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The Liability of the Classification Societies

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INTRODUCTION.

The Classification societies are on the main entities in the maritime industry. Their knowledge about the vessels help construct and maintain them in a safe way. In addition to this, the classification societies participate in the development of the safety standards for maritime industry.

The control of the classification societies is superior not only for the shipowner, but for State authorities and third parties as well. However, classification societies often argues that thee have no liability for their acts, as their activity does not provide any risk for the third parties. The classifications societies claim, that they can only state that a ship is safe, and there is no risks caused by such representation. However, such representation could cause an actionable claim for the shipowner, third parties like passengers, crewmembers, insurance company or ever for the costal State authorities. During the long history of the classifications societies there, of course, were cases where the mistake of the surveyor caused damage to the ship and/or environment.

The question of the liability of the classification societies and, if there is such liability, application of the maritime limitations to it remains open nowadays. Even today, there is quite few cases in which the classification society has been recognized liable for its action.

This thesis is focused on the both private and public liability of classification societies. For the purposes of this work private liability covers the liability for the breach of contract as well as tortious liability to the contractual and third party. Public liability part is focused on conventional liability of the classifications societies for their services. The main problem researched in this work is whether the Classification Societies are liable for their faults and how it is regulated in legislation of different countries. The first chapter of the work describes the basic contractual and public obligations of the societies and explains the process of recognition of the Register in European Union, as it's necessary for the further parts of the work. The second part if the thesis focuses on the liability under the private law in Germany, Russia and in Common Law countries. The third chapter explains the liability of the classification societies under the tort law and toward third parties. The legal basis for the third chapter is divided in two parts: civil and common law. The forth chapter analyzes the most arguable and unclear issue – liability under the international public law and within EU law. Analyze in that chapter is built on The Hague-Visby and Hamburg rules, CLC convention and EU law without specification on any Member state.

1. CLASSIFICATION SOCIETIES.

1.1. General Information and History

For the long time in the history, the ships were not classed as their owners were self-insured. With growing of transportation of goods overseas and cross ocean the need of the common rules for ships safety, composition and handling arise. First and foremost, those factors were necessary for ship insurers.

The history of the classification societies starts with the establishing of Lloyd's Register[1]. Its history can be traced back to London Coffee Houses in the mid 17th century. According to the records the first Coffee House of that kind was opened in London in 1652 and rapidly became place for gathering of all kind of businessmen and especially for merchants, shippers and marine underwriters. Nevertheless, the first specialized on marine shipping Coffee House was opened by Edward Lloyd in 1688. In the beginning the main purpose of Lloyd's business was not classification or insuring of the vessels, but gathering and structuring of the information about different vessels, their capacity and usual type of cargo carried onboard, in other words of all information which might be valuable to his clients[2].

Developments of the Lloyd's were later used by his successors to establishing in 1760 the first register of ships "Lloyd's Register of Ships". This register kept the information about all the vessels name, year of construction, the condition of hull and lashes, its owners and masters, the ports of trading, number of crew and even the number of guns carried[3].

However, these "enterprise" can be hardly called "classification society", as it issued no rules on the maintaining or building of the ships. The so-called "Green Book" published by Lloyd's initially consists only the same information as ship's list issued previously by them. Only in 1834 was established Lloyd's Register of British and Foreign Ships, which nowadays is known as Lloyd's Register of Shipping. First time in history its book were orientated not only on insurers but for all participants of shipping. In the eleven categories the information "was provided concerning the name and description of vessel, the name of the master, the tonnage, the port and the year of construction, the name of the owner, the port of the registry, a classification, if one was assigned, and the port were the survey was carried out"[4]. Meanwhile the first classification society, functioning in a modern way, was established in Antwerp in 1828 – Bureau Veritas. For many years, those two societies were

[1] Brown, 300 Years of Lloyds (1988), 16.
[2] Martin, The history of Lloyd's (1876), 106
[3] Lay, Marine Insurance (1925), 161
[4] Lay, Marine Insurance (1925), 175

main competitors and partners of each other, until it came in trend and became prestigious for every major European maritime country to have their own classification society. The end of nineteenth and early years of twentieth century became the time of establishing of most of modern registries of ships[5].

The further development of modern classification societies started in 1968 with organizing of International Association of Classification Societies (IACS). Today according to the statistics more than 90% of all ships in the world classed by the members of the IACS. Following the Institute Classification Clause only the vessel registered and classed by one of the IACS members could be a subject of hull insurance.

Nowadays, the classification of the vessels does not mean dividing of the vessels into different classes, but instead it describes the condition of the ship, its hull, equipment etc.[6]

The classification of the vessels is carried out in a same way by all classification societies in the world. Following its rules, the society has to analyze the design, construction, integrity and condition of the ship. If the vessels meets all the requirements, the classification society issues the classification certificate and put the name of the vessel into the Register of ships. The ship remains "in class" as long as it comply with all the rules of the register. If the vessel is deficient – it class should be canceled or suspended.

In addition to the main class, the classification society may give a ship a "classification notation", which reflects the vessels special capabilities or equipment of the vessel[7]. Moreover, as some of the geographical regions of the seas are restricted for the free entrance of the ship (mainly polar regions), the classification society may grant a ship special class (e.g. ice-class), which allows is to enter those regions.

The process of classification is governed by private law and organized by private contracts. Besides, the classification societies have included in their sphere also some obligations and services towards public entities, governments. For them the societies provides services regarding the application of international and national law on maritime security, and collaborate in the prevention of pollution of the sea. The relations with state

[5] Brown, 300 Years of Lloyds (1988), 46
[6] IACS, Classification societies - what, why and how?, 5-6
[7] As an example, ships build under the supervision of the Classification society have special symbol after their class: RS grant the ships an d floating facilities built according to the Rules of and surveyed by the Register are assigned a class notation with the character of classification: KM✪ or KE✪or K✪. The Rules of the Classification and Construction of the Sea-going Ships (2016), 20 (http://www.rs-class.org/upload/iblock/166/2-020101-082-E(T1).pdf)

authorities is governed by both private and public law. Hence, nowadays the Classifications Societies offers both public (statutory) and private (classification) services

1.2. Recognition of the Classification Societies under EU Law

One of the biggest market for classification societies from all over the world is European market. However, European market is known not only for it size and amount of work, but also for relatively strict rules on allowance to it.

Following two disastrous incidents with oil tanker, Erica in 1999 and Prestige in 2002, off the coast of Europe, European Union decided to establish special body, who's main role will be observing and determine of safety measures in maritime sphere. Thus European Maritime Safety Agency (EMSA) was formed.

EMSA's main role is to provide technical assistance and support to the European Commission and Member States in the development and implementation of EU legislation on maritime safety, pollution by ships and maritime security, as well as operational tasks in the field of oil pollution response, vessel monitoring and in long range identification and tracking of vessels[8].

Following its tasks EMSA and European Commission worked out special regulations for recognition of classification societies by EU. The recognition of classification societies is mandatory process, which main purpose to assure clients and governments, that services provided is in compliance with EU safety and pollution rules, and that the vessels classed by such societies could fly flag of one of the member states.

According to the Regulation's (EC) No 391/2009 EU (Reg. No 391/2009) Member States can only authorise classification societies recognized by EU[9]. Recognition of the classification society is possible only, if it meets the minimum criteria, described in the Annex to Reg. 391/2009. For example the minimum criteria for the applicant should be as follows: a recognized organisation should have a legal presence in the State of its location; register of ships of classification society should be published on annual basis; the recognized organisation shouldn't be controlled by shipowners or shipbuilders or involved into commercial activities regarding manufacturing, equipping or repairing of the vessels. In addition to general minimum criteria Reg. 391/2009 consists a list of specific criteria, which should be met as well.

[8] EMSA's official web page, URL: http://emsa.europa.eu/about.html
[9] Article 3 of Reg. No 391/2009

If the classification societies has it branches, which operated by the daughter companies, recognition is granted only for parental company. On the other hand parental company is obliged to ensure that all daughter companies fulfil minimum requirements[10]. The Commission may limit the recognition of certain types of ships, ships of the certain size or certain trades, classed by the recognised society. In that case the Commission should give motivated answer with strong reasoning why the recognition was limited, as well as explanation of steps needed for removing the limitations[11].

Special attention in the Regulation is paid to cooperation between recognized organization, the Commission and ESMA. Since ESMA is granted exclusive right to supervise technical, safety and pollution prevention conditions of classification society facilities and services, it also has a right to advise recognized organizations about better ways of unification of its services and procedures. One of the main principles stipulated by the Regulation No 391/2009 reads that the recognized organizations should remain competitors one to another, but at the same time they have to cooperate on safety, pollution and other important issues in order of harmonization of market[12]. At the same time classification societies are obliged to consult with each other from time to time for optimization of the procedures and services. They also have to provide the Commission and the member state with the report of progression made during such consultations[13].

If recognized classification society failed to meet the minimum criteria described above, or obligation from Regulation as well if it pollution prevention performance was suspended, but all of the above didn't lead to "unacceptable" level of threat to the safety or the environment, the European Commission as well as EMSA may prescribe to society which preventive and remedial measures should be taken[14]. In addition to this measures the Commission may impose fines on classification society whose failed to meet minimum criteria several times, or if the breach led to serious effects.

The Regulation also includes provisions on excluding of classification society from the list of recognized organizations. The recognition of the organization could be withdrawn, if such organization fails to fulfill of violate the minimum general and special criteria, listed in Appendix 1 to the mentioned Regulation, and such fail causes severe threat to safety and pollution protection; if the society prevents or repeatedly obstructs the inspections or

[10] Para 3 Article 4
[11] Para 4 Article 4
[12] p 11 of Regulation
[13] Article 10
[14] Article 5 of Reg.

supervision of the Commission and/or ESMA; if the society fails to pay fines and/or penalties in accordance with Article 6 of the Regulation or if society seeks for reimbursement of any of such fines[15]. Withdrawal of the recognition could be performed only by the Commission; however, this process could be initiated by the request of any Member State of EU.

For the purpose of common and non-discriminatory implementation of the above described Regulation, the EU government has adopted Directive 2009/15 EC. Following this Directive the Member States to fulfill their obligations and responsibilities under international conventions on safety and pollution prevention at see shall ensure, that the ships flying the flags of Member State comply all the necessary requirements stipulated in in international and EU Law[16]. To do so, a Member State should assign a special organization to survey and inspect ships[17].

Following the rules in the Directive a Member State may authorize the surveyor company only from the list of recognized organizations. Also, Member state cannot in principle reject any of the recognized classification societies, but are able to limit the number of organizations allowed to class the vessels for them. Strong, objective and transparent grounds are needed for such limitation.

1.3. Contractual Functions of the Classification Societies

The Classification societies base its activities on the contractual relations between them and their clients. The contractual relations of the Classification societies arises from the private contract with shipowners or shipyards. The terms of such contract are established by two parties, but in accordance with the rules of classification society[18]. The price of such contract bases on different factors from type to the size and weight of the vessels as well as on the place of survey – surveying of the vessels abroad usually costs extra.

The contractual duties of the Classifications societies under the classification depend on the different factors, such as the stage when the surveyor starts to perform, type of service and .

