

ASSOCIAZIONE ITALIANA DI DIRITTO MARITTIMO



CMI Questionnaire on Classification Societies

Question 1:

Is there any legislation (or regulation) specifically dealing with the classification activities of Classification Societies in your country?

The Italian legislation in the matter of classification activities of Classification Societies has been largely enacted in pursuance of the EU Regulation. In this respect:

- the Legislative Decree 14 June 2011 n° 104 has implemented the Directive n° 2009/15/EC of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations;
- the Regulation (EC) n° 391/2009 of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organizations is binding and directly applicable (and therefore is part of the Italian legal system).

Question 2:

On what basis does your court retain jurisdiction in respect of a third-party claim against a Classification Society:

- . *domicile of the defendant,*
- . *locus delicti,*
- . *joinder with other defendants.*
- . *Rules of the Society*
- . *others?*

1) The Italian courts have been sought twice on issues of jurisdiction arising out of third-party claims filed by a third party. Both issues have been adjudicated in the context of *lis pendens* cases and the courts denied the Italian jurisdiction.

In the first case (*Registro Italiano Navale v. Copeco Maritime N.V., Pixie Corporation and*

Aida N.V., in *Diritto Marittimo* 1998, 1156) the Court of First Instance of Genoa, by order dated 7 February 1996 stayed an action brought against RINA by the buyers of a ship because such buyers had firstly sought the High Court of London.

In the second case (*I.O.P.C.F. v. Registro Italiano Navale and others*) regarding the sinking of m/t “Erika”, the Italian Supreme Court (“Corte di Cassazione”) with judgement 17 October 2002 n. 14769 applied art. IX, paragraph 1 of the CLC 1969 upholding the lack of the Italian jurisdiction.

2) Notwithstanding the above it is worth pointing out that the matter of the litigations arising out of a third-party claim against a Classification Society is largely influenced by the applicable law that, in tortious actions, is the *lex loci commissi delicti*.

In the European Union, with the entry into force of the Regulation (EC) n° 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (“Roma II”) the search of the applicable law is simplified inasmuch Article 4.1 quotes: “*The law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur*”.

Question 3:

How many cases – if any – concerning the liability of Classification Societies to third parties, have been decided in your country?

The cases which have been published on the Italian legal reviews are six, namely:

- Supreme Court (“Corte di Cassazione”), 2 March 2018 n° 4915, *Top Immobilier SCP v. Lloyd’s Register Group Services Ltd. (The Redwood)*, *Dir. Mar.* 2018, 899;
- Court of Appeal of Genoa, 25 June 2014, *Lloyd’s Register of Shipping v. Argos Shipping Agency (The Redwood)*, *Dir. Mar.* 2016, 125;
- Court of First Instance of Genoa, 24 February 2010, *Argos Shipping Agency v. Lloyd’s Register of Shipping (The Redwood)*, *Dir. Mar.* 2011, 230;
- Court of Appeal of Ancona, 2 August 2017, *Tranquillidad Charter v. Istituto Giordano*, *Dir. Mar.* 2017, 1079;
- Court of Appeal of Genoa, 27 November 1991, *Francesco Verani Masin di Castelnuovo and others (The Tito Campanella)*, *Dir. Mar.* 1992, 432;
- Court of First Instance of Savona, 29 October 1990, *Francesco Verani Masin di Castelnuovo and others (The Tito Campanella)*, *Dir. Mar.* 1991, 423.

Question 4:

On which of the following subject matters were these decisions rendered:

- *sinking or damage to a ship including pollution damage?*
- *action by cargo owners or their insurers or by charterers?*
- *sale of a secondary ship?*
- *others?*

The *Redwood* decision adjudicated a dispute arising out of a claim brought (in tort) by the charterers against the Classification Society based on its negligence in the issuance of a provisional certificate to a vessel (who resulted to be unseaworthy) in order to let her perform the sea passage up to the port of repairs.

The Court of Appeal of Ancona decided on a tortious action brought by a buyer against the Society which had certified the seaworthiness of a second-hand leisure boat.

