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A Comparative Study on Marine Transport Contract and Marine Insurance Contract with Reference to Unseaworthiness

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Abstract

Purpose – This study analyses the excepted requirement and burden of proof of the carrier due to unseaworthiness through comparison between the marine transport contract and marine insurance contract.

Design/methodology – This study uses the legal analytical normative approach. The juridical approach involves reviewing and examining theories, concepts, legal doctrines and legislation that are related to the problems. In this study a literature analysis using academic literature and internet data is conducted.

Findings – The burden of proof in case of seaworthiness should be based on presumed fault, not proved fault. The burden of proving unseaworthiness/seaworthiness should shift to the carrier, and should be exercised before seeking the protections of the law or carriage contract. In other words, the insurer cannot escape coverage for unfitness of a vessel which arises while the vessel is at sea, which the assured could not have prevented in the exercise of due diligence. The insurer bears the burden of proving unseaworthiness. The warranty of seaworthiness is implied in hull, but not protection and indemnity policies. The 2015 Act repeals ss. 33(3) and 34 of MIA 1906. Otherwise the provisions of the MIA 1906 remain in force, including the definition of a promissory warranty and the recognition of implied warranties. There is less clarity about the position when the source of the loss occurs before the breach of warranty but the actual loss is suffered after the breach. Nonetheless, by s.10(2) of the 2015 Act the insurer appears not to be liable for any loss occurring after the breach of warranty and before there has been a remedy.

Originality/value – When unseaworthiness is identified after the sailing of the vessel, mere acceptance of the ship does not mean the party waives any claims for damages or the right to terminate the contract, provided that failure to comply with the contractual obligations is of critical importance. The burden of proof with regards to loss of damage to a cargo caused by unseaworthiness is regulated by the applicable law. For instance, under the common law, if the cargo claimant alleges that the loss or damage has been caused by unseaworthiness, then he has the burden of proof to establish the followings: (i) that the vessel was unseaworthy at the beginning of the voyage; and that, (ii) that the loss or damage has been caused by such unseaworthiness. In other words, if the warranty of seaworthiness at the inception of the voyage is breached, the breach voids the policy if the ship owner had prior knowledge of the unseaworthy condition. By contrast, knowingly permitting the vessel to break ground in an unseaworthy condition denies liability only for loss or damage proximately caused by the unseaworthiness. Such a breach does not, therefore, void the entire policy, but only serves to exonerate the insurer for loss or damage proximately caused by the unseaworthy condition.

Keywords: Burden of Proof, Marine Insurance Contract, Marine Transport Contract, MIA 1906, Unseaworthiness, 2015 Act,

JEL Classifications: F10, G22, K12, L90

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1. Introduction

The importance of seaworthiness 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. 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 marine 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 idealized view of seaworthiness. A significant portion of the law has been developed by the courts and by legislators over the last three centuries to address this area. 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. On the other hand, in common law, the obligation of the owner to provide a seaworthy ship is absolute and in the event of breach, the owner will be liable irrespective of fault. It amounts to an undertaking not merely that they should do their best to make the ship fit, but that the ship should really be fit. On the other hand, the owner is not under a duty to provide a perfect ship but merely one that is reasonably fit for the purpose intended (Wilson, 2010). It is wise to insert terms in a contract to clarify the legal relationship.

A ship's seaworthiness is one of the most basic obligations of a shipowner in maritime law, especially in marine insurance and maritime transport contracts. Many modern charter forms expressly include the provisions of the Hague Rules, Hague-Visby Rules, Hamburg Rules or Rotterdam Rules and this practice affects the operation of the implied seaworthiness obligation. Seaworthiness is considered regardless of whether it is a voyage policy or a time policy, and whether or not the policyholder or the insured is at fault for unseaworthiness. Unseaworthiness is often triggered by insurers in marine insurance laws based on either of the two legal mechanisms mentioned above. In other words, s.39(1) of the English Marine Insurance Act 1906 (hereinafter, MIA 1906), states that "in a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured." Therefore, the insurer is exempted only if it is proven that there is a lack of seaworthiness, that is, a breach of the warranty of seaworthiness. If there is a breach of the implied warranty for the ship's seaworthiness, the insurer's immunity is recognized without enquiring into the occurrence of an insurance accident due to the breach. This is in keeping with s.39(5) of the MIA, which states that "in a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness."

The threshold question, so far as the application, as far as the application of s.11 of the English Insurance Act 2015 (hereinafter, 2015 Act) to the implied warranties is concerned, is whether there are terms defining the risk as a whole. The circumstances in which these words came to be inserted in s.11 of the 2015 Act (Gilman et al., 2018). In the absence as yet of any judicial consideration of s. 11 as yet, it is difficult to form definite conclusions as how the opening words in this section are likely to be construed by the courts. However, there is little doubt that the implied warranties under discussion, in ss.39 and 40 of the MIA 1906 are to be regarded as terms defining the risk as a whole, and are, therefore excluded from the scope of s.11 of the 2015 Act, were the point to arise in any future litigation.

As a previous study on the carrier's excepted requirements and the burden of proof for

unseaworthiness, Yang, Seok-Wan (2011) analyses the burden of proof and burden-shifting scheme under s.17 of the Rotterdam Rules comparing with the Hague-Visby Rules. Yang, Seok-Wan (2014) states that this differs from the allocation commonly employed in many jurisdictions to determine fault-based liability under which the plaintiff must prove the defendant's fault as part of its affirmative case in order to recover. Song, Ok-Rial (2009) states that the high amount of limits of carrier's liability may be the obstacle for Korea to endorse this Rotterdam Rules, but it should be more carefully observed whether such move toward shipper's interest might be an international norm in maritime law area. Song, M. (2012) analyses the rules of causation under marine insurance law from the perspective of marine losses and risks. Lee, Phil-Bok (2020) analyses the maritime case study/actual claim based on ship time insurance through governing law of English Law: Korean Supreme Court Decision 2020.6.4. Docket No.2020da204049. Kwon, Kee-Hoon (2007) examines the standpoint of the burden of proof regarding unseaworthiness, and in particular, propose a rational distribution plan of the burden of proof through a critical review of the interpretation of s.789(2) of the Korean Commercial Act. Jo, Jong-Ju (2010) states that s.17 of the Rotterdam Rules expressly states how the burden of proof is allocated between cargo interests and carrier, following the complicated approach of Hague Rules, rather than the simple approach taken in the Hamburg Rules. Jo, Jong-Ju (2016) is considering the carrier's principal recourse for defending himself in most cargo claims. Ji, Sang-Gyu (2010) states that a loss is brought to the ship due to unseaworthiness of the ship and the carrier is charged to compensate the loss, the carrier should submit substantial evidence that carrier had taken every rational and necessary measures to prevent such a loss if carrier tries to be exempted from such responsibility. Choi, Jong-Hyeon (2004) analyses the Seoul District Court Decision (2002) on the exemption of liability of a carrier based on the perils of the sea defense. In this study, it is different from previous studies in analyzing the excepted requirements and burden of proof of carrier caused by unseaworthiness through comparison of marine insurance contracts and marine transport contracts. There is the 2015 Act related to the duty of care for seaworthiness.

This study seeks to set out the parameters of seaworthiness and evaluate its importance at the present time. It explores clear relations between seaworthiness and terms in causing the loss. Furthermore, it analyses the exception requirement and burden of proof of the carrier due to unseaworthiness through comparison between the marine transport contract and marine insurance contract.

2. Warranty under English Law and Continental Law

2.1. Warranty under English Law

2.1.1. The Test of Materiality

Contractual terms in English are considered conditions, warranties, or innominate. All parties will agree on how to classify each term when they start negotiating a contract (Merkin and Gürses, 2016). Traditionally, contractual terms were classified as either conditions or warranties. The category of innominate terms was created in *Hong Kong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd :* [1962] 1 All E.R. 474; [1962] 2 Q.B.26. It is important for parties to correctly identify which terms are to be conditions and which are to be warranties. Where there has been a breach of contract, it is important to determine which type of term has been breached in order to establish the remedy available.

Warranties, on the other end of the spectrum are merely minor contractual terms that are not central (i.e., "the root") to the contract. Accordingly, if a warranty is breached, the

aggrieved party may be able to recover the damages it suffers as a consequence but will not be entitled to terminate the contract, that is, bring it to an end. If the innocent party terminates the contract, they are risk of being sued for unjustified contract termination. What is considered a warranty in one contract could be a condition in a different contract. For example, the case of *Bank of Nova Scotia v. Hellenic Mutual War Risk Association (Bermuda) Ltd (The Good Luck)*: [1992] 1 AC 233, [1991] 2 WLR 1279, [1991] 3 All ER 1. It all depends on how important the term is to the parties involved. It is often the case that statements about factual matters are expressly referred to as "warranties" in a contract, such as a party warranting that it has obtained all the necessary consents in order to start a contract. A condition is part of the contract that the parties consider to be vitally important and that has to be performed. A condition is the heart of the contract and the most important part. In a contract to sell goods, a condition could take the form of a clause that says that says that the goods are required to be delivered by a certain time(e.g., *Aspen Insurance UK Ltd v. Pectel Ltd.* [2008] EWHC 2804 (Comm); [2009] 2 All E.R. (Comm) 873). In a Sale of Goods agreement this may include for example a provision recording that "time is of the essence," that is to say, it is a condition of the contract that the goods must be delivered by a specific time and that is the purpose of the contract, that is, that they arrive on time, since otherwise they may be useless to the customer.

