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JUDICIAL DEVELOPMENTS IN THE ERIKA CASE: LIABILITY FOR OIL POLLUTION AT SEA AND UNPREDICTABILITY

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JUDICIAL DEVELOPMENTS IN THE ERIKA CASE: LIABILITY FOR OIL POLLUTION AT SEA AND UNPREDICTABILITY (1)

Abstract

Erika case has given rise to several decisions issued by the French criminal courts and the Court of Justice of the European Community.

If the decision of the Court of Justice may be read as a fundamental statement on the coexistence between the international system of liability for oil pollution at sea and the European Directive on waste, the decisions of the French criminal courts have been a sort of "contradictory discussion" over the fundamental principles of liability for oil pollution at sea, especially with regard to the "canalization" of responsibility on the shipowner and its limits.

The analysis of the decisions on the *Erika case* demonstrates that a fundamental question like "Who pays for an oil spill at sea?" may receive unpredictable answers. In this context it could be useful to starting a discussion based on some "policy concerns" in order to propose predictable solutions for the future (God forbid!).

1. *Introduction.*

On 12 December 1999, the Erika, a Maltese flag single-skinned tanker

(1) Text of the speech delivered at the International Workshop "*Carriage Of Dangerous Goods By Sea: Maritime Education and Training*", Messina, 10-11 July 2015.

that was carrying heavy fuel oil, broke into two and sank off the Brittany coast, causing severe pollution in the west coast of France.

The Erika was owned by the Maltese company Tevere Shipping and time chartered to Selmont International Ltd (Bahamas). Selmont chartered the ship to Total Transport Corporation (Panama) for the carriage of heavy fuel oil (sold by Total International Ltd to Enel S.p.A.) from Dunkirk to Leghorn. The Erika was classified by RINA S.p.A. and managed by the Italian company Panship Management Services.

On 15 December 1999, the investigating magistrate and public prosecutor from the Paris Tribunal de Grande Instance brought criminal charges ("*information judiciaire*") against 15 defendants (including the main shareholder of Tevere Shipping, the legal representatives of Panship Management Services, Total S.A., Total Transport Corporation, Total International Ltd, and RINA: (***a***) for endangering human life (under Article 223.1 of the French Criminal Code); and (***b***) for causing oil pollution at sea and deliberately failing to take measures to prevent a hazardous incident from occurring (under Article 8 of Law No. 83-5835 of 5 July 1983).

Around 120 civil parties claimed damages, for a total of more than EUR 1 bn, including the French government (which claimed EUR 150 mn), the regional and local authorities of the coasts that suffered the pollution, and various associations, private companies and individuals (2).

The Erika case gave rise to several decisions — from French criminal courts and the Court of Justice of the European Union (3).

If the decision of the Court of Justice can be considered a fundamental declaration on the coexistence between the international system of liability for oil pollution at sea and the European Directive on waste, the decisions of the French criminal courts are a type of "contradictory discussion" of the fundamental principles of liability for oil pollution at sea, especially with regard to the "channelling" of liability to the shipowner and the extent thereof.

The following brief analysis of the decisions in the Erika case demonstrates that the answer to a fundamental question, such as: "Who pays for an oil spill at sea?" could be unpredictable.

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(2) The liability action regarding the Erika incident was brought before the French criminal courts: this choice was not considered the "best path" by P. Bonassies (*Affaire* Erika*: Et si les victimes avaient agi devant les juridictions civile?*, in *Dr. mar. franç.*, 2014, p. 103 ff.).

(3) This paper does not consider Italian Supreme Court Decision No. 14769 of 17 October 2002, in *Dir. mar.*, 2003, p.139 regarding jurisdiction issues (in this respect, see E. Rosafio, *Profili di responsabilità e giurisdizione in materia di ambiente marino*, in *Dir. mar.*, 2014, p. 358 ff., and p. 374 in particular).

2. *The case before the French criminal courts and the liability claim.*

2.1. *The liability of RINA (for "certification" activities performed on behalf of the flag state).*

A) The preliminary issue of immunity from jurisdiction

As a preliminary issue, RINA claimed immunity from jurisdiction on the ground that its certification activities have to be qualified as acts in the exercise of the sovereign authority of the flag state — because they were performed on behalf of the flag state (Malta).

The positions of the French criminal courts were not univocal on this point:

(*a*) The **Tribunal de Grande Instance de Paris** held (4) that the immunity from jurisdiction does not apply to the classification societies which perform certification activities on behalf of the flag state because "*l'activité des sociétés de classification est d'ordre privé, réalisée à la demande du propriétaire, en exécution d'un contrat conclu avec lui*".

