# Classification societies and immunity from jurisdiction

**Vivian van der Kuil**
*Erasmus School of Law, Rotterdam*

One of the issues that may arise when a classification society acts on behalf of a flag state carrying out statutory certification services is whether the classification society can rely on the same defences as a state when held liable. The most important of these defences is immunity from jurisdiction. In the cases arising from the incidents with the *Erika*[1] and the *Prestige*[2] this indeed played a role and, more recently, this was also the case before the Court of Justice of the European Union (ECJ) in the matter of the *Al-Salam Boccaccio 98*.[3] These cases are discussed below. One of the criteria that is of relevance to assess whether a classification society may rely on immunity is the legal basis for the work performed. The article will address the various roles of classification societies, their commercial classification activities and statutory activities as delegates of flag states.

## Introduction

Classification societies have been the subject of various studies over the years. These studies provide a useful analysis of the development and current position of classification societies in the maritime world and describe recent developments in legislation pertaining to classification societies.[4] The incentive for these studies[5] can be found in major maritime disasters such as the incident with the *Erika*, the Maltese-flagged oil tanker that broke in two off the coast of Brittany, France on 12 December 1999 and the *Prestige*, the oil tanker that ran into problems off the coast of Spain in 2002 in adverse weather conditions and eventually lost around 63,000 tonnes of heavy fuel oil. In both cases, it appeared that the incidents were not only caused by human navigational errors, but also that the damage was caused or increased because of certain structural defects to the vessel that could and should have been noted by the classifications societies that carried out the inspections of the vessel. This led to questions regarding the liability of the classification societies involved and regarding their legal position in general. In both cases, legal proceedings[6] against the classification societies involved were initiated. In the matter of the *Erika*, the *Registro Italiano Navale* (RINA) was found guilty of

[1] https://iopcfunds.org/incidents/incident-map#3253-12-December-1999.
[2] https://iopcfunds.org/incidents/incident-map#1916-13-November-2002.
[3] Case 641/18 *LG and Others v Rina SpA and Ente Registro Italiano Navale* ECLI:EU:C:2020:349.
[4] The most important and comprehensive studies are the following: J Basedow and W Wurmnest *Third-Party Liability of Classification Societies* (Springer 2005), providing a comparative study of the Australian, English, French, New Zealand, US and German perspectives on third-party liability; N Lagoni *The Liability of Classification Societies* (Springer 2007) and F Goebel *Classification Societies: Competition and Regulation of Maritime Information Intermediaries* (Veröffentlichungen des Instituts für Seerecht und Seehandelsrecht der Universität Hamburg 2017). Goebel addresses the question of liability from a law and economics perspective. In addition, De Bruyne addresses classification societies together with other similar organisations which he identifies as 'certifiers' in J De Bruyne *Third Party Certifiers* (Wolters Kluwer 2019).
[5] See Lagoni (n 4) 40 and Goebel (n 4) 36.
[6] The website of the International Oil Pollution Compensation (IOPC) Funds (https://iopcfunds.org/) contains an overview of all incidents pertaining to oil pollution damage from spills of persistent oil from tankers. The various legal proceedings are discussed in detail.

imprudence in renewing the *Erika*'s classification certificate because of an inspection that fell below the standards of the profession. In the matter of the *Prestige*, the classification society American Bureau of Shipping (ABS) allegedly failed to detect corrosion, permanent deformation, defective materials and fatigue in the vessel, and had been negligent in granting classification. Proceedings initiated by the French government against ABS are still pending. The case of the French government against ABS is one of the cases that will be discussed below.[7]

Authors such as Lagoni and Goebel have remarked upon the special position of classification societies as privately owned commercial organisations working for the shipowner, as well as on behalf of the flag state of a vessel simultaneously. In the latter role, they have the status of a recognised organisation (RO), which is an organisation assessed by a flag state[8] and found to comply with the RO code issued by the International Maritime Organization (IMO). In a European Union (EU) context, they need to comply with 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 (Directive 2009/15/EC) and with Regulation (EC) No 391/2009 of the European Parliament and of Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations.[9]

These authors also recognised that there may be a potential conflict of interest owing to the various roles classification societies have. This is especially because public functions on behalf of the flag state are carried out on the basis of a private contract paid for by the shipowner. Classification societies economically depend on shipowners and on other parties within the maritime industry to preserve their position. At the same time, the classification activities undertaken by classification societies may have direct and severe consequences for the same parties.

In addition to surveying vessels, classification societies nowadays are engaged in a broad array of activities. These organisations are regarded as experts in all matters related to maritime safety, and the construction and equipment of ships. This is evidenced by the fact that the International Association of Classification Societies (IACS), the organisation of which 11 of the larger classification societies are members,[10] has consultative status with the IMO.[11] Many of the rules pertaining to ship safety issued by the IMO are based on technical expertise provided by classification societies.

The position of classification societies can be seen as part of a wider known phenomenon that privately owned, commercially operating organisations are used to perform public tasks. Other examples are certifiers engaged with consumer safety (such as TÜV[12] and DEKRA[13]),[14] credit rating

[7] Legal proceedings were also initiated by the Spanish government before the Federal Court of First Instance in New York. The Court of Appeals for the Second Circuit dismissed this claim against ABS stating that the Spanish government had not proved that ABS had acted recklessly. See United States Court of Appeals for the Second Circuit (29 August 2012) No 10-3518-cv https://iopcfunds.org/wp-content/uploads/2018/10/judgment_prestige_e.pdf.

[8] The flag state and classification society enter into a written agreement enabling the RO to act on behalf of the flag state describing the legal basis, function and authority of the RO. The items that should at least be included in the agreement are described in Annex 3 of the RO code.