If a breach of condition occurs, the party that is innocent can make a choice: a) End the contract and sue for damages; b) Continue the contract by performing the actions they are contractually obligated to, sue for damages, and pursue other solutions like injunctions. Significantly the type and scale of the damage arising from a breach of a condition is immaterial to the question as to whether there has been a repudiatory breach. A repudiatory breach still gives rise to the innocent party's choices.

Innominate terms or intermediate terms are terms of a contract that are in limbo and are somewhere in between a condition and a warranty. A term becomes innominate when it cannot be shown to be a condition or warranty. An important innominate term, such as one that if breached would deprive one of the parties of the entire benefit of the contract, means that the innocent party is allowed to terminate the contract and find other alternatives. For example *Ronson International Ltd v. Patrick*: [2005] EWHC 1767 (QB); [2006] Lloyd's Rep. I.R. 194, *Friends Provident Life and Pensions v. Sirius International Insurance*: [2005] EWCA Civ 601; [2005] 2 All E.R. (Comm) 145. If the innominate term is not as important, such as a term that would not ruin the entire contract if it were breached, the innocent party is not allowed to terminate the contract. In that case, the innocent party can only sue for damages.

If a breach occurs that deprives the wronged party of the entire benefit of the contract, then the term is considered a condition and would allow the party to terminate the contract (*Hong Kong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd* (1962)). If that is not the case, the term would be considered a warranty, and the wronged party would be eligible to claim damages. However, if the breach did not really deprive one party of the benefit of the entire contract, that party could be liable for wrongful termination. Parties give up a degree of certainty because an innocent party could become liable if a third party decides that the breach did not deprive them of the entire value of the contract.

In other words, Continental law, including Korea, has no distinction as described above, and if there is a breach of a contract (default), it is possible to claim damages and cancel or terminate the contract, except in cases due to utmost good faith.

2.1.2. Warranty under English Insurance Law

Warranty under English insurance law has a similar meaning to the terms of cancellation under general contract law, but is not the same. Looking at the conditions under the General

Contract Act (not the above conditions), the condition precedent is that the contractual obligation occurs only when the content of the condition is fulfilled, and the condition subsequent is the contractual right and obligation in effect. It occurs, but the contract becomes invalid if the conditions are fulfilled, which is the same as the Continental law.

Warranty under English insurance law is defined as an affirmative warranty (a matter that needs to be satisfied or fulfilled at the time the insurer's responsibility begins) and a promissory warranty (a matter that needs to be met or fulfilled continuously for a certain period of time). MIA 1906, however, does not distinguish between the two and defines both as promissory warranty, so there is no discrimination benefit. Also, it is divided into express warranty and implied warranty depending on whether or not it is stated in the policy.

Implied warranty exists only in marine insurance, and there are warranties of legality and warranties of seaworthiness. The warranty of legality cannot be waived by the insurer, but the warranty of seaworthiness may be waived by the insurer (Seaworthiness Exemption of cargo insurance among others).

Due to the effect of breach of warranty under English insurance law, MIA 1906 stipulates that the insurer is exempt from liability from the time of breach of warranty, but does not affect accidents that occurred prior to breach of warranty.

2.1.3. Promissory warranties and other terms

The English law on warranties has long courted controversy primarily because of the consequences of breach. The pre-2015 Act is set out in the MIA 1906, ss.33-41, much of which is unaffected by the new law. A promissory warranty is defined in s.33(1) as an undertaking of the assured : "…that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts." The nature of the undertaking and consequences of breach were set out in s.33(3) of the MIA 1906, which may be summarized as follows: A warranty must be exactly complied with; it may be material to the risk or not; if not complied with, subject to policy terms, the insurer is discharged from liability from the date of the breach; but the insurer is responsible for liabilities incurred before the date of breach. The discharge from liability occurs automatically and is not dependent on the exercise of an election and/or giving notice (*The Good Luck* (1992)). Further, where there has been a breach, the assured cannot cure the breach by complying with the warranty before loss has occurred (s.34(2)). It is always possible for an insurer to waive a breach of warranty (s.34(3)). Apart from express warranties the MIA 1906 recognizes implied warranties in relation to the seaworthiness of ships (ss.39 and 40(2)) and legality (s.41). In other words, the 2015 Act repeals ss.33(3) and 34 of the MIA 1906. Otherwise the provisions of the MIA 1906 remain in force, including the definition of a promissory warranty and the recognition of implied warranties. The new provisions in the 2015 Act are set out in ss. 10 and 11 and their effect may be presented as follows: Continuing warranties are warranties where the undertaking of the assured extends continuously over the period of the policy or a shorter period specified in the policy. The consequence of breach of this category of warranty is that the liability of the insurer is suspended for the period of the breach. If the breach is remedied, the liability of the insurer is restored from the time of remedy.

The insurer is liable under the policy until the occurrence of a breach of warranty and thereafter liability is suspended until the breach is cured. Once cured the insurer is again at risk. Should the breach not be cured the liability of the insurer is suspended for the remainder of the policy period.

There is, in this regard a technicality to be noted. With regard to the suspension of liability, it is stated that the insurer is not liable for "…any loss occurring, or attributable to something

happening, after the warranty (express or implied) in the contract has been breached but before the breach has been remedied" (s.10(2)).

This provision makes it clear that when the source of loss occurs during the period that an insured is in breach of warranty but the actual loss is suffered after the breach of warranty has been remedied, the insurer is not liable.

There is less clarity about the position when the source of the loss occurs before the breach of warranty but the actual loss is suffered after the breach. Under s.10(4) the insurer appears to be liable, because the loss is attributable to something happening before the breach of warranty. Nonetheless, by s.10(2) of the 2015 Act the insurer appears not to be liable for any loss occurring after the breach of warranty and before there has been a remedy.

In other words, the rule of suspension of liability operates most comfortably with regard to continuing warranties. There is, however a class of warranties where the undertaking of the assured is of a one-off nature, relating, for example, to something specific at a point of time. They are, therefore, not continuing warranties and are defined in the 2015 Act as warranties that require. It is clear that the breach of such a warranty cannot logically be cured in the traditional manner, and, in response to this difficulty, the 2015 Act formulates a specific concept of cure.

This provision is probably best explained by examining an unexceptional example. An insurance policy on a ship contains a warranty "that a specified safety certificate of compliance will be presented to insurers within 14 days of the date of the insurance." The insurance is dated January 1, 2018. The insured fails to present the certificate within 14 days, and consequently there is a breach of warranty with cover suspended. Nonetheless, the insured presents the safety certificate on February 1, 2018. Logically, the breach of the express warranty cannot be cured: There is no way the insured can correct the failure to present the certificate by the due date. Nonetheless, applying the concept in the 2015 Act, the breach is cured on February 1, 2018, on which date the liability of the insurer is revived.

The essential nature of the risk that the insurers were accepting was the insurance of the particular ship in respect to which the specified safety certificate had been issued. When the insureds failed to produce the certificate within 14 days, this ceased to be the case and the liability of the insurers was suspended. On February 1, 2018 however, when the safety certificate was presented the risk became precisely that which the insurers had accepted when agreeing to provide the insurance. The 2015 Act deems this to amount to curing the breach.

2.2. Warranty under Continental Law

Continental Law countries such as Germany, and France, including Korea, are not familiar with the term "warranty": instead, the term "coverage" is used in insurance. The meaning of warranty in terms such as "warranty of seaworthiness" is a concept purely relied on in English and American law. Therefore, it is advisable to use the definition of the term when using this term, and it is common to understand the concept of nature or vice of subject-matter insured instead of using the term "warranty" in the Continental law system in terms of a ship's unseaworthiness.

In addition, s.678 of the Korean Commercial Act (Grounds for Exclusion of Insurer's Liability) does not use the term warranty, and stipulates that "no insurer shall be liable to compensate for losses caused by the nature, vice or natural wear and tear of the subject matter insured." However, since most of the marine transport laws and marine insurance laws are based on English law, their actual application is extremely limited.

3. Concept of Seaworthiness and Legal Provisions on Unseaworthiness

3.1. Concept of Seaworthiness

3.1.1. The Definition of Seaworthiness

Seaworthiness classifies whether a ship has passed the required tests and safety checks to be able to sail without any mishaps. It determines whether or not the ship has been properly assessed, outfitted and maintained in accordance with admiralty law (Menon, 2020). In general, it is an abstract concept used mainly in the field of maritime law. It indicates the condition of the vessel and whether it is safe to sail.

A seaworthy vessel in a contract of affreightment (COA) implies the vessel is "fit to meet and undergo the perils of the sea and other incidental risks to which of necessity she must be exposed in the course of voyage." This renowned definition happens to be in conformity with s.39(4) of the MIA 1906, providing that "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." Sir Chalmers relied upon the ancient case, *Dixon v. Sadler*: (1839) 5M & W 405, affd (1841) 8M & W405, when codifying s.39 of the MIA 1906. Moreover, the ninth edition of Black's Law Dictionary defines a seaworthy vessel as one that is "properly equipped and sufficiently strong and tight to resist the perils reasonably incident to the voyage for which the vessel is insured." The only perceptible difference may be the usage of "perils of the sea of necessity", "ordinary perils of sea," and even "reasonably" in the literal sense (Song, 2012).

3.1.2. Seaworthiness as a Warranty

The principle of warranty was not established and formed until the era of Lord Mansfield. His lordship set forth a definitive analysis of the law of warranty in the law of marine insurance, which substantively affected Sir Chalmers' work on the MIA 1906 in this regard (Schoenbaum, 1998). Mansfield's doctrines still remain effective, despite a heated discussion of reform.

