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Classification Societies Acting on Behalf of States

A Conundrum in International Law?

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1 - INTRODUCTION

Ever since the beginning of trade by sea, there has been an interest to regulate transportation between States. Although State sovereignty is central in international law, reflected primarily in the notion of the Flag State (as well as Port State and Coastal State), the global character of this commercial activity has always been at the heart of regulating the shipping industry. In this sense, international rules on the safety of shipping have heavily relied on the commercial practices of the various actors and stakeholders in the business. In particular, States have depended on the role of classification societies when agreeing on international norms, as these have been at the forefront of the development of industry standards and requirements.

One of the underlying difficulties in international law in general, is the lack of enforcement mechanisms in place to ensure compliance with international rules. Maritime law is no exception. In theory, each Flag State should ensure compliance and enforcement of the international rules it has accepted by incorporating these standards into its legal system. On top of this, the industry itself, thanks to the intrinsic risks of shipping and the transnational nature of the trade, has organically developed industrial standards to ensure the safety and the security of shipping – both in terms of its financing and in terms of protection from any physical harm. Consequently, the development of maritime rules as a whole is generally sparked by an intricate and corollary relationship between the self-regulated industry standards and the supra-national imposition of norms.

This paper will explore the particular role of classification societies when they have been delegated powers by Flag States to carry out public functions. While classification societies are often better equipped than States to carry out certain surveying tasks, due to their high level of technical expertise, their role within the maritime world as a whole puts classification societies in a position of power which is not adequately addressed in international law. There are

certainly national laws regulating the relationships between classification societies and the public administration. Yet, this myriad of relationships with different States has been inadequately reflected at an international level as it maintains its focus of authority on the State and the Flag State system.

Methodology and Structure

In carrying out the research for this analysis, academic resources along with official primary sources were looked at. Texts from maritime law, international law of the sea and EU law were researched to get a thorough insight into the safety aspects of maritime affairs and the technicalities of delegating public functions. Some feminist jurisprudence and legal theory was also relied on as a basis for the critique on the current legal framework for the delegation of powers by States to classification societies. This critique falls in line within a broader philosophical discussion on private bodies within the international legal order.

This paper will begin by defining the roles of States and classification societies within the maritime sector, looking at some of the forces and developments which have led to the current legislative framework. Chapter 3 will look at how the relationship between classification societies has been, to a certain extent, structurally institutionalised both politically and legally. Specific international and European efforts to formalise this relationship will be looked at more closely, which have tried to create a more certain domain for classification societies and States to operate in. Chapter 4 will look at the problems of defining the public and the private spheres of activities for classification societies from a jurisprudential perspective. It will then go on to apply this analysis to when classification societies have attempted to benefit from invoking State immunity for claims brought against them.

2 – CLASSIFICATION SOCIETIES AND STATE FUNCTIONS

In this chapter we will explore how classification societies have been carrying out functions in the public interest, something which would normally be reserved for the Flag States. In the first section, we look at the roles of Flag States in upholding the public interest; and we look at the ways in which the functions of classification societies relate to the tasks of Flag States in the second section.

2.1. FLAG STATES: FUNDAMENTALS IN INTERNATIONAL LAW

Before looking at some functional aspects of the Flag State system, we need to briefly explain its *raison-d'être*. The flag of the ship indicates which State's laws operate on board the ship and as such which State has prescriptive jurisdiction.¹ “From the early eighteenth century up to the end of the nineteenth century the seas were largely subject to a laissez-faire regime. Beyond the narrow belt of coastal seas, the high seas were open to free and unrestricted use by all.”² Where a vessel is on the high seas, therefore in an area which is not under the scope of any territorial jurisdiction, it is only the Flag State which can exercise jurisdiction over its activities. The concept of the freedom of the high seas reflects the basic international law principle of equality between sovereign States, whereby one State cannot appropriate the sea because it is an open resource accessible to all.

2.1.1. Exclusivity of flag

One of the most widely accepted and followed international convention is the UN Convention on the Law of the Sea (UNCLOS), which has been ratified by 167 states.³ This convention

¹ Evans, “International Law” 3rd Ed. Oxford University Press, 2010, p.318

² Churchill & Lowe, “The Law of the Sea” 3rd Ed. Manchester University Press, 1999, p.2

³ Chronological lists of ratifications of, accessions and successions to UNCLOS

http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm

regulates all main activities and international aspects of marine activities. Even for the non-parties⁴ to the Convention, UNCLOS still bears legal weight as many of its articles are in fact a codification of well-established customary rules which are binding between all States.⁵

Despite the vast number of international conventions on maritime safety,⁶ these conventions cannot be directly imposed on ships if the Flag State has not accepted these rules as part of its domestic laws. This is because the subjects of international law are States and therefore international laws are only binding between them, not directly between individuals. As such, the record of ratified and implemented international conventions by a Flag State is an important indicator of the safety norms that vessels of that State abides to. Crucially, however, in order for these rules to be applicable to ships, they need to be incorporated into the national law of the Flag State. It is against this backdrop that the Port State Control inspections work, which we will come back to later.⁷

However, article 94 UNCLOS sets out the main duties of Flag States whereby “every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”⁸ Sub-paragraphs 3 and 4 go into more detail on the type of control that should be had over ships by the Flag State. And sub-paragraph 5 states that each Flag State “is required to conform with generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.” These “generally accepted international regulations, procedures and practices”, are mostly, but not limited to, the works and guidelines of the International Maritime Organisation (IMO). Furthermore, the international standards that a Flag State is expected to comply with are generally MARPOL, SOLAS, Load Line Convention, International Regulations for Preventing

⁴ For instance, the United States of America

⁵ Churchill & Lowe, *supra* note 2, pp. 7-12

⁶ *Ibid.* p.256

⁷ See below, Section 2.2.2.2 *Port State Control*

⁸ Art.94(1) UNCLOS

Collisions at Sea, and the Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), to name the main ones.⁹ As a consequence, without making it legally binding, this provision ties other conventions to UNCLOS as a way of indicating the standards that a State should adopt, even if that State is not a party to those conventions.

Nonetheless, as mentioned below, the notion that the Flag State has primarily jurisdictional over a vessel is not absolute, given that a ship may have to abide by other laws of other States if it wishes to operate in certain waters.¹⁰

2.1.2. Enforcement by Flag States

As stated above, Flag State jurisdiction follows the ship regardless of where it finds itself. According to Article 91 UNCLOS a ship must have a nationality and therefore needs to indicate its Flag State in order for it to be allowed to navigate. Moreover, where the specific grounds for another State to enforce its laws on a ship are not present,¹¹ it is in theory only the Flag State that can exercise enforcement jurisdiction over its ships. This is also implicit according to Article 94(6) UNCLOS which allows for another State to indicate a breach by a vessel, but the Article does not give the right for that State to directly intervene. If it were not so, an unjustified enforcement by another State could amount to an act of aggression or the use of force under Article 2(4) of the UN Charter and/or breach of the principle of non-intervention contained in Article 2(7) UN Charter.

However, there are difficulties in controlling ships if that control is exclusively and unexceptionally reserved to Flag States in all circumstances. This is, for example, because one flag may have a very big fleet which operates world-wide. Consequently, there could easily be a lack of resources of officials. It may also give rise to other jurisdictional problems for these

⁹ See the list as set out in Paragraph 6 of IMO Resolution A.973(24)

¹⁰ UNCLOS Articles 210, 211, 212

¹¹ *Ibid.*

officials to enforce laws within the territorial jurisdiction of another State. For this reason, there are certain enforcement measures that a Port State and a Coastal State can take.¹² Furthermore, there are prescribed circumstances that warrant for universal enforcement jurisdiction.¹³ Nevertheless, despite the practical hurdles, the general rule remains that enforcement and control of ship safety standards should be *prima facie* carried out by the Flag State.