[9] The Code for Recognized Organizations (RO Code) was adopted by the IMO by Resolutions MSC.349 (92) and MEPC.237 (65), replacing Resolution A.739 (18) and A.789 (19), and entered into force on 1 January 2015. The EU also introduced a system for the recognition of classification societies through Council Directive 94/57/EC on common rules and standards for ship inspection and survey organisations, and for the relevant activities of maritime administrations in 1997 amended by Commission Directive 97/58/EC implementing IMO Resolution A.789 (19). These were later replaced by Directive 2001/105/EC as part of the Erika I package and then again by 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 and Regulation (EC) No 391/2009 of the European Parliament and of Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations, as part of the ERIKA III package.

[10] The members of the IACS are the American Bureau of Shipping, the Korean Register of Shipping, Bureau Veritas, Lloyd's Register, the China Classification Society, Nippon Kaiji Kyokai (ClassNK), the Croatian Register of Shipping, Registro Italiano Navale, the Polish Register of Shipping, the Indian Register of Shipping and the Korean Register of Shipping. In March 2022 IACS Council adopted a Resolution that the Russian Maritime Register of Shipping's membership of IACS was withdrawn with immediate effect.

[11] https://www.imo.org/en/OurWork/ERO/Pages/NGOsInConsultativeStatus.aspx.

[12] https://www.tuvcom/world/en/about-us/tüv-rheinland-–-company-profile/tüv-rheinland-international/.

[13] https://www.dekra.com/en/home/.

[14] Described in De Bruyne (n 4).

agencies, chartered accountants, privately operated prisons, private security companies used to guard prisons and private armed guards placed on board ships in areas where piracy takes place. The increased involvement of private companies in the performance of traditional governmental tasks appears part of the generally recognised shift from government to governance. This is driven by the need for a more decentralised regulatory governance approach, increased market orientation and cost-effectiveness. These private parties often provide higher quality and less bureaucracy, as well as greater efficiency and expertise in often technical and complex subject matters. This development does, however, raise concerns regarding their independence, integrity, auditing and their potential liability in case things go wrong. An illustrative example of this can be found in the role accountancy firm Arthur Andersen played in the bankruptcy of Enron, an American energy company that had been one of the top seven largest companies in the United States in 2001.[15] At that time, accountancy firms such as Arthur Andersen were responsible for reporting on regulatory compliance of the same companies they had advised regarding the organisation of their financial activities. It turned out that Arthur Andersen had played a crucial role in allowing fraudulent practices and hiding huge financial losses. Prior to the *Enron* case, the monitoring of the activities of accountancy firms and managing their dual role – advising and auditing – had primarily been left to self-regulation. Important similarities can be seen with the position of classification societies.[16]

Classification societies that act on behalf of flag states may argue that, as a representative of the flag state, they can rely on the same defences that a sovereign state can invoke including sovereign immunity from jurisdiction. Sovereign immunity from jurisdiction traditionally is a prerogative of states as a defence against possible liability claims. Whether this holds up in court in the case of classification societies is discussed in this article. Immunity from jurisdiction is not easily accepted for a commercial organisation that performs public tasks as agent of a state while simultaneously carrying out purely commercial activities, as is the case with a classification society. It appears to be decisive whether the classification society acted on the basis of a commercial contract with the shipowner or was authorised by the flag state in its capacity as RO, and whether or not the classification society had decision-making authority to grant certification of the vessel inspected.[17] All these elements were considered in the matter of *Al-Salam Boccaccio 98*.

To appreciate the issues that turned out to be crucial in the matter of the *Al-Salam Bocaccio 98*, it is necessary first of all to discuss the special position of classification societies in the maritime world and to define what classification is. This article will therefore start with explaining what classification entails and how it has developed historically. Then the focus will turn to the matter of the *Al-Salam Boccaccio 98*. The judgment of the ECJ will be assessed, followed by a discussion of cases whereby immunity of jurisdiction of classification societies also played a role.

## What is classification?

Classification societies such as Lloyd's Register of Shipping,[18] Bureau Veritas (BV),[19] Det Norske Veritas[20] (DNV) and Germanischer Lloyd (GL)[21] are all well-known names in the maritime world.

[15] For further background information see eg https://www.bbc.com/news/business-58026162.

[16] K Djønne *Rocking the Boat, EU Maritime Safety Policy and the International Regime, 1975–2015* (unpublished dissertation Trondheim 2022) 168.

[17] Flag states may choose to delegate the issuing of statutory certificates to an RO or may choose to only authorise an RO to inspect and survey a vessel leaving the actual decision to issue, withhold or withdraw the statutory certificate with the flag state administration.

[18] Lloyd's Register of Shipping was founded in 1834. See *Annals of Lloyd's Register of Shipping London 1834–1884* (Lloyd's 1884) 2 ff.

[19] BV was founded in Antwerp in 1828. The history of BV is described in Y Saunière *Le Bureau Veritas, Société Internationale de Classification de Navires et d'Aéronefs et sa Responsabilité* (Sirey 1932).

[20] DNV was founded in 1864 in Oslo as a Norwegian membership organisation to establish a uniform set of rules and procedures, used in assessing the risk of underwriting individual vessels. The group aimed to provide 'reliable and uniform classification and taxation of Norwegian ships'. G Paulsen and others *Building Trust: The History of DNV 1864–2014* (Dinamo Forlag 2014).

[21] GL was founded in 1867, described in Germanischer Lloyd 125 Jahre, 1867–1992. As of 12 September 2013, DNV and GL have merged and continue working as the DNV GL Group, recently renamed DNV.

