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## Contractual Liability of Classification Societies in Belgium: Dune Case

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### ABSTRACT

*The Dune case is one of the few decisions in Belgium addressing the contractual liability of classification societies. The ruling is in line with conclusions of older cases dealing with the liability of classification societies towards shipowners. The Antwerp Court of Appeal concluded that the classification society acted negligently by issuing the class certificate without first completing the necessary preparatory works. The decision affirmed that classification societies are obliged to survey vessels to the best of their abilities and apply the normally required diligence and care when performing the survey (obligation de moyen), without necessarily having to achieve a particular anticipated result (obligation de résultat). The Court eventually held that the repair and maintenance costs to make the Dune seaworthy did not constitute the plaintiffs' contractual damage. The Court, however, concluded that it was beyond reasonable doubt that the plaintiffs suffered pecuniary loss because of the classification society's negligence. Therefore, the recoverable loss was estimated ex aequo et bono at €35.000. The case of the Dune also shows that classification societies do not take over the shipowner's responsibility to provide a seaworthy vessel. The shipowner is fully responsible to ensure that the vessel remains seaworthy between all periodical class surveys. A class certificate is an indication of the vessel's state at the moment that the survey is completed, but cannot be used by the shipowner as an absolute proof of the vessel's seaworthiness.*

### KEY WORDS

*Classification Societies, Contractual Liability, Belgium, Dune*

## 1. Introduction

Classification societies are independent legal entities hired and paid for by the owner of vessel that is to be classified and certified. Classification societies issue a class certificate attesting that a vessel is built in accordance with the so-called class rules. Important sectors of and actors in the maritime industry rely on these certificates as assurance that the classed vessel is likely to be reasonably suited for its intended use.<sup>1</sup> As such, classification societies perform a vital function with respect to the insurability and marketability of vessels.<sup>2</sup> Besides shipowners and vessel purchasers, maritime insurers, cargo-owners and charterers use certificates of class prior to providing financial coverage or prior to hiring the vessel. A certificate allows them to make a reasonable assumption as to the condition of ship and the risks it represents without having to check the vessel themselves.<sup>3</sup> This is referred to as the private function of classification societies. A classification contract is agreed with the shipowner or the shipyard in accordance with the class rules.<sup>4</sup>

From this private function, the role of classification societies has gradually expanded to cover public tasks. This is referred to as statutory certification.<sup>5</sup> Flag States have a duty to take appropriate measures for vessels flying their flag to ensure safety at sea.<sup>6</sup> States often delegate executive powers to classification societies. Acting as Recognized

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<sup>1</sup> Machale A. Miller, "Liability of Classification Societies from the perspective of United States Law", *Tulane Maritime Law Journal* (1997): 82-88; Nicolai Lagoni, *The Liability of Classification Societies* (Berlin: Springer, 2007), 43-50; International Association of Classification Societies (IACS), "Classification Societies: their key role", 2001, 5-6, available at: *International Association of Classification Societies Ltd. portal*, [http://www.iacs.org.uk/document/public/explained/CLASS\\_KEY\\_ROLE.pdf](http://www.iacs.org.uk/document/public/explained/CLASS_KEY_ROLE.pdf) (accessed on 1<sup>st</sup> June 2016).

<sup>2</sup> Juan L. Pulido Begines, "The EU Law on Classification Societies: Scope and Liability Issues", *Journal of Maritime Law & Commerce* (2005): 487-488.

<sup>3</sup> Damien L. O'Brien, "The Potential Liability of Classification Societies to Marine Insurers under United States Law", *University of San Francisco Maritime Law Journal* (1995): 404-405; Hannu Honka, "The Classification System and its Problems with Special Reference to the Liability of Classification Societies", *Tulane Maritime Law Journal* (1994): 3-5; Miller, *op.cit.*, 82-88; Lagoni, *op.cit.*, 43-50; IACS *op.cit.*, 11-26.

<sup>4</sup> Lagoni, *id.*; IACS, *ibid.*, 43-46.

<sup>5</sup> Alan Khee-Jin Tan, *Vessel-Source Marine Pollution: the Law and Politics of International Regulation* (Cambridge: Cambridge University Press, 2006), 44.

<sup>6</sup> Article 94 (3), *United Nations Convention on the Law of the Sea* (UNCLOS), United Nations Treaty Series: 1833, 1834, 1835.