According to s.33(1) of the MIA 1906, warranty means "a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing should or should not be done, or that some condition should be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts"(*HIH Casualty & General Insurance Ltd v. New Hampshire Insurance Co*: [2001] EWCA Civ 735). Implied warranties were recognized and stipulated by the MIA 1906, including seaworthiness and port worthiness.

In England, the rule of law that had been developed in relation to marine insurance was applied in its full extent to property and life insurance (Vance, 1911). Therefore, the legal effect of warranties and the modification of the law of warranties ought to be critically reviewed, taking seaworthiness as an example in this section (Song, 2012).

3.1.3. Seaworthiness as a Cause of Loss

In s.3(1) of Hague/Hague-Visby Rules seaworthiness was defined in details. First, the physical seaworthiness of the ship itself, that is the physical shape of the ship should be fit in all aspects to carry the out the intended voyage and the manning of the ship. This implies a competent crew and the adequacy of the equipment and the ship's supply. Second, the cargo seaworthiness is important in regard to, making the refrigeration, cool chambers, and all other parts of the vessel in which goods are carried, fit and safe for their reception, preservation and carriage. From the definition it is clear that the ship must be fit for the

intended voyage to withstand the perils of the sea.

When the consignee receives the cargo in a damaged condition it is the responsibility of the carrier to show that it is not at fault for the damage and loss. The shipowner has to prove that he was diligent in providing a seaworthy ship, and the damage or loss was due to one or more of the exemption provided in s.4(2) of the Hague/Hague-Visby Rules.

Failure on the part of the ship owner to prove due diligence will make him liable for the damage and loss to the cargo. In this case, the voyage was in winter and it was windy before the ship left port, as mentioned in the scenario where the seaman was a competent member of the crew. As a competent seaman, he carried out his duty in checking the ballast tank, yet he was not diligent when it came to screwing the ballast pipe lid, for the reason that he had to finish the procedure before the ship proceeded out to sea. This is more a case of mismanagement of the ship rather than due diligence of the ship owner.

It is necessary to distinguish between two main issues when it comes to the ship's crew. The first issue is that if the crew were incompetent, the ship was not seaworthy. The second issue is that if the crew was competent and skilled as required, but negligent in their duty, it reflected ignorance and the ship was unseaworthy.

The ship was seaworthy for the voyage, but the negligence from a competent seaman to fulfill his duty affected the ship's status. However, according to ss.3(1) and 4(1) of Hague/Hague-Visby Rules, it is the responsibility of the shipowner to make sure that the ship was seaworthy in all aspects before and at the beginning of the voyage.

Exercising due diligence on the part of the shipowner can be an impossible task, if he lacks the experience. This is why many of ship owners delegate their duty to the master and the ship's crew, to make sure that the ship is seaworthy. The ship owner delegation of his duty toward due diligence to make the ship seaworthy does not mean the delegation of his responsibility of providing a seaworthy ship, it is the owner responsibility and he cannot escape responsibility by delegating his duty.

For example in the Muncaster Castle case the judge stated "There is nothing, in my opinion, Extravagant in saying that this is an inescapable personal obligation. The carrier cannot claim to have shed his obligation to exercise due diligence to make his ship seaworthy by selecting a firm of competent ship-repairers to make his ship seaworthy. Their failure to use due diligence to do so is his failure" (*Riverstone Meat Co Pty Ltd v. Lancashire Shipping Co* (*The Muncaster Castle*) : HL1961)..

In other words, in a voyage policy of insurance on hull, the undertaking of seaworthiness is clearly defined as a warranty under marine insurance law. The basis for the implied warranty, as only found in voyage policies, is ss.45(1)-(4) of the MIA 1906, but the classic exposition remains that of Parke B in *Dixon v. Sadler* (1839).

The foundation of the implication of the warranty has been stated as being a desire to ensure that persons with an insurable interest arising out of the adventure do not, by reason of their insurance cover, grow careless of the condition of the vessel and the safety of the master and crew (*Wilkie v. Geddes, 1815*). The underwriter, when assessing the risk of a particular voyage, must have the right to assume a certain fitness of the vessel to encounter the ordinary hazards of the adventure in order to fix an appropriate premium (Bennett, 2006). Both the cases and the MIA 1906 make it quite clear that in a voyage policy, there is an implied warranty that, at the commencement of the voyage, the ship shall be seaworthy(s.45(1) of the MIA 1906). The reason for this was the general rule that a loss through decay, waste or inherent vice should not normally fall on the underwriter and the further consideration that the assured could be presumed to be well acquainted with the condition of the ship on sailing (Daimond, 1986).

Causation is a very important part in marine insurance law. The general principle in

English law is that the insurer will only be liable for any loss that is proximately caused by a peril insured against (s.55 of the MIA). At the beginning of the last century, the determination of the proximate cause in common law was considered to be the nearest in time. This approach was changed with ruling in *Leyland Shipping Co v Norwich Union Insurance Co.: [*1918] AC 350 HL, which clarified the meaning, and provided authority: Proximate cause is that which is proximate in efficiency.

The ruling in *Canada Rice Mills v. Union General Insurance Co*.: [1941] AC 55, stated that the proximate cause had to be determined "according to a broad commonsense view of the whole position." Lately, *Bingham LJ in TM Noten BV v. Harding*: [1990]. Lloyd's Rep 283, added that the commonsense view to apply was "of a business or seafaring man".

Finally, *Global Process Systems Inc v. Syarikat Takaful Malaysia Berhad (The Cendor MOPU:* [2011] UKSC5*)* provides new authority: The defense of inherent vice in cargo will be valid only when the sole reason for such loss is the nature of the cargo, without external fortuitous events. When a loss is developed with the assistance of an external circumstance as by action of wind and waves, the dominant cause of the loss is perils of the sea.

This decision refers to a case in which the Insurance Company, Syarikat Takaful, rejected a claim of a loss. On May 2005, Global Process Systems (the assured) bought an oil rig "Cendor MOPU" to be transported on the towed barge "Boagarge 8" from Galveston, Texas (U.S.) to Lumut in Malaysia. The rig had three legs (tubular structures). The oil rig was insured with an all-risk policy that incorporated the Institute Cargo Clauses (ICC A). The moment the barge arrived at Saldanha Bay, some repairs were made according to recommendations by the surveyors approved by the insurers. A considerable degree of fatigue cracking around the pinholes of the legs of the oil rig was found. These repairs did not prevent the failure of the legs. One of the legs first broke off and fell into the sea. The next day, the two other legs fell off as well. The insurers rejected the claim based on inherent vice.

Blair J, in Commercial Court rejected the claim considering that "the proximate cause of the loss was the fact that the legs were not capable of withstanding the normal incidents of the insured voyage from Galveston to Lumut, including the weather reasonably to be expected." He also concluded in fact, that the loss was very probable but not inevitable. The Court of Appeal reversed the decision with the opinion that the "proximate cause of the loss was an insured peril in the form of the occurrence of a leg breaking wave, which resulted in the starboard leg breaking off, leading to greater stresses on the remaining legs, which then also broke off." The insurers appealed before the Supreme Court.

The Supreme Court on February 1, 2011, unanimously dismissed the appeal. The essential question in this case for the Supreme Court was one of causation: The loss was caused by an inherent vice in the legs, or as a consequence of peril of the seas, or the concurrent two competing causes.

The meaning of the words "privity of the insured" was considered by the Court of Appeal in *The Oceanus Mutual Underwriting Association (Bermuda) Ltd. (The Eurysthenes)*: [1976] 2 Lloyds Rep 171. Here, it was decided first, "privity" in this subsection means not only knowledge of the facts constituting the unseaworthiness but also knowledge that those facts rendered the ship unseaworthy. Second that the persons whose knowledge is relevant are the insured himself in the case of an individual insured, or their alter ego in the ca of a company(Gilman et al., 2018).

The principle that "blind eye knowledge" can amount to privity for the purposes of s.39(5) of the MIA 1906 is confirmed by the decision of the Lords in *Manifest Shipping Co Ltd v. Uni-Polaris Shipping Co Ltd and others(The Star Sea):* [2003] 1 AC 469; [2001] 1 All ER (Comm) 193; [2001] 2 WLR 170. Roskill LJ's use of the phrase "had he thought of it" in the cited passage was questioned by both Lord Hobhouse and Lord Scott, in their respective speeches. This

phrase might be read as suggesting that the test is objective. That is not correct the test is subjective. For "blind eye knowledge" to be established, it must be shown that the insured believed or suspected that the vessel was unseaworthy in the relevant respects and made a deliberate decision not to check the ship in order to avoid gaining direct knowledge of what he had reason to believe was her unseaworthy state.

"An imputation of blind eye knowledge," said Lord Scott in *The Star Sea(2001)*, "requires an amalgam of suspicion that certain facts may exist and a decision to refrain from taking any step to confirm their existence." Both requirements must be present, for privity to be established on the basis of blind eye knowledge. The suspicion, according to Lord Scott must be firmly grounded and targeted on specific facts not merely a vague feeling of unease, and the decision to refrain from inquiry must be a deliberate decision to avoid obtaining confirmation of facts in whose existence the insured had good reason to believe. To treat a decision not to inquire into vague speculative suspicions as tantamount to knowledge would allow negligence to become the basis for a finding of privity, which is not warranted by s.39(5) of the MIA 1906(Gilman et al., 2018).

