

## Liability of Classification Societies Developments in Case Law and Legislation\*

### Abstract

Classification societies issue a class certificate which attests that a vessel is built in accordance with class rules. Important sectors of and actors in the maritime industry rely on these certificates as an assurance that the classed vessel is likely to be reasonably suited for its intended use. This is referred to as the private function of classification societies. From this private function, the role of classification societies gradually expanded to cover public tasks. Flag States have the duty to take appropriate measures for vessels flying their flag to ensure safety at sea. States often delegate executive powers to classification societies. Acting as Recognised Organisations (ROs), the latter become responsible for the implementation and enforcement of international maritime safety standards.

The contribution at hand sheds light on some (recent) evolutions in both case law and legislation dealing with the liability of classification societies. The first part gives an overview of case law in England, the United States and Belgium. More importantly, it also analyses some recent cases more thoroughly. The second part focusses on regulatory changes that have occurred in the field of the liability of classification societies. Particular attention is given to the recently adopted Code for Recognised Organisations and especially its interplay with the supranational instruments covering the liability of ROs.

SUMMARY: 1. Introduction. – 2. Case law and liability of classification. – 2.1. Comparative overview on the liability of Classification Societies. – 2.2. The case of the *Erika*. – 2.3. The case of *Prestige*. – 2.4. The case of the *Al-Salam Boccaccio 98*. – 3. Recent regulatory changes on the liability of Classification Societies. – 3.1. General considerations. – 3.2. Liability of Classification Societies at the international level. – 3.3. Liability of Classification Societies at the supranational level. – 4. Conclusion. – Bibliography.

### 1. Introduction

Classification societies are independent legal entities hired and paid for by the owner of the vessel that is to be classified and certified. Classification

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societies issue a class certificate which attests that a vessel is built in accordance with so-called class rules. Important sectors of and actors in the maritime industry rely on these certificates as an assurance that the classed vessel is likely to be reasonably suited for its intended use <sup>(1)</sup>. As such, classification societies perform a vital function with respect to the insurability and marketability of vessels <sup>(2)</sup>. Besides the shipowner and purchasers of vessels, maritime insurers, cargo-owners and charterers use certificates of class prior to providing financial coverage or prior to hiring the vessel. A certificate allows them to make a reasonable assumption as to the condition of a ship and the risks it represents without having to check the vessel themselves <sup>(3)</sup>. This is referred to as the private function of classification societies. A “classification contract” is agreed with the shipowner or the shipyard in accordance with the class rules <sup>(4)</sup>.

From this private function, the role of classification societies gradually expanded to cover public tasks. This is referred to as statutory certification <sup>(5)</sup>. Flag States have the duty to take appropriate measures for vessels flying their flag to ensure safety at sea <sup>(6)</sup>. States often delegate executive powers to classification societies. Acting as Recognised Organisations (ROs), the latter become responsible for the implementation and enforcement of international maritime safety standards <sup>(7)</sup>. Consequently, a classification society acting on behalf of a flag State is bound by two contracts. The first one with the flag State itself, an “agreement on the delegation of power”, and the second one with the shipowner for the performance of the obligatory statutory surveys, a “statutory survey contract” <sup>(8)</sup>.

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<sup>(1)</sup> M.A. MILLER, *Liability of Classification Societies from the perspective of United States Law*, in *Tulane Maritime Law Journal*, 1997, 22, pp. 82 - 88; N. LAGONI, *The Liability of Classification Societies*, Berlin, 2007, pp. 43 - 50; IACS, *Classification Societies: their key role*, IACS Publications, 2001, pp. 5 - 6.

<sup>(2)</sup> J.L. PULIDO BEGINES, *The EU Law on Classification Societies: Scope and Liability Issues*, in *Journal of Maritime Law & Commerce*, 2005, 36, pp. 487 - 488.

<sup>(3)</sup> D.L. O’ BRIEN, *The Potential Liability of Classification Societies to Marine Insurers under United States law*, in *University of San Francisco Maritime Law Journal*, 1995, 7, pp. 404 - 405; H. HONKA, *The Classification System and its Problems with Special Reference to the Liability of Classification Societies*, in *Tulane Maritime Law Journal*, 1994, 19, pp. 3 - 5; M.A. MILLER, *op. cit.*, pp. 82-88; N. LAGONI, *op. cit.*, pp. 11 - 26.

<sup>(4)</sup> N. LAGONI, *op. cit.*, pp. 43 - 46.

<sup>(5)</sup> A. KHEE-JIN TAN, *Vessel-Source Marine Pollution: the Law and Politics of International Regulation*, Cambridge, 2006, p. 44.

<sup>(6)</sup> Article 94 (3) United Nations Convention on the Law of the Sea (UNCLOS).

<sup>(7)</sup> J.L. BEGINES, *op. cit.*, pp. 488 - 490; N. LAGONI, *op. cit.*, pp. 50 - 53; A. ANTAPASSIS, *Liability of Classification Societies*, in *Electronic Journal of Comparative Law*, 2007, 11, pp. 13 - 14.

<sup>(8)</sup> N. LAGONI, *op. cit.*, pp. 53 - 55.

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## 2. Case law and liability of classification

### 2.1. Comparative overview on the liability of Classification Societies

There have already been different cases dealing with the liability of classification societies in common law (e.g. England and the US) and civil law countries (e.g. Belgium) <sup>(9)</sup>.

In England, classification societies will only be liable for negligence if they violate a duty of care towards third parties such as cargo owners. A classification society has such a duty of care if three requirements are met, namely when 1) the society can reasonably foresee that a specific third party will rely on its certificate of class; 2) the relationship between the classification society and the third party is close enough to create a duty of care; and 3) a duty of care is fair, just and reasonable <sup>(10)</sup>. In the *Marc Rich* case, the House of Lord, for instance, decided that it would not be just and fair to recognise that classification society NKK would have a duty of care towards the cargo owners <sup>(11)</sup>. The existence of a duty of care was also denied in the case of the *Morning Watch* as there was not

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<sup>(9)</sup> See for discussion and further references to several studies on the liability of classification societies: J. DE BRUYNE, *Liability of Classification Societies: Cases, Challenges and Future Perspectives*, in *Journal of Maritime Law & Commerce* 2014, 45, pp. 180 - 221; P. BOISSON, *Classification Societies and Safety at Sea: Back to Basics to Prepare for the Future*, in *Maritime Policy*, 1994, 18, p. 373; M. MILLER, *op. cit.*, pp. 88 - 114; N. LAGONI, *op. cit.*, pp. 59 - 259; H. HONKA, *op. cit.*, pp. 12 - 33.

<sup>(10)</sup> See for discussion on the liability of classification societies in England: C. FEEHAN, *Liability of Classification Societies from the British Perspective: The Nicholas H*, in *Tulane Maritime Law Journal*, 1998, 22, pp. 163 - 190; J. DE BRUYNE, *op. cit.*, p. 203. See in general on tort law in England V. BERMINGHAM & C. BRENNAN, *Tort Law*, Oxford, 2012, pp. 43 - 107.