The case *Tito Campanella* was relating to a civil suit brought in the criminal action against the shipowners by the relatives of some crew members who lost their life in the sinking of the ship.

Question 5:

What is the legal basis used or considered in the decisions rendered, in your country, in cases of third-party claims against Classification Societies:

- *tort,*
- *duty of care,*
- *negligent misrepresentation,*
- *reliance on the classification certificate,*
- *others?*

The legal basis used in the *Redwood* was to ascertain whether the claimant (the charterer) had discharged the burden of proving that, when entering into contact with the owner, it had actual knowledge of the certificates issued by the Classification Society and relied upon them. In this light the claim of the charterer based on reliance of the classification certificates was dismissed because it resulted that the charterer entered into the contract with negligence *i.e.* without giving due consideration to such certificates.

The legal basis adopted in the case decided by the Court of Appeal of Ancona was to give acknowledgement to the public nature of the classification activity so that in default of a truthful certification the Classification Society remains liable vis á vis the third-party buyer.

The liability of the Classification Society in the *Tito Campanella* case was focused on the

grounds that the Society had failed to properly inspect the ship and detect her condition so that the classification activity turned to be inadequate.

Question 6:

Has a court of your country imposed liability on a Classification Society on the basis of insufficiency or incompleteness of their Rules?

No decision has ever been published in Italy stating the liability of Classification Societies on the basis of insufficiency or incompleteness of their Rules.

Question 7:

*Is a certificate of classification considered in your country as a certificate of seaworthiness?
If so, what is the reasoning?*

No, there are no rulings rendered by the courts of Italy upholding that a certificate of classification is considered in Italy as a certificate of seaworthiness.

Question 8:

What is the importance given, by your courts, in their reasoning on the liability of classification societies towards third parties, to the rules and regulations of the Society?

In the *Tito Campanella* case the Court of Appeal held that if the rules and regulations of the Society are not adequate to ensure safety of navigation, those rules must be supplemented with the international rules governing the matter. In this light, the Court established the liability of the Society because - although the verification it had carried out on the conditions of the ship was compliant with its rules and regulations - it was not accurate enough pursuant to the provisions of Rule 19 of SOLAS, of the Paris MOU and of the Italian Presidential Decree n° 1154/1972 concerning safety of navigation and the human life at sea.

In the other cases no importance was given by the courts to those rules and regulations.

Question 9:

What are the defenses available to a Classification Society sued in tort by a third party (assuming

that the facts of the matter are not disputed)?

1) So far the statutory activity of the classification activity is concerned, special mention has to be made to the recent ruling rendered on May 7, 2020 by the European Court of Justice in the case C:2020:349, LG and others v. RiNA SpA and Ente Registro Italiano Navale, in the matter of immunity of the Classification Societies when performing ship certification.

The case arose out of the sinking of the m/f “Salam Boccaccio ’98” in the Red Sea on February 2006 causing the loss of more 1,000 lives. The ship was sailing the flag of Panama, but the classification and certification operations had been carried out – since 1999 – by RiNA SpA and its (then) controlling body Ente Registro Italiano Navale (hereinafter: “RiNA”).

The action for recovery was brought before the Court of First Instance of Genoa by some relatives of the deceased persons who claimed the negligence of RiNA in the performance of the above mentioned operations. RiNA objected the immunity from Italian jurisdiction (having acted upon delegation of the Republic of Panama).

