

# **The Legal Aspects of Seaworthiness: Current Law and Development**

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## Summary

The thesis aims to analyse the current legal approach to the carrier's obligation of seaworthiness under Carriage of Goods by Sea due to the impact of such an obligation on the stability of the shipping industry and its effect on reducing marine casualties. In addition, recent developments in the industry have had an affect on the carrier's obligation. Therefore, it seems necessary to deal with the carrier's obligation of seaworthiness under the current law and in the light of recent development.

In order to achieve the aim of this study, a library-based research project will be conducted and most of the courts' decisions, recent or old, will be considered in order to find out how they have dealt with this issue in the past and whether their attitude has changed to reflect the development in the shipping industry. The opinions and thoughts of scholars on this matter will also be examined in order to ascertain their opinion on the law and its development.

The final chapter of this thesis will deal with the conclusions arrived at by this study. These can be summarised by the following:

- The carrier's obligation to make the vessel seaworthy should be extended to cover the whole voyage instead of just limiting it to the beginning of the voyage.
- The burden of proof in case of seaworthiness should be based on presumed fault, not proved fault.
- The burden of proving unseaworthiness/seaworthiness should shift to the carrier, and should be exercised before seeking the protections of the law or carriage contract.
- There is also a need to depart from the use of detailed articles with regard to Seaworthiness to a more general article which deals with carriers' duties and obligations in general.
- Finally, it is necessary to highlight the need to establish that the ISM Code, and to a lesser extent the ISPS, should be considered as good practice with regard to seaworthiness.

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## PREFACE

Seaworthiness, is an important concept in Maritime Law, its effect is not limited to one area of the shipping industry it affects Marine, Marine Insurance, Marine Pollution, Carriage of Goods by Sea, Liability... etc. as a result this issue was dealt with under these different areas of law, and it has been covered by national laws and international conventions and still subject to development. Also the obligation of seaworthiness under the carriage of goods by sea, which is the subject of this study, is an important one. The reason for that that this obligation, and other aspects of carriage of goods by sea, up until 1924 was covered by national laws, for example, under the Common Law the obligation was an absolute one. However, the position changed in 1924, when the Hague Rules were adopted and radical change took place, making the carriers obligation a duty to exercise due diligence, the subsequent amendments Hague-Visby Rules in 1968 adopted the same position. However, there was no change to the time of exercising the obligation, before and at the beginning of the voyage, or the meaning and definition of the obligation. And due to the need for change in the law governing the carriage of goods by sea further change was considered by the introduction of Hamburg Rules, this convention was and still not successful as not many countries accepted it and the position of Hague/Hague-Visby Rules is still widely applicable. Hamburg Rules again had a radical approach to seaworthiness as it extended the carriers obligation to cover the period he is in charge of the goods, and further still is replaced the detailed article III r1 of Hague/Hague-Visby Rules with a general Article that deals with the carriers duties and obligations in general and removed the need for long list of exceptions provided in Article IV r2 of Hague/Hague-Visby Rules. All these conventions have failed in achieving one of their main objectives, mentioned in their title, '*Unification of the law*', and now we have three laws governing the carriage of goods by sea; Hague Rules, Hague-Visby Rules and Hamburg Rules. Due to the development in the shipping industry further additions to the law governing carriage of goods by sea<sup>1</sup> presented by the International Management Safety Code (ISM) and International Ship and Port Facility Security Code (ISPS) both of these Codes could have considerable effect on the carriers obligation of seaworthiness and could lead to change in the way the industry deals with such obligation. The final development that could affect this obligation is the UNCITRAL Draft convention on the Carriage of Goods, again it attempts to Unify the rules governing this area. The draft is in a way an attempt to arrive to a set of rules which falls between Hamburg Rules and Hague-Hague-Visby Rules. With regard to Seaworthiness, the draft attempts to extend the carriers obligation to cover the whole voyage also I introduced a new article on basis of liability.

As the issue of seaworthiness have not been dealt with in details in any previous study, therefore, this study aims at providing a complete understanding of the carrier's obligation under the Carriage of Goods. This means it is important analyse the position of the current law; the Common Law, the Hague/Hague-Visby Rules and Hamburg Rules, and it would be essential to consider the case law which dealt with this issue, in order to assess the importance of this duty, and how the courts dealt with it under the different types of carriage contracts. Furthermore, it would be

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1- These addition was adopted by the Safety of Life at Sea Convention (SOLAS).

important to assess whether the current law is sufficient to reflect the changes in the shipping industry in general, and especially after the introduction of the ISM and ISPS Codes which could considerably affect the carrier's obligation, or if a need for change in the law is needed in order to reflect the changes. As a result it would be important to look at how both of these Codes could affect the carrier's obligation and if their introduction is going to reduce the numbers of marine incidents and casualties. Finally it would be important to analyse the UNCITRAL draft convention to see if it does respond to the changes in the shipping industry as it is still possible to do changes to the draft if there is need to do that.

This study is based on the case law, information and materials available to me on 30<sup>th</sup> October 2006.

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*London*

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# **Chapter One**

## **Introduction**

*“Shipping in the 21<sup>st</sup> century underpins international commerce and the world economy as the most efficient, safe and environmentally friendly method of transporting goods around the globe. We live in a global society which is supported by a global economy – and that economy simply could not function if it were not for ships and the shipping industry”<sup>1</sup>*

The above comments highlight the importance of the shipping industry on the international commerce especially considering that more than 90% of the world trade is carried by sea<sup>2</sup>. Therefore, in order to ensure that this important industry functions properly, is kept safe and environmentally friendly it is crucial to guarantee that it is properly regulated on a continuous basis to comply with the regular developments in the industry and world trade.

In order to make certain that such industry is kept safe and environmentally friendly it is critical to make sure that all ships maintain the highest standards in terms of maintenance, crew competence and training safety standards... etc, otherwise enormous consequences could result from the failure to do so, e.g. oil pollution, increases in insurance premiums, instability of the commercial industry, increase in marine casualties .... Etc. It is here where the issue of vessel seaworthiness comes to light, as seaworthiness deals with the fitness and readiness, in all respects: human, physical, documentary and cargo-worthiness, of the vessel and its ability to sail safely to its destination.

### ***- Historical Development***

The law governing maritime activities is not new; it is as old as the industry itself. Originally the law governing this industry was represented by state, local and national laws, along with the customs and practices which existed at the time. But the fifteenth century, when global voyages started, and Venice become a maritime power, gave rise to what is known as the Law Merchant, and it is to that law that the roots of modern shipping law can be traced back<sup>3</sup>. Since then the law has continued developing on local levels, and there were no international conventions to cover that area of law until the

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1- International Maritime Organization, International Shipping, Carrier of World Trade, [www.imo.org/includes/blastDataOnly.asp/data\\_id=12908/IntShippingFlyerfinal.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id=12908/IntShippingFlyerfinal.pdf), at p.1, taken on 22/10/2006.

2- *ibid*, p.2

3\_ The Law of Admiralty. 2nd Ed, Grant Gilmore & Charles L. Black, the Foundation Press, Inc, 1975, p. 1-50.

early twentieth century, when international conventions were introduced to cover different aspects of marine activities, e.g. the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 1924 (The Hague Rules) and its Visby amendment of 1968, the Safety of Life at Sea Convention adopted in 1974, International Convention Relating to the Limitation of the Liability of Owners of Sea-Going 1957. The Convention on Limitation of Liability for Maritime Claims (LLMC) 1976 and its 1996 Protocol.... etc.

Also International Organizations concerned with the maritime industry, e.g. International Maritime Organization (IMO), Committee Maritime International (CMI) and United Nation Commission on International Trade Law (UNCITRAL), now do their best to ensure that the laws governing the Marine Industry are kept up to date with the needs of the Industry.

***- Laws Governing the Carriage of Goods by Sea in General, and Seaworthiness in Particular***

Until the nineteenth century Maritime Law was governed by the national laws of different countries, e.g. the Common law in UK and US Harter Act... etc. However because of the international nature of the Carriage of Goods by Sea there was a need to unify the rules governing maritime activities in General, and Carriage of Goods by Sea in particular, in order to ensure that the parties to any maritime activity are aware of the result of the breach of agreements by either party. This resulted in the introduction of different maritime conventions to govern different aspects of maritime transactions, e.g. liability, pollution, carriage of goods, safety and security, collision, Maritime Liens and Mortgages... etc.

This study will concern itself only with those conventions dealing with the Carriage of Goods by Sea generally and Seaworthiness in Particular. The first convention was the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 1924 (The Hague Rules). This convention was the first International instrument to change the nature of the carrier's obligation to provide a seaworthy vessel. The duty changed from being an absolute duty to become a duty to exercise due diligence to make the vessel

seaworthy. The convention also provided detailed articles to deal with the issue of seaworthiness and basis of liability of the carrier. This convention was amended by Visby Amendments in 1968<sup>4</sup>. Most countries now give effect to the Hague or the Hague-Visby Rules making them the widely accepted and applied Rules in the Carriage of Goods by sea area.

This convention was followed by the United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules) in 1978, which came into force in 1992. With regard to Seaworthiness this convention differed in the following ways: 1. it did not deal with seaworthiness in a separate detailed article. 2. The duty of the carriers to exercise due diligence was extended to the whole period when the carriers have custody of the cargo. 3. It made the carrier responsible for the loss of or damage to the cargo unless he was able to prove his innocence. 4. Finally it did not provide the carrier with a list of exceptions to limit his liability. The above differences and other might have been the reason why not many countries signed this convention; to date only about 30 countries have signed and adopted this convention.

Another Convention which has important impact on the issue of Seaworthiness is the International Convention on Safety of Life at Sea (SOLAS) 1974, especially Chapter IX which adapted the International Safety Management Code (ISM) and came into force in two stages July 1998 and July 2002, and Chapter XI which incorporates the International Ship and Port Facility Security Code (ISPS) Code which came into force in July 2005. These two Codes affect the safety and security aspects of the shipping industry and impose certain obligations on shipping companies to comply with their requirements.

Finally the shipping industry, like any other industry, is always on the move and developing to meet the needs of the trade, therefore, the laws governing it should be updated or changed to meet the changes in the industry. That is why the Committee Maritime International (CMI) and the United Nation Commission on International Trade Law (UNCITRAL) are working together on new Draft Instrument on Transport Law. This Instrument affects the carrier's obligation of seaworthiness in different ways: 1. the

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4- Some of the amendments are related to the limits of liability and amount of compensation.

time at which the Carrier should exercise his duty. 2. the Carrier's Basis of Liability and Burden of Proof. 3. the protections the carrier has to limit his liability.

This study concentrates on the carrier's obligation of seaworthiness due to its importance in the shipping industry. Its impact is not only limited to the Carriage of Goods by Sea but extends to several areas in the Maritime Law as we will see below

***- Relevance of seaworthiness***

The carrier's duty to provide a seaworthy vessel has received considerable attention, world wide, from courts, scholars and others in the shipping industry. This attention has resulted in the production of different national laws and international conventions to govern the shipping industry in general and seaworthiness in particular. This has resulted in some confusion as to whether seaworthiness means the same in different branches of Maritime Law. Due to the wide interest in this issue, in this section will deal with the relevance of seaworthiness in different branches of Maritime Law, its meaning and nature.

The duty of the carrier to provide a seaworthy vessel has significant importance. Although it is not required in all seafaring activities, it still has a serious impact on different aspects of maritime law, e.g. Marine Insurance, Carriage of Goods by Sea, Salvage, etc. Therefore, it is important to define the term, and its different aspects, in order to recognize the consequences of the compliance with or the breach of such a duty.

***- Importance of the duty under Carriage of Goods by Sea:***

The importance of seaworthiness under the current Carriage of Goods by Sea law arises before and at the beginning of the voyage. Therefore, if the carrier was able to

prove that the vessel was seaworthy at the relevant time<sup>5</sup> then he has discharged his obligation and can benefit from the exceptions or limitation available to him by law<sup>6</sup>.

The next important point about seaworthiness is the effect of the breach of the obligation on the rights and immunities of the carrier, i.e. would he still be able to use the exceptions provided in the contract or in the governing Rules and Regulations? Or is it enough for the vessel to be unseaworthy in order to prevent the carrier from using his immunities or should there be a causal link between the loss/damage and unseaworthiness?

Also, would the non-compliance of the carrier with a set of Rules and Regulations not part of the governing regime, e.g. ISPS and ISM Codes have an effect on his rights and obligations?

Moreover, it is very important to know what constitutes a seaworthy vessel, because even if the vessel is physically seaworthy, she might not be seaworthy in other respects affecting her ability to navigate safely or even to enter or depart from a port.

How these questions are answered has a direct impact on the compliance of the carriers with his obligations and his enjoyment of his rights and immunities, and the courts' opinions or rulings will also be influenced by the answers to these questions.

#### *- Importance of the duty under Marine Insurance Law*

The seaworthy condition of the vessel has a direct impact on the right of the carrier/shipowner to claim compensation from his insurers in case of loss or damage to the ship or its cargo. When issuing an insurance policy for a vessel, the insurer(s) will assume when estimating the premium that the vessel is deemed to be seaworthy at the commencement of the voyage<sup>7</sup>, or the stage she is going to perform<sup>8</sup>, even if they did not

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5- Under Hague/Hague-Visby Rules he either has to prove that the vessel was seaworthy or that he exercised due diligence to make her so. *Robin Hood Flour Mills, Ltd. v. N. M. Paterson & Sons, Ltd., (The Farrandoc)*, [1967] 2 Lloyd's Rep. 276, p.280. *Maxine Footwear Co. Ltd. and Another. Appellants; v. Canadian Government Merchant Marine Ltd. Respondents*, [1959] A.C. 589. However, the situation differs under the Hamburg Rules where the carrier's obligations extend to cover the whole period when the goods are under his custody, See Article 5 Hamburg Rules.

6- *McFadden v. Blue Star Line*, [1905] 1 K.B. 697

7- Marine Insurance Act 1906, s 39 Warranty of seaworthiness of ship.

inquire about this. Also under the Marine Insurance Act 1906 the Assured is under a legal obligation to disclose all material information and circumstances known to him or that should be known by him, or his insurance contract can be void<sup>9</sup> if the insurer could

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- (1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.
  - (2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.
  - (3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.
  - (4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.
  - (5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

See also *Sadler v. Dixon*, 5 M. & W. 405. *McFadden v. Blue Star Line*, [1905] 1 K.B. 697.

8- Marine Insurance Act 1906, s. 39(3) provides that "3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kind of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purpose of that stage". The *Quebec Marine Insurance Company v. The Commercial Bank of Canada*, (1869-71) L.R. 3 P.C. 234

9- S 18. Disclosure by assured.

- (1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.
- (2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.
- (3) In the absence of inquiry the following circumstances need not be disclosed, namely:-
  - (a) Any circumstance which diminishes the risk;
  - (b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;
  - (c) Any circumstance as to which information is waived by the insurer;
  - (d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.
- (4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.
- (5) The term "circumstance" includes any communication made to, or information received by, the assured.

S 20. Representations pending negotiation of contract.

- (1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.
- (2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.
- (3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.
- (4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.

prove that such material information would have influenced his judgement<sup>10</sup>, e.g. in taking the risk or fixing the premium<sup>11</sup>. Such materiality should also affect the ultimate liability of the insurer, and therefore, if the insurer could prove this, the contract can be annulled<sup>12</sup>. This is due to the fact that taking the route of s 17 of MIA 1906 will be more difficult so the insurer's best option is to stick to s 39.

Moreover, the failure of the carrier to make the vessel seaworthy or exercise due diligence can have a huge impact on liability insurance, since Article 1(6) of the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC) provides:

*“An insurer of liability for claims subject to limitation in accordance with the rules of this Convention shall be entitled to the benefits of this Convention to the same extent as the assured himself.”*

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(5) A representation as to a matter of expectation or belief is true if it be made in good faith.

(6) A representation may be withdrawn or corrected before the contract is concluded.

(7) Whether a particular representation be material or not is, in each case, a question of fact.

10- Lord Mustil in *Pan Atlantic v. Pine Top*, [1995] 1 A.C. 501 stated: “On these facts two questions of law arise for decision. 1. Where sections 18(2) and 20(2) of the Act relate the test of materiality to a circumstance “which would influence the judgment of a prudent underwriter in fixing the premium, or determining whether he will take the risk,” must it be shown that full and accurate disclosure would have led the prudent underwriter to a different decision on accepting or rating the risk; or is a lesser standard of impact on the mind of the prudent underwriter sufficient; and, if so, what is that lesser standard? 2. Is the establishment of a material misrepresentation or non-disclosure sufficient to enable the underwriter to avoid the policy; or is it also necessary that the misrepresentation or non-disclosure has induced the making of the policy, either at all or on the terms on which it was made? If the latter, where lies the burden of proof? The court arrived to the decision that the material circumstances that have not been disclosed should have effect on the mind of the insurer in weighing the risk and estimating the premium. Also the House of Lords was of the opinion that in order for the contract to be void the insurer must prove that he was actually induced by the non-disclosure to enter into the contract. See p. 501

11- This case is the same as one where the shipowner intends to send his vessel to a country where there is a war risk that will increase the possibility of the ship being in danger, therefore, the insurer would ask for a higher premium.

12- *K/s Merc-Scandia XXXXII v. Certain Lloyd's Underwriters Subscribing to Lloyd's Policy No. 25t 105487 and Ocean Marine Insurance Co. Ltd. and Others, (The Mercandian Continent)*, [2001] 2 Lloyd's Rep. 563, The Court of Appeal Held: “s. 17 of the Marine Insurance Act, 1906 stated that if the utmost good faith was not observed by either party to the contract, the remedy was avoidance but did not lay down the situations in which avoidance was appropriate; it was only appropriate to invoke the remedy of avoidance in a post-contractual context in situations analogous to situations where the insurer had the right to terminate for breach; and for this purpose the fraud must be material in the sense that the fraud would have an effect on the underwriters' ultimate liability and the gravity of the fraud or its consequences had to be such as would enable the underwriters if they wished to do so to terminate for breach of contract; and the right to avoid the contract with retrospective effect was only exercisable in circumstances where the innocent party would in any event be entitled to terminate the contract for breach” p. 564-565. See also p. 575. Dr Baris Soyer said: “Fraudulent or deliberate concealment is not on its own sufficient to bring the avoidance remedy stipulated in s. 17 of the MIA into play. The insurer must also show that the concealment would give the insurer a right to repudiate the contract.

This means that if the carrier is entitled to limit his liability according to the convention, then his insurer, if the carrier was insured, is entitled to the same benefits of the convention. This in turn means that if the carrier was not allowed to limit his liability because he was in breach of some of his obligations, i.e. breach of his obligation to make the vessel seaworthy or failure to exercise due diligence, then he will not be entitled to limit his liability and accordingly his insurers will not be allowed to do so either. Consequently, they will have to pay full compensation when they are asked to do so. The convention will affect the rights of the insurers under S33 (3)<sup>13</sup> of the Marine Insurance Act 1906, which discharges the insurer from liability if the assured was in breach of a warranty, e.g. Warranty of Seaworthiness. Therefore, the breach of the carriers could affect the liability of the insurers.<sup>14</sup>

Consequently, if the ship was unseaworthy, the carrier will not be able to recover his loss from the insurers<sup>15</sup>. The insurer does not need to prove a causal link between unseaworthiness and the loss in the case of voyage policy<sup>16</sup>. However, the situation is different in a time policy, where there is no implied warranty as to seaworthiness. However, if the vessel was sent to sea in an unseaworthy condition, with the privity of the owner, the insurers are not liable for the loss<sup>17</sup>.

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13- Marine Insurance Act 1906 S33 states:

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

14- For more information see Patrick Griggs and Richard Williams, *Limitation of Liability for Maritime Claims*, 4th Ed, 2004, LLP, at p.13

15- *Project Asia Line Inc. and Another v. Shone, (The Pride of Donegal)*, [2002] 1 Lloyd's Rep. 659

16- *The Pride of Donegal*, *ibid.* MR. Justice Andrew Smith "It is also common ground that the insured voyage commenced when the vessel left Detroit, and that there was an implied warranty by the assured that she was then seaworthy. If the assured is in breach of that warranty, the insurers are not liable, regardless of whether the breach caused any loss and of whether the breach came about through fault or want of diligence on the part of the assured", at p. 665. But "causation remains relevant in the context of the Institute Cargo Clauses, the operation of marine perils such as perils of the sea and unseaworthiness in time policies" *The Law of Marine Insurance*, Howard Bennett, 1996, at p. 302.

17- Marine Insurance Act s. 39(5) states that "In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

*- Importance of Seaworthiness in Case of Safety Marine Pollution*

The importance of seaworthiness is not restricted to commercial transactions, e.g. carriage of goods, Insurance... etc. It also extends to cover other areas like Marine Pollution and Safety of Life. This is clear from the Safety of Life at Sea Convention (SOLAS). Chapter V, entitled Safety of Navigation, which provides several regulations regarding providing the vessel with a sufficient number of qualified and certified crew<sup>18</sup>. The convention further provides for the creation of provision to ensure continuous maintenance of ship's equipment<sup>19</sup>... etc. SOLAS also incorporated the International Safety management and Pollution Prevention Code (ISM) into Chapter IX. This Code sets out certain practices which can be considered as a framework for the exercise of Due Diligence. Furthermore the convention also incorporated the International Ship and Port Facility Code (ISPS), which was incorporated into Chapter XI of SOLAS Convention. The Code aims at preventing and reducing terrorist attacks using vessels; both Codes apply now to the majority of commercial vessels. As a result if the carrier/shipowner fails to comply with the Codes' requirements he will not be able to acquire or maintain the certificates required by the Codes, which might result in his being prevented from entering or leaving ports or even the detention of his vessel. Also if the vessel was not seaworthy in accordance with the terms of the convention and the Codes, the carrier/shipowner would be in breach of his obligation and liable for the consequences resulting from such breach.

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18- Regulation 14 Ships' manning:

- 1 Contracting Governments undertake, each for its national ships, to maintain, or, if it is necessary, to adopt, measures for the purpose of ensuring that, from the point of view of safety of life at sea, all ships shall be sufficiently and efficiently manned.
- 2 Every ship to which chapter I applies shall be provided with an appropriate minimum safe manning document or equivalent issued by the

19- Regulation 16 Maintenance of equipment:

- 1 The Administration shall be satisfied that adequate arrangements are in place to ensure that the performance of the equipment required by this chapter is maintained.
- 2 Except as provided in regulations I/7(b)(ii), I/8 and I/9, while all reasonable steps shall be taken to maintain the equipment required by this chapter in efficient working order, malfunctions of that equipment shall not be considered as making the ship unseaworthy or as a reason for delaying the ship in ports where repair facilities are not readily available, provided suitable arrangements are made by the master to take the inoperative equipment or unavailable information into account in planning and executing a safe voyage to a port where repairs can take place.

These are only some of the examples of the importance of seaworthiness in the shipping industry. It extends to cover more areas, e.g. collusion, limitation of liability... etc.

### ***-Conclusion***

It is very important to study vessel seaworthiness and see its impact on the shipping industry. This issue has a heavy impact on Marine Insurance, Carriage of Goods by Sea, Liability, Marine Environment... etc. However, it would need more than one study to cover all these issues, so this thesis will concentrate only on the legal aspects of seaworthiness on the carriage of goods by sea, taking into consideration the position of the current laws, represented by the common law, Hague/Hague-Visby Rules and Hamburg Rules, then shed light on those recent development in the shipping industry which have an effect on seaworthiness. This will involve looking at the effect of the International Safety Management Code (ISM) and the International Ship and Port Facility Security Code (ISPS), and then move to consider the attempt of UNCITRAL and the Committee Maritime International (CMI) to introduce a new convention on the Transport Law, currently known as Draft Convention on the Carriage of Goods [wholly or partly by Sea]<sup>20</sup>.

In doing this the study will attempt to answer the question whether the current position of law on seaworthiness should be maintained, taking into account developments in the shipping industry, and in particular: the time at which the vessel should be seaworthy, basis of liability of the carrier and burden of proof.

In order to achieve the purpose of this study it is essential to look at the previous authorities on this issue. This will include considering all cases that have dealt with the issue of seaworthiness analysing them then seeing if they can still be applied in the light of the recent changes in the shipping industry. Furthermore, it is essential to consider the thoughts of legal scholars and experts on seaworthiness in order to tackle the above issues. Consequently, this study will involve library based research and will consult the

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20- The reason for the brackets at the end of the name is because the final name of the convention have not been decided yet, as there is still discussions whether this convention should cover all methods of transport or should it only concentrate on sea transport only.

available resources in order to achieve the final aim, which is represented by providing some recommendations with regard to the current law.

Finally, in order to achieve the purpose of this research in a coherent logical method it will be divided into six chapters:

**Chapter Two:** will deal with the definition of seaworthiness and what constitutes a seaworthy vessel.

**Chapter Three:** will deal with the nature of the carrier's obligation to provide a seaworthy vessel, how this obligation could be found in the contract of carriage, and the time at which the carrier should exercise his duty.

**Chapter Four:** will consider the legal implication of breaching the obligation of seaworthiness including the ability of the carrier to limit or exclude his liability.

**Chapter Five:** will deal with the effect of the International Safety Management Code (ISM) and International Ship and Port Facility Security Code (ISPS) on the carrier's obligation to provide a seaworthy vessel.

**Chapter Six:** will consider the UNCITRAL and CMI work on the Draft Convention on the Carriage of Goods [wholly or Partly by Sea]; however, the chapter will only consider the draft articles related to the carrier's obligation of seaworthiness.

**Chapter Seven:** this chapter will form the conclusion of this study and will provide recommendations to what should be the position of the law in the light of the development of the shipping industry.

**Chapter Two**  
**Seaworthiness**  
**Definition and Meaning**

## Definition of Seaworthiness

In spite of the fact that the law governing the Carriage of Goods by Sea in General and Seaworthiness in particular has changed over the years<sup>1</sup>, the definition of Seaworthiness has not changed. What has actually changed is the nature of the duty and consequently the extent to which the carrier would be liable in case of loss or damage resulting from the unseaworthy condition of the vessel.

The term “seaworthiness” is a very broad one, as it does not only include the physical state of the vessel but also extends to other aspects/factors. Consequently, it is not easy to define Seaworthiness in specific limited terms. It is therefore better to use general terms to give a close indication as to what the concept means. The definition of seaworthiness is the same under the different branches of Maritime Law; however, we are going to consider the definition of seaworthiness in the context of Carriage of Goods by Sea and Marine Insurance as an example.

### *- Definition of seaworthiness Under Carriage of Goods by Sea*

Though the applicable law regarding seaworthiness under Carriage of Goods by Sea underwent major changes, as it was originally subject to common law, then it became subject to the Harter Act followed by the Hague/Hague-Visby or the Hamburg Rules, the definition of seaworthiness did not vary much as it still includes the same principles.

Under common law, Field J in *Kopitoff v. Wilson*<sup>2</sup>, stated that the carrier should provide a vessel “fit to meet and undergo the perils of the sea and other incidental risks which of necessity she must be exposed in the course of the voyage”. Also, Channel J, in *McFadden v. Blue Star Line*<sup>3</sup>, cited Carver, Carriage by Sea, which defined seaworthiness as “... that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it”.

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1- It was subject to the common law then the Hague/Hague-Visby Rules, which took some of its ideas from the Harter Act, and Hamburg Rules.

2- *Kopitoff v Wilson* (1876) 1 QBD 377 at p 380

3- *McFadden v. Blue Star Line*, [1905] 1 K.B. 697, at p 706.

Under common law, the duty of seaworthiness means that the carrier is under an absolute obligation, hence ‘the vessel *must* have that degree...’, to provide a vessel that is fit, in every way, to receive the cargo and to encounter the ordinary perils of the sea, which a ship of its kind at that time of year, might be expected to meet in such a voyage. But this absolute obligation does not mean that the ship must be perfect; it means that she should be made “as seaworthy as she reasonably can be or can be made by known methods”<sup>4</sup> to undertake that particular voyage, since Carver’s definition takes into consideration the behaviour of the prudent carrier.

This means “if the ship is in fact unfit at the time when the warranty begins, it does not matter that its unfitness is due to some latent defect which the shipowner does not know of, and it is no excuse for the existence of such a defect that he used his best endeavours to make the ship as good as it could be made”<sup>5</sup>.

Carver introduced a test to find out whether the shipowner/carrier exercised his duty to provide a seaworthy vessel or not. The test is: “Would a prudent owner have required that it (the defect) should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking”<sup>6</sup>. The test is an objective one as it takes into account the conduct of a prudent shipowner and what he would do if he discovered a defect in his vessel. Therefore, if a prudent carrier/shipowner decided that the defect should be repaired before sending the vessel to sea, she would be unseaworthy if she was sent without repairs, but if he decided that the defect did not need to be repaired and she would be safe without doing so, then she would be seaworthy if sent in such a condition. In deciding the seaworthy condition of a vessel the surrounding circumstances should be considered, e.g. the type of ship, the route she is going to take, the cargo she is carrying or going to carry and the season of

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4- *McFadden v. Blue Star*, *ibid*, Channel J. provided: “... the shipowner... undertakes absolutely that she is fit, and ignorance is no excuse” at p. 706. *The Glenfruin*, (1885) Q.B.D 103, at p. 106. *Readhead v. The Midland Railway Company*, 18 Law Rep. 4 Q. B. 379, at p. 379. And in *Steel et Al. v. The State Line Steamship Company*, (1877-78) L.R. 3 App. Cas. 72 Lord Blackburn referred to *Readhead v. The Midland Railway* at p. 86-87.

5- *McFadden v. Blue Star Line*, *ibid*, at p. 703

6- The test was first introduced by Carver on *Carriage of Goods*, 18th Ed. The test then was applied to many cases e.g. *McFadden v. Blue Star Line*, *ibid*, at 703..M.D.C., Ltd. v. N.V. Zeevaart Maatschappij, [1962] 1 Lloyd’s Rep. 180.

the year in which she is to sail<sup>7</sup>. A further important factor that should be taken into consideration is the degree of knowledge available at the relevant time<sup>8</sup>.

When the Harter Act was introduced in the United States in 1893, there were no changes to the definition of seaworthiness; however, there was a change to the nature of the obligation because section 2 of the Act provided:

“That it shall not be lawful for any vessel transporting merchandise or property from or between the ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of the said vessel to exercise due diligence to properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage ... shall in anywise be lessened, weakened, or avoided”.

Section 3, entitled limitation of liability for errors of navigation, dangers of the sea and acts of God, provided:

“If the owner of any vessel transporting merchandise or property to or from any port in the United State of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel...”

The Harter Act did not make the exercising of due diligence an obligation; it was only a minimum requirement that the carrier would exercise due diligence to make the vessel seaworthy and take due care of the cargo in order to prevent him from contracting himself out of his obligation to provide a seaworthy vessel and exercise due care with regard to the cargo. At the same time it was a defence he could use should there be any loss or damage to the cargo. As a result the act was the first step towards the next stage, i.e. obliging the carrier to exercise due diligence to make the vessel seaworthy<sup>9</sup>.

The reason behind the introduction of the Harter Act is that the carriers used to include in the bills of lading they issued a list of exception to exclude them not only from liability for loss of or damage to the cargo due to the perils of the sea, act of God,

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7- *Mcfadden v Blue Star Line, Ibid*, the vessel "must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it", at p. 706

8- The carrier cannot be responsible if he did not supply his vessel with the latest technology if this technology is not properly tested and widely implemented. *Demand Shipping Co. Ltd. v. Ministry of Food Government of the People's Republic of Bangladesh and Another, (The Lendoudis Evangelos II)*, [2001] 2 Lloyd's Rep. 304. *F. C. Bradley & Sons, Ltd. v. Federal Steam Navigation Company, Ltd.* (1926) 24 Ll. L. Rep. 446. *President of India v. West Coast S.S.Co.*, [1963] 2 Lloyd's Rep 278 at p. 281.

9- *Grant Gilmore and Charles L. Black, The Law of Admiralty*, 2nd Ed, 1975, the Foundation Press. Inc, at p.143.

act of war ...etc, known as the traditional exceptions, but also from a list of exceptions extended to exempt the carriers from damage or loss resulting from their own faults or negligence or those of their agents or servants. As a result the American Congress found itself in need to protect two main obligations on the part of the carrier, 1. The obligation to exercise due care of the cargo. 2. To furnish a seaworthy vessel. They wanted to prevent the carrier from using exceptions if the loss or damage resulted from the carrier's failure to exercise either of these two duties. The Act came as a compromise between the carriers' interests and the cargo owners' interests<sup>10</sup>.

This approach of the Harter Act was then adopted by the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 1924 (Hague Rules) and its Visby Amendments in 1968<sup>11</sup> (Hague-Visby Rules) and the United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules) in 1978<sup>12</sup> and the duty to exercise due diligence became a positive obligation on the part of the carrier. The Harter Act was the first step towards increasing the carrier's liability, although some would say that the Act reduced the carrier's obligation with regards to seaworthiness from an absolute duty into a duty to exercise due diligence. However, it invalidated<sup>13</sup> any attempt by the carrier to reduce or exempt himself from responsibility for not exercising due diligence to provide a seaworthy vessel<sup>14</sup>.

This change of applicable law, with regard to the carriage of goods by sea in general and seaworthiness in particular, did not introduce major changes to the definition of seaworthiness; it only changed the nature of the duty and consequently the effect of the breach.

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10- The Law of Admiralty, *ibid*, p139-143

11- Hereafter known as the Hague Rules 1924 and the Hague-Visby Rules 1968.

12- Hereafter known as the Hamburg Rules.

13- This was made clear By Hague/Hague-Visby Rules Art III r8: "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability."

14- The Law of Admiralty, *infra*.

On the other hand the Hague/Hague-Visby Rules took a further step in defining seaworthiness, by providing detailed articles about what factors constitute seaworthiness in Art III rule 1:

‘1\_ The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

- a\_ Make the ship seaworthy;
- b\_ Properly man, equip and supply the ship;
- c\_ Make the holds, refrigeration and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation’.

From Art III r1 we can see that the Hague/Hague-Visby Rules replaced the absolute duty to provide a seaworthy vessel by the duty to exercise due diligence to make the vessel seaworthy<sup>15</sup>. Also the article specified the elements of seaworthiness.

One might question whether it was a good idea to go into detail about what makes a seaworthy vessel, as it can be considered as limiting the ability of the court to expand the meaning of seaworthiness in accordance with the development of the shipping industry. This was avoided by Hamburg Rules where the Rules adopted a general article which not only covers the duty to provide a seaworthy vessel but also includes negligence. Article 5 of the Hamburg Rules provides that:

“1\_ The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, or damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

4\_ (a) The carrier is liable:

- i. for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;
- ii. for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or negligence of the carrier, his servants or agents, in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences”.

From this article it can be seen that the Hamburg Rules, in contrast to the Hague/Hague-Visby Rules, further increased the carrier’s liability. The Hamburg Rules make the carrier responsible unless he proves that there was no privity on his part, or that of his agents or servants. Moreover, the Hamburg Rules did not allocate a separate Article for seaworthiness; it only used a general article for the carrier’s liability, leaving it to the courts to define seaworthiness. Finally and more importantly Art 5, r1 and 4 (a)

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15- The meaning of due diligence will be dealt with later on. See Chapter Three

makes the carrier responsible for any loss or damage occurring while the cargo is in his possession. This includes any damage resulting from unseaworthiness, which mean that the carrier should ensure that his vessel is seaworthy during the whole voyage, or the period of the contract.

Defining seaworthiness was not only a job for the courts as scholars in this area of law had their own input to clarify an important issue in Maritime Law; however, all these definitions have more or less the same meaning. For instance, Tetley defined seaworthiness as “the state of a vessel in such a condition, with such equipment and manned by such a master and crew, that normally the cargo would be loaded, carried, cared for and discharged properly and safely on the contemplated voyage”<sup>16</sup>.

#### ***- Definition of seaworthiness under Marine Insurance Law***

Under Marine Insurance Law the carrier has a duty to provide a vessel that is capable of performing the voyage, i.e. seaworthy; failing to do so will have a serious implication on his right to claim compensation for the loss he suffered. But does the meaning of seaworthiness under Marine Insurance differ from the one used for Carriage by Sea?

The Marine Insurance Act (MIA) states in S. 39 (4) thus ‘A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured’.

S. 39(4) of the Act did not specifically point out what seaworthiness should include, it preferred to say instead that she should be reasonably fit in *all respects*.. The reason behind this is explained by the drafter of the Act, Sir Mackenzie Chalmers, who said: “the words ‘in all respects’, in s.39 (4) include ‘manning, equipment and stowage’, but these additional words were cut out in the Lords, being regarded as unnecessary and probably restrictive”<sup>17</sup>.

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16- Tetley, Marine Cargo Claims, 4th Edition (to be published March, 2008). The source was taken from Tetley’s web page at <http://tetley.law.mcgill.ca/maritime/ch15.pdf> on 11/06/2003. Also in Tetley 3ed Edition, (1984), at p 370. Empresa Cubana Importada de Alimentos “Alimport” v. Iasomos Shipping Co.S.A, (the Good Friend), [1984] 2 Lloyd’s Rep. 586.

17- Chalmers and Archibald, 1922, p. 64. Sited in Soyer, B. (2001). Warranties in Marine Insurance, Cavendish Publishing Limited, London – Sydney. at p. 61.

While the Act used broad terms to define seaworthiness, it left to the courts the job of identifying what is a seaworthy vessel, according to the facts and circumstances surrounding each case.

In one of the early cases on this issue, *Dixon v. Sadler*<sup>18</sup>, seaworthiness of the vessel was defined thus: ‘she (the vessel) shall be in a fit state as to repairs, equipment, and crew, and in all other respects to encounter the ordinary perils of the voyage’.

The MIA 1906, in defining the duty to provide a seaworthy vessel, used the ability of the vessel to encounter the ordinary perils of the sea. Whereas, in the context of Carriage of Goods by Sea, the definition of seaworthiness used by *McFadden v. Blue Star*, and other cases, and the definition in Hague/Hague-Visby Rules in Art III r1, used the conduct of a prudent carrier<sup>19</sup>. This can also be derived from the test introduced by Carver on Carriage of Goods<sup>20</sup>.

These different definitions might indicate that seaworthiness does not mean the same under different branches of Maritime Law. However, this is not the case, because the few differences that exist between the Carriage of Goods by Sea Law and Marine Insurance with regard to seaworthiness do not affect the concept of seaworthiness itself, and only appear where there is a breach of the duty. The first difference is that under carriage of goods contracts the carrier guarantees that the ship is fit to carry the cargo and perform the agreed voyage safely or that he exercised due diligence to make her fit<sup>21</sup>. Whereas, in the insurance contract, if the policy covers the vessel, the insurer’s only concern is that the vessel is fit for the voyage, but if the policy is for the cargo, then the cargo insurer’s concern is that the vessel is seaworthy and capable of carrying the

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18- *Dixon v. Sadler*, 5 M. & W. 405, 414. Cited in *Hedley v. The Pinkney and Sons Steamship Company, Limited*, [1894] A.C. 222 at p.227. See also *Steel v. State Line Steamship Co.*, (1877-78) L.R. 3 App. Cas. 72, Lord Cairns, defined seaworthiness as that ‘the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter on the voyage’

19- Soyer, B. (2001) *Warranties in Marine Insurance*. P. 60.

20- The test is “Would a prudent owner have required that it (the defect) should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking” Carver on Carriage of Goods, 18th Ed. The test then was applied to many cases e.g. *McFadden v Blue Star Line* [1905] 1 K.B. 697 at 703..*M.D.C., Ltd. v. N.V. Zeevaart Maatschappij*, [1962] 1 Lloyd’s Rep. 180

21- As under Harter Act, Hague/ Hague-Visby and Hamburg Rules.

cargo safely to its destination<sup>22</sup>. The second difference is that the parties involved in a carriage contract differ from those in the insurance contract; in the carriage contract it is the carrier and the shipper/cargo-owner but in the insurance contract it is the insurer and the assured. Furthermore, in the case of a breach of obligation to provide a seaworthy vessel, the carrier will not be responsible if unseaworthiness was not the cause of loss, or if it was the cause, if he proves that he exercised due diligence to make her seaworthy then he will not be liable<sup>23</sup>, whereas in the insurance contract the insurer will not be responsible to pay the money to the assured if the vessel was not seaworthy, even if unseaworthiness was not the cause of the loss<sup>24</sup>. Finally, a difference arises in a time policy and a time charter; while there is no implied warranty of seaworthiness in a time policy<sup>25</sup>, in a time charter it is implied that the shipowner is still under an obligation to maintain the vessel in efficient condition through out the period of charter. None of these differences have an impact on the meaning of seaworthiness such as to make it differ in Marine Insurance from the one given by Carriage of Goods by Sea, as will be seen below.

Apart from these differences, the term seaworthiness means exactly the same in both Marine Insurance and Carriage of Goods contracts, as was clearly illustrated by Lord Esher in *Hedley v. Pinkney*<sup>26</sup>, where, after he cited the definition used in *Dixon v. Sadler*<sup>27</sup>, he stated that,

“The term "seaworthy" is a well-known term in nautical matters. In this Act it is used with regard to such matters. It appears to me that, in the absence of any reason to the contrary, it must receive in this Act its ordinary meaning in nautical matters. What is that meaning? It has been well explained by Parke, B., in *Dixon v. Sadler* ... The question being one of insurance, he is dealing with the time of sailing, but the legal definition given of seaworthiness, which is not applicable only to insurance

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22- Baric Soyer, stated that “If a ship is insured for a voyage from A to B, the insurer’s primary concern is whether she is reasonably fit at the commencement of the voyage to carry that sort of cargo which a vessel of her type might be expected to load, over that part of the world’s oceans, at the time of the year. On the other hand, a cargo-owner with a particular cargo to load on board that vessel, at that time, is specifically concerned that the ship is reasonably fit to carry this particular cargo”. At p. 60

23- Soyer, *Ibid*

24- Project Asia Line Inc. and Another v. Shone, (The Pride of Donegal), [2002] 1 Lloyd’s Rep. 659.

25- MIA s39 (5) “In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.”

26- *Hedley v. The Pinkney and Sons Steamship Company, Limited*. [1892] 1 Q.B. 58 at p. 64

27- *Dixon v. Sadler*, 5 M. & W. 405.

cases, is that the ship must be in a fit state as to repairs, equipment, and crew, and in all other respects to encounter the ordinary perils of the voyage”.

This view was accepted in other insurance and carriage cases. For example Lord Sumner, in *Becker v. London Assurance Corporation*, stated that<sup>28</sup>:

“Again, it is important that the same words should mean the same thing when used in a mercantile contract, whether that contract be of one description or another. Perils of the seas do not mean one thing in a bill of lading and something else in a policy; restraints of princes do not bear a different interpretation in the one or in the other...”

Therefore, it should be clear that terms used in mercantile matters should mean exactly the same in order to maintain stability. Seaworthiness is no exception and should mean the same in both insurance and carriage contracts and in any other branch of maritime law<sup>29</sup>.

Consequently seaworthiness can be defined as: *the fitness of the vessel in all respects, to encounter the ordinary perils of the sea; that could be expected on her voyage, and deliver the cargo safely to its destination.*

Usually the obligation to provide a seaworthy ship is referred to as the ‘warranty of seaworthiness’<sup>30</sup>. However, the obligation to provide a seaworthy vessel is neither a condition, breach of which will allow the aggrieved party to cancel the contract if he chooses to do so else just claim damages, nor a warranty the breach of which will allow the aggrieved the right to claim damages only. The obligation is classified to fall somewhere between the above two and can be called an innominate or an intermediate obligation<sup>31</sup>. Therefore, the effect of the breach of such obligation will vary depending on the severity of the breach, the time it takes to rectify it and the type of contract

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28- *Becker, Gray and Company Appellants; v. London Assurance Corporation Respondents*, [1918] A.C. 101 at p. 114. *Fireman's Fund Insurance Company, Ltd. v. Western Australian Insurance Company, Ltd., and Atlantic Assurance Company, Ltd.* (1927) 28 Ll. L. Rep. 243. In *Hedley v. The Pinkney and Sons Steamship Company, Limited*. [1892] 1 Q.B. 58.

29- Lord Esher, in *Hedley v. The Pinkney* which is a carriage case, *ibid*.

30- *Steel v. State Line Steamship Co.*, (1877) 3 App. Cas. 72. Lord Blackburn at p. 86 stated: “That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a “warranty,” not merely that they should do their best to make the ship fit, but that the ship should really be fit”.

31- *Hongkong Fir Shipping Company, Ltd. v. Kawasaki Kisen Kaisha, Ltd., (The Hongkong Fir)*, [1961] 2 Lloyd's Rep. 478. Diplock L.J. Stated that the obligation of Seaworthiness “can be broken by the presence of trivial defects easily and rapidly remediable as well as by defects which must inevitably result in a total loss of the vessel.” At p.494.

involved<sup>32</sup>. The use of the word “warranty” by the courts and the scholars to describe the obligation of seaworthiness in the context of Carriage of Goods by Sea is misleading, as it confuses it with “warranty” as a term whose breach will give the aggrieved party the right in damages. However, the use of the word “warranty” is meant to make reference to the promise by the carrier that the vessel will be seaworthy at the relevant time.

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32- The Hongkong Fir, *ibid*. See also Bunge Corp v. Tradax Export [1981] 1 WLR 711. The Hermosa [1982] 1 Lloyd’s Rep 570. Stanton v. Richardson (1875) LR 9 C.P. 390. Snia v. Suzuki (1924) 19 LILR 333. a full discussion around this issue will follow in a later part of this study.

## Vessel Seaworthiness and Cargo-Worthiness

It has already been shown that seaworthiness could be defined as the fitness of the vessel in all respects to encounter the ordinary perils of the sea that could be expected on her voyage, and deliver the cargo safely to its destination<sup>1</sup>.

But what is exactly meant by fitness: is it just the physical fitness of the vessel or does it extend to cover its equipment, crew and documents? Furthermore, is it just limited to the ability of the vessel to sail or does it extend to cover its ability to receive the cargo?

The definition of seaworthiness includes, beside the vessel's fitness to encounter the voyage, its ability to deliver the cargo safely to its final destination. This means that the concept of seaworthiness contains several aspects. The first is the seaworthiness of the vessel itself. This aspect deals with the overall fitness of the vessel and its readiness to undertake the voyage. It also includes the competence of its crew with regard to numbers and training. Vessel seaworthiness further extends to cover the documents required to ensure that the vessel can enter and leave ports without problems. The second aspect concerns the ability of the ship to carry the agreed cargo; the ship might be able to carry cargo in general, but certain cargo may need special arrangements (refrigeration, clean holds ... etc), so if the carrier agreed with the cargo-owner to ship certain cargo then he has to ensure that his vessel is prepared to carry it<sup>2</sup>.

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1\_ A Seaworthy Vessel was defined in *Mcfadden v Blue Star Line*, [1905] 1 K.B. 697, as "must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it", at p. 706. Also *Kopitoff v Wilson* (1876) 1 QBD 377 at p 380, provided that the vessel should be "fit to meet and undergo the perils of the sea and other incidental risks which of necessity she must be exposed in the course of the voyage".

2- *Actis Co. Ltd. v. The Sanko Steamship Co. Ltd., (The Aquacharm)*, [1982] 1 Lloyd's Rep. 7. Lord Justice Griffiths stated "As I understand the authorities, there are two aspects of seaworthiness. The first requires that the ship, her crew and her equipment shall be in all respects sound and able to encounter and withstand the ordinary perils of the sea during the contemplated voyage. The second requires that the ship shall be suitable to carry the contract cargo", at p. 11. *Elder, Dempster and Company, Limited, and Others v. Paterson, Zochonis and Company, Limited*, 1924] A.C. 522. *Steel et Al. v. The State Line Steamship Company*, (1877-78) L.R. 3 App. Cas. 72. *Gilroy, Sons, & Co. v. W. R. Price & Co.*, [1893] A.C. 56. *Owners of Cargo on Ship "Maori King" v. Hughes*, [1895] 2 Q.B. 550. *Queensland National Bank Limited v. Peninsular and Oriental Steam Navigation Company*, [1898] 1 Q.B. 567. *The Thorsa*, [1916] P. 257. *Hogarth v. Walker*, [1900] 2 Q.B. 283

Consequently, a vessel may be seaworthy to encounter the perils of the sea, but it is not cargo-worthy to carry a particular cargo.

This section of the thesis is going to consider these two aspects of seaworthiness, starting with vessel seaworthiness, then cargo worthiness.

### **- *Vessel Seaworthiness***

This aspect of seaworthiness is not limited to the physical fitness of the vessel itself, i.e. that its body is clear of any damage or that its engine is functioning properly, but further extends to cover the vessel's equipment, competency of the seamen, documentation and all other issues that might affect the fitness of the vessel and its efficiency to encounter the ordinary perils of the sea.

Consequently, this kind of seaworthiness is divided into physical seaworthiness, human seaworthiness and documentary seaworthiness. Each of these issues will be considered separately.

#### *1- Physical seaworthiness*

The physical seaworthiness of the vessel deals with the state of the vessel itself, i.e. its readiness to encounter the ordinary perils of the sea that it might face during its voyage, taking into consideration the type of the vessel, its age, the type of navigational water, the route it is going to take, and the time of the year at which it is going to embark on the journey. Consequently, this kind of seaworthiness takes into consideration the engine of the vessel, its holds, pipes, bunkers, tackles, engine.... etc. It requires that the carrier, before his vessel sails, must make sure that it is fit or, where his obligation is to exercise due diligence, must prove, if the vessel was not seaworthy, that he exercised due diligence to make it so, in order to be able to protect himself from responsibility for any loss or damage.

Seaworthiness depends to a large extent on the different circumstances surrounding the voyage. Therefore, seaworthiness depends on the time of the voyage, the route the ship is going to take, the kind of water she is going to sail in (ocean, sea, river, lake... etc), the type of vessel, the available knowledge at the time of voyage, the type of cargo

she is going to carry and where she is going to carry it. (The latter two issues will be discussed under cargo worthiness.) This means that even if a vessel is seaworthy to perform a particular voyage she may not be so if she were to do the same voyage but in a different season, or carrying different cargo ... etc. Also if she was seaworthy to sail in the ocean she may not be seaworthy to sail in a lake or river, or to sail to a different destination.

In *Daniels v. Harris*<sup>3</sup>, Brett, J. stated:

“... according to the authorities, has the implied warranty been the same in extent and effect in all policies? It has not. With regard to policies on the same subject-matter, as, on ship, the extent of the warranty as to the condition of the ship has been held to be different for different voyages, for the same voyage at different seasons, for the same voyage at the same season according to whether the same ship was in ballast or loaded with one kind of cargo or another. The required condition of the ship has been held to be different when the ship was to enter under policy in port from what it must be when going to sea under the same policy. It has been held to be different for a coasting voyage, or lake, or river, or canal voyage, from what it must be for an ocean voyage under the same policy”.

a. Seaworthiness and the time of the voyage

The time at which the voyage is going to be performed is very important because if the ship is seaworthy for a trip to be made in summer she might not be seaworthy for a winter voyage, therefore the shipowner has to make sure that the vessel is fit or, where

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3- *Daniels v. Harris*, (1874-75) L.R. 10 C.P. 1 at p. 6. In the same case the judge cited from *Phillipps on Insurance*, “ss. 695 to 723 inclusive. In s. 719 it is said: “The warranty of seaworthiness varies in different places: a vessel considered seaworthy for a voyage in one place may not be so considered in another: the standard of seaworthiness also varies from time to time in the same place.” In s. 720, “The requisites as to seaworthiness depend upon the intended use and service of the vessel. The requisites to satisfy this warranty for lying in port, or for temporary purposes, short coasting passages, or navigating a lake, river, or canal, are different from those demanded for navigating the open sea on long voyages.” If, therefore, the warranty were set out in detailed terms, instead of in the comprehensive description “that the ship must be seaworthy,” it is obvious that the terms of the warranty as to each of the voyages, or, as it were, parts of voyages, or conditions of things mentioned in these sections, would and must be different. If, then, the implied warranty is as to its extent and effect different in different policies, with regard to the same subject-matter, it might be not unreasonably predicated that it might be also different in different policies, with regard to different subjects. It might be different with regard to the same voyage to be made at the same season, if applied to two different subjects of insurance. There seems to be authority for saying that there is a difference. In *Phillipps on Insurance*, s. 721, it is said: “It follows, if we apply the same criterion, that there may be a compliance with this warranty in a policy on the ship while lying in port, and not one upon the cargo of the same ship; for, circumstances may be readily imagined, and often occur, in which the vessel is in reasonable security in port, though goods on board would not be so.” In s. 723: “There are, then, two distinctions in the insurance on the ship and that on cargo and freight;—first, in respect of what is seaworthiness in port,—and second, as to the time when the policy attaches: and these two distinctions have place, though all these interests are insured in the same policy made or having reference to the time before the cargo is on board.”

appropriate, exercise due diligence to make his vessel seaworthy for the particular time of the year at which she is going to sail.

For example, in *Daniels v. Harris*<sup>4</sup>, an insurance case, the ship sailed from St. Lucar in February; part of the cargo was loaded on deck as the policy allowed this, and the issue was whether loading cargo on the deck would affect the safety of the vessel if she encountered ordinary rough weather - not extraordinary conditions - which should be anticipated at that time of year<sup>5</sup>. In fact the ship was only able to survive such weather provided the crew were able to jettison the deck cargo in reasonable time. The court did not accept this and arrived at the conclusion that the ship was not seaworthy for the cargo carried if her safety were subject to the destruction of the carried cargo, and therefore, the vessel was not seaworthy for the purpose of the particular subject matter of the insurance<sup>6</sup>.

In *Moore v. Lunn*<sup>7</sup> the vessel started her voyage with a cargo of wooden logs on deck unlashd, with improper manning, Lord Justice Bankes said that on a trip like the one the ship

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4- *Daniels v. Harris, Ibid.*

5- *Ibid*, at p. 5 "Therefore it is not to be taken to be sufficient that the ship would be able to encounter without danger smooth or fair weather, but the question is whether she would be able to encounter without danger rough weather also. But there is at every season of the year some weather rougher than the ordinary rough weather of that season; and, although the ship ought to be able to stand, not only the smooth, but also the ordinary rough weather of the season in which she sails, yet the value of insurance is that it insures against damage or loss by reason of the rougher weather than the ordinary rough weather of the season. Therefore you are not to consider whether this ship would have been safe without rough weather: she was bound when she left St. Lucar to be in such a condition with regard to herself and her cargo as to be able to surmount the ordinary occurrences of an ordinary voyage in that season, including the rough weather, which must be anticipated at that time of year".

6- *Ibid*, at p. 1, "The warranty of seaworthiness implied in a contract of marine insurance is a warranty that the ship is seaworthy for the purposes of the particular subject - matter of the insurance. Therefore, in the case of a policy of insurance on deck cargo, it is not a compliance with the warranty of seaworthiness that the ship is fit to encounter ordinary rough weather with safety to herself because the deck cargo is such as may be readily jettisoned in such weather". Further more at p. 9 Brett J stated: "We are of opinion, upon consideration, that the extent and effect of the warranty that the ship is seaworthy, in a policy on cargo, can never be implied to be so great as to be considered to contemplate the destruction, in order to save the ship, in an ordinary voyage, of that very cargo which is the subject-matter of insurance. Such a supposition makes the contract as a business transaction insensible. The extra premium invariably paid in respect of a deck cargo applies to the extra danger to the cargo in case of weather more rough than the ordinary rough weather of the voyage insured.

7- *Moore v. Lunn*, (1923) 15 Ll. L. Rep. 155.

was performing in winter, with unlashd cargo and improper manning, the ship was unseaworthy because it could be predicted that the ship would be going to face bad weather<sup>8</sup>.

b. Seaworthiness and different types of navigational water

It has been mentioned earlier that Seaworthiness is affected by the type of waters the vessel is going to navigate: whether fresh water or salt water, ocean, rivers...etc. As a result, a vessel that is seaworthy to sail in inland waters might not be so for ocean or sea voyages, and the shipowner who is sending his vessel on a voyage that contains different legs in different types of waters must make his vessel seaworthy for each leg, either from the initial start of the voyage or by allowing for intermediate stops to make the required adjustment to make the vessel fit for the next part of the journey<sup>9</sup>.

For instance, in *The Quebec Marine Insurance Company v. The Commercial Bank of Canada*<sup>10</sup>, the vessel was insured for a trip from Montreal to Halifax, which included navigation in a river and the sea. The boiler of the vessel had a defect which was not apparent in the river leg of the voyage, but as soon as the vessel touched salt water the defect became apparent and she had to put in for repair. The court decision was that the ship was not seaworthy because she was not fit to embark on the sea leg of the voyage. Consequently, the underwriter was not liable to pay the assured when the vessel became a wreck because the shipowner was in breach of his implied obligation, by virtue of s39 of the Marine Insurance Act, to make his vessel seaworthy<sup>11</sup>.

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8- Moore v. Lunn, *ibid*, at p. 156, Lord Justice Bankes stated "That was the state in which this vessel started on a voyage in mid-winter across the North Atlantic with an unlashd deck cargo of logs. In my opinion the learned Judge was quite right in coming to the conclusion that at the time the vessel started she was in fact unseaworthy by reason of the state in which the captain and the first engineer were".

9- *The Quebec Marine Insurance Company v. The Commercial Bank of Canada*, (1869 -71) L.R. 3 P.C. 234. Lord Penzance stated: "It was argued that the obligation thus cast upon the Assured to procure and provide a proper condition and equipment of the Vessel to encounter the perils of each stage of the voyage, necessarily involves the idea that between one stage of the voyage and another he should be allowed an opportunity to find and provide that further equipment which the subsequent stage of the voyage requires; and no doubt that is so. But that equipment must, if the warranty of seaworthiness is to be complied with, be furnished before the Vessel enters upon that subsequent stage of the voyage which is supposed to require it . Dixon v. Sadler, 5 M. & W. 414. sited in the above case

10- *Ibid*.

11- *Ibid*, Lord Penzance, stated: "The general proposition is not denied, that in voyage Policies there is an implication by law of a warranty of seaworthiness, and it was not contended that the Vessel was seaworthy when she found herself in salt water; but it has

Furthermore, in *Moore v. Lunn*<sup>12</sup>, the vessel was loaded in Baltimore with, amongst other things, a number of hardwood logs on deck to be delivered to Hamburg. Part of the journey was a river trip followed by an open sea leg. The vessel in this case was not seaworthy in many respects as to its crew, physical damages... etc but one of the points which was raised as to constitute unseaworthiness was the fact that the logs were not lashed when the ship started from Baltimore; as the practice was, in that area with such cargo, that the lashing took place while in the river before reaching the open sea, L.J. Atkin was of the opinion that there was 'considerable evidence' that it was proper not to lash the logs at the start of the journey provided they are lashed before embarking on the next leg of the journey.

Therefore, when the vessel is going to perform a voyage which involves sailing in two different types of water, sea leg, river leg...etc, then the carrier has to make the vessel ready to sail through these legs before she sails, or he should arrange, at the beginning of the voyage, for the vessel to be made ready before embarking on the next part of the voyage<sup>13</sup>.

#### c. Seaworthiness and the type of vessel

Another factor that should be taken into account in deciding the seaworthiness of the vessel is the type of vessel involved in the voyage. This is important in two respects: the first is the ability of the vessel to navigate through certain types of water, i.e. sea, ocean, river or lakes. The other is the suitability of the vessel to carry the agreed cargo<sup>14</sup>. Regarding the first issue, the ability of the vessel to navigate through certain types of water plays an important role in deciding whether she is seaworthy or not, because a vessel which is built for inland navigation, in rivers or lakes, may not be seaworthy to

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been suggested that there is a different degree of seaworthiness required by law, according to the different stage or portion of the voyage which the Vessel successively has to pass through, and the difficulties she has to encounter; and no doubt that proposition is quite true."

12- *Moore v. Lunn*, (1923) 15 Ll. L. Rep. 155. See also *Burges v. Wicham*, (1863) 3 B & S 669.

13- *The Quebec Marine Insurance Company v. The Commercial Bank of Canada*, (1869-71) L.R. 3 P.C. 234.

14- This factor will be considered in details later on when dealing with cargo worthiness.

navigate in the sea, or vice versa, unless some modification has been done to make her so<sup>15</sup>.

In *Burges v. Wickham*<sup>16</sup> the *Ganges*, a steamer, was built in the UK in order to navigate the river Indus. She was supposed to sail from Liverpool to Karachi or Calcutta where she was supposed to be delivered. An insurance policy was issued to cover the ocean journey of the steamer. Due to the construction and character of the steamer as a river steamer, she was modified in order to be able to withstand the peril of her ocean journey to her final destination. The builder did everything that can be done to a vessel of this type to strengthen it in order to be able to encounter the ordinary perils of its journey. The assured paid an extra premium due to the extra risk the insurers were taking and they were informed about the modification that had been done. During the voyage the steamer met with heavy gales and subsequently was lost. The insurers contended that the steamer was not seaworthy because she was designed to navigate in rivers rather than ocean trip. But the court refused that and held that:

“the warranty of seaworthiness must be taken to be limited to the capacity of the vessel, and therefore, was satisfied if, at the commencement of the risk, the vessel was made as seaworthy as she was capable of being made: though it might not make her as fit for the voyage as would have been usual and proper if the adventure had been that of sending out an ordinary sea-going vessel.”<sup>17</sup>

Consequently if the vessel was not designed to navigate in certain type of waters, but the carrier did everything that could be possibly done in order to make her able to undertake the required trip, the vessel will still be unseaworthy because she is not designed for that purpose. However, if the other party- in the above case the insurer - accepts the risk then the carrier has done his duty by making the vessel as fit as possible and the other party has accepted the risk involved in using this vessel.

Furthermore, in *Paterson, Zochonis v. Elder, Dempster*<sup>18</sup>, a vessel with deep holds and no twin deck was chartered to carry a cargo of casks of palm oil and palm kernels. The trade from West African ports usually used twin-deck vessels to carry such cargo.

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15- For example, after the fall of the Soviet Union, Russian river boats were used to carry cargo across the Black Sea to Turkey, and because they were not built to undertake such voyages many of them did not make it.

16- *Burges v. Wickham*, 3 B & S 669.

17- *Ibid*, p. 669.

18- *Paterson, Zochonis v. Elder, Dempster*, [1924] A.C. 522

The cargo owners loaded the ship with a cargo of casks of palm oil and palm kernels. The casks arrived in a damaged condition due to the heavy weight of the kernels and were damaged from the beginning of the voyage. The cargo owner contended that the ship was unseaworthy because it was not fitted with twin-deck holds. Lord Sumner stated that such vessel might not be a good freight earner but that did not make her unseaworthy<sup>19</sup>. Here, if fewer kernels had been put on top the casks would not have suffered any damage, and bad stowage was the cause of the damage<sup>20</sup>.

Therefore, the type of the vessel is essential when assessing its seaworthiness, as a vessel which is seaworthy to navigate in rivers may not be seaworthy for sea or ocean voyages even if she was modified for that purpose. However, although the vessel might be of the type suitable for a particular voyage, its type may not be suitable to carry certain cargo. This may amount to uncargo-worthiness but not vessel unseaworthiness as will be explained later.

#### d. Seaworthiness and existing state of knowledge

Seaworthiness of the vessel depends to a large extent on the prevailing practice of the shipping industry at the time of the voyage. A ship does not need to be fitted with the latest technology as long as the practice at the time of the voyage was not to adopt or approve it. Thus a ship does not need to be fitted with the latest technology unless such technology has been adopted by the industry and has become necessary for safe sailing. For example satellite navigation equipment was not used in the past but recently more ships have been fitted with them and soon they will become compulsory for all vessels.

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19- *Ibid*, Lord Sumner at p. 562 stated that “There is a sense, but I think one sense only, in which the *Grelwen* might be said to have been unfit for the carriage of this cargo. One must distinguish between general fitness for what the nature of the trade requires and fitness to receive and carry a particular cargo or part of a cargo, tendered in the course of that trade. A ship, which in a certain trade and in certain not improbable combinations of cargo offering in the trade, has to shut out cargo and to sail less than a full ship, because if she takes the cargo offered she will thereby damage other cargo already loaded, is *pro tanto* an unprofitable ship. She is not as good a freight earner as she might be. For the cargo, however, that she does carry, without sacrificing it to enable her owners to carry more cargo and so earn more freight, she is perfectly fitted and quite seaworthy. All that can be said is that she might have paid better in another trade, or that another ship differently built might have paid better in the same trade”.

20- *Ibid*, p. 522 the court held: “the ship being structurally fit to carry the palm oil at the time when it was loaded, the damage was due not to the unseaworthiness of the ship for the cargo by reason of the absence of ‘tween decks, or the non-provision of a temporary ‘tween deck, but to bad stowage, and that, consequently, the charterers were protected by the exceptions in the bills of lading.”

For instance, in *M. D. C., Ltd. v. N.V. Zeevaart Maatschappij*<sup>21</sup>, a cargo of potatoes was shipped on board of the *Westerdok*. On arrival part of the cargo was damaged due to a lack of ventilation, as the vessel met with expected bad weather for the time of year and the shipowner had to close the hatches to prevent the incursion of water into the holds. The cargo owner claimed that the vessel was unseaworthy to carry the cargo, because the vessel was not fitted with ventilators. Mr. Justice McNair, in order to find whether the ship was seaworthy or not, directed the following test “Would a prudent shipowner, if he had known of the defect, have sent the ship to sea in that condition?”<sup>22</sup>, the owner said that if a prudent shipowner knew that his ship might meet with bad weather at that time of the year, and that such bad weather would lead to the closing of the hatches, and he decided to send the vessel on such a trip, then the vessel is seaworthy, but if he would not send it in such circumstances, the vessel would be unseaworthy. In this case the learned judge arrived at the decision that the vessel was seaworthy and the damage suffered was not beyond what should be expected in such voyage.

Also, in *Bradley v. Federal Steam Navigation*<sup>23</sup>, a cargo of apples was shipped from Tasmania to London and Liverpool. The apples were shipped in apparent good order and condition but arrived damaged with brown heart disease. The cargo owner claimed that the ship was not seaworthy because it did not have a ventilation system similar to the one used on the ‘battery vessels’; this system cools the air in a separate chamber, then the fans push it into the holds. While the ship in the present case did not have this system it had, instead, another system called the grid system, ‘the grid ship’. In fact both systems were equally used in this trade and the majority of vessels used the grid system. The court said that according to the existing state of knowledge at the time the

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21- *M. D. C., Ltd. v. N.V. Zeevaart Maatschappij*, [1962] 1 Lloyd's Rep. 180. in *The Schwan*, [1909] A.C. 450, the German shipyard provided the ship with a three-way cock which was common in German ships and usually used by the builder, but the engineers knew nothing about its particularities and the court held that the vessel was unseaworthy because the shipowner did not make sure that his engineers knew everything about the vessel.

22- *Ibid*, at p. 186. We can see that Mr Justice McNair used the test introduced by Carver on *Carriage by Sea*, and used in *McFadden v. Blue Star Line*, [1905] 1 K.B. 697.

23- *Bradley v. Federal Steam Navigation*, (1926) 24 Ll. L. Rep. 446.

shipowner supplied a seaworthy vessel and the damage of the cargo was not due to unseaworthiness<sup>24</sup>.

Consequently, in deciding the seaworthiness of the vessel the court must take into account the existing practice, knowledge and technology available to the shipping industry at the time of the incident; the knowledge of hindsight should not be taken into consideration. But once the new practice, knowledge or technology proves to offer a safer environment to the vessel, its crew and the cargo, and becomes widely used and acceptable, if the ship was not then fitted with such equipment it can be considered unseaworthy<sup>25</sup>.

For instance in 1960 it was not necessary, in order for the vessel to be seaworthy, to have on board radar or loran and at that time a vessel was considered to be seaworthy even if she did not have them<sup>26</sup>. The District Judge of Oregon stated that "there is no worldwide or American practice or custom with reference to the use of radar or loran as aids to navigation"<sup>27</sup> but a few years later the use of radar and such equipment became essential and the non-existence of such equipment on board the vessel made her unseaworthy<sup>28</sup>.

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24- *Ibid*, Lord Justice Bankes stated at p. 448 "Assuming for the present purpose that the conclusion of the scientists on this point is correct, I am satisfied that upon the existing state of knowledge, and with the result of part experience to guide them, there is no ground for imputing to the shipowners in the present case any want of care in reference to the provision of ventilation in the holds of the Northumberland during the voyage in question. The charge of negligence therefore fails, and Branson, J., in my opinion, was right in so holding. In my opinion the charge of unseaworthiness also fails. The defendants no doubt undertook that the Northumberland should be reasonably fit for the carriage of apples, but if she was fitted with sufficient means for providing the necessary amount of ventilation in the holds and spaces in which the apples were carried, she did not become unseaworthy because those means were not used".

25- *Ibid*, at p. 454-455. Lord Justice Scrutton. See also *Virginia Co. v. Norfolk Shipping Co.*, 17 Com. Cas. 277, at p. 278

26- Tetley, *Marine Cargo Claims*, 4th edition (to be published March, 2008). The source was taken from Tetley's web page at <http://tetley.law.mcgill.ca/maritime/ch15.pdf> on 11/06/2003 at p. 31.

27 - *President of India v. West Coast S.S. Co. (S.S. Portland Trader)*, [1963] 2 Lloyd's Rep. 278 at p. 281. The Court added: "advances in science, as such, do not make one seaworthy ship unseaworthy... ships which were well built in their time might still carry cargo unless they became so clearly out of fashion as to be an anachronism." Upheld in appeal, 327 F.2d 638, 1975 AMC 2259 at p. 2568 (9 Cir. 1964). The source of this case was taken from Tetley *ibid*.

28- In *Irish Spruce (Irish Shipping Ltd. Lim. Procs.)* 1975 AMC 2259 at p. 2568 (S.D. N.Y. 1975); reversed in appeal on other grounds, 548 F.2d 56, 1977 AMC 780 (2 Cir. 1977). "there has been a judicial reluctance to find that the failure to employ the major electronic navigational aids (even radar which is almost universally used by seagoing and coastwise vessels of all sizes)

e. Seaworthiness of the vessel and its equipment

The main obligation on the carrier is to ensure that the vessel and its equipment are in good order and condition before and at the beginning of the voyage. This would include the carrier making sure that the vessel's engine and equipment are in full working order before and at the beginning of the voyage. Therefore, he should carry out an inspection to make sure that everything is in working order, and furthermore, if a surveyor recommends certain repair work to be done then he must insure that these repairs are carried out.

The carrier should also ensure that his vessel is supplied with the necessary equipment to ensure the safe navigation of the vessel; e.g. radar, satellite navigation. In addition he should ensure that the vessel is provided with the equipment necessary for the safe delivery of the cargo; e.g. refrigeration, ventilation ... etc as will be seen later. But as was shown earlier, the carrier is not required to provide his vessel with the latest technology as long as it has not become widely used or proved to be essential for the increasing safety of navigation<sup>29</sup>.

Consequently it is the carrier's responsibility to ensure that the vessel and its equipment are in full working order, or else to prove that he, his servants, agents, or an independent contractor exercised due diligence to make the vessel seaworthy, and that the defects which caused the loss or damage were not discoverable even with the help of competent prudent experts. However, the latter situation with regard to the exercise of diligence will not apply where the carrier's obligation to provide a seaworthy vessel is an absolute one, because in this case the vessel must be seaworthy and if she was not then the carrier will automatically be in breach of his obligation<sup>30</sup>

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constitutes an unseaworthy condition, although the courts have been willing to consider the inoperability of radar aboard as unseaworthiness." cited in Tetley, *ibid*.

29- Bradley v. Federal Steam Navigation, (1926) 24 Ll. L. Rep. 446, at p. 454-455, Virginia Co. v. Norfolk Shipping Co., 17 Com. Cas. 277, at p. 278. See Tetley, *supra*.

30- Steel v. State Line Steamship Co, (1877) 3 App Cas 72 at p. 86. Kopitoff v. Wilson and Others, (1875-76) L.R. 1 Q.B.D. 377. Cohn v. Davidson, (1876-77) L.R. 2 Q.B.D. 455. The West Cock, [1911] P. 23, and CA [1911] P. 208. Robertson v. The Amazon Tug and Lighterage Company, (1880-81) L.R. 7 Q.B.D. 598.

f. The ISM Code

In line with improving the safety of navigation and environmental protection a new code, The International Safety Management Code (ISM), was introduced, and was incorporated into Safety of Life at Sea (SOLAS) Convention under Chapter IX. It became compulsory for this code to be applied by those vessels described in the Code which carry the flags of the member states to the Convention.

The Code aims at improving Maritime Safety by introducing a series of measures to ensure that vessels are kept up to certain standards. Such measures include maintenance and testing of the vessel and its equipment, and carrying out regular audits to make sure that the vessel is constantly in compliance with the Code. In exchange the vessel and the owning company will be provided with appropriate certificates to prove that the vessel is in compliance with the requirement of the Code.

In spite of the fact that the ISM Code is not part of the Hague/Hague-Visby or Hamburg Rules, it will still be compulsory for all the vessels carrying the Flags of the member states of SOLAS. As a result of the Code, both parties to the Contract of Carriage will be able to prove whether the vessel was seaworthy or not, thanks to the compulsory detailed documentation of all incidents and procedures taken by the Company, Designated Person, Master and crew to make the vessel comply with the Code. Further discussion about the ISM Code will follow in the second part of this study.

*2\_Human Seaworthiness*

This is another important factor with regard to vessels' seaworthiness. In fact most marine accidents can be, in one way or another, traced back to human errors. A report commissioned by the Marine Directorate of the Department of Transport entitled "The Human Element in Shipping Casualties" found that the Human Element was present in a

large proportion of Marine Casualties: it was present in 90 per cent of collisions and groundings, and in more than 75 per cent of contacts and fire/explosions<sup>31</sup>.

Even though the ship is physically seaworthy, it might not have sufficient or competent crew, and this could increase the possibility of its being involved in an accident that could lead to damage or loss of the cargo, human casualties or loss of property. Consequently, it is the carrier who has to make sure that his vessel is provided with a sufficient number of trained, competent crew. He also has an obligation to make sure that they know about the specification or any special requirements of the vessel, because a competent crew might still be unable to navigate the vessel safely if managing her needed special knowledge regarding one of its particularities which, if no one knew about, it might expose the vessel to danger<sup>32</sup>.

The following sections deal with different aspects of Human Seaworthiness.

a. Seaworthiness and Competence of the crew

In order for the shipowner to satisfy the requirement of seaworthiness he must employ a competent crew; special attention should be given to the recruiting of the master and the engineers, as the management of the vessel is their responsibility. A competent crew means that the staff are familiar with the vessel and its equipment and able to deal with any problem that may arise during the voyage<sup>33</sup>.

Furthermore, it is important to know how a candidate for employment as crew might behave in a particular situation and how he would manage emergencies which the vessel might face during the course of its voyage. That is because “competence includes the ability to deal with an emergency situation: such a situation might only occur many

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31- The Human Element in Shipping Casualties, report commissioned by the Marine Directorate of the Department of Transport the report is based on research carried out by Tavistock Institute of Human Relations. The report was edited by D.T. Bryant. HMSO ISBN 0 11 551004 4. 1991, at p.2. The Guidelines on the application of the IMO International Safety Management Code, Published by ISC and ISF in 1994, says that statistics shows that 80% of Marine Accidents are caused by human error but the act or omission of a human being plays a part in any virtually every accident, p. 3.

32- The Schwan, [1908] P. 356. Manifest Shipping & Co. Ltd. v. UniPolaris Insurance Co. Ltd. and la Réunion Europeene, (The Star Sea), [1997] 1 Lloyd's Rep. 360. The Farrandoc, [1967] 1 Lloyd's Rep. 232. Papera Traders Co. Ltd. and Others v. Hyundai Merchant Marine Co. Ltd. and Another, The "Eurasian Dream". [2002] 1 Lloyd's Rep. 719.

33- *ibid.*

years after qualification”<sup>34</sup>. Furthermore, the carrier has to take notice of the captain’s or engineers’ behaviour onboard the vessel because a master would not be competent to control the ship if, for example, he was frequently drunk or ill as he would not be able to exercise his assigned duties<sup>35</sup>.

The test whether a person of the crew is competent or incompetent is an objective one. The test is: would a fully competent (prudent) person be able to discover the problem and resolve it? If the answer was yes and the engineer, for example, acted in the same way as a prudent person would act, then he is competent, but if he did not act in the same way then he is not<sup>36</sup>.

The competence of the crew would also include their ability to handle the vessel on board which they are employed to work, therefore, if a new member of the crew was not familiar with the vessel this could affect his/her competence especially if there was not sufficient means, e.g. ship manuals, for them familiarise themselves with the ship within reasonable time. This would mean that, even if the crew had long experience and training, their lack of specific information could mean that they are incompetent to navigate a particular ship<sup>37</sup>.

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34- Roger White, *The Human Factor in Unseaworthiness Claims*, LMCLQ, 1996, p. 24, at p. 25.

35- *Moore and Another v. Lunn and Others*. (1923) 15 Ll. L. Rep. 155. Lord Justice Bankes stated at p. 156 “I think that the learned Judge has found, and in my opinion rightly found, that she was not seaworthy in that respect, and for the reason that the captain and the chief engineer, at any rate, from the time the vessel arrived in Mobile in the previous September, had both of them been what I may call habitual drunkards”. *The Makedonia*, [1962] 1 Lloyd's Rep. 316, at p. 336.

36- *The Roberta*, (1938) 60 Ll. L. Rep. 84. Lord Justice Greer at p. 86. Also the test was mentioned in *The Hongkong Fir* [1961] 1 Lloyd's Rep. 159, at p. 168 the test would apply in case of the Human Seaworthiness “Would a reasonably prudent owner, knowing the relevant facts, have allowed this vessel to put to sea with this engine-room staff” by Salmon J. A. P. Stephen v. *Scottish Boatowners Mutual Insurance Association (The Talisman)*, [1989] 1 Lloyd's Rep. 535, at p. 539 “The test is an objective one, directed to ascertaining what an ordinarily competent fishing boat skipper might reasonably be expected to do in the same circumstances”, by Lord Keith of Kinkel.

37- *Standard Oil Company of New York; v. Clan Line Steamers, Limited*. [1924] A.C. 100. p. 120-121. *Robin Hood Flour Mills, Ltd. v. N. M. Paterson & Sons, Ltd., (The Farrandoc)*, [1967] 1 Lloyd's Rep. 232. See also *The Schwan*, [1908] P. 356. *Papera Traders Co. Ltd. and Others v. Hyundai Merchant Marine Co. Ltd. and Another, (The Eurasian Dream)*. [2002] 1 Lloyd's Rep. 719. *Manifest Shipping Co. Ltd. v. Uni-Polaris Insurance Co. Ltd. and la Réunion Européene, (The Star Sea)*, [2001] 1 Lloyd's Rep. 389.

b. Seaworthiness and sufficient number of crew

The carrier must also employ on board his vessel an adequate number of crew in order to be able to provide the required service and to ensure that, in an emergency, there are enough seamen to carry out the emergency procedures<sup>38</sup>. Therefore, if the vessel sailed without a sufficient number of crew she would not be seaworthy and the carrier would be in breach of his duty to provide a seaworthy vessel<sup>39</sup>.

For example, in *the Hongkong Fir*<sup>40</sup>, the vessel was time chartered for a period of 24 months. During the journey from Liverpool to Osaka the vessel went off hire for 8 and half weeks, then for another 15 weeks. The charterer claimed that the vessel was not seaworthy in several respects, *inter alia*, she was not manned sufficiently and the crew were not competent. The court found that the engine-room crew numbers were insufficient and they were not competent, and consequently the vessel was unseaworthy, but such a breach was not enough to allow the charterer to repudiate the contract although they were entitled to damages.

Additionally, if the shipowner provided his ship with an adequate number of crew, but while she was loading or discharging or in an intermediate port one of them left the vessel and did not come back, the carrier then has to replace the missing member of crew as soon as possible, especially if the role of the missing person was so important that no one else can provide the same service<sup>41</sup>.

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38- *Burnard & Alger, Ltd. v. Player & Co.* (1928) 31 Ll. L. Rep. 281. In this case the vessel met with bad weather which led to the hatchway being uncovered and the cargo being damaged. The cargo owners claimed that the vessel was not seaworthy due to insufficient manning and to non-attention to the adequate tightening of the wedges which held the battens holding the tarpaulin in place over the hatches of the ship. The court found that the vessel was unseaworthy due to both causes and that the absence of one of the ship mates made a difference which led to such a result. p. 248

39- *Hongkong Fir Shipping Company, Ltd. v. Kawasaki Kisen Kaisha, Ltd.*, [1961] 1 Lloyd's Rep. 159. [1961] 2 Lloyd's Rep. 478. *Burnard & Alger, Ltd. v. Player & Co.* (1928) 31 Ll. L. Rep. 281.

40- *Hongkong Fir Shipping Company, Ltd. v. Kawasaki Kisen Kaisha, Ltd.*, *The "Hongkong Fir"*, [1961] 1 Lloyd's Rep. 159. [1961] 2 Lloyd's Rep. 478

41- *Burnard & Alger, Ltd. v. Player & Co.* (1928) 31 Ll. L. Rep. 281. Where the chief officer left the vessel and did not return. His presence was important on board and the ship sailed without him or without recruiting another one. the established number of the crew was nine but the second engineer also left and was found drowned so the vessel left with seven crew members instead of nine and she turned out to be unseaworthy.

c. Ignorance of the crew

In dealing with Human Seaworthiness it is important to distinguish between two situations. The first is where the crew is incompetent to manage the ship; in this case the vessel would automatically be unseaworthy<sup>42</sup>. The other case is where the crew is competent and has all the required skills but the carrier failed to communicate to them certain key information about his vessel the awareness of which is important to avoid endangering the ship, its crew and cargo. This latter could be referred to as ignorance of the crew. The information in question is specific to a particular vessel. In this case the master and the crew do not lack general competence but because they were not given certain information about the vessel they will be incompetent to manage this particular vessel. The carrier will be in breach of his obligation to provide a competent crew by not informing them about such particularities and the vessel will be ‘inherently unseaworthy’. In this case “There cannot be any difference in principle... between disabling want of skill and disabling want of knowledge. Each equally renders the master unfit and unqualified to command, and therefore makes the ship he commands unseaworthy”<sup>43</sup>.

For example, In *Standard Oil Company v. Clan Line Steamers*<sup>44</sup>, the shipowner did not communicate to the captain the information he received from the builders of the ship, regarding the amount of water that should be kept in the ballast tanks and the best way of loading the ship. The captain ordered the crew to empty two ballasting tanks, and that led to the ship capsizing and consequently it was lost. The House of Lords said that even a skilful and experienced captain would not have known this fact about the vessel without instruction. Lord Atkinson stated:

“It is not disputed, I think, that a ship may be rendered unseaworthy by the inefficiency of the master who commands her. Does not that principle apply where the master's inefficiency consists, whatever his general efficiency may be, in his ignorance as to how his ship may, owing to the peculiarities of her structure, behave in circumstances likely to be met with on an ordinary ocean voyage?”<sup>45</sup>

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42- *The Makedonia*, [1962] 1 Lloyd's Rep. 316.

43- *Standard Oil Company of New York; v. Clan Line Steamers, Limited*. [1924] A.C. 100. p. 120-121.

44- *Standard Oil Company of New York; v. Clan Line Steamers, Limited*, *ibid*.

45- *Standard Oil Company of New York; v. Clan Line Steamers, Limited*, *ibid*, at 120.

In *The Farrandoc*<sup>46</sup>, the shipowner engaged a second engineer after seeing his certificates, but without making any further enquiry whether or not the engineer had worked in the past on a ship of similar type. During the trip the engineer opened the wrong valve during the pumping operation, allowing the water to enter the holds and damage the cargo of wheat. The shipowner did not provide the engineer with a plan for the engine-room piping system. The cargo owners claimed that the engineer was not competent. The court arrived at the decision that the engineer was not competent and the owner did not exercise due diligence in employing competent crew and providing a proper plan for the pipework, Mr. Justice Arthur I. Smith stated:

“Had such a plan been available it is reasonable to suppose that Humble (the engineer) would have availed himself of it with the result that he would not have made the error of opening the wrong valve”<sup>47</sup>.

d. Negligence of the crew or Incompetence

It is also very important to distinguish between incompetence of the crew and the negligence of the crew, as this has a very serious impact in cases where there was any loss or damage. The Hague/Hague-Visby, and the Hamburg Rules set different results for each of these cases.

Art III r 1 and Art IV r 1 of the Hague/Hague-Visby Rules provides

III r1 ‘The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

b) properly man, equip and supply the ship.

IV r1 “Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.”

So if the shipowner did not fulfil this obligation by employing a competent crew and a loss or damage occurs he will not be able to use the exceptions mentioned in Art IV r2,

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46- *The Farrandoc*, [1967] 1 Lloyd's Rep. 232. See also *The Schwan*, [1908] P. 356.

47- *The Farrandoc*, *Ibid*, at p. 235

as the obligation to provide a seaworthy vessel is an overriding obligation under the Hague/Hague-Visby Rules<sup>48</sup>.

But if the cause of the loss has nothing to do with the unseaworthiness of the ship or the failure to exercise of due diligence then the shipowner will be able to exempt himself from the liability for the damage if it was a result of the negligence of the crew, using the exception in Art IV r.2 (a)<sup>49</sup>. But under the Hamburg rules he will still be liable for damages resulting from the negligence of the crew which means that the carrier, under the Hamburg Rules, does not enjoy the same protection offered by Art IV r2 of the Hague/Hague-Visby Rules.

Article 5 of the Hamburg Rules, uses different wording to refer to this duty. The article states that:

“1\_ The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, or damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

4\_ (a) The carrier is liable:

(i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;

(ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents, in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences”.

Under the Hamburg Rules the carrier will not be able to protect himself unless he proves that there was no privity or fault on his part, or his servants or agents. This means that both the negligence of the crew and their incompetence have the same effect on the carrier, i.e. he will be responsible to the same extent regardless whether the cause was negligence or incompetence.

There is a very fine line in distinguishing between negligence and incompetence of the crew. A crew member will be competent if he has the knowledge, experience and

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48- *Maxine Footwear Co. Ltd. and Another v. Canadian Government Merchant Marine Ltd.*, [1959] A.C. 589.

49- Art IV r2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from-

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

skills on how to operate the part of the ship for which he is responsible. On the other hand, he will not be competent if he “does not possess the level of capability or skill to be reasonably expected of an ordinary seaman of his rank”<sup>50</sup>. Therefore, in the case of incompetence the crew do not have the experience and the knowledge to exercise the duties assigned to them to take the ship safely to its destination; because of this the ship will be unseaworthy. But if the shipowner chose his crew with due care and made sure that they had the required qualification, knowledge, experience...etc and provided a vessel which had all the required equipment and documents, but the crew did not carry out their duties responsibly, failing either to use the qualifications and knowledge they have or to use the equipment provided properly so as to prevent any danger that the ship might face, that would amount to negligence and not incompetence<sup>51</sup>. This can be clearly found in Lord Blackburn’s statement:

“If, for example, this port was left unfastened, so that when any ordinary weather came on, and the sea washed as high as the port, it would be sure to give way and the water come in, unless something more was done--if in the inside the wheat had been piled up so high against it and covered it, so that no one would ever see whether it had been so left or not, and so that if it had been found out or thought of, it would have required a great deal of time and trouble (time above all) to remove the cargo to get at it and fasten it--if that was found to be the case, ..., I can hardly imagine any jury finding anything else than that a ship which sailed in that state did not sail in a fit state to encounter such perils of the sea as are reasonably to be expected in crossing the Atlantic. I think, on the other hand, if this port had been, .... , open, and when they were sailing out under the lee of the shore remaining open, but quite capable of being shut at a moment's notice as soon as the sea became in the least degree rough, and in case a regular storm came on capable of being closed with a dead light--in such a case as that no one could, with any prospect of success, ask any reasonable people, whether they were a jury or Judges, to say that that made the vessel unfit to encounter the perils of the voyage, because that thing could be set right in a few minutes, and there is always some warning before a storm comes on, so that they would have plenty of time to put it all right, and it would have been put right. If they did not put it right after such a warning, that would be negligence on the part of the crew, and not unseaworthiness of the ship. But between these two extremes, which seem to me to be self-evident cases as to what they would be, there may be a great deal of difficulty in ascertaining how it was here”.

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50- Roger White, *The Human Factor in Unseaworthiness Claims*, LMCLQ 1995, 2 May 221-239, at p.223. Lord Ellenborough in *Hunter v. Potts*, (1815) 4 Camp. 203 Cited in the above article stated “[t]he crew must be adequate to discharge the usual duties and to meet the usual dangers to which the ship is exposed”.

51- *Steel et Al. v. The State Line Steamship Company*, (1877-78) L.R. 3 App. Cas. 72. Lord Blackburn at p. 90-91. Also see *Hedley v. The Pinkney and Sons Steamship Company, Limited*. [1892] 1 Q.B. 58, “A ship, which is properly equipped for encountering the ordinary perils of the sea, does not become unseaworthy with in the above enactment, because the captain negligently omits to make use of part of her equipment” at p. 58.

