

SHIPBUILDING AND CLASSIFICATION OF SHIPS. LIABILITY TO THIRD PARTIES

*José M. Alcántara, LL. B.**

UDK 347.791.2
347.445:347.791.2
Izvorni znanstveni rad
Primljeno: lipanj 2007.

The role of the Classification Societies has changed today. Their task projection addresses issues of safety in navigation and protection of human life at sea and of the marine environment. The importance of their technical expertise is to be outlined in the perspective of third-party rights and general duty of care. The Classification Societies do not have an international regulation that will define their liability at present. They effectively protect themselves within the framework of the classification contract with Owners. Classification Societies, as much as Shipbuilders, have a responsibility for damage to third parties out of negligence in the performance of their work. They are exposed to Court decisions in the various jurisdictions. As international Convention is necessary and to that effect the works of the CMI should be taken into account.

Key words: shipbuilding and classification, duty of care and reliance by third parties, liability regime for Classification Societies, maritime safety

PREAMBLE

It appears that everything has been said and written about the liability of the Classification Societies in relation to new buildings. It would seem true that, despite a considerable amount of specialised literature, market statements and decisions from learned Judges, their legal position is still far from consolidated and that their views are not unanimous. The accident of the “Prestige” in November 2002 brought about an interesting new question, namely, whether

* José M. Alcántara, LL. B. maritime lawyer and arbitrator, AMYA Abogados, Princesa 61, Madrid, Spain

a Classification Society is liable for damages to the third party Government having jurisdiction over the waters in which the casualty took place.

The Courts of Justice, in some countries, have progressively pointed out the fact that there is social reliance upon the expertise of Classification Societies and, thereby, their liability in tort toward third parties. That is a trend which poses many questions but which seems to be steaming ahead in Civil-law jurisdictions. Meanwhile, after important progress, the contractual framework, binding upon Owner and Classification Society, which has been evolving toward a voluntary Code of Conduct, was blocked at the limitation of liability clause, over which an agreement could not be reached.

The reaction of the Classification Societies has been fundamentally one of self-regulation. New rules about technical audits, increase of in-house control over surveys, amplified scrutiny of classification requirements, etc., etc. were developed. The IACS has not, however, accepted an international regulation by way of Convention or any form of international compulsory scheme.

While the ambit of the classification contract lives in the domain of the terms and conditions drafted by the Classification Societies and, therefore, within the boundaries of freedom of contract, I will not pay attention to their contractual liability in these pages.

The subject that presents the utmost interest and stands to be the real issue is, indeed, the perspective of the third parties, who are affected by the acts and omissions of the classification surveyors. However, it seems to me that much of the channelling of liability to Classification Societies occurred by necessity in the absence of or together with other performers, or by detection of opportunity for a potential case of severability, or by criteria residing in the law of consumers or, indeed, for pursuing tort actions where no contractual rights were available.

Unfortunately, some such actions hit the target successfully but did not throw enough light on issues such as the role of Classification Societies, their duty of care and the basis of their liability. Despite some decisions of certain impact, to many the position is unclear as to whether the Classification Society is a product guarantor, a quality guarantor, a technical auditor, a service insurer, a safety provider, a guardian of the builder, or etc. Classification Societies themselves know clearly who they are and exactly what they do, namely, "classification" of a ship or of certain materials. But their understanding is not perceived with similar clarity by the laymen and the merchants operating beyond the realms of Builders and Owners. The Courts of Justice, in particular, are not familiar with

classification works and often try hard to depict the function of Classification Societies by reference to analogous industrial or economical tasks.

The right approach must be found then. Perhaps we must look to the very source of the problem, namely, the “doctrine of risk creation”. In the world of the XXI century the transportation of hazardous cargoes by sea is rather a serious and specific risk. The construction of tankers, chemical carriers, nuclear carriers and potentially dangerous ships is a matter of general concern and so important to the human life at sea and to the marine environment that it cannot be left to the involved parties alone. The vicarious liability of shipbuilders and Classification Societies arises from such consideration attaching to the general interest or to general safety.

Yet, which role must the Classification Society play in such a context of general safety? Should there be a change from their original role? Can we all expect them to be and to act differently from what they actually are? These questions may not find an accurate response in this essay. I shall try, though.