<sup>(11)</sup> *Marc Rich & Co. AG v Bishop Rock Marine Co. Limited*, [1996] E.C.C. 120, 136-137 (first instance decision); *Marc Rich & Co AG v Bishop Rock Marine Co. Limited*, [1993] E.C.C. 121 (decision on appeal); *Marc Rich & Co AG v Bishop Rock Marine Co Limited*, [1994] 1 W.L.R. 1071 (decision by the House of Lords)

sufficient proximity between the third party's economic loss and the role of the classification society<sup>(12)</sup>.

Courts in the US have also been confronted with claims against classification societies, either filed by shipowners (contractual)<sup>(13)</sup> or by third parties (extra-contractual). With regard to third-party liability claims, older case law often required that the classification society acted negligently<sup>(14)</sup>. Plaintiffs in more recent judgments, however, rely on a classification society's negligent misrepresentation to claim compensation in tort<sup>(15)</sup>. Several strict requirements have to be met under the tort of negligent misrepresentation before a classification society can be held liable. These requirements are rarely fulfilled, especially because third parties often fail to establish reliance upon a class certificate<sup>(16)</sup>. Only a limited group of persons can rely on the tort of negligent misrepresentation, namely those for whose benefit and guidance a classification society intends to supply the information or knows that the recipient intends to supply it<sup>(17)</sup>. Classification societies are often not informed about all details and reasons why a class survey was ordered. Consequently, they rarely misrepresent anything to the aggrieved party<sup>(18)</sup>. However, each case has to be assessed taking

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<sup>(12)</sup> *Mariola Marine Corp. v. Lloyd's Register of Shipping* (1991) E.C.C. 103 (first instance decision); *Mariola Marine Corp. v. Lloyd's Register of Shipping* (1990) 1 Lloyd's Rep. 547 (decision on appeal).

<sup>(13)</sup> See for example: *Great American Ins. Co. v. Bureau Veritas*, 338 F. Supp. 999 (S.D.N.Y. 1972) affirmed in *Great American Ins. Co. v. Bureau Veritas*, 478 F.2d 235 (2d Cir. 1973); *Sundance Cruises Corp. v. American Bureau of Shipping*, 799 F. Supp. 363 (S.D.N.Y. 1992) affirmed in *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F. 3d 1077 (2d Cir. 1993).

<sup>(14)</sup> See for example: *Great American Ins. Co. v. Bureau Veritas*, 338 F. Supp. 999 (S.D.N.Y. 1972) affirmed in *Great American Ins. Co. v. Bureau Veritas*, 478 F.2d 235 (2d Cir. 1973); *Steamship Mut. Underwriting Ass'n v. Bureau Veritas*, 380 F. Supp. 482 (E.D. La. 1973). See for discussion of the cases: N. LAGONI, *op. cit.*, pp. 145-160; P. BOISSON, *Classification Society Liability: Maritime Law Principles must be Requestioned?*, in *CMI Yearbook*, 1994, p. 244.

<sup>(15)</sup> Section 311 of the Restatement (Second) of Torts addresses physical harm, Section 552 deals with pecuniary loss. See in this regard for example: *Otto Candies L.L.C. v. Nippon Kaiji Kyokai Corporation (NKK)*, 2002 WL 1798767 1 (E.D. La. 2002) affirmed in *Otto Candies L.L.C. v. Nippon Kaiji Kyokai Corp.*, 346 F.3d 530 (5th Cir. 2003); *Somarelf, Elf Union and Fairfield Maxwell Services Ltd. v. the American Bureau of Shipping*, 704 F. Supp. 59 (N.J. 1989); *In Re Eternity Shipping Ltd.*, 444 F.Supp.2d 347 (Md. 2006). See for a discussion: M. MILLER, *op. cit.*, pp. 100 - 107; B.D. DANIEL, *Potential Liability of Classification Societies to Non-Contracting Parties*, in *University of San Francisco Maritime Law Journal*, 2007, 19, pp. 233 - 243.

<sup>(16)</sup> See for example: *Cargill, Inc. v. Bureau Veritas*, 902 F. Supp. 49 (S.D.N.Y.1995); *In re Eternity Shipping Ltd.*, 444 F.Supp.2d 347 (Md. 2006).

<sup>(17)</sup> See in this regard Restatement (Second) of Torts, §552 (2) (a).

<sup>(18)</sup> S. BLOCK, *No Class Act: A Bad Survey Lands a Classification Society in Hot Waters*, in *Forwarderlaw Library*, 2003.

into account its particular facts and third-party liability of classification societies can be possible in certain circumstances. This is especially the case if a classification society negligently performs its services and if the injured party relied upon it as an independent verifying entity <sup>(19)</sup>.

The liability of classification societies has also been at stake in civil law countries such as Belgium. Classification societies have already faced contractually liable towards shipowners. Shipowners who want to recover their losses have to prove that the society violated the classification agreement. Belgian courts address the contractual liability of classification societies from the perspective of the nature of their contractual performances. In this regard, the distinction between the obligation to produce or achieve a specific anticipated result (*obligation de résultat*) and the obligation to apply the normally required diligence, reasonable care and skill (*obligation de moyen*) is essential. Classification societies will violate an *obligation de résultat* whenever the promised result has not been reached, except when the society proves that this failure is due to impossibility or *force majeure*. The shipowner will thus only have to establish that the CRA did not achieve the contractually promised result(s). A violation of an *obligation de moyen*, on the other hand, presupposes that the classification society did not apply the required care and skill. If the contract is qualified as *obligation de moyen*, the society will only be liable if the shipowner shows that it has been negligent and did not act as a reasonable classification society placed in the same circumstances (*bonus pater familias* criterion) <sup>(20)</sup>.

Several cases under Belgian law have affirmed that classification societies only have to apply the normally required diligence and care (*obligation de moyen*) <sup>(21)</sup>. In the recent case of the *Dune*, the court held that the classification society

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<sup>(19)</sup> See for example: *Somarelf v. American Bureau of Shipping*, 704 F. Supp. 59 (D.N.J. 1989); *Otto Candies LLC v Nippon Kaiji Kyokai Corp.*, 346 F.3d 530 (5th Cir. 2003); *Psarianos v. Standard Marine, Ltd*, 728 F. Supp. 438 (E.D. Tx. 1989). Also see the reasoning in *Cargill Inc. v. Veritas*, 902 F. Supp. 49 (S.D.N.Y. 1995). See for discussion and further references: J. DE BRUYNE, *op. cit.*, pp. 205-208.

