Journal of Maritime Law & Commerce, Vol. 36, No. 4, October, 2005

The EU Law on Classification Societies: Scope and Liability Issues

Juan L. Pulido Begines*

I
INTRODUCTION

The aim of this paper is to cast a glance at the current European Law on the subject of classification societies. This is a complex issue that gives rise to many difficult problems. Therefore, my analysis will be devoted mainly to considering the concept of the "recognised organisation" and its responsibility, and also to some important related matters that must first be studied in order to understand properly the implications of Directive 94/57/EC. My starting point is the background of the European Law. Then the paper surveys the scope of the Directive, and introduces the concept of the recognized organization. Finally, the liability regime laid down by the Directive will be studied, with special attention to the liability of the recognized organization.[1]

A. The Dual Role of Classification Societies in Modern Shipping

Nowadays, the activities performed by those societies are usually classified into two large fields.

First, there are what are normally called "classification services," private tasks, such as issuing rules for safe shipping and performing surveys to ensure that those rules are being applied. This activity is prompted mainly by private interest, but indirectly it benefits the public interest in maritime safety, because it helps to prevent accidents. Classification societies perform

*Professor of Maritime Law, University of Cádiz. Ll.B., Ll.D., University of Cádiz.

[1]It is not my intention herein to consider other matters relevant to the recognized organization, such as the process for its recognition, the quantitative and qualitative criteria for obtaining such recognition, or the system for monitoring classification societies when they are performing statutory duties.

a vital function with respect to the insurability[2] and the marketability[3] of vessels, so over the years the maritime industry has grown to depend heavily on them for such services.[4]

Secondly, there are what are usually known as certification or statutory services: police tasks performed by classification societies exercising powers delegated by national authorities. Among these services are enforcement of maritime safety standards contained in international conventions, generally through surveys and inspections and the issue of official certificates of conformity.

Therefore, it can be said that classification societies perform a dual role in the present situation, and have both a public and a private aspect, although both aspects foster the same goal of safe ships and equipment.[5] Whereas classification functions are, at least in theory, voluntary, the statutory functions of classification societies are compulsory.[6]

B. Statutory Functions of Classification Societies

Maritime safety law provides currently for a great number of control systems devoted to make sure that ships are in adequate condition for their traffic.[7] The mechanism is predominantly one of ship surveys and the issue of certificates, as laid down in the relevant conventions (SOLAS, MARPOL and Load Lines, for example). The survey is mainly preventive: its object is to detect defects in order to prevent a ship from going to sea in a condition

---

[2]Classification used to be a prerequisite to coverage in hull, cargo, and P&I insurance. See C.E. Feehan, Liability of Classification Societies from the British Perspective: *"The Nicholas H,"* 1997 Tul. Mar. L. J. 163, 164 (1997); J.C.B Gilman, 3 Arnould's Law of Marine Insurance and Average 40-41 (16th ed. 1997); N.G. Hudson & J.C. Allen, The Institute Clauses 95-99 (3d ed. 1999); H.G. Lay, The History of Marine Insurance, including the Functions of Lloyd's Register (1925); R. Merkin, Marine Insurance Legislation 147-148 (2000); D.L. O'Brien, The Potential Liability of Classification Societies to Marine Insurers under United States Law, 7 U.S.F. Mar. L.J. 403 (1995).

[3]Iain S. Goldrein & Paul Turner, Ship Sale and Purchase 96-139 (4th ed. 2003); José María Ruiz Soroa & José Luis Gabaldón García, *Manual de Derecho de la Navegación Marítima* 241 (2d ed. 2002).

[4]Jürgen Basedow & Wolfgang Wurmnest, Third-Party Liability of Classification Societies: A Comparative Perspective, 7-9 (2005); Thor Falkanger, Hans Jakob Bull & Lasse Brautaset, Introduction to Maritime Law: The Scandinavian Perspective 82 (1998); W.N. France, Classification Societies: Their Liability—an American Lawyer's Point of View in Light of Recent Judgments, 1996 Int'l J. Shipping L. 67, 69; T. Gomez Prieto, *Las sociedades de clasificación de buques,* 11 *Anuario de Derecho Marítimo* 257 (1994); J. B. Hutchinson, Practical and Political Considerations, in Classification Societies 27-35 (J. Lux, ed. 1993); M.A. Miller, Liability of Classification Societies from the Perspective of United States Law, 22 Tul. Mar. L. J. 75, 75-82 (1997); Yvette Saunière, *Le Bureau Véritas: société internationale de classification de navires et d'aéronefs et sa responsabilité* (1932).

[5]Philippe Boisson, Classification Societies and Safety at Sea: Back to Basics to Prepare for the Future, 18 Marine Policy 363, 371 (1994); Gomez Prieto supra at 294.

[6]Id. at 293.

[7]See Guidelines on Surveys and Inspections under the Protocol of 1978 relating to the SOLAS and MARPOL Conventions, IMO Resolution A.413 (XI), 15 November 1979.

unfit to do so. The certificates, in turn, prove the conformity of ships to the international requirements of maritime safety.[8]

There is a general agreement that the existing substantive international maritime safety rules create overall an acceptable standard. The conventions' provisions have been incorporated into the national law of almost all the relevant maritime countries. Today, the problem is inadequate compliance with those rules.[9] Before creating any new regulation on the subject, therefore, the maritime community has to face the fundamental problem of how to enforce the existing rules.

In international maritime law, ensuring the compliance of ships with uniform international standards for safety and prevention of pollution of the seas is the responsibility of flag and port States. It is thus in UNCLOS[10] and in European Union law.[11] The flag State can perform its legal inspection functions on its own, through competent public servants or governmental bodies. But a flag State can also delegate all or part of its power of inspection to a third party.[12] In practice, the extent of that delegation varies, but it is nevertheless the preference of many governments, which have delegated all or some of their supervisory powers to classification societies.[13] It can

---

[8]See Philippe Boisson, Safety at Sea: Policies, Regulations and International Law 399 (1999).

[9]See *Réfléxion de l'Académie de Marine sur la prevention des catastrophes maritimes*, 637 *Le Droit Maritime Française* 454, 470 (2003); B.D. Starer, US Perspective, in Classification Societies 51, 52 (J. Lux ed. 1993).

[10]Convention on the Law of the Sea, opened for signature Dec. 10, 1982, arts. 91 and 94, 21 I.L.M. 1261, 1287, 6C Benedict on Admiralty (Frank L Wiswall, Jr., ed. 2005) Doc. 10-6, at 10-124, 10-125.

[11]"In the enforcement of the provisions of the international conventions, Member States shall act in accordance with the relevant rules of IMO Resolution A.847(20) on guidelines to assist flag States in the implementation of IMO instruments." Council Directive 2001/105, amending Council Directive 94/57/EC on Common Rules and Standards for Ship Inspection and Survey Organisations and for the Relevant Activities of Maritime Administrations, art. 1.2 (amending Directive 94/57/EC, art.3.1), 2002 O.J. (L 019) 9, 11.

[12]This delegation of powers is permitted generally by international maritime law; it is laid down expressly in the Safety of Life at Sea Convention (SOLAS), rule 6.a, pt. B, Nov. 1, 1974, 32 U.S.T. 47, 164 U.N.T.S. 113; the Convention for the Prevention of Pollution from Ships, app. 1, reg. 4(3), Nov. 2, 1973, 1340 U.N.T.S. 184; and the Convention on Load Lines, art. 13, Apr. 5, 1966, 18 U.S.T. 1857, T.I.A.S. No. 6331. And also by European Union law:

> Member States may decide with respect to ships flying their flags to authorise organisations to undertake fully or in part inspections and surveys related to certificates, and, where appropriate, to issue or renew those certificates. But in exercising that option, Member States must comply with the process and assume the duties laid down in this Directive.

Council Directive 94/57/EC of 22 November 1994 on Common Rules and Standards for Ship Inspection and Survey Organizations and for the Relevant Activities of Maritime Administrations, art. 3.2, 1994 O.J. (L 319) 20.

[13]Many administrations around the world have exercised their option to delegate their statutory functions on maritime safety certification to classification societies. The first State to delegate those powers was the United Kingdom, which in 1890 empowered Lloyd's Register of Shipping and Bureau Veritas to assign freeboard to British ships. Boisson, Safety at Sea, supra note 8, at 122. In the last decades of the twentieth century, a broader range of statutory work was being delegated to classifications societies by many governments.

therefore be said that, in this context, classification societies have acquired a public service character, since the control of statutory maritime safety is so often entrusted to them.

The powers that can be delegated may be sorted into two basic groups: powers to conduct inspections or surveys and powers to issue safety certificates, as a result of those inspections. Some States have delegated both,[14] while others have assigned the task of inspection but retained the power of certification.[15]

II
THE BACKGROUND OF THE CURRENT EUROPEAN LAW ON CLASSIFICATION SOCIETIES

A. The Crisis of Class

During the last two decades, classification societies have been frequently in the glare of the media, and under the scrutiny of States, international organizations, and marine professionals. Under the pressure of repeated criticism, classification societies had lost some of their credibility,[16] leading to what has been known as the "crisis of class." Although some strident defenders of the status quo still insist that it has been more a crisis of perception rather than reality,[17] it can be said that, at least until the mid-nineties,

[14]E.g., Decree-Law 275, of 11 Aug, 2003, arts. 1 and 4, 234 *Gazz. Uff.* 4, 8 Oct. 2003 (Italy); *Arrêté du 11 mars 2003 portant modification de l'arrêté du 23 novembre 1987 relatif à la sécurité des navires*, art. 140.1.01, *Journal Officiel de la République Française* [J.O][Official Gazette of France] 16 April 2003, 6746); European Communities-Ship Inspection and Survey Organisations-Regulations 2003, 301/2003, as amended by the European Communities-Ship Inspection and Survey Organisations, Amendment- Regulations 2003, art. 4.1, 638/2003 (Ir.); Marine Safety Agency, Merchant Shipping (Ship Inspection and Survey Organisations) Regulations 1996, 1996/2908, M.S.N. M.1672 (U.K.); Danish Maritime Authority, Tech. Reg. no. 5, On the Technical Regulation on the Recognition and Authorisation of Organisations Carrying Out Inspections and Survey of Ships, 27 Sept. 2003, ver. 1.0, 15 Jan. 2004.

[15]E.g., Decree-Law 403/98, art. 3, 23 Dec. 1998, D.R. 295/98, ser. I-A (Port.), available at http://www.iapmei.pt/acessivel/iapmei-leg-03.php?lei=2572; or *Verordnung zur Durchführung von Gemeinschaftsvorschriften über die Überprüfung und Zertifizierung auf dem Gebiet der Seeschiffahrt durch anerkannte Schiffsüberprüfungs-und-besichtigungsgesellschaften,* [Regulation for the implementation of Community specifications for inspection and certification in the field of shipping by recognized ship inspection and survey companies], 15 Dec. 1995, BGBl.I at 1706; *Erste* Schiffssicherheitsverordnung [First ship safety adaptation regulation], 18 Sept. 1998, BGBl. I at 3013 (F.R.G.).

[16]Boisson, Classification Societies, supra note 5, at 363.

[17]M. Grey, Classification Societies Under Renewed Scrutiny, 96 BIMCO Bull. No. 2 at 46 (2001).

there was agreement among most commentators[18] and shipping operators[19] that many classification societies did not perform their work properly.

This idea of the crisis of class can be also found in the introduction to Directive 94/57/EC:

> Whereas worldwide a large number of the existing classification societies do not ensure either adequate implementation of the rules or reliability when acting on behalf of national administrations as they do not have adequate structures and experience to be relied upon and to enable them to carry out their duties in a highly professional manner.

It is also implied in the works developed within the framework of the CMI and OMI in the eighties and the nineties that will be studied next.

Within the sphere of the crisis of class a wide range of problems emerge. The main problems relate to the following:

1. Independence

It has been said that, for more than a century and a half, classification societies have been responsible for supplying an independent opinion on the quality and safety of ships.[20] But, are they really independent? Recently, parties in the shipping industry[21] and the academy[22] have questioned whether class is any longer objective and impartial.

Classification societies are hired and paid by the owners of the vessels that are classified. They therefore risk alienating their clientele if they apply

---

[18]See, e.g., Navegación Castro Riva, S.A. v. M/S Nordholm, 287 F.2d 398, 1961 AMC 2135 (5th Cir. 1961). See also P.F. Cane, The Liability of Classification Societies, 1994 LMCLQ 364, 364; Gomez Prieto, supra note 4, at 258; Colin M. De La Rue & Charles B. Anderson, Shipping and the Environment 639 (1998); Hannu Honka, The Classification System and its Problems with Special Reference to the Liability of Classification Societies, 19 Tul. Mar. L.J. 1, 5 (1994); H.G. Payer, Insurer and Class and Marine Accidents, in Current Marine Environmental Issues and the International Tribunal for the Law of the Sea 291, 293 (Myron H. Nordquist & John Norton Moore eds., 2001); Vincent Power, Aspects of EC Maritime Policy: A Lawyer's Reaction, in 31 Eur. Transp. L. 215; John Spruyt, Ship Management 145-147 (2d ed. 1994).

[19]"The consequence of such an experience is that nobody in the industry – be they hull underwriters, P&I underwriters or charterers — relies completely on what the classification societies are doing." A. Ulrik, The Underwriters' Perspective, in Classification Societies 37, 41 (Jonathan Lux ed., 1993).

[20]Boisson, Classification Societies, supra note 5, at 363; Miller, supra note 4, at 75; Somerville, Will Ship Classification be Credible in the Year 2000?, 1998 BIMCO Rev. 105.

[21]L. Lindfelt, A Future for Classification Societies, 1994 CMI Y.B. 253; Ulrik, supra note 19, at 40-42.

[22]See I. Arroyo, *Problemas jurídicos relativos a la seguridad de la navegación marítima (Referencia especial al "Prestige")*, 20 *Anuario de Derecho Marítimo* 23, 39 (2003); *Réfléxion*, supra note 9, at 465; De La Rue & Anderson, supra note 18, at 901; L. East, The Duty of Care in a Marine Context – Is There Someone to Blame?, in Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds 129, 130-134 (Francis Rose ed., 2000); France, supra note 4, at 71; Honka, The Classification System, supra note 18, at 6; Martine Rémond-Gouilloud, *Droit Maritime* 194 (2d ed. 1994).

their standards too strictly in comparison with their competitors.[23] In the business, the strains to which a classification society is put, sometimes by owners of vessels, sometimes by buyers or other parties, are also generally recognized. In short, there are commercial pressures being brought against classification societies.[24]

Their corporate structure also gives grounds for doubts about their impartiality. For example, Lloyd's Register is controlled by a committee representing shipowners, shipbuilders, and underwriters.[25] Moreover, it must be emphasized that when classification societies act on behalf of States, they are not independent, as they must comply with the guidelines and instructions issued by the regulatory bodies of the national administration.[26]

Therefore the independence of classification societies can be assumed to be more aspiration than reality. The current structure of the classification system promotes the ambiguity of the legal status of those bodies, and casts doubts about the impartiality of the process, since classification societies operate as both judges and parties.[27] For many scholars and maritime operators, the conflict of interest is apparent, as classification societies in a competitive environment go about developing the same rules that they thereafter apply.[28] This reality has been acknowledged even by the most strident defenders of the status quo.[29]

2. The Number and Nature of Classification Societies

Another problem has been their proliferation. In the fifties, there were fewer than ten organizations engaged in classification; by the end of the twentieth century, more than fifty were in the business. The number itself is not a problem, but the increasing number of classification societies has contributed to excessive competition, which has produced erosion in the quality of their services, to the emergence of abuses, and to inspiring in certain of them a mental-

---

[23]Hannu Honka, Questions on Maritime Safety and Liability, Especially in View of the Estonia Disaster, in Essays in Honour of Hugo Tiberg 351, 372 (Peter Wetterstein & Anders Beijer eds., 1996).

[24]See the case law referred to by East, supra note 22, at 132-134.

[25]Ulrik, supra note 19, at 40.

[26]Gomez Prieto, supra note 4, at 295.

[27]De La Rue & Anderson, supra note 18, at 901; Honka, The Classification System, supra note 18, at 6; Rémond-Gouilloud, supra note 22, at 194.