3.1.4. Seaworthiness and Cargo- Worthiness

Seaworthiness is the ability of the vessel to safely navigate the intended waters, meaning that its hull, engines and general instruments are in safe condition prior to and during the commencement of the intended voyage. Cargo-worthiness refers to the suitability of the vessel to safely carry out the transportation of the intended cargo for a particular voyage. From the technical perspective, to determine cargo-worthiness, it is very important to consider load distribution, cargo securing, type of cargo, machinery and equipment and good seamanship (Gard, 2020).

Seaworthiness is a relative term, and the ship only needs to be seaworthy for the purpose of the particular voyage. The vessel must be sufficiently seaworthy to meet the perils likely to be encountered on the intended voyage. Seaworthiness embraces not merely the condition of the ship generally but also the suitability and adequacy of her equipment, bunkers, and so on, the sufficiency and competency of her master, officers and crew, and what has been described as cargo-worthiness.

In *Texaco Inc. v. Universal Marine:* 400 F. Supp. 311, 312-13. (E.D. La. 1975) the Court stated that "Since the term seaworthiness is a relative one, its meaning is dependent upon the vessel involved and the service in which it is to be employed. In general, a ship must be sufficiently strong and staunch and equipped with the appropriate appurtenances to allow it to safely engage in the trade for which it was intended. Put in another way, the ship must be fit for the use intended." A vessel can be tight, staunch, strong and in every way, and prepared for safe navigation, but at the same time it may still be unseaworthy in relation to certain cargoes so that the shipowner would be liable for the loss of or damage to cargo resulting from the absence of the attribute of cargo-worthiness necessary for the proper carriage of that particular cargo.

Unseaworthiness of a ship can result in the shippers not paying the freight (if the vessel was unseaworthy before the reception of the cargo on board) or the cargo underwriter voiding his policy; it may affect the responsibility of the vessel in a case of collision, the COA could be void, it may modify the understanding of general average to the executed sacrifices, and it may eliminate the carrier limitation of liability (Gard, 2020).

The carriage of Goods by Sea Act of 1924 modified the law regarding the obligation of the shipowner to provide a seaworthy vessel for the carriage of goods by sea. Substituting the absolute warranty of seaworthiness, an undertaking that the shipowner should exercise due diligence to make the ship seaworthy was agreed upon. This Act governs the contractual

relationship of the shipowner and cargo owner under the COA, and the concession to shipowners means that it is possible for the cargo owner to fall between two stools in the event of the unseaworthiness of the vessel.

Due to the absolute warranty in marine insurance, the underwriters could void their policy if the ship were found to have been unseaworthy at the beginning of the voyage, and his claim for loss or damage to the cargo would be against the shipowner. With the implementation of the Carriage of Goods by Sea Act(COGSA), though the ship may admittedly be unseaworthy, the shipowner may possibly establish that it was not discoverable by the exercise of due diligence and be able to refuse liability (Baatz et al., 2008).

The meaning of due diligence is of key importance in the event of unseaworthiness. It means that reasonable conduct under time and place circumstances was exercised. The Brussels 1967 Conference pointed out that due diligence should not be understood as the action of making vessel seaworthy, but exclusively what is adequate to the particular case. Such diligence must be exercised before and at the commencement of the voyage.

Due diligence is an exclusive responsibility of the shipowner. This responsibility cannot be transferred to another party. Even when the shipowner demonstrates due diligence in the employment of high quality and very professional providers, their failing in their responsibility would still fall onto the shipowner's shoulders. If they did not fail we may still face a case of unseaworthiness undiscovered under the exercise of due diligence the shipowner may refuse liability (Gard, 2020).

3.2. Legal Provisions on Unworthiness

3.2.1. 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 protect against the human risk factor. Apart from that, the ship owner does not, in such situations, need any legal incentive to take care. There is no need at that stage for the law to develop the notion of seaworthiness. As far back as the fourteenth century (Hughes, 1994), 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 an 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 (*Coggs v. Bernard,* [1703] 2 Ld Raym 909*; Forward v. Pittard,* [1785] 1 TR27). To reiterate, there was no pressing need at this point for the notion of seaworthiness to protect cargo owners' interests (Safewatersmarine, 2016).

The developments of lucrative trades whereby the profits from successful voyages outweighed occasional losses, charter parties that 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 (*Liver Alkali Co. v. Johnson:* [1874] LR EX338*; Paterson Steamship Ltd v. Canadian Cooperative Wheat Producers*, [1934] AC 538) 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, while 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 that are interchangeable, the context in which the definition is provided means that certain features are restricted to application in that field alone (Gilman et al., 2018; White, 1996).

3.2.2. Unseaworthiness under Marine Transport Law

S.794 of the Korean Commercial Act (Duty of Care for Seaworthiness) stipulates that "A carrier shall be liable to compensate for any damage arising out of the loss of, damage to or late arrival of cargo unless he/she proves that he/she, the crew, or other employees of a ship have not failed to exercise due care concerning the following matters at the time of departure": 1. ensuring the ship voyage to be made safe; 2. boarding of the necessary crew and supply of equipment and necessities of the ship; 3. maintaining the hold, cold storage room, and other parts of the ship to load the cargo suitable for reception, transportation and preservation of the cargo. Therefore, the Korean Commercial Act restricts the warranty of seaworthiness to the time of departure and not as an absolute duty of care. This provision, like the Korean Commercial Act, requires a considerable duty of care (the Korean Commercial Act relies on the Hague-Visby Rules).

Therefore, the shipowner is not liable for all responsibilities due to unseaworthiness, and even if the ship was unseaworthy, the owner is exempted from liability if the ship has fulfilled its obligations to pay attention to seaworthiness before and at the beginning of the voyage. In addition, the carrier cannot claim indemnity or limit liability for accidents caused by breach of the ship's obligation to pay attention to seaworthiness at the time of departure. In the English law, this is considered a fundamental breach, and if there is a basic breach, the permitted immunity cannot be relied on; Korean precedents are also interpreted in the same way in the result.

3.2.3. Unseaworthiness under Marine Insurance Law

S.39(4) of MIA 1906 stipulates that "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." This is different from the seaworthiness obligation under the Contract of Carriage Act (Hague-Visby Rules). It means that the vessel is in a condition suitable enough to encounter the ordinary perils arising from repairs, equipment, crew and all other insured voyages at the time of departure (*Dixon v. Sadler* (1839)).

Seaworthiness under the insurance law is considered to have similar contents to seaworthiness under the Contract of Carriage Act, but according to Gow's view, seaworthiness under the English insurance law is as follows (Gow, 1914): "The Vessel's fabric must be fit as far as a vessel of the kind can be: her gear must be sufficient in quantity and quality: she must be completely, commanded, officered and fully manned: she must be properly provisioned: she must not be overloaded; and if she is a steamer, she must be adequately supplied with fuel".

The effect of the warranty is that, if the vessel is not seaworthy, the insurer is not liable for any loss or damage, whether that was proximately caused by unseaworthiness."(*The Cendor MOPU* (2011))

In other words, it is arguably "desirable...as a matter of public policy and concern, that some which obligation of keeping his vessel, as far as it is within his power, seaworthy, should be cast on a shipowner" (*Dudgeon v. Pembroke*: [1877] 2 A.C. 284) under a time policy. However, the existence of such a general rule was denied by the House of Lords in *Gibson v. Small:* [1853] 4HLC 353, where it is stated that, since time policies commonly commenced during

performance of a voyage, it would be wrong to impose an obligation at that time when it would not exist in a voyage policy. At that at that time the assured would generally be unaware of the condition of the vessel, an implied term therefore defeating the object of the insurance, and the advantage of a plain rule outweighing creation of an exception where he was so aware. However, such a rule would not prevent the underwriter from avoiding the policy for fraud or non-disclosure of circumstances actually known to the assured (*Gibson v. Small,* 1853; *Fawcus v. Sarsfield*: [1856] 6E1 & B1192), from covering himself by introducing an express warranty or from insisting on an adequate premium (*Thompson v. Hopper:* [1856] 6. And B.172), or from defending a claim on the ground that the loss was caused by inherent vice (*J. J. Lloyd Instruments Ltd v. Northern Star Co. Ltd. (The Miss Jay Jay),* 1985; 1 Lloyd's Rep. 270; *The Cendor MOPU* (2011)).

Thus, it was established that "the law does not, in the absence of special stipulation in the contract, infer in the case of a time policy any warranty that the vessel at any particular time shall have been seaworthy"(*Dudgeon v. Pembroke*, 1877; *Gibson v. Small*, 1853; *Thompson v. Hopper*, 1856*; Fawcus v. Sarsfield*, 1856). The general rule is therefore that in a time policy there is no implied warranty that the ship will be seaworthy at any state of the adventure (s.39(5) of the MIA 1906).

