The role and liability of classification societies

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Oslo, 21.4.2010
Classification societies...

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Introductory remarks

Why Cl.S. were born?

- To ensure safety and quickness in maritime commerce
- Classification process covering a wide range of technical objects (design, construction, maintenance and operation), in accordance with the rules of the respective Cl.S.
- Class certificates: evidence of seaworthiness
- Private role: safety of property
- Strong self-regulation
To the benefit of whom?

- Initially, to protect (hull & P.I.) insurers from insuring unseaworthy vessels
- Important also to charterers, cargo owners, cargo underwriters, buyers, bankers and others requiring to know the ship’s condition
- Indirectly to the society as a whole
Objectives of the ABS (1867):

“... The collection and dissemination of information upon subjects of marine or commercial interest; the encouragement of worthy and well-qualified commanders;... The promoting of security of life and property on the seas; The provision to shipowners, shipbuilders, underwriters, shippers and all those interested in maritime commerce of a faithful and accurate classification and registry of mercantile shipping...”
States regulate also seaworthiness to protect the public interest

- Delegation of supervisory powers to Cl.S.
- SOLAS 1974, LLC 1966, MARPOL 73/78
- Public role as a sign of recognition
- Extension of functions
- Need to survey the surveyors
- Restriction of self-regulation
Private v. public role

✓ Diversification of tasks
  1.1. Human error as accident factor
  1.2. Extension of surveys to management policies
  1.3. ISM Code (IX Chapter SOLAS)

✓ Decline in the quality of control
  1.1. Conflicting pressures
  1.2. Class shopping
  1.3. Proliferation of Cl.S.
How the controller can be controlled?
A. Regulation
B. Self-improvement
C. [Tort Liability]
A. Regulation


☑ Objectives:

1. Uniform professional standards for surveyors
2. Uniform implementation of international conventions
3. Freedom to provide services within EU
4. Greater involvement of MS
5. Removing substandard vessels from EU waters
Main features of the system:

1. **Recognition procedure**
   1.1. Common minimum criteria set by Reg. 391/2009 relating to the quality and safety performance of the organization (general & specific)
   1.2. Recognition granted by the Commission upon request by the MS
   1.3. *A posteriori* monitoring by both MS + Co
   1.4. Deficiencies to be addressed by the Commission through preventive and remedial action (e.g. fines, periodic penalty payments)
   1.5. Withdrawal of the recognition by the Commission
   1.6. Exchange of information between Cl.S. and with the State authorities
2. Rights and duties of MS

2.1. Authorizing *only* recognized organizations

2.2. Authorizing *any* recognized organization

2.3. Restrictions permitted on transparent and objective grounds

2.4. Working relationship between Administration & Cl.S. based on written and non discriminatory agreement (financial liability, audit, local representation etc).

2.5. Report on deficiencies
B. Self-improvement & cooperation

✓ IACS aims at implementing a high standard certification system, mandatory for its members

✓ Competition investigation into IACS (2009) regarding a) criteria ruling membership and b) accessibility of IACS resolutions and technical background

✓ Commitments offered (case COMP/39416: Ship Classification)
Main contents of the offered commitments:

- Single class of membership
- Objective, transparent and non discriminatory criteria
- Compliance with Quality System Certification Scheme (QSCS) to be assessed by independent bodies
- Participation of non-members in IACS technical work
- Access of non-members to IACS resolutions and technical background
- Possibility of further information on individual basis
Liability issues

- **Liability in contract**
  
  (main issues: exemption clauses, qualification of inspector’s duties, shipowner as a consumer)

- **Liability in tort**
  
  1. Full compensation by the negligent shipowner may be prevented by legal (limited liability) or factual obstacles (no assets)
  2. Many third parties involved (cargo, seafarers, non maritime interests)
  3. In some legal systems, a claim may be established in both tort and contract
  4. Comparative perspective
“Nicholas H.”

Facts:

- The loaded vessel deviated and anchored off Puerto Rico, due to a crack in her hull.
- The surveyor demanded repairs to be carried out.
- After temporary repairs, the vessel was allowed to proceed to next port.
- One day after, she sank with the loss of all of her cargo.
- Cargo-owners settled their claims with the shipowners and filed a tort claim against NKK to recover the balance of $5,5 million.
Cont’d…

- **Commercial Court**: Cl.S. bears a duty of care
- **Court of Appeal**: no such duty exists
- **House of Lords** affirmed CoA

For a duty of care to be accepted, plaintiffs must prove:

1. foreseeability
2. proximity
3. that it would be fair, just and reasonable to impose a duty of care
Relevant factors:

✓ No direct physical damage, because NKK’s role was subsidiary
✓ No reliance on the surveyor’s recommendation
✓ Likely impact of the imposition of a duty on the insurance system and international trade (it would destroy limitation of liability & increase potential exposure of Cl.S. to cargo claims) – Public policy issue
✓ Impact on traditional role of Cl.S.
✓ Recognition of duty would inevitable extend to any type of survey
Tort Liability – American Law


- As a matter of law, an injured 3rd party has a cause of action based upon *negligent misrepresentation*

- Restatement 2nd of Torts, S. 311 (physical damage) & S. 552 (pecuniary loss)
Continued...