Their origins can be traced back to the early 18th century, to the famous Lloyd's Coffee House in London where maritime underwriting agents and insurance brokers met to discuss business. The concept of marine insurance and the idea that responsibilities and liabilities of a maritime enterprise are best shared among various parties is much older than that, but in the 18th century the then existing insurance companies felt the need for a more accurate and reliable way to determine the risk involved (and subsequently the premium charged). This was established by keeping a register of vessels which contained data relating to, among others, the current and previous owners, tonnage capacity, home port and year of build. In addition, the periodic inspections of hull and equipment were listed.[22] The registration of these data made it possible to compare the condition of vessels. The data originated from inspections carried out by surveyors. It should be noted that, even then there was debate about whether a public classification society should be established.[23] However, it was decided that the administration of a state would not have the necessary knowledge and expertise to manage such an organisation, and that classification societies are best placed and equipped to take on this role. In the aftermath of various maritime incidents, this decision has been revisited on multiple occasions. The same applies for the question if commercial and statutory activities could be dealt with by the same organisations. However, to date the position of classification societies has remained unaltered although there has clearly been a shift regarding the monitoring and regulation of these organisations.

## The concept of classification

Classification is a concept not specific to shipping-related issues. It refers to the process of categorisation or ordering of objects.[24] Examples of classification systems from other scientific disciplines are the periodic table pertaining to the classification of chemical elements and the classification of mental disorders through the Diagnostic and Statistical Manual of Mental Disorders (DSM).

Categorisation is how ship classification started in the 18th century, when the condition of the hull of a ship was classified in categories A, E, I, O or U, depending on the condition and soundness of its construction. The equipment on board was also categorised as good (G), middling (M) or bad (B), later replaced by 1, 2 or 3.[25]

To categorise the ships, each class society developed its own set of rules, the classification or class rules for different categories of vessels. The categories of vessels are not uniformly established but vary for each society. If a vessel complies with the class rules of that society for that particular type of vessel, the relevant class certificate is issued. These rules are constantly updated to keep them in line with the most current technical developments. The class certificate needs to be renewed periodically, which means that surveys need to take place regularly.[26] Each society has its own rules for renewal and for the various inspections in between.[27] So, although classification started as simply categorising ships, it gradually moved towards a process of compliance and the development of rules for shipbuilding, and as a consequence the position of classification societies changed. This system of rules and framework for the issuance of class certificates developed outside the scope of politicians and policy-makers, and today commercial classification is largely unregulated except for the internal rules of, for instance, the IACS.

One of the first signs of government involvement in respect of ship safety was the introduction of the Plimsoll mark – named after British politician Samuel Plimsoll – through the Merchant Shipping Act

[22] Goebel (n 4) 46.

[23] Goebel (n 4) 52.

[24] According to the Cambridge Dictionary, classification is defined as 'the act or process of dividing things into groups according to their type'. See https://dictionary.cambridge.org/dictionary/english/classification.

[25] Lagoni (n 4) 5.

[26] See *Classification Societies – What, Why and How?* (IACS October 2020) https://www.iacs.org.uk/media/7425/classification-what-why-how.pdf.

[27] IACS establishes minimum technical standards and requirements for its members to achieve a level of uniformity. On 14 December 2005, the Common Structural Rules for Double Hull Oil Tankers (CSR OT) and Common Structural Rules for Bulk Carriers (CSR BC) were adopted by the IACS Council.

in 1874. The Plimsoll mark indicates the level to which a ship can be safely loaded (the load line of a vessel) and by regulating this issue a major step was taken to improve the stability of ships and therefore also the safety of ships. However, until the 20th century ship safety predominantly remained a private concern. Classification was a prerequisite to obtain insurance cover and to enter into various contracts. The disaster with the *Titanic* in 1912 – a ship considered to be unsinkable – created the urgency for the international community to improve ship safety. This led to the first version of the International Convention for the Safety of Life (the SOLAS Convention) in 1914.[28] However, only after the major shipping incidents with the *Torrey Canyon* (1967), the *Amoco Cadiz* (1978), the *Exxon Valdez* (1989) and the *Braer* (1993),[29] all of which caused severe damage to the environment as a consequence, a truly different approach was adopted, and the need was felt to make ship safety a priority.[30]

Developments such as the increased popularity of open registries or flags of convenience for ship registration[31] and the entry into force of the United Nations Convention on the Law of the Sea (UNCLOS)[32] also influenced the change in perspective on ship safety and on the role of classification societies.

Article 94 of UNCLOS determines that flag states should take the measures necessary to guarantee safety at sea with regard to the construction, equipment and seaworthiness of the vessels sailing under their flag. The SOLAS Convention[33] specifies the minimum standards for the construction, equipment and operation of ships to ensure safety at sea. Technical requirements for ships and ship safety can also be found in the Tonnage Convention 1969 (TONNAGE)[34] and in the International Convention on Load Lines (CLL),[35] and in various resolutions and guidelines issued by the IMO. Under Regulation 6, Chapter 1 of the SOLAS Convention, the inspection and survey of ships must be carried out by officers of the state under whose flag the ship is registered, provided that the government of each country may entrust the inspection and survey either to surveyors nominated for the purpose, or to organisations recognised by it. An administration nominating surveyors or recognising organisations to conduct inspections and surveys must as a minimum empower any nominated surveyor or recognised organisation to require repairs to a ship and to carry out inspections and surveys if requested by the appropriate authorities of a port state.[36] The administration must notify the organisation of the specific responsibilities and conditions of the authority delegated to nominated surveyors or recognised organisations.

As these inspections and surveys are exactly what classification societies had been doing all along, it seemed only logical that classification societies would take up this task on behalf of flag states. Therefore, classification societies in many cases fulfil the role of the recognised organisations mentioned and are authorised by the administration of the flag state to inspect ships, require repairs and report deviations from the certificate.

However, classification societies also play an important role in defining and developing the technical standards vessels need to comply with. Conventions such as the SOLAS Convention only

[28] The second SOLAS Convention was adopted in 1929, the third in 1948 and the fourth in 1960. The current convention dates from 1974. See https://www.imo.org/en/KnowledgeCentre/ConferencesMeetings/Pages/SOLAS.aspx.