<sup>(20)</sup> W. VAN GERVEN, S. COVEMAEKER, *Verbintenissenrecht*, Leuven, 2006, pp. 32 - 33; L. VAN VALCKENBORGH, *De kwalificatie van een verbintenis als resultaats-of middelenverbintenis*, in *Tijdschrift voor Belgisch Burgerlijk Recht*, 2011, 5, pp. 222 - 229; B. DUBUISSON, *Questions choisies en droit de la responsabilité contractuelle*, in P. Wéry (edited by), *La théorie générale des obligations*, Luik, 1998, p. 103; S. STIJNS, *VERBINTENISSENRECHT. BOEK 1*, BRUGGE, 2005, pp. 8 - 10; M. KRUTHOF, E. WYMEERSCH, *The Regulation and Liability of Credit Rating Agencies in Belgium*, in E. DIRIX, Y.H. LELEU (edited by), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussel, 2006, pp. 374 - 376.

<sup>(21)</sup> See for example the case of the *Rukie*, *Rechtbank van Eerste Aanleg Dendermonde*, January 11, 1973, *Rechtspraak Haven van Antwerpen*, 1973, p. 127.

(Unitas) was only obliged to apply the normally required diligence without necessarily having to achieve a specific anticipated result. The claimants argued that Unitas failed to fulfil its contractual obligations. Not only because it did not perform the required maintenance but also due to its negligent and careless survey of the vessel in April 1998. The report revealed that the survey was inaccurate since Unitas did not establish the necessary preparations. The court held that the absence of these preparations implied that the classification society did not use all reasonable efforts and, as a consequence, acted negligently <sup>(22)</sup>.

Besides contractual liability, classification societies have also faced liability towards third parties in Belgium. The core conclusions following from such decisions are twofold. Firstly, the certificate of class does not guarantee the seaworthiness of a vessel. It remains a non-delegable duty of the shipowner to ensure that his ship is seaworthy. Although a certificate may serve as evidence of seaworthiness and indicate that the vessel complies with class regulations, it does not fulfil the obligations of the shipowners to maintain the vessel in a seaworthy condition. Secondly, and contrary to the situation in England, a classification society has a general duty of care to anybody who could be affected by its activities. Classification societies can thus face third-party liability if they negligently perform their survey and certification services under the agreement with the shipowner <sup>(23)</sup>.

In sum, the short overview showed that national courts already had to judge on the (extra-) contractual liability of classification societies at several occasions. More interesting and less examined in academic scholarship are some recent case where the liability of classification societies was at stake. Although an extensive discussion of case law does not fall within the scope of this contribution, the following paragraphs shed light on three recent cases: the *Erika* (part 1.2.), the *Prestige* (part 1.3.) and the *Al-Salam Boccaccio 98* (part 1.4.).

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<sup>(22)</sup> The case of *Dune*, Rechtbank van Koophandel Antwerpen, September 20, 2006, A/02/04109 (unpublished). The decision has been upheld by the Antwerp Court of Appeal. See in this regard: Hof van Beroep Antwerpen, February 18, 2013 *Nieuw Juridisch Weekblad*, 2013, pp. 659 - 660, with annotation by J. DE BRUYNE, "Aansprakelijkheid van classificatiemaatschappijen". See also the discussion in J. DE BRUYNE, *op cit.*, pp. 201 - 202.

<sup>(23)</sup> See in this regard the case of the *Spero*, Hof van Beroep Antwerpen, February 14, 1995, *Rechtspraak Haven van Antwerpen* 1995, pp. 321 - 329 and the case of the *Paula*, Hof van Beroep Antwerpen, May 10, 1994, *Rechtspraak Haven van Antwerpen*, 1995, pp. 313 - 317. See also the discussion in J. DE BRUYNE, *op cit.*, pp. 197 - 200.



## 2.2. The case of the Erika

The sinking of the *Erika* vessel caused a huge oil pollution of the French shoreline. Proceedings were subsequently instituted by the *Conseil Général de la Vendée* against the shipowners, the owners of the cargo (Total) and *Registro Italiano Navale* (RINA). The *Erika* was classed by RINA, which renewed the class certificate in November 1999 (private function). RINA also acted as RO for Malta and issued an International Safety Certificate. As a consequence, RINA claimed that it could not be held liable by a French court as it benefited from sovereign immunity (public function) <sup>(24)</sup>. The decisions by the *Tribunal Correctionnel* in first instance <sup>(25)</sup> and by the *Cour d'Appel* on appeal <sup>(26)</sup> have already been discussed elsewhere <sup>(27)</sup>. The following paragraphs, therefore, mainly focus on the decision by the Criminal Section of the French *Cour de Cassation*, which largely upheld the judgement by the Court of Appeal <sup>(28)</sup>.

The Supreme Court did not address whether a RO could benefit from flag State immunity because RINA unequivocally renounced immunity by participating in the proceedings <sup>(29)</sup>. In first instance, however, the *Tribunal Correctionnel* rejected sovereign immunity because the inspections and certification of the vessel were performed in the interest of the shipowner <sup>(30)</sup>. The court held that “*l'existence d'un lien textuel ou factuel entre certification et classification, les relations de l'Etat de Malte avec les différentes sociétés de classification (...)*”

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<sup>(24)</sup> M. SHAW, *International Law*, Cambridge, 2008, pp. 697 - 750; P.H. KOOIJMANS, *Internationaal publiekrecht in vogelhucht*, Deventer, 2008, pp. 68 - 70. See for a discussion on the case: V.J. FOLEY, C.R. NOLAN, *The Erika Judgment-Environmental Liability and Places of Refuge: a Sea Change in Civil and Criminal Responsibility that the Maritime Community must Heed*, in *Tulane Maritime Law Journal*, 2008, 33, p. 44; O.Z. ÖZCAYIR, *The Erika and its Aftermath*, in *International Maritime Law*, 2000, 7, pp. 230 - 235.

<sup>(25)</sup> The case of the *Erika*, Tribunal de Grande Instance Paris, January 16, 2008, nr. 9934895010, pp. 1 - 358.

<sup>(26)</sup> The case of the *Erika*, Cour d'Appel Paris, March 30, 2010, nr. RG 08/02278-A, pp. 1 - 487.

<sup>(27)</sup> V.J. FOLEY, C.R. NOLAN, *op. cit.*, pp. 42 - 77; M.G. VAN DEN DOOL, J.F. VAN DER VLIES, *Liability of classification societies before and after the Erika-verdict*, in *Tijdschrift Vervoer en Recht*, 2008, 3, pp. 91 - 100; J. DE BRUYNE, *op. cit.*, pp. 209 - 213.

<sup>(28)</sup> The case of the *Erika*: Cour de Cassation, September 25, 2012, no. H 10-82.938, in *Droit Maritime Français*, 2012, p. 995. See in this regard M. NDENDE, *Pollution marine par hydrocarbures (Affaire de l'Erika)*, in *Revue de droit des transports*, 2012, 4, p. 52.

<sup>(29)</sup> The case of the *Erika*: Cour de Cassation, September 25, 2012, no. H 10-82.938, p. 15.

<sup>(30)</sup> The case of the *Erika*, Tribunal de Grande Instance Paris, January 16, 2008, nr. 9934895010, p. 276.