For instance, in *Hedley v. The Pinkney and Sons Steamship*<sup>52</sup>, the ship was seaworthy in all aspects to encounter the perils which she might face in her trip. The ship had an opening in her ‘bulwarks for the purpose of gangway’ which was designed in such a way that this opening could be closed with a movable railing which could be put up or moved in a short time according to need. The vessel encountered a storm and one of the crew fell overboard through the opening and drowned in the sea. During the trip, and before the accident, one of the crew asked the ship’s mate whether he should put up the railing or not but the mate said that there was no need for it. The captain also saw that the rail was not in its place but he took no action. The wife of the deceased seaman claimed that the ship was unseaworthy because the railing was not in its place. The court held that the shipowner was not in breach of his duty to provide a seaworthy ship. Lord Esher. M.R. stated<sup>53</sup>, “It was said that the Act means that the ship must be seaworthy with regard to the safety of the crew or others on board. But that does not alter the fact that ‘seaworthiness’ must relate to the condition of the vessel” and he said that in this sense she was seaworthy<sup>54</sup>. The court’s opinion thus was that there was negligence on the part of the master not to put the rail on its place though he had sufficient time to do so and that the vessel was seaworthy.

e. Mismanagement or Incompetence

In some cases a distinction should be drawn between the incompetence of the crew and mismanagement of the vessel or the failure to exercise due care. As has been shown, in the case of incompetence the crew is not qualified to manage the vessel and to take it safely to its destination. But in the case of mismanagement of the vessel the crew is qualified and competent but they did not take proper care in handling the equipment or apparatus with which the vessel has been provided, and in this case that would not

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52- *Hedley v. The Pinkney and Sons Steamship Company, Limited*, [1892] 1 Q.B. 58.

53- *Hedley v. The Pinkney and Sons Steamship Company, Limited*, *ibid*, at p. 65-66. See also Mr. Justice Branson in *F. C. Bradley & Sons, Ltd. v. Federal Steam Navigation Company, Ltd.* (1925) 22 Ll. L. Rep. 424 at p. 436.

54- *Hedley v. The Pinkney and Sons Steamship Company, Limited*, *ibid*, it was held in this case that “the ship being provided with sufficient means of closing the opening readily available, the fact that such opening was unprotected at the time of the accident did not make the ship unseaworthy within s. 5 of the above-mentioned Act; and therefore the shipowners were not liable to an action for breach of the obligation created by that section.” at p. 58.

indicate the unseaworthiness of the vessel but mismanagement, and the shipowner would not be responsible if there was a clause in the contract that protected him against such things<sup>55</sup>. Under the Hague/Hague-Visby Rules the carrier is protected against the mismanagement of the vessel by virtue of Art IV r2 (a).

In the latter case one should differentiate between a situation where the equipment is provided for the service of the whole ship and one where the equipment was provided for the service of the particular cargo shipped on board. In the first case, if such part of the vessel was provided initially for the service of the vessel as a whole and not a particular cargo, then the mismanagement of such part would be mismanagement of the vessel as a whole. But in the second case, where the apparatus is provided for the protection of a particular cargo shipped on board, the mismanagement of this part would be mismanagement of this part alone, not the whole vessel and the loss of the cargo would amount to the breach of the duty of care of the cargo referred to in Art III r2. But in both of these cases the mismanagement would not amount to breach of the obligation of seaworthiness<sup>56</sup>.

#### f. The ISM Code and Human Seaworthiness

It was stated earlier that the ISM Code was introduced to deal with the issue of safety on board the vessel and environmental protection. The code requires the ship owning companies to introduce a Safety Management System (SMS) which deals, *inter alia*, with the training of the crew, employment and making sure that all the crew on board the vessel have access to all the information needed to manage the vessel. And in spite of the fact that the Code is not part of the Hague/Hague-Visby or Hamburg Rules, it can be considered as a framework to give a guideline as to the best practice in making the vessel seaworthy<sup>57</sup>. The certificates required by the code can be considered part of Documentary Seaworthiness.

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55- Rowson v. Atlantic transport, [1903] 2 K.B. 666

56- Rowson v. Atlantic Transport, *Ibid*, see Vaughan Williams L.J. and Romer L.J.

57- The Eurasian Dream. [2002] 1 Lloyd's Rep. 719

### *3\_ Documentary Factor*

Even though the carrier might have provided a vessel that is physically seaworthy, properly manned with competent and trained crew, the vessel might yet be unseaworthy. The reason for that is the vessel must have on board certain documents to ensure its safe sailing and compliance with both international and national rules and regulations. Such documents are very important to enable the vessel to enter or leave ports, and might include. ISM or ISPS documentation, documents relating to the cargo being carried, documents related to its ability to sail, e.g. navigational charts, or documents related to the ship's operation; e.g. ship plans... etc. Furthermore, it is not enough to provide the vessel with these documents; the carrier or his agent must ensure that these documents are updated on a regular basis.

Therefore, the vessel must be provided with the navigational documents needed for the route she is going to take and ship plans. In addition if, the regulations in a specific port bind ships to carry particular documents, then if the ship does not have such documents this might affect its seaworthiness. Furthermore, if there was a certain practice in the trade that the ship must have certain documents, then the vessel must have them to be seaworthy<sup>58</sup>. However, if the documents were of a type not usually carried on board the vessel, or usually issued to the carrier or the master, then not having these documents will not affect the seaworthiness of the ship to proceed in her voyage, unless the carrier knew these to be required at a particular port and that his vessel is going to call at that port<sup>59</sup>. In addition to that, the carrier has to provide a system for keeping these documents up-to-date; otherwise he would be in breach of his duty.

The required documents can be divided into three categories. First are navigational documents necessary for safe navigation. The second is ship's plans; such documents are important to show how the ship's parts can be dealt with and operated without compromising the safety of the vessel, her crew and cargo. The third category includes

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58- Levy v. Costerton, 4 Camp. 389, cited in Chellew Navigation Company, Ltd. v. A. R. Appelquist Kolimport, A.G. (1933) 45 Ll. L. Rep. 190, at p. 193

59- Chellew Navigation Company, Ltd. v. A. R. Appelquist Kolimport, A.G. (1933) 45 Ll. L. Rep. 190. Alfred C. Toepfer Schiffahrtsgesellschaft G.M.B.H. v. Tossa Marine Co. Ltd. Tossa Marine Co. Ltd. v. Alfred C. Toepfer Schiffahrtsgesellschaft G.M.B.H., The "Derby", [1985] 2 Lloyd's Rep. 325.

any other documents which are important for the vessel to be able to load, unload or sail to its destination.

a. Navigational Documents

The ship must have on board sufficient up-to-date charts, sailing directions, lists of lights, notices to mariners, tide tables and all other nautical publications necessary for the intended voyage, which will allow her to navigate safely to her destination. These documents are as important as any other equipment aboard the ship such as the compass or radar, and it is the responsibility of the ship owner to make sure that his ship is supplied with such documents<sup>60</sup>. Also the vessel must have the charts not only for the route she is taking but also for alternative routes that she might need to take instead of the original one.

It was shown earlier that the shipowner can delegate the duty to provide a seaworthy vessel to his agent or servant... etc, therefore, he can also delegate the duty of supplying the vessel with documents to the master or an agent, but in this case he will still be responsible if they fail to provide these documents or keep them up to date. This is because the duty to provide a seaworthy vessel is a personal one and non-delegable<sup>61</sup>.

The documents that the ship needs on board and which affect its seaworthiness vary and depend on the circumstances of each case and depend on “the law of the vessel's flag or by the laws, regulations or lawful administrative practices of governmental or local authorities at the vessel's port of call”<sup>62</sup>.

For instance, in *The Marion*<sup>63</sup>, the vessel was awaiting a berth on Teesside. The master ordered the ship to anchor somewhere near the port of loading until a berth was available, but he did not realize that the Ekofisk pipeline lay in this area, as he was using an old chart, and as a result the pipeline was damaged. At the beginning of the

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60- Grand Champion Tankers Ltd. v. Norpipe A/s and Others (The Marion), [1982] 2 Lloyd's Rep. 52, p. 57. Mr. Justice SHEEN

61- Union of India v. N.V. Reederij Amsterdam, (The Amstelslot), [1963] 2 Lloyd's Rep 223. Riverstone Meat Company, Pty., Ltd. v. Lancashire Shipping Company, Ltd., (The Muncaster Castle) [1961] 1 Lloyd's Rep 57. W. Angliss and Company (Australia) Proprietary, Limited v. Peninsular and Oriental Steam Navigation Company. [1927] 2 K.B. 456.

62- Alfred C. Toepfer Schiffahrtsgesellschaft G.M.B.H v. Tossa Marine Co. Ltd. (The Derby), [1985] 2 Lloyd's Rep. 325, at p. 331.

63\_ The Marion, *Supra*.

voyage the master asked his assistant to bring the charts for the trip, and the assistant picked an old one; however, if he had looked properly in the chart room he would have realized that there were up-to-date charts. The shipowner's agent delegated the matter of updating the charts to the master, but did not check whether the master was using up-to-date charts, or whether, if the master removed the old charts from the chart room, he also did not establish a system to ensure that the charts were continuously updated. As a result of this the court held that the vessel was unseaworthy due to lack of up-to-date charts and the lack of a system to supervise this operation.

As a result the carrier is required to establish a system onboard his vessel/fleet to ensure that all the navigational documents are updated and all the old ones have been removed from the vessel. He can delegate this job to the master or an agent, but he will still be responsible if his agent fails to do his job. One of the ISM Code requirements is to ensure that all the documents on board the vessel are updated; moreover, the Code requires the shipowner to create a monitoring system to ensure that all the old documents have been removed from the chart room, and that the documents are up-dated on a regular basis<sup>64</sup>.

#### b. Ship Plan

The vessel also must be supplied with a plan that shows how its parts work, such as the pipes, fire extinguishing system, engines... etc, in order to be able to operate the ship properly. This is very important because even though the seamen might not be competent or have experience with a particular type of ship, and the shipowner did not exercise due diligence to make the ship seaworthy regarding its men, the existence of such plans might prevent its loss or at least reduce the possibility, as even though the engineers or seamen might not have experience with a particular vessel they will be able, by reading the manuals, to ensure that the vessel is operated in the proper way.

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64- ISM Code S.11. Guidelines on the application of the IMO International Safety Management Code, Published by ICS/ISF 1994 p. 21-22. The ISM does not specify the navigational documents, it deals with all the documents on board the vessel.

For example, In *The Farrandoc*<sup>65</sup>, the shipowner employed a second engineer on the same day as the ship sailed. He saw the engineer's certificate but he did not make any inquiries about his experience, or whether he had served on a vessel of similar type to *The Farrandoc*. The vessel did not have on board any plans for the engine-room piping system and the shipowner did not attempt to orientate the engineer with the vessel. In order to stabilize the vessel at the plaintiff's dock at Montreal, an order was given to fill the number 2 tank with ballast water. However by mistake the engineer opened the wrong valve, allowing seawater to get into cargo hold number 2. The court said that even though the shipowner did not exercise due diligence in appointing the engineer, Mr. Justice Arthur I. Smith stated that<sup>66</sup> "had such a plan been available it is reasonable to suppose that Humble (the engineer) would have availed himself of it with the result that he would not have made the error of opening the wrong valve". If the shipowner wants to escape liability he has to prove that even if such a plan were provided, the loss could not have been avoided<sup>67</sup>.

Consequently, even though the crew was not competent or had insufficient experience if the ship was provided with a plan that showed how some of its parts operated, that might reduce the chance of damage or loss to her and the cargo onboard.

c. Other necessary Documents indirectly related to vessel seaworthiness

Sometimes the port authorities, or the flag state, or the rules and regulations governing the Shipping Industry might require the vessel to carry certain documents which are not related to the safety of navigation or the ship plans, and the vessel will not be allowed to enter or leave the port, load or unload without presenting them. In this case failing to provide such documentation might render her unseaworthy<sup>68</sup>.

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65- Robin Hood Flour Mills, Ltd. v. N. M. Paterson & Sons, Ltd., (*The Farrandoc*), [1967] 2 Lloyd's Rep. 276.

66- Robin Hood Flour Mills, Ltd. v. N. M. Paterson & Sons, Ltd., (*The Farrandoc*), [1967] 1 Lloyd's Rep. 232, at p. 235. *The Makedonia*, [1962] 1 Lloyd's Rep. 316, at p. 338.

67- *The Farrandoc*, *ibid.*

68- For example the ISM Code requires that the vessel should have a Safety Management System, Document of Compliance and a Safety Management Certificate. The International Ship and Port Facility Security Code (ISPS) further requires the vessel to have on board a Ship Security Plan, Continuous Synopsis Record, Ship Security Certificate, and a log of the last ten ports she visited along with the security level she was operating on when visiting these ports. If the vessel does not have such documents especially

For example, in *The Madeline*<sup>69</sup>, the health authorities in the port of delivery, Calcutta, demanded that the ship should obtain a deratisation certificate in order to be able to trade and load cargo. The vessel was supposed to be delivered to the charterers by May 10<sup>th</sup> 1957 but the fumigation of the vessel could not be finished before midnight on May 10<sup>th</sup> and the certificate was obtained on May 12<sup>th</sup>. The charterers used their right to cancel the charter because the vessel was not delivered ready by the cancellation date and the carriers contested this. The court held in this case that the shipowner failed to deliver the vessel in a seaworthy condition by the delivery date, therefore he was in breach of his duty and the charterers had the right to cancel the contract.

d. Other documents not related to vessel seaworthiness

Sometimes ships might be obliged to have some documents that do not in any way affect the safety or fitness of the ship, the crew, the cargo or the property of other people, but these documents should be kept because of the rules of a particular organization or the regulations at the port of delivery/loading. In this case the absence of these documents, although not affecting the seaworthiness of the ship or its safety, might yet prevent her from being allowed to load/unload or even leave/enter the port of anchorage without presenting them. In this case, would not having these documents cause the vessel to be unseaworthy and breach of the carrier's obligation?

To answer this question it is necessary to distinguish between two situations. The first is if the carrier knew or anticipated that his vessel would call at a port where such documents are required, then he should provide his vessel with these documents to prevent any delay or detention of his vessel, and the courts may consider failure to do so as a breach of his obligation to provide a seaworthy vessel. This case could be regarded as similar to the situation in the previous section. The second situation is if the vessel called at a port without advance planning; i.e. for emergency repairs or because the charterers decided suddenly to load ore cargo. Here the carrier had no means of knowing that his vessel would call at such a port in order to arrange for such documents

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the ISPS ones she might find great difficulty visiting getting into the ports to load or unload – if indeed it was permitted to get in at all.

69- Cheikh Boutros Selim El-Khoury and Others v. Ceylon Shipping Lines, Ltd., (The Madeleine), [1967] 2 Lloyd's Rep. 224.

and will not be in breach of his obligation. The latter situation would also apply if the carrier did not expect that the rules of a local, national or international organization, which normally apply to vessels carrying the flag of the country at which his vessel is calling or the flag of certain countries, would apply to his vessel.

For instance, in *The Derby*<sup>70</sup>, the vessel arrived at Leixoes in Portugal to discharge its cargo. The International Transport Workers Federation (I.T.F) representative asked if the ship had the I.T.F Blue Card, which is basically a certificate to ensure that the rate of pay and the conditions of employment of the crew comply with the requirements of the organization, but it has nothing to do with the safety of the ship, the crew or the cargo. When the ITF found out that the vessel did not have such a document, it asked the stevedores to stop unloading until they arrived at an agreement with the carriers. This resulted in a delay in unloading and the charterers requested to take the vessel off hire due to a breach of contract conditions and because the vessel was unseaworthy, due to the lack of the documents. The court of appeal held, affirming Mr. Hobhouse J's decision, that the Blue Card has nothing to do with the safety of the ship and does not affect its seaworthiness and fitness to proceed in her voyage, it stated:

“(1) the context in which the words "in every way fitted for the service", occurred showed that these words related primarily to the physical state of the vessel; the warranty that the vessel was seaworthy required the provision of a sufficient and competent crew to operate the vessel for the purposes of the charter service and to that extent the words went beyond the physical state of the vessel as such; but there was no basis for any enlargement of the scope of those words a warranty that the rates of pay and conditions of employment of the crew must also comply with the requirements of a self-appointed and extra-legal organization such as the I.T.F.; this was not the meaning which those words could properly bear

(2) the scope of the words have also been held to cover the requirements that the vessel must carry certain kinds of documents which were relevant to her seaworthiness or fitness to perform the service for which the charter provided; the nature or description of such certificates which may be required to be carried on board to render the vessel seaworthy depended on the circumstances but there was no basis for holding that such certificates could properly be held to include documents other than those which might be required by the law of the vessel's flag or by the laws, regulations or lawful administrative practices of governmental or local authorities at the vessel's port of call; an I.T.F. blue card did not fall within this category ....”

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70- *The Derby*, [1985] 2 Lloyd's Rep. 325. at p. 331. See also *Compagnie Algerienne de Meunerie v. Katana Societa di Navigazione Marittima, S.P.A.*, [1960] 2 Q.B. 115. in this case the Syrian authorities prevented the loading of the vessel until the vessel got permission to load, on the condition of proving that she did not call at any Israeli port which she failed to prove, and consequently she was refused the permission to load. The court held that she was not unseaworthy, as this document has nothing to do with her safety.

In this case the parties to the contract of carriage expected that the ITF might interfere and cause delay, and this is clear from the clauses they included in their contract, but the court found that the ITF document did not affect the seaworthiness of the vessel and therefore there is no need to extend the meaning of seaworthiness to include such documents. But this decision is debatable; in this case the parties expected such interference and took certain measures to minimise its effect; i.e. the charterer expected the risk and accept to take it, but what would be the situation if both parties did not know about such documents?

It is the duty of the carrier, if he knows what ports his vessel will, to investigate the rules and regulations of the port and any required documents and if he does not do so and, as a result, his vessel is delayed then he will be in breach of his obligation. Nevertheless, if visiting a particular port was not within the plan, and due to the lack of documents the vessel was detained, the carrier will not be in breach of his duty because he did not anticipate such a stop.

Furthermore, if the carrier knew that one of the ports the vessel would visit has rules, regulations or a statutory instrument that the ship before leaving/entering should obtain a particular clearance document, which has no effect except in this port, and he instructed his master to obtain the document but the latter sailed without obtaining it, the carrier will be responsible for such a breach, unless the master acted without his knowledge or consent, and this act will not render the ship unseaworthy<sup>71</sup>.

*-Conclusion*

In a nutshell, vessel seaworthiness includes three fundamental aspects, physical fitness of the vessel, which includes the physical readiness of the vessel and its equipment to undertake the voyage; human seaworthiness, a very important factor as most marine incidents could be traced back to an error on the part of the carrier or his crew, which includes ensuring the competence of the crew to deal with the vessel and its equipment, and also extends to cover their readiness to deal with emergencies, e.g. fire fighting training. Finally vessel seaworthiness covers the documentary element of

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71- Wilson v. Rankin, (1865 -66) L.R. 1 Q.B. 162.

seaworthiness, e.g. navigational charts, ship plans... etc. Once the vessel has satisfied these three elements we can say that the vessel is seaworthy.

However a vessel satisfying the above elements will be seaworthy but may not be cargo worthy. This would lead on to the second aspect of seaworthiness which is cargo-worthiness of the vessel.

### **- Cargo Worthiness**

It was shown earlier that the duty of the carrier to provide a seaworthy vessel is divided into two parts: The first one deals with the vessel's physical seaworthiness, its crew and documentation, while the second part deals with the ability of the vessel to receive the cargo and deliver it to its final destination safely<sup>72</sup>. The carrier not only guarantees that the vessel is seaworthy before and at the beginning of the voyage but also "the warranty is that at the time the goods are put on board she is fit to receive them and to encounter the ordinary perils that are likely to arise during the loading stage"<sup>73</sup>.

Therefore, in addition to the obligation of the carrier to provide a vessel that is seaworthy in terms of men, equipment and documents, he must provide a cargo-worthy vessel in order to be able to discharge his duty to provide a seaworthy vessel, or in the case of the Hague/Hague-Visby and the Hamburg Rules if the vessel was unseaworthy he has to prove that he exercised due diligence. The duty to provide a cargo-worthy vessel does not need to be expressly mentioned in the contract of carriage, as the duty to provide a vessel that is fit to carry the cargo is part of the duty to provide a seaworthy vessel, this view was confirmed by a long line of authorities as Lord Blackburn stated in, *Steel v. State Line*<sup>74</sup>:

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72- Elder, Dempster and Company, Limited, and Others Appellants; v. Paterson, Zochonis and Company, Limited and Others, [1924] A.C. 522, Viscount Cave at p 530.

73- McFadden v. Blue Star Line, [1905] 1 K.B. 697. Channell J at p. 704

74- Steel et Al. v. The State Line Steamship Company, (1877-78) L.R. 3 App. Cas. 72. Owners of Cargo on Maori King v. Hughes, [1895] 2 Q.A.B. 550. In Rathbone Brothers & Co. v. D. Maciver, Sons & Co. [1903] 2 K.B. 378. Romer L.J. stated at p. 390 that: "It is said that in this bill of lading the word "unseaworthiness" ought not to receive its ordinary meaning, but should be limited to unfitness of the ship as a ship to meet the ordinary perils of navigation without special regard to the cargo. On full consideration, I think it would not be right in this bill of lading to cut down in this way the meaning of the term "unseaworthiness." In the first place, it is important to bear in mind that this word "unseaworthiness" is used in a mercantile document and by mercantile men,

“I take it my Lords, to be quite clear, both in *England* and in *Scotland*, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a "warranty," not merely that they should do their best to make the ship fit, but that the ship should really be fit”.

The fact that seaworthiness is a combination of two factor, can mean that the vessel is seaworthy with regards to physical, human and documentary seaworthiness but is uncargo-worthy<sup>75</sup> or *vice versa*, therefore if such a ship was delivered at the port of loading, the fact that it is seaworthy in one respect but not the other will mean that the carrier has failed to exercise his duty to make the vessel seaworthy.

Cargo-worthiness can be divided into two separate areas. The first is the general cargo-worthiness that deals with the cargo-worthiness of any vessel for any kind of cargo. The second is a special cargo-worthiness, meaning the fitness of the vessel to receive a particular cargo.

It is also important to make a clear distinction between unfitness of the vessel to receive the cargo and improper stowage that renders the vessel unseaworthy and the stowage that damages the cargo but does not endanger the vessel itself.

### *1\_General Cargo-worthiness*

The carrier is obliged to provide a vessel that is fit to carry the contracted cargo in order to be able to discharge his obligation to provide a seaworthy vessel. This general cargo-worthiness will include preparing the holds to receive the cargo; this might include disinfecting or fumigating the holds if the vessel was carrying infected cargo on

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and it ought to receive its well-known meaning, unless there are other and overwhelming considerations which compel the Court to depart from that meaning. To my mind there is nothing in this bill of lading taken as a whole which prevents the Court from giving to the word "unseaworthiness" its ordinary meaning. ... Such a limitation would practically take away from the term "unseaworthiness" the whole of its meaning". *Ben Line Steamers Ltd. v. Pacific Steam Navigation Co, The Benlawers*, [1989] 2 Lloyd's Rep. 51.

75- *Read v. Page*, [1927] 1 K.B. 743, Scrutton L.J. at p. 754. "A ship may be unfit to carry the contemplated cargo, because, for instance, she has not sufficient means of ventilation, and yet be quite fit to make the contemplated voyage, as a ship”.

the previous voyage<sup>76</sup> or if the vessel was in a port known to be contaminated with some disease. The carrier thus has to decontaminate his vessel before calling at another port or start loading, especially if the authorities of the next port of call are expected to ask for such procedures<sup>77</sup>. Also the holds must be in a seaworthy condition in a way that will not endanger the cargo i.e. the leakage of pipes or hatches<sup>78</sup>. However, if the carrier did take such procedures to make the vessel fit to receive the cargo, but did not have the required certificates to prove this, that would not render the vessel unseaworthy if he can prove without delay that he made all the required arrangements to make her so. Furthermore, even if the carrier did not make such arrangements but unseaworthiness could be remedied without delay and the carrier was able to arrange for that, then he will not be in breach of his duty<sup>79</sup>.

In addition, if there was a special practice in the trade that should be followed before or during the loading operation in order to protect the cargo, then the carrier has to follow such practice in order to discharge his duties. So If the ordinary practice in a particular trade was that, before a particular cargo is loaded on board, a specific precaution should be taken to prevent damage to or loss of the cargo, then if these precautions are not taken, the ship will not be cargo-worthy, unless such precaution can be taken after loading/sailing without delay or difficulties. For example, in the *Gilroy, Sons, & Co v. Price & Co*<sup>80</sup>, a cargo of jute was shipped on board the vessel; however

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76- *Tattersall v. The National Steamship Company, Limited*, (1883-84) LR 12 Q.B.D. 297. *Cheikh Bo utros Selim El-Khoury and Others v. Ceylon Shipping Lines, Ltd., (The Madeleine)*, [1967] 2 Lloyd's Rep. 224. *The Tres Flores*, [1973] 2 Lloyd's Rep. 247. *Mediterranean Freight Services Ltd. v. BP Oil International Ltd., (The Fiona)*, [1994] 2 Lloyd's Rep. 506.

77- *Ciampa and Others v. British India Steam Navigation Company, Limited*, [1915] 2 K.B. 774.

78- *Rathbone Brothers & Co. v. D. Maciver, Sons & Co*, *supra*.

79- *The Madeleine*, *supra*. *Hedley v. The Pinkney and Sons Steamship Company, Limited*, [1892] 1 Q.B. 58. *F. C. Bradley & Sons, Ltd. v. Federal Steam Navigation Company, Ltd.* (1925) 22 Ll. L. Rep. 424 at p. 436. *Moore and Another v. Lunn and Others*, (1923) 15 Ll. L. Rep. 155.

80- *Gilroy, Sons, & Co v. W. R. Price & Co*, [1893] A.C. 56. Lord Herschell, LC at p. 63. *Hogarth v. Walker*, [1899] 2 Q.B. 401. *Steel et Al. v. The State Line Steamship Company*, (1877-78) L.R. 3 App. Cas. 72. Lord Blackburn at p. 90-91 stated: "If, for example, this port was left unfastened, so that when any ordinary weather came on, and the sea washed as high as the port, it would be sure to give way and the water come in, unless something more was done—if in the inside the wheat had been piled up so high against it and covered it, so that no one would ever see whether it had been so left or not, and so that if it had been found out or thought of, it would have required a great deal of time and trouble (time above all) to remove the cargo to get at it and fasten it - if that was found to be the case, and it was found that at the time of sailing it was in that state, I can hardly imagine any jury

the practice of the trade when shipping jute was to case the pipe of the port water-closet before putting any cargo against it. However, in this case the pipe was not cased and the cargo was loaded without leaving any space to get to the pipe and case it. During the voyage the vessel met with heavy weather and the pipe broke under the heavy weight of the cargo and water entered the cargo holds and damaged the jute. The House of Lord, reversing the decision of the Court of Session, found out that the vessel was not seaworthy because the pipe was not cased and it was not possible to case it without moving a considerable amount of cargo and this could not have been done quickly. Lord Watson found that<sup>81</sup>:

“The defect in the fittings of the Tilkhurst, which was the occasion of injury to her cargo, existed before she left Chittagong. That circumstance might not be sufficient to shew that she was unseaworthy so long as it could be reasonably suggested or inferred that the pipe could have been cased immediately, at any moment, without considerable trouble. But any such suggestion or inference is excluded by the express findings that, according to the usual practice of jute-carrying vessels, the pipe ought to have been cased before the vessel sailed, and that during the voyage the pipe was neither visible nor accessible without the removal of part of the cargo.”

Furthermore, where the contract of carriage gives the shipper the right to chose between different ranges of cargoes, the shipowner has to provide a vessel that can take safely and be able to handle any of these cargoes and if a special arrangement has to be taken he should make appropriate arrangements before delivering the vessel at the port of loading, i.e. in *Stanton v. Richardson*<sup>82</sup>, the cargo owner had the right to chose between a range of cargoes: wheat, sugar and barley without any qualification apart from putting a different freight rate for each type of cargo. In this case the cargo-owner provided a cargo of wet sugar for which the contract provided a special freight rate. However, the vessel's pumps which were used to pump out moisture from the cargo, were not able to handle the moisture from the sugar and the ordinary leakage from the ship and more pumps needed to be installed which would have required a considerable amount of time to do. The shipowner was in breach of his duty to provide seaworthy vessel. This led to the unloading of the cargo of sugar and the time charterer refused to

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finding anything else than that a ship which sailed in that state did not sail in a fit state to encounter such perils of the sea as are reasonably to be expected in crossing the Atlantic.”

81- *Gilroy, Sons, & Co v. W. R. Price & Co*, *ibid*, at p 66-67.

82- *Stanton v. Richardson*, (1871-72) L.R. 7 C.P. 421.

load any more cargo. The Court of Common Plea found that the vessel was not fit to carry the cargo and it could have not been made so in a reasonable time<sup>83</sup>.

Finally, the carrier must ensure that the existence of a particular cargo on board would not endanger any other cargo on board. For example, in *the Kapitan Sakharov*<sup>84</sup>, a dangerous cargo was loaded on the vessel's deck. However the owners of the cargo failed to declare the dangerous nature of the cargo. Also, the carrier loaded under the deck a highly inflammable cargo that needed proper ventilation to ensure that the vapour of the inflammable cargo was extracted instantly to reduce the risk of explosion, but the carrier did not make provision for ventilation on his vessel. During the voyage the dangerous cargo on board exploded. As a result the vessel's deck cracked and the fire spread to the holds and the inflammable cargo exploded, and consequently, the vessel sank. The cargo-owners claimed that the vessel was not seaworthy because the carrier had on board dangerous cargo and because the vessel did not have a ventilation system. The court decided that there was no want of due diligence on the part of the carrier with regard to the cargo stored on deck because its owner's failed to declare its nature, but that the vessel would not have sunk had it had a ventilation system to extract the vapour of the inflammable cargo, or if the carrier refused to load it the damage would have been restricted to the deck cargo only, and in this regard the carrier failed to exercise due diligence in stowing the cargo. Mr Clarke J. Held<sup>85</sup> that:

“The initial explosion occurred in undeclared and dangerous cargo in a DSR container stored on deck on hatch 3; the stowage of that cargo had rendered the vessel unseaworthy though not because of any lack of due diligence by NSC; the explosion and resultant fire on deck caused damage to part of

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83- *Stanton v. Richardson*, *ibid.* the decision of this court was confirmed by the Exchequer Chamber, (1873-74) L.R. 9 C.P. 390. See also *The Benlawers*, [1989] 2 Lloyd's Rep. 51. “The words “any permissible cargo” are there as part of the contract and the onions were a permissible cargo. It is not part of the shipowners' case that there was any breach of the charter-party on the part of the time charterers, nor is it a part of their case that the onions were anything other than a legitimate cargo. The position therefore is that if it is a permitted cargo then the shipowners must be prepared to do whatever is necessary to carry the cargo safely.... If the owners had wanted to make special provision for a cargo of onions or if they were to advance a case that it was exceptional or unusual cargo, then they might have done so. But the cargo of onions was not such a cargo and there was no special provision in this charter-party. If owners wish a different result, they must limit the cargoes which may be carried under the charter-party. If they expressly exclude such cargoes then there will be no risk of their having any liability to cargo interests in respect of such cargoes and, indeed, shipping such a cargo will be a breach of the charter-party.” per Mr. Justice Hobhouse at p. 60, 61.

84- *Northern Shipping Co. v. Deutsche Seereederei G.M.B.H. and Others (The Kapitan Sakharov)*, [2000] 2 Lloyd's Rep. 255.

85- *The Kapitan Sakharov*, *ibid.*, at 255. The Court of Appeal upheld Clarke's J decision, [2000] 2 Lloyd's Rep. 255, at p. 263,265, and 275. *The Thorsa*, [1916] P. 257.

the ship and part of the cargo and were an effective cause of the sinking and loss of the vessel and most of the cargo; however that would not have caused those further losses if NSC had not stowed CYL's isopentane below deck, and this stowage had rendered the vessel unseaworthy and was due to NSC's lack of due diligence; it contributed to the fire below deck and explosion of one or both of the diesel tanks and was a further effective cause of the loss of the vessel and most of the cargo”

## 2\_ *Special Cargoes*

In addition to the duty of the carrier to provide a vessel that is cargo-worthy in general, there is a duty on the carrier to provide his vessel with special equipment if the contracted cargo needed such arrangements and failing to do so will be considered as failing to provide a seaworthy vessel.

For example, if the cargo to be carried was frozen meat, the shipowner must provide a vessel that has refrigeration machinery installed and has to make sure that the machinery is working properly. The existence of such machinery is not enough if it was not working properly<sup>86</sup>.

For example, in *The Owners of Cargo on Ship Maori King*<sup>87</sup>, the bill of lading stated that it is a ‘Refrigerator bill’ and the cargo was described as hard frozen mutton shipped in apparent good order and condition. The meat arrived in a damaged condition due to the failure of the refrigeration machinery. The shipowner claimed that the exclusion clause protected him from responsibility. But the court’s approach was that, due to the circumstances surrounding the shipment, there was an implied obligation that the vessel was fitted with refrigeration machinery, because of the phrase ‘Refrigerator Bill’, thus allowing her to carry the contracted goods. This implied obligation also includes an expectation that the machinery should be in a fit condition at the start of the voyage because the mere existence of it without being in working order would be of no use. Lord Esher M.R. stated<sup>88</sup>:

“Now, the bill of lading is headed "Refrigerator bill," and those words must have some meaning. In my opinion, the necessary meaning of that heading, when you know the circumstances, is that there is refrigerating machinery on board the ship for the purpose of keeping frozen the meat which is shipped in a frozen state... An obligation, therefore, is to be implied from the bill of lading to have such machinery on board for the purpose of receiving the frozen meat; and the implication arises in

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86- Owners of Cargo on Ship "Maori King" v. Hughes, [1895] 2 Q.B. 550. Rowson v. Atlantic Transport Company, Limited, [1903] 2 K.B. 666.

87- Owners of Cargo on Ship "Maori King" v. Hughes, *ibid*.

88- Owners of Cargo on Ship "Maori King" v. Hughes, *ibid*, Lord Esher M.R.

the way in which all implications are made by law, and the only way in which they can be made, namely, that the Court can see that the implied obligation must have been in the contemplation and intention of both parties to the contract... Therefore both parties must have contemplated, if they thought about it at all, that there should be such machinery on board the ship. If, however, the machinery will not work it is useless: it is the same thing as if there were none”.

Also if the carrier contracted with the shipper to carry valuable cargo, such as gold, both parties could expect that such cargo would need a special room to keep it safe, i.e. a room that is ‘constructed as reasonably fit to resist thieves’, and in this case there will be an implied obligation that such room exist on board or that the vessel is going to be fitted with one before loading. Therefore, if the vessel was delivered without the special arrangement for such cargo then the vessel will be unseaworthy<sup>89</sup>.

### *3\_Unseaworthiness or Bad Stowage*

Unseaworthiness might arise either by a defect in the ship itself, its equipment, its crew or documentation. Alternatively it can be uncargo-worthy because the holds were not clean or the vessel was not provided with special machinery or equipment to handle particular cargo. However, sometimes the vessel might be seaworthy and cargo-worthy but when the cargo was loaded on board it was stowed in a way that affected her seaworthiness and made her unseaworthy and such cause for unseaworthiness can be called ‘Bad Stowage’. There is a difference between uncargo-worthiness and unseaworthiness resulting from bad stowage.

In the case of uncargo-worthiness the vessel is either unable to receive the cargo at all or if the cargo was shipped on board it will be lost or arrives in a damaged condition because the vessel is not cargo-worthy on loading and at the beginning of the voyage, e.g. refrigerating machinery is not working, or there is leakage in the hold pipes which existed before loading, or the ship has no proper tackle to put the cargo onboard<sup>90</sup>.

But in the case of bad stowage the vessel herself is seaworthy and able to receive the contracted cargo but bad stowage rendered her unseaworthy or damaged the cargo. Therefore, bad stowage might have one of two effects. It might affect the safety of the

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89- Queensland National Bank Limited v. Peninsular and Oriental Steam Navigation Company, [1898] 1 Q.B. 567.

90- Madras Electric Supply Company v. P. & O. Steam Navigation Company, (1923) 16 Ll. L. Rep. 240. PARSONS Corporation & 6 ORS v CV Scheepvaartonderneming Happy Ranger, the ‘Happy Ranger’, [2006] EWHC 122.

vessel rendering her unseaworthy. Alternatively it might affect the safety of the cargo without endangering the safety of the vessel<sup>91</sup> and in this case the responsibility for the damage or loss would be on the party responsible for the stowing operation. This might be the shipper or the carrier or even an independent third party.

a. Bad stowage which affect the safety of the vessel

In this case the carrier provides a seaworthy vessel which is appropriate to carry the contracted cargo, but bad stowage of the cargo affects the safety of the vessel and renders her unseaworthy. Therefore, if the carrier was the one responsible for the loading and stowing operation he would be liable for breaching the obligation of seaworthiness<sup>92</sup>. Also, even if loading and stowing duties were transferred to the charterer/cargo-owner the master is still obliged to supervise such operation and to intervene when stowage can affect the seaworthiness of his vessel, as he is the one to know what might affect its stability, and if he fails to do so the carrier would be in breach of his duty to provide a seaworthy vessel or exercise due diligence<sup>93</sup>.

In *Reed v. Page*<sup>94</sup>, a barge was called to carry a cargo of wood pulp from the ship to lighter it to a port down the river. The lighter, before the loading started, was in every way seaworthy; during the loading operation the barge was overloaded with cargo. Consequently, when she was waiting afloat to be towed, she sank and lost all the cargo. The court of appeal said that the fact that the barge was overloaded made her unseaworthy even though she was seaworthy at the beginning of the loading operation.

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91- *Elder, Dempster and Co mpany, Limited, and Others Appellants; v. Paterson, Zochonis and Company, Limited*, [1924] A.C. 522.

Lord Sumner at p 562 "Bad stowage, which endangers the safety of the ship, may amount to unseaworthiness, of course, but bad stowage, which affects nothing but the cargo damaged by it, is bad stowage and nothing more, and still leaves the ship seaworthy for the adventure, even though the adventure be the carrying of that cargo".

92- *Ingram & Royle, Limited v. Services Maritimes du Tréport*, [1913] 1 K.B. 538. Scrutton J. at p 543: "I have considered whether this ship was unseaworthy on starting on her voyage. Bad stowage, which endangers the safety of the ship and cannot readily be cured on the voyage, is unseaworthiness". Also see above, *The Kapitan Sakharov*, [2000] 2 Lloyd's Rep. 255

93- *Court Line v. Canadian Transport*, (1940) 67 Ll. L. Rep. 161, at p. 166 see also Lord Wright at p. 168, and Lord Porter at p.172. *Transocean Liners Reederei G.m.b.H. v. Euxine Shipping Co. Ltd., (The Imvros)*, [1999] 1 Lloyd's Rep. 848, at p.851. C.H.Z. "Rolimpex" v. Eftavrysses Compania Naviera S.A. (the Panaghia Tinnou), [1986] 2 Lloyd's Rep. 586, at .591.

94- *A. E. Reed and Company, Limited v. Page, Son and East, Limited, and Another*, [1927] 1 K.B. 743. *The Kapitan Sakharov*, [2000] 2 Lloyd's Rep. 255. *Moore and Another v. Lunn and Others*. (1923) 15 Ll. L. Rep. 155. *Ingram & Royle, Limited v. Services Maritimes du Tréport*, [1913] 1 K.B. 538. *Kopitoff v. Wilson and Others*, (1875-76) L.R. 1 Q.B.D.

Also in *Ingram & Royle, Limited v. Services Maritimes du Tréport*<sup>95</sup>, the cargo owner shipped his goods on board the vessel and the shipowner also loaded a cargo of cases of metallic sodium saturated with petrol which was insufficiently packed and was stowed with insufficient care. The vessel sailed in rough weather, the cases broke loose and came into contact with water which resulted in many explosions and fire started onboard; subsequently the cargo was lost by reason of fire. The court found that the vessel was unseaworthy because bad stowage endangered her but the shipowner was protected by the exception in S 502 of Merchant Shipping Act.

b. Bad stowage and the safety of the goods

If the bad stowage did not affect the safety of the vessel but only the safety of the cargo and led to the loss of or damage to the cargo, then in this case the ship will not be unseaworthy and the carrier will not be in breach of his duty to exercise due diligence<sup>96</sup>, although he might be in breach of his duty to supervise the loading and stowage operation or his duty of care of the cargo while on board his vessel if he was responsible for the loading and stowing of the cargo<sup>97</sup>.

For example, in *Elder Dempster v. Paterson, Zochonis*<sup>98</sup>, a cargo of palm oil casks were loaded on board of a one deck ship and over the casks bags of palm kernels were loaded, although in such trade the practice was to use a tween-deck vessel; but due to the shortage of vessels the shipper had no other option but to hire a one deck vessel. When the ship arrived at its destination it was found that the casks were damaged. Rowlatt. J.

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95- *Ingram & Royle, Limited v. Services Maritimes du Tréport, Limited*, [1914] 1 K.B. 541. Also in *Kopitoff v. Wilson*, *ibid*, the shipper delivered to the shipowner three armour plates, each of them weighing 18 tons or more; the armour plates were stowed by the servants of the shipowner over a cargo of railway iron and secured by wooden shores. A few hours after sailing, the vessel faced heavy weather and one of the armour-plates moved from its place to the vessel's side; consequently the vessel with its cargo were lost. The court arrived at the verdict that the vessel itself was in a good condition and seaworthy but due to the bad stowage of the armour-plates it was rendered unseaworthy and that the loss was a result of this bad stowage.

96- *Elder, Dempster and Company, Limited, and Others Appellants; v. Paterson, Zochonis and Company, Limited*, [1924] A.C. 522, p.561, Lord Sumner stated, "Bad stowage, which endangers the safety of the ship, may amount to unseaworthiness, of course, but bad stowage, which affects nothing but the cargo damaged by it, is bad stowage and nothing more, and still leaves the ship seaworthy for the adventure, even though the adventure be the carrying of that cargo".

97- *Ismail v. Polish Ocean Lines, (The Ciechocinek)* [1976] 1 Lloyd's Rep. 489.

98- *Elder, Dempster and Company, Limited, and Others Appellants; v. Paterson, Zochonis and Company, Limited*, (1922) 12 Ll. L. Rep. 69. *The Thorsa*, [1916] P. 257.

and the court of appeal<sup>99</sup>, by majority, held that the ship was unseaworthy because she was not a tween-deck ship, as the practice in the trade of the West African coast was to use tween-deck vessels and that the carrier should have arranged for the vessel to be converted to a tween-deck ship. But the House of Lords made it clear that the loss was due to the heavy weight of the bags of palm kernels and that the ship was not unseaworthy, because she was fit to receive the casks alone or without so many bags of palm kernels being put on top of them, and the fact that the trade from west coast of Africa habitually uses tween-deck ships, to carry the palm oil casks and the palm kernel bags, does not make the provided ship unseaworthy. Lord Sumner stated that<sup>100</sup>:

“One must distinguish between general fitness for what the nature of the trade requires and fitness to receive and carry a particular cargo or part of a cargo, tendered in the course of that trade. A ship, which in a certain trade and in certain not improbable combinations of cargo offering in the trade, has to shut out cargo and to sail less than a full ship, because if she takes the cargo offered she will thereby damage other cargo already loaded, is pro tanto an unprofitable ship. She is not as good a freight earner as she might be. For the cargo, however, that she does carry, without sacrificing it to enable her owners to carry more cargo and so earn more freight, she is perfectly fitted and quite seaworthy. All that can be said is that she might have paid better in another trade, or that another ship differently built might have paid better in the same trade”

In *The Aquacharm*<sup>101</sup>, the vessel was loaded with a cargo of coal, and was supposed to pass through the Panama Canal, but due to the way the cargo was loaded the vessel exceeded the permitted draught and the canal authorities prevented her from passing and hence the vessel was delayed for about 9 days. The cargo owner claimed that the vessel was unseaworthy because she could not pass through the canal, but the court arrived at the conclusion that the delay was due to the bad stowage of the cargo, not to its unseaworthiness because the vessel was able to sail safely in the open seas.

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99- *Elder, Dempster and Company, Limited, and Others Appellants; v. Paterson, Zochonis and Company, Limited*, *ibid.* [1923] 1 K.B. 420.

100- *Elder, Dempster and Company, Limited, and Others Appellants; v. Paterson, Zochonis and Company, Limited*, [1924] A.C. 522, at p. 562.

101- *Actis Co. Ltd. v. The Sanko Steamship Co. Ltd., (The Aquacharm)*, [1982] 1 Lloyd's Rep. 7.

c. Bad Stowage caused by Shipper/Charterer/Cargo-owner and the safety of the vessel

Under common law it is the carrier's, his agent's or servants' duty to carry out the loading and stowage operation<sup>102</sup>. However, there is nothing in the law to prevent the parties from agreeing to transfer this duty to the shipper/Charterer/Cargo-owner<sup>103</sup>. But in this case who would be responsible if the bad stowage lead to damaging the cargo and affecting vessel seaworthiness?

*i- Bad stowage caused by shipper/charterer/cargo-owner and cargo safety*

In a recent case, the *Jordan II*<sup>104</sup>, a cargo of steel coils was loaded on board the vessel by the shipper/charterer. The loading, stowing and discharging operation was transferred to the cargo-owner in accordance with clause 17 of the charterparty. On delivery it was discovered that the cargo was damaged due either to rough handling while loading/unloading or to failure to provide dunnage, failure to secure the coils and/or stacking them so that the bottom layers were excessively compressed. All these operations were carried out by the cargo-owners/charterers. The House of Lords, affirming the decisions of the courts below, was of the opinion that the carrier will not be responsible for damage to the cargo resulting from loading/discharging or stowing carried out by cargo-owner/shipper/charterer unless the damage resulted from want of the carrier's duty of care to the cargo mentioned in the Hague/Hague Visby Rules Art III r 2 or if the loss or damage was a result of act or omission of the carrier, his servants or agents according to Art 5 r 1 and 4 of the Hamburg Rules.

It is important to mention that if the loading and stowing operation operations were supposed to be carried out by the cargo-owners/shippers/charterers but under the supervision and responsibility of the Master; then if the Master failed to supervise the

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102- *Pyrene Co. Ltd v. Scindia Steam Navigation Co. Ltd*, [1954] 1 Lloyd's Rep 321; [1954] 2 Q.B. 402. *Filikos Shipping Corporation of Monrovia v. Shipmair B.V., (The Filikos)*, [1983] 1 Lloyd's Rep 9.

103- the NYPE 1993 time charterparty in line 78 transfer the responsibility for loading and stowing to the charterers. See *Court Line v. Canadian Transport (1940)* 67 L.L.Rep 161.

104- *Jindal Iron and Steel Co. Ltd. and Others v. Islamic Solidarity Shipping Co. Jordan Inc., (The Jordan II)*, [2005] 1 Lloyd's Rep. 57. *Renton (G. H.) & Co. v. Palmyra Trading Corporation (The Caspiana)*, (H.L.) [1956] 2 Lloyd's Rep. 379; [1957] A.C. 149.

operation and as a result the cargo was lost or damaged then they. For example, in *the Ciechocinek*<sup>105</sup>, clause 49 of the charterparty provided:

“Dunnaging and stowage instructions given by the charterers to be carefully followed but to be executed under the supervision of the Master and he is to remain responsible for proper stowage and dunnaging.”

A cargo of bags of potatoes was loaded and stowed on board the vessel in accordance with the instructions of the cargo-owners brother, who had the authority to do so in accordance with cl.49, and the master followed the instructions carefully after the brother explained that the cargo was suitably packaged and as a result there was no need for dunnage. On the vessel’s arrival to London half of the cargo was found damaged, two third of the damage was a result of bad stowage and one third was due to inherent vice in the cargo. The cargo-owners sued the carrier for the damage contending that it resulted from improper stowage, and the carrier claimed that they followed the instructions of the cargo-owner’s brother who was authorised by the virtue of cl.49 and also that they were protected by the reason of variation of charterparty or by operation of estoppel in their favour. The Court of Appeal arrived at the conclusion that the carrier was protected from liability under different grounds: firstly, the master followed the instructions of the cargo-owner’s brother, who was authorised to give instruction according to cl.49, especially since the brother assured him that the cargo was suitably packaged and there was no need for reason; secondly that the carrier was protected by Art III r2 of the Hague Rules which relieve him from responsibility for loss or damage resulting from act or omission on the part of the charterer/cargo-owner or their representative. Finally, the carrier could still be protected even if the master was responsible, because the charterers were disentitled from their rights as this was a case of estoppel by conduct<sup>106</sup>.

*ii- Bad stowage caused by shipper/charterer/cargo-owner and vessel safety*

Even if the duty to load and stow the cargo is transferred to the cargo-owners/charterers, the master has a duty to supervise the loading and stowing operations,

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105- *Ismail v. Polish Ocean Lines, (The Ciechocinek)*, [1976] 1 Lloyd’s Rep. 489.

106- *The Ciechocinek, ibid*, at p.490 and 494-501.

even if the contract of carriage makes no provision for supervising the operation, in order to ensure that this operation would not affect the safety and the fitness of the vessel, and if this operation was going to affect the fitness and stability of the vessel then the master has the right to interfere and stop that to protect the interest of the carrier in *Court Line v. Canadian Transport*<sup>107</sup>, Lord Atkin stated that<sup>108</sup>:

“The supervision of the stowage by the captain is in any case a matter of course; he has in any event to protect his ship from being made unseaworthy; and in other respects no doubt he has the right to interfere if he considers that the proposed stowage is likely to impose a liability upon his owners. If it could be proved by the charterers that the bad stowage was caused only by the captain's orders, and that their own proposed stowage would have caused no damage, no doubt they might escape liability. But the reservation of the right of the captain to supervise, a right which in my opinion would have existed even if not expressly reserved, has no effect whatever in relieving the charterers of their primary duty to stow safely; any more than the stipulation that a builder in a building contract should build under the supervision of the architect relieves the builder from duly performing the terms of his contract.”

If the master fails to intervene when the loading and stowing is likely to affect the fitness/seaworthiness of the vessel then he will be responsible for that and if the vessel becomes unseaworthy the carrier would be in breach of his obligation to provide a seaworthy vessel. Lord Porter in *Court Line v. Canadian Transport*, stated<sup>109</sup>:

“It may indeed be that in certain cases as, e.g., where the stability of the ship is concerned, the master would be responsible for unseaworthiness of the ship and the stevedore would not. But in such cases I think that any liability which could be established would be due to the fact that the master would be expected to know what method of stowage would affect his ship's stability and what would not, whereas the stevedores would not possess any such knowledge. It might be also that if it were proved that the master had exercised his rights of supervision and intervened in the stowage, again the responsibility would be his and not the charterers.”

In a more recent case, *The Kapitan Sakharov*<sup>110</sup>, the carrier loaded a cargo of dangerous nature under deck. He knew about its nature and that it needed ventilation to ensure that dangerous vapour released from the cargo would not stay in the holds in order to avoid any explosion which would endanger the ship, her crew and other cargo. On deck another cargo was loaded. The carrier knew nothing about the nature of this second cargo as the shipper failed to disclose it. The loading on deck was agreed with

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107- *Court Line v. Canadian Transport* (1940) 67 L.L.Rep 161.

108- *Court Line v. Canadian Transport*, *ibid*, at p. 166, see also Lord Wright at p. 168.

109- *ibid*, Lord Porter at p.172.

110- *Northern Shipping Co. v. Deutsche Seereederei G.M.B.H. and Others, (The Kapitan Sakharov)* [2000] 2 Lloyd's Rep. 255.

the cargo owner and a special freight rate was agreed. During the voyage one of the containers on deck exploded and fire spread below the deck which led to the explosion of the cargo below deck. The court found that the initial explosion was caused by the cargo on deck and that there was failure on the part of its owner to declare its dangerous nature<sup>111</sup>, however, the court also found that the vessel was unseaworthy due to the failure of the carrier to provide sufficient means of ventilation to ensure that no vapour remained in the holds<sup>112</sup>. Here the fault of the owners of the cargo on deck, by not declaring its dangerous nature, endangered the safety of the vessel and had the carrier been told about such nature he might taken certain precautions to ensure safe stowage of the cargo.

The master has no obligations towards the charterers/cargo-owners if he does not supervise the stowing operation, when the contract of carriage does not contain clause obliging the master to supervise, and the right of the master to intervene when the stowage can affect the safety of the vessel does not carry liability if the master does not do so or relieves the charters from their liability. The right of the master to intervene comes from the 'overriding responsibility' of the carrier to ensure the stability of the vessel<sup>113</sup>.

Consequently, if the loss or damage resulted from bad stowage/loading or discharging of the vessel carried out by the shipper/cargo-owner or charterer, the carrier will not be responsible for such loss unless if the master was responsible for supervising and giving advice on how the stowage and loading should be carried out, and he fails to do that or if the cargo-owners prove that there was want of duty of care on his part or his servants or agents. Further, if the loading and stowing was supposed to be carried out by the cargo-owners/charterers, and it was done so badly that it caused the vessel to be unseaworthy the carrier will be responsible for the loss or damage caused to the cargo as the master, even if not expressly stated in the contract of carriage, should supervise the

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111- The Kapitan Sakharov, *ibid*, at p.263, 275.

112- *ibid*.

113- Transocean Liners Reederei G.m.b.H. v. Euxine Shipping Co. Ltd., (The Imvros), [1999] 1 Lloyd's Rep. 848, at p.851. C.H.Z. "Rolimpex" v. Eftavrysses Compania Naviera S.A. (the Panaghia Tinnou), [1986] 2 Lloyd's Rep. 586, at .591.

operation and intervene when the stowage is going to affect the stability of the vessel, as he has an overriding duty to ensure that.

d. Time at which the responsibility for the cargo passes to the carrier

*i. under the Hague/Hague-Visby and the Hamburg Rules*

It is worth mentioning that the responsibility for the cargo is transferred to the carrier at different times depending on the type of the contract of carriage. Consequently, for bills of lading or charterparties made subject for the Hague/Hague-Visby Rules carrier's responsibility starts at the time when the cargo is loaded on board and ends when it is discharged, as Art 1 (e) states:

(e) "Carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

If these were made subject to the Hamburg Rules, the responsibility starts when the carrier takes charge of the goods at the loading port and lasts until he delivers them at the discharging port according to Art 4.

However the parties to a contract of carriage can extend this period beyond that to start before loading or after loading, especially if the carrier undertook to carry out loading and discharging. For example, in *Pyrene Company, Ltd. v. Scindia Steam Navigation Company, Ltd.*<sup>114</sup>, a cargo of six fire tenders was supposed to be shipped on board the vessel. The shipper was supposed to deliver them to the dock side then the carrier was going to load them on board the vessel using the ship tackles. During the attempt to load one of the fire tenders, and while it was swinging above the ship rail, it was dropped and fell into the water and became damaged, and the cargo owner sued the carrier for damage. The carrier admitted responsibility but tried to limit his liability, but the cargo-owners claimed that the protection of the 1924 Act incorporating Hague Rules does not apply to this case as the damage occurred before the carrier took charge of the cargo. The court did not take this contention and Mr J Devlin held that<sup>115</sup>:

“The phrase "shall properly and carefully load" may mean that the carrier shall load and that he

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114- *Pyrene Company, Ltd. v. Scindia Steam Navigation Company, Ltd.*, [1954] 1 Lloyd's Rep. 321

115- *Pyrene Company, Ltd. v. Scindia Steam Navigation Company, Ltd.*, *ibid.*, at p 322.

shall do it properly and carefully: or that he shall do whatever loading he does properly and carefully. The former interpretation perhaps fits the language more closely, but the latter may be more consistent with the object of the Rules. Their object, as it is put, I think, correctly in Carver, 9th ed., p. 186, is to define not the scope of the contract service but the terms on which that service is to be performed. The extent to which the carrier has to undertake the loading of the vessel may depend not only upon different systems of law but upon the custom and practice of the port and the nature of the cargo. It is difficult to believe that the Rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the Rules should not leave the parties free to determine by their own contract the part which each has to play. On this view the whole contract of carriage is subject to the Rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide."

*ii. In case of Voyage Charters*

if the parties does not agree to the contrary, the common law implies a time at which the cargo passes to the carrier which is 'alongside' the vessel, the shipper will bring the cargo along side the vessel and the carrier will take the responsibility from that time<sup>116</sup>, unless the parties agrees to something else, i.e. if the cargo-owner is responsible for loading unloading and stowing, in other words Free In and Out and Stow (FIOS) or Free In and Out (FIO) for bulk cargo and oil<sup>117</sup>, or if the carrier take charge of the cargo when it is in the port stores. This also would apply to the case of bill of lading if the parties elect to do so.

*iii. In case of time charters*

In case of a time charterparty, if there is no agreement to the contrary the common law implies an obligation on the carrier to Load, stow and discharge the cargo<sup>118</sup>, which means that the responsibility starts from the time the cargo-owner delivers the cargo and puts it alongside the vessel. However, the parties can agree to the contrary; for example the 1993 version of the NYPE time charter party makes the charterers responsible for all the handling of the cargo, i.e. loading, stowing and discharging, and such operations will be at their own risk, which mean that the carrier's responsibility starts after such operation finishes or before the time it starts<sup>119</sup>

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116- John F Wilson, Carriage of Goods By Sea, 5th Ed, p 68

117- A. Meredith Jones & Co. Ltd. v. Vangemar Shipping Co. Ltd., (The Apostolis) (No. 2), [1999] 2 Lloyd's Rep 292.

118- The Filikos, [1983] 1 Lloyd's Rep 9.

119- Court Line v. Canadian Transport (1940) 67 L.L.Rep 161.

### ***Conclusion***

The carrier is under an obligation to exercise due diligence, or absolute obligation, where the common law applies, to make the vessel seaworthy. This obligation consists of two aspects: vessel seaworthiness and cargo-worthiness. The first aspect includes a requirement that the vessel is physically capable of safe navigation and that it is provided with appropriate equipment which guarantees the safety of the vessel and its cargo and crew. Also the carrier has to ensure that his crew have the experience and skills to manage the vessel and he has to provide them with training on a regular basis. Finally the carrier has to ensure that the vessel has on board the appropriate documents that the vessel might need on its voyage, i.e. navigational documents, ship plan... etc. The second aspect of seaworthiness is to ensure the ability of the vessel to receive the cargo and make sure that the cargo is stowed on board in a way that does not endanger the safety of the vessel.

Recently a new code was introduced to the shipping industry. The Code is the International Safety Management Code (ISM). The Code was made part of the Safety of Life at Sea Convention (SOLAS). Although the code was not made part of the Hague/Hague-Visby or the Hamburg Rules the code can be considered as framework to govern the behaviour of the prudent carrier. This means that if the carrier diligently followed the requirement of the code he will be able to ensure that his vessel is seaworthy at any time and not only before and at the beginning of the vessel, and he or the cargo owner will be able to prove whether the vessel was seaworthy or not by looking at the documentary evidence generated by the proper application of the ISM Code.

## **Chapter Three**

### **Nature of Duty, Implied and Express Duty, and Time of Exercising the Duty**

### ***Introduction***

The previous chapter discussed the relevance of seaworthiness and defined seaworthiness as the fitness of the vessel, in all respects, to encounter the ordinary perils of the sea; that could be expected on her voyage, and deliver the cargo safely to its destination<sup>1</sup>. A discussion of the aspects of seaworthiness, vessel seaworthiness and cargo-worthiness, followed the definition.

However, in order to understand the importance of seaworthiness it is essential to know the nature of the carrier's duty to provide a seaworthy vessel, how such duty can be found in the contract of carriage and, finally, when the carrier has to exercise his duty. The refore, this chapter will explore the issues mentioned above.

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<sup>1</sup> A Seaworthy Vessel was defined in *Mcfadden v Blue Star Line*, [1905] 1 K.B. 697, as one that "must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it", at p. 706. Also *Kopitoff v Wilson* (1876) 1 QBD 377 at p 380, provided that the vessel should be "fit to meet and undergo the perils of the sea and other incidental risks which of necessity she must be exposed in the course of the voyage".

## Nature of the duty

The duty to provide a seaworthy vessel is a personal duty on the part of the carrier<sup>2</sup>. The personal character of the duty is the same under common law, the Hague/Hague-Visby Rules and Hamburg Rules; what changes is the nature of the duty. Under common law the duty is an absolute one, whereas the Hague/Hague-Visby and the Hamburg Rules provide for a duty to exercise due diligence. In spite of this variation the shipowner remains under an absolute duty where the Hague/Hague-Visby Rules or the Hamburg Rules do not apply.

This section will consider the nature of the duty to provide a seaworthy vessel under the common law, the Hague/Hague-Visby Rules and the Hamburg Rules.

### **- Absolute Obligation**

The common law obligation is a strict one which imposes on the carrier an absolute duty to provide a seaworthy vessel, but this absolute duty does not mean that he has to provide a perfect vessel. The carrier is not required to provide a vessel that can withstand any kind of hazards during its voyage merely to provide a vessel that is fit for the purpose of the contracted voyage she is going to perform<sup>3</sup>, that is, he should furnish a vessel that can meet the ordinary perils of the sea she is likely to encounter, taking into consideration the time of the voyage, the type of waters she is going to navigate through, the type of the vessel, the cargo she is going to carry and where the cargo is going to be stowed. It is not enough for the shipowner to prove that he did his best to make her seaworthy but it should be fit for the purpose. Lord Blackburn stated<sup>4</sup>:

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2- Paterson Steamships Ltd v. Robin Hood Mills Ltd, (The Thordoc), (1937) 58 Ll.L. Rep. 33 ““The condition ” - that is, of the exercise of due diligence to make a vessel seaworthy - ”is not fulfilled merely because the shipowner is personally diligent. The condition requires that diligence shall in fact have been exercised by the shipowner or by those whom he employs for the purpose”, at p. 40.

3- President of India v. West Coast Steamship Co, [1963] 2 Lloyd’s Rep. 278, Killenny. J. stated that the vessel required is “not an accident-free-ship, nor an obligation to provide ship or gear which might withstand all conceivable hazards. ...the obligation, although absolute, means, nothing more or less than the duty to furnish a ship and equipment reasonably suitable for the intended use or service” at p. 281

4- Steel et Al. v. The State Line Steamship Company, (1877-78) L.R. 3 App. Cas. 72, at p.86. Kopitoff v. Wilson and Others, (1875-76) L.R. 1 Q.B.D 377. Field J stated that “We hold that, in whatever way a contract for the conveyance of merchandise be made,

“... also in marine contracts, contracts for sea carriage, that is what is properly called a "warranty," not merely that they should do their best to make the ship fit, but that the ship should really be fit.”

Consequently, if the carrier is in breach of his obligation, he would be responsible whether he was at fault or not<sup>5</sup>, and it does not matter whether the defect was discoverable by examination or not<sup>6</sup>. Lord Blackburn in *Steel v. State Line*<sup>7</sup>, explained that this absolute duty means

“that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy”<sup>8</sup>.

Therefore, if the shipowner provided such a ship he would discharge his obligation and would not be responsible for any loss, unless he was responsible on other grounds such as breach of his duty to exercise due care for the cargo or in stowing the cargo<sup>9</sup>, etc. However, even if the carrier supplied a vessel that was physically seaworthy and cargo-seaworthy, he would still be responsible for any unseaworthy condition of the vessel which resulted from bad stowage. For example, in *the Kapitan Sakharov*<sup>10</sup>, the carrier had a container vessel, Kapitan Sakharov. A cargo was loaded on the vessel's deck, and the owners of the cargo failed to declare its dangerous nature. In addition, the carrier loaded a highly inflammable cargo below the deck, which needed ventilation in order to extract the vapour it emitted, to reduce the danger of explosion. However the Kapitan Sakharov was not supplied with any ventilation system. During the journey, the dangerous cargo on deck exploded causing a fire on board. The explosion also caused

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where there is no agreement to the contrary, the shipowner is, by the nature of the contract, impliedly and necessarily held to warrant that the ship is good, and is in a condition to perform the voyage then about to be undertaken, or, in ordinary language, is seaworthy, that is, fit to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage” at p. 380. *The Glenfruin* (1885) Q.B.D 103

5\_ Wilson, p. 9.

6- *The Glenfruin*, *Supra*, at p. 103. In this case there was a latent defect which rendered the vessel unseaworthy. The crank shaft broke due to a latent defect in it resulting from a flaw in the welding. Although it was impossible to discover this latent defect, the court held that the carrier was not entitled to salvage and the protection of the exceptions in the bill of lading because the vessel was not seaworthy at the time.

7- *Steel et Al. v. The State Line Steamship Company*, (1877-78) L.R. 3 App. Cas. 72.

8- *Steel et Al. v. The State Line Steamship Company*, *ibid*, Lord Blackburn at p.86.

9- *Lyon v. Mells*, (1804) 5 East 428.

10- *Northern Shipping Co. v. Deutsche Seereederei G.M.B.H. and Others*, (*The Kapitan Sakharov*), [2000] 2 Lloyd's Rep. 255.

the deck to crack so the fire spread to the hold in which the highly inflammable cargo was stored. This cargo exploded, the ship then sank and all the cargo on board was lost.

The court arrived at the opinion that the cause of the fire was the undeclared cargo loaded on deck and as the carrier had nothing to do with this, it did not interfere with his obligation to exercise due diligence. Nevertheless, the vessel's second explosion would not have happened if the carrier had not loaded the highly inflammable cargo below the vessel's deck without providing ventilation for it, and because of that the carrier did fail to exercise due diligence, and had the under-deck cargo not been there the vessel would not have sunk. Mr. J Clarke held that:

“the initial explosion occurred in undeclared and dangerous cargo in a DSR container stored on deck on hatch 3; the stowage of that cargo had rendered the vessel unseaworthy though not because of any lack of due diligence by NSC; the explosion and resultant fire on deck caused damage to part of the ship and part of the cargo and were an effective cause of the sinking and loss of the vessel and most of the cargo; however that would not have caused those further losses if NSC had not stowed CYL's isopentane below deck, and this stowage had rendered the vessel unseaworthy and was due to NSC's lack of due diligence; it contributed to the fire below deck and explosion of one or both of the diesel tanks and was a further effective cause of the loss of the vessel and most of the cargo.”<sup>11</sup>

Consequently, the duty will extend to ensuring that there is no dangerous cargo on board that could affect the safety of the vessel, its cargo and crew. This will even extend to ensuring that bad stowage will not render the vessel unseaworthy, as will be seen later.

Although the duty is an absolute one, the carrier can exclude his liability for providing an unseaworthy ship by including a proper exclusion clause in the contract of carriage, as will be shown below.

### **- Due Diligence**

The concept of Due Diligence was introduced by the Harter Act in 1893<sup>12</sup>, then the Hague/Hague-Visby Rules and Hamburg Rules adopted it, and it became an inseparable part of the obligation to provide a seaworthy vessel. This duty has a different nature

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11- The Kapitan Sakharov, *ibid*, at p. 255 the court of Appeal confirmed the decision of Mr J Clarke, at p.256.

12- Under the Act it was not a duty it was just used as a minimum requirement to ensure that the vessel was seaworthy, but the carrier would not be able to limit his liability if he failed to exercise this minimum requirement, consequently the due diligence was more of a defence for the carrier. due diligence became an obligation with the introduction of Hague Rules

from the absolute duty to provide a seaworthy vessel. And in order to understand the effect of this duty it is important to define it.

The duty to exercise due diligence was firstly introduced by the US Harter Act 1893; due to the need to find a balance between the carriers' and the cargo-owners' interests. At that time the exercise of the duty was not a positive obligation but was a way for the carriers to defend themselves should the cargo owners incur damage or loss. At a later stage, the positive obligation to exercise due diligence was adopted by Hague/Hague-Visby Rules Art III (1) and Art IV (1)<sup>13</sup>. By taking this approach, the absolute duty to provide a seaworthy vessel was replaced by a duty to exercise due diligence<sup>14</sup> and at that point the obligation became a positive one which the carrier must exercise in order to enjoy the protection of the Rules in Art IV r2. The absolute obligation will still be applicable where the Rules do not apply, i.e. in case of charterparties, where common law still applies, unless the parties agree otherwise. Also the Carriage of Goods by Sea Act 1971 clearly expressed in S. 2(3) that "there shall not be implied in any contract for the carriage of goods by sea to which the Rules apply by virtue of this Act any absolute undertaking by the carrier of the goods to provide a seaworthy ship". Hamburg Rules adopted the same approach but did not use the term 'due diligence' but instead used the term all 'reasonable measures'<sup>15</sup>.

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13- Article III r1. 'The carrier shall be bound before and at the beginning of the voyage to exercise *due diligence* to: (a) Make the ship seaworthy; (b) Properly man, equip and supply the ship; (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation'.

Art IV r1 provides that 'Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Art III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or the person claiming exemption under this article'.

14- *The Muncaster Castle*, [1961] 1 Lloyd's Rep 57.

15- Article 5. Basis of liability:

1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took *all measures that could reasonably* be required to avoid the occurrence and its consequences.

4. (a) The carrier is liable

According to the new approach “The carrier will have some relief which, weighed in the scales, is not inconsiderable when contrasted with his previous common-law position. He will be protected against latent defects, in the strict sense, in work done on his ship, that is to say, defects not due to any negligent workmanship of repairers or others employed by the repairers and, . . . ., against defects making for unseaworthiness in the ship, however caused, before it became his ship, if these could not be discovered by him, or competent experts employed by him, by the exercise of due diligence”.<sup>16</sup>

### **- Definition of Due Diligence**

The Harter Act, the Hague/Hague-Visby and Hamburg Rules all mention the duty to exercise due diligence without defining exactly what constitutes due diligence. So what does Due Diligence mean?

Tetley<sup>17</sup> defined due diligence as a “genuine, competent and reasonable effort of the carrier to fulfil the obligations set out in subparagraph (a), (b) and (c) of Art III (1) of the Hague or Hague-Visby Rules.

Some American cases defined due diligence as “not merely a praiseworthy or sincere, though unsuccessful, effort, but such an intelligent and efficient attempt as shall make it so [i.e. seaworthy], as far as diligence can secure it”<sup>18</sup>.

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(i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;

(ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents in taking all *measures that could reasonably* be required to put out the fire and avoid or mitigate its consequences.

16- The Muncaster Castle, *supra*, Lord Keith of Avonholm, at p. 87

17- Professor William Tetley, *Marine Cargo Claims* 4 Ed, to be published in 2008, Chapter 15 Due Diligence to Make the Ship Seaworthy at p. 3-4, taken from Prof Tetley’s web site : <http://www.mcgill.ca/maritimelaw/mcc4th/>. on 06/02/2006.

18- *Growers Export Co. v. Canada Steamship Lines Ltd.* (1918) 43 O.L.R. 330 at pp. 344-345 (Ont. S.C. App. Div.), upheld (1919) 59 S.C.R. 643 (Supr. C. of Can.). See also *C. Itoh & Co. (America) Inc. v. M/V Hans Leonhardt* 719 F. Supp. 479 at p. 504, 1990 AMC 733 at p. 743 (E.D. La. 1989): “...such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.” See also *Tuxpan Lim. Procs.* 765 F. Supp. 1150 at p. 1179, 1991 AMC 2432 at p. 2445 (S.D. N.Y. 1991): whatever a reasonably competent vessel owner would do under the circumstances. The above cases are cited in Tetley, *ibid*, at p.4

Due diligence means that the carrier must take all reasonable measures that could possibly be taken by him, or his servants or agents, to man, equip and make the ship in all respects fit to undertake the agreed voyage.

Lord Justice Auld, accepting the view of the court below, in *The Kapitan Sakharov*<sup>19</sup>, set a test to examine whether the carrier exercised due diligence or not. The test had to show that “it (the vessel), its servants, agents or independent contractors, had exercised all reasonable skill and care to ensure that the vessel was seaworthy at the commencement of its voyage, namely, reasonably fit to encounter the ordinary incidents of the voyage”. In order to apply this test it is important that the diligence required is “the diligence of the ‘reasonably prudent’ carrier, as at the time of the relevant act or omission, and not in hindsight”<sup>20</sup>.

Therefore, in considering whether the carrier had exercised due diligence to provide a seaworthy vessel, an objective test must be applied; that is the conduct of a reasonably prudent carrier at the time of exercising due diligence. And the standard of due diligence is not the same in every case but differs according to the facts, the circumstances of each case and the knowledge available at the time of exercising the duty<sup>21</sup>.

Consequently Due Diligence can be defined as: *the efforts of the prudent carrier to take all reasonable measures that can be possibly taken, in the light of available knowledge and means at the relevant time, to fulfil his obligation to provide a seaworthy vessel.*

### **- Relevance of exercising Due Diligence**

The importance of exercising due diligence arises when the shipowner attempts to use the exemptions in Art IV r2 of the Hague/Hague-Visby Rules or to prove his innocence in accordance with Art 5 of Hamburg Rules or the exemption clauses of the

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19- Northern Shipping Co. v. Deutsche Seereederei G.M.B.H. and Others, (*The Kapitan Sakharov*), [2000] 2 Lloyd's Rep. 255, at p. 266.

20- *The Subro Valour*, [1995] 1 Lloyd's Rep. 509 at p. 516.

21- *The Kapitan Sakharov*, *supra*.

contract of carriage<sup>22</sup>, in order to exempt himself from liability if the vessel commenced its voyage in an unseaworthy condition. Because, if the shipowner could prove that he exercised due diligence to make the vessel seaworthy<sup>23</sup> then he will not be responsible if it turns out to be unseaworthy.

If the shipowner did not exercise due diligence to provide a seaworthy vessel he will not be able to use the protection provided by Art IV r2, as the duty to provide a seaworthy vessel is an overriding obligation<sup>24</sup> as will be seen later. In order for the carrier to use the protection given to him by law, if the vessel was not seaworthy, he can seek the protection of Art IV r2 directly, unless the cargo-owner can prove that the vessel was unseaworthy at which point the carrier has to prove the exercise of due diligence and then use the protection<sup>25</sup>. However, the situation is quite different in the Hamburg Rules where there is no Article similar to Art IV r2 of the Hague/Hague-Visby Rules and the carrier is considered to be responsible for any loss of or damage to the cargo unless he proves that he took all reasonable measures to prevent the damage or loss<sup>26</sup>.

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22- This is in case of the use of such clauses was made subject to the exercise of due diligence.

23- Art IV (1) Hague, Hague-Visby Rules, and Art 5 (1) Hamburg Rules.

24- Maxine Footwear Co. Ltd. and Another. v. Canadian Government Merchant Marine Ltd. [1959] A.C. 589 LORD SOMERVELL stated, "In their Lordships' opinion the point fails. Article III, rule 1, is an overriding obligation. If it is not fulfilled and the nonfulfilment causes the damage the immunities of article IV cannot be relied on. This is the natural construction apart from the opening words of article III, rule 2. The fact that that rule is made subject to the provisions of article IV and rule 1 is not so conditioned makes the point clear beyond argument" at p. 602-603.

25- Maxine Footwear Co. Ltd. and Another. v. Canadian Government Merchant Marine Ltd, *ibid*, See also Robin Hood Flour Mills, Ltd. v. N. M. Paterson & Sons, Ltd., (The Farrandoc) [1967] 2 Lloyd's Rep. 276. Empresa Cubana Importada de Alimentos "Alimport" v. Iasmos Shipping Co. S.A. , (The Good Friend), [1984] 2 Lloyd's Rep. 586. Mediterranean Freight Services Ltd. v. BP Oil International Ltd., (The Fiona), [1994] 2 Lloyd's Rep. 506. Northern Shipping Co. v. Deutsche Seereederei G.M.B.H. and Others, (The Kapitan Sakharov), [2000] 2 Lloyd's Rep. 255. Parsons Corporation and Others v. C.V. Scheepvaartonderneming "Happy Ranger" and Others , (The Happy Ranger), [2002] 2 Lloyd's Rep. 357.

26- See above Art 5 (1) and (4) of Hamburg Rules.

*1- Due Diligence and Latent defect*

Under common law the carrier would be responsible for the unseaworthy condition of the vessel even if it was not discoverable by reasonable inspection<sup>27</sup>, but is this the case when the carrier has to exercise due diligence?

The carrier, if his obligation was to exercise due diligence, will not be responsible for any latent defect not discoverable by a reasonable check carried out by prudent person. However, the carrier does have an obligation to exercise due diligence to choose a reputable shipbuilding company; which employs diligent naval engineers and workers, to survey, repair or construct his vessel<sup>28</sup>.

Another recent case involves a ship that did not recently come into to the carrier's ownership but involved a shipbuilders' mistake. In *the Kamsar Voyager*<sup>29</sup>, the vessel was loaded with part cargo of soybean from Reserve and Westwego, Louisiana, to Inchon in Korea. The contract of carriage was evidenced by a number of bills of lading incorporating a modified version the US COGSA 1936, the Hague Rules. On the way some smoke was seen leaking from the crankcase., The engineer was unable to identify the cause, but when he contacted MAN, under whose licence the engine was built, he was advised that cylinder compression tests be carried out, which revealed low pressure in cylinders No 1 and 5. Cylinder 1 should have been serviced a while ago but the carrier failed to adhere to the recommended service schedule. Even though cylinder 1 had failed the vessel would have been able to continue its voyage under its own power after isolating piston No 1, but the engineer attempted to fix the problem using a spare part supplied by MAN; the supplier provided different spare parts to the shipowners after the latter sent a list of the required parts accompanied by copies of the engine design and modifications. The engineer replaced the damaged part in cylinder No1 using a spare part provided by MAN<sup>30</sup>, and the engine started working on full power. After

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27- *The Glenfruin* (1885) Q.B.D 103.

28- *Angliss and Company (Australia) Proprietary, Limited v. Peninsular and Oriental Steam Navigation Company*, [1927] 2 K.B. 456, at p. 461-462. *The Muncaster Castle*, [1961] 1 Lloyd's Rep 57.

29- *Guinomar of Conakry and Another v. Samsung Fire & Marine Insurance Co, (the Kamsar Voyager)* [2002] 2 Lloyd's Rep. 57.

30- This particular spare part should not have been used because it was the wrong one, however, such a mistake could not be discovered even by prudent person.

some time the engine stopped, followed by severe damage to unit number 1 and consequential damage to cylinder no 2 due to water leakage. The vessel was immobilized and had to be towed to Yokohama for repairs. The cargo owners sued the carrier to recover general average, claiming that the carrier failed to supply a seaworthy vessel.

The carrier claimed that the history of the vessel did not require cylinder No 1 to be serviced at the time recommended in the service schedule. They further tried to make MAN responsible because they supplied the wrong spare part. In spite of the fact that there was a fault on the part of MAN to supply the correct spare, the carrier failed to prove that MAN failed to exercise due diligence in sending the correct spare part<sup>31</sup>. Rather, the carrier failed to exercise due diligence to make the vessel seaworthy; because the piston would not have failed and the engineer would not have had to use the spare part had cylinder No 1 been serviced according to the schedule recommended by the engine builders, so the carrier failed to exercise due diligence in carrying out the regular maintenance of the engine<sup>32</sup>. Also, the failure of piston No 1 was not the cause of loss because the vessel would have been able to continue its trip by isolating the broken piston. The court held that:

“the experts agreed that the failure of the No. 1 piston did not cause consequential damage to the rest of the engine and that the No. 1 unit could have been isolated so that the vessel could have completed the voyage under her own power; however, there would have been no need to install the spare if the original piston had not failed at sea; although the installation of a defective spare was not reasonably foreseeable as such, if the vessel carried a spare, as a prudent shipowner would have done, its use was inevitable; accordingly the failure of the original piston was not simply an occasion giving rise to the opportunity to install the spare whose causative force had been spent; it was an operative cause that was indeed the only reason for the use of the only relevant spare part on board the vessel; it was thus causative of the installation of the spare part and the subsequent immobilization of the vessel at sea.”<sup>33</sup>

In another recent case, in *the Happy Ranger*<sup>34</sup>, the carrier ordered a new vessel from shipbuilders, which was delivered in February 1998. She was then contracted to carry a process vessel to Saudi Arabia. During the loading operation one of the ramshorn hooks broke due to a defect. The design of the vessel and the hooks ...etc, was approved

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31- *The Kamsar Voyager*, *ibid*, p.69.

32- *The Kamsar Voyager*, *ibid*, at p.64.

33- *The Kamsar Voyager*, *ibid*, at p.58.

34- *Parsons Corporation & 6 ORS v CV Scheepvaartonderneming Happy Ranger*, (*The Happy Ranger*), [2006] 1 Lloyd's Rep. 649.

by Lloyds Register and another reputable agency. But the new owner failed to test the hooks to their maximum capability when the vessel was delivered, a test which should not have taken more than an hour. Mrs. Justice Gloster arrived at the conclusion that the carrier has failed to exercise due diligence to make the vessel seaworthy, with regard to testing the hooks. She stated:

“In my judgment, the defendant has failed to discharge the burden of showing that it did indeed exercise due diligence to make the vessel seaworthy, after it took delivery on 16 February 1998. Before summarising my reasons for this conclusion, I should say something about the respective expert witnesses called by the parties.....

The claimants can only succeed if the breaches by the defendant to make the vessel seaworthy were causative of the damage to the process vessel. In my judgment such breaches were indeed causative of the damage. Each breach, taken separately and cumulatively, was one of the several legally effective causes of the accident. Thus:

(i) Had Mammoet/the defendant appreciated the fact that the hooks had not been proof tested, and that there were no certificates to that effect there should, and could, have been a proof test of the hooks before the loading took place. If that had happened, the defect would have been discovered, since it would have tested the hooks to at least 110 per cent of their swl, which it is common ground was greater than the weight of the load at the time that the hook broke.

(ii) Had Lloyd's done its job properly at the time Mr Mast came to consider the grant of the extension, it would have appreciated that, given the double hook arrangement, the previous barge test had not tested the hooks to the loads which they might experience in practice, and it would have insisted that a proof load test was done.”<sup>35</sup>

As a result, the carrier will be responsible for the unseaworthy condition of the vessel, even if there was a failure on the part of the shipbuilders, if he fails to exercise due diligence to service or check the vessel regularly or upon delivery. On taking a first look at *the Kamsar Voyager* one would think that the case took a different approach to *Angliss v. P. & Q*<sup>36</sup> or *the Happy Ranger*<sup>37</sup> but the initial cause of damage was the failure of the carrier to exercise due diligence to service the vessel according to the recommended schedule, and had this failure not existed and had the carrier been able to prove the want of due diligence on the part of the engine builders, in this case MAN, then he could have escaped liability, especially if the builders' mistake could not have been discovered without actually trying to fit the spare part as happened in *the Kamsar Voyager*.

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35- *The Happy Ranger*, Mrs. Justice Gloster, at p. 657 and 663

36- *Supra*.

37- *Supra*.

## *2- Delegation of the Duty*

The tests of the exercise of due diligence take into account the conduct of a reasonable prudent carrier. Therefore, the duty to exercise due diligence is a personal one, in other words, it must be exercised by the carrier, though, it can also be exercised by one of his agents, servants or independent contractors. But if they fail to comply with the obligation the ultimate responsibility still lies with the carrier<sup>38</sup>.

As a result, the carrier can delegate the exercise of due diligence to his agent, servants or an independent contractor, e.g. ship repairers, in order to relieve himself of the burden, especially if he does not have experience in these matters, but if the delegate was not diligent, the carrier will not be able to defend himself by claiming that he delegated the duty to another person, as the duty to provide a seaworthy vessel is a personal one and the responsibility is non-delegable<sup>39</sup>.

As a result if the carrier chooses to delegate the exercise of the duty to his agent or servant or independent contractor, the shipowner must choose a diligent, reliable and reputable person to undertake the duty of checking the seaworthiness of the vessel. The latter must exercise reasonable care to make the ship seaworthy. The test whether the delegate exercised due diligence or not is as objective as the duty of the carrier himself, that is, what a prudent person would do in such a case, and if the agent or servant did what a reasonable man would do, then the carrier has fulfilled his duty of exercising due diligence<sup>40</sup>.

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38- *Paterson Steamships Ltd v. Robin Hood Mills Ltd*, (1937) 58 Ll.L. Rep. 33 “‘The condition’ - that is, of the exercise of due diligence to make a vessel seaworthy - is not fulfilled merely because the shipowner is personally diligent. The condition requires that diligence shall in fact have been exercised by the shipowner or by those whom he employs for the purpose”, at p. 40.

39- Tetley, *Marine Cargo Claims* 3rd Ed, 1988, stated that “The carrier may employ some other person to exercise due diligence, but, if the delegate is not diligent, then the carrier is responsible”, at p. 391.

40- In *Union of India v. N.V. Reederij Amsterdam, (the Amstelslot)*, [1963] 2 Lloyd's Rep. 223, at p. 234-235. In this case two reputable surveyors undertook a visual inspection to check whether there were fatigue cracks in the vessel and found none. Later on during the voyage there was a breakdown in the reduction gear, and the plaintiff claimed that the carrier failed to exercise due diligence to make the vessel seaworthy. The court of appeal rejected the judgment of Mr. McNair J. and found that the carrier failed to discharge the onus of proof that he exercised due diligence. However, the HL restored McNair J's decision and held that the shipowner and the surveyors did what was reasonably required to make the ship seaworthy and that the carrier discharged the onus of proof.

For example, in *the Muncaster Castel*, after the vessel was surveyed the inspection covers of storm valves were replaced by reputable fitters. The latter failed to tie the nuts properly, as a result of which sea water gained access to the ship holds when she met with heavy weather. The court was of the opinion that the carrier had failed to exercise due diligence to make the vessel seaworthy, due to the failure of the fitter to ensure that the inspections covers were closed properly and he had no excuse even if the fitters were reputable ones<sup>41</sup>.

In another case, *the Amstelslot*<sup>42</sup>, the carrier issued a bill of lading for a cargo of wheat shipped on board at Portland destined for Bombay; the bill was made subject to the US Carriage of Goods by Sea Act 1936. On the way there was a breakdown in the reduction gear and the vessel had to be towed to Kobe. The cargo-owners chartered another vessel to deliver the cargo to Bombay. The cargo-owners claimed that the vessel was unseaworthy due to the improper fixing of a helix tyre on drum or an undiscovered fatigue crack in tyre. The carriers claimed that they had exercised due diligence to make the vessel seaworthy and they employed reputable and competent persons to carry out the necessary inspection and these latter did not find any discoverable problem in the vessel. Mr Justice McNair, and the House of Lords agreed, and arrived at the conclusion that the shipowner did employ competent people to do the inspection and they did their job competently but they were unable to find any discoverable problems and as a result they were entitled to the protection of the Act.

However, the situation changes if the fault resulted from the lack of diligence on the part of ship builders or spare part suppliers. Therefore if the supplier fails to provide the correct spare parts, and such a mistake was not easily discoverable by a reasonable

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41- *The Muncaster Castle*, [1961] 1 Lloyd's Rep 57, Lord Keith of Avonholm, at p. 87 stated that "There is nothing, in my opinion, extravagant in saying that this is an inescapable personal obligation. The carrier cannot claim to have shed his obligation to exercise due diligence to make his ship seaworthy by selecting a firm of competent ship-repairers to make his ship seaworthy. Their failure to use due diligence to do so is his failure".

42- *Ibid*, in *The Amstelslot*, [1962] 1 Lloyd's Rep. 539, Mr Justice McNair held: "that inspection carried out in 1956 was carefully and competently performed that defendants had exercised due diligence to make *Amstelslot* seaworthy because they employed skilled and competent persons to carry out necessary inspections and those persons carried out those inspections carefully and competently; and that, therefore, defendants were entitled to protection of Act – Judgment for defendants on counterclaim (i.e., cargo's proportion of general average) with interest." At p. 539 -540. The Court of Appeal reversed this decision, [1962] 2 Lloyd's Rep. 336, but it was restored by the House of Lords. [1963] 2 Lloyd's Rep. 223.

check then the carrier will not be responsible unless the original cause for unseaworthiness resulted from the want of due diligence on the part of the carrier<sup>43</sup>. Also, if the vessel came to the carrier's orbit from the shipbuilders or from its previous owner he will not be responsible for unseaworthiness resulting from a latent defect undiscoverable by inspection carried out by prudent expert person, as long as the carrier engage reputable shipbuilders to construct the vessel, in case of recently constructed vessel<sup>44</sup>.

### 3- Shipowner and supervision system

It has been shown that the carrier can delegate his duty of exercising due diligence to another person i.e. his agent or master, but he cannot escape responsibility - if the agent failed to exercise his job properly the carrier will still be responsible if the vessel turned to be unseaworthy<sup>45</sup>. Therefore, if the carrier wants to keep on the safe side, even if he delegates the job to a diligent person he must keep supervising him. This can be done by establishing a proper supervision/monitoring system, but if he fails to establish such a system, he will be responsible for the breach of his obligation because he will not be able to prove that he exercised due diligence to make the vessel seaworthy.

For example, in *The Marion*<sup>46</sup>, a tanker was awaiting a berth on Teesside. The master ordered the ship to anchor somewhere near the port of loading until a berth was available, but he did not realize that in this area lay the Ekofisk pipeline and that caused

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43- *Guinomar of Conakry and Another v. Samsung Fire & Marine Insurance Co, Ltd. , (The Kamsar Voyager)*, [2002] 2 Lloyd's Rep. 57. "the experts agreed that the failure of the No. 1 piston did not cause consequential damage to the rest of the engine and that the No. 1 unit could have been isolated so that the vessel could have completed the voyage under her own power; however, there would have been no need to install the spare if the original piston had not failed at sea; although the installation of a defective spare was not reasonably foreseeable as such, if the vessel carried a spare, as a prudent shipowner would have done, its use was inevitable; accordingly the failure of the original piston was not simply an occasion giving rise to the opportunity to install the spare whose causative force had been spent; it was an operative cause that was indthe only reason for the use of the only relevant spare part on board the vessel; it was thus causative of the installation of the spare part and the subsequent immobilization of the vessel at sea.", at p.58.