One particular enforcement issue has been galvanized with the rise of the so-called “Flags of Convenience” (FOCs), or, as they prefer to be called, “open registries”. According to Article 91(1) UNCLOS there should be a “genuine link” between the vessel and the Flag State. However, according to the same provision, it is up to each State to set its own internal rules for granting nationality. As such, the nationality link between the vessels and a FOC is often missing or is at best tenuous.¹⁴ Lenient rules on flag registration makes it easier for shipowners to register under that flag. In 2009, about half the world tonnage was registered under the top 5 most used flags, and over 70% of the tonnage was registered under the top 10 flags.¹⁵ Most commonly, shipowners use FOC for tax purposes, but there may be many other commercial (and, unfortunately, sometimes also criminal)¹⁶ considerations that will influence the choice of flag. From the FOC point of view, there are also many benefits¹⁷ for having a large fleet and to encourage ships to register under their flag. Therefore, it is more efficient and convenient for the FOC States (but we will see that this applies to practically all States) to delegate their State functions to private bodies.¹⁸

¹² UNCLOS Articles 218 and 220

¹³ UNCLOS Articles 99-109: Piracy, human trafficking, smuggling, illegal broadcasting

¹⁴ See Court of Appeal decision in *Erika*: Cour d’Appel de Paris Pôle 4 – Chambre 11 (30 March 2010) n.08/02278; see also below, section 4.2.1.2. *Examples*

¹⁵ UNCTAD Review on Maritime Transport 2009 http://unctad.org/en/docs/rmt2009_en.pdf

¹⁶ Gianni, M., “Real and Present Danger: Flag State Failure and Maritime Security and Safety” ITF and WWF 2008 http://assets.panda.org/downloads/flag_state_performance.pdf

¹⁷ Ademuni-Odeke, “Bea boat and Charter (Ship) Registration” Kluwer Law International 1998, p.24: “FOC registry has nothing to do with sovereignty, as its supporters would have us believe, but rather with hard economics.”

¹⁸ See below, section 2.1.3.2. *Prevention*

2.1.3. Addressing enforcement problems of the Flag State system

2.1.3.1. *Post facto intervention*

One solution to this enforcement problem has been the creation of a Port State Control (PSC) mechanisms, whereby a Port State can inspect vessels in their ports for compliance with international standards. The basis for this type of inspection can be traced to Article 218 UNCLOS. In Europe, the regional inspections are carried out under the auspices of the Paris Memorandum of Understanding (MOU) which provides for a black, grey and white listing of flags. The listings under Paris MOU look at the compliance records of the vessels with the Load Lines Convention 1966 (and Protocol 1988), SOLAS (and the 1978 and 1988 Protocols), MARPOL 73/78, Protocol of 1992 to the International Convention on Civil Liability for Oil Pollution Damage, STCW 1978, CORLEG 72, TONNAGE 69, and ILO Convention No. 147 and its Protocol of 1996.¹⁹ The records of these inspections reflect the risks of the *flags* of the vessels that enter the ports which follow the Paris MOU. The PSC mechanism is a way for Port States to intervene in cases breach of a convention is detected. The detention records and the listing signal which Flag States are compliant and which are not, but it is only a *post facto* intervention, it is not a way to ensure compliance in order to prevent the occurrence of a breach.

2.1.3.2 *Prevention*

Another solution to the problem of weak enforcement by the Flag State has been the increased delegation of statutory functions of the Flag State to Recognised Organisations (ROs), who will survey ships on their behalf. These ROs are often and most typically classification societies, who were originally only contracted by the shipowners to certify their ships.²⁰ This delegation

¹⁹ Knapp, S. "Analysis of the Maritime Safety Regime: Risk Improvement Possibilities for the Port State Control Target Factor (Paris MOU)", p.7

²⁰ See section 2.2. *Classification Societies as Public Entities*

is widespread²¹ among all Flag States, and particularly essential for the non-traditional shipping states²² that never had a developed maritime administration to carry out the surveying of ships. This delegation is to a certain extent also necessary for the biggest Flag States in order to have better control of all their vessels. The outsourcing of such surveying duties may also be cheaper for the public balance and is, in the vast majority of cases, more efficient than solely relying on the public administration.²³

2.2. CLASSIFICATION SOCIETIES AS PUBLIC ENTITIES

When classification societies first came into being their clients were not the shipowners, but marine underwriters. Insurers and charterers were able to assess the risk of doing business with a given ship as a result of the certifications done by the classification society. In the 19th century shipowners began to pay these societies for their services, namely rating their vessels and issuing quality certificates.²⁴ The ratings and certificates were based on internal “rules” of the classification societies that were developed in reference to the shipping industry practices and expected standards of clients.²⁵ Hence, the work of classification societies was not tailored by legislative initiatives, but was rather an organic development within the shipping industry itself.

The aim of the work of classification societies was to aid and facilitate the various maritime actors in their businesses by providing information on standards. The standards that classification societies have traditionally always assessed are those relating to “design, construction and condition of ships and survey marine structures”, but they did not look at

²¹ Mansell, J. N. K, “Flag State Responsibility: Historical Development and Contemporary Issues” (Springer), 2009, p.137

²² *Ibid.*, at pp. 5, 21, 100

²³ *Ibid.*, at p.141

²⁴ Özcayir, Z. O., “Port State Control”, 2nd Ed. London Singapore, 2004, p.477

²⁵ *Ibid.*

manning or operations of vessels. Thus, the assessments were more on the “static condition of a ship” and not on its operation during voyage.²⁶

Apart from rendering a service to the marine undertakers, and later to shipowners for commercial purposes, the inherent effect was to increase safety and security within the shipping industry overall: ultimately benefitting a wider range of actors than just the ones directly involved in the service contract. As such, the role of classification societies, despite being privately-driven, carries with it a strong public interest in making the industry safer. It is from this that classification societies first acquired their ‘dual function.’²⁷ On the one hand, they primarily answer to contractual interests as they render a service to private actors, while on the other hand, this service has now become indispensable for the safety of the industry as a whole.

2.2.1. The Genesis of International Association of Classification Societies

The Load Line Convention of 1930 encouraged classification societies to cooperate together in order to have “as much uniformity as possible in the application of the standards of strength on which freeboard is based.”²⁸ After the inception of this collaboration, the International Association of Classification Societies (IACS) was eventually established in 1968 and is currently made up of 12 members.

*“IACS Members make a unique contribution to maritime safety and regulation through technical support, compliance verification and research and development. [The vessels are] covered by the classification design, construction and through-life compliance Rules and standards set by the Member Societies of IACS.”*²⁹

²⁶ *Ibid.*, at p.478

²⁷ Mansell, *supra* note 21, at p.128; Pulido Begines, J. L., “The EU Law on Classification Societies: Scope and Liability Issues”, 36(4) *Journal of Maritime Law & Commerce*, (2005), 487, 493

²⁸ Özçayir, *supra* note 24, at p.480

²⁹ IACS “Classification Societies – Their Key Role”

http://www.iacs.org.uk/document/public/explained/CLASS_KEY_ROLE.pdf

In the 1980's IACS underwent a period of "crisis of class" due to transparency problems and accusations that they were not performing their work properly.³⁰ This led IACS to develop in 1990's its own mandatory Quality System Certification Scheme (QSCS) for its members and an IACS Code of Ethics which addressed the transparency problem and ensured that its members were held to a minimum standard.³¹ In 1996 new conditions of class for ships were announced by the IACS Council, aimed at restricting the operations of vessels failing to meet the IACS standards.³² Today, IACS members are the highest performing classification societies and together they cover more than 90% of the world's cargo carrying tonnage.³³

2.2.2. Interaction between Class and Flag States

2.2.2.1. Importance of being "in class"

The industry standards that classification societies assess are referred to in international conventions that Flag States are expected to implement. This is because international convention rules are broad legal rules and do not seek to duplicate class rules which are more technical in nature. For instance, under the Load Line Convention 66, in order for a ship to be issued a certificate of compliance with the LLC 66, it needs to have proven structural strength, which can be fulfilled through the compliance with the detailed class requirements of the ship's structure.³⁴ Indeed, in order for a ship to receive a statutory certificate by the Flag State for its compliance with a given convention, it needs to have been successfully certified by a classification society first.³⁵ In this sense, the compliance with class rules are a precondition for a ship to be in line with the required international law minimum standards that its Flag State

³⁰ Pulido Begines, *supra* note 27, at p.490

³¹ Boisson, P., "Safety at Sea: Policy, Regulations & International Law", Bureau Veritas, 1999, p.403

³² Özcayir, *supra* note 24, at p.481

³³ IACS, *supra* note 29

³⁴ Özcayir, *supra* note 24, p.482

³⁵ Lagoni, N., "The Liability of Classification Societies" Springer, 2007, 254-257

has bound itself to. In other words, if a vessel is “out of class”, it will automatically be in breach with its Flag States requirements under international law.