*ou encore “l’objectif de service public” (...) qui serait poursuivi lors de l’activité de classification n’ont ni pour objet ni pour effet de rattacher celle-ci à l’exercice de la souveraineté des Etats dont le pavillon flotte sur les navires pris en classe par la société RINA”* <sup>(31)</sup>. In sum, although the first instance court did not explicitly decide whether a classification society acting as RO could enjoy immunity, it, nonetheless, held that a classification society is not immune when acting on behalf of a shipowner to classify the latter’s vessel (private function) <sup>(32)</sup>.

The *Cour d’Appel*, however, decided that the certificates issued by a classification society acting as RO are “*actes de puissances publiques*” and not simple administrative acts (“*actes de gestion*”). Statutory certificates are issued to enhance the safety at sea and serve the public interest. The *Erika* could not have sailed under Maltese Flag without RINA’s (necessary) certification services. As a consequence, a classification society acting as RO should be able to rely on immunity. Moreover, the court seems to accept that a society can even enjoy immunity when providing private certification services to the shipowner. That is because the (technical) standards that have to be fulfilled before a classification society can issue a certificate are part of a set of (class) rules “*qui conditionnent la certification statutaire*”, by virtue of the reference made to them in the SOLAS Convention <sup>(33)</sup> and the Load Lines Convention <sup>(34)</sup>. Class rules (aim to) improve the safety at sea and thus serve the public interest <sup>(35)</sup>. However, the *Cour d’Appel*, relying on Article 8 of the United Nations Convention on Jurisdictional Immunities of States and their Property (UNCSI) <sup>(36)</sup>, decided that RINA had

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<sup>(31)</sup> The case of the *Erika*, Tribunal de Grande Instance Paris, January 16, 2008, nr. 9934895010, p. 276. The court held that the existence of a (factual or textual) link between public certification and private classification services, the relations of the Flag State Malta with the various classification companies, or even the objective of ‘public service’ which would be pursued with the classification activities, had neither the purpose nor the effect of linking the activities to the exercise of sovereignty of the State whose flag flies on vessels classified by RINA.

<sup>(32)</sup> See for discussion: J. DE BRUYNE, *De aansprakelijkheid van classificatiemaatschappijen in België en enkele (recente) ontwikkelingen en pijnpunten vanuit een rechtsvergelijkend perspectief*, in *Tijdschrift Vervoer & Recht*, 2014, pp. 83 - 91.

<sup>(33)</sup> International Convention for the Safety of Life at Sea (SOLAS), 1974, 1184 UNTS 278.

<sup>(34)</sup> International Convention on Load Lines (CLL), 1968, 640 UNTS 133.

<sup>(35)</sup> The case of the *Erika*, Cour d’Appel Paris, March 30, 2010, nr. RG 08/02278-A, pp. 322 - 323.

<sup>(36)</sup> See in this regard Article 8 van de United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (“*A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has: (a) itself instituted the proceeding; or (b) intervened in the proceeding or taken any other step relating to the merits*”).



renounced the privilege of flag State immunity by participating in the criminal proceedings<sup>(37)</sup>.

The *Cour de Cassation*'s reasoning further seems to indicate that the *Cour d'Appel* had been wrong in deciding that RINA could not benefit from the provisions in Article III, 4 of the International Convention on Civil Liability for Oil Pollution Damage (CLC)<sup>(38)</sup>. The CLC provides for a strict liability regime for the registered shipowner for oil pollution damage. According to Article III, 4 (a)-(c) CLC, no claim for compensation for pollution damage may be made against the "servants or agents of the owner (...) [or] any other person who, without being a member of the crew, performs services for the ship (...) [or] operator of the ship", unless the damage resulted from their personal act or omission, committed with the intent to cause such damage or recklessly and with knowledge that such damage would probably result. As such, the French Supreme Court seems to accept that a classification society can be qualified as servant or agent of the shipowner or someone who performs services for the ship. However, the *Cour de Cassation* decided that the harm had resulted from RINA's own recklessness and could, therefore, not enjoy the channeling of liability under the CLC<sup>(39)</sup>.

### 2.3. The case of the Prestige

On November 13, 2002 the *Prestige* developed a starboard list about 50 kilometers from the Galician coast and began to leak oil. The ship's request for secure shelter and a safe harbor to pump off the cargo of oil was refused by the Spanish and Portuguese authorities. Arguing that the *Prestige*'s draught was too large to enter into the port of refuge, the vessel was instead towed to the Atlantic Ocean. Rough sea conditions caused the vessel to break in two. About 64,000 tonnes of oil escaped from the vessel and caused enormous environmental pollution and an economic disaster for the region. Spain commenced proceedings against American Bureau of Shipping (ABS) in the United States District of New York. Whereas the *Prestige* was listed as meeting all regulations

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<sup>(37)</sup> The case of the *Erika*, Cour d'Appel Paris, March 30, 2010, nr. RG 08/02278-A, pp. 323 - 324. See in this regard also: J. DE BRUYNE, *op. cit.*, pp. 209 - 213.

<sup>(38)</sup> International Convention on Civil Liability for Oil Pollution Damage (CLC), 1992, 1956 UNTS 255.

<sup>(39)</sup> The case of the *Erika*: Cour de Cassation, September 25, 2012, no. H 10-82.938, p. 221. See for an annotation of the decision by the Supreme Court: F. STEVENS, *noot bij Cass.* 25 september 2012, in *Revue de Droit Commercial Belge/Tijdschrift voor Belgisch Handelsrecht*, 2013, 13, p. 200.

for various certificates, the Spanish Government claimed that the vessel did not satisfy the 2003 ABS Fatigue Requirements. As such, a careful survey of the vessel would have revealed that the vessel had several shortcomings and that a class certificate could not have been issued <sup>(40)</sup>.

ABS disputed Spain's allegations of the wrongful classification and certification services. It argued that the CLC principles barred Spain's liability claims because a classification society qualified as a person that renders services for the ship under the exemptions contained in Article III, 4, (a)-(b) CLC. However, based on Article IX CLC, the District Court decided that it lacked the necessary power to adjudicate Spain's claims arising from the sinking of the *Prestige*. As such, ABS' motion for summary judgment dismissing the plaintiff's claims was granted because of the lack of jurisdiction <sup>(41)</sup>.

In a subsequent summary order, however, the Court of Appeals for the Second Circuit concluded that the District Court had erred in assuming that the CLC deprived it of subject matter jurisdiction. It overturned the decision and sent it back to the District Court for further proceedings <sup>(42)</sup>. The District Court subsequently ruled that ABS was not liable for the sinking of the *Prestige* <sup>(43)</sup>. Spain failed to identify any precedent in which a classification society had been held to have a duty towards flag States to prevent recklessness certification-related conduct. The District Court (even) doubted whether such a duty could exist towards coastal States. The Court made thus no distinction with regard to the application of liability principles depending upon whether the party suffering the losses was "private" (e.g. cargo-owners) or "public" (e.g. flag State). Imposing a duty upon classification societies to refrain from reckless or negligent behavior to coastal States "*would constitute an unwarranted expansion of the existing scope of tort liability*", especially considering that the shipowner has a non-delegable duty to ensure the seaworthiness of his vessel. Furthermore, such a duty of care would undermine the existing relationship between the shipowners and classification societies. Reference was made to the disproportionality between the small fees

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<sup>(40)</sup> See for a discussion: E. GALIANO, *In the Wake of the PRESTIGE Disaster: Is an Earlier Phase-out of Single-Hulled Oil Tankers the Answer*, in *Tulane Maritime Law Journal*, 2004, pp. 113 - 114; J. WENE, *European and International Regulatory Initiatives Due to the Erika and the Prestige Incidents*, in *Maritime Law Association of Australia and New Zealand Journal*, 2005, 19, pp. 58 - 59.