The most typical job the classification society do is giving the class to the ship. The classing of the vessel happens on two different ways. The first way starts when the

[15] *Neither the Commission nor ESMA do not specify does this provision apply if decision of imposing of such fines were unlawful or if the third parties' actions brought the classification society to violation of its obligations in accordance with the Regulation*
[16] Article 3 (1) of Dir
[17] Article 3(2)
[18] Lagoni, The Liability of Classification Societies (2007), 43

classification society enters before or during the construction of the vessel. For the construction of the new vessel the shipyard always requests for the classification organization and specify the "classification notations that should be assigned"[19]. The society must analyze this notations and verify, that they are in compliance with the shipbuilding requirements of the society[20]. In addition to that classification society may be obliged by the contract for reviewing of the blueprints of the ship and, if the results of such review is positive, issue an interim certificate. The final certificates comes after the delivery of the ship to the owner, and after it arrives the relations between the shipyard and the classification society are over. If the vessel is built under the supervision of the classification society it has a special mark on it class.

There is slightly different situation, if the classification society receives a request for the ship which has already been build. First, the request for class should came from the owner of the vessel, as the shipyard doesn't really participate in this contract as one of the party. In case, if the plans of the ship or even the type of the vessel has been previously certified and match society's rules and standards, then the only duty for the surveyor, before the owner receive the certificate of class, arises from this situation is to inspect the vessel itself. In contrary if the vessel doesn't have class, the entire inspection of its design is mandatory.

As follows from above said the main contractual obligations of the Classification society on constructional stage is to ensure that the construction of the ship, its design and plans, as well as all the material and even welding[21].

However, after assignment of class Classification plays not less important role in the life of the vessel. Following the rules of the all respective societies[22] the owner of the ship have annually request the survey of the vessel, so it can maintain the class. The contract for such surveys usually concluded with the classification society, which supervised the construction of the vessel or granted it initial class. Despite the fact, that according to the rules it's the full responsibility of the owner of the vessel to request such survey, classification societies have their own obligation in this situation. The surveyors are obliged to examine internal and external condition of the ship, its machinery and equipment.

[19] See supra p. 43
[20] e.g. DNV GL Rules for Classification (2016), 17
[21] see DNV GL Rules for Classification of Ships (2016),cl. 1.2.1, p.18
[22] e.g. Lloyd's Register: Rules and Regulations for Classification of the Ships (2016), Cl. 3.5.1, p. 37

In addition to all what is mentioned before, the Classification Society has an obligation to maintain its duty of due care, which depend on the activities and functions that society has[23]. Many Classification societies claim their main goal is to protect their clients' assets[24], to ensure protection of life at sea[25] and of the marine environment[26]. Even those statements announced to public, and even stipulated in Rules by some of the, the should be considered as slogans, rather than legal statements. So where is the border of the "duty of due care" obligations? The classification societies by their own nature are meant to be the guarantee that the ship meets all the local and international rules on safety and maintenance. However, the classification societies could not guarantee absolute safety of the ship's part and the ship in total during its entire lifetime. The maintaining of the vessel in a proper way is a duty of owner, and it lies outside of the scope of classification society. Besides, the classification societies do not ensure the quality of every detail used for the building of the vessel. Certification does not not mean quality control. Summarizing this facts: the register of the ship does not supervise the vessel and every product from which it made for all times, thus the duty of due care arises only for the actions of society while performing its services in accordance with their rules and contracts, and does not cover all other period of ship's lifetime.

1.4. Public duties of the Classification Societies

Apart of contractual functions, the Classification societies also provide their services to public authorities. Those services are usually provide in the respect of the provisions of the United Nations Convention on the Law of the Sea (UNClOS). Following those provisions every country, which granted the nationality to the ship[27] have to ensure safety of that vessel to the other participants and environments[28], when it is crossing the high seas. In addition to those rules the States are obliged by different other international conventions, for example SOLAS, OILPOL, OPRC, LL[29], to survey the ships flying their flag to fulfill the requirements of those conventions.

There are two possible ways how any can any country, which is obliged for this this surveys, perform them. The first way is to survey the vessels by the government itself by

[23] Lagoni, The Liability of Classification Societies (2007), 48
[24] see Lloyd's Register web page (URL: http://www.lr.org/en)
[25] ABS Rules Part 1 Chapter 1 Section 2 (2016)
[26] Russian Maritime Register of Shipping web page
[27] UNCLOS, art. 90,
[28] UNCLOS, art. 94
[29] International Convention for Safety of Life at Sea, Convention for the Prevention of Pollution of the Sea by Oil, International Convention on Oil Pollution Preparedness, Response and Co-operation,

state owning company. Thus, it is prohibited by public international law for the states to exercise their power on foreign state without special permission from a host country[30]. It mean that the first way is not applicable all the time, and could be even impossible if the relationship between two states are tense. Here the classification societies come into play.

The second way of performing such surveys is to hire a classification society. A state could delegate to classification society any power regarding society's sphere of competence. Usually the societies act in the area of renewing of the certificates or surveying of the ship with further professional opinion towards the state's port authorities. However, a State may authorized classification societies with power to issue all types of necessary statutory certificates and carry out all types of surveys. This practice is popular not among the States, which do not have capability for surveys, but even among the major States in the Maritime sphere like, for example, USA, United Kingdom and Norway[31].

If a State authorized a Classification society to issue the Statutory Certificates for the registered vessels, the classification society became technicaly obliged by two contracts: one with shipyard or owner of the vessel for carrying of all necessary surveys and with government for inspections purposes. Sometimes the classification society is supervised by the state authority itself[32] or another independent auditor. Furthermore, usually all inspection of the classification society recognized as carried out by states official[33]. The Classification society in this case has to inform a State about any deficiencies with a vessel, as well as if the ship is not fit to proceed to the sea.

Finally, as it has been mentioned, the recognized classification societies could perform in a same way as State's authorities. Due to the lack of an effective port controls in several countries, the role of Port State Control significantly increased during the past 30 years. To systemize the control over the vessel between different countries it was signed special agreement between the States authorities – it calls Memorandum of Understanding (MOU). Nowadays there are the Paris MOU, the Tokyo MOU, the Caribbean MOU, the Black MOU and others. Those agreements are varies from one to another, but the common idea remains

[30] Lagoni, The Liability of Classification Societies (2007), 51
[31] USA Cost Guard recognized classification societies: ABS, ClassNK, DNV GL, LR, BV, RINA (USCG: https://www.uscg.mil/hq/cg5/acp/default.asp) ; UK authorized: LR, BV, ClassNK, RINA, DNV, ABS (Maritime and Coast Guard Agency: https://www.gov.uk/guidance/uk-authorised-recognised-organisations-ros); Norway granted permission for the same organizations as UK and US (Sjøfartsdirektoratet: https://www.sjofartsdir.no/sjofart/fartoy/tilsyn/tilsyn2/anerkjente-klasseselskap/).
[32] The Class agreement between Sjøfartsdirektoratet and RO, chapter 5 (https://www.sjofartsdir.no/en/shipping/vessels/vessel-surveys/inspection/approved-classification-societies/klasseavtalen/)
[33] Lagoni, The Liability of Classification Societies (2007), 54

the same: to establish common rules for ship inspection, as well as common database of all inspected and detained ships. In addition, the MOU try to minimize the time the ships spend under the layover to prevent unnecessary inspection of recently checked vessels and focus on dangerous and sub-standard ships[34]. Duties of the Classifications societies as recognized organizations may undertook all the obligations of the State Port Authority under such MOUs and, in addition to that, supply state authorities with all necessary information regarding any vessel registered within the register of the society, which entered the port of the State.

2. CONTRACTUAL LIABILITY OF THE CLASSIFICATION SOCIETIES

Before starting talking about the liability of the Classification societies there is one point that must be clarified. Of course, the duties of the classification societies are to verify the compline of a vessel with the rules of the Register. However, the seaworthiness of the vessels is non-delegable duty of the shipowner. This doctrine found it place in a various cases regarding the liability of the Classification societies. The common law system stipulates the duty of the shipowner to undertake that the ship is seaworthy. This duty forces the shipowner to do everything to keep the ship safe, for instance to request the annual surveys by the Register.

2.1. Common Law

English or common law system is one that governs the contracts of the two biggest register in the world – Lloyd's Register and American Bureau of Shipping. The contractual liability of the Classification Societies is one of the most vital question, which, however, is not as difficult and uncertain as liability in tort and public liability.

2.1.1. The Applicable Law

The Common law should be mainly analyzed from the position of the decisions of the courts relating the classification societies, but every court bases it decisions on the actual legislation of the State. However, until now there is no case law made by UK courts

[34] Paris MOU (2016), section 1 (https://www.parismou.org/system/files/Paris%20MoU%2C%20including%2039th%20amendment%20_rev%20final_.pdf)

regarding question of liability of the Classifications Societies. In Contrary, in the USA courts provided several rulings.

One of the main question of the liability of the Classification Societies in the English law problem *is to identify the exact scope of engagement of the Classification Societies*[35]. The Hedley Byrne case established that those who provides incorrect information to the can be liable not only for death of personal injure, but also for economic loss[36]. According to that case the contractual relations between the Register and its client includes such duty to prevent the economic loss.

In the Common law someone who enters the contract guarantees his capability of performing obligations[37]. Following this, there is no obligations for plaintiff to prove the fault of the defender[38]. For Classification societies this means, that in case of the breach of contractual duties they are liable for the caused damages regardless of their fault[39].

There are several main categories of the types of the damages done by the Classification Societies as a result of breaching contractual duties according to the UK Law. Two of those categories are specific only for the Register. The first category deals with the breach with a direct causation of the damage to others. In other words, with the damage caused by the deeds of the surveyors to the client. The liability for such damage is obvious and evident.

The second category relates to the damaged which occurs not in direct way. The indirect damage here happens not due the direct actions of the Classification Society, but due to the chain of causation which cause damage. As an example: The Register certify the spare parts of the ship, which do not meet the requirements. Itself those parts can't cause damage until they put in use. After the damage occurs the detailed investigation may evidence the fault of the Classification Society.

The third category rules the question of a certain negligent behavior of the Register. The certificate of the class may be awarded on the certain conditions, e.g. the vessel should be employed in a certain region only. If the classification society withdraw the certificate due to the condition is no longer applicable, but the situation with the vessel did not changed, the Register may be liable for such withdrawal[40].

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[35] Lagoni, The Liability of the Classification Societies, pp.60-61
[36] Hedley Byrne and Co. Ltd. V Heller and Partners (1964) A.C. 465 (H.L.)
[37] Poole, Contract Law, pp.2-21
[38] Raineri v. Miles (1981) A.C. 1050
[39] Jackson/Powell, On professional Negligence (2002), p.8-10
[40] Lagoni, ibid, pp.63

The fourth category and the last include the rules of the classification. This category establishes liability of the Classification Society for the standards of safety included in their Rules. The Rules is a part of the contract. Thus if the safety standards are not high enough, the Register may be liable for this. In addition, if after the major incident the Classification Society does not update its Rules to prevent this situation in the future – the liability may arise as well. The Rules of the Register should always remain on state-of-the-art level[41].

The Supply of Goods and Services Act 1982 establishes that surveyors and Classification Societies should carry their activities with reasonable care and skill. The courts define that the level of such skills *should not lag behind other ordinary assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field.* Same court also noticed that *the law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet*[42].

The US law is similar to the UK Law in this question. If the Classification Society breach the contractual duties, it is liable for the damages caused. In addition, the Us law defines the non-performance and partial non-performance of the duties. However, this issue is relevant only when it comes to the repudiator of the contract, and has no effect on the liability.