It is worth noting that the ultimate responsibility for the safety and seaworthiness of a ship lies with the shipowner. Indeed, being “in class” is not even a formal legal requirement. The reality, however, is that without showing that a ship is “in class”, it will not receive insurance and cannot obtain the statutory certificates which are necessary for it to sail.

2.2.2.2. *Port State Control*

In 1994 IACS members started assisting in Port State Control inspections by providing information on changes of class, providing databases on detentions and giving training assistance to the inspecting authorities.³⁶ This cooperation and assistance from classification societies can help to obtain a more complete picture of the safety of the ships entering ports, not only because classification societies have survey records of their clients’ ships, but also because they are often ROs and act on behalf of Flag State administrations.

In fact, classification societies are also ranked under the Paris MOU. In 2001 a study initiated by the Paris MOU found that classification societies were responsible for the detention of 22% of the vessels, and the majority of those detentions, 78%, were “attributed to classification societies acting in the name of Flag States on the ‘black list’ of the MOU.”³⁷ And in 2013, out of all the 688 detentions recorded under the MOU, “15.87% were considered RO related.”³⁸ This shows that the rate of detention of a vessel under PSC is not merely linked to the flag of a vessel. In her analysis, Sabine Knapp found that “the quality of safety expressed either in number of deficiencies or by the probability of detention can be explained based on a

³⁶ Özcayir, *supra* note 24, p.481; see above Chapter 2.1.

³⁷ Silos, Piniella, Monedero & Walliser “The Role of Classification Societies in a Globalised Era: a case study”, 40(4) *Marine Policy & Management* (2013), 384, 387

³⁸ Paris MOU Annual Report 2013 at p.20

https://www.parismou.org/sites/default/files/Paris%20MoU%20Annual%20Report%202013%20revised_1.pdf

relationship between age, size, flag, port states, classification society and ownership of a vessel.”³⁹ She also found that there was a difference in percentage of detention between the EU recognised classification societies and those who were not. This clearly indicates that the choice of classification society also has a role to play in assessing the compliance with international standards.

We have seen that international law and the consequent maritime safety rules hinge on the historical notion of the sovereign State which is reflected in the Flag State system. In a globalised industry which developed its rules internally and organically through business practice, the sole focus on the Flag State imposition of standards would present a skewed reality of the industry. Mechanisms such as PSC inspections and the delegation of statutory functions to expert classification societies try to address the lack of enforcement control by Flag States over their vessels. In fact, the compliance performance of Flag States with international safety standards is not solely dependent on themselves, but also, to a certain extent, on the quality of the classification society chosen by the shipowner and by the administration as an RO. However, despite these attempts, which practically lead to clouding duties and responsibilities, the Flag State system continues to remain a pilaster in international maritime law.

³⁹ Knapp, *supra* note 19

3 – THE ARRANGEMENTS BETWEEN CLASSIFICATION SOCIETIES AND PUBLIC AUTHORITIES

In this chapter we will begin by looking at the role of classification societies in developing international norms and standards, both within the shipping industry and through their direct involvement in intergovernmental fora (classification societies as legislators). In the second part we will explore the delegation of statutory certification duties of the Flag States to classification societies and the ways in which classification societies execute these duties.

3.1. CLASSIFICATION SOCIETIES AS LEGISLATORS: SELF-REGULATION AND AUTHORITY IN INTERNATIONAL FORA

We have seen that classification societies are very well positioned to take up the role of a Flag State for the implementation of international rules. This special position is made use of by IACS in the development of international legislation. On the one hand, IACS can rely on its good reputation to directly and indirectly take part as an unofficial legislator of international law. On the other hand, some States also rely on this influence, without which the quality of the rules on maritime safety and their adequate execution may even be compromised.

3.1.1. Self-regulation and international reputation

Since its inception in 1968, IACS has been working to develop “a uniform course of action by its members and the improvement of the services rendered by them by means of self-regulation.”⁴⁰ The members of IACS are expected to comply with the Association’s codes of conduct, programmes and modes of operation (without which they risk suspension from

⁴⁰ Antapassis, A. M., “Liability of Classification Societies”, 11(3) *Electronic Journal of Comparative Law* (2007), 22, p.5

IACS).⁴¹ In doing so, they also provide for a guarantee to their clients of their quality of services.⁴² In this way, “a classification society being a member of IACS enjoys enhanced reliability in the international field and assists the prestige and role of the Association as a non-governmental organisation.”⁴³ In fact, already in the year that IACS was formed, the Association was granted consultative status at the IMO.⁴⁴

According to classification societies, self-regulation is the best way to regulate the industry and “for a time, it was thought that self-regulation would protect the industry from increasing government intrusion.”⁴⁵ However, beyond the internal self-regulation, there is also within IACS a Statutory Panel Work Programme⁴⁶ which “monitors the IMO and other external regulatory and governmental agency activities and initiatives and develops unified interpretations and responses to these initiatives.”⁴⁷ In this way, the member societies to IACS purport to guarantee a uniform application and understanding of the international instruments which they are expected to implement and execute. This consolidates the members’ position as experts, not only on technical matters pertaining to classification of ships, but also in their interpretation of shipping requirements generally.

Hence, despite their consultative and observer status within the IMO, it is not surprising that IACS takes a proactive role in international discussions on maritime safety.⁴⁸

⁴¹ For example, in 1997 the Polish Register was suspended from IACS for not complying with IACS’ Quality System Certification Scheme. See Pulido Begines, *supra* note 27

⁴² Antapassis, *supra* note 27, p.5

⁴³ *Ibid.*, p.5-6.

⁴⁴ Pulido Begines, *supra* note 27, p. 500

⁴⁵ *Ibid.*

⁴⁶ IACS work programme:

<http://www.iacs.org.uk/publications/IACSWork.aspx?pageid=4§ionid=7&panelid=4>

⁴⁷ Nersesian, R. and Mahmood, S., “International Association of Classification Societies” in *Handbook of Transnational Economic Governance Regimes*, Tietje C., and Brouder, A. Eds., 2009, p.772

⁴⁸ Boisson, *supra* note 31, p.402 and p.407

3.1.2. The benefits of their involvement for the Flag States

Given the above, the benefits for classification societies to self-regulate while at the same time to participate in creating rules in shipping is evident. Nevertheless, their involvement would not be possible if there were not at least an acquiescence on the part of states to have classification societies involved in the process.

As we saw in Chapter 2, Flags of Convenience (and not only)⁴⁹ benefit from the delegation of their Flag State duties to classification societies. Although it is States who decide and vote at the IMO, a classification society with delegated powers is functionally⁵⁰ the body who becomes directly interested in what standards are decided. As such, IACS' lobbying power as an observer – not only for its authoritative opinions as sectoral expert, but also for having members that have a direct interest in executing delegated public duties – is significant.⁵¹

Because it is classification societies who implement rules on behalf of States, it is essential that they both agree and cooperate on the interpretation of the rules decided at the IMO.⁵² In this way, the interpretations developed by the IACS Statutory Panel Work Programme mentioned above will influence the positions taken by many States, and vice versa. Considering that the IACS groups 12 members who act on behalf of governments for more than 100 States, the position developed by the IACS Statutory Panel Work Programme will have a very big influence on how the States within the IMO will position themselves too. It is important to note that although a Flag State may have delegated all of its implementation duties to a classification

⁴⁹ Özçayır, *supra* note 24, p. 482: “more than 100 IMO signatory States have authorised the classification societies to implement some or all of these functions on their behalf.”