<sup>(41)</sup> *Reino de Espana v. The American Bureau of Shipping*, 528 F.Supp.2d.455, pp. 459 - 460 (S.D.N.Y. 2008).

<sup>(42)</sup> *Reino de Espana v. The American Bureau of Shipping*, no. 08-0579-cv(L), p. 1 - 8 (2d Cir. 2008).

<sup>(43)</sup> *Reino de Espana v. The American Bureau of Shipping*, 729 F.Supp.2d 635 (S.D.N.Y. 2010). See for a discussion: A. BUGRA, *ABS held not liable to Spain by US Court*, in *Shipping and Trade Law*, 2010, 10, pp. 1 - 3.

for classification services and the potentially unlimited scope of liability. As such, ABS was entitled to summary judgment and its motion was granted <sup>(44)</sup>.

The Court of Appeal of the Second Circuit affirmed the District Court's decision <sup>(45)</sup>. Even if assuming (*arguendo*) that ABS owed a duty of reasonable care, Spain “*nonetheless failed to adduce sufficient evidence to create a genuine dispute of material fact as to whether [ABS] recklessly breached that duty such that their actions constituted a proximate cause of the wreck of the Prestige*”. As such, the liability of a classification society in tort towards Spain for reckless conduct in connection with the classification of vessels did not need to be examined because it was not established that ABS acted recklessly in the first place <sup>(46)</sup>.

#### 2.4. *The case of the Al-Salam Boccaccio 98*

The *Al-Salam Boccaccio 98* vessel sank in the Red Sea after a fire broke out on the car deck. Classification society RINA was acting as RO for flag State Panama (public role) and provided classification services for the shipowners as well (private role) <sup>(47)</sup>.

By way of preliminary ruling, the *Tribunale Amministrativo Regionale* in Liguria held that RINA had to be considered as an Italian public administration due to the public, or at least, administrative nature of the delegated functions performed under the authority of the Italian Government <sup>(48)</sup>. As such, the classification and certification activities carried out by RINA were expressions of the public powers and prerogatives of the State <sup>(49)</sup>.

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<sup>(44)</sup> *Reino de Espana v. The American Bureau of Shipping*, 729 F.Supp.2d 635, p. 646 (S.D.N.Y. 2010).

<sup>(45)</sup> *Reino de Espana v. The American Bureau of Shipping*, 691 F.3d 461 (2d Cir. 2012).

<sup>(46)</sup> *Reino de Espana v. The American Bureau of Shipping*, 691 F.3d 461, p. 463 (2d Cir. 2012). See in this regard also: F. STEVENS, *op. cit.*, p. 200; J. DE BRUYNE, *op. cit.*, pp. 213 - 216; P.R. KNIGHT & C. FOSTER, *Second Circuit Addresses the Tort Liability of Classification Societies to Third Parties in Reino de España v. ABS*, Robinson & Cole Update Environmental & Maritime, 2012.

<sup>(47)</sup> See for a discussion of the facts: *Class on trial*, in *Fairplay*, 2012, 374, p. 26.

<sup>(48)</sup> See in this regard also Legge 7 agosto 1990, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi, n. 241, Gazz. Uff., n. 192.

<sup>(49)</sup> Tribunale Amministrativo Regionale Administrative Liguria, September 12, 2012, *Il Diritto Marittimo*, 2008, p. 1449. See for a discussion: F. SICCARDI, *Immunity from jurisdiction are CS entitled to it (a) as Recognized Organizations acting for flag states (b) when performing class services*, in ISLC, *London Shipping Law Center, Classification Societies Regulatory Regime and Current issues on Liability*, Februari 21, 2013, pp. 62 - 63.

The Association of Victim's Families subsequently filed a law suit against RINA before the civil court of Genoa. The Association claimed compensation of \$132,000,000 from RINA. The plaintiffs argued that the society had been negligent during the ship inspections because several technical safety class rules were not respected. As a consequence, RINA was not allowed to issue the certificate of class. RINA would have withdrawn the vessel's class if it had respected the ISM Code and several other compliance documents. However, RINA contested these allegations and argued that it should have been granted immunity because it acted as an RO on behalf of a flag State <sup>(50)</sup>. The *Tribunale* in Genoa indeed granted RINA immunity from Italian judiciary as it acted as an RO on behalf of Panama. The court relied on several precedents (among which the judgment in the *Erika* case) to conclude that private companies do enjoy immunity from jurisdiction insofar as they perform public activities and duties delegated by flag States <sup>(51)</sup>. In addition, the court held that the distinction between (private) classification and (public) statutory services was arbitrary and irrelevant for the purpose of granting immunity because class certificates are required for each vessel to sail <sup>(52)</sup>.

### 3. Recent regulatory changes on the liability of Classification Societies

#### 3.1. General considerations

The previous paragraphs shed light on the evolution(s) in case law dealing with the liability of classification societies. The following part examines regulatory changes that have occurred in the field of the liability of classification societies at the international (part 2.2.) and supranational level (part 2.3.). It should, nonetheless, be noted that minor changes have (only) occurred in legislation dealing with the role of classification societies when acting as ROs.

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<sup>(50)</sup> See in this regard: M. FERRERO, *Press Conference on Al Salam Boccaccio 98 shipwreck*, Ufficio Stampa & Comunicazione, July 20, 2010. See for further references; J. DE BRUYNE, *op. cit.*, pp. 208 - 217.

<sup>(51)</sup> *Abdel Naby Hussein Maboruk Aly contro RINA s.p.a.*, Trib. Geova, March 8, 2012, no. 9477/2010, pp. 36 - 38. Also see the discussion in F. SICCARDI, *op. cit.*, pp. 64 - 66; A. MOIZO, *RINA will be tried in Panama for the Boccaccio*, in *Ship2shore*, 2012, p. 27.

<sup>(52)</sup> *Abdel Naby Hussein Maboruk Aly contro RINA s.p.a.*, Trib. Geova, March 8, 2012, no. 9477/2010, p. 40. See in this regard also: F. SICCARDI, *op. cit.* pp. 64 - 66. See for further references; J. DE BRUYNE, *op. cit.*, pp. 208 - 217.

