"Most professionals who went aboard or got close to the oil tanker thought it was in an apparently good condition or observed no major abnormalities which deserved to be reported."

- The Paris Court of First Instance, ERIKA Judgment dated January 16, 2008

The *ERIKA* Judgment:

A Sea Change in Environmental Liability for the Maritime Community

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I. Introduction - Criminal Responsibility for Involvement with Transport of Oil Cargoes on High Risk Vessel

The maritime safety chain concept is well accepted throughout the maritime industry. Each entity along the chain must work together in order to prevent casualties resulting in loss of life, loss of property, and debilitating environmental harm. If one of the links in the chain fail, such as the ship owners; the operators and managers; the insurance underwriters; the classification societies; the vessel's flag state; or the port state, in theory one of the other links may catch the error and be able to correct it. But what if multiple links in the chain are weakened, or rusted, or break; all

at the same time? A "perfect storm" of misfeasance, nonfeasance, and even malfeasance, in connection with one vessel can occur. And it did – with the *Erika*.

The *Erika* judgment, rendered on January 16, 2008, has changed the landscape for assessment of potential environmental liability arising out of the transport of petroleum products by oil tankers. Criminal responsibility should be anticipated for involvement with the shipment of oil cargoes on high risk vessels.

The Paris Court of First Instance issued a stern warning to ship owners, managers, classification societies and oil companies: adhere to safe shipping practices or face criminal charges and potentially limitless civil liability for endangering seafarers and causing harm to the environment. In an expansive decision, criminal liability was found against the ship owner and class society who acted together to deliberately reduce structural repairs and save costs at the expense of jeopardizing the safety of the ship. The oil company was also tagged for its negligence in chartering a vessel way beyond its intended life expectancy to transport dangerous and persistent oil products.

Upon *Erika*'s departure from the port of Dunkirk fully loaded with heavy fuel oil, the vessel was to "most professionals" in good condition with no major abnormalities. The dangerously weak and corroded structural

condition was known only to those involved with the intricate process of surveys, thickness measurements and structural repairs underlying the classification certificates. The survey and repair process had been abused and manipulated by the ship owner to save costs. The court held that the ship owner could not have been unaware that this practice jeopardized the safety of the ship creating the severe risk of an accident at sea. The same criticism was directed at the classification society inspector, who had directly participated in approving the thickness measurements and retained the sole contractual power to grant a temporary classification certificate. The classification society and ship owner worked hand-in-hand to obfuscate the true condition of the vessel. Both were held accountable for neglecting their very serious duties to determine, monitor and approve necessary repairs that would maintain the safety and structural integrity of the vessel.

After conducting a four month trial involving scores of live witnesses, voluminous documentary evidence, testimony from individual experts as well as detailed submissions from judge appointed boards of inquiry, the court meticulously presented the history of ownership, operation, management, inspections and trading patterns of the *ERIKA*. The opinion provided, in comprehensive detail, an analysis of the legal or proximate causes of the loss of the oil tanker *ERIKA* . Significantly, the court exposed a segment of

the oil transportation industry that deliberately engaged in unacceptable risks, and in effect, conspired to cause oil pollution damage.

In a stinging rebuke to classification societies, who have traditionally avoided liability by pointing to the unscrupulous ship owner, the court uncovered the questionable practice of manipulating steel thickness measurements to reduce structural repairs and save costs on the shipyard bill. This critical process was supposed to be closely controlled by the classification society. Notwithstanding "serious anomalies" in the thickness measurements, the classification society inspector granted a certificate to the vessel. Classification society complicity had given the ship owner wide latitude to manipulate the system of approvals needed for the vessel to obtain its classification certificate.

The oil company vetting process was examined at length, but to a large extent that process relied on class certificates for structural issues. While the oil company vetting inspection system could not detect structural deficiencies, the oil companies were held "imprudent" in not recognizing the increased dangers associated with use of an aged ship that had several management, ownership and class society changes. The imprudence in ignoring these commercial factors established the necessary causal link between the oil company, the vessel casualty and the resulting pollution.

This paper presents a review of the decision rendered by the *Erika* court from the perspective of an American lawyer. This paper is not intended to provide legal advice or an opinion on the liabilities of any of the parties to the ERIKA proceedings.