⁵⁰ Knudsen & Hassler “IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative process” 35 (2011) *Marine Policy* 201, “In terms of international law, vessel construction and maintenance is a flag state’s responsibility. So are upgrading measures mandated by IMO decisions. However, since flag states – at their best – have delegated these tasks to classification societies, it is the latter who ensure their quality.”, p. 202

⁵¹ *Ibid.*

⁵² Özçayır, *supra* note 24, p.482

society, the State still remains ultimately responsible.⁵³ This is because international law is only binding between States that have agreed on a rule and cannot bind private individuals directly if the rule has not been accepted by the State and incorporated into its legal system. This ultimate responsibility is therefore something which a State cannot avoid, despite delegation and regardless of its wish to be passive in the decision-making or its lax enforcement culture.

A big weakness of the IMO, international law in general, is that it is not able to enforce its rules directly and independently, but rather relies on States who always have a choice not to enforce or even to not adhere to them.⁵⁴ “If ships, their operators, personnel or cargoes are found not to comply with IMO provisions, it is the governments that for one reason or another are not getting the message through to the ships under their flag.”⁵⁵ In this sense, the active role of IACS at the IMO, although without voting power, ensures that the ones who operate within the industry directly, and who have to carry out the actual implementation, are involved. Moreover, from the point of view of the States who delegate, they may want to rely on IACS’ expert position as it will be the classification societies who implement their Convention duties while the States retain the responsibilities.

Classification societies can also be considered as the operational link between IMO rules and Flag State implementation of rules: “the failing implementation by flag states – partly due to reluctance on the part of some to use the services of classification societies – is one effect of the national level being insufficiently coupled to the IMO, and it is the most difficult to get at.”⁵⁶ As Knudsen and Hassler have put it, it may be true that the delegation of State functions to classification societies would lead to improvement of implementation of IMO rules.

⁵³ *Ibid.*

⁵⁴ Mitrussi “Quality in Shipping: IMO’s role and problems of implementation” 13(2004) *Disaster Prevention and Management* 50, 58: “Perhaps the greatest limitation of IMO is its inability to actually enforce the regulations it adopts.”

⁵⁵ Dijkhoorn “Port and shipping management: the role of the IMO” (1993) *Marine Policy* 363, p.364

⁵⁶ Knudsen & Hassler, *supra* note 50, p.203

However, this could lead to begging the politically sensitive questions as to whether classification societies are actually better placed than (some) States to assess the practical implications of the decisions taken at the IMO. If we are to accept this, then the intergovernmental nature of the IMO, based on the Flag State system, becomes more of a superficial screen behind which there are private entities who run the show.

Flag States may also have a commercial interest in delegating their statutory functions to classification societies: a way of promoting an image of trust and reliability of their flag and therefore lead to an expansion of the fleet. A poor compliance performance by a Flag State will be detected by the PSC inspections. If a flag is grey or black listed, its vessels will be more prone to inspections in the future and may be more vulnerable to abuse by port authorities or to a stricter application of some Convention rules during inspections.⁵⁷ Therefore, every Flag State has an interest in having a good reputation (while not necessarily have the interest in complying with all the rules).⁵⁸ One way of improving the flag's record is to delegate some public functions to a private party, such as an IACS member, in order to reduce the risk of being targeted in PSC inspections.

3.2. REGULATING THE RELATIONSHIP WITH FLAG STATE ADMINISTRATIONS

We saw above that there is close cooperation between classification societies, especially IACS members, and the IMO. With the 'crisis of class' there was a need to ensure a minimum standard for delegating state functions to classification societies. This paved the way for the development of the IMO Guidelines for the Authorization of Organizations Acting on Behalf of the

⁵⁷ *Ibid.* p.206

⁵⁸ *Ibid.*

Administration of 1993, adopted in the IMO Resolution A.739(18) and then in the later Resolution A.847(20).

The Resolutions themselves are not legally binding, however they have been integrated into SOLAS through the mandatory Regulation 1 of New Chapter XI-1, thereby making the IMO Resolution compulsory for the SOLAS signatories. Furthermore, the provisions in Resolution A.739(18) were also incorporated into Article 3 of the EU Directive 2001/105 on common rules and standards for ship inspection and survey organisations.⁵⁹ Hence, the substantive rules of the non-binding IMO Resolutions have been incorporated into legally binding instruments.

The concerns voiced in the '90's, during the "Crisis of Class" sparked the need to internationally address the delegation of powers by States to classification societies. The obstacles for the delegation of powers, were deemed to be two-fold:

*"firstly, the articulation of minimum standards of quality for the societies acting on behalf of States, and the establishment of procedures for adequately monitoring the performance of societies acting in such roles. Also necessary was a general regulation of the liability of classification societies, which presupposed a general consensus on the issue of whether and to what extent the classification society is liable, and might be embodied in either an international convention or a self-regulation instrument from the market."*⁶⁰

The efforts made by the IMO mainly address the first concern, meaning that the focus has rather been on the means of delegation and oversight by Flag States, and not so much on the obligations of classification societies and their consequential liabilities.⁶¹ However, the Comité

⁵⁹ Pulido Begines, supra note 27, p.495

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, see also the Convention on the Limitation of Liability for Maritime Claims 1976, as amended by the 1996 Protocol

Maritime International (CMI) did attempt to address liability issues to a certain extent, as we shall see below.⁶²

3.2.1. The IMO Model Agreement: uniform oversight by Flag States

With Resolution A.739(18), the IMO adopted Guidelines for the Authorization of Organizations Acting on Behalf of the Administration. This resolution introduced three main elements in instituting an RO. Firstly, it required each State administration to have a formal agreement with the classification society to whom it was delegating statutory functions. Secondly, it required the establishment of a verification system in order to monitor the activity of classification societies. Lastly, it also set out minimum requirements for classification societies that would need to be fulfilled in order for them to become an RO and carry out statutory functions on behalf of a State. Eventually, in 1997, the Model Agreement for the Authorization of Recognised Organisations Acting on Behalf of the Administration was approved (the IMO Model Agreement). This became a way to give guidance on how to enter into these agreements with classification societies. Nevertheless, although there is a widespread use of the IMO Model Agreement as a basis for many agreements between Flag States and classification societies, it was always accepted that the wording should be adapted in order to reflect the specificities of each legal system.⁶³

Moreover, in 1997, Resolution A.847 (20) on Guidelines to Assist Flag States in the Implementation of IMO Instruments was also adopted (revoked by the 2005 IMO Resolution A.973(24) on the Code for the Implementation of Mandatory IMO Instruments). This Resolution sets out duties for Flag States to help them ensure that the international commitments which they have signed up to, are being followed. For example, it recommends that the Flag States “should establish or participate in an oversight programme with adequate resources for

⁶² Section 3.2.2 *CMI Model Clauses: attempts to tackle Classification Society Liability*

⁶³ Pulido Begines, *supra* note 27, p.496

monitoring of, and communication with, its recognized organizations in order to ensure that its international obligations are fully met”⁶⁴; “it should retain authority to conduct supplementary surveys; and it should provide staff in adequate strength and with adequate expertise for effective field oversight of the recognized organizations.”⁶⁵ Thus, the Resolution makes it clear that the ultimate responsibility for the adherence to international rules rests with the State administration, despite the delegated statutory functions to ROs.