1. Ship Construction as a risk General liability of the Builder toward third parties. Control of safety

The risk exposure to users and to all those affected by the ship’s navigation and carriage of goods starts with her construction. The risk is created by building a ship that may not be safe. The risk derives from various sources mainly: faulty design, inadequacy of materials and appliances and defective construction. Buyers seek and effectively secure protection against these wrongs through the building contract which defines the scope of the Builder’s liability. However, as the ship is delivered and used in navigation damages may be caused to third parties which became attributable to such causes “ex origine”. The Builder cannot then oppose the exceptions contained in the building contract.

In almost all jurisdictions worldwide the tort liability of the Builder (shipyard) towards third parties is allowed by statute or otherwise by general provisions or Product Liability Law. The time bar rule is usually restricted to one year in Civil Law countries, but no limitation of liability is provided.

Fault of design is a risk that the contracting partners tend to allocate one to another according to the contract form, including the warranty period but not beyond. The Classification Societies are normally strangers to design matters, so a third party could only address his claim against the Owner, Builder and Design Projector, unless the Classification Society had checked the design.

Defective workmanship and inadequate materials resulting in defective construction is seemingly another matter, because the Classification Society plays a relevant part then and later and during the operational life of the ship. From the commencement of the ship's construction a particular Classification Society is appointed by the Owners to ensure a high technical standard and eventually to issue the Classification Certificate. The new BIMCO form for a standard new building contract NEWBUILDCON, at Section 1.2 contemplates that "the vessel shall be designed, constructed, surveyed, tested and delivered in accordance with the rules, regulations and requirements of the Classification Society". Thus the Classification Society shall have the final decision, binding the Yard and Owners as to the vessel's compliance with their rules and requirements; the Classification Society shall also have a say over protective coatings, which must be in accordance with the IACS Common Structural Rules for bulk carriers and for oil tankers; importantly enough, the Classification Society shall approve of plans and drawings; the Classification Society shall be in direct communication with the Builders and the Owners' representative throughout the construction; it will supervise tests, trials and inspections, as deemed necessary; the Classification Society may set out requirements on modifications and changes; its representative must be present at the vessel's trials. The Classification Society shall particularly act to settle technical disputes and, in relation to compliance with Classification requirements; the Classification Society shall issue the Classification Certificate, the validity of which is essential for arranging insurance coverage and for market confidence.

The Classification intervention in the building process of the vessel is means of fulfilling an underlying objective, the enforcement of safety standards through private methods. In that mission of control over the ship's safety the Classification Society does not cross with or touch upon the regular controls carried out by the maritime administration of the State where the ship is registered. It has a different purpose, namely, the assigning of a class rating to the vessel and allowing it to be maintained, but the approaches are similar. The Classification Society conducts surveys at regular intervals under the particular classification rules, and such surveys are relevant enough to imply a permanent control over the vessel's safety. For example, the general survey procedure includes examination of the parts of the ship under watch by the class rules, examination of the methods used by the owner or the yard for maintenance and repairs and more detailed verifications using spot checks and cross checks. Classification Society carries out special surveys, annual surveys (the class surveyor becomes the sole

judge of the state of the ship and its equipment) and occasional surveys in the cases of vessel's grounding and maintenance work. It is in the area of the periodic survey where much criticism was laid by the Spanish Government's claim under the "Prestige".

The presence of the Classification Society in the vessel's construction and in her subsequent trading employment is important and decisive, though it never deprives or relieves the Builder from his liability. So, as it is generally agreed that Classification Society play a major role in safety at sea, any third party victim of an accident caused by an unsafe ship may wonder whether the Classification Society should be, or not be, one more party responsible for guaranteeing that the ship navigates in safety. Not the only such party, but possibly together within the builder, the owner and even the Flag State regulatory bodies. There lies the question of liability of Classification Society toward third parties.