This is, however, subject to the exception that, "where, the privity of the assured, the ship is sent to sea in a state, the insurer is not liable for any loss attributable to unseaworthiness"(Rose, 2012). To avoid liability, the insurer bears burden of proofing that unseaworthiness was a cause of the loss that the assured was privy to sending the vessel to sea in a unseaworthy state (*Marina Offshore Pte Ltd. v. China Insurance Company (Singapore) Pte Ltd.(The Marina Iris):* [2006] SGCA 28; (2007) 1 Lloyd's Rep. 66). It has also been accepted that they must prove the identity of the particular person with the requisite knowledge of the vessel's unseaworthiness and, where the defendant is a company, who could be regarded as the company's alter ego (*The Marina Iris,* 2006). In practice, it may be necessary to prove the privity of a particular human agent in order to demonstrate the privity of a corporation. However, since the matter to be proved is the privity of the assured, rather than how the assured came to be privy, it should be sufficient if the insurer can prove that the unseaworthiness must have been with the privity of someone who could be regarded as the company's alter ego, without having also to prove exactly who was the responsible natural person. In *The Eurysthenes* (1977), the Court of Appeal refrained from deciding exactly in whom the relevant privity rested, although Lord Denning M.R. opined that there is privity of "the assured" for this purpose where there is knowledge or concurrence of "the assured personally, or of alter ego". In the context of operating a vessel, this should encompass the ship's managers or superintendent employed by the owners for this purpose.

The assured has the relevant privity if the insurer proves that he has knowledge both of the facts concerning the unseaworthiness and that those facts rendered the ship unseaworthy or that he deliberately refrained from receiving or seeking better knowledge of such facts of which he was unsure (*The Eurysthenes,* 1977; *CN Vascongada v. British & Foreign Mar Co. Ltd. (The Gloria),* 1935; *Frangos v. Sun Ins Office Ltd,* 1934; *Mountain v. Whittel,* 1921; *M Thomas & Sons Shipping Co. Ltd. v. London & Provincial Mar & Gens Ins Co. Ltd.,* 1914). This has been described as fault or misconduct (*Thomas v. Tyne & Wear SS Freight Ins Assn,* 1917). However, it does not include mere omission, negligence, or even willful misconduct, unless the foregoing test is satisfied (*The Eurysthenes,* 1977; *CN Vascongada v. British & Foreign Mar Co. Ltd. (The Gloria):* [1935] 54 Ll LR 35). It is not equivalent to "actual fault or privity" under the previous law on limitation of liability. Thus, an assured is not deprived of cover where unseaworthiness was due to a latent defect (*The Miss Jay Jay, 1*985). The insurer remains liable where seaworthiness requires a crew of 14 and the assured knows there is a

crew of only 12 but believes this sufficient, but not if in such a case the assured sends only 10 (*The Eurysthenes*, 1977). The assured does not have privity for this purpose simply because he has "blind eye knowledge"-i.e., he has refrained from discovering the truth-unless he is shown to have had a suspicion of or belief in the vessel's unseaworthiness and had deliberately refrained from making relevant enquiries.

Negligence or gross negligence is insufficient (*The Star Sea,* 2001). In particular, the assured should be entitled to disclaim privity to unseaworthiness where the seaworthiness is by warranty to be determined by an expert opinion upon which he relies (*Marina Offshore Pte Ltd. v. China Insurance Company (Singapore) Pte Ltd. (The Marina Iris),* 2006). Nonetheless, the insured should be entitled to the defense if he can show that a favorable expert's report did not, as a matter of construction, relieved the assured of proven privity to unseaworthiness.

Although s.39(5) of the MIA 1906 states that, "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," it has been held that the insurer is relieved only where the loss was caused by seaworthiness to which the assured was privy (*Thomas v. Tyne & Wear SS Freight Ins Assn*: [1917] 1K.B.938). However, it is not necessary for such unseaworthiness to be the sole cause of the loss, provided it was a proximate cause (*M Thomas & Sons Shipping Co. Ltd. v. London & Provincial Mar & Gens Ins Co. Ltd.,:* [1914] 30 TLR 595). Parties can avoid the effect of the rule under discussion by contracting out of it, either totally or partially.

S.706(grounds for exclusion of marine insurers' liability) of the Korean Commercial Act states that "No insurer shall be liable to compensate for the following losses and expenses: 1. If a ship or freight has been insured, any loss arising from the failure, at the time of departure, to make preparations necessary for a safe voyage or to have necessary documents on board; 2. If cargo has been insured, any loss arising from bad faith or gross negligence of the charterer, consignor, or consignee; 3. Pilotage dues, port charges, light dues, quarantine fees, and other ordinary expenses incurred in relation to the ship or cargo in the course of a voyage". Unseaworthiness requirements under the Korean Commercial Act, applicable only to ship insurance and freight insurance (seaworthiness is not required for cargo insurance) are as follows: The failure, at the time of departure, to make preparations necessary for a safe voyage or to have necessary documents on board. The Korean Commercial Act only stipulates seaworthiness for ships, freight and cargo. It does not stipulate protection and indemnity (P&I) insurance, and applies the insurer's immunity for seaworthiness defects only to ship insurance and freight insurance, and Seaworthiness is not required for cargo insurance.

Continental law regards unseaworthiness as an inherent vice or nature of the subject matter insured (s.678 of Korean Commercial Act). Unless the policy otherwise provides, insurers are not liable for them, but the Continental law requires a causal relationship between unseaworthiness and the occurrence of an accident. The insurer must prove that unseaworthiness is the cause of the accident in order for the insurer to be indemnified (same as the causal requirement under time policy of the English law).

In Korean Supreme Court Decision (Docket No.2020da204059), the issue discussed was whether defendants who are insurers can be exempted due to the unseaworthiness of the ship in this case is the key issue in this case. This is a question of whether the plaintiff breached the warranty of seaworthiness under the MIA 1906 (Lee Phil-Bok, 2020). Decision of the first instance decision denied this, but the decision of Court of Appeals affirmed it, and it was held that this decision judged of the Court of Appeals was legitimate. In the case of the time policy, in principle, implied warranty for seaworthiness does not exist, but the insurer's indemnity is recognized if "the insured makes the ship sail even though he knows that there is no seaworthiness." The burden of proof for this lies with the insurer. According to the MIA 1906, the insured's privity is a concept that includes not only "actively knowing that it is

unseaworthiness", but also "letting it go without taking measures to equip it even though knowing that there may be no seaworthiness." This includes not only the insured's own privity, but also the privity of those who can be regarded as his alter ego (Korean Supreme Court Decision (Docket No.2003da312992005)). In the first instance of this judgment, the grounds that the towing method chosen by the plaintiff was a cause of the incident was insufficient grounds to show that there was no seaworthiness of the ship in this case, or that the plaintiff, who is the insured, was aware of the lack of seaworthiness of the ship in this case. The defendants' defense was rejected. However, decision of the Court of Appeal found that, through a wider examination of evidence, the case vessel was not capable of withstanding ordinary perils on the voyage, in which three barges were towed in winter and transported to Tanzania by sea route. The plaintiff admitted that there was privity as a result of the fact that the plaintiff was aware of this, or at least knew that it may not be seaworthy, but avoided measures to equip it and allowed the ship to leave.

3.2.4. The Effect of unseaworthiness in P&I insurance

In the case of P&I Club, which is governed by English law, warranty of seaworthiness is not required because P&I Club is a time policy under the English insurance law. However, given the fact that the ship owner had the privacy of the fact that the ship owner knew that the ship was unseaworthy at the time of departure, it is necessary to prove that the ship's unseaworthiness was an effective cause of the accident, but it is very difficult to prove this in practice (*The Star Sea, 2001, 2003).*

In *The Eurysthenes* (1976), the contract between the Club and the owners was a time policy within the meaning of the s.25 of the MIA 1906, and that although the Club conditions specifically covered the assured's liability arising out of unseaworthiness or unfitness of the entered ship, the Club was entitled to rely on any defense available under s.39(5) of the MIA 1906. It is necessary for underwriters to prove that the unseaworthiness was an effective cause of the loss. This is frequently very difficult to do in practice (Goodacre, 1981).

Furthermore, the MIA 1906 separately stipulates the insurer's immunity against accidents caused by inherent vice or nature of the subject matter insured, apart from the warranty of seaworthiness (s.55 of the MIA 1906).

It is natural that this is an affirmative warranty in subject matter insured for the purpose of warranty of in case of accidents.

In other words, the Korean Commercial Act does not have rules related to seaworthiness for P&I insurance, and it is questionable whether P&I insurance can apply seaworthiness requirements to ship insurance or freight insurance by analogy. Therefore, it seems that the problem of unseaworthiness should be solved by the nature or vice of subject matter insured or defects unless otherwise specified.

When the problem of seaworthiness is interpreted as the nature or vice of subject matter insured, it occurs in the subject matter insured. The vice of subject matter insured is common to the subject matter insured and similar items. As a result, some scholars distinguish defects that exist by chance from those that have always existed. However it seems that many theories consider the nature of vices as the same concept without distinguishing them.

Since the nature or vice of subject matter insured lacks contingency in the insurance contract, the theory of insurer immunity is common, but it is understood that insurance coverage is possible if the policy holder or insured is not sure that an accident will occur.

However, the nature or vice of subject matter insured, unlike the warranty under the English Insurance Act, require a causal relationship.

In summarizing the above, the continental legal system, including Korea, interprets unseaworthiness as nature or vice of subject matter insured. Unless there is a provision to

warrant it, the insurer is exempt from the liability for compensation. In order for the insurer to be free from liability for compensation, but for the insurer to be exempt from liability for compensation, the insurer must prove that there was unseaworthiness and that the fact and accident was caused by unseaworthiness (a significant causal relationship).

However, if there is any other content in the terms of warranty, regulations, or rules, this content may take precedence. So it seems that determining whether final warranty should be secured is only possible after reviewing all the regulations in full.

