The Importance of Seaworthiness

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INTRODUCTION.

The importance of Seaworthiness [1] appears at first sight to be self evident. An unseaworthy ship is a potential danger to life. To operate an unseaworthy vessel is to invite loss or damage to cargo and damage to the environment. Whilst the sea has the capacity to overwhelm any vessel at sea it should be incumbent on those that ply the maritime trade to ensure, as much as is humanly possible, that before a vessel is sent to sea, it is fit for its purpose. Logic must dictate that those who fail to satisfy the legal requirements deserve to bear the consequences of such failure. The duty to provide a seaworthy vessel should be a deterrent, promoting safe use of the sea and should provide compensation for those who innocently suffer loss in consequence of a breach of the duty. Those who place their lives and property in the hands of others, for the purpose of a maritime adventure, should be suitably protected by the legal requirement that all vessels be seaworthy. By such reasoning the need for and the importance of "Seaworthiness" is proven.

Reality is somewhat different from this idealised view of seaworthiness. A large body of law has been developed by the courts and by legislators over the last three centuries. The scope of Seaworthiness is not self evident. The legal rules defining the issues that fall under the umbrella of Seaworthiness are technical and complicated. Parties to contracts frequently specify duties which may or may not be covered by seaworthiness, in order to inject a degree of certainty into their relations. On times legal requirements are imposed by the law whilst at other times the parties are free to determine who must bear the consequences of unseaworthiness or the circumstances when unseaworthiness will or will not attract liability. It is wise to insert terms in a contract to clarify the legal relationship. Furthermore, unseaworthiness can have serious consequences for marine insurance claims.

Charterparties, contracts for the carriage of goods and bills of lading have inevitably become highly detailed documents, specifying the rights and duties of the relevant parties. Much that potentially falls within the scope of seaworthiness is specified within the documents. It is not possible however to cover every conceivable eventuality in such documents. When an event occurs that is not covered by the terms of the contract seaworthiness is likely to be at least one of the ports of call for litigants. Seaworthiness certainly provides a tool for dispute settlement. It is a legal hazard the participants must navigate around. The extent to which Seaworthiness acts as a deterrent to reckless behaviour or protects the innocent party is less clear. Even when the scope of the duty and the allocation of responsibilities are clear the courts still have to deal with causation. Recourse to the law is an uncertain business. This paper seeks to set out the parameters of seaworthiness and evaluate its importance at the present time.

DEVELOPMENT OF THE LEGAL CONCEPT OF SEAWORTHINESS.

The ship owner who is also the captain of a vessel should need little legal incentive to do everything possible to safeguard his own life and that of his crew. Likewise he would wish to protect his financial investment in the vessel or any other vessels that he might own. If the ship owner also owns the cargo a similar concern for the cargo would apply. The only exception might be where the pursuit of profit tempts a ship owner to throw caution to the wind and take unacceptable risks. No law could provide against the human risk factor, but that apart the ship owner did not in such situations need any legal incentive to take care. There was no need at that stage for the law to develop the notion of Seaworthiness. As far back as the fourteenth century,[2] the courts had to deal with the problem of ensuring that carriers took proper care of their clients' cargo. English Law developed the notion of the common carrier whereby in the absence of Act of God, King's Enemies and inherent vice in cargo, liability for any damage to cargo carried on board a vessel rested with the ship owner, provided the vessel operated as a common carrier.[3] Again there was no pressing need for the notion of Seaworthiness to protect cargo owners' interests.

[1] For the purposes of clarity and simplicity the term seaworthy is used in this paper to denote the condition of a vessel as being seaworthy. Seaworthiness is used to denote the legal requirement to furnish a seaworthy vessel. The term "unseaworthiness" is used to denote a breach of the legal duty to furnish a seaworthy vessel and unseaworthy represents the condition of the vessel.

[2] **The Humber Ferryman** case (1348) 22 YB 22 Liber Assisarum N041 f.94. A.D.Hughes, Casebook on Carriage of Goods By Sea. Blackstone 1994. p4.

[3] **Forward v Pittard** (1785)1 TR 27; **Coggs v Bernard** (1703)2 Ld Raym 909.

The developments of lucrative trades whereby the profits from successful voyages outweighed occasional losses, charterparties which placed the responsibility for loss of a vessel on the charterer, the availability of insurance and the legal ability to exclude liability for damage to cargo as an uncommon carrier[4] altered this state of affairs. The concept of seaworthiness was developed by the courts to place a legal duty on ship owners and carriers to furnish a vessel fit for its purpose.

The courts have variously described the duty in the context of the issue at hand. The search for a single all embracing definition of Seaworthiness has proved elusive. This is because, whilst definitions of seaworthiness in relation to marine insurance, carriage of goods and simple and demise charterparties, which may be further subdivided into time and voyage charterparties, contain general principles which are interchangeable, the context in which the definition is provided means that certain features are restricted to application in that field alone.[5]

The result is that Seaworthiness is a highly technical concept. Assessing the importance of Seaworthiness is far from straight forward. The number of disputes evidenced by the Lloyd's Law Reports since 1989 involving Seaworthiness testify to the fact that Seaworthiness continues to play an important role up to the present time.

SAFETY

The development of the legal notion of seaworthiness may, by providing an incentive to furnish a seaworthy vessel have contributed to safety of life at sea but seaworthiness is a much narrower concept than that of safety. International Conventions and legislation[6] promoting safety of life at sea now govern this area and detailed consideration of these provisions is beyond the scope of this paper. However, seaworthiness has had an impact on the development of the right to limit liability for maritime losses and pollution.[7]

INSURANCE.

Seaworthiness played an important part in the development of marine insurance. A claim to recover on a marine insurance policy for loss or damage to a vessel or for loss and damage to cargo may be jeopardised if the vessel concerned was unseaworthy. The Marine Insurance Act 1906, s39 implies a statutory warranty of seaworthiness of a ship into marine insurance policies.

The Marine Insurance Act 1906 s39

(1) In a voyage po7icy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

(2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

(3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of the stage.

(4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured

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

The Marine Insurance Act 1906 s40 provides in respect of goods that

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

(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.

4 **Liver Alkali Co. v Johnson** (1874) LR Ex 338; **Paterson Steamship Ltd v Canadian Cooperative Wheat Producers** [1934] AC 538.

5 Arnould's Law of Marine Insurance and Average. 16th edn (London, 1981) para 738 ; R.White, The Human Factor in Unseaworthiness Claims [1995] LMCLQ 221 at 222 ; Human Unseaworthiness [1996] LMCLO 24.

6 Merchant Shipping Acts and various statutory instruments.

7 See below under the heading of Limitation of Liability p25 et seq.

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Regarding policies in respect of voyages several features emerge. Statute introduces the term into the insurance contract. The parties do not have to do anything to incorporate the term, though it is possible to expressly exclude it,[8] or to waive the breach in the absence of privity of unseaworthiness or unfitness of the vessel by the assured for example clause 5.2. Institute Cargo Clauses.

The duty is to provide a vessel which is fit for its purpose. A number of purposes are set out but specifically, fitness relates to the ability to encounter the ordinary perils of the seas of the adventure insured under s39. Again under s40(2) fitness relates specifically to the ability to carry goods safely. These provisions neatly provide the basis of the notion that Seaworthiness includes cargoworthiness and is equally applicable to the other fields considered below in relation to Seaworthiness.