2. The duty of care. Reliance by third parties

Classification Societies are commonly said to owe a "duty of care" to their customers, the ship owners and such a duty is a fundamental obligation under the classification contract. The obligation extends to the shipbuilding yards since the classification contract brings considerable benefits to the Builders of the ship. Within a contractual framework the issue presents little controversy. Shipowners require classification for their ships in order to comply with international conventions and the national laws of flag states. Shipowners are also required to classify their vessels in order to provide their P&I Clubs with accurate information regarding the condition of their ships. Equally important, shipowners must satisfy Marine Insurers as to classification in order to obtain coverage of risks for a particular ship. Also shipowners need their vessels to be classed in order to enter into fixtures with Charterers, and to arrange financial assistance from banking institutions. Last but not least, shipowners have a responsibility toward their seafarers to ensure that the vessels wherein they work are safe and provide adequate living conditions. Thence, the duty of care on the part of the Classification Society is something Owners are entitled to and effectively must rely upon.

However, the duties of the Classification Societies are governed by the terms and conditions of the contract (asserted in "Continental Insurance Co. V. Daewoo Shipbuilding", New York, 18.07.1988.86 - Civ 8255 (RLC)).

The contractual duties relate to examining drawings and surveying construction work before issuing certificates of classification, then classify the vessels in accordance with rules and standards established by the Classification Society and exercising due care in detecting defects in the ships and informing Owners and Charterers (case “The Great American”). The Classification Society, however, may protect itself and exclude its contractual liability for breach of contract or negligent performance by relying on the so-called “exclusion clauses” and may also limit their liability in contract. The Courts in the U.K., U.S.A. and France have conducted rather interesting analysis on the validity and extent of such protection clauses.

Yet, liability in tort arising outside any contractual framework remains to be the most concerning matter for a Classification Society when it has caused damage to third parties through its negligence. In Civil Law systems (e.g., France and Spain), the indemnity principle is solidly established according to the Roman rule of “*neminem laedere*”. The principle is particularly relevant against a Classification Society when a ship is sold and the purchaser relies on the accuracy of the class certificate provided to the seller (case the “Elodie”, Court d’Appel de Versailles, 21.03.96. Dalloz 196, 547).

Under English Law, extra-contractual liability is based essentially on the existence of the duty of care, incumbent upon certain persons under certain circumstances. The position as to whether a duty of care is owed by a Classification Society to a third party is far from being absolute. In the case of the yacht “Morning Watch”, the High Court refused to give satisfaction to the purchaser, where the yacht was shown to be unseaworthy despite having a class certificate, holding that there was not sufficient proximity between the economic loss sustained by the purchaser and the role of the Classification Society (High Court of Justice, QBD, Commercial Court, 15.02.1990).

The famous case of the “Nicholas H” (High Court of Justice, QBD. Commercial Court, 02.07.1993, 2 LL- R. 481) constitutes the leading doctrine in the U.K. The Court of Appeal found that the Classification Society had no duty of care as regards the interest of the cargo owner, who had sustained damages out of the deficiencies, breakdown and sinking of the ship with a cargo of zinc and lead. This precedent has been favourable to Classification Societies, assertable on the reasoning that the Shipowner cannot delegate his obligations as to safety to the Classification Society.

In the United States, the duty of care to third parties was not established through either of the cases “Great American” and “Marine Sulphur Transporter”.

tation Corporation". The N.Y. attorney Brian Starer considers that there is a duty of care recognised (in the "Great American" case), though the question of the casual nexus between the Classification Society's negligence and the loss of the vessel has to be established. This is the heart of the liability issue being currently fought under the "Prestige" case in the United States Courts.

Reliance by third parties on the surveys and certificates of Classification Societies on the crucial matter of the safety of the vessel is extremely relevant in the context of today's trade but it remains undefined and unresolved in the main jurisdictions.

3. A liability regime for the Classification Societies?

Lord Steyn (in the "Nicholas H" decision) stated that "the present-day role of the Societies is to promote safety of life and ships at sea in the public interest". This thought, expressed twelve years ago, is paramount for understanding the overall concept of SAFETY intended for maritime navigation in 2007.

Classification, it must be granted, does not cover the manning, the maintenance and operation of a particular vessel, which all belongs to the area of the shipowners' liability. But the classed ships are periodically surveyed by the Classification Society, and by the Flag State, so as to maintain their initial classification. To date, and still today, information regarding classification is confidential and becomes the property of the shipowner. This "policy of confidentiality" is seen by many as opposed to the "public interest" and to undermine the efforts of the maritime industry in eradicating substandard ships.