### 3.2. *Liability of Classification Societies at the international level*

At the international level, there are no provisions that deal with a classification society's third-party liability. A Joint Working Group on the Study of Issues of Classification Societies was set up in 1992 by the *Comité Maritime Internationale* (CMI). The Working Group began with the study of the rights, the duties and the scope of the liability of classification societies. However, on the first meeting it was decided that issues of statutory limitation and regulation of civil liability of classification societies would be examined in a future study <sup>(53)</sup>. The Group's activities, nevertheless, were useful insofar as they established the Principles of Conduct for Classification Societies <sup>(54)</sup>. The Principles were considered as wide-accepted standards to evaluate the survey, certification and classification activities of classification societies <sup>(55)</sup>. The Working Group also drafted Model Contractual Clauses for use in the agreements with the shipowner and those with Flag States <sup>(56)</sup>. The idea of the Clauses was to provide a uniform system of contractual liability for classification societies and an appropriate limitation thereof. The draft clauses have however not been adopted by the CMI because of diverging opinions between shipowners and classification societies on the maximum limits of liability. More important is that the draft clauses did not address a classification society's liability towards third parties <sup>(57)</sup>.

Besides the CMI, there are several other institutions that might be well placed to regulate the liability of classification societies. The *International Maritime Organisation* (IMO), for instance, is the global standard-setting authority for the safety, security and environmental performance of international shipping. Its main role is to create a regulatory framework for the shipping industry which is fair and effective, universally adopted and implemented <sup>(58)</sup>. However, it remains to be seen if the IMO will be able to set uniform or harmonised rules that deal with the liability of classification societies towards third parties. Besides the

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<sup>(53)</sup> F.L. WISWALL, *Report and Panel Discussion concerning the Joint Working Group on a Study of Issues re Classification Societies*, in *CMI Yearbook*, 1994, p. 229; J. DE BRUYNE, *op. cit.*, pp. 185 - 188 & 227 - 230.

<sup>(54)</sup> As reported in CMI, *CMI Yearbook 1995*, 1995, 100-106 and reprinted in F.L. WISWALL, *Classification societies: issues considered by the Joint Working Group*, in *International Journal of Shipping Law*, 1997, 2, pp. 183 - 185.

<sup>(55)</sup> A. ANTAPASSIS, *op. cit.*, p. 49; J. DE BRUYNE, *op. cit.*, pp. 185 - 188 & 227 - 230.

<sup>(56)</sup> Documents for the Centenary Conference, *CMI Yearbook 1996*, 1996, pp. 334 - 342.

<sup>(57)</sup> N. LAGONI, *op. cit.*, pp. 298 - 299; F.L. WISWALL, *op. cit.*, pp. 229-233; J.M. ALCANTARA, *Shipbuilding and classification of ships. Liability towards third parties*, in *Zbornik PFZ*, 2008, p. 58; J.L. BEGINES, *op. cit.*, p. 499; J. DE BRUYNE, *op. cit.*, pp. 185 - 188 & 227 - 230.

<sup>(58)</sup> IMO, Introduction to IMO available at [www.imo.org/About/Pages/Default.aspx](http://www.imo.org/About/Pages/Default.aspx).

strong reaction of classification societies against proposals to place their (private) activities under control of the IMO <sup>(59)</sup>, it can be doubted whether the IMO has enough financial and especially legal and technical expertise to draft rules dealing with the “private” liability of classification societies. The IMO is primarily oriented towards the regulation of classification societies when acting as ROs in their public role <sup>(60)</sup>. The IMO, for example, adopted several resolutions establishing minimum requirements for ROs and agents acting on behalf of the governments <sup>(61)</sup>. More importantly, the IMO recently adopted the Code for Recognised Organisations which recalled IMO Resolutions A.739(18) and A.789(19) <sup>(62)</sup>.

The Code serves as the international standard which contains the minimum criteria to assess whether flag States can recognise and authorise organisations to act on their behalf <sup>(63)</sup>. The Code establishes the mandatory requirements that a classification society has to fulfill in order to be recognised and authorised by a flag State to perform statutory certification and services (parts 1 and 2). Furthermore, the Code contains the mandatory requirements that flag States have to respect when authorising an RO to act on its behalf (part 2). Finally, the Code also contains guidelines for flag State with regard to the oversight of ROs (part 3).

The Code defines an RO as an organisation that has been assessed by a flag State and which complies with part two of the Code. As previously mentioned, the second part of the Code contains the recognition and authorisation requirements for ROs. For instance, ROs have to establish, publish and systematically maintain their rules for the design, construction and certification of ships and their associated essential engineering systems as well as provide for adequate research capability to ensure appropriate updating of the

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<sup>(59)</sup> L. LINDELT, *A Future for Classification Societies* in CMI, *CMI Yearbook 1994*, Sydney, 1994, pp. 254 - 255.

<sup>(60)</sup> J. DE BRUYNE, *op. cit.*, pp. 227 - 230.

<sup>(61)</sup> See for example: IMO Resolution A.789(19) on the specifications on the survey and certification functions of recognized organizations acting on behalf of the administration adopted on 23 November 1995 and IMO Resolution A.789(19) on the specifications on the survey and certification functions of recognized organizations acting on behalf of the administration adopted on 23 November 1995.

<sup>(62)</sup> IMO Code for Recognized Organizations, Resolution MSC.349(92) adopted on 21 June 2013 MEPC.237(65).

<sup>(63)</sup> See in this regard Article 1 (“Purpose”), in Part 1 (“General”) of the IMO Code for Recognised Organisations.



published criteria <sup>(64)</sup>. Moreover, the Code requires ROs to be independent <sup>(65)</sup>, impartial <sup>(66)</sup> integer <sup>(67)</sup> and competent <sup>(68)</sup>. There are several additional requirements with regard to the management and organisation of ROs (e.g. quality and pollution prevention policy and documentation/reporting requirements) <sup>(69)</sup> and statutory certification and services processes (e.g. design and development verification or control of monitoring and measuring devices) <sup>(70)</sup>.

The relationship between the Code for ROs on the one hand and supranational legislation dealing with the role and recognition of ROs on the other hand is challenging. Although the former IMO Resolutions dealing with ROs were not legally binding, their content was given mandatory effect by the SOLAS Convention <sup>(71)</sup> and EU legislation <sup>(72)</sup>. However, things seem a bit more complex with regard to the recently adopted Code for ROs. That is because the EU is neither a member of the IMO nor a contracting party to its conventions

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<sup>(64)</sup> See in this regard Article 2.2. (“Rules and Regulations”) of the IMO Code for Recognised Organisations.

<sup>(65)</sup> See in this regard Article 2.3. stipulating that “ROs and their staff cannot not engage in any activities that may conflict with their independence of judgement and integrity in relation to their statutory certification and services. The RO and its staff responsible for carrying out the statutory certification and services shall not be the designer, manufacturer, supplier, installer, purchaser, owner, user or maintainer of the item subject to the statutory certification and services, nor the authorized representative of any of these parties. The RO shall not be substantially dependent on a single commercial enterprise for its revenue”.

