internal waters of another State in situations of force majeure or distress is not regulated by UNCLOS, although this constitutes an internationally accepted practice, at least in order to preserve human life. This, however, does not preclude the adoption of rules or guidelines complementing the provisions of UNCLOS.

SOLAS Regulation V/7 requires Governments to ensure that any necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea round their coasts. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers and shall, so far as possible, provide adequate means of locating and rescuing such persons.

Spain appears to justify its stance on not granting a place of refuge to the *Prestige* on the notion that the tanker's passage through the Spanish waters was not innocent, rather in line with the relevant provisions in UNCLOS⁷¹ and Spanish maritime law provisions to take the necessary steps that will prevent non-innocent passage, the *Prestige* was engaged in 'wilful and serious pollution and could therefore not avail itself of the force majeure exception of the requirement of continuous passage under the law.'⁷²

In a parallel development following the institution of Spain's action against ABS in New York, the Spanish Maritime Authority hit out at the Bahamas Maritime Authority (BMA) in an addendum to its first report on the *Prestige* Casualty that the BMA's report on the casualty could not be 'considered independent and impartial because it ignored key facts relating to a sub-standard ship'.⁷³ It is Spain's belief from the report that the BMA was aware of the 'poor structural condition of the vessel and a chain of errors, omissions and negligence in

⁷¹ Articles 195, 211, and 221 of UNCLOS

⁷² 'Madrid rejects ABS New York Court claims on unlawful action', *ibid*, 3

⁷³ 'Biased and Flawed: Spain blasts *Prestige* Casualty Report', *Lloyds List*, June 24, 2005, 3

inspections'⁷⁴ which led to the accident. The Country further claimed that due to the foregoing, an apparent avenue was created for the Captain of the tanker and the Salvage team to exercise their discretion which ultimately had the Spanish coast paying dearly for the spill in the course of trying to take preventive measures to no avail, since it did not have the true picture of the state of the tanker.

This allegation was refuted by the BMA as 'just not true' with their representative, Capt Doug Bell affirming that the information Spain claims it withheld was included in their report. Further, Spain's allegation that the initial structural failure stemmed from a particular tank was contentious because this tank (tank 3) was apparently destroyed in and its debris scattered all over the ocean.

IACS was not spared Spain's wrath either and was accused of 'passing over numerous errors, omissions and negligence easily observable in the reports of the inspections carried out by ABS.'⁷⁵ This has also been roundly denied by IACS on the basis that it had audited ABS'S work wherein external observers provided by Intertanko, the EU Commission and the BMA were all involved. Further, it claimed that Spain which had been invited to participate in the audit had refused the invitation.

Spain's actions have been viewed by some, not unexpectedly by the parties who have had accusations levelled at them, as a show in publicity stunts. ABS currently has refrained from making any comments since the matter is now before the Courts. Nevertheless the

⁷⁴ *ibid*, 3

⁷⁵ *ibid*, 3

Classification Society's position is that Spain was as much to blame for the casualty by virtue of not allowing the tanker a place of refuge whereby much of the oil spill could have been stemmed. The ABS Vice-President said in this regard that:

"It is unfortunate that Spain has chosen to repeat the past pattern of using the media and the public to attempt to deflect attention from its failure to offer a place of refuge to the stricken vessel, an action that would have averted the serious pollution that occurred as a result of the government's ill-informed decision to send the vessel out to sea"⁷⁶

4.4.3 Analysis of the *Erika* Measures

The *Erika I* package was proposed by the EU Commission in March 2000 and were recommended as an immediate measure in response to the *Erika* accident, with the *Erika II* package following suit and presented to the Union by the Commission in December 2000 as means of facilitating the effectiveness of *Erika I*.

Port State Controls (PSCs) were brought into the picture as a sort of check and balance on the work of Classification Societies and registers around the world. They were deemed in the proposal to be a buffer in situations whereby the vessel has certificates issued by a Classification Society, which more than any other reason has not abided by the criteria set out for Classification Societies in the Annex to both Directives 94/57/EC and 2001/105/EC. Where the Classification Society has not been granted full recognition either, it will precipitate the PSC to inspect the vessel.

⁷⁶ *ibid*, 3

Another unique feature of the liability regime is that the competent administration on whose behalf the Classification Society/Recognised Organisation acts firstly has to be found liable by the Court of law before the Classification Society can be held liable at all. How feasible this provision is bearing in mind issues of sovereignty arises. In effect, an aggrieved plaintiff will have to focus on the administration of a Member State in order to get through to the Classification Society.

The feasibility of the Flag State being sued by a Plaintiff instead of suing the Ship-owner has been queried on the basis of the Ship-owner supposedly having more access to cover by way of insurance. Nikos Mikelis commented:

“Also I have difficulty in imagining that an injured party will sue the flag State and not the Ship-owner who already has Protection & Indemnity insurance for much larger sums than defined in the Directive and for liabilities such as those we are discussing. And if a claim under this Directive was to arise, would the flag State also have to defend the interests of the RO while defending its own case, or would there have to be a subsequent court case between the flag State and the RO?”⁷⁷

The American case of **Sundance Cruises Corporation v. American Bureau of Shipping (ABS)**⁷⁸ exhibited the futility of proceeding against a Classification Society especially where it is held to be acting on behalf of a State. No mention was made however of the possible outcome of the case if Sundance sued the Bahamian Maritime Authority instead, for whom ABS was acting as agent. That said, in **Marc Rich & Co v. Bishop Rock Marine Co. Ltd (the Nicholas**

⁷⁷ Mikelis N., ‘Liability of Classification Societies – Does the EU Bite’, Seminar of London Shipping Law Centre, December 10, 2003

⁷⁸ *The Sundancer*, [1994] 1 Lloyd Report 183

H)⁷⁹, the whole essence of instituting an action against Nippon Kaiji Kyokai (NKK), the Classification Society involved in that case was due to the fact that the Shop-owner's liability was limited to about US\$500,000. The other party deemed to be in a position to pay up was therefore NKK. This may go to show that the vessel owner may not always be the main compensation source in the event of an accident.

The Erika I legislation finally entered into force on July 22, 2003 more than 3 years after these stricter maritime safety rules were proposed by the Commission. Loyola de Palacio, Vice-President in charge of transport and energy declared:

"We could have avoided the PRESTIGE oil spill, had these key measures been into force earlier as the Commission initially proposed... These rules now need to be fully adopted and implemented. The Commission, as guardian of the EU treaties, will do its utmost to make sure that another Prestige disaster does not endanger EU waters and shores."⁸⁰

The Commission decided by this time to initiate legal proceedings against 10 Member States for failing to notify transposition of this key EU maritime safety legislation. Both the ship inspection and survey organisation and Port State Control rules adopted under Directives 2001/105/EC and 2001/106/EC respectively in the aftermath of the ERIKA disaster should have been transposed into national law by 22 July 2003. Only Denmark, France, Germany, Spain and the UK had ratified the Directive into the national law of their countries. Failure to implement these rules can directly affect the quality and safety of the ships sailing in European waters, of European ships globally as well as the removal of unsound vessels from the seas.

⁷⁹ [1996] 1 Loyds Report, 299

⁸⁰ Communiqués de Presse, 'ERIKA I maritime safety legislation enters into force: Commission takes action against 10 Member States', Référence: IP/03/1116 Date: 25/07/2003

The Commission has initiated the infringement procedure against Austria, Belgium, Finland, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal and Sweden for failing to communicate national measures implementing two key maritime safety Directives.⁸¹ Belgium and Ireland have so far only transposed the Port State control Directive and the Netherlands, the ship inspection and survey organisation Directive (see table in Annex 2).

Notification of transposition however does not mean that the transposition is complete and satisfactory. In 2002, for example, the Commission brought France and Ireland in front of the Court of Justice for example, for not observing the annual threshold of 25% of ships inspected by the port State as provided for by the Port State Control Directive. The Commission is empowered to pursue the Member States for failure to notify, to adequately transpose or to implement the Directive. The legal action launched may ultimately lead the Court of Justice to impose fines on Member States should they consistently fail to implement these maritime safety rules.

These maritime safety rules, proposed in the aftermath of the Erika disaster and adopted on 19 December 2001, came into force on 22 January 2002. Member States had until 22 July 2003 to implement the Directives by adopting the necessary laws, regulations or administrative provisions and they are obliged to notify the Commission of their transposition into national legislation immediately after their enactment.

⁸¹ EUROPA - Rapid - Communiqués de presse on Erika Mesures, July 25, 2003

Lately, there has been a recent development regarding the *Erika Measures*, where what is termed the *Erika III*, dealing with the European Union maritime safety legislation has been included in the package. Under this proposal, which was expected to be published by the mid 2005, it was anticipated that the role, function and liability of Classification Societies will be re-analysed in the event of an oil spill. The liability provision that already exists in Article 6 of 2001/105/EC covers the prospective liability of Classification Societies in their capacity to issue statutory certificates under international conventions. The liability regime being proposed under the *Erika III* was envisaged to cover the relationship between Classification Societies in their private capacity and other parties excluding Flag States. Most likely this package may attempt to govern the contractual agreement between class and Ship-owners. Also inclusive in the *Erika III* are proposed legislation on Flag State and Port State Control; amendments to the places of refuge regime and a standardised system for accident investigation. Apparently the proposed laws on classification societies is a recent addition and was not originally included by the Commission during the first round of industry hearings held last year.⁸²

The draft on *Erika IIII* which was to be deliberated on by Member States and heads of Classification Societies had the latter set of parties calling loudly for a set of rules that will categorically institute a limited liability regime for Class not unlike that enjoyed by Ship-owners and cargo-owners. Ugo Salerno, the Managing Director of RINA said:

⁸² Justin Snares, 'Brussels adds Class to Safety Rules Agenda', www.lloydslist.com, February 2, 2005

“We believe it is not fair that there is no right to limit responsibility. We don't want to avoid liability but think we should only be liable for our part of the business. We have told this to the Commission and we hope they propose new rules”⁸³

The *Erika III* package was earlier slated for publication by the Maritime Safety Committee of the EU in late 2004, but was postponed upon Jacques Barrot assuming the position of the European Transport Commissioner as a gesture to foster a wider grasp of the industry. It could well be that the inclusion of Classification Societies in the new package is linked to Mr Barrot's candidature, which has had the effect of Classification Societies quaking in their boots at the prospect of possible unlimited liability on their part upon an oil spill or pollution from a vessel classified in their register.

Recently, it was reported that recognition could be withdrawn from more than one Classification Society where Mr Barrot was quoted as saying, ‘in the maritime sector a problem has emerged with certain classification societies...We are examining the possibility of withdrawing recognition from several of these societies’⁸⁴ In as much as there is the given procedure under Directive 2001/105/EC for the withdrawal of recognition from Classification Societies, it has been observed that this may not be very feasible in practice due to the fact that the Society cannot issue or renew certificates on behalf of a member State within the period of suspension.

Nikos Mikelis said of this position that:

“In view of the current tight requirements and lengthy period needed for a Transfer of Class, owners of European flagged ships classed by the suspended Society will find themselves in a near impossible

⁸³ *ibid*

⁸⁴ Justin Snares, ‘IACS alarmed over Barrot threat’, www.lloydslist.com, February 7, 2005

situation as every ship needs a number of certificates to be issued annually by its RO. It therefore follows that the suspension procedure is not well thought out as a method of giving a 'last warning' and it is therefore quite unlikely that it will ever be used"⁸⁵

The International Association of Classification Societies (IACS) has not been sitting on its oars either. With the EU apparently up in arms on the themes of safety and regulation, it has presented a draft common Class Rules for tanker and bulk carrier scantling in their capacity as recognised organisations acting on the authority of Flag administrations and under the quasi-statutory authority they enjoy under IMO Convention law.⁸⁶ This has come just after the

Maritime Safety Committee (MSC) has adopted a goal-based standard on bulk carrier side shell failure under SOLAS Regulation XII/6-5⁸⁷. IACS's proposals have however been interpreted as being too 'generally worded ...and leaves room for conflicting interpretation'⁸⁸. This is due to the fact that as far as IMO is concerned in its outcome-oriented approach, a goal-based standard (such as IACS's proposal) must be verifiable, which in the MSC's view means 'credible', 'transparent', and 'auditable'. This has led to various players in the shipping circle, including BIMCO, the International Chamber of Commerce and Shipping, and Intercargo to call on MSC to develop a circular, providing 'the necessary authoritative interpretation'⁸⁹ of SOLAS Regulation XII/6-5.

⁸⁵ Mikelis, N., 'Liability of Classification Societies – Does the EU Bite', op cit

⁸⁶ International Safety of Life at Sea Convention (SOLAS). Regulation 3-1 of Part A-1 of Chapter II-I, entered into force on July 1, 1998. This states *inter alia* that SOLAS vessels in addition to satisfying the Convention's ship construction requirement, must be designed and constructed in compliance with the structural requirements stipulated by a recognized Classification Society.

⁸⁷ Lloyds List, March 4, 2005, 12

⁸⁸ *ibid*, 12

⁸⁹ *ibid*, 12

4.4.4 Third Maritime Safety Package

On November 23, 2005, the European Commission presented the Third Maritime Safety Package. The package with an array of proposals mentioned above is worth noticing that the legislative package has changed its name from the ERIKA III package to the present the Third Maritime Safety Package – perhaps to indicate that the focus has shifted away from the more incident related measures contained in the former maritime safety packages, which were clearly linked to the two large oil tanker incidents – PRESTIGE and ERIKA – which took place in EU waters.

The package was expected to be submitted to the industry for consultation as soon as possible in order to provide the industry with an opportunity to state their opinions and priorities at an early stage with regard to the different proposals in the package. The deadline for consultation responses ideally was billed for January 10, 2006.⁹⁰ Furthermore, according to the usual procedure, the proposals were to be discussed among the different EU member countries during the national EU decision-making procedure with a view to determine their position for the negotiations on the proposals in the European Union. This is currently an ongoing process.

⁹⁰ Please see www.europarl.europa.eu/meetdocs/2004_2009/documents/pr/629/629339/629339en.pdf In the Draft EU proposal (COM(2005)0587 – C6 – 0038/2006 – 2005/0237 (COD)), on November 6, 2006, it says: “Previous directives, particularly Directive 2001/105/EC, one of three proposals in the Erika 1 legislative package, have already raised the serious need to reform the present system for Community recognition of classification societies, set up by Directive 94/57/EC; the substantial progress that they made was then reinforced by the Council’s conclusions of 13 December 2002 and Parliament’s resolutions on strengthening safety at sea (2003/2235(INI) and the resolution adopted after the wreck of the Prestige (2003/2066(INI)).”

At the meeting of the Transport Council on 5 December 2005, the Commission presented the proposals contained in the maritime safety package, however, an actual discussion or negotiation was not readily expected. This, therefore, inhibited any perception of the attitude of the Member States towards the individual elements of the many proposals and when the proposals are expected to be adopted.

The package contains 7 proposals of new European legislation and amendments to existing legislation. Despite the reduction in the number of maritime accidents, the threats relating to failure to comply with safety standards remain. The seven proposals contained in the package are therefore intended to supplement the European rules concerning maritime safety and improve the efficiency of the existing measures and they include;

- A proposal for a Directive on the conformity requirements of flag states;
- Amendment of the Directive on classification societies;
- Amendment of the Port State Control Directive;
- An amendment of the Traffic Monitoring Directive;

- A proposal for a Directive on accident investigations;
- A Regulation on liability and compensation for damage of passengers in the event of maritime accidents;
- A Directive on the extra-contractual liability of ship-owners

The above proposals take account of the experience acquired in implementing the Community legislation on maritime safety (the ERIKA I and II packages and the measures adopted following the prestige accident), and the concerns expressed on several occasions by the European Parliament, the European Council and the Ministers of Transport.

In its preliminary communication to the Council, the EU Commission observed that certain factors militated against the progress of the EU in its commitment to foster a safe maritime environment and chief among these was the fact that it still did not have legal status within the IMO, which the EU Parliament had earlier requested the Council to follow up with the IMO in its MARE Resolution in 2002. It also bore in mind that most of the trade routes, for instance the Black/Caspian sea region⁹¹ and Russia⁹² were developing with lots of installations emerging in these areas, were growing in both scale and volume particularly as some of these regions are

⁹¹ Information from COM(2004) 373 final, 12.5.2004. shows that the protection of the Mediterranean against the risks of pollution by ships from the Black Sea remains a source of concern. In 2002, 122 million tonnes of oil crossed the Bosphorus, on board 7 400 oil tankers. The risk of pollution is likely to increase with the growth in oil production in the Caspian Sea region: assuming that all the oil pipeline expansion or construction projects are completed, the average oil export capacity from the Caspian to the Black Sea terminals would be 2.4 million barrels/day in 2015. These trends, which concern the countries of northern Europe and the Mediterranean, demonstrate the need to develop and intensify the maritime safety component of the dialogue between the Community and its neighbours, particularly in the context of the establishment of the common economic area between the EU and Russia and through the dialogue established by the European neighbourhood policy¹⁰ which establishes a framework for relations between the enlarged Europe and its neighbours. Under this strategy, action plans have been concluded with the partner countries of the Black Sea and the Mediterranean and entail several measures intended to strengthen cooperation concerning maritime safety policies and improve the efficiency of the implementation of standards for port and flag States.

not (or not yet) within the EU, hence the need for a more integrated action between both the EU and the IMO.

The Communication further notes the requirement for constant audit of the Classification Societies and the need to re-assess the current liability regime for ship-owners. This is somewhat reminiscent of the *Nicholas H case*, wherein the Ship-owner's liability was limited to £500,000 resulting in the plaintiff Cargo-owner seeking to retrieve the balance of its loss of 6,000,000 pounds from the Classification Society involved, NKK. It would appear that the proposal aims to strike a fairly more even balance in terms of liability of both parties, particularly the Ship-owner or vessel operator who has the comfort of a liability regime, while Classification Societies do not as yet in a private capacity.

The proposal new package aims in **Art.21** to improve the position of Classification Societies by setting up a joint and independent body that will assess the quality systems of the recognised organisations and their certifications. It focuses on the uniform interpretation and application of the technical Regulations and international conventions. It behoves that where the technical regulations are compatible, there will be a corresponding credible mutual recognition of Class Certificates.

⁹² New traffic routes have been created, whereby Russia, for example, has built large oil terminals which are resulting in a spectacular and rapid increase in maritime traffic in the Gulf of Finland. In 2000, some 40 million tonnes of crude oil and petroleum products were carried in the Gulf of Finland. According to estimates, this figure could reach 100 to 120 million tonnes by 2010.

Further a new mode of sanctions is proposed for Classification Societies regarding the withdrawal of recognition and the imposition of fines. Where the recognised Organisation error is of a phenomenal magnitude to safety and the environment, recognition may be withdrawn. While a twofold system of sanctions exists, for non-compliance with recognition criteria on the one hand, and poor performance on the other, the Package proposes both derive from a single list of infringements and penalties. Also it is recommended that the element of financial penalties is substituted for the suspension of recognition.⁹³

Austria held the EU presidency in the first six months in 2006 and it was not expected that maritime matters would be given high priority. With the assistance of Great Britain, Austria launched the negotiation on one or two of the proposals which included negotiations on amendments of the Port State Directive and the Traffic Monitoring Directive. The other proposals will follow suit depending on the priorities of future presidencies. Presently, most rest on the decision expected from the *Prestige* Case

⁹³ This may well have a link to Mikelis's comment in the LSLC Lecture of December 2003 to the effect that the suspension of recognition from Classification Societies under Arts.9 and 10 of 2001/105 Directive, does not appear to have been very well thought out and to that extent not practical, since vessels need to maintain their certificates and these certificates need to be issued by valid Classification Societies in full operation.

CHAPTER FIVE

Conclusion

5.1 What is Class and Evolutionary Trends

In concluding this treatise, the questions is asked again, what are Classification Societies?

What do they do? Who do they deal with and to whom are they responsible, if at all?

Classification Societies are private or public organisations that survey and inspect ships to ensure they comply with their respective standards and guidelines for Ship-owners. This has not always been the case, since at their inception the initial clients of Classification Societies were marine insurance companies with an interest to obtain some assurance from Class that the vessel they intended to underwrite in their books would not be an action in futility. The same need for assurance, and to a reasonable extent safety, paved the way for Ship-owners to engage the services of Classification Societies to assess their vessels in compliance with that Society's Rules, Regulations and Guidelines. Marine insurance companies then took a step backwards to the extent that Ship-owners (or the Ship-yard for that matter where it is a new build) dealt directly with the selected Classification Society. The marine insurance company re-appears in the picture in the event it has paid out for a claim to the Ship-owner and it then takes the position of the Ship-owner in terms of subrogation.

They also survey vessels to ensure that international conventions initiated by the IMO are adhered to such as the **Load Line Convention**, **MARPOL** and the **SOLAS Convention**. We can conclude from this that the parties who engage the services of a Classification Society are Ship-owners and Flag-States. With the first they deal in a private capacity, while with the other

they are engaged in a public capacity¹ and more often than not, they are not unlike agents of the Flag-States on whose behalf they perform services and thus may covered by sovereign immunity similar to the one held by the principal Flag-State.²

5.2 Pervasiveness and Potential Defendant

The safety of vessels is due in huge part to Class, in spite of the non-delegable duty of seaworthiness placed on the Ship-owner, who have the expertise and resources to survey and inspect ships. They are so important that they are a ready criterion in assessing the rate of premium for a vessel about to be insured. Should there be any equivocation about the classification of the vessel, this will escalate the rate of premium payable for the vessel's insurance policy. Such is the confidence expressed in Classification Societies that certain judgements in actions against them have expressed the essence of obtaining a Classification Certificate is to derive the benefits mentioned earlier of cheaper insurance premium³

¹ See Boisson, P, 'Are classification societies above the law?' Classification Societies, Issue 2, January (1998) ,www.maritimeadvocate.com/i2_clas.htm., where he says: "Flag states rely almost completely on class. Only class has the depth of knowledge, experience and expertise needed to meet public expectations of ship safety. As the world demands higher standards of ship safety, operation and environmental protection, the burden of making it happen will inevitably fall primarily on class."

² Ibid. Boisson further advises that: 'If the exposure to liability of serving the public interest gets too high, class will be forced to discontinue this work. Governments with sovereign immunity would be forced to take it on. Unfortunately, most governments have simply not got the necessary expertise or control to replace class. Things would be bound to go wrong, but as governments are immune, the potential liability for any default would be nothing at all, which is a lot less than class is willing to stand behind.'

³ The Sundancer [1994]; Otto Candies v. NKK [2003]

Current trends have dictated a move towards laying the blame on Class in the event of a collision, sinking or loss of ship and/or cargo.⁴ This has been more so where the amount recoverable from other parties concerned is a mere fraction of the true loss that has been suffered by the plaintiff. This has precipitated the advance by aggrieved parties to retrieve the balance of their loss from the Classification Societies involved in an incident. In this connection, Class have been drawn into legal suits as unwilling defendants by parties who seek to make good their loss at all costs and see in Classification Societies a potential way of doing just that.

The argument by Class is that the mounting disapproval at the performance of their duties, by contractual parties and third-parties alike, will only adversely affect the manner in which they act and will thereby adopt a defensive stance. This position was observed by Lord Steyn in the **Nicholas H**⁵ who stated that '*...the question is whether NKK, and other classification societies, would be able to carry out their functions as efficiently if they become the ready alternative target of cargo owners, who already have contractual claims against the ship-owners. In my judgement, there must be some apprehension that the classification societies would adopt, to the detriment of their traditional role, a more defensive position.*'

5.3 Variety of Legal perspectives and relationships

The nature of a relationship with a Classification Society can be either contractual, tortious or both contractual and tortious. The resulting effect of these diverse relationships is that there

⁴ **Nicholas H** [1996] 2 LR 299; The *Erika* and the *Prestige* as discussed in the preceding chapter on IMO and EU initiatives

⁵ [1995] L.R. 299 at 313

will be varying degrees of liabilities and obligations flowing from one party to the other or even none at all. An important factor in ascertaining the level of duty of care and liability from one party to the other will necessarily depend on the circumstances in the particular case. In this regard, the particular level of duty that the Classification Society undertakes to perform for the Client will necessarily determine the extent of the liability or non-liability of that Society to the Client.

In contract, what has developed over the years, as an aid in ascertaining liability on the part of the Classification Society, is the theme of the 'Ryan warranty to perform in a workmanlike manner' borrowed, from the case decided a good fifty years ago. For Class, they have so far been mostly successful in not getting involved in the full substantive case and have been able to achieve this by resorting to procedural tactics detected from the contract itself through the Exclusion and Limitation of Liability, Choice of Law and Jurisdiction/Forum Clauses in the contract.

Further, the inclusion of exclusion or exculpatory and limitation of liability clauses in the contracts have worked to keep Class out of potential claims by their contractual partners. While some of these clauses have been frowned upon, they have at times been upheld in court in a bid to observe the notion of freedom of contract by parties with fairly equal bargaining power.⁶

Regarding tort, where the parties are already had a contract in place, that contract may determine the whole extent of the claim, where it has been drafted in such a way to dispense with a recourse to tort. The contract will nevertheless be subject to the **Unfair Contract Terms**

⁶ See generally the **Rome Convention 1980**, discussed in chapter 2 of the thesis

Act, 1977 where the contract is governed by English law or the equivalent Act in the country whose laws will determine the contract.

The Choice of Law and Jurisdiction/Forum Clauses in the contract are designed in the Classification contract in such a way that arbitration will be the first option for the resolution of a dispute, and the jurisdiction more often than not will be one that may be sympathetic to the cause of Class.⁷

In a pure tortious situation, there will obviously be no pre-existing contract between the parties. Rather, there could be a contract between the plaintiff and the Ship-owner, the ship-owner then has a contract with the Classification Society. It could also be an action between the ship-owner and the Classification Society, where the Ship-owner has had his vessel registered with a flag-state, and that flag-state's registration and compliance functions have been performed by a Classification Society.⁸ In this case, the extent to which the party in contract with the plaintiff is precluded from liability or even legal action may equally extend to the Classification Society as well. It will be recalled that ABS was precluded from liability to the owners of the *Sundancer* as far as the aspect of compliance with international conventions was concerned by virtue of undertaking that set of duties on behalf of the Bahamian Maritime Authority. The latter was precluded from legal suit due to sovereign immunity and this ABS, deemed to be an agent of the Bahamian Maritime Authority, derived the same immunity from the principal.

⁷ Please refer to Chapter 2 of the thesis on class and contract, where the choice of law clause in classification contracts was discussed.

⁸ *The Sundancer* [1994] L.R. 183

In view of the legal relationships above, the question remains how will the Classification Society be found liable in a duty of care to the plaintiff? The Anglo-American position makes it clear that a claim culminating in one for economic loss will be dispensed with in favour of the Classification Society. The European and Canadian positions are markedly different with most claims, being resolved in favour of the plaintiffs. The contemporary general test in the England which has been adopted through various means of ascertaining that a duty exists is the foreseeability; proximity; and the fair, just and reasonable test. Following the **Nicholas H case**, the aspect of it being fair just and reasonable to impose a duty of care can be gleaned if there was some reliance, and/or voluntary assumption of responsibility.⁹

It is submitted that the foreseeability and proximity tests are clear-cut premises of ascertaining liability in a duty of care on the part of the classification society. The aspect of whether finding class liable is fair, just and reasonable, however, appears to be capable of any interpretation and adaptable to any situation. While, it is recommended that class should not be besieged by legal actions (or the threat of it), it would not appear to be fair, just and reasonable either that the plaintiff on establishing a loss, and on being able to prove that such loss would not have happened but for negligent survey of the vessel, is left with no recompense.¹⁰

⁹ See generally the **Nicholas H** [1995] 2 LR 299 at 314 by Lord Steyn that: “it is possible to visualize direct exchanges between cargo-owners and a classification society, in the context of a survey behalf of owners of a vessel laden with cargo which might give rise to an assumption of liability in the sense explained by Lord Goff in **Henderson v. Merrett Syndicates Ltd** [1994] 2 LR 468 AT 489, 493 – 495.” **Henderson v. Merrett** has been discussed in Chapter 3 of the thesis under the Assumption of Responsibility premise of ascertaining a duty of care.