(*b*) The **Cour d'Appel de Paris** held (5), in contrast, that:

(*i*) they are both "*activité*[s] *de service public*", namely: (***x***) "certification" activities (i.e., the issuance of statutory certifications attesting a ship's compliance with the safety standards under the current international regulations) performed by the classification societies on behalf of the flag state, and (***y***) "classification" activities (i.e., the issuance of certificates of class confirming that the requirements laid down in rules and standards established by a certain classification society were met during design and construction of a certain ship and are maintained during operation) performed by the classification societies pursuant to SOLAS and Load lines conventions;

(*ii*) RINA, on the basis of the above, as a general rule, "*est ainsi investie d'une prérogative de puissance publique et doit bénéficier de l'immunite de juridiction*"; but

(*iii*) RINA waived immunity from jurisdiction, so it cannot be claimed because: (***x***) Malta (i.e., the flag state) did not request immunity from jurisdiction in favour of RINA but in favour of the Malta Maritime Authority; (***y***) RINA did not claim immunity during the preliminary investigations carried out by the French public prosecutor; instead, it requested only the dismissal of the case and actively participated in the preliminary criminal proceedings; and (***z***) RINA tried to start a civil claim

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(4) Tribunal de Grande Instance de Paris, 16 January 2008, in *Dir. mar.*, 2008, 247, with a comment by P. Bonassies.

(5) Cour d'Appel de Paris, 30 March 2010, in *Dr. Mar. Franç.*, 2010, p. 858, with comments by P. Boisson, P. Bonassies, B. Bouloc, P. Delebecque and R. Gouilloud.

before Italian courts (which declared not to be competent to hear the case), seeking a ruling that it had no liability in the Erika case.

(*c*) The **Cour de Cassation** upheld (6) the above ruling of the Cour d'Appel de Paris, also finding that RINA's participation in the preliminary criminal proceedings constituted conduct contrary to "*une éventuelle intention de se prevaloir de cette immunité*".

Immunity of states from jurisdiction is a generally recognised rule under public international law founded on the principle "*par in parem non habet jurisdictionem*". On the basis of this rule, a state (or any other entity empowered by a state) may not be brought before the courts of another state for acts performed in the exercise of sovereign authority of the first state (i.e., *acta iure imperii*) (7).

Under Article 94 of the 1982 United Nations Convention on the Law of the Sea ("UNCLOS"), the flag state has the duty to "*take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to: a. the construction, equipment and seaworthiness of ships*" and that "*such measures shall include those necessary to ensure that each ship [...] at appropriate intervals, is surveyed by a qualified surveyor of ships* [...]".

This "certification" activity is the expression of sovereign authority by the flag state and may be delegated "*to organisations recognised by* [the public administration]" of the flag state under Regulation 6 of the 1974 International Convention for the Safety of Life at Sea ("SOLAS") (8).

It is therefore clear that the nature of the "certification" activity performed by RINA on behalf of the flag state is an "*activité de service public*" (9) and is covered by the state immunity rule, as confirmed by the

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(6) Court de Cassation, 25 September 2012, in *Dir. mar.*, 2012, 1269, with comments by F. Berlingieri, P. Bonassies and L. Schiano di Pepe.

(7) On the immunity of states from jurisdiction in general, see, among others, R. Luzzatto, *La giurisdizione sugli Stati stranieri tra Convenzione di New York, norme internazionali generali e diritto interno*, in *Comunicazioni e studi*, XXIII, 2007, 7 ff.; N. Ronzitti - G. Venturini (eds.), *Le immunità giurisdizionali degli Stati e degli altri enti internazionali*, Padova, 2008, *passim*; R. Luzzatto - I. Queirolo, *Sovranità territoriale, "jurisdiction" e regole di immunità*, in S.M. Carbone - R. Luzzatto - A. Santa Maria (eds.), *Istituzioni di diritto internazionale*, 4th ed., Torino, 2011, p. 235 ff.

(8) On the duties of the flag state in general, see S. Sucharktul, *Liability and Responsibility of the State of Registration or the Flag State in respect of Sea-Going Vessels, Aircrafts and Spacecrafts Registered by National Registration Authorities*, in *Am. Journ. Comp. L.*, 2006, p. 409 ff.; L. Schiano di Pepe, *Inquinamento marino da navi e poteri dello stato costiero. Diritto internazionale e disciplina comunitaria*, Torino, 2007; J.A. Witt, *Obligations and Control of Flag States*, Berlin-Münster-Wien-Zürich-London, 2007; J.N.K. Mansell, *Flag State Responsibility - Historical Development and Contemporary Issues*, Berlin-Heidelberg-New York, 2009; C. Ingratoci, *Flag State Control*, in F. Pellegrino (ed.), *Sviluppo sostenibile dei trasporti marittimi nel Mediterraneo*, Napoli, 2013, p. 493 ff.

(9) See *W. Angliss and Co. (Australia) Proprietary Ltd. v Peninsular and Oriental Steam Navigation Co. Ltd.* [1927] 28 *Ll. L. Rep.* 202, at 214, stating that classification societies occupy "a public and quasi-judicial position"; *March Rich & Co. AG v Bishop Rock Marine Co. Ltd. (the "Nicholas H")* [1995] 2 Lloyd's Rep 299 (H.L.), at 316, where Lord

Cour de Cassation (and previously by the Cour d'Appel de Paris) (10). From this perspective, the distinction underlined by the Tribunal de Grande Instance de Paris between the ship-owner/classification society relationship ("*d'ordre privé*" relevant to the case) and the Malta State/classification society relationship (involving a matter of sovereign authority not relevant to the case because — according to the court — it is a type of *res inter alios acta*) seems to have no sense. But the nature of the "certification" activity does not depend on such relationships, because it is a matter involving the exercise of public powers connected to the duties of the flag state regarding the security of navigation and the seaworthiness of the vessels that fly its flag (11). In reality, as mentioned, both functions of classification societies (i.e., certification and classification activities) are essential to combat "substandard shipping" (12), so they are indeed of public interest (13).