The duty attaches at the commencement of the voyage and in the absence of contractual provisions to the contrary is strict. The vessel must be seaworthy. Best efforts to ensure the vessel is seaworthy do not displace the duty. Extraordinary events however do not have to be guarded against. The standard required for a vessel to be seaworthy is relative, not absolute.[9]

The effect of a breach of the warranty of Seaworthiness firmly establishes the importance of Unseaworthiness in respect of marine insurance. The policy is avoided and the assured cannot recover for his losses.

Marine Insurance Act 1906. s33

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

Regarding time policies there is no warranty of Seaworthiness as such. The effect of the Marine Insurance Act 1906 s39(5) is that if the vessel was unseaworthy when it sailed and the assured actually or constructively knew of that unseaworthy state the insurer is not liable for loss due to unseaworthiness. Losses caused by other perils covered by the policy may nonetheless be recovered by the assured. This can be seen in **The Star Sea** [1995] 1 Lloyd's Rep 651. The vessel was destroyed by fire. Underwriters resisted the claim on the basis of unseaworthiness of the vessel with the privity of the assured. The chief engineer had cut a pipe rendering the emergency fire pump useless. The master did not know how to use the C02 fire suppression system effectively. The court held that the master was the alter ego of the owner in the circumstances of the case and that his lack of knowledge of how to extinguish the engine room fire amounted to unseaworthiness. The unseaworthiness of the vessel caused the additional loss suffered because of the failure to use the fire fighting system properly. This additional loss could not be recovered under the policy. Loss suffered prior to the inept actions of the master could be recovered.

Where an insurer seeks to avoid payment on a claim on the basis of unseaworthiness he has to prove that unseaworthiness.[10] Where the facts appear to speak for themselves in that there is no immediate evidence pointing to any other cause of the loss but unseaworthiness, the doctrine of *Res Ipsa Loquitur* can shift the evidential burden to the assured who then has to displace the presumption that the vessel was unseaworthy.[11]

The failure of an underwriter to establish Unseaworthiness is no guarantee of success however. The assured also has to show that a loss is due to a peril insured against. Even if an initial presumption of Unseaworthiness is displaced, in the absence of proof of how the loss actually occurred a claim will fail. This is demonstrated vividly by **The Marel** [1994] 1 Lloyd's Rep 624. The Marel sank off the coast of Spain. The crew claimed to have heard a bump followed by which water started to enter the vessel. Ultrasonic tests had been carried out on the shell plating prior to sailing. Despite the failure of the underwriters to establish Unseaworthiness, the owners had also failed to prove to the court that there had been a collision or that the vessel was lost due to a peril of the sea. The assured could not recover on the policy.

Unseaworthiness continues to be a powerful defence tool for the insurer in marine insurance. The three crucial issues regarding Seaworthiness in marine insurance centre around the burden of proof as to whether or not a vessel was unseaworthy regarding voyage policies ; causation, whether or not the cause of a loss

8 **Cantiere Meccanico v Janson** [1912] 3 KB 452.

9 E.R. Hardy Ivamy. Chalmer's Marine Insurance Act 1906. Butterworths p57.

10 **Parker v Potts** [1815] 3 Dow 23. E.R.Ivamy. Manne Insurance 4th edn. Butterworths. p298.

11 **Pickup v Thomas and Mersey Marine Insurance Co Ltd** (1878)3 OBD 594.

falls within the definitions of Unseaworthiness and uncargoworthiness as set out in the Marine Insurance Act 1906 and clauses of the marine insurance policy and knowledge of such Unseaworthiness where applicable regarding time and cargo policies. As such, the outcome of a dispute is far from certain and depends largely on a finding of fact by the trial court. Unseaworthiness is often alleged as one of several grounds for resisting a claim. The existence of the defence increases the likelihood of disputes going to court since the chance that such a defence might succeed often makes it worthwhile resisting a claim. At the least it affords the insurer a valuable bargaining chip when negotiating a settlement.

Arguably, the paucity of reported marine insurance cases in recent times where unseaworthiness has been the central issue could indicate that the duty to furnish a seaworthy vessel is heeded by owners, operators and carriers.[12] This could be construed as evidence of the continuing importance of Seaworthiness in relation to marine insurance.

SHIPOWNER / CHARTERER RELATIONSHIPS[13]

In the absence of provisions to the contrary,[14] the common law implies a term into charterparties that the vessel so chartered be seaworthy.[15]

The fact that shipowners are permitted to exclude liability for Seaworthiness in charterparties[16] appears to undermine the importance of Seaworthiness. There is a justification for retaining the right to exclude the implied term. Arguably, neither shipowners nor charterers dominate the market.[17] The freedom to contract on whatsoever terms that the parties wish is central to the establishment of a free open competitive industry. Each party is free to assess the financial risks they wish to expose themselves to.

This rationale appears to be borne out by the fact that many standard form charterparties do not seek to exclude the implied term that the vessel be seaworthy.[18] The prevailing economic situation and the number of suitable vessels available at any particular time and in any particular trade are likely to affect the bargaining power of the parties and therefore the importance or otherwise of Seaworthiness. The law has adopted a paternalistic approach to carrier / cargo owner relationships but has generally steered away from that course of action in relation to shipowners and charterers. There appears to be no compelling reason for the law to alter the balance of bargaining power as between shipowner and charterer, though clearly there may well be times when market conditions disadvantage charterers. It cannot be said however that shipowners always have the upper hand and can therefore dictate the terms and conditions of contracts. Nor

12 **The Mare** [1994] 1 Lloyds Rep 624; **The Star Sea** [1995] 1 Lloyds Rep 651.

13 Allocation of responsibility for cargo, as between shipowner and charterer, is considered below under the heading of cargo Interests p16 et seq.

14 All contracts of carnage subject to the H & H.V.R. automatically incorporate the convention model of Seaworthiness. **Lipton v Jescott Steamers** (1895) 1 Corn. Cas; and see Scrutton on Charterparties. 19 edn. Sweet & Maxwell p80 & p201

15 **Steel v Stateline Steamship Co**. (1877) 3 App. cas. 72.

16 C.O.G.S.A. 1971 Art 1(b). 'contract of carriage applies only to contract of carriage covered by a bill of lading .....' and Art VI. 'Notwithstanding the provisions of the preceding articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligations as to seaworthiness so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodies in a receipt which shall be a non-negotiable document and shall be marked as such. Any agreement so entered into shall have full legal effect. Provided that this artiole shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the charterer or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify special agreement.

17 **The Chicuma** [1981] 1 Lloyd's Rep 371. Per Lord Bridge of Harwich ' ... It has often been pointed out that shipowners and charterers bargain at arm's length. Neither class has such a preponderance of bargaining power as to be in a position to oppress the other." President of India per Lord Goff of Chievely .... It must not be forgotten that a charter-party is netlike legislation, forced upon parties against their wills; it is bargained for, and if any particular provision is perceived to favour one or other party, that can be taken into account when negotiating the contract consideration"...'

18 eg clause 13 BALTIME 1939 retains liability for damage caused by unseaworthiness where there is an absence of due diligence by the shipowner.

is the outlook of the charterer necessarily that stark when liability for unseaworthiness is excluded since the effect of other terms in the charterparty that require the shipowner to maintain the vessel in working order,[19] to supply a vessel that fulfils specified requirements[20] and off hire clauses,[21] must be taken into account.