3.2.5. Consequences of Breach

Where a vessel is delivered to the port of loading in an unseaworthy condition a voyage charterer may choose to refuse to taking delivery of the vessel and treat the breach as bringing the charterparty to an end (*Stanton v. Richardson,* 1874; *Hong Kong Fir Shipping v. Kawasaki Kisen Kaisha* (*The Hongkong Fir,* 1962; *Seachem Tankers, Ltd. v. Oxyde Chemicals, Inc (The Peaceventure L. and Prideventure L. SMA No. 3137, 21 Dec 1994*). 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 uncargo-worthy vessel, at least until it is rendered seaworthy or cargo-worthy by the shipowner *(Cargo Per Maori King v. Hughes: [1895] 2 Q.B. 550*). Clearly, where it is not possible to return the vessel to a seaworthy or cargo-worthy state, the charterer can reject the vessel and they are 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 (*McAndrew v. Adams:* [1834] 1 Bing N.C. 29). 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 (Safewatersmarine, 2016).

A charterer may be able to claim damages for loss suffered due to a delay in sailing brought about by the unseaworthiness of the vessel at the port of loading. 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 (*Hadley v. Baxendale:* [1854] 9 Exch 341*; Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd.:* [1949] 2 KB 528). The plaintiff must show that unseaworthiness caused the loss (*The Europa,* 1908). 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 (*Abrahams v. Herbert Reiach Ltd:* [1922] 1 KB 477). The most common forms of loss in this context occur when cargo is delivered late and the carrier has to pay compensation to a shipper for late delivery (*SS Ardennes (Cargo Owners) v. SS Ardennes (Owners) (The Ardennes):* [1951] 1 KB 559), or, the market price of goods is adversely affected by late delivery (*Koufos v. C Czarnikow Ltd (The Heron II):* [1876] 1 QBD 377). This is quite common in fluctuating commodity markets. Equally, there are times when the charterer suffers no loss because of unseaworthiness and cannot therefore recover substantial damages.

3.2.6. 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 December 1, 1986 the Convention on Limitation of Liability for Maritime Claims (The Convention) 1976 became law by virtue of Schedule 4 of the Merchant Shipping Act 1979. Ss.1(1) and (2) permits shipowners and charterers to limit liability for claims. Ss.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 (Safewatersmarine, 2016).

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 s.3(2)(q) of Hague-Visby Rules 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(Singh, 2011).

S.4 of the Limitation Convention governs situations where limitation is not permitted. S.4 replaces the limitation requirements formerly governed by s.503 of the Merchant Shipping Act 1894, which was also couched in terms of actual fault and privity. These were discussed in the case of *The Erst Stefanie* (1989), 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 General Average. Arbiters found against the owners since the vessel was unseaworthy but permitted limitation of liability under s.503 of the Merchant Shipping Act 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 have acted on behalf of the governing mind and will of the corporation. Limitation was not allowed (Safewatersmarine, 2016).

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 the future to reduce the extent of their liability for the consequences of operating unseaworthy vessels.

4. Burden of Proof of Seaworthiness and its Implications

4.1. Burden of Proof of the Unseaworthiness under Marine Transport Contract

The burden of proof of unseaworthiness rests on the part alleging it, although in many cases they may be assisted by inferences drawn by the court. Thus, the presence of seawater in the hold will normally be treated by the courts as prima facie evidence of unseaworthiness (Wilson, 2010). Having established breach of this undertaking, however, it will then be incumbent on the claimant to establish that the unseaworthiness caused the loss of which he is complaining about (The Europa, 1908). In the case of International Packers v. Ocean Steamship Co. (1955) a cargo of tinned meat shipped from Brisbane to Glasgow was damaged by seawater during the voyage as the result of tarpaulins being stripped from the hatch covers during a storm. On hearing that the vessel was equipped with locking bars designed to secure the hatches, the trial judge held that the loss was caused not by the unseaworthiness of the vessel but by the negligence of the crew on failing to make use of the equipment provided (Boyd et al., 2008). Similarly, the cargo owner failed to discharge the burden of proof and it was unclear that the damage resulted from bad stowage rather than from any unfitness of the vessel to receive the contract cargo (The Thorsa, 1916).

If damage occurs due to the unseaworthiness of the ship, the negligence of the carrier is presumed, and in order for the carrier to be exempt from liability, it must be proved that all reasonable steps have been taken to prevent such damage. In other words, the carrier can be exempted from liability for damages by proving that due diligence care has been taken to provide a ship with seaworthiness. S.796 of the Commercial Act, like international conventions, places the burden of proof on the carrier. However, in order for the carrier to use the indemnification provisions or limitation of liability provisions under THE Commercial Act or international agreements, it must be proved that all reasonable and necessary measures have been taken (Ji Sang-Gyu, 2010).

A case for claiming damages due to the loss of a maritime transport or delay in delivery begins with the evidence of a "prima facie case." The Rotterdam Rules codify this prima facie case in s.17(1), enabling the proof of the presumed reason for the carrier with two means: issuance of a non-reserved bill of lading by the consignor and the acceptance of the shipment in good condition (Yang Seok-wan, 2011).

The problem here is regarding who bears the burden of proving the causal relationship between the facts of unseaworthiness and whether the damage to the transport is caused by unseaworthiness. This point is not clear in the Hague-Visby Rules or the Hamburg Rules, and each country's approach to this is different (Choi Jong-Hyeon, 2004; Kwon Kee-Hoon, 2007; Jo Jong-Ju, 2010; Schoenbaum, 2001). The Rotterdam Rules inherits the existing framework of international norms for the occurrence of the carrier's liability, and only requires proof of the fact that the consignor has suffered damage during the storage of the carrier in the case of a duty of caution regarding the shipment. In particular, in the case of duty of seaworthiness, it stipulates that the burden of proof for the breach lies with the shipper (s.17(5)) (Yang Seok-Wan, 2011).

The case where the sea carrier is liable is when there is a breach of duty of seaworthiness and when there is a breach of the duty of care for the shipment. Breach of the duty of seaworthiness and the breach of the duty of care for the goods are both liable for negligence (s.17(2)), and it is assumed that the maritime carrier is at fault (Song Ok-Rial, 2009).

The duty of seaworthiness is the overriding duty for the carrier to enjoy immunity. The Rotterdam Rules impose a special duty on carriers, the duty of seaworthiness (s.14). S.3(1) of the Hague-Visby Rules, s.794 of the Korean Commercial Act, and the Hamburg Rules do not stipulate the duty of seaworthiness, which is not limited to the time of departure, but is intended to continue to bear this duty during voyage. At sea, the carrier must pay due diligence to the following aspects of seaworthiness prior to commencement and during the voyage: a) ensuring that the vessel can withstand the voyage and maintain it; b) ensuring that the crew's embarkation, the ship's design, and the supply of necessary goods are appropriate and that the crew's embarkation, the ship's design and supply of the necessary goods are maintained throughout the entire voyage; c) keeping the hold, the place to load the goods, and all containers for transporting the goods provided by the carrier in a condition suitable for receipt, transportation and preservation of the goods. If this is breached, the person shall be liable for damages caused by loss, damage, or delay in delivery (s.14). The time at which the carrier bears the duty of seaworthiness is before and at the beginning of the voyage under s.3(1) of the Hague-Visby Rules or s.794 of the Korean Commercial Act. That is, it was from the start of shipment to the time of departure, but the Rotterdam Rules expanded it to cover the entire maritime transportation period. However, the burden of proof for unseaworthiness is borne by the shipper (s.17(5)) (Yang Seok-Wan, 2011).

In other words, breach of seaworthiness functions as a basis for causing the carrier to be liable for damages. The Rotterdam Rules stipulate a continuing obligation as a duty of care regarding the seaworthiness of ships used to fulfill the contract of carriage. If the underlying

reason for unseaworthiness appears prominent during the voyage, or if a new reason occurs after the commencement of the voyage, the carrier must show that he has not neglected considerable attention regarding the reason for unseaworthiness. Since the duty of care is relative, the degree or extent of the duty of care for the seaworthiness of the ship will be different when the ship is in port and when it is sailing (Cho Hyun-Sook, 2010). The duty of seaworthiness is a separate duty independent of the duty of care for the shipment (Berlingieri, 2008).

On the other hand, the Rotterdam Rules take over the existing framework of international norms for the occurrence of the carrier's liability. They only require proof that the consignor incurred damage during the storage of the carrier in the case of the duty of due diligence (commercial negligence) on the shipment (Tetley, 2008). In particular, in the case of the duty of seaworthiness, it stipulates that there is a burden of proof for the breach (s.17(5)). In general, if the carrier neglects the duty of seaworthiness they are liable for damages incurred, irrespective of the obligation to pay attention to the cargo, but the Hague-Visby Rules and Hamburg Rules do not clearly stipulate who bears the burden of proof. Under Hague Rules and Hague-Visby Rules, in the case of damage to the shipment, the burden of proof and proof of fact to determine the liability are generally: i) proof of the fact that the damage has occurred, ii) the carrier's cause of damage, and iii) order of proof of performance of the carrier's duty of seaworthiness. However, when the carrier claims immunity, the necessity to prove that the duty of seaworthiness has been fulfilled as a prerequisite is divided into a position denying the premise of duty of seaworthiness and an affirmative position (Yang Seok-Wan, 2011).

In contrast, the Rotterdam Rules specifically stipulate how to distribute the burden of proof between the carrier and the consignor (s.17). Rather than a simple approach to the Hamburg Rules, the ping pong method of burden of proof, which is almost similar to the Hague Rules, is chosen with an important immunity (Maraist, Galligan and Maraist, 2003).