3.2.2. CMI Model Clauses: attempts to tackle Classification Societies’ Liability

In 1999 the CMI drafted Model Contractual Clauses, based on the 1997 Principles of Conduct for Classification Societies from the Centenary Assembly.⁶⁶ The 1997 Principles set out the required standard of care that a classification society is expected to have when performing both statutory and private functions. Adherence to these Principles would be *prima facie* evidence that the classification society has not acted negligently. Thus, the Principles are preventive of any liability.⁶⁷

Part I of the CMI Model Clauses apply to the agreements between classification societies and States for the delegation of powers. Clauses 2 and 3 read in the following way:

“2. In carrying out the duties and responsibilities specified in Annex I, whether pursuant to applicable international agreements, conventions, national legislation, or this agreement, [Classification Society] acts solely as the agent of [Administration], under whose authority or upon whose behalf it performs such work.

⁶⁴ Paragraph 20, IMO Resolution A.973(24)

⁶⁵ Pulido Begines, *supra* note 27, p. 497; see also paragraphs 18-20 in IMO Resolution A.973(24)

⁶⁶ Comité Maritime International “Model Contractual Clauses for Use in Agreements Between Classification Societies and Governments and Classification Societies and Shipowners” New York, May, 1999
<http://www.comitemaritime.org/Uploads/Work%20In%20Progress/Classification%20Societies/Model%20Clauses%20for%20Class%20Society%20Agreements%20-%201999.pdf>

⁶⁷ Pulido Begines, *supra* note 27, p.498 ; see introduction to the CMI “Model Contractual Clauses for Use in Agreements Between Classification Societies and Governments and Classification Societies and Shipowners”

3. 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.”

These clauses make it clear that in all the functions that the classification society carries out on behalf of the State, the ultimate responsibility should rest on the State, given that the classification society only acts as an agent on its behalf. In this sense, regardless of the extent and the details contained in the so-called ‘Annex I’ of the agreement (which describes the specific duties and responsibilities), the CMI Model Clauses apply a blanket rule across the whole spectrum of possible degrees of delegation. Nevertheless, this does not address the variations of duties and responsibilities that there can be in the different arrangements with classification societies. Consequently, according to the CMI Clauses, although there will be varying degrees of duties and responsibilities of classification societies in each specific agreement, these will always be equated to tasks being carried out by the State (for the purposes of liability and defences). This includes the possibility for classification societies to enjoy State immunity.⁶⁸

Moreover, the Model Clauses did try to tackle the need to define the scope and the limitation of liability of classification societies. This, however, was attempted in Part II of the Clauses which proposes Rules of the Societies (which contain the terms of agreements between the Societies and Shipowners), and therefore not to agreements entered into with State administrations for delegated powers. An agreement between the main Shipowner interest

⁶⁸ See Chapter 4 below

groups during the time of drafting was not reached and so Clauses II-8 and II-9 offer alternative wording to liability regimes, with no clarity as to what such a Model Clause would be like. Importantly, the CMI Clauses are in any event intended as “a best-practice drafting aid”,⁶⁹ and not as dictating compulsory contractual terms. Hence, even if there had been a model clause defining the scope and limitation of liability inserted in the CMI Clauses, there would be no obligation on the parties to adopt such a clause in their contract. Nevertheless, the fact that there was an attempt to draft a non-compulsory model clause on the liability of classification societies but to no avail, illustrates how sensitive the issue is for the industry.⁷⁰

3.2.3. EU Legislation: spreading the scope

The EU Directive 2009/15/EC and EU Regulation (EC) No 391/2009 have transposed large parts and of the IMO Resolutions and defined them further. The Directive by in large covers the duties of Flag States described in the IMO Resolutions and makes them binding on the EU Member States. The underlying framework of the Regulation, on the other hand, is as follows: each Member State who wants to recognise and organisation⁷¹, needs to send the request to the EU Commission first, who will finally approve its status as an RO. The rules under the regulation are also directed to the entities seeking approval, and not only to duties of the Member States and the Commission. In this sense the EU framework is more extensive than the IMO Resolutions. Once the Commission has assessed the entity for its recognition, it will enlist the entity as an RO, whose status is recognised on the whole EU territory.

In fact, this EU mechanism centralises the role of the approval of an RO to the Commission – a prerogative normally reserved to the Flag State. Yet given the wide-ranging legislation on

⁶⁹ CMI Model Clauses, *supra* note 66

⁷⁰ For further reading about limitation of liability of classification Societies in contract and tort see Basedow, J., Wurmnest, W., “Third-Party Liability of Classification Societies” (Springer), 2006; Lagoni, “The Liability of Classification Societies” *supra* note 35; Vaughn, B., “The Liability of Classification Societies” University of Cape Town, LL.M 2006; see also below, section 4.2.2 *Convention on Limitation of Liability for Maritime Claims*

⁷¹ Article 8

maritime matters that is regulated under EU law,⁷² this ensures a more uniform assessment of the quality of surveying of EU legislation. Moreover, it means that there is mutual recognition of ROs, bringing them into the scope of the EU freedom of establishment⁷³ and furthers harmonisation between Member States. In practice, any IACS members can be an RO in the EU.⁷⁴ This does not necessarily oblige each Member State to make use of all IACS members to carry out statutory functions, but it means that the Commission approves the use of any of these ROs in a Member State because they all comply with the EU requirements under the Directive and Regulation.

The EU has perhaps made the best attempt at trying to harmonise the delegation of statutory certification duties. It has been able to do so primarily because the Commission is the formal body who recognises organisations, thereby reducing the prerogative for States to delegate for themselves and making the system more coordinated and transparent. However, the maritime industry is global and the ROs will be controlled differently by non-EU States.

⁷² See Ringbom, H., "EU Maritime Safety Policy and International Law" Martinus Nijhoff Publishers, 2008, Chapter 2; Mandaraka-Sheppard, A., "Modern Maritime Law and Risk Management", 2nd. Ed. London, 2009, Chapter 20

⁷³ Regulation (EC) No 391/2009, Article 1

⁷⁴ EMSA Chronological List of Inspections of Recognised Organisations <http://www.emsa.europa.eu/visits-a-inspections/assessment-of-classification-societies.html>

4 – WHAT REMAINS OF THE FLAG STATE SYSTEM?

The notion of the sovereign State as expressed in the Flag State system, and which is central to the legal apparatus of maritime and shipping affairs, is in fact heavily reliant on the private sector, both in regulation and in executing public functions. We will continue to explore this dynamics looking at it through the lens of international feminist jurisprudence, which will highlight the shortcomings of the legal structures around the roles (and consequently the responsibilities) of Flag States and classification societies. In particular, international feminism questions the public and private divide between actors and types of norms,⁷⁵ and also questions the role and the definition of the State⁷⁶. Although feminist jurisprudence has been developed around the role of women in the law, the analysis in this paper will not explore gender-related issues, but rather on how legal constructs in general - and therefore also those that frame maritime law – can be criticised on the basis of feminist jurisprudence.

This theoretical backdrop will be the underlying perspective to this chapter which expands on the conclusions from Chapters 2 and 3. After an introduction to some elements of feminist legal theory in international law, the second section will look at how classification societies have invoked immunity when acting on behalf of states and to what extent this immunity has been, or has not been, recognised in case law. This part will also look at the exclusion of classification societies from the Convention on Limitation of Liability for Maritime Claims and the consequence that this has on classification societies invoking immunity.

⁷⁵ See Chinkin, C., “The Challenge of Soft Law: Development and Change in International Law” 38 *International and Comparative Law Quarterly* (1989), 850

⁷⁶ Knop, K., “Re/Statements: Feminism and State Sovereignty in International Law” 3 *Transnational Law & Contemporary Problems* (1993), 293, 318

4.1 FEMINISM AS A STRUCTURAL CRITIQUE

Much could be said about gender issues in shipping;⁷⁷ however, the scope of this paper is not to address gender problems, but rather to look at how feminism as a way of thinking criticises the structures of the law and how this criticism can be brought into the context of our analysis on classification societies' role in international law. Firstly, we will look at how public and private areas of society have been separated so as to weigh more importance on what happens in the public sphere. Secondly, we will look at how the centrality of the State, which is by its essence public in international law, does not correspond to how various actors engage and interrelate in the international order.