44- *Angliss and Company (Australia) Proprietary, Limited v. Peninsular and Oriental Steam Navigation Company*. [1927] 2 K.B. 456, at p. 461-462. *The Happy Ranger*, [2006] 1 Lloyd's Rep. 649. *the Amstelslot*, [1962] 1 Lloyd's Rep. 539.

45- *The Amstelslot*, [1963] 2 Lloyd's Rep 223. *The Muncaster Castle*, [1961] 1 Lloyd's Rep 57. *Dow Europe v. Novoklav Inc*, [1998] 1 Lloyd's Rep. 306

46- *The Marion*, [1984] A.C. 563.

damage to the pipelines and the pumping of oil was ceased, causing huge financial loss to the companies operating the pipes. The reason for the loss was due the master's usage of old charts which did not show the position of the pipe, although there was an up-to-date chart on board the vessel. The court held that the carrier failed to provide a seaworthy vessel even though he supplied up-to-date charts because he failed to establish a system to ensure that old charts were removed to prevent accidental use of old documents.

The reason behind such a decision was that the agent did not exercise any kind of supervision over the master to monitor the actions and orders he was taking on board his vessel, i.e. choosing the appropriate charts. Lord Brandon of Oakbrook stated:

“It was the duty of Mr. Downard (the managing director of the company) to ensure that an adequate degree of supervision of the master of the *Marion* in this field was exercised, either by himself or by his subordinate managerial staff, Mr. Lowry or Mr. Graham, each of whom was fully qualified to exercise such supervision”<sup>47</sup>.

Lord Brandon of Oakbrook further said that in order to ensure that a proper safety system is established on board; the system has to satisfy several requirements.

“The first requirement is that she should have on board, and available for use, the current versions of the charts necessary for such voyages. The second requirement is that any obsolete or superseded charts, which might formerly have been proper for use on such voyages, should either be destroyed, or, if not destroyed, at least segregated from the current charts in such a way as to avoid any possibility of confusion between them. The third requirement is that the current charts should either be kept corrected up-to-date at all times, or at least that such corrections should be made prior to their possible use on any particular voyage”<sup>48</sup>.

Lord Brandon of Oakbrook's decision was emphasised by the International Safety Management Code (ISM) s 11.2 which requires the shipowner/company/ship managers to establish a system to ensure that valid documents are kept in specific places, that all the vessel's documents are kept up-to-date, and that invalid documents are destroyed or removed as soon as possible. The Code was not made part of the Hague/Hague-Visby or the Hamburg Rules in order to make it part of the carriers seaworthiness obligation, however, the Code was incorporated into the Safety of Life at Sea (SOLAS) Convention and made compulsory to all member states of the SOLAS Convention and although it is not connected to the Hague/Hague-Visby or the Hamburg Rules, the documentary

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47- The *Marion*, *ibid*, at p. 577.

48- The *Marion*, *ibid* at p. 573.

requirement of the code can be considered as part of the documentary element of seaworthiness.

#### 4- Standard of Due Diligence

Due diligence is a relative term, which mean we cannot say that there is one single rule that can be applied to all cases in order to establish whether the carrier did exercise due diligence or not. Due diligence in each case depends on the surrounding circumstances at the relevant time, because it depends to a large extent on the available knowledge and technology and on marine industry practices at the time of the act or omission and not at the time of the trial<sup>49</sup>.

For example, in *Bradley v. Federal Steam Navigation*<sup>50</sup>, a cargo of Tasmanian apples was shipped from Hobart to the United Kingdom and arrived damaged with Brown Heart disease. The cargo-owner claimed that the ship was not seaworthy and that the carrier did not make her so because they did not equip her with a particular type of ventilation system. Lord Justice Bankes, in the Court of Appeal, considering the state of knowledge at the material time stated that:

“Assuming for the present purpose that the conclusion of the scientists on this point is correct, I am satisfied that upon the existing state of knowledge, and with the result of part experience to guide them, there is no ground for imputing to the shipowners in the present case any want of care in reference to the provision of ventilation in the holds of the *Northumberland* during the voyage in question.”<sup>51</sup>.

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49- Demand Shipping Co. Ltd. v. Ministry of Food Government of the People’s Republic of Bangladesh and Another, (The Lendoudis Evangelos II), [2001] 2 Lloyd’s Rep. 304. F. C. Bradley & Sons, Ltd. v. Federal Steam Navigation Company, Ltd. (1926) 24 Ll. L. Rep. 446. President of India v. West Coast S.S.Co, [1963] 2 Lloyd’s Rep 278 at p. 281.

50- Bradley & Sons, Ltd. v. Federal Steam Navigation Company, (1926) 24 Ll. L. Rep. 446.

51- Bradley & Sons, Ltd. v. Federal Steam Navigation Company, Ltd, *ibid*, at p. 448. Lord Justice Scrutton, stated “I respectfully agree with these views. The vessel is to be reasonably fit. It certainly need not have fittings or instruments which had not at the time been invented, because by subsequent inquiry a danger has been discovered which these fittings and instruments when invented might avert. While the shipowner may be bound to add improvements in fittings where the improvement has become well known or the discovery of danger established, the position is quite different where at the time of the voyage the discovery had not been made or the danger discovered. It is not enough in my view to say, “we have now after the event discovered that there was a danger to which the cargo was exposed, the nature of which was unknown at the time; and, the danger being known, we have thought of a remedy, which was not common knowledge at the time, and which a prudent owner would not be imprudent in neglecting, having regard to the existing state of knowledge.” Further, it is well established that a ship is not unseaworthy because of a defect, at the beginning of the voyage, which can easily in the ordinary course of management be rectified on the voyage”, at p. 454-455.

In a more recent case, *The Lendoudis Evangelos II*<sup>52</sup>, one of the crew members activated the fuel tank's emergency shut-off system, causing the vessel to suffer complete electrical failure, which led to her grounding and suffering bottom damage. The cargo-owner contended that the loss was attributed to the fact that the vessel was unseaworthy because the control box housing the emergency shut-off device was not provided with a glass panel; this fact allowed the crew member to activate the device. Mr. Justice Cresswell said that the issue whether the vessel was seaworthy or not should be judged according to the prevailing circumstances at the time of the case in 1990. The judge held that the prudent carrier would be entitled to take the view prevailed in 1990, and that there was no requirement then that there should be a glass panel<sup>53</sup> and that the primary requirement was accessibility and ease of operation in case of an emergency, particularly fire; he stated that "there would be greater accessibility and ease of operation in case of fire, if there was no glass in front of the box"<sup>54</sup>.

The carrier should also exercise due diligence in choosing the crew of his vessel in order to make sure that he employs competent and qualified crew to manage and navigate his vessel; this will include, *inter alia*, ensuring that they have experience on similar ship and know how to deal with emergencies ... etc, in order to satisfy the human element of vessel seaworthiness<sup>55</sup>. Due diligence should also be exercised to update the vessel's documents, maintain the vessel and its equipment and to make the vessel cargo-worthy, as was discussed in the previous chapter.

Developments in the area of Maritime Law generally and safety particularly resulted in the introduction of the ISM Code, which was incorporated into the SOLAS

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52- *The Lendoudis Evangelos II*, [2001] 2 Lloyd's Rep. 304.

53- *The Lendoudis Evangelos II*, *ibid*, at p. 311.

54- *The Lendoudis Evangelos II*, *ibid*, at p. 311.

55- *The Makedonia*, [1962] 1 Lloyd's Rep. 316. *The Roberta*, (1938) 60 Ll. L. Rep. 84. 55- *The Schwan*, [1908] P. 356. *Manifest Shipping & Co. Ltd. v. UniPolaris Insurance Co. Ltd. and la Réunion Europeene*, (*The Star Sea*), [1997] 1 Lloyd's Rep. 360. *Robin Hood Flour Mills, Ltd. v. N. M. Paterson & Sons, Ltd.*, (*The Farrandoc*), [1967] 1 Lloyd's Rep. 232. *Papera Traders Co. Ltd. and Others v. Hyundai Merchant Marine Co. Ltd. and Another*, *The "Eurasian Dream"*. [2002] 1 Lloyd's Rep. 719.

Convention; this Code proposes a series of rules and practices that can be considered as a standard for exercising due diligence<sup>56</sup>.

To sum up, the standard of exercising due diligence depends on the knowledge and practice at the time when the carrier has to exercise this duty and he will not be in breach if he did not use or provide his vessel with the latest inventions if these were not widely used<sup>57</sup>

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56- *Papera Traders Co. Ltd. and Others v. Hyundai Merchant Marine Co. Ltd. and Another, (The Eurasian Dream)*, [2002] 1 Lloyd's Rep. 719 Captain Haakansson, one of the witnesses in this case said that: ". . .the ISM Code. . .is a framework upon which good practices should be hung. Even for companies - or for that matter vessels - who have waited until the last minute to apply for certification the principles are so general and good that a prudent manager/master could very well organize their companies/vessels work following those (at present) guidelines - unless hindered to do so by other instructions that has yet not been withdrawn". A full discussion about the code will follow in the next section of this thesis

57- *F. C. Bradley & Sons, Ltd. v. Federal Steam Navigation Company*, *supra*, see Lord Justice Scrutton at p. 454-455. See also *Virginia Co. v. Norfolk Shipping Co.*, 17 Com. Cas. 277, at p. 278.

## Express and Implied Duty

### - Introduction

The duty to provide a seaworthy vessel might be express or implied. These two different ways of incorporating the obligation into the Contract of Carriage do not imply a different obligation on the part of the carrier, as he will still be obliged to provide a seaworthy vessel whether the duty was an express or an implied one. The differences between expressed and implied duty appear in couple of areas: 1. the effect of the exclusion clause on the obligation; where an express obligation generally can be excluded by a general exclusion clause if appropriate wording was used<sup>1</sup>, the implied duty needs an express, specific and clear exclusion clause. 2. The other difference is with regard to the time at which the duty should be exercised. However, the existence of an express duty to provide a seaworthy vessel and an exclusion clause does not mean that the exemption clause will automatically apply to the duty of seaworthiness; all it does is to provide a greater presumption that the party might have intended to apply the exemption clause to the duty, depending on the wording of the exclusion clause. Whereas, with the implied duty of seaworthiness, the existence of an exclusion clause does not presume that it will apply to the implied duty of seaworthiness unless the clause clearly and without any doubt states that it applies to the duty of seaworthiness. Also the effect of the exception clause will differ: in the case of the express duty, depending on the time when the duty should be exercised, i.e. the time of entering into the contract of carriage<sup>2</sup> or time of delivery<sup>3</sup> or at a later date. This problem would not arise in case of the implied duty, which should be exercised at the loading date and at the start of the journey<sup>4</sup>.

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1- Bank of Australasia and Others v. Clan Line Steamers, Limited, [1916] 1 K.B. 39. Minister of Materials v. Wold Steamship Company, Ltd. [1952] 1 Lloyd's Rep. 485.

2- Minister of Materials v. Wold Steamship Company, Ltd. [1952] 1 Lloyd's Rep. 485.

3- Baltimore form Clause 1 provides "... the vessel is delivered and placed at the disposal of the charterers .... The vessel being in every way fitted for ordinary cargo service".

4- Atlantic Shipping & Trading Company v. Louis Dreyfus & Co. (1922) 10 Ll. L. Rep. 707.

***- The expressed duty of Seaworthiness***

The contract for the Carriage of Goods by Sea often provides an express duty to provide a seaworthy vessel especially in case of charterparties, as opposed to the bills of lading, which are more likely to be subject to the Hague/Hague-Visby Rules or the Hamburg Rules where the duty is already expressed<sup>5</sup>. For example in SYNACOMEX 90 voyage charterparty cl.2 provides that “The said vessel being tight, staunch and in every way fit for the voyage...”<sup>6</sup>. Also NYPE 93 time charterparty provides, in cl.2, that ‘The Vessel on her delivery shall be ready to receive the cargo with clean-swept holds and tight, strong and in every way fitted for ordinary cargo service, having water ballast and with sufficient power to operate all cargo-handling gear simultaneously’<sup>7</sup>. Furthermore, most of the charter forms used by the industry nowadays either contain a paramount clause making the charterparty subject to the Hague/Hague-Visby Rules or the Hamburg Rules; although the Hamburg Rules have not yet been incorporated into any of the charterparties, parties can chose to do so and expressly include a duty to provide a seaworthy vessel, or incorporate the provisions of these Hague/Hague-Visby Rules into the charter as in BALTIME cl.13.

The advantage of having an expressed obligation of seaworthiness in the contract of carriage is that a general liability exclusion clause in the contract will be applicable, provided the clause is clearly worded, to exclude the carrier’s liability in case of breach of the obligation of seaworthiness, because the exclusion clause will extend to cover the breach of the duty<sup>8</sup>.

For instance, in *Bank of Australasia v. Clan Line Steamers*<sup>9</sup>, clause 14 of the bill of lading provided that ‘The shipowners shall be responsible for loss or damage arising

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5- Art III (1) and Art IV (1) of Hague, Hague-Visby Rules, and Hamburg Rules Art 5 r1 and r4 (a) (i) (ii).

6- Also cl.40 regarding Documentation. See also GENCON1976 cl.2, GENCON 1994 cl.2, ASBATANKVOY cl.1. In *Minister of Materials v. Wold Steamship Company, Ltd.* [1952] 1 Lloyd’s Rep. 485. In this case a clause in the charter-party stated that “The said steamship being warranted as above described, and now tight, staunch, and strong and in every way fitted for the voyage, and so to be maintained while under this charter”.

7- See also BALTIME 1939 cl.1, GENTIME cl.11, SHELLTIME 4 cl.1. cl.2.

8- *Bank of Australasia and Others v. Clan Line Steamers, Limited*, [1916] 1 K.B. 39. *Minister of Materials v. Wold Steamship Company, Ltd.* [1952] 1 Lloyd’s Rep. 485.

9- *Bank of Australasia and Others v. Clan Line Steamers, Limited*, *ibid.*

from any unfit state of the vessel to receive the goods, or any unseaworthiness of the vessel when she sails on the voyage...’ clause 12 stated that ‘No claim that may arise in respect of goods shipped by this steamer will be recoverable unless made at the port of delivery within seven days from the date of the steamer's arrival there’. On the arrival at the discharging port, part of the cargo was damaged by sea water due to the vessel’s unseaworthy condition; there was a defect in the plates of the tanker. The cargo owner did not issue his claim within the seven days stipulated in cl.12, contending that this clause was not applicable to the breach of the duty to provide seaworthy vessel; however, the Court of Appeal did not take this view and held that:

“[I]n view of the fact that the bill of lading was subject to an express condition making the shipowners liable for damage resulting from unseaworthiness, the provisions of clause 12 applied....”<sup>10</sup>.

Buckley J stated<sup>11</sup>:

“It seems to me that in this case clause 14 has expressly introduced that which would otherwise be implied, and that therefore the obligation as regards seaworthiness in this case rests upon express contract and not upon implied contract. The relevance of that for the present purpose is this. The clause of limit of liability, according to Tattersall's Case, would not extend to the implied contract if it were implied; but if it is expressed, then such stipulation of the contract is to be applied to that part of the contract as well as to any other part. The result is that Tattersall's Case does not apply in this case. There is here an express contract as to unseaworthiness. Consequently clause 12 applies.”

Also in the *Minster of Materials v. Wold Steamship Company*<sup>12</sup> the charter-party provided, *inter alia*:

“The said steamship being warranted as above described, and now tight, staunch, and strong and in every way fitted for the voyage, and so to be maintained while under this charter.

The act of God, perils of the sea . . . stranding, and other accidents of navigation excepted . . . Ship not answerable for losses, through . . . any latent defect in the machinery or hull not resulting from want of due diligence by the owners . . . or by the ship's husband or manager”.

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10- Bank of Australasia and Others v. Clan Line Steamers, Limited, *ibid*, at p. 39. See BUCKLEY L.J. at p. 48-49 See also BANKES L.J. at p. 55-56. Paterson Zochonis and Company, Limited v. Elder Dempster and Company, Limited, and Others. : [1923] 1 K.B. 420. Bankes L.J at 436 stated: “Having arrived at the conclusion that the vessel was unseaworthy it is necessary to deal with the contention that the appellants are protected by the conditions in the bills of lading. The bills of lading do not contain any express warranty of seaworthiness. Under these circumstances it is I think established that though exceptions may be introduced in a bill of lading to an express warranty of seaworthiness, where there is no express warranty exceptions will be read as not applicable to the implied warranty”.

11 Bank of Australasia and Others v. Clan Line Steamers, Limited, *ibid*, at p. 48-49 See also p. 55-56

12- Minister of Materials v. Wold Steamship Company, Ltd. Ltd. [1952] 1 Lloyd's Rep. 485. Petrofina, S.A., of Brussels v. Compagnia Italiana Trasporto Olii Minerali, of Genoa. (1937) 57 Ll. L. Rep. 247

The ship encountered heavy weather and sea water gained entry to the ship through a fractured pipe that was not discovered before loading due to improper inspection of the pipe; the shipowner alleged that the fracture was a latent defect which was not discoverable by reasonable means, but the court refuted this allegation, stating that the ship was unseaworthy and the exclusion clause was not applicable because the shipowner failed to exercise due diligence to make the ship seaworthy. The court decided that the exception clause did not protect the shipowner due to his failure to exercise due diligence<sup>13</sup>. Here the exception clause did not work even though the obligation to provide a seaworthy ship was expressed due to a qualification in the exemption clause that in order for the shipowner to benefit from the clause he has to exercise due diligence. However, if the unseaworthiness did not contribute to the loss or damage of the cargo, or if the latent defect developed after the time at which the carrier should exercise due diligence, or if the shipowner could discharge the onus of proving that he exercised due diligence, then the exclusion clause would still apply.

#### *1\_ Express duty and Charterparties*

As was stated earlier, charterparties these days, usually contain an express seaworthiness clause, either in a form of a paramount clause incorporating the Hague/Hague-Visby Rules or the Hamburg Rules, or by actually incorporating the Articles of the Rules into the charterparty, or in the form of a clause that the carrier must provide a seaworthy vessel. The question here is what is the nature of the duty in this case: would the courts deal with it as an absolute duty or duty to exercise due diligence?

If the duty to provide a seaworthy vessel was mentioned in a normal clause<sup>14</sup>, the courts tend, unless otherwise stated, to apply the common law approach. This means that

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13- Minister of Materials v. Wold Steamship Company, *ibid*.

14- SYNACOMEX 90 voyage charterparty cl.2 provides that "The said vessel being tight, staunch and in every way fit for the voyage...", NYPE 93 time charterparty provides, in cl.2, that "The Vessel on her delivery shall be ready to receive the cargo with clean-swept holds and tight, strong and in every way fitted for ordinary cargo service, having water ballast and with sufficient power to operate all cargo-handling gear simultaneously". See also GENCON1976 cl.2, GENCON 1994 cl.2, ASBATANKVOY cl.1, BALTIME 1939 cl.1, GENTIME cl.11, SHELLTIME 4 cl.1. cl.2.

the carrier is under an absolute duty to provide a seaworthy vessel; this will apply to both voyage and time charterparties<sup>15</sup>.

For instance in *The Fjord Wind*<sup>16</sup>, the charterparty contained two seaworthiness clauses, cl.1 provided that “the said vessel being tight, staunch and strong and in every way fit for the voyage, shall with all convenient speed proceed to [the river Plate]. . .and there load . . .’ while cl.35 was a paramount clause incorporating the US COGSA 1936 or the Canadian Water Carriage of Goods Act 1936<sup>17</sup>, which enacted the Hague Rules. Although the court decision in this case was that the shipowner has to exercise due diligence to provide seaworthy vessel because of the paramount clause, had this clause not existed the carrier’s duty would have been an absolute duty to provide a seaworthy vessel<sup>18</sup> that would be clear from cl.1. The reason behind such a decision is that the court has to take into consideration the intention of both parties to the contract of carriage, and by incorporating the Hague Rules into their contract by virtue of cl.35 the parties intention was to take the approach of the Hague Rules under which the carrier is obliged to exercise due diligence to make the vessel seaworthy<sup>19</sup>.

In the case of time charterparty the same would apply, for example NYPE 1993 Time charterparty form states in cl.2 line 34 that the vessel should be delivered ‘... tight, staunch, strong and in every way fitted for ordinary cargo service...’ The actual construction of this clause is that the carrier must exercise an absolute duty to make the

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15- The carrier will be under an absolute obligation where there is no express obligation in the charterparty in the case of a voyage charterparty; as for the time charter party the situation differs if there was no express duty to provide a seaworthy vessel, as will be seen below.

16- *Eridania S.P.A. And Others v. Rudolf A. Oetker And Others*, (The Fjord Wind), [2000] 2 Lloyd's Rep. 191.

17- Cl. 35 stated: “Owners shall be bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy and to have her properly manned, equipped and supplied and neither the vessel nor the Master or Owners shall be or shall be held liable for any loss of or damage or delay to the cargo for causes excepted by the U.S. Carriage of Goods by Sea Act, 1936 or the Canadian Water Carriage of Goods Act, 1936.

18- *Minister of Materials v. Wold Steamship Company, Ltd. Ltd.* [1952] 1 Lloyd's Rep. 485. Lord Justice CLARKE stated that “Clause 1 provides that the vessel, being tight, staunch and strong and in every way fitted for the voyage, shall with all convenient speed proceed to one or more loading ports and there load. If there were no cl. 35 it is likely that it would be held that there was an absolute warranty that the vessel should be seaworthy for both the approach voyage and loading”, at p. 196. *Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd. (The Saxon Star)* [1959] A.C. 133.

19- More discussion will follow. In this case the vessel’s engine stopped working due to an unknown reason for a defect in one of the crankpins and the shipowner could not discharge the burden of proving that he exercised due diligence to make the vessel seaworthy. *Minister of Materials v. Wold Steamship Company, Ltd.* [1952] 1 Lloyd's Rep. 485.

vessel seaworthy and ready to receive and carry the agreed cargo safely<sup>20</sup>. But as was shown above, the situation will be different if that clause was qualified by a paramount clause incorporating the Hague/Hague-Visby or the Hamburg Rules.

## 2- Maintenance Clause

The duty to provide a seaworthy vessel is exercised at the time of the delivery of the vessel, or before loading and sailing<sup>21</sup>, or at the time the charter was concluded<sup>22</sup>. Therefore, in addition to the express or implied obligation, charterparties might contain maintenance clauses, especially in time charterparties, to the effect that the carrier is under an obligation to keep the vessel in efficient condition to provide the required service throughout the journey; the question here is what the effect of such a clause is? And does this clause provide a continuous duty of seaworthiness<sup>23</sup>?

In order to answer the first question we have to distinguish between two types of maintenance clauses i.e. whether the clause is attached to the seaworthiness clause or whether the maintenance clause is a separate one.

### a- The maintenance clause is part of the expressed seaworthiness clause

This situation arises when there is an express duty to provide a seaworthy vessel. If the maintenance clause in the charterparty was part of the vessel seaworthiness clause, then the maintenance obligation will depend on the language of the clause<sup>24</sup>. Therefore,

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20- In *Cheikh Boutros Selim El-Khoury and Others v. Ceylon Shipping Lines, Ltd., (The Madeleine)*, [1967] 2 Lloyd's Rep. 224. cl .1 of the BALTIME charterparty provided that '... [the vessel] being in every way fitted for ordinary cargo service' the vessel when delivered did not have a deratisation certificate although she was fumigated, and therefore she was unseaworthy, Roßkill J said "There was here an express warranty of seaworthiness and unless the ship was timeously delivered in a seaworthy condition, including the necessary certificate from the port health authority, the charterers had the right to cancel", at p. 241.

21- *Hongkong Fir Shipping Company, Ltd. v. Kawasaki Kisen Kaisha, Ltd., (The Hongkong Fir)*, [1961] 2 Lloyd's Rep. 478. NYPE 1993 Time Charterparty line 33-36. Shelltime 4 Charterparty lines 6-24. GENTIME lines 263 -267.

22- NYPE 1946 line 5.

23- The second question will be answered later on when the time of exercising the warranty is considered.

24- *Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd. (The Saxon Star)* [1957] 2 Q.B. 233. Parker L.J. stated that "The nature of the obligation to maintain must depend on the exact words used", at p. 272. . *Minister of Materials v. Wold Steamship Company, Ltd.* [1952] 1 Lloyd's Rep. 485. *Tyndale Steam Shipping Co. Ltd. V. Anglo-Soviet Shipping Co. Ltd* (1936) 54 Ll. L. R. 341 Lord Roche in this case stated that "... in clause 2 of the charter-party, ...does not constitute an absolute engagement or warranty that the shipowner will succeed in so maintaining her whatever perils or causes may intervene to cause her to be inefficient for the purpose of her service" at p. 344-345. See also *Giertsen v. Turnbull*, 1908 S.C. 1101.

if the carrier was under an absolute duty to provide a seaworthy vessel, he will be under an absolute duty to keep the vessel maintained in an efficient condition, and if he had to exercise due diligence to make the vessel seaworthy then his maintenance obligation will be exercising due diligences to maintain her.

For instance, in *The Saxon Star*<sup>25</sup>, cl.1 of the charterparty provided “being tight, staunch and strong and every way fitted for the voyage, and to be maintained in such condition during the voyage, perils of the sea excepted, shall with all convenient despatch sail and proceed to”. The wording of the carrier’s obligation to provide a seaworthy vessel, ‘being tight, staunch...’, make his obligation an absolute one, and therefore, as the maintenance clause is part of the initial obligation of seaworthiness, the carrier’s duty to maintain the vessel throughout the charter period is an absolute one<sup>26</sup>.

Consequently, if the maintenance clause was part of the absolute warranty of seaworthiness, the carrier has to maintain the vessel in seaworthy condition “by the necessary inspections and surveys, replacements and repairs” and he will be in breach of his obligation if the vessel at any point turned out to be unseaworthy when, if regular maintenance had been carried out, it would not have become unseaworthy<sup>27</sup>. On the other hand, if the language of the clause made the carrier’s obligation a duty to exercise due diligence then the maintenance would have the same nature, and the shipowner’s obligation would be to maintain her within a reasonable time, as will be seen below<sup>28</sup>.

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25- *The Saxon Star*, *Ibid*.

26- *The Saxon Star*, *Ibid*, Lord Denning stated “Their obligation was, I think, an absolute obligation to ensure that the vessel was throughout in a seaworthy condition, save only when the vessel was rendered unseaworthy by perils of the sea, or perhaps by any of the excepted perils in clause 9. The introduction of the exception “perils of the sea” would be meaningless unless the obligation to maintain was an absolute obligation to ensure that the vessel remained efficient” at p. 265.

27- *The Saxon Star*, *Ibid*, Sellers L.J, stated: “A vessel is maintained in a watertight condition by the necessary inspections and surveys, replacements and repairs. It is not so maintained if it is allowed to leak and is then repaired with despatch and diligence.” at p. 276.

28- *Tyndale Steam Shipping Co. Ltd. V. Anglo-Soviet Shipping Co. Ltd* (1936) 54 Ll. L. R. 341. Lord Roche in this case stated that “... in clause 2 of the charter-party, ...does not constitute an absolute engagement or warranty that the shipowner will succeed in so maintaining her whatever perils or causes may intervene to cause her to be inefficient for the purpose of her service” at p. 344. See also *Giertsens v. Turnbull*, 1908 S.C. 1101.

b- The maintenance clause is a separate clause

If the maintenance clause is separate from any other clause, then the nature of the carrier's obligation to maintain the vessel will depend on the language of this particular clause<sup>29</sup> The difference from the situation in (a) is that the parties may choose to make the duty to make the vessel seaworthy an absolute one, while the maintenance clause may be to exercise due diligence only or vice versa; it all depends on the language of the clause, but the maintenance obligation of the charter continues through out the journey.

For example the NYPE charterparty form 1993 provide in lines 81-82:

“... shall maintain the Vessel's class and keep her in a thoroughly efficient state in hull, machinery and equipment for and during the service, and have a full complement of officers and crew”

In this case the carrier is not under an absolute duty to continuously maintain the vessel's seaworthiness, though he will be in breach of his contract if the vessel ceases to provide the required service, or if he fails to exercise “the necessary inspections and surveys, replacements and repairs” in order to prevent such occurrence. However, the carrier will not be in breach of his obligation from the moment the machinery fails to function properly because he does not guarantee absolutely that he will maintain her regardless of the perils that might intervene to make her inefficient for the purpose of the service<sup>30</sup>. In this case if an accident happens and the vessel becomes unseaworthy, the only obligation on the part of the carrier is to take all reasonable and proper steps to put her back to a seaworthy condition in a reasonable time<sup>31</sup>.

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29- NYPE 1993 cl.6 lines 81-82 provides 'inter alia' "... shall maintain the Vessel's class and keep her in a thoroughly efficient state in hull, machinery and equipment for and during the service, and have a full complement of officers and crew. See also NYPE 1946 cl.1 lines 37-38, and SHELLTIME 4, cl.3

30- Tyndale Steam Shipping Co. Ltd. V. Anglo-Soviet Shipping Co. Ltd (1936) 54 Ll. L. R. 341.

31- Time Charters, 5th Ed, 2003, paragraph 11.5. Tyndale Steam Shipping Co. Ltd. V. Anglo-Soviet Shipping Co. Ltd, *Ibid*, Lord Roche stated “The engagement of the shipowner is this, that if an accident happen, or even arise to cause the ship to be inefficient, or the winches to be ineffective, and out of action, they will take all reasonable and proper steps to put them back again. There is no evidence whatever... that there was any breach of the obligation on the part of the shipowners” at p.345. See also *Snia v. Suzuki*, (1924) 17 Ll. l. Rep 78, Greer J., said that the obligation of the shipowner “does not mean that she will be in such a state during every minute of the service. It does mean that when she gets into a condition when she is not thoroughly efficient in hull and machinery they will take within a reasonable time reasonable steps to put her into that condition”, at p. 88.

Whereas if the language of the charterparty indicates that the carrier's obligation is an absolute one, then the carrier will be in breach of his obligation if he fails to exercise the necessary inspection and survey as was shown earlier<sup>32</sup>.

- Conclusion

The reason behind the distinction between the separate maintenance clause and the one which is part of an absolute clause is that with the latter the clause has to be read as a whole to find out what the parties intended by the clause, therefore, the maintenance duty will be considered as an absolute one if the main duty is an absolute one. The failure of the carrier to maintain the vessel will allow the aggravated party to claim damages unless the damage was so serious to the extent it prevented the cargo-owner from obtaining the whole benefit intended from the contract<sup>33</sup>.

Even when the maintenance obligation is not directly related to the carriers' obligation to provide a seaworthy vessel or exercise due diligence it can still shed light on how the courts react to the extension of the duty to exercise due diligence beyond the start of the voyage, especially in the light of the recent developments in the marine industry, i.e. introduction of the ISM and ISPS Codes and the UNCITRAL new Draft Instrument on Transport Law, the latter of which attempts to extend the carrier's obligation to cover the whole journey. One of the arguments to support this extension is that maintenance clauses did not raise any problems and therefore extending the duty should not be a problem especially if extension of the duty does not impose an extra duty on the carrier, i.e. if the carrier's obligation is only to exercise due diligence to keep the vessel seaworthy then if he did that his obligation will be discharged as will be seen later.

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32- *Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd. (The Saxon Star)* [1957] 2 Q.B. 233.

33 - *Hongkong Fir Shipping Company, Ltd. v. Kawasaki Kisen Kaisha, Ltd., (The Hongkong Fir)*, [1961] 2 Lloyd's Rep. 478. *Snia v. Suzuki*, (1924) 18 L.L.Rep. 333. Further discussion about the effect of such breach will follow at a latter stage. Also the breach of such obligation can affect other clauses in the contract, *Whistler International Ltd. v. Kawasaki Kisen Kaisha Ltd The Hill Harmony* [2001] 1 Lloyd's Rep 147 at 157. See also Time charters Para 11.8

### *3\_ Express Seaworthiness Clause and Clauses Paramount*

The Hague/Hague-Visby and the Hamburg Rules only apply to bills of lading<sup>34</sup> or any similar document of title<sup>35</sup>. Therefore, in order for the charterparties to be subject to Hague/Hague-Visby or Hamburg Rules the parties should agree to incorporate them into the charterparty either by printing the Rules into their contract or by including in their charter a paramount clause which incorporates the Rules into the contract.

But a problem might arise when the parties to a charterparty make provision for an express obligation of seaworthiness, e.g. “The said vessel being tight, staunch and in every way fit for the voyage...”, and at the same time include a clause paramount which incorporates the Hague/Hague-Visby Rules into the charterparty<sup>36</sup>. On the other hand, there might be a clause which incorporate the Hague/Hague-Visby Rules and then a typed clause saying that ‘the vessel should be tight staunch ....’. In either of these two cases the problem would be the nature of the carrier’s duty: is it an absolute obligation to provide a seaworthy vessel or is it just a duty to exercise due diligence to provide seaworthy vessel? Knowing the answer to this question is essential as it would affect the carrier’s liability because under Art IV r.1 the carrier will be able to limit his liability, if the loss or damage was caused by unseaworthiness, if he proves that he exercised due diligence to make the vessel seaworthy, whereas if the absolute obligation is applied the carrier will be responsible for the loss or damage even if he exercised due diligence to make the vessel seaworthy because the vessel must be seaworthy<sup>37</sup>. Therefore it is important to know whether the paramount clause will take effect or whether the express absolute seaworthiness clause will take effect. The same situation exists with regard to the Hamburg Rules Art 5 where the carrier will not be liable if he proves that there was no fault or privity on his part and that he exercised due diligence.

In answering this question, the general rule is that the court should consider the intention of the parties. Usually where there is an express seaworthiness clause followed

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34- Hague/Hague-Visby Rules Art I (b). Hamburg Rules Art 1.6 and 2 (d, e).

35- Hague/Hague-Visby Rules Art I (b).

36- *Eridania S.P.A. And Others v. Rudolf A. Oetker And Others, (The Fjord Wind)*, [2000] 2 Lloyd’s Rep. 191. The same problem would arise if the parties printed the Articles of the Rules into their charterparty.

37- *Steel v. State Line Steamship, (1877-78) L.R. 3 App. Cas. 72* at p. 86.

by a clause paramount, the court has to look at the contract of carriage as a whole and try to construe it in the light of the parties' intention and in the light of the commercial consideration in order to maintain the stability of the commercial transactions<sup>38</sup>.

For instance in, *The Fjord Wind*<sup>39</sup>, clause 1 of the charterparty provided that 'The said vessel being tight, staunch and strong and in every way fit for the voyage, shall with all convenient speed proceed to [the river Plate] . . .and there load', while clause 35 provided that 'The Owners shall be bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy and to have her properly manned, equipped and supplied and neither the vessel nor the Master or Owners shall be or shall be held liable for any loss of or damage or delay to the cargo for causes excepted by the U.S. Carriage of Goods by Sea Act, 1936'.

The existence of two express clauses regarding seaworthiness, one of which is an absolute obligation to provide a seaworthy vessel and the other which provides for a duty to exercise due diligence only, can create a dilemma over which one the court should consider in case of the breach of obligation of seaworthiness. In the above case the vessel was unseaworthy because there was an unknown defect in one of its crankpins, which meant that it could not operate on an ordinary voyage. The question was whether the carrier's duty was an absolute one or a mere duty to exercise due diligence. Lord Justice Clarke stated that:

"In all the circumstances I have reached the conclusion that the correct construction of cl.1 and 35 of the charter when read together in the context of the contract as a whole and in the light of the commercial considerations to which I have referred is that the disponent owners' obligation as to seaworthiness at each stage was the same, namely to exercise due diligence to make the vessel seaworthy"<sup>40</sup>.

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38- *The Fjord Wind*, *ibid*, at p. 197.

39- *The Fjord Wind*, *ibid*.

40- *The Fjord Wind*, *ibid*, per Lord Justice CLARKE at p. 197 also he stated at p. 196 that "Clause 1 provides that the vessel, being tight, staunch and strong and in every way fitted for the voyage, shall with all convenient speed proceed to one or more loading ports and there load. If there were no cl.35 it is likely that it would be held that there was an absolute warranty that the vessel should be seaworthy for both the approach voyage and loading. Yet on any view cl.35 expressly applies 'before and at the beginning of the voyage', which must include the loading process. Thus under cl.35 the owners must exercise due diligence to make her seaworthy for the loading process and thereafter they must exercise due diligence to make her seaworthy for the cargo-carrying voyage itself. It follows that cl.35 directly affects the true construction of cl.1 and the question arises whether it was intended to affect the whole operation of the clause. In my judgment, it was. The expression "before and at the beginning of the

Consequently, where there are two clauses regarding seaworthiness, one an absolute duty and the other a duty to exercise due diligence to make the vessel seaworthy, both of them should be construed together to find out which one the parties intended to apply in the light of the surrounding circumstances.

The incorporating of the Hague/Hague-Visby Rules into a time charterparty has a rather interesting effect. In a time charterparty the carrier's obligation should be exercised at the time stated in the charterparty if the obligation was an express one, or at the time of delivery when the obligation is implied. However, the incorporation of the Rules into a time charter would make the carrier obliged to make the vessel seaworthy before and at the beginning of each voyage. For example, in *The Aquacharm*<sup>41</sup>, Clause 15 of the time charterparty provided:

“ . . . in the event of the loss of time from deficiency of men or stores, fire breakdown or damage to hull, machinery or equipment or by any other cause preventing the full working of the vessel the payment of hire shall cease for the time thereby lost.”

On the other hand Clause 24 incorporated the Hague Rules, including Art IV r2 (a) which exempt the carrier from liability for the act, neglect, or default of the master in the navigation or the management of the vessel.

The court decided obiter that the incorporation of the Hague Rules into the charterparty means that the carrier's duty would be a duty to exercise due diligence and that the word seaworthy in Art III r1 should be given its usual meaning, Lord Denning stated<sup>42</sup>:

“I think the word "seaworthy" in The Hague Rules is used in its ordinary meaning, and not in any extended or unnatural meaning. It means that the vessel -- with her master and crew -- is herself fit to encounter the perils of the voyage and also that she is fit to carry the cargo safely on that voyage”

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voyage" is apt to include the whole period before the beginning of the voyage". *The Saxon Star*, [1959] A.C. 133. *the Actis Co. Ltd. v. The Sanko Steamship Co. Ltd., (The Aquacharm)*, [1982] 1 Lloyd's Rep. 7, this case is not related to seaworthiness but cl.15 of the time charterparty mentioned the cases where the ship will go off hire should any problem arise. The ship was delayed in the Panama Canal due to the negligence of the master in the vessel management. By virtue of cl.24, which incorporated the Hague Rules, the Court of appeal followed the approach of the *Saxon Star* and ruled that the shipowner can use the protections in Art IV r2. see also *Aliakmon Maritime Corporation v. Trans Ocean Continental Shipping Ltd. and Frank Truman Export Ltd., (The Aliakmon Progress)*, [1978] 2 Lloyd's Rep. 499. For further details see *Time Charters*, 5ed, 2003, at p. 568-570.

41- *Actis Co. Ltd. v. The Sanko Steamship Co. Ltd., (The Aquacharm)*, [1982] 1 Lloyd's Rep. 7.

42- *The Aquacharm*, *ibid.*, at p.9.

Lord Denning's statement makes it clear that if Hague/Hague-Visby Rules are incorporated into a time charterparty then seaworthiness should be given its usual meaning i.e. that the vessel should be fit to encounter the peril of the voyage and she should be fit for that particular voyage. As a result, the incorporation of the Hague/Hague-Visby Rules into a time charter will increase the duties of the carrier from having an absolute duty of seaworthiness, at the agreed time or on delivery, to exercise due diligence at the beginning of each voyage undertaken within the period of hire<sup>43</sup>.

However, Mustill. J in the *Hermosa* commented, *obiter*, that:

“The difficulties created by the inclusion of The Hague Rules into a time charter have not yet been worked out by the Courts. The analogy with a consecutive voyage charter is not exact. For example, the charterer pays directly for the whole of the time while the ship is on hire, including ballast voyages; and there are in most time charters express terms as regards initial seaworthiness and subsequent maintenance which are not easily reconciled with the scheme of The Hague Rules, which create an obligation as to due diligence attaching voyage by voyage. It cannot be taken for granted that the interpretation adopted in [*Adamastos Shipping Co. Ltd v. Anglo-Saxon Petroleum Co. Ltd.*], in relation to voyage charters applies in all respects to time charters incorporating The Hague Rules. It is, however, unnecessary to tackle this problem in the present case, for on the findings which I have made, there was a breach of the initial warranty of seaworthiness or (if that warranty is to be regarded as qualified by The Hague Rules) of the obligation to exercise due diligence to make the ship seaworthy”

Therefore, when the parties to a time charterparty decide to incorporate Hague/Hague-Visby Rules into their contract, we cannot assume that the carrier's obligation will be to make the vessel seaworthy at the beginning of each voyage or at least exercise due diligence at the beginning of each voyage, as the courts have not fully accepted this approach<sup>44</sup>.

Furthermore, by adopting this approach and taking the parties' intention to incorporate a paramount clause into their contract, if the vessel turns out to be unseaworthy, the carrier will not be responsible for any loss or damage unless he fails to exercise due diligence to make the vessel seaworthy, and if this was the case he will not be able to use the protections of Art IV r2 due to the fact that his obligation to provide a seaworthy vessel or exercise due diligence to make her seaworthy is an overriding

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43- See *Time Charters*, 5th Ed, at p.571. paragraph 34.16

44- *Time Charters*, *ibid*, Paragraph 34.17

obligation, the breach of which prevents him from using Art IV r2<sup>45</sup>. Also the carrier will not be able to use the exemption clause provided in the charter, which would have otherwise, been applied to the express seaworthiness clause, unless clear, unambiguous words were used to make it applicable to the paramount clause<sup>46</sup>.

On the other hand where there is a printed seaworthiness clause or paramount clause and a typed clause on the same charterparty or on an attached sheet, priority should be given to the typed clause, as this is a very clear unambiguous indication to the parties' intention to which clause they want to apply to their contract.

For example, in *Anglo-Saxon Petroleum v. Adamastos Shipping*<sup>47</sup>, cl.1 of the charterparty provided the following:

“the vessel being tight, staunch and strong, and every way fitted for the voyage, and to be maintained in such condition during the voyage, perils of the sea excepted”

While cl.52 provided that:

‘Paramount Clause. It is agreed that the.... Paramount Clause [is] to be incorporated in this charterparty’

The paramount clause, which was typed on a separate slip and attached to the charterparty, provided that

‘This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States... 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further’.

The vessel during the charterparty turned to be unseaworthy in different respects, as to its engine-room, staff and its physical seaworthiness. Again the same question was put to the court: does the shipowner have to exercise absolute duty or exercise due diligence only?

Viscount Simonds in delivering his judgment stated that<sup>48</sup>:

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45- Maxine Footwear Co. Ltd. and Another. Appellants; v. Canadian Government Merchant Marine Ltd. Respondents, [1959] A.C. 589.

46- See Below *Adamastos Shipping Co. Ltd v. Anglo-Saxon Petroleum Co. Ltd. (The Saxson Star)*. [1959] A.C. 133, Viscount Simonds statement, p.154.

47- *Adamastos Shipping Co. Ltd v. Anglo-Saxon Petroleum Co. Ltd. (The Saxson Star)*. [1959] A.C. 133

48- *The Saxson Star*, *ibid* at p. 154

“I can entertain no doubt that the parties, when they agreed by clause 52 of the charter that the “paramount clause ... as attached” should be incorporated in their agreement, and proceeded physically to attach the clause which I have set out, had a common meaning and intention which compels me to regard the opening words ‘This bill of lading’, as a conspicuous example of the maxim ‘falsa demonstratio non nocet cum de corpore constat.’ There can be no doubt what is the corpus. It is the charterparty to which the clause is attached. ... [T]he parties to a charterparty often wish to incorporate the Hague Rules in their agreement: and by that I do not mean, nor do they mean, that they wish to incorporate the ipsissima verba of those rules. They wish to import into the contractual relation between owners and charterers the same standard of obligation, liability, right and immunity as under the rules subsists between carrier and shipper: in other words, they agree to impose upon the owners, in regard, for instance, to the seaworthiness of the chartered vessel, an obligation to use due diligence in place of the absolute obligation which would otherwise lie upon them”.

The court refused the submission of the cargo owner that the clause paramount would not apply to the charterparty because it started with the phrase “this bill of lading...” Instead the court was of the opinion that the parties, by making the clause paramount part of their contract, wanted to apply to their relation the same rights and obligation of the parties to the bill of lading. As a result, changes should be made to the Hague Rules to make them applicable to the charterparty.

To sum up, where the contract incorporates a typed clause that contradicts a printed clause the court will apply the typed one, as the intention of the parties clearly shows that they want the typed attached clause to be applicable. However, where there are two clauses in the charterparty, an express seaworthiness clause and a clause paramount, the court should look at the contract as a whole and try to infer the intention of the parties and the commercial considerations.

### ***- The Implied duty of Seaworthiness***

The contract of carriage might sometimes be silent with regard to the obligation of the shipowner to provide a seaworthy vessel. In this case would the carrier be obliged to provide a seaworthy vessel or will there be no obligation whatsoever? To answer this question one should distinguish between bills of lading and voyage charters on the one hand, and time charters on the other hand.

#### *1- The Implied Duty of Seaworthiness in case of Bills of Lading and Voyage Charters:*

In this case, where there is a voyage charter or bill of lading, the shipowner will be under an implied obligation to provide a seaworthy vessel even if there was no express

clause in the contract. This case, in respect of bills of lading, used to arise under common law before the introduction of the Hague/Hague-Visby and Hamburg Rules. Nowadays, however, it mostly arises in case of voyage charterparties where there might not be an express duty of seaworthiness, while it no longer appears in bills of lading, as the Hague/Hague-Visby Rules or Hamburg Rules cover such contracts in most countries and contain express obligation for seaworthiness<sup>49</sup>.

Under common law, where the contract is silent with regard to the duty to provide a seaworthy vessel, the Carrier will be under an obligation to provide a seaworthy vessel; because there is an implied duty that the shipowner has to provide a seaworthy vessel.

There are two reasons behind such implied duty. The first is when the cargo-owner contracts to carry his cargo on board a vessel; he implicitly expects that the vessel is fit to meet the ordinary perils of the voyage and deliver the cargo safely to its destination.

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49- Hague/Hague-Visby Rules will apply to Bills of Lading or any similar document of title subject to the conditions mentioned in Art X:

The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:

- (a) the bill of lading is issued in a contracting State, or
- (b) the carriage is from a port in a contracting State, or
- (c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract,

whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

In Case of Hamburg Rules it will apply subject to the following Art 2:

1. The provisions of this Convention are applicable to all contracts of carriage by sea between two different States, if:
  - (a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or
  - (b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or
  - (c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or
  - (d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or
  - (e) the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.
2. The provisions of this Convention are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person.
3. The provisions of this Convention are not applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer.
4. If a contract provides for future carriage of goods in a series of shipments during an agreed period, the provisions of this Convention apply to each shipment. However, where a shipment is made under a charter-party, the provisions of paragraph 3 of this article apply.

The second relates to the cargo insurance; when a cargo-owner insures his cargo, he implicitly warrants, to his insurers, that the vessel is seaworthy. Therefore, if there was no such implied obligation between the carrier and the cargo-owner, and the vessel was not seaworthy, the cargo-owner would not be able to claim indemnity in case of loss or damage due to unseaworthiness. For instance, Field, J, in *Kopitoff v. Wilson*<sup>50</sup>, stated, referring to the doctrine adopted by the American Courts, that

“It appears to us also that there are good grounds in reason and common sense for holding such to be the law. It is well and firmly established that in every marine voyage policy the assured comes under an implied warranty of seaworthiness to his assurer, and if we were to hold that he has not the benefit of a similar implication in the contract which he makes with a shipowner for the carriage of his goods, the consequence would be that he would lose that complete indemnity against risk and loss which it is the object and purpose to give him by the two contracts taken together. Holding as we now do, the result is that the merchant, by his contract with the shipowner, having become entitled to have a ship to carry his goods warranted fit for that purpose, and to meet and struggle against the perils of the sea, is, by his contract of assurance, protected against the damage arising from such perils acting upon a seaworthy ship”.

A long line of authorities affirmed the implied duty of seaworthiness; in *Kopitoff v. Wilson*<sup>51</sup> for example, the learned judge stated that:

“We hold that, in whatever way a contract for the conveyance of merchandise be made, where there is no agreement to the contrary, the shipowner is, by the nature of the contract, impliedly and necessarily held to warrant that the ship is good, and is in a condition to perform the voyage then about to be undertaken, or, in ordinary language, is seaworthy, that is, fit to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage”.

In contrast to the expressed obligation of seaworthiness, the implied obligation raises a very important issue regarding the protection the exclusion clause offers to the carrier. The efficiency of such a clause depends to a large extent on its language and on the other clauses of the contract of carriage, as will be shown later when breach of the duty of seaworthiness is examined. It is worth mentioning that the implied duty to provide a seaworthy vessel is divided into two parts, just as the expressed one is: a duty to make

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50- *Kopitoff v. Wilson*, (1875-76) L.R. 1 Q.B.D 377, at p. 381-382.

51- *Kopitoff v. Wilson*, *ibid.*, at p. 380 by Field, J. *Steel et Al. v. The State Line Steamship Company*, (1877-78) L.R. 3 App. Cas. 72.

Lord Blackburn at p. 86 stated “I take it my Lords, to be quite clear, both in England and in Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a "warranty," not merely that they should do their best to make the ship fit, but that the ship should really be fit”. *Tattersall v. The National Steamship Company, Limited*, (1883-84) LR 12 Q.B.D. 297

the vessel seaworthy, i.e. the physicality of the vessel, its crew and documents, and a duty to make her cargo-worthy. This latter should be exercised before or at the time of the loading of the cargo on board the vessel<sup>52</sup>, whereas, the duty to make the vessel seaworthy; as to its crew, documents, and physical seaworthiness of the vessel should be exercised before and at the beginning of the voyage. More detailed discussion about the time to exercise the duty will follow later on.

### *2- The Implied Duty of Seaworthiness in case of Time Charterparties*

In this case of a time charterparty, the shipowner does not charter his vessel for one voyage or a particular number of voyages where he has to make the vessel seaworthy at the beginning of each voyage. Instead he hires his vessel to another person for a particular period of time, and that raises the question whether there is an obligation on the carrier to provide a seaworthy vessel in the case of a time charterparty or the shipowner is exempted in this case.

This problem does not arise when there is an express obligation where the clause stipulates the carrier's obligation and the time of exercising the duty, but appears instead where we have a time charter without an express duty of seaworthiness. The common law approach in this case is that the carrier is under an implied obligation to make the vessel seaworthy at the time of delivery, and this obligation is an absolute one<sup>53</sup>, unless the contract states clearly otherwise, i.e. a duty to exercise due diligence<sup>54</sup>.

However, it must be noted that the carrier's duty to provide a seaworthy vessel is not a continuous one throughout the time charter - his obligation is only to make the vessel fit at the time of delivery - but due to the fact that the vessel might be chartered for a

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52- *McFadden v. Blue Star Line*, [1905] 1 K.B. 697. In this case the valve-chest joint was imperfectly remade before the goods were loaded. After the engineer finished ballasting the vessel he screwed down the sea-cock but due to the presence of some hard material the sea-cock was partially left open and consequently seawater gained access through it and forced out the defective packing of the valve-chest and entered the lower part of the vessel through the joint, damaging the cargo. Channell J held that: "the defective fitting of the sea-cock and of the sluice-door, being defects which came into existence after the plaintiff's goods were loaded, were not breaches of the implied warranty of the fitness of the ship to receive the cargo; but that the defective packing of the valve-chest, being an existing defect at the time of the loading of the goods, was a breach of the warranty." at p.697.

53- *Giertsen and Others V. Gorge Turnbull & Company*, (1908) 16 S.L.T. 250. Lord Ardwall at p. 255.

54- Clause 24 NYPE incorporates Hague Rules changing the carrier's obligation into a duty to exercise due diligence.

long period of time to carry out many voyages and the vessel might become unseaworthy after the time of delivery, therefore, the parties might include in their contract a maintenance clause obliging the carrier to maintain the vessel in a fit state to be able to provide the required service as discussed earlier.

## **Time of exercising the duty to provide a seaworthy vessel**

The duty to provide a seaworthy vessel, like any other duty, should be exercised at a certain period of time. This period varies depending on the type of the contract; i.e. Bill of Lading, time or voyage charterparty. The time is also different for vessel seaworthiness and cargo seaworthiness. However, this duty is not continuous; the carrier has only to exercise this duty before and at the beginning of the voyage or at the time stated in the contract of carriage, unless otherwise stated, except in the case of time charter when the duty is implied. In this case the carrier's obligation is to make the vessel seaworthy at the time of delivery as will be shown later. Furthermore, although the carrier has to exercise his obligation before and at the beginning of the voyage, certain action does not need to be taken at that stage but can be taken at a later stage after sailing. This may lead to confusion with the old concept of stages.

Consequently, this section will consider the time of exercising due diligence to provide a seaworthy vessel; with regard to the cargo and the vessel, the doctrine of stages and the bunkering of the vessel.

### ***- Time to exercise the obligation of seaworthiness with regard to the cargo***

The carrier's obligation to provide a vessel that is able to receive the contracted cargo, in other words a cargo-worthy vessel, must be exercised before and at the time of loading the cargo: "one must apply exactly the same rule to the loading stage of a vessel whilst she remains in her port of loading... the warranty is that at the time the goods are put on board she is fit to receive them and to encounter the ordinary perils that are likely to arise during the loading stage; but that there is no continuing warranty after the goods are once on board that the ship shall continue fit to hold the goods during that stage and until she is ready to go to sea, notwithstanding any accident that may happen to her in the meantime"<sup>1</sup>. Consequently, if the vessel was not fit to receive the cargo, the carrier will be in breach of his obligation to make the vessel seaworthy.

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<sup>1</sup> - *McFadden v. Blue Star Line*, [1905] 1 K.B. 697, at p. 704.

The carrier's duty to provide a cargo-worthy vessel starts from the time before the loading of the vessel and continues until the loading operation is finished. For example in *Stanton v. Richardson*<sup>2</sup> a cargo of wet sugar was loaded on board the vessel, the cargo-owner having had the option of different cargoes, including wet sugar. Usually great deal of moisture drains from wet sugar, and therefore any vessel carrying such cargo should be fitted with sufficient pumps in order to extract the moisture, but in this case the pumps on the vessel were not sufficient and when all the cargo was nearly loaded it was found that there was an accumulation in the holds. It was not possible to fit the vessel with extra pumps within reasonable time and the cargo was consequently discharged. The Court of Common Plea found and the Exchequer Chamber affirmed that the vessel was not seaworthy at the time of loading and that the shipowner failed to discharge his duty to provide a seaworthy vessel.

Therefore, if some action which should have been arranged for the vessel to be able to receive the cargo safely had not been taken before loading, the carrier would be in breach of his obligation; for example in *Tattersall v. The National Steamship*<sup>3</sup>, the shipper contracted with the shipowner to carry a cargo of cattle, but the vessel on its previous trip had carried cattle infected with foot and mouth disease. The ship was not fumigated before loading the new cargo and during the voyage the cattle became infected. The court held that the vessel was not seaworthy before loading the cattle since it was not fumigated before loading, and the shipowner was not able to limit his liability.

Also in *McFadden v. Blue Star Line*<sup>4</sup>, the cargo was loaded safely and properly on board the vessel; after that the ship's engineer opened a sluice-door in a watertight bulkhead in the lower part of the ship, but when he closed it some time later, he did not screw it down properly in order to ensure that it was watertight. After that the engineer

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2- *Stanton v. Richardson*, (1871-72) L.R. 7 C.P. 421, (1873-74) L.R. 9 C.P. 390. *Compania de Naviera Nedelka S.A. v. Tradax International S.A.*, (The Tres Flores), [1973] 2 Lloyd's Rep. 247, this case deals with the notice of readiness, but it shows that if the vessel was not ready to receive the cargo at the time of the notice then the notice will not be valid.

3- *Tattersall v. The National Steamship Company, Limited*, (1883-84) LR 12 Q.B.D. 297. *Compania de Naviera Nedelka S.A. v. Tradax International S.A.*, (The Tres Flores), [1973] 2 Lloyd's Rep. 247. *McFadden v. Blue Star Line*, [1905] 1 K.B. 697. *Owners of Cargo on Ship "Maori King" v. Hughes*, [1895] 2 Q.B. 550. *Mediterranean Freight Services Ltd. v. BP Oil International Ltd.*, (The Fiona), [1994] 2 Lloyd's Rep. 506.

4- *Ibid.*

proceeded to fill one of the ballast tanks. In order to do that he had to open a sea-cock on the side of the vessel to allow seawater to pass through. The water, on its way to the ballast tank, had to go through a valve-chest, the joint between the lid and body of which had been packed as usual with cotton to make it water tight, but this joint was imperfectly remade just before the cargo was loaded. As a result of the presence of some hard substance the sea-cock was not closed properly after the tank was loaded and, due to the continued pressure of the water, forced out the packing of the valve-chest and seawater went through the joint into the lower part of the vessel down the sluice-door into the cargo holds and damaged the shipper's cargo. The court held:

“that the defective fitting of the sea-cock and of the sluice-door, being defects which came into existence after the plaintiff's goods were loaded, were not breaches of the implied warranty of the fitness of the ship to receive the cargo; but that the defective packing of the valve-chest, being an existing defect at the time of the loading of the goods, was a breach of the warranty.”<sup>5</sup>.

It is worth mentioning that when the duty to make the vessel seaworthy is expressed in the contract of carriage then the time at which the vessel should be cargo-worthy is usually also mentioned in the contract, e.g. at the time of contract or at the time of delivery. However if the duty was implied then the carrier is under an obligation to make the vessel cargo-worthy at the time of loading.

Consequently, any defect that exists before loading will make the vessel uncargo-worthy; however, if the defect develops after the loading operation has finished, then the vessel will not be uncargo-worthy as the duty of the carrier stops at the end of loading operation, but such a defect might render her unseaworthy as the carrier's obligation of seaworthiness continues until the time of sailing, while his duty of cargo-worthiness stops at end of loading operation<sup>6</sup>.

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5- *Ibid.*, at p. 697.

6- *Ibid.*

***- The Time at which to exercise obligation of seaworthiness with regard to the vessel***

The carrier's obligation to make the vessel seaworthy must be exercised at a particular time of the voyage. This time differs according to the type of the contract of carriage: if it is bill of lading, time charterparty or voyage charterparty. Usually there is no difference between a bill of lading contract and a voyage charterparty, but a time charterparty sometimes differs from the other two. In the case of charterparties the parties to the contract may choose another period to exercise the duty.

***1- Bill of lading and Voyage charterparty***

Under this type of carriage contracts the vessel should be seaworthy at the beginning of the voyage, regardless of whether the carrier's obligation was expressed or implied. The term "voyage" covers the whole period from the loading port until the arrival of the vessel at its destination<sup>7</sup>. Channell J. in *McFadden v. Blue Star Line*<sup>8</sup> stated that "the warranty of seaworthiness in the ordinary sense of that term, the warranty, that is, that the ship is fit to encounter the ordinary perils of the voyage, is a warranty only as to the condition of the vessel at a particular time, namely, the time of sailing"<sup>9</sup>. Here the obligation is a continuous one and it cannot be divided into stages; it starts from the loading and continues till the vessel starts its voyage, and the shipowner cannot claim

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7- *The Makedonia*, [1962] 1 Lloyd's Rep. 316 at pp. 329-330 "I see no obligation to read into the word "voyage" a doctrine of stages, but a necessity to define the word itself. The word does not appear in the earlier Canadian Act of 1910. "Voyage" in this context means what it has always meant: the contractual voyage from the port of loading to the port of discharge as declared in the appropriate bill of lading".

8- *McFadden v. Blue Star Line*, [1905] 1 K.B. 697.

9- *Ibid.*, at p. 703, see also p.697. *Manifest Shipping & Co. Ltd. v. Uni-Polaris Insurance Co. Ltd. and la Réunion Europeene (The Star Sea)*, [2001] 1 Lloyd's Rep. 389. In *Eridania S.P.A. And Others v. Rudolf A. Oetker And Others, (The Fjord Wind)*, [2000] 2 Lloyd's Rep. 191. Lord Justice CLARKE stated "In all the circumstances I have reached the conclusion that the correct construction of cl. 1 and 35 of the charter when read together in the context of the contract as a whole and in the light of the commercial considerations to which I have referred is that the disponent owners' obligation as to seaworthiness at each stage was the same, namely to exercise due diligence to make the vessel seaworthy. In these circumstances I would uphold the decision of the Judge on this part of the case but not for the same reasons". At p. 197

that the vessel was seaworthy when she was loaded, if she become unseaworthy after that<sup>10</sup>.

As the carrier's duty to provide a seaworthy vessel should be exercised before the vessel sets sail to its destination, it is important to determine exactly when the voyage actually does start. The precedents show that the voyage starts "when all hatches are battened down, visitors are ashore and orders from the bridge are given so that the ship actually moves under its own power or by tugs or both"<sup>11</sup>. This means that the voyage starts when the vessel starts moving away from its mooring place to leave the port, so the carrier duty stops at this point of time.

For instance, in *the Rona*<sup>12</sup>, the court held that the voyage must be considered as having commenced if the vessel started, in a seaworthy condition, from wherever she was moored, and therefore if any damage happens to her while she is leaving the harbour and she proceeds without repairs, the shipowner will not be responsible for unseaworthiness because he discharged the obligation when the vessel started its voyage.

a. Remedying unseaworthiness after starting the voyage

In some cases the vessel may start its voyage in an unseaworthy condition; either because the crew were not aware of the cause of the unseaworthiness or because it is the practice of a particular trade to sail in such a condition, which would be remedied at a

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10- *Maxine Footwear Co. Ltd. v. Canadian Government Merchant Marine Ltd*, [1959] A.C. 589. Lord Somervell of Harrow stated "On that view the obligation to exercise due diligence to make the ship seaworthy continued over the whole of the period from the beginning of loading until the ship sank", at p. 603. In this case the vessel was lost after loading the cargo but before starting its voyage. In *Cohn v. Davidson*, (1876-77) L.R. 2 Q.B.D. 455. FIELD, J. stated at p. 460-461 "That is the point at which the risk commences, at which the warranty attaches, and is by the law of England exhausted. No degree of seaworthiness for the voyage at any time anterior to the commencement of the risk will be of any avail to the assured, unless that seaworthiness existed at the time of sailing from the port of loading". *McFadden v. Blue Star Line*, [1905] 1 K.B. 697 *Steel v. State Line*, (1877) 3 App.Cas. 72.

11- Professor William Tetley, *Marine Cargo Claims* 4 Ed, to be published in 2008, Chapter 15 Due Diligence to Make the Ship Seaworthy at p. 16, taken from Prof Tetley's web site: <http://www.mcgill.ca/maritimelaw/mcc4th/> taken in 06/02/2006

12- *The Rona*, (1884) 51 L.T. 3 P.C. 234, cited in *Carver Carriage by Sea* 13th Ed, at p. 120

later stage, with the knowledge of the carrier<sup>13</sup>. In these cases, would the carrier be in breach of his obligation to provide a seaworthy vessel?

To answer this question it is necessary to differentiate between two scenarios. The first is if the unseaworthiness could be cured during the voyage without delay and without causing any danger to the vessel, her cargo, crew or property, the carrier will not be in breach of his duty to provide a seaworthy vessel. In this case, if the crew of the vessel fails to take the appropriate measures to make the vessel seaworthy then this could be classified as negligence of the crew, not breach of the obligation of seaworthiness<sup>14</sup>.

In *Moore v. Lunn*<sup>15</sup>, the vessel left the loading port with a cargo of wooden logs shipped on deck; the crew did not tie the logs after loading because the vessel had to travel by river before going to the open sea, and it was the practice to tie the logs during the river trip. Mr. Justice Bailhache held that the ship was not unseaworthy when she started the river stage but if the logs were not tied when the ship started her ocean stage she would be unseaworthy. That is because it was the practice of that trade to lash the logs during the river trip, which could be done easily and quickly<sup>16</sup>. The vessel in this case was in fact unseaworthy due to the drunkenness of the master and the engineer.

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13- In the case of trade practice or where the voyage consists of different legs the doctrine of stages could apply, discussion about this will follow later.

14- *Hedley v. The Pinkney and Sons Steamship Company, Limited*, [1892] 1 Q.B. 58. *F. C. Bradley & Sons, Ltd. v. Federal Steam Navigation Company, Ltd.* (1925) 22 Ll. L. Rep. 424 at p. 436. *Moore and Another v. Lunn and Others*, (1923) 15 Ll. L. Rep. 155.

15- *Moore and Another v. Lunn and Others*, (1923) 15 Ll. L. Rep. 155. *Hedley (Pauper) Appellant; v. The Pinkney & Sons Steamship Company, Limited Respondents*. [1894] A.C. 222.

16- *Moore v. Lunn*, *ibid*, Mr Justice Bailhache stated at p. 91: "The stevedores who loaded the vessel at New York suggested they should lash these logs, but one of the officers on the ship said they were not to do that; the ship's crew would do it when she was proceeding down the river after leaving Baltimore, and there is evidence that is the common practice. As the vessel is proceeding down the river she is in smooth water, and this attention to lashing of deck cargo is a matter which can be attended to quite readily while she is in the smooth water.... The lashings were put in place so that they could be applied after leaving Baltimore, because the chains or ropes were placed underneath the logs, so it would not be necessary to shift the logs. But the cargo was not lashed. It is quite clear that, if a vessel is to be seaworthy for an ocean voyage, and particularly for a North Atlantic voyage in the winter, it is essential that a deck cargo of logs should be securely lashed. If they are not, they are not only a danger to the life and limbs of the sailors, but to the structure of the ship. They may get loose and carry away ventilators and things of that sort. A vessel which has not got these logs securely lashed is not seaworthy for an ocean voyage."

The other scenario is that if the vessel starts in an unseaworthy condition, e.g. a defect in the boilers or engine-room, if the carrier repairs the vessel after that, he will still be in breach of his duty because on the initial commencement of the voyage the vessel was unseaworthy, even if the repairs took place before the loss, i.e. in *The Quebec Marine Insurance Company v. The Commercial Bank of Canada*<sup>17</sup> a voyage policy on steam vessel was issued for a trip from Montreal to Halifax. The policy contained a few exceptions, inter alia, unseaworthiness. There was a defect in the boiler which was not apparent during the river stage of the voyage, but upon entering the sea stage of the voyage the salt water made the defect apparent and disabled the vessel so she had to be put in for repairs. A few days later she sailed but subsequently sank after she met with heavy weather. The court held that:

“that in a Voyage Policy there is, by implication of law, a warranty of seaworthiness, which had not been complied with, as the Vessel sailed with a defect of such a nature that, so long as it remained unremedied, it made her unseaworthy for the voyage, or stage of the voyage, she entered upon, and that although the defect was afterwards repaired, though before loss, it avoided the Policy”.<sup>18</sup>

Therefore, if the vessel starts her voyage in an unseaworthy condition but the unseaworthiness can be cured quickly without any difficulties, then the ship will not be considered unseaworthy, and if the crew did not take appropriate measures to cure the problem the ship will not be unseaworthy but any loss would be a result of negligence of the crew<sup>19</sup>. Also if the vessel was unseaworthy at the commencement of the voyage, but

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17- *The Quebec Marine Insurance Company v. The Commercial Bank of Canada*, (1869-71) L.R. 3 P.C. 234.

18- *Ibid.*

19- *Steel et Al. v. The State Line Steamship Company*, (1877-78) L.R. 3 App. Cas. 72. Lord Blackburn at p. 90-91 “If, for example, this port was left unfastened, so that when any ordinary weather came on, and the sea washed as high as the port, it would be sure to give way and the water come in, unless something more was done—if in the inside the wheat had been piled up so high against it and covered it, so that no one would ever see whether it had been so left or not, and so that if it had been found out or thought of, it would have required a great deal of time and trouble (time above all) to remove the cargo to get at it and fasten it--if that was found to be the case, and it was found that at the time of sailing it was in that state, I can hardly imagine any jury finding anything else than that a ship which sailed in that state did not sail in a fit state to encounter such perils of the sea as are reasonably to be expected in crossing the Atlantic. I think, on the other hand, if this port had been, as a port in the cabin or some other place would often be, open, and when they were sailing out under the lee of the shore remaining open, but quite capable of being shut at a moment's notice as soon as the sea became in the least degree rough, and in case a regular storm came on capable of being closed with a dead light--in such a case as that no one could, with any prospect of success, ask any reasonable people, whether they were a jury or Judges, to say that that made the vessel unfit to encounter the perils of the voyage, because that thing could be set right in a few minutes, and there is always some warning before a storm comes on, so that they would have plenty of time to put it all right, and it would have been put right. If they did not put it right after such a warning, that would be negligence on the part of the

such unseaworthiness would not have affected the vessel's ability to sail but would have had to be remedied before the end of the voyage, i.e. as the defective part is essential for the unloading operation then if the carrier arranged in advance for the vessel to call at a particular port to collect the part necessary to render the vessel seaworthy the carrier's obligation would have been discharged and even if the vessel had to deviate from her course to collect the required part, such deviation can be considered as reasonable if it had been arranged in advance<sup>20</sup>.

b. Seaworthiness before a vessel's arrival at the loading port

In some cases, especially charterparties, the carrier might be obliged to make sure that the vessel is seaworthy while she is on her way to the loading port, a trip known as the ballasting voyage. The reason for this is if she was not seaworthy during this voyage, the carrier has to arrange for her to be made fit for the voyage at the loading port and this could cause a delay in loading the cargo or sailing.

For instance, in *Adamastos Shipping v. Anglo-Saxon Petroleum*<sup>21</sup>, the tanker was chartered to make consecutive voyages carrying cargo from and to different ports; the shipowner appointed an engine-room member of staff who turned out to be incompetent, and due to his incompetence the vessel broke down in her first voyage to the loading port; with further problems arising later. The charterparty incorporated the 1936 US Carriage of Goods by Sea Act. The House of Lords decided that some changes should be made to the Act's provisions in order for it to be applicable to the charterparty and the provisions that contradicted it should be ignored.

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crew, and not unseaworthiness of the ship. But between these two extremes, which seem to me to be self-evident cases as to what they would be, there may be a great deal of difficulty in ascertaining how it was here". Also see *Hedley v. The Pinkney and Sons Steamship Company, Limited*. [1892] 1 Q.B. 58, "A ship, which is properly equipped for encountering the ordinary perils of the sea, does not become unseaworthy within the above enactment, because the captain negligently omits to make use of part of her equipment" at p. 58. *The Carron Park*, (1890) LR 15 P.D. 203 at p. 206-207.

20- *Lyric Shipping Inc. v. Intermetals Ltd. and Another, (The Al Taha)*, [1990] 2 Lloyd's Rep. 117 Mr. Justice Phillips held: "a 'reasonable deviation' within art. IV, r. 4 could be a deviation planned before the voyage began or the bills of lading were signed; the cargo boom was necessary if Al Taha was to be reasonably fit to discharge her cargo at her destination and as the boom was not necessary to render the vessel seaworthy at the commencement of the voyage it was reasonable to plan to deviate to collect the boom en route rather than to wait for the weather conditions to permit delivery at Portsmouth; the mode of performance was within the liberty afforded by art. IV, r. 4" at p.118, see also p.128.

21- *Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd.*, [1959] A.C. 133 at p. 179-180

Furthermore, the House of Lords, after pointing out that the Act applies only to cargo carrying voyages, considered that during the ballasting voyage to the loading port the shipowner must exercise due diligence to make the vessel seaworthy even though it is not a cargo carrying voyage. The reasoning behind such decision was the following: Firstly the purpose of the ballasting voyage is to perform the goal of the charterparty, which is carrying cargo from the loading port; therefore, the ballasting voyage can be considered a voyage relating to the carrying of the goods even though the vessel was not carrying any cargo. Secondly the ballasting voyage under charterparties is indeed a voyage under the contract of carriage that related to the loading of the goods, handling, stowage, carriage ... etc, even though it does not cover the period mentioned in the Hague Rules, from loading till the beginning of the voyage, which was incorporated in the US Act, as this rule does not apply to a charterparty. Finally the shipowner has to arrange the holds and refrigeration etc of the ship in order to be fit to receive the cargo, then carry it to its destination safely and this is considered to be directly related to the carriage of the cargo. This applies to charterparties, and if the shipowner did not arrange for this to be done before arriving to the loading port, he has to arrange for it to be done before each voyage and that would put him under greater liabilities than those under Art III of the Rules. In addition it will cause too much delay to arrange for the vessel to be ready, unless the vessel was brought to the loading port prior to the agreed delivery date in order to arrange for these things to be done, which would be time-consuming and might not be feasible<sup>22</sup>.

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22- *Ibid*, Lord Keith of Avonholm stated "Taking section 3 (1) and section 4 (1) and (2) (a) by themselves, no difficulty would arise in giving them a literal and effective interpretation as between owner and charterer. Two points, however, are taken, that these provisions do not apply to a ballast, or non-cargo carrying, voyage, and apply only to a voyage to or from a United States port. On the first point, of course, the Act as drawn applied only to cargo voyages because it dealt wholly with contracts of carriage under bills of lading. But ex hypothesi that limitation has gone. The Act is now being applied to a charterparty. A charterparty is a contract for the purpose of the carriage of goods by sea, and I see no difficulty in saying that a voyage in ballast is all part and parcel of and incidental to that purpose. If a chartered ship proceeds to its port of loading, it is, in my opinion, engaged in a voyage relating to the carriage of goods though it is not actually carrying goods at the time. To exclude the carrier in such a case from the obligations and immunities of sections 3 and 4 is merely to assert that the Act applies to contracts for the carriage of goods by sea under bills of lading which are confined to the actual carriage of goods. Reference was made to section 2, but that does not, in my opinion, advance the argument for exclusion of ballast voyages any further. Indeed, it might be said that a voyage under a charterparty in ballast is a voyage under the contract "in relation to" the loading, handling, stowage, carriage, etc., of goods. True, it does not cover the period from the time when the goods are loaded to the time when they are discharged as

It is worth mentioning that in the context of incorporating the Hague/Hague-Visby Rules into charterparties it is important for the cargo to be identifiable. This is clear from Mr. Justice Colman's statement in *the Marinor*<sup>23</sup>:

"If the effect of incorporation of the rules by general words is to enable the shipowner to rely on the protection of art. IV to the extent enunciated in *Adamastos* and *The Satya Kailash*, then there can, in my judgment, be no reason in principle why the protection provided to the shipowner by art. III, r. 6 should not apply to an equally broad spectrum of claims, provided always that it is possible to identify a date when goods sufficiently relevant to the claim were delivered or should have been delivered."<sup>24</sup>

Although this statement was delivered in the context of the time bar limitation in Art IV r6, the same can be said in the context of the exceptions of Art IV r2 and for the rules to be incorporated into charterparties.

Therefore the shipowner's duty to provide a seaworthy vessel under a voyage charterparty could extend to cover the time before the vessel arrives at the loading port, while in her ballasting voyage for the reasons given above. In spite of the fact that this case regarded a consecutive voyage charterparty, it can apply to both time and voyage charterparties, and there is no harm even in extending it to the bill of lading as this will save time, and will allow the shipowner some time to cure any unseaworthiness that may exist as he will be able to discover any problems in advance and arrange for engineers or spare parts to be ready at the ports upon arrival. The International Safety Management Code allows for such actions, as the Master should report any incidents to the Designated Person who in turn should arrange for corrective action to be taken as will be seen later.

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mentioned in section 1 (e) of the Act, but that clause has no meaning in a charterparty, which covers a much greater scope of time, and may be rejected as inconsistent with the purpose of the charterparty. In this matter I am reluctant to differ from the learned judge. He seems to attach considerable weight to subsection (1) (c) of section 3, which imposes the duty to make the holds, refrigerating and cooling chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation. That is no doubt directed to the carriage of goods, but so is a charterparty. and if a ship has not made this provision before she sails for her port of loading, she will have to do so before she takes on a cargo at the port of loading and on each voyage thereafter under the charterparty on which she carries goods. I am not prepared to hold that because section 3 (1) (c) is inapplicable to a ship on a ballast voyage, if that be so, the shipowner is therefore placed under greater liabilities than those imposed in other respects under section 3", at p. 179-180.

23- *Noranda Inc. and Others v. Barton Ltd. and Another (Time Charter)*, (*The Marinor*), [1996] 1 Lloyd's Rep. 301.

24- *Ibid.*, at p 310.

c. Consecutive voyages under charterparty

Sometimes vessels are chartered to carry out consecutive voyages, which means that the vessel should do as many voyages as possible within a specified period of time. In this case the obligation of seaworthiness must be exercised at the beginning of each voyage and not at the first voyage only. The carrier cannot defend himself by claiming that he made the vessel seaworthy at the beginning of the first voyage.

We saw earlier, in *Adamastos Shipping v. Anglo-Saxon Petroleum*<sup>25</sup>, that the tanker was voyage chartered to carry a cargo of oil all over the world on as many consecutive voyages as might be possible within the period of 18 months and a question arose with regard to the carrier's duty to make the vessel seaworthy. Should he exercise his duty only at the start of the first voyage or at the beginning of each voyage of the consecutive voyages? The court of appeal held:

“That the obligations of the owners under this form of consecutive voyage charter (which was different in kind from a time charter) were (a) an obligation... to ensure at the beginning of each successive voyage contemplated by the charter that the vessel was in a seaworthy condition; (b) a continuing express warranty to maintain the vessel in a seaworthy condition during each successive voyage over the whole period of the charter, perils of the sea excepted; (c) an obligation... to proceed to each nominated port of loading and complete with all convenient despatch as many voyages as possible within the period of the charterparty”<sup>26</sup>.

Consequently, the carrier in this case should ensure that his vessel meets the requirement of seaworthiness at the beginning of each consecutive voyage, but this situation does not apply in the case of time charterparty as we will see below.

2- Time Charters

The time to exercise the duty to provide a seaworthy vessel differs in the case of time charterparties from that in the case of voyage charterparties or bills of lading. This is because the nature of the time charterparty differs from that of voyage charterparty and bills of lading. In a voyage charter and bill of lading the cargo-owner pays the carrier to provide a service to him, i.e. carrying the cargo from port A to port B. The carrier is the one in total control of the vessel; the master and crew are accountable to the

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25- *Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd.*, [1959] A.C. 133.

26- *Ibid.*, [1957] 2 Q.B. 233, at p. 235. *Agro Co. of Canada v. Richmond Shipping, (The Simonburn)* [1972] 2 Lloyd's Rep. 355, sea Macotta J.

carrier and he responsible for their acts and for the state of the vessel. Whereas in time charterparties the charterer hires the vessel for a period of time, e.g. 20 months, and he and the shipowner put his vessel at the disposal of the charterer. The latter will be in total control of the commercial service of the vessel and is free to use it within the limits of the charterparty. Furthermore, the charterer is free to give instructions to the master who should obey them, though the charterer would be responsible to indemnify the shipowner against the liability resulting from his instructions<sup>27</sup>

As to the voyage charter or bill of lading, the carrier's duty is to make the vessel seaworthy before and at the beginning of each voyage and this continues from the loading till the commencement of the voyage. Whereas in time charterparties, where the vessel is chartered for a period of time rather than for a voyage or number of voyages, the carrier has to exercise his duty only at the commencement of the time stated in the charterparty, if that was expressed, or at the time of delivery if the seaworthiness obligation was implied, and he will not be responsible for any unseaworthy condition of the vessel that arises after that, even if there was an express maintenance clause to keep the vessel efficient<sup>28</sup>.

Clause 2 of the NYPE 93 form of time charterparty provides that "... the vessel on her delivery shall be ready to receive cargo with clean-swept holds and tight, strong and in every way fitted for the ordinary cargo service, having water ballast and with sufficient power to operate all cargo-handling gear simultaneously". The NYPE charterparty provides for initial seaworthiness at the time of delivery but there is no obligation regarding each voyage that takes place within the hire period. In order to solve such problems some time charterparties incorporate a maintenance clause that obliges the carrier to keep the vessel in an efficient state during the charter period, but this obligation is distinct from the duty to provide a seaworthy vessel, and the effect of

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27- Wilson, Carriage of Goods by Sea, 4th Ed, p. 85.

28- Carver Carriage by Sea, 13th ED, 1982, §626. NYPE form cl.1 states that the maintenance duty of the shipowner is "to keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service".

not complying with it depends on the language of the clause and whether or not it is part of the seaworthiness clause, as was shown earlier<sup>29</sup>.

The case of a time charterparty might be confused with the case of a consecutive charter under which the carrier charts his vessel for a particular time to carry out consecutive voyages. However, these are different from each other because under a consecutive charter there is an implied undertaking that the vessel must be seaworthy at the beginning of each voyage<sup>30</sup> while under a time charter the obligation is only applicable at the beginning of the charter. Also in the case of a consecutive voyage charterparty the vessel is still under the control of the shipowner, while in time charters the vessel is controlled by the charterer who would be liable for the results of his instructions.

The parties to a charterparty may choose to incorporate the Hague/Hague-Visby Rules into their charterparty, leaving a confusion as to the time of exercising due diligence. Should it be exercised at the beginning of the hire period or at the beginning of each separate voyage?

To answer this question it is first of all important to mention that in order for the Rules to be incorporated into charterparties, whether voyage or time charters, the cargo should be identifiable, i.e. it should be possible to identify the date when the goods relevant to 'the claim were delivered or should have been delivered'<sup>31</sup>. Once this is done then the rules could be incorporated.

Bearing in mind the decision in *the Marinor*,<sup>32</sup> the answer to the question regarding the time to exercise the obligation of seaworthiness if the Hague/Hague-Visby Rules were incorporated into a time charter, could be found in *The Aquacharm*<sup>33</sup>, where the vessel was time chartered and the charterparty incorporated the Hague Rules. Lord

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29- Wilson, Carriage of Goods by Sea, 4th ED 2001, at p. 12

30- Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd, [1959] A.C. 133

31- Noranda Inc. and Others v. Barton Ltd. and Another (Time Charter), (*The Marinor*), [1996] 1 Lloyd's Rep. 301., at p 310.

32- *Ibid.*

33- Actis Co. Ltd. v. The Sanko Steamship Co. Ltd., (*The Aquadarm*), [1982] 1 Lloyd's Rep. 7.

Denning M.R. and Griffiths L.J. decided *obiter*<sup>34</sup>, that the incorporation of the Hague Rules into the charterparty had the effect on the time charter of incorporating the duty to exercise due diligence at the beginning of each voyage, and it is said that “when the Act (the Hague Rules) is notionally written out in full in the charter there seems no good reason to disregard as ‘insensible’ or inapplicable’ the relevant provisions... nor to give ‘voyage’ anything other than its ordinary meaning”<sup>35</sup>.

However this decision was criticized as it followed the analogy of the consecutive charterparties, without considering two issues: The first is that in time charterparties the charterer pays the hire money for the whole period of the charter party. The second is that most time charterparties contain an express obligation of seaworthiness and maintenance clause which cannot be reconciled with the requirements of the Hague/Hague-Visby Rules which require that the duty should be exercised at the beginning of each voyage<sup>36</sup>. Consequently the incorporation of the Rules into a time charter-party should be considered closely in the light of the statement in *the Hermosa*<sup>37</sup> case and the conditions provided in *the Marinor*<sup>38</sup> case.

### 3- Charterparties and the implied obligation of seaworthiness and time of duty

Most bills of lading are subject to the Hague/Hague Visby Rules where due diligence should be exercised before and at the beginning of the voyage<sup>39</sup>. In some cases, where the Hamburg Rules apply to bills of lading or charterparties, if the parties choose to

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34- *Ibid.*, at p. 9, 11.

35- Time Charters, 4th ED 1995, at p. 517.

36- *Ibid.*, p. 9. *The Hermosa*, [1980] 1 Lloyd's Rep. 638. It was decided *obiter* “The difficulties created by the inclusion of The Hague Rules into a time charter have not yet been worked out by the Courts. The analogy with a consecutive voyage charter is not exact. For example, the charterer pays directly for the whole of the time while the ship is on hire, including ballast voyages; and there are in most time charters express terms as regards initial seaworthiness and subsequent maintenance which are not easily reconciled with the scheme of The Hague Rules, which create an obligation as to due diligence attaching voyage by voyage. It cannot be taken for granted that the interpretation adopted in (The *Adamastos* case) in relation to voyage charters applies in all respects to time charters incorporating The Hague Rules. It is, however, unnecessary to tackle this problem in the present case, for on the findings which I have made, there was a breach of the initial warranty of seaworthiness or (if that warranty is to be regarded as qualified by The Hague Rules) of the obligation to exercise due diligence to make the ship seaworthy”, per Mustill J. at 647 -648.

37- *ibid.*

38- *The Marinor*, *supra*.

39- Art III r1.

incorporate them into their charterparty, the duty to make the vessel seaworthy covers the whole voyage or the time of hire as Article 5 of the Rules does not provide a certain period of time at which the duty should be exercised. Instead it provides that the carrier is responsible for any damage, loss or delay which takes place while the cargo is in the carrier's possession<sup>40</sup>. But the question would be, in the case of charterparties that do not incorporate the Rules or are silent about the duty of seaworthiness - , in other words where the duty will be implied - at what time the carrier should exercise his obligation?

In case of a voyage charterparty, the common law approach will be followed, which means that there is an implied and absolute obligation on the part of the carrier to provide a seaworthy vessel and this obligation should be exercised at the time of sailing. For example, in *Kopitoff v. Wilson*<sup>41</sup>, a number of armour-plates were loaded onboard the vessel by the carrier's servants and during the voyage the vessel met with bad weather and number of the iron armour-plates were lost. The judge, after indicating to the jury that as a matter of law any carrier is under an implied obligation that his vessel is actually fit at the time of sailing, and his obligation is not merely to do his best endeavour to make her so<sup>42</sup>, then directed a question to the jury as to whether the vessel was, at the time of sailing, fit to encounter the ordinary perils of the sea expected at the time of voyage, to which the jury answered no.

However, in case of time charterparties, given the absence of an express obligation, there will be an absolute implied obligation that the vessel will be seaworthy on her

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40- Art 5 of Hamburg Rules:

1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place *while the goods were in his charge as defined in article 4*, unless the carrier proves that he, his servants or agents took all

4. (a) The carrier is liable

(i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;

(ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.

41- *Kopitoff v. Wilson and Others*, (1875-76) L.R. 1 Q.B.D. 377.

42- *Kiptoff v. Wilson*, *ibid*, "The learned judge told the jury as a matter of law, and not as a question for them, that a shipowner warrants the fitness of his ship when she sails, and not merely that he will honestly and bonâ fide endeavour to make her fit" at p. 379. *Steel et Al. v. The State Line Steamship Company*, (1877-78) L.R. 3 App . Cas. 72. *Lyon v. Mellis* (1804) 5 East 428.

delivery only and this does not continue through out the hire period, unless the parties chose to include a maintenance clause into their contract. In this case, complying with the maintenance clause is an obligation different from the one of seaworthiness as was shown earlier. Thus, in *Giertsen v. Turnbull*<sup>43</sup>, the owners of the steamship time chartered her to Turnbull for six calendar months. On the vessel's trip to Jaffa the master heard a strange knocking sound but the vessel carried on her voyage and loaded a cargo of oranges then sailed for Valencia. An hour after sailing the master heard the knocking noise again and after inspection decided to go to Bona, where the vessel was inspected. It was found that her shafting had got out of line and that the white metal stem had worn down to a dangerous level. Consequently the vessel was not able to sail until repairs were carried out, which took some time and the cargo was transhipped to another vessel. The cargo-owners recovered the general average they had to pay and the cost they had to pay for transhipment. Clause 1 of the charterparty provide for a maintenance duty on the carrier and there was legal action with regard to the cost of coal used during the off hire period and with regard to when the payment of hire should cease. Lord Ardwall Stated that<sup>44</sup>:

“I am accordingly of opinion that the charterers' contention on this point is ill-founded, that the implied warranty of seaworthiness was complied with when the vessel was handed over to the charterers in a seaworthy condition at the commencement of the period of hiring, and that the maintenance clause in Article 1 of the charter-party is inserted merely for the purpose of laying upon the owners the burden and the expense of maintaining the vessel during the period of hire in a thoroughly efficient state, including, of course, the expense of all necessary and proper repairs.”

Therefore, if the parties to a charter fail to stipulate the time at which the vessel should be seaworthy, then if it was a voyage charter the carrier/shipowner's obligation should be exercised before the time of sailing, but if it was a time charter then the shipowner/carrier must exercise his duty at the time of delivery. In both cases the obligation is an absolute one.

#### *4- Carrier's Liability before Taking Responsibility of the Vessel*

In some cases the carrier may enter into a contract of carriage even before the vessel comes into his possession, i.e. if the vessel is still with the shipbuilders or if he bought it

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43- *Giertsen and Others v. George Turnbull & Company*, (1908) 16 S.L.T. 250

44- *Giertsen v. Turnbull*, *ibid*, at p.253

recently but it did not come to his orbit yet. In this case what would be the position of the carrier with regard to seaworthiness?

Under common law the carrier is under an absolute obligation to make the vessel seaworthy and it is no excuse that he did his best to make her so<sup>45</sup>, therefore, he must ensure that the vessel is seaworthy before she sets sail and a latent defect is not an excuse. However, if the carrier's obligation is to exercise due diligence to make the vessel seaworthy, i.e. because his contract was made subject to Hague/Hague-Visby or Hamburg Rules or because the party chose to do so, then the carrier is not responsible for any unseaworthiness which existed before the vessel came to his orbit from the shipbuilders or from her previous owner, as long as this unseaworthiness cannot be discovered by a reasonable, prudent check carried out by the carrier or professional expert<sup>46</sup>.