[28]M.M. Comenale Pinto, *La responsabilità delle società di classificazione di navi,* 2003 *Il Diritto Marittimo,* 3, 6; Payer, supra note 18 at 294; Spruyt, supra note 18, at 146; Ulrik, supra note 19, at 40.

[29]"There is also an extraneous pressure being applied in the shape of the owner's surveyor, who (and let us be honest about this) is almost honour bound to try to persuade the Class surveyor that the repair is unnecessary, could be reasonably postponed or severely limited in extent". Grey, supra note 17, at. 44. See also Somerville, supra note 21, at 105.

ity of convenience.[30] Some, in fact, have begun developing their own rules and standards and changing them according to the type of client or the country in which they were going to be applied.[31] Meanwhile, some have been criticized for failing to meet standards considered the minimum for the roles they play, for lacking the capacity to undertake the relevant responsibilities, and for lacking the knowledge and experience necessary for proper performance.[32]

3. Class Hopping

As the number of classification societies grew and their independence suffered from increased competition, there developed among ship owners a response characterized as class hopping: owners tended to take their ships to a competitor when they did not like the requirements and recommendations of a particular classification society,[33] and some societies proved all too ready to accept vessels previously denied class by another society.[34]

4. Liability

The lack of national or international laws regulating the activities of classification societies has lead to much uncertainty regarding both the duties assumed by those bodies vis-à-vis their clients and third parties, and the related level of liability. The case law of late is, in this regard, self-explanatory.[35]

5. Problems Arising From the Dual Role of Classification Societies

It has been emphasized that there is a fundamental difference in the nature of public rules based on international conventions, and that of private rules, such as classification standards.[36] The dual role of classification societies in modern shipping can cause tensions between their commercial interests on

---

[30]A. Antapassis, A Classification Society's Liability: a Comparison with Emphasis to Greek Law, in 2 Marine Insurance at the Turn of the Millennium 57, 58 (2000); Arroyo, supra note 22 at 38; Cane, supra note 18, at 364; Payer, supra note 18, at 293.

[31]Arroyo, supra note 22, at 38-39.

[32]Phillippe Boisson, *Responsabilité des sociétés de classification: Faut-il remettre en cause les principes du droit maritime?*, 546 *Le Droit Maritime Française* 110, 123 (1995); Hutchinson, supra note 4, at 29.

[33]Honka, Questions, supra note 23, at 372; Payer, supra note 18, at 294.

[34]B. Farthing, International Shipping 156 (2d ed. 1993).

[35]E.g., Otto Candies L.L.C. v. Nippon Kaiji Kyokai Co., 346 F.3d 530, 2003 AMC 2409 (5th Cir. 2003); Sundance Cruises Co. v. Am. Bureau of Shipping (The Sundancer), 7 F.3d 1077, 1994 AMC 1, [1994] 1 Lloyd's Rep. 183 (2d. Cir. 1993); Sealord Marine Co., Ltd. v. Am. Bureau of Shipping, 220 F. Supp. 2d 260, 2002 AMC 2817 (S.D.N.Y. 2002); Marc Rich & Co., A.G. v. Bishop Rock Marine Co., Ltd. (The Nicholas H), [1996] 1 A.C. 211, [1995] 2 Lloyd's Rep. 299 (H.L.); Niobe Mar. Corp. v. Tradax Ocean Transp. S.A. (The Niobe), [1994] 2 Lloyd's Rep. 487 (Ct. App. U.K.).

[36]Boisson, Classification Societies, supra note 5, at 363.

the one hand and their public control functions on the other,[37] manifest in disputes about the nature and scope of their obligations and responsibilities.[38] Those tensions can cause problems of consistency for the societies, which may in turn affect their diligence in the development of their public functions.[39]

As a consequence, there is doubt in the shipping industry about whether classification societies are capable of performing both commercial and regulatory functions.[40] Recently, a very important question has been posed: whether these two activities are compatible, and whether, more specifically, one organization can simultaneously certify a ship's conformity to statutory requirements, and assess her level of safety by assigning a classification rating.[41]

Certification and classification services might be compatible, but only in other circumstances. In a competitive environment, one of these functions must be sacrificed in order to guarantee the independence of classification societies and restore their credibility. As the two functions arise out of different logics, it is appropriate that they be submitted to different rules of law, and maybe that they be assigned to different bodies.

B. Solutions Proposed for the Crisis of Class

Loss of confidence in classification societies became evident in many areas of the shipping business.[42] For example, P&I clubs, not content with fully-classified vessels and not wholly trusting the classification societies, started to demand a special survey for entry to the club.[43] Charterers also found it necessary to make their own surveys.

At the same time, the lack of national or uniform law laying down the duties and responsibilities of classification societies fostered some legal uncertainty.[44] It was clear that core values could be adequately served only by stricter control of delegation of statutory survey roles and more stringent

---

[37]Henrik Ringbom, The Erika accident and its Effects on EU Maritime Regulation, in Current Marine Environmental Issues and the International Tribunal for the Law of the Sea 265, 269 (Myron H. Nordquist & John Norton Moore eds., 2001).

[38]Phillippe Boisson, Liability of Classification Societies, in Classification Societies 1, 2 (J. Lux ed. 1993).

[39]Ringbom, supra note 37, at 269.

[40]Philip Anderson, ISM Code: A Practical Guide to the Legal and Insurance Implications 38 (1998).

[41]Boisson, *Responsabilité,* supra note 32, at 135.

[42]"[N]obody in the industry . . . relies completely on what the classification societies are doing." Ulrik, supra note 19, at 41.

[43]S.J. Hazelwood, P&I Clubs: Law and Practice 46-47 (2d ed. 1994).

[44]A. Mandaraka-Sheppard, Modern Admiralty Law 289 (2001).

regulation of the relevant procedures, harmonized if possible at a supranational level. Two challenges in particular called urgently for attention by the maritime community and its regulating bodies: firstly, the articulation of minimum standards of quality for the societies acting on behalf of States, and the establishment of procedures for adequately monitoring the performance of societies acting in such roles. Also necessary was a general regulation of the liability of classification societies, which presupposed a general consensus on the issue of whether and to what extent the classification society is liable, and might be embodied in either an international convention or a self-regulation instrument from the market.

Proposals relating to both challenges have come from different directions. In general, it can be said that the first problem has been tackled properly, but not the second.

1. IMO Resolutions A.739(18) and A.847(20)

The IMO tried to address the problem of unqualified classification societies acting on behalf of maritime administrations by proposing minimum standards for agents acting for flag States. In Resolution A.739(18), dated 4 November 1993, the IMO adopted Guidelines for the Authorization of Organizations Acting on Behalf of the Administration,[45] the aim of which, as stated in the introduction, is:

> to develop uniform procedures and a mechanism for the delegation of authority to, and the minimum Standard for, recognized organisations acting on behalf of the Administration, which would assist flag States in the uniform and effective implementation of the relevant IMO Conventions.

Resolution A.739(18) also "urges Governments as soon as possible to apply the Guidelines, and to review the Standard of already recognised organisations." The resolution is not itself legally binding: it only *urges* governments to follow and apply the guidelines. However, its provisions were made mandatory by Regulation 1 of New Chapter XI-1 of SOLAS, in force since 1 January 1996, and by article 3 of European Community Directive 2001/105.

The main particulars of this resolution are the following. First of all, it lays down that there should be a formal written agreement between the State administration and the non-State organization being authorized to carry out inspections and issue certificates on its behalf, which should include at least the elements set out in appendix 2 ("Elements to be included in an agreement"). Among these are the purpose for the authorization, its legal basis,

[45]Res. 733-799, IMO Resolutions, 18th Sess. 1993, IMO Sales No. I180-E.

the duty of reporting to the State administration, and the conditions respecting liability and financial responsibility. Secondly, the resolution emphasizes verification and monitoring of the activity of the classification societies, requiring the establishment of a system (to ensure the adequacy of work performed by the bodies authorized) that should include, for example: procedures for communication with the society or other non-State organization, for reporting by the organization, and for processing of such reports by the State administration. Finally, Appendix 1 lists thoroughly the minimum quality standards for an organization in order to be recognized by the State administration to perform statutory work on its behalf. Those minimum conditions are also part of Directive 94/57/EC (Annex A.7), where they are developed, made more specific, and clarified.

The IMO also requested its Maritime Safety and Marine Environment Protection Committees to review the Guidelines and Minimum Standards with a view to improving them as necessary; "and to develop, as a matter of urgency, detailed specifications on the precise survey and certification functions of recognised organisations."

To comply, those committees approved the circular MSC/Circ.788-MEPC/Circ.325, Model Agreement for the Authorization of Recognised Organisations Acting on Behalf of the Administration,[46] the aim of which is to assist maritime administrations when formalizing in writing the delegation of authority for the purpose of having statutory certification services rendered by a recognized organization on their behalf, by the suggestion of a model agreement set out in the annex.

This circular includes two appendices, which are integral to the model agreement. The first specifies the scope and extent of the delegated duties and authority; it has to be adapted for particular cases in accordance with the intent of the State administration. The second specifies the reporting and communication patterns for the execution of the delegated duties which have to be agreed between the parties. It is expressly recognized that the legal system of any particular State may require adaptation of the proposed wording.

The IMO Model Agreement is currently being used by most classification societies, along with their own Generals Terms and Conditions, as the basis for all authorization agreements between classification societies and national authorities. The Model Agreement is generally considered to meet the minimum standard for a formal agreement, which, at the discretion of the national authority may be supplemented or reformulated in greater detail.

[46]27 March 1997, available at www.uscg.mil/hq/g-m/nmc/imo/pdf/Circ1/Msc0/710.pdf.

More recently, on 23 November 1995, the IMO approved Specifications on the Survey and Certifications Functions of Recognised Organisations Acting on Behalf of the Administration, by Resolution A.789(19),[47] in order to refine and develop the provisions of the Resolution A.739(18). And finally, on 27 November 1997, the IMO adopted Guidelines to Assist Flag States in the Implementation of IMO Instruments, Resolution A.847(20),[48] the annex of which, part 4, contains provisions aiming to promote uniformity of inspections and maintain established standards on the delegation of authority. While Resolution A.847(20) does not lay down new duties to be fulfilled by the recognized organization, it specifies some duties for the flag State to ensure that its international obligations are fulfilled. For example, the State administration should establish an oversight program with adequate resources for the continuous monitoring of its recognized organizations; it should retain authority to conduct supplementary surveys; and it should provide staff in adequate strength and with adequate expertise for effective field oversight of the recognized organizations. The authorization should also provide the recognized organization with all appropriate instruments of national law giving effect to the provisions of the conventions, or specify whether the State administration's standards go beyond convention requirements.

2. Parallel Efforts of the CMI

In 1992, the CMI's Executive Council formed the Joint Working Group of Issues re Classification Societies (CSJWG), with the aim of resolving a number of contentious issues relating the activities of those organizations. After five years of work on the part of persons from various sectors of the industry, the CMI presented at two international conferences[49] Principles of Conduct for Classification Societies and Model Clauses.[50] Both documents are intended to cover the activities of the classification societies with respect to statutory as well as classification surveys.

The core issues for these documents are the liability of classification societies and its limitation. The intent of the CSJWG was to attack the problem at its roots in a preventive manner, and the Principles of Conduct followed. Of course, even the best attempt at prevention might fail, making necessary

[47]See Res. 780-838, IMO Resolutions, 19th Sess. 1995, IMO Sales No. I194-E.

[48]See Res. 733-799, IMO Resolutions, 20th Sess. 1997, IMO Sales No. I020-E.

[49]XXXV International Conference, Sydney, October, 1994, and XXXVI International Conference, Antwerp, June, 1997.

[50]Antwerp I: Documents for the Centenary Conference, 1996 CMI Y.B. 334-342. See also Frank L. Wiswall, Jr., Classifications Societies: Issues Considered by the Joint Working Group, 2 Int'l J. Shipping L. 171 (1997).

at least some provisions for liability. But full agreement was not possible with respect to these, and so the matters of statutory regulation and limitation of the civil liability of the societies were deferred for future study.[51]

a. Principles of Conduct for Classification Societies

These are meant for all classification societies, including those not members of the IACS, and irrespective of their organization (i.e., whether they are public bodies, private corporations, or otherwise structured). The Principles address the activities of classification societies with respect to statutory as well as classification surveys.

The main aim of the Principles is to lay down a standard of care for classification societies. It is the expressed will of the CMI that a demonstrated adherence to the standard described in the Principles should be held as a *prima facie* evidence that a classification society or similar body had not acted in a negligent manner. The Principles also set forth (in article 5) some specific duties for classification societies, for example, that they publish their rules, that they utilize suitably qualified persons in the performance of their services, and that they conduct a program of technical research and development. Standards of Practice and Performance are laid down, with respect to technical, administrative and managerial matters, to technical personnel, to certificates and reports, and to confidentiality. Those pertaining to the publication of information about the ship's particulars are the most relevant.

In general, the Principles of Conduct tend to restrict the scope of the potential liability of a classification society.[52] Anyway, it was recognized that the document is by its nature dynamic, and surely to be reconsidered in the future and revised in the light of experience.[53]

b. The Model Clauses

These clauses stand as models recommended for use by individual classification societies, which may modify them as appropriate, in accordance with commercial practice, or with a particular national law. The model clauses are intended to be read in conjunction with the Report and the Principles of Conduct.

The Model Clauses are arranged in two Parts. The first deals with agreements between classification societies and governments concerning statutory surveys and the issuing of certifications. The second deals with the tradi-

[51]Wiswall, supra note 49, at 173.
[52]Comenale Pinto, supra note 28, at 19.
[53]Wiswall, supra note 49, at 175.

tional work of classification of ships, and its provisions are intended to form part of the agreement between the shipowner and the classification society.

The aim of Part One is to establish the duties and functions of classification societies, but the model clause only refers to Annex I, which contains those duties and must be attached to the contract.

There is first a stipulation to the monitoring powers of the State administration, which may utilize appropriate audit methods as well as an independent body of auditors. Once again, it is laid down here that the Principles shall be the standard for measuring performance by the classification societies.

In Clause 2, it is expressly stated that in carrying out their duties and responsibilities, the classification societies act solely *as the agents* of the State administration, under the authority of which, or upon behalf of which, they perform such work. This is important for liability issues.

Clause 3 addresses the immunities of classification societies: with respect to any claim arising out of the performance of the duties of the classification societies, the organization and its employees and agents shall be subject to the same liabilities and be entitled to the same defenses (including, expressly, any immunity from or limitation of liability) as would be available to the State administration's own personnel had they themselves performed the certification in question.

As to limitation of liability in the agreements between classification societies and shipowners, the Model Clauses propose a ceiling that is ten times the classification fee or four million US dollars, whichever is higher.

No other provision for limiting liability is included in Part I, so it is clear that the aim of the model clauses is otherwise to leave for national or supranational legislation the subject of limitation of liability for classification societies when performing statutory tasks of certification.

3. Efforts at Self-Regulation

To cope with the crisis already described, the main and largest classification societies of the world organized as the International Association of Classification Societies (IACS) in September 1969.[54] Its primary aim is to promote and control the services provided by classification societies, through the regulation of their work of classification and thus to enhance public confidence in classification societies.[55] The association's creation was

[54]Although not all classification societies are included, the members of IACS classify 90% of the world fleet. See Mandaraka-Sheppard, supra note 44, at 289.

[55]For more details about the origin, structure, and functioning of IACS, see Boisson, *Responsabilité*, supra note 52, at 124-129; Gomez Prieto, supra note 4, at 287-290.

welcomed by the IMO, and the IACS was granted consultative status at the IMO in October of that year.[56]

The IACS created the IACS Quality System Certification Scheme, based on ISO 9001, in order to ensure that all of its members meet minimum standards and to provide proof of efforts to improve quality control systems.[57] All members of IACS had been audited by 1996, the IMO participating as an observer in the process. If a member fails to effect the changes required in the light of the Quality System Certification Scheme, it is suspended from IACS membership, and the Polish Register was suspended for this reason in 1997.[58] These standards have been an inspiration for the European Community's Council Directive 94/57.[59]

Maybe the most tangible result of the activity of the IACS has been the Transfer of Class Agreement (TOCA), which has put a halt to class hopping. According to this agreement, a participating classification society can only accept a new ship if all the requirements from the previous classification society have been met and surveyed. Substandard or older ships can only be accepted by an IACS member after it has assured itself of the condition of the vessel by conducting a special survey.[60] But the TOCA system has some important limitations. Its scope and coverage is not wide enough, for example. It assumes that, at the time of class transfer, there exist recommendations concerning the ship, and it does not address transfers effected before recommendations can be expected.[61]

According to the classification societies, only self-regulation could be acceptable.[62] But there was a clear perception that, if in the future the industry did not fully support self-regulation, a response would come from legislative and regulatory bodies eager to address any shortcoming. For a time, it was thought that self-regulation would protect the industry from increasing government intrusion. But that intrusion occurred anyway, as described below.