**Conditions for negligent misrepresentation (S.311):**

1. Negligently providing false information
2. Recipient has taken action relying on that information
3. Physical harm as result from that action
4. Injured party is one whom the defendant knows or should expect to be imperiled
5. Negligence may consist of failure to exercise reasonable care in ascertaining info or in the manner of communication
In particular for pecuniary loss:

1. Defendant professionally supplies info for the guidance of others
2. Provision of false info
3. Fails to exercise reasonable care
4. Plaintiff is expected to receive info
5. Plaintiff justifiably relies upon the info
6. Plaintiff suffers a pecuniary loss as a result
Possible defenses of Cl. Sties:

- **Privity of contract** (the fact that the Cl. S. does not directly supply info to 3rd parties bars action)
- **Warranty of Seaworthiness** (enrollment does not warranty seaworthiness) – “Great American Insurance”
- **Exculpatory clauses** (no representation to 3rd parties / no responsibility for losses sustained by 3rd parties)
- Superseding Cause (owner’s knowledge of deficiencies)
German Law

- Principe of self-dependent decision making & obligation of 3rd parties to inform themselves properly
- Experts may be held liable for advice, if there is a contractual relationship or they have negligently violate a right or interest protected by the law in tort
- Insufficient protection, as the law (823(1)BGB) does not allow recovery of negligently inflicted pure eco loss
- Extension of 3rd party liability in case law, without clear dogmatic foundation
Cont’d...

Legal bases used by German courts:

- Contract for the provision of information, implicitly entered into with a 3rd party
- Culpa *in contrahendo* (contractual diligence due during negotiations)
- Contract with protective effects towards 3rd parties
Contract with protective effects:

- Extension of collateral obligations to 3rd persons falling within the protective ambit of the contract
- Breach of the obligation by fault
- Defining the protected parties:
  1. proximity of performance
  2. justifiable interest in the protection of the 3rd party
  3. ability to foresee the protected group
  4. 3rd party must merit protection
Does the concept apply to Cl.S.?

- Difficulties to define the group of claimants (danger to break down risk allocation)

- Selected 3rd parties:
  1. Purchasers to be excluded (equivalent claims)
  2. Hull underwriters = contested
  3. Shippers & freight forwarders = contested
  4. Cargo underwriters = contested
  5. Crew members & passengers: in principle yes for physical damages
French Law

✓ Arts. 1382-1384 CCiv
✓ "Every act whatever of man which causes damage to another obliges him by whose the fault the damage occurred to repair it”
✓ Case law related to ship-buyers (Elodie II)
✓ Cargo insurers (Wellborn case – 2004)
✓ Groupes de contrats
Greek Law

- Art. 914 C.Civ. (unlawful act, fault, damage, causal link)
- Unlawfulness requires in principle breach of a legal provision protecting the interests of the injured parties
- New approach: breach of the duty of care imposed by good faith and business ethics
- Unlawful if physical damage, breach of an international law provision or a penal law one. Classification may be also considered as an independent verification process.
Case “Dystos” : Unlawful act (breach of SOLAS obligations & of penal code) + causal link issue

Case “Carbotrade” (1997): Court of Appeal choose Greek Law as applicable law

“Greek Law recognizes a general obligation of safety and care, the breach of which may engage the liability in tort of the Cl.S.”
Comparative results

- Expanded role of Cl.S. leads to greater accountability
  - *One of the means* to achieve that, is increased exposure to 3rd party liability
  - However, concerns that Cl.S. would be transformed into a secondary insurer.
  - Question whether it is fair and reasonable to impose 3rd party liability on Cl.S, without the privilege of limitation
Limitation of liability

- “deep pocket” with unlimited tort liability?
- Limitation of liability provisions included in class documents unlikely to be enforced against 3rd parties for public policy reasons (direct –benefit estoppel)
- Contrast with the legal regime of shipowners charged with the non-delegable duty to ensure seaworthiness
- Need for some form of limited liability to avoid ruinous exposure through national or international legislation.