<sup>(66)</sup> See in this regard Article 2.4. stipulating that the “personnel of ROs shall be free from any pressures, which might affect their judgment in performing statutory certification and services. Procedures shall be implemented to prevent persons or organizations external to the organization from influencing the results of services carried out. All potential customers shall have access to statutory certification and services provided by the RO without undue financial or other conditions. The procedures under which the RO operates shall be administered in a non-discriminatory manner”.

<sup>(67)</sup> See in this regard Article 2.5. stipulating that the “RO shall be governed by the principles of ethical behaviour, which shall be contained in a Code of Ethics. The Code of Ethics shall recognize the inherent responsibility associated with a delegation of authority to include assurance of adequate performance of services”.

<sup>(68)</sup> See in this regard Article 2.6. stipulating that the “RO shall perform statutory certification and services by the use of competent surveyors and auditors who are duly qualified, trained and authorized to execute all duties and activities incumbent upon their employer, within their level of work responsibility”.

<sup>(69)</sup> See in this regard Part 2 (“Recognition and Authorization Requirements For Organizations”), Article 3 (“Management and Organization”) IMO Code for Recognized Organizations.

<sup>(70)</sup> See in this regard Part 2 (“Recognition and Authorization Requirements For Organizations”), Article 5 (“Statutory Certification and Services Processes”) IMO Code for Recognized Organizations.

<sup>(71)</sup> International Convention for the Safety of Life at Sea (SOLAS), 1974 adopted on November 1, 1974.

<sup>(72)</sup> See discussion on the supranational instruments *infra* in part 2.2.

and protocols. The Council of the EU has to authorise Member States to give their consent to be bound by (the amendments to) those conventions and protocols which make the Code for ROs mandatory <sup>(73)</sup>. The importance of the Code for ROs, nonetheless, is acknowledged in Recital (4) of Regulation 391/2009 according to which Member States and the Commission should promote the development by the IMO of an international Code for Recognised Organisations <sup>(74)</sup>. At the same time, however, a declaration annexed to Council Decision 2013/268 stipulates that Member States will consider that the Code for ROs contains a set of minimum requirements on which States can elaborate and improve as appropriate for the enhancement of maritime safety and the protection of the environment. The declaration further states that nothing in the Code for ROs can be construed to restrict or limit in any way the fulfillment of Member States' obligations under EU law in relation to the definition of statutory and class certificates, the scope of the obligations and criteria laid down for ROs and the duties of the Commission with regard to the recognition, assessment and imposition of corrective measures or sanctions on ROs <sup>(75)</sup>.

Against this background, it is no surprise that there remain some discrepancies between the Code for ROs and EU legislation dealing with ROs. An example is the definition of Recognised Organisations. It has already been mentioned that the Code defines an RO as an organisation assessed by a flag State and found to comply with the provisions in the second Part of the Code. In contrast, Article 2(g) of Directive 2009/15/EC stipulates that an RO is an organisation recognised in accordance with Regulation 391/2009 on common rules and standards for ship inspection and survey organisations <sup>(76)</sup>. The following paragraphs illustrate that several provisions in Part two of the Code for ROs are incompatible with Regulation 391/2009. The definition of an RO

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<sup>(73)</sup> Recital (17) in Council Decision 2013/268/EU of 13 May 2013 on the position to be taken on behalf of the European Union within the International Maritime Organization (IMO) with regard to the adoption of certain Codes and related amendments to certain conventions and protocols, *OJ L* 155/3.

<sup>(74)</sup> Recital (4) Regulation 391/2009 of 23 April 2009 on common rules and standards for ship inspection and survey organisations, *OJ L* 131/11.

<sup>(75)</sup> Annex I to Council Decision 2013/268/EU of 13 May 2013 on the position to be taken on behalf of the European Union within the International Maritime Organization (IMO) with regard to the adoption of certain Codes and related amendments to certain conventions and protocols, *OJ L* 155/3.

<sup>(76)</sup> See the discussion on the supranational framework dealing with the liability of ROs *infra* in part 2.3.

in the Code for ROs would thus not fulfill the requirements of the EU and, would, therefore, not meet the definition of an RO as set out in EU law <sup>(77)</sup>.

The Commission Implementing Directive, for example, notes that the Code for ROs defines “statutory certification and services” as a single category of activities performed by an RO on behalf of the flag State. These activities include the issuance of certificates pertaining to both statutory and class requirements <sup>(78)</sup>. In contrast, the definitions used in Article 2(i) and (k) of Directive 2009/15/EC draw a clear distinction between statutory certificates on the one hand and class certificates on the other hand. Statutory certificates are issued by or on behalf of a flag State in accordance with the international conventions. Class certificates are provided by an RO in its capacity as classification society certifying the fitness of a ship for a particular use or service in accordance with the rules and procedures laid down and made public by that RO. As a consequence, statutory and class certificates are distinct and have different natures under EU law. Whereas statutory certificates have a public nature, class certificates have a private nature and are issued by the society in accordance with its own class rules, procedures and conditions. As a consequence, class certificates issued by an RO for a ship in order to attest compliance with class rules and procedures are documents of a strictly private nature, which are neither acts of a flag State nor carried out on any flag State’s behalf <sup>(79)</sup>.

In the Code for ROs, statutory certification and services are systematically referred to as being performed by the RO on behalf of the flag State. This contradicts with the legal distinction established in EU law. The acceptance of

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<sup>(77)</sup> Recital (20) of the Commission implementing directive of 17 December 2014 amending Directive 2009/15/EC with regard to the adoption by the International Maritime Organization (IMO) of certain Codes and related amendments to certain conventions and protocols, *OJ L 366/83*.

<sup>(78)</sup> Statutory certification and services means certificates issued, and services provided, on the authority of laws, rules and regulations set down by the Government of a sovereign State. This includes plan review, survey, and/or audit leading to the issuance of, or in support of the issuance of, a certificate by or on behalf of a flag State as evidence of compliance with requirements contained in an international convention or national legislation. This includes certificates issued by an organization recognized by the flag State in accordance with the provisions of SOLAS regulation XI-1/1, and which may incorporate demonstrated compliance with the structural, mechanical and electrical requirements of the RO under the terms of its agreement of recognition with the flag State. See in this regard Part 2 (“Recognition and Authorization Requirements For Organizations”), Article 1 (“Terms and Definitions”), paragraph 1.3. of the IMO Code of Recognized Organizations.

<sup>(79)</sup> Recital (21) of the Commission implementing directive of 17 December 2014 amending Directive 2009/15/EC.

this provision of the Code in the supranational order might thus entail a manifest risk that the recognition requirements contained in Regulation 391/2009 and Directive 2009/15/EC could no longer be enforced within the EU <sup>(80)</sup>. Recital (15) of the Implementing Directive 2014/111, however, stipulates that amendments to international conventions may be excluded from the scope of EU maritime legislation when there exists a manifest risk that those amendments could have a negative impact on the objectives of supranational maritime legislation or are found incompatible with it <sup>(81)</sup>. As such, the provisions in the Code for ROs can be excluded from the scope of the Directive <sup>(82)</sup>. Considering the importance that EU instruments (still) play in the field of ROs, the following paragraphs briefly focus on the EU Regulation and Directive dealing with ROs<sup>524</sup>  
(83).