---

[56]See generally J.R.G. Smith, Ship Safety and Pollution Prevention: The Regulatory Regime (1999), available at http://www.iacs.org.uk/publications/Booklet/IACSRegR.pdf.

[57]Boisson, Classification Societies, supra note 5, at 375.

[58]Wiswall, supra note 49, at 173.

[59]As is expressly stated in whereas nine. The Consolidated Text of the Directive, produced by the CONSLEG system of the Office for Official Publications of the European Communities, can be found in EUR-Lex (http://europa.eu.int/eur-lex/es/oj/index.html).

[60]Boisson, Classification Societies, supra note 5, at 375; Payer, supra note 18, at 294.

[61]Honka, Questions, supra note 23, at 372-373.

[62]Somerville, supra note 21, at 105-106.

C. The European Response to the Crisis of Class

1. The General Framework: the European Policy on Maritime Safety

The EU legislation in this field should be assessed within the general framework of the Maritime Safety Policy,[63] and ought to be considered as part of a general effort to establish an acceptable system of survey and certification. It is just another step towards safer and cleaner seas, along with, for example, the initiative for port State control. In fact, as port authorities, Member States are required to enhance safety and prevention of pollution in Community waters through priority inspection of vessels carrying certificates of organizations that do not meet the common criteria. The body of European Union measures already in force consists of some twenty-five legal instruments covering issues as classification societies, port State control, ship registration, etc.

1993 marks the starting point for development by the EU of a comprehensive maritime safety policy,[64] with the adoption and approval of the Commission's Communication, A Common Policy on Safe Seas,[65] and the subsequent resolution by the European Council on the same subject,[66] which outlined the four pillars of that policy. In the same year, the Commission also presented a plan for the ten years to follow, which has been largely implemented.

Since then, the European Union institutions have become even more involved in matters relating to the safety at sea and maritime pollution. In this field, there has been a continuous expansion of the scope of the European Union legislation, particularly significant in recent years, that is, in the aftermath of the *Erika* and *Prestige* accidents.

2. Council Directive 94/57/EC[67]

The two essential aims of this Directive are set forth in its premier article. The first is to establish measures to be followed by the Member States and

---

[63]See Rosa Greaves, EC Transport Law 1-27 (2000); Vincent Power, EC Shipping Law 55-61 1st ed. 1992 (1994 Suppl.). See also Pedro Jesús Baena Baena, *La política comunitaria de los transportes marítimos* (1995); Rosa Greaves, Transport Law of the European Community 1-10, 154-158 (1991).

[64]See C.F. Fernandez Beistegui, *La seguridad marítima y la prevención de la contaminación causada por buques en la Comunidad Europea*, 14 *Anuario de Derecho Marítimo* 124 (1997); J.L. Gabaldon Garcia, *Protección del medio ambiente y evolución del Derecho marítimo*, 25 *Anuario de Derecho Marítimo* 303 (1998).

[65]COM (93)66, Final, 24 February 1993.

[66]Council Resolution of 8 June 1993 on a Common Policy on Safe Seas, 1993 O.J. (C 271) 1.

[67]Council Directive 94/57/EC of 22 November 1994 on Common Rules and Standards for Ship Inspection and Survey Organizations and for the Relevant Activities of Maritime Administrations, 1994 O.J. (L 319) 20. Directive 94/57/EC has been corrected twice and amended 30 times. A consolidated version current as of November 29, 2002 is available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/consleg/1994/L/01994L0057-20021129-en.pdf.

organizations concerned with the inspection, survey and certification of ships for compliance with the international conventions on safe shipping and prevention of marine pollution, in order to ensure that only organizations that meet minimum criteria are allowed to function within the European Union. The second is to enhance the freedom to provide services, by ensuring that Member States do not refuse an authorization of power to a recognized organization in a discriminatory manner.

From the important role that those bodies perform in the promotion of maritime safety, the Directive derives minimum criteria for classification societies carrying out surveys and inspections on behalf of Member States. The need for uniformity of regulation on this matter is made clear by the same whereas clause in the Directive. The starting point is an observation that worldwide a large number of the existing classification societies do not ensure either adequate implementation of the rules or reliability when acting on behalf of national administrations because they do not have adequate structures and experience. In other words, many of the classification societies do not have the qualities required to perform public duties. Desirous of remedying this situation, the European Union has established minimum criteria for obtaining recognition, thereby guaranteeing the professionalism and reliability of qualifying classification societies.

The main particulars of the Directive are as follows. First, it establishes criteria for recognition. Inspired by the IACS standards, these criteria are intended to ensure that only highly reliable organizations will be authorized to work on behalf of Member States and by this means to ensure that ships flying the flag of a Member State are constructed and maintained always in accordance with the rules of a reliable classification society. These criteria will not be analyzed here, because that subject is adequately covered elsewhere, by another article.[68]

Secondly, the Directive limits European Union Member States, in their capacity as flag States, to selecting only recognized organizations when authorizing classification societies to do statutory functions on their behalf, because the Directive provides that only the safety certificates issued by those organizations will be considered valid. Article 4 vests the competence for granting recognition in Member States. A classification society's recognition by any Member State is valid in the whole area of the European Union.

In Article 6, the Directive requires each Member State to formalize, in a written and non-discriminatory agreement or by means of an equivalent

[68]See J.M. Martín Osante, *La normativa comunitaria en materia de seguridad marítima. Sociedades de clasificación y transporte de petróleo,* 18 *Anuario de Derecho Marítimo* 163 (2001).

legal arrangement, its working relationship with a classification society to which it has delegated powers.

Finally, the Directive also introduces for member States the obligation of monitoring classification societies working on their behalf. Consequently, a recognized organization is under constant scrutiny; according to Article 11, each member State is obliged to assess periodically the performance of the bodies working on its behalf and to provide the Commission and all other Member States with precise reports about that performance.

3. Commission Directive 97/58/CE

The original text was amended by the Commission's Directive 97/58/CE of 27 September 1997,[69] in order to comply with IMO resolution A.789(19), which was incorporated as an Annex.

4. The Erika *Incident and Ensuing Developments*

As has been the rule in recent decades, the *Erika's* accident provoked profound changes to the regulatory regime for shipping. It can be said that the *Erika* and *Prestige* incidents together mark a turning point in the evolution of European maritime safety law. The *Erika* incident stimulated reactions by several entities (e.g., IACS, INTERTANKO, ITF, IMO[70]). In the European Union, the reaction was embodied in sets of measures called "*Erika* Packages."

Under pressure by the media and public opinion, European authorities acted rapidly; only three months after the *Erika* incident, the European Commission adopted the First *Erika* Package in the form of a Communication on the Safety of Seaborne Oil Trade. The package consisted of a number of measures proposed to protect European waters from sea pollution. The European Parliament, during its Plenary Session of 30 November 2000, approved, subject to a number of amendments, the Commissions' proposals. The First *Erika* Package made changes to the Directive on port State control, called for faster phasing out of single hull tankers in European waters, and amended the European Union directive on classification societies.

On December 6, 2000, the European Commission adopted a second set of measures on maritime safety in response to the *Erika* incident. The Communication from the Commission to the European Parliament and the

---

[69]Commission Directive 97/58/EC of 26 September 1997 Amending Council Directive 94/57/EC on Common Rules and Standards for Ship Inspection and Survey Organizations and for the Relevant Activities of Maritime Administrations, 1997 O.J. (L 274) 8.

[70]Martín Osante, supra note 68, at 194-195; Z.O. Özçayir, Port State Control 239 (2001).

Council contained new proposals for a European Maritime Safety Agency and a Community system of monitoring and controlling maritime traffic. The Commission also proposed to improve the international scheme of liability and compensation for oil pollution damage.[71]

a. Directive 2001/105/EC

Council Directive 2001/105/EC Amending Council Directive 94/57/EC on Common Rules and Standards for Ship Inspection and Survey Organisations and for the Relevant Activities of Maritime Administrations[72] was the first post-*Erika* package measure that reached the status of general law. Its paramount aim is to enhance safe shipping and pollution prevention.[73]

The implementation of Directive 94/57/EC had exposed shortcomings in several areas; in particular, there was evident a lack of harmonization in the procedures for recognizing organizations and for monitoring those already recognized. The procedure for recognition was left to individual Member States without any harmonized control as to the satisfaction of the common criteria. Also lacking were common procedures for periodic audit of the recognized organizations. Besides, there were some gaps in the criterion for granting or maintaining recognition; for example, the overall safety and pollution prevention performance record of the society was not taken into account. Finally, there was no common regime of liability; it was not clear whether classification societies should be held liable in the event of casualty, and to what extent. Article 6.2 of the Directive simply stated that in the agreement regulating the working relationship between the recognized organization and the Member State there should exist a clause laying down the liability regime, but the Directive lacked any criteria for that regulation.

---

[71]See Communication from the Commission to the Council and the European Parliament on Improving Safety at Sea in Response to the Prestige Accident, adopted on 3 December 2003, COM(2002) 681; Proposal for a European Parliament and Council Regulation on the Establishment of a Fund for the Compensation of Oil Pollution Damage in European Waters and Related Measures: COM(2000) 802; Bull. 12-2000, point 1.4.60; European Parliament and Council Directive 2002/59/EC Establishing a Community Monitoring, Control and Information System for Maritime Traffic and repealing Council Directive 93/75/EEC, 2002 O.J. (L 208) 10; Bull. 6-2002, point 1.4.54; Council Regulation 1406/2002 Establishing a European Maritime Safety Agency, 2002 O.J. (L 208) 1; Bull. 7/8-2002, point 1.4.45.

[72]2002 O.J. (L 019) 9.

[73]Along with Council Directive 2001/106/EC Amending Council Directive 95/21/EC Concerning the Enforcement, in Respect of Shipping Using Community Ports and Sailing in the Waters under the Jurisdiction of the Member States, of International Standards for Ship Safety, Pollution Prevention and Shipboard Living and Working Conditions (Port State Control), 2002 O.J. (L-019) 17, this directive tightens the safety checks and controls of ships undertaken by classification societies on behalf of EU flag States and those carried out by States whose ports are visited by the ships. Their objective is to make the inspection regimes of potentially dangerous ships more rigorous.

Regarding these shortcomings, some important changes have been introduced in Directive 94/57/EC:

- A stricter procedure for monitoring recognized organizations is introduced. According to Article 9.1, recognition must be withdrawn from organizations that no longer satisfy the quality criteria. According to Article 10, recognition may also be suspended for one year, leading to withdrawal if corrective action does not satisfy.
- Taken together, Articles 4, 7, 9, and 10 make it clear that control over the processes for recognizing and monitoring classification societies is no longer left entirely to individual Member States; instead, it is shared between the Member States and the Commission, but the latter reserves the right to suspend or withdraw recognition. Decisions to recognize particular classification societies, or to withdraw such recognition are for the Commission assisted by the Committee on Safe Seas and the Prevention of Pollution from Ships (COSS), although Article 11 makes it clear that Member States will still maintain a close control on the recognized organizations working on their behalf. This should lead to a simpler and more coordinated system of control, and ease the burden formerly on individual Member States to inspect by themselves all the organizations acting on their behalf.
- Some provisions for a common regime of liability for classification societies are introduced. Indeed, the main feature of the new version of the Directive is that, at least in some respects (as we shall see later), the societies must be held liable in the event of negligence.[74]
- Article 9.2 makes a good safety and pollution prevention performance record essential for receiving or retaining recognition. That record judged with reference to all of the ships in class and irrespective of the flags they fly. This innovation is quite significant, because it will allow monitoring of the whole fleet in class for recognition of a classification society that is working on behalf of different flags.
- The quality criteria that ought to be met by the recognized organizations are basically still the same, but they have been made more stringent because of the changes in the wording of the provisions: instead of the ambiguous "the organization should," the new text uses a quite clear and compulsory "the organization must."[75]

---

[74]Mandaraka-Sheppard, supra note 44, at 289.

[75]P. Bonnassies, *Le Droit Maritime Française* 13 (June 2002).

- More duties are imposed on recognized organizations, for example, the duty in Article 15.5 to transmit the complete history file of a ship to the new organization, when she changes class. Classification societies are now obliged by Article 15.3 also to supply all relevant information about their classed fleet, irrespective of flag, to the Member States' administrations and to the Commission. According to Article 11.4, as a condition of recognition, classification societies must also establish a system management quality review, and report the results to the Committee on Safe Seas and the Prevention of Pollution from Ships.

In short, the criteria for recognition and the procedure for monitoring classification societies are considerably strengthened through the post-*Erika* amendments of Directive 94/57/EC, and so are the remedies when classification societies fail to meet the necessary criteria. Moreover, the role of the Commission is enhanced, at the expense of individual Member States, in the assessment and evaluation process.[76]

b. Directive 2002/84/EC

Council Directive 2002/84/EC Amending the Directives on Maritime Safety and the Prevention of Pollution from Ships[77] introduces several slight changes in relation to earlier amendments, the most significant of which pertain to wording of Article 7.1 (making it clear that that the Commission shall be assisted by the Committee on Safe Seas and Prevention of Pollution from Ships) and to the last phrase in Article 2.d (specifying the International Conventions included within the scope of the Directive).

III
THE SCOPE OF THE CURRENT EUROPEAN LAW

The current European law on classification societies is not comprehensive; the regulation does not cover all the works of those bodies, but just their activity as agents of Member States in executing statutory functions. Not all statutory functions are included; just some tasks related to survey and certification in connection with several international conventions. The delimitation criteria are therefore important for determining the scope of the Directive for its application.

---

[76]Ringbom, supra note 37, at 269.

[77]2002 O.J. (L 324) 1.

Even as amended, Directive 94/57/EC[78] does not cover all possible tasks of inspection related to maritime safety, but only those expressly laid down in Articles 1 and 2.d. The statutory duties that may be delegated are: the development and implementation of safety requirements for hull, machinery, electrical, and control installations of ships falling under the scope of the international conventions. In this context, "international conventions" means the 1974 International Convention for the Safety of Life at Sea,[79] the 1966 International Convention on Load Lines,[80] and the 1973/78 International Convention for the Prevention of Pollution from Ships,[81] together with their protocols and amendments, and related codes of mandatory status in all Member States, in their current versions.[82]

Article 3.2 allows Member States to entrust to private bodies other than "recognised organisations" the assessment work required for the "cargo ship radio safety certificate" required by the amended SOLAS 74/78 Radio Regulations, and Article 3.3 removes from the Directive's restrictions on delegation any assessment work in conjunction with the certification of specific items of marine equipment.

On the other hand, according to Article 3.2, "the competent administration shall in all cases approve the first issue of the exception certificates," so this matter cannot be delegated at all. Therefore, we can conclude that the powers to be delegated are always limited, and that there should always be a "competent administration." In short, no Member State could delegate *all* of its statutory functions.

---

[78]Henceforth, references to Directive 94/57/EC should be considered to be references to the Directive as amended through 2002. See supra note 67.

[79]The SOLAS Convention contemplates several certificates of conformity with its requirements. The safety certificate for passenger ships, and the radiotelegraphy and radiotelephony safety certificates are all valid for twelve months; the safety equipment certificate, valid for twenty-four months; and the construction certificate, valid for a maximum of five years. See Safety of Life at Sea Convention, reg. 12, Nov. 1, 1974, 32 U.S.T. 47, 164 U.N.T.S. 113; reprinted at 6D Benedict on Admiralty, Doc. No. 14-1, at pp. 14-26, 14-27.