II. Criminal Offenses for Endangering Others and Causing Environmental Harm

The *ERIKA* court assessed four types of criminal offenses against various individuals and companies involved in the operation and management of the vessel including the ship owner, its technical manager, its classification society, and the oil company involved with the cargo carried on the final voyage.

The four offenses were described as follows:

1. Unintentional fault for failure to comply with an obligation of prudence or safety provided for by law or regulation;

2. Endangerment to others or directly exposing others to immediate risk of death or injury;

3. Willfully omitting or failing to fight a disaster;

4. Complicity in endangerment of others, knowingly aiding or assisting another in the principal offense of endangerment of others.

(Op. at p. 90). With the exception of No. 3, the criminal offenses involved unintentional negligent conduct against the persons or entities that either caused the oil spill or "did not take the necessary actions to avoid it." (Op. at p. 89). The court rejected arguments that the French criminal laws for the offense of pollution did not extend to actors in maritime transportation. The court also commented that the Civil Liability Convention of 1969, as amended in 1992 ("CLC '92"), had created a legal regime for victims of pollution, but that the CLC regime should not deprive the French court of its jurisdiction to hear actions for damages usually open to civil parties. (Op. at p. 100).

III. Ship Owner Fault in Managing and Operation of *ERIKA*

As one would expect, the ship owner was roundly criticized for derogating its well-accepted duties of managing a vessel within its fleet to meet or exceed international safety standards. The technical manager of the *ERIKA* was harshly criticized for exploiting the ship and engaging in conduct which systematically reduced, for purely financial reasons, maintenance and repair work. This was particularly the case during the classification survey which occurred sixteen months before the avoidable casualty.

In addition to reviewing the process to determine and complete repairs, the court engaged in an analysis of the debt problems of the ship

owner. Demonstrating the symbiotic relationship between the ship owner and its classification society, the class society was criticized for not suspending its certificates when the ship owner failed to comply with financial commitments. (Op. at p. 205) To the court, the owner's debt problems "were telling of the conditions in which the repairs had been anticipated, performed and finally paid." (Op. at p. 205). It was, in reality, the insufficiency of maintenance and correlatively, the quick development of the corrosion that were the original causes and the decisive factors of the weakening of the structure of the *Erika*. The ship owner's clear liquidity problems should have been a red flag warning to the classification society that the ship owner could not meet the maintenance expenses required to keep the vessel in a condition warranting continued issuance of a classification certificate. (Op. at p. 93). Instead, this fact was ignored by class.

The court considered the reduction of the shipyard's invoice to be deliberately and jointly decided by the ship owner and its technical manager for reasons of cost to reduce the work to such an extent that the ship owner could not have been unaware that this would jeopardize the safety of the ship. (Op. at 207). This specific fault (which was equally attributed to the classification society) exposed others to a particularly severe risk of the accident that occurred on the *Erika* and the resulting oil pollution.

To put the ship owner's misdeeds in context, a baseline understanding of the Oil Pollution Act of 1990 is necessary. Under OPA '90, the ship owner including its operator and manager, are typically the Responsible Party held liable for removal costs and damages. OPA '90 provides limitations of liability damages based on the gross tonnage of the polluting vessel. 33 U.S.C. §2704 (a) (1). The statute holds Responsible Parties strictly liable for clean up costs and other damages and may subject a Responsible Party to civil and criminal sanctions. OPA limits of liability do not apply if the incident was proximately caused by the gross negligence of a Responsible Party or for failure of the Responsible Party to comply with an applicable federal safety, construction or operating regulation. 33 U.S.C. § 2704 (a) (1).

Accordingly, although ordinary negligence can result in the imposition of some criminal penalties under U.S. law[1], the oil pollution statutes generally require a showing of gross negligence or reckless conduct by a Responsible Party to be denied the benefits of limited liability. The finding by the *Erika* court that the ship owner purposely reduced structural repairs to save costs and knowingly jeopardized the safety of the ship would appear to meet the requirements under OPA '90 to deprive a Responsible Party of the benefits of limited liability.

[1] See *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999) *cert. denied,* 528 U.S. 1102 (2000).