As observed above, the law has chosen to impose seaworthiness conditions on carriers dealing with cargo owners.[22] A shipowner may find therefore that excluding liability for Unseaworthiness in relation to the charterer still leaves him exposed to liability to the cargo owner. In order to protect himself from liability to the cargo owner the shipowner can also negotiate a demise clause whereby bills of lading are issued by the charterer in the charterer's name and cargo owners are obliged to enter suit against the charterer and not the shipowner.[23] If this objective is to be fulfilled care must be taken to adopt effective clauses in the charterparty to shift that liability. If bills of lading issued by a charterer do not reflect the charterparty terms the shipowner may then recover any monies paid out in damages to cargo owners from the charterer.[24]

A shipowner should be wary of leaving the charterer to achieve this objective by incorporating terms into bills of lading since poor draftsmanship may leave the shipowner exposed to liability. **The Mahkutai** [1996] 2 Lloyd's Rep 1. P.C.. 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(ii) 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(ii), the Himalaya Clause, was not effective to incorporate clause 19, the jurisdiction clause. The claim for damages for loss caused either by lack of care of the cargo by the shipowner or what amounted to unseaworthiness could be pursued.

In charterparties which exclude liability for Seaworthiness and contain an effective demise clause[25] Seaworthiness has little importance whatsoever to the shipowner / charterer relationship. The shipowner nonetheless still has a continuing interest in the condition of the vessel. In particular charterparties can contain terms regarding the condition of the vessel when returned to the owner. It would be wrong to parallel these requirements with those of Seaworthiness but the interplay between the two notions is interesting. In **The Griparion** [1994] 1 Lloyd's 533 bareboat charterers returned the vessel to the owners stating that it had become unseaworthy. The cost of repairs needed were disproportionate to the value of the vessel. The time required to carry out the repairs would consume a significant proportion of the outstanding time left on the hire period of the charterparty. In the circumstances the charterer claimed that the charterparty was frustrated. The owners treated redelivery as repudiation of the charterparty. The charterers further claimed that the contract was procured by fraud. Repair costs would have been $lm US. Under the prevailing market the vessel could have barely achieved a balance between operational costs and profit. The court held that the charterer had not established that the charterparty was procured by fraud. The charterparty excluded all liability. The charterer could not claim frustration due to unseaworthiness. The charterer was ordered to pay damages in lieu of hire.

[19] eg clause 1 TANKERVOY 87. condition of vessel.
[20] eg clause 12 Inert Gas System BEEPEEVOY 3.
[21] eg clause 11 BALTIME 1939.
[22] footnotes 13 & 14, and see p16 below under cargo interests..
[23] see **The Caspiana** [1957] Ac 149: **The Berkshire** [197411 Lloyd's Rep 185; **The Boston City** [1895] 2 Q.B. 282; **Aries Tanker corporation v Total Transport Ltd** [19771 1 W.L.R. 185; **Elder Dempster v Patterson, Zochonis & Co [**1924] A.C. 522**; The Oakhampton** [1913] Probate 137. Demise clauses are more common regarding time charterparties.
[24] **The Boston City** [1895] 2 Q.B. 282 is an example of a failure to insert a demise clause in the bill of lading.
[25] The effects of strict liability regimes and the Hamburg Rules are not considered here. See also footnote 23 supra regarding demise clauses.

Seaworthiness impacts differently on time and voyage charterparties, reflecting the nature of the contractual obligations undertaken in each form of charterparty. Whilst broad definitions of seaworthiness apply to both forms of charterparty, the scope of the obligations, the time and duration of the obligation and the consequences of breach are not identical. Therefore, the importance of seaworthiness in respect of voyage and time charterparties differs and must therefore be considered separately.

VOYAGE CHARTERPARTIES

Voyage charterparties frequently contain an express clause requiring that the chartered vessel be 'tight, staunch and strong and in every way fit for the voyage.' This refers according to **Seville Sulphur Co v Colvils** (1888) 15 R.See.Cas (4th) 616 to the preliminary voyage to the port of loading, not the contract voyage from port of loading to port of discharge. Even in the absence of such a provision other requirements such as the class of the vessel,[26] reasonable dispatch[27] and cancellation clauses stipulating final permissible dates for loading[28] can achieve a similar result.

The Kriti Rex [1996] 2 Lloyd's Rep 171. 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 Toma's, Guatemala. The engine broke down during the voyage. The vessel went to Puerto Corte's as a port of refuge and the master declared general average. Fyffes had to make alternative arrangements for shipment of the bananas at Santo Toma's and because of deterioration in the condition of the bananas already aboard eventually donated them to the Honduran Red Cross. A sale was not possible because there was no local market for the bananas and the bananas 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 Toma's 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

The common law implied term in respect of seaworthiness governs the voyage from port of loading to port of discharge[29] in voyage charterparties and has to be satisfied at the time that the vessel commences the voyage.[30] It is not a continuing duty in that there is no breach of the term if the vessel becomes unseaworthy after commencement of the voyage. To hold otherwise would be impracticable since fortuitous events that occur during a voyage can cause damage to a vessel. No useful purpose would be served by holding the shipowner responsible for such occurrences. The exception to this rule, if it truly be an exception, is that where a voyage is split up into several stages, with the vessel calling into a number of ports before reaching the port of final destination, each stage of the voyage can be treated as a separate voyage for the purposes of seaworthiness and the vessel must be seaworthy at the commencement of each stage.[31]

[26] eg clause 1 BEEPEEVOY 3.

[27] **McAndrew v Adams** (1834)1 Bing N.c.; clause 3 BEEPEEVOY 3 line 41... Thereupon the Vessel shall proceed with such cargo at a speed which the Owners undertake shall be ____ knots

[28] eg clause 17 BEEPEEVOY 3 line 253; For the effect of delivering after the cancellation date see **The Mihalis Angelos** [1971]1 Q.B. 164 albeit that this concerned a time charterparty.

[29] **Steel v Stateline SS Co**. (1877) 3 App. Cas. 72 ; **Compagnie Algerienne de Meunerie v Katana** [1960] 1 Lloyd's Rep 132.

[30] **Snia Societa v Suzuki** (1924) 29 Com. Cas. 284.

[31] **Reed v Page** [1927] 1 K.B. 743.

A breach of the term only occurs after sailing where the unseaworthy condition existed at the time of sailing and continued to exist up to the time that the harm for which the charterer seeks compensation occurred. There is no requirement that the breach was known by the charterer at the time of sailing. Indeed, if the charterer knew of the breach at that time and did nothing about it the court can treat the inaction as a waiver of the breach and the charterer can lose the right to claim damages.[32] Usually therefore the unseaworthy condition of the vessel at the commencement of the voyage is latent and takes the form of a hidden problem or unperceived danger.

If a charterparty contains an express clause couched in terms of due diligence[33] to furnish a seaworthy vessel the plaintiff must prove the absence of due diligence in order to recover damages. **The Theodegmon** [1989] 2 Lloyd's Rep 52. The vessel loaded a cargo of crude oil at Orinoco. The laden vessel stranded. The court had to decide whether the cause of the stranding which resulted in loss and expense to the plaintiff was due to malfunctioning steering gear which was in turn attributable to a lack of due diligence under the Hague Rules or inappropriate orders by the pilot. The court held that unseaworthiness caused the stranding. The defendants had failed to establish that there was no absence of due diligence on their behalf. The plaintiff's claim succeeded.