B) The liability issue

The 1969 Brussels International Convention on Civil liability for oil pollution damage (the "CLC", as amended in 1992) (14) provides a "channelling" form of strict liability against the registered shipowner that — at

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Steyn states that classification societies act in the public interest and fulfill a "role which in its absence would have to be fulfilled by states".

(10) In the same sense, see Administrative Court of Liguria Decision No. 1569 of 12 September 2007, *Abdel Naby Hussein Mabrouk Aly* c. *RINA*, in *Dir. mar.*, 2008, p. 1449, with a comment by Turci; L. Schiano di Pepe, *Brevi note (di diritto del mare) in tema di immunità delle società di classificazione a margine della pronuncia della Corte di Cassazione francese nel caso* Erika, note to the Cour de Cassation, 25 September 2012, cit., p. 1281 ff.

(11) In this sense, see the US case *Sundance Cruise Corporation v American Bureau of Shipping* 7 F. 3d 1077 (2nd Cir. 1993). *Contra*, see P. Bonassies, *Réflections d'un jurist français sur le jugement "*Erika*"*, note to the Tribunal de Grande Instance de Paris, 16 January 2008, cit.

(12) H. Jessen, *The liability of classification societies - Some practical issues*, in *CMI Yearbook*, 2014, 276, quoting a passage from J.A. Witt, *Obligations and Control of Flag States*, cit., 274.

(13) E. Turco Bulgherini, *Sicurezza della navigazione*, in *Enc. dir.*, XLII, Milano, 1990, 473.

(14) On the CLC in general, see, among others, J. Basedow - U. Magnus (eds.), *Pollution of the Sea - Prevention and Compensation*, Berlin-Heiderlberg, 2007; S.M. Carbone, *Strumenti internazionalistici e privatistici-internazionali relativi al risarcimento dei danni provocati da idrocarburi all'ambiente marino*, in *Riv. dir. int. priv. e proc.*, 2006, p. 623 ff.; S.M. Carbone - L. Schiano di Pepe, *Uniform Law and Conflicts in Private Enforcement of Environmental Law: the Maritime Sector and Beyond*, in J. Basedow - U. Magnus - R. Wolfrum (eds.), *The Hamburg Lectures on Maritime Affairs 2007 & 2008*, Berlin-Heiderlberg, 2010, p. 21 ff.; M. Comenale Pinto, *La responsabilità per inquinamento da idrocarburi nel sistema della C.L.C.*, Padova, 1993; C. de la Rue-C. B. Anderson, *Shipping and the Environment*, 2nd ed., London, 2009; S.F. Gahlen, *Civil Liability for Accidents at Sea*, Berlin-Heiderlberg, 2015, p. 19 ff. and 49 ff.; G.M. Gauci, *Oil Pollution at Sea, Civil Liability and Compensation for Damage*, Chichester, 1997; P. Ivaldi, *Inquinamento marino e regole internazionali di responsabilità*, Padova, 1996; H.K. Jacobsson, *The International Liability and Compensation Regime for Oil Pollution from Ships - International Solutions for a Global Problem*, in 32 *Tul. Mar. L.J.*, 2007-2008, 1 ff.; E. Rosafio, *Profili di responsabilità e giurisdizione in materia di ambiente marino*, cit.; UNCTAD, *Liability and compensation for ship-source oil pollution*,

certain conditions — expressly excludes various others from damages claims (15).

With regard to RINA's liability, the issue turned on whether a classification society is excluded from liability under Article III.4 of the CLC — either as a "servant or agent of the owner" under Article III.4, letter a, or as a "person who performs services for the ship" under Article III.4, letter b (16).

Also here the French criminal courts took differing positions:

(*a*) The **Tribunal de Grande Instance de Paris** held (17) that the exclusion under Article III.4, letter b, does not apply to classification societies but rather only to "*personnes qui, sans être membres de l'équipage, s'acquittent de prestations pour le navire en participant directement à l'opération maritime*". Although the court also ruled that the certification activity "*est d'ordre privé*" (18), it did not consider RINA eligible for the exclusion under Article III.4, letter a, of the CLC (19).

(*b*) The **Cour d'Appel de Paris** held (20) that activities performed by the classification societies are public services and, therefore, that Article III.4 of the CLC does not apply to them (in this respect the court does not

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doc. UNCTAD/DTL/TLB/2011/4, New York-Geneva, 2012; C. Wu, *Pollution from the carriage of oil by sea: Liability and compensation*, London-Boston, 1996.

