CHAPTER NINE

CHARTERPARTIES

Introduction

A charterparty is quite simply a contract for the hire of a vessel. Whilst there is no required form for a charterparty, it is usual for charterparties to be in written/printed standard form. The terms and conditions of charterparties regularly used in the industry are well known and have evolved over many years, adapting to modern trends and in response to judicial judgements that have clarified the meaning of specific words and phrases.

The three broad categories of charterparty in common use are

- Bareboat/Demise,
- Simple Time and
- Simple Voyage Charter.

In recent times very short spot charters have become much more common. The demise charter does not include crew and very limited services whereas the simple charters normally include a crew and responsibility for maintenance of the vessel remains with the shipowner. Charterparty documents are very sophisticated and are designed to reflect the requirements of specific trades and the global regions in which the vessel trades.

INCO amongst others, produce off the shelf charterparties for use by the industry. Many shipowners have their own standard form terms and conditions for the hire of their vessels. They may even have a variety of standard form contracts for different types of vessel, different types of trade and for different forms of chartering. The printed form will carry standard information and leave spaces to be filled in by the parties. Individual terms may be added to or subtracted from the standard form. It is always important to have sight of the actual contract used by the parties and not to presume that the content is known simply because it is stated to be on standard form terms.

The Common Law and Charterparty Terms

The terms of charterparties are subject to all the basic principles of contract law in respect of discovery of terms, whether express or implied by common law or statute, incorporation, scope and legality outlined in Chapter One. This chapter provides a general introduction to the topic. The distinctive nature of some of the obligations involved in time and voyage charterparties means that terms common to time charterparties may have no relevance to voyage charterparties and vice~versa. Some terms, for example those in respect of the condition of the vessel can apply to both forms of charterparty. This apparent uniformity may be deceptive. The consequences of breach may differ as between voyage and time charterparties and thus the classification of the term as a condition or warranty can likewise be affected. It is important therefore to consider all terms in the context of the charterparty being considered and to take care not to generalise.

Location of a vessel.

The stated location of a ship in a charterparty is normally regarded as a condition. A charterparty may state the position of the ship at the time when the charterparty comes into being. The location can be of great significance to the charterer. It is a direct indicator of the safety of the vessel at the time when it is hired and the ability of the vessel to arrive at the port of loading on time and its ability to fulfil contractual obligations. Thus in **Behn v Burness** [1] the position of the ship was held to be a condition. The Charterparty, dated October 19th, stated *'the ship now at Amsterdam'*. On October 15th the ship was in fact 62 miles away and was detained there by weather tilt the 23rd of October. The court held that the position of the ship was an essential fact for the interests of the charterer.

[1] **Behn v Burness** (1863) 2 B & 5 751.

Terms regarding time of loading.

Terms in respect of loading time may be conditions. If the term is a condition the charterer can rescind the contract in event of breach. As ever, the classification depends on the intentions of the parties. A specified date of arrival or final date for deliver, as opposed to the date when a vessel is expected to be ready to load and estimated times of arrival (E.T.A.), is likely to be a condition and would normally be accompanied by a rider stating that in the event of breach the charterer may terminate the contract.

The Mihalis Angelos [2] concerned a charterparty dated 25th May, which stipulated that the vessel was expected ready to load at Haiphon on July 1st. As events developed it became clear that the vessel would probably arrive at Haiphon no earlier than the 27th July. On the 17th July the Charterer repudiated the contract. The court confirmed that a final date of arrival breach of which was stated to give rise to a right to repudiate was a condition. The charterer's action of repudiating before the final date for performance amounted to an anticipatory breach of contract. Since the vessel could not have arrived in time in any case, if the charterer had waited until the due date of performance he could have lawfully terminated the contract and claimed damages. His haste to mitigate his potential losses by acting too early meant that he could not claim damages for the anticipated breach by the shipowner. However, the courts awarded the shipowner nominal damages only for the charterer's anticipatory breach and effectively penalised the shipowner for mounting a legal action by awarding costs to the charterer.

An anticipatory breach occurs where, by words or actions, a party intimates in advance that he will not or cannot fulfil his contractual obligations on the due date. If there are no grounds for so doing, this is also a repudiatory breach. The innocent party is not obliged to accept a repudiatory breach of contract, though often there is no option but to do so. If the innocent party can carry on and perform his obligations without the aid of the repudiating party he can do so.[3]

The repudiatory breach must be accepted by word or action to terminate the contract. Otherwise the contract is deemed to be ongoing and both parties can and must then fulfil their obligations. **The Santa Clara** and **The Gregos** [4] demonstrate that it can be dangerous to attempt an anticipatory repudiatory breach since, in the absence of a liquidated damages clause such as demurrage damages for breach are assessed by the courts to put the parties into the position that they would have been in if the contract had not been breached, which explains why only nominal damages were awarded in the **Mihalis Angelos**.

The time of sailing.

When a vessel is described as having sailed from a particular port the courts tend to treat this statement as a condition. Thus in **Bentsen v Taylor** [5] the charterparty described the vessel as 'now sailed or about to sail from the pitch pine ports to the U.K. Dated 29th March'. The vessel did not in fact leave until 23rd April. The court held that this was a breach of condition, but in the circumstances it was not actionable since the charterer had waived the breach.

The name & nationality of the ship.

The courts treat such terms as conditions. These terms are important in the event of war and regarding the laws of navigation and on flagging. In **lsaacs & Son v McAllum** [6] the court held that during the duration of the charterparty the ship must not change its flag. This is an implied condition.

Classification

The Warranty of Ship's classification as to fitness is treated by the courts as a condition despite the fact that it carries the label of warranty. The court looks to the consequence of breach for its actual classification. The terms condition and warranty were frequently used in rather a loose and imprecise manner years ago so some care is required in respect of older cases. Thus in **Routh v McMillan** [7] the vessel was described as Al fit under the Lloyds of London Classification. This amounted to a promise that the vessel was Al fit. If it is

2 **Mihalis Angelos** [1970] 2 Lloyds Rep 43 CA at 47.
3 **White and Carter v McGregor** [1961] 3 All E.R. 1178.
4 **The Santa Clara** [1995] Lloyds Rep ; **The Gregos** [1995] 1 Lloyds Rep p3
5 **Bentsen v Taylor** [1893] 2 Q.B. 274. CA.
6 **lsaacs & Son v McAllum** [1921] 3 KB 377.
7 **Routh v McMillan** 1863 2 H & C 750.

not Al fit then the charterer may refuse to load. Note however that terms regarding class only apply at the time of the Charter party. If at some time latter after delivery the vessel looses it's classification for example, during a storm, then the condition is not applicable.

Olive v Booker [8] is authority for the statement that a charterer may refuse to load cargo on board a ship if the ship does not fulfil the class. If the vessel is not rendered cargo worthy within an acceptable time the cargo owner can repudiate the contract and claim damages for breach of contract.[9]

Hurst v Usborne and **French v Newgrass** [10] are further authorities for the statement that the warranty only applies to the date of the charterparty and is not a warranty that the ship will not lose its class. The courts then limited the scope of the warranty by stating that a refusal to load would not be permitted if the ship was in class at the time of the charterparty but subsequently lost its class on the way to the port of loading. The apparent contradiction between these cases was resolved by **The Elena D'Amico** where the court held that if vessel cannot be repaired in time to fulfil the charterparty contract then the charterer can repudiate.

Warranties in Charterparties.

These are statements which do not go to the root of the contract. A breach of warranty however serious gives no right to the innocent party to be released from the contract. It only provides a right to recover damages. Any term can be expressly made a condition but in the absence of categorisation the following have been treated as warranties by the courts.

Terms regarding performance.

In **Lorentzen v White Shipping** Co [11] the court held that provisions in the charterparty as to fuel consumption and speed amount to warranties that at the time of the charterparty the ship was capable of so performing.

Repudiation would not therefore be possible, but the charterer would be entitled to compensation for loss suffered in consequence of a breach of the warranty. The speed that the vessel is supposed to be capable of will obviously affect a great number of factors such as how many voyages are possible, when goods are expected to arrive and whether or not regarding the state of the market, it is worthwhile undertaking such a voyage.

Similarly the size of bunkers affects what voyages are possible and how often the vessel will have to call at ports to refuel. Thus in **The Pantanassa** [12] a vessel expected to be laden with 6/700 tons of fuel arrived with 936 tons. The price to be paid under the charterparty for bunkers differed from the cost of bunkers commercially available to the charterer who therefore made a financial loss. As a warranty he was only entitled to damages.

Terms regarding the redelivery of vessel and its condition have implications for the degree of care and attention to maintenance that the charterer will have to exercise. In **Attica Sea Carriers** [13] the charterparty required the vessel to be in the same order and condition on redelivery as on delivery. The court held that the stipulation was a warranty and awarded damages to cover the cost of repairs. Terms in respect of the maintenance of the vessel to keep it in a seaworthy state are warranties. A breach can result in delay which gives rise to damages.

Innominate charterparty terms.

The innominate term is unclassified either by a lack of an express statement in the charterparty as to the consequence of breach or because the courts have not made a definitive classification of such terms. The courts, following **Hong Kong Fir** [14] now tend to treat such terms as innominate and the court then classifies the term by reference to the consequence of its breach in respect of that particular commercial venture. The advantage of the process is that it enables the courts to tailor the outcome of the dispute more closely to the

8 **Olive v Booker** (1847)1 Ex 416
9 **The Elena D'Amico** [1980] 1 Lloyds 75
10 **Hurst v Usborne** (1856) 18 C.B. 144 and **French v Newgrass** (1878) 3 C.P).D. 163
11 **Lorentzen v White Shipping** Co (1943) 74 Lloyds Rep. 161
12 **The Pantanassa** [1958] 2 Lloyds Rep 449 Q.B.D.
13 **Attica Sea Carriers** [1976] 1 Lloyds Rep 250. CA.
14 **Hong Kong Fir v Kawasaki Kisen Kaisha**

circumstances of the case but the disadvantage is that a degree of predictability is lost. Thus today it is likely that statements as to measurement / tonnage / dead weight capacity will not be automatically treated as either a condition or a mere warranty. Similarly statements as to a vessel's speed could now be innominate and the court could have regard to just how slow a particular the vessel is.

Seaworthiness and maintenance as demonstrated by **Hong Kong Fir** are the classic innominate terms and the charterer runs the risk that the court may decide that the consequence of breach is insufficient to deprive the charterparty of its central economic purpose. In order to avoid the contract the consequence of the breach must be quite substantial.

Compare the unclassified term with a situation where the term is classified as a condition. In such situations the courts cannot reclassify the term, which makes it easier for the charterer to decide what action to take at an early stage. In **The Aegean Dolphin** [15] a cruise ship was chartered for holiday cruises. It was essential that the vessel could complete the planned cruises in a specified time so that passengers could catch their plane's home after their 12 day leisure cruise holidays. The vessel's speed proved to be insufficient and the charterer sought to reject the vessel. The court held that speed was in the circumstances a condition of the contract. The charterer would have been entitled to reject the vessel for breach of the condition. However, the charterer had accepted the vessel having had an opportunity to inspect it. He had had the ability to check the speed but failed to do so. By acceptance of the vessel the charterer had waived the breach and was only entitled to damages and could no longer lawfully reject the vessel.

Common Law Implied undertakings in Voyage Charter Parties.

Reasonable dispatch.

Time is of the essence in commercial contracts. Under a time charterparty the charterer pays for the vessel on a time basis and thus has a large degree of control over the operation and sailing of the vessel and so *'Reasonable Dispatch'* is not a time charterparty issue. The ability to order a vessel to sail is covered under E & l Clauses and the duty of the captain to follow reasonable orders.

Since under a voyage charter party the charterer pays a one off fee for the voyage a delay in sailing does not automatically result in the charterer suffering loss. None the less a delay in sailing can result in perishable goods deteriorating or in goods failing to get to market in time. Where the charterer has to meet the contractual deadlines of shippers and other cargo owners delay in sailing can have serious financial consequences for the charterer.

It would appear that the implied term as to reasonable dispatch is, in the absence of express classification by the parties, treated by the courts as an innominate term. The courts applied this logic to reasonable dispatch long before the terminology of innominate term was coined and provides a firm common law precedent for the decision in **Hong Kong Fir**.

In **McAndrew v Adams** [16] Charter party 20th October. a vessel was contracted to proceed from Portsmouth to St Michaels in The Azores and to load fruit and return to London. On the 7th November the vessel took an intermediate voyage and then sailed on the 6th December for St Michaels. The Shipowner was held liable to the Charterer for breach of the implied term to commence the voyage in a reasonable time.

The question to be answered is *'Has the delay been so serious as to frustrate the contract?'* If so then repudiation is permitted but if not then the innocent party can only claim damages. Once the vessel sails on the charterparty voyage only damages can be claimed.[17] Be careful with the word frustration.

The Effect of a failure to proceed with reasonable dispatch.

Common law frustration.

This occurs where the failure to sail is caused by an unforeseen event beyond the control of the parties resulting in mutual release, e.g. the port is closed, the vessel breaks down, there is a strike etc. This is not breach of contract but the result is that the contract is brought to an end. Neither party can claim damages. Compensation for frustration is governed by the Law Reform Frustrated Contracts Act in domestic law but

15 **The Aegean Dolphin** [1992] 2 LR 179.

16 **McAndrew v Adams** (1834) 1 Bing N.C. 29.

17 See Scrutton

not in international contracts and contracts for the carnage of goods by sea which is still governed by the common law. The existence of frustration is a question of fact for the court. It is a difficult area of law and it is hard to predict when a delay will be deemed to become a frustrating event. [18]

Frustration of the commercial purpose.
An act of the party causing a breach of the implied undertaking which adversely affects the contract and in McAndrew's terminology frustrates the commercial purpose of the contract. This is not frustration and in reality enables the court to classify it as a breach of condition. [19]

Non frustration of the commercial purpose.
An act of the party causing a breach of the implied undertaking but which does not rob the venture of its entire commercial value. The charterer can claim damages for his loss, if any. The de minimis rule may apply.

If there is a breach of the implied undertaking of reasonable dispatch which deprives the contract of its commercial purpose only the shipper is released from his obligation and then only if he so wishes. Repudiation is not automatic and the guilty party cannot delay sailing as a means of avoiding the contract. The innocent party has the right of election, whether to be released from the contract or to continue the contract and sue for damages.[20]

Regarding a breach of the term the innocent party (the shipper) can therefore

a) Elect to continue with the contract and lodge a protest reserving the right to sue for damages for delay, or
b) Elect to repudiate the contract and sue for damages. Damages will be assessed on the basis of loss. If there is no loss only nominal damages will be awarded. The loss must also be caused by the breach, is causation must be proved. [21] Note that election by the innocent party, with knowledge, implied or actual, of the breach, is essential. A failure to elect can result in
c) Implied waiver. Where the charterer impliedly waives the breach by doing nothing he gives the shipowner the impression that everything is alright and that the contract is on going. He is later estoped from asserting the right to repudiate the contract.

Thus, election is essential to avoid implied waiver. If the vessel has eventually sailed with knowledge of the breach by the charterer and without protest by him then it would be too late in most circumstances to repudiate the contract. The failure to act could even result in a loss of the right to claim damages if he has given the shipowner the impression that he is not concerned about it.

If there is an exclusion clause for damages for delay this should not adversely affect liability for delay since this particular delay would be the result of a breach of the term to sail with reasonable dispatch. Exclusion clauses are treated contra preferentem by the courts so the exclusion clause would have to specifically cover a failure to sail promptly, for example 'shipowner not liable for consequences of late sailing for whatever reason, with or without his fault.' The exclusion of liability for delay would only apply to other types of delay.

In **The Baleares** [22] a vessel and substitute failed to meet the estimated time of arrival and the charterparty cancellation date having passed the charterer cancelled the charterparty and claimed damages to cover damages suffered by a rise in market price of the cargo of propane that resulted from the failure of the vessel to proceed with reasonable dispatch. Propane rose by $50 per tonne in price but the charterers were forced to sell at previously arranged lower fixed prices thus incurring a loss which the C.A. held was recoverable.

18 See **The Nema** [1981] 2 AII.E.R. 1030.
19 **The Eugina** [1964] 2 0.8.226.
20 **White and Carter (Councils) V McGregor**
21 **The Europa**.
22 **The Baleares** [1993] 1 Lloyd's Rep 215

CHAPTER NINE

Deviation

There is an implied undertaking by the carrier that he will not unlawfully deviate from the contractual route. The undertaking is considered by some commentators to be a fundamental term entitling the innocent party to a contract of carriage to repudiate the contract of carriage even if the contract has been performed. Whilst some academics dispute whether such a thing as a fundamental term still exists today, the term is still clearly a condition in the absence of classification to the contrary by the parties. As such the innocent party can repudiate the contract of carriage in the event of breach. Express and implied waiver are however possible once the innocent party knows of the breach. Since the contract of carriage has been performed, if the contract is displaced the carriage is treated by the courts as having been performed on the basis of common carrier terms. All exclusions under the contract of carriage are removed and the carrier is strictly liable for all loss not excluded on the basis of Act of God, King's enemies and inherent vice or other acts of the shipper which cause the loss.

The issues involved in deviation

1) Has a deviation occurred?
   a) What was the proper route?
   b) Did the vessel depart from that route?
   c) Was the departure intentional?
2) Was the deviation permitted ie lawful
   a) By Common Law?
   b) By Statute?
   c) By the Charterparty (regarding charterer & shipowner relationships)
   d) By the contract of carriage between the shipper & carrier?
   e) By the contract of carriage with endorsee under the bill of lading?
3) The effect of an unlawful deviation
   a) As between charterer and shipowner
   b) As between shipper and carrier
   c) As between endorsee of bill of lading and carrier

Deviation and the proper route.

In order to determine whether or not a vessel has deviated from the contractual route one needs to know what is the proper course or route. The ordinary trade route has variously been described as the direct geographical route, the usual route and the nautically usual route.

Regarding the usual route the question is ***'Usual for whom ?'*** A route may be usual and reasonable though followed only by ships of one line, and though only recently adopted. On the other hand the 'proper route' may be the route determined at the time the Charter party is entered into provided that the parties actually bothered to specify the route. If the route has not been specified then it may be taken to be the most direct & safe route. The following act as a guide to what is the 'proper route'.

a) If named in the contract then it is the proper route.
b) If the route is not specifically mapped out in the contract and general terms only are used such as "Ports in the West Indies Islands" then the ports must be taken in the geographical order.
c) Settled usage resulting in a customary route may be taken into account but there must be a constant practice for it to be a custom.