The injured party may also claim against the Register on the basis of the Ryan Doctrine of workmanlike performance[43]. This Doctrine will be covered latter in the part regarding the Great American Insurance case. However, Ryan doctrine does not provide shipowner with a relevant claim to the Classification Society, as it follows form the case law below.

2.1.2. Leading Cases

The UK law is dealing with the classification of the ships longer than any other system of law. However, as it has been said previously, there are no case law provided by English courts regarding the liability of the classification societies. Most of the cases, which should be used to solve the problem between a calcification society and its client, are analyze and discuss one side of the dispute. As an example, in Smith v Eric S. Bush the court dealing with the building surveyors. In this case, Lord Justice Templeman held that the surveyors should exercise reasonable care in their surveys. The principles laid in the that case may be

[41] Ibid, pp.63-64
[42] Eckersley v. Binnie (1988), 18. Con. L.R. 1
[43] Stuart, Liability of marine Surveyors, Adjusters, and Claims Handlers (1997), pp. 39-42

applicable to any surveying activity under the English law including the Classification Societies.

American Law, in contrary to British, provides larger variety of cases regarding the liability of the Classification Societies[44].

One of the main and probably one of the most valuable case in the history of the American judicial system regarding the Classification Societies is the Great American Insurance Case. Following the facts of this case the vessel Tradeways II sank on 22 October 1965 on its voyage from Antwerp to the United States. Right before this voyage the vessel was surveyed by Bureau Veritas employee. Several deficiencies in the hull of the ship were discovered, and the class was suspended. The shipowner carried out repair of the ship, however the frames and deep tank in one of the holds were not fixed. Despite of that fact the class of the vessel was renewed. From the very beginning of its way to US, the ship requires pumping of the water from its lower deck. Later the vessel sank taking all the cargo and life of 11 crewmembers with it. The plaintiffs sue the BV for its failure to perform a proper survey of the vessel and breach of its workmanlike performance[45].

First of all, the Federal District Court discussed whether the Ryan doctrine is applicable here or not. The Ryan Doctrine is based on a case, where Ryan Stevedoring and Co. Inc.[46] was held liable for the action of its stevedore during the loading of the vessel. In that case the court established, that stevedores in a time of loading or unloading of the vessel is more capable of avoiding the accidents and actually is in control of the vessel. The Classification Society does not have such power over the vessel. Thus, the Court decided that Ryan Doctrine is not applicable to that case[47].

On the second place the court rejected the applicability of the In re Marine Sulphur Transport Corp case. That case extended the liability of the shipyard to the designer-converter, who rebuilt the ship by a negligence, which caused unseaworthiness of the vessel. In the Great American Insurance case the Court held that its solely shipowner's duty to insure seaworthiness of the vessel, which he gives to the crew[48].

In addition to all aforementioned, the Court rejected the existence of the Register's duty to provide seaworthiness of the ship by very interesting statement: "*In theory, recognition of a right of action against a classification society would confer benefit upon ship owners,*

[44] Stuart, ibid, pp. 45
[45] Beck, Liability of Marine Surveyors for Loss of Surveyed Vessel (1989), p. 255
[46] Ryan Stevedoring Co. Inc. v. Pan-Atlantic Steamship Corp (1956), 350 U.S. 124. 76 S. Ct.
[47] Great American Insurance Co. v. Bureau Veritas (1972), 338 F.Supp. 999, p. 1008
[48] Ibid, p. 1010

ship operators and seamen. In practice, such a "new remedy" would produce several undesirable effects. One of these would be to place the ultimate responsibility for seaworthiness on an organization which has contact with the vessel for only brief annual periods, whereas the owner, who is always "present" in respect to this vessel, would elude liability in many cases. Second, this right of action would have the effect of making the classification society an absolute insurer of any vessel it surveys and certifies[49]."

Summarizing the facts of the case, the Court rejected the claim. The Court of Appeal approved this judgement by adding *that plaintiff failed to establish causal relationship between BV's negligence and the loss of the vessel*[50]*".*

For the Contracting parties the outcome of that case is that several duties cannot be transferred to the Classification Societies. It means, that even in the case of the breach of contract, the Classification Society may not be liable, as the violated duty is the sole responsibility of the shipowner, and the liability for it cannot be transferred.

Another case, which is really important for the liability of the Register under the US law is the Sundance case. Following the facts of this case, the passenger vessel Sundancer sank due to the sever deficiencies in several parts of the ship, which has not been surveyed properly by the classification Society ABS[51].

This case is truly a landmark for the whole system of liability of the Register. There are four major issues in that particular case: first one is whether the Classification Society was grossly negligent; the second one is whether there was a negligent misrepresentation on the Register's side; the third and the fourth is whether the remedies are limited to the contract and if so, whether the Ryan doctrine is applicable.

The plaintiff claimed that the Register was grossly negligent in performing of its services. It also has been negligent in organizing the survey and training the surveyor, as the chek of the vessel was performed by a person with no skill in surveying the passenger vessel and there was only one surveyor, when at least two are required. However, the Court rejected that arguments by holding that there is no evidence that the Defendant *was so extremely careless that it was equivalent to recklessness*[52].

[49] Ibid, p. 1012
[50] Lagoni, ibid. p. 77
[51] Ibid, p. 82
[52] Sundance Cruises Corp v. ABS (1992), 799 F. Supp. 363, p. 378

The negligent misrepresentation argument was rejected by the court too. It was explained to the plaintiff, that there was no request from the shipowner side to provide him with the information from the Classification Society and such request did not implied[53].

For the third issue the Court addressed to the East River doctrine[54]. The court claim that the loss of the vessel is the pure economic loss and is burred by East River Doctrine[55].

The Fourth issue concerning the Ryan doctrine was rejected as well. The court completely agreed with the arguments made by the Court in the Great American Insurance case[56].

The decision for the Sundace case was approved by the court of appeal. It also added that there are two main reasons against the liability of the Register: disparity of the damage sustained and the fees charged and the impossibility of apportionment of liability between the shipowner and the classification society[57].

The outcome of the Sundace case for the contractual liability of the Classification Society is probably the most valuable among the others. That case proved second time that the Ryan Doctrine is not applicable to the classification society and that in bearers no liability for the pure economic loss to the shipowner.

2.2. German Law

2.2.1. Liability for Breach of Contract

German system of civil law is one of the oldest in the world and serves as a basis for many other systems, e.g. Russian. Contractual relations in Germany are regulated by the Bürgerliches Gesetzbuch (BGB) – German Civil code.

The liability of the Classification Societies depends on type of concluded contract. The German Law recognizes two types of the contracts for the Register – contract for work and contract for services. There is a discussion between the German Law scholars about the nature of the Contract with the Classification Society. In a sole decision regarding the duties of the Register the German court considered as the contract for work. However, despite there is no joint position on this question yet[58], the description of the liability for the contract for work will prevail.

[53] Ibid, p. 382
[54] East River, S.S. Corp. v. Transamerica DeLavel inc. (1986), 476 U.S. 858
[55] Sundance Cruises Corp v. ABS (1992), 799 F. Supp. 363, p. 381
[56] Ibid, p. 390
[57] Sundance Cruises Corp v. ABS (1992), 7 F.3d 1077, p. 1084
[58] Basedow, Third party liability of Classification Societies (2005), p. 12

The difference between those two contracts is in its claim time-bar period, preconditions of breach and the extent of obligation of the Classification Society. The time-bar for the contract of work is two years after the breach arise, whether for the services it is three years[59]. In both situations the damaged party should know about the breach, and if not, the time starts since the plaintiff became aware of the damage[60]. In addition, the contract of work may be terminated at any time until the completion of work, when the contract of service not. Upon the termination of contract of work the Register may ask for the remuneration for the completed work, whether the customer may claim for the damages, if the breach of contract was the reason of termination[61].

The liability of the Classification Societies for the breach of contract is based on the provision of § 280 BGB. This provision obliges the fault party to compensate damages. For the contract of work there two different regimes. Before the acceptance of the work applies the normal regime provided by the aforementioned BGB provision based on the principal of fault[62]. After the acceptance of work, the plaintiff should prove the defect in the complete work, as the principal of fault of the Classification Society is no longer valid[63].

The German Law also specifies different regime for the direct and indirect breach of the contract. In the first case the liability of the Classification Society is evident, as it is responsible for its workers and servants as a vicarious agent[64]. In the second case, according to the rules in § 634 and 280 (1) BGB the damaged party should proof the faulty behavior of the Register, which goes in contrary with his duties[65].

In addition, the existence of the defect is crucial for the liability based on the contract for work rules. The German Law recognizes three different types of it. The term defect uses the normal understanding of this word. Another one is defect of title – is whenever the third party may exercise rights with regard to the work – never happened to the Register[66]. The last one is a defect of substance. This is the difference between the target condition of the object and the actual one. This type of defect could happen to the Classification Society and it is based on the Rules of the Society, which assumed to be a state-of-the-art. Thus,

[59] § 634 BGB
[60] §§ 195, 199 BGB
[61] § 649 BGB
[62] Zimmermann, The new German law of Obligations (2005), p. 159
[63] Lagoni, ibid, p. 102
[64] § 278 BGB
[65] Lagoni, ibid, p. 103
[66] § 633(3) BGB

almost any contract with the Register could contain the liability for this type of defect. However, the liability regime for it and for the basic defect is the same[67].

2.2.2. Exemption from Liability

The Contract with the Classification Society is based on a standard term, which, in most cases, could not be changed by contracting party. Following this, the classification society cannot exclude or limit its liability for the personal injure or death, even if their employees are solely liable for that. Moreover, the Classification Societies cannot exempt themselves from liability for the negligent actions or themselves or willful faults of their employees[68].

2.3. Russian Law

2.3.1. Liability under the Civil Code

The basis for any contractual relations under the Russian Law is the Civil Code of Russian Federation (Civil Code). Russian Civil Code is really familiar to the German BGB, as the German Law was one of the reference point for the new Russian law after the Soviet Union era.

As it has been mentioned, any contract under the Russian law is regulated by the Civil Code. Thus, the liability for the breach of contract lays strictly within the provisions of the Civil Code. However, special liability for certain contracts is also exists.

If the Classification Society violates its obligations according to the contract, it is liable for any damages, which arise from such breach[69]. The amount of reimbursement by the breach party include all the damages and economic loss as well, and defined in Civil Code as sum any losses sustained by the plaintiff.

One of the main difference of liability in Russian Law is that the damaged party may claim a penalty from the breached party in any situation. The penalty calculates according to the contract, or if one is not set in contract the court calculates it in accordance with the Civil Code[70]. However, the Civil Code allows for the contracting party to limit their liability only by claiming the penalty from the party in breach. This position is highly arguable amongst the lawyers in Russia[71].

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[67] Lagoni, ibid, pp.103-104.
[68] Ibid, p. 105
[69] Article 393, Civil Code
[70] Article 394, Civil Code
[71] Гаврилов, О Неустойке И Процентах За Неисполнение Денежного Обязательства После Принятия Изменений В Общую Часть Обязательственного Права, Хозяйство и право (2015), pp. 3-13 (Gavrilov,

In contrary to the Common Law the Russian law is very certain about the status of employee in the dispute concerning the breach of the contract. Following the provision of the Article 402 of the Civil Code and several provisions of the Labor Code any faults of the employees of the debtor or party in breach should be recognized as actions of the debtor[72].