Even where the plaintiff proves Unseaworthiness and the absence of due diligence he must also establish a causative link between that absence of due diligence and the loss. **The Yamatogawa** [1990] 2 Lloyd's Rep 39. The vessel sailed with an unknown defect in its reduction gear. The vessel stopped in the East China Sea to repair a lube oil pump coupling. When the vessel's engine restarted the propeller would not turn. Salvage and G.A. charges were incurred towing the vessel to Singapore. Unseaworthiness and a failure to exercise due diligence were admitted. Hobshouse J. in the Commercial Court considered whether or not it would have made any difference if due diligence had been exercised. He found that the defect would not have been detected without dismantling the reduction gear which was not called for by good engineering practice. In the event therefore the failure to exercise due diligence did not cause the breakdown and the claim for damages failed.

CONSEQUENCES OF BREACH

Where a vessel is delivered to the port of loading in an unseaworthy condition a voyage charterer may wish to refuse to take delivery of the vessel and treat the breach as bringing the charterparty to an end.[34] Whether or not this option is available to the charterer depends on how unseaworthy the vessel is and how long it is likely to take to restore the vessel to a seaworthy condition. Similarly, a voyage charterer is entitled to refuse to load an unseaworthy or uncargoworthy vessel, at least until it is rendered seaworthy or cargoworthy by the shipowner.[35] Clearly, where it is not possible to return the vessel to a seaworthy or cargo worthy state the charterer can reject the vessel and he is under no obligation to load the vessel. Rejection of the vessel must be on the grounds that the vessel cannot fulfil the contractual voyage within a reasonable time scale due to unseaworthiness.[36] What the courts will or will not consider to be 'reasonable' in the circumstances of any particular case provides an unwelcome and unpredictable element of uncertainty.

A charterer may be able to can claim damages for loss suffered due to a delay in sailing brought about by the Unseaworthiness of the vessel at the port of loading.[37] The right to damages is not automatic. The purpose of damages in the law of contract is to compensate the innocent party for losses sustained by a breach of contract[38] The plaintiff must show that Unseaworthiness caused the loss.[39] Extended voyage time is likely to increase operational costs for the shipowner rather than the charterer. A shipowner cannot recover demurrage from a charterer for delay occasioned by the shipowner himself.[40] The most common forms of

[32] **Fraser v Telegraph Construction & Maintenance Co (**1872) L.R. 7 OB 566; **Pust v Dowie** (1864) 5 B & S20.

[33] as where the charterparty incorporates the Hague or Hague-Visby Rules or like terms.

[34] **Stanton v Richardson** (1874) L.R. 9 c.P. 390.; **The Hongkong Fir** [19621 2 Q.B. 26; **The Peaceventure** considered p21 below.

[35] **Cargo Per Maori King v Hughes** [18951 2 Q.B. 550.

[36] **McAndrew v Adams** (1834)1 Bing N.c. 29.

[37] **Tattersall V National S.S. Co**. [1884) 12 Q.B.D. 297; see also exceptions for delay such as Clause 32(a) SHELLVOY 5 commencing line 362.

[38] **Hadley v Baxendale** (1854)9 Exch 341; **Victoria Laundry (Windsor) Ltd V Newman Industries Ltd** [1949)2 KB 528.

[39] **The Europa** (1908) Probate 84;

[40] **Abrahams v Herbert Reiach Ltd** [1922)1 KB 477.

loss in this context occur when cargo is delivered late and the carrier has to pay compensation to a shipper for late delivery,[41] or, the market price of goods is adversely affected by late delivery.[42] This is quite common in fluctuating commodity markets. There are equally times when the charterer suffers no loss because of unseaworthiness and cannot therefore recover substantial damages.[43]

TIME CHARTERPARTIES

It is more difficult for a time charterer to reject a vessel on the grounds of unseaworthiness. The courts have adopted the strategy of treating Seaworthiness as an innominate term.[44] The parties must wait and see how serious the consequences of the breach are. If the breach deprives the charter of its commercial purpose the charterparty may be terminated because of a breach of condition. If the breach is minor, it is treated as a breach of warranty. The innocent party can recover damages for the breach. Only a vessel which is in every respects unseaworthy and cannot be rendered seaworthy or is incapable of carrying the cargo that it has been specifically contracted to carry can be safely rejected out of hand by a charterer. These are likely to the exceptions rather than the rule. Most vessels can be repaired. The central issue therefore is how long it will take to repair relative to the length of the charterparty. The shorter the charter period and the longer the anticipated repair time the more likely it is that the vessel may be rejected.

The difficulty for the charterer is that he may be placed in the position of not knowing how long it will actually take for the vessel to become available. The wait and see principle means that the charterer and the courts can better judge the seriousness of the breach with hindsight, after the event. If the charterer repudiates the charter in anticipation of a serious breach by the shipowner which does not then materialise the charterer will in turn be in breach to contract. The charterer will have to account to the shipowner for that breach of contract.

The fact that a vessel is unseaworthy or uncargoworthy may or may not be the shipowner's fault. In such circumstances the shipowner may seek to rely on the doctrine of frustration.[45] The same principles apply to the non-availability of a vessel, as for instance where a vessel is lost at sea after the contract has been made. The significance of a shipowner raising the defence of frustration is that if successful the contract is frustrated. The contract is terminated. Damages for breach of contract are not available.[46] In order to successfully plead frustration the shipowner must demonstrate that the frustrating event has not been occasioned by any wrongdoing on the shipowner's part.[47] Many contracts will contain a *force majeure* clause relieving the shipowner for liability for specified events[48] Such a clause can limit the scope of legal action by the charterer for unseaworthiness. Again whether a charterparty contains such a clause and the breadth of the clause will depend on the standard terms upon which the parties contract and the bargaining strength of each of the parties to the contract.

Where the parties do not become aware of the unseaworthy condition of a vessel until some time after it has sailed it is normally not possible to repudiate the charterparty. **Snia Societa v Suzuki** (1924) 29 Com Cas 284 is an exception to the rule. The vessel kept on shedding its propellers over an extended period and had to be towed into port several times. The court allowed the charterer to repudiate the contract. Where a vessel is lost at sea due to unseaworthiness, the contract is not repudiated. Clearly further performance is not possible. The shipowner is judged to have breached the contract and in the terms to the contrary the shipowner has to pay the charterer damages to compensate for losses suffered.

41 **The Ardennes** [1951]1 K.B. 55.

42 **The Heron II** [1969] 1 AC 350.

43 **British Columbia Co. v Nettleship** (1868) L.R. 3 C.P. 499. On use of 'loss of right to reject due to false statements in a bill of lading enabling full recovery of sale price from seller see **Kwei Tek Chao v British Traders & Shippers Ltd** [1954] 2 OB 459.

44 **Hongkong Fir Shipping Co. v Kawasaki Kisen Kaisha** [1962] 2 QB 26.