In **Reardon Smith v Blacksea Baltic** [23] the chartered vessel went off the direct geographical route because fuel oil (bunkers) was cheaper elsewhere. 25% of the vessels in the same trade went there to bunker. The House of Lords held that this was not a deviation. They stated that the test was 'Was the departure reasonably necessary in a business sense ?' See Porter L's judgement.

[23] **Reardon Smith Line v Blacksea Baltic General Insurance** [1939] AC 562.

Mental element of deviation.

A Deviation is the voluntary substitution of another *voyage " the essence of deviation is the undertaking of a voyage for the contract voyage."* What amounts to a voluntary substitution? Consider the situation where a captain is drunk. The reason for the deviation is that he is drunk. Therefore it is not in fact a deviation since it is not voluntary. It is an unintentional act. Therefore there is no need to ask if the deviation was reasonable.

In **Rio Tinto v Seed** [24] The court considered a charterparty dispute which involved allegations of unseaworthiness and a claim for the loss of cargo through vessel stranding. Allegations by the plaintiff included claims that the master was 1) incompetent and 2) guilty of unnecessary deviation. There was a clause in the charterparty excepting the shipowner's liability for errors in judgement of master. The court held that in the circumstances the level of incompetence was not so great as to constitute unseaworthiness. The central issue therefore was deviation and the court concluded that there had been a mere departure from the correct course. Roche J stated that he did not deviate to another route. He merely ended up in the ditch on the side of the route. If there was no deviation there is no need to consider whether or not the deviation was reasonable or not since there was no deviation.

The loss of cargo of coal and coke through the stranding of The Marjorie Seed on Christmas Day in the Firth of Clyde was considered by Mansfield L in **Lavabre v Wilson** [25] where he stated that ' the mischief or essence of deviation was that the parties contracting had voluntarily substituted another voyage for that for which has been insured. A mere departure or failure to follow the contract voyage or route is not necessarily a deviation or every stranding which occurred in the course of a voyage would be a deviation because the voyage contracted for is in no case one which essentially involves the necessity of stranding. It is a change of voyage, a radical breach of the contract that is required to and essentially does constitute a deviation.'

In **Tait v Levi** [26] the court stated that if a ship's master is incompetent, to such an extent that he should not be employed by a reasonable ship owner then the ship is unseaworthy. However, the consequences of unseaworthiness, as will be demonstrated later are quite different from the consequences of unlawful deviation, so that whilst such unseaworthiness may give rise to damages the charterparty may not be avoided.

Lawful and unlawful deviation.

Justifiable deviation at common law.

There are two situations where a deviation is justified at common law

i) to save life (compare the common law attitude towards saving of property).
ii) to avoid danger (is this limited to danger to the ship and crew or does it include danger to the cargo?).

Justifiable deviation under statute.

There are also two reasons why deviation is justified under statute. Art IV(3) C.O.G.S.A. 1971 permits the following deviations

i) for the purpose of saving life or property and
ii) any reasonable deviation is justified.

Deviation and the Common Law.

Deviation to save life on board another vessel.

It was established in **Scaramanga v Stamp** [27] that deviation to save life is justified but a deviation to save property is not. The vessel was in distress. It would have been no problem to evacuate the vessel. The deviating / rescuing vessel went round to help the distressed vessel as well as the people. Once the evacuation was complete there was no more justification for the deviation since this would then become a deviation for salvage purposes. Thus, if after saving crew a vessel hangs around and places itself in danger and endangers cargo by excessive delay, merely to earn salvage, an unlawful deviation situation could be brought about.

24 **Rio Tinto v Seed** (1926) 24 Lloyds 316.
25 **Lavabre v Wilson** 1779
26 **Tait v Levi** 14 East 481
27 **Scaramanga v Stamp** (1880) 4 C.P.D..

CHAPTER NINE

Multiple reasons for deviation.

What if there were several concurrent purposes? Then one should look to the primary purpose, the main motive. Thus the question may arise as to whether one may leave a ship in distress or not. The court then has to decide whether the primary reason for attendance is to save life or property. Presumably if there was a real danger to life present the court would have to accept saving life as the primary purpose lest the duty of common humanity be undermined.

Deviation to avoid danger to the carrying vessel.

In **The Teutonia** [28] the court held that a deviation may be justified or even obligatory in certain situations. A German ship carried some English goods aboard. At the time there was a war between France and Germany. The Master deviated to make inquiries. It was held that one must look at the whole situation to see whether or not a deviation is in fact justified. Furthermore, T**he Anastasia** [29] is authority for the statement that the master not only exercises his own judgement but that he has a duty to exercise his own judgement and that he does not and must not perform his duties merely at the whim and dictat of the vessel's charterer or owner. Thus, disobeying the orders of a charterer where following the order would result in danger to the vessel would not amount to an unlawful deviation.

Deviation to save cargo on board the carrying vessel.

In **Notura v Henderson** [30] cargo aboard the vessel got wet and was liable to get much worse. The ship itself was in good condition. The question therefore was *'should the master go to the nearest port to save the cargo* ?" The court held that the master is bound to take into account the interests of the cargo as well as those of the ship. He must act prudently for all concerned having regard to all the circumstances of the case. In **The Rona**[31] a cargo of flour was damaged when water penetrated the deck. The master had to decide whether to return to port or to continue the voyage. The court held that it would have been negligence on the master's behalf to continue the voyage. *"He (the master) must not consider only the question of the ship must also consider the whole adventure without repair he would jeopardise the cargo "*. It was further held that seaworthiness must exist at the commencement of the voyage. It is not a breach of the condition of seaworthiness if the ship later falls below the standard.

In **Phelps v Hill** [32] a vessel landed at Queenstown in distress. It needed repairs and proceeded to Bristol. Unfortunately on the way to Bristol it was sunk in a collision with another vessel. The cargo owners claimed that going to Bristol was not justifiable. The vessel could have been repaired at Queenstown. The court held as a fact that Queenstown was not really practicable though it would have been possible to have gone to Swansea which was 66 miles closer than Bristol. However, there was a saving of expense by going to Bristol since the repairs could be carried out cheaper at Bristol and done quickly and finally that transshipment of cargo would have been easier at Bristol. Thus the master had considered the interests of both the ship and the cargo and so it was a justifiable deviation. The master is not bound in the circumstances to consult with the cargo owner before selecting the port at which to get the repairs done.

Deviation to avoid danger to the carrying vessel.

In **Kish v Taylor** [33] the vessel had been excessively overloaded. This is a classic instance of unseaworthiness which amounted to a breach of contract. In the circumstances the master was obliged to deviate. The court held the deviation justifiable even though it was the direct result of the act of the master who had created the danger and therefore could be regarded as intentional. Atkinson J said that the ship's master should not be put in the position of having to decide on the merits of the situation. He has to be allowed to deviate in order to save the venture. The rationale of Kish v Taylor therefore is that the existence of the peril is looked at and not the cause of the peril.

28 **The Teutonia** [1872] L.R. 3 A & E 394.
29 **Midwest Henry v Jute - The Anastasia** [1971] 1 Lloyds Rep 375.
30 **Notura v Henderson** [1870] L.R. 5 Q.B. 354.
31 **The Rona** 5 Aspinal M.C. 259.
32 **Phelps v Hill** [1891] 1 Q.B. 605.
33 **Kish v Taylor** [19121 A.C. 604.

Contrast this with the decision in **The Willdomino** [34] where a deviation for refuelling purposes was stated to be inexcusable where the bunkers aboard the vessel were inadequate for the voyage. The deviation was therefore unjustifiable according to the court. However, U.S. cases are only of persuasive authority and it would be unlikely to be followed in the U.K. in the light of **Kish v Taylor**.

Reasonableness, deviation and C.O.G.S.A. 1971.

C.O.G.S.A. 1971 permits *'Any reasonable deviation'* by Article IV(4) but leaves open the question as to what a reasonable deviation is. In **Stag Line Ltd v Foscolo Mango** [35] the House of Lords considered a case where a ship deviated to land engineers who had been on board testing a fuel preservation system. The ship struck a rock. The court held that this was not a reasonable deviation.

The true test seems to be *"What departure from the contract voyage might a prudent person in control of the voyage at the time make and maintain having regard to all the circumstances?"* In **Theiss Bros** [36] a vessel was required to deliver goods at Melbourne according to the Bill of Lading. However the vessel deviated to Newcastle, which was 4 miles off course, in order to take on bunker. The court held that the deviation was not reasonable.

In T**he Daffodil B** [37] Lloyd J in the Commercial Court had to consider a time charterparty dispute involving claims for general average in the light of allegations of unlawful deviation. A casualty occurred during deviation. The question arose as to whether or not the owners could claim general average contribution. Thus the court had to decide whether or not the deviation was reasonable and applied Art IV(4) Hague Rules. The vessel was charter to carry fuel oil from Milazzo in Sicily for Rotterdam via Turkey. The ship's diesel generator failed but the vessel still had sufficient power to sail and was ordered to Lavrion a small port to take on a repair team. The vessel subsequently headed for the Dardanelles and repairs were carried out during the voyage. Due to bad navigation by the master master the ship grounded. It was then towed to Corinth and then to Piraeus for repairs. Eventually the vessel successfully discharged at Ismir as originally intended. The owners claimed general average from the defendant and their insurers. The defendant claimed there had been an unlawful deviation. The shipowner admitted deviation but sought protection under Art 4(4). The defendant also claimed that Lavrion was not a safe port for a ship of the Daffodil's size. The court held that ships of The Daffodil's size often anchored at Lavioron which was a safe anchorage, that the deviation was reasonable and that the shipowner could therefore could claim general average.

Express clause allowing deviation.

These are often referred to as *'Liberty to Deviate'* clauses. The first problem in this area is as to the interpretation of such clauses. Vague generous clauses will be limited by the courts applying the 'contra preferentum' rules. The courts look at the commercial venture as a whole. An example is Clause 3 '***Gencom***'. *'The vessel has liberty to call at any port or ports in any order for any purpose, to sail without pilots, tow or assist vessels for all purposes to save life.'*

The courts have held that all these clauses must be construed *'in the light of the commercial venture undertaken by the ship owner.'* in **Leduc v Ward** [38] the contract contained the following ***'liberty to deviate'*** clause *'Liberty to call at any ports in any order ... and to deviate for the purpose of saving life or property '* The vessel deviated for the shipowner's private business. The court held that the clause did not give an unlimited right, merely a right to call at any ports in the ordinary course of the voyage." The general principle for interpretation of such clauses is that the main object of the contract must not be defeated.

In **Connolly Shaw v Nordenfjedske** [39] the contract contained the following extremely wide ***'Liberty to deviate'*** clause *"Nothing in this bill of lading (whether written or printed) is to be read as an engagement that the said carriage shall be performed directly or without delays, the ship is to be at liberty, either before or after proceeding towards the port of delivery of the said goods, to proceed to or return to and stay at any ports or places whatsoever*

34 **The Willdomino** (1927) 272 U.S. 714 U.S.A
35 **Stag Line Ltd v Foscolo Mango** [1932] A.C. 328.
36 **Theiss Bros** [1955] 1 Lloyds Rep 459.
37 **Danae Shipping Co v T.P.A.O. & Guven Turkish Insurance Co Ltd : The Daffodil B** [19831 1 Lloyds 498 Q.B.
38 **Leduc v Ward** [1888] 20 Q.B.D. 475.
39 **Connolly Shaw Ltd v Nordenfjedske** [19341 50 T.L.R. 418.

(although in a contrary direction to or out of or beyond the route of the said port of delivery) once or oftener in any backwards or forwards for loading or discharging cargo passengers coals or stores or for any purpose whatsoever whether in relation to her homeward voyage or to her outward voyage or to an intermediate voyage and all such ports places and sailings shall be deemed included within the intended voyage of the said goods'.

Due to a deviation to Hull before proceeding to London the cargo owner lost money because of a fall in the market price during the extended period of the voyage. The lemons however arrived in good condition. The court held that the deviation complained of was covered by the clause.

The second issue to be paid consideration to is regarding who is governed by the liberty to deviate clause which in turn depends on whether the clause is contained in the charter party, the contract of carriage with the shipper or the contract of carriage with the endorsee and between which of the following personalities the dispute takes place, namely, the ship owner, the charterer, the shipper, the endorsee of a bill of lading.

Remember that one person may wear several hats at the same time which further complicates matters since the charterer shippers are governed by the charterparty not the bill of lading or any other purported contract of carriage.

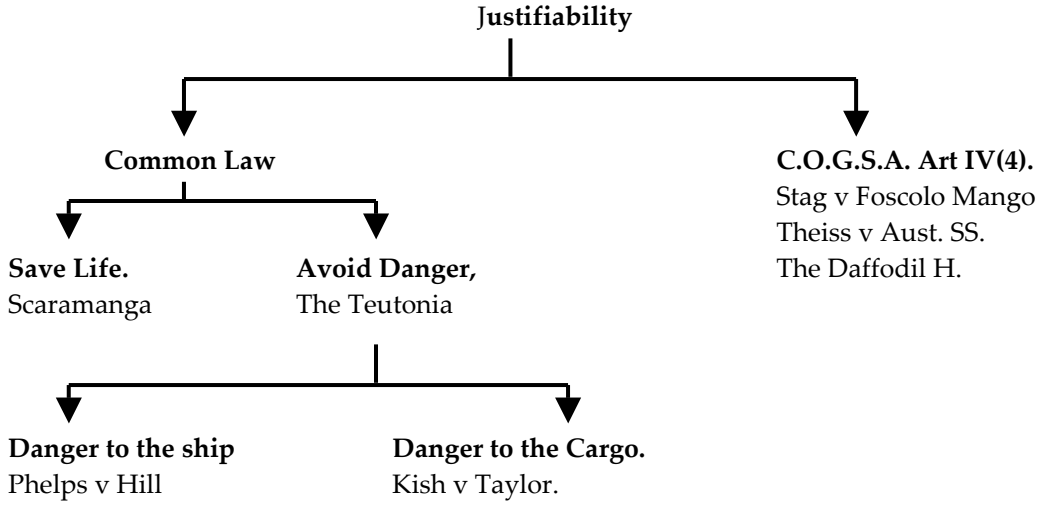
Whilst therefore the issue of which contract terms prevails is now discussed in relation to exemption clauses discussing deviation, the discussion is in fact relevant to all exclusion clauses including those in relation to the seaworthiness of the vessel.

Effect of Unlawful Deviation.

If a deviation is unjustified it amounts to a breach of the charterparty contract or other relevant contract of carriage which may then be avoided. If the charterparty / contract of carriage is avoided, then the exclusion clauses within the charterparty / contract of carnage do not operate. The carrier then assumes the role of a common carrier and as such, must shoulder the strict liability duties of a common carrier.[40]

Outline plan of deviation issues.

1 Has there been a Deviation
   a) Proper route?
   b) Was it voluntary ? Rio Tinto Case.
2 Is the deviation justifiable?



The effect of a deviation if justifiable.

An express or implied right exists to undertake a justifiable deviation so there are no contractual repercussions if a deviation takes place. Breach of the implied condition is therefore excused since the express term of the contract negates and removes the implied condition. The contract is not frustrated even where a vessel and cargo are lost at sea. These events are forseeable and can therefore be insured against. Most contracts provide guidance as to liability for cargo, freight and hire payments in the event of such loss.

[40] **Coggs v Bemard** (1703) 92 ER 107.

Note that the consequences of delay are also usually provided for. The HVR prevents recovery for delay but Hamburg permits it. See also the standard provisions of marine insurance policies on delay.

The effect of a deviation if unjustifiable.

Many authors use deviation as an implied undertaking not to deviate not as a condition or warranty. The problem is that this approach does not disclose what the effect of a such a breach is. If it is a guarantee (marine insurance type warranty) then it would in fact be more severe than a condition because the contract would be automatically abrogated on breach as demonstrated by **The Good Luck** [41] whereas it is clear that following notification of a deviation the innocent party must make an election to repudiate or waive with or without protest and reservation of right to damages. For this reason it is submitted that the best approach must be to state that there is a very important implied condition that the vessel must not deviate.

Case law is clear on the effect of an unjustifiable deviation. It results in a Fundamental Breach of the charter. The consequence is that the innocent party has a choice

a) either to repudiate the contract : or
b) to waive the deviation and to elect to treat the contract as subsisting and to reserve the right to claim damages.

In **Hain v Tate & Lyle** [42] Lord Atkin stated that *"However slight the deviation the other party to the contract is entitled to treat it as going to the root of the contract .... if this view be correct, then the breach by the defendant does not automatically cancel the express contract, otherwise the shipowner by his own wrong can get rid of his own contract'.* Election must be a positive act. It cannot merely be implied or take place by omission.

Waiver or Affirmation.

If with knowledge of a breach an innocent party does nothing arid gives the carrier the impression that the contract is on going there is an implied waiver of the breach. The innocent party loses the right to repudiate the contract and at most may only claim damages for the breach though even this may be lost. However, in order to treat the contract as binding or subsisting, an express waiver of the implied term not to deviate must be definite, cogent and complete.

In **Hain v Tate & Lyle** the charterer waived the deviation in a voyage charter party by stages and loaded cargo at a third port of call after a deviation. The vessel subsequently foundered and cargo was lost and monies spent on salvaging the vessel and cargo. The consignees had no notice of the deviation. Could the carrier plead waiver against the consignee's claim? The House of Lords held that the consignee was not subject to the waiver and could therefore repudiate the contract of carriage and thus avoid paying freight. However, since general average applies both to all contracts of carriage including that of the common carrier the endorsee of the bill of lading his general average contribution towards expenses incurred in salvaging the ship and cargo. Since endorsees of bills of lading rarely know about a deviation before loss or late delivery implied waiver would be rare between carrier and endorsee.

Legal Consequences of Unlawful Deviation.

The effects of a deviation depend upon whether or not it is a Fundamental Breach or a breach of condition. The classification is the essential question to be settled. This can be discussed in respect of four specific areas

1) Effect on excepted peril.
2) Effect on deviation on freight.
3) Effect on General Average.
4) Effect on limitation of liability and demurrage.