¹⁰ Lord Lloyd in his dissenting judgement in the **Nicholas H** at p. 309 said: “In physical damage cases, proximity very often goes without saying. Where the facts cry out for the imposition of a duty of care between the parties, as they do here, it would require an exceptional case to refuse to impose a duty on

5.4 Insurance Angle

As observed earlier, the first clients of Classification Societies were marine insurance companies, who required confirmation that the vessel to be insured was not an unacceptable risk. The onus of seeking classification assistance has been passed from the marine insurers to the ship-owners, who now deal directly with the classification societies. The relationship between underwriters and class, however, has retained elements of the initial contact at the inception of classification societies, due to the former recommending to the ship-owner/ship-yard on the particular classification society whose inspection will suffice to render the vessel insurable.

The various Institute Clauses Hulls (ICH), which have been drafted over the years have invariably incorporated a Classification Clause which has always had the effect of a warranty, with non-compliance rendering the policy void.¹¹

Classifying a vessel, especially and preferably with a member of IACS can be something of the proverbial double-edged sword. With Classification, the Ship-owner can enjoy the benefit of a favourable insurance premium with rates that would be inaccessible without classification.¹² However, with that classification entails a warranty in marine insurance, which can result in the termination of the cover of the vessel should the terms of the classification be derogated from.

the ground that it would not be fair, just and reasonable. Otherwise there would be a risk that the law of negligence will disintegrate into a series of isolated decisions without any coherent principles at all...”

¹¹ See generally the ITCH 1983, ITCH 1995 and ICH 2003.

¹² In practice, however, classification is indispensable because no insurance company would risk any venture with a ship-owner or ship-yard without any information from a classification society to guide it in its decision on whether or not to underwrite the vessel.

These include switching to another Classification Society without the consent of the insurer, or not complying with the terms of the Classification Agreement itself.¹³

5.5 The Future and recommendations

Classification Societies have a function in the maritime world which cannot be detracted from or dispensed with.¹⁴ They have, however, been mired in legal battles regarding their potential liability in the course of their duties to their contractual parties and to third-parties. Should they be found so liable? The future will appear to rest on the final outcome of the controversial cases currently *sub judice*¹⁵ where every party imaginable¹⁶ in the maritime arena is involved.

It is submitted that Classification Societies have a function which goes to the root of maritime safety and whose impact has led to improved shipping and further advances in technology related thereto. The Courts so far, especially in the Anglo-American jurisdictions, have been

¹³ Clauses 4 & 5 ITCH 1995, Clause 13 ICH 2003

¹⁴ In their private role of contracting with ship-owners and ship-yards, classification societies' recommendations are relevant in guiding underwriters and P & I clubs in their decision to insure the vessel, in their absence of which, the insurers would have no records to go by. In the public contract between Class and flag-states, the flag states invariably rely on the reputation and expertise of the classification societies to certify the vessels registered with their maritime administrations, in accordance with the IMO guidelines and standards. These flag-states routinely delegate their powers of certification to the classification societies, who on their part have the resources to research on new techniques of certification.

¹⁵ The *Erika* and *Prestige* Cases

¹⁶ In the above cases, which have also impacted hugely on the marine environment, including its flora and fauna, plaintiffs have included the countries of France and Spain; cargo-owners; environmentalists; hoteliers with property on the beaches who have suffered loss of revenue, albeit this may be deemed economic loss; and of course the vessel/tanker owners.

largely favourable towards Class in the actions that have been brought against them by contractual or third-parties. This may be due to the fact (at least in part) that Classification Societies do not as yet have any statutory right to limitation of liability such as that which ship-owners for instance derive from like the Hague and Hamburg Rules as well as under the Limitation of Liability Convention.

In this regard, it is recommended that a statutory position should be adopted in terms of the limitation of the liability of Class, whereby should a particular case distinctly preclude the protection of limitation the errant party will have to pay the consequences.¹⁷ It is envisaged that this will be lead to a more level playing field amongst all the parties (ship-owners, cargo-owners, salvors, etc who already have the benefit of limitation of liability) who together forge a safer environment on the seas.

Further, there is the debate on the conflict of interest that classification societies find themselves in, acting for both ship-owners and shipyards in a private capacity, and in a public role for flag-states when they undertake certification duties on the State's behalf. The argument has arisen, therefore, classification societies should adhere to one role, either the private or public, to make for some transparency.¹⁸ This would present an ideal picture, however the problem herein is that the very reason classification societies have their public function

¹⁷ A new proposed Directive, (COM(2005)0587 – C6 – 0038/2006 – 2005/0237 (COD)), is currently undergoing revision at the European Parliament in this regard.

¹⁸ Greece and the Bahamas presented arguments to the International Maritime Organisation (IMO) Assembly in 2003 that classification societies ought to maintain a particular role and suggested that their public function should be taken over by the IMO

delegated to them in the first place is due to the fact of their expertise which has been nurtured for almost 250 years.

Should a strong, albeit nearly impossible, case be made for the separation of the duties of classification societies, and their public function remain with the flag-states it may be possible for the classification societies to act as consultants to the flag states in a less dominant capacity and less powers delegated to them. A time frame could be put in place for the training of flag-state administrations by classification societies. This may be the ideal position and while it would certainly present some transparency, its practicability may well tell another story.

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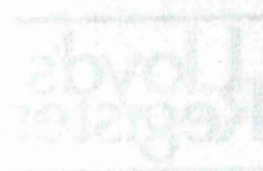
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		IMO Number
GENERAL INFORMATION		
Main builder / moulder / completing yard		Yard number
Secondary builder		Yard / works number
Other ships / vessels		
Name and address of prospective owner		Proposed flag
Estimated date of keel laying	Estimated date of delivery	If dual class, specify other society
Date of contract between the main builder and prospective owner for the construction of the ship:		

HULL INFORMATION		
Type of ship / vessel		
Standard series / trade name		Material of hull / superstructure
Length overall (m)	Length between perpendiculars (m)	Breadth moulded (m)
Depth moulded (m)	Design draught moulded (m)	Estimated gross tonnage
Estimated deadweight (tonnes) at design draught	Displacement (tonnes) at design draught	Maximum service speed (knots) at design draught

MACHINERY INFORMATION					
Description of main propulsion arrangement					
Total main propulsion output power (kW)	Engine RPM	Propeller RPM	Number of shaft lines	Number of engines per shaft line	
	MANUFACTURER		MODEL TYPE/DESIGNATION	POWER (kW) / PRESSURE BAR	NO. OF UNITS
MAIN PROPULSION ENGINES					
MAIN GEARING					
PROPELLERS					
AUXILIARY ENGINES					
GENERATORS					
MAIN BOILERS					
AUXILIARY BOILERS / THERMAL OIL HEATERS	OIL FIRED				
	EXHAUST GAS				
	COMPOSITE				
OUTBOARD PROPELLER / WATER JETS / VOITH SCHNEIDER					

ATHWARTSHIP THRUSTER UNITS				
MAIN AIR RECEIVERS				
AUXILIARY AIR RECEIVERS				
STEERING GEAR				

CLASSIFICATION INFORMATION

We request that the vessel be specially surveyed during its construction and that a classification certificate be issued for the below mentioned classification notations (for guidance see www.cdlive.lr.org pressing classfinder button). This request is made on the basis that we accept the relevant Rules and Regulations for Classification and the terms and conditions of this form.

HULL NOTATIONS - THE SUITABILITY OF HULL NOTATIONS CAN BE CONFIRMED ONLY AFTER THE MAIN SCANTLING PLANS HAVE BEEN EXAMINED

Character symbols / type notation / special features notation

Service restriction notation

MACHINERY / CONTROL NOTATIONS

Machinery class notation

Control engineering / navigation / dynamic positioning notations

Refrigerated cargo installation notation

Environmental Protection Notation

CARGO GEAR / LIFTING APPLIANCE NOTATIONS

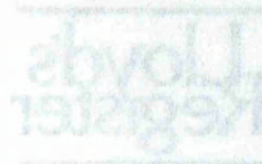
Mandatory class notation (LA) - Applicable where a lifting appliance is an essential feature e.g. crane barge

Optional class notations, (CG, CL, PL, CR) required for:

- | | | | |
|---|--|--|---|
| <input type="checkbox"/> Derricks | <input type="checkbox"/> Passenger lifts | <input type="checkbox"/> Deck cranes including
Hose Handling cranes | <input type="checkbox"/> Cargo lifts |
| <input type="checkbox"/> Derrick cranes | <input type="checkbox"/> Vehicle lifts | <input type="checkbox"/> Cargo ramps | <input type="checkbox"/> Engine room cranes |
| <input type="checkbox"/> Store/Provision cranes | <input type="checkbox"/> Self unloaders | | |
| <input type="checkbox"/> Other (please specify) | | | |

DESCRIPTIVE NOTES

Abbreviated descriptive notes are stated on the Certificate of Class.



PROGRESS REPORTS

Progress reports can be issued by surveyors in the form of a factual statement relating to the completion to class requirements, of stages of construction defined in the contract between the builder and the owner. Any request for progress reports to be issued is made on the basis that the terms and conditions on this form are accepted and that the statement of work reported does not warrant that the work completed is worth a specific monetary value. A separate fee will be charged for these reports as this service is outwith the classification service.

Progress Report Required

STATUTORY CERTIFICATION / APPROVAL AND STATEMENT OF COMPLIANCE

We request that the following certificates / statement of compliance be issued and documents approved. This request is made on the basis that we accept the terms and conditions on this form.

LOAD LINE, SOLAS, IMO CODES AND OTHER CONVENTIONS

- | | | | |
|---|---|--|---|
| <input type="checkbox"/> Cargo Ship Safety Construction | <input type="checkbox"/> Load Line (1966 LL) | <input type="checkbox"/> Load Line (1966 LL as amended by 1988 protocol) | <input type="checkbox"/> Cargo Ship Safety Radio |
| <input type="checkbox"/> Passenger Ship Safety | <input type="checkbox"/> Safety Management Certificate | <input type="checkbox"/> Carriage of Dangerous Goods (SOLAS Ch II-2) | <input type="checkbox"/> Cargo Securing Manual Approval |
| <input type="checkbox"/> International Bulk Chemical (IBC) Code | <input type="checkbox"/> International Gas Carrier (IGC) Code | <input type="checkbox"/> IMO Mobile Offshore Drilling Unit (MODU) Code | <input type="checkbox"/> IMO Code of Safety for Special Purpose Craft |
| <input type="checkbox"/> IMO International Code of Safety for High-Speed Craft (HSC) Code | <input type="checkbox"/> Safety of Fishing Vessels (Torremolinos) Convention. | <input type="checkbox"/> Ship Structure Access Manual | <input type="checkbox"/> Cargo Ship Safety Equipment |
| <input type="checkbox"/> Other (please specify) | | | |

- Stability Approvals:
- | | | |
|---|---|--|
| <input type="checkbox"/> Damage Stability | <input type="checkbox"/> Intact stability | <input type="checkbox"/> Grain stability |
| <input type="checkbox"/> Other (please specify) | | |

TONNAGE

- | | |
|---|--|
| <input type="checkbox"/> International (1969) | <input type="checkbox"/> National (please specify) |
| <input type="checkbox"/> Certificate of measurement | <input type="checkbox"/> Suez Canal <input type="checkbox"/> Panama Canal (PC/UMS) |
| <input type="checkbox"/> Other (please specify) | |

MARPOL AND OTHER POLLUTION PREVENTION CONVENTIONS

- Annex I Annex II Annex IV Annex V Annex VI NOx Code
 Anti-Fouling Systems Convention

Operational Manuals Approval

- | | | |
|---|--|--|
| <input type="checkbox"/> Shipboard Oil Pollution Emergency Plan (SOPEP) | <input type="checkbox"/> Shipboard Marine Pollution Emergency Plan (SMPEP) | <input type="checkbox"/> Shipboard Marine Pollution Emergency Plan - Noxious Liquid Substances (SMPEP-NLS) |
| <input type="checkbox"/> Crude Oil Washing Manual (COW) | <input type="checkbox"/> Procedures and Arrangements Manual (P & A) | <input type="checkbox"/> Oil Discharge Monitoring and Control Systems Operational Manual (ODM) |
| <input type="checkbox"/> Other (please specify) | | |

OTHER REGULATIONS AND STATEMENTS / CERTIFICATES OF COMPLIANCE

- | | |
|--|---|
| <input type="checkbox"/> Canadian Arctic Pollution Prevention | <input type="checkbox"/> Code of Safety Practice for Solid Bulk Cargoes (BC Code) |
| <input type="checkbox"/> Crew Accommodation (please specify Rules) | <input type="checkbox"/> USCG requirements for Foreign Flag Gas Carriers |

- | | |
|---|---|
| <input type="checkbox"/> Vapour Emission Control Systems (VECS) USCG and / or IMO Standard (please specify and indicate any variations e.g. exclusions) | <input type="checkbox"/> USCG Requirements Related to Pollution Prevention (including US, Double Hull Regs. for tankers). Regulation numbers to be specified. |
| <input type="checkbox"/> Safety Guidelines for Cargo Ships of less than SOLAS convention size (please specify Rules) | |
| <input type="checkbox"/> Longitudinal strength calculation program | <input type="checkbox"/> Stability calculation program |
| <input type="checkbox"/> Other (please specify) | |
| <input type="checkbox"/> Please indicate on a continuation sheet any other statements of compliance required to be issued. | |

SURVEY SERVICES ON BEHALF OF FLAG ADMINISTRATIONS - CERTIFICATION ISSUED BY ADMINISTRATION

- (please specify with scope)

SERVICE ADDITIONS TO THE CLASSIFICATION AND STATUTORY REQUIREMENTS

- Ship Emergency Response (SERS) Summary of Services additional to those required by Classification and Statutory Requirements and not indicated on this form has been completed and is attached.

CARGO GEAR / LIFTING APPLIANCES FOR STATUTORY CERTIFICATION

- | | | | |
|---|--|---|---|
| <input type="checkbox"/> Derricks | <input type="checkbox"/> Passenger lifts | <input type="checkbox"/> Deck cranes including Hose Handling cranes | <input type="checkbox"/> Cargo lifts |
| <input type="checkbox"/> Derrick cranes | <input type="checkbox"/> Vehicle lifts | <input type="checkbox"/> Cargo ramps | <input type="checkbox"/> Engine room cranes |
| <input type="checkbox"/> Store/Provision cranes | <input type="checkbox"/> Self unloaders | | |
| <input type="checkbox"/> Other (please specify) | | | |

THIS CONTRACT IS BETWEEN THE CLIENT AND Lloyd's Register Asia (hereinafter referred to as LR) AND IS SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS

The following terms and conditions apply to all services provided by any entity that is part of the "LR Group" as hereinafter defined:

- In these terms and conditions: (i) "Services" means any and all services provided to the Client by any entity that is part of the LR Group, as hereinafter defined, including any classification of the Client's vessel, equipment or machinery; (ii) the "Contract" means this agreement for supply of the Services, and (iii) the "LR Group" means LR, its affiliates and subsidiaries, and the officers, directors, employees, representatives and agents of any of them, individually or collectively.
- The Client agrees to give the LR Group entity concerned every facility and necessary access to carry out the Services and undertakes to familiarise itself with the appropriate Rules and Regulations and, where appropriate, ensure that all subcontractors and suppliers of components, materials or equipment do the same.

The Client also agrees to oblige its subcontractors and suppliers to arrange the necessary plan approval surveys and to pay LR Group entity's associated fees.

- The survey procedures undertaken by the LR Group entity including those followed during periodical visits are published in the classification Rules and Regulations. Surveyors will not be in continual attendance at the builder's premises. Where construction and outfitting are continuous processes, the Client has the overall responsibility to the prospective owner to ensure and document that the requirements of the Rules and Regulations, approved drawings and any agreed amendments made by the attending surveyors have been complied with at all times.
- The interpretation of the appropriate Rules and Regulations for classification is the sole responsibility and at the sole discretion of the LR Group entity concerned.

CONTRACT FOR MARINE SERVICES DURING CONSTRUCTION

The Client agrees to pay all undisputed portions of invoices for the Services within 30 days of the invoice date. LR reserves the right to charge interest at an annual rate of 2% above the greater of the London Interbank Offered Base Rate (LIBOR) or the equivalent in the country where the Client maintains its principal office on any amount remaining unpaid beyond 30 days, and may withhold any or all Services until the arrears, including interest, are paid.

The Client will be charged additional fees in respect of (i) changes to the agreed building schedule, other delays, cancellations, aborted visits, postponements, or suspensions for which the LR Group entity concerned is not responsible; or (ii) any alterations, amendments, or changes to specifications or the scope of the Services; or (iii) the need for re-inspection or appraisal of drawing revisions on more than one occasion unless otherwise agreed. These fees will be added to the Contract price at current rates.

The LR Group will keep confidential and not use or disclose to any third party any technical information or operating data (other than ship plans available on the LR Group classification website: www.cd.live.lr.org) derived from the Client in connection with the Services except as may be required by law or as may be requested by the Client. This obligation will survive termination of the Contract. This obligation will not apply to any technical information or operating data that was in the LR Group's possession before its disclosure to the LR Group entity in connection with the Services, that is or becomes part of the public domain through no fault of the LR Group or that otherwise becomes available to the LR Group from an independent source not under a confidentiality obligation.

The Contract continues in force until terminated by LR or the Client, after giving the other party 30 days' written notice.

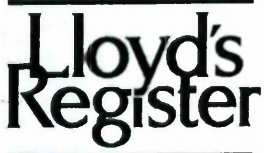
If the Contract is terminated by LR or the Client before the Services are completed, the fees will be calculated on a pro rata basis up to the date of termination. Any reasonable costs directly attributed to early termination and any amounts then due will immediately become payable.

LR's services do not assess compliance with any standard other than the applicable rules and codes of Lloyd's Register of Shipping, international conventions, or any other standards that are expressly agreed in writing by LR and the Client. Without limiting the generality of the foregoing, the issuance of a class certificate does not in itself constitute a guarantee that the vessel is seaworthy and does not relieve the owner or operator of the vessel of its non-delegable duty to maintain the vessel in seaworthy condition.

If the Client requires classification services relating to vessels, machinery, or equipment in a jurisdiction in which LR itself does not do business (including without limitation Brazil, Canada, Greece, and the United States of America), the Client hereby acknowledges and agrees that these services will be

performed by a subsidiary or affiliate of LR that is part of the LR Group and that is authorised to conduct classification surveys and issue certificates on the vessel, machinery, or equipment, or by another person or entity that has been approved by LR to perform the services.

12. In providing Services, information, or advice, the LR Group does not warrant the accuracy of any information or advice supplied. Except as set out in these Terms and Conditions, LR will not be liable for any loss, damage, or expense sustained by any person and caused by any act, omission, error, negligence, or strict liability of any of the LR Group or caused by any inaccuracy in any information or advice given in any way by or on behalf of the LR Group even if held to amount to a breach of warranty. Nevertheless, if the Client uses the Services or relies on any information or advice given by or on behalf of the LR Group and as a result suffers loss, damage, or expense that is proved to have been caused by any negligent act, omission, or error of the LR Group or any negligent inaccuracy in information or advice given by or on behalf of the LR Group, then LR will pay compensation to the Client for its proved loss up to but not exceeding the amount of the fee (if any) charged by the LR for that particular service, information, or advice.
13. Notwithstanding the previous clause, the LR Group will not be liable for any loss of profit, loss of contract, loss of user, or any indirect or consequential loss, damage, or expense sustained by any person caused by any act, omission, or error or caused by any inaccuracy in any information or advice given in any way by or on behalf of the LR Group.
14. No LR Group entity will be liable or responsible in negligence or otherwise to any person not a party to the agreement pursuant to which any certificate, statement, data, or report is issued by an LR Group entity for (i) any information or advice expressly or impliedly given by an LR Group entity, (ii) any omission or inaccuracy in any information or advice given, or (iii) any act or omission that caused or contributed to the issuance of any certificate, statement, data, or report containing the information or advice. Nothing in these Terms and Conditions creates rights in favour of any person who is not a party to the Contract with an LR Group entity.
15. No omission or failure to carry out or observe any stipulation, condition or obligation to be performed under the Contract will give rise to any claim against LR or any other LR Group entity, or be deemed to be a breach of contract, if the failure or omission arises from causes beyond that entity's reasonable control.
16. The Client has a duty to provide a safe place of work for LR's surveyors. This duty relates to places of work which are under the control of the Client which can include ships, shipyards, offshore platforms, factories, foundries, refineries and offices.
17. Any dispute, claim, or litigation between LR and the Client arising from or in connection with the Services provided by LR shall be subject to the exclusive jurisdiction of the English courts and will be governed by English law.



CONTRACT FOR MARINE SERVICES DURING CONSTRUCTION

2005
1917

18. No addition, alteration or substitution of the Terms and Conditions will bind LR or form part of this Contract unless it is expressly accepted in writing by an authorized representative of LR who expressly states in writing that LR is agreeing to alter these Terms and Conditions. In the event of any conflict between these Terms and Conditions and any document purporting to impose different terms, these Terms and Conditions will prevail.	
Signature and official Stamp of Client	Signature Lloyd's Register Asia
Date	Date
Name in BLOCK CAPITALS	Name in BLOCK CAPITALS
Position in Client Organisation	Designation

FOR LLOYD'S REGISTER GROUP OFFICE USE ONLY

Office overseeing construction	Fee quotation no.
Main machinery and hull scantling design appraisal centre	
Main statutory design appraisal centre	



REQUEST FOR CLASS

AGREEMENT FOR CLASSIFICATION OF EXISTING VESSELS

(CHANGE OF CLASS)



REQUEST FOR CLASS AGREEMENT FOR CLASSIFICATION OF EXISTING VESSELS

This Agreement is entered into as of the ____ day of ____, between

(client name)

and American Bureau of Shipping
16855 Northchase Drive
Houston, Texas 77060-6008, U.S.A.

(client address)

hereinafter referred to as "Client", of the first part

hereinafter referred to as "ABS" of the second part,
as follows:

AUTHORIZED REPRESENTATIVES who may request services on behalf of the Client: (check the boxes that apply)

- Owner/Representative _____ (name)
- Shipyard (for vessels being modified) _____ (name)
_____ (address)
- Designer (for vessels being modified) _____ (name)
_____ (address)
- Other (please specify) _____

FEES * (Refer to section 3 for payment conditions)

The fee for classing this vessel is _____, this fee covers any plan review required to class this vessel to the extent of one original submission and one re-submission.

If additional plan review is required, it will be billed at the hourly rate stated in the current ABS Fee Schedule at the time of review. In addition to fees for classing this vessel, fees are to be paid for any required due or overdue classification and statutory surveys. These fees will be based on the current fee schedule at the time of survey.

Fee quotations are based on a definite scheduled completion date fixed at the time of entering into this Agreement. Should the services extend beyond the anticipated completion date, additional charges in accordance with the then current ABS Fee Schedule shall be assessed and invoiced along with costs and expenses. This also applies to services

NOTICES

All notices and correspondence sent to Client shall be addressed to *:

NOTICES

All notices and correspondence sent to Client shall be addressed to *:

Address for invoices, if different:

All correspondence sent to ABS shall be addressed to *:

American Bureau of Shipping, CDC Center, 16855 Northchase Drive, Houston, Texas 77060 U.S.A.

Complete section II. a) or section II. b), as applicable
Or such addresses as may be designated in writing from time to time by either party. All notices shall be in writing and shall be effective upon receipt, unless sent by telex or fax and repeated by mail in which case they shall be effective on dispatch.



REQUEST FOR CLASS
AGREEMENT FOR CLASSIFICATION OF EXISTING VESSELS

DEFINITIONS

- a) "Vessel" means any vessel, drilling unit, offshore installation, platform, submersible or marine structure, owned, by the Client or by any company whose shares are at least fifty percent controlled by Client, and which is intended to be presented to ABS for classification. Pages 9 through 15 detail all of the class services & requirements for the vessels governed by this Agreement, and the main particulars, which the Client shall update by written notice to the ABS Chief Surveyor as changes occur.
- b) "Classification" - The Classification process consists of: i) the development of Rules, Guides, standards and other criteria for the design and construction of marine vessels and structures, for materials, equipment and machinery; ii) the review of design and survey during and after construction, to verify compliance with such Rules, Guides, standards or other criteria; and iii) the assignment and registration of class when such compliance has been verified.

The Rules and standards are developed by ABS staff and passed upon by technical and special committees made up of naval architects, marine engineers, shipbuilders, engine builders, steel makers and by other technical, operating and scientific personnel associated with the worldwide maritime industry. Theoretical research and development, established engineering disciplines, as well as satisfactory service experience are utilized in their development and promulgation.

ABS and its committees can act only upon such theoretical and practical considerations in developing Rules and standards and in no way should classification, issuance of certificates or performance of services be deemed to be a representation, statement or warranty of seaworthiness, structural integrity, quality or fitness for a particular use or service, of any vessel, structure, item of material, equipment or machinery beyond the representations contained in the Rules of ABS.

Surveyors apply normally accepted examination and testing standards to those items specified for each survey by the Rules; construction procedures, safety procedures and construction supervision remain the responsibility of the shipyard, ship repairer, manufacturer, owner, or other Client.

It is understood and agreed that the issuance of classification certificates or the performance of services shall be at the sole discretion of ABS and that ABS reserves the right to withhold or withdraw classification, certificates or services for lack of conformity with its Rules or for any other reason, whether or not such reason be deemed by the other party to be unreasonable, frivolous, arbitrary or capricious.

ABS reserves the right to reconsider, withhold, suspend, or cancel the class of any vessel immediately for noncompliance with the Rules, for defects or damages which are not reported to ABS, for defects reported by the Surveyors which have not been rectified in accordance with their recommendations, or for nonpayment of fees which are due on account of Classification and other services.

ABS SERVICES

- a) Upon Client's request, ABS shall review plans and calculations (as appropriate, ABS may consider all or part of the design based on satisfactory service and the previous class society's plan approval), perform surveys, witness testing and issue reports as required for classification under ABS Rules. Client is familiar with and is referred to the ABS Rules for survey contents and on-line computer status service for details of survey timing. The vessel shall be reviewed for compliance with the ABS Rules in effect on the date of build or the date of construction contract between the Client and the prospective vessel owner (if being



REQUEST FOR CLASS
AGREEMENT FOR CLASSIFICATION OF EXISTING VESSELS

converted/modified) unless Client requests the application of a later edition of the Rules, or ABS requires earlier implementation of a specific Rule change.

All services covered by this Agreement are indicated on pages 9 through 15.