[80]The 1966 Loadline Convention requires two types of documents: an international loadline certificate valid for five years, see arts. 3(1) and 19(1), and an exemption certificate, see arts. 3(1) and 6(2). International Convention on Load Lines, Apr. 5, 1966, 18 U.S.T. 1857, T.I.A.S. No. 6331; reprinted at 6E Benedict on Admiralty, Doc. No. 14-10, at pp. 14-841, 14-847, 14-848.

[81]International Convention for the Prevention of Pollution from Ships, opened for signature Nov. 2, 1973, 1340 U.N.T.S. 184,; as amended by the Protocol of 1978, Feb. 17, 1978, 1340 U.N.T.S. 61 & 1341 U.N.T.S. 3 (MARPOL 73/78). Three types of certificates are contemplated as proof of compliance with the requirements of this convention: an international oil pollution prevention certificate, id., annex 1, reg. 5; a pollution prevention certificate for the carriage of noxious liquid substances in bulk, id., annex 2, reg. 11; and a sewage pollution prevention certificate, id., annex 3, reg. 4. All of them have a period of validity of five years. See id. annex 1, reg. 9; annex 2, reg. 12; annex 3 reg. 7.

[82]The original version of the Directive stated that the conventions included were those "in force at the date of adoption of the Directive;" subsequently, in Directive 2001/105/EC, the following phrase was substituted: "in force on 19 December 2001." Finally, Directive 2002/84/EC laid down the current wording, which represents a substantial improvement.

It is significant that in the IMO Model Agreement for the Authorisation of Recognized Organisations acting on Behalf of the Administration (MSC/Circ.710-MEPC/Circ.307), the delegation is broader: it extends to functions relating to all the conventions included in the Directive as well as to those relating to the Convention on the International Regulation for Preventing Collisions at Sea of 1972, The International Convention on Tonnage Measurement of Ships, of 1969, the ILO Convention nos. 92 and 133, on Accommodation of Crews, and ILO Convention no. 147, on Merchant Shipping (Minimum Standards).

Some Member States, in their national laws, have added to this regime of inspection and certification pursuant to the Directive. For example, in its statutory regulation Portugal includes the ILO's Placing of Seamen Convention 1920, the Convention on the International Regulation for Preventing Collisions at Sea 1972, and the International Convention on Tonnage Measurement of Ships 1969.[83] Denmark has acted in similar fashion.[84] These responses by Portugal and Denmark are in accordance with European law, because the Directive established in this instance a minimum standard, not a maximum standard. The European law lays down that when a Member State decides to delegate its public functions in the field of the expressly stated conventions, there is a process and some limits to be followed. But nothing in the current law prevents any Member State from also limiting its delegation of the power to perform tasks pursuant to other international instruments.

While submitting other inspection and certification to the regime mandated in Directive 94/57/EC as amended is lawful, is it desirable? What is the reason for the restricted scope stated in the Directive? And, should that scope be generally extended, as it has been done by some Member States? I cannot work out any reason in law for restriction. The ultimate causes may be more technical than juridical. It can be said, however that the scope of the Directive has a *vis expansiva* evident in some provisions. For example, in Article 14 it is stated that each Member State shall ensure that ships flying its flag shall be constructed and maintained in accordance with the hull, machinery and electrical and control installation requirements of a recognized organization. In this way, European Union law requires the classification services to be developed by recognized organizations, although this task

---

[83]Decree-Law 321/2003, 23 Dec. 2003, art. 3.1. Decree-Law 115/96, 6 Aug. 1996, implemented the original Directive. Decree-Law 403/98, 18 Dec. 1998, implemented Council Directive 97/58/EC.

[84]Danish Maritime Authority's Technical Regulation no.5, On the Technical Regulation on the Recognition and Authorisation of Organisations Carrying Out Inspections and Survey of Ships, 9 Aug. 2002, available at http://www.sofartsstyrelsen.dk/graphics/Synkron-library/DMA/UK_PDF/Class_Agreement.pdf. See Annex I—Scope of Authorisation.

is not regulated in the Directive. Notwithstanding its timidity, this measure may be considered a first step toward regulation on this subject.

It must also be emphasized that, although the expressed aim of the 2001 Directive is the regulation of the activity of classification societies when acting on behalf of Member States, it has not gone unnoticed that its effects could also reach the private activities of those bodies in their private roles. According to Article 9.2, the evaluation of the performance of a recognized organization will be carried out with respect to all of its classed fleet, irrespective of flag.[85] Therefore, it will be possible to notice, and if necessary sanction, unacceptable cases of differing performance on the part of a recognized organization working for different flags.

IV
THE ORGANIZATION: THE CLASSIFICATION SOCIETY IN CONCEPT

The provisions of the EU Directive apply to "recognised organisations." According to Article 2(e), an organization is a classification society or other private body carrying out safety assessment work for an administration; and according to 2(f) a recognized organization is an organization recognized in conformity with article 4.

In the Directive, there is a difference between *recognition,* to which Article 2(f) refers, and *authorization,* to which Article 2(g) refers. Working out the distinction requires reference also to Articles 3.2 and 4. Recognition and authorization are two different concepts, corresponding to different stages in the process of delegation.

First there must be recognition. The scope of this legal concept is problematic, because of the laconic wording and the defective scheme of the Directive: Article 2(f) refers to Article 4, but Article 4 does not supply any concept. I think this is the inadvertent consequence of the changes undergone by the Directive; originally, that is, in 1994, it was clearer from Article 4 that recognition was a prerequisite to authorization to perform a public function on behalf of a Member State. In the current version, this idea is only latent. Anyway, it can be induced from Article 4 that recognition is the act by which the Commission declares that an organization can be entrusted with public functions. An important consequence of recognition is that the organization is subject to monitoring from then on. Article 4.4 vests the competence for recognition with the Commission. The procedure for recog-

[85]Comenale Pinto, supra note 28, at p. 33; Martín Osante, supra note 68, at 197; Özçayir, supra note 70, at 375.

nition is addressed in Article 7.2. Beyond the scope of this paper, it will not be discussed, but I would like to point out that petitions for recognition are to be channeled by Member States. As Article 4.2 makes clear, there are two kinds of recognition: full or limited.

Secondly, there could be an authorization: that is, an act whereby a Member State grants an authorization or delegates specific powers to a recognized organization. Recognition does not create a right to authorization; on the contrary, the Member State is completely free to delegate its statutory functions to any recognized organization, subject only to the limits set out in Article 5. In principle, Member States shall not refuse to authorize any recognized organization to undertake such functions, but Member States may restrict the number of organizations they authorize in accordance with their needs, provided that there are transparent and objective grounds for so doing. This restriction has been implemented in most of the national regulations.

In the statutory regulations of some Member States the difference between recognition and authorization and their corresponding consequences are more clearly laid down. Take for example, the UK regulations.[86] Article 5 states precisely the duties of the authorized organizations: to perform the delegated functions stated in the law. The following article then directs recognized organizations to consult each other periodically, to demonstrate willingness to cooperate with port State control administrations, and to provide relevant information to the Maritime Safety Agency about changes of class or declassing of vessels. The matter is more obscure in other national enactments, such as that of France.[87]

It is remarkable that Directive 94/57/EC avoids the words "classification societies." Instead, the term used is "recognised organisation." In this way, the European law follows a pattern established in the SOLAS Convention.[88] In all of the national transpositions of the Directive we can find the same wording, except in the French one, where appear the words "classification society." A new nomenclature is a very sensible idea, because in the modern maritime world classification societies are numerous and diverse.[89] Of

[86]Marine Safety Agency, Merchant Shipping (Ship Inspection and Survey Organisations) Regulations 1996, M.S.N. M.1672, available at http://www.mcga.gov.uk/c4mca/mcga-mld-page.htm?textobjid=073EE11D0CBCFCBE.

[87]See *Arrêté du 11 mars 2003 portant modification de l'arrêté du 23 novembre 1987 relatif à la sécurité des navires,* J.O., 16 April 2003.

[88]Chap. I, pt. B, Reg. 6.

[89]Boisson, *Responsabilité,* supra note 32, at 123; Comenale Pinto, supra note 28, at 4; Gomez Prieto, supra note 4, at 259; Singh & Colinvaux, 13 British Shipping Laws 173-184 (1967).

In 1997, there were 50 organizations holding themselves out as classification societies. See The Classification Society in the Year 2000, in Marine Log, April 1997, p. 80. The major classification societies

course they vary in size, experience, and means,[90] but what is more important is that they differ in their legal status: while almost all of them are today private companies or foundations, some are still paragovernmental agencies.[91] Today's classification societies usually have the corporate form of a company limited by shares.[92]

As there is no generally accepted legal concept of a classification society, it is better to have avoided in the Directive words about which there would have followed an endless and unproductive debate. The Directive contains a very broad notion of a classification society, so broad in fact that it even eschews the phrase, and instead refers to an *organization.*

We might at least pay some attention to the main features of the concept of recognized organization in European law. For example, the Directive refers to maritime surveyors. Irrespective of their internal structure and nature, there is general agreement about their functions: as maritime surveyors, classification societies are expected to check and certify whether vessels comply with national or international safety rules, or with their own class standards for the construction, maintenance and operation of vessels.[93]

Although the Directive does not explicitly acknowledge the concept of a classification society, it imposes a structural requirement for delegation of the power to act on behalf of a Member State: only private bodies can be recognized organizations. By this qualification, the European Commission has taken a side in the old legal and economic debate about the best way of performing public services. It is clear that for the Commission, there is a link between market competition and company structure and efficiency. This assumption is at least questionable, as we shall see later.[94]

It is generally agreed that classification societies are non-profit entities, established for the sole purpose of promoting the safety of lives and property at sea, and they tend not to share benefits with shareholders. However,

---

included in Lloyd's Register's Infosheet No. 15 (updated August 4, 2003) are: Lloyd's Register of Shipping, Bureau Veritas, American Bureau of Shipping, Germanisher Lloyd, Registro Italiano Navale and Der Norske Veritas.

[90]"Each Member of the IACS can be defined as a Classification Society having comprehensive Classification Rules compiled on the basis of sound research and development; efficient and effective feedback of significant technical data via surveyor's reports; a worldwide network of well qualified surveyors and a internationally recognised quality management system." Smith, supra note 56, at 7.

[91]As used to be the Italian RINA, although there were some doubts on the subject. see E. Carboni, *Il Registro Italiano navale e Aeronáutico* 5-20 (1938); Gomez Prieto, supra note 4, at 267-269; LeFevre, Pescatore & Tullio, *Manuale di Diritto della Navigazione* 96 (8th ed. 1996); F. Quercy, *Diritto della Navigazione* 74-75 (1989). Today, there is not doubt that RINA is a private body. Decree-Law 314, 3 Aug. 1998, art. 14.3. See Comenale Pinto, supra note 28, at 4-5.

[92]Antapassis, supra note 30, at 57; Gomez Prieto, supra note 4, at 282-285; Miller, supra note 4, at 77.

[93]Cane, supra note 18, at 364; O'Brien, supra note 2, at 403-404; Stuart & Caffrey, Liability of Marine Surveyors, Adjusters and Claims Handlers, 22 Tul. Mar. L. J. 1, 7-8 (1997).

[94]See Conclusions supra.

classification societies compete to control a billion dollar market.[95] And they have been working hard, particularly in recent decades, to get a good share of the lucrative market of statutory certification.[96] Therefore, while they might be formally non-profit organizations, they are nevertheless highly profitable ventures often making millions of dollars.[97] And although it is true that most of the profits of classification societies are reinvested in ship-related research and development, some do distribute part of their profits to shareholders.[98]

Anyway, even if we accept classification societies as non-profit organizations, they cannot escape their context: they work in a competitive environment, and if there are no clients, there is no business.[99] There is here a clear conflict of interests: each society wants to keep its clients, but classification societies must also comply with maritime safety rules; a client ship owner might be persuaded to change society by the strict application of those rules. Therefore, although classification societies could be real non-profit making associations, they nevertheless would need a clientele, and so, they act with the same logic as any other company vying for clients in a competitive market. That is why it is so important to establish rules guaranteeing the independence of the societies and deterring undue transfers of class.[100]

It is very important to have a clear idea of the real role of classification societies in the market, because their formal status as non-profit associations is frequently used to justify their immunity from liability, as we shall see later.

V
THE AGREEMENT BETWEEN RECOGNIZED ORGANIZATIONS AND STATES

Before the Directive, there was much variety in the nature and scope of the agreements linking the European States and classification societies for the delegation of statutory duties; after all, there were then no imperative

---

[95]Boisson, *Responsabilité,* supra note 32, at 123 (figures for 1996); Grey, supra note 17, at 46.

[96]Anderson, supra note 40, at 38; Starer, supra note 9, at 53.

[97]Miller, supra note 4, at 115; See East, supra note 22, at 149; Gomez Prieto, supra note 4, at 282-286. In *The Nicholas H,* (1996) A.C. at 228, [1995] 2 Lloyd's Rep. at 308, Lord Lloyd pointed out that ABS had a net profit income of US $ 11 million in 1990, and operating revenue of US $ 122 million.

[98]E.g., Germanisher Lloyd. See C. Breitzke, German Perspective: In Defence of Classification Societies, in Classification Societies 59, 60-61 (J. Lux ed. 1993); Gomez Prieto, supra note 4, at 282-286. In April 1993, three European societies (Germanisher Lloyd, Bureau Veritas, and RINA) set up UNITAS, a European economic interest group.

[99]H. Harling, The Liability of Classification Societies to Cargo Owners, 1993 LMCQ 7-8; Honka, The Classification system, supra note 18, at 6; Ulrik, supra note 19, at 40.

[100]Those rules are in Directive 94/57/EC, but they will not be studied here.

rules.[101] The variety of agreements—especially with respect to their provisions on liability—led naturally to legal uncertainty, which in turn led to general agreement within the maritime community about the need for harmonization of this issue.[102]

A. Content

In Article 6, Directive 94/57/EC requires that the relationship between the State and the recognized organization be set out in a written agreement. That document should set out the specific duties and functions assumed by the organizations and include at least:

- The provisions set out in Appendix II of the IMO Resolution A.739(18) on Guidelines for the Authorisation of Organisations Acting on Behalf of the Administration, while drawing inspiration from the Annex, Appendixes and Attachment to the IMO MSC/Circular 710 and the MEPC/Circular 307 on Model Agreement for the Authorisation of recognized Organisations Acting on Behalf of the Administration.
- The provisions concerning financial liability that we will study later.
- Provisions for a periodic audit by the administration (or by an impartial external body appointed by the administration) examining performance by the organization of the duties undertaken on the administration's behalf, as referred to in Article 11(1).
- The possibility for random and detailed inspections of ships.
- Provisions for reporting essential information about the organization's classed fleet, including changes, suspensions and withdrawals of class, as referred to in Article 15(3).

The document lacks a thorough development of the subject of the duties of the Member State. It is only laid down that there must be a working relationship between the State and the recognized organization, regulated in a formal written and non-discriminatory agreement, that the State must mon-

[101]The standard content of those contracts were: applicable law, scope of the delegation, conditions on liability, fees, arrangements for settling disputes, and clauses laying down immunity from jurisdiction. See annexes in Classification Societies, supra note 19. Lately, were also included stipulations laying down the means of control and evaluation of the performance of classification societies.

[102]It has been said that: "legal processes for delegating powers used to be very rudimentary, usually involving an administrative formality, empowering the organisation to carry out surveys and inspections for a particular international convention, and to issue the corresponding certificates of conformity." See Boisson, Safety at Sea, supra note 8, at 406.

itor the service that has been delegated, and finally that the State must deliver detailed reports to the Commission.

Regarding recognized organizations, on the other hand, Article 15 of the Directive obliges them to consult one another periodically in order to maintain equivalence of their technical standards, to send periodical reports to the Commission, and to demonstrate their willingness to cooperate with port state control administrations when a ship of their class is the subject of statutory inspection. They are also obliged to provide the State administration with all relevant information about changes of class or declassing of ships, and they are prohibited from issuing certificates to a disclassed ship before consulting the competent State administration.

Thus, some obligations for classification societies are expressly dictated by European law. But this regulation is not comprehensive, and so other sources ought to be considered, in particular: contracts, rules (of the classification societies), professional customs, etc.