The general opinion is that deviation is a Fundamental Breach of the charterparty contract that goes to the root of the contract resulting in election, repudiation or waiver. A comparison between the concepts of Breach of a Fundamental Term and Fundamental Breach is more than mere semantics. Deviation has been described as a breach of a condition giving rise to a right to repudiate.

41 **The Good Luck** [1991] 2 LR 191:

42 **Hain S.S.Co v Tate & Lyle Ltd** [1936] 2 All E.R. 597. H.L :

CHAPTER NINE

Deviation Effect on excepted perils.

In **Hain v Tate & Lyle**. it may be recalled it was stated by Atkin L that ' *Deviation automatically displaced the contract .... however slight the deviation the other party to the contract is entitled to treat it as going to the root of the contract and to declare himself as no longer bound by any of the contract terms, if this view be correct then the breach by deviation does not automatically cancel the express contract otherwise the shipowner can by his wrong get rid of the contract.*' In **Woolf v Collis Removal Service** [43] Asquith L made it clear that a deviation without election does not automatically abrogate the contract.

In **Joseph Thorley v Orchis** [44] an exemption clause in the charterparty stated that the shipowner was not to be held liable for loss arising through the negligence of stevedores. The ship deviated. The court held at p669 that *'a deviation is such a serious matter and changes the contemplated voyage so essentially that a shipowner guilty of deviation cannot be considered as having performed his part of the bill of lading, but something fundamentally different This is often expressed in the words deviation displaces the contract contained in the Bill of Lading...."* Damage was caused to a cargo of beans which were negligently mixed with terraumber, another cargo by stevedores. Terraumber is poisonous. The unlawful deviation from Limassol to the Palestine and then to Malta before proceeding to London negated the contract of carriage and meant that the carrier could no longer rely on the clause excluding liability for negligence of stevedores.

Deviation and the exemptions of the common carrier.

The common carrier is normally entitled to exemptions for loss resulting from Act of God, King's enemies and Inherent vice. Since the deviating carrier becomes a common carrier can he still rely on these exemptions?

In International Guano v McAndrew [45] a ship deviated. The voyage took longer than would otherwise have been the case. The cargo of bagged super phosphates suffered from loss due to inherent vice in that the bags containing the fertiliser were eaten away by the acidic nature of the cargo. This placed the two issues of deviation and inherent vice in juxtaposition. The nubb of the case revolved around the question of causation i.e. which of the factors caused the loss? Some damage had already occurred even before the deviation took place. Damage continued during the course of the deviation. The duration of that damage was extended by the deviation. Effectively, with or without the deviation the cargo would have nonetheless sustained damage but the deviation increased the amount of damage sustained.

Pre deviation	During Deviation		Post deviation.
A	D	DS	T
< Do excepted perils apply ?	>< during and after deviation exemptions of common carrier apply		>
20% inherent vice	+15% aggravation	Once deviation occurs the whole contract is displaced.	

Morrison v Shaw Saville [46] concerned the exception of King's Enemies. The ship was bound to London with a cargo of wool but deviated to Le Havre to deliver a cargo of frozen meat and was sunk by enemy submarine. It was held that once deviation took place exceptions of the charterparty were not applicable. However, the carrier could rely on the common carrier exemption. In order to do so however, the carrier must prove that the loss would have occurred even if there had been no deviation. Whilst it could be argued that it was no less dangerous to go to Le Havre as to go to London the shipowner failed to prove that the vessel would have been sunk even if it had sailed direct to London. The fact that both routes were equally dangerous however ruled out a plea of lawful deviation to avoid danger. The conclusion must be that the defence of inherent vice is easier for the carrier to establish than the defences of Act of God and Act of King's Enemies.

Causation and deviation

Thorley v Orchis The vessel deviated to the Palestine and Malta instead of sailing direct from Limassol to London. On arrival goods were damaged by negligence of the stevedores because traces of terraumber belonging to another cargo owner contaminated the plaintiff's cargo of beans. The court held that the

[43] **Woolf v Collis Removal Service** [1948] 1 K.B. 11.
[44] **Joseph Thorley v Orchis** [1907] 1 K.B. 243 & 660.
[45] **International Guano v McAndrew** [1909] 2 K.B. 360.
[46] **Morrison v Shaw Saville** [1915] 2 K.B. 783.

shipowner was liable even though there was an exemption from such liability for negligence of stevedores in the bill of lading. There was no need to show the loss that occurred was due to the deviation. Once there is an unjustifiable deviation the shipowner is strictly liable as a common carrier. Thus it can be seen that an unlawful deviation can have much more serious consequences for the carrier than breach of the warranty of seaworthiness.

Regarding **International Guano v McAndrew** there is a difference of opinion between Scrutton and Carver regarding the effect of the unlawful deviation. Scrutton [47] states that *'The contract (of carriage) is displaced even in respect of damage suffered before deviation'*. Carver [48] however states that *'The Owner is bound by any exception regarding a loss occurring before the deviation. '* Carver relies on the Rules of Marine Insurance which discuss the situations where the policy continues to be valid ie for loss occurring before the deviation occurs.

Hain v Tate & Lyle involved claims for general average and outstanding freight charges in respect the carriage of cargo and to cover the costs of rescuing a vessel following a stranding that had occurred during the course of an unlawful deviation. Lord Atkin dismissed earlier dicta to the effect that an unlawful deviation automatically displaces a contract of carriage but confirmed that however minor an unlawful deviation might be, it gives the cargo owner the right to treat the contract as at an end as from the date of the deviation. A Lloyds' general average bond had been signed and secured by a deposit and the plaintiff could not escape his liability to pay the balance. However, since the contract of carriage had been broken and the cargo owner chose not to waive the breach, the balance on unpaid freight ceased to be payable.

In **Hirju Mulji v Cheung Yue** [49] Sumner L stated that *'Though a party may exercise his right to treat his contract as at an end as regards future obligations it remains alive for the purpose of vindication rights ALREADY acquired under it on either side .'* This however was not a deviation case. In fact it involved frustration of a charterparty when a vessel was requisitioned by the government. The charterer refused to take delivery of the vessel after the government released it. The charterparty had an arbitration clause and the shipowner sought to go to arbitration over the refusal to take delivery. The House of Lords held that the contract was frustrated and all obligations under the contract were at an end. At the time of frustration the contract was entirely executory. If the vessel had been requisitioned during the course of the charter then the common law rules on damages would have meant that losses would have rested with the parties. However, a ruling on the effect of arbitration clauses would then have had some impact on who, that is to say the court or the arbitrator would have had jurisdiction to determine the legality of the claim of jurisdiction would in such a situation have had some import on the case. Chorley & Giles [50] consider that Carver's view is better and is in line with common sense.

In **International Guano v McAndrew** Pickford J held that the shipowner cannot rely on the exceptions in a contract of carriage even in respect of a loss occurring BEFORE deviation. This causes problems for Carver's view and provides support for Scrutton's view. Carver [51] asserts that before the deviation the carrier had the benefit of the excepted perils and of inherent vice. After the deviation he could only avail himself of the exception of inherent vice. Therefore it was unnecessary for Pickford J to decide whether or not the exceptions under the contract were applicable to the period before deviation or not. The exception of inherent vice was available in any case for the entire duration of the contract. Therefore his dictum on this issue was obiter.

The problem with Carver's view is that he misses the point that the contract of carriage is displaced completely, not just from the point when deviation occurs, so there can be no reliance on the contractual exemptions even before deviation. Thus there is no question regarding causation under the contract, it has gone. The shipowner is now a common carrier. He cannot be held liable for purely inherent vice related losses. The fact that in **McAndrew** the contract of carriage also exempted liability for inherent vice was a coincidence. Thus, a case in the future could feature loss caused by an excepted peril before a deviation

47 Scrutton 19th Ed p262

48 Carver p632 12th ed para 739

49 **Hirju Mulji v Cheung Yue S.S.Co** [1926] A.C. 497.

50 Chorley & Giles Shipping Law, p188 6th Ed

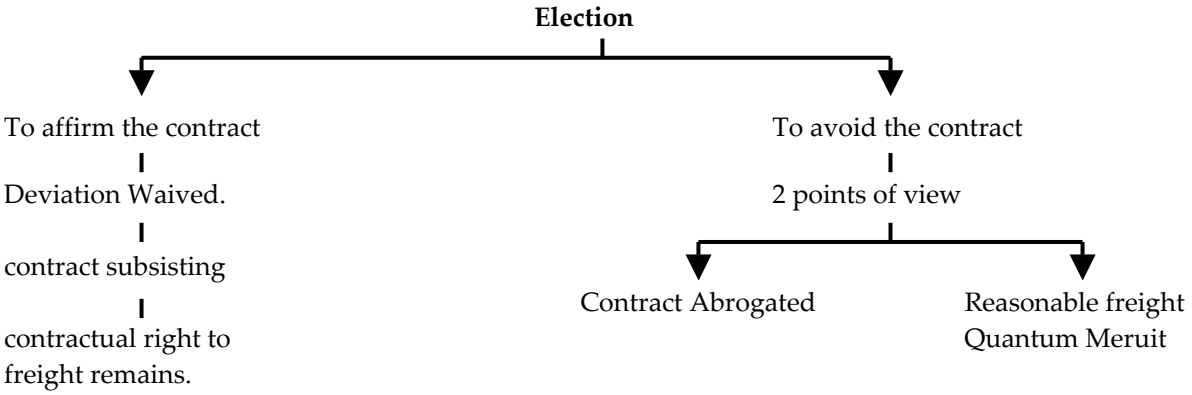
51 Carver p631 & 2

occurs which is not covered by the common carrier excepted perils. The importance of the dictum by Pickford J becomes apparent.

There is no reason why a carrier cannot be held liable for aggravated losses caused by inherent vice where the carrier deviates or takes an excessive amount of time to fulfil the contract of carriage. Thus, for example, tomatoes will eventually self destruct. A carrier should not be held liable for normal expected minor deterioration which occurs during a voyage resulting from inherent vice. However, if the voyage takes an excess time to complete and all the tomatoes are destroyed why should the carrier be able to escape liability? If the carrier had fulfilled his contract the loss would not have occurred. It is the deviation not the inherent vice which is the causative factor in the aggravated loss as is made clear by Morrison v Shaw Savile.

The effect of unlawful deviation on the payment of freight.

Freight is the money payable for carrying the goods. In the event of a deviation the contract is displaced on election of the other. There are two views of the effect of election to end the contract. Scrutton is of the view that the carrier is not entitled to claim freight. However other commentators state that the carrier can claim Quantum Meruit that is to say a reasonable freight. [52]



This issue may be more of academic than of practical importance today however, since many contracts of carriage are conducted on the basis of prepayment of freight and there is usually a statement to the effect that there is no right to a repayment of freight in respect of various events such as the loss of the vessel or for a change of voyage. [53]

Effect of unlawful deviation on General Average.

General Average and General Average Sacrifice. If a ship is in imminent danger and there is a need to jettison goods to save the ship, a ***'General Average'*** is made of the value of the loss of the goods jettisoned, which is levied on all the other cargo owners. For example, if pianos are jettisoned this might enable the owner of a diamond cargo to have his diamonds saved since the boat is saved. Therefore, the diamond owner must contribute a share to defray the losses of the owner of the pianos. The concepts are governed by the terms General Average Expense and General Average Contribution.

The questions to be discussed therefore are

a) 'Can one claim General Average Contribution if one has repudiated the contract because of a deviation ?' and

b) 'Can the deviator ie Ship Owner, claim a general average contribution from a person who has so repudiated?'

The rule is that *'The general average loss must have occurred even if there had been no deviation'* otherwise the answer is no. General average is discussed in **Hain v Tate & Lyle**.

Effect of unlawful deviation on demurrage.

Demurrage A sum named in a charter-party to be paid e.g. by the charterer as liquidated damages for delay beyond the lay days (the time allotted for loading and unloading the cargo at the commencement and at the end of the voyage). Sometimes the number of days allowed on demurrage after expiration of the lay days is

[52] See in particular Carver, Chorley & Giles and **Hain v Tate & Lyle.**

[53] Note that **Hain v Tate & Lyle** concerned payment of outstanding freight not repayment of prepaid freight.

expressly stated in the charter party. These are known as ***'demurrage days'*** eg. *'Ten running days on demurrage at the rate stated in Box 18 per day or pro rata for any part of a day, payable day by day to be allowed Merchants altogether at port of loading and discharging.* [54]

Sometimes no further time is expressly allowed, but it is simply stipulated that the charterer is to pay demurrage at the rate of so much a day for every day that the ship is detained beyond the lay days.

Where demurrage is to be paid in foreign currency, the rate to be applied is that ruling at the date of payment. [55]

Once a ship is on demurrage, the charterers are liable to pay demurrage unless there is a clearly worded clause in the charter-party relieving them from such liability.[56] This liability is often expressed by the maxim *'Once on demurrage, always on demurrage'*. If one contrasts this with the view of Pickford J in **McAndrew** a problem arises where demurrage is incurred at the port of loading and the vessel subsequently deviates during the voyage. Does the unlawful deviation destroy the obligation to pay that demurrage in a situation where the charterer or cargo owner elects to repudiate the contract?

Usually it will be the charterer who will be liable for the payment of demurrage. If it is desired to make shippers or consignees who are not parties to the charter-party liable to pay the amount of demurrage agreed on in the charter-party, there must be a clear stipulation to that effect in the bill of lading e.g. *'freight and all other conditions as per charter-party'* as demonstrated by **Porteus v Watney.**[57]

Even where the ship is not under charter, the bill of lading which is issued may make the shipper, consignee or holder of the bill of lading liable to pay demurrage. The charterpany may contain a 'cesser clause' which purports to relieve the charterer from paying demurrage It is a question of construction in each case whether it does so relieve him.

The other question that needs to be addressed is what is the effect if any of an unlawful deviation on Limitation of Liability Clauses on demurrage in the contract of carriage, bills of lading and in Charterparties? Limitation of liability is governed by s185 /186 M.S.A. 1995 and Schedule 7. The law is not clear however on what the effect of a deviation is in this respect.

United States Shipping Board v Bunge Y Born [58] also considered claims for the repayment of overpayment of freight, short delivery, demurrage and deviation. The vessel had a liberty to deviate clause for bunkers and supplies. Chartered for a voyage from the River Plate to Seville via Malaga the vessel sailed with sufficient fuel to reach Seville. However, since bunkers were not available at Seville the vessel went from Malaga first to Gibraltar and then to Lisbon for fuel for the vessel to continue in operation after the charter ended. The charterers sought damages for the deviation. The shipowners failed to show the deviation was reasonably necessary in that there was no evidence that they had made efforts at the commencement of the voyage to provide sufficient fuel to deal with the problem. Note that this peculiar predicament would not have placed the vessel in danger, it would have quite simply ended up stuck in port at Seville.

The **Texaco Melborne** [59] has some relevance for deviation. The shipowner argued with shipper / charterer and delivered cargo to a different port. The case discusses the assessment of value of the cargo regarding compensation for breach of contract for non-delivery.

54 See Gencon charter party clause 7.
55 See **George Veflings Rederi KS v President of India : The Bellami.** [1979] 1 All ER 380.
56 **Nippon Yusen Kaisha v SA Marocaine de L'lndustrie de Raffinage : The Tsukuba Maru** [1979] 1 Lloyd~s Rep 459.
57 **Porteus v Watney** (1878) 3 QBD 534.
58 **United States Shipping Board v Bunge Y Born Limitada Sociedad** (1925) All E.R. 173
59 **Texaco Melborne** [1992] 1 LR 303.

CHAPTER NINE

SEAWORTHINESS

Lyons v Mells [60] possibly represents the birth of the concept of the implied warranty of seaworthiness. The case was heard before Ellenborough C .J. and encapsulates many of the central issues involved up to the present time in respect of the duty to furnish a seaworthy vessel.

There was a contract for the carriage of yam in a lighter to a sloop. The contract limited liability to 10% for negligence of master and crew up to the maximum value of the lighter itself all other risks exempted unless an extra premium paid. The lighter was leaky and the bilge pump was inaccessible because cargo had been loaded on top of it. The lighter started to sink and was secured by ropes to the sloop to prevent it sinking. Yam to the value of £274 was damaged by seawater. The court held that the implied warranty of seaworthiness was not affected by the exemption clause since it attacked the very root of the contract entered into. In any event the exclusion clause was far too wide. The loss was occasioned by the fault of the owners, not the master or crew. The limitation was judged to be unreasonable since the poorer the quality of the lighter provided the less the liability incurred would be.

There is an implied undertaking in the contract of carriage of goods on a voyage that the carrying vessel be seaworthy as expounded by **Steel v State Line,**[61] unless the contract expresses a contrary intention.

The Hague Visby Rules and C.O.G.S.A. 1971 is an example of a contrary intention since it requires, regarding contracts governed by the Act, that the shipowner exercises due diligent to render the carrying vessel seaworthy before and at the beginning of the voyage.

One should compare and contrast the implied with the express undertaking of Seaworthiness, couched in such terms as that the 'ship must be tight, staunch and strong and in every way fit for the voyage. In **Seville Sulphur v Colvils** [62] the court considered the scope and meaning of the *'Express undertaking as to seaworthiness'* and concluded that it refers only to the preliminary voyage TO the port of loading. Compare this with the implied warranty which applies **FROM** the port of voyage and which may also be an express term but it is not strictly necessary to have an express term since it is implied in any case.

The vessel must be seaworthy at the commencement of the voyage. If a vessel is temporarily unseaworthy on delivery and the shipowner is able to take steps within a reasonable time to render the vessel seaworthy without destroying the commercial viability of the charterparty or contract of carriage he is allowed to do so. However, once an unseaworthy vessel sails the contract is breached. Putting the problem to rights may enable the venture to continue but the breach having occurred, the innocent party will be entitled to damages for any consequences of that breach. The repair work will not affect that right to damages.

In **Quebec Marine Insurance v Commercial Bank of Canada** [63] it was held that unseaworthiness once established at the coinmencement of the voyage cannot be cured at a later stage. The case concerned River and Sea Insurance under a voyage policy which contained special exemptions from loss. The court considered the effect of a breach of the implied warranty of seaworthines in that the vessel sailed with a defective boiler which was remedied before loss of vessel. The vessel undertook a voyage from Montreal Canada to Halifax, Nova Scotia. The policy contained express exemption of voyages for rottenness, inherent defects and other unseaworthiness, theft, barratry or robbery, bursting or explosion of boilers or collapsing of flues or breakage of machinery unless occasioned by unavoidable external cause or fire ensues from therefrom and charges, damages or loss in consequence of a seizure or detention on account of any illicit or prohibited trade in articles contraband of war.