Furthermore, the approach is similar to the Hague-Visby Rules, but the Rotterdam Rules are in contrast to the legal framework and text (Song Ok-Rial, 2009; Jo, Jong-Ju, 2010). According to the Rotterdam Rules, if the shipper proves that damage has occurred to the shipment in transit (s.17(1)), the carrier is not liable for liability if it proves that it has fulfilled its duty of care or that it is a cause for indemnification (s.17(2), (3)) (Yang Seok-Wan, 2011). In this case, in order for the shipper to take responsibility again, it is sequentially stipulated that the carrier must prove that he has breached the duty of seaworthiness (s.17(5)) (Song Ok-Rial, 2009).

However, if the cause of the damage results in being included in the grounds for indemnification, the burden of proof of the carrier's negligence is converted to the shipper. This in turn does not result in the carrier evading responsibility. Even if the cause of the damage is the uninsured risk, if the shipper proves the negligence of the carrier, then the reason for exempt does not protect the carrier's full or partial liability. In addition, the cause of the indemnification is not effectively applied if the consignor proves that the damage is likely caused or contributed to by a breach of the duty of seaworthiness. In such a case, the carrier may seek indemnification if the shipper's claim of unseaworthiness is misrepresented or due diligence of the vessel's seaworthiness has been proved. Caution is required if the shipper has not proven unseaworthiness as the cause of the damage, care should be taken when there is a possibility that unseaworthiness caused damage. The carrier is exempted from part of its responsibility, but has to bear the rest (Jo Jong-Ju, 2010).

However, despite the presence of unseaworthiness, it may not fall under s.17(5) of the Rotterdam Rules. That is, i) there is no causal relationship between unseaworthiness and damage, and ii) although there is a causal relationship between the two, it is the case that the carrier has given due diligence to its seaworthiness.

Therefore, in order to hold the carrier liable under s.17(5) of the Rotterdam Rules, logically, the following step-by-step process must be followed (Yang Seok-Wan, 2011). First, it is necessary to identify the cause of the damage and check whether unseaworthiness exists. Second, if unseaworthiness exists, it is necessary to determine whether there is a causal relationship with damage. Third, even if there is a causal relationship between the unseaworthiness and the damage, it is necessary to examine whether the carrier has fulfilled its due diligence with respect to its unseaworthiness. The burden of proof of unseaworthiness will rest on the part alleging it, although in many cases he may assisted by inference drawn by the court. Thus the presence of seawater in the hold will normally be treated by the courts as prima facie evidence of unseaworthiness (Wilson, 2010). Having established breach of this undertaking, however, it will then be incumbent on the claimant to establish that the unseaworthiness caused the loss of which he complains (*The Europa* (1908)). In the case of International *Packers v. Ocean Steamship Co.* (1955) a cargo of tinned meat shipped from Brisbane for Glasgow was damaged by seawater during the voyage as the result of tarpaulins being stripped from the hatch covers during a storm. On hearing that the vessel was equipped with locking bars designed to secure the hatches, the trial judge held that the loss was caused not by the unseaworthiness of the vessel but by the negligence of the crew on failing to make use if the equipment provided (Boyd et al., 2008). Similarly, the cargo owner will fail to discharge the burden of proof if it is clear that the damage resulted from bad stowage rather than from any unfitness of the vessel to receive the contract cargo (*The Thorsa* (1916)).

If damage occurs due to the unseaworthiness of the ship, the negligence of the carrier is presumed, and in order for the carrier to be exempt from liability, it must be proved that all reasonable steps have been taken to prevent such damage. In other words, the carrier can be exempted from liability for damages by proving that due diligence care has been taken to provide a ship with seaworthiness. The s.796 of the Commercial Act, like international conventions, places the burden of proof on the carrier. However, in order for the carrier to use the indemnification provisions or limitation of liability provisions under Commercial Act or international agreements, it must be proved that all reasonable necessary measures have been taken (Ji Sang-Gyu, 2010).

A case for claiming damages due to the loss of a maritime transport or delay in delivery begins with the evidence of a "prima facie case". The Rotterdam Rules codify this prima facie case in s.17(1), enabling the proof of the presumed reason for the carrier with two means: issuance of a non-reserved bill of lading by the consignor and the acceptance of the shipment in good condition (Yang Seok-wan, 2011).

The problem here is who bears the burden of proving the causal relationship between the fact of unseaworthiness and whether the damage to the transport is caused by unseaworthiness. This point is not clear in the Hague-Visby Rules or the Hamburg Rules, and each country's approach to this is different (Choi Jong-Hyeon; 2004; Kwon Kee-Hoon, 2007; Jo Jong-Ju, 2010; Schoenbaum, 2001). The Rotterdam Rules inherits the existing framework of international norms for the occurrence of the carrier's liability, and only requires proof of the fact that the consignor has suffered damage during the storage of the carrier in the case of a duty of caution regarding the shipment. In particular, in the case of duty of seaworthiness, it stipulates that the burden of proof for the breach lies with the shipper (s.17(5))(Yang Seok-Wan, 2011).

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Rotterdam Rules impose a special duty on carriers, the duty of seaworthiness (s.14). S.3(1) of the Hague-Visby Rules, s.794 of the Korean Commercial Act and Hamburg Rules do not stipulate the duty of seaworthiness, which is not limited to the time of departure, but is intended to continue to bear this duty during voyage. At sea, the carrier must pay due diligence to the following seaworthiness prior to, commencement and during voyage. a) Ensuring that the vessel can withstand the voyage and maintain it, b) Ensure that the crew's embarkation, the ship's design and supply of necessary goods are appropriate, and that the crew's embarkation, the ship's design and supply of the necessary goods are maintained throughout the entire voyage, c) It bears the duty of seaworthiness, which consists of keeping the hold, the place to load the goods, and all containers for transporting the goods provided by the carrier in a condition suitable for receipt, transportation and preservation of the goods, if this is breached, the person shall be liable for damages caused by loss, damage, or delay in delivery(s.14). The time at which the carrier bears the duty of seaworthiness is before and at the beginning of the voyage under s.3(1) of the Hague-Visby Rules or s.794 of the Korean Commercial Act, that is, it was from the start of shipment to the time of departure, but the Rotterdam Rules expanded to cover the entire maritime transportation period. However, the burden of proof for unseaworthiness is borne by the shipper (s.17(5))(Yang Seok-Wan, 2011).

In other words, breach of seaworthiness functions as a basis for causing the carrier to be liable for damages. The Rotterdam Rules stipulate a continuing obligation as a duty of care regarding the seaworthiness of ships used to fulfill the contract of carriage. If the underlying reason for unseaworthiness appears prominent during the voyage, or if a new reason occurs after the commencement of the voyage, the carrier must show that he has not neglected considerable attention regarding the reason for unseaworthiness. Since the duty of care is relative, the degree or extent of the duty of care for the seaworthiness of the ship will be different when the ship is in port and when it is sailing (Cho Hyun-Sook, 2010). The duty of seaworthiness is a separate duty independent of the duty of care for the shipment (Berlingieri, 2008).

On the other hand, the Rotterdam Rules take over the existing framework of international norms for the occurrence of the carrier's liability, and only require proof that the consignor incurred damage during the storage of the carrier in the case of the duty of due diligence [commercial negligence] on the shipment(Tetley, 2008), in particular, in the case of the duty of seaworthiness, it stipulates that there is a burden of proof for the breach(s.17(5)). In general, if the carrier neglects the duty of seaworthiness, he or she is liable for damages incurred irrespective of the obligation to pay attention to the cargo, but Hague-Visby Rules and Hamburg Rules do not clearly stipulate who bears the burden of proof. Under Hague Rules and Hague-Visby Rules, in the case of damage to the shipment, the burden of proof and proof of fact to determine the liability are generally i) proof of the fact that the damage has occurred, ii) the carrier's cause of damage, iii) It goes through the order of proof of performance of the carrier's duty of seaworthiness. However, when the carrier claims immunity, whether it must prove that the duty of seaworthiness has been fulfilled as a prerequisite is divided into a position denying the premise of duty of seaworthiness and an affirmative position (Yang Seok-Wan, 2011).

In contrast, the Rotterdam Rules specifically stipulate how to distribute the burden of proof between the carrier and the consignor (s.17). Rather than a simple approach to the Hamburg Rules, the ping pong method of burden of proof, which is almost similar to the Hague Rules, is chosen with an important immunity (Maraist, Galligan and Maraist, 2003).

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shipment in transit (s.17(1)), the carrier is not liable for liability if it proves that it has fulfilled its duty of care or that it is a cause for indemnification(s.17(2), (3)) (Yang Seok-Wan, 2011). In this case, in order for the shipper to take responsibility again, it is sequentially stipulated that the carrier must prove that he has breached the duty of seaworthiness (s.17(5))(Song Ok-Rial, 2009).