B. The Nature of the Relationship Linking the Member State and the Recognized Organization

According to Article 6 of Directive 94/57/EC, the link between the state administration and the recognized organization is a *working relationship.* This statement is especially inaccurate and disconcerting,[103] and it can cause unnecessary and fruitless litigation. It does not seem, however, to have resulted from a mistake by European law makers, but rather from their deliberate decision.

It is self evident that the intention of the law is not to declare that the relationship is a contract for work. That characterization would be quite arguable in light of current national laws in Europe, because the agreements between the national administration and the recognized organization lack one or more of that legal concept's relevant elements: for example, dependence. Besides, it is obvious that a corporation or similar legal body can participate as a party to a contract of work and service only as a master.[104] In that case, the more appropriate characterization in English would be "contract of employment."[105] But it does not seem a simple mistake of translation. In other languages, the problem is the same; in the French version, for example, it is *relation de travail,* and in the Spanish one, *relación de trabajo.* In

[103]See Bonassies, supra note 75, at 15.

[104]See Francis Raleigh Batt, The Law of Master and Servant 41-42 (5th ed. 1967); S. F. Deakin & Gillian S. Morris, Labour Law, 142-143 (1995).

[105]See id. at 140-168.

the German text, however, we find the term *Auftragsverhältnis,* which in turn can be translated into *mandate relationship.*

It is difficult to imagine the reason that led the authors of the Directive to state such a strange rule. One explanation for the use of this terminology is that the aim of the Commission was to ensure that, in the agreements between the recognized organizations and the governments, it is clearly stated that the former function as the *servant* of the latter, so that the organizations entitled to all the defenses and protections afforded by law towards the government and its own surveyors. There is a parallel between this situation and one manifested in some standard maritime contracts. Take, for example, the standard contract for towage, where we find clauses stating that the tug is the servant of the tow.[106]

On the other hand, it seems that the aim of the Directive is to shift the consequences of the mistakes and faults of the recognized organization to the delegating State. The wording here under scrutiny appeared in the first version of the text, in which there was no provision on financial liability, so the Directive's legal concept would have some effect in the applicable liability regime. But since 2001 there has been a specific provision on the subject, so the wording is now rather unnecessary if this is indeed the purpose behind it. And even if the original intention was to establish indirectly a liability regime, the method employed has to be criticized.

Under the current law of *appliance* within European States, in order to achieve the consequences of burdening one party with liability for the acts of another party acting on its behalf, it is unnecessary to use the framework of the labor contract, which has far reaching consequences. The same result can be achieved by application of other legal concepts such as agency[107] or mandate. In this regard, the Directive can be compared with Clause 2 of the CMI Model Clauses, which states clearly that, in carrying out their duties and responsibilities, the classification societies act solely *as the agents* of the administration, under whose authority or upon whose behalf they perform such work. This is an important provision related to liability.

In the tort law common to Europe, the law governing liability for the actions of others also includes cases in which the person liable and the person acting are not parties to a contract of employment.[108] For example, if an agent acts within the scope of its agency, the principal is made liable to third

---

[106]See J.L. Pulido Begines, *Los contratos de remolque marítimo* 183-186 (1996); Simon Rainey, The Law of Tug and Tow 65-70 (1996).

[107]"By agent is meant one who acts on behalf of another; it is thus a much wider term than servant; all servants are in some matters the agents of their masters, but all agents are not servants." Batt, supra note 104, at 9.

[108]Christian von Bar, 1 The Common European Law of Torts 207 (1998).

parties.[109] To sum up, the liability principle by which the principal must respond for the acts of its servant is connected, not with internal contractual relationships, but with conditions in which the actor is bound to follow instruction; and it is generally agreed that such state of dependency exists if the superior usually has the authority to give instructions.[110]

The general principle operating in this field is that the legal entity is ordinarily liable for damages caused by its duly appointed representative. Since the classification society has a legal contract for acting on behalf of the State, and the inspectors have a contract for work or agency,[111] the damage caused by any misconduct of those inspectors may be recovered from the State, which is finally responsible.[112] Therefore, the State must be considered liable for any tort committed by its servants or agents, in circumstances similar to those in which any employer would be. The same rule should apply when the State activity is performed by an independent contractor, if this actor also can be considered an "agent" of the administration.

The natural persons for whom a legal person can be made liable are the duly appointed representatives. These can be identified mainly by the internal rules of the corporation, by the relevant provisions of the applicable company law, and, in particular, in our case, by the Directive and by the General Conditions in the agreement between the classification society and the State.

And finally, irrespective of the specific legal nature of the relationship linking the Member State with the recognized organization, it is clear that the aim of the Directive is to establish a *conventional* relationship between them, that is, a kind of contract with obligation and duties for both parties.

---

[109]See Batt, supra note 104, at 9-10, 315-381; Dix, Crump & Pugsley, Contracts of Employment 41-42 (7th ed. 1997); Tettenborn, Wilby & Bennet, The Law of Damages 493 (2003).

[110]Besides, it must necessarily be so, because the liability of a corporation, or a state, is inevitably vicarious, for legal persons are not capable of conduct: that is why they cannot be held responsible for failing to select and supervise properly their servants or agents (board members, employees, sub-contractors, etc. . . .), and, therefore, a legal person cannot be at fault, it can only be liable. This a principle followed in all European Nations: a legal person is identified with the natural person representing it. See P.F. Cane, An Introduction to Administrative Law 262 (2d ed. 1992); Gomez Prieto, supra note 4, at 322; Von Bar, supra note 108, at 190; D. Walker, The Law of Delict in Scotland 127 (2d ed. 1981).

In our case, we have a company which acts on behalf of a maritime administration, in other words, two legal persons. But finally, it has to be a natural person which performs the task that is the basis of the responsibility.

[111]F. B. Goldsmith, River Pilot, Marine Surveyor, and Third-Party Inspector Liability, 26 Tul. Mar. L. J. 463, 485 (2002).

[112]Duncan Fairgrieve, State Liability in Tort: A Comparative Study 261-284 (2003); Brian Jones & Katharine Thompson, Garner's Administrative Law 340-345 (8th ed. 1996); F. Ossenbühl, *Staatshaftungsrecht* 19-34 (4th ed. 1991).

VI
THE LIABILITY REGIME OF THE DIRECTIVE

There is no international convention establishing a liability regime for classification societies. Therefore, this subject is left to national laws. Unsurprisingly, in the absence of a single regime applicable to classification societies, jurisdictions offer different solutions to the same problems.[113]

The issue of the liability of classification societies has prompted considerable legal debate, but many difficult questions are still unanswered, and in no sphere has the necessary consensus been reached. The main question is how set a level of liability for classification societies, and this remains hotly debated.[114] For example, in the Working Group of the CMI, statutory limitation and regulation of civil liability were considered, but had to be deferred for future study, because in the then current circumstances (i.e., those of the nineties) those approaches were clearly unfeasible.[115]

European authorities, although reluctant, have been compelled to establish some regulation on this matter, which was discussed above, with respect to Directive 94/57/EC. But, the liability regime eventually laid down and currently in force reflects all the doubts still lingering on this subject, as well as the lack of a generally accepted agreement by the main business parties. It seems that, even within the Commission, there was not a clear idea regarding some core issues, such as the degree of accountability for classification societies that should be laid down in the Directive, and the scope of the liability regime.

A. Scope and Nature of Liability in the Directive

The regulation of the liability of classification societies when carrying out statutory functions can cover multiple aspects. But in a general overview, it is at least twofold: on the one hand, there is the aspect of responsibility arising from the relationship between the State and the classification society, on the other, there is the aspect of liability to clients or third parties injured as a result of the performance of the statutory surveys.

The Directive's liability regime is not comprehensive; the current European law only covers some topics, in particular, the liability of the classification society with regard to the State for whom it has performed the statutory functions. Therefore, outside of the scope of the Directive there

---

[113]Comenale Pinto, supra note 28, at 21; Stuart & Caffrey, supra note 93, at 1-6. See the case law produced in the last years in paragraph 2.1.4.

[114]Feehan, supra note 2, at 164-165; Miller, supra note 4, at 76.

[115]Wiswall, supra note 49, at 173.

remain such important issues as the liability of classification societies to their clients (the owners of the ships that they survey) and liability to third parties. These subjects are left to the specific provisions of the agreement and to the national law of contracts or torts. At present, an injured third party can choose to sue either the classification society performing the statutory survey, or else the delegating national administrative body. The clients of the classification society enjoy the same options; although they have a contractual relationship only with the former and not with the latter, the task is a public duty, the competence and responsibility for which lay with the flag State. But, of course, the European regulation does not mean that the State is only answerable if the classification society acting on its behalf is also liable.

B. Responsibility in Tort: State Liability

The authorization granted by a national administration to a classification society to control the safety of its fleet gives rise to the particular issue of the liability of the State in the event of wrongful performance of public duties. When classification societies, acting on behalf of public bodies, perform governmental duties, they do so within the limits of the law of state damage liability (claims against a state body), a special category of damage claims. This means that, in principle, such delegation would not relieve the State from liability in damages for the actions of its agents, and that they, in turn, could be entitled to all the defenses and protections afforded by law to the government and its own surveyors. This principle is manifest in international conventions on maritime safety: the flag State is the absolute guarantor of the complete and effective performance of inspections and surveys, and bears full responsibility for related certificates.[116]

As a result, the State may delegate the functions of auditing, inspecting and issuing certificates, but cannot delegate the responsibility for performance of those functions. A legal accountability for their performance remains with the national authority. Whatever the form of carrying out such certifying functions, the ultimate liability for faults in their execution lies with the delegating public body. That is why it is so important that the flag State properly performs its functions of monitoring classification societies.[117] If something is wrong it can be assumed that the Flag State has failed in exercising control of its delegated body, and therefore it will be hold liable.

---

[116]E.g., SOLAS, ch. I.B, regs. 6(e) and 12(a)viii; Marpol Annex 1, regs 4.1 and 5.2; Load Lines Convention art. 16.

[117]Smith, supra note 56, at 15.

There is not an international regime of State liability; so it is necessary to look at specific national laws applicable to State liability in tort to determine the basis of accountability.

Regarding this subject, there are great differences between the legal systems.[118] In the common law, when the State delegates governmental authority to a classification society, the issue of further state liability is at least questionable.[119] For example, in English law, an action for damages against a public authority must sound in one of the diverse and varied torts that have been applied by the courts to public bodies.[120] And there should also be a casual connection between the failure of activity of the State and the damage. There is no broad principle of administrative liability, as there is in civil law.[121]

In the civil law, general systems of liability are the rule. For example, there is in French law a general principle that a claimant may gain damages for the fault of a public body that has caused loss. The doctrine of *faute de service* demarcates the circumstances in which the State will be liable for the actions of its servants.[122] Similar rules operate in Spain, Italy, and Germany.[123] There are also differences in the procedures for damages actions against the public bodies. In civil law systems, there are usually administra-

---

[118]See generally Keith Stanton, Statutory Torts (2003); Harry Street, Governmental Liability: A Comparative Study (1953); A. Tunc, *La responsabilité Civile* (1989); von Bar, supra note 108.

[119]See Societa per Azioni de Navigazione Italia v. City of Los Angeles, 645 P.2d 102, 1982 AMC 2281 (Cal. 1982); Reeman v. Dep't of Transp., [1997] 2 Lloyd's Rep. 648 (Ct. App. U.K.). See also Cane, supra note 18, at 364; Goldsmith, supra note 111 at 485; Honka, Classification System, supra note 18, at 11.

[120]D. J. Ibbetson, A Historical Introduction to the Law of Obligations 192-193 (1999). Thereby, the torts of assault, breach of statutory duty, nuisance and negligence have to be applied. Nevertheless, the tort of negligence has progressively been expanded in the last century to become the predominant tort. See Yuen Kun Yeu v. Att'y Gen. of H.K., (1988) A.C. 175, 174 (P.C.); Caparo Indus. Plc v. Dickman, [1990] 2 A.C. 605, 617-618 (H.L.).

[121]Fairgrieve, supra note 112, at 16-17. In the United States, the Federal Tort Claims Act 28 U.S.C. §§ 1346(b), 2401(b), 2671-2680, provides a limited waiver of the federal government's sovereign immunity when its employees are negligent within the scope of their employment.

[122]Fairgrieve, supra note 112, at 16-19; J. Grosdidier de Matons, *La responsabilité de l'Etat pour le fonctionnement de certains services maritimes*, in 1968 *Le Droit Maritime Française* 67-76; Reynard-Payen & Robineau, *La responsabilité de l'État pour faute du fait du fonctionnement défectueux du service public de la justice judiciaire et administrative*, http://www.courdecassation.fr/_rapport/rapport02/etudes&doc/1-EtudeRenard-Payen.htm; John Bell, Sophie Boyron & Simon Whittaker, Principles of French Law 354 (1998).

[123]Re Spain, see article 121 *Ley de Expropiación Forzosa, de 16 de diciembre de 1954*. See also F. Garcia Gomez de Mercado, *Legislación de Expropiación Forzosa. Comentarios y Jurisprudencia*, 407-439 (2d ed. 2001). See generally Garrido Falla, 2 *Tratado de Derecho Administrativo* (1992); Gonzalez Perez, *La responsabilidad patrimonial de las Administraciones Públicas* (1996); Muñoz Machado, *La responsabilidad concurrente de las Administraciones Públicas* (1992). Re Italy, see art. 52 *delle leggi sulla Corte dei Conti*, June 12 1934, n. 1214; art. 18 *dello Statuto degli impiegati civili dello Stato*, Decree 10 January 1957. See also G. Duni, *Lo Stato e la responsabilità patrimoniale* (1968). Re Germany, see *Burgerliches Geseztbuch* [BGB][Civil Code] § 839.

tive courts with jurisdiction over State liability claims.[124] In common law systems, ordinary courts have traditionally applied the ordinary rules of tort law to claims against public bodies.[125] In spite of these differences, outcomes are similar in the courts of both civil and common law, because they share the same policy of promoting the interest of the victim by allowing actions against the State.[126] In short, as a general rule, tort law contemplates State liability as a supplementary liability, intended to protect the victim.

It seems self-evident that when a recognized organization acts on behalf of a governmental entity, the liability for the acts or omissions of the former is, directly or vicariously,[127] that of the State, which has competence for the control of the compliance of ships with international standards, and which retains responsibility and obligations under the conventions that it has ratified.[128] Therefore, if negligence occurs during a survey, or in the issuing of a survey certificate, a claim can be filed against the flag State administration, and against its officials and agents. The classification society is working in the State's interest and on its instructions when the damage occurs, and so the State is liable, on the grounds of its deficiency in performing a public service. Because of these rules, only rarely would a classification society be directly and solely liable for negligence in tort for the performance of inspection and certification services for a government, since the ultimate liability lies on the government.

C. Responsibility Arising from the Relationship between the Recognized Organization and the Delegating State

Defective inspections and surveys by classification societies, committed during the course of their employment for the execution of public services, can lead to liability in damages. A failure by any classification society representative can result in loss or damage not only to the vessel and her cargo, but also to the property of third parties; it can lead to loss of life or injury for her officers and crew, as well as for other persons. If a casualty follows after a ship has been allowed to trade following her certification by a classification society, and that society's inspection failed to spot defects that were

---

[124]For example, in Spain the *Tribunal Contencioso-Administrativo*, regulated in *Ley 29/1998, de 13 de Julio, Reguladora de la Jurisdicción Contencioso-Administrativa*.

[125]Carol Harlow & Richard Rawlings, Law and Administration 618-621 (2d ed. 1997).

[126]Fairgrieve, supra note 112, at 25-27.

[127]As a rule, that liability should be direct in civil law countries, and vicarious in common law systems. Id. at 21-23; Boisson, *Responsabilité*, supra note 32, at 124-125. See *Tribunale di Savona*, 29 October 1990, IDM 1991, 423-452.

[128]See Cane, supra note 18, at 364; Comenale Pinto, supra note 28, at 9; Tort Liability of Public Authorities in Comparative Perspective (Duncan Fairgrieve, Mads Tønneson Andenæs et al. eds., 2002); Gomez Prieto, supra note 4, at 295; Smith, supra note 56, at 13.

the casualty's cause, then victims can sue the State administration.[129] But under the same circumstances, the maritime administration on whose behalf the classification society was acting can, in turn, sue the latter for compensation.