At the commencement of the voyage there was a defect of the boilers not apparent in rivers. When salt entered the boilers she was disabled and put into port for repairs. She was later lost at sea by bad weather. The court held that a voyage policy implies a warranty of seaworthiness. Even though later remedied the policy was avoided. The excepted categories for unseaworthiness do not exclude the implied warranty of seaworthiness. A voyage may proceed by stages. The vessel must be seaworthy for each stage.

60 **Lyons v Mells** 1804 5 East 428. 102 E.R. 1134

61 **Steel v State Line SS Co** (1877) 3 App.Cas 72

62 **Seville Sulphur Co v Colvils** (1888)15 R.Sess.Cas (4th) 616

63 **Quebec Marine Insurance Co v Commercial Bank of Canada** [1870] Lloyd's Rep. 3, P.C. 234.

Care should be taken at this stage since there was a breach of an insurance warranty, which automatically allows an underwriter to avoid a policy as demonstrated by **The Good Luck**. The consequences of a temporary breach which is repaired would not result in a successful claim outside marine insurance since causation must be shown. A subsequent loss from some other cause would fail because of a break in the chain of causation. The success of the claim would therefore depend not on seaworthiness but rather on the terms of the contract governing that other cause of loss. Typically, subsequent damage to goods by stevedores, unconnected to the breach would depend on the carrier's liability, if any, under the contract for the short coinmings of stevedores.

The Kriti Rex [64] provides an example of the importance of establishing unseaworthiness at the commencement of the voyage. It also demonstrates how complicated such disputes can be where a number of parties and issues are involved. REL subchartered the vessel to Fyffes to carry bananas from Big Creek in Belize, Puerto Cortes in Honduras and Manzanillo in the Dominican Republic to Portsmouth and Zeebrugge, subject to COGSA 1971. The owners chartered the vessel to REL on a three year Baltime form charterparty incorporating the US clause paramount. The vessel loaded 16,530 boxes of bananas at Manzanillo and sailed to Santo Tomas, Guatemala. The engine broke down during the voyage. The vessel went to Puerto Cortes as a port of refuge and the master declared G.A.. Fyffes had to make akernative arrangements for shipment of the bananas at Santo Tomas and because of deterioration in the condition of the bananas already aboard eventually donated them to the Honduran Red Cross, because there was no local market for them and they could not be transported to the European market. Fyffes claimed damages against REL for a breach of art III, r. 1 of the Hague-Visby Rules to exercise due diligence to make the vessel seaworthy and for failure to tender a vessel at Santo Tomas and Big Creek. Caribbean Gold, holder of bills of lading in respect of the Manzanillo bananas claimed damages for non delivery due to unseaworthiness caused by a failure to exercise due diligence prior to loading the vessel. REL in turn sought an indemnity against any liability from the owners.

The court held that fine particulate matter in lubricating oil caused the failure of the main engine bearing. The vessel was unseaworthy at the commencement of the voyage from Zeebrugge to Manzanillo. The engine was known by the owners to have a large amount of sludge in the sump as evidenced by a high frequency of filter flushings carried out prior to the voyage. The presence of particulate matter would have been discovered by regular independent analysis. A standard procedure not carried out by the owners. REl was held liable to Fyffes on the basis of unseaworthiness for losses sustained by not loading at Santo Tomas and Big Creek or alternatively on the basis of a failure to proceed with reasonable dispatch to these ports. Caribbean Gold's claim against the owners for damages for loss of cargo caused by unseaworthiness also succeeded. REL in turn recovered part of the damages paid to Fyffes, from the owners under the indemnity.

Seaworthiness by Stages

Where a voyage is split up into stages it may be possible to separate the duty to furnish a seaworthy vessel into stages also. This helps the shipowner, in that he does not have to plan so far ahead. However, equally it disadvantages the shipowner in that he cannot simply rely on the fact that a vessel was seaworthy at the commencement of the first stage as a defence to a claim for unseaworthiness in respect of subsequent stages.

Thin v Richards [65] states that the excepted perils in bills of lading do not exempt the carrier from liability for loss due to unseaworthiness. The principle that the ordinary implied undertakings by the shipowner to provide a ship that is fit for the cargo and have her seaworthy for the voyage on sailing is considered by the courts to be very important. By using the contra preferentem rule the courts have ruled that a clear and specific reference to seaworthiness is required in exclusion clauses. A Bill of lading contained an exception clause regarding *"any act, neglect or default whatever of pilot, master or crew in the management or navigation of the vessel."* A cargo of Esparto Grass was bound for Oran. There was a liberty to load ore for Garston. The vessel went to Huelva to load ore after loading grass but negligently sailed with insufficient fuel. The vessel was lost owing to want of fuel. The court held the owners liable for the loss of the grass despite the exception clause, since the vessel was unseaworthy and because the exclusion clause did not cover unseaworthiness.

64 **The Kriti Rex** [1996] 2 Lloyds Rep 171.

65 **Thin v Richards** [1892] 2 Q.B. 141

The Vortigern [66] discusses stages in a voyage charterparty and liability for insufficiency of coal when a cargo of tobacco was burnt as fuel during a voyage from Cebu in Phillipines to Liverpool. The Bill of Lading contained a liberty to refuel. After leaving Colombo the vessel passed Perim, a fuelling stage, and failed to take on fuel due to the negligence of the engineer. The vessel ran out of coal and burnt 50 tons of cargo in order to reach the Suez. It was held in the C.A. by Russel L Smith LJ. & Collins L.J. that the defendants could set off the cargo against freight. The warranty of seaworthiness was breached on that stage of voyage. The exception clause did not cover engineer's negligence since the vessel was unseaworthiness at Perim.

In **Northumbrian Shipping v Timm** the court observed[67] that the doctrine of stages is not a concession to the ship owner but arises from commercial necessity and is to the mutual advantage of both parties. If it is impossible to have sufficient bunker (fuel) for the entire voyage because the bunkers are not large enough to carry that much fuel then the voyage has to be split into fuelling stages. At the commencement of each stage there must be sufficient fuel on board for that stage. Thus, a failure to take on fresh bunkers before a subsequent stage is undertaken is a breach of the warranty of seaworthiness.

A Bill of Lading was issued in respect of wheat bound from Vancouver to Hull subject to s6 Canadian Water Carriage of Goods Act 1910. The Act requires due diligence to render the ship seaworthy but excludes responsibility for faults and errors in navigation. The Master was instructed to bunker at St Thomas in the Virgin Islands. The ship left with insufficient coal to get to St Thomas but could bunker at Colon, the master being authorised to do so if necessary. He failed to do so and finding he had insufficient fuel altered course to Port Royal in 3amaica. He grounded on a reef resulting in a total loss of ship & cargo, due to errors of navigation. The court held that since the vessel had insufficient fuel it was unseaworthy. The exempting provisions of the C.W.C.G. were not applicable and the owner was liable for the loss.

The Marion [68] concerned the availability of navigational charts, and drew analogies from U.S. case law since there was little U.K. case law on the topic. It was held that at the commencement of a voyage one should have all the charts in order. The problem here however, is that the charts are usually updated during the course of a voyage by the ship's mate. This is an essential and principal part of a mate's job. If not, what else might he do? It would be quite impractical for the mate to prepare charts for future voyages unless the employment of a vessel could be predicted accurately in advance. The Marion had the latest information on board but unfortunately the crewmember responsible for the task forgot to update the information. The Marion dredged up an undersea cable with its anchor. The question was *'Can one have seaworthiness by stages regarding charts?'* or do all the charts have to be on board before the initial stage is commenced?

Seaworthiness under English Law may be defined in general and in specific terms. In **Dixon v Sadler** [69] Parke B stated that *'A Ship shall be in a fit state as to crew'.* This has since been codified by s39(4) Marine Insurance Act 1906, for the purpose of marine insurance.

s39 Marine Insurance Act 1996

s39(1) *In a voyage policy there is an implied warranty that at commencement of voyage the ship shall be seaworthy for the purpose of the particular adventure insured.*

s39(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.*

s39(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.*

s39(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.*

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 loss attributable to unseaworthiness.*

66 **The Vortigern** (1899) Prob 140 4 Com Cas 152.

67 **Northumbrian Shipping v Timm** (1939) A.C. 397 , infra, Wright L at p404 and Porter L.J. at p412

68 **The Marion : Grand Champion Tankers v Norpipe** [1984] 2 Lloyds 1

69 **Dixon v Sadler** (1839) 5 M & W 414

s40 Marine Insurance Act 1906

s40(1) In a policy on goods or other moveables there is no implied warranty that the goods or moveables are seaworthy.

s40(2) In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy.

This last section mirrors the common law categorisation of uncargoworthiness as a sub-category of seaworthiness.

Definitions of Seaworthiness : The problem with seaworthiness is that seaworthiness is a variable concept. Its requirements differ with the circumstances and the area of law under consideration. The search for a universal definition is likely to prove unfruitful. Nonetheless, it is possible to tease out some basic requirements from the cases.

In **Steel v State Line** [70] Blackburn J stated that seaworthiness is the *"... ability of the ship to endure ordinary weather. "* A ship sailed from U.S.A. for Scotland and a wheat cargo was damaged by sea water. The contract contained an exception clause in respect of perils of the sea. It sailed with a port hole open. Was the ship seaworthy? Yes, provided the porthole was capable of being closed. The implied condition of seaworthiness requires that a ship should be actually fit for its purpose. It is not sufficient that the owner simply does his best to make it fit without more. However simply because a ship is not seaworthy for an entire voyage because port holes are left open does not render the vessel unseaworthy if they can be closed at the appropriate time.

McFaddon v Blue Starline [71] established the '**Prudent Ship Owner Test'.**. To be Seaworthy a vessel a ship 'must have that degree of fitness which an ordinary prudent shipowner would require that ship to have at the commencement of a voyage having regard to all the probable circumstances of it.' The warranty that a ship is fit to receive cargo attaches at the time the goods are put on board or more accurately at the time of starting to load. It is not a continuing warranty. Sluice doors were opened and subsequently badly closed after the plaintiffs goods shipped causing cargo damage. Channel J held that the warranty would only be breached if the doors were opened before loading

This definition was adopted in **Reed v Page** [72] by Roche J. Regarding the lying up stage, there is an intermediate common law warranty. Where a vessel has to wait up before sailing it must be fit for the purpose. A towing barge was overloaded and consequently sank during lying up stage before being attached for towing. The court held that the vessel was unseaworthy. Note that there would also be a second warranty at the time of sailing which would also have been be breached by overloading.

Regarding Marine Insurance in **Gibson v Small** [73] Earle J used a combination of the tests laid down in the Dixon and the Steel Cases. The duty to supply a seaworthy ship is not the equivalent of supplying a perfect ship that cannot break down even under extraordinary peril. It requires that degree of fitness that an ordinary careful and prudent owner would require his vessel to have at the commencement of the Voyage. This is an Objective Test.

In **Foley v Tabor** [74] the court observed that Seaworthiness is a word which the import varies with the place, the voyage, the class of ship and even the nature of cargo."

Seville Sulphur v Colvils [75] established the principle that the ordinary implied undertakings by the shipowner to provide a ship that is fit for the cargo and have her seaworthy for the voyage on sailing are not affected by the exceptions in the Bill of Lading unless that is clearly stipulated. The case involved an exception clause regarding "negligence of navigation of whatsoever nature and kind during said voyage". Damage was caused by taking in muddy water to the boilers. The court held that this rendered the vessel unseaworthy. Since it was not due to navigation the exception was not applicable. Whilst the express

70 **Steel v State Line** (1877) 3 A.C. 723
71 **McFaddon v Blue Starline** (1905)1 K.B. (697) 706.
72 **Reed v Page** (1927) 743
73 **Gibson v Small** (1853) 4 H.L.C. 353 21 L.T.(os) 240
74 **Foley v Tabor** (1861) 2 F & F 663 at 671
75 **Seville Sulphur Co v Colvils** (1888) 25 Sc.Lrl 437

warranty as to seaworthiness applies to the time of sailing for a port, there is also an implied warranty by law, for the sailing from the port. The charterparty stated that the vessel *'being tight, staunch and strong, and in every way fitted for the voyage shall proceed to Seville ...'*. The court held that the implied condition **FROM** Seville covered the muddy water taken on at Seville.

It was stated in **Dixon v Sadler** [76] that a ship must be fit in design, structure, condition and equipment to encounter the ordinary perils of the voyage she must have a competent master and competent and sufficient crew and unless the master is sufficiently able, a pilot in difficult waters. If the voyage splits into separate stages the vessel should be fit at the start of each stage for that particular stage, though not necessarily for the entire voyage at the commencement of the first stage.

The John Cook sailed from Rotterdam for Sunderland. 4 miles from Sunderland the crew jettisoned ballast ready for docking but the ship was driven back out to sea by a gale and was too light to weather the storm, listed and sank. Underwriters claimed the vessel was not seaworthy due to wilful act of master & crew (though not amounting to barratry). The court held that the underwriter must pay. The warranty of seaworthiness applies to the start of a voyage and any new voyage under a time charter. It is not an absolute warranty of seaworthiness throughout a voyage. Negligence of the crew was covered by the policy.

The Standard of Fitness

It can be seen from the common law definitions of seaworthiness that *'Perfect fitness'* is not required. With the exception of the owners of the Titanic, few would seek to describe their vessel as unsinkable. Nonetheless the standard is very high. Whether or not a vessel is seaworthy is a question of fact to be determined by the court. The standard is high and is relative to the nature of the adventure to be undertaken. The warranty of seaworthiness has been described as 'absolute' but this absoluteness refers to the absoluteness of liability and not to the standard of seaworthiness. Liability for a lack of seaworthiness is absolute, however reasonable the shipowner is. Once it is determined that the vessel was unseaworthy that is the end of the matter. The shipowner cannot alter this fact by claiming that he did his best.

In **The Toledo** [1995] 1 Lloyds Rep 40 shell plating on a vessel failed because of corroded brackets. The fault was well known to such vessels and the master who was aware of this did nothing about it. Seawater entered the vessel, which was subsequently scuttled. The vessel had been given a clean bill of health during classification. The court held that the vessel was unseaworthy and the owners had not exercised due diligence. The classification did not excuse the owners.

To merely exercise due diligence would not be enough to satisfy the common law, though it would satisfy the lower standard required by the Hague and Hague Visby Rules and many contracts of carriage and charterparties will exclude the common law implied requirements and substitute a contractual duty of seaworthiness which is limited to the exercise of due diligence. However, even when the shipowner exercises due diligence by appointing a reputable contractor to carry out work on a vessel the negligence of the contractor is still borne by the owner as demonstrated by **The Muncaster Castle** where dock repairmen failed to seal down hatches properly and the owner was held liable for subsequent damage to cargo. The court held that the duty to furnish a seaworthy ship cannot be delegated.

In **Rio Tinto v Seed** [77] which followed **Moore v Lunn** [78] in holding that the drunken state of a captain and chief officer when a vessel starts a voyage can render the vessel unseaworthy.

The distinction between unseaworthiness and mere negligence of the crew is demonstrated by what have become known as The Open Porthole cases. The significance of the distinction lies in the fact that it is standard practice to exclude liability for negligence of crew whereas it is far more difficult to exclude liability for unseaworthiness. In **Gilroy v Price** [79] the casing of a pipe, which needed to be covered, was missing when the vessel set sail. After the cargo had been loaded the pipe became inaccessible. It was held that the vessel was unseaworthy.

76 **Dixon v Sadler** (1839) 5 M & W 414
77 **Rio Tinto Co v Seed Shipping Co** (1926) 24 Lloyds Rep 316
78 **Moore v Lunn** (1923) 39 T L R 526; 15 Lloyd's Rep 155
79 **Gilroy v Price** [1893] A.C. *56.*

In **Dobell v S.S.Rossmore** [80] the court observed that the master is not expected to personally close all portholes provided he can have them closed before a storm. Thus a vessel can sail with open portholes provided that the closing mechanism works and the porthole is accessible so that if the need arises it can be closed. However, on the facts of the case the ship owner was held liable for the damage caused to cargo by the unseaworthiness of the vessel. The relevant bill of lading was governed by the statutory implied term regarding due diligence to make a vessel seaworthy by virtue of the 1893 Act of Congress. The Bill of lading contained exclusions regarding faults of navigation and management of the vessel Due to the negligence of a carpenter the vessel was allowed to go to sea in an unseaworthy and the cargo was damaged. The court held that the shipowner must not only be diligent himself but must not allow others servicing the ship to be negligent either and so the exemption clause was not applicable.

Lyons v Mells [81] involved a lighter with a defective bilge pump that could not be attended to once cargo was loaded over it. If the lighter was so leaky that the bilge pumps could not have saved the vessel then it would have been unseaworthy in any case. However, if the pumps had been reachable and if attended to the vessel would have been safe, presumably the lighter would have been seaworthy.

Charles Brown v Nitrate Products [82] involved a claim under a bill of lading for damage to the plaintiffs cargo of wheat because of leaky rivets. Was this due to a latent defect or a lack of diligence on the part of the shipowner rendering the vessel unseaworthy ? The defect was not identified by prior surveys. The court held that the damage was the result of a latent defect, which could not be discovered by a careful examination and therefore the shipowner was not liable.

In **The Antigoni** [83] a ship's engineer failed to carry out regular inspection work on the balance weights governing the movement of the crankshaft. The weights became loose during a voyage and the engine broke down. The vessel had to be towed to port and the plaintiff cargo owner had to pay salvage charges and a General average contribution. The court held that the shipowner had to reimburse the cargo owner because the vessel was unseaworthy.

In **The Sundancer** [84] the owner bought a car ferry and had it converted into a cruise ship. The conversion was badly executed. The vessel struck a rock off British Columbia and because there were no valves installed in the grey water system the entire vessel was flooded and it sank. Despite the fact that a classification society had issued a provisional Loadline and S.O.L.A.S. safety certificate the vessel was unseaworthy, rendering the owner liable.

Seaworthiness : Warranty or Condition?