- b) The work shall be performed solely under the terms and conditions of this Agreement, and any printed terms or conditions found in other documents used to implement this Agreement shall be void and shall not affect or extend any rights or obligations under this Agreement nor create any new rights or obligations. These provisions apply regardless of whether the loss, damage, or expense has affected a party to this Agreement, or a third party who acted or relied on the information given by ABS.
- c) In performance of this Agreement, ABS shall be and remain, at all times, an independent contractor and neither ABS nor any of its officers, employees, servants, agents or subcontractors shall be or act as the employee, servant or agent of any other party hereto in its performance of any of the terms and conditions of this agreement.
- d) All work performed on behalf of flag administrations shall be governed by the terms and conditions of this Agreement unless the flag administration specifies otherwise.
- e) Client shall verify to ABS that the materials and components intended for classification or certification (if being converted/modified) meet the requirements of the Rules by producing certificates for such materials and components.
- f) If the vessel is being converted or modified and any part of the work is subcontracted, Client shall provide ABS with the names of the subcontractor(s), and address of the subcontractor's site(s), and shall provide the subcontractors with correct and adequate information regarding ABS requirements and any statutory requirements. ABS shall be entitled to rely on certificates provided by such subcontractors as it would rely on Client's certificates. Client stands surety for the acts and debts of its subcontractors. The cost of services at a sub-contractor are in addition to those stated in item 3a, and will be billed directly to the subcontractor.

PAYMENT CONDITIONS

- a) Fees for classing this vessel are payable for services provided regardless of whether or not the vessel is classed.
- b) Unless otherwise directed by American Bureau of Shipping, all fees are to be remitted upon receipt of invoice in U. S. Dollars to American Bureau of Shipping, P.O. Box 201614, Houston, Texas 77216-1614 U.S.A. by check and shall refer to the ABS issued invoice number. Wire transfers may be made through Chase Bank of Texas N.A., Houston, Texas 77252-8025 U.S.A., account number 0010-088-8180.
- c) Unless otherwise provided by agreement or prohibited or restricted by law, interest will be charged at a rate of 1 1/2% per month on any amounts not paid within 30 days from invoice date.
- d) The vessel and its owner, operator, and charterer shall be jointly and severally liable to ABS for the payment of all charges including but not limited to court costs, expenses and reasonable attorney's fees incurred in collecting sums due ABS, and ABS may take judgment for the entire amount due. Payment to anyone other than ABS or its authorized agent shall not be deemed payment and shall be made at payer's sole risk.



REQUEST FOR CLASS
AGREEMENT FOR CLASSIFICATION OF EXISTING VESSELS

DEFAULT

In the event of a default in the payment of any fees assessed in accordance with this Agreement, ABS shall have the right to terminate this Agreement and cancel classification and the vessel, as well as all plans, drawings, specifications, information and reports in possession of ABS, shall be subject to a lien for the payment of all fees and expenses due and owing by virtue of this Agreement and the termination or default hereof.

ASSIGNMENT & SALE

Any attempt to subcontract, assign, delegate, sublet, or transfer this agreement without prior written notice to ABS shall at ABS's option render this Agreement void. ABS may deem the classification of any vessel canceled upon the vessel's sale or transfer without prior written notice to ABS.

If Client shall breach any provision hereof or shall become insolvent, enter voluntary or involuntary bankruptcy or receivership proceedings, or make an assignment for the benefit of creditors, or should the vessel be arrested or sold at auction or at a Marshall's sale ABS shall have the right (without limiting any other rights or remedies which it may have hereunder or by operation of law) to terminate this Agreement, whereupon ABS shall be relieved of any and all further obligation hereunder and Client shall be liable to ABS for all resulting damages. ABS's right to require any previous waiver, forbearance, or course of dealing hereunder shall not affect strict performance of any obligation.

CONFIDENTIALITY

Subject to sections 4 and 5 hereof, all plans, drawings, specifications and information given to and reports prepared by ABS in connection with performance under this Agreement shall be treated as confidential by ABS and shall not be used for any other purposes than those for which furnished without prior written consent, except as required by judicial order, governmental order or regulation, by subpoena or by direction of a governmental agency with subpoena power.

Notwithstanding the obligations of confidentiality outlined above, during conversion or modification of the vessel ABS is authorized to discuss and disclose to the Client all submitted drawings, specifications and information from the designer and subcontractors and to discuss and disclose all pertinent information provided by the Client with subcontractors.

By signing this Agreement Client authorizes ABS, in accordance with the IACS Transfer of Class Agreement, to obtain from the present classification society, if any, the classification survey status indicating any overdue surveys, outstanding conditions/recommendations for the subject vessel, to disclose to the present society the means of satisfying any such overdue surveys, outstanding conditions/recommendations, and consents to ABS providing the corresponding information to any successor society.

ACCESS

ABS, its officers, employees, servants, agents or subcontractors shall have access to all vessels, drawings, plans, records, places of manufacture and assembly or other items necessary to complete the requested services. Client shall also grant access to auditors from ABS, the International Association of Classification Societies (IACS) or flag administration when requested by ABS and accompanied by ABS personnel.



REQUEST FOR CLASS
AGREEMENT FOR CLASSIFICATION OF EXISTING VESSELS

Client is responsible for establishing and maintaining safe working conditions in accordance with applicable safety standards and for providing ABS surveyors with safe access to sites and assistance during construction, testing and trials. ABS personnel shall comply with Client's safety procedures to the extent such procedures are communicated to such personnel. If ABS personnel feel the proposed working conditions are unsafe they may refuse to attend the work site.

Client shall provide ABS with the following documentation before issuance of a full-term classification certificate:

- a) Plans and calculations required by the Rules for review
- b) Technical descriptions and data, including material specifications
- c) All the necessary documentation as required under the IACS transfer of class agreement.

NON-WAIVER AND SEVERABILITY

No waiver by either party of any breach of any of the terms of this Agreement shall be construed as a waiver of any subsequent breach, whether of the same or of any other term hereof. If a provision of this Agreement is held invalid all valid provisions that are severable from the invalid provision remain in effect.

FORCE MAJEURE

Upon prompt notification of the other party by fax, telex or letter communication, neither party hereto shall be liable to the other for default or delay in performing its obligations hereunder if such default or delay is caused by fire, strike, riot, war, act of God, delay of carriers, governmental order or regulations and/or any other similar or different occurrence beyond the reasonable control of the party so defaulting or delaying, except that cancellation for such causes may not be made without reimbursement to ABS for expenditures actually incurred for labor and materials upon the authority of this Agreement prior to receipt of such notice.

TERM

This Agreement shall remain in force until terminated pursuant to the terms of this Agreement or by either Client or ABS upon thirty days' prior written notice.

RESPONSIBILITY AND LIABILITY

It is understood and agreed that any report, statement, notation of plan review or certificate (hereafter referred to collectively as "certificate") issued as part of the services rendered under this Agreement is a representation solely to the signatory to this Agreement and only that at the time of survey the vessel, structure, item of material, equipment or machinery or any other item covered by a certificate has met one or more of the Rules or standards of American Bureau of Shipping and is issued solely for the use of ABS, its committees, clients or other authorized entities. ABS is not an insurer or guarantor of a vessel's integrity or safety or that of any of its equipment or machinery. The validity, applicability, and interpretation of a certificate issued under the terms of or in contemplation of this Agreement are governed by the Rules and standards of American Bureau of Shipping who shall remain the sole judge thereof. Nothing contained herein or in such a certificate or in any report issued in contemplation of such a certificate shall be deemed to relieve any designer, builder, owner, manufacturer,



REQUEST FOR CLASS
AGREEMENT FOR CLASSIFICATION OF EXISTING VESSELS

seller, supplier, repairer, operator, insurer or other entity of any duty to inspect or any other duty or warranty express or implied. If an entity is specifically identified as "Owner" in the vessel details section of this Agreement, such entity shall be considered a third party beneficiary of this agreement. Except for such entity, nothing in this agreement or in any certificate or report issued under this Agreement shall be deemed to create any interest, right, claim, or benefit in any insurer or other third party. It is understood and agreed that nothing expressed herein is intended or shall be construed to give any person, firm or corporation, other than the signatories hereto and any identified "Owner", any right, remedy or claim hereunder or under any provisions herein contained; all provisions hereof are for the sole and exclusive benefit of the parties hereto.

LIMITATION

ABS MAKES NO REPRESENTATIONS BEYOND THOSE CONTAINED IN SECTIONS 1 AND 11 HEREOF REGARDING ITS REPORTS, STATEMENTS, PLAN REVIEW, SURVEYS, CERTIFICATES OR OTHER SERVICES. EXCEPT AS SET OUT HEREIN, NEITHER ABS, NOR ANY OF ITS OFFICERS, EMPLOYEES OR AGENTS SHALL BE LIABLE FOR ANY LOSS, DAMAGE OR EXPENSE OF WHATEVER TYPE OR KIND SUSTAINED BY ANY PERSON DUE TO ANY ACT, OMISSION OR ERROR OF ANY NATURE CAUSED BY ABS, ITS OFFICERS, EMPLOYEES OR AGENTS, OR DUE TO ANY INACCURACY OF ANY NATURE, EVEN IF HELD TO AMOUNT TO A BREACH OF WARRANTY.

INSURANCE

The Client agrees that ABS and all of its officers, employees, or agents will be additional assureds under the Client's relevant insurance and that full waivers of rights of subrogation will be provided by relevant underwriters to ABS and all of its officers, employees or agents.

ARBITRATION

Any and all differences and disputes of whatsoever nature arising out of this Agreement shall be put to arbitration in the City of New York pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by ABS, one by Client, and one by the two so chosen. The decision of any two of the three on any point or points shall be final. Until such time as the arbitrators finally close the hearings either party shall have the right by written notice served on the arbitrators and on an officer of the other party to specify further disputes or differences under this Agreement for hearing and determination. The arbitration is to be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc. The arbitrators may grant any relief other than punitive damages, which they, or a majority of them, deem just and equitable, and within the scope of the agreement of the parties, including, but not limited to, specific performance. Awards made in pursuance to this clause may include costs including a reasonable allowance for attorney's fees and judgment may be entered upon any award made hereunder in any court having jurisdiction. ABS and Client hereby mutually waive any and all claims to punitive damages in any forum.

Client shall be required to notify ABS within thirty (30) days of the commencement of any arbitration between it and third parties which may concern ABS's work in connection with this Agreement and shall afford ABS an opportunity, at ABS's sole option, to participate in the arbitration.

TIME BAR TO LEGAL ACTION

Any statutes of limitation notwithstanding, Client expressly agrees that its right to bring or to assert against ABS any and all claims, demands or proceedings whether in arbitration or otherwise shall be waived unless (a) notice is received by ABS within ninety (90) days after Client had notice of or should reasonably have been expected to have had notice of the basis for such claims; and (b) arbitration or legal proceedings, if any, based on such claims or demands of whatever nature are commenced within one (1) year of the date of such notice to ABS.



REQUEST FOR CLASS
AGREEMENT FOR CLASSIFICATION OF EXISTING VESSELS

LIMITATION OF LIABILITY

If any party to this Agreement relies on any information or advice given by ABS and suffers loss, damage, or expense directly thereby which is proven to have been caused by the negligent act, omission or error of ABS, its officers, employees or agents, or from breach of any implied or express warranty of workmanlike performance in connection with the services, or from any other reason, then the combined liability of American Bureau of Shipping, its officers, employees, agents or subcontractors to Client or any other person, corporation, partnership, business entity, sovereign, country or nation, will be limited to the greater of a) \$100,000 or b) an amount equal to ten times the sum actually paid for the services alleged to be deficient.

The limitation of liability may be increased up to an amount twenty-five times that sum paid for services upon receipt of Client's written request at or before the time of performance of services and upon payment by Client of an additional fee of \$10.00 for every \$1,000.00 increase in the limitation.

ABS shall in no circumstances be liable for indirect or consequential loss or damage (including, but without limitation, loss of profit, loss of contract, loss of use) suffered by any person resulting from any failure by ABS in the performance of its obligations under this Agreement. Under no circumstances whatsoever shall any individual who may have personally caused the loss, damage or expense be held personally liable.

THE UNDERSIGNED PARTIES ACKNOWLEDGE THAT ALL OF THE TERMS AND CONDITIONS CONTAINED IN PAGES 1 THROUGH 8 HEREOF (AND IF APPLICABLE, THE MODU ADDENDUM) HAVE BEEN REVIEWED. THIS AGREEMENT REPRESENTS THE ENTIRE INTEGRATED AGREEMENT BETWEEN THE PARTIES; THERE ARE NO OTHER REPRESENTATIONS OR ORAL AGREEMENTS. ALL SERVICES RENDERED IN CONNECTION WITH THIS CLASSIFICATION AGREEMENT ARE GOVERNED BY THE TERMS AND CONDITIONS CONTAINED HEREIN.

Name of Client _____

(Signed) _____

(Title) _____

(Address) _____

AMERICAN BUREAU OF SHIPPING

Signature

Details of Class coverage and services are shown on Pages 9 through 15. These sections must be fully completed prior to signing by the ABS office negotiating the Agreement.



REQUEST FOR CLASS
AGREEMENT FOR CLASSIFICATION OF EXISTING VESSELS

VESSEL'S CLASS DETAILS

To be completed by the ABS office negotiating the Agreement and must be filled out prior to presentation to the Owner.

GENERAL CHARACTERISTICS

Name of contract between Shipyard and Owner _____

Vessel Class
No. _____

ABS applicable Rules _____

Year _____

Vessel Designation

Vessel Name _____

Flag State _____

Structural Type _____

Vessel Function(s) _____

Vessel Description _____

Vessel Relationship

Related Vessel ID _____

Sister Vessel

Previous Class

IACS

Non-IACS

Similar Hull Structure

Previous Class Society

Comparable Hull Structure

Dual / Double Class

State Society

Principal Dimensions

Length Overall _____

(m) (ft)

Length Between Perpendiculars _____

(m) (ft)

Molded Breadth _____

(m) (ft)

Molded Depth _____

(m) (ft)

Design Draft _____

(m) (ft)

Estimated Characteristics at Design Draft

Gross Tonnage _____

Deadweight _____

TEU _____

Class Parameters

Design Speed Ahead _____

(m/sec) (knot)

Design speed Astern _____

(m/sec) (knot)

Scantling Draft _____

(m) (ft)

Scantling Length _____

(m) (ft)

Shipyard Designation

Shipyard _____

Hull Number _____

Project Name _____

Shipyard Role _____

Prime Builder _____

Shipyard Address _____

Owner Designation

Owner Name _____

Owner ID _____

Owner Address _____



REQUEST FOR CLASS
AGREEMENT FOR CLASSIFICATION OF EXISTING VESSELS

PROPULSION SYSTEM

System Type	_____	Prime Mover Type	_____
Number of Propellers	_____		
Propulsion Diesel Engine			
Designer	_____	Model Number	_____
Manufacturer	_____	Rated Power	_____ (kW) (HP)
Rated Engine Speed	_____ rpm	Max Cylinder Pressure	_____ (Kgf/cm ²) (PSI)
Propulsion Steam Turbine			
Designer	_____	Model Number	_____
Manufacturer	_____	Rated Power	_____ (kW) (HP)
Number of Turbines	_____		
Propulsion Gas Turbine			
Designer	_____	Model Number	_____
Manufacturer	_____	Rated Power	_____ (kW) (HP)
Number of Turbines	_____		
Propulsion Generators			
Designer	_____	Model Number	_____
Manufacturer	_____	Total Rated Power	_____ (kW) (HP)
Number of Generators	_____		
Propulsion Motors			
Designer	_____	Model Number	_____
Manufacturer	_____	Total Rated Power	_____ (kW) (HP)
Number of Motors	_____		
Propulsion Water Jet Unit			
Designer	_____	Model Number	_____
Manufacturer	_____	Total Rated Power	_____ (kW) (HP)
Number of Units	_____		
Propulsion Reduction Gear			
Designer	_____	Model Number	_____
Manufacturer	_____	Gear Ratio Ahead	_____
Number of Reduction Gears	_____		
Propulsion Boiler			
Designer	_____	Model Number	_____
Manufacturer	_____	Design Pressure	_____ (Kgf/cm ²) (PSI)
Number of Boilers	_____	Design Temperature	_____ (°C) (°F)
Total Heating Surface	_____ (m ²) (ft ²)		



REQUEST FOR CLASS
AGREEMENT FOR CLASSIFICATION OF EXISTING VESSELS

Main Power Distribution System

Auxiliary Diesel Engine

Designer	_____	Model Number	_____
Manufacturer	_____	Rated Power per unit	_____ (kW) (HP)
Number of Units	_____		

Auxiliary Steam Turbine

Designer	_____	Model Number	_____
Manufacturer	_____	Rated Power per unit	_____ (kW) (HP)
Number of Units	_____		

Generator

Designer	_____	Model Number	_____
Manufacturer	_____	Rated Power per unit	_____ (kW) (HP)
Number of Units	_____		

Maneuvering System

Thruster			
Designer	_____	Model Number	_____
Manufacturer	_____	Thruster Type	_____
Number of Units	_____	Rated Power per unit	_____ (kW) (HP)



REQUEST FOR CLASS
AGREEMENT FOR CLASSIFICATION OF EXISTING VESSELS

VESSEL CLASS DESIGNATION
Services ABS will provide under this agreement *

CLASS NOTATION HULL

No
 A1

CLASS NOTATION MACHINERY

Yes No
 AMS

SPECIAL VESSEL RULES

Vessels	Yes	Barges
BP- Bollard pull in Long Tons (_____)	<input type="checkbox"/>	Accommodation Barge
Bulk Carrier	<input type="checkbox"/>	Barge
Chemical Carrier	<input type="checkbox"/>	Chemical Tank Barge
Container Carrier	<input type="checkbox"/>	Fuel Oil and Chemical Tank Barge
DM (Dual Mode)	<input type="checkbox"/>	Fuel Oil or Chemical Tank Barge
Fishing Vessel	<input type="checkbox"/>	Fuel Oil Tank Barge
Fishing Vessel - Side Trawl	<input type="checkbox"/>	Hotel Barge
Fishing Vessel - Stern Trawl	<input type="checkbox"/>	Independent Tank Barge
Fuel Oil Carrier	<input type="checkbox"/>	LASH Barge
HSC	<input type="checkbox"/>	Liquefied Gas Tank Barge
HSC Cargo Craft	<input type="checkbox"/>	Oil and Chemical Tank Barge
HSC Coastal Naval Craft	<input type="checkbox"/>	Oil or Chemical Tank Barge
HSC Crewboat	<input type="checkbox"/>	Oil Tank Barge
HSC Naval Craft	<input type="checkbox"/>	Pressure Tank Barge
HSC Passenger Craft (A)	<input type="checkbox"/>	Tank Barge
HSC Passenger Craft (B)		
HSC Riverine Naval Craft		
HSC RO/RO Passenger Craft (A)	Yes	Offshore units
HSC RO/RO Passenger Craft (B)	<input type="checkbox"/>	Barge Drilling Unit
Ice Breaker	<input type="checkbox"/>	Column Stabilized Drilling Unit
Liftboat	<input type="checkbox"/>	Drilling Unit
Liquefied Gas Carrier	<input type="checkbox"/>	F (LNG) <input type="checkbox"/> LSO <input type="checkbox"/> ORS <input type="checkbox"/> PLSO <input type="checkbox"/> SO <input type="checkbox"/> T
OE (Operational Envelope for HSC Naval)	<input type="checkbox"/>	Floating Offshore Installation (FOI)
Oil Carrier	<input type="checkbox"/>	Floating Production (and Offloading) System (FPS)
Oil or Bulk/Ore (OBO) Carrier	<input type="checkbox"/>	Floating Production, Storage and Offloading System (FPSO)
Ore Carrier	<input type="checkbox"/>	Floating Storage and Offloading System
Ore or Oil Carrier	<input type="checkbox"/>	G (LNG) <input type="checkbox"/> LSO <input type="checkbox"/> ORS <input type="checkbox"/> PLSO <input type="checkbox"/> SO <input type="checkbox"/> T
Passenger Vessel	<input type="checkbox"/>	Offshore Installation
PM (Pushing Mode)	<input type="checkbox"/>	Offshore Installation - Chemical Processing
RB- Date of Survey (_____)	<input type="checkbox"/>	Offshore Installation - Electrical Generation
RCC - Refrigerated Cargo Carrier	<input type="checkbox"/>	Offshore Installation - Hydrocarbon Processing
RCCC - Refrigerated Cargo Container Carrier	<input type="checkbox"/>	Offshore Installation - Hydrocarbon Production
REBLT - Refrigerated Edible Bulk Liquid Tanker	<input type="checkbox"/>	Offshore Installation - Metal/Ore Processing
Swath Vessel	<input type="checkbox"/>	Offshore Installation - Offshore Pipelines and Risers
Towing Vessel	<input type="checkbox"/>	Offshore Installation - Undersea Pipeline
Vehicle Carrier	<input type="checkbox"/>	Self Elevating Drilling Unit
Vehicle Passenger Ferry	<input type="checkbox"/>	Ship Type Drilling Unit
Water Carrier	<input type="checkbox"/>	Single Point Mooring
Underwater Systems		
Deck Decompression Chamber		
Diving Bell	Yes	Floating Dry Dock
Dive Control Station	<input type="checkbox"/>	Floating Dry Dock
Diving System		
Habitat		
Handling System		
Passenger Submersible		
Personnel Capsule		
Remote Operated Vehicle		
Submersible		
Underwater Complex		

TO BE COMPLETED BY THE ABS OFFICE NEGOTIATING THE AGREEMENT, ONLY ITEMS MARKED 'YES' ARE THOSE INCLUDED IN THIS AGREEMENT



**REQUEST FOR CLASS
AGREEMENT FOR CLASSIFICATION OF EXISTING VESSELS**

SPECIALIZED VESSELS AND SERVICES

Escort Vessel	<input type="checkbox"/>	Yes	Offshore Support Vessel	<input type="checkbox"/>	
Ferry Service	<input type="checkbox"/>		Offshore Support Vessel,	<input type="checkbox"/>	<input type="checkbox"/> AH <input type="checkbox"/> WS
(Fire Fighting Capability)	<input type="checkbox"/>		Oil Recovery Vessel Class	<input type="checkbox"/>	<input type="checkbox"/> 1 <input type="checkbox"/> 2
Fire Fighting Vessel Class	<input type="checkbox"/> 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3		Safety Standby Service	<input type="checkbox"/>	<input type="checkbox"/> GR A ()
Fire Fighting Vessel Class 1 and Class 2			Safety Standby Service	<input type="checkbox"/>	<input type="checkbox"/> GR B ()
Fire Fighting Vessel Class 1 and Class 3			Safety Standby Service	<input type="checkbox"/>	<input type="checkbox"/> GR C ()
Government Service					

SCG- CFR/ NVIC/ MSM

NVIC 2-95 Change 1 ACP	<input type="checkbox"/>	Yes	NVIC 10-92	<input type="checkbox"/>
NVIC 10-82 Change 2 Acceptance of Plan Review	<input type="checkbox"/>		NVIC 3-73 for Novel Unit	<input type="checkbox"/>

GEOGRAPHICAL AREA

Unrestricted Service	<input type="checkbox"/>	Yes	Sound Service _____	<input type="checkbox"/>	Operational Limit
Restricted Service _____	<input type="checkbox"/>		Sea Service _____	<input type="checkbox"/>	_____
Arabian Gulf Service	<input type="checkbox"/>		Great Lakes Service	<input type="checkbox"/>	_____
Bay Service _____	<input type="checkbox"/>		Rivers & Intra-coastal Waterways Service _____	<input type="checkbox"/>	_____
Coastwise service _____	<input type="checkbox"/>		Canal Service _____	<input type="checkbox"/>	Fixed Geographical Area
Domestic Service _____	<input type="checkbox"/>		Harbor Service _____	<input type="checkbox"/>	Longitude _____
Gulf of Mexico Service	<input type="checkbox"/>		Lake Service _____	<input type="checkbox"/>	Latitude _____
Inter-Island Service _____	<input type="checkbox"/>		River Service _____	<input type="checkbox"/>	
Lake Maracaibo Service	<input type="checkbox"/>				

EQUIPMENT SYMBOL

No	<input type="checkbox"/>	Yes	No	<input type="checkbox"/>	Yes	No	<input type="checkbox"/>
<input type="checkbox"/> E		<input type="checkbox"/>	<input type="checkbox"/> M		<input type="checkbox"/>	<input type="checkbox"/> P	
<input type="checkbox"/> HHP		<input type="checkbox"/>	<input type="checkbox"/> HS		<input type="checkbox"/>	<input type="checkbox"/> RW	
<input type="checkbox"/> SHHP		<input type="checkbox"/>	<input type="checkbox"/> T		<input type="checkbox"/>	<input type="checkbox"/> U	
<input type="checkbox"/> UA		<input type="checkbox"/>	<input type="checkbox"/> U-OPT		<input type="checkbox"/>	<input type="checkbox"/> U-SPEC	
<input type="checkbox"/> Y							

CLASS NOTATION SYSTEMS (OPTIONAL)

Automation	<input type="checkbox"/>	Yes	Oil Cargo	<input type="checkbox"/>	Yes	Thrusters	<input type="checkbox"/>
ABCU	<input type="checkbox"/>		VEC	<input type="checkbox"/>		APS	<input type="checkbox"/>
ACC	<input type="checkbox"/>		VEC - L	<input type="checkbox"/>		DPS - 0	<input type="checkbox"/>
ACCU	<input type="checkbox"/>		CPP	<input type="checkbox"/>		DPS - 1	<input type="checkbox"/>
AMCC	<input type="checkbox"/>		Refrigerated Cargo	<input type="checkbox"/>		DPS - 2	<input type="checkbox"/>
AMCCU	<input type="checkbox"/>	Yes	(F) Fruit Carrier	<input type="checkbox"/>		DPS - 3	<input type="checkbox"/>
PORT	<input type="checkbox"/>		APLUS	<input type="checkbox"/>		DPS-IS	<input type="checkbox"/>
Navigation	<input type="checkbox"/>		ASLS	<input type="checkbox"/>		PAS	<input type="checkbox"/>
NBL	<input type="checkbox"/>		CA <input type="checkbox"/> (INST) hold # _____	<input type="checkbox"/>		Propulsion Redundancy	<input type="checkbox"/>
NBLES	<input type="checkbox"/>		IRCC	<input type="checkbox"/>		R1 <input type="checkbox"/> +	<input type="checkbox"/>
NIBS	<input type="checkbox"/>		RC _____ (hold number)	<input type="checkbox"/>		R1 - S <input type="checkbox"/> +	<input type="checkbox"/>
Hull Monitoring	<input type="checkbox"/>		RFC	<input type="checkbox"/>		R2 <input type="checkbox"/> +	<input type="checkbox"/>
HM1 <input type="checkbox"/> + R <input type="checkbox"/> SW <input type="checkbox"/> GS	<input type="checkbox"/>		RMC	<input type="checkbox"/>		R2 - S <input type="checkbox"/> +	<input type="checkbox"/>
<input type="checkbox"/> SM	<input type="checkbox"/>		SASLS	<input type="checkbox"/>		Systems	<input type="checkbox"/>
HM2 <input type="checkbox"/> + R <input type="checkbox"/> HGS <input type="checkbox"/> LSM	<input type="checkbox"/>	Yes	Drilling	<input type="checkbox"/>		(disconnectable)	<input type="checkbox"/>
<input type="checkbox"/> FL	<input type="checkbox"/>		CDS	<input type="checkbox"/>		(LNG) R	<input type="checkbox"/>
HM3 <input type="checkbox"/> VDR <input type="checkbox"/> Enhanced VDR	<input type="checkbox"/>		CDS (N)	<input type="checkbox"/>		DFD	<input type="checkbox"/>
						DFS	<input type="checkbox"/>
						QR (Quick Release)	<input type="checkbox"/>



REQUEST FOR CLASS
AGREEMENT FOR CLASSIFICATION OF EXISTING VESSELS

MARPOL Annex IV (Sewage)
MARPOL Annex IV (Sewage) Voluntary Compliance (VCP)

- SOLAS SLC Certification- HSSC
- Carriage of Dangerous Goods (IMDG Code)
- Liberian SOLAS < 500GRT
- NVIC 2-95 Change I (ACP)
- SOLAS SLC Voluntary Compliance (VCP)
- Singapore Merchant Shipping Safety Regulations 1971

MARPOL ANNEX V (Garbage)
MARPOL Annex V (Garbage)
MARPOL Annex V (Garbage) Voluntary Compliance (VCP)

- Yes SOLAS SLE Certification- HSSC**
- SOLAS SLE Certification- HSSC
 - NVIC 2-95 Change I (ACP)
 - SOLAS SLE Voluntary Compliance (VCP)
 - Singapore Merchant Shipping Safety Regulations 1971

MARPOL ANNEX VI (Air Pollution)- HSSC**
MARPOL Annex VI (Air Pollution)
MARPOL Annex VI (Air Pollution) Voluntary Compliance (VCP)

- Yes SOLAS SLP Certification- HSSC**
- SOLAS SLP Certification- HSSC
 - Carriage of Dangerous Goods (IMDG Code)
 - SOLAS SLP Voluntary Compliance (VCP)

Main diesel engine certification - NOx Technical Code
Auxiliary diesel engine certification - NOx Technical Code

MODU

Annual Liberian Safety Inspection
Canada Nova Scotia Offshore Petroleum Board
IMO MODU Code 1979
IMO MODU Code 1979 Amended by Administration
IMO MODU Code 1979 Exemption
IMO MODU Code 1989
MODU National Safety Standard
MODU National Safety Standard Based on C.O.I
Norwegian Maritime Directorate (NMD)
Norwegian Petroleum Board (NPD)
UK SCE Verification

- Yes SOLAS SLR Certification- HSSC**
- SOLAS SLR Certification- HSSC
 - SOLAS SLR Voluntary Compliance (VCP)
 - Singapore Merchant Shipping Safety Regulations 1971

- Yes Tonnage**
- International Tonnage Admeasurement 1969
 - National Tonnage Admeasurement (pre 1969)
 - Panama Tonnage Admeasurement
 - Suez Canal Tonnage Admeasurement

MOU
MOU Code
MOU National Safety Standard

- Yes Other**
- Bulk Cargoes Code (BC Code)
 - COLREGS 1972
 - Code of Safety for Special Purpose Ships, A.534
 - Guideline for the Design & Construction of Offshore Supply Vessels, A.469
 - IC of Safety for High Speed Craft
 - STCW 95
 - Anti Fouling Systems Convention (AFS)

National Safety <500 GRT
Liberian SOLAS < 500GRT
Marshall Islands SOLAS

SOLAS Other
SOLAS Cargo Ship Damage Stability
SOLAS Grain Loading

* Some National Authorities have not authorized Classification Societies to act on their behalf in issuing certificates of compliance to their requirements or in issuing IMO MODU Code Certificates. In such cases. If so requested by the undersigned, ABS will issue a statement of fact report identifying the extent of compliance with such requirements.