Organizations (ROs), the latter become responsible for the implementation and enforcement of international maritime safety standards.<sup>7</sup> Consequently, a classification society acting on behalf of a flag State is bound by two contracts. The first one with the Flag State itself – an agreement on the delegation of power; and, the second with the shipowner – for the performance of the obligatory statutory surveys – a statutory survey contract.<sup>8</sup>

Classification societies have already been held liable in several countries, both towards the shipowners (on a contractual basis) as well as towards third parties (on a non-contractual basis).<sup>9</sup> The contribution at hand sheds light on the recent *Dune* case dealing with the contractual liability of a classification society in Belgium. Prior to this analysis, a number of essential principles of Belgian contract law will be examined. Although an in-depth analysis of Belgian contract law is beyond the scope of the present paper,<sup>10</sup> it is necessary to describe the general and basic legal principles to fully understand the *Dune* case.

## 2. General Considerations on Contractual Liability in Belgium

### 2.1. General Requirements

Shipowners who want to recover their losses have to prove that the classification society violated the classification agreement. Article 1101 of the Belgian Civil Code (BCC) defines a contract as “... an agreement by which one or more persons obligate themselves to one or

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<sup>7</sup> Begines, *op.cit.*, 488-490; Lagoni, *op.cit.*, 43-50; Anthony Antapassis, “Liability of Classification Societies”, *Electronic Journal of Comparative Law* (2007): 13-14.

<sup>8</sup> Lagoni, *ibid.*, 53-55; Jan De Bruyne, Cedric Vanleenhove, “An EU perspective on the liability of classification societies: selected current issues and private international law aspects”, *Journal of International Maritime Law* (2015): 104-105.

<sup>9</sup> For an extensive discussion and references to case law see: Jan De Bruyne, “Liability of Classification Societies: Cases, Challenges and Future Perspectives”, *Journal of Maritime Law and Commerce* (2014): 196-221. See for the contractual liability of classification societies in Belgium: *Rukie* case, Court of First Instance Dendermonde, January 11, 1973, *Rechtspraak Haven van Antwerpen* (1973): 127. See for the non-contractual liability of classification societies in Belgium: *Paula* case, Court of Appeal Antwerp, May 10, 1994, *Rechtspraak Haven van Antwerpen* (1995): 301; and, *Spero* case, Court of Appeal Antwerp, February 14, 1995, *Rechtspraak Haven van Antwerpen* (1995): 321.

<sup>10</sup> See in this regard: Marc A. Huybrechts, “Classificatiemaatschappijen of de schone schijn doorkruist?”, in: *Liber Amicorum Jacques Putzeys*, ed. Jacques Putzeys (Bruylant: Brussel, 1996), 471-472; Marc A. Huybrechts, “De Classificatie-maatschappij en haar aansprakelijkheid”, *Tijdschrift Vervoer en Recht* (1997): 1-5.

more other persons to give, to do or not to do something".<sup>11</sup> Four requirements have to be met for a contract to be valid and binding: all parties must have reached mutual consent to create a legal obligation (*consentement*); all parties have to be legally competent (or have legal capacity) to contract (*capacité à contracter*); the contract needs to have a legal object (*objet*); and the parties must have a valid cause/reason to contract (*cause de l'obligation*).<sup>12</sup>

Against the background of the *animus contrahendae obligationis*, parties are free to determine the content of their contract, the contractual terms and obligations. Article 1134 BCC further embodies the principle of performance in good faith of any agreement (*bonne foi*). It is an expression of the duty of loyalty owed by each contractor to the bargain reached between the parties, a duty to respect the mutual confidence agreement as to the content of the contract.<sup>13</sup> In addition, Article 1135 BCC states that contracts do not only oblige to what is expressly agreed between the parties but also to all the consequences attached to these obligations by equity, custom or the law (statutes and regulations).<sup>14</sup>

## 2.2. Obligation of Result and Obligation of Means

The Belgian courts address the contractual liability of classification societies from the perspective of the nature of their contractual obligations. The distinction between the obligation to produce or achieve a specific anticipated result (*obligation de résultat*) and the obligation to apply the normally required diligence, reasonable care and skill (*obligation de moyen*) is essential in this regard. This distinction influences the content

<sup>11</sup> Author's (unofficial) translation of Article 1101 Belgian Civil Code (BCC), March 21, 1804, 1804-03-21/30, "Een contract is een overeenkomst waarbij een of meer personen zich jegens een of meer andere verbinden iets te geven, te doen, of niet te doen".