### 3.3. *Liability of Classification Societies at the supranational level*

The EU enacted Directive 2009/15/EC <sup>(84)</sup> and Regulation (EC) 391/2009 <sup>(85)</sup> that deal with the role, recognition and liability of ROs <sup>(86)</sup>.

Directive 2009/15/EC imposes cooperation agreements between administrations and classification societies and deals with potential liability claims in this regard. Member States that delegate certifying functions to ROs have to set out a working relationship between their competent administration and the classification society that acts on their behalf. This working relationship has to be regulated by a formalised written and non-discriminatory agreement or other equivalent legal arrangements. It must contain the specific duties and functions assumed by ROs <sup>(87)</sup>. Article 5.2(b) of the Directive regulates the

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<sup>(80)</sup> Recital (21) of the Commission implementing directive of 17 December 2014 amending Directive 2009/15/EC.

<sup>(81)</sup> Commission implementing directive of 17 December 2014 amending Directive 2009/15/EC.

<sup>(82)</sup> Recitals (21)-(23) & (26) of the Commission implementing directive of 17 December 2014 amending Directive 2009/15/EC.

<sup>(83)</sup> See for an extensive discussion: J.L. PULIDO BEGINES, *op. cit.*, p.487.

<sup>(84)</sup> Directive 2009/15/EC of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations, *OJ L* 131/47.

<sup>(85)</sup> Regulation 391/2009 of 23 April 2009 on common rules and standards for ship inspection and survey organisations, *OJ L* 131/11.

<sup>(86)</sup> See for discussion and further references: J. DE BRUYNE, *op. cit.*, pp. 188 - 189.

<sup>(87)</sup> Article 5 of Directive 2009/15/EC.

financial liability of ROs when their activities cause harm for which the government has been held liable. Under the circumstances set out in that article, the administration is entitled to financial compensation from the RO to the extent that the loss, injury or death was caused by it <sup>(88)</sup>. One of the problems with the Directive is the use of unclear phrasing and undefined terms. For instance, there seems to be no difference in treatment between the notions of “reckless act” and “gross negligence” <sup>(89)</sup>. Consequently, the liability of classification societies might be restricted to major faults and imply that they cannot be liable for minor faults or ordinary negligence. It is rightly argued that excluding minor faults from the scope of the Directive does not fit in the post-*Erika* and *Prestige* era. As such, it would also be justifiable to hold classification societies liable in cases of ordinary negligence <sup>(90)</sup>. Furthermore, the Directive lacks the necessary standards against which the reckless or gross negligent acts of ROs must be evaluated. Whereas specific regulations of classification societies might be relevant, general principles of national tort law could set the level of professionalism expected from a society<sup>525</sup> <sup>(91)</sup>. Finally, it is not clear upon which ground the limitation figures in the Directive are based. The minimums of 4 and 2 million euro, for personal injury or death and other losses respectively, do not reflect the maximum financial liability of classification societies <sup>(92)</sup>.

The Regulation, on the other hand, establishes measures to be followed by ROs to comply with the international conventions on safety at sea and prevention of marine pollution, while at the same time furthering the objective of freedom to provide services <sup>(93)</sup>. Member States wishing to obtain recognition for an organisation have to submit a request to the European Commission (Article 3). The organisation needs to comply with the minimum criteria set out in Annex I and with several other provisions in the Regulation itself (e.g. Articles 9 <sup>(94)</sup> and 11 <sup>(95)</sup>). Annex I of the Regulation contains the general and special

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<sup>(88)</sup> Article 5 of Directive 2009/15/EC.

<sup>(89)</sup> J.L. PULIDO BEGINES, *op. cit.*, pp. 524 - 527.

<sup>(90)</sup> J.L. PULIDO BEGINES, *op. cit.*, p. 526 referring to J. ARROYO, *Problemas jurídicos relativos a la seguridad de la navegación marítima (Referencia especial al 'Prestige')*, in *Anuario de Derecho Marítimo*, 2003, 20, pp. 39 - 40. Also see article 3 TEU: *The Union's aim is to promote [...] well-being of its peoples*.

<sup>(91)</sup> J.L. PULIDO BEGINES, *op. cit.*, p. 529.

<sup>(92)</sup> N. LAGONI, *op. cit.*, pp. 324 - 325.

<sup>(93)</sup> Article 1 of Regulation 391/2009.

<sup>(94)</sup> Recognised Organisations have to ensure that the Commission has access to the information necessary for the purposes of the assessment referred to in Article 8(1). No contractual clauses may be invoked to restrict this access.

<sup>(95)</sup> Recognised Organisations shall set up by 17 June 2011 and maintain an independent quality assessment and certification entity in accordance with the applicable international quality

minimum criteria for classification societies <sup>(96)</sup>. The Regulation also grants power to the European Commission in several ways. The Commission, together with the Member State which submitted the request for recognition, has to assess the ROs at least every two years. The assessors have to check whether the RO complies with the requirements and criteria in the Regulation (Article 3). When the Commission considers that an RO does not comply with the minimum criteria set out in the Annex, it can require the RO to undertake the necessary preventive and remedial action (Article 5). The Commission can also impose fines on ROs when there has been a serious or repeated failure to meet the minimum criteria or obligations set out in the Regulation, when the RO's bad performance is due to serious internal failures or when it has deliberately sent incorrect or incomplete information to the Commission. The Commission can decide to issue periodic penalty payments against the RO if it does not implement the required remedial and preventive measures. (Article 6). Finally, the Commission can decide, upon request from a Member State or upon its own initiative, to withdraw recognition as a result of serious and repeated failures to meet the minimum criteria or requirements included in the Regulation (Article 7).

#### 4. Conclusion

The contribution briefly shed light on some evolutions in the field of the liability of classification societies. Classification societies have already been held liability at several occasions, both towards shipowners and third parties. Recent decisions show that classification societies can benefit from sovereign immunity when acting on behalf of flag States as ROs. Moreover, some decisions also illustrate that the distinction between the private and public duties of classification societies and the influence on their immunity loses importance. As a consequence, classification societies would even benefit from immunity when acting pursuant to their private role and performing contractual services under the classification agreement. In addition, the article discussed inter- and subnational legislation dealing with (the liability of) classification societies. Several regulatory changes have occurred at the international level. These changes especially deal with the role and position of ROs. However, none of the

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standards where the relevant professional associations working in the shipping industry may participate in an advisory capacity.

<sup>(96)</sup> See for discussion: J.L. PULIDO BEGINES, *op. cit.*, pp. 487 - 543.



existing inter- and supranational instruments address the liability of classification societies in their private role towards the shipowner (contractual) or third parties (extra-contractual) <sup>(97)</sup>.

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<sup>(97)</sup> See in this regard also the discussion and references in J. DE BRUYNE, *op. cit.*, pp. 181 - 232.

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