While it is generally accepted that the contractual liability of Classification Societies lives within and cannot extend beyond the boundaries of the contract with the shipowners, let alone (??) the enforcement and effectiveness of some ultra-protective clauses, there is a growing market demand for a legal definition of their vicarious liability to parties who are outside the contract and against whom the exclusion clauses have no effect. Also the growing risk of huge damage claims creates an ultimate uncertainty about the survival of the Classification Societies. As F. Wiswall has put it, the absence of a legal system to protect Classification Societies raises a serious problem which threatens their very existence.

We have heard (at Lloyd's List, 5 March 1997) that "if Classification Societies are forced tomorrow to assume responsibility for every measurement

or decision taken by their surveyors, legal experts will probably have to take priority over technicians, in order to set up systems of defence that could alter the nature of classification. In such a new system, where the surveyor's subjective judgment and statistical inspection methods would become meaningless, it is by no means certain that safety at sea will emerge with any improvement". This view is, let me say, "classical" and based on the even ground of "science versus law". There is a lot of bias in it. Not only because Classification Societies have well-equipped legal teams for defending their interests nowadays, but also because their technical expertise must not suffer from a test of liability, as is the case with most of the services providers.

The CMI attempted to provide, in 1996, a practical answer by issuing model contract clauses and principles of conduct to define the role and obligations of classification societies toward their shipowner clients and toward third parties. The CMI's work was very clarifying in nature insofar as it set out a Code of Conduct for Classification Society including standards of practice and performance, completed by model contractual clauses for inclusion in agreements between the Societies and Governments and for terms of agreements between the Societies and Shipowners. It was an excellent contribution to a field in which only clauses drafted by the Classification Societies themselves had prevailed and where there was no balanced order nor any uniform scheme for all the classification contracts, whether within the IACS or outside. However, the CMI's project was unsuccessful and the market did not finally adopt it. With regard to the exposure of Classification Societies to claims from third parties, the CMI did not intend to give the Societies any immunity from lawsuit upon a claim arising out of the activities related to the rules for classification of ships. Indeed, the contract model clauses proposed may have no effect upon a third party non-contractor. The CMI, also took the view that the Classification Societies should be afforded protection under an international convention on Limitation of Liability, e.g. the London Convention of Limitation of Liability for Maritime Claims 1996. The CMI proposals were a positive step, nonetheless, promoting and provoking a debate on the subject of an international rule for Classification Societies.

According to the excellent analysis of S. Durr the sides divide up between the arguments against liability of Classification Societies (the shipowner's non-delegable duty to provide a seaworthy vessel, the Classification Society's brief contact with the vessel, the Classification Society as absolute insurer of the vessel it surveys, the return to the credibility on the IACS) and arguments favouring

such liability (shipowners as clients of classification Societies, a deterioration in the conditions of ships, competition between Classification Societies lowering standards, the shipowner as an ineffective protector of the “public interest” and the failure of Flag State Control). The confrontation of such views, pros and cons, has led to a deadlock in the international arena, leaving the national Courts to re-examine the issue of liability under their domestic laws, while the IACS further pursues reforms under a spirit of self-regulation only.

The approach is not correct in my own view. Nothing will come out of a debate over “rights and wrongs” of a liability system for Classification Societies because there are many interests at stake which would rather opt for the continuity of the present no-law status, no matter the surprises that might arise in certain jurisdictions. The issue is quite another, namely, whether in an era of International Conventions, of the ISM, of Product Liability, of rules of strict liability for risk-attaching activities, of regulation of quality control systems, of utmost efforts in the protection of human life at sea and the marine environment, of the liability of independent contractors and altogether of a world campaign for “safer ships” and for “quality shipping”, the liability of the Classification Societies to third parties should remain undefined and loose at the international level.