<sup>12</sup> Article 1108 BCC. See in general: Jacques Herbots, "Belgium", in: *International Encyclopedia for Contracts*, ed. Jacques Herbots (Alphen aan den Rijn: Kluwer Law International, 1998), 39-40; Walter Van Gerven, Sofie Covemaeker, *Verbintenissenrecht* (Leuven: Acco, 2006), 719.

<sup>13</sup> Sophie Stijns, Dirk van Gerven, Patrick Wéry, "Chronique de jurisprudence. Les obligations: les sources (1985-1995)", *Journal des Tribunaux* (1996): 33-35; Walter Van Gerven, Sofie Covemaeker, *Verbintenissenrecht* (Leuven: Acco, 2001), 58-59; Jan M. Smits, Sophie Stijns, *Inhoud en Werking Van de Overeenkomst Naar Belgisch en Nederlands Recht* (Intersentia: Antwerpen, 2005), 40-43; Hubert Bocken, "De goede trouw bij de uitvoering van verbintenissen", *Rechtskundig Weekblad* (1990): 1043.

<sup>14</sup> Also see: De Bruyne, *op.cit.*, 190-191, with additional references.

and scope of a classification society's specific obligations, and, especially, the burden of proof allocation.<sup>15</sup>

Classification societies will have violated an *obligation de résultat* whenever the promised result has not been reached, unless the society is able to prove that this failure is due to an impossibility or *force majeure*. The shipowner will thus only have to establish that the classification society did not achieve the contractually promised result(s). A violation of an *obligation de moyen*, on the other hand, presupposes that the classification society did not apply the required care and skill. If the contract is qualified as *obligation de moyen*, the classification society will only be liable if the shipowner shows that the former was negligent and did not act as a reasonable and careful society placed in the same circumstances would (*bonus pater familias* criterion).<sup>16</sup> This has to be considered on the basis of the actual facts and circumstances of each case (*in concreto*). However, this consideration is often given an objective touch by relying on external circumstances (and expertise) such as professional classification and certification knowledge.<sup>17</sup>

### 2.3. Indemnity and Exoneration/Exemption Clauses

Most contracts will often contain a provision that explicitly limits the duty of the classification society to the sole application of necessary diligence without assuring a particular result (*obligation de moyen*). This is strengthened by the inclusion of indemnity and exoneration/exemption clauses limiting the liability in case of a violation of contractual terms.

Indemnity clauses are provisions under which a party (shipowner) assures to compensate the other party (classification society) for any harm, liability or loss arising

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<sup>15</sup> Van Gerven, Covemaeker, *op.cit.*, 32-33; Jan Roodhooft, Cathy Vanackere, "Definitie en enkele soorten", in: *Bestendig Handboek Verbintenissenrecht*, ed. Jan Roodhooft (Kluwer: Antwerpen, 1998), 40.

<sup>16</sup> Van Gerven, Covemaeker, *id.*; Leentje Van Valckenborgh, "De kwalificatie van een verbintenis als resultaats- of middelenverbintenis", *Tijdschrift voor Belgisch Burgerlijk Recht* (2011): 222-229; Bernard Dubuisson, "Questions choisies en droit de la responsabilité contractuelle", in: *La théorie générale des obligations*, ed. Patrick Wéry (Luik: Larcier, 1998), 103; Sophie Stijns, *Verbintenissenrecht. Boek 1* (Brugge: Die Keure, 2005), 8-10; Marc Kruithof, Eddy Wymeersch, "The Regulation and Liability of Credit Rating Agencies in Belgium", *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, ed. Eric Dirix, Yves Henri Leleu (Brussel: Bruylant, 2006), 374-376.