[29] For an overview of major oil spills see https://lloydslist.maritimeintelligence.informa.com/infographics/tanker-spills-a-journey-through-time.

[30] See Djønne (n 16) for an overview of the change in the EU maritime safety policy following these incidents.

[31] An open registry refers to a shipping register that does not require a genuine connection between the owner of the vessel and the country of registration. Well-known examples are countries such as Liberia, Panama and the Marshall Islands.

[32] United Nations Conference on the Law of the Sea 1982 (adopted 10 December 1982, entered into force on 16 November 1994) 1833 UNTS 3.

[33] International Convention for the Safety of Life at Sea 1974 (SOLAS) (adopted on 1 November 1974, entered into force on 25 May 1980) 1184 UNTS 278.

[34] International Convention on Tonnage Measurement of Ships 1969 (adopted on 23 June 1969, entered into force on 18 July 1982) 1291 UNTS 3.

[35] International Convention on Load Lines 1966 (adopted 5 April 1966, entered into force on 21 July 1968) 640 UNTS 1857.

[36] This is to be distinguished from port state control (PSC), whereby the port state inspects the vessel itself based on the jurisdiction it has in its own ports when vessels enter voluntarily.

cover a limited set of components of a ship. Many areas of the building (and maintenance) process of a ship are not included. These areas are regulated through class rules which do, in detail, determine all the technical requirements a vessel needs to comply with. In addition, classification societies can more easily respond to new technological developments and can amend their class rules accordingly. Amendments to conventions and introductions of new resolutions by the Maritime Safety Committee of the IMO are often based on recommendations of IACS or individual classification societies.

As a result of the incidents previously mentioned, the international community became more aware of the special position classification societies have in carrying out inspections and issuing certificates, and therefore in guaranteeing safety at sea. This has led to closer monitoring of classification societies and regulation of the tasks to be performed by these organisations. The central question was how the independence of classification societies can be guaranteed against the background of the close ties they have within the maritime industry. The need was felt to develop a common and uniform standard for classification. In addition, there were economic arguments that played a role in the EU becoming involved with this subject; the EU wanted to ensure a level playing field for classification societies and shipowners within the EU. This eventually gave rise to, among other things, the Erika I,[37] II[38] and III[39] packages of legislation containing not only rules pertaining to classification societies, but also regarding port state control (PSC),[40] the investigation of maritime accidents,[41] compliance with flag state requirements,[42] vessel traffic monitoring[43] and tanker safety.[44]

Also worth mentioning in this respect is the introduction of goal-based standards (GBSs) for ship construction by the IMO in 2005.[45] The purpose of these standards was to remove the possibility of competition between classification societies in the quality of new-build ships. GBSs are determined by the IMO for various vessel types, such as double-hull oil tankers and bulk carriers.[46] This development may give the impression that the role of classification societies has become less influential. However, as the GBSs do not include rules on compliance but only on certain goals or levels that need to be achieved, the system also creates more discretionary powers for class.

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[37] The Erika I package entered into force on 22 July 2003. For an overview see 'Commission communication of 21 March 2000 to Parliament and the Council on the safety of the seaborne oil trade' https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al24230.

[38] Erika II contained, inter alia, the establishment of EMSA. For an overview of the entire package see 'Communication from the Commission to the Council and the European Parliament of 6 December 2000 on a second set of Community measures on maritime safety following the sinking of the oil tanker Erika COM(2000) 802 final https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l24242&from=DE.

[39] Third package of legislative measures on maritime safety in the European Union COM(2005) 585 final. See https://ec.europa.eu/commission/presscorner/detail/en/MEMO_05_438.

[40] Directive 2001/106/EC of the European Parliament and of the Council of 19 December 2001 amending Council Directive 95/21/EC concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (Port State Control) later replaced by Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port state control.

[41] Directive 2009/18/EC of the European Parliament and of the Council of 23 April 2009 establishing the fundamental principles governing the investigation of accidents in the maritime transport sector and amending Council Directive 1999/35/EC and Directive 2002/59/EC of the European Parliament and of the Council.

[42] Directive 2009/21/EC of the European Parliament and of the Council of 23 April 2009 on compliance with flag state requirements.

[43] Directive 2009/17/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system.

[44] Regulation (EC) No 417/2002 of the European Parliament and of the Council of 18 February 2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers and repealing Council Regulation (EC) No 2978/94, later replaced by Regulation (EU) No 530/2012 of the European Parliament and of the Council of 13 June 2012 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers.

[45] Goebel (n 4) 85 and see also https://www.imo.org/en/OurWork/Safety/Pages/Goal-BasedStandards.aspx.

[46] Resolution MSC.287(87) adopted on 20 May 2010 https://wwwcdn.imo.org/localresources/en/OurWork/Safety/Documents/GBS/RESOLUTION%20MSC.287(87).pdf.

### Defining classification

Some of the authors that have studied classification societies have also tried to define what classification entails. Lagoni[47] defines classification as the process of analysing the design, construction, integrity and condition of a vessel as carried out by a classification society. This process is governed by private law and is always based on a commercial contract with either a shipowner or a shipyard. Classification therefore does not include public tasks carried out by classification societies on behalf of a flag state. These tasks are to be distinguished as statutory or regulatory tasks.

Goebel[48] makes a distinction between the various services classification societies provide. He divides these into:

- private classification services
- public statutory certification services
- private advisory services.

Both authors distinguish between the private or commercial activities on the one hand and the statutory activities on the other. However, the question is whether this distinction accurately reflects the current situation. This is illustrated by the fact that the RO Code of the IMO does not make a distinction between commercial classification activities and statutory activities, whereas the EU directive defining the criteria for an RO at the EU level does distinguish statutory certificates from class certificates.[49] In practice, statutory and class inspections often take place simultaneously by the same inspector. Both inspections are paid for by the shipowner or by the party managing the ship and responsible for ship safety. So, although the legal basis and the consequences may be different, the activities undertaken can be virtually the same.