In addition, following the Russian Civil Code the defendant is liable for the actions of any third party hired by him with a right of recourse to such third party.

For the Classification Societies Russian Civil Code leaves no possibility to avoid liability for the breach of contract in any cases. The Russian law fully relies on the Codes, Acts and other statutes, rather than on the Case law. The straightforwardness of the applicability of the statues in Russia makes the Russian Law one of the simplest for understanding the liability system. However, there are a lot of underwater stones in a disputes regarding the question of liability for the breach of contract, which varies depending on a case facts[73].

3. LIABILITY UNDER THE TORT LAW AND TOWARDS THE THIRD PARTIES

3.1. Tort law Liability

The breach of contractual duties by the Classification societies is the most common type delict that the classifications societies could be involved in. Nevertheless, what if the surveyor did a mistake and caused a damage to his contractual party not by breaching contractual duties, but by other actions, e.g. wrongful or misleading information or representation, while performing in respect with his contractual duties? At this situation tort law steps forward. The liability in tort varies from different law system, but its idea remains the same – the guilty party should reimburse the damage done. Moreover, at this point hides one of the most difficult issue of the liability under tort law – the identification of the guilty party.

Penalty and Interests for Breach of Contract after the amendments in the Civil Code, Economy and Law. In Russian)

[72] Article 402, Civil Code

[73] Белов, Практика применения Гражданского кодекса Российской Федерации, части первой (2011), p. 1301 (Belov, Application of the Civil Code of Russian Federation, part one. In Russian).

3.1.1. Common law countries Implementation of the tortious liability.

The origin of the liability in tort is the same for both UK and USA law, but there is a slight difference between the usages of them. However, there is still no case for the tort liability of the classification societies in UK and US. The classification societies in principle deny their liability under the rules of tort, but the analyze of the statutes and related to this sphere cases makes this positon of them highly arguable.

a. United Kingdom's system

It is more natural to start with the UK system of the tort liability and tort of negligence doctrine. This doctrine could be a basis for an additional liability of the classification society apart of the contractual. For every tort liability under the English law, three criteria should be present[74]. The first one stipulates that the defendant must owe a duty of care to the plaintiff. This criterion is a main point on which the classification societies base their defensive position in the hearings. The problem here is whether this duty of care exists for the surveyors and whether the damage is related to the breach of such duty[75]. To establish duty of care the courts generally do a test whether such doctrine is fair, just and reasonable to be imposed on the defender[76]. In contractual relationship the contract itself usually supplies sufficient ground for such duties. The leading case for this situation should be Smith v. Eric S. Bush, where the court discussed duty of due care of servitors. In this case, the court held the building surveyors should exercise the reasonable duty of care apart of their contractual obligations[77]. Despite this case lays outside of the maritime sphere, and, of course, the liability of the classification societies, it could become a strong basement for imposing the liability of the Register for tort of negligence. It also means, that the contractual duties of the Register corresponds to it duties in tort[78]. It was also confirmed in Midland Bank trust Co v. Hett Stubbs & Kemp[79] in which the Court of Appeal ruled that where there is a contract the duty of care of the parties, which duties are governed by that contract, also exists[80].

[74] Jackson and Powell, On Professional Negligence (2002), 2-13, p. 11
[75] Lagoni, The liability of Classifications societies (2007), 64
[76] Poole, Textbook on Contract Law (2014), 441
[77] Smith v. Eric S.Bush (1990) 1 A.C. 831
[78] Lagoni, The liability of the Classifications societies (2007), 65
[79] Midland Bank trust Co v. Hett Stubbs & Kemp, (1979), Ch. 384
[80] Jackson and Powell, On Professional Negligence (2002), 9-032, p. 417

The second criterion is related to the first and says that the damage caused by, in our case, surveyors should be within the duty of care of the defendant. In other words, this criterion apply the remoteness of damage test to the casualty situation. As it was said previously, the duty of care could be imposed on the Classification societies as party in the contract. Thus, it allows evaluating the distance between the caused damaged, breach of contract and society's duties. The grounds for the remoteness test here is governed by Hadley v Baxendale case – the damages which the other party ought to receive in respect of such breach should be reasonably considered as arising from the duties of the party in breach[81]. However, there duties of the defendant could not be extended here beyond those, which arise from the nature of contract[82].

The third criterion doesn't have any underwater rocks and sounds like: the defendant should act in such way that it's breach the contract. Usually, if the first two criteria are successfully reached the third is solved itself.

b. The United States system

The United States law is quite similar to the English, but the way it works regarding the questions of the liability of the Register is different. The key difference between American and British practice regarding this question is that American courts recognize duty of care of the party in contract, but it cannot be fully applied to the classification societies[83].

The US doctrine for duty of care of the contractual party is based on previously mentioned Ryan case. Meanwhile, the Ryan case rules is not applicable to classification societies, as there is difference between their and stevedore's way of performing their duties. As it has been clarified by researchers of this question the classification societies can force the shipowner to fix the vessel or improve it's condition by threating no to issue certificate to him, which puts the ship in a factual control of the Register, which means that the Register should show a due care about it while performing its contractual duties[84]. This statement is based on the facts of the Great American Insurance case, without which the Rayn doctrine could not be imposed on the Classification societies.

In addition the Great American Insurance case brought an idea into the US law, that for the improvement of the liability of the classification societies and strengthen their

[81] Hadley v Baxendale (1854) 9 Ex 341, p. 354
[82] Downsview Nominees Ltd. V First City Corporation (1993) A.C. 295.
[83] Miller, Liability of Classifications Societies in the Perspective of United states Law (1997), 89-92
[84] Lagoni, The liability of Classifications societies (2007), p 81

responsibility both parties in the contract should be made tortfeasors towards each other[85]. This position of the court is highly arguable[86]. Following this statement, the shipowner would better control the classification society and vice versa, as in case of casualty they are both jointly liable. However, this rule did not find implementation on practice until now. In addition, despite the duty of care for the Register of ships has been confirmed by those cases, the US courts did not give the shipowner or other contractual parties right to use warranty of workmanlike performance against them as the societies don't really provide one, because they cannot change the situation (fixes or repairs) with the ship by their own.

3.1.2. Tort law liability in Civil Countries.

a. German Law

German Law regulates tort liability in its Civil Code. Despite the contract law should prevail in the relations between the contractual party, the BGB allows the application of tort law to the same set of facts.

Title 27 "Torts" of BGB regulates the tort law. The paragraph 823, as the basic provision of this chapter, reads: *who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is bound to compensate him any damages arising therefrom*[87]. Following the nature of this provision there should be three elements presented: injure or damage of one of the rights stipulated in the paragraph, wrongfulness and fault.

However, the German tort law also has a duty of care test, but in a more wide way, rather than Common law countries. This test is based on the paragraph 823 as well and *obliges someone who creates a source of danger or at least allows such danger to continue within his sphere of influence to take all reasonable measures to protect other individual form the risk*[88]. One may said, that application of this rule removes the duty of care at all from the German Law. This statement is partly true and false at the same time. It is true, because the definition of the test makes it is enormously wider than it is in English or American Law. However, it is false, because the test requires form the injured party more

[85] Great Amirican Insurance Co. v. Bureau Veritas, 338 F. supp
[86] Lagoni, The liability of Classifications societies (2007), p 80
[87] Goren, The German Civil Code (1994), p. 126
[88] Magnus/Bitterich Tort and regulatory Law in Germany, as part of Tort and Regulatory Law (2007), p. 116

precisely prove the fault of the presumable tortfeasor and that he did not take any measures to avoid or minimize damage.

For the Classification Societies such test leaves no possibility to escape the liability, when the fault, which caused the damage, falls within the scope of responsibility of the Register.

b. Scandinavian Law

In Scandinavian countries the tort law and liability is not regulated by the civil codes, as there are no civil codes. In Denmark the tort law rules established by the legislation, when in Norway and Sweden the precedent law also forms this liability[89].

The main difference between Scandinavian view and other civil law countries or common law interpretation of the tort law is the way how the criterion of foreseeability is treated. Following the classic approach. As it has been mentioned previously, the foreseeability of the damage together with duty of care are one of the main criteria upon which the entire tort liability is based. However, the Scandinavian *shift from a subjective to an objective approach* and replaced foreseeability by «typical damage». This criterion tests *whether or not the occurred damage can be regarded typical*, rather than analyzing the state of mind of tortfeasor[90].

Another valuable point of the Scandinavian tort Law is how it deals with the question of pure economic loss in the tort liability. Swedish tort law answer to this issue is negative, as the Swedish legislation does not treat the suck loss as recoverable under the tort conditions.[91] In contrary Danish[92] and Norwegian[93] law allows recovering of such damage as any other.

For the Classification Societies this means that the chance of became liable in tort under the Scandinavian law is much higher, then in other countries. In Scandinavia, the Register is liable even if it cannot foresee the damage, and the "typical damage" criterion lives him no chance as any damage related to the surveyors faults or negligence can be treated as typical for the registration and surveying of the vessel and other marine objects.

c. Russian Law

[89] Ulfbeck, Modern Tort Law and Direct Claims Under the Scandinavian Insurance acts, Scandinavian Studies in Law (2001), p.522
[90] Ibid, p. 522
[91] Hellner, Modern Swedish Perspectives: The New Swedish Tort Liability Act (1974), pp. 1-16
[92] Gomard, recent Developments in Danish Tort Law, Scandinavian Studies in Law (2001), pp. 233-247
[93] Ulfbeck, p. 523;

In Russia the question of the tort liability is treated in a same way as in the German Law. The reason for that is that the modern Russian Civil Code has been mainly influenced by the Bürgerliches Gesetzbuch (German Civil Code). Thus, for the Classification societies in Russia the situation with liability is equal to the German law.

Following the Russian law, the person, who caused damage to the personality or property of the legal or physical entity, should reimburse such damage in full amount[94]. This provision is synonymic to the German one[95]. Russian civil law concerning this issue use the presumption of guilt upon which the defendant should prove his innocence[96].

The mentioned provision allows to claim for the damages both in case of fraud and in case of negligence. For negligence claims, the plaintiff should prove existence of duty of care on defendant's side. This principal goes in contrary with the presumption of guilt, and is a subject for dispute in legal sphere[97]. Unfortunately, there is no court practice until this moment on this issue.

In addition, Russian tort law is in its infancy, so there might be a problem with a claim, if it is not based on the criminal law case of fraud[98].

3.2. Liability of the Classification Societies towards Third Parties

It is quite common situation when the accident happened to the vessels caused damage not only to the shipowner, by to the third party as well. Third party in this case is a non-contractual party with a classification society such as a passengers of the vessel, cargo-owners, workers of the shipyard or any other party, which suffered a damage due to the marine incident caused by the shipowner due to the faults of a classification society. Damage to the third parties here means a damage that the non-contractual party suffered from the fault of the classification society. In most cases shipowner will be liable for the damage. However, sometimes shipowner is not liable due to the legal limitations and exemptions from liability and sometimes because his insurance was suspended or canceled. In this situation, the third parties seek the possibilities to claim their damages form the classification societies.