(15) In this sense, the relevant articles of the CLC read as follows:

Article III.1: "the **owner** of a ship at the time of an incident, or, where the incident consists of a series of occurrences, at the time of the first such occurrence, **shall be liable for *any* pollution damage caused by the ship as a result of the incident".**

Article III.4: "***No* claim** for compensation for pollution damage under this Convention or otherwise may be made **against**:

(*a*) the **servants or agents of the owner** or the members of the crew;

(*b*) the pilot or **any other person who**, without being a member of the crew, **performs services for the ship**;

(*c*) any charterer (how so ever described, including a bareboat charterer), manager or operator of the ship;

(*d*) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;

(*e*) any person taking preventive measures;

(*f*) all servants or agents of persons mentioned in subparagraphs (c), (d) and (e);

unless the damage resulted from their personal act or omission, committed with the **intent to cause** such damage, or **recklessly and with knowledge that such damage would probably result**".

(16) See footnote no. 15.

(17) Tribunal de Grande Instance de Paris, 16 January 2008, cit.

(18) See the text referred to in footnote no. 4.

(19) In this regard, see S.M. Carbone - L. Schiano di Pepe, *Uniform Law and Conflicts in Private Enforcement of Environmental Law*, cit., p. 33 affirm that classification societies might be covered by the exclusion pursuant to Article III.4, letter a, of the CLC, because they can be considered "servants or agents of the owner", as they are independent contractors, which fall within the scope of such definition — as confirmed by the interpretation of the *Himalaya* clauses in the context of Article 4-*bis*, point 2, of the Hague-Visby Rules. *Contra*, see the New York District Court's ruling in the Prestige case: *Reino de Espagna v American Bureau of Shipping*, 2 January 2008, p. 528 F.Supp.2d 455 (S.D.N.Y. 2008), supported by the majority of legal scholars.

(20) Court d'Appel de Paris, 30 March 2010, cit.

distinguish the case considered in letter a from that considered in letter b of Article III.4).

(*c*) The **Cour de Cassation** held ([21]) that a classification society can generally obtain exclusion from liability under Article III.4 of the CLC, but that RINA's conduct was of a "*faute de témérité au sens de la Convention CLC 69/92*" nature and that "*prive nécessarirement* [RINA] *de la possibilité d'invoquer un tel bénéfice*" ([22]).

The Cour de Cassation was correct in ruling that classification societies benefit from the channelling provision under Article III.4, letter b, of the CLC, as "any other person who, without being a member of the crew, performs services for the ship".

Indeed, in practice, both the classification and certification activities carried out by classification societies can be considered services performed "in the interest of the ship", because the ship cannot navigate without valid certificates and class documentation ([23]). Furthermore, Article III.4, letter b, of the CLC:

- applies not only to natural persons, but also to legal persons ([24]);
- refers not only to natural/legal persons who perform services similar

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([21]) Cour de Cassation, 25 September 2012, cit.

([22]) RINA'S "*faute d'imprudence*" was established by the Tribunal de Grande Instance de Paris, 16 January 2008, cit., spec. 263 (that point not reversed on by the following decisions) with reference to the renewing the vessel's classification certificate in November 1999 notwithstanding the annotations regarding the substantial corrosion in a ballast tank of the *Erika*.

([23]) See the first-instance decision in the Prestige case: *Reino de Espagna v American Bureau of Shipping*, 2 January 2008, 528 F.Supp.2d 455 (S.D.N.Y. 2008). In the same sense, see A. Cachard, *Le sociétés de classification et la canalisation prévue à l'article III § 4 lettre (b) de la CLC 1992*, in *Dir. mar.*, 2014, p. 33-35; S.M. Carbone - L. Schiano di Pepe, *Uniform Law and Conflicts in Private Enforcement of Environmental Law*, cit., p. 33; F. Siccardi, *Pollution Liability and Classification Societies, Is the System a Fair One?*, in *Dir. mar.*, 2005, p. 691. *Contra*, see, among others (including C. de la Rue - C. B. Anderson, *Shipping and the Environment*, cit.), F. Berlingieri, *Sull'applicabilità dell'art. III.4 della CLC 1992 alle società di classificazione*, note to Court de Cassation, 25 September 2012, cit., p. 1287 ss., in particular, pp. 1287-1289 where the author states that the certification activities, being performed for a public interest and regarding security issues, cannot be considered "services" for the ship performed on behalf of the shipowner. But in this respect, it should be noted that also the certification activities performed by the classification societies are normally regulated by a service agreement between the classification society and the shipowner. Furthermore, I cannot agree with P. Bonassies (*Réflections d'un juriste français sur le jugement "*Erika*"*, note to Tribunal de Grande Instance de Paris, 16 January 2008, cit., 254-255) and M. Lopez de Gonzalo (*La responsabilità delle società di classifica; dal caso "Nicholas H" ai casi "Erika" e "Prestige"*, in *Scritti in onore di Francesco Berlingieri*, Genova, 2010, 713-714) given that these authors hold that the services provided by the classification societies are services for the shipowner and not services for the ship. It seems to me that the certification (and — *latu sensu* — the classification) activities are services for the ship because they regard the navigation of the ship and — in any case — are provided in the individual interest of the ship.