Very few would dispute that Classification Societies provide a service that is decisively important to the ship safety and that any wrongdoing or negligence in their performance may result in very adverse consequences to crew members, cargo owners, the shoreline, property interests both at sea and ashore, States, etc., always provided that a causative link between the act or omission of the class surveyor and the accident may be established. Therefore, since Classification Societies engage in an exercise of control from the design of a vessel through the maintenance of class during her trading life, it would appear that their task is of “public interest” and that their good work must GUARANTEE that the ship is employed according to safety technical standards, on which not only Insurers and Charterers but, given today’s attitudes, all persons and interests affected by the ship’s trade have a necessity to rely upon.

The CMI’s project could be useful as a first step towards an International Convention that would set out a liability regime for Classification Societies. Such a regime should deal with contractual liability, setting a balanced play of principles, terms and conditions, and also should enact a framework of liability toward third parties allowing for the right of limitation (whether on account of the fees charged, on account of the vessel’s tonnage or based on a compromise

between both). An International Convention will certainly protect the Classification Societies against the legal uncertainty flowing from lawsuits in national jurisdiction (e.g. the “Prestige” lawsuit against ABS in the U.S. Courts), and the regulatory solution should be one of its own, and nothing made part of a piece-meal set of rules or patched into other Convention instruments (like the Himalaya Clause-type of regulation of terminal operator’s liability under the UNCITRAL instrument of door-to-door transport). We have had enough caselaw and scholarly discussion about the subject to take advantage of that extensive research when drafting an International Convention. Therefore, the question about the liability of Classification Societies must not be “what?” but “how?”.

CONCLUSION

In the last 5 or 7 years, there have been suggestions of various kinds to the effect that the IMO should take over from classification societies the development for ship construction. The IACS responded in favour of a closer “integration” between classification rules and IMO safety objectives by way of IMO taking the responsibility for setting overall safety goals based on risk acceptance criteria with IACS undertaking to develop a basis for developing structural requirements. Very fine language to mean that, politically, the class system we have today should prevail.

The European Union has taken a stricter stand over compliance with a maritime safety policy and has shown a clear determination to fight substandard tonnage. In 1994 Directive 94/57/CE of the Council was adopted to bring about a regime of control over the Classification Societies that were to inspect vessels by delegation from State Members. The Directive was amended in 2001 by the Directive 2001/105/CE of the Parliament and the Council with the intention of improving the inspection methods and also of tightening the compliance by the admitted Classification Societies. After the “ERIKA” packages the EU has reinforced its desire for security and control over the Classification Societies, which “are key elements in the chain that guarantees the quality of the shipowners who trade in European waters” (T. Barrot).

The solutions seem still to be elusive and each body or regional power appears to have chosen for the area in which it will take steps. There must be an international consensus over the role and liability of Classification Societies

for 2007 and beyond, and that should lead to an International Convention, from which the Classification Societies themselves, the Flag States, the Marine Insurers, the shipowners and the recipients of the risks will benefit.

Sažetak

José M. Alcántara *

BRODOGRADNJA I KLASIFIKACIJA BRODOVA. ODGOVORNOST PREMA TREĆIM OSOBAMA

Uloga klasifikacijskih društava u današnje vrijeme se promijenila. Njihov zadatak odnosi se na pitanja sigurnosti plovidbe, zaštite ljudskog života na moru i morskog okoliša. Važnost njihove tehničke ekspertize naglašena je s obzirom na prava trećih osoba i dužne pažnje. Trenutačno ne postoji međunarodno pravno uređenje klasifikacijskih društava koje bi definiralo njihovu odgovornost. Ta društva efikasno štite svoju pravnu poziciju ugovorima s brodovlasnicima. Klasifikacijska društva, jednako kao i brodograditelji, odgovorna su za štetu prouzročenu trećim osobama zbog nepažnje u obavljanju svojih poslova. Ta su društva izložena sudskim postupcima u različitim državama. Potrebna je međunarodna konvencija koja bi uredila ulogu i odgovornost klasifikacijskih društava i u tom smislu valja upozoriti na djelatnost Međunarodnog pomorskog odbora.

Ključne riječi: brodogradnja i klasifikacija brodova, dužna pažnja i povjerenje trećih osoba, uređenje odgovornosti klasifikacijskih društava, sigurnost na moru

* José M. Alcántara, pomorski pravnik i arbitar, AMYA Abogados, Princesa 61, Madrid, Španjolska