[94] Russian Civil Code, Article 1064.
[95] § 823 Bürgerliches Gesetzbuch
[96] Bogdanova, Topical problems of compensation of losses in contractual obligations, Civil Law (2015), pp. 6-9
[97] Budylin, Tort or Breach of Contract? Representations and Warranties in Russia and Abroad, Russian Economic Justice Bulletin (2016), pp. 85
[98] Ibid, p. 86

3.2.1. Protection of the Third Parties Interests in the Civil Law Countries

Civil Law countries in general have a special Legislation on protection of rights and interests of the third parties. This protection usually expressed in the number of articles in the Civil Codes of the country or, sometimes, even includes in the contract.

a. German Law

The analyze of the Liability of the Classification societies towards third parties should start with Germany, as this country is usually associated with the definition of Civil Law, and it maintains its law system in the most similar way to Roman Law. Following the German legal scholars there are two main theories in the German Civil Law under which the Classification Societies could be held liable towards third parties[99]. In addition to those theories also exists the institute of *Culpa in Contrahendo* (fault in conclusion of contract), which can protect the third parties in some cases of provision of information[100].

As the first theory the German lawyers and courts recognize the implied Agreement to Provide Information[101]. According to this agreement the provider of information is liable towards the recipient of it, as an agreement between them should be assumed whenever the supplier of such information took part in the negotiations as competent man of confidence. The Classification societies will be usually recognized as such independent experts. However, this theory can only apply in cases when the Classification society directly provides an information to the third party. In addition, it should be mentioned that this provision is strongly criticized now by legal researchers.

The second option to held the Classification society liable is if the contract between the Register and the contractual party has a protection mechanism for third party. In other words, the Contract with the Protective effects towards third party[102]. It grants protection against all type damages, injuries and even pure economic loss[103]. There are two way of application of this theory. Following the first one the creditor himself is obliged to protect the third party. This way most likely makes the shipowner of ship management company liable. The second one provides the protection of the third party by the will of the

[99] Lagoni, The liability of the Classifications societies (2007), 189
[100] Markesinis, The German Law of Obligations (1997), p. 276
[101] RG 27 October 1902, 52 RGZ 365
[102] § 278 Bürgerliches Gesetzbuch
[103] § 280 Bürgerliches Gesetzbuch

contractual party in accordance with courts findings. This is the one which should be used against the Register to make him liable.

In addition to the mentioned theories there is and institute of *Culpa Contrahendo*[104]. This institute mainly spreads on the cases related to the incorrect information in the ship's certificate, issued by the Classification society. If someone uses the information provided in the certificate of the vessel to conclude a contract, and the loss was caused, due to the incorrect information in the certificate, the Register could be brought to liability under the mentioned institute[105].

b. Scandinavian Law

Under the basics of the tort law only the person who suffered damage from the tortious act is entitled for reimbursement. Danish and Norwegian Law shared the same position of doctrine of unlawfulness for the long time. Following it only the person to whom wrong has been done may sue for the loss. However, with decreasing role of the fault criterion this doctrine has been changed significantly. Nowadays, the Scandinavian law uses allows third parties with "specific and closely connected interests" sue for the damages[106]. For the Classification Societies this position of legislation does not give a clear answer, thus the situation is mainly rules by the court law.

c. Russian Law

As it has been mentioned previously Russian Civil Law is quite modern and incorporated many principles of the German and French Civil law practices. However, there are many novels in it legislation, which Russia invents itself.

Russian Civil Law recognizes the existence of the third parties (or in literal translation - third entities) in different situation, but the definition of the third parties, which is suitable for the liability of the Classification societies is given only in Civil Procedure Code (GPK) and Arbitration Procedure Code (APK)[107]. Following those Codes, there are two types of the third entities – first one is the third party making independent (or separate) claims concerning the subject of the dispute and the second one is the third party no making independent claims[108].

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[104] § 311 Bürgerliches Gesetzbuch
[105] Kraft, Die Dritthaftung von Klassifikationsgesellschaften (2004), p. 1102. In interpretation by N. Lagoni
[106] Ulfbeck, Modern Tort Law and Direct Claims Under the Scandinavian Insurance acts, Scandinavian Studies in Law (2001), p.523
[107] Civil Procedure Code, Article ; Arbitration Procedure Code, Article
[108] Sukhanov, Civil Law (2010), p. 256

The first type of the third parties have a right to enter the trial if they have, upon their respectful opinion, claims both to the plaintiff and defendant regarding the subject of the dispute. Russian Legislation is very strict on this question and do not allow any interpretation on this question. Thus it is quite hard to imagine the situation when the third party with the separate claims may enter the trial between the Classification society and its contractual party. However, the injured third party may sue the Classification society as causer of the damages, but it should be done on the basis of the tort law principles and will be discussed later in this chapter.

The second type of the third entities – not making independent claim – most likely could exists in the trial involving the Register. This types of the third parties, as it could be seen from their name, couldn't make any claims, but they have to participate in the trial, as their rights could be affected by the decision. In the light of Classification Societies liability such entities could be employees of the society itself, employees of the other contractual party, the charter party (bare-boat as well), etc. Despite, such third parties could not make claim and basically are not parties of the trial, they could evidence in favor of the party of the court hearing, which side they represent. Such parties also can participate in the trial if such participation will help to uncover all the facts of the case or will save the time of the court for making the decision on the case.

The protection of the as it is understood in German or English law exists only in the form of the tort liability of the Register of Ships. The chapter 59 of the Civil Code of Russian Federation allows any third party, which suffered the damages due to the deficiency of lack of information or service claim the damages from the person responsible for such service or provider of the information regardless whether there was a contractual relationship between them[109]. Thus, the Classification society, which actions or provided information caused the damage to third party, is liable towards the injured party. These provisions allows to disregard the shipowner of the vessel and directly claim the damages for the Classification society, if it was acknowledge by the previous court ruling or facts of the case, that it's the Register's fault brought to the dangerous situation and caused damage.

3.2.2. Application of the English and US law on Liability towards Third Parties

a. United Kingdom

[109] Alekseev, The Civil Law Studies (2009), p. 358

The United Kingdom protection of the rights of the third parties starts with The Contracts (Rights of Third Parties) Act 1999. The third parties use the same principles of contractual protection as parties of the contract. The third party have to be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into[110].

In the English law, one type of the liability in tort for the Classification societies is tort of negligence. The rules of implementation of it is the same to the rules if the plaintiff is contractual party. However, in contrary to the contractual liability the duty of care of the Classification society here should not be a perquisite[111], which existence should be tested all the time. Meanwhile, in some other cases it was stated that there is a necessity of duty of care, which is owed by the defendant to plaintiff, and breach of which caused the loss or damage to the plaintiff. In addition to this, the courts tests the duty of care from the position of duty of care. With or without this condition the damages to the third parties is much more difficult to be recognized. Such damages could only be reimbursed if they are consequential damage of the main damage suffered by the contractual party and they are not too remote. The remoteness test could be one of the main evaluation criterion for the damages suffered by the plaintiff. Moreover, besides the prove of the casual link between the actions of the defendant and plaintiff's damage there should an evidence that this damage could be foreseen.

One of the leading case in this sphere is Mariola Marine Corporation v. Lloyd's Register of Shipping (The "Morning Watch"). This is the first case in the history of UK courts, when the Classification society's liability under the tort law towards the third party was discussed form the position of the duty of care. The Court also was trying to established a duty of care of the Register towards non-contractual party. Following the facts of that case – the classification society negligently misrepresented that the vessel, which the plaintiff purchased from the owner, is seaworthy[112]. The fact the seaworthiness of the vessel is specific duty of its owner. The court added that it was not proved by the facts of the case that there was a proximity between the defendant and the plaintiff, which could give a basis for a duty of care. Following this statement, the court rejected the plaintiff's claim to the Register. Nevertheless, it should be taken in consideration, that the court got to that

[110] The Contracts (Right of the Third Parties) Act (1999), para. 1 (3)
[111] Heaven v. Pender (1883) 11 Q.B.D. 503
[112] Mariola Marine Corporation v. Lloyd's Register of Shipping ("The Morning Watch") (1990), 1 Lloyd's Rep. 547

conclusion, only because it was impossible to prove, that the classification society knew who's exactly going to purchase the vessel. Regarding this, the court made a remark, that if the plaintiff could prove that the survey was made in favor of the specific purchaser, the doctrine from Smith v. Eric S. Bush will apply[113].

Another valuable case for the tort liability in English law is The Marc Rich & Co v. Bishop Rock Marine Co. Ltd. (and Class NK) (The Marc Rich Case). This case is a landmark case when it comes to the liability of the classification societies towards cargo-owners as the third parties. This case does not question the liability from the position of existence of duty of care, but from the position of whether the recognition of this duty is fair, just and reasonable. To cut a long story short: the vessel with cargo of zinc and lead should sail to Italy and Russia, but developed several cracks during the loading. The ship was requested for permanent repairs by ClassNK Classification Society. However, the owner was short on time and did only temporary repairs to the cracks, which nevertheless were accepted by the Register as sufficient for the journey. During its sail the ship cracked in half and sunk with all its cargo. The cargo-owners settled a claim in amount of 5.5 million USD against ClassNK.

The House of Lords in his verdict to this case made several references to the Donoghue v Stevenson[114] case. In this decision the Lord Justice Lloyd and Lord Justice Steyn came to the different conclusions, but majority remained on the Lord Justice Steyn's side. The first argument brought by Lord Justice Steyn was built on whether there was a direct physical loss suffered by cargo-owners or a reliance. The Judge answer to this question was negative, because there are no obligations on maintaining seaworthiness of the vessel are imposed on Classification Societies. As an argument to this Lord Justice Steyn provides a comparison with Clay v. Crump case[115], where the architect was held liable for the wall failed on the workers. However, as it has been mentioned previously unlike the architect, who is responsible for the building, the Register bears no liability for the seaworthiness of the vessel.

Next argument provided by the majority of judges was based on voluntary assumption of responsibility, which has a direct connection with duty of care criterion. The court in its majority found that there was no voluntary assumption as the plaintiffs did not even know

[113] Ibid, p. 561
[114] Donoghue v Stevenson is a decision made by the House of Lords on 26 of May 1932. This is fundamental case for English tort and Scottish delict law, which defines the modern concept of negligence, by pointing out the principle of duty of care from one person to another.
[115] Clay v. A.J. Crump & Sons Ltd. (1964) 1 .Q.B. 533 (Q.B.)

that the defendant was surveying the vessel, until the damage occurred. This fact denies the liability of the Register[116].

The third main argument of the Lord Justice Steyn included the regulation of the limitation of liability. The Majority agreed with the Court of Appeal in this question and held, that it is not fair just and reasonable for the Classification society to share liability with the shipowner, who is covered by the Hague-Visby rules[117]. In contrary to this argument, Lord Justice Lloyd objected that The Hague-Visby rules is not applicable for all the parties, hence they should not be used at all. The Law Lord added: "It would make nonsense of the law if a surveyor in the position of Mr. Ducat owed a duty of care towards cargo if the contract of carriage were contained in a charter-party, which does not incorporate the Hague Rules, but not if it were contained in a bill of lading which does[118]".