([24]) See the first-instance decision in the Prestige case: *Reino de Espagna v American Bureau of Shipping*, 2 January 2008, 528 F.Supp.2d 455 (S.D.N.Y. 2008). In the same sense, see A. Cachard, *Le sociétés de classification et la canalisation prévue à l'article III § 4 lettre (b) de la CLC 1992*, cit., 33-35.

to those of a pilot, but to "*any other* person", i.e., without any requirement of a connection to a pilot (or a crew member) ([25]); and

• applies to natural/legal persons who perform services for the ship "regardless of whether such services take place on a ship or on land" ([26]).

But in this case, notwithstanding the above dictum, the Cour de Cassation ruled that RINA could not benefit from the exclusion under Article III.4, letter b, because RINA's conduct was of a "*faute de témérité au sens de la Convention CLC 69/92*" nature.

It is pointless to "re-open" the trial, and there is no room here to delve into the matter of liability of classification societies ([27]). But it seems to me that — apart from their reasoning — the French courts approached this case with the clear intent of increasing the number of parties liable, in disregard of the channelling provisions under the CLC and without fully assessing the causal link between the conduct of the classification society and the accident involving the Erika ([28]). As correctly pointed out by a

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([25]) A. Cachard, *Le sociétés de classification et la canalisation prévue à l'article III § 4 lettre (b) de la CLC 1992*, cit., 35-37; F. Siccardi, *Pollution Liability and Classification Societies, Is the System a Fair One?*, cit., 707. *Contra*, in the sense that Article III.4, letter b, of the CLC, refers only to natural/legal persons who perform services similar to those of a pilot; see F. Berlingieri, *Sull'applicabilità dell'art. III.4 della CLC 1992 alle società di classificazione*, cit., 1291-1292; and N.I. Lagoni, *The Liability of Classification Societies*, Berlin-Heidelberg-New York, 2007, 290.

([26]) S.M. Carbone - L. Schiano di Pepe, *Uniform Law and Conflicts in Private Enforcement of Environmental Law*, cit., 34. In the same sense, see A. Cachard, *Le sociétés de classification et la canalisation prévue à l'article III § 4 lettre (b) de la CLC 1992*, cit., 40-41. *Contra*, recently, S.F. Gahlen, *Civil Liability for Accidents at Sea*, cit., 121 ff., also for further references.

([27]) On this topic see, among others, A.M. Antapassis, *Liability of classification societies*, in K. Boele-Woelki - S. van Erp, *General reports of the XVIIth congress of the International Academy of Comparative Law, Bruxelles-Utrectht*, 2007, p. 631 ff.; J. Basedow - W. Wurmnest, *Third-Party Liability of Classification Societies*, Berlin-Heidelberg, 2005; F. Berlingieri, *Sull'applicabilità dell'art. III.4 della CLC 1992 alle società di classificazione*, cit.; Id., *Alcune considerazioni sulla possibile responsabilità delle società di classificazione nei confronti dei terzi*, note to Court of Appeal of Genoa 18 July 2014, in *Dir. mar.*, 2014, p. 636 ff.; P. Boisson, *The liability of classification societies*, in J. Lux, *Classification Societies*, London, 1993, 3 ff.; P. Bonassies, *Réflections d'un juriste français sur le jugement* "Erika", note to Tribunal de Grande Instance de Paris, 16 January 2008, cit., 254-255; A. Cachard, *Le sociétés de classification et la canalisation prévue à l'article III § 4 lettre (b) de la CLC 1992*, cit.; S.M. Carbone - L. Schiano di Pepe, *Uniform Law and Conflicts in Private Enforcement of Environmental Law*, cit.; M. Comenale Pinto, *La responsabilità delle società di classificazione di navi*, in *Dir. mar.*, 2003, p. 3 ff.; J. Hare, *Liability of classification societies - Current status and past CMI initiatives*, in *CMI Yearbook*, 2014, p. 323 ff.; H. Jessen, *The liability of classification societies - Some practical issues*, cit.; N.I. Lagoni, *The Liability of Classification Societies*, cit.; and M. Lopez de Gonzalo, *La responsabilità delle società di classifica; dal caso "Nicholas H" ai casi "Erika" e "Prestige"*, cit. F. Siccardi, *Pollution Liability and Classification Societies, Is the System a Fair One?*, cit.

([28]) M. Comenale Pinto, *La responsabilità delle società di classificazione di navi*, in *Dir. mar.*, 2003, 41, underlines that the causal link between the activity of the classification society and the non-contractual liability for oil pollution is very difficult to prove — and this despite the obligation on the shipowner to maintain the seaworthiness of the ship: in this respect, also for further references, see N.I. Lagoni, *The Liability of Classification Societies*, cit., p. 55 ff.

distinguished legal scholar, the interpretation of the CLC given in this case has the effect of fragmenting the civil liability regime for oil pollution at sea, which is very disappointing given its purpose ([29]).

2.2. *The liability of the TOTAL Group (for vetting and having "power of control" over the vessel).*

Three companies belonging to the Total Group were involved in the Erika case: (***a***) Total S.A., which is the oil major that controls the Total Group and for which the vetting of the Erika was performed; (***b***) Total Transport Corporation (Panama), which was the voyage charterer of the Erika; and (***c***) Total International Ltd, which was the owner of the cargo shipped on the Erika.