45 **Joseph Constantine Steamship Line Ltd. v Imperial Smelting Corporation Ltd.** [1942] AC 154; See in general Schmithoff's Export Trade 10th edn. Stevens. Chapter 12

46 Per Lord Simon, **Joseph Constantine Steamship Line Ltd. v Imperial Smelting Corporation Ltd.** [1942] QC at 163 When frustration in the legal sense occurs, it does not merely provide one party with a defence in an action brought by the other. It kills the contract itself and discharges both parties automatically.' ; **Hir Ji Mulji v Cheong Yue S.S. Co Ltd** [1926] AC 492.

47 **Paul Wilson & Co. A/S v Partenreederi Hannah Blumenthal** [1983] 1 A.C. 854.

48 eg **The Marine Star** [1993] 1 Lloyd's Rep 329 though in the circumstances it did not cover non-availability of the vessel because the defendant chose to employ it elsewhere. This was self induced frustration.

As between time charterer and shipowner clauses such as those dealing with the payment of hire[49] and off hire provisions[50] tend to be of more importance than Seaworthiness. Clauses regarding the maintenance of the vessel[51] firmly place the costs of reinstating an unseaworthy vessel on the shipowner.

ANTICIPATORY BREACH

There are times when a shipowner becomes aware, at some time before the due date for delivery of a vessel to a charterer, that he cannot or may not be able to fulfil the obligation. Perhaps the vessel is lost at sea, requires major repairs or for some other reason will not be available. Where the vessel is unseaworthy and needs extensive repairs the shipowner has to choose whether to notify the charterer in advance or say nothing in the hope that by the due date the vessel will become available.

The advantage of giving advance notice is that the charterer is afforded the opportunity to take measures to mitigate the consequences of the shipowner's breach of contract. Provided there is a ready market of available shipping at the charterer's disposal the charterer will only suffer minor financial loss. Damages will be kept to a minimum. There is a legal duty to mitigate losses so the charterer cannot take the option of doing nothing.[52] The court will estimate the amount of money that a charterer would have saved by mitigating his losses and deduct that sum from any damages that it might award to the charterer.[53] The disadvantage of giving advance notice of the shipowner's inability to fulfil the contract is that if the vessel does become available, the shipowner will have already lost the charter and must pay unnecessary damages to the charterer. However, damages would still be considerably less than those payable if on the due date the vessel could not be delivered and the shipowner were to find himself in breach of contract at that time.

A charterer may similarly find himself in the position where he anticipates that the shipowner will not be able to fulfil his contractual obligations either because his vessel will not be available or the vessel would not be capable of carrying the cargo for which it has been chartered. If the shipowner does not choose to seek to settle the affair in advance the charterer may be tempted to take action himself. Whilst this might appear at first sight to be good business sense, in that the charterer can make alternative arrangements to avoid incurring liability to third parties which could flow from the non-delivery of the vessel or its inability to carry the cargo, there are dangers inherent in pre-emptive action.

In **The Mihalis Angelos** [1971] 1 Q.B. 164. a charterer became aware of the fact that the shipowner could not deliver the vessel on time. The charterparty contained a cancellation date which the shipowner would clearly not be able to meet. The charterer made other arrangements and told the shipowner he would no longer require the vessel. The shipowner repaid the charterer's efforts to let him off the hook, by suing for anticipatory repudiatory breach of contract. The court found for the shipowner. The victory was somewhat phyric in that the shipowner was awarded nominal damages and legal costs were awarded against him. The risk however that a charterer who commits an anticipatory repudiatory breach of contract takes is that the shipowner is entitled to keep the contract alive until the due date of performance. If the charterer incorrectly anticipates that a vessel will not be seaworthy or cargo worthy unwise pre-emptive action could cost the charterer dear. This appears to have been the outcome in **The Santa Clara** [1993] 2 Lloyd's Rep 301. The parties contracted for the loading of a cargo between 17th March. On the 8th March the buyer notified the seller that since loading would not be completed until the 9th the seller had committed a breach of condition. The buyer elected to repudiate the contract on this basis. The seller never acknowledged the repudiation and completed loading. The vessel sailed and on the 15th March the seller resold the cargo at a loss of $lm to a third party and claimed $lm damages from the buyer. The arbitrator found that the buyer was guilty of an anticipatory breach of contract which was not accepted by the seller and awarded the seller $lm compensation. The buyer's appeal to the court failed.

[49] **The Laconia** [1977] 1 Lloyd's Rep 315.

[50] Off hire clauses cover a wide range of situations and depend on the specific wording of each clause. See **Beatson v Schank** (1803) East 233 on deficiency of crew and sickness; **Giertsen v Turnbull** (1908)16 S.L.T. 250 ; **Cosmos Bulk Transport v China** [1978] 1 Lloyd's Rep 52 ; **Adelaide S.S. Co. v R** [1923] 29 Corn. Cas. 165/169 : **The Apollo** [1978] 1 Lloyd's Rep 206 **Hogarth v Miller** (1891) AC 48 **The Berge Sund** [1992] 1 Lloyd's Rep 460, amongst others on break down of machinery and various other causes preventing working of a vessel.

[51] eg Clause 3 line 44 SHELLTIME 4

[52] **British Westinghouse Electric and Manufacturing Co. v Underground Electric Railway Co of London** [1912] AC 673.

[53] **Harries v Edmunds** (1845)1 Car & Kir 686, NP.

If the shipowner has committed a repudiatory breach of contract there is no problem. The shipowner cannot then insist on keeping the contract alive. However, a guilty party cannot use his breach of contract as a method of terminating a contract without the acquiescence of the innocent party in circumstances where the innocent party can continue to fulfil contractual obligations without relying on the participation of the other party. The innocent party can refuse to accept a notice of repudiatory breach.[54] The problem for the charterer in The Santa Clara was that the arbitrator found as a fact that the charterer was the party at fault. Whilst Seaworthiness was not at issue in The Santa Clara the same principles would apply if a charterer were to give advance notice repudiating the charterparty on the basis of his expectations regarding the prospective uncargoworthiness of the vessel or anticipated non-arrival of the vessel. The shipowner can refuse to accept the repudiation and deliver the vessel to the port of loading. Provided the vessel is rendered seaworthy and cargoworthy within the legally permissible period the charterer must account to the shipowner for any losses he suffers due to the charterer's breach. The shipowner's duty to mitigate loss does not come into play unless and until the charterer refuses to accept delivery and refuses to load.

Judging by the number of disputes that have involved allegations of uncargoworthiness due to contamination of holds by previous cargoes[55] such a scenario is quite realistic. Whether or not a hold is clean and cargoworthy or not is a question of fact for the courts taking into account all the circumstances. A charterer, learning the vessel he has chartered is carrying a cargo deleterious to his own, may believe the vessel prospectively uncargoworthy if he is of the opinion that no amount of cleaning can remove traces of the existing cargo. The unsatisfactory result is that a charterer may be better advised to nonetheless load the cargo and if the contamination materialises, sue the shipowner for uncargoworthiness.