Is the implied undertaking of seaworthiness a warranty or a condition ? It is now settled that it is an innominate Term. it is more difficult to prove that the consequences of the breach amount to a breach of condition in respect of events occurring after sailing. However a shipper or charterer can, in appropriate circumstances, reject a vessel at the commencement of the voyage for unseaworthiness or refuse to load aboard an unseaworthy or uncargo worthy vessel. Repudiation is only permitted if the vessel cannot be put into a seaworthy or cargo worthy state before the appointed sailing time or a reasonable time thereafter. Where the delay is insufficient to render the time element a failure to comply with reasonable dispatch requirements in a voyage charterparty and where the delay does not deprive the charterparty of its commercial value in a time charterparty (**Hong Kong Fir**) there is only a breach of warranty. The innocent party is entitled to damages and cannot repudiate. Once the vessel sails subsequent breakdown must be substantial if repudiation is to be permitted.

Snia Societa v Suzuki [85] was heard before Bankes L.J. Warrington L.J. : Scrutton L.J. A charterparty was ultimately cancelled by the charterers who then claimed damages for breach of undertaking as to seaworthiness due to a breakage of propeller blades resulting from unseaworthiness. The shipowners

80 **Dobell v S.S.Rossmore** (1895) 2 Q.B. 408
81 **Lyons v Mells** [1804] 5 East 428. 102 E.R. 1134
82 **Charles Brown Co v Nitrate Products** [1937] *50* Lloyd's Rep 188.
83 **Charles Brown Co v Nitrate Products** [1937] *50* Lloyd's Rep 188.
84 **The Sundancer** [1994] 1 Lloyds Rep 183
85 **Snia Societa v Suzuki** (1924) 29 Corn Cas 284 :18 Lloyd's Rep 333.

claimed the vessel suffered from a latent defect and counter claimed for hire. The court considered whether seaworthiness was a condition precedent and what represented a reasonable time to put ship in for proper repair and discussed breach of the undertaking in the charterparty to maintain the ship in seaworthy condition. Did the failure by the shipowner to comply entitle the charterers to cancel the charter party and if so the measure of damages and whether this extended to a claim damages for loss of a profitable sub~harter which had not been brought to the notice of the owners. A new Japanese built ship kept losing its propeller blades. The charterer had a three stage voyage planned from Cardiff to Savona carrying coal which she successflilly completed, followed by a voyage in bunkers to Las Palmas via Gibraltar to carry Coal to the River Plate and to finally return with grain for the Italian government.

The vessel shed blades at Palmas on the 2nd March. By May 22nd the propeller was still not successfully repaired. The Charterers repudiated and claimed damages. It was held at 1st instance and confirmed on appeal that the ship was unseaworthy from the commencement of the voyage and thus the charterers were entitled to repudiate and claim damages for loss of profits, expenses incurred. Hire was due for the first stage only. All damages were to be assessed by an independent referee as per the contract.

In classifying the nature of the breach under the wait and see procedure it is relevant to pose the question *'Can it be repaired?'* If not, the result is a condition justifying repudiation. If it can, it is a warranty and the appropriate remedy is damages. One must examine the effects of breach and see if the contract has been executed. It is difficult to repudiate once performance has started and so it is often too late to repudiate once the vessel has been loaded and the vessel has sailed.

Causation and Unseaworthiness

In order to claim damages for breach of contract the plaintiff has to establish that the breach of contract caused the loss. In **The Europa** [86] an unseaworthy vessel collided with a dock wall. The impact ruptured pipes in a water closet. Water from the toilet caused damage to cargo. Bucknill J made it clear that one has to determine what caused the loss. To win the plaintiff must show that unseaworthiness was causative of the loss. If it is not then the exemption clauses in the charterparty, such as for loss due to negligent navigation, will still be valid to protect the ship owner. Compare deviation where the shipowner will only be able to rely on the defences available to the common carrier, namely Act of God, King's Enemies and Inherent Vice. The consequences of a breach of the undertaking of seaworthiness are less serious than the consequences of unlawful deviation.

In **The Yamatogawa** [87] a vessel sailed with an unknown defect in its reduction gear. The vessel stopped in the East China sea to effect repairs to a lube oil pump coupling. When the engines were restarted the propeller would not turn. Salvage and general average charges were incurred by the plaintiffs when the vessel was towed to Singapore. The defendant admitted unseaworthiness and a failure to exercise due diligence. Hobhouse J held however that even if due diligence had been exercised the defect in the reduction gear would not have been discovered. The breach of the duty to exercise due diligence did not therefore cause the loss so the plaintiffs claim failed.

Problems with causation are highlighted by **The Apostolis**.[88] During a break between loading a fire started in the vessel which destroyed a cargo of cotton bound from Salonika to Brazil. All the cargo was destroyed either by fire or by water used to extinguish the fire. A replacement cargo was loaded and the vessels sailed to Brazil. The cause of the fire was either welding carried out on deck to repair a hatch cover or a discarded cigarette. The plaintiff needed to establish the former in order to recover since a fire caused by smoking would not attract liability under art iii, r.1 of the Hague-Visby Rules. It was clear that the repairs were a continuing process and had not been completed even after the fire. All the evidence pointed to welding being carried out on the vessel after loading had been concluded for the day the fire occurred and that the hold was not fit and safe for cargo. The vessel was unseaworthy. The plaintiff had not established that the vessel was unseaworthy because of the hatch covers or that such unseaworthiness made the welding necessary, The cause of the fire was the welding not the state of the hatch covers. The plaintiff established

86 **The Europa** (1908) Probate 84 : [1904-7] All E.R. 394.
87 **The Yamatogawa** [1990] 2 Lloyds Rep 39
88 **The Apostolis** [1996] 1 Lloyds Rep 475

that the managers knew of the welding and the fire was caused with actual fault or privity of the owners, contrary to Art *IV*, r.2. of the Hague-Visby Rules. However the claims that the lack of a C02 fire fighting system in the holds and the state of the hatch covers made the vessel unseaworthy failed.

Seaworthiness and Exception Clauses

It is not difficult to exclude the warranty of seaworthiness in a charterparty, providing the parties make their intentions clear and unambiguous. It is more difficult to exclude in respect of a contract of carriage with shippers and especially consignees who are not parties to the charterparty, in particular because of the Hague and Hague Visby Rules. Furthermore, as with any exemption clause the courts will construe such clauses 'contra preferentem' the party seeking to rely on such a clause. [89]

In **Nelson v Nelson** [90] the court held that exception clauses must be 'Plain, clear, unequivocal and unambiguous.' The court was involved in the construction of a contract of carriage and in particular the terms regarding the liability of shipowner for unseaworthiness, and the effect of excepted perils. There was a contract to carry frozen meat, which contained contradictory exemption clauses. It was not clear what was agreed. Meat was damaged by unseaworthiness and negligence of the shipowner's agent. The court held that there was no clear express exemption. The owner was not therefore relieved from his duty to provide a seaworthy ship and to take reasonable care.

The trend in the cases has been that the courts have been reluctant to allow shipowners to exempt liability for unseaworthiness. The courts try hard to prevent the use of exemption clauses by use of the contra preferentem rule and also by paying strict regard to the timing of exclusion clauses. If introduced after the contract is concluded they do not form part of the contract and are therefore unenforceable.

In **The Mikhail Lermontov** [91] a passenger ticket sought to exclude liability for personal injury and loss of luggage. The vessel sank. The court held that the contract had been concluded at the shipping office before the boarding ticket containing the exclusion clauses was issued. In the circumstances it was issued too late to be incorporated into contract. A subsequent settlement and release from further liability by the passenger was reached by unfair practice & coercion and therefore invalid. Normally UK Law and International Conventions prevent such exclusion clauses. This contract was not made in the UK. The UCTA 1977 did not apply. Neither in the circumstances, did the Athens Convention.

Steel v Stateline demonstrated that the Courts should not nullify the implied undertaking of seaworthiness unless the parties have made such an intention clear. Can an exemption clause be used to exclude the terms of C.O.G.S.A. 1971? Article 111(8) states that *"Any term reducing liability under C.O.G.S.A. is null and void under a bill of lading"*, so clearly the answer is "**NO**". However, as demonstrated by **The Caspiana** [92] the duty can be allocated to either shipowner or charterer as carrier.

The Hague and Hague Visby Rules themselves contain limitation of liability provisions based on actual fault or privity of the carrier as to the unseaworthiness of the vessel. **The Erst Stefanie** [93] concerned a Gencon voyage charterparty for the carriage of ferrosilicon from Rijeka to Rotterdam. Baker, director of Sorek regularly inspected the vessel. He did not appreciate the poor condition of the vessel's bottom plating which was defective. Neither did he appreciate the nature of ferrosilicon which gives off dangerous fumes when exposed to moisture. The accommodation quarters were not gas sealed. The vessel developed serious leaks during a voyage. Fumes killed a crewmember. Others became seriously ill. The vessel entered three ports of refuge in succession and after the third the voyage was abandoned. Baker was found, as the governing mind of the operating mind of the owning company, to have had actual fault and privity, and hence limitation of liability was not allowed.

Another danger under the Hague Visby Rules is that even if unseaworthiness causes the loss, a valid claim can be time barred by the Rules. In **The Marinor** [94] a vessel time chartered to the plaintiff for 10 years to

89 See **Lyons v Mells** 1804 5 East 428. 102 E.R. 1134.
90 **Nelson v Nelson** 1908 A.C. 16.
91 **The Mikhail Lermontov** [1991] 2 Lloyd's Rep *155.*
92 **The Caspiana : Renton v Palmyra**
93 **The Erst Stefanie** [1989] 1 Lloyds Rep 349
94 **The Marinor** [1996] 1 Lloyds Rep 301.

carry sulphuric acid and clay slurry. Clause 47 of the charterparty stated: *"Vessel to be manned with a full compliment of crew holding relevant certificates ... crew to be properly trained and comply with local safety regulations concerning cargo handling for the intended cargoes to be carried."* Clause *53* stated *"Vessel's Description (p)) Capable of loading full cargo of sulphuric Acid and clay slurry in totally segregated tanks."* The charterparty spanned over the change over from the Hague to the Hague Visby-Rules by Canada and a rider in the charterparty allowed for changes in legislation to apply as and when they occurred. A mysterious source of contamination damaged five cargoes of acid and resulted in the plaintiff selling at a lower price. The plaintiff was forced to use alternative vessels for further shipments to avoid cargo contamination. There were clearly grounds for a claim for breach of clause 53. The plaintiff also alleged that the vessel was unseaworthy. The court held that the claims for compensation for using alternative vessels could be considered by arbitrators but that the claims for contaminated cargo were time barred under art III, r.6. Hague-Visby Rules.

The Subro Valour [1995] 1 Lloyds Rep 509 demonstrates that in order to rely on excluded perils the owner must prove causation related to the excluded peril. A fire started in the upper engine room flat due to an exhaust hot spot or faulty wiring. The condition existed before the voyage so the vessel was unseaworthy. The defendant failed to establish due diligence.

Choice of Law and Seaworthiness : Another way of evading the requirements of seaworthiness is to make the contract of carriage subject to foreign law and jurisdiction. There are limitations to the ability of the parties to do this. Clearly, goods shipped out of the UK are subject to The Hague Visby Rules by virtue of C.O.G.S.A. 1971. However, goods shipped from other states are not subject to the same constraints. Frequently the issue of incorporation of such terms becomes vital to the discussion as to whether or not a carrier can be held responsible for uncargoworthiness and unseaworthiness as demonstrated by **The Mahkutai** [95] and **The Pioneer** .[96]

In **The Mahkutai** Sentosa voyage chartered the vessel from the appellant owners. Sentosa in turn shipped plywood belonging to PTJ from Jakarta, Indonesia to Shantou in the People's Republic of China, issuing a charterer's bill of lading. Clause 4(u) of the bill of lading provided *"... every ... servant agent and subcontractor (of the carrier) shall have the benefit of all exceptions limitations, provisions, conditions and liberties herein benefiting the carrier as if such provision were expressly made for their benefit."* The jurisdiction Clause 19 provided that : *"The contract evidenced by the Bill of Lading shall be governed by the Law of Indonesia and any dispute arising hereunder shall be determined by the Indonesian Courts according to that law to the exclusion of the jurisdiction of the Courts of any other Country."* The cargo was damaged by water on discharge and the cargo owners sued the ship owners for breach of contract and for the tort of negligence. The vessel was arrested and released on payment of security into court. The owners sought a stay of action on the basis of clause 19. The Privy Council held that clause 4(u), the Himalaya Clause, was not effective to incorporate clause 19, the jurisdiction clause. The claim for damages effectively for damaging caused either by lack of care of the cargo by the shipowner or unseaworthiness could be pursued.

The Albattani [97] concerned a charterparty for a voyage from Alexandria to Hamburg in March 1991. There was an alleged oral agreement to proceed direct without delay. The vessel loaded a cargo from Lanarca to UK on the way. It was claimed that the cargo had deteriorated due to unseaworthiness on account of inadequate ventilation and also due to the prolonged voyage, resulting in £200k loss. The defendant countered that all terms of carriage were contained in the bill of lading, including Egyptian choice of jurisdiction. A sistership was arrested in the U.K. The court held that whilst the bill of lading would be conclusive regarding an endorsee here there was no endorsee so the oral charterparty agreement prevailed. The Egyptian Statute Art 245 conferring Egyptian jurisdiction on disputes regarding goods shipped out of Egypt could not deprive the claimant of a right in the U.K. since as a non-Egyptian citizen he was not governed by it. **The Spillada** applied. The U.K. was the proper forum. The defendant had to show proper cause for court to award a stay of action and had failed to do so.

95 **The Mahkutai** [1966] 2 Lloyds Rep 1 P.C.
96 **The Pioneer** [1994] 2 All E.R. 250.
97 **The Albattani** [1993] 2 Lloyd's Rep 219

The Komninos S [98] discusses H.V.R. Art 10 (c), which provides that the H.V.R. applies if the bill of lading states that these rules or legislation of any State giving effect to them are to govern the contract. The parties must not only choose the law of a contracting state but also the specific legislation incorporating the H.V.R. and in the case of the U.K. C.O.G.S.A. 1971. The case then discusses the contract of carriage, cargo worthiness and limitation of liability. The hold of the vessel was not cleaned properly leaving a residue from the previous cargo of sak which combined with water which broken bilge pumps had failed to discharge. This corroded a cargo of steel. The court held that the vessel was un-cargo and unseaworthy. Whilst subject to U.K. law and U.K. jurisdiction The Contracts Applicable Act 1990 Art 3(3) states that a mandatory provision of a state, which is otherwise closely connected with the essential ingredients of the contract, cannot be evaded by a choice of law clause. Art 142 Greek Code of Private Maritime Law imposes compulsory liability on the shipowner in respect of liability of goods covered by a bill of lading.

Seaworthiness and the Burden of Proof

The Burden of Proof refers to who must prove the existence of a situation to the court in respect of a claim for damages. The burden of proof has been likened to a see-saw. The standard of proof required is not of absolute proof since little in the affairs of man is ever 100% certain, or even as in criminal law, beyond all reasonable doubt, but rather that on the balance of probability a certain even caused the loss. The burden first lies with the plaintiff to establish a prima facie case that there has been a breach of contract or a breach of tortious duty by the defendant. The defendant then has the opportunity to show that the plaintiff's allegations are not correctly founded. The plaintiff, once appraised of the defence, has the opportunity to show that the defence is flawed.

The prima facie duty of the assured is to demonstrate that the vessel had been lost due to a peril insured against. In **The Marel** [99] a vessel sank of the coast of Spain. Crew claimed to have heard a bump followed by the entry of water. The vessel had been ultra-sound tested prior to sailing so the underwriter was unable to prove unseaworthiness. However, despite the suspicion that collision with a container had caused the loss the owners could not prove this and so the claim under the policy failed.

Pickup v Thames [100] demonstrates that the Burden of proof may shift from one party to another. Whilst there is a presumption of seaworthiness that presumption is rebuttable. The case involved a Marine Insurance claim. Was the loss due to unseaworthiness or due to perils of the sea? The ship attempted to return to port ii days after sailing because she was unable to continue the voyage. The ship was subsequently lost. It was held by the trial judge that the shortness of time before the mishap was sufficient to shift the onus of proof onto the shipowner to show that the reason for the loss was due to perils of the sea and not a lack of seaworthiness at the commencement of the voyage. It was held on appeal that this was a misdirection.

The burden of proof in respect of unseaworthiness regarding a loss from an unexplained cause lies on the person who alleges it, in this case the underwriter. Certain occurrences may shift the burden back to the owner but length of time in this case was not one of them.

In **Stanton v Richardson**[101] a vessel was chartered for the carriage of bagged sugar, hemp and or measurement goods with separate rates for dry and wet cargo. The contract required the vessel to be seaworthy and a good insurance risk before and when receiving cargo. A survey report was stipulated and duly furnished declaring the vessel Al. The vessel loaded a cargo of wet sugar. Moisture drained from the cargo into the hold. The vessel's pumps failed. The vessel was perfectly seaworthy unless required to carry wet sugar. The sugar was unloaded. The charterer refused to reload and claimed damages because the ship not cargo fit. The shipowner counter claimed damages for refusal to load. The court held that the ship was not cargo-worthy for wet sugar. The charterer had successfully discharged his burden of proof and thus succeeded in his claim since the shipowner had not displaced the charterer's assertions as to the cause of the breach.

98 **The Komninos S** [1991] 1 Lloyd's Rep 370; 1992 JBL 321

99 **The Marel** [1994] 1 Lloyds Rep 624

100 **Pickup v Thames Insurance Co** (1878) 47 L.3.Q.B 749 3 Q.B.D. 594

101 **Stanton v Richardson** 1874 9 C.P. 390.

In **0 Company v M Company** [102] the court confirmed, that whilst the burden of proof lies with the plaintiff regarding allegations of loss due to unseaworthiness the plaintiff has a right to discovery of documents from the defendant where it is reasonably supposed that the documents would throw light on the issue.

Discovery is more important in contract than in tort where the concept of "***Res Ipsa Loquitur***" will shift the burden of proof onto the defendant if the plaintiff can demonstrate that the facts appear to speak for themselves and indicate the defendant's negligence. Then the defendant will have to produce the paperwork in court to show that he was not in fact negligent.