In the context of such litigation the Court of Genoa decided to stay the proceedings and refer the following question to the ECJ for a preliminary ruling: *“Are Articles 1(1) and 2(1) of Regulation n° 44/2001 [on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters within the EU] to be interpreted .. as preventing a court of a Member State, in an action in tort, delict or quasi-delict in which compensation is sought for death and personal injury caused by the sinking of a passenger ferry, from holding that it has no jurisdiction and from recognizing the jurisdictional immunity of private entities and legal persons established in that Member State which carry out classification and/or certification activities in so far as they carry out those activities on behalf of a [third] State?”.*

In its judgment the ECJ, after having held that “it is for the referring court, not the Court of Justice, to assign a legal classification to those operations in that regard”, the ECJ has drawn the path that the referring court (*i.e.* the Court of Genoa) has to follow; in this respect:

- *“it is irrelevant that certain activities were carried out upon delegation from a State, since the Court has held, in that regard, that the mere fact that certain powers are delegated by an act of a public authority does not imply that those powers are exercised iure imperii ... such a conclusion is not disproved by the fact that those classification and certification operations were carried out by the RiNA companies on behalf of and in the interest of the Republic of Panama. The Court has already ruled that the fact of acting on behalf of a State does not always imply the exercise of public powers”;*
- *“the fact that certain activities have a public purpose does not, in itself, constitute sufficient evidence to classify them as being carried out iure imperii, in so far as they do not entail the exercise of any powers falling outside the scope of the ordinary legal rules applicable*

to relationships between private individuals ... Although the RiNA companies activity is intended to ensure the safety of a ship's passengers, that does not mean that their activity stems from the exercise of public powers";

- *"it follows from the foregoing that, subject to the checks to be carried out by the referring court, the classification and certification operations, such as those carried out on the vessel 'Al Salam Boccaccio '98' by the RiNA companies, upon delegation from and on behalf of the Republic of Panama, cannot be regarded as being carried out in the exercise of public powers within the meaning of EU law, with the result that an action for damages in respect of those operations falls within the concept of 'civil matters and commercial matters', within the meaning of Article 1(1) of Regulation n° 44/2001, and falls within the scope of that Regulation".*

Finally, examining the further plea of RiNA based on the principle of customary international law concerning immunity from jurisdiction, it has been held that such a principle means that a State cannot be subject to the jurisdiction of another State: *"However, in the present state or international law, that immunity is not absolute, but is generally recognised where the dispute concerns sovereign acts performed iure imperii. By contrast, it may be excluded if the legal proceedings relate to acts which do not fall within the exercise of public powers ... In the present case, as the Advocate General stated in points 108 to 128 of his Opinion, the immunity from jurisdiction of bodies governed by private law, such as the RiNA companies, is not generally recognised as regards classification and certification operations for ships, where they have not been carried out iure imperii within the meaning of international law".*

- 2) In cases concerning tort liability, a Classification Society sued in tort by a third party can rely on the general rule resulting from Articles 2043 and 2697 of the Italian Civil Code according to which it is upon the claimant the burden to prove that:
 - the Classification Society has committed a wrongful act;
 - the claimant has suffered unjustified injury and
 - the casual nexus exists between the wrongful act and the injury.
- 3) More specifically, the Classification Society can object against the alleged third-party reliance on the classification and certification by arguing that such claimant failed to bring evidence:
 - i- that it gained actual knowledge of the issued certificates before entering the relevant contract (of purchase, charter party or insurance);
 - ii- that it entered into the contract (with the seller, the shipowner or the insurer) on the basis of such certificates (and not from other sources of information like those coming from its contractual counterpart).

Question 10:

Have Classification Societies the possibility to invoke, in your country, the limitation of liability inserted in their rules or in the classification certificates as a defense against a tort action of a third party? If so please expand.

Under Italian law limitation of liability clauses inserted by Classification Societies in their rules cannot be invoked by them as a defense against a tort action of a third party. In fact such clauses have a contractual nature (and it is a debatable issue whether they can be opposed to the contractual counterpart). In the tort situation, such clauses cannot be opposed by virtue of Article 1372 of the Civil Code which quotes: “A contract does not produce effects with respect to third parties except in cases provided by law”.

Question 11:

Is, on one hand personal injury or death allegedly caused by negligence of a Classification Society and, on the other hand, economic loss, treated by your courts according to the same principles of law or different ones?

In such a case please explain the differences.

Any harmed person (or anybody deriving his/her rights) suffering personal injury or death allegedly caused by negligence of a Classification Society is entitled to claim damages. The same is for any person suffering economic loss.