The liability of these companies was initially established (then denied and in final instance re-established) not only under French criminal law, but also under the CLC. The French criminal courts had different views also in this respect:

(*i*) the **Tribunal de Grande Instance de Paris** held ([30]) that: (***a***) the positive vetting on a 23 year old vessel (which has always carried corrosive substances, has changed name eight times, has flown three different flags, and has been classified by four classification societies) is a "*faute d'imprudence*" that establishes the criminal liability of the oil major (Total S.A.) on behalf of which the vetting was performed; and (***b***) the vetting and the inspections carried out on the Erika before the voyage demonstrate that the oil major exercised a "power of control" over the vessel ([31]).

(*ii*) The **Cour d'Appel de Paris** held ([32]) that: (***a***) the errors of Total S.A. (as the controlling entity of the Total Group) during the vetting, inspections and performance of the charter party imply that "*le représentant de cette société qui l'a commis avait conscience que, en agissant ainsi, il s'ensuivrait probablement un dommage par pollution*"; and (***b***) Total S.A. (as the "*véritable affréteur à temps de l'*Erika") is protected by Article III.4, letter c, of the CLC, because its errors do not demonstrate that it

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([29]) T. Scovazzi, *Due recenti e divergenti sentenze in tema di risarcimento del danno all'ambiente marino da inquinamento da idrocarburi*, in *Riv. giur. ambiente*, 2009, 208 ff., who refers to the decision of the Tribunal de Grande Instance de Paris in its first ruling on the case. For another recent case where the court's decision had the effect of fragmenting the civil liability regime for oil pollution at sea see Italian Supreme Court Decision No. 902 of 16 January 2013, in *Dir. mar.*, 2013, p. 455 (with a comment by F. B[erlingieri]) and in *Dir. trasp.* 2015, p. 169 (with a comment by L. Tullio).

([30]) Tribunal de Grande Instance de Paris, 16 January 2008, cit.

([31]) The court excluded liability of the charterer Total Transport Corporation (Panama), under Article III.4, letter c, of the CLC, but found the other Total group companies not protected under the CLC and, instead, liable under French criminal law. On damages for oil pollution claims outside the CLC system in general, see Gahlen, *Civil Liability for Accidents at Sea*, cit., pp. 148-151.

([32]) Court d'Appel de Paris, cit.

acted recklessly or knew that damage to the environment would probably result from its conduct.

(*iii*) The **Cour de Cassation** held (33) that: (***a***) the *charterer* (i.e., Total S.A., as an actual charterer), on behalf of which vetting was performed had the ability (and duty) to know of the conditions of the Erika, so its conduct entailed a "specific fault" that resulted in liability under French criminal law for voluntary pollution; and (***b***) Total S.A. is not protected by Article III.4, letter c, of the CLC, because it acted recklessly and in the knowledge that damage to the environment would probably result from its conduct.

The above confirms yet again that this sector lacks clear rules on the identification of the liable party/parties and that unpredictable rulings might be issued in similar cases. Also on this topic, I do not wish to express an opinion on the conduct of the liable party or the qualification by the French courts of its conduct. I merely want to raise a matter of interpretation of the CLC. Very briefly, it seems to me that:

- the court's ruling that Total S.A. was not protected by the channelling provision under the CLC, since it was not the Erika's "nominal" charterer is incorrect and — as pointed out by some legal scholars — was based on policy reasons (34);
- the exclusion from liability under Article III.4, letter c, of the CLC, has to apply to more entities than the "nominal" charterer, including the "actual" charterer (i.e., the natural or legal person that exercises a power of control over a chartered vessel without being officially given legal authority to do so); and
- no paradox results in the fact that a charterer's parent company will benefit from the exclusion above, as it is the "actual" charterer (for example, because the corporate veil is pierced (35)), but that it will have no such benefit if there is no proof of a link of control with its subsidiary (36). If no link exists, there is no liability and no need for limitation, as per the CLC; whereas if proof is given that the parent company is the "actual" charterer, Article III.4, letter c, of the CLC does apply.

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(33) Cour de Cassation, 25 September 2012, cit.

(34) P. Bonassies, *Réflections d'un juriste français sur le jugement "*Erika*"*, note to Tribunal de Grande Instance de Paris, 16 January 2008, cit., p. 254; C. de la Rue - C. B. Anderson, *Shipping and the Environment*, cit., p. 111.

(35) On this topic see the Amoco Cadiz case (*US District Court, Northern District of Illinois (Eastern Division)*, 18 April 1984, *In re oil spill by the Amoco Cadiz*) and the relevant comment by F. Bonelli, *La responsabilità della società controllante per gli illeciti delle proprie controllate*, in *Dir. mar.*, 1985, p. 908 ff. More in general on the subject of piercing the veil, see the recent analysis of Benatti, *L'abuso del diritto societario: l'esperienza del* piercing the veil, note to Trib. Reggio Emilia, 16 June 2015, in *Banca, borsa e tit. credito*, 2016, II, p. 201 ff.