Similarly, where a defendant seeks to rely on an excepted peril the defendant has the burden of proof of showing that the loss was caused by an excepted peril. This is another way in which the court makes it more difficult for defendants to rely on exclusion clauses to evade responsibility. In **The Theodegmon** [103] a vessel loaded a cargo of crude oil at Orinoco and subsequently stranded. Was the stranding caused by malfunctioning steering gear which had not been detected by a lack of due diligence or by pilot error? The court held that the vessel was unseaworthy and that the defendant had failed to prove an absence of due diligence, so the claim succeeded.

Misrepresentation and Unseaworthiness

Shipowners and charterers have to rely on shipyards to carry out maintenance on vessels. Where such work is carried out badly the shipowner may be able to recover damages from the shipyard for breach of contract. However, whilst damages to cover the cost of solving the problem may be recovered, frequently other damages such as loss of profit and compensation to cargo owners is excluded in the contracts.

Shipowners often employ independent ship's surveyors from classification societies to supervise repair work and to determine whether or not a vessel needs repairs. The owner uses such reports as a guide to the seaworthiness of the vessel. However, since the duty to provide a seaworthy vessel is absolute and non-delegable, if the surveyor is negligent the shipowner is deemed not to have fulfilled his duty to furnish a seaworthy ship simply because a surveyor has given the vessel a clean bill of health.

This is demonstrated by **The Toledo.**[104] The Toledo was a log and bulk carrier. Supporting brackets between the holds and the outside plating of the vessel became distorted and corroded over an extended period of time. During a voyage from Canada to Denmark with potash, subject to the Hague Rules, the vessel entered bad weather. The unsupported plating buckled and sprang a leak. The vessel was scuttled 200 miles off the U.K. with loss of cargo. A German classification surveyor failed to identify the need for repairs to buckled plates since buckling was common as a result of loading logs. The court held that the vessel was unseaworthy at the commencement of the voyage and the owner was liable for the loss of cargo. The failure of the surveyor to order repairs to the vessel did not exculpate the owner. In such circumstances, is the shipowner able to recover any losses suffered when a surveyor gives a vessel a clean bill of health and the vessel subsequently runs into problems, which would not have occurred if the surveyor had done his job properly? Much depends on the terms of the contract with the classification society or surveyor. If the contract excludes liability the answer must be answered in the negative. An additional problem for the shipowner is that insurance cover can be avoided by an underwriter if a vessel proves to have been unseaworthy, by virtue of s39 Marine Insurance Act 1906.

A separate question, allied to the first is whether or not a classification society or ship's surveyor owes a duty of care to cargo owners and can therefore be held liable in tort for cargo losses that flow from a negligent survey? The absence of privity of contract prevents a contract action. In **The Nicholas H** [105] a laden vessel developed hull damage and put into port. A classification surveyor recommended temporary repairs to enable the vessel to complete its voyage followed by full repairs. Following the repairs the vessel set sail again and subsequently sank with loss of cargo. The cargo owners reached a settlement with the owners and sued the classification society for the balance of their losses. The court held on appeal that a classification society does not owe a duty of care to cargo owners when classifying a vessel as seaworthy. In the

102 **0 Company v M Company** [1996] 2 Lloyds Rep 347
103 **The Theodegmon** [1989] 2 Lloyds Rep 52,
104 **The Toledo** [1995] 1 Lloyds Rep 40.
105 **The Nicholas H** [1995] 2 Lloyd's Rep 299

circumstances, unless one treats this as a voyage by stages the vessel was seaworthy at the commencement of the voyage. Provided a reliable classification society is used the ship owner does not have actual fault or privity. Does the absolute liability under **The Muncaster Castle** apply? What happens if a lowly rated society is used?

If an insurance company relies on the classification or surveyor's report when undertaking to insure a vessel or cargo, can the insurance company recover from the surveyor for negligent misrepresentation under **Hedley Byrne v Heller** or the Misrepresentation Act 1967, since the underwriter will have relied upon the report? The extent of the surveyor's liability is far from clear at present.[106]

Seaworthiness includes Cargo Worthiness

It is now firmly established that as far as cargo is concerned the implied warranty as to seaworthiness embraces the ability of the vessel to safely load, carry and discharge cargo envisaged by the contract of carriage and the charterparty. A vessel may be cargo worthy for one type of cargo but uncargo-worthy in respect of other cargoes. An inability to carry a cargo safely entitles charterers and cargo owners to pursue an action for breach of contract. If the problem is discovered at the outset a charterer can reject delivery of a vessel which cannot quickly be rendered cargo-worthy and a cargo owner can refuse to load or otherwise jeopardise the safety of his cargo. Post shipment loss due to un-cargo-worthiness gives rise to a right to damages. Since the vessel is in breach of the implied duty to be seaworthy the exemptions under The Hague and Hague Visby Rules cannot be relied on by the ship owner to limit or exclude liability

In **Cargo Per Maori King v Hughes** [107] the court held that if a vessel carries a cargo of frozen meat the vessel needs refrigeration equipment which functions properly. If it does not have a refrigeration plant or if the plant does not work effectively at the time of sailing the vessel is uncargoworthy and hence unseaworthy. 4553 carcasses of hard frozen mutton were shipped from Melbourne to London in apparent good condition. The bill of lading contained an exception *'steamer not accountable for the condition of goods or for any loss or damage by failure of machinery or insulation or other appliances.'* The refrigerator broke down. The Court of Appeal held that the exceptions only apply as to what happens during sailing. Seaworthiness warrants the condition of the vessel and machinery at the time of sailing.

In **Ciampa v British India** [108] the court confirmed that *"Seaworthiness refers to fitness to carry a particular cargo."* A Bill of Lading contained exceptions regarding restraints of princes and any circumstance beyond the shipowner's control. Cargo was loaded onboard a vessel with a foul bill of health requiring the fumigation of ship in accordance of French Law. The fumigation resulted in mage to cargo thereby invoking the issue of seaworthiness. The plaintiff's cargo of lemons was loaded at Naples for London. The contract of carriage contained a liberty to call at any port. The vessel went to Naples from Mombassa. Mombassa being a plague port the ship had a foul bill of health. The vessel landed at Marseilles where the French authorities pumped sulphur fumes into the ship and the lemons were damaged. The court held that the exception clause did not protect the shipowner. The vessel was not seaworthy when she arrived at Naples since it was inevitable that on calling at Marseilles that she would be fumigated and thus she was not fit to carry lemons.

In **Tattersall v National** [109] a vessel carried a cargo of cattle. The vessel harboured a disease on board the ship because the stalls had not been cleaned out. The cattle caught foot and mouth. It was held that the vessel was unseaworthy due to uncargo-worthiness. A limitation of liability clause capping damages to a maximum of *£5* per animal was held not to be applicable to damage caused by an unseaworthy vessel.

In **The Peace Venture L.**[110] a vessel was chartered under a Vegoilvoy voyage charterparty from Belowan to Rotterdarn. On discharge a cargo of crude palm kernel oil was found to be contaminated with traces of a cargo previously carried on the vessel. The cargo was sold at a substantial loss and the charterer sued for

106 See in particular *"Unseaworthines and Ship Classification Certificates"* The Solicitor's Journal Vol 102, 1938 p716: The Morning Watch : Mariola Marine Corp v Lloyd's Register of Shipping Times 21.2.90 "*The liability of classification societies*" P.F.Cane. L.C.M.L.Q. 1994 p363 ; The Nicholas H "*The liability of classification societies to cargo owners"* L.C.M.L.Q. 1993 p1.

107 **Cargo Per Maori King v Hughes [**1895] 2 Q.B. 550.

108 **Ciampa v British India S.S.Co** [19l5] 2 K.B.

109 **Tattersall v National S.S.Co** (1884) 12 Q.B.D. 297

110 **The Peace Venture L.** [1996] 2 Lloyds Rep 75.

damages for breach of clause 1 Part II Vegoilvoy Charterparty. He also claimed for breach of art III, r. 1 of the Hague-Visby Rules for a failure to exercise due diligence to comply with the obligation to provide a seaworthy vessel. Whilst the owners had taken care to clean the hold before loading, they were aware that the cleaning methods used were not effective since similar contamination had occurred on two previous occasions. First arbitrators and subsequently the Queens Bench Division found that the vessel was unseaworthy due to a lack of due diligence.

The Gudermes [111] Ex ship contract for the purchase of oil. Bills of lading subject to U.K. Law & 3urisdiction and incorporated the H.V.R. The master advised the shipper post loading that the vessel did not have heating coils. The oil was too cold to discharge and had to be taken to a warmer climate transshipped and returned to port of discharge in another vessel. The court held that the notice of the lack of heaters was delivered too late to establish estoppel. The vessel was uncargoworthy and the endorsee of the bill of lading was entitled to recover under both Brandt v Liverpool and s1 Bills of Lading Act 1855 actions against the shipowner. On appeal,[112] the Court of Appeal held that the vessel did not have to be heated in order to be cargo/seaworthy. Heat was only required to deliver to the nominated port. The shipper should have nominated a port that could take delivery of cold oil since he was aware that the ship had no heaters. The shipowner was not therefore liable to cargo owners.

Stowage

Stowage takes two forms, namely Bad Stowage simpliciter where the ship is not deemed to be unseaworthy, though of course there may be a claim for damages for bad stowage if applicable and Bad Stowage amounting to un-sea-worthiness.

Upperton v Union Castle [113] concerned a passenger's luggage. The vessel was suffering from overcrowding and so, the passenger's luggage was left in a vacant sealed up lavatory, by a porter. Someone left the water on in the next water closet and the luggage was ruined. The ship did not have a dedicated luggage room. There was an exemption clause on passenger tickets excluding liability for damage to luggage *"even if such damage be caused by negligence of shipowner's servants"*. The Court of Appeal affirmed Bingham J at 1st instance, holding that since there was no proper place for luggage the vessel was unseaworthy since the ship was not fit to carry luggage.

In **Elder Dempster v Paterson Zochonis** [114] casks of palm oil were stowed between decks. Large palm kernels were then stowed on top of them. The Casks were damaged by the weight of the kernels and the oil lost. Was it bad stowage simpliciter or bad stowage amounting to unseaworthiness? The cargo owner claimed that the ship was not fit to carry casks because there were no separate compartments for it and therefore the vessel was uncargo worthy. There was an exception clause in the Bill of Lading limiting liability for bad stowage The court held that the vessel was fit to carry oil the oil and therefore it was seaworthy. The damage was due to bad stowage simpliciter since it would have been possible for the cargo to have been stowed in a perfectly safe manner. The court also held that an exemption clause protected the shipowner as well as the carrier even though he was not a party to the Bill of Lading and the action was founded in tort, but how? Was the ship owner privy to the contract?[115] In **Bond, Connolly v Federal S.S.**[116] a cargo of apples was kept in refrigerators which were good efficient machines for a voyage from Tasmania to Liverpool. However, the fruit was closely packed. The apples went rotten. It was held by Channel J that the ship was fit to carry apples and therefore it was bad stowage simpliciter. The Bill of lading contained an exception for bad stowage, even if negligent.

Bad stowage simpliciter exception clauses may be valid. On the other hand, since bad stowage resulting in un-seaworthiness means that there is a breach of the contract of carriage, the contract of carriage along with its exemption clauses can be avoided. This would then cast the strict liability doctrine of the common carrier onto the carrier, removing the benefits of the exclusion clauses within the contract of carriage.

111 **The Gudermes** [1991] 1 Lloyd's Rep *456*

112 [1993] 1 Lloyd's Rep 311

113 **Upperton v Union Castle S.S.. Co** (1903) 8 Com. Cas 96,

114 **Elder Dempster v Paterson Zochonis** (1924) All ER. 135. C & G 1.

115 Note that in **Scruttons v Midland Silicones** the court stated that the ratio of Elder Dempster was obscure on this point.

116 **Bond, Connolly v Federal S.S.Co** [1906] 21 T.L.R. 438.

The Thorsa [117] concerned cargoes of respectively chocolate and cheese stored together. The chocolate went bad because the cheese was placed on top of it. The implied warranty of cargo worthiness is applicable only at the commencement of loading and so the relevant time was immediately before loading, at which time the ship was cargo-worthy. Swinfen Eady, Phillimore & Bankers L.J in the C. A. stated that the crucial question was "When the cheese was loaded was the ship cargo worthy to load cheese?" Taking it that the cheese was stowed afterwards that did not make the ship unseaworthy regarding the chocolates. Thus it was an example of bad stowage simpliciter. An exception of liability was contained in the bill of lading for negligence so the claim failed. Presumably the result would have been different if the chocolate was loaded alongside the cheese, after the cheese had been loaded, but even then, surely the question ought to have been as to whether or not there was a safe and suitable place elsewhere on the vessel for the chocolate, in which case it would still have been bad stowage simpliciter?

In **The Upperton Castle** there was no specific place anywhere in the vessel for the baggage. Contrast this with cases where the vessel has not been decontaminated. Clearly there is no safe place on the vessel in such circumstances.

However, recent cases do not always appear to have targeted cargoworthiness and the order of loading as being so crucial to liability. The cause of action may need to be based on lack of cargo care as opposed to un-cargoworthiness / un-seaworthiness but such rulings have implications for **The Thorsa.** The danger of relying on cargo care is that there may be an exception for negligence of crew but would nonetheless be vital in the event of the damaged cargo being loaded first. In **The Iron Gippsland** [118] vapour from a later cargo contaminated a prior cargo in contravention of Art III r2 H.V.R. to carefully carry, keep and care for goods. The vapour was carried from one hold to the next by a common inert gas system.

Time bars can present problems for claims for un-cargoworthiness as in **The Stephanos.**[119] A cargo of preslung rice was damaged by aflatoxin, a poisonous mould but the claim for damage was time barred.

The Inowroclaw [120] concerned damage sustained to a cargo of coffee beans by a combination of events. The plaintiff recovered against the owner for un-seaworthiness and negligence related to rain and sea water damage and also for un-cargoworthiness in respect of damage caused by copra tainting when the beans came into contact with another cargo.

Seaworthiness and Dangerous Goods

There is a duty on the shipper to inform the ship owner about the nature of the cargo where the special qualities of the cargo are such that the ship owner would require this information in order to safely carry the cargo or protect his vessel and crew. Information which a shipowner / carrier within a trade is deemed to possess, as general knowledge, does not have to be provided.

Article IV 2 (q) H.V.R. exempts the shipowner from liability for any loss caused by any other cause besides those listed in a-p, where the owner has no actual fault or privity. Art IV 2(1) specifically exempts liability for acts and omissions of the shipper. Art IV 6 empowers the carrier to discharge dangerous cargo, destroy it or render it safe without liability for the carrier.

Defective packaging can render an otherwise harmless cargo dangerous. In **Brass v Maitland** [121] the court held that there is a duty on the shipper of dangerous cargo to disclose their dangerous nature. There was an insufficiency of packing. That the packing was carried out by a third party afforded no defence. What was the effect of a lack of knowledge on the part of the master of the vessel of the contents of the package? Chloride of lime was shipped as bleaching powder in casks packed by a third party. The master was not aware that the contents were corrosive. The casks appeared to be sufficient on loading but corroded during the voyage and damaged other goods. The court held that the shipper was not liable since he had declared the contents. The master could have discovered from the description that the goods were corrosive. The mere fact that a third party was at fault would not however, on its own have provided a defence.

117 **The Thorsa** (1916) Probate *257*

118 **The Iron Gippsland** [1994] 1 Lloyds Rep 335. (Australian Case).

119 **The Stephanos** [1989] 1 Lloyds Rep 652.

120 **The Inowroclaw** [1989] 1 Lloyds Rep 498

121 **Brass v Maitland** (1956) 6 E & B 470 26 L.3.Q.B. 49.

The duty of disclosure is strict. The fact that a shipper does not know of the dangerous nature of a cargo is no defence. In **Banfield v Goole** [122] ferro silicon was shipped in casks on a keel boat. The plaintiff, administratrix of her husband's estate, sued the defendant for shipping a dangerous chemical without informing her and her husband, as common carriers, of the dangerous nature of the goods. It was unknown to the defendant that, in certain circumstances, the chemical can give off dangerous fumes, which it did, killing the husband and making the wife seriously ill. The court held that despite the lack of knowledge on the defendant's behalf there is a duty to disclose the nature of dangerous goods to a common carrier and not merely to declare the contents as general cargo.

The duty of disclosure covers anything which could threaten the security of the vessel, including the status of the goods including whether or not it fulfils government requirements for export and import which could lead to delay or cause a vessel to be arrested. Thus an infected cargo could lead to a quarantine order for a vessel. In **Mitchell & Cott v Steel** [123] a ship carried a cargo of rice for Piraeus. The charterer knew government permission was needed in order to land the cargo but presumed incorrectly as it turned out that it would be granted. The carrier did not know of the need for permission. The court held that the delay resulted from a breach by the charterers of their duty to inform the ship owner. The owner had a valid action against the charterers.

If the carrier knows expressly or impliedly of the dangerous nature of the cargo and consents to carry it, presumably adjusting his freight charges to take account of the danger, there is no breach of duty. **The Athanasia Comninos** [124] considered whether or not the various types of coal, which give off inflammable gasses render the cargo dangerous and the degree of knowledge that should be attributed to carriers.

In **The George C Lemnos** the court considered whether or not liability for the shipment of dangerous cargo could be shifted from the shipper to endorsee of a bill of lading under s1 Bill of Lading Act 1855. This question is now academic since section 3 C.0.G.S.A. 1992 enables the carrier to sue either the shipper or the consignee for breach of the duty to provide information in respect of dangerous cargo.[125]

Where a carrier knows of the dangerous nature of the cargo on shipment, the exemptions from liability of the carrier for destruction of the cargo to preserve the vessel do not apply. The carrier is liable for a contribution to general average sacrifice in such an event. **The Indian Grace** [126] concerned such a dangerous cargo, namely 870 bombs bound from Sweden to India. The vessel caught fire and *52* bombs were thrown overboard. The cargo owner successfully claimed damages in Indian court. It later transpired that the remaining cargo was damaged by fire and had to be written off The cargo owner claimed damages in the UK. Was the issue "res judicata", that is to say a claim based on the same facts in a different court and therefore an attempt at double recovery, which is not permitted. The Lords held that the amount at stake was too large to dismiss the claim on a mere technicality and that the case should proceed to trial in Admiralty court.

A safe cargo may become dangerous due to mistreatment as demonstrated by **The Boucraa**.[127] The charterers were accused of putting excessive water on a cargo of sulphur turning it into a corrosive cock-tail, which caused damage to the hull of the carrying vessel. The principal issues for the court concerned delay and want of prosecution. However, the case provides an example of how a shipper might negligently turn an otherwise safe cargo into a dangerous cargo.