However, if the cause of the damage results in being included in the grounds for indemnification, the burden of proof of the carrier's negligence is places on the shipper. This in turn does not result in the carrier evading responsibility. Even if the cause of the damage is the uninsured risk, if the shipper proves the negligence of the carrier, then the reason for exemption does not protect the carrier's full or partial liability. In addition, the cause of the indemnification is not effectively applied if the consignor proves that the damage is likely caused or contributed to by a breach of the duty of seaworthiness. In such a case, the carrier may seek indemnification if the shipper's claim of unseaworthiness is misrepresented or due diligence of the vessel's seaworthiness has been proved. Caution is required if the shipper has not proven unseaworthiness as the cause of the damage. Care should be taken when there is a possibility that unseaworthiness caused damage. The carrier is exempted from part of its responsibility, but has to bear the rest (Jo Jong-Ju, 2010). However, despite the presence of unseaworthiness, it may not fall under s.17(5) of the Rotterdam Rules. That is, i) there is no causal relationship between unseaworthiness and damage, and ii) although there is a causal relationship between the two, it is the case that the carrier has given due diligence to its seaworthiness. Therefore, in order to hold the carrier liable under s.17(5) of the Rotterdam Rules, logically, the following step-by-step process must be followed (Yang Seok-Wan, 2011). First, it is necessary to identify the cause of the damage and check whether unseaworthiness exists. Second, if unseaworthiness exists, it is necessary to determine whether there is a causal relationship with damage. Third, even if there is a causal relationship between the unseaworthiness and the damage, it is necessary to examine whether the carrier has fulfilled its due diligence with respect to its unseaworthiness.

4.2. Burden of Proof of the Unseaworthiness under Marine Insurance Contract

The burden of proof with regard to unseaworthiness is on the insurer (*Parker v. Potts* (1815)). However, where a ship founders soon after sailing or becomes so leaky or disabled as to be unable to proceed, and this cannot be ascribed to any violent storm or other adequate cause, the fair presumption is that it arose from causes existing at the time of her sailing, and consequently that she was not then seaworthy. That, however, is but an inference from the facts, and not a presumption of law (Gilman et al., 2018).

In such cases, the inference that the ship was unseaworthy when she sailed may be drawn even though it may be impossible to identify the nature of the defects which rendered her unfit to perform the voyage and gave rise to the casualty (*Eridania SpA v. Oetker (The Fjord Wind):* [1999] 1 Lloyd's Rep. 307).

Unseaworthiness may, of course, be in issue for more than one reason. Unseaworthiness will also, in many situations, affect the issue of whether the loss was caused by an insured peril. The lack of evidence may leave the court in doubt as to the true reason for the loss and the insured may not succeed in their claim (*European Group Ltd. v. Chartis Ins UK Ltd.:* [2013] EWCA Civ 224). When the vessel is lost without trace and nothing is known about the circumstances prevailing at the time of her loss, a presumption of loss due to perils of the seas can be made if she is shown to have been seaworthy on sailing; the onus will then switch to the insurer to rebut that presumption by presenting evidence of her unseaworthiness

(*Lamb Head Shipping Co. Ltd. and Others v. Jennings (The MAREL):* [1994] 1 Lloyd's Rep. 624). When it is known that the vessel sank in calm waters as a result of an incursion of seawater in a particular part of the vessel, the cause of which is uncertain, there is no room for any presumption of a fortuitous loss. Typically, in cases of this type, the insurer will seek to establish a positive case of unseaworthiness as a likely cause of loss, but he need not do so; the insured has to prove loss by a peril insured against.

However, where the loss is of a type which must on the face of it, either have resulted from a peril of the sea or from unseaworthiness the insurer cannot simply put the plaintiff to proof. The court must proceed on the basis that the vessel was seaworthy and that her loss was therefore by perils of the seas. The clause was designed so that in such cases there would be a deemed loss by perils of the seas. However, where there are grounds for supporting that the loss was due to some cause outside the scope of the clause (Munro Brice & Co. v. Marten: (1920) 3 K.B. 94), t, to which the admission of seaworthiness would be irrelevant, the insured's claim would fail unless he were able to establish that the loss was actually caused by an insured peril.

In other words, a breach of the implied warranty may be waived, expressly or by conduct, after it is known to have occurred. Equally, such waiver may take place after the occurrence of a loss. Whether the implied warranty has been so modified, by terms in apparent conflict with it or with its being given its full scope, is of course a question of construction. The general principle, that terms should not be implied that are inconsistent with the express terms of a contract applies to the implied warranty as it does to any other kind of putative implied term. The cases in point suggest that stipulations contained in the policy are unlikely to be construed as excluding or modifying the warranty of seaworthiness unless the language used clearly demonstrates that such an effect was intended or is clearly inconsistent with the implied warranty.

5. Conclusions

The bottom line is that seaworthiness is an abstract concept used in maritime law that indicates how safe and ready a ship is to sail. Regular checks must be carried out to ensure that the highest standards are maintained onboard the vessel at all times. If found to be negligent, the owners are liable to face strict action. Before accepting or assessing a ship, it is important to check with experts and marine professionals regarding the state of the ship.

The Merchant Shipping Act makes it a criminal offence to send an unseaworthy and unsafe ship out to sea. In the event that crew or passengers deem the ship to be unsafe, they can approach the relevant authorities to register a complaint. In the case of crew members, there must be at least five members who agree on the unseaworthy nature of the vessel.

Only then will a complete investigation be launched. Unsatisfactory safety measures and faulty equipment etc. are considered to be unsafe. Since ships often spend days at sea without docking at land, it is important that the highest safety standards be maintained. Thus, inspections can be used to ensure that the vessel is properly equipped to handle the perils of the sea, as well as to ensure the safety of its crew, passengers and the property on board.

Opinions of those in the industry are varied. In recent years the English courts have been critical of the harsh and arbitrary effect of seaworthiness warranties. As a consequence, the modern tendency is for hull policies to include, in their place, promises that spell out the consequences of breach, make those consequences more appropriate to the breach, and re-establish full cover after the breach is remedied. It is the opinion of the author that the unreliable ship owners are not going to change, chameleon-like, its skin just to toe the party

line of its hull policy.

The burden of proof on the issue of unseaworthiness is on the insurer. However, where a ship soon sailing founders, or become so leaky or disabled as to be unable to proceeds, and this cannot be ascribed to any violent storm or other adequate cause, the fair presumption is that it arose from causes existing at the time of her sailing, and consequently that she was not then seaworthy. That, however, is but an inference from the facts, and not a presumption of law. In such cases, the inference that the ship was unseaworthy when she sailed may be drawn even though it may impossible to identify nature of the defects which rendered her unfit to perform the voyage and gave rise to the casualty.

S.34(3) of the MIA 1906 provides generally that a breach of warranty may be waived by the insurer. S.34 is omitted under the regime of s.10(7)(b) of the 2015 Act, but the same principle that a breach of warranty may be waived is re-enacted at a s.10(3)(c) in different wording. S.39(5) of the MIA 1906 remains in place in relation to policies to which the new regime of the 2015 Act, applies. Its application is not affected by the 2015 Act. It is not necessary, in order to exonerate the insurer from liability, that the unseaworthiness should be the sole cause of the loss; it is sufficient that the unseaworthiness was a proximate causes of the loss.

The large corporate structures that own and manage ships, such as those uncovered in *The Star Sea*, are complex and time-consuming for a court to navigate, and often do not result in a clear-cut answer. The job of classifying societies' inspectors is becoming more taxing, due to there being greater numbers of ships to inspect. There is hardly enough time to walk from bow to stern of the larger bulk carriers.

However, the converse argument is that seaworthiness warranties are the only effective remedy that insurers can use to protect themselves from the unreliable operators that exist within the industry.

While there is a broad consensus that the provisions of the MIA 1906 dealing with seaworthiness warranties are capable of operating in an unfair manner, and that fair outcomes may require insurers to "do the right thing" even where they may have no legal obligation to honor a claim. Where a policy issued by the insurer stated that "the Insured should prove that such loss or damage happened independently of the existence of such abnormal conditions" which refers to the excluded perils, the court held that the clause effectively reversed the onus of proof. It has been further clarified that in order to benefit from this type of clause, the insurers must produce prima facie evidence demonstrating that the loss was caused by an excepted peril, and only when the cause of loss becomes arguable should the assured disapprove the exclusions.

The importance of seaworthiness cannot be doubted. It has a fundamental role to play in the regulation of relationships between charterer and shipowner, between cargo owner and carrier, and between underwriter and assured. 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.

Under a voyage policy which is subject to the regime and which does not contain an admission of seaworthiness, the principle enshrined in s.18(3)(d) of the MIA 1906 would operate so as to relieve the insured from a duty of disclosure with regard to the vessel's condition, in the absence of inquiry. This subsection does not apply to proposals for insurance governed by the new regime of the 2015 Act, nor did it apply under the old regime in cases where the insurance which was proposed was to incorporate an admission of seaworthiness. The duty of disclosure has its normal scope, where the policy is to include a seaworthiness admitted clause. It should be noted, however, that in the case just cited where this point was

established, the circumstances (including the fact that a seaworthiness admitted policy was being requested) were such as to put the insurers on inquiry and to relieve the insured from and duty of disclosure he would otherwise have owed with regard to the vessel's unseaworthy condition. The insurer knew he was being asked to insure a vessel of unusual construction (a floating dock), and the insured was requesting a policy in non-standard terms, containing the admission of seaworthiness, evidently designed to avoid disputes about its fitness to undertake the voyage.

The first part of the Seaworthiness Admitted Clause, therefore, had three main consequences: (1) it dispensed with the warranty of seaworthiness; (2) it enabled the insured to recover, in appropriate circumstance, for a deemed loss by perils of the seas, which the insurer (having admitted the vessel's seaworthiness) would be unable to challenge; and (3) it meant that the insured would in certain circumstances owe a duty of disclosure during the negotiation of the insurance, when he would not otherwise do so if the implied warranty remained in place.

It should also be noted that there is a seaworthiness admitted clause in a policy of reinsurance, but no such clause is contained in the underlying policy, it is open to the reinsurer to dispute the reinsured's claim on the ground that there was no liability under the original policy, by reason of the vessel's unseaworthiness.

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