<sup>17</sup> Hubert Bocken, Ingrid Boone, *Inleiding tot het schadevergoedingsrecht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels* (Brugge: Die Keure, 2011), 100-102. Also see: De Bruyne, *op.cit.*, 190-191, with additional references.



out of the contract. The Belgian courts accept their validity as long as they comply with public legal policy and common decency.<sup>18</sup>

Exoneration clauses, on the other hand, are contractual provisions that protect a classification society from being sued by its co-contractors for damage, negligence or non-performance. Exoneration clauses included in classification rating agreements or terms and conditions of use are principally valid under Belgian law. There are, however, three exceptions. Clauses excluding or limiting the classification society's liability *vis-à-vis* professional parties are not valid if they: (1) conflict with public policy or mandatory law restricting the possibilities for the classification society to exclude or limit its liability; (2) are applicable as to the classification society's personal fraud or intentional acts; or (3) render invalid the essential object of the classification agreement.<sup>19</sup>

The last requirement can be problematic in the context of classification societies. A reference is, for example, made to the decision by the Antwerp Court of Appeal in the *Paula* case. Several parties claimed recovery from the classification society Nautilus alleging that the latter issued a class certificate even though the vessel *Paula* was unseaworthy. Nautilus referred to the exoneration clause in its terms and conditions to reject any potential liability. The clause stipulated that the issuance of a certificate of class could not lead to "any" liability on the part of the classification society or its employees.<sup>20</sup> However, the Court rejected the use of such a broad exoneration clause on the ground that it would render invalid the content of the classification society's contractual obligations.<sup>21</sup>

## 2.4. Contract Interpretation

<sup>18</sup> Alois van Oevelen, "Exoneratiebedingen en vrijwaringsbedingen", in: *Actuele Ontwikkelingen inzake Verbintenissenrecht*, ed. Vincent Sagaert & Dirk Lambrecht (Antwerpen: Intersentia, 2009), 30-34; De Bruyne, *op.cit.*, 192.

<sup>19</sup> See in this regard the judgment by the Belgian Supreme Court, September 25, 1959, *Arresten van het Hof van Verbreking* (1960): 86, For an overview see: Alois van Oevelen, *op.cit.*, 11-19; Ludo Cornelis, "Les clauses d'exonération de responsabilité couvrant la faute personnelle et leur interprétation", *Revue Critique De Jurisprudence Belge* (1981): 204-209; Nicolas Carette, "Exoneratiebedingen in het gemeen recht", *Jura Falconis* (2005): 81; Bernard Dubuisson, "Les clauses limitatives ou exonératoire de responsabilité ou de garantie en droit belge", in: *Les clauses applicables en cas d'inexécution des obligations contractuelles*, ed. P. Wery (Brussel: Die Keure, 2001), 63; De Bruyne, *ibid.*, 191-192.

<sup>20</sup> *Paula* case, *op.cit.*, 311 ("geen enkele aansprakelijkheid kan doen ontstaan").

<sup>21</sup> *Ibid.*, 315.

In the unlikely case that the contract does not contain a provision specifying that the society must apply reasonable efforts, a recourse to general legal principles is necessary. Here, the majority view applies the idea of contract interpretation.<sup>22</sup> If a specific delimitation of contractual obligations is open for consideration, Article 1156 BCC requires adjudicators to rely on the actual common intention of the parties to determine the meaning of contract.<sup>23</sup>

An important criterion used to interpret the contract is the degree of certainty to which a classification society is able to achieve a particular result.<sup>24</sup> Since a class certificate only confirms the seaworthiness of a vessel at the time it is issued, there is an inherent element of uncertainty with regard to a classification society's contractual obligations. Therefore, it can be argued that a classification society only has to perform services to the best of its abilities. A minority view, however, relies on Article 1135 BCC and the notion of good faith to interpret the content of a classification contract.<sup>25</sup>

The additional implied obligations, such as the requirement to inform parties of technical deficiencies, could arise out of a classification contract.<sup>26</sup> This criterion is more subjective and takes case-related circumstances into account.<sup>27</sup>

## 2.5. Non-Contractual Remedy

The final aspect concerns the question whether shipowners having contracted with a classification society can recover in tort from the latter, having in mind the Belgian doctrine of non-concurrence of liability in contract and in tort (*non-cumul des responsabilités*). Legal scholars have reached different interpretations with respect to the case law of the *Cour de Cassation* on this issue.<sup>28</sup>

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<sup>22</sup> Pierre Van Ommeslaghe, *Droit des obligations I* (Brussel: Bruylant, 2010), 40-41; Van Gerven, Covemaeker, *op.cit.*, 33; Thierry Vansweevelt, *De civielrechtelijke aansprakelijkheid van de geneesheer en het ziekenhuis* (Antwerpen: Maklu, 1992), 110-114.