** ABS will recognize NOx Technical Code certification provided by another IACS Member on behalf of the flag Administration for engines installed on ships for which ABS is to provide MARPOL VI certification. However, that IACS Member retains responsibility for the NOx Technical Code certification of that engine, including engine certification for change of flag, and for modifications/adjustments affecting the engine certification, the associated Technical File or NOx critical component specifications.
In the case of USA flag vessels, engines are to be certified by the U.S. Environmental Protection Agency, EPA. However, as the EPA would not be able to provide the NOx certification should there be a change of flag (due to the unique aspects of their engine certification scheme), parallel NOx certification by ABS from the outset is advisable as such certification is not readily achievable after engine installation.

DANISH CLASS AGREEMENT MAY 2005



**Agreement Governing the Authorization of
The Recognized Organization (RO) to undertake
Statutory Certification Services for Vessels Registered in Denmark**

between

the Danish Maritime Authority

and

the following RO's:

American Bureau of Shipping

Bureau Veritas

Det Norske Veritas

Germanischer Lloyd

Lloyd's Register

Nippon Kaiji Kyokai

RINA S.p.A. Registro Italiano Navale Group

Agreement	Original agreement	27 September 2003
Annex I	Scope of Authorisation	19 May 2005
Annex II	Guidance Notes	19 May 2005
Annex III	Danish national regulations	19 May 2005

RELEASE NOTE FOR PRINTED AND "PDF" VERSION ISSUED 19TH MAY 2005

1. MARPOL Annex VI, incl the NOx Code, is added to the scope of authorisation, section 37.
2. All for the RO relevant Danish National Regulations (additions/amendments), supplementary to IMO, ILO or EU/EC regulations, are now published in Annex III.
3. Section 29 has been rewritten for clarification. IMO resolution A. 948 (23) has been incorporated. In addition precautions concerning withdrawal of a DOC have been added.
4. Section 30 has been rewritten; attention should be made especially to 30.4 describing the handling of "footnotes", and to section 30.5, describing IACS unified interpretations.
5. Content of section 69 has been deleted ("guidance on non-cargo handling lifting appliances") as this matter is without of the scope of the authorisation. Items related to lifting appliances, relevant to the scope, are described in section 44.
6. New procedures regarding handling of Multiple Load Lines has been added, see section 69
7. Section 70, guidance on ISPS, has been rewritten completely.
8. Section 34.7 and 34.8, the exception for INF vessels has been deleted.
9. Content of section 38 (AFS) has been transferred to section 55, and content of section 39 (Ballast Water---) has been transferred to section 57(these matters are not within the scope of authorisation.)
10. Section 55 has been updated with the CSR, AFS and Radio Station Licence documents
11. Section 53 has been added further text to provide more information to the DMA.
12. In section 50.4 the last sentence has been deleted (content without relevance to RO).
13. Figure in section 56 has been redrawn.
14. Section 68 has been updated with item 68.3.3 and 68.3.4 (banned PV Valves.)
15. An administrative note has been added in section 71.2 (SOLAS Reg. II-1/29.13.1) regarding arrangement and placing of the steering gear installation.
16. Annex II has been renamed to: Guidance Notes
17. Section 37.1 has been added "CAS" information
18. Text, regarding CAS, in section 57 and section 37.2, has been deleted. (CAS matters are now dealt with in a fully transparent way through IMO/MEPC resolutions)
19. Section 39 has been added text regarding Inclining Test and Light Weight Survey.
20. Section 40, single ship authorisation, has been rewritten and some new text has been added.
21. Section 59, safety signs, text have been deleted.
22. Section 42, Marine Equipment Directive, has been rewritten.
23. Section 78 has been added a summary of Danish Technical Regulations, relevant for the RO.

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PREFACE

The first "Class Agreement" between the original six authorised Classification Societies (RO) and the Danish Maritime Authority (DMA) was issued in April 1996.

A new agreement was issued 28 February 2001. The new agreement was based on the European Union's Council Directive 94/57/EC. This agreement instituted a system of a "more permanent" legal agreement supplemented by a number of technically oriented annexes.

A new set of annexes was issued 25 February 2002 and the delegation was brought in line with the SOLAS amendments entering into force on 1 July 2002.

The 1st consolidated edition 2002 contains the agreement of 28 February 2001 and the annexes valid from 1st March 2002.

The 2nd consolidated edition 2002 is a reprint with some minor changes to the formatting of the text.

The "2003 agreement", to be referred to as the "Danish Class Agreement 2003", is a revision of the 2001 agreement and rewriting of the 2002 annexes.

The Danish Class Agreement May 2005 includes the original agreement issued 27 September 2003, and a revised annex I and II primarily because of the new MARPOL Annex VI, but also with the intention to improve

the reporting scheme of the RO to the DMA. In addition, a new annex III includes the Danish National Regulations (additions). It is the hope of the DMA that the inclusion of the Danish National Regulations in the Class Agreement will assure that these regulations are included in the RO's QA-system.

Publication

The plan is to publish the Danish Class Agreement May 2005 in the following formats, as supplements to the signed agreements between the DMA and the ROs:

- Read-only Microsoft Word document for inclusion in the RO IT systems (distributed only to RO).
- PDF-document on DMA web site.
- Book containing a printout of the PDF-document.

Acknowledgments

The creation of the present agreement has only been possible through the participation of many interested parties within the RO, the DMA and the industry in general.

Danish Maritime Authority
Class Society Secretariat
May 2005

AGREEMENT- Original agreement

Danish Class Agreement 2003, Governing the Authorization of the Recognized Organization to undertake Statutory Certification Services for Vessels Registered in Denmark

Between

the Danish Maritime Authority and The Recognized Organizations:

American Bureau of Shipping, Bureau Veritas, Det Norske Veritas, Germanischer Lloyd, Lloyd's Register, Nippon Kaiji Kyokai and RINA S.p.A. Registro Italiano Navale Group

Of 27th September 2003

INTRODUCTION

This Agreement is issued in accordance with Technical Regulation no. 5 of 9 August 2002 on recognition and authorization of Organizations undertaking ship inspection and survey.

The Technical Regulation contains regulations which implement the European Union's Council Directive 94/57/EC (as amended – 97/58/EC and 2001/105/EC) on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations, hereinafter referred to as "the Class Directive".

Further, the "Guidelines for the authorization of organizations acting on behalf of the Administration", IMO Assembly resolution A.739(18) and the Annexes thereto, hereinafter referred to as "Resolution A.739(18)", and the "Specifications on survey and certification functions of recognized organizations acting on behalf of the Administration", IMO Assembly resolution A.789(19), hereinafter referred to as "Resolution A.789(19)", is agreed upon by **American Bureau of Shipping, Bureau Veritas, Det Norske Veritas, Germanischer Lloyd, Lloyd's Register, Nippon Kaiji Kyokai, RINA S.p.A. Registro Italiano Navale Group**, hereinafter referred to as "RO", and **THE DANISH MARITIME AUTHORITY**, hereinafter referred to as "the DMA" with respect to the performance of statutory surveys and issuance of relevant certificates

Irrespective of this Agreement, the Ministry of Business, Trade and Industry and the DMA,

are responsible for survey, certification and other matters relating to the seaworthiness of Danish Registered Ships pursuant to Danish Legislation.

2 PURPOSE

- 2.1 The purpose of this Agreement is to authorise the RO to perform survey and certification services to the extent given in the Annexes to this Agreement.
- 2.2 The purpose of this Agreement is also to define the scope, terms, conditions, requirements and co-operation between RO and the DMA, relating to all Danish registered ships or Mobile Offshore Drilling Units (MODUs) in class by the RO and to the Companies responsible for operating Danish registered ships and MODUs.

3 GENERAL CONDITIONS

- 3.1 RO shall have established a quality management system complying with the provisions of Appendix 1 of the Annex to Resolution A.739 (18) and the Annex to the Class Directive.
- 3.2 Statutory certification services comprise the assessment of vessels registered in Denmark and classed by RO in order to determine the compliance of such vessels with the applicable requirements of the international conventions, codes and national regulations and interpretations, circulars, additional instructions and specific national regulations (hereinafter referred to as "applicable instruments") and the issue of

relevant certificates and to extend the validity of the certificates and documents within the limits of the relevant instruments as set out in the list of Annexes to this Agreement.

- 3.3 RO, its employees and others acting on behalf of the RO are obliged to follow the instructions issued by the DMA for execution of authority under this Agreement.
- 3.4 When RO is notified by Port State Authorities/owners/management company/agent/master of an accident or a Port State intervention on a Danish registered ship for which RO has issued certificates, the matter shall be dealt with without delay.
- 3.5 In so far as the certification services covered by this Agreement are concerned, RO agrees to co-operate with port States to facilitate the rectification of reported deficiencies when so requested, and report to the DMA, cf. SOLAS regulation I-6 (b) (ii).
- 3.6 Where the general condition of a Ship or Company¹, its Equipment, Manning or Operation in important respects is found not to be in accordance with the specifications of the relevant certificates, or to be such that the ship is not fit for navigation without danger to the ship or those onboard or the marine environment or to 3rd parties, the RO surveyor concerned shall immediately make sure that the necessary corrective actions are taken to rectify the defects and shall in due course notify the Danish Maritime Authority.
- 3.7 If such corrective actions are not taken the relevant certificates shall be withdrawn and the Danish Maritime Authority shall be notified immediately².
- 3.8 If the ship is in a foreign port, the appropriate authorities of the port State shall also be notified immediately.
- 3.9 In the event that deficiencies or discrepancies prove to be beyond the scope of the general authorisations, cf. Annexes of this Agreement, further action by RO on behalf of the DMA shall be defined in a special authorisation, cf. Annex I, section 41.

3.10 Statutory services rendered and statutory certificates issued by RO, in accordance with this Agreement, will be accepted as services rendered by or certificates issued by the DMA provided that RO maintains compliance with the provisions of Appendix 1 of the Annex to Resolution A.739(18) and Resolution A.789(19) and the Class Directive.

3.11 RO shall endeavour to avoid under-taking activities, which may result in a conflict of interest.

4 INTERPRETATIONS AND EQUIVALENTS

4.1 RO may decide on interpretations and equivalents within the framework of this agreement. If the owner insists the RO are obliged to forward requests for interpretations and equivalents to the DMA.

4.2 Unified IMO interpretations and IACS Unified Interpretations will be accepted by the DMA, unless they are in conflict with DMA interpretations.

4.3 Final interpretations of the applicable instruments, as well as the final determination of equivalents or the final acceptance of substitutes to the requirements of the applicable instruments remain the prerogative of the DMA. The RO will co-operate in their establishment as necessary.

4.4 For Fishing Vessels all interpretations and equivalents has to be approved by the DMA according to EC Directive 97/70/EC article 4 in order to ensure the proper notification of the EU Commission.

5 EXEMPTIONS

5.1 The RO shall obtain approval from the DMA before first issue of any exemptions from the requirements stipulated in any of the mentioned conventions or instruments.

5.2 Any survey and certification related thereto will normally be carried out by the RO unless the DMA instructs the RO otherwise.

5.3 Renewal survey and endorsement or reissue of exemption certificates is to be carried out by RO.

¹ As defined in the ISM and ISPS Codes.

² Regarding withdrawal of DOC, see section 29.10

6 REQUESTS TO THE DMA FOR INTERPRETATIONS, EQUIVALENTS AND EXEMPTIONS

- 6.1 Requests to the DMA for interpretations, equivalents and exemptions must always be signed by the owner of the ship or MODU in question, but the owner, a consultant, a shipyard or the RO may write up the formal request.
- 6.2 The request must be forwarded to the RO, which shall process the request and make any necessary plan approvals, etc. before forwarding their well-founded recommendation including all relevant documentation, calculations, etc. and suggested conditions to the DMA.
- 6.3 If the request is granted, the DMA may add conditions or comments to the recommendations made by the RO.
- 6.4 Refer to "road map" in section 59.

7 TEMPORARY REMEDIES

- 7.1 In instances where, temporarily, the requirements of an applicable instrument cannot be met under particular circumstances, the RO surveyor shall specify such measures or supplementary equipment as may be available to permit the vessel to proceed to a suitable port where permanent repairs or rectification can be effected or replacement equipment fitted.
- 7.2 The RO surveyor shall furnish the vessel with a signed statement describing the measures or supplementary equipment specified and the time limit for permanent repairs or rectification.
- 7.3 A copy of this statement shall be forwarded to the DMA for information. This may be in the form of e-mail to DMA Centre for Ships (CFS) at the address: cfs@dma.dk.

8 INFORMATION AND LIAISON – GENERAL

- 8.1 RO and the DMA, recognizing the importance of technical liaison, agree to co-operate toward this end and maintain an effective dialogue.
- 8.2 The RO invites the DMA to participate in relevant Technical Committees etc.

- 8.3 The relevant regulations, rules, instructions and report forms shall be written in the English language.
- 8.4 The RO agrees to report to the Administration information pertaining to services performed pursuant to this agreement as follows. To this end RO shall:
 - 8.4.1 Provide the DMA with electronic access³ to all Rules and Interpretations⁴ relevant to the DMA in respect of work carried out by RO in accordance with this Agreement.
 - 8.4.2 Provide the DMA with access to forms, reports, checklists and instructions that the RO surveyors use when conducting surveys on Danish Ships in question according to the Annexes of this agreement.
 - 8.4.3 Provide the DMA with direct electronic access to the status of all statutory surveys and certificates for all Danish ships classed by the RO.
 - 8.4.4 If technically possible, provide the DMA with direct electronic access to the statutory certificates and pertaining reports.
 - 8.4.5 Hardcopies of statutory certificates shall only be sent to the DMA upon request of the DMA. The only exemption is the International Tonnage Certificate, which – for legal reasons – has to be forwarded in hardcopy to the DMA by the RO immediately after it being issued.
 - 8.4.6 Upon request grant the DMA access to all plans and documents including reports on surveys on the basis of which certificates are issued or endorsed by RO.
 - 8.4.7 Every year in January and July provide the DMA with information as described in section 53.3.

³ By the way of the Internet, CD-ROM etc. If the actual regulations are not available on an electronic format the RO shall provide the Danish Maritime Authority with one paper copy and keep it updated.

⁴ E.g. a statement that only IACS Unified Interpretations are used and where they are accessible electronically.

9 THE RO OBLIGATION TO CONSULT OR INFORM THE DMA

- 9.1 The RO shall inform the DMA without delay if a ship has been declassified (class suspended or withdrawn)⁵.
- 9.2 The RO shall consult the DMA to determine whether a full inspection is necessary before issuing any certificates to a ship, which has been declassified (class suspended or withdrawn) for safety reasons.
- 9.3 The RO shall consult the DMA to determine whether a full inspection is necessary before issuing any certificates to a ship, which, for any reason is changing its class⁶. Also cf. section 17.2 of this agreement.
- 9.4 The RO shall inform the DMA without delay if a ship is discovered to be operating with faults or defects which may affect its seaworthiness or safety in general or represent significant deviations from the standards required in international conventions and rules, national laws, rules and regulations, and the RO rules and regulations. This obligation applies regardless of how such faults or defects are discovered.

10 RO WAY OF COMMUNICATION

- 10.1 The primary way of communications between the Danish Maritime Authority and the RO are through the RO main representation in Denmark, unless otherwise agreed between the DMA and the RO.
- 10.2 The RO main representation in Denmark must be a legal party capable of representing the RO in a Danish Court of Law, cf. section 22 of the agreement.
- 10.3 The RO shall provide an official e-mail address for the purpose of this communication.
- 10.4 For practical purposes, correspondence concerning newbuildings, the fleet in service, specific ships or MODUs may be solely between the DMA and the RO main representation in

Denmark or any part of the RO organisation to the discretion of the RO (e.g. field office).

- 10.5 For use in case of accidents or other incidents involving ships or MODUs under Danish Flag, the RO shall provide the DMA with a point of contact (Contact by phone, fax and e-mail) that is responsive all year, 24 hours a day.

11 DMA WAY OF COMMUNICATIONS

- 11.1 The DMA shall provide RO with the necessary documentation for the purpose of RO's provision of statutory certification services.
- 11.2 The DMA will provide access to the above-mentioned documentation on its web site. Cf. section 30.9 in Annex I to this agreement.
- 11.3 Any questions about interpretations and/or ambiguities of this agreement shall be forwarded directly to DMA's "Class Society Secretariat" hereafter referred to as CSS. C.f. section 52.

12 DISCLAIMER

- 12.1 According to Danish legislation the only authentic version of any rules or regulations are the Danish versions of the actual documents. Accordingly, any documentation provided by the Danish Maritime Authority in English is a translation of the relevant Danish text, and provided as a service only.

13 SUPERVISION

- 13.1 The DMA is entitled to satisfy itself that the RO effectively carries out its functions in accordance with this Agreement and that the RO's quality system continues to comply with the requirements of Appendix 1 of the Annex to IMO Assembly Resolution A.739(18) and to fulfil the criteria set out in the Annex to the Class Directive.
- 13.2 The DMA may supervise the work of the RO by audits, random inspections, planned inspections or expanded special surveys.
- 13.3 The DMA may choose to co-operate with other administrations or to recognize audits per-

⁵ Note that the ships "Danish Trading Permit" is conditional to the ship having valid Class Certificates.

⁶ Change of Classification Society, change of purpose etc.

formed on the RO by an independent audit group, which effectively is representing the interests of the DMA such as EMSA⁷ or the IACS' Quality Committee.

13.4 Should the DMA choose to conduct direct auditing of the RO, the frequency and the extent of audit will be subject to consultation between the DMA and the RO.

13.5 The DMA shall ensure that the audit group is bound by confidentiality obligations, cf. clause 19.

13.6 The DMA is entitled to report to the Commission of the European Union and the Member States of the European Union the results of the Auditing of the RO and to send them the performance record of the RO and other relevant information.

13.7 The report on the audit shall be submitted to the RO. If the RO comments the report without undue delay, the DMA shall take the comments into serious consideration prior to the submission of the report to the Commission and the Member States.

14 GOVERNING LAW AND SETTLEMENT OF DISPUTES

14.1 The Agreement shall be governed by and construed in accordance with Danish law. Any dispute arising in connection with this Agreement, which cannot be settled by negotiations between the parties, shall be settled finally by the Civil Court in Copenhagen.

14.2 In the performance of statutory certification services hereunder, RO, its officers, employees, agents or others acting on its behalf are entitled to all the protection of law and the same defences and/or counterclaims including but not limited to any immunity from or limitation of liability as would be available to the DMA and its own staff surveyors or employees if the latter had conducted the statutory certification services in question.

15 LIABILITY

15.1 If liability arising out of any incident is finally and definitely imposed on the Danish Government by a court of law or as part of the settlement of a dispute through arbitration procedures, together with a requirement to compensate the injured parties for loss or damage to property or personal injury or death, which is proved in that court of law to have been caused by a wilful act or omission or gross negligence of the RO, its bodies, employees, agents or others who act on behalf of the RO, the administration shall be entitled to financial compensation from the RO to the extent that the said loss, damage, injury or death is, as decided by that court, caused by the RO.

15.2 If liability arising out of any incident is finally and definitely imposed on the Danish Government by a court of law or as part of the settlement of a dispute through arbitration procedures, together with a requirement to compensate the injured parties for personal injury or death, which is proved in that court of law to have been caused by any negligent or reckless act or omission of the RO, its employees, agents or others who act on behalf of the RO, the administration shall be entitled to financial compensation from the recognised organisation to the extent that the said personal injury or death is, as decided by that court, caused by the RO, up to but not exceeding an amount of € 5.000.000,-.

15.3 If liability arising out of any incident is finally and definitely imposed on the Danish Government by a court of law or as part of the settlement of a dispute through arbitration procedures, together with a requirement to compensate the injured parties for loss or damage to property, which is proved in that court of law to have been caused by any negligent or reckless act or omission of the RO, its employees, agents or others who act on behalf of the RO, the administration shall be entitled to financial compensation from the RO, to the extent that the said loss or damage is, as decided by that court, caused by the RO, up to but not exceeding an amount of € 2.500.000,-.

15.4 Neither party shall be liable to the other for any special, indirect or consequential losses or damages resulting from or arising out of ser-

⁷ European Maritime Safety Agency.

vices performed under this Agreement, including without limitation loss of profit, loss of production, loss of contract, loss of use, business, interruption or any other special, indirect or consequential losses suffered or incurred by any party howsoever caused.

15.5 If the DMA is summoned or is expected to be summoned to answer for such liability as mentioned above in this Article, the RO shall be informed without undue delay.

15.6 The DMA shall, for information purposes, send all claims, documents and other relevant material to RO. RO shall be entitled to provide support and/or participate in the defence of such claim, if RO deems it necessary or appropriate.

15.7 If the DMA fails to plead all appropriate available defensive measures then the RO shall not be required to indemnify the DMA in accordance with the clauses 15.1, 15.2 and 15.3 above.

15.8 The DMA shall not enter into any commitment or agreement within the framework of this Agreement, which involves acceptance of such liability as mentioned in sub-clauses 1, 2 and 3 above, without the prior written consent of RO.

15.9 While acting for the DMA under this Agreement, the RO shall be free to create contracts directly with its clients and such contracts may contain RO's normal contractual conditions for limiting its legal liability.

15.10 For the avoidance of doubt, nothing contained herein shall create or is intended to create any new cause of action in favour of the DMA or third parties.

16 WITHDRAWAL, SUSPENSION OR TERMINATION OF AUTHORISATION

16.1 The DMA is entitled to withdraw fully or in parts the authorization given to the RO, if the latter no longer fulfils the criteria referred to in clause 13.1, or if the proper body of the European Union requests the withdrawal of the recognition.

16.2 Notwithstanding the criteria specified in clause 13.1 above, the DMA may suspend the authorization to carry out tasks specified in this Agreement, if it considers that RO can no

longer be authorized. In case of such a suspension the DMA shall inform the Commission of the European Union in accordance with the principles in the Class Directive.

16.3 If this Agreement is breached by one of the parties, the other party shall notify the violating party of its breach in writing. The latter shall within 30 days inform the former about the steps it intends to take, and remedy the breach without undue delay, but within 90 days at the latest, failing which the notifying party has the right to terminate the Agreement immediately.

16.4 Either party may terminate this Agreement by giving the other party 12 months written notice.

17 CHANGE OF RECOGNISED ORGANISATION

17.1 A change of Recognised Organisation (Transfer of Class – TOC) to or from the RO shall be in accordance with the procedures of IACS Transfer of Class Agreement.

17.2 Both involved ROs shall inform the DMA – in advance – about the TOC, also cf. section 9 of this agreement⁸.

18 REMUNERATION

18.1 Remuneration for statutory certification services carried out by the RO on behalf of the DMA will be charged by RO directly to the party requesting such services.

18.2 The RO do not invoice the DMA for any costs or financial burden caused by this Agreement

18.3 The DMA do not invoice the RO for any costs or financial burden caused by this Agreement except as required by Danish Law or Danish administrative practice.

19 CONFIDENTIALITY

19.1 When acting on behalf of the DMA, RO, it's officers; employees or agents shall be subject to the general rules of Danish law on confiden-

⁸ Note that the ship is formally "un-seaworthy" unless the Danish Trading Permit has been updated by the DMA with the name of the gaining RO.

tiality for employees in public service (Law on Government Administration).

class the RO shall inform the DMA without any unnecessary delay.

23.4 If the RO is not, within a reasonable time-frame, able to survey and certify at least one ship under Danish flag the DMA may instate the following procedure:

23.4.1 Supervision of the RO according to section 13.1 will be suspended.

23.4.2 If the RO fails to survey and certify at least one ship under Danish flag for a prolonged time the DMA may choose to terminate this Agreement, cf. section 16.

23.4.3 After receiving information from the RO, according to section 9.3, that a ship will be surveyed and certified by the RO, the DMA will decide whether any additional actions is deemed necessary.

23.4.4 The DMA will audit the RO within 6 months of the ships certification at the expense of the RO.

24 RO SURVEYORS

24.1 Surveys and inspections shall be carried out by the RO's own surveyors working exclusively for the RO.

24.2 The RO may use exclusive surveyors of another RO provided that the other RO is signatory to this Agreement.

24.3 However, RO may use subcontractors and other suppliers of support services being relevant to survey and certification provided such subcontractors and all services and functions performed by such personnel relevant to this Agreement, are operating under a Quality Assurance System approved by the RO according to the requirements of IACS, and thus indirectly under the control of the quality assurance system of RO.