In *Union of India v. N.V. Reederij Amsterdam*<sup>47</sup>, the vessel was delivered to the carrier from its previous owners. Upon receiving the vessel the new owner put the vessel in for general overhaul and survey at Rotterdam. During that survey its machinery was checked by Lloyds register who recommended a list of required parts that were needed for the machinery. At that time the reduction gear was not inspected, as its inspection was not due at the time of the survey, but with the help of the vessel's engineer and the Lloyds register a new reduction gear was added to the parts list in order to avoid any delay in getting one should there be any need for that when its inspection date came. During the journey there was a breakdown in the reduction gear and the cargo owner claimed that the vessel was not seaworthy before and at the beginning of the journey. However, McNair, J did not agree with that and said that the breakdown was due to a

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45- *Kopitoff v. Wilson and Others*, (1875-76) L.R. 1 Q.B.D. 377 at p.379. *Steel et Al. v. The Stæ Line Steamship Company*, (1877-78) L.R. 3 App. Cas. 72. *Lyon v. Mells* (1804) 5 East 428.

46- *Angliss v. P. & O.* [1927] 2 K.B. 456. Mr J. Wright stated: that if the carrier "has a new vessel built he will be liable if he fails to engage builders of repute and to adopt all reasonable precautions. He may be held bound to require, for instance, the builders to satisfy one of the well known classification societies, such as Lloyd's, or to engage skilled naval architects to advise him and skilled inspectors to supervise the work. In the same way, if he buys a ship he may be required to show that he has taken appropriate steps to satisfy himself by appropriate surveys and inspections that the ship is fit for the service in which he puts her. But I do not think in any case that the carrier can be held guilty of want of due diligence simply because the builders' employees have put in some bad work which, though concealed, renders the vessel unfit" AT P. 461-462.

47- *Union of India v. N.V. Reederij Amsterdam, (the Amstelslot)* [1962] 1 Lloyd's Rep. 539.

fatigue crack, that its cause was unknown and that there was nothing in the vessel's history which indicated that such problem may arise. He also stated that:

“that inspection carried out in 1956 was carefully and competently performed that defendants had exercised due diligence to make Amstelslot seaworthy because they employed skilled and competent persons to carry out necessary inspections and those persons carried out those inspections carefully and competently; and that, therefore, defendants were entitled to protection of Act-- Judgment for defendants on counterclaim (i.e., cargo's proportion of general average) with interest”<sup>48</sup>.

In the *Angliss v. P. & O*<sup>49</sup>, the carrier ordered shipbuilder to construct a vessel for him which they did. On delivery the shipowner had the vessel inspected by qualified naval architects and surveyors who carried their work prudently and could not discover any problem with the vessel. Under a bill of lading subject to the Australian COGSA 1924 a cargo of Carcasses of lamb was loaded on board the vessel at Melbourne and Sidney to be shipped to London. On arrival, part of the cargo was damaged by oil taint. The cargo owner claimed that the vessel was not seaworthy; because the bulkhead between the No 3 hold, where the cargo was loaded, and the fuel oil bunker was leaking at many points and that deckbar was too small and its riveting should have been double and not single, which were defects in design. The shipowner claimed that they had exercised due diligence to make the vessel seaworthy according to Art III r 1 of the 1924 Act, by employing a reputable surveyor to inspect the vessel and that the defect was not discoverable by prudent inspection. The court found that the carrier was not liable for the damage as he had satisfied the requirement for Art III r1 and the defect was a result of not exercising due diligence by the builders and their worker. Further, the court said that the carrier will only be responsible if he does not choose a reputable shipbuilder who employs diligent navel architects and workers<sup>50</sup>. And that the shipowner is only responsible for the seaworthiness of the vessel for a certain period of time - that is before and at the beginning of the voyage, Mr J Wright emphasised this by the following:

“It was argued on behalf of the defendants that the obligation only attached in respect of matters at the port of loading, the words being "before and at the commencement of the voyage" and the obligation being only in favour of the particular shipper and dating at earliest from the time of the material contract of carriage between that shipper and the carrier. In a sense I think that this is true,

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48- The *Amstelslot*, *ibid*, at p. 539-540. the decision was reversed in the court of appeal [1962 2 Lloyd's Rep. 336 but restored in the House of Lords [1963] 2 Lloyd's Rep. 223

49- *Angliss v. P. & O.* [1927] 2 K.B. 456.

50- *Angliss v. P. & O. ibid*, at p. 461-462.

but, if the vessel were in fact unfit owing to some earlier breach of due diligence in that regard by the carrier, his agents, or servants, I think that the carrier would be liable on the ground of actual or imputed knowledge of the defects or failure to use due diligence continuing to the date relevant to the particular contract.”<sup>51</sup>.

In a more recent case *The Happy Ranger*<sup>52</sup>, the shipowner received the vessel from the builders on 16<sup>th</sup> February 1998 and on 11<sup>th</sup> March 1998 it started loading its first cargo which was a process vessel, - a large cylindrical object required as part of a gas plant in Saudi Arabia. During the lifting operation to put the process vessel on board the vessel one of the double ramshorn hooks on the number 2 crane broke and the process vessel fell and suffered serious damage, the cost of repairs being in excess of \$2 million. The cargo owners claimed that the vessel was not seaworthy and that the shipowner failed to exercise due diligence to make her so. During the inspection that took place after the accident it was discovered that there was a latent defect in the hooks and they were unable to carry the maximum load they were designed to carry. The ramshorn hooks were not tested by the shipowner or his representative, to check their capability, when the vessel was delivered. The court found that although the defect was the fault of the shipbuilders and that the shipowner is only responsible from the moment the vessel comes to his orbit, the shipowner was still responsible because he failed to exercise due diligence to inspect the vessel by himself or his agent in order to ensure that everything was in working order<sup>53</sup>.

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51- *Angliss v P. & O.*, *ibid*, at 462-463.

52- *The Happy Ranger*, [2006] 1 Lloyd's Rep. 649.

53- *The Happy Ranger*, *ibid*, p.657-659. Mrs Justice Gloster stated at p. 657 and 663:

“In my judgment, the defendant has failed to discharge the burden of showing that it did indeed exercise due diligence to make the vessel seaworthy, after it took delivery on 16 February 1998. Before summarising my reasons for this conclusion, I should say something about the respective expert witnesses called by the parties.....

The claimants can only succeed if the breaches by the defendant to make the vessel seaworthy were causative of the damage to the process vessel. In my judgment such breaches were indeed causative of the damage. Each breach, taken separately and cumulatively, was one of the several legally effective causes of the accident. Thus:

- (i) Had Mammoet/the defendant appreciated the fact that the hooks had not been proof tested, and that there were no certificates to that effect there should, and could, have been a proof test of the hooks before the loading took place. If that had happened, the defect would have been discovered, since it would have tested the hooks to at least 110 per cent of their swl, which it is common ground was greater than the weight of the load at the time that the hook broke.
- (ii) Had Lloyd's done its job properly at the time Mr Mast came to consider the grant of the extension, it would have appreciated that, given the double hook arrangement, the previous barge test had not tested the hooks to the loads which they might experience in practice, and it would have insisted that a proof load test was done.”

Consequently, the carrier will only be responsible for the vessel the moment it comes into his orbit/possession and is not responsible for any latent defect existing before the vessel delivery; as long as it is not discoverable by a prudent inspection carried out by the carrier, his agent or a professional surveyor. However he will be liable if he does not carefully and prudently chose reputable shipbuilder who employs reputable and diligent workers and navel engineers.

### *5- Doctrine of Stages*

The concept of exercising the obligation of seaworthiness before and at the beginning of the voyage is a new one, because in the past the voyage was divided into different stages, and the vessel had to be seaworthy at the beginning of each one of these different stages, until this was abandoned by the introduction of the Hague Rules in 1924. Also, in spite of the fact that the carrier's obligation to make the vessel seaworthy or exercise due diligence should be exercised before and at the beginning of the voyage, the carrier does not have to make everything ready at that point in time; sometimes he only has to arrange for supplies and equipment to be ready when they are needed at a later stage. This section will examine both the old doctrine of stages and the current doctrine of stages.

#### a. The old doctrine of stages

The old doctrine of stages means that the voyage is divided into stages and the vessel should be seaworthy at the beginning of each stage she is going to undertake<sup>54</sup>. This doctrine existed under the common law where "the voyage was, where necessary to the shipowner, divided into a series of stages, but that was in relation to the warranty of seaworthiness; it did not alter the definition of 'voyage'. There may have been several stages, but there was only one voyage"<sup>55</sup>. However, this doctrine was abandoned by the introduction of The Hague, Hague-Visby Rules in particular Art III r1 which states that:

"The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to....".

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54- The Makedonia, [1962] 1 Lloyd's Rep. 316. Mr. Justice Hewson at p. 329.

55- The Makedonia, *ibid*, atp.329.

This old principle of stages meant that the voyage, the vessel is going to perform, is divided into stages and each one is separate from the other. Therefore, the vessel should satisfy the seaworthiness standards at the start of each particular stage. Consequently the voyage would be divided into different stages, the loading one, waiting in the port to start and bunkering, river leg, ocean leg...etc<sup>56</sup>, and the vessel must be seaworthy at the beginning of each one of these stages. Collins L.J. stated<sup>57</sup>:

“The warranty of seaworthiness, therefore, must be construed by reference to the reasonably possible standard applicable to such a vessel on such a voyage. The voyage, therefore, for this purpose must be looked upon as divided into stages, with the necessary incident that the warranty must be adjusted accordingly. It follows that the warranty must cover a condition that the vessel shall, at the commencement of each stage, be in this respect seaworthy for that stage. The warranty was, as I have pointed out, in its inception relative--that is to say, varying according to the standard reasonably applicable to the contemplated conditions”

For instance, in *The Vortigern*<sup>58</sup>, the vessel started its voyage from the Philippine Islands to Liverpool with liberty to call at any port. The vessel called at Colombo but did not take on sufficient coal to take her to Suez, due to the engineers' negligence. Collins L.J. stated:

“This principle has been sanctioned by various decisions; but it has been equally well decided that the Vessel, in cases where these several distinct stages of navigation involve the necessity of a different equipment or state of seaworthiness, must be properly equipped, and in all respects seaworthy for each of these stages of the voyage respectively at the time when she enters upon each stage, otherwise the warranty of seaworthiness is not complied with”<sup>59</sup>.

Also in *Reed v. Page*<sup>60</sup>, where a lighter was overloaded with cargo, and sank after the loading operation was finished, the court said that the lighter was seaworthy for the loading. But the fact that she was overloaded endangered her and made her unseaworthy to lie afloat waiting to be towed. Therefore the lighter was not fit at the beginning of the next stage and the lightermen were liable for the breach of the warranty.

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56- *The Quebec Marine Insurance Company v. The Commercial Bank of Canada*, (1869-71) L.R. 3 P.C. 234. Lord Penzance stated: “The case of *Dixon v. Sadler*, and the other cases which have been cited, leave it beyond doubt that there is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases, as in a case that has been put forward of a whaling voyage, for some definite, well-recognised, and distinctly separate stage of the voyage.” *The Vortigern*, [1899] P. 140.

57- *The Vortigern*, *ibid*, at p 159-160. . See also *Thin v. Richards*, [1892] 2 Q.B. 141. *The Quebec Marine Insurance Company v. The Commercial Bank of Canada*, (1869-71) L.R. 3 P.C. 234.

58- *The Vortigern*, *ibid* .

59- *Ibid* , at p. 159. Also Smith L.J. at p. 155.

60- *A. E. Reed and Company, Limited v. Page, Son and East, Limited, and Another*, [1927] 1 K.B. 743.

To sum up, under this doctrine the carrier is obliged to make the vessel seaworthy at the beginning of each stage in order to be able to satisfy the requirement of seaworthiness and discharge his duty. However, the introduction of the Hague/Hague-Visby Rules made this doctrine void and the carrier's obligation now should be exercised before and at the beginning of the voyage. Yet the abolition of this concept does not mean that the vessel needs to take all the supplies and equipment or take all the necessary measures at the beginning of the voyage, as this might be impossible or unreasonable. The carrier can make arrangement at the beginning of the voyage for provisions to be provided later, as will be explained below.

b. The current doctrine of stages

This doctrine existed under common law and remains applicable now. This type of stages means that when the voyage consists of more than one leg; e.g. sea leg with river or lake leg... etc; then it is obvious that these different legs might require different standards of seaworthiness<sup>61</sup>. Accordingly the carrier's duty to provide a seaworthy vessel is still be exercised before and at the commencement of the voyage, with one exemption: that the carrier will not be obliged to make the vessel seaworthy for the whole trip from the beginning to the end but instead can make her seaworthy before and at the beginning of the first leg, and with regard to the other legs, the vessel must be seaworthy on entering upon the next leg<sup>62</sup>.

For instance, in *Moore v. Lunn*<sup>63</sup>, the vessel was loaded with different types of cargo at Baltimore, part of which was a cargo of wooden logs loaded on deck. The vessel had to undertake a river leg before entering the open sea at Chesapeake Bay, therefore, the voyage can be considered to include two stages<sup>64</sup>. The logs were put on deck but they were not lashed by the time she left Baltimore, as it was the practice to lash the logs

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61- *The Quebec Marine Insurance Company v. The Commercial Bank of Canada*, (1869-71) L.R. 3 P.C. 234. Lord Penance stated, "it has been suggested that there is a different degree of seaworthiness required by law, according to the different stage or portion of the voyage which the Vessel successively has to pass through, and the difficulties she has to encounter; and no doubt that proposition is quite true".

62- *The Quebec Marine Insurance Company v. The Commercial Bank of Canada*, *Ibid.*

63- *Moore and Another v. Lunn and Others*, (1922) 11 Ll. L. Rep. 86. (1923) 15 Ll. L. Rep. 155

64- *Moore and Another v. Lunn and Others*, (1922) 11 Ll. L. Rep. 86, at p. 92.

during the river stage. During the stage to Chesapeake Bay the vessel's forepeak was damaged by a collision with ice and consequently she became unseaworthy. Also the master and the chief engineer were, as Lord Justice Bankes preferred to call them, 'habitual drunkards'. The master informed the shipowner about the forepeak damage but no proper action was taken to fix her and the vessel continued its voyage to the open sea with an incompetent crew, unlashd logs, and with the damage that resulted from the collision. The court of appeal and the court below arrived at the conclusion that the vessel was not seaworthy due to the state of the master and the chief engineer at the commencement of the voyage from Baltimore, due to the collision during the river trip to Chesapeake Bay, due to the unlashing of the logs before the starting of the open sea leg and also to the non-repairing of the forepeak. However, in relation to the river part of the voyage, had the crew been competent, the unlashing of the vessel did not make her unseaworthy as it was the practice to lash the logs during the river stage and before embarking on the open sea stage. Mr. Justice Bailhache stated<sup>65</sup>:

"I have come to the conclusion that this voyage was, in fact, a voyage in stages. The first stage was the passage from Baltimore to the Capes at Chesapeake, and the second stage from Chesapeake to Hamburg, and though it is true when a voyage is one and indivisible the warranty of seaworthiness attaches at the commencement and not afterwards, yet it is also true that when a voyage is in stages the warranty of seaworthiness attaches at the commencement of each stage, and it is necessary the vessel should be seaworthy for the stage she is about to embark upon"

In *Quebec Marine Insurance Company v. The Commercial Bank of Canada*<sup>66</sup>, which is an insurance case, the vessel had to undertake a voyage from Montreal to Halifax. Part of the trip was on a river before the vessel entered the open sea. There was a defect in the boiler, which was not apparent when the vessel was sailing in fresh water. The defect became apparent when the vessel entered the sea leg; as a result she had to be put into port for repairs. The court arrived at the conclusion that the vessel was not seaworthy when she started the second stage of her voyage due to the boiler defect and the owner was in breach of his duty to provide a seaworthy vessel, because he did not provide the vessel with sufficient equipment for the salt-water trip. Lord Penzance stated

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65- Moore and Another v. Lunn and Others, *ibid*.

66- Quebec Marine Insurance Company v. The Commercial Bank of Canada, (1869-71) L.R. 3 P.C. 234.

“[T]hat equipment must, if the warranty of seaworthiness is to be complied with, be furnished before the Vessel enters upon that subsequent stage of the voyage which is supposed to require it”<sup>67</sup>.

Therefore, although the carrier does not have to make the vessel seaworthy for all the different stages at the beginning of the voyage, he is still obliged to make the required arrangements so that it can be made seaworthy within a reasonable time before embarking on the next stage of her voyage.

### c. Bunkering

Bunkering means supplying the vessel with fuel, water... etc to be able to undertake the voyage to her destination. Therefore, this operation is considered part of the due diligence which the carrier has to exercise to make his vessel seaworthy. Consequently, if the carrier fails to provide his vessel with sufficient bunkers for the whole of the voyage he will be in breach of his duty to provide a seaworthy vessel<sup>68</sup>.

Nevertheless, due to the fact that most vessels are machinery vessels and the voyages are usually long, it would be impossible to carry enough bunkers to cover the whole voyage, and therefore, the carrier is not obliged to supply his vessel with sufficient fuel or coal to take her to her final destination; instead he can divide the voyage into many bunkering stages<sup>69</sup>, and he is only obliged to provide the vessel with sufficient bunkers to take her to the next bunkering port and so on until she arrives at her destination<sup>70</sup>.

Lord Wright stated in *Northumbrian Shipping v. Timm*:

“The application of the doctrine of stages became particularly important when vessels came to depend for their propulsion on machinery, the fuel for which was necessarily consumed as the voyage went on. The rule which has been established is that a steamship or motor vessel starting from her port on a long ocean voyage need not carry enough coal (or oil or other fuel) for the whole voyage, but only sufficient to take her to a particular convenient or usual bunkering port on the way. That is treated as a section of the voyage and is called a stage of the voyage”<sup>71</sup>.

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67- Quebec Marine Insurance Company v. The Commercial Bank of Canada, *ibid*, at p

68- The Vortigern, [1899] P. 140.

69- Northumbrian Shipping v. E. Timm. [1939] A.C. 397, at p. 404. Thin v. Richards, [1892] 2 Q.B. 141. McLver v. Tate Steamer, [1903] 1 K.B. 362. The Vortigern, *ibid*. Greenock Steamship v. Marine Insurance, [1899] P. 140.

70- The dividing of the bunkering of the vessel into different stages was not allowed for the benefit of the carrier but for the commercial necessity. See The Vortigern, *supra*, at 159. And Northumbrian Shipping v. E. Timm, *ibid*, p. 404. Noemijulia Steamship Company, Ltd. v. Minister of Food, (1950) 84 Ll. L. Rep. 354.

71- Northumbrian Shipping v. E. Timm. *ibid*, at p. 404.

Under the old doctrine of stages each bunkering stage used to be considered as a separate voyage, therefore, the vessel must be seaworthy at the beginning of each bunkering stage. For example in *The Vortigern*<sup>72</sup>, the vessel was sent on a trip from the Philippines to Liverpool. It took on enough coal to last until the next intermediate port where she was supposed to get more bunkers. When she arrived there the engineer did not take on a sufficient amount of bunkers and as a result she ran short of coal and was delayed. The court said that the vessel started in an unseaworthy condition, not from the loading port but from Colombo, which was its second stop.

After the abandonment of the old doctrine by the introduction of Art III r1 of the Hague/Hague-Visby Rules, the bunkering stages ceased to be considered as a separate stage; instead it is now considered as part of the initial obligation of seaworthiness of the vessel. Therefore, if the vessel cannot take enough bunkers for the whole voyage, the carrier must plan in advance where the vessel should stop to take more bunkers and if she did stop at port other than those planned ones, because she ran out of bunkers she will be considered unseaworthy. That can also be described as the obligation of “seaworthiness is sub-divided in respect of bunkers. Instead of a single obligation to make the vessel seaworthy in this respect, which must be satisfied once for all at the commencement of the voyage, there is substituted a recurring obligation at each bunkering port . . .”<sup>73</sup>.

It must also be mentioned that bunkering does not only mean the fuel or coal which is necessary to provide the vessel with power, but also includes its supplies of fresh water and food, which are necessary for the vessel’s crew, and the water necessary for the boilers and engine<sup>74</sup>.

Consequently, in order for the carrier to satisfy the standards of seaworthiness he must plan and arrange in advance the bunkering ports along the rout of the voyage, and

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72- *The Vortigern*, *supra*.

73- *Northumbrian Shipping Company Limited v. E. Timm and Son, Limited*, *supra*, Lord Wright at p. 404. *The Makedonia*, [1962] 1 Lloyd's Rep. 316.

74- *The Makedonia*, *ibid*, at p. 330

to provide the vessel with enough amount of bunker that is sufficient to take her to the first bunkering port and so on. In *the Makedonia*<sup>75</sup> Mr. Justice Hewson stated that:

“I see no obligation to read into the word "voyage" a doctrine of stages, but a necessity to define the word itself... "Voyage" in this context means what it has always meant: the contractual voyage from the port of loading to the port of discharge... the obligation on the shipowner was to exercise due diligence before and at the beginning of sailing from the loading port to have the vessel adequately bunkered for the first stage to San Pedro and to arrange for adequate bunkers of a proper kind at San Pedro and other selected intermediate ports on the voyage so that the contractual voyage might be performed. Provided he did that, in my view, he fulfilled his obligation in that respect”,

Also “it is only the arrangements that have to be made; if the bunkers are not there on the arrival of the vessel at the arrangement port, due diligence has, nevertheless, been exercised if the arrangement were reasonably made”<sup>76</sup>.

In *Northumbrian Shipping v. Timm*<sup>77</sup>, the vessel was on a trip from Vancouver to Hull. The vessel was supposed to take bunkers which would be enough to take her to St. Thomas where she was supposed to take on more bunkers. Due to the fault of the master and the engineer fault, the vessel started with insufficient coal and, instead of taking bunkers at Colon as he was authorised to do, he decided to proceed to St. Thomas. During the voyage the master discovered that there was not enough coal and directed the vessel to Royal. Before arriving there the vessel ran aground on Morant Cap, a reef off the island of Jamaica, and became, along with her cargo, a total loss. The court of first instance did not accept the contention that the master’s miscalculation of the amount of coal was a navigational mistake, because the duty to provide a seaworthy vessel is a personal one and it is the responsibility of the shipowner to make sure that the vessel was provided with sufficient coal<sup>78</sup>. Furthermore, the House of Lords and the courts below insisted that if the shipowner planned the bunkering ports from the beginning of the voyage at the loading port, and at one of the stages the ship ran short of fuel so she had to call at an intermediate port for bunkering, even if the master was allowed to do so, the shipowner will be in breach of his obligation to make the vessel seaworthy,

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75- *The Makedonia*, *ibid*, at p. 329, 330.

76- Tetley, *Marine Cargo Claims* 3rd ED, 1988, at p. 377-378.

77- *Northumbrian Shipping Company Limited v. E. Timm and Son, Limited*. [1939] A.C. 397

78- *Northumbrian Shipping Company Limited v. E. Timm and Son, Limited*, *Ibid*, at p. 403.

because this intermediate port was not in the original plan, Lord Wright was of the opinion that:

“It is true that the master had authority, if coal were proving insufficient, to replenish the bunkers at Colon, as he thought of doing when in the Canal. But in my opinion the stage must be determined when the vessel sails. Seaworthiness is no doubt relative to the nature of the adventure and the other circumstances of the case. But, unless it is determined on sailing what the stage of the voyage is, it is impossible to say whether the ship is seaworthy or not. This might have serious consequences on the insurances. There is also the special difficulty under s. 6 that a vessel might be lost by negligent navigation soon after sailing from her first port with insufficient bunkers. Like *Barnes J.* I prefer what he called the former alternative, that is, that the intention on sailing definitely fixes the stage and that the availability en route of what might be called an optional bunkering port cannot be taken into account. I think that this is true not only in general but also where it may be said that it is only a question of estimating the margin for contingencies. If the stage is determined, the quantity of bunkers sufficient to make the vessel seaworthy for that stage must be determined in view of all contingencies that a prudent shipowner ought to contemplate”<sup>79</sup>.

Also, in *The Makedonia*<sup>80</sup>, the vessel was carrying a cargo of temper from West Canadian port to UK. Due to the contamination of the fuel oil, she was unable to continue its trip under its own power and some of the cargo was jettisoned and some was burned to provide her with power then she was salvaged. The vessel was actually provided with sufficient fuel for its first stage of bunkering and the second stage but at some point, some of the fuel which was provided became contaminated and there was a shortage of feed water. Here the court said that the vessel was unseaworthy due to the lack of proper plans for bunkering and the incompetence of the crew which was the reason for the insufficient bunkering.

However it is important to mention that if the vessel deviated from its route to take bunker at a usual bunkering port or to do some repairs then the carrier will not be in breach of his obligation to provide a seaworthy vessel; provided this has been arranged before the contract of carriage was entered into or started, i.e. in *the Al Taha*<sup>81</sup> case, the vessel was time chartered for a period of 24 month. The charterparty incorporated the Hague Rules, article IV r 5 of which allowed the shipowner to take reasonable deviation without being held liable for that. The bunkering of the vessel was made the responsibility of the shipowner. The vessel loaded cargo at Portsmouth and left one of the cargo derricks there to be taken by road to Bethlehem Steel Corporation Yard at

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79- *Northumbrian Shipping Company Limited v. E. Timm and Son, Limited, ibid.*, at p. 407-408.

80- *The Makedonia*, [1962] 1 Lloyd's Rep. 316.

81- *Lyric Shipping Inc. v. Intermetals Ltd. and Another, (The Al Taha)*, [1990] 2 Lloyd's Rep. 117.

Boston for repairs. This boom was not necessary for the vessel's seaworthiness at this time but would be necessary at the unloading stage. After that the shipowner sent the vessel to Boston to take some bunkers and at the same time collect the boom. But while the vessel was leaving Bethlehem No 2 berth in the inner harbour at Boston she took the ground. As a result of the grounding the shipowner incurred expenses and claimed general average from the cargo owners. The cargo owner contended that the deviation to Boston was not reasonable and the shipowner could have arranged for bunkers to be collected at Portsmouth and waited there for the boom to be delivered by road. The Shipowner claimed that Boston was the usual bunkering port for the ships of the kind of his. Mr Justice Phillips held<sup>82</sup>:

“the evidence established conclusively not merely that Boston was a usual bunkering port for such a vessel but that it was *the* usual bunkering port; more particularly it established that the usual bunkering place at Boston was the outer anchorage

a ‘reasonable deviation’ within art. IV, r. 4 could be a deviation planned before the voyage began or the bills of lading were signed; the cargo boom was necessary if *Al Taha* was to be reasonably fit to discharge her cargo at her destination and as the boom was not necessary to render the vessel seaworthy at the commencement of the voyage it was reasonable to plan to deviate to collect the boom en route rather than to wait for the weather conditions to permit delivery at Portsmouth; the mode of performance was within the liberty afforded by art. IV, r. 4”

The decision on the *Al Taha* proves that if the vessel deviated to take bunker, en route to its destination, from a port which is usually used by trade for bunkering this would not be considered an unreasonable deviation and it cannot be said that the vessel was not seaworthy because it deviated to take bunker from such port, especially if a such deviation was planned before the start of the contract of carriage or even before it was entered into. Furthermore, it emphasises the principle that if the vessel started her voyage with one item of its equipment not ready to be used - in other words unseaworthy - but the use of such piece of equipment was not necessary until a later stage in the voyage, e.g. for the discharge of the cargo, and the carrier arranged for this piece to be repaired before the time it is needed, then he will not be in breach of his obligation of seaworthiness provided he arranged for the repair of such equipment in advance before the start of the journey or before entering into the contract of carriage.

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82- *Ibid*, at p.118.

One final point has to be mentioned with regard to the amount of bunkers the vessel needs in order to perform its stage to the next bunkering port. It is not enough for the carrier to provide his vessel with the exact amount of bunker which is needed to arrive to the next calling port; he has to leave a margin of fuel that is enough in case the vessel is faced with some problems in the way; e.g.. having to divert to another port in an emergency. Consequently, if the carrier provided the vessel with sufficient bunkers, including some margin, but due to the contingencies of the voyage, the vessel ran out of fuel or coal and she had to call at an intermediate port, which she was authorized to do, in this case it cannot be said that due diligence was not exercised<sup>83</sup>.

**- Conclusion**

The sole purpose for the shippers/charterers to enter into a contract of carriage, in case of voyage charters and bills of lading, is to use the service of the vessel in delivering their cargo to its final destination, while in case of time charters the purpose is to benefit from the use of the vessel within the permitted limits. As a result the charterer/shipper expects that the vessel should be fit to provide this service, in other words she should be seaworthy. This puts the carrier/shipowner under an obligation to ensure that his vessel is seaworthy, which means that he has to exercise this duty before the vessel sets sail to the required destination, and under the current law this duty should be exercised either at the agreed time in the contract of carriage or before and at the beginning of the voyage in case of a voyage charter or bill of lading, whether the duty is expressed or implied. And in the case of implied obligation in time charters the duty should be exercised at the time of delivery. Furthermore, time charterparties may include a maintenance clause that obliges the carrier to ensure the continuous fitness of the vessel through out the journey.

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83- Northumbrian Shipping Company Limited v. E. Timm and Son, Limited, *supra*, Lord Wright “This is, that though a steamer has not in fact a sufficient margin of bunkers to satisfy the normal contingencies of the stage which the owners have fixed, yet, if a reasonably sufficient margin has been allowed for, the fact that there turns out to be an actual deficiency will not necessitate a finding that the vessel was unseaworthy for the stage, or that due diligence has not been used to make her so, provided that there is in the course of the stage an intermediate bunkering port at which in case of need the vessel can call. The quantity of bunkers, which apart from this qualification would be necessary for the stage, is then, it is said, to be modified by taking into account this optional facility” at p. 405.

However, with the recent developments in the Marine Industry, i.e. the introduction of the International Safety Management Code (ISM) and the International Ship and Port Facility Security Code (ISPS), it has become clear that the current law needs to be reviewed and changed to comply with the changes. The reason for that is that the above two codes require the owners of the vessels to comply with their requirement on a continuous basis in order to keep the certificates issued upon complying with the Codes valid. Both of the Codes relate to seaworthiness on different levels, i.e. physical seaworthiness because the Codes require regular maintenance and inspection of the vessel and its equipment; human seaworthiness because the Codes require regular staff training; and finally documentary seaworthiness as the compliance with the Codes results in issuing certificates; also the ISM Code requires regular updates for the vessel charts and manuals.

Consequently if the current law does not change, this may lead to a discrepancy between the new development and the current situation. The Codes were made part of the Safety of Life at Sea Convention (SOLAS) and they were made obligatory to ships flying the flags of the member states; as a result the Courts in the states members to the convention should take the changes into consideration. Also the CMI is working on a new Transport Law which extends the period of the carrier's duty to exercise due diligence to cover the whole journey, but until this new Law comes into force, immediate changes need to be introduced. The requirements of the Codes can be satisfied by accepting that the Codes, especially the ISM Code, constitute a framework upon which good practice can be established, and also by encouraging shipping companies to establish strict monitoring system to ensure that their vessels are kept in seaworthy condition.

This could be considered as an interim stage before the required changes are introduced, because continuing to restrict the exercise of the obligation to the time before and at the beginning of the voyage or the time of the contract or delivery will still raise an important issue, especially when Hague/Hague-Visby Rules are governing the contract of carriage. These allow the carrier to protect himself using the protections in Art IV r2. The problem with keeping the law as it is arises in the following scenario:

there are cargo to be loaded from port A and B; the vessel loaded cargo from port A, where she was seaworthy before and at the beginning of the voyage, and while on her way to port B to take the second cargo she became unseaworthy but she was not made seaworthy before sailing from port B. After sailing the vessel sank due to its unseaworthiness. The carrier will not be able to use the protection of Art IV r2 of Hague/Hague-Visby Rules with regard to the cargo loaded at port B because he failed to exercise his obligation to provide a seaworthy vessel, which is an overriding one<sup>84</sup>. While with regard to cargo loaded at port A he can use such protection because he will only be in breach of his duty stated in Art III r2 to care for the cargo in his charge. This duty was made subject to the exceptions in Art IV r2. . This position discriminates between two cargo owners whose cargo was lost due to the same cause but the fact that the vessel was seaworthy at port A left the owner of the cargo loaded there in an unfavourable position. Such a situation needs to be corrected and this can only be done by extending the duty to cover the whole voyage from the start of the loading operation until the discharge of the cargo.

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84- *Maxine Footwear Co. Ltd. and Another. Appellants; v. Canadian Government Merchant Marine Ltd. Respondents*, [1959] A.C. 589.

***Chapter Four***  
***Basis of Liability, Classification, Effect of Breach***  
***Immunities and Limitation***

### **- Introduction**

It has already been shown that the carrier/shipowner is under an absolute obligation to provide a seaworthy vessel<sup>1</sup>, or under an obligation to exercise due diligence to make the vessel seaworthy<sup>2</sup>.

If the shipowner exercised his obligation prudently and the cargo arrived safely at its destination, then he would have exercised his duties properly and no problems regarding seaworthiness would arise. But the situation is different when the vessel turns to be unseaworthy and the cargo-owner suffers damage, either in the shape of loss of or damage to the cargo, or financial loss represented by the failure to get the cargo to its market at the right time, or sub-contract i.e. sub-charter ...etc. In this case the cargo-owner could sue the carrier to claim damages or, if the seaworthiness was apparent before loading, the shipper/cargo-owner/charterer may even cancel their contract with the carrier/shipowner. So in this case what are the consequences of providing an unseaworthy vessel?

To examine such a situation this chapter looks firstly at the basis of liability, i.e. is it based on fault or is the carrier not liable until it is proven that his acts or omission contributed to the loss. After discussing this, it will move to deal with the burden of proof, i.e. who bears the burden of proving whether the vessel was seaworthy or not and if the carrier/shipowner exercised due diligence; and also look at the order of proof<sup>3</sup>. Once this has been discussed, the effect of the breach must be examined. This can be divided into several issues: the first is whether the carrier/shipowner would be able to use the protections provided for by the contract of carriage or by the applicable rules and regulations. The second issue is kind of compensation the aggrieved party is entitled to, i.e. is he entitled to damages only or

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1- This is under the common law or in Case of Charterparties which are not subject to the Hague/Hague-Visby or Hamburg Rules or if there was no express clause making the carriers obligation one to exercise due diligence.

2- This case applies when the contract of Carriage is subject to the Hague/Hague-Visby or Hamburg Rules.

3- William Tetley distinguishes between the burden of proof and the order of proof and states "Law traditionally distinguished between 'burden of proof' and 'order of proof'. Burden of proof determined which party to a suit had the responsibility for adducing evidence of one particular issue of fact (often referred to as the 'evidentiary burden'). Order of proof, on the other hand, related to the sequence in which the facts or allegations had to be proven by one party or the other to the suit during the trial. This traditional distinction between burden of proof and order of proof was understood and applied in marine cargo claims as in other types of litigation." For in depth details about Burden and Order of Proof . Tetley, Marine Cargo Claims, 4th Edition (to be published March, 2008), chapter 6 at p3. The source was taken from Tetley's on web page on 12/03/2006 at: <http://www.mcgill.ca/files/maritimelaw/ch6.pdf>

can he repudiate the contract or is he entitled to both? It should also be noted that the effect of the breach of obligation differs, depending on the nature of the carrier's/shipowner's obligation, i.e. an absolute obligation or just a duty to exercise due diligence.

## **Basis of Liability**

### ***- Types of Basis of Liability***

There are two systems on which liability is built; the first is the presumed fault based system under which the carrier is liable the moment loss or damage occurs, unless he proves that the loss or damage was not a result of any fault or wrong doing on his part, i.e. the Hamburg Rules Art 5. The other system is a proved fault based system under which the carrier is not liable unless the cargo-owner proves that the loss was a result of the carrier's fault or privity, i.e. the Hague/Hague-Visby Rules Art IV r1. It is also possible to have a system that falls between the main two systems for Basis of Liability.

Under the existing law on Carriage of Goods by Sea the two systems are applicable. Under the Hamburg Rules the carrier's liability is based on presumed fault, whereas, under the Hague/Hague-Visby Rules, the carrier's liability is based on proved fault, where he is not liable unless it is proven that he was at fault or there was a privity on his part that contributed to the loss or damage.

### ***1- Presumed Fault Based Liability System***

Under this system, the moment the loss or damage occurs, the carrier will be liable for it unless he proves that there was no fault or privity on his part or that of his agents or servants, or even if there was fault or privity it did not contribute to the loss or the damage. Consequently, the carrier is always considered to be at fault unless he proves his innocence.

Such a system of liability can be found in the Hamburg Rules under Article 5 (1), which provides:

"The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences."

We can see from this article that the carrier is considered liable for any loss of or damage to cargo or for delay if it took place while the cargo was in his charge. If the carrier wants to avoid liability, he must prove that he and his servants and agents

took all reasonable measures that could be taken to avoid the cause of the loss or damage and its consequences. The use of the terms ‘all measures that could reasonable be required’ includes the duty of the carrier to exercise due diligence. To some extent this system favours the cargo-owners in terms of burden of proof because the carrier bears the burden of proving the cause of the loss and has to prove the exercise of due diligence the moment the cargo-owner/shipper proves the loss or damage, as will be shown below. In this regard the Hamburg Rules follow the steps of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 (Warsaw Convention)<sup>4</sup> and Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 (Athens Convention)<sup>5</sup>.

However, when it comes to loss or damage caused by fire, the Hamburg Rules, unfortunately, did not follow the above system of liability, but instead used the proved fault based system. Article 5 (4) is clear example of that:

“The carrier is liable

- (i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;
- (ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.”

Under this section of Article 5 the carrier will be liable if:

- The claimant could prove that the fire resulted from any fault or negligence on the part of the carrier, or his agents and servants; or
- The claimant could prove that there was fault or negligence on the part of the carrier, or his servants or agents, in taking all reasonable measures that could be taken to put out the fire or to avoid or reduce its consequence. This part relates to the exercise of due diligence to make the vessel seaworthy, i.e. training the crew, providing fire fighting equipment... etc.

It was unfortunate that The Hamburg Rules switched back to the proved fault based liability after using that of presumed fault, because the cargo-owner seldom has enough information, if he has anything at all, to prove the fault or negligence or the want of due diligence on the part of the carrier and it would have been more

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4- Warsaw Convention deals with this issue in Articles 17-20.

5- Athens Convention deals with the issue in Article 3.

logical to have kept Art 5(1) as a general rule for liability including loss or damage resulting from fire.

## *2- Proved Fault Based Liability System*

This system is contrary to the previous one. Under this system the carrier is not responsible for any loss or damage unless the cargo-owner proves that the actions or omission of the carrier, his servants or agents, caused or participated in the loss or damage. This system clearly puts the burden of proving the cause of the loss on the part of the cargo-owner and takes account of the fact that he may not be able to get enough information to prove his case.

The Hague/Hague-Visby and Article 5(4) of the Hamburg Rules<sup>6</sup> are an example of such a system, where Article IV r 1 of Hague/Hague-Visby provides

“Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.”

This rule is a clear example of the proved fault based system, hence the phrase *‘Neither the carrier nor the ship shall be liable’* which means that unless the cargo-owner proves that the action or omissions of the carrier, or his servants or agents, contributed to the loss the carrier will not be liable for the loss or damage. In fact, although, this article did not set an order of proof as Article 5 of the Hamburg Rules did, the courts’ approach was<sup>7</sup>:

- The cargo-owner should prove his loss or damage;
- Then the carrier has to prove the cause of loss and that it is one of the causes referred to in Art IV r 2 for which he is not liable;
- Then the cargo-owner can raise several arguments, he can raise and prove, on a balance of probabilities<sup>8</sup>, that the vessel was unseaworthy;

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6- Article 5 (4) of Hamburg Rules as stated above.

7- N.M. Paterson & Sons Ltd. v. Robin Hood Flour Mills, Ltd. (The Farrandoc), [1967] 2 Lloyd’s Rep 276, at p 284.

8- William Tetley, Marine Cargo Claims 4th Ed, Chapter 6, *supra*, p. 25. A. Meredith Jones & Co. Ltd. v. Vangemar Shipping Co. Ltd., The "Apostolis" (No. 2), [1999] 2 Lloyd’s Rep. 292, at p. 299 Mr. Justice Longmore stated: “ The shipowners, in

- Finally the person who is claiming the exercise of due diligence has to prove it; in this case it will be the carrier, according to the last part of Art IV r1.

It is evident that the basis of liability under the Hague/Hague-Visby Rules puts a heavy burden on the cargo-owner to prove that there was fault or negligence on the part of the carrier or his agents and servants, because it is the cargo-owner who has to prove the unseaworthy condition of the vessel, as it is proved fault based system. However, considering that the carrier possesses the information about the condition of the vessel and what actually happened on board, it is more logical to make the carrier responsible for proving the seaworthy condition of the vessel. This should happen before he tries to prove that the loss was caused by one of the exceptions in Article IV r2, particularly since the carrier cannot seek such protection if he fails to prove that he exercised due diligence to make the vessel seaworthy, if a claim of unseaworthiness was proved, because his obligation to exercise due diligence is an overriding obligation<sup>9</sup>.

### *3- New development on the Basis of Liability*<sup>10</sup>

Currently the UNCITRAL Working Group III is working on a new Transport Law Convention, which involves some changes to the Basis of Liability of the Carrier. Article 17 of the draft provides<sup>11</sup>:

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that

- (a) the loss, damage, or delay; or
- (b) the occurrence that caused or contributed to the loss, damage, or delay

took place during the period of the carrier's responsibility as defined in chapter 4. The carrier is relieved of all or part of its liability if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 19.

2. If the carrier, alternatively to proving the absence of fault as provided in paragraph 1, proves that an event listed in paragraph 3 caused or contributed to the loss, damage, or delay, then the carrier is relieved of all or part of its liability subject to the following provisions:

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order to succeed, must show not merely that the fire was, on the balance of probability, caused by a cigarette carelessly discarded by a stevedore, but also that the owners are responsible for that negligence on the part of the stevedores." at p 299.

Also see the Court of Appeal [2000] 2 Lloyd's Rep. 337.

9- Maxine Footwear Co. Ltd. and Another; v. Canadian Government Merchant Marine Ltd. [1959] A.C. 589. The Farrandoc, [1967] 2 Lloyd's Rep 276. Standard Oil Company of New York; v. Clan Line Steamers, Limited, [1924] A.C.100.

10- Full discussion on this issue will follow at a latter stage of the thesis.

11- United Nations Commission on International Trade Law, Working Group III (Transport Law), Sixteenth session, Vienna, 28 November-9 December 2005. A/CN.9/WG.III/WP.56.

(a) If the claimant proves that the fault of the carrier or of a person referred to in article 19 caused or contributed to the event on which the carrier relies, then the carrier is liable for all or part of the loss, damage, or delay.

(b) If the claimant proves that an event not listed in paragraph 3 contributed to the loss, damage, or delay, and the carrier cannot prove that this event is not attributable to its fault or to the fault of any person referred to in article 19, then the carrier is liable for part of the loss, damage, or delay.

(c) If the claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by

(i) the unseaworthiness of the ship;

(ii) the improper manning, equipping, and supplying of the ship; or

(iii) the fact that the holds or other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) were not fit and safe for reception, carriage, and preservation of the goods,

and the carrier cannot prove that;

(A) it complied with its obligation to exercise due diligence as required under article 16(1); or

(B) the loss, damage, or delay was not caused by any of the circumstances referred to in (i), (ii), and (iii) above,

then the carrier is liable for part or all of the loss, damage, or delay.

3. The events mentioned in paragraph 2 are: .....

Again under the Draft, the liability of the carrier is based on proved fault. This is clear from Art 17 r1, which provides that the carrier will only be liable if the cargo-owner proves the loss or the damage he suffered and also that such loss or damage occurred while the cargo was in the custody of the carrier. That done, the carrier has few options to avoid liability; however, if the claimant chooses to raise the issue of seaworthiness then Art 17 r.2(c) makes the carrier responsible for proving the unseaworthy condition of the vessel.

Consequently, although the draft uses different language to that in the Hague/Hague-Visby Code the end result is the same, i.e. it is the duty of the cargo-owner to prove unseaworthiness. Until September 2005 the UNCITRAL Draft Convention had three options with regard to basis of liability; one was similar to the Hamburg Rules, one was similar to the Hague/Hague Visby Rules and the third was a system varying between the other two, but the delegates in the CMI chose the Hague/Hague-Visby variant, preferring to keep the existing system rather than trying to move to a more logical easier approach. This, beside moving the burden of proving unseaworthiness to the carrier and reducing trial time, also would have got rid of the long list of exceptions, i.e. Art IV r.2 of the Hague/Hague-Visby Rules and Art 17 r3 of the Draft Convention, which would have been in the interest of both

parties, especially the carrier because once he proves the cause of the loss and that the cause is not attributable to his actions or omissions, then he will not be liable.

The UNCITRAL could still change the draft convention and adopt the Hamburg approach, as the Convention is still a draft and changes can be introduced, but in reality is unlikely to do so

### ***- Burden of Proof and Order of Proof***

Once the cargo-owner/shipper/charterer discovers that the cargo has been damaged or lost during the voyage, or if the vessel was not able to set sail, once loaded, or if it was not possible to load the vessel due to some defect, the process for claiming damages or cancelling the contract of carriage starts, and the claim for the unseaworthy condition of the vessel can be raised at this stage. But the question in this case would be: Who carries the burden of proving whether the vessel was seaworthy or unseaworthy? Is it the carrier/shipowner who carries this burden or is it the cargo-owner/shipper/charterer? Furthermore, once this has been established the next question would be: what is the order of proof?

#### *1- Burden of Proof*

Once the cargo-owner/shipper/charterer proves that he received a damaged cargo or that the cargo was lost then the search for the cause of loss starts. The cargo-owner can prove that he delivered the cargo in a good condition by presenting a clean bill of lading; under common law such a presentation will be considered as a *prima facie* evidence of the condition of the cargo. However, where a third party is involved, in order to make the statement binding as estoppel, the third party should prove that he accepted the goods based on the fact that he accepted the statement in the bill of lading in good faith<sup>12</sup>. In the case of Hague/Hague-Visby<sup>13</sup> and Hamburg Rules<sup>14</sup>, the

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12- *Compania Naviera Vasconzada v. Churchill & Sim*, [1906] 1 K.B. 237, at p.249.

13- Art III r4 of Hague/Hague-Visby Rules provides

“Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3(a), (b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.”

14- Art 16.3 (a-b) provides:

“Except for particulars in respect of which and to the extent to which a reservation permitted under paragraph 1 of this article has been entered:

situation is similar, and such a statement will be considered *prima facie* evidence about the condition of the cargo on loading when the bill is in the hand of the shipper, but once it is transferred to a third party it will be conclusive evidence that that party was acting in good faith when he acquired it. Therefore, any consequent damage will be deemed to have happened while the cargo was in the carrier's possession<sup>15</sup>. The fact that the bill of lading is *prima facie* evidence in the hand of the shipper means that the carrier can prove that the cargo was not lost or damaged while in his custody or that he is not responsible for the loss or damage. If the bill of lading is transferred to the hands of a third party acting in good faith he cannot then do that, but may be able to sue the shipper instead.

If the cause of loss was not apparent, then it will be presumed that unseaworthiness caused the loss or damage and it is for the carrier to prove the actual cause of loss or damage and that he exercised due diligence to make her seaworthy. For example if the vessel was lost shortly after sailing, and there was no bad weather or any other apparent reason present, then the court will assume that the loss was caused by unseaworthiness; also the presence of seawater in the vessel holds will normally be treated by the court as having been caused by unseaworthiness. It is for the carrier to prove the cause of loss and that he exercised due diligence or that the vessel was seaworthy<sup>16</sup>.

The position under the common law<sup>17</sup> with regard to burden of proof is: it is the duty of the party alleging the unseaworthiness to prove it; logically this would be the cargo owner. If the ship was actually unseaworthy, it is the duty of the cargo-owner to prove the connection between the loss and the unseaworthiness of the vessel<sup>18</sup>.

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(a) the bill of lading is *prima facie* evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and  
(b) proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein."

15- *The River Gurara*, [1998] 1 Lloyd's Rep. 225. *Naviera Mogor S.A. v. Societe Metallurgique de Normandie, The "Nogar Marin"*, [1988] 1 Lloyd's Rep. 412.

16- Wilson, *Carriage of Goods by Sea*, 5th Ed, at p. 13

17- Under the common law the carrier must provide a seaworthy vessel, it is not sufficient to prove that he did his best to make her seaworthy but she should be fit. But the vessel does not need to be perfect it is enough to make her as seaworthy as she could be reasonably done for the purpose of the voyage. *Steel et Al. v. The State Line Steamship Company*, (1877-78) L.R. 3 App. Cas. 72 at p. 86. *President of India v. West Coast Steamship Co*, [1963] 2 Lloyd's Rep 278. p.281.

18- *The Europa*, [1908] p. 84 at 97-98.

For example, in the *Europa*<sup>19</sup>, a cargo of sugar was loaded at Stettin for delivery at Liverpool. The cargo arrived partially damaged due to the escape of seawater through a defective closet pipe on the side port. The cargo-owner claimed that the loss was due to the unseaworthy condition of the vessel, i.e. the defective closet pipe. Bucknill J said<sup>20</sup>:

“It appears to us, therefore, that whenever a cargo-owner has claimed damages from a shipowner for loss occasioned to his goods on the voyage, and the ship was in fact unseaworthy at the material time, the cargo-owner has had to prove that the loss was occasioned through or in consequence of the unseaworthiness, and it has not been sufficient to say merely that the ship was unseaworthy, and therefore that he was entitled to recover the loss, although there was no relation between the unseaworthiness and the damage.”

Also in the *Thorsa*<sup>21</sup>, a cargo of chocolate was loaded on board the vessel with a cargo of gorgonzola cheese. The chocolate arrived deteriorated and tainted by the cheese. The cargo-owners claimed that the vessel was unseaworthy by bad stowage, while the carrier said that the bad stowage was due to mismanagement from the master, crew and his agents and there was an exclusion clause to protect him from loss or damage resulting from the acts or omissions of those people. The court was of the opinion that upon the evidence provided, the cargo-owners failed to prove the unseaworthiness of the vessel and failed to prove that the carrier is not protected by the exception in the Bill of lading<sup>22</sup>

The Hague/Hague-Visby Rules on the other hand, if the unseaworthy condition of the vessel was raised as a possible cause of the loss or damage, allow the cargo owner to prove this on a balance of probability, with the duty to prove the exercise of

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19- The *Europa*, *ibid*.

20- The *Europa*, *ibid*, at p 97-98.

21- The *Thorsa*, [1916] P. 257.

22- The *Thorsa*, *ibid*, Bankes L.J. stated: “The case for the plaintiffs rests entirely on their being able to establish this alleged unseaworthiness. We have been referred to a number of cases, and it is admitted that there is no case which has gone as far as the present contention; and, without expressing any opinion as to what constitutes unseaworthiness, it is quite sufficient to say that in this particular case, if it be unseaworthiness at all, it is unseaworthiness using that term in a particularly narrow sense. But even if the plaintiffs could establish unseaworthiness, they have got to take the next step, which is to show that they bring themselves within the principle I have stated, and that the defendants have failed to indicate in sufficiently clear and unambiguous language that they seek to protect themselves by the clause in the bill of lading from the particular act or class of act of which the plaintiffs are complaining. Upon that point it seems to me that the plaintiffs fail. The complaint here is negligent stowage, negligent stowage which is said to amount to unseaworthiness. I fail to see that there is anything wanting in the language used, either that it can be said to be ambiguous or wanting in clearness when the shipowner provides that, with regard to stowage, he will not be responsible for the act of the stevedores or the master or the officers.” at p 265-266.

due diligence on of the carrier or the person claiming such thing. Article IV r1 of the Hague/Hague-Visby provides:

“..... Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.”

From Article IV r1 we can see that the Rules make it the duty of the cargo-owner to prove the unseaworthy condition of the vessel. In marine cargo claims it is enough for the parties to a claim to give reasonable evidence ‘on a balance of probabilities’; they do not have to give absolute evidence<sup>23</sup>.

Some cases in the past required that, in order to use the exceptions in Article IV r2, the carrier must prove that there was no fault or negligence on his part.<sup>24</sup> For instance, in *Bradley & Sons, Ltd. v. Federal Steam Navigation Company*<sup>25</sup>, a cargo of apples was loaded on board the vessel to be shipped from Australia to London and Liverpool. On arrival it was found that the apples were damaged with brown heart disease. The cargo-owner claimed that the cause of the damage was due to vessel unseaworthiness because the vessel did not use a particular type of refrigeration system, but the system used by the vessel was, in fact, used in the trade alongside the system claimed essential by the cargo-owners. The carrier tried to use an exception in the bill of lading which was subject to the Australian COGSA. Viscount Sumner stated<sup>26</sup>:

“Accordingly, in strict law, on proof being given of the actual good condition of the apples on shipment and of their damaged condition on arrival, the burden of proof passed from the consignees to the shipowners to prove some excepted peril which relieved them from liability, and further, as a condition of being allowed the benefit of that exception, to prove seaworthiness at Hobart, the port of shipment, and to negative negligence or misconduct of the master, officers and crew with regard to the apples during the voyage and the discharge in this country.”

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23- William Tetley, *Marine Cargo Claims* 4th Ed, Chapter 6 p. 25 to be published in 2008, <http://www.mcgill.ca/files/maritimelaw/ch6.pdf>. The information was taken from the web page on 12/03/2006. A. Meredith Jones & Co. Ltd. v. Vangemar Shipping Co. Ltd., *The "Apostolis"* (No. 2), [1999] 2 Lloyd's Rep. 292, at p. 299 Mr. Justice Longmore stated: “ The shipowners, in order to succeed, must show not merely that the fire was, on the balance of probability, caused by a cigarette carelessly discarded by a stevedore, but also that the owners are responsible for that negligence on the part of the stevedores.” at p 299. Also see the Court of Appeal [2000] 2 Lloyd's Rep. 337.

24- William Tetley, *Marine Cargo Claims* 4th Ed, Chapter 6 p. 10 to be published in 2008, <http://www.mcgill.ca/files/maritimelaw/ch6.pdf>

25- F. C. Bradley & Sons, Ltd. v. Federal Steam Navigation Company, Ltd. (1927) 27 Ll. L. Rep. 395.

26- F. C. Bradley & Sons, Ltd. v. Federal Steam Navigation Company, Ltd, *ibid*, at p. 296. *Gosse Millard v. Canadian Government Merchant Marine, Limited.*, [1927] 2 K.B. 432, At p. 435-437. *Borthwick & Sons, Ltd. v. New Zealand Shipping Company, Ltd.* (1934) 49 Ll. L. Rep. 19 at p 23-24.

However this position was not constant and changed, and now after the cargo-owner proves his loss, the carrier, to avoid liability, has to prove that the cause of loss or damage falls within one of the exceptions in Article IV r2 of Hague/Hague-Visby Rules. The cargo owner then has to claim that there is another cause for the loss or damage, e.g. the unseaworthiness of the vessel, then it becomes the duty of the carrier to prove that he exercised due diligence to make the vessel seaworthy, in order to be able to use the exceptions in Art IV r2, as his obligation under Art III r1 is an overriding one<sup>27</sup>.

For instance, in *Maxine Footwear Co. Ltd. and Another; v. Canadian Government Merchant Marine Ltd*<sup>28</sup>, after the loading of the cargo had begun it was discovered that some of the scupper pipes passing through the hold where the cargo was loaded were frozen. The master instructed one of the ship's officers to have the pipes thawed. The work was done by an employee of a Halifax firm who used an acetylene torch. The scupper pipes were insulated with cork which, due to the heat, caught fire, and in spite of the efforts to extinguish the fire the master ordered the vessel to be scuttled and consequently the cargo was lost. The court concluded that the shipowner failed to exercise due diligence to make the vessel seaworthy before and at the beginning of the voyage and that such unseaworthiness was the cause of the fire. Further Lord Somervell of Harrow stated<sup>29</sup>:

“In their Lordships' opinion the point fails. Article III, rule 1, \*603 is an overriding obligation. If it is not fulfilled and the nonfulfilment causes the damage the immunities of article IV cannot be relied on. This is the natural construction apart from the opening words of article III, rule 2. The fact that that rule is made subject to the provisions of article IV and rule 1 is not so conditioned makes the point clear beyond argument.”

Consequently if the vessel was unseaworthy and such unseaworthiness was the cause of the loss or damage, then if the carrier wants to use the protection in Art IV r2 then he must prove that he exercised due diligence to make the vessel seaworthy.

The Hamburg Rules position is shown in Art 5 which states:

“1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.”

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27- *Maxine Footwear Co. Ltd. and Another; v. Canadian Government Merchant Marine Ltd.* [1959] A.C. 589

28- *Ibid.*

29- *Ibid.*, at p. 602-603.

4. (a) The carrier is liable
  - (i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;
  - (ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.”

The Hamburg Rules took a different approach from the Hague/Hague-Visby Rules which did not state the order and burden of proof clearly and left that to be decided by the courts. The approach taken by the Hamburg Rules is: there is a presumption of fault on the part of the carrier, which means the carrier is responsible for any loss, except in loss caused by fire, unless he proves that he and his servants and agents took all reasonable means to prevent the cause of the loss or damage and its consequences<sup>30</sup>. In the case of loss or damage caused by fire, it is the responsibility of the cargo-owner to prove that the loss was caused by fault or negligence on the part of the carrier or his servant or agents, or prove that the carrier or his agents failed to take all reasonable measures to put out the fire and mitigate its consequences<sup>31</sup>.

This means that the cargo-owner/charterer/shipper bears the responsibility of proving the vessel's unseaworthy condition, except in the case of the Hamburg Rules where, if there is loss or damage, the carrier has to prove that he and his servants and agents took all reasonable measures to avoid the cause of damage and its results<sup>32</sup>. Putting the burden of proving the unseaworthy condition of the vessel on the cargo-owner is not fair, because the carrier possess all the information about the vessel and what happens during the voyage. It therefore makes more sense to make the carrier responsible for proving whether the vessel was seaworthy or not, especially since he is the one who will be trying to escape liability. The introduction of the ISM Code will help cargo-owners in their case, as the Code requires the shipowner/carrier to document all occurrences on board the vessel, e.g. crew training, incidents, any correction actions, maintenance and audits, and the carrier is under obligation to

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30- Hamburg Rules Art 5 r1.

31- Hamburg Rules Art 5 r 4. See Wilson at p. 218-219, Tetley, *The Hamburg Rules – A Commentary*, 1979, LMCLQ, p. 1-20 at p9. Tetley, *Interpretation and Construction of The Hague, Hague-Visby and Hamburg Rules*, (2004) JIML, p 30-70. at p.69.

32- This does not apply to loss or damage caused by fire. In his case the cargo-owner has to prove that the fire resulted from act or omission from the carrier or that the carrier and his servants and agents did not take all reasonable measures to avoid the cause of the fire and its consequences.

provide all the information he possesses which could help the cargo-owners in their case. Although these documents will help the cargo-owner, the burden of proving the seaworthy condition of the vessel should still be the carrier's. As he is the one who possesses all the information and the one who is trying to escape responsibility, it would be better that he carries the burden of proof, especially as this would reduce trial time spent on exchanging documents and information.

## 2- Order of Proof

In the previous section we said that the cargo-owner is responsible for proving that the vessel is unseaworthy. He has to prove this on a balance of probability, or else he has to provide evidence to a reasonable degree that the vessel was unseaworthy<sup>33</sup>. However when the case comes to court how does the order of proof work, i.e. who has to prove what and when?

Under common law and the Hague/Hague-Visby Rules, it was left to the courts to decide such matters, whereas, under the Hamburg Rules the case is different because liability is based on the presumption of fault, which means that once the cargo-owner has proved their loss or damage, i.e. by presenting the damaged goods and clean bill of lading, it will be presumed that the loss or damage is the carrier's fault unless he proves that he took all reasonable measures to avoid the damage and its cause. Under common law and Hague/Hague-Visby Rules the carriers liability is based on proved fault therefore, where the bill of lading was transferred to a third party acting in good faith it will provide conclusive evidence as to the condition, leading marks and quantity and the carrier would not be able to adduce evidence to the contrary and would thus be obliged to compensate the third party because the latter has the right of estoppel<sup>34</sup>. If the bill of lading was in the hand of the charterer/shipper it will be *prima facie* evidence which enable the carrier can prove the opposite, and therefore where the goods were damaged or lost, either partially or

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33- William Tetley, *Marine Cargo Claims* 4th Ed, Chapter 6 p. 25 to be published in 2008, <http://www.mcgill.ca/files/maritimelaw/ch6.pdf>. The information was taken from the web page on 12/03/2006. A. Meredith Jones & Co. Ltd. v. Vangemar Shipping Co. Ltd., The "Apostolis" (No.2), [1999] 2 Lloyd's Rep. 292, at p. 299 Mr. Justice Longmore stated: "The shipowners, in order to succeed, must show not merely that the fire was, on the balance of probability, caused by a cigarette carelessly discarded by a stevedore, but also that the owners are responsible for that negligence on the part of the stevedores." At p 299. Also see the Court of Appeal [2000] 2 Lloyd's Rep. 337.

34- See full discussion in Simon Baughen, *Shipping Law*, 3rd Ed, 2004, at p.70-78.

completely, then beside the fact that the bill of lading is a *prima facie* evidence, it is the duty of the cargo-owner to provide further proof to complete his evidence<sup>35</sup>.

It has already been said that the order of proof under common law and Hague/Hague-Visby Rules was left to the courts. In *The Farrandoc*<sup>36</sup>, Mr Justice Noel, while delivering his judgment, stated the order of proof that should be followed in such cases he said<sup>37</sup>:

“The cargo-owner must, firstly, prove damage or loss to his cargo and as the primary obligation of the owner of the vessel is to deliver to destination the goods of the plaintiff in like good order and condition as when shipped, once damage or loss of the goods so shipped is established, the owner of the vessel becomes *prima facie* liable to the cargo-owner for the damages. This liability is, however, subject to any exception clause contained in the bill of lading such as that the loss or damage arises or results from an 'act, neglect, or default . . . in the navigation or in the management of the ship'. If the shipowner establishes the cause of the damage or loss and that he falls within the conditions of the above exception, the owner of the cargo, in order to succeed, must then prove some other breach of the contract of carriage to which the exception clause provides no defence such as the unseaworthiness of the vessel, for instance, and then the owner of the ship may establish, that notwithstanding such unseaworthiness, he is still protected by the exception clause because (1) unseaworthiness does not give rise to a cause of action unless it consists of unfitness at the material time (which must be at the commencement of the voyage) and damage to the cargo must have been caused thereby and that such unseaworthiness occurred after the commencement of the voyage or it did not cause the loss or damage.”

According to Mr. Justice Noel the order of proof is:

- The cargo owner must prove the loss of or the damage to his cargo; this can be proven by providing a clean bill of lading which is *prima facie* evidence against the carrier. In case of loss the cargo-owner has to provide further evidence to complete the *prima facie* evidence especially when the bill of lading is qualified, e.g. 'weight unknown', 'said to contain'... etc, or when the cargo is shipped inside containers.
- Once the cargo-owner proves his loss, then it is the carrier's job to prove the cause of the loss and that such cause is covered by one of the exception in the contract of carriage or in the law, i.e. Art IV r2 of the Hague/Hague-Visby Rules;

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35- Tetley, *ibid*, at p 23. Simon Baughen, Shipping Law, 3rd Ed, 2004, at p.72-74.

36- Robin Hood Flour Mills, Ltd. v. N. M. Paterson & Sons, Ltd., (*The Farrandoc*), [1967] 2 Lloyd's Rep. 276.

37- *The Farrandoc*, *ibid*, at p 284. Great China Metal Industries Co. Ltd. v. Malaysian International Shipping Corporation Berhad, (*The Bunga Seroja*), [1999] 1 Lloyd's Rep. 512. *The Toledo* [1995] 1 Lloyd's Rep. 40. *Minister of Food v. Reardon Smith Line, Ltd.*, [1951] 2 Lloyd's Rep. 265.. *The Eurasian Dream*, [2002] 1 Lloyd's Rep. 719. *The Hellenic Dolphin* [1978] 2 Lloyd's Rep. 336. *The Good Friend* [1984] 2 Lloyd's Rep. 586. *The Subro Valour* [1995] 1 Lloyd's Rep 509. *The Apostolis* [1997] 2 Lloyd's Rep 241. *The Antigoni* [1991] 1 Lloyd's Rep 209.

- Then the cargo-owner, in order to get compensation, must prove another cause of loss which is not covered by the exceptions. Here the cargo-owner can raise the claim of unseaworthiness, which he must prove to succeed;
- If the cargo-owner succeeds in that, then the carrier will have one of two options in order to avoid liability:
  - a. he must prove that he exercised due diligence to make the vessel seaworthy or that she was seaworthy; or
  - b. he must prove that although the vessel was unseaworthy this unseaworthiness did not contribute to the loss or damage of the cargo.

We can see here that it is the duty of the cargo-owner to prove the unseaworthy condition of the vessel, bearing in mind that the evidence to prove such a thing, i.e. the history of vessel maintenance, surveyors' recommendations and occurrences during the journey, lies with the carrier. This puts the cargo-owner in a rather difficult position. The recent developments in the shipping industry represented by the introduction of the ISM Code might make the cargo-owner's job slightly easier because the shipper is obliged to keep documentary records of all the incidents, maintenance, training, corrective action ...etc. but it still should be the duty of the carrier who is trying to benefit from the law or the contract exceptions to prove his case.

However, the position under the Hamburg Rules is different and clearer because the carrier's obligations and protections are provided in one Article, i.e. Article 5, and liability is based on presumed fault, which mean the carrier has to prove that he, his servants and agents took all reasonable measures to prevent the cause of loss or damage and its consequences, in order to be able to avoid liability for the loss or damage. Article 5 r 1 provides:

“The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.”

Under this article the order of proof is as follows<sup>38</sup>:

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38- C. C. Nicoll, Do The Hamburg Rules Suit a Shipper-Dominated Economy? Journal of Maritime Law and Commerce, v. 24, No. 1, January 1993, p151-179 at 166-168.

- the cargo-owner has to prove the loss of or damage to his cargo, in the same way as under the Hague/Hague-Visby Rules, and that this loss occurred while the cargo was in the carrier's possession;
- then if the carrier wants to avoid liability he has to prove the cause of the loss or damage and that he, his servants or agents took all reasonable measures to avoid liability

However, the order of proof differs again if the loss or damage was caused by fire; in this case Art 5 r 4(a) provides:

“The carrier is liable

(i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;

(ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.”

Here the cargo-owner has to prove his loss or damage, in the same way as in the Hague/Hague-Visby Rules, and that such loss or damage resulted either from direct fault or negligence on the part of the carrier, his servants or agents or otherwise fault or negligence on the part of carrier, his servants or agents in taking all measures that could be reasonably taken to put out the fire and avoid or mitigate its consequences. After this it is for the carrier to prove that there was no fault or privity on his part, or his agents or servants. We can see here that in the case of fire it is again the duty of the cargo-owner's duty to prove the cause of loss, considering that the carrier is the one who has all relevant facts to prove the case.

William Tetley suggests the following order of proof<sup>39</sup>:

- 1- The cargo-owner should prove his loss or damage and that this happened while that cargo was in the hands of the carrier;
- 2- The carrier must prove the cause of loss or damage;
- 3- Then he must prove that he exercised due diligence to make the ship seaworthy before and at the beginning of the voyage;
- 4- The carrier must then prove one of the exculpatory exceptions of art. 4. 2 (a) to (q) of the Hague/Hague/Visby Rules.

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39- William Tetley, *Marine Cargo Claims* 4th Ed, Chapter 6 p. 33-34, to be published in 2008, <http://www.mcgill.ca/files/maritimelaw/ch6.pdf>. The information was taken from the web page on 12/03/2006.

5- The cargo-owner then attempts to prove lack of care of cargo or attempts to disprove the above evidence of the carrier, including lack of seaworthiness and/or lack of due diligence.

6- Both parties, then, have various arguments available to them.

According to Tetley's order of proof, the cargo-owner has to prove the loss of or damage to the cargo. Once that has been done, then the burden of proof shifts to the carrier to explain how the loss or the damage occurred. After that, he has to prove that the vessel was seaworthy or, if it was not, he has to prove that he exercised due diligence to make her so; we can add here that the carrier should prove that there was no fault or privity on his part, his servants and agents. Once the carrier can prove this, he can subsequently move to seek the protections provided by the law, i.e. Art VI r2 of the Hague/Hague-Visby Rules, or the contract of carriage. After that it is for the cargo owner to counter-prove the carrier's claims or claim any other causes for loss.

We can see from the above that the applicable law, i.e. the Hague/Hague-Visby Rules<sup>40</sup> and the common law, makes it the duty of the shipper/cargo-owner to prove his loss and the unseaworthy condition of the vessel; he has to prove this on a balance of probability<sup>41</sup>. Yet, this is not logical for several reasons. The first is, the carrier possess all the information relating to the vessel and its condition. The second is, the carrier is the one who is seeking protection from liability, therefore, it make more sense that he should prove that the vessel was seaworthy or that he exercised due diligence to make the vessel seaworthy before seeking protection. Finally, making the carrier responsible for proving unseaworthiness will shorten the trial time, because he has to prove the cause of loss, that the vessel was seaworthy or that

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40- Although Hamburg Rules is in operation but it is only been rectified and adopted by few countries comparing to the Hague/Hague-Visby Rules which make latter's position prevails.

41- William Tetley, *Marine Cargo Claims* 4th Ed, Chapter 6 p. 25 to be published in 2008, <http://www.mcgill.ca/files/maritimelaw/ch6.pdf>. The information was taken from the web page on 12/03/2006, we have to bear in mind that Tetley also make the shipper responsible for proving that the vessel was unseaworthy but only as a final stage of proof ad after the carrier prove that he exercised due diligence, in fact her the cargo-owner can prove that the carrier did not exercises do diligence as he claims. *A. Meredith Jones & Co. Ltd. v. Vangemar Shipping Co. Ltd., The "Apostolis"* (No. 2), [1999] 2 Lloyd's Rep. 292, at p. 299 Mr. Justice Longmore stated: "The shipowners, in order to succeed, must show not merely that the fire was, on the balance of probability, caused by a cigarette carelessly discarded by a stevedore, but also that the owners are responsible for that negligence on the part of the stevedores." at p 299. Also see the Court of Appeal [2000] 2 Lloyd's Rep. 337.

he exercised due diligence to make her so. Having done this he can prove that he is protected by the law or the contract. Whereas, under the current situation the cargo-owner has to prove the loss or damage, then the carrier has to prove the cause and that the cause falls within one of the exceptions in Art IV r2 then the burden shifts to the cargo-owner to prove unseaworthiness, bearing in mind that he does not possess any information, then the burden shifts back to the carrier to prove that he exercised due diligence. Finally it is currently open to both parties to provide several claims, which make the proof process long and difficult.

At present the UNCITRAL is working on a new draft convention on Transport Law which includes a new section on the burden of proof. This differs slightly from the current law, but is not similar to the one suggested by Tetley. Article 17 of the proposal reads as follow:

#### Article 17 Basis of Liability<sup>42</sup>

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that

- (a) the loss, damage, or delay; or
- (b) the occurrence that caused or contributed to the loss, damage, or delay

took place during the period of the carrier's responsibility as defined in chapter 4. The carrier is relieved of all or part of its liability if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 19.

2. If the carrier, alternatively to proving the absence of fault as provided in paragraph 1, proves that an event listed in paragraph 3 caused or contributed to the loss, damage, or delay, then the carrier is relieved of all or part of its liability subject to the following provisions:

(a) If the claimant proves that the fault of the carrier or of a person referred to in article 19 caused or contributed to the event on which the carrier relies, then the carrier is liable for all or part of the loss, damage, or delay.

(b) If the claimant proves that an event not listed in paragraph 3 contributed to the loss, damage, or delay, and the carrier cannot prove that this event is not attributable to its fault or to the fault of any person referred to in article 19, then the carrier is liable for part of the loss, damage, or delay.

(c) If the claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by

- (i) the unseaworthiness of the ship;
- (ii) the improper manning, equipping, and supplying of the ship; or
- (iii) the fact that the holds or other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) were not fit and safe for reception, carriage, and preservation of the goods,

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42- United Nations Commission on International Trade Law, Working Group III (Transport Law), Sixteenth session, Vienna, 28 November-9 December 2005. A/CN.9/WG.III/WP.56

and the carrier cannot prove that;

(A) it complied with its obligation to exercise due diligence as required under article 16(1);  
or

(B) the loss, damage, or delay was not caused by any of the circumstances referred to in (i),  
(ii), and (iii) above,

then the carrier is liable for part or all of the loss, damage, or delay.

3. The events mentioned in paragraph 2 are: .....

The first part of this article is a proved fault based system as it only makes the carrier responsible if the cargo-owner proves his loss and that the loss or damage occurred while the goods were in the custody of the carrier; the carrier, in order to exempt himself, has to prove that the cause of loss is not attributable to his fault or that of any person for whom he is responsible. Alternatively the carrier can escape liability by proving that the loss or damage resulted from one of the excepted causes in section 3, subject to the carrier proving, *inter alia*, the unseaworthy condition of the vessel. As a result the burden of proof of unseaworthiness is still borne by the cargo-owner and, in the case of seaworthiness, leaves the industry in the same position that it finds itself under the current law<sup>43</sup>.

In certain cases the order of proof may not be a problem. For example, if the vessel was lost without apparent reason then the courts are likely to presume that the vessel was unseaworthy. There is also a case for the carrier's failure to exercise his duty of care for the cargo under Art III r2 of the Hague/Hague-Visby Rules. Another example would be where the bill of lading is in the hand of a third party - consignee or buyer - acting in good faith, it will be conclusive evidence as to the quantity and condition of the cargo and the carrier will be obliged to indemnify the holder of the bill of lading. However the problem still remains that should the shipper/charterer decide to raise a claim of unseaworthiness the obligation to prove this is still his..

### ***- Causation***

In order to establish the responsibility of the carrier for the loss or damage suffered by the cargo-owners/charterers it is important to establish that it was his acts or omissions which either caused, or contributed towards the cause of, the loss. This principle applies generally to all type of loss or damage, and the breach of the obligation of seaworthiness is no exception to the rule.

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43- Detailed discussion on the new draft on Transport Law will follow at a later stage.

This section will consider two issues. The first is whether the carrier would be responsible for the loss or damage if the vessel was unseaworthy but unseaworthiness was not the cause of loss. The second is what would happen if there was more than one reason for the loss or damage: would the carrier still be responsible for the loss or damage?

*1- Where unseaworthiness was not the cause of loss.*

In order for the shipper/cargo-owner to be able to cancel the contract of carriage or claim damages, he has to establish that unseaworthiness was a/the cause of the loss or damage. On the other hand, if the carrier wants to escape or limit his liability, he has to prove either another cause for the loss or damage, or that the fact that the vessel was not seaworthy or the want of due diligence on his part did not cause or contribute to the loss or damage.

This means that if unseaworthiness was not the cause of the loss, the carrier will not be liable for any loss of or damage to the cargo and this is clear from Article IV r1 of the Hague/Hague-Visby Rules:

“Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness *unless caused by* want of due diligence on the part of the carrier ....”

In *The Europa*<sup>44</sup>, the vessel was chartered to carry a cargo of sugar in bags from Stettin to Liverpool, and one of the clauses stated that the carrier was exempted from damage caused by collision. On its arrival at Liverpool and while entering the port, the port bow of the steamship hit the dock wall and the effect of the collision led to the breaking of a water closet pipe. As a result sea water entered the ‘tween decks’ and damaged part of the cargo. The ‘tween deck’ had two scupper holes which were used to connect water pipes from the ‘tween decks’ to the bilge; the pipes were removed and the holes were imperfectly plugged, and because of that the water which came through the broken water closet pipe passed through the scupper holes and got into the lower holds damaging some of the bags of sugar. The cargo-owner sued the carrier for the damage caused to the cargo in the lower holds and in the ‘tween decks’, and claimed that the cause of the damage was unseaworthiness. The carrier accepted responsibility that the vessel was not seaworthy with regard to the scupper holds and consequently for the damage caused due to that, i.e. the damage to

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44- *The Europa*, [1908] P.84.

the cargo in the lower holds but not to the damage in the 'tween decks'. Bucknill J stated<sup>45</sup>:

“It appears to us, therefore, that whenever a cargo-owner has claimed damages from a shipowner for loss occasioned to his goods on the voyage, and the ship was in fact unseaworthy at the material time, the cargo-owner has had to prove that the loss was occasioned through or in consequence of the unseaworthiness, and it has not been sufficient to say merely that the ship was unseaworthy, and therefore that he was entitled to recover the loss, although there was no relation between the unseaworthiness and the damage.”

In *the Fjord Wind*<sup>46</sup> the vessel was unseaworthy because some of the crankpin bearings failed; the ship engineer attempted to repair the problem but it was apparent that the vessel needed to be taken ashore for repairs. These took three months, and as a result the shipowner had to give notice of voyage frustration to the bill of lading holders and to the sub-charterers. As a result the vessel was found to be unseaworthy and this unseaworthiness was deemed to be the cause of the loss suffered by the holders of the bill of lading, i.e. the cost of transshipment of the cargo. The shipowners failed to prove that they exercised due diligence, and consequently the shipowner was responsible for the damage caused to the bill of lading holders and the sub-charterers. Lord Justice Clarke said<sup>47</sup>:

“It follows from the conclusion that the owners have failed to show that due diligence was exercised to make the vessel seaworthy before she sailed from Rosario that, given the further conclusion that the vessel was unseaworthy at that time, the defendants are liable for any loss caused by that unseaworthiness as damages for breach of the charter or of the contract of carriage contained in or evidenced by the bill of lading as the case may be.”

Consequently if the vessel was unseaworthy but its unseaworthiness did not contribute to the loss or damage suffered by the cargo owners then the carrier will not be responsible for not exercising due diligence.

Also, under Article 5 of Hamburg Rules<sup>48</sup> if the carrier proves that he and his servants took all reasonable measures to avoid the occurrence which caused the loss and its consequences then he will not be responsible for the loss or damage, but if he

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45- *The Europa*, *ibid*, at 87-98.

46- *Eridania S.P.A. And Others v. Rudolf A. Oetker*, (*The Fjord Wind*), [2000] 2 Lloyd's Rep. 191.

47- *The Fjord Wind*, *ibid*, at p.204. *Guinomar of Conakry and Another v. Samsung Fire & Marine Insurance Co. Ltd*, (*The Kamsar Voyager*), [2002] 2 Lloyd's Rep. 57. *Kish v. Taylor*, [1912] A.C. 604. *The Tokdo*, [1995] 1 Lloyd's Rep. 40. *Riverstone Meat Company, Pty., Ltd. v. Lancashire Shipping Company, Ltd.*, (*The Muncaster Castle*), [1961] 1 Lloyd's Rep 57.

48- “The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.”

fails to do that this would mean that his failure to take all reasonable measures was the/a cause of the occurrence and he would be responsible for the results.

*2- Where there was more than one cause*

If, beside unseaworthiness, there were other causes which contributed to the damage or loss, e.g.. act of God, war, strike...etc, then we have two or more effective causes and the carrier will be liable only for the loss or damage caused by unseaworthiness and will be able to limit his responsibility to this loss or damage alone<sup>49</sup>, i.e. loss caused directly by unseaworthiness. If unseaworthiness did not contribute to the loss or damage then he will not be liable for it.

*The Europa*<sup>50</sup> is an example of this. Part of the loss - that which related to the cargo in the 'tween decks' - was caused by the collision, , while that of the cargo in the lower hold was caused as a result of the unseaworthy condition of the vessel, as the water entered the hold because of the imperfect plugging of the scupper holes. The court held the carrier responsible for the damage to the bags of sugar which were loaded in the lower hold, but as for the cargo loaded in the 'tween deck' he was exempted from any loss or damage caused by collision as this was an exception in the contract. Bucknill J, in responding to the question of whether the shipowner, because he was in breach of his obligation to provide a seaworthy vessel, is liable for damage not caused by unseaworthiness stated<sup>51</sup>:

“... and in our judgment the plaintiffs are only entitled to recover from the defendants such damages as directly resulted from the want of seaworthiness and not for the damage caused by the water which got into the 'tween decks through the collision between the ship and the dock wall, which was covered by the excepted perils in the charterparty, and to the protection of which the

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49- Article 5 (7) of Hamburg Rules Provide:

“7. Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery, the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable.”

Hague/Hague-Visby Rules does not provide a similar provision but the courts tend to follow the same direction. Also the UNCITRAL draft convention dealt with this situation in Article 17 (4) which provide:

“When the carrier is relieved of part of its liability pursuant to the previous paragraphs of this article, then the carrier is liable only for that part of the loss, damage, or delay that is attributable to the event or occurrence for which it is liable under the previous paragraphs, and liability must be apportioned on the basis established in the previous paragraphs.” United Nations Commission on International Trade Law, Working Group III (Transport Law), Sixteenth session, Vienna, 28 November-9 December 2005. A/CN.9/WG.III/WP.56

50- *The Europa*, [1908] P.84.

51- *The Europa*, *ibid*, p 98-99. Northern Shipping Co. v. Deutsche Seereederei G.M.B.H. and Others, (*The Kapitan Sakharov*), [2000] 2 Lloyd's Rep 255, at p.270-271. *The Sivand*, [1998] 2 Lloyd's Rep 97, at p.104-105.

shipowner was still entitled, notwithstanding the unseaworthiness of the vessel. As the damages have not been ascertained on this basis the matter must be sent back to the county court judge to assess them.”

Consequently, in assessing whether the carrier is responsible for loss or damage, the court will search for the operative/effective cause of loss and if there is more than one, then the carrier’s liability for unseaworthiness will be determined according to how much the unseaworthiness participated in causing the loss. In assessing whether unseaworthiness was the operative/effective, or one of the operative/effective causes, a test can be used here. The test is: would the loss have happened if the vessel were not unseaworthy? If the answer was yes, then the unseaworthiness is an effective cause of loss, and if the answer was no then in spite of the fact that the vessel was not seaworthy its condition did not contribute to the loss or damage, and the carrier will not be responsible for the loss or damage.

For instance, in *the Kamsar Voyager*<sup>52</sup>, the carrier did not carry out the service for cylinder No 1 according to the service schedule recommended by the engine builders. During the voyage the cylinder failed and when the engineer checked cylinder No 1 he found an extensive cracking. Although this made the vessel unseaworthy, the cylinder could have been isolated and the vessel would have been able to complete her voyage on its remaining power. However, as the vessel had on board a spare piston<sup>53</sup>, the engineer attempted to repair the vessel using the spare part. After fitting it, the engineer started the engine and it worked. But after some time a strange noise was heard and the engine stopped. As a result damage was caused to cylinder No 1 and consequential loss to cylinder No 2 and the vessel had to be immobilised and towed in for repairs. The cargo-owner sued the carrier to recover the general average they had to pay on the basis that the vessel was not seaworthy in terms of the No 1 Cylinder and that the spare piston was not designed for the particular engine of the vessel, because the engine builder failed to send the correct part even though the shipowner provided the correct engine description and serial number. It was not possible to discover the fact that the spare part was the wrong one with reasonable inspection. In discussing whether the cause of the engine

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52- *Guinomar of Conakry and Another v. Samsung Fire & Marine Insurance Co. Ltd, (The "Kamsar Voyager")* [2002] 2 Lloyd’s Rep 57.

53- Having spare parts on board is what a prudent shipowner/carrier would do in the normal case scenario as was found in the case

problem which led to the general average being incurred was the spare part or the vessel's unseaworthy condition, the court held<sup>54</sup>:

“the experts agreed that the failure of the No. 1 piston did not cause consequential damage to the rest of the engine and that the No. 1 unit could have been isolated so that the vessel could have completed the voyage under her own power; however, there would have been no need to install the spare if the original piston had not failed at sea; although the installation of a defective spare was not reasonably foreseeable as such, if the vessel carried a spare, as a prudent shipowner would have done, its use was inevitable; accordingly the failure of the original piston was not simply an occasion giving rise to the opportunity to install the spare whose causative force had been spent; it was an operative cause that was indeed the only reason for the use of the only relevant spare part on board the vessel; it was thus causative of the installation of the spare part and the subsequent immobilization of the vessel at sea.”

Therefore, the court has to search for the underlying cause of damage or loss which led to the actual/apparent cause. But where there is more than one cause for the loss or damage and the court is not sure what actually caused it, then the court will look for the most probable cause. If unseaworthiness was a probable cause then the court will hold the carrier liable for any unseaworthiness existing before and at the beginning of the voyage<sup>55</sup>. In *the Subro Valour*<sup>56</sup>, there was a fire in the engine room for which there were three possible causes: a discarded cigarette, material which had been shelved too close to the engine exhaust falling, or mechanical damage to the insulation of the wiring, which may have been caused by improper installation of shelves. There was no evidence to support the first two causes, and thus the court considered the unseaworthy condition of the vessel before and at the beginning of the voyage to be the cause of the fire, Mr. Justice Clarke held<sup>57</sup>:

“on the evidence the defendants were unable to show that they exercised due diligence to avoid damage to the wiring to make the vessel seaworthy at the commencement of the voyage; although there was no evidence how the damage to the wiring occurred, it could only have occurred by impact or impacts from materials stored on the shelves or from the shelves

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54- *The Kamsar Voyager*, *ibid*, p.58. in this case it was found that the carrier was responsible for the want of due diligence on the part of the ship builders. Through this the carrier's obligation of due diligence was extended to cover the action of the ship-builders as opposed to the previous cases where the carrier was not responsible. Such previous cases are *Union of India v. N.V. Reederij Amsterdam*, (the *Amestlslot*), [1963] 2 Lloyd's Rep 223. -*Angliss and Company (Australia) Proprietary, Limited v. Peninsular and Oriental Steam Navigation Company*. [1927] 2 K.B. 456. *The Muncaster Castle*, [1961] 1 Lloyd's Rep 57. *Metals and Ores Pte. Ltd. and Another v. Compania de Vapores Stelvi S.A., (The Tolmidis)*, [1983] 1 Lloyd's Rep. 530. *Mediterranean Freight Services Ltd. v. BP Oil International Ltd., (The Fiona)*, [1993] 1 Lloyd's Rep. 257.

55- Tetley, *Marine Cargo Claims* 4th Ed, Chapter 15 p. 21-22 to be published in 2008, <http://www.mcgill.ca/files/maritimelaw/ch15.pdf>. The information was taken from the web page on 04/04/2006

56- *The Subro Valour*, [1995] 1 Lloyd's Rep. 509.

57- *The Subro Valour*, *ibid*, p 510, 516-518. *A. Meredith Jones & Co. Ltd. v. Vangemar Shipping Co. Ltd. , (The Apostolis)*, [1997] 2 Lloyd's Rep. 241. *Rey Banano del Pacifico C.A. and Others v. Transportes Navieros Ecuatorianos and Another (the Isla Fernandina)*, [2000] 2 Lloyd's Rep. 15. In this case the court rejected the contention that the damage was due to the lack of navigational aids, i.e. charts, and held that the loss was caused by negligence in navigation, see p33-34.

themselves or from an extraneous cause; the exercise of proper care would have avoided the damage.”

But, where there is more than one cause that participated in the loss or damage, one of which being unseaworthiness and the other being one of the exceptions mentioned in Art IV r2 of Hague/Hague-Visby Rules then unseaworthiness will be considered the cause of loss even if the others were effective/operative causes because the carrier’s obligation to exercise due diligence is an overriding obligation that should be satisfied before the carrier can use the exceptions of Art IV r2<sup>58</sup>. Consequently if the loss or damage was caused by unseaworthiness or want of due diligence and by one of the causes mentioned in Art IV r2 then all loss or damage will be considered to have been caused by unseaworthiness<sup>59</sup>.

However, the situation is different under Hamburg Rules because if the shipper could prove that the damage or loss took place while the cargo was in the carrier’s custody, then it will be assumed that the carrier is responsible for the loss or damage. But the rule of causation still applies here because, if the carrier could prove that the loss/damage was not caused by his acts or omissions, or by the acts or omissions of his servants or agents, then he would be able to escape liability. The only difference from Hague/Hague-Visby is that the liability here is based on an assumption of fault on the part of the carrier, and if the carrier is unable to prove his innocence then he will be responsible even if the cause of loss is not apparent<sup>60</sup>. But if the cause of loss or damage is fire then the same principle of Hague/Hague-Visby Rules will apply, i.e. the shipper/cargo-owner has to prove the unseaworthy condition of the vessel and then the same causation system of Hague/Hague-Visby will apply<sup>61</sup>.

### *3- Where the cause of the loss was unknown*

Where there is no apparent cause for the loss or damage, i.e. the vessel sank in calm and quiet water, then the court will assume that the loss or damage was caused

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58- Tetley, *Ibid*, p. 22. Maxine Footwear Co. Ltd. and Another. Appellants; v. Canadian Government Merchant Marine Ltd. Respondents. [1959] A.C. 589, Lord Somervelle stated: “In their Lordships’ opinion the point fails. Article III, rule 1, is an overriding obligation. If it is not fulfilled and the nonfulfilment causes the damage the immunities of article IV cannot be relied on. This is the natural construction apart from the opening words of article III, rule 2. The fact that that rule is made subject to the provisions of article IV and rule 1 is not so conditioned makes the point clear beyond argument.” P.602-3.

59- The Eurasian Dream, [2002] 1 Lloyd’s Rep. 719, at p.737

60- Hamburg Rules Art 5 r1.