As a brief summary of this case: the House of Lords by issuing a ruling to this case showed very important issue regarding duty of due care of the Registor. In other words, the entire judgement based on analyzing whether the implementation duty of due care of the Classification society is just, fair and reasonable. However, this case should become a guide for all the cases with the liability of the Classification Society, judged under the English Law, as every case is unique, and duty of care strongly depend on the facts. Nevertheless, the Marc Rich Case made a precedent, which can affect many disputes between the Classification Societies and cargo-owners.

b. United States of America

The United States Law allows the third party to claim against the Classifications Societies on several different doctrines. The first one is the contractual right of Indemnity. This doctrine separates in three other standalone ways. The first way holds that issuance of the certificate to the shipowner does not trigger the contractual relationship between them, as it follows from the contractual law principles. The second way is that, in addition to the contract the contractual parties may expressly add a benefit for a third party[119]. The third way is based on the Ryan doctrine – workmanlike performance. However, this way is

[116] Marc Rich & Co. AG v. Bishop Rock MarineCo. Ltd. (and ClassNK) (1995), 2 Llouyd's Rep. 299(H.L.), p. 314
[117] Ibid, p. 316
[118] Ibid, p. 304
[119] Lagoni, The liability of the Classifications societies (2007), 142

highly arguable[120], as the Register is not responsible for the condition of the ship, but control the vessel. The usage of the Ryan doctrine was rejected by the court[121].

The second doctrine for liability of the Register is Tort of Negligence. As United States Law differs from the English Law this doctrine is not a copy of the one used in UK. To sue the Classification society under this doctrine the plaintiff have to prove the absence of any rule limiting the general duty of ordinary care[122]. The main issue here is to identify the third parties, to which the Register owns a duty of care. In the Amaya v. Home Ice, Fuel & Supply Co. the court established several principles on which the Classifications could own the duty of due care to the third party[123]:

1) *the extent to which the transaction was intended to affect the plaintiff*
2) *the foreseeability of harm to him*
3) *the degree of certainty that the plaintiff suffered injury*
4) *the closeness of the connection between the defendant's conduct and the injury suffered*

The United States provided several cases on this doctrine with both positive (liable)[124] and negative (not liable)[125] for the third party outcome. However, most of them are not published, so it is impossible to discuss on the arguments of the cases.

The Tort of Negligent Misrepresentation is the third doctrine for the liability. This doctrine relates to the Classification societies, as it deals with the negligent provision of the false information. According to the Restatement of Torts, this liability is raised when the false information is presented, and it protects the users of such information from physical harm or economical loss. If the plaintiff in that case knows that, the defender will present this information to other third party or limited group of person, such third party can sue the Register for economic loss[126].

4. CONVENTIONAL AND INTERNATIONAL LAW LIABILITY AND LIMITATIONS.

[120] In the matter of the Compliant of Dann Marine Towing, LC et al., (2004), p. 6
[121] Great Amirican Insurance Co. v. Bureau Veritas, 338 F. supp
[122] Dobbs, The Law of Torts (2000), p. 269
[123] Amaya v. Home Ice, Fuel & Supply Co. (1963) (in interpretation by N. Lagoni)
[124] Psarianos v. Standart Marine, Ltd. (1994), 12 F3d 461
[125] Gulf Tampa Drydock Co v. Germanischer Lloyd (1981), 634 F.2d 874
[126] Sundance Cruisers Corp v. American Bureau of Shipping

4.1. The Hague-Visby, Hamburg Rules

4.1.1. Applicability and limitations to the Classification Societies

The Hague-Visby Rules is set of rules for the international carriage of goods by sea. It has been ratified by more than 90 countries, and all the leading maritime states are among them. One man can say that this convention has nothing to do with the Classification Societies and it is protect only shipper and carrier. However, the protection of these rules extends not only the mentioned persons. In the part 2 the Article 4bis of the Rules includes the following statement: *If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules*. The meaning of this is, if the Classification Society is recognized as a servant or agent of the carrier, it could benefit from the limitation to the liability granted by those Rules. So, can the Classifications Societies be recognized as those persons?

The Hague-Visby Rules has no definition of a servant or an agent, which makes those terms a subject to interpretation. The interpretation of this convention could be done on the basics laid down in Vienna Convention on the Law of the Treaties 1969. Section 3 of the Vienna Convention includes the exact rules on the interpretation of the international treaties[127]. Despite those provisions are binding only to the members of the mentioned convention, they have to be applicable to any international convention and treaty[128].

There are three typical methods used for the interpretation of the terms: grammatical, systematic and functional. Following the grammatical method, "the servant" is a person who acts in the service of a master and who has to obey his orders[129]. The Classification Societies could be requested to carry out a classification of survey of a certain vessel, but they are free to choose the way this request will be done. Thus, the Register is not a servant of a shipowner, as he has no control over it[130]. "An agent" is not the right term for the Classification Society as well, as agent works on behalf of the principal, and the Register is always contractually bound, but, nevertheless, acts fully independently. Thereby, the Classification Societies are not agents or servants under the grammatical method of interpretation.

[127] Vienna Convention on the Law of the Treaties, Section 3, Art. 31-32
[128] Bernhardt, Interpretation in International law, as part of Encyclopaedia of Public International Law (2012), p. 1416
[129] Oxford dictionary of English (2010), p. 852
[130] Lagoni, The Liability of the Classification Societies (2007), p. 280

The Systematic method also denies the recognition of the Classification Societies as subjects of the Hague-Visby Rules. For the purpose of this method, the Articles 4 and 6 of the Rules have to be analyzed. According to the Article 4, *neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from act, neglect, or default of the servants of the carrier in the navigation or in the management of the ship.* Article 6 stipulates the right of the carrier and shipper to enter into the agreement that relates to the care or diligence of his servants or agents. The servant in this situation is a person who helps carrier in the navigation or management of the vessel, when agent is a generally representative of the carrier in concluding the contract of carriage or issuing the bill of lading[131]. The Classification Societies are neither of those.

Form the functional method position the picture does not change at all. The purpose of the Article 4bis is to limit the liability of the person for whom carrier may have answer. Generally, this provision seeks to prevent the limitation of the liability of the carrier to become ineffective, by extending such limitations to the servant or agent. As it has been confirmed, that the Classification Societies do not fall within the scope of those persons, the Article 4bis to them.

Summing up all above mentioned, it can be said, that the Classification Societies are not subject of the Hague-Visby Rules and does not benefit from the limitation of the liability granted by them.

Another set of rules relating to the carriage of goods by sea is Hamburg Rules 1978. Following those Rules the Classification Societies can seek the protection only, if they are the servants or agents of the carrier[132]. As in the Hague-Visby Rules a servant or an agent has to perform in favor or on behalf of the carrier in connection with the contract of carriage of goods by sea[133]. The main purpose of the Classification Society is to class the vessel or help to make it seaworthy, but it has nothing to with carriage by sea. In addition, it does not really survey the vessel when it is loading or discharging cargo, unless such survey is necessary due to the damage suffered[134]. Hence, the Classification Society cannot limit its liability in accordance with Hamburg rules, as those rules are not applicable to it.

[131] Bernhardt, Interpretation in International law, as part of Encyclopaedia of Public International Law (2012), p. 1417
[132] Hamburg rules, article 7
[133] Hamburg rules, article 5
[134] Lagoni, The Liability of the Classification Societies (2007), p. 281

4.1.2. Limitation under the LLMC

The Convention on Limitation of Liability for Maritime Claims defines the limitations of liability, which could be applicable in different maritime cases. This Convention does not expressly includes the Classification Societies as subject to limitations, but does not exclude them from it at the same time.

Articles 1(4) and 9(1) of the LLMC spread the limitations for the maritime claim liability on the persons for whom the shipowner is responsible. However, the LLMC includes no legal definition of the mentioned entities. In addition, during the International Conference on Limitation of Liability for Maritime Claims, the participants paid much attention to the fact that the LLMC applies only to limited number of persons[135]. Thus, the answer to the question "for whom shipowner is responsible" have to be solved by the domestic law of the contracting States.

In English and American law the Classification Societies acts, as it has been mentioned many times before, in accordance with their rules and in respect with contractual relationships between them and shipowner. The independent contractors perform their duties independently and in a way, which they chose by their own. Of course, they could follow some directions from the shipowner, but this does not make them his employee and does not put them under his control. In the light of this theory, the Classification Societies cannot limit their liability under the LLMC provisions.

The German Law defines two types of person for the employer is for their act, neglect or default. The first type is a person instructed by the employer to fulfill his obligations to the creditor in contractual relations; the second type is an employee authorized to execute the task allotted to him if the claim is based on tort.[136] The Classification Society is nether of those persons. Both of the mentioned persons cannot decide the time and extent of their activities and, with regard to the maritime sphere, they have to participate in the operation of the ship and day-by-day management. In contrary, the Register does not participate in the operation of the vessel, but insure its safety and award it with a class. The Classification Societies limits their activities by their rules and contract, and they cannot perform duties, that do not comply with their mission. In addition, under the German Law there is no civil liability of the shipowner for the Classification Society. All the above mentioned excludes the Classification Societies for the limitation system under LLMC.

[135] Lagoni, The Liability of Classification Societies (2007), p. 285
[136] Ibid ,p. 287

The Russian Law is not positive about this question as well. The Russian Civil Code excludes responsibility of one contractual party for the action of the other[137], unless on contractual party were forced to perform such actions by fraud, violence, threats or adverse circumstances[138]. However, such involuntary actions suspects the contract itself and excludes the injured party (the one, which was forced to do something) from the liability. In addition, there is no identification for the Classification Societies as an employer, because for such status the Classification Society should sign an employment contract and became a subject to Labor law. This is impossible as legal entity cannot enter in a such contract, as employment contract is an agreement between a physical entity (or a person) with legal entity.

4.2. Convention on Civil Liability for Oil Pollution Damage (CLC)

4.2.1. Classification Society as a subject for liability

The Convention on Civil Liability for Oil Pollution Damage (CLC) has come to power in 1969 and has been renewed in 1992. The main purpose of this convention is to unify and systemize the liability for the pollution from oil spills in maritime sphere.

Article I of the Convention gives a definition of a word "person" used in CLC - *the "Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions*[139]. According to this definition, the Classification Societies can be a subject to liability to this convention, as they are private corporate bodies.

Clause 4 of the Article III does not exclude the Classification Societies from the liability[140]. Following the provision of this clause no claim can be made against the agents, servants or members of the crew of the owner. As it has been confirmed by the analyze of The Hague-Visby and Hamburg Rules the Classification Societies act as independent contractors and cannot be recognized as owner's agents or servants. Thus, they cannot benefit from the protection of channeling of liability granted by the CLC. This position is confirmed by many researchers. Some of them argue that clause 4 of the Article III has to be interpreted in even more narrow way – only the person mentioned in it are protected from the claims. In addition to this, some scholars propose that neither the shipbuilders or

[137] Civil Code, Article 153
[138] Civil Code, Article 179
[139] Convention on Civil Liability for Oil Pollution, Article I
[140] Convention on Civil Liability for Oil Pollution, clause 4 Article III

shiprepairs of the vessel or the owner or the operator of the colliding ship are not included in the mentioned clause.[141] However, most of them agree on the possible application of liability for the classification societies[142].

4.2.2. Erika and Prestige cases legacy

As it has been acknowledged the Classification Societies are not protected by the channeling of the liability clause in CLC convention, which make their liability under the CLC is more than possible. Until now international case law knows only two major cases with opposite outcome, regarding the CLC and liability of the Register – Erika and Prestige.