25 ISSUE OF CERTIFICATES

25.1 All convention certificates shall be issued on behalf of "The Government of the Kingdom of Denmark.

25.2 Certificates specified in an instrument relevant to this agreement, shall be issued in a format

20 MAINTAINING THE EQUIVALENCE OF STANDARDS

20.1 The RO shall fulfil the requirements of Article 15(1) of the Class Directive.

21 AMENDMENTS

21.1 Amendments to this Agreement and Annexes will become effective only after consultation and written agreement between the DMA and the RO.

21.2 The DMA and the RO shall in due course enter into consultations for changes in this Agreement necessitated by any amendments of the relevant legislation of the European Union.

21.3 The DMA may re-issue this agreement with updated electronic links and informative references to annexes without re-signing of the agreement.

22 REPRESENTATION

22.1 The RO shall establish a local representation of a legal nature on the territory of Denmark to ensure legal personality under Danish law and the competence of Danish national courts.

23 OBLIGATION OF THE RO TO CLASS AT LEAST ONE SHIP UNDER DANISH FLAG.

23.1 With reference to the Class Directive Article 5.1, the DMA may restrict the number of organisations authorised to carry out survey and certification services in accordance with the needs of the DMA.

23.2 The DMA will not authorise new ROs unless the RO is able to document that at least one ship will be surveyed and certified by the RO within a reasonable timeframe. The following clauses 23.4.3 and 23.4.4 are also applicable to new signees to this agreement.

23.3 If an RO, which is authorised by the DMA, ceases to have any ships under Danish flag in

- and with contents as described in the instrument.
- 25.3 According to IMO Resolution A.600(15), the ship's IMO number shall be entered on all ship-certificates.
- 25.4 All Ships Certificates – With the exemption of the SMC and ISSC – shall be harmonised to a common Anniversary Date, which shall be the same as the due date of the International Load Line Certificate (ILLC).
- 25.5 The following definitions applies to the certificates mentioned in section 25.2:
- 25.5.1 (Official seal):
The official coat of arms (seal) of the Kingdom of Denmark, as supplied by the DMA.
- 25.5.2 (State):
The flag state in question (“Denmark”).
- 25.6 The certificates shall be printed on RO certificate paper and be furnished with appropriate stamps and other means to minimise falsification.
- 25.7 All certificates shall be in the English language or in combined Danish/English language except for the Tonnage Certificate (Målebrev) where combined Danish/English language is mandatory.
- 25.8 Names of ships, homeports and companies must be in Danish and the appropriate national letters shall be used. E.g. MÆRSK, RØNNE or ÅRHUS.
- 25.9 The tonnage figures on all certificates must be entered correctly according to the relevant tonnage regulations. It shall be noted that:
- 25.9.1 GRT shall be entered with 2 decimals.
- 25.9.2 GT shall be entered with no decimals.
- 25.9.3 For ships with a length of less than 24 meters GT shall be entered with one decimal.
- 25.10 All statutory certificates must display the “regulatory” tonnage as stated in the ships Tonnage Certificates. For a vessel that has had its keel laid before the 18 July 1994 this might be the 1947 tonnage (Gross Register Tonnage or GRT) according to the National Danish Tonnage Certificate.
- 25.11 Any certificates issued by the RO in accordance with this agreement shall be handled according to the RO's administrative rules as long as they are within the limits of the instrument in question.
- 25.12 The RO has the right and obligation, if deemed necessary, to suspend and/or withdraw any certificate issued by the RO, cf. section 3.7.
- 25.13 The Danish Maritime Authority and the owner and operator of the ship in question shall be informed immediately if any statutory or class certificates are suspended or withdrawn.
- 26 ISSUE OF NON-CONVENTION CERTIFICATES OR DOCUMENT OF COMPLIANCE**
- 26.1 The RO may issue any Non-Convention Certificates or Documents of Compliance as long as it does not appear to be issued on behalf of the Danish Maritime Authority or by the Government of the Kingdom of Denmark.
- 27 DANISH MARITIME AUTHORITY'S RIGHT TO CARRY OUT ANY SURVEY**
- 27.1 The Danish Maritime Authority may at any time carry out any Statutory Survey and/or Certification.
- 27.2 In such case the DMA may charge the party requesting its services a fee for services rendered.
- 28 TRANSFER OF MARITIME AUTHORITY TO THE FAEROE ISLAND**
- 28.1 On 1 January 2002 the authority on maritime matters was transferred from the Government of Denmark to the Government of the Faeroe Islands, both within the Kingdom of Denmark, which is the signatory party to IMO conventions, etc.
- 28.2 The present agreement is thus **not** in force for vessels registered in the Faeroe Islands.
- 28.3 The Agreement governing the Delegation of Statutory Certification Services for Vessels registered in Denmark between the Danish Maritime Authority and Recognised Organisations (RO) issued on 28 February 2001 with annexes issued on 25 February 2002 will re-

main in force for vessels under Faeroe Island
flag until the Government of the Faeroe Islands

cancels the agreement.

This Agreement Governing the Authorization of the Recognized Organization to undertake Statutory Certification Services for Vessels Registered in Denmark between the Danish Maritime Authority and Recognized Organizations (Actual name of Organisation entered in signed copies.)

enters into force on the **27th September 2003** and supersedes all previous agreements.

IN WITNESS WHEREOF the undersigned, duly authorised, have on the 20th October 2003 signed this Agreement.

Hans Christensen,
Director
Danish Maritime Authority

IN WITNESS WHEREOF the undersigned, duly authorised, have signed this agreement:

American Bureau of Shipping
On the 31st of October 2003

Lloyd's Register
On the 10th November 2003

Bureau Veritas
On the 25th November 2003

Nippon Kaiji Kyokai
On the 12th November 2003

Det Norske Veritas
On the 26th November 2003

RINA S.p.A. Registro Italiano Navale Group
On the 13th January 2004

Germanischer Lloyd
On the 3rd of November 2003

List of Annexes

To the Agreement Governing the Authorization of the Recognized Organization to undertake Statutory Certification Services for Vessels Registered in Denmark between the Danish Maritime Authority and Recognized Organizations of 27 September 2003, valid by 19th May 2005, the following annexes are issued:

ANNEX I SCOPE OF AUTHORISATION,
ANNEX II GUIDANCE NOTES,
ANNEX III DANISH NATIONAL REGULATIONS,

LIST OF ANNEXES, Issued on 30 May 2005

Per Sønderstrup,
Head of Division
Danish Maritime Authority

ANNEX I – SCOPE OF AUTHORISATION

29 SCOPE OF AUTHORISATION

- 29.1 The RO is **authorised to perform** the statutory certification services on behalf of the Danish Maritime Authority (DMA) as stated in the following “annex I scope of authorisation” under the conditions specified in the AGREEMENT of 27 September 2003, and in accordance with IMO resolution A.948(23) “Revised Survey Guidelines under the harmonized System of Survey and Certification as adopted on the 5 December 2003”.
- The Scope of Authorisation encompasses the following tasks:
- 29.2 Performance of plan approval and survey in accordance with IMO resolution A.948(23)
- 29.3 Issuance, endorsement and renewal of certificates in accordance with IMO resolution A.948(23).
- For certificates where the RO is granted full authorisation, the RO may supersede an existing DMA certificate with its own. The DMA shall be informed afterwards.
 - The RO may endorse any DMA certificate with prior written consent by the DMA.
 - The DMA may endorse any RO certificate with prior written consent by the RO.
- 29.4 Extension of the period of validity of certificates issued by the RO within the limits given in the relevant conventions or other instruments.
- 29.5 After consultation with the DMA and in accordance with relevant instruments, issuance of exemption certificates to certificates issued by the RO.
- 29.6 Issuance of any type of “Non Convention Certificates”, “Statement of Compliance” and “To Whom it may concern letters” as long as there is no doubt that it is issued on behalf of
- the RO itself (c.f. section 26 of the agreement)
- 29.7 Demanding repairs to a vessel or equipment under the auspices of this agreement.
- 29.8 Demanding changes in operational procedures on board a vessel at a company under the auspices of this agreement.
- 29.9 Carrying out inspections and surveys if requested by the appropriate authorities of a Port State.
- 29.10 Suspension and/or withdrawal of certificates issued by the RO.
- Please note, that due to the Danish Civil Law, the RO shall consult the DMA **before** withdrawal of the DOC certificate, if the withdrawal is caused by non-compliance (ISM Code).
- 29.11 Provision of relevant information to the authorities of flag and/or port states and to regional and/or global organisations.

30 REFERENCES TO INTERNATIONAL CONVENTIONS AND DANISH NATIONAL REGULATIONS (AMENDMENTS) INCLUDED IN SCOPE OF AUTHORISATION

- 30.1 This Annex contains references to “Notice from the Danish Maritime Authority B – The Construction and Equipment, etc. of Ships”, which is the legal premises for entering international conventions and other regulations into force on Danish ships. The notice “B” also contains Danish amendments (additions) to the International conventions or regulations.
- 30.2 **In all cases the reference to any International Convention, Code or EC Regulation includes the protocols and amendments thereto that have entered into force internationally.**
- 30.3 English translations of the Danish amendments (additions) to the International conventions or regulations are provided in Annex III of this agreement. The Danish amendments shall be read only in connection with an updated copy of the relevant international convention or regulation.
- 30.4 All “footnotes” in Danish National Regulations shall be treated according to MSC/Circ 930 – MEPC/Circ 364 of 26 July.
- 30.5 IACS Unified Interpretations are to be used when not in conflict with Danish national regulations or IMO regulations or interpretations. Cf. section 4.2.
- 30.6 Additionally, this annex contains other Danish Technical Regulations included in the Scope of Authorisation⁹. (For the convenience a summary is made in section 78) The content of these Danish Technical Regulations are not published in this document, but can be accessed on our homepage.
- 30.7 This annex makes references only to the latest revision known at time of issue of this Annex of international and national regulations.
- 30.8 Ships in Service shall in many cases be surveyed according to older regulations (grandfather clause). These “outdated” regulations shall be carried on board the ship in question for reference.
- 30.9 For access to all Danish Maritime Regulations published in English, please visit the website of the DMA at:
<http://www.dma.dk>
- 30.10 Whereas all possible care has been taken to ensure that the quoted regulations are correct at the time of publication of this annex, it shall be noted that the list is not exhaustive, that it is provided for information only and that it is the responsibility of the RO to ensure that the correct regulations are employed.
- 30.11 Please observe that only the Danish version of regulations is authentic cf. section 12.1 of the Class Agreement.
- 30.12 When, in the following, a reference is made to gross tonnage, this is the actual “regulatory” gross tonnage of the vessel as stated in the vessels Tonnage Certificate. For ships the keel of which is laid before the 18 July 1994 this **might** be the 1947 gross tonnage (Gross Register Tonnage or GRT) according to the National Danish Tonnage Certificate. C.f. IMO Resolution A.XII/Res.494 of 4 January 1982.

⁹ These regulations are notified in accordance with the Council's Directive 83/189/EEC as last amended in Directive 94/10/EF.

31 THE INTERNATIONAL CONVENTION ON TONNAGE MEASUREMENT 1969 (TM69)

Certificate	Authorisation	Danish National Regulations (<i>and further remarks</i>)
31.1 International Tonnage Certificate (TMC69)	ALL SHIPS, BARGES AND MODUS within the limits of the Convention	Copy of International Tonnage Certificate to be forwarded to the DMA in hardcopy. Attention is drawn to the clauses 25.7 and 25.9 of the agreement.

32 THE INTERNATIONAL CONVENTION ON LOAD LINES, 1966 (ICLL 1966)

Certificate	Authorisation	Danish National Regulations (<i>and further remarks</i>)
32.1 International Load Line Certificate, 1966 (ILLC)	ALL SHIPS, BARGES AND MODUS within the limits of the Convention	For additional regulations, go to section 74 on page 49 Annex III. ILLC may also be issued to Passenger Vessels in National Trade according to Notice from the DMA D – cf. section 49. Multiple Load Lines are to be handled according to instructions given in section 69.
32.2 International Load Line Exemption Certificate (ILLEC)	ALL SHIPS, BARGES AND MODUS within the limits of the Convention	All exemptions are to be granted by the DMA – cf. section 5. Any survey and certification related thereto shall normally be carried out by the RO.

33 INTERNATIONAL CONVENTION FOR PREVENTING COLLISIONS AT SEA 1972 (COLREG)

The SAFEEQ Certificate (section 34.2) covers the technical provisions of the International Convention for Preventing Collisions at Sea, and thus the authorisation for COLREG “72” (COLREG).

34 THE INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA 1974 (SOLAS 74)

Certificates	Authorisation	Danish National Regulations (<i>and further remarks</i>)
34.1 Cargo Ship Safety Construction Certificate (SAF-CON)	CARGO SHIPS within the limits of the Convention	For additional regulations, go to section 71, Annex III
34.2 Cargo Ship Safety Equipment Certificate (SAFEQ)	CARGO SHIPS within the limits of the Convention	For additional regulations, go to section 72, Annex III

Certificates	Authorisation	Danish National Regulations (<i>and further remarks</i>)
34.3 Cargo Ship Safety Radio Certificate (SA-FRA)	CARGO SHIPS and GMDSS equipped MODU within the limits of the Convention	For additional regulations, go to section 73, Annex III At owner's request the RO may certify any GMDSS equipped Cargo Ship.
34.4 Cargo Ship Safety Certificate (CSSC)	CARGO SHIPS within the limits of the Convention	For additional regulations, go to section 71, 72 and 73, Annex III On owner's request this certificate may substitute the Safety Construction, Safety Equipment and Safety Radio Certificates
34.5 Special Purpose Code Certificate (SPCC)	CARGO SHIPS within the limits of the Convention	The SPCC is to be issued in accordance with IMO res. A 534(13) "Code of Safety for Special Purpose Ships" as amended. Although the Code specifies that the SPCC substitutes the SAFCON, SAFEQ and SAFRA certificates, the SPCC shall be issued in addition to ships ordinary SOLAS certificates.
34.6 Document of Compliance for Carriage of Dangerous Goods (DOCDG)	ALL NON-PASSENGER VESSELS within the limits of the Convention	
34.7 ISM Document of Compliance (DOC)	For the operation of ALL NON-PASSENGER VESSELS within the limits of the Convention	
34.8 Safety Management Certificate (SMC)	ALL NON-PASSENGER VESSELS within the limits of the Convention.	
34.9 International Ship Security Certificate (ISSC)	ALL NON-PASSENGER VESSELS within the limits of the Convention	Reference is made to EC Regulation No 725/2004 of the European Parliament of the Council of 31 March 2004 on enhancing ship and port facility security.
34.10 International Certificate of Fitness for the Carriage of Dangerous Chemicals in Bulk	CARGO SHIPS within the limits of the Convention.	
34.11 Certificate of Fitness for the Carriage of Dangerous Chemicals in Bulk	CARGO SHIPS within the limits of the Convention.	

Certificates	Authorisation	Danish National Regulations (<i>and further remarks</i>)
34.12 International Certificate of Fitness for the Carriage of Liquefied Gases in Bulk	CARGO SHIPS within the limits of the Convention	
34.13 Certificate of Fitness for the Carriage of Liquefied Gases in Bulk	CARGO SHIPS within the limits of the Convention.	
34.14 Cargo Securing Manual	ALL SHIPS AND MODUS CARRYING ALL CARGOES OTHER THAN SOLID AND LIQUID BULK CARGOES within the limits of the Convention.	Please refer to MSC/Circ.745
34.15 Document of Authorization for the Carriage of Grain	ALL SHIPS CARRYING GRAIN within the limits of the Convention	The document shall accompany or be incorporated into the Grain Loading Manual (Grain Stability Manual)
34.16 Bulk Carrier Booklet	all BULK CARRIERS within the limits of the Convention	Directive 2001/96/EC of the European Parliament and of the Council of 4 December 2001 – Establishing Harmonised Requirements and Procedures for the Safe Loading and Unloading of Bulk Carriers. <i>A Bulk Carrier Booklet as described in SOLAS Chapter VI, Regulation 7 may be approved at the request of the owner.</i>
34.17 Stability calculation by computer	ALL NON-PASSENGER VESSELS within the limits of the Convention.	IMO Code on Intact Stability for All Types of Ships Covered by IMO Instruments (as amended – MSC.75(69) amending resolution A.749(18)), Chapter 2. Paragraph 2.2.2 shall be read as: The computer hardware and software <i>shall</i> be approved for stability calculation by the RO. <i>RO shall accept equipment type approved by any RO authorised by the DMA.</i> <i>The RO shall validate the proper function of the computer system, c.f. regulation 2.2.4 of the code.</i>

35 INTERNATIONAL CODE OF SAFETY FOR HIGH-SPEED CRAFT (HSC CODE)

Certificate	Authorisation	Danish National Regulations (<i>and further remarks</i>)
35.1 International High Speed Craft Safety Certificate	ALL NON-PASSENGER VESSELS within the limits of the Convention.	Technical Regulation no. 9 of 4 December 1997 on Registration of Navigational Data on Board High-Speed Craft

36 CODE FOR THE CONSTRUCTION AND EQUIPMENT OF MOBILE OFFSHORE DRILLING UNITS (MODU CODE).

Certificate	Authorisation	Danish National Regulations (and further remarks)
36.1 Mobile Offshore Drilling Unit Safety Certificate 1979 (MODU79)	ALL MODUS within the limits of the Convention	Danish National Regulations to be surveyed and approved by the DMA according to <i>Technical Regulation no. 5 of 18. May 2000.</i> For Danish National Regulations an authorisation of the RO may be given on a "Case by Case authorization" according to section 41. <i>On owners request and the consent of the DMA the RO may issue a statement covering one or more of the following sections of the Technical Regulation: 3, 9.5, 9.11 and 12.</i>
36.2 Mobile Offshore Drilling Unit Safety Certificate 1989 (MODU89)	ALL MODUS within the limits of the Convention	Danish National Regulations to be surveyed and approved by the DMA according to Technical Regulation no. 5 of 18. May 2000. For Danish National Regulations an authorisation of the RO may be given on a "Case by Case authorization" according to section 41. <i>On owners request and the consent of the DMA the RO may issue a statement covering one or more of the following sections of the Technical Regulation: 3, 9.5, 9.11 and 12.</i>

37 THE INTERNATIONAL CONVENTION FOR THE PREVENTION OF POLLUTION FROM SHIPS 1973/78 (MARPOL) (INCL NO_x CODE)

Certificates	Authorisation	Danish National Regulations (and further remarks)
37.1 International Oil Pollution Prevention Certificate (IOPP)	ALL NON-PASSENGER VESSELS within the limits of the Convention	For additional regulations, go to section 75, Annex III. (the authorisation includes the CAS work, under regulation 13G, in accordance with MEPC res. 94 (46) as amended by MEPC res. 99(48) and MEPC res. 112(50)) (the authorisation also includes the approval of Shipboard Oil Pollution Emergency Plan (SOPEP))
37.2 International Pollution Prevention Certificate for the Carriage of Noxious Liquid Substances in Bulk (NLS)	ALL NON-PASSENGER VESSELS within the limits of the Convention.	This text covers all vessels within the scope of authorisation. (The authorisation includes also the approval of Shipboard Marine Pollution Emergency Plan for Noxious Liquid Substances, alternatively the Shipboard Marine Pollution Emergency Plan (SMPEP)).
37.3 *left free intentionally*	-na-	-na-

Certificates	Authorisation	Danish National Regulations (<i>and further remarks</i>)
37.4 International Sewage Pollution Prevention Certificate (ISPPC)	ALL NON-PASSENGER VESSELS within the limits of the Convention	Denmark implements the revised Annex IV, cf. IMO MEPC/44/20, to enter into force on the 27 September 2003.
37.5 Prevention of Pollution by Garbage from Ships	ALL NON-PASSENGER VESSELS within the limits of the Convention.	As no certificate is required for this MARPOL Annex, the RO may, at the owner's request issue a Statement of Compliance.
37.6 International Air Pollution Prevention Certificate (IAPPC)	ALL NON-PASSENGER VESSELS within the limits of the Convention	The exception, for installations containing HCFC, stated in MARPOL Annex VI regulation 12.2, does not apply to Danish Ships. (Reference is made to EU regulation no. 2037/2000 of 29 June 2000)
37.7 Engine International Air Pollution Prevention Certificate (EIAPPC)	ALL Installations within the limits of the Code	

38 *LEFT FREE FOR FUTURE USE*

39 INCLINING TEST AND LIGHT WEIGHT SURVEY

39.1 The RO may perform Inclining Tests and Light Weight Survey on ships, where the DMA is to approve the stability Documenta-

tion, without the attendance of the DMA during the test/control

40 "SINGLE SHIP" AUTHORISATIONS

40.1 In order to avoid "double work", where the DMA carries out plan approval and/or survey which also is carried out by the RO to enable it to issue Class Certificates, the DMA may accept such work by the RO in lieu of the DMA plan approval and/or survey.

40.2 To facilitate this, the RO and the DMA shall coordinate the plan approval process and survey work at the earliest possible point in time and agree upon the distribution of work and kind of documentation to be provided to the DMA.

40.3 In addition, the RO may be authorised by the DMA to carry out additional plan approval and/or survey tasks.

40.4 The RO shall apply to the DMA describing the "Single Ship" authorisation sought and accompanied by CV of the surveyors designated to carry out the work in question.

40.5 **If such additional "Single Ship" authorisation is given, the following conditions apply:**

40.5.1 All relevant provisions of this Agreement shall be applied to such agreement between the RO and the DMA.

40.5.2 The Owner and – if the owner is not the contractor of the RO – the Contractor (e.g. shipyard) must approve of the authorisation, as the RO will not receive remuneration from the DMA (c.f. section 18).

40.5.3 It is the obligation of the RO to obtain the approval from its Contractor.

40.5.4 A "single ship" agreement shall be made up between the RO and the DMA describing the tasks the RO has been authorised to carry out, and the kind of documentation to be provided to the DMA.

41 "CASE-BY-CASE" AUTHORISATIONS

41.1 The DMA may at any time authorise the RO to carry out specific tasks on behalf of the DMA.

41.2 All relevant provisions of this Agreement shall be applied to such "Case-by-Case" authorisation.

42 MARINE EQUIPMENT DIRECTIVE

42.1 In accordance with *Technical Regulation on Marine Equipment no. 12 of 2 December 2002* the RO shall maintain compliance with the provisions in the European Union's Council Directive 96/98/EC on marine equipment (as amended), hereinafter referred to as "the Marine Equipment Directive" or MED (Wheel-mark).

Fire Nozzles – as required in SOLAS reg. II-2 C/10.2.3.3.

42.2.4 Equipment not listed in the directives ANNEX A.1 or A.2 shall be approved by the DMA or by one of the organisations (RO) authorised by the DMA.

42.2 RO shall insure when issuing or renewing the relevant safety certificates that the equipment on board Danish ships for which it issues safety certificates complies with the requirements in the Equipment Directive as follows:

42.2.5 Any other equipment not mentioned above may be accepted only after consultation with the DMA.

42.2.1 Equipment listed in the Equipment Directive's ANNEX A.1 shall meet the applicable requirements of the international instruments referred to in that annex and be "wheel-marked".

42.2.6 The DMA has banned some specific "Wheel-marked" pieces of equipment from installation on board Danish ships. The RO shall not issue Statutory Certificates to Danish ship on board which equipment banned by the DMA is installed. A list of equipment banned by the DMA appears in section 68.

42.2.2 Equipment listed in the Equipment Directive's ANNEX A.2 shall be approved by one of the following to be used on board for the purpose in question:

- A Maritime Authority of an EC/EEC country.
- The Maritime Authority of USA, Canada or Australia.
- One of the organisations (RO) recognised by the DMA.
- The Danish Maritime Authority.

42.3 If the RO identify wheel-marked equipment, referred to in the MED, when installed, maintained and used for its intended purpose may compromise the health and/or safety of the crew, the passengers or, where applicable, other persons, or adversely affect the marine environment, the RO shall prohibit it being used on board a ship for which it issues the safety certificates. **The RO shall in such cases immediately inform the DMA.**

42.2.3 The following equipment listed in the Equipment Directive's ANNEX A.2 shall be type-approved by the DMA only:

42.4 Where equipment needs to be replaced where it is not practicable in terms of reasonable time, delay and cost to place on board equipment that is EC type approved (wheel-marked), other equipment may be placed on

board **after prior consultation with the DMA only.**

42.5 Equipment on board **Danish ships built on 1 January 1999 or later** (new ship as defined in the Marine Equipment Directive) shall comply with the Marine Equipment Directive.

42.6 Equipment on board **existing Danish ships** (built prior to 1 January 1999) shall be accepted as long as it complies with the regulations to which it originally was approved. However if the equipment is replaced with

new equipment, it must comply with the requirements of the Marine Equipment Directive.

42.7 If a ship, irrespective of its flag, is to be transferred to the Danish ship register, the ship is subject to inspection by the RO / DMA to verify that the actual condition of its equipment corresponds to its safety certificates. If the RO is not capable of or willing to perform such inspection, the **DMA shall be informed prior to the change of flag (EC/96/98 Article**

43 PASSENGER LIFTS

43.1 Based on *Technical Regulation no. 7 of 3 July 1997 on "PASSENGER LIFTS in SHIPS"* the RO is **authorised** to carry out plan approval, survey and inspection and to issue certificates and statements of compliance on any **Non-Passenger Ship or MODU** with regard to Passenger Lifts on behalf of the DMA.

43.2 It must be noted that, the ship owner is at liberty to employ any RO signatory to this present agreement to carry out the survey and certification services specified in this section or even a third party if permitted in the actual technical regulation.

44 CARGO HANDLING GEAR ON SHIPS

44.1 According to Annex to "*Technical Regulation on Lifting Appliances and Cargo Handling Gear on Ships, No. 12 of 12 October 2000*" – as corrected by Notice from the Danish Maritime Authority no. 5 2001, page 90 (The Technical Regulation is based upon the ILO "Occupational Safety and Health (Dock work) Convention, 1972, No. 152.). The RO is herein authorised as an approved category "A" competent party.

44.5 If the lifting appliances or loose gear is to be **used at sea** it must be constructed and tested according to the relevant regulations of the ships or MODUs Classification Society.

44.6 All cargo handling lifting appliances and loose gear on board the ship shall be inspected and entered into the register. **This shall include:**

- Overhead cranes in engine room.
- Provision and hose-handling cranes and davits.
- Cargo and Provisions slings.

44.2 It must be noted that, the ship owner is at liberty to employ any RO signatory to this present agreement to carry out the survey and certification services specified in this section or even a third party if permitted in the actual technical regulation.

44.7 The RO may issue the "Register of Lifting Appliances and Loose Gear", but the ship may choose to use one of the other systems permitted in the Technical Regulation. In the last case the RO must inspect it as described in section 11.11.

44.3 It is emphasised that the Danish Maritime Authority does not require any lifting appliances or loose gear to be "classed", but only that the above-mentioned Technical Regulation must be complied with.

44.8 The following interpretations applies to **overhead cranes in engine rooms:**

44.4 Special attention is drawn to section 11.10 and 11.11 of the Technical Regulation. The RO may order new tests if needed as described in section 25.6.

44.8.1 Section 8.4.1 may be omitted if the load is slung directly from the drum, and the operator has a clear view of the drum.

44.8.2 Section 8.5.6 and 8.6.1 second paragraph, may be omitted if there is no direct access for people to the tracks of the crane.