<sup>23</sup> De Bruyne, *op.cit.*, 192.

<sup>24</sup> Van Valckenborgh, *op.cit.*, 222-229.

<sup>25</sup> Robert Kruithof, "La théorie de l'apparance dans une nouvelle phase", *Revue Critique de Jurisprudence Belge* (1991): 80.

<sup>26</sup> Hugo Vandenberghe, "De grondslag van de contractuele en extra-contractuele aansprakelijkheid voor eigen daad", *Tijdschrift voor Privaat Recht* (1984): 147.

<sup>27</sup> Van Valckenborgh, *op.cit.*, 230-231.

<sup>28</sup> The *Cour de Cassation* is the Supreme Court in Belgium. See for example: Supreme Court, December 7, 1973, *Rechtskundig Weekblad* (1974): 1597; Supreme Court, April 8, 1983, *Rechtskundig Weekblad* (1984):



According to one interpretation (*verfijningstheorie*), concurrence of liabilities is possible when: (1) the behavior of one party constitutes not only a breach of contractual obligations but also a breach of a general (*ie*, non-contractual) duty of due care, and, (2) the harm for which compensation is sought does not consist of the loss of the benefits that were to be expected from the performance of contract or harm that is a consequence of such loss.

Another, and more restrictive view (*verdwijningstheorie*), holds that a claim in tort between contracting parties is only possible: (1) when the behavior on which the claim is based does not constitute a breach of contract but solely a breach of a general (*ie*, non-contractual) duty of care, and, (2) the harm for which compensation is sought is not the result of or caused by an act that can (also) be qualified as a breach of the contract.<sup>29</sup>

Whereas older case law<sup>30</sup> and a predominant part of legal scholarship<sup>31</sup> favored the second reading of decision of the highest court in Belgium, recent decisions increasingly seem to support the first and less restrictive view. The First Chamber of the *Cour de Cassation* held in the *Tiércé Franco Belge* case that a contractor has a claim in tort when an act of his co-contractor constitutes both a breach of contractual obligations and a breach of the general duty of care.<sup>32</sup> Thus, the harm for which compensation is sought will determine the scope of recovery in tort between the contractors. Article 1149 BCC stipulates that the creditor must be compensated not only for the loss that was actually incurred but also for lost income (*réparation intégrale du dommage*). Due to this (broad) wording, the requirement that a party has to suffer “not merely contractual losses” for a

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164; Supreme Court, September 28, 1995, *Arresten van het Hof van Cassatie* (1995): 287; Supreme Court, September 29, 2006, *Nieuw Juridisch Weekblad* (2006): 946; Supreme Court, November 27, 2006, *Rechtspraak Antwerpen Brussel Gent* (2007): 1257.

<sup>29</sup> For a discussion and further references see: Thierry Vansweevelt, Britt Weyts, *Handboek Buitencontractueel Aansprakelijkheidsrecht* (Antwerpen: Intersentia, 2009), 98-99; Bocken, Boone, *op.cit.*, 41-48; De Bruyne, *op.cit.*, 192-193.

<sup>30</sup> Supreme Court, September 28, 1995, *Arresten van het Hof van Cassatie* (1995), 825; Supreme Court, May 23, 1997, *Arresten van het Hof van Cassatie* (1997): 563.

<sup>31</sup> Alois van Oevelen, “De betekenis van het stuwadoorsarrest van het Hof van Cassatie voor het maritieme recht, bijna dertig jaar later”, in: *Stouwers, naties en terminal operators het gewijzigde juridische landschap (Reeks Antwerpse Zeerechtdagen)*, ed. Eric van Hooydonk (Antwerpen: Maklu, 2003), 161-178; Hugo Vandenberghe, Marc Van Quickenborne, Steven Decoster & Koen Geelen, “Overzicht van rechtspraak 1979-1984. Aansprakelijkheid uit onrechtmatige daad”, *Tijdschrift voor Privaat Recht* (1987): 1602.