(36) S.F. Gahlen, *Civil Liability for Accidents at Sea*, cit., p. 115.

3. *The case before the Court of Justice and the qualification of hidrocarbons spilled at sea as 'waste' under European law.*

In 2000, the Commune de Mesquer initiated proceedings against the Total Group companies before the Tribunal de Commerce de Saint-Nazaire, seeking, among other things, a ruling that the companies are liable for the consequences of damage caused by the 'waste' spillage in the territory of the municipality.

The court dismissed the case (37), ruling that heavy fuel oil did not constitute waste but merely combustible material for energy production manufactured for a specific use. The Cour d'Appel de Paris upheld the first-instance ruling, stating that although the heavy fuel oil that had spilled and mixed with water and sand had formed waste, there was no provision under which the Total companies could be held liable, since they could not be considered the producers or holders of that waste. The municipality appealed on a point of law to the Cour de Cassation.

As the case raised matters of interpretation of Directive 75/442 on waste (38), the Cour de Cassation stayed the proceedings to refer several questions to the Court of Justice for a preliminary ruling (39).

In brief, the Court of Justice ruled (40) that:

(*a*) hydrocarbons accidentally spilled at sea following a shipwreck that then mix with water and sediment and drift along the coast of a member state until being washed up on that coast constitute waste within

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(37) On that decision, see P. Bonassies, *Note Tribunal de Commerce de Saint-Nazare, 16.2.2000*, in *Dr. Mar. Franç.*, 2002, p. 43.

(38) Council Directive of 15 July 1975 on waste (75/442/EEC). Article 11 states that: "*In accordance with the "polluter pays" principle, the cost of disposing of waste, less any proceeds derived from treating the waste, shall be borne by:*

— the holder who has waste handled by a waste collector or by an undertaking referred to in Article 8;

— and/or the previous holders or the producer of the product from which the waste came".

(39) The following questions were referred to the Court of Justice:

1. *Can heavy fuel oil, as the product of a refining process, meeting the user's specifications and intended by the producer to be sold as a combustible fuel, and referred to in [Directive 68/414] be treated as waste within the meaning of Article 1 of [Directive 75/442] as ... codified by [Directive 2006/12]?*

2. *Does a cargo of heavy fuel oil, transported by a ship and accidentally spilled into the sea, constitute — either in itself or on account of being mixed with water and sediment — waste falling within category Q4 in Annex I to [Directive 2006/12]?*

3. *If the first question is answered in the negative and the second in the affirmative, can the producer of the heavy fuel oil (Total raffinage [distribution]) and/or the seller and carrier (Total International Ltd) be regarded as the producer and/or holder of waste within the meaning of Article 1(b) and (c) of [Directive 2006/12] and for the purposes of applying Article 15 of that directive, even though at the time of the accident which transformed it into waste the product was being transported by a third party?*

(40) The Court of Justice of the European Community (Grand Chamber), 24 June 2008, C-188/07, *Commune de Mesquer v Total France SA* and *Total International Ltd*, in *Report*, 2008 I-04501.

the meaning of Directive 75/442 when the hydrocarbons can no longer be exploited or marketed without processing;

(*b*) the national court may regard the seller of hydrocarbons and charterer of the ship carrying them as the producer of that waste within the meaning of Article 1(b) of Directive 75/442, as amended by Decision 96/350, and thereby as a 'previous holder' for the purposes of applying the first part of the second indent of Article 15 of that directive, if that court, in light of the elements which it alone is in a position to assess, concludes that the seller-charterer contributed to the risk that the pollution caused by the shipwreck would occur, in particular if the seller-charterer failed to take measures to prevent such an incident, such as the choice of ship; and

(*c*) if it happens that the cost of disposing of the waste produced by an accidental spillage of hydrocarbons at sea is not borne by the International Oil Pollution Compensation Fund (or cannot be borne because the ceiling for compensation for that accident has been reached), and that, in accordance with the limitations and/or exemptions of liability laid down, the national law of a member state (including the law derived from international agreements), prevents that cost from being borne by the shipowner and/or the charterer, even though they are to be regarded as 'holders' of waste, such a national law shall then have to make provision for that cost to be borne by the producer of the product from which the waste thus spread came. In accordance with the 'polluter pays' principle, however, such a producer cannot be liable for that cost unless its conduct contributed to the risk of pollution caused by the shipwreck will occur.

As it has been affirmed, the principle that liability for oil pollution shall be exclusively regulated by CLC has been significantly challenged by this decision, which seems to be a sort of "warning" to all those involved in the sale and transport of oil (and — more in general — of noxious substances). In particular, the Court of Justice does furnish a very broader interpretation of the 'polluter pays' principle, extending the notion of "producer" of waste pursuant to Directive 75/442 substantially including the oil major involved in the relevant operation, and that with the purpose to enlarge the number of whom must pay for oil pollution damage at sea (41).