IV. Reckless and Knowing Conduct by Classification Society Resulting in Criminal Liability

The acts of the ship owner's representative and class society inspector, beginning sixteen months prior to the vessel leaving the berth on its final voyage, were held to be the cause of the sinking and oil pollution. The court acknowledged that the ship owner's technical manager was to prepare the list of repairs and the contract with the ship yard. The court noted, however, that it was incumbent on the classification society's inspector to determine the work and approve it in accordance with the rules established for each type of survey and to verify that the defects effecting the ship's class had indeed been repaired. (Op. at p. 118). The class society had taken a "preponderant role" in the determination of the work required on the vessel in order to complete the special survey. (Op. at p. 203).

In view of the time needed for serious corrosion to develop in the vessel's steel structure, the court concluded that the weakened structure could only have developed well prior to the ship wreck. Accordingly, the court stated that the situation of "generalized corrosion at the place where the damage occurred resulted from the conditions in which the special survey performed once every 5 years and repair work had been carried out" at the last classification society special survey." (Op. at p. 201).

Based on an analysis of a small number of structural members recovered from the wreck of the *ERIKA*, the court concluded that the cause of the loss of the *ERIKA* first occurred in its starboard side in ballast tank No. 2. The measurements taken on the wreck showed general and high levels of corrosion significantly exceeding the limit values accepted by the classification society rules. The court noted corrosion values from 28 percent to 56 percent and up to 71 percent. The classification society rules only admitted, at most, 25 percent corrosion. (Op at p. 200).

The court engaged in an in-depth study of the process for taking thickness measurements (of *Erika's* steel structures) during the last special survey by the class society inspector. There were many "serious anomalies" in the thickness measurements taken during the special survey:

1. reported thickness measurements, allegedly taken using rafts, could not have been done because the vessel was in a floating dock which prevented movement of weights on board (i.e. the filling of tanks) for rafting purposes.

2. thickness measurements of structures that did not physically exist on the *ERIKA*

3. absence of thickness measurements for structural elements that did exist on the *ERIKA*,

4. thickness measurements with values higher than the thickness of the ship when it was brand new in certain cases by 6-9 mm.

(Op. at p. 203-204).

The court also noted that the thickness measurements taken by the gauging company at the special survey were practically always higher than those taken from the pieces removed from the wreck regardless of the nature of the structural component. (Op. at p. 204). The class society was responsible to verify thickness measurements, make visual controls (otherwise termed close surveys) and give instructions so that additional thickness measurements could be made. The class society inspector acknowledged this role and rejected thickness measurements which were not made in his presence initially, but then in contradiction of his own ruling the same class society inspector accepted thickness measurements made outside of his presence. (Op. at p. 203). This appeared to be yet another glaring example of business time constraints taking precedence over quality classification surveying work.

Only days before the final voyage of the *Erika*, a second classification society inspector had identified serious corrosion issues and "suspicious" repair work that should not have existed sixteen months after the special survey. (Op. at p. 213). Again, a permissive attitude from the classification society extended the need for examination of this serious corrosion, and

allowed the vessel to continue its highly risky trade carrying "black products" such as No. 2 fuel oil. The court found that the substantial corrosion and "suspicious" repairs observed by the class inspector only sixteen months after the special survey was a clear sign of "worrisome" state of the structures. (Op. at p. 213). The class inspector knew that the vessel was transporting polluting products. This neglect by the inspector of the class society was considered a "fault of imprudence" which caused the accident at sea. The court concluded that without repair work, the class certificate could not have been renewed and the *Erika* would not have been chartered a few days after the inspection for a voyage. (Op. at p. 213).

In view of the willful violation of several safety obligations which were incumbent upon it under the SOLAS convention and the ISM code, the class society was held to have directly exposed the crew to an immediate risk of death by "shipwreck or drowning" and was held to have committed the offense of endangerment. In the light of the *Erika* court's decision, the traditional defenses to liability raised by classification societies would seem to be abrogated by their active role in hiding the vessel's deficiencies. Classification societies have typically relied upon the following rationales to avoid liability for their negligence[2] in surveys and classification of vessels:

1. Immunity under the law of the Vessel's Flag state.

[2] The class society argued that corrosion was not the cause of the accident at sea offering instead the theory of a hidden defect or "invisible crack" in the side shell plating. The court considered this theory improbable and criticized it for largely ignoring the facts. (Op. at p. 196).

2. Contractual limitations in their agreement with the ship owner preclude liability because the amount of fees charged do not justify imposition of liability for the loss of the vessel.

3. The ship owner has exclusive responsibility and control over the vessel, and can not delegate this responsibility to the classification society.