<sup>32</sup> Supreme Court, September 29, 2006, AR C.03.0502.N; Kristof Van Hove, “Noot onder Cass 29 September 2006”, *Tijdschrift voor Bouwrecht en Onroerend Goed* (2007): 67; Ingrid Boone, “Samenloop contractuele en buitencontractuele aansprakelijkheid verfijnd”, *Nieuw Juridisch Weekblad* (2006): 947; Eric Dirix, “Rechterlijk overgangsrecht”, *Rechtskundig Weekblad* (2009): 1756.

recovery in tort to be available, will rarely be met. Consequently, many authors assume that the post-*Tiércé Franco Belge* case law is not likely to substantially affect the concurrence of liabilities doctrine in Belgium. However, when contractual loss is strictly interpreted as a loss of contractual advantages, claims in tort law between a shipowner and a classification society might be more successful.<sup>33</sup>

An exception to the exclusion of liability in tort between contracting parties is generally recognized when the act comprising the breach of contract also constitutes a criminal offence. Having in mind that negligence causing physical injuries and harm constitutes such an offence, a shipowner can bring a claim in tort against a classification society in cases where such harm has been the result of a breach of the general (non-contractual) duty of care or a violation of a statutory or regulatory rule by a classification society.<sup>34</sup>

### 3. Contractual Liability of Classification Societies – The *Dune* Case

A recent Belgian case sheds more light with regard the contractual liability of classification societies. The vessel *Dune* was bought by Mr. G. and Ms. A. on 7<sup>th</sup> April 1998. The vessel was purchased and delivered to the claimants on the day that the contract was signed. The contract stipulated that the vessel would be delivered under a certificate of class. Prior to the purchase of vessel, a report on its condition was issued by Mr. V. On 7<sup>th</sup> April 1998, the classification society Unitas was requested to conduct a special survey of the *Dune*, and, on 17<sup>th</sup> April 1998 Unitas issued a class certificate valid until 7<sup>th</sup> April 2003. A new engine motor was installed in the ship in 1999 and maintenance works on the bottom boards were performed shortly after. Additional repairs were conducted on the ship's propeller in August 2001. During the cleaning of the bottom planking, it became clear that both the planking and the bilge plank were damaged. The shipowners requested Euroclass, a second classification society, to survey the vessel. The inspection report concluded that the *Dune* was unseaworthy and recommended immediate repairs. On 11<sup>th</sup> September 2001, the purchasers filed a claim against Bureau Veritas (previously

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<sup>33</sup> Vansweevelt, Weyts, *op.cit.*, 105; Hubert Bocken, "Samenloop contractuele en buitencontractuele aansprakelijkheid. Verfijners, verdwijners en het arrest van het Hof van Cassatie van 29 September 2006", *Nieuw Juridisch Weekblad* (2007): 722-731. See in this regard also: Supreme Court, June 7, 2010, AR C.09.0586.N (unpublished). However, for a contradictory view: Supreme Court, November 27, 2006, *Rechtspraak Antwerpen Brussel Gent* (2007): 1257; De Bruyne, *op.cit.*, 193-194, with further references.

<sup>34</sup> Bocken, Boone, *op.cit.*, 47-48; De Bruyne, *ibid.*, 194.

Unitas<sup>35</sup>). An expert was asked to examine whether the issuance of certificate on the 7<sup>th</sup> April 1998 was considered justified, to which extent the vessel was seaworthy, and whether the recommended works were necessary to render the *Dune* seaworthy again.<sup>36</sup>

The Commercial Court affirmed in its decision that a class certificate is an indication of vessel's state at the moment of completion of the survey. The survey has to be adapted to the particular nature of vessel and its construction materials. Although the shipowner is fully responsible for ensuring that the vessel remains seaworthy between all periodical surveys, the Court relied on the expert report to conclude that the *Dune* must already have been unseaworthy in 1998. As a consequence, the classification society was not entitled to issue a certificate of class on 17<sup>th</sup> April 1998.<sup>37</sup>

More important are the considerations addressing the liability of classification society Unitas. The Commercial Court held that a classification society is only obliged to apply the normally required diligence (*obligation de moyen*) and is not necessarily required to achieve a specific anticipated result (*obligation de résultat*). This conclusion is in line with the older case law dealing with the contractual liability of classification societies in Belgium.<sup>38</sup> The claimants argued that Unitas did not comply with its contractual obligations. The classification society did not conduct the maintenance works and performed a negligent and careless survey of the vessel in April 1998. The report revealed that the survey was inaccurate since Unitas did not carry out the necessary preparatory works. The Court held that the absence of such preparatory works implied that the classification society did not use all reasonable efforts, and that Unitas was negligent when issuing the certificate, especially considering that reliance on the report endangered the life of the crew and the maritime industry in general.<sup>39</sup>