It is difficult to quantify the importance of seaworthiness in respect of the shipowner / charterer relationship. To a very large extent the relationship is governed by the terms of the contract negotiated between the parties, which in turn reflect the respective bargaining powers of the parties and the flexibility of the standard term contracts employed. The influence of Seaworthiness on the way that such terms have developed and are worded however is considerable. Those responsible for the development of new forms of charterparty need to have a very clear understanding of the requirements of the law governing Seaworthiness lest a carelessly or loosely worded contract leaves open an avenue for disputing parties to resort to the common law implied term. Charterparty terms can stipulate that the chartered vessel be seaworthy. It can specify that the standard of care to be exercised by the parties be strict or limited to due diligence. It is no easy matter to predict the outcome of litigation involving allegations of unseaworthiness. The importance of Seaworthiness to the industry is still considerable because of the wide variety of forms of contract in current use and because seaworthiness is a central principle that underpins the law governing the hire of vessels.

3rd PARTY CARGO INTERESTS NOT GOVERENED BY THE CHARTERPARTY

Whilst Seaworthiness is the most commonly used legal device for regulating the relationship between carrier and cargo owner, the law of bailment also has a continuing contribution to make towards cargo care. As discussed in the introduction, the common carrier regime did not rely on Seaworthiness to protect the cargo owner. The bailor/bailee relationship made the carrier a virtual insurer of the cargo bailed to him. The frequency with which bailment has been raised in litigation in recent times[56] provides a salutary warning to carriers and sub-carriers that the legal duties involved in the bailor/bailee relationship have not lost their potency.

At common law it was a simple enough task for a carrier to declare himself expressly or impliedly not to be a common carrier. In order to counteract such practices, the common law implies into all contracts for the carriage of goods the requirement that the carrier furnish a seaworthy ship.[57] The requirement has been said to attach to the bill of lading.[58] The duty is not however limited to bills of lading. It applies to all contracts

54 **White & Carter (Councils) v McGregor** [1962] AC 413.

55 eg **The Iron Gippsland** [1994] 1 Lloyds rep 335; **The Inowroclaw** [1989] 1 Lloyd' Rep 498; **The Marinor** [1996] 1 Lloyds Rep 301; **The Peaceventure L** [1996] 2 Lloyd's Rep 75.

56 eg **The Pioneer Container K.H.Enterprise (Cargo Owners) v Pioneer Containers (owners)** [1994] 2 All.E.R. 250. Privy Council.

57 **Notura v Henderson** (1872) LR 7 OB 225.

58 This is true to the extent that the bill of lading is the contract of carriage. Where the contract of carriage is a charterparty the bill of lading is merely evidence of the contract of carriage. Compare **Leduc & Co v Ward** [1888] QBD 475 and **The Ardennes** [1951] 1 KB 55.

for the carriage of goods by sea whatever form is adopted.[59] Nonetheless the common law allows a carrier to exclude all liability for loss or damage to cargo and thus negate the implied term as to Seaworthiness.[60] In the 19th century the balance of negotiating power favoured shipowners, who adopted the universal practice of excluding all liability.

Cargo owners sought the aid of their governments to counteract this imbalance of power. The regime ushered in by The Harter Act in the United States, emulated by The Hague Rules and updated more recently by The Hague-Visby Rules established minimum standards for the carriage of goods by sea. The common law implied form of Seaworthiness, unmodified by the requirements of the International Conventions continues to apply to cargoes a) shipped out of non-contracting states where the contract of carriage is not stated to incorporate the Convention[61] ; b) to situations where documentation does not fulfil the Convention requirements, as where a bill of lading is not issued[62]; and c) where there is no contract of carriage for the Convention terms to attach to.[63] In such circumstances the requirements of Seaworthiness apply in the absence of terms to the contrary.

The basic requirements of seaworthiness and cargoworthiness are clear. The vessel must be seaworthy at the commencement of the voyage and fit to survive the ordinary perils of the sea of the voyage to be undertaken.[64] **The Antigoni** [1991] 1 Lloyd's Rep 209. exemplifies this principle. Balance weights on the crankshaft of the ship's engine required regular inspection and had to be maintained at a specific torque. The ship's engineer failed to carry out this work. The engine broke down whilst the vessel was at sea. The vessel was towed into port. Cargo owners successfully claimed salvage and G.A. contribution against the owners on grounds of unseaworthiness.

The vessel must also be cargoworthy, that is to say suited for and in every ways fit to carry the cargo safely from port of loading to discharge.[65] Contamination of cargo by other cargo or from the residue of previous cargoes has proved to be a fruitful source of claims in respect of unseaworthiness. Thus in **The Inowroclaw** [1989] 1 Lloyd's Rep 498. coffee beans on two vessels respectively suffered damage by rain water, sea water and copra tainting. The plaintiff recovered against the owner for unseaworthiness and negligence.

Similarly in **The Iron Gippsland** [1994] 1 Lloyd's Rep 335. Aust.Ct. the vessel carried different grades of oil for different customers. The same inert gas system was used on all tanks and the plaintiff's oil was contaminated as a result. In the event the court found for the plaintiff and held that there had been a failure to properly care for the cargo. The gas system could have been isolated to service holds separately and not used in common for all holds. Liability, in the event was not based on uncargoworthiness. If however, a vessel only has a common system and separation is not possible the vessel would presumably be uncargoworthy.

Who the carrier is and therefore who the duty attaches to depends on the circumstances of the case.[66] The contract of carriage governs relationships between the charterer as carrier and independent shipper.[67] Where the bill of lading governs the relationship, the carrier may be either the shipowner or the charterer.[68] Who issues the bill of lading, shipowner or charterer and in whose name determines who is the carrier.[69] Even where the shipowner issues a bill of lading in his own name terms of the charterparty may require the charterer to indemnify the shipowner for damages paid to cargo owners.[70]

[59] **Steel v Stateline** (1877) 3 AC 72. Per Lord Blackburn ... whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship that the ship shall be fit for its purposes. That is generally expressed by saying that it shall be seaworthy....

[60] **Kopitoff v Wilson** (1876)1 QBD 377 per Field J~.... where there is no agreement to the contrary, the shipowner is, by the nature of the contract, impliedly and necessarily held to warrant that the ship is good

[61] C.O.G.S.A. 1971 Art X(c)

[62] C.O.G.S.A. 1971 sl(4)

[63] C.O.G.S.A. 1971 Art 1(b); **Heskell v Continental Express Ltd**. [1950] 1 All E.R. 1033.

[64] Steel v Stateline [18771 3 A.C. 72.

[65] **Ciampa v British India Steamship Co**. [1915] 2 K.B.

[66] see footnote 58 supra.

[67] **The Ardennes** [1951] 1 K.B. 55.

[68] **Baumwoll v Furness** [1893] AC 8; **Aries Tanker Corporation v Total Transport Ltd** [1977]1 W.L.R. 185; **The Boston City** [1895] 2 Q.B. 282.

[69] see cases referred to in footnote 68 supra.

[70] eg SHELLTIME 4 Clause 13, Bills of Lading, line 145 "Charterers hereby indemnify Owners against all consequences or liabilities that may arise."