A carrier, if he is to succeed in an action for breach of duty, has to establish that damage is caused by dangerous cargo and that the carrier has not himself caused the damage complained of by mishandling the cargo or by furnishing an unseaworthy or uncargoworthy vessel. **The Fiona** [128] involved cross claims regarding dangerous cargo and un-cargoworthiness. The vessel's previous cargo was condensate. The tanks

122 **Banfield v Goole and Sheffield** (1910) 2 K.B. 94
123 **Mitchell & Cott v Steel** (1916) 2 K.B. 610
124 **The Athanasia Comninos** [1990] 1 Lloyd's Rep 277
125 See also **Burley v Stepney Corp** [1947] 1 All.E.R. 507 and **Transoceanica v Shipton** [1923] 1 KB 31
126 **The Indian Grace** [1993] 1 Lloyd's Rep 387 House of Lords
127 **The Boucraa** [1993] 2 Lloyd's Rep149.
128 **The Fiona** [1993] 1 Lloyd's Rep *257*

were washed but a residue was left behind on the walls of the tanks. The charterer pointed out the importance of ensuring that there no residue left before loading a new cargo of oil under the charterparty. Prior to discharge of the oil an engineer took readings of the tank and the heating was coil turned on. The heating coil leaked, an explosion ensued and the engineer was killed. The cargo was destroyed. The shipowner claimed damages under H.V.R. for charterer's negligence in shipping a dangerous cargo. The charterer counter claimed for un-cargoworthiness and loss of cargo. The court held that the shipowner had breached Art III rule 1 H.V.R. The vessel was uncargoworthy. It was the contamination of fuel oil that made it dangerous and caused the explosion. The shipper was not liable.

In **The Amphion** [129] the charterer shipped a dangerous cargo of fishmeal which due to ineffective chemical treatment overheated in the hold. The shipowner incurred additional unloading costs and delay. The court held that the charterer was in breach of the charterparty for loading dangerous cargo. However, a claim for indemnity covering the consequences of following the charterer's orders to ship the cargo was rejected.

The primary duty not to ship dangerous goods lies on the shipper. Since the advent of s2 C.O.G.S.A. 1992 the carrier can sue either the shipper or the endorsee of a bill of lading in respect of such dangerous cargo. This was not always so. In **The Giannis NK** [130] a cargo of ground nuts was shipped at Dakar. The shipper alleged that the vessel was infested with Khapra beetle prior to loading. The owner alleged that the beetles entered the vessel with the cargo which was therefore a dangerous cargo. The court held that the shipper had failed to prove the vessel was uncargoworthy and he was held liable for losses due to shipment of dangerous cargo. s1 Bill of Lading Act 1855 did not shift liability for shipping dangerous goods to the consignee

There are wide range of statutory provisions regarding dangerous goods.[131] The I.M.O code governing the Carriage of Dangerous Goods in Ships contains a classification system for dangerous cargoes. [132]

Seaworthiness and Safety

The common law implied undertaking requires that the vessel be a seaworthy ship. There is no implied undertaking that the vessel be a '**safe ship**' in U.K. law, though this is probably is in the U.S.

Hutton v Royal Exchange Assurance [133] concerned a vessel which had no fire extinguisher on board. The court held that one had to make a comparison with the concept of perils OF the sea and as opposed to perils **ON** the sea. Thus, fire extinguishers were merely an aspect of safety on the sea as opposed to "seaworthiness' which dealt with the ability to survive the vicissitudes of the sea.

Hutton involved a marine insurance claim and construction of the marine insurance policy, the perils insured against under a voyage policy and un-seaworthiness. A launch was destroyed by fire due partly to a lack of fire extinguishers. Hutton claimed for loss of the launch. REA repudiated liability. The launch was grounded by the tide and petrol spilled out. when the plaintiff tried to start it a fire broke out. There was no fire extinguisher on board. Even if there had been he would have had no time to use it. REA claimed un-seaworthiness because there was no automatic fire extinguisher or dinghy on board. The court held inter alia that the loss was not attributable to un-seaworthiness and the presence or otherwise of a dinghy would make no difference to the ability of the ship to survive the ordinary perils of the sea. The onus of proving a breach of warranty lay with REA, who had failed to do so. Thus, a vessel which is uncargoworthy and therefore unable to carry its cargo safely without exposing it, for instance, to the danger of fire or explosion is unseaworthy. Note however that the issue here is not whether fire or explosion is a peril of the sea or on the sea but rather one of un-cargoworthiness.

The Fiona [134] involved a vessel carrying fuel oil, which had explosive characteristics not known to the shipowner. The Fiona had a residue of condensates in its tanks and leaking heating elements. Whilst a failure to notify a carrier of the dangerous nature of a cargo could result in the shipper having to indemnify

129 **The Amphion** [1991] 2 Lloyd's Rep 101

130 **The Giannis NK** [1996] 1 Lloyds Rep 577.

131 E.g. the consolidated Merchant Shipping Act 1995 ; The M.S. Safety Convention Act 1949 523 and subordinate regulations; The Explosive Substance Act 1883 s8 and Art III(6) CO.G.S.A. 1971.

132 the I.M.D.G.

133 **Hutton v Royal Exchange Assurance** [1971] N.Z.L.R. 1045 Sc.

134 **The Fiona** [1994] 2 Lloyds Rep *506*

the owner for any subsequent loss or damage, in the circumstances, the operative cause of the explosion on discharge, which resulted in the death of an engineer, was un-cargoworthiness.

Thus, there is little problem outside the constraints of marine insurance in recovering damages for fire caused by the negligence of the owners in the maintenance of a vessel. The negligence prevents the carrier relying on the Hague-Visby Rules exemptions for liability for damage caused by fire. In **The Subro Valour**[135] a fire on board the vessel was caused either by faulty wiring igniting fumes in the vessels exhaust, caused in turn by shelves rubbing against the wiring or by material stacked against the exhaust, whichever event occurring before sailing resulting in the vessel being unseaworthy. The vessel was salved, cargo was transhipped at the plaintiff f.o.b. buyer's expense and the buyer was subject to an E.C.C. restitution claim for delay. The court held that the buyer (and his insurance company) could recover the salvage costs and the restitution claim, but transshipment costs were not directly caused by the fire and not reclaimable.

Contrast **Hutton v R.E.A** which held that fire is a peril on the sea not of the sea with **The Star Sea**.[136] The master did not know the basics required to operate a fire suppression gas system. Two sister ships had previously suffered fires. The owner had done nothing to ensure The Star Sea had an adequate fire fighting system. Defects were drawn to the master's attention prior to the voyage by port authorities. A repair was botched by him. The plaintiffs cargo was destroyed by a subsequent fire. The court held that there was no breach of utmost good faith, so the marine policy was not invalidated but the vessel was unseaworthy due to its inability to suppress fire as a result of the master's lack of training and because the engine room was not sealed, preventing gas suppressants from working. The causative factor of the loss was not fire as a peril on the sea but un-seaworthiness due to incompetent crew.

In **Woolf v Clagget,**[137] a vessel had insufficient medicines aboard. Again this was an issue of safety not seaworthiness. The case deals mainly with deviation and contains only a few lines in the text on seaworthiness. When sickness of the master or crew is set up as an excuse for deviation, it is incumbent on the plaintiff in a suit for non payment to show that proper medicines and necessaries for the voyage were on board especially where the nature of the voyage requires that there should be a surgeon on board. A Danish ship was engaged on a voyage from Altona to Surinam. Deviation was put up as a justification for non-payment. The ship put into Plymouth during voyage and stayed for 14 days. The captain had a fit of gravel (gall stones) and the mate had a swollen arm. The surgeon on board had insufficient medicines to deal with the illnesses. The court held that the deviation may have been justified by necessity. However if a surgeon is necessary in such a voyage and this was such a voyage, then the plaintiff must show that the surgeon is adequately supplied with equipment to do his job. That is to say that a ship must have been seaworthy at outset. If not, the deviation is not justified. Was the vessel itself unseaworthy or did the facts simply negate the defence of deviation? However, contrast **Kish v Taylor** [138] where Atkinson J held that the mere fact that the owner was responsible for a vessel's un-seaworthiness which in turn endangered the ship or cargo did not prevent a deviation to save the ship or cargo from being lawful.

In **Cotter v Huddard Parker Ltd**[139] a vessel had no goggles for welding or helmets for rigging. It was held that this was a safety issue only. There was no breach of the warranty of seaworthiness. Seamen onboard the vessel were injured during welding operations. The court considered the application of the Commonwealth Navigation Act 1912 s46 & 59 and the Worker's Compensation Act 1926 Nol5, s65. Davidson & Street J.J. stated that s59 implies an obligation of seaworthiness of a vessel but not of safety. The seaman were injured by a faulty boiler. The ship's officer acted negligently whilst trying to avert further damage. The employer also has a duty to provide a safe place of work and a breach of this duty would render the owners liable.

In conclusion whilst an unseaworthy ship is an unsafe ship, an unsafe ship is not necessarily an unseaworthy vessel. Seaworthiness is an aspect of safety but safety is a far wider concept than that of seaworthiness.

135 **The Subro Valour** [1995] 1 Lloyds Rep *509.*
136 **The Star Sea** [1995] 1 Lloyds Rep 541.
137 **Woolf v Clagget [1800**] 170 E.R. 607,
138 **Kish v Taylor** [1912] A.C. 604
139 **Cotter v Huddard Parker Ltd** [1942] N.S.W.R. 33

In **The Xanthro** [140] the court made it clear that Seaworthiness is about the perils **OF** the sea and **NOT** about perils **ON** the sea. The contract contained an exception clause in respect of liability for "Dangers and accidents of the sea". The vessel sank following a collision. In the absence of negligence was the loss or damage covered under the policy by 'perils of the sea' ? The bill of lading in respect of cargo bound from Cronstadt to Hull excluded liability for loss of goods due to Act of God, King's enemies, fire, machinery, boilers, steam dangers and accidents of sea, rivers and steam navigation, whatsoever. Following the collision the cargo was lost. The court held that the cause, in the absence of negligence, fell within the description covered by the exception. Herschell L observed that the policy is against things that might happen, that is to say a casualty, and not against things that must inevitably happen. Bramwell L stated that perils of the sea means the same thing in carriage as in marine insurance.

Consider also the Safety of Life at Sea and The Loadline Conventions. By analogy the Loadline Convention deals with Seaworthiness of the ship whereas the S.O.L.A.S. Convention deals with the safety of the ship, as can be seen by the lists of things included under each convention. Under the revisions introduced by the Merchant Shipping Act 1974 there was a change of terminology from an unseaworthy ship as in the old s457 M.S.A. 1894 to a 'dangerously unsafe ship' under s44 M.S.A. 1979 and to an unsafe ship in s44 M.S.A. 1974 in respect of oil pollution. The significance in this change of terminology is not altogether clear, as can be seen by the various statutory uses of these two terms by the M.S.A.s over the years. [141] s44 M.S.A. 1979 was itself replaced by new provisions on safety under s30 M.S.A. 1988 in respect of a vessel 'unfit to go to sea'. This certainly seems to return us closer to the concept of seaworthiness than the ambiguous term 'unsafe' which fails to specify safety regarding the ability to go to sea and safety for the crew and passengers. [142]

Seaboard Offshore v Sec State for Transport [143] concerned criminal liability of unseaworthiness and breach of the safety requirements under s31 M.S.A. 1988 which imposes criminal liability on owners for failure to implement safe operating systems. Simply because a vessel is not operated safely does not mean the company is automatically liable. It must be proved to the court and the court must decide that the company did not have a safe system. This was not addressed by the court which simply found at first instance that because the chief engineer sailed after a mere 2 hours and *50* minutes without first familiarising himself with the vessel that someone was to blame. That person had to be identified in court. The appeal was allowed overturning the company's conviction for vicarious liability. Even if convicted, the conviction alone would not be sufficient to guarantee success in a civil action for a claim for damages.

What should be remarked perhaps, is that due to all this confusion the civil case law on seaworthiness is the only true guide to discussion of this topic in relation to Carriage of Goods by Sea and that one should not be tempted to draw analogies from statutory provisions in the Merchant Shipping Acts.

Seaworthiness and Ship Design

It is arguably far too simplistic an approach to limit seaworthiness to the notion that only a hole in the hull makes a ship unseaworthy. A badly designed vessel can in appropriate circumstances be regarded as an unseaworthy ship. This problem has particular significance regarding the Zebrugge Ferry type roll on roll off ferry Is it possible to make such a ferry with additional bulk heads or additional watertight flotation tanks and if not should Ro-Ro ferries exist at all?

In **Angliss v P & 0** [144] the court had to consider the seaworthiness of vessels where the designers have not incorporated coffer dam bulkheads in a vessel in order to increase the cargo area. Coffer dam bulk heads are vertical divisions of the hull which prevent water from flowing from one end of the vessel to the other uninhibited. If the vessel is holed, only one section of the vessel between the dams floods. The rest of the vessel remains watertight and so it continues to float. If there are no dams the vessel floods completely and sinks. The court had to address claims for damage to cargo covered by bills of lading. The cargo was delivered in a damaged condition. The claimants alleged that the holds were unfit and unsafe and that there

140 **The Xanthro** (1887) 12 A.C. *503* [1886 - 90] All E.R. 212.

141 See *'From Dover To Zeebrugge - Safety at Sea in the wake of the M.S.A. 1988'* by C.H.Spurin.

142 NB all the above provisions have now been transposed into the M.S.A. 1995 and the section numbers have altered yet again.

143 **Seaboard Offshore v Sec State for Transport** Times 9.2.93

144 **Angliss v P & 0** (1927) 2 K.B. *456*

was a defect in design of the vessel and bad workmanship by the builder's servants. what was the liability of the shipowner under the Australian Sea Carriage of Goods Act 1924 - No22 of 1924 sched Art 111(1) Art IV(1) C.O.G.S.A 19245ched 111(1)Art IV(1). ? Art3 rule 1 states that the carrier shall be bound before and at the beginning of the voyage to exercise due diligence to a) Make ship seaworthy b) properly man equip & supply ship c) make holds, refrigeration etc in which goods are carried fit and safe for reception carriage & preservation. Art W(1) states that Neither the carrier nor the ship shall be liable in loss or damage arising or resulting from un-seaworthiness unless caused by want of due diligence by the Carrier.

The obligation of seaworthiness and goods worthiness is not limited to the carrier's personal diligence. He is responsible for the acts of his servants and agents. where a ship builder has been employed the Carrier is only liable for a failure to engage a competent builder and to ensure that those advising him are competent. The same duty applies where a carrier buys a vessel, regarding the competence of surveyors and inspectors. The carrier is not responsible for the shortcomings of the competently chosen contractors. Wright J draws a distinction between obvious and latent defects. A degree of diligence is necessary. In the circumstances of the case the design of the ship proved to be inadequate. Coffer dams had been removed to increase cargo space. However this did not amount to negligence in the light of the technical understanding of that time. There had also been poor riveting workmanship resulting in a latent defect. In the circumstances of the carrier was not liable.

Similarly, in **The Princess Victoria** [145] there was an inadequacy in the stern doors, which were of a poor design. As a result water accumulated on the deck. The vessel was incapable of coping with the ordinary perils of the sea and sank in the Irish Sea. The court considered the effect of the provisions of the M.S.A. 1894 - 1923. The vessel was unseaworthy due to wrongful act or default of shipowners and managers following a sinking in rough but not exceptional sea. The cause of the loss appears to have been due to poor design. The vessel's suitability as a seaworthy ro-ro ferry was not proven. There was a continuing duty on the shipowner to supply a Seaworthy ship. There was evidence from previous voyages should have put the shipowners on inquiry. There had been problems with the stem doors. The Court of Inquiry found default in the shipowners and managers and breach of common law and statutory duties, namely the M.S.A. *425* - 466(11) - 470(1) & M.S.A. 1906, s66 Loadlines rules 1941 reg 35. The Princess Victoria was a car ferry on a voyage from Lame to Stranraer. The ferry sank. The vessel was built in 1947 and sank 1953. The Court of Inquiry held the Managers at fault in that i) they had failed to provide strong stern doors ii) there were a lack of holes to let water out once it got on deck iii) they had failed to take action after previous incidents and iv) they had failed to report incidents under M.S.A. regs.

On appeal the owners claimed that there had been exceptional weather and that the knowledge of the managers in respect of new technology could not be attributed to the shipowner and that cargo had shifted during the voyage. The court held that i) the weather not that exceptional ; ii) that the loss was due to defective doors and the lack of escape holes for water but that the shifting of the cargo was merely contributory not causative; iii) the new technology defence was lost once the inadequacies in design had come to light ; iv) whilst the first manager was initially in default such default could not be attributed to the new manager or to the shipowner. Nonetheless a ship owner should set up an adequate system of review for newly designed ships and not leave it to the manager who has other pressing business to deal with. The owners had failed to do so and were contributory to the disaster on this account.

Consider also **The Marine Sulphur Queen** [146] which concerned an experimental conversion of an oil carrier to a molten sulphur carrier. The ship sailed out of a U.S. port and did a Marie Celeste, never to return, her fate unknown. The U.S. court had to consider the availability of the right to limit liability where there was an inexplicable loss of a vessel. The conversion had been approved by U.S. Coast Guard and A.B.S. Had the owner and demise charterer established seaworthiness? If not, were they privy to the absence of seaworthiness ? What was the liability of the conversion designer? What was the optimum tonnage of the vessel. What was the effect of waiver and subrogation clauses regarding Marine Insurance ? What was the relationship of the assured cargo owner to the ship owner and was he the charterer ?

145 **The Princess Victoria** [1953] 2 Lloyds 619

146 **The Marine Sulphur Queen** [1973] 1 Lloyds 88 and [1970] 2 Lloyds 285

The court held that 1) the ship breached building regulations and was therefore unseaworthy; 2) there was no negligence on the carrier's behalf since the ship design was approved by the U.S. Coastguard; 3) loss of life was attributable to un-seaworthiness since the actual cause of loss was a mystery and no one had shown the un-seaworthiness was not at fault ; 4) the charterer was a wholly owned subsidiary of the owner and so they bore joint liability for the death ; *5)* without proof of causation liability could not be limited; 6) there was no proof that the design was the cause of loss so the ship builders were not liable ; 7) without proof that the carriers were at fault there was no liability under C.O.G.S.A. for the loss of cargo; 8) no punitive damages for deaths would be awarded since no fault was shown and thus there was no criminal recklessness.