The right to life and to physical integrity is protected by Article 2 of the Italian Constitution and their violation (homicide/personal injury) is sanctioned by the Criminal Code.

Question 12:

Please explain briefly the rules of procedure applied and of investigations carried out in your country in such matters concerning Classification Societies liability with particular emphasis on the role of:

- . private or court experts;*
- . witnesses.*

- 1) The rules of procedure that the courts have applied in Italy in order to adjudicate cases concerning Classification Societies liability have been the rules of the code of civil procedure. The ordinary course of a civil proceeding is shaped in a first stage (before the Court of First

Instance), a second stage (before the Court of Appeal) and, for errors of law only, a third stage (before the Supreme Court).

The first concept to be clarified, particularly for the benefit of Anglo-American lawyers, is that under Italian civil procedure there is no distinction between pre-trial and trial stages as there is in the common law countries. This is so because there is no such defined stage as a trial stage in that in the preparatory stages (*"Istruttoria"*) there are included activities which common law lawyers would expect to find at the trial, and at the end of the preparatory stage all that remains to be done is for the parties to lodge with the court the pleadings, the conclusions and the supporting documents so that the panel of judges may consider the matter and render its decision in due course. Therefore, almost all the procedure is in writing and certainly nothing which has not been reproduced in writing is considered by the panel of judges when they render their decision.

Whenever the facts of a dispute require specific technical knowledge the enquiring judge may appoint an expert at any hearing before him and will fix the date of the hearing at which the expert will have to appear in court. When the judge appoints the expert, he also gives the parties a deadline within which they may appoint their own experts. The function of the court's expert is to assist the judge with his technical knowledge and by way of reports or notes in relation to such matters as the judge may think fit. The conclusions of the expert appointed by the judge are not binding and constitute only one of the elements which contribute to form the judge's view during the "pre-trial" stage. Any written reports or notes will form part of the court's bundle which will in due course be transmitted to the panel of judges.

Evidence may be obtained from witnesses upon application by the parties. Such an application is made to the inquiring judge by way of presentation of a list of witnesses to be called. The application must also contain, like that relating to the formal examination of a party, a list of questions to be put to the witness, so that the judge may consider first of all whether the persons indicated by the parties, with reference to their capacity and relation to the parties, may be heard as witnesses, and, secondly, whether all the intended questions are relevant or admissible. The Judge will issue an order, which can be appealed immediately to a panel of three judges, whereby he or she may shorten the list of witnesses if he or she thinks the number is excessive and he or she will delete the names of those witnesses which cannot be heard by law.

- 2) It is worth pointing out that Title I of the Fourth Book of the Italian Maritime Code (*"Codice della Navigazione"*) – under the heading "Summary Proceedings" sets forth the rules with the scope and the functioning of the Boards of Inquiry within the Coast Guard. These are bodies composed of officers of the Coast Guard having the task to carry out investigations on any maritime casualty occurring in their area of territorial competence. The Maritime Code assigns

to such Boards of Inquiry administrative functions (mainly those aimed to verify whether the ship under inquiry complied with the safety rules to the benefit of the transported persons and goods) and the result of their investigations can be used as evidence in the proceedings before the Civil and Criminal Courts that can be instituted on a later stage.

There are two types of inquiries of the Board of Inquiry:

- summary inquiry where an investigating maritime officer of the Coast Guard draws a simple report with the traces of the casualty and the measures taken in view of preserving the evidences of the accident;
- formal inquiry where the Board of Inquiry made of five members is to ascertain the causes and the responsibilities of the accident. The formal inquiry can be organized under request of the concerned parties and must be ordered without request if the report of summary inquiry or reliable information shows that the fact could have been caused through fraud or fault.

Question 13:

Would a third-party claim against a Classification Society be subject to any time limitation or time bar in your country?

A third-party claim against a Classification Society is subject to the time bar that the statute of limitations establishes for the actions in tort (Article 2947 of the Civil Code). Such a time bar is five years.

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