Formerly, the law to be applied in such situations depended entirely upon the kind of relationship between the State and the classification society: it could be either administrative liability[130] or civil liability.[131] Indeed, in some cases, the facts could also point to a criminal liability.[132] Within the European Union, there was a wide variety of legal solutions to the same problem because the particulars were to be found in the respective law of each Member State. This was an undesirable situation for many reasons. Article 6 of Directive 94/57/EC makes this a matter of European law, by laying down a special regime of responsibility for recognized organizations in such situations.

The main effect of the current regulation is that, irrespective of the nature of the relationship existing between the recognized organization and the State, common rules about this issue should be operating by now, and those rules establish that the Member State is entitled to damages against the classification societies when the latter is guilty of negligence in the execution of its public activities.

As amended by Directive 2001/105/EC, article 6 of Directive 94/57/EC sets out a liability regime the scope and consequences of which are somewhat confusing because of the article's strange and cumbersome wording. According to article 6, its liability regime applies

> if liability arising out of any incident is finally and definitely imposed on the administration by a court of law or as part of the settlement of a dispute through arbitration procedures, together with a requirement to compensate the injured parties for loss or damage . . .

From this long and dense phrase we can work out that the requirements are: first, a judicial or arbitral procedure, the aim of which must be an award of damages, and a final and non-appealable ruling enforcing the judgment against the administration. Secondly, it has to have been proved that the damage was caused by act or omission of the recognized organization, its bodies, employees, agents or others acting on the organization's behalf. In

---

[129]Examples of possible mistakes of classifications societies: organisational defects within the society, wrong standards set by the society, incorrect application of the rules laid down in conventions or statutory law, incorrect application of the society's own rules, or inability to detect defects in a concrete survey.

[130]For example, in France or in Spain. See Boisson, *Responsabilité,* supra note 32 at 124-125.

[131]For example in some common law countries, such as England.

[132]Boisson, *Responsabilité,* supra note 32, at 127-128; Gomez Prieto, supra note 4, at 322-323. See *Cour d'appel de Douai,* 6 July 1978, *Le Droit Maritime Française,* 1981, pp. 153-174.

other words, the responsibility of the recognized organization or its agents must be completely resolved. The wording of the Directive covers work performed by agents (non-exclusive surveyors, for example), as well as work performed by persons directly employed by the organizations.

If these conditions are met, the administration shall be entitled to financial compensation from the recognized organization to the extent that the loss, as decided by that court, was caused by the recognized organization. In this way, the Directive channels liability for faults in the conduct of delegated public duties ultimately to the classification society. Note that actual payment of compensation is not a precondition to action against the recognized organization. It is enough, according to the Directive, that there be but a "requirement [for the administration] to compensate."

The scheme laid down in the Directive is rather tortuous, because it does not establish directly the liability regime applicable in such cases, but instead obliges the Member State to include in the contractual agreement provisions concerning financial liability to the same effect. In other words, the Directive does not establish directly the right of the Member State to indemnity by the negligent classification society, but instead a duty to obtain the same guarantee through a provision in its contract with recognized organization. The burden of compensating injured third parties falls on the State, but once the State has been held liable, it can claim indemnification from classification society. In effect, Directive 94/57/EC regulates liability as between State administrations and recognized organizations by regulating the provisions of their contract pertaining to such liability. As a result, the content of those agreements is, in some regards, compulsory.[133]

The ultimate aim of the Directive's provisions on financial liability is to share the liability between the flag State and the classification society in cases when that State is held liable but the cause is linked to the operation of the recognized organization performing duties on its behalf, because the State can use the established remedy to recoup, but only in some cases and to some extent, the financial cost of the accident.

Such a scheme prompts many doubts. I will only take up the most important: for example, what would happen if, despite the Directive, or even despite the national statutory rule, the Member State does not include that provision concerning financial liability in the contract, or does so incorrectly? Of course, financial liability in that case cannot be established by reference to the text of the Directive, because it is not directly applicable; nor, probably, is the statutory regulation, if such even exists. The gap can only be

[133]Because of the Directive, there is in the current European law on the subject a restriction to the freedom of contract.

filled with national law, and that will depend on the kind of relationship between the national administration and the recognized organization.[134] And, what happens if the classification society (as servant), is jointly liable with the State (as principal)? Can the State recover from the society? What happens if both are at fault? Must damages be split according to the share of fault? This last solution seems to be implied in the wording of the Directive's article 5: "to the extent that the said loss, damage, injury or death is, as decided by that court, caused by the recognised organisation." But this question is certainly not clear in the Directive, and therefore, the rules of the national law will have to be applied.

But these considerations are only in passing. They all require further thinking, and a specific and longer study.

D. Grounds in the Directive for Liability

The formalized written agreement between the administration and the classification society should contain the grounds for liability established in article 6.2.b of the Directive.

Basically, the Directive lays down a contractual liability based on negligence, but the construction of that strange provision is difficult and gives rise to several questions. Three cases are considered in the wording of the rule:

> a) If it is proved that a *loss or damage to property or personal injury or death*, has been caused by a *wilful act or omission* or *gross negligence* of the recognized organization, its bodies, employees, agents or others who act on behalf of the recognized organization, the administration shall be entitled to financial compensation from the recognized organization to the extent that the said loss, damage, injury or death is, as decided by the court, caused by the recognized organization, without any possible limitation.
>
> b) If the damage caused is a *personal injury or death*, and if it is proved to have been caused by any *negligent or reckless act or omission* of the recognized organization, its employees, agents or others who act on behalf of the recognized organization, the administration shall be entitled to financial compensation from the recognized organization to the extent that the said personal injury or death is, as decided by the court, caused by the recognized organization. But in this case, the Member

[134] At common law, in the case of an agency relationship, the result of an agent's negligence is to make the principal liable to third parties. The loss suffered by the principal is recoverable from the agent if indeed it is the result of the agent's negligence. Tettenborn et al., supra note 109, at 493-495.

States may limit the maximum amount payable by the recognized organization, which must, however, be at least equal to € 4 million.

c) If the damage caused is a simple *loss or damage to property*, and if it is proved to have been caused by any *negligent or reckless act or omission* of the recognized organization, its employees, agents or others who act on behalf of the recognized organization, the administration shall be entitled to financial compensation from the recognized organization to the extent that the said loss or damage is, as decided by the court, caused by the recognized organization. But in this case, the Member States may limit the maximum amount payable by the recognized organization, which must, however, be at least equal to € 2 million.

This provision reproduces the general structure of the equivalent clause of the IMO Model Agreement for the Authorisation of Recognised Organisations acting on behalf of the Administration (MSC/Circ.710-MEPC/Circ.307). But there are some important differences. First, the IMO Model Agreement does not distinguish between personal and material damages. Secondly, the IMO document only distinguishes between *grossly negligent act or wilful or grossly negligent omission* on the one hand, and *any other negligent act or any other negligent omission* on the other, which is a much simpler distinction than that attempted in the Directive. Finally, the IMO Model Agreement has some provisions that have been omitted in the Directive; for example, the Model Agreement prohibits the State from entering into conciliation without the consent of the recognized organization.

In some aspects, Article 6 of the Directive improves upon the liability provisions of the IMO Model Agreement, by eliminating some improper dispositions, and providing better protection to the victims of a recognized organization's negligence. But Article 6 lacks clarity: the whole liability scheme is confusing and presents several problems of construction.

One of these is the problem of fixing the meaning of expressions used in European law to distinguish different degrees of fault. In the English version, the terms *wilful act or omission* and *gross negligence* describe the behavior that prevents limitation of liability, while the term *any negligent or reckless act* is used when limitation is allowed. There is even a difference among the terms used in each section of the provision; while slight, it leaves open sufficient ambiguity to cause different consequences depending on the interpretation. But the core issue is whether there is a real difference between *gross negligence* on the one hand, and a *reckless act* on the other. It seems at least possible to conclude that there is no real difference between them, which would rule out the responsibility of classification societies for

minor mistakes and even ordinary negligence.[135] From this, one might reasonably infer that the aim of the Directive is to restrict the scope of the responsibility of classification societies to responsibility only for major faults, because the *reckless act* and *negligence* are treated same. In other words, because of the wording in Article 6, one might reasonable doubt whether the classification societies are to be liable for ordinary negligence or minor fault.

This is not a subject without importance, nor simply an oversight. In fact, the CMI's Joint Working Group after a study of issues concerning classification societies in its Sixth Session,[136] affirmed that classification societies should not be liable unless their management violated the standard of reasonable care or their servants or agents otherwise acting within the scope of employment or agency committed a deliberate act of negligence that directly resulted in damage.

And in the Committee of the Regions opinion delivered on 21 September 2000, there is this significant suggestion: "With regard to the directive on classification societies, the Committee proposes a provision establishing a level of liability on the part of the recognized organization *in the event of minor error* that would not be below a sum fixed by the directive."[137] Thus, the drafters of the Directive were surely aware at the time of the need to resolve this issue and that it had been argued about.

It might otherwise be a problem of translation. However, in the German version, for example, we find the same problem as in the English one. Paragraph (i) refers to *vorsätzliche* (wilful act or omission), and *grobe fahrlässigkeit (*gross negligence), while paragraphs (ii) and (iii) refers to *fahrlässige oder leichtfertige*, (negligent or reckless act). This poses the same problems of construction.

In other versions of the Directive, the differences in Article 6 between types of conduct are clearer. For example, in the Spanish version, paragraph (i) contains the terms *negligencia grave* (gross negligence), and paragraph (ii) and (iii) *acto u omission negligente* (negligent act or omission). Here, because *reckless* is not mentioned, it is more difficult to conclude that minor fault is to be excluded from the scope of the Directive. Something similar appears in the Portuguese version: paragraph (i) refers to *acto voluntário ou*

---

[135]See Bonassies, supra note 75, at 15.

[136]1994 CMI Y.B. 233.

[137]Proposal for a Directive of the European Parliament and of the Council amending Council Directive 95/21/EC concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port State control), 2000 O.J. (C 212E) 102.

por omissao ou negligência grave, and paragraphs (ii) and (iii) refer to *negligência* and *acto imprudente*.

In any case, and whatever the version, the Directive presents problems of construction to a greater or lesser extent. Therefore, one might justifiably conclude that its wording is imperfect and ambiguous.

This problem could have been avoided, if only the legal terms had been used more precisely. There are at least two possibilities. If the aim of the Directive was to rule out the liability of classification societies for minor faults, then the inclusive terms should have been the same (i.e., gross negligence and reckless act).[138] If, on the other hand, there was no intent to restrict the scope potential liability of classification societies, then the difference between gross negligence and ordinary negligence should have been laid down clearly. As is, the Directive is very unclear as to whether the minor faults are excluded (as they seem to be in the English and German versions), or else included (as they seem to be in the Spanish and Portuguese versions).

In my opinion, it is difficult to ascertain the aim of the Directive. The exclusion of minor faults from the sphere of liability of classification societies would mean that those bodies enjoy a particular and privileged liability position. But I find it difficult to accept that a regulation passed in the wake of a very severe maritime disaster (the *Erika*), really had such aim. And anyway, as a matter of justice and public policy, discussed below, classification societies ought to be held liable even in cases of minor fault.[139]

To find a solution for this problem of construction, it might be useful to compare the wording of the Directive with that of the Financial Liability-Alternative provision in the IMO's Model Agreement for the Authorisation of Recognised Organisations Acting on Behalf of the Administration (MSC/Cir.710-MEPC/Cir.307), which offers two clear alternatives: on the one hand, *a wilful or grossly negligent act or wilful or grossly negligent omission*, for which the State is entitled to receive from the recognized organization full compensation, and on the other, a *negligent act or any other negligent omission*, for which the State is entitled to receive from the recognized organization compensation up to the limit of financial liability as defined in the standard terms and conditions.

From the analysis of this clause, two conclusions can be drawn. First, the problem of the Directive is revealed to be improper use of the term *reckless*. Secondly and more important, because the Directive is inspired by the

[138]Compare, for example, the wording of the draft of Model Contractual Clauses of the CMI for classification societies, art. 9. b: ". . . unless it is proved that the damage giving rise to the claim(s) resulted from an act or omission done by such person with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result." See 1995 CMI Y.B. 106.

[139]Arroyo, supra note 22, at 39-40.

IMO's Model Agreement, and the text of the latter is therefore an appropriate tool for the construction of the European law, the aim of the Directive can be seen to include ordinary negligence within its scheme for liability on the part of the classification society.

Another serious problem of construction is whether the Directive is intended to be stringently compulsory or else just to set out a general framework that can be amended by Member States in their national regulations. Directive 94/57/EC is the result of the *Erika* Package, the aim of which was to put an end to some unacceptable situations within maritime transport. It is clear to me that the Directive intends to bring about in all Member States a harmonized liability regime for this important issue related to maritime safety, without any leeway for deviation by national legislators.

I think that the Directive is strictly compulsory and therefore that the national regulations must each establish the same grounds for liability.[140] As a general rule, it has been the intention of the Commission to establish a harmonized liability regime, and in cases where room for discretion has been intended (for example, regarding the matter of limitation of liability), that intention has been expressly stated in the Directive. Thus, it is clear that Member States cannot, for example, lay down a scheme of strict liability or include exonerations or exclusions of liability for classification societies that are not found in the European law. In this Directive, the only leeway left to for national legislators is that of setting (or not setting) a limit to liability.

In short, Member States cannot deviate from the harmonized liability regime laid down in the Directive, not even in a stricter direction. The same reasoning persuaded the European Court of Justice, in *Sánchez vs. Medicina Asturiana SA,* where, it was said that *"[the Product Liability] Directive, unlike others, does not expressly authorise Member States to adopt or maintain more stringent provisions."*[141]

Directive 94/57/EC is the result of a complex balancing of different interests, the outcome of which is only a weak consensus that was difficult to achieve in the first place. That fragile balance could be disturbed if any country introduces different rules. The realities underlying the Directive therefore limit the range of variations in the national contracts to only complementary or developing clauses, not amending clauses.

With respect on the other hand to issues not regulated in the Directive, the general rules of the law of damages must be applied, and these are more or less similar in most European countries: there should be an injury, negligence, and a causal link between the two.

---

[140]Comenale Pinto, supra note 28, at 34.

[141]Case 183/00, 2002 ECR 1-3901.

E. The Standard of Care

The liability established in the Directive is not strict, but based on negligence. Negligence arises from the failure to comply with the contractual duties of the agreement linking the recognized organization and the Member State, or with general duties imposed by the law of damages.

As in any other field of the law of damages, a criterion is needed to determine when a classification society will be found negligent; in other words, there must be a standard by which the conduct of these bodies is to be measured. This is a very important subject that is not treated in the Directive. By default, therefore, the general rules of the law of damages of each Member State will be applied. Nevertheless, some general considerations can be formulated.

Classification societies have tried repeatedly to lay down that their own rules, and later, the Principles of Conduct for Classification Societies, as the standard for measurement of their performance, and therefore, to lay down that adherence to these standards should be prima facie evidence in a case of maritime loss that the organization concerned had not acted negligently.[142] Indeed, this is the approach found in Part I.2 of the Model Contractual Clauses for Inclusion in Agreements Between Societies and Governments. But in my opinion[143] this approach is unsound in general, as well as in the specific context of the liability regimen of the Directive.

Under this approach, in a case of maritime loss, a claimant would need to prove either that the classification society concerned had not complied with the Principles, or else that the standards in the Principles were so obviously deficient in a respect material to the case that the Society could not reasonably have applied them.[144] This consequence cannot be accepted, because it would leave the scope of liability for classification societies narrower than what, as we have already seen, is permitted by European law.

An appropriate standard of care is of course necessary. In the determination of that standard, the Principles or the society's own rules may help, but they should not be the only element. General rules of the law of damages should be applied, in order to set the level of professionalism that is expected from an expert organization like a classification society.

In the modern law of damages, the standards for professionalism are high.[145] The liability of experts and consultants has become increasingly

---

[142]See Report of the Joint Working Group on a Study of Issues re Classification Societies, 1996 CMI Y.B. 328.

[143]See also Comenale Pinto, supra note 28, at 19; Gomez Prieto, supra note 4, at 323.

[144]See Report of the Joint Working Group on a study of issues re classifications societies, 1996 CMI Y.B. 329.