Regarding the construction of a ship there are a plethora of rules and regulations as to quality and standard and construction methods.[147] Certification is required to conform with many of the Rules.

The age of a vessel alone is not in itself a determinant of seaworthiness though it may be taken into consideration. The speed of a ship is not a matter of seaworthiness. **The Marine Electric** concerned a 38 year old tanker in very poor condition. It sank with the loss of 31 lives. The hatch covers had pinholes in them. For over a year the U.S. coastguards had made requests for the owners to replace the hatch covers. Witnesses later stated that the seamen prayed for a safe return before each voyage. Only two crew-members survived to testify. The hatch covers eventually caved in under water pressure. This would appear to have been a classic case of unseaworthiness. The design of the tankers had been abandoned in the U.K. and all U.K. registered tankers of that design scrapped. This had not occurred in the U.S.

Seaworthiness and a Ship's Equipment

Where the equipment on board a vessel is necessary as a means of locomotion then it obviously has direct implications for the seaworthiness of the vessel. Equipment used as a navigational aid is harder to classify. Is sophisticated equipment necessary and does the absence of the latest navigational aid amount to un-seaworthiness? To answer these questions the court may consider statutory requirements often provided by Statutory Instruments and judicial observations.

In **Inglis Bros v S.S.Stephens** [148] a vessel had a defective cargo hook. During discharge the hook, which was weak and defective, broke causing damage to the cargo. The Court of Appeal held that the mere existence of a defective hook did not amount to a breach of the warranty of Seaworthiness. There was a breach of the duty owed by shipowner as carrier of goods but he was entitled to rely on the exemption from liability under the Bill of Lading.

However, a vessel should be capable of loading and discharging cargo. In **Hang Fung Shipping** [149] a vessel, engaged under an amended GENCOM Free In and Out Charterparty, had defective loading and discharging tackle. The court had to decide whether or not the shipowner was obliged to supply cargo gear m working order. The Charterparty stated that cargo was to be loaded at Charterer's expense. The ship's cranes failed to work and had to be repaired. who was liable for dispatch monies lost and demurrage? McNair J held in the Q.B.D. that whilst not express in the charterparty, the ship should have working tackle available for use by the charterer. The shipowner was liable for loss of dispatch monies and could not claim demurrage.

In **Leonard v Leyland** [150] a vessel had defective loading hooks and davits for lifeboats. The court held that life boat provision is a safety feature and does not affect the ability of the vessel to load cargo. The vessel was not unseaworthy or uncargoworthy. The court considered s485 M.S.A. 1894 in respect of an action for damages for personal injuries by a seaman against the shipowner. During life boat drill a hook fell off & davit broke. The plaintiff, the lifeboat and the davit fell into the water. The plaintiff was injured. He claimed that due to the defective hook and davit the vessel was unseaworthy. The jury found for the plaintiff and awarded him *£25* damages. Wills J applied **Dixon v Sadler**. The ship was not unseaworthy and ordered a stay of execution of the award of damages.

147 eg s2(3). M.S.A. 1964. Rules of Construction; M.S (Cargo ship construction and Survey) Rules 1965 & 1981 amendment. M.S. (Oil Tankers and combination carriers). Rules *1975 ;* Oil Tanker Construction rules s1 M.S.A. 1974.

148 **Inglis Bros v S.S.Stephens** [1926] N.Z.L.B. 357.

149 **Hang Fung Shipping** [1966] 1 Lloyds 511 & 116 NL3 1034 1966

150 **Leonard v Leyland** (1902) 18 T.L.R. 727.

Echo Sounders Under M.S. (Navigation : Equipment Regulations) 1980 echo sounders are mandatory for vessels of 500 tones plus undertaking International Voyages.

Navigational Aids : Many of the requirements regarding navigational aids are contained in the Safety of Life At Sea Conventions, brought about by the activities of the International Maritime Organisation (I.M.O.) through the auspices of the United Nations. However, as far as the U.K. is concerned the legal source of material on navigational aids is to be found in enabling legislation which implements S.O.L.A.S. and in particular in the wealth of statutory instruments that have thus been authorised.

There are a wide variety of optional navigational aids available today. The question is as to how much of the new hightec equipment that is constantly being developed should or should not be carried on a vessel and the effect of a failure to install such equipment on a vessel in relation to seaworthiness. Whilst concerned with cargoworthiness the observations on state of the art technology by Scrutton L.J. are pertinent to this question. In **Bradely v Federal S.S.Co** [151] Scrutton L.J. stated that 'while the shipowner may be bound to add improvements in fittings where the improvement has become well known or the discovery of danger has become well established the position is quite different where at the time of the voyage the discovery had not been made or the danger discovered.'. A cargo of apples developed brown heart a wasting disease. Was this due to the absence of ventilation on the vessel or inherent vice under the Australian C.O.G.S.A. 1904 s5 & 8. 15,272 cases of apples were dispatched from Hobart Tasmania for London. In the circumstances the court held that the cargo was damaged by inherent vice. There is no stipulation that goods were to be delivered in the same condition as on loading where such cargo suffered from inherent vice. If the damage was not due to inherent vice the court may then have had to decide whether or not the vessel required a ventilation system in order to render it cargo-worthy. This would in turn have depended on whether or not ventilation systems had by that time become standard equipment.

Radio Installations : Certain standards of Radio Installations are mandatory under the M.S. (Safety Convention) Act 1949.[152]

Direction Finder Instruments : s5 M.S. (Safety Convention) 1949. [153]

Compass *: A c*ompass must be properly adjusted. Did this imply that there must be one or merely, if the ship had one, that it had to work? **The Thordoc** [154] concerned the right to limit liability, which would not have been available at that time if the shipowner had been found to be at fault. The ship's compass was incorrectly adjusted by a reputable and competent firm of subcontractors. The court held that the ship was unseaworthy. The deviation that resulted was the fault of someone for whom the carrier was responsible. Nonetheless the carrier could limit liability for the grounding of the vessel since it was due to improper navigation after the deviation was over. Presumably if the faulty compass had been the cause of the grounding the outcome would have been different.

Radar: All ships of 1,600 tons gross and over when registered are required to have a radar installed since April 1976. The penalty for failure is up to two years imprisonment or a fine of up to £2,000. Vessels of 10,000 tons and over are required to have two radar, since 1980. [155]

The Portland Trader [156] concerned a vessel that was not equipped with radar. At that time the fitting of radar was not customary practice. Did the absence of radar make the ship unseaworthy? The court held that it was not unseaworthy per se, because radar was not so essential to navigate that its absence would give rise to a finding of un-seaworthiness. The judge warned however that in the near future it was most likely that it would become a condition of seaworthiness. Presumably that that time has now come. The U.S. court discussed the lack of radar and loran (long range radio navigation system) in respect of a vessel navigating

151 **Bradely v Federal S.S.Co** [1927] Lloyds. 395

152 See also The M.S. Radio Installations Regs 1981 (1980 Amended). All ships in U.K. belonging to U.K. or other nations, whilst in U.K. territorial waters, of 300 tons plus must comply with the regulations and be certificated.

153 See also Regulation 3 M.S. Navigation Equipment Regulations mandatory for vessels of over 1,600 tons.

154 **The Thordoc** : **Patterson v Robinhood Mill** (1937) 58 Lloyds 33 Privy Council, *1965 :* Mandatory for the first time. s285 & s432 M.S.A. 1894 :

155 Subject to the S.O.L.A.S. Convention 1974 & the Safety Of Life At Sea Protocol 1978, radar is mandatory.

156 **The Portland Trader (President of India)** [1963] 2 Lloyds 278

in dangerous waters. There was a failure to safeguard cargo after the ship hit a reef due to the negligence of the master. The cargo of wheat was damaged by seawater and the cargo owners claimed against the shipowner under the U.S. C.O.G.S.A. 1936. The ship was initially abandoned but later salved by which time part of cargo had been lost. The court found at that time that radar was not a prerequisite for tramp steamers. The loss was due to negligence of the master, shipowner not liable.

Nautical Publications are mandatory.[157] **The Irish Spruce** [158] involved a vessel which ran aground and sank on a reef with loss of cargo. There was no loran or Decca navigator on board. Charts were out of date charts. The vessel failed to take advantage of a radio beacon indicated on up to date charts. The court held that the installation of Loran on a vessel is not a prerequisite of seaworthiness. Neither Loran nor Decca would have been of any use in the circumstances. There was no local apparatus for either of these systems to communicate with. The lack of up to date charts however was a breach of condition of seaworthiness. Thus both the shipowner and charterer liable were prima facie. However, the Charterer was protected by an indemnity by the Owner.

The Maria [159] concerned charts, light lists and navigation data. These are essential for the safety of the ship and its navigation, which would be unseaworthy without them. It is the duty of the shipowner to supply this equipment. The McFaddon prudent ship owner test applies along with the notion of the ability of the vessel to encounter the ordinary perils of the sea.

Seaworthiness and manning

What happens if the vessel is insufficiently manned for safe/effective operations? Amongst other things it was affirmed in **Hong Kong Fir** that an incompetent crew could make a ship unseaworthy. Incompetence is a question of fact not of qualifications. It was held in **Wedderburn v Bell**[160] that a vessel must have a sufficient and an efficient crew. In the event the case centred on other aspects of seaworthiness. A vessel was lost in a hurricane and the assured claimed under a marine policy. The underwriter sought to avoid the policy on the basis of un-seaworthiness. The top-gallant sails and studding were defective. However, her main sails were in good condition as was the hull. In any case, the top-sail would have been useless in a gale and so the fact that it was unserviceable did not contribute to the loss. The court held that the ship must be in all ways seaworthy. Loss of the gallant sails meant that she lost time in light breezes and had not been able to keep up with a convoy she had sailed with. If she had she would have arrived safely with the others before the storm so the policy was void. One should not loose sight of the fact that the effect of un-seaworthiness may be far more drastic in regard to marine insurance claims than in respect to other claims, since causation has to be established before damages can be recovered whereas in marine insurance the allegation of unseaworthiness is asserted as a shield to protect against a claim.

In **The Makedonia** [161] it was stated that adequate qualifications can be negated by laziness. A well qualified but lazy and ineffective crew may be next to useless rendering the vessel unseaworthy. The court considered un-seaworthiness due to inefficiency of crew, the right of under deck and or on deck cargo owners to recover their share of a salvage award from shipowners, the liability of such cargo owners to make general average contributions and the liability of ship owners for cargo jettisoned or burnt, in relation to the Canadian Water Carriage of Goods Act 1936 Art III(1). Timber was carried on board The Makedonia from Western Canada to U.K. subject to a Bill of Lading incorporating general average subject to the York I Antwerp Rules 1950. Clause 6 of the bill of lading provided that carriage and discharge be at the risk of owner with an exemption clause for negligence of servants and stevedores, irrespective of the seaworthiness of the ship. The vessel had contaminated fuel and lost power in mid Atlantic. Some deck cargo was burnt to supply auxiliary power and some cargo was jettisoned. The ship received salvage towage. The court held that the break downs were the fault of the engineer. He was not up to the job. The ship was unseaworthy from the commencement of the voyage because of the poor quality of the engineer. There was no breach of

157 The Merchant Shipping (Carriage and Nautical Publications) Rule *1975.*

158 **The Irish Spruce** [1976] 1 Lloyds 63 before the District Ct New York.)

159 **The Maria** [1937] 2 Lloyds 203,

160 **Wedderburn v Bell** [1807] 1 Kemp 170 E.R. *855*

161 **The Makedonia (cargo owners) v The Makedonia (ship owners)** [1962] 1 Lloyds 36.

seaworthiness regarding the quantity of bunkering or the condition of machinery at the time of sailing. There was no obligation to save the cargo but if saved General Average could be claimed.

Frequently, the issue regarding competence of crew and un-seaworthiness is raised in the context of the right to limit liability under International Conventions and the Merchant Shipping Acts. Since the owner's hire the crew and have duties to monitor their effectiveness the owner is privy to the state of affairs that might give rise to this form of un-seaworthiness. Legislation has in the past denied owners the right to limit liability to the statutory levels where the owner was privy to the un-seaworthiness. Such cases may be less common in the future since today intention or recklessness must now be established.

In **Standard Oil v Clanline** [162] it was held that the inefficiency of the crew which renders a vessel unseaworthy may spring from a want of instructions. A cargo claim was made in respect of a cargo subject to a bill of lading governed by the Harter Act which provided exceptions for loss due master's errors in navigation. The competence of the master to operate a turret ship was questioned in that the owners had failed to pass on the ship builder's directions for ballasting the ship. The ship capsized because too much ballast was off loaded. Could the owner limit liability and was there actual fault or privity under the M.S.A. 1894 *s503.* ? Nine years previously a sister ship was lost. The builders sent the owner instructions on ballasting but the master was never given these instructions. The court held 1) that the ship was inherently unseaworthy unless precautions taken. It was the duty of the shipowner to take such precautions. He had breached this duty and was therefore liable for loss of cargo and 2) the ship owners had failed to show loss not due to their own actual fault or privity so the owners were not able to limit liability.

In **The Empire Jamaica** [163] the court had to consider what would happen if a crew member was competent and experienced but lacked paper qualifications. Is the vessel nonetheless unseaworthy ? The case turned upon the interpretation of and the effect of a Hong Kong Ordinance. An uncertified master was appointed in breach of a Hong Kong Statutory Instrument law. However, despite his lack of paper qualifications the man was competent and hence perhaps even better than many so called qualified first mates. Jenkins J's view was that it was only a technical breach. On the other-hand, Marimons J thought that it was not a mere technical breach but still thought that it was 'Doubtful whether the breach of the regulations itself was sufficient to render unseaworthy a ship putting to sea sufficiently manned .' There was a collision between the plaintiffs vessel the Empire Jamaica and the defendant's vessel The Garoet in the Java Sea due to negligent navigation. The 2nd mate was competent. Wilmer J held that a mere breach of the regulations did not per se render the right to limitation invalid. The question was whether the owner was entitled to believe that the man was competent, which he was in this particular case.

In **Charles Goodfellow Lumber Sales** [164] the master of a vessel was not properly certificated but nonetheless it was held that the ship was seaworthy. A cargo of timber sustained loss and damage. The court canvassed a number of issues including the seaworthiness of vessel, stowage of cargo, the meaning of perils of the sea, the liability of owner and or charterer and whether the plaintiffs claim was time barred under Canadian W.C.G.A. 1952 Art III rule 6. Timber was loaded aboard The Claudette V for a voyage from Sorel to St Bride. During a storm the vessel leaked, was abandoned and subsequently towed to Burin by Salvors. The plaintiff claimed for loss of deck cargo & damaged cargo in the hold and repayment of salvage award. The shipowner claimed the loss was due to perils of the sea and thus not recoverable by the plaintiff. Whilst the master lacked proper certification it would appear that there was no statutory requirement to have a qualified master within the St Lawrence River. Dumoulin J held that the vessel was seaworthy at time of voyage. The non-certification of the master was known and accepted by the authorities. The master was not at fault when the vessel swept out beyond the confines of the St Lawrence and so the claim was dismissed.

162 **Standard Oil v Clanline** [1924] A.C. 100.

163 **The Empire Jamaica : Koninkluje Rotterdamsche Lloyd v Western S.S. Co** [1955] 2 Lloyds 109,

164 **Charles Goodfellow Lumber Sales** [1968] 2 Lloyds 383,

The level of crewing required to render a vessel seaworthy is a question of fact for each vessel and depends on a variety of factors such as the automation levels of the vessel. There are statutory manning rules contained in the Statutory Instruments on this issue. [165]

Seaworthiness and stowage

The famed Sam Plimsoll fought for seamen's rights and invented or at least instigated the introduction of the load line. This is a line painted on a ship's hull. If the vessel is overloaded the line is submerged below the waterline thus indicating that the vessel is overloaded. In 1836 there was an inquiry into the cause of loss of ships at sea and it was concluded that much of this loss was due to overloading. Plimsoll claimed that since the owner could get his investment money back through insurance, many owners would deliberately overload vessels, which were old and decrepit, hoping they would be lost at sea.

In 1875 loadlines were introduced by the government but it was effectively 'The owner's load line' since the onus was placed on the owner to determine the appropriate positioning of the load line. Consequently many owners painted the load line on the funnels of their ships. Clearly if the water reached the funnel the vessel was doomed in any case and thus the legislation was useless. In 1883 The Load line Committee made a fresh report and in 1890 Load lines set by the Board of Trade were made compulsory. In 1894 The Load line Rules were established. In 1930 there was an International Load line Conference resulting in the 1932 Convention Nol which is embodied today in The M.S. (Safety and Load line) Act 1967. See also the 1966 Load Line Convention No2 and The 1967 M.S. Load line Act. where sections 2 & 3 are especially important. By s4(2)(b) M.S. 1967. There are penal sanctions for failing to comply with the Load Line regulations.

The court in **St John Shipping v Joseph** [166] observed that whilst is a standard fine for breach of load line regulations plus an additional fine for extra profit earned through the carriage of freight resulting from loading the vessel to a point beyond the load line limits a breach of the load line regulations does not invalidate the contract on the grounds of illegality. A foreign vessel was overloaded and the master was convicted and fined by a British Court on arrival in U.K. Part of the freight was withheld by cargo owners and the owners claimed for the balance of freight. Was the claim enforceable under s44 & 57 M.S.A. 1932 (Safety & Load Line Conventions)? The court held that the contract was not void for illegality. To mount an action the plaintiff has to show he delivered the goods in a good condition, which he had done, not that they had carried goods in an overloaded vessel.

The answer to the question as to whether or not an overloaded vessel is seaworthy seems to depend on the degree of overloading and its actual effect on the seaworthiness of the vessel, rather than simply on the mere fact that the vessel is overloaded contrary to the loa4ing regulations contained in the SOLAS Convention.

165 eg The 1980 Maritime Certificate of Deck Officers; the M.C.D. of Marine Personnel 1981. under 543 M.S.A. 1970; The M.S.Radio Instruments regs 26 1980. Regarding Deck Ratings see Notice M 798 April 1977 whereby the levels are flexible and determined by the Department of Trade for each vessel.

166 **St John Shipping v Joseph** [1956] 2 Lloyds 413,