I respectfully dissent from those who hold that the CLC regards only

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(41) See F. Pellegrino, *Introduction* to the International Workshop "*Carriage of Dangerous Goods by Sea: Maritime Education and Training*", Messina, 10 July 2015; Ead., *I nuovi orizzonti della sicurezza marittima*, in *Scritti in onore di Francesco Berlingieri*, cit., p. 793 ff.; Ead., *La corte di giustizia europea si pronuncia sul caso dell'Erika*, note to Court of Justice of the European Community (Grand Chamber), 24 June 2008, C-188/07, *Commune de Mesquer v Total France SA* and *Total International Ltd*, in *Dir.Trasp.*, 2009, p. 151. In the same sense, see F. Munari - L. Schiano di Pepe, *Tutela transnazionale dell'ambiente*, Bologna, 2012, p. 180; F. Smeele, *International Civil Litigation and the Pollution of the Marine Environment*, in J. Basedow - U. Magnus - R.Wolfrum (eds.), and *The Hamburg Lectures on Maritime Affairs 2007 & 2008*, cit., p. 86.

matters of civil liability, when Directive 75/442 and the national administrative laws implementing the directive regard matters of *lois de police* and public duties ([42]). As a matter of fact, the approach of the Court of Justice has a strong impact on the CLC channelling system, altering the balance of risk and liabilities provided for by the Convention and generating potential discriminations between the liable entities ([43]).

4. *More pending questions than answers from the courts: certainty of the law as a value and the encyclical letter* Laudato sì *as a guideline for the future.*

The Erika case demonstrates the difficulty to precisely answer the question "Who pays for sea pollution?".

The three levels of French criminal courts gave *opposing answers* to the three central questions: the immunity of jurisdiction of the classification society, the liability of the classification society, and the interpretation of the fundamental "channelling" liability system under the CLC. Furthermore, the Court of Justice's ruling opened the door to a significant (and unpredictable) extension to the number of persons liable for sea pollution.

Unpredictability in court decisions is always unacceptable, albeit understandable in the Erika case given its peculiarity and complexity. But "anger" can ever prevail over the law: that would certainly be unjust. In a society where relativism is considered a fundamental parameter, certainty in the application of positive law by the courts is the one objective value to preserve, irrespective of any other considerations ([44]).

Of course, a separate point to consider regards the limits and shortcomings of the current positive law and the possibility to amend it to better address the needs of people and the environment. The Erika case is the point of departure for discussions on a possible amendment of various aspects under international rules on the prevention of pollution at sea. In particular:

(*a*) the "channelling" system of liability and its limits;

(*b*) the interplay between international rules, European Union law and national law; and

(*c*) the liability of the classification societies.

The search for answers to these issues is beyond the bounds of this brief paper, but it is essential to consider that any reasoning on the matters

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([42]) P. Bonassies, *Note Tribunal de Commerce de Saint-Nazare, 16.2.2000*, cit.

([43]) See F. Munari - L. Schiano di Pepe, *Tutela transnazionale dell'ambiente*, cit., p. 181; and S.F. Gahlen, *Civil Liability for Accidents at Sea*, cit., p. 162.

([44]) See S. Pugliatti, *Conoscenza e diritto*, Milano, 1961, 29 ff., who quotes P. Calamandrei (*La certezza del diritto e la responsabilità della dottrina*, in *Riv. dir. comm.*, 1943, I, p. 341 ff.), F. Carnelutti (*La certezza del diritto*, in *Riv. dir. proc. civ.*, 1943, p. 81 ff.), and M.S. Giannini (*Certezza pubblica*, in *Enc. dir.*, VI, Milano, 1960, p. 770).

above cannot ignore policy concerns or the problem of sustainable development ([45]).

In this respect, fundamental suggestions (and a sort of guideline for the future) can be found in Pope Francis' recent encyclical letter *Laudato sì*. Indeed, future discussions on a possible reform of the legislative framework considered in this paper should bear the Pope's warning in mind:

> [E]conomic powers continue to justify the current global system where priority tends to be given to speculation and the pursuit of financial gain, which fail to take the context into account, let alone the effects on human dignity and the natural environment. Here we see how environmental deterioration and human and ethical degradation are closely linked. (...). As a result, "whatever is fragile, like the environment, is defenceless before the interests of a deified market, which become the only rule" ([46]).

([45]) See, among others, S. Marchisio, *Is the European Environmental Policy Sufficient to the Principle of Sustainable Development?*, in *Environmental Law in Europe*, Brussels, 10-11 May 1997, Dusseldorf, 1997, 84 ff., and more recently, Fois (ed.), *Il principio dello sviluppo sostenibile nel diritto internazionale ed europeo dell'ambiente*, Documents of the XI[th] Congress of the Italian Society of International Law - SIDI-ISIL, Alghero 16-17 June 2006, Napoli, 2007, *passim*; F. Pellegrino (ed.), *Sviluppo sostenibile dei trasporti marittimi nel Mediterraneo*, cit., *passim*.

([46]) Pope Francis, encyclical letter *Laudato sì on care for our common home*, Vatican, 2015, point 56. For an analysis of this encyclical letter from a lawyer's point of view, see A. Toffoletto, *Note minime a margine di* Laudato sì, in *Le società*, 2015, p. 1203 ff.