[145]See Harling, supra note 99 at 7-8; Honka, The Classification System, supra note 18, at 33.

stringent in recent decades as a result of several factors outside the province of this paper, but mainly in order to reinforce their preventive effect.

The duty of care owed by the surveyors of a classification society is that required from an expert in his business.[146] Surveyors must exercise due care in their detection of defects in ships surveyed and in the notification thereof to the contracting party.[147] They owe a duty to conform to a standard of conduct which is generally the "the degree of skill which reasonably may be expected of one in the given circumstances."[148]

Standards for the performance of their duties by classification societies can also be found in other sources such as the class rules, the contractual agreements,[149] local customs of marine surveying,[150] and even in the Principles, according to Article 4 of which: "Each Classification Society which adopts these Principles of Conduct undertakes via its contracts with clients to perform all agreed services related to ship classification and statutory certification *using reasonable skill, care and judgement.*"

Moreover, there could be specific national regulations on this subject, which must comply with the Directive. In UK Statutory Instrument 1996 No. 2908, art. 8, for example, it is laid down that it shall be a defense for an organization charged with an offence under these Regulations to prove that *all reasonable steps were taken* to ensure that the regulation in question was complied with.

To recap, an action against a classification society may be based on the negligence of the society's employees or agents,[151] but because the Directive does not itself set any specific criteria on this subject, it is necessary to consult the law of the Member State for the applicable standard of care.

F. Damages

Another important question is what kind of damages are payable under the Directive. It states only that they have to be for loss or damage to property or for personal injury or death. This laconic wording leaves unanswered

---

[146]Goldsmith, supra note 111, at 471.

[147]Great Am. Ins. Co. v. Bureau Veritas, 338 F. Supp. 999, 1973 AMC 1755 (S.D.N.Y. 1972), aff'd, 478 F.2d 235, 1973 AMC 1755 (2d Cir. 1973).

[148]Bradshaw v. Monk, 1952 AMC 53 (Sup. Ct. King County 1951).

[149]If the contract linking the society with the state so provides. In general, since the relationship between those two parties is contractual, and since in the Directive there is nothing contrary, the standard of care can be set contractually.

[150]B.J. Beck, Liability of Marine Surveyors for Loss of Surveyed Vessels: When Someone Other than the Captain Goes Down with the Ship, 64 Notre Dame L. Rev. 246, 246 (1989).

[151]Helmut Koziol, The Concept of Wrongfulness under the Principles of European Tort Law, in European Tort Law 2002 at 552 (Helmut Koziol & Barbara C. Steininger eds., 2003).

some important questions, for example, whether environmental cleanup costs are included. This is not easy to answer; the issue has been debated in several contexts, but mainly in that of marine pollution law.[152] From the wording of the Directive, it might be concluded that such costs are not included, because they are not, strictly speaking, costs from *damage to property*. But, of course, it would depend on the construction of that expression in the national courts.

It is a very important question. The harm most frequently arising from a maritime accident is environmental in nature. In my opinion, this is clearly a question of public policy: if cleanup costs are excluded, the liability of classification societies could be considered illusory to a great extent. On the other hand, if cleanup costs are included, they pose problems of measurement and they have the potential to be very expensive indeed. For these reasons, it would be reasonable to conclude that the aim of the Commission and the Parliament was to exclude such costs from the damages said in the Directive to be recoverable.

VII
LIMITATION OF LIABILITY

For many years, the issue of the limitation of the liability of classification societies has been the subject of a wide-ranging legal debate. The CMI, for example, tried to establish "an appropriate level of protection" from liability. But agreement among all the interested parties was not possible.[153] In the CMI's Model Contractual Clauses, the limit is either ten times the classification fee or US$ four million, whichever is the higher. In the CMI Joint Group, the International Council of Shipping and the International Group of P&I Clubs thought this level was too low, while the IACS on the other hand thought it too high.[154] The consensus on this subject was so weak that the CMI expressly states that the form proposed in the Model Clauses stands as a recommended model for use by individual societies, which may modify them in accordance with commercial practice, particular national law or regulation, or otherwise as appropriate.[155]

---

[152]See Z. Oya Özçayir, Liability for Oil Pollution and Collisions 268-270 (1998).

[153]"[S]ince we have not reached agreement on the level of liability in Article 9 of the Model Contractual Clauses, IACS will reserve its position and will not adopt and will not recommend adoption of the Principles of Conduct". A.W. Skou (on behalf of the IACS) in Classification Societies, 1997 CMI Y.B. 184, 184.

[154]See Wiswall, supra note 49 at 182.

[155]See Report of the Joint Working Group on a study of issues reclassifications societies, 1996 CMI Y.B. 330.

It seems evident that there is not in the maritime world the minimum consensus required to establish a generally agreed rule on this matter. There are rationales for limitation and for non-limitation.

On the one hand, it has been said that, as the activity of classification societies is related to assets of high value, therefore, they are exposed to high risks.[156] It is also argued that, as the fees are charged by class, they do not correlate with the value of the assets.[157] It has also been argued that if the exposure to liability is too high, societies will be forced to withdraw from some activities, so that there is a public interest in setting a level of liability that would persuade classification societies to keep playing their role.

From my point of view, the most sensible argument in favor of limitation is that it would be unfair to hold the classification societies liable without limit when ship-owners are only liable to a certain limit.[158] Should classification societies be brought within the scope of the International Convention on Limitation of Liability for Maritime Claims? Although this convention does not specify clearly who is entitled to global limitation (so that the final solution in each case depends upon the applicable national law),[159] it is generally accepted that classification societies do not have this entitlement.[160] According to Article 1 of the International Convention on Limitation of Liability for Maritime Claims 1976, those entitled to limitation are ship-owners (i.e., the owners, managers and operators of a seagoing ship), salvors, and the liability insurers.[161] This subject was considered by the CMI's CSJWG. The Group agreed that classification societies should be afforded such protection and concluded that the matter should be re-examined at such time as a substantial revision of the Convention is next considered by the IMO.[162]

Another reason for changing the current international regime of limitation of liability is that the present exclusion of classification societies motivates tort victims to sue these bodies instead of ship-owners in ship loss cases.[163]

On the other hand, there are also sound reasons for non-limitation. From various points of view, it has been argued that classification societies should

---

[156]P. Passias, *Die Abwicklung von seerechtlichen Haftungsfällen mit Haftungshöchstsummen bei mehreren Geschädigten* 89-124 (1998).

[157]Boisson, Liability, supra note 38, at 13; G. Chaves, The Issue of Liability, 1998 BIMCO Rev. 113.

[158]See East, supra note 22, at 148.

[159]Honka, Classification System, supra note 18, at 10.

[160]See Feehan, supra note 2, at 164; Honka, Classification System, supra note 18, at 9-10;. On the contrary, for example, Boisson, Liability, supra note 38, at 23-24, asserts that the London Convention of 1976 can offer legal protection to classification societies.

[161]Patrick Griggs & Richard Williams, Limitation of Liability for Maritime Claims 7-15 (3d ed. 1998); Passias, supra note 156, at 17-48.

[162]Report of the JWGCL, 1996 CMI Y.B. 329-330.

[163]Beck, supra note 150, at 260.

bear unlimited liability for their negligent acts because this would make shipping safer.[164]

According to Directive 94/57/EC, when the loss or damage to property or personal injury or death has been caused by a willful act or omission or by gross negligence, the recognized organization should respond without limitation, but when personal injury or death is caused by any negligent or reckless act or omission, then Member States may limit the liability of the recognized organization to at least € 4 million. And when property is lost or damaged by any negligent or reckless act or omission, Member States may limit the liability of the recognized organization to at least € 2 million.

A. Scope

European law does not establish a general regime of limitation of liability, applicable in all cases and in all Member States. That possibility is restricted in two ways. First, the scope for limitation of liability in the Directive is not general, because there is no limitation possible if it is proved that damage of any nature has been caused by a *willful act or omission* or by *gross negligence* on the part of the recognized organization, its bodies, employees, agents or others who act on behalf of the recognized organization. Thus, the current European law invalidates contractual clauses limiting liability for gross negligence or willful acts. In many European countries, clauses of this sort would be contrary to public policy and therefore unenforceable anyway. As to liability for negligent or reckless acts, on the other hand, Member States may impose a limit in their national regulation, but they need not; it is left to the national competent authorities to make that decision. Only if a competent authority decides to limit liability in such cases do the relevant quantitative limits of the Directive come into play. In cases of property damage or loss, the Directive allows limitation by national law so long as the limit is at least € 2 million. In cases of personal injury or death, the Directive allows limitation by national law so long as the limit is at least € 4 million. Member States electing to limit liability in cases of negligence or recklessness are therefore free to set limits higher than these European floors.

Here lies a significant difference between the current European law and the IMO Model Agreement for the Authorisation of Recognised Organizations Acting on Behalf of the Administration (MSC/Circ.788-MEPC/Circ.325). In the latter, it is understood that some limitation of liability should exist, although it is left to the parties to specify in their agree-

[164]Arroyo, supra note 22, at 39-40.

ment the maximum amount. In short, while the IMO seems to assume some kind of limitation on the liability of classification societies, the European Commission has stated that it could be unlimited.

If, as has been the case, national regulations adopt different solutions to this problem, it is not hazardous to venture that many classification societies would decline statutory work on behalf of States which leave their potential liability unlimited.[165] These States could face serious problems when it comes to concluding agreements at the usual market price, which has hitherto been set on the basis of assumptions by the classification societies about the cost of their insurance.

The major classification societies have criticized the Directive's treatment of this specific issue; they would have preferred that the law adopted a clear and objective general solution, compulsory for all Member States. Maybe the lack of fundamental agreement explains the undesirable response found in the Directive.

Finally, it is important to note carefully the reach of Directive 94/57/EC on this subject: it only regulates the relationship linking Member States with the recognized organization.[166] Therefore, it can only affect the contract between them; contracts between the recognized organization and its clients are beyond the scope of the Directive, and limitation of liability clauses can be included in those contracts to the extent allowed by the applicable national law. A clear example can be found in the Danish Class Agreement 2003.[167]

It seems generally agreed nowadays that in its contracts with clients, a classification society is allowed to include clauses limiting liability. According to Article 6.2 of the IMO Model Agreement for the Authorisation of Recognised Organisations Acting on Behalf of the Administration (MSC/Cir.710-MEPC/Cir.307), for example: "While acting for the Administration under this agreement recognised organisations shall be free to create contracts direct with its clients and such contracts may contain recognised organisation's normal contractual conditions for limiting its legal liability."

Of course, the benefit of limitation is intended for the classification society, not the State. Injured parties who sue the State can recover the whole of their loss or damage if the applicable law allows. Injured third parties are not affected by the protection against liability provided by the Directive to the classification societies.

---

[165]See ¶ 7.4.

[166]See ¶ 6.1.

[167]"While acting for the DMA under this Agreement, RO shall be free to create contracts directly with its clients and such contracts may contain RO's normal contractual conditions for limiting its legal liability." Danish Maritime Authority, Technical Regulation on the Recognition and Authorisation of Organisations Carrying Out Inspections and Survey of Ships, cl.6.9.7, Tech. Reg. no. 5, 9 August 2002, available at http://www.sofartsstyrelsen.dk/graphics/Synkron-library/DMA/UK_PDF/Class_Agreement.pdf.

B. The Limitation Criteria

In some forums, the representatives of classification societies have argued that limitation must be related to the fees charged for the services rendered.[168] Underlying this argument is the dramatic difference between the fee charged and the potential risk.[169] Although this argument has garnered some support,[170] its reasoning is questionable.[171] After all, the extent of the liability of other professionals, such as surgeons, accountants and lawyers, for their negligence is not controlled by the amount of the fees they charge. Applying the logic advanced by the classification societies, the more expensive service, the higher should be the level of responsibility. But this formula is without any reference to the degree of the negligence, so there must be serious doubts about its validity. I do not know of any instance in which the maximum amount of liability is set low by law or statute because the professional fee is low. In any case, the risk of liability can be assured, and the amount of the insurance premium is not fixed by reference to the amount of the professional fee, but instead to the amount of the risk incurred.[172]

According to classification societies, their limitation of liability must be very different from that of shipowners, because the latter are in full control of the operation of the vessel at all times. Therefore, say the societies, it would be unfair to treat both parties equally as regards liability exposure.[173] But when responsibility is based on fault, each party should be held liable only in proportion to its fault. The amount of control of an operation can be a criterion for assessing the diligence of the offending party, but it ought not to define a particular regime of liability.

It can be agreed that some limitation should exist in order to make insurance possible. The difficulty is in fashioning a sensible criterion for limitation. In my opinion, the limit of liability ought to be in proportion to the fault and the level of possible damage.

---

[168]The Joint Working Group of CMI could not reach an agreement on this point. At the beginning, the fee was the basis for drafting a limitation clause; then tonnage emerged as an alternative, but this criterion was unacceptable for classification societies. See Skou, supra note 153, at 182; Chaves, supra note 157, at 114.

[169]Skou, supra note 153, at 182.

[170]E.g, Goldsmith, supra note 111, at 514. See Sundance Cruises Corp. v. Am. Bureau of Shipping, 7 F.3d 1077, 1994 AMC 1 (2d Cir. 1993).

[171]Cane, supra note 18, at 368; East, supra note 22, at 133; Lindfelt, supra note 21, at 254; Stearer, Liability, Is It Just Around the Corner? An Advocate's View of a Classification Society and its Duty, 1994 CMI Y.B. 260-261.

[172]"In a world where liability insurance is pervasive there is not justification for a general proposition that a professional fee which is only a small fraction of the amount at stake in the transaction shows that the professional cannot have intended to assume the risk of liability commensurate with the amount at stake." Cane, supra note 18, at 368.

[173]Skou, supra note 153, at 183.

Limitation need not be related to vessel tonnage. As ship-owners have pointed out, this criterion has the advantage of objectivity, and it is a criterion generally accepted and applied in national laws and international conventions. But the classic form of limitation by tonnage is not acceptable to classification societies.

Therefore, although the tonnage of the vessel can be a proper criterion, other criteria ought to be considered in pursuit of a broad consensus. In the panel on classification societies organized by the CMI in 1996,[174] a representative of the German shipowners' association proposed relating limitation to the current situation in insurance markets, that is, setting the limit of liability for classification societies with reference to the sum for which the societies insure themselves against liability claims.

But this is very problematic, because although there could be agreement on the general proposition, there would remain the problem of setting a specific limit because each insured makes its own decision about how much cover to buy and how much exposure to leave uninsured.

C. The Limit in Directive 94/57/EC

It is evident from the trauvaux preparatoire of Directive 2001/105/EC that the amount of liability of classification societies was the topic of long discussions. In the Proposal for a European Parliament and Council Directive Amending Council Directive 94/57/EC,[175] it was suggested that provision be made for review of the compensation ceilings for negligence on the part of a classification society by the Council and Parliament within three years at the latest. And in the Council Agreement With a View to a Common Position on the Proposals Concerning Ship Inspection Organisations and Port State control, arising from its meeting on 20 and 21 December 2000,[176] it was proposed that, with respect to their conduct as ship inspection organizations, the compensation payable by classification societies in the event of accidents involving personal injury would be limited to a maximum of € 5 million. On 16 May 2001, the European Parliament adopted, in a second reading, the following amendment as regards classification societies: to set the compensation to be paid by recognized organizations when liable from a minimum of € 4 million to a maximum of € 7 million for personal injury or death and

[174]B. Kröger, Presentation on behalf of the German Shipowners' Association and of the Maritime Law Committee of ICS, in Classification Societies, 1997 CMI Y.B. 185, 188.

[175]Bulletin EU 11-2000, point 1.4.54.

[176]Bulletin EU 12-2000, point 1.4.61.

from € 2 million to € 4 million for damage to property.[177] Finally, the proposed revision of Directive 94/57/EC's Article 6 provided for unlimited liability for the recognized organizations where the loss or damage is caused by willful acts or omissions or gross negligence, and a financially limited liability for negligence or recklessness. The European Parliament endorsed this approach.[178]

The limit finally established in the Directive is set between the alternatives considered in the Joint Working Group of CMI. Although the classification societies in the IACS took the position that they were prepared to accept limits as high as two million dollars, or ten times the fee, whichever is the lower, the Group finally proposed ten times the classification fee, or US$ four million, whichever is the higher, over objections by IACS and the P&I clubs.