61- Hamburg Rules Art 5 r4.

by unseaworthiness even if the cause of unseaworthiness was not identified<sup>62</sup>. Mr Justice Moore-Bick stated<sup>63</sup>:

“Where, as here, a vessel suffers a serious casualty without any outside intervention, the natural inference is that there was something wrong with her which a prudent owner would have rectified if he had known about it. I do not think it makes any difference for this purpose whether the defect is one which can subsequently be specifically identified, such as a crack in a component, or is one which cannot be specifically identified but whose existence can be inferred from a propensity for failures to occur for unknown reasons and at unpredictable intervals. What matters is whether such a defect actually exists, and if it does, whether the risks involved in leaving it unrepaired are sufficiently serious to require remedial action to be taken before the ship proceeds farther. In this case I think it is clear that there was a defect, albeit unidentified, in the vessel's propulsion equipment which was liable to result in a crankpin bearing failure at some time during the voyage without warning and with potentially disastrous consequences. It had manifested itself as a propensity for crankpin bearings to fail at unpredictable intervals, and I have little doubt that a prudent owner, if he had been aware of the nature of the defect, would have taken steps to correct it rather than risk the consequences. I am satisfied, therefore, that the vessel was unseaworthy both when she left Rosario and, for that matter, when she left Barcelona at the beginning of her approach voyage.”<sup>64</sup>

Therefore, if the cause of the loss or damage was unknown and the carrier cannot prove, if required, that he exercised due diligence, to make the vessel seaworthy, then he will be responsible for that loss or damage.

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62- Tetley, *Marine Cargo Claims* 4th Ed, Chapter 15 p. 21-22 to be published in 2008, <http://www.mcgill.ca/files/maritimelaw/ch15.pdf>. The information was taken from the web page on 04/04/2006

63- *Eridania S.P.A. And Others v. Rudolf A. Oetker And Others (The Fjord Wind)*, [1999] 1 Lloyd's Rep. 307.

64- *The Fjord Wind*, *ibid.* at p.319.

## **Classification of the obligation of seaworthiness**

After the basis of liability and the order and burden of proof have been examined it is necessary to discuss the effect of the breach, i.e. the rights and obligations of the carrier and the cargo-owner, but in order to be able to do that it is essential to classify the carrier's obligation to provide a seaworthy vessel. This means that it is necessary to determine whether the obligation under the Contract of Carriage is a condition or a warranty or if it is neither. Upon this classification we can determine if the cargo-owner has the right to cancel the contract, or if his rights are limited to claim damages, and also whether the carrier can use the protection of the law or the contract.

This will entail the definition of the terms 'condition' and 'warranty' before moving on to establish whether seaworthiness is a condition or a warranty.

### **- *What is a Condition?***

Conditions are a very important part of the contract, if not its essence. A condition is generally defined as: "a term that goes to the root of a contract or is of the essence of a contract... Breach of a condition constitutes a fundamental breach of the contract and entitles the injured party to treat it as discharged"<sup>1</sup>.

Contracts may sometime be suspended until a certain condition is satisfied, which means that the performance of that contract will not start until the party responsible for complying with the condition satisfies it; such a condition is called Condition Precedent. On the other hand, some conditions may bring a contract to an end if a certain situation occurs after the contract starts; such a condition is called Condition Subsequent<sup>2</sup>. Both of these types of conditions are different from the Promissory Condition which constitutes the subject matter of the contract and whose breach will allow the aggrieved party the right to cancel the contract during its performance. The other two types allow the aggrieved party to terminate the contract either before the performance starts or after it

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1 - Oxford Dictionary of Law, 4th ED, 1997, Oxford University Press. p.94.

2- *Ibid.*

ends<sup>3</sup>. The breach of a condition, no matter how trivial it is will allow the party to consider the contract as repudiated.

Taking the definition of a contract into consideration, we can say that the aggrieved party has the right to cancel the contract or treat it as discharged, the moment the other party breaches the condition. In certain situations the failure of the carrier to make the vessel seaworthy can give the charterer/cargo-owner the right to treat the contract of carriage as repudiated.

For example, In *Stanton v. Richardson*<sup>4</sup>, the charterparty provided that the charter had a choice of different cargos, including wet sugar, and the charter specified a different freight rate for each type of cargo. A cargo of wet sugar was loaded on board but after the loading was finished it was found that there was an accumulation of molasses in the holds, and the pump, although sufficient to drain the moisture from normal cargo, was unable to deal with the amount of moisture coming out of the wet sugar and the cargo had to be unloaded. The charterer decided to consider the contract as discharged because the carrier failed to make the vessel cargo-worthy. The Court held that<sup>5</sup>:

“the shipowner, by entering into the charterparty, undertook that the ship should be reasonably fit for the carriage of a reasonable cargo of any of the kinds of goods specified in the charterparty, and consequently of a reasonable cargo of wet sugar; and that, upon the findings of the jury that she was not so fit, and could not be made so in such a time as not to frustrate the object of the voyage, the charterer was entitled to succeed in both actions.”

In this case the court considered the option of providing an extra pump to deal with the accumulation of molasses but found that it would have taken a long time to do which would have caused a long delay to the cargo owner. Therefore, he was allowed to cancel his contract. However, if the obligation of seaworthiness had been a condition, the shipper/charterer/cargo-owner would have been able to terminate the contract straight away without considering the option of remedy. Furthermore, not all seaworthiness cases arrived at the same result, i.e. that the shipper/cargo-owner has the right to

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3- Voyage Charters 2nd Ed, p.39

4- *Stanton v. Richardson*, (1871-72) L.R. 7 C.P. 421.

5- *Stanton v. Richardson*, *ibid*, p. 421. the Chamber of Exchequer affirmed this decision, (1873-74) L.R. 9 C.P. 390. *Snia v. Suzuki* (1924) 18 LILR 333.

terminate the contract once the breach arises. It should further be realised that the right to terminate the contract arises before the carriage contract starts or the vessel sails, but this would not be of great benefit if the vessel was half way through the journey when it was discovered that she was unseaworthy. This means that the carrier's obligation of seaworthiness is not a condition and that its breach cannot be considered a breach of a condition. This would lead on to an examination of the term Warranty.

**- What is a Warranty?**

A warranty is generally defined as a "term or promise in a contract breach of which will entitle the innocent party to damages but not to treat the contract as discharged by breach."<sup>6</sup>

This means that the breach of a warranty does not go to the root of the contract and as a result does not deprive the aggrieved party of the benefits of the contract, therefore, he will only be entitled to claim damages and not able to terminate the contract.

It can be seen that in some cases of unseaworthiness the breach was so trivial that the court only allowed the charterer/cargo-owner to claim damages if the damage was caused by unseaworthiness and did not allow them to cancel the contract of carriage. For example in *The Hongkong Fir*<sup>7</sup>, the vessel was time chartered for a period of 24 months. During the early stages of the charter the vessel developed a number of problems and had to undergo several repair attempts before eventually being repaired. The total period of time lost as a result was about 5 months. The charterer terminated the contract on the basis that the vessel was unseaworthy and she was not fit for her purpose, i.e. embarking on the voyages. However the court was not of the same opinion and considered that although the charterer lost five months he still had another 17 months within which he could still benefit from the service of the vessel; as a result the

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6- Oxford Dictionary of Law, 4th ED, 1997, Oxford University Press. p.499.

7- *Hongkong Fir Shipping Company, Ltd. v. Kawasaki Kisen Kaisha, Ltd.*, (The "Hongkong Fir"), [1961] 1 Lloyd's Rep. 159, [1961] 2 Lloyd's Rep. 478.

charterparty was not frustrated, therefore, the charterer was not right when he terminated the contract. Mr Justice Salmon held<sup>8</sup>:

“(c) that *Hongkong Fir* was capable of 12 1/2 knots that unseaworthiness by itself gave charterers no right to rescind, and, *a fortiori*, a breach of the condition to maintain the vessel in an efficient state could not, by itself, entitle charterers to rescind; that, in determining the question of frustration, in this case there was no real difference between "reasonable time" and "frustrating time"; that on Sept. 15, *Hongkong Fir* was admittedly seaworthy and still available for about 17 months under the charter-party; that the circumstances in which performance was called for did not render it a thing radically different from that which was undertaken; and that, accordingly, the charter-party was not frustrated; and that, therefore, charterers had no legal right to repudiate the charter-party, although they would have been entitled to such damage as they suffered by reason of delay caused by shipowners' breaches of charter-party, had they counterclaimed for it.”

The decision in this case could mean that the obligation of seaworthiness is a warranty but, as was seen above, in certain cases the court allowed the cargo owner to consider the contract as discharged because the breach of the obligation was not remediable. This means again that the carrier's obligation is not a warranty.

#### **- Is Seaworthiness a Condition or Warranty?**

The obligation of seaworthiness can be broken for so many reasons, i.e. leaving the hatch open, an open valve, incompetent staff or defective engine ....etc. Some of the things that can cause unseaworthiness can be so trivial that they could be remedied quickly without delay, but other causes can be so major that they cannot be remedied within a reasonable time<sup>9</sup>, which means that the vessel will not be fit for its purpose<sup>10</sup>. Because of that, it is difficult to describe the seaworthiness obligation as either a condition or as a warranty. Moreover, the fact that the parties to the contract of carriage and the courts describe the duty as the “warranty of seaworthiness” does not help and it

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8- *Hongkong Fir Shipping Company, Ltd. v. Kawasaki Kisen Kaisha, Ltd.*, (The "Hongkong Fir"), [1961] 1 Lloyd's Rep. 159. at p. 159. this was affirmed by the court of appeal, [1961] 2 Lloyd's Rep. 478.

9- *Snia v. Suzuki* (1924) 17 L.L.R. 78, *The Hongkong Fir*, *ibid*.

10- *Hongkong Fir Shipping Company, Ltd. v. Kawasaki Kisen Kaisha, Ltd.*, (The "Hongkong Fir"), [1961] 2 Lloyd's Rep. 478. L.J. Diplock stated: “the shipowner's undertaking to tender a seaworthy ship has, as a result of numerous decisions as to what can amount to "unseaworthiness", become one of the most complex of contractual undertakings. It embraces obligations with respect to every part of the hull and machinery, stores and equipment and the crew itself. It can be broken by the presence of trivial defects easily and rapidly remediable as well as by defects which must inevitably result in a total loss of the vessel.” at p.494.

is a misleading phrase in the context of Carriage of Goods by Sea. For example Lord Blackburn stated<sup>11</sup>:

“That is generally expressed by saying that it (the vessel) shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a "warranty," not merely that they should do their best to make the ship fit, but that the ship should really be fit”.

The term may have been borrowed from the Marine Insurance Act where S39 is entitled the Warranty of Seaworthiness<sup>12</sup>.

Furthermore, the fact that the parties to a contract call a certain clause in the contract a condition or a warranty does not necessarily make it such, because the clause has to be construed by looking at the contract as a whole, taking into consideration the commercial practice and the law, and through looking at the terms of the contract of carriage in order to find out the actual intention of the parties and the legal classification<sup>13</sup>.

This raises the following question: What is the classification of the carrier’s duty to provide a seaworthy vessel?

This issue was discussed by the House of Lords in *The Hongkong Fir*<sup>14</sup>. The House of Lords refused to categorise the duty as a condition, which would entitle the claimant the right either to terminate the contract or carry on with the contract and claim

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11- *Steel v. State Line Steamship Co.*, (1877) 3 App. Cas. 72. Lord Blackburn, at p. 86.

12- s 39 Warranty of seaworthiness of ship.

- (1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.
- (2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.
- (3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.
- (4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.
- (5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

13- *Voyage Charters*, 2nd ED, p. 39-40. *Hongkong Fir Shipping Company, Ltd. v. Kawasaki Kisen Kaisha, Ltd.*, (The Hongkong Fir), [1961] 2 Lloyd's Rep. 478, at p.490.

14- *The Hongkong Fir.*, *ibid.*

damages, or as a warranty, the breach of which would entitle the claimant the right of damages only. Diplock L.J. in his judgement stated:

“It is, ..., by no means surprising that among the many hundreds of previous cases about the shipowner's undertaking to deliver a seaworthy ship there is none where it was found profitable to discuss in the judgments the question whether that undertaking is a "condition" or a "warranty"; for the true answer, as I have already indicated, is that it is neither.”<sup>15</sup>

This again raises the same question: under what category does such an undertaking fall?

Due to the fact that the vessel's seaworthiness is a fragile issue, which makes any minor problem capable of rendering the vessel unseaworthy<sup>16</sup>, the severity of such unseaworthiness would vary depending on the problem itself. Some problems can be fixed during the voyage without delay or endangering the vessel; its crew and/or cargo, e.g. an unclosed hatch which can be closed easily without delay. Other problems, however, might be of such extreme severity that the carrier needs to dry dock the vessel to fix it. In between these two there are various problems which would require different courses of action to correct them.

Consequently the effect of a breach of the carrier's obligation should vary according to the nature of the problem and the speed of rectifying it. Therefore, the carrier's obligation can be classified as an innominate or intermediate term which falls between the above two categories, warranties and conditions, Lord Diplock stated:

“but one of that large class of contractual undertakings one breach of which may have the same effect as that ascribed to a breach of "condition" under the Sale of Goods Act and a different breach of which may have only the same effect as that ascribed to a breach of "warranty" under that Act.”<sup>17</sup>

As a result of such classification, the effect of the breach will vary depending on the severity of the breach and on the time it takes to rectify it and the type of contract of carriage involved. Thus, in order to assess the effect of the breach of the obligation a test

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15- The Hongkong Fir, *ibid*, at p. 494.

16- The Hongkong Fir, *ibid*, at p. 494. Lord j. Diplock stated: “It can be broken by the presence of trivial defects easily and rapidly remediable as well as by defects which must inevitably result in a total loss of the vessel.”

17- The Hongkong Fir, *ibid*, at p. 494-495.

can be applied. The test is: as a result of the breach would the charterer/shipper be substantially deprived from the whole benefit intended from the contract?<sup>18</sup>

This will lead us to find out what options the shipper/cargo-owner has if the carrier was in breach of his duty to provide a seaworthy vessel.

**- *The result of classifying the carrier's obligation as Innominate***

We saw that the carrier's obligation of seaworthiness is an innominate/intermediate one which means that the result of breaching the obligation will differ from obligations classified as warranties or conditions. The vessel can also be rendered unseaworthy through a variety of reasons, some of which may be so trivial that they can be quickly remedied without delay, while others can be so severe that they can go to the root of the contract and deprive the shipper from the whole benefit of the contract as well as the severity of the unseaworthiness making it impossible for it to be remedied quickly and without delay<sup>19</sup>. Therefore the question would be what options the aggrieved party has in the case of a breach of obligation of seaworthiness.

***1- Frustration of the Contract of Carriage***

As a result of classifying the seaworthiness obligation as an innominate the cargo-owner cannot be allowed to consider the contract frustrated every time the vessel turns to be unseaworthy but at the same time he cannot be prevented from cancelling the contract if the unseaworthiness was so severe that it prevented him substantially from the whole benefit of the contract, unless the parties expressly agree that the breach of certain term of their contract will allow the other party to take certain action, i.e. cancel the contract,

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18- The Hongkong Fir, *ibid*, at p. 491-492 Diplock L.J stated: "The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: Does the occurrence of the event deprive the party, who has further undertakings still to perform, of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings? See also *The Hermosa*, [1980] 1 Lloyd's Rep. 638. [1982] 1 Lloyd's Rep. 570. *Universal Cargo Carriers Corporation v. Citati*, [1957] 2 Q.B. 401.

19- *The Hongkong Fir*, [1961] 2 Lloyd's Rep. 478. Lord Diplock stated: "It can be broken by the presence of trivial defects easily and rapidly remediable as well as by defects which must inevitably result in a total loss of the vessel.", at p. 494.

regardless how of how severe the breach is<sup>20</sup>. Therefore a test must be established in order to assess the rights of the cargo-owner in a case where the obligations are breached.

The test is: did unseaworthiness deprive the shipper/cargo-owner substantially from the whole benefit of the contract or not? If the answer to this question is yes then the cargo-owner is entitled to cancel the contract<sup>21</sup>. Another type of test was applied in *Universal Cargo Carriers Corporation v. Citati*<sup>22</sup>. This test is based on the time it will take to remedy unseaworthiness, and means that if unseaworthiness cannot be remedied quickly, within a reasonable time so that it does not frustrate the commercial purpose of the contract, then the cargo-owner/shipper can consider the contract to be frustrated, but if it can be done within reasonable time then they cannot repudiate it<sup>23</sup>.

Consequently, it can be said that the test to see whether unseaworthiness frustrates the contract of carriage or not is: if unseaworthiness is so severe that it cannot be remedied with reasonable time, and as a result it goes to the root of the contract depriving the other party substantially from the whole benefit which was the reason for the contract of carriage, e.g. carrying the goods to their destination, then the charterer/cargo-owner has the right to terminate the contract.

For instance, in *the Hongkong Fir*<sup>24</sup>, the vessel was time-chartered for a period of 24 months. During the voyage the engine developed a problem which the engine-room staff

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20- *The Hongkong Fir*, *ibid.* Bunge Corporation, New York v. Tradax Export S.A., Panama, [1981] 1 W.L.R. 711, p.717. *Universal Cargo Carriers Corporation v. Citati*, [1957] 2 Q.B. 401.

21- *The Hongkong Fir*, *ibid.*, Lord Diplock, at p. 491-2. See also *The Hermosa*, [1982] 1 Lloyd's Rep. 570. in this case the court held that the time-charterers had right to cancel only if it was clear that the carrier had no intention to repair the vessel therefore they have to wait until such intention is clear, p. 571.

22- *Universal Cargo Carriers Corporation v. Citati*, [1957] 2 Q.B. 401. *Stanton v. Richardson*, (1873-74) L.R. 9 C.P. 390. *Snia v. Suzuki* (1924) 18 Ll. L. Rep. 333.

23- *Universal Cargo Carriers Corporation v. Citati*, *ibid.* the court held: "That the proper test to apply in order to decide whether delay in fulfilling obligations under a contract was so grave as to entitle the aggrieved party to rescind was whether that delay was such as to frustrate the commercial purpose of the venture; that "reasonable time " could only be accepted as the test where the period regarded as reasonable time was the same as the period necessary to frustrate; and therefore, as the arbitrator had based his award in favour of the owners on the finding that the charterer would be unable to perform within a reasonable time after the expiry of the lay days (which was less than the period required to frustrate) he had applied a test as to the delay necessary to amount to repudiation which was erroneous in law.", at p.403.

24- *The Hongkong Fir*, [1961] 1 Lloyd's Rep. 159.

were incompetent to repair. This resulted in the vessel having to go off hire to undergo certain repairs for a total period of 5 month. The charterer considered that this unseaworthiness and delay for 5 month frustrated the contract and they consequently cancelled the charter. However, the court did not accept this view and said that the incompetence of the crew cannot go to the root of the contract and the crew could be changed. In addition the fact that the vessel was off hire for a period of 5 month, out of the 7 since the contract of carriage started, does not frustrate the contract as the charterers still have another 17 months to benefit from the vessel<sup>25</sup>.

On the other hand, in *Stanton v. Richardson*<sup>26</sup>, where a cargo of wet sugar was loaded on board, such cargo needed pumps to discharge the draining coming out of the wet sugar. Such pumps were also needed to discharge the ordinary leakage from the vessel, however, the pumps which were already fitted were unable to do that. This led to the cargo being unloaded to prevent damage. It became clear that installing more water pumps would take a very long time. As a result the charterers had the right to cancel the contract because the vessel was unseaworthy and such unseaworthiness could not be remedied within such a time so as not to frustrate the object of the contract<sup>27</sup>.

## 2- Right to Claim Damages

Beside the charterer's/cargo-owner's right to cancel the contract, when unseaworthiness frustrates the contract of carriage, he can claim damage for the loss or damage he suffered as a result of such unseaworthiness, e.g. loss or damage to cargo or costs to hire another vessel and transshipment ... etc<sup>28</sup>.

However, the right to terminate the contract of carriage appears in two situations. The first is during a time charter where seaworthiness was discovered during the period of charter; as the contract of hire is for the use of the vessel within the limits allowed by

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25- The Hongkong Fir, *ibid*, at p. 159. The Court of Appeal affirmed Mr. Justice Salmon decision [1961] 2 Lloyd's Rep. 478.

26- *Stanton v. Richardson*, (1871-72) L.R. 7 C.P. 421.

27 - *Stanton v. Richardson*, *ibid*, at. P. 421 (1873-74) L.R. 9 C.P. 390. *SNIA v. Suzuki* (1924) 18 Ll. L. Rep. 333. *Tully v. Howling*, (1876-77) LR 2 Q.B.D. 182

28- *Scrutton on Charterparties*, p.99-100. *Scott v. Foley Aikman & Co*, (1899) 5 Com.Cas. 53. Reported in *Scrutton on Charterparties*

the contract, therefore, if such usage could not be achieved the carrier may be able to cancel the contract during its performance. The second situation, which applies to any contract of carriage; i.e. Bill of Lading, voyage-charter or time-charter... etc, is where unseaworthiness is discovered before the cargo is loaded on board or before sailing. Then, if unseaworthiness frustrates the contract, the charterer/cargo owner has the right to terminate the contract. This right to cancel is guaranteed under common law even if there was no cancellation clause<sup>29</sup>.

The right of cancellation arises when the goods are not loaded on board or before sailing, in the case of a bill of lading or voyage charter, or at any time in the case of a time charter, if this unseaworthiness goes to the root of the contract and deprives the charterer/cargo-owner from the whole benefit of the contract. But when the goods are already on board and the vessel has started its voyage, or where unseaworthiness does not frustrate the contract of carriage, then the only option the charterer/shipper has is to claim damages for the loss or damage to the cargo or any extra cost they had to pay for transshipment or general average... etc<sup>30</sup>.

For example in *the Kamsar Voyager*<sup>31</sup>, the vessel was unseaworthy because one of the pistons, No 1, had a crack which was not checked before sailing. If the piston had been isolated the vessel would have been able to carry on her voyage using her own power. However, the engineer attempted to fix the problem with a spare part available on board the vessel but this part was not designed for the particular engine of the vessel<sup>32</sup>. This problem could not have been discovered even with a prudent check; the only way to discover it was actually to fit the spare part. The fitting of the wrong spare part resulted in total stoppage of the engine and the vessel was immobilized and had to be towed for repair. The cargo-owners sued the shipowner to recover the general

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29- *Stanton v. Richardson*, *ibid*, *Maxine Footwear Co. Ltd. and Another; v. Canadian Government Merchant Marine Ltd.*, [1959] A.C. 589. *Tully v. Howling*, (1876-77) LR 2 Q.B.D. 182. *Time Charters*, p.104.

30- *The Kamsar Voyager*, [2002] 2 Lloyd's Rep. 57. *Maxine Footwear Co. Ltd. and Another. v. Canadian Government Merchant Marine Ltd.* [1959] A.C. 589. In this case the vessel caught fire while the crew were trying to defrost some frozen pipes before sailing and some of the cargo was lost. *Northern Shipping Co. v. Deutsche Seereederei G.M.B.H. and Others*, (*The Kapitan Sakharov*), [2000] 2 Lloyd's Rep. 255. *The Toledo*, [1995] 1 Lloyd's Rep. 40. *The Subro Valour*, [1995] 1 Lloyd's Rep. 509.

31- *The Kamsar Voyager*, *ibid*.

32- The spare part was wrongly delivered by the suppliers although the shipowner sent the right engine description.

average they had paid and the court granted them this on the basis that the vessel was unseaworthy and this unseaworthiness led to the fitting of the wrong spare part and the incurring of the general average.

Also, in *the Hongkong Fir*<sup>33</sup> the fact that the vessel was unseaworthy and was off hire for a period of 5 months out of a 24-month time charter was not considered to be frustrating the contract of carriage as the charterer still had the benefit for 19 months.

Therefore, where unseaworthiness does not go to the root of the contract and deprive the other party substantially from the whole benefit which was the purpose of the contract of carriage, the aggrieved party can only claim damages for whatever loss or damage he has suffered, and if he cancelled the contract for such unseaworthiness he will be in breach of his obligations towards the carrier, i.e. loading cargo and paying freight, because they had no right to cancel the contract in such circumstances<sup>34</sup>.

Finally, if the unseaworthiness was discovered after the vessel set sail, the mere acceptance of the vessel by the shipper/charterer does not mean that they have waived their right either to claim damage or consider the contract to be frustrated if unseaworthiness deprived the charterer/carrier from the whole benefit of the contract of carriage<sup>35</sup>.

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33- *The Hongkong Fir*, *ibid*.

34- *The Hongkong Fir*, *ibid*. *Universal Cargo Carriers Corporation v. Citati*, [1957] 2 Q.B. 401. *Stanton v. Richardson*, (1873-74) L.R. 9 C.P. 390. *Snia v. Suzuki* (1924) 18 Ll. L. Rep. 333. *The Hermosa*, [1982] 1 Lloyd's Rep. 570

35- *The Hongkong Fir*, *ibid*. *Marbienes Compania Naviera S.A. v. Ferrostal A.G., (The Democritos)* [1975] 1 Lloyd's Rep. 386, at p.397-8.

## **Carrier's Immunities for the Breach of his obligation of seaworthiness**

In spite of the fact that the carrier may be in breach of his obligation to provide a seaworthy vessel he could still be able to protect himself through various options: either by ensuring that the contract of carriage includes an exclusion clause that clearly exempts him from liability for the breach of his obligation to make the vessel seaworthy or to exercise due diligence to make the vessel seaworthy. The other option is to limit his liability, i.e. limiting the amount of money he has to pay the cargo-owner/charterer in case the breach of his obligation was the cause of the loss or damage they have suffered. Therefore, in this section we will discuss the above two issues.

### ***-Exclusion from the carrier's Liability for failing to exercise his duty***

Even when the duty to provide a seaworthy vessel under common law is an absolute one, the carrier can exempt himself from the consequences of providing an unseaworthy ship, so even though "the law imposes on shipowners a duty to provide a seaworthy ship and to use reasonable care, they may contract themselves out of those duties"<sup>1</sup>.

Hence, the bill of lading, or charterparty, as the case may be, may contain a clause exempting the carrier from liability for the loss of or damage to the cargo shipped on board their vessels, where such loss or damage arises from the breach of the obligation of seaworthiness. In this case the carrier will try to avert liability by claiming that the exemption clause protects him against the consequences of such breach. However, in such cases the courts have to examine the exemption clause carefully in order to decide whether it or not protects the carrier. It should further be made clear that the applicability of the exemption clause depends on the language of the clause itself and if the clause was not clear or did not specifically mention unseaworthiness, especially where the obligation of seaworthiness is implied, then the court would not apply it to exempt the carrier from liability. Furthermore, when the Hague/Hague-Visby Rules

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1 - Nelson Line (Liverpool), Limited v. James Nelson & Sons, Limited [1908] A. C. 16, at p 18 per Lord Lorburn L.C.

apply to the contract of carriage, the carrier will not be able to use the protection of Article IV r2 if the loss was caused by unseaworthiness which resulted from his failure to exercise due diligence to make the vessel seaworthy, because the duty to exercise due diligence is an overriding one<sup>2</sup>. Also under Article 5 (1) Hamburg Rules, the carrier will not be able to escape liability if he cannot prove that he, his servants and agents, took all measures that could reasonably be taken to avoid the occurrence and its consequences.

#### *1- Efficiency of the Exclusion Clause*

In order for the carrier to be able to use the protection of the exclusion clause its language should specify its meaning clearly and without any room for doubt. However we should distinguish between two situations: one where the obligation of seaworthiness is express one and the other where it is implied.

##### a. The obligation of seaworthiness is expressed

If the contract of carriage expressly mentions the duty of seaworthiness<sup>3</sup>, the exception clause in the contract of carriage will extend to cover the breach of the duty, provided appropriate language is used in constructing the clause. Usually such an exclusion covers unseaworthiness that comes into existence after the commencement of the voyage, and if the carrier wants to cover seaworthiness existing before and at the beginning of the voyage then this should be stipulated clearly.

For example, in *Bank of Australasia v. Clan Line Steamers*<sup>4</sup>, clause 14 of the bill of lading provided that ‘The shipowners shall be responsible for loss or damage arising from any unfit state of the vessel to receive the goods, or any unseaworthiness of the vessel when she sails on the voyage...’. Clause 12 stated that ‘No claim that may arise in respect of goods shipped by this steamer will be recoverable unless made at the port of delivery within seven days from the date of the steamer's arrival there’. The duty to provide a seaworthy ship was expressly mentioned in the carriage contract by virtue of

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2- Maxine Footwear Co. Ltd. and Another. Appellants; v. Canadian Government Merchant Marine Ltd. Respondents. [1959] A.C. 589.

3- Bank of Australasia and Others v. Clan Line Steamers, Limited, [1916] 1 K.B. 39. Minister of Materials v. Wold Steamship Company, Ltd. [1952] 1 Lloyd's Rep. 485.

4- Bank of Australasia and Others v. Clan Line Steamers, Limited, *ibid.*

cl.14. The cargo-owner received his cargo in a damaged condition; however, he did not make the claim within the specified seven days period, contending that cl.12 does not apply to damage resulting from the failure of the carrier to provide a seaworthy vessel. The court did not accept this argument and held that the limitation of liability clause, regarding the time bar, was applicable to the loss, which resulted from unseaworthiness, Buckley L. J. stated<sup>5</sup>:

“It seems to me that in this case clause 14 has expressly introduced that which would otherwise be implied, and that therefore the obligation as regards seaworthiness in this case rests upon express contract and not upon implied contract. The relevance of that for the present purpose is this. The clause of limit of liability, according to Tattersall's Case, would not extend to the implied contract if it were implied; but if it is expressed, then such stipulation of the contract is to be applied to that part of the contract as well as to any other part. The result is that Tattersall's Case does not apply in this case. There is here an express contract as to unseaworthiness. Consequently clause 12 applies.”

b. The obligation of seaworthiness is implied

The second situation is where the duty to provide a seaworthy ship is implied; here the carrier cannot seek the protection of a general exemption clause, as this will not be sufficient to cover the breach of the obligation.

For instance, *Atlantic Shipping v. Louis Dreyfus & Co*<sup>6</sup>, again shows a case for limitation of action, regarding a time bar to sue for loss or damages. Clause 39 of the charterparty provided the following:

‘All disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single arbitrator, be referred to the final arbitrament of two arbitrators carrying on business in

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5- Bank of Australasia and Others v. Clan Line Steamers, Limited, *ibid*, BUCKLEY L.J. at p.49 stated: “It seems to me that in this case clause 14 has expressly introduced that which would otherwise be implied, and that therefore the obligation as regards seaworthiness in this case rests upon express contract and not upon implied contract. The relevance of that for the present purpose is this. The clause of limit of liability, according to Tattersall's Case, would not extend to the implied contract if it were implied; but if it is expressed, then such stipulation of the contract is to be applied to that part of the contract as well as to any other part. The result is that Tattersall's Case does not apply in this case. There is here an express contract as to unseaworthiness. Consequently clause 12 applies.” See also BANKES L.J. at p. 55-56. Paterson Zochonis and Company, Limited v. Elder Dempster and Company, Limited, and Others. : [1923] 1 K.B. 420. BANKES L.J at 436 stated: “The bills of lading do not contain any express warranty of seaworthiness. Under these circumstances it is I think established that though exceptions may be introduced in a bill of lading to an express warranty of seaworthiness, where there is no express warranty exceptions will be read as not applicable to the implied warranty”.

6- Atlantic Shipping & Trading Company v. Louis Dreyfus & Co. (1922) 10 Ll. L. Rep. 707. See also Rathbone Brothers & Co. v. D. Maciver, Sons & Co, [1903] 2 K.B. 378, VAUGHAN WILLIAMS L.J. at p. 383-384. ROMER L.J. at p. 388-398. Owners of Cargo on Board SS. Waikato v. The New Zealand Shipping Company Limited. [1898] 1 Q.B. 645, See also the decision of the Court of Appeal in the same case [1899] 1 Q.B. 56.

London, who shall be members of the Baltic and engaged in the shipping and/or grain trade, one to be appointed by each of the parties, with power to such arbitrators to appoint an umpire. Any claim must be made in writing, and claimants' arbitrator appointed within three months of final discharge, and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred'.

The charterparty did not contain any express obligation of seaworthiness. A dispute arose over damage to the cargo resulting from the unseaworthy condition of the vessel, and the cargo-owner failed to appoint an arbitrator within the time limit specified in cl.39; the shipowner contended that the charterers waived their right to claim damages. Lord Sumner<sup>7</sup> was of the opinion that as the shipowner's duty is an implied one, if he could prove that he discharged his obligation to provide a seaworthy vessel then he would be able to use the protection provided in cl.39, but if he could not discharge his duty then the exception will not apply to the breach of the obligation to provide seaworthy vessel. He stated:

"... there is an implied condition upon the operation of the usual exceptions from liability, namely, that the shipowners shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them; if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowners' protection in such a case."

In this case Lord Dunedin, although he eventually agreed with the opinion of Lord Sumner, was initially of the opinion that if cl.39 just stopped at the point of referring to arbitration without going any further, then the matter would be a procedural matter and the cargo-owners could not have sued the carrier, but as it went further than just a mere reference to arbitration, the cargo-owners could benefit from the clause if the loss or damage resulted from unseaworthiness as the duty is implied and the exclusion of liability will not apply<sup>8</sup>.

## *2- Conflict between the exemption clause and other clauses in the carriage contract.*

Contracts of Carriage may contain different clauses that can contradict each other, and the exemption clauses are no exception. Generally speaking, "where there are

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7- Atlantic Shipping & Trading Company v. Louis Dreyfus & Co. *ibid*, Lord Sumner stated, at p 708, the court of appeal prevented the cargo owner from suing the carrier as he did not start the arbitration procedures within the time limit allowed, however the court did not look at the issue of seaworthiness but only looked at the case as a matter of procedures, (1921) 6 Ll. L. Rep. 194, see also the judgment of Mr. Justice Rowlatt (1920) 4 Ll. L. Rep. 424. . See also Tattersall v. The National Steamship Company, Limited, (1883-84) LR 12 Q.B.D. 297. See FN 51.

8\_ Atlantic Shipping & Trading Company v. Louis Dreyfus & Co. (1922) 10 Ll. L. Rep. 707, at p. 707-708.

several clauses, as far as possible they must be construed consistently with one another, and one of them ought not to be treated as surplusage, and rejected, unless it is impossible to read it with other clauses”<sup>9</sup>.

Take for instance, *Borthwick v. Elderslie Steamship Company*<sup>10</sup>. Here there were two exemption clauses. The first one stated that “Neither the steamer, nor her owners, nor her charterers shall be accountable for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto, whether arising from failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not, nor for detention; nor for the consequence of any act, neglect, default, or error of judgment of the master, officers, engineers, refrigerating engineers, crew, or other persons in the service of the owners or charterers, nor from any other cause whatsoever”. The second clause stated, *inter alia*, that “... and loss or damage resulting therefrom, or from any of the following causes or perils, are excepted, namely, insufficiency in packing or in strength of packages, loss or damage from coaling on voyage, rust, vermin ... or any other causes beyond the control of the owners or charterers, or by or from any accidents to or defects latent or otherwise in hull, tackle, boilers, or machinery, refrigerating or otherwise, or their appurtenances (whether or not existing at the time of the goods being loaded, or the commencement of the voyage), or insufficiency of coals at the commencement or any stage of the voyage, if reasonable means have been taken to provide against such defects and unseaworthiness”.

The ship was unseaworthy due to the existence of carbolic acid which had been used to disinfect her ‘tween-decks’ before receiving the new cargo; the crew did not ensure that the holds were washed properly before loading, and as a result of this the cargo arrived in a damaged condition. The shipowner alleged that he was protected by the first clause, which was printed in a large size font, while the second clause was printed in a small size print, and they contended that that first clause meant to override the second

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9- *Elderslie Steamship Company, Limited v. Borthwick*, [1904] 1 K.B. 319. Lord Alverstone C.J. at p. 324.

10- *Elderslie Steamship Company, Limited v. Borthwick*, *ibid.*

one. The court, after considering the contract and the authorities, held that the shipowner was not exempted because the general exemption clause, the first one, was qualified by the second clause and that the operation of the second exemption clause was subject to exercising reasonable means to provide a seaworthy ship which had not been exercised. As a result, the shipowner was not protected<sup>11</sup>.

Consequently, where the contract of carriage contains two contradicting clauses, i.e. an exemption clause which is subject to the exercising of due care to make the ship seaworthy, and another clause which exempts the carrier from liability without any qualification, then such stipulation is “not intended by the clause relating to ‘unseaworthiness’ to create a new exception or to add to the list of exceptions.... that clause is a qualification which overrides the exceptions before mentioned, and is not a new exception”<sup>12</sup>. Hence, the carrier cannot seek the protection of the exemption clause if he did not satisfy the requirements of the exemption clause, i.e. of providing a seaworthy vessel or exercising due diligence or care to provide a seaworthy ship<sup>13</sup>.

### *3-Conflicts between statutory exemptions and another exclusion clause*

In addition to the previous conflict, sometimes, there might be a conflict between statutory provisions and the rule is that the implied obligation cannot be subject to the exception clause, unless clear words have been used. In this case a close consideration has to be given. For instance, The Merchant Shipping Act of 1894 in S 502 stated that

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11- *Elderslie Steamship Company v. Borthwick*, *ibid*, Lord Alverstone C.J. at p. 327 stated “In this case the learned judge has found that, the ship being tainted with carbolic acid, she was at the commencement of the voyage unseaworthy, in the sense of being unfit for the carriage of a delicate cargo like meat. That being so, upon the narrower construction which must be put on the large print clause, it follows that the defendants are liable, because under the small print clause they are only exempted from liability for damage occasioned by unseaworthiness, if reasonable means have been taken to provide against it, which is found not to have been the case here”, see also [1905] A.C. 93. *Minister of Materials v. Wold Steamship Company, Ltd.* [1952] 1 Lloyd's Rep. 485, at p. 500-502. Also *Fletcher Moulton L.J. in James Nelson & Sons, Limited v. Nelson Line (Liverpool), Limited (No.2)*, [1907] 1 K.B. 769. at p. 782 “The fundamental obligation of this contract is not merely to supply a ship, but to supply a seaworthy ship, and the clause, which is in fact a limitation of liability, cannot be prayed in aid by the defendants if they have failed to fulfil their fundamental obligation. If they do fulfil that obligation the clause limits their liability; otherwise they cannot rely upon its assistance”.

12- *Per Vaughan Williams L.J. in Rathbone Brothers & Co. v. D. Maciver, Sons & Co.* [1903] 2 K.B. 378 at p. 385.

13- *Borthwick v. Elderslie Steamship Company*, *supra*. See also *Bank of Australasia and Others v. Clan Line Steamers, Limited*, [1916] 1 K.B. 39. *Rathbone Brothers & Co. v. D. Maciver, Sons & Co.* [1903] 2 K.B. 378.

“The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely: --(1.) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship”. This provision was subject to debate in many cases. In some cases<sup>14</sup> the carrier might contend that the language of this provision is capable of protecting him even if the fire was a result of the unseaworthiness of the ship. In such a situation the court’s approach was that the carrier would be protected by S 502 of MSA against the loss of or damage to the goods on board resulting from fire caused by unseaworthiness of the vessel, subject to two conditions. The first one is that there is no actual fault or privity on his part, i.e. he took all reasonable means to make her seaworthy<sup>15</sup>, and this is obvious from the language of the provision. Secondly, there should not be any ‘special agreement’ in the contract of carriage which make S 502 of the Merchant Shipping Act inefficient<sup>16</sup>.

In *Virginia Carolina Chemical Company v. Norfolk and North American Steam Shipping*<sup>17</sup>, S. 502 of the MSA was incorporated into the bill of lading and there was an exception clause stating that “The shipowners and/or charterers are not responsible for any loss, detention of or damage to the goods, or the consequences thereof, or expenses occasioned by any of the following causes, viz.--... fire on board, ... or by unseaworthiness of the ship at the commencement of or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness, or by any other cause whatever.” Vaughan Williams L.J. stated that<sup>18</sup>: “If the parties included in their contract of carriage a clause that preclude the shipowner from claiming protection under the statute, therefore S. 502 will be stopped by the special agreement”.

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14- Asiatic Petroleum Company, Limited v. Lennard's Carrying Company Limited [1914] 1 K.B. 419. *Virginia Carolina Chemical Company v. Norfolk and North American Steam Shipping Company*. [1912] 1 K.B. 229.

15- Asiatic Petroleum Company, Limited v. Lennard's Carrying Company Limited, *ibid*, per Buckley L.J. at p. 431-432

16- *Virginia Carolina Chemical Company v. Norfolk and North American Steam Shipping Company*, *supra*, at p. 238. See Vaughan Williams L.J. at p 238

17- *Virginia Carolina Chemical Company v. Norfolk and North American Steam Shipping Company*, *ibid*,

18- *Virginia Carolina Chemical Company v. Norfolk and North American Steam Shipping Company*, *ibid*, Vaughan Williams L.J. at p238

The court of appeal and the court below held that the existence of such a clause in the bill of lading precludes the carrier from using S. 502 as a defence against the cargo-owner's claim for loss of the cargo caused by fire resulting from the ship unseaworthiness<sup>19</sup>.

Therefore, in order for the carrier to benefit from the protection offered by statutory instrument for the breach of his implied obligation to provide a seaworthy vessel, such protection must be clear and unambiguous and must not have been overridden by an agreement between the parties of the contract of carriage. Furthermore, the carrier must prove that he took all reasonable means to make the vessel seaworthy. Another condition can be added: if the protection of the statutory instrument was qualified with a condition, then the carrier must satisfy such qualification before claiming to be protected by the instrument.

#### *4- Interpretation of the exception clause*

In order for the court to be able to interpret the exemption clause correctly and check whether or not the exemption clause would provide protection to the carrier, it must read the carriage contract as a whole and carefully interpret the exemption clause along with other clauses in the document presented before the court in order to be able to analyse it and give it the right meaning intended by the parties. Furthermore, it is important for the court when construing the clause to take into consideration, in case of damage or loss, what causes the parties intended the clause to cover, i.e. does it protect the carrier against all causes existing before and during the voyage or just to those that came into existence after the start of the journey? This can only be established from the wording of the exclusion clause.

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19- Virginia Carolina Chemical Company v. Norfolk and North American Steam Shipping Company, *Ibid*, at p 229.

In *Rathbone v. D. Maciver*<sup>20</sup>, the exception clause contained, *inter alia*, that: "...or by unseaworthiness of the ship at the beginning or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness". The breach of the warranty was due to a broken service pipe that existed either before loading or occurred during the loading operation. The shipowner contended, and Wills. J in the court below agreed with this contention, that these words cover only breaches which relate to the fitness of the ship to encounter the perils of the voyage but not to fitness to carry the cargo. This was because the word unseaworthiness was followed by the phrase 'at the beginning or at any period of the voyage', and that the exercise of reasonable means covers this fitness only. Therefore, by taking into account the words of the previous lines of the same clause '...however such damage, defect, or injury may be caused, and notwithstanding that the same may have existed at or at any time before the loading or sailing of the vessel...' the carrier is protected even if he did not exercise the reasonable means. The court of appeal rejected this argument and stated, reversing Wills. J's decision, that the clause must be read in its totality and that the qualification at the end of the clause must be given its wide meaning, as known in mercantile transactions, as long as there are no specific words which narrow its meaning. Therefore, the word 'unseaworthiness' in the clause means the fitness of the ship to receive the cargo on board and to embark on the voyage; the qualification of exercising due diligence covers any breach existing before and at the beginning of the voyage including loading of the cargo<sup>21</sup>.

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20- *Rathbone Brothers & Co. v. D. Maciver, Sons & Co.* [1903] 2 K.B. 378. The exemption clause stated: "(the act of God ... and loss or damage resulting from (inter alia) the consequence of any damage, breakdown, injury to, or defect in hull, tackle, boilers, or machinery, ... however such damage, defect, or injury may be caused, and notwithstanding that the same may have existed at or at any time before the loading or sailing of the vessel, collision, stranding ... or any other peril of the sea ... and whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom, be occasioned by the ... negligence ... of the owners, master, officers ... crew ... and whether before or after, or during the voyage, or for whose acts the shipowner would otherwise be liable, or by unseaworthiness of the ship at the beginning or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness, or by any cause whatever excepted)."

21- *Rathbone Brothers & Co. v. D. Maciver, Sons & Co.* [1903] 2 K.B. 378. ROMER L.J. "I think it would not be right in this bill of lading to cut down in this way the meaning of the term 'unseaworthiness.' In the first place, it is important to bear in mind that this word "unseaworthiness" is used in a mercantile document and by mercantile men, and it ought to receive its well-known meaning, unless there are other and overwhelming considerations which compel the Court to depart from that meaning. To my mind there is nothing in this bill of lading taken as a whole which prevents the Court from giving to the word "unseaworthiness"

However, where the seaworthiness obligation is implied, the exemption clause will apply only, unless otherwise clearly stated, to any loss or damage caused by failure or breakdown which arises after the start of the voyage, but does not apply to the carrier's initial implied obligation<sup>22</sup>.

#### *5- Construction of the exemption clause*

If the carrier wants to ensure that the exception clause covers the loss or damage resulting from his failure to make the vessel seaworthy, then special consideration should be given to the way in which such a clause is written. Accordingly special thought should be given to the language of the clause and its qualifications.

If the shipowner wants to benefit from the protection provided by the exception clause two conditions have to be satisfied. Firstly, the language of the clause must expressly<sup>23</sup> and plainly<sup>24</sup> show that the carrier will not be responsible for any loss or damage resulting from the unseaworthy condition of the vessel, especially where the carrier's obligation is implied; the words used in the clause should give to the ordinary man reading it the idea that the parties intended to exclude the shipowner's liability<sup>25</sup>,

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its ordinary meaning", at p. 390. Also in *The Carron Park*, (1890) L.R. 15 P.D. 203. The exemption clause stated that "... neglect or default whatsoever of the pilot, master, crew, or other servants of the shipowners ... and all and every other dangers and accidents of the seas, rivers, and steam navigation of what nature and kind soever during the said voyage always excepted." The court held that: "the term "voyage" included the period of time during which the vessel was being loaded, and that consequently the damage was within the exception and the defendants were not liable".

22- *Owners of Cargo on Ship "Maori King" v. Hughes*, [1895] 2 Q.B. 550. Lord Esher M.R. stated: "But there are exceptions in this bill of lading just as in every bill of lading which is in the ordinary form; and, if there are in the contract express stipulations which are in terms inconsistent with the primary implication to which I have referred, that stipulation cannot be implied. In that case there would be express stipulations with regard to the condition of the machinery or the ship at starting, and when there are express stipulations as to any matter you cannot imply any others. But the exceptions here are, in my opinion, of the same kind as exceptions in ordinary bills of lading - that is, with regard to matters which may happen during the voyage. They are exceptions from the obligation of the shipowner to deliver the goods at the end of the voyage in the same condition as they were intrusted to him at its commencement. They do not apply to the primary warranty of the condition of the machinery at the time when its application is to begin". See also *Minister of Materials v. Wold Steamship Company, Ltd.* [1952] 1 Lloyd's Rep. 485, at p. 498.

23- *McFadden v. Blue Star Line* [1905] 1 K.B. 697. CHANNELL J. at p 705 "An intention to exclude the warranty must be indicated by express words, and there are no such express words here". *Paterson Zochonis and Company, Limited v. Elder Dempster and Company, Limited, and Others.* [1923] 1 K.B. 420.

24- *Master and Owners of SS. "City of Lincoln" v. Smith* [1904] A.C. 250. *Virginia Carolina Chemical Co. v. Norfolk and North American Steam Shipping Co.* [1912] 1 K. B. at p. 240. *Nelson Line (Liverpool), Limited v. James Nelson & Sons, Limited,* [1908] A. C. 16.

25- *Owners of Cargo on Board SS. Waikato v. New Zealand Shipping Company, Limited.* {1899} 1 Q.B. 56 see A. L. SMITH L.J.

otherwise any ambiguity will not be construed as protecting the shipowner and the clause will be of no use to him<sup>26</sup>. Secondly, where the exception clause is qualified, the carrier must show that he satisfied such qualification, i.e. if the clause specifies that the carrier should exercise all 'due care' to make sure that the ship is seaworthy in order to use the protection of the clause, then he must satisfy such qualification<sup>27</sup>. If the Harter Act, Hague/Hague Visby or Hamburg Rules, were incorporated into the carriage contract he (the carrier) must show that the ship was seaworthy or if it was not, he must show that he exercised due diligence to make her seaworthy<sup>28</sup> before being able to exempt liability.

a. Language of the Exemption Clause.

If the shipowner wanted to escape liability for the breach of his obligation, then the carriage contract must contain a clear and unambiguous exemption clause, which an ordinary man can understand without difficulty, Bigham J. stated<sup>29</sup>:

"The common law obligation of a shipowner is to provide a ship reasonably fit to carry the cargo that is shipped upon it. If a shipowner desires to avoid this responsibility he must, I think, use very plain and distinct words to give notice of his intention to get out of this obligation."

For example, in *Owners of Cargo on Board SS. Waikato*<sup>30</sup> the exemption contained *inter alia* "loss or damage arising from accidents to or defects latent on beginning voyage or otherwise, or to hull, tackle, boilers, or machinery, or their appurtenances". The shipowner contended that the clause protected him from the liability for the patent defects that exists at the beginning of the voyage. Bigham J. in his judgment stated, "That is, he contends, the effect of the words 'or otherwise' in the bill of lading. I do not

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26- *Elderslie Steamship Company, Limited v. Borthwick*, [1905] A. C. 93 see Lord Macnaghten at p. 96. *Ingram & Royle, Limited v. Services Maritimes du Tréport, Limited* [1914] 1 K.B. 541. *Rathbone Brothers & Co. v. D. Maciver, Sons & Co.* [1903] 2 K.B. 378.

27- *Master and Owners of SS. "City of Lincoln" v. Smith* [1904] A.C. 250 see Beaumont J. at p. 251. *Atlantic Shipping & Trading Company v. Louis Dreyfus & Co.* (1922) 10 Ll. L. Rep. 707. In *The Cargo Ex Laertes*. (1887) LR 12 P.D. 187 the case was a salvage one and seaworthiness was not an issue there but the court found that the ship was unseaworthy but the shipowner did exercise due care in providing a seaworthy ship but the unseaworthiness was a result of a latent defect, which was not discoverable by a reasonable care and the shipowner could claim protection.

28- *Moore and Another v. Lunn and Others*, (1922) 11 Ll. L. Rep. 86. See Mr. Justice BAILHACHE at p. 93.

29- *Owners of Cargo on Board SS. Waikato v. New Zealand Shipping Company, Limited*, [1898] 1 Q.B. 645, at 647.

30- *Owners of Cargo on Board SS. Waikato v. New Zealand Shipping Company, Limited*, *ibid*.

think that those words would convey that idea to the mind of any ordinary person reading this clause, and I think that if they were intended to convey that idea they were not at all apt for that purpose. The shipowner must use language very different to this: he must use very plain and simple words, if he wishes to tell the cargo-owner that he must insure against damage arising from every sort of defect, whether patent or latent, and whether existing at the beginning of the voyage or arising during the course of it”<sup>31</sup>.

Consequently, the carrier cannot seek protection from an ambiguous clause, because if the court is in doubt, with regard to what the parties intended from it, it will not interpret the exemption clause for his benefit. Therefore, if the shipowner wants to benefit from such clauses he should use language which, if read by the ordinary man, would straight away bring to his mind the notion that the carrier is not liable for the breach of his obligation to provide a seaworthy vessel.

#### b. Qualified Exclusion Clause

Certain exemption clauses might be qualified; this would mean that the carrier will not be able to use it unless he satisfies the condition in the clause. The exemption from the seaworthiness obligation is no exception.

For example in *Minster of Materials v. Wold Steamship Company, Ltd*<sup>32</sup>, the charterparty contained, *inter alia*, the following:

“The said steamship being warranted as above described, and now tight, staunch, and strong and in every way fitted for the voyage, and so to be maintained while under this charter.

The act of God, perils of the sea . . . stranding, and other accidents of navigation excepted . . . Ship not answerable for losses, through . . . any latent defect in the machinery or hull not resulting from want of due diligence by the owners . . . or by the ship's husband or manager. “

Here, the exclusion from liability clause stated that the carrier is protected against any damage or loss resulted from any latent defect provided there was no want of due

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31- Owners of Cargo on Board SS. Waikato v. New Zealand Shipping Company, Limited, *ibid.* and in the same case in the Court of Appeal Collins L.J. said: "I am not sure myself that the shipowners did not really mean to cover by the exception all defects at the beginning of the voyage, whether latent or patent. I am inclined to think that they probably did mean to do so. But they are the persons setting up the exception, and who have to make out their exemption. I do not think they can sustain that onus, unless by unambiguous language they have excluded the liability which would *primâ facie* rest upon them. I think that the language used in this case is far too ambiguous for that purpose". [1899] 1 Q. B. at p. 58. See also Vaughan Williams L.J. in *Rathbone Brothers & Co. v. McIver, Sons & Co.* [1903] 2 K. B. 378.

32- *Minister of Materials v. Wold Steamship Company, Ltd.* [1952] 1 Lloyd's Rep. 485.

diligence on his part, or his servants or agents. Therefore, if the loss results from such latent defect, if the carrier proves that the vessel was seaworthy or that he exercised due diligence to make her so then he has discharged his obligation and can use the protection. But if he cannot satisfy this condition he will not be protected against such loss or damage<sup>33</sup>.

*6- The exclusion clause and Hague/Hague-Visby and Hamburg Rules*

The Hague/Hague-Visby position on exclusion clauses can be found in Article III r1 and 8 and IV r. 1 and 2. The carrier's obligation to exercise due diligence to make the vessel seaworthy under Art III r1 is an overriding obligation, which means that the carrier should satisfy its requirements before using the protections of Art IV r2<sup>34</sup>. Also, Art IV r1 make the carrier responsible for any damage or loss caused by the want of due diligence on the part of the carrier. Furthermore, Art III r8 provides:

“Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.”

In the light of the above the carrier will not be able to exempt himself if the loss or damage resulted from his failure to exercise due diligence to make the vessel seaworthy. Moreover, if the contract of carriage to which the Rules apply contains any clause or agreement to reduce or relieve the carrier for loss or damage resulting from his failure to comply with his duties and obligations, e.g. exercise due diligence, then such a clause would be null and void. Consequently, any clause trying to exempt the carrier from liability would be qualified by the requirement of Art III r8 in a similar fashion to the case of conflict between a statutory instrument and an exemption clause.

The same situation could arise if the parties to a charterparty choose to include into their contract a clause paramount, incorporating the Hague/Hague-Visby Rules into their

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33- Minister of Materials v. Wold Steamship Company, Ltd, *ibid*, p. 485-486. Tynedale Steam Shipping Company, Ltd. v. Anglo-Soviet Shipping Company, Ltd. (1936) 54 Ll. L. Rep. 341. Rathbone Brothers & Co. v. D. Maciver, Sons & Co. [1903] 2 K.B. 378. Borthwick v. Elderslie Steamship Company, [1904] 1 K.B. 319.

34\_ Maxine Footwear Co. Ltd. and Another. Appellants; v. Canadian Government Merchant Marine Ltd. Respondents, [1959] A.C. 589.

charterparty<sup>35</sup> which simultaneously contains an unqualified clause exempting the carrier from loss or damage resulting from unseaworthiness or the failure of the carrier to exercise due diligence. In this case the court, in order to solve such issue, should look at the contract as a whole to interpret the parties' intention and if the exclusion clause was in conflict with Art III r8 then such a clause would be void if there was want of due diligence on the part of the carrier. This is because Article III r8 prevents the parties from contracting out of the rules if such covenant resulted in reducing the carrier's duties and obligations. Again the approach would be similar to the case of conflict between statutory instrument and an exclusion clause.

On the other hand, the Hamburg Rules, in Art 5 r.1 make the carrier liable for any loss or damage to the cargo unless he proves that he took all reasonable measures that can be taken to prevent the occurrence that caused the loss or damage and its consequences. Article 5 r.4 a(i, ii) states that if the aggrieved party could prove that a fire was caused by the carriers fault or negligence, or that of his agents or servants, or that he, his agents or servants, did not take all measures that could be possibly taken to put out the fire or reduce its consequences then the carrier will be responsible. This means that the carrier cannot exempt himself from liability unless he proves that he exercised due diligence. Furthermore, Art 6.4<sup>36</sup> allows the parties to increase the limits of liability over the stated limits provided by the Rules provided they are fixed, but it does not deal with reducing such limits which means that this is not allowed.

### **- Conclusion**

The parties to a contract of carriage can incorporate into the contract a clause which exempts the carrier from liability for breach of their obligation to provide a seaworthy vessel. However, in order for this clause to achieve its intended purpose the language used in its construction must be clear and unambiguous, i.e. it should clearly state that it intends to protect the carrier from liability for any loss or damage resulting from a

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35\_ See Lyric Shipping Inc. v. Intermetals Ltd. and Another, (The Al Taha), [1990] 2 Lloyd's Rep. 117 and Adamastos Shipping v. Anglo-Saxon Petroleum, [1959] A.C. 133, for the effect of such incorporation

36- Hamburg Rules Art 6 r.4 provides:

"By agreement between the carrier and the shipper, limits of liability exceeding those provided for in paragraph 1 may be fixed."

breach of the obligation to provide a seaworthy vessel. But the carrier cannot exempt himself from the exercise of the obligation to provide a seaworthy vessel, whether it was an absolute obligation or an obligation to exercise due diligence; this is because the carrier's obligation to provide a seaworthy vessel is an overriding one<sup>37</sup>. In addition if the carrier was allowed to exempt himself from exercising his obligation to provide a seaworthy vessel the whole purpose of contract of carriage, i.e. to deliver the vessel safely to its destination, will be lost as an unseaworthy vessel will not be able to deliver the cargo to its destination.

### ***-Limitation of Liability***

In addition to the exclusion clause which can protect the carrier from liability should the vessel turn out to be unseaworthy, the parties to a contract of carriage can include within their contract a clause which limits the carrier's liability should there be damage or loss resulting from the carrier's acts or omission; including the failure to exercise due diligence or make the vessel seaworthy, while the cargo is in his care. However in order to ensure that such limitation of liability is going to work, clear and unambiguous language should be used to exempt the carrier's liability, especially when the carrier's obligation of due diligence is implied.

The situation under Hague/Hague-Visby and Hamburg Rules is different, because the parties to a contract subject to these Rules are not allowed to contract out of them if such an agreement would lead to the reduction of the carrier's duties or obligations, and such an agreement would be null and void. Therefore, if the contract, subject to the Rules, included a clause exempting the carrier from the results of failure to exercise due diligence then such a term would be void in accordance with Art III r8 of Hague/Hague-Visby Rules and Article 6.4 of Hamburg Rules.

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37- Maxine Footwear Co. Ltd. and Another. Appellants; v. Canadian Government Merchant Marine Ltd. Respondents. [1959] A.C. 589.

*1- Loss or damage caused by the carrier*

Under common law the parties to a contract of carriage can agree on the limits to which the carrier is going to be liable to pay to the cargo-owner/charterer for any loss or damage they have suffered as a result of the carrier's breach of his obligations and duties in general and his duty provide a seaworthy vessel in particular.

However the situation is different under the international conventions covering this area of law, i.e. Hague/Hague-Visby and Hamburg Rules.

Article IV r 5 of the Hague Rules states:

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connexion with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

Under this article the carrier can limit his liability to the amount mentioned in the Article, or they can agree to increase the limit but they cannot decrease it below the limit decided by the convention. But due to the development of the shipping industry and the wide usage of containers, a change to the Hague Rules was imminent. The Hague-Visby Rules were introduced and amended some of the Articles in Hague Rules, one of these being Art IV r5. The changes read as follows:

5. (a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

(b) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged.

The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

(c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed

the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.

(d) The unit of account mentioned in this Article is the special drawing right as defined by the International Monetary Fund. The amounts mentioned in sub-paragraph (a) of this paragraph shall be converted into national currency on the basis of the value of that currency on a date to be determined by the law of the Court seized of the case.

(e) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

(f) The declaration mentioned in sub-paragraph (a) of this paragraph, if embodied in the bill of lading, shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

(g) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph.

(h) Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading.

Under the changes three different types of compensation were introduced depending on the type of the cargo carrier, so now there are package or unit limits besides limit per weight of the cargo. Another change addresses the issue of compensation in instances of loss or damage to cargo loaded in containers, so if the bill of lading enumerated how many packages are packed inside the container then this number will be considered when deciding the responsibility of the carrier. Also if the cargo-owner declared the real value of the cargo then this will be considered as *prima facie* evidence of the value but it is not conclusive, unless if the bill of lading has been transferred to a third party acting in good faith. One of the most important introductions is Art IV r5(e) under which the carrier will not be able to limit his liability if the damage or loss resulted from an act or omission of the carrier done with intention to cause damage or loss or done recklessly with the knowledge that it may cause loss or damage.

Art IV r 5(e) can be considered relevant in a case of unseaworthiness if the carrier was reckless in maintaining his vessel and expected that she might be unseaworthy, yet sent her to sea. In this case he probably expected that such unseaworthiness may cause loss or damage to the cargo but he turned a blind eye and ignored the problem. This means that by doing this the carrier did not act as a prudent person who will not consider it acceptable to send his vessel in such a condition. Consequently, by virtue of this article, the carrier will not be able to limit his liability if he knew that his vessel was unseaworthy but did not act on this. It is also the duty of the carrier to prove that he

exercised due diligence to make the vessel seaworthy in order to be able to limit his liability.

On the other hand Art 6 and 8 of the Hamburg Rules deals with limitation of liability.

Article 6 provides

1. (a) The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher.
- (b) The liability of the carrier for delay in delivery according to the provisions of article 5 is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea.
- (c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.
2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 (a) of this article, the following rules apply:
  - (a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.
  - (b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit.

And Art 8 provides:

1. The carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.
2. Notwithstanding the provisions of paragraph 2 of article 7, a servant or agent of the carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

These two articles are very similar to Art IV r5 of Hague-Visby Rules. In particular Art 8 r1 of Hamburg Rules has close parallels with Art IV r.5 (e) of Hague/Hague-Visby Rules.

By looking at the above articles we can see that, beside the fact that the carrier cannot exclude himself from liability for the breach of his obligation to exercise due diligence to make the vessel seaworthy, Art III r8 of Hague/Hague-Visby clearly states

that the carrier cannot lessen or exempt himself from liability for any loss or damage resulting from his fault, negligent or failure. This means that the carrier cannot relieve himself from liability if he fails to exercise due diligence to make the vessel seaworthy. The Hamburg Rules do not contain such article, except that Art 6 deals with increasing the limits but says nothing about decreasing it, thus giving the impression that the parties are not allowed to decrease it, but the language of Article 5 r1 gives the impression that the only case where the carrier can exempt himself from liability is when he proves that he, his servants or agents, took all measures that could reasonably be taken to avoid the occurrence and its consequences. Furthermore, the carrier will not be able to limit his liability to the amount mentioned in Art IV r5 of the Hague-Visby Rules and Art 6 of the Hamburg Rules if the loss or damage results from an act or omission of the carrier, his servants or agents, if it is done with intention to cause damage or loss or recklessly with knowledge that loss or damage will probably occur because of his act or omission; in this case it is his failure to exercise due diligence.

A point worth mentioning here is that if the loss or damage resulted from several causes, each of which was an effective/operative cause the carrier can limit his liability to the amount to which his action or omission contributed to the loss or damage<sup>38</sup>. The CMI's new draft on Transport Law has dealt with this situation and provides for a similar Article to the one in Hamburg Rules. Art 17 r4 provides:

“4. When the carrier is relieved of part of its liability pursuant to the previous paragraphs of this article, then the carrier is liable only for that part of the loss, damage, or delay that is attributable to the event or occurrence for which it is liable under the previous paragraphs, and liability must be apportioned on the basis established in the previous paragraphs.”<sup>39</sup>

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38- Art 5 r7 of Hamburg Rules provide: “Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery, the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto. The *Sivand*, [1998] 2 Lloyd's Rep. 97. The *Kapitan Sakharov*, [2000] 2 Lloyd's Rep. 255. The Hague/Hague-Visby Rules do not provide such article but the courts followed the approach of Hamburg Rules even before it was introduced.

39- United Nations Commission on International Trade Law, Working Group III (Transport Law), Sixteenth session, Vienna, 28 November-9 December 2005. Doc A/CN.9/WG.III/WP.56.

Finally, it is worth mentioning that Article VIII of the Hague/Hague-Visby Rules<sup>40</sup> and Article 25 (1)<sup>41</sup> of the Hamburg Rules do not affect rights and obligations of the carrier under any international or national rules and regulations relating to the limitation of liability. Which means that the carrier can benefit from the rights and obligations stated in the International Convention on Limitation of Liability for Maritime Claims (1976). By virtue of Article VIII of Hague/Hague-Visby Rules and Art 25(1) of Hamburg Rules the carrier can limit his liability further, if both parties agree to such a thing. The further limitation of the carrier duty should not contradict with Article III r8, as the language of Article VIII does state that *'the provisions of these Rules shall not affect the rights and obligations...'*. The incorporation of the 1976 Limitation Convention will not only affect the rights and obligations of the carrier but also his Insurers as Article 1 (6) of the 1976 Conventions states:

“An insurer of liability for claims subject to limitation in accordance with the rules of this Convention shall be entitled to the benefits of this Convention to the same extent as the assured himself.”

This means if the carrier was entitled to limit under this convention their insurers will be able to do that too, but at the same time if the carrier was not entitled to limit their liability under the convention then their insurers will not be able to do that either should a claim for compensation be raised by a third party. This contradicts with the insurer's rights. For example under s 39 of the Marine Insurance Act 1906 (MIA) the insurer will not be liable towards the carrier if the vessel was not seaworthy, giving a protection which the insurer can enjoy. However if the 1976 convention is going to apply to a claim the insurers may be stripped of enjoying such protection<sup>42</sup>.

## 2- *Loss or Damage due to the Shipper's Fault*

The shipowner could exempt himself from liability if he could prove that the loss or damage resulted from the fault or negligence of the shipper/cargo-owner in packing the cargo or in loading and stowing it, if the shipper/cargo-owner were responsible for the

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40- Article VIII “The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.”

41- Article 25(1) “This Convention does not modify the rights or duties of the carrier, the actual carrier and their servants and agents provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships.”

42- For Further details see Griggs and Williams, *Limitation of Liability for Maritime Claims*, 4th Ed, at p. 15-16.

loading and stowing operations. In this case, even if the vessel was unseaworthy and the carrier could prove that the loss or damage would have occurred even if the vessel were not unseaworthy, then he can exempt himself from responsibility.

In a recent case, the *Jordan II*<sup>43</sup>, a cargo of Steel Coils was loaded on board the vessel, and the loading, stowing and discharging operations were transferred to the cargo-owner in accordance with clause 17 of the charterparty. On delivery it was discovered that the cargo was damaged due either to rough handling while loading/unloading or due to failure to provide dunnage, failure to secure the coils and or stacking them so that the bottom layers were excessively compressed. All these operations were carried out by the cargo-owners/charterers. The House of Lords, affirming the decisions of the courts below, was of the opinion that the carrier would not be responsible for damage to the cargo resulted from loading/discharging or stowing carried out by cargo-owner/shipper/charterer unless the damage resulted from want of the carrier's duty of care to the cargo mentioned in the Hague/Hague Visby Rules Art III r 2 or if the loss or damage was a result of an act or omission of the carrier, his servants or agents according to Art 5 r 1 and 4 of the Hamburg Rules.

However, even if the loading, stowing and unloading was the responsibility of the cargo owner such operation should be carried out under the supervision of the master in order to assess whether or not it is done in a way that affects the vessel seaworthiness. So if the loading or stowing was done so badly that it affected the vessel's seaworthiness and the master did not take any action to stop it then the carrier will be responsible for such unseaworthiness.

For example in *The Cienhocinek*<sup>44</sup>, the vessel was voyage chartered to carry a cargo of potatoes from Alexandria to Boston. One of the clauses in the charterparty provided that the cargo-owner would take responsibility for loading and stowing under the supervision of the master. The cargo-owner's brother insisted that the cargo should be stowed in certain way. On arrival at Boston some of the cargo was found to be damaged,

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43- *Jindal Iron and Steel Co. Ltd. and Others v. Islamic Solidarity Shipping Co. Jordan Inc.*, (The *Jordan II*), [2005] 1 Lloyd's Rep.

57. *Renton (G. H.) & Co. v. Palmyra Trading Corporation (The Caspiana)*, [1956] 2 Lloyd's Rep. 379; [1957] A.C. 149

44- *Ismail v. Polish Ocean Lines, (The Cienhocinek)*, [1975] 2 Lloyd's Rep. 170.

partly due to improper stowage and partly to inherent vice. The court was of the opinion that although the cargo-owners were to give instructions on how to stow the cargo, this should only have been done under the supervision of the master in order to ensure that the stowage did not affect the safety of the cargo or the vessel, Mr. Justice Kerr stated<sup>45</sup>:

“On its true construction cl. 49 does not relieve the owners from their ordinary responsibility for safe stowage which, in the absence of any contrary provision, arises both at common law and in this case also under art. III r. 2 of the Hague Rules. On the contrary, cl. 49 expressly makes it clear, as it says, that dunnaging and stowage is to be executed under the supervision of the master and that he is to remain responsible for proper stowage and dunnaging. .... It follows that effect can easily be given to the first limb of the clause by confining it to cases in which any instructions which may be given do not endanger the safe stowage of the cargo. The second limb of the clause in my view then makes it perfectly clear that responsibility for safe stowage remains the responsibility of the master notwithstanding any instructions which may be given under the first limb.”

### **- Conclusion**

If the carrier was in breach of his obligation to provide a seaworthy vessel or exercise due diligence to make the vessel seaworthy and the unseaworthiness was the/a cause of loss or damage suffered by the charterer/shipper, then the carrier should take responsibility for his breach of obligations. And he should be responsible for compensating the aggrieved party. Yet, if the contract of carriage, especially under common law, contained a clause that clearly exempted the carrier from liability for breach of his obligation then he will be able to escape liability, but under the Hague/Hague-Visby and Hamburg Rules this would not be possible. And it is not felt that the carrier should benefit from limitation of liability or exemption from liability, where common law applies, or when he is in breach of one of his main obligations as the legacy to the shipping industry can be negative.

In *Kish v. Taylor*<sup>46</sup>, the charterers failed to load a full cargo as required by the charter so the master had to go to another port to take on more cargo. As a result the vessel was overloaded and became unseaworthy and had to deviate from her course for repairs after which she continued her journey safely. The shipowners, by virtue of the charterparty,

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45- The *Ciechocinek*, *ibid*, at p.185-6. However, on Appeal by the owner the court held that the carrier was not responsible for the damage, and he could use Art IV r 2(i) where the damage results from the fault or actions of the cargo -owner/shipper. But even if they were responsible there was an estoppel by conduct because the cargo-owner's brother had given instruction that there was no need to dunnage, therefore, the master did not need to do that. [1976] 1 Lloyd's Rep. 489 at p. 495, 498, 500.

46- *J. & E. Kish v. Charles Taylor, Sons & Co*, [1912] A.C. 604.

were allowed a lien over the cargo for dead freight and the charterers sued them, contending that the shipowner was in breach of his obligation to provide a seaworthy vessel and that the shipowner could not take advantage of his own error. The court refused this contention because the reason for taking on more cargo was the failure of the charterers to provide full cargo. In this case, had the charterer not failed to provide the cargo the shipowner would not have been able to take advantage of the lien<sup>47</sup>.

Consequently, if the carrier can prove that he exercised due diligence to make the vessel seaworthy or prove that the vessel was seaworthy then he will be able to escape liability but if he cannot prove this then he will be liable to pay compensation to the cargo-owner/charterer, or still more, the charterer/cargo-owner will be able to terminate the contract of carriage when unseaworthiness goes to the root of the contract to the extent that it deprives the charterer/shipper substantially from the whole benefit of the contract of carriage, i.e. the service of the vessel.

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47- *Kish v. Taylor*, *ibid*, Lord Atkinson stated: "To permit a wrong-doer to recover contribution in such a case would indeed be to permit him to take advantage of his own wrong, for his wrong-doing necessitated the sacrifice out of which his claim for contribution would spring. The present case is wholly different. Here the claim of the appellants arose before they were in default at all. It does not spring from their default; it is entirely independent of their default. It springs, on the contrary, from the respondents' default. And the contract of the parties provides a specific and particular method, a lien, by which it may be enforced. It is, in truth, the respondents, not the appellants, who seek to take advantage of the appellants' wrong in order to deprive the appellants of a right which the respondents' wrong gave to them.", at p.620-1.

**Chapter Five**  
**Effect of ISM and ISPS Code**  
**on Seaworthiness**

- ***Introduction***

The Law on the Carriage of Goods by Sea has been in place for a long time, starting from Rules based on customs, precedents and best practice in the industry, i.e. Common Law then developing to meet the different needs of the industry, i.e. the Harter Act, followed by the Hague-Hague-Visby Rules then Hamburg Rules. Law in general is dynamic, which means that it should be flexible and able to develop according to industry needs, and the Law on the Carriage of Goods by Sea is no exception this principle. The Harter Act and the two sets of Rules are good examples of this.

The Marine Industry has witnessed several developments since the end of the twentieth century starting with the introduction of the International Safety Management Code (ISM); the first stage of its application was July 1998 then the second stage followed in July 2002. The second development came as a result of the September 2001 attacks on the World Trade Centres in the USA. This resulted in the introduction of the International Ship and Port Facility Security Code (ISPS). Both of these Codes introduced certain measures to improve safety and security on board the vessel and at ports.

As these two Codes can directly or indirectly affect the carrier's obligation to provide a seaworthy vessel it would be reasonable to consider the sections of the Codes which affect or help the carrier in complying with his obligation.

## Potential legal implications of the ISM Code on the issue of Seaworthiness

The International Safety Management Code (ISM) is one of the recent developments in the Maritime Industry, in spite of the fact that it has been in enforcement since 1998<sup>1</sup>; there are no authorities as such which focus on the relation between the ISM Code and Seaworthiness. Therefore, all that is written in this area are personal opinions which might be right or wrong, however, history proves that judges often scrutinise the views of scholars in order to reach their binding decisions.

### *- Background of the Code*

The increase in maritime accidents resulting in massive loss of life and loss of property (ships and cargo) put the Maritime Industry under pressure to minimise such losses, especially since the increase in maritime accidents could lead to a boost in litigations, insurance claims and premiums and, eventually, freight rates.

The rise in marine incidents led to extensive research funded by governments<sup>2</sup> or NGOs<sup>3</sup>, in order to find a solution for the problem. All these reports came to the same conclusion: that the majority of marine accidents, directly or indirectly, were due to a human error<sup>4</sup>. Consequently, it was of very great importance, in order to reduce marine incidents, to reduce the risk of human error by introducing an appropriate safety system.

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1 - The ISM Code was enforced in two stages, the first one started in July 1998 and the second stage was in July 2002.

2- The UK Department of Transport, in 1988, funded research carried out by Tavistock Institution. This research resulted in the report "The Human Element in Shipping Casualties"<sup>2</sup> (HMSO, London, 1988) ISBN 0 11 551004 4. This report was then taken to the IMO. In 1992 the House of Lords select committee on Science and Technology, chaired by Lord Carver, issued a report on the "Safety Aspects of Ship Design and Technology" House of Lord Session 1991 -92, HL Paper 30-II and HL Paper 75.

3- In 1991 the United Kingdom P&I Club, Mutual Steamship Assurance Association (Bermuda) Limited, issued its first "Analysis of Major Claims"

4- "While statistical analyses suggest that around 80% of all shipping accidents are caused by human error, the underlying truth is that the act or omission of a human being plays some part in virtually every accident, including those where structural or equipment failure may be the immediate cause" Guidelines on the application of the IMO International Safety Management Code. Published by The International Shipping Federation (ISF) and International Chamber of Shipping (ICS), 1994. Philip Anderson, ISM Code. P.15.

In order to achieve that, the UK delegate, in the 57<sup>th</sup> session of the IMO, in 1989<sup>5</sup>, tried unsuccessfully to pass the draft guidelines contained in MSC 56/WP.4. However, these were adopted by the 16<sup>th</sup> Assembly in October 1989 as resolution A.647 (16) which henceforth became known as the ISM Code. This included the main principles of the Merchant Shipping Regulations. Then the ISM Code was finally adopted by resolution A.741(18) in 1993. Thereafter, it was incorporated, on 19 May 1994, into the SOLAS Convention 1974, as chapter IX entitled: “Management for the Safe Operation of Ships”. The IMO made the Code applicable over two phases in July 1998 and July 2002<sup>6</sup>. Afterwards, the IMO issued “Guidelines for the Implementation of the ISM Code by Administration” which were adopted by the 19<sup>th</sup> IMO Assembly in 23<sup>rd</sup> Nov 1995<sup>7</sup>.

The ISM Code was made part of the SOLAS Convention for two reasons<sup>8</sup>:

- SOLAS was adopted and ratified by the majority of the world’s flag states, which constitute about 96% of the world’s tonnage.
- The Code would be implemented as part of the SOLAS Convention and become mandatory for all contracting states according to the SOLAS tacit acceptance procedures unless an express reservation is made by a contracting state.

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5- The efforts to find a solution to this problem started before the idea of ISM Code. It began in July 1986, after the loss of MV Grainville, where the British government issued M Notice 1188 followed by M Notice 1424 in 1990 entitled “Good Ship Management”. The latter was followed by the ISF & ICS publication of “Code of Good Management and Practice in Safe Ship Operation”. Also after the Loss of MV Herald of Free Enterprise in 1987 the Merchant Shipping (Operations Book) Regulations was introduced in 1988 by the UK Government. The Book basically contains instructions on safe and efficient ship operation and it mentions the appointment of a designated person to supervise the proper application of the regulations. Further, in 1988 M Notice 1353 was issued to give guidelines on how to comply with the regulations. Sited in ISM Code a Practical Guide to the Legal and Insurance Implications by Philip Anderson, 1998, LLP. Page 15-16.

6- The Code was made mandatory to passenger ships, oil tankers, chemical tankers, gas carriers, bulk carriers, and cargo high speed craft of 500 gross tonnage and upwards by no later than 1st July 1998. And for other cargo ships and mobile offshore drilling units of 500 gross tonnage and upwards by no later than 1st July 2002. However, the EU made the Code application to ro-ro passenger vessels travelling between ports of the EU from 1 July 1996.

7- More details on this can be found in Philip Anderson, The ISM Code, *supra*, p 15-17.

8- Warranties in Marine Insurance, Baris Soyer, 2001, Cavendish Publishing Limited, p. 121. IMO’s International Safety Management Code (The ISM Code), by Captain Terry Ogg, International Journal of Shipping Law, 1996, p. 143.

**- Objectives of the code**

The ISM, as its preamble states, aims to provide “an international standard for the safe management and operation of ships and for pollution prevention”<sup>9</sup>.

The essential target of the code is the elimination of human error, as this is a major cause of marine accidents. Therefore, if the proper application of the Code led to the elimination of repeated occurrences of human error, this, in essence, should raise the international shipping standards and, consequently, raise the safety at sea and pollution protection objectives of the code as stated in section 1.2 of the ISM Code:

“1.2.1 The objectives of the Code are to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment, in particular, to the marine environment, and to property.

1.2.2 Safety management objectives of the Company should, inter alia:

1. provide for safe practices in ship operation and a safe working environment;
2. establish safeguards against all identified risks; and
3. continuously improve safety management skills of personnel ashore and aboard ships, including preparing for emergencies related both to safety and environmental protection.

1.2.3 The safety and management system should ensure:

1. compliance with mandatory rules and regulations; and
2. that applicable codes, guidelines and standards recommended by the Organization, Administrations, classification societies and maritime industry organizations are taken.”

Lord Donaldson of Lynton, summarised the purpose of the Code by stating the code’s intention:

“In the short and medium term it is designated to discover and eliminate sub-standard ships, together with sub-standard owners and managers, not to mention many others who contribute to their survival and, in some cases, prosperity. In the longer term its destination is to discover new and improved methods of ship operation, management and regulation which will produce a safety record more akin to that of the aviation industry. But as I readily admit, that is very much for the future”<sup>10</sup>.

If one reviews the definition of Seaworthiness, provided in chapter 2 of this study:

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9- The Preamble of the Code provides as following: “1. The purpose of this Code is to provide an international standard for the safe management and operation of ships and for pollution prevention” Dr Aleka Manadaraka-Sheppard, stated: “[t]he purpose of the Code is to ensure safe practices in ship operation, to safeguard against identified risks, to improve safety-management skills of personnel and thus achieve a substantial decrease in, or even eliminate of substandard and dangerous ships”, *The International Safety Management Code in Perspective*, P&I International, June 1996, P 107.

10- Lord Donaldson of Lynton, *The ISM Code: the road to discovery?*, *Lloyd’s Maritime and Commercial Law Quarterly*, 1998, (4) Nov 526. p527. the ISF & ICS, in its “Guidelines on the application of the IMO International safety Management Code”, commented on the advantage of establishing a SMS “ A structural safety management system enables a company to focus on the enhancement of safe practice in ship operations and in emergency preparedness. A company that succeeds in developing and implementing an appropriate SMS should therefore expect to experience a reduction in incidents which may cause harm to people, damage to the environment, or damage to property....” p.3.

*Seaworthiness is the fitness of the vessel in all respects, to encounter the ordinary perils of the voyage, and deliver its cargo safely.*

And if one considers the definition of Due Diligence provided in chapter 3:

*Due Diligence is the efforts of the prudent carrier to take all reasonable measures that can be possibly taken, in the light of available knowledge and means at the relevant time, before and the beginning of the journey<sup>11</sup>, to fulfil his obligation to provide a seaworthy vessel.*

One can then compare the definition of Seaworthiness with the Objectives of the Code mentioned in section 1.2.1 and see that both aim to achieve the same purpose, i.e. increasing safety at sea in order to reduce damage or loss of the cargo or other property, and reduce human losses and injuries. The Code further aims at preventing Marine Pollution, which in a way could result from the lack of seaworthiness.

Also, when the definition of Due Diligence is compared to the methods the ISM Code employs to achieve its objective great similarities can indeed be seen. Due Diligence requires the carrier to take all reasonable means and measures in the light of the available knowledge in order to provide a seaworthy vessel. The Code in fact states those reasonable means, i.e. creating safe practice on board the vessel and ensuring that the crew are prepared to face emergencies; this would mean that the crew should be competent, trained, and provided with all necessary information to be able to carry out their duties. It also requires the carrier/shipping company to identify all the risks their vessels may encounter and ensure that it is prepared for them. Furthermore the Code provides the means and methods that should be followed in order to comply with its requirements.

In a nutshell, the ISM Code aims to increase the shipping standards in order to create safer shipping environment and eventually to reduce maritime accidents. This should benefit all parties to any shipping transaction as we will see below. Seaworthiness in essence aims to achieve the same goal.

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<sup>11</sup> - It has to be said that if the UNCITRAL draft on Carriage of Goods were passed and became a convention then the relevant time would extend to cover the whole journey. A full section will follow with regard to this draft.

**- ISM Code and Seaworthiness**

The ISM Code was incorporated into the Safety of Life at Sea convention, rather than to the Hague/Hague-Visby or the Hamburg Rules for the above mentioned reasons. This might give the idea that the code has nothing to do with the issue of seaworthiness. But this is not the case as all maritime conventions are linked to one another in one way or another. Furthermore, as the ISM Code sets the minimum standards required to eliminate human error, it can therefore be considered as a frame work to set high standards of seaworthiness. In other words, we can say that a prudent ship owner would follow the ISM Code in order to provide a seaworthy vessel<sup>12</sup>. Consequently, the ISM Code can be considered a framework for a good practice to provide a seaworthy vessel.

Moreover, the ISM Code did not introduce revolutionary ideas; to the contrary, the Code emphasised the existing good practice carried out by prudent shipowners, i.e. keeping up to date charts, carrying out regular maintenance, thus, the Code highlights good practice in the industry and asks all the companies/shipowners to follow it<sup>13</sup>. That is why the code requires each owner/shipping company to set their own Safety Management System which on the one hand complies, with the requirement of the Code, and on the other, reflects the good practice in the type of trade the vessel is involved with.

Taking into account what was mentioned above and compared with the duty of the carrier to exercise due diligence to provide seaworthy vessel a clear resemblance can be seen between the requirement of the Code and the requirement of seaworthiness.

From all the authorities on the issue of seaworthiness it is evident that the shipowner's duty to provide a seaworthy vessel is a relative one, i.e. it is relative to the

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12- In the *Eurasian Dream*, [2002] 1 Lloyd's Rep. 719, Captain Haakansson, as an expert in the case, said that:

“... the ISM Code... is a framework upon which good practices should be hung. Even for companies - or for that matter vessels - who have waited until the last minute to apply for certification the principles are so general and good that a prudent manager/master could very well organize their companies/vessels work following those (at present) guidelines - unless hindered to do so by other instructions that has yet not been withdrawn”, p.143.

13- The ISM Code did not provide certain practises and ask all the shipping companies to follow it. To the contrary, the Code used general principles and objective broad terms because the IMO took into account that not all shipping companies operate in the same way or have the same size or number of ships. This was clearly stated in the Code's preamble, paragraphs 4 and 5.

state of knowledge and the standards at the relevant time, and when assessing seaworthiness one has to consider what a prudent shipowner would have done had he been in the same situation and under the same conditions<sup>14</sup>.

And as the ISM Code takes into account the prevailing knowledge of the Shipping Industry, it can thus be said that complying with the requirement of the code can be considered as exercising due diligence to provide a seaworthy vessel, especially since the Code requires the shipping company to provide competent, qualified and trained crew to manage the vessel, to equip the vessel appropriately and to maintain the vessel and its equipment so it is able to perform its service properly. All these requirements can be seen as essential elements of seaworthiness; as provided by Article III of the Hague/Hague-Visby Rules<sup>15</sup>.

The International Shipping Federation & International Chamber of Shipping did realise that:

“experience from within the shipping industry and from other industries has shown that a company may benefit further (from applying a SMS) in terms of:

- An improvement in the safety consciousness and safety management skills of personnel;
- The establishment of a safety culture that encourages continuous improvement in safety and environment protection;
- Greater confidence on the part of clients; and
- Improved company morals;

There is some evidence to suggest that, over time, commercial benefits may also flow from the general benefits, including:

- Cost saving resulting from improved efficiency and productivity (such as through the minimisation of disruptions to the operation of the ship that may cause delay);
- Favourable insurance premiums relative to the market; and

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14- In *Bradley & Sons v. Federal Steam Navigation Co.*, (1927) 27 Li.L. Rep. 395. Viscount Sumner stated: “In the law of carriage by sea neither seaworthiness nor due diligence is absolute. Both are relative, among other things, to the state of knowledge and the standards prevailing at the material time.” P. 396.

15- ARTICLE III

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to-

- (a) Make the ship seaworthy.
- (b) Properly man, equip and supply the ship.
- (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

- The minimisation of exposure to claims in the event of a major marine disaster”<sup>16</sup>.

From the ISF & ICS findings it can be seen that proper application of the ISM Code would create safer shipping culture, as it eliminates careless shipping companies from the industry and only those companies which apply high shipping standards would be able to acquire the required Safety Management Certificates (SMC). That would mean, eventually, that the number of vessels sent to sea in an unseaworthy condition would be reduced if not eliminated, unless there is a latent defect that cannot be discovered without taking the vessel to a dry dock in order to investigate. However, the application of the Code was left entirely to the member states, which meant that the standards of applying the Code would vary. It would have been much better if the Code had been accompanied by a strict enforcement regime.

### **- ISM Code and burden of proof**

The existing law on the burden of proof, with regard to seaworthiness, is represented by Art IV (1) of the Hague/Hague-Visby Rules<sup>17</sup> and Article 5 of Hamburg Rules<sup>18</sup>. The

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16- Guidelines on the application of the IMO International Safety Management Code, *Ibid.*, p.4

17- ARTICLE IV

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

18- Article 5 of Hamburg Rules provides:

1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.
4. (a) The carrier is liable
  - (i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;
  - (ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.

burden of proof is divided into several stages, as explained by Mr. Justice Noel, in *the Farrandoc*<sup>19</sup>:

- The cargo owner has to prove the loss of or damage to the cargo.
- Then the shipowner/carrier has to explain the reason for the loss of or damage to the cargo;
- At the same time the shipowner/carrier can use the protection provided for in Art IV(2);
- Then the cargo owner has to prove another cause of loss, if he can; one of the reasons might be unseaworthiness of the vessel<sup>20</sup>;
- At this stage the shipowner/carrier needs to prove that either he provided a seaworthy vessel or that he exercised due diligence to provide one.