4.1.1 The Public and the Private divide as a basis

There is a general agreement that feminist jurisprudence is not one single theory, but rather a group of theories which have as their core gender issues.⁷⁸ One of the fundamental critiques which brings them together is on the dichotomy of what is considered “public” and “private”. What is generally considered public is governed by male notions of objectivity, whereas the private is left to domesticity and is therefore more subjective. However, “[it] is not just the family which is private. In a capitalistic society, the main part of production is also private. The industrialization process [...] made a large part of the working population wage-earners in the new sphere of private enterprise.”⁷⁹ Extrapolating this from the family context, it has been argued⁸⁰ that this dualism is reflected in the law and forces a conceptual separation between public and private spheres of interest and makes us blind to a proper understanding of the

⁷⁷ Horck, J., “The Gender Perspective in Maritime Education and Training”, *WMU Journal of Maritime Affairs*, 9(2010), No.1, 93-119

⁷⁸ Charlesworth, H., Chinkin, C., Wright, S., “Feminist Approaches to International Law” 85(4) *American Journal of International Law* 1991, 613

⁷⁹ Dahlerup, D., “Confusing concepts – Confusing reality: a theoretical discussion of the patriarchal state” in *Women and the State: The Shifting Boundaries of Public and Private*, Showstack Sassoon, A., 1987, p.106

⁸⁰ Chinkin, C., “A Critique of the Public/Private Dimension”, 10(2) *European Journal of International Law* (1999), 387, 398

influences between these areas. As such, by mere acceptance of the imposed distinction between public and private sectors of the law, we are inevitably lead to having a distorted vision of the powers of different actors.

The distinction between public and private spheres in international law has been explained by Charlesworth, Chinkin and Wright in the following way:

*“Modern international law rests on and reproduces various dichotomies between the public and private spheres, and the "public" sphere is regarded as the province of international law. One such distinction is between public international law, the law governing the relations between nation-states, and private international law, the rules about conflicts between national legal systems. Another is the distinction between matters of international "public" concern and matters "private" to states that are considered within their domestic jurisdiction, in which the international community has no recognized legal interest.”*⁸¹

These authors give examples of how Human Rights only apply between the State and the individual, where for instance torture between individuals is not internationally protected.⁸² The problem of not recognising non-state actors is also evident in armed conflicts, a particularly pressing issue in how to deal with international terrorism.⁸³ These issues are not within the scope of our topic, but they highlight the wider problem of the public/private divide which is present in international law generally.

Drawing this to the discussions of this paper, the matters relating to public concern between States correspond to those matters dealt with by Flag States and the international obligations which they have signed up to follow. On the other hand, the rules for the delegation of Flag

⁸¹ Charlesworth, Chinkin & Wright, *supra* note 78, p.625; Chinkin, *supra* note 80, p. 390

⁸² Charlesworth, Chinkin & Wright, *supra* note 78, p. 629; for further reading see also Romany, C., “Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law”, 6 *Harvard Human Rights Journal* (1993), 87

⁸³ For further reading see Gardam, J. G., “The Law of Armed Conflict: A Feminist Perspective”, in *Human Rights in the Twenty-First Century: a Global Challenge*, Mahoney, E. K. & Mahoney P. eds., pp. 422-24, 430.

State functions to ROs are precisely those ‘private’ matters which fall under their domestic jurisdiction. Thus, this delegation can be considered as a structural blind-spot in international law as it has no formal legal relevance.

4.1.2. The Centrality of the State

The dominant liberal perception of law is that it is objective, and it is in this that it gains legitimacy and authority in the public sphere.⁸⁴ In other words, the ‘Law’ (as an order of norms as a whole) operates in the objectively public sphere, as opposed to all other social or interpersonal orders which are subjective and therefore are private. It is this abstract distinction of the public that allows it to gain power over the private, elevating the supposedly objective nature of the Law to a position over other forms of private, specific and subjective realities. In international law, States are the objective power which regulate public affairs. What occurs within a State is in its ‘private’ domain of national affairs, and therefore does not come within the area of interest of international law. Ironically, physically speaking, States are abstract constructs of power, and in and of themselves fictional entities.

Linking this to classification societies, the dogma that States are the only subjects of international law means that it ignores one basic truth: namely, that private subjects may be just as much (although differently) in control of the creation and execution of international law. We have seen the extent to which classification societies generate maritime norms and standards for certification,⁸⁵ and how they, on top of having a big influence in the development of international rules and guidelines, also implement them when they act as ROs.⁸⁶

⁸⁴ “Although the scientific basis of the public/private distinction has been thoroughly attacked and exposed as a culturally constructed ideology, it continues to have a strong grip on legal thinking. The language of the public/private distinction is built into the language of the law itself: law lays claim to rationality, culture, power, objectivity - all terms associated with the public or male realm.” In Charlesworth, Chinkin & Wright, *supra* note 78, p.627; see also Chinkin, *supra* note 80, pp. 387-395; for an eco-feminist approach to the public/private debate see Plumwood, V., “Environmental Culture: the Ecological Crisis of Reason”, p.15

⁸⁵ Chapter 2.2. *Classification Societies as Public Entities*

⁸⁶ Chapter 3.1. *Classification Societies as Legislators: self-Regulation and Authority in International Fora*

The position of classification societies clearly varies between them and so it is complicated to define their power and scope within the international arena, not least in legal terms. However, it is clear that some IACS members, or at least IACS as an association in its own right, enjoys a privileged position in influencing both the private and the public spheres of operation of the maritime industry. Arguably, this does not marry with the superior objective position of power of Flag States to legislate, whether domestically or internationally, in the maritime field. Additionally, this phenomenon is a further example which questions the utility and truth in upholding the centrality of the State in international law.⁸⁷

Questioning the centrality of the State is not something which has been reserved to feminist legal theory. Myres McDougal, one of the pioneers of the Yale school of international law, describes it in the following terms:

“[T]here is urgent need for a framework of theory and intellectual procedures which might more effectively and economically relate authoritative decision to its larger context and to a preferred world public order... International law would be conceived of not merely in terms of the rules that officials and others use in explaining and justifying decision, but rather as decision itself, combining both authority and control, and constituting a continuous flow of decision of trans-national origin and impact.”⁸⁸

This approach is policy-oriented⁸⁹ and is founded on the vision of a ‘world public order’, where international law is assessed on its ability to achieve basic public order goals.⁹⁰ McDougal and Reisman see international law as having three main components: “Firstly international law is seen as decision itself, rather than merely rules. Second, international law unites ‘authority’ and

⁸⁷ Knop, *supra* note 76, pp. 308, 332

⁸⁸ McDougal, M. & Reisman, W. M., “International Law in Policy-Oriented Perspective”, in *Structure and Process of International Law: Essays in Legal Philosophy and Theory*, Macdonald & Johnston eds., 1983, p.112

⁸⁹ Knop, *supra* note 76, p.335

⁹⁰ *Ibid.* p.336

‘control,’ where authority signifies community expectations about how decisions should be made and who should make them, and control refers to a decision backed by effective sanctions. Third, international law is but one process situated in a larger framework of interpenetrating global processes.”⁹¹ Bearing in mind the function of classification societies, this definition of international law would allow their power and influence to be more adequately recognised than what it currently is. For the first component, there would be more space for classification societies in international law if it were not understood as a set of rules under Article 38(1) of the ICJ Statute. Private individuals also create their own “custom” when they act internationally, as can be seen in the generation of class rules since the creation of classification societies.⁹² For the second component, even some States rely on the expertise and technical authority of classification societies to guide them on which decisions and guidelines to adopt.⁹³ And as for the last component, in some Conventions it is already recognised that the industry certifications are an integral part of the compliance with safety standards⁹⁴ (this is common for laws relating to various technical activities, not unique to the maritime sector, where legislators do not have the knowledge and resources to adequately regulate). Despite this, the centrality of States as the only legislators and subjects is still firmly maintained, ignoring the plurality of actors that inter-relate with one another.⁹⁵