## The various roles of classification societies further examined – immunity from jurisdiction

If a classification society acts on behalf of a flag state, it is important to assess to which kind of liabilities a state can normally be exposed. An important principle in public international law is that states are considered to be equal. This principle lies at the heart of the concept of sovereign immunity from jurisdiction. The principle is also known as *par in parem non habet imperium* (equals do not exercise power over each other).[50] Different views on the scope of the concept of sovereign immunity exist.[51] These can be summarised as follows: the broad doctrine sees the immunity of states as an absolute right with regard to all activities of the state. The more limited doctrine, or relative immunity, distinguishes between *acta iure imperii*, the actions of the state performed in the exercise of governmental power and *acta iure gestionis* (the action of the state as a private party on an equal footing with private individuals). In the more limited approach, the immunity only applies with regard to governmental actions that qualify as *acta iure imperii*. A classification society may be awarded some form of decision-making authority equal to that of a state and this may thus imply that its activities are to be regarded as *acta iure imperii*. However, the question is whether sovereign immunity can be applied to entities other than states.

Recital 16 of Directive 2009/15/EC addresses this question and reads as follows:

> When a recognised organisation, its inspectors or its technical staff issue the relevant certificates on behalf of the administration, Member States should consider enabling them, as regards these delegated

[47] Lagoni (n 4) 5.

[48] Goebel (n 4) 42–44.

[49] See in this respect V Ulfbeck and A Møllmann 'Public function liability of classification societies' in P Rott (ed) *Certification: Trust, Accountability, Liability* (Springer 2019) 226.

[50] J Crawford *Brownlie's Principles of Public International Law* (9th edn OUP 2019) 431.

[51] There have been attempts to codify the international customary rules on immunity, eg via the United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet in force) and the European Convention on State Immunity 1972 (done in Basle on 16 May 1972) 1495 UNTS 181, with only eight signatory Member States.

activities, to be subject to proportionate legal safeguards and judicial protection, including the exercise of appropriate rights of defence, apart from immunity, which is a prerogative that can only be invoked by Member States as an inseparable right of sovereignty and therefore that cannot be delegated.

This appears to reflect the current position within international law that there is a difference between the position of a state and its administration, and private organisations such as classification societies and their inspectors and staff. Although classification societies carry out activities on behalf of a state (which are by law attributed to the administration of that state) they do not have the same position as the state or its representatives. For private entities to rely on sovereign immunity, they must be able to demonstrate they have exercised sovereign powers.

### Other issues pertaining to the various roles of classification societies

Another question is how to ensure that a classification society acts independently and impartially. The importance of this has also been recognised by the EU as evidenced in recital 9 of Directive 2009/15/EC which states: 'To enable them to carry out that duty in a satisfactory manner they need to have strict independence, highly specialised technical competence and rigorous quality management.'

Classification societies do not only inspect vessels and assess whether these vessels comply with the relevant rules pertaining to equipment, design and structure but, as explained, they have also contributed to the development of these rules. Also of importance is that they have close commercial ties with the parties interested in the vessels they inspect. This means that clear rules are needed to ensure impartiality and independence. As indicated, in practice it is not always easy to distinguish in which capacity a classification society acts, and this further complicates issues such as impartiality and independence. Commercial classification services as well as statutory services are both conducted to ensure the safety of the vessel and its crew. However, the question is whether ship safety always prevails in the case of the classification society being paid by the shipowner, or whether classification societies are sensitive to commercial pressure if exercised; for instance, if a ship is damaged after a collision and may need repairs but the shipowner needs the vessel to continue its journey and wishes to put off repair work until regular maintenance is scheduled. Furthermore, certain repair work can only be effected at specialised yards. For example, the largest container vessels in the world have a length up to 400 metres. If such a vessel needs repair work, it may be a logistic challenge to find a shipyard equipped to take on the job. The class society must approve the one-way journey to the nearest shipyard to carry out the repair work. This creates room to manoeuvre for both the shipowner and the classification society. It is then up to the individual surveyor to resist the commercial pressure, to ignore the economic and logistic considerations and to put ship safety first, even if the shipowner is an important client.

A question pertaining to the dual role of classification societies and highly relevant looking at the cases that will be discussed is how the quality of the work carried out by classification societies is assessed and guaranteed. Within the EU, the European Maritime Safety Agency (EMSA) has the role of performing audits of classifications societies and the EU has introduced a system for quality assessment and certification of organisations recognised by the EU (QACE). IACS members are all ISO-certified[52] and IACS has its own externally audited quality system certification scheme (QSCS). However, the question is whether these instruments guarantee the required level of quality of the work performed, especially against the background of the dual role of classification societies. There are more than 50 classification societies worldwide, of which only 11 are members of IACS. This raises the question of how to deal with classification societies that are not IACS members and are not covered by the EMSA audits.

Also noteworthy is that IACS takes the position that classification societies are not guarantors of safety of life or property at sea or the seaworthiness of a vessel because the classification society has no control over how a vessel is manned, operated and maintained between the periodical surveys

[52] ISO stands for International Organization for Standardization.

which it conducts. A class certificate does not imply, nor should it be construed as a warranty of safety, fitness for purpose or seaworthiness of a vessel. It is only a statement that the vessel complies with the rules that have been developed and published by the society issuing the classification certificate.[53] This raises the question of what the options are if things do go wrong. It will not be straightforward for third parties, for the owner of the inspected vessel or for parties that have sustained damage as a consequence of activities of classification societies to successfully hold the classification society involved liable. In the cases discussed below, this is exactly what turned out to be problematic, not only because of immunity issues.