The situation is slightly different in the case of the Hamburg Rules as the carrier will be liable if there was loss, damage or delay unless he proves that he and his servants and agents took all reasonable measures to prevent the occurrence and its consequences. However, the situation differs where the loss or damage or delay was caused by fire. In this latter case it is the duty of the cargo-owner to prove that the fire was a fault on the

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19- *Robin Hood Flour Mills, Ltd. v. N. M. Paterson & Sons, Ltd., (The Farrandoc)*, [1967] 2 Lloyd's Rep. 276. p. 284, he stated "The cargo-owner must, firstly, prove damage or loss to his cargo and as the primary obligation of the owner of the vessel is to deliver to destination the goods of the plaintiff in like good order and condition as when shipped, once damage or loss of the goods so shipped is established, the owner of the vessel becomes prima facie liable to the cargo-owner for the damages. This liability is, however, subject to any exception clause contained in the bill of lading such as that the loss or damage arises or results from an 'act, neglect, or default . . . in the navigation or in the management of the ship'. If the shipowner establishes the cause of the damage or loss and that he falls within the conditions of the above exception, the owner of the cargo, in order to succeed, must then prove some other breach of the contract of carriage to which the exception clause provides no defence such as the unseaworthiness of the vessel, for instance, and then the owner of the ship may establish, that notwithstanding such unseaworthiness, he is still protected by the exception clause because (1) unseaworthiness does not give rise to a cause of action unless it consists of unfitness at the material time (which must be at the commencement of the voyage) and damage to the cargo must have been caused thereby and that such unseaworthiness occurred after the commencement of the voyage or it did not cause the loss or damage." *the Eurasian Dream*, [2002] 1 Lloyd's Rep. 719, p. 735

20- It is worth mentioning that in order for a claim of unseaworthiness to succeed, the cargo owner must prove that the vessel was unseaworthy before and at the beginning of the voyage, and that the unseaworthy condition of the vessel caused the loss. *Great China Metal Industries Co. Ltd. v. Malaysian International Shipping Corporation Berhad, (The Bunga Seroja)*, [1999] 1 Lloyd's Rep. 512, p. 527. *A. Meredith Jones & Co. Ltd. v. Vangemar Shipping Co. Ltd, (The Apostolis)*, [1997] 2 Lloyd's Rep. 241, p. 244 and 257. *The Toledo*, [1995] 1 Lloyd's Rep. 40, p. 50. In *the Eurasian Dream*, [2002] 1 Lloyd's Rep. 719, p. 735.

part of the carrier, his agents or servants or he has to prove that the carrier or his servants did not take all reasonable measures to put off the fire.

The order of proof in Hague/Hague-Visby Rules, which is already followed by the English and Commonwealth courts<sup>21</sup>, puts a significant burden on the part of the cargo-owner to prove the unseaworthiness of the vessel, considering that he does not have any cannot have and documents or evidence to support his case.

The ISM Code can solve this problem easily, as one of the main requirements of the ISM Code is the documenting every procedure, incident, or action taken on board or by the company. This was made clear in Sections 9 and 11 of the ISM Code<sup>22</sup>.

Furthermore, the Code requires the establishment of a system whereby every incident, hazardous situation, non-compliance or corrective action taken is reported<sup>23</sup> to the highest level of management via the Designated Person<sup>24</sup>. Hence, a documenting system is in place and the shipowner will be required to keep these documents and

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21- A similar order of proof is followed in different parts of the world.

22- Section 9 provides: Reports and Analysis of Non-Conformities, Accidents and Hazardous Occurrences.

“The SMS should include procedures ensuring that non-conformities, accidents and hazardous situations are reported to the company, investigated and are analysed with the objective of improving safety and pollution prevention. Procedures should be established for the implementation of corrective action.”

Section 11 provides:

11. DOCUMENTATION

11.1 The Company should establish and maintain procedures to control all documents and data which are relevant to the SMS.

11.2 The Company should ensure that:

valid documents are available at all relevant locations;

changes to documents are reviewed and approved by authorized personnel; and

obsolete documents are promptly removed.

11.3 The documents used to describe and implement the SMS may be referred to as the "Safety Management Manual".

Documentation should be kept in a form that the Company considers most effective. Each ship should carry on board all documentation relevant to that ship.

23- The Code requires, in Art 9, for the company to establish a system to report any incident, hazardous situation or non-conformity.

These should then be investigated and analysed in order to take the corrective action and implement it. Further, Art 12 of the Code requires the company to carry out regular verification, review, and evaluation of the SMS in order to see if it needs any changes.

And requires that all these actions to be documented and kept for future reference.

24- The code in section 4 requires every shipping company to appoint a designated person who has access to the highest level of management to report everything that happens on board to the management, in order to take the appropriate corrective action if one has not been taken already.

present them to the court if these documents can help his case or the claimant's case<sup>25</sup>. Once the documents are presented the cargo-owner can have access to the relevant documents to prove unseaworthiness if it exists<sup>26</sup>. These documents can also be used by the company to prove their case.

Some scholars suggest<sup>27</sup> that the effect of the ISM Code is more likely to appear in the case of burden of proof rather than in improving the standard of due diligence. This might be right because any thing that happens on board or any non-conformity with the ISM Code and the SMS should be reported and documented along with the corrective action taken, therefore, it would be easier for both parties to prove their case when the shipowner/carrier is asked to disclose the relevant documents. However, this in itself would be an incentive for the shipowner/carrier to exercise due diligence to make his vessel seaworthy in order to document this and reveal it as proof of his diligence. The issue of whether the Code would prove beneficial in increasing the standards of seaworthiness and prudence of shipowner would only appear once the ISM Code is put to a real test and scrutinised by the courts.

### ***- The Designated Person***

One innovation introduced by the code is an obligation upon every shipping company to employ a Designated Person(s) who should provide the connection between

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25- The Civil Procedures Rules 1998, provides in r31(6) that:

Standard disclosure requires a party to disclose only -

(a) the documents on which he relies; and

(b) the documents which-

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) the documents which he is required to disclose by a relevant practice direction.

26- The cargo-owner can prove his case by establishing that an accident, incident or non-conformity took place and no corrective action was taken to put things right or if a corrective action was recommended to the shipping company and either they did not implement it or they took long time to apply it..

27- Mentioned in Phillip Anderson, p. 119.

the shore- based company and the staff on-board<sup>28</sup>. The role of the designated person (DP) includes, *inter alia*, the following:

First of all, the designated person is a link between the shore-based management and the ship-based staff, therefore, he will have access to the highest level of management and to the ship's crew.

The DP is responsible for ensuring that the vessel and its crew are complying with the SMS, and that adequate resources and shore-based support are available. Also, he is in charge of carrying out audits to identify any incompliance with or deficiencies in the SMS and report it to the highest level of management. Finally, he is responsible for making sure that corrective actions have been taken and applied appropriately.

Hence, as the designated person will be responsible for the safe operation of the vessel, and ensure the compliance with the SMS, it is very important that he should have sufficient qualifications to carry out such a mission. Therefore, he should have the appropriate experience with regard to the ship's operation, ship safety and pollution prevention. Moreover, he should be aware of the company's safety and pollution prevention policy. Also, he should have the independence, authority and the access to the highest level of management to report any incompliance or deficiencies. Finally, he should be able to carry out safety audits to ensure compliance with the SMS and the Code and make sure that the corrective action has been taken<sup>29</sup>.

#### *1- What the DP should report?*

The DP - and eventually the Company's management board<sup>30</sup>, due to his role - should be in possession of all the information about the vessel, its performance and its

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28- ISM Code Article 4:

"To ensure the safe operation of each ship and to provide a link between the company and those on board, every company, as appropriate, should designate a person or persons ashore having direct access to the highest level of management. The responsibility and authority of the designated person or persons should include monitoring the safety and pollution prevention aspects of the operation of each ship and to ensure that adequate resources and shore based support are applied, as required".

29- Guideline on the application of the IMO International Safety Management Code, p.11. Lord Donaldson, *The ISM Code: the road to discovery*. P.531.

30- As the designated person is supposed to report most of the information he has to the managing board of the company. That would raise the issue of what the DP should report and would the knowledge of the company be considered the same as that of the DP.

problems. Therefore, the role of the DP, as explained by Lord Donaldson of Lymington, is

“[O]ne of the central pillars of the Code, but also as the errant shipowners’ Achilles heel. The “blind eye” shipowner is faced with a “catch 22” situation. If he hears nothing from the designated person, he will be bound to call for reports, for it is inconceivable there will be nothing to report. If the report is to the effect that all is well in a perfect world, the shipowner would be bound to require how that could be, as the safety management system is clearly intended to be dynamic system which is subject to continuous change in the light not only of the experience of the individual ship, and the company as a whole, but also of the experience of others in the industry. So there will be always something to report. Quite apart from this, the shipowner can at any time be called upon to produce documentary evidence of his internal audits of every area of his system, including the work of the designated person”<sup>31</sup>.

The above comment by Lord Donaldson would leave the shipowner/Company cornered, as they cannot turn a blind eye to what is happening on board their vessel(s), without it raising the following question: Is the DP obliged to report everything that happens on board to the highest level of management or there are certain things that he has to report and others that he does not have to?

The answer to this question depends on the DP’s responsibilities and the authority he has to carry out his duties. Usually this is included in his appointment document which would contain the procedure on how to report and what the DP should report to the management and what he can deal with directly without reporting. It is often the case that the senior management would only be interested in major incidents or non-conformities which need huge financial resources to correct, and would leave the minor issues to the DP to deal with. Therefore, in the case of major issues the DP would report the incident and his recommendations then wait for the response from senior management.

*2- Would the knowledge of the Senior Management considered the same as that of the DP?*

The position of the DP would allow him to be in touch with all that is happening on board the vessel, and he is responsible for reporting that to the senior level of management, so would his knowledge be the same as that of the Management?

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<sup>31</sup> - Lord Donaldson of Lymington, *The ISM Code: the road to discovery?*, *Lloyd’s Maritime and Commercial Law Quarterly*, 1998, p526-534, p.531.

In small size shipping companies, it is often the case that the management would be more involved with the daily running of the vessel and it is more likely, though not always the case, for the management of the company to play the role of the DP at the same time. In this case the knowledge of the management would be the same as that of the DP.

However, where the size of the company makes it more practical to employ one or more designated person(s) the question which would arise is: can the management say that they did not know what was happening on board, or in other words turn a blind eye?

The answer to this question can be seen in *the Eurysthenes*<sup>32</sup>. This case is a marine insurance case, which deals with the issue of seaworthiness under s39 (5) of the Marine Insurance Act of 1906. The vessel in this case was sent to sea and then stranded during her trip from the United States to the Philippines. The cargo owners made a claim against the shipowner, who in turn went back to their P&I Club for indemnity. The P&I Club refused to pay on different grounds that:

“*Eurysthenes* did not have (i) her full complement of deck officers; (ii) proper charts; (iii) a serviceable echo sounder and (iv) an operative boiler, she was unseaworthy when she embarked on the voyage<sup>33</sup> .

The court was asked to consider the following questions:

- “1. Whether . . . it constituted a defence to the defendants to prove that the ship was sent to sea in an unseaworthy state with the privity of the plaintiffs within s. 39 (5) of the Marine Insurance Act, 1906.
2. If so, whether in order to prove "privity" within the said section, it was necessary for the defendants to prove (i) negligence . . . and/or (ii) knowledge . . . of the fact constituting unseaworthiness and/or (iii) some deliberate or reckless conduct . . . in sending the ship to sea in an unseaworthy state.
3. Whether the [defendants'] discretion to reject or reduce a claim . . . may be exercised where the only evidence . . . relevant to the exercise of such discretion concerned the conduct of the member before any claim against him had arisen in sending the ship to sea in an unseaworthy state.”<sup>34</sup>

In answering the first question the court said that the vessel was sent in an unseaworthy condition with the privity of the shipowner and therefore was within s 39

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32- *Compania Maritima San Basilio S.A. v. The Oceanus Mutual Underwriting Association (Bermuda) Ltd., (The Eurysthenes)*, [1976] 2 Lloyd's Rep. 171.

33- *The Eurysthenes*, *ibid*, p.171.

34- *The Eurysthenes*, *ibid*, p. 171-172.

(5) of MIA 1906<sup>35</sup>. In responding to the second question Lord DENNING, M.R stated in defining what privity means:

“If the ship is sent to sea in an unseaworthy state, with the knowledge and concurrence of the assured personally, the insurer is not liable for any loss attributable to unseaworthiness, that is, to unseaworthiness of which he knew and in which he concurred. To disentitle the shipowner, he must, I think, have knowledge not only of the facts constituting the unseaworthiness but also knowledge that those facts rendered the ship unseaworthy, that is, not reasonably fit to encounter the ordinary perils of the sea. And, when I speak of knowledge, I mean not only positive knowledge but also the sort of knowledge expressed in the phrase "turning a blind eye". If a man, suspicious of the truth, turns a blind eye to it, and refrains from inquiry--so that he should not know it for certain--then he is to be regarded as knowing the truth. This "turning a blind eye" is far more blameworthy than mere negligence. Negligence in not knowing the truth is not equivalent to knowledge of it.”<sup>36</sup>

Also, in *the Star Sea*<sup>37</sup>, a more recent case on the same issue s39 (5) MIA 1906, Lord Justice LEGGATT delivered the following statement which was approved by the other members of the court:

“We in fact think that Counsel for the defendants got the concept absolutely right when he was putting to witnesses that they ‘realised that if the matters were looked into the crew would be found to be insufficiently trained in matters of firefighting’ ... However negligent it may have been not to learn lessons from the previous fires on *Centaurus* or *Kastora*, or to fail to give proper instructions in firefighting or whatever, what the defendant underwriters had to establish was a suspicion or realization in the mind of at least one of the relevant individuals that *Star Sea* was unseaworthy in one of the relevant aspects, and a decision not to check whether that was so for fear of having certain knowledge about it.... The Judge made no such finding. Indeed, his finding in this area comes down simply to a finding of negligence, albeit negligence in a high degree.”<sup>38</sup>

The court found that the owners of the vessel failed to seek further information when they suspected something from fear of having certain knowledge, in other words, they turned a blind eye.

Considering the previous judgments and the opinion of Lord Donaldson of Lynton, in which he said that the Code would make the shipowner subject to ‘catch 22’ so if the shipowner did not receive any reports from the DP or if the report said that everything is well then the shipowner should suspect that something is wrong and should investigate the matter; if he does not do that then he will be trying not to discover the truth, or in other words, trying to turn a blind eye. The ISM Code would have a big effect on the privity of the shipowner as there will be continuous communication

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35- The Eurysthenes, *Ibid*, p. 172.

36- *Ibid*, p. 179. Lord Roskill L.J was of the same opinion at p. 184-185

37- *The Star Sea*, [1997] 1 Lloyd's Rep. 360.

38- *The Star Sea*, *ibid*, p. 377.

between the shipboard crew and the shore based management through the DP. Therefore, the shipowner cannot claim that they did not have information about what is going on as the regular contact with the DP should prove them wrong. This was clear from *the Apostolis*<sup>39</sup>, where the Queen Bench Division Judge made it clear that regular communication between the general manager of the vessel's management company and the master or superintendent or the engineer made it impossible for the general manager to claim that he did not know about the welding work.

The ISM Code's introduction of the Designated Person role would make it very difficult for the shipowner/carrier to use the exceptions of Art IV 2(q) of the Hague/Hague-Visby Rules as it requires proof that neither the Shipowner nor his servants contributed to the loss in any sort of way in order to use this exception. Moreover the shipowner would not be able to use any of the protections provided for in Art IV 2 if there was want of due diligence represented here by turning a blind eye. i.e. not asking for reports or not taking the appropriate corrective action.

Also it is the duty of the DP to ensure that the SMS is implemented in the right way and any negligence on his part can be considered as privity of the senior management due to the fact that they did not ensure that the SMS is not properly implemented by the crew.

For example in *The Marion*<sup>40</sup>, the owners of the vessel delegated to the Master of the ship the responsibility of replacing or updating the charts of the vessel, which was the practice in the industry. However, they left this responsibility to the master without having in place a system to ensure that the master exercised his duty diligently. The Master had new charts on board, supplied by the vessel managers, but he had the tendency to use old charts, which were outdated and not corrected. While the vessel was dropping its anchor it hit the EkoFisk pipe line, which did not appear on the old charts used by the master, causing considerable damage. The shipowner was sued by the

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39- *The Apostolis*, [1996] 1 Lloyd's Rep, 475. p. 483-484. The decision of the queens Bench was reversed by the Court of Appeal on the basis that there was no proof of welding. However if that was proved the court would have adopted the same finding of the court below.

40- *The Marion*, [1984] A.C. 563. This case deals with having proper system of supervision with regard to updating charts, this case was long before the introduction of the ISM Code

owners of the pipe line for damage. In spite of the fact that the shipowners regularly provided the vessel with British Admiralty Weekly Notices and up to date charts, and although they sent a letter to the master asking to update all the charts and make obsolete the old ones, after receiving a report from the Liberian Bureau of Marine affairs, who inspected the vessel and found its charts being old and were not updated, the House of Lords found the shipowner in breach of their duty of exercising due diligence because although one of their representatives visited the vessel regularly when she was at the port, he did not ensure that all the charts were up to date and that old one were taken off board. Also they were in breach because they did not have in place a proper supervision system to ensure compliance with the industry needs.

This case, although it came before the introduction of the ISM Code, highlights the need for a monitoring system to ensure that the vessel is seaworthy at all relevant times. The ISM Code, although not directly related to the issue of seaworthiness, can prove beneficial to raise the standard of due diligence.

It is worth mentioning that the carrier would not be able to blame the DP for the unseaworthy condition of the vessel by claiming that he diligently appointed a competent DP and that the latter failed to be diligent. The reason for that is, the duty to exercise due diligence is a personal one and in spite of the fact that the carrier can delegate the exercise of the duty to someone else, in this case the DP, he will still be liable should the vessel turn to be unseaworthy and the DP fails to exercise due diligence<sup>41</sup>.

### *3- The role of the DP and Seaworthiness*

The role of the DP is important to ensure the seaworthiness of the vessel, as he is the company representative responsible for ensuring the safety of the vessel at sea and while at port. This can be done throughout the different responsibilities of the DP. The relationship between seaworthiness and the role of the DP can appear in different areas:

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41- Riverstone Meat Company, Pty., Ltd. v. Lancashire Shipping Company, Ltd., (The *Muncaster Castle*), [[1961] 1 Lloyd's Rep. 57.

a. Training

The DP should carry out audits<sup>42</sup> to check that the vessel complies with the ISM Code and vessel SMS. The audit should reflect the preparedness of the crew to face emergency situations. Therefore, if he realizes that part or all of the crew lack training in certain areas, i.e. facing emergency situation<sup>43</sup> ...etc, then it is his responsibility to recommend training to cover this gap in order to guarantee that the crew can face an emergency situation. By failing to do so he will be compromising the vessel's seaworthiness. It is also his duty to ensure that training is carried out at regular intervals. For example in the *Eurasian Dream*<sup>44</sup>, the vessel was unseaworthy in different respects: one of these was the lack of training in the use of fire fighting equipment. The ship was not required at the time to comply with the ISM Code, but had the code been applicable to the ship and a DP been appointed he would have realized the need for training and the vessel would not have been unseaworthy in this regard.

b. Physical Seaworthiness

Beside the issue of crew preparedness, if the DP discovers, either through the audits or through the reports sent by the Master of the vessel, that the vessel need some repairs or maintenance<sup>45</sup> then he should promptly take corrective action if this falls within his authority, or send his recommendation to the company management in order for them to take the appropriate action to maintain the vessel, and if the company or he, when taking such actions as fall within his responsibility, decides to take corrective action it is his duty to ensure that such action is implemented promptly and correctly. This would ensure that the vessel is ready 'seaworthy' at any time to perform the required trip.

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42- ISM Code Art 12.

43- ISM Code Art 8.

44- *Papera Traders Co. Ltd. and Others v. Hyundai Merchant Marine Co. Ltd. and Another, (The Eurasian Dream)*. [2002] 1 Lloyd's Rep. 719. *The Star Sea*, [2001] 1 Lloyd's Rep. 389.

45- The Code requires in Art 10 the company to have in place a system to maintain the vessel and its equipment. Furthermore, it requires them to identify any equipment or technical system, the sudden operational failure of which would affect the performance of the vessel.

c. Documentation

The ISM Code depends, to a very large extent, on documentation i.e. the company and the vessel should have Document of Compliance (DOC), SMS<sup>46</sup>, safety and environmental protection policy<sup>47</sup>. Also the code requires that the vessel should always have up to date documentation. The documents which the ISM Code requires the vessel to carry are essential to the vessel's seaworthiness, as she might not be allowed to enter or leave the port if she does not have, for example, SMS or SMC on board it, which means that the vessel is unseaworthy. Therefore it is the duty of the DP to ensure that the vessel has on board, at any time, all the required documents. Also part of the documentary element of seaworthiness is to ensure that all documents essential for the safe navigation of the vessel<sup>48</sup>, i.e. charts, ship manuals ... etc are on board, and it is the DP's responsibility with the Master to ensure that they are kept up to date and the obsolete ones are removed, otherwise, in case of an accident the company/shipowner cannot claim that his vessel was seaworthy<sup>49</sup>.

**- Conclusion**

In conclusion, on the positive side the ISM Code should prove to be of considerable importance to the shipping industry as it will increase the standards of due diligence and eventually reduce the chances of unseaworthy vessels being sent to sea. Furthermore, it should have a substantial commercial effect as it will improve productivity and efficiency, will reduce insurance rates due to increase of due diligence standards, and

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46- ISM Code Art 1.4 and Art 13.

47- ISM Code Art 2

48- The Torepo, [2002] 2 Lloyd's Rep. 535. In this case the vessel ran aground due to some fault/confusion in reading charts and the claimants raised, inter alia, the issue whether the owners provided up to date charts and whether the master and officers were competent in using charts and planning the journey. With regard to both questions the vessel was not unseaworthy as the master requested to have on board the appropriate charts for the journey, which had been supplied, and that the discrepancy between the charts was not in itself causative to the grounding. Also both the master and the officer were competent. In this case, however, the owners of the vessel applied for ISM Code documentation after the vessel complied with its requirements, and at the time when the case came to court the ISM Code was not in enforcement. As a result there was no question whether the vessel complied with the Code or not.

49- The Marion [1983] 2 Lloyd's Rep. 156. Demand Shipping Co. Ltd. v. Ministry of Food Government of the People's Republic of Bangladesh and Another, (The Lendoudis Evangelos II), [2001] 2 Lloyd's Rep. 304.

reduce litigation<sup>50</sup>. The proper implementation of SMS should also help creating documents that can be used by both parties to any litigation to prove their case.

However the downside of the Code is that as its application is left to the members of the SOLAS convention, some countries might be strict in applying the Code while other countries might not, due to poor resources or simply due to negligence. This could result in the creation of safe haven flag countries to which shipping companies might be attracted due to their lack of strictness in applying the ISM Code.

In order for the ISM to be applied effectively the IMO should have followed two routes. The first one is the creation of a penalty system for member states which do not strictly apply the Code. This can take the form of withdrawing the right of a member state to issue the required certificates and putting it on a black list<sup>51</sup>. Also the IMO should assign to a reputable entity, i.e. a Classification Society, the duty to check that the same standards and strictness are applied in all member states. Moreover, it is very important that the IMO should produce a black list of countries, companies or vessels that do not comply with the requirement of the Code in order to prevent any unfounded attempts by member states to prevent certain ships, carrying flags of certain states, from entering their ports.

The second is that the IMO should require the member states to introduce a penalty system to be applied in respect of companies and their individuals when they do not comply with the requirement of the Code or the companies' SMS. With regard to this route some countries already have in place such penalty regime, i.e. UK in the Merchant Shipping Regulations 1998 enacted the ISM Code, and voluntarily introduced a criminal regimen on ships registered under its flag, represented by fines and/or imprisonment for

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50- The ISF and ICS in its Guidelines on the application of the IMO International Safety Management Code at p. 4, says that

“[T]here is some evidence to suggest that, over time, commercial benefits may also flow from the general benefits, including:

- cost saving resulting from improved efficiency and productivity (such as through the - -minimisation of disruptions to the operation of the ship that may cause delay);
- favourable insurance premiums relative to the market; and
- the minimisation of exposure to claims in the event of a major marine disaster”

51- Lord Donaldson of Lynton, *The ISM Code: the road to discovery?* p.532. These systems seem fair as it help to eliminate sub standard shipping companies.

company staff, or the withdrawal of certificates which might render the vessels unseaworthy.

Also, the introduction of the code conflicts with the existing law on seaworthiness; represented by Hague/Hague-Visby Rules, with regard to the period of exercising Due Diligence. The current law requires the carrier to exercise due diligence before and at the beginning of the journey. Whereas, the Code requires the shipping-company/carrier to ensure compliance with the code at anytime so as to ensure the continuous validity of the certificates. Which means he must ensure that the vessel is seaworthy at any time. This means that the current law needs to be reconsidered to extend the duty to cover the whole journey<sup>52</sup>. The extension of the period of responsibility should not make the carriers duties difficult due to the existence of the DP who would be leasing between the company and the vessel to ensure the swift running and management of the vessel, and should the need for repairs or maintenance arises, the DP can arrange for those to take place, i.e. providing spare parts at the next port of call, providing up to date charts ... etc.

Finally, although the Code is adopted by SOLAS Convention, which made the Code mandatory to all member states, it was not made part of the Hamburg or the Hague/Hague-Visby Rules. This is not essential provided the IMO with the cooperation of CMI recommends that the member states consider the Code as a framework for what might be considered good practice and what a prudent carrier would do to make his vessel seaworthy, some courts, i.e. in the UK, for example, the court in *the Eurasian Dream*<sup>53</sup>, already gave the ISM Code such a description when Captain Haakansson, as an expert witness in the case described the Code as a ‘... framework upon which good practice should be hung’<sup>54</sup>.

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52- The UNCITRAL is working on a new Carriage of Goods Convention, which extends the duty to cover the whole journey.

However, this would take time to enter into enforcement, therefore, an action should be taken to change the current law while waiting for the new convention.

53- In the *Eurasian Dream*, [2002] 1 Lloyd's Rep. 719,

54- The *Eurasian Dream*, *ibid*, at p.143.

## **Potential Legal Implications of the ISPS Code on the issue of seaworthiness**

### ***- Background of the code***

Following the events of September 11<sup>th</sup>, 2001, there was not only a massive loss of life but also huge insurance claims. The aftermath of the attacks resulted in the increase of insurance premiums not only on vessels and planes but also on building and possessions, because of the destruction of the WTC. Therefore, most of the countries, especially the USA, who suffered as a result of the attacks, increased the security on all transportation methods in order to reduce the probability of other attacks. Also, the USA and the other members of the G8 Group agreed on a timetable within which an Automatic Information System (AIS) should be fitted on certain vessels and another timetable for implementing the Ship and Port Facility Security Code (ISPS) which was adopted by the IMO at a later stage. The ISPS Code proposes to increase the security measures on all the ports and vessels by creating a set of protective measures and procedures on a world wide scale in order to prevent any future attempts to use vessels in attacks similar to those of September 11<sup>th</sup>, 2001.

On a national level the United States, following the events of September 2001, introduced a set of measures to minimise the risk of terrorist attacks. The US took two initiatives for this purpose, the first one was the Container Security Initiative (CSI) and the second one was the Customs-Trade Partnership Against Terrorism (C-TPAT), These two initiatives were not mandatory and thus they were followed by a series of actions such as the establishment of certain governmental bodies, i.e. the Department of Homeland Security within which the United State Custom Service and the United States Coastguard operate, and by the introduction of some mandatory instruments, i.e. the Maritime Transport Security Act 2002 and the Bio Terrorism Act of 2002<sup>1</sup>.

These measures were applied on a national level. But there was a need to apply such measures on an international level, therefore the United States through the IMO and the

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1- For more information see War, Terror and Carriage by Sea, Keith Michel, LLP, 2004, p.745 on wards.

co-operation of the EU and other countries introduced the International Ship and Port Facility Security Code (ISPS) which aims through its measures to prevent, or at least reduce, the possibility of any type of terrorist attack similar to those of September 11<sup>th</sup> 2001.

The Code introduced a series of measures, which should be followed in order to obtain the relevant security certificates to allow ports to function in accordance with the Code and vessels to operate within the territories of the member states. By introducing the ISPS Code, The IMO for the first time extended its territory from ships to work also on shore-based facilities, i.e. ports. Consequently, the duty to comply with the Code should be borne not only by shipowners/operators but also by ports and the contracting governments under which these ports exist or ships carrying its flag<sup>2</sup>.

The ISPS Code was then adopted by the General Assembly of the IMO and then incorporated into the SOLAS Convention as an annex to article XI-2. Chapter XI was divided into two sections. XI-1 entitled “Special Measures to Enhance Maritime Safety” deals with Ship Identification Number and Continuous Synopsis Record (CSR). The other part, XI-2 entitled “Special Measures to Enhance Maritime Security” is designed to constitute the background of the code which in itself divided into part A and B; Part A is mandatory for all member states of the SOLAS Convention as amended in 1994 and 2002. Part B on the other hand is voluntary; it consists of guidelines regarding chapter XI-2 of the SOLAS Convention. It is worth mentioning that the US made both parts of the Code mandatory.

The reasons for making the ISPS Code part of the SOLAS Convention are exactly the same as those of the ISM Code, mainly due to the fact that more than 96% of the world tonnage countries are part of the SOLAS Convention. The other reason is that all the members will be obliged to comply with the Code in accordance with SOLAS tacit acceptance procedures by which all countries will be obliged unless if they make a reservation.

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2- *ibid*

The contracting states agreed that the ISPS Code should enter into force on 1<sup>st</sup> July 2004. The Code applies to the following types of vessels and port facilities:

- Passenger ships, including high-speed passenger craft;
- Cargo ships, including high-speed craft, of 500 gross tonnage and upwards;  
and
- Mobile offshore drilling units; and
- Port facilities serving such ships engaged on international voyages.

Due to the fact that the ISPS Code only came into enforcement on 1<sup>st</sup> July 2004 there are, to date, no precedents with regard to the ISPS Code. However, a few incidents came into light during the application of the Code which we will look at in due course. This part of the study will not go into the technicalities of the Code but it will concentrate on its effect on the issue of seaworthiness. Therefore, this chapter will look at the objectives of the ISPS Code and certification requirements, then examine the effect of the code on the issue of seaworthiness and what would happen in the case of not adhering to the code and then sum up with a conclusion regarding the benefits and criticisms of the Code.

#### ***- ISPS Code Objectives and Certification Requirements***

The ISPS Code, like any other legal instrument, has objectives to achieve and a requirement that should be satisfied by the subjects of these instruments. Therefore, the ISPS Code is no different from any other legal instruments.

The objective of the Code is to establish an international framework, based on the co-operation of different bodies; contracting governments, governmental agencies, local administrations and shipping companies, in order to put preventative measures to stop any security breaches against vessels or port facilities. Furthermore, the Code aims to establish the roles and responsibilities of each of the relevant parties in order to ensure maritime security. In addition the code aims to establish procedures to exchange relevant security information, create methodology for security assessment and finally to ensure

that appropriate security measures are in place<sup>3</sup>. Consequently, the ISPS Code aims, in general, to enhance the security measures for all port facilities and on board vessels in order to reduce or eliminate any security breach that might endanger or threaten lives or properties through a series of measures to evaluate and determine security levels<sup>4</sup>.

### **- ISPS Code and Seaworthiness**

In broad terms the ISPS Code affects various aspects of carriage of goods by sea, including insurance and limitation of liability. Regarding the carriage of goods by sea it affects lay time, vessel readiness to load or unload, demurrage, cancellation of contract of carriage and it affect also vessel seaworthiness.

However, with regard to seaworthiness, the ISPS Code (as opposed to the ISM Code) might not have much, if any, effect on the physical or human aspects of seaworthiness of the vessel, as it does not deal with the maintenance of the vessel or its machinery, crew training and competence. It does deal with training some members of the crew to carry out some security duties, with regard to the navigational requirement of the vessel and dealing with emergencies that might affect its seaworthiness, i.e. fire fighting or engine problems<sup>5</sup>, but it does not deal with updating a vessel's documents, i.e. charts, manuals... etc. However, the act does require that some personnel on board

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3- Section 1.2 of the ISPS Code, entitled Objectives provides the following:

The Objectives of this code are:

- to establish an international framework involving co-operation between Contracting Governments, Government Agencies, Local Administrations and the ship and port industries to detect security threats and take preventive measures against security incidents affecting ships or port facilities used in international trade;
- to establish the respective roles and responsibilities of the contracting Governments, Government Agencies, Local Administrations and the ship and port industries, at the national and international level for ensuring maritime security;
- to ensure the early and efficient collection and exchange of security- related information;
- to provide a methodology for security assessment so as to have in place plans and procedures to react to changing security levels; and
- to ensure confidence that adequate and proportionate maritime security measures are in place.

4- The IMO web page on FAQ provided an answer for the purpose of the code as following: "The purpose of the Code is to provide a standardised, consistent framework for evaluating risk, enabling Governments to offset changes in threat with changes in vulnerability for ships and port facilities through determination of appropriate security levels and corresponding security measures". <http://www.imo.org/home.asp> , as of 07/06/05.

5- The Code does require from the shipping company to appoint Company Security Officer (CSO) and Ship Security Officer (SSO), ISPS Code Part A Section 11 and 12 respectively. But the role of these two officers has nothing to do with the vessel seaworthiness but it part of compliance with the Code in order to obtain the relevant certificates.

the vessel should have some security duties - this person being the Ship Security Officer together with other members of the crew - in order to carry out the duties mentioned in the Code which means that those personnel should receive the appropriate training to carry out their duties<sup>6</sup>. Also, the Code requires the carrier to provide his vessel with security equipment, i.e. lights, ship identification number...etc. Finally the Code requires the carrier to keep certain records, for example: changes in security level, any breach of security, records of the security level at which the vessel operated in the last ten ports<sup>7</sup> and ship security plan<sup>8</sup>... etc. Once the carrier complies with the requirements of the Code then certain Certificates will be given to him and should be kept on board, all these can have impact on the Seaworthiness of the vessel.

The requirement of the ISPS code might have an effect on a vessel's seaworthiness. The reason behind this is that the Code requires the vessel to comply with its provisions in order to obtain certain documents and certificates. Further the code requires a vessel to keep certain records updated, for example: changes in security level, any breach of security<sup>9</sup>, records of the security level at which the vessel operated in the last ten ports<sup>10</sup> ... etc. If the vessel does not comply with the Code's provisions then this would invalidate the certificates issued under the Code and may give the authorities at the destination port leave either to prevent the vessel from entering the port, from loading/unloading or even from leaving the port. As yet there has been no incident that required the courts to interfere and give their opinion about the effect of the Code on the carrier's obligation with regard to seaworthiness. But if the carrier knew the code to be applicable at certain ports and he knew that his vessel would be visiting such ports then he should ensure that his vessel complies with the Code's requirements, otherwise the

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6- S 11 of the ISPS Code.

7- SOLAS Convention Art XI-2 Regulation 9.2. S 10 of the ISPS Code.

8- S 9 of the ISPS Code.

9- ISPS Code Section 10.

10- SOLAS Convention Art XI-2 Regulation 9.2.

authorities at these ports can prevent the vessel from providing the service she is supposed to provide<sup>11</sup>.

The Code requires any vessel which satisfies its requirement to keep on board at any time a set of documents: Ship Security Plan (SSP), International Ship Security Certificate or interim one (ISSC), Continuous Synopsis Records (CSR)<sup>12</sup>. The vessel is also required to keep a record of all security incidents that happen on board or any change to the security level on board the vessel as well as records of the security level at which the vessel was operating during the last ten ports it visited...etc. The question which definitely would be raised is what would happen if the vessel did not have some or any of these records or if it did not comply with the code at all?

If the vessel does not comply with the requirement of the Code the officers in the ports of the contracting governments have the right to take one of the following control measures<sup>13</sup>:

- Inspection of the ship;
- Delaying the ship;
- Detention of the ship;
- Restriction of operations including movement within the port; or
- Expulsion of the ship from port

In addition to these measures, or as an alternative to them, other measures can be taken which might include less administrative or corrective measures.

The application of such measures by the port facilities or the contracting government might raise the question of whether or not the lack of documents required by the ISPS

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11- Cheikh Boutros Selim El-Khoury and Others v. Ceylon Shipping Lines, Ltd., (The Madeleine), [1967] 2 Lloyd's Rep. 224.  
Compagnie Algerienne de Meunerie v. Katana Societa di Navigazione Marittima, S.P.A, [1960] 2 Q.B. 115. The Derby, [1985] 2 Lloyd's Rep. 325.

12- SOLAS Convention Art XI-1 Regulation 5 provide for the need to CSR which should contain, inter alia, the name of the flag state, name of the vessel, date of registration Ship's Identification Number (SIN)... etc.

13- SOLAS Convention, Art XI-2 Regulation 9.1.

Code would affect the documentary aspect of seaworthiness rendering the vessel unseaworthy, and eventually question whether the carrier exercised due diligence.

As the ISPS Code has not been in force for a very long,<sup>14</sup> there are therefore no precedents with regard to this issue at the moment. However, courts are more likely to revert to previous authorities in search for an answer to this question, and this can be found in *the Derby*<sup>15</sup>.

- *The Derby*:

In this case, the vessel, *the Derby*, was time chartered for 11-13 months. Line 22 of New York Produce Exchange form provided inter alia:

Vessel on her delivery to be ready to receive cargo . . . and in every way fitted for the service ... (and with full complement of officers, seamen . . .).

The vessel was manned with a Filipino crew. The vessel arrived to Leixoes in Portugal and started to discharge its cargo. While discharging, the vessel was visited by an I.T.F Representative to enquire about the ITF Blue card<sup>16</sup>. *The Derby* did not have the Blue card, consequently the representative halted the discharging of the cargo until a blue card was produced or the vessel obtained a new one. The shipowners arranged to obtain this document, made the relevant changes in the seamen's contracts and paid the ITF charges. Discharging then continued, however the delay caused by this process made the vessel unable to perform another sub-charter. This caused separate disputes between the parties to the different charters. The disputes were referred to arbitrators who decided that the carrier was in breach of their obligation with regard to the vessel's fitness to perform the required service in accordance with line 22 of the charterparty.

The owners then appealed to the Queen's Bench. Hobhouse, J arrived to the conclusion that:

“the correct construction of line 22 was that in its context it related only to matters of seaworthiness; seaworthiness included the legality of the vessel and her documentation and in

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14- The Code became mandatory for all contracting governments on 1st July 2004.

15- Alfred C. Toepfer Schiffahrtsgesellschaft G.M.B.H. v. Tossa Marine Co. Ltd. Tossa Marine Co. Ltd. v. Alfred C. Toepfer Schiffahrtsgesellschaft G.M.B.H., (*The Derby*), [1985] 2 Lloyd's Rep. 325.

16- The ITF regulations deals with crew rate of pay and condition of employment but it does not affect crew competence or experience.

conjunction with the whole of lines 21-24, the adequacy and competency of the crew; it did not relate to any matters which did not affect the seaworthiness of the ship or the ability of the owners to comply with orders given to them by the charterers; here it did not extend to the characteristics of the crew which did not affect the crew's ability to preserve the safety of the vessel and her cargo and to fulfil the owners' obligations under the charter nor did it extend to the provision of a blue card or any similar document demanded by I.T.F.”<sup>17</sup>

On appeal to the Court of Appeal by the charters the CA arrived to the same conclusion as *Hobhouse*. Lord Justice Kerr stated that:

“I accept that precisely the same reasoning applies to the words "in every way fitted for the service" in the present case. To that extent, therefore, these words go beyond the purely physical state of the vessel as such. However, I cannot see any basis for any further enlargement of the scope of these words by extracting from them a warranty that the rates of pay and conditions of employment of the crew, with which they expressly declared themselves to be satisfied, must also comply with the requirements, not of any law which is relevant to the vessel, her crew or the vessel's operation under the charter, but also of a self-appointed and extra-legal organization such as the I.T.F. In my view this is not a meaning which these words can properly bear, let alone in the context in which they appear in the charter.”<sup>18</sup>

The court of appeal did not want to extend the meaning of documentary seaworthiness to include documents required by a non-governmental agency, especially when these documents are not related to the physical readiness of the vessel or to the competency and fitness of the crew. The court further came to the conclusion that the only documents which affect the seaworthiness of the vessel are those which affect its fitness and performance of the service, i.e. navigational charts, vessel manuals, but under no circumstances it can be extended to documents required by any self-appointed organisation. Also, the documents which can affect the seaworthiness of the vessel are those which are required by the law or regulations of the flag state, or other governments or local authorities. The court of appeal held that:

“the scope of the words have also been held to cover the requirements that the vessel must carry certain kinds of documents which were relevant to her seaworthiness or fitness to perform the service for which the charter provided; the nature or description of such certificates which may be required to be carried on board to render the vessel seaworthy depended on the circumstances but there was no basis for holding that such certificates could properly be held to include documents other than those which might be required by the law of the vessel's flag or by the laws, regulations or lawful administrative practices of governmental or local authorities at the vessel's port of call; an I.T.F. blue card did not fall within this category and there was no reason for including it within the scope of the words in line 22”<sup>19</sup>.

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17- *The Derby*, [1984] 1 Lloyd's Rep. 635, at p. 635. See *Hophouse*, J comment on p. 639 and 642.

18- *The Derby*, [1985] 2 Lloyd's Rep. 325, at page 326, see also p.331.

19- *The Derby*, *ibid*, at p.326 see also p.331, 333 and 334.

Considering this result - that the vessel is obliged to carry documents required by the law and regulations of the its flag state, the governments of the countries she is visiting, or the local administrations of these countries - the vessel would be unseaworthy if she did not possess such documents. And considering that the documents required by the ISPS Code would be of the same kind - , documents required by international organisations, contracting governments and local authorities represented by the port facilities - the resulting lack of these certificates, records, and documents would render the vessel unseaworthy because the vessel might be delayed, detained, inspected or even prevented from entering the port to load or discharge. Consequently, the courts, when they are faced with a case dealing with the ISPS or ISM Code, might come to the conclusion that the vessel would not be seaworthy if she does not have the documents required by these two Codes.

However, if the vessel lacks one of these documents, but it can be obtained in a short period of time without delaying the vessel, then this should in no case affect the seaworthiness of the vessel<sup>20</sup>. Lord Denning, in *the Tres Flores*<sup>21</sup> case, stated:

“In considering the cases, it seems to me that the submission which Mr. MacCrimmon put forward was correct. In order to be a good notice of readiness, the master must be in a position to say: "I am ready at the moment you want me, whenever that may be, and any necessary preliminaries on my part to the loading will not be such as to delay you." Applying this test it is apparent that notice of readiness can be given even though there are some further preliminaries to be done, or routine matters to be carried on or formalities observed. If those things are not such as to give any reason to suppose that they will cause any delay, and it is apparent that the ship will be ready when the appropriate time arrives, then notice of readiness can be given.”

Although this case deals with the issue of notice of readiness, the same concept can apply in the case of the ISPS where the master and the carrier could avoid detaining or delaying their vessel if they could provide the relevant documents without delay.

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20- Shipping Developments Corporation S.A. v. V/O Sojuzneftexport, (*The Delian Spirit*), [1971] 1 Lloyd's Rep 64, at p. 70 Donaldson J stated “There are, it is true, difficulties which flow from the decision in *The Austin Friars*, (1890) 10 T.L.R. 633, but unless constrained by authority binding upon me, I should hold that a vessel is ready to load and can be an arrived ship if she is in such a state of physical and legal readiness that there is nothing to prevent her being made ready at once if required”. Donaldson J also cited the following case in proving his point. *Armement Adolf Deppe v. John Robinson & Co. Ltd.*, [1917] 2 K.B. 204, p.208.

21- *Compania de Naviera Nedelka S.A. of Panama v. Tradax Internacional S.A. of Panama City R.P.*, (*The Tres Flores*), (1973) 2 Lloyd's Rep. 247, at p.249. *Logs & Timber Products (Singapore) Pte. Ltd. v. Keeley Granite (Pty) Ltd (The Freijo)*, [1979] 1 Lloyd's Reports 1.

***- Seaworthiness and port facilities***

The ISPS Code, as opposed to any other work of the IMO, does not deal only with vessels; it is, as was said earlier, the first instrument of the IMO to extend its coverage to shore based facilities, i.e. port facilities, local administrations and contracting states. This means that the contracting government has to nominate ports to which the Code will apply<sup>22</sup> and the organizations and local authorities responsible for ensuring compliance with the code. Once the ports are nominated then the contracting government and local authorities have to arrange for these ports to obtain the relevant documents and certificates<sup>23</sup> and appoint a Port Security Officer<sup>24</sup>.

The effect of the Ports Facilities on Seaworthiness appears in four situations

The first scenario is when a vessel, which is in compliance with the code, has interface with a complying port and it responds positively to any changes to the security level, if any, required by the flag state or the port facility itself. In this case there will be no problems as long as both sides comply with their security plans and procedures.

The second scenario, is when a vessel complying with the Code, comes into interface with a complying port but it does not change its security level to the one required by its flag state or any other contracting government port at which the vessel is visiting.

The third situation is when a complying vessel visits a non-complying port; either because the government within which the port is based is not a contracting government to SOLAS convention, or because it was not nominated as one of the ports to which the Code would be applicable, and she does not change its security level.

The last situation is when a non-complying vessel visits a complying port.

It should be borne in mind that a complying vessel has to keep records of the security levels it operated at for the last ten ports she visited.

In the first scenario the seaworthiness of the vessel would not be affected and there should be no delay or any problems with the vessel entering the port facility. However in

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22- These ports are mostly those which are involved in international rather than internal shipping.

23- Port Facility Security Plan (PFSP) ISPS Code Part A Section 16.

24- ISPS Code Part A Section 17.

situation 2, where the vessel does not change its security level as required by the relevant authorities, or in scenario 3 where the vessel sails to enter the next complying port and the port facility requires to see the security records of the last ten ports the ship visited, and sees that there was a breach of security, either because the vessel did not change its security level or because she visited a non-complying port, then the authorised officer of the contracting government can take one of the measures stipulated in Regulation 9.1 of Chapter XI-2 of SOLAS Convention<sup>25</sup>.

With regard to scenario 4 the authorised officer might detain the vessel if she was in port, or prevent the vessel from entering the port due to the lack of required certificates.

In the last three scenarios, due to the delay or prevention of the vessel from entering the port or leaving it, the cargo owners or charterers might claim that the vessel is not seaworthy due to the lack of documents or because the shipowner allowed his vessel to visit a non-complying port. Although in the latter case it is not the fault of the shipowner that the port is not ISPS certified, it is still his fault that he allowed his vessel to visit such a port.

It is not yet known what the opinion of the courts or arbitration tribunal would be with regard to this situation, but problems would rise especially when the delay caused damage to the cargo or the loss of another charter or shipment... etc.

#### ***- Real examples of the effect of ISPS Code***

The example we have here is about a shipment of lemons from Venezuela to the USA. A cargo of five refrigerated containers of lemons were shipped from La Guaira to Newark. The American Coastguard received tip-off information, which they did not verify, that the cargo was contaminated with a biological agent. The ship was prevented

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25- this regulations states that if the authorised security officer has clear ground, or where a valid certificates has not been produced when they are required then the officer can take one of the following measures:

Inspect the ship;

delay the ship;

restrict its operations including movement within the port; or

expel the ship from port;

Such measure may additionally or alternatively include other administrative or corrective measures.

from entering the port and was examined thoroughly without anything being found, then was allowed to enter to the port and was subject to still more scanning which did not reveal anything. However, the cargo was fumigated with chlorine dioxide then destroyed. The Coastguard also attempted to destroy the containers but later changed their mind and released them.

This resulted in considerable financial expenses, which were borne by different parties, and loss to the cargo owner and the potential loss of the containers, had they been destroyed<sup>26</sup>.

This all happened because the Coastguard acted upon information which they did not have firm grounds to believe, thus, breaking one of the most important regulation of Chapter XI-2 Regulation 9.1, which states that “when there is clear grounds.... The officer duly authorised by the contracting government shall impose any one or more control measures in relation to that ship as provided in paragraph 1.3. any such measures imposed must be proportionate, taking into account the guidance given in part B of the ISPS Code”.

From this it can be seen that once the Code is put to the test a relevant authority managed not to adhere to it. Further similar instances would have a great effect on the shipping industry leaving shipowners and cargo-owners subject to uncertainty when the port authority receives false information or even when they do not have valid grounds to suspect something is wrong.

Alongside this problem will be the question of who would be responsible for any financial loss caused by the delay. There will be no problem in answering this question if the delay was the fault of the shipowner for not having the relevant documents or if the shipper did not disclose the characteristic of his cargo if this was the reason for the problem<sup>27</sup>. But who would be responsible for the delay or the consequent financial loss

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26- The incident was reported in TT Talk edition 57, Nov 23rd, 2004.

<http://www.ttclub.com/TTClub/ttclub.nsf/HTML/BF9FD62AB2967F4680256F55005F5F3A> Taken from resource on 08/06/05.

27- TT Talk edition 62 Feb 23rd, 2005. see the other case reported in this edition.

if there was no fault on the part of the shipowner/carrier or the cargo-owner? The answer to this question would depend on the circumstances of each individual case. However, where the delay was caused by the authorities of the contracting government of the delivery or loading port, without having clear grounds for their suspension, we do not see any reason why this authority should not bear responsibility for their unfounded suspension.

But would the port authorities of one member state be allowed to deny entry or leave or detain vessels which comply with the ISPS Code and carry the relevant documents, because they think that the standards of applying the Code's requirements followed by the flag states of these vessels are not strict as theirs? This scenario is not impossible to envisage, and the IMO should consider taking action to ensure that such a situation does not arise in the future.

### **- Conclusion**

The ISPS Code was introduced in order to prevent any terrorist which might target ships or port facilities. However, due to the speed of introducing the Code<sup>28</sup>, some problems will inevitably arise in the course of its application, which mean that the code must be reviewed regularly in order for it to be amended to meet the needs of the industry.

However, the Code lacks certain elements which, if introduced, would make its enforcement much easier and would give certainty to a very important industry. The first step is that the IMO should introduce a penalty regime for those governments whose ships or ports do not comply with the requirement of the codes. For those who do not apply the code strictly, the penalty could be to withdraw the right of that government to issue the relevant certificates and to black list it. This is currently difficult as the IMO does not have power over the member states, thus, if the member states would like the ISPS Code to be effective and efficient they should grant the IMO such power. In

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<http://www.ttclub.com/TTClub/ttclub.nsf/HTML/E5B725DAD2AEC1CC80256FB7005B8CB8>. Taken from the source on 08/06/05. Northern Shipping Co. v. Deutsche Seereederei G.M.B.H. and Others (The Kapitan Sakharov), [2000] 2 Lloyd's Rep. 255.

28- The events of September 11th, 2001 and the Code was incorporated into SOLAS Convention in Dec 2002.

addition the IMO should have a list of complying ports and governments. It would be a good idea if the duty to check whether the countries are complying with the Code or not, or if they are overreacting, was devolved to a reputable organization or Classification Society who can establish partners at the ports of the member states, and the organization or the Society will monitor the application of the Code on a regular basis and report its findings to the IMO, after which a black list can be established or recommendation given to the member state. Such a body could also recommend changes to the code should the need arise in the future and could monitor that the same standards are applied in all member states to prevent the port authorities of a member state from stopping a vessel carrying valid ISPS documents and complied with the Code just because its flag country applies more lenient standards than the country of the port authority at the destination port.

The second procedure which should be taken by the governments of the contracting states and by the IMO and the local authorities, is introducing a criminal regime the same as the one suggested earlier for the ISM Code, in which companies and individuals would be subject to a criminal penalty if they do not comply with the requirements of the Code. Penalties can include, but not be limited to, black listing the company, fines, and imprisonment to the party in breach.

Furthermore, changes to the existing seaworthiness regime must be introduced, especially with regard to the period of exercising the duty so it is not limited to the period before and at the beginning of the voyage. This is important because the Code requires having valid certificates during any time of the voyage. The Extension of the period of the period of duty will not affect all aspects of seaworthiness, for example preparing the vessel holds to receive the cargo, i.e. cleaning them and disinfecting them, will only need to be done before the cargo is loaded, however, if the cargo needed refrigerating then the refrigerators should work through out the voyage to prevent any damage to or loss of the cargo.

In addition, procedures should be taken to ensure that the port authorities will not delay, deny a vessel entry to the port, detain or evict a vessel from a port without clear and strong grounds for such action. The port authority should investigate the

information they receive and check the vessel records thoroughly then take their decision based on the findings of these procedures, otherwise the authority would bear the responsibility for any financial loss or damage resulting from an unfounded decision. Should any problem arise from a decision to detain or delay a vessel it is the courts who should decide whether or not those who took a decision had valid grounds for suspicion, based on the facts of each individual case. If the port authorities know that their decision can be monitored by the courts then they will be more careful.

Furthermore, as the Code does not only concern shipping companies, but also extends to cover port authorities, it must be clear that the carrier would not be responsible if he fulfilled the Code's requirements but the port authorities of the destination port failed to comply with their obligations under the Code.

Finally the ISPS should be subject to a review on a regular basis in the light of any incident, in order to make sure that it does not affect the regular flow of trade between the ports of different states.

## **Chapter Six**

# **The UNCITRAL Draft on New Transport Law in the area of Carriage of Goods by Sea with Effect on Seaworthiness**

- ***Introduction***

The Law on the Carriage of Goods by Sea has been in place for a long time, originating from Rules based on customs, precedents and best practice in the industry, i.e. common law which then developed to meet the different needs of the industry, i.e. the Harter Act, followed by the Hague/Hague-Visby Rules then the Hamburg Rules. Law in general is dynamic, which means that it should be flexible and able to develop to according to industry needs, and the Law on the Carriage of Goods by Sea is no exception to this principle. The Harter Act and the two sets of Rules are good examples of this.

The Marine Industry has witnessed several developments since the end of the twentieth century starting with the introduction of the International Safety Management Code (ISM); the first stage of its application was July 1998 followed by the second stage in July 2002. The second development came as a result of the September 2001 attacks on the World Trade Centres in the USA. This resulted in the introduction of the International Ship and Port Facility Security Code (ISPS). Both of these Codes introduced certain measures to improve safety and security on board the vessel and at ports.

The final development concerns the Committee Maritime International's (CMI) work on a new draft on Transport Law. The CMI started working on this following the UNCITRAL's request at the 29<sup>th</sup> Session in 1996. There are certain areas in this draft that have a direct impact with regards to Seaworthiness, i.e. period to exercises the duty, and basis of liability and burden of proof<sup>1</sup>.

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1- The last UNCITRAL meeting which dealt with the Articles related to Seaworthiness and Basis of Liability took place in Vienna during the 16th session of the UNCITRAL between 28 Nov – 9th Dec 2005, UNCITRAL document A/CN.9/WG.III/WP.56. However, the Seventeenth Session was held between 3rd - 13th of April 2006 in New York but this session did not deal with the issue of Seaworthiness. Furthermore, the 18th Session is going to be held in Vienna between 6th and 17th of November 2006 but according to its agenda the meeting will not discuss this issue, and Session 19 is scheduled between 16th - 27th of April 2007 in New York but the Agenda of this meeting is not yet prepared.

As these developments have a direct impact on this study we are going to discuss them and see their impact on the carrier's obligation to provide a seaworthy vessel. This analysis will start with the CMI work then move on to the ISM and ISPS Codes.

## The Period of Exercising Due Diligence under the UNCITRAL draft on Transport Law

### - *Background:*

The issues around the time at which the vessel should be seaworthy are not new, and have been dealt with for centuries. The common law has dealt with this issue over and over again, since the nineteenth century or even earlier. At that time the duty to provide a seaworthy vessel was an absolute one. The shipowner's obligation was to make the vessel seaworthy before and at the beginning of the journey<sup>2</sup>, otherwise he would be in breach of his duty, and at that time it was not enough for him to prove that he did his best to make the vessel seaworthy; the vessel had, in fact, to be reasonably fit to undertake its journey<sup>3</sup>.

The introduction of the Harter Act, followed by Hague/Hague-Visby and Hamburg Rules, changed the nature of the duty from an absolute one to a duty to exercise due diligence, but did not change the position of the common law regarding the time at which the vessel should be seaworthy.

The Hague/Hague-Visby Rules provided in Art III. r.1 that:

"1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to--  
(a) Make the ship seaworthy.  
(b) Properly man, equip and supply the ship.  
(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation".

This Article clearly and expressly adopted the common law approach to when the vessel should be seaworthy and to when the shipowner had to exercise his duty of due

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2- *McFadden v. Blue Star Line*, [1905] 1 K.B. 697. Channell J stated: "...that the warranty of seaworthiness in the ordinary sense of that term, the warranty, that is, that the ship is fit to encounter the ordinary perils of the voyage, is a warranty only as to the condition of the vessel at a particular time, namely, the time of sailing; it is not a continuing warranty, in the sense of a warranty that she shall continue fit during the voyage". p. 703. *A. E. Reed and Company, Limited v. Page, Son and East, Limited*, [1927] 1 K.B. 743. *Rathbone Brothers & Co. v. D. Maciver, Sons & Co.* [1903] 2 K.B. 378.

3- *The Glenfruin*, (1885) Q.B.D 103, at p. 106. Butt, J. stated: "... that under his implied warranty of seaworthiness the shipowner contracts, not merely that he will do his best to make the ship reasonably fit, but that she shall really be reasonably fit for the voyage". *Steel v. State Line Steamship Company*, (1877-78) L.R. 3 App. Cas. 72. *Kopitoff v. Wilson*, 1 Q.B. D. 377 .

diligence. Therefore, the carrier/shipowner would be responsible for any unseaworthiness existing before or at the time of the sailing, but would not be responsible for any unseaworthiness arising after that, as long as its cause did not exist before or at the beginning of the journey<sup>4</sup>.

In contrast to the Hague/Hague-Visby rules, the Hamburg Rules do not have a specific article for the issue of seaworthiness<sup>5</sup>; instead the Rules provide a general article for the basis of liability which makes the carrier liable for any loss or damage that takes place while the cargo is in his possession. This would include any damage or loss resulting from unseaworthiness. The article means that the duty of the carrier to exercise due diligence covers the whole journey rather than before and at the beginning of the voyage.

Article 5.1 of the Rules provides:

“The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4 unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.”

The approach of the Hamburg Rules seems to be much more appropriate in the light of the recent development in the Marine Industry, i.e. the ISPS and the ISM Codes. Due to the need for modernising the Law of Carriage of Goods by Sea, certain changes are necessary, especially with regard to the Hague/Hague-Visby Rules, in order to make this law more adaptable to change. In the light of these developments the Committee

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4- *Steel v. State Line Steamship*, (1877-78) L.R. 3 App. Cas. 72, at p.78-79. *Hedley (Pauper) Appellant v. The Pinkney & Sons Steamship Company, Limited Respondents*. [1894] A.C. 222, at p.228. *G. E. Dobell & Co. v. The Steamship Rossmore Company, Limited*. [1895] 2 Q.B. 408, at p.414. *The Carron Park*, (1890) L.R. 15 P.D. 203, at p.206-207. *Gilroy, Sons, & Co. Appellants; v. W. R. Price & Co. Respondents*, [1893] A.C. 56, at p.63-64.

5- Hamburg Rules, Art 5: Basis of liability

1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

4. (a) The carrier is liable

(i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;

(ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.

Maritime International and the UNCITRAL took upon themselves the duty to introduce a new Transport Law which reflects the needs of the industry, and includes a few changes which have a direct impact on the obligation of the carrier to provide a seaworthy vessel. This work is known as the UNCITRAL Draft Instrument on the carriage of goods [wholly or partly] [by sea] and the preparation and drafting of the Instrument is being carried out by Working Group III.

***- The UNCITRAL draft instrument for new Transport Law***

The whole idea of the new Transport Law is to introduce changes to the existing law which make it better able to adapt to changes in the Shipping Industry. Changes in this law should reflect the need of this industry. One of the most important issues that needed to be considered was the period for the exercise of due diligence: should it stay as it was under the Hague/Hague-Visby Rules or should it be changed to cover the whole voyage? There was some resistance against introducing changes to the existing rule but the support for change was too great to be ignored. However, the draft is still under consideration, which means that a return to the old regime is technically possible even though it is not feasible.

*1- Arguments for keeping the existing rule*

The first argument against the extension of the duty beyond the beginning of the journey is: if we removed navigational error and the negligence of the crew from the list of exceptions there would be no need to extend the duty, otherwise the continuing obligation of due diligence would make the carrier subject to a sure side standard which is too difficult to fulfil at sea<sup>6</sup>.

Also, it was feared that the extension of the duty beyond the beginning of the voyage might give the courts the idea that the extension of the obligation of due diligence intended to go beyond a fault-based regime<sup>7</sup>.

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6- CMI Yearbook 2001, Singapore II, the argument of Mr Hooper, Tutelary Member of the CMI, p. 295.

7- *Ibid*, Mr Hooper, p. 297

A third argument that can be raised is that the obligation to exercise due diligence before and at the beginning of the journey has been applied for so long, that any change here might create unnecessary instability in the shipping industry causing greater burden on the carrier and potentially leading to an increase in freight rates<sup>8</sup>.

## *2- Arguments for changing the existing rule*

In response to the latter argument for keeping the existing rule, although it can be argued that the courts are used to the existing rule, the continuing obligation of due diligence is used in some charterparties and time charterparties where the duty is extended in the form of a maintenance clause without any problems<sup>9</sup> being caused in these charterparties

Moreover, in response to the argument that the existing rules have been applied for such a long time that changing them could affect the stability of the industry, time charterparties often contain maintenance clauses which oblige the carrier to ensure that the vessel is in a fit state during the period hire<sup>10</sup>. So in fact the courts are familiar, in a way, with the continuous duty to keep the vessel seaworthy through out the voyage. It should be noted that the extension does not mean that the vessel must be fit during the whole journey; it only means that if the vessel becomes unseaworthy at some point during the journey, the carrier, his agents and servants, should subject to the circumstances surrounding the incident, exercise due diligence to make the vessel seaworthy<sup>11</sup>.

Keeping the existing rule without any change would nowadays seem unreasonable, especially with the recent changes in the Shipping Industry which introduced the ISM

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8- CMI Yearbook 2003, Vancouver 1, p.139.

9- CMI Yearbook 2001, Prof Gorton, Swedish Representative and member of Working Group III , p. 296. The NYPE 1946 Charterparty states in Line 36-38 the following "That the Owners shall...maintain the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service". See also NYPE 93 Clause 6 Lines 80 -82. BALTIME 1939, Clause 3 lines 43-48. GENTIME Clause 11 Lines 263-267.

10- NYPE 93 Clause 6 Lines 80-82. BALTIME 1939, Clause 3 lines 43-48. GENTIME Clause 11 Lines 263-267.

11- *Snia v. Suzuki*, (1924) 17 L.L.Rep. 78. *Anglo-Saxon Petroleum Company, Ltd. v. Adamastos Shipping Company, Ltd.*, [1957] 1 Lloyd's Rep. 271. See also Report of the Fifth Meeting of the International Sub-Committee on Issue of Transport Law, London 16th-18th July 2001, Yearbook 2001 the argument of Prof Berlingieri p.296.

and the ISPS Code. It is recognised that both of these, but especially the ISM Code, require the carrier to keep their vessel in a fit condition in order to maintain the validity of their certificates, therefore, not extending the obligation of due diligence to cover the whole voyage would seem out of tune<sup>12</sup>.

Another argument that could be raised for changing the rules runs as follows: if a ship took a cargo from port A, being seaworthy at the time, then moved to port B where it loaded another cargo, but was unseaworthy when it started from port B, and consequently sank, then the vessel would be considered unseaworthy for the cargo loaded in port B and the shipowner would be in breach of an overriding obligation and would not therefore be able to use any of the exceptions in the Hague/Hague-Visby Rules Art IV r.2, while the carrier, with regard to the cargo loaded in port A, would be in breach of Art III r.2, which deals with the care of cargo while in his possession, and the latter would be able to use any of the exceptions in Art IV r.2, despite the fact that the cause of loss or damage is the same but the effect on the cargo owners is different and this would have unfair results. Therefore, making the obligation a continuous one would be appreciated by the cargo-owners.

Again the Doctrine of Stages, allow the carrier to arrange in advance for bunkers and equipment to be collected at intermediate ports. This would not make his vessel unseaworthy, provided he had in place a plan for the ports at which the vessel was going to stop and prepared the bunkers and equipment. The Doctrine exists to ensure that the vessel is able to proceed on its voyage without delay, which again demonstrates that the courts and the industry are familiar with a concept close to the continuous duty to exercise due diligence.

The continuous obligation received strong support from many members of the Sub-Committee, the Working Group, the CMI and the UNCITRAL members and a new article has been introduced without any reservations.

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12- Synopsis of the responses of National Associations, Consultative Members and Observers to the Consultation Paper and Other Comments on the Draft Outline Instrument, CMI Yearbook 2001, see the Denmark response, p. 436.

Art 16 r.1 of the draft instrument provides<sup>13</sup>

“1. The carrier shall be bound, before, at the beginning of, and during the voyage by sea, to exercise due diligence to:

- (a) Make and keep the ship seaworthy;
- (b) Properly man, equip and supply the ship and keep the ship so manned, equipped and supplied throughout the voyage;
- (c) Make and keep the holds and all other parts of the ship in which the goods are carried, including containers where supplied by the carrier, in or upon which the goods are carried fit and safe for their reception, carriage and preservation.”

N.B. Before the article was put in this form there were some square brackets around the words, [and during], [and keep] in Article 16 (1), those were removed during the discussions of the Working Group III on Transport Law<sup>14</sup>.

### ***- Effect of extending the period of exercising due diligence***

The extension of the duty to exercise due diligence to cover the whole journey is likely to be one of the greatest results of the UNCITRAL draft instrument on Transport Law. The extension of the duty in the draft convention did not pass without raising few concerns during the discussions of the working group:

“Although there was strong support in favour of making the obligation of seaworthiness a continuing obligation, it was acknowledged that making the obligation a continuing one might be interpreted as significantly changing the allocation of risk in the draft instrument. There was general agreement that, if seaworthiness was to be a continuing obligation, an attempt should be made to rectify that balance with respect to the carrier in the Working Group’s consideration of other articles concerning the rights and interests of the carrier. One suggestion made was that this change in the carrier’s allocation of risk could be borne in mind during the Working Group’s discussion of draft article 14(3) on apportionment of liability in cases of multiple causation of damage. Concern was expressed that continuing the obligation of seaworthiness after the vessel sailed might be interpreted to continue the high degree of care appropriate when shore experts were available. It was suggested that the appropriate at-sea degree of care would be achieved by removing the error of navigation and management defence.”<sup>15</sup>

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13- Article 16 in this form was agreed upon in the UNCITRAL Working Group III 16th session, Vienna 28 Nov – 9th Dec 2005, Document A/CN.9/WG.III/WP.56, p. 19,

<http://daccessdds.un.org/doc/UNDOC/LTD/V05/870/82/PDF/V0587082.pdf?OpenElement>. Taken on the 9th May 2006

14\_ “After discussion, the Working Group agreed that the carrier’s obligation of due diligence in respect of seaworthiness should be a continuing one, and that all square brackets in draft article 13(1) should thus be removed, and the text in them retained. The Working Group also requested the Secretariat to make the necessary changes to subparagraph (b) to ensure that this obligation was understood to be of a continuing nature. It was also agreed that making this obligation a continuing one affected the balance of risk between the carrier and cargo interests in the draft instrument, and that care should be taken by the Working Group to bear this in mind in its consideration of the rest of the instrument.” United Nations Commission on International Trade Law, Thirty-seventh session, Document A/CN.9/544, Paragraph 153 p.47.

15\_ United Nations Commission on International Trade Law, Thirty-seventh session, Document A/CN.9/544, Paragraph 151 p.47.

However, an important question would arise from such an extension as to the extent to which such obligation should be strictly applied. Does it intend that the carrier should restore the vessel to its seaworthy condition instantly it become unseaworthy or should he take reasonable measures to restore its seaworthiness within reasonable time?

The discussions of the CMI Sub-committee and Work Group III did not ignore this point. Prof Berlingieri in his argument in support of extending due diligence to cover the whole voyage said that: “[T]he degree of diligence that is ‘due’ must be determined on the basis of the circumstances. During the voyage, only the master and the crew are available to correct any unseaworthiness that arises during the voyage”<sup>16</sup>

The idea of extending the duty to exercise due diligence is not a new one. The extension of the duty was applied in few of the time charters under what is known as the maintenance clause, i.e. NYPE 1946, lines 36-38, states “That the Owners shall...maintain the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service”<sup>17</sup>. Such usage does not seem to have raised any difficulties, and the courts have taken into consideration the surrounding circumstances in deciding how strictly the maintenance clause should be applied. It is important that careful consideration is given to the wording of the clause<sup>18</sup>.

For example in *Snia v. Suzuki*<sup>19</sup>, the vessel was chartered to Snia for 9 months the Charterparty was to start on 19 Dec 1919. The charterparty contained a maintenance clause<sup>20</sup>. In March 1920 the vessel left Las Palmas and shortly after she lost a propeller blade and had to deviate back to Las Palmas for repairs. Three blades were replaced and the vessel set sail, intending to arrive on time before the cancellation date of its next charter. But it had to return again to Las Palmas when one of the new blades broke, so

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16- Report of the Fifth Meeting of the International Sub-Committee on Issue of Transport Law, London 16th-18th July 2001, Yearbook 2001 p.296.

17- See also NYPE 93 Clause 6 Lines 80-82. BALTIME 1939, Clause 3 lines 43-48. GENTIME Clause 11 Lines 263-267.

18- *Anglo-Saxon Petroleum Company, Ltd. v. Adamastos Shipping Company, Ltd.*, [1957] 1 Lloyd's Rep. 271. Parker, L.J., said “The nature of the obligation to maintain must depend on the exact words used” at p. 280

19- *Snia v. Suzuki*, (1924) 17 L.L.Rep. 78.

20- Condition 2 of the contract provided: “That the owners shall provide and pay for all the provisions and wages, and for the insurance of the steamer, and for all deck and engine -room stores and maintain her in a thoroughly efficient state in hull and machinery for and during the service”.

that it could be replaced. The vessel set sail again but some 720 miles away from the port another blade broke and the Captain, instead of going to Dakar which was nearer and had good facilities, decided to go back to Las Palmas for repairs. This took until 22 May, when a new blade with extra thickness was fitted and the vessel resumed its voyage. By this time the vessel had lost shipping contracts as the charterers decided to cancel the Charterparty. After sailing again the vessel lost yet another blade and sailed to Baltimore for repairs where newer blades of steel were fitted instead of the iron ones. The question in this case was whether the vessel was unseaworthy and whether the charterers were right to cancel their contracts?<sup>21</sup>

In explaining the meaning of the words in the maintenance clause Greer, J., said<sup>22</sup>:

“though that does not mean that she will be in such a state during every minute of the service, it does mean that when she gets into a condition when she is not thoroughly efficient in hull and machinery they will take within a reasonable time reasonable steps to put her into that condition.”

In this case the carrier’s obligation to maintain the vessel is not an absolute one to require him to restore her to a seaworthy condition; his obligation is only to take reasonable steps in reasonable time<sup>23</sup>.

However, the situations changes when the language of the maintenance clause changes, i.e. in the *Saxon Star*<sup>24</sup> provision 1 of the charterparty stated that:

“1. That the said vessel being tight, staunch and strong, and every way fitted for the voyage, and to be maintained in such condition during the voyage, perils of the sea excepted, shall, with all convenient despatch, sail and proceed to . . .”

The Court of Appeal was of the opinion that the mention of the maintenance clause in provision 1 of the Charterparty alongside the obligation to make the vessel seaworthy puts the carrier under an absolute obligation to make the vessel seaworthy and this

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21- *Snia v. Suzuki* *infra*, Greer, J., arrived at the decision that the vessel was unseaworthy, and he reached the conclusion that although the charterers’ cancellation of the contract was justifiable, due to the loss of service, they were not right in doing so because they knew from the time they took the vessel that it was unseaworthy or else they had the means to find out this. See P. 87  
22- *Ibid*, p. 88. See also *Giertsen v. Turnbull*, 1908 S.C. 1101.

23- *Tynedale Shipping v. Anglo-Soviet Shipping*, (1936) 45 Ll.L.Rep. 341, p.344 Lord Roche stated “in my judgment there is no doubt that this stipulation . . . in Clause 2 of the charter -party, that the owners are to ‘maintain her in a thoroughly efficient state in hull and machinery during service,’ does not constitute an absolute engagement or warranty that the shipowners will succeed in so maintaining her whatever perils or causes may intervene to cause her to be inefficient for the purpose of her services”.

24- *Adamastos Shipping v. Anglo-Saxon Petroleum (The Saxon Star)*, [1957] 1 Lloyd’s Rep. 271

absolute obligation extends to cover the maintenance of the vessel in order to make sure that it remains efficient<sup>25</sup>.

**- Conclusion**

Bearing in mind the above case law, we think that the UNCITRAL approach to the extension of the seaworthiness obligation to cover the whole voyage should not be a strict one, i.e. the carrier should not be under an absolute obligation to maintain the vessel in a seaworthy condition, as this would not be possible to achieve and would affect the shipping industry massively. Therefore, the UNCITRAL, in order to prevent any future confusion by the courts and to respond to the fears voiced by some of the representatives<sup>26</sup>, should clearly state in its Draft Instrument that, when dealing with the carrier's continuing obligation to maintain the vessel in a seaworthy condition, the courts should consider what a prudent person would have done in the same situation, i.e. the prudent carrier would have taken reasonable steps in reasonable time to restore the seaworthy condition of the vessel though whether he succeeds or not is not important in terms of his obligation. By doing this the courts would not be under the impression that extending the duty to exercise due diligence to cover the whole journey extends beyond the remedy of a simple fault or that the extension is meant to make the carrier subject to 'shore-side' standards that are difficult to fulfil, as voiced by the argument against the extension of the duty.

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25- The *Saxon Star*, *Ibid*, Lord Justice DENNING stated: "The owners were under an express obligation to maintain the vessel in a seaworthy condition during each of the successive voyages, perils of the sea excepted. Their obligation was, I think, an absolute obligation to ensure that the vessel was throughout in a seaworthy condition, save only when the vessel was rendered unseaworthy by perils of the sea, or perhaps by any of the excepted perils in Clause 9." at p. 276. Also Lord Justice PARKER stated: "I think that the obligation to maintain in Clause 1, which extends over the whole period of the charter, amounts to an undertaking that the vessel would remain tight, staunch and strong and in every way fitted for the successive voyages, "perils of the sea excepted." The nature of the obligation to maintain must depend on the exact words use... In its present form it can, I think, only be read as a continuing warranty of seaworthiness..." at p.280. *Minister of Materials v. Wold Steamship Company, Ltd*, [1952] 1 Lloyd's Rep. 485.

26- Report of the Fifth Meeting of the International Sub-Committee on Issue of Transport Law, London 16th-18th July 2001, Yearbook 2001 p.295-297.

## **Basis of Liability and Burden of Proof under the UNCITRAL draft on Transport Law**

### ***- Introduction***

The basis of liability and burden of proof are essential in the case of seaworthiness as the current situation, represented by the Hague/Hague-Visby Rules, makes the carrier not liable for any loss or damage unless caused by want of due diligence on his part, or his agents or servants. Because it is the duty of the cargo-owner/charterer to prove that the vessel was unseaworthy, this imposes a heavy burden on him, bearing in mind that he does not possess any information about the state of the vessel. The Hamburg Rules, on the other hand, take a different approach, making the carrier responsible for any loss or damage unless he proves that he took all measures that could reasonably be taken to prevent the occurrence and its consequences. This is beneficial for the cargo-owners/charters, but unfortunately the Hamburg Rules are not widely applicable as the Hague/Hague-Visby Rules.

### ***- The existing law on Basis of Liability***

There are two existing regimes on basis of liability. The first one is represented by the Hague/Hague-Visby Rules, under Article IV r.1, the Article provides:

“Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article”.

The other regime is represented by the Hamburg Rules Article 5.(1) and (4.a) , it provides that:

“1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences

4. (a) The carrier is liable

- (i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;
- (ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.”.

Whereas Art 5 of the Hamburg Rules is based on presumed fault, where the carrier will be deemed responsible for any loss or damage to the goods while in his care, unless he proves that he, his servants or agents, took all reasonable measures necessary to avoid the occurrence or its results. The use of such a system would mean that there is no need for a list of exceptions because the moment the carrier proves that the loss or damage did not result from a fault or privity on his part, or his agents or servants, he will not be responsible. Art IV r1 of the Hague/Hague-Visby Rules, on the other hand, presumes that the carrier or the ship-owner are not responsible for any loss or damage to the goods unless the cargo owner proves that the vessel was unseaworthy. To avoid responsibility the carrier then, has to prove that the vessel was seaworthy or that he exercised due diligence to make it so. This type of system requires the list of exceptions for the carrier to be able to blame the loss or damage on one of the exceptions.

The difference between these two sets of Rules in terms of the Basis of Liability, have a major effect on the order of proof, and the burden borne by the cargo-owners to prove their cases. While the Hamburg Rules make it the responsibility of the Carrier to prove that the loss of or damage to the cargo did not result from any fault on his part, or his servants or agents, this will include an expectation that he exercised due diligence to make the vessel seaworthy. The Hague/Hague-Visby Rules make it the responsibility of the Cargo-owner to prove that the vessel was unseaworthy<sup>1</sup>, and the Carrier has to prove that he provided a seaworthy vessel or exercised due diligence to make it so.

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<sup>1</sup> - Bearing in mind that this is not an easy burden, as the carrier, in most cases, does not possess all the evidence needed to prove such thing. However, sometimes the cause of loss in itself might indicate that it is a result of unseaworthiness of the vessel.

Furthermore, the Hague/Hague-Visby Rules provides the carrier, in Art IV r2<sup>2</sup>, with protection from liability for loss or damage resulting from act, default, or negligence of his servants in the navigation or management of the vessel or from loss or damage caused by fire not resulting from his own fault or privity (he will be protected if the fire resulted from fault of the servants or agents). These exceptions provide the carrier with extra protection. Whereas the Hamburg Rules make the carrier responsible for the loss or damage, regardless of the cause, if it resulted from fault or privity on the part of the carrier, his agents or servants. These two exceptions were later dropped from the UNCITRAL Draft on Transport Law.

***- The existing law on Burden/Order of Proof***

From the evidence above we can see that at the moment the two regimes governing Carriage of Goods by Sea have two different approaches to the order of proof.

The Hamburg Rules approach takes the following order of Proof: the Cargo owner has to prove the loss of or damage to his cargo - which can be proved by providing a clean bill of lading issued by the carrier<sup>3</sup> - or any other loss or damage he suffered, e.g financial loss or loss of sub-contract. Also Art 5.1 requires that it should be proven that the loss took place while the cargo was in the carrier's care as set by Art 4:

“1. The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.”

Moreover, Art 5.1 does not state who should prove whether the loss took place while the cargo was in the carrier custody or not, but the onus of proof should lie on the party claiming that loss or damage. If the cargo owner is the claimant he must prove that the loss or damage took place while the cargo was in the carrier's custody; if the carrier is the claimant then he must prove that the loss or damage took place before the cargo

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2- “Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from-

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

(b) Fire, unless caused by the actual fault or privity of the carrier.”

3- Although this may not be as easy in the case of containerised cargo, when the cargo is loaded into the container by the cargo owner or his agents

came to his possession or after he delivered it. Furthermore, it is difficult sometimes to prove whether the cargo was damaged while it was in the carrier's care or not, e.g. in pre-packed sealed containers it is difficult to know when the cargo became damaged or lost, and this would pose another problem for the cargo-owner or the carrier. Finally, Art 5.1 of the Hamburg Rules fails to deal with the eventuality where the occurrence takes place before the cargo comes into the carrier's care but the result of the occurrence only appears after the cargo is loaded, for example a cargo of live animals, which was contaminated with foot and mouth disease, was unloaded but the crew failed to clean and disinfect the holds properly before another cargo of live animals was loaded on board. This resulted in the contamination of the new cargo and some of the animals died. It is not clear what the position of the Hamburg Rules would be in this case<sup>4</sup>.

Once this been proven, the carrier, in order to clear him self from responsibility, has to prove that he, his servants and agents took all reasonable measures to avoid the occurrence, which damaged or led to the loss of the goods or any other loss or damage, and its consequences. His defence can include that he provided a seaworthy vessel or that he exercised due diligence to make the vessel seaworthy.

This regime shifts the burden of proving unseaworthiness to the carrier, as he is the one who possess the information about what has happened on board the vessel and the actions taken. However, the Hamburg Rules only cover a small fraction of the Carriage of Goods Claims because the majority of the world's tonnage is covered by the Hague/Hague-Visby Rules.

This leads us to a second regime governing the Carriage of Goods by Sea represented by the Hague/Hague-Visby Rules. We saw above that Article IV r 1 of the rules provides the following:

“Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit

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4- this problem was resolved in the final drafting of Art 17 (1) Basis of Liability, of the new Transport Law, where it requires the claimant either to prove his loss or damage or delay, or prove that the occurrence that caused the loss, damage or delay took place while the cargo was in the carrier's care., and her the carrier to prove his innocence should prove that the occurrence did not result from a fault or privity on his part, his agents or servants.

and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article”.

As the basis of liability under this set of Rules differs from the one in the Hamburg Rules the order of proof would consequently differ, and as the Rules did not suggest one, the Courts in the UK took the burden of deciding the order of proof and it arrived at the following order<sup>5</sup>:

- Firstly the cargo-owner has to prove the loss of or the damage to his cargo by providing the clean bill of lading given to him by the carrier. If the carrier packed the cargo himself in the container or if he supervised the loading, this would satisfy the requirement, but if the cargo-owner packed the cargo in the

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5- Robin Hood Flour Mills, Ltd. v. N. M. Paterson & Sons, Ltd., 'The Farrandoc', [1967] 2 Lloyd's Rep. 276. Mr Justice Noel, at p. 284, suggested the following order: "It may be useful here to set down the manner and the order in which I believe the burden of proof should be discharged in a common-law action as distinct from a statutory action (with particular regard to the decision of the Privy Council in Maxine Footwear.... The cargo-owner must, firstly, prove damage or loss to his cargo and as the primary obligation of the owner of the vessel is to deliver to destination the goods of the plaintiff in like good order and condition as when shipped, once damage or loss of the goods so shipped is established, the owner of the vessel becomes prima facie liable to the cargo-owner for the damages. This liability is, however, subject to any exception clause contained in the bill of lading such as that the loss or damage arises or results from an 'act, neglect, or default . . . in the navigation or in the management of the ship'. If the shipowner establishes the cause of the damage or loss and that he falls within the conditions of the above exception, the owner of the cargo, in order to succeed, must then prove some other breach of the contract of carriage to which the exception clause provides no defence such as the unseaworthiness of the vessel, for instance, and then the owner of the ship may establish, that notwithstanding such unseaworthiness, he is still protected by the exception clause because (1) unseaworthiness does not give rise to a cause of action unless it consists of unfitness at the material time (which must be at the commencement of the voyage) and damage to the cargo must have been caused thereby and that such unseaworthiness occurred after the commencement of the voyage or it did not cause the loss or damage" This order of proof was supported by the Report of CMI Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003) "By way of further presentation, the Working Group heard the suggestion that a case for cargo damage was, in practice, a four-step process. In the first step, the cargo claimant was required to establish its prima facie case by showing that the cargo was damaged during the carrier's period of responsibility. In that first step, the cargo claimant was not required to prove the cause of the damage, and if no further proof was received, the carrier would be liable for unexplained losses suffered during its period of responsibility. In the second step, the carrier could rebut the claimant's prima facie case by proving an "excepted peril" under article IV.2 of The Hague and Hague-Visby rules, and that that peril was the cause of the damage to the cargo. In step three, the cargo claimant had the opportunity to prove that the "excepted peril" was not the sole cause of the damage, and that the carrier caused some of the damage by a breach of its duty to care for the cargo. Once the claimant had shown that there were multiple causes for the damage, the analysis proceeded to step four, in which liability for the damage was apportioned between the different causes. It was suggested that the first three steps of this approach had worked well since their inception in the Hague Rules, and that this general approach should be preserved in the draft instrument". Paragraph 88 p. 28, of the United Nations Commission on International Trade Law Thirty-seventh session New York, 14 June-2 July 2004. Document A/CN.9/544 16th Dec 2003.

container then the bill of lading will simply be a receipt for the goods and the carrier can put a qualification that he did not inspect the contents of the container<sup>6</sup>;

- Next the carrier has to prove the cause of the loss or damage;
- Then he must prove that the loss or the damage cause is covered by one of the exceptions mentioned in Art IV r 2;
- At that point the cargo-owner can raise the issue of vessel unseaworthiness, he has to prove the unseaworthiness of the vessel;
- Finally, in order to avoid responsibility, the carrier has to prove that the vessel was seaworthy or that he exercised due diligence to make it so or that the vessel's unseaworthiness did not contribute to the loss or damage or contributed only partially.

However, Mr Tetley did recognise that in spite of the difference between the world's legal systems the courts in different countries followed a similar pattern<sup>7</sup>.

**- *UNCITRAL Draft on Transport Law Suggested Basis of Liability***

As Working Group III works on producing a new Transport Law<sup>8</sup> one of the issues they had to deal with is which regime they should adapt with regard to the Basis of Liability: whether it should be that of the Hague/Hague-Visby Rules, that of the Hamburg Rules, or whether they should come up with a totally new Basis of Liability System? These discussions led the drafters of the Instrument to come with three different alternatives.

Dealing with the issue of basis of liability and burden/order of proof is important with regard to seaworthiness, as under the existing Rules the claimant has the burden of proving vessel unseaworthiness, as well as other marine cargo claims, It is therefore very

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6- Ace Imports Pty v Companhia de Navegacao Lloyd Brasileiro (The Esmeralda 1), [1988] 1 Lloyd's Rep 206.

7- Tetley, Marine Cargo Claims, 4th edition (to be published in 2008) Chapter 6: The Burden and Order of Proof p.31. Tetley's webpage: <http://www.mcgill.ca/maritimelaw/mcc4th/> on Aug 5th/2005.

8- The work is Called: UNCITRAL Draft instrument on the carriage of goods [wholly or partly] [by sea].

important to establish an appropriate system for proving unseaworthiness to help cargo-owners 'claimants' proving their cases.

*1- Variant A of Paragraph 1 and 2 of Article 14<sup>9</sup>*

The first suggested regime for the basis of liability reads as follow:

1. The carrier shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence that caused the loss, damage or delay took place during the period of the carrier's responsibility as defined in chapter 3, unless the carrier proves that neither its fault nor that of any person referred to in article 15(3) caused or contributed to the loss, damage or delay.
2. Notwithstanding paragraph 1, if the carrier proves that it has complied with its obligations under chapter 4 and that loss of or damage to the goods or delay in delivery has been caused [solely] by one of the following events [it shall be presumed, in the absence of proof to the contrary, that neither its fault nor that of a performing party has caused [or contributed to cause] that loss, damage or delay] [the carrier shall not be liable, except where proof is given of its fault or of the fault of a performing party, for such loss, damage or delay].

This variant is similar to Art 5.1 of the Hamburg Rules and to the exception in Article IV r 2(q) of the Hague/Hague-Visby Rules in spite of the fact that different wording is used. Where the Hamburg Rules talks about taking all reasonable measures to avoid the loss or damage this variant uses the wording of Article IV r 2(q) by mentioning the fault or privity of the carrier or his servants<sup>10</sup>. This variant is based on the presumed liability of the carrier who can prove his innocence by proving that the loss was not caused by any fault or privity on his part or by the act of any person he is responsible for, or else the carrier can demonstrate that he complied with all of his obligations, including that of due diligence, in order to prove that he is not responsible for the loss or damage. Finally, the carrier, instead of proving that the cause of the loss did not result from his fault or privity, can prove that the only cause for the loss or damage falls within one of the exceptions listed in the article and in this case the cargo-owner, in order to make the carrier liable, has to prove the contrary, i.e. that the loss or

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9- United Nation Commission on International Trade Law, Working Group III, Twelfth Session Vienna 14 June – 2 July 2004. Document A/CN.9/544, 16 Dec 2003, p.25, Article 14 became Article 17 according to the latest draft of the Working Group III produced in the 16th Session held in September 2005.

10- United Nation Commission on International Trade Law, Working Group III, Ninth Session, New York 15-26 April 2002, Document A/CN.9/WG.III/WP 21, 8 Jan 2002, Paragraph 66-67.

damage was caused by another factor which is not listed in the exceptions<sup>11</sup>, or the carrier's fault or privity, or those of his agents or servants, caused or contributed to the loss or damage.

This Variant received major support from the members of the working group due to the fact that it keeps within the existing liability regime, but also because it holds the carrier responsible in case the cause of the loss was unknown. In spite of the support for this variant some amendments were suggested.<sup>12</sup>

## 2- Variant B of Paragraph 1 and 2 of Article 14<sup>13</sup>

The second variant is:

1. The carrier is relieved from liability if it proves that:

- (i) It has complied with its obligations under article 13.1 [or that its failure to comply has not caused [or contributed to] the loss, damage or delay], and
- (ii) Neither its fault, nor the fault of its servants or agents has caused [or contributed to] the loss, damage or delay, or "that the loss, damage or delay has been caused by one of the following Events: .....

The carrier shall, however, be liable for the loss, damage or delay if the shipper proves that the fault of the carrier or the fault of its servants or agents has caused [or contributed to] the loss, damage or delay.

This variant is similar to the first one in terms of presuming the carriers liability for any loss or damage ; however, it uses different wording in order for the carrier to prove that he is not liable. This can be done by proving that he complied with his obligation to exercise due diligence or that his failure to do so did not contribute or cause the loss, damage or delay. He also has to prove that neither his fault nor the fault of his servants or agent caused or contributed to the loss or damage, or that the cause of the loss falls within one of the exceptions mentioned in this variant. Even so, the carrier would still be responsible if the claimant could prove that the carrier's fault, or the fault of his servants, was the cause of the loss or contributed to it.