44.9 The RO or other approved category "A" competent party shall check **special heavy-lift arrangements** – e.g. lifting lugs for propeller shaft or bow truster motor – prior to the arrangement being used.

44.10 It shall be noted that section 24 of the Technical Regulation makes reference to "Notice from the DMA B, Chapter II-1, Regulation 3.5. This is not correct. The correct reference is to Regulation 3.6 – "Guidelines for the construction and installation of suspended decks with associated safety devices in passenger ships". **Relevant parts of these guidelines must thus also be applied to cargo vessels.**

45 OFF SHORE CONTAINERS

45.1 The RO are **authorised** to approve Offshore Containers according to *Technical Regulation*

no. 1 of 11 January 2000 on the Approval of Offshore Containers Handled in Open Sea.

46 IMDG CODE

46.1 *Technical Regulation no. 8 of 28 November 2002 on the Carriage of Dangerous Goods by Ships* (amendment to the IMDG Code) enters the amended IMDG code into force on Danish ships.

46.2 The RO is authorised to carry out plan approval, survey and inspection and to issue certificates and statements of compliance on any **Non-Passenger Ship** with regard to the IMDG Code on behalf of the DMA.

47 SHELL DOORS AND RAMPS ON RO/RO SHIPS

47.1 *Technical Regulation no. 8 of 12 October 1995 on Special Requirements on the Placing, Strength and Securing of Shell-doors and Weather Tight Ramps on RO/RO ships.*

47.2 The herein required manual may be approved by the RO as a stand-alone document, but the manual will usually be part of the ISM system.

47.3 On RO/RO Cargo Vessels the RO shall ensure that the technical requirements of Chapter 7 of the regulation is fulfilled.

47.4 On RO/RO Passenger vessels the RO is authorised to carry out plan approval, survey and inspection and to issue statements of compliance on the fulfilment of the technical requirements of the regulation.

48 "STOCKHOLM AGREEMENT"

48.1 The so called "Stockholm Agreement" is implemented on ships under Danish flag by *Technical Regulation no. 2 of 3 March 1998 on special stability requirements for RO/RO passenger vessels with water on deck in international trade.*

48.2 When approving load line etc. for passenger vessels covered by the "Stockholm Agreement" the RO shall take into consideration the requirements on strength and water-/weather tightness of doors etc.

49 PASSENGER VESSELS IN NATIONAL TRADE WITH A LENGTH OF 24 METERS OR ABOVE

49.1 The DMA will issue the EC Document of Compliance with the EC Directive 98/18/EC, as specified in Notices from the DMA "D", to Passenger Vessels in national trade. It should

be noted that this regulation applies to any Danish Passenger Vessel irrespective of length.

- 49.2 To facilitate this, the owner of such vessels which are classed with an RO authorised by the DMA may choose one of the following options:
- 49.2.1 Request the RO to issue and maintain an International Load Line Certificate.
- 49.2.2 Request the RO to issue a statement of compliance with the International Load Line Convention before the ship commences trading.
- 49.2.3 Request the DMA to verify compliance with the International Load Line Convention before the ship commences trading.

50 FISHING VESSELS WITH A LENGTH OF 15 METERS AND ABOVE

- 50.1 Fishing Vessels with a length¹⁰ of 15 meters and above are subject to surveys as specified in Notice from the Danish Maritime Authority E¹¹, and amendments thereto that has entered into force, or other relevant instruments and covering the areas specified below.
- 50.2 The RO is strongly urged to align its survey schedule for Fishing Vessels within class, to the time schedules (4-year periods between renewal surveys) set forward in the above-mentioned DMA regulations.
- 50.3 **After any survey** the RO shall deliver a statement to the ship, stating the result of the inspection, which can be presented to the DMA at any visit onboard.
- 50.4 The RO is **authorised** to issue a statement of compliance in connection with the **initial survey of Fishing Vessels with a length of 45 meters and above** confirming the vessels compliance with the following regulations:
- Notice from the Danish Maritime Authority E, Chapter II.
Notice from the Danish Maritime Authority E, Chapter IV, excluding regulations 12, 15 and 19, which are exempted from this authorisation.
- 50.5 The RO is **authorised to conduct periodical survey on Fishing Vessels with a length of 45 meters** and to issue a Statement of Com-
- pliance confirming the vessels compliance with the following regulations:
- Notice from the Danish Maritime Authority E, Chapter II.
Notice from the Danish Maritime Authority E, Chapter IV, excluding regulations 12, 15 and 19, which are exempted from this authorisation.
- 50.6 The RO is **authorised to conduct periodical survey on the Radio Communication Equipment of Fishing Vessels with a length of 15 meters and above** according to Notice from the Danish Maritime Authority E, Chapter IX and endorse the ship's Document of Compliance accordingly.
- 50.7 Owners of Fishing Vessels not within class and with a length of 15 meters and above, but under 45 meters, may choose freely between an RO, a company authorised by the DMA or the DMA for the mentioned services.

¹⁰ The length (L) shall be taken as 96 % of the total length on the waterline at 85% of the least depth (moulded) measured from the keel line, or as the length from the fore side of the stem to the axis of the rudder stock on that waterline, if that be greater. In vessels designed with a rake of keel the waterline on which this length is measured shall be parallel to the designed waterline.

¹¹ Technical Regulation on the Construction and Equipment etc. of Fishing Vessels, which implements EU Council Directive 97/70/EC, and amendments thereto that has entered into force, as applied to groups of Fishing Vessels

ANNEX II – GUIDANCE NOTES

51 GUIDANCE NOTES INTRODUCTION

- 51.1 As specified in the AGREEMENT the RO is authorised to issue statutory certificates on behalf of the DMA.
- 51.2 The sections below specify administrative decisions, additions and/or clarifications made by the Danish Maritime Authority in relation to the authorisation.

52 DANISH MARITIME AUTHORITY CLASS SOCIETY SECRETARIAT

- 52.1 Within the DMA's Centre or Ships (CFS) a Class Society Secretariat (CSS) has been established to handle the following tasks:
- Class Agreement
 - Audit of RO
 - Coordination of the DMA monitoring of the RO
 - Day-to day liaison between the DMA and the RO
 - CAS
 - Information on TOC and Declassing
- 52.2 Requests concerning specific ships, e.g. during newbuilding, conversion or flagging in to Danish flag, shall be directed to the CSS.
- 52.3 If the DMA responsible Ship Surveyor is known to the RO, direct contact may be made.
- 52.4 The official e-mail address of the DMA CSS is: css@dma.dk.
- 52.5 The preferred way of communication is by e-mail.
- 52.6 To facilitate speedy answers, questions and comments should be forwarded in an electronic format (e.g. Microsoft Word, e-mail or Adobe "pdf" format).
- 52.7 Detailed questions or comments forwarded by fax or letter may not be answered by the CSS unless the questions or comments are forwarded in electronic format as well.

53 MONITORING OF RO BY THE DMA

- 53.1 The DMA has since the summer of 2002 employed a risk based strategy in deciding where and how to employ its resources available for monitoring of the RO activities on behalf of the DMA.
- 53.2 The prime factors for deciding on which ROs to focus on and which means to employ will be:
- 53.2.1 The number of detainments and reported deficiencies by Port State Authorities in relation to the number and tonnage of ships in the RO's register.
- 53.2.2 Number and severity of observations made by DMA surveyors on board ships under Danish Flag in relation to number and tonnage of ships in the RO's register.
- 53.2.3 Age and type mix of ships in the RO's register.
- 53.2.4 Any significant non-conformance with respect to statutory regulations on Danish ships in the RO 's register.
- 53.3 To facilitate this, section 8.4.7 of the agreement requires the RO, every year in January/February, to provide the DMA with the information as described below, with a baseline date 1 January every year, submitted to the DMA no later than 1 March:
- Number of ships and MODUs under Danish Flag within the RO registry.
 - Total Gross Tonnage of ships under Danish Flag within the RO registry.
 - Average age of ships under Danish Flag within the RO registry.

If possible, the required numbers should be distributed on the following ship types:

- RO/RO Pax
- Other RO/RO
- Other Pax
- Container ships
- Crude oil tankers
- Chemical tankers
- Gas tankers
- Other tankers
- Bulk carriers
- Other ships with GT of, or larger than 500
- MODUs
- Barges
- Other ships

53.3.1 Furthermore, the ROs are requested to provide the DMA with additional information as specified by the DMA. The DMA will submit the specification no later than 1 July for the year of reporting.

53.3.2 If, for any reason the RO cannot provide the information required the RO must inform DMA as soon as possible and suggest alternative information to be accepted by the DMA.

53.4 The figures relating to the individual RO will only be shared with that RO, although the ranking of the ROs might be published.

53.5 When the DMA conducts an audit of an RO, the scope and objectives will be:

An examination of the quality system with special focus on the current Class Agreement as well as follow-up on any observations made during the class monitoring on board ships under Danish Flag.

53.6 The audit will normally be carried out bi-annually – cf. the Class Directive Article 11.1 and .2 – unless special circumstances apply (a high detention rate, outstanding Non-conformity Reports or other special considerations).

53.7 It has for many years been the principle of the Danish Government that expenses incurred by the administration, due to a company – for its own convenience – has located an office or ship to be surveyed or audited outside of Denmark, shall be carried by that company. Cf. clause 18.3 of the agreement. If an audit takes place at the office from where the RO has chosen to administrate its ships under Danish flag, and this office is not located in Denmark, the RO shall therefore reimburse the DMA for the travel costs of the audit team.

54 ITEMS SURVEYED AND APPROVED BY THE DMA ON “SOLAS” CARGO SHIPS

54.1 **Crew Accommodation** Requirements as described in Notice “B”, Chapter II-3 (regulations are based on ILO 92 and ILO 133).

54.2 **Occupational Health and Safety** issues including Medicine Chest as described in Notice “B” Chapter II-4, Notice “A”, and addi-

tional Danish technical regulations, except those covered by this Class Agreement.

54.3 **Approval of Noise-reports** in accordance with Technical Regulation no. 4 of 3 May 2002 on Noise Levels in Ships. RO may be involved in the actual noise measurements, please cf. Section 60.

55 MANDATORY DOCUMENTS ISSUED BY AUTHORITIES OTHER THAN THE RO’S

55.1 **Documents issued by the DMA:**

- Danish Certificate of Nationality,
- Continuous Synopsis Record, CSR,
- Radio station licence,
- Minimum Safe Manning Document,

- CLC, Certificate of insurance or other financial security in respect of civil liability for oil pollution damage (CLC),
- Trading Permit,

The “Trading Permit” is a Danish certificate issued by the Danish Maritime Authority when the initial survey has been completed.

The validity of the “Trading Permit” is conditional to the ship carrying a complete set of valid certificates class and statutory and that all areas where the DMA carries out plan approval and/or surveyed has been found to be satisfactory by the DMA.

The Trading Permit will state the trading area for the ship and the maximum number of persons permitted onboard.

- AFS Certificate, International Anti-Fouling System Certificate.
The owner shall request “Survey and Certification” services from the Danish Environmental Protection Agency (EPA):

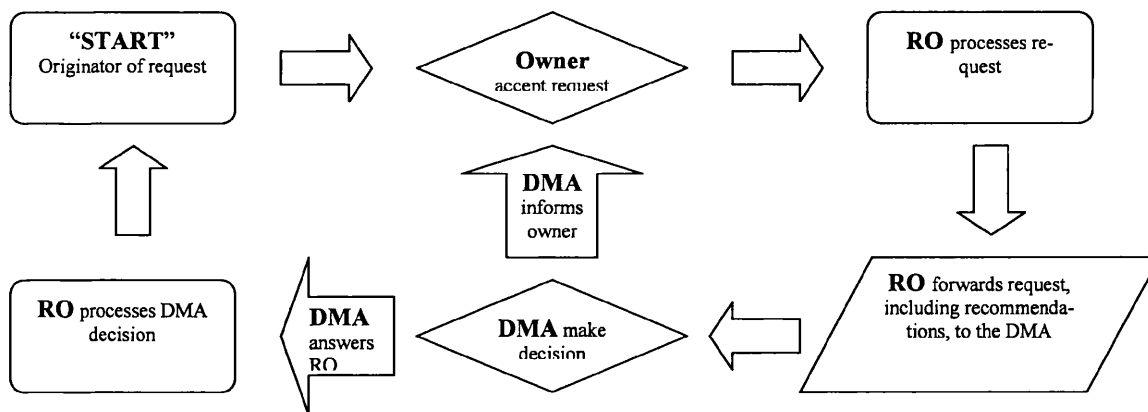
Danish EPA
29 Strandgade
DK-1401 København K
Phone: +4532660100
Fax: +4532660479
E-mail: mst@mst.dk

55.2 Documents issued by Danish Environmental Protection Agency:

56 ROADMAP FOR PROCESSING OF REQUESTS FOR INTERPRETATIONS, EQUIVALENTS AND EXEMPTIONS

56.1 The below inserted figure supplements the description given in section 6 in the Agreement.

56.2 Please note that requests shall be forwarded to the CSA, not to the CSS.



Figur 1 - Flow of requests to the DMA for Interpretations, Equivalents and Exemptions.

57 INTERNATIONAL CONVENTION FOR THE CONTROL AND MANAGEMENT OF SHIP’S BALLAST WATER AND SEDIMENTS

57.1 The Convention has not been ratified yet, and is not set in force in any way in Denmark at the date of the issue of this document.

57.3 Guidance and information can be sought at the DMA or, primarily, from the Danish Forest and Nature Agency (FNA):

Danish FNA
53 Haraldsgade
DK-2100 Copenhagen Ø
Denmark
Tel. +45 39 47 20 00, E-mail: sns@mst.dk

57.2 With reference to section 26.1 and section 29.7 the RO can issue Statement of Compliance AO.

58 APPROVAL OF INTACT AND DAMAGE STABILITY DOCUMENTATION, ETC.

- 58.1 Approval of all intact and damage stability documentation must always be carried out by the same organisation (either the RO or the DMA).
 - 58.3 Approval of all required stability documentation on Cargo Ships (Including tankers not covered by SOLAS etc.) within class is the responsibility of the RO.
- 58.2 The organisation responsible for approval of intact and damage stability documentation must – by survey on board – check the assumptions done for the approval of the intact and damage documentation such as progressive flooding points, weathertight and watertight integrity, cross-flooding arrangements, etc. to ensure that the ship is build and oper-
 - 58.4 Approval of all required stability documentation on passenger ships is the responsibility of the DMA.

59 *LEFT FREE FOR FUTURE USE*

60 NOISE MEASUREMENTS

- 60.1 Noise measurements shall be carried out according to *Danish Maritime Authority Technical Regulation no. 4 of 3 May 2002 on Noise Levels in Ships*.
 - 60.2.4 Subcontractors to RO working under a Quality Assurance System approved by the RO according to the requirements of IACS.
- 60.2 The noise measurements may be carried out by:
 - 60.3 For guidance and standard reports as required by the DMA refer to:
 - Noise Report - Fishing Vessels
 - Noise Report - Cargo and Passenger Ships
 - Noise Report - Conversions
 - Guidance on the Use of the Standard Noise Report
- 60.2.1 Companies approved by the Danish Maritime Authority to carry out noise measurements.
- 60.2.2 Companies not approved by the Danish Maritime Authority to carry out noise measurements, but working under direct supervision of the Danish Maritime Authority or the RO.
- 60.4 The DMA will not accept noise measurements carried out by a shipyard or a ship design consultant unless the company in question has been approved by the DMA prior to the measurements being carried out.
- 60.2.3 The RO's own surveyors or technicians, if duly qualified for the task.

61 ANNUAL SURVEY OF THE OUTSIDE OF HIGH-SPEED CRAFT'S BOTTOM

- 61.1 As the quality of a "wet" bottom survey will always be inferior to that of a "dry" bottom survey, due to limited visibility and limitations to the methods and tools used for the examination of the structure, it is assumed that this should not be the normal practice.
 - 61.2 A "wet" bottom survey may thus only be carried out on High-Speed Craft's bottoms by special permission from the DMA.
- 61.3 Should such a "wet" survey be accepted by the DMA and carried out by the RO, the IMO should, in any case, be notified in accordance with SOLAS I/A/Reg. 5, cf. IMO Subcommittee DE 46/INF.2.

62 PHASING OUT OF HALON BASED FIRE EXTINGUISHING SYSTEMS

- 62.1 IACS has informed the Danish Maritime Authority that IACS has noted the EC submission MSC 77/11/1. removed from Danish ships before 1 January 1999.
- 62.2 Please note that the installation of new of HALON 1301 fire-extinguishing systems has been prohibited by Danish regulations since 1 July 1992 and that all Halon based fire-extinguishing systems were required to be
- 62.3 If today a Danish ship is found to have on board a HALON based fire-extinguishing systems the DMA shall be consulted immediately. The DMA will hand over the case to the Danish Environmental Protection Agency (EPA) who might file for prosecution.

63 RETROFIT OF CO₂ SYSTEMS

- 63.1 The Danish Maritime Authority has decided that the retrofit of total flooding CO₂ fire-extinguishing systems is to be surveyed and approved by the Danish Maritime Authority.
- 63.2 This applies only where the new CO₂ systems replace a HALON system, and not in case of refit or rebuilding/enlargement of existing CO₂ systems.

64 ANNUAL TESTING AND SERVICING OF VOYAGE DATA RECORDERS

- 64.1 According to SOLAS Chapter V, regulation 19.8 voyage data recorder systems shall be subject to an annual performance test. the manufacturer of the voyage data recorder systems.
- 64.2 The test shall be conducted by a testing or servicing facility authorised (approved) by
- 64.3 In connection with surveys in relation to the SAFEQ Certificate the RO shall verify the existence of a valid certificate of compliance issued by the testing facility.

65 APPROVAL OF SERVICING STATIONS FOR INFLATABLE LIFERAFTS

- 65.1 The Danish Maritime Authority have decided that a service-station servicing inflatable liferafts shall be approved (In accordance with the annex to IMO Resolution A.761(18).) by the manufacturer of the inflatable liferafts in question and by the national maritime administration in the country where the service-station has its premises.
- 65.2 Therefore, the Danish Maritime Authority does not require service stations servicing inflatable liferafts to be approved by the RO.
- 65.3 If the RO is able to document major non-conformities in the service work performed on inflatable liferafts this shall be reported to the manufacturer of the inflatable liferaft and to the DMA.

66 EXTENSION OF SERVICE INTERVALS ON INFLATABLE LIFERAFTS AND HYDROSTATIC RELEASE UNITS

- 66.1 The authorisation stated in clause 3.2 of the agreement includes the authorisation to extend the service period of inflatable liferafts and hydrostatic release units as specified in SOLAS, Chapter III, Regulation 20.8.1.1 and Regulation 20.9.1 for ships or MODUs for which the RO issue Safety Certificates.
- 66.2 The service period must not be extended automatically but only after a well-founded request, and it must not be extended beyond the period specified in the above regulations.

67 SOLAS 1974 SHIPS WITH EQUIVALENT LIFE-SAVINGS ARRANGEMENT

- 67.1 The Danish Maritime Authority has notified the IMO about an equivalent arrangement accepted under SOLAS 1974 Chapter I, Regulation 5. C.f. IMO SLS 14/circ. 24 of 1 October 1982.
- 67.2 This equivalent arrangement permits existing non-tankers with a GRT of more than 500 but less than 1.600, to use inflatable liferafts in combination with a MOB-boat in lieu life-boats as required by SOLAS Chapter III, Regulation 35.
- 67.3 The MOB-boat may either be an inflatable or a rigid (glass fibre) boat where both boat and launching arrangement fulfils specific requirements from the DMA.
- 67.4 All ships to which this equivalent arrangement is relevant where originally issued with an Exemption Certificate to the SAFEQ Certificate.
- 67.5 RO shall maintain the Exemption Certificate to the SAFEQ Certificate. The Exemption Certificate may **not** be superseded by an endorsement of the SAFEQ Certificate.
- 67.6 As an alternative the complete Life-Savings Arrangement may be brought “up-to-date” according to current SOLAS regulations for the size and type of ship. In such case the Exemption Certificate shall be discarded.

68 “WHEEL-MARK” EQUIPMENT BANNED BY THE DMA

- 68.1 The DMA has decided that some equipment certified (Wheel Marked) under the Marine Equipment Directive (MED) is banned from installation on Danish ships.
- 68.2 In the opinion of the DMA it has **not** been demonstrated that the equipment listed in section 68.3 below, comply with all relevant instruments and is manufactured in accordance with the conformity-assessment procedure. Cf. the MED Article 11 and Article 13 (a) and (b), with reference to the MED Article 5 (1) and (2).
- 68.3 **List of banned equipment:**
- 68.3.1 High velocity pressure/vacuum relief valves of the types KSPA-3/4, KSPA-6/8, KSPV-3, KSPV-4, KSPV-6 and KPSV-8 ordered after 1 August 2000 will not be accepted for installation on Danish ships.
- The manufacturer is Korea Steel Power Co, LTD., 368-3 Yang Dong Ri Ju Chen Meon, Kim Hae City, Kyung Nam, Korea.
The notified body is Bureau Veritas, 17 bis, Place des Reflets, La Defense 2, 92400 Courbevoie, France.
- 68.3.2 Inherently Buoyant Lifejacket Type Regatta Thermo Cruise Adult/Child will not be accepted for use on Danish ships
- The manufacturer is regatta as Portugal, Lugar Di Ribeiro, Vila Nova Da Telha, P-4470 Maia, Portugal for Regatta AS, Ålesund, Norway.
The notified body is Det Norske Veritas, Vertitaseveien 1, N-1322 Høvik, Norway.
- 68.3.3 High velocity pressure/vacuum relief valves of the type NEW-ISO-HV shall not be accepted on board Danish ships.
- The manufacturer is TANKTECH Co., Ltd., 368-3 Yangdong-ri, Juchonmeon, Kim Hae City, Kyung Nam, Republic of Korea.
The notified body is Bureau Veritas, 17 bis, Place des Reflets, La Defense 2, 92400 Courbevoie, France.
- 68.3.4 High velocity pressure/vacuum relief valves of the type HPV shall not be accepted on board Danish ships.
- The manufacturer is SE-WON Industries Co., Ltd., 938-8, Dalsanri, Jungkwan-myun, kijang.kun/. Pusan, Republic of Korea.
The notified body is Bureau Veritas, 17 bis, Place des Reflets, La Defense 2, 92400 Courbevoie, France.

69 CONDITIONS FOR THE ISSUE OF MULTIPLE LOAD LINE CERTIFICATE

- 69.1 The RO may permit Multiple Load Lines on Danish vessels without previous approval from the Danish Maritime Authority (DMA) on the following conditions:
- 69.2 The ship is to comply fully with all relevant legislative safety requirements in force for a ship of a maximum deadweight corresponding to the least freeboard shown on the certificates issued. Safety standards are to be maintained regardless of the deadweight of the ship.
- 69.3 Each set of Load Line marks corresponding to the certificates shall be permanently marked on the ship's side and verified.
- 69.4 Only the set of Load Line marks corresponding to the least freeboard assigned shall normally show the full grid markings. The additional increased freeboards shall be marked as all seasonal, and only the Load Line Mark and the Fresh Water Load Line need be marked. Cf. ICLL 66, reg. 6(6). However, in individual cases and at the discretion of the owner, a full grid of density and seasonal Load Lines may be marked¹².
- 69.5 Only one set of Load Line marks are allowed to be on display at any time, the other sets being effectively obliterated with paint.
- 69.6 Only the Load Line Certificates associated with the current Load Line marks are allowed to be on display¹³ at any one time. The Load Line Certificates not being used are to be kept in a sealed envelope addressed to an authorised surveyor (RO). The sealed envelope is to be kept under lock and key by the Master, who is accountable for the proper use of such certificates.
- 69.7 The record of Construction and Equipment /Form "B") attached to the MARPOL Annex I, IOPP certificate should be amended at item 1.6 to show the greatest and least deadweight. A note is to be added at the foot of the page,
- cross-referenced by "*" to read, "This is a multiple Load Line vessel".
- 69.8 When any Load Line survey is held, the RO must ensure that each set of Load Line marks are verified and that all corresponding Load Line certificates, including those not on display, are endorsed or renewed as appropriate.
- 69.9 The direct electronic access to the status of all statutory surveys and certificates provided to the DMA by the RO in accordance with section 8.4.3 of the agreement shall contain information on which Load Line the ship is currently operating with date of change.
- 69.10 Proper instructions to the ships master are issued by the RO in accordance with these conditions.
- 69.11 When alterations are made to the Load Line marks, a surveyor from the RO who has issued the Load Line Certificate shall:
- witness each change of marks,
 - verify that the exhibited certificate corresponds to the marks displayed on the ship side,
 - seal the envelope containing the other certificates, and
 - ensure that the Master makes an official entry in the ship's deck log.
- 69.12 In the event that the change of marks is scheduled for a port where a surveyor is unavailable, the Master of the ship may conduct the change of Load Line marks and certificates after receiving approval to do so from the RO. On completion he must ensure that:
- The correct Load Line marks and the associated certificate are on display, and notification in writing is submitted to the RO.
 - An official entry is made in the ship's deck log.
 - At the first practical port of call thereafter the requirements of section 69.11 shall be complied with.

¹² This is a requirement for ships trading on Iceland in winter season.

¹³ And/or available to Port State Surveyors in the ships certificate binder.

70 GUIDANCE CONCERNING ISPS

- 70.1 Please note that some of the paragraphs in the ISPS Code Part B are made mandatory by EC Regulation No 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security.
- 70.2 For interpretations of the ISPS Code please contact DMA's "Class Society Secretariat" (CSS@dma.dk). Questions shall be forwarded in electronic form.
- 70.3 When assessing the RSO fulfilment of ISPS Code Part B regulation 4.5.5 and 4.5.6 the DMA will expect the RO to maintain policies and procedures **equivalent** to NATO/EU/WEU "Confidential".
- 70.3.1 The RO does not necessarily have to "clear" its employees with the authorities, but a regime of "background checking" must be in place and carried out by a part of the organisation not directly in the chain of command.
- 70.4 **Competent authority** for receiving / acting upon security alerts from vessels is: The Admiral Danish fleet.
- 70.5 **National points of contacts:** The focal point for alerts from Danish vessels and ships in Danish Waters is The Admiral Danish fleet.
- 70.6 Reference from the ISM manual to the SSP for confidential information is to be avoided.
- 70.7 Some of the regular safety drills may be credited as a "security drill". Security drills may be integrated as a part of a safety drill.
- 70.8 The validity of the international Ships Security Certificate follows the validity for any other SOLAS certificate. A full term period shall not exceed 5 years and the requirement in the ISPS Code part A paragraph 19.3 should be observed. If a vessel arrives after the expiry of the ISSC, SOLAS Ch. I, part B reg. 14 allows for an extension.
- 70.9 The immediate use of a SSP developed for a sister ship or the use of a modified standard SSP should not be allowed unless a proper SSA has been carried out on board and the vessels new SSP is updated accordingly. Furthermore a sister ship shall be verified to the full extend.
- 70.10 According to ISPS Code part B paragraph 4.13 changes of security level will be promulgated via 1) OXXO, NAVTEX, MF+VHF and 2) via the company, which then will inform the respective vessel.

ANNEX III – DANISH NATIONAL REGULATIONS

71 CARGO SHIP SAFETY CONSTRUCTION CERTIFICATE (SAFCON)

SOLAS Chapter II-1 A:

Regulation 3-5 – New installation and repairs of materials containing asbestos*)

(Paragraph 2 shall run as follows)

2 For all ships, new installation of materials, which contain asbestos as well as repairs carried out using materials containing asbestos, shall be prohibited. (*exceptions stated in SOLAS are deleted in Danish regulations*)

*) Attention is drawn to European Commission Directive 1999/77/EC on restrictions on the marketing and use of certain dangerous substances and preparations (asbestos), according to which the exceptions stipulated will lapse as of 1 January 2005 in the EU member states as well as in countries covered by the EEA agreement.