It should be noted, however, that the Yale school of international law is also criticised by some feminist legal theorists⁹⁶ because of the reliance on the classical liberal notions which to some are also problematic (like notions of equality, universalism, participation and rationality).⁹⁷ Yet this simply shows that the critique of the centrality of the State embedded in feminist legal

⁹¹ *Ibid.* pp. 335-336

⁹² See section 2.2. *Classification Societies as Public Entities*

⁹³ See section 3.1. *Classification Societies as Legislators: self-Regulation and Authority in International Fora*

⁹⁴ E.g. Regulation 3-1, Chapter II-1 SOLAS

⁹⁵ McDougal, M. et al., “Human Rights and World Public Order: the Basic Policies of an International Law of Human Dignity” (1980), p.179

⁹⁶ *Ibid.*, pp.612-52

⁹⁷ Knop, *supra* note 76, p.339

theory is not as radical as it may first appear to be. There may be disagreement on a better notion of international law, but the underlying objection to the current framework is shared by various schools of thought. As Knop puts it, “[b]y fetishizing sovereignty, international law has ignored what is actually happening in the international legal community, who the actors really are, and what each one does.”⁹⁸

4.2. IMMUNITY OF CLASSIFICATION SOCIETIES

As we saw in Chapter 3.2., Flag States are encouraged to extend their defences to classification societies when they are granted the status of an RO. This includes allowing classification societies to claim immunity since they are considered to be acting as agents on behalf of states. We will now look at the occurrence of granting immunity to classification societies in some cases and what this generally implies for their liability. Although immunity is a jurisdictional limitation that only States can use to protect themselves from state responsibility, extending this immunity to classification societies in a systematic way adds to the corrosion of the centrality of the State discussed above.

4.2.1. Invoking State Immunity

4.2.1.1. Defining the material scope to invoke immunity

When States – or, rather, public officials or State entities – are accused of committing a wrongful act in the exercise of a public duty, there may be a defence of State immunity. State immunity is not a real defence, as there may still be a breach of the law, but it can be raised in order to bar another State from having the forum to decide upon a given case. In order for the defending State to invoke immunity, the State in which the claim was brought must have

⁹⁸ *Ibid.*, p.335

jurisdiction to hear the case to begin with. If the defence of immunity is successful, it does not imply that the State is exempt from following the law, but that the case needs to be brought before its own courts. Thus, immunity relates to jurisdiction and not to an absolute defence. Although classification societies may have a status of an RO, they do not acquire the nature of a State organ, but are merely delegated certain functions and act as State agents for certain tasks. Therefore, when classification societies have invoked immunity they have done so, not based on their personal scope as an organ of the State (*ratione personae*),⁹⁹ but based on the material scope: the nature of the acts which they perform (*ratione materiae*).¹⁰⁰ Hence, classification societies can only claim immunity for those acts which they carry out on behalf of the State, and not to any other act. Cases involving classification societies using the immunity defence mostly rest on deciding whether the act which caused the damage was carried out while performing a public function on behalf of the Flag State or not.

In Chapter 3.2. we saw that the CMI Model Clause 3 recommends Flag States to grant classification societies the same State defences when they act as ROs. Also the IMO Model Agreement and EU Directive 2009/15/EC take this approach. They imply that in those circumstances where ROs are liable for breaches when performing public functions, there will be a vicarious liability of the Flag State.¹⁰¹ As such, when acting as an RO, classification societies benefit from two hurdles which may protect them from incurring liability. Firstly, they may enjoy jurisdictional immunity as though they were part of a State. Secondly, if a court were to decide that there was a breach in the performance of a public duty by an RO, the ultimate responsibility would still lie with the Flag State. The classification society may be liable towards the Flag State, who bears the responsibility for it, but the terms of this liability would be contained in the delegating agreement and subject to national administrative law. Therefore,

⁹⁹ ILC Draft Articles on State Responsibility Article 4

¹⁰⁰ ILC Draft Articles on State Responsibility Article 5

¹⁰¹ See for instance EU Directive 2011/105/EC Article 6(2) (Erika Package I)

deciding whether or not a classification society is acting within the delegated powers of the agreement with the Flag State, will have great effects on its liability.

Under international law, immunity may be granted to private entities when they perform a task on behalf a State. In theory, this principle is quite straight-forward. However, the wording of the agreement between the Flag State and the classification society will define more specifically the protections available to the RO, with some agreements using the term ‘immunity’ expressly, while others implying it.¹⁰² It is also crucial to be able to clearly distinguish which tasks are of a statutory nature and which belong to class certification. It is quite accepted that the issuance of statutory certifications required under international conventions, such as SOLAS or MARPOL, will be categorised as statutory functions. Yet, it is unclear whether activities relating to the issue of a certificate of class (based on the private contract between the shipowner and the classification society), will also amount to a public function. The uncertainty of this can be seen, for instance, in the requirements of Regulation 3-1, Chapter II-1 SOLAS¹⁰³ which expressly states that a class certificate is a precondition for a ship to be in compliance with the convention.¹⁰⁴

Practically speaking, it may be impossible for classification societies to separate the tasks of class certification from those inspections required for statutory certification. For instance, the IACS unified rules for the structural surveys of oil tankers (URZ 10.1) and bulk carriers (URZ 10.2), developed for the compliance with MARPOL Annex 1 Regulation 13G, were later

¹⁰² Siccardi, F. “Classification Societies’ Regulatory Regime and Current Issues on Liability” London Shipping Law Centre, Siccardi Brigante & C, 2013. The author bases himself on a study carried out by the University of South Hampton which looked at how the EU Directive had been implemented in each Member State (study unavailable). The Dutch and Finnish Administrations expressly state ‘immunity’, while the Danish administration does not in its agreements:

<http://www.dma.dk/SiteCollectionDocuments/CFS/Danish%20RO%20Agreement%202015%20-%20opdatering%20hjemmeside.pdf>

¹⁰³ Siccardi, *supra* note 102

¹⁰⁴ See above section 2.2.2.1 *Importance of being “in class”*

adopted by the IMO in Resolution A 744.¹⁰⁵ In this sense, the class surveys are the same as the ones carried out to assess compliance with MARPOL. “[I]t may be rather difficult, if not even impossible, to identify which part of the survey was of relevance for the classification and which one for the statutory certificate, and, in the same vein, whether negligence only existed with regard to the one or other activity.”¹⁰⁶

4.2.1.2 Examples

There are two cases decided by the US Courts that were rejected based on the classification society invoking immunity for carrying out statutory functions on behalf of the Bahamas.¹⁰⁷ In the *Sundancer*¹⁰⁸ the owners sued ABS for wrongly certifying the compliance of their ship with the SOLAS and LLC rules. The US District Court for the Southern District of New York decided that immunity could be invoked by ABS as the *Sundancer* was registered under the Bahamian flag. Although it was not the issue in that case, the Court also made it clear that there could be no immunity for services regarding class. Thus, the Court deemed that certifying compliance with the SOLAS and LLC rules were within the material scope of statutory duties that were carried out by ABS on behalf of Bahamas. In the *Scandinavian Star*¹⁰⁹ the US District Court of Southern District of Florida relied on the Bahamian Merchant Shipping Act 1976 to confer Lloyds Register State immunity. It decided that Lloyds Register could fall within the personal scope of section 279, therefore implying that the classification society could within the personal scope of invoking State immunity. However, it went on to clarify that, even if Lloyds Register did not qualify as a person within the meaning of the section, it would still be

¹⁰⁵ Boisson, *supra* note 31, p.402

¹⁰⁶ Lagoni, *supra* note 35, p.254

¹⁰⁷ Rhidian Thomas, D., Ed. “Liability Regimes in Contemporary Maritime Law” (London), 2007, pp. 137

¹⁰⁸ *Sundance Cruises Co. v. Am. Bureau of Shipping (The Sundancer)*, 7 F.3d 1077, 1994 AMC 1, [1994] 1 Lloyd's Rep. 183 (2d. Cir. 1993)

¹⁰⁹ *Scandinavian Star*, US District Court (Southern District Florida) 4 June 1993, 336

within the material scope to enjoy immunity because it acted on behalf of the State. This latter interpretation would seem to be more in line with the ILC Draft Articles.