## The *Al-Salam Boccaccio 98* case

The *Al-Salam Boccaccio 98* was a roll-on/roll-off (ro-ro) ferry registered in Panama. The vessel had previously been registered in Italy. On 3 February 2006, the vessel sank in the Red Sea and more than 1,000 passengers were killed in this incident. A group of victims and relatives of deceased passengers (indicated as *LG and Others*) initiated proceedings before the Court in Genoa (*Tribunale di Genova*) against RINA, the classification society involved. The applicants argued that the defendant's certification and classification activities contributed to the sinking of the vessel caused by the vessel's lack of stability.

The defendants contested the claims and argued in response that they carried out the certification and classification services as a delegate of a foreign sovereign state, the Republic of Panama. The services were provided when the vessel changed flag from Italy to Panama and were required for the registration of the vessel in Panama. These activities were a manifestation of the sovereign power of a foreign state and therefore the defendants could rely on sovereign immunity from jurisdiction.

As this case was initiated before a court within the EU and because the case involved plaintiffs and defendants who were domiciled in different countries, the question of whether the Court in Genoa had jurisdiction to hear the case was governed by Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I).[54]

Article 1(1) of Regulation No 44/2001 provides that the regulation 'shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters'. Article 2(1) determines that 'subject to [that] regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State'.

The applicants argued that the Court in Genoa had jurisdiction to hear the case based on Article 2(1) of Regulation 44/2001 (and thus that there were no grounds to assume immunity from jurisdiction which would imply that the regulation did not apply).

The Court in Genoa decided to stay the proceedings and to refer the following question to the ECJ:

> Are Articles 1(1) and 2(1) of Regulation [No 44/2001] to be interpreted – including in the light of Article 47 of the [Charter], Article 6(1) [of the] ECHR and Recital 16 of Directive [2009/15] – as preventing a court of a Member State, in an action in tort, delict or quasi-delict in which compensation is sought for death and personal injury caused by the sinking of a passenger ferry, from holding that it has no jurisdiction and from recognising the jurisdictional immunity of private entities and legal persons established in that Member State which carry out classification and/or certification activities in so far as they carry out those activities on behalf of a non-EU State?

The ECJ concluded that the relevant question was whether Article 1(1) of Regulation No 44/2001 must be interpreted as meaning that an action for damages, brought against private law corporations

[53] See *Classification Societies* (n 26) 3.

[54] Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters has now succeeded Regulation 44/2001.

engaged in the classification and certification of ships on behalf of and upon delegation from a third state, falls within the concept of 'civil and commercial matters', within the meaning of that provision, and, therefore, within the scope of that regulation and, in such a case, whether the principle of customary international law concerning immunity from jurisdiction precludes the national court seized from exercising the jurisdiction provided for by that regulation.

To determine whether a dispute concerns acts committed in the exercise of public powers it is, according to the ECJ, necessary to examine the legal basis and the detailed rules governing the bringing of the action. In this case, this involved Italian provisions regarding non-contractual and contractual liability.

The Court then assessed whether the classification and certification activities carried out by RINA on behalf of, and as a delegate of, the Republic of Panama fall within the exercise of powers of public authority. In this regard, it is not decisive that the work was carried out based on delegation, that action was taken on behalf of the state or that the work served a public purpose – the safety of passengers. What is relevant is whether the powers exercised by RINA fell outside the system of rules applicable to private individuals. In that regard, the Court considered it important that the classification and certification services were provided under an agreement concluded with the shipowner of the *Al-Salam Boccaccio 98*. RINA's role, it emerged from that agreement, was limited to determining whether the ship complied with the requirements of the applicable regulations and, if the answer was 'yes', to issue the corresponding certificates. The cases in which the certificate must be withdrawn are laid down by law and not at the discretion of the classification organisation. The flag state determines the conditions under which a ship may fly its flag. This means that the activities are not carried out with the decision-making autonomy that is typical for the exercise of powers of public authority. For these reasons, the activities of RINA were not considered to have been carried out in the exercise of powers of public authority.

As to whether customary international law precludes the application of Regulation 44/2001 in this matter, the Court held that although the principle of state immunity is enshrined in international law, this principle is generally recognised only as far as *acta iure imperii* are concerned and not insofar as it concerns acts not falling under the exercise of official authority (*acta iure gestionis*). Immunity from jurisdiction of private law organisations is not generally recognised for ship classification and certification work when not performed *iure imperii*. In this context, the Court referred to the above-mentioned recital from Directive 2009/15/EC, which, although not directly applicable in this case because the directive only concerns the Member States, does confirm this reading.[55] The decision is regarded as a manifestation of the trend that is noticeable in the ECJ jurisprudence of limiting the scope of application of state immunity. The judgment clearly indicates that private actors such as RINA cannot automatically rely on immunity from jurisdiction when acting as a delegate of a state performing international obligations.[56] The decision of the Court means that the victims have an opportunity to find a remedy and can continue their liability case against RINA. It is noteworthy that, in 2012, the *Tribunale* in Genova in the case of another victim, *Abdel Naby Hussein Mabrouk Aly and Others v RINA SpA*,[57] had concluded that RINA could partially rely on immunity from jurisdiction because of the fact that the classification activities took place assigned by the flag state. This judgment received criticism, which may have influenced the decision of the Court. The question is of course what the outcome would have been if the statutory classification activities were conducted

[55] After the ECJ judgment, the Italian Supreme Court, in overruling the Genoa Court of Appeal's decision, rejected RINA's defence based on the state immunity and confirmed the dispute was to be heard in Genoa in accordance with art 2(1) of the EU Regulation 44/2001. The case is now to be continued before the court in Genoa.

[56] A Spagnolo 'A European way to approach (and limit) the law on state immunity? The Court of Justice in the RINA Case' (2020) 5(1) *European Papers* 1, 11 https://www.europeanpapers.eu/en/europeanforum/european-way-to-approach-and-limit-law-on-state-immunity-rina-case.