The tanker Erika sank on December 1999 60 nautical miles away from the Britany Coast of France. The vessel was carrying around 31,000 tons of crude oil and caused pollution of almost 400 kilometers of French shoreline[143]. The Erika was classed by RINA (Registro Italiano Navale), and her class certificate was renewed in early 1999. In addition, the ship went through several inspections in the period from 1991 to 1999 carried by both Port Controls and Flag State surveyors. In addition to that Erika held certificates from different major oil companies, which also carried out several inspection of the vessel before it could be accepted. All the certificates were valid at the moment of sinking[144].

The French authorities initiated the trial against the shipowners, TOTAL as owners of the cargo and RINA, as the Register. During the court investigation it has been revealed that Erika sunk due the serious internal corrosion of the internal construction elements[145]. It has also been revealed that RINA and the shipowners were acted together to reduce the amount of steel needed for the repair of the vessel. In addition, the court held that the Register and the owners acted negligently, and RINA issued a certificate, despite the knowledge that the maintenance of Erika is necessary[146].

The court also found several problems with the Classification Society's survey of the vessel. RINA did not provide a surveyor for thickness test of the vessel, and some parts of the ship were missing at the time of such inspection. Thus, RINA willfully violated safety

[141] Wu, Pollution from the Carriage of Oil by Sea (1996), p. 170
[142] De La Rue, Shipping and the Environment (1998), p. 98
[143] Somers, Consequences of the Sinking of the MIS ERIKA in European Waters: Towards a Total Loss for International Shipping Law (2010).
[144] Ozcavir, The Erika and its Afternath (2000), p. 230-235
[145] Foley, The Erika Judgment-Environmental Liability and Places of Refuge: a Sea Change in Civil and Criminal Responsibility that the Maritime Community must Heed,(2008), p. 33
[146] Michael G. Faure et. al, Maritime Pollution Liability and Policy: China. Europe, and the U.S., (2010), p.183

regulations, sabotage the safety of the ship, endangered environment and third parties. The court found the Register liable for the amount of 500,000 USD[147].

During the trial RINA several times applied to the non-applicability of the CLC convention to it, as it can benefit from clause 4 Article III of the Convention, as the Register performed several services for the owner of the ship. The court did not find this argument strong enough and explained, that the person protected by the mentioned clause, as it performs services to the ship, should directly participate in the voyage of the vessel. The RINA failed to prove its proximity between it and Erika[148].

RINA objected the ruling of the court to the Paris Cour d'Appèl. The court examined the case and confirmed the ruling of the previous tribunal. RINA brought an additional argument to the court. It held that the Register can benefit from the provisions of clause 4 article III by invoking its state immunity. Erika was flying Maltese flag, and RINA acted as Malta's Register. The court denied this argument, because according the United Nations Convention on Jurisdictional Immunity of States and their Property (UNCSI) RINA renounced its immunity by participating in the trial[149]. The Court of Appeal decline the applicability of the CLC protections to the Register.

The Court of Cassation confirmed the decisions made two previous instances. However, the Court of Cassation held that two previous tribunals misinterpret the provisions of the clause 4 of the Article III CLC. By the court's opinion, RINA could benefit from the channeling clause of CLC, but, nevertheless, in this case that clause is not applicable, as the Register by its own recklessness made harm to the environment and the third parties.

This was the first case where the rules on channeling of liability in CLC has been interpret by the court. By those decisions the French court confirmed position announced by many researchers of that question before. However, the position of the Court of Cassation brings some doubts to the picture, that just seems to became clear. Probably, the Court did these, because it did not want solely decide such difficult situation, which should be better explained by the IMO.

Another major case relating the liability of the Classification Societies in the light of the CLC is the Prestige Case.

The Liberian-owned tanker Prestige developed a starboard list 50 nautical miles away from the Northern Atlantic coast of Spain on November 13, 2002. The ship's request for the

[147] Foley/Nolan, The Erika Judgment-Environmental Liability and Places of Refuge… (2008), p. 63-69
[148] Somers/Gonsaeles, Consequences of the Sinking of the MIS ERIKA in European Waters… (2010), p. 64
[149] United Nations Convention on Jurisdictional Immunity of States and their Property, Article 8 (2004)

port of refugee was denied, as the vessel's draught was too large to enter any of the nearest ports. Instead of it, Prestige was towed to the Atlantic Ocean, where, on November 19, due to the rough condition it suffered a crack and latter broke in two. This resulted in the oil spill of 64,000 tons of crude oil and enormous pollution of the coast of Galicia.

The Spanish authorities filed a claim again American Bureau of Shipping. Spain claimed that Prestige failed to comply with ABS Fatigue Requirements and that the deficiencies in the construction of the ship would have been noticed during the proper inspection of the vessel. In addition, Spain argued that ABS breached its duty of due care, thus it should be liable under the law of tort[150]. ABS objected this statement, claiming that the vessel sunk due to the heavy weather conditions and mistakes of the Master[151].

ABS based its defensive position on the application of the provisions of the Article III of CLC. It argued, that the Classification Society provides service for the vessel and can be recognized as servant of the shipowners within the meaning of clause 4(b) of the Article III. The U.S. District Court of the Southern District of New York upheld this position and accepted the reasoning, despite the fact that USA is not contracting party of the CLC. The court explained, that Spain's claim to ABS is barred, due to the violation of Spanish authorities the rules of Article IX of CLC[152]. CLC obliged Spain to file a claim against ABS in its own court first. Thus, the claim was rejected because of the jurisdiction mistakes[153].

The Court of Appeal corrected the District Court in its understanding of the jurisdiction power of CLC and returned the case to lower instance. The Court of Appeal referred to the Lauritzen[154] case and stated: *a connection of Spain's claims to the United States that is more significant than the geographic contacts proffered regarding any other nation (including the flag nation) in this action[155]*.

This time the District Court of NY addressed more to the US law, rather than to CLC. Judge Swain held, that Spain failed to establish causal link between the obligations of the Classification Society, its duty of due care and accident. The ABS argument, that it is the

[150] Wene, European and International Regulatory Initiatives Due to the Erika and the Prestige Incidents (2005), p. 55-60.

[151] Ship Structure Committee, Case Study XII, the Prestige

[152] Article IX rules: *Where an incident has caused pollution damage in the territory, including the territorial sea or an area referred to in Article II, of one or more Contracting States or preventive measures have been taken to prevent or minimize pollution damage in such territory including the territorial sea or area, actions for compensation may only be brought in the Courts of any such Contracting State or States. Reasonable notice of any such action shall be given to the defendant.*

[153] Reino de Espana v. The American Bureau of Shipping (2008), 528 ESupp.2d. 459

[154] Lauritzen v. Larsen (1953), 345 U.S. 571

[155]Reino de Espana v. The American Bureau of Shipping (2010), 729 F. Supp. 2d 642-646

shipowner's duty to ensure the seaworthiness of the vessel, prevailed in the decision of the Court. Spain applied against this ruling again. However, this time the Court of Appeal upheld the decision made by Judge Swain.

Prestige case has much less to do with the liability of the Classification Societies under the CLC provisions, rather than Erika. Nonetheless, the very first ruling by the District Court of NY leaves some questions open. One of them, is why the Court supported the argument of the ABS on the Article III? The reasoning, for such decision may hide behind the fact, that the Judged interpreted the facts, that the request made by the shipowner for the inspection of the vessel made ABS bound and moved it in the category of the persons performing the service to the vessel[156].

As a conclusion from the described cases: the question of applicability of Claus 4 of the Article III of CLC to Classification societies is solved by the Erika case. The Prestige case is very important as well, but since US did not ratify the CLC, it cannot be used for resolving of the upcoming disputes in the Member states of the Convention. The principles of the decision ruled by the French Courts can also be used, to interpret other international conventions, where the role of the Classification Societies as agents of servants is uncertain.

4.3. Liability and Limitation under EU Law

4.3.1. Classification societies as a subject to liability

Recognition of the Classification Societies by European Union under the provision of the Regulation (EC) 391/2009 and Directive 2009/15/EC not only allows the Registers to participate in the European maritime classification market, but also places obligations and liability on the Societies. The Regulation (EC) 391/2009 does not contain the liability issues of the Register and mainly serves as general frame for relations between the Member State and surveyors. Directive 2009/15/EC imposes cooperation agreements between the Member States and the Registers and contains several probable claims for violation of its provisions. The Member States should establish a connection and set several rules between their administration and the Register, recognized by EU. Article 5 of the Directive stipulates that the relationship between Member State administration and Classification Society have to be regulated by a formal written and non-discriminatory agreement or any other legal

[156] Reino de Espana v. The American Bureau of Shipping (2008), 528 ESupp.2d. 459

arrangements, which include specific duties and several provisions highlighted in the article[157].

After the conclusion of the agreements mentioned in the Article 5 of the Directive, the loss caused by the Surveyors may be recovered from the Member State in which behalf the surveyors performed their duties. Thus it is general rules that when the Classification Societies perform duties on behalf of the States authorities *the liability for its acts or omissions is directly (in civil law systems) or vicariously (in common law systems) that of the State which must ensure compliance with the conventions it has ratified*[158].

This position on interpretation of the Directive in such way is not supported by all the researches of this topic. Some of them, as it has been mentioned, agrees on the fact, that the liability of the classification societies should be transferred to the Flag Member State[159]. In this situation the injured party may sue the Classification Society itself, the administration of the State or both parties. In addition, same researchers also add, that in extraordinary cases the Register can be solely held liable under the law of tort. Unfortunately, such extraordinary cases are not specified. Other scholars interpret the provision of the Article 5 in a way, that the Classification Society is the only liable party for the caused loss and the State is indemnified[160]. In the support of this theory The Supreme Court of Netherlands held that the State could not be liable for the loss of the vessel, caused by the Classification Society mistake[161].

In addition, the Directive does not clearly define the liability of the Classification Societies for the reckless act and gross negligence. At the same time, it does not precisely identify whether the Register is liable for the for minor faults and ordinary negligence, when the liability for the major faults is in place[162]. The researchers of this problem supports the position, that after the decisions on Erika and the Prestige case, the Classification societies should be liable for ordinary negligence and minor faults[163]. However, none of the researchers defines the minor faults. Nevertheless, it is clear that the Register is a subject to liability in light of the EU legislation.

[157] Directive 2009/15/EC, Article 5
[158] Lagoni, The Liability of the Classification Societies (2007), p. 53-54
[159] Begines, The EU Law on Classification Societies: Scope and Liability Issues, Journal of Maritime Law and Commerce, October 2005, p. 487-543
[160] Cane, The Liability of the Classification Societies (1994)
[161] De Bruyne, Liability of Classification Societies: Cases, Challenges and Future Perspectives, Journal of Maritime Law and Commerce, April 2014, p. 188
[162] Ibid p. 189
[163] Begines, The EU Law on Classification Societies…, p. 521-526

4.3.2. Application of Limitations

As the issue with the liability of the Classification Societies under EU is solved and the answer is positive, there arise next logically correct question: is there any applicable limitations to the liability of the Register?

The Directive 2009/15/EC does not forbid to establish limitations on the liability of the Classification Societies in the respective agreements between them and the Member State[164]. However, the Directive itself consist a minimum maximum amount of the liability of the Register, which could not be downgraded in the agreements by the Member States. The minimum payable amount for the personal injury or death *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* is set on the level of 4 million EUR. The Register may limit its liability, if other not specified by the agreement, to 2 million EUR in case of loss or damage to the property of the injured party, if the fact of negligence or reckless action on the side of the Classification Society is proved by the court. Some countries, such as France, Germany, Luxemburg and Spain, limited the liability of the Classification societies in a different way, when other Member States relies on the Directive.