At first blush, these developments might suggest that the European Union has leaned towards the position of classification societies, but the Directive permits each Member State to establish unlimited liability. So, a balance of sorts has been reached between the conflicting positions. Is the level in the Directive appropriate? In my opinion, it is too low. But since it is a minimum that can be ignored by Member States, it does not itself pose a great problem.

D. Limitation in the Standard Contracts

In practice, some agreements between recognized organizations and Member States do raise the level of liability. An example is the Danish Class Agreement 2003, linking the Kingdom of Denmark with Lloyd's Register, ABS, BV, DNV, GL, NKK, and RINA.[179] In article 15, it is agreed that liability will not exceed € 5 million in the case of personal injury or death caused by negligent or reckless act or omission, and € 2 million if that conduct caused only property loss or damage.

Germanischer Lloyd's General Terms and Conditions[180] set a limitation of "five times the remuneration of the individual obligation to which the breach relates" (that amounts to a sum from € 500,000 up to € 2,000,000) in a case of negligent performance of its obligations. But if the breach is of a "con-

---

[177]The minimum level of liability was higher in the Directive proposed by the Commission on 21 March 2000: € 5 million for personal injury or death, and € 2.5 million for loss or damage to property. Council's Common Position No. 14/2001 of 26 February 2001. 2001 O.J. (C 101) 1.

[178]First Reading Report of the European Parliament of 30 November 2000.

[179]Danish Maritime Authority, Technical Regulation no.5 of 9 August 2002, Technical Regulation on the Recognition and Authorisation of Organisations Carrying Out Inspections and Survey of Ships.

[180]Available for download at http://www.gl-group.com/office/general_terms_and_conditions.pdf.

tractually essential obligation," the liability shall be limited to "typical contractual foreseeable damage."[181]

Some classification societies have introduced interesting dispositions on limitation in their model clauses. For example, Germanischer Lloyd's General Terms and Conditions, which limit liability in terms already seen, state expressly that liability may be extended beyond what is generally provided. But such extension of liability is subject to several requirements: namely, an expressed client's demand, the prior acceptance of the insurer of Germanisher Lloyd, and the client's bearing of any additional insurance cost associated with such increase in liability. Thus, the limit of liability can be raised or even removed, but only if the client assumes the cost of additional insurance.[182]

The American Bureau of Shipping (ABS) in its Request for Class Agreement for Classification of Existing Vessels includes a clause stating that if any party relies on any information or advice given by ABS and suffers loss, damage, or expense directly thereby which is proven to have been caused by the negligent act, omission or error of ABS, then the liability of that classification society will be limited to the greater of a) $100,000 or b) an amount equal to ten times the sum actually paid for the services alleged to be deficient.[183]

According to information provided to the author by the managers of Lloyd's Register, this classification society will not contract with Member States that establish unlimited liability, and declines to perform statutory services for those States.

While limitation of liability through the Model Contractual Clauses is a partial and temporary answer,[184] the final solution should come in the form of compulsory legal regulation, the scope of which should be as wide as possible.

VIII
ASSESMENT OF THE LIABILITY REGIME OF THE DIRECTIVE

It must be acknowledged that the matter of a liability regime for classification societies is far from settled as between those engaged in the business and the main regulatory bodies of maritime law. There is still a long road ahead, and much discussion, study and consensus are needed.

---

[181]Id. at ¶ G.3.

[182]Id. at ¶ G.5. It is also relevant to point out that limitation of liability do not have effect in cases of claims for death, personal injury or damage to health. Id. at ¶ G.7.

[183]C1. 16. See http://www.eagle.org/forms/AB%20122-EX.doc.

[184]Wiswall, supra note 49, at 172.

Perhaps such problems arise because one fundamental issue lingers, as yet unresolved: whether and how a liability regime for classification societies could prevent substandard surveys.[185]

In determining an adequate degree of accountability of classification societies several questions must be considered. First of all, we must assess the foundations of liability regimes. It is generally agreed that the law of damages has two basic aims: that of repair and that of prevention (by means of deterrence from the risk of liability.[186] From this perspective, it is possible to analyze current European law on the subject.

Regarding repair, it should be noted that victims of the accidents are not unprotected as a result of the application of Directive 94/57/EC. Aggrieved parties can generally pursue remedies against the Member State. Stricter rules of liability for classification societies would enable better compensation of the States, stemming or preventing public budgetary losses.

Regarding prevention, we must decide whether the imposition of greater accountability on classification societies would lead to safer shipping. Since State liability in this case ensures that the victim is always protected, the preventive function of liability should control analysis.

At a more general level, the preventive effects of the law of damage have been long debated by scholars and others, and the pros and cons of that debate will not be reconsidered here.[187] But on a specific level some conclusions beckon. In my opinion, it is necessary to impose a stringent level of liability upon classification societies in order to promote the safety of life and property at sea. Both policy preferences and practical reasons dictate clarifying and amplifying the liability of classification societies.

Such provisions would reinforce the importance of vigilance in the performance by classification societies of their tasks and contribute in this way to enhancement of their service.[188] It seems beyond debate that a more stringent liability regime would lead to increased scrutiny of ships and therefore to safer seas.

Secondly, as a matter of public policy, law should tend to place the risk of liability for negligent conduct on the party who is best positioned to minimize the risk of harm. On this basis, classification societies, which play such

---

[185]Honka, Classification System, supra note 18, at 8.

[186]Honka, Questions, supra note 23, at 376.

[187]See, e.g., James Fleming, Jr. & John J. Dickinson, Accident Proneness and Accident Law, 63 Harv. L. Rev. 769 (1950); Kenneth Diplock, Conventions and Morals—Limitation Clauses in International Maritime Conventions, 1 J. Mar. L. & Com. 525 (1970); Underhill Moore & Charles C. Callahan, Law and Learning Theory: A Study in Legal Controls, 53 Yale L. J. 1 (1943); Andrew E. Rossmere, Cargo Insurance and Carrier's Liability: A New Approach, 6 J. Mar. L. & Com. 425 (1975).

[188]Antapassis, supra note 30, at 58; Beck, supra note 150, at 267; France, supra note 4, at 71.

an important role in assuring safety at sea, must be responsible for their faults.

And lastly, imposing liability on classification societies would have tangible results in the form of reduction in the number and grievousness of marine casualties,[189] because it is to be expected that those who cause such casualties would be obliged to pay higher insurance premiums, be forced therefore to charge higher fees, and as a result, to lose clients to their more careful competitors.[190]

That classification societies might be exempted from liability should therefore be considered out of the question.[191] Immunity from civil action would severely inhibit the preventive role of liability in damages.[192] And besides, why should classification societies enjoy a greater degree of immunity than any other profession in the shipping industry?[193] Rather, like any other professional societies (even hospitals[194]), they should be liable for their errors and omissions, whether they are profitable or not.[195]

But the core issue of this legal debate is the appropriate level of liability. On the one hand, classification societies ought not be considered the warrantors of the seaworthiness of ships,[196] but on the other hand, they ought not be exempted from liability under any possible circumstances. So, some type of liability in damages must be allowed, but to what extent? And what should be the basis of that liability?

The arguments against increasing the liability of the classification societies are mainly economic. For example, it has been asserted that the setting of a very stringent level of liability on those bodies could lead to the financial collapse of the classification system.[197] Classification societies would have to increase greatly their insurance cover against liability, and face risks at some level uninsurable,[198] with the final result of either the bankruptcy of classifi-

---

[189]France, supra note 4, at 71; Starer, supra note 9, at 56.

[190]Ulrik, supra note 19, at 41.

[191]Arroyo, supra note 22, at 39-40.

[192]Honka, Questions, supra note 23, at 380.

[193]C. Moore, UK and Far East Perspective, in Classification Societies supra note 19, at 43, 44.

[194]"Hospitals are also charitable and non-profit making organisations. But they are subject to the same common duty of care under the Occupier's Liability Acts 1957 and 1984 as are betting shops or brothels." Marc Rich & Co. AG v. Bishop Rock Marine Co. Ltd. (The Nicholas H), [1996] A.C. 211, 218, [1995] 2 Lloyd's Rep. 299, 308 (H.L.) (per Lord Lloyd).

[195]Miller, supra note 4, at 115.

[196]See In re Oil Spill by the Amoco Cadiz, 1986 AMC 1945 (N.D. Ill. 1986); Arthur v. Flota Mercante Gran Centro Americana S.A, 487 F.2d 561, 1974 AMC 97 (5th Cir. 1973). See also Beck, supra note 150, at 252; Boisson, *Responsabilité,* supra note 32, at 129; Gomez Prieto, supra note 4, at 325-326; Karen C. Hildebrandt, Personal Injury and Wrongful Death Remedies for Maritime Passengers, 68 Tul. L. Rev. 403, 422 (1994); O'Brien, supra note 2, at 404. Contra Starer, supra note 9, at 57.

[197]Boisson, *Responsabilité,* supra note 38, at 129-130; Chaves, supra note 157, at 113; Grey, supra note 17, at 44-46.

[198]Hutchinson, supra note 4, at 32.

cation societies or severe increase in the price of the classification, a price eventually to be paid by the shipowners. And if the classification societies do not go bankrupt, they would be compelled to withdraw from those activities that left them exposed to high liability risk. In short, there is an understandable concern that classification societies could not bear the financial burden of full responsibility for their faults. But the general argument that classification societies cannot bear the financial burden of greater liability can be misguided,[199] and is still to be proved. And anyway, I think that the economic interest of the societies must be subordinated to the superior public interest in maritime safety. The price of increased liability is worth paying. Therefore, an adequate balance has to be found between the financial and the policy arguments, and in finding the appropriate level of liability for classification societies, the insurance system ought to be considered.[200]

Of course, this is a very complex problem, the solution to which is necessarily difficult, and the difficulty is mainly in the context of our analysis because classification societies have acquired a public service character. Any new measure, especially any change in the liability regime, must be assessed carefully for the purpose of avoiding any weakening of their position[201] or excessive disturbance to their market.[202]

Nevertheless, since the late nineties there seems to have emerged a broad consensus about the future of classification societies that makes practically inevitable the expansion of their liability.[203] This movement for greater accountability results mainly from the recently expanded role of classification societies,[204] but also from the heightened attention paid to accidents at sea by public opinion and the mass media and, more generally, as a result of the increasing trend for imposing greater liability on various professional classes and regulatory bodies, such as those of accountants, auditors, etc.

To recap, although the existing European liability regime is not perfect, in general the measures introduced in the reform of 2001 should improve the standards of maritime safety. They can be considered a positive move toward establishing a regime of responsibility for the correctness of certificates issued by classification societies, although some additional steps are still needed. In my opinion, a greater degree of accountability by classification societies is necessary. Therefore, in the near future European authorities

---

[199]Miller, supra note 4, at 115.

[200]France, supra note 4, at 70-71.

[201]Antapassis, supra note 30, at 58.

[202]Honka, Questions, supra note 23, at 379-380.

[203]Feehan, supra note 2, at 188-189; Honka, Questions, supra note 23, at 379-380; Lindfelt, supra note 21, at 254-255; O'Brien, supra note 2, at 404; Starer, supra note 9, at 262.

[204]Feehan, supra note 2, at 189.

will have to change both the grounds for liability and the liability limits.[205] From the trend of the past, it can reasonably be expected that voices from many spheres will be raised in support of such measures because they promote safety at sea.[206]

Any widening of scope of the liability of classification societies should follow clarification of their current role: of course they do not guarantee the absolute safety of every ship, but on the other hand it cannot be accepted that they can warn only contracting parties of the risk of accidents. Those who defend the limitation of liability of classification societies underestimate the real significance of the tasks such entities perform, portraying them as basically technical advisors, who should not be expected, on their own responsibility, to guarantee the accuracy of the information they supply. In their view, classification is a simple opinion, reflecting only a strictly personal assessment, subject to discussion between interested parties.[207] To the contrary, and especially when they take on statutory functions, classification societies do something more. They are agents entrusted with the work of assuring the maritime community that the vessels forming the fleet of a flag State have been properly surveyed and certificated.[208] They should shoulder therefore the burden of a proportional liability because greater accountability ought to accompany their increasingly larger advisory and supervisory roles.[209]

IX
CONCLUSIONS

The regulation contained in the Directive is unclear and unnecessarily complex so that it leads to misunderstandings and difficulties of construction. The ambiguity of some provisions invites different interpretations, and therefore differences in the national statutory regulations.[210] Some terms are used incorrectly and create problems, an example being "working relationship." Regarding the role and liability of classification societies, the current European law is not at all clear. The European legislature should clarify its

---

[205]Arroyo, supra note 22, at 39-40. Contra Gomez Prieto, supra note 4, at 369-371.

[206]The French National Parliament has approved a resolution "On maritime safety in Europe" (NO. 645, of 4 March 2003), calling for amendment of Directive 2001/105/EC: "*Demande que la directive 2001/105/CE du 19 décembre 2001 fixant les modalités d'agrément des sociétés de classification soit modifiée, afin d'assujettir ces dernières à un régime de responsabilité illimitée et de dissocier clairement leur rôle de classification et celui de contrôle.*"

[207]Boisson, Liability, supra note 38, at 13.

[208]Starer, supra note 9, at 262.

[209]Moore, supra note 192, at 44.

[210]Bonassies, supra note 75, at 15.

regulation of these points, particularly the wording with regard to the basis of liability, in order to avoid the aforementioned problems.

Perhaps some of these mistakes are the result of a hasty process, driven by the *Erika* and the *Prestige* accidents. There should have been further study and discussion before regulating about such core issues as the limitation of liability of classification societies, especially if one concludes that the current system is too flexible and does not lead to the harmonization of national laws.

Even its drafters seem insecure about the final result of Directive 94/57/EC. Anxious that its provisions could affect seriously the financial viability of many classification societies,[211] they have provided in Article 6.5 that the Commission shall submit, not later than 22 July 2006, a report evaluating the economic impact of the liability regime on the parties concerned and, more particularly, its consequences for the financial equilibrium of recognized organizations. The report is supposed to be drawn up in cooperation with the competent authorities of the Member States and the parties concerned, in particular, the recognized organizations. The Commission shall, if necessary in the light of this evaluation, submit a proposal amending the Directive with more specific reference to the principle of liability and the maximum liabilities. In short, in the next years there ought to be a process of assessment of the current European law in which the mistakes and gaps pointed out here, at least, are discussed.

The changes should go beyond a simple widening of the scope and formal amendments. Its philosophy, its basic principles, have to be reconsidered. It seems to me that the European law is based on a questionable and dogmatic assumption: that competition between classification societies is beneficial by its own nature. But is that always true? Is it true when the public's welfare is at stake? Another question that ought to be asked is whether it is sensible that recognized classification societies compete within the boundaries of a single Member State if this country authorizes, as most do, more than one classification society to perform statutory certifications. Would not competition pressure classification societies toward lenience in the enforcement of the conventions, in order to gain or conserve clients? [212] In my opinion, ship safety should not be the occasion for competition between classification societies. Somehow in this context, two concerns dif-

[211]It seems self-evident that the current European law should produce important changes in the international market of classification societies. I. Christodoulou-Varotsi, *L'adaptation du Droit Maritime Hellenique et du Droit Maritime Chypriote au Droit Communautaire* 116 (1999).

[212]Starer, supra note 9, at 53. Smith, supra note 56, at 18, has pointed out that this criticism is not without substance, and suggested that the IACS Code of Ethics would work in the opposite direction, that is, promoting honest and healthy competition. But is that enough?

ferent by nature have been merged: governmental obligations to protect the public from undue risks of harm, and economic efficiency and market competition. This merger threatens proper enforcement of maritime safety conventions.[213]

Although self-regulation is welcome, it is not enough, and it should not prevent or dissuade higher authorities from burdening classification societies with the proper level of accountability. In any event, because of the functions assigned to classification societies. They must be subject to public control.[214]

A final consideration: accidents will continue to occur. They will happen despite the best precautionary efforts of governments, private bodies, the shipping industry, and others. But we should spare no effort or expense in order to minimize their possibility, and to establish the best remedies for when they inevitably occur.

---

[213]Id.

[214]Lindfelt, supra note 21, at 253; Moore, supra note 192, at 49.