[57] This concerned Case 9477/2010 *Abdel Naby Hussein Maboruk Aly contro RINA SpA* Il Tribunale di Genova (8 maggio 2012). J de Bruyne has described the case in M Musi (ed) *Liabilities of Classification Societies: Developments in Case Law and Legislation, New Challenges in Maritime Law: de Lege Lata et de Lege Feranda* (2015) 232. The case is also discussed by Spagnolo (n 56).

by the administration of the flag state instead of by an RO. In that case, the test would have also been whether the activities were performed *iure imperii*. An important difference, however, is that the case would then have been initiated against the flag state Panama, which may make it more likely that sovereign immunity from jurisdiction would have been accepted.

## Other cases where immunity from jurisdiction played a role

The case of the *Al-Salam Boccaccio 98* was the first case where the issue of immunity from jurisdiction of a classification society was assessed from an EU law perspective, but not the first case that addressed the defence immunity from jurisdiction of a classification society. To see whether the outcome was different when the issue was assessed under other systems of law, several other cases will now be discussed where immunity from jurisdiction played a role in the assessment of the liability of a classification society.

### *The Erika*

In *The Erika* it was also RINA that invoked the defence of immunity from jurisdiction. The appeal for immunity was rejected by the court of first instance, the *Tribunal Correctionnel* in Paris.[58] The reasoning behind this was that because RINA's activities were carried out on behalf of the shipowner on the basis of a contract concluded between RINA and the shipowner, these did not qualify as acts that would lead to immunity from jurisdiction. The judge did not comment on the question of how this would turn out if it were a comparable inspection, but on behalf of the flag state. The *Cour d'Appel*[59] opted for a completely different approach in appeal and ruled that issuing certificates is a public task with a view to promoting safety at sea and that an organisation that does so can therefore invoke immunity of jurisdiction. Classification societies, even if they act as private parties, carry out their activities on the basis of international conventions, which underlines the fact that classification is a public task. The *Cour de Cassation*[60] finally found that RINA had relinquished its right to invoke immunity from jurisdiction by appearing in the proceedings.

### *The Sundancer*

Further back, and probably less well known, there was the case of the *Sundancer*,[61] in which ABS, which had issued inspection certificates on behalf of the flag state – the Commonwealth of the Bahamas – argued that it could rely on immunity of jurisdiction. That appeal was successful in respect of issuing statutory certificates as, according to the Federal Court for the Southern District of New York, this was a task reserved for the state and subject to immunity. The limitation of immunity did not apply to issuing certificates for insurance purposes because, according to the court, this did not concern activities based on a statutory regulation or provision.[62]

### *The Prestige*

Immunity also played a role in the proceedings that the French state brought before the *Tribunal de Grande Instance de Bordeaux* in 2010 against ABS,[63] the classification society that inspected the *Prestige* in 2002 on behalf of the Commonwealth of the Bahamas, the flag state.[64] This was also a

[58] *Tribunal de Grande Instance de Paris*, 11ème chambre, 4ème section (16 janvier 2008) No 9934895010, 1–358.
[59] *Cour d'Appel Paris* (30 mars 2010) nr RG08/02278-A, 1–487.
[60] *Cour de Cassation France* (25 septembre 2012) no H 10-82.938.
[61] *Sundance Cruises v American Bureau of Shipping (The Sundancer)* [1994] 1 Lloyd's Rep 299 (HL).
[62] See regarding this case B Vaughan *The Liability of Classification Societies* (LLM thesis 2006) 4–6 https://comitemaritime.org/wp-content/uploads/2018/05/Vaughan-The-Liability-of-Classification-Societies-UCT-LLM.pdf.
[63] In 2003, Spain initiated proceedings against ABS before the Southern District Court in New York. The appeal in this case ended in 2012 in favour of ABS. The court came to the decision that there was no evidence that ABS recklessly breached any duty of care. See *Reino de España v ABS* (2nd Cir, 29 August 2012).
[64] O Cachard '"Rear Window" on classification societies: no jurisdictional immunity for pure classification activities in the Prestige' (2019) 25 *Journal of International Maritime Law* 97.

statutory certification on behalf of the flag state. However, ABS simultaneously inspected the ship as a commercial classification society. The French state based its claim in the first instance on errors made by ABS as representative of the flag state. ABS invoked immunity from jurisdiction. The *Tribunal de Grande Instance* in Bordeaux[65] recognised that there is a close link between the commercial and statutory activities of a classification society, and that inspections are often carried out simultaneously by the same inspector. However, the defence of immunity was upheld now that the claimant himself had chosen to base the claim for damages on the activities the classification society had undertaken as a representative of the flag state. In appeal, the French state unsurprisingly changed the basis of its claim and based the claim on a shortcoming in the other inspection work carried out by ABS. The *Court d'Appel de Bordeaux*[66] then rejected the claim for immunity, which decision was later upheld by the *Cour de Cassation,*[67] considering that immunity is reserved only for classification societies engaged in statutory certification activities.[68]

A comparison of these cases and an assessment of the legal framework used by the various courts is complicated by the fact that different types of cases in different jurisdictions are being considered. As indicated above, the principle of immunity from jurisdiction is enshrined in customary international law, but there are no international legal rules on how to implement the principle. Therefore, this is always the prerogative of the court presiding over the matter. When faced with the defence of immunity from jurisdiction, the court must apply its domestic law and its own domestic views on the defence of sovereign immunity from jurisdiction. In addition, the *Erika* case concerned proceedings before the French criminal court, as a result of which Regulation 44/2001 and the assessment framework for jurisdiction contained there did not come up for discussion.