Perhaps a more recent and more significant decision on immunity of classification societies, which has had a big impact on the change and development of legislation in the EU, is the *Erika* case.¹¹⁰ Both the Italian classification society, RINA, and the Flag State, Malta, invoked State immunity before the French Courts. The Maltese immunity was accepted by the Court of First Instance and confirmed by the *Cour de Cassation*. Interestingly, the Court of Appeal clearly stated that it was evident that there was no genuine link of nationality between the *Erika* and Malta and that the attribution of the flag was granted by the Maltese registry for purely commercial purposes. Despite stating that there was no particular connection or genuine nationality link between Malta and the vessel, the Court went on to decide that Malta could still enjoy immunity protection without giving further reasons. By contrast, the French Courts did not accept that the immunity granted to Malta should be extended to allow RINA a State immunity. The Court of First instance rejected the claim all together, whereas the Court of Appeal considered the possibility to extend the notion of a public service to class certification where it was required by the statutory certification. However, it did not express a final judgment on the matter as it deemed that RINA had waived its right to immunity by not invoking it since the beginning of the proceedings. The *Cour de Cassation* affirmed that RINA had revoked its right to immunity and did not express itself on the matter. The *Erika* case, therefore, reflected on the possibility of extending class certification to a statutory function; yet there is presently no clear interpretation on this matter.¹¹¹

¹¹⁰ Tribunal de Grande Instance de Paris 11ème chambre – 4ème section, (16 January 2008), n.9934895010 (First Instance); Cour d’Appel de Paris Pôle 4 – Chambre 11 (30 March 2010) n.08/02278 (Court of Appeal); Cour de Cassation, arrêt n.3439, 25 September 2012, (10-82.938) (Supreme Court)

¹¹¹ Siccardi, *supra* note 102

A consideration to be made from all this is that one given classification society may be subject to a wide variety of liability definitions and regimes for each State that it is an RO for. From the point of view of the classification societies, it may be more practical if one liability regime and interpretation were to apply for all States as this would give them more legal certainty of their responsibilities and liabilities within the company. On the other hand, one could also suppose that this uncertainty also gives classification societies the flexibility and possibility to argue in favour of the widest definition of a statutory function on a case-by-case basis, in order to fall within the remit of State immunity and avoid liability all together.

4.2.2. Convention on Limitation of Liability for Maritime Claims

Chapter 3.2. briefly mentioned the attempt by the CMI to come up with a liability regime expressed in the Model Clauses for contracts between shipowners and classification societies. This attempt did not lead to any significant result given that Clauses II-8 and II-9 were largely left in blank. Moreover, in terms of liability regulated in international conventions, classification societies are also not one of the persons who may benefit from a limitation of liability under the Convention on Limitation of Liability for Maritime Claims 1976.¹¹² The persons entitled to limit liability are shipowners, charterers, managers, operators, insurers and salvors, and the all the persons rendering a service in connection to the salvage

In this regard, when it is deemed that a classification society has acted negligently or recklessly in its classification duties, it will not be able to limit its liabilities against the damage caused, meaning that all the damages suffered by the claimant will have to be paid. Consequently, it is essential for classification societies to stipulate a liability regime in the service contract with the shipowner. Nonetheless, depending on the clauses of the contract and jurisdiction, this may

¹¹² Article 1

still not prevent claims by third parties to be brought against them.¹¹³ This is, of course, also due in part to the fact that there was no agreement at the CMI on a Model Clause. The scope of this paper does not permit a deeper analysis into the liability claims brought against classification societies under contract and tort law. However, it is important to bear in mind that where the operation of a ship results in some form of damage, the liability may be limited for the shipowner, whereas there is no international regime for limiting liability for classification societies. It is therefore not surprising if there were a sentiment that classification societies are vulnerable to being sued.¹¹⁴

Accordingly, classification societies have a strong interest to claim that the functions which they carry out fall under their public function as ROs as this will give them the chance to invoke State immunity. This also means that there is a tangible economic motive for them to extend and to interpret their class functions as statutory duties wherever possible. Thus, the exclusion of limitation of liability for classification societies in maritime claims is also a partial driving force behind the wish to intertwine and confuse the private role with the public one; and an additional ingredient in stirring up the paradigm of the centrality of the State.

¹¹³ *Otto Candies L.L.C. v. Nippon Kaiji Kyokai Co.*, 346 F.3d 530, 2003 AMC 2409 (5th Cir. 2003); and *Sundance Cruises Co. v. Am. Bureau of Shipping (The Sundancer)*, 7 F.3d 1077, 1994 AMC 1, [1994] 1 Lloyd's Rep. 183 (2d. Cir. 1993). Contrast these with *Mariola Marine Corp v Lloyd Register of Shipping (Morning Watch)*, [1990] 1 Lloyd's Rep. 547; and *Marc Rich & Co., A.G. v. Bishop Rock Marine Co., Ltd. (The Nicholas H)*, [1996] 1 A.C. 211, [1995] 2 Lloyd's Rep. 299 (H.L.).

¹¹⁴ Lagoni, N., "The Liability of Classification Societies" Springer, 2007, p.304

5 – CONCLUSION

In this paper we have looked at the relationship that classification societies have with the public domain: from States' increased confidence in classification societies' expertise, their influence at the IMO, to the agreements with States to act as ROs. We have also looked at the implications of this relationship, for instance at the effects of extending State immunity and the exclusion of classification societies from the Convention on Limitation of Liability for Maritime Claims. These implications are also political in nature and they raise questions about the jurisprudential paradigms within which maritime law is developed and applied. International feminist jurisprudence was proposed as one way of exploring this issue. The suggestion is that the relationship is not unique to the maritime industry, but that it rather fits with the wider debate on redefining or dismantling the boundaries between public and private spheres of the international order.

For the purposes of exploring and researching this further, it would be interesting to have access to agreements entered into by one single classification society with many different Flag States. It has been documented that the difference in the performance of a classification society are likely to be impacted by the Flag State and owner of a vessel.¹¹⁵ Moreover, efforts to collect and compare the delegation agreements in the EU have also been made.¹¹⁶ To have a better understanding whether there is a causal link between the legal content of a delegation agreement and the conduct of a classification society as an RO, a comparative research into both the performance and the agreement clauses would be necessary. This would hopefully shed some light on how to develop a system (assuming it were necessary), for delegating State functions

¹¹⁵ Knapp's third finding, *supra* note 19

¹¹⁶ See note 102

to classification societies, taking into account the weaknesses of the current legal framework which inadequately defines this delegation internationally.

In light of the challenges that international law faces in keeping a strict positivistic division between public and private actors, it has been proposed that the rules relating to ROs should focus less on the formal relationship with States and be more function-based and policy-driven. If this relationship were defined based on what the both entities actually do, there could be a more honest structure to indicate the roles, duties, and responsibilities (and as a consequence liabilities) of classification societies and States. Delegating public functions to classification societies warrants much more legal certainty about their assigned role in maritime safety, while recognising that they are both public and private vital actors in the industry. The disparity in legal traditions between States in delegation means that the current international scenery is obscure and not properly characterised. Lack of legal certainty, not only is a detriment to the wider maritime industry and to affected stakeholders, but it also creates the potential for abuse by those who are in the position to benefit from this uncertainty. The theoretical discussions about international law that advocate for non-State actors to be recognised for their power in the development and execution of international law, underscore this problem. Yet, these discussions have not been extended to the maritime industry: an industry which is highly dependent on private actors having a public function.

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