However, with regard the causal link between the harm and Unitas' negligence, the Commercial Court had doubts as to whether the unseaworthy state of the vessel was a direct consequence of the negligent survey. In this regard, one needs to examine which financial or economic advantages the shipowners would have obtained if the survey had been done correctly. The report concluded that the *Dune* was already unseaworthy when

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<sup>35</sup> *Dune* case, Commercial Court Antwerp, September 20, 2006, A/02/04109 (unpublished).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See in this regard: *Rukie, op.cit.*

<sup>39</sup> *Dune, op.cit.*

the certificate was issued in April 1998. The shipowners' benefit would thus not have been a seaworthy vessel but merely a certificate of class in case of seaworthiness or an absence of it in case of unseaworthiness. As such, Unitas' contractual default was not the direct and proximate cause for the harm claimed by the owners. The loss would have occurred anyway, even without the negligent survey. The lack of a class certificate would only have had consequences on the conditions of sale of the vessel. These considerations could, however, not be evaluated by the Court since the shipowners did not invoke it in their argumentation (*non ultra petita*). Consequently, the claim for recovery against Bureau Veritas was unfounded and dismissed.<sup>40</sup>

The case eventually made it to the Antwerp Court of First Instance and the Court of Appeal. In the first instance, the Court held that Unitas/Bureau Veritas did not apply reasonable efforts when it had surveyed the *Dune*. The classification society acted negligently by issuing the class certificate without first completing the necessary preparatory works. The Court of First Instance, nevertheless, concluded that the unseaworthy state of the vessel was not a direct consequence of the negligent class survey. Causation between the harm and the classification society's negligence was thus not proven, and the plaintiff's claim for recovery was unfounded and dismissed.

The Antwerp Court of Appeal also concluded that the classification society was negligent because it did not establish the necessary preparatory works. The plaintiffs would not have bought the *Dune* if the class certificate had not been issued. They claimed the repayment of the purchase price of vessel together with the repair and maintenance costs, reduced by the price of the sale of *Dune* in July 2002. The Court had to examine whether there was a causal link between the classification society's negligence and the plaintiff's financial loss. According to Article 1150 BCC, a debtor is only required to compensate for the contractual damage that was foreseen or foreseeable at the time the contract was agreed, unless the non-performance of contract is caused by the debtor's intentional fault. In addition, Article 1151 BCC stipulates that, even in the case of intentional non-performance of the contract, contractual damages concerning the loss incurred by the creditor and the gain of which he was deprived, extend only to the direct and immediate consequences of the non-performance of agreement. Against this background, the Court held that the repair and maintenance costs to make the *Dune*

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<sup>40</sup> *Id.*

seaworthy did not constitute contractual damage recoverable by the plaintiffs. The Court, however, concluded that it was beyond reasonable doubt that plaintiffs suffered pecuniary loss because of the classification society's negligence. Therefore, the recoverable loss was estimated *ex aequo et bono* at €35.000.<sup>41</sup>

#### 4. Conclusion

The *Dune* case is one of the few cases in Belgium addressing the contractual liability of classification societies. The decision is in line with the conclusions of older cases dealing with the liability of classification societies towards shipowners. Three major conclusions can be drawn based on the analysis conducted in this paper.

Firstly, classification societies are obliged to survey vessels to the best of their abilities and apply the normally required diligence and care when performing the survey (*obligation de moyen*), without necessarily having to achieve a particular anticipated result (*obligation de résultat*). Secondly, classification societies do not take over the shipowner's responsibility to provide a seaworthy vessel. Finally, a class certificate cannot be used by the shipowner as an absolute proof of the vessel's seaworthiness.<sup>42</sup>

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<sup>41</sup> *Dune* case, Court of Appeal Antwerp, February 18, 2013 *Nieuw Juridisch Weekblad* (2013): 659-660 with annotation by Jan De Bruyne, "Aansprakelijkheid van classificatiemaatschappijen". Also see the discussion in: De Bruyne, *op.cit.*, 201-202.

<sup>42</sup> For an analysis of case law in England and US, see: De Bruyne, *ibid.*, 218-222.