SOLAS Chapter II-1 B:

Regulation 11 – Peak and machinery space bulkheads and stern tubes in cargo ships

(Insert after Paragraph 11.10)

10 Where pipes, scuppers, electrical cables, etc. are carried through watertight subdivision bulkheads, measures shall be taken to ensure that the watertight integrity of the bulkheads is maintained.

11 Valves not forming part of a pipe system may not be found in watertight sub-division bulkheads.

12 Lead or other materials that are not heat-resistant may not be used in systems penetrating watertight sub-division bulkheads where a deterioration of such systems in case of fire would impair the watertight integrity of the bulkheads.

Regulation 21 – Bilge pumping arrangements

(Insert after Paragraph 1.6.2.4)

1.6.3 The drainage from car decks/ro-ro decks shall be of such capacity that two-thirds of the scuppers, freeing ports etc. on the starboard or port side shall be capable of draining off a quantity of water originating from sprinkler pump + fire pumps, taking into account a list of about 10 for ships with a breadth of above 20 metres and about 1.50 to 20 for ships with a breadth below 20 metres and trim forward or aft of about 0.50.

1.6.4 Scuppers on the car deck shall be provided, over the outlet grate, with a removable grill with “vertical” bars, to prevent large obstacles from blocking the drain. The grill may be placed obliquely against the side of the ship. The grill shall have a height of min. 1 m above the deck and shall have a free flow area of min. 0.4 m², while the distance between the individual bars shall be maximum 25 mm.

Regulation 22 – Stability information for passenger ships and cargo ships

(Insert after Paragraph 22.5)

6 Ships the keels of which are laid or which are at a similar stage of construction on or after 1 April 1976*) shall, regardless of their length, comply with the relevant provisions in the code of intact stability, Res. A.749(18), as amended. *) With regard to passenger ships the keels of which are laid or which are at a similar stage of construction before 1 April 1976, reference is made to technical regulation no. 6 of 3 August 1995 on supplementary requirements for intact stability for existing passenger ships engaged on international voyages issued by the Danish Maritime Authority.

6.1 The same shall apply to ships that are being altered if the alteration has considerable effect on

the conditions of stability and to ships bought abroad if they are registered with the Ships Register or Danish International Ship Register

6.2 Ships the keels of which were laid or which were at a similar stage of construction before 1 July 1998 and all cargo ships with a gross tonnage below 500 shall, however, not be required to meet the weather criteria in regulation 3.2 of the code.

6.3 The special stability criteria for container ships with a length of more than 100 m stipulated in regulation 4.9 of the code are not mandatory.

6.4 If the existing stability information of the ship must be corrected in order to comply with this regulation, such corrected stability information shall be approved at the next renewal survey, at the latest.

7 Suction dredgers shall comply with the provisions of the code under general loading conditions and under the following special loading conditions:

- .1 Light ship with stores and 10% bunker.
- .2 100% bunker, no cargo.
- .3 10% bunker, water in cargo hold to the widest level.
- .4 10 % bunker, water to the upper edge of cargo hold.
- .5 10% bunker, 1/3 sand cargo, water to the upper edge of cargo hold.
- .6 10% bunker, 2/3 sand cargo, water to upper edge of cargo hold.
- .7 10% bunker, cargo hold filled with sand.
- .8 70% bunker, cargo hold filled with sand.
- .9 In .3, .4, .5 and .6, correction shall be made for the effect of free surface from water in the cargo hold.

In dredging work where, for example, mud occurs, correction shall be made for the effect of full

free surface from the load. The specific gravity for mud etc. shall be set at 1.5.

The stability information for suction dredgers shall make the master of the ship aware that the sand cargo in rough weather shall be drained from the bottom.

- **SOLAS Chapter II-1 C**

Regulation 29—Steering Gear

Administrative note

With respect to the wording in regulation 29.13.1, the RO shall consult the DMA if and when the intention with the regulation not can be complied with, i.e. *when the steering gear compartment (incl. components) not can be separated from machinery spaces.*

End of Administrative note

SOLAS Chapter II-1 D & E:

Regulation 43 – Emergency source of electrical power in cargo ships

(Insert after Paragraph 43.2.6.2)

2.6.3 It shall be possible to pull in stabilizers by means of the emergency Source of electrical power.

Regulation 48 – Protection against flooding

(Insert in paragraph 48.3): time assumed is for Danish ship: 10 minutes

SOLAS Chapter II-2 A & B:

Regulation 3 – Definitions

(Paragraph 2.5 – insert hereafter)

2.6 Fire insulation with soft mineral wool and equivalent material on vertical and overhead surfaces shall be secured in a solid way, e.g. by means of clips with a mutual spacing of about 300

mm and by means of wire netting, glass tissue or other suitable, non-combustible material.

Regulation 4 – Probability of ignition

(Paragraph 4.2.2.4 – insert at the end after the last sentence)

.1 Any settling tanks and/or service tanks shall, in addition to air pipes, be fitted with overflow pipes led to a sufficiently large bottom or overflow tank.

.2 Any overflow pipes from tanks, except for double-bottom tanks, shall be provided with inspection glass and alarm equipment sounding either when or immediately before the tank flows over. Such alarm equipment may be omitted if an arrangement for automatic stop of the pumps is provided.

(Paragraph 4.3 shall run as follows)

4.3 Insulation surfaces protected against oil penetration

In spaces where penetration of oil products is possible, the surface of insulation shall be impervious to oil or oil vapours (provided with vapour barriers). Such vapour barriers shall be made of a material with low flame-spreading properties and shall be secured against mechanical damage by means of a non-combustible material with good

integrity. For this purpose, vapour barriers may be covered with perforated steel plate or another equivalent non-combustible material, however not aluminium.

SOLAS Chapter II-2 C:

Regulation 9 – Containment of fire

(Paragraph 7.5.2.1.2 shall run as follows)

a fire damper located in the upper and the lower end of the duct;

SOLAS Chapter II-2 D & E:

Regulation 13 – Means of escape

(Paragraph 4.2.1.2 – insert hereafter)

Machinery control and operation spaces as well as workshop spaces located within a machinery space shall be provided with at least two means of escape, one of which shall be independent of the machinery space and shall allow access to the open deck.

Ladders in machinery spaces shall be made of steel and be shielded on the lower side.

72 CARGO SHIP SAFETY EQUIPMENT CERTIFICATE (SAFEQ)

SOLAS Chapter II-2 C:

Regulation 10 – Fire fighting

(Paragraph 2.1.4.3 – insert after the last sentence)

The pressure side of all fire pumps shall be fitted with a non-return valve.

(Paragraph 3.1 shall run as follows)

Portable fire extinguishers shall comply with the requirements of the Fire Safety Systems Code and be subjected to inspections in pursuance of the provisions of annex N(3) to this chapter.

(Paragraph 4.1.1.1 shall run as follows)

a fixed gas fire-extinguishing system complying with the provisions of the Fire Safety Systems Code and the provisions of annexes N(1) and N(2) to this chapter;

(Paragraph 10.2.5 shall run as follows)

At least two spare charges shall be provided for each required breathing apparatus containing at least 3,600 l of air. Passenger ships carrying not more than 36 passengers and cargo ships that are equipped with suitably located means for fully recharging the air cylinders free from contamination need carry only one spare charge for each required apparatus. Such suitable located means for fully recharging the air cylinders free from contamination shall consist of at least one air

compressor connected to the emergency source of power and with a capacity of 3,600 l times the number of fire-fighter's outfits required; however, the capacity need not exceed 25,000 l. In passenger ships carrying more than 36 passengers, at least two spare charges for each breathing apparatus shall be provided in addition to the air compressor mentioned above.

Annex N (1) to SOLAS Chapter II-2: Construction - Fire Protection, Fire Detection and Fire Extinction

Part A – High-pressure CO2 fire-extinguishing systems

Regulation 1 – General

The provisions of paragraphs 2.1 and 2.2 of Chapter 5 of the Fire Safety Systems Code shall apply by analogy.

Regulation 2 – CO2 storage spaces

.1 The space where CO2 containers are stored shall be separately ventilated shall have direct access from open deck and may not be used for other purposes. .2 The space shall be insulated ventilated and arranged in such a way that the temperature shall not normally exceed 40°C.

.3 Drainage shall be led separately over board or to the open deck.

.4 All doors and hatches shall be easily operable from both sides. .5 Communication shall be possible by means of ordinary telephones, portable radiotelephones or the like between the navigation bridge or the fire control room and the release stations of the system.

.6 The CO2 containers shall be fixed in an upright position and arranged in such a way that the container valves are easily accessible for control. Furthermore, the containers shall be isolated from the deck to prevent outside bottom corrosion.

Regulation 3 – CO2 containers

.1 The CO2 containers shall comply with the latest Danish regulations for CO2 containers. CO2

containers complying with foreign standards may be used provided that they comply with the rules of a recognised classification society. .2 Every container or container valve shall be provided with a frangible disc guaranteed by the manufacturer to protect the container against harmful overpressure, and the arrangement shall permit free passage of gas from the container if the frangible disc breaks.

.3 Tare and gross weights, month and year of the latest pressure test as well as the test pressure shall be stamped on the container.

.4 The companies that charge the containers are responsible for the content, which may not exceed 0.67 kg per litre of the container volume. The companies shall issue a certificate stating the content of each container.

.5 If a weight loss of 10 per cent or more of the charged weight stamped on the container is observed, the container in question shall be recharged, however the extinguishing capacity required shall always be available.

.6 The containers shall be pressure-tested every 20 years by a recognised test institute, classification society or the chief engineer of the ship in question (only on ships where a certificate of competency as chief engineer officer is required in pursuance of the STCW Convention, chapter III, regulation III-2). A discharged container may not be recharged until a new pressure test has been carried out with a satisfactory result if 5 or more years have passed since the latest pressure test.

Regulation 4 – CO2 piping, etc.

.1 All pipes outside machinery and boiler spaces shall be externally and internally galvanised, and the fittings used shall be corrosion-resistant.

.2 Only flexible high-pressure hoses are permitted between container valves and the manifold of the CO2 containers.

.3 The internal diameter of the above connections shall be at least 10 mm.

.4 Non-return valves shall be fitted on the manifold for each container connection in such a way that a container may, if necessary, be disconnected from the manifold without putting the system out of operation.

.5 Immediately after the main stop valve, a connection facility for testing the free flow of air through the whole distributing system shall be fitted. .6 The CO2 piping including the manifold shall be made of certificated seamless steel pipes. Only flanges for pressure level 10 N/mm² may be used. Manifolds shall be fitted with a safety pressure release valve with an outlet pipe leading to the open air. The valve shall open at 13 N/mm² and have a size so as to prevent dangerous over-pressure in the manifold. The external diameters and wall thickness shall be in accordance with table 1. Differentiation in wall thickness may be permitted for pipes manufactured in accordance with other standards.

Table 1

Manifolds, including pipes to main stop valve

Nominal diameter in mm	Wall thickness in mm
20.0	3.2
25.0	4.0
32.0	4.0
40.0	4.0
50.0	4.5
65.0	5.0
80.0	5.6
100.0	7.1
125.0	8.0
150.0	8.8

.7 Distributing valves for cargo spaces shall be of the quick-opening type in order to prevent freezing and the cargo space or spaces to which they are connected shall be clearly indicated by marking.

.8 All the fittings used between container valves and main stop valves and distributing valve manifold shall be made of steel. Threaded fittings may be used only up to 2" pipe thread.

.9 Main stop valves shall be made of steel or of an equivalent approved material and be designed for a working pressure of 10 N/mm².

.10 All fittings used between main stop valve and between distributing valve manifold and outlet nozzles may be made of annealed castings or tough-hard iron, and the joints shall be made without free threads. Manifolds and pipes for the main stop valve shall at least have an external diameter and wall thickness as given in table 1. Pipes from main stop valve or distributing valve manifold to outlet nozzles shall at least have a wall thickness as stated in table 2.

Table 2

Pipes from main stop valve/distributing valve manifold to outlet nozzles

Nominal diameter in mm	Wall thickness in mm
20.0	2.6
25.0	3.2
32.0	3.2
40.0	3.2
50.0	3.6
65.0	3.6
80.0	4.0
100.0	4.5
125.0	5.0
150.0	5.6

.11 CO2 pipes for "total flooding" systems for machinery spaces shall be designed in accordance with the amount of CO2 that they are meant to carry. The maximum amount of CO2 may not exceed the values stated in table 3.

Table 3

Maximum amount of CO₂ through pipes and main stop valves in total flooding systems

CO ₂ quantity	Internal pipe diameter
45 kg	13 mm
100 kg	19 mm
135 kg	25 mm
275 kg	32 mm
450 kg	38 mm
1100 kg	50 mm
2000 kg	76 mm
3250 kg	89 mm
4750 kg	101 mm
6800 kg	114 mm
9500 kg	127 mm
15250 kg	152 mm

Regulation 5 – Pressure testing of pipes

.1 The entire pipe system shall be hydraulically pressure-tested. The test pressure between container valves and the blank flange arrangement fitted and between container valves and manifold for cargo spaces shall be at least 19 N/mm². The hydraulic test pressure of the remaining pipe system shall be at least 2.5 N/mm². Pipes in the control system shall be pressure-tested by air to 1.3 times the working pressure.

.2 The hydraulic pressure-test of manifolds referred to in .1 may be carried out before installed on board if a pressure test certificate from the manufacturer can be presented.

.3 When the pressure tests referred to in .1 and .2 have been carried out, a leakage test of the entire pipe system shall be carried out after the final installation of the system has taken place. The test shall be carried out with air at a pressure of 1 N/mm².

Regulation 6 – Release arrangement

.1 The two control handles required shall be arranged in such a way that the handle for the opening of the main stop valve must be operated before the handle for the opening of the container valves.

.2 If the quantity of CO₂ in the system exceeds 225 kg, a hydraulic or pneumatic (servo) control arrangement is required for the opening of the container valves and the main stop valve. Wire control arrangement is not permitted in such systems.

.3 Servo-operated release stations shall be located outside the CO₂ space. There shall be free access from the open deck to the release station.

.4 The servo-operated arrangement shall be designed so that the control system may be ventilated at the release station and that any fault in the manoeuvre sequence does not prevent the release of the system.

.5 It shall be possible to open and close the main stop valve locally by hand at the maximum CO₂ pressure in the manifold. The valve shall be provided with indicators for open and closed position, and it shall be so placed that it is easily accessible.

.6 Where a separate pressure container serves the servo arrangement, an intermediate stop valve shall be fitted in the pipeline which shall be operated from the release station.

.7 If CO₂ gas is used for the operation of the servo arrangement, CO₂ gas from the system must not be vented to an enclosed space unless the concentration of CO₂ gas will become less than 3 per cent in volume of the space in question. .8 Operating devices and all components associated with the servo arrangements, including any power sources and pipelines, shall, in terms of fire technology, be independent of the space or spaces protected by the installation.

Regulation 7 – Alarm equipment for “total flooding” installations

.1 In CO₂ protected spaces, an acoustic alarm shall automatically sound before the first release handle is operated. Such an alarm shall, at the maximum noise level in the protected space, be audible everywhere in the space and shall be clearly distinguishable from other acoustic alarms in the ship. The alarm devices shall be clearly marked “CO₂ ALARM”.

.2 Adequate measures shall be taken to secure the reliability of the alarm system. Such measures include the marking and locking in the open position of valves for propelling gas and the marking of electric connections including fuses. A fire in the protected space may not disable the alarm devices. It shall not be possible to put the alarm out of operation because of a fire in the protected space. Electric alarm equipment shall be supplied from the emergency source of power. Alarm signal devices propelled by the released CO₂ gas shall not be used in working spaces.

.3 Manifolds for “total flooding” systems shall be provided with a pressure gauge and a pressure transmitter. The pressure transmitter shall automatically sound an acoustic alarm on the main engine alarm system or other suitable alarm systems when any pressure occurs in the manifold.

Regulation 8 – Testing of the system

.1 Testing of the system after final installation on board shall be carried out as follows:

.1 Control of the free air flow in all pipes and nozzles.

.2 Control of the alarm equipment.

.3 Functioning test of the system by releasing the whole system with the blank flange referred to in paragraph 9.1 inserted (“total flooding test”). (It is recommended that the installation is pre-tested by means of a single container connected to the manifold before the actual “flooding test” is carried out).

Regulation 9 – Special provisions

.1 It shall be possible to secure the system against inadvertent release during dry docking and similar occasions by the insertion of a blank flange (sliding flange) just after the main stop valve.

.2 Local CO₂ systems installed for the purpose of extinguishing internal fires in engines, e.g. scavenging air fires in diesel engines, are permitted if installed at a suitable place in the engine room and provided the CO₂ concentration does not exceed 3 per cent of the volume of the space in question.

.3 All doors to spaces protected by a CO₂ system shall have a clear sign stating that the space is protected by a CO₂ fire-extinguishing system and that the space shall be left immediately if the alarm sounds.

Regulation 10 – Periodical inspection and maintenance

.1 Suppliers of CO₂ systems shall provide manuals and drawings of the systems, including a checklist for maintenance, in Danish and English.

.2 The quantity of CO₂ shall be checked at least once a year by the chief engineer of the ship or by a classification society or company recognised by the Danish Maritime Authority.

.3 The on-going inspections, etc. performed by the chief engineer or on the initiative of the ship’s management shall be recorded in the survey book of the ship, stating the extent of the inspection, any repairs made as well as the date of the inspection.

Part B: Low pressure CO₂ fire-extinguishing systems

Regulation 1 – Construction

.1 With the exception of the provisions for CO₂ containers, the provisions on highpressure CO₂ fire-extinguishing systems shall apply by analogy, however, design criteria for pipes and nozzles shall be submitted to the Danish Maritime Authority in each individual case.

.2 Tanks for the storage of CO₂ (CO₂ tanks) shall, in terms of design, materials, material dimensions and test pressure, comply with regulations corresponding to those used by a recognised classification society or by a recognised competent authority. The tanks shall be marked in order that they may be identified and shall be marked with test pressure and date as well as working pressure, volume and supervisor’s mark.

Regulation 2 – Pressure-testing and inspection

.1 CO₂ tanks shall be pressure-tested before installed on board, and subsequently the tanks together with fittings shall be inspected externally

every 5 years. The Danish Maritime Authority, a recognised classification society or the chief engineer shall carry out the pressure test as well as external inspections. At the external inspections every 5 years, it shall be possible to remove insulation material of the tank at the points at which this is considered necessary. Pipes and valves at transitional points between insulated and uninsulated areas (cold-conductors) as well as tank supports, flange sockets and valves shall be covered by the external inspection every 5 years.

.2 In addition, the chief engineer of the ship shall continuously inspect the installation in accordance with the manual delivered by the manufacturer, including the checklist for maintenance. At least once a year, a thorough external inspection of the tank supports, flange sockets and valves mentioned in .1 shall be carried out.

.3 The extent of the external inspections referred to in .1 and .2 as well as any repairs and improvements made shall be recorded in the survey book of the ship stating date and place.

Regulation 3 – Safety valves

.1 At least two safety valves shall be fitted directly on each tank. It is permitted to fit a three-way valve for the safety valves arranged in such a manner that it is only possible to shut off one safety valve at a time and that a free flow of air is permitted at all times.

.2 The opening pressure of the safety valves may not exceed the permitted working pressure in the tank, and the flow area of each valve shall be sufficient for the tanks not to be exposed to overpressure even if both the refrigeration units should fail.

.3 Outlet pipes from safety valves shall lead to open deck, and the outlet shall be placed so that CO₂ cannot flow into the interior of the ship. The flow area of the pipe shall be at least twice the total flow area of the valves.

Regulation 4 – Gauging equipment and shut-off devices

.1 At least one pressure gauge, including shut-off valve, shall be fitted on each tank.

.2 On each tank, an external pipe shall be fitted for the determination of the CO₂ fluid level. An automatic level alarm with a set point of 95 per cent CO₂ content shall also be fitted.

.3 Means for checking the quantity of CO₂ shall be so designed that damage does not cause leakage.

.4 It shall be possible to shut off all pipelines leading from a tank, with the exception of the safety valves, by means of shut-off valves fitted directly on the tank.

.5 It shall be possible to lock the main stop valve of the CO₂ tank in the closed position.

Regulation 5 – Refrigerating plant and alarm arrangement

.1 CO₂ tanks shall have at least two refrigerating units that are completely independent of each other with a sufficient and equal capacity and with a malfunction alarm. One of the refrigerating units shall be connected to the emergency switchboard.

.2 An automatic alarm for CO₂ leakage in the tank space shall be provided. The alarm shall be connected to the engine alarm panel, and it shall come into operation before the concentration of CO₂ gas in the room has reached 3 per cent.

Annex N (2) to SOLAS Chapter II-2: Construction – Fire protection, fire detection and fire extinction.

Installation and testing of fire extinction systems with mixed atmospheric gases in engine spaces on board ships

Regulation 1 – General

The provisions of chapter 5 of "the Fire Safety Systems Code" shall apply by analogy.

Regulation 2 – Tests

.1 Each individual mixture of gases shall be tested in accordance with the standard tests stipulated in MSC/Circ.848.

.2 A recognised test company shall test the mixture of gases with a satisfactory result in accordance with the standard tests referred to in .1 above. The approval certificate from such a test company shall, among others, state the composition of the mixture and the minimum and maximum oxygen concentrations permitted in the protected space when the extinguishant has been released (the concentration of extinguishant).

Regulation 3 – Installation

.1 Under normal circumstances, the system may be designed only for manual release.

.2 In special cases, the Danish Maritime Authority may, however, permit automatic release of both new and existing fire extinction systems provided that:

.1 the ship in question is not covered by the provisions of the SOLAS Convention;

.2 a green indicator lamp and a sign on the release panel indicate when the system has been set for manual release;

.3 a red indicator lamp and a sign on the release panel indicate when the system has been set for automatic release;

.4 a conspicuous red sign with white letters (about 30 pitch) is affixed below the red indicator lamp with the following text:

”When at sea, the system may not be set for automatic release.”

.3 If the system is intended to serve more than one space, its storage and release functions shall be arranged so as to ensure that the required volumes of extinguishant are released into the spaces.

.4 Means shall be provided for automatic stop of all ventilators serving the protected space before the extinguishant is released.

.5 At the release point or points, written instructions shall be available clearly stating that all ventilation and all combustion engines must be

stopped and that all fire dampers and hatches shall be closed before the system is released.

.6 The release arrangement shall be designed so that 85% of the amount of extinguishant required according to the approval certificate is released within a maximum period of 120 seconds.

.7 It shall be possible to maintain the minimum concentration of extinguishant in the space for at least 15 minutes.

.8 The system shall be designed to resist temperatures, vibrations, shocks and mechanical impact, fouling and corrosion as well as moist that may occur in the space where the system is installed.

.9 The release of the system as well as any release via the frangible discs of the containers may not present any danger to personnel engaged in the maintenance of equipment or using the normal access ladders to and exits from the space.

.10 It shall be possible for the crew to check the pressure (the content) of the containers without any risk.

.11 Unless otherwise provided, the amount of the mixture of gases available for cargo spaces shall be sufficient to produce the minimum volume of free mixture stated on the approval certificate. If two or more cargo spaces are connected through ventilation ducts, such spaces shall be considered one space.

.12 The amount of the mixture of gases available for engine spaces shall be sufficient to produce the minimum volume of free mixture stated on the approval certificate. Two or more engine spaces of category A that are not separate shall be considered one space.

.13 The number and location of nozzles shall be such as to achieve a homogenous distribution of the mixture of gases in the space.

.14 All doors leading to spaces protected by a system with atmospheric gases shall be clearly marked with a sign stating that the space is protected by a system with atmospheric gases and that the space shall be left when the alarm sounds.

Regulation 4 – Testing on board

.1 The distribution and extinguishing capacity of each system installed shall be demonstrated in practice on board.

.2 The extinguishant shall be tested in connection with a test fire that is under control in the form of fires caused by burning alcohol fuels in small trays placed at different levels in the engine room; during the test, the combustion engines and the ventilation shall have been stopped and the fire dampers shall have been closed. The fires shall be distributed evenly throughout the space.

.3 When the extinguishant has been released, the concentration of oxygen in the engine space is measured in order to prove that the extinguishant has been well distributed. The concentration of oxygen may, at no point in time, be below 10% and not above 12%.

In addition, the following shall be checked:

.1 How long time it takes to discharge the extinguishant into the space.

.2 How long time it takes from the release of the system has taken place until all fires in the trays have been extinguished.

.3 For how long time the concentration capable of extinguishing a fire is maintained (in accordance with the approval).

.4 If, during the above tests, doubt arises as to the efficiency of the extinguishant, the Danish Maritime Authority may require further tests to be carried out. The Danish Maritime Authority may, however, sustain from requiring such a test if previous tests carried out in spaces of the same design and size and with approximately the same number and location of nozzles have proved satisfactory.

.5 The release arrangement shall be designed so that the release function can be demonstrated. Such a check shall be demonstrated for the Danish Maritime Authority with a satisfactory result before the system is put into operation.

Regulation 5 – Installation of pressure containers and surveillance system

.1 The mixture of gases may be stored in the protected space, cf. however paragraph 3.8. The location of the containers in the protected space and the release arrangement shall be such that at least 5/6 of the extinguishant may be discharged even if one of the release connections have been damaged because of fire or explosion. The containers shall always be divided into at least two sections.

.2 A manual, servo-driven or electrically driven release arrangement shall be provided outside the protected space. Two sources of power shall be connected to this release arrangement, both of which shall be located outside the protected space and shall be readily available. In the case of engine rooms, one of the said sources of power may, however, be located in the protected space.

.3 Electrical circuits shall be under surveillance for defects and power failure by means of visual and acoustic alarms.

.4 Pneumatic, hydraulic or electrical release circuits connecting the containers shall be available in duplicate. Pneumatic or hydraulic sources of pressure shall be under surveillance for pressure failure by means of visual and acoustic alarms.

.5 In the protected space, the electrical circuits needed to release the system shall be carried in fire-proof cables in accordance with the standards of the IEC. The required piping for hydraulic or pneumatic operation shall be made of steel or another similar heat-resistant material, which the Danish Maritime Authority can approve.

.6 All doors leading to the protected space shall be marked with the following text:

”The space is connected to a fire-extinguishing system using fire-extinguishing gases and must be left immediately if the alarm sounds.”

.7 Arrangements in connection with systems serving spaces that require only one or two containers of ordinary size shall be executed to the satisfaction of the Danish Maritime Authority.

Regulation 6 – Pressure containers

.1 The containers shall comply with the Danish or any other EU and EEA state provisions on containers of the type in question in force at any time. Containers manufactured in other countries may be permitted provided that they comply with a recognised standard in the country in question and that the safety level of this standard is similar to that of the EU or EEA states or provided that they comply with the regulations on such containers used by a recognised classification society. A maximum pressure of 30 N/mm² shall be permitted.

.2 Any container or container valve shall be fitted with a frangible disc which, according to the manufacturer's guarantees, protects the container against harmful overpressure, and the arrangement shall allow gas to flow freely from the container if the frangible disc bursts.

.3 The tare and gross weight, month and year of the latest pressure test as well as the test pressure shall be stamped on the containers.