Cargoworthiness only applies where the relationship is governed by a contract of carriage. A purchase of goods at sea may not be sufficient to invoke the principle. In **The Gudermes** [1993] 1 Lloyd's Rep p311. the plaintiff's bought a cargo of oil bound for Ravenna from Aden on board The Gudermes from the defendant shipowners. Bills of lading subject to the Hague-Visby Rules had been issued in respect of the cargo. The vessel had no heating coils and ENEL, the sub-purchasers rejected the cargo to prevent clogging underwater sealines at their terminal. The charterers and owners colluded in sending the vessel to Marta where the cargo was transhipped to the Sea Oath and then redelivered to Ravenna. The Sea Oath had heating coils. The plaintiff claimed The Gudermes was unseaworthy in that it could not maintain the temperature of the oil until discharge because of the lack of heating coils and claimed damages to cover the transhipment costs. The court was prepared to accept that in appropriate circumstances the vessel could be considered to be unseaworthy. However, the bill of lading did not govern the relationship between the parties and there was no Brandt v Liverpool implied contract either. The cargo had suffered no harm and so no action lay in tort either. In that particular case the plaintiff could not recover transhipment costs on the basis of unseaworthiness. Nonetheless, it would appear that in appropriate circumstances a vessel which is unable to discharge a cargo could be classified as an unseaworthy vessel.

Vessels today are capable of carrying large and valuable cargoes so claims for uncargoworthiness can often be for very significant sums. In **The Atlantic Emperor** [1989] 1 Lloyd's Rep 548. the principal issues in the report concern arbitration and jurisdiction. However, the substance of the claim related to uncargoworthiness and involved an action, to recover damages for contamination to cargo that occurred on loading, for £7m. Whilst the ability to limit liability may reduce the final amount payable[71] the law nonetheless provides a powerful financial incentive for carriers to make strenuous efforts to ensure that vessels are both seaworthy and cargoworthy.

INTERNATIONAL CONVENTIONS[72]

The provisions regarding seaworthiness in the Hague and Hague-Visby Rules are the same. Apart from linguistics variations there is no significant difference between the various versions adopted by signatory states under the various Carriage of Goods By Sea Acts as far as Seaworthiness is concerned. All references below are to the U.K. version of the Hague-Visby Rules incorporated into English Law by the Carriage of Goods By Sea Act 1971.

Art II C.O.G.S.A. 1971 defines the scope of the Act as follows - *Subject to the provisions of Art IV, under every contract of carriage of goods by sea the carrier, in relation to the loading handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.*

Art III C.O.G.S.A. 1971 sets out the requirements as to seaworthiness as far as the Act is concerned. It is similar to common law, in that it also covers the areas within the common law notion of cargoworthiness. **Pyrene Co. v Scindia Navigation Co**. [1954] 2 All.E.R. 158 established that the Act applies as from commencement of loading at the time when grappling hooks are attached to cargo. Art III provides

1 *The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to -*
a) make the ship seaworthy.
b) Properly man, equip and supply the ship.
c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.
2 Subject to the provisions of Art IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

C.O.G.S.A. 1971 s3 makes it clear that
"There shall not be implied in any contract for the carriage of goods by sea to which the Rules apply by virtue of this Act any absolute undertaking by the carrier of the goods to provide a seaworthy ship." This section unequivocally displaces the duties of the common carrier where the provisions of the Act apply.

The duty to provide a seaworthy vessel cannot be delegated to another person in order to escape liability. If that other person fails to exercise due diligence the shipowner is liable for that failure according to **The Muncaster Castle** [1961] AC 807 . This is restated in **The Sundancer** [1994] 1 Lloyd's Rep 183. U.S.Ct..

[71] see page 25 below under the heading Limitation of Liability.
[72] This paper concentrates on Seaworthiness under the law governing England and Wales. Therefore, the implications of The Hamburg Rules are not considered.

Sundance bought a car ferry and converted it into a luxury cruise ship. ABS, a classification society issued provisional Loadline and SOLAS safety certificates. The vessel struck an underwater rock off British Columbia. There were no valves in the grey water system and the whole of the vessel flooded and sank. The court held that the conversion was badly carried out and the vessel was unseaworthy. The owner has a non-delegable duty to furnish a seaworthy ship and could not shift liability onto the ABS who were in any case shielded from liability by Bahamian Law.

The Toledo [1995] 1 Lloyd's Rep 40 is an example of the English Courts following the same principle. The shell plating of the vessel failed because of corroded brackets. This type of damage was common in such vessels and well known to the master who did nothing about it. Seawater entered the vessel which was ultimately scuttled. The problem was not identified during classification. The court found that this was no excuse. Distortion of plates was evident and there was a lack of due diligence by the owners.

Art 111(8) prevents the parties from contracting out of the rules or of setting a lower standard.[73] Art 111(8) provides that *'Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules,[74] shall be null and void and of no effect*

Art IV C.O.G.S.A. 1971 provides (inter alia) the following exclusions from liability which also introduce the notion of due diligence.-

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

2 Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from - (inter alia)

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

b) Fire, unless caused by the actual fault or privity of the carrier.

p) Latent defects not discoverable by due diligence

q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the barrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Some aspects of due diligence are discussed above.[75] The issue continues to receive judicial attention. In **The Peaceventure L**. [1996] 2 Lloyd's Rep 75 a vessel was chartered under a Vegoilvoy voyage charterparty from Belowan to Rotterdam. 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 damages for breach of clause 1 Part II Vegoilvoy Charterparty. The charterer also claimed for breach of art III, r.1 of the Hague-Visby Rules for a failure to exercise due dilligence 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 contamination of the hold and liability attached because there had been a lack of due diligence.

Liability for certain perils such as fire damage are excluded by the Hague-Visby Rules art IV (2). However, if the cause of the excluded peril is unseaworthiness then the carrier can still be held liable for loss caused by that unseaworthiness despite the exclusion. In **The Subro Valour** [1995] 1 Lloyd's Rep 509. a vessel caught fire. Liability for fire is an excluded peril under the Hague-Visby Rules. Subsequent delays resulted in an

[73] The allocation of the duty to either the shipowner or the Charterer is perfectly permissible provided there is no attempt to set a lower standard**. The Caspiana** [1957] AC 149 but compare **The Mica** [19731 2 Lloyd's Rep 478..

[74] It is perfectly permissible to apply a higher standard.

[75] C.O.G.S.A. 1971 Art III, and see page 19 supra.

EEC restitution claim for loss of subsidy. The plaintiff also claimed transhipment costs and salvage expenses. The fire started in the upper engine room flat due to an exhaust hot spot or faulty wiring. The condition existed before the voyage and the vessel was unseaworthy. The court held that the defendant was liable since he could not establish due diligence.

The Apostolis [1996] 1 Lloyd's Rep 475. 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 vessel 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 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.

Art IV(6) places duties on the shipper in respect of dangerous cargoes. Where the dangerous cargo as opposed to the seaworthiness of the vessel causes loss the shipowner is not liable to the cargo owner, who may in turn have to compensate the carrier. Art IV(6) provides -*Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.*

These provisions echo common law duties in respect of the shipment of dangerous cargo. In **The Fiona** [1994] 2 Lloyd's Rep 506. fuel oil shipped on board the vessel gave off inflammable vapours which were ignited during sampling in preparation for discharge. Ignition was caused either by leaking heating coils or by an unearthed electric thermometer. The dangerous nature of the cargo was unknown to the shipowner. The shipper did not warn of the danger. However the court found that the dominant cause of the fire was contamination with residues from a previous cargo, rendering the vessel unseaworthy. The court held that the fuel oil contributed to the fire.