However, the conclusion that can be drawn from these cases is that immunity from jurisdiction is not easily accepted for a commercial organisation that performs tasks as a delegate of a state while commercial activities are carried out simultaneously, as is the case with classification societies. What is decisive appears to be whether the classification society acted on the basis of a commercial contract with the shipowner, or was authorised by the flag state in its capacity as an RO. In addition, it is relevant whether the inspection and certification activities were carried out based on a legal requirement or in the context of a classification contract or other commercial activity. Finally, also of relevance is whether the classification society had discretionary powers to decide whether a statutory certificate would be issued or whether this was for the flag state to decide. The assessment of the facts presented appears to be of crucial importance and, as the case *Abdel Naby Hussein Maboruk Aly contro RINA SpA* shows, the outcome of this assessment may differ and is by no means certain.

It is also open to discussion whether the distinction between private and statutory classification activities is as strict as was assumed in some of the cases discussed already (and as can also be found in the above-mentioned definitions of Directive 2009/15/EC). In practice, these inspection activities are often carried out simultaneously, which then leads to the issuance of both the class certificate and the certificate evidencing the safety of the ship at sea based on the SOLAS Convention. In the latter case, the classification society acts as a delegate of the flag state, in the former as a 'normal' private party. In the *Prestige* case, although the court recognised that in practice there is a close link between the different activities, nevertheless a clear distinction was still made between those activities for the purpose of assessing immunity, concluding that immunity from jurisdiction can only be successfully invoked in the case of statutory certification activities.

These cases show that the question of what classification entails and in which capacity the classification activities take place is highly relevant for the position of classification societies vis-a-vis third

[65] *Tribunal de Grande Instance de Bordeaux*, 6ème Chambre no 10/02421 (19 mars 2014).
[66] *Cour d'appel de Bordeaux* docket no 14/02185 (6 mars 2017).
[67] *Cour de Cassation France*, Chambre Civile 1 (17 avril 2019) 17-18.826.
[68] The case was returned to the *Tribunal de Grande Instance* in Bordeaux to consider the merits of France's claim against ABS.

parties. Immunity from jurisdiction means that a party cannot be held liable before any court. The question then is whether there are other means to hold a classification society accountable if their activities are not performed correctly and furthermore, how to ensure that they meet the required quality standard. As indicated, recital 16 of Directive 2009/15/EC does mention that a classification society must have access to defences when acting as delegate of a state, but the question remains what the possibilities are for third parties to verify whether the classification society has performed its work correctly and accurately and has acted impartially.

## Conclusion

The aim of this article was to assess whether a classification society may rely on immunity from jurisdiction when acting on behalf of a flag state. To answer this question, the focus has been on the special position of classification societies and how this has developed, and a definition of what classification entails has been suggested. The following observations can be made.

Classification societies engage in a broad array of activities, which have both a private and a public character. They have managed to obtain and maintain this position by being a reliable partner for governmental bodies, insurance companies, shipowners, shipbuilders and international organisations such as the IMO, and delivering state-of-the art technical advice in maritime matters in the broadest sense. However, with more than 50 classification societies active worldwide, quality differences between these different organisations can easily occur and the dual role of classification societies gives rise to questions regarding their impartiality and independence. Important steps have been taken to ensure that 'the guardians are also guarded against' such as the RO code and the *Erika* I, II and III Packages, as well as the establishment of EMSA and initiatives such as the introduction of QSCS by the IACS. Whether these steps are sufficient and offer workable solutions in practice has not yet been established.

An incentive for achieving the required level of quality may be found in the possibility that a classification society is held liable when mistakes are made.[69] The cases discussed show that sovereign immunity from jurisdiction will – in most cases – not stand in the way of such liability claims. However, these cases also show that the outcome is by no means certain, because to assess whether such an invocation of immunity from jurisdiction is justified, it is necessary to determine the nature of the relationship between the parties and the activities performed. The outcome largely depends on the way parties have contracted with each other and whether the classification society has discretionary powers with regard to the way the statutory activities were performed and whether or not a classification certificate would be withdrawn. No general rule can be derived from these cases, which still implies uncertainty for other parties involved in the process. A further complication is that, in practice, statutory classification and commercial certification are not always easy to distinguish and sometimes take place simultaneously.

With the *Enron* case[70] in mind, the question could be raised as to whether similar steps should be taken as with chartered accountants: to separate compliance from consultancy services. This would for instance mean that classification societies are organised differently and internally separate their commercial from their statutory services through different branches or sections to avoid close commercial relations between a class surveyor and a shipowner when conducting statutory services on behalf of a flag state. This does, however, require a more detailed look at the issues that arise from

[69] On 8 May 1999, the Joint working group on a study of issues regarding classification societies under the Comité Maritime International drafted contractual clauses for use in agreements between classification societies and governments, and classification societies and shipowners. These model clauses contain the following provision: 'In any claim arising out of the performance of a duty or responsibility, or out of any certification with regard to work covered by Annex I, [Classification Society] and its employees and agents shall be subject to the same liabilities and be entitled to the same defences (including but not limited to any immunity from or limitation of liability) as would be available to [Administration's] own personnel if they had themselves performed the work and/or certification in question.' See https://comitemaritime.org/wp-content/uploads/2018/05/Model-Clauses-for-Class-Society-Agreements-1999.pdf.

[70] https://www.britannica.com/event/Enron-scandal.

the various roles of classification societies, and an assessment of the legal framework and monitoring system for classification societies introduced in recent years. This could also lead to a reassessment of the question of whether commercial parties should still carry out statutory certification services, or whether public classification societies are needed. However, the reasons for entrusting these tasks to classification societies are still valid. It is hard to imagine that a government administration could provide the same level of technical expertise and efficiency. This implies that a choice must be made between efficiency and cost-effectiveness on the one hand, and impartiality and independence on the other. The question is what benefits ship safety the most. Therefore, there is much uncovered ground, which justifies further research beyond the question of liability of classification societies alone.