.4 Only the manufacturer or other companies approved by the manufacturer may charge the containers. The companies are responsible for the charging of the containers and the composition of the mixture of gases. The companies shall issue a certificate stating the composition of the mixture and this certificate shall be delivered together with the container. Furthermore, in a conspicuous place, a durable label shall be affixed to the containers stating:

- .1 the composition of the mixed/atmospheric mixture of gases;
- .2 date and year of the charging;
- .3 the name and address of the company responsible for the charging.

.5 The containers shall be fixed and placed so that it is easy to check the container valves. Furthermore, they shall be stored above the floor and be protected against corrosion. The marking of the containers, including their label and the size of the connection for the outlet nozzle on both the container valve and container manifold shall be executed in accordance with the standards in force.

.6 The containers shall be pressure tested every 20 years by a recognised test institute, a recognised classification society or by the chief engineer of the ship in question (only on board ships where a certificate of competency as a chief engineer officer is required in accordance with the STCW Convention, chapter III, regulation III-2).

.7 If more than 5 years have passed since the latest pressure test, a discharged container may not be recharged until a renewed pressure test has been carried out with satisfactory result.

.8 If, in connection with the inspection of the containers, a 10% loss of pressure or more is found, the container in question shall be recharged.

Regulation 7 – Alarm and release arrangement

.1 Alarms for the surveillance of the system shall be located at a central point so that they are easily accessible to the responsible crewmembers at all times when the ship is at sea or in port.

.2 The electrical circuits and/or pipes necessary to release a system as well as the location of the containers shall be such that it will be possible to release the entire fire-extinguishing volume prescribed in paragraph 3.11 or 3.12 to the protected space in case one of the release pipes is damaged by a fire or explosion in the space in question.

.3 The containers shall be under surveillance for a drop in pressure caused by leakage and release. Visual and acoustic alarms shall be fitted that sound when 80% of the recharging pressure has been reached at 20 C.

Regulation 8 – Local, automatic systems

.1 Local, automatic, permanently installed fire-extinguishing systems located in encased areas (in engine spaces) presenting a great fire hazard may be permitted provided that they are independent of the prescribed, permanently installed fire-extinguishing system.

.2 The area where such an additional, local protection is provided shall primarily be at a working deck and at the same level as the access to the space. More than one working deck may be permitted at the discretion of the Danish Maritime

Authority if means of access are provided at each level.

.3 The size of the space and the means of access thereto as well as the location of the machinery shall be arranged so that it is possible to leave all points in the space in less than 10 seconds.

.4 The activation of a system shall be indicated both visually and acoustically outside any means of access to the engine space and on the navigation bridge or in the space where the fire control equipment is located.

.5 A sign stating that the space contains one or more automatic fire-extinguishing systems and giving the extinguishant used shall be affixed outside any means of access thereto.

.6 Outlet nozzles and frangible discs shall be located so that the release does not present any danger to personnel using ordinary access ladders to and exits from the space. Furthermore, it shall be ensured that personnel engaged in the maintenance of machinery are protected against inadvertent release of extinguishants.

.7 The system shall be designed to resist temperatures, vibrations, shocks and mechanical impact, fouling and corrosion as well as moist that may occur in the space where the system is installed.

.8 Measures shall be taken to allow the crew to check the pressure (the content) of the containers without any risk.

.9 The total amount of extinguishant in the local, automatic installations shall be such that the maximum permitted concentration of the mixture of gases, based on the net cubic capacity of the encased space, is not exceeded, cf. paragraph 4.3. This requirement shall be applied when either a local, automatic system or a permanently installed system has been released, but not if both systems have been released.

.10 Local, automatic fire-extinguishing systems shall be designed so that their release does not lead to loss of electrical power or deterioration of the ship's manoeuvrability.

Regulation 9 – Inspection and checks

.1 Manufacturers of systems shall also provide customers with a description of the system, including a checklist for maintenance.

.2 The ship's chief engineer or a classification society or company recognised by the Danish Maritime Authority shall check the system at least once a year.

.3 The continuous inspections, etc. carried out by the chief engineer or by order of the ship's management shall be recorded in the ship's survey book stating the extent of the survey, any repairs made as well as the date of the inspection.

Annex N (3) to SOLAS Chapter II-2: Construction - Fire Protection, Fire Detection and Fire Extinction

Periodic Surveys, etc. of Fire-Extinguishers (amendments to chapter 4 in the FSS Code)

Regulation 1 – General

.1 Fire extinguishers and spare charges shall be ready for use at any time and be subjected to routine checks.

.2 The functioning of a suitable number of the ship's portable fire-extinguishers from both accommodation and engine spaces shall be systematically tested in connection with fire drills.

.3 The inspections prescribed in regulations 2 and 3 may be carried out on board on the responsibility of the master, chief engineer or chief officer of the ship in question provided that the manufacturer's service instructions for each individual type of extinguisher on board are followed. The chief engineer of the ship in question may carry out the pressure tests mentioned in regulation 4 provided that he or she holds a certificate of competency as a chief engineer. If the said inspections and pressure tests are not carried out on board, they shall be carried out by recognised companies, persons or test institutes in this country. Abroad inspections and tests may be carried out by local, recognised companies.

Regulation 2 – Monthly inspections of certain foam-extinguishers

As to protein foam-extinguishers with mixed foam-charges located in engine spaces or in spaces where the temperature normally exceeds 25 C, the charge shall be replaced every four months by a new spare charge on which the manufacturer has stamped the date of manufacture which may not be older than one year. Spare charges shall be stored at a temperature below 15 C.

Regulation 3 – Annual inspections of all types of fire-extinguishers

.1 CO2 fire-extinguishers,

.1 The weight of the fire-extinguisher shall be checked after it has been fitted on board. If a reduction of more than 10% of the charged weight stamped on the container is found, the fire-extinguisher shall be recharged.

.2 Powder fire-extinguishers charged with nitrogen or CO2,

1. The functioning of the pressure gauge shall be checked. Furthermore, it shall be checked that the correct pressure is indicated by the pressure gauge at normal temperatures. If the pressure is below the normal range stamped on the pressure gauge, the fire-extinguisher shall be recharged. In connection with the pressure tests prescribed under regulation 4, the powder charge shall be replaced.

.3 Cartridge-driven powder, water and foam fire-extinguishers

.1 The cartridge, etc. shall be removed, and the charge shall be replaced by a new one. However, powder charges shall not be replaced if it can be proved in an effective way that the powder is “easy-flowing” and absolutely dry.

.2 The cartridge shall be cleaned, and its weight shall be checked. If a reduction of more than 10% of the weight stamped on the

cartridge is not found, the cartridge may be reused. In connection with the pressure tests prescribed in paragraph 4, the cartridge shall be replaced by a new one.

.4 Common to the fire-extinguishers mentioned in paragraphs 3.1, 3.2 and 3.3

.1 The container shall be inspected for external deformities and any external corrosion. The container for the fire-extinguishers mentioned in paragraph 3 shall also be inspected on the inside. If any corrosion is found, it shall be removed, and the container shall be repainted. In case of considerable external deformities and/or massive external corrosion, the container shall be either discarded or pressure-tested and inspected on the inside in pursuance of regulation 4 with a satisfactory result.

.2 Valve and hose, etc. shall be undamaged. Any damaged parts shall be replaced. It must be carefully checked that air can flow free. In connection with any replacement of damaged parts, the following shall be complied with:

.1 Packings shall be made of rubber resistant to oil, weather and aging and of a good quality or of another material with similar properties.

.2 Hoses shall have an appropriate length and be made of rubber resistant to oil, weather and aging and of a good quality or of another material with similar properties.

.3 Hoses with associated fittings for CO2 fire-extinguishers shall be able to resist a test pressure of 25 N/m² and other types of fire-extinguishers shall be able to resist twice the operating pressure.

.3 It shall be checked that the instruction manual for the fire-extinguisher is undamaged and easily legible. If not, it shall be replaced.

.4 When the inspection has been carried out, the operating handle of the fire-extinguisher shall be sealed, and an inspection label shall

be affixed firmly to the fire-extinguisher stating:

.1 The month and year of the latest annual inspection;

.2 The name and address of the person or the company which has carried out the inspection, cf. paragraph 1.3 above.

Regulation 4 – Periodical pressure test, etc.

.1 CO2 fire-extinguishers

.1 Containers for CO2 fire-extinguishers shall be cleaned and inspected internally as well as pressure-tested every ten years. The test pressure shall be 20 N/mm² or 25 N/mm² dependent on the test pressure stamped on the container.

.2 If more than five years have passed since the latest pressure test, a discharged CO2 fire-extinguisher may not be recharged until a new pressure test has been carried out with a satisfactory result.

.2 Fire-extinguishers charged with nitrogen or CO2

.1 Containers for pressure-charged fire-extinguishers shall be cleaned and inspected internally as well as pressure-tested every ten years. The test pressure shall be 1.5 times the pre-charged pressure, however not below 1 N/mm², cf. the test pressure stamped on the container.

.2 If more than five years have passed since the latest pressure test, a charged fire-extinguisher may not be recharged until a new pressure test has been carried out with a satisfactory result.

.3 Cartridge-driven powder, water and foam fire-extinguishers

.1 Containers for cartridge-driven fire-extinguishers shall be cleaned and inspected internally as well as pressure-tested every five years. The test pressure shall be 1.5 times the

operating pressure, however not below 1 N/mm², cf. the test pressure stamped on the container.

.4 Common to the fire-extinguishers mentioned in paragraphs 4.1, 4.2 and 4.3

.1 All pressure tests shall be carried out hydraulically by the chief engineer of the ship (only on board ships where a certificate of competency as a chief engineer officer is required in pursuance of the STCW Convention, chapter III, regulation III-2), and it shall be carefully checked that the container is completely filled with liquid. The test pressure shall be constant for at least 15 seconds, and the containers may show now signs of leakage or permanent deformity. After the pressure test, the container shall be carefully dried.

.2 The month and year of the pressure test shall be stamped on the container in a durable way.

SOLAS Chapter III, Life-saving appliances and arrangements:

Regulation 3 – Definitions

(Paragraph 7 – insert after the first sentence)

In Danish ships, immersion suits shall be of a kind with built-in insulation and buoyancy.

Regulation 20 – Operational readiness, maintenance and inspections

(Paragraph 4.1 – insert after the last sentence)

With regard to stainless steel falls, it is permitted that wires of AISI 316 quality or better and which are provided with steel cores are replaced after 15 years from the date stated on the wire certificate. The wire shall be turned end on end or displaced lengthwise at intervals not exceeding 30 months in order that a “new” piece of wire will lie over blocks and sheaves. The lifetime of taleroid splices must not exceed 5 years. If inspection reveals mechanical damage, corrosion or other defects, the wire shall be replaced immediately.

Regulation 31 – Survival craft and rescue boats

(Paragraph 1.4 – insert after the last sentence)

The life raft shall be so stowed that it may be transferred to either side of the ship. Such arrangements shall be made that the raft may be launched without the necessity of lifting it over rails or bulwarks. There shall also be emergency lighting at the place where the raft is stowed. A portable safety lamp of an approved type may be used for this purpose. The release line – the painter – shall be secured to the place where the raft is stowed in such a way that it may be easily released for attachment to the place where the raft may be launched.

Regulation 32 – Personal life-saving appliances

(Paragraph 3.2 – insert before the last sentence)
Ships navigating in Greenland, Arctic and comparable waters shall, for each person on board, carry an immersion suit complying with the requirements of regulation 2.3 of the Code.

(Paragraph 3.3.3 – insert hereafter)

Cargo ships below 1600 tons, constructed before 1 July 1986 and which are exempted from the requirement of carrying lifeboats on more detailed conditions (the equivalent system) and in which the life rafts cannot be launched with an approved launching appliance capable of lowering the rafts when loaded, shall carry immersion suits complying with the requirements of Paragraph 2.3 for each person on board the ship.

SOLAS Chapter V: Safety of Navigation**Regulation 19 – Carriage requirements for shipborne navigational systems and equipment**

(Paragraph 1.2.3 – insert hereafter)

1.2.4) be fitted with a bridge navigation watch alarm in accordance with paragraph 7.

Paragraph 7: Ships fitted with a wheelhouse shall be equipped with a bridge navigation watch

alarm which, as a minimum, meet the technical and operational requirements of IMO's performance standards.*) Such ships shall be equipped with a bridge navigation watch alarm in accordance with the following schedule:

.1 ships constructed on or after 1 March 2003, upon delivery;

.2 ships constructed before 1 March 2003:

.1 ships with a gross tonnage below 500, not later than 1 March 2004;

.2 ships with a gross tonnage below 3,000, but of or above 500, not later than 1 March 2005; and
.3 all other ships, not later than 1 March 2006;

.3 Ships which were equipped with a bridge navigation watch alarm before 1 March 2002 which ensures, in a satisfactory way, the awareness of the watch-keeping officer, but which does not fully comply with IMO's performance standards, may use such an alarm instead of the prescribed bridge navigation watch alarm until 1 March 2006.

In ships equipped with an automatic heading control system or track control system, the bridge navigation watch alarm shall be switched on when this equipment is in use. In ships without an automatic heading control system or track control system, the bridge navigation watch alarm shall be switched on when the ship is located outside a port or safe anchorage.

Regulation 36 – Navigation lights, shapes and sound signal devices

1 All ships shall be provided with navigation lights, shapes and sound signal devices to such an extent that they comply with the Convention on the International Regulations for Preventing Collisions at Sea, 1972, as amended. The design of the shapes and the effectiveness and installation of the sound signal devices on board shall be in accordance with the International Regulations for Preventing Collisions at Sea as well as the regulations issued by the Danish Maritime Authority in force at any time.

2 All ships constructed on or after 1 July 2002 shall be provided with a spare set of permanently installed electrical navigation lights for the top, side, stern and anchor lights prescribed in the International Regulations for Preventing Collisions at Sea for the type of ship in question. Ships constructed before 1 July 2002 and engaged on voyages outside restricted trade shall be provided with a spare set of navigation lights for the top, side, stern and anchor lights prescribed in the International Regulations for Preventing Collisions at Sea for the type of ship in question. If the spare navigation lights are designed for electrical lighting, it shall be possible to connect them to the ship's emergency power source.

3 Kerosene navigation lights may not be used on tankers and ships designed for the carriage of gases, including liquefied gases.

4 Navigation lights and sound signal devices shall be of an approved type and comply with the provisions of the Convention on the International Regulations for Preventing Collisions at Sea, 1972, as amended.

5 A gong shall have a diameter of at least 50 cm and shall be made of approximately 1.5 mm soft steel or brass. The edge shall be flanged.

73 CARGO SHIP SAFETY RADIO CERTIFICATE (SAFRA)

Chapter IV: Radio communications – GMDSS

Regulation 6 – Radio installations

(Paragraph 2.5 shall run as follows)

2.5 be clearly marked with the ship's name, call sign, MMSI number and any Inmarsat numbers.

Regulation 13 – Sources of energy

(Paragraph 8 – insert hereafter)

9 The lighting required in regulation 6.2.4 and navigational equipment that is connected to the radio equipment of the ship shall be connected to the same source of power as the radio equipment.

74 INTERNATIONAL LOAD LINE CERTIFICATE (ILLC)

Additional Danish regulations to the International Convention on Load Lines. Technical regulation on the construction and equipment, etc. of ships, Notice from the Danish Maritime Authority B, revised According to the amendments of 1 July 2001.

Chapter II-5 N, Load Lines

Regulation 1 – Application

1 This Chapter contains regulations implementing, expanding or deviating from the provisions of the Convention on Load Lines.

2 Unless expressly provided otherwise, this Chapter shall apply to ships of a length of or above 24 m and to ships below 24 m the keels of which are laid on or after 1 January 2002.

Regulation 2 – Exceptions

This Chapter shall not apply to the ships mentioned in Chapter I, Regulation 3.

Regulation 3 – Definitions

1 The Convention on Load Lines is the International Convention on Load Lines of 5 April 1966, as amended by the Protocol of 1988. 2 "Length": as defined in Annex I, Regulation 3 (1) to the Convention on Load Lines.

Regulation 4 – Exemptions

In addition to the possibilities of exemptions mentioned in Article 6 of the Convention on Load Lines, the Danish Maritime Authority may allow deviations from the provisions in this Chapter if the following applies to each individual ship:

.1 the ship is only engaged in domestic trade, and

.2 navigation in the allocated area of trade takes place under conditions so protected that full application of the regulations would be unreasonable or unnecessary.

Regulation 4 – Protection of the crew

Arrangements for the protection of the crew, as stipulated in Regulation 25(4) and in Regulation 26(2) and (3) of the Convention on Load Lines and in Chapter II-1, Regulation 3-3 of these Regulations for tankers, shall be carried out in accordance with the rules of a recognized classification society and the interpretations and guidelines of IACS.*)

*) The International Association of Classification Societies.

Regulation 5 – Guard rails on passenger ships

1 On the decks to which passengers are given access and where there is no bulwark of adequate height, passenger ships shall be provided with guard rails that comply with the following provisions:

.1 The total height of the guard rail shall be at least 1000 mm, measured from the deck.

.2 The guard rail shall be constructed with vertical bars, which are connected only to one upper and one lower horizontal bar or stringer.

.3 The distance between the upper and lower horizontal bars/stringers referred to in the above 1.2 shall not be less than 800 mm.

.4 The opening below the horizontal bar referred to in the above 1.2 shall not exceed 120 mm.

.5 The distance between the vertical bars may not exceed 120 mm, and the distance between sceptres may not exceed 1.5 m.

2 External staircases, landings etc. shall be provided with guard railings of equivalent construction.

3 The decks that are effectively barred against the presence and passage of passengers shall either be provided with guard railings complying with the above 1.1-1.5 or railings/bulwarks as prescribed in the Convention on Load Lines.

4 No arrangement inferior to a guard railing or a gate that complies with the above 1.1-1.5 will be approved as an effective barrier.

5 Where a gate is used, the closing mechanism must not be immediately accessible to the passengers, and adequate signs shall be provided.

6 The Danish Maritime Authority may permit deviations from the above on the condition that the required safety level to prevent forcing and falling is achieved.

Part A – Load lines for ships with a length of 24 m or more

Regulation 6 – Application

1 This section shall apply to ships of a length of 24 m or more. 2 Ships the keels of which are laid before 1 January 2002 and only engaged in domestic trade shall comply with the regulations in force until then. For ships with a gross tonnage below 500, the provisions on surveys and certificates in Regulation 13 shall apply, and for ships with a gross tonnage of 500 or more, surveys of the freeboard-related conditions shall be carried out in connection with the surveys stipulated in Chapter I, Regulation 10 (a) (ii).

Regulation 7 – Structure and freeboard-related conditions*)

Unless expressly provided otherwise in this section, ships engaged on both domestic and international voyages shall comply with the provisions of the Convention on Load Lines

*) Reference is also made to SOLAS Chapter II-1, Regulation 13, on sub-division load lines in passenger ships.

Regulation 8 – Marking*)

1 Load line marks shall be marked D-L to indicate the authority assigning load lines.

2 For ships flagged in from abroad, it may be accepted that the existing letters intended to indicate the classification society of the ship as the authority that assigns load lines are maintained.

3 The stem and stern post shall be provided with draught marks in decimetres on both sides. Such marks shall be placed as close to the perpendiculars as possible.

*) Reference is also made to SOLAS Chapter II-1, Regulation 13, on sub-division load lines in passenger ships.

Regulation 9 – Surveys and Certificates

1 Freeboard-related conditions shall be surveyed in accordance with the provisions of Article 14 of the Convention on Load Lines.

2 An international load line certificate shall be issued to ships that have been surveyed and marked in accordance with the Convention on Load Lines and that comply with these Regulations.

3 The validity and duration of certificates have been laid down in Article 19 of the Convention on Load Lines.

4 Classification societies recognized by the Danish Maritime Authority in accordance with the provisions of Chapter XI, Regulation 1 shall be authorized to carry out freeboard calculations and freeboard surveys as well as to issue and endorse load line certificates.

Part B – Load lines for ships with a length below 24 m

Regulation 10 – Application

1 This section shall apply to ships of a length below 24 m.

2 Ships the keels of which are laid before 1 January 2002 shall comply with the regulations in force until then. For these ships, the regulations on surveys and certificates in Regulation 13 shall be complied with.

Regulation 11 – Structure and freeboard-related conditions*)

1 Ships shall maintain a safety level satisfying the criteria of the Convention on Load Lines.

2 The freeboard shall be assigned on the basis of the criteria of the Convention on Load Lines in consideration of the hull strength, stability, buoyancy and service area of the ship.

3 The freeboard shall be assigned on the basis of a table freeboard of 200 mm and shall be corrected with the relevant parameters in the Convention on Load Lines. In cases where parameter values are not readily deductible from the Convention on Load Lines, values used for ships with a length of 24 m shall be used.

4 Normally, the freeboard in cargo ships may not be below 150 mm, however, under special conditions and in consideration of the season and the durability of the voyage, a smaller freeboard may be permitted, but it may never be below 50 mm (cf. Regulation 40 of the Convention on Load Lines).

*) Reference is also made to SOLAS Chapter II-1, Regulation 13, on sub-division load lines in passenger ships

Regulation 12 – Marking*)

1 Deck line and load line marks shall be made as stipulated in the Convention on Load Lines, but without the letters D-L. For small ships, the load line mark may be made with a smaller diameter, however not below an external diameter of 200 mm.

2 The stem and stern post shall be provided with draught marks in decimetres on both sides. Such marks shall be placed as close to the perpendiculars as possible.

*) Reference is also made to SOLAS Chapter II-1, Regulation 13, on sub-division load lines in passenger ships

Regulation 13 – Surveys and Certificates

1 Passenger ships

.1 The freeboard-related conditions shall be surveyed in connection with the surveys of passenger ships mentioned in Chapter I, Regulation 7.

.2 A freeboard certificate shall be issued when a freeboard has been approved by the Danish Maritime Authority and when it has been ascertained at

a satisfactory survey that these regulations have been complied with.

.3 Freeboard certificates shall be issued by the Danish Maritime Authority.

2 Cargo ships

.1 The freeboard-related conditions shall be surveyed in connection with the surveys of cargo ships mentioned in Chapter I, Regulation 10-1.

.2 The minimum freeboard shall be indicated on the safety certificate for cargo ships mentioned in Chapter I, Regulation 12-1.

75 INTERNATIONAL OIL POLLUTION PREVENTION CERTIFICATE (IOPP)

MARPOL annex I, Regulations for the prevention of pollution by oil from ships,

Regulation 16, (Insert after 6)

7 Guidelines on the minimum capacity of oil separators for the treatment of bilge water from engine rooms:

Gross Tonnage (GT):	Minimum Capacity (m ³ /hour)
200 – 400:	0,25
400 - 1,600:	0,5
1,600 - 4,000:	1,0
4,000 - 15,000	2,5
15,000 and above:	5,0

Larger separator capacities may be necessary in ships with complex, large engine rooms.

76 INTERNATIONAL SEWAGE POLLUTION PREVENTION CERTIFICATE (ISPP)

MARPOL annex IV, Treatment and Storage of Sewage.

Annex B. Guidelines for capacity calculation of sewage systems

These guidelines shall be used for calculating the size of systems for the treatment and storage of sewage so that they comply with the provisions of technical regulation no. 1 of 15 February 1990 issued by the Danish Maritime Authority. They are based on the Guidelines for Capacity Calculation of Sewage Systems on Board Passenger Ships (Helcom recommendation no. 11/14 adopted on 14 February 1999).

The guidelines contain rules on both black and grey sewage. Black sewage has been defined in part 1 of the above-mentioned technical regulation. Grey sewage is the term for effluents from

galley, laundries, bathrooms, etc. Only black sewage is required to be treated in accordance with the regulations, but since the sanitary systems on board many ships have been designed so that the black and the grey sewage is led to the same system or tank, the table below also gives calculation values for such systems. The most common systems used on board ships are the conventional system and the vacuum system, but on board a few ships recirculation systems//water saving systems are, however, used.

The figures in the table below give the litre per person per day for the three systems.

Systems	Black Water	Black/grey water
Conventional system	70	230
Vacuum system	25	185
Recirculation/water saving system	2	-

The figures mentioned above may be deviated in connection with any other toilet systems.

Ships provided with systems for comminution and disinfection of sewage shall also be equipped with a suitable holding tank.

Holding tanks shall, as a general rule, be sufficiently large to hold sewage for 24 hours' operation.

Ships engaged on day voyages, such as fishing vessels used for pleasure, may be fitted with a holding tank capacity for 12 hours according to the circumstances.

Passenger ships engaged on regular voyages between two ports shall at least have a holding tank capacity sufficient for a return voyage.

77 MARPOL ANNEX V, REGULATIONS FOR THE PREVENTION OF POLLUTION BY GARBAGE FROM SHIPS

Regulation 9 – Placards, garbage management plans and garbage record-keeping (Paragraph 1 (b) – insert hereafter)

(c) The placard shall be placed in conspicuous places where passengers and crewmembers move about in general as well as in galleys where stores are unpacked, where garbage is sorted, stored and treated and in similar places.

(Paragraph 6 – insert hereafter)

(7) (a) All ships shall be provided with storage facilities of a capacity sufficient to store solid garbage on board as well as food waste in consideration of the relevant ship's area of operation and sailing time to ports that are capable of receiving the garbage. The ships shall, as a minimum, be provided with storage facilities of a capacity as indicated in appendix 1.

Appendix 1 - Guidelines for the capacity of garbage containers:

10,000 and above	5.0
Ships carrying more than 50 persons	1.0 m3 per 100 persons a day

The ships shall be provided with three garbage containers in accordance with the three garbage categories stipulated in the "Guidelines for the implementation of Annex V of MARPOL 73/78".

In general, garbage may be expected to consist of 50 per cent glass, cardboard, paper, etc., 25 per cent plastic and 25 per cent foodstuffs.

The garbage container capacity may be reduced for ships that sail only on two ports or that have a short sailing time or that are provided with garbage incinerators or compactor and grinding plants.

Gross tonnage and number of persons	Min. capacity of garbage containers (m3)
< 400 with up to ten persons	0.1
< 400 with up to 50 persons	0.5
400 - 1,600	0.4
1,600 - 4,000	1.2
4,000 - 10,000	2.5

78 SUMMARY OF DANISH TECHNICAL REGULATIONS RELEVANT FOR THE RO

- Technical Regulation on Registration of Navigational Data on Board High-Speed Craft, no. 9 of 4 December 1997
- Technical Regulation on the Construction and Equipment, etc. of Mobile Offshore Drilling Units (MODU Codes with Supplementary Provisions), no. 5 of 18. May 2000, File in PDF-format
- Technical Regulation on Marine Equipment, no. 12 of 2 December 2002
- Technical Regulation on Passenger lifts in Ships, no. 7 of 3 July 1997
- Technical Regulation on Lifting Appliances and Loose Gear on Ships, no. 12 of 12 October 2000.
- Technical Regulation on the Approval of Offshore Containers Handled in Open Sea, no. 1 of 11 January 2000
- Technical Regulation on the Carriage of Dangerous Goods by Ships (Amendments to the IMDG Code) no. 8 of 8 November 2002
- Technical Regulation on Special Requirements on the Placing, Strength and Securing of Shell-doors and Weather Tight Ramps on RO/RO ships, no. 8 of 12 October 1995
- Technical Regulation on special stability requirements for ro-ro passenger vessels with water on deck in international trade (Stockholm Agreement), no. 2 of 3 March 1998
- Technical Regulation on Noise in Ships, no. 4 of 3 May 2002