Similarly in **The Giannis NK** [1996] 1 Lloyd's Rep 577. a cargo of ground-nuts shipped at Dakar was infested with Khapra beetle. The vessel was not allowed to dock or discharge its cargo. Eventually all cargos aboard the vessel were destroyed including prior loaded cargo. The shipper was held liable to the shipowner for all losses due to shipment of dangerous cargo. The shipper failed to show that the Kapra beetles were already aboard the vessel when it arrived at Dakar and that the vessel was unseaworthy. The shipper carrier relationship was governed by s1 BLA 1855 and liability for shipping dangerous goods was not shifted to the consignee under that Act. Art X sets out the situations where the rules apply[76] and states that -
The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if -

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

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

[76] The Hague Rules rely on a clause paramount to incorporate the rules into bills of lading. See **Vita Food Products Inc v Unus Shipping Co Ltd.** [1939] 1 AC 277. As to C.O.G.S.A. 1971 and the way Art X works see **The Hollandia** [1983] 1 AC 565.

In **The Komninos S** [1991] 1 Lloyd's Rep 370. a vessel was uncargoworthy because of moisture in its holds which corroded a cargo of steel coils. The moisture was caused by a failure to clean the holds and a failure of bilge pumps. The court discussed the effects of a choice of English law clause. Art X(c) incorporates the Rules into a contract where *'the bill of lading provides that legislation of any State giving effect to them are to govern the contract'*. English law only gives effect to rules regarding shipment out of a contracting state or if the bill of lading incorporates the Rules. Thus express incorporation of the law of England and the Rules is required.

The legal consequences for damage to cargo take one of three forms under the Hague-Visby Rules. Those areas covered by the exemptions under Art IV attract no liability whatsoever for the carrier. Those areas governed by Art III and Art IV(1) where there is an absence of due diligence by the shipowner attract full liability. In respect of damage not covered by these provisions the carrier is entitled to limit his liability to the Convention rates set out under Art IV (5)(a-h).

It is impossible to conclude otherwise than that Seaworthiness, albeit in a modified form, continues to play an important role in the regulation of the relationship between carrier and cargo owner where the Hague or Hague Visby Regimes apply.

The legal consequences for damage to cargo take one of three forms under the Hague-Visby Rules. Those areas covered by the exemptions under Art IV attract no liability whatsoever for the carrier. Those areas governed by Art III and Art IV(1) where there is an absence of due diligence by the shipowner attract full liability. In respect of damage not covered by these provisions the carrier is entitled to limit his liability to the Convention rates set out under Art IV (5)(a-h). It is evident that Seaworthiness, albeit in a modified form, continues to play an important role in the regulation of the relationship between carrier and cargo owner where the Hague or Hague Visby Regimes apply.

TIME BARS

Apart from the standard statutes of limitation[77] provisions in respect of contract and tort actions, which can therefore defeat claims founded on unseaworthiness and unseaworthiness if the claimant delays his claim beyond the statutory permitted period, the Hague-Visby Rules Art 111(6) also implies a time bar which limits action for claims based on breach of the rules.

Similarly, many standard form charterparties also contain contractual time bars. Whilst such provisions might appear at first sight to be of minor technical importance and easy enough to comply with, the reports regularly testify to the fact that this is not so. The courts tend to be strict in the enforcement of contractual time bars.[78]

Litigants and their lawyers need to be aware of the importance of pursuing claims promptly in all areas of maritime law since contract and Convention time limits are considerably shorter than those areas normally covered by general practice. General practitioners who foray into the maritime sphere need to be aware of these constraints. A failure to do so can have devastating effects for claims in respect of unseaworthiness. In **The Stephanos** [1989] 1 Lloyd's Rep 652. a cargo of pre-slung rice appears to have been affected by aflatoxin, a poisonous mould. In 1986 the cargo receivers claimed against the owners for damage due to uncargoworthiness and a failure to safely care for the cargo. The owner issued a writ in 1987 against the charterers. In 1988 the owner sought a declaration on the effect of the arbitration clause in the Centrocon voyage charterparty and the time bar regarding a claim for indemnity by the charterer. The court held that the claim was time barred.

In **The Marinor** [1996] 1 Lloyd's Rep 301. a vessel was time chartered to the plaintiff for 10 years to 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."

[77] The Limitation Act 1980 s2 "An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."
The Limitation Act 1980 s5 "An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued."

[78] **The Jay Boa** [19921 2 Lloyds Rep 62; **The Leni** [1992] 2 Lloyds Rep 48; **The Zi Jiang Kou** [1991]1 Lloyds Rep 493; **Paybi v Armstel** 26.2.92. The Times

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.

LIMITATION OF LIABILITY

Even where a carrier is liable for damage caused by unseaworthiness or uncargoworthiness, whether under the common law implied term or under the Hague-Visby Regime the cargo owner may not be able to recover damages in full. On the 1.12.1986 the Convention on Limitation of Liability for Maritime Claims (The Convention) 1976 became law by virtue of Schedule 4 M.S.A. 1979. Art 1(1)&(2) permits shipowners and charterers to limit liability for claims. Art 2(1)(a) and (b) state that claims in respect of loss or damage to property and claims resulting from delay in the carriage by sea of cargo are subject to limitation of liability.

The Hague-Visby Rules system of limitation continues to apply to those areas governed by it. The right to limit under the Hague-Visby Rules in respect of seaworthiness requires that the carrier have exercised due diligence. In respect of those areas covered by Art III(2)(q) a person seeking to avail himself of the limitation rights under the Rules must show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Article 4 of the Limitation Convention governs situations where limitation is not permitted. "A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result." Article 4 replaces the limitation requirements formerly governed by the Merchant Shipping Act 1894 s503, which was also couched in terms of actual fault and privity. These were discussed in **The Erst Stefanie** [1989] 1 Lloyd's Rep 349. which concerned a Gencon voyage charterparty for the carriage of ferrosilicon from Rijeka to Rotterdam. Mr Baker a director of Sorek, the owners, regularly inspected the vessel. He did not appreciate the poor condition of the vessel's bottom plating which was defective, or 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 crew member and other crew members became seriously ill. The vessel entered three ports of refuge successively and the voyage was abandoned at the third. The charterers and owners cross claimed for damage and G.A. Arbiters found against the owners since the vessel was unseaworthy but permitted limitation of liability under s503 M.S.A. 1894 finding no actual fault or privity in Mr Baker. On appeal it was held that there was actual fault and privity by Mr Baker who could be considered to act on behalf of the governing mind and will of the corporation. Limitation was not allowed.

It is submitted that it will be far harder to defeat limitation of liability applications under the new rules. 'Intent to cause loss or recklessness with knowledge' is far harder to establish than 'actual fault or privity'. Therefore, carriers will find it easier in future to reduce the extent of their liability for the consequences of operating unseaworthy vessels.

CONCLUSION

The importance of Seaworthiness cannot be doubted. It has a fundamental role to play in the regulation of relationships between charterer and shipowner[79], between cargo owner and carrier[80] and between underwriter and assured.[81] Quantifying its significance is difficult in that its application varies as between the various relationships and much depends on the circumstances of each individual case. If nothing else, an understanding of the complexities of seaworthiness is a central ingredient of the maritime lawyer's stock in trade, and helps to ensure lawyers have an important contribution to make to the maritime industry.

79 see page 6 et seq supra and general observations on page 16.

80 see page 16 et seq supra and conclusions on page 24.

81 see page 3 et seq supra and conclusions on page 6.