4. The purpose of classification certificates is limited to allowing the ship owner to take advantage of favorable insurance rates, and should not form the basis of more extensive liability.

See generally Sundance cruises Corp. v. American Bureau of Shipping, 7 F.3d 1077 (2d Cir. 1993); *Great American Ins. Co. v. Bureau Veritas*, 478 F. 2d 235 (2d Cir. 1973). The *Erika* court's analysis squarely rejected flag state immunity as a grounds for protection of the classification society (Op. at p. 176). But the court also denied classification societies any protection under the Civil Liability Convention of 1992 (CLC '92) because the classification society was not directly involved on the incident voyage with operation of the vessel. (Op. at p. 235). The court's finding that the classification society, through its surveyor, acted in concert with the ship owner's representative to deliberately jeopardize the safety of the ship, and thereby endanger third parties should undermine future attempts by classification societies to distance themselves from responsibility for creating these dangerous conditions on aged vessels. Classification society

negligence, for the first time, has been declared to be the legal and proximate cause for a major accident at sea and the resulting oil pollution.

V. Oil Company Improper use of High Risk Vessel

The process of controls or "vetting" applied to the *Erika* included a review of the vessel certifications and whether the documentation was consistent with international conventions in terms of safety, pollution prevention, classification rules and the rules of the flag state. The purpose of the vetting inspection was to insure the quality of the ship and its crew in terms of safety and prevention of accidents or pollution risks. (Op. at p. 124). The vetting service was not required by any international convention, community regulation or national law. (Op. at p. 123). The court recognized that the vetting process by the various oil companies "could not be as thorough as the classification society's inspections nor replace the class certification." (Op. at p. 122). The vetting inspector had "neither the resources nor the skills of the classification's society's inspectors."(p. 122). Unlike the classification surveyor, the vetting inspector could not interfere with loading or unloading, and if he wanted to survey the structures, specifically the cargo and ballast tanks, he had to do it safely which was "fairly uncommon" considering the ongoing commercial operations. (Op. at p. 122).

The result of the vetting process was a standardized ship inspection report ("SIRE") database. The vetting department was systematically consulted each time any entity of the oil company intervened in a cargo transportation. Application for approval was to be submitted to the vetting department before the ship could be the subject of a chartering or transportation contract signed by the oil company. Any ship reviewed negatively by the vetting department was to be refused by the oil companies traders, charters, operating departments and terminals. Notwithstanding these control procedures, the oil company's charterering subsidiary entered the voyage charter with the Erika five days after its vetting approval had officially expired. (Op. at p. 137).

According to the court, even aside from the expiration of the *Erika's* vetting approval, the following operational factors should have raised concerns prohibiting use of the *ERIKA* by the oil company:

1) Changes in ownership seven times

2) Changes in classification society several times including four different class societies.

3) Change in its Flag state four times from Panama to Iberia to Malta. (Op. at p. 103).

The court noted that the oil company's vetting organization was attached to its legal affairs department. The oil company subsidiary was also criticized for executing a contract with a shell company "known to have little concern for the ship's condition". The charterer failed "to make sure the operating company had the required skills" to manage the vessel. Because the oil company entered the charter party despite its control process, and with knowledge that this was a high risk vessel, the court found that it had failed to act to avoid the accident and was criminally responsible for causing the pollution at sea. (Op. at p. 217). Because a subsidiary of the oil company was the named entity on the charter party, the parent oil company that actually did the vetting was not entitled to any protection or benefits of being the charterer.

Although not privy to the detailed information on the weakened and corroded structure of the *Erika*, the oil company took an unacceptable risk by selecting the *Erika* to carry its cargo. Several "high risk" factors prohibited use of the *Erika* by the oil company including its peculiar history of multiple changes in managers, ownership and classification societies. This error in judgment was compounded by the fact the oil company's vetting approval for the Erika had, in fact, expired five days before the vessel was chartered on its final voyage.

VI. CONCLUSION

Because the court found a number of significant players in the maritime community to be at fault for causing the accident at sea to varying degrees, the whole industry must take heed. All entities in the safety chain must re-evaluate their own control processes in order to avoid being involved with transporting oil cargoes on high risk vessels. While the state of the law is in flux after the *Erika* ruling, maritime entities must be aware that more will be demanded of them; the failure to act prudently will result in criminal liability.