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11- For more in depth discussion about this variant please refer to United Nation Commission on International Trade Law, thirty six session, Vienna 30th June – 11th July 2003 Document A/cn.9/525, 7th Oct 2002, p. 13.

12- See United Nation Commission on International Trade Law, Working Group III, Twelfth Session Vienna 14 June- 2 July 2004. Document A/CN.9/544, 16 Dec 2003. Paragraph 91, p.29-30.

13- United Nation Commission on International Trade Law, Working Group III, Twelfth Session Vienna 14 June- 2 July 2004. Document A/CN.9/544, 16 Dec 2003, p.26, as we said earlier art 14 become article 17.

This variant followed the same approach of the Hague/Hague-Visby Rules with regard to the fact that the carrier is not liable until the cargo-owner proves the loss of or damage to the cargo. However it received less support than the previous one since it did not clearly express the carrier's liability because it started with 'the carrier is relieved from Liability'<sup>14</sup>.

*3- Variant C of Paragraph 1 and 2 of Article 14*<sup>15</sup>

The third and the last suggested variant uses the following wording

1. The carrier shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence that caused the loss, damage or delay took place during the period of the carrier's responsibility as defined in chapter 3.
2. The carrier is relieved of its liability under paragraph 1 if it proves that neither its fault nor that of any person referred to in article 15(3) caused [or contributed to] the loss, damage or delay.
- 2 bis. It shall be presumed that neither its fault nor that of any person referred to in article 15(3) caused the loss, damage or delay if the carrier proves that loss of or damage to the goods or delay in delivery has been caused [solely] by one of the following events: .....

The presumption is rebutted if the claimant proves that the loss, damage or delay was caused by the fault of the carrier or any person referred to in article 15(3). Furthermore the presumption is rebutted if the claimant proves that the loss, damage or delay was caused by one of the cases listed in article 13(1) (a), (b) or (c). However, in such a case, the carrier is relieved of liability if it proves compliance with the duty under article 13.”

This variant, although avoiding the vague liability approach used by variants A and B, still used the presumed liability approach. In paragraph 2, it used the same wording as paragraph 1 of variant B and relieved the carrier from liability if he could prove that there was no fault on his part or on the part of any of the people for whom he is responsible. However paragraph 2 bis relieved the carrier from responsibility if he could prove that the cause of the loss was one of the exceptions provided for in the same paragraph. This variant did not receive any support from the working group members and it was later dropped<sup>16</sup>.

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14- See United Nation Commission on International Trade Law, Working Group III, Twelfth Session Vienna 14 June – 2 July 2004, Document A/CN.9/544, 16 Dec 2003, paragraph 92, p.30.

15- United Nation Commission on International Trade Law, Working Group III, Twelfth Session Vienna 14 June – 2 July 2004, Document A/CN.9/544, 16 Dec 2003, p.27.

16- United Nation Commission on International Trade Law, Working Group III, Twelfth Session Vienna 14 Jun – 2 July 2004. Document A/CN.9/544, 16 Dec 2003. Paragraph 93, p.30

#### *4- Result of the working Group as of 8th September 2005*

After discussing the three suggested Variants, the working group redrafted Article 14 to read as follow<sup>17</sup>:

##### Article 17. Basis of liability

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that:
  - (a) the loss, damage, or delay; or
  - (b) the occurrence that caused or contributed to the loss, damage, or delay took place during the period of the carrier's responsibility as defined in chapter 4.The carrier is relieved of all or part of its liability if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 19.
2. If the carrier, alternatively to proving the absence of fault as provided in paragraph 1, proves that an event listed in paragraph 3 caused or contributed to the loss, damage, or delay, then the carrier is relieved of all or part of its liability subject to the following provisions:
  - (a) If the claimant proves that the fault of the carrier or of a person referred to in article 19 caused or contributed to the event on which the carrier relies, then the carrier is liable for all or part of the loss, damage, or delay.
  - (b) If the claimant proves that an event not listed in paragraph 3 contributed to the loss, damage, or delay, and the carrier cannot prove that this event is not attributable to its fault or to the fault of any person referred to in article 19, then the carrier is liable for part of the loss, damage, or delay.
  - (c) If the claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by
    - (i) the unseaworthiness of the ship;
    - (ii) the improper manning, equipping, and supplying of the ship; or
    - (iii) the fact that the holds or other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) were not fit and safe for reception, carriage, and preservation of the goods, and the carrier cannot prove that:
      - (A) it complied with its obligation to exercise due diligence as required under article 16(1); or
      - (B) the loss, damage, or delay was not caused by any of the circumstances referred to in (i), (ii), and (iii) above, then the carrier is liable for part or all of the loss, damage, or delay.
3. The events mentioned in paragraph 2 are: .....<sup>18</sup>
4. When the carrier is relieved of part of its liability pursuant to the previous paragraphs of this article, then the carrier is liable only for that part of the loss, damage, or delay that is attributable to the event or occurrence for which it is liable under the previous paragraphs, and liability must be apportioned on the basis established in the previous paragraphs."

This rather prolonged Article was the one which Working Group III devised. It is based on the presumed liability of the carrier; however, the suggested article gives the carrier an opening to prove that he is not liable or to limit his liability for any loss or damage by using one of the provided exceptions.

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17- United Nations Commission on International Trade Law Working Group III (Transport Law) Sixteenth Session, Doc A/DC9/WP.III/WP.56. 28th November to 9th December 2005.

18\_ The Exceptions in this article are more or less the same of those in Art IV r2 of the Hague/Hague-Visby Rules with the exception of the error in navigation and management of the vessel which have been removed in Article 17.

Also, this Article assumes that the carrier is able to find out the cause or causes of damage or loss, which raises the question with regards to containerised cargo and how the carrier will know whether the damage or loss occurred while the cargo was in his custody or before or after it came into his possession.

The answer to this problem lies in several articles in this draft. For example in Chapter 8, entitled Obligations of the Shipper, Article 28 makes the cargo-owner/shipper, who chooses to provide his cargo in a container or similar sealed storage responsible for ensuring that it is lashed and secured in such way that the goods can withstand all aspects of the journey from loading to delivery<sup>19</sup>. This way if the shipper fails to take appropriate action and the vessel meets any expected perils of the sea and as a result the cargo is damaged or lost then the carrier will not be responsible for such loss. In addition where carriage of goods in containers is involved the carrier can limit his liability by using qualifying terms in the contract of carriage. This is specifically dealt with in Chapter 9, entitled Transport Documents and Electronic Records, where Article 41, entitled Qualifying the Description of the Goods in the Contract Particulars. Article 41(b, c) allows the carrier, provided he is acting in a good faith, to use qualifying terms when he suspect that some of the information provided by the shipper may not be correct. Such qualification might be with regard to the leading marks of the cargo, number of packages, pieces or quantity of the goods or with regard to the weight of the cargo...etc<sup>20</sup>.

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19\_ Article 28 “The shipper must deliver the goods ready for carriage, unless otherwise agreed in the contract of carriage, and in such condition that they will withstand the intended carriage, including their loading, handling, stowage, lashing and securing, and discharge, and that they will not cause injury or damage. In the event the goods are delivered in or on a container or trailer packed by the shipper, the shipper must stow, lash and secure the goods in or on the container or trailer in such a way that the goods will withstand the intended carriage, including loading, handling and discharge of the container or trailer, and that they will not cause injury or damage.”

20\_ Article 41 states: “The carrier, if acting in good faith when issuing a transport document or an electronic transport record, may qualify the information referred to in article 38(1)(a), 38(1)(b) or 38(1)(c) in the circumstances and in the manner set out below in order to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper:

(a) For non -containerized goods

(i) if the carrier can show that it had no reasonable means of checking the information furnished by the shipper, it may so state in the contract particulars, indicating the information to which it refers, or

(ii) if the carrier reasonably considers the information furnished by the shipper to be inaccurate, it may include a clause providing what it reasonably considers accurate information.

These two articles are unique and new, with regard to having detailed articles dealing with containerised cargo. Neither of them existed in the Hague/Hague-Visby or Hamburg Rules, although both of these mentioned containers in terms of limitation of liability to define what constitutes a package, in order to decide the amount of compensation. However, they are not the sole creation of the Working Group III or the CMI. The qualifications mentioned in Article 41 in fact used in the shipping industry to limit the carrier's liability where containers have been used. Even when no such qualifications were used in the contract of carriage, the courts were prepared to consider the number of the packages/pieces loaded into the container and mentioned in the contract of carriage to be prima facie evidence which can be rebutted if the carrier had reasonable grounds to suspect that such information was incorrect or had no reasonable means of checking it<sup>21</sup>.

- *Conclusion*

Article 17 is somewhat complicated, creates confusion and is too long when compared to Art IV of Hague/Hague-Visby Rules. It asks too much from the cargo-owner who has little information with which to prove the cause of the loss: it asks to prove either the unseaworthiness of the vessel, or to prove that it was the result of a fault by the carrier; his servants or agents, or to prove that the loss, if not caused by

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(b) For goods delivered to the carrier or a performing party in a closed container, unless the carrier or a performing party in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container before issuing the transport document or the electronic transport record, provided, however, that in such case the carrier may include such clause if it reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate, the carrier may include a qualifying clause in the contract particulars with respect to

(i) the leading marks on the goods inside the container, or

(ii) the number of packages, the number of pieces, or the quantity of the goods inside the container.

(c) For goods delivered to the carrier or a performing party in a closed container, the carrier may qualify any statement of the weight of goods or the weight of a container and its contents with an explicit statement that the carrier has not weighed the container if

(i) the carrier can show that neither the carrier nor a performing party weighed the container, and the shipper and the carrier did not agree prior to the shipment that the container would be weighed and the weight would be included in the contract particulars, or

(ii) the carrier can show that there was no reasonable means of checking the weight of the container.

21\_ The Esmeralda 1, [1988] 1 Lloyd's Rep 206. The River Gurara, [1998] 1 Lloyd's Rep. 225 .

unseaworthiness or fault of the carrier, has been caused by some other reason which is not covered by the exceptions.

However, the other suggested variants<sup>22</sup>, were not much better in terms of wording or complications, although all of them; in one way or another, were based on presumed liability. They were long, complicated and contain many exceptions which could easily be avoided. In the last section of this study we are going to provide what we think is a simple easy Rule for the Basis of Liability and Burden of Proof. It is worth mentioning that although the variants all included a list of exceptions none of them included the exception for loss or damage resulted from act or negligence in managing or navigating the vessel mentioned in Article III r 2(a) of the Hague/Hague-Visby Rules. This states:

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from-
  - (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

Retaining this exception raised opposition from many delegates for the following reasons:

“It was recalled that subparagraphs (a) and (b) set forth the first two of the traditional exceptions to the carrier’s liability, as provided in the Hague and Hague-Visby Rules. It was also recalled that there was considerable opposition to the retention of either. As regards subparagraph (a), it was pointed out that there was little support for the “management” element, which was simply productive of disputes as to the difference between management of the ship and the carrier’s normal duties as to care and carriage of the goods. It was also pointed out that a similar exception to the carrier’s liability based on the error in navigation existed in the original version of the Warsaw Convention and had been removed from the liability regime governing the air carriage of goods as early as 1955 as a reflection of technical progress in navigation techniques. It was widely felt that the removal of that exception from the international regime governing carriage of goods by sea would constitute an important step towards modernizing and harmonizing international transport law. It was emphasized that such a step might be essential in the context of establishing international rules for door-to-door transport.”<sup>23</sup>

If the exception of error of management and navigation is removed then the duty to exercise due diligence should be made a continuous one, but if the exception is retained then the duty should not be extended beyond the commencement of the journey<sup>24</sup>. This

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22- Except Variant A 1 and 2, after taking out the list of exemptions.

23- The United Nation Commission on International Trade Law, Working Group III, Thirty-sixth session, Vienna, 30 June -11 July 2003, taken from <http://daccessdds.un.org/doc/UNDOC/GEN/V02/585/44/PDF/V0258544.pdf?OpenElement>, on 4th July 06.

24- In responding to the argument whether there is a need to extend the duty to exercise due diligence to become a continuous one if the error of management exception is deleted Prof Berlingieri said that: “To ensure uniform application, the final instrument should clarify that the obligation (to exercise due diligence) is continuous if it eliminates the negligent management exception. If the exception is retained, however, then the obligation should not continue past the commencement of the voyage.”

means that we cannot have both the continuous duty and error in management and navigation exception. The reason for this is due to the fact that if the duty was extended to cover the whole journey it will naturally cover errors in management and navigation of the vessel, and will be indirectly connected to the human and documentary<sup>25</sup> elements of seaworthiness.

**- *UNCITRAL Draft on Transport Law Suggested Burden/Order of Proof***

Usually the article dealing with basis of liability will, directly or indirectly, deal with the issue of burden/order of proof, in spite of the fact that it might be left to the courts to decide upon the order that should be followed in providing evidence<sup>26</sup>.

Deciding the order of proof has a great impact on the outcome of any claim including marine cargo claims.

The UNCITRAL in its attempt to introduce new Transport Law provided different variants on the issue of the Carriers Liability with regard to the Carriage of Goods by Sea. All these variants were based on presumed liability as we saw above<sup>27</sup>.

We can say that all the above variants A, B and C; in one way or another, followed the same order of proof used by the courts under the Hague/Hague-Visby and the Hamburg Rules and the order is as follow:

- The cargo-owner/consignee/shipper has to prove the loss or damage to his cargo. This can be done by providing the clean bill of lading issued by the carrier. If the carrier packed the cargo himself in the container or if he supervised the loading, this would satisfy the requirement, but if the cargo-owner packed the cargo in the container then the bill of lading will just be a receipt for the goods and the carrier can put a qualification that he did not

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25- When the error in navigation is due to the use of out dated charts or if the vessel had the no manuals on board or had wrong or voluminous ones.

26- See Robin Hood Flour Mills, Ltd. v. N. M. Paterson & Sons, Ltd., 'The Farrandoc', [1967] 2 Lloyd's Rep. 276. Mr Justice Noel, at p. 284.

27- We so that Variant B did not used clear wording with regard to the carrier liability in case of loss or damage instead it used at the beginning of the Article "The carrier is relieved from liability if it proves that" the usage of this wording made this Variant subject to criticism.

inspect the contents of the container<sup>28</sup>; the loss or damage can be financial not only physical loss or damage to the cargo.

- The carrier has, then, to prove the cause of the loss;
- After that the carrier has to prove that there was no fault or privity on his part, or on the part of any of the people he is responsible for, or that the loss or damage was solely caused by one of the exceptions provided for in one of the variants;
- At this point the cargo-owner can rebut this by proving that the carrier was in breach of one of his obligations provide for in the Draft including The duty to exercise due diligence to provide seaworthy vessel;
- Finally, the carrier, in order to rebut this claim, has to prove that he complied with all of his obligations, or that his failure to comply with his obligation did not cause or contribute to the loss or damage.

However the draft that the Working Grouped has arrived at so far can be a bit complicated, wordy and can lead to confusion.

*- Result of the working Group III as of 8<sup>th</sup> September 2005*

The Meeting of the Working Group III in its sixteenth session in 2005 resulted in the introduction of Draft Article 17, mentioned above. The advantage of this Article over the other three Variants and the existing set of Rules, the Hamburg and the Hague/Hague-Visby, is that this draft clearly states the order of proof that should be followed in order to prove who is responsible for any loss or damage. The order which should be followed is:

The cargo owner has either to prove that there is loss or damage or delay, or that the occurrence which caused the loss or damage or delay took place while the goods were in the care of the Carrier, he can provide a clean bill of lading;

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28- The Esmeralda 1, [1988] 1 Lloyd's Rep 206.

The carrier, in order to avoid liability, has to prove the cause(s) of the loss, and that there was no fault on his part or on the part of one of the people he is responsible for. Alternatively he can prove that the cause(s) falls within the exceptions provided in Art 17.3;

The burden then, shifts to the cargo-owner who, in order to prove the liability of the carrier, has to prove that:

- the fault or privity of the carrier, his agent or servants, caused or contributed to the event which the carrier relies on for exemption; or
- that the loss was caused by another event. (To prove this case Article 17 r 1 should apply, in other words, we go to the first step of burden of proof);
- The Cargo-owner can claim that the carrier failed to comply with his duty to provide a seaworthy vessel<sup>29</sup>;
- At this point the carrier has to prove either that the vessel was seaworthy or at least that he has exercised due diligence to make her so; alternatively he has to prove that even though he did not comply with his obligation of due diligence this did not cause or contributed to the loss or damage;

- *Conclusion*

Although this draft Article is much clearer than what we have at the moment, in terms of what each party has to do with regard to the order of proof, it remains long, complicated and contains so many exceptions to both the proof and the counter proof. Furthermore, it still makes the cargo-owner responsible for proving the unseaworthy condition of the vessel or the lack of due diligence, even though proving this is not easy because the carrier possesses all the required evidence. However it is the carrier's duty to prove the cause of the loss or damage and therefore he might seek to prove that the cause is covered by one of the exceptions listed in this article<sup>30</sup>, but it is the cargo-

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29- The duty to provide seaworthy vessel under this draft convention is still an overriding obligation and this is clear from the wording of Art 14.2 when it said that "without prejudice to paragraph 3"

30- One advantage of the new Transport Law is that it removed from the list of exceptions the exceptions related to the fault or negligence of the carrier's servants in managing or navigating the vessel.

owner's duty to raise the possibility that the cause could have resulted from vessel unseaworthiness. The proof here is thus based on a balance of probability similar to the current system. Therefore, it would have been much better to make the carrier, after explaining the cause of the loss or damage, responsible for proving that he exercised due diligence before moving to using one of the exceptions. However, once this has been made the case there will no longer be any need for the list of exceptions, and it would have been much better to limit the Basis of Liability article to one similar to Article 5 of the Hamburg Rules, without the special provision of fire. This means that it is enough for the carrier to prove that there was no fault or privity on his part, or those who work for him and prove that he exercised due diligence to make the vessel seaworthy or, even if there was fault or privity, it did not cause or contribute to the loss or damage. Such an approach would have been easier, simpler and would save time in litigation. This would not only be beneficial in case of seaworthiness; it could also be used in any claim with regard to the carriage of goods by sea. Therefore, as long as the carrier proves that he complied with all of his obligations or that his failure or his fault or privity did not cause or contribute to the loss or damage, he will not subsequently be responsible for anything. The only exceptions which could be retained are the conventional ones, i.e. Act of God, War... etc.

## **Chapter Seven**

### **Conclusion and Recommendations**

### **- Introduction**

During the previous chapters it was shown that under the current law, represented by the Hague/Hague-Visby Rules and common law, the carrier is obliged to provide a seaworthy vessel before and at the beginning of any journey. The situation is different under the Hamburg Rules where the carrier's obligation extends to cover the whole journey rather than the beginning only. It has also been demonstrated that seaworthiness not only covers the physical aspects of the vessel but extends to cover the manning of the vessel, the documents and its readiness to receive the cargo.

It has also been shown that under Hague/Hague-Visby Rules Liability is Based on proved fault which means in a case relating to unseaworthiness of the vessel it is the party, usually the cargo-owner/charterer, claiming the unseaworthy condition of the vessel who has to prove this. Once this is proven it is then the duty of the party - usually the carrier - alleging that the vessel was seaworthy or alleging the exercise of due diligence to prove that. Again the situation is different under the Hamburg Rules, under which the carrier is responsible for any loss or damage unless he proves that the loss or damage did not result from any fault or negligence on his part, or that of his agents or servants. The Hamburg Rules approach is based on the common understanding adopted by United Nation Conference on the Carriage of Goods by Sea in Annex 2 of Hamburg Rules:

“It is the common understanding that the liability of the carrier under this Convention is based on the principle of *presumed fault or neglect*. This means that, as a rule, the burden of proof sets on the carrier but, with respect to certain cases, the provisions of the convention modify this rule.”

Furthermore the Carriage of Goods by Sea is currently covered by two international conventions, The Hague/Hague-Visby Rules on the one hand and the Hamburg Rules on the other<sup>1</sup>, so the whole idea of having one set of rules covering the Carriage of Goods by Sea has not been satisfied. Particularly when considering the issue of Seaworthiness

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1 - it is worth mentioning that the Hague/Hague-Visby Rules are widely accepted by the majority of the shipping countries. Around 93 countries signed the Hague or the Hague-Visby Rules, while only a few countries – 31 states - signed for the Hamburg Rules which only came into force in November 1992 although it was adopted by the UNCITRAL in March 1978. Sources are <http://www.comitemaritime.org/ratific/brus/bru05.html>, taken on the 24th June 2006, and [http://www.uncitral.org/uncitral/en/uncitral\\_texts/transport\\_goods/Hamburg\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html), taken on 24th June 2006.

it can be seen that each set of Rules deals with it in a different way, in terms of having special articles for seaworthiness or not, burden of proof and time to exercise the duty.

Finally the introduction of the ISM and ISPS Code has had a certain effect on the carrier's obligation to provide a seaworthy vessel.

This raises the following question: Does the current law on seaworthiness satisfy or even comply with the changes in the Marine Industry?

From what has been shown throughout the study, the current law was sufficient when it was first introduced, although in some situations it was not fair, i.e. the time of exercising the duty and burden of proof, and it may have sufficed until the new millennium. But the Law on the Carriage of Goods by Sea is like any other set of Rules or any other law, being a result of the needs of a certain group of people or industry, which means it should progress to keep up with these needs and the development of the society. As a result the law on the Carriage of Goods by Sea needs to improve, to address the points which have been brought out by this study, the Law on the issue of seaworthiness needs to evolve to meet the recent development in the Marine Industry.

Consequently, certain changes need to be introduced in order to meet the interests of the parties of the contract of carriage, i.e. carrier/shipowner and shipper/charterer. It would seem that the changes should touch on the following areas, Time to Exercise the Duty, Burden and Order of Proof, the need for detailed or general article on Seaworthiness, then importance of the ISM and ISPS Codes measures to ensure strict compliance with the Codes' requirements.

#### ***- Time to Exercise the Duty***

Currently, under the Hague/Hague-Visby Rules and common law, the obligation to provide a seaworthy vessel should be exercised before and at the commencement of the voyage<sup>2</sup>. The Hamburg Rules approach, by contrast, is that the Carrier is responsible for

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2- *McFadden v. Blue Star Line*, [1905] 1 K.B. 697, at p. 704. *Maxine Footwear Co. Ltd. and Another. Appellants; v. Canadian Government Merchant Marine Ltd. Respondents*, [1959] A.C. 589. *Tattersall v. The National Steamship Company, Limited*, (1883-84) LR 12 Q.B.D. 297. *Compania de Naviera Nedelka S.A. v. Tradax International S.A., (The Tres Flores)*, [1973] 2 Lloyd's Rep. 247. *Owners of Cargo on Ship "Maori King" v. Hughes*, [1895] 2 Q.B. 550. *Stanton v. Richardson*, (1873-74) L.R. 9

any loss of or damage to the cargo resulting from a fault or omission on the part of the carrier, his servants or agents, while the cargo is in his charge. This means that the duty to exercise due diligence under the Hamburg Rules runs from the time the cargo comes under his charge, during the voyage and until he discharge it at the port of delivery, rather than just at the before and at the beginning of the voyage. Bearing in mind that the Hague/Hague-Visby Rules are widely applicable when compared to the Hamburg Rules, the question here is: does the current regime correspond with recent developments in the Marine Industry and if not what should be done?

*1- The Position of the current law in the light of the recent changes*

The current law, with regard to seaworthiness, creates certain problems if not contradictions. Limiting the carrier's obligation to cover, only the period before and at the beginning of the voyage can leave some cargo owners in a negative position. For example where some cargo is loaded at port A, at which stage the vessel was seaworthy in all respects. The vessel then sailed to port B and loaded another cargo, however, during the journey to port B the vessel suffered some problems and became unseaworthy but the carrier did not take any action to remedy the unseaworthiness. The vessel sailed from port B and shortly after sank due to the unseaworthiness of the vessel. Under the current law the cause of the loss of the cargo shipped at port B is the unseaworthy condition of the vessel and the owners can sue the carrier for their loss. The latter will not be able to use the protections of Art IV r 2 of Hague/Hague-Visby Rules because the obligation of Art III r.1<sup>3</sup> is an overriding one and should be satisfied before the carrier can use the protections<sup>4</sup>. On the other hand, with regard to the cargo shipped from port A

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C.P. 390. Mediterranean Freight Services Ltd. v. BP Oil International Ltd., (The Fiona), [1994] 2 Lloyd's Rep. 506. Also Article III r. 1 of the Hague/Hague-Visby Rules.

3- Art III r.1

"The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to--

(a) Make the ship seaworthy.

(b) Properly man, equip and supply the ship.

(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation."

4- Maxine Footwear Co. Ltd. and Another. v. Canadian Government Merchant Marine Ltd. [1959] A.C. 589 LORD SOMERVELL stated, "In their Lordships' opinion the point fails. Article III, rule 1, is an overriding obligation. If it is not fulfilled and the

the carrier would be in breach of his obligation to exercise due care of the cargo, Art III r.2<sup>5</sup>, which is not an overriding obligation because it is made subject to Art IV, and means the carrier can use the protection of Art IV r.2 and escape liability. This means that the owners of the cargo loaded at port A will not be in the same position of the owners of the cargo loaded at port B; although that the cause of loss is exactly the same: the unseaworthy condition of the vessel at port B.

In the above case the same cause of loss led to two different results for the cargo owners, and has created an unfair situation. Therefore, to redress this imbalance, the carrier's duty to provide a seaworthy vessel should be extended to cover the whole voyage not only 'before and at the beginning of the voyage'.

Moreover, the introduction of the ISM and ISPS Codes affected the current position of the Law on Seaworthiness. The Codes were made part of the Safety of Life at Sea Convention (SOLAS), and were made obligatory to all ships covered by their scope, shipping and flying the flags of the member states of SOLAS. Both Codes require the carrier to comply continuously with their requirements in order to keep the certificates issued under the Codes valid. Some of the codes' requirements match the requirements of vessel seaworthiness; i.e. crew training, documents updating, maintenance, safety and security...etc. The Working Group III of the UNCITRAL stated:

"In respect of draft article 5.4, strong support was expressed for imposing upon the carrier an obligation of due diligence that was continuous throughout the voyage by retaining the words that were currently in square brackets "and during" and "and keep". Among views that were expressed in favour of imposing such an obligation, it was pointed out that, with improved communication and tracking systems allowing a carrier to closely follow the voyage of a vessel, a continuing obligation of due diligence was appropriately adapted to modern business practices. However, it was suggested that the degree of diligence would or should depend on the context, to the effect that, for example, the duty of the carrier would be different depending on whether the vessel was at sea or in port. In addition, it was suggested that the content of such a duty of due diligence should be drafted so that account could be taken of evolving standards such as the International Management Code for the Safe

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nonfulfilment causes the damage the immunities of article IV cannot be relied on. This is the natural construction apart from the opening words of article III, rule 2. The fact that that rule is made subject to the provisions of article IV and rule 1 is not so conditioned makes the point clear beyond argument" at p. 602-603. Also under common law the carrier may not be able to use the exemption clause in the contract of carriage if he fails to provide a seaworthy vessel; however, this depends on the language of the exclusion clause as was shown in chapter 4 of this study.

5- Art III r.2

"Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

Operation of Ships and for Pollution Prevention (1993, “the ISM Code”) and evolving international standards that might be developed, in particular, by the International Maritime Organization.”<sup>6</sup>

Consequently, if the period for exercising the duty to provide a seaworthy vessel is kept at its current position this will contradict with the requirements of the Codes, as at the moment the carrier’s obligation only attaches before and at the beginning of the voyage. As a result he could say that he complied with the Codes’ requirements at the relevant time and by doing so discharged his duty. *The Eurasian Dream*<sup>7</sup> case is an example of the importance of the ISM Code. At the time of the incident the Code was not in force but the experts in the case mentioned that the ISM Code could be considered a framework upon which good practice should be established<sup>8</sup>. At the moment there are no precedents regarding the ISM and ISPS Codes, because they have not been in force for long, but when cases do come before the courts difficulties will arise, particularly, those related to seaworthiness and the time to exercise the duty. Regarding this, a carrier operating under the Common and Hague/Hague-Visby Rules will ensure he complies with the requirements of the Codes before and at the beginning of the voyage, but may neglect to continue to comply with them after that. Therefore extending the time of obligation to cover the whole voyage would ensure that the Codes requirements are fulfilled and complied with during the whole journey.

As a result, the period to exercise the duty should be extended to cover the whole voyage in order to satisfy and comply with the new development in the marine industry. Some may say that this change will affect the stability of the industry, considering that the existing law has been in existence for centuries. The change should, in fact, not cause problems because some Time Charters already apply a similar duty, where the carrier is obliged to ensure the seaworthiness of the vessel during the whole period of hire. This is done by obliging him to make the vessel seaworthy at the beginning of the hire at the time of delivery, but after that his obligation is reduced to the maintenance of the vessel in a seaworthy condition; the extent of the duty depends on the language of

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6- A/CN.9/510 - Report of the Working Group on Transport Law on the work of its ninth session April 2002, p.15 taken from <http://daccessdds.un.org/doc/UNDOC/LTD/V02/541/91/PDF/V0254191.pdf?OpenElement>, on 17th July 2006.

7- *Papera Traders Co. Ltd. and Others v. Hyundai Merchant Marine Co. Ltd. and Another, (The Eurasian Dream)*. [2002] 1 Lloyd’s Rep. 719.

8- *The Eurasian Dream, ibid*, p.739.

the maintenance clause as was seen earlier<sup>9</sup>. So what can be done to ensure such stability?

*2- How strict the extension of the duty should be?*

The extension of the carrier's obligation to cover the whole journey should not in any way impose an extra burden on the part of the carrier; his obligation would still be to exercise due diligence to make the vessel seaworthy and keep her in such condition.

There is no problem with exercising due diligence before and at the beginning of the voyage, but the question would be how seaworthiness can be maintained on a continuous basis?

The behaviour of the prudent carrier should be taken into consideration, which means looking at what he would do if the vessel became unseaworthy during the voyage? It is also necessary to take into consideration the surrounding circumstances, bearing in mind that only the master, engineers and crew are on board the vessel and they have limited access to spare parts and equipments to fix the problem. Even if the vessel did have spare parts on board and the engineer attempted to fix the problem, if he failed and as a result there was loss or damage, and if the original cause of the problem which led to the need to repair was the unseaworthy condition of the vessel before the voyage started, then the carrier would still be liable, as unseaworthiness was, in fact, the effective cause of loss<sup>10</sup>, but if the unseaworthiness developed during the voyage and the crew and the carrier did their best to fix the problem within a reasonable time then they have satisfied their obligation.

Here the carrier can satisfy the obligation if he tries his best to minimise the damage and tries to fix the vessel as soon as possible, i.e. moving to the nearest port to carry out

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9- NYPE 1993 cl.6 lines 81-82 provides 'inter alia' "... shall maintain the Vessel's class and keep her in a thoroughly efficient state in hull, machinery and equipment for and during the service, and have a full complement of officers and crew. See also NYPE 1946 cl.1 lines 37-38, and SHELLTIME 4, cl.3. Also in the *Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd. (The Saxon Star)* [1957] 2 Q.B. 233. cl.1 of the charterparty provided "being tight, staunch and strong and every way fitted for the voyage, and to be maintained in such condition during the voyage, perils of the sea excepted, shall with all convenient despatch sail and proceed to".

10- *Guinomar of Conakry and Another v. Samsung Fire & Marine Insurance Co, (the Kamsar Voyager)* [2002] 2 Lloyd's Rep. 57

necessary repairs to make the vessel fit again. Also, if the engineers were able to identify the required parts to fix the vessel, the master can order, through the carrier or his representatives,<sup>11</sup> spare parts to be ready at the next port so the vessel can be fixed quickly without extensive delay. So as long as the carrier, his agents and servants do their best to make the vessel fit again then he would discharge his obligation and would not be responsible for any consequences<sup>12</sup>. The courts have already arrived at such decisions in case of time charters that include maintenance clause<sup>13</sup>. The UNCITRAL, in its attempt to develop new Transport Law, extended the carrier's obligation to cover the whole journey and this is clear from Art 16 r.1 of the draft instrument which provides<sup>14</sup>

- “1. The carrier shall be bound, *before, at the beginning of, and during* the voyage by sea, to exercise due diligence to:
- (a) Make and keep the ship seaworthy;
  - (b) Properly man, equip and supply the ship and keep the ship so manned, equipped and supplied throughout the voyage;
  - (c) Make and keep the holds and all other parts of the ship in which the goods are carried, including containers where supplied by the carrier, in or upon which the goods are carried fit and safe for their reception, carriage and preservation.”

Commenting on this new addition to the duty Professor Berlingieri said:

“[T]he degree of diligence that is ‘due’ must be determined on the basis of the circumstances. During the voyage, only the master and the crew are available to correct any unseaworthiness that arises during the voyage”<sup>15</sup>

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11- The role of the Designated Person, mentioned in the ISM Code, would be of great importance, as he would be leasing between the ship and the management of the shipping company.

12- A/CN.9/510 - Report of the Working Group on Transport Law on the work of its ninth session April 2002, p.15 taken from <http://daccessdds.un.org/doc/UNDOC/LTD/V02/541/91/PDF/V0254191.pdf?OpenElement>, on 17th July 2006. The Working Group III stated: “However, it was suggested that the degree of diligence would or should depend on the context, to the effect that, for example, the duty of the carrier would be different depending on whether the vessel was at sea or in port.”

13- Time Charters, 5th Ed, 2003, paragraph 11.5. *Tynedale Shipping v. Anglo-Soviet Shipping*, (1936) 45 Ll.L.Rep. 341, Lord Roche stated “The engagement of the shipowner is this, that if an accident happen, or even arise to cause the ship to be inefficient, or the winches to be ineffective, and out of action, they will take all reasonable and proper steps to put them back again. There is no evidence whatever... that there was any breach of the obligation on the part of the shipowners” at p.345. See also *Snia v. Suzuki*, (1924) 17 Ll. l. Rep 78 Greer J., said that the obligation of the shipowner “does not mean that she will be in such a state during every minute of the service. It does mean that when she gets into a condition when she is not thoroughly efficient in hull and machinery they will take within a reasonable time reasonable steps to put her into that condition”, at p. 88.

14- Article 16 in this form was agreed upon in the UNCITRAL Working Group III 16th session, Vienna 28 Nov – 9th Dec, Document A/CN.9/WG.III/WP.56, p. 19, <http://daccessdds.un.org/doc/UNDOC/LTD/V05/870/82/PDF/V0587082.pdf?OpenElement>. Taken on 9th May 2006

15- Report of the Fifth Meeting of the International Sub-Committee on Issue of Transport Law, London 16th–18th July 2001, Yearbook 2001 p.296.

Also the Hamburg Rules already extend the duty to cover the whole voyage, and this has been applied in the countries which adopted Hamburg Rules, even though they are not a majority. But extending the duty should not create any problems as the shipping industry would be already familiar with it, through the ISM and ISPS Codes and Time Charters.

### ***- Burden and of Proof and Order of Proof***

#### *1- Why the current position is not appropriate*

Again the current system on burden of proof and order of proof with regard to seaworthiness, puts the cargo-owner/shipper/charterers in an unfair or unfavourable position as it makes the cargo-owner/shipper responsible for proving the unseaworthy condition of the vessel. This is clear from Mr. Justice Noel who, while delivering his judgment, stated the order of proof that should be followed in such cases to be<sup>16</sup>:

“The cargo-owner must, firstly, prove damage or loss to his cargo and as the primary obligation of the owner of the vessel is to deliver to destination the goods of the plaintiff in like good order and condition as when shipped, once damage or loss of the goods so shipped is established, the owner of the vessel becomes *prima facie* liable to the cargo-owner for the damages. This liability is, however, subject to any exception clause contained in the bill of lading such as that the loss or damage arises or results from an 'act, neglect, or default . . . in the navigation or in the management of the ship'. If the shipowner establishes the cause of the damage or loss and that he falls within the conditions of the above exception, the owner of the cargo, in order to succeed, must then prove some other breach of the contract of carriage to which the exception clause provides no defence such as the unseaworthiness of the vessel, for instance, and then the owner of the ship may establish, that notwithstanding such unseaworthiness, he is still protected by the exception clause because (1) unseaworthiness does not give rise to a cause of action unless it consists of unfitness at the material time (which must be at the commencement of the voyage) and damage to the cargo must have been caused thereby and that such unseaworthiness occurred after the commencement of the voyage or it did not cause the loss or damage.”

According to this judgment, the burden of proving unseaworthiness lies in the hands of the shipper/cargo-owner who, in spite of the fact that he does not possess any information regarding what has happened on board or the state of the vessel, should

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16- Robin Hood Flour Mills, Ltd. v. N. M. Paterson & Sons, Ltd., (The Farrandoc), [1967] 2 Lloyd's Rep. 276, at p 284. Great China Metal Industries Co. Ltd. v. Malaysian International Shipping Corporation Berhad, (The Bunga Seroja), [1999] 1 Lloyd's Rep. 512. The Toledo [1995] 1 Lloyd's Rep. 40. Minister of Food v. Reardon Smith Line, Ltd., [1951] 2 Lloyd's Rep. 265. The Eurasian Dream, [2002] 1 Lloyd's Rep. 719. The Hellenic Dolphin [1978] 2 Lloyd's Rep. 336. Empresa Cubana Importada de Alimentos "Alimport" v. Iasmos Shipping Co.S.A, (The Good Friend), [1984] 2 Lloyd's Rep. 586. The Subro Valour [1995] 1 Lloyd's Rep 509. A. Meredith Jones & Co. Ltd. v. Vangemar Shipping Co. Ltd, (The Apostolis), [1997] 2 Lloyd's Rep. 241. The Antigoni [1991] 1 Lloyd's Rep 209.

establish the unseaworthiness of the vessel in order to support his claim. And according to this judgment the order of proof runs as follows:

- the cargo owner/shipper/charterer should establish the loss of or the damage he suffered, either physically to his cargo or financially, i.e. general average or loss of sub-contract... etc;
- once the loss or damage is established the carrier will be, *prima facie*, liable for that; however he can defend himself against such liability by proving the cause of loss or damage and that he is protected by a clause in the contract of carriage or by the exceptions in Art IV r.2 of the Hague/Hague-Visby Rules;
- once the carrier has done that, it is then the duty of the cargo owner/shipper/charterer to prove that the cause of loss was something else that does not fall within the limits of the exception clause in the contract of carriage or Article IV r2 of Hague/Hague-Visby-Rules. At this point he can raise the point that the cause of loss might be unseaworthiness; in this case he should prove that the vessel was unseaworthy before and at the beginning of the voyage and that it was the/a cause of the loss or damage;
- finally, if unseaworthiness is established, the carrier can still defend him self, if the contract of carriage was subject to the Hague/Hague-Visby Rules<sup>17</sup>, by establishing that he exercised due diligence to make the vessel seaworthy, or that although the vessel was not seaworthy this did not cause or participate in causing

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17- The situation does not apply under common law because the carrier's obligation under common law is that the vessel must be seaworthy and it is not enough for the carrier just to his best to make her so. But he can still escape liability if the contract of carriage included a clause to protect hi from loss or damage cause by unseaworthiness. *Steel et Al. v. The State Line Steamship Company*, (1877-78) L.R. 3 App. Cas. 72, Lord Blackburn, at p.86. stated "... also in marine contracts, contracts for sea carriage, that is what is properly called a "warranty," not merely that they should do their best to make the ship fit, but that the ship should really be fit.". *Kopitoff v. Wilson and Others*, (1875-76) L.R. 1 Q.B.D 377. Field J stated that "We hold that, in whatever way a contract for the conveyance of merchandise be made, where there is no agreement to the contrary, the shipowner is, by the nature of the contract, impliedly and necessarily held to warrant that the ship is good, and is in a condition to perform the voyage then about to be undertaken, or, in ordinary language, is seaworthy, that is, fit to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage" at p. 380. *The Glenfruin* (1885) Q.B.D 103.

the loss or damage, or if the contract of carriage was not covered by the Rules, by proving that the exclusion clause covers unseaworthiness.

The situation is different under the Hamburg Rules because the moment the cargo-owner/shipper/charterer discovers that he has suffered loss or damage the carrier will be liable for that, as liability under the Hamburg Rules is presumed, as long as the cause of the loss or damage occurred while the goods were in his charge, until he proves that the loss or damage did not result from any act or omission committed by him, or his servants or agents. This would include proving that he did his best to avoid the cause of the damage or loss and its consequences. However in a case of loss or damage or delay caused by fire the charterer/cargo-owner, in order to hold the carrier liable, has to prove the failure of the carrier, his servants or agents to take all reasonable measures that could be possibly taken to prevent the fire or put it out and avoid or reduce its consequences; this will include fire caused by unseaworthiness. Therefore, even under the Hamburg Rules the cargo-owner/shipper will still have to prove the want of due diligence in case of loss or damage caused by fire and this is clear from Art 5 r1 and 4 (a) which provide:

“1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.”

4. a. The carrier is liable

(i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;

(ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.”

The unfairness of the current law appears in making the cargo-owner/shipper/charterer prove the unseaworthy condition of the vessel and to some extent, on a balance of probabilities<sup>18</sup>, the cause of unseaworthiness. This is difficult

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18- William Tetley, *Marine Cargo Claims* 4th Ed, Chapter 6 p. 25 to be published in 2008,

<http://www.mcgill.ca/files/maritimelaw/ch6.pdf>. The information was taken from the web page on 12/03/2006. A. Meredith Jones & Co. Ltd. v. Vangemar Shipping Co. Ltd., *The "Apostolis"* (No. 2), [1999] 2 Lloyd's Rep. 292, at p. 299 Mr. Justice Longmore stated: "The shipowners, in order to succeed, must show not merely that the fire was, on the balance of probability, caused by a cigarette carelessly discarded by a stevedore, but also that the owners are responsible for that negligence on the part of the stevedores." at p 299. Also see the Court of Appeal [2000] 2 Lloyd's Rep. 337.

considering that the carrier is the one who possesses all the information about the condition of the vessel, the cause of unseaworthiness, and what took place on board the vessel and led to the damage or loss. To make the other party responsible for proving the unseaworthiness will be both difficult and inequitable, as well as causing delay in the trial.

*2- What can be done to improve the current situation*

Consequently it is necessary to change the burden and order of proof to one which is fairer and faster. As a result it is suggested that the carrier should carry the burden of proving either that the vessel was seaworthy or that the cause of loss or damage is not related to the unseaworthiness of the vessel, and this should be done after the shipper/cargo-owner/charterer prove their loss or damage and before the carrier attempts to use the protections of the contract or the law. Thus, the order of proof should be:

- the cargo-owner/charterer should prove the loss or damaged they have suffered, and that this took place while the cargo was in the carrier's charge;
- then the carrier should prove the cause of loss and that the vessel was seaworthy, or if it was unseaworthy he should prove that he exercised due diligence to make her seaworthy;
- otherwise he can prove that, although the vessel was unseaworthy and he failed to exercise due diligence, neither unseaworthiness nor his failure contributed to the loss or damage;
- once he proves this, then, the carrier can move on to use the protections in the contract of Carriage or Art IV r.2 of the Hague/Hague-Visby Rules. In the case of the Hamburg Rules the carrier will not be responsible as long as he proves that the loss or damage did not result from his acts or omissions, and the Hamburg Rules do not therefore provide a set of exceptions as the Hague/Hague-Visby Rules do.

Improving the current position can be done by the courts without any need to change the Rules, as the Hague/Hague-Visby Rules do not state the order of proof and the

burden of proof. Instead they say that the party claiming the exercise of due diligence, usually the carrier, must prove it. Consequently such a change could be enforced immediately, although this would mean changing the precedents which stated the law in the first instance. The law, however, is there to help the industry and it should be changed if the industry develops, otherwise it would no longer be able to comply with the requirements of the industry.

The UNCITRAL is working to produce a new Transport Law. However some of the suggested changes have the potential to make things more complicated. For example Article 17 which deals with liability provides the following:

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that
  - (a) the loss, damage, or delay; or
  - (b) the occurrence that caused or contributed to the loss, damage, or delay took place during the period of the carrier's responsibility as defined in chapter 4. The carrier is relieved of all or part of its liability if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 19.
2. If the carrier, alternatively to proving the absence of fault as provided in paragraph 1, proves that an event listed in paragraph 3 caused or contributed to the loss, damage, or delay, then the carrier is relieved of all or part of its liability subject to the following provisions:
  - (a) If the claimant proves that the fault of the carrier or of a person referred to in article 19 caused or contributed to the event on which the carrier relies, then the carrier is liable for all or part of the loss, damage, or delay.
  - (b) If the claimant proves that an event not listed in paragraph 3 contributed to the loss, damage, or delay, and the carrier cannot prove that this event is not attributable to its fault or to the fault of any person referred to in article 19, then the carrier is liable for part of the loss, damage, or delay.
  - (c) If the claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by
    - (i) the unseaworthiness of the ship;
    - (ii) the improper manning, equipping, and supplying of the ship; or
    - (iii) the fact that the holds or other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) were not fit and safe for reception, carriage, and preservation of the goods, and the carrier cannot prove that;
      - (A) it complied with its obligation to exercise due diligence as required under article 16(1); or
      - (B) the loss, damage, or delay was not caused by any of the circumstances referred to in (i), (ii), and (iii) above, then the carrier is liable for part or all of the loss, damage, or delay.
3. The events mentioned in paragraph 2 are: .....

This draft Article makes the carrier responsible for the damage or loss or delay if the claimant can prove either the loss or damage or delay, or if he could prove that the occurrence which caused them took place during the carrier's responsibility. In order to escape liability the carrier then has to prove the absence of fault on his part, his servants

or agents, or that the loss or damage is caused by an event that falls within the list of exceptions, subject to several conditions which the cargo-owner/shipper/charterer must prove, i.e. that the fault contributed to the loss, or that another event that is not exempted was responsible, or that the vessel was unseaworthy. Then, in order to escape liability the carrier should prove that he exercised due diligence or that the unseaworthiness did not cause or contribute to the loss or damage or delay. This draft should not be accepted because, although in contrast to the current to Hague/Hague-Visby Rules it actually provides an order of proof which mean the courts have to follow it, it is complicated and contains unnecessary details and exceptions which can cause confusion and further delays in the trial. The situation could be improved by adopting a similar approach to Art 5.1 of Hamburg Rules which makes the carrier responsible unless he proves that the loss or damage did not result from his acts or omissions and that he took all measures that could reasonably be taken to prevent the occurrence or its consequences. As this Rule is based on presumed fault as opposed to Hague/Hague-Visby and the UNCITRAL draft convention which are based on proved fault, if under Hamburg Rules the carrier could prove that there was no fault on his part, or his agents and servants, then he would not be liable and there will be no need for any loss or damage and he will not need to seek the protection of any exception clause.

***- General Article for Carrier's Obligations***

We said earlier that the current Law on Seaworthiness is covered by the Hague/Hague-Visby Rules, the Hamburg Rules or common law in the UK or the national law in other countries which apply to contracts of carriage that are not covered by the above two sets of Rules. The common law does not provide a specific rule for the duties of the carrier, but depends on the practices of the industry, e.g. what are the type of ships used in certain trade, or how loading should be done... etc, and on what the parties agree in their contracts, and through that the courts have interpreted the carrier's duties and obligations. However, the introduction of the Hague/Hague-Visby and Hamburg Rules introduced two completely different approaches. The Hague/Hague-Visby Rules provided the carriers duties in Article III, under which it made separate provisions for seaworthiness, care of cargo, issuing bill of lading... etc. Then in Article

IV it deals with the carrier's liability and exemptions. On the other hand, the Hamburg Rules have only a general article for the Carrier's Duties and Obligations, which is Art 5 entitled Basis of Liability and does not provide and exemptions.

Why the current position is not suitable?

The fact that the Carriage of Goods by Sea is governed by two sets of Rules - three if we consider that there are some differences between Hague and Hague Visby Rules<sup>19</sup>, i.e. the amount of limitation per package, unit or weight and with regard to cargo carried by containers - contradicts the whole idea of unifying the Rules governing this area of law, which was the original reason for introducing the Hague/Hague-Visby and the Hamburg Rules. With regard to seaworthiness the fact that both sets of rules dealt with this issue in two different ways creates difficulties, especially if certain countries apply both Hague/Hague-Visby and Hamburg Rules<sup>20</sup> then the court has to establish which law would apply. If the parties chose in advance what system they wanted their contract to be subject to, a particular set of Rules will apply, but otherwise the courts may chose the law applicable in their country, if that is permitted.

The main issue is the Hague/Hague-Visby Rules; which are applicable in most of the major shipping countries, are signed up to by about 100 countries and apply to most carriage contracts. Art I (b)<sup>21</sup> states that the Rules govern bills of lading and any similar document of title; furthermore, Art X states to which Bills of Lading and documents of title the Rules apply<sup>22</sup>. The Rules also apply to charterparties and other contracts of

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19- Not all the countries signed to the Hague Rules accepted the Visby Protocol, i.e. the United States still apply the Hague Rules by virtue of the Carriage of Goods by Sea Act (COGSA) 1936.

20- Syria applies Hague/Hague-Visby Rules and recently rectified Hamburg Rules in 2002.

21- Art I (b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same."

22- The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:

- (a) the bill of lading is issued in a contracting State, or
- (b) the carriage is from a port in a contracting State, or

(c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract,

whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

carriage if the parties to such contracts agree to this. In Article III r1 the Rules provide a detailed provision of when the carrier should exercise his obligation of due diligence and what constitute unseaworthiness, then, in Art IV r1 they deal with the carrier's liability and in r2 provide a long list of exemptions that the carrier can use to seek protection. A detailed article about seaworthiness will limit the ability of courts in certain countries to expand the meaning of seaworthiness to cover new aspects that arise as the Marine Industry develops. This may not pose a problem for courts in countries such UK or USA, where the judicial system depends on precedent and the courts are able to establish a new precedent should there be a need, whereas, in countries where, to arrive at a decision, courts depend on written laws that they have to adhere strictly to, this would limit the courts in adapting new aspects of seaworthiness should there be need for that.

For example, Professor Tetley cited an American case where the court considered that the arrest of a vessel would cause the vessel to be unseaworthy if the carrier did not have in place a quick system to quickly provide bond, such as those provided by P & I Club<sup>23</sup>. This case is an example where the court was prepared to extend the meaning of seaworthiness beyond the physical, human, documentary or cargo aspects of seaworthiness, but the question would be: would a court in a country like France or Syria,... where the legal system is a Civil Law one and the courts depends on written laws, be prepared to expand the law beyond the traditional aspects of seaworthiness which was stated in Art III r.1?

Also, having a detailed article regarding the carrier's obligations and another for basis of liability would usually be followed by a list of exemptions that the carrier can use to protect him self or at least minimise liability, i.e. Articles III and IV of the Hague/Hague-Visby Rules or Articles 16 and 17 the UNCITRAL new draft convention on Transport Law. The long list of exceptions mean that, should the parties need to go to court in case of loss or damage, the case can take a long time because, if the carrier elects to use one of the exceptions, it is the other party's job to prove why the carrier

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23- William Tetley, *Marine Cargo Claims* 4th Ed, Chapter 15, Due Diligence to Make the Vessel Seaworthy, p. 37 to be published in 2008, <http://www.mcgill.ca/files/maritimelaw/ch6.pdf>. The information was taken from the web page on 12/03/2006. *Morrissey v. S.S. A. & J. Faith*, 252 F. Supp. 54, 1966 AMC 71 (N.D. Oh. 1965) cited in Tetley, *ibid*.

cannot use that exception or that there is another cause for loss or damage. Then the carrier can try to defend himself and use another exemption. But if there was a general article for the carrier's obligations and liabilities, based on presumed fault, then there would be no need for the long list of exceptions; because if the carrier proves the cause of loss or damage and that there was no fault of privity on his part, his agents or servants, or that such fault did not cause or contributed to the loss or damage then he will be exempted from liability. However, for this system to be successful it should be based on presumed fault. Article 5.1 of the Hamburg Rules is a good example, because the carrier can prove that he is not liable by proving that there was no fault or privity on his part and that he, his servants and agents, took all measures that could possibly be taken to avoid the cause of the loss or damage or its consequences. The moment the carrier proves this he can escape liability.

This means that having a General Article can relieve the cargo-owners/shippers/charterers from the burden of proving the cause of loss or damage, e.g. unseaworthiness, lack of care of cargo ...etc, when they do not have access to information, and the burden of proving the cause of loss would shift to the carrier who can escape liability by proving that he complied with his duties and obligations or that his failure to do so did not contribute to the loss or damage. Also it will relieve the carrier from trying to search for an exemption that covers him and consequently reducing the time lost on litigation.

#### ***4- The ISM and ISPS Code***

The ISM and ISPS Code introduced certain measures to ensure the safety and security of the shipping industry, therefore, they both require the carriers/shipping companies to take certain actions to comply with the Codes' requirements in order to achieve the intended purposes of the Codes i.e. to increase awareness of the importance of safety and security in the Marine Industry.

The Codes require the carrier to provide his vessel with competent, experienced and sufficiently qualified crew, and provide them with regular training on different aspects, e.g. safety, security...etc. also the carrier should schedule regular maintenance for his

vessel to ensure that she is fit and comply with the requirement of the Codes, and finally the master should keep records of all security breaches or incident with regard to the ISPS Code, or records of non-compliance with the requirements of the ISM Code and the Ship Management System (SMS) and either recommend any appropriate corrective actions to deal with any incident or occurrence, or recommend changes to the System. Moreover, the ISM Code requires the vessel's documents to be updated on a regular basis...etc, and compliance with the requirement of the Codes will result in awarding the vessel certain certificates that the carrier should keep on board presenting them to the relevant authorities when required and thus avoid unwanted delay.

Also, the Codes, especially the ISM Code, can be considered a framework upon which good practice can be established as they oblige the carrier to establish monitoring system to ensure the continuous compliance with the Codes' requirements with regard to training, maintenance, and documentation, and recording any non-compliance, incidents or security breaches and the actions that have been taken in response to these issues. The Codes, if applied properly and efficiently, could result in the reduction of maritime casualty, losses, reducing security breaches and prevent terrorist attacks. But would the Codes in their current states be able to achieve the intended purpose for which they have been introduced.

- *The Ability of the Codes to achieve the intended purposes*

In order to ensure the swift and continuous running of their vessels, companies should ensure continuous compliance with the requirements of the Codes. However, this is not always the case in reality as some companies seek to register their vessel in countries where the Codes are not strictly applied, which means that the authorities in these countries will not strictly check compliance with the Codes requirements, Some companies may choose, after initial compliance with the Codes, not to continue complying and take the risk of exposing their vessel to detention or delay should the authorities of the port the vessel is visiting decide to inspect the vessel, or if there was a problem and the aggrieved party chose to sue the carrier. In this case the court may ask to check the vessel's records and inspect the vessel, at which point the non-compliance

would be discovered. In this case, are there any measures in place to ensure that carriers and shipping companies continue to comply with the Codes' requirements?

The first penalty that the non-complying carrier would face is the invalidation of the certificates issued in accordance with the requirements of the Codes and this can render his vessel unable to visit the ports of many countries. Also, non-compliance with the ISPS Code gives the authorities at the port the vessel is visiting the right to search the vessel, detain it, or even prevents it from entering or leaving the port. Sometimes the port authority may choose to destroy the cargo carried on board the vessel, as the US port authority did with a cargo of South American lemons when it suspected it to be contaminated with a biological agent. But apart from that, what are the other measures to ensure that carriers and countries do comply with the requirements of the Codes?

*- Conclusion*

If all or part of the above recommendations are applied, this would force most of the shipping companies who want to continue providing their services, to ensure that their vessels and staff are complying on a regular basis with the Codes. If companies realise that there is a problem, they should investigate the cause of the problem and if it relates to the fact that the Codes does not meet the needs of the industry they should report the problems and any suggestions they have to their flag country or shipping industry representatives who can discuss the issue with the IMO in order to introduce any required changes.

*- Conclusion*

To sum up, the current law on Seaworthiness, represented by the Hague/Hague-Visby Rules as the most commonly used system, was sufficient for the era when it was introduced. However, laws in general should be dynamic and able to change in accordance with the changing needs of the industry they govern, and the law on the Carriage of Goods by Sea is no different from any other law; it should be dynamic and able to adapt to meet the needs of the Marine Industry. The UNCITRAL responded to the needs of the industry and is currently working on a draft for new Transport Law, and as was seen earlier the Working Group III of the UNCITRAL have discussed a proposed

draft and accepted certain articles and are still discussing other sections of the draft. Some of the UNCITRAL proposed changes are directly related to the issue of seaworthiness and comply with changes in the industry, i.e. the ISM and ISPS Code in terms of extending the period of obligation. Other changes, meanwhile, make things complicated, especially those related to basis of liability and burden of proof.

The UNCITRAL draft convention, like any other international convention, will take many years before it reaches its final draft, then another few years for ratification and yet more time before it comes into force, which means a long wait before the draft becomes an International Convention, that is if it reaches that point at all. Prof Tetley suggested the following two track approach to introduce changes to the current law<sup>24</sup>:

“Because the Instrument is so unfinished, a two track proposal seems advisable. Under the Fast Track, a new port-to-port convention would be quickly drawn up and in fact UNECE has suggested that this be carried out by itself, UNCITRAL and UNCTAD. The new convention would be somewhere between the Hague-Visby and the Hamburg Rules.

The Slow Track would consist of the CMI continuing the long process of trying to improve **the Instrument**.

The Fast-Track will provide a text 1) which should be **satisfactory to the Hague/Visby nations**; 2) will also be **close to the Hamburg Rules** and so Hamburg nations need not amend their Rules, while 3) the **United States** should be satisfied, because the **two fundamental desires** of American shippers, carriers and lawyers, etc. are a kilo limitation and avoiding the jurisdiction and arbitration effects of the US Supreme court *Sky Reefer* decision. These desires would be covered in the "Fast-Track" document.”

This study supports Prof Tetley’s approach of the fast and slow tracks, but the fast track it recommends is changing the particular Rules with regard to seaworthiness in Hague/Hague-Visby Rules, and at the same time working on the Draft Instrument.

With regards to the issue of burden of proof and order of proof, at the moment, the current order of proof is suggested by the courts. Consequently, the court could change its approach and follow the suggested approach without any need for international conventions, especially given that the suggested approach of the UNCITRAL is more

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24- Professor William Tetley, The CMI Final Draft Instrument - Participation versus Decision-Making - What We Need is a Two-Track Approach (April 8, 2002). Taken from Prof Tetley’s web site: <http://www.mcgill.ca/maritimelaw/maritime-admiralty/cmifinal/> Taken on 1st July 2006. Prof Tetley further states that: “The Fast-Track proposal, incidentally, was made by Barry Oland for Canada at the CMI meeting in New York in May, 1999, and the Fast -Track was also proposed by Lloyd Watkins of the Intl. Group of P & I Clubs at a steering committee meeting of the CMI in London in June 1999. The CMLA Executive Committee also unanimously agreed to the Two -Track approach.”

complicated when compared to the current approach. Also, scholars who do not agree with current system of proof should put forward their criticism, similar to the critics of Prof Tetley which were considered earlier.

Finally, the IMO should review both the ISM and ISPS Codes, but especially the ISM Code, the first stage of whose enforcement started in July 1998 and the second stage in July 2002, so that by now the CMI should have received feedback about the result of applying the Code and how efficient it is, Based on that information the CMI should try to take some steps to ensure comp liance with the Codes.

## **Appendices**

## **International Convention for the Unification of Certain Rules of Law relating to Bills of Lading**

Brussels, 25 August 1924

### *Article I*

- In this Convention the following words are employed with the meanings set out below:
- (a) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.
  - (b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.
  - (c) "Goods" includes goods, wares, merchandise and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.
  - (d) "Ship" means any vessel used for the carriage of goods by sea.
  - (e) "Carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

### *Article II*

Subject to the provisions of Article 6, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

### *Article III*

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:
  - (a) Make the ship seaworthy.
  - (b) Properly man, equip and supply the ship.
  - (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.
2. Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.
3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

- (a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.
  - (b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.
  - (c) The apparent order and condition of the goods.  
Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.
4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3(a), (b) and (c).
  5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.
  6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.  
If the loss or damage is not apparent, the notice must be given within three days of the delivery of the goods.  
The notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection.  
In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.  
In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.
  7. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article 3, shall for the purpose of this Article be deemed to constitute a "shipped" bill of lading.
  8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion with, goods arising from

negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

*Article IV*

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article 3. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article.
2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:
  - (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.
  - (b) Fire, unless caused by the actual fault or privity of the carrier.
  - (c) Perils, dangers and accidents of the sea or other navigable waters.
  - (d) Act of God.
  - (e) Act of war.
  - (f) Act of public enemies.
  - (g) Arrest or restraint of princes, rulers or people, or seizure under legal process.
  - (h) Quarantine restrictions.
  - (i) Act or omission of the shipper or owner of the goods, his agent or representative.
  - (j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.
  - (k) Riots and civil commotions.
  - (l) Saving or attempting to save life or property at sea.
  - (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.
  - (n) Insufficiency of packing.
  - (o) Insufficiency or inadequacy of marks.
  - (p) Latent defects not discoverable by due diligence.
  - (q) Any other cause arising without the actual fault or privity of the carrier, or without the actual fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.
3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.
5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connexion with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.
6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damage and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

#### *Article V*

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and obligations under this Convention, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this Convention shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of this Convention. Nothing in these rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

#### *Article VI*

Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading,

handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect.

Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

#### *Article VII*

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connexion with, the custody and care and handling of goods prior to the loading on, and subsequent to, the discharge from the ship on which the goods are carried by sea.

#### *Article VIII*

The provisions of this Convention shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.

#### *Article IX*

The monetary units mentioned in this Convention are to be taken to be gold value. Those contracting States in which the pound sterling is not a monetary unit reserve to themselves the right of translating the sums indicated in this Convention in terms of pound sterling into terms of their own monetary system in round figures.

The national laws may reserve to the debtor the right of discharging his debt in national currency according to the rate of exchange prevailing on the day of the arrival of the ship at the port of discharge of the goods concerned.

#### *Article X*

The provisions of this Convention shall apply to all bills of lading issued in any of the contracting States.

#### *Article XI*

After an interval of not more than two years from the day on which the Convention is signed, the Belgian Government shall place itself in communication with the Governments of the High Contracting Parties which have declared themselves prepared to ratify the Convention, with a view to deciding whether it shall be put into

force. The ratifications shall be deposited at Brussels at a date to be fixed by agreement among the said Governments. The first deposit of ratifications shall be recorded in a procès-verbal signed by the representatives of the Powers which take part therein and by the Belgian Minister of Foreign Affairs.

The subsequent deposit of ratifications shall be made by means of a written notification, addressed to the Belgian Government and accompanied by the instrument of ratification. A duly certified copy of the procès-verbal relating to the first deposit of ratifications, of the notifications referred to in the previous paragraph, and also of the instruments of ratification accompanying them, shall be immediately sent by the Belgian Government through the diplomatic channel to the Powers who have signed this Convention or who have acceded to it. In the cases contemplated in the preceding paragraph, the said Government shall inform them at the same time of the date on which it received the notification.

#### *Article XII*

Non-signatory States may accede to the present Convention whether or not they have been represented at the International Conference at Brussels.

A State which desires to accede shall notify its intention in writing to the Belgian Government, forwarding to it the document of accession, which shall be deposited in the archives of the said Government.

The Belgian Government shall immediately forward to all the States which have signed or acceded to the Convention a duly certified copy of the notification and of the act of accession, mentioning the date on which it received the notification.

#### *Article XIII*

The High Contracting Parties may at the time of signature, ratification or accession declare that their acceptance of the present Convention does not include any or all of the self-governing dominions, or of the colonies, overseas possessions, protectorates or territories under their sovereignty or authority, and they may subsequently accede separately on behalf of any self-governing dominion, colony, overseas possession, protectorate or territory excluded in their declaration. They may also denounce the Convention separately in accordance with its provisions in respect of any self-governing dominion, or any colony, overseas possession, protectorate or territory under their sovereignty or authority.

#### *Article XIV*

The present Convention shall take effect, in the case of the States which have taken part in the first deposit of ratifications, one year after the date of the protocol recording such deposit.

As respects the States which ratify subsequently or which accede, and also in cases in which the Convention is subsequently put into effect in accordance with Article 13, it shall take effect six months after the notifications specified in paragraph 2 of Article 11 and paragraph 2 of Article 12 have been received by the Belgian Government.

*Article XV*

In the event of one of the contracting States wishing to denounce the present Convention, the denunciation shall be notified in writing to the Belgian Government, which shall immediately communicate a duly certified copy of the notification to all the other States, informing them of the date on which it was received.

The denunciation shall only operate in respect of the State which made the notification, and on the expiry of one year after the notification has reached the Belgian Government.

*Article XVI*

Any one of the contracting States shall have the right to call for a fresh conference with a view to considering possible amendments.

A State which would exercise this right should notify its intention to the other States through the Belgian Government, which would make arrangements for convening the Conference.

*DONE* at Brussels, in a single copy, August 25th, 1924.

## **The Hague-Visby Rules**

### **The Hague Rules as Amended by the Brussels Protocol 1968**

#### *Article I*

##### Definitions

In these Rules the following expressions have the meanings hereby assigned to them respectively, that is to say,

- (a) "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper;
- (b) "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by water, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same;
- (c) "goods" includes goods, wares, merchandise and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried;
- (d) "ship" means any vessel used for the carriage of goods by water;
- (e) "carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

#### *Article II*

##### Risks

Subject to the provisions of Article VI, under every contract of carriage of goods by water the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

#### *Article III*

##### Responsibilities and Liabilities

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to
  - (a) make the ship seaworthy;
  - (b) properly man, equip and supply the ship;

(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

3. After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things

(a) the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;

(b) either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;

(c) the apparent order and condition of the goods:

Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking.

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs 3(a), (b) and (c).

However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

6.bis An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time

- allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.
7. After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this Article be deemed to constitute a "shipped" bill of lading.
8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.  
A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability.

#### *Article IV*

##### Rights and Immunities

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.  
Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.
2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from
- (a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;
  - (b) fire, unless caused by the actual fault or privity of the carrier;
  - (c) perils, dangers and accidents of the sea or other navigable waters;
  - (d) act of God;
  - (e) act of war;
  - (f) act of public enemies;
  - (g) arrest or restraint of princes, rulers or people, or seizure under legal process;
  - (h) quarantine restrictions;
  - (i) act or omission of the shipper or owner of the goods, his agent or representative;
  - (j) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general;
  - (k) riots and civil commotions;

- (l) saving or attempting to save life or property at sea;
  - (m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;
  - (n) insufficiency of packing;
  - (o) insufficiency or inadequacy of marks;
  - (p) latent defects not discoverable by due diligence;
  - (q) any other cause arising without the actual fault and privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.
3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.
4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.
5. (a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.
- (b) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged.  
The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.
- (c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.
- (d) The unit of account mentioned in this Article is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in subparagraph (a) of this paragraph shall be converted into national currency on the basis of the value of that currency on the date to be determined by the law of the Court seized of the case. The value of the national currency, in terms of the Special Drawing Right, of a State which is a member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of the national currency, in terms of the Special Drawing Right, of a State which is not a member of the International Monetary Fund, shall be calculated in a manner determined by that State.

Nevertheless, a State which is not a member of the International Monetary Fund and whose law does not permit the application of the provisions of the preceding sentences may, at the time of ratification of the Protocol of 1979 or accession thereto or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in its territory shall be fixed as follows:

- (i) in respect of the amount of 666.67 units of account mentioned in sub-paragraph (a) of paragraph 5 of this Article, 10,000 monetary units;
- (ii) in respect of the amount of 2 units of account mentioned in sub-paragraph (a) of paragraph 5 of this Article, 30 monetary units.

The monetary unit referred to in the preceding sentence corresponds to 65.5 milligrammes of gold of millesimal fineness 900. The conversion of the amounts specified in that sentence into the national currency shall be made according to the law of the State concerned. The calculation and the conversion mentioned in the preceding sentences shall be made in such a manner as to express in the national currency of that State as far as possible the same real value for the amounts in sub-paragraph (a) of paragraph 5 of this Article as is expressed there in units of account.

States shall communicate to the depositary the manner of calculation or the result of the conversion as the case may be, when depositing an instrument of ratification of the Protocol of 1979 or of accession thereto and whenever there is a change in either.

- (e) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.
- (f) The declaration mentioned in sub-paragraph (a) of this paragraph, if embodied in the bill of lading, shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.
- (g) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph.
- (h) Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

#### *Article IVbis*

#### Application of Defences and Limits of Liability

1. The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.
2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules.
3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in these Rules.
4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this Article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

#### *Article V*

##### Surrender of Rights and Immunities, and Increase of Responsibilities and Liabilities

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the Rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of these Rules shall not be applicable to charter-parties, but if bills of lading are issued in the case of a ship under a charter-party they shall comply with the terms of these Rules. Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

#### *Article VI*

##### Special Conditions

Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by water, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect.

Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions

under which the carriage is to be performed are such as reasonably to justify a special agreement.

*Article VII*

Limitations on the Application of the Rules

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by water.

*Article VIII*

Limitation of Liability

The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of vessels.

*Article IX*

Liability for Nuclear Damage

These Rules shall not affect the provisions of any international Convention or national law governing liability for nuclear damage.

*Article X*

Application

The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:

- (a) the bill of lading is issued in a Contracting State, or
- (b) the carriage is from a port in a Contracting State, or
- (c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract, whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person

## **United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules)**

*(Hamburg, 31 March 1978)*

### **PREAMBLE**

#### **THE STATES PARTIES TO THIS CONVENTION,**

**HAVING RECOGNIZED** the desirability of determining by agreement certain rules relating to the carriage of goods by sea,

**HAVING DECIDED** to conclude a convention for this purpose and have thereto agreed as follows:

### **PART I. GENERAL PROVISIONS**

#### *Article 1. Definitions*

In this Convention:

1. "Carrier" means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.
2. "Actual carrier" means any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.
3. "Shipper" means any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.
4. "Consignee" means the person entitled to take delivery of the goods.
5. "Goods" includes live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, goods includes such article of transport or packaging if supplied by the shipper.
6. "Contract of carriage by sea" means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea.
7. "Bill of lading" means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that

the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

8. "Writing" includes, *inter alia*, telegram and telex.

#### *Article 2. Scope of application*

1. The provisions of this Convention are applicable to all contracts of carriage by sea between two different States, if:

(a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or

(b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or

(c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or

(d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or

(e) the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.

2. The provisions of this Convention are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person.

3. The provisions of this Convention are not applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer.

4. If a contract provides for future carriage of goods in a series of shipments during an agreed period, the provisions of this Convention apply to each shipment. However, where a shipment is made under a charter-party, the provisions of paragraph 3 of this article apply.

#### *Article 3. Interpretation of the Convention*

In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity.

### PART II. LIABILITY OF THE CARRIER

#### *Article 4. Period of responsibility*

1. The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.

2. For the purpose of paragraph 1 of this article, the carrier is deemed to be in charge of the goods

- (a) from the time he has taken over the goods from:
- (i) the shipper, or a person acting on his behalf; or
  - (ii) an authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment;
- (b) until the time he has delivered the goods:
- (i) by handing over the goods to the consignee; or
  - (ii) in cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge; or
  - (iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.
3. In paragraphs 1 and 2 of this article, reference to the carrier or to the consignee means, in addition to the carrier or the consignee, the servants or agents, respectively of the carrier or the consignee.

*Article 5. Basis of liability*

1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.
2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.
3. The person entitled to make a claim for the loss of goods may treat the goods as lost if they have not been delivered as required by article 4 within 60 consecutive days following the expiry of the time for delivery according to paragraph 2 of this article.
4. (a) The carrier is liable
- (i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;
  - (ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.
- (b) In case of fire on board the ship affecting the goods, if the claimant or the carrier so desires, a survey in accordance with shipping practices must be held into the cause and circumstances of the fire, and a copy of the surveyors report shall be made available on demand to the carrier and the claimant.
5. With respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. If the carrier proves that he has complied with any special instructions given to him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or

delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents.

6. The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.

7. Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery, the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto.

#### *Article 6. Limits of liability*

1. (a) The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea.

(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 (a) of this article, the following rules apply:

(a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.

(b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit.

3. Unit of account means the unit of account mentioned in article 26.

4. By agreement between the carrier and the shipper, limits of liability exceeding those provided for in paragraph 1 may be fixed.

#### *Article 7. Application to non-contractual claims*

1. The defences and limits of liability provided for in this Convention apply in any action against the carrier in respect of loss of or damage to the goods covered by the contract of

carriage by sea, as well as of delay in delivery whether the action is founded in contract, in tort or otherwise.

2. If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

3. Except as provided in article 8, the aggregate of the amounts recoverable from the carrier and from any persons referred to in paragraph 2 of this article shall not exceed the limits of liability provided for in this Convention.

*Article 8. Loss of right to limit responsibility*

1. The carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

2. Notwithstanding the provisions of paragraph 2 of article 7, a servant or agent of the carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

*Article 9. Deck cargo*

1. The carrier is entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations.

2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier must insert in the bill of lading or other document evidencing the contract of carriage by sea a statement to that effect. In the absence of such a statement the carrier has the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier is not entitled to invoke such an agreement against a third party, including a consignee, who has acquired the bill of lading in good faith.

3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this article or where the carrier may not under paragraph 2 of this article invoke an agreement for carriage on deck, the carrier, notwithstanding the provisions of paragraph 1 of article 5, is liable for loss of or damage to the goods, as well as for delay in delivery, resulting solely from the carriage on deck, and the extent of his liability is to be determined in accordance with the provisions of article 6 or article 8 of this Convention, as the case may be.

4. Carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act or omission of the carrier within the meaning of article 8.

*Article 10. Liability of the carrier and actual carrier*

1. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.
2. All the provisions of this Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7 and of paragraph 2 of article 8 apply if an action is brought against a servant or agent of the actual carrier.
3. Any special agreement under which the carrier assumes obligations not imposed by this Convention or waives rights conferred by this Convention affects the actual carrier only if agreed to by him expressly and in writing. Whether or not the actual carrier has so agreed, the carrier nevertheless remains bound by the obligations or waivers resulting from such special agreement.
4. Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.
5. The aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limits of liability provided for in this Convention.
6. Nothing in this article shall prejudice any right of recourse as between the carrier and the actual carrier.

*Article 11. Through carriage*

1. Notwithstanding the provisions of paragraph 1 of article 10, where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named person other than the carrier, the contract may also provide that the carrier is not liable for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage. Nevertheless, any stipulation limiting or excluding such liability is without effect if no judicial proceedings can be instituted against the actual carrier in a court competent under paragraph 1 or 2 of article 21. The burden of proving that any loss, damage or delay in delivery has been caused by such an occurrence rests upon the carrier.
2. The actual carrier is responsible in accordance with the provisions of paragraph 2 of article 10 for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in his charge.

PART III. LIABILITY OF THE SHIPPERS

*Article 12. General rule*

The shipper is not liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by the fault or

neglect of the shipper, his servants or agents. Nor is any servant or agent of the shipper liable for such loss or damage unless the loss or damage was caused by fault or neglect on his part.

*Article 13. Special rules on dangerous goods*

1. The shipper must mark or label in a suitable manner dangerous goods as dangerous.
2. Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, the shipper must inform him of the dangerous character of the goods and, if necessary, of the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character:
  - (a) the shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment of such goods, and
  - (b) the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.
3. The provisions of paragraph 2 of this article may not be invoked by any person if during the carriage he has taken the goods in his charge with knowledge of their dangerous character.
4. If, in cases where the provisions of paragraph 2, subparagraph (b), of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of article 5.

PART IV. TRANSPORT DOCUMENTS

*Article 14. Issue of bill of lading*

1. When the carrier or the actual carrier takes the goods in his charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading.
2. The bill of lading may be signed by a person having authority from the carrier. A bill of lading signed by the master of the ship carrying the goods is deemed to have been signed on behalf of the carrier.
3. The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued.

*Article 15. Contents of bill of lading*

1. The bill of lading must include, *inter alia*, the following particulars:
  - (a) the general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

- (b) the apparent condition of the goods;
- (c) the name and principal place of business of the carrier;
- (d) the name of the shipper;
- (e) the consignee if named by the shipper;
- (f) the port of loading under the contract of carriage by sea and the date on which the goods were taken over by the carrier at the port of loading;
- (g) the port of discharge under the contract of carriage by sea;
- (h) the number of originals of the bill of lading, if more than one;
- (i) the place of issuance of the bill of lading;
- (j) the signature of the carrier or a person acting on his behalf;
- (k) the freight to the extent payable by the consignee or other indication that freight is payable by him;
- (l) the statement referred to in paragraph 3 of article 23;
- (m) the statement, if applicable, that the goods shall or may be carried on deck;
- (n) the date or the period of delivery of the goods at the port of discharge if expressly agreed upon between the parties; and
- (o) any increased limit or limits of liability where agreed in accordance with paragraph 4 of article 6.

2. After the goods have been loaded on board, if the shipper so demands, the carrier must issue to the shipper a "shipped" bill of lading which, in addition to the particulars required under paragraph 1 of this article, must state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier the shipper must surrender such document in exchange for a "shipped" bill of lading. The carrier may amend any previously issued document in order to meet the shippers demand for a "shipped" bill of lading if, as amended, such document includes all the information required to be contained in a "shipped" bill of lading.

3. The absence in the bill of lading of one or more particulars referred to in this article does not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements set out in paragraph 7 of article 1.

#### *Article 16. Bills of lading: reservations and evidentiary effect*

1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person must insert in the bill of lading a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.

2. If the carrier or other person issuing the bill of lading on his behalf fails to note on the bill of lading the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition.

3. Except for particulars in respect of which and to the extent to which a reservation permitted under paragraph 1 of this article has been entered:

(a) the bill of lading is *prima facie* evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and

(b) proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein.

4. A bill of lading which does not, as provided in paragraph 1, subparagraph (k), of article 15, set forth the freight or otherwise indicate that freight is payable by the consignee or does not set forth demurrage incurred at the port of loading payable by the consignee, is *prima facie* evidence that no freight or such demurrage is payable by him. However, proof to the contrary by the carrier is not admissible when the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.

#### *Article 17. Guarantees by the shipper*

1. The shipper is deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper must indemnify the carrier against the loss resulting from inaccuracies in such particulars. The shipper remains liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity in no way limits his liability under the contract of carriage by sea to any person other than the shipper.

2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss resulting from the issuance of the bill of lading by the carrier, or by a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, is void and of no effect as against any third party, including a consignee, to whom the bill of lading has been transferred.

3. Such a letter of guarantee or agreement is valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including a consignee, who acts in reliance on the description of the goods in the bill of lading. In the latter case, if the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier has no right of indemnity from the shipper pursuant to paragraph 1 of this article.

4. In the case of intended fraud referred to in paragraph 3 of this article, the carrier is liable, without the benefit of the limitation of liability provided for in this Convention, for the loss incurred by a third party, including a consignee, because he has acted in reliance on the description of the goods in the bill of lading.

#### *Article 18. Documents other than bills of lading*

Where a carrier issues a document other than a bill of lading to evidence the receipt of the goods to be carried, such a document is *prima facie* evidence of the conclusion of the

contract of carriage by sea and the taking over by the carrier of the goods as therein described.

## PART V. CLAIMS AND ACTIONS

### *Article 19. Notice of loss, damage or delay*

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the carrier not later than the working day after the day when the goods were handed over to the consignee, such handing over is *prima facie* evidence of the delivery by the carrier of the goods as described in the document of transport or, if no such document has been issued, in good condition.
2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article apply correspondingly if notice in writing is not given within 15 consecutive days after the day when the goods were handed over to the consignee.
3. If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties, notice in writing need not be given of loss or damage ascertained during such survey or inspection.
4. In the case of any actual or apprehended loss or damage, the carrier and the consignee must give all reasonable facilities to each other for inspecting and tallying the goods.
5. No compensation shall be payable for loss resulting from delay in delivery unless a notice has been given in writing to the carrier within 60 consecutive days after the day when the goods were handed over to the consignee.
6. If the goods have been delivered by an actual carrier, any notice given under this article to him shall have the same effect as if it had been given to the carrier; and any notice given to the carrier shall have effect as if given to such actual carrier.
7. Unless notice of loss or damage, specifying the general nature of the loss or damage, is given in writing by the carrier or actual carrier to the shipper not later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with paragraph 2 of article 4, whichever is later, the failure to give such notice is *prima facie* evidence that the carrier or the actual carrier has sustained no loss or damage due to the fault or neglect of the shipper, his servants or agents.
8. For the purpose of this article, notice given to a person acting on the carriers or the actual carriers behalf, including the master or the officer in charge of the ship, or to a person acting on the shippers behalf is deemed to have been given to the carrier, to the actual carrier or to the shipper, respectively.

### *Article 20. Limitation of actions*

1. Any action relating to carriage of goods under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.
2. The limitation period commences on the day on which the carrier has delivered the goods or part thereof or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered.
3. The day on which the limitation period commences is not included in the period.

4. The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.

5. An action for indemnity by a person held liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within the time allowed by the law of the State where proceedings are instituted. However, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.

#### *Article 21. Jurisdiction*

1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or

(b) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(c) the port of loading or the port of discharge; or

(d) any additional place designated for that purpose in the contract of carriage by sea.

2. (a) Notwithstanding the preceding provisions of this article, an action may be instituted in the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the law of that State and of international law. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.

(b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court of the port or place of the arrest.

3. No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not specified in paragraph 1 or 2 of this article. The provisions of this paragraph do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.

4. (a) Where an action has been instituted in a court competent under paragraphs 1 or 2 of this article or where judgement has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgement of the court before which the first action was instituted is not enforceable in the country in which the new proceedings are instituted;

(b) For the purpose of this article, the institution of measures with a view to obtaining enforcement of a judgement is not to be considered as the starting of a new action;

(c) For the purpose of this article, the removal of an action to a different court within the same country, or to a court in another country, in accordance with paragraph 2 (a) of this article, is not to be considered as the starting of a new action.

5. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an actions, is effective.

#### *Article 22. Arbitration*

1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.

2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.

3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

(a) a place in a State within whose territory is situated:

(i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

(ii) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(iii) the port of loading or the port of discharge; or

(b) any place designated for that purpose in the arbitration clause or agreement.

4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

5. The provisions of paragraphs 2 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.

6. Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.

### PART VI. SUPPLEMENTARY PROVISIONS

#### *Article 23. Contractual stipulations*

1. Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of goods in favour of the carrier, or any similar clause, is null and void.

2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention.

3. Where a bill of lading or any other document evidencing the contract of carriage by sea is issued, it must contain a statement that the carriage is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee.

4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in paragraph 3 of this article, the carrier must pay compensation to the extent required in order to give the claimant compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery. The carrier must, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted.

#### *Article 24. General average*

1. Nothing in this Convention shall prevent the application of provisions in the contract of carriage by sea or national law regarding the adjustment of general average.

2. With the exception of article 20, the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.

#### *Article 25. Other conventions*

1. This Convention does not modify the rights or duties of the carrier, the actual carrier and their servants and agents provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships.

2. The provisions of articles 21 and 22 of this Convention do not prevent the application of the mandatory provisions of any other multilateral convention already in force at the date of this Convention relating to matters dealt with in the said articles, provided that the dispute arises exclusively between parties having their principal place of business in States members of such other convention. However, this paragraph does not affect the application of paragraph 4 of article 22 of this Convention.

3. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964, or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or

(b) by virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as is either the Paris Convention or the Vienna Convention.

4. No liability shall arise under the provisions of this Convention for any loss of or damage to or delay in delivery of luggage for which the carrier is responsible under any

international convention or national law relating to the carriage of passengers and their luggage by sea.

5. Nothing contained in this Convention prevents a Contracting State from applying any other international convention which is already in force at the date of this Convention and which applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than transport by sea. This provision also applies to any subsequent revision or amendment of such international convention.

#### *Article 26. Unit of account*

1. The unit of account referred to in article 6 of this Convention is the special drawing right as defined by the International Monetary Fund. The amounts mentioned in article 6 are to be converted into the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of a national currency, in terms of the special drawing right, of a Contracting State which is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the special drawing right, of a Contracting State which is not a member of the International Monetary Fund is to be calculated in a manner determined by that State.

2. Nevertheless, those States which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature, or at the time of ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in their territories shall be fixed as 12,500 monetary units per package or other shipping unit or 37.5 monetary units per kilogram of gross weight of the goods.

3. The monetary unit referred to in paragraph 2 of this article corresponds to sixty-five and a half milligrams of gold of millesimal fineness nine hundred. The conversion of the amounts referred to in paragraph 2 into the national currency is to be made according to the law of the State concerned.

4. The calculation mentioned in the last sentence of paragraph 1 and the conversion mentioned in paragraph 3 of this article is to be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for the amounts in article 6 as is expressed there in units of account. Contracting States must communicate to the depositary the manner of calculation pursuant to paragraph 1 of this article, or the result of the conversion mentioned in paragraph 3 of this article, as the case may be, at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in paragraph 2 of this article and whenever there is a change in the manner of such calculation or in the result of such conversion.

### PART VII. FINAL CLAUSES

#### *Article 27. Depositary*

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

*Article 28. Signature, Ratification, Acceptance, Approval, Accession*

1. This Convention is open for signature by all States until 30 April 1979 at the Headquarters of the United Nations, New York.
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. After 30 April 1979, this Convention will be open for accession by all States which are not signatory States.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

*Article 29. Reservations*

No reservations may be made to this Convention.

*Article 30. Entry into force*

1. This Convention enters into force on the first day of the month following the expiration of one year from the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.
2. For each State which becomes a Contracting State to this Convention after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.
3. Each Contracting State shall apply the provisions of this Convention to contracts of carriage by sea concluded on or after the date of the entry into force of this Convention in respect of that State.

*Article 31. Denunciation of other conventions*

1. Upon becoming a Contracting State to this Convention, any State Party to the International Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924 (1924 Convention) must notify the Government of Belgium as the depositary of the 1924 Convention of its denunciation of the said Convention with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.
2. Upon the entry into force of this Convention under paragraph 1 of article 30, the depositary of this Convention must notify the Government of Belgium as the depositary of the 1924 Convention of the date of such entry into force, and of the names of the Contracting States in respect of which the Convention has entered into force.
3. The provisions of paragraphs 1 and 2 of this article apply correspondingly in respect of States Parties to the Protocol signed on 23 February 1968 to amend the International

Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924.

4. Notwithstanding article 2 of this Convention, for the purposes of paragraph 1 of this article, a Contracting State may, if it deems it desirable, defer the denunciation of the 1924 Convention and of the 1924 Convention as modified by the 1968 Protocol for a maximum period of five years from the entry into force of this Convention. It will then notify the Government of Belgium of its intention. During this transitory period, it must apply to the Contracting States this Convention to the exclusion of any other one.

*Article 32. Revision and amendment*

1. At the request of not less than one third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

*Article 33. Revision of the limitation amounts and unit of account or monetary unit*

1. Notwithstanding the provisions of article 32, a conference only for the purpose of altering the amount specified in article 6 and paragraph 2 of article 26, or of substituting either or both of the units defined in paragraphs 1 and 3 of article 26 by other units is to be convened by the depositary in accordance with paragraph 2 of this article. An alteration of the amounts shall be made only because of a significant change in their real value.

2. A revision conference is to be convened by the depositary when not less than one fourth of the Contracting States so request.

3. Any decision by the conference must be taken by a two-thirds majority of the participating States. The amendment is communicated by the depositary to all the Contracting States for acceptance and to all the States signatories of the Convention for information.

4. Any amendment adopted enters into force on the first day of the month following one year after its acceptance by two thirds of the Contracting States. Acceptance is to be effected by the deposit of a formal instrument to that effect with the depositary.

5. After entry into force of an amendment a Contracting State which has accepted the amendment is entitled to apply the Convention as amended in its relations with Contracting States which have not within six months after the adoption of the amendment notified the depositary that they are not bound by the amendment.

6. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

*Article 34. Denunciation*

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.
2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

Done at Hamburg, this thirty-first day of March, one thousand nine hundred and seventy-eight, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

## The International Safety Management Code

IMO Assembly Resolution A.741(18) - 1993

### THE ASSEMBLY,

**RECALLING** Article 15(j) of the Convention on the International Maritime Organization concerning the functions of the Assembly in relation to regulations and guidelines concerning maritime safety and the prevention and control of marine pollution from ships,

**RECALLING ALSO** resolution A.680(17), by which it invited Member Governments to encourage those responsible for the management and operation of ships to take appropriate steps to develop, implement and assess safety and pollution prevention management in accordance with the IMO Guidelines on management for the safe operation of ships and for pollution prevention,

**RECALLING ALSO** resolution A.596(15), by which it requested the Maritime Safety Committee to develop, as a matter of urgency, guidelines, wherever relevant, concerning shipboard and shore-based management and its decision to include in the work programme of the Maritime Safety Committee and the Marine Environment Protection Committee an item on shipboard and shore-based management for the safe operation of ships and for the prevention of marine pollution, respectively,

**RECALLING FURTHER** resolution A.441(XI), by which it invited every State to take the necessary steps to ensure that the owner of a ship which flies the flag of that State provides such State with the current information necessary to enable it to identify and contact the person contracted or otherwise entrusted by the owner to discharge his responsibilities for that ship in regard to matters relating to maritime safety and the protection of the marine environment,

**FURTHER RECALLING** resolution A.443(XI), by which it invited Governments to take the necessary steps to safeguard the shipmaster in the proper discharge of his responsibilities in regard to maritime safety and the protection of the marine environment,

**RECOGNIZING** the need for appropriate organization of management to enable it to respond to the need of those on board ships to achieve and maintain high standards of safety and environmental protection,

**RECOGNIZING ALSO** that the most important means of preventing maritime casualties and pollution of the sea from ships is to design, construct, equip and maintain ships and to operate them with properly trained crews in compliance with international conventions and standards relating to maritime safety and pollution prevention,

**NOTING** that the Maritime Safety Committee is developing requirements for adoption by Contracting Governments to the International Convention for the Safety of Life at Sea (SOLAS) 1974, which will make compliance with the Code referred to in operative paragraph 1 mandatory,

**CONSIDERING** that the early implementation of that Code would greatly assist in improving safety at sea and protection of the marine environment,

**NOTING FURTHER** that the Maritime Safety Committee and the Marine Environment Protection Committee have reviewed resolution A.680(17) and the Guidelines annexed thereto in developing the Code,

**HAVING CONSIDERED** the recommendations made by the Maritime Safety Committee at its sixty-second session and by the Marine Environment Protection Committee at its thirty-fourth session,

1. **ADOPTS** the International Management Code for the Safe Operation of Ships and for Pollution Prevention, (International Safety Management (ISM) Code), set out in the Annex to the present resolution;
2. **STRONGLY URGES** Governments to implement the ISM Code on a national basis, giving priority to passenger ships, tankers, gas carriers, bulk carriers and mobile offshore units, which are flying their flags, as soon as possible but not later than 1 June 1998, pending development of the mandatory applications of the Code;
3. **REQUESTS GOVERNMENTS** to inform the Maritime Safety Committee and the Marine Environment Protection Committee of the action they have taken in implementing the ISM Code;
4. **REQUESTS** the Maritime Safety Committee and the Marine Environment Protection Committee to develop Guidelines for the implementation of the ISM Code;
5. **REQUESTS ALSO** the Maritime Safety Committee and the Marine Environment Protection Committee to keep the Code and its associated Guidelines, under review and to amend them, as necessary;
6. **REVOKES** resolution A.680(17).

## **The International Safety Management (ISM) Code**

Annex to IMO Assembly Resolution A.741(18) - 1993

## **PREAMBLE**

1. The purpose of this Code is to provide an international standard for the safe management and operation of ships and for pollution prevention.
2. The Assembly adopted resolution A.443(XI) by which it invited all Governments to take the necessary steps to safeguard the shipmaster in the proper discharge of his responsibilities with regard to maritime safety and the protection of the marine environment.
3. The Assembly also adopted resolution A.680(17) by which it further recognized the need for appropriate organization of management to enable it to respond to the need of those on board ships to achieve and maintain high standards of safety and environmental protection.
4. Recognizing that no two shipping companies or shipowners are the same, and that ships operate under a wide range of different conditions, the Code is based on general principles and objectives.
5. The Code is expressed in broad terms so that it can have a widespread application. Clearly, different levels of management, whether shore-based or at sea, will require varying levels of knowledge and awareness of the items outlined.
6. The cornerstone of good safety management is commitment from the top. In matters of safety and pollution prevention it is the commitment, competence, attitudes and motivation of individuals at all levels that determines the end result.

## **1. GENERAL**

### **1.1 Definitions**

1.1.1 "*International Safety Management (ISM) Code*" means the International Management Code for the Safe Operation of Ships and for Pollution Prevention as adopted by the Assembly, as may be amended by the Organization.

1.1.2 "*Company*" means the Owner of the ship or any other organization or person such as the Manager, or the Bareboat Charterer, who has assumed the responsibility for operation of the ship from the Shipowner and who on assuming such responsibility has agreed to take over all the duties and responsibility imposed by the Code.

1.1.3 "*Administration*" means the Government of the State whose flag the ship is entitled to fly.

### **1.2 Objectives**

1.2.1 The objectives of the Code are to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment, in particular, to the marine environment, and to property.

1.2.2 Safety management objectives of the Company should, inter alia:

- provide for safe practices in ship operation and a safe working environment;

- establish safeguards against all identified risks; and
- continuously improve safety management skills of personnel ashore and aboard ships, including preparing for emergencies related both to safety and environmental protection.

1.2.3 The safety and management system should ensure:

- compliance with mandatory rules and regulations; and
- that applicable codes, guidelines and standards recommended by the Organization, Administrations, classification societies and maritime industry organizations are taken into account.

### **1.3 Application**

The requirements of this Code may be applied to all ships.

### **1.4 Functional requirements for a Safety Management System (SMS)**

Every Company should develop, implement and maintain a Safety Management System (SMS) which includes the following functional requirements:

- a safety and environmental protection policy;
- instructions and procedures to ensure safe operation of ships and protection of the environment in compliance with relevant international and flag State legislation;
- defined levels of authority and lines of communication between, and amongst, shore and shipboard personnel;
- procedures for reporting accidents and non-conformities with the provisions of this Code;
- procedures to prepare for and respond to emergency situations; and
- procedures for internal audits and management reviews.

## **2. SAFETY AND ENVIRONMENTAL PROTECTION POLICY**

2.1 The Company should establish a safety and environmental protection policy which describes how the objectives, given in paragraph 1.2, will be achieved.

2.2 The Company should ensure that the policy is implemented and maintained at all levels of the organization both ship based as well as shore based.

## **3. COMPANY RESPONSIBILITIES AND AUTHORITY**

3.1 If the entity who is responsible for the operation of the ship is other than the owner, the owner must report the full name and details of such entity to the Administration.

3.2 The Company should define and document the responsibility, authority and interrelation of all personnel who manage, perform and verify work relating to and affecting safety and pollution prevention.

3.3 The Company is responsible for ensuring that adequate resources and shore based support are provided to enable the designated person or persons to carry out their functions.

#### **4. DESIGNATED PERSON(S)**

To ensure the safe operation of each ship and to provide a link between the company and those on board, every company, as appropriate, should designate a person or persons ashore having direct access to the highest level of management. The responsibility and authority of the designated person or persons should include monitoring the safety and pollution prevention aspects of the operation of each ship and to ensure that adequate resources and shore based support are applied, as required.

#### **5. MASTER'S RESPONSIBILITY AND AUTHORITY**

5.1 The Company should clearly define and document the master's responsibility with regard to:

- implementing the safety and environmental protection policy of the Company;
- motivating the crew in the observation of that policy;
- issuing appropriate orders and instructions in a clear and simple manner;
- verifying that specified requirements are observed; and
- reviewing the SMS and reporting its deficiencies to the shore based management.

5.2 The Company should ensure that the SMS operating on board the ship contains a clear statement emphasizing the Master's authority. The Company should establish in the SMS that the master has the overriding authority and the responsibility to make decisions with respect to safety and pollution prevention and to request the Company's assistance as may be necessary.

#### **6. RESOURCES AND PERSONNEL**

6.1 The Company should ensure that the master is:

- properly qualified for command;
- fully conversant with the Company's SMS; and
- given the necessary support so that the Master's duties can be safely performed.

6.2 The Company should ensure that each ship is manned with qualified, certificated and medically fit seafarers in accordance with national and international requirements.

6.3 The Company should establish procedures to ensure that new personnel and personnel transferred to new assignments related to safety and protection of the environment are given proper familiarization with their duties. Instructions which are essential to be provided prior to sailing should be identified, documented and given.

6.4 The Company should ensure that all personnel involved in the Company's SMS have an adequate understanding of relevant rules, regulations, codes and guidelines.

6.5 The Company should establish and maintain procedures for identifying any training which may be required in support of the SMS and ensure that such training is provided for all personnel concerned.

6.6 The Company should establish procedures by which the ship's personnel receive relevant information on the SMS in a working language or languages understood by them.

6.7 The Company should ensure that the ship's personnel are able to communicate effectively in the execution of their duties related to the SMS.

## **7. DEVELOPMENT OF PLANS FOR SHIPBOARD OPERATIONS**

The Company should establish procedures for the preparation of plans and instructions for key shipboard operations concerning the safety of the ship and the prevention of pollution. The various tasks involved should be defined and assigned to qualified personnel.

## **8. EMERGENCY PREPAREDNESS**

8.1 The Company should establish procedures to identify, describe and respond to potential emergency shipboard situations.

8.2 The Company should establish programmes for drills and exercises to prepare for emergency actions.

8.3 The SMS should provide for measures ensuring that the Company's organization can respond at any time to hazards, accidents and emergency situations involving its ships.

## **9. REPORTS AND ANALYSIS OF NON-CONFORMITIES, ACCIDENTS AND HAZARDOUS OCCURRENCES**

9.1 The SMS should include procedures ensuring that non-conformities, accidents and hazardous situations are reported to the Company, investigated and analyzed with the objective of improving safety and pollution prevention.

9.2 The Company should establish procedures for the implementation of corrective action.

## **10. MAINTENANCE OF THE SHIP AND EQUIPMENT**

10.1 The Company should establish procedures to ensure that the ship is maintained in conformity with the provisions of the relevant rules and regulations and with any additional requirements which may be established by the Company.

10.2 In meeting these requirements the Company should ensure that:

- inspections are held at appropriate intervals;

- any non-conformity is reported with its possible cause, if known;
- appropriate corrective action is taken; and
- records of these activities are maintained.

10.3 The Company should establish procedures in SMS to identify equipment and technical systems the sudden operational failure of which may result in hazardous situations. The SMS should provide for specific measures aimed at promoting the reliability of such equipment or systems. These measures should include the regular testing of stand-by arrangements and equipment or technical systems that are not in continuous use.

10.4 The inspections mentioned in 10.2 as well as the measures referred to 10.3 should be integrated in the ship's operational maintenance routine.

## **11. DOCUMENTATION**

11.1 The Company should establish and maintain procedures to control all documents and data which are relevant to the SMS.

11.2 The Company should ensure that:

- valid documents are available at all relevant locations;
- changes to documents are reviewed and approved by authorized personnel; and
- obsolete documents are promptly removed.

11.3 The documents used to describe and implement the SMS may be referred to as the "Safety Management Manual". Documentation should be kept in a form that the Company considers most effective. Each ship should carry on board all documentation relevant to that ship.

## **12. COMPANY VERIFICATION, REVIEW AND EVALUATION**

12.1 The Company should carry out internal safety audits to verify whether safety and pollution prevention activities comply with the SMS.

12.2 The Company should periodically evaluate the efficiency and when needed review the SMS in accordance with procedures established by the Company.

12.3 The audits and possible corrective actions should be carried out in accordance with documented procedures.

12.4 Personnel carrying out audits should be independent of the areas being audited unless this is impracticable due to the size and the nature of the Company.

12.5 The results of the audits and reviews should be brought to the attention of all personnel having responsibility in the area involved.

12.6 The management personnel responsible for the area involved should take timely corrective action on deficiencies found.

## **13. CERTIFICATION, VERIFICATION AND CONTROL**

13.1 The ship should be operated by a Company which is issued a document of compliance relevant to that ship.

13.2 A document of compliance should be issued for every Company complying with the requirements of the ISM Code by the Administration, by an organization recognized by the Administration or by the Government of the country, acting on behalf of the Administration in which the Company has chosen to conduct its business. This document should be accepted as evidence that the Company is capable of complying with the requirements of the Code.

13.3 A copy of such a document should be placed on board in order that the Master, if so asked, may produce it for the verification of the Administration or organizations recognized by it.

13.4 A Certificate, called a Safety Management Certificate, should be issued to a ship by the Administration or organization recognized by the Administration. The Administration should, when issuing a certificate, verify that the Company and its shipboard management operate in accordance with the approved SMS.

13.5 The Administration or an organization recognized by the Administration should periodically verify the proper functioning of the ship's SMS as approved.

**AMENDMENTS TO THE ANNEX TO THE  
INTERNATIONAL CONVENTION FOR THE SAFETY  
OF LIFE AT  
SEA (SOLAS), 1974**

[contained in Resolutions 1, 2, 6 and 7  
and

including International Ship and Port Facility Security (ISPS) Code]  
(London, 12 December 2002)

RESOLUTION 1 OF THE CONFERENCE OF CONTRACTING GOVERNMENTS  
TO THE INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA,  
1974 ADOPTED ON 12 DECEMBER 2002

ADOPTION OF AMENDMENTS TO THE ANNEX TO THE INTERNATIONAL  
CONVENTION FOR THE SAFETY OF LIFE AT SEA, 1974

THE CONFERENCE,

BEARING IN MIND the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of friendly relations and co-operation among States,

DEEPLY CONCERNED about the world-wide escalation of acts of terrorism in all its forms, which endanger or take innocent human lives, jeopardize fundamental freedoms and seriously impair the dignity of human beings,

BEING AWARE of the importance and significance of shipping to the world trade and economy and, therefore, being determined to safeguard the worldwide supply chain against any breach resulting from terrorist attacks against ships, ports, offshore terminals or other facilities,

CONSIDERING that unlawful acts against shipping jeopardize the safety and security of persons and property, seriously affect the operation of maritime services and undermine the confidence of the peoples of the world in the safety of maritime navigation,

CONSIDERING that the occurrence of such acts is a matter of grave concern to the international community as a whole, while also recognizing the importance of the efficient and economic movement of world trade,

BEING CONVINCED of the urgent need to develop international co-operation between States in devising and adopting effective and practical measures, additional to those already adopted by the International Maritime Organization (hereinafter referred to as "the Organization"), to prevent and suppress unlawful acts directed against shipping in its broad sense,

RECALLING the United Nations Security Council resolution 1373(2001), adopted on 28 September 2001, requiring States to take measures to prevent and suppress terrorist acts, including calling on States to implement fully anti-terrorist conventions,

HAVING NOTED the Co-operative G8 Action on Transport Security (in particular, the Maritime Security section thereof), endorsed by the G8 Leaders during their Summit in Kananaskis, Alberta (Canada) in June 2002,

RECALLING article VIII(c) of the International Convention for the Safety of Life at Sea, 1974, as amended (hereinafter referred to as "the Convention"), concerning the procedure for amending the Convention by a Conference of Contracting Governments,

NOTING resolution A.924(22) entitled "Review of measures and procedures to prevent acts of terrorism which threaten the security of passengers and crew and the safety of ships", adopted by the Assembly of the Organization on 20 November 2001, which, inter alia:

(a) recognizes the need for the Organization to review, with the intent to revise, existing international legal and technical measures, and to consider appropriate new measures, to prevent and suppress terrorism against ships and to improve security aboard and ashore in order to reduce the risk to passengers, crew and post personnel on board ships and in port areas and to the vessels and their cargoes; and

(b) requests the Organization's Maritime Safety Committee, the Legal Committee and the Facilitation Committee under the direction of the Council to undertake, on a high priority basis, a review to ascertain whether there is a need to update the instruments referred to in the preambular paragraphs of the aforesaid resolution and any other relevant IMO instrument under their scope and/or to adopt other security measures and, in the light of such a review, to take action as appropriate;

HAVING IDENTIFIED resolution A.584(14) entitled "Measures to prevent unlawful acts which threaten the safety of ships and the security of their passengers and crew", MSC/Circ.443 on "Measures to prevent unlawful acts against passengers and crew on board ships" and MSC/Circ.754 on "Passenger ferry security" among the IMO instruments relevant to the scope of resolution A.924(22),

RECALLING resolution 5 entitled "Future amendments to chapter XI of the 1974 SOLAS Convention on special measures to enhance maritime safety", adopted by the 1994 Conference of Contracting Government to the International Convention for the Safety of Life at Sea, 1974,

HAVING CONSIDERED amendments to the Annex of the Convention proposed and circulated to all Members of the Organization and to all Contracting Governments to the Convention,

1. **ADOPTS**, in accordance with article VIII(c)(ii) of the Convention, amendments to the Annex of the Convention, the text of which is given in the Annex to the present resolution;
2. **DETERMINES**, in accordance with article VIII(b)(vi)(2)(bb) of the Convention, that the aforementioned amendments shall be deemed to have been accepted on 1 January 2004, unless, prior to that date, more than one third of the Contracting Governments to the Convention or Contracting Governments the combined merchant fleets of which constitute not less than 50% of the gross tonnage of the world's merchant fleet, have notified their objections to the amendments;
3. **INVITES** Contracting Governments to the Convention to note that, in accordance with article VIII(b)(vii)(2) of the Convention, the said amendments shall enter into force on 1 July 2004 upon their acceptance in accordance with paragraph 2 above;
4. **REQUESTS** the Secretary-General of the Organization, in conformity with article VIII(b)(v) of the Convention, to transmit certified copies of the present resolution and the text of the amendments contained in the Annex to all Contracting Governments to the Convention;
5. **FURTHER REQUESTS** the Secretary-General to transmit copies of this resolution and its Annex to all Members of the Organization, which are not Contracting Governments to the Convention.

**ANNEX**  
**AMENDMENTS TO THE ANNEX TO THE INTERNATIONAL CONVENTION**  
**FOR THE SAFETY OF LIFE AT SEA, 1974 AS AMENDED**  
**CHAPTER V**  
**SAFETY OF NAVIGATION**

Regulation 19 - Carriage requirements for shipborne navigational systems and equipment

- 1 The existing subparagraphs .4, .5 and .6 of paragraph 2.4.2 are replaced by the following:  
".4 in the case of ships, other than passenger ships and tankers, of 300 gross tonnage and upwards but less than 50,000 gross tonnage, not later than the first safety equipment survey[1] after 1 July 2004 or by 31 December 2004, whichever occurs earlier; and"
- 2 The following new sentence is added at the end of the existing subparagraph .7 of paragraph 2.4:  
"Ships fitted with AIS shall maintain AIS in operation at all times except where international agreements, rules or standards provide for the protection of navigational information."

CHAPTER XI  
SPECIAL MEASURES TO ENHANCE MARITIME SAFETY

3 The existing chapter XI is renumbered as chapter XI-1.

Regulation 3 - Ship identification number

4 The following text is inserted after the title of the regulation:

"(Paragraphs 4 and 5 apply to all ships to which this regulation applies. For ships constructed before [1 July 2004], the requirements of paragraphs 4 and 5 shall be complied with not later than the first scheduled dry-docking of the ship after [1 July 2004])"

5 The existing paragraph 4 is deleted and the following new text is inserted:

"4 The ship's identification number shall be permanently marked:

- .1 in a visible place either on the stern of the ship or on either side of the hull, amidships port and starboard, above the deepest assigned load line or either side of the superstructure, port and starboard or on the front of the superstructure or, in the case of passenger ships, on a horizontal surface visible from the air; and
- .2 in an easily accessible place either on one of the end transverse bulkheads of the machinery spaces, as defined in regulation II-2/3.30, or on one of the hatchways or, in the case of tankers, in the pump-room or, in the case of ships with ro-ro spaces, as defined in regulation II-2/3.41, on one of the end transverse bulkheads of the ro-ro spaces.

5.1 The permanent marking shall be plainly visible, clear of any other 4 markings on the hull and shall be painted in a contrasting colour.

5.2 The permanent marking referred to in paragraph 4.1 shall be not less than 200 mm in height. The permanent marking referred to in paragraph 4.2 shall not be less than 100 mm in height. The width of the marks shall be proportionate to the height.

5.3 The permanent marking may be made by raised lettering or by cutting it in or by centre punching it or by any other equivalent method of marking the ship identification number which ensures that the marking is not easily expunged.

5.4 On ships constructed of material other than steel or metal, the Administration shall approve the method of marking the ship identification number."

6 The following new regulation 5 is added after the existing regulation 4:

"Regulation 5  
Continuous Synopsis Record

- 1 Every ship to which chapter I applies shall be issued with a Continuous Synopsis Record.
- 2.1 The Continuous Synopsis Record is intended to provide an on-board record of the history of the ship with respect to the information recorded therein.
- 2.2 For ships constructed before 1 July 2004, the Continuous Synopsis Record shall, at least, provide the history of the ship as from 1 July 2004.
- 3 The Continuous Synopsis Record shall be issued by the Administration to each ship that is entitled to fly its flag and it shall contain at least, the following information:
- .1 the name of the State whose flag the ship is entitled to fly;
  - .2 the date on which the ship was registered with that State;
  - .3 the ship's identification number in accordance with regulation 3;
  - .4 the name of the ship;
  - .5 the port at which the ship is registered;
  - .6 the name of the registered owner(s) and their registered address(es);
  - .7 the name of the registered bareboat charterer(s) and their registered address(es), if applicable;
  - .8 the name of the Company, as defined in regulation IX/1, its registered address and the address(es) from where it carries out the safety management activities;
  - .9 the name of all classification society(ies) with which the ship is classed;
  - .10 the name of the Administration or of the Contracting Government or of the recognized organization which has issued the Document of Compliance (or the Interim Document of Compliance), specified in the ISM Code as defined in regulation IX/1, to the Company operating the ship and the name of the body which has carried out the audit on the basis of which the document was issued, if other than that issuing the document;
  - .11 the name of the Administration or of the Contracting Government or of the recognized organization that has issued the Safety Management Certificate (or the Interim Safety Management Certificate), specified in the ISM Code as defined in regulation IX/1, to the ship and the name of the body which has carried out the audit on the basis of which the certificate was issued, if other than that issuing the certificate;
  - .12 the name of the Administration or of the Contracting Government or of the recognized security organization that has issued the International Ship Security Certificate (or an Interim International Ship Security Certificate), specified in part A of the ISPS Code as defined in regulation XI-2/1, to the ship and the name of the body which has carried out the verification on the basis of which the certificate was issued, if other than that issuing the certificate; and

.13 the date on which the ship ceased to be registered with that State.

4.1 Any changes relating to the entries referred to in paragraphs 3.4 to 3.12 shall be recorded in the Continuous Synopsis Record so as to provide updated and current information together with the history of the changes.

4.2 In case of any changes relating to the entries referred to in paragraph 4.1, the Administration shall issue, as soon as is practically possible but not later than three months from the date of the change, to the ships entitled to fly its flag either a revised and updated version of the Continuous Synopsis Record or appropriate amendments thereto.

4.3 In case of any changes relating to the entries referred to in paragraph 4.1, the Administration, pending the issue of a revised and updated version of the Continuous Synopsis Record, shall authorise and require either the Company as defined in regulation IX/1 or the master of the ship to amend the Continuous Synopsis Record to reflect the changes. In such cases, after the Continuous Synopsis Record has been amended the Company shall, without delay, inform the Administration accordingly.

5.1 The Continuous Synopsis Record shall be in English, French or Spanish language. Additionally, a translation of the Continuous Synopsis Record into the official language or languages of the Administration may be provided.

5.2 The Continuous Synopsis Record shall be in the format developed by the Organization and shall be maintained in accordance with guidelines developed by the Organization. Any previous entries in the Continuous Synopsis Record shall not be modified, deleted or, in any way, erased or defaced.

6 Whenever a ship is transferred to the flag of another State or the ship is sold to another owner (or is taken over by another bareboat charterer) or another Company assumes the responsibility for the operation of the ship, the Continuous Synopsis Record shall be left on board.

7 When a ship is to be transferred to the flag of another State, the Company shall notify the Administration of the name of the State under whose flag the ship is to be transferred so as to enable the Administration to forward to that State a copy of the Continuous Synopsis Record covering the period during which the ship was under their jurisdiction.

8 When a ship is transferred to the flag of another State the Government of which is a Contracting Government, the Contracting Government of the State whose flag the ship was flying hitherto shall transmit to the Administration as soon as possible after the transfer takes place a copy of the relevant Continuous Synopsis Record covering the period during which the ship was under their jurisdiction together with any Continuous Synopsis Records previous issued to the ship by other States.

9 When a ship is transferred to the flag of another State, the Administration shall append the previous Continuous Synopsis Records to the Continuous Synopsis Record the Administration will issue to the ship so to provide the continuous history record intended by this regulation.

10 The Continuous Synopsis Record shall be kept on board the ship and shall be available for inspection at all times."

7 The following new chapter XI-2 is inserted after the renumbered chapter XI-1:

"CHAPTER XI-2  
SPECIAL MEASURES TO ENHANCE MARITIME SECURITY

Regulation 1  
Definitions

1 For the purpose of this chapter, unless expressly provided otherwise:

- .1 Bulk carrier means a bulk carrier as defined in regulation IX/1.6.
- .2 Chemical tanker means a chemical tanker as defined in regulation VII/8.2.
- .3 Gas carrier means a gas carrier as defined in regulation VII/11.2.
- .4 High-speed craft means a craft as defined in regulation X/1.2.
- .5 Mobile offshore drilling unit means a mechanically propelled mobile offshore drilling unit, as defined in regulation IX/1, not on location.
- .6 Oil tanker means an oil tanker as defined in regulation II-1/2.12.
- .7 Company means a Company as defined in regulation IX/1.
- .8 Ship/port interface means the interactions that occur when a ship is directly and immediately affected by actions involving the movement of persons, goods or the provisions of port services to or from the ship.
- .9 Port facility is a location, as determined by the Contracting Government or by the Designated Authority, where the ship/port interface takes place. This includes areas such as anchorages, waiting berths and approaches from seaward, as appropriate.
- .10 Ship to ship activity means any activity not related to a port facility that involves the transfer of goods or persons from one ship to another.
- .11 Designated Authority means the organization(s) or the administration(s) identified, within the Contracting Government, as responsible for ensuring the implementation of the provisions of this chapter pertaining to port facility security and ship/port interface, from the point of view of the port facility.
- .12 International Ship and Port Facility Security (ISPS) Code means the International Code for the Security of Ships and of Port Facilities consisting of Part A (the

provisions of which shall be treated as mandatory) and part B (the provisions of which shall be treated as recommendatory), as adopted, on 12 December 2002, by resolution 2 of the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974 as may be amended by the Organization, provided that:

- .1 amendments to part A of the Code are adopted, brought into force and take effect in accordance with article VIII of the present Convention concerning the amendment procedures applicable to the Annex other than chapter I; and
  - .2 amendments to part B of the Code are adopted by the Maritime Safety Committee in accordance with its Rules of Procedure.
- .13 Security incident means any suspicious act or circumstance threatening the security of a ship, including a mobile offshore drilling unit and a high speed craft, or of a port facility or of any ship/port interface or any ship to ship activity.
- .14 Security level means the qualification of the degree of risk that a security incident will be attempted or will occur.
- .15 Declaration of security means an agreement reached between a ship and either a port facility or another ship with which it interfaces specifying the security measures each will implement.
- .16 Recognized security organization means an organization with appropriate expertise in security matters and with appropriate knowledge of ship and port operations authorized to carry out an assessment, or a verification, or an approval or a certification activity, required by this chapter or by part A of the ISPS Code.
- 2 The term "ship", when used in regulations 3 to 13, includes mobile offshore drilling units and high-speed craft.
- 3 The term "all ships", when used in this chapter, means any ship to which this chapter applies.
- 4 The term "Contracting Government", when used in regulations 3, 4, 7, 10, 11, 12 and 13 includes a reference to the "Designated Authority".

#### Regulation 2 Application

- 1 This chapter applies to:
- .1 the following types of ships engaged on international voyages:
    - .1.1 passenger ships, including high-speed passenger craft;
    - .1.2 cargo ships, including high-speed craft, of 500 gross tonnage and upwards; and
    - .1.3 mobile offshore drilling units; and
  - .2 port facilities serving such ships engaged on international voyages.
- 2 Notwithstanding the provisions of paragraph 1.2, Contracting Governments shall decide the extent of application of this chapter and of the relevant sections of part A of the ISPS Code to those port facilities within their territory which, although used

primarily by ships not engaged on international voyages, are required, occasionally, to serve ships arriving or departing on an international voyage.

- 2.1 Contracting Governments shall base their decisions, under paragraph 2, on a port facility security assessment carried out in accordance with the provisions of part A of the ISPS Code.
- 2.2 Any decision which a Contracting Government makes, under paragraph 2, shall not compromise the level of security intended to be achieved by this chapter or by part A of the ISPS Code.
- 3 This chapter does not apply to warships, naval auxiliaries or other ships owned or operated by a Contracting Government and used only on Government non-commercial service.
- 4 Nothing in this chapter shall prejudice the rights or obligations of States under international law.

#### Regulation 3

##### Obligations of Contracting Governments with respect to security

- 1 Administrations shall set security levels and ensure the provision of security level information to ships entitled to fly their flag. When changes in security level occur, security level information shall be updated as the circumstance dictates.
- 2 Contracting Governments shall set security levels and ensure the provision of security level information to port facilities within their territory, and to ships prior to entering a port or whilst in a port within their territory. When changes in security level occur, security level information shall be updated as the circumstance dictates.

#### Regulation 4

##### Requirements for Companies and ships

- 1 Companies shall comply with the relevant requirements of this chapter and of part of the ISPS Code, taking into account the guidance given in part B of the ISPS Code.
- 2 Ships shall comply with the relevant requirements of this chapter and of part A of the ISPS Code, taking into account the guidance given in part B of the ISPS Code, and such compliance shall be verified and certified as provided for in part A of the ISPS Code.
- 3 Prior to entering a port or whilst in a port within the territory of a Contracting Government, a ship shall comply with the requirements for the security level set by that Contracting Government, if such security level is higher than the security level set by the Administration for that ship.

4 Ships shall respond without undue delay to any change to a higher security level.

5 Where a ship is not in compliance with the requirements of this chapter or of part A of the ISPS Code, or cannot comply with the requirements of the security level set by the Administration or by another Contracting Government and applicable to that ship, then the ship shall notify the appropriate competent authority prior to conducting any ship/port interface or prior to entry into port, whichever occurs earlier.

#### Regulation 5 Specific responsibility of Companies

The Company shall ensure that the master has available on board, at all times, information through which officers duly authorised by a Contracting Government can establish:

- .1 who is responsible for appointing the members of the crew or other persons currently employed or engaged on board the ship in any capacity on the business of that ship;
- .2 who is responsible for deciding the employment of the ship; and
- .3 in cases where the ship is employed under the terms of charter party(ies), who are the parties to such charter party(ies).

#### Regulation 6 Ship security alert system

1 All ships shall be provided with a ship security alert system, as follows:

- .1 ships constructed on or after 1 July 2004;
- .2 passenger ships, including high-speed passenger craft, constructed before 1 July 2004, not later than the first survey of the radio installation after 1 July 2004;
- .3 oil tankers, chemical tankers, gas carriers, bulk carriers and cargo high speed craft, of 500 gross tonnage and upwards constructed before 1 July 2004, not later than the first survey of the radio installation after 1 July 2004; and
- .4 other cargo ships of 500 gross tonnage and upward and mobile offshore drilling units constructed before 1 July 2004, not later than the first survey of the radio installation after 1 July 2006.

2 The ship security alert system, when activated, shall:

- .1 initiate and transmit a ship-to-shore security alert to a competent authority designated by the Administration, which in these circumstances may include the Company, identifying the ship, its location and indicating that the security of the ship is under threat or it has been compromised;
- .2 not send the ship security alert to any other ships;
- .3 not raise any alarm on-board the ship; and
- .4 continue the ship security alert until deactivated and/or reset.

3 The ship security alert system shall:

- .1 be capable of being activated from the navigation bridge and in at least one other location; and
  - .2 conform to performance standards not inferior to those adopted by the Organization.
- 4 The ship security alert system activation points shall be designed so as to prevent the inadvertent initiation of the ship security alert.
- 5 The requirement for a ship security alert system may be complied with by using the radio installation fitted for compliance with the requirements of chapter IV, provided all requirements of this regulation are complied with.
- 6 When an Administration receives notification of a ship security alert, that Administration shall immediately notify the State(s) in the vicinity of which the ship is presently operating.
- 7 When a Contracting Government receives notification of a ship security alert from a ship which is not entitled to fly its flag, that Contracting Government shall immediately notify the relevant Administration and, if appropriate, the State(s) in the vicinity of which the ship is presently operating.

Regulation 7  
Threats to ships

- 1 Contracting Governments shall set security levels and ensure the provision of security level information to ships operating in their territorial sea or having communicated an intention to enter their territorial sea.
- 2 Contracting Governments shall provide a point of contact through which such ships can request advice or assistance and to which such ships can report any security concerns about other ships, movements or communications.
- 3 Where a risk of attack has been identified, the Contracting Government concerned shall advise the ships concerned and their Administrations of:
- .1 the current security level;
  - .2 any security measures that should be put in place by the ships concerned to protect themselves from attack, in accordance with the provisions of part A of the ISPS Code; and
  - .3 security measures that the coastal State has decided to put in place, as appropriate.

Regulation 8  
Master's discretion for ship safety and security

- 1 The master shall not be constrained by the Company, the charterer or any other person from taking or executing any decision which, in the professional judgement of the master, is necessary to maintain the safety and security of the ship. This includes denial of access to persons (except those identified as duly authorized by a Contracting

Government) or their effects and refusal to load cargo, including containers or other closed cargo transport units.

- 2 If, in the professional judgement of the master, a conflict between any safety and security requirements applicable to the ship arises during its operations, the master shall give effect to those requirements necessary to maintain the safety of the ship. In such cases, the master may implement temporary security measures and shall forthwith inform the Administration and, if appropriate, the Contracting Government in whose port the ship is operating or intends to enter. Any such temporary security measures under this regulation shall, to the highest possible degree, be commensurate with the prevailing security level. When such cases are identified, the Administration shall ensure that such conflicts are resolved and that the possibility of recurrence is minimised.

### Regulation 9 Control and compliance measures

#### 1 Control of ships in port

- 1.1 For the purpose of this chapter, every ship to which this chapter applies is subject to control when in a port of another Contracting Government by officers duly authorised by that Government, who may be the same as those carrying out the functions of regulation I/19. Such control shall be limited to verifying that there is onboard a valid International Ship Security Certificate or a valid Interim International Ships Security Certificate issued under the provisions of part A of the ISPS Code (Certificate), which if valid shall be accepted, unless there are clear grounds for believing that the ship is not in compliance with the requirements of this chapter or part A of the ISPS Code.
- 1.2 When there are such clear grounds, or where no valid Certificate is produced when required, the officers duly authorized by the Contracting Government shall impose any one or more control measures in relation to that ship as provided in paragraph 1.3. Any such measures imposed must be proportionate, taking into account the guidance given in part B of the ISPS Code.
- 1.3 Such control measures are as follows: inspection of the ship, delaying the ship, detention of the ship, restriction of operations including movement within the port, or expulsion of the ship from port. Such control measures may additionally or alternatively include other lesser administrative or corrective measures.

#### 2 Ships intending to enter a port of another Contracting Government

- 2.1 For the purpose of this chapter, a Contracting Government may require that ships intending to enter its ports provide the following information to officers duly authorized by that Government to ensure compliance with this chapter prior to entry into port with the aim of avoiding the need to impose control measures or steps:
  - .1 that the ship possesses a valid Certificate and the name of its issuing authority;
  - .2 the security level at which the ship is currently operating;
  - .3 the security level at which the ship operated in any previous port where it has conducted a ship/port interface within the timeframe specified in paragraph 2.3;

- .4 any special or additional security measures that were taken by the ship in any previous port where it has conducted a ship/port interface within the timeframe specified in paragraph 2.3;
- .5 that the appropriate ship security procedures were maintained during any ship to ship activity within the timeframe specified in paragraph 2.3; or
- .6 other practical security related information (but not details of the ship security plan), taking into account the guidance given in part B of the ISPS Code.

If requested by the Contracting Government, the ship or the Company shall provide confirmation, acceptable to that Contracting Government, of the information required above.

2.2 Every ship to which this chapter applies intending to enter the port of another Contracting Government shall provide the information described in paragraph 2.1 on the request of the officers duly authorized by that Government. The master may decline to provide such information on the understanding that failure to do so may result in denial of entry into port.

2.3 The ship shall keep records of the information referred to in paragraph 2.1 for the last 10 calls at port facilities.

2.4 If, after receipt of the information described in paragraph 2.1, officers duly authorised by the Contracting Government of the port in which the ship intends to enter have clear grounds for believing that the ship is in non-compliance with the requirements of this chapter or part A of the ISPS Code, such officers shall attempt to establish communication with and between the ship and the Administration in order to rectify the non-compliance. If such communication does not result in rectification, or if such officers have clear grounds otherwise for believing that the ship is in non-compliance with the requirements of this chapter or part A of the ISPS Code, such officers may take steps in relation to that ship as provided in paragraph 2.5. Any such steps taken must be proportionate, taking into account the guidance given in part B of the ISPS Code.

2.5 Such steps are as follows:

- .1 a requirement for the rectification of the non-compliance;
- .2 a requirement that the ship proceed to a location specified in the territorial sea or internal waters of that Contracting Government;
- .3 inspection of the ship, if the ship is in the territorial sea of the Contracting Government the port of which the ship intends to enter; or
- .4 denial of entry into port.

Prior to initiating any such steps, the ship shall be informed by the Contracting Government of its intentions. Upon this information the master may withdraw the intention to enter that port. In such cases, this regulation shall not apply.

### 3 Additional provisions

3.1 In the event:

- .1 of the imposition of a control measure, other than a lesser administrative or corrective measure, referred to in paragraph 1.3; or
- .2 any of the steps referred to in paragraph 2.5 are taken,

an officer duly authorized by the Contracting Government shall forthwith inform in writing the Administration specifying which control measures have been imposed or steps taken and the reasons thereof. The Contracting Government imposing the control measures or steps shall also notify the recognized security organization, which issued the Certificate relating to the ship concerned and the Organization when any such control measures have been imposed or steps taken.

3.2 When entry into port is denied or the ship is expelled from port, the authorities of the port State should communicate the appropriate facts to the authorities of the State of the next appropriate ports of call, when known, and any other appropriate coastal States, taking into account guidelines to be developed by the Organization. Confidentiality and security of such notification shall be ensured.

3.3 Denial of entry into port, pursuant to paragraphs 2.4 and 2.5, or expulsion from port, pursuant to paragraphs 1.1 to 1.3, shall only be imposed where the officers duly authorized by the Contracting Government have clear grounds to believe that the ship poses an immediate threat to the security or safety of persons, or of ships or other property and there are no other appropriate means for removing that threat.

3.4 The control measures referred to in paragraph 1.3 and the steps referred to in paragraph 2.5 shall only be imposed, pursuant to this regulation, until the non-compliance giving rise to the control measures or steps has been corrected to the satisfaction of the Contracting Government, taking into account actions proposed by the ship or the Administration, if any.

3.5 When Contracting Governments exercise control under paragraph 1 or take steps under paragraph 2:

- .1 all possible efforts shall be made to avoid a ship being unduly detained or delayed. If a ship is thereby unduly detained, or delayed, it shall be entitled to compensation for any loss or damage suffered; and
- .2 necessary access to the ship shall not be prevented for emergency or humanitarian reasons and for security purposes.

Regulation 10  
Requirements for port facilities

- 1 Port facilities shall comply with the relevant requirements of this chapter and part A of the ISPS Code, taking into account the guidance given in part B of the ISPS Code.
- 2 Contracting Governments with a port facility or port facilities within their territory, to which this regulation applies, shall ensure that:

- .1 port facility security assessments are carried out, reviewed and approved in accordance with the provisions of part A of the ISPS Code; and
- .2 port facility security plans are developed, reviewed, approved and implemented in accordance with the provisions of part A of the ISPS Code.
- 3 Contracting Governments shall designate and communicate the measures required to be addressed in a port facility security plan for the various security levels, including when the submission of a Declaration of Security will be required.

Regulation 11  
Alternative security agreements

- 1 Contracting Governments may, when implementing this chapter and part A of the ISPS Code, conclude in writing bilateral or multilateral agreements with other Contracting Governments on alternative security arrangements covering short international voyages on fixed routes between port facilities located within their territories.
- 2 Any such agreement shall not compromise the level of security of other ships or of port facilities not covered by the agreement.
- 3 No ship covered by such an agreement shall conduct any ship-to-ship activities with any ship not covered by the agreement.
- 4 Such agreements shall be reviewed periodically, taking into account the experience gained as well as any changes in the particular circumstances or the assessed threats to the security of the ships, the port facilities or the routes covered by the agreement.

Regulation 12  
Equivalent security arrangements

- 1 An Administration may allow a particular ship or a group of ships entitled to fly its flag to implement other security measures equivalent to those prescribed in this chapter or in part A of the ISPS Code, provided such security measures are at least as effective as those prescribed in this chapter or part A of the ISPS Code. The Administration, which allows such security measures, shall communicate to the Organization particulars thereof.
- 2 When implementing this chapter and part A of the ISPS Code, a Contracting Government may allow a particular port facility or a group of port facilities located within its territory, other than those covered by an agreement concluded under regulation 11, to implement security measures equivalent to those prescribed in this chapter or in Part A of the ISPS Code, provided such security measures are at least as effective as those prescribed in this chapter or part A of the ISPS Code. The Contracting Government, which allows such security measures, shall communicate to the Organization particulars thereof.

Regulation 13  
Communication of information

- 1 Contracting Governments shall, not later than 1 July 2004, communicate to the Organization and shall make available for the information of Companies and ships:
  - .1 the names and contact details of their national authority or authorities responsible for ship and port facility security;
  - .2 the locations within their territory covered by the approved port facility security plans.
  - .3 the names and contact details of those who have been designated to be available at all times to receive and act upon the ship-to-shore security alerts, referred to in regulation 6.2.1;
  - .4 the names and contact details of those who have been designated to be available at all times to receive and act upon any communications from Contracting Governments exercising control and compliance measures, referred to in regulation 9.3.1; and
  - .5 the names and contact details of those who have been designated to be available at all times to provide advice or assistance to ships and to whom ships can report any security concerns, referred to in regulation 7.2; and thereafter update such information as and when changes relating thereto occur. The Organization shall circulate such particulars to other Contracting Governments for the information of their officers.
  
- 2 Contracting Governments shall, not later than 1 July 2004, communicate to the Organization the names and contact details of any recognized security organizations authorized to act on their behalf together with details of the specific responsibility and conditions of authority delegated to such organizations. Such information shall be updated as and when changes relating thereto occur. The Organization shall circulate such particulars to other Contracting Governments for the information of their officers.
  
- 3 Contracting Governments shall, not later than 1 July 2004 communicate to the Organization a list showing the approved port facility security plans for the port facilities located within their territory together with the location or locations covered by each approved port facility security plan and the corresponding date of approval and thereafter shall further communicate when any of the following changes take place:
  - .1 changes in the location or locations covered by an approved port facility security plan are to be introduced or have been introduced. In such cases the information to be communicated shall indicate the changes in the location or locations covered by the plan and the date as of which such changes are to be introduced or were implemented;
  - .2 an approved port facility security plan, previously included in the list submitted to the Organization, is to be withdrawn or has been withdrawn. In such cases, the information to be communicated shall indicate the date on which the withdrawal will take effect or was implemented. In these cases, the communication shall be made to the Organization as soon as is practically possible; and
  - .3 additions are to be made to the list of approved port facility security plans. In such cases, the information to be communicated shall indicate the location or locations covered by the plan and the date of approval.

- 4 Contracting Governments shall, at five year intervals after 1 July 2004, communicate to the Organization a revised and updated list showing all the approved port facility security plans for the port facilities located within their territory together with the location or locations covered by each approved port facility security plan and the corresponding date of approval (and the date of approval of any amendments thereto) which will supersede and replace all information communicated to the Organization, pursuant to paragraph 3, during the preceding five years.
- 5 Contracting Governments shall communicate to the Organization information that an agreement under regulation 11 has been concluded. The information communicated shall include:
- .1 the names of the Contracting Governments which have concluded the agreement;
  - .2 the port facilities and the fixed routes covered by the agreement;
  - .3 the periodicity of review of the agreement;
  - .4 the date of entry into force of the agreement; and
  - .5 information on any consultations which have taken place with other Contracting Governments; and thereafter shall communicate, as soon as practically possible, to the Organization information when the agreement has been amended or has ended.
- 6 Any Contracting Government which allows, under the provisions of regulation 12, any equivalent security arrangements with respect to a ship entitled to fly its flag or with respect to a port facility located within its territory, shall communicate to the Organization particulars thereof.
- 7 The Organization shall make available the information communicated under paragraph 3 to other Contracting Governments upon request.

CONFERENCE RESOLUTION 2  
(adopted on 12 December 2002)

ADOPTION OF THE INTERNATIONAL CODE FOR THE SECURITY OF SHIPS  
AND OF PORT FACILITIES

THE CONFERENCE,

HAVING ADOPTED amendments to the International Convention for the Safety of Life at Sea, 1974, as amended (hereinafter referred to as "the Convention"), concerning special measures to enhance maritime safety and security,

CONSIDERING that the new chapter XI-2 of the Convention makes a reference to an International Ship and Port Facility Security (ISPS) Code and requires that ships, companies and port facilities to comply with the relevant requirements of part A of the International Ship and Port Facility Security (ISPS) Code, as specified in part A of the ISPS Code,

BEING OF THE OPINION that the implementation by Contracting Governments of the said chapter will greatly contribute to the enhancement of maritime safety and security and safeguarding those on board and ashore,

HAVING CONSIDERED a draft of the International Code for the Security of Ships and of Port Facilities prepared by the Maritime Safety Committee of the International Maritime Organization (hereinafter referred to as "the Organization"), at its seventy-fifth and seventy-sixth session, for consideration and adoption by the Conference,

1. ADOPTS the International Code for the Security of Ships and of Port Facilities (hereinafter referred to as "the Code"), the text of which is set out in the Annex to the present resolution;
2. INVITES Contracting Governments to the Convention to note that the Code will take effect on 1 July 2004 upon entry into force of the new chapter XI-2 of the Convention;
3. REQUESTS the Maritime Safety Committee to keep the Code under review and amend it, as appropriate;
4. REQUESTS the Secretary-General of the Organization to transmit certified copies of the present resolution and the text of the Code contained in the Annex to all Contracting Governments to the Convention;
5. FURTHER REQUESTS the Secretary-General to transmit copies of this resolution and its Annex to all Members of the Organization, which are not Contracting Governments to the Convention.

ANNEX  
INTERNATIONAL CODE FOR THE SECURITY OF SHIPS  
AND OF PORT FACILITIES  
PREAMBLE

1 The Diplomatic Conference on Maritime Security held in London in December 2002 adopted new provisions in the International Convention for the Safety of Life at Sea, 1974 and this Code[\*]to enhance maritime security. These new requirements form the international framework through which ships and port facilities can co-operate to detect and deter acts which threaten security in the maritime transport sector.

2 Following the tragic events of 11th September 2001, the twenty-second session of the Assembly of the International Maritime Organization(the Organization), in November 2001, unanimously agreed to the development of new measures relating to the security of ships and of port facilities for adoption by a Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974 (known as the Diplomatic Conference on Maritime Security) in December 2002. Preparation for the Diplomatic Conference was entrusted to the Organization's

Maritime Safety Committee (MSC) on the basis of submissions made by Member States, intergovernmental organizations and non-governmental organizations in consultative status with the Organization.

3 The MSC, at its first extraordinary session, held also in November 2001, in order to accelerate the development and the adoption of the appropriate security measures established an MSC Intersessional Working Group on Maritime Security. The first meeting of the MSC Intersessional Working Group on Maritime Security was held in February 2002 and the outcome of its discussions was reported to, and considered by, the seventy-fifth session of the MSC in March 2002, when an ad hoc Working Group was established to further develop the proposals made. The seventy-fifth session of the MSC considered the report of that Working Group and recommended that work should be taken forward through a further MSC Intersessional Working Group, which was held in September 2002. The seventy-sixth session of the MSC considered the outcome of the September 2002 session of the MSC Intersessional Working Group and the further work undertaken by the MSC Working Group held in conjunction with the Committee's seventy-sixth session in December 2002, immediately prior to the Diplomatic Conference and agreed the final version of the proposed texts to be considered by the Diplomatic Conference.

4 The Diplomatic Conference (9 to 13 December 2002) also adopted amendments to the Existing provisions of the International Convention for the Safety of Life at Sea, 1974 (SOLAS 74) accelerating the implementation of the requirement to fit Automatic Identification Systems and adopted new Regulations in Chapter XI-1 of SOLAS 74 covering marking of the Ship's Identification Number and the carriage of a Continuous Synopsis Record. The Diplomatic Conference also adopted a number of Conference Resolutions including those covering implementation and revision of this Code, Technical Co-operation, and co-operative work with the International Labour Organization and World Customs Organization. It was recognized that review and amendment of certain of the new provisions regarding maritime security may be required on completion of the work of these two Organizations.

5 The provision of Chapter XI-2 of SOLAS 74 and this Code apply to ships and to port facilities. The extension of SOLAS 74 to cover port facilities was agreed on the basis that SOLAS 74 offered the speediest means of ensuring the necessary security measures entered into force and given effect quickly. However, it was further agreed that the provisions relating to port facilities should relate solely to the ship/port interface. The wider issue of the security of port areas will be the subject of further joint work between the International Maritime Organization and the International Labour Organization. It was also agreed that the provisions should not extend to the actual response to attacks or to any necessary clear-up activities after such an attack.

6 In drafting the provision care has been taken to ensure compatibility with the provisions of the International Convention on Standards of Training, Certification and Watch keeping and Certification for Seafarers, 1978, as amended, the International Safety Management (ISM) Code and the harmonised system of survey and certification.

7 The provisions represent a significant change in the approach of the international maritime industries to the issue of security in the maritime transport sector. It is recognized that they may place a significant additional burden on certain Contracting Governments. The importance of Technical Co-operation to assist Contracting Governments implement the provisions is fully recognized.

8 Implementation of the provisions will require continuing effective co-operation and understanding between all those involved with, or using, ships and port facilities including ship's personnel, port personnel, passengers, cargo interests, ship and port management and those in National and Local Authorities with security responsibilities. Existing practices and procedures will have to be reviewed and changed if they do not provide an adequate level of security. In the interests of enhanced maritime security additional responsibilities will have to be carried by the shipping and port industries and by National and Local Authorities.

9 The guidance given in part B of this Code should be taken into account when implementing the security provisions set out in Chapter XI-2 of SOLAS 74 and in part A of this Code. However, it is recognized that the extent to which the guidance applies may vary depending on the nature of the port facility and of the ship, its trade and/or cargo.

10 Nothing in this Code shall be interpreted or applied in a manner inconsistent with the proper respect of fundamental rights and freedoms as set out in international instruments, particularly those relating to maritime workers and refugees including the International Labour Organization Declaration of Fundamental Principles and Rights at Work as well as international standards concerning maritime and port workers.

11 Recognizing that the Convention on the Facilitation of Maritime Traffic, 1965, as amended, provides that foreign crew members shall be allowed ashore by the public authorities while the ship on which they arrive is in port, provided that the formalities on arrival of the ship have been fulfilled and the public authorities have no reason to refuse permission to come ashore for reasons of public health, public safety or public order, Contracting Governments when approving ship and port facility security plans should pay due cognisance to the fact that ship's personnel live and work on the vessel and need shore leave and access to shore based seafarer welfare facilities, including medical care.

## PART A

### MANDATORY REQUIREMENTS REGARDING THE PROVISIONS OF CHAPTER XI-2 OF THE INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA, 1974, AS AMENDED

#### 1 GENERAL

##### 1.1 Introduction

This part of the International Code for the Security of Ships and Port Facilities contains mandatory provisions to which reference is made in chapter XI-2 of the International Convention for the Safety of Life at Sea, 1974 as amended.

## 1.2 Objectives

The objectives of this Code are:

- .1 to establish an international framework involving co-operation between Contracting Governments, Government agencies, local administrations and the shipping and port industries to detect security threats and take preventive measures against security incidents affecting ships or port facilities used in international trade;
- .2 to establish the respective roles and responsibilities of the Contracting Governments, Government agencies, local administrations and the shipping and port industries, at the national and international level for ensuring maritime security;
- .3 to ensure the early and efficient collection and exchange of security-related information;
- .4 to provide a methodology for security assessments so as to have in place plans and procedures to react to changing security levels; and
- .5 to ensure confidence that adequate and proportionate maritime security measures are in place.

1.3 Functional requirements In order to achieve its objectives, this Code embodies a number of functional requirements. These include, but are not limited to:

- .1 gathering and assessing information with respect to security threats and exchanging such information with appropriate Contracting Governments;
- .2 requiring the maintenance of communication protocols for ships and port facilities;
- .3 preventing unauthorized access to ships, port facilities and their restricted areas;
- .4 preventing the introduction of unauthorized weapons, incendiary devices or explosives to ships or port facilities;
- .5 providing means for raising the alarm in reaction to security threats or security incidents;
- .6 requiring ship and port facility security plans based upon security assessments; and
- .7 requiring training, drills and exercises to ensure familiarity with security plans and procedures.

## 2 DEFINITIONS

2.1 For the purpose of this part, unless expressly provided otherwise:

- .1 Convention means the International Convention for the Safety of Life at Sea, 1974 as amended.
- .2 Regulation means a regulation of the Convention.

- .3 Chapter means a chapter of the Convention.
- .4 Ship security plan means a plan developed to ensure the application of measures on board the ship designed to protect persons on board, cargo, cargo transport units, ship's stores or the ship from the risks of a security incident.
- .5 Port facility security plan means a plan developed to ensure the application of measures designed to protect the port facility and ships, persons, cargo, cargo transport units and ship's stores within the port facility from the risks of a security incident.
- .6 Ship security officer means the person on board the ship, accountable to the master, designated by the Company as responsible for the security of the ship, including implementation and maintenance of the ship security plan and for liaison with the company security officer and port facility security officers.
- .7 Company security officer means the person designated by the Company for ensuring that a ship security assessment is carried out; that a ship security plan is developed, submitted for approval, and thereafter implemented and maintained and for liaison with port facility security officers and the ship security officer.
- .8 Port facility security officer means the person designated as responsible for the development, implementation, revision and maintenance of the port facility security plan and for liaison with the ship security officers and company security officers.
- .9 Security level 1 means the level for which minimum appropriate protective security measures shall be maintained at all times.
- .10 Security level 2 means the level for which appropriate additional protective security measures shall be maintained for a period of time as a result of heightened risk of a security incident.
- .11 Security level 3 means the level for which further specific protective security measures shall be maintained for a limited period of time when a security incident is probable or imminent, although it may not be possible to identify the specific target.

2.2 The term "ship", when used in this Code, includes mobile offshore drilling units and high-speed craft as defined in regulation XI-2/1.

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.3 The term "Contracting Government" in connection with any reference to a port facility, when used in sections 14 to 18, includes a reference to the "Designated Authority".

2.4 Terms not otherwise defined in this part shall have the same meaning as the meaning attributed to them in chapters I and XI-2.

### 3 APPLICATION

3.1 This Code applies to:

- .1 the following types of ships engaged on international voyages:
  - .1 passenger ships, including high-speed passenger craft;

- .2 cargo ships, including high-speed craft, of 500 gross tonnage and upwards;  
and
  - .3 mobile offshore drilling units; and
- .2 port facilities serving such ships engaged on international voyages.

3.2 Notwithstanding the provisions of section 3.1.2, Contracting Governments shall decide the extent of application of this Part of the Code to those port facilities within their territory which, although used primarily by ships not engaged on international voyages, are required, occasionally, to serve ships arriving or departing on an international voyage.

3.2.1 Contracting Governments shall base their decisions, under section 3.2, on a port facility security assessment carried out in accordance with this Part of the Code.

3.2.2 Any decision which a Contracting Government makes, under section 3.2, shall not compromise the level of security intended to be achieved by chapter XI-2 or by this Part of the Code.

3.3 This Code does not apply to warships, naval auxiliaries or other ships owned or operated by a Contracting Government and used only on Government non-commercial service.

3.4 Sections 5 to 13 and 19 of this part apply to Companies and ships as specified in regulation XI-2/4.

3.5 Sections 5 and 14 to 18 of this part apply to port facilities as specified in regulation XI-2/10.

3.6 Nothing in this Code shall prejudice the rights or obligations of States under international law.

#### 4 RESPONSIBILITIES OF CONTRACTING GOVERNMENTS

4.1 Subject to the provisions of regulation XI-2/3 and XI-2/7, Contracting Governments shall set security levels and provide guidance for protection from security incidents. Higher security levels indicate greater likelihood of occurrence of a security incident. Factors to be considered in setting the appropriate security level include:

- .1 the degree that the threat information is credible;
- .2 the degree that the threat information is corroborated;
- .3 the degree that the threat information is specific or imminent; and
- .4 the potential consequences of such a security incident.

4.2 Contracting Governments, when they set security level 3, shall issue, as necessary, appropriate instructions and shall provide security related information to the ships and port facilities that may be affected.

4.3 Contracting Governments may delegate to a recognized security organization certain of their security related duties under chapter XI-2 and this Part of the Code with the exception of:

- .1 setting of the applicable security level;
- .2 approving a Port Facility Security Assessment and subsequent amendments to an approved assessment;
- .3 determining the port facilities which will be required to designate a Port Facility Security Officer;
- .4 approving a Port Facility Security Plan and subsequent amendments to an approved plan;
- .5 exercising control and compliance measures pursuant to regulation XI-2/9; and
- .6 establishing the requirements for a Declaration of Security.

4.4 Contracting Governments shall, to the extent they consider appropriate, test the effectiveness of the Ship or the Port Facility Security Plans, or of amendments to such plans, they have approved, or, in the case of ships, of plans which have been approved on their behalf.

## 5 DECLARATION OF SECURITY

5.1 Contracting Governments shall determine when a Declaration of Security is required by assessing the risk the ship/port interface or ship to ship activity poses to persons, property or the environment.

5.2 A ship can request completion of a Declaration of Security when:

- .1 the ship is operating at a higher security level than the port facility or another ship it is interfacing with;
- .2 there is an agreement on a Declaration of Security between Contracting Governments covering certain international voyages or specific ships on those voyages;
- .3 there has been a security threat or a security incident involving the ship or involving the port facility, as applicable;
- .4 the ship is at a port which is not required to have and implement an approved port facility security plan; or
- .5 the ship is conducting ship to ship activities with another ship not required to have and implement an approved ship security plan.

5.3 Requests for the completion of a Declaration of Security, under this section, shall be acknowledged by the applicable port facility or ship.

5.4 The Declaration of Security shall be completed by:

- .1 the master or the ship security officer on behalf of the ship(s); and, if appropriate,
- .2 the port facility security officer or, if the Contracting Government determines otherwise, by any other body responsible for shore-side security, on behalf of the port facility.

5.5 The Declaration of Security shall address the security requirements that could be shared between a port facility and a ship (or between ships) and shall state the responsibility for each.

5.6 Contracting Governments shall specify, bearing in mind the provisions of regulation XI-2/9.2.3, the minimum period for which Declarations of Security shall be kept by the port facilities located within their territory.

5.7 Administrations shall specify, bearing in mind the provisions of regulation XI-2/9.2.3, the minimum period for which Declarations of Security shall be kept by ships entitled to fly their flag.

## 6 OBLIGATIONS OF THE COMPANY

6.1 The Company shall ensure that the ship security plan contains a clear statement emphasizing the master's authority. The Company shall establish in the ship security plan that the master has the overriding authority and responsibility to make decisions with respect to the safety and security of the ship and to request the assistance of the Company or of any Contracting Government as may be necessary.

6.2 The Company shall ensure that the company security officer, the master and the ship security officer are given the necessary support to fulfil their duties and responsibilities in accordance with chapter XI-2 and this Part of the Code.

## 7 SHIP SECURITY

7.1 A ship is required to act upon the security levels set by Contracting Governments as set out below.

7.2 At security level 1, the following activities shall be carried out, through appropriate measures, on all ships, taking into account the guidance given in part B of this Code, in order to identify and take preventive measures against security incidents:

- .1 ensuring the performance of all ship security duties;
- .2 controlling access to the ship;
- .3 controlling the embarkation of persons and their effects;
- .4 monitoring restricted areas to ensure that only authorized persons have access;
- .5 monitoring of deck areas and areas surrounding the ship;
- .6 supervising the handling of cargo and ship's stores; and
- .7 ensuring that security communication is readily available.

7.3 At security level 2, the additional protective measures, specified in the ship security plan, shall be implemented for each activity detailed in section 7.2, taking into account the guidance given in part B of this Code.

7.4 At security level 3, further specific protective measures, specified in the ship security plan, shall be implemented for each activity detailed in section 7.2, taking into account the guidance given in part B of this Code.

7.5 Whenever security level 2 or 3 is set by the Administration, the ship shall acknowledge receipt of the instructions on change of the security level.

7.6 Prior to entering a port or whilst in a port within the territory of a Contracting Government that has set security level 2 or 3, the ship shall acknowledge receipt of this instruction and shall confirm to the port facility security officer the initiation of the implementation of the appropriate measures and procedures as detailed in the ship security plan, and in the case of security level 3, in instructions issued by the Contracting Government which has set security level 3. The ship shall report any difficulties in implementation. In such cases, the port facility security officer and ship security officer shall liaise and co-ordinate the appropriate actions.

7.7 If a ship is required by the Administration to set, or is already at, a higher security level than that set for the port it intends to enter or in which it is already located, then the ship shall advise, without delay, the competent authority of the Contracting Government within whose territory the port facility is located and the port facility security officer of the situation.

7.7.1 In such cases, the ship security officer shall liaise with the port facility security officer and co-ordinate appropriate actions, if necessary.

7.8 An Administration requiring ships entitled to fly its flag to set security level 2 or 3 in a port of another Contracting Government shall inform that Contracting Government without delay.

7.9 When Contracting Governments set security levels and ensure the provision of security level information to ships operating in their territorial sea, or having communicated an intention to enter their territorial sea, such ships shall be advised to maintain vigilance and report immediately to their Administration and any nearby coastal States any information that comes to their attention that might affect maritime security in the area.

7.9.1 When advising such ships of the applicable security level, a Contracting Government shall, taking into account the guidance given in the part B of this Code, also advise those ships of any security measure that they should take and, if appropriate, of measures that have been taken by the Contracting Government to provide protection against the threat.

## 8 SHIP SECURITY ASSESSMENT

8.1 The ship security assessment is an essential and integral part of the process of developing and updating the ship security plan.

8.2 The company security officer shall ensure that the ship security assessment is carried out by persons with appropriate skills to evaluate the security of a ship, in accordance with this section, taking into account the guidance given in part B of this Code.

8.3 Subject to the provisions of section 9.2.1, a recognized security organization may carry out the ship security assessment of a specific ship.

8.4 The ship security assessment shall include an on-scene security survey and, at least, the following elements:

- .1 identification of existing security measures, procedures and operations;
- .2 identification and evaluation of key ship board operations that it is important to protect;
- .3 identification of possible threats to the key ship board operations and the likelihood of their occurrence, in order to establish and prioritise security measures; and
- .4 identification of weaknesses, including human factors in the infrastructure, policies and procedures.

8.5 The ship security assessment shall be documented, reviewed, accepted and retained by the Company.

## 9 SHIP SECURITY PLAN

9.1 Each ship shall carry on board a ship security plan approved by the Administration. The plan shall make provisions for the three security levels as defined in this Part of the Code.

9.1.1 Subject to the provisions of section 9.2.1, a recognized security organization may prepare the ship security plan for a specific ship.

9.2 The Administration may entrust the review and approval of ship security plans, or of amendments to a previously approved plan, to recognized security organizations.

9.2.1 In such cases the recognized security organization, undertaking the review and approval of a ship security plan, or its amendments, for a specific ship shall not have been involved in either the preparation of the ship security assessment or of the ship security plan, or of the amendments, under review.

9.3 The submission of a ship security plan, or of amendments to a previously approved plan, for approval shall be accompanied by the security assessment on the basis of which the plan, or the amendments, have been developed.

9.4 Such a plan shall be developed, taking into account the guidance given in part B of this Code and shall be written in the working language or languages of the ship. If the

language or languages used is not English, French or Spanish, a translation into one of these languages shall be included. The plan shall address, at least, the following:

- .1 measures designed to prevent weapons, dangerous substances and devices intended for use against persons, ships or ports and the carriage of which is not authorized from being taken on board the ship;
- .2 identification of the restricted areas and measures for the prevention of unauthorized access to them;
- .3 measures for the prevention of unauthorized access to the ship;
- .4 procedures for responding to security threats or breaches of security, including provisions for maintaining critical operations of the ship or ship/port interface;
- .5 procedures for responding to any security instructions Contracting Governments may give at security level 3;
- .6 procedures for evacuation in case of security threats or breaches of security;
- .7 duties of shipboard personnel assigned security responsibilities and of other shipboard personnel on security aspects;
- .8 procedures for auditing the security activities;
- .9 procedures for training, drills and exercises associated with the plan;
- .10 procedures for interfacing with port facility security activities;
- .11 procedures for the periodic review of the plan and for updating;
- .12 procedures for reporting security incidents;
- .13 identification of the ship security officer;
- .14 identification of the company security officer including 24-hour contact details;
- .15 procedures to ensure the inspection, testing, calibration, and maintenance of any security equipment provided on board;
- .16 frequency for testing or calibration of any security equipment provided on board;
- .17 identification of the locations where the ship security alert system activation points are provided;<sup>[1]</sup>and
- .18 procedures, instructions and guidance on the use of the ship security alert system, including the testing, activation, deactivation and resetting and to limit false alerts.<sup>1</sup>

9.4.1 Personnel conducting internal audits of the security activities specified in the plan or evaluating its implementation shall be independent of the activities being audited unless this is impracticable due to the size and the nature of the Company or of the ship.

9.5 The Administration shall determine which changes to an approved ship security plan or to any security equipment specified in an approved plan shall not be implemented unless the relevant amendments to the plan are approved by the Administration. Any such changes shall be at least as effective as those measures prescribed in chapter XI-2 and this Part of the Code.

9.5.1 The nature of the changes to the ship security plan or the security equipment that have been specifically approved by the Administration, pursuant to section 9.5, shall be documented in a manner that clearly indicates such approval. This approval shall be

available on board and shall be presented together with the International Ship Security Certificate (or the Interim International Ship Security Certificate). If these changes are temporary, once the original approved measures or equipment are reinstated, this documentation no longer needs to be retained by the ship.

9.6 The plan may be kept in an electronic format. In such a case, it shall be protected by procedures aimed at preventing its unauthorized deletion, destruction or amendment.

9.7 The plan shall be protected from unauthorized access or disclosure.

9.8 Ship security plans are not subject to inspection by officers duly authorized by a Contracting Government to carry out control and compliance measures in accordance with regulation XI-2/9, save in circumstances specified in section 9.8.1.

9.8.1 If the officers duly authorized by a Contracting Government have clear grounds to believe that the ship is not in compliance with the requirements of chapter XI-2 or part A of this Code, and the only means to verify or rectify the non-compliance is to review the relevant requirements of the ship security plan, limited access to the specific sections of the plan relating to the non-compliance is exceptionally allowed, but only with the consent of the Contracting Government of, or the master of, the ship concerned. Nevertheless, the provisions in the plan relating to section 9.4 subsections .2, .4, .5, .7, .15, .17 and .18 of this Part of the Code are considered as confidential information, and cannot be subject to inspection unless otherwise agreed by the Contracting Governments concerned.

## 10 RECORDS

10.1 Records of the following activities addressed in the ship security plan shall be kept on board for at least the minimum period specified by the Administration, bearing in mind the provisions of regulation XI-2/9.2.3:

- .1 training, drills and exercises;
- .2 security threats and security incidents;
- .3 breaches of security;
- .4 changes in security level;
- .5 communications relating to the direct security of the ship such as specific threats to the ship or to port facilities the ship is, or has been;
- .6 internal audits and reviews of security activities;
- .7 periodic review of the ship security assessment;
- .8 periodic review of the ship security plan;
- .9 implementation of any amendments to the plan; and
- .10 maintenance, calibration and testing of any security equipment provided on board including testing of the ship security alert system.

10.2 The records shall be kept in the working language or languages of the ship. If the language or languages used are not English, French or Spanish, a translation into one of these languages shall be included.

10.3 The records may be kept in an electronic format. In such a case, they shall be protected by procedures aimed at preventing their unauthorized deletion, destruction or amendment.

10.4 The records shall be protected from unauthorized access or disclosure.

## 11 COMPANY SECURITY OFFICER

11.1 The Company shall designate a company security officer. A person designated as the company security officer may act as the company security officer for one or more ships, depending on the number or types of ships the Company operates provided it is clearly identified for which ships this person is responsible. A Company may, depending on the number or types of ships they operate designate several persons as company security officers provided it is clearly identified for which ships each person is responsible.

11.2 In addition to those specified elsewhere in this Part of the Code, the duties and responsibilities of the company security officer shall include, but are not limited to:

- .1 advising the level of threats likely to be encountered by the ship, using appropriate security assessments and other relevant information;
- .2 ensuring that ship security assessments are carried out;
- .3 ensuring the development, the submission for approval, and thereafter the implementation and maintenance of the ship security plan;
- .4 ensuring that the ship security plan is modified, as appropriate, to correct deficiencies and satisfy the security requirements of the individual ship;
- .5 arranging for internal audits and reviews of security activities;
- .6 arranging for the initial and subsequent verifications of the ship by the Administration or the recognized security organization;
- .7 ensuring that deficiencies and non-conformities identified during internal audits, periodic reviews, security inspections and verifications of compliance are promptly addressed and dealt with;
- .8 enhancing security awareness and vigilance;
- .9 ensuring adequate training for personnel responsible for the security of the ship;
- .10 ensuring effective communication and co-operation between the ship security officer and the relevant port facility security officers;
- .11 ensuring consistency between security requirements and safety requirements;
- .12 ensuring that, if sister-ship or fleet security plans are used, the plan for each ship reflects the ship-specific information accurately; and
- .13 ensuring that any alternative or equivalent arrangements approved for a particular ship or group of ships are implemented and maintained.

## 12 SHIP SECURITY OFFICER

12.1 A ship security officer shall be designated on each ship.

12.2 In addition to those specified elsewhere in this Part of the Code, the duties and responsibilities of the ship security officer shall include, but are not limited to:

- .1 undertaking regular security inspections of the ship to ensure that appropriate security measures are maintained;
- .2 maintaining and supervising the implementation of the ship security plan, including any amendments to the plan;
- .3 co-ordinating the security aspects of the handling of cargo and ship's stores with other shipboard personnel and with the relevant port facility security officers;
- .4 proposing modifications to the ship security plan;
- .5 reporting to the company security officer any deficiencies and non-conformities identified during internal audits, periodic reviews, security inspections and verifications of compliance and implementing any corrective actions;
- .7 ensuring that adequate training has been provided to shipboard personnel, as appropriate;
- .8 reporting all security incidents;
- .9 co-ordinating implementation of the ship security plan with the company security officer and the relevant port facility security officer; and
- .10 ensuring that security equipment is properly operated, tested, calibrated and maintained, if any.

### 13 TRAINING, DRILLS AND EXERCISES ON SHIP SECURITY

13.1 The company security officer and appropriate shore-based personnel shall have knowledge and have received training, taking into account the guidance given in part B of this Code.

13.2 The ship security officer shall have knowledge and have received training, taking into account the guidance given in part B of this Code.

13.3 Shipboard personnel having specific security duties and responsibilities shall understand their responsibilities for ship security as described in the ship security plan and shall have sufficient knowledge and ability to perform their assigned duties, taking into account the guidance given in part B of this Code.

13.4 To ensure the effective implementation of the ship security plan, drills shall be carried out at appropriate intervals taking into account the ship type, ship personnel changes, port facilities to be visited and other relevant circumstances, taking into account the guidance given in part B of this Code.

13.5 The company security officer shall ensure the effective coordination and implementation of ship security plans by participating in exercises at appropriate intervals, taking into account the guidance given in part B of this Code.

## 14 PORT FACILITY SECURITY

14.1 A port facility is required to act upon the security levels set by the Contracting Government within whose territory it is located. Security measures and procedures shall be applied at the port facility in such a manner as to cause a minimum of interference with, or delay to, passengers, ship, ship's personnel and visitors, goods and services.

14.2 At security level 1, the following activities shall be carried out through appropriate measures in all port facilities, taking into account the guidance given in part B of this Code, in order to identify and take preventive measures against security incidents:

- .1 ensuring the performance of all port facility security duties;
- .2 controlling access to the port facility;
- .3 monitoring of the port facility, including anchoring and berthing area(s);
- .4 monitoring restricted areas to ensure that only authorized persons have access;
- .5 supervising the handling of cargo;
- .6 supervising the handling of ship's stores; and
- .7 ensuring that security communication is readily available.

14.3 At security level 2, the additional protective measures, specified in the port facility security plan, shall be implemented for each activity detailed in section 14.2, taking into account the guidance given in part B of this Code.

14.4 At security level 3, further specific protective measures, specified in the port facility security plan, shall be implemented for each activity detailed in section 14.2, taking into account the guidance given in part B of this Code.

14.4.1 In addition, at security level 3, port facilities are required to respond to and implement any security instructions given by the Contracting Government within whose territory the port facility is located.

14.5 When a port facility security officer is advised that a ship encounters difficulties in complying with the requirements of chapter XI-2 or this part or in implementing the appropriate measures and procedures as detailed in the ship security plan, and in the case of security level 3 following any security instructions given by the Contracting Government within whose territory the port facility is located, the port facility security officer and ship security officer shall liaise and co-ordinate appropriate actions.

14.6 When a port facility security officer is advised that a ship is at a security level, which is higher than that of the port facility, the port facility security officer shall report the matter to the competent authority and shall liaise with the ship security officer and co-ordinate appropriate actions, if necessary.

## 15 PORT FACILITY SECURITY ASSESSMENT

15.1 The port facility security assessment is an essential and integral part of the process of developing and updating the port facility security plan.

15.2 The port facility security assessment shall be carried out by the Contracting Government within whose territory the port facility is located. A Contracting Government may authorise a recognized security organization to carry out the port facility security assessment of a specific port facility located within its territory.

15.2.1 When the port facility security assessment has been carried out by a recognized security organization, the security assessment shall be reviewed and approved for compliance with this section by the Contracting Government within whose territory the port facility is located.

15.3 The persons carrying out the assessment shall have appropriate skills to evaluate the security of the port facility in accordance with this section, taking into account the guidance given in part B of this Code.

15.4 The port facility security assessments shall periodically be reviewed and updated, taking account of changing threats and/or minor changes in the port facility and shall always be reviewed and updated when major changes to the port facility take place.

15.5 The port facility security assessment shall include, at least, the following elements:

- .1 identification and evaluation of important assets and infrastructure it is important to protect;
- .2 identification of possible threats to the assets and infrastructure and the likelihood of their occurrence, in order to establish and prioritize security measures;
- .3 identification, selection and prioritization of counter measures and procedural changes and their level of effectiveness in reducing vulnerability; and
- .4 identification of weaknesses, including human factors in the infrastructure, policies and procedures.

15.6 The Contracting Government may allow a port facility security assessment to cover more than one port facility if the operator, location, operation, equipment, and design of these port facilities are similar. Any Contracting Government, which allows such an arrangement shall communicate to the Organization particulars thereof.

15.7 Upon completion of the port facility security assessment, a report shall be prepared, consisting of a summary of how the assessment was conducted, a description of each vulnerability found during the assessment and a description of counter measures that could be used to address each vulnerability. The report shall be protected from unauthorized access or disclosure.

## 16 PORT FACILITY SECURITY PLAN

16.1 A port facility security plan shall be developed and maintained, on the basis of a port facility security assessment, for each port facility, adequate for the ship/port

interface. The plan shall make provisions for the three security levels, as defined in this Part of the Code.

16.1.1 Subject to the provisions of section 16.2, a recognized security organization may prepare the port facility security plan of a specific port facility.

16.2 The port facility security plan shall be approved by the Contracting Government in whose territory the port facility is located.

16.3 Such a plan shall be developed taking into account the guidance given in part B of this Code and shall be in the working language of the port facility. The plan shall address, at least, the following:

- .1 measures designed to prevent weapons or any other dangerous substances and devices intended for use against persons, ships or ports and the carriage of which is not authorized, from being introduced into the port facility or on board a ship;
- .2 measures designed to prevent unauthorized access to the port facility, to ships moored at the facility, and to restricted areas of the facility;
- .3 procedures for responding to security threats or breaches of security, including provisions for maintaining critical operations of the port facility or ship/port interface;
- .4 procedures for responding to any security instructions the Contracting Government, in whose territory the port facility is located, may give at security level 3;
- .5 procedures for evacuation in case of security threats or breaches of security;
- .6 duties of port facility personnel assigned security responsibilities and of other facility personnel on security aspects;
- .7 procedures for interfacing with ship security activities;
- .8 procedures for the periodic review of the plan and updating;
- .9 procedures for reporting security incidents;
- .10 identification of the port facility security officer including 24-hour contact details;
- .11 measures to ensure the security of the information contained in the plan;
- .12 measures designed to ensure effective security of cargo and the cargo handling equipment at the port facility;
- .13 procedures for auditing the port facility security plan;
- .14 procedures for responding in case the ship security alert system of a ship at the port facility has been activated; and
- .15 procedures for facilitating shore leave for ship's personnel or personnel changes, as well as access of visitors to the ship including representatives of seafarers' welfare and labour organizations.

16.3.1 Personnel conducting internal audits of the security activities specified in the plan or evaluating its implementation shall be independent of the activities being audited unless this is impracticable due to the size and the nature of the port facility.

16.4 The port facility security plan may be combined with, or be part of, the port security plan or any other port emergency plan or plans.

16.5 The Contracting Government in whose territory the port facility is located shall determine which changes to the port facility security plan shall not be implemented unless the relevant amendments to the plan are approved by them.

16.6 The plan may be kept in an electronic format. In such a case, it shall be protected by procedures aimed at preventing its unauthorized deletion, destruction or amendment.

16.7 The plan shall be protected from unauthorized access or disclosure.

16.8 Contracting Governments may allow a port facility security plan to cover more than one port facility if the operator, location, operation, equipment, and design of these port facilities are similar. Any Contracting Government, which allows such an alternative arrangement, shall communicate to the Organization particulars thereof.

## 17 PORT FACILITY SECURITY OFFICER

17.1 A port facility security officer shall be designated for each port facility. A person may be designated as the port facility security officer for one or more port facilities.

17.2 In addition to those specified elsewhere in this Part of the Code, the duties and responsibilities of the port facility security officer shall include, but are not limited to:

- .1 conducting an initial comprehensive security survey of the port facility taking into account the relevant port facility security assessment;
- .2 ensuring the development and maintenance of the port facility security plan;
- .3 implementing and exercising the port facility security plan;
- .4 undertaking regular security inspections of the port facility to ensure the continuation of appropriate security measures;
- .5 recommending and incorporating, as appropriate, modifications to the port facility security plan in order to correct deficiencies and to update the plan to take into account of relevant changes to the port facility;
- .6 enhancing security awareness and vigilance of the port facility personnel;
- .7 ensuring adequate training has been provided to personnel responsible for the security of the port facility;
- .8 reporting to the relevant authorities and maintaining records of occurrences which threaten the security of the port facility;
- .9 co-ordinating implementation of the port facility security plan with the appropriate Company and ship security officer(s);
- .10 co-ordinating with security services, as appropriate;
- .11 ensuring that standards for personnel responsible for security of the port facility are met;
- .12 ensuring that security equipment is properly operated, tested, calibrated and maintained, if any; and

.13 assisting ship security officers in confirming the identity of those seeking to board the ship when requested.

17.3 The port facility security officer shall be given the necessary support to fulfil the duties and responsibilities imposed by chapter XI-2 and this Part of the Code.

## 18 TRAINING, DRILLS AND EXERCISES ONPORT FACILITY SECURITY

18.1 The port facility security officer and appropriate port facility security personnel shall have knowledge and have received training, taking into account the guidance given in part B of this Code.

18.2 Port facility personnel having specific security duties shall understand their duties and responsibilities for port facility security, as described in the port facility security plan and shall have sufficient knowledge and ability to perform their assigned duties, taking into account the guidance given in part B of this Code.

18.3 To ensure the effective implementation of the port facility security plan, drills shall be carried out at appropriate intervals taking into account the types of operation of the port facility, port facility personnel changes, the type of ship the port facility is serving and other relevant circumstances, taking into account guidance given in part B of this Code.

18.4 The port facility security officer shall ensure the effective coordination and implementation of the port facility security plan by participating in exercises at appropriate intervals, taking into account the guidance given in part B of this Code.

## 19 VERIFICATION AND CERTIFICATION FOR SHIPS

### 19.1 Verifications

19.1.1 Each ship to which this Part of the Code applies shall be subject to the verifications specified below:

.1 an initial verification before the ship is put in service or before the certificate required under section 19.2 is issued for the first time, which shall include a complete verification of its security system and any associated security equipment covered by the relevant provisions of chapter XI-2, this Part of the Code and the approved ship security plan. This verification shall ensure that the security system and any associated security equipment of the ship fully complies with the applicable requirements of chapter XI-2 and this Part of the Code, is in satisfactory condition and fit for the service for which the ship is intended;

.2 a renewal verification at intervals specified by the Administration, but not exceeding five years, except where section 19.3 is applicable. This verification shall ensure that the security system and any associated security equipment of the ship fully complies with the applicable requirements of chapter XI-2, this Part of

the Code and the approved ship security plan, is in satisfactory condition and fit for the service for which the ship is intended;

.3 at least one intermediate verification. If only one intermediate verification is carried out it shall take place between the second and third anniversary date of the certificate as defined in regulation I/2(n). The intermediate verification shall include inspection of the security system and any associated security equipment of the ship to ensure that it remains satisfactory for the service for which the ship is intended. Such intermediate verification shall be endorsed on the certificate;

.4 any additional verifications as determined by the Administration.

19.1.2 The verifications of ships shall be carried out by officers of the Administration. The Administration may, however, entrust the verifications to a recognized security organization referred to in regulation XI-2/1.

19.1.3 In every case, the Administration concerned shall fully guarantee the completeness and efficiency of the verification and shall undertake to ensure the necessary arrangements to satisfy this obligation.

19.1.4 The security system and any associated security equipment of the ship after verification shall be maintained to conform with the provisions of regulations XI-2/4.2 and XI-2/6, this Part of the Code and the approved ship security plan. After any verification under section 19.1.1 has been completed, no changes shall be made in security system and in any associated security equipment or the approved ship security plan without the sanction of the Administration.

## 19.2 Issue or endorsement of certificate

19.2.1 An International Ship Security Certificate shall be issued after the initial or renewal verification in accordance with the provisions of section 19.1.

19.2.2 Such certificate shall be issued or endorsed either by the Administration or by a recognized security organization acting on behalf of the Administration.

19.2.3 Another Contracting Government may, at the request of the Administration, cause the ship to be verified and, if satisfied that the provisions of section 19.1.1 are complied with, shall issue or authorize the issue of an International Ship Security Certificate to the ship and, where appropriate, endorse or authorize the endorsement of that certificate on the ship, in accordance with this Code.

19.2.3.1 A copy of the certificate and a copy of the verification report shall be transmitted as soon as possible to the requesting Administration.

19.2.3.2 A certificate so issued shall contain a statement to the effect that it has been issued at the request of the Administration and it shall have the same force and receive the same recognition as the certificate issued under section 19.2.2.

19.2.4 The International Ship Security Certificate shall be drawn up in a form corresponding to the model given in the appendix to this Code. If the language used is not English, French or Spanish, the text shall include a translation into one of these languages.

### 19.3 Duration and validity of certificate

19.3.1 An International Ship Security Certificate shall be issued for a period specified by the Administration which shall not exceed five years.

19.3.2 When the renewal verification is completed within three months before the expiry date of the existing certificate, the new certificate shall be valid from the date of completion of the renewal verification to a date not exceeding five years from the date of expiry of the existing certificate.

19.3.2.1 When the renewal verification is completed after the expiry date of the existing certificate, the new certificate shall be valid from the date of completion of the renewal verification to a date not exceeding five years from the date of expiry of the existing certificate.

19.3.2.2 When the renewal verification is completed more than three months before the expiry date of the existing certificate, the new certificate shall be valid from the date of completion of the renewal verification to a date not exceeding five years from the date of completion of the renewal verification.

19.3.3 If a certificate is issued for a period of less than five years, the Administration may extend the validity of the certificate beyond the expiry date to the maximum period specified in section

19.3.1, provided that the verifications referred to in section 19.1.1 applicable when a certificate is issued for a period of five years are carried out as appropriate.

19.3.4 If a renewal verification has been completed and a new certificate cannot be issued or placed on board the ship before the expiry date of the existing certificate, the Administration or recognized security organization acting on behalf of the Administration may endorse the existing certificate and such a certificate shall be accepted as valid for a further period which shall not exceed five months from the expiry date.

19.3.5 If a ship at the time when a certificate expires is not in a port in which it is to be verified, the Administration may extend the period of validity of the certificate but this extension shall be granted only for the purpose of allowing the ship to complete its voyage to the port in which it is to be verified, and then only in cases where it appears proper and reasonable to do so. No certificate shall be extended for a period longer than three months, and the ship to which an extension is granted shall not, on its arrival in the port in which it is to be verified, be entitled by virtue of such extension to leave that port

without having a new certificate. When the renewal verification is completed, the new certificate shall be valid to a date not exceeding five years from the expiry date of the existing certificate before the extension was granted.

19.3.6 A certificate issued to a ship engaged on short voyages which has not been extended under the foregoing provisions of this section may be extended by the Administration for a period of grace of up to one month from the date of expiry stated on it. When the renewal verification is completed, the new certificate shall be valid to a date not exceeding five years from the date of expiry of the existing certificate before the extension was granted.

19.3.7 If an intermediate verification is completed before the period specified in section 19.1.1, then:

- .1 the expiry date shown on the certificate shall be amended by endorsement to a date which shall not be more than three years later than the date on which the intermediate verification was completed;
- .2 the expiry date may remain unchanged provided one or more additional verifications are carried out so that the maximum intervals between the verifications prescribed by section 19.1.1 are not exceeded.

19.3.8 A certificate issued under section 19.2 shall cease to be valid in any of the following cases:

- .1 if the relevant verifications are not completed within the periods specified under section 19.1.1;
- .2 if the certificate is not endorsed in accordance with section 19.1.1.3 and 19.3.7.1, if applicable;
- .3 when a Company assumes the responsibility for the operation of a ship not previously operated by that Company; and
- .4 upon transfer of the ship to the flag of another State.

19.3.9 In the case of:

- .1 a transfer of a ship to the flag of another Contracting Government, the Contracting Government whose flag the ship was formerly entitled to fly shall, as soon as possible, transmit to the receiving Administration copies of, or all information relating to, the International Ship Security Certificate carried by the ship before the transfer and copies of available verification reports, or
- .2 a Company that assumes responsibility for the operation of a ship not previously operated by that Company, the previous Company shall as soon as possible, transmit to the receiving Company copies of any information related to the International Ship Security Certificate or to facilitate the verifications described in section 19.4.2.

19.4 Interim certification

19.4.1 The certificates specified in section 19.2 shall be issued only when the Administration issuing the certificate is fully satisfied that the ship complies with the requirements of section 19.1. However, after 1 July 2004, for the purposes of:

- .1 a ship without a certificate, on delivery or prior to its entry or re-entry into service;
- .2 transfer of a ship from the flag of a Contracting Government to the flag of another Contracting Government;
- .3 transfer of a ship to the flag of a Contracting Government from a State which is not a Contracting Government; or
- .4 when a Company assumes the responsibility for the operation of a ship not previously operated by that Company; until the certificate referred to in section 19.2 is issued, the Administration may cause an Interim International Ship Security Certificate to be issued, in a form corresponding to the model given in the Appendix to this Part of the Code.

19.4.2 An Interim International Ship Security Certificate shall only be issued when the Administration or recognized security organization, on behalf of the Administration, has verified that:

- .1 the ship security assessment required by this Part of the Code has been completed,
- .2 a copy of the ship security plan meeting the requirements of chapter XI-2 and part A of this Code is provided on board, has been submitted for review and approval, and is being implemented on the ship;
- .3 the ship is provided with a ship security alert system meeting the requirements of regulation XI-2/6, if required,
- .4 the company security officer:
  - .1 has ensured:
    - .1 the review of the ship security plan for compliance with this Part of the Code,
    - .2 that the plan has been submitted for approval, and
    - .3 that the plan is being implemented on the ship, and
  - .2 has established the necessary arrangements, including arrangements for drills, exercises and internal audits, through which the company security officer is satisfied that the ship will successfully complete the required verification in accordance with section 19.1.1.1, within 6 months;
- .5 arrangements have been made for carrying out the required verifications under section 19.1.1.1;
- .6 the master, the ship's security officer and other ship's personnel with specific security duties are familiar with their duties and responsibilities as specified in this Part of the Code; and with the relevant provisions of the ship security plan placed on board; and have been provided such information in the working language of the ship's personnel or languages understood by them; and
- .7 the ship security officer meets the requirements of this Part of the Code.

19.4.3 An Interim International Ship Security Certificate may be issued by the Administration or by a recognized security organization authorized to act on its behalf.

19.4.4 An Interim International Ship Security Certificate shall be valid for 6 months, or until the certificate required by section 19.2 is issued, whichever comes first, and may not be extended.

19.4.5 No Contracting Government shall cause a subsequent, consecutive Interim International Ship Security Certificate to be issued to a ship if, in the judgment of the Administration or the recognized security organization, one of the purposes of the ship or a Company in requesting such certificate is to avoid full compliance with chapter XI-2 and this Part of the Code beyond the period of the initial interim certificate as specified in section 19.4.4.

19.4.6 For the purposes of regulation XI-2/9, Contracting Governments may, prior to accepting an Interim International Ship Security Certificate as a valid certificate, ensure that the requirements of sections 19.4.2.4 to 19.4.2.6 have been met.

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UNCITRAL Documents Related to the Draft Convention on Carriage of Good [wholly or partly by Sea] can be found on the Organization web page, especially the work of Working Group III, where most of the Draft papers and discussions are available. The web page is:

<http://www.uncitral.org/uncitral/en/index.html>

Working Group III web page is:

[http://www.uncitral.org/uncitral/en/commission/working\\_groups/3Transport.html](http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html)

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