This rules only applies to the Classification Societies when they perform their public duties on behalf of the Member State, and do not cover the private classification and surveys. Furthermore, such limitations may be applied only in recourse claim of Flag Member State and only if the Register and the Flag State has been held liable by a competent court (i.e. the Court of the one of Member States). Thus, the limitations do not include the issues concerning the Register liability towards third parties for its statutory surveys[165].

[164] Lagoni, The Liability of Classification Societies (2007), p. 291
[165] Directive 2009/15/EC, Article 5(2b)

CONCLUSION

The liability of the Classification Societies is very difficult question, which attracts attention of the many researchers all around the world. The certification of the vessels as well as their survey is the most important part of the maintaining of safety in the industry of maritime shipping. Since this work covers several types of the liability the conclusion will not cover all of them, but several important aspects.

The contractual liability of the Classification Societies is the topic with the fewest amount of underwater stones. In the Civil Law countries, it is mainly regulated by the Civil Codes. In Common Law countries, in contrary, the court precedent plays the main role. Unfortunately, the lack of the cases does not allow to investigate this question deeply.

The liability under the tort law is way more complicated than the contractual one. In the UK tort liability of the classification societies is theoretically at the same possible and not. It will strongly depend on the fact of the cases and implementation of the previous judgments regarding tortious liability of the surveyors in other spheres with application of maritime specific to it. In US, the liability is possible within the borders of the Great American Insurance case with usage of Rayn's case doctrine. the Classification Societies in Civil Law countries more likely became liable under the provision of tort law. In Germany they will be liable in accordance with § 823 BGB. Same rules under Article 1064 Civil Code apply in Russia. In Scandinavian countries, however, the basic concept of tort law has been significantly changed and moved from subjective to objective approach. This approach puts the Classification Societies in the most difficult position amongst the others civil law countries, and force be careful with every step.

Another side of the tortious liability is liability towards third parties. As it has been explained previously the term "third party" used in this work in a very broad way. The Common law countries in this regard follow mostly the same way of implementation of a such liability. English law protects third parties in the case of negligence performance from the side of the Register. However, the plaintiff has to prove the same thing, as in normal tort case, that the defendant violates the duty of care and foreseen the damage. American law shares the same ideas with English law, but implies them in a more detailed way and narrows the circle of cases when the Classification Society may be sued in tort by third party. In contrary in Common law countries situation differs more. However, all of those system allow the third party in one way or another to claim the damages form the Classification Societies.

Public liability of the Register is, probably, the topic which became very actual during past several years. The decision on Erika case solved the problem of the possible conventional liability of the Register. At the same time the Prestige case together with the analyze of the main convention applicable in shipping strongly question or even deny the liability of the Register. What should be done to solve this problem? There is no answer to this question yet and will not be in a nearest future, as it will affect the jurisdiction of many countries, which treat the Classification Societies in a different way. Erika and the Prestige cases are good example of that.

As a last remark to this work. The Classification Societies are by far the most important gear in the mechanism of the modern international maritime industry. However, their liability mostly relies on a national legislation, which sometimes does not reflect present situation in the industry.

TABLE OF REFERENCES

List of Judgements/Decisions

1. Clay v. A.J. Crump & Sons Ltd., 1 .Q.B. 533, 1964
2. East River, S.S. Corp. v. Transamerica DeLavel inc., 476 U.S. 858, 1986
3. Eckersley v. Binnie, 18. Con. L.R. 1, 1988
4. Great American Insurance Co. v. Bureau Veritas, 338 F.Supp. 999, 1972
5. Gulf Tampa Drydock Co v. Germanischer Lloyd, 634 F.2d 874, 1981
6. Hadley v Baxendale, 9 Ex 341, 1854
7. Heaven v. Pender, 11 Q.B.D. 503, 1883
8. Hedley Byrne and Co. Ltd. V Heller and Partners A.C. 465 (H.L.), 1964
9. Marc Rich & Co. AG v. Bishop Rock MarineCo. Ltd. (and ClassNK), 2 Llouyd's Rep. 299(H.L.), 1995
10. Mariola Marine Corporation v. Lloyd's Register of Shipping ("The Morning Watch"), 1 Lloyd's Rep. 547, 1990
11. Midland Bank trust Co v. Hett Stubbs & Kemp, Ch. 384, 1979
12. Psarianos v. Standart Marine, Ltd., 12 F3d 461, 1994
13. Raineri v. Miles, A.C. 1050, 1981
14. Reino de Espana v. The American Bureau of Shipping, 528 ESupp.2d. 459, 2008
15. Reino de Espana v. The American Bureau of Shipping, 729 F. Supp. 2d, 2010
16. Ryan Stevedoring Co. Inc. v. Pan-Atlantic Steamship Corp, 350 U.S. 124. 76 S. Ct., 1956
17. Sundance Cruises Corp v. ABS, 799 F. Supp. 363, 1992

Treaties/Statutes

1. International Convention on Civil Liability for Oil Pollution Damage, 1992. URL: http://www.iopcfunds.org/uploads/tx_iopcpublications/Text_of_Conventions_e.pdf
2. Convention on Limitation of Liability for Maritime Claims, 1976. URL: http://www.jus.uio.no/english/services/library/treaties/06/6-07/liability-maritime-claims-consolidated.xml
3. United Nations Convention on the Law of the Sea, 1982, URL: http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf
4. United Nations Convention on Jurisdictional Immunity of States and their Property, 2005, URL: https://treaties.un.org/doc/source/recenttexts/english_3_13.pdf

5. Regulation (Ec) No 391/2009 of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations. Official Journal of the European Union. L 131. Volume 52. p. 11
6. Directive 2009/15/Ec of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations. Official Journal of the European Union. L 131. Volume 52. p. 47
7. German Civil Code. URL:http://www.gesetze-im-internet.de/englisch_bgb/
8. Civil Code of Russian Federation, URL: http://www.consultant.ru/document/cons_doc_LAW_5142/
9. Civil Procedure Code of Russian Federation, URL: http://www.consultant.ru/document/cons_doc_LAW_39570/
10. Arbitrage Procedure Code of Russian Federation, URL: http://www.consultant.ru/document/cons_doc_LAW_37800/

Secondary Literature

1. Alekseev, Sergei, "The Civil Law Studies", Moscow: Urait, 2009
2. Basedow, Jurgen, "Third party liability of Classification Societies", Heidelberg: Springer, 2005.
3. Beck, Brian J., "Liability of Marine Surveyors for Loss of Surveyed Vessel", Notre Dame Law Review, vol. 64, 1989
4. Begines, Juan L., The EU Law on Classification Societies: Scope and Liability Issues Journal of Maritime Law and Commerce, 2005
5. Belov, Viktor, Application of the Civil Code of Russian Federation, part one, Moscow: Urait, In Russian, 2011
6. Bernhardt, "Interpretation in International law, as part of Encyclopaedia of Public International Law", North-Holland Publ., 2012
7. Bogdanova, "Topical problems of compensation of losses in contractual obligations", Civil Law, 2015
8. Budylin, "Tort or Breach of Contract? Representations and Warranties in Russia and Abroad", Russian Economic Justice Bulletin, 2016
9. Brown, "Anthony, 300 Years of Lloyds (1988), 300 years of Lloyds – A Lloyd's List Special Supplement", Colchester: Lloyd's of London Press, 1988

10. De Bruyne, “Liability of Classification Societies: Cases, Challenges and Future Perspectives, Journal of Maritime Law and Commerce”, 2014
11. De La Rue, Collin, “Shipping and the Environment”, Hong Kong: LLP, 1998
12. Dobbs, Dan B., “The Law of Torts”, St. Paul (Minn.): West, 2000
13. Foley, Vincent, “The Erika Judgment-Environmental Liability and Places of Refuge: a Sea Change in Civil and Criminal Responsibility that the Maritime Community must Heed”, Tulane Maritime Law Journal, 2008
14. Gavrilov, Eduard, Penalty and Interests for Breach of Contract after the amendments in the Civil Code, Economy and Law, In Russian, 2015
15. Gomard, Bernhard, “Recent Developments in Danish Tort Law, Scandinavian Studies in Law”, 2001, URL: http://www.scandinavianlaw.se/pdf/41-8.pdf
16. Jackson, Rupert and Powell, John, “On professional Negligence”, London: Sweet and Maxwell, 2002
17. Hellner, “Modern Swedish Perspectives: The New Swedish Tort Liability Act”, 1974, URL: https://www.jstor.org/stable/839054?seq=1#page_scan_tab_contents
18. Lagoni, Nicolai,” The Liability of Classification Societies”, Springer, 2007
19. Lay, H.G., “Marine Insurance”, London: Post Magazine, 1925
20. Magnus U., Bitterich K. Tort and regulatory Law in Germany, Tort and Regulatory Law, SpringerWienNewYork, 2007
21. Markesinis, Basil S., “The German Law of Obligations”, Oxford: Clarendon Press, 1997
22. Martin, Frederick, “The history of Lloyd's and of Marine Insurance in Great Britain”, London: Macmillan and Co, 1876
23. Miller, “Liability of Classifications Societies in the Perspective of United states Law”, Tulane Maritime Law Journal, vol. 22, 1997
24. Poole, Jill, “Contract Law”, 12th edition, Oxford University Press, 2014
25. Stuart, Claude L., “Liability of marine Surveyors, Adjusters, and Claims Handlers”, Tulane Maritime Law Journal, vol. 22, 1997
26. Somers, Consequences of the Sinking of the MIS ERIKA in European Waters: Towards a Total Loss for International Shipping Law, 2010
27. Sukhanov, Eugeniy, “Civil Law”, Moscow: Statut, In Russian, 2010
28. Ulfbeck, Vibe Garf., “Modern Tort Law and Direct Claims Under the Scandinavian Insurance acts”, Scandinavian Studies in Law, 2001, URL: http://www.scandinavianlaw.se/pdf/41-20.pdf

29. Zimmermann, Reinhard, “The new German Law of Obligations, Historical and Comparative Perspectives”, Oxford: Oxford University Press, 2005

Internet Sources:

1. EMSA’s official web page, URL: http://emsa.europa.eu/about.html
2. IACS, “Classification societies - what, why and how?”, URL: http://www.iacs.org.uk/document/public/explained/class_whatwhy&how.pdf
3. DNV GL Rules for Classification, URL: https://www.dnvgl.com/rules-standards/
4. . Lloyd's Register: Rules and Regulations for Classification of the Ships, URL: http://www.lr.org/en/RulesandRegulations/ships.aspx
5. ABS Rules, URL: http://ww2.eagle.org/en/rules-and-resources/rules-and-guides.html
6. Russian Maritime Register of Shipping Rules, URL: http://www.rs-class.org/en/register/publications/list.php?SECTION_ID=98
7. The Class agreement between Sjøfartsdirektoratet and RO, URL: https://www.sjofartsdir.no/en/shipping/vessels/vessel-surveys/inspection/approved-classification-societies/klasseavtalen/
8. Paris MOU, 2016, URL: https://www.parismou.org/system/files/Paris%20MoU%2C%20including%2039th%20amendment%20_rev%20final_.pdf
9. Oxford dictionary of English, 2010, URL: https